No. 86A23-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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DOUG TURPIN and NICOLE TURPIN,

Plaintiffs–Appellants,

v.

CHARLOTTE LATIN SCHOOLS, INC., CHARLES D. BALDECCHI, TODD BALLABAN, DENNY S. O'LEARY, MICHAEL D. FRENO, R. MITCHELL WICKHAM, COURTNEY HYDER, IRM R. BELLAVIA, PHIL COLACO, JOHN D. COMLY, MARY KATHERINE DUBOSE, ADAORA A. ERUCHALU, DEBBIE S. FRAIL, DON S. GATELY, ISRAEL K. GORELICK, JOY M. KENEFICK, KARIM LOKAS, JOHN T. MCCOY, KRISTIN M. MIDDENDORF, A. COY MONK IV, UMA N. O'BRIEN, DAVID A. SHUFORD, MICHELLE A. THORNHILL, FLETCHER H. GREGORY III, TARA LEBDA, and PAIGE FORD,

Defendants–Appellees.

From Mecklenburg County

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RESPONSE TO PLAINTIFFS-APPELLANTS' PETITION FOR DISCRETIONARY REVIEW AS TO ADDITIONAL ISSUES

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RESPONSE TO PLAINTIFFS-APPELLANTS' PETITION FOR DISCRETIONARY REVIEW AS TO ADDITIONAL ISSUES

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant-Respondents Charlotte Latin School, Inc. ("Latin") and the individual defendants (collectively with Latin, "Defendants"), pursuant to Rule 15(d) of the North Carolina Rules of Appellate Procedure, respond to the Plaintiff-Appellants' ("Plaintiffs") Petition for Discretionary Review as to additional issues filed on 7 May 2024.

Independent and religious schools are private entities that have the freedom to set their own curriculum and policies. Like other businesses in this state, they are service providers competing in an educational marketplace for customers. Parents may choose where to enroll their children, and they do so through contracts which

define the parties' rights and obligations. In the event parents are dissatisfied with a private school's curriculum and culture, they have the option to enroll their children at a new school that suits their needs. And, if a private school has parents that reject the school's policies, it likewise may end their relationship.

In several communications with Latin and its leadership, Plaintiffs repeatedly and unequivocally indicated that they opposed Latin's curriculum and culture, which they considered too "political." Latin concluded that the parties needed to go their separate ways. Plaintiffs then took their political dispute to court. They filed a Complaint asserting nine claims, including seven statutory and tort claims against Latin, its administrators, and 23 volunteer members of its Board of Trustees for disagreeing with Plaintiffs' views and rejecting Plaintiffs' demands that Latin change its "curriculum and culture and its focus on a political agenda." Applying settled law to the facts alleged by Plaintiffs, the three-judge panel in the Court of Appeals unanimously affirmed the trial court's dismissal of Plaintiffs' extracontractual claims.

Plaintiffs' Petition continues to advance their political disagreements with Latin's policies. They argue that the three-judge panel on the Court of Appeals acted with "animus" and "open hostility" towards Plaintiffs when it unanimously dismissed Plaintiffs' extracontractual claims. They also argue that the Court of Appeals "relied on motivated reasoning" and granted private schools "special immunity" from tort liability because the "woke indoctrination machine" does not want thousands of

private school parents questioning "sacrosanct" diversity, equity, and inclusion ("DEI") programs.

But the Court of Appeals' ruling dismissing Plaintiffs' statutory and tort claims is no such thing. Relying on well-settled and controlling North Carolina law and Plaintiffs' own allegations, the lower courts simply recognized that the dissolution of Plaintiffs' relationship with Latin is a contractual matter and did not violate any independent duties imposed by statutory or common law. In an attempt to avoid application of that law, including the black letter principle that dismissal is appropriate if facts disclosed in the Complaint defeat the claim, Plaintiffs attempt to ignore or recharacterize their Complaint and the substance of the documents they chose to put before the Court at the pleading stage of the case.

For the reasons discussed more fully below, Defendants respectfully request the Court let the decision of the Court of Appeals stand and deny Plaintiffs' Petition for Discretionary Review as to additional issues.

FACTS

Plaintiffs appeal from an Order granting, in part, Defendants' Rule 12(b)(6) motion. Therefore, the allegations of the Complaint are deemed to be true, unless contradicted by documents referenced therein. *See Schlieper v. Johnson*, 195 N.C. App. 257, 263, 672 S.E.2d 548, 552 (2009).

In June of 2020, the Latin Board of Trustees wrote to Latin parents, faculty, and staff, stating, "[t]he principles of diversity, equity and inclusion are foundational for the Board and will lead our thinking in the development of our next strategic plan,

the preparation for which is happening now." (R p 14 (quoting Doc. Ex. pp 2-3)). Plaintiffs alleged this letter "showed the first sign that Latin was moving toward a curriculum, culture, and focus associated with a political agenda." (R p 14).

During the 2020-2021 school year, Plaintiffs observed changes in Latin's "curriculum and culture" consistent with Latin's commitment to DEI and began to discuss with other parents their concerns that these changes "were indicative of a political agenda." (R p 16).

Despite their knowledge of Latin's focus on equity and their concerns with perceived changes in its culture, the Turpins re-enrolled their two children at Latin for the 2021-2022 school year by executing Enrollment Agreements on February 5, 2021. (R p 8; Doc. Ex. 12-21).

