

STATE OF NORTH CAROLINA  
BUNCOMBE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
23 CVS 1594

VISTA HORTICULTURAL, INC.  
d/b/a EDEN BROTHERS,

Plaintiff,

v.

JOHNSON PRICE SPRINKLE, PA,

Defendant.

**ORDER AND OPINION ON  
PLAINTIFF'S MOTION FOR LEAVE  
TO AMEND COMPLAINT TO  
INCLUDE ADDITIONAL PARTY**

1. **THIS MATTER** is before the Court upon Plaintiff's Motion for Leave to Amend to Include Additional Party (the "Motion"), filed 20 December 2023 in the above captioned case.<sup>1</sup>

2. Having considered the Motion, the parties' briefs, affidavits, and materials offered in support of and in opposition to the Motion, the arguments of counsel at the hearing on the Motion, and other relevant matters of record, the Court hereby **GRANTS in part** and **DENIES in part** the Motion.

*Tonkon Torp LLP, by Samantha Taylor and Caroline Harris Crowne, and DeVore, Acton & Stafford, PA, by F. William DeVore, IV, for Plaintiff Vista Horticultural, Inc. d/b/a Eden Brothers.*

*Ragsdale Liggett PLLC, by Melissa Dewey Brumback and John M. Nunnally, for Defendant Johnson Price Sprinkle, PA.*

Bledsoe, Chief Judge.

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<sup>1</sup> (Pl.'s Mot. Amend Compl. Include Additional Party, [hereinafter, "Mot."], ECF No. 30.)

## I.

### FACTUAL AND PROCEDURAL BACKGROUND

3. Plaintiff Vista Horticultural, Inc. d/b/a Eden Brothers initiated this action in Buncombe County Superior Court on 25 April 2023 alleging malpractice against an accounting firm, DMJPS, PLLC (“DMJPS”),<sup>2</sup> and shortly thereafter filed an Amended Complaint on 9 May 2023 adding another accounting firm, Johnson Price Sprinkle, PA (“JPS”; together with DMJPS, “Defendants”), as a party-defendant.<sup>3</sup> Both the original and amended complaints assert claims, the former against DMJPS and the latter against both DMJPS and JPS, for breach of contract, professional malpractice/professional negligence, common law negligence, gross negligence/punitive damages, and breach of fiduciary duty. Defendants filed separate answers to the Amended Complaint on 13 June 2023.<sup>4</sup>

4. On 13 August 2023, Defendants’ original lead counsel passed away, and Defendants’ current lead counsel entered notices of appearance on 28 August 2023.<sup>5</sup> Thereafter, the Court held a BCR 9.3 Case Management Conference on 26 September 2023<sup>6</sup> and entered the Case Management Order in this case on 27 September 2023.<sup>7</sup>

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<sup>2</sup> (Compl., ECF Nos. 3, 5.) ECF Nos. 3 and 5 are identical.

<sup>3</sup> (Am. Compl., ECF No. 4.)

<sup>4</sup> (Answer DMJPS, PLLC Am. Compl., ECF No. 8; Answer Johnson Price Sprinkle, PA Am. Compl., ECF No. 9.)

<sup>5</sup> (Notice Appearance, ECF No. 19 (Melissa Dewey Brumback); Notice Appearance, ECF No. 20 (John Nunnally).)

<sup>6</sup> (Am. Notice BCR 9.3 Case Management Conference, ECF No. 22.)

<sup>7</sup> (Case Management Order, ECF No. 26.)

5. The parties exchanged document discovery and produced documents to one another in November and December 2023, and Plaintiff filed the Motion to add Sok Heang Cheng (“Cheng”), JPS’s lead shareholder and owner, as a party-defendant on 20 December 2023 after determining that JPS’s insurance coverage was insufficient to cover the full extent of Plaintiff’s damages claim.<sup>8</sup> On 24 January 2024, the parties filed a Stipulated Notice of Dismissal of all claims against DMJPS without prejudice.<sup>9</sup>

6. After full briefing, the Court held a hearing on the Motion on 30 January 2024, at which all parties were represented by counsel (the “Hearing”). The Motion is now ripe for resolution.

