

Vernon v. Trs. of Gaston Coll.; Archie v. Trs. of Gaston Coll.; Eppes v. Trs. of Gaston Coll., 2024 NCBC 54.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

GASTON COUNTY

23 CVS 3059

CHASITY VERNON, on behalf of
herself and all others similarly
situated,

Plaintiff,

v.

THE TRUSTEES OF GASTON
COLLEGE,

Defendant.

GASTON COUNTY

23 CVS 3149

LUDENIA ARCHIE, individually and
on behalf of all others similarly
situated,

Plaintiff,

v.

THE TRUSTEES OF GASTON
COLLEGE,

Defendant.

**ORDER AND OPINION ON MOTIONS
TO DISMISS**

GASTON COUNTY

23 CVS 3383

SHAQUASIA EPPES, an individual,
on behalf of herself and all others
similarly situated,

Plaintiff,

v.

THE TRUSTEES OF GASTON
COLLEGE,

Defendant.

1. **THIS MATTER** is before the Court on the filing of Defendant Trustees of Gaston College’s (“Defendant” or “Gaston College”) Motions to Dismiss Amended Complaint (the “Motions”) in three related but unconsolidated actions. The Motions were filed in the following three cases: *Vernon v. Trustees of Gaston College*, (23 CVS 3059; Gaston Cnty.) (the “Vernon Action”), (*Vernon*, ECF No. 29 [“*Vernon Mot.*”]); *Archie v. Trustees of Gaston College*, (23 CVS 3149; Gaston Cnty.) (the “Archie Action”), (*Archie*, ECF No. 18 [“*Archie Mot.*”]); and *Eppes v. Trustees of Gaston College*, (23 CVS 3383; Gaston Cnty.) (the “Eppes Action”; with the Vernon Action and Archie Action, the “Actions”), (*Eppes*, ECF No. 17 [“*Eppes Mot.*”]).¹

2. Pursuant to Rules 12(b)(1), (b)(2), and (b)(6) of the North Carolina Rules of Civil Procedure (the “Rule(s)”), Defendant seeks dismissal of each of the three actions in their entirety. Because the Motions raise the same legal issues and similar legal arguments, the Court considers the Motions together.

3. For the reasons set forth herein, the Court **GRANTS** in part and **DENIES** in part the Motions.

Milberg Coleman Bryson Phillips Grossman, PLLC, by Scott C. Harris and Jacob M. Mores, and Laukaitis Law LLC, by Kevin Laukaitis, for Plaintiff Ludenia Archie.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by David M. Wilkerson, for Plaintiff Shaquasia Eppes.

Siri & Glimstad, LLP by Dana Smith, Tyler Bean, and Mason J. Barney, for Plaintiff Chasity Vernon.

¹ For purposes of this Order and Opinion, documents of record are always cited with the relevant case name, to avoid confusion, as follows: (*Case Name*, [document name] [page or paragraph], ECF No. []). For example, the Court would cite to a filing in the Vernon Action as, (*Vernon*, Compl. ¶ 3, ECF No. 3).

Parker Poe Adams & Bernstein, LLP, by Scott E. Bayzle, Sarah F. Hutchins, Adam Setzer, and Andrew Tabeling, for Defendant Trustees of Gaston College.

Robinson, Judge.

I. INTRODUCTION

4. This action arises out of a reported data breach in 2023 at Gaston College, a North Carolina higher education institution. As a result of the data breach incident, the named plaintiffs' private information was potentially compromised. Following their respective receipt of data breach notice letters from Gaston College, the named plaintiffs each separately initiated a purported class action lawsuit to recover from the college for its alleged failure to safeguard confidential personal information.

5. The Motions presently pending before the Court raise fundamental issues regarding whether the three related cases may proceed in this Court, given concerns about sovereign immunity and whether Defendant waived that immunity.

II. FACTUAL BACKGROUND

6. The Court does not make findings of fact on the Motions. Rather, the Court recites the allegations asserted in the Amended Complaints that are relevant to the Court's determination of the Motions.

A. The Parties

7. Plaintiff Chasity Vernon ("Vernon") is an individual resident of this State. (*Vernon*, First Am. Verified Compl. ¶ 17, ECF No. 22 [*"Vernon, Am. Compl."*].)

