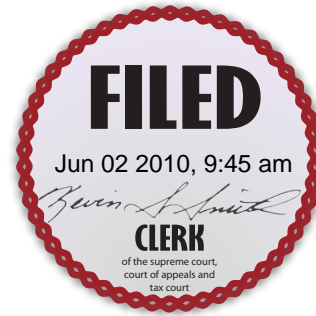


**Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



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**IN THE  
COURT OF APPEALS OF INDIANA**

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STUART REED; DELAWARE MANOR, INC., )  
d/b/a WILLOWBEND LIVING CENTER; )  
HOOSIER ENTERPRISES III, INC., d/b/a )  
HOLLY HILL HEALTHCARE; HOOSIER )  
ENTERPRISES III, INC.; d/b/a LIBERTY )  
VILLAGE; MAGNOLIA HEALTH SYSTEMS )  
XIV, LLC, d/b/a LIBERTY VILLAGE; HOOSIER )  
ENTERPRISES III, INC., d/b/a TWIN CITY )  
HEALTHCARE; MAGNOLIA HEALTH )  
SYSTEMS XIII, LLC, d/b/a TWIN CITY )  
HEALTHCARE; HOOSIER ENTERPRISES I, )  
INC., d/b/a UNIVERSITY NURSING CENTER; )  
HOOSIER ENTERPRISES III, INC., d/b/a )  
WINTERSONG VILLAGE; HOOSIER )  
ENTERPRISES I, INC., d/b/a ROSE GATE )  
VILLAGE; HOOSIER ENTERPRISES II, )  
INC., d/b/a ESPECIALLY KIDZ HEALTH & )  
REHABILITATION CENTER; HOOSIER )  
REALTY I, LLC, d/b/a WASHINGTON )  
NURSING CENTER; HOOSIER REALTY IV, )  
LLC, d/b/a WOODLAND HILLS CARE CENTER;) )  
MAGNOLIA ENTERPRISES, INC., d/b/a )  
CAMELOT CARE CENTER; HOOSIER )  
ENTERPRISES IV, INC., d/b/a MEADOW )  
BROOK REHABILITATION CENTRE; )

HOOSIER ENTERPRISES V, INC., d/b/a )  
OAKBROOK VILLAGE; HOOSIER )  
ENTERPRISES V, INC., WILLOW CROSSING )  
HEALTH & REHABILITATION CENTER; )  
MAGNOLIA HEALTH SYSTEMS XVII, LLC, )  
d/b/a WILLOW CROSSING HEALTH & )  
REHABILITATION CENTER; HOOSIER )  
ENTERPRISES VII, INC., d/b/a AVALON )  
VILLAGE; HOOSIER ENTERPRISES VIII, )  
INC., d/b/a WESTRIDGE HEALTHCARE; )  
HOOSIER ENTERPRISES VII, INC., d/b/a )  
HILLCREST CENTRE FOR HEALTH & )  
REHABILITATION; HOOSIER ENTERPRISES )  
VII, INC., d/b/a LOWELL HEALTHCARE; )  
HOOSIER ENTERPRISES IX, INC., d/b/a )  
GRANDVIEW HEALTH & REHABILITATION )  
CENTER; HOOSIER ENTERPRISES X, INC., )  
d/b/a ALEXANDRIA CARE CENTER; )  
HOOSIER ENTERPRISES XI, INC., d/b/a )  
BROOKVILLE HEALTHCARE CENTER; )  
MAGNOLIA HEALTH SYSTEMS VI, LLC, )  
d/b/a CHALET VILLAGE HEALTH AND )  
REHABILITATION CENTER; HOOSIER )  
ENTERPRISES XII, LLC, d/b/a VERMILLION )  
CONVALESCENT CENTER; MAGNOLIA )  
HEALTH SYSTEMS VIII, INC., d/b/a )  
LAKEVIEW MANOR, INC.; AND MAGNOLIA )  
HEALTH SYSTEMS X, INC., d/b/a )  
GREEN-HILL MANOR, INC.;

Appellants/Defendants/Counterclaim )  
Plaintiffs/Third-Party Plaintiffs, )

vs. )

No. 49A05-0909-CV-535 )

INDIANAPOLIS WELDING SUPPLY, INC., )  
d/b/a MEDICAL OXYGEN COMPANY d/b/a )  
MED O2, )

Appellees/Plaintiffs/Counterclaim )  
Defendants, )

and )

DWIGHT DARLAGE, )

Appellee/Third-Party Defendant.

