

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34162

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THE BOOK EXCHANGE, INC., a West Virginia
Corporation,

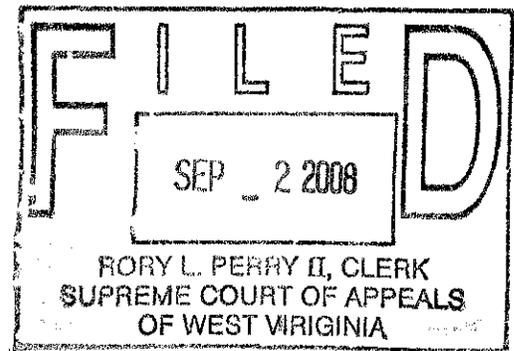
Appellant,

v.

WEST VIRGINIA UNIVERSITY, through the WEST
VIRGINIA UNIVERSITY BOARD OF GOVERNORS,
a corporation; NARVEL G. WEESE, JR., individually,
and BARNES AND NOBLE COLLEGE
BOOKSELLERS, INC., d/b/a WEST VIRGINIA
UNIVERSITY/DOWNTOWN BOOKSTORE, WEST
VIRGINIA UNIVERSITY/EVANSDALE
BOOKSTORE, WEST VIRGINIA UNIVERSITY/LAW
BOOKSTORE, and WEST VIRGINIA
UNIVERSITY/HEALTH SCIENCES BOOKSTORE,

Appellees.

:
: (Appeal from)
: Monongalia County Circuit Court
: Civil Action No. 07-C-369



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BARNES & NOBLE COLLEGE BOOKSELLERS, INC.'S APPELLEE BRIEF

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INTRODUCTION

The Book Exchange, Inc. (the “Book Exchange”), the appellant and plaintiff below, has appealed from the December 7, 2007 final order of the Circuit Court of Monongalia County (the “Final Order”) dismissing in its entirety and with prejudice its complaint (the “Complaint”) against the appellees and defendants below, Barnes & Noble College Booksellers, Inc. (“Barnes & Noble College”), West Virginia University Board of Governors (“WVU”), and Narvel G. Weese, Jr. (“Weese”) (collectively, “Appellees”), in Civil Action Number 07-C-369. The Final Order also “dissolved, vacated and lifted” the July 25, 2007 preliminary injunction (the “Injunction”) “without prejudice to the rights of the Defendants to seek relief under the [injunction] bond.” (R. at 317).

The appeal arises from Appellees’ motions to dismiss the Complaint under West Virginia Rule of Civil Procedure 12(b)(6). As reflected in the Final Order, the Circuit Court held that Book Exchange’s ten (10) pled causes of action failed to state a claim upon which relief could be granted, and the Circuit Court dismissed the entire Complaint with prejudice.

Barnes & Noble College was and is the operator of WVU’s campus bookstores, having successfully responded to WVU’s Requests for Proposals in 1991 and 2001. In 2007, Book Exchange, a competitor of Barnes & Noble College’s at WVU, sued to challenge a practice whereby a portion of WVU-administered financial aid could be directly accessed by a student if that student chose to purchase textbooks from one of WVU’s campus bookstores. This program was known as the “Reserve Convenience Account.”

For the Fall 2007 semester, the Reserve Convenience Account would have allowed any student receiving WVU-administered financial aid to have up to \$450 set aside to purchase textbooks and other school supplies at a campus bookstore. WVU was to notify the

student of this program before the Fall semester started. If the student did not wish to participate in this program, the student simply had to respond, by e-mail, to the WVU e-mail notice indicating the student's desire to "opt out" of the Reserve Convenience Account program and thereby receive the textbook portion of their financial aid by check from WVU prior to the start of the semester. If the student did not affirmatively "opt out" prior to the semester's beginning, but chose not to utilize the Reserve Convenience Account, the unused textbook funds would be disbursed, by check, directly to the student approximately two weeks after the Fall semester commenced. As a result of the Injunction entered by the Circuit Court, Appellees were temporarily enjoined from "providing the 'direct interface' 'to student financial aid accounts' . . . as contemplated by [Appellees 'Reserve Convenience Account' textbook purchasing] program" for the Fall 2007 academic term. (R. at 125).

Appellees each moved to dismiss the Complaint. After a hearing on August 28, 2007, those motions were granted, as reflected in the Court's October 3, 2007 letter (the "Opinion Letter"). Thereafter, the Circuit Court entered the Final Order, correctly concluding that Book Exchange did not have standing to bring many of the statutory claims alleged in its Complaint, (R. at 311-13), and that Book Exchange's antitrust and conspiracy claims similarly were insufficient to state a claim upon which relief could be granted. (R. at 313-14 and 316). As to Book Exchange's claim that Appellees had tortiously interfered with its prospective business relationships, the Circuit Court properly determined that the conduct alleged to be "tortious interference" was not wrongful, recognizing that Book Exchange and Appellees "are in legal competition with one another, and thus . . . have the privilege of using lawful means to gain business, even to the detriment of competitors, such as the Book Exchange." (R. at 315).

Book Exchange asserts that the Circuit Court erred by (i) dismissing the Book Exchange's complaint per W. Va. R. Civ. P. 12(b)(6); (ii) dismissing the Book Exchange's complaint with prejudice; (iii) considering "evidence and proffers" in ruling on the defendants' Rule 12(b)(6) motion to dismiss, thus improperly applying a W. Va. R. Civ. P. 56 summary judgment legal standard and further dismissing the complaint under such a standard without permitting discovery; (iv) dismissing the complaint without permitting the Book Exchange to amend the same; and (v) dissolving the preliminary injunction entered July 25, 2007.

Book Exchange's petition to this Court for Appeal was granted on June 11, 2008. As shown below, none of the Circuit Court's rulings were in error. This Court should affirm the Circuit Court on all counts.

STATEMENT OF FACTS

Barnes & Noble College is the operator of WVU's campus bookstores. Its contract with WVU requires it to pay a guaranteed fee each year to WVU and, in the event sales exceed certain specified thresholds, WVU receives additional fees. (R. at 310).

Barnes & Noble College initially was awarded the campus bookstore contract in 1991, following a Request for Proposal process open to all interested entities, including Book Exchange. Barnes & Noble College again was the successful bidder in 2001 after a second Request for Proposal process.¹ Upon information and belief, Book Exchange chose on both occasions not to participate in the RFP process.

¹ This Court can take judicial notice that, in March 2008, WVU modified and renewed Barnes & Noble College's contract for operating WVU's bookstores for an additional fifteen (15) year term.

Barnes & Noble College's 2001 contract with WVU contemplated the establishment of a direct billing interface between Barnes & Noble College's points of sale and WVU-administered student financial aid accounts.² When students were awarded WVU-administered financial aid, a portion of that aid, up to \$450 per student, was earmarked for the purchase of textbooks and related school supplies. The intent of the Reserve Convenience Account was to automate and streamline the process of distributing that aid for the benefit of the entire campus community. The Reserve Convenience Account was designed with students' needs in mind, but it benefits both students and their parents because, once implemented, it helps to insure that financial aid allocated for textbooks and related supplies is, in fact, spent on such items. The alternative, *i.e.*, direct disbursement of these funds to the student, offers no such assurance. Cash awards could be spent by the student for any purpose. The Reserve Convenience Account program was first implemented at WVU in 2005.

In 2005 and 2006, the Reserve Convenience Account was used by about one-third of students receiving WVU-administered financial aid (which represented only 11% of the overall student body at that time). Others eligible students either opted out, or simply did not use the Reserve Convenience Account and, in that case, the funds were disbursed to the student by check after the semester started.

Students were notified by WVU via campus e-mail that a Reserve Convenience Account had been established for them. The email also advised students that they could opt out of the program via reply e-mail and receive their textbook funds by check.

² As noted, the billing interface was geared only to WVU-administered financial aid distributions and not all the numerous other sources of financial aid utilized by WVU students.

For the Fall 2008 semester, the “direct interface” between the campus bookstores and WVU-administered financial aid was redesigned. (See footnote 1, *supra*.) For the Fall 2008 semester, the student had to first affirmatively choose to purchase their books online through the campus store after registering for class, and then, in a second “prompt,” the student had to affirmatively choose the method of payment (*i.e.*, credit card, debit card, or financial aid).

Book Exchange’s Complaint purports to seek injunctive relief to end the Fall 2007 version of the Reserve Convenience Account – which is not currently in use – and damages based upon the Reserve Convenience Account’s use prior to Fall 2007. (R. at 1, *et. seq.*).