8. Plaintiff Ludenia Archie (“Archie”) is an individual resident of Shelby, North Carolina. (*Archie*, First Am. Class Action Compl. ¶ 15, ECF No. 8 [*Archie*, Am. Compl.”].)

9. Plaintiff Shaquasia Eppes (“Eppes”; with Vernon and Archie, “Plaintiffs”) is an individual resident of Dallas, North Carolina. (*Eppes*, First Am. Class Action Compl. ¶ 6, ECF No. 12 [*Eppes*, Am. Compl.”].)

10. Plaintiffs are each former Gaston College students. (*See Vernon*, Am. Compl. ¶ 78; *Archie*, Am. Compl. ¶ 16; *Eppes*, Am. Compl. ¶¶ 6, 47.)

11. Defendant is a higher education institution—a public community college—with its principal place of business at 201 Highway U.S. 321 South in Dallas, North Carolina. (*Vernon*, Am. Compl. ¶¶ 18, 22; *see Archie*, Am. Compl. ¶ 31; *Eppes*, Am. Compl. ¶ 7.)

B. Defendant’s Website and Alleged Purchase of Insurance

12. Plaintiffs each allege that Defendant maintains a website, <http://www.gaston.edu>, which includes a privacy policy. (*Vernon*, Am. Compl. ¶¶ 25–26; *Archie*, Am. Compl. ¶¶ 52–53; *Eppes*, Am. Compl. ¶¶ 16–17.) The privacy policy states that it “governs the manner in which Gaston College collects, uses, maintains and discloses information collected from users” of the website and “applies to the Site and all products and services offered by Gaston College.” (*Vernon*, Am. Compl. ¶ 26; *Archie*, Am. Compl. ¶ 53; *Eppes*, Am. Compl. ¶ 17.)

13. Plaintiffs allege that the privacy policy informs website users of the following:

We may collect personal identification information from Users in a variety of ways, including, but not limited to, when Users visit our Site, or fill out a form, and in connection with other activities, services, features or resources we make available on our Site. Users may be asked for, as appropriate, name, email address, mailing address, phone number, credit card information, and social security number.

(*Vernon*, Am. Compl. ¶ 26; *Archie*, Am. Compl. ¶ 53; *Eppes*, Am. Compl. ¶ 17.) The privacy policy further states that,

[b]y using this Site, you signify your acceptance of this policy. If you do not agree to this policy, please do not use our Site. Your continued use of the Site following the posting of changes to this policy will be deemed your acceptance of those changes.

(*Vernon*, Am. Compl. ¶ 26; *Archie*, Am. Compl. ¶ 53; *Eppes*, Am. Compl. ¶ 17.)

14. Plaintiffs allege that the privacy policy further states, “[w]e [Gaston] adopt appropriate data collection, storage and processing practices, and security measures to protect against unauthorized access, alteration, disclosure or destruction of personal information, username, password, transaction information, and data stored on our Site.” (*Vernon*, Am. Compl. ¶ 27; *Archie*, Am. Compl. ¶ 54; *Eppes*, Am. Compl. ¶ 18.)

15. Plaintiffs each allege that Defendant assumed “legal and equitable duties” by obtaining, collecting, using, and deriving a benefit from Plaintiffs’ private information and that Defendant knew or should have known that it was responsible for protecting that information from unauthorized disclosure. (*Vernon*, Am. Compl. ¶¶ 29, 52; *Archie*, Am. Compl. ¶¶ 56, 71, 79; *Eppes*, Am. Compl. ¶ 21.)

16. Plaintiffs further allege that Defendant purchased a cybersecurity insurance policy. (*Vernon*, Am. Compl. ¶ 31; *Archie*, Am. Compl. ¶ 58; *Eppes*, Am. Compl. ¶ 45.) Based on the Minutes of the Gaston College Board of Trustees Meeting dated 23 January 2023, attached to each of the Amended Complaints, Plaintiffs allege on information and belief that the insurance policy covers the claims brought by them in the Actions. (*Vernon*, Am. Compl. ¶ 31; *Archie*, Am. Compl. ¶ 58; *Eppes*, Am. Compl. ¶ 45.)

