STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 13860
TRACE WEDDLE, LINDA MATTHIAE, and KIM NAUGLE, on behalf of themselves and all others similarly situated, Plaintiffs, v. WAKEMED HEALTH AND HOSPITALS d/b/a WAKEMED, Defendant.	**ORDER AND OPINION ON DEFENDANT'S MOTION TO DISMISS**

1. Plaintiffs Trace Weddle, Linda Matthiae, and Kim Naugle are patients or former patients of Defendant WakeMed Health and Hospitals. In this class action, Plaintiffs allege that WakeMed gave Meta Platforms, Inc.—the company that owns social media giant Facebook—unauthorized access to patients' personal and medical data for advertising and marketing purposes. They have asserted a variety of claims, including negligence, breach of implied contract, and breach of fiduciary duty.

2. WakeMed has moved to dismiss the complaint in its entirety under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. (*See* ECF No. 59.) For the following reasons, the Court **GRANTS in part** and **DENIES in part** the motion.

Milberg Coleman Bryson Phillips Grossman, PLLC, by Scott Crissman Harris and James DeMay, and Law Offices of James Scott Farrin, by Thomas Wilmoth and Gary Jackson, for Plaintiffs Trace Weddle, Linda Matthiae, and Kim Naugle.

Cohen & Malad, LLP, by Amina A. Thomas and Lynn Toops, for Plaintiffs Trace Weddle and Linda Matthiae.

Lockridge Grindal Nauen P.L.L.P., by Kate Baxter-Kauf and Maureen Kane Berg, and CR Legal Team, LLP, by Peter H. Burke, for Plaintiff Kim Naugle.

Alston & Bird LLP, by Matthew P. McGuire, Kristine McAlister Brown, Donald Houser, and Brandon Springer, for Defendant WakeMed Health and Hospitals.

Conrad, Judge.

I.
BACKGROUND

3. The Court does not make findings of fact on a motion to dismiss. The following background assumes that the allegations of the second amended complaint are true.

4. This case is about something called the Meta Pixel. In simple terms, the Pixel is software code created by Meta that can be put into a website to collect data. Companies use the Pixel to assess how people interact with their websites—for example, who they are, what they click, and what information they type into forms. Meta also receives that data and uses it "to serve targeted ads and identify users to be included in such targeted ads." (2d Am. Compl. ¶¶ 26–30, ECF No. 58.)

5. Hospital systems are among those that use the Meta Pixel. WakeMed is one of them, having first embedded the Pixel in its website and patient portal in March 2018. This allegedly gave Meta regular access to sensitive patient data—their contact information, medical history, appointment calendar, and all sorts of other information provided to WakeMed as a condition of receiving medical care. But WakeMed did not tell patients about the Pixel or ask for their consent to share information with Meta. (*See* 2d Am. Compl. ¶¶ 3–5, 11, 17, 31, 32, 39–41, 45.)

6. After a news organization published a report in June 2022 about hospitals' use of the Pixel, WakeMed removed it. A few months later, WakeMed notified its patients for the first time that it had embedded the Pixel in its website and patient portal. Although WakeMed professed that its intent was to collect anonymous data to improve the user experience and access to healthcare, it acknowledged that the Pixel had collected patient-specific data and may have sent some of that data to Meta. (*See* 2d Am. Compl. ¶¶ 31, 35, 36, 46–48; Ex. D to 2d Am. Compl., ECF No. 58.4.)

7. Plaintiffs are patients or former patients of WakeMed who claim to have been harmed by its unauthorized disclosure of sensitive personal and health information to Meta. Individually and on behalf of a putative class of similarly situated individuals, they assert claims for negligence, negligence *per se*, invasion of privacy, breach of implied contract, unjust enrichment, unfair or deceptive trade practices under N.C.G.S. § 75-1.1, breach of fiduciary duty, and violation of the North Carolina Electronic Surveillance Act.

