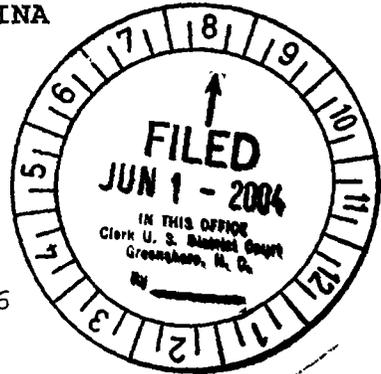


27.

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

FRIEDA FOSTER, TAMI BORLAND, and )  
 KATHY BOWEN, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 THE NATIONAL CHRISTIAN COUNSELORS )  
 ASSOCIATION, INC., a.k.a. )  
 ("N.C.C.A."), )  
 )  
 Defendant. )

1:03CV00296



ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Facts

Defendant is a nonprofit corporation in the business of developing, printing, and selling educational courses on Christian counseling. It makes these courses available to certain schools and qualified organizations. If a student or qualified individual completes a course of study based on these materials and meets other requirements, he or she can apply for membership with defendant and receive a counseling certificate/license. This "license" is not issued pursuant to any government authority and is perhaps better described as a certificate showing completion of a certain course of training. Holders of the license are supposed to adhere to defendant's Code of Ethics and can be subject to discipline by defendant if they are found to have violated the Code.

In 1992, Michael Rivest applied for and received his license and membership with defendant. He was then, and at all times

relevant to this case continued to be, the leader or priest at St. Michael's Chapel in Winston-Salem, North Carolina. Plaintiffs and a few other people were members at St. Michael's. Also, plaintiffs and Rivest were the sole members of a religious order known as the "Cistercian Oblates."

Plaintiffs allege that their relationship with Rivest extended beyond that of parishioners or members of his religious order. Two of the plaintiffs, Frieda Foster and Kathy Bowen, also paid to receive Christian counseling services from Rivest. Plaintiff Tami Borland attended counseling sessions with Rivest's wife, but not with Rivest himself. All three plaintiffs allege that Rivest used his position as their counselor and pastor to manipulate them into parting with sizeable portions of their money, either for counseling fees or donations to his ministry. Also, Bowen and Borland allege that Rivest pressured them into having sexual relationships with him.

Plaintiffs state that, as a result of Rivest's actions toward them, they suffered financial and/or emotional damage. They contend that defendant is responsible for Rivest's actions because it failed to properly train, supervise, and control him to prevent the conduct which injured them. Based on these contentions, plaintiffs have raised claims for negligent infliction of severe emotional distress, negligent misrepresentation, unfair and deceptive trade practices, and negligent supervision and retention.

Defendant now moves for summary judgment as to all of these claims.<sup>1</sup>

### Legal Standards

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and inferences which can reasonably be drawn from the evidence in a light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). When opposing a properly supported motion for summary judgment, the party cannot rest on conclusory statements, but must provide specific facts, particularly when that party has the burden of proof on an issue. Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4<sup>th</sup> Cir. 1990). "The summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof of his claim at trial." Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) (emphasis added).

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<sup>1</sup>Defendant has also filed a motion to strike certain pieces of evidence presented by plaintiffs in support of their case. While it appears on its face that the motion may have some merit, the Court finds that it does not need to decide the motion because the outcome of the case is the same whether or not the challenged evidence is considered. For this reason, the Court will simply deny the motion for being moot.

A mere scintilla of evidence will not suffice. Rather, there must be enough evidence for a jury to render a verdict in favor of the party making a claim. A few isolated facts are not sufficient. Sibley v. Lutheran Hosp. of Maryland, Inc., 871 F.2d 479 (4<sup>th</sup> Cir. 1989).

