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IN THE COURT OF APPEALS OF NORTH CAROLINA

2023-NCCOA-10

No. COA22-31

Filed 17 January 2023

Durham County, No. 18 CVS 2942

JAMES HWANG, MD, Plaintiff,

v.

BRUCE CAIRNS, THE UNIVERSITY OF NORTH CAROLINA, THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL and UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM, Defendants.

Appeal by plaintiff from orders entered 6 August 2021 by Judge John M. Dunlow in Durham County Superior Court. Cross-appeal by defendants from order entered 4 April 2019 by Judge Lora Cabbage in Durham County Superior Court. Heard in the Court of Appeals 2 November 2022.

Zaytoun Ballew & Taylor, PLLC, by John R. Taylor, Robert E. Zaytoun, Matthew D. Ballew, and Clare F. Kurdys, for plaintiff-appellant/cross-appellee.

Hartzog Law Group LLP, by Dan M. Hartzog and Katie Weaver Hartzog, for defendant-appellee/cross-appellant Bruce Cairns.

Marla S. Bowman, Laura E. Dean, and Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Eric M. David, for defendants-appellees/cross-appellants the University of North Carolina and the University of North Carolina at Chapel Hill.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, and Wyrick Robbins Yates & Ponton LLP, by T. Cullen Stafford

and Michael D. DeFrank, for defendant-appellee/cross-appellant University of North Carolina Health Care System.

ZACHARY, Judge.

¶ 1 Plaintiff James Hwang, M.D., appeals from the trial court’s 6 August 2021 orders granting summary judgment in favor of the University of North Carolina and the University of North Carolina at Chapel Hill (“the University”), University of North Carolina Health Care System (“UNC-HCS”), and Bruce Cairns, M.D. (“Cairns”) (collectively, “Defendants”). Plaintiff also appeals from the trial court’s 6 August 2021 order dismissing as moot Plaintiff’s motion for leave to file his second amended complaint. Lastly, Defendants cross-appeal from the trial court’s 4 April 2019 order denying their motions to dismiss Plaintiff’s amended complaint pursuant to Rule 12 of the North Carolina Rules of Civil Procedure.

¶ 2 After careful review, we affirm the 6 August 2021 orders. Because we affirm the 6 August 2021 orders granting Defendants’ motions for summary judgment, we dismiss Defendants’ cross-appeal as moot.

I. Background

¶ 3 Plaintiff is a physician and critical care surgeon. In June 2010, the University appointed Plaintiff as an “Assistant Professor in the tenure track in the Department of Surgery, Burn Center[,]” and in September 2014, and again in February 2017, it reappointed Plaintiff as a “Clinical Assistant Professor in the Department of Surgery

at the University[.]” Plaintiff practiced medicine in the field of burn surgery at a hospital operated by UNC-HCS in Orange County, North Carolina. Cairns, who was the Division Chief of Burns in the Department of Surgery and the Medical Director of the Burn Center at the time, supervised Plaintiff.

¶ 4 During Plaintiff’s tenure at the Burn Center, he experienced difficulties working with Cairns. Allegedly, “Cairns would regularly yell at Plaintiff in public and in front of other treatment providers without valid justification.” Cairns also allegedly “engaged in similar harassing and abusive conduct to other physicians, physician’s assistants, nurses and other staff members at the Burn Center throughout Plaintiff’s entire term of employment.” In light of these issues, Plaintiff accepted a position with the University of Alabama at Birmingham in February 2017. His last day of employment at the Burn Center was 30 June 2017.

¶ 5 Upon learning of Plaintiff’s anticipated departure, three of Plaintiff’s colleagues organized a party to celebrate Plaintiff’s work at the Burn Center and to wish him well on his next endeavor. The party organizers emailed UNC-HCS and the University employees an electronic invitation to the going-away party, with the subject line: “Hwang’s A Big Boy Now! Come Wish Him Good Luck!!”

¶ 6 The party took place on 11 June 2017 in a private room at the Top of the Hill Restaurant & Brewery in Chapel Hill. Some of the party’s decorations included a poster of Plaintiff’s head photoshopped onto the squatting body of a person wearing

thong underwear, as well as other posters with Plaintiff's head photoshopped onto the bodies of shirtless men. The party organizers also hired a male stripper to perform "[a]s an innocent joke[.]" The stripper removed his pants and shirt, and danced with some of the participants.

¶ 7

Dr. Shiara Ortiz-Pujols, a research fellow in the Burn Center in 2017, observed photographs of the party on Facebook in her cubicle the following morning. Dr. Ortiz-Pujols did not attend the going-away party, and she "found [the photographs] to be distasteful and inappropriate." She described one of the photographs depicting "a gentleman in what appeared to be chaps[.]" another showing "what appeared to be a cutout of [Plaintiff] partially unclothed and making an odd facial expression[.]" and "a photo appearing to show [Plaintiff] touching another employee's breasts." After looking at the photographs "one time for a one-minute to two-minute period[.]" she sent a text message to Dr. Samuel Jones, one of Dr. Ortiz-Pujols's supervisors at the Burn Center, expressing her concern. Dr. Ortiz-Pujols also discussed the photographs with a colleague at her cubicle that morning; Cairns walked by her cubicle during this conversation.