APPELLANT’S ASSIGNMENTS OF ERROR

On appeal, Book Exchange asserts five assignments of error by the Circuit Court:

- (1) dismissing the Book Exchange’s complaint per W. Va. R. Civ. P. 12(b)(6);
- (2) dismissing the Book Exchange’s complaint with prejudice;
- (3) considering “evidence and proffers” in ruling on the defendants’ Rule 12(b)(6) motion to dismiss, thus improperly applying a W. Va. R. Civ. P. 56 summary judgment legal standard and further dismissing the complaint under such a standard without permitting discovery;
- (4) dismissing the complaint without permitting the Book Exchange to amend the same; and
- (5) dissolving the preliminary injunction entered July 25, 2007.

DISCUSSION

I.

The Circuit Court Appropriately Dismissed Book Exchange's Complaint Pursuant To W. Va. R. Civ. P. § 12(b)(6) Because The Complaint Fails To State A Claim Upon Which Relief Can Be Granted

In its first assignment of error, Book Exchange asserts that the Circuit Court erred by dismissing its Complaint under W. Va. R. Civ. P. § 12(b)(6).

A. Standard of Review

The Circuit Court's decision to grant Barnes & Noble College's motion to dismiss is to be reviewed by the Court *de novo*. See *Longwell v. Board of Education of County of Marshall*, 213 W. Va. 486, 488, 583 S.E.2d 109, 111 (2003) (affirming grant of motion to dismiss). However, in doing so, this Court should conclude, as the Circuit Court did, that the Complaint should be dismissed in its entirety, with prejudice.

B. Dismissal Is Proper Where Relief Cannot Be Granted Under The Allegations Pled

A complaint should be dismissed for failure to state a cause of action upon which relief can be granted where, as here, (i) essential material facts do not appear on the face of the complaint (*i.e.*, the complaint is comprised of mere bald allegations); (ii) the plaintiff fails to state every essential element of the cause of action; and/or (iii) the complaint fails to link the parties with the wrong alleged. *Fass v. Nowasco Well Service, Ltd.*, 177 W. Va. 50, 51, 350 S.E.2d 562, 563 (1986) (citations omitted); see also *Estate of Hough by & Through LeMaster v. Estate of Hough by & Through Berkeley County Sheriff*; 205 W. Va. 537, 544, 519 S.E.2d 640, 647 (1999).

“The purpose of a [12(b)(6)] motion is to test the formal sufficiency of the complaint essential material facts must appear on the face of the complaint [and] the

complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist.” *Fass*, 177 W. Va. at 51-52, 350 S.E.2d at 563 (citations omitted). To withstand a 12(b)(6) motion, “more detail is required than the bald statement that the plaintiff has a valid claim of some type against the defendant . . . thus, rules of civil procedure clearly contemplate some factual statement in support of the claim.” *Id.* at 52, 564 (citation omitted). As this Court has explained:

[L]iberalization in the rules of pleading civil cases does not justify a carelessly drafted or baseless pleading. As stated in Lugar and Silverstein, West Virginia Rules of Civil Procedure (1960) at 75: ‘Simplicity and informality of pleading do not permit carelessness and sloth; the plaintiff’s attorney must know every essential element of his cause of action and must state it in the complaint.’ *Id.* (citing *Sticklen v. Kittle*, 168 W. Va. 147, 164, 287 S.E.2d 148, 157-158 (1981)).

(emphasis added). “No claim for relief is stated if the complaint pleads facts insufficient to demonstrate that a legal wrong has been committed, or omits an averment necessary to establish the wrong or fails to so link the parties with the wrong as to entitle the plaintiff to redress.” *Id.* (citation omitted.)

The Circuit Court correctly applied these standards in dismissing Book Exchange’s Complaint. “[A] motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.” *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). Here, because Book Exchange does not have standing to assert its statutory claims, and with respect to its other claims, cannot show that the allegations, even if proven, could sustain a claim, dismissal was required. On appeal, Book Exchange primarily argues that its claim of tortious interference with prospective business relations should be reinstated.

(1) Count II: Book Exchange's Tortious Interference Claim
Fails to State A Claim For Relief

To state a *prima facie* claim of tortious interference with prospective business relations, Book Exchange must show: 1) the existence of a contractual or business relationship or expectancy; 2) an intentional act of interference by a party outside that relationship or expectancy; 3) proof that the interference caused the harm sustained; and 4) damages. *Precision Piping & Instruments, Inc. v. E.I. DuPont De Nemours and Company*, 707 F. Supp. 225, 231 (S.D.W.Va. 1989) (citing *Torbett v. Wheeling Dollar Savings & Trust Co.*, syl. pt. 2, 314 S.E.2d 166 (1983)).

Instead of alleging actual facts, Book Exchange, relying heavily on *Arrow Concrete, Lodge, Conrad*³ and other similar decisions, insists that Count II of its Complaint sufficiently states a claim for tortious interference with prospective business relations because it put Appellees on notice of the facts of its claim. However, notice of an intended claim alone cannot sustain that claim in the face of insufficient factual allegations, notwithstanding the light burden a plaintiff must meet for its claims to survive a Rule 12(b)(6) motion to dismiss. *Lodge*, 161 W. Va. at 606, 245 S.E.2d at 159 (citations omitted).

The Circuit Court correctly held that Book Exchange's allegations, even if true, "do not establish an 'anticipated business relationship with an identifiable class of third parties.'" (R. at 315). Book Exchange also fails to allege any conduct on the part of Appellees that, if true, would be tortious or unlawful. Book Exchange does not sustain its burden by repetition of the charge that Barnes & Noble College's conduct was wrongful. Thus, the Circuit Court correctly

³ *State ex rel. Arrow Concrete Co. v. Hill*, 194 W.Va. 239, 460 S.E.2d 54 (1995); *John W. Lodge Distributing Co. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978); *Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996).

dismissed the Book Exchange's Count II tortious interference claim. This Court should affirm that ruling.

(i) Element One – The Requirement of A Business Relationship Or Expectancy of a Business Relationship

Book Exchange asserts that the allegations in its Complaint, taken as true, establish that Book Exchange has the expectation of a business relationship with students attending WVU. (Appellant's Brief at 10.)

The Circuit Court correctly held that the Complaint failed to allege any facts beyond speculation that Book Exchange should be enjoying more sales to students receiving financial aid. As the Circuit Court explained, Book Exchange was required to allege facts sufficient to establish "a probability of future economic benefit, not a mere possibility." (R. at 315). "[S]peculation as to the existence of a contractual or business relationship or expectancy is insufficient to establish" this required element. *Precision Piping & Instruments*, 707 F. Supp. at 231. "To prove the existence of a business expectancy, a party must demonstrate an objective expectation of future business; 'mere proof of a plaintiff's belief and hope that a business relationship will continue is inadequate'. . . . The plaintiff must establish 'a probability of future economic benefit, not a mere possibility.'" *Southprint, Inc. v. H3, Inc.*, 208 Fed. Appx. 249, 253 (4th Cir. 2006) (citations omitted). The business relationship, or expectancy of a business relationship, "must be a reasonable likelihood or a probability, not mere wishful thinking." *Beydown v. Clark Construction*, 72 Fed. Appx. 907, 915 (4th Cir. 2003) (citation omitted) (finding that plaintiff's allegations of a substantial network of important business contacts failed to support any inference that those contacts amounted to a business expectancy).

“To demonstrate such a realistic expectation, Plaintiffs must prove an anticipated business relationship with an identifiable class of third parties.” *Id.* (quoting *Lucas v. Monroe County*, 203 F.3d 964, 979 (6th Circuit, 2000) (hereinafter *Lucas*). Book Exchange asserts that under Rule 12(b)(6)’s liberal pleading standards, the Complaint’s allegations sufficiently identify a continued business expectancy with unidentified future WVU financial aid students because it pleads that it has been selling textbooks in Morgantown since 1934 and is the main competitor in Morgantown of WVU’s campus bookstore. (Appellant’s Brief at 11.) From this, Book Exchange concludes “[t]o the extent that appellees’ default program *unlawfully* diverts this future trade, as asserted, the first element of the tortious interference claim is stated.” *Id.* (emphasis added). This allegation states no incidents from which a court could conclude that any future student was misled by Appellees or evidence that any student had decided not to patronize Book Exchange because of the implementation of the Reserve Convenience Account between the campus bookstore and WVU-administered financial aid.

Book Exchange relies on *Buffalo Wings Factory, Inc. v. Mohd*, 2007 WL 4358337 (E.D. Va. Dec. 12, 2007), to support its claim that interference even with future nonspecific sales may serve as the basis for the business expectancy element of a tortious claim. (Appellant’s Brief at 10.) In that case, Buffalo Wings Factory, a restaurant, sued another restaurant, Buffalo Wing House, on a variety of common law theories, including tortious interference with an expected business relationship. The plaintiff had operated four Buffalo Wings Factory restaurants since 1990. In 2005, a former employee opened the Buffalo Wing House restaurant which “shared” many close similarities to the Factory restaurants including slogans, layout, and menu. Further, the *Buffalo Wings* defendants allegedly had stolen numerous proprietary recipes. *Buffalo Wings*, 2007 WL at 1-2.

