No. COA26-132 DISTRICT 38

NORTH CAROLINA COURT OF APPEALS
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CHARLIE MOSLEY, *a.k.a.*
PRISHA MOSLEY, *a.k.a.*
ABIGAIL MOSLEY,

Plaintiff-Appellant,

v.

ERIC T. EMERSON, *et al.*,

Defendants-Appellees.

From Gaston County

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REPLY BRIEF OF PLAINTIFF-APPELLANT

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REPLY BRIEF OF PLAINTIFF-APPELLANT

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Judges apply the law; they do not sit above it. When the General Assembly enacts a statute and commands that it govern pending cases, a trial court has no license to disregard it. That principle resolves the first issue, and it is the one the Defendants try hardest to talk around.

House Bill 805 restored Prisha's malpractice and negligent-infliction claims and, on its face, reaches actions already filed. The Defendants never deny this—they admit the revival provision was drafted in direct response to Prisha's testimony before the House Judiciary Committee. Having no answer to the only question the statute poses, they conjure a trial court "discretion" to override a legislative directive, then pivot to a constitutional attack that the Court has no authority to entertain.

Nor can the Defendants salvage the summary judgment order on fraud. Prisha's experts branded the Defendants' representations—male brain, coming male puberty, medically necessary amputation of healthy breasts—as anything but legitimate medical judgment. Belief, deceptive intent, agreement, and discovery were the jury's issues to weigh, not the trial court's issues to decide.

Finally, the claims struck on the pleadings must return. Testing a complaint by what the evidence later showed inverts Rule 12(b)(6), and a denied motion to dismiss is not a springboard for appeal after summary judgment. Read as pleaded, every count states a claim.

ARGUMENT

I. The Trial Court Erred by Refusing to Reinstate the Medical Malpractice and Negligent Infliction Claims.

A. Trial courts must apply new laws that expressly apply to pending cases.

If the legislature enacts a new law and directs that it be applied to pending cases, then it must be applied to pending cases. Judges must apply that law, since they do not make the law. But the Defendants' joint brief would subvert that principle.

The only question on appeal is whether House Bill 805, by its own terms, applies to pending actions. Opening Br. at 14-15. The Defendants ignore that question of statutory interpretation because the answer is an unequivocal yes. Indeed, the Defendants indicate that the legislature specifically intended for the new law to revive Prisha's claims in this pending action. They explain that the revival provision was added to the bill immediately after Prisha testified before the House Judiciary Committee. Jt. Br. at 6.[1]

The statute leaves no room for discretion, so the Defendants' cases on discretion all miss the mark. Indeed, even if Rule 54(b) was generally discretionary for changes in law, the more specific statute, House Bill 805, controls. *See, e.g.*, *N.C. State Bar v. Musinguzi*, 299 N.C. App. 410, 420, 919 S.E.2d 271, 278 (2025). As the Supreme Court has explained, "[w]hen a statute speaks plainly and in no uncertain or ambiguous terms, the voice of discretion cannot be heard." *Town of Newton v. State Highway Comm'n of N.C.*, 192 N.C. 54, 60, 133 S.E. 522, 525 (1926).

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1 Contrary to the Defendants' handwaving, Jt. Br. at 14 n.7, the targeting of this action by the legislature does not raise separation-of-powers concerns. The revival provision does not say "Prisha wins." It only gives Prisha her day in court. If the Defendants think that Prisha's claims are so clear cut on the merits that the legislature intended "Prisha wins," Prisha would welcome that concession, though it would have no constitutional relevance. *Bank Markazi v. Peterson*, 578 U.S. 212, 215 (2016) ("Congress, our decisions make clear, may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative.").

To circumvent the legislature's command, the Defendants first argue that the trial court had discretion to ignore the new law because reinstating the medical malpractice claim would have "injected a new legal theory" into the case. Jt. Br. at 9. But the Defendants' individual briefs all contradict this argument. The Defendants argue repeatedly that *all* the claims in this case are essentially medical malpractice claims, so *all* of them should have been dismissed under the malpractice-repose statute. If all the claims are functionally malpractice, then reinstating the actual malpractice claim a year before the trial date could not have prejudiced the Defendants' defense of the case. Thus, the Defendants have succeeded only in undermining their joint brief.

In any event, this reason for refusing reinstatement fails for other reasons, too. Inconvenience is no ground for ignoring a legislative command. The legislature knew that changing the law in pending cases could be inconvenient, but it weighed these policy concerns differently, as is its prerogative. *McKinney v. Goins*, 387 N.C. 35, 42, 911 S.E.2d 1, 7 (2025). And to the extent a prediction about altering the course of the case was some factual finding of the trial court, there's not a whit of evidence to support it.

Next, the Defendants try to cobble together two cases to show that trial courts have discretion to ignore statutory commands. Neither case says that.

In *Hamby v. Profile Products, LLC*, the trial court was asked to exercise its authority under Civil Rule 60(b)(6) to reconsider a summary judgment ruling after the Supreme Court (rather than the legislature) changed the law. 197 N.C. App. 99, 110, 676 S.E.2d 594, 601 (2009). Rule 60(b)(6) is an equitable remedy that applies to judgments, rather than interlocutory orders. Unlike this case, where the trial court was asked to correct an interlocutory order under Rule 54(b), the *Hamby* plaintiff resorted to Rule 60(b)(6), which is a "grand reservoir of equitable power." *Id.* Prisha's motion did not seek an equitable (and thus uniquely discretionary) remedy. She asked for a statutory remedy—that the statute's revival provision be obeyed. In any event, *Hamby*'s discussion of "discretion" under Rule 60(b)(6) was dicta because this Court held that, even under the change in law, the plaintiff still lost. *Id.* at 110-11, 676 S.E.2d at 602. Any discretion exercised by the trial court had no effect on the outcome.

The Defendants' other case, from the Second Circuit, is neither controlling nor analogous. *Commerzbank AG v. U.S. Bank, N.A.*, 100 F.4th 362 (2d Cir. 2024). The only teaching of *Commerzbank* is that a court can enforce a predetermined deadline for seeking reconsideration based on an intervening change in law. In *Commerzbank*, a local court rule required a party to seek reconsideration within 14 days of the original order or when the change in law occurred. *Id.* at 377-78. The defendant, which sought reconsideration, learned of the change in law in June 2021, but then waited nine months before seeking reconsideration. *Id.* at 378. The Second Circuit held that the trial court had "broad discretion" to enforce its own local rules and deem the motion to reconsider untimely. *Id.*

Here, by contrast, the Defendants have no argument that Prisha's reconsideration motion was untimely. There is no rule, local or otherwise, for filing a reconsideration motion in North Carolina. And, even if there were, Prisha filed her motion within a week of House Bill 805's enactment, so the motion could not have been untimely.

It speaks volumes that these two cases are all that these Defendants could muster. The law is decidedly against the Defendants. That is why they fail to distinguish the contrary law from the Supreme Court of North Carolina and the Supreme Court of the United States. Jt. Br. at 15-16. They seek to limit two holdings of the Supreme Court of North Carolina to the criminal context. But the rule's pedigree is civil, not criminal, descending from multiple civil cases decided by the Supreme Court of the United States. *See State v. Pardon*, 272 N.C. 72, 76, 157 S.E.2d 698, 701 (1967) (quoting the rule from *Gulf, Colo. & Santa Fe Ry. Co. v. Dennis*, 224 U.S. 503, 505 (1912), a civil case basing its holding on *Schooner Peggy*, another civil case).

And the Defendants have only a limited response to the two binding cases from this Court, which state that courts must apply a new statute to pending cases unless doing so would be unconstitutional. Opening Br. at 16 (discussing *Expert Discovery* and *Bowen*). The Defendants argue that this Court should only apply the new statute if it first determines that it is constitutional. Jt. Br. at 17. But the Supreme Court has repeatedly held that this Court cannot pass on a constitutional question that the trial court has not passed on. *See infra* Argument § I.B. So that argument gets the Defendants nowhere.