¶ 8

Cairns and Dr. Ortiz-Pujols then privately discussed the photographs from the party. Dr. Ortiz-Pujols told Cairns—who also did not attend the party—that she "had seen a photo appearing to show [Plaintiff] touching another employee's breasts[.]" as well as a photograph "showing what appeared to be a cutout of [Plaintiff] partially

unclothed and making an odd facial expression.” Cairns noticed that “Dr. Ortiz-Pujols was clearly uncomfortable” and “distressed[.]” He asked Dr. Ortiz-Pujols who she believed Plaintiff was grabbing in one of the photographs, and Dr. Ortiz-Pujols reported that “it was one of the [operating room] nurses.”

¶ 9 As one of Dr. Ortiz-Pujols’s supervisors, Cairns felt “an obligation to report” what Dr. Ortiz-Pujols had seen to his supervisor, Dr. Melinda Kibbe, the Chair of the Department of Surgery. Cairns thus relayed Dr. Ortiz-Pujols’s concerns to Dr. Kibbe shortly after his conversation with Dr. Ortiz-Pujols. Dr. Kibbe asked to speak with Dr. Ortiz-Pujols. After Cairns brought Dr. Ortiz-Pujols into Dr. Kibbe’s office, the three of them discussed the photographs. Dr. Kibbe then asked Cairns to find the photographs so that she could review them, but the photographs had already been removed from Facebook by the time Cairns attempted to locate them.

¶ 10 Following her conversation with Cairns and Dr. Ortiz-Pujols, Dr. Kibbe reported the allegations to Dr. Harvey Lineberry, who held joint appointments as the University’s “associate dean for the School of Medicine for human resources and as vice president for HR coordination with” UNC-HCS. Dr. Lineberry decided to initiate an investigation based upon Dr. Kibbe’s report. On 23 June 2017, representatives from the University and UNC-HCS jointly began the investigation into the party and Plaintiff’s actions. Because Plaintiff’s last day at the Burn Center was 30 June 2017, Dr. Kibbe felt that “it [wa]s [her] duty to withhold [Plaintiff’s] incentive

comp[ensation]” of \$63,545.00 until the investigation into Dr. Ortiz-Pujols’s allegations had concluded.

¶ 11 On 9 November 2017, Dr. Kibbe received the final report from the investigation, which concluded that Plaintiff did not violate any policies at his going-away party on 11 June 2017. The investigators interviewed the party organizers and Plaintiff, all of whom “adamantly denied” the existence of the photographs and any unprofessional behavior at the party. Consequently, the investigators concluded that Plaintiff did not violate the applicable disruptive and inappropriate behavior policy, ADMIN 204. The day after Dr. Kibbe received the report, she authorized the payment of Plaintiff’s incentive compensation. On or around 7 December 2017, Plaintiff received his incentive compensation of \$63,545.00.

¶ 12 On 30 May 2018, Plaintiff filed a complaint in Durham County Superior Court against Defendants, arising out of Defendants’ respective roles in the investigation into the allegations against Plaintiff and the temporary withholding of his incentive compensation. Plaintiff filed an amended complaint on 8 November 2018, asserting against the University and UNC-HCS claims of (1) breach of contract and (2) breach of implied covenant of good faith and fair dealing. Plaintiff asserted against Cairns claims of (1) interference with existing contractual duties, (2) slander *per se*, and (3) slander *per quod*; he further asserted that Cairns was “not entitled to the defense of

public official immunity[.]” Plaintiff sought punitive damages from Cairns, and he alleged that Defendants were jointly and severally liable.

¶ 13 On 7 December 2018, UNC-HCS filed a motion to dismiss Plaintiff’s amended complaint pursuant to Rule 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. The University and Cairns jointly filed a motion to dismiss the amended complaint on the same grounds on 12 December 2018. After a hearing on 11 March 2019, the trial court denied Defendants’ motions. In an order entered on 4 April 2019, the court noted that “[n]othing in this [c]ourt’s order precludes Defendants from developing facts to later assert defenses and privileges for summary judgment or other dispositive motions.”

¶ 14 The parties thereafter conducted extensive discovery for almost two years. On 10 February 2021, Defendants each filed a motion for summary judgment. On 15 March 2021, Plaintiff filed a motion for leave to file his second amended complaint, attaching, *inter alia*, the unverified pleadings of his second amended complaint.

¶ 15 Defendants’ motions for summary judgment came on for hearing on 15 July 2021. In orders entered on 6 August 2021, the trial court concluded that “there [wa]s no genuine issue as to any material fact” and that Defendants were “entitled to judgment as a matter of law as to all claims[.]” Accordingly, the court dismissed Plaintiff’s claims against Defendants with prejudice.

¶ 16 Plaintiff's motion for leave to file his second amended complaint also came on for hearing on 15 July 2021. On 6 August 2021, the court entered an order in which it concluded: "Having considered this [c]ourt's ruling on Defendants' Motions for Summary Judgment, the [c]ourt hereby determines . . . Plaintiff's Motion for Leave to File Second Amended Complaint is now moot."

