No. COA23-487 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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EMILY HAPPEL, individually, TANNER SMITH, a minor and EMILY HAPPEL on behalf of TANNER SMITH as his mother, Plaintiffs v. GUILFORD COUNTY BOARD OF EDUCATION and OLD NORTH STATE MEDICAL SOCIETY, INC. Defendants	)	FROM GUILFORD COUNTY No. 22CVS7024

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PLAINTIFFS-APPELLANTS' BRIEF

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STATEMENT OF JURISDICTION

This matter was initiated on August 19, 2022, by the plaintiffs' filing of a verified complaint and the issuance of a summons by the Clerk to the defendants. Both defendants were properly served, and the Superior Court, Guilford County had subject matter and *in-personam* jurisdiction over the parties. On January 30, 2023, a hearing was held before the Honorable Lora Cubbage, Superior Court Judge in Superior Court, Guilford County. Following the hearing, Judge Cubbage entered an order dismissing plaintiffs' complaint, with her written order being signed February 27, 2023, and filed March 1, 2023. On March 9, 2023, plaintiffs, by and through counsel, caused to be filed a Notice of Appeal, appealing the matter to this Honorable Court. Subject matter and personal jurisdiction lie with the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE CASE

Plaintiffs initiated this action on August 19, 2022 by the filing of a verified complaint and the issuance of a summons by the Clerk to the defendants. (R. 3-17) On November 21, 2022, Defendant Guilford County Board of Education filed its answer, a motion to dismiss, and a cross-claim. (R. 20) On December 30, 2022, Defendant Old North State Medical Society, Inc. filed its answer, motion to dismiss, and reply to crossclaims. (R. 34) On January 30, 2023, a hearing was held on the defendants' motions to dismiss

before the Honorable Lora Cubbage, Superior Court Judge in Superior Court, Guilford County. Following the hearing, Judge Cubbage entered an order dismissing plaintiffs' complaint, with her written order being signed February 27, 2023, and filed March 1, 2023. (R. 51) On March 9, 2023, plaintiffs, by and through counsel, caused to be filed a Notice of Appeal, appealing the matter to this Honorable Court. The matter is ripe for decision by this Honorable Court.

STATEMENT OF FACTS

For the purposes of this appeal, with no evidentiary hearings being held, the facts are as stated in the complaint. (R. 9-16).

At the time relevant to this matter, Plaintiff Tanner Smith was 14 years of age and was a football player at Western Guilford High School, a public school that is within the Guilford County Schools school district. On August 14, 2021, Tanner was informed by letter on Guilford County Schools letterhead that there was a cluster of COVID-19 cases among the football team, and because of this cluster he would need to report for a COVID-19 test to continue participating as a player on the Western Guilford High School football team. The letter informed Tanner that he would be tested on August 20, 2021, that the testing would take place from 2:00 p.m. to 6:00 p.m. at Northwest Guilford High, and that Old North State Medical Society "will be conducting testing, consent for testing is required." (R. 18).

On August 20, 2021, Tanner was driven by his stepfather, Brett Happel, to the testing facility. When they arrived, Tanner went into the testing site to be tested, and Mr. Happel remained in his vehicle. Upon Tanner's entrance to the facility, workers at the testing site gave Tanner a form to fill out. Tanner believed the form to be related to the required COVID-19 test.

Unbeknownst to Tanner, there was a COVID-19 vaccination clinic also being held at the testing site. A flyer promoting the vaccination clinic stated "Old North State Medical Society in partnership with Guilford County Schools presents FREE COVID-19 Vaccines." (R. 19). It indicated that there would be a vaccine clinic held on Friday, August 20th, 2021 from 2:00 p.m. to 6:00 p.m. at Northeast Guilford High and Northwest Guilford High. Further, the flyer clearly stated: "Students age 12-17 must have their parent or guardian sign the consent form and bring the completed form to the vaccination site."

Tanner was shown to a seat, and the workers at the clinic attempted to contact Tanner's mother, Plaintiff Emily Happel, without success. They were attempting to contact her to gain consent to administer a COVID-19 vaccination to Tanner. At no point did the clinic workers attempt to contact Mr. Happel, who was waiting in the vehicle outside the testing clinic.

