STATE OF NORTH CAROLINA BUNCOMBE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 1594
VISTA HORTICULTURAL, INC. d/b/a EDEN BROTHERS, Plaintiff, v. JOHNSON PRICE SPRINKLE, PA and SOK HEANG CHENG, Defendants.	**ORDER AND OPINION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

1. **THIS MATTER** is before the Court upon Defendants' Motion for Summary Judgment (the "Motion"), filed pursuant to Rule 56 of the North Carolina Rules of Civil Procedure (the "Rule(s)") on 10 May 2024 in the above captioned case.[1]

2. Having considered the Motion, the parties' briefs and materials offered in support of and in opposition to the Motion, the arguments of counsel at the hearing on the Motion, and other appropriate matters of record, the Court hereby **GRANTS in part** and **DENIES in part** the Motion.

Tonkon Torp LLP, by Caroline Harris Crowne and Samantha Taylor, and DeVore, Acton & Stafford, PA, by F. William DeVore, IV, for Plaintiff Vista Horticultural, Inc. d/b/a Eden Brothers.

Ragsdale Liggett PLLC, by Melissa Dewey Brumback and John M. Nunnally, for Defendants Johnson Price Sprinkle, PA and Sok Heang Cheng.

Bledsoe, Chief Judge.

[1] (Defs.' Mot. Summ. J. [hereinafter, "Mot."], ECF No. 48.)

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. While the Court does not make findings of fact on a motion for summary judgment, "it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment." *Collier v. Collier*, 204 N.C. App. 160, 161–62 (2010) (citation and quotation marks omitted). Accordingly, the following background, drawn from the undisputed evidence submitted by the parties, is intended only to provide context for the Court's analysis and ruling and not to resolve issues of material fact.

4. Plaintiff Vista Horticultural, Inc. d/b/a Eden Brothers ("Vista") is an online retailer specializing in seed and flower bulbs.[2] In 2017, Vista engaged Defendant Johnson Price Sprinkle, PA ("JPS") to provide various accounting- and bookkeeping-related services, the extent of which the parties dispute. Defendant Sok Heang Cheng ("Cheng") was the JPS shareholder on the Vista account throughout the engagement and Vista's primary point of contact for routine communications.[3]

5. Vista contends that it engaged JPS for "accounting, bookkeeping, and business consulting services" that included from the outset, the filing of Vista's monthly North Carolina sales tax returns and advice concerning the "sales tax nexus based on the current state of the law in 2017."[4] JPS disagrees and argues that the

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[2] (Pl.'s Resp. Opp'n Defs.' Mot. Summ. J. 3 [hereinafter "Pl.'s Br. Opp'n"], ECF No. 54.)

[3] (Pl.'s Br. Opp'n Exs. 1 (ECF No. 54.2), 2 (ECF No. 54.3), 6 (ECF No. 54.7), 7 (ECF No. 54.8), 8 (ECF No. 54.9).)

[4] (Pl.'s Br. Opp'n 3–4; Pl.'s Br. Opp'n Exs. 1, 3 (ECF No. 54.4).)

scope of its engagement with Vista was limited by its engagement letters to the preparation of "[f]ederal and North Carolina income tax returns [. . .], [l]ocal government property tax listing(s), [and] [y]ear-end informational reporting"[5] and by the parties' oral agreements for various "one off" services that were agreed-upon outside the scope of the engagement letters.[6] Defendants contend they never agreed to provide "out-of-state tax advice" or "sales tax nexus" advice to Vista.[7]

6. The scope of JPS's engagement is important because, consistent with JPS's advice to Vista in 2017, Vista paid sales taxes from 2017 until 2021 only to the state of its physical operations, i.e., North Carolina, in accordance with the applicable law in 2017.[8] On 21 June 2018, however, the United States Supreme Court ruled in *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018), that states could assess taxes to out-of-

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[5] (Defs.' Br. Supp. Mot. Summ. J. 3 [hereinafter "Defs.' Br. Supp."], ECF No. 49; Defs.' Br. Supp. Exs. 2 (11 January 2018 engagement letter, ECF No. 49.3), 3 (30 January 2019 engagement letter, ECF No. 49.4), 4 (20 January 2020 engagement letter, ECF No. 49.5), 5 (8 February 2021 engagement letter, ECF No. 49.6).)

[6] (Defs.' Br. Supp. 4, 5 ("JPS provided Vista/Randon with a number of 'one off' services outside the scope of these written agreements.").)

[7] (Defs. Br. Supp. 15.)