Because all of plaintiffs' claims arise under state law, special rules apply. The Court must first rely on the law as it has been delineated by the North Carolina Supreme Court. Private Mortgage Investment Services, Inc. v. Hotel and Club Associates, Inc., 296 F.3d 308, 312 (4th Cir. 2002). When state law is unclear, the federal court must rule in such a manner as it appears the highest state court would rule if presented with the issue. Where the state's highest court has not decided the particular issue, the federal court should examine the rulings of the lower state courts. Rulings of the lower courts may be considered as persuasive evidence of state law, but they are not binding on the federal court should it be convinced the highest court would rule to the contrary. Sanderson v. Rice, 777 F.2d 902, 903 (4th Cir. 1985), cert. denied, 475 U.S. 1027, 106 S.Ct. 1226, 89 L.Ed.2d 336 (1986). Furthermore, the federal court must rule on state law as it exists, as opposed to surmising or suggesting an expansion of state law. Burris Chemical, Inc. v. USX Corp., 10 F.3d 243 (4th Cir. 1993).

## Discussion

### **Duty**

Three of plaintiffs' claims, negligent infliction of emotional distress, negligent misrepresentation, and negligent supervision or retention, are based on defendant's alleged negligent behavior. In order to establish a claim based on negligence, one of the elements that plaintiffs must show is that defendant owed them a duty of care. Without this, there is no liability. Williams v. Smith, 149 N.C. App. 855, 858, 561 S.E.2d 921, 923 (2002). Whether a duty exists is a matter of law. Davidson v. Univ. of North Carolina at Chapel Hill, 142 N.C. App. 544, 552, 543 S.E.2d 920, 925 (2001). Defendant's first argument in favor of summary judgment is that it owed no duty to plaintiffs.

It is a basic principle of tort law, as well as the law in North Carolina, that there generally is no duty to protect others from third persons. King v. Durham County Mental Health Developmental Disabilities and Substance Abuse Authority, 113 N.C. App. 341, 439 S.E.2d 771, rev. denied, 336 N.C. 316, 445 S.E.2d 396 (1994), citing W. Page Keeton, et al., Prosser and Keeton on the Law of Torts, § 56 at 385 (5<sup>th</sup> Ed. 1984). However, exceptions exist where a defendant and the third person have a special relationship giving rise to a duty to control the third person or where the defendant and the injured party have a special relationship so that the defendant has a duty to protect the injured party from third

persons. Id.; Restatement (Second) of Torts § 315 (1965). Examples of such relationships which have been recognized in North Carolina case law include: "(1) parent-child, (2) master-servant, (3) landowner-licensee, (4) custodian-prisoner, and (5) institution-involuntarily committed mental patient." Id. at 346, 439 S.E.2d at 774 (citations omitted). An analysis of whether such a relationship exists turns largely on the defendant's right of control and the defendant's knowledge of the tortfeasor's propensity for violence.<sup>2</sup> Id., citing Abernathy v. United States, 773 F.2d 184, 189 (8<sup>th</sup> Cir. 1985).

Plaintiffs claim that defendant had a duty to protect them from Rivest because (1) it produced and sold to Rivest a temperament profile or "TAP" test which Rivest used in their counseling, (2) gave guidance on how to use the TAP test after "receiving and analyzing" the tests, (3) "authorized Rivest as its agent for purposes of selling its curriculum, (4) oversaw Rivest through a Code of Ethics, and (5) had authority to discipline Rivest for violations of the Code of Ethics. (Pls.' Brf. at 6) Unfortunately for their case, these contentions lack both factual

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<sup>2</sup>Perhaps because of the facts involved, cases dealing with special relationships often use terms like "propensity for violence" or "dangerousness" to describe the tortfeasors involved. The parties in the present case appear to have assumed that it is at least possible for the principle to extend beyond violence or dangerousness and cover a propensity for any sort of tortious behavior, but have not cited any North Carolina case allowing this. Federal courts should be cautious in providing interpretations of state law which expand rights. American Chiropractic Ass'n v. Trigon Health Care, Inc., \_\_\_ F.3d \_\_\_, 2004 WL 964227, at \*12 (4<sup>th</sup> Cir. May 6, 2004).

support and a viable rationale for finding that they create the type of special relationship necessary to impose on defendant a duty to protect plaintiffs.

As an initial matter, none of the allegations raised by plaintiffs suggests a relationship between defendant and Rivest which even approaches the type of special relationships where a duty to protect a third party typically arises. The type of relationships set out by plaintiffs do not involve the extensive day-to-day control or detailed knowledge present in parent-child, custodian-prisoner, or even master-servant relationships. Plaintiffs have cited no case law suggesting that selling a test to a person, allowing the person to sell materials, or issuing memberships and certifications to persons, without some type of further connection, can lead to the type of duty they rely on raise their claims.

A more detailed examination of plaintiffs' contentions only reinforces this point. Regarding the first two alleged duties, defendant did produce TAP tests and the software necessary to analyze and interpret them. However, plaintiffs have not produced evidence that defendant sold the tests or software to Rivest or that, as they claim, defendant interpreted the tests and advised Rivest on how to counsel plaintiffs. Instead, what the evidence actually suggests is that Rivest bought the tests from the Sarasota Academy of Christian Counselors (S.A.C.C.), an organization

separate from defendant, and that he analyzed them himself using software that he also purchased from S.A.C.C. (Moylan Aff. ¶ 2 and Defendant's Ex. 11) In any event, defendant's records do not show that he purchased the tests directly from it or that he had it interpret the tests. (Arno. Aff. ¶ 5) Moreover, the tests consist of nothing more than generalized personality or "temperament" profiles with general suggestions about approaches to take and questions to raise in counseling persons with plaintiffs' particular temperaments. They did not identify problems or issues particular to the plaintiffs or advise a specific course of counseling tailored to the individual plaintiffs. In no way can it be said that defendant actively participated in Rivest's counseling of plaintiffs so that it had any knowledge or control of the situation. Without knowledge and control, no duty generally arises.

In addition to defendant not having a duty to the plaintiffs merely because it produced and sold the TAP tests and interpretation software, any duty that did arise would necessarily be connected to the tests, i.e. a duty to produce an accurate test or software to correctly analyze the answers.<sup>3</sup> Plaintiffs have not

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<sup>3</sup>The lack of connection between defendant's sale of the tests and software and the plaintiffs' alleged injuries is demonstrated by one of the cases it cites. In the case of Quail Hollow East Condominium Association v. Donald J. Scholz Company, 47 N.C. App. 518, 268 S.E.2d 12, rev. denied, 301 N.C. 527, 273 S.E.2d 454 (1980), the North Carolina Court of Appeals found that it was appropriate to hold an architect liable to a homeowners association when a piping system deteriorated, even though there was no privity of contract between the

(continued...)

shown that they suffered harm because of the test results. Nor have they shown that the use of the tests, as opposed to Rivest's independent and unauthorized actions, caused the harms they allegedly suffered.<sup>4</sup> For these additional reasons their arguments based on the TAP tests fail. And, plaintiff Borland does not even show that she was counseled or had the TAP test administered to her by Rivest. Thus, she has no basis for a claim against defendant.

Plaintiffs' allegation that Rivest was an authorized agent of defendant for purposes of selling its curriculum cannot satisfy the duty element of plaintiffs' negligence claims. Initially, it appears that plaintiffs greatly overstate the connection between Rivest and defendant. While it is true that he sometimes bought and sold defendant's curriculum, he was not paid a salary or considered an employee by defendant. (Arno Aff. ¶ 4) Nor was his

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<sup>3</sup>(...continued)

parties. The court found that liability was appropriate because the architect knew that the building was being constructed for the association's benefit and because the architect hired and supervised the subcontractor that installed the system. In the present action, however, defendant only created the tests and sold them to S.A.C.C., which sold them to Rivest. Defendant did not supervise his use of them and did not know that they were used to test and counsel plaintiffs. Also, no harm has been shown related to the tests themselves. To hold defendant liable based on the sales of the tests would be akin to holding liable an architect who published a plan and sold it to another party who then sold it to a contractor who then independently constructed a building using the plan, but employing bad techniques. This would be an extreme and unwarranted expansion of the concept of liability under North Carolina law.