C. The Data Breach at Issue

17. Plaintiffs each allege that Gaston College suffered an unauthorized access to its computer systems in February 2023. (*Vernon*, Am. Compl. ¶ 80; *Archie*, Am. Compl. ¶ 60; *Eppes*, Am. Compl. ¶ 11.) Gaston College allegedly became aware of suspicious activity within its computer systems on 22 February 2023 and, after an investigation, determined that an unauthorized party accessed certain sensitive files between 21–22 February 2023 (the “Data Breach”). (*Vernon*, Am. Compl. ¶¶ 5, 33; *Archie*, Am. Compl. ¶¶ 4, 60; *Eppes*, Am. Compl. ¶¶ 3, 11.)

18. Plaintiffs each further allege that on or about 26 August 2023 they received a Notice of Security Incident letter (the “Notice(s)”) from Defendant informing them of the Data Breach. (*Vernon*, Am. Compl. ¶ 79; *Archie*, Am. Compl. ¶ 20; *Eppes*, Am. Compl. ¶ 51, Ex. 1.) The Notices informed Plaintiffs that their private information was compromised during the Data Breach. (*Vernon*, Am. Compl. ¶ 79; *Archie*, Am. Compl. ¶¶ 20, 63; *Eppes*, Am. Compl. ¶¶ 13, 51.)

19. Vernon was informed that her “name, Social Security number, driver’s or state license number, date of birth[,] student record information, and student identification number[,]” was compromised. (*Vernon*, Am. Compl. ¶ 79.) Defendant offered Vernon one year of free credit monitoring services in the Notice. (*Vernon*, Am. Compl. ¶ 81.) As a result of the incident, Vernon alleges that she “anticipates spending considerable time and money on an ongoing basis to try to mitigate and address the many harms caused by the Data Breach.” (*Vernon*, Am. Compl. ¶ 91.)

20. Archie was similarly informed that her “name, Social Security number, student record information, and student identification number,” was compromised in the Data Breach. (*Archie*, Am. Compl. ¶ 20.) Archie alleges that she was also offered one year of free credit monitoring services. (*Archie*, Am. Compl. ¶ 22.) As a result of the Data Breach, Archie alleges that she has spent considerable time verifying the legitimacy and impact of the breach, exploring credit monitoring and identify theft insurance options, self-monitoring her accounts with heightened scrutiny, and seeking legal counsel regarding her options for remedying or mitigating the effects of the Data Breach. (*Archie*, Am. Compl. ¶ 24.) Archie contends that she lost the benefit of the bargain she made with Defendant because she “overpaid for services that were intended to be accompanied by adequate data security but were not.” (*Archie*, Am. Compl. ¶ 27.)

21. Eppes was informed that her personal identifying information “was improperly accessed and obtained by unauthorized third parties.” (*Eppes*, Am. Compl. ¶ 51.) Eppes alleges that she signed up for the one-year credit monitoring

service offered by Defendant in the Notice and obtained a credit report from Equifax. (*Eppes*, Am. Compl. ¶ 52.) Eppes is continuing to analyze other options and alleges that she has spent significant time dealing with the aftermath of the Data Breach. (*Eppes*, Am. Compl. ¶ 52.)

22. Plaintiffs each allege that Defendant breached its obligations owed to them by negligently and recklessly failing to properly maintain and safeguard Plaintiffs' private information stored in Defendant's computer and network systems. (*Vernon*, Am. Compl. ¶¶ 53–54; see *Archie*, Am. Compl. ¶¶ 9, 93–94; *Eppes*, Am. Compl. ¶ 30, 32.)

III. PROCEDURAL BACKGROUND

23. The Court sets forth here only those portions of the procedural history relevant to its determination of the Motions.

24. The *Vernon* Action was initiated on 8 September 2023 on the filing of the Complaint, (*Vernon*, ECF No. 3), and was designated and assigned to the undersigned on 13 October 2023, (*Vernon*, ECF Nos. 1–2). On 12 November 2023, Defendant moved to dismiss the Complaint. (*Vernon*, ECF No. 15.)

25. On 5 December 2023, *Vernon* filed the First Amended Class Action Complaint (“*Vernon* Amended Complaint”) as of right. (See *Vernon*, Am. Compl.) Defendant subsequently filed its Motion to Dismiss the *Vernon* Amended Complaint on 22 December 2023, seeking dismissal of the *Vernon* Action in full. (See *Vernon*, Mot.)