The Enrollment Agreements provided, *inter alia*, "I understand that in signing this Enrollment Contract for the coming academic year, my family and I understand the mission, values, and expectations of the School as outlined in the Charlotte Latin School Parent-School Partnership and agree to accept all policies, rules, and regulations of Charlotte Latin Schools, Inc." (Doc. Ex. 13).

The Parent-School Partnership ("PSP") set out certain expectations for parents, including:

> Understanding that an effective partnership is characterized by clearly-defined responsibilities, mutual respect, open communication, support of the Mission of the School, adherence to the Honor Code and a commitment to the Core Values.

(Doc. Ex. 15).

The PSP ended,

> A positive, collaborative working relationship between the School and a student's parent/guardian is essential to the fulfillment of the School's mission. Therefore, the School reserves the right to discontinue enrollment if it concludes that the actions of a parent/guardian make such a relationship impossible or seriously interfere with the School's mission.

(Doc. Ex. 16).

During the summer of 2021, Plaintiffs and other "concerned parents," who came to refer to themselves as "Refocus Latin," prepared a PowerPoint presentation for the Board of Trustees outlining their concerns with Latin's culture and curriculum relating to DEI. (R pp 17-18; Doc. Ex. 23-48).

On 24 August 2021, Mr. Turpin and nine other parents representing that group presented the PowerPoint to members of the Board's executive committee and the Head of School, Mr. Charles Baldecchi. (R pp 17-18). The presentation accused Latin's Board leadership of publicly aligning "with a political organization and an ideology that is inconsistent the [sic] school's core values, beliefs and founding principles" and accused the administration of "[r]eplacing school traditions grounded in American values with politically extremist and anti-nuclear family values." (Doc. Ex. 31, 40).

The Refocus Latin presentation objected to a variety of perceived changes in the curriculum and culture at Latin. (Doc. Ex. 23-48). The Refocus Latin presentation also complained that "equity" would lower the quality of students and faculty at Latin and called on Latin to "affirm meritocracy" (Doc. Ex. 47):

- "DEI goals superseding optimizing evaluations for admitting most qualified students and hiring most qualified faculty." (Doc. Ex. 44).

- "Admissions is weighting diversity over academic excellence, particularly in [Upper School]." (Doc. Ex. 37).

- "The weighting of DEI and Critical Theory [sic] on a 'culturally responsive education' eventually erodes the quality of student, quality of curriculum, quality of teacher and the academic rigor at the school." (Doc. Ex. p 37).

After the presentation, the Latin Board of Trustees thanked the parents, but indicated that the Board would not entertain further discussion with the group regarding Latin's curriculum or culture. (R p 18).

Dissatisfied with the Board's response and apparently not willing to accept "no" for an answer, Mr. Turpin sent an email to members of the Latin Board of Trustees and the Refocus Latin group on 29 August 2021. (R p 19; Doc. Ex. 50-52). Mr. Turpin's email called on members of the Board of Trustees and the Latin administration to individually address numerous issues <u>in writing</u>—most of which had been addressed in the Refocus Latin presentation, including:

- Demanding action in response to objections to a video about Latin's history." "It can not [sic] go unaddressed any longer <u>and it is not going away without being addressed</u>." (Doc. Ex. p 51 (emphasis added)).

- Asking the Board and administration to answer whether certain topics were political, including allegations (which Mr. Turpin heard from another parent) that the sixth grade humanities class spent three days on "being Woke," including reading the book *Woke: A Young Poet's Call to Justice*. (Doc. Ex. p 51).

- Asking the Board to answer whether the administration appropriately refused to have a meeting with the Turpins to discuss its masking and vaccination policies and to direct the administration to have the meeting. (Doc. Ex. p 51).

Mr. Turpin ended his email by noting,

> I think many parents are now in the previously unthinkable and life disrupting position, of having to evaluate whether Latin has left them to become another type of school entirely, one that focuses on radical progressive issues over educating our children, which is forcing them to consider alternatives to being Latin Lifer's.

(Doc. Ex. 52).

On 7 September 2021, Mr. Turpin sent yet another email, repeating his criticisms of his son's humanities teacher and demanding that his son be reassigned to an instructor that Mr. Turpin deemed suitable. (Doc. Ex. 72-73). Mr. Turpin's September 7 email requested a telephone discussion with Todd Ballaban, Latin's Head of Middle School, before the issue was addressed with the teacher. (Doc. Ex. 72). Mr. Ballaban, however, responded to Mr. Turpin that he needed to investigate the matter with the teacher. (Doc. Ex. 72). After he had done so, he requested an in-person meeting with the Turpins. (Doc. Ex. 71). As a result, on 10 September 2021, Mr. Baldecchi, the Head of School, and Mr. Ballaban met with Mr. Turpin. At the meeting, Mr. Baldecchi terminated Plaintiffs' Enrollment Agreements pursuant to the PSP. (R p 23).

PROCEDURAL BACKGROUND

Plaintiffs asserted nine causes of action against Latin, its administrators, and its Board of Trustees:

1. Unfair Trade Practices ("UDTP") [Latin, Baldecchi, Ballaban] ¶¶ 87-112
2. Fraud [Latin, Baldecchi, Ballaban] ¶¶ 113-131
3. Negligent Misrepresentation [Latin, Ballaban] ¶¶ 132-151
4. Negligent Infliction of Emotional Distress [Latin, Baldecchi] ¶¶ 152-164

5. Negligent Supervision and Retention [Latin] ¶¶ 165-173
6. Slander per quod [Latin, Baldecchi] ¶¶ 174-188
7. Libel per quod [Latin, Board defendants] ¶¶ 189-203
8. Breach of Contract [Latin] ¶¶ 204-212
9. Breach of Implied Covenant of Good Faith [Latin] ¶¶ 213-221.