<sup>4</sup>Plaintiffs do state that the tests recommended that some of them be placed in a position so that they could see Rivest's degrees and certificates to build confidence and trust in him. They claim that this trust is what later allowed Rivest to abuse them. However, there is no evidence that Rivest followed the advice of the test on this point. His testimony is that his office was naturally set up so that all clients could see his many degrees and certificates. (Rivest Dep. at 192)

relationship unique or exclusive. Richard Arno, defendant's president, testified at his deposition that any of defendant's members who had taken additional courses allowing them to supervise students could buy its curriculum, at least if they operated an organization or institution. (Arno. Dep. at 65-69, 106) Once the members bought the materials, defendant did not control what they did with them. (Id. at 102) These facts are inconsistent with the existence of an agency relationship between defendant and Rivest. See Sharpe v. Bradley Lumber Co., 446 F.2d 152, 153 (4<sup>th</sup> Cir. 1971), cert. denied, 405 U.S. 919, 92 S.Ct. 946, 30 L.Ed.2d 789 (1972) (agency turns on the right to control manner and methods of work as well as the results), citing, McCraw v. Calvine Mills, Inc., 233 N.C. 524, 64 S.E.2d 658, 660 (1951).

More importantly, even if Rivest were considered defendant's agent for the purpose of selling its curriculum, this would not give rise to liability on defendant's part because the harms allegedly inflicted on plaintiffs were inflicted in the course of his counseling and pastoring them, not in the course of Rivest's selling them curriculum. Liability for the acts of an agent is limited by the scope of the agency relationship. Phillips v. Restaurant Management of Carolina, L.P., 146 N.C. App. 203, 216, 552 S.E.2d 686, 695 (2001), rev. denied, 355 N.C. 214, 560 S.E.2d 132 (2002). Counselor-client and pastor-parishioner interactions are obviously separate from the selling of textbooks

and course materials. Plaintiffs have produced no evidence of the type of control that would allow a jury to find that Rivest was defendant's agent when acting as a counselor or pastor.

Plaintiffs' arguments which relate to defendant's Code of Ethics and its right to discipline Rivest for a breach of that Code also fail. As defendant correctly points out, regulating an activity is not the same as engaging in it, or even controlling it, under North Carolina law. Daniels ex rel. Webb v. Reel, 133 N.C. App. 1, 9-11, 515 S.E.2d 22, 28-29, rev. denied, 350 N.C. 827, 537 S.E.2d 817 and 350 N.C. 827, 537 S.E.2d 818 (1999).<sup>5</sup> This distinction is an important one in the present case, just as it was in Daniels. There, the plaintiffs were injured/killed in an automobile accident that occurred while they were being transported to a youth baseball game. The plaintiffs played for a team sponsored by a local American Legion outpost. However, they sued not only that outpost, but also the state and national American Legion organizations. Those organizations both issued rule books concerning the operation of the baseball program. However, the North Carolina Court of Appeals stated that setting rules governing

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<sup>5</sup>Regulating activity is not enough to subject a party to liability for the actions of those being regulated. Were the law otherwise, professional organizations and government entities would be endlessly liable for the actions of their members or the persons they seek to regulate. In North Carolina this would mean that bar, medical, and other regulated associations would be liable for all actions taken by its members. And, these organizations have far more control over their members than defendant did over Rivest. This would discourage entities from engaging in regulatory activity, a result that would not be in the public interest.

an activity is not the same as day-to-day control. Id. This is no less true in the case at bar. While defendant did establish a Code of Ethics that it expected Rivest to follow when counseling, this in no way gave defendant the type of direct, day-to-day, operational control over his counseling that is present in the "special relationships" recognized by North Carolina law.

Finally, even if the Court were to find sufficient control to be present, plaintiffs have failed to show that defendant had knowledge of Rivest's misdeeds and his propensity to take advantage of his clients. Plaintiffs do not even claim that defendant knew of their allegations regarding Rivest until after their relationships with him had ended.

In an attempt to salvage their case, plaintiffs point to Arno's knowledge of Rivest's dismissal from a teaching position at Vintage Bible College. They apparently contend that this should have caused defendant to be aware of Rivest's tendency to engage in misconduct and, therefore, to have conducted an investigation. Thus, they also allege that "Arno agreed with Wood that Rivest should be terminated for what he had done, but nevertheless continued to license Rivest . . . ." (Pls.' Brf. at 4) However, this dismissal was for reasons unrelated to the practices that plaintiffs claim harmed them and Arno was not involved in the decision to terminate Rivest.