8. WakeMed has moved to dismiss all claims against it. (*See* ECF No. 59.) The motion is fully briefed, and the Court held a hearing on 8 November 2023. The motion is ripe for decision.

II.
LEGAL STANDARD

9. A motion to dismiss for failure to state a claim "tests the legal sufficiency of the complaint." *Isenhour v. Hutto*, 350 N.C. 601, 604 (1999) (citation and quotation marks omitted). Dismissal is proper when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence

of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Corwin v. Brit. Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (citation and quotation marks omitted). In deciding the motion, the Court must treat all well-pleaded allegations as true and view the facts and permissible inferences in the light most favorable to the nonmoving party. *See, e.g.*, *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019).

III.
ANALYSIS

10. In their opposition brief, Plaintiffs abandoned their claim for violation of the North Carolina Electronic Surveillance Act. The Court therefore dismisses that claim without further discussion and turns to the remaining seven claims.

A. Common-Law Negligence and Negligence *Per Se*

11. Plaintiffs' first and second causes of action are for common-law negligence and negligence *per se*. Because the claims involve similar allegations and legal principles, they are best addressed together.

12. Negligence at common law is the "failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002) (citation and quotation marks omitted). Stated another way, "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence." *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474 (1951). The duty of ordinary care "does not require perfect prescience, but instead extends only

to causes of injury that were reasonably foreseeable and avoidable through the exercise of due care." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226 (2010).

13. Negligence *per se* looks to statutory standards rather than common-law standards. "The violation of a statute which imposes a duty upon the defendant in order to promote the safety of others, including the plaintiff, is negligence *per se*, unless the statute, itself, otherwise provides, and such negligence is actionable if it is the proximate cause of injury to the plaintiff." *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415 (1990) (citation and quotation marks omitted). "The statute prescribes the standard, and the standard fixed by the statute is absolute. The common law rule of ordinary care does not apply—proof of the breach of the statute is proof of negligence." *Cowan v. Murrows Transfer, Inc.*, 262 N.C. 550, 554 (1964).

14. Plaintiffs allege that WakeMed's unauthorized disclosure of private patient information to Meta violated federal law—namely, section 5 of the Federal Trade Commission ("FTC") Act and regulations implementing the Health Insurance Portability and Accountability Act ("HIPAA"). These statutory and regulatory violations, they claim, are negligence *per se*. Failing that, they claim, WakeMed had a common-law duty to keep their information private and to notify them of the privacy breach.

15. The negligence *per se* claim is untenable because neither the FTC Act nor the HIPAA regulations are public safety laws. As our Supreme Court has explained, "[a] safety statute or ordinance is one designed for the protection of life or limb and

which imposes a duty upon members of society to uphold that protection." *State v. Powell*, 336 N.C. 762, 768–69 (1994). Section 5 of the FTC Act targets unfair methods of competition and unfair or deceptive trade practices. *See* 15 U.S.C. § 45(a)(1). HIPAA has many purposes related to the health insurance industry and the confidentiality of patient information. *See, e.g.*, 45 C.F.R. §§ 164.504, 164.508 (2023). These are primarily competition and privacy laws, not laws for the protection of life or limb.

16. Plaintiffs argue that a violation of a public safety statute, though sufficient to state a claim for negligence *per se*, is not necessary. That is incorrect. Binding appellate precedent makes clear that "negligence *per se* applies only when the statute violated is a public safety statute." *Hardin v. York Mem'l Park*, 221 N.C. App. 317, 326 (2012); *see also Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326 (2006) (stating that "the violation of a public safety statute constitutes negligence *per se*" (cleaned up)); *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 475 (1989) (stating that "the violation of a statute enacted for the safety and protection of the public constitutes negligence per se"); *Cowan*, 262 N.C. at 554 ("It is the generally accepted view that the violation of a statute enacted for the safety and protection of the public constitutes negligence *per se*, i.e., negligence as a matter of law.").