After the workers failed to contact Mrs. Happel, one of the workers instructed the other worker to "give it to him anyway." Tanner then indicated

to the workers that he did not want to receive the vaccine, and that he was just expecting to be tested for COVID-19. Despite failing to get parental consent or the consent of Tanner himself, the workers administered a COVID-19 dose to Tanner. (R. 11)

Tanner was administered a dose of the Pfizer COVID-19 vaccine, and at the time that Tanner was administered that dose, the Pfizer COVID-19 vaccine was granted only Emergency Use Authorization by the Food and Drug Administration for minors 14 years of age. (R. 11)

STANDARD OF REVIEW

In ruling on pretrial motions to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, the allegations of the complaint are viewed as true and admitted. *Asheville Lakeview Properties, LLC v. Lake View Park Comm'n, Inc.,* 254 N.C. App. 348, 351–52, 803 S.E.2d 632, 636 (2017).

> It is well-settled that a plaintiff's claim is properly dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.

Id. at 352, 803 S.E.2d at 636. (Citations omitted). The Court of Appeals reviews a trial court's order dismissing a complaint pursuant to Rule 12(b)(6) de novo. *Id*. Similarly, a trial court's order dismissing a complaint pursuant to Rule 12(b)(1) of the Rules of Civil Procedure is reviewed de novo. *Bunch v. Britton*, 253 N.C. App. 659, 666, 802 S.E.2d 462, 469 (2017).

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT ALLEGING STATE CONSTITUTIONAL CLAIMS ON THE BASIS OF THE AVAILABILITY OF AN ADEQUATE STATE LAW REMEDY.

The trial court found that the plaintiffs' state tort claim for battery "provides an opportunity for Plaintiffs to enter the courthouse doors and present their claim, and would, if successful, provide the same remedy (monetary relief for an unconsented vaccination) sought under the state constitutional claims." (R. 52-53). Because of this finding, the trial court dismissed the plaintiffs' state constitutional claims. Despite the trial court's reliance on the availability of a battery claim against the defendants as a rationale for the dismissal of the plaintiffs' state constitutional claims, the trial court similarly dismissed the battery claim. This inconsistency demonstrates the faulty reasoning behind the trial court's dismissal of the plaintiffs' state constitutional claims. Additionally, the right of a parent under the North Carolina Constitution to raise one's child and to have control over his care and custody in accordance with her conscience is not similar in nature to battery, and thus, battery does not constitute an adequate state law remedy.

In the complaint, plaintiffs alleged that Emily Happel had a liberty interest under NC Const. Art. I, §§ 1, 13, and 19 "to raise her son and to have

control over his care and custody, and to do so in accordance with her conscience." (R. 13). The complaint further alleged that her liberty interest could only be deprived but by the law of the land. (R. 13). At the time of the vaccine dose, the law of the land of North Carolina required parental consent: "Notwithstanding any other provision of law to the contrary, a health care provider shall obtain written consent from a parent or legal guardian prior to administering any vaccine that has been granted emergency use authorization and is not yet fully approved by the United States Food and Drug Administration to an individual under 18 years of age." N.C. Gen. Stat. § 90-21.5(a1). The complaint further alleged that Guilford County Schools was a state actor, and that parental consent was not received by defendants prior to the administration of the vaccine to Tanner.

As to Tanner's state constitutional rights, the complaint alleged that "Tanner Smith has a liberty interest under the North Carolina Constitution to his own bodily autonomy, subject to the similar rights as his mother, Emily Happel, to the care, custody, and control of her children." (R. 15). The complaint further alleges that Tanner did not give consent to the vaccine being administered. (R. 15).

"[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum v. Univ. of N. Carolina Through Bd. of Governors*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). "[T]o be considered

adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339–40, 678 S.E.2d 351, 355 (2009).

In *Craig*, the Supreme Court of North Carolina held that a plaintiff whose claims were barred by sovereign immunity did not have an adequate state remedy on common law negligence, and accordingly was allowed to make a colorable claim under the North Carolina Constitution. *Id. See also*, *Deminski on behalf of C.E.D. v. State Bd. of Educ.,* 2021-NCSC-58, ¶ 18, 377 N.C. 406, 413, 858 S.E.2d 788, 794 (2021) (discussing the interplay of immunity and *Corum*). This case is similar to *Craig* and *Deminski*.

While the trial court asserts that the plaintiffs' battery claim was not "adequately pled," the trial court also dismissed the battery claim based on the immunity of 42 U.S.C. § 247d-6d(a)(1) and N.C. Gen. Stat. § 115C-524. While the trial court may have dismissed the battery claims for an alleged failure to adequately plead the claim, it is clear that the trial court was dismissing the claim based upon immunity as well. The trial court stated that these immunities "provide an independently sufficient basis for that dismissal." Thus, had the trial court found that the battery claim was sufficiently pled, the trial court still would have dismissed the battery claim on immunity grounds. If the battery claim was barred by these assertions of immunity (as the trial court concluded as to the battery claim for **both**

defendants), then the battery claim could not be an adequate state law remedy that shuts the courthouse doors to plaintiffs' otherwise colorable North Carolina Constitutional claims. There is no rational reason that a claim barred by statutory immunity should be treated any different than the claims barred by sovereign immunity in *Craig* and *Deminski*.