Curtis Wood, Vintage's president, testified in a deposition that Rivest asked to bring someone that he had counseled in the past to speak in class, but that Rivest instead brought plaintiff Bowen who was still in counseling. (Wood Dep. at 48-51) Wood dismissed Rivest because he felt that Rivest violated their agreement that the person brought in be a past, rather than present, client. Wood also informed Arno of this fact because he wanted to be sure he could still purchase the curriculum. (Id. at 52-54) It was in that context that Arno agreed with Wood's decision and assured Wood that he could still purchase the curriculum. (Id.) Arno recalls that the main reason for Rivest's dismissal was that he taught Catholic doctrine at Vintage, which is a Baptist school. According to Arno, bringing a guest to class was only a small part of what Woods told him concerning the basis for the decision to terminate Rivest from the teaching position. (Arno Dep. at 46-50)

Plaintiffs also state that "Wood informed Richard Arno that Rivest had violated his Code of Ethics." (Pls.' Brf. at 4) They provide no cite or explanation for this assertion and, as already stated, this is not consistent with either Wood's or Arno's testimony which shows that Wood told Arno only that Rivest breached an agreement with Wood and/or taught doctrines that Vintage found unacceptable. Also, in no way did Wood's conversation with Arno

inform defendant of a propensity on the part of Rivest to engage in the behavior alleged by plaintiffs.

Overall, neither Rivest's purchase and use of the TAP tests, his sales of defendant's curriculum, the fact that he was subject to defendant's Code of Ethics, nor the fact that he may have breached it subjected defendant to a duty to prevent Rivest from harming plaintiffs in the ways they allege. Plaintiffs' arguments otherwise all either contradict the facts or the law, lack facts rising to the level necessary to establish a duty, or are simply irrelevant. For these reasons, they cannot establish the duty element of any of their negligence claims based on knowledge and control.<sup>6</sup>

Defendant points out that courts do sometimes find that a special relationship exists where a defendant gains some economic advantage from a plaintiff or where custom, public sentiment, and social policy support such a finding. Davidson, 142 N.C. App. at 554, 543 S.E.2d at 926-927. It is not clear whether plaintiffs are relying on such rationales in the present case, but if so, they fail. Here, defendant gained no revenue from plaintiff or from Rivest's alleged misdeeds. It may have derived some gain through

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<sup>6</sup>Plaintiffs make much of the fact that defendant should have foreseen that a counselor/client relationship could be exploited by the counselor and that this could cause great harm to the client. However, duty, not some generalized foreseeability, is at issue here. Plaintiffs need to show both that defendant had a great deal of control over Rivest's daily counseling operations and that it had knowledge of his propensity to harm plaintiffs in the way that he harmed them. They have shown absolutely nothing along these lines.

Rivest's purchasing and selling its curriculum and his purchase of the TAP tests and software as does any seller of goods. However, none of these acts are a basis for liability, nor are they acts alleged to have harmed plaintiffs, nor do they involve money passing directly from plaintiffs to defendant. Also, for the reasons set out earlier in footnotes 3 and 5, public policy does not support the finding of liability in this case. In the end, no special relationship existed between defendant and plaintiffs, no duty requiring defendant to protect plaintiffs from Rivest existed, and defendant should be granted summary judgment on all of plaintiffs' negligence claims.

#### **Negligent Retention**

As discussed above, all of plaintiffs' negligence claims should be dismissed because they have failed to produce evidence that defendant owed them any duty of protection. However, as to some of the claims, alternative bases for dismissal also exist.

The first claim which should be dismissed for reasons beyond a lack of duty is plaintiffs' negligent retention claim. The elements of such a claim are that (1) a tortious act was committed by an incompetent employee of the defendant and (2) that the defendant knew that the employee was incompetent before the tort was committed. Smith v. First Nat'l Bank, 202 F.3d 234, 249-50 (4<sup>th</sup> Cir. 2000). For reasons already stated, Rivest was not an employee of defendant, particularly where his counseling operation was

concerned. Moreover, defendant had no knowledge of his propensity to engage in the type of sexually and financially exploitive behaviors that plaintiffs allege. Plaintiffs have failed to establish any element of this claim and it should be dismissed.

