Weddle v. WakeMed Health & Hospitals, 2023 NCBC Order 18.

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

1. **THIS MATTER** is before the Court upon Defendant WakeMed Health and Hospitals' ("WakeMed" or "Defendant") Motion to Abate, or in the Alternative Stay, Plaintiffs' Putative Class Action Lawsuit (the "Motion to Stay")[1] and WakeMed's Motion to Dismiss Plaintiffs' Amended Class Action Complaint (the "Motion to Dismiss," together, the "Motions").[2]

2. After considering the Motions, the parties' briefs in support of and in opposition to the Motions, the relevant pleadings, and the arguments of counsel at the hearing on the Motions, the Court **GRANTS in part** and **DENIES in part** the Motion to Stay and **DEFERS** ruling on the Motion to Dismiss pending further order of the Court.

[1] (ECF No. 21.)

[2] (ECF No. 23.)

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. The Court recites the allegations asserted and documents referenced in Plaintiffs' Complaint that are relevant to the Court's determination of the Motion to Stay.

4. Defendant is a hospital and health services provider based in North Carolina.[3] Because of its role as a healthcare provider, Defendant collects sensitive personal health information ("PHI") from and about its patients.[4] PHI includes names, addresses, birth dates, insurance information, social security numbers, and various forms of medical diagnostic and treatment information.[5]

5. Defendant notifies its patients that it sometimes shares PHI with other businesses for "accreditation, legal, computer, or auditing services."[6] In the same notification, Defendant informs its patients that it will disclose PHI for marketing purposes, or for payment, only if the patient consents to the disclosure in writing.[7]

6. This action arises from Defendant's use of a tracking tool developed by Facebook,[8] the Meta Pixel (the "Pixel"). The Pixel collects data from the user of a

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[3] (Am. Class Action Compl. ¶ 15 [hereinafter "Compl."], ECF No. 6.)

[4] (Compl. ¶ 16.)

[5] (Compl. ¶ 17.)

[6] (Compl. ¶ 20.)

[7] (Compl. ¶ 22.)

[8] Facebook changed its name to Meta Platforms, Inc. in 2021. (Compl. ¶ 2 n.1.) Plaintiff uses both "Facebook" and "Meta" in its complaint, so the Court does likewise. (*See* Compl. ¶ 2 n.1.)

website to identify that user and produce targeted advertisements.[9] Plaintiffs claim that Defendant installed and used the Pixel on its website and patient portal to collect Defendant's patients' PHI.[10]

7. Tracy Weddle and Linda Matthiae (together, "Plaintiffs") are patients of Defendant.[11] Plaintiffs used Defendant's website and patient portal, and entered their PHI on those sites, but did not know at that time of use that Defendant had used the Pixel or that their PHI would be collected or shared with any third parties.[12] Plaintiffs did not authorize any disclosure of their PHI to any third parties.[13] Between March 2018 and May 2022, Defendant transmitted Plaintiffs' PHI to Facebook through the Pixel's software code.[14]

8. In May or June 2022, Defendant stopped using the Pixel and initiated a review of its privacy policies.[15] Defendant did not inform its patients of its use of the Pixel until October 2022.[16]

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[9] (Compl. ¶¶ 26–30.)

[10] (Compl. ¶¶ 31–39.)

[11] (Compl. ¶ 8.)

[12] (Compl. ¶¶ 40–42.)

[13] (Compl. ¶ 43.)

[14] (Compl. ¶¶ 44–45.)

[15] (Compl. ¶ 46.)

[16] (Compl. ¶ 48.)

9. Plaintiffs filed the operative version of their complaint on 5 December 2022 on behalf of a putative class defined as "[a]ll citizens of North Carolina whose [PHI] was collected and transmitted by the Defendant to an unauthorized party using [the Pixel]."[17] Plaintiffs contend that they have suffered distress and expended time and effort monitoring their PHI to prevent any unauthorized use.[18]

10. Plaintiffs seek to hold Defendant liable for negligence[19] based on a standard of care Plaintiffs contend is set by HIPAA and Federal Trade Commission ("FTC") enforcement actions,[20] negligence per se under HIPAA[21] and the FTC Act,[22] invasion of privacy,[23] breach of implied contract,[24] unjust enrichment,[25] violation of the North Carolina Unfair and Deceptive Trade Practices Act (the "UDTPA"),[26] and breach of fiduciary duty.[27]

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[17] (*See* Compl. ¶¶ 93–96.)

[18] (Compl. ¶¶ 84–85.)

[19] (Compl. ¶¶ 97–105.)

[20] (*See* Compl. ¶¶ 53–70.)

[21] 42 U.S.C. § 201 *et seq*.

[22] 15 U.S.C. § 41 *et seq*.; (*see* Compl. ¶¶ 106–24.)