The 13 October 2022 Order dismissed all claims except Plaintiff's ninth claim for breach of the implied covenant of good faith. (R pp 78-79). Plaintiffs voluntarily dismissed, without prejudice, that ninth claim on 17 October 2022 and filed a Notice of Appeal on 18 October 2022.

On 23 March 2023, Plaintiffs petitioned this Court for discretionary review, seeking to bypass review by the North Carolina Court of Appeals. The Court denied Plaintiffs' bypass petition on 30 August 2023. *Turpin v. Charlotte Latin Sch., Inc.*, 890 S.E.2d 916 (N.C. 2023) (mem).

On 2 January 2024, following briefing and oral argument, a three-judge panel of the Court of Appeals issued a unanimous, unpublished opinion affirming dismissal of all Plaintiffs' claims. On 17 January 2024, Plaintiffs filed a petition for rehearing en banc before the Court of Appeals. On 12 February 2024, the panel ordered that its January 2 opinion was withdrawn and retained the case. The Court of Appeals denied Plaintiffs' petition for rehearing en banc without prejudice.

On 2 April 2024, the three-judge panel issued a new opinion. The new opinion revised the Court's analysis regarding Plaintiffs' breach of contract claim, with all three judges writing separately on that claim and Judge Flood dissenting as to dismissal of that claim. However, all three judges affirmed dismissal of Plaintiffs' extracontractual claims without any substantive changes to their analysis.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Plaintiffs Have Not Demonstrated a Strong Public Interest Warranting Review of Their Extra-Contractual Claims.

As of July 2023, there were 319 independent and 565 religious private schools in North Carolina. (*See* N.C. Dep't Educ., https://www.doa.nc.gov/dnpe/privateschoolreport2022-23/download?attachment). Subject to certain health and safety regulations, these 884 schools develop their curriculum and course of study without government interference. *See* N.C. Gen. Stat. §§ 115C-554 & 562 (schools which comply with provisions relating to religious or qualified nonpublic schools shall not "be subject to any other provision of law relating to education except requirements of law respecting fire, safety, sanitation and immunization"); *see State v. Williams*, 253 N.C. 337, 345, 117 S.E.2d 444, 450 (1960).

Each private school decides what textbooks to use and what materials are appropriate in their library. They also determine whether and to what extent cultural or religious principles will underpin their mission and curriculum. Not surprisingly, these choices vary from school to school, and parents are free to choose among them to obtain a philosophy and curriculum that suits their family. Each private school is also free to define parents' roles and responsibilities in their contracts. If a parent does not like the education they have purchased, their remedies lie in contract and in the marketplace. *See, e.g.*, *Hart v. State*, 368 N.C. 122, 139-40, 774 S.E.2d 281, 293 (2015) (declining to impose minimal educational standards on private schools); *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 216–21, 229–32, 768 S.E.2d 582, 590–93, 598–600 (2015) (affirming verdict on breach of contract claim for

failure to conduct a contractually agreed upon background check and affirming summary judgment dismissing claims for fraud, unfair and deceptive trade practices, negligence, and negligent misrepresentation based on the same conduct).

Plaintiffs argue that the Court of Appeals "immunized" private schools from suit, but that is false. Plaintiffs chose not to pursue their remaining contractual claim against Latin in the trial court, and they are not content pursuing contractual relief in this Court either. Plaintiffs seek to go beyond the benefit of their bargain and punish Latin, its administrators, and its volunteer board members for refusing to accept Plaintiffs' preferred school policies. They ask this Court to redefine the contours of common law[1] and to overlook dispositive facts in Plaintiffs' Complaint so Plaintiffs can recover extracontractual relief such as treble damages, punitive damages, emotional distress damages, reputational damages, and attorneys' fees in connection with Latin terminating Plaintiffs' Enrollment Agreements.

Burdening everyday contractual relationships with unwarranted exposure to litigation over spurious tort claims creates a significant risk of harm to the public generally, and to school choice specifically. Reviewing such claims would create an open season on independent and religious schools any time those schools refuse to change school policy, regardless of what those policies might be. For example, under Plaintiffs' extracontractual theories, parents, students, and employees would be emboldened to target private Christian schools and their leadership for preaching,

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[1] Plaintiffs' Petition cites *Herrera v. Charlotte Sch. of L., LLC*, No. 17 CVS 1965, 2018 WL 1902556 (N.C. Super. Apr. 20, 2018). Defendants address this case below in their discussion of the tort of negligent misrepresentation.

teaching, and modeling their faith. *See, e.g.*, *Kelly v. State*, 286 N.C. App. 23, 26, 878 S.E.2d 841, 845 (2022) (asserting claims that Opportunity Scholarships to religious schools are a form of religious discrimination); *cf. Billard v. Charlotte Cath. High Sch.*, No. 22-1440, 2024 WL 2034860, at *2–3 (4th Cir. May 8, 2024); *Benjamin v. Sparks*, 986 F.3d 332, 338–40 (4th Cir. 2021). Only weeks ago, 16 private schools were threatened with criminal liability by a state legislator if they did not provide information on a host of school policies, such non-discrimination and religious accommodation policies. *Cf.* David N. Bass, *Anti-school choice Democrats send threatening letter to private schools*, The Carolina Journal (Apr. 24, 2024), available at https://www.carolinajournal.com/anti-school-choice-democrats-send-threatening-letter-to-private-schools/#:~:text=David%20N.,Bass&text=An%20anti%2Dschool%20choice%20Democratic,comply%20with%20an%20information%20request.

