Appendix A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2236

LEILA NASSER ASR, individually and as parent of minor child DM,

Plaintiff - Appellant,

v.

KAREN EADY-WILLIAMS; MECKLENBURG COUNTY COURTHOUSE,

Defendants - Appellees,

No. 20-2271

LEILA NASSER ASR, Individually and as parent of minor child DM,

Plaintiff - Appellant,

v.

MITZI Y. KINCAID; KINCAID & ASSOCIATES, PLLC,

Defendants - Appellees,

No. 20-2274

LEILA NASSER ASR, Individually and as parent of minor child DM,

Plaintiff - Appellant,

v.

CHARLES GUY MONNETT; CHARLES G. MONNETT III & ASSOCIATES,

Defendants - Appellees,

No. 20-2276

LEILA NASSER ASR, Individually and as parent of minor child DM,

Plaintiff - Appellant,

v.

ANTHONY GIORDANO; GIORDANO, GORDON & BURNS, PLLC,

Defendants - Appellees,

No. 20-2351

LEILA NASSER ASR, individually and as parent of minor child D.M.,

Plaintiff - Appellant,

v.

DANIEL R. HANSEN; KINDERCARE EDUCATION, LLC, f/k/a Knowledge Universe Education LLC; KINDERCARE LEARNING CENTERS, LLC, d/b/a Park Road Kindercare,

Defendants - Appellees.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. Max O. Cogburn, Jr., District Judge. 3:20-cv-00140-MOC-DCK; 3:20-cv-00142-MOC-DCK; 3:20-cv-00139-MOC-DCK; 3:20-cv-00143-MOC-DCK; 3:20-cv-00141-MOC-DCK

Submitted: January 31, 2022 Decided: April 4, 2022

Before MOTZ, HARRIS, and RUSHING, Circuit Judges.

Affirmed in part, affirmed as modified in part by unpublished per curiam opinion.

Leila Nasser Asr, Appellant Pro Se. Kathryn Hicks Shields, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina; Karen Harris Chapman, John Michael Durnovich, POYNER SPRUILL, LLP, Charlotte, North Carolina; Randall Joseph Phillips, CHARLES G. MONNETT III & ASSOCIATES, Charlotte, North Carolina; Ryan D. Bolick, CRANFILL SUMNER, LLP, Charlotte, North Carolina; Lucas D. Garber, SHUMAKER LOOP & KENDRICK, PLLC, Charlotte, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Leila Nasser Asr appeals the district court's orders granting Appellees' motions to dismiss her complaints on the grounds of lack of subject matter jurisdiction, judicial and Eleventh Amendment immunity, and collateral estoppel and res judicata. Although the district court granted her multiple extensions of time to do so, Asr did not respond in the district court to Appellees' motions to dismiss and therefore failed to address their assertions that her complaints were subject to dismissal. Accordingly, her arguments challenging the district court's reasons for dismissal are raised for the first time on appeal. As a general rule in civil cases, we will not review appellate arguments that were not made in the district court. *See In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014). We have considerable discretion in deciding which issues to consider for the first time on appeal, *id.*, and, "absent exceptional circumstances," we will decline to exercise that discretion, *Hicks v. Ferreyra*, 965 F.3d 302, 310 (4th Cir. 2020) (cleaned up). We have reviewed the record and conclude that Asr has not met this standard.

Asr also argues that the district court's orders were the result of judicial bias. Our review of the record leads us to conclude that this argument is without merit. *See, e.g.*, *Belue v. Leventhal*, 640 F.3d 567, 573 (4th Cir. 2011) (explaining that rulings made "on the basis of facts introduced or events occurring in the course of the current proceedings . . . almost never constitute a valid basis for a bias or partiality motion" (internal quotation marks omitted)).

We therefore affirm the district court's orders dismissing Asr's complaints against Eady-Williams, the Mecklenburg County Courthouse, Hansen, KinderCare Education,

LLC, and KinderCare Learning Centers, LLC. *Asr v. Eady Williams*, No. 3:20-cv-00140-MOC-DCK (W.D.N.C. Oct. 19, 2020); *Asr v. Hansen*, No. 3:20-cv-00141-MOC-DCK (W.D.N.C. Nov. 23, 2020). However, the dismissal of Asr's complaints against Kincaid, Giordano, and Monnett for lack of subject matter jurisdiction should have been without prejudice. *See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir 2013) (explaining that court lacking "jurisdiction has no power to adjudicate and dispose of a claim on the merits"). We therefore modify the orders in those cases to reflect that the dismissals are without prejudice, *see* 28 U.S.C. § 2106, and affirm the judgments as modified. *Asr v. Kincaid*, No. 3:20-cv-00142-MOC-DCK (W.D.N.C. Oct. 29, 2020); *Asr v. Giordano*, No. 3:20-cv-00143-MOC-DCK (W.D.N.C. Oct. 29, 2020); *Asr v. Monnett*, No. 3:20-cv-00139-MOC-DCK (W.D.N.C. Oct. 29, 2020).

We deny Asr's motions to seal the record on appeal and for appointment of counsel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED IN PART,
AFFIRMED AS MODIFIED IN PART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:20-cv-140-MOC-DCK

LESLIE NASSER ASR, Individually and as parent of minor Child DM,	)	
Plaintiff,	)	
vs.	)	
KAREN EADY WILLIAMS, MECKLENBURG COUNTY COURTHOUSE,	)	**ORDER**
Defendants.	)	

THIS MATTER comes before the Court on a Motion to Dismiss by Defendant Karen Eady-Williams. (Doc. No. 7).

I. BACKGROUND AND DISCUSSION

Plaintiff Leslier Nasser Asr, individually as the parent of minor child DM, commenced this action on March 6, 2020, naming as Defendants Judge Eady-Williams and the "Mecklenburg County Courthouse." At all relevant times, Defendant Eady-Williams was serving in her capacity as a Superior Court Judge for North Carolina's 26th Judicial District.

Plaintiff's claims against Judge Eady-Williams arise from a June 12, 2019, hearing to approve a minor settlement agreement before Judge Eady-Williams during a civil superior court session in Mecklenburg County, North Carolina. (Doc. No. 1; ¶¶ A. 1, 3). Plaintiff asserts that during the hearing, Judge Eady-Williams collaborated with the other party and Plaintiff's attorney in the minor settlement to conspire against and deprive Plaintiff of a fair trial. (Id. at ¶ A. 4). Plaintiff asserts the following claims against Judge Eady-Williams: (1) conspiracy, fraud,

racial discrimination, and harassment, and violating Plaintiff's right to having a fair trial; (2) defamation/slander and violation of a human right by discrimination and harassment; (3) fraud and violation of a human right; and 4) falsifying, conspiracy, and violating a human right. For relief, Plaintiff seeks compensatory, treble, and punitive damages.

On March 30, 2020, Defendant Judge Eady-Williams filed a motion to dismiss for failure to state a claim under Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. No. 7). On the same day, the Court ordered Plaintiff to respond, advising Plaintiff that "failure to file a timely response will likely lead to dismissal of the claims against Defendant." (Doc. No. 9). Despite seeking and obtaining extensions of time, Defendant has not responded to the motion to dismiss, and the time to do so has passed. Thus, the matter is ripe for disposition.

First, as to Plaintiff's claim against Judge Eady-Williams, it is well established that judges, in exercising the authority vested in them, are absolutely immune from civil lawsuits for money damages.[1] Dean v. Shirer, 547 F.2d 227, 231 (4th Cir. 1976). Judicial immunity applies to judicial action taken in error, done maliciously, or in excess of authority. Stump v. Sparkman, 435 U.S. 349, 355–56 (1978). An act by a judge is "judicial" when it is "normally performed by a judge and ... the parties dealt with the judge in his judicial capacity." King v. Myers, 973 F.2d 354, 357 (4th Cir. 1992). And there is no absence of jurisdiction when, at the time the judge

[1] Plaintiff does not indicate the capacity in which she asserts claims against Judge Eady-Williams in this lawsuit. To the extent that Plaintiff asserts claims for monetary relief against Judge Eady-Williams in her official capacity, those claims are barred by the Eleventh Amendment. Furthermore, although judicial immunity extends only to requests for money damages, as opposed to injunctive relief, Plaintiff here does not seek injunctive relief. In any event, even if she did, the Court would dismiss those claims based on federal abstention principles.

took the challenged action, she had jurisdiction over the subject matter before her. Stump v. Sparkman, 435 U.S. 349, 356 (1978) (jurisdiction in this context "must be construed broadly").

Here, Plaintiff's claims against Judge Eady-Williams concern judicial actions and decisions that she made concerning a minor settlement agreement and entering an Order approving the minor settlement agreement. In North Carolina, the courts have inherent authority over the property of infants and will exercise this jurisdiction whenever necessary to preserve and protect children's estates and interests. Creech v. Melnik, 147 N.C. App. 471, 477 (2001). Plaintiff's claims against Judge Eady-Williams must be dismissed based on absolute judicial immunity.[2]

The only other named Defendant is the "Mecklenburg County Courthouse," which is not a distinct legal entity capable of being sued. FED. R. CIV. P. 17(b). Therefore, to the extent that Plaintiff has named the "Mecklenburg County Courthouse" as a Defendant, Plaintiff's claims as to this Defendant are also dismissed.

III. CONCLUSION

For the reasons stated herein, Plaintiff's action is dismissed as to all Defendants.