[8] *See, e.g.*, *Nat'l Bellas Hess v. Dep't of Revenue*, 386 U. S. 753 (1967) (holding that an out-of-state seller's liability to collect and remit sales tax to the consumer's State depended on whether the seller had a physical presence in that State); *Quill Corp. v. N.D.*, 504 U.S. 298, 311 (1992) (following *Bellas Hess* and holding that a State may not require a business to collect its sales tax if the business lacks a physical presence in the State because to do otherwise would unduly burden interstate commerce since the tax would not have a "substantial nexus" with the activity being taxed). *See also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (holding as part of a four-part test that a tax will survive a Commerce Clause challenge so long as the "tax is applied to an activity with a substantial nexus with the taxing State").

state online retailers for sales to in-state residents, overruling prior law. *Id.* at 188.[9] Since Vista had substantial online sales to residents in states other than North Carolina during and after 2018, the *Wayfair* decision greatly expanded Vista's sales tax liability for those sales.[10] Vista contends that Defendants failed to advise it of the *Wayfair* decision until 2021, preventing Vista from passing its sales tax liability on to its online customers for three years and thereby causing the company to incur an unexpected $2 million tax liability.[11] Defendants maintain that they had no legal duty to advise Vista of the *Wayfair* decision and that Vista is responsible for its losses because it "did not tend to its ordinary business affairs in a diligent manner."[12]

7. Vista initiated this action in Buncombe County Superior Court on 25 April 2023 alleging malpractice against DMJPS, PLLC ("DMJPS"),[13] and then in an

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[9] The Supreme Court concluded in *Wayfair* that "the physical presence rule of *Quill* is unsound and incorrect" and thus overruled both *Quill* and *Bellas Hess*. *Wayfair*, 585 U.S. at 188. The Court held that the appropriate rule of decision is "the first prong of the *Complete Auto* test," which the Court noted "simply asks whether the tax applies to an activity with a substantial nexus with the taxing State." *Id.* at 188 (*citing Complete Auto*, 430 U. S. at 279). The Court further held that "such a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Id.* (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U. S. 1, 11 (2009)). Applying this test in *Wayfair*, the Court held that "the nexus is clearly sufficient based on both the economic and virtual contacts [Wayfair had] with the State." *Id.*

[10] (Pl.'s Br. Opp'n Ex. 24, Dep. Sok Heang Cheng, dated 26 February 2024, at 147:6–148:4 [hereinafter "Cheng Dep."], ECF No. 54.25; Pl.'s Br. Opp'n Ex. 21.)

[11] (Pl.'s Br. Opp'n 13; Second Amended Compl. ("SAC") ¶¶ 31–32, ECF No. 40.)

[12] (Pl.'s Br. Opp'n 18.)

[13] (Compl., ECF Nos. 3, 5.) ECF Nos. 3 and 5 are identical. On 24 January 2024, the parties filed a Stipulated Notice of Dismissal of all claims against DMJPS without prejudice. (ECF No. 37.)

Amended Complaint filed on 9 May 2023, against JPS.[14] On 8 February 2024 and with leave of court,[15] Plaintiff filed its Second Amended Complaint, adding allegations and claims against Cheng.

8. Vista asserts claims against JPS for breach of contract and against both JPS and Cheng for professional malpractice/professional negligence, common law negligence, gross negligence/punitive damages, and breach of fiduciary duty. For its relief, Vista seeks compensatory and punitive damages as well as disgorgement of the professional fees Vista paid to JPS from mid-2018 through mid-2021. Defendants have denied all liability, and their Motion seeks summary judgment on all claims.

9. After full briefing, the Court held a hearing on the Motion on 10 July 2024, at which all parties were represented by counsel (the "Hearing"). The Motion is now ripe for resolution.

II.

LEGAL STANDARD

10. Under Rule 56(c), "[s]ummary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Da Silva v. WakeMed*, 375 N.C. 1, 10 (2020) (quoting N.C. R. Civ. P. 56(c)). "A genuine issue of material fact is one that can be maintained by substantial evidence." *Curlee v. Johnson*, 377 N.C. 97,

[14] (Am. Compl., ECF No. 4.)

[15] (Order and Opinion on Plaintiff's Mot. Leave Am. Compl. Include Add'l Party, ECF No. 39.)

101 (2021) (cleaned up). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference[.]" *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (cleaned up). "An issue is material if, as alleged, facts 'would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action.' " *Bartley v. City of High Point*, 381 N.C. 287, 292 (2022) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518 (1972)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310 (2022) (quoting *Dalton v. Camp*, 353 N.C. 647, 651 (2001)).

11. "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). The movant may meet this burden either (1) "by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense," or (2) "by showing through discovery that the opposing party cannot produce evidence to support an essential element of [its] claim[.]" *Dobson v. Harris*, 352 N.C. 77, 83 (2000) (cleaned up). If the movant meets its burden, "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial[.]" *Cummings v. Carroll*, 379 N.C. 347, 358 (2021) (cleaned up); *see also* N.C. R. Civ. P. 56(e) ("[A]n adverse party

may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

III.