Whether or not Latin properly terminated Plaintiffs' Enrollment Contracts in the face of Mr. Turpin's repeated complaints about the school's curriculum and policies is a contractual question and is already before this Court. Like any dispute sounding in contract, what the parties agreed to should be paramount. Expanding the scope of tort liability in unpredictable ways so that Plaintiffs can litigate their political differences with Latin's leadership threatens the educational marketplace and the public's interest in school choice. Moreover, as discussed more fully below, Plaintiffs' extracontractual claims are not well-grounded in law or fact.

II. The Court of Appeals Correctly Applied the Standard of Review to Plaintiffs' Tort Claims.

"A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). "[D]ocuments which are the subject of a plaintiff's complaint and to which the complaint specifically refers, even though they are presented by the defendant." *Oberlin Cap., L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001); *Coley v. N. Carolina Nat. Bank*, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979). Finally, the court "may reject allegations that are contradicted by documents attached to the complaint." *Schlieper*, 195 N.C. App. at 265, 672 S.E.2d at 553 (citing *Oberlin Cap.*, 147 N.C. App. at 60, 554 S.E.2d at 847).[2]

Here, the Court of Appeals looked at allegations in the Complaint and the documents referenced by Plaintiffs, and determined that Plaintiffs pleaded themselves out of court. Even Plaintiffs know that the documents they referenced in their Complaint are fatal to their case: in the record, they designated a proposed issue

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[2] It is well-established that North Carolina courts do not ignore the plain language of documents referenced in the Complaint. *Id.*; *see, e.g.*, *McDonald v. Bank of New York Mellon Tr. Co., Nat'l Ass'n*, 259 N.C. App. 582, 588, 816 S.E.2d 861, 865 (2018); *Wilson v. SunTrust Bank*, 257 N.C. App. 237, 244, 809 S.E.2d 286, 292 (2017); *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206, 794 S.E.2d 898, 903 (2016); *Laster v. Francis*, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009).

that the documents they incorporated into their Complaint were not properly considered on a Rule 12(b)(6) motion (R p 100), but abandoned that proposed issue in the Court of Appeals.

A. Plaintiffs' Fraud and Negligent Misrepresentation Claims Fail for Lack of Misrepresentations or Reliance.

When it comes to Plaintiffs' fraud and negligent misrepresentation claims, Plaintiffs now ignore the documents they previously relied on in drafting their Complaint; those documents necessarily defeat their claims. Both fraud and negligent misrepresentation claims require (1) a misrepresentation, (2) reliance, and (3) injury. *Forbis v. Neal*, 361 N.C. 519, 526-27, 649 S.E.2d 382, 387 (2007); *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988).

Plaintiffs' fraud and negligent misrepresentation claims are downright bizarre. They specifically relate to the 10 September 2021 meeting between Mr. Turpin, Mr. Ballaban, and Mr. Baldecchi. Plaintiffs allege that Mr. Ballaban (and by omission, Mr. Baldecchi), in email correspondence incorporated by reference into the Complaint, falsely or negligently misrepresented (i) that Latin would not take action against Plaintiffs or (ii) that the 10 September 2021 meeting was solely to address their allegations against L.T.'s teacher. (R p 35). Plaintiffs further allege Defendants made these misrepresentations to lure Mr. Turpin to the September 10 meeting, and that somehow the meeting was necessary to terminate his Enrollment Agreements.

Plaintiffs argue, without relying upon the actual text of the emails at issue, that "the Court of Appeals read Mr. Turpin and Mr. Ballaban's ambiguous email exchange in a way that disadvantaged the Turpins." (Pet. p. 19). But the email

exchange is not ambiguous — Mr. Turpin was concerned about L.T.'s teacher retaliating against L.T. Mr. Turpin explicitly stated that "I would prefer that we discuss this situation on a call, before you address this with the teacher I am referencing in this email. We do not want [L.T.] to experience any possible blowback because of what we are bringing to your attention." (Doc. Ex. 72). In response, Mr. Ballaban said "You make some serious claims that I need to investigate with the teacher, which is only fair so she can provide context. Our teachers do not retaliate and there will be no blowback, I assure you." (Doc. Ex. 72). The reference to "blowback," read in the full context of the email referenced by Plaintiffs, is not about the 10 September 2021 meeting. It is about speaking with L.T.'s teacher before talking to Mr. Turpin, and Mr. Turpin's fear of retaliation by L.T.'s teacher. Plaintiffs do not, and cannot, allege that L.T.'s teacher retaliated against him as a result of Mr. Ballaban reaching out to her.

Additionally, Mr. Ballaban never promised that the 10 September 2021 meeting would "solely" be about what Plaintiffs wanted to discuss. (Doc. Ex. 71 ("I have had a chance to review your email and look into the matter in depth. Chuck Baldecchi and I would like to meet with you and Nicole in person about it.")). Mr. Turpin's objection regarding L.T.'s teacher was addressed at the meeting. (R pp 22-23). Thus, the Court of Appeals properly concluded that the Complaint reveals that Mr. Ballaban's statements were not misrepresentations.

