No. COA26-132 DISTRICT 38

NORTH CAROLINA COURT OF APPEALS
****

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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BRIEF OF PLAINTIFF-APPELLANT

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INDEX

TABLE OF AUTHORITIES iii

ISSUES PRESENTED 4

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW 4

STATEMENT OF THE FACTS 4

A. Defendants Deceive Prisha into Transitioning 5

B. Superior Court Proceedings 10

STATEMENT OF THE CASE 13

ARGUMENT 14

I. The Change in Law Required Reinstatement of Prisha's Medical Malpractice and Negligent Infliction Claims. 14

II. The Trial Court Erred By Granting Summary Judgment on Prisha's Fraud, Facilitating Fraud, and Conspiracy Claims Because She Presented Sufficient Evidence in Support of Them. 19

A. Standard of review 19

B. Prisha presented evidence of Defendants' fraud. 20

C. Prisha presented evidence that Defendants facilitated fraud and engaged in civil conspiracy. 23

D. Prisha's claims for fraud, facilitating fraud, and civil conspiracy are timely. 25

III. The Trial Court Improperly Dismissed Other Claims at the Pleading Stage. 27

A. Standard of review 27

B. Prisha properly pleaded claims for breach of fiduciary duty and constructive fraud. 28

C. Prisha properly pleaded her claim for negligent infliction of emotional distress. 33

D. Prisha properly pleaded a claim under N.C. Gen. Stat. § 75-1.1. 34

CONCLUSION 37

CERTIFICATE OF COMPLIANCE 40

CERTIFICATE OF SERVICE 41

TABLE OF AUTHORITIES

Cases

Bowen v. Mabry,
154 N.C. App. 734, 572 S.E.2d 809 (2002) 16

Bryant v. Thalhimer Brothers, Inc.,
113 N.C. App. 1, 437 S.E.2d 519 (1993) 33

Bryant v. Wake Forest Univ. Baptist Med. Ctr.,
281 N.C. App. 630, 870 S.E.2d 269 (2022) 20, 30

Chisum v. Campagna,
376 N.C. 680, 855 S.E.2d 173 (2021) 29

Cottle v. Mankin,
294 N.C. App. 20, 901 S.E.2d 682 (2024) 20

Doe 1K v. Roman Cath. Diocese of Charlotte,
387 N.C. 12, 911 S.E.2d 38 (2025) 16, 17

Elina Adoption Servs., Inc. v. Carolina Adoption Servs., Inc.,
No. 1:07CV169, 2008 WL 4005738
(M.D.N.C. Aug. 25, 2008) 35

Est. of Graham v. Lambert,
385 N.C. 644, 898 S.E.2d 888 (2024) 19

Forbis v. Neal,
361 N.C. 519, 649 S.E.2d 382 (2007) 22

Gardner v. Gardner,
300 N.C. 715, 268 S.E.2d 468 (1980) 16

Henry v. Deen,
310 N.C. 75, 310 S.E.2d 326 (1984) 23

Howell v. Cooper,
388 N.C. 71, 919 S.E.2d 212 (2025) 27, 28

In re NC & VA Warranty Co., Inc.,
594 B.R. 316 (Bankr. M.D.N.C. 2018) 32

Latta v. Rainey,
202 N.C. App. 587, 689 S.E.2d 898 (2010) 23

McClean v. Duke Univ.,
376 F. Supp. 3d 585 (M.D.N.C. 2019) 35

Miller v. Carolina Coast Emergency Physicians, LLC,
382 N.C. 91, 876 S.E.2d 436 (2022) 14

NationsBank of N.C., N.A. v. Parker,
140 N.C. App. 106, 535 S.E.2d 597 (2000) 31

Neugent v. Beroth Oil Co.,
149 N.C. App. 38, 560 S.E.2d 829 (2002) 23, 26

Pleasant Valley Promenade v. Lechmere, Inc.,
120 N.C. App. 650, 464 S.E.2d 47 (1995) 24

RCDI Const., Inc. v. Spaceplan/Architecture, Plan. & Interiors, P.A.,
148 F. Supp. 2d 607 (W.D.N.C. 2001) 35

Reid v. Ayers,
138 N.C. App. 261, 531 S.E.2d 231 (2000) 36

Russell v. Adams,
125 N.C. App. 637, 482 S.E.2d 30 (1997) 33

Savage v. N.C. Dep't of Transportation,
388 N.C. 196, 919 S.E.2d 144 (2025) 15

Sharp v. Teague,
113 N.C. App. 589, 439 S.E.2d 792 (1994) 26

Smart Online, Inc. v. Sherb & Co., LLP,
No. 1:10CV244, 2012 WL 13162888
(M.D.N.C. Mar. 29, 2012) 35

Spears v. Moore,
145 N.C. App. 706, 551 S.E.2d 483 (2001) 27

State ex rel. Expert Discovery, LLC v. AT&T Corp.,
287 N.C. App. 75, 882 S.E.2d 660 (2022) 16

State v. Abernethy,
220 N.C. 226, 17 S.E.2d 25 (1941)............................... 24

State v. Currie,
284 N.C. 562, 202 S.E.2d 153 (1974)............................17

State v. Pardon,
272 N.C. 72, 157 S.E.2d 698 (1967) 17

State v. Whiteside,
204 N.C. 710, 169 S.E. 711 (1933)...........................24, 25

State v. Winkler,
368 N.C. 572, 780 S.E.2d 824 (2015) 24

Trantham v. Michael L. Martin, Inc.,
228 N.C. App. 118, 745 S.E.2d 327 (2013).....................37

United States v. Schooner Peggy,
5 U.S. 103, 110 (1801)..16

Watts v. Cumberland Cnty. Hosp. Sys., Inc.,
317 N.C. 110, 343 S.E.2d 879 (1986).......................20, 30

White v. Consol. Plan., Inc.,
166 N.C. App. 283, 603 S.E.2d 147 (2004)....................29

Wilkins v. Wachovia Corp.,
No. 5:10-CV-00249-D, 2011 WL 902031
(E.D.N.C. Feb. 28, 2011) 32

Wilson v. Crab Orchard Dev. Co.,
276 N.C. 198, 171 S.E.2d 873 (1970).............................33

Statutes

1977 N.C. Session Laws, ch. 747 36

1993 N.C. Session Laws, ch. 514 36

N.C. Sess. Laws 2025-84 .... 11, 12, 14, 15

N.C. Gen. Stat. § 1-15 .... *passim*

N.C. Gen. Stat. § 1-52..26

N.C. Gen. Stat. § 1-267.1 19

N.C. Gen. Stat. § 7A-27... 4

N.C. Gen. Stat. § 7A-47.3 ....10, 13

N.C. Gen. Stat. § 75-1.1 .... *passim*

N.C. Gen. Stat. § 75-16.2 37

Rules

N.C. R. Civ. P. 42 19

N.C. R. Civ. P. 54 16

Treatises

Antonin Scalia & Bryan A. Garner, *Reading Law* (2012)..........36

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From Gaston County

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BRIEF OF PLAINTIFF-APPELLANT

****

When Prisha Mosley was a teenager, she was sexually assaulted and suffered from depression, anxiety, an eating disorder, and other serious mental health conditions. She turned to adults she trusted—doctors and counselors—for help. They did not help her. Instead, they told her she had a male brain and was intersex. They told her she could go through male puberty and grow a penis. They told her that testosterone and the removal of her healthy breasts were necessary, life-saving treatments, and that there were no alternatives. They told her it was illegal for her parents to intervene. None of that was true.

Prisha believed these professionals. She had every reason to. They were her medical team—a pediatrician, two licensed counselors, and a plastic surgeon—and she was a mentally ill teenager desperate for relief. So Prisha took the testosterone. She had her breasts surgically removed. And for years afterward, she kept "waiting for it to work," as Defendants had promised.

It never worked. It was not until October 2022, when her partner's young daughter called her "mommy" and the reality of what had been done to her became undeniable, that Prisha began to understand the scope of Defendants' deception. She filed this lawsuit less than a year later.

The trial court then dismissed every one of Prisha's claims, and it was wrong at every step.

At the outset, the court dismissed the medical malpractice claim as untimely under N.C. Gen. Stat. § 1-15(c). The General Assembly then enacted House Bill 805, which expressly revived time-barred malpractice claims arising from gender-transition procedures and made the new law applicable to pending cases. Prisha promptly moved the court to reinstate her claim. The court refused. Rather than follow the command of the legislature, the trial court expressed offense at the new law, and asserted discretion to ignore the General Assembly's enactment. No such discretion exists. When the legislature changes the law and directs that the change apply to

pending actions, courts must obey. That has been the law in this State and the nation for centuries.

The trial court then compounded this error by granting summary judgment on Prisha's fraud, facilitating fraud, and civil conspiracy claims—despite a record replete with evidence of material misrepresentations, intentional concealment, and coordinated conduct among Defendants. Prisha's experts confirmed that none of the Defendants' statements constituted legitimate medical opinions. Defendants referred Prisha to one another, shared information, and worked as a team toward the common goal of transitioning her—all while deceiving her about the nature, risks, and necessity of what they were doing. That evidence, viewed in the light most favorable to Prisha as the law requires, was more than sufficient to create genuine issues of material fact for a jury.

The trial court also erroneously dismissed Prisha's claims for constructive fraud, negligent infliction of emotional distress, and unfair and deceptive practices at the pleading stage. Prisha's complaint adequately stated each of those claims under the notice-pleading standard. Yet the court dismissed them anyway, applying legal standards that find no support in precedent.

Prisha Mosley deserves her day in court. She presented well-pleaded claims supported by substantial evidence, against professionals who exploited her trust and

caused her permanent harm. The trial court's orders and judgment should be reversed and this case remanded for trial on all counts.

ISSUES PRESENTED

(1) While this case was pending in the trial court, the legislature eliminated the time bar for Prisha's medical malpractice claim, rendering it timely. The court decided that it had discretion to refuse to reinstate the claim. Did the trial court have discretion to disobey the law?

(2) Did the trial court err by granting summary judgment to Defendants on the claims for fraud, facilitating fraud, and civil conspiracy?

(3) Did the trial court err by dismissing on the pleadings the claims for breach of fiduciary duty and constructive fraud, negligent infliction of emotional distress, and violation of N.C. Gen. Stat. § 75-1.1?

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

On 28 August 2025, the superior court entered an order granting summary judgment to all Defendants on all remaining claims. (R pp 407-09.) Prisha filed a notice of appeal within 30 days, on 10 September 2025. (R p 410.) Because the summary judgment order disposed of all claims, it was a final judgment, appealable to this Court. N.C. Gen. Stat. § 7A-27(b)(1).

STATEMENT OF THE FACTS

The evidence, taken in the light most favorable to Prisha, shows the following.

A. Defendants Deceive Prisha into Transitioning

When Prisha Mosley was a teenager, she suffered profound mental health issues, including depression, anxiety, suicidal ideation, self-harm, obsessive-compulsive disorder, insomnia and sleep disturbances, panic attacks, eating disorder, and borderline personality disorder. (1.Doc.Ex. 114 ¶ 1.) Her mental health issues were compounded by a sexual assault which resulted in a miscarriage. (1.Doc.Ex. 114 ¶ 1, 2519-23.) While she was in this vulnerable state, desperately needing help, a pediatrician, two counselors, a plastic surgeon, and their related practices worked together to medically "transition" her into a boy. (R pp 290-341; 1.Doc.Ex. 2499-3094; 1.Doc.Ex. 114-20.) Their work began when Prisha was only 16 years old and continued after her eighteenth birthday and into her young adulthood. (1.Doc.Ex. 4133-37, 5033, 5449-50, 5772-73, 5852, 5786, 5873-75, 5918-19.) Defendants never explained to Prisha that she could not actually become a boy. (1.Doc.Ex. 114-20, 2536-37.) And they never told her that the so-called treatments they pushed on her—testosterone and "breast reduction" surgery—were not proven to be safe and effective treatments for her mental health issues. (1.Doc.Ex. 114-20, 2536-37.)

From the time of Prisha's interactions with Defendants, until about October 2022 when she began to detransition, she continued to suffer numerous mental health issues. (1.Doc.Ex. 119 ¶ 21.) She depended on others for housing, food, and

clothing, and to take her to healthcare visits. (1.Doc.Ex. 119 ¶ 21.) She felt unsafe and alone. (1.Doc.Ex. 119 ¶ 21.)

Defendants deceived her into transitioning through numerous misrepresentations. For example, Defendant Martha Perry, a pediatrician and director at Defendant Cone Health, told Prisha she had a male brain, could go through male puberty, would grow a penis, and that it was illegal for her parents to stop her from taking testosterone. (1.Doc.Ex. 2667-68, 2670, 4231, 4686-87, 4970, 4986-89.) None of that was true.

Defendant Shana Gordon, a counselor and owner at Defendant Tree of Life Counseling, told Prisha she had a male brain and was intersex. (1.Doc.Ex. 2667-68.) Gordon told Prisha that testosterone would cure her mental health problems. (1.Doc.Ex. 2717.) Gordon also misrepresented Prisha's mental health condition as presenting no psychopathology and no problems related to mood. (1.Doc.Ex. 4879-80.) And Gordon falsely claimed that Prisha's anorexia was in remission. (1.Doc.Ex. 4879-80.)

Defendant Brie Klein-Fowler, a counselor at Defendant Family Solutions, told Prisha that the testosterone and breast surgery were necessary, beneficial treatments for which there was no alternative. (1.Doc.Ex. 2847-50, 2964, 5797-98.) Klein-Fowler was aware of a study indicating that some individuals who pursue medical

transition later change their mind or decide to detransition, but Klein-Fowler intentionally withheld that information from Prisha. (1.Doc.Ex. 3318, 3327-28.) Klein-Fowler also falsely implied she was a transgender specialist and stated in her letter clearing Prisha for surgery that she had been counseling Prisha for gender issues longer than she actually had. (1.Doc.Ex. 3332-34, 5798.) Klein-Fowler suppressed the true facts of Prisha's ongoing mental health issues to push Prisha into the removal of her healthy breasts. (1.Doc.Ex. 3334-35, 5798.)

Defendant Eric Emerson, a surgeon and partner at Defendant Piedmont Plastic Surgery, told Prisha that the breast surgery was medically necessary and would benefit her. (1.Doc.Ex. 2988.) Emerson concealed from Prisha alternative courses of treatment that would not cause such grave harm to Prisha. (1.Doc.Ex. 2988, 5879-90.) Emerson misrepresented the nature and effects of "breast reduction" surgery. (1.Doc.Ex. 2988, 5879-90.) Emerson concealed the detrimental effects such surgery would have, such as the loss of Prisha's breasts, loss of ability to nurse a child, the likelihood of mastitis after giving birth (a condition she first experienced after filing this case), and physical and psychological pain. (1.Doc.Ex. 2979-83, 2988, 3134-35, 5879-90.) Emerson misrepresented to Prisha that breast feeding would not be impossible for her after the surgery. (1.Doc.Ex. 2979-83, 2988, 5879-90.)

These representations were not true. None of Defendants' statements or omissions constituted opinions, and certainly not legitimate medical opinions. (1.Doc.Ex. 227-388, 6036-6559.)

Prisha continued to believe Defendants' false representations that medical transition would turn her into a happy, well-adjusted boy because of the force of Defendants' representations and Defendants' influence over her. (1.Doc.Ex. 114-20, 2536-37.) The representations and so-called treatments were presented to her as a lifeline for her ongoing mental health struggles. (1.Doc.Ex. 114-20, 2536-37.)

