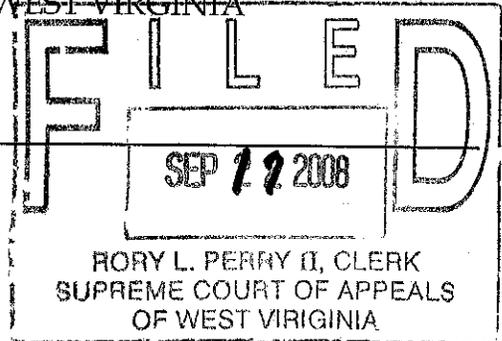


IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34162



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

Appellant,

vs.

MONONGALIA COUNTY CIRCUIT COURT
CIVIL ACTION NO.: 07-C-369

WEST VIRGINIA UNIVERSITY, through the
WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS, a corporation;
NARVEL G. WEESE, JR., individually; and
BARNES & 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.

=====
APPELLANT'S REPLY BRIEF
=====

Counsel for Appellant:

A handwritten signature in black ink, appearing to read "Bader C. Gigenbach".

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The appellant has received the briefs of the Appellees in this matter. This reply brief will begin by addressing the issues raised by the first appellee named in the style, being West Virginia University ("WVU"). In the introduction portion of WVU's brief, at page 1, it is stated that the "Book Exchange has conceded that it had no basis for seeking recovery under any of the ten statutes." This statement by WVU is entirely inaccurate. The appellant only referenced four statutes for the purposes of saying that an independent cause of action did not exist. (WVU's Br. at 20). WVU's introduction goes on to claim that the appellant is guilty of "evasion of analysis," that its brief is "rife with conclusions," and "bereft of actual legal analysis." However, WVU cannot overcome the legal proposition (which is well supported in the law and fully briefed by the appellant), that a tortious interference claim may include unlawful or wrongful acts, which are not necessarily independent torts for a plaintiff. WVU likewise cannot overcome the fact that W.Va. R. Civ. P. 8(e) requires that pleadings "shall be simple, concise, and direct."

WVU contends at page 3 of its brief that appellants' first challenge to the withholding program was when the complaint was filed. While this may be true regarding a formal legal challenge, WVU disregards the efforts by the appellant and its President, John Fleming, to resolve the issue without court action. The appellant argued that other attorneys tried to resolve the dispute, before present counsel.

He didn't want to go to court. Look at his shirt today. He's got a West Virginia shirt on. There's a reason why. He loves WVU. The last thing he wanted to do is to drag these people into court. The last thing he wanted to do is go this route He had me as a lawyer, and the charge he gave me, get them to the table and talk, and I tried twice and was left with terse nos both times; once before

the new president took over and once after. We've tried to work it out. Well, here we are in court, the last thing we wanted to do.

(H. T., July 20, 2007, p. 12).

WVU's brief spends much time attacking the appellant for alleging that various acts are tortious, as opposed to alleging tortious acts, and WVU maintains that some of the allegations are merely "self-serving characterizations." (WVU Br., p. 4, n. 2). However, to follow the logic of WVU on this point, all complaints which are filed should be dismissed. For example, Form 9 of the West Virginia Rules of Civil Procedure contains a complaint for negligence as follows:

1. On June 1, 1955, in a public highway called Washington Street in Charleston, West Virginia, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.
2. As a result, plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.
3. Wherefore, plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs.

W. Va. R. Civ. P. Form 9. Under WVU's theory, the plaintiff in this form complaint makes a "self-serving characterization" by stating the facts which support the negligent claim. All complaints contain statements which are self serving, by the very nature of the complaint itself, which contains a request for relief in favor of the plaintiff. WVU confuses the statement of a "claim" under Rule 12(b)(6) with a "genuine issue as to any material fact" under Rule 56(c). WVU appears to be arguing that the complaints should be dismissed for failure to state a claim upon which relief may be granted, because

complaints contain statements which may be "self-serving." That is not the rule and that is not a proper basis for dismissal.

WVU goes on in this vein to make the statement that one of the appellant's assertions is "absurd and without foundation." (WVU Brief p. 4, n. 3). Similarly, this is an argument by WVU regarding a claim it disputes. The appellant claims, among other things, that WVU students are misled and that the holding of textbook monies at appellees' stores is what "forces" the financial aid student to go to appellees' stores as opposed to appellant's stores. Although WVU may consider such a claim to be "absurd," that is not the standard under Rule 12(b)(6). Certainly, WVU had the right to file an answer and deny the claims made by appellant. Again, WVU appears to confuse Rule 12(b)(6) with Rule 56, because under a Rule 56 proceeding, it would be appropriate to assert that a claim is "without foundation."