In evaluating the defendants' motion to dismiss the plaintiff's tortious interference claims with respect to the plaintiff's customer base, the court in *Buffalo Wings* focused on the allegations "that Defendants had induced Plaintiff's customers to patronize Defendants' restaurants by intentionally creating confusion as to whether Defendants' restaurant and Plaintiff's restaurants are part of the same entity." *Id.* at 8. However, the confusion and copying relied on by the court in *Buffalo Wings* with regard to the defendants' diversion of customers is not alleged in this case and Book Exchange suggests no alternate unlawful methods in use to "divert" students from its store or otherwise impair its further sales.

Instead, Book Exchange asserts that WVU has experienced record student enrollments in the time since implementation of the Reserve Convenience Account. (Appellant's Brief at 12.) It then goes on to assert, rather surprisingly since it claims damages in this case, that although its textbook sales have increased, the increase has not been as much as it would have hoped given the increase in enrollment. In fact, many variables, including increased internet sales of textbooks, or construction projects on the street near Book Exchange affect Book Exchange's sales. Any of those could account for the alleged increases or decreases in its future sales rather than the Reserve Convenience Account.

Accordingly, there is nothing in Book Exchange's Complaint beyond mere speculation to support the requirement that it allege a lost expectancy of future business.

(ii) Element Two – Interference Must be Improper or Unlawful

Book Exchange's arguments with respect to its establishment (for pleading purposes) of the second element of a *prima facie* claim for tortious interference – that the interference be improper or unlawful -- also fail. Book Exchange asserts that through their agreement to establish the Reserve Convenience Account, Appellees “have intentionally and improperly interfered” with Book Exchange’s “prospective business expectancies and relations” with financial aid students at WVU. (Appellant’s Brief at 13.) Beyond this conclusory statement, however, Book Exchange provides no factual or legal support to demonstrate that Appellees’ alleged conduct was either improper or unlawful.⁴

Book Exchange instead relies on Count I of its Complaint’s allegations regarding the alleged statutory violations as the basis for its claim that Appellees also engaged in unlawful and improper activities but, as discussed in Point (2), *infra*, Book Exchange does not have standing to assert many of those claims, and they otherwise fail as completely unsupported. (Appellant’s Brief at 16-17.)⁵

Book Exchange argues that “[t]here is . . . no requirement that the Book Exchange have an independent cause of action for those violations of statute which serve as an element of the tortious interference claim.” (Appellant’s Brief at 19.) Book Exchange looks to *Torbett v.*

⁴ Book Exchange also looks to this Court’s decision in *C.W. Development, Inc. v. Structures, Inc. of West Virginia*, 185 W.Va. 462, 465-466, 408 S.E.2d 41, 44 - 45 (1991) for a laundry list of potential types of improper or wrongful conduct and argues that Appellees’ conduct was improper “because the actions are unethical, overreaching, and are below the behavior of fair corporations similarly situated.” (Appellant’s Brief at 19.) As with many of its other assertions, however, it alleges no facts upon which to rest this hollow conclusion.

⁵ Book Exchange does not seriously dispute that those alleged statutory claims were properly dismissed by the Circuit Court. Indeed, it is ironic that while Book Exchange argues with vigor that its allegations of statutory violation provide the foundation for its tortious interference claim, it offers this Court exactly one sentence that could be viewed as argument in support of its dismissed statutory claims. (Appellants Brief at 20 (“With respect to the statutory violations and civil conspiracy claims, each of the elements are concisely and directly stated in the complaint, with supporting factual allegations.”).)

Wheeling Dollar Savings & Trust Company, 173 W.Va. 210, 314 S.E.2d 166 (1984), and its citation to Section 768 of *The Restatement (Second) of Torts*, “Competition as Proper or Improper Interference”, in an effort to use the statutory claims for which it lacks standing as the support for the “wrongful” element of its tortious interference with prospective business relationship claim. Book Exchange also cites the Supreme Court of Oregon’s decision of *Top Service Body Shop v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365 (1978), in support of its position that an independent cause of action is not required to support the “wrongful” element of its tortious interference claim.

This proposition begs the question -- it remains inescapable that tortious interference claims “arise only in cases in which the defendant employed unlawful means to stiff a competitor.” *Speakers of Sport, Inc. v. Proserv, Inc.*, 178 F.3d 862, 867 (7th Cir. 1999) (citing Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61 (1982)). For this reason, in *Klinger v. Morrow County Grain Growers, Inc.*, 794 P.2d 811 (Or. App. 1990), *leave for appeal denied*, 310 Or. 422, 799 P.2d 151, the Oregon Court of Appeals limited the reach of *Top Service*. Specifically, in *Klinger*, the court disagreed with plaintiff’s contention “that any statutory violation can supply the ‘improper means’ element for an intentional interference claim.” *Id.* at 813. The court explained that “it would make no sense for an intentional interference claim to be maintained simply because the defendant violated a statute that has no nexus with the business or economic relationships allegedly harmed. Indeed, the context of the statement in *Top Service* makes it clear that the violation of a tangential statute is not what the court had in mind.” *Id.*

Following *Klinger*, and not *Top Service*, the Supreme Court of Hawaii affirmed the summary judgment dismissal of tortious interference claims that were premised upon

statutory violations. See *Whitey's Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc.*, 110 Hawaii 302, 312, 132 P.3d 1213, 1223 (2006). In *Whitey's*, the plaintiff asserted claims of common law unfair competition, tortious interference with prospective business advantage and unjust enrichment that were "entirely dependent upon" defendant's alleged violation of various Hawaii state statutes that do not provide a private right of action for damages. The court held that the plaintiffs "simply attached common law labels to allegations that assert no wrong other than the statutory violation" and dismissal of those claims was thus proper. 110 Hawaii at 318, 132 P.3d at 1229. See also *Wine and Spirits Wholesalers of Massachusetts, Inc. v. Net Contents, Inc.*, 10 F.Supp.2d 84 (D. Mass. 1998) (affirming grant of motion to dismiss of claim for tortious interference with business relations which was based upon violation of a statute without a private right of action). Just as the plaintiffs in *Whitey's* and in *Wine and Spirits* could not bring their claims for tortious interference because the underlying statutes lack a private right of action, Book Exchange is precluded from bringing its claim for tortious interference based upon alleged violations of statutes which it lacks standing to enforce.

Book Exchange next turns to *Lucas v. Monroe County*, 203 F.3d 964 (6th Cir. 2000), in a further attempt to establish error here. The *Lucas* decision clearly is distinguishable and is of no precedential value in this case. In *Lucas*, County officials removed the plaintiff towing company from its county and sheriff call list after operators for the towing company publicly spoke out in opposition to certain county policies. The towing company sued Monroe County claiming primarily that its removal from the call lists violated various constitutional protections. It also claimed that the county had tortiously interfered with its business relationship with stranded motorists. The district court dismissed the majority of plaintiffs' claims on summary judgment, but the appellate court reversed with regard to the plaintiffs'

claims of retaliation for public criticism, political patronage, and tortious interference. *Id.* at 978-79. In reversing, the Sixth Circuit looked to the plaintiffs' allegations that Monroe County officials' improper political patronage practices constituted the defendant's wrongful conduct for the purposes of the tortious interference claim. Having already found that dismissal of the plaintiffs' First Amendment political patronage claims was improper, the appellate court stated:

Plaintiffs have presented evidence that the Sheriff's wrongful conduct in excluding them from the regular tow rotation prevented them from entering into a business relationship with stranded motorists who request tow services via central dispatch. Accordingly, we conclude that Plaintiffs have adduced sufficient evidence from which a rational trier of fact could find that the individual Defendants are liable for tortious interference with Plaintiffs' economic relations.

Id. at 979.

In this case, unlike the retaliation and wrongful political patronage claims in *Lucas*, Book Exchange can point to no cognizable wrongful conduct to support its tortious interference claims. Receiving an exclusive contract after an RFP is not unlawful or wrongful. *See, e.g., Kessel v. Monongalia County General Hospital*, 220 W. Va. 602, 648 S.E.2d 366 (2007) (affirming dismissal of antitrust claims arising out of awarding of exclusive contract to surgical anesthesia service following a request for proposal). Appellees' Reserve Convenience Account is a legitimate method of business competition that did not unlawfully divert students from purchasing textbooks at Book Exchange.