[23] (Compl. ¶¶ 125–37.)

[24] (Compl. ¶¶ 138–49.)

[25] (Compl. ¶¶ 150–55.)

[26] N.C.G.S. § 75-1.1. (Compl. ¶¶ 156–65.)

[27] (Compl. ¶¶ 166–73.)

11. On 17 January 2023, Defendant moved to abate or stay this action in favor of a previously filed action currently pending in the United States District Court for the Middle District of North Carolina (the "Federal Action")[28] that Defendant argues features substantially similar parties, subject matter, issues, and requested relief.[29] On the same date, Defendant also moved to dismiss Plaintiffs' complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.[30]

12. On 14 March 2023, the Court held a hearing on the Motions, at which all parties were represented by counsel (the "Hearing"). After hearing arguments on the Motion to Stay at the Hearing, the Court issued an oral ruling on the Motion to Stay and deferred consideration of the Motion to Dismiss. The Court therefore now issues this order to memorialize its ruling at the Hearing.

II.

LEGAL STANDARD

13. Defendant has moved to abate or, in the alternative, to stay the above-captioned action under the prior pending action doctrine (the "Doctrine").[31] Under the Doctrine, a second action should be abated if another, first-filed action is pending

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[28] *Naugle v. WakeMed*, No. 1:22-cv-727 (M.D.N.C. filed Sept. 1, 2022).

[29] (Def. WakeMed's Mot. Abate, Alternative Stay, Pls.' Putative Class Action Lawsuit, ECF No. 21.)

[30] (Def. WakeMed's Mot. Dismiss Pls.' Am. Class Action Compl., ECF No. 23.)

[31] (*See generally* Def. WakeMed's Mem. Law Supp. Mot. Abate, Alternative Stay, Pls.' Putative Class Action Lawsuit [hereinafter "Br. Supp. Stay"], ECF No. 22.)

involving "a substantial identity as to parties, subject matter, issues involved, and relief demanded[.]" *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 21 (1990).

14. If the Doctrine's standard is met, a trial court must grant a properly raised and presented motion to abate as a matter of law. *See State HHS v. Armstrong*, 203 N.C. App. 116, 123 (2010) (reversing denial of a motion to abate when the Doctrine's standard was met).

15. The Doctrine applies whether the first action is pending in state or federal court, so long as both lawsuits are pending in courts geographically within North Carolina which have jurisdiction over the respective actions. *See Eways v. Governor's Island*, 326 N.C. 552, 560–61 (1990). The root and purpose of the Doctrine is judicial economy. *See id.* at 561.

III.

ANALYSIS

16. The parties dispute whether the two actions at issue here contain similar parties, issues, or requested relief.[32] After careful review, the Court agrees with Plaintiffs that the Doctrine does not require that this action be abated. In particular, the Court finds that the parties in the two actions are not "substantially similar" as required by the Doctrine for two independent reasons. *See Armstrong*, 203 N.C. App. at 121.

[32] (*See generally* Br. Supp. Stay; Resp. Def.'s Mot. Abate, Alternative Stay, Pls.' Putative Class Action Lawsuit [hereinafter "Br. Opp'n Stay"], ECF No. 26.)

17. First, the Court concludes that, at present, the only plaintiffs in the Federal Action are the named class representatives, Kim Naugle and Afrika Williams.[33] The federal court has not yet issued a ruling on class certification in that case. But in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), the United States Supreme Court held that unnamed members of an as-yet-uncertified class are not parties to the case in which the putative class seeks certification. *See id.* at 313. Indeed, an eight-Justice majority[34] in *Smith* described the contrary position as "novel and surely erroneous." *See id.*

18. Defendant attempts to distinguish *Smith* by arguing that the Court interpreted party status narrowly out of due process concerns associated with binding a non-party under a judgment. But neither *Smith* nor other authority binding in the Federal Action expressly draws that distinction. *See id.*; *Quicken Loans Inc. v. Alig*, 737 F.3d 960, 966 (4th Cir. 2013).[35] Indeed, the Supreme Court expressly disclaimed

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[33] (Br. Supp. Stay Ex. 1, Compl. – Class Action 1 [hereinafter "Federal Compl."], ECF No. 22.2.)

[34] *Smith* was a unanimous decision. However, Justice Thomas did not join this portion of the opinion.

