



2. In response to Plaintiffs' Complaints, pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*, Defendants, Raleigh Heart Clinic and Dr. Barghouthi filed Motions to Dismiss (Transaction IDs 62116814 (D.B.) and 62122080 (R.T.)). In their Motions to Dismiss, Defendants alleged that one patient (D.B.) never underwent a stress test at the Raleigh Heart Clinic, and the other patient (R.T.) admitted to having Hepatitis C before undergoing a stress test at Raleigh Heart Clinic. Attached to Defendants' Motions were Affidavits from Dr. Barghouthi, and, in the case of R.T., medical records supporting Defendants' position.

3. When making a motion pursuant to *West Virginia Rule of Civil Procedure* 12(b)(6) for failure to state a claim upon which relief can be granted, "if matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]"

4. Because Defendants have attached documents to their Motions outside of the Complaint, this Court **FINDS** that Defendants' Motions to Dismiss shall be treated as Motions for Summary Judgment under Rule 56(c) of the *West Virginia Rules of Civil Procedure*.

5. During the hearing Plaintiffs' counsel argued that Plaintiffs have not had the opportunity to gather their medical records from other healthcare providers in this matter, and, therefore, have not had an opportunity to determine whether Dr. Barghouthi may have treated and exposed the Plaintiffs to Hepatitis at another facility.

6. When considering a Motion under Rule 56 of the *West Virginia Rules of Civil Procedure*, a court may refuse the motion for judgment and allow discovery to be taken if the party opposing the motion does not have facts essential to justify the opposing party's opposition to the motion. W. Va. R. Civ. P. 56(f).

7. Given the liberality of Rule 56(f) of the *West Virginia Rules of Civil Procedure*, this Court **FINDS** that the Plaintiffs should have the opportunity to gather the medical records and conduct the discovery necessary to fully respond to Defendants' Motions.

8. For these reasons, the Court hereby **ORDERS** that Defendants' Motions to Dismiss are hereby **DENIED**. Nothing in this Order prohibits or limits the Defendants from refileing their Motions as summary judgment motions at the conclusion of the discovery. The exceptions and objections of the Defendants are noted and preserved for the record.

It is so **ORDERED**.

**ENTER:** December 19, 2018.

/s/ Jay M. Hoke  
Lead Presiding Judge  
Raleigh Heart Clinic Litigation

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