Similarly, Book Exchange's attempted reliance on *Garrison v. Herbert J. Thomas Mem. Hosp. Ass'n*, 190 W. Va. 214, 438 S.E.2d 6 (1993), is misplaced. In *Garrison*, the Defendant sought to bar the plaintiff's tortious interference claim, in which defamation was alleged as an element of the wrongful interference, by asserting that the statute of limitations for defamation barred the action. However, a statute of limitations is an affirmative defense; it is not

a required element of a claim and the statutory time bar did not vitiate the wrongfulness of the actions for purposes of a cause of action for tortious interference which was itself not time-barred. *Id.* at 223, 15.

Finally, Book Exchange discusses *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998), but mischaracterizes the tortious interference issue actually decided by this Court in that case. In *Kessel*, a newborn child's biological father brought various causes of action against the child's biological mother and others after the child was placed for adoption. One of plaintiff's causes of action was for tortious interference with a parental relationship, a cause of action not yet recognized under West Virginia law. *Id.* at 134, 159. In considering whether to recognize such a cause of action, as a matter of first impression, the Supreme Court looked to a multitude of sources including West Virginia's penal statutes relating to child welfare. The Court found that "[b]ased upon the prior recognition of other tortious interference claims by this Court, our criminal statutes providing penal remedies for unlawful custodial interference, and the high esteem with which we regard the rights of parents to maintain relationships with their children, we find that it is proper to recognize, as a valid cause of action, the claim of tortious interference as asserted by [the plaintiff]." *Id.* at 140, 765. However, the wrongful conduct plaintiff identified in his complaint had nothing to do with the defendants having allegedly violated any statutes. Rather, the improper conduct alleged was fraudulent and other tortious activities engaged in by the defendants. Book Exchange's attempted reliance on *Kessel* is simply inapposite. In short, the implementation of the Reserve Convenience Account, which is not violative of any statute, was not improper and does not constitute "tortious" interference.

(iii) Elements Three and Four – Harm and Damages from the Unlawful Interference

Book Exchange cannot establish the third and fourth elements of a *prima facie* tortious interference claim -- *i.e.*, that any alleged interference caused the harm sustained and damages arising therefrom -- because it has not alleged facts which, if true, are sufficient to establish the first two elements of a *prima facie* tortious interference claim.

To establish these two final elements, Book Exchange presumably relies upon its allegations that (i) although WVU enrollment has increased, Book Exchange's sales have not increased by the same increment, and (ii) as a result of Appellees' voluntary cessation of the Reserve Convenience Account during the 2007 summer session, it experienced an increase in textbook sales for the summer term. (Appellant's Brief at 13-14). However neither of these facts, if true, prove any causal relationship between the two events, nor can one reasonably be inferred without additional facts regarding other impacts on the textbook sales environment during that same period -- *i.e.*, whether additional internet sales impacted all competitor textbook sellers.

The Circuit Court's admonition rings true: The "characterization or label placed on the actions alleged is irrelevant." (R. at 316). What is relevant is that Book Exchange simply failed to make factual allegations that, even if true, could support a claim of tortious interference against Barnes & Noble College. The Circuit Court did not err in dismissing Book Exchange's tortious interference claim pursuant to W. Va. R. Civ. P. § 12(b)(6), and the Court should affirm the Final Order below.

(2) Book Exchange's Count I Statutory Claims Were Properly Dismissed

(i) W. Va. Code § 18B-10-14(e) Does Not Govern Barnes & Noble College's Conduct

In Count I of its Complaint, Book Exchange alleges that Appellees did not abide by West Virginia statutory rules governing the creation of bookstores by institutions of higher education. (Complaint, ¶¶ 43 – 45). The statute provides, in part, that “[e]ach governing board shall ensure that bookstores . . . minimize the costs to students of purchasing textbooks.”⁶ W. Va. Code § 18B-10-14(c).

The Circuit Court properly dismissed this claim for three reasons. First, as the Circuit Court recognized, the statute's plain meaning shows that Book Exchange's cause of action would not lie against Barnes & Noble College, which is a private corporation and not an institution of higher education. (R. at 312). Second, this claim fails since Chapter 18B creates no private cause of action for Book Exchange. Third, assuming, *arguendo*, that a private cause of action could be found within § 18B-10-14(c), Book Exchange's claims still fail because of a lack of its standing to assert a claim on behalf of WVU students.

In short, Book Exchange alleges no set of facts in its Complaint that sustain this claim against Barnes & Noble College. The Circuit Court's dismissal should be affirmed.

(ii) Book Exchange Fails to State a Claim Under the West Virginia E-Mail Act

At paragraphs 59-71 in Count I of its Complaint, Book Exchange attempts to create for itself a cause of action under W. Va. Code § 46A-6G-2 (West Virginia Electronic Mail

⁶ Each governing board shall ensure that bookstores operated at institutions under its jurisdiction minimize the costs to students of purchasing textbooks. The governing board may: 1) require the repurchase and resale of textbooks on an institutional or a statewide basis; and 2) provide for the use of certain basic textbooks for a reasonable number of years.

W. Va. Code § 18B-10-14(c).

Protection Act (hereinafter, the “Email Act”). The statute provides, in pertinent part: “[n]o person may initiate the transmission of an unauthorized electronic mail message with the intent to deceive and defraud . . . to an electronic mail address that . . . is held by a West Virginia resident that . . . [contains] false or misleading information in the subject line.” W. Va. Code § 46A-6G-2.

As the Circuit Court recognized, this claim fails for two reasons. (R. at 312). First, with regard to Barnes & Noble College, Book Exchange does not, and cannot, allege that Barnes & Noble College “initiated the transmission” of the challenged electronic mail messages to any WVU student – or to anyone else for that matter. To the contrary, the email notification regarding the Reserve Convenience Account was sent by WVU. *Id.* Second, W. Va. Code § 46A-6G-5 expressly grants only recipients of electronic mail a right of action under the statute. Therefore, Book Exchange has no standing to assert a cause of action against Barnes & Noble College under the Email Act since it has not alleged that it received any email sent by Appellees.

(iii) Book Exchange Fails to State a Claim under
West Virginia’s Consumer Credit and Protection Act

Book Exchange’s claim in Count I of the Complaint under the Consumer Credit and Protection Act (hereafter CCPA), fails both for lack of standing and for substantive deficiencies. The CCPA limits the classes of persons who may bring actions as follows: “Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article may bring an action . . .” W. Va. Code § 46A-6-106 (emphasis added).

Book Exchange does not allege that it has purchased goods or services from the Appellees, or that it suffered an ascertainable loss due to any such purchase. Hence, this claim under the CCPA was properly dismissed.

(iv) Book Exchange Fails to State a Cause of Action under the West Virginia Unfair Trade Practices Act

The Circuit Court properly found that Book Exchange's claim under W. Va. § 47-11A-3 failed. That Code Section provides for sanctions against companies that secretly offer rebates or discounts (or special services) to certain purchasers (and not others) with an aim toward destroying competition. The statute requires: (1) a secret; (2) extension to certain purchasers of special services or privileges; (3) where such special services or privileges are not extended to all purchasers purchasing upon like terms and conditions; and (4) injury of a competitor.

Book Exchange's claim fails because it seeks to apply § 47-11A-3 in a manner that simply is not contemplated by either the statute or case law. A typical example of a "secret rebate" implicating § 47-11A-3 (or similar statutes) involves a manufacturer and two distributors that compete for the manufacturer's goods. Where one of the distributors discovers that the competitor-distributor received secret rebates from the manufacturer, such that the first distributor was injured due to an inability to compete on a level playing field, the first distributor would be justified in bringing an action alleging a secret rebate in violation of an unfair trade practices act. *See, e.g., Diesel Elec. Sales & Service v. Marco Marine San Diego, Inc.*, 16 Cal. App. 4th 202, 20 Cal. Rept. 2d 62 (Cal. App. Ct. 1993). In each instance reported, the "secret" in question was kept from the party filing the complaint. *See generally, In Town Hotels v. Marriott Int'l*, 246 F. Supp. 2d 469, 481--85 (S.D.W.V. 2003).

Here, Book Exchange tries to apply the statute to a set of allegations that simply make no sense in the context of asserting a claim under the statute. Indeed, Book Exchange makes no allegation that any secret was kept from it; instead, it attempts to piggyback its § 47-11A-3 claim on the specious assertion that Appellees somehow purposefully withheld information regarding the Reserve Convenience Account from students not receiving financial aid.