ANALYSIS

A. Vista's Breach of Contract Claim Against JPS

12. Vista alleges that it entered into several valid and enforceable contracts with JPS between 2017 and 2021, both written and oral, and that JPS breached those contracts "by failing to update its tax advice in response to a change in the law and failing to advise [Vista] that it could be incurring substantial state tax liabilities, when JPS had information showing [Vista's] revenue from sales outside North Carolina."[16] Vista also contends that JPS breached its contract with Vista by failing to respond to Vista's inquiry about a sales tax notice from the Arizona Department of Revenue in early 2021.[17]

13. JPS moves to dismiss, contending that JPS did not breach any of its written agreements with Vista and that JPS had no contractual duty to advise Vista of the *Wayfair* decision and its possible implications for Vista's business.

14. As an initial matter, the Court agrees with JPS that Vista has not offered evidence that JPS failed to fulfill its obligations under the express terms of its written

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[16] (SAC ¶ 43.)

[17] (*See* Defs.' Br. Supp. Ex. 1, Dep. Sabine Randon, dated 27 February 2024, at 228:24–229:21 [hereinafter "Randon Dep."], ECF No. 49.2; *see also* ECF No. 49.14 (Arizona sales tax notice).)

engagement letters with Vista. The specific terms of those agreements require only the preparation of federal and North Carolina state income tax returns, local government property tax listings, and year-end informational reporting, and Vista does not contend or offer evidence that JPS breached these specific contractual duties.

15. Vista does contend, however, that JPS and Vista discussed the scope of the parties' engagement in the spring of 2017, eight months before the first written engagement letter, and developed a course of conduct "separate and apart from the annual tax return engagement letters."[18] Vista relies on that course of conduct, "laid out in the initial engagement emails as well as in the invoices," as the basis for "the relationship between [Vista] and JPS from 2017 to 2021."[19] Vista asserts that, through this course of conduct, JPS became aware that Vista expected JPS to provide tax advice, provided advice to Vista on the payment of sales taxes in 2017, and thereby assumed a duty to update that advice in the face of changes in the law, which it failed to do when the *Wayfair* decision was issued the following year.[20]

16. For its part, JPS acknowledges that it "provided [Vista] with a number of 'one off' services outside the scope of these written agreements,"[21] but argues that Vista's breach of contract claim should be dismissed because it is undisputed that JPS never agreed to provide, nor ever in fact provided, "out-of-state tax advice" to

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[18] (Pl.'s Br. Opp'n 25.)

[19] (Pl.'s Br. Opp'n 25.)

[20] (Pl.'s Br. Opp'n 25.)

[21] (Defs.' Br. Supp. 5.)

Vista. JPS argues that since it never gave Vista any tax advice on the payment of sales taxes on out-of-state sales, it had no duty to provide Vista advice about changes in the law concerning that issue.[22]

17. Based on a careful review of the evidence advanced by the parties, the Court concludes that JPS's Motion should be denied as to Vista's breach of contract claim. Viewing the evidence of record in the light most favorable to Vista, a factfinder could reasonably conclude that JPS agreed to provide services beyond the scope of the written engagement letters and in particular that:

a. At the beginning of the engagement in May 2017, Vista told Defendants that it was "not knowledgeable" and wanted assistance with "[b]asically, everything from accounting, tax preparation, tax advising, [and] professional advising"[23];

b. While JPS and Vista executed annual engagement letters, Vista and Defendants agree that JPS agreed to provide, and did provide, various services from time to time that were beyond the scope of the services described in the engagement letters[24];

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[22] (Defs.' Br. Supp. 15.) Defendants base their argument on the parties' alleged oral and written agreements as well as their contention that, "[a]side from JPS's contractual obligations, JPS was subject to, and complied with, 21 N.C. Admin. Code 8N.0211(b) ("Responsibilities in Tax Practice"). (Defs. Br. Supp. 14–15.)

[23] (Pl.'s Br. Supp. Ex. 25, Randon Dep. 126:12–127:2, ECF No. 54.26; *see also* ECF No. 49.2.)

[24] (Defs. Br. Supp. 5 ("JPS provided Vista/Randon with a number of 'one-off' services outside the scope of these written agreements."); Pl's. Br. Opp'n 4 ("throughout the engagement, the core scope of services JPS provided to Eden Brothers followed the initial engagement emails from the spring of 2017 [and not the written engagement letters]").)

c. JPS rendered a broad range of services at the start of the relationship in May and June 2017 before the first written engagement letter was issued, including: "tax research related to corporate tax issues," "preparation of tax projections," "preparation of 2016 federal and state income tax returns," "accounting and bookkeeping services" for May and June 2017, as well as "small business consulting services"[25];

d. At the beginning of the engagement and before *Wayfair* was issued, Cheng and Randon discussed that Vista shipped products into other states and that eventually they would need to examine the sales tax implications of that activity[26];

e. From the beginning of the engagement, JPS filed monthly North Carolina sales tax returns for Vista, which required a monthly, ongoing assessment of Vista's sales tax liability[27];

f. During the course of the engagement, JPS viewed itself as Vista's Chief Financial Officer[28] and performed, among other things, Vista's monthly

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[25] (Pl.'s Br. Opp'n Ex. 3 at 1.)