26. The Archie Action was initiated on 15 September 2023 with the filing of the Complaint, (*Archie*, ECF No. 3), and was designated and assigned to the undersigned on 27 October 2023, (*Archie*, ECF Nos. 1–2). On 16 November 2023, Defendant moved to dismiss Archie’s Complaint. (*Archie*, ECF No. 6.)

27. On 7 December 2023, Archie filed her First Amended Complaint (“Archie Amended Complaint”) as of right. (*See Archie*, Am. Compl.) Defendant subsequently filed its Motion to Dismiss the Archie Amended Complaint on 5 January 2024. (*See Archie*, Mot.)

28. The Eppes Action was the last-filed action with the Complaint being filed on 4 October 2023 and one month thereafter was designated and assigned to the undersigned. (*Eppes*, ECF Nos. 1–3.)

29. As in the Vernon Action and the Archie Action, when Defendant moved to dismiss Eppes’s Complaint, (*Eppes*, ECF No. 6), Eppes filed the First Amended Class Action Complaint (“Eppes Amended Complaint”; with the Vernon Amended Complaint and Eppes Amended Complaint, the “Amended Complaints”) as of right on 14 December 2023, (*Eppes*, Am. Compl.). Defendant subsequently filed its Motion to Dismiss the Eppes Amended Complaint on 16 January 2024. (*Eppes*, Mot.)

30. In each of the Actions, Plaintiffs allege claims for: (1) breach of contract;² (2) breach of implied contract;³ and (3) unjust enrichment.⁴ In addition to those three core claims, Archie and Vernon each allege claims for negligence and negligence per se. (*Vernon*, Am. Compl. ¶¶ 158–93; *Archie*, Am. Compl. ¶¶ 95–121, 133–45.) Eppes alleges additional claims for declaratory judgment and violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1 *et seq.* (“UDTPA”). (*See Eppes*, Am. Compl. ¶¶ 104–24.)

31. The Motions were filed in December 2023 and January 2024. Following full briefing on the Motions, the Court held a hearing on the Motions on 17 April 2024 at which all parties in the Actions were represented through counsel. (*Vernon*, ECF No. 38; *Archie*, ECF No. 27; *Eppes*, ECF No. 26.)

32. The Motions are now ripe for resolution.

IV. LEGAL STANDARD

33. Defendant brings the Motions under Rules 12(b)(1), (b)(2), and (b)(6), and, as noted above, seeks dismissal of the Actions based largely on its sovereign immunity defense.

34. “In North Carolina, the appropriate rule for consideration of a motion to dismiss on the grounds of sovereign immunity is somewhat unsettled.” *Johnson Bros.*

² (*See Vernon*, Am. Compl. ¶¶ 122–32; *Archie*, Am. Compl. ¶¶ 146–56; *Eppes*, Am. Compl. ¶¶ 76–86.)

³ (*See Vernon*, Am. Compl. ¶¶ 133–45; *Archie*, Am. Compl. ¶¶ 122–32; *Eppes*, Am. Compl. ¶¶ 87–94.)

⁴ (*See Vernon*, Am. Compl. ¶¶ 146–57; *Archie*, Am. Compl. ¶¶ 157–66; *Eppes*, Am. Compl. ¶¶ 95–103.)

Corp. v. City of Charlotte, 2024 NCBC LEXIS 32, at *10 (N.C. Super. Ct. Feb. 27, 2024) (citations omitted). “Our Court of Appeals, however, recently determined that ‘[issues of sovereign immunity] should be classified as [issues] of personal jurisdiction under Rule 12(b)(2).’” *Id.* at *11 (modifications in original) (quoting *Torres v. City of Raleigh*, 288 N.C. App. 617, 620 (2023)). The Court therefore construes the Motions for dismissal on sovereign immunity grounds as an issue of personal jurisdiction under Rule 12(b)(2) and applies the appropriate standard of review for motions under that Rule.

35. Where, like here,

neither party submits evidence [on personal jurisdiction], the allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged. The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court’s exercise of personal jurisdiction.

Parker v. Town of Erwin, 243 N.C. App. 84, 96 (2015) (cleaned up) (quoting *Banc of Am. Sec., LLC v. Evergreen Int’l Aviation, Inc.*, 169 N.C. App. 690, 693–94 (2005)).

