

STATE OF NORTH CAROLINA
CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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’ REPLY TO
DEFENDANT’S BRIEF IN OPPOSITION
TO PLAINTIFF’S AND THIRD-PARTY
DEFENDANTS’ MOTION TO DISMISS**

Pursuant to Rule 15.7 of the General Rules of Practice and Procedure for the North Carolina Business Court, Plaintiff Western Piedmont Anesthesia, P.A. (“Plaintiff”) and Third-Party Defendants, Ronald C. Gildersleeve, M.D., Thomas R. Hill, M.D., Larry T. Williams, M.D., and Todd W. McKenney (hereinafter collectively referred to as “Third-Party Defendants”), respectfully submit this Brief in reply to Defendant’s Brief in Opposition to Plaintiff’s and Third-Party Defendants’ Motion to Dismiss. In addition to relying on the facts, arguments and law contained in this Reply Brief, Plaintiff and Third-Party Defendants continue to rely on the facts, arguments and law contained in their Brief in Support of Motion to Dismiss, filed with this Court on August 27, 2007.

ARGUMENT

I. **DEFENDANT HAS FAILED TO ASSERT A DERIVATIVE ACTION AGAINST THIRD-PARTY DEFENDANTS**

A. **Both Bases of Defendant's Derivative Action Are Individual, Not Derivative, in Nature**

Defendant asserts two bases in his Response Brief in his attempt to state a derivative cause of action against Third-Party Defendants. First, he alleges that Third-Party Defendants breached their duty as directors and officers of Plaintiff by failing to make distributions of Plaintiff's retained profits to all shareholders equally. Specifically, Defendant asserts that the Third-Party Defendants failed to make any further distributions of Plaintiff's retained profits *to the Defendant*. If Defendant were to prevail on this claim for breach of fiduciary duty, he would obtain an award of damages against the Third-Party Defendants. Defendant has articulated no rights of the Plaintiff-corporation to be asserted derivatively.

The second basis Defendant asserts for stating a derivative action is that Third-Party Defendants failed to satisfy their duty to adequately investigate Catawba Valley Medical Center's ("CVMC") allegations against Defendant before terminating his employment with Plaintiff. This position is baseless. First of all, as in Defendant's first basis for stating a derivative action, this is an alleged injury to Defendant as an individual, not to Plaintiff as a corporation. Defendant cites no authority allowing a shareholder to pursue a derivative action when the only harm alleged is to the shareholder individually.

Moreover, Defendant's employment was terminated pursuant to ¶ 19(n) of Defendant's Employment Agreement with Plaintiff, which allows termination where "[t]he Physician engages in conduct which all of the other physicians employed by the Corporation deem in their reasonable judgment to be inimical to the reputation or best interest of the Corporation...."

Plaintiff's business interests rest entirely on its exclusive contract with CVMC (See Plaintiff's Reply to Defendant's Counterclaim, Third-Party Defendants' Answer to Third-Party Complaint, ¶¶ 8, 12; Defendant's Answer, Counterclaim and Third-Party Complaint, ¶ 8). Defendant acknowledges that he engaged in conduct which offended decision makers at CVMC. (See Defendant's Answer, Counterclaim and Third-Party Complaint, ¶¶ 10-11, 17). The term of the Exclusive Contract extended through December of 2008, and Plaintiff reasonably desired to sustain a good working relationship with CVMC to maximize the possibility that CVMC would exercise its unfettered discretion to renew the exclusive contract upon its expiration. (See Exhibit B, Plaintiff's Reply to Defendant's Counterclaim, Third-Party Defendants' Answer to Third-Party Complaint). All other members of Plaintiff reasonably deemed that Defendant's unprofessional and inappropriate conduct was inimical to the reputation and best interests of the corporation, and impaired Plaintiff's long-term relationship with CVMC, completely irrespective of whether Defendant's unprofessional and inappropriate conduct provided grounds for CVMC to terminate the exclusive contract in December of 2006. Plaintiff and Third-Party Defendants had no "duty to investigate" whether Defendant's unprofessional and inappropriate conduct provided grounds for CMVC to terminate the exclusive contract for cause. If there is no legal duty, the failure to perform that duty cannot provide the basis for a derivative action.

Third-Party Defendants reasonably believed that Defendant's conduct damaged the reputation of Plaintiff, and their decision to terminate Defendant's employment was based on Plaintiff's damaged reputation, not on whether Plaintiff's contract with CVMC would be terminated. The only relevance of the CVMC contract is that it evinces the fact that Defendant's conduct was inimical to the reputation of Plaintiff and that the Third-Party Defendants were

reasonable in their decision to terminate Defendant's employment pursuant to ¶ 19(n) of the Employment Agreement.

Defendant once again employs circular reasoning in arguing that the failure to adequately investigate is a basis for a derivative action. 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 by the disgruntled former employee into a shareholders' derivative action. Once again, if Defendant's reasoning were correct, then every shareholder's individual action against directors of a corporation would also state a derivative action because it could potentially open the corporation up to liability. Thus, Defendant fails to allege a derivative action against Third-Party Defendants, and this claim should be dismissed by the Court.

