

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

ALEXANDER COUNTY

SUPERIOR COURT DIVISION

13 CVS 326

OLIVIA BURLESON APPLING, et. al.,)

Plaintiffs,)

v.)

ALLEGHANY COUNTY, et. al.,)

Defendants.)

**ORDER ON DEFENDANTS'
MOTION TO STRIKE AND
MOTION TO DISMISS**

THIS MATTER coming on to be heard and being heard on February 17, 2014 before the Honorable Jeff P. Hunt, Special Superior Court Judge Presiding, upon Defendants' Rule 12(f) Motion to Strike and Defendants' Motions to Dismiss Pursuant to Rule 8(a)(2), 9(b) and 12(b)(6);

The Plaintiffs were represented by their attorney of record, and the Defendants were represented by their attorneys of record. With the consent of the Court and counsel, defense attorney Bradley O. Wood presented arguments on behalf of all Defendants. The Court, having reviewed the case file, having heard argument of counsel, and having reviewed the applicable law, determines that the Motion to Strike should be GRANTED as specifically set forth in this Order and that the Motion to Dismiss should be GRANTED in part and DENIED in part.

WITH REGARD TO DEFENDANTS' MOTION TO STRIKE, the Court makes the following:

FINDINGS OF FACT

1. This Court has jurisdiction over the parties and subject matter of this case.
2. Plaintiffs first filed this case in the United States District Court for the Western District of North Carolina, Statesville Division (Civil Action number 5:12-cv-37-RLV) on April 2, 2012. On March 28, 2013, the Honorable Richard L. Voorhees, United States District Judge, entered a Memorandum and Order granting Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) and dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction.
3. Plaintiffs instituted this current action with the filing of a Complaint on June 21, 2013 in the Superior Court Division of Alexander County.

4. On December 9, 2013, the Honorable Christopher W. Bragg entered an Order denying Defendants' Motion to Transfer Venue ruling that venue was proper in Alexander County. Judge Bragg's Order held that: "As cited in the Motion to Transfer Venue, N.C.G.S. §1-77(2) states the case 'must be tried in the county where the cause, or some part thereof, arose.' Review of the Plaintiffs' Complaint finds paragraphs 152-157, 159-160, 203 and 205, for the basis for concluding or some part thereof of the cause of Plaintiffs' action arose in Alexander County." All of these paragraphs of the Complaint cited by Judge Bragg refer or relate to allegations of purported "fraudulent misrepresentation" or other alleged fraud committed on the part of the defendants.

5. Plaintiffs' Complaint is sixty (60) pages long and contains 373 numbered paragraphs.

6. Plaintiffs' Complaint is neither simple, concise, or direct, as suggested in N.C.G.S. §1A-8(e)(1); and, indeed, even when considered in the light most favorable to the Plaintiffs, Plaintiffs' Complaint is needlessly convoluted, confused, and confusing.

7. A monumental effort is required for the reader of Plaintiffs' Complaint to arrive at a level of understanding of the possible recoverable causes of action which Plaintiffs are attempting to assert therein.

8. Much of Plaintiffs' verbiage is redundant, irrelevant, immaterial, impertinent, or scandalous, or various combinations thereof, as these terms are set forth in N.C.G.S. §1A-12(f).

9. Despite the convoluted and confusing nature of the Complaint, the bases of the claims apparently asserted in Plaintiffs' Complaint are neither unusually technical nor complicated. The Court does recognize that these issues are of the utmost importance to the parties to this action.

10. Portions of Plaintiffs' Complaint are needlessly at odds with maintenance of the dignity of the Court, as well as civility and decorum in the context of such serious litigation as this action.

11. The first 132 paragraphs of Plaintiffs' Complaint purport to set forth a "Summary of Allegations" (paragraphs 1 through 4), "Parties" (paragraphs 5 through 120), and "Jurisdiction and Venue" (paragraphs 121 through 132).

12. Paragraphs 133 through 283 of Plaintiffs' Complaint purport to set forth the "Factual Background Common to All Claims" and are organized into groupings under various headings such as: "The Fiasco (2006-2011)" (located on page 25 of the Complaint); "The Collapse (2011)" (located on page 28 of the Complaint); "The Dodge (2012)" (located on page 39 of the Complaint); and "The Reckoning (2013)" (located on page 43 of the Complaint). These headings are entirely unnecessary and, furthermore, immaterial to an understanding of the Complaint.