)  
)

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable David A. Shaheed, Judge  
Cause No. 49D01-0808-CC-39406

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**June 2, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

In this interlocutory appeal, Appellants/Defendants/Counterclaim Plaintiffs/Third-Party Plaintiffs Stuart Reed; Delaware Manor, Inc., d/b/a Willowbend Living Center; Hoosier Enterprises III, Inc., d/b/a Holly Hill Healthcare; Hoosier Enterprises III, Inc., d/b/a Liberty Village; Magnolia Health Systems XIV, LLC, d/b/a Liberty Village; Hoosier Enterprises III, Inc., d/b/a Twin City Healthcare; Magnolia Health Systems XIII, LLC, d/b/a Twin City Healthcare; Hoosier Enterprises I, Inc., d/b/a University Nursing Center; Hoosier Enterprises III, Inc., d/b/a Wintersong Village; Hoosier Enterprises I, Inc., d/b/a Rose Gate Village; Hoosier Enterprises II, Inc., d/b/a Especially Kidz Health & Rehabilitation Center; Hoosier Realty I, LLC, d/b/a Washington Nursing Center; Hoosier Realty IV, LLC, d/b/a Woodland Hills Care Center; Magnolia Enterprises, Inc., d/b/a Camelot Care Center; Hoosier Enterprises IV, Inc., d/b/a Meadow Brook Rehabilitation Centre; Hoosier Enterprises V, Inc., d/b/a Oakbrook Village; Hoosier Enterprises V, Inc., Willow Crossing Health & Rehabilitation Center; Magnolia Health Systems XVII, LLC, d/b/a Willow Crossing Health

& Rehabilitation Center; Hoosier Enterprises VII, Inc., d/b/a Avalon Village; Hoosier Enterprises VIII, Inc., d/b/a Westridge Healthcare; Hoosier Enterprises VII, Inc., d/b/a Hillcrest Centre for Health & Rehabilitation; Hoosier Enterprises VII, Inc., d/b/a Lowell Healthcare; Hoosier Enterprises IX, Inc., d/b/a Grandview Health & Rehabilitation Center; Hoosier Enterprises X, Inc., d/b/a Alexandria Care Center; Hoosier Enterprises XI, Inc., d/b/a Brookville Healthcare Center; Magnolia Health Systems VI, LLC, d/b/a Chalet Village Health and Rehabilitation Center; Hoosier Enterprises XII, LLC, d/b/a Vermillion Convalescent Center; Magnolia Health Systems VIII, Inc., d/b/a Lakeview Manor, Inc.; and Magnolia Health Systems X, Inc., d/b/a Green-Hill Manor, Inc. appeal from the trial court's grant of dismissal of some of its counter- and third-party claims against Appellants/Plaintiffs/Counterclaim Defendants Indianapolis Welding Supply, Inc., d/b/a Medical Oxygen Company d/b/a Med O2 and Appellee/Third-Party Defendant Dwight Darlage. We affirm.

## **FACTS**

On January 12, 2006, a "Product Supply Agreement" ("Agreement") was executed by or on behalf of Appellant Stuart Reed and Indianapolis Welding Supply, d/b/a Medical Oxygen. Reed was a principal of Hoosier Health Systems,<sup>1</sup> which provided goods and services to, managed, and/or owned nursing homes or healthcare facilities in Indiana. The

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<sup>1</sup> Although Hoosier Enterprises, Inc., was a party to the Agreement, Hoosier Health Systems was not. Appellants seem to acknowledge, however, that Hoosier Enterprises was acting on behalf of Reed, Hoosier Health Systems, and the other Appellants when it executed the Agreement, and we will therefore proceed under the assumption that it was.

Agreement governed Medical Oxygen's provision of goods and services, including the sale of liquid and gaseous oxygen and rental of liquid and gaseous oxygen accessories. At some point, Medical Oxygen extended credit to Hoosier Health Systems. Hoosier Health Systems did not pay Medical Oxygen for some goods and services.

