

with Dr. Daniel. Instead, Defendants initially failed to produce the bulk of the relevant documents.

Defendants' subsequent piece-meal production of more than 28,000 documents, caused Dr. Cope's counsel to conduct repetitive and laborious reviews, comparisons and indexing of the documents received, in order to determine which documents were new or duplicative, irrelevant or responsive to the requests made, and which documents were still missing. Defendants now ask the Court to ignore the time and effort necessary for counsel and the Court to review documents for a time period outside their new statute of limitations defense and further claim that certain of the damages are somehow preempted by ERISA.

Defendants' affirmative defenses, if valid, should have been raised in the Answer filed more than fourteen months ago. Defendants' Motion provides no explanation for the delay, have substantially impacted the cost of the litigation to date and further injured Dr. Cope as discussed below.

The Court on February 28, 2008,¹ entered a new Case Management Order. Absent the new order, necessitated by defendants' discovery abuse, expert report deadlines would have passed and discovery would have been over. Even with the latest extension, Dr. Cope's initial expert report is due April 30, 2008, less than one month away. The effort made to review and organize the financial documentation produced for the full eight year period could not wait and, by necessity, continues during the pendency of this Motion.

Finally, the ERISA federal preemption defense Defendants now seek to assert at this late stage is potentially prejudicial to Dr. Cope for another reason. Dr. Cope disputes the validity of the ERISA preemption defense now raised and believes the amendment should be denied for

¹ Paragraph 3 of Defendants' Motion for Leave to Amend incorrectly states that no new case management order has been entered.

futility. But if found even potentially valid by the Court, Defendants' delay in asserting this defense could cause Dr. Cope to lose an equivalent period of recovery if forced to pursue those claims in federal court.

Therefore, based upon the undue delay and prejudice that would result, Dr. Cope objects to Defendant's Motion for Leave to Amend the Answer to now assert statute of limitations and ERISA defenses.²

ARGUMENT

After the period for amending pleadings as a matter of course under Rule 15(a) has elapsed, as is the case here, a motion for leave to amend is addressed to the sound discretion of the trial judge, and the denial of such a motion is not reversible on appeal absent a clear showing of abuse of discretion by the trial judge. *Caldwell's Well Drilling v. Moore*, 79 N.C. App. 730, 731, 340 S.E.2d 518, 519 (1986); citing: *Smith v. McRary*, 306 N.C. 664, 444 (1982). Valid reasons that warrant a trial court's denial of leave to amend and answer include: "(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Walker v. Stone*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 247 (2000) (citations omitted).

A. Defendants' Motion to Add the Affirmative Defenses of Statute of Limitations and ERISA Preemption Should be Denied for Undue Delay and Prejudice to Dr. Cope.

Defendants' Motion for Leave to Amend offers no explanation for the lengthy delay in seeking these amendments. As previously stated, Defendants filed their Answer and Counterclaims more than fourteen months ago. Where no explanation for a lengthy delay is

² Defendants' Motion also seeks the right to amend to add a counterclaim for the right to buy back Cope's shares in the medical practice pursuant to the Shareholder Agreement. Because the repurchase of shares is consistent with the relief sought by Cope in this case, no objection is raised. Cope notes, however, that this proposed amendment is inconsistent with paragraph 26 of the Counterclaim already filed by Defendants that claims Cope "has forfeited all claims for stock repurchase of Daniel Urological."

offered by the party seeking to amend a pleading, the trial court acts within its discretion, and the appeal court will not reverse a denial of the motion to amend. See: *Walker*, 137 N.C. App. at 402 (No abuse of discretion shown where Plaintiffs had offered no explanation for the failure to move to amend for three months after the answer was filed); citing: *Caldwell's Well Drilling*, 79 N.C. App. at 731 (No error in denying motion to amend where there is nothing in the record to indicate a reason for the lengthy delay in seeking leave).

Defendants' unexplained and lengthy delay in seeking to amend the Answer and Counterclaims is prejudicial to Dr. Cope. Part of the prejudice to Dr. Cope flows from the substantial costs that Dr. Cope has incurred fighting over years worth of documents that, if valid, would be barred by a statute of limitations defense that was never previously raised (formally or informally). Likewise, Dr. Cope would be prejudiced by the potential loss of recovery of a year's worth of damages to retirement contributions if the Court accepts the new theory that ERISA bars damages related to amounts taken by Dr. Daniel to put in Dr. Daniel's retirement account. But see discussion below.