17. Because Plaintiffs have not alleged a violation of a public safety statute, they have failed to state a claim for negligence *per se*.[1]

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[1] For these and other reasons, courts around the country routinely dismiss negligence *per se* claims based on the FTC Act and HIPAA regulations. *See Citizens Bank of Pa. v. Reimbursement Techs., Inc.*, 609 F. App'x 88, 93–94 (3d Cir. 2015) (unpublished) (affirming dismissal of negligence *per se* claim under Pennsylvania law based on alleged HIPAA

18. Plaintiffs have, however, adequately stated a claim for common-law negligence. The gist of their claim is that WakeMed owed a duty to exercise reasonable care when handling its patients' confidential information and that it breached that duty by using the Pixel and giving Meta unauthorized access to the information. That unauthorized disclosure led to foreseeable, avoidable harm, compounded by WakeMed's delay in notifying its patients of the breach of confidence. (*See* 2d Am. Compl. ¶¶ 120–25.)

19. WakeMed argues that North Carolina law does not recognize a duty of care in these circumstances. Not so. "It is well established that hospitals and doctors in their employ owe their patients a duty to exercise the degree of care that a reasonable person would in similar circumstances to prevent an unreasonable risk of harm to their patients." *Demarco v. Charlotte-Mecklenburg Hosp. Auth.*, 268 N.C. App. 334, 338 (2019). Our courts have applied that "general duty of reasonable care" in proper

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violation); *In re Capital One Consumer Data Sec. Breach Litig.*, 488 F. Supp. 3d 374, 408 (E.D. Va. 2020) (concluding that the FTC Act is not "aimed at protecting public safety, as that term is applied under Virginia law"); *see also J.R. v. Walgreens Boots Alliance, Inc.*, 2021 U.S. App. LEXIS 31389, at *18–21 (4th Cir. 2021) (unpublished) (concluding that violations of HIPAA and FTC Act could not support claim for negligence *per se* under South Carolina law because neither allowed for a private right of action); *Gilbert v. Bioplus Specialty Pharm. Servs., LLC*, 2023 U.S. Dist. LEXIS 90820, at *5–6 (M.D. Fla. Mar. 3, 2023) ("Courts have declined to find a private right of action under the FTC Act or HIPAA, so those cannot support a negligence *per se* claim."); *In re Netgain Tech., LLC Consumer Data Breach Litig.*, 2022 U.S. Dist. LEXIS 98342, at *42 (D. Minn. June 2, 2022) ("Plaintiffs have not cited any precedent in California, Minnesota, Nevada, South Carolina, or Wisconsin that permits a state-law negligence *per se* claim to proceed based on the theory that there is a violation of Section 5 of the FTC Act."); *Walters v. Blue Cross & Blue Shield of Tex., Inc.*, 2022 U.S. Dist. LEXIS 55061, at *14 (N.D. Tex. Mar. 28, 2022) (concluding that plaintiff had "cite[d] no case law supporting his contention that HIPAA . . . can be the basis for a negligence per se claim" under Texas law); *Cohen v. Ne. Radiology, P.C.*, 2021 U.S. Dist. LEXIS 16497, at *20 (S.D.N.Y. Jan. 28, 2021) ("[S]everal New York courts have concluded that neither HIPAA nor the FTC Act can sustain a negligence *per se* claim.").

circumstances to the maintenance and dissemination of patient records. *Id.* at 339; *see also Acosta v. Byrum*, 180 N.C. App. 562, 568 (2006) (holding that plaintiff had adequately alleged the existence of a "duty to maintain privacy in her confidential medical records").

20. *Acosta* and *Demarco* have not been overruled, as WakeMed contends. In fact, the case it cites for that proposition has nothing to do with the duties that doctors owe patients. *See Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 383 N.C. 31, 61–72 (2022) (refusing to recognize a claim for negligent regulation by a government agency).

