

STATE OF NORTH CAROLINA
COUNTY OF CATAWBA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 08 Cvs 2242

LAURA FARUQUE)
 Plaintiff)
)
 vs.)
)
F. ALICE BISHOPRIC, ROBERT D.)
BOYD, STEVEN R. MERTA and)
CLAIRE HARRAGHY)
 Defendants)
_____)

BRIEF OPPOSING DEFENDANTS’
MOTION TO DISMISS

Plaintiff Laura Faruque respectfully submits this brief in opposition to Defendants’ F. Alice Bishopric (“Dr. Bishopric”), Robert D. Boyd (“Dr. Boyd”), and Steven R. Merta (Dr. Merta) (collectively referred to as “the Defendants”) Motion to Dismiss Plaintiff’s claim for unfair and deceptive trade practices.

FACTS

Prior to September 1, 2007, Plaintiff had been a general partner of The Woman’s Clinic for approximately eighteen (18) years and had an extensive and loyal base of clients. (Comp. ¶ 7). Plaintiff, along with all of the Defendants, as well as Dr. Claire Harraghy (“Dr. Harraghy), were general partners who contracted with one another to be treated as equal partners. (Comp. ¶ 6). Prior to March 2007, the general partners held monthly partnership meetings to discuss the business of the partnership. (Comp. ¶ 16).

In order to practice obstetric medicine at Frye Regional Medical Center, the doctor desiring privileges must have one or more other doctors willing to provide “call coverage” for the doctor,

which is a rotational system where one doctor makes himself or herself available when called upon to care for patients of another doctor after hours or when the primary doctor is unavailable. (Comp. ¶ 12). Prior to August 1, 2007, Dr. Bishopric, Dr. Merta and Dr. Harraghy provided call coverage for Plaintiff and vice versa. (Comp. ¶ 14). Sometime around March 2007, the Defendants began meeting without Plaintiff in an effort to force her out of The Woman's Clinic by no longer providing call coverage for her effective August 1, 2007. (Comp. ¶ 18 and ¶ 19). The Defendants also began secretly discussing a merger with another obstetric and gynecological practice in Catawba County and made disparaging comments to the doctors in that practice about Plaintiff in an effort to discourage them from providing call coverage for Plaintiff. (Comp. ¶ 23 and ¶ 26). Due to the constructive discharge from The Woman's Clinic, Plaintiff advised the Defendants that she would be leaving The Woman's Clinic, and Plaintiff moved her practice, along with Dr. Harraghy, to A Woman's View. (Comp. ¶ 35 and ¶ 37).

Plaintiff filed a Complaint on June 10, 2008 in the Catawba County Superior Court alleging breach of fiduciary duty, constructive fraud, breach of contract, civil conspiracy, unfair and deceptive trade practices, punitive damages, and accounting / winding up. The Defendants filed a Motion to Dismiss, Answer and Counterclaim. Plaintiff has now filed a Motion to Dismiss and Reply to the Defendants' Counterclaim, along with a supporting Brief, in addition to this Brief in Opposition to the Defendants' Motion to Dismiss Plaintiff's Unfair and Deceptive Trade Practices Claim.

ARGUMENT

Plaintiff's Unfair and Deceptive Trade Practices Claim is Not Barred by the Learned Profession Exemption.

N.C. Gen. Stat. § 75-1.1(a) deems "unfair or deceptive acts or practices in or affecting

commerce” unlawful. N.C. Gen. Stat. § 75-1.1 defines commerce as “all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.” N.C. Gen. Stat. § 75-1.1(b) (2008). The relevant inquiry in the instant case is whether the learned profession exemption applies and effectively bars an unfair and deceptive trade practices claim by Plaintiff against the Defendants. Furthermore, pursuant to N.C. Gen. Stat. § 75-1.1(d), the Defendants, as “the part[ies] claiming to be exempt from the provisions of [N.C. Gen. Stat. § 75-1.1], shall have the burden of proof with respect to such claim.” *See also Stolfo v. Kernodle*, 118 N.C. App. 580, 583, 455 S.E.2d 869, 871 (1995). Based on a review of the case law, Plaintiff contends that the Defendants have failed to meet their burden and are therefore not exempt from an unfair and deceptive trade practices claim.

“In order for the learned profession exemption to apply, a two-part test must be satisfied. First, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services.” *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) (internal citations omitted). In the instant case, there is no dispute that doctors are members of a learned profession. However, the second prong of the test is not satisfied because the actions underlying the unfair and deceptive trade practices claim do not qualify as a “rendering of professional services.”

The Court in *Reid* provided some guidance regarding how to analyze whether a particular act on the part of a learned professional qualifies as the rendering of professional services. *Reid* involved homeowners suing an attorney for violating debt collection practices in collecting delinquent assessments and dues. The Court ultimately concluded that the attorneys were rendering a professional legal service because “[d]ebt collection, along with the collection of attorney’s fees

incurred as a penalty, is a necessary part of debtor-creditor law.” *Reid* at 267, 531 S.E.2d at 236. Despite this conclusion on the particular facts presented in *Reid*, the Court further held that “not all services performed by attorneys will fall within the exception.” *Id.* For example, neither advertising nor attorney price-fixing would fall within the exception. *Id.* Essentially, “the exemption applies anytime an attorney or law firm is acting within the scope of the traditional attorney-client role. It would not apply when the attorney or law firm is engaged in the entrepreneurial aspects of legal practice that are geared more towards their own interest, as opposed to the interests of their clients.” *Id.*

Similarly, in *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 293 S.E.2d 90, *disc. review denied*, 307 N.C. 127, 297 S.E.2d 399 (1982), the Court addressed the “rendering of legal services” prong in the context of medical professionals. In *Cameron*, two podiatrists sued a hospital, trustees, administrator and two other doctors alleging they were wrongfully denied hospital staff privileges. The Court found that the defendants were excluding the plaintiffs based on an “important quality control component” and that “consideration of whom to grant hospital staff privileges is a necessary assurance of good health care[.]” The Court in *Reid* analyzed *Cameron* and found that “the crucial inquiry [is] whether the administrative functions were a necessary part of the medical services provided.” *Reid* at 267, 531 S.E.2d at 235.

In the instant case, the inquiry is the same, but the conclusion is different. Actions by the Defendants in systematically meeting without Plaintiff’s knowledge (Comp. ¶ 18 and ¶ 19) to discuss excluding Plaintiff from The Woman’s Clinic by eliminating her call coverage had no connection to the rendering of medical services to patients. Rather, these meetings were administrative in nature with the sole purpose of forcing Plaintiff out of the partnership. The instant case is distinguishable

from *Cameron* because although both scenarios ultimately involve hospital privileges, the decision of the defendants in *Cameron* was motivated by concern for the patients. In contrast, the Defendants in the instant case were acting in an effort to further their own interests, not the interests of their patients. Accordingly, their actions are not shielded from an unfair and deceptive trade practices claim based upon the learned profession exemption.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny the Defendants' Motion to Dismiss Plaintiff's unfair and deceptive trade practices claim.

This the 2nd day of September, 2008.

**SIGMON, CLARK, MACKIE, HUTTON,
HANVEY & FERRELL, P.A.**

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was duly served on the attorneys for the Defendant by depositing a copy of the same in the U.S. Mail, postage prepaid, and addressing it as follows:

Mr. Paul E. Culpepper
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This the 2nd day of September, 2008.

**SIGMON, CLARK, MACKIE, HUTTON,
HANVEY & FERRELL, P.A.**

By: 
Stephen L. Palmer