Dr. Cope believes that had these defenses been raised in the beginning that at least partial summary judgment would have been appropriate given the intense year-by-year factual inquiry that is appropriate to a case of this nature. Understandably, Dr. Cope has pursued discovery for the full period alleged in his Complaint. Furthermore, the prejudice to Dr. Cope was exacerbated by Defendants' piecemeal production of documents. Every time Dr. Cope's counsel was forced to review new documents, these documents included items that were from a period that Defendants would like to claim is irrelevant.

If the new affirmative defense is correct, a fact hotly disputed by Dr. Cope, the time period, according to Defendants would be narrowed by 5 years. Even if, as no doubt would be

the case, the statute of repose would expand that period, there would still be 2 years of documents that were reviewed and analyzed on multiple occasions. The Court will recall that Dr. Cope was also forced to obtain a large number of these records through subpoenas to credit card companies, banks, vendors and an accountant used by Defendants.

Dr. Cope asks the Court to recall the substantial claim for attorneys fees associated with his initial Motion to Compel and the fact that the Court did not award Dr. Cope all of the fees and expenses associated with just that Motion, let alone the Motion for Sanctions that finally produced the documents claimed all along to be “missing” or destroyed. As shown in Plaintiff’s Motion for Additional Fees recently filed, the amount the Court awarded is only a fraction of the fees and costs actually incurred by Dr. Cope: a) to seek and recover by subpoena financial records not being produced by Defendants in discovery; b) to make the Court aware of Defendants’ continued non-compliance and pursue the Motion to Compel and the Motion for Sanctions; and c) provide the Court as ordered with an initial and supplemental affidavit regarding document production; and d) depose Dr. Daniel regarding the location of records.

More importantly, as made clear in Dr. Cope’s Motion for Additional Fees and the accompanying Affidavit of Jessica Cox filed March 25, 2008 (Cox’s Affidavit), the amount of the additional fees that Dr. Cope requests of the Court still does not include the substantial fees and costs incurred by Dr. Cope to examine, organize and prepare the financial documentation recovered for use by Dr. Cope’s forensic accountant. By the end of the greatly prolonged discovery process, Dr. Cope had recovered more than 28,000 documents covering the period of 1998 through 2006. (Cox Affidavit ¶3) The difficulty and resulting increased costs incurred to accomplish the discovery to this point was caused by Defendants’ misconduct and would be further exacerbated by rewarding the Defendants for their misconduct. Defendants provided the

voluminous financial documents over fifteen separate “mini” productions, over half of which occurred only after Defendants had falsely claimed full compliance with the document requests at the hearing on the Motion for Sanctions. This piecemeal production necessitated multiple, repetitive and laborious reviews, comparisons and indexing to compare the productions to see if they consisted of documents already reviewed or new documents needed by the forensic accountant to complete her analysis of the damages in this case. (See Cox Affidavit ¶3)

Defendants were well aware, or should have known, of these costs being incurred by Dr. Cope due to their misconduct. Yet, Defendants did not ask for leave to amend until the eve of Dr. Cope’s expert report deadline. Counsel for the parties had agreed upon a proposed case management in mid-February 2008, which included the April 30, 2008 deadline. Defendants, however, made no mention of any intention to seek leave to amend until they filed this Motion a month later. The efforts required by the deadline could not wait and, by necessity, continues during the pendency of this Motion. Consequently, the only way to avoid prejudice to Dr. Cope at this stage is to deny the Motion for Leave to assert statute of limitation defenses.

Finally, the proposed ERISA preemption defense poses a different, yet clear form of prejudice to Dr. Cope if allowed. Defendants now wish to argue for the first time that only through an ERISA claim in federal court may Dr. Cope recover the additional retirement plan contributions that would have flowed from the proper payment of salaries and bonuses by Dr. Daniel. Dr. Cope contests the merits of this argument for the reasons set forth in Section B below, but in any event, such a defense, if proper, would force Dr. Cope to seek relief in federal court a full year later than otherwise would have occurred had this affirmative defense been raised in a timely manner.

Accordingly, Defendants' Motion for Leave to Amend Answer is substantially overdue without any explanation provided for the fourteen month delay and would impose undue prejudice upon Dr. Cope if the Court now allows these additional affirmative defenses at this late date.

B. Defendants' Motion for Leave to Amend Answer to State an ERISA Preemption Defense Should Also Be Denied Based Upon Futility.

The Defendants' Motion to Amend to assert an ERISA preemption defense should be denied because any such defense would be futile. As a matter of law, Dr. Cope's claims are not preempted by ERISA.

Stripped to its essence, Dr. Cope's complaint is that Dr. Daniel took far more than he was entitled out of their joint medical practice. Dr. Cope's causes of action are based on breach of an employment agreement, breach of *corporate* fiduciary duty, unfair and deceptive trade practices as well as conversion and fraud all with regard to corporate assets. No ERISA plan is a defendant, there is no separate count seeking benefits from any ERISA governed plan nor is there a count for fiduciary breach under ERISA. Dr. Cope is also not asking for any money to be taken from or deposited into an ERISA governed plan. Finally Dr. Cope is not arguing that there has been misadministration with regard to any retirement plan. He does not dispute what he actually received in compensation was what was used to determine his contributions under that retirement plan.

What Dr. Cope has alleged in his Complaint, however, is that he should have received more in compensation from the practice and that Dr. Daniel should have received less. The vast majority of his claim is based on the remuneration that should have been paid directly to him in the applicable years. But, in addition, if his compensation would have been greater and Dr. Daniel's correspondingly less there would have been an adjustment to the contributions made to

the retirement plan. Of course due to the Defendants' breach of contract, fraud and malfeasance with regard to corporate assets as alleged in the Complaint, the additional compensation to which Dr. Cope was entitled was not paid to him in the years in which it was earned. Thus, no further amounts for Dr. Cope can be put into the retirement plan for those past years because the contributions are based on compensation actually paid. The remedy Dr. Cope seeks is to recover from Dr. Daniel and Daniel Urological (not from the retirement plan) his share of the excess amount contributed for Dr. Daniel (which should have remained in the corporation) as well as the additional amounts that should have been contributed on Dr. Cope's behalf if his compensation had been calculated and paid correctly.

Presented with allegations similar to that contained in Dr. Cope's Complaint, courts have found, time and again, that simply because the measure of damages in an employment action might include lost retirement benefits or contributions, does not mean that the action is preempted by ERISA. For example, in *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120-21 (4th Cir.1989) the plaintiffs brought a cause of action in state court for breach of an employment contract where they were promised that they would remain employed until age 62. The plaintiffs were terminated prior to age 62. As part of the measure of damages for the breach of that employment agreement they sought compensation from the corporation measured by what they would have earned in pension benefits if the employer had not breached the employment contract. (They could not seek the damages from the plan because, due to the alleged breach of the employment agreement, they did not participate in the plan after their termination). Judge Carlton Tilley, sitting by designation, wrote the opinion for the Fourth Circuit first noting that ERISA preemption is appropriate where state law claims would: a) subject an employer to conflicting employer obligations and variable standards of recovery; b) determine whether any

benefits are paid from a plan; or c) directly affect the administration of benefits under the plan.

Id. The Court found that simply seeking damages in an employment claim that are measured by benefits that would have been earned under a pension plan was not sufficient to trigger preemption under this standard. Judge Tilley noted:

In their state law claims, the Plaintiffs seek from the corporation compensatory damages for wages and pension, health, life and disability benefits that they would have been entitled to had the alleged contract to work until age 62 not been breached. If the Plaintiffs prevail, the damages would be measured in part by the lost pension benefits the Plaintiffs would have received, but the pension trust itself would not be liable and the administrators of the pension plan would not be burdened in any way.

Similarly here, Dr. Cope is seeking from Dr. Daniel and Daniel Urological Center Inc. (“Daniel Urological”) compensatory damages in the form of wages/compensation as well as the value of the retirement contributions to which he would have been entitled if the Defendants had not breached the employment agreement or engaged in the other corporate chicanery alleged in the Complaint. He is also seeking from Defendants his share of the excess contributions that were made on behalf of Dr. Daniel that should have remained in the corporation if Dr. Daniel had not taken improper and inflated compensation. The retirement plan and trust will not be liable for any of these damages and the administration of the plan would not be affected in any way. Therefore, Dr. Cope’s causes of action are not preempted.

Federal courts in North Carolina, of course, have followed the reasoning of the Fourth Circuit in Pizlo. *Holder v. Petree & Stoudt Associates, Inc.* 2003 WL 22213633, 3 (M.D.N.C. 2003) (“One instance where state law claims are not preempted by ERISA is where the plaintiff’s claim is for breach of employment contract and the ERISA plan benefits are used merely as a measure of damages.”) *Smith v. Cohen Ben. Group, Inc.* 851 F.Supp. 210, 214 (M.D.N.C.,1993) (no ERISA preemption where the plaintiffs “will not be entitled to Plan benefits but will be

limited to a recovery of damages against [the employer] itself. Plan benefits could be considered only in calculating damages.”) Other federal circuits have adopted logic identical or similar to the Fourth Circuit’s reasoning. *Rozzell v. Security Services, Inc.* 38 F.3d 819, 822 (5th Cir.1994) (rejecting the argument that “any lawsuit in which reference to a benefit plan is necessary to compute plaintiff’s damages is preempted by ERISA”) *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1406-07 (11th Cir.1994) (“[T]he mere fact that the plaintiffs’ damages may be affected by a calculation of [ERISA] pension benefits is not sufficient to warrant preemption.”); *Funkhouser v. Wells Fargo Bank, N.A.* 289 F.3d 1137, 1143 -1144 (9th Cir. 2002) (“a claim does not ‘relate to’ an ERISA employee benefit plan simply because a court would refer to the plan in calculating damages).³

³ Numerous other cases exist standing for the same proposition. *E.I. DuPont De Nemours & Co. v. Sawyer*, Nos. 06-20865, 07-40574, 2008 WL 400226, at *12 (5th Cir. 2008) (“The fact that the employees have pled, as one element of their damages, that they suffered losses with regard to benefits ... does not require a finding of preemption. We have rejected the argument that ‘any lawsuit in which reference to a benefit plan is necessary to compute plaintiff’s damages is preempted by ERISA’....”); *Bullard v. Anheuser Busch, Inc.*, No. 3:07-cv-76-J-16HTS, 2007 WL 1428620, at *4 (M.D. Fla. May 11, 2007); *Damiano v. Orion Refining Corp.*, No. Civ. A. 02-2959, 2003 WL 282337, at *1 (E.D. La. Feb. 7, 2003) (“However, where ‘the loss of benefits is merely an element in damages related to a claim for wrongful discharge,’ preemption is not invoked, and the action does not ‘arise under’ ERISA for purposes of federal question jurisdiction”); *Grover v. Comdial Corp.*, No. Civ. A. 3:01CV00035, 2002 WL 1066951, at *4 (W.D. Va. May 23, 2002); *McCutcheon, et.al. v. Valley Rich Dairy*, 81 F.Supp.2d 657, 660 n.3 (S.D.W. Va. 2000) ; *Decker v. Vt. Educ. Television, Inc.*, 13 F. Supp.2d 569, 572 (D. Vt. 1998) (no preemption even though the “complaint may allege loss of benefits as a consequence of termination or an element of damages”); *Greater Blouse, Skirt & Undergarment Assoc., Inc. v. Morris*, No. 93 Civ. 1257 (SS), 1996 WL 325595, at *6 (S.D.N.Y. June 12, 1996) (“mere fact that the plaintiffs’ damages may be affected by a calculation of pension benefits is not sufficient to warrant preemption”); *Maldonado v. J.M. Petroleum Corp.*, 827 F.Supp. 1285, 1287 (S.D. Tex. 1993) (“The fair market value of plan benefits as a measure of damages for the loss of employment falls outside of ERISA’s preemption. ”); *Nutter v. Monongahela Power Co.*, Civ. A. No. 92-47-C, 1993 WL 757336, at *1 (N.D.W. Va. Feb. 1, 1993) (“No preemption since “ ...the trust fund is not a party and would not be liable. The issue relates principally to the plaintiff’s job status and the pension benefits involved are only a small measure of damages”); *Donaldson Mine Co. v. Human Rights Comm’n*, 420 S.E.2d 902, 908 (W. Va. 1992) (no preemption, because “there [was] no pension trust defendant and although the amount of recovery could in part be measured by benefits the plan would have provided, the recovery itself did not become an obligation of the pension plan”)

ERISA preemption decisions are usually decided by federal courts because Defendants remove the state court action to federal court based on preemption and the plaintiff then asks the federal court to remand.⁴ Still, there are instances where North Carolina state courts have analyzed ERISA preemption. In *Welsh v. Northern Telecom, Inc.* 85 N.C.App. 281, 288-289, 354 S.E.2d 746, 750 (N.C.App.,1987) the Court of Appeals engaged in an ERISA preemption analysis and cited with approval the case of *Shaw v. Westinghouse Elec. Corp.*, 276 Pa.Super. 220, 419 A.2d 175 (1980). Here is how the *Welsh* Court characterized *Westinghouse* and that court's finding that a cause of action for a breach of employment contract was not preempted:

In *Westinghouse*, the employee sued his employer for breach of an employment contract. He alleged, among other things, that one of his employment contract terms was that he would receive a pension equal to 60% of his base salary. He claimed his employer did not pay him promised salary increases, causing him to lose some of his pension benefits. The court held that ERISA did not govern this claim, and thus the employee's state law claim was not preempted. The court concluded that such a claim does not 'relate to' the plan or attempt to regulate the plan, even though the trial court may have to make determinations of the employee's present and future rights to benefits under the plan to decide if the employee's rights under the employment contract have been violated.