Moreover, the battery claim was Tanner's claim, not Mrs. Happel's claim. The complaint alleges "[p]laintiff Tanner Smith is entitled to compensation for defendants' battery." (R. 13). It is unconscionable that a claim of one plaintiff for battery would somehow bar the state constitutional claim of another plaintiff who was not the victim of the alleged battery. Mrs. Happel's claim is not that she was battered, but that the actions of a government actor violated her well-established rights as a parent.

Counsel will concede that, if this Honorable Court finds that Tanner Smith's battery claim against defendant Board was dismissed in error and is not subject to immunity, that necessarily would defeat Tanner Smith's state constitutional claims as being precluded by an adequate state law remedy. However, if this Court finds that the battery claim was dismissed in error only as to Old North State Medical Society, Inc., counsel contends that Tanner Smith's state constitutional claims against defendant Board are colorable and not subject to dismissal based on an adequate state law remedy. Regardless, Tanner Smith's battery claim is not an adequate state law remedy as to Emily Happel's state constitutional claims.

The trial court erred in finding that battery was an adequate state law remedy that served as a bar to plaintiffs' state constitutional claims because the Court also dismissed the battery claim on statutory immunity grounds, and because the battery claim only pertained to Tanner Smith, and is, therefore, inadequate to provide a remedy to Mrs. Happel.

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT WHEN IT DETERMINED THAT THE COMPLAINT FAILED TO ADEQUATELY PLEAD VICARIOUS LIABILITY AGAINST THE BOARD OF EDUCATION ON PLAINTIFFS' BATTERY CLAIM.

The trial court dismissed plaintiff Tanner Smith's battery claim against the Board when it found that there were insufficient facts to support vicarious liability. (R. 55). The trial court concluded "[p]laintiffs also do not allege facts to show that administering vaccines without consent was within the scope of any employee's or agent's duties." The trial court's definition and interpretation of "the scope of any employee's or agent's duties" is too narrow to pass muster.

"As a general rule, liability of a principal for the torts of its 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 committed within the scope of his employment and in furtherance of the principal's business[;] or (3) when the agent's act is ratified by the principal." *Hendrix v. Town of W. Jefferson*, 273 N.C. App. 27, 32–33, 847 S.E.2d 903, 907 (2020) (internal quotation marks and citations omitted). "An act is within the scope of an employee's implied

authority, even if it is contrary to the employer's express instructions, when the act is done in the furtherance of the employer's business and in the discharge of the duties of employment." *Edwards v. Akion*, 52 N.C. App. 688, 693, 279 S.E.2d 894, 897, aff'd, 304 N.C. 585, 284 S.E.2d 518 (1981). For instance, an employee threatening to gouge out the eyes of a customer is clearly outside the scope of employment, but to shatter a glass in anger, and thereby injuring a person, is within the scope of employment. *Wegner v. Delly-Land Delicatessen, Inc.*, 270 N.C. 62, 68, 153 S.E.2d 804, 809 (1967) (an employee's "negligent or improper method of doing [an act he was hired to do] would have been the act of his employer in the contemplation of the law").

The clinic workers were present at the vaccine clinic to carry on and further the business of the partnership that had been formed by defendants. They were there to administer vaccines. The scope of their employment was to administer vaccines. When they administered the vaccine to Tanner, they were doing so in furtherance of their employer's business and within the scope of their employment. That they did so without consent does not move them outside the scope of their employment. The trial court's narrowing of the scope of the employment or duties of the vaccine clinic workers to be the "administering of vaccines without consent" would serve to obliterate the doctrine of *respondeat superior* in North Carolina. As soon as an agent or employee commits a wrongful act, they would be immediately removed from the scope of their employment or duties. For instance, a hypothetical

company's truck driver is employed to transport goods safely. If he negligently injures another, then that would be outside the scope of his employment, because "negligent driving" is not within the scope of his employment. The vaccine workers were not on a frolic and detour. They were carrying out the duties they had been assigned, and those actions are attributable to the partnership of the defendants. The trial court erred in determining that the complaint failed to adequately plead vicarious liability for battery.