IT IS, THEREFORE, ORDERED that:

(1) Defendant's Motion to Dismiss, (Doc. No. 7), is **GRANTED**, and this matter is

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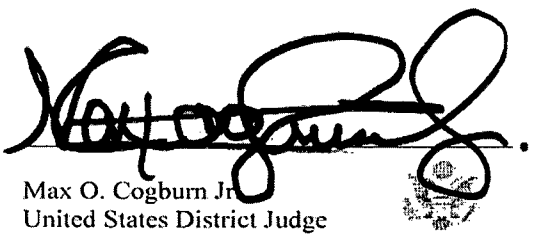
[2] Plaintiff asserts that subject matter jurisdiction in this action is based on 28 U.S.C. § 1332. Although Defendant has not moved to dismiss based on lack of subject matter jurisdiction, it also appears that the Court lacks subject matter jurisdiction because complete diversity of citizenship appears to be lacking on the face of the Complaint and the pleadings, and Plaintiff has also not asserted that her claims amount to more than $75,000. The Court may order dismissal on the motion of a party or sua sponte when it appears that there is no basis for subject matter jurisdiction. FED. R. CIV. P. 12(b)(1), 12(h). Thus, it appears that this matter is alternatively subject to dismissal based on lack of subject matter jurisdiction.

dismissed with prejudice.

(4) The Clerk is directed to terminate this action.

Signed: October 19, 2020



Max O. Cogburn Jr
United States District Judge

United States District Court
Western District of North Carolina
Charlotte Division

Leila Nasser Asr, Plaintiff(s), vs. Mecklenburg County Courthouse Karen Eady-Williams, Defendant(s).	))))))))	JUDGMENT IN CASE 3:20-cv-00140-MOC-DCK

DECISION BY COURT. This action having come before the Court and a decision having been rendered;

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in accordance with the Court's October 19, 2020 Order.

October 19, 2020

Frank G. Johns, Clerk
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:20-cv-142-MOC-DCK

LESLIE NASSER ASR, Individually and as parent of minor Child DM,	)	
Plaintiff,	)	
vs.	)	
MITZI KINCAID, KINKAID & ASSOCIATES, PLLC,	)	**ORDER**
Defendants.	)	

THIS MATTER comes before the Court on a Motion to Dismiss by Defendants. (Doc. No. 6).

I. BACKGROUND

Pro se Plaintiff Leslier Nasser Asr, individually as the parent of minor child DM, commenced this action on March 6, 2020, naming as Defendants Mitzi Kincaid and & Kinkaid & Associates, PLLC. This Complaint arises from the settlement of a personal injury case involving Plaintiff Asr's minor child, which is currently pending in Mecklenburg County Superior Court. Mogharrebi vs. KinderCare Education, LLC, Civil Action 17-CVS-11996.

According to Plaintiff Asr, Ms. Kincaid was retained to help draft a special needs trust in connection with the minor settlement in the state court action. Plaintiff alleges Ms. Kincaid conspired with the minor child's litigation attorney and committed fraud by advocating for the appointment of a third-party trustee to oversee the minor settlement funds. Plaintiff does not allege that the state court ever entered any order creating a trust, appointing a trustee, or

establishing any oversight of the funds. Plaintiff merely alleges that "if" such an order is entered, Plaintiff will not allow Ms. Kincaid to serve as the third-party trustee.

Plaintiff's complaint stems from the minor child's receipt of an undisclosed sum of money in settlement of a personal injury lawsuit in Mecklenburg County Superior Court. (Doc. No. 1 at 6 ¶¶ 1–2). Plaintiff alleges that the "litigation attorney" (not a party to this action), who represents the minor child in that underlying personal injury lawsuit, "was forcing [Plaintiff Asr] to accept his proposal of establishing a structured settlement" for the minor child's settlement proceeds. (Doc. No. 1 at 6 ¶ 2). Plaintiff Asr, who alleges the minor child will need "a lot more money" than the settlement allows, would prefer a special needs trust over which she would serve as the trustee. (Doc. No. 1 at 6 ¶¶ 2–4). To this end, Plaintiff Asr alleges she retained Defendant Mitzi Y. Kincaid and her firm, Kincaid & Associates, PLLC, to prepare a special needs trust. Plaintiff Asr also alleges that the litigation attorney "is determin[ed] to prevent plaintiff from serving as a trustee" of the proposed special needs trust. (Doc. No. 1 at 7 ¶ 10). According to Plaintiff, Ms. Kincaid proposed a special needs trust whereby Plaintiff Asr would serve as a trustee, but with oversight from an attorney or certified public accountant. (Id.). Plaintiff Asr alleges she agreed with Ms. Kincaid's proposal. (Doc. 1 at 7 ¶ 12).

Plaintiff alleges Ms. Kincaid later prepared a draft trust instrument, but included a proposed provision requiring approval of any transaction from the trust over $1,500. (Doc. 1 at 7 ¶ 13). After reviewing the draft, Plaintiff Asr alleges she asked Ms. Kincaid not to seek the Superior Court judge's approval of the trust at an upcoming hearing. (Id. at 7 ¶ 15). Plaintiff Asr alleges Ms. Kincaid explained to her that the upcoming hearing before the Superior Court judge only concerned approval of the settlement, and that the trust instrument would need to be addressed in another hearing. (Doc. No. 1 at 7 ¶ 16). Despite this, Plaintiff alleges Ms. Kincaid

presented the trust instrument to a Superior Court judge on June 12, 2019. (Doc. No. 1 at 7 ¶ 17). Plaintiff further alleges Ms. Kincaid "argued to the court to appoint 3rd party trustee and defendant serve as trustee of the trust." (Doc. No. 1 at 8 ¶ 19). Plaintiff Asr claims Ms. Kincaid did this in "conspiracy with plaintiff's litigation attorney" for the purpose of stealing her child's money and "destroy[ing] a family from the Middle East." (Doc. No. 1 at 8 ¶ 21). Plaintiff Asr alleges Ms. Kincaid stopped representing her a couple days later. Plaintiff does not allege whether the Superior Court judge issued any order approving the settlement or trust or otherwise ruled on any of the matters described in the Complaint. Instead, Plaintiff alleges that "if" the judge orders a third-party trustee, Plaintiff will not allow Ms. Kincaid to serve as that trustee. (Doc. No. 1 at 8 ¶ 22).

Defendants filed the pending motion to dismiss on March 25, 2020. On the same day, the Court ordered Plaintiff to respond, advising Plaintiff that "failure to file a timely response will likely lead to dismissal of the claims against Defendant." (Doc. No. 8). Despite seeking and obtaining extensions of time, Plaintiff has not responded to the motion to dismiss, and the time to do so has passed. Thus, the matter is ripe for disposition.

II. STANDARD OF REVIEW

Defendants move to dismiss this action under Rules 12(b)(1) and 12(b)(6). A Rule 12(b)(1) motion challenges whether a court has subject matter jurisdiction. Subject matter jurisdiction is a threshold issue that courts must resolve before they address the merits of a case. Darling v. Falls, 236 F. Supp. 3d 914, 920 (M.D.N.C. 2017) (quoting Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 479–80 (4th Cir. 2005)). To this end, a 12(b)(1) motion asks the court to determine whether the plaintiff "has a right to be in the district court." Holloway v. Pagan River Dockside Seafood, Inc., 669 F.3d 448, 452 (4th Cir. 2012).

Federal Rule of Civil Procedure 12(b)(6) provides that a motion may be dismissed for failure to state a claim upon which relief can be granted. A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint without resolving contests of fact or the merits of a claim. Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992), cert. denied, 510 U.S. 828 (1993). Thus, the Rule 12(b)(6) inquiry is limited to determining if the allegations constitute "a short and plain statement of the claim showing the pleader is entitled to relief" pursuant to Federal Rule of Civil Procedure 8(a)(2). To survive a defendant's motion to dismiss, factual allegations in the complaint must be sufficient to "raise a right to relief above a speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Thus, a complaint will survive if it contains "enough facts to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

For the purposes of a Rule 12(b)(6) analysis, a claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Twombly, 550 U.S. at 556). The Court must draw all reasonable factual inferences in favor of the plaintiff. Priority Auto Grp., Inc. v. Ford Motor Co., 757 F.3d 137, 139 (4th Cir. 2014). In a Rule 12(b)(6) analysis, the Court must separate facts from legal conclusions, as mere conclusions are not entitled to a presumption of truth. Iqbal, 556 U.S. at 678. Importantly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. However, well-pleaded factual allegations are entitled to a presumption of truth, and the court should determine whether the allegations plausibly give rise to an entitlement to relief. Id. at 679.

"When considering a motion to dismiss involving pro se parties, the court construes the pleadings liberally to ensure that valid claims do not fail merely for lack of legal specificity."

Brown v. Charlotte Rentals LLC, No. 3:15-cv-0043-FDW-DCK, 2015 WL 4557368, at *2 (W.D.N.C. July 28, 2015) (citing Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978)). At the same time, however, the Court should not "assume the role of advocate for the pro se plaintiff." Gordon, 574 F.2d at 1151 (quotation omitted).

III. DISCUSSION

A. Subject Matter Jurisdiction

Defendants first contend that this action must be dismissed for lack of subject matter jurisdiction. For the following reasons, the Court agrees.

Federal courts are courts of limited jurisdiction, meaning that a federal court is empowered only to consider certain types of claims. Home Buyers Warranty Corp. v. Hanna, 750 F.3d 427, 432 (4th Cir. 2014). A federal court has subject matter jurisdiction over civil cases "arising under the Constitution, laws, or treaties of the United States," pursuant to 28 U.S.C. § 1331, or over civil cases in which the amount in controversy exceeds $75,000, exclusive of interest and costs, and in which diversity of citizenship exists between the parties, pursuant to 28 U.S.C. § 1332. Questions regarding subject matter jurisdiction may be raised by either party at any time or sua sponte by the court. Plyler v. Moore, 129 F.3d 728, 731 n.6 (4th Cir. 1997). The burden of establishing subject matter jurisdiction is on the party asserting its existence. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).