36. To the extent Defendant seeks dismissal on sovereign immunity grounds under Rule 12(b)(6), the standard of review is the same as the analysis the Court conducts under Rule 12(b)(2) when neither party presents evidence of personal jurisdiction. *See Atl. Coast Conf. v. Clemson Univ.*, 2024 NCBC LEXIS 92, at **11 n.45 (N.C. Super. Ct. July 10, 2024); *see also Farmer v. Troy Univ.*, 382 N.C. 366, 369–70 (2022) (reviewing a motion to dismiss on the grounds of sovereign immunity under Rules 12(b)(2) and (b)(6)).

37. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court reviews the allegations in the Amended Complaint in the light most favorable to Plaintiffs. See *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). The Court’s inquiry is “whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted under some legal theory[.]” *Harris v. NCNB Nat’l Bank*, 85 N.C. App. 669, 670 (1987). The Court accepts all well-pleaded factual allegations in the relevant pleading as true. See *Krawiec v. Manly*, 370 N.C. 602, 606 (2018).

38. Our Supreme Court has observed that “[i]t is well-established that dismissal pursuant to Rule 12(b)(6) is proper when ‘(1) the complaint on its face reveals that no law supports the plaintiff’s claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff’s claim.’” *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)).

V. ANALYSIS

39. There are three general issues that the Court must consider in its determination of the Motions: (1) does Defendant have sovereign immunity protecting it from potential liability for the wrongdoing alleged by Plaintiffs; (2) if so, was there a waiver of that immunity in whole or in part; and (3) if there has been a waiver, have Plaintiffs sufficiently stated a claim pursuant to Rule 12(b)(6). The Court addresses each of these issues in turn.

A. Sovereign Immunity

40. Defendant argues that, as a public institution, it is entitled to sovereign immunity from suit absent a finding of waiver by this Court. (*Vernon*, Br. Supp. Mot. 8–9, ECF No. 30 [*Vernon*, Br. Supp.]; *Archie*, Br. Supp. Mot. 8–9, ECF No. 19 [*Archie*, Br. Supp.]; *Eppes*, Br. Supp. Mot. 8–9, ECF No. 18 [*Eppes*, Br. Supp.].) Plaintiffs generally do not dispute that, as a general proposition, Defendant is entitled to sovereign immunity because it is a public institution. (*Vernon*, Br. Opp’n Mot. 3, ECF No. 34 [*Vernon*, Br. Opp.]; *Archie*, Br. Opp’n Mot. 3, ECF No. 23 [*Archie*, Br. Opp.]; *Eppes*, Br. Opp’n Mot. 3, ECF No. 22 [*Eppes*, Br. Opp.].)

41. “It is a fundamental rule of law that the State is immune from suit unless it expressly consents to be sued[.]” *Zimmer v. N.C. Dep’t of Transp.*, 87 N.C. App. 132, 134 (1987) (citation omitted), “or upon its waiver of immunity, and that *this immunity is absolute and unqualified*,” *Guthrie v. N.C. State Ports Auths.*, 307 N.C. 522, 534 (1983) (emphasis in original).

42. Here, Plaintiffs’ allegations in the Amended Complaints admit that Defendant is a public education institution. (See *Vernon*, Am. Compl. ¶ 22; *Archie*, Am. Compl. ¶ 49; *Eppes*, Am. Compl. ¶ 7.) As a result, the Court determines that Gaston College is a state institution entitled to immunity from suit unless it expressly or impliedly consents to suit or otherwise waives this immunity. See *Chastain v. Arndt*, 253 N.C. App. 8, 13–15 (2017) (treating Gaston College and its governing body, the Board of Trustees, as entitled to sovereign immunity).

B. Waiver of Immunity

43. The parties dispute (1) whether Gaston College waived sovereign immunity or otherwise consented to suit, and (2) if there was waiver, the scope of such waiver. The Court addresses each issue in turn below.