### **Negligent Misrepresentation**

Alternative reasons also exist for dismissing plaintiffs' negligent misrepresentation claim. "The 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, 367 S.E.2d 609 (1988), citing Howell v. Fisher, 49 N.C. App. 488, 272 S.E.2d 19 (1980), rev. denied, 302 N.C. 218, 277 S.E.2d 69 (1981); Davidson and Jones, Inc. v. County of New Hanover, 41 N.C. App. 661, 255 S.E.2d 580, rev. denied, 298 N.C. 295, 259 S.E.2d 911 (1979). Naturally, the information relied on must also be false. Taylor v. Gore, \_\_\_ N.C. App. \_\_\_, 588 S.E.2d 51, 54 (2003).

In the present case, plaintiffs list two possible misrepresentations by defendant. The first is that defendant issued Rivest a license that "ostensibly indicates" that he was qualified to treat mental illnesses and allowing him to charge fees to treat clients without limitation or supervision. Plaintiffs then claim that Rivest was not competent to perform these tasks,

but that plaintiff Foster believed that he was due to his license from defendant. (Pls.' Brf. at 9)

The only cite given to support any part of this line of argument is to pages 163-166 of Rivest's deposition. However, those pages show only that Rivest, after consultation with two doctors, diagnosed Foster with "major depressive disorder recurrent." (Rivest Dep. at 63) They do not show that Rivest's license stated that he could treat mental illness or that it stated he could bill for his services or work without supervision or limitation. Plaintiffs have also not pointed to evidence showing that these things, even if stated, were untrue. Finally, they have not shown what Foster believed concerning the meaning of the license. There is a complete failure of proof by plaintiffs on this point.

Plaintiffs also claim that defendant made a misrepresentation when it recommended, based on the TAP test results, that Rivest place Foster in a way so that she could see his degrees and recommended that he tell her that she was a valuable person. This argument fails on many levels. Initially, it must be noted that the alleged misrepresentation is actually a recommendation of action to Rivest and not a "representation" to any of the plaintiffs. Second, as previously discussed, the TAP analysis was performed by software Rivest bought from S.A.C.C. The recommendation was not given directly from defendant to Rivest.

Third, plaintiffs have not shown that any part of the recommendation was false or that any statement made on defendant's license to Rivest was false. Fourth, Rivest apparently did not alter his actions to position Foster in any particular way based on the recommendation because he testified that his office was set up so that all clients could see his many degrees and certifications. (Rivest Dep. at 192) Finally, plaintiffs do not cite to evidence that Foster relied on the statements in any way.

Overall, plaintiffs have not provided evidence of any misrepresentations by defendant and have not shown that they relied on any misrepresentations. Therefore, their claim for negligent misrepresentation should be dismissed for these additional reasons.<sup>7</sup>

#### **Unfair and Deceptive Trade Practices**

Because all of plaintiffs' negligence claims should be dismissed, only their unfair and deceptive trade practices claim remains for further discussion. To establish such a claim under North Carolina law, a litigant must show:

(1) that the defendant engaged in conduct that was in or affecting commerce, (2) that the conduct was unfair or "had the capacity or tendency to deceive," and (3) "that the plaintiff suffered actual injury as a proximate result of defendant's deceptive statement or

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<sup>7</sup>Defendant has also raised an argument that plaintiff Borland's negligence claims should be dismissed because they were not brought within the applicable statute of limitation. While this argument appears to have merit, discussion on the matter is not needed because all of plaintiffs' negligence claims should be dismissed for the reasons already set out.

misrepresentation." Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174, 179-80 (1986). Occurrence of the alleged conduct, damages, and proximate cause are fact questions for the jury, but whether the conduct was unfair or deceptive is a legal issue for the court. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342, 346-47 (1975); accord United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375, 389 (1988).

Gilbane Bldg. Co. v. Federal Reserve Bank of Richmond, Charlotte Branch, 80 F.3d 895, 902 (4<sup>th</sup> Cir. 1996); N.C. Gen. Stat. § 75-1.1.