As a result of counseling sessions shortly before she began to detransition in or about October 2022, Prisha began to accept the reality of being a woman. (1.Doc.Ex. 119 ¶ 22.) She still suffers from mental health issues, including borderline personality disorder, anxiety, codependency, insomnia and sleep disturbances, and panic attacks. (1.Doc.Ex. 119 ¶ 22.)

Prisha testified she was not aware of the concept of detransitioning until after her partner's daughter called her "mommy"; at that point, "the veil was lifted" and she realized she could not become a boy, years after Defendants misled her into taking testosterone and having "breast reduction" surgery. (1.Doc.Ex. 114-20, 2536-37.) Prior to that time, Prisha believed Defendants and kept pursuing the treatments

they pushed on her, "waiting for it to work" as Defendants promised her it would. (1.Doc.Ex. 114-20, 2536-37.)

Only after detransitioning did Prisha learn that Defendants' representations were false and that Defendants withheld material information from her. (1.Doc.Ex. 118 ¶ 20.) From the time of her interactions with the Defendants until about October 2022 when she began to detransition, Prisha had no idea that the representations they had made to her were or could be false. (1.Doc.Ex. 115 ¶ 3.) Upon realizing that Defendants had misled her, Prisha suffered extreme emotional distress and is unable to fully trust doctors and other people she needs to help her live a normal, healthy life. (1.Doc.Ex. 2995-3005.)

Prisha did not learn of some of Defendants' concealments until even after she filed this lawsuit. (1.Doc.Ex. 118 ¶ 20.) For example, after this lawsuit was filed, Prisha became pregnant and gave birth to a son and tried—but was unable—to breastfeed him when breast tissue left behind by Emerson produced milk, which was trapped inside her causing painful mastitis, because Emerson had severed and reattached her nipples. (1.Doc.Ex. 2981-82.) This excruciating experience made her realize, for the first time, that she could not in fact breastfeed and caused her even more psychological and physical pain and suffering. (1.Doc.Ex. 2981-82.) 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.) Similarly, Prisha only learned in depositions that Klein-Fowler had intentionally withheld from her information and data about detransitioning. (1.Doc.Ex. 3318, 3327-28.)

B. Superior Court Proceedings

Prisha filed this lawsuit in Gaston County Superior Court on 17 July 2023, less than a year from her detransition in or about October 2022. (R p 1; 1.Doc.Ex. 115 ¶ 3.) The complaint brought seven claims against the Defendants. Six of the claims were against all Defendants: fraud, facilitating fraud, breach of fiduciary duty rising to the level of constructive fraud, civil conspiracy, medical malpractice, and negligent infliction of emotional distress. (R pp 41-50.) Against the counselor Defendants—Gordon, Tree of Life Counseling, Klein-Fowler, and Family Solutions—Prisha also brought a claim under N.C. Gen. Stat. § 75-1.1 for unfair and deceptive practices. (R pp 50-51.) The Honorable Robert C. Ervin was assigned, under N.C. Gen. Stat. § 7A-47.3(e), to preside over the case. (R p 264.)

All Defendants sought dismissal of all claims under Rule 12(b)(6). (R pp 357-59.) In seeking dismissal, Defendants argued that the malpractice and negligent infliction claims were untimely under N.C. Gen. Stat. § 1-15(c). (1.Doc.Ex. 2120-26, 2140-45, 2181-82, 2193-96, 2204-09, 2220-21.) On 28 July 2025, the court entered

an order, granting the motion in part by dismissing the claims for malpractice, constructive fraud, negligent infliction, and violation of section 75-1.1. (R pp 357-59.) The court denied the motion as to actual fraud, facilitating fraud, and civil conspiracy. (R pp 357-59.) The court's order was signed on or about 7 May 2024, around the time that it announced its ruling informally, but the order was not filed and entered until 28 July 2025. (R pp 357-59.) The original complaint was later amended to substitute the proper Cone Health entity. (R p 290.) The amended complaint did not change any of the allegations relevant to this appeal.[1]

While this action was pending, the General Assembly passed House Bill 805 on 26 June 2025. N.C. Sess. Laws 2025-84, *available at* https://www3.ncleg.gov/EnactedLegislation/SessionLaws/HTML/2025-2026/SL2025-84.html [R pp 394-401; App. 13-20]. Although Governor Stein vetoed it, the legislature overrode that veto on July 29, the day after the formal entry of the order on the motion to dismiss. *Id.*

House Bill 805 enacted a new statute, N.C. Gen. Stat. § 90-21.175, providing civil remedies against those who perform gender transition procedures. N.C. Sess. Laws 2025-84, § 3.1(a). The new statute permits a cause of action under N.C. Gen.

1 The University of North Carolina at Chapel Hill was named as a defendant then voluntarily dismissed. (R p 351.)

Stat. § 1-15 to be brought for malpractice "arising out of the performance of or failure to perform services while in the course of facilitating or perpetuating gender transition." *Id.* The law gives victims 10 years to file such actions, "from the time of discovery by the injured party of both the injury and the causal relationship between the treatment and the injury against the offending medical professional or entity." *Id.*

This change in law is retroactive. It "revives any cause of action arising out of the performance of or failure to perform services while in the course of facilitating or perpetuating gender transition otherwise time-barred under G.S. 1-15, whether or not such cause of action has been asserted in a pending civil action or appeal." *Id.* § 3.1(b).

The legislature was well aware of Prisha's pending case when it enacted the new law. Prisha testified before the House Judiciary Committee on the bill. (T3 p 5.)

Just days after the new law was passed, Prisha filed a motion to reconsider the dismissal of her malpractice and negligent infliction claims, arguing that the change in law required reinstatement of those claims. (R pp 389-91.) Meanwhile, Defendants moved for summary judgment on the remaining claims for fraud, facilitating fraud, and civil conspiracy.

Judge Ervin heard the motion for reconsideration and the motions for summary judgment on 15 August 2025. (T3 p 1.) On the reconsideration motion, Judge

Ervin said it would be "staggering" to believe that the legislature had the power to change the law and make it apply to pending actions where interlocutory rulings had been made under the old law. (T3 p 10:7-12.)

After the hearing, the court entered orders denying the motion for reconsideration and granting summary judgment to Defendants on all remaining claims. (R pp 405, 407.) Prisha timely filed a notice of appeal from the orders dismissing some claims on the pleadings and other claims at summary judgment, as well as the order denying reconsideration and reinstatement of claims after the passage of House Bill 805. (R p 410.)

STATEMENT OF THE CASE

Prisha commenced this case with the filing of a complaint and the issuance of summonses in Gaston County Superior Court on 17 July 2023. (R pp 1, 57-64.) The Honorable Robert C. Ervin was assigned, under N.C. Gen. Stat. § 7A-47.3(e), to preside over the case. (R p 264.) Judge Ervin entered an order under Rule 12(b)(6) dismissing some claims on 28 July 2025. (R p 357.) Judge Ervin denied Prisha's motion to reconsider that ruling by an order entered on 28 August 2025. (R p 405.) Judge Ervin entered an order granting Defendants summary judgment on all remaining claims on 28 August 2025. (R p 407.) Prisha timely filed a notice of appeal on 10

September 2025. (R p 410.) Prisha filed the record on appeal with this Court on 10 February 2026, and received an extension to file this opening brief.

ARGUMENT

I. The Change in Law Required Reinstatement of Prisha's Medical Malpractice and Negligent Infliction Claims.

At the pleading stage, the trial court dismissed Prisha's claims for medical malpractice and negligent infliction of emotional distress as untimely under N.C. Gen. Stat. § 1-15(c).[2] Thereafter, while the case was still pending, House Bill 805 became law. N.C. Sess. Laws 2025-84. The new law revived time-barred actions and applied to pending actions, like Prisha's. The court then refused to apply this new law, denying Prisha's motion to reconsider and reinstate her claims.

This error is reviewed de novo. Although many reconsideration motions are reviewed for abuse of discretion, trial courts always abuse their discretion when they misapprehend the law, thus making the question one of de novo review. *Miller v. Carolina Coast Emergency Physicians, LLC*, 382 N.C. 91, 104, 876 S.E.2d 436, 447 (2022). Here, the only question is one of statutory interpretation: does the new law apply to Prisha's case? If it does, the trial court had no discretion to ignore the new

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2 Although the court did not provide reasoning in its order, Defendants had argued that, if the underlying negligence claim—i.e., the medical malpractice claim—was time-barred, the negligent infliction claim would necessarily fail. (1.Doc.Ex. 2120-26, 2140-45, 2181-82, 2193-96, 2204-09, 2220-21.)

law, and was duty-bound to apply it. *See Savage v. N.C. Dep't of Transportation*, 388 N.C. 196, 200, 919 S.E.2d 144, 147 (2025) (questions of statutory interpretation are reviewed de novo).

Here, House Bill 805 extended the time for bringing malpractice claims for "facilitating or perpetuating gender transition" to ten years. N.C. Sess. Laws 2025-84, § 3.1(a). The ten-year period counts "from the time of discovery by the injured party of both the injury and the causal relationship between the treatment and the injury." *Id.* The legislature expressly stated that the new law revives claims that have become time-barred under the malpractice statute, N.C. Gen. Stat. § 1-15, and applies to claims "in a pending civil action or appeal." *Id.* § 3.1(b).

Although Prisha brought the change in law to the trial court's attention within a week of it becoming law, the court denied Prisha's request to reinstate the malpractice and negligent infliction claims by refusing to apply the new law. That was error. When the legislature changes the law that applies to pending cases, trial courts have no discretion to ignore it.

The trial court's original order dismissing the malpractice claims was an interlocutory order, since it did not dispose of all claims. Under Civil Rule 54, an interlocutory order "is subject to revision at any time" before entry of a final judgment.

N.C. R. Civ. P. 54(b). Thus, the trial court certainly had the *authority* to reconsider its prior order.

And because the new law applied to pending actions, the trial court was *required* to reconsider its prior order and reinstate the claim. When a new or amended statute states that it applies prospectively or retroactively, courts "must apply it" according to its terms. *State ex rel. Expert Discovery, LLC v. AT&T Corp.*, 287 N.C. App. 75, 90, 882 S.E.2d 660, 672 (2022) (applying new statutory immunity to a pending action). Indeed, this Court has required that statutory changes be applied to pending actions, especially when, as here, the legislature directs the change to apply to pending actions. *See, e.g.*, *Bowen v. Mabry*, 154 N.C. App. 734, 737, 572 S.E.2d 809, 811 (2002). The only requirement is that the statutory change take effect before the court renders a "final judgment," meaning a judgment that has become final after the exhaustion of all appeals. *Gardner v. Gardner*, 300 N.C. 715, 716, 268 S.E.2d 468, 469 (1980); *Doe 1K v. Roman Cath. Diocese of Charlotte*, 387 N.C. 12, 15, 18, 911 S.E.2d 38, 41, 42 (2025).

In fact, this has been the law in America since the founding. In 1801, the U.S. Supreme Court explained that, even if the law is changed after judgment is entered, but while the case is still on appeal, the change in law still "must be obeyed" by the appellate court. *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801). Our Supreme

Court adheres to the same rule. *See, e.g.*, *State v. Pardon*, 272 N.C. 72, 76, 157 S.E.2d 698, 701 (1967); *State v. Currie*, 284 N.C. 562, 568, 202 S.E.2d 153, 157 (1974).

The rule makes sense. A judge has no discretion whether to apply statutory changes to pending actions because judges do not have discretion to decide whether to apply statutory law. The application of a new law to a pending action is a policy choice made by the legislature, which the judiciary must carry out. No court in this state has ever suggested that trial courts have the discretion to ignore changes in the law that, by their express terms, apply to pending cases.

Here, the trial court appears to have confused the distinction between final judgments—which are unaffected by later changes in law—and interlocutory orders in pending actions—which must follow the change in law. (T3 pp 10-11 (referring to *Doe 1K v. Roman Cath. Diocese of Charlotte*, 387 N.C. 12, 911 S.E.2d 38 (2025)).) *Doe 1K*, however, applied the rule for final judgments; a change in law cannot unsettle those. *Doe 1K*, 387 N.C. at 18, 911 S.E.2d at 42. The trial court applied none of the relevant case law, and instead relied on irrelevant reasons for denying the motion.

The court suggested that the medical malpractice claim "would have injected a new legal theory into [the] case after a vast amount of discovery had been conducted." (R p 406.) The court suggested that reinstating the medical malpractice claim "would significantly alter the legal issues presented in the case." (R p 406.)

These reasons are irrelevant because, as already explained, courts must obey changes in the law when they apply to pending actions; there is no choice to make or discretion to exercise. But the court's reasons were also factually wrong. Reinstating Prisha's malpractice claims would not have dramatically altered the case or required redoing substantial discovery. Defendants themselves argued that the fraud claim on which they had already taken discovery was no different than the malpractice claim, which had been dismissed earlier. (T3 p 44 (arguing that Plaintiff's evidence about "substandard care . . . just turns this into a medical malpractice case"); *accord* T3 pp 46, 61, 70, 82, 105-08.) Since the parties had apparently treated the case as involving malpractice, reinstating the malpractice claim could not have materially changed the issues.

Nor did the court make any findings that additional discovery would be needed if the claims were reinstated. (T3 p 39-41 (observing that the parties might decide to "supplement" some of their testimony).) And even if more discovery were needed, there was time to complete it, since trial was set for July 2026—nearly a year after Plaintiff filed her motion to reconsider. (R p 355 ¶ 10.) By the time of the reconsideration hearing, discovery was not even complete. (R pp 354 ¶ 8.)

Under our system of government, the legislature makes the law and the courts apply it. Trial courts do not have the discretion to ignore applicable statutes. The

trial court's refusal to reinstate the malpractice claim was plainly wrong and must be reversed.[3]

II. The Trial Court Erred By Granting Summary Judgment on Prisha's Fraud, Facilitating Fraud, and Conspiracy Claims Because She Presented Sufficient Evidence in Support of Them.

The trial court granted summary judgment in Defendants' favor on Prisha's claims for fraud, facilitating fraud, and civil conspiracy. (R pp 407-08.) That judgment should be reversed because Prisha presented sufficient evidence in support of those claims.

A. Standard of review

This Court reviews summary judgment orders de novo. *Est. of Graham v. Lambert*, 385 N.C. 644, 650, 898 S.E.2d 888, 895 (2024). In reviewing the parties' forecast of evidence, the Defendants' evidence is "carefully scrutinized," while Prisha's evidence is "indulgently regarded." *Id.* The Court "must credit all facts asserted by" Prisha, and "draw any inferences in [her] favor." *Id.* (cleaned up). "Courts must tread gingerly at summary judgment, reserving it for cases where only questions of

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3 The trial court declined to address whether House Bill 805 was constitutional, (T3 p 33), since that issue would have to be decided by a three-judge panel after all other claims are resolved. N.C. R. Civ. P. 42(b)(4); N.C. Gen. Stat. § 1-267.1. That issue, therefore, is not before this Court.

law are involved and a fatal weakness in the claim of a party is exposed." *Id.* at 650-51, 898 S.E.2d at 895.

B. Prisha presented evidence of Defendants' fraud.

Fraud has five elements: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 636, 870 S.E.2d 269, 274 (2022). "Our 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), *reversed on other grounds*, 388 N.C. 531, 923 S.E.2d 502 (2025) (citing *Watts v. Cumberland Cnty. Hosp. Sys., Inc.*, 317 N.C. 110, 116-17, 343 S.E.2d 879, 884 (1986)) ("*Watts* and similar cases concern concealment of facts concerning the treatment of the plaintiff.").

Prisha presented evidence from which a reasonable jury could find every element of fraud. Defendants made false representations of material fact to Prisha, or concealed materials facts from her:

- Perry falsely told Prisha that 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. (1.Doc.Ex. 2667-68, 2670, 4231, 4686-87, 4970, 4986-89.)

- Gordon falsely told Prisha that she had a male brain and was intersex, would be cured of her mental health conditions with testosterone, her anorexia was in remission (it wasn't), and her mental health conditions presented no psychopathology and no problems related to mood. (1.Doc.Ex. 2667-68, 2717, 4879-80.)
- Klein-Fowler falsely told Prisha that testosterone and breast surgery were necessary, beneficial treatments for which there was no alternative; suppressed facts about Prisha's mental health; and falsely implied she was a transgender specialist. (1.Doc.Ex. 2847-50, 2964, 3332-35, 5797-98.) Klein-Fowler was also aware of a study indicating that some individuals who pursue medical transition later change their mind, or decide to detransition as Prisha ultimately did in this case, but Klein-Fowler intentionally withheld that information from Prisha. (1.Doc.Ex. 3318, 3327-28.)
- Emerson falsely told Prisha that breast surgery was medically necessary and would benefit her, without disclosing alternative treatments that wouldn't pose serious harm. (1.Doc.Ex. 2988, 5879-90.) He

misrepresented the nature and effects of "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. 2979-83, 2988, 3134-35, 5879-90.)

None of the Defendants' statements or omissions constituted opinions, much less legitimate medical opinions. (1.Doc.Ex. 227-388, 6036-6559.) Defendants' misrepresentations and concealments were material to Prisha's decision to take the testosterone and undergo the "breast reduction" surgery, and Defendants knew they were material. (1.Doc.Ex. 118 ¶ 18, 227-388, 6036-6559.)

As practitioners in an emerging field with reputations to build and maintain, Defendants had a motive to guide Prisha into medical transition. 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). As this Court has explained, when a defendant makes a knowing, material misrepresentation (or concealment), then that "evidence is sufficient to permit a reasonable inference that defendant intended to deceive plaintiffs."

Latta v. Rainey, 202 N.C. App. 587, 600, 689 S.E.2d 898, 909-10 (2010). This rule makes sense because fraudulent intent is generally "proven by circumstances." *Id.*

Finally, Prisha suffered harm from Defendants' fraud: the loss of her healthy body and body parts, severe psychological distress, and an ongoing need for hormone therapy and special medical attention. (1.Doc.Ex. 114-20, 2995-3005.)

C. Prisha presented evidence that Defendants facilitated fraud and engaged in civil conspiracy.

The trial court also erred when it dismissed Prisha's claims for facilitating fraud and for civil conspiracy.

The two claims have similar elements. The elements of facilitating fraud are "(1) that the defendants agreed to defraud plaintiff; (2) that defendants committed an overt tortious act in furtherance of the agreement; and (3) that plaintiff suffered damages from that act." *Neugent v. Beroth Oil Co.*, 149 N.C. App. 38, 53, 560 S.E.2d 829, 839 (2002) (citation omitted). Similarly, the elements of civil conspiracy are "a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the objective." *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984).

Prisha testified that Defendants conspired and worked together to mislead her into harmful medical procedures and did in fact mislead her. (1.Doc.Ex. 2532, 2814,

2986.) This testimony showed that the Defendants were communicating and working toward a common purpose as members of her medical team.

"Direct evidence of a conspiracy agreement is not necessary and often does not exist." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 657, 464 S.E.2d 47, 54 (1995). At the evidentiary stage, "to submit the case to the jury, the circumstantial evidence must amount to more than mere suspicion or conjecture." *Id.* Direct evidence of an express agreement is unnecessary. *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 827 (2015). Nor must there be proof of "any direct act, or even any meeting of the conspirators." *State v. Abernethy*, 220 N.C. 226, 17 S.E.2d 25, 27 (1941).

The Supreme Court has explained that circumstantial evidence may include "the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties, and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom . . . ." *State v. Whiteside*, 204 N.C. 710, 713, 169 S.E. 711, 712 (1933). "[I]n the absence of direct proof, and often in the teeth of positive testimony to the contrary," this circumstantial evidence provides "ample ground for concluding that a conspiracy exists." *Id.*

There is sufficient circumstantial evidence to support these claims because the Defendants coordinated with one another with the intent to deceive Mosley into transitioning into a male by referring Prisha to each other and sharing information with each other toward this common goal. (1.Doc.Ex. 114-20, 2532, 2814, 2986; 1.Doc.Ex. 3432-34, 3437-38 (Perry referred Prisha to Gordon and spoke with other therapists at Gordon's practice); 1.Doc.Ex. 3227-28 (Gordon referred Prisha to Emerson); 1.Doc.Ex. 3295-97 (Klein-Fowler shared reports with Perry); 1.Doc.Ex. 2082-84 (coordination between Family Solutions and Klein-Fowler); 1.Doc.Ex. 3136-37 (Emerson performed breast surgery upon recommendation from Klein-Fowler).)

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. Defendants coordinated as a team to transition Prisha, which was harmful and deceptive. Because of their coordination, each Defendant is liable for the harm done to Prisha through the claims for facilitating fraud and civil conspiracy.

D. Prisha's claims for fraud, facilitating fraud, and civil conspiracy are timely.

The fraud claim is "governed by a three year statute of limitations," which "commences from discovery of the fraud or from when it should have been

discovered exercising ordinary care." *Neugent*, 149 N.C. App. at 54, 560 S.E.2d at 839; *accord* N.C. Gen. Stat. § 1-52(9). Claims for facilitating fraud and civil conspiracy are governed by the same three-year statute of limitations. *Id.*

"The appropriate statute of limitations depends upon the theory of the wrong or the nature of the injury." *Sharp v. Teague*, 113 N.C. App. 589, 592, 439 S.E.2d 792, 794 (1994). Because fraud "is not within the scope of 'professional services' as that term is used in N.C. Gen. Stat. § 1-15(c), and thus cannot be 'malpractice' within the meaning of that statute," "courts have generally applied the jurisdiction's fraud statute of limitations" to claims of fraud in the professional setting. *Id.* In *Sharp*, this Court recognized that malpractice claims (professional negligence claims) are governed by N.C. Gen. Stat. § 1-15(c), while fraud claims against professionals are not malpractice, so they are governed by N.C. Gen. Stat. § 1-52. *Id.*

To establish the timeliness of these claims, Prisha relied on the discovery rule set out in *Neugent*. Prisha testified that she was unable to discover the falsity of Defendants' representations until shortly before she filed suit because she trusted the Defendants and suffered from numerous mental health ailments. (1.Doc.Ex. 114-20.) She "needed to be better so badly" that she continued to believe Defendants' misrepresentations until she received proper counseling and "the veil was lifted by being called mommy" by her partner's daughter in or about October 2022. (1.Doc.Ex. 119

¶ 22, 2536-37.) Until that time, Prisha "was still waiting for [the transition] to work," as Defendants said it would. (1.Doc.Ex. 2536-37.)

Accordingly, she did not discover the fraud earlier and could not have done so under the circumstances: Defendants' insistence on their misrepresentations, their influence over Prisha, and Prisha's numerous mental health comorbidities. (1.Doc.Ex. 114-20, 2536-37.) Prisha discovered the fraud in October 2022, so her complaint filed in July 2023 was within the three-year limitations period.

Although Defendants may argue that their fraud should have been discovered earlier, that question is reserved for the jury: "when 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).

III. The Trial Court Improperly Dismissed Other Claims at the Pleading Stage.

The court also erred earlier in the litigation when it granted Defendants' motions under Rule 12(b)(6), eliminating several other meritorious claims.

A. Standard of review

The dismissal of these claims under Rule 12(b)(6) is reviewed de novo. *Howell v. Cooper*, 388 N.C. 71, 78, 919 S.E.2d 212, 219 (2025). The "only purpose" of Rule

12(b)(6) is to test the "legal sufficiency" of a complaint. *Id.* at 77-78, 919 S.E.2d at 218-19. Motions under the rule do not test "the facts which support" the claim in the complaint. *Id.* For that reason, "a complaint is legally sufficient so long as it states enough to give the substantive elements of at least some legally recognized claim." *Id.* at 78, 919 S.E.2d at 219 (cleaned up).

Few complaints can be properly dismissed under Rule 12(b)(6). *Id.* Rather, "[d]ismissal under Rule 12(b)(6) is warranted only when (1) it appears *certain* that plaintiffs could prove no set of facts which would entitle them to relief under some legal theory; (2) *no* law exists to support the claim made; or (3) the complaint on its face discloses facts that *necessarily* defeat the claim." *Id.* (emphasis in original).

B. Prisha properly pleaded claims for breach of fiduciary duty and constructive fraud.

Prisha brought a claim against all Defendants for breach of fiduciary duty rising to the level of constructive fraud. (R pp 47-48.[4]) The trial court wrongly dismissed it.

Breach of fiduciary duty has three elements: "(1) the defendants owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the

4 Citations here to the complaint are to the original complaint, which Defendants moved to dismiss. The allegations in the amended complaint are the same.

breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Chisum v. Campagna*, 376 N.C. 680, 706, 855 S.E.2d 173, 192 (2021). Constructive fraud additionally requires that defendants benefit themselves from the breach. *Id.*; *accord White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004).

Accepting the allegations as true, Defendants did not dispute that Prisha adequately alleged that Defendants owed her a fiduciary duty, breached that duty, or took advantage of their positions of trust to her detriment. Rather, their sole arguments for dismissal were that she did not sufficiently allege that Defendants sought to benefit themselves in the transaction or that she relied upon their misrepresentations. The trial court erred by accepting Defendants' arguments.

The complaint sufficiently pleads that Defendants sought to benefit from breaching their fiduciary duties to Prisha in two ways.

First, Prisha alleged that Defendants breached their fiduciary duties "to build up and enhance their respective reputations as providers of gender-affirming care." (R p 39 ¶ 126.) Emerson even used Prisha's case to bolster his involvement in the "Charlotte Transgender Healthcare Group," and "received reputational benefit and referrals for surgery as a result of performing 'top surgery' on Prisha." (R p 39 ¶ 132.)

Our appellate courts have explained that the benefit element is satisfied by a healthcare provider's effort to enhance his reputation. *Bryant*, 281 N.C. App. at 638, 870 S.E.2d at 275 (constructive fraud claim failed because no evidence that procedure would "enhance [the doctor's] reputation"); *Watts*, 317 N.C. at 116, 343 S.E.2d at 884 (assuming that buttressing of medical reputations meets the benefit requirement).

Second, the complaint pleads that the Defendants benefited financially from selling services and treatments to Prisha, even though those services were both unnecessary and harmful. As the complaint alleged, "Each Defendant benefited monetarily with every visit from Prisha and every treatment and procedure provided to her . . . ." (R pp 47 ¶ 157.) Defendants received "huge" sums for permanently deforming Prisha's body. (R p 40 ¶ 134.)

A professional improperly seeks to benefit from a breach of his fiduciary duty when he sells services to a client that are harmful or unnecessary. Consider an attorney who charges hourly, knowingly performs 100 hours' worth of unnecessary and unhelpful work, and then bills the client for that time. That attorney has breached his fiduciary duty to his client, and has sought to benefit himself through the breach.

Below, Defendants argued that this benefit theory was inadequate because the benefit must be something more than payment for services actually performed. This argument misunderstands both the law and the facts alleged.

A fiduciary does not benefit from the breach of his duties for purposes of constructive fraud if he would have received the benefit even if he hadn't breached his fiduciary duty. *NationsBank of N.C., N.A. v. Parker*, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000). In *NationsBank*, a bank sued an attorney for constructive fraud, alleging that the attorney falsely notarized documents for his client. *Id.* at 113, 535 S.E.2d at 601. The complaint alleged that this closing attorney benefited because he was paid for his services in closing the transaction. *Id.*

This Court affirmed summary judgment on the constructive fraud claim due to the benefit element. *Id.* at 114, 535 S.E.2d at 602. The benefit element had not been demonstrated because there was "no evidence that the amount paid defendant for notarizing and witnessing the loan documents would have been any different if the documents had not been forged." *Id.* In other words, the plaintiff needed proof that the defendant received a benefit *because of* his breach. Since the attorney-defendant would've been paid the same for closing the transaction, no matter if he forged the documents, the benefit element wasn't met.

The corollary of *NationsBank* is that the benefit element of constructive fraud is adequately pleaded when, as here, the fiduciary got paid *because of* his dishonest conduct. Federal courts have confirmed this point. In such cases, there is a sufficient, causal relationship between the breach and the benefit. *See, e.g.*, *In re NC & VA Warranty Co., Inc.*, 594 B.R. 316, 358 (Bankr. M.D.N.C. 2018) (fee charged to plaintiff was a benefit because, but for the breach, no fee would have been charged); *Wilkins v. Wachovia Corp.*, No. 5:10-CV-00249-D, 2011 WL 902031, at *14 (E.D.N.C. Feb. 28, 2011), *report and recommendation adopted in relevant part, rejected in part for other claims*, No. 5:10-CV-249, 2011 WL 1134706 (E.D.N.C. Mar. 24, 2011) (benefit element satisfied where plaintiff would not have paid beneficial fee if defendant "had made full and accurate disclosures").

Those federal cases capture the type of benefit at stake in this case. Had Defendants been truthful and forthright, Prisha would not have purchased their services, so they would have received no payment. (R pp 38-39 ¶¶ 125-26; R p 47-48 ¶ 157.)

Finally, Prisha sufficiently alleged that she relied upon Defendants' misrepresentations and was misled by their concealments. (R pp 13-14 ¶ 50, 20-21 ¶ 66, 24-25 ¶ 79, 30-31 ¶ 97, 36-37 ¶ 115, 46-47 ¶ 149, 51 ¶¶ 180-82.)

C. Prisha properly pleaded her claim for negligent infliction of emotional distress.

Next, Defendants urged the trial court to dismiss Prisha's negligent infliction of emotional distress claim as untimely under N.C. Gen. Stat. § 1-15(c). The trial court granted that motion, (R p 358), then refused to reinstate the claim after the legislature revived it, (R p 406). If this Court reverses the trial court's order refusing to reconsider and reinstate the claims, then the negligent infliction claim should be reinstated, too. (R pp 389-91 (requesting reinstatement).)

Even if this Court were to find Plaintiff's medical malpractice claim to be time-barred, the negligent infliction claim was still timely. For statute-of-limitations purposes, claims do not accrue (and the clock doesn't begin running) until all essential elements are satisfied. *See Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 214, 171 S.E.2d 873, 884 (1970). Negligent infliction claims are governed by a three-year statute of limitations, which "does not begin to run (accrue) until the 'conduct of the defendant causes extreme emotional distress.'" *Russell v. Adams*, 125 N.C. App. 637, 641, 482 S.E.2d 30, 33 (1997) (quoting *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 12, 437 S.E.2d 519, 525 (1993)).

Dismissal of a complaint under Rule 12(b)(6) due to the running of the statute of limitations "is proper only when all the facts necessary to establish the plea in bar are either alleged or admitted in the plaintiff's pleadings, construing plaintiff's

pleadings liberally in [the plaintiff's] favor." *Id.* Yet Prisha's complaint pleads the opposite. She alleged that she became aware of the injury—and as a result suffered extreme emotional distress from the Defendants' misconduct—only within the year before filing her lawsuit. (R pp 13-14 ¶ 50, 20-21 ¶ 66, 24-25 ¶ 79, 30-31 ¶ 97, 36-37 ¶ 115, 46-47 ¶ 149). Therefore, this claim was timely and could not be dismissed on the pleadings.