Plaintiff relies on 28 U.S.C. § 1332 as the basis for invoking this Court's subject matter jurisdiction, but Plaintiff has not established diversity of citizenship. See (Doc. No. 1 at 3). "When original jurisdiction is based on diversity of citizenship, the cause of action must be between parties of completely diverse state citizenship, that is, no plaintiff may be a citizen of the same state as any defendant." Elliot v. Am. States Ins. Co., 883 F.3d 384, 394 (4th Cir.

2018). Plaintiff correctly states that Defendant Kincaid is a citizen of North Carolina. Plaintiff Asr asserted Iranian and Canadian citizenship, listed her residence and domicile as Charlotte and Mecklenburg County in the Complaint, and failed to make any allegation whatsoever with regard to the citizenship or residency of DM, the infant/minor child for whom she filed this action in her alleged capacity as his legal representative. This Court notes that, in an almost identical lawsuit filed by Plaintiff against different attorneys, the defendants in that action asserted that DM is a citizen and/or resident of both North Carolina and the United States, having been born in Charlotte, North Carolina. See Asr v. Monnett, Def. Brief in Supp. Motion to Dismiss, Doc. No. 7, 3:20cv139 (W.D.N.C). Plaintiff has not denied that DM is a North Carolina citizen for purposes of Section 1332. By its plain language, 28 U.S.C. § 1332(c)(2), the federal statute governing diversity of citizenship, provides that "the legal representative . . . of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent." Plaintiff Asr filed her Complaint in the claimed legal representative capacity of her infant child as stated in the Complaint: "DM, a Minor Child Through his mother Leila Nasser Asr." (Doc. No. 1, at 3, 6). Plaintiff therefore "shall be deemed to be a citizen only of the same State as the infant," which is North Carolina. As both Plaintiff—as a legal representative of an infant—and Defendants are citizens of North Carolina, complete diversity does not exist. Buffkin v. Maruchan, Inc., No. 1:14CV3, 2016 WL 183548, at *2 (M.D.N.C. Jan. 14, 2016) (stating that "'the next friend or guardian ad litem of an infant is a mere mechanical device . . . the infant is the real litigant and his would be the controlling citizenship.'... 'the citizenship of the infant determines the question of diversity, and not that of the guardian ad litem'"); Jones v. N.C. Dep't of Transp., No. 3:15-cv-170, 2015 WL 4663875, at *2 (W.D.N.C. Aug. 6, 2015) (dismissing a complaint for lack of jurisdiction where a "legal representative" and the defendant were "both

citizens of North Carolina for the purposes of this case").

As the party invoking this Court's diversity jurisdiction, Plaintiff also bears the burden of showing that the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332(a). Plaintiff cannot meet her burden of showing the amount in controversy exceeds $75,000 for two reasons. First, Plaintiff's Complaint does not even attempt to satisfy the amount-in-controversy requirement, as this portion of the Complaint is left blank. Second, even if Plaintiff had alleged an amount in controversy, Plaintiff still "must prove by a preponderance of the evidence that the amount in controversy requirement has been met." Rosas v. Hearn, No. 3:19-CV-594-RJC-DSC, 2019 WL 6880631, at *2 (W.D.N.C. Dec. 17, 2019). "[T]he amount in controversy requirement cannot be based on speculation or 'what ifs' that may occur." Christopher v. Miller, No. 5:16CV188, 2017 WL 462010, at *3 (N.D. W. Va. Feb. 2, 2017). Plaintiff cannot meet that burden because the Complaint makes clear that Plaintiff has not suffered any damages whatsoever. At best, Plaintiff describes the possibility that a court might take some action in the future that might affect Plaintiff and the minor child.[1] And even then, the Complaint leaves the Court and Defendants to guess as to what that harm might be. Plaintiff's speculative "what if" allegations fall well short of establishing the requisite amount in controversy. Christopher, 2017 WL 462010, at *3.

In sum, because Plaintiff has not met her burden of showing that, pursuant to 28 U.S.C. § 1332, complete diversity of citizenship has been met, or that the amount in controversy has been satisfied, Plaintiff has failed to show that this Court has subject matter jurisdiction, and the action

[1] Similarly, Defendants also argue that Plaintiff lacks standing because she has not suffered any damages. Plaintiff alleges that "if" a North Carolina trial court judge enters an order approving a special needs trust, Plaintiff may not be appointed as Trustee. According to Defendants, these allegations of "possible future injury are not sufficient" to establish standing.

will therefore be dismissed for that reason alone.

B. Alternative Grounds for Dismissal

Defendants contend that, alternatively, this matter is subject to dismissal because Plaintiff Asr cannot bring suit on behalf of her minor child. The Court agrees. Although Federal Rule of Civil Procedure 17(c) does permit a case to be brought on behalf of a minor by either a guardian ad litem or next friend, a non-attorney parent cannot litigate in federal court on behalf of a minor child without licensed counsel. See Myers v. Loudoun Cty. Pub. Sch., 418 F.3d 395, 401 (4th Cir. 2005) ("We therefore join the vast majority of our sister circuits in holding that non-attorney parents generally may not litigate the claims of their minor children in federal court.") (citing cases). Thus, Plaintiff Asr, as a pro se litigant, may not bring this action on behalf of her minor child because she is not a licensed attorney. Id. at 400 (explaining that "[t]he right to litigate for oneself . . . does not create a coordinate right to litigate for others"). For this alternative reason, Plaintiffs' lawsuit must also be dismissed.

Next, Defendants also argue that, even if this Court could exercise subject matter jurisdiction, the pleadings in the Complaint simply do not state a cognizable claim and the Complaint is subject to dismissal under Rule 12(b)(6). The Court agrees.

Plaintiff's Complaint purports to assert claims "for fraud, false pretense, and conspiracy." (Doc. No. 1 at 6). Plaintiff fails to state a cognizable claim against Defendants for which relief may be granted. First, the heightened pleading requirements of Rule 9(b) demand that fraud-based claims be stated with factual particularity. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999). The essential elements of fraud that must be plead with particularity are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5)

resulting in damage to the injured party." Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co., 418 S.E.2d 648, 658 (N.C. 1992). Plaintiff's Complaint falls well short of meeting any of these elements. At most, Plaintiff Asr appears to allege that Ms. Kincaid advocated a position with which Plaintiff Asr disagreed. She does not allege Ms. Kincaid made any false statement, much less that any such false statements resulted in damage to Plaintiff Ars or her minor child.

Second, there does not appear to be any recognized claim for "false pretense" under North Carolina law. To the extent Plaintiff intends to assert a civil claim based on the criminal offense of obtaining property by false pretenses, that claim must fail because (1) Plaintiff does not allege that Ms. Kincaid made any false statement, and (2) Plaintiff does not allege that Ms. Kincaid obtained any property as a result of any false statement. Cf. N.C. GEN. STAT. § 14-100 (obtaining property by false pretenses).

Finally, Plaintiff's claim for conspiracy also fails, because "North Carolina does not recognize an independent cause of action for civil conspiracy." USA Trouser, S.A. de C.V. v. Williams, 812 S.E.2d 373, 380 (N.C. Ct. App.), review denied, 817 S.E.2d 199 (N.C. 2018). Thus, even if this Court had subject matter jurisdiction, the action would be subject to dismissal on this alternative ground.

IV. CONCLUSION

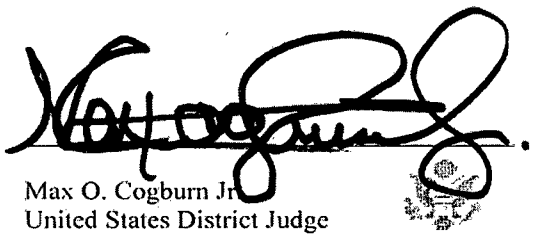
For the reasons stated herein, Plaintiff's action is dismissed.

IT IS, THEREFORE, ORDERED that:

(1) Defendants' Motion to Dismiss, (Doc. No. 6), is **GRANTED**, and this matter is dismissed with prejudice.

(4) The Clerk is directed to terminate this action.

Signed: October 29, 2020



Max O. Cogburn Jr
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:20-cv-139-MOC-DCK

LESLIE NASSER ASR, Individually and as parent of minor Child DM,	)	
Plaintiff,	)	
vs.	)	
CHARLES G. MONNETT, CHARLES G. MONNETT & ASSOCIATES,	)	**ORDER**
Defendants.	)	

THIS MATTER comes before the Court on a Motion to Dismiss by Defendants. (Doc. No. 6).

I. BACKGROUND

Pro se Plaintiff Leslier Nasser Asr, individually as the parent of minor child DM, commenced this action on March 6, 2020, naming as Defendants Charles G. Monnett and Charles G. Monnett III & Associates. This action is related to an underlying civil action, Mogharrebi vs. KinderCare Education, LLC, Civil Action 17-CVS-11996, which remains pending in Mecklenburg County Superior Court on behalf of the minor child DM for personal injuries sustained in the incident that is the subject of that action. Defendants represented DM in that action. A hearing was scheduled before Judge Karen Eady-Williams in Mecklenburg County Superior Court on March 27, 2020, with regard to the disbursement of the net settlement proceeds obtained on behalf of the minor child. That hearing has now been postponed indefinitely due to the disruption of the court's schedule caused by coronavirus.

In this action, Plaintiff alleges that, while acting as Plaintiff's counsel in the underlying state court action, Defendant Monnett bullied and harassed Plaintiff based on her national origin (Iranian) and intimidated her into entering into a settlement for her minor child that she did not want to enter into. Plaintiff purports to bring the following claims against Defendants Monnett and his law firm Charles G. Monnett III & Associates: (1) "Conspiracy and Violating Human Right by Racial Discrimination and Harassment"; (2) "Fraud and Violating Human Right for Having Fair Trial"; (3) and "Falsifying, Conspiracy, and Violating Human Right."