[26] (Cheng Dep. 67:1–5, 67:6–25; Pl.'s Br. Supp. Ex. 5 (12/31/16 carryforward notes indicating that Cheng and Randon "[d]iscussed potential for nexus in other states (income, franchise, sales)" and that Vista "wants to pass for now" and "acknowledged back penalties/interest could apply.")

[27] (Pl.'s Br. Opp'n Ex. 2.)

[28] (Randon Dep. 181:25-182:2 (ECF No. 54.26); 227:11–24 (ECF No. 60.2).)

revenue reconciliation,[29] managed Vista's accounts payable system,[30] handled Vista's employee retirement plan,[31] and prepared Vista's tax returns and tax projections[32];

g. JPS became aware of the *Wayfair* decision shortly after it was issued and recognized its potential impact on JPS's clients[33];

h. Vista was not aware of the *Wayfair* decision and its implications for Vista's business until it hired its first CFO in the spring of 2021[34]; and

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[29] (Pl.'s Br. Opp'n Ex. 4 at 3–4.)

[30] (Pl.'s Br. Opp'n Ex. 4 at 1–6.)

[31] (Pl.'s Br. Opp'n Ex. 4 at 1; Randon Dep. 243:25–244:2 (ECF No. 60.2).)

[32] (Pl.'s Br. Opp'n Exs. 3, 16.)

[33] (Pl.'s Br. Opp'n Ex. 9 (email from JPS's VP of Taxation to its Tax and Assurance Departments after *Wayfair* seeking annual online sales information for clients with significant online retail sales "so we can get some idea of the impact [of *Wayfair*] on our client base"); Ex. 23 (emails referring JPS personnel to *Wayfair* expert for advice); *see also* Defs. Br. Supp. 6 ("*Wayfair* represented a seismic shift in the tax obligations of online retailers").)

[34] (Pl's. Br. Opp'n Ex. 27, Dep. Keith Simon, dated 28 February 2024, at 56:10–57:23, ECF No. 54.28; Defs.' Br. Supp. Ex. 1 (Randon Dep. 131:13–23 (ECF No. 54.26)).) Although Defendants argue that Vista knew about *Wayfair* because JPS sent Randon an article about the *Wayfair* decision and its impacts in December 2019, (Defs.' Br. Supp. Ex. 7), and because Cheng asserts that she called Randon in August 2018 to request state-by-state sales records, (Cheng Dep. 68:1–73:22), Vista offers evidence to dispute each claim. Not only did Randon testify that she had no memory of reading the *Wayfair* article, (Randon Dep. 176:5–177:6 (ECF No. 54.26)), and that Cheng never called her to request state-by-state sales records or mention *Wayfair*, (Randon Dep. 132:19–133:4 (ECF Nos. 49.2, 54.26)), but Vista also points to evidence suggesting that Randon did not open the email containing the *Wayfair* article, (ECF No. 49.10 at 3), and establishing that Cheng did not recall whether she told Randon about the *Wayfair* decision or its implications for Vista before 2021, (Cheng Dep. 72:17–73:12; 80:1–8.) As discussed in more detail below, the parties also offer conflicting evidence concerning the matters discussed at a February 2020 meeting in which Cheng asked Randon to provide state-by-state sales data. Vista's evidence shows that Cheng did not explain why she needed this information and that JPS did not include the request in its follow up email setting forth Vista's responsibilities arising from the meeting, (Randon Dep. 136:16–17 (ECF Nos. , 49.2, 54.26).) Nor have Defendants offered evidence that Cheng followed up with Vista

i. Defendants did not advise Vista of the *Wayfair* decision and its impact until Vista's newly hired CFO identified that Vista had an out-of-state sales tax compliance problem in mid-2021.[35]

18. Based on the above, and despite Defendants' contention that Vista's statement that it wanted to "pass for now" terminated any obligation JPS may have had to advise Vista of the *Wayfair* decision when it was issued, the Court concludes that a reasonable factfinder could conclude that providing and updating sales tax advice concerning out-of-state sales was included within the wide-ranging financial, tax, accounting, and bookkeeping services JPS had agreed to provide. This is particularly true in light of the parties' recognition in 2017 that JPS would need to look into Vista's shipping of product into other states, the parties' specific discussion of the "potential for nexus in other states" the year before the *Wayfair* decision was issued, and the fact that JPS was providing ongoing, monthly sales tax compliance services to Vista which, until *Wayfair*, required payment of sales taxes only to North Carolina. Given the reasonable inferences that may be drawn from this evidence, the Court concludes that the parties' competing contentions and evidence concerning the scope of their engagement must be resolved by a jury.

19. The Court also concludes that Plaintiff has offered sufficient evidence to survive Defendants' motion under Rule 56 on its claim for breach of contract based

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at any time. Viewed in the light most favorable to Vista, this evidence creates an issue of fact as to when Vista learned of the *Wayfair* decision and its implications for Vista's business.

[35] (Pl's. Br. Opp'n Ex. 23, ECF No. 54.24; Randon Dep. 228:24–229:5 (ECF Nos. 49.1, 60.2); Simon Dep. 56:10–57:23.)

on JPS's alleged failure to provide a substantive response to Plaintiff's inquiry concerning the sales tax notice Vista received from the Arizona Department of Revenue in early 2021.[36]

20. Based on the above, the Court concludes that Defendants' motion for summary judgment on Vista's breach of contract claim should be denied.

B. Vista's Claim for Professional Negligence/Malpractice and Common Law Negligence

21. Defendants seek to dismiss Vista's claims for professional negligence/malpractice and common law negligence on grounds that Vista's contributory negligence bars these claims as a matter of law.

22. To establish professional negligence under North Carolina law, "the plaintiff bears the burden of showing: (1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs." *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 35 (2014) (cleaned up). "It is generally recognized that an accountant may be held liable for damages naturally and proximately resulting from his failure to use that degree of knowledge, skill and judgment usually possessed by members of the profession in a particular locality." *Snipes v. Jackson*, 69 N.C. App. 64, 73 (1984). In particular, "[a]n accountant may be liable for loss or damage due to erroneous tax advice or management." *Id.* To establish common law negligence, "a

[36] (*See, e.g.*, Defs.' Br. Supp. Ex. 12, ECF No. 49.13 (Randon's 2 March 2021 email to JPS); ECF No. 49.14 (Arizona sales tax notice); Randon Dep. 227:7–10 (ECF No. 60.2), 229:5–8 (ECF Nos. 49.1, 60.2) ("[Defendants] failed to respond upon a direct question about Arizona letter and did not inform me what this meant.").)

plaintiff must offer evidence of four essential elements in order to prevail: duty, breach of duty, proximate cause, and damages." *Estate of Mullis by Dixon v. Monroe Oil Co.*, 349 N.C. 196, 201 (1998).

23. "Contributory negligence 'is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains,' " *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 278-79 (2000) (cleaned up), and is a defense to a claim of professional negligence, *see, e.g.*, *Piraino Bros., LLC v. Atl. Fin. Group, Inc.*, 211 N.C. App. 343, 351 (2011). "In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Proffitt v. Gosnell*, 257 N.C. App. 148, 152 (2017) (cleaned up).

24. Defendants contend that "[t]he undisputed evidence demonstrates that [Vista] is contributorily negligent because [Vista] did not tend to its ordinary business affairs in a diligent manner."[37] For their proof, Defendants rely on Vista's owner Sabine Randon's deposition admission that she did not send "sales by state data" to Defendants after Defendants requested the information when the out-of-state tax issue was discussed in a February 2020 meeting between Cheng, JPS's employee Zeiger, and Randon.[38]

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[37] (Defs.' Br. Supp. 18.)

[38] Zeiger's contemporaneous, handwritten notes of the February 2020 meeting state: "sales by state. Sabine [Randon] to f/u [follow up] with report (mid-year)." (Defs.' Br. Supp. Ex. 9.)

25. Defendants ignore, however, that Randon further testified that the sales-by-state information was "one of the many items that were addressed in passing by [Cheng], and that [Cheng] did not explain the reason [why she needed this information]."[39] Moreover, in the follow-up email Zeiger sent to Randon shortly after the February 2020 meeting with a list of tasks and document requests, Zeiger did not mention sales-by-state information, much less include it in the list of documents and information Defendants requested Vista to provide.[40] Neither Zeiger nor Cheng (nor anyone else at JPS) followed up with Vista to seek sales-by-state information, and it was not until the spring of 2021 that anyone at JPS mentioned the *Wayfair* decision to Vista or its potential impact on Vista's sales tax liabilities.[41] Based on this record, the Court cannot conclude that Vista was contributorily negligent as a matter of law in not learning about and acting upon the *Wayfair* decision before the spring of 2021.