B. Defendant Has Not Alleged Conduct Constituting Gross Neglect or Mismanagement.

Throughout Defendant's attempt to justify a derivative action, he sporadically accuses Third-Party Defendants of "gross neglect and mismanagement." However, none of the conduct Defendant alleges on the part of Third-Party Defendants rises to the level of "gross neglect and mismanagement." At the very most, Third-Party Defendants' actions may constitute "errors of judgment made in good faith," for which directors cannot be held personally liable. Oberlin Capital, L.P. v. Slavin, 147 N.C. App. 52, 56-57, 554 S.E.2d 840, 842 (2001); see also F-F Milling Co., Inc. v. Sutton, 9 N.C. App. 181, 175 S.E.2d 746 (1970) (holding that defendant-director was not personally liable for his actions because there was no evidence of bad faith, fraud or misconduct on the part of defendant). Defendant's unsupported allegations of "gross neglect and mismanagement" do not overcome the presumption that in making the decision to allocate bonuses instead of shareholder distributions, the Third-Party Defendants acted with due

care and in good faith in the honest belief that their action was in the best interest of the Corporation. See Russell M. Robinson, II, Robinson on North Carolina Corporation Law, § 14.6, at 281 (5th ed. 1995). Moreover, Defendant has alleged injury only to himself, not to the Plaintiff-corporation. Thus, there are no rights of the Plaintiff to be asserted derivatively.

C. Defendant's Derivative Claims are Asserted for an Improper Purpose

Defendant has promoted no interest of the Plaintiff-corporation to be asserted via a derivative action, nor has he asserted any damage suffered by the Plaintiff-corporation that can be in any way differentiated from the claims for which he is seeking recovery on his own behalf. Defendant's attempt to allege a derivative action appears, therefore, to be nothing more than a veiled attempt to promote entitlement to attorneys' fees pursuant to N.C. Gen. Stat. § 55-7-46. Accordingly, Defendant's improper and unsupportable efforts to assert a derivative action should be dismissed.

II. DEFENDANT HAS FAILED TO ASSERT AN UNFAIR AND DECEPTIVE TRADE PRACTICES CLAIM

A. The Exception for Employment Disputes Bars the Chapter 75 Claim

In his argument that the Chapter 75 claim is not barred by the exception for employment disputes, Defendant relies on a case that supports the opposite proposition. Specifically, Defendant cites Durling v. King, 146 N.C. App. 483, 554 S.E.2d 1 (2001), in which the court barred a Chapter 75 claim where the dispute was over how much money an employer owed to an employee. Defendant attempts to distinguish Durling, arguing that the alleged conduct by Third-Party Defendants had an impact beyond the parties' employment relationship, yet the only conduct Defendant relies on in his brief is the Third-Party Defendants' alleged failure to make a proper distribution of profits to the Defendant. Significantly, the profits that Defendant claims should have been distributed to him were derived from Defendant's and Third-Party Defendants'

practice of medicine as employees of Plaintiff. Moreover, Paragraph 2 of the Stockholders' Agreement links Defendant's status as a stockholder to his employment with Plaintiff, stating that if a stockholder ceases to be employed by Plaintiff, he agrees to offer to sell his stock to Plaintiff within thirty (30) days thereafter. (See Exhibit A, Plaintiff's Reply to Defendant's Counterclaim and Third-Party Defendants' Answer to Defendant's Third-Party Complaint). Thus, although Defendant attempts to circumvent the employment dispute exception by basing his Chapter 75 claim on the Third-Party Defendants' alleged breach of fiduciary duty, his allegation regarding his claim for breach of fiduciary duty is directly related to Defendant's status as an employee of WPA and therefore does not fall within the scope of an unfair and deceptive trade practices claim under N.C.G.S. § 75-1.1.

B. The Learned Professions Exemption Bars the Chapter 75 Claim

Defendant has failed to rebut the application of the learned professions exemption to bar his unfair and deceptive trade practices claim against Plaintiff and Third-Party Defendants. Defendant's sole argument is that the alleged unfair and deceptive trade practices did not arise from professional services rendered by Third-Party Defendants. However, as Plaintiff and Third-Party Defendants acknowledged in their Brief in Support of Motion to Dismiss, North Carolina Courts construe the "learned profession" exemption broadly to uniformly bar Chapter 75 actions against physicians and corporate entities providing medical care. See, e.g., 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). Defendant cites no authority in support of his proposition that the learned profession exemption does not apply and therefore fails to invalidate the well-established principle in North Carolina that the learned profession exemption bars Chapter 75 claims against physicians and corporate entities providing medical care.

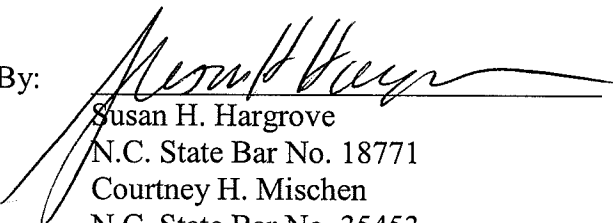
CONCLUSION

For the foregoing reasons in this Reply Brief as well as Plaintiff's and Third-Party Defendants' Brief in Support of Motion to Dismiss, 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 27th day of September, 2007.

SMITH, ANDERSON, BLOUNT, DORSETT,
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CERTIFICATION OF COMPLIANCE

Pursuant to Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court, counsel for Plaintiff and Third-Party Defendants certifies that Plaintiff's and Third-Party Defendants' Reply to Defendant's Brief in Opposition to Plaintiff's and Third-Party Defendants' Motion to Dismiss has no more than the maximum of three thousand, seven hundred and fifty (3,750) words permitted under the rule, as counted by the word-processing system used in its preparation.

This the 27th day of September, 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 27th day of September, 2007.



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