Plaintiffs' Complaint also is fatally defective with respect to actual and reasonable reliance. Plaintiffs allege that Mr. Baldecchi and Mr. Ballaban "lured"

Mr. Turpin into the meeting about which he complains, yet he was the one that actually requested the meeting. (*See* Doc. Ex. 71-73). Plaintiffs allege that Mr. Baldecchi and Mr. Ballaban intended to use the 10 September 2021 meeting to provoke Mr. Turpin into misconduct that would serve as grounds to terminate the Enrollment Agreements. (R p 35). Plaintiffs, however, allege that Defendants' "plot" failed — Mr. Turpin allegedly "communicated with respect, courtesy, and dignity throughout the meeting." (R p 36). Plaintiffs failed to investigate other topics that might be discussed at the 10 September 2021 meeting prior to Mr. Turpin attending. (*See* Doc. Ex. 71-72). They also do not allege that they could not have discovered the purposes of the meeting even if they had been reasonably diligent. (*See id.*).

Finally, Plaintiffs do not allege a cognizable injury. Plaintiffs' misrepresentation claims all rely upon a faulty assumption — that Mr. Turpin's attendance at the 10 September 2021 meeting was necessary for Latin to terminate Plaintiffs' Enrollment Agreements. However, the PSP did not require an in-person meeting, or any of the procedures that Mr. Turpin alleges he would have invoked had he not attended the meeting. (See Doc. Ex. 16, 21; R pp 38-39).

In sum, the Court of Appeals did not misapply the standard of review. Plaintiffs' fraud and negligent misrepresentation claims are fatally defective and properly dismissed.

B. Plaintiffs' Complaint Fails to Allege Aggravated Breach of Contract as Required to Plead Unfair or Deceptive Trade Practices.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the

action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Id.* "[A]n intentional breach of contract, standing alone, simply does not suffice to support the assertion of an unfair and deceptive trade practices claim." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 427, 838 S.E.2d 334, 348 (2020).

The three-judge panel in the Court of Appeals concluded that terminating Plaintiffs' Enrollment Agreements was not unfair or deceptive.[3] Refocus Latin was told that there would be no retaliation for preparing or presenting the Refocus Latin PowerPoint. (*See* R pp 17-18). The Board heard Refocus Latin out, decided it would not engage in further discuss with the group on the issues raised, and told the Refocus Latin presenters to address any future concerns to Latin's administration. (*Id.*).

Mr. Turpin did not accept the Board's decision, finding it to be "the worst outcome [he] could have imagined." (Doc. Ex. 50). Just days after the Board meeting, he emailed the Board and Administration and demanded that they individually address in writing a host of issues already raised by Refocus Latin, including (1) a video regarding Latin's history acknowledging that Latin benefitted from white flight in the 1970s, (2) the presence of "politics in the school," and (3) Latin's DEI policies, which Mr. Turpin argued "lower[ed] criteria for one group to give them an advantage

[3] As part of its analysis, the Court of Appeals correctly concluded that, to the extent Plaintiffs' UDTPA claim mirrored Plaintiffs' fraud claim, it was properly dismissed for the same reasons. *See, e.g.*, *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 89–90, 747 S.E.2d 220, 226–27 (2013).

over other groups." (Doc. Ex. 41-45, 50-52). Mr. Turpin specifically singled out L.T.'s sixth grade humanities class as a class where "political" subject matter was being taught. (Doc. Ex. 51).

Just days later, Mr. Turpin reiterated to Mr. Ballaban his complaint that his son was being taught "political" subject matter in his sixth-grade humanities class and demanded that his son be reassigned to a new teacher. (Doc. Ex. 72-73). Mr. Turpin also made clear on both occasions that Latin's policies were "not what we signed up for." (Doc. Ex. 52, 73). Mr. Ballaban investigated the matter with L.T.'s teacher, who denied Mr. Turpin's assertions. (R pp 22-23). Mr. Ballaban said that he believed the teacher, and Mr. Baldecchi terminated Plaintiffs' Enrollment Agreements. (R pp 22-23).

Plaintiffs argue that the Court of Appeals made a mistake — Mr. Turpin did not rehash the same issues multiple times because the Refocus Latin PowerPoint was about "high-level questions and concerns" while Mr. Turpin's concerns that led him to request a meeting with Mr. Ballaban on 7 September 2021 were "more concrete." (Pet. pp. 20-22).

Plaintiffs' Petition ignores Mr. Turpin's 29 August 2021 email, which explicitly links the "high-level questions and concerns" in the Refocus Latin PowerPoint to the "more concrete" complaints Mr. Turpin had about L.T.'s sixth grade humanities class. (Doc. Ex. 45, 51, 72-73). Mr. Turpin repeated the same grievance over and over again — that Latin had adopted a "political agenda," and one of the ways that "political agenda" was being advanced was teaching children (including his children)

inappropriate, "political" subject matter. (*See, e.g.*, Doc. Ex. 31-32, 36-37, 44-45, 50-52, 72-73). Faced with a parent irreconcilably opposed to its policies and curriculum, Latin terminated Plaintiffs' Enrollment Agreements.

