

STATE OF NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
21 CVS 3201

CENTRAL CAROLINA SURGICAL  
EYE ASSOCIATES, P.A. by and  
through GERALD JEUTTER,  
Receiver,

Plaintiff,

v.

JOHN D. MATTHEWS, M.D.,

Defendant.

**ORDER ON DEFENDANT'S MOTION  
FOR ATTORNEYS' FEES**

1. **THIS MATTER** is before the Court upon Defendant John D. Matthews, M.D.'s ("Matthews" or "Defendant") Motion for Attorneys' Fees Pursuant to N.C.G.S. Sections 75-16.1 and 1D-45 (the "Motion"). (ECF No. 71.)

2. After considering the Motion, the parties' briefs in support of and in opposition to the Motion, the relevant pleadings, and the arguments of counsel at the hearing held on the Motion, the Court **DENIES** the Motion.<sup>1</sup>

I.

BACKGROUND

3. The current litigation is the second between these parties. The receiver for Plaintiff Central Carolina Surgical Eye Associates, P.A.'s ("CCSEA" or "Plaintiff"), Gerald Juetter, first filed suit against Matthews, a former CCSEA physician, on 17

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<sup>1</sup> When a trial court, in its discretion, denies a motion for attorneys' fees, the court is not required to make specific findings under section 75-16.1, *see E. Brooks Wilkins Fam. Med., P.A. v. WakeMed*, 244 N.C. App. 567, 581 (2016), but findings are required when attorneys' fees are denied under section 1D-45, *see Kings Harbor Homeowners Ass'n v. Goldman*, 2018 N.C. App. LEXIS 1008, at \*20 (N.C. Ct. App. Oct. 16, 2018).

July 2015 (the “2015 Complaint”), seeking damages for Matthews’ alleged breaches of contract and fiduciary duty and requesting an accounting of and a constructive trust over all income Matthews received from former CCSEA patients after he terminated his employment with CCSEA in 2012 (the “First Action”).<sup>2</sup>

4. On 23 November 2015, the Court consolidated the First Action into the *In re Southeastern Eye Center* group of consolidated cases.<sup>3</sup> After extensive fact and expert discovery and substantial motions practice in the First Action, CCSEA moved for partial summary judgment and both parties moved to exclude certain expert testimony. At the hearing on the motions on 24 September 2020, CCSEA announced its intention to voluntarily dismiss without prejudice all of its claims against Matthews under Rule 41 of the North Carolina Rules of Civil Procedure (the “Rule(s)”) and promptly thereafter refile a new action against Matthews.<sup>4</sup> CCSEA moved to voluntarily dismiss the action under Rule 41(a)(2) on 30 September 2020,<sup>5</sup> and after full briefing by the parties, the Court granted CCSEA’s motion on 12 November 2020, dismissing CCSEA’s claims against Matthews without prejudice.<sup>6</sup>

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<sup>2</sup> (Compl. ¶¶ 29, 43, 46 [hereinafter “2015 Compl.”], ECF No. 1 (15 CVS 7266).) At certain points in this order, the Court refers to documents filed in other actions, in which case the Court will identify the pertinent action by case number in its citation. If a citation to the record contains no such denomination, that citation refers to a document filed in the above-captioned action.

<sup>3</sup> (Consolidation Order, ECF No. 259 (15 CVS 1648).)

<sup>4</sup> (Scheduling Order and Am. Notice of Hr’g 1, ECF No. 1340 (15 CVS 1648).)

<sup>5</sup> (Pl.’s Rule 41(a)(2) Mot. for Voluntary Dismissal without Prejudice of Claims Against Def., ECF No. 1343 (15 CVS 1648).)

<sup>6</sup> (Order Granting Pl.’s Rule 41(a)(2) Mot. for Voluntary Dismissal without Prejudice of Claims Against Def., ECF No. 1371 (15 CVS 1648).)