21. Nor did the Court of Appeals apply the wrong standard of review in *Acosta* and *Demarco*. WakeMed misreads those cases to allow a plaintiff to give "notice of a theory of duty" even if that duty is not one "recognized under the law." (Br. Supp. 7, ECF No. 60.) But courts do not indulge futile claims. In both cases, the Court of Appeals held that the plaintiffs had stated valid claims for relief and had properly pointed to "HIPAA, its implementing regulations, and hospital privacy policies . . . to plead a specific standard of care sufficient to overcome dismissal under Rule 12(b)(6)." *Demarco*, 268 N.C. App. at 339; *see also Acosta*, 180 N.C. App. at 568. Plaintiffs in this case have done the same. (*See, e.g.*, 2d Am. Compl. ¶¶ 19–22, 67, 71–74.)

22. The Court therefore grants WakeMed's motion to dismiss the claim for negligence *per se* but denies its motion to dismiss the claim for common-law negligence. *See Hart v. Ivey*, 332 N.C. 299, 303–05 (1992) (concluding that plaintiff

had adequately alleged common-law negligence but had not alleged a violation of a public safety statute for purposes of negligence *per se*).

B. Invasion of Privacy

23. Several torts fall under the umbrella of invasion of privacy. *See Renwick v. News and Observer Publ'g Co.*, 310 N.C. 312, 322 (1984). Plaintiffs frame their privacy claim as one for intrusion into seclusion.

24. "[O]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Miller v. Brooks*, 123 N.C. App. 20, 26 (1996) (citation and quotation marks omitted). "Generally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion." *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 29 (2003). Examples include "physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another." *Id.* (quoting *Burgess v. Busby*, 142 N.C. App. 393, 406 (2001)).

25. As WakeMed correctly observes, Plaintiffs do not allege that it intruded into their private affairs, either physically or by prying into their personal records without authorization. Rather, they allege that they voluntarily shared sensitive information with WakeMed and that WakeMed then gave Meta unauthorized access to that

information. (*See* 2d Am. Compl. ¶ 150 (alleging that WakeMed's "disclosure of" personal information was "an intentional intrusion on Plaintiffs' . . . solitude or seclusion").) Even if true, that unauthorized *disclosure* of confidential information to a third party is not an *intrusion* into Plaintiffs' private affairs. *See Hall v. Post*, 323 N.C. 259, 270 (1988) (holding that North Carolina does not recognize "a claim for relief for invasion of privacy by public disclosure of true but 'private' facts"); *see also Sabrowski v. Albani-Bayeux, Inc.*, 2003 U.S. Dist. LEXIS 23242, at *38 (M.D.N.C. Dec. 19, 2003) (applying North Carolina law and holding that a "wrongful dissemination of Plaintiff's confidential information would not be recognized as the tort of intrusion").

26. Plaintiffs' reliance on *Toomer v. Garrett*, 155 N.C. App. 462 (2002), is misplaced. There, the Court of Appeals allowed an intrusion claim to proceed based on allegations that the defendants engaged in an "unauthorized examination" of the plaintiff's personnel file and then disclosed that file to other "unauthorized persons." *See id.* at 467, 480. Missing here is any allegation of unauthorized examination by WakeMed. Absent that, the claim fails. *See, e.g.*, *Alexander v. City of Greensboro*, 762 F. Supp. 2d 764, 815–16 (M.D.N.C. 2011) (observing that *Toomer* "focused its intrusion discussion on the 'unauthorized examination' " of information by defendants "rather than on the later public disclosure of those contents" (quoting *Toomer*, 155 N.C. App. at 480)); *Sabrowski*, 2003 U.S. Dist. LEXIS 23242, at *38 (observing that the defendants in *Toomer* and another case "intruded into the plaintiffs' privacy by improperly accessing the plaintiffs' medical and employment

records"); *Allen v. Novant Health, Inc.*, 2023 U.S. Dist. LEXIS 149692, at *4–5 (M.D.N.C. Aug. 23, 2023) (applying North Carolina law and dismissing invasion of privacy claim brought against another hospital system for its use of the Meta Pixel "[b]ecause the plaintiffs acknowledge in the complaint that they voluntarily provided their information directly to Novant").