In sum, the Court of Appeals did not misapply the standard of review by looking at the allegations in the Complaint including the documents incorporated therein and concluding that Plaintiffs failed to plead substantial aggravating factors necessary to make Latin's termination of Plaintiffs' Enrollment Agreements unfair or deceptive.

C. The Refocus Latin PowerPoint Necessarily Defeats Plaintiffs' Defamation Claim.

With respect to their defamation claims, Plaintiffs argue that the Court of Appeals "ignored most of Refocus Latin's message," citing other parts of the Refocus Latin PowerPoint that they suggest the Court of Appeals should have considered. (Pet. pp. 22–24). However, Plaintiffs concede that the Refocus Latin PowerPoint "offered a cautionary message" about Latin "promot[ing] diversity at merit's expense." (Pet. p. 23).

Plaintiffs focus on other messages Refocus Latin sought to convey in the PowerPoint is misplaced. Plaintiffs' alleged defamatory statements implicate only one issue: is it substantially true that the Refocus Latin PowerPoint asserted "that diverse students and faculty have not earned their positions and honors at Latin and that diversity comes at the expense of excellence"? (*See* R pp 23–24, 56); *see Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 68–69, 846 S.E.2d 647, 677 (2020) (explaining a statement is not materially false, and therefore not defamatory, if it is

substantially true). Under headings such as "Meritocracy" and "Standards," the Refocus Latin PowerPoint stated:

- "DEI goals superseding optimizing evaluations for admitting most qualified students and hiring most qualified faculty." (Doc. Ex. 44).

- "What you've told or shown us . . . Admissions is weighting diversity over academic excellence, particularly in [Upper School]." (Doc. Ex. 37);

- "The weighting of DEI and Critical Theory on a 'culturally responsive education' eventually erodes the quality of student, quality of curriculum, quality of teacher and the academic rigor at the school." (Doc. Ex. 37).

Defendants' statements rejected a premise that Refocus Latin explicitly asserted in its PowerPoint — that Latin was compromising with respect to the academic excellence of its faculty and students by promoting DEI. The Court of Appeals read the alleged defamatory statements and the Refocus Latin PowerPoint, which the Complaint incorporated by reference, and held Defendants' statements were not defamatory because Defendants did not misstate the content in the PowerPoint that they were responding to. In short, the Court of Appeals correctly applied the Rule 12(b)(6) standard of review. This Court should deny Plaintiffs' Petition for the same reason.

D. Plaintiffs' Assertions of "Animus" are Unwarranted.

Plaintiffs speculate that the Court of Appeals may have engaged in "motivated reasoning to reach a certain outcome" because the three-judge panel displayed "animus" towards Plaintiffs. (Pet. pp. 24–25). Plaintiffs' argument is baseless and

does not justify discretionary review of Plaintiffs' extracontractual tort claims by this Court.

Plaintiffs' Petition echoes arguments they raised in a petition for rehearing en banc to the Court of Appeals — that the Court should not have used "the Turpins' after-the-fact characterization of events [in the Complaint] against them." (Pet. p. 25). Plaintiffs' assertion that the Court cannot consider the allegations in the Complaint on a Rule 12(b)(6) motion is questionable at best. Nonetheless, the Court of Appeals panel withdrew its January 2024 opinion and revisited the case. The panel removed the analysis about which Plaintiffs complain and issued a new opinion in April 2024. (Pet. Add. 93–103). The fact that the Court of Appeals panel gave Plaintiffs a rare second bite at the apple where it was under no obligation to do so further undercuts Plaintiffs' assertion of bias.

Additionally, the language Plaintiffs point to in the withdrawn January 2024 opinion pertains to Plaintiffs' breach of contract claim. (Pet. Add. 58, 60). With respect to that claim, the outcome in the Court of Appeals did change. The April 2024 opinion dismissed Plaintiffs' contract claim, with all three judges writing opinions on the breach of contract claim. As Plaintiffs note, one of those opinions was a dissent, affording Plaintiffs review of their dismissed breach of contract claim in this Court.

What did not change was the Court of Appeals' reasoning regarding Plaintiffs' extracontractual tort claims. In the Court of Appeals' April 2024 opinion, all three judges agreed that, applying North Carolina law to the facts alleged, Plaintiffs failed to state extracontractual claims. (Pet. Add. pp. 18–35; *see id.* pp. 40–45 (dissenting

only as Plaintiffs' breach of contract claim)). That analysis issued twice from the Court of Appeals without substantial alteration. (*Id.* pp. 105–24 (showing in redline no substantive changes to the court's analysis of the tort claims)).

In sum, three judges on the North Carolina Court of Appeals panel agreed twice that Plaintiffs' extracontractual tort claims were properly dismissed, without any material change to the Court's reasoning. Plaintiffs' suggestion that the Court of Appeals acted with "animus" based upon a selective, misleading interpretation of a withdrawn opinion is an affront to the integrity of the North Carolina judiciary, disincentivizes judges from reconsidering their opinions, and should be rejected as a basis for discretionary review.

III. The Legal Principles at Issue Here Are Well-Settled.

Plaintiffs argue that review is necessary to "clarify" the law regarding negligent infliction of emotional distress ("NIED") and negligent misrepresentation. But the law regarding NIED and negligent misrepresentation claims is clear — Plaintiffs' claims are barred. The Court should not entertain Plaintiffs' requests to upend settled precedent and drastically expand common law torts.

A. Plaintiffs Attempt to Muddy the Waters Separating NIED from IIED, and in Any Event Plaintiffs Failed to Allege Foreseeability Under Established Law.

The elements of a NIED claim are well-settled. Plaintiff must allege "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress ..., and (3) the conduct did in fact cause the plaintiff severe emotional distress." *McAllister v. Ha*, 347 N.C. 638,

645, 496 S.E.2d 577, 582-83 (1998) (emphasis added). With respect to this first element, North Carolina courts uniformly hold that "[a]llegations of intentional conduct . . . even when construed liberally on a motion to dismiss, cannot satisfy the negligence element of an NIED claim." *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 228 N.C. App. 142, 149, 746 S.E.2d 13, 19 (2013); *see also Radcliffe v. Avenel Homeowners Ass'n, Inc.*, 248 N.C. App. 541, 573, 789 S.E.2d 893, 914 (2016); *Glenn v. Johnson*, 247 N.C. App. 660, 666–67, 787 S.E.2d 65, 71 (2016).[4] The Court simply applied this rule to Plaintiffs' Complaint, which alleges that Latin's head of school intentionally terminated Plaintiffs' Enrollment Agreements, and that termination is the alleged basis for Mrs. Turpin's emotional distress. (*See* R p 47).

Without citing a single North Carolina case regarding NIED,[5] Plaintiffs argue this Court should consider throwing out this well-established line of NIED cases and redefine the elements of NIED to cover the unintended effects of intentional conduct. (Pet. pp. 26–27). However, there are two torts in this state for infliction of emotional distress: one for negligent conduct (NIED) and one for intentional conduct (IIED). *McAllister*, 347 N.C. at 645, 496 S.E.2d at 582-83; *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981) (allowing IIED claims for "(1) extreme and outrageous

[4] North Carolina's federal courts also regularly apply this rule. *See, e.g.*, *McClean v. Duke Univ.*, 376 F. Supp. 3d 585, 616 (M.D.N.C. 2019); *Yarbrough v. E. Wake First Charter Sch.*, 108 F. Supp. 3d 331, 341 (E.D.N.C. 2015); *Bratcher v. Pharm. Prod. Dev., Inc.*, 545 F. Supp. 2d 533, 545 (E.D.N.C. 2008); *Sheaffer v. Cnty. of Chatham*, 337 F. Supp. 2d 709, 734 (M.D.N.C. 2004); *Thomas v. N. Telecom, Inc.*, 157 F. Supp. 2d 627, 637 (M.D.N.C. 2000).

[5] Plaintiffs rely upon inapposite cases regarding social host liability and not claims for emotional distress.

conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another"). Claims seeking recovery for the "unintended effects" of intentional conduct are IIED claims. *Dickens*, 302 N.C. at 452, 276 S.E.2d at 335 (explaining that IIED claims include situations where a "defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress"). North Carolina courts police the boundary between these torts to prevent exactly what Plaintiffs admit they are doing here — attempting to avail themselves of NIED where they cannot plead extreme and outrageous conduct necessary to sustain an IIED claim. (Pet. p. 27).

Additionally, Plaintiffs suggest that the consequences of Mr. Baldecchi's conduct were "foreseeable." (Pet. p. 27). Though the Court of Appeals did not reach the issue, Plaintiffs likewise ignore well-established law regarding this element of a NIED claim. The parent-child relationship, standing alone, is not sufficient to allege the foreseeability of severe emotional distress. *Hickman By & Through Womble v. McKoin*, 337 N.C. 460, 464, 446 S.E.2d 80, 83 (1994); *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 673–74, 435 S.E.2d 320, 323 (1993); *Gardner v. Gardner*, 334 N.C. 662, 663–64, 667–68, 435 S.E.2d 324, 326, 328 (1993). That is all that Plaintiffs plead — that Mrs. Turpin has a close relationship to her children. (R pp 48–49). That allegation, taken as true, is insufficient as a matter of law to allege the foreseeability of severe emotional distress allegedly arising from termination of the Enrollment Agreements.

In sum, the Court need not, and should not, revisit its established jurisprudence regarding NIED claims. Doing so would unsettle, not clarify, claims for emotional distress.

B. Plaintiffs Seek to Dramatically Expand the Duty Underlying Negligent Misrepresentation Claims.

Under established North Carolina law, "[t]he tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988). The duty of care in a negligent misrepresentation case applies to "[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions." *Marcus Bros. Textiles v. Price Waterhouse, LLP*, 350 N.C. 214, 218, 513 S.E.2d 320, 323–24 (1999); *Raritan River Steel*, 322 N.C. at 209–10, 367 S.E.2d at 614. North Carolina courts routinely reject attempts to expand this duty beyond situations where a defendant "has a pecuniary interest" in inducing Plaintiffs to undertake a "business transaction." *Jordan v. Earthgrains Cos., Inc.*, 155 N.C. App. 762, 767-68, 576 S.E.2d 336, 340 (2003); *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 534–35, 537 S.E.2d 237, 241 (2000); *see also Rountree v. Chowan Cnty.*, 252 N.C. App. 155, 160–

62, 796 S.E.2d 827, 831–33 (2017); *Kindred of N. Carolina, Inc. v. Bond*, 160 N.C. App. 90, 101, 584 S.E.2d 846, 853 (2003).