Book Exchange's arguments under § 47-11A-3 also fail for other reasons: There are no "special services" or "privileges" being extended to students who receive financial aid - nor does Book Exchange specify exactly what these alleged services or privileges may be. No "rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise," and/or "special services or privileges" are given to financial aid students - only the availability of an account (funded by the student's own financial aid funds) that the student may use or not use, at his/her discretion. Book Exchange states no facts to support its claim that the "purposes of [the Reserve Convenience Account] program is to injure The Book Exchange as a competitor," or that "it tends to destroy competition, and is an unfair trade practice." (Complaint at ¶ 75.) The Circuit Court properly dismissed the Book Exchange's WVUTPA claim.

(v) Book Exchange Fails to State a Claim Under the Uniform Commercial Code

At ¶¶ 80 - 83 in Count I of its Complaint, Book Exchange alleges that "Defendants' sales of textbooks to financial aid students are individual contracts governed by the Uniform Commercial Code" and that all such contracts violate the Uniform Commercial Code "because good faith and honesty in fact is lacking in the electronic correspondence to financial aid students"

Book Exchange's Uniform Commercial Code cause of action necessarily fails since it does not allege – and cannot – that it is a party to any of the transactions between the students and Appellees in question. Book Exchange has no standing to assert a claim based upon any contracts to which it is not a party. (*See, e.g., State ex rel. Leong v. Sanders*, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003) (“One specific aspect of standing is that one generally lacks standing to assert the rights of another.”)).

The Circuit Court properly dismissed the Book Exchange's Uniform Commercial Code claim, like all of its other statutory claims, for failure to state a claim upon which relief could be granted under W. Va. R. Civ. P. § 12(b)(6).

3. Book Exchange Fails to State Antitrust Claims in Count I of its Complaint

The Circuit Court properly dismissed each of Book Exchange's three purported “antitrust” causes of action. Simply put, not only did Book Exchange not allege all predicate elements of those causes of action, it failed to allege facts that even if proven true, could substantiate the elements it did plead in Count I of its Complaint. As Judge Maxwell stated in *L.S. Good & Co. v. H. Daroff & Sons, Inc.*, 263 F. Supp. 635 (N.D.W.V. 1967) (cited with approval by *Fass v. Newsco Well Service, Ltd.*, 177 W. Va. 50, 350 S.E.2d 562 (1986)):

[s]uits involving alleged conspiracies to monopolize or restrain trade often lead to protracted trials and it is not reasonable to subject either or both parties to the expense of a long trial when it appears with reasonable clarity from the declaration that conceding all of the facts therein well pleaded, there would have to be a directed verdict against the plaintiff.

Cf., Allstate Wrecker Service v. Kanawha County Sheriff's Dept., 212 W.Va. 226, 569 S.E.2d 473 (2002).

The Reserve Convenience Account is an exclusive arrangement between WVU and Barnes & Noble College resulting from the award of the contract by WVU for campus bookstore

services after an RFP process.⁷ However, a contractual arrangement between WVU and Barnes & Noble College does not give rise to an antitrust claim by a competitor. “[A]ntitrust laws were enacted for ‘the protection of competition, not competitors.’” *See, e.g., All Richfield Co. v. United States Petroleum Co.*, 495 U.S. 328, 338 (1990) (citation omitted). It is not the court’s role to provide relief to disgruntled competitors who choose not to compete. Antitrust laws are designed to protect competition.

(i) Book Exchange Fails to State a Price Fixing Claim

In Count I of its Complaint, Book Exchange asserts that Appellees violated W. Va. Code § 47-18-3(b)(1)(B) which prohibits: “[f]ixing, controlling, maintaining, limiting or discontinuing the . . . sale or supply of any commodity . . . for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity.” To survive a Rule 12(b)(6) motion under this statute, Book Exchange was required to have alleged, at a bare minimum, that Barnes & Noble College and WVU entered into an agreement that controlled the production, sale or supply of some commodity for the purpose or with the effect of controlling or maintaining the market price of the commodity. (*See R.* at 313.) The Reserve Convenience Account does not “control” the market price of textbooks sold by the campus store, it merely enabled students who received WVU-administered financial aid to pay for textbooks they selected directly from their financial aid.

Thus, Book Exchange did not, and cannot, under any construction of the undisputed facts sufficiently allege “price fixing.” As the Circuit Court correctly recognized:

⁷ As noted in the Statement of Facts, *supra*, upon information and belief, Book Exchange did not participate in the RFP process.

The price fixing claim under the West Virginia Antitrust Act also suffers a standing defect. The complaint does not claim that the Book Exchange is a purchaser of books from the WVU Bookstore. If the prices of textbooks were fixed, there is still no allegation that would give standing to the Bookstore. In addition, the recent decision in *Kessel v. Monongalia County General Hospital Co.*, _____ W. Va. ___, 648 S.E.2d 366 (2007) establishes that “price fixing” is an antitrust term of art, with a specific meaning. In *Kessel*, a reference in a contract between two *non-competitors* to price was held insufficient to create “price fixing.” There is not even an allegation that the contract between WVU and Barnes & Noble refers to price, but certainly no allegation that they are competitors who agreed upon a specific price.

Id.

“[C]onstriction of supply is the essence of ‘price-fixing,’ whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered.” *See, e.g., FTC v. Superior Court Trial Lawyers Assoc.*, 493 U.S. 411, 423 (1990). Concerted action between two entities to fix prices, or restrict output, is a necessary element of a price fixing claim. *See, e.g., Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984).

Book Exchange alleged only that the purpose or effect of the agreement between Barnes & Noble College and WVU was to divert trade from Book Exchange and that the terms of the agreement serve to create a “marketing and revenue tool” for the Appellees. (Complaint at ¶¶ 47-53.) Failure to allege the necessary components of a price fixing cause of action is fatal to the Book Exchange’s claims in this regard, and the Circuit Court correctly dismissed this claim.

(ii) Book Exchange Fails to State a Claim Alleging Improper Market Allocation

In Count I of its Complaint, Book Exchange alleges that Appellees violated W. Va. Stat. § 47-18-3(b)(1)(C), which prohibits “allocating or dividing customers or markets, functional or geographic, for any commodity or service.”

The Circuit Court summarily dismissed this claim because:

While WVU and Barnes & Noble may share profits generated from the WVU bookstores, they are not competitors as required in order to maintain the various claims for market allocation, monopoly, and the WVUTPA asserted by the Book Exchange. *Kessel, supra*, at 384. Regardless of how prices are set at the WVU Bookstore, they are either set by WVU itself, or its contracted agent; the prices are not alleged to be set as a result of agreement with *competitors* in the market.

(R. at 313).

In support of this claim, Book Exchange alleges that “[t]he intent, purpose, and effect of Defendant’s lease agreement . . . is to allocate WVU financial aid students to Defendant’s bookstores . . . all in an effort to restrain trade which would have otherwise gone to The Book Exchange.” (Complaint at ¶ 55.) Book Exchange makes no allegation that Appellees divided customers and/or territories among themselves; rather, it relies on the contractual relationship between Barnes & Noble College and WVU, entities that are not competitors.

As in *Kessel*, “[b]ecause there is no agreement by competitors to allocate a market, [the Book Exchange’s] claims based upon a theory of market allocation fail as a matter of law.” *Kessel v. Monongalia County Gen. Hosp.*, 2007 W. Va., *LEXIS* 52, 58 (2007) (citing *United States v. Topco Associates*, 405 U.S. 596, 608 (1972)).

(iii) Book Exchange Does Not Properly Allege That a Monopoly was Created

Book Exchange's Count I monopoly claim (Complaint at ¶¶ 56-58) simply repackages the terms of W. Va. Code § 47-18-4, and asserts "the intent, purpose and effect of Defendants' lease agreement . . . is to monopolize the trade involving the sale of textbooks to WVU financial aid students and to exclude Book Exchange as a competitor." The Circuit Court correctly dismissed this claim too.

Book Exchange's allegations do not support any element of this cause of action:

In order to succeed on a [monopolization] claim, Book Exchange must establish that a defendant has monopoly power in the relevant product and geographic markets, and that such power was willfully acquired or maintained 'A party has monopoly power if it has, over any part of the trade or commerce among the several States,' a power of controlling prices or unreasonably restricting competition.'

M&M Medical Supplies & Service v. Pleasant Valley Hospital, Inc., 738 F. Supp. 1017, 1020 (S.D.W.V. 1990) (citations omitted).⁸ In terms of attempted monopoly,

[i]t is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. . . . To determine whether a dangerous probability of monopoly exists courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91 (1993).

Book Exchange does not even attempt to identify any "relevant market." That failure, standing alone, mandates affirmance of dismissal of the monopoly claim. *See Id.* (quoting *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172,

⁸ The cases in this section interpret the federal Sherman Act. The West Virginia Antitrust Act is "construed liberally and in harmony with federal decisional law interpreting comparable federal antitrust law provisions." *Kessel v. Monongalia County Gen Hosp.*, 220 W. Va. 602 (2007).