In WVU's discussion of the tortious interference claim, it complains that there were no allegations of any tortious facts. This argument ignores the multiple statements in the complaint supportive of the tortious interference claim. The following is a list of such claims, in the order in which they appear in the complaint: withholding of student money; failure to obtain student authorization; referring to the program as a "convenience account"; creating an unreasonably short window of time within which the student must take affirmative steps to be taken out of the automatic program; forwarding the email notices at particularly busy times for the students, such as finals; constructive taking of student monies; WVU's unilaterally choosing the refund date; the students being precluded from using a portion of their financial aid award to purchase

textbooks from the appellant; failure of the appellees to recognize the efforts of students to be removed from the reserve program; wrongful direction of students to appellees' bookstores; failure to minimize costs to students, unlawful diversion of trade; unlawful control of the sale of textbooks; deceptive electronic correspondence to students; use of public monies to obtain competitive advantage; causing students to have a misimpression regarding their funds, which in turn causes the students to go to appellees' bookstores as opposed to that of the appellant; taking the money from the student at a time when it is needed, at the beginning of the semester, and refunding the money after the semester starts; essentially forcing the student to purchase books from appellees; having a program the purpose of which is to injure the plaintiff; lack of honesty; wrongful inducement; efforts to destroy competition and to restrain trade; unethical and overreaching actions below the behavior of fair corporations similarly situated;¹ unlawful inducement; malicious desire to destroy the business of the appellant; and acting for the purpose of injuring the appellant. These claims may be found at complaint paragraphs 14, 18, 19, 22, 23, 25, 26, 27, 28, 32, 45, 49, 50, 52, 57, 65, 66, 68, 69, 70, 75, 83, 86, 87, 90, 94, and 95. As such, contrary to the arguments of WVU, the improper interference and wrongful means were stated in numerous ways, in addition to the statutory violations. For example, WVU cites the Wolff v. Rare Medium,

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Oddly, WVU's brief at page 16, asserts that the appellant's complaint contains no allegations of "unethical business behavior."

Inc., 65 Fed. Appx. 736 (2d Cir. March 14, 2003) (unpub.), in footnote 5 at page 9 for the proposition that a "district court correctly dismissed" tortious interference claims, where the complaint did not contain statements to establish that the defendant "was 'unjustified' or 'dishonest, unfair, or improper.'" Id. The appellant in the present case made numerous statements showing that appellees' actions were unjustified, dishonest, unfair, and improper.

At pages 13 and 14 of WVU's brief, it gives several examples of actions WVU may take which would give it a competitive advantage. These items include opening the bookstores for 24 hours a day and the offer of on-campus housing and food. First, if the appellees opened their stores for 24 hours a day, the appellant could open its store for 24 hours a day. However, the appellant has no access to WVU student financial aid funds. With respect to the housing argument, there is a legitimate public policy and purpose behind requiring freshman to live in dormitories. This of course involves the need to acclimate a young individual to the higher education setting. There is no legitimate public policy statement behind appellees' "reserve convenience account."

Merely because appellees' call the program a reserve convenience account does not make it so. In fact, it is very inconvenient for a student to be precluded from comparison shopping. It is extremely inconvenient for a student to receive confusing and misleading emails at inconvenient times. It is inconvenient for a student to have to be required to affirmatively request removal from a program in which he or she was involuntarily placed. Additionally, the dormitory requirement applies to all incoming freshman. Appellees' financial aid withholding program applies only to financial aid

students. The financial aid students are selected and isolated from the remaining student population, because it is the financial aid student who most needs the ability to comparison shop. Appellees recognized that appellant was receiving a good share of the financial aid student market, and the withholding program was instituted and implemented, unlawfully, in order to take this business from the appellant.

With respect to the offer of on campus food, the undersigned is unaware of any requirement by WVU that students purchase a university meal plan, and the undersigned is unaware of any deceptive or unlawful coercion utilized by WVU in its attempts to gain a competitive market advantage with respect to food sales in Morgantown. However, if WVU were using such unlawful means, the use of such a meal plan would then be tortious, as to private affected businesses.

At pages 14 and 15, WVU attempts to distinguish many of the cases cited by appellant in its brief. Each of these attempts at distinction fail, because the end result in each case is that the plaintiff was harmed. As stated in appellant's brief, the wrongful means or unlawful interference may come in many different forms. The cases cited by appellant certainly may involve different forms of interference, but the end result is the same in those cases as in the present case, which involves damages to the injured party. Merely because these cases may have different factual patterns involving other forms of interference, does not mean that the cases are "inapposite" as asserted by WVU.