27. The Court grants the motion to dismiss the claim for invasion of privacy.

C. Breach of Implied Contract

28. An implied contract "arises where the intent of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts." *Creech v. Melnik*, 347 N.C. 520, 526 (1998). As the Court of Appeals has put it, "[o]ur system of notice pleading means the bar to plead a valid contract is low." *Lannan v. Bd. of Governors of the Univ. of N.C.*, 285 N.C. App. 574, 596 (2022) (citation and quotation marks omitted). All that Plaintiffs must plead are the elements required for any valid contract—"offer, acceptance, and consideration." *Id.* at 597.

29. The complaint adequately alleges each element. As alleged, WakeMed "offered health services to Plaintiffs," who "accepted . . . and paid for those services." (2d Am. Compl. ¶ 158.) Plaintiffs also provided their personal information; in return, WakeMed "agreed to safeguard and protect such information and to timely and accurately notify Plaintiffs . . . if their information was compromised and or accessed without authorization." (2d Am. Compl. ¶ 161.) These allegations, taken as true, are sufficient to plead the existence of an implied contract.

30. WakeMed's contrary argument rests on a cramped reading of the complaint. It points to paragraph 159, which refers to "promises" in WakeMed's "Privacy Policy." (2d Am. Compl. ¶ 159.) That policy, according to WakeMed, did not exist until after the Meta Pixel had been removed from the patient portal, meaning that Plaintiffs could not have read or relied upon any promises within it before providing their personal information. As a result, WakeMed contends, there was no meeting of the minds and no valid contract. But this ignores other allegations that WakeMed adopted a privacy policy before the Pixel incident with similar promises to keep patient information confidential. (*See* 2d Am. Compl. ¶¶ 18–24.) And in any event, whether there was a meeting of the minds is a fact issue for discovery. "[I]t will be for the trier of fact to determine on what terms there was a meeting of the minds and thus what terms are included in the alleged contract on which Plaintiffs will ultimately need to demonstrate breach to prevail." *Lannan*, 285 N.C. App. at 598 (affirming denial of motion to dismiss).

31. At this point, Plaintiffs need only give notice of their claim and the basis for it, which they have done. Thus, the Court denies WakeMed's motion with respect to Plaintiffs' claim for breach of implied contract.

D. Unjust Enrichment

32. "The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated." *Snow Enter., LLC v. Bankers Ins. Co.*, 282 N.C. App. 132, 146 (2022) (quoting *Collins*

v. Davis, 68 N.C. App. 588, 591 (1984)). North Carolina case law "typically contemplates unjust enrichment as an appropriate remedy only in situations where the complaining party intentionally and deliberately undertook an action with an expectation of compensation or other benefit in return." *Butler v. Butler*, 239 N.C. App. 1, 12 (2015).

33. Plaintiffs' allegations fall short. They allege that they provided personal information (and paid money) to WakeMed in exchange for medical services. (*See* 2d Am. Compl. ¶¶ 39, 173.) But they do not allege that they expected to receive any other compensation or benefit, apart from medical services, in return for their personal information. Taking their allegations as true, Plaintiffs either had no expectation of compensation or received all the compensation that they expected in the form of medical services. *See Twiford v. Waterfield*, 240 N.C. 582, 585 (1954) (requiring a "mutual understanding" that "payment was intended on the one hand and expected on the other"); *Allen*, 2023 U.S. Dist. LEXIS 149692, at *7–8 (dismissing unjust enrichment claim based on defendant hospital's use of the Meta Pixel because "[t]here is no allegation the plaintiffs did not receive the medical care they expected in return").