5. After initiating the current action on 8 March 2021,<sup>7</sup> CCSEA filed its new complaint against Matthews (the “2021 Complaint”) on 29 March 2021.<sup>8</sup> CCSEA reasserted in its 2021 Complaint its claims for breach of contract<sup>9</sup> and breach of fiduciary duty and added new claims for constructive fraud, restitution and disgorgement, and violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1 (the “UDTPA”).<sup>10</sup> CCSEA also made a new request for punitive damages.<sup>11</sup> CCSEA further alleged—again for the first time—that, during Matthews’ employment, CCSEA was insolvent and that Matthews took excessive compensation and other money from CCSEA, mismanaged CCSEA’s finances, and failed to retain and recruit physicians, all of which contributed to CCSEA’s insolvency, breached Matthews’ fiduciary duties to CCSEA, and constituted unfair and deceptive trade practices under section 75-1.1.<sup>12</sup>

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<sup>7</sup> (Appl. and Order Extending Time to File Compl., ECF No. 3.)

<sup>8</sup> (*See* Compl. [hereinafter “2021 Compl.”], ECF No. 4.)

<sup>9</sup> The parties later stipulated that any of CCSEA’s claims for breach of contract based on Section 16A of the Employment Agreement were withdrawn and not subject to the tolling provisions of Rule 41(a). (CCSEA’s Resp. Br. Opp’n Matthews’ Mot. J. on Pleadings 9 [hereinafter “Pl.’s 12(c) Opp’n Br.”], ECF No. 42.)

<sup>10</sup> (*See generally* 2021 Compl.)

<sup>11</sup> (2021 Compl. ¶¶ 72–76.)

<sup>12</sup> (2021 Compl. ¶¶ 3, 22–26, 41, 58, 63, 75; Amendment to Compl. ¶¶ 68–71 [hereinafter “Amendment to 2021 Compl.”], ECF No. 24.)

6. CCSEA amended its pleading in August 2021<sup>13</sup> and shortly thereafter, on 3 September 2021, Defendant filed a motion for judgment on the pleadings under Rule 12(c) seeking dismissal of Plaintiff's amended complaint (the "12(c) Motion").<sup>14</sup>

7. Matthews' 12(c) Motion asserted that CCSEA's new and expanded allegations and claims for breach of fiduciary duty, constructive fraud, restitution and disgorgement, violation of the UDTPA, and punitive damages did not enjoy the benefit of Rule 41's savings provision and therefore were time-barred or time-limited.<sup>15</sup> Matthews also challenged the legal sufficiency of CCSEA's pleading of certain claims and contended, in particular, that CCSEA's UDTPA claim failed as a matter of law because Matthews' actions occurred within a single market participant, *see White v. Thompson*, 364 N.C. 47, 53 (2010) (concluding that the UDTPA did not cover unfair or deceptive conduct occurring within a "single market participant" or "single business"), and fell within the UDTPA's learned profession exception, *see* N.C.G.S. § 75-1.1(b) (excluding from the UDTPA's coverage "professional services rendered by a member of a learned profession").<sup>16</sup>

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<sup>13</sup> CCSEA amended its UDTPA claim to allege that Matthews engaged in commerce in North Carolina and thus that his conduct was "in or affecting commerce" under the UDTPA. CCSEA's amendments also sought to clarify that its UDTPA claim excluded Matthews' "provision of medical services as a professional physician," apparently to avoid application of the learned profession exception to its claim. (Amendment to 2021 Compl. ¶¶ 67–71.)

<sup>14</sup> (Def. Matthews' Mot. J. Pleadings Pursuant R. 12(c) [hereinafter "12(c) Motion"], ECF No. 31.)

<sup>15</sup> (12(c) Motion ¶¶ 13, 15–19.)

<sup>16</sup> (12(c) Motion ¶ 12.)

8. The Court held a hearing on the 12(c) Motion on 14 October 2021 and, on 16 March 2022, entered its order and opinion granting certain aspects of the 12(c) Motion and denying others (the “12(c) Opinion”).<sup>17</sup>

9. In particular, the Court granted the 12(c) Motion as to CCSEA’s claim for breach of fiduciary duty and dismissed that claim to the extent it was based on CCSEA’s allegations that Matthews was overcompensated during his employment with CCSEA, that CCSEA was insolvent during the period of Matthews’ employment, or that Matthews mismanaged CCSEA, concluding that each of these claims was time-barred because they were newly made in the 2021 Complaint and thus not subject to Rule 41(a)’s savings provision.<sup>18</sup>

10. The Court also concluded that because CCSEA’s UDTPA claim “involve[d] different elements and significantly different defenses and remedies” than the breach of fiduciary duty and constructive fraud claims pleaded in the 2015 Complaint, CCSEA’s First Action did not put Matthews on notice of the UDTPA claim and thus that Rule 41(a)’s savings provision did not apply. Since the UDTPA claim was based on conduct occurring more than four years before the filing of the 2021 Complaint, the Court dismissed the claim as untimely.<sup>19</sup>

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<sup>17</sup> (Order and Op. R. 12(c) Cross-Mots. J. Pleadings [hereinafter “12(c) Opinion”], ECF No. 58.)

<sup>18</sup> (12(c) Opinion 14–18.)

<sup>19</sup> (12(c) Opinion 20–23.)

11. Finally, the Court dismissed CCSEA's purported claim for punitive damages to the extent it was pleaded as a standalone claim and ruled that punitive damages could not be awarded as incidental damages to the dismissed claims. The Court, however, specifically held that its "rulings in no way impair[ed] CCSEA's right to seek punitive damages as a remedy, where appropriate, for its remaining claims" and denied the Rule 12(c) Motion as to CCSEA's claims for constructive fraud and restitution and disgorgement.<sup>20</sup>

12. Several months later, on 2 November 2022, Matthews filed the current Motion, seeking to recover its reasonable attorneys' fees incurred in the defense of CCSEA's dismissed claims under the UDTPA pursuant to N.C.G.S. § 75-16.1 and for punitive damages pursuant to N.C.G.S. § 1D-45, including Matthews' fees incurred in seeking attorneys' fees under both sections.<sup>21</sup>

13. After full briefing, the Court held a hearing on the Motion via Webex videoconference on 10 January 2023, at which all counsel were represented by counsel. The Motion is now ripe for adjudication.

## II.

### LEGAL STANDARD

14. The relevant legal standards are not in dispute.

15. Section 75-16.1 provides, in relevant part, as follows:

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the

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<sup>20</sup> (12(c) Opinion 18–20, 23–26.)

<sup>21</sup> (ECF No. 71.)

prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious.<sup>22</sup>

16. Section 1D-45 provides, in relevant part, as follows:

The court shall award reasonable attorneys' fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious. The court shall award reasonable attorney fees against a defendant who asserts a defense in a punitive damages claim that the defendant knows or should have known to be frivolous or malicious.<sup>23</sup>

17. Both statutes thus either permit (per section 75-16.1)<sup>24</sup> or require (per section 1D-45) an award of reasonable attorneys' fees if a party files an action the party knew or should have known was "frivolous" *and* (per section 75-16.1)/*or* (per section 1D-45) "malicious." A claim is "frivolous, if a proponent can present no rational argument based upon the evidence or law in support of [the claim]. A claim is malicious if it is wrongful and done intentionally without just cause or excuse or as a result of ill will." *McKinnon v. CV Indus., Inc.*, 228 N.C. App. 190, 199 (2013) (cleaned up).

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<sup>22</sup> N.C.G.S. § 75-16.1.

<sup>23</sup> N.C.G.S. § 1D-45.

<sup>24</sup> "The decision whether or not to award attorney fees under section 75-16.1 rests within the sole discretion of the trial [court]." *Blankenship v. Town & Country Ford, Inc.*, 174 N.C. App. 764, 771 (2005).

### III.

#### ANALYSIS

18. The Court has carefully reviewed all briefs, materials, and arguments advanced in support of and in opposition to the current Motion, including, in particular, the 2015 Complaint, the 2021 Complaint, the arguments CCSEA advanced in opposition to Matthews' 12(c) Motion (both in briefing and at oral argument), and the Court's ruling on the 12(c) Motion. Based on its careful review of the relevant record, the Court concludes that CCSEA's arguments in opposition to those aspects of the 12(c) Motion seeking to dismiss CCSEA's claims under the UDTPA and for punitive damages were rational based upon the relevant evidence and relevant law, and were not wrongful and done intentionally without just cause or excuse or as a result of ill will.

19. First, as to CCSEA's UDTPA claim, the Court summarized CCSEA's contentions in its 12(c) Opinion as follows:

CCSEA invokes the Court of Appeals' *Haynie* decision in response, contending that, while it did not expressly plead a UDTPA claim in the First Action, the 2015 Complaint nevertheless put Matthews on notice of the factual basis for that claim. (Pl.'s Opp'n Br. 12–13.) In particular, CCSEA contends that the 2015 Complaint pleaded both Matthews' breach of fiduciary duty, which CCSEA argues may constitute an unfair or deceptive trade practice under the UDTPA, (Pl.'s Opp'n Br. 12–13 (citing 2015 Compl. ¶¶ 26–31)), and that Matthews' actions were in or affecting commerce because the 2015 Complaint alleged that Matthews left CCSEA for a competing firm and used CCSEA's confidential information to induce employees to do the same, (Pl.'s Opp'n Br. 13 (citing 2015 Compl. ¶¶ 28–29, 41–43)). CCSEA argues that these two allegations, read in combination, state a UDTPA claim that enjoys the tolling provision in Rule 41(a). (Pl.'s Opp'n Br. 13.)<sup>25</sup>

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<sup>25</sup> (12(c) Opinion 20–21.)



20. While the Court ultimately disagreed with CCSEA’s position, CCSEA’s argument was rational based upon the relevant evidence and relevant law, and Defendant has failed to offer persuasive evidence to show that CCSEA’s assertion of the UDTPA claim was wrongful and advanced intentionally without just cause or excuse or as a result of ill will.

21. The Court reaches the same conclusion concerning CCSEA’s contentions that its UDTPA claim was not barred by the learned profession exception or the “single market participant” rule. Indeed, CCSEA devoted six pages of its Rule 12(c) opposition brief to these arguments, relied upon relevant decisions from the North Carolina courts, and presented a rational, well-supported argument that neither the learned profession exception nor single market participant rule of *White v. Thompson* barred its claim.<sup>26</sup>

22. Matthews also seeks attorneys’ fees arising from CCSEA’s assertion of a standalone “claim” for punitive damages, even though the Court concluded in its 12(c) Opinion that “[b]ecause CCSEA pleaded facts in the 2015 Complaint permitting a factfinder to conclude that Matthews engaged in willful, wanton, or reckless conduct, the Court concludes that CCSEA’s request for punitive damages in [the 2021] action is not barred under Rule 41.”<sup>27</sup> It is true that “[p]unitive damages are available, not as an individual cause of action, but as incidental damages to a cause

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<sup>26</sup> (Pl.’s 12(c) Opp’n Br. 4–9.) The Court notes that in light of its dismissal of the UDTPA claim on other grounds, it did not decide whether either the learned profession exception or the single market participant rule required dismissal of CCSEA’s UDTPA claim.

<sup>27</sup> (12(c) Opinion 25–26.)

of action.” *Collier v. Bryant*, 216 N.C. App. 419, 434 (2011). Nonetheless, the Court cannot conclude that CCSEA’s technical pleading error—one the Court observes that North Carolina litigants make frequently—constitutes frivolous or malicious conduct under either section 75-16.1 or section 1D-45.