For example, WVU argues at page 23 of its brief that the appellants claim of deception, regarding the emails, is merely a conclusion of law. Again, to follow this line of thinking, with respect to Form 9, the allegation of negligence is an improper

conclusion of law. The acts of deception are repeatedly stated throughout the complaint and the claim regarding the deceptive email is a claim, not a conclusion. WVU further struggles with the distinction between an opinion and a claim in its citation of the Kopelman case at page 24. The pertinent definition of opinion from Blacks Law Dictionary, 7th Edition, is a "witness's thoughts, beliefs, or inferences about facts in dispute, as opposed to personal knowledge of the facts themselves." The American Heritage Dictionary (1983) gives a similar definition by stating that an opinion is a "belief held often without positive knowledge or proof." The appellant has not asserted opinions, because the assertions referenced in the complaint are supported by the factual statements contained in the complaint. The same would be true for Form 9 in the Rules of Civil Procedure. The claim of negligence is supported by the claim that the individual was "thrown down" and "had his leg broken." In the complaint, the appellant made repeated factual claims which support its legal claims.

At page 26 of WVU's brief, it contends that appellant's brief abandoned the civil conspiracy claim. However, pages 20 and 21 of appellant's brief state "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 assertions. Complaint ¶¶ 1-83 and 92-110. In view of the body of law governing Rule 12(b)(6), expressed herein, the court also erred in dismissing the statutory and conspiracy claims." The civil conspiracy claim is self explanatory and is supported by all of the other unlawful acts in the complaint. The civil conspiracy count alleges that the appellees acted in concert "to accomplish an unlawful purpose or by unlawful means, all as more fully referenced

above." Appellant by no means has abandoned this cause of action.

At page 27 of its brief, WVU states that the Appellant cited the Rhododendron case "for the proposition that a Rule 12(b)(6)[sic] can never be with prejudice." The appellant in no manner, shape, or form made such a statement in its brief. To the contrary, the appellant cites adverse authority in this section of its brief at page 22, when discussing the Rhododendron decision. The purpose of discussing Rhododendron and the Sprouse v. Clay Communication cases, was for the purposes of raising the issue. There certainly would appear to be an inconsistency regarding whether Rule 12(b)(6) dismissals are with or without prejudice. Appellate suggests that this inconsistency can be resolved by considering that the Rhododendron case is a per curiam opinion. Inasmuch as Rhododendron is per curiam, appellant suggests that for this 2003 decision to be consistent with the 1975 Sprouse decision, that one would have to interpret Rhododendron to be applicable to those instances where a circuit court converts a Rule 12(b)(6) proceeding into a Rule 56 hearing. Appellant asserts that Rhododendron would require such a dismissal to be without prejudice. Rhododendron is thus applicable in the present case, given the circuit court's dismissal, apparently pursuant to Rule 56, as opposed to Rule 12(b)(6). WVU goes on at page 28 to argue that appellant is asserting that Sprouse was "silently" overruled. Again, appellant's brief makes no such statement.

At page 29 of WVU's brief, it argues that the appellant failed to state why discovery documents "were inadequate." WVU's responsive brief misses the issue involving Rule 12(b)(6). There was no motion to compel discovery below. In its brief,

appellant explained that discovery was halted by the court's opinion letter, mere days after the first discovery was produced. The point is that if the court was of the opinion to make a Rule 56 ruling, it should have permitted discovery. With respect to the issue before the Supreme Court on Rule 12(b)(6), the content of the discovery is not controlling. It is the content of the complaint which should govern under Rule 12(b)(6). The appellant raised the discovery issue below as a motion in the alternative. Appellant can add as an aside that discovery would have been helpful on many issues. For example, an examination of the emails to the students could have helped the court to understand appellant's claims that the emails were deceptive and confusing. The emails, as alleged in the complaint, are worded in such a manner as to make the student believe that the account has already and automatically been created. The end result is that the student is left with the impression that he or she has no other choice but to purchase his or her textbooks at appellees' stores. Discovery involving accounts, ledgers, and books involving sales over time, would also establish the vast financial impact that appellees' withholding program has on textbook commerce.

At page 29 of WVU's brief it contends that the appellant's Rule 41(b) argument is "non-sensical." WVU states that the Rule "provides for involuntary dismissal of claims that plaintiffs fail to prosecute." (WVU Br. at 29). This statement is not entirely accurate, because Rule 41(b) actually states that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." (Emphasis added).