34. In their opposition brief, Plaintiffs argue that they conferred the "marketing value of their data," which WakeMed used to enrich itself "with advertising and marketing services" from Meta. (Opp'n 13, ECF No. 61.) This appears to be a novel theory; nothing in the complaint treats the marketing value of Plaintiffs' personal information as something distinct from the information itself. Regardless, Plaintiffs

have not pointed to any allegations that they intentionally conferred the marketing value of their data on WakeMed or that they expected compensation for it. And "the mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play." *Watson Elec. Constr. Co. v. Summit Cos., LLC*, 160 N.C. App. 647, 652 (2003).

35. The Court dismisses Plaintiffs' claim for unjust enrichment.

E. Section 75-1.1

36. Plaintiffs claim that WakeMed's disclosure of its patients' information to Meta violated section 75-1.1. WakeMed argues that its alleged misconduct, even if true, falls outside the statute's bounds.

37. Section 75-1.1 proscribes "unfair or deceptive acts or practices in or affecting commerce." N.C.G.S. § 75-1.1(a). Commerce, though broadly defined, excludes "professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b). This statutory exemption, which "for medical professionals has been broadly interpreted," requires a two-part inquiry: "First, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." *Sykes*, 372 N.C. at 334; *accord Wheeless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589 (2014).

38. That two-part inquiry is easily satisfied here. WakeMed, a hospital system, is undoubtedly a member of a learned profession. *See, e.g.*, *Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120, 126 (2006).

39. And WakeMed's alleged conduct is a rendering of professional services because its collection, use, and storage of patients' personal and health information is entwined with its provision of professional services. The complaint bears this out. The data that WakeMed collects—about medical conditions, treatments, prescriptions, appointments, insurance coverage, and more—go directly to patient care and the relationship between patient and provider. (*See* 2d Am. Compl. ¶¶ 2, 17.) In Plaintiffs' own words, this information "is used to facilitate both payment and the provision of services." (2d Am. Compl. ¶ 173.) Indeed, each Plaintiff shared his or her personal information "as a condition of receiving [WakeMed's] healthcare services." (2d Am. Compl. ¶¶ 36, 81, 92, 99.)

40. Numerous cases have applied the learned profession exemption in similar circumstances and to conduct less closely tied to patient care. *See, e.g.*, *Sykes*, 372 N.C. at 336 (concluding that exemption applied to intermediary that "terminate[d] providers' in-network access to patients when those providers exceed[ed] a certain average cost per patient"); *Wheeless*, 237 N.C. App. at 590–91 (concluding that exemption applied to submission of a complaint about the plaintiff to the North Carolina Medical Board); *McNew v. Fletcher Hosp., Inc.*, 2022 NCBC LEXIS 109, at *17–18 (N.C. Super. Ct. Sept. 20, 2022) (concluding that exemption applied to a hospital's alleged "overbilling without disclosing its actual rates to Plaintiff at the time of treatment").

41. The Court grants WakeMed's motion to dismiss the section 75-1.1 claim.

F. Breach of Fiduciary Duty

42. To plead a claim for breach of fiduciary duty, Plaintiffs must allege the existence of a duty, a breach of that duty, and an injury proximately caused by the breach. *See Sykes*, 372 N.C. at 339. The relationship between "physician and patient" is, of course, "inherently fiduciary." *King v. Bryant*, 369 N.C. 451, 464 (2017). Even so, WakeMed argues that whatever duties it owed to Plaintiffs were limited to diagnosis and treatment and had no bearing on its alleged unauthorized disclosure of confidential information.

43. The Court disagrees. Yes, physicians owe their patients a duty of care when making diagnoses and prescribing treatment. They also owe a duty of confidentiality. The law recognizes that the relationship between physician and patient is fiduciary in nature both because the physician possesses special knowledge and skill and because of "the high level of personal trust and confidence undergirding the patient's decision to disclose sensitive, confidential medical information to the physician and rely on that physician's treatment advice." *McNew*, 2022 NCBC LEXIS 109, at *7–8. Thus, "a patient may legitimately expect that confidential information will not be disclosed to the general public or to hospital personnel unconcerned with his treatment . . . ." *Smith v. State*, 298 N.C. 115, 132 (1979). That expectation of privacy could be lost, however, if "the patient breaks the fiduciary relationship with the physician by revealing, or permitting revelation of, the substance of the information

transmitted to the physician." *Cates v. Wilson*, 321 N.C. 1, 15 (1987); *accord Jones v. Asheville Radiological Grp., P.A.*, 129 N.C. App. 449, 459 (1998).[2]

