

STATE OF NORTH CAROLINA
CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
11 CVS 2780

COUNTY OF CATAWBA d/b/a
CATAWBA VALLEY MEDICAL
CENTER,

Plaintiff,

v.

FRYE REGIONAL MEDICAL CENTER,
INC., and TATE SURGERY CENTER,
LLC,

Defendants.

ORDER ON PRETRIAL MOTIONS

1. **THIS MATTER** is before the Court upon (i) Plaintiff County of Catawba d/b/a Catawba Valley Medical Center's ("Catawba") Motion *in Limine* (the "Motion *in Limine*"), (ii) Defendants Frye Regional Medical Center, Inc. ("Frye"), and Tate Surgery Center, LLC's ("Tate") (collectively, "Defendants") Request for Judgment (the "Request for Judgment"), (iii) Catawba's Motion to Strike Defendants' Request for Judgment (the "Motion to Strike"), (iv) Defendants' Motion to Sever and Hold Bench Trial on Counterclaim (the "Motion to Sever" and, collectively, the "Motions"), as well as *sua sponte* to address and rule on various objections to the proposed jury questionnaire and other evidence sought to be introduced by the parties at trial in the above-captioned case.

2. After considering the Motions, the arguments of counsel for the parties at the September 18, 2015 hearing on the Motions and the September 24, 2015 Pretrial Conference, and the briefs and documents submitted by the parties in support of and in opposition to the Motions, the Court hereby (i) **GRANTS in part and DENIES in part** Catawba's Motion *in Limine*, (ii) **DENIES** Plaintiff's Motion to Strike, (iii) **DENIES** Defendants' Request for

Judgment, (iv) **DENIES** Defendants' Motion to Sever, and (v) rules on the various other objections made by the parties as follows below.

I.

FACTUAL & PROCEDURAL BACKGROUND

3. The factual and procedural background of this case is recited in detail in *County of Catawba v. Frye Regional Medical Center, Inc.*, No. 11 CVS 2780 (N.C. Super. Ct. Jun. 27, 2014) (Murphy, J.) (order on cross-motions for summary judgment). The alleged facts and procedural history pertinent to the resolution of the present Motions are set forth below.

4. Catawba filed its Verified Complaint on September 8, 2011, asserting various claims for breach of contract, fraud, and unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 against Frye, Tate, and Viewmont Surgery Center, LLC ("Viewmont").

5. On June 26, 2014, this Court (Murphy, J.) issued an Order and Opinion on the parties' cross-motions for summary judgment (the "Summary Judgment Order") which dismissed several of Catawba's claims and left for trial only two claims: (1) Catawba's claim against Frye for breach of the Private Party Settlement Agreement (the "PPSA"), and (2) Defendants' counterclaim against Catawba for breach of the Viewmont II/CT II Settlement Agreement.

6. This matter is now scheduled for a jury trial in Catawba County Superior Court beginning on October 12, 2015. Catawba filed its Motion *in Limine* on August 17, 2015. Defendants filed their Motion to Sever also on August 17, 2015. In their response to Catawba's Motion *in Limine*, Defendants included the Request for Judgment, seeking judgment in favor of Defendants on Catawba's claim for breach of the PPSA. Catawba filed its Motion to Strike on September 14, 2015. The parties filed various other submissions and objections to the parties'

proposed exhibits, witnesses, and other evidence between September 4, 2015 and September 22, 2015.

7. The Court held a hearing on the Motions on September 18, 2015 and held a Pretrial Conference on September 24, 2015, at both of which the parties were represented by counsel.

II.

LEGAL STANDARD

8. “A Motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial” *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App. 789, 793, 654 S.E.2d 708, 710 (2007). The Court’s ruling on motions *in limine* is interlocutory and “subject to modification during the course of the trial.” *Id.*

III.

ANALYSIS

A. Catawba’s Motion in Limine

9. Catawba seeks to exclude at trial evidence and argument relating to the following: (1) the legal theory that the PPSA is not supported by consideration; (2) the legal theory that Frye was legally excused from its obligations under the PPSA by legal impossibility or legal impracticability because of changed economic conditions; (3) the legal theory that Frye was legally excused from its obligations under the PPSA because of the failure of conditions precedent; (4) the legal theory that Frye was legally excused from its obligations under the PPSA because a cost-overrun certificate of need (“CON”) was required and could not have been obtained; (5) a June 2007 letter agreement executed in error and abrogated by the parties (the “June 2007 Letter”); and (6) the legal theory that Catawba made binding representations about projected case volumes at the future Tate ASC. Catawba seeks to exclude this evidence on the

grounds that it is irrelevant under N.C. R. Evid. 401 and 402 or that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under N.C. R. Evid. 403.