26. Similarly, while Defendants marshal facts to suggest a benign explanation for their failure to provide a substantive response to Randon's inquiry about the Arizona sales tax notice,[42] nothing Defendants argue suggests that Plaintiff was contributorily negligent as a matter of law. Indeed, Plaintiff has offered evidence

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(*See also* Defs.' Br. Supp. Ex. 1 (Randon Dep. 134:3–19 (ECF Nos. 49.2, 54.26) (acknowledging Defendants requested sales information by state) and 136:5–17 (ECF Nos. 49.2, 54.26) (acknowledging that Vista did not send the requested information).)

[39] (Defs. Br. Supp. Ex. 1 (Randon Dep. 134:3–19 (ECF Nos. 49.2, 54.26)).)

[40] (Defs. Br. Supp. Ex. 15.)

[41] (Defs.' Br. Supp. Ex. 1 (Randon Dep. 131:13–23 (ECF Nos. 49.2, 54.26)); Pl's. Br. Opp'n Exs. 23, 25 (Randon Dep. 228:24–229:5 (ECF Nos. 49.2, 60.2)), 27 (Simon Dep. 56:10–57:23).)

[42] (Defs.' Br. Supp 9–10.)

that, after Plaintiff received the notice in February 2021, Zeiger prepared a strategy memo which Cheng never reviewed and which was never provided to Plaintiff,[43] and, when Randon asked on 2 March 2021 "do you know anything about other states asking for sales tax now?",[44] Defendants did not advise Plaintiff of the now-nearly-three-year-old *Wayfair* decision or otherwise provide a substantive answer to Randon's inquiry. The Court cannot find Vista contributorily negligent as a matter of law on this record.

27. Accordingly, for each of these reasons, the Court concludes that Defendants' Motion should be denied as to Vista's claims for professional negligence/malpractice and common law negligence. *See, e.g.*, *Ballenger v. Crowell*, 38 N.C. App. 50, 55 (1978) ("Like negligence, contributory negligence is rarely appropriate for summary judgment.").[45]

C. Vista's Claim for Breach of Fiduciary Duty

28. Defendants next seek summary judgment on Vista's claim for breach of fiduciary duty. Here, Defendants' arguments fare better.

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[43] (Pl.'s Br. Opp'n Ex. 19, ECF No. 54.20; Pl.'s Br. Opp'n Ex. 26, Dep. Hannah Zeiger, dated 26 February 2024, at 105:24-106:2, ECF No. 54.27; Cheng Dep. 150:12–153:22.)

[44] (Pl.'s Br. Opp'n Ex. 17, ECF No. 54.18.)

[45] Because Defendants challenged Vista's negligence claims in their opening brief solely on contributory negligence grounds, the Court declines to consider the affidavit of Plaintiff's expert, Gregory T. Reagan, which was submitted with Plaintiff's opposition brief to establish Defendants' breach of the applicable standard of care, since that issue has no bearing on the issue of contributory negligence. (ECF No. 55.) As a result, Defendants' challenge to the admissibility of Reagan's affidavit on this Motion is denied as moot. (*See* Defs.' Reply Br. Supp. Mot. Summ. J. 5–6 [hereinafter "Defs. Reply Br."], ECF No. 60.)

29. To make out a claim for breach of fiduciary duty, Vista must show that "(1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 339 (2019).

30. It is axiomatic that "[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651 (2001). "North Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship." *Hager v. Smithfield E. Health Holdings, LLC*, 264 N.C. App. 350, 355 (2019).

31. North Carolina courts, however, do not recognize *de jure* fiduciary relationships between accountants and their clients, or between external auditors and their clients. *See, e.g.*, *Harrold v. Dowd*, 149 N.C. App. 777, 783–84 (2002) (accountants); *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 52–53 (2016) (external auditors); *see also, e.g.*, *Silverdeer, LLC v. Berton*, 2013 NCBC LEXIS 21, at *26–27 (N.C. Super. Ct. Apr. 24, 2013) (cleaned up) (noting that "an accountant-client relationship is not an inherently fiduciary one and . . . mere allegations of the accountant's failure to properly advise his client [are] insufficient to support a claim for breach of fiduciary duty."). As a result, for a fiduciary duty to exist between Vista and Defendants, it must be a *de facto* one.

32. Under North Carolina law, "a [*de facto*] fiduciary relationship is generally described as arising when 'there has been a special confidence reposed in one who in

equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014) (quoting *Green v. Freeman*, 367 N.C. 136, 141 (2013)). "The standard for finding a *de facto* fiduciary relationship is a demanding one: Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 636 (2016) (cleaned up).

33. Here, the Court concludes that Vista has failed to offer evidence from which a reasonable factfinder could conclude that its relationship with Defendants was a fiduciary one.