[35] *See also, e.g.*, *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 297 (D.C. Cir. 2020) ("[P]utative class members – at issue in this case – are *always* treated as nonparties. The Supreme Court made this clear in *Smith*." (emphasis in original)); *Alwert v. Cox Commc'ns., Inc.*, 835 F.3d 1195, 1203 (10th Cir. 2016) ("But prospective plaintiffs – that is, unnamed members of a putative class – are not parties to class litigation."); *Larsen v. Citibank FSB*, 780 F.3d 1031, 1037 (11th Cir. 2015); *Vertrue v. Vertrue, Inc.*, 719 F.3d 474, 479 n.1 (6th Cir. 2013); *Rolo v. City Inv. Co. Liquidating Tr.*, 155 F.3d 644, 659 (3d Cir. 1996); *Bowser v. Ford Motor Co.*, 78 Cal. App. 5th 587, 618–19 (Cal. Ct. App. 2022) (relying on *Smith* to reach a similar conclusion under California law); *Gembarski v. PartsSource, Inc.*, 134 N.E.2d 1175, 1181–82 (Ohio 2019) (to similar effect); *Pallister v. Blue Cross & Blue Shield of Mont., Inc.*, 302 P.3d 106, 109–10 (Mont. 2013) (same).

the notion that its ruling in *Smith* rested on due process principles, and clarified that its decision instead relied upon a pertinent federal statute and "basic premise[s] of preclusion law." *See Smith*, 564 U.S. at 308 n.7, 312. Thus, under applicable law in the Federal Action, *only* the named class representatives are parties, so no member of the proposed class in this action is a party to the Federal Action. Therefore, there is no overlap between the parties, much less the "substantial similarity" required to abate this suit. *See, e.g.*, *Eways*, 326 N.C. at 558.

19. Next, even if the putative class members in the two actions could be considered parties for purposes of the Doctrine and the Motion to Stay, there is imperfect overlap between the two putative classes. The parties argue at length in their briefs over the degree of party similarity required between two actions for the Doctrine to apply.[36] However, neither party has cited a North Carolina case applying the Doctrine to overlapping class actions, nor has the Court's own research revealed one. Thus, how the Doctrine should apply to overlapping class actions appears to be unsettled in this State. Nevertheless, the class definitions themselves demonstrate a lack of substantial similarity even under the more lenient standard Defendant advances.[37]

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[36] (Br. Supp. Stay 7–9; Br. Opp'n Stay 2–6.)

[37] Plaintiffs contend that the Doctrine's similar party element must be "stringently applied" to abate cases involving effectively only the exact same individuals, (Br. Opp'n Stay 3–4), while Defendant argues that the parties need only be "*substantially* similar[.]" (Def. WakeMed's Reply Supp. Mot. Abate, Alternative Stay, Pls.' Putative Class Action Lawsuit 1–5, ECF No. 31 (emphasis added).)

20. Both cases are in the early stages of litigation,[38] and the record is unclear as to who, precisely, fits into which class action, and whether there may be some individuals who fall within one class but not the other. The Court must therefore rely, at this early stage, upon the complaints in the two actions. The complaint in this case names a class of "[a]ll citizens of North Carolina whose [PHI] was collected and transmitted by the Defendant to an unauthorized party using [the Pixel]."[39] Meanwhile, the Federal Action complaint defines its class as "[a]ll Facebook users who are current or former patients of medical providers in the United States with web properties through which Facebook acquired patient communications . . . for which neither the medical provider nor Facebook obtained a HIPAA, or any other valid, consent."[40]

21. Comparing these two definitions reveals a gap sub-class of those persons who used Defendant's patient portal, but who are not Facebook users. The current record does not disclose whether any such persons exist but if they do, they would be members of the putative class in this case, but not in the putative class in the Federal Action. Given the parties' speculations at the Hearing that this gap sub-class could be large or small, and considering that further record development will be necessary to determine which putative class members overlap between the two actions and

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[38] In this action, the only substantive filings have been the Motions. At the Hearing, the parties represented that the only activity in the Federal Action has likewise been a set of preliminary motions.

[39] (Compl. ¶ 93.)

[40] (Federal Compl. ¶ 97.)

which do not, the Court cannot conclude as a matter of law at this juncture that the parties in the two actions are substantially similar.

22. Because the Court cannot conclude that there is substantial similarity between the parties in the two actions at this stage of the litigation, the Court determines that abatement would be improper as a matter of law on this ground alone, and therefore finds it unnecessary to examine whether the legal issues and requested relief in the two actions substantially overlap.[41] *See, e.g.*, *Armstrong*, 203 N.C. App. at 121 (posing test for abatement in the conjunctive).

23. Despite its decision that abatement of the action is not required on the current record, the Court nevertheless concludes, after careful review, that a stay is appropriate in the circumstances of this case. The North Carolina appellate courts have approved the stay of a case on judicial economy grounds even when the abatement standard was not met. For example, in *Baldelli v. Baldelli*, 249 N.C. App. 603 (2016), the North Carolina Court of Appeals examined two related lawsuits. The *Baldelli* court concluded that although the cases did not meet the standard for abatement, the second-filed suit should be stayed because of the "clear interrelationship" between the two suits, the potential to "invite conflict between the resolution of interrelated issues," and "the interest of judicial economy and clarity." *See id.* at 608. Each of these three concerns is present in this case.

24. First, these suits are related. The Court offers no opinion at this juncture on whether the issues, claims, and requested relief in this case and the Federal Action

[41] (Br. Supp. Stay 10–12; Br. Opp'n Stay 6–7.)

are substantially similar within the meaning of the Doctrine. However, the two cases are undeniably related in the ordinary, colloquial sense; indeed, both parties acknowledge this fact in their briefs.[42] Each case involves similar (and in part identical) claims[43] by hospital patients (some of whom are members of both putative classes), against WakeMed over its use of Meta's data tracking tools.[44] There is thus a "clear interrelationship" between the cases' factual underpinnings and the claims asserted on behalf of the respective putative classes.

25. Second, there is a significant risk of conflicting rulings between this Court and the federal court. These actions involve novel and hotly contested issues of North Carolina law including, for example, whether and how a healthcare provider has a duty to safeguard patient information, whether HIPAA or the FTC Act are "public safety statutes" whose violation can create negligence per se liability under North Carolina law, and whether a defendant's alleged failure to safeguard information from third parties can give rise to North Carolina privacy tort liability.[45]

26. These issues present unsettled questions, but neither this Court nor the United States District Court for the Middle District of North Carolina has the

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[42] (Br. Supp. Stay 3–4; Br. Opp'n Stay 6 ("admittedly the two actions are similar").)

[43] Both actions involve claims for breach of implied contract, negligence, negligence per se, and invasion of privacy. (*See* Br. Supp. Stay 5.)

[44] (*See* Br. Supp. Stay 4–6; Br. Opp'n Stay 6–7 (acknowledging that the two cases involve "the same factual issues" and "some common causes of action").)

[45] (*See* Def. WakeMed's Mem. Law Supp. Mot. Dismiss Pls.' Am. Class Action Compl. 5, 8, 10–11 [hereinafter "Br. Supp. Dismiss"], ECF No. 24; Resp. Opp'n Def.'s Mot. Dismiss Pls.' Am. Class Action Lawsuit 4–5, 8–9, 11–13 [hereinafter "Br. Opp'n Dismiss"], ECF No. 27.)

authoritative last word on the content of North Carolina law; both this Court and the federal court would therefore necessarily have to offer rulings based on analogy and the Courts' application of North Carolina appellate precedent to novel claims and factual scenarios. This situation presents a stark risk of inconsistent or even outright conflicting rulings.

27. Finally, although abatement is inappropriate on the current record, a stay would serve the interests of judicial economy by preventing two clearly interrelated actions from proceeding in parallel and drawing upon the finite resources of two court systems. *See, e.g.*, *Baldelli*, 249 N.C. App. at 608–09; *Johns v. Welker*, 228 N.C. App. 177, 182–83 (2013); *Jessee v. Jessee*, 212 N.C. App. 426, 438–39 (2011); *Iqvia, Inc. v. Circuit Clinical Sols.*, 2022 NCBC LEXIS 105, at *4–7 (N.C. Super. Ct. Sept. 14, 2022).

28. The Court, in its discretion, therefore concludes that the circumstances of this case warrant the imposition of a stay. The clear relationship between the factual bases of the cases, the risk of conflicting rulings, and the interests of judicial economy all counsel in favor of the imposition of an indefinite stay until further order of the Court. The Court cautions, however, that developments in the Federal Action or otherwise may justify lifting the stay. The Court therefore enters the stay subject to the conditions set forth below to ensure that the parties' rights and the interests of justice are adequately protected in the circumstances.

29. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **DENIES** the Motion to Stay insofar as it seeks abatement of this action, **GRANTS** the Motion

to Stay insofar as it seeks a stay of this action, and **STAYS** this case indefinitely, subject to the following terms:

a. The parties shall file a joint status report reflecting developments in the Federal Action beginning on 1 April 2023 and every 60 days thereafter. If the parties disagree on any matter in the status report, the parties should note their disagreement and briefly summarize their competing positions;

b. The parties shall immediately inform the Court under the procedures and terms of the preceding sub-paragraph if the court in the Federal Action:

(1) Dismisses the Federal Action,

(2) Rules upon the Federal Action putative class's certification,

(3) Stays the Federal Action, or

(4) Takes other significant or dispositive action in the Federal Action;

c. Either party may utilize the procedures set forth in Business Court Rule 10.9 at any time to seek a status conference to examine whether to lift the stay.

30. In light of the stay ordered herein, the Court hereby **DEFERS** ruling on the Motion to Dismiss pending further order of the Court.

SO ORDERED, this the 22nd day of March, 2023.

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