177 (1965)(“[w]ithout a definition of [a relevant market] there is no way to measure [the defendant’s] ability to lessen or destroy competition.”)). In addition, Book Exchange did not allege that a monopoly (or a dangerous probability of a monopoly) even exists. Rather, it simply asserts, in conclusory fashion, that the intent, purpose and effect of the Reserve Convenience Account is to monopolize the sale of textbooks to WVU financial aid students. (Complaint at ¶ 57.) Book Exchange makes a naked assertion that Appellees have violated § 47-18-4, but does not allege: (1) that those parties have established a monopoly; (2) any facts to establish that a monopoly exists; and (3) that a monopoly is even possible (let alone dangerously probable).

Even assuming, *arguendo*, that Book Exchange could remediate its inartful pleading, its cause of action would still fail for a number of reasons. First, Book Exchange makes the unique argument that an increase in its sales can actually establish Appellees’ monopoly power. (Complaint at ¶ 97). Indeed, Book Exchange claims that: (1) from the time of the prior agreement between the Appellees, WVU has experienced record numbers of incoming students; but (2) Book Exchange’s business has not increased to the extent that would be expected, given the increase in the number of students. (Complaint at ¶¶ 97–98).

Book Exchange’s theory posits two equally unavailing possibilities: either the number of students receiving WVU administered financial aid is insignificant as a percentage of the total number of WVU students (which would not have given Appellees the opportunity to achieve monopoly power via the Reserve Convenience Account in the first place), or there is no significant causal connection between the Reserve Convenience Account and Book Exchange revenues. In either event, Book Exchange has not alleged that Appellees unreasonably restricted competition, and for this reason, Book Exchange’s monopolization claim was appropriately dismissed.

Appellant also fails to assert any set of facts upon which a finding of attempted monopoly (or a dangerous probability of same) could be made. For either a claim of an existing monopoly, or attempted monopoly, Book Exchange must allege the existence of a relevant market and the assertion of (or attempt to assert) monopoly power over that market. The relevant product market is “those products or services which are ‘reasonably interchangeable by consumers for the same purposes.’” *Satellite Television and Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351, 355 (4th Cir. 1983)(quoting *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 395 (1956)). Book Exchange does not suggest a product market definition in which a monopoly could exist particularly in light of the availability of textbooks from other vendors over the internet.

Apparently recognizing the inadequacy of its allegations, Book Exchange attempted to assert that Appellees’ prior actions have had the *effect* of monopolizing trade involving the sale of textbooks to WVU’s financial aid students. (Complaint at ¶ 57.) Importantly, Book Exchange cannot rely on Appellees’ sale of textbooks only to WVU’s financial aid students in its attempt to define a relevant market because it has asserted otherwise in its Complaint. (See Complaint at ¶¶ 97 – 98, 107, wherein Plaintiff asserts damages by reference to sales involving all WVU students.) Book Exchange does not attempt to establish, nor can it, that appellees’ actions have resulted in a monopoly over the sale of textbooks and related items to all WVU students. To the extent Book Exchange’s allegations amount to a statement with regard to a submarket of some undefined relevant market, that must be rejected too. An attempt to divide the relevant market into submarkets “is to be avoided; it adds only confusion to an already imprecise and complex endeavor.” *Satellite Television v. Continental Cablevision*, 714 F.2d at 355, fn. 5.

4. Count III: Civil Conspiracy Claim:

A civil conspiracy is “a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff.” *Kessel* 204 W. Va. at 129, 511 S.E.2d at 754. “At its most fundamental level, a civil conspiracy is a combination to commit a tort.” *Id.* at 128, 753 (citations omitted).

As established above, Book Exchange asserts no viable causes of action against Appellees in its Complaint. Since the Book Exchange’s civil conspiracy claim relies upon the other allegations within its Complaint, it cannot successfully assert a claim for civil conspiracy among Appellees, and it does not even try to do so in its Brief.

The Circuit Court properly dismissed Book Exchange’s Count III civil conspiracy claim under W.Va.R. Civ. P. 12(b)(6), and its decision should be affirmed.

II.

The Circuit Court Did Not Err By Dismissing Book Exchange’s Complaint With Prejudice And Without Leave to Amend

In its second assignment of error, Book Exchange asserts that the Circuit Court erred by dismissing its Complaint “with prejudice.” In its fourth assignment of error, Book Exchange asserts that its belated and informal request for leave to amend its Complaint should have been granted.

A. Dismissal with Prejudice On a 12(b)(6) Motion Is Proper and In Light of the Legal Insufficiency of the Claims, Not an Abuse of Discretion

Book Exchange’s argument that the Circuit Court erred in dismissing the Complaint with prejudice questions both the power of the Circuit Court to do so as a matter of law, and in addition, assuming, *arguendo*, the Circuit Court had the power to do so, questions whether a “with prejudice” dismissal was a sound exercise of the Circuit Court’s discretion.

Sprouse v. Clay Communications, Inc., 158 W. Va. 427, 211 S.E.2d 674 (1975) decisively disposes of the first prong of Book Exchange’s challenge. In *Sprouse*, this Court extensively discussed both the majority and minority views on the finality of a 12(b)(6) dismissal and adopted the majority rule that “dismissal under Rule 12(b)(6) is a final judgment unless the court specifically dismisses without prejudice.” 158 W. Va. at 460; 211 S.E.2d at 696. As the *Sprouse* Court explained:

...a judgment dismissing an action under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and without reservation of any issue, shall be presumed to be on the merits, unless the contrary appears in the order, and the judgment shall have the same effect of Res judicata as though rendered after trial in a subsequent action on the same claim [and] we further hold that a judgment on the merits shall not require a determination of the controversy after a trial or hearing on controverted facts.

158 W. Va. at 461, 211 S.E.2d at 696. It is self evident that if an order is silent as to whether the dismissal is with or without prejudice, and the law, after *Sprouse*, presumes that the dismissal is “with prejudice,” a court certainly has the power to explicitly make its dismissal “with prejudice.”

In deciding *Sprouse*, this Court squarely rejected the prior rule reflected in *United States Fidelity & Guaranty Co. v. Eadis*, 150 W. Va. 238, 144 S.E.2d 703 (1965) which had held that it was proper to presume that the grant of a 12(b)(6) motion to dismiss for the failure to state

a claim was not a dismissal with prejudice. 158 W. Va. at 457-458, 211 S.E.2d at 694. Nevertheless, Book Exchange, by citing the *per curiam* opinion in *Rhododendron Furniture & Design, Inc. v. Marshall*, 214 W. Va. 463, 590 S.E.2d 656 (2003), for the continuing validity of the now rejected “minority view” about the presumption of finality which, in turn, relied on *United States Fidelity & Guaranty Co. v. Eadis*, attempts to create doubt as to whether USF&G Co.’s rejected rule for 12(b)(6) motions has been resurrected. (Appellant’s Brief at 21.) Of course, even then, that would only impact a “presumption” if the Final Order were silent rather than as the Circuit Court ruled expressly “with prejudice.” (R. at 317). Moreover, *Rhododendron* is a summary judgment case and its cite to USF&G Co. is for the first portion of the paragraph in that opinion which states that the entry of summary judgment under Rule 56 is a dismissal with prejudice. So *Sprouse* remains the rule with respect to 12(b)(6) motions, and West Virginia continues to adhere to the “majority view” that 12(b)(6) motions, when granted, are presumed to be dismissed with prejudice unless the order provides to the contrary.

Indeed, since *Sprouse*, this Court has repeatedly reaffirmed the power of a court to dismiss a 12(b)(6) motion with prejudice. See, e.g., *Coonrod v. Clark*, 189 W. Va. 669, 672, 434 S.E.2d 29, 32 (1993); *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983); See also *Messer v. Huntington Anesthesia Group, Inc.*, 218 W. Va. 4, 620 S.E.2d 144 (2005) (noting a circuit court’s grant of dismissal *with prejudice* pursuant to Rule 12(b)(6)), *Shaffer v. West Virginia Dept. of Transp.*, 208 W. Va. 673, 542 S.E.2d 836 (2000) (same), *Garrison supra*, 190 W. Va. 214, (same), *Adkins v. Miller*, 187 W. Va. 774, 421 S.E.2d 682 (1992)(same).

Book Exchange also contends that the “with prejudice” dismissal was error because “the circuit court’s dismissal is more consonant with a dismissal for lack of jurisdiction

as opposed to a dismissal for failure to state a claim” (Appellant’s Brief at 23.) Here, the Court need not analogize the dismissal of the Complaint for failure to state a claim upon which relief may be granted to other types of dismissals in an effort to discern whether it was intended to be with or without prejudice. The Circuit Court expressly so ruled because there is no set of circumstances under which Book Exchange could amend its claims to state a claim upon which relief could be granted.