On February 27, 2007, Reed, through an agent, requested that Medical Oxygen change the name on the Hoosier Health Systems account to Magnolia Health Systems, Inc. Medical Oxygen refused to extend credit to Magnolia but agreed to extend credit to Reed d/b/a Magnolia. Medical Oxygen subsequently sold liquid and gaseous products and rented associated equipment to Reed d/b/a Magnolia for use at twenty-five nursing homes.

On August 29, 2008, Medical Oxygen brought suit against Reed and the twenty-five nursing homes. The claims on account against Reed were brought for \$287,119.44 and against the nursing homes for \$359,199.44,<sup>2</sup> for an aggregate of \$646,318.88. In addition to money damages, the Amended Complaint also asked for possession of certain tanks and cylinders in replevin. On December 29, 2008, Appellants filed their Answer to Medical Oxygen's claims, Counterclaims, and a Third-Party Complaint against Darlage, the President of Medical Oxygen. Appellants contended that Medical Oxygen had significantly overcharged them, thereby breaching the Agreement between the parties, violating its duty of good faith, and committing criminal mischief and deception, the last of which, if proved, would entitle Appellants to treble damages, costs, and attorneys' fees under the Indiana

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<sup>2</sup> The original complaint did not contain a specific claim against Magnolia Enterprises, Inc., d/b/a Camelot Care Center, but an amended complaint filed on November 18, 2008, did.

Crime Victims Relief Act (“CVRA”). *See* Ind. Code Chapter 34-24-3 (2008). Appellants also contended that Darlage, in his individual capacity, committed criminal mischief and deception, which, if proved, would entitle them to treble damages, costs, and attorneys’ fees under the CVRA.

On February 9, 2009, Medical Oxygen filed a motion to dismiss the counterclaims that alleged violations of its duty of good faith and that it had committed criminal mischief and deception. In the same consolidated motion, Darlage moved to dismiss the entirety of the third-party claim against him. On August 25, 2009, following a hearing, the trial court granted the Combined Motion to Dismiss in all respects.

## **DISCUSSION AND DECISION**

Appellants contend that the trial court improperly granted Medical Oxygen’s and Darlage’s motions to dismiss for failure to state a claim upon which relief can be granted.

### ***Standard of Review***

In reviewing a 12(B)(6) motion to dismiss, we look at the complaint in the light most favorable to the plaintiff, with every inference drawn in its favor, to determine if there is any set of allegations under which the plaintiff could be granted relief. *King v. S.B.*, 837 N.E.2d 965, 966 (Ind. 2005). A 12(B)(6) dismissal is improper unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief. *Id.* Dismissals under T.R. 12(B)(6) are “rarely appropriate.” *Id.* (citing *State Civil Rights Comm’n v. County Line Park, Inc.*, 738 N.E.2d 1044, 1049 (Ind. 2000)). Though Indiana’s notice pleading rules do not require the complaint to state all elements of a cause of action, *Miller v. Mem’l Hosp. of S. Bend, Inc.*, 679 N.E.2d 1329, 1332 (Ind. 1997) (citing *State v. Rankin*, 260 Ind. 228, 294 N.E.2d 604, 606 (1973)), the plaintiff must still plead the operative facts necessary to set forth an actionable claim. *Trail v. Boys and Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 135 (Ind. 2006) (citing *Mem’l Hosp. of S. Bend, Inc.*, 679 N.E.2d at 1332).

*State v. American Family Voices, Inc.*, 898 N.E.2d 293, 295-96 (Ind. 2008) (footnote omitted).

### **I. Claims Under CVRA Against Medical Oxygen and Darlage**

Appellants contend that the trial court erred in dismissing claims that they brought against Medical Oxygen and Darlage pursuant to the CVRA. Indiana Code section 34-24-3-1 (2008) provides, in relevant part, as follows:

If a person suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3, IC 35-42-3-4, or IC 35-45-9, the person may bring a civil action against the person who caused the loss for the following:

- (1) An amount not to exceed three (3) times the actual damages of the person suffering the loss.
- (2) The costs of the action.
- (3) A reasonable attorney's fee.

Specifically, Appellants alleged that Medical Oxygen and Darlage both committed criminal mischief<sup>3</sup> and deception,<sup>4</sup> crimes defined in Indiana Code Article 35-43 and therefore are claims upon which relief can be granted pursuant to Indiana Code sections 35-43-1-2 (2008) and 35-43-5-3 (2008). Medical Oxygen and Darlage countered that, because the alleged damages arise solely from the contractual agreement between the parties, Appellants' claims are limited to those sounding in contract.