An act is considered unfair or deceptive if it is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." In re Kittrell, 115 B.R. 873, 877 (Bankr. M.D.N.C. 1990).

Plaintiffs' argument concerning the acts that they allege constituted unfair and deceptive trade practices is somewhat unclear. However, they rely on many of the same incorrect or unsupported assertions discussed above, as well as some that were previously unmentioned.

Plaintiff's first assertion is that Rivest was an agent of defendant for the purposes of selling its curriculum. However, once again, even if this is true, this in no way caused any injury to the plaintiffs who were allegedly injured by his counseling abuses, not by defendant's sale of the tests and software. Also, it is not clear how it would be immoral, unscrupulous, etc., for Rivest to be defendant's agent for the purposes of selling its curriculum.

Plaintiffs next make the statement that Rivest was defendant's agent because he "had supervisory authority over other counselors." Once again, it is not clear how this could cause plaintiffs any injury or be considered unfair or deceptive. Also, this claim does not appear to be true. Plaintiffs cite to page 158, lines 1-9 of Rivest's deposition to support their statement. However, Rivest directly states in that passage that "I have the certificate. I am not officially supervising anybody." (Rivest Dep. at 158, lines 8-9) Then, immediately afterward on the page he is asked if he can remember the last time that he did officially supervise anyone through the defendant. He replied that he did not because the question connected supervision responsibilities to defendant when it should have connected them to Isaiah 61, a ministry run by Rivest. (Id., lines 10-23) The clear meaning of his answer is that any supervision he performed was for his own organization and not for defendant. Any assertion to the contrary is flatly inconsistent with the evidence that plaintiffs themselves have presented.

Plaintiffs' next set of statements is aimed at showing that defendant did not adequately train, educate, or evaluate Rivest before giving him a license to counsel. This line of argument has at least marginal relevance to plaintiffs' injury, although their claims largely stem from inappropriate, intentional behavior by Rivest, as opposed to mere incompetent counseling. Assuming for

the sake of argument that their claimed damages could at least be partially linked to Rivest's inadequacies as a counselor, they still cannot prevail because of a lack of evidence.

Plaintiffs make a number of statements in their brief for which no evidence is cited or which involve serious misinterpretations of the evidence in the case. First, they state that the license Rivest held could be obtained "by merely taking a minimum number of courses over a short period of time." (Pls.' Brf. at 13) Yet, they cite no evidence showing the number of courses that must be taken or the time needed to complete them. Significantly, they also fail to offer anything other than their own conclusory opinion that the number of courses or the time needed to complete them is not sufficient for the license given. For instance, they point to no expert testimony on the matter.

Next, plaintiffs claim that Rivest's license will allow a person to "counsel a wide range of mental health issues without any board certification." (Id.) This is again vague, unsupported, and really a mere conclusory opinion with no actual evidence to allow a jury to make a finding on the matter. Plaintiffs fail to show that Rivest's certification/license from defendant allowed him to do counseling otherwise prohibited under North Carolina law. Plaintiffs' charge is also at least partially incorrect based on defendant's licensing materials which were submitted to the Court by plaintiffs. Those materials clearly state that a basic

requirement for all of the licensing programs described in the materials is a written ethics test conducted by a "National Licensing Board of Examiners." This is some type of board certification and plaintiff has submitted no evidence showing that it is so inadequate as to constitute an unfair and deceptive trade practice.

Finally, plaintiffs state that "[a]lthough the NCCA states in its Code of Ethics that it will subject its members to peer review and that complaints will be submitted to a State Ethics Committee, Arno testified that that was more rhetoric than reality." (Pls.' Brf. at 13) Not only do plaintiffs not provide any support for this statement, but the facts actually show otherwise. Defendant's Code of Ethics states that complaints submitted in writing will be submitted to a State Ethics Committee, and Arno testified at length that there are procedures in place for doing so, described those procedures in detail, and stated that he would follow them. (Arno Dep. at 201-214, 245-247) In fact, he testified that he has done so on one occasion in the past and that most complaints resolve themselves through admissions of guilt and forfeitures of licenses prior to a committee being convened. (Id. at 202-203) He also testified that, after being presented with a written complaint from plaintiff Bowen in his deposition, he would convene a committee to investigate the complaint as soon as he returned home to Florida. (Id. at 200-228) He did not, either directly or indirectly,