10. Under North Carolina law, “[r]elevant evidence’ means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *State v. Graham*, 186 N.C. App. 182, 190, 650 S.E.2d 639, 645 (2007) (quoting N.C. R. Evid. 401). Generally, all relevant evidence is admissible. *Matthews v. James*, 88 N.C. App. 32, 39, 362 S.E.2d 594, 599 (1987). However, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, [or] misleading the jury” *Id.* “[A]ll evidence favorable to [Defendants] will be, by definition, prejudicial to [Catawba].” *Id.* The test is whether such prejudice is unfair. *Id.*

11. The Court, after consideration of N.C. R. Evid. 401, 402, and 403, and in the exercise of its discretion, addresses each category of evidence as follows:

- a. As to category (1) above, Catawba argues that the Court should exclude evidence and argument that the PPSA was not supported by adequate consideration because the evidence of record shows that the PPSA was a bargained-for exchange and, therefore, any evidence or argument as to lack of consideration is irrelevant. Based on the arguments and representations before the Court at this time, however, the Court cannot conclude that the PPSA was supported by consideration as a matter of law. It further appears to the Court that the admission of evidence relating to whether the PPSA was supported by consideration will not cause Catawba unfair prejudice and that the risk of confusing the issues or

misleading the jury does not substantially outweigh the probative value of the proffered evidence. Accordingly, the Court will permit evidence and argument concerning whether the PPSA is supported by consideration. The Court therefore DENIES the Motion *in Limine* as to category (1).

- b. As to category (2) above, based on the arguments and representations before the Court at this time, it appears to the Court that evidence and argument concerning changed economic circumstances is relevant to whether the PPSA, if it is found to be an enforceable contract, could have been implemented, and thus whether Frye's performance under the PPSA was legally excused. It further appears to the Court that the admission of such evidence will not cause Catawba unfair prejudice and that the risk of confusing the issues or misleading the jury does not substantially outweigh the probative value of the proffered evidence. The Court therefore DENIES the Motion *in Limine* as to category (2).
- c. As to category (3) above, based on the arguments and representations before the Court at this time, it appears to the Court that evidence and argument concerning the existence of conditions precedent to Frye's performance is relevant to whether the PPSA is an enforceable agreement, and, if so, whether Frye's performance under the PPSA was legally excused. It further appears to the Court that the admission of such evidence will not cause Catawba unfair prejudice and that the risk of confusing the issues or misleading the jury does not substantially outweigh the probative value of the proffered evidence. The Court therefore DENIES the Motion *in Limine* as to category (3).
- d. As to category (4) above, the Court concludes as follows:

- i. N.C. Gen. Stat. § 131E-176 defines “new institutional health service” to include:

A change in a project that was subject to certificate of need review and for which a certificate of need was issued, if the change is proposed during the development of the project For purposes of this subdivision, a change in a project is a change of more than fifteen percent (15%) of the approved capital expenditure amount”

N.C. Gen. Stat. §131E-176(16)(e).

- ii. Under N.C. Gen. Stat. § 131E-178, “[n]o person shall offer or develop a new institutional health service without first obtaining a certificate of need” N.C. Gen. Stat. § 131E-178(a).
- iii. The Court concludes that the Tate project was a “new institutional health service”, as defined by N.C. Gen. Stat. § 131E-176(16)(e), and thus generally subject to CON review under N.C. Gen. Stat. § 131E-178(a).
- iv. N.C. Gen. Stat. § 131E-184, however, exempts a “new institutional health service” from certificate of need review in order “to comply with State licensure standards,” N.C. Gen. Stat. § 131E-184(a)(1a), and “to provide . . . heating or cooling systems . . . , unless these activities are integral portions of a project that involves the construction of a new health service facility or portion thereof and that is subject to certificate of need review,” N.C. Gen. Stat. § 131E-184(a)(4).

- v. The initial CON issued to Frye for Tate included a representation that capital expenditures for the project would be \$0. Frye, however, was advised by the Construction Section of the Division of Health Services Regulation (“DHSR”) of the North Carolina Department of Health and Human Services during development of the project that renovations, mainly in the form of the installation of a new HVAC system with an estimated total cost of \$639,825.00, were necessary to bring the facility into compliance with DHSR licensure standards.
- vi. The Court concludes that under the plain language of N.C. Gen. Stat. § 131E-184(a)(1a), Frye was exempt from obtaining a cost-overrun CON for Tate because the additional capital expenditures were necessary “to comply with State licensure standards.”
- vii. The Court similarly concludes that under the plain language of N.C. Gen. Stat. § 131E-184(a)(4), Frye was also exempt from obtaining a cost-overrun CON for Tate because the additional capital expenditures were “to provide . . . heating or cooling systems” as contemplated under that subsection. The Court further concludes that the exception under N.C. Gen. Stat. § 131E-184(a)(1a) for the “construction of a new health service facility or portion thereof” is not applicable here because the project, as proposed, did not contemplate any construction.

viii. Accordingly, the Court concludes that a cost-overrun CON was not necessary to make the required HVAC-related renovations to the Tate ASC project, and therefore, based on the arguments and representations before the Court at this time, it appears to the Court that evidence concerning whether a cost-overrun CON was required or could have been obtained is irrelevant. The Court therefore GRANTS Catawba's Motion *in Limine* to this extent as to category (4) and will not allow evidence or argument as to whether a cost-overrun CON was required or could have been obtained by Frye. However, the Court will allow evidence and argument in support of Defendants' argument that if the PPSA was an enforceable agreement, a material term of that agreement was that there would be \$0 capital expenditures, as well as evidence and argument in support of Catawba's argument that \$0 capital expenditures was not a material term of the PPSA.

e. As to category (5) above, based on the arguments and representations before the Court at this time, it appears to the Court that evidence of the June 2007 Letter is relevant to show whether the PPSA was an enforceable agreement. The Court further concludes that it does not appear that the admission of such evidence will cause Plaintiff unfair prejudice and that the risk of confusing the issues or misleading the jury does not substantially outweigh the probative value of the proffered evidence. The

Court therefore DENIES the Motion *in Limine* as to category (5), but, based on the representations from the parties that the June 2007 Letter was withdrawn after it was signed by both parties, the Court will not allow evidence and argument to show that the June 2007 Letter was a binding agreement between the parties.

- f. As to category (6) above, based on the arguments and representations before the Court at this time, it appears to the Court that evidence and argument concerning projected case volumes is relevant to whether the PPSA was an enforceable agreement, and if so, whether inability to achieve such projected case volumes at Tate was a legal excuse to Defendants' performance under the PPSA. The Court further concludes that it does not appear that the admission of such evidence will cause Plaintiff unfair prejudice and that the risk of confusing the issues or misleading the jury does not substantially outweigh the probative value of the proffered evidence. The Court therefore DENIES the Motion *in Limine* as to category (6), but in light of the Court's ruling concerning category (4) above, the Court will not allow evidence and argument concerning projected case volumes to show that a new CON application could not have been approved.

B. Defendants' Request for Judgment and Catawba's Motion to Strike

12. In its brief supporting the Motion *in Limine*, Catawba seeks to exclude evidence and argument that Defendants' obligations under the PPSA were conditioned upon Frye's obtaining a cost-overrun CON for Tate, contending that "as a matter of law, a cost-overrun CON was and is

not required.” (Pl.’s Br. Supp. Mot. *In Limine* 15.) In response, Defendants argue that by requesting a determination as to whether it was legally impossible for Frye to obtain a cost-overrun CON for the Tate project, Catawba has sought judicial resolution of this issue as a matter of law and that resolution of the issue requires entry of judgment for Defendants on Catawba’s claim for breach of the PPSA. Catawba disagrees and moves to strike Defendants’ Request for Judgment.

13. Having considered the arguments and representations of counsel, the Court, in the exercise of its discretion, DENIES Catawba’s Motion to Strike, and finds that it may consider Defendants’ Request for Judgment. As explained above, however, the Court has concluded that a cost-overrun CON was not required in these circumstances. Accordingly, the Court, in the exercise of its discretion, DENIES Defendants’ Request for Judgment.

C. Defendants’ Motion to Sever

14. Having considered the arguments of counsel and the submissions by the parties in support of and in opposition to the Motion to Sever, the Court, in the exercise of its discretion, DENIES Defendants’ Motion to Sever. Catawba’s breach of contract claim and Defendants’ counterclaim will both be heard in the same jury trial.

D. Jury Questionnaire

15. The Court approved the use of a jury questionnaire in its Order on August 20, 2015. The jury questionnaire filed by the parties on September 22, 2015 for use at trial contained several objections from Catawba. After considering the arguments of counsel made at the Pretrial Conference and as announced at the Pretrial Conference, the Court, in the exercise of its discretion, overrules Catawba’s objections and approves the use of the jury questionnaire as submitted by Defendants.

E. Viewmont Evidence

16. A substantial number of the parties' objections to various exhibits and testimony sought to be admitted at trial concern evidence relating to Viewmont. The Court finds it necessary to rule on the admissibility of this category of evidence as a general matter. However, the Court's ruling is made without prejudice to each party's right to object to specific evidence as it is sought to be admitted at trial, and the Court reserves the right, in its discretion, to sustain or overrule such objections at that time.

17. As an initial matter, Catawba seeks to introduce evidence relating to Viewmont as background and factual context concerning the PPSA. After consideration of N.C. R. Evid. 401, 402, and 403, and in the exercise of its discretion, the Court will allow evidence concerning Viewmont to the extent that matters relating to Viewmont are relevant background concerning the circumstances surrounding how the PPSA came into being, the parties' conduct and intentions in entering the transaction, and whether the PPSA is an enforceable agreement between the parties.

18. In addition, Catawba seeks to introduce Viewmont evidence to support its affirmative defense of fraud to Defendants' counterclaim for breach of the Viewmont II/CT II Agreement. Defendants object to evidence or argument relating to Catawba's allegations of fraud for two primary reasons: (i) that Catawba did not comply with Rule 9 of the North Carolina Rules of Civil Procedure when it pled a general allegation of fraud in Catawba's response to Defendants' counterclaim and (ii) that even if Catawba satisfied Rule 9, Judge Murphy dismissed Catawba's affirmative claim for fraud in his Summary Judgment Order, necessitating the dismissal of Catawba's affirmative defense of fraud based on that same allegedly fraudulent conduct.

19. As to Defendants' first argument, the Court concludes that, although Catawba did not assert specific allegations of fraud in Catawba's Third Affirmative Defense to Defendants' counterclaim, Catawba did incorporate every allegation contained in the Complaint as its First Affirmative Defense, including the specific allegations of fraud contained therein. Accordingly, the Court concludes that Catawba has satisfied the requirements of Rule 9.

20. As to Defendants' second argument, the Court notes that Judge Murphy's Summary Judgment Order dismissed Catawba's affirmative claim for fraud against Defendants with prejudice because he concluded that Catawba could not prove any injury, specifically "any purposeful movement of physicians to Viewmont in an effort to exclude Tate." *County of Catawba v. Frye Regional Medical Center, Inc.*, No. 11 CVS 2780 (N.C. Super. Ct. Jun. 27, 2014) (Murphy, J.). At the same time, Judge Murphy explicitly recognized that there was "evidence before the Court tending to prove Frye's intent not to perform under the Tate Agreements[.]" *Id.*

21. Under North Carolina law, the contract defense of fraud requires "that [Catawba have] entered into the contract with [Defendants] as a result of [Catawba's] reliance on [Defendants'] false representation." N.C.P.I. Civil 501.45. It is Catawba's specific contention in defense of Defendants' counterclaim that Catawba was fraudulently induced to enter into the Viewmont II/CT II Settlement Agreement as a result of Defendants' misrepresentations. The Court concludes that Judge Murphy's holding in dismissing Catawba's affirmative claim for fraud, i.e., that Catawba could not prove purposeful movement of physicians to Viewmont to the exclusion of Tate, particularly in light of his conclusion that there was evidence "tending to prove Frye's intent not to perform" the Tate Agreements, did not constitute a ruling dismissing Catawba's affirmative defense of fraud and does not preclude Catawba from attempting to prove

its affirmative defense to Defendants' counterclaim for breach of contract based on Defendants' allegedly fraudulent conduct.

22. Accordingly, the Court, after consideration of N.C. R. Evid. 401, 402, and 403, and in the exercise of its discretion, will permit evidence and argument concerning Viewmont to the extent that such evidence is relevant to Catawba's affirmative defense of fraud to Defendants' counterclaim for breach of the Viewmont II/CT II Agreement.

F. Other Objections

23. The Court reserves ruling on the parties' additional arguments and objections to other evidence sought to be admitted at trial until such later time as the Court deems appropriate.¹

IV.

CONCLUSION

24. For the foregoing reasons, the Court, after consideration of N.C. R. Evid. 401, 402, and 403, in the exercise of its discretion, and without prejudice to the Court's right to modify its Motion *in Limine* rulings during the course of the trial, hereby (i) **GRANTS in part and DENIES in part** Plaintiff's Motion *in Limine*, (ii) **DENIES** Plaintiff's Motion to Strike, (iii) **DENIES** Defendants' Request for Judgment, (iv) **DENIES** Defendants' Motion to Sever, and (v) rules on various other objections made by the parties as explained above.

SO ORDERED, this the 2nd day of October, 2015.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases

¹ The parties have identified a number of objections to the designated deposition testimony of Scott Spurger and John Holland. The Court believes that most of the parties' objections are addressed by the Court's rulings in this Order. However, the Court invites the parties to notify the Court if there are specific deposition designations left unresolved in this Order that the parties wish to have addressed prior to trial.