We agree with Medical Oxygen and Darlage on this point. "The rule of law is that a party to a contract or its agent may be liable in tort to the other party for damages from

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<sup>3</sup> Ind. Code § 35-43-1-2(a) ("A person who ... knowingly or intentionally causes another to suffer pecuniary loss by deception ... commits criminal mischief, a Class B misdemeanor.").

<sup>4</sup> Ind. Code § 35-43-5-3(a) ("A person who ... knowingly or intentionally makes a false or misleading written statement with intent to obtain property ... commits deception, a Class A misdemeanor.").

negligence that would be actionable if there were no contract, but not otherwise.” *Greg Allen Const. Co. v. Estelle*, 798 N.E.2d 171, 175 (Ind. 2003). “Recovery under the [CVRA] is not based on a breach of contract, but must be predicated on an independent tort.” *State Group Indus. (USA) Ltd. v. Murphy & Assocs. Indus. Servs., Inc.*, 878 N.E.2d 475, 480 (Ind. Ct. App. 2007). As in *Greg Allen Construction*, the question is not whether Appellants have, as we assume, adequately pled a CVRA claim, but, rather, whether Medical Oxygen or Darlage are alleged to have done anything that “constituted an independent tort if there were no contract.” *Greg Allen Const.*, 798 N.E.2d at 173.

Here, the only damages alleged by Appellants are \$218,820.90 in overpayments due to invoices that allegedly contained “charges in amounts in excess of the prices allowed by the Agreement” and “duplicate charges, material and unauthorized increases in charges for the same item at different times, charges for items not provided, surcharges in variable and various amounts, and charges for Medical Oxygen’s internal costs of doing business, e.g., delivery charges, mileage, shipping, and overtime.” Appellant’s App. pp. 288-89. Simply put, Appellants have made claims based solely on alleged breaches of the Agreement and have not alleged an independent tort, as Medical Oxygen would have no duty whatsoever to Appellants *vis-à-vis* invoices in the absence of that Agreement.<sup>5</sup> In other words, Appellants have failed to allege that their interests have been invaded beyond a mere failure to fulfill

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<sup>5</sup> We observe also that a likely result of allowing Appellants’ claims under the CVRA to proceed would be to transform a large percentage of routine contract disputes into tort cases with the potential for the award of treble damages, costs, and fees. We doubt that this is what the General Assembly intended when it enacted the CVRA, and we are reluctant to embrace an interpretation with such far-reaching impact without very clear indications to that effect.



contractual obligations, nor have they identified any acts which would be independently tortious in the absence of a contract. The trial court correctly dismissed Appellants' claims under the CVRA against Medical Oxygen and Darlage.

## **II. Claims of Breach of Duty of Good Faith Against Medical Oxygen**

Indiana Code section 26-1-1-203 (2008) provides that “[e]very contract or duty within IC 26-1 imposes an obligation of good faith in its performance or enforcement.” Appellants contend that this Uniform Commercial Code (“UCC”) provision gives rise to a cause of action independent from its breach of contract claim. As Medical Oxygen points out, however, Indiana does not recognize an independent claim for violation of a duty of good faith under the UCC.

The commentary to Indiana Code section 26-1-1-203 clearly indicates that it is not intended to support an independent cause of action:

This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

Consistent with this language, every court that has addressed the question has concluded that the UCC-imposed obligation of good faith does not give rise to an independent cause of action. *See, e.g., Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Prods., Inc.*, 212 F.3d 373, 381 (7<sup>th</sup> Cir. 2000) (concluding that, under

Illinois law, “Brooklyn Bagel cannot bring a separate cause of action on th[e] basis [that Earthgrains breached its duty of good faith]”); *Tidmore Oil Co. v. BP Oil Co./Gulf Prods. Div., a Div. of BP Oil Co.*, 932 F.2d 1384, 1391 (11<sup>th</sup> Cir. 1991) (“In Alabama, the good faith provision of the Uniform Commercial Code ... does not create a cause of action either in contract or in tort.”). To the extent that Appellants asserted independent causes of action under Indiana Code section 26-1-1-203, we affirm the trial court’s dismissal of those claims.

We affirm the judgment of the trial court.

RILEY, J., concurs in result.

MATHIAS, J., concurs.