23. In addition, CCSEA’s opposition to the 12(c) Motion, which sought to defend CCSEA’s punitive damages “claim” on grounds that “North Carolina law is clear that a request for punitive damages is not a claim that is subject to a statute of limitations defense,”<sup>28</sup> was rational based upon the relevant evidence and relevant law and not wrongful and done intentionally without just cause or excuse or as a result of ill will. *See, e.g., Holley v. Hercules, Inc.*, 86 N.C. App. 624, 627–28 (1987) (permitting punitive damages to be sought for the first time in a refiled complaint and recognizing that North Carolina courts do not require a pleader to plead punitive damages by name, because “it is enough that the facts tending to establish the aggravated character of the wrong are alleged, and that characterizing a party’s conduct as being wilful [sic], or wanton, or reckless without alleging the specific acts relied upon are but conclusions that add nothing to the allegation.”).

24. Matthews’ claim for attorneys’ fees based on his contention that CCSEA sought punitive damages for its UDTPA claim is similarly misplaced. While CCSEA may have inartfully pleaded in its “claim” for punitive damages that it “re-allege[d] and incorporate[d] by reference the preceding paragraphs [thereby including the

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<sup>28</sup> (Pl.’s 12(c) Opp’n Br. 9–10, 14.)

UDTPA claim] as if fully set forth herein,”<sup>29</sup> CCSEA has never argued or contended at any time that it could recover punitive damages for a claim under section 75-1.1 and instead has freely acknowledged that “a claimant cannot recover both treble damages and punitive damages.”<sup>30</sup> CCSEA’s technical pleading slip cannot be seen as “frivolous” or “malicious” under applicable law in these circumstances.

25. Finally, Matthews contends that attorneys’ fees should be awarded for CCSEA’s assertion of punitive damages for those portions of CCSEA’s claim for breach of fiduciary duty that were dismissed, including those based on Matthews’ overcompensation, CCSEA’s insolvency, and Matthews’ mismanagement extending back to 2006. CCSEA argued in opposition to this aspect of the 12(c) Motion that Matthews’ demand in the First Action for an accounting and a constructive trust based on his counterclaim for underpayment entitled CCSEA to seek in the 2021 Complaint all excessive compensation Matthews received in breach of his fiduciary duties to CCSEA.<sup>31</sup> While the Court ultimately did not agree, the Court cannot conclude that CCSEA failed to present a rational argument based upon the relevant evidence and relevant law or that CCSEA’s request for punitive damages based on this alleged misconduct was wrongful and done intentionally without just cause or excuse or as a result of ill will.

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<sup>29</sup> (2021 Comp. ¶ 72.)

<sup>30</sup> (CCSEA’s Resp. Br. Opp’n Matthews’ Mot. Att’ys’ Fees Pursuant to N.C.G.S. § 75-16.1 and N.C.G.S. § 1D-45 at 9 [hereinafter “Pl.’s Fees Opp’n Br.”], ECF No. 74.)

<sup>31</sup> (CCSEA’s 12(c) Opp’n Br. 16–17.)

26. Accordingly, for each of these reasons, the Court concludes that CCSEA's unsuccessful claim under the UDTPA and purported "claim" for punitive damages were neither frivolous nor malicious under applicable law, *see Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 229 (2011) (recognizing under a different statute and standard that an unsuccessful claim is not inherently frivolous), and therefore that an award of attorneys' fees is neither required under section 1D-45 nor appropriate in the exercise of the Court's discretion under section 75-16.1. As a result, Defendant's Motion is hereby **DENIED**.<sup>32</sup>

**SO ORDERED**, this 18th day of January 2023.

/s/ Louis A. Bledsoe, III  
Louis A. Bledsoe, III  
Chief Business Court Judge

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<sup>32</sup> The Court's denial of the Motion under section 75-16.1 is in the exercise of the Court's discretion. *See generally Kraemer v. Grant Cty.*, 892 F.2d 686, 690 (7th Cir. 1990) ("[sanctions are] not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."); *Aetna Life Ins. Co. v. Alla Med. Servs., Inc.*, 855 F.2d 1470, 1476 (9th Cir. 1988) (noting that the goal in assessing sanctions, albeit under different statutes and standards, is to "reduce frivolous claims . . . without impeding zealous advocacy or freezing the common law in the status quo."); *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987) (noting that sanctions are not intended to chill zealous advocacy, but rather to reduce the assertion of frivolous claims or defenses).