44. WakeMed insists that one party's decision to share confidential information with another does not create a fiduciary relationship. That is true as far as it goes. Here, though, Plaintiffs have alleged that they shared confidential information with WakeMed in the context of a physician–patient relationship and for the purpose of receiving medical care. (*See, e.g.*, 2d Am. Compl. ¶¶ 81, 92, 99, 188.) That is enough to plead the existence of a fiduciary relationship. And the allegation that WakeMed disclosed confidential information without authorization is enough to plead a breach. *See King*, 369 N.C. at 466 (holding that a patient's provision of confidential information supported the existence of a de facto fiduciary duty before creation of physician–patient relationship); *Watts v. Cumberland Cnty. Hosp. Sys., Inc.*, 75 N.C. App. 1, 9–12 (1985) (reversing order granting summary judgment on claim for breach

[2] Courts in other jurisdictions agree that a healthcare provider has a fiduciary duty of confidentiality whose breach can give rise to a claim for damages in tort. *See, e.g.*, *Sorensen v. Barbuto*, 177 P.3d 614, 618 (Utah 2008) ("Utah law recognizes a healthcare fiduciary duty of confidentiality."); *Fairfax Hosp. v. Curtis*, 254 Va. 437, 442 (1997) ("[A] health care provider owes a duty to the patient not to disclose information gained from the patient during the course of treatment without the patient's authorization, and . . . violation of this duty gives rise to an action in tort."); *Alberts v. Devine*, 395 Mass. 59, 69 (1985) ("We hold today that a duty of confidentiality arises from the physician-patient relationship and that a violation of that duty, resulting in damages, gives rise to a cause of action sounding in tort against the physician."); *Vassiliades v. Garfinckel's, Brooks Bros., Miller & Rhoades, Inc.*, 492 A.2d 580, 591–92 (D.C. 1985) (recognizing an independent cause of action for breach of confidentiality, partially due to the fiduciary relationship between physician and patient); *Horne v. Patton*, 291 Ala. 701, 708–09 (1973) ("[A] medical doctor is under a general duty not to make extra-judicial disclosures of information acquired in the course of the doctor-patient relationship . . . ."); *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 801–02 (N.D. Ohio 1965) (holding that a similar duty exists under Ohio law and characterizing the duty as fiduciary); *but see Quarles v. Sutherland*, 215 Tenn. 651, 657 (1965) (refusing to recognize a cause of action for a physician's disclosure of a patient's confidential information to a third person).

of fiduciary duty and reasoning that "a health care provider may be liable for medical malpractice based in part upon the provider's breach of a duty to maintain the patient's trust and confidence"), *rev'd in part on other grounds*, 317 N.C. 321 (1986); *Allen*, 2023 U.S. Dist. LEXIS 149692, at *14–15 (denying motion to dismiss patients' breach of fiduciary duty claim based on hospital system's use of the Meta Pixel).

45. The Court denies WakeMed's motion to dismiss Plaintiffs' claim for breach of fiduciary duty.

IV.
CONCLUSION

46. For the foregoing reasons, the Court **GRANTS in part** and **DENIES in part** WakeMed's motion to dismiss as follows:

a. The Court **GRANTS** the motion with respect to Plaintiffs' claims for negligence *per se*, invasion of privacy, unjust enrichment, violation of section 75-1.1, and violation of the North Carolina Electronic Surveillance Act. These claims are **DISMISSED with prejudice**.

b. The Court **DENIES** the motion with respect to Plaintiffs' claims for common-law negligence, breach of implied contract, and breach of fiduciary duty.

SO ORDERED, this the 4th day of December, 2023.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases