PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2376

AFFINITY LIVING GROUP, LLC; CHARLES E. TREFZGER, JR.,

Plaintiffs – Appellants,

v.

STARSTONE SPECIALTY INSURANCE COMPANY,

Defendant – Appellee,

and

HOMELAND INSURANCE COMPANY OF NEW YORK,

Defendant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:18-cv-00035-CCE-JEP)

Argued: January 30, 2020 Decided: May 26, 2020

Before KING, HARRIS, and RICHARDSON, Circuit Judges.

Vacated and remanded by published opinion. Judge Richardson wrote the opinion, in which Judge Harris joined. Judge King wrote a dissenting opinion.

ARGUED: Carl Abbott Salisbury, BRAMNICK, RODRIGUEZ, GRABAS, ARNOLD & MANGAN, LLC, Scotch Plains, New Jersey, for Appellants. David L. Brown, GOLDBERG SEGALLA LLP, Greensboro, North Carolina, for Appellee. **ON BRIEF:**

Thomas W. Waldrep, Jr., Francisco T. Morales, WALDREP LLP, Winston-Salem, North Carolina, for Appellants. Martha P. Brown, GOLDBERG SEGALLA LLP, Greensboro, North Carolina, for Appellee.

RICHARDSON, Circuit Judge:

Affinity Living Group, LLC and Charles E. Trefzger, Jr. (collectively, "Affinity") were sued for allegedly submitting Medicaid reimbursement claims for services that they never provided. Affinity then sought coverage for the suit under its insurance policy with StarStone Specialty Insurance Company. StarStone denied coverage because the lawsuit's claims did not fall within the policy's coverage for "damages resulting from a claim arising out of a medical incident." J.A. 110. Affinity sued. Agreeing with StarStone that the policy did not cover the lawsuit, the district court granted judgment on the pleadings against Affinity on a declaratory-judgment claim and a breach-of-contract claim. After Affinity then stipulated to the dismissal of its extra-contractual claims, it sought to appeal.

Looking first to our own jurisdiction, we find that Affinity properly appeals from a "final" decision. Turning to the merits, we apply North Carolina law to hold that the allegations in the underlying complaint fall within the insurance policy's coverage provision. We thus vacate the district court's order and remand for further proceedings.

I. Background

In 2016, Stephen Gugenheim filed a false-claims-act action against Affinity as an operator of adult care homes.[1] In a false-claims-act suit, a private party brings an action on the government's behalf and that party may receive a share of the recovery if successful. *ACLU v. Holder*, 673 F.3d 245, 248 (4th Cir. 2011). Gugenheim alleged that Affinity

[1] An "adult care home" is an assisted living residence under North Carolina Law. N.C. Gen. Stat. § 131D-2.1(3). Affinity manages eighty of these facilities.

submitted reimbursement claims for resident services that were never provided. Because those allegedly false claims were submitted to the government as part of the Medicaid program, he alleged Affinity's actions violated the federal False Claims Act, 31 U.S.C. § 3729, and the North Carolina False Claims Act, N.C. Gen. Stat. § 1-605.

Affinity sought coverage for the false-claims-act suit under a policy issued by StarStone.[2] That policy provided indemnification and defense against certain claims. StarStone denied Affinity's request for coverage, so Affinity sued in federal court, bringing four claims. In Count 1, Affinity asked for a declaratory judgment that StarStone breached its coverage obligations. Based on the same theory, Count 2 was a breach of contract claim for StarStone's denial of coverage. In Counts 3 and 4, Affinity sought extra-contractual relief: Count 3 alleged a breach of the common law duty of good faith and fair dealing and Count 4 alleged a violation of North Carolina's Unfair and Deceptive Trade Practices Act.

On Counts 1 and 2, StarStone moved for judgment on the pleadings. And Affinity sought partial summary judgment on whether StarStone had a duty to defend Affinity in the false-claims-act suit. The district court granted StarStone's motion for judgment on the pleadings and denied Affinity's motion for partial summary judgment.

[2] While no longer at issue, Affinity also sought coverage under a policy issued by Homeland Insurance Company of New York. Homeland's policy served as "the first line of defense" while StarStone's policy operated as the "umbrella" policy that applied "if the Homeland policy [was] exhausted on, or [was] inapplicable to, a covered claim." J.A. 380–81. The district court held that Homeland's policy failed to provide coverage, and this appeal does not challenge that determination.

The district court determined that the insurance policy did not cover the false-claims-act suit, so it rejected Affinity's claim for a declaratory judgment (Count 1). And since the policy did not require coverage, the court held that StarStone did not breach its contract with Affinity by denying coverage (Count 2). But two claims remained against StarStone: Count 3 (duty of good faith and fair dealing) and Count 4 (North Carolina's Unfair and Deceptive Trade Practices Act).

Affinity stipulated with StarStone that Counts 3 and 4—the only remaining counts in the action—"are dismissed without prejudice." J.A. 398; *see* Fed. R. Civ. Pro. 41(a)(1)(A). The stipulation explained that any amendment to Counts 3 and 4 "cannot revive the claims in this case, in consequence of the Court's dismissal on summary judgment of Counts I and II, and this action has therefore been finally resolved on the merits." *Id.* Affinity now appeals the dismissal of Counts 1 and 2 against StarStone.

II. Appellate Jurisdiction

Although Affinity and StarStone urge this appeal properly lays before us, "we must assure ourselves of jurisdiction regardless of [the parties'] wishes." *Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC*, 938 F.3d 113, 122 (4th Cir. 2019). With few exceptions, we may review district court judgments only once they have become "final." 28 U.S.C. § 1291. But what constitutes a "final" decision under § 1291 has consistently confused litigants and courts alike.

Generally, a final decision disposes of all claims and "ends the litigation on the merits." *Catlin v. United States*, 324 U.S. 229, 233 (1945). So "orders that dispose of only some of the claims in the lawsuit typically are not final and appealable." *Sprint Nextel*

Corp., 938 F.3d at 122; *see also* Fed. R. Civ. P. 54(b). And since the district court dismissed only Counts 1 and 2 against StarStone—leaving Counts 3 and 4—the Parties faced a finality problem when planning this appeal. *See Williamson v. Stirling*, 912 F.3d 154, 169 (4th Cir. 2018).

Anticipating the finality issue, Affinity and StarStone stipulated to the dismissal of Counts 3 and 4 without prejudice. With all counts thus dismissed, the Parties contend an appealable final judgment exists. But this stipulation raises a separate concern about whether the Parties agreed to the "voluntary dismissal[] as a subterfuge to manufacture jurisdiction for reviewing [an] otherwise non-appealable, interlocutory order[]." *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 359 (4th Cir. 2013). This we cannot abide. So to solve one problem, StarStone and Affinity may have created another.

Just three years ago, the Supreme Court addressed this concern with manufacturing finality through a voluntary dismissal. In *Microsoft Corp. v. Baker*, 137 S.Ct. 1702, 1710 (2017), consumers brought a design-defect claim on behalf of a putative class. But the district court struck the plaintiffs' class allegations—thus functionally denying the class certification. The court's decision did not end the case because the individual claims remained. But the ability to seek damages on behalf of a class, rather than the individual claims, motivated the case. *Id.* at 1711, 1711 n.7. Class certification decisions are "'inherently interlocutory,'" not final under § 1291. *Id.* at 1706 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978)). So to create an appealable final order on the class certification question, the *Microsoft* plaintiffs voluntarily dismissed *all* their

claims while reserving the right to revive their dismissed claims if the order striking class allegations was reversed on appeal. Giving finality a "practical rather than technical construction," the Supreme Court found appellate jurisdiction lacking. *Id*. at 1712–13 (internal quotation marks and citation omitted). The plaintiffs could not "subvert[] the final-judgment rule" to obtain review of the order striking their class allegations by dismissing their legally viable claims. *Id.* at 1712. They had to first "pursue their individual claims on the merits to final judgment, at which point the denial of class-action certification becomes ripe for review." *Id.* at 1706. Permitting these plaintiffs to avoid the merits and obtain an immediate appeal of the class order would have improperly created piecemeal litigation and subverted, for plaintiffs alone, the established scheme for interlocutory class-certification appeals. *Id*. at 1712.

Similarly, in *Keena v. Groupon, Inc.*, 886 F.3d 360, 362−63 (4th Cir. 2018), our Court applied *Microsoft* and rejected a plaintiff's attempt to manufacture a final order. Keena sought to appeal an interlocutory order staying the action and compelling arbitration of her claims. *Id.* at 362; *cf. Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1414, 1414 n. 1–2 (2019) (finding that an order compelling arbitration but also *dismissing* the claims qualifies as a "final" decision). After the district court entered the order, Keena voluntarily dismissed her entire complaint. Even though Keena did so with prejudice, we held that the final-judgment rule would not tolerate that voluntary-dismissal tactic. Like the *Microsoft* plaintiffs, Keena had to have the merits of her claims addressed in arbitration before she could secure a final judgment to appeal the arbitration order. In finding jurisdiction lacking, we noted that Keena's tactic violated the "long-settled principle" that "'no appeal

lies from a judgment of voluntary nonsuit.'" *Keena*, 886 F.3d at 365 (quoting *Kelly v. Great Atlantic & Pacific Tea Co.*, 86 F.2d 296, 297 (4th Cir. 1936)); *see also Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 39 (1891); *United States v. Evans*, 9 U.S. (5 Cranch) 280, 281 (1809).[3]

At first glance, it might seem the Parties here defied *Microsoft* and *Keena*—Affinity voluntarily stipulated to dismissing Counts 3 and 4 to appeal the court's dismissal of Counts 1 and 2. And, as in *Microsoft*, Affinity plans to reinstate Counts 3 and 4 if we reverse the district court's dismissal of Counts 1 and 2.

Yet *Microsoft* and *Keena* are distinguishable based on the nature of the order sought to be appealed. In both those cases, the issues that the parties sought to appeal did not turn on the merits of the legal claims that they asserted. *See Princeton Digital Image Corp. v. Office Depot Inc.*, 913 F.3d 1342, 1348 (Fed. Cir. 2019) (noting that *Microsoft* "establishes that a voluntary dismissal does not constitute a final judgment where the district court's ruling has not foreclosed the plaintiff's ability to prove the required elements of the cause of action"). The issue in *Microsoft*—a ruling on class allegations—"in no way touch[ed] the merits" of the claims. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 482 (1978). And in *Keena*, the arbitration ruling dealt with the mode of dispute settlement, not the merits of the dispute. *Keena*, 886 F.3d at 362.

[3] Here, Affinity does not seek to appeal from its consensual dismissal of Counts 3 and 4. Affinity seeks only to appeal the district court's dismissal of Counts 1 and 2.

But here, success on Counts 1 and 2 is *necessary* for Affinity to prevail on the merits of Counts 3 and 4. Without a contractual duty to provide coverage, StarStone cannot breach the covenant of good faith and fair dealing. *See Tillis v. Calvine Cotton Mills, Inc.*, 111 S.E.2d 606, 610 (N.C. 1959); *Cordaro v. Harrington Bank, FSB*, 817 S.E.2d 247, 257 (N.C. Ct. App. 2018). The same is true under the North Carolina Unfair and Deceptive Trade Practices Act. *See Heron Bay Acquisition, LLC v. United Metal Finishing, Inc.*, 781 S.E.2d 889, 892 (N.C. Ct. App. 2016). So in rejecting Affinity's contractual claims (Counts 1 and 2), the district court—as a doctrinal matter—doomed Affinity's extra-contractual claims (Counts 3 and 4).[4]

In this context, the voluntary dismissal without prejudice of claims rendered legally deficient by the district court's prior ruling created a final judgment. The Parties' stipulation of dismissal explained that "any amendment to Counts III and IV . . . cannot revive the claims in this case in consequence of the Court's dismissal on summary judgment of Counts I and II, and this action has therefore been finally resolved on the merits." J.A. 398; *see Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1066–67 (4th Cir. 1993) (holding that dismissals without prejudice generally are not appealable unless the dismissal indicates that no amendment could cure the defect). In doing so, Affinity waived any right to later assert that Claims 3 and 4 can survive the district

[4] Because of this relationship between the contractual and extra-contractual claims, Affinity was unable to avail itself of certification under Rule 54(b) of the Federal Rules of Civil Procedure. *See Braswell Shipyards, Inc. v. Beazer East, Inc.*, 2 F.3d 1331, 1335–39 (4th Cir. 1993).

court's interpretation of the policy. *See In re GNC Corp.*, 789 F.3d 505, 511 n.3 (4th Cir. 2015).

So Affinity's case was not just practically over (as in *Microsoft*) but legally over—and no legal argument could permit success on Counts 3 and 4 after the rejection of Counts 1 and 2.[5] As a matter of law, the district court's order on Counts 1 and 2 meant that Affinity lacked an essential element of the claims in Counts 3 and 4. Neither *Microsoft* nor *Keena* prohibits parties from voluntarily dismissing legal claims that necessarily fail based on a district court's prior order. *See Sprint*, 938 F.3d at 124 n.5; *see also Princeton Digital Image Corp.*, 913 F.3d at 1349 ("[U]nless the district court has conclusively determined, including determined by consent, that the plaintiff has failed to satisfy a required element of the cause of action, a voluntar[y] dismissal lacks finality."). All of Affinity's claims were effectively disposed of and the litigation on the merits was unavoidably over in the district court. *See Catlin*, 324 U.S. at 233; *see also United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794−95 n.1 (1949) (permitting appeal from a dismissal without prejudice based on the court's denial of the "Government's motions for production of documents essential to prove the Government's case"). We thus find that the voluntary dismissal of Counts 3 and 4 based on the district court's order dismissing Counts 1 and 2 created a final, appealable order.

[5] Of course, we would have a different case if the district court had dismissed Counts 3 and 4, and the Parties voluntarily dismissed Counts 1 and 2. Because legal success on Counts 1 and 2 does not necessarily depend on Counts 3 and 4, we may well be suspicious that this scenario involves an end run around the final judgment rule. *Cf. West v. Louisville Gas & Elec. Co.*, 920 F.3d 499, 504–05 (7th Cir. 2019). But we do not address this circumstance today.

III. The Insurance Policy Coverage

Having confirmed our appellate jurisdiction, we now turn to the merits. We review de novo the district court's granting of StarStone's motion for judgment on the pleadings, assuming the facts alleged are true and drawing all reasonable factual inferences in favor of the non-moving party. *Burbach Broadcasting Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 405–06 (4th Cir. 2002). We also review de novo the denial of Affinity's motion for partial summary judgment. *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018). And we apply North Carolina law in interpreting the insurance policy de novo. *See Wells v. Liddy*, 186 F.3d 505, 521 (4th Cir. 1999); *Fortune Insurance Co. v. Owens*, 526 S.E.2d 463, 466 (N.C. 2000).

Affinity seeks insurance coverage for the false-claims-act suit filed against it.[6] That suit seeks damages for Medicaid claims that Affinity submitted for personal-care services for residents of Affinity's adult-care homes. Those claims, the false-claim-act complaint alleges, were false because Affinity failed to provide the residents with the claimed personal-care services.

[6] StarStone has a duty to defend "any suit for damages which are payable under this Policy." J.A. 197. This duty to defend, under North Carolina law, depends on the allegations in the complaint. *Pennsylvania National Mutual Casualty Insurance Co. v. Associated Scaffolders & Equipment Co.*, 579 S.E.2d 404, 407 (N.C. Ct. App. 2003). Here, the relevant pleading is the false-claim-act complaint. In North Carolina, "[w]hen the pleadings [in the underlying lawsuit] state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." *Ames v. Cont'l Cas Co.*, 340 S.E.2d 479, 486 (N.C. App. 1986).

StarStone's policy covers "damages resulting from a claim arising out of a medical incident." J.A. 187.[7] Affinity argues that the false-claims-act action is covered under this provision because its damages "aris[e] out of a medical incident." J.A. 187. A "[m]edical incident" is an "act, error or omission in [Affinity's] rendering or failure to render medical professional services [*i.e.*, 'the health care services or the treatment of a patient']." J.A. 205.[8] And the parties agree that rendering, or failing to render, personal-care services qualifies as a "medical incident."

But the false-claims-act complaint does not seek damages for rendering or failing to render the personal-care services. It instead seeks damages for submitting false Medicaid reimbursement claims for resident services that Affinity never provided. And StarStone rightly argues that billing Medicaid for reimbursement is not itself a "medical incident." Instead, medical incidents focus on providing services or treatment to a patient. J.A. 205. And they do not include submitting Medicaid reimbursement claims.[9]

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[7] While the policy includes bolded language (in this provision, bolding "damages," "claim," and "medical incident" to reflect that those words are defined elsewhere in the policy), we have omitted the emphasis throughout this opinion to improve readability.

[8] J.A. 205 ("Medical Incident means an alleged or actual act, error or omission in the insured's rendering or failure to render medical professional services. . . . Medical Professional Services mean the health care services or the treatment of a patient including medical, surgical, dental, nursing, psychiatric, osteopathic, chiropractic or other health care professional services; furnishing or dispensing of prescription drugs, blood, blood products, medical, surgical or dental supplies; furnishing of food or beverage in connection with such treatment; and the providing of counseling or social services in connection with such treatment of care. Medical professional services includes the insured's committee activities for accreditation, quality assurance, peer review, and standards review.").

[9] A "medical incident" is defined to include some administrative tasks—"committee activities for accreditation, quality assurance, peer review, and standards review," J.A. 205—but nothing that would include submitting reimbursement claims.

Even though seeking Medicaid reimbursement is not itself a "medical incident," Affinity argues that the Medicaid claims do "aris[e] out of" a medical incident. The policy does not itself define the phrase, "arising out of." And although we have encountered this phrase in other contexts, *see Keith v. Aldridge*, 900 F.2d 736, 740 (4th Cir. 1990) (claim preclusion); *Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*, 538 F.2d 1048, 1050 (4th Cir. 1976) (compulsory counterclaims), we must apply the law of North Carolina in interpreting the meaning of "arising out of" in StarStone's policy.

For insurance policy provisions, North Carolina courts interpret "arising out of" broadly to include only a causal connection when used in a provision *extending* coverage but interpret the phrase more narrowly to require proximate causation when used in a provision *excluding* coverage. *State Capital Insurance Co. v. Nationwide Mutual Insurance Co.*, 350 S.E.2d 66, 72 (N.C. 1986). In *State Capital*, the owner of a pick-up truck spotted a deer and reached into the back of his truck to retrieve his rifle. *Id*. at 67. In doing so, the rifle discharged, striking a passenger in the leg. *Id*. at 68. The driver held two insurance policies, an automobile policy and a homeowner's policy. *Id*. The automobile policy provided coverage for damages "arising out of the ownership, maintenance or use" of the truck. *Id*. In construing this policy, the court followed the rule that insurance policy provisions extending coverage "must be construed liberally, so as to provide coverage, whenever possible by reasonable construction." *Id.* at 68. Based on this rule, the court held that the phrase "arising out of" required only some causal connection between the use of the automobile and the accident, not that the use of the automobile was the proximate cause of the accident. *Id.* at 69. As the transport and unloading of firearms

is an ordinary use of a truck, the court held that an accidental discharge during that use was covered by the automobile policy. *Id.* at 70.

Having found coverage under the automobile policy, the court turned to the driver's homeowner's policy. That policy excluded damages "arising out of the ownership, maintenance, use, loading, and unloading" of a motor vehicle. *Id.* The insurance company argued that, if this same language ("arising out of") extended coverage in the automobile policy, then it must exclude coverage for the homeowner's policy. Not so. Applying its corollary rule of construction that requires the strict construction of terms limiting insurance coverage, the court held that "arising out of" required more than a mere causal connection; it required "proximate cause." *Id.* at 74. Given this narrow interpretation, the court determined that negligent mishandling of a rifle could constitute the proximate cause of the passenger's injury and so the homeowner's policy might also apply. *Id.*[10]

Applying the broad conception of "arising out of" for a policy provision extending coverage, the court in *City of Greenville v. Haywood*, 502 S.E.2d 430 (N.C. App. 1998), held that a police officer's sexual assault after an investigation concluded was a wrongful act "arising out of" the performance of law enforcement activities. *Id.* at 434–35. Giving a "liberal construction" to this policy provision that *extends* coverage, as the Supreme

[10] North Carolina courts are not alone in applying different rules of construction when interpreting insurance policy provisions that extend coverage and those that exclude coverage. *See Crossett Paper Mills Emps. Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 476 F.3d 578, 581 (8th Cir. 2007) ("[T]he Arkansas Supreme Court would construe the necessary 'arising out of the use' of an automobile causal connection in an *exclusion* of coverage situation *as narrowly as it construed this term broadly* in a coverage situation [, so] . . . only if the bodily injury's sole proximate cause is the use of an automobile will this exclusion apply and coverage be denied.").

Court of North Carolina had done in *State Capital*, the court held that the officer's sexual assault arose out of his law enforcement duties because "'but for'" his role as an officer, he "would not have had an opportunity to enter Ms. Haywood's home, conduct a partial investigation of the reported break-in, and later sexually assault her." *Id.* at 434. All that was required was a "causal nexus between [the officer's] law enforcement duties and the resultant unlawful conduct." *Id.*[11]

Here, the term "arising out of" falls within a provision extending coverage and so must be interpreted broadly to require only some "causal connection" between the conduct defined in the policy and the injury for which coverage is sought. *State Capital*, 350 S.E.2d at 69. There is no connection if the injury "was directly caused by some independent act or intervening cause wholly dissociated from, independent of, and remote from" the conduct defined in the policy. *Id.*

[11] More recently, the North Carolina Supreme Court found that an insurance policy provided no coverage for claims against a city police officer for sexual assault. *Young v. Great Am. Ins. Co. of N.Y.*, 602 S.E.2d 673, 674 (N.C. 2004) (adopting the dissent from the North Carolina Court of Appeals, 590 S.E.2d 4 (N.C. Ct. App. 2004) (Hunter, J., dissenting)). As in *Haywood*, the *Young* policy covered claims that "aris[e] out of the performance of the Insured's duties to provide law enforcement activities." 590 S.E.2d at 6 (internal quotation marks and citation omitted). But, unlike *Haywood*, the policy in *Young* went a step further, covering only claims for "wrongful acts," which were defined as "actual or alleged errors, misstatement or misleading statement, act or omission, or negligent act or breach of duty by an Insured while performing law enforcement duties." *Id*. The court relied on this narrow definition of "wrongful acts" to hold that the policy did not cover the assault. *Id*. at 8. And the court noted that the general liability policy also excluded coverage for the officer's intentional sexual assaults. *Id.*

StarStone's policy, like that in *Young*, enumerates coverage exclusions. And StarStone made various arguments below for why the lawsuit was excluded from coverage. Having resolved the threshold question that the lawsuit did not fall within the coverage provision, the district court declined to reach StarStone's alternative arguments against coverage. J.A. 391. And we do not reach those arguments now.

StarStone contends that billing for personal-care services is "wholly disassociated from, independent of, and remote from" the personal-care services. *Id.* Here, the false-claims-act complaint alleges that Affinity billed Medicaid for personal-care services that were not performed. This allegedly false billing does not arise in a vacuum. The personal-care-services billing is false, and thus gives rise to a claim for damages, because Affinity failed to provide the personal-care services to its residents. *See* J.A. 103. In other words, but for the failure to provide the services, no claim for damages exists.

The "failure to render" services is a covered "medical incident" under the policy. J.A. 205. And that alleged failure made the Medicaid claims false, giving rise to potential damages in the false-claims-act suit. So while the alleged false billing was not itself a "medical professional service," the failure to "render medical professional services" bears a causal relationship to the billing. J.A. 205.[12] Thus, under North Carolina's caselaw, the false-claims-act action falls within the coverage provision in the StarStone insurance policy.

[12] The Tenth Circuit has held that, under Colorado law, fraudulent Medicaid billing is not covered by a policy encompassing claims "caused by" a medical incident. *Zurich Am. Ins. Co. v. O'Hara Regional Ctr. for Rehabilitation*, 529 F.3d 916, 921–926, 919 n. 3, 5 (10th Cir. 2008). It did so only after adopting Colorado's narrow causation requirement between the injury and the covered activity. The Supreme Court of North Carolina adopts a much broader causal link for policy provisions extending coverage based on the phrase "arising out of." *Compare State Capital*, 350 S.E.2d at 69 ("arising out of" is "much broader" than "caused by" and is understood to mean "incident to" or "having connection with"), *with Zurich*, 529 F.3d at 925 (noting that the billing was "incidental" to operating the nursing home and thus the injury was not "caused by" medical services).

* * *

Affinity properly appealed the district court's order dismissing its contractual claims after voluntarily dismissing extra-contractual claims that were necessarily precluded by the order. And we agree with Affinity that the district court should not have rejected the contractual claims as it did. Applying North Carolina's precedents on interpreting insurance policies, we find that the false-claims-act action "arises out of" a medical incident as required to fall under the coverage provision of StarStone's policy. So we vacate the district court's order granting StarStone's motion for judgment on the pleadings and vacate the order denying Affinity's motion for partial summary judgment. We express no opinion on StarStone's alternative arguments that the district court did not consider. And we remand for further proceedings.

VACATED AND REMANDED

KING, Circuit Judge, dissenting:

I would dismiss this appeal for lack of appellate jurisdiction because the district court has not rendered a "final decision[]" within the meaning of 28 U.S.C. § 1291. The Supreme Court made clear in its 2017 *Microsoft Corp. v. Baker* decision that a party may not manufacture § 1291 final decision jurisdiction through a voluntary dismissal. *See* 137 S. Ct. 1702, 1706-07. Our Court faithfully applied that directive in *Keena v. Groupon, Inc.*, when we ruled that the appellant's voluntary dismissal of her claims in the district court could not "transform an otherwise interlocutory order into a § 1291 final decision." *See* 886 F.3d 360, 364 (4th Cir. 2018). Other federal courts of appeals have rendered similar jurisdictional decisions when a plaintiff has voluntarily dismissed a claim in an attempt to create appellate jurisdiction under § 1291. *See, e.g., Galaza v. Wolf*, 954 F.3d 1267, 1272 (9th Cir. 2020); *West v. Louisville Gas & Elec. Co.*, 920 F.3d 499, 504-06 (7th Cir. 2019); *Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495, 499-500 (5th Cir. 2004).

In these proceedings, Plaintiffs Affinity Living Group, LLC, and Charles E. Trefzger, Jr. (together, "Affinity"), along with Defendant StarStone Specialty Insurance Co., did precisely what *Baker* and *Keena* forbid. That is, they strove to make appealable under § 1291 an interlocutory order that resolved only half of Affinity's claims (the "contractual claims") by way of a stipulated voluntary dismissal of the balance of Affinity's claims (the "extra-contractual claims").[1] And the voluntary dismissal of the extra-

[1] Rule 41(a) of the Federal Rules of Civil Procedure governs the voluntary dismissal of an "action." Under that rule, the parties stipulated to the voluntary dismissal of the extra-contractual claims alleged against StarStone. *See* Fed. R. Civ. P. 41(a)(1)(A)(ii) (providing

contractual claims was without prejudice, potentially permitting Affinity to revive those claims after testing the appellate waters for the contractual claims. Notably, the language of the stipulated voluntary dismissal demonstrates that the purpose thereof is to manufacture appellate jurisdiction under § 1291.

In seeking to concoct § 1291 final decision jurisdiction, the parties attempt to perform an end run around the procedural rules governing their circumstances — just as in *Baker* (where the plaintiff sought to avoid Rule 23(f) of the Federal Rules of Civil Procedure) and as in *Keena* (where the plaintiff sought to avoid 9 U.S.C. § 16(b)). For example, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, Affinity could have sought the entry of final judgment on the contractual claims — even if the probability of prevailing on that request was low — and then appealed if successful. *See West*, 920 F.3d at 506. In the alternative, Affinity could have pursued an interlocutory appeal from the district court's ruling on the contractual claims, pursuant to 28 U.S.C. § 1292(b). *Id.* Affinity did neither.[2] Instead, Affinity — along with StarStone — endeavored to contrive

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for stipulated voluntary dismissals). By accepting the stipulated dismissal as effective, my good colleagues in the majority must assume that Rule 41(a) can be utilized to dismiss specific claims against one defendant — as opposed to an entire lawsuit. Without staking my dissent on the issue, I simply observe that some of our sister circuits disagree. *See Perry v. Schumacher Grp. of La.*, 891 F.3d 954, 958 (11th Cir. 2018); *Berthold Types Ltd. v. Adobe Sys., Inc.*, 242 F.3d 772, 777 (7th Cir. 2001); *Philip Carey Mfg. Co. v. Taylor*, 286 F.2d 782, 785 (6th Cir. 1961).

[2] Affinity might also have asked for reconsideration of the district court's judgment on the contractual claims and identified the overlapping nature of the extra-contractual claims with the resolved contractual claims. Or Affinity could have moved for leave to amend its complaint to withdraw the extra-contractual claims after the district court entered judgment on the contractual claims. Another possibility: after noticing this appeal,

finality under § 1291 through voluntary dismissal. *Id.* (criticizing an appellant for his efforts "to fabricate a final judgment" and "circumvent section 1291").

Although the panel majority's jurisdictional ruling may very well be motivated by pragmatism, today's decision further complicates the already complex topic of federal appellate jurisdiction. As I see it, the majority conjures up an immaterial and somewhat confusing distinction between this matter, on the one hand, and the *Baker* and *Keena* cases, on the other. At bottom, I believe that the precedents of the Supreme Court and this Court require us to discourage litigants from manufacturing § 1291 appellate jurisdiction by way of voluntary dismissals. Because I would dismiss this appeal based on those precedents, I respectfully dissent.

Affinity might have asked the district court to help it cure the jurisdictional problem. *See Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) (explaining that, after the filing of a notice of appeal, a federal district court is divested of jurisdiction to rule on matters related to the appeal unless such rulings "aid[] the appellate process").