1. Unjust Enrichment

44. Before more fully addressing the parties' waiver arguments, the Court first briefly addresses Plaintiffs' unjust enrichment claims. Plaintiffs argue that their claims are based upon a contract implied in law. (*Vernon*, Br. Opp. 10; *Archie*, Br. Opp. 9; *Eppes*, Br. Opp. 10.) Defendant contends that the State has sovereign immunity from such a claim. (*Vernon*, Br. Supp. 13–14; *Archie*, Br. Supp. 13–14; *Eppes*, Br. Supp. 13–14.)

45. Defendant is correct. Unjust enrichment, a claim “based upon a quasi contract or a contract implied in law[,]” is not based upon an actual agreement. *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42 (1998). “Only in the absence of an express agreement of the parties will courts impose a quasi contract or a contract implied in law in order to prevent an unjust enrichment. We will not imply a contract in law in derogation of sovereign immunity.” *Id.* (citation omitted). An unjust enrichment claim alleged against an arm of the State is barred by sovereign immunity, *Eastway Wrecker Serv. v. City of Charlotte*, 165 N.C. App. 639, 643 (2004), because the State only waives its immunity when it *expressly* enters into a valid contract, *Smith v. State*, 289 N.C. 303, 320 (1976).

46. The Court therefore **GRANTS** in part the Motions and **DISMISSES** Plaintiffs' respective claims for unjust enrichment with prejudice.

2. The UDTPA Claim

47. The Court also observes that Eppes alleges a claim for violation of the UDTPA. The UDTPA applies only to claims against a “person, firm, or corporation[.]” N.C.G.S. § 75-16. State institutions are creatures of the sovereign and, as such, are neither a “person, firm, [n]or corporation” under the UDTPA. *See Sperry Corp. v. Patterson*, 73 N.C. App. 123, 125 (1985) (“The consumer protection and antitrust laws of Chapter 75 of the General Statutes do not create a cause of action against the State, regardless of whether sovereign immunity may exist.”).

48. Eppes has not stated a claim against the State for which relief may be granted. The Court therefore **GRANTS** in part the Motions and **DISMISSES** Eppes's claim for violation of the UDTPA with prejudice.

3. Waiver by the State Tort Claims Act

49. The State Tort Claims Act, N.C.G.S. § 143-291 *et seq.*, is one example of a permitted and intentional waiver of sovereign immunity. Through its enactment, “the General Assembly partially waived the sovereign immunity of the State to the extent that it consented that the State could be sued for injuries” arising out of the State's negligence. *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 134 (1987). However, it is well-settled that “[j]urisdiction to hear such claims [is] vested in the Industrial Commission.” *Id.*; *Guthrie*, 307 N.C. at 536.

50. Archie and Vernon each allege claims for negligence and negligence *per se*. Further, Eppes’s claim for declaratory judgment sounds in tortious conduct—namely that Defendant owed her a legal duty and that it breached that duty by failing to employ reasonable measures for data security. (*Eppes*, Am. Compl. ¶¶ 108, 113.)

51. All tort claims against North Carolina community colleges are subject to the exclusive jurisdiction of the North Carolina Industrial Commission, as expressly provided in the State Tort Claims Act. See N.C.G.S. § 143-291(a) (“Community colleges and technical colleges shall be deemed State agencies for purposes of this Article.”).

52. Plaintiffs argue that Defendant’s purchase of insurance pursuant to N.C.G.S. § 115D-24 indicated acknowledgement of potential liability and that Defendant is therefore precluded from raising a sovereign immunity defense. (*Vernon*, Br. Opp. 2–4; *Archie*, Br. Opp. 6–7; *Eppes*, Br. Opp. 2, 7–9.) However, a waiver analysis on the basis of the purchase of insurance is irrelevant as to Plaintiffs’ tort claims because this Court lacks jurisdiction over those claims, *Chastain*, 253 N.C. App. at 14–15, and they must proceed in the North Carolina Industrial Commission.

53. Therefore, as to Plaintiffs’ tort claims, including the claims for negligence, negligence *per se*, and declaratory judgment, the Court hereby **GRANTS** in part the Motions and those claims are hereby **DISMISSED** without prejudice so that Plaintiffs may bring those claims in the Industrial Commission, as appropriate.

4. Waiver by Contract: The Breach of Contract Claims

54. The remaining claims for consideration are Plaintiffs' claims for breach of contract and alternative claims for breach of implied in fact contract.