With respect to Dr. Cope and Dr. Daniel, retirement plan contributions were also linked to compensation. Dr. Cope has sought not only the promised additional compensation that should have been paid to him but also sought from the Defendants (and not the retirement plan) the difference between the retirement contributions that were actually made and those contributions that should have been made if his and Dr. Daniel's compensation had be calculated correctly. As noted above, where the cause of action is for compensation that was not paid, the mere fact that

⁴ Of course in this instance Defendants have missed the deadline for removal.

damages also include the value of employee benefits that would have been based on the amount of unpaid compensation is simply not the kind of claim that implicates ERISA preemption.

In *Vaughn v. CVS Revco D.S. Inc.* 144 N.C. App. 534; 551 S.E.2d 122) the Court of Appeals considered an anticipatory breach of contract claim and a claim for unfair and deceptive trade practices where an employer promised an employee that he would be given pension credit based on an agreed hire date but the retirement plan actually used a much later date. In finding that the plaintiffs' causes of action was not preempted the Court noted that the plaintiff's claims were "not aimed at the administrator of defendant's employee benefit plan. Instead plaintiff is suing defendant in its individual corporate capacity for its alleged refusal to adhere to the agreement entered into between it and plaintiff..." *Id.* at 539. The Court further observed that "[s]hould plaintiff prevail on the damages portion of his claim, his recovery would be limited to damages against the defendant itself, and he would not be entitled to recover ERISA plan benefits." *Id.*⁵.

Once again, the same factors compel a finding that Dr. Cope's causes of action are not preempted. His claim is aimed at Dr. Daniel and Daniel Urological in its corporate capacity and not in any capacity as a plan administrator. He also does not seek damages from the plan or in relation to the administration of the plan but instead seeks damages from the Defendants directly related to their breach of an employment agreement and other corporate non-plan related misconduct.

In sum the Complaint alleges that, in several different ways, Dr. Daniel received improper remuneration which reduced the amount of compensation received by Dr. Cope. One

⁵ The plaintiff in *Vaughn* also sought, in the alternative, to enjoin the corporate defendant from denying that he had an earlier date of hire for pension purposes. Even though this relief would appear to be of more consequence to the plan, the Court still found the connection between the relief sought and the plan too minimal to warrant ERISA preemption. *Id.* 539-540

of the consequences of these allegations is that, to the extent that retirement plan contributions were based on compensation, the corporation should have contributed less for Dr. Daniel and more for Dr. Cope. Dr. Cope's measure of damages will include this difference. However, as explained in detail above, the reference to a retirement plan with regard to a measure of a plaintiff's damages in what is essentially an employment action is far too tangential to invoke ERISA preemption. Indeed if this were not the case, every suit for termination of employment, reduction in compensation or a similar employment related causes of action would be preempted if there were also any ERISA covered employee benefits conditioned upon either the amount of compensation or an ongoing employment relationship. Courts have rightly rejected such an absurd result and it should be rejected here.⁶

Accordingly, the Defendants Motion to Amend should be denied because any amendment alleging ERISA preemption as a defense will be futile.

CONCLUSION

For the reasons stated herein, Defendants' Motion for Leave to Amend Answer should be denied.

⁶ Even if Dr. Cope's claim was one for ERISA benefits this court would have concurrent jurisdiction under 29 U.S.C. §1132(e) because such a claim would fall under §1132(a)(1)(B). Although Dr. Daniel might argue that Dr. Cope would still have to exhaust his administrative remedies, obviously asking Dr. Daniel to administratively determine that he paid himself excess compensation would be the height of futility and exhaustion of administrative remedies is therefore not required. *Makar v. Health Care Corp. of Mid-Atlantic*, 872 F.2d. 80, 83 (4th Cir. 1989); *Fulk v. Hartford Life Ins Co.* 839 F.Supp. 1181, 1186 (M.D. NC 1993)

This the 7th day of April, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO AMEND ANSWER** was served upon the following parties by electronic filing and by mailing a copy thereof by first-class, postage prepaid mail to the following counsel of record:

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