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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 24-158

Filed 7 May 2025

Pitt County, No. 22CVS000680-730

DAVID R. DERKITS, M.D., Plaintiff,

v.

PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED; EAST CAROLINA UNIVERSITY; BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; AND RICHARD W. STAIR, M.D., in his official capacity and his individual capacity, Defendants.

Appeal by plaintiff from orders entered 27 July 2023 by Judge Jeffrey B. Foster in Superior Court, Pitt County. Heard in the Court of Appeals 29 January 2025.

*Fox Rothschild LLP, by Matthew Nis Leerberg, for plaintiff-appellant.*

*Harris, Creech, Ward & Blackerby, PA, by Jay C. Salsman, A. Ruthie Sheets, & Christina J. Banfield, for defendant-appellee Pitt County Memorial Hospital, Inc.*

*Attorney General Jeff Jackson, by Assistant Attorney General Anne P. Martin & Special Deputy Attorney General Kimberly D. Potter, for defendant-appellee East Carolina University, et al.*

ARROWOOD, Judge.

Dr. David Derkits (“plaintiff”) appeals from orders entered 27 July 2023 dismissing his Complaint against Pitt County Memorial Hospital (“PCMH”), East

*Opinion of the Court*

Carolina University (“ECU”), University of North Carolina Board of Governors (“UNC”), and Dr. Richard W. Stair (“Dr. Stair”) for numerous causes of action arising out of his residency at PCMH. For the following reasons, we affirm in part and reverse in part the trial court’s orders.

I. Background

Because this appeal arises out of a dismissal pursuant to Rule 12(b)(6), we rely upon the facts as alleged in plaintiff’s complaint and defendants’ motions submitted to the Pitt County Superior Court.

Plaintiff graduated from the University of Virginia School of Medicine with an M.D. degree on 21 May 2017. During plaintiff’s final year of medical school, he began applying to emergency medicine residency programs accredited by the Accreditation Council for Graduate Medical Education (“ACGME”). On 17 March 2017, plaintiff was notified that he had matched with PCMH’s three-year emergency residency program.

At the time of plaintiff’s acceptance to the residency program, PCMH was in a contractual relationship with ECU and UNC pursuant to an Affiliation Agreement (“Agreement”). This Agreement identified PCMH “dba Vidant Medical Center (VMC)” as the primary teaching hospital of ECU’s Brody School of Medicine (“BSOM”). In the Agreement, PCMH, ECU, and UNC agreed to

accept the joint responsibility for developing and administering all residency and other graduate medical education (GME) programs accredited by the Accreditation

Council for Graduate Medical Education (ACGME) or other national accrediting agencies, and unaccredited programs as jointly approved by the Dean of BSOM and the President of VMC. GME programs shall be conducted in accordance with the requirements of the accrediting body and the GME Committee. The Chair of an academic clinical department sponsoring any GME program shall maintain management responsibility for the conduct of these programs unless otherwise directed by the President of VMC and the Dean of BSOM acting jointly.

Upon “matching” into PCMH’s residency program, plaintiff was under a binding obligation to accept a position in the residency program and accordingly entered into a contract with PCMH to start training in the residency program. On 12 April 2017, plaintiff signed a memorandum of understanding (“MOU-1”), which detailed the contractual relationship between plaintiff and PCMH.

In MOU-1, PCMH agreed to “provide an environment and educational program that is in accord with the ‘Essentials of Accredited Residencies’ of the [ACGME]”. The ACGME requires all sponsoring institutions to “have a policy that requires each of its ACGME-accredited programs to determine the criteria for promotion and/or renewal of a resident’s/fellow’s appointment.” Furthermore, the sponsoring institution “must ensure that each of its programs provides a resident/fellow with a written notice of intent when that resident’s/fellow’s agreement will not be renewed, when that resident/fellow will not be promoted to the next level of training, or when that resident/fellow will be dismissed.” Finally, the sponsoring institution must “have a policy that provides residents/fellows with due process relating to the

following actions regardless of when the action is taken during the appointment period: suspension, non-renewal, non-promotion; or dismissal.”

In compliance with ACGME’s policy, PCMH included in MOU-1, and in all subsequent MOUs, the appeal procedure available to residents who faced disciplinary actions, non-reappointment, or other actions taken that could significantly threaten their intended career development. This policy was referred to as the Resident Reappointment and Grievance Policy (“RRG Policy”). If a resident was not reappointed to the next year of the residency program, an “appeal must be made in writing and delivered to the Institutional Official within 5 (five) business days of the notification of disciplinary action.”