55. Defendant argues that the contract claims fail as a matter of law. (*See Vernon*, Br. Supp. 15; *Archie*, Br. Supp. 15; *Eppes*, Br. Supp. 17.) Defendant contends that the breach of contract claims are simply negligence claims in disguise and that Plaintiffs' allegations in the Amended Complaints are conclusory and fail to plead the existence of a valid contract. (*See Vernon*, Br. Supp. 15–22; *Archie*, Br. Supp. 15–22; *Eppes*, Br. Supp. 17–25.)

56. In response, Plaintiffs contend that they have sufficiently alleged the required elements for breach of an express and implied contract. (*See Vernon*, Br. Opp. 11–17; *Archie*, Br. Opp. 10–14; *Eppes*, Br. Opp. 11–16.)

57. When the State “‘enters into a valid contract, [it] implicitly consents to be sued for damages on the contract in the event [that] it breaches’” *Gilchrist*, 348 N.C. at 42 (quoting *Smith*, 289 N.C. at 320).

58. The Court considers Plaintiffs' breach of contract and breach of implied in fact contract claims separately.

i. Breach of Express Contract

59. “The elements of a claim for breach of contract are (1) [the] existence of a valid contract and (2) breach of the terms of that contract.” *Poor v. Hill*, 138 N.C. App. 19, 26 (2000) (citation omitted). “As our Court of Appeals has noted, ‘[o]ur system of notice pleading means the bar to plead a valid contract is low.’” *Atl. Coast*

Conf. v. Bd. of Trs. of Fla. State Univ., 2024 NCBC LEXIS 53, at **48 (N.C. Super. Ct. Apr. 4, 2024) (modification in original) (quoting *Lannan v. Bd. of Governors of Univ. of N.C.*, 285 N.C. App. 574, 596 (2022), *writ allowed*, 384 N.C. 37 (2023)).

60. Here, Plaintiffs' allegations are substantially similar, if not nearly identical, with respect to their breach of contract claims. Plaintiffs allege that they each entered into a valid and enforceable contract through which they paid money to Defendant in exchange for services. (*Vernon*, Am. Compl. ¶ 123; *Archie*, Am. Compl. ¶ 147; *Eppes*, Am. Compl. ¶ 77 (specifying that the agreement was "for educational and other services").) Plaintiffs further allege that the contract included promises by Defendant to secure, safeguard, and not disclose Plaintiffs' personal identifying or private information. (*Vernon*, Am. Compl. ¶ 123; *Archie*, Am. Compl. ¶ 147; *Eppes*, Am. Compl. ¶ 77.)

61. Consistent with our State's caselaw concerning the relative ease of pleading a claim for breach of contract, Plaintiffs' allegations are enough to sufficiently plead the existence of an express contract.

62. Plaintiffs have also sufficiently alleged breaches of that contract. Plaintiffs allege that Defendant did not secure, safeguard, and/or keep private Plaintiffs' private information, "and therefore Defendant breached its contracts with Plaintiff[s]" (*Vernon*, Am. Compl. ¶ 127; *see also Archie*, Am. Compl. ¶ 151; *Eppes*, Am. Compl. ¶ 81.) Plaintiffs further allege that Defendant, "allowed third parties to access, copy, and/or exfiltrate Plaintiff[s]' . . . Private Information without permission. Therefore, [Defendant] breached the Privacy Policy with

Plaintiff[s]” (*Vernon*, Am. Compl. ¶ 128; *see also Archie*, Am. Compl. ¶ 152; *Eppes*, Am. Compl. ¶ 82.)

63. As a result, Plaintiffs have sufficiently alleged that they had a contract with Defendant Gaston College and that Defendant breached that contract. The Motions are therefore **DENIED** as to Plaintiffs’ claims for breach of express contract.

ii. Breach of Implied in Fact Contract

64. In the alternative, Plaintiffs also alleged claims for breach of implied contract. To plead breach of an implied in fact contract, Plaintiffs must allege offer, acceptance, and consideration. *Lannan*, 285 N.C. App. at 596–97. “A valid contract may be implied in light of the conduct of the parties and under circumstances that make it reasonable to presume the parties intended to contract with each other.” *Se. Caissons, LLC v. Choate Constr. Co.*, 247 N.C. App. 104, 113 (2016) (cleaned up); *Atl. Coast Conf.*, 2024 NCBC LEXIS 53, at **53–54. This requires a consideration of “the circumstances, conduct, acts or relations of the parties, showing a tacit understanding.” *Lannan*, 285 N.C. App. at 592.