¶ 17 On 12 August 2021, Plaintiff filed a notice of appeal from the trial court's 6 August 2021 orders that (1) granted summary judgment in favor of Defendants and (2) dismissed as moot his motion to file his second amended complaint. On 20 August 2021, the University and UNC-HCS filed a notice of appeal from the court's 4 April 2019 order denying their motions to dismiss Plaintiff's amended complaint. Cairns filed a notice of appeal from the 4 April 2019 order on 24 August 2021.

II. Motion to Dismiss Appeal

¶ 18 We first address this Court's jurisdiction to review Plaintiff's appeal of the trial court's orders granting Defendants' motions for summary judgment and determining that Plaintiff's motion to file his second amended complaint was rendered moot by the trial court's rulings on Defendants' summary judgment motions. Defendants maintain that Plaintiff's appeal should be dismissed due to various violations of the North Carolina Rules of Appellate Procedure. Plaintiff concedes that his brief contains rules violations, but contends that the violations are nonjurisdictional and do not rise to such a level as to warrant dismissal of his appeal.

¶ 19 The North Carolina Rules of Appellate Procedure contain a variety of nonjurisdictional requirements that are “designed primarily to keep the appellate process flowing in an orderly manner.” *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (citation and internal quotation marks omitted). Though not jurisdictional, compliance with these rules is mandatory. *Id.* at 194, 657 S.E.2d at 362. “But rules of practice and procedure are devised to promote the ends of justice, not to defeat them.” *Id.* at 194, 657 S.E.2d at 363 (citation and internal quotation marks omitted). As such, our Supreme Court has repeatedly “emphasized that noncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal.” *Id.*; *see id.* at 198, 657 S.E.2d at 365 (“We stress that a party’s failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal.”).

¶ 20 “Whether and how a court may excuse noncompliance with the rules depends on the nature of the default.” *Id.* at 194, 657 S.E.2d at 363. For nonjurisdictional rules violations, “the appellate court may not consider sanctions of any sort” unless a party’s noncompliance rises “to the level of a ‘substantial failure’ or ‘gross violation.’” *Id.* at 199, 657 S.E.2d at 366. Rather, “the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible.” *Id.* When determining whether a party’s noncompliance rises to a level justifying sanctions, “the court may consider, among other factors, whether and to what extent the

noncompliance impairs the court’s task of review and whether and to what extent review on the merits would frustrate the adversarial process.” *Id.* at 200, 657 S.E.2d at 366–67. However, “only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate.” *Id.* at 200, 657 S.E.2d at 366.

¶ 21 In the instant case, Plaintiff failed to timely serve his appellate brief upon Defendants, serving his brief two minutes after the deadline. In addition, the citations to the record in his brief are incorrectly formatted, and his brief does not include his appellate counsel’s signature block at its conclusion. Plaintiff thus has failed to comply with Appellate Rules 9, 13, and 26. *See* N.C.R. App. P. 9(b)(4), 13(c), 26(g)(3). In an effort to remedy these violations, Plaintiff has filed with this Court a motion to consider his primary appellate brief timely filed, as well as a motion to file an amended substitute brief.

¶ 22 Plaintiff’s nonjurisdictional violations are few and do not relate to the merits of his appeal. We do not consider Plaintiff’s noncompliance an “egregious instance[] of nonjurisdictional default” warranting dismissal of his appeal, and conclude that we are able to complete our “task of review[.]” *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366. Further, a review on the merits would not “frustrate the adversarial process[.]” in that Defendants do not contend in their motion to dismiss that they suffered prejudice as a result of Plaintiff’s noncompliance. *Id.* at 200, 657 S.E.2d at 366–67.

¶ 23 Because Plaintiff's noncompliance with the rules does not rise to the level of a substantial failure or gross violation, we deny Defendants' motion to dismiss Plaintiff's appeal. *See, e.g., Stevens v. Heller*, 268 N.C. App. 654, 657, 836 S.E.2d 675, 678 (2019) (denying the defendants' motion to dismiss the plaintiff's appeal where the plaintiff's two-day delay in serving his brief on the defendants did not amount to "a substantial failure or gross violation justifying the extreme sanction of dismissal because . . . the non-compliance ha[d] not impaired our task of review, and review on the merits would not frustrate the adversarial process" (citation and internal quotation marks omitted)).

¶ 24 In light of our disposition of Defendants' motion to dismiss, we allow Plaintiff's motion to consider his primary brief timely filed and dismiss Plaintiff's motion to file an amended substitute brief, and proceed to the merit of Plaintiff's appeal.

III. Discussion

A. Appeal from Summary Judgment Orders

¶ 25 On appeal, Plaintiff first argues that the trial court erred by granting summary judgment in favor of Defendants. Concerning the University and UNC-HCS, Plaintiff asserts that summary judgment in their favor was improper because Plaintiff sufficiently alleged and demonstrated that: (1) an employment contract existed with both the University and UNC-HCS; (2) he suffered "undue harm" as a result of the University and UNC-HCS's investigation; and (3) the University and UNC-HCS

waived their sovereign immunity by entering into an employment contract. Regarding Cairns, Plaintiff contends that he presented sufficient evidence that: (1) Cairns “maliciously published false accusations that Plaintiff committed sexual misconduct”; (2) Cairns “knew his false accusations would result in a frivolous investigation, contract breach, and subsequent damages”; and (3) Cairns was not entitled to public official immunity.