Book Exchange’s reliance on *Belcher v. Greer*, 181 W. Va. 196, 382 S.E.2d 33 (1989) is misplaced. *Belcher* does not controvert the principle that the Circuit Court had the power to dismiss with prejudice, nor does it undermine the Circuit Court’s exercise of discretion. (Appellant’s Brief at 23.) *Belcher* holds that “a trial court may dismiss a complaint *without* prejudice for lack of standing when it is apparent that such lack of standing results only from an *easily cured, technical problem*.” Syl. Pt. 3, *Belcher*, 181 W.Va. at 197, 382 S.E.2d at 34 (emphasis added). Book Exchange’s lack of standing in this action is not an easily cured, technical problem.

The Circuit Court unquestionably had the power to dismiss this case with prejudice. In light of the legal insufficiency of Book Exchange’s claims, the Circuit Court did not abuse its discretion in explicitly dismissing the Complaint with prejudice.

B. Leave to Amend the Complaint Was Properly Denied

A circuit court’s denial of a motion to amend a complaint is also committed to that court’s sound discretion. *See Jones v. Sanger*, 217 W.Va. 564, 571, 618 S.E.2d 573, 580 (2005) (citing Syl. Pt. 6, *Perdue v. S. J. Groves and Sons Co.*, 152 W.Va. 222, 161 S.E.2d 250 (1968)). Under the applicable abuse of discretion standard, the Circuit Court’s decision should

only be reversed if the circuit court has made a “clear error as a matter of law.” *State ex rel. Packard v. Perry*, 221 W.Va. 526, 540, 655 S.E.2d 548, 562 (2007) (denying writ of prohibition sought to challenge circuit court’s denial of petitioner’s leave to amend complaint). The decision of a trial court to deny a motion to amend is “protected by the parameters of sound discretion.” *Jones, supra*, 217 W.Va. at 569, 618 S.E.2d at 578.

Leave to amend a complaint is properly denied when the proposed amendments would be futile or when no utility is served by permitting an amendment. *See Farmer v. L. D. I., Inc.*, 169 W.Va. 305, 308, 286 S.E.2d 924, 926 (1982); *Hinchman v. Gillette*, 217 W.Va. 378, 385, 618 S.E.2d 387, 394 (2005). Similarly, leave to amend is properly denied “when the moving party knew about the facts on which the proposed amendment was based but omitted the necessary allegations from the original pleading.” *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 533, 618 S.E.2d 537, 542 (2005) (citing Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1488 (2nd ed. 1990)); *see also Poling v. Belington Bank, Inc.*, 207 W.Va. 145, 153, 529 S.E.2d 856, 864 (2000) (affirming denial of a motion to amend where the amended complaint raised no new issues).

In this case, in light the insufficiency of its claims discussed *supra*, the Circuit Court properly exercised its discretion in refusing leave to amend the Complaint. Its ruling should be affirmed.

Book Exchange’s request to amend its Complaint was also tardy and procedurally deficient. Book Exchange’s attempt to amend its Complaint came only after the parties fully briefed Appellees’ motion to dismiss and argued it before the Circuit Court. Indeed, the Circuit Court had already published its rulings *via* its October 3, 2007 Opinion Letter.⁹ Further, Book

⁹ Book Exchange’s reliance on *Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W.Va. 210, 314 S.E.2d 166 (1984) is misplaced because as Book Exchange concedes in its brief, in *Torbett*,

Exchange did not move on formal motion papers, but only requested the relief in passing as an unsupported alternative request for relief in its objections to the proposed dismissal order submitted to the Circuit Court. [cite] Moreover, nowhere in any document filed with the Circuit Court (or this Court) has Book Exchange suggested any proposed amendments to its complaint or presented any new factual allegations or alternative pleadings to support the amendment of its dismissed claims.

In short, despite the Book Exchange's assertions that it has been prejudiced by the Circuit Court's denial of its motion to amend, it did nothing to indicate to that court, or this Court, that any amendment to its pleadings could cure the fatal deficiencies of its claims. The Circuit Court did not abuse its discretion by denying the motion to amend. *See Farmer*, 169 W. Va. at 308; *See also, Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147, 149 (4th Cir. 1944) (finding that the district court did not abuse its discretion for denying leave to amend when suggested amendments did not change substance of plaintiff's claims).

No new factual allegations, grounds for relief, or related issues have been suggested at any point in the procedural history of this matter. The Circuit Court did not abuse its discretion in dismissing the Complaint with prejudice and denying Book Exchange's motion to amend. The Court should affirm the Circuit Court's ruling on these issues.

the plaintiff did not move to amend its complaint in the Circuit Court at all. (Appellant's Brief at 28.) In this case, while its minimalist motion for leave to amend was asserted as an alternative ground to other requested relief, Book Exchange did move the Circuit Court for such relief. Accordingly, unlike the Court in *Torbett*, this Court is constrained to review the Circuit Court's ruling under an abuse of discretion standard. Additionally, in *Torbett*, the plaintiff did not seek to amend her complaint; rather, the Court remanded the action to permit the plaintiff to amend her complaint to allege the additional count of tortious interference because a statute under which the plaintiff had already received a judgment had been overruled.

III.

The Circuit Court Did Not Improperly Apply A Summary Judgment Standard When Ruling On Appellees' Motion To Dismiss: It Properly Dismissed Book Exchange's Complaint For Failure To State A Claim Under A Rule 12(b)(6) Standard

In its third assignment of error, Book Exchange argues that the Circuit Court erred by improperly considering "evidence and proffers" in ruling on the Appellee's Rule 12(b)(6) motions to dismiss, thus improperly applying a W. Va. R. Civ. P. 56 summary judgment legal standard without permitting Book Exchange discovery.

While a circuit court may certainly consider matters outside the pleadings (as discussed below) and convert a motion to dismiss to a motion for summary judgment, the Monongalia County Circuit Court did not do so in this case. No evidence of any kind was introduced at the oral argument before the Circuit Court on the Appellees' motions to dismiss, and nowhere in the Final Order is there a reference to the introduction of evidence. (R. at 308-17). The Circuit Court did not apply a Rule 56 standard and did not consider evidence and proffers in dismissing Book Exchange's Complaint.

Book Exchange does not point to the introduction of evidence but instead relies on the dual senses of the words "find" and "finding" as the basis for its assertion that the Circuit Court improperly dismissed its Complaint under a Rule 56 standard. Book Exchange contends that the Circuit Court made "several factual findings" and further complains that the Circuit Court erred by considering evidence and then treated Appellees' motions as motions for summary judgment without permitting Book Exchange discovery to support its claims.

The Circuit Court did use the phrase "findings" in its Final Order, but none of those were "findings of fact" and none took the matter out of the purview of Rule 12(b)(6). The Circuit Court simply "found" Book Exchange's legal argument unpersuasive. (R. at 310-17). A

court may “find” that a party’s reliance on a case is misplaced, or “find” that a party is in error. Of course, courts can (and do) “find” that allegations made do not state a claim under the law. None of these uses of the term “find” (or “findings”) require or suggest that a “finding of fact” has been made. These very common usages show only that the court has reached a legal conclusion (e.g., “has found” that a party is in error or is not entitled to relief). See e.g., *Affiliated Construction Trades Foundation v. Public Service Com’n.*, 211 W.Va. 315, 322, 565 S.E.2d 778, 785 (2002) (“... we find that the PSC determination that Big Sandy is not a ‘public utility’ was erroneous as a matter of law.”).

The phrases “finding of fact” and “factual finding” do not appear in the Circuit Court’s opinion letter or Final Order, and that court’s use of the term “find” clearly relates to legal conclusions. For example, in its brief, Book Exchange selectively quotes paragraph 2 of the opinion letter, where the Circuit Court states that it “cannot make a finding that the reserve program harms financial aid students at WVU.” (Appellant’s Brief at 25.) This is disingenuous. Book Exchange fails to point out that the Circuit Court was unable to make such a “finding” because Book Exchange did not establish it had standing to assert these statutory claims in the first place. The Circuit Court’s “finding” in that regard is a conclusion of law: that, under the clear terms of the relevant statute, only students (or other parties with a direct interest) could assert many of the claims made by Book Exchange. In “finding” that Book Exchange lacked standing, the Circuit Court did not resolve any factual dispute. Rather, it simply applied the law to test the formal sufficiency of Book Exchange’s factual allegations, accepted to be true for purposes of the motion.