D. Prisha properly pleaded a claim under N.C. Gen. Stat. § 75-1.1.

Finally, Prisha brought a claim under N.C. Gen. Stat. § 75-1.1 for unfair and deceptive practices against two individual counselor defendants and the two practices they worked at: Gordon, Tree of Life Counseling, Klein-Fowler, and Family Solutions. (R pp 4, 50-51.) Gordon and Klein-Fowler are counselors. (R p 4 ¶¶ 12, 14.)

The trial court dismissed the claims against these defendants because, as these Defendants argued, their conduct fell within the "learned profession" exemption in N.C. Gen. Stat. § 75-1.1. Section 75-1.1 exempts from its coverage "professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). Dismissal was error because counselors are not members of a learned profession.

The statute doesn't define the term "learned profession," so "courts must look to whether a particular profession has traditionally been considered a learned

profession." *RCDI Const., Inc. v. Spaceplan/Architecture, Plan. & Interiors, P.A.*, 148 F. Supp. 2d 607, 618 (W.D.N.C. 2001), *aff'd*, 29 F. App'x 120 (4th Cir. 2002). Although attorneys and physicians are members of learned professions, other licensed professionals, like electricians and insurance agents are not. *Id.* As to counseling, courts have declined to hold that counselors are members of a learned profession. *McClean v. Duke Univ.*, 376 F. Supp. 3d 585, 610 (M.D.N.C. 2019) (avoiding deciding the issue by holding that the counselors' conduct was not the rendering of professional services).

It's not always possible to determine on the pleadings whether a particular vocation is a learned profession. For example, a federal district court cast doubt on "whether an adoption service professional meets the 'learned profession' exception," holding that it could not be definitively resolved on the pleadings. *Elina Adoption Servs., Inc. v. Carolina Adoption Servs., Inc.*, No. 1:07CV169, 2008 WL 4005738, at *9 (M.D.N.C. Aug. 25, 2008) [App. 12]; *see also Smart Online, Inc. v. Sherb & Co., LLP*, No. 1:10CV244, 2012 WL 13162888, at *2 (M.D.N.C. Mar. 29, 2012) [App. 22-23] (declining to hold that accountants are members of a learned profession at the pleading stage). *Elina Adoption* and *Smart Online* make sense because the party claiming an exemption from section 75-1.1 has the burden of proving it, N.C. Gen. Stat. § 75-1.1(d), which a defendant typically cannot do at the pleading stage.

Moreover, counseling was not considered a learned profession when the learned profession exemption was added to the statute. The phrase "learned profession" should be given the meaning that the phrase had when the legislature enacted it, just as statutory words should always be given the meaning they have at the time of enactment. Antonin Scalia & Bryan A. Garner, *Reading Law* § 7, at 78 (2012) ("Words must be given the meaning they had when the text was adopted."). That is no less true of the learned profession exemption. The touchstone of the test for learned professions, as *RCDI* and this Court have noted, is "tradition." *See Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) ("the practice of law has traditionally been considered a learned profession").

Counseling has not traditionally been understood as a learned profession, nor would the legislature have considered it to be one when it enacted the learned profession exemption. The learned profession exemption was added in 1977. 1977 N.C. Session Laws, ch. 747 (amending N.C. Gen. Stat. § 75-1.1) [App. 1-4]. At that time, counselors were not even a *licensed* profession in North Carolina. They did not become licensed until nearly 20 years later, in 1994. History, Licensed Clinical Counselors of N.C., https://www.lccnc.org/history.php (last visited April 10, 2026); An Act to Provide for the Regulation of the Practice of Counseling and the Licensure of Counselors, 1993 N.C. Session Laws, ch. 514, *available at*

https://www.ncleg.gov/EnactedLegislation/SessionLaws/HTML/1993-1994/SL1993-514.html. Although being a licensed profession does not convert a profession into a "learned" one, the *absence* of a licensure regime is strong evidence that, when the learned profession exemption was adopted, the legislature would not have considered counseling to be a learned profession.

Finally, the section 75-1.1 claim was also timely. It is subject to a four-year statute of limitations. N.C. Gen. Stat. § 75-16.2. When, as here, the claim is "based on fraud," the claim does not accrue until "the fraud is discovered or should have been discovered with the exercise of reasonable diligence." *Trantham v. Michael L. Martin, Inc.*, 228 N.C. App. 118, 126, 745 S.E.2d 327, 334 (2013).

As explained for the negligent infliction claim, because Prisha discovered the fraud within the year before filing suit, *supra* § III.C, the unfair and deceptive practices claim was timely filed.

CONCLUSION

The judgment below should be reversed in its entirety. Every claim was timely. Every claim dismissed at summary judgment was supported by law and evidence. And every claim dismissed under Rule 12(b)(6) was properly pleaded. And the General Assembly's commands in House Bill 805 must be obeyed.

This the 13th day of April, 2026.

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Pursuant to Rule 28(j) of the Appellate Rules of Procedure, counsel certifies that this brief contains no more than 8,750 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 13th day of April, 2026.

/s/ Troy D. Shelton

Troy D. Shelton

No. COA26-132 DISTRICT 38

NORTH CAROLINA COURT OF APPEALS

****

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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CONSOLIDATED APPENDIX AND ADDENDUM

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1977 N.C. Session Laws, ch. 747 .... App. 1-4

Elina Adoption Servs., Inc. v. Carolina Adoption Servs., Inc.,
No. 1:07CV169, 2008 WL 4005738
(M.D.N.C. Aug. 25, 2008).................................... App. 5-12

N.C. Sess. Laws 2025-84 .... App. 13-20

Smart Online, Inc. v. Sherb & Co., LLP,
No. 1:10CV244, 2012 WL 13162888
(M.D.N.C. Mar. 29, 2012).................................. App. 21-23

STATE OF NORTH CAROLINA

1977

Session Laws And Resolutions

PASSED BY THE

1977 GENERAL ASSEMBLY

AT ITS

FIRST SESSION

HELD IN THE CITY OF RALEIGH

BEGINNING ON

WEDNESDAY, THE TWELFTH DAY OF JANUARY, A.D. 1977

ISSUED BY
SECRETARY OF STATE THAD EURE

PUBLISHED BY AUTHORITY

H. B. 1050 **CHAPTER 747**

AN ACT TO REVIVE AND IMPROVE CERTAIN PROVISIONS OF CHAPTER 75 OF THE GENERAL STATUTES, TO PROTECT THE CITIZENS OF NORTH CAROLINA FROM UNFAIR, UNETHICAL, DECEPTIVE AND UNSCRUPULOUS BUSINESS PRACTICES.

The General Assembly of North Carolina enacts:

Section 1. G.S. 75-1.1(a) is rewritten to read as follows:

"(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

Sec. 2. G.S. 75-1.1(b) is rewritten to read as follows:

"(b) For purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession."

Sec. 3. Chapter 75 of the General Statutes is amended by adding a new Section 75-15.2, to read as follows:

"§ 75-15.2. *Civil penalty.*—In any suit instituted by the Attorney General, in which the defendant is found to have violated G.S. 75-1.1 and the acts or practices which constituted the violation were, when committed, specifically prohibited by a court order or knowingly violative of a statute, the court may, in its discretion, impose a civil penalty against the defendant of up to five thousand dollars ($5,000) for each violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant. Any penalty so assessed shall be paid to the General Fund of the State of North Carolina."

Sec. 4. Chapter 75 of the General Statutes is amended by adding a new Article to read as follows:

"§ 75-50. *Definitions.*—The following words and terms as used in this act shall be construed as follows:

(a) 'Debt' means any obligation owed or due or alleged to be owed or due from a consumer.

(b) 'Consumer' means any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes.

(c) 'Debt collector' means any person engaging, directly or indirectly, in debt collection from a consumer except those persons subject to the provisions of Article 9, Chapter 66 of the General Statutes.

"§ 75-51. *Threats and coercion.*—No debt collector shall collect or attempt to collect any debt alleged to be due and owing from a consumer by means of any unfair threat, coercion, or attempt to coerce. Such unfair acts include, but are not limited to, the following:

(a) Using or threatening to use violence or any illegal means to cause harm to the person, reputation or property of any person.

(b) Falsely accusing or threatening to accuse any person of fraud or any crime, or of any conduct that would tend to cause disgrace, contempt or ridicule.

(c) Making or threatening to make false accusations to another person, including any credit reporting agency, that a consumer has not paid, or has willfully refused to pay a just debt.

(d) Threatening to sell or assign, or to refer to another for collection, the debt of the consumer with an attending representation that the result of such sale, assignment or reference would be that the consumer would lose any defense to the debt or would be subjected to harsh, vindictive, or abusive collection attempts.

(e) Representing that nonpayment of an alleged debt may result in the arrest of any person.

(f) Representing that nonpayment of an alleged debt may result in the seizure, garnishment, attachment, or sale of any property or wages unless such action is in fact contemplated by the debt collector and permitted by law.

(g) Threatening to take any action not in fact taken in the usual course of business, unless it can be shown that such threatened action was actually intended to be taken in the particular case in which the threat was made.

(h) Threatening to take any action not permitted by law.

"§ 75-52. *Harassment.*—No debt collector shall use any conduct, the natural consequence of which is to oppress, harass, or abuse any person in connection with the attempt to collect any debt. Such unfair acts include, but are not limited to, the following:

(a) Using profane or obscene language, or language that would ordinarily abuse the typical hearer or reader.

(b) Placing collect telephone calls or sending collect telegrams unless the caller fully identifies himself and the company he represents.

(c) Causing a telephone to ring or engaging any person in telephone conversation with such frequency as to be unreasonable or to constitute a harassment to the person under the circumstances or at times known to be times other than normal waking hours of the person.

(d) Placing telephone calls or attempting to communicate with any person, contrary to his instructions, at his place of employment, unless the debt collector does not have a telephone number where the consumer can be reached during the consumer's nonworking hours.

"§ 75-53. *Unreasonable publication.*—No debt collector shall unreasonably publicize information regarding a consumer's debt. Such unreasonable publication includes, but is not limited to, the following:

(a) Any communication with any person other than the debtor or his attorney, except:

(1) with the written permission of the debtor or his attorney;
(2) to persons employed by the debt collector, to a credit reporting agency, to a person or business employed to collect the debt on behalf of the creditor, or to a person who makes a legitimate request for the information;
(3) to the spouse (or one who stands in place of the spouse) of the debtor, or to the parent or guardian of the debtor if the debtor is a minor and lives in the same household with such parent;
(4) for the sole purpose of locating the debtor, if no indication of indebtedness is made;
(5) through legal process.

(b) Using any form of communication which ordinarily would be seen or heard by any person other than the consumer that displays or conveys any information about the alleged debt other than the name, address and phone number of the debt collector except as otherwise provided in this Article.

(c) Disclosing any information relating to a consumer's debt by publishing or posting any list of consumers, except for credit reporting purposes and the publication and distribution of otherwise permissible 'stop lists' to the point-of-sale locations where credit is extended, or by advertising for sale any claim to enforce payment thereof or in any other manner other than through legal process.

"§ 75-54. *Deceptive representation.*—No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. Such representations include, but are not limited to, the following:

(a) Communicating with the consumer other than in the name (or unique pseudonym) of the debt collector and the person or business on whose behalf the debt collector is acting or to whom the debt is owed.

(b) Failing to disclose in all communications attempting to collect a debt that the purpose of such communication is to collect a debt.

(c) Falsely representing that the debt collector has in his possession information or something of value for the consumer.

(d) Falsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding; falsely representing that the collector is in any way connected with any agency of the federal, State or local government; or falsely representing the creditor's rights or intentions.

(e) Using or distributing or selling any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by a court, an official, or any other legally constituted or authorized authority, or which creates a false impression about its source.

(f) Falsely representing that an existing obligation of the comsumer may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges.

(g) Falsely representing the status or true nature of the services rendered by the debt collector or his business.

"§ 75-55. *Unconscionable means.*—No debt collector shall collect or attempt to collect any debt by use of any unconscionable means. Such means include, but are not limited to, the following:

(a) Seeking or obtaining any written statement or acknowledgement in any form containing an affirmation of any debt by a consumer who has been declared bankrupt, an acknowledgement of any debt barred by the statute of limitations, or a waiver of any legal rights of the debtor without disclosing the nature and consequences of such affirmation or waiver and the fact that the consumer is not legally obligated to make such affirmation or waiver.

(b) Collecting or attempting to collect from the consumer all or any part of the debt collector's fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge.

(c) Communicating with a consumer (other than a statement of account used in the normal course of business) whenever the debt collector has been notified by the consumer's attorney that he represents said consumer.

2008 WL 4005738
Only the Westlaw citation is currently available.
United States District Court,
M.D. North Carolina.

ELINA ADOPTION SERVICES, INC., Plaintiff,
v.
CAROLINA ADOPTION SERVICES, INC. and ABC Adoption Services, Inc., Defendants.

No. 1:07CV169.
|
Aug. 25, 2008.

Attorneys and Law Firms

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MEMORANDUM OPINION

BEATY, Chief District Judge.

***1** This matter is before the Court on Defendants' Motion to Dismiss Plaintiff's Amended Complaint [Doc. # 24] pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff Elina Adoption Services, Inc. ("Elina" or "Plaintiff") filed a civil action against Defendants, Carolina Adoption Services, Inc. ("CAS") and ABC Adoption Services, Inc. ("ABC") (together "Defendants"), in the United States District Court for the Northern District of Georgia on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. The action was subsequently transferred to the Middle District of North Carolina on motion by the Defendants. Defendants then filed a Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) [Doc. # 15]. However, before the Court had an opportunity to rule upon Defendants' Motion to Dismiss Plaintiff's Complaint [Doc. # 15], Plaintiff filed an Amended Complaint [Doc. # 21]. In the Amended Complaint, Plaintiff alleges claims of breach of contract, defamation, conspiracy, tortuous interference with a business relationship, and unfair and deceptive trade practices. In addition, Plaintiff asserts claims for attorney's fees and punitive damages. Defendants have now filed a Motion to Dismiss Plaintiff's Amended Complaint [Doc. # 24] seeking dismissal of each of Plaintiff's claims for failure to state a claim upon which relief may be granted. For the reasons stated herein, Defendants' Motion to Dismiss Plaintiff's Complaint [Doc. # 15] and Defendants' Motion to Dismiss Plaintiff's Amended Complaint [Doc. # 24] will be DENIED.

I. FACTUAL BACKGROUND

This action arises out of a business dispute between Plaintiff Elina and Defendants ABC and CAS. Elina is a Georgia corporation that specializes in facilitating adoptions from Russia to the United States. CAS, a North Carolina corporation, and ABC, a Virginia corporation, are child adoption agencies which approve adoptive placements of Russian children. Home study documentation is required to be submitted to Russian authorities for processing by an accredited agency before Russian children can be adopted. ABC is accredited by the Russian Government to approve the placement of orphans from Russia for adoption in the United States. CAS is authorized to process cases using ABC's accreditation.

Plaintiff alleges that in March of 2003, Elina, ABC and CAS entered into a written agreement (the "Agency Agreement") whereby ABC and CAS agreed to review and forward Elina's home study documents to the Russian Government for processing and accreditation in exchange for a fixed fee. It is alleged that CAS entered into the Agency Agreement in its capacity as sole member of ABC's Board of Directors. It is further alleged that ABC subsequently ratified the Agency Agreement and became a party to the same. Under the alleged terms of the Agency Agreement, Elina assisted families in the United States with home study documentation. The documentation was then sent to ABC and CAS for processing and review. Defendants, however, dispute that any such Agency Agreement existed.