13. After 283 paragraphs, Plaintiffs' Complaint recites twelve "claims" for relief.
14. The Complaint alleges a contract apparently between Plaintiffs, as employees, and New River Services Authority (NRSA), an unincorporated association, "entity," or "undertaking" formed by the Defendant counties with one another.
15. The Complaint likewise alleges a contract between the Defendant counties (Interlocal Agreement) pursuant to N.C.G.S. §§ 160A-460 and 160A-461.
16. Plaintiffs' Complaint does not allege that any of the Plaintiffs are signatories to either the alleged contract between Plaintiffs and NRSA or the alleged contract between the Defendant counties.
17. It is impossible to determine whether the Plaintiffs seek to assert either or all of the following: a third party beneficiary interest in either the contract as between the Defendant counties (Interlocal Agreement); some sort of an oral contract; or some sort of oral/written contract for vacation, healthcare, and retirement somehow arising from Plaintiffs' respective employment relationships with NRSA.
18. In paragraph 249 (contained on page 41 of Plaintiffs' Complaint), Plaintiffs' allege a portion of the March 28, 2013 Order by Judge Voorhees in the Western District of North Carolina dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction, specifically referencing the following language: "...issues presented are more akin to a state law breach of contract claim (or equitable unjust enrichment) rather than a violation of federal law." The unusual vagueness of the U.S. District Court's Order attempting to describe Plaintiffs' asserted claims only serves to illustrate the difficulty that both the District Court and this Court (as well as, presumably, the Defendants) have had in understanding, interpreting, and comprehending the precise causes of action Plaintiffs seek to assert in their pleading. Otherwise, this paragraph is irrelevant and immaterial to the asserted claims in the Complaint.
19. With regard to Claim XII (Punitive Damages), Plaintiffs pleaded punitive damages but directly violated the provisions of Rule 8(a)(2) by setting forth specifically "not less than \$1,000,000," rather than "in excess of \$10,000," as required in all civil cases.
20. In their Complaint, Plaintiffs have completely ignored (by mistake or design) the provisions of N.C.G.S. §§ 1A-8, 1A-9, and 1A-12(f), which has directly resulted in both the Court, and undoubtedly Defendants' counsel, being required to expend a substantial number of hours not normally required in a matter of this nature in order to comprehend what causes of action under North Carolina law Plaintiffs have attempted to assert in this action.

Based upon the foregoing Findings of Fact, the Court reaches the following:

CONCLUSIONS OF LAW

1. The Court has personal jurisdiction and subject matter jurisdiction over this case and the issues presented in this Motion.
2. Plaintiffs' Complaint violates both mandatory and suggestive provisions of Rules 8(a)(2), 9(b), 9(k), 12(f) and 84 of the North Carolina Rules of Civil Procedure.
3. As a matter of law, portions of Plaintiffs' Complaint should be stricken pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure (hereinafter "Rule 12(f)") for violation of one or more of the proscriptions set out in that Rule, on both Motion of the Defendants and of the Court.
 - (1) The heading "The Fiasco (2006-2012)," located on page 25 of Plaintiffs' Complaint;
 - (2) The heading "The Collapse (2011)," located on page 28 of Plaintiffs' Complaint;
 - (3) The heading "The Dodge (2012)," located on page 39 of Plaintiffs' Complaint;
 - (4) The heading "The Reckoning (2013)," located on page 41 of Plaintiffs' Complaint.
5. The entirety of the second two paragraphs of footnote #4, located on page 19 of Plaintiffs' Complaint, except "...the individual Defendants who are county commissioners and who are named in an individual capacity herein,...", are redundant, irrelevant, immaterial, impertinent, and/or scandalous and should therefore be stricken pursuant to Rule 12(f).
6. The entirety of paragraph 174 (located on page 27) is irrelevant to Plaintiffs' claims for relief and should, therefore, be stricken pursuant to Rule 12(f).
7. Footnote 21 (located on page 30) is irrelevant and immaterial to Plaintiffs' claims for relief and should, therefore, be stricken pursuant to Rule 12(f).

8. The portion of paragraph 208 (located on page 35) which states "...Defendants came to understand the enormity of their failure to prudently manage NRSA and the resulting inevitability of NRSA's impending collapse..." is redundant, irrelevant, immaterial, and/or impertinent to the allegations in the paragraph in the context of the asserted claims, when taken in the light most favorable to Plaintiffs herein. Pursuant to Rule 12(f), the quoted verbiage herein should therefore be stricken.

9. The portion of paragraph 210 (located on page 35) in which Plaintiffs allege a "...phoney cover story so far-fetched as to shock the conscience..." is redundant, irrelevant, immaterial, impertinent, and/or scandalous and should, therefore, be stricken pursuant to Rule 12(f).

10. The portion of paragraph 216 (located on page 36) in which Plaintiffs allege "...in pusillanimous third-person-speak" is redundant, irrelevant, immaterial, impertinent, and/or scandalous and should, therefore, be stricken pursuant to Rule 12(f).

11. Paragraphs 234 and 235 (located on page 39) are redundant, irrelevant, immaterial, impertinent, and/or scandalous and should, therefore, be stricken pursuant to Rule 12(f).

12. Paragraphs 238, 239, 240, 242, 243, and 244 (located on page 40) are each, in their entireties, immaterial and irrelevant and, to a substantial degree, involve settlement discussions as between the parties. Consequently, these paragraphs, in their entireties, should be stricken pursuant to Rule 12(f).

13. Paragraph 249 (located on page 41) and paragraph 251 (located on page 42) are entirely irrelevant and immaterial and should, therefore, be stricken pursuant to Rule 12(f).

14. Paragraphs 251 and 252 (located on page 42) are entirely repetitive, redundant and immaterial and should, therefore, be stricken pursuant to Rule 12(f).

15. Footnote #45 (located on page 46) is redundant, irrelevant, immaterial, and/or impertinent and should, therefore, be stricken pursuant to Rule 12(f).

16. Paragraph 373 (located on page 59) violates Rule 8(a)(2) of the North Carolina Rules of Civil Procedure and should, therefore, be stricken.

17. The Court has considered sanctions for Plaintiffs' violation of Rule 8(a)(2) in Plaintiffs' pleading of their alleged claim for punitive damages which are less severe than striking the entire paragraph 373. In its discretion, however, the Court concludes that any lesser

sanctions would not be appropriate given the nature of the violation, which is consistent with the general manner in which the Complaint appears to have been drafted.

FROM THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The portions of Plaintiffs' Complaint which are set out above in this Court's CONCLUSIONS OF LAW, in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 are hereby stricken pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure, on motion of this Court, as well as on motion of Defendants as set out in Defendants' Rule 12(f) Motion to Strike filed in this action. Each relevant portion of those specific paragraphs of this Court's CONCLUSIONS OF LAW, above, are incorporated fully by reference in this paragraph of the Court's ORDER and DECREE.

2. The allegations in paragraph 373 of Plaintiffs' Complaint as to Punitive Damages, improperly pleaded, are hereby stricken in their entirety. Plaintiff's claim for punitive damages is hereby dismissed with prejudice.

WITH REGARD TO DEFENDANTS' MOTION TO DISMISS, the Court considered only the facts set forth in the Complaint, which are treated as true for purposes of the Motion to Dismiss, as required by applicable North Carolina case law.

AND IT APPEARING to the Court, that Defendants' Motion to Dismiss should be **denied** as to **Claim I** and **Claim II** of Plaintiffs' Complaint on the grounds that Plaintiffs' Complaint states a claim upon which relief can be granted for breach of contract (Claim I of Plaintiffs' Complaint) and unjust enrichment/quantum meruit (Claim II of Plaintiffs' Complaint), at this pleading stage and to the extent necessary to survive a Motion to Dismiss. The Court does not make any ruling or inference as to the ultimate merit of these claims.

AND IT APPEARING to the Court, that Defendants' Motion to Dismiss should be **denied** as to **Claim VIII** of Plaintiffs' Complaint ("Conversion") on the grounds that Plaintiffs have successfully pleaded a property interest and potential legal conversion of the benefits fund at this pleading stage and to the extent necessary to survive a Motion to Dismiss. The Court does not make any ruling or inference as to the ultimate merit of this claim.

AND IT APPEARING to the Court, that the claims which Plaintiffs set out separately (not as alternative claims) as **Claim IV** ("Fraud by Concealment"), **Claim V** ("Misrepresentation") and **Claim VI** ("Fraudulent Inducement") are more properly considered to be part of Plaintiffs' **Claim III** ("Fraud, Common Law Fraud and Promissory Fraud"); and, IT FURTHER APPEARING to the Court that Plaintiffs have failed to allege, with any degree of

particularity, the requisite elements of these purported claims (including, but not limited to, what individual(s) (either by name, title, or other means of identification) made fraudulent misrepresentations, promises or fraudulently concealed material facts) as required by well-established case law and the Rules of Civil Procedure, and, therefore, Plaintiffs' **Claim III**, **Claim IV**, **Claim V**, and **Claim VI** each fails to state a claim upon which relief may be granted.

AND IT APPEARING to the Court, that other than Plaintiffs' multiple conclusory assertions about relationships and that Defendants, collectively, are allegedly Fiduciaries as to Plaintiffs, nowhere in Plaintiffs' Complaint is there an underlying factual assertion that Defendants, individually or collectively, represented, contracted, or agreed to become administrators or trustees (and, thus, Fiduciaries) of the benefit funds; and, IT FURTHER APPEARING to the Court that neither the Financial Statement (referenced in Footnote #6 on page 21) nor Chapters 159 or 160A of the North Carolina General Statutes automatically create the Fiduciary relationship between the parties; and, therefore, Plaintiffs' **Claim VII** ("Breach of Fiduciary Duty") fails to state a claim upon which relief may be granted.

AND IT APPEARING to the Court, that the "claims" which Plaintiffs attempted to set forth separately (not in the alternative) in **Claim IX** ("Misappropriation"), and **Claim X** ("Conspiracy, Aiding and Abetting, and Concerted Action") are part of other alleged claims for relief and do not set forth a recognized, individual, recoverable cause of action in the context of the entire Complaint, even when taken in the most favorable light and even when the facts are considered true for purposes of the Motion to Dismiss, and, therefore, those "claims" fail to state a claim upon which relief may be granted.

AND IT APPEARING to the Court that Plaintiffs have failed to allege underlying facts to support the conclusory allegation that the Defendants, or any of them, were in a Fiduciary relationship as to Plaintiffs with regard to the benefits and, further, that without the Fiduciary relationship (and underlying facts to give rise to that especially high level of responsibility), Plaintiffs' **Claim XI** ("Unfair or Deceptive Acts or Practices In or Affecting Commerce"), brought pursuant to Chapter 75 of the North Carolina General Statutes, is not sufficiently pled to withstand a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and fails to state a claim upon which relief may be granted.

AND IT APPEARING to the Court, in considering the arguments with regard to **Defendants' Motion to Dismiss Pursuant to Rule 8(a)(2)**, that Plaintiffs improperly pled the claim for punitive damages (Claim XII), the Court has determined as set forth above that Plaintiffs violated Rule 8(a)(2) of the North Carolina Rules of Civil Procedure.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, for failure to state a claim upon which relief can be granted, is hereby GRANTED as to the following "claims" of Plaintiffs, all of which are hereby dismissed with prejudice:

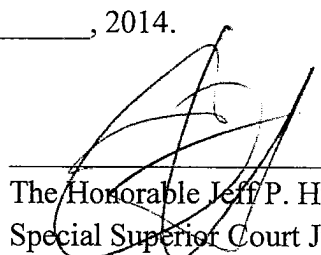
- (1) Claim III (three)
- (2) Claim IV (four)
- (3) Claim V (five)
- (4) Claim VI (six)
- (5) Claim VII (seven)
- (6) Claim IX (nine)
- (7) Claim X (ten)
- (8) Claim XI (eleven)

2. Defendants' Motion to Dismiss Pursuant to Rule 8(a)(2) of the North Carolina Rules of Civil Procedure is hereby GRANTED. Plaintiffs' Claim XII (twelve) is hereby dismissed with prejudice.

3. Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, for failure to state a claim upon which relief can be granted, is hereby DENIED as to the following "claims" of Plaintiffs:

- (1) Claim I (one)
- (2) Claim II (two)
- (3) Claim VIII (eight)

This the 29 day of June, 2014.



The Honorable Jeff P. Hunt
Special Superior Court Judge