1. Standard of Review

¶ 26 A trial court properly grants summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021). “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). “If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision.” *Asher v. Huneycutt*, 2022-NCCOA-517, ¶ 18 (citation omitted).

¶ 27 Appellate courts review “decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review.” *Cummings v. Carroll*, 379 N.C. 347, 2021-NCSC-147, ¶ 21. “When reviewing de novo,

the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Asher*, ¶ 19 (citation and internal quotation marks omitted).

¶ 28 The burden of proof governing motions for summary judgment is well settled. First, the moving party “bears the burden of establishing that there is no triable issue of material fact.” *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). The moving party may meet this burden “by proving that an essential element of the opposing party’s claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]” *Id.* (citation omitted). After the moving party has made the required showing, “the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial[.]” *Cummings*, ¶ 21 (citation and internal quotation marks omitted).

2. Summary Judgment: The University and UNC-HCS

¶ 29 As a preliminary matter, we address the applicability of sovereign immunity to the University and UNC-HCS in the present case. As state institutions, the University and UNC-HCS generally enjoy immunity from suit. *See* N.C. Gen. Stat. §§ 116-4, -37; *see also Jones v. Pitt Cty. Mem’l Hosp., Inc.*, 104 N.C. App. 613, 616, 410 S.E.2d 513, 514 (1991) (“The doctrine of sovereign immunity applies not only to suits in which the State is a named defendant, but also to actions against its departments, institutions, and agencies.”); *Kawai Am. Corp. v. Univ. of N. Carolina at Chapel Hill*,

152 N.C. App. 163, 165, 567 S.E.2d 215, 217 (2002) (“The University is a state agency to which the doctrine of sovereign immunity applies.”).

¶ 30 Generally, “under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity.” *Wray v. City of Greensboro*, 370 N.C. 41, 47, 802 S.E.2d 894, 898 (2017) (citation omitted). However, “whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.” *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976). Thus, in contract causes of action, “[t]he State will occupy the same position as any other litigant[,]” and “the doctrine of sovereign immunity will not be a defense to the State.” *Id.* at 320, 222 S.E.2d at 424. As such, “an allegation of a valid contract is an allegation of waiver of governmental immunity.” *Wray*, 370 N.C. at 48, 802 S.E.2d at 899.

¶ 31 Here, Plaintiff alleged in his amended complaint that a “valid and enforceable written employment contract existed between Plaintiff and the [University and UNC-HCS], supported by adequate consideration.” Accordingly, Plaintiff has adequately alleged waiver of sovereign immunity, and the University and UNC-HCS are barred from asserting sovereign immunity as a defense to Plaintiff’s claims against them. *See Smith*, 289 N.C. at 320, 222 S.E.2d at 424. We now turn to the merits of Plaintiff’s claims against them.

a. Breach of Contract

¶ 32 Plaintiff first argues that “the trial court’s ruling had to be made with the presumption that, as Plaintiff alleged and supported, [the University and UNC-HCS] were party to an implied employment contract with [Plaintiff] which was breached by the withholding of [his] pay and conducting the frivolous investigation based on Cairns’ false accusations.” He further argues that “[a]ny questions as to Plaintiff’s contract . . . , including what constituted the employment contract, who employed Plaintiff, and whether the contract was breached, are ambiguous and require the determination of a jury.” We disagree. As explained below, the trial court properly awarded summary judgment in favor of the University and UNC-HCS on the breach of contract claim because (1) the terms of the contract are not ambiguous and the University’s actions did not amount to a breach, and (2) UNC-HCS cannot breach a contract to which it was not a party.

¶ 33 Plaintiff maintains on appeal that he had an implied contract with the University and UNC-HCS. However, he expressly alleged in his amended complaint that he had a “written employment contract” with the University and UNC-HCS. “[I]t is a well[-]established principle that an express contract precludes an implied contract with reference to the same matter, so that, if there is a contract between the parties, the contract governs the claim and the law will not imply a contract.” *Mancuso v. Burton Farm Dev. Co.*, 229 N.C. App. 531, 536–37, 748 S.E.2d 738, 743

(citations and internal quotation marks omitted), *disc. review denied*, 367 N.C. 279, 752 S.E.2d 149 (2013). Therefore, if we determine that an express contract existed between Plaintiff and the University and UNC-HCS, Plaintiff's breach of contract claim pursuant to an implied contract is precluded as a matter of law.

¶ 34 “The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.” *Howe v. Links Club Condo. Ass’n*, 263 N.C. App. 130, 138, 823 S.E.2d 439, 448 (2018) (citation omitted). Hence, in a breach of contract action, “the complaint must allege the existence of a contract between [the] plaintiff and [the] defendant, the specific provisions breached, the facts constituting the breach, and the amount of damages resulting to [the] plaintiff from such breach.” *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 675, 235 S.E.2d 234, 238 (1977) (emphasis omitted) (citation and internal quotation marks omitted).