Defendants filed the pending motion to dismiss on March 27, 2020. On March 30, 2020, the Court ordered Plaintiff to respond, advising Plaintiff that "failure to file a timely response will likely lead to dismissal of the claims against Defendant." (Doc. No. 8). Despite seeking and obtaining extensions of time, Plaintiff has not responded to the motion to dismiss, and the time to do so has passed. Thus, the matter is ripe for disposition.

II. STANDARD OF REVIEW

Defendants move to dismiss this action under Rules 12(b)(1) and 12(b)(6). A Rule 12(b)(1) motion challenges whether a court has subject matter jurisdiction. Subject matter jurisdiction is a threshold issue that courts must resolve before they address the merits of a case. Darling v. Falls, 236 F. Supp. 3d 914, 920 (M.D.N.C. 2017) (quoting Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 479–80 (4th Cir. 2005)). To this end, a 12(b)(1) motion asks the court to determine whether the plaintiff "has a right to be in the district court." Holloway v. Pagan River Dockside Seafood, Inc., 669 F.3d 448, 452 (4th Cir. 2012).

Federal Rule of Civil Procedure 12(b)(6) provides that a motion may be dismissed for failure to state a claim upon which relief can be granted. A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint without resolving contests of fact or the merits of a

claim. Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992), cert. denied, 510 U.S. 828 (1993). Thus, the Rule 12(b)(6) inquiry is limited to determining if the allegations constitute "a short and plain statement of the claim showing the pleader is entitled to relief" pursuant to Federal Rule of Civil Procedure 8(a)(2). To survive a defendant's motion to dismiss, factual allegations in the complaint must be sufficient to "raise a right to relief above a speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Thus, a complaint will survive if it contains "enough facts to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

For the purposes of a Rule 12(b)(6) analysis, a claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Twombly, 550 U.S. at 556). The Court must draw all reasonable factual inferences in favor of the plaintiff. Priority Auto Grp., Inc. v. Ford Motor Co., 757 F.3d 137, 139 (4th Cir. 2014). In a Rule 12(b)(6) analysis, the Court must separate facts from legal conclusions, as mere conclusions are not entitled to a presumption of truth. Iqbal, 556 U.S. at 678. Importantly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. However, well-pleaded factual allegations are entitled to a presumption of truth, and the court should determine whether the allegations plausibly give rise to an entitlement to relief. Id. at 679.

"When considering a motion to dismiss involving pro se parties, the court construes the pleadings liberally to ensure that valid claims do not fail merely for lack of legal specificity." Brown v. Charlotte Rentals LLC, No. 3:15-cv-0043-FDW-DCK, 2015 WL 4557368, at *2 (W.D.N.C. July 28, 2015) (citing Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978)). At the same time, however, the Court should not "assume the role of advocate for the pro se plaintiff."

Gordon, 574 F.2d at 1151 (quotation omitted).

III. DISCUSSION

A. Subject Matter Jurisdiction

Defendants first contend that this action must be dismissed for lack of subject matter jurisdiction. For the following reasons, the Court agrees.

Federal courts are courts of limited jurisdiction, meaning that a federal court is empowered only to consider certain types of claims. Home Buyers Warranty Corp. v. Hanna, 750 F.3d 427, 432 (4th Cir. 2014). A federal court has subject matter jurisdiction over civil cases "arising under the Constitution, laws, or treaties of the United States," pursuant to 28 U.S.C. § 1331, or over civil cases in which the amount in controversy exceeds $75,000, exclusive of interest and costs, and in which diversity of citizenship exists between the parties, pursuant to 28 U.S.C. § 1332. Questions regarding subject matter jurisdiction may be raised by either party at any time or sua sponte by the court. Plyler v. Moore, 129 F.3d 728, 731 n.6 (4th Cir. 1997). The burden of establishing subject matter jurisdiction is on the party asserting its existence. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).

Plaintiff relies on 28 U.S.C. § 1332 as the basis for invoking this Court's subject matter jurisdiction, but Plaintiff has not established diversity of citizenship. See (Doc. No. 1 at 3). "When original jurisdiction is based on diversity of citizenship, the cause of action must be between parties of completely diverse state citizenship, that is, no plaintiff may be a citizen of the same state as any defendant." Elliot v. Am. States Ins. Co., 883 F.3d 384, 394 (4th Cir. 2018). Plaintiff correctly states that Defendant Charles G. Monnett is a citizen of the State of North Carolina. Charles G. Monnett III & Associates does not exist as a separate entity. Plaintiff Asr asserted Iranian and Canadian citizenship (Doc. 1 at 3), listed her residence and

domicile as Charlotte and Mecklenburg County in the Complaint, (Doc. 1 at 1), and failed to make any allegation whatsoever with regard to the citizenship or residency of DM, the infant/minor child for whom she filed this action in her alleged capacity as his legal representative. Defendant notes that DM is a citizen and/or resident of both North Carolina and the United States, having been born in Charlotte, North Carolina. By its plain language, 28 U.S.C. § 1332(c)(2), the federal statute governing diversity of citizenship, provides that "the legal representative . . . of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent." Plaintiff Asr filed her Complaint in the claimed legal representative capacity of her infant child as stated in the Complaint: "DM, a Minor Child Through his mother Leila Nasser Asr." (Doc. No. 1, at 3, 6). Plaintiff therefore "shall be deemed to be a citizen only of the same State as the infant," which is North Carolina. As both Plaintiff—as a legal representative of an infant—and Defendants are citizens of North Carolina, complete diversity does not exist. Buffkin v. Maruchan, Inc., No. 1:14CV3, 2016 WL 183548, at *2 (M.D.N.C. Jan. 14, 2016) (stating that "'the next friend or guardian ad litem of an infant is a mere mechanical device . . . the infant is the real litigant and his would be the controlling citizenship.'... 'the citizenship of the infant determines the question of diversity, and not that of the guardian ad litem'"); Jones v. N.C. Dep't of Transp., No. 3:15-cv-170, 2015 WL 4663875, at *2 (W.D.N.C. Aug. 6, 2015) (dismissing a complaint for lack of jurisdiction where a "legal representative" and the defendant were "both citizens of North Carolina for the purposes of this case").

As the party invoking this Court's diversity jurisdiction, Plaintiff also bears the burden of showing that the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332(a). Plaintiff cannot meet her burden of showing the amount in controversy exceeds $75,000 for two reasons.

First, Plaintiff's Complaint does not even attempt to satisfy the amount-in-controversy requirement, as this portion of the Complaint is left blank. Second, even if Plaintiff had alleged an amount in controversy, Plaintiff still "must prove by a preponderance of the evidence that the amount in controversy requirement has been met." Rosas v. Hearn, No. 3:19-CV-594-RJC-DSC, 2019 WL 6880631, at *2 (W.D.N.C. Dec. 17, 2019). "[T]he amount in controversy requirement cannot be based on speculation or 'what ifs' that may occur." Christopher v. Miller, No. 5:16CV188, 2017 WL 462010, at *3 (N.D. W. Va. Feb. 2, 2017). Plaintiff cannot meet that burden because the Complaint makes clear that Plaintiff has not suffered any damages whatsoever. At best, Plaintiff describes the possibility that a court might take some action in the future that might affect Plaintiff and the minor child.[1] And even then, the Complaint leaves the Court and Defendants to guess as to what that harm might be. Plaintiff's speculative "what if" allegations fall well short of establishing the requisite amount in controversy. Christopher, 2017 WL 462010, at *3.

In sum, because Plaintiff has not met her burden of showing that, pursuant to 28 U.S.C. § 1332, complete diversity of citizenship has been met, or that the amount in controversy has been satisfied, Plaintiff has failed to show that this Court has subject matter jurisdiction, and the action will therefore be dismissed for that reason alone.

B. Alternative Grounds for Dismissal

Defendants contend that, alternatively, this matter is subject to dismissal because Plaintiff Asr cannot bring suit on behalf of her minor child. The Court agrees. Although Federal Rule of

[1] Similarly, Defendants also argue that Plaintiff lacks standing because she has not suffered any damages. Plaintiff alleges that "if" a North Carolina trial court judge enters an order approving a special needs trust, Plaintiff may not be appointed as Trustee. According to Defendants, these allegations of "possible future injury are not sufficient" to establish standing.

Civil Procedure 17(c) does permit a case to be brought on behalf of a minor by either a guardian ad litem or next friend, a non-attorney parent cannot litigate in federal court on behalf of a minor child without licensed counsel. See Myers v. Loudoun Cty. Pub. Sch., 418 F.3d 395, 401 (4th Cir. 2005) ("We therefore join the vast majority of our sister circuits in holding that non-attorney parents generally may not litigate the claims of their minor children in federal court.") (citing cases). Thus, Plaintiff Asr, as a pro se litigant, may not bring this action on behalf of her minor child because she is not a licensed attorney. Id. at 400 (explaining that "[t]he right to litigate for oneself . . . does not create a coordinate right to litigate for others"). For this alternative reason, Plaintiffs' lawsuit must also be dismissed.

Next, Defendants also argue that, even if this Court could exercise subject matter jurisdiction, the pleadings in the Complaint simply do not state a cognizable claim and the Complaint is subject to dismissal under Rule 12(b)(6). The Court agrees. Other than using conclusory allegations and legal jargon, Plaintiff fails to define what "Human Right" was violated and how in her Complaint. Silvers v. Iredell Cty. Dep't of Soc. Servs., No. 5:15-CV-00083-RLV-DCK, 2016 WL 427953, at *15 (W.D.N.C. Feb. 3, 2016) (dismissing the plaintiff's claim for a vague violation of "International Human Rights" because the plaintiff failed to "cite this Court to any treaty or executive agreement of the United States that affords Plaintiff rights that may be vindicated"). Furthermore, Plaintiff's claim for conspiracy also fails, because "North Carolina does not recognize an independent cause of action for civil conspiracy." USA Trouser, S.A. de C.V. v. Williams, 812 S.E.2d 373, 380 (N.C. Ct. App.), review denied, 817 S.E.2d 199 (N.C. 2018). Thus, even if this Court had subject matter jurisdiction, the action would be subject to dismissal on this alternative ground.

IV. CONCLUSION

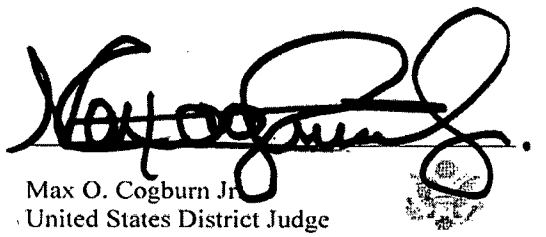
For the reasons stated herein, Plaintiff's action is dismissed.

IT IS, THEREFORE, ORDERED that:

(1) Defendants' Motion to Dismiss, (Doc. No. 6), is **GRANTED**, and this matter is dismissed with prejudice.

(4) The Clerk is directed to terminate this action.

Signed: October 29, 2020



Max O. Cogburn Jr
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:20-cv-143-MOC-DCK

LESLIE NASSER ASR, Individually and as parent of minor Child DM,	)	
Plaintiff,	)	
vs.	)	
ANTHONY GIORDANO, GIORDANO, GORDON & BURNS, PLLC,	)	**ORDER**
Defendants.	)	

THIS MATTER comes before the Court on a Motion to Dismiss by Defendants. (Doc. No. 9).

I. BACKGROUND

Pro se Plaintiff Leslier Nasser Asr, individually as the parent of minor child DM, commenced this action on March 6, 2020, naming as Defendants Anthony Giordano and Giordano, Gordon & Burns, PLLC. This action arises from a dispute over the establishment of a Special Needs Trust to distribute the net proceeds of a personal injury settlement involving Plaintiff Asr's minor child, which is currently pending in Mecklenburg County Superior Court. Mogharrebi vs. KinderCare Education, LLC, Civil Action 17-CVS-11996. Plaintiff filed this action on March 6, 2020, seeking monetary relief against Defendants based on allegations of fraud, false pretense, and conspiracy stemming from Defendants' representation of Plaintiff during the establishment of the Special Needs Trust.

In the Complaint, Plaintiff Asr alleges that Defendants made false pretenses in an attempt

to steal the minor's property. Plaintiff alleges the existence of a conspiracy between Defendants, Plaintiff's litigation attorney, and the overseeing state court judge "to steal Plaintiff's money and destroy a family from the Middle East in the most disgustingly and fraudulently way possible." See (Doc. No. 1 at ¶¶ 32, 37).

Plaintiff alleges that on June 19, 2019, Defendants were retained by the proposed Trustees (Shahriar Mogharrebi and Leila Nasser Asr) and Guardian ad Litem (Shahriar Mogharrebi) to prepare the aforementioned Special Needs Trust. See (Id. at ¶ 1). Defendants prepared a Trust that was accepted by the state court, subject to the inclusion of a provision suggested by Plaintiff's litigation attorney that would limit the Trustees' ability to withdraw funds from the Trust in excess of a certain amount without the permission of Defendant Anthony L. Giordano, the trust protector. See (Id. at ¶¶ 13-14). The proposed Trustees opposed the inclusion of this limitation. (Id. at ¶¶ 16-17).

The proposed Trustees told Defendants they were planning to move back to Canada and wanted to set up a Canadian Special Needs Trusts instead of the North Carolina Special Needs Trust that Defendants had originally been instructed to prepare. (Id. at ¶¶ 10, 22). Defendants advised the proposed Trustees that it would be best to first seek approval by the state court, leaving open the possibility of transferring the situs of the Trust to Canada at a later date when they moved to Canada. See (Id. at ¶ 23). The proposed Trustees rejected this advice, terminating Defendants' representation. See (Id. at ¶ 33). In this action, Plaintiff alleges that, in refusing to go along with the proposed Trustees' wishes regarding the Special Needs Trust, Defendants are liable to Plaintiff for "fraud, false pretense, and conspiracy." (Id. at p. 6).

Defendants filed the pending motion to dismiss on April 20, 2020. On April 21, 2020, the Court ordered Plaintiff to respond, advising Plaintiff that "failure to file a timely response

will likely lead to dismissal of the claims against Defendant." (Doc. No. 10). Despite seeking and obtaining extensions of time, Plaintiff has not responded to the motion to dismiss, and the time to do so has passed. Thus, the matter is ripe for disposition.

II. STANDARD OF REVIEW

Defendants move to dismiss this action under Rules 12(b)(1) and 12(b)(6). A Rule 12(b)(1) motion challenges whether a court has subject matter jurisdiction. Subject matter jurisdiction is a threshold issue that courts must resolve before they address the merits of a case. Darling v. Falls, 236 F. Supp. 3d 914, 920 (M.D.N.C. 2017) (quoting Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 479–80 (4th Cir. 2005)). To this end, a 12(b)(1) motion asks the court to determine whether the plaintiff "has a right to be in the district court." Holloway v. Pagan River Dockside Seafood, Inc., 669 F.3d 448, 452 (4th Cir. 2012).

Federal Rule of Civil Procedure 12(b)(6) provides that a motion may be dismissed for failure to state a claim upon which relief can be granted. A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint without resolving contests of fact or the merits of a claim. Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992), cert. denied, 510 U.S. 828 (1993). Thus, the Rule 12(b)(6) inquiry is limited to determining if the allegations constitute "a short and plain statement of the claim showing the pleader is entitled to relief" pursuant to Federal Rule of Civil Procedure 8(a)(2). To survive a defendant's motion to dismiss, factual allegations in the complaint must be sufficient to "raise a right to relief above a speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Thus, a complaint will survive if it contains "enough facts to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

For the purposes of a Rule 12(b)(6) analysis, a claim has facial plausibility "when the

plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Twombly, 550 U.S. at 556). The Court must draw all reasonable factual inferences in favor of the plaintiff. Priority Auto Grp., Inc. v. Ford Motor Co., 757 F.3d 137, 139 (4th Cir. 2014). In a Rule 12(b)(6) analysis, the Court must separate facts from legal conclusions, as mere conclusions are not entitled to a presumption of truth. Iqbal, 556 U.S. at 678. Importantly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. However, well-pleaded factual allegations are entitled to a presumption of truth, and the court should determine whether the allegations plausibly give rise to an entitlement to relief. Id. at 679.

"When considering a motion to dismiss involving pro se parties, the court construes the pleadings liberally to ensure that valid claims do not fail merely for lack of legal specificity." Brown v. Charlotte Rentals LLC, No. 3:15-cv-0043-FDW-DCK, 2015 WL 4557368, at *2 (W.D.N.C. July 28, 2015) (citing Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978)). At the same time, however, the Court should not "assume the role of advocate for the pro se plaintiff." Gordon, 574 F.2d at 1151 (quotation omitted).

III. DISCUSSION

A. Subject Matter Jurisdiction

Defendants first contend that this action must be dismissed for lack of subject matter jurisdiction. For the following reasons, the Court agrees.

Federal courts are courts of limited jurisdiction, meaning that a federal court is empowered only to consider certain types of claims. Home Buyers Warranty Corp. v. Hanna, 750 F.3d 427, 432 (4th Cir. 2014). A federal court has subject matter jurisdiction over civil cases "arising under the Constitution, laws, or treaties of the United States," pursuant to 28

U.S.C. § 1331, or over civil cases in which the amount in controversy exceeds $75,000, exclusive of interest and costs, and in which diversity of citizenship exists between the parties, pursuant to 28 U.S.C. § 1332. Questions regarding subject matter jurisdiction may be raised by either party at any time or sua sponte by the court. Plyler v. Moore, 129 F.3d 728, 731 n.6 (4th Cir. 1997). The burden of establishing subject matter jurisdiction is on the party asserting its existence. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).

Plaintiff relies on 28 U.S.C. § 1332 as the basis for invoking this Court's subject matter jurisdiction, but Plaintiff has not established diversity of citizenship. See (Doc. No. 1 at 3). "When original jurisdiction is based on diversity of citizenship, the cause of action must be between parties of completely diverse state citizenship, that is, no plaintiff may be a citizen of the same state as any defendant." Elliot v. Am. States Ins. Co., 883 F.3d 384, 394 (4th Cir. 2018). Plaintiff correctly states that Defendant Giordano is a citizen of North Carolina. Plaintiff Asr asserted Iranian and Canadian citizenship, listed her residence and domicile as Charlotte and Mecklenburg County in the Complaint, and failed to make any allegation whatsoever with regard to the citizenship or residency of DM, the infant/minor child for whom she filed this action in her alleged capacity as his legal representative. This Court notes that, in an almost identical lawsuit filed by Plaintiff against different attorneys, the defendants in that action asserted that DM is a citizen and/or resident of both North Carolina and the United States, having been born in Charlotte, North Carolina. See Asr v. Monnett, Def. Brief in Supp. Motion to Dismiss, Doc. No. 7, 3:20cv139 (W.D.N.C). Plaintiff has not denied that DM is a North Carolina citizen for purposes of Section 1332. By its plain language, 28 U.S.C. § 1332(c)(2), the federal statute governing diversity of citizenship, provides that "the legal representative . . . of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent."

Plaintiff Asr filed her Complaint in the claimed legal representative capacity of her infant child as stated in the Complaint: "DM, a Minor Child Through his mother Leila Nasser Asr." (Doc. No. 1, at 3, 6). Plaintiff therefore "shall be deemed to be a citizen only of the same State as the infant," which is North Carolina. As both Plaintiff—as a legal representative of an infant—and Defendants are citizens of North Carolina, complete diversity does not exist. Buffkin v. Maruchan, Inc., No. 1:14CV3, 2016 WL 183548, at *2 (M.D.N.C. Jan. 14, 2016) (stating that "'the next friend or guardian ad litem of an infant is a mere mechanical device . . . the infant is the real litigant and his would be the controlling citizenship.'... 'the citizenship of the infant determines the question of diversity, and not that of the guardian ad litem'"); Jones v. N.C. Dep't of Transp., No. 3:15-cv-170, 2015 WL 4663875, at *2 (W.D.N.C. Aug. 6, 2015) (dismissing a complaint for lack of jurisdiction where a "legal representative" and the defendant were "both citizens of North Carolina for the purposes of this case").

As the party invoking this Court's diversity jurisdiction, Plaintiff also bears the burden of showing that the amount in controversy exceeds $75,000. See 28 U.S.C. § 1332(a). Plaintiff cannot meet her burden of showing the amount in controversy exceeds $75,000 for two reasons. First, Plaintiff's Complaint does not even attempt to satisfy the amount-in-controversy requirement, as this portion of the Complaint is left blank. Second, even if Plaintiff had alleged an amount in controversy, Plaintiff still "must prove by a preponderance of the evidence that the amount in controversy requirement has been met." Rosas v. Hearn, No. 3:19-CV-594-RJC-DSC, 2019 WL 6880631, at *2 (W.D.N.C. Dec. 17, 2019). "[T]he amount in controversy requirement cannot be based on speculation or 'what ifs' that may occur." Christopher v. Miller, No. 5:16CV188, 2017 WL 462010, at *3 (N.D. W. Va. Feb. 2, 2017). Plaintiff cannot meet that burden because the Complaint makes clear that Plaintiff has not suffered any damages

whatsoever. At best, Plaintiff describes the possibility that a court might take some action in the future that might affect Plaintiff and the minor child. And even then, the Complaint leaves the Court and Defendants to guess as to what that harm might be. Plaintiff's speculative "what if" allegations fall well short of establishing the requisite amount in controversy. Christopher, 2017 WL 462010, at *3.

In sum, because Plaintiff has not met her burden of showing that, pursuant to 28 U.S.C. § 1332, complete diversity of citizenship has been met, or that the amount in controversy has been satisfied, Plaintiff has failed to show that this Court has subject matter jurisdiction, and the action will therefore be dismissed for that reason alone.

B. Alternative Grounds for Dismissal

Next, Defendants also argue that, even if this Court could exercise subject matter jurisdiction, the pleadings in the Complaint simply do not state a cognizable claim and the Complaint is subject to dismissal under Rule 12(b)(6).[1] The Court agrees.

Plaintiff's Complaint purports to assert claims "for fraud, false pretense, and conspiracy." (Doc. No. 1 at 6). Plaintiff fails to state a cognizable claim against Defendants for which relief may be granted. First, the heightened pleading requirements of Rule 9(b) demand that fraud-based claims be stated with factual particularity. Harrison v. Westinghouse Savannah River Co.,

[1] Although Defendants do not argue as such, the Court notes that Plaintiff Asr cannot bring suit on behalf of her minor child. Although Federal Rule of Civil Procedure 17(c) does permit a case to be brought on behalf of a minor by either a guardian ad litem or next friend, a non-attorney parent cannot litigate in federal court on behalf of a minor child without licensed counsel. See Myers v. Loudoun Cty. Pub. Sch., 418 F.3d 395, 401 (4th Cir. 2005) ("We therefore join the vast majority of our sister circuits in holding that non-attorney parents generally may not litigate the claims of their minor children in federal court.") (citing cases). Thus, Plaintiff Asr, as a pro se litigant, may not bring this action on behalf of her minor child because she is not a licensed attorney. Id. at 400 (explaining that "[t]he right to litigate for oneself . . . does not create a coordinate right to litigate for others").

176 F.3d 776, 784 (4th Cir. 1999). The essential elements of fraud that must be plead with particularity are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co., 418 S.E.2d 648, 658 (N.C. 1992). Plaintiff's Complaint falls well short of meeting any of these elements. At most, Plaintiff Asr appears to allege that Defendants advocated a position with which Plaintiff Asr disagreed. She does not allege Defendants made any false statement, much less that any such false statements resulted in damage to Plaintiff Ars or her minor child.

Second, there does not appear to be any recognized claim for "false pretense" under North Carolina law. To the extent Plaintiff intends to assert a civil claim based on the criminal offense of obtaining property by false pretenses, that claim must fail because (1) Plaintiff does not allege that Defendants made any false statement, and (2) Plaintiff does not allege that Defendants obtained any property as a result of any false statement. Cf. N.C. GEN. STAT. § 14-100 (obtaining property by false pretenses).

Finally, Plaintiff's claim for conspiracy also fails for two reasons. First, "North Carolina does not recognize an independent cause of action for civil conspiracy." USA Trouser, S.A. de C.V. v. Williams, 812 S.E.2d 373, 380 (N.C. Ct. App.), review denied, 817 S.E.2d 199 (N.C. 2018). A civil conspiracy claim must be based on an adequately pled underlying claim. Id. Here, Plaintiff's underlying claims are that Defendants conspired to commit the acts of fraud and false pretense against Plaintiff. However, the Court has already found that Plaintiff has not stated cognizable claims for either fraud or false pretense. That is, Plaintiff has failed to allege facts regarding the existence of any agreement between Defendants, Plaintiff's litigation attorney, and or the state court judge to steal Plaintiff's money, as required when asserting a

claim for civil conspiracy. See Henderson v. LeBauer, 101 N.C. App. 255, 261, 399 S.E.2d 142, 145 (1991). Plaintiff also has not alleged that Defendants' actions caused Plaintiff damages. Under North Carolina law, a civil conspiracy is an action "for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone." Henderson, 101 N.C. App. at 260, 399 S.E.2d at 145 (citation omitted). Plaintiff has not alleged that she has suffered any damages, as Plaintiff terminated Defendants' representation when the parties disagreed over details of the Special Needs Trust.

In sum, even if this Court had subject matter jurisdiction, this action would be subject to dismissal on the alternative ground that Plaintiff has failed to state a claim for which relief may be granted against Defendants.

IV. CONCLUSION

For the reasons stated herein, Plaintiff's action is dismissed.

IT IS, THEREFORE, ORDERED that:

(1) Defendants' Motion to Dismiss, (Doc. No. 9), is **GRANTED**, and this matter is dismissed with prejudice.

(4) The Clerk is directed to terminate this action.

Signed: October 29, 2020

Max O. Cogburn Jr
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:20-cv-141-MOC-DCK

LEILA NASSER ASR, Individually and as parent of minor Child DM,	)	
Plaintiff,	)	
vs.	)	
DANIEL R. HANSEN, et al.,	)	**ORDER**
Defendants.	)	

THIS MATTER comes before the Court on a Motion to Dismiss by Defendant Daniel R. Hansen, (Doc. No. 9), and on a Motion to Dismiss by Defendants Kindercare Education, LLC and Kindercare Learning Centers, LLC, (Doc. No. 10).

I. BACKGROUND

Pro se Plaintiff Leila Nasser Asr, individually as the parent of minor child DM, commenced this action on March 6, 2020, naming as Defendants Daniel R. Hansen, Kindercare Education, LLC, and Kindercare Learning Centers, LLC. This action arises from a dispute over a personal injury settlement involving Plaintiff Asr's minor child in a prior lawsuit in North Carolina state court. Mogharrebi vs. KinderCare Educ., LLC, Civil Action 17-CVS-11996.

The previous North Carolina lawsuit, filed on June 28, 2017, was captioned Darab Mogharrebi, a Minor, by and through his Guardian ad Litem, Shahriar Mogharrebi and Shahriar Mogharrebi and Leila Nasser-Asr v. Kimberly Franklin, [and the KinderCare Defendants], 17-CVS-11996 (the "First Lawsuit"). The First Lawsuit was litigated for approximately two years, ending when the KinderCare defendants served an Offer of Judgment for $3,050,000, which the

plaintiffs in that lawsuit accepted (the "Acceptance") on May 8, 2019. The Acceptance was filed June 6, 2019.

Under North Carolina law, acceptance of the Offer of Judgment had to be approved by a Superior Court Judge as it involved claims of a minor, as well as the minor's parents. Accordingly, on June 19, 2019, after an extensive hearing in which Plaintiff Nasser-Asr and her husband Shahriar Mogharrebi acknowledged their approval of the settlement and acceptance of the Offer of Judgment, the Honorable Karen Eady-Williams entered an Order Approving Settlement and Acceptance of Offer of Judgment for Minor Child (the "Order of Approval"). The Order of Approval disposed of all claims in the First Lawsuit. Complying with the Order of Approval, the KinderCare Defendants satisfied the Judgment, as shown by the July 29, 2019, Satisfaction of Judgment (the "Satisfaction of Judgment").

Plaintiff Nasser-Asr now initiates this litigation on behalf of herself and her minor child, despite accepting the Offer of Judgment and the KinderCare Defendants' satisfaction thereof. Although Plaintiff's specific legal claims are not clear, significantly she claims that she is not satisfied with the $3,050,000 judgment and that the Offer of Judgment was not in her child's best interest.

Defendants filed the pending motions to dismiss on April 17, 2020. On April 20, 2020, the Court ordered Plaintiff to respond, advising Plaintiff that "failure to respond may result in Defendants being granted the relief that they seek." (Doc. No. 11). Despite seeking and obtaining extensions of time, Plaintiff has not responded to the motions to dismiss, and the time to do so has passed. Thus, the matter is ripe for disposition.

II. FACTS UNDERLYING THE FIRST LAWSUIT

According to the First Lawsuit Complaint, DM attended day care at KinderCare's Park

Road facility in Charlotte, North Carolina. (Def. Ex. A at ¶ 14). The First Lawsuit Complaint alleges that on July 14, 2014, when DM was three years old, a teacher at the Park Road facility grabbed DM, dragged him, and threw him against a wall, where his head hit a shelf. (Id. at ¶¶ 18 & 22). According to the Complaint, DM suffered a traumatic brain injury from being thrown. (Id. at ¶ 19). The plaintiffs in the First Lawsuit were DM's mother Nasser-Asr, DM's father Shahriar Mogharrebi, and Shahriar Mogharrebi, as guardian ad litem for DM. They hired Chuck Monnett as their legal counsel.

The KinderCare Defendants hired the law firm Shumaker, Loop & Kendrick, LLP, who made their appearance on August 4, 2017. Defendant Hansen was one of the Shumaker attorneys who worked on the case. As noted earlier, the KinderCare Defendants submitted a $3,050,000 Offer of Judgment. But at the same time, the KinderCare Defendants also indicated through the mediator, Ray Owens, that they would pay $3,500,000 ($450,000 more) if the First Lawsuit plaintiffs would sign a confidentiality agreement. (Def. Ex. F, pp. 5–6). The plaintiffs in the First Lawsuit chose the lesser amount so that they would not be bound by a confidentiality agreement. Consequently, the plaintiffs in the First Lawsuit served written notice of the Acceptance of Offer of Judgment. Hearings took place June 6 and 12, 2019, to determine whether to approve the Acceptance of Offer of Judgment. At both hearings, the plaintiffs were represented by two separate attorneys: Mr. Monnett, and an attorney from the Kincaid & Associates law firm. See (Def. Ex. F, pp. 2, 5–6).

At the June 12 hearing, a court-certified interpreter who spoke the plaintiffs' native language was also present in case there might be trouble communicating. (Def. Ex. G, p. 15). The First Lawsuit plaintiffs rarely asked for the interpreter's help, preferring to address the court in English. Many of the fraud, discrimination, and collusion claims in this lawsuit arose from the

two June hearings in the First Lawsuit. Since it had been stated at both hearings that the First Lawsuit plaintiffs had some "divergence of opinions about how the case should be handled" with Mr. Monnett, the trial court was careful to ensure that Nasser-Asr and Mogharrebi both understood what was going on and that they voluntarily consented to the Acceptance and the Order Approving Minor Settlement. The following exchanges were typical:

> **THE COURT**: So you feel like you've [sic] being forced to take the settlement? Your attorney, Mr. Monnett, told you you had no choice? Is that what you're saying?
> **MS. NASSER-ASR**: No. He said this is the best thing I can get out of it.
> **MR. MOGHARREBI**: Option. Yeah, yeah. Best option we have. Yeah.
> **MS. NASSER-ASR**: And I accept it because I have lots of friend [sic] here.

(Def. Ex. G, p. 31).

> **THE COURT**: But with where you stand now, are you satisfied with this outcome for your child?
> **MS. NASSER-ASR**: Yeah. I have—I'm out of choice. And as you say, it's a possibility I'm going to get this [a poor result at trial], so I accept it, yes.

(Id., p. 32).

> **THE COURT**: So are you not satisfied with this outcome?
> **MR. MOGHARREBI**: Which one?
> **THE COURT**: The settlement that's in the best interest of the child?
> **MR. MOGHARREBI**: I'm not talking about the settlement, Your Honor. Stop. I'm not talking about settlement. I'm talking about the way Mr. Monnett handled to invest in the settlement. We want—
> **THE COURT**: But you do agree that all would reach a resolution that's in the best interest of your child.
> **MR. MOGHARREBI**: Yes.
> **THE COURT**: You agree with that, right?
> **MR. MOGHARREBI**: Yes. I accept offer of judgment. Yes. Because Mr. Monnett said that's the best thing you are going to have. Yes, we accept that. Yes. Yeah. We accept that.
> **THE COURT**: And like I told your wife or explained to your wife, you do agree that going to trial is a risk? You understand that?
> **MR. MOGHARREBI**: Yes. Yes. We accept that after Mr. Monnett talk to us. Yes. And we saw some shortfall from the Mr. Monnett office, so for that he is—we accept that.

(Id. at pp. 42–43).

During the hearing, the main point of contention was not whether to accept KinderCare's Offer of Judgment and enter the Order Approving Settlement. Rather, it was how the settlement money would be invested and where it would go once KinderCare paid it. Further, at the June 12 hearing, the parties went over the language in the Order Approving Settlement. During that discussion, it was clear that the Offer of Judgment was not just to end the minor's claims in exchange for the $3,050,000, it was also to end the parents' individual claims:

> **MR. MECKLER**: ... And that would be my only change to this order [approving minor's settlement]—is that paragraph H talks about the individual claims of the parents. It would just need to say dismissed with prejudice.
> **THE COURT**: H or 8?
> **MR. MECKLER**: H, page 6. Because the offer of judgment is to all the parties. ...
> **MR. HANSEN**: Add with prejudice.
> **THE COURT**: With prejudice.
> **MR. MECKLER**: I think that was the intent. It's just not included.
> **THE COURT**: And it needs to be added with prejudice.
> **MR. MECKLER**: Yes.
> **THE COURT**: Okay. I'm fine with the outcome. I want to go ahead and move forward with the offer of judgment being approved, which is essentially an order approving this settlement for the minor child at $3,050,000.

(Def. Ex. G, pp. 49–50).

To comply with the court's Order, the KinderCare Defendants paid the $3,050,000, and Mr. Monnett filed the Satisfaction of Judgment. (Def. Ex. E). Eight months later, Plaintiff Nasser-Asr filed this action, in which she purports to bring claims, on behalf of her minor child, against Defendants for "conspiracy, fraud, violating human right by racial discrimination and harassment, and violating the human right of having a fair trial," and for "conspiracy, falsifying and violating human right by racial discrimination and harassment." Plaintiff alleges that on July 14, 2014, on two separate occasions, "defendant attempted to murder a three-year-old child because the child's parents were originally from the Middle East. Defendant committed this crime while the child was under their care." (Doc. No. 1 at 6). Plaintiff alleges that Defendants

"joined together fraudulently and conspiratorially to systematically bully, harass, and discriminate [against] plaintiff in the wors[t] inhuman[e] and cruel ways": Defendants "prevent[ed] [Plaintiff] from learning the truth every step of the case" and intimated and interrogated "Plaintiff many times during the discovery and mediation about her origin country Iran"; Defendants "collaborated in conspiracy with plaintiff's litigation attorney to violate plaintiff's right for having a fair trial"; and Defendants "intentionally collaborated in conspiracy with the judge and plaintiff's litigation attorney to make false statements/documents in order to prevent the justice, suppress his criminal action, eliminate plaintiff from the order approving the settlement, and violate plaintiff's rights because she is from the Middle East." (Doc. No. 1 at 6–7). Plaintiff contends that Defendants collaborated with the judge and Plaintiff's attorney in the First Lawsuit to essentially force Plaintiff to accept a settlement that she did not want. See (Doc. No. 1 at 8). As relief, Plaintiff seeks compensatory, treble, and punitive damages.

III. STANDARD OF REVIEW

Defendants move to dismiss this action, in part, under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 12(b)(6) provides that a motion may be dismissed for failure to state a claim upon which relief can be granted. A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint without resolving contests of fact or the merits of a claim. Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992), cert. denied, 510 U.S. 828 (1993). Thus, the Rule 12(b)(6) inquiry is limited to determining if the allegations constitute "a short and plain statement of the claim showing the pleader is entitled to relief" pursuant to Federal Rule of Civil Procedure 8(a)(2). To survive a defendant's motion to dismiss, factual allegations in the complaint must be sufficient to "raise a right to relief above a speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Thus, a complaint

will survive if it contains "enough facts to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570).

For the purposes of a Rule 12(b)(6) analysis, a claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Twombly, 550 U.S. at 556). The Court must draw all reasonable factual inferences in favor of the plaintiff. Priority Auto Grp., Inc. v. Ford Motor Co., 757 F.3d 137, 139 (4th Cir. 2014). In a Rule 12(b)(6) analysis, the Court must separate facts from legal conclusions, as mere conclusions are not entitled to a presumption of truth. Iqbal, 556 U.S. at 678. Importantly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. However, well-pleaded factual allegations are entitled to a presumption of truth, and the court should determine whether the allegations plausibly give rise to an entitlement to relief. Id. at 679.

"When considering a motion to dismiss involving pro se parties, the court construes the pleadings liberally to ensure that valid claims do not fail merely for lack of legal specificity." Brown v. Charlotte Rentals LLC, No. 3:15-cv-0043-FDW-DCK, 2015 WL 4557368, at *2 (W.D.N.C. July 28, 2015) (citing Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978)). At the same time, however, the Court should not "assume the role of advocate for the pro se plaintiff." Gordon, 574 F.2d at 1151 (quotation omitted).

IV. DISCUSSION

A. Res Judicata As to Plaintiff's Claims Against the KinderCare Defendants and Mr. Hansen.

In support of the motions to dismiss, Defendants first contend that this action is barred by res judicata. For the following reasons, the Court agrees.

A federal court sitting in diversity generally applies the relevant state substantive law and federal procedural law. Erie R.R. v. Tompkins, 304 U.S. 64, 58 (1938). In determining the preclusive effect of a state-court judgment, the federal courts must, as a matter of full faith and credit, apply the forum state's law of res judicata and collateral estoppel. See Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481–82 (1982); St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973) (applying North Carolina law in a diversity case involving res judicata).

"Under the doctrine of res judicata or 'claim preclusion', a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." Whiteacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15 (2004) (citation omitted). "For res judicata to apply, a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both [the party asserting res judicata and the party against whom res judicata is asserted] were either parties or stand in privity with parties." State ex rel. Tucker v. Frinzi, 344 N.C. 411, 413–14 (1996) (alternation in original). "The doctrine prevents the relitigation of 'all matters . . . that were or should have been adjudicated in the prior action.'" Whiteacre P'ship, 358 N.C. at 15 (quoting Thomas M. McInnis & Assocs. v. Hall, 318 N.C. 421, 428 (1986)).

An important res judicata principle is that it "bars every ground of recovery or defense which was actually presented or which could have been presented in the previous action." Goins v. Cone Mills Corp., 90 N.C. App. 90, 93 (1988). A final judgment "operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination."

Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 22 (1985). In sum, a party may not reopen the subject of litigation that might have been brought forward in the previous proceeding. Id. at 23. With respect to Mr. Hansen, as the defense counsel for the KinderCare Defendants, he is considered their privy. "If a non-party who thus participates in litigation has an interest sufficiently close to the matter in litigation," then both the non-party and opponent are bound by that judgment under the principles of res judicata. Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp., 380 F. Supp. 976, 980 (M.D.N.C. 1974). A non-party who has the legal right, interest, or duty dependent wholly or in part on the cause of action before the court is considered a privy for the purposes of res judicata. Id. Notably, a fiduciary relationship between a party and non-party is a basis for applying res judicata. See Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 593–94(1974). As the KinderCare Defendants' attorney in the First Lawsuit, Mr. Hansen owed KinderCare fiduciary duties. Moreover, he owed legal and ethical duties to KinderCare that arose from his representation. Thus, Mr. Hansen was KinderCare's privy and enjoys the same res judicata protection as KinderCare.

The First Lawsuit was a personal-injury action by a minor child whose parents also brought individual claims arising from the child's injury. Plaintiff's present Complaint alleges collusion, discrimination, and a list of other conclusory bad acts against Mr. Hansen and the KinderCare Defendants that started from the date of the minor child's injury in July 2014, continued to the filing of the First Lawsuit in 2017, and even beyond that for another two years, until Plaintiffs accepted the Offer of Judgment. If those allegations were true, then the causes of action in the current action should have been brought in the First Lawsuit.

Similarly, if the bad acts occurred throughout the two years of litigating the First Lawsuit—as alleged in the current Complaint—then the plaintiffs in the First Lawsuit should

have moved to amend the First Lawsuit complaint and add their current discrimination/collusion claims or otherwise sought relief in the First Lawsuit. Plaintiff Nasser-Asr's failure to bring her current claims in the First Lawsuit bars Plaintiff now from pursuing them in this Court. In sum, Plaintiff Nasser-Asr is not allowed to relitigate the same personal-injury claims that she received a favorable judgment on in the First Lawsuit.

B. Collateral Estoppel as to all Claims against the KinderCare Defendants.

Under the collateral-estoppel doctrine, or issue preclusion, "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." State ex rel. Tucker v. Frinzi, 344 N.C. 411, 414 (1996). A party asserting collateral estoppel is required to show that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to the issue actually litigated and necessary to the judgment, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with the parties. Id. The same principles of "privity" explained above also apply to the collateral-estoppel doctrine.

Here, in addition to being barred by res judicata, Plaintiff is barred by collateral-estoppel as to the KinderCare Defendants. First, the Acceptance of the Offer of Judgment by the plaintiffs in the First Lawsuit and its prompt satisfaction constitute a final judgment on the merits. Second, the actual issue litigated in the First Lawsuit was whether the minor child, DM, and his parents were injured as a result of the alleged abuse incident on July 14, 2014. Further, the civil procedure concerning how the First Lawsuit was conducted was obviously "necessary to the judgment," as the judgment's legitimacy would depend in part on whether the First Lawsuit was conducted in accordance with the appropriate civil rules. Thus, there is identity of the actual

issue litigated and items necessary to the First Lawsuit judgment that are now being relitigated in this action.

Third, there is an identity of parties or their privies between the First Lawsuit and this one. In the First Lawsuit both the minor child, DM, and Leila Nasser-Asr were plaintiffs. They are plaintiffs again in this lawsuit. In the First Lawsuit, the KinderCare Defendants were defendants, just as they are now in this lawsuit. Accordingly, all collateral estoppel elements are met, and Plaintiff is barred from seeking to relitigate the injury and procedures of the First Lawsuit.

In sum, this action will be dismissed as barred by res judicata and collateral estoppel principles.

C. Nasser-Asr's Standing to Bring Claims on Behalf of Her Minor Child.

Dismissal is also appropriate because Plaintiff Nasser-Asr does not have standing to bring this action on behalf of her minor child. "It is fundamental to civil practice that minors are not competent to sue or be sued without appointment of a guardian ad litem." Queen v. Minn. Life. Ins. Co., No. 3:09cv383-DCK, 2010 WL 249326, at *1 (W.D.N.C. Jan. 21, 2010). Federal Rule of Civil Procedure 17(c) provides that certain specified representatives "may sue . . . on behalf of a minor" or, if the minor "does not have a duly appointed representative," he or she "may sue by a next friend or guardian ad litem." FED. R. CIV. P. 17(c). "In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State . . . they must appear by general or testamentary guardian . . . or if there is no such known guardian, then such persons may appear by guardian ad litem." See N.C. R. CIV. P. 17(b). "It has long been the law of North Carolina that a next friend or guardian ad litem cannot step forward and assume on his own the authority to prosecute the infant plaintiff's suit;

rather, his authority is based on appointment by the court." Genesco, Inc. v. Cone Mills Corp., 604 F.2d 281, 285–86 (4th Cir. 1979). "[E]ven the parent or other natural guardian of the infant cannot step forward as a self-appointed guardian ad litem." Id. at 286. "Although a parent may initiate an action in North Carolina on behalf of a minor, the parent can do so only with court approval." J.W. v. Johnson Cty. Bd. of Educ., No. 5:11-CV-707, 2012 WL 4425439, at *6 (E.D.N.C. Sept. 24, 2012). Moreover, the Fourth Circuit has held that a non-attorney parent of a minor child may not represent the interests of that child in litigation. Myers v. Loudoun Cty. Public Sch., 418 F.3d 395, 401 (4th Cir. 2005). Here, since Plaintiff Nasser-Asr does not allege that she is the minor child's guardian ad litem or has otherwise received judicial approval, she does not have standing to bring this case on her son's behalf. Thus, dismissal is alternatively appropriate on this basis.

D. Plaintiffs' Acceptance of the Offer of Judgment Waived, Released, and Extinguished Plaintiffs' Claims against the Kindercare Defendants.

Finally, the Court finds that dismissal is also appropriate because the plaintiffs in the Fist Lawsuit accepted the KinderCare Defendants' Offer of Judgment, and the KinderCare Defendants satisfied that judgment. A plaintiff's acceptance of an offer of judgment precludes the plaintiff from later initiating a related action against the same defendant in any court of competent jurisdiction. Kutsmeda v. Informed Escrow, Inc., No. 3:06CV082, 2016 WL 1720696, at *2 (E.D. Va. June 22, 2006). "Many courts have recognized that the acceptance of a Rule 68 offer of judgment effectively operates as a settlement and release of all claims against the defendant." See, e.g., Delta Air Lines, Inc. v. August, 450 U.S. 346, 350, 363 (1981). Further, a plaintiff's acceptance of defendant's Rule 68(a) offer of judgment precludes recovery beyond the amount ordered. Estate of Wells By and Through Morley v. Toms, 129 N.C. App.

413, 417 (1998).

Even if the Offer and Acceptance of Judgment in this case does not constitute a settlement and release, the satisfaction of judgment in the prior lawsuit bars and extinguishes any subsequent causes of action. Simpson v. Plyler, 258 N.C. 390, 395–96 (1963). Entry and satisfaction of a judgment pursuant to Rule 68(a) of the North Carolina Rules of Civil Procedure discharges all tortfeasors from liability to the claimant. See Akins v. Mission St. Joseph's Health Sys. Inc., 193 N.C. App. 214, 219–20 (2008) (where an entry of judgment was entered and a defendant filed a satisfaction of judgment, the court held that not only did the satisfaction of judgment extinguish all claims against the primary defendant, the hospital, but also its agent, a doctor). Here, the plaintiffs' acceptance of the Offer of Judgment in the First Lawsuit, their confirmation that the process was fair, and the fact that they accepted the Offer of Judgment and dismissal with prejudice after having an opportunity to be heard in open court together waive and extinguish all claims alleged by Plaintiff Nasser-Asr in the Complaint in this action. For this additional reason, the Court dismisses this action.

V. CONCLUSION

For the reasons stated herein, Plaintiff's action is dismissed.[1]

IT IS, THEREFORE, ORDERED that:

(1) Defendants' Motions to Dismiss, (Doc. Nos. 9, 10), are **GRANTED**, and this matter is dismissed with prejudice.

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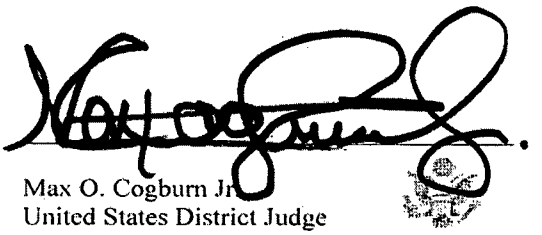
[1] Defendants also contend that dismissal is appropriate because the Kindercare Defendants were not properly served and because Plaintiff's Complaint, which alleges vague claims of human rights violations, does not state a cognizable claim. Because the Court finds that dismissal is appropriate for the other reasons stated in this decision, the Court does not address Defendants' alternative grounds for dismissal.

(4) The Clerk is directed to terminate this action.

Signed: November 21, 2020



Max O. Cogburn Jr
United States District Judge