If the resident successfully requested an appeal,

“[a]n appeals committee shall be appointed by the Institutional Official and be composed of three chairs of academic departments/chiefs of services that sponsor graduate medical education programs. These individuals shall not be participants in the involved department. The VMC Vice President for Human Resources or his/her designee shall be an additional ad hoc voting member of this appeals committee. This appeals committee shall be chaired by the Institutional Official who shall have voting privileges if required to create a majority vote on any issue. In this appeal hearing both sides may be represented by counsel and written transcripts of the proceedings will be prepared and subsequently provided to either party upon request. The role of legal counsel shall be limited to that of an advisor to his or her client and shall not otherwise participate in the hearing process. The appeals committee shall be convened within 10 (ten) business days following the receipt of the written request for appeal.

Pursuant to MOU-1, plaintiff was appointed as an emergency medicine resident for a one-year term from 1 July 2017 to 30 June 2018. MOU-1 provided that plaintiff would be reappointed for each year of his residency program “upon recommendation by The Program Director after consultation with the faculty.” Additionally, “[i]t is the responsibility of the [Clinical Competency Committee] and [The Program Director] to annually determine the progression within [The Program]. The recommendation for reappointment is made with the understanding that the recommended reappointment is contingent upon satisfactory completion of [The Program]’s requirements for promotion.” At PCMH’s emergency residency program, Dr. Stair was the program director until his resignation on or about 1 October 2019. After Dr. Stair’s resignation, Dr. Cassandra Bradby (“Dr. Bradby”) became the program director. Dr. Herbert Garrison (“Dr. Garrison”) served as the Designated Institutional Official and the Associate Dean of Graduate Medical Education for PCMH. Plaintiff successfully completed his first year of the residency program and was reappointed for a second-year term, which was set to begin on 1 July 2018.

Although plaintiff was successfully reappointed after his first year, he later alleged he had been targeted by Dr. Stair since the beginning of his residency appointment. Around September 2017, Dr. Stair allegedly developed personal ill will toward plaintiff for reasons not related to his performance as an emergency resident physician. Plaintiff alleged that Dr. Stair intended to compile a negative review of plaintiff’s performance as a resident in order to get plaintiff dismissed from the

program. In furtherance of this goal, Dr. Stair called a meeting with plaintiff and Dr. Bradby to discuss Dr. Stair's concerns with plaintiff. However, at no point before, during, or after this meeting did plaintiff receive written or oral notice of informal remediation, formal remediation, or any other disciplinary action.

On 20 September 2017, Dr. Stair memorialized the details from this meeting in an unaddressed Memorandum from that date. Plaintiff alleged that Dr. Stair intentionally misrepresented plaintiff's performance in the memorandum; plaintiff argued these misrepresentations were refuted by pertinent evaluations of plaintiff's performance. Dr. Stair did not provide plaintiff with a copy of this memorandum nor place a copy in plaintiff's residency file. Later, Dr. Stair sent plaintiff an email with the subject line "Performance review" and wrote "[p]lease set up a time to meet with me." Plaintiff made several attempts to schedule a meeting, but Dr. Stair did not follow up with plaintiff, and no meeting occurred.

Plaintiff also alleged that Dr. Stair intentionally withheld information from plaintiff on interventions available for improving plaintiff's performance, including a written learning plan, formal and informal remediation, additional training, supervision, modification of duties, and modification of clinical responsibilities. After 1 November 2017, Dr. Stair ceased all communications with plaintiff until 24 January 2018. Plaintiff did not hear any further information about his performance from Dr. Stair. Despite Dr. Stair's actions, plaintiff was reappointed to his second year of residency on 1 July 2018.

During plaintiff's second year of residency, he met with Dr. Susan Miller ("Dr. Miller"), an Associate Program Director for the residency program, on 5 February 2019 for his third semi-annual assessment. As part of this assessment, Dr. Miller reviewed specific numbers in the assessment which she characterized as "Dr. Stair's numbers", and indicated that Dr. Stair was creating benchmarks for plaintiff's promotion.

On 20 March 2019, plaintiff had a meeting with Dr. Stair where plaintiff was notified of his first non-reappointment. In lieu of reappointment to his third year of residency on 1 July 2019, plaintiff would remain a second-year resident from 1 July 2019 to 22 September 2019. Dr. Stair stated that the reason for the non-reappointment was that plaintiff was not meeting his milestones as set forth by Stair.

On 25 March 2019, plaintiff initiated an appeal of his non-reappointment. Plaintiff alleged that Dr. Stair became angry with plaintiff for appealing the non-reappointment and encouraged his fellow colleagues to "[pack] in negative evaluations" to bolster Dr. Stair's claims. After plaintiff initiated his appeal, Dr. Garrison had ten business days to convene an Appeals Committee to oversee plaintiff's appeal. However, after plaintiff filed his appeal on 25 March 2019, no Appeals Committee was convened, despite plaintiff's repeated requests to convene the panel. After the ten business days passed, plaintiff had several meetings with Dr. Garrison between April and May 2019. At a meeting on 23 April 2019, Dr. Garrison told plaintiff that Dr. Stair was being "intransigent" as to allowing plaintiff's

appeal to be heard and that Dr. Stair would not allow the appeal to happen.

Later, on 2 May 2019, Dr. Garrison told plaintiff that he would not interfere with Dr. Stair's actions against plaintiff and also told plaintiff that "You'd lose. You know you'd lose the appeal." Dr. Garrison supported this statement by telling plaintiff that an Appeals Committee would be made up of physicians from other departments and they would rely on the judgment of emergency medicine experts, like Dr. Stair, in making their decision. Dr. Garrison stated "that he thought plaintiff had a legitimate, serious, personal concern about how he [had] been treated[,] but that Dr. Garrison "was not as anxious about it." Although Dr. Garrison agreed that there were issues with plaintiff's non-reappointment, he informed plaintiff that if he did not sign MOU-3 by 30 June 2019, then he would no longer have a job in PCMH's emergency medicine residency program.

Plaintiff signed MOU-3 on 6 June 2019, which took effect on 1 July 2019. On 16 September 2019, Dr. Stair had another meeting with plaintiff and notified him that his remediation would be continued beyond the initial four-month period and asked him to sign MOU-4 with a second remediation period. This second remediation period was set to last until 11 February 2020. Plaintiff signed this memorandum "under continuing duress."

On 20 September 2019, plaintiff appealed his second non-reappointment and a hearing for this appeal took place on 1 October 2019. That appeals committee voted to uphold the non-reappointment. Following the second remediation period, on



6 February 2020, plaintiff was again notified that he would remain in remediation and would not be appointed to his third year of residency until 30 June 2020. On 11 February 2020, plaintiff appealed his third non-reappointment and an appeals panel was convened on 24 February 2020. This panel again unanimously voted to uphold the non-reappointment.

Plaintiff eventually completed his residency program on 30 June 2021. Plaintiff was required to report his first two non-reappointments when he submitted his application for a North Carolina Physician License to the North Carolina Medical Board.

On 15 March 2022, Plaintiff filed a complaint with the Pitt County Superior Court alleging eight causes of action against various defendants: (1) PCMH breached MOU-2 by not providing the appeal as required by the contract; (2) PCMH breached MOU-2 through anticipatory repudiation; (3) PCMH breached the implied covenant of good faith and fair dealing in MOU-2; (4) PCMH was vicariously liable for Dr. Stair's actions; (5) Dr. Stair tortiously interfered with plaintiff's rights under MOU-2; (6) Dr. Stair committed civil conspiracy by conspiring to deny plaintiff his appeal after his first non-reappointment; (7) ECU and UNC breached the Agreement with PCMH because plaintiff was a third-party beneficiary of the Agreement; and (8) ECU and UNC violated his constitutional rights to liberty and property by interfering with the contract between PCMH, ECU, and UNC.

Based upon these claims, plaintiff sought several forms of relief. First, plaintiff

requested specific performance with respect to MOU-2 and that PCMH, ECU, and UNC conduct the appeal he was guaranteed. Next, plaintiff sought damages in the amount of the difference in the salary plaintiff received from PCMH between 1 July 2019 and 30 June 2020 and what he would have received as a third-year resident during the same time frame. Finally, plaintiff sought damages, in an amount to be determined at trial, for any injury to his business and occupation and reputation.

On 17 May 2022, ECU and UNC moved to dismiss plaintiff's claims against them pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, and in the alternative to strike part of plaintiff's complaint. ECU and UNC contended plaintiff's constitutional claim was barred by sovereign immunity and his breach of contract claim failed because he was not an intended beneficiary of the Agreement between PCMH, ECU, and UNC.

On 30 May 2023, PCMH filed a motion to dismiss plaintiff's claims against it under Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. PCMH argued plaintiff's claims were non-justiciable and that the requested relief was moot. In the alternative, PCMH requested that the trial court strike the entirety of plaintiff's claims against Dr. Stair as redundant.

Finally, on 2 June 2023, Dr. Stair also filed a motion to dismiss plaintiff's claims against him under Rule 12(b)(1) of the North Carolina Rules of Civil

Procedure. Dr. Stair argued that plaintiff's claims were non-justiciable and the trial court lacked jurisdiction over his claims. In the alternative, Dr. Stair requested the trial court strike the entirety of plaintiff's claims against him as redundant.

Following a hearing, the trial court issued an order on 27 July 2023 granting PCMH's and Dr. Stair's motions to dismiss pursuant to Rule 12(b)(6). The order further allowed PCMH's and Dr. Stair's motions to dismiss pursuant to Rule 12(b)(1) and found the motion to strike moot. The trial court relied on *McAdoo v. University of North Carolina at Chapel Hill*, 366 N.C. 581 (2013), in determining that plaintiff's claims were moot and subject to dismissal pursuant to Rule 12(b)(1) because he had completed the residency program. The trial court further stated that it was dismissing plaintiff's claims pursuant to Rule 12(b)(6) because the damages he requested were speculative and plaintiff provided no "forecast of likely damages." With regards to plaintiff's claims against ECU and UNC, the trial court ruled that plaintiff had not adequately alleged facts to indicate that he was an intended beneficiary of the affiliation agreement between PCMH, ECU, and UNC. Furthermore, the trial court dismissed plaintiff's constitutional claims against ECU and UNC finding that plaintiff had adequate state remedies available to seek relief from those defendants. Accordingly, the trial court dismissed all of plaintiff's claims with prejudice.

Plaintiff appealed on 22 August 2023.

## II. Discussion

On appeal, plaintiff argues that: (1) the trial court erred in dismissing plaintiff’s claims under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure as non-justiciable, (2) the trial court erred in dismissing plaintiff’s claims under Rule 12(b)(6) for failure to state a claim, and (3) ECU and UNC are proper defendants for plaintiff’s breach of contract and constitutional claims. We address each argument in turn.

A. Justiciability under Rule 12(b)(1)

Plaintiff argues on appeal that the trial court erred in dismissing his claims under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure as non-justiciable. Plaintiff contends the trial court erred in using federal standing requirements to rule that plaintiff’s claims were non-justiciable and for determining that plaintiff’s claims were moot. Appellate counsel for PCMH and Dr. Stair stated at oral argument that they abandoned their argument that plaintiff lacked standing under Rule 12(b)(1) for monetary relief. However, they maintained that plaintiff’s request for equitable relief is moot.

1. Standing

Our Court reviews Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo. *Trivette v. Yount*, 217 N.C. App. 477, 482 (2011) (citation omitted). When a “party invoke[es] jurisdiction, plaintiffs have the burden of proving the elements of standing.” *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113 (2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

561 (1992)). Federal standing requirements have three elements:

(1) “injury in fact”—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Id.* at 114. However, in *Committee to Elect Dan Forest v. Employees Political Action Committee (EMPAC)*, 376 N.C. 558 (2021), our Supreme Court held for the first time that the North Carolina Constitution has no analogous provision requiring a plaintiff to show an “injury-in-fact” in order to establish jurisdiction. *See id.* at 609. Accordingly, in North Carolina, a party may bring a complaint when “a person alleges the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution[.]” *Id.* In doing so our Supreme Court implicitly overruled *McAdoo* and its progeny.

“An appellate court considering a challenge to a trial court’s decision to grant or deny a motion to dismiss for lack of subject matter jurisdiction may consider information outside the scope of the pleadings in addition to the allegations set out in the complaint.” *United Daughters of the Confederacy v. City of Winston Salem*, 383 N.C. 612, 624 (2022). Our Supreme Court has previously found that “[w]here a party alleges the existence of a valid contract and that such contract has been breached, that party has alleged a legal injury that gives rise to standing.” *Soc’y for the Hist. Pres. Of the Twenty-Sixth N.C. Troops v. City of Asheville*, 385 N.C. 744, 751 (2024).

Here, plaintiff's injuries as alleged satisfy the requirements for standing because his complaint discussed how he suffered injury from PCMH, ECU, and UNC breaching MOU-2 by not allowing plaintiff to appeal his non-reappointment and by not convening an appeals panel within ten business days of receiving plaintiff's written request for an appeal. Plaintiff further establishes standing by alleging lost wages and harms to his professional reputation. Accordingly, plaintiff alleged a legal injury under a breach of contract claim sufficient to establish standing in North Carolina, and the trial court erred by using federal justiciability standards to dismiss plaintiff's claims.

## 2. Mootness

The trial court also held that plaintiff's claims for monetary and equitable relief are moot and thus, his claims should be dismissed for lack of jurisdiction. We disagree.

"[J]urisdiction does not extend to questions that are altogether moot." *Calabria v. N.C. State Bd. Of Elections*, 198 N.C. App. 550, 554 (2009). "Mootness arises whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue." *Gray Media Grp. v. City of Charlotte through City Counsel*, 290 N.C. App. 384, 389 (2023) (internal quotations omitted). In other words, a case is moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645,

647 (2003) (emphasis added).

Here, plaintiff's claims are not moot. Plaintiff requested various forms of relief, including specific performance for his right to an appeal guaranteed under MOU-2, monetary damages for lost wages, and monetary damages for any injuries to plaintiff's business and reputation. For plaintiff's request for monetary damages, a determination by a trial court could still award him lost wages he would have earned as a third-year resident. As noted above, counsel for Dr. Stair and PCMH abandoned their argument that plaintiff's claim for monetary damages was moot. However, defendant's counsel still maintained that plaintiff's request for equitable relief was moot because he has since graduated from his residency program and providing plaintiff with an appeal at this point would have no practical impact on his progress through the residency program.

We disagree. Plaintiff had to report his non-reappointment to the North Carolina Medical Board when he was applying for his medical license. This non-reappointment remains on his record with the North Carolina Medical Board and should plaintiff prevail on his appeal, he contends that he would have the opportunity to correct his record and restore his reputation.

Our Supreme Court has previously confronted the idea of stigma interfering with future employment opportunities in *Tully v. City of Wilmington*, 370 N.C. 527 (2018). There the Court held that a plaintiff has a cause of action when "[t]he right of a citizen to live and work where he will is offended when a state agency unfairly

imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities.” *Id.* at 535. Here, because plaintiff’s non-reappointment is on his North Carolina Medical Board record, it could potentially impact future employment opportunities. Plaintiff’s request for an appeals hearing in accordance with his contract could remove the non-reappointment from his record and have a practical effect on future employment opportunities. Accordingly, plaintiff’s request for equitable relief in the form of an appeals hearing is not moot and the trial court erred by dismissing plaintiff’s claim for lack of jurisdiction.

B. Motion to Dismiss Under Rule 12(b)(6)

Plaintiff next contends that the trial court erred in dismissing his claims against PCMH and Dr. Stair for failure to state a claim upon which relief could be granted. Plaintiff argues that the trial court erred in dismissing his six claims against PCMH and Dr. Stair: (1) breach of the MOU Contract by PCMH, (2) anticipatory repudiation of the MOU contract, (3) breach of the implied covenant of Good Faith and Fair Dealing, (4) tortious interference with the MOU contract by Dr. Stair, (5) PCMH’s vicarious liability for Dr. Stair’s tortious interference, and (6) civil conspiracy. We agree.

1. Standard of review

The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for



which relief may be granted.

*Stanback v. Stanback*, 297 N.C. 181, 185 (1979) (citations omitted). “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Products, Inc.*, 157 N.C. App. 396, 400 (2003).

2. Breach of Contract Claims against PCMH

Three of plaintiff’s claims against PCMH stem from his allegations that PMCH: (1) breached MOU-2, (2) anticipatorily repudiated MOU-2, and (3) breached the implied covenant of good faith and fair dealing in MOU-2.

“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.” *Poor v. Hill*, 138 N.C. App. 19, 26 (2000) (citation omitted). Here, plaintiff sufficiently pled facts for each element. First, there is no dispute that MOU-2 is a valid contract between plaintiff and PCMH. Rather, PCMH argues that plaintiff does not allege a breach of a “specific aspect of the contract that would not involve an ‘inquiry into nuances of educational processes and theories.’” In support of its argument, PCMH cites *Ryan v. University of North Carolina Hospitals*, 128 N.C. App. 300 (1998), which held that for breach of contract claims for educational contracts, like a residency contract, a plaintiff “must point to an identifiable contractual promise that the University failed to honor” rather than asking the court to look into the quality of the education he received. *Id.* at 302.

In his complaint, plaintiff alleged that PCMH violated the RRG Policy, which

was incorporated into MOU-2 on 16 April 2017. This policy clearly outlines the appeals process that plaintiff was entitled to during his residency by stating:

[The] appeal must be made in writing and delivered to the Institutional Official within 5 (five) business days of the notification of disciplinary actions. This written request must state the basis for the appeal. . . . The appeals committee shall be convened within 10 (ten) business days following the receipt of the written request for appeal.

This contractual promise guaranteed to plaintiff by PCMH does not require a court to consider the quality of plaintiff's medical education that he received during residency thereby distinguishing this case from *Ryan*. In *Ryan*, plaintiff argued that the University breached his residency contract by not providing plaintiff with a rotation in gynecology services. *Id.* at 302–03. However, here, plaintiff does not advance similar claims about the quality of his medical education. Rather, he identified specific provisions in his contract with PCMH regarding his appeal rights for non-reappointment. Accordingly, plaintiff's allegations, taken as true, meet every element for a breach of contract claim and the trial court erred in dismissing plaintiff's breach of contract claim against PCMH.

Plaintiff further alleged that PCMH breached MOU-2 through anticipatory repudiation.

Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. When a party repudiates his obligations under the contract before the time for performance under the terms of the contract, the issue of anticipatory breach . . . arises.

*Profile Invs. No. 25, LLC v. Ammons East Corp.*, 207 N.C. App. 232, 237 (2010) (citations omitted). “In order to maintain [such] a claim for anticipatory [repudiation], the words or conduct evidencing the renunciation or breach must be a positive, distinct, unequivocal, and absolute refusal to perform the contract when the time fixed for it in the contract arrives.” *Gupton v. Son-Lan Dev. Co., Inc.*, 205 N.C. App. 133, 139–40 (2010) (citations omitted).

Here, plaintiff alleged sufficient facts, taken as true, to show PCMH breached MOU-2 through anticipatory repudiation. Plaintiff alleged in his complaint that Dr. Garrison had informed him that “the outcome of the Implementation of the Appeal under the RRG Policy is predetermined, such that Dr. Garrison could predict with certainty that plaintiff would lose.” Furthermore, plaintiff alleged that Dr. Garrison made a positive and distinct statement on 2 May 2019 to plaintiff that PCMH would not offer him a fair hearing and he would not receive the “due deliberation” guaranteed to him under the RRG policy. Accordingly, plaintiff alleged sufficient facts to show that PCMH anticipatorily repudiated the RRG policy and the trial court erred in dismissing this claim.

Finally, plaintiff alleged that PCMH breached the implied covenant of good faith and fair dealing in MOU-2. “Under North Carolina Law, every contract contains 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.” *Cordaro*

*v. Harrington Bank, FSB*, 260 N.C. App. 26, 38 (2018) (internal quotations omitted).

“As a general proposition, 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.” *Id.* at 38–39 (internal quotations omitted).

Here, plaintiff based his claim for breach of the implied covenant of good faith and fair dealing on the same actions from Dr. Stair and Dr. Garrison that were the basis of his breach of contract claim. Furthermore, plaintiff also alleges that Dr. Stair and Dr. Garrison, who were employees and agents of PCMH, put pressure on plaintiff to cease his appeal attempts and also ensured that any outcome of any hearing would be subject to Dr. Stair’s approval. These statements, taken as true, indicate that Dr. Stair and Dr. Garrison, acting as agents of PCMH, intended to interfere with plaintiff’s right to receive the benefit of an appeal as contractually promised to him. Accordingly, the trial court erred in dismissing plaintiff’s claim for breach of the implied covenant of good faith and fair dealing in MOU-2.

3. Claims against Dr. Stair

Two of plaintiff’s claims were made directly against Dr. Stair in his individual capacity: (1) tortious interference with MOU-2 and (2) civil conspiracy. Plaintiff argues the trial court erred in dismissing these claims against Dr. Stair under Rule 12(b)(6) for failure to state a claim. We agree.

To establish a claim for tortious interference with contract, a plaintiff must

show:

(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

*Beck v. City of Durham*, 154 N.C. App. 221, 232 (2002) (citations omitted).

Here, plaintiff alleged sufficient facts against Dr. Stair, that when taken as true, establish all five elements. First, there is no dispute between all of the parties that MOU-2 is a valid contract between plaintiff and PCMH. Second, plaintiff repeatedly alleged in his complaint that Dr. Stair knew about MOU-2 and the RRG policy, particularly because of his role as the residency program director. Third, plaintiff alleged that Dr. Stair persuaded PCMH to not comply with MOU-2, including through his own actions of malice through misrepresenting plaintiff's performance in written memos and evaluations. Fourth, plaintiff alleged that Dr. Stair had no business or legal justification for interfering with plaintiff's appeal rights. And fifth, plaintiff demonstrated that he suffered actual damages in the form of lost wages and injuries to his business reputation. These allegations, taken as true, are sufficient to state a claim against Dr. Stair for tortious interference with MOU-2 and the trial court erred in dismissing this claim.

Plaintiff also alleged a claim against Dr. Stair for civil conspiracy. To establish a claim for civil conspiracy, a plaintiff must show there was: "(1) an agreement

between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.” *Privette v. University of North Carolina*, 96 N.C. App. 124, 139 (1989). “It is well established that “there is not a separate civil action for civil conspiracy in North Carolina.” *Dove v. Harvey*, 168 N.C. App. 687, 690 (2005). Rather, “civil conspiracy is premised on the underlying act.” *Harris v. Matthews*, 361 N.C. 265, 273, n. 2 (2007).

Here, the underlying claim that plaintiff asserted in his complaint is breach of contract. Furthermore, plaintiff alleged that Dr. Garrison, Alyson Riddick, and Dr. Stair all agreed to deny plaintiff his appeal guaranteed to him under the RRG policy. Plaintiff alleged that Alyson Riddick in particular was closely involved in decisions related to implementing his appeal. Plaintiff also claimed that Dr. Stair acted wrongly by denying the implementation of his appeal without justification and intentionally inducing PCMH to not perform in accordance with the RRG policy. Plaintiff also sufficiently alleged injuries, in the form of lost wages and injuries to his professional reputation, to show how this conspiracy has caused him harm. Finally, plaintiff alleged that Dr. Stair and others acted this way under a common scheme to deny plaintiff’s implementation of appeal. Accordingly, plaintiff alleged sufficient facts to show a cause for civil conspiracy against Dr. Stair and the trial court erred in dismissing plaintiff’s civil conspiracy claim against Dr. Stair.

4. Vicarious Liability for PCMH

Finally, plaintiff brought a claim against PCMH under a theory of vicarious liability for Dr. Stair's tortious interference with MOU-2. "Generally, liability of a principal for the tort of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is ratified by the principal; or (3) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business." *Creel ex rel. Morgan v. N.C. Dep't of Health & Hum. Servs.*, 152 N.C. App. 200, 202 (2002) (citation omitted). Plaintiff alleged in his complaint that because Dr. Stair was the program director for the residency program, PCMH held Dr. Stair out as his agent and authorized him to perform on behalf of PCMH. Furthermore, plaintiff alleged that Dr. Stair's tortious interference was carried out in his duties as program director, which include carrying out defendant's appeal process. Therefore, the trial court erred in dismissing plaintiff's claim against PCMH under a theory of vicarious liability.

C. Plaintiff's Claims against ECU and UNC

Next, plaintiff contends the trial court erred in dismissing his breach of contract claim and constitutional claims against UNC and ECU. Plaintiff argues that ECU and UNC are proper defendants in this case because plaintiff is a third-party beneficiary in the affiliation agreement between UNC, ECU, and PCMH. We agree.

In order to bring a breach of contract claim based on the third-party beneficiary doctrine, a plaintiff must allege: "(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; (3) that the contract was

entered into for *his direct, and not incidental, benefit.*” *Hoots v. Pryor*, 106 N.C. App. 397, 408 (1992) (emphasis added). “It is not enough that the contract . . . benefits the [third party], if, when the contract was made, the contracting parties did not intend it to benefit the [third party] directly.” *Davis & Taft Architecture, P.A. v. DDR-Shadowline, LLC*, 268 N.C. App. 327, 332 (2019) (citations omitted). “[T]he determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract.” *Snyder v. Freeman*, 300 N.C. 204, 220 (1980). Furthermore, although not dispositive, North Carolina Courts have considered whether a party is designated as an intended beneficiary of a contract. *See Raritan River Steel Co. v. Cherry. Bekaert & Holland*, 329 N.C. 646, 653 (1991). If “the contract is ambiguous, its interpretation usually requires a factual determination of the intent of the parties; on conflicting evidence of intent, the jury must resolve the issue.” *Citrini v. Goodwin*, 68 N.C. App. 391, 395 (1984).

Here, plaintiff alleged in his complaint that the Affiliation Agreement between UNC, ECU, and PCMH was intended to benefit him because there is language in the agreement requiring ECU and PCMH to “accept the joint responsibility for developing and administering all residency and other graduate medical education (GME) programs accredited by the Accreditation Council for Graduate Medical Education (ACGME) or other national accrediting agencies, and unaccredited programs as jointly approved by the Dean of BSOM and the President of VMC.”

While plaintiff will have a substantial burden to sustain this claim as the



litigation progresses, he has alleged sufficient facts, taken as true, to show he was a direct and intended beneficiary of the Affiliation Agreement for several reasons. First, ECU and PCMH agree to share joint responsibility of administering the residency program in compliance with ACGME requirements. Although this provision in the Affiliation Agreement does not specifically note that it was enacted for the benefit of residents, the provision does state that both ECU and PCMH “will assure that the learning environment promotes the development of explicit and appropriate professional attributes in its medical students and residents.”

Second, although plaintiff was not designated as an intended beneficiary in the Affiliation Agreement, the agreement likewise does not disavow residents as intended beneficiaries. ECU and UNC argue that residents are typically not intended beneficiaries under affiliation agreements between hospitals and schools of medicine. Defendants cite to *Irani v. Palmetto Health*, 2016 U.S. Dist. LEXIS 71547, 2016 WL 3079466 (D.S.C. June 1, 2016) to support this point. First, we note that a Federal District Court case from South Carolina is neither binding nor persuasive in the interpretation of North Carolina law. Furthermore, in *Irani*, the plaintiff's claim failed because he failed to mention any language in his amended complaint from the Affiliation agreement between the hospital and the school of medicine. *Id.* at \*49. Here, in contrast with the plaintiff in *Irani*, plaintiff sufficiently alleged in his complaint, with quoted language from the Affiliation agreement, to argue that he was an intended beneficiary of the agreement.

Additionally, because plaintiff and ECU and UNC disagree with the intent behind the agreement and the agreement is ambiguous on its face as to whether the agreement was intended to benefit residents like plaintiff, this fact-specific inquiry should be decided at a later stage of the litigation. Accordingly, the trial court erred in dismissing plaintiff’s breach of contract claim against UNC and ECU.

Plaintiff alternatively brought a constitutional claim against UNC and ECU, specifically alleging that UNC and ECU deprived plaintiff of liberty and property, enjoyment of the fruits of his own labor, and violated the equal protection clause. We affirm the trial court’s dismissal of this cause of action.

In *Corum v. University of North Carolina*, 330 N.C. 761 (1992), our Supreme Court held that a plaintiff may bring a North Carolina constitutional claim against the State or its agents if no adequate state remedy exists. *See id.* at 782. In order to constitute an adequate state remedy, “a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim.” *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339–40 (2009). Thus, to bring a constitutional claim directly against a State actor, a plaintiff must show: (1) a state actor must have violated an individual’s constitutional rights, (2) the claim must be colorable, or plausible, and (3) there must be no adequate state remedy available to the plaintiff. *See generally Deminski v. State Bd. of Educ.*, 377 N.C. 406 (2021) (listing out the elements for bringing a North Carolina constitutional claim against a State actor).

Here, it is undisputed that ECU and UNC are state actors as they are public

*Opinion of the Court*

institutions. However, plaintiff has failed to show that an adequate state remedy does not exist. Plaintiff's constitutional claims against UNC and ECU are all premised on plaintiff's non-reappointment to his third year of residency due to the actions of PCMH and Dr. Stair. Plaintiff clearly has state remedies against those defendants as he is able to bring breach of contract claims against them in his complaint as set forth above. Accordingly, the trial court properly dismissed plaintiff's constitutional claims against UNC and ECU because there was an adequate state remedy available to plaintiff.

III. Conclusion

For the foregoing reasons, we affirm in part, reverse in part the trial court's order and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges GORE and MURRY concur in result only.

Report per Rule 30 (e).