65. Plaintiffs fail to allege one or more of the required elements for breach of an implied in fact contract.

66. *Vernon* alleges that, through the provision of higher learning and educational services, Defendant “knew or should have known” that it must protect *Vernon*’s private information. (*Vernon*, Am. Compl. ¶¶ 135–36.) However, this allegation does not describe an offer and *Vernon* does not specify what the offer *was*. While *Vernon* goes on to adequately plead acceptance and consideration, (*Vernon*,

Am. Compl. ¶¶ 137–38), she cannot overcome her failure to adequately plead an offer from Defendant. To be clear, while Vernon alleges that *she* intended and understood that Defendant would adequately safeguard her information, she wholly fails to allege that *Defendant* understood or offered the same. Thus, Vernon has failed to allege an unspoken or implicit understanding.

67. Next, Eppes generally alleges that she provided her personal information to Defendant and thus entered into an implied contract whereby Defendant agreed to safeguard that information and notify Eppes if her data was breached or otherwise compromised. (*Eppes*, Am. Compl. ¶ 88.) Eppes fails to specify that there was an offer and an acceptance of that offer. Thus, even reading this in the light most favorable to her, it is not clear to the Court *what* precisely Eppes offered to Defendant whereby it agreed to safeguard her information. Eppes also alleges that “Gaston [College] required Plaintiff . . . to provide and entrust [her private information] as a condition of obtaining services.” (*Eppes*, Am. Compl. ¶ 90.) These allegations, even read in the light most favorable to Eppes, are not enough. The Court is unable to parse out what the offer was, who made that offer, and who may have accepted that offer. Thus, Eppes has failed to allege a tacit understanding because the Court cannot determine what the understood terms of the agreement are.

68. Finally, Archie alleges that “through its course of conduct,” she and Defendant entered into an implied contract. (*Archie*, Am. Compl. ¶ 123.) She alleges that Defendant solicited and invited her to provide her personal identifying information to Defendant and that Archie accepted that offer and provided her

information to Defendant. (*Archie*, Am. Compl. ¶¶ 125–26.) Archie has not, however, pleaded consideration. The closest allegation that the Court could locate was Archie’s allegation that she provided her information to Defendant in exchange for its protection. (*Archie*, Am. Compl. ¶ 129.) This is not valid consideration, as there has been no exchange of promises or value, and it would not pass even the lenient standard announced in *Lannan*.

69. The Court therefore **GRANTS** in part the Motions and **DISMISSES** Plaintiffs’ breach of implied in fact contract claims with prejudice.⁵

VI. CONCLUSION

70. **THEREFORE**, for the foregoing reasons, the Court hereby **GRANTS** in part and **DENIES** in part the Motions as follows:

a. The Motions are **GRANTED** in part as to Plaintiffs’ claims for unjust enrichment and breach of implied in fact contract. Those claims are **DISMISSED** with prejudice. The Motions are further **GRANTED** in part as to Eppes’s UDTPA claim and that claim is **DISMISSED** with prejudice.

b. The Motions are **GRANTED** in part as to Plaintiffs’ claims for negligence, negligence *per se*, and declaratory judgment. As a result, those claims are **DISMISSED** without prejudice to their refile with the North Carolina Industrial Commission.

⁵ Notwithstanding the Court’s conclusions that this claim should be dismissed, “[t]he decision to dismiss an action with or without prejudice is in the discretion of the trial court[.]” *First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013). The Court concludes, in the exercise of its discretion, that dismissal of Plaintiffs’ claims for breach of implied in fact should be with prejudice.

c. The Motions are otherwise **DENIED**, leaving only Plaintiffs' respective claims for breach of express contract to proceed through discovery.

71. As a result, the Court hereby lifts the stay on case management in the Actions. The parties' counsel shall conduct a Case Management Meeting, pursuant to Business Court Rule 9, on or before 20 September 2024 and file their Case Management Report within fifteen days thereafter.

IT IS SO ORDERED, this the 21st day of August, 2024.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases