

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

CATAWBA COUNTY

Case No.: 07 CVS 2062

WESTERN PIEDMONT ANESTHESIA, )  
P.A., )

Plaintiff, )

v. )

DANIEL C. BARNETTE, M.D., )

Defendant, and Third )  
Party Plaintiff )

v. )

RONALD C. GILDERSLEEVE, M.D., )  
THOMAS R. HILL, M.D., LARRY T. )  
WILLIAMS, M.D., and TODD W. )  
MCKENNEY, M.D. )

Third-Party Defendants. )

**PLAINTIFF'S AND THIRD-PARTY  
DEFENDANTS' BRIEF IN SUPPORT OF  
THEIR MOTION TO DISMISS**

Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and Rule 15 of the General Rules of Practice and Procedure for the North Carolina Business Court, Plaintiff Western Piedmont Anesthesia, P.A. and Third-Party Defendants, Ronald C. Gildersleeve, M.D. ("Dr. Gildersleeve"), Thomas R. Hill, M.D. ("Dr. Hill"), Larry T. Williams, M.D. ("Dr. Williams"), and Todd W. McKenney ("Dr. McKenney") (hereinafter collectively referred to as "Third-Party Defendants"), respectfully submit this brief in support of their Motion to Dismiss Defendant's claims for shareholder derivative relief (Second Claim for Relief) and unfair and deceptive trade practices (Third Claim for Relief).

**LEGAL STANDARD**

A complaint should be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed

which necessarily will defeat the claim. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). On a Rule 12(b)(6) motion, all allegations of fact are taken as true, but conclusions of law and “unwarranted deductions of fact” are not. *See Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). North Carolina courts have held consistently that conclusory pleadings are insufficient to defeat a motion to dismiss. *See, e.g., Privette v. University of North Carolina*, 96 N.C. App. 124, 385 S.E.2d 185 (1989). Defendant has asserted claims against Plaintiff and Third-Party Defendant for breach of contract, breach of fiduciary duty (individually and derivatively), and unfair and deceptive trade practices. As discussed below, Defendant’s derivative claim for breach of fiduciary duty and Defendant’s unfair and deceptive trade practices claim should be dismissed with prejudice.

### **BACKGROUND**

Plaintiff Western Piedmont Anesthesia, P.A. (“WPA”) is an anesthesiology group practicing in Hickory, North Carolina pursuant to an exclusive contract with Catawba Valley Medical Center (“CVMC”). WPA filed a complaint seeking specific performance of a Stockholders’ Agreement requiring Defendant Daniel C. Barnette, M.D. (“Defendant”) to tender his shares in WPA to WPA for purchase upon termination of his employment with WPA. (See Plaintiff’s Motion for Judgment on the Pleadings and Brief in Support thereof)

Defendant, an anesthesiologist and former employee of WPA, filed a Counterclaim and Third-Party Complaint (“Counterclaim”) alleging breach of contract, breach of fiduciary duty (individually and derivatively), and unfair and deceptive trade practices. Defendant’s breach of contract claim alleges that his acknowledged adulterous sexual relationship with a certified registered nurse anesthetist (“CRNA”) at CVMC did not provide an adequate basis for Plaintiff to terminate Defendant’s employment for engaging in conduct inimical to the reputation and best

interests of WPA. The allegations in the Counterclaim, while denied by WPA and Third-Party Defendants, meet the legal threshold sufficient to survive a motion to dismiss pursuant to Rule 12(b)(6). However, Defendant's Counterclaim is devoid of any claims asserted to enforce alleged rights of WPA as a corporation (as opposed to rights allegedly accruing to Defendant in his individual capacity). Therefore, Defendant's alleged "derivative" claim should be dismissed.

Finally, all allegations by Defendant in his Counterclaim arise from and are directly related to the termination of his employment by WPA, a physician's practice, for conduct damaging the reputation of the group and to decisions by the medical practice related to Defendant's conduct and his termination. Thus, Defendant's claim for unfair and deceptive trade practices is barred by both the exception for disputes arising out of an employment relationship and by the learned profession exemption contained in the unfair and deceptive trade practices statute.

### ARGUMENT

#### **I. DEFENDANT'S SHAREHOLDER'S DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY SHOULD BE DISMISSED**

A "derivative proceeding" means a civil action brought by a shareholder "in the right of" a corporation. N.C. Gen. Stat. § 55-7-40.1 (2007); Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App 390, 359, 537 S.E.2d 248 (2000), rev. denied, 353 N.C. 378, 547 S.E.2d 15 (2001). Defendant attempts to assert a shareholder's derivative claim against Third-Party Defendants based on their alleged breach of fiduciary duties.

Paragraphs 32 and 33 of Defendant's Counterclaim describe the conduct upon which Defendant bases his breach of fiduciary duty claim. In summary, Defendant alleges that he was damaged because after his termination, the distribution to WPA's stockholders was not made consistently with prior years' distributions; that his termination was improper; and that WPA

failed to adequately investigate the allegation against him before terminating his employment.<sup>1</sup> All of these allegations involve purported injuries to Defendant in his individual capacity and do not allege any injury or damage to WPA that would give WPA a claim or a right to be enforced through a derivative action. Further, in Paragraph 33 Defendant alleges that “actions taken by the Third Party Defendants have potentially opened the corporation up to a lawsuit for wrongful termination.” This allegation is nothing more than a veiled attempt by Defendant to bootstrap his wrongful termination claim into a derivative action. There is no authority for turning an employment contract action into a shareholders’ derivative action by the disgruntled former employee.

In addition, Defendant’s derivative claim fails because he cannot “fairly and adequately represent the interests of the corporation in enforcing the right of the corporation.” N.C.G.S. § 55-7-41 (2007). Pursuant to N.C. Gen. Stat. § 55-7-41, in order to commence or maintain a derivative proceeding, a shareholder must fulfill two requirements: (1) be a shareholder in the corporation at the time of the act or omission complained of, and (2) *fairly and adequately represent the interests of the corporation in enforcing the right of the corporation.* (emphasis added). In North Carolina, shareholders who are unhappy in their business dealings with a corporation cannot “fairly and adequately represent” the corporation’s interests:

There is nothing to indicate that the General Assembly intended that a minority shareholder, who has uppermost a personal agenda rather than the best interests of the corporation, would have standing to file and maintain a shareholder derivative action under section 55-7-40 of our General Statutes.

Robbins v. Tweetsie R.R., Inc., 126 N.C. App. 572, 578, 486 S.E.2d 453, 456, rev. denied, 347 N.C. 402, 494 S.E.2d 418 (1997).

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<sup>1</sup> Despite Defendant’s allegation of inadequate investigation, Defendant admitted to the sexual affair with a CRNA which led to the termination of his employment. (See Defendant’s Answer, Counterclaim and Third-Party Complaint, ¶¶ 11, 20).

In this case, Defendant's employment was lawfully terminated by WPA pursuant to ¶ 19(n) of his Employment Agreement because Defendant engaged in inappropriate conduct that was inimical to the reputation and best interests of WPA. However, Defendant alleges that his employment was wrongfully terminated and refuses to sell his shares back to WPA pursuant to the Stockholders' Agreement. Defendant obviously has feelings of animus toward Third-Party Defendants regarding the termination of employment, and this derivative claim reveals that Defendant is pursuing his personal agenda based on his difficulties with Third-Party Defendants. Defendant is exactly the kind of person that Robbins excludes as a proper derivative claim plaintiff. Thus, Defendant does not "fairly and adequately represent the interests of the corporation," and the derivative claim for breach of fiduciary duty should be dismissed. § 55-7-41.

## II. DEFENDANT'S UNFAIR AND DECEPTIVE TRADE PRACTICES CLAIM SHOULD BE DISMISSED

### A. Defendant's Unfair and Deceptive Trade Practices Claim is Barred by the Exception for Employment Disputes

Before the question of unfairness or deception arises in Defendant's unfair and deceptive trade practices claim, Defendant must first establish that Plaintiff's and Third-Party Defendants' conduct was "in or affecting commerce." HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991). Though the statutory definition of commerce is broad, the Unfair and Deceptive Trade Practices Act "is not intended to apply to all wrongs in a business setting...[and] does not cover employer-employee relations." Id.

In Defendant's Counterclaim / Third-Party Complaint, Defendant claims that the alleged breach of fiduciary duties by Plaintiff and Third-Party Defendants constitutes an unfair and deceptive trade practice under N.C.G.S. § 75-1.1. (See Defendant's Counterclaim and Third-

Party Complaint, ¶ 37).<sup>2</sup> However, Defendant's allegations regarding his claim for breach of fiduciary duty are based upon Defendant's status as an employee of WPA and therefore do not fall within the scope of an unfair and deceptive trade practices claim under N.C.G.S. § 75-1.1. See HAJMM Co., 328 N.C. at 593, 403 S.E.2d at 492 (holding that employment disputes involving wrongful termination issues do not fall within the intended scope of § 75-1.1); see also Buie v. Daniel International, 56 N.C. App. 445, 289 S.E.2d 118, rev. denied, 305 N.C. 759, 292 S.E.2d 574 (1982) (finding that employer-employee relationships do not fall within the intended scope of N.C.G.S. § 75-1.1); Maurer v. Slickedit, Inc., 2005 NCBC 1 (2005) (finding that plaintiff's claim of unfair and deceptive trade practices stemming from her termination did not fall within the intended scope of § 75-1.1 because it was based on the employer-employee relationship); Berman v. Physical Medicine Associates, Ltd., 225 F.3d 429 (4th Cir. 2000) (rejecting terminated employee's breach of fiduciary duty claim against directors of corporation because the allegations involved terminated employee's status as an employee, not as a stockholder; "directors cannot act as fiduciaries in their relationship with employees and at the same time discharge their fiduciary duties to the corporation of which they are directors").

There is some authority allowing a dispute involving an employment relationship to proceed under N.C.G.S. § 75-1.1, but only if "some type of *egregious or aggravating* circumstances" are alleged and proved. Dalton v. Camp, 353 N.C. 647, 657, 548 S.E.2d 704, 711 (2001) (quoting Allied Distributions, Inc. v. Latrobe Brewing Co., 847 F. Supp. 376, 379 (E.D.N.C. 1993) (emphasis added)). For example, employers have successfully sought damages under Chapter 75 when an employee's conduct: (1) involved egregious activities outside the scope of his assigned employment duties, and (2) otherwise qualified as unfair or deceptive

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<sup>2</sup> Defendant must know that employment disputes cannot form the basis of a Chapter 75 claim because he attempts to circumvent this principle by basing his Chapter 75 claim on Plaintiff's and Third-Party Defendants' alleged breach of fiduciary duties.

practices that were in or affecting commerce. Dalton, 353 N.C. at 656, 548 S.E.2d at 710-11 (citing as an example, Sara Lee Corp. v. Carter, 351 N.C. 27, 519 S.E.2d 308 (1999) (holding that Sara Lee could pursue a Chapter 75 claim where defendant-employee, while serving as a purchasing agent for Sara Lee, simultaneously sold parts to his employer at inflated prices)).

Defendant has alleged no egregious or aggravating circumstances to preclude application of the general rule that employer-employee disputes do not fall within N.C.G.S. § 75-1.1. Thus, Defendant's unfair and deceptive trade practices claim should be dismissed because the allegations supporting his breach of fiduciary duty claim involve his status as an employee, and Defendant has not alleged any facts or circumstances to indicate that conduct by Plaintiff and Third-Party Defendants was egregious or aggravating. See Dalton, 353 N.C. at 658, 548 S.E.2d at 711-12 (upholding summary judgment as to employer's Chapter 75 claim against employee where there was no evidence of attendant circumstances to indicate that employee's conduct was aggravating or egregious enough to overcome the longstanding presumption against unfair and deceptive trade practices claims as between employers and employees).

**B. Defendant's Unfair and Deceptive Trade Practices Claim is Barred by the Learned Professions Exemption**

Defendant's Chapter 75 claim should be dismissed pursuant to the standards for dismissal under Rule 12(b)(6). N.C. Gen. Stat. § 75-1.1 provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a). In defining "commerce" for purposes of this section, however, the Act expressly provides that "'commerce'...does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). The well-settled North Carolina rule is that this "learned profession" exception bars Chapter 75 actions against physicians and medical practice groups such as Plaintiff and Third-Party Defendants.

See Gaunt v. Pittaway, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000) (“medical professionals are expressly excluded from the scope of N.C.G.S. § 75-1.1(a)”).

North Carolina Courts construe the “learned profession” exemption broadly and uniformly hold that Chapter 75 actions against physicians and corporate entities providing medical care are prohibited by the learned profession exemption. See Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4 (Chapter 75 claim against physician who had published the names of jurors in a medical malpractice case barred by learned profession exemption), rehearing denied, 2001 WL 1700037 (2001); Gaunt, 139 N.C. App. at 784, 534 S.E.2d at 664 (applying learned profession exemption where plaintiff brought unfair and deceptive trade practices claim against defendant-physicians for making allegedly defamatory statements to a newspaper regarding plaintiff’s training and expertise in the field of *in vitro* fertilization); Cohn v. Wilkes General Hospital, 767 F. Supp. 111, 114 (W.D.N.C. 1991) (granting defendants’ motion for summary judgment on Chapter 75 claim against municipal hospital, board of trustees, and individual physician medical staff members, noting that “medical professionals are not contemplated by North Carolina’s prohibition of unfair trade practices”), aff’d sub nom. Cohn v. Bond, 953 F.2d 154 (4th Cir. 1991), cert. denied, 505 U.S. 1230, 112 S.Ct. 3057, 120 L.E.2d 922 (1992); Abram v. Charter Medical Corp., 100 N.C. App. 718, 398 S.E.2d 331 (1990), rev. denied, 328 N.C. 328, 402 S.E. 2d 828 (1991) (learned profession exclusion barred Chapter 75 action against operator of chemical dependency treatment facility); Cameron v. New Hanover Memorial Hosp., 58 N.C. App. 414, 293 S.E.2d 901 (barring Chapter 75 action against public hospital, its trustees, administrators, and two medical doctors under prior version of statute and noting that current version including the learned profession exclusion would produce same result), rev. denied, 307 N.C. 127, 297 S.E. 2d 399 (1982).



Even before the legislature amended Chapter 75 to include the “learned profession” exemption, our appellate courts recognized the importance of such protection for medical professionals. Cameron, 58 N.C. App. at 447, 293 S.E.2d at 921. In Cameron, for example, the court held that decisions concerning hospital staff privileges were “necessary” to the “assurance of good health care” and should be excluded from Chapter 75’s coverage. Id., 293 S.E.2d at 921.

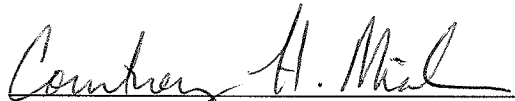
When a complaint “discloses an unconditional affirmative defense which defeats the asserted claim, the motion to dismiss will be granted and the action dismissed.” Bob Timberlake Collection, Inc. v. Edwards, 626 S.E.2d 315, 324 (N.C. App. Jun. 15, 2006). Defendant’s allegations purporting to support his unfair and deceptive trade practices claim involve actions performed by Plaintiff, a corporate entity providing medical care, and Third-Party Defendants, physicians. Since “medical professionals are expressly excluded from the scope of N.C.G.S. § 75-1.1(a),” Defendant’s unfair and deceptive trade practices claim against Plaintiff and Third-Party Defendants should be dismissed. Gaunt, 139 N.C. App. at 784, 534 S.E.2d at 664.

### **CONCLUSION**

For the foregoing reasons, Plaintiff and Third-Party Defendants respectfully request that the Court dismiss with prejudice Defendant’s derivative claim for breach of fiduciary duty and Defendant’s claim for unfair and deceptive trade practices.

This the 27<sup>th</sup> day of August, 2007.

SMITH, ANDERSON, BLOUNT, DORSETT,  
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**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served the foregoing document in the above-entitled action upon all other parties to this cause electronically and/or by depositing a copy thereof, postage paid in the United States mail, addressed to the attorney or attorneys for said parties as follows:

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This the 27<sup>th</sup> day of August, 2007.

  
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