testify, as plaintiffs claim, that the disciplinary process set out in defendant's Code of Ethics was more rhetoric than reality. This may be the opinion of plaintiffs' counsel, but it was not testified to by Arno, it is not evidence, and is not supported by evidence. Therefore, it cannot be used to prevent the entry of summary judgment.

Plaintiffs also seek to compare the license issued to Rivest by defendant with counseling licenses issued by the State of North Carolina. Citing to N.C. Gen. Stat. § 90-329, et seq., § 90-279, et seq., and 90-380, et seq., they claim that North Carolina has stricter and more extensive procedures for obtaining State licenses and that the uses of those licenses are more restricted. Assuming without deciding that this is correct, plaintiffs have not shown that defendant ever claimed otherwise. It did not contend that its license was issued by the State of North Carolina, that its license was the equivalent of a license from the State, or that its training was equal to that required for a license from the State. There is no evidence that it made any false or misleading representations to plaintiffs regarding the training required for the license Rivest had or that such representations were heard and relied upon by plaintiffs.

Also, if plaintiffs are attempting to show that Rivest engaged in types of counseling that he was not allowed to engage in under North Carolina law, this will not advance their case. Plaintiffs

fail to show that defendant's certificate allowed such activity. The evidence shows that defendant recognizes that states may have separate rules that govern counseling. Arno noted this and testified that defendant instructs its members to comply with applicable state laws when providing counseling. (Arno. Dep. at 248-250) If Rivest's license from defendant were insufficient under state law to allow him to engage in the type of counseling or billing activities that he did, it is simply another case of him failing to follow the rules that defendant requested that he follow. Moreover, defendant cannot be liable because it did not have any direct, day-to-day control over Rivest and did not have knowledge of his activities. For all of these reasons, plaintiffs have failed to show that defendant engaged in any activity that was immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Therefore, their claim for unfair and deceptive trade practices should be dismissed.<sup>8</sup>

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<sup>8</sup>Defendant also raised an argument that plaintiffs' unfair and deceptive trade practices claim should fail because its educational, training, and licensing activities are "learned professions" which fall outside of the scope of activities that are considered in or affecting commerce under the statutes defining unfair and deceptive trade practices in North Carolina. N.C. Gen. Stat. § 75-1.1(b). While it cites a case establishing that medicine and theology are "learned professions," it has not conclusively demonstrated that religious counseling, or more particularly religious counseling education and licensing, is a "learned profession" under North Carolina law. See RCDI Constr., Inc. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607, 617-18 (W.D.N.C. 2001). However, no final ruling on this point is necessary in order to decide the case.

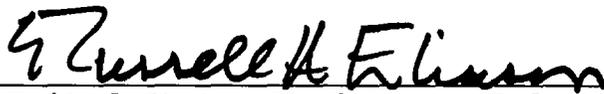
Conclusion

If there is an underlying theme in this case it is that any injuries caused to plaintiffs were caused by the misdeeds of Rivest acting alone and in intentional, but secretive, violation of the guidelines that defendant had set for him. Despite all their attempts, plaintiffs have simply not mustered the evidence necessary to prove that defendant can be held responsible under the law for any of Rivest's alleged misdeeds. Therefore, this action should be dismissed.

**IT IS THEREFORE ORDERED** that defendant's motion to strike (docket no. 19) be, and the same hereby is, denied for being moot.

**IT IS FURTHER ORDERED** that objections to the Recommendation must be filed with the Court and hand-delivered to defendant on or before 2:00 p.m. on June 11, 2004. Any response must be filed on or before June 21, 2004.

**IT IS RECOMMENDED** that defendant's motion for summary judgment (docket no. 13) be granted and that Judgment be entered dismissing this action.

  
United States Magistrate Judge

*June 1st*  
~~1st~~, 2004