***2** Plaintiff contends that Defendants breached the Agency Agreement when a representative of ABC and CAS, operating in Russia, demanded that Elina pay fees that were substantially higher than those previously paid. Further, Plaintiff contends that Defendants made defamatory statements about Plaintiff's business. In support thereof, Plaintiff alleges that an ABC and CAS agent told Plaintiff's clients that Elina could no longer get home studies approved in Russia because the Ministry of Education recommended

that ABC and CAS no longer work with Elina. Plaintiff further alleges that after the alleged defamatory statements, Defendants completed the adoption process for Plaintiff's clients and thereafter refused to do any further business with Plaintiff. Plaintiff contends that as a result of Defendants' actions its business collapsed.

Plaintiff initiated this action by filing a Complaint in the United States District Court for the Northern District of Georgia. Defendants subsequently filed a Motion to Dismiss or Alternatively, Transfer the Case to the Middle District of North Carolina pursuant to Federal Rule of Civil Procedure 12(b)(1) and (3) arguing improper venue and lack of subject matter jurisdiction [Doc. # 4]. In an Order issued by the Northern District of Georgia [Doc. # 9], Defendants' motion was granted in part and denied in part, and the matter was transferred to the Middle District of North Carolina. Defendants then filed a Motion to Dismiss Plaintiff's Original Complaint pursuant to Rule 12(b)(6)[Doc. # 15]. However, before Defendants' Motion to Dismiss Plaintiff's Original Complaint was ruled upon, Plaintiff filed an Amended Complaint [Doc. # 21] alleging breach of contract, defamation, conspiracy, tortuous interference with a business relationship, and unfair and deceptive trade practices against Defendants. Defendants have now filed a Motion to Dismiss Plaintiff's Amended Complaint [Doc. # 24] seeking dismissal of all of Plaintiff's claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

II. STANDARD OF REVIEW

Defendants have moved to dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). Rule 12(b)(6) provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6) (2008). A motion to dismiss pursuant to Rule 12(b)(6) should be granted "only in very limited circumstances." *Rogers v. Jefferson–Pilot Life Ins. Co,* 883 F.2d 324, 325 (4th Cir.1989). In determining whether to grant a Motion to Dismiss, the court evaluates the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded factual allegations. *Randall v. United States,* 30 F.3d 518, 522 (4th Cir.1994). Fed.R.Civ.P. 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a) (2008). "This 'statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests.' " *Anderson v. Sara Lee Corp.,* 508 F.3d 181, 188 (4th Cir.2007) (quoting *Eirckson v. Pardus,* ––U.S. ––––, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007) (citing *Bell Atlantic v. Twombly,* ––– U.S. ––––, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007)). Additionally, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly,* ––– U .S. at ––––, 127 S.Ct. at 1974. However, the Court "need not accept the legal conclusions drawn from the facts," nor "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Giarratano v. Johnson,* 521 F.3d 298, 302 (4th Cir.2008) (quoting *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship,* 213 F.3d 175, 180 (4th Cir.2000).[1]

1 Plaintiff argues that Defendants' 12(b)(6) motion is untimely, citing Fed.R.Civ.P. 12(g). Rule 12(g) provides that a party raising any 12(b) defenses by pre-answer motion waives any 12(b) defenses not included in therein. *See* Fed.R.Civ.P. 12(g) (2008). The Court finds that Defendants' motion is not untimely. Plaintiff filed an Amended Complaint. Defendants subsequently filed a Motion to Dismiss Plaintiff's Amended Complaint. For the reasons discussed *infra* Part III.A., any previous motions based on Plaintiff's Original Complaint are moot. Moreover, Rule 12(h) provides that a 12(b)(6) motion may nevertheless be raised in a responsive pleading. *See* Fed.R.Civ.P. 12(h)(2)(A) (2008). In their responsive pleading, Defendants asserted Rule 12(b)(6) as a defense to Plaintiff's allegations. Therefore, Defendants in fact raised a 12(b)(6) motion within their responsive pleading as expressly permitted by Rule 12(h). Accordingly, the Court will allow Defendants to proceed with the present 12(b)(6) motion and will consider the arguments on the merits in this Memorandum Opinion.

III. DISCUSSION

A. Plaintiff's Breach of Contract Claim

***3** Plaintiff alleges that Defendants ABC and CAS breached the Agency Agreement. Defendants contend that there was no binding agreement between the parties, or in the alternative, that there was no breach of its provisions. Under North Carolina law, in order to state a claim for breach of contract there must be (1) a valid contract; and (2) breach of the terms of that contract. *Poor v. Hill* 138 N.C.App. 19, 27, 530 S.E.2d 838, 843 (2000) (citing *Jackson v. California Hardwood Co.,* 120 N.C.App. 870, 871, 463 S.E.2d 571, 572 (1995)). A valid contract exists when there is an agreement based on a meeting of the minds and sufficient consideration. *Creech ex rel. Creech v. Melnik* 147 N.C.App. 471, 477, 556 S.E .2d 587, 591 (2001).

Defendants contend that there was no valid contract because there was no signed writing between the parties.[2] Defendants cite *Croom v. Goldsboro Lumber Co.* arguing that absent allegations and proof of mutual assent, a contract is not valid and enforceable. 182 N.C. 217, 108 S.E. 735 (1921). However, a signed writing is not essential to the validity of a contract; "[a]ssent may be shown in other ways, such as acts, or conduct or silence." *Burden Pallet Co., Inc. v. Ryder Truck Rental* 49 N.C.App. 286, 289, 271 S.E.2d 96, 97 (1980). Although Plaintiff's Amended Complaint does not explicitly allege that there was a signed writing between the parties, the Court finds that because Plaintiff alleged that the parties undertook obligations and retained benefits pursuant to mutually agreed upon terms, Plaintiff has sufficiently alleged the existence of a valid and enforceable contract. Specifically, Plaintiff alleges that pursuant to the Agency Agreement, "Elina assisted families in the United States with the home study documentation required to be submitted to Russian authorities prior to adopting Russian children and sent the documents to ABC/CAS for processing and review." (Amended Complaint ¶ 9) Further, the Amended Complaint alleges that the Agency Agreement provided that ABC and CAS were then required to "review and approve home studies submitted by Elina, to monitor and require compliance to the policies of Russia and [CAS] regarding adoption and to recommend families for adoption documents." (Amended Complaint ¶ 15) Finally, the Amended Complaint alleges that the Agency Agreement provided that Elina would pay fixed fees to CAS in exchange for CAS and ABC's services, and that "every effort w[ould] be made to maintain this agreement by both parties." (Amended Complaint ¶ 15) Considering these allegations, the Court finds that Plaintiff has adequately alleged that there was a valid contract between the parties.

2 The Court notes that despite their present argument that there was no written agreement between the parties, Defendants relied on a Forum Selection Clause in the Agency Agreement in moving to transfer venue from the Northern District of Georgia to this Court.

In the alternative, Defendants argue that the Agency Agreement contemplated and authorized the Defendants' conduct of which Plaintiff now complains, and that, consequently, Plaintiff has failed to establish that there was any breach of the Agency Agreement. Specifically, Defendants argue that the actions Plaintiff has alleged in support of its breach of contract claim, that is, that the agreement was breached when Defendants demanded higher fees, refused to provide further adoption services for Plaintiff, and further, that the Defendants convinced families not to continue to use Elina's services, were expressly contemplated and authorized under the terms of the Agency Agreement. In support of this argument, Defendants point to Plaintiff's Original Complaint to which a copy of the Agency Agreement was attached. With regard to Defendants' present 12(b)(6) motion, the Amended Complaint is the pleading that controls at this stage in the litigation. *See* *Young v. City of Mount Rainer,* 238 F.3d 567, 572 (4th Cir.2001) (stating that an amended complaint ordinarily supersedes the original complaint and that as such, the Court should not consider allegations in the original complaint to dismiss the amended complaint). No additional documents were attached to the Amended Complaint. Therefore, Defendants' arguments in support of their motion to dismiss in so far as they are based upon allegations in Plaintiff's Original Complaint have been rendered moot by virtue of the filing of an Amended Complaint. *See,* *Hariston v. N.C. Agri. & Tech. State Univ.,* No. 1:04CV1203, 2005 WL 2136923, at *1 (M.D.N.C. Aug. 5, 2005) (stating that where a motion to dismiss is pending on the original complaint, the motion is "directed at a pleading that is no longer operative, and the [m]otion therefore is moot.").[3]

3 The Court notes that Defendants in their Reply Brief in response to Plaintiff's argument that Defendants should be precluded from filing a second 12(b)(6) motion to dismiss, stated, "[the] law is clear that the filing of an Amended Complaint moots the original Complaint and any Motions pending with respect to the same." (Def. Reply Br. at 2) Defendants further recognized the rule articulated by this Court in *Hariston,* 2005 WL 2136923, at *1, that where a motion to dismiss is directed at a pleading that is no longer operative, the motion is rendered moot. Yet, Defendants, in the face of the rules they explicitly cited in their Reply Brief, base their present arguments on Plaintiff's Original Complaint and the attachments thereto. For the reasons discussed herein, Defendants' arguments at this stage in the litigation cannot stand. The Court notes, however, that Plaintiff's Original Complaint and attached affidavits could be used as admissions in support of a motion for summary judgment pursuant to Rule 56.

***4** Moreover, an inquiry into the Defendants' conduct in light of the terms of the Agency Agreement is more appropriately reserved for consideration after the conclusion of discovery and upon a motion for summary judgment. The question presently before the Court is whether Plaintiff has alleged facts in its Amended Complaint so as to give Defendants sufficient notice of its claims. With regard to

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that question, the Court will not at this stage consider the conduct of the parties, but rather, will focus its analysis on the allegations as stated in Plaintiff's Amended Complaint. In that regard, the Amended Complaint alleges that ABC and CAS breached their agreement with Elina when they demanded higher fees than the agreement contemplated and subsequently refused to continue to provide adoption services in Russia for Elina. The Court finds that these allegations are sufficient to give Defendants notice of Plaintiff's breach of contract claim. Accordingly, Defendants' motion to dismiss Plaintiff's breach of contract claim will be denied.

B. Plaintiff's Defamation Claim

Plaintiff has also asserted a claim for defamation against Defendants ABC and CAS. In order to recover for a claim of defamation under North Carolina law, "a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley, PLLC v. Cooper,* 153 N.C.App. 25, 29, 568 S.E.2d 893, 897 (2002). A claim for defamation may be asserted by alleging either of two torts: libel or slander. *Id.* at 29, 588 S.E.2d at 898. Libel is any false written publication to a third party; whereas, slander is a false oral communication which is published to a third party. *Barker v. Kimberly–Clark Corp.,* 136 N.C.App. 455, 459, 524 S.E.2d 821, 824 (2000).

In the present case, Plaintiff alleges that the defamation was an oral communication; therefore, the allegations in the complaint must be sufficient to satisfy the elements of either slander *per se* or slander *per quod.* "Slander per se is a false statement which is orally communicated to a third person and amounts to: (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease." *Id.,* at 459, 524 S.E.2d at 824. "To establish a claim for slander *per se,* a plaintiff must prove: (1) defendant spoke base or defamatory words which tended to prejudice him in his reputation, office, trade, business or means of livelihood or hold him up to disgrace, ridicule or contempt; (2) the statement was false; and (3) the statement was published or communicated to and understood by a third person." *Friel v. Angell Care, Inc.,* 113 N.C.App. 505, 509, 440 S.E.2d 111, 113–14 (1994). When the defamatory communication is slander *per se,* "a prima facie presumption of malice and a conclusive presumption of damages arises, obviating the need for the plaintiff to plead and prove special damages." *Id.* at 460, 524 S.E.2d at 825. "When the defamatory character of the words does not appear on their face, but only in connection with extrinsic, explanatory facts, they are only actionable as ... slander per quod." *Eli Research, Inc.,* 312 F.Supp.2d at 761 (citing *Badame v. Lampke,* 242 N.C. 755, 756–57, 89 S.E.2d 466, 467–68 (1955)). When stating a claim for slander *per quod,* however, a plaintiff must plead and prove special damages, in addition to the aforementioned elements of a claim for slander *per se. Id.* at 757, 89 S.E.2d at 825. Here, Plaintiff has alleged that the statements by Defendants impeached Plaintiff in its profession as an agency that specialized in facilitating adoptions from Russia. Therefore, the Court finds that Plaintiff has alleged that the statements were slanderous *per se,* thus, obviating the need for Plaintiff to plead and prove special damages.

***5** With regard to Plaintiff's claim of slander *per se,* Defendants contend that the claim should be dismissed because it was not pled with sufficient particularity, arguing that North Carolina's heightened pleading standard for defamation actions applies. In this regard, Defendants claim that Plaintiff's Amended Complaint does not allege with sufficient particularity: (1) the identities of the individuals who allegedly made defamatory statement to third parties; (2) the identities of the individuals to whom the alleged defamatory statements were made; (3) the place and time the statements were made; or (4) the specific content of the alleged defamatory statements.

Defendants contend that North Carolina's heightened pleading standard, which requires defamation claims to be pled with particularity, should apply. Defendants' contention, however, is without merit. Although state substantive law applies in determining whether a plaintiff has satisfied the elements of a claim, "cases in federal court are subject to federal procedural law." *Martin v. Boyce,* No. 1:99CV01072, 2000 WL 1264148, at *8 (M.D.N.C. July 20, 2000) (citing *Hanna v. Plummer,* 380 U.S. 460, 465, 85 S.Ct. 1136, 1140 (1965) (holding that federal courts sitting in diversity must apply state substantive law and federal procedural law)). The Federal Rules of Civil Procedure do not prescribe a special pleading standard for libel or slander. Nor has the Fourth Circuit Court of Appeals imposed a heightened pleading standard for actions for defamation. In *Wuchenich v. Shenandoah Mem'l Hosp.,* No. 99–1273, 2000 WL 665633, at *14 (4th Cir. May 22, 2000), the Fourth Circuit expressly stated that "Rule 8 does not contain a special pleading requirement for defamation;" therefore, the legal sufficiency of a claim alleging defamation should be determined by "Rule 8(a)'s liberal pleading requirement of a short and

plain statement showing that [Plaintiff] is entitled to relief." *Wuchenich,* 2000 WL 665633, at *14; *see also, Martin,* 2000 WL 1264148 at *9 (declining to measure defamation claims against a heightened standard and instead following the standards set forth in Fed.R.Civ.P. 8(a)). Consequently, in light of Rule 8(a) which is the proper standard of review for Plaintiff's defamation claim, Defendants' contentions that Plaintiff's Amended Complaint fails to specify such details as the place and time the statements were made and the specific content of the alleged defamatory statements, are irrelevant. *See Martin,* 2000 WL 1264148 at *9 (holding that defendants' arguments that plaintiff failed to allege "the exact words alleged to be defamatory and ... the time and place of each allegedly defamatory statement" were without merit).

Next, Defendants argue that Plaintiff has failed to establish the elements of a claim for slander *per se.* The Court finds, however, that Plaintiff has sufficiently pled each element of claim for slander *per se* under North Carolina substantive law. The first element requires Plaintiff to allege that "[d]efendant spoke base or defamatory words which tended to prejudice him in his reputation, office, trade, business or means of livelihood or hold him up to disgrace, ridicule or contempt." *Friel,* 113 N.C.App. at 509, 440 S.E.2d at 113–14. Although Defendants argue that Plaintiff failed to set out the identity of the parties who allegedly made the defamatory statements, Plaintiff's Amended Complaint alleges that employees of ABC and CAS, specifically, Oleg Oleinikov and Tom Jackson, told several of Elina's clients, on several occasions that Elina was no longer qualified to set up adoptions in Russia. The Amended Complaint further alleges that these were defamatory statements which held Plaintiff in disgrace, ridicule, and contempt, and that Plaintiff suffered economic damages, including but not limited to total loss of its business. Therefore, the Court finds that Plaintiff's allegations in this regard are sufficient to satisfy the first element of a claim for slander *per se.*

***6** The second element requires that Plaintiff allege that Defendants' statements were false. *See Friel,* 113 N.C.App. at 509, 440 S.E.2d. at 113–14. The Amended Complaint alleges that Oleg Oleinikov falsely stated that Elina could no longer get home studies approved in Russia because the Ministry of Education recommended that ABC and CAS no longer work with Elina. Because Plaintiff has alleged that the statement was false, the Court finds that Plaintiff has sufficiently pled the second element of its defamation claim.

The third element requires that Defendants' statements be published or communicated to and understood by a third person. Contrary to Defendants' contention that Plaintiff failed to allege the identities of the individuals to whom the alleged defamatory statements were made, the Amended Complaint states that the alleged defamatory statements were communicated to Denise Hardin, Susan Hopson, Dawn Levreau, Jennifer Hinton, and other Elina clients.[4] The Court finds that these allegations are sufficient to satisfy the third element of a cause of action for slander *per se.* Accordingly, in light of Federal Rule of Civil Procedure 8(a), which does not require a defamation claim to be pled with particularity, the Court concludes that Plaintiff's allegations are sufficient to establish a prima facie case of slander *per se.* Therefore, Defendants' Motion to Dismiss with respect to Plaintiff's defamation claim will also be denied.

4 Defendants' arguments regarding whether the statements were communicated to a third person based upon the affidavits attached to Plaintiff's previous pleadings are misplaced at this stage in the litigation. Such arguments based upon the affidavits are better reserved for a later stage of the litigation pursuant to a Rule 56 motion for summary judgment.

C. Plaintiff's Civil Conspiracy Claim

In Count III of the Amended Complaint, Plaintiff asserts a cause of action for common law civil conspiracy against Defendants. Here, Defendants have moved to dismiss this claim arguing that there is no separate cause of action for conspiracy in North Carolina. While Defendants are correct that there is no cause of action for civil conspiracy *per se,* an "action may lie for wrongful acts committed pursuant to a conspiracy." *Henderson v. LeBauer,* 101 N.C.App. 255, 260, 399 S.E.2d 142, 145 (1991). In order to state a claim for civil conspiracy under North Carolina law, Plaintiff must allege that there was: "(1) an agreement between two or more persons to commit a wrongful act; (2) an act in furtherance of the agreement; and (3) damage to the plaintiff as a result." *Eli Research, Inc. v. United Comm. Group, LLC,* 312 F.Supp.2d 748, 763 (M.D.N.C. Apr. 6, 2004) (citing *Pleasant Valley Promenade, L.P., v. Lechmere, Inc.,* 120 N.C.App. 650, 657, 464 S.E.2d 47, 54 (1995)). "[L]iability attaches as a result of the wrongful act committed, not the agreement itself." *Eli Research, Inc.,* 312 F.Supp.2d at 763 (citing *Dickens v. Puryear,* 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981)). Thus, "the existence of an underlying tortious act is the key to establishing a civil conspiracy." *Id.* With regard to these elements, the Amended

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Complaint alleges that Defendants conspired with each other and "upon information and belief, with others," to defame Plaintiff, and that Defendants committed acts in furtherance of that conspiracy. Finally, Plaintiff alleges that it suffered damages in excess of $75,000. The Court finds that Plaintiff's allegations of defamation as the wrongful act underlying the civil conspiracy claim, in addition to Plaintiff's allegations of an agreement between Defendants ABC and CAS to defame the Plaintiff, are sufficient to put Defendants on notice of Plaintiff's claim for civil conspiracy. As such, Defendants' motion to dismiss this claim will also be denied.

D. Plaintiff's Tortious Interference with a Contractual Relationship Claim

***7** Count IV of Plaintiff's Amended Complaint asserts a cause of action for tortious interference with a business relationship. North Carolina, however, does not recognize a cause of action for tortious interference with a business relationship. To the extent that Plaintiff is attempting to allege a cause of action for tortious interference with a *contractual* relationship, Plaintiff must plead the following elements: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff. *Childress v. Abeles,* 240 N.C. 667, 674, 84 S.E.2d 176, 181–82 (1954). *See also, Eli Research,* 312 F.Supp.2d at 756.

Defendants contend that Plaintiff has failed to establish each of the elements set forth above. With respect to the first element, Defendants argue that Plaintiff failed to set forth specific details regarding their contracts with families it assisted in adopting children from Russia. To that end, Defendants contend that Plaintiff's allegations are insufficient because they fail to allege the names of all the parties to the alleged contracts, the dates and locations where the contracts were executed, the form of the contracts—whether oral or written, and the terms of contracts. In support of their argument that the aforementioned details are required to state a claim for tortious interference with a contract, Defendants cite *Moore v. Fidelity Fin. Servs., Inc.,* 869 F.Supp. 557 (N.D.Ill.1999). The Court notes that Defendants' authority is not binding on this Court in this district; and further, that *Moore* is inapplicable to the allegations at bar. First, *Moore* addressed the sufficiency of the allegations of a breach of contract claim under Illinois law, rather than a claim for tortious interference with a contractual relationship as recognized by North Carolina law. Moreover, when assessing the breach of contract claim in that case, *Moore* addressed the defendant's motion for a more definite statement pursuant to Rule 12(e) (which that court denied, finding that the plaintiff had "recite[d] the relevant agreement, the basic contents of that agreement, and the pertinent parties." *Id.* at 560–61).

With regard to the elements of Plaintiff's tortious interference with a contract claim, the Court finds that Plaintiff has sufficiently alleged each element to establish a prima facia case for tortious interference with a contract. With regard to the first element, that there be a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person, Plaintiff alleges that in 2005 it executed and maintained contracts with the Hopson, Hardin, Levreau and Hinton families to facilitate the adoption of Russian children in exchange for a fee. Regarding the second element requiring that the defendants have some knowledge of the contract to which they are alleged to have interfered, Plaintiff alleges that Defendants were aware of Plaintiff's contracts with these families. Next, in satisfaction of the third element, that the defendants intentionally induced the third person not to perform the contract, Plaintiff alleges that Defendants intentionally induced these families to terminate contractual relations with Plaintiff and instead enter into contracts with Defendants. The Court finds that these allegations are sufficient to satisfy the first, second and third elements of Plaintiff's claim for tortious interference with a contract.

***8** Concerning the fourth element, which requires Plaintiff to allege that Defendants acted without justification in interfering with its contract, Defendants argue that they were in fact justified in interfering with Plaintiff's contractual relationships. The Court notes that "[u]nless it appears on the face of the complaint that a defendants' conduct was justified, justification is an affirmative defense." *Embree Const. Group,* 330 N.C. at 499, 411 S.E.2d at 925. Therefore, unless Defendants' actions appear justified on the face of Plaintiff's Complaint, Defendants' contentions in this regard are a matter to be decided after resolution of the facts at issue in this dispute. This Court, looking only to Plaintiff's Complaint as it must when considering a Rule 12(b)(6) motion to dismiss, must determine whether it appears from the face of Plaintiff's Complaint that Defendants' actions were justified. To that end, Defendants again direct the Court's attention to the attachments filed along with Plaintiff's Original Complaint in arguing that their actions were justified. As previously discussed, Defendants' arguments with regard to

Plaintiff's Original Complaint are moot. The Court finds that Defendants' actions do not appear to be justified on the face of Plaintiff's Amended Complaint. On the contrary, Plaintiff's Amended Complaint states that Defendants acted "without privilege and with intent to injure Elina." Therefore, because Defendants' conduct does not appear to be justified on the face of the Amended Complaint, and because Plaintiff has expressly alleged that Defendants' interference was not justified, the Court finds that Plaintiff has sufficiently alleged the fourth element of a claim for tortious interference with a contractual relationship.

With respect to the fifth and final element of Plaintiff's claim for tortious interference with a contractual relationship, that is, that Defendants interference resulted in actual damage to Plaintiff, Defendants argue that Plaintiff failed to specify the nature of its sustained pecuniary damages. However, Defendants have not cited any authority which would support their contention that Plaintiff is required to specify how it arrived at its measure of damages in the Amended Complaint. While the North Carolina courts have not defined the element of "actual damages" for a tortious interference with a contract claim, the courts have observed that cases asserting this cause of action involved a claim for "actual monetary damages." *Burgess v. Busby,* 142 N.C.App. 393, 403–04, 544 S.E.2d 4, 10 (2001) (citing *Childres v. Abeles,* 240 N.C. 667, 84 S.E.2d 176 (1954) (finding that plaintiff who was entitled to commissions suffered actual damage as a result of defendants' tortious interference with plaintiff's contract)); *Lexington Homes Inc. v. W.E. Tyson Builders, Inc.,* 75 N.C.App. 404, 412, 331 S.E.2d 318, 323 (1985) (holding that defendant stopping payment on $42,000 worth of checks resulting in checkholders filing liens, tended to show that defendant was actually damaged in some pecuniary amount by the tort complained of); *Barker v. Kimberly–Clark Corp.,* 136 N.C.App. 455, 462, 524 S.E.2d 821, 826 (2000) (overturning award of summary judgment where actions of defendants caused plaintiff to lose employment, resulting in actual damage). In the present case, Plaintiff has alleged that it suffered "significant pecuniary damages, including a total loss of its business," as a result of the Defendants' interference with Plaintiff's contracts with families seeking to adopt children from Russia. The Court finds that viewed in the light most favorable to Plaintiff, an allegation asserting a "total loss of its business" is sufficient to state a claim for actual monetary damage suffered by Plaintiff. The Court notes that, ultimately, Plaintiff will have to present evidence to establish actual damages, and the Court offers no opinion as to whether Plaintiff will be able to meet that test. However, the Court concludes that given Plaintiff's allegations of a "total loss of its business," Plaintiff should not be denied the opportunity to produce evidence of damages due to the Defendants' alleged interference with its contractual relationships. Therefore, the Court concludes that Plaintiff's allegations are sufficient to satisfy the final element of its claim for tortious interference with a contract, that it has suffered actual damage.

***9** Having considered each of the elements, the Court concludes that Plaintiff's allegations are sufficient to establish the prerequisites for a claim of tortious interference with a contractual relationship. Accordingly, to the extent that Plaintiff is asserting a claim for tortious interference with a contractual relationship, Defendants' Motion to Dismiss that claim will also be denied.

E. Plaintiff's Unfair and Deceptive Trade Practices Claim

Plaintiff also asserts a claim under North Carolina's Unfair and Deceptive Trade Practices Act, ("UDTPA"), N.C. Gen.Stat. § 75–1.1. To prevail on such a claim, a plaintiff must prove that: (1) the defendant committed unfair or deceptive acts, (2) the defendants' action was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff. *Eli Research, Inc.,* 312 F.Supp.2d at 757; *Dalton v. Camp,* 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001);

Defendants do not dispute that Plaintiff has sufficiently pled the three essential elements of a claim under UDTPA; rather, Defendants contend that they are exempt from the statute by the "learned profession" exception. N.C. Gen.Stat. § 75–1.1(b) broadly defines commerce as "business activity, however denominated ." *Id.; Dalton,* 353 N.C. at 656–57, 548 S.E.2d at 711. However, "[p]rofessional services rendered by a member of a learned profession" are specifically excluded by N.C. Gen.Stat. § 75–1.1(b). While the statutes do not define the term "learned profession," North Carolina courts have said that "[a][l]earned 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. Hosp., Inc.,* 58 N.C.App. 414, 445, 293 S.E.2d 901, 920 (1982) (quoting *Commonwealth v. Brown,* 302 Mass. 523, 527, 20 N.E.2d 478, 481 (1939)). Further, the North Carolina Courts have consistently found that members of the medical and legal professions are members of a "learned profession." *See Philips v. Triangle Women's Health Clinic,* 155 N.C.App. 372, 378–79, 573 S.E. 600, 604–05 (2002); *Boyce & Isley v. Cooper,* 152 N.C.App. 25, 36,

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568 S.E.2d 893, 902 (2002); *Reid v.. Ayers,* 128 N.C.App. 261, 266, 531 S.E.2d 231, 236 (2000). Defendants cite no authority to support their contention that adoption service professionals are akin to medical and legal professionals. Moreover, this Court has not adopted a position with regard to whether an adoption service professional meets the "learned profession" exception. Consequently, the Court finds that a determination of whether Defendants meet this "learned profession" exception would require the Court to make findings of fact which are not appropriate at the motion to dismiss stage and should be determined at either the summary judgment stage or at trial. Therefore, Defendants' Motion to Dismiss Plaintiff's claim under the UDTPA will also be denied.

F. Plaintiff's Request for Attorney's Fees

***10** In Count VI of the Amended Complaint, Plaintiff requests recovery of attorney's fees alleging that the Defendants have acted in bad faith, that they have been "stubbornly litigious," and that they have caused Plaintiff unnecessary trouble and expense. As a general rule, attorney's fees are not recoverable as an item of damages unless expressly authorized by statute. *Stillwell Enters., Inc. v.. Interstate Equip. Co.,* 300 N.C. 286, 289, 266 S.E.2d 812, 814–15 (1980). N.C. Gen.Stat. § 1D–45 permits an award of attorney's fees "against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious." N.C. Gen. Stat § 1D–45 (2001) Because an award of attorney's fees requires findings of fact, any final determination regarding Plaintiff's recovery of attorney's fees will be addressed by the Court's final judgment at the conclusion of this litigation. Therefore, Defendants' Motion to Dismiss Plaintiff's claim for attorney's fees is denied at this time.

G. Plaintiff's Request for Punitive Damages

Finally, Plaintiff requests punitive damages against Defendants. Pursuant to N.C. Gen.Stat. § 1D–15(a), "punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that fraud, malice or willful wanton conduct was present and was related to the injury for which compensatory damages were awarded." *Id.* Defendants have moved to dismiss Plaintiff's claim for punitive damages arguing that Plaintiff has failed to sufficiently allege any of its underlying tort claims, and thus Plaintiff has no basis to state a claim for punitive damages. The Court has previously determined that Plaintiff has sufficiently stated claims of defamation and tortuous interference with a contractual relationship. Further, Plaintiff has alleged that Defendants engaged in conduct which demonstrated ill will or malice toward Plaintiff. For these reasons, the Court will not dismiss Plaintiff's claim for punitive damages. Accordingly, Defendants' Motion to Dismiss Plaintiff's request for punitive damages will also be denied.

IV. CONCLUSION

Because Plaintiff has filed an Amended Complaint, Defendants' Motion to Dismiss Plaintiff's Original Complaint [Doc. # 15] will be DENIED as moot. More appropriately before the Court is Defendants' Motion to Dismiss Plaintiff's Amended Complaint [Doc. # 24]. With respect to Defendants' Motion to Dismiss Plaintiff's Amended Complaint, the Court finds that Plaintiff has established a prima facie case for its claims of breach of contract, defamation, civil conspiracy, tortious interference with a contract, and unfair and deceptive trade practices, and has sufficiently stated a claim for attorney's fees and punitive damages. Therefore, Defendants' Motion to Dismiss Plaintiff's Amended Complaint [Doc. # 24] pursuant to Rule 12(b)(6) for failure to state claim upon which relief may be granted will also be DENIED.

***11** An Order consistent with this Memorandum Opinion will be filed contemporaneously herewith.

All Citations

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Exhibit A

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2025

SESSION LAW 2025-84
HOUSE BILL 805

AN ACT TO OFFICIALLY RECOGNIZE TWO SEXES IN NORTH CAROLINA, TO PREVENT THE SEXUAL EXPLOITATION OF WOMEN AND MINORS, TO LIMIT THE USE OF STATE FUNDING, TO MODIFY THE LAW RELATED TO BIRTH CERTIFICATES, TO MODIFY THE LAW RELATED TO CIVIL REMEDIES FOR GENDER TRANSITION PROCEDURES ON NON-MINORS, TO ALLOW STUDENTS WITH RELIGIOUS OBJECTIONS TO BE EXCUSED FROM CERTAIN CLASSROOM DISCUSSIONS OR ACTIVITIES, AND TO ALLOW PARENT ACCESS TO LIBRARY BOOKS AND TO PROVIDE FOR RESTRICTIONS ON SCHOOL SLEEPING QUARTERS.

Whereas, on January 20, 2025, President Donald J. Trump issued Executive Order 14168, titled "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," which affirms that the United States recognizes only two sexes–male and female–as immutable and grounded in biological reality; and

Whereas, the General Assembly finds that North Carolina must provide clarity, certainty, and uniformity to its laws by requiring that the laws and policies of the State reflect and apply biologically grounded definitions of sex; and

Whereas, the General Assembly must ensure compliance with Executive Order 14168 and federal policy directives issued by the federal government to maintain eligibility for any and all federal funding and program participation; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1.(a) Chapter 12 of the General Statutes is amended by adding a new section to read:

"**§ 12-3.3. Official recognition of two sexes in all administrative rules, regulations, or public policies adopted by the State of North Carolina or its political subdivisions.**

The following definitions shall apply to all administrative rules, regulations, or public policies adopted by the State of North Carolina or its political subdivisions, unless otherwise specified:

(1) Biological sex. – The biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual's psychological, chosen, or subjective experience of gender.

(2) Boy. – A minor human male.

(3) Father. – A male parent.

(4) Female. – A term that when used to refer to a natural person, means a person belonging, at conception, to the sex characterized by a reproductive system with the biological function of producing ova (eggs).

(5) Gender identity. – A term that means an individual's self-declared identity that may not align with biological sex and, being a subjective internal sense, shall not be treated as legally or biologically equivalent to sex.
(6) Girl. – A minor human female.
(7) Male. – A term that when used to refer to a natural person, means a person belonging, at conception, to the sex characterized by a reproductive system with the biological function of producing sperm.
(8) Man. – An adult human male.
(9) Mother. – A female parent.
(10) Woman. – An adult human female."

SECTION 1.(b) This section becomes effective January 1, 2026.

SECTION 2.(a) Chapter 66 of the General Statutes is amended by adding a new Article to read:

"Article 51A.

"Prevent Sexual Exploitation of Women and Minors.

"**§ 66-505. Short title; definitions.**

(a) This Article shall be known and may be cited as the "Prevent Sexual Exploitation of Women and Minors Act."

(b) The following definitions apply in this Article:

(1) Authorized representative. – With respect to an individual:
a. A person authorized in writing under State or other applicable law by the individual to act on behalf of the individual with regard to the matter in question; or
b. In the case of an individual under the age of 18, a parent or legal guardian of the individual.

(2) Coerced consent. – Purported consent obtained from a person lacking the capacity to consent or obtained from a person with capacity to consent under any of the following circumstances:
a. Through fraud, duress, misrepresentation, undue influence, or nondisclosure.
b. Through exploiting or leveraging the person's (i) immigration status, (ii) pregnancy, (iii) disability, (iv) substance abuse disorder, (v) juvenile status, or (vi) economic circumstances.

(3) Consent. – An agreement that is informed and thorough and does not include coerced consent.

(4) Distribute. – As defined in G.S. 66-500.

(5) Eligible person. – An individual depicted in the pornographic image who has not provided consent, or who has withdrawn consent in compliance with the laws applicable to the jurisdiction, for the distribution of the pornographic image, or an authorized representative of that individual.

(6) Intimate visual depiction. – Any visual depiction of an individual meeting all of the following criteria:
a. The individual is reasonably identifiable from the visual depiction itself or information displayed in connection with the visual depiction, including through (i) facial recognition, (ii) an identifying marking on the individual, including a birthmark, piercing, or tattoo, (iii) an identifying feature of the background of the visual depiction, (iv) voice matching, or (v) written confirmation from an individual who is responsible, in whole or in part, for the creation or development of the visual depiction.

b. The individual depicted is engaging in sexual activity or the exposed or substantially exposed genitals, anus, pubic area, or post-pubescent female nipple of the individual depicted is visible.

(7) Online entity. – An individual or group of individuals working together or an entity defined in G.S. 66-500.

(8) Online entity operator. – A provider for an online entity that qualifies as a sexually oriented business as defined by G.S. 160D-902(f) or which is subject to G.S. 66-501 because it publishes or distributes material on a website that contains a substantial portion of material harmful to minors.

(9) Performer. – Any person portrayed in a visual depiction engaging in, or assisting another person to engage in, sexual activity.

(10) Pornographic image. – A visual depiction of actual or feigned sexual activity or an intimate visual depiction.

(11) Publish. – As defined in G.S. 66-500.

(12) Sexual activity. – As defined in G.S. 14-190.13.

(13) Visual depiction. – Any photograph, film, video, picture, digital image, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means.

"**§ 66-506. Age verification obligations.**

(a) An online entity operator may not publish or allow a user to publish a pornographic image to the online entity unless the operator has verified that all of the following criteria are met for each individual appearing in the pornographic image:

(1) The individual was not less than 18 years of age when the pornographic image was created.

(2) The individual has provided explicit written evidence of consent for each act of sexual activity in which the individual engaged during the creation of the pornographic image.

(3) The individual has provided explicit written consent for the distribution of the specific pornographic image.

(b) Separate consent is required for the act of sexual activity and for distribution of the intimate visual depiction, as follows:

(1) Consent for sex act. – Consent described in subdivision (2) of subsection (a) of this section does not imply or constitute evidence of consent described in subdivision (3) of that subsection.

(2) Consent for distribution of image. – Consent described in subdivision (3) of subsection (a) of this section does not imply or constitute evidence of consent described in subdivision (2) of that subsection.

(c) To carry out the obligations of subsection (a) of this section, an online entity operator shall obtain all of the following from the user or entity seeking to publish the pornographic image or through other means:

(1) Written consent from each individual appearing in the pornographic image that includes:

a. The name, date of birth, and signature of the individual.

b. A statement that the individual is not less than 18 years of age, unless no reasonable person could conclude that the individual is less than 30 years of age.

c. A statement that the consent is for distribution of the specific pornographic image.

d. A statement that explains coerced consent and that the individual has the right to withdraw the individual's consent at any time.

(2) Not less than one form of valid identification for each individual appearing in the pornographic image (i) issued by an agency of the federal government or of a state, local, or foreign government; and (ii) containing the name, date of birth, signature, and photograph of the individual; and on which the name, date of birth, and signature of the individual match the name, date of birth, and signature of the individual on the consent form required under subsection (a) of this section.

"**§ 66-507. Removal of images.**

(a) An online entity operator shall establish a procedure for removing a pornographic image from the online entity at the request of a person and designate one or more employees of the operator to be responsible for handling requests for removal of pornographic images.

(b) An online entity operator shall display a prominently visible notice on the website or mobile application of the online entity that provides instructions on how a person can request the removal of a pornographic image.

(c) If an online entity operator receives a request from an eligible person or a law enforcement officer acting pursuant to a valid court order, through any request mechanism offered by the operator under subsection (b) of this section, to remove a pornographic image that is being hosted by the online entity without the consent of an individual who appears in the pornographic image, the operator shall remove the pornographic image as quickly as possible, and in any event not later than 72 hours after receiving the request.

(d) If an online entity operator receives a request from a person other than an eligible person or law enforcement officer acting pursuant to a court order, through any request mechanism offered by the operator under subsection (b) of this section, to remove a pornographic image that is being hosted by the online entity without the consent of an individual who appears in the pornographic image, then not later than 72 hours after receiving the request, the operator shall do the following:

(1) Review the records of the operator with respect to the pornographic image to determine whether the pornographic image was published to the platform in accordance with the verification requirements of G.S. 66-506; and

(2) Remove the pornographic image if the operator determines that the pornographic image was not published to the platform in accordance with the verification requirements of G.S. 66-506.

(e) An online entity operator shall remove a pornographic image temporarily if any question arises as to the consent of a performer. This requirement is in addition to the requirements of subsections (c) and (d) of this section.

(f) At the request of a performer, a pornographic image distributed or published by an online entity operator must be removed within 72 hours of the request being made, regardless of the age or consent of the performer.

(g) In the case of a pornographic image that has been removed from an online entity in accordance with this section, the online entity operator shall block the pornographic image, and any altered or edited version of the pornographic image, from being distributed on or published to the online entity again.

"**§ 66-508. Obligations of users.**

(a) A user of an online entity may not distribute or publish a pornographic image of an individual to the online entity without the consent of the individual.

(b) For purposes of subsection (a) of this section, whether an individual has provided consent to the publishing of a pornographic image shall be determined in accordance with this Article.

"**§ 66-509. Enforcement.**

(a) Violations of this Article are subject to the imposition of civil penalties. In determining the amount of the penalty, the Attorney General shall consider the degree and extent

of harm caused by the violation. A civil penalty under this Article shall accrue on a per day and per image basis. The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) The Attorney General may impose a civil penalty on any online entity operator that violates this Article in an amount of not more than ten thousand dollars ($10,000) for each day during which a pornographic image remains on the online entity, beginning 24 hours after the Attorney General provides notice of the violation to the operator.

(c) The Attorney General may impose a civil penalty on any online entity operator that violates G.S. 66-507(b) in an amount of not more than ten thousand dollars ($10,000) for each day during which the online entity remains in violation, beginning 24 hours after the Attorney General provides notice of the violation to the operator.

(d) The Attorney General may impose a civil penalty on any online entity operator that violates G.S. 66-507(c) in an amount of not more than five thousand dollars ($5,000) for each day during which the online entity remains in violation of that subsection, beginning 24 hours after the Attorney General provides notice of the violation to the operator.

(e) An online entity operator shall not be liable for a violation of this Article if, in allowing the publishing of a pornographic image to the online entity, the operator reasonably relied on verification materials that were later found to be in violation of this Article, provided that the operator removes the pornographic image not later than 24 hours after receiving notice that the verification materials are in violation of this Article.

(f) If an online entity operator fails to remove a pornographic image within 24 hours of receiving notice that the verification materials are in violation of this Article, damages shall be calculated with respect to each day on or after the date on which that 24-hour period expires.

(g) If an online entity operator violates this Article with respect to a pornographic image, any eligible person may bring a civil action against the online entity operator for damages in an amount equal to (i) ten thousand dollars ($10,000) for each day during which a pornographic image remains on the online entity in violation of this Article, calculated on a per day and per image basis, or (ii) actual damages, whichever is greater. A prevailing eligible person shall be awarded attorneys' fees.

(h) If a user of an online entity violates this Article with respect to a pornographic image, any eligible person may bring a civil action against the user for damages in an amount equal to (i) ten thousand dollars ($10,000) for each day during which the pornographic image remains on the online entity in violation of this Article, calculated on a per day and per image basis, or (ii) actual damages, whichever is greater. A prevailing eligible person shall be awarded attorneys' fees.

"§ 66-510. Severability.

If any provision of this Article is held invalid or unenforceable, the invalidity or unenforceability shall not affect other provisions or applications of this Article that can be given effect without the invalid or unenforceable provision or application and, to this end, the provisions of this Article are severable."

SECTION 2.(b) This section becomes effective December 1, 2025, and applies to acts or omissions occurring before, on, or after that date.

SECTION 3.(a) G.S. 143C-6-5.6 reads as rewritten:

"§ 143C-6-5.6. Limitation on use of State funds for gender transition procedures.

(a) The following definitions apply in this section:

(1) Cross-sex hormones. – As defined in G.S. 90-21.150.
(2) Minor. – As defined in G.S. 90-21.150.
(3) Puberty-blocking drugs. – As defined in G.S. 90-21.150.
(4) Surgical gender transition procedure. – As defined in G.S. 90-21.150.

(b) No State funds may be used, directly or indirectly, for the performance of or in furtherance of surgical gender transition procedures, or to provide puberty-blocking drugs or

cross-sex hormones to a minor, or to support the administration of any governmental health plan or government-offered insurance policy offering surgical gender transition procedures, puberty-blocking drugs, or cross-sex hormones to a minor.

(b1) No State funds may be used, directly or indirectly, for the performance of or in furtherance of surgical gender transition procedures, or to provide puberty-blocking drugs or cross-sex hormones to any prisoner incarcerated in the State prison system or the Statewide Misdemeanor Confinement Program or otherwise in the custody of the Department of Adult Correction, or to support the administration of any governmental health plan or government-offered insurance policy offering surgical gender transition procedures, puberty-blocking drugs, or cross-sex hormones to any prisoner incarcerated in the State prison system or the Statewide Misdemeanor Confinement Program or otherwise in the custody of the Department of Adult Correction. Nothing in this subsection shall be construed to prevent State funds from being used, directly or indirectly, to address medical complications resulting in imminent physical harm, including the treatment of any infection, injury, disease, or disorder that has been caused by or exacerbated by a previously performed or privately funded gender transition procedure.

(c) ~~Subsection (b)~~ Subsections (b) and (b1) of this section shall not apply to the State Health Plan for Teachers and State Employees."

SECTION 3.(b) This section becomes effective July 1, 2025. Subsection (c) of G.S. 143C-6-5.6 expires 30 days after the Memorandum and Order, dated June 10, 2022, or the permanent injunction ordered therein in Kadel v. Folwell, 1:19CV272 is vacated, overturned, or is no longer in force. The State Health Plan for Teachers and State Employees shall notify the Revisor of Statutes if the order or injunction is vacated, overturned, or no longer in force.

SECTION 3.1.(a) Chapter 90 of the General Statutes is amended by adding a new Article to read:

"Article 1O.

"Gender Transition Procedures on Non-Minors.

"§ 90-21.175. Civil remedies for gender transition procedures on non-minors.

(a) Unless the context requires otherwise, the definitions provided in G.S. 90-21.150 apply in this section.

(b) Unless an action is brought pursuant to G.S. 90-21.154, a cause of action for malpractice under G.S. 1-15 arising out of the performance of or failure to perform services while in the course of facilitating or perpetuating gender transition shall be commenced within 10 years from the time of discovery by the injured party of both the injury and the causal relationship between the treatment and the injury against the offending medical professional or entity.

(c) A medical professional or entity may not seek a contractual waiver of the liability arising out of the performance of or failure to perform services while in the course of facilitating or perpetuating gender transition. Any attempted waiver is contrary to the public policy of this State and is null and void.

(d) G.S. 90-21.19 does not apply to damages for a cause of action for malpractice under G.S. 1-15 arising out of the performance of or failure to perform services while in the course of facilitating or perpetuating gender transition."

SECTION 3.1.(b) This section is effective when it becomes law and applies to causes of action accruing before, on, or after that date. This section revives any cause of action arising out of the performance of or failure to perform services while in the course of facilitating or perpetuating gender transition otherwise time-barred under G.S. 1-15, whether or not such cause of action has been asserted in a pending civil action or appeal.

SECTION 3.2.(a) G.S. 115C-47 reads as rewritten:

"§ 115C-47. Powers and duties generally.

In addition to the powers and duties designated in G.S. 115C-36, local boards of education shall have the power or duty:

…
(33b) To Excuse Students with Religious Objections. – Local boards of education shall adopt policies to allow a student or the student's parent or guardian to request that the student be excused from specific classroom discussions, activities, or assigned readings that the student, parent, or guardian believes would (i) impose a substantial burden on the student's religious beliefs or (ii) invade the student's privacy by calling attention to the student's religion. To the extent practicable, the local board of education shall provide advance notice to students, parents, and guardians of the discussions, activities, or assigned readings. If a student is excused from a classroom discussion, activity, or assigned reading, the school shall provide the student with an alternative activity or assignment aligned with the standard course of study.

(33c) To Allow Parent Access to Library Books. – Local boards of education shall adopt policies related to library books consistent with G.S. 115C-98.1.

…."

SECTION 3.2.(b) This section is effective when it becomes law.

SECTION 3.3.(a) Article 3 of Chapter 115C of the General Statutes is amended by adding a new section to read:

"**§ 115C-98.1. Parent access to library books.**

(a) For the purposes of this section, the term "library books" means electronic, print, and nonprint resources, excluding textbooks, for independent use by students and school personnel outside of the standard course of study for any grade or course. Library books may be held in a formal school library or in a classroom.

(b) Local boards of education shall adopt policies that do all of the following:

(1) Provide ongoing public access through a searchable web-based catalog to the titles of any library books available at each school within the local school administrative unit. Each school shall display its catalog on the homepage of its website.

(2) Allow a parent or guardian of a student to identify any library books that may not be borrowed by the student. A student shall not be permitted to borrow any library books identified by the student's parent or guardian pursuant to this subdivision."

SECTION 3.3.(b) This section is effective when it becomes law and applies beginning with the 2025-2026 school year.

SECTION 3.4.(a) Article 7B of Chapter 115C of the General Statutes is amended by adding a new section to read:

"**§ 115C-76.110. Restrictions on sleeping quarters.**

(a) For the purposes of this section, the following definitions apply:

(1) Biological sex. – As defined in G.S. 12-3.3.

(2) Immediate family member. – A parent, brother, sister, or grandparent. The term includes step and half relationships.

(3) Sleeping quarters. – A room with a bed that is intended to be used to house a person overnight or other area designated for overnight sleep.

(b) The governing body of a public school unit shall adopt a policy that prohibits students from sharing sleeping quarters with a member of the other biological sex during any activity or event authorized by a school within the public school unit, except when authorized by the school in either of the following circumstances:

(1) The parents or legal guardians of all students sharing the sleeping quarters have provided written permission to the school.

(2) The member of the other biological sex is the student's immediate family member."

SECTION 3.4.(b) This section is effective when it becomes law and applies beginning with the 2025-2026 school year.

SECTION 4.(a) G.S. 130A-118 reads as rewritten:

"**§ 130A-118. Amendment of birth and death certificates.**

…

(f) When the sex of a person is changed on an amended or new birth certificate issued under subsection (a) or (b)(4) of this section, the State Registrar shall attach the new certificate to the certificate of birth then on file and shall preserve both certificates as a multi-page document. The State Registrar shall forward a copy of the new certificate to the register of deeds of the county of birth. The register of deeds of the county of birth shall attach the new certificate to the copy of the certificate of birth on file. The register of deeds shall preserve both certificates as a multi-page document. Thereafter, when a certified copy of the certificate of birth of the person is issued, it shall be a copy of the multi-page document. The State Registrar shall adopt rules and policies to implement these requirements."

SECTION 4.(b) This section becomes effective December 1, 2025.

SECTION 4.1. If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional or invalid.

SECTION 5. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 26th day of June, 2025.

s/ Rachel Hunt
President of the Senate

s/ Destin Hall
Speaker of the House of Representatives

VETO Josh Stein
Governor

Became law notwithstanding the objections of the Governor at 11:28 a.m. this 29th day of July, 2025.

s/ Ms. Sarah Holland
Senate Principal Clerk

2012 WL 13162888
Only the Westlaw citation is currently available.
United States District Court, M.D. North Carolina.

SMART ONLINE, INC. Plaintiff,
v.
SHERB & CO., LLP Defendant.

1:10CV244
|
Signed 03/29/2012

Attorneys and Law Firms

Seth Allen Neyhart, Stark Law Group, PLLC, Chapel Hill, NC, for Plaintiff.

Amy E. Ray, Richard Lee Edwards, United States Attorney Office, Asheville, NC, for Defendant.

ORDER

***1** Presently before this court is Defendant's Motion to Dismiss Plaintiff's Complaint (Doc. 7). The parties have filed the appropriate memoranda of law (see Docs. 8, 23, and 28) and this matter is currently ripe for resolution. Further, in accordance with an Order of this court, Plaintiff has filed a More Definite Statement as to the state law claims within its complaint (Doc. 37), Defendant has filed a response (Doc. 38), and Plaintiff has filed a reply (Doc. 41). For the reasons set forth herein, Defendants Motion to Dismiss Plaintiff's Complaint will be denied.

I. Background

Plaintiff Smart Online, Inc. ("SOI") is a Delaware corporation with its principal place of business in Durham, North Carolina. (Corrected Compl. (Doc. 6) at 4-5.[1]) SOI develops and markets software applications and data resources primarily for small businesses. (Id. at 5). Defendant Sherb and Co., LLP ("Sherb") served as SOI's outside auditor from April 3, 2006 through September 2007.[2] (Id.) Sherb is a limited liability partnership organized under the laws of New York with its principal place of business located in New York, New York. (Id.)

1 All citations in this order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

2 The complaint contains allegations against other defendants that are not relevant to this court's present ruling.

In its complaint, Plaintiff alleges that Defendant is liable for breach of contract, professional malpractice, breach of the implied covenant of good faith and fair dealing, and for committing an unfair and/or deceptive business practice in violation of N.C. Gen. Stat. § 75-1.1. (Corrected Compl. (Doc. 6) ¶ 69-97.) As the basis for these claims, Plaintiff contends that Sherb violated Generally Accepted Accounting Principals ("GAAP") and SEC Rules by failing to uncover a fraudulent scheme designed to inflate the market interest in SOI securities. (Id. at 14.) Plaintiff alleges that Sherb ignored "red flags" that should have alerted them to the fraud, including the fact that the SEC temporarily suspended the trading of SOI securities because of possible manipulative conduct. (Id.) Finally, Plaintiff also alleges that Sherb violated several Generally Accepted Auditing Standards ("GAAS") and Statements on Accounting Standards ("SAS") in issuing an unqualified opinion as to SOI's financial statements. (Id. at 16-17.)

Defendant counters by contending that Plaintiff's complaint should be dismissed because: (1) SOI's state law claims are barred by the Securities Litigation Uniform Standards Act ("SLUSA"), (2) the state law claims are barred by the doctrine of in pari delicto, (3) the state law claims fail to state a cause of action, and (4) Plaintiff lacks standing to sue. (See Def. Sherb's Mem. Supp. Mot. Dismiss (Doc. 8) at 3.)

II. Legal Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting Bell Atlantic Corp. V. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is facially plausible provided the plaintiff provides enough factual content to enable the court to reasonably infer that the defendant is liable for the misconduct alleged. Ashcroft, 129 S. Ct. at 1949. According to the United States Supreme Court, this plausibility requirement "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that [the] defendant has acted unlawfully." Id.

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Thus, while the complaint need not contain detailed factual allegations, a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S.Ct. 1955 (citation omitted). Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true. Id. (citation omitted). "Nonetheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege any facts [that] set forth a claim." Estate of Williams-Moore v. Alliance One Receivables Mgmt., Inc., 335 F. Supp. 2d 636, 646 (M.D.N.C. 2004).

III. Analysis

a. SLUSA

***2** Defendant contends that Plaintiff's claims are barred by SLUSA only if the court consolidates this action with the class action case Beauregard v. Smart Online, et al., 07CV785. (See id. at 9.) Because this court has denied Sherb's Motion to Consolidate (see Order (Doc. 53, No. 10CV244; Doc. 118, No. 07CV785)), Sherb's SLUSA preclusion argument is moot.

b. In pari delicto

The doctrine of in pari delicto "prevents the courts from redistributing losses among wrongdoers." Whiteheart v. Waller, 199 N.C. App. 281, 285, 681 S.E.2d 419, 422 (2009). Sherb argues that several SOI directors, officers, and employees participated in the fraudulent scheme and that their conduct is imputed to the company for purposes of in pari delicto. (See Def. Sherb's Mem. Supp. Mot. Dismiss (Doc. 8) at 12.) To support this contention, Sherb cites In re Vendsouth for the proposition that "in the context of in pari delicto in North Carolina 'the knowledge of a corporate officer or agent in [that] capacity ... is imputed to the corporation.' " (Def. Sherb's Mem. Supp. Mot. Dismiss (Doc. 8) at 12) (quoting In re Vendsouth, 2003 Bankr. LEXIS 1437, at *44 (Bankr. M.D.N.C. Oct. 9, 2003)). The complete relevant statement of the law from In re Vendsouth, however, reads as follows:

> Thus, if the interests of the corporation and its officers or directors are clearly aligned with those of the corporation, the corporation is properly charged with the knowledge and actions of the individual officers or directors. See Hice v. Hi-Mil, Inc., 301 N.C. 647, 654, 273 S.E.2d 268, 272 (1981). However, an exception to this rule is the "adverse interest exception" which provides that a corporation is generally not chargeable with the knowledge of its officer or director concerning a transaction in which the officer or director is acting in his own behalf. Id.

In re Vendsouth, Inc., 2003 Bankr. LEXIS 1437, at *44-45. In this case, it is not clear that the interests of the corporation and its officers and directors who committed the fraud were clearly aligned. On the contrary, it appears at this stage of the proceedings that the officers and directors participating in the scheme were operating on their on behalf for their own financial gain, and thus the adverse interest exception should apply. Although discovery and summary judgment may ultimately present different facts, this court finds that Sherb's in pari delicto argument should be denied at this stage of the litigation.

c. Failure to State a Claim

Sherb argues that Plaintiff has failed to state a claim under the North Carolina Unfair and Deceptive Trade Practices Act ("NCUDTPA") for two reasons. First, Sherb argues that the North Carolina Supreme Court has held that "securities transactions are beyond the scope" of the NCUDTPA. (Def. Sherb's Mem. Supp. Mot. Dismiss (Doc. 8) at 13) (quoting Skinner v. E.F., Hutton & Co., 314 N.C. 267, 274-75, 333 S.E.2d 236, 241 (1985)). While this proposition may be correct, Plaintiff's NCUDTPA claim is not based upon a securities transaction. Instead, Plaintiff has alleged harm as a result of Sherb failing to fulfill its duties as auditor. The fact that SOI's shareholders have filed a separate action alleging violations of the federal securities laws does not transform this action into one based upon "securities transactions." Second, Sherb contends that accountants are shielded from the NCUDTPA based on the "learned profession" exception. (Def. Sherb's Mem. Supp. Mot. Dismiss (Doc. 8) at 13-14.) However, Sherb does not cite any North Carolina case holding that the learned profession exception applies to accountants, and this court has been unable to locate such a case. (See id.) (citing cases relating to architects and other non-precedential holdings). In the absence of applicable case law, this court notes that another court in this district has previously found it improper to make the factual determination of whether a profession falls within the "learned profession" exception at the motion to dismiss stage of litigation. Elina Adoption

Servs. v. Carolina Adoption Servs., 2008 WL 4005738, at *9, 2008 U.S. Dist. LEXIS 87745, at *30-32 (M.D.N.C. Aug. 25, 2008) ("[T]he Court finds that a determination of whether Defendants meet this 'learned profession' exception would require the Court to make findings of fact which are not appropriate at the motion to dismiss stage and should be determined at either the summary judgment stage or at trial."). Accordingly, this court will not make such a finding here. Sherb's arguments as to Plaintiff's NCUDTPA claim thus fail at this stage of the proceeding.

***3** With regard to Plaintiff's Malpractice, Breach of Contract, and Implied Covenant of Good Faith claims, Sherb first argues that the complaint is "bare of facts which demonstrate any error (much less material error) in the financial statements." (Def. Sherb's Mem. Supp. Mot. Dismiss (Doc. 8) at 15.) While none of the numbers in SOI's financial statements have been alleged to be incorrect, certain entries for consulting and investor relations fees are alleged to have represented illegal payments to brokers as part of the fraudulent scheme. Plaintiff has alleged that Sherb failed to meet the applicable standard of care, breached its contract with Plaintiff, and breach the implied covenant of good faith by failing to uncover and report the fraud and accompanying conduct. (See Corrected Compl. (Doc. 6) at 14.)

As further basis for these three claims, Plaintiff alleges that Sherb failed to disclose the true financial condition of Smart Online and that Sherb failed to establish and maintain adequate internal accounting controls to detect the fraudulent scheme. (Id.) Sherb argues that it was not required to opine or report on SOI's internal controls at the time it was serving as SOI's outside auditor. However, this court finds that determining Sherb's exact duties to its client SOI is a factual matter not appropriate for resolution at the motion to dismiss stage of litigation. Sherb's further arguments as to these claims rely on inapplicable cases concerning federal securities law, in which a heightened pleading standard is applied. (See Def. Sherb's Mem. Supp. Mot. Dismiss (Doc. 8) at 15-19.) These arguments are thus unpersuasive as to Plaintiff's state law claims.

d. Standing

Finally, Sherb argues that Plaintiff lacks standing to bring this action. In doing so, Sherb relies upon the Settlement Agreement between SOI and the settlement class of SOI shareholders. In pertinent part, the Settlement Agreement reads, "[A]s of March 26, 2010, and subject to the terms and conditions of the Assignment Agreement, SOI hereby irrevocably ... assigns to the Lead Plaintiff for the benefit of the Settlement Class, all right, title, and interest in any and all claims SOI may have under federal and state law against ... Sherb & Co." (Def. Sherb's Mem. Supp. Mot. Dismiss (Doc. 8) at 6) (quoting Def. Sherb's Mem. Supp. Mot. Dismiss Ex. 4 (Doc. 9-7) at ¶ 2.12.) Notably, the Settlement Agreement states that the assignment is "subject to the terms and conditions of the Assignment Agreement," which Sherb fails to cite or discuss. The Assignment Agreement states that

> Assignor [SOI] agrees to reasonably cooperate with the Assignee in the prosecution of the Assigned Claims ... and permitting the Assignee to sue upon any of the Assigned Claims in the Assignor's [SOI's] name to the extent required for the purposes of jurisdiction or standing .... The Assignor shall receive no payment or remuneration with respect to any recovery that may result from ... the Assigned Claims and the Assignor [SOI] hereby ... assigns any and all interest Assignor [SOI] may have ... in any recovery.

(Decl. S. Ranchor Harris Supp. Pl.'s Resp. Opp. Def. Sherb's Mot. Dismiss (Doc. 23-1) ¶ 5, 7.) Accordingly, the Assignment Agreement appears to have specifically contemplated the arrangement pursuant to which Plaintiff's claims are currently being prosecuted. The Settlement Agreement did not unconditionally assign all potential claims; the Assignment Agreement expressly provided that SOI may prosecute any claims it may have for the benefit of the settlement class when necessary for purposes of jurisdiction or standing.

IV. Conclusion

For all of the above reasons, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss Plaintiff's complaint is **DENIED**.

All Citations

Not Reported in Fed. Supp., 2012 WL 13162888

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