As such, Rule 41(b) applies to dismissals other than involuntary dismissals. Appellant raised the Rule 41(b) issue, because it asserts that the circuit court's dismissal amounts to a dismissal for lack of jurisdiction, inasmuch as the court made a finding that there was no standing on various statutory claims. Rule 41(b) is asserted for the proposition that the circuit court's dismissal order should have been without prejudice, inasmuch as it is a dismissal for what amounts to be a lack of jurisdiction. The transformation of the dismissal, as discussed by WVU in its brief, is the act of the court. It is the circuit court's order which states that the lack of standing on the statutory claims precludes the appellant from utilizing these same statutory violations as part of the tortious interference claim. As such, it is the court which transformed appellees' Rule 12(b)(6) motions to dismiss. Even though the court may have stated that the dismissal was per Rule 12(b)(6), a reading of the order suggests that the dismissal was due to lack of standing, and appellant asserts that this would be a dismissal pursuant to lack of jurisdiction. This argument by appellant is similar to the assertion that the court transformed a Rule 12(b)(6) proceeding into a Rule 56 proceeding, in that the court applied a legal rule which was inapplicable to the Rule 12(b)(6) motions.

WVU asserts in footnote 5 at page 30 of its brief that appellant inappropriately cited the Belcher v. Greer case for the proposition that "all dismissals for lack of standing generally must be without prejudice." Again, a reading of appellant's brief reveals that no such claim was ever made. In fact, the exact sentence from appellant's brief is that a "lack of standing could equate to a lack of jurisdiction over the subject matter." (Appellant's Br. 23).

With respect to WVU's assertion that there was no evidence introduced at the hearing, the appellant has agreed those matters which are apparent from the opinion letter and the order, and that includes the fact that the court used the word "evidence" in its initial ruling and the fact that the court cites Rule 56 authorities, together with its factual findings, as detailed in appellant's brief at pages 25 through 27. A careful review of the findings as stated by the court reveals that these were in fact factual findings as opposed to legal opinions. For example, when the circuit court states that the appellant "has failed to convince the Court" that the program is unlawful, it holds the appellant to a different standard under the Rule 12(b)(6). (Opinion letter, p. 2.) At a Rule 12(b)(6) proceeding, the plaintiff is not required "to convince the court" that it will prevail on its claim.

WVU, at page 32 of its brief, attempts to claim that the Southprint and Lucas decisions apply to Rule 12(b)(6) and Rule 56. However, WVU cites no language from the opinions which specifically states that these holdings are applicable in a Rule 12(b)(6) proceeding.

Next, at page 33 of its brief, WVU claims that the appellant never filed a motion to amend its complaint. The appellant did file such a motion and the exact language surrounding the alternative motion to amend the complaint is cited below.

The Supreme Court affirmed the Rhododendron case, because it found that the Circuit Court had treated what was essentially a Rule 12(b)(6) motion as a Rule 56 motion. The Court went on to say that "whether the circuit court dismisses a party's case under Rule 12 or Rule 56 determines if the non moving party will have the opportunity to re-file, amend their complaint, or conduct additional discovery." Inasmuch as the Plaintiff in the present case was not able to present evidence to the Court, the Court's ruling

should be without prejudice so as to give the Plaintiff the appropriate opportunity to re-file the complaint in Circuit Court. Alternatively, the Circuit Court could rescind the Dismissal Order so as to permit discovery. Another alternative is that the Court permit the Plaintiff's to amend its present complaint in order to address any pleading issues that the Court may have.

(R. at 228). The motion in the alternative to amend the complaint was filed. (R. at 221).

The grounds for the motion are stated in the above cited section. The appellant suggested an alternative to the court, as opposed to the harsh sanction of dismissal.

WVU's brief at page 35 contends that the appellant acts improperly where it requests discovery to proceed in order to develop "facts sufficient" to state its claim. WVU's brief leaves out the fact that this quotation comes from the circuit court's order. WVU misses the point here, because the argument made by the appellant is that it would have been in an appropriate position to meet the court's high standard, had discovery been permitted to proceed through its normal course. The appellant would have been in a much better position to meet the court's high standard, after the conclusion of written discovery and depositions. WVU then makes another reference to the many documents it provided in the case, but ignores that fact that these documents were provided mere days before the court dismissed the case. In reply to the brief of Barnes and Noble, at page 7 it states that "because (appellant) 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.

Just as with WVU, Barnes & Noble's brief, at the first several pages, appears to resist the legal proposition that the wrongful means or unlawful interference portion of a tortious interference claim may consist of matters for which a plaintiff may not

necessarily have an independent cause of action. At page 10 of Barnes and Noble's brief, it states that the appellant "states no incidents from which a court could conclude that any future student was misled." Paragraph 84 of plaintiff's complaint is the first paragraph under the tortious interference claim, and this paragraph adopts all of the prior averments, as permitted by Rule 10(c) of the West Virginia Rules of Procedure. The very next paragraph under this count refers to prospective business expectancies and relations involving WVU financial aid students. The complaint is clear on its face that students were being misled, and that this unlawful action by appellees has affected and would continue to affect the appellant.