¶ 35 For a valid contract to exist between two parties, “an offer and acceptance are essential elements; they constitute the agreement of the parties. The offer must be communicated, must be complete, and must be accepted in its exact terms.” *Yeager v. Dobbins*, 252 N.C. 824, 828, 114 S.E.2d 820, 823–24 (1960) (citation omitted). “An acceptance by conduct is a valid acceptance.” *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 822, 561 S.E.2d 578, 582, *disc. review denied*, 356 N.C. 611, 574 S.E.2d 676 (2002).

¶ 36 “It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners.” *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 336, 777 S.E.2d 272, 279 (2015) (citation omitted). “When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court and the court cannot look beyond the terms of the contract to determine the intentions of the parties.” *Lynn v. Lynn*, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (citation omitted), *disc. review denied*, 364 N.C. 613, 705 S.E.2d 736 (2010). “When a contract expressly incorporates a document by reference, however, that document becomes a part of the parties’ agreement.” *Montessori Children’s House of Durham v. Blizzard*, 244 N.C. App. 633, 637, 781 S.E.2d 511, 514, *disc. review denied*, 369 N.C. 31, 792 S.E.2d 505 (2016).

¶ 37 “Additionally, as a matter of law, a non-party to a contract cannot be held liable for any breach that may have occurred.” *Howe*, 263 N.C. App. at 139, 823 S.E.2d at 448 (citation and internal quotation marks omitted).

¶ 38 Here, Plaintiff and the University entered into a valid, written employment contract. According to Dr. Kibbe, the letters appointing Plaintiff to the position of “Assistant Professor” and “Clinical Assistant Professor” constituted offers of employment with the University. Plaintiff accepted the terms of these offers through his conduct, as indicated by his completion of his onboarding employment paperwork. In addition, Plaintiff maintained at his deposition that his breach of contract claim

arose out of “the employment contract with” the University, and he asserted that the appointment letters established the contract. Thus, a valid employment contract between Plaintiff and the University existed: the appointment letters acted as the University’s offer and the completion of the onboarding paperwork acted as Plaintiff’s acceptance. *See Yeager*, 252 N.C. at 828, 114 S.E.2d at 823–24. Plaintiff’s implied contract theory accordingly fails. *See Mancuso*, 229 N.C. App. at 536–37, 748 S.E.2d at 743.

¶ 39 However, UNC-HCS was not party to this employment contract. Although Plaintiff performed his duties as a surgeon in UNC-HCS’s facilities, his job title was “Clinical Assistant Professor in the Department of Surgery at the University” at the time of the alleged breach, and he was solely supervised and managed by other University employees. In addition, the executive of human resources at UNC-HCS maintained in a sworn affidavit that her “comprehensive search of UNC[-]HCS’s employment records indicates unequivocally that UNC[-]HCS has never employed” Plaintiff. Furthermore, the University’s official letterhead was at the top of Plaintiff’s appointment letters and attachments—the terms of which serve as the contract. Therefore, because UNC-HCS did not employ Plaintiff, it cannot be party to Plaintiff’s written employment contract with the University.

¶ 40 Plaintiff nevertheless argues that both the University and UNC-HCS breached the employment contract “by the withholding of [his] pay and conducting the frivolous investigation based on Cairns’ false accusations.”

¶ 41 Because we have determined that an express employment contract existed between the University and Plaintiff by the terms articulated in the appointment letters, we evaluate Plaintiff’s breach of contract claims pursuant to those letters. The letters indicate that Plaintiff’s compensation was subject to a compensation plan established by the University’s School of Medicine. Pursuant to that compensation plan, a “faculty member’s incentive component may be reduced where, under the methodologies adopted by his or her Department or Division, . . . the faculty member has not met . . . professionalism . . . standards.” The compensation plan further provides that “[p]ayment is dependent upon appropriate professional behavior and compliance with institutional policies[.]”

¶ 42 One such policy upon which payment is dependent under the compensation plan is ADMIN 204, which governs “disruptive and inappropriate behavior for all employees, staff and faculty (collectively, ‘health care team members’).” ADMIN 204 defines such behavior, in part, as “inappropriately touching a . . . health care team member.” The policy repeatedly instructs that all employees have a “Duty to Report” such behavior: “All instances of disruptive and inappropriate behavior should be reported [D]isruptive and inappropriate behavior should always be reported,

even if resolved informally.” Such reporting, pursuant to ADMIN 204, “should be made through the chain of command, e.g., immediate Supervisor, Department Director, or Vice President, in writing, verbally, or through UNC[-]HCS’s Compliance/Abusive Behavior Hotline.” The policy also requires that “[e]ach report of disruptive and inappropriate behavior shall be screened, investigated and documented by staff trained to discern the severity of the violation, the presence of mitigating factors, and the existence of risk of harm to patients.”

¶ 43 In light of the terms articulated in the compensation plan and ADMIN 204, we conclude that the University did not breach its contract with Plaintiff by initiating an investigation into the allegations of inappropriate conduct and temporarily withholding his incentive compensation.

¶ 44 The appointment letters incorporate by reference the University’s compensation plan, and thus, “that document bec[ame] a part of the parties’ agreement.” *Montessori Children’s*, 244 N.C. App. at 637, 781 S.E.2d at 514. And pursuant to the compensation plan, “[p]ayment is dependent upon appropriate professional behavior and compliance with institutional policies[.]” One such institutional policy is ADMIN 204, which mandates reporting of any disruptive and inappropriate behavior—behavior such as that reported by Dr. Ortiz-Pujols upon observing the photograph on Facebook of Plaintiff “touching another employee’s breasts[.]” And pursuant to ADMIN 204, the University was required to initiate an

investigation upon Dr. Ortiz-Pujols’s report, as she alleged that Plaintiff “inappropriately touch[ed] a . . . health care team member.” In that the appointment letters incorporate by reference the compensation plan, and the compensation plan required all employees to comply with ADMIN 204, the University did not breach its contract by initiating an investigation into Dr. Ortiz-Pujols’s allegations. Further, because the “incentive component may be reduced” where a faculty member has not met professionalism standards under the compensation plan, the University did not breach the terms of its contract with Plaintiff by temporarily withholding Plaintiff’s incentive payment pending the outcome of the investigation.

¶ 45 Accordingly, Plaintiff cannot “produce a forecast of evidence demonstrating that [he] will be able to make out at least a prima facie case at trial” of a breach of contract by the University, and summary judgment in the University’s favor on this claim was appropriate. *Cummings*, ¶ 21 (citation omitted).

¶ 46 Regarding UNC-HCS, because “a non-party to a contract cannot be held liable for any breach that may have occurred[,]” *Howe*, 263 N.C. App. at 139, 823 S.E.2d at 448 (citation and internal quotation marks omitted), Plaintiff’s breach of contract claim against it fails. As explained above, UNC-HCS sufficiently demonstrated “that an essential element of [Plaintiff]’s claim is non-existent”—namely, that no employment contract existed between Plaintiff and UNC-HCS. *DeWitt*, 355 N.C. at

681, 565 S.E.2d at 146. The trial court therefore properly awarded summary judgment in UNC-HCS’s favor on this claim.

b. Breach of Implied Covenant of Good Faith and Fair Dealing

¶ 47 Plaintiff next argues that the University and UNC-HCS’s “frivolous investigation caused [him] undue harm, which constituted a breach of the implied covenant of good faith and fair dealing.” Specifically, he maintains that the University and UNC-HCS “improperly initiated a harmful investigation” despite “Cairns’ pattern of false allegations and personal animus against” Plaintiff, of which the University and UNC-HCS “knew or should have known.” Plaintiff further maintains that the University and UNC-HCS “failed to perform their contractual obligations in good faith” by making “the unilateral choice to withhold promised wages, without giving [Plaintiff] an opportunity to contest those allegations beforehand[.]” Again, we disagree.

¶ 48 “In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.” *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted); *see also Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005) (“In addition to its express terms, a contract contains all terms that are necessarily implied to effect the intention of the parties and which are not in conflict with the express terms.” (citation and

internal quotation marks omitted)). However, “where a party’s claim for breach of the implied covenant of good faith and fair dealing is based upon the same acts as its claim for breach of contract, we treat the former claim as ‘part and parcel’ of the latter.” *Cordaro v. Harrington Bank, FSB*, 260 N.C. App. 26, 38–39, 817 S.E.2d 247, 256 (citation omitted), *disc. review denied*, 371 N.C. 788, 821 S.E.2d 181 (2018).

¶ 49 In the present case, Plaintiff argues on appeal that the University and UNC-HCS breached the implied covenant of good faith and fair dealing by initiating an investigation and withholding his incentive compensation. As detailed above, Plaintiff argues that the same conduct constituted a breach of contract by the University and UNC-HCS. Additionally, the conduct that Plaintiff alleged in his amended complaint constituted a breach of contract matches verbatim the conduct that he alleged constituted a breach of implied covenant of good faith and fair dealing. Plaintiff’s breach of implied covenant of good faith claim thus “is based upon the same acts as [his] claim for breach of contract,” and we treat it as “part and parcel” of his breach of contract claim. *Id.* (citation omitted). Accordingly, for the reasons articulated in the above section, we conclude that the trial court properly awarded summary judgment in favor of the University and UNC-HCS on this claim.

3. Summary Judgment: Cairns

¶ 50 Plaintiff contends that the trial court erred by granting summary judgment in favor of Cairns because “Cairns is sued in his individual capacity and is not entitled

to any form of immunity that would bar Plaintiff's claims." Because his amended complaint alleged claims against Cairns in his individual capacity and seeks a judgment against Cairns personally, Plaintiff argues, "the defense of sovereign immunity is not applicable as a matter of law." (Emphasis omitted). Plaintiff's argument is unavailing.

¶ 51 "A suit against a public official in his official capacity is a suit against the State. Therefore, sovereign immunity bars an intentional tort claim against a public official in his official capacity." *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2012) (citation and internal quotation marks omitted) (concluding that the defendant, as head of the Department of Electrical and Computer Engineering at N.C. State University, was a public official entitled to immunity from the plaintiff's libel action).

¶ 52 Our Supreme Court has identified "several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999). As regards the distinction between discretionary and ministerial duties, our Supreme Court explained:

An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of

sovereign power. Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.

Meyer v. Walls, 347 N.C. 97, 113, 489 S.E.2d 880, 889 (1997) (citations and internal quotation marks omitted).

¶ 53 Yet, although defendants-officials “may be shielded from liability in their official capacities, they remain *personally* liable for any actions which may have been corrupt, malicious or perpetrated outside and beyond the scope of official duties.” *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 204, 468 S.E.2d 846, 851 (citation omitted), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). “To sustain the personal or individual capacity suit, the plaintiff must initially make a *prima facie* showing that the defendant-official’s tortious conduct falls within one of the immunity exceptions, *i.e.*, that the official’s conduct is malicious, corrupt, or outside the scope of official authority.” *Id.* at 205, 468 S.E.2d at 851–52. Once the plaintiff makes such a showing, the “officers who seek to defend an action on the ground of sovereign immunity must show they are acting within the scope of their authority.” *Id.* at 205, 468 S.E.2d at 852 (citation omitted).

¶ 54 Here, Plaintiff asserts that “Cairns is not a public official simply because he works as a physician for a state entity and exercises medical discretion.” He also

contends that Cairns is not a public official because his “position was not created by statute, nor did it require Cairns to take a public oath or exercise of sovereign power or discretion[.]” However, Plaintiff construes Cairns’ duties and the category of public official too narrowly.

¶ 55 Just as the defendant in *White*, Cairns worked at a public university in a position that requires “deliberation, decision and judgment[.]” *White*, 366 N.C. at 363, 736 S.E.2d at 168 (citation omitted). Indeed, as the Division Chief of Burns in the Department of Surgery and Medical Director of the Burn Center at the time relevant to the complaint, Cairns’ position undoubtedly required him to exercise “personal deliberation, decision and judgment” in carrying out his duties. *Meyer*, 347 N.C. at 113, 489 S.E.2d at 889 (citation omitted). Cairns did more than “exercise[] medical discretion[.]” as Plaintiff claims; as the Division Chief, Cairns handled many “personnel and administrative matters[.]” such as reviewing and approving all discretionary fund requests submitted by the faculty in his division. We therefore conclude that Cairns is a public official entitled to immunity, in that his position required that he “exercise[] discretion” rather than “perform ministerial duties.” *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127.

¶ 56 Nevertheless, Cairns’ status as a public official does not provide him total immunity from suit, for Plaintiff sued Cairns in Cairns’ individual capacity rather than his official capacity. See *Epps*, 122 N.C. App. at 204, 468 S.E.2d at 851. In order

for his claims against Cairns to succeed, Plaintiff must demonstrate that Cairns' allegedly "tortious conduct falls within one of the immunity exceptions, *i.e.*, that [Cairns'] conduct is malicious, corrupt, or outside the scope of official authority." *Id.* at 205, 468 S.E.2d at 852. As Plaintiff has not alleged that Cairns' actions were corrupt or outside the scope of his authority, the only relevant exception to public official immunity here is malice.

¶ 57 "A malicious act is one which is: (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Fullwood v. Barnes*, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016) (citation and internal quotation marks omitted); *see also In re Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984) ("A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another.").

¶ 58 Like Plaintiff, Cairns was a faculty member at the University subject to ADMIN 204, the disruptive and inappropriate behavior policy. ADMIN 204 provides a non-exhaustive list of disruptive and inappropriate behavior, which includes "inappropriately touching a . . . health care team member" and "ignoring potentially harmful situations or failing to report them appropriately[.]" Accordingly, when Dr. Ortiz-Pujols expressed to Cairns her belief that she witnessed inappropriate behavior by Plaintiff on Facebook, Cairns had a duty to report it—not only because ADMIN

204 affirmatively states that “disruptive and inappropriate behavior should always be reported,” but also because failure to do so would itself constitute disruptive and inappropriate behavior. As confirmed by Cairns, Dr. Ortiz-Pujols, and Dr. Kibbe at their respective depositions, after Dr. Ortiz-Pujols first disclosed her concerns to Cairns, Cairns reported the allegations up the chain of command to his immediate supervisor, Dr. Kibbe, as required by ADMIN 204. Dr. Kibbe then reported the allegations to Dr. Lineberry, the School of Medicine’s associate dean for human resources and vice president of human resources coordination with UNC-HCS, and Dr. Lineberry initiated the investigation.

¶ 59 In that Plaintiff cannot demonstrate that Cairns acted contrary to his duty to report Dr. Ortiz-Pujols’s concerns pursuant to ADMIN 204, Plaintiff is unable to show that Cairns acted with the malice required to overcome Cairns’ public official immunity. Because Plaintiff “cannot produce evidence to support an essential element of his claim” that Cairns’ conduct fell within one of the immunity exceptions, we conclude that the trial court did not err by granting summary judgment in Cairns’ favor for the slander *per se* and tortious interference with contract claims, both of which arose out of Cairns’ reporting. *DeWitt*, 355 N.C. at 681, 565 S.E.2d at 146 (citation omitted).

4. Summary Judgment: Abandoned Issues

¶ 60 In his amended complaint, Plaintiff alleged a claim for slander *per quod* and sought punitive damages against Cairns, as well as the joint and several liability of all Defendants. To the extent that Plaintiff advances these issues on appeal, he has stated no reason or argument in support of them in his brief. Accordingly, these issues are abandoned. See N.C.R. App. P. 28(b)(6); *see also, e.g., Wilson v. Pershing, LLC*, 253 N.C. App. 643, 650, 801 S.E.2d 150, 156 (2017) (concluding that where an appellant’s “brief does not contain any substantive arguments on [an issue presented], this issue has been abandoned”).

B. Appeal from Order Denying Motion to File Second Amended Complaint

¶ 61 Plaintiff next appeals from the trial court’s order determining that “Plaintiff’s Motion for Leave to File Second Amended Complaint is now moot.” Plaintiff asserts that “[t]he trial court’s failure to rule on [his] motion to amend the pleadings before ruling on summary judgment is clear error.”

1. Standard of Review

¶ 62 “[O]ur standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion.” *Delta Envtl. Consultants of N. Carolina, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999). “A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are

manifestly unsupported by reason.” *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985) (citation omitted).

2. Analysis

¶ 63 Plaintiff asserts that the trial court “prematurely ruled on the [m]otions for [s]ummary [j]udgment before considering the amended pleadings[,]” which constituted “clear legal error.”

¶ 64 Rule 15 of the North Carolina Rules of Civil Procedure provides, in relevant part, that “a party may amend his pleading only by leave of court or by written consent of the adverse party” after a responsive pleading has already been served. N.C. Gen. Stat. § 1A-1, Rule 15(a). “Generally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced.” *Delta*, 132 N.C. App. at 165, 510 S.E.2d at 694.

¶ 65 “When the trial court states no reason for its ruling on a motion to amend, this Court may examine any apparent reasons for the ruling.” *Id.* at 166, 510 S.E.2d at 694. “[P]roper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party. Other reasons that would justify a denial are bad faith, futility of amendment, and repeated failure to cure defects by previous amendments.” *Id.* (citations omitted).

¶ 66 Although a trial court errs by “grant[ing] a motion for summary judgment without first ruling on a party’s motion to amend its pleadings under Rule 15(a), this

error is harmless when the amended pleadings are unverified because the trial court may not consider an unverified pleading when ruling on a motion for summary judgment.” *Tew v. Brown*, 135 N.C. App. 763, 766–67, 522 S.E.2d 127, 130 (1999) (citation omitted), *disc. review improvidently allowed*, 352 N.C. 145, 531 S.E.2d 213 (2000).

¶ 67 In the instant case, Defendants filed their motions for summary judgment on 10 February 2021, and Plaintiff filed his motion for leave to file his second amended complaint on 15 March 2021. Plaintiff attached to his motion an unverified second amended complaint. The trial court did not state in its order the reason for its ruling on the motion to amend; the order simply provided that “[h]aving considered this [c]ourt’s ruling on Defendants’ Motions for Summary Judgment, the [c]ourt hereby determines . . . Plaintiff’s Motion for Leave to File Second Amended Complaint is now moot.” “While it [wa]s error for the trial court to grant [the] motion[s] for summary judgment without first ruling on [Plaintiff]’s motion to amend [his] pleadings under Rule 15(a),” the error was harmless; Plaintiff’s amended pleadings were unverified, precluding their consideration by the trial court when ruling on Defendants’ motions for summary judgment. *Tew*, 135 N.C. App. at 766–67, 522 S.E.2d at 130.

C. Cross-Appeal from Order Denying Motions to Dismiss

¶ 68 On cross-appeal, Defendants jointly assert that the trial court erred by denying their motions to dismiss because (1) the University and UNC-HCS are immune from

suit as state agencies, and (2) Cairns is immune from suit as a public official. However, they note that if this Court affirms the dismissal of Plaintiff's claims in summary judgment, "Defendants' appeal will be moot." (Footnote omitted).

¶ 69 "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *TAC Stafford, LLC v. Town of Mooresville*, 282 N.C. App. 686, 2022-NCCOA-217, ¶ 44 (citation omitted), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2022). Here, we have provided the relief that Defendants seek by affirming the court's orders granting summary judgment, and as Defendants acknowledge, further determination of Defendants' cross-appeal could not have any practical effect on the existing controversy. Accordingly, we need not address Defendants' cross-appeal, as it is rendered moot by our disposition of Plaintiff's appeal.

IV. Conclusion

¶ 70 For the foregoing reasons, we affirm the trial court's orders granting summary judgment in favor of Defendants, as well as the trial court's order dismissing Plaintiff's motion to file his second amended complaint. Defendants' cross-appeal from the 4 April 2019 order is dismissed as moot.

AFFIRMED; CROSS-APPEAL DISMISSED.

Judges ARROWOOD and GRIFFIN concur.

HWANG V. CAIRNS

2023-NCCOA-10

Opinion of the Court

Report per Rule 30(e).