## II.

### LEGAL STANDARD

7. When a party seeks leave of court to amend a pleading, “leave shall be freely given when justice so requires.” N.C.R. Civ. P. 15(a). “A motion to amend is addressed to the sound discretion of the trial [court]” and is reviewable only for abuse of discretion. *House of Raeford Farms, Inc. v. City of Raeford*, 104 N.C. App. 280, 282 (1991). A motion to amend may be denied for “(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments.” *Id.* at 282–83.

8. “The futility standard under Rule 15 is essentially the same standard used in reviewing a motion to dismiss under Rule 12(b)(6)[.]” *Simply the Best Movers, LLC*

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<sup>8</sup> (Mot. Ex. A, Aff. Samantha Taylor Supp. Pl.’s Mot. Leave File Am. Compl., dated Dec. 18, 2023, at ¶¶ 7–9 [hereinafter “Taylor Aff.”].)

<sup>9</sup> (ECF No. 37.)

*v. Marrins' Moving Sys., Ltd.*, 2016 NCBC LEXIS 28, at \*5 (N.C. Super. Ct. Apr. 6, 2016). When considering a motion to dismiss under Rule 12(b)(6), the Court views the allegations in the pleading at issue “in the light most favorable to the non-moving party[.]” *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017) (cleaned up), and determines “whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory[.]” *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016)).

9. “[T]he [pleading] is to be liberally construed, and the trial court should not dismiss the [pleading] unless it appears beyond doubt that [the] [claimant] could prove no set of facts in support of his claim which would entitle him to relief.” *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444 (2008) (fourth alteration in original) (quoting *Meyer v. Walls*, 347 N.C. 97, 111–12 (1997)). Dismissal of a pleading under Rule 12(b)(6) is proper only: “(1) when the [pleading] on its face reveals that no law supports [the] claim; (2) when the [pleading] reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the [pleading] necessarily defeats the [ ] claim.” *Oates v. JAG, Inc.*, 314 N.C. 276, 278 (1985).

### III.

#### ANALYSIS

10. Plaintiff’s Motion seeks leave to amend its First Amended Complaint to add Cheng, a Certified Public Accountant, as a party-defendant in this action. For the

most part, Plaintiff's proposed amendments seek to assert against Cheng many of the factual allegations asserted against JPS (mostly by changing "JPS" to "Defendants") and to assert against Cheng the same claims it has asserted against JPS (breach of contract, professional malpractice/professional negligence, common law negligence, gross negligence/punitive damages, and breach of fiduciary duty).<sup>10</sup>

11. JPS opposes the Motion on grounds of undue delay, ulterior tactical advantage/bad faith, and futility.<sup>11</sup>

12. After careful consideration and review, the Court, in the exercise of its discretion, will grant the Motion in part and deny the Motion in part for the reasons set forth below.

A. Undue Delay

13. First, the Court is not persuaded, in the circumstances of this case, that Plaintiff has unduly delayed in bringing the Motion.<sup>12</sup> Plaintiff has offered evidence that it did not file the Motion until eight months after it filed the initial Complaint because, despite its diligence in seeking information concerning Defendant's insurance coverage in discovery, it did not succeed in obtaining relevant coverage information until Defendant produced documents on 13 October 2023 and 9 November 2023. Plaintiff thereafter promptly sought JPS's consent to add Cheng as

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<sup>10</sup> (See Mot., Ex. A-1, proposed Second Am. Compl. [hereinafter, "SAC"]; Mot. Ex. B, Redline Comparison Proposed Second Am. Compl. and First Am. Compl., ECF No. 30.)

<sup>11</sup> (Defs.' Br. Opp'n Pl.'s Mot. Amend Compl. Include Additional Party 3-12 [hereinafter, "Defs.' Br. Opp'n Mot."], ECF No. 33.)