Barnes and Noble's brief goes on to complain that the appellant's complaint lacked more than "conclusory statement[s]" (Barnes and Noble Br. at 12). As stated above, in response to WVU's similar argument, the appellant made repeated references in its complaint to factual claims supportive of its position, in addition to the statutory violations.

A review of the Speakers of Sport, Inc. v. Proserv, Inc., 178 F.3d 862, 865 (7th Cir. 1999) case cited by Barnes & Noble, arguably reveals that the position asserted by the present appellant regarding the multiple means by which a tortious interference may be established, is in the majority nationally. For example, the Speakers opinion states that "competition can be tortious even if it does not involve an actionable fraud . . . or other independently tortious act." Id. The opinion goes on to say that "competitors should not be allowed to use 'unfair' tactics." Id. The opinion next states that "[c]onsiderable support for this view can be found in the case law." Id. The case then

cites opinions from Idaho, New York, Virginia, the Top Service case cited by appellant, and Iowa, together with the Restatement of Torts. Then, the opinion states that “the Illinois courts have not as yet embraced the doctrine, and we are not alone in thinking it pernicious,” and a California case is cited. Id.

Appellant agrees with Barnes and Noble that the Klinger v. Morrow County decision limits the Top Service decision. Interestingly though, the Top Service case is approvingly cited by our neighbor in Virginia. Duggin v. Adams, 234 Va. 221, 227-28, 360 S.E.2d 832, 837 (1987).

At page 32 of its brief, Barnes and Noble discusses appellant’s arguments regarding the Belcher v. Greer case. The appellant cited the Belcher case, because of its footnote 2 and not because of Syllabus Point 3, as argued by Barnes and Noble. Footnote 2 recognizes that the lack of standing dismissal in Belcher was for “for lack of jurisdiction within the meaning of Rule 41 which would guarantee that the dismissal was *without* prejudice even if the trial court failed to specify.” (Citing Costello v. United States). (Appellant’s Br. at 20). Appellant’s argument under Belcher is that if the court’s dismissal was for a lack of standing/lack of jurisdiction, then it would be without prejudice.

At pages 33 and 34 of Barnes and Noble’s brief, it raises the same assertion as WVU that the motion in the alternative to amend the complaint filed by appellant was unsupported, when the record reveals otherwise, albeit without belaboring the point. (R. at 221 and 228). Additionally, although WVU asserts that no motion to amend was filed, Barnes and Noble does admit that the appellant “did move the circuit court for

such relief.” (Barnes and Noble Br. at 34, n. 9).

At page 36 of the Barnes and Noble brief, a claim is made that the appellant is “disingenuous.” Appellant placed the quotation regarding the court’s statement that it “cannot make a finding” in the brief together with other references to the court’s statement that it could not make various “findings.” The citation of the court’s language from the opinion letter was in no way intended to be misleading. An examination of the statement reveals that irrespective of whether standing is considered, the court nevertheless makes the statement that it “cannot make a finding that the reserve program harms financial aid students at WVU.” As has been asserted numerous times in the brief and in the present reply brief of the appellant, there is no requirement that there be independent standing on the statutory claims, which are part of the tortious interference claim. The full statement by the circuit court, in its opinion letter is as follows, “[a]s no party with standing is before the Court requesting that such a determination be made, this Court cannot make a finding that the reserve program harms financial aid students at WVU.” The appellant understands the distinction being made by Barnes and Noble, but takes issue with its charge of disingenuousness. A review of this statement by the court appears to show that the court never considered the question regarding harm to financial aid students, because it made the inaccurate determination that the appellant had to have standing. This same type of sentence contained at paragraph 7 of the court’s final order. (R. at 14).

Appellant continues in its request that the Supreme Court grant this appeal, reverse the circuit court below, and remand the matter with instructions consistent with

the appeal.

RESPECTFULLY SUBMITTED,
THE BOOK EXCHANGE, INC.
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Civil Action No.: 07-C-369

Monongalia County
WEST VIRGINIA UNIVERSITY, et al.
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CERTIFICATE OF SERVICE

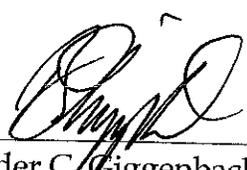
The undersigned does hereby certify that he served a true copy of the within
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