Plaintiffs argue that the Court of Appeals' decision is "at odds" with *Herrera v. Charlotte Sch. of L.*, LLC, No. 17 CVS 1965, 2018 WL 1902556 (N.C. Super. Apr. 20, 2018), which they cite for the sweeping proposition that the duty of care attaches to any statement made by a private school's administrators to parents or students. (Pet. pp. 28–29). Plaintiffs' reliance on *Herrera* is misplaced. First, the North Carolina Business Court's decisions "have no precedential value in North Carolina." *Bottom v. Bailey*, 238 N.C. App. 202, 212, 767 S.E.2d 883, 889 (2014). Second, *Herrera* stands for a limited proposition — private schools have a pecuniary interest in misrepresentations that induce students to make enrollment payments, and therefore a duty of care attaches to those statements. *See Herrera*, 2018 WL 1902556, ¶¶ 112, 115.

Here, the Court of Appeals applied *Simms* and *Rountree* to the facts alleged in the Complaint and found the duty of care does not attach to Mr. Ballaban's statements because there is no pecuniary interest or business transaction at issue. Mr. Ballaban responded to Mr. Turpin's criticisms of L.T.'s teacher and scheduled a meeting that Mr. Turpin originally requested. Mr. Turpin attended the 7 September 2021 meeting with Mr. Ballaban and Mr. Baldecchi. Plaintiffs cannot, and do not, allege Mr. Ballaban's comments or Mr. Turpin's decision to attend the 7 September

2021 meeting are a business transaction or that Mr. Ballaban had any pecuniary interest in the same.

Accordingly, no duty of care arises under the facts alleged by Plaintiffs. To hold otherwise would upend decades of precedent and dramatically expand the tort of negligent misrepresentation without any limiting principle. For these additional reasons,[6] Plaintiffs do not articulate a significant legal interest in reviewing their negligent misrepresentation claim.

CONCLUSION

This case is a garden variety contract dispute over whether Latin validly terminated Plaintiffs' Enrollment Agreements. That issue will be briefed for the Court at a later date. Reviewing Plaintiffs' extracontractual claims would threaten the educational autonomy that allows our state's independent and religious schools to set their own policies and thrive. Review would also incentivize parents to bring meritless tort actions whenever our State's independent or religious schools act contrary to their wishes. Moreover, Plaintiffs repeatedly overlook settled North Carolina law and the facts they pleaded. Defendants respectfully request that the Court deny Plaintiffs' Petition for Discretionary Review as to Additional Issues.

This the 20th day of May, 2024.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, LLP

By: Electronically Submitted
Jennifer K. Van Zant
N.C. State Bar No. 21280

[6] As discussed above, Plaintiffs also fail to plead a misrepresentation or reliance.

Post Office Box 26000
Greensboro, North Carolina 27420
Telephone: (336) 373-8850
Email: jvanzant@brookspierce.com

N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, LLP

By: Electronically Submitted
Jim W. Phillips, Jr.
N.C. State Bar No. 12516
Post Office Box 26000
Greensboro, North Carolina 27420
Telephone: (336) 373-8850
Email: jphillips@brookspierce.com

By: Electronically Submitted
William A. Robertson
N.C. State Bar No. 53589
Post Office Box 26000
Greensboro, North Carolina 27420
Telephone: (336) 373-8850
Email: wrobertson@brookspierce.com

Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

The undersigned attorney for Defendant-Appellants hereby certifies that on this day the foregoing Response to Plaintiffs' Petition for Discretionary Review as to Additional Issues was served by electronic email, addressed to the following:

Alexander C. Dale
N.C. State Bar No. 28191
acd@wardandsmith.com
Christopher S. Edwards
N.C. State Bar No. 48385
csedwards@wardandsmith.com
Alexandra E. Ferri
N.C. State Bar No. 59690
aeferri@wardandsmith.com
Jonathan A. Vogel
N.C. State Bar No. 34266
jonathan.vogel@vogelpllc.com
John J. Dowling
N.C. State Bar No. 57517
john@dowlingdefensegroup.com

Attorneys for Plaintiffs-Appellants

Melinda R. Beres
N.C. State Bar No. 33562
melindaberes918@gmail.com

Attorney for Amicus Curiae Concerned Private School Parents of Charlotte

James R. Lawrence, III
N.C. State Bar No. 44560
jlawrence@envisage.law

Attorney for Amicus Curiae Moms for Liberty Mecklenburg, Union, Iredell, Chatham, Forsyth, Guilford, Gaston, and Buncombe Counties, Moms for America, Color Us United, New Tolerance Campaign, Education Veritas, Parents Unite, and Future Prep Educational Services LLC

Troy D. Shelton
N.C. State Bar No. 48070
tshelton@dowlingfirm.com

Attorney for Amicus Curiae Tim Moore, Paul Newton, Brad Overcash, Amy Galey, Destin Hall, David Willis, Donnie Loftis, George Cleveland, Keith Kidwell, Frank Sossamon, Jeff Zenger, Bill Ward, Patt Harrigan, Hal Weatherman, and Future Prep Educational Services

Christopher G. Smith
N.C. State Bar No. 22767
csmith@smithlaw.com

Attorneys for Amicus Curiae North Carolina Association of Independent Schools

This the 20th day of May, 2024.

Electronically Submitted
Jennifer K. Van Zant
N.C. State Bar No. 21280
Post Office Box 26000
Greensboro, North Carolina 27420
Telephone: (336) 373-8850
Email: jvanzant@brookspierce.com