B. The constitutionality of the revival statute is not before this Court.

Defendants devote several pages to challenging the constitutionality of the revival statute. But they offer just a brief, closing remark on the obvious threshold issue, whether the issue is properly before this Court. Jt. Br. at 22-23. It isn't, for two reasons: the challenge is a facial one, which must be heard first by a three-judge panel, and the trial court never passed on the question anyway, making it improper for review on appeal.

First, the Defendants' constitutional challenge is facial, not as applied. The distinction matters, as the Supreme Court recently explained, because "[t]he law permits one trial tribunal to hear and determine facial challenges raised on or after 7 August 2014: a three-judge panel of the Superior Court, Wake County. A single trial court judge may not adjudicate such claims." *Hoke Cnty. Bd. of Educ. v. State*, 389 N.C. 198, 258-59, 927 S.E.2d 600, 639 (2026) (citations omitted).

Because the Defendants' challenge is facial, neither this Court nor the trial have jurisdiction over it. The Defendants do not address the Supreme Court's controlling standard for deciding whether constitutional challenges are facial or as applied. *See Singleton v. N.C. DHHS*, 386 N.C. 597, 906 S.E.2d 806 (2024) (finding challenge to be facial). A party's label on its challenge is irrelevant. *Id.* at 599, 906 S.E.2d at 807. Instead, if "the plaintiffs' claim and the relief that would follow could reach beyond the particular circumstances of these plaintiffs, then that claim becomes a facial challenge to the extent of that reach." *Id.* (cleaned up). Or, as *Hoke* put it earlier this year, "[a] 'facial challenge' to the constitutionality of a statute is an attack on the statute itself as opposed to a particular application of that statute to a particular plaintiff." *Hoke Cnty. Bd. of Educ.*, 389 N.C. at 258, 927 S.E.2d at 639.

The Defendants' challenge to the revival statute is facial. The Defendants are arguing that the General Assembly could not revive a claim that has become time-barred by a statute of repose. They are not arguing about the facts and circumstances of either the Defendants or the Plaintiffs. They outright concede as much: "The details of Defendants' treatment of Ms. Mosley are not relevant to this brief." Jt. Br. at 4. Of course, those details are not relevant. If the revival provision is unconstitutional as applied to these Defendants, it's unconstitutional as to everyone. Their challenge "is an attack on the statute itself." *Hoke Cnty. Bd. of Educ.*, 389 N.C. at 258, 927 S.E.2d at 639. The trial judge properly declined to answer the constitutional question, since it was not properly before him. (T3 p 33 (noting that the "constitutional arguments" are not yet "ripe for the Court").)

Aside from the lack of jurisdiction to consider the constitutional argument, appellate courts will not pass on *any* constitutional question that has not first been passed on by the trial court. This is a fundamental rule, repeated throughout the state's jurisprudence. *City of Durham v. Manson*, 285 N.C. 741, 743, 208 S.E.2d 662, 664 (1974) (holding that this Court lacked authority to rule on constitutionality of statute that was not passed upon in the trial court); *State v. Cumber*, 280 N.C. 127, 131, 185 S.E.2d 141, 144 (1971) (same); *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 428, 269 S.E.2d 547, 577 (1980) (similar). Like the proper standard for facial claims, this rule too was overlooked in the Defendants' joint brief.

Besides, the Defendants' arguments provide the shakiest foundation on which to build a constitutional argument. A real constitutional analysis must focus on the constitution's "original public meaning," and make analogical arguments from "text, history, and precedent." *Stein v. Berger*, 923 S.E.2d 579, 590 (N.C. Ct. App. 2025) (Murry, J., concurring), *review allowed*, 930 S.E.2d 219 (N.C. 2026). Arguments from text and history are notably deficient in the joint brief. The brief does not consider how the founding generation would have interpreted the law of the land clause, or whether that generation would have drawn a constitutional distinction between statutes of repose and statutes of limitation under the clause. Indeed, the Defendants concede that statutes of repose are a novelty of the twentieth century. Jt. Br. at 4. But nothing in the text of the repose statute indicates that the legislature intended to divest itself of the authority to revive lapsed claims. *See* N.C. Gen. Stat. § 1-15(c). The trial court was right that the Defendants' constitutional challenge is unripe—it still is.

* * *

There are no constitutional questions properly before this Court. The question for the medical malpractice and negligent infliction claims is just whether House Bill 805's revival provision applies to pending actions. It does, and the Defendants don't dispute that. Therefore, no matter if trial courts have theoretical discretion over Rule 54(b) motions, this Court must apply the intervening law and reverse.

II. Prisha Is Entitled to a Trial on Her Claims for Fraud, Facilitating Fraud, and Civil Conspiracy.

Prisha presented evidence from which a reasonable jury could find the Defendants liable for fraud, facilitating fraud, and civil conspiracy.[2]

A. These claims are not malpractice claims, nor does that label matter.

Some Defendants argue that the fraud and conspiracy claims are repackaged claims for malpractice, so they should have been dismissed as time-barred under section 1-15(c). That argument is both irrelevant and wrong.

It's irrelevant because, even if the claims had been ones for malpractice, they were revived by House Bill 805. *See supra* Argument § I. If the Court agrees with Prisha about revival, then it can reject this argument outright.

The argument is also wrong on the merits. This extreme proposal, if accepted, would mean a patient can *never* sue a health care provider for actual fraud—a physician who knowingly lies to a patient to induce treatment would answer only in professional negligence, on a repose clock that can expire before the lie is discovered. No North Carolina court has ever adopted that rule, and the existing law contradicts the Defendants' proposal.

2 This brief references each of the pairs of Defendants by the individual associated with that pair. So, for example, references to "Perry" include Moses H. Cone Hospital.

As this Court recently observed, "[o]ur Supreme Court recognizes that a plaintiff may have a claim for failing to disclose information to a patient (e.g., a fraud concealment) apart from a malpractice claim." *Cottle v. Mankin*, 294 N.C. App. 20, 28, 901 S.E.2d 682, 687 (2024), *rev'd in part on other grounds*, 388 N.C. 531, 923 S.E.2d 502 (2025)[3] (citing *Watts v. Cumberland Cnty. Hosp. Sys., Inc.*, 317 N.C. 110, 116-17, 343 S.E.2d 879, 884 (1986)). This Court has held that a claim for fraud is outside the scope of N.C. Gen. Stat. § 1-15(c), as Prisha explained in her opening brief. Opening Br. at 26 (discussing *Sharp v. Teague*, 113 N.C. App. 589, 592, 439 S.E.2d 792, 794 (1994)).

Some Defendants argue that *Sharp* was a legal malpractice case, not a medical malpractice case. *E.g.*, Gordon Br. at 22. But that point is irrelevant. *Sharp* interpreted section 1-15(c), which covers all malpractice claims, not just healthcare malpractice. *See* N.C. Gen. Stat. § 1-15(c). *Sharp* rested its decision on *Watts*, which was a healthcare-malpractice decision. *Sharp*, 113 N.C. App. at 592, 439 S.E.2d at 794. The Defendants offer no explanation for why legal and medical malpractice claims

3 The Defendants do not argue that the Supreme Court's decision in *Cottle* calls for a reconsideration of any prior decision.

would be treated differently under the *same* statute. Claims based on a mere breach of the standard of care are malpractice claims; claims of deceit are not.[4]

In *Cottle*, this Court concluded that the plaintiffs failed to forecast evidence of fraud in the medical context. But examples of sufficient evidence include the "concealment of facts concerning the treatment of the patient." *Cottle*, 294 N.C. App. at 28, 901 S.E.2d at 687. Similarly, the Supreme Court found the *Watts* plaintiff failed to put forward evidence that her doctors concealed from her the "material fact" that "spinal fractures were apparent on [her] earlier X rays," which would have shown deceit as to the "source" of the patient's injury. *Watts*, 317 N.C. at 117, 343 S.E.2d at 884.

Prisha, in contrast, has presented facts showing that the Defendants committed fraud by concealing and misrepresenting facts about her condition and treatment. *Cottle*, 294 N.C. App. at 28, 901 S.E.2d at 687 (viable fraud claim includes concealment of facts about the patient's "condition" and "the course of treatment that [the defendant] recommended"). Her fraud claims, therefore, require a jury trial. If the Defendants want to change the law and convert fraud claims into malpractice claims,

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4 Some Defendants contend that N.C. Gen. Stat. § 90-21.13's objective reliance standard is "substantively incompatible" with a fraud claim, but the statute does not apply when consent is procured through fraud or misrepresentation. N.C. Gen. Stat. § 90-21.13(b). Rather than displace common law fraud, the statute uses fraud to set the bounds of a malpractice claim.

then they must ask that of the Supreme Court. *See Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985); *Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014).[5]

B. Prisha forecast evidence of fraud as to each Defendant.

Next, the Defendants aim a volley of arguments at Prisha's fraud claim. But none of these arguments require affirmance.

1. Prisha presented evidence that Defendants misrepresented and concealed material facts that did not constitute "legitimate medical opinions."

The Defendants give a passing nod to *Watts*' reference to fraud claims in the medical context, but only to assert—incorrectly—that their representations consist of nothing other than "legitimate medical opinions" as a matter of law. *Watts* rejected a medical fraud claim where physicians' representations were "legitimate medical opinions," which "cannot sustain the indispensable element of intentional deceit to a claim of relief sounding in fraud." *Watts*, 317 N.C. at 118, 343 S.E.2d at 885.

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5 The citation to *Jones v. Mill* does not help the Defendants because the case did not cite *Watts*, much less purport to overrule it. 923 S.E.2d 895 (N.C. Ct. App. 2025). The complaint in *Jones v. Mill* was dismissed because it "did not comply with Rule 9(j)." *Id.* at 900. Prisha's complaint complied with Rule 9(j), and Defendants have never argued otherwise. *See, e.g.,* (T3 p 49 (Gordon's counsel: "As Your Honor's well aware, 9(j); Plaintiff had a 9(j) in her Complaint."); R p 49 ¶ 167; R p 338 ¶ 167.)

But that is nothing like this case, where the Defendants knowingly misrepresented and concealed material facts, including telling Prisha she had a male brain, would go through male puberty, would grow a penis, and that it was illegal for her parents to stop her from taking testosterone. Opening Br. at 5-10, 20-22. No Defendant challenges the legitimacy of these absurd misrepresentations. But silence is dispositive. Defendants offered no expert testimony as to the legitimacy of their representations. Prisha's experts explained that the Defendants' various misrepresentations did not constitute legitimate medical opinions. (1.Doc.Ex. 227-388, 6036-6559.)

For example, a medical ethicist at Duke University testified that the Defendants could not reasonably advise Prisha that removing her healthy breasts was medically necessary. (1.Doc.Ex. 245-50.) As Dr. Curlin testified in his affidavit, the Defendants

> deceptively conveyed to Prisha that her primary problem was the presence of sex traits that are normal for a female of her age, that the testosterone and mastectomy were medically indicated as treatments for this problem, that she was mentally fit to comprehend and freely consent to these medically necessary interventions, and that the risks of the interventions were modest compared to the benefits they would bring.

(1.Doc.Ex. 249 ¶ 64.) Meanwhile, Defendants knew that Prisha's sex traits were "normal and healthy," that their treatments were unnecessary and unproven, and that her mental health problems made her vulnerable to their decisions to put ideology and profit over patient health. (1.Doc.Ex. 249-50.)

Prisha's other experts confirmed the illegitimacy of the Defendants' medical misrepresentations. It was illegitimate for Perry to tell Prisha that she had a male brain and would go through male puberty. (1.Doc.Ex. 302-03.) It was illegitimate for Gordon to tell Prisha she had a male brain and was "intersex." (1.Doc.Ex. 360; *accord* 1.Doc.Ex. 325.) It was illegitimate for Klein-Fowler to advise Prisha to have breast surgery. (1.Doc.Ex. 361.) And it was illegitimate for Emerson to mislead Prisha into believing that "she could become male" or that breast surgery was a "medically necessary" treatment with "no alternative." (1.Doc.Ex. 382-84.)

A reasonable jury could conclude that these do not constitute "legitimate medical opinions." The illegitimacy of these misrepresentations appears to be conceded by the Defendants who, at least in part, deny making some of the misrepresentations. For instance, Perry denied telling Prisha that she could go through male puberty, (1.Doc.Ex. 3484), but Perry told Prisha in an email that Perry was "re-inducing puberty and thus you will have the same symptoms a male can have when starting puberty." (1.Doc.Ex. 4970.) And although Prisha testified that Perry told her that clitoral enlargement from testosterone is "like a penis" and "your clitoris is actually your penis," Perry denied saying that because "[it] would be inaccurate" to do so. (1.Doc.Ex. 2667, 3475.) Such denials show both the illegitimacy of the asserted misrepresentations and the need for a trial so a jury can determine who is telling the truth.

Besides misrepresentations, the Defendants also suppressed material facts concerning Prisha's serious mental health conditions and misrepresented the nature and effects of the "breast reduction" surgery, the physical and emotional detrimental effects from the procedure, the likelihood of mastitis, and the future inability to breastfeed. (1.Doc.Ex. 382-84, 2847-50, 2964, 2979-83, 2988, 3134-35, 3332-35, 4879-80, 5797-98, 5879-90.). Klein-Fowler even concealed from Prisha a study indicating that some who pursue transition later change their minds or decide to detransition, just as Prisha did. (1.Doc.Ex. 3318, 3327-28.) That concealment gives rise to a fraud claim. *Watts*, 317 N.C. at 117, 343 S.E.2d at 884 (fraud includes concealment of material fact).

2. The Defendants cannot, as a matter of law, defeat Prisha's proof of actual reliance.

The Defendants argue in their briefing that, though they may have lied to Prisha and hid the truth from her, Prisha was not deceived because she already wanted to transition when she met each of them.

This argument misunderstands the law, for a vulnerable patient's desires are separate from professional validations and actions that fulfill the patient's desires.

Prisha was a vulnerable adolescent. Her desire to transition could accomplish nothing without a diagnosis and testosterone prescription from Perry, a mental-health clearance from Gordon, the supportive counseling records and clearance letter from Klein-Fowler, and a surgeon's determination that the mastectomy was medically necessary from Emerson. Each Defendant was a gatekeeper who removed an obstacle in the way of medically transitioning—an obstacle that Prisha couldn't remove herself. Prisha continued down the transition pathway because each of these gatekeepers represented, falsely, that the treatment was safe, necessary, and beneficial.

A fraud victim's preexisting hopes do not immunize the professionals who falsely validate those hopes, and North Carolina law does not require a plaintiff's reliance on the defendant to be the *sole* inducement for her conduct, to the exclusion of the plaintiff's own investigation: "It is not necessary to the predication of fraud that a misrepresentation be the sole cause or inducement of the . . . transaction in question . . . but it is enough that it may constitute a material inducement. Relief may be had under the rule where reliance was in part on one's own investigation." *State v. Howley*, 220 N.C. 113, 120, 16 S.E.2d 705, 709 (1941).

This is especially true for someone like Prisha. As her expert testified, the Defendants knew that Prisha was "a vulnerable adolescent suffering from several serious mental health disorders." (1.Doc.Ex. 245 ¶ 56.) They ignored the evidence that

Prisha's mental-health problems were not being adequately managed before they began transitioning her. (1.Doc.Ex. 246 ¶ 59.) Instead of attending to these mental health concerns, the Defendants "reflexively affirm[ed] what this vulnerable, mentally ill young woman requested and thereby mov[ed] her along a pathway of unproven, risky medical interventions." (1.Doc.Ex. 246 ¶ 59.)

And, as Prisha testified, she relied on the Defendants' misrepresentations and concealments to take the testosterone and undergo the "breast reduction" surgery. (1.Doc.Ex. 118 ¶ 18, 227-388, 2536-37, 6036-6559.) At her deposition, Prisha testified that she was so desperate for better mental health that she believed Defendants and was "still waiting for [the medical transition] to work" until "the veil was lifted by being called mommy" and she realized she could not become a man as the Defendants had led her to believe for years. (1.Doc.Ex. 2537.)

In her affidavit, Prisha elaborated on this point, consistent with her deposition testimony, testifying that "[f]rom the time of my interactions with the Defendants until in or about October 2022 when I began to detransition, I had no idea that the representations they had made to me were or could be false." (1.Doc.Ex. 115 ¶ 3.) She testified that she was completely unaware of the misleading nature of each of the Defendants' misrepresentations and concealments, due to the Defendants' influence over her, her desperation, and her ongoing mental health struggles. (1.Doc.Ex. 115-119 ¶¶ 3-22.)

Emerson argues that Prisha's affidavit should be disregarded as contradictory of her deposition testimony, but he does not identify any contradictions. Emerson Br. at 35-36. Gordon asserts that Prisha's affidavit testimony, that Gordon told her she was intersex and that testosterone would cure her mental health problems, contradicts her deposition testimony. Gordon Br. at 24-25 & n.5. In fact, Prisha's testimony is consistent. Prisha testified at her deposition that Gordon, like Perry, told Prisha she had a male brain because she was intersex (facts they now deny). (1.Doc.Ex. 2667 p 69.)

Nor does it matter that Prisha consulted other providers. That a plaintiff also consults outside sources does not, as a matter of law, defeat reliance on the defendant's representations. *Howley*, 220 N.C. at 120, 16 S.E.2d at 709 ("[I]t is not always determinable merely from the fact that outside sources are consulted that there is no reliance on the representations."). And the "other providers" here were the very Defendants Prisha alleges conspired to mislead her—each reinforcing the same representations within a single referral chain, not supplying a genuine independent check. Because Prisha had a doctor-patient relationship with the physician Defendants, the Defendants were fiduciaries on whose expertise Prisha was entitled to rely.

See Black v. Littlejohn, 312 N.C. 626, 645-46, 325 S.E.2d 469, 482 (1985). The counselor Defendants, whom Prisha likewise trusted as members of her treatment team, occupied the same position of trust.

Ultimately, whether Prisha actually relied on the Defendants' misrepresentations is a question of fact for the jury. *See Harbach v. Lain & Keonig, Inc.*, 73 N.C. App. 374, 381, 326 S.E.2d 115, 119 (1985) ("Under the circumstances recorded, who, if anybody, the plaintiffs relied upon in buying the property, and whether they acted reasonably were questions of fact for the jury, rather than questions of law for the court."). The Defendants ask this Court to resolve reliance against Prisha as a matter of law on a summary-judgment record that, viewed in her favor, shows a vulnerable teenager guided step-by-step through an irreversible medical pathway by the professionals she trusted to tell her the truth. That is a paradigm jury question.

3. Prisha presented evidence from which the jury could find that Defendants' misrepresentations and concealments were reasonably calculated to deceive, made with intent to deceive.

Once a plaintiff provides evidence that a defendant has falsely represented or concealed a material fact, it then "follows" that there are genuine issues of material fact concerning whether the defendant's misrepresentation or concealment was "reasonably calculated to deceive and made with intent to deceive; whether it did in fact deceive; and whether reliance upon it was reasonable." *Forbis v. Neal*, 361 N.C.

519, 527, 649 S.E.2d 382, 388 (2007); *see also Leftwich v. Gaines*, 134 N.C. App. 502, 509, 521 S.E.2d 717, 723 (1999) ("Whether statements were intended and received as expressions of opinion or as statements of fact is a factual issue proper for the jury.").

As practitioners in an emerging field with reputations to build and maintain, the Defendants had a motive to guide Prisha into medical transition, just as they did. *Latta v. Rainey*, 202 N.C. App. 587, 600, 689 S.E.2d 898, 909 (2010) ("Fraudulent intent usually is not shown by direct evidence but generally is proven by circumstances. Oftentimes the intent can be shown by presenting evidence of some motive on the part of the perpetrator." (cleaned up)). The Defendants' motives and knowing misrepresentations amount to evidence of an intent to deceive, and it is the province of the jury to decide these issues. *See* N.C.P.I. – Civil 101.46 ("A person acts intentionally if he desires to cause the consequences of his act or believes that the consequences are substantially certain to occur. Intent may be proven by direct evidence or inferred from the circumstances.").

As shown above, Prisha presented evidence that the Defendants falsely represented and concealed material facts, and that she believed and relied upon what the Defendants told her. As already shown, Prisha presented expert testimony that the Defendants' misrepresentations did not constitute legitimate medical opinions. A jury can conclude from the spread of illegitimate medical opinions and factual assertions that the Defendants did not even believe them. That is the kind of circumstantial evidence that plaintiffs use every day to prove a defendant's state of mind. *Latta*, 202 N.C. App. at 600, 689 S.E.2d at 909 ("Whether the defendant acts with the requisite scienter for fraud is generally a question of fact for the jury."). Requiring defendants to confess their intent, as the Defendants suggest, would eliminate nearly all fraud claims, contrary to North Carolina law.[6]

Accordingly, it is for the jury to determine whether the Defendants intended to deceive Prisha.

C. Prisha presented evidence from which the jury could find the Defendants liable for facilitating fraud and civil conspiracy.

Prisha testified that the Defendants conspired and worked together to mislead her into harmful medical procedures and did in fact mislead her. (1.Doc.Ex. 2532,

6 Gordon argues that *Latta* should be limited to fraud claims when defendants admit that they lied. Gordon Br. at 27. But *Latta*'s analysis on intent to deceive did not turn on whether the defendant admitted that his representations were false. *Latta*, 202 N.C. App. at 600, 689 S.E.2d at 909-10. When there's circumstantial evidence that the defendant knows his statement is false (like when the defendant gives illegitimate medical opinions or misstatements of fact), scienter is a jury question. *E.g.*, *Bucci v. Burns*, 2020 NCBC 50 ¶ 65 (N.C. Bus. Ct. June 30, 2020). *Latta* doesn't establish any special kind of proof of falsity necessary to allow an inference of intent to deceive.

2814, 2986.) This testimony showed that the Defendants were communicating and working toward a common purpose to transition Prisha as members of a team.

Circumstantial evidence provides "ample ground for concluding that a conspiracy exists." *State v. Whiteside*, 204 N.C. 710, 713, 169 S.E. 711, 712 (1933). While there is no requirement of proof of "any direct act, or even any meeting of the conspirators," *State v. Abernethy*, 220 N.C. 226, 230, 17 S.E.2d 25, 27 (1941), there is direct evidence in this case that Defendants communicated with one another about Prisha with the goal of transitioning her into a male. Opening Br. at 23-25.

Perry admitted to referring Prisha to Gordon and to a group that met at Gordon's practice Tree of Life, for the purpose of transitioning Prisha. (1.Doc.Ex. 3432-34, 3437-38.) Perry also admitted to speaking with therapists at Tree of Life, although she denied speaking directly with Gordon. (1.Doc.Ex. 3433, 3441.) Despite denying that she spoke with Gordon directly, Perry admitted that she relied on Gordon's letter when she prescribed testosterone to Prisha for the purpose of transitioning Prisha. (1.Doc.Ex. 3432 (Perry stating she relied on Gordon's "comprehensive evaluation" of Prisha).)

Gordon admitted to knowing of Emerson so well that she gave all of her clients, including Prisha, Emerson's name as a surgeon who would perform transition surgery. (1.Doc.Ex. 3227-28 (Gordon stating Emerson's name was the "same name I gave everybody").)

Klein-Fowler admitted to receiving regular communications from Perry about Prisha, as part of Family Solutions' and Perry's "ongoing working relationship" to facilitate Prisha's transition. (1.Doc.Ex. 3295-96.) Klein-Fowler stated she "looked at the records that Dr. Martha Perry sent over" to her, and she "consulted" "the reports that Dr. Martha Perry sent over" to her. (1.Doc.Ex. 3295.)

Family Solutions' co-owner, Anita Faulkner, who functioned as Klein-Fowler's supervisor at relevant times, admitted that she and Klein-Fowler discussed Prisha's counseling at Family Solutions. (1.Doc.Ex. 2082-84 (Faulkner recalling discussions with Klein-Fowler about resources to provide to Prisha and her family, and admitting other discussions may have occurred).)

Emerson admitted to receiving Klein-Fowler's letter clearing Prisha for the transition surgery and relying on the letter to proceed with the surgery. (1.Doc.Ex. 3136-38.)

Consistent with the Defendants' admissions that they communicated with one another in the course of transitioning Prisha, Prisha testified that "I trusted my doctors to communicate with each other about the single patient they were seeing and be like a team that was communicating." (1.Doc.Ex. 2532.)

The Defendants may argue that their cooperation was innocent and that they did not intend to mislead and harm Prisha, but it is for the jury to weigh the testimony and decide whom to believe. *See Whiteside*, 204 N.C. at 713, 169 S.E. at 712. There is evidence from which the jury could find the Defendants liable for facilitating fraud and civil conspiracy.

D. Prisha presented evidence from which the jury could find that her claims for fraud, facilitating fraud, and civil conspiracy are timely.

A subset of Defendants[7] argue that Prisha should have discovered their deceit earlier under the discovery rule for fraud claims. But application of the discovery rule is a jury question.

"[W]hen there is a dispute as to a material fact regarding when the plaintiff should have discovered the fraud, summary judgment is inappropriate, and it is for the jury to decide if the plaintiff should have discovered the fraud." *Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001). As discussed above, Defendants' misrepresentations and concealments were material to Prisha's decision to transition, and she "had no idea" that they "were or could be false." (1.Doc.Ex. 115 ¶ 3, 118 ¶ 18; 1.Doc.Ex. 2536-2637.)

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7 This includes Emerson, Piedmont Plastic Surgery, Perry, and Cone Health. Gordon, Tree of Life Counseling, Klein-Fowler, and Family Solutions did not argue in their appeal briefs that Prisha should have discovered their fraud earlier than she did.

Prisha testified that she was so desperate for her mental health to improve that she kept pursuing the medical transition, "waiting for it to work." (1.Doc.Ex. 2537.) When her partner's daughter called her "mommy," "the veil was lifted" and she realized for the first time that she could not become a man no matter how hard she tried, contrary to the lies that the Defendants had told her in the preceding years. (1.Doc.Ex. 2537.)

Prisha testified that she was unaware of the misleading nature of each of the Defendants' misrepresentations and concealments, and continued to believe what the Defendants had told her "because of the force of Defendants' representations and Defendants' influence over me, the fact that the representations and so-called treatments were presented to me as a lifeline, my desperate need of healthcare, and my ongoing mental health struggles." (1.Doc.Ex. 115-19 ¶¶ 3-22.)

In light of that testimony, Perry is incorrect to suggest that the undisputed evidence shows that Prisha decided to detransition "because she changed her mind about her gender identity, not because she learned something she did not know about the care rendered by Dr. Perry." Perry Br. at 37. Prisha testified that she detransitioned because she discovered after years of trying that she could not become a man, contrary to Perry's express misrepresentations. (1.Doc.Ex. 115 ¶¶ 4-6; 1.Doc.Ex. 2536-37.)

Similarly, Emerson is wrong to assert that Prisha was aware of "all facts" regarding Emerson's misrepresentations and concealments "at least by the time of her surgery." Emerson Br. at 33-34. Again, Prisha "had no idea" Defendants had misled her until she realized, after years of trying, that she could not become a man as the Defendants had told her she could. (1.Doc.Ex. 115 ¶ 3, 118 ¶ 18; 1.Doc.Ex. 2536-2637.)

Indeed, it was not until after Prisha filed this lawsuit and gave birth to a son, whom she tried to breastfeed, that she realized she could not do so because of the procedure Emerson performed on her. Opening Br. at 9-10; (1.Doc.Ex. 2981-82). Prisha tried to breastfeed her son because breast tissue left behind by Emerson produced milk, which was trapped inside her, causing painful mastitis. (1.Doc.Ex. 2981-82, 2995-96.) Emerson conceded at his deposition that he did not disclose to Prisha that she could experience mastitis or blockage from lactation as a result of the surgery he performed. (1.Doc.Ex. 3134-35.)

Prisha disputes the Defendants' assertions that she was aware of their fraud earlier than October 2022 or that she could have discovered it prior to that time. As a result, "it is for the jury to decide if [she] should have discovered the fraud" earlier than she did. *Spears*, 145 N.C. App. at 708, 551 S.E.2d at 485. The timeliness of Prisha's fraud, facilitating fraud, and conspiracy claims is a matter for the jury.[8]

III. All of Prisha's Claims Were Properly Pleaded.

Prisha is also entitled to have reinstated her claims that were dismissed at the pleading stage.

A. The Defendants cannot argue evidence to seek affirmance of a Rule 12(b)(6) dismissal.

Some of the Defendants appear to misunderstand the governing standard for Rule 12(b)(6) dismissals. Rather than focus on the complaint's *allegations* for the order granting their motion to dismiss, these Defendants argue that there is also no "evidence" to support the claims for purposes of summary judgment. *E.g.*, Perry Br. at 19 (arguing that "[t]here is no allegation or evidence" to support the constructive fraud claim). Arguing evidence to affirm a Rule 12(b)(6) order conflicts with the governing standard: "Under the Rule 12(b)(6) standard, the facts are treated as true and there is no other evidence considered outside the four corners of the complaint." *Fox v. Lenoir-Rhyne Univ.*, 296 N.C. App. 613, 621, 909 S.E.2d 750, 757 (2024).

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8 Some Defendants also argue that Prisha is not entitled to tolling of her claims under N.C. Gen. Stat. § 1-17(a), but she did not invoke that statute in her opening brief.

If it takes evidence to defeat the complaint's allegations, then the trial court necessarily erred in dismissing at the pleading stage.

B. Emerson cannot attack the trial court's Rule 12(b)(6) order denying dismissal of the fraud, facilitating fraud, and conspiracy claims.

Separate from the other Defendants, Emerson makes a procedurally improper argument. He argues that the trial court erred by denying his Rule 12(b)(6) motion to dismiss the fraud and conspiracy claims at the pleading stage. Emerson Br. at 20-25.

This outlier argument should be rejected. The trial court's summary judgment ruling was a final judgment on the merits. From such a ruling, the denial of a Rule 12(b)(6) motion "is not reviewable on appeal." *In re Will of McFayden*, 179 N.C. App. 595, 599, 635 S.E.2d 65, 68 (2006) ("It is well established in our state's caselaw that a denial of a party's motion to dismiss made pursuant to Rule 12(b)(6) is not reviewable on appeal following a final judgment on the merits of the case."). It would be "anomalous" to let an appellee argue an error at an earlier procedural stage, when there has been later factual development at the next phase of the trial court proceeding. *Harris v. Walden*, 314 N.C. 284, 286-87, 333 S.E.2d 254, 256 (1985) (summary judgment order cannot be reviewed after trial). The order denying the motion to dismiss is subsumed into the summary judgment order, and the question on appeal is just whether the summary judgment order was erroneous.

In any event, the claims for fraud, facilitating fraud, and conspiracy were all sufficiently pleaded.

Emerson trains most of his fire on the fraud claim. He first argues that the fraud claim fails because it's based on medical judgment or informed consent, so it was an untimely medical malpractice claim.[9] That argument fails for the reasons already given. *See supra* Argument § II.A.

Next, Emerson argues that Prisha cannot establish reliance as to him because Prisha had told Klein-Fowler that she already knew about the risks of "top surgery." Emerson Br. at 22-23. This allegation in the complaint, however, does not allege that Prisha actually appreciated the risks. Rather, Prisha's statement is alleged to have been made without an appreciation of the risks because it "[r]eflected her vulnerable and immature state of mind and Defendant Klein-Fowler's lack of experience with transgender counseling." (R p 28 ¶ 89.) That allegation shows that Prisha was entirely dependent on Emerson to give legitimate medical advice, but he concealed the true facts about the top surgery. (R pp 30-31 ¶¶ 94-97; R pp 37-38 ¶¶ 116-21; R pp 41-46.)

9 Perry also makes this argument. Perry Br. at 25-27.

Finally, Emerson argues that it's impossible for him to be liable for fraud because Prisha sought him out for the procedure. Emerson Br. at 23-24. This argument lacks support in the law. A professional can make material misrepresentations after a professional relationship begins; if the rule were otherwise, professionals would be virtually immune from fraud claims. As alleged, Emerson lied about and concealed facts during the course of his professional relationship with Prisha. (R pp 30-31 ¶¶ 94-97; R pp 37-38 ¶¶ 116-21, R pp 41-46.)

Emerson also attacks the conspiracy and facilitating fraud claims by arguing that the allegations of agreement are too general, and thus improperly pleaded. Emerson Br. at 24-25. A complaint sufficiently pleads a civil conspiracy when it alleges "a conspiracy, wrongful acts done by certain of the alleged conspirators, and injury." *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984). Conspiracy is not subject to any heightened pleading requirement. Here, the complaint alleges a conspiracy among the Defendants, who worked together "to mislead Prisha into changes to her body to make it look more like a boy's body." (R p 40 ¶ 135.) Emerson in particular conspired with Defendant Klein-Fowler "to mislead Prisha into surgery." (R p 40 ¶ 137.) Klein-Fowler wrote the letters of recommendation for surgery, while Emerson performed the surgery based on those recommendations. (R p 40 ¶ 137.)

Emerson's brief ignores these allegations, but they are sufficient to state claims for civil conspiracy and facilitating fraud in North Carolina.

C. The negligent infliction claim was not properly dismissed on the pleadings.

Prisha brought a negligent infliction claim against all Defendants, (R p 50), which the trial court dismissed, (R p 358). Prisha argued that this dismissal was error in her opening brief. Opening Br. at 33.

As a threshold matter, Gordon appears to have confessed error on this point. In her appellee brief, she nowhere argues that the negligent infliction claim was rightly dismissed. The Court should, therefore, reinstate the claim against Gordon and Tree of Life.

The other Defendants argue that the negligent infliction claim is nothing but a dressed-up malpractice claim, so it was properly dismissed as time-barred under section 1-15(c). Klein-Fowler Br. at 23-24; Perry Br. at 20; Emerson Br. at 22-23. Even if this Court agrees that the negligent infliction claim is a medical malpractice claim, the claim was properly revived by House Bill 805. *See supra* Argument § I.

If the Court does not agree with Argument I, then the Court could alternatively hold that the negligent infliction claim was not a malpractice claim, so it never reposed under section 1-15(c). Section 1-15(c) reaches only actions "arising out of the performance of or failure to perform professional services"—that is, claims predicated on a provider's breach of the professional standard of care. Negligent infliction is a distinct common law tort with its own elements: negligent conduct, reasonable foreseeability of severe emotional distress, and resulting severe emotional distress. *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). The negligence that supplies the first element need not be a departure from a professional standard. The complaint does not allege that the Defendants' negligent conduct for this claim was necessarily a departure from the professional standard of care. (R p 50.) For example, just like intentional misrepresentations that do not constitute legitimate medical opinions are not malpractice claims, *negligently* misrepresenting the same illegitimate opinions is not malpractice either. For instance, telling Prisha that she "would grow a penis" is a *Watts*-style misrepresentation that is so illegitimate that it is not the provision of professional services under section 1-15(c).

To defeat the Rule 12(b)(6) motion, Prisha's complaint could not be dismissed unless it was "*certain* that plaintiff[] could prove no set of facts which would entitle them to relief under some legal theory." *Howell v. Cooper*, 388 N.C. 71, 78, 919 S.E.2d 212, 219 (2025) (emphasis in original). Because the negligent infliction claim is broader than malpractice, it was not barred by the repose statute.

D. Prisha adequately pleaded constructive fraud.

The Defendants press two theories to avoid reinstatement of the constructive fraud claim.

The Defendants' briefs all concede that burnishing bona fides can be a sufficient benefit to support a constructive fraud claim. They simply dispute whether the allegations in the complaint are sufficient. But the complaint pleads a reputational benefit for all defendants.

The complaint alleges that each defendant "benefited by using Prisha as a means of increasing their 'gender-affirming care' bona fides and boosting their reputations and practices in the burgeoning money-making field of 'gender-affirming care.'" (R pp 47-48 ¶ 157.) That allegation alone is sufficient when combined with the circumstances around each Defendant's involvement, which are explained in detail in the 50 pages of allegations in the complaint. (R pp 1-51.)

Klein-Fowler argues, without citation, that constructive fraud must be pleaded with particularity, like actual fraud. Klein-Fowler Br. at 25 n.8. Constructive fraud may be pleaded with "even less particularity" than actual fraud. *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). The pleading standard for constructive fraud "may be met by alleging facts and circumstances (1) which created the relation of trust and confidence, and (2) which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Id.* (cleaned up).

Besides the allegation just mentioned, the complaint makes further allegations of reputation-burnishing as well.

Gordon used Prisha to become certified with the World Professional Association for Transgender Health (WPATH). (R p 39 ¶¶ 127-29.) Before treating Prisha, Gordon lacked WPATH certification. (R p 39 ¶¶ 127-29.) As soon as she began treating Prisha, she began advertising herself as having done "[e]valuations for cross-sex hormones and gender reassignment surgery." (R p 39 ¶ 128.) She used this experience to "work[] towards WPATH Certification," as she advertised on her website. (R p 39 ¶ 128.) She then achieved her WPATH certification around 2022, after transitioning Prisha.[10] (R p 39 ¶ 129.)

Gordon acknowledges these allegations but tries to rewrite them in her brief. Gordon Br. at 35-36. She argues that the WPATH certification is irrelevant because

10 In June 2026, the Federal Trade Commission sued WPATH for its deceitful role in transitioning adolescents. *See* Press Release, FTC, *FTC, States Sue World Professional Association for Transgender Health Over Deceptive Claims Regarding the Treatment of Children* (June 17, 2026), https://www.ftc.gov/news-events/news/press-releases/2026/06/ftc-states-sue-world-professional-association-transgender-health-over-deceptive-claims-regarding-treatment-children. As the complaint alleges, WPATH and its certified members, like Gordon, use illegitimate transitioning procedures to bilk patients and insurers for medically unnecessary and harmful procedures. *Id.*

it was received after treating Prisha. *Id.* This argument overlooks that Gordon used her transitioning of Prisha both as an advertisement and also to achieve the WPATH certification. The chronology, therefore, fits the reputational-burnishing theory hand in glove.

Emerson likewise used Prisha to build a gender-transitioning practice. Before operating on her, Emerson expressed eagerness at operating on Prisha and led her to believe that the opportunity to operate on her was important to him and his career. (R p 39 ¶ 131; *accord* 1.Doc.Ex. 119 ¶ 23.) He then used her surgery to bolster his reputation and involvement as a "founding member of the Charlotte Transgender Healthcare Group," and separately received "referrals for surgery as a result of performing 'top surgery' on Prisha." (R p 39 ¶ 132.) The complaint pleads more than enough for Emerson.

The claim is also adequately pleaded as to Perry. Perry holds herself out as providing "gender-affirming care" to adolescents, using Prisha to develop her niche business. (R p 39 ¶ 130.) She put Prisha on a "transition plan" that called for Prisha to have weekly visits with her. (R p 26 ¶ 83.) She continuously prescribed testosterone for Prisha even when it did nothing to cure her severe mental illness. (R p 32 ¶ 101.)

Similarly, Klein-Fowler used her letter clearing Prisha for surgery to promote herself and bolster her reputational bona fides to counsel patients dealing with gender issues, even though she knew she lacked the credentials of a transgender specialist. (R p 34 ¶ 107.)

The complaint, therefore, more than adequately pleads the benefit element of constructive fraud.

A subset of defendants also argue that Prisha has failed to show that her harm was the result of the Defendants' misconduct, rather than because Prisha acted on the "independent advice" of others. These Defendants would have this Court apply a heightened pleading standard beyond the standard in *Terry*, forcing plaintiffs to affirmatively establish the lack of any independent advice.

That would be an invitation to err because no court has ever rebutted the constructive-fraud presumption on the pleadings based on the "independent advice" defense. The presumption shifts a burden of production to the fiduciary once the plaintiff makes out a prima facie case, and it is "rebutted" only when the defendant comes forward with contrary *proof*. *Watts*, 317 N.C. at 116, 343 S.E.2d at 884; *Collier v. Bryant*, 216 N.C. App. 419, 432, 719 S.E.2d 70, 81 (2011) ("After the plaintiff has established a *prima facie* case of the existence of a fiduciary duty, and its breach, the burden shifts to the defendant to prove he acted in an open, fair and honest manner, so that no breach of fiduciary duty occurred." (cleaned up)). That is why all the Defendants' cases are summary judgment cases, where the issue was resolved on a developed record after consideration of the defendant's evidence. None of the Defendants' cases dismissed a constructive fraud claim on the pleadings, since the "independent advice" theory is not relevant to the *Terry* pleading standard. Invoking a rebuttal doctrine to defeat a claim under Rule 12(b)(6) inverts the standard of review. Those kinds of arguments have no place in testing the "legal sufficiency" of a complaint. *Howell*, 388 N.C. at 77, 919 S.E.2d at 218. *Watts* itself held that the pleading standard was satisfied by the plaintiff's complaint in that case, and only engaged with the independent advice theory at the summary judgment posture based on the parties' "[e]vidence." *Watts*, 317 N.C. at 116, 343 S.E.2d at 884.

But even if the Court were to indulge this theory, it would still fail because the Defendants' arguments mistake what "independent advice" means. The rebuttal dispels reliance only where the plaintiff consulted a *disinterested outside source* about the same subject and thereby obtained a genuine check on the fiduciary's advice—the outside specialists in *Watts* and *Lackey*, and the plaintiff's own attorney and business partner in *Sullivan*. But here the "independent" advisors could only be the *other Defendants*, with whom each Defendant conspired and facilitated fraud. Each Defendant was a necessary step in the transitioning process.

Advice is not "independent" when it comes from the alleged participants in the same course of misconduct. Each Defendant's illegitimate advice and misstatements of fact served to deepen Prisha's reliance rather than dispel it. At a bare minimum, this question of fact is not one that the complaint "on its face" discloses to "necessarily defeat the claim." *Howell*, 388 N.C. at 78, 919 S.E.2d at 219.

E. The learned-profession exemption does not require dismissal of the section 75-1.1 claims against the counselor defendants.

The counselor defendants (Gordon, Tree of Life, Klein-Fowler, and Family Solutions) argue that the section 75-1.1 claims against them had to be dismissed under the statute's learned-profession exemption. They do not dispute that no court has ever extended the statute to cover counselors. Instead, they invite this Court to be the first to do so. The Court should decline the invitation.

First, the procedural posture of the case makes extension improper. The Defendants acknowledge that the learned-profession provision of section 75-1.1 is an "exemption" from the statute's reach. Gordon Br. at 37-42; Klein-Fowler Br. at 26-27 (attempting to incorporate by reference the Gordon brief). As parties claiming exemption from the statute, the Defendants bear the burden of proving their entitlement to the exemption. N.C. Gen. Stat. § 75-1.1(d) ("Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim."). Courts recognize that they typically cannot extend the learned-profession exemption to new professions at the pleading stage. Opening Br. at 35. That measured approach applies just as well here. There is no way to determine from the face of the complaint that counseling is definitively a learned profession. The complaint certainly does not allege as much.

Second, even if that assessment could be made at the pleading stage, the Court should not extend the statute to cover counseling. The Gordon brief mischaracterizes Prisha's argument on this point. Her brief says that Prisha argues that the "statute's applications are frozen in place for all time." Gordon Br. at 39-40. But Prisha argued that the meaning of the statute's *text* is what is frozen in time. Opening Br. at 36. Gordon's mistake is to conflate meaning (which is fixed) and application to novel situations (which isn't). Antonin Scalia & Bryan A. Garner, *Reading Law* § 7, at 78 (2012) ("Although courts routinely apply legal instruments to novel situations over time, their meaning remains fixed.").

Here, there is not even a novel application at issue. As the U.S. Supreme Court explained just months ago, the regulation of counseling is not "part of a historical tradition," but is instead a "relatively recent innovation." *Chiles v. Salazar*, 146 S. Ct. 1010, 1027 (2026). Counseling is normal human behavior that is as old as human civilization. It does not have the pedigree of a separate "learned profession." *Patronelli v. Patronelli*, 360 N.C. 628, 630, 636 S.E.2d 559, 561 (2006) ("Law is one of the three learned professions, the others being medicine and the clergy."). It wasn't a licensed occupation anywhere in the nation until 1976. *Chiles*, 146 S. Ct. at 1027. Both millennia ago and today people have counseled each other: advice between friends, family, teachers-students, and mentors-mentees. Secular, for-fee counseling didn't emerge from a learned tradition; it was carved out of ordinary human relations by a relatively recent licensing statute.

These points also rebut the exaggeration of "sweeping consequences" in Gordon's brief. Gordon Br. at 40-41. It's irrelevant that anesthesiology assistants, occupational therapists, and others became separately regulated occupations after 1977. *Id.* Without the creation of these separate licensing regimes, these professions would be the practice of medicine, which is one of the historical learned professions. But that is not true of counseling, since it is not part of medicine's "historical tradition." *Chiles*, 146 S. Ct. at 1027 (rejecting argument that counseling falls within "traditional law[s] licensing the practice of medicine").[11]

Thus, licensure regimes as they existed in 1977 are important evidence of whether an occupation can be deemed a "learned profession." And the mere fact of

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11 *See also Allred v. State*, 554 P.2d 411, 419 (Alaska 1976) ("'counseling' most often refers to psychological efforts of a non-medical nature, administered by non-medical personnel"); *Rehm v. Lenz*, 547 N.W.2d 560, 564 (S.D. 1996) (negligent counseling does not constitute medical malpractice).

a late-enacted licensing regime is not enough for the counseling defendants to carry their burden of proof. *Jordan Consultants, ASLA, P.A. v. Trinity Consulting & Dev., LLC*, No. COA22-458, 2023 WL 1788514, at *3 (N.C. Ct. App. Feb. 7, 2023) (unpublished) [Add. 3] (party failed to carry its burden of proving that landscape architecture was learned profession).

At the time of section 75-1.1's enactment, the phrase "learned profession" referred to a set of traditional professions—law, medicine, clergy—and it didn't include humans talking through their problems with each other. At a minimum, the counseling defendants have not carried their burden of proving, from the face of the complaint, that they are exempt from the reach of section 75-1.1.

CONCLUSION

The judgment below should be reversed.

This the 28th day of July, 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Appellate Rules of Procedure and this Court's order of 15 May 2026, counsel certifies that this brief contains no more than 15,000 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

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This the 28th day of July, 2026.

/s/ Troy D. Shelton
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No. COA26-132 DISTRICT 38

NORTH CAROLINA COURT OF APPEALS

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CHARLIE MOSLEY, *a.k.a.* PRISHA MOSLEY, *a.k.a.* ABIGAIL MOSLEY, *Plaintiff-Appellant*, *v.* ERIC T. EMERSON, *et al.*, *Defendants-Appellees*.	From Gaston County

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ADDENDUM

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287 N.C.App. 613
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.
Court of Appeals of North Carolina.

JORDAN CONSULTANTS, ASLA, P.A., Plaintiff,
v.
TRINITY CONSULTING AND DEVELOPMENT, LLC and Trinity Consulting and Development LLC d/b/a Trinity Funding and Consulting, LLC, Defendants.

No. COA22-458
|
Filed February 7, 2023

Appeal by plaintiff from order entered 21 February 2022 by Judge Ashley Watlington-Simms in Guilford County District Court. Heard in the Court of Appeals 15 November 2022. Guilford County, No. 20CVD6667

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Opinion

GORE, Judge.

***1** Plaintiff Jordan Consultants seeks appeal of an interlocutory order denying plaintiff's motion for summary judgment. Plaintiff filed motions for summary judgment as to all claims and counterclaims, and the trial court granted summary judgment on the slander of title claim, but denied summary judgment on all other claims, determining there were genuine issues of material dispute that should be submitted to a jury. Plaintiff seeks review claiming it has a substantial right that will be lost or irreparably harmed if this Court does not allow interlocutory appeal. Conversely, defendants move to dismiss plaintiff's appeal claiming there is no right to interlocutory appeal. Upon review of the parties' briefs and the record as it stands, we grant defendants' motion for dismissal.

I.

Plaintiff and defendants entered into a contractual agreement for plaintiff to provide "landscape architectural and civil engineering services" at defendants' property in Greensboro, North Carolina. Defendants claim plaintiff did not fulfill its obligations under the contract, while plaintiff claims it did fulfill its obligations. After defendants refused to pay certain invoices, plaintiff filed a mechanic's lien and notice of lis pendens. Plaintiff filed a complaint on 24 August 2020 for breach of contract, lien enforcement, and quantum meruit claims against defendants. Defendants raised the following counterclaims against plaintiff: breach of contract and/or moneys owed, slander of title, and unfair and deceptive trade practices ("UDTP"). In response, plaintiff filed a motion to dismiss and motion for summary judgment on all of defendants' counterclaims.

The parties engaged in discovery and on 10 December 2021, plaintiff filed another motion for summary judgment on all its claims. On 15 February 2022, the trial court heard arguments on plaintiff's pending motions. The trial court entered an order on 21 February 2022 granting summary judgment for the slander of title counterclaim and denying plaintiff's motions as to all other claims and counterclaims. On 23 March 2022, plaintiff timely filed a notice of appeal from the interlocutory order. Plaintiff seeks interlocutory appeal of the denied claims and counterclaims, including the UDTP claim.

II.

Our Courts have stated the general rule for an interlocutory appeal many times—that an appeal from an interlocutory order is not ripe for appellate review. *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 709 (1999); *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990); *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). However, there are two main

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exceptions carved out of this general rule. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999). (1) "[W]here the order represents a final judgment as to one or more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal," or (2) "where delaying the appeal will irreparably impair a substantial right of the party." *Id.* (quotation marks and citations omitted). "Denial of summary judgment is interlocutory in nature and not appealable under [Section] 1-277 ..., unless a substantial right of one of the parties would be affected if the appeal were not heard prior to final judgment." *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 164, 265 S.E.2d 240, 242 (1980).

***2** It is this Court's duty to dismiss an interlocutory appeal "as fragmentary and premature unless the order affects some substantial right ...." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation omitted). The party seeking review holds the burden to show it has a substantial right to immediate review. *Id.* (citations omitted). Further, "the North Carolina Rules of Appellate Procedure require that the appellant's brief contain a statement of the grounds for appellate review, which must allege sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Id.* at 219, 794 S.E.2d at 499 (quoting N.C.R. App. P. 28(b)(4)) (quotation marks omitted). The party seeking review must provide "more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009).

A.

Plaintiff admits it is seeking review of an interlocutory order, but asserts it has a substantial right under Section 1-277. N.C. Gen. Stat. § 1-277 (2021). Plaintiff first argues it has a substantial right to a jury trial and cites multiple appellate cases as grounds for the constitutional right to a jury trial. Specifically, it cites to *Lancaster v. Harold K. Jordan and Co.*, stating, "The right to a jury trial accrues only when there is a genuine issue of fact to be decided at trial." 243 N.C. App. 74, 83, 776 S.E.2d 345, 352 (2015) (citation omitted). Additionally, plaintiff cites to *Mathias v. Brumsey*, in support of its substantial right to a jury trial. 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975) ("The right to a jury trial is a substantial right of great significance."). However, plaintiff claims the *denial* of its motions for summary judgment on the remaining claims are its deprivation.

In plaintiff's opinion, only genuine issues of material fact should be submitted to a jury. While the rule for summary judgment does require only "genuine issue[s] as to any material fact" to proceed to a jury trial, plaintiff appears to be seeking a backdoor approach to having this Court review the trial court's denial of summary judgment. N.C. R. Civ. P. 56(c). Such an argument is confusing, and it lacks legal support. The denial of summary judgment provides plaintiff with the right to a jury trial on the remaining claims. Plaintiff has not met its burden to show a substantial right will be lost if this Court does not review the interlocutory order.

B.

Plaintiff also seeks interlocutory appeal of the UDTP statutory claim arguing it is immune under the learned profession exemption. The Unfair and Deceptive Trade Practices Act ("UDTPA") includes a carve out within the statute to prevent actions of this type against "a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b) (2021). To qualify for the exemption, the party claiming the exemption must prove (1) "the person or entity performing the alleged act [is] a member of a learned profession"; and (2) "the conduct in question [is] a rendering of professional services." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 334, 828 S.E.2d 467, 472 (2019) (citation omitted). The term "learned profession[ ] [is] characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place, and in a profession like that of medicine by intimate and delicate personal ministration." *Cameron v. New Hanover Mem'l Hosp., Inc.*, 58 N.C. App. 414, 445, 293 S.E.2d 901, 920 (1982) (internal quotation marks and citation omitted).

Plaintiff fails to cite any authority proving it is a learned professional. Plaintiff refers to case law dealing with legal professionals exempt under the learned profession carve out and to statutes promulgated for landscape architects. Plaintiff states it is entitled to this exemption as a matter of law but fails to cite to any law to support this. Further, plaintiff cites to *Wallace v. Jarvis* as support for when statutory immunity is applicable. 119 N.C. App. 582, 459 S.E.2d 44 (1995). In *Wallace*, the defendant, who had the burden to show he had a substantial right, relied on a case involving sovereign immunity. *Id.* at 584, 459 S.E.2d at 46. This

Court distinguished the sovereign immunity case from the defendant because he was claiming statutory immunity, and the defendant had to first satisfy the requirements of the statute to claim immunity. *Id.* at 585, 459 S.E.2d at 46–47.

***3** Similarly, in the present case, plaintiff has not proved it meets the requirements of the learned profession statutory exemption. Nor is there evidence on the record this challenge was presented to the trial court. Plaintiff broadly asserts it is immune from the UDTPA yet fails to substantiate this claim. To indisputably show such a case requires plaintiff to ground its claim in law. Plaintiff fails to do so, and by failing to prove its exemption from the statute, plaintiff falls short of relying on immunity for its substantial right to appeal an interlocutory order. *But see Topping v. Meyers*, 270 N.C. App. 613, 617, 842 S.E.2d 95, 99 (2020) (discussing when immunity from suit is a substantial right such that an interlocutory appeal is proper).

Finally, plaintiff's reference to various statutes that require a certification for landscape architects and specify requirements and limitations within the occupation do not prove landscape architects are learned professionals. *See* N.C. Gen. Stat. §§ 89A-1, 89A-2, 55B-2(6) (2022). The "burden of proof" is upon the party claiming exemption under Section 75.1-1. § 75.1-1(d). Specifically, plaintiff cites to § 55B-2(6) as proof a landscape architect is a "professional service" provider. It would appear plaintiff relies on this statute along with the statutes specific to the landscape architect as legal grounds to qualify as a learned profession and be exempted. By relying on these statutes and going no further, plaintiff fails to carry its burden of proving it qualifies for the learned profession exemption, and further that it has a substantial right which would grant this Court jurisdiction to review an interlocutory denial of summary judgment. Accordingly, we grant defendant's motion to dismiss the interlocutory order.

III.

For the foregoing reasons, we grant defendant's motion to dismiss the interlocutory appeal.

DISMISSED.

Report per Rule 30(e).

Chief Judge STROUD and Judge DILLON concur.

All Citations

287 N.C.App. 613, 882 S.E.2d 751 (Table), 2023 WL 1788514

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