Similarly, the Circuit Court’s statement that “the Court does not find that the [program] is tantamount to ‘preventing’ or ‘unlawfully interfering’ with the prospective business

relationships,” represents a legal conclusion. Indeed, while Book Exchange asserts throughout its argument under its third assignment of error that the Circuit Court has somehow imposed a standard applicable to Rule 56, it complains only of legal conclusions properly reached by that court. *Sprouse, supra*, recognized that a judgment on the merits arising out of a 12(b)(6) motion did not always require a hearing on controverted facts. 158 W. Va. at 461, 211 S.E.2d at 696.

Further, Book Exchange complains that the Circuit Court’s statement in its opinion letter -- that “[t]he Book Exchange has failed to convince the Court that either the means or the end result of the [defendants’] financial reserve program is unlawful.” -- “imposes a standard of proof that does not apply in Rule 12(b)(6) proceedings.” (Appellant’s Brief at 26-27.) There is no support for this assertion. The workings of the Reserve Convenience Account were not disputed at the pleading stage, and the Circuit Court simply pointed out that Book Exchange’s legal arguments -- accepted as true -- had not convinced the Circuit Court that either the means or the ends (as spelled out in the Complaint and accepted as true for purposes of the motion) were unlawful. Moreover, the Circuit Court’s citation to some cases involving summary judgment does not change the nature of that court’s ruling. The legal elements of a tortious interference claim are the same in both the context of a motion to dismiss and a motion for summary judgment.

Book Exchange’s assertion that the Circuit Court further erred by denying its alternative motion for discovery also is misplaced. Like its motion to amend its complaint, discussed in Section III *supra*, Book Exchange’s alternative motion for discovery came only after the Circuit Court published its rulings to the parties via its opinion letter. Book Exchange did not seek discovery to aid that court in deciding some contentious issue before it. *Contra e.g., Bowers v. Wurzburg*, 202 W.Va. 43, 48, 501 S.E.2d 479, 484 (1998) (“Whether to permit

discovery to aid its decision of a motion to dismiss for lack of personal jurisdiction, or whether to decide such a motion based solely upon the pleadings, affidavits and other documentary evidence, is within the trial court's sound discretion."'). Indeed, the Circuit Court had already decided the issues before it, finding that no set of facts would give rise to actionable claims against Barnes & Noble College.

The Circuit Court understood the nature of the motions before it and the proper standard to apply. Because the Circuit Court did not consider evidence and did not apply a Rule 56 summary judgment standard when adjudicating the Rule 12(b)(6) motion before it, the Circuit Court's decision should be affirmed, and Book Exchange's Appeal should be denied.

IV.

Appellant's Fifth Assignment Of Error Is Not Ripe For Appeal And The Circuit Court Did Not Err By Dissolving the Injunction

By its order of December 7, 2007, the Circuit Court of Monongalia County "DISSOLVED, VACATED and LIFTED [the preliminary injunction of July 25, 2007] without prejudice to the rights of the Defendants to seek relief under the bond that was previously granted." (R. at 317). While Appellees have moved for such relief against the bond in the Circuit Court, that court has yet to address the issue. It is W.Va. R. Civ. P. 65(c)'s provision for payment under an injunction bond of "such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained," that is central to Book Exchange's fifth assignment of error on appeal. It asserts that Appellees were not "wrongfully enjoined or restrained" such that Appellees can recover damages under the Injunction bond.

In its brief, Book Exchange concedes that “the precise issue” it is raising “has not been determined below, but the matter is raised on appeal out of an abundance of caution.” (Appellant’s Brief at 30.) “It is axiomatic that ‘this Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.’” *Citizens Bank of Weston, Inc. v. City of Weston*, 209 W.Va.145, 149, 544 S.E.2d 72, 76, fn 9 (2001) (citing Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958)). Accordingly, because the Circuit Court has yet to rule on Barnes & Noble College’s motion for execution on the injunction bond and no damages have been awarded thereunder, the issues raised in Book Exchange’s fifth assignment of error are not ripe for appeal and should be dismissed.

Assuming, *arguendo*, that the issues raised by Book Exchange regarding the dissolution of the preliminary injunction are capable of review now, the ruling of the Circuit Court should be affirmed because that court did not abuse its discretion when dissolving the Injunction. Absent an absolute right to injunctive relief conferred by statute, a circuit court’s decision to “dissolve a temporary [preliminary] or a permanent injunction, whether preventative or mandatory in character, ordinarily rests in the sound discretion of the trial court, according to the facts and circumstances of the particular case; and its action in the exercise of its discretion will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion.” *Chapman v. Catron*, 220 W.Va. 393, 396, 647 S.E.2d 829, 832 (2007) (citing *e.g.*, Syl. Pt. 1, *Baisden v. West Virginia Secondary Schools Activities Commission*, 211 W.Va. 725, 568 S.E.2d 32 (2002)).

In seeking the Injunction first entered and then later dissolved by the Circuit Court, Book Exchange alleged that continued operation of Appellees’ “unfair and unlawful” Reserve Convenience Account program would irreparably harm Book Exchange by subjecting it

to money damages beyond the available insurance policy coverage. (Complaint, ¶¶ 103-110.) In dismissing Book Exchange's Complaint, however, the Circuit Court found that Book Exchange failed to state allegations sufficient to support a claim that Appellees' Reserve Convenience Account was illegal or tortious. Accordingly, the grounds upon which the preliminary injunction originally rested had no likelihood of success on the merits. *See Hart v. National Collegiate Athletic Ass'n*, 209 W.Va. 543, 549, 550 S.E.2d 79, 85 (2001) (vacating the award of a preliminary injunction by the circuit court and finding that the appellee faced no potential for irreparable harm without injunctive relief because his claims for injunctive relief were not based on any enforceable rights recognized by state law).

Book Exchange's assertion that the Circuit Court erred by dissolving the Injunction by virtue of its December 7, 2007 order because that Injunction had, in essence, "run its course" is disingenuous. First, the Circuit Court published its decision to terminate the Injunction during the Fall term in its October 3, 2007, Opinion Letter. Indeed, the Circuit Court's decision to lift the Injunction in its Opinion Letter spurred the Book Exchange to seek interlocutory review of that decision with this Court. (R. at 255). The Injunction was in place and fully effective at the time the Circuit Court dismissed Book Exchange's Complaint for failure to state a claim and, therefore, properly subject to dissolution.

Moreover, a party may be wrongfully enjoined for a finite period of time and still seek relief under a bond after that injunction terminates. If this were not the case, then a party wrongfully enjoined for a finite duration would always be foreclosed from proceeding to enforce an injunction bond under W.Va.R.Civ.P. 65(c) if that finite period ended before the merits of the case were determined.

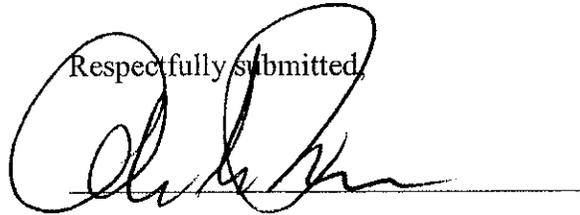
This Court should affirm the Circuit Court's dissolution of the Injunction as a proper exercise of its discretion and permit the enforcement proceedings on the Injunction bond to continue below.

SUMMARY CONCLUSION

For those reasons fully set forth above, this Court should affirm the Circuit Court of Monongalia County's Final Order dismissing Book Exchange's Complaint with prejudice, and in its entirety.

Dated this _____ day of August, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "A. G. Fusco", written over a horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34162

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THE BOOK EXCHANGE, INC., a West Virginia Corporation,	:	
	:	(Appeal from)
	:	Monongalia County Circuit Court
<i>Appellant,</i>	:	Civil Action No. 07-C-369
	:	
v.	:	
	:	
WEST VIRGINIA UNIVERSITY, through the WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS, a corporation; NARVEL G. WEESE, JR., individually, and BARNES AND NOBLE COLLEGE BOOKSELLERS, INC., d/b/a WEST VIRGINIA UNIVERSITY/DOWNTOWN BOOKSTORE, WEST VIRGINIA UNIVERSITY/EVANSDALE BOOKSTORE, WEST VIRGINIA UNIVERSITY/LAW BOOKSTORE, and WEST VIRGINIA UNIVERSITY/HEALTH SCIENCES BOOKSTORE,	:	
	:	
<i>Appellees.</i>	:	
	:	

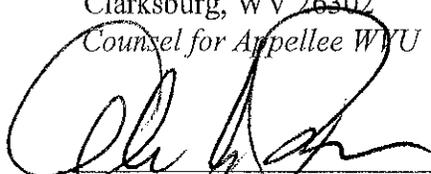
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true copy of the within **APPELLEE'S BRIEF**, via U.S. Mail, on the 29th day of August, 2008, upon the following named counsel:

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