34. First, while Vista certainly looked to Defendant to provide important and necessary financial and accounting services, those services were defined by contract and the performance of those services was governed by the parties' contract terms and the standard of care accountants owe their clients under North Carolina law.[46]

35. Moreover, the evidence on which Vista relies for a fiduciary relationship does not permit a factfinder to conclude that Defendants "figuratively held all the cards" in the parties' relationship. Indeed, the undisputed evidence shows that

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[46] *See* 21 N.C. Admin. Code 8N.0211(b) ("Responsibilities in Tax Practice") (providing that "A member has no obligation to communicate with a taxpayer when subsequent developments affect advice previously provided with respect to significant matters, except while assisting a taxpayer in implementing procedures or plans associated with the advice provided or when a member undertakes this obligation by specific agreement"); *see also* Defs.' Br. Supp. Ex. 15 at 16.

Randon took an active part in that relationship. She requested information and asked questions, including, in early 2021, about out-of-state sales taxes.[47] She hired JPS to perform discrete tasks, including, for example, to assist in obtaining a PPP loan for Vista.[48] Despite JPS's provision of bookkeeping and accounting services, JPS only paid invoices after Vista's specific approval,[49] and Randon carefully scrutinized Vista's receipt of funds, often on an hourly basis.[50]

36. While it is certainly true that Defendants had a very involved role in performing their accounting-related services for Vista, the Court concludes that no reasonable factfinder could find that Defendants' performance of those services, including Defendants' sales tax-related services, "influenced, controlled, or dominated" Vista's decision-making process enough to create a *de facto* fiduciary duty. *See Provectus Biopharmaceuticals, Inc. v. RSM US LLP*, 2018 NCBC LEXIS 101, *48 (N.C. Super. Ct. Sept. 28, 2018) (finding an accountant did not have a fiduciary duty even where the client "lacked the internal resources or ability to manage and monitor its accounting and financial systems"). Accordingly, the Court will grant this portion of Defendants' Motion and dismiss Vista's claim for breach of fiduciary duty with prejudice. *See, e.g.*, *Sykes*, 372 N.C. at 340 (recognizing that "[o]ur courts have been clear that general contractual relationships do not typically rise to

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[47] (*See* Defs.' Br. Supp. Ex. 12; Pl.'s Br. Opp'n Ex. 17.)

[48] (Randon Dep. 108:9–109:22 (ECF Nos. 49.2, 54.26); Randon Dep. 178:5–179:7 (ECF No. 60.2).)

[49] (Randon Dep. 111:24–112:12 (ECF Nos. 49.2, 54.26).)

[50] (Randon Dep. 112:19–113:25 (ECF Nos. 49.2, 54.26).)

the level of fiduciary relationships" and that "[p]arties to a contract do not thereby become each other's fiduciaries; they generally owe no special duty to one another beyond the terms of the contract[.]") (cleaned up).

D. Vista's Claims for Gross Negligence/Punitive Damages

37. "Gross negligence has been defined as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.' " *Toomer v. Garrett*, 155 N.C. App. 462, 482 (2002) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583 (1988)). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey v. Lea*, 354 N.C. 48, 52 (2001) (internal citation omitted). It requires more than "[c]arelessness or recklessness." *Shaw v. Goodyear Tire & Rubber Co.*, 225 N.C. App. 90, 95 (2013). "An act or conduct rises to the level of gross negligence when the *act* is done purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others." *Id.* at 53 (emphasis in original). "Aside from allegations of wanton conduct, a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages." *Toomer*, 155 N.C. App. at 482 (cleaned up).

38. Under North Carolina law, " '[p]unitive damages may be awarded only if the claimant proves' that either fraud, malice, or '[w]illful or wanton conduct' occurred and related to the injury." *Estate of Long v. Fowler*, 378 N.C. 138, 150 (quoting N.C.G.S. § 1D-15(a)). As our Supreme Court has explained: " '[w]illful or wanton conduct' means more than gross negligence and is defined as 'the conscious and

intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm.' " *Id.* at 150–51 (quoting N.C.G.S. § 1D-5).

39. Defendants seek dismissal of Plaintiff's claims for gross negligence and punitive damages, arguing that Vista has failed to offer evidence that Defendants engaged in reckless, intentional, willful, or wanton conduct. At most, Defendants argue, Vista's evidence—consisting of Defendants "doing nothing, failing to advise, and failing to follow up"—is not evidence of willfulness or wantonness and instead only gives rise to a claim in simple negligence.[51] The Court agrees.

40. As discussed above, Vista has offered sufficient evidence to support its claims sounding in negligence. Our Supreme Court has held, however, that the difference between ordinary negligence and gross negligence is "substantial" and "is not in degree or magnitude of inadvertence or carelessness, but rather is intentional wrongdoing or deliberate misconduct affecting the safety of others." *Yancey*, 354 N.C. at 53. While "[n]egligence, a failure to use due care, be it *slight or extreme*, connotes inadvertence . . . [w]antonness . . . connotes intentional wrongdoing." *Id.* (emphasis in original.) "An act or conduct moves beyond the realm of negligence when the *injury or damage* itself is intentional." *Id.* (emphasis in original.)

41. Although Vista attempts to build its claims for gross negligence and punitive damages on a series of speculative inferences based on Defendants' alleged failures

[51] (Defs.' Reply Br. 11.)

to perform and what Vista contends are Cheng's repeated lies and evasions,[52] the Court cannot conclude from this evidence, and the reasonable inferences permitted therefrom, that Defendants intended, expected, knew, or should have known that their conduct would cause the injury or damage that Vista alleges. Nor can the Court otherwise conclude from this record that Defendants acted willfully, wantonly, intentionally, or with reckless or conscious disregard for or indifference to Vista's rights. Further, contrary to Vista's contention, the Court cannot conclude that Plaintiff's evidence reflects "a repeated course of conduct [by Defendants] which constituted a callous or intentional indifference to the plaintiff's rights" as in *Potts v. KEL, LLC*, 2021 NCBC LEXIS 100, *34 (N.C. Super. Ct. Nov. 5, 2021) (quotations omitted). Rather than engage in "a repeated course of conduct" as in *Potts*, the Court concludes that the evidence, when viewed in the light most favorable to Vista, shows only that Defendants failed to advise Vista about the *Wayfair* decision after it was issued and to recognize the sales tax liability the decision imposed on Vista thereafter.

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[52] (Pl.'s Br. Opp'n 23–24 (contending variously that "Cheng is now lying," "Cheng realized for the first time during the February 2020 meeting," "Cheng did not want to draw any attention to her failure," "[Cheng] intentionally downplayed the issue," "Cheng chose not to advise [Vista]," "Cheng did not [take action] because she knew it would raise questions about her oversight of the account," "Cheng instructed Ms. Zeiger . . . because Ms. Cheng wanted to control the message and protect herself from accusations of malpractice," "Cheng never followed up . . . because she could not explain her delay in raising the issue," "Cheng either chose not to review Ms. Zeiger's memo in 2021 or is now lying about that . . . or intentionally delayed communicating its conclusions to [Vista]," and "Cheng [took action] for fear that the sales tax issue would be discovered.")

42. While a jury certainly might find Defendants negligent on the evidence of record here, Vista has not offered sufficient evidence of Defendants' reckless, intentional, willful, or wanton conduct to permit its claims for gross negligence or punitive damages to proceed to a jury at trial. Accordingly, the Court shall grant this aspect of Defendants' Motion and dismiss Vista's claims for gross negligence and punitive damages. *See, e.g.*, *Archie v. Durham Pub. Schs. Bd. of Ed.*, 283 N.C. App. 472, 478 (2022) ("A plaintiff must come forward with particular evidence of gross negligence to overcome summary judgment."); *Robinson v. Duke Univ. Health Sys.*, 229 N.C. App. 215, 239 (2013) (affirming dismissal of punitive damages claim under Rule 56 where plaintiffs failed to "present any evidence that defendants' conduct in this case was willful, wanton, malicious, or fraudulent").[53]

IV.

CONCLUSION

43. **WHEREFORE**, the Court hereby **GRANTS in part** and **DENIES in part** the Motion as follows:

a. Defendant's Motion is hereby **DENIED** as to Vista's claims against JPS for breach of contract[54] and against JPS and Cheng for professional negligence/malpractice and common law negligence.

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[53] Plaintiff does not contend that Defendants' conduct was "malicious" or "fraudulent."

[54] The Court notes that Defendants contend for the first time in their Reply Brief that Vista's request for disgorgement on its breach of contract claim is improper. (Defs. Reply Br. 12–13.) Because this issue was not raised in Defendants' Motion or opening brief, the Court declines to consider Defendants' contention in its resolution of the Motion. *See* Business Court Rule 7.7 ("A reply brief must be limited to discussion of matters newly raised in the

b. Defendant's Motion is hereby **GRANTED** as to Vista's claims against JPS and Cheng for gross negligence/punitive damages, and breach of fiduciary duty, and those claims are hereby **DISMISSED with prejudice**.

SO ORDERED, this the 17th day of September, 2024.[55]

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

responsive brief, and the Court may decline to consider issues or arguments raised by the moving party for the first time in a reply brief.").

[55] The Court notes that while Vista observed in its opposition brief that Defendants filed their Motion before "the close of fact discovery, and before responding to outstanding discovery requests from [Vista]," Pl.'s Br. Opp'n 2, n.6, Plaintiff has not sought relief under either Rule 56(f) or BCR 10.9 or otherwise contended that the Court should defer consideration of the Motion.