<sup>12</sup> (Defs.' Br. Opp'n Mot. 3-5.)

a party-defendant, but JPS declined to consent on 30 November 2023. Plaintiff thereafter filed the Motion with its supporting brief and materials.<sup>13</sup> The Court notes that, typically, North Carolina courts have found undue delay in situations where there is far more delay than that alleged here. *See, e.g., Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 679 (2013) (thirteen months); *Carmayer, LLC v. Koury Aviation, Inc.*, 2017 NCBC LEXIS 82, at \*21 (N.C. Super. Ct. Sept. 11, 2017) (seventeen months); *Alkema Sing. PTE Ltd. v. DEW Global Fin., LLC*, 2017 NCBC LEXIS 112, at \*31 (N.C. Super. Ct. Dec. 12, 2017) (collecting cases to similar effect)).

14. Moreover, discovery in this case is ongoing; the discovery period does not expire until 28 May 2024.<sup>14</sup> Indeed, JPS’s counsel admitted at the Hearing that Cheng’s addition as a party-defendant would not prejudice or change JPS’s litigation conduct in any respect, and the Court concludes that, while Cheng’s addition may prompt additional motion practice, it will not result in any discovery in addition to that already planned. For all these reasons, therefore, the Court concludes that Defendant’s objection based on undue delay is without merit.

B. Bad Faith/Ulterior Tactical Advantage

15. Defendant’s bad faith/ulterior tactical advantage argument fares no better.<sup>15</sup> Although JPS argued at the Hearing that adding Cheng to the case and exposing her personal assets to liability would create unnecessary “tension” between

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<sup>13</sup> (Taylor Aff. ¶¶ 3–9.)

<sup>14</sup> (Case Management Order 4.)

<sup>15</sup> (Defs.’ Br. Opp’n Mot. 5–6.)

Cheng and JPS's shareholders concerning settlement, Plaintiff's allegations are supported by facts that must be taken as true, and the Court cannot conclude that Plaintiff has engaged in bad faith or any other unfair or inappropriate tactical or strategic action through the Second Amended Complaint. *See, e.g., Bundy v. Com. Credit Co.*, 202 N.C. 604, 607 (1932) (“[B]ad faith . . . implies a false motive or a false purpose, and hence it is a species of fraudulent conduct.”); *Vitaform, Inc. v. Aeroflow, Inc.*, 2021 NCBC LEXIS 79, at \*\*15–16 (N.C. Super. Ct. Sept. 16, 2021) (“Bad faith amendments are those which may be abusive or made in order to secure some ulterior tactical advantage.”) (quoting *GSS Props., Inc. v. Kendale Shopping Ctr., Inc.*, 119 F.R.D. 379, 381 (M.D.N.C. 1988)).

C. Futility

16. Defendant makes several arguments based on the alleged futility of the proposed amendment.

17. First, Defendant contends that “any claim against Ms. Cheng personally for disgorgement [of fees paid to JPS] is futile on its face.”<sup>16</sup> Perhaps in recognition of the strength of Defendant's argument, Plaintiff conceded at the Hearing that it no longer seeks disgorgement from Cheng of the fees Plaintiff paid to JPS for its services. Accordingly, the Court will exercise its discretion to deny the Motion to the extent Plaintiff seeks to add Cheng to its request for disgorgement.

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<sup>16</sup> (Defs.' Br. Opp'n Mot. 10–11.)

18. The Court next turns to Defendant's contention that Plaintiff's claims are barred by the economic loss rule and finds that contention without merit.<sup>17</sup>

19. First, "the economic loss rule, in its simplest form, holds that purely economic losses are not ordinarily recoverable under tort law." *Crescent Univ. City Venture, LLC v. AP Atl., Inc.*, 2019 NCBC LEXIS 49, at \*14 (N.C. Super. Ct. Aug. 14, 2019) (citation omitted), *aff'd*, 376 N.C. 54 (2020). Consequently, the rule does not bar Plaintiff's breach of contract claim.

20. Neither does the rule bar Plaintiff's claims for professional malpractice/professional negligence, common law negligence, and gross negligence because North Carolina law is clear that an accountant, like Cheng, "owes a duty to competently perform [her] services independent of the contractual engagements between the parties." *Provectus Biopharms., Inc. v. RSM US LLP*, 2018 NCBC LEXIS 101, \*55 (N.C. Super. Ct. Sept. 28, 2018). Because the economic loss rule does not bar tort claims that are based on a duty "that is separate and apart from any duty owed under a contract," *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at \*48 (N.C. Super. Ct. Nov. 3, 2011), Plaintiff's proposed negligence-based claims against Cheng survive JPS's futility challenge based on the economic loss rule.

21. Finally, although JPS initially asserts that all proposed claims against Cheng are barred by operation of the economic loss rule,<sup>18</sup> JPS subsequently asserts in the same brief that the rule bars Plaintiff's claims for negligence, gross negligence,

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<sup>17</sup> (Defs.' Br. Opp'n Mot. 11–12.)

<sup>18</sup> (Defs.' Br. Opp'n Mot. 9.)



and disgorgement and nowhere mentions Plaintiff's breach of fiduciary duty claim.<sup>19</sup> Nor did Defendants' counsel mention that claim at the Hearing. The Court thus concludes that Defendant has abandoned any contention that leave to amend should be denied as to Plaintiff's claim for breach of fiduciary duty and will grant the Motion on that basis. *Cf. Cohen Schatz Assocs., Inc. v. Perry*, 169 N.C. App. 834, 837 (2005) ("Issues raised in defendant's brief, but not supported by argument or authority, are deemed abandoned.") (quoting *Pharmarsch. Corp. v. Mash*, 163 N.C. App. 419, 428 (2004))).

22. Defendants also contend that Plaintiff's request for leave to assert its gross negligence/punitive damages claim should be denied as futile because Plaintiff has failed to allege sufficient facts to sustain a gross negligence claim.<sup>20</sup> "Gross negligence has been defined as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.'" *Toomer v. Garrett*, 155 N.C. App. 462, 482 (2002) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583 (1988)). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey v. Lea*, 354 N.C. 48, 52 (2001) (internal citation omitted). "An act or conduct rises to the level of gross negligence when the *act* is done purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others." *Id.* at 53 (emphasis in original). "Aside from allegations of wanton conduct, a claim for gross negligence requires that

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<sup>19</sup> (Defs. Br. Opp'n Mot. 10.)

<sup>20</sup> (Defs.' Br. Opp'n Mot. 7-9.)

plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages.” *Toomer*, 155 N.C. App. at 482 (cleaned up).

23. Plaintiff pleads here that Cheng had “professional and legal duties” to provide her professional services to Plaintiff, that she “was fully aware that Plaintiff would rely on [her] services,”<sup>21</sup> that she “knew about the [the United States Supreme Court’s] *Wayfair* decision,<sup>22</sup> and that she failed to “properly advise [Plaintiff] of its state tax liability after the *Wayfair* decision in 2018, despite the significance of this change in the law and the specific significance for online retailers” like Plaintiff.<sup>23</sup> Plaintiff further alleges that Cheng “had in [her] possession information from [Plaintiff] showing substantial sales revenues outside of North Carolina,” and that

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<sup>21</sup> (SAC ¶ 64.)

<sup>22</sup> (SAC ¶ 66.) Plaintiff alleges the following concerning the *Wayfair* decision:

17. On June 21, 2018, the U.S. Supreme Court announced its decision in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018), overruling past precedent to hold that states had the authority to assess taxes on online merchants—with no physical presence in the taxing state—based on sales to the state’s residents.

18. The *Wayfair* decision was a major development in the accounting world due to its far-reaching implications for businesses of all sizes engaged in online sales. Firms like JPS issued urgent alerts to their clients who sold goods out of state, warning them that they could now be obligated to pay sales taxes in other states.

19. Specifically, as to Eden Brothers, the *Wayfair* decision meant that the advice JPS had given Eden Brothers at the beginning of the engagement—that it was only necessary to collect and remit tax on sales to North Carolina residents—was no longer correct.”

(SAC ¶¶ 17–19.)

<sup>23</sup> (SAC ¶ 64.)

she “willfully or recklessly failed to inform [Plaintiff] that it could have liability for sales taxes to states other than North Carolina, and failed to take any action to help [Plaintiff] avoid continuing and increasing sales tax liability in those other states, despite being armed with this knowledge.”<sup>24</sup> Plaintiff otherwise alleges facts showing causation, proximate cause, and damages.

24. Although Plaintiff’s gross negligence claim may face a different fate at summary judgment, the Court concludes that these allegations are sufficient to allege that Cheng engaged in “intentional wrongdoing or deliberate misconduct affecting the safety of others,” *Yancey*, 354 N.C. at 53, and thus that she engaged in “wanton conduct.” As a result, since the Court concludes that Plaintiff has pleaded all required elements of its gross negligence claim against Cheng, the Court will grant the Motion to the extent Plaintiff seeks leave to assert its gross negligence/punitive damages claim against Cheng in the proposed Second Amended Complaint.

25. Defendants also raised a futility challenge at the Hearing as to Plaintiff’s breach of contract claim against Cheng. The Court will deny the Motion to the extent Plaintiff seeks to add Cheng as a party-defendant to its breach of contract claim against JPS because Plaintiff does not allege in its proposed Second Amended Complaint that Plaintiff entered into a contract with Cheng. *See, e.g., Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 216 (2015) (“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.”) (cleaned up) (emphasis added).

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<sup>24</sup> (SAC ¶ 65.)

26. To the contrary, Plaintiff alleges that it “engaged JPS’s accounting services,”<sup>25</sup> that “[Plaintiff] and JPS would execute specific engagement letters for annual tax return preparation,” that “JPS was involved in all of [Plaintiff’s] financial and accounting functions,” and that “JPS’s invoices to [Plaintiff] from 2017 through the course of the engagement reflect that JPS provided regular business consulting services, monthly accounting and bookkeeping services, federal and state tax return preparation, and period sales tax assistance.”<sup>26</sup> Plaintiff nowhere alleges that it entered into a contract, oral or written, with Cheng, that Cheng is a third-party beneficiary of a contract with Plaintiff, or that Cheng is JPS’s alter ego through veil-piercing allegations. Accordingly, the Court will exercise its discretion to deny the Motion and disallow Plaintiff’s proposed Second Amended Complaint to the extent Plaintiff seeks to add Cheng to its breach of contract claim against JPS.

#### IV.

#### CONCLUSION

27. **WHEREFORE**, the Court hereby **GRANTS in part** and **DENIES in part** the Motion as follows:

- a. Plaintiff’s Motion is hereby **DENIED** as to Plaintiff’s proposed claims against Cheng for disgorgement and for breach of contract, and those

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<sup>25</sup> (SAC ¶ 9.)

<sup>26</sup> (SAC ¶ 10.) The Court notes, but does not rely upon, the fact that the engagement letters attached to JPS’s opposition brief show that each was entered into by JPS, not Cheng in her individual capacity. (See ECF No. 33.1.)

claims and the allegations supporting them shall be excluded from the Second Amended Complaint.

- b. Plaintiff's Motion is otherwise **GRANTED**, and Plaintiff's proposed claims against Cheng for professional malpractice/professional negligence, common law negligence, gross negligence/punitive damages, and breach of fiduciary duty, with supporting allegations, may be included in the Second Amended Complaint.
- c. Plaintiff shall file the proposed Second Amended Complaint, modified to reflect the Court's rulings hereunder, no later than 9 February 2024.

**SO ORDERED**, this the 5th day of February, 2024.

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