III. THE TRIAL COURT ERRED WHEN IT DETERMINED THE BOARD WAS IMMUNE FROM LIABILITY UNDER THE THIRD-PARTY USE OF SCHOOL FACILITIES STATUTE. N.C. GEN. STAT. § 115C-524.

The trial court found that N.C. Gen. Stat. § 115C-524 provided immunity to defendant Board, stating that statute "provides immunity to school boards who enter into agreements with third parties for use of school facilities." (R. 57). N.C. Gen. Stat. § 115C-524 (c) provides:

> Notwithstanding the provisions of G.S. 115C-263 and 115C-264, local boards of education may adopt rules and regulations under which they may enter into agreements permitting non-school groups to use school real and personal property, except for school buses, for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. No liability shall attach to any board of education or to any individual board member for personal injury suffered by reason of the use of such school property pursuant to such agreements.

The clear import of this statute is to shield local boards of education from liability when the local board has created a policy to allow the use of school property for non-school uses with third parties and enters into agreements consistent with that policy.

This interpretation of the statute is consistent with appellate court decisions applying N.C. Gen. Stat. § 115C-524(c). *See e.g. Henderson v. Charlotte-Mecklenburg Bd. of Educ.*, 253 N.C. App. 416, 801 S.E.2d 145, 146 (2017) (no liability for school board when referee was injured during a third-party basketball club's tournament where the board "complied with its own rules and regulations when it entered into a valid contract" permitting the use of the gym); *Lindler v. Duplin Cnty. Bd. of Educ.,* 108 N.C. App. 757, 425 S.E.2d 465, 466 (1993) (no liability when plaintiff fell and was injured during a fundraising auction for a third-party honors sorority); *Plemmons by Teeter v. City of Gastonia*, 62 N.C. App. 470, 471, 302 S.E.2d 905, 906 (1983) (no liability when minor was injured after falling from the bleachers during a non-school event conducted by a third-party city government).

The instant case is quite distinguishable. In this case, Tanner Smith was directed by letter from Guilford County Schools to report for COVID-19 testing to continue his participation in a school activity—playing football for his school. (R. 18). This is not a situation where the school facility was simply being used by a third-party with little-to-no oversight by the school system. In fact, the vaccine clinic was held by "Old North State Medical Society in

partnership with Guilford County Schools." (emphasis added) (R. 19). While one may doubt the wisdom of conducting a testing clinic and a vaccine clinic in the same location, no one can doubt that it was the **collective** wisdom of both defendants. The facts as stated in the complaint make it clear that Tanner went to the clinic at the direction of Guilford County Schools, and when he ended up in a vaccine clinic, it was a clinic that was operated with two partners—the defendants. The trial court erred in finding that the statutory immunity of N.C. Gen. Stat. § 115C-524(b) barred plaintiff Tanner Smith's claim for battery against defendant Board.

IV. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CONSTITUTIONAL CLAIMS AGAINST OLD NORTH STATE MEDICAL SOCIETY, INC. MUST BE DISMISSED BECAUSE THAT DEFENDANT WAS NOT ACTING UNDER COLOR OF STATE LAW OR WAS A STATE ACTOR.

The trial court erroneously concluded that the Old North State Medical Society, Inc. had no liability relating to the constitutional claims because ONSMS was not acting under color of state law or was a state actor. While, as will be later stated, plaintiffs are abandoning their federal constitutional claims, a resort to federal decisions regarding the state constitutional claims is appropriate and instructive.

"[T]o act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons,

jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." *Dennis v. Sparks*, 449 U.S. 24 (1980), (emphasis added). "[T]he question is whether the State was sufficiently involved to treat that decisive conduct as state action." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988).

Here, there is no dispute that there was significant state involvement that led to ONSMS's decisive action that violated the state constitutional rights of plaintiffs. First, it was the defendant Board, through its employees and officers, that directed Tanner to the clinic as a condition of his continued activity in school related sports. Second, the vaccine clinic that was held at the school facility was a partnership between the defendants. Finally, the idea that vaccine administration--paid for by governmental actors, promoted by governmental actors, and provided as part of a push by federal, state, and local governments--is totally divorced from government action ignores the facts that are plain from every American's experience during the COVID-19 crisis.

ONSMS was acting as a government actor, in partnership with a government actor, and violated the constitutional rights of the plaintiffs while doing so. The trial court erred in holding otherwise.

V. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE PREP ACT PROVIDED IMMUNITY TO THE BOARD AND TO OLD NORTH STATE MEDICAL SOCIETY, INC. AND PRE-EMPTS STATE LAW CLAIMS.

The trial court determined that the federal PREP Act provided broad immunity to defendants for their actions. The PREP Act provides, in relevant part:

> Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.

42 U.S.C. § 247d-6d(a)(1). It is not disputed that the Pfizer COVID-19 vaccine was a "covered countermeasure." The trial court found that both ONSMS and the Board were "covered persons." It is unclear under what theory the Board was a covered person under the trial court's reasoning, but the only acceptable theory is that it is because of the Board's involvement in the partnership with ONSMS in operating and providing the locations for the vaccine clinics. *See* 42 U.S.C. § 247d-6d(i)(2) (defining "covered persons").

It is important to note that the claims made by plaintiffs are not **because** this relates to COVID-19, but they **happen** to relate to COVID-19. Plaintiffs' battery and state constitutional claims are not dependent on COVID-19 and the COVID-19 vaccine and its administration. Those claims would result regardless of what substance had been administered to Tanner. It matters not whether it was a COVID-19 vaccine, a chickenpox vaccine, an Aspirin, or open-heart surgery. The trial court's broad reading of the PREP Act to provide immunity in a situation such as this does not further the

purpose of the PREP Act "[t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency . . .." *The PREP Act and COVID-19, Part 1: Statutory Authority to Limit Liability for Medical Countermeasures*, Congressional Research Service Legal Sidebar, LSB10443 (April 13, 2022).

Taking the trial court's interpretation of the PREP Act to its logical conclusion, had defendants injected Tanner with saline, they would have been liable, but since they injected him with a vaccine they are not liable. Should a covered person have a slip-of-the-hand and inject saline into a person's heart there would be no immunity, but if the substance was a COVID-19 vaccine, there would be immunity. This certainly could not be the intent of Congress. The intent of Congress, when reading the Act as a whole, was to limit the liability for adverse effects and promote the quick development and deployment of the countermeasure, not to give *carte blanche* to medical providers to perform medical procedures without consent.

It does not appear that North Carolina appellate courts, North Carolina's federal district courts, or the Fourth Circuit have interpreted these provisions of the PREP Act. Other courts' interpretations have been varied on pre-emption and immunity.

> Although our court has not previously considered whether the PREP Act completely preempts state-law claims within its ambit, several federal courts of appeals have addressed the issue in similar cases involving claims against assisted-living facilities and nursing homes during the COVID-19 pandemic. *See Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 406–13 (3d Cir. 2021);

> *Mitchell v. Advanced HCS, L.L.C.,* 28 F.4th 580, 584–88 (5th Cir. 2022); *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237, 242–46 (5th Cir. 2022); *Martin v. Petersen Health Operations, LLC*, 37 F.4th 1210, 1213–14 (7th Cir. 2022); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 687–88 (9th Cir. 2022). These courts have taken different views as to whether the PREP Act completely preempts any state-law claims, but the courts have all held that the Act does not completely preempt claims, like Hudak's, that do not allege willful misconduct related to the administration or use of covered COVID-19 countermeasures. We agree.

Hudak v. Elmcroft of Sagamore Hills, 58 F.4th 845, 853 (6th Cir. 2023).

North Carolina's courts should find that the claims presented by plaintiffs in this matter, are not pre-empted by the PREP Act and further that immunity does not extend to claims regarding lack of consent. Particularly, this Court should hold that state constitutional claims are not pre-empted and that state actors are not immune from liability for the violation of the Constitution when the allegations are not specific to the countermeasure or its adverse effect, but to the administration of medicine without consent.

VI. PLAINTIFFS-APPELLANTS ABANDON THEIR FEDERAL CONSTITUTIONAL CLAIMS

Plaintiffs-Appellants hereby give notice to this Honorable Court and the opposing parties that they abandon their federal constitutional claims.

CONCLUSION

For the foregoing reasons, the decision of the Superior Court should be reversed, and the matter should be remanded to Superior Court, Guilford

County for further proceedings consistent with the opinion of this Honorable Court.

RESPECTFULLY SUBMITTED, this the 21st day of July, 2023.

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CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify that the Brief of Plaintiff-Appellee complies with North Carolina Rule of Appellate Procedure 28(j).

Respectfully submitted, this the 21st day of July, 2023.

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CERTIFICATE OF FILING AND SERVICE

This shall certify that a copy of the foregoing was this day served upon opposing counsel by emailing it to the email of record, by the consent of all parties, as follows:

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This the 21st day of July, 2023.

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