

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Case No. 2013-CP-10-00444

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R. Markley Dennis, Jr., Circuit Court Judge

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Appellate Case No. 2013-001933

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Jeremy Greene,

Appellant,

v.

Medical University of South Carolina,

Respondent.

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**INITIAL BRIEF OF APPELLANT**

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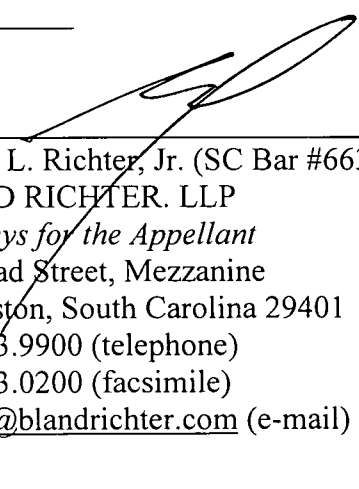
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## QUESTION PRESENTED

Did the trial court err in dismissing through 12(b)(6) a complaint which embraces important and novel issues regarding the availability of kidney transplants to the citizens of South Carolina?

## STATEMENT OF THE CASE

The Appellant commenced this action through the filing of a Summons and Complaint on January 24, 2013. The Complaint alleged in essence that the Appellant was wrongfully discharged from the kidney transplant program which is administered by the Medical University of South Carolina (hereinafter referred to as "MUSC" or "Respondent") and that as a result of his discharge from the program, he has been forced to seek the same services at considerable additional expense outside of the State of South Carolina. The Complaint alleged two causes of action: breach of contract and defamation.

On March 19, 2013, the Respondent moved for dismissal pursuant to South Carolina Rule of Civil Procedure 12(b)(6), asserting that the Appellant could not maintain a cause of action for breach of contract to provide medical services and that the defamation claim is barred by the doctrine of privilege.

On August 13, 2013, the Honorable R. Markley Dennis granted the Respondent's motion as it relates to the breach of contract claim. The parties subsequently stipulated to the dismissal with prejudice of the defamation claim, thereby making the lower court ruling a final disposition of all remaining claims. Appellant filed his Notice of Appeal on September 10, 2013.

## ARGUMENT

The Trial Court erred in failing to recognize Appellant's right to prosecute a breach of contract action resulting from the Respondent's summary suspension of the Appellant from the kidney transplant program. The Trial Court further failed to appreciate the important and novel public policy reasons which should have prevented dismissal of this action.

a. Standard of Review

When reviewing the dismissal of an action pursuant to Rule 12(b)(6) SCRPC, this court applies the same standard of review as the trial court. Doe v. Marion, 373 S.C. 390, 395. 645 S.E.2d 245, 247 (2007). “In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.” Id. Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible therefrom, when viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. Id. The court should not dismiss the complaint merely because it doubts the plaintiff will prevail in the action. Id.

b. The Appellant’s Complaint

In reviewing the Appellant’s Complaint and in providing him the benefit of all reasonable inferences derived from his Complaint, it is important first to review the Complaint to ascertain precisely what he has alleged, as well as what he has not alleged. First, the Appellant is a citizen of South Carolina. Complaint, para. 7. He was originally accepted into the kidney transplant program at MUSC in 1994 and eventually received a kidney transplant in 1999. Complaint, paras. 9, 11. The Appellant remained a compliant patient of the transplant program after 1999. Complaint paras. 14, 15. In fact, the Appellant was so successful in the care of his kidney that the transplanted kidney which had an expected life of 4 to 7 years actually lasted for 12 years. Complaint, paras. 12, 16.

In 2010, the Appellant’s transplanted kidney finally began to fail. Complaint, para. 17. On February 2, 2011, the Appellant was summarily dismissed from the MUSC kidney transplant program via letter which alleged that his dismissal was as a result of a “history of severe noncompliance.” Complaint, para. 23. The letter afforded no explanation and no opportunity to cure any alleged non-compliance. Complaint, paras. 23, 24. The Appellant was forced to seek

transplant services outside of the State of South Carolina and was later accepted into the Mayo Clinic program in Jacksonville, Florida. Complaint, paras. 26, 27. The result will be dramatically increased costs associated with being forced to participate in the transplant program long distance, including increased cost of travel, time and lodging. Complaint, para. 28.

The Complaint never uses the phrase “standard of care.” The Complaint never refers to a deviation from the standard of care. The Complaint never alleges or embraces traditional tort concepts of proximate cause and harm. To the contrary, the Complaint alleges simply that the Appellant was a compliant patient of the kidney transplant program, that there was no basis for his dismissal from the program, and that as a result of the wrongful decision to terminate him from the program, he will be forced to secure the same services at considerable additional expense elsewhere.

As it relates to the program which is administered by MUSC, the Complaint also alleges that MUSC accepts patients, like the Appellant, into its program by application. Complaint, paras 5, 6. Inferentially, the Complaint speaks to the enormous power and responsibility which is vested with MUSC through the administration of its kidney transplant program. The power is quite literally life and death for patients requiring kidney transplants. Despite being vested with this power, MUSC does not provide its patients with any written policies, nor with any explanation of their rights. Complaint, para. 10. Therefore, MUSC feels it is empowered to summarily suspend its patients with no right to cure and no real explanation for the reasons associated with its decisions. In the present action, MUSC wielded its power in such a manner as to force a South Carolina resident who lives within an hour of its hospital to travel to and from Jacksonville, Florida to receive the same services which should be available to him here.

c. Banks v. Medical University of South Carolina

In moving for dismissal, the Respondent relied solely on Banks v. Medical University of South Carolina, 314 S.C. 376, 444 S.E.2d 519 (1994), for the proposition that South Carolina

does not recognize a cause of action for breach of an implied contract to provide adequate medical services. Banks is distinguishable here. Banks arose out of the death on an eight-year-old patient who was rushed to MUSC with respiratory distress and later died during surgery from a pulmonary emboli. Id., at. 520. In the wrongful death tort action that followed, the child's mother also brought causes of action for battery, deprivation of liberty interests and breach of contract. Id. The trial court granted summary judgment as to several causes of action, including breach of contract.

In upholding the summary judgment, it is abundantly clear that the Court properly viewed the Banks Complaint as sounding essentially in negligence. In point of fact, the primary cause of action was wrongful death. In reviewing the same conduct that formed the basis of a negligence cause of action, the Court properly refused to recognize an action for "breach of implied contract arising from an alleged failure to provide **adequate** medical treatment." Id. [Emphasis Added]. While not articulated in the opinion, in the context of a wrongful death action, the Court obviously construed the allegation that MUSC had not provided "adequate medical treatment" synonymously with an allegation that it had deviated from the appropriate standard of care. This is the clear and distinguishable feature of the present action. There is no complaint as to the "adequacy" of care. To the contrary, the Complaint simply alleges that a contractual relationship existed, that the Respondent breached the contract, and that the Appellant will be forced now to seek the same services elsewhere at significantly higher cost. All of these allegations were to be accepted as true for purposes of the motion to dismiss.

The Banks Court did not hold that it is impossible to sue a medical provider in contract, nor does there exist any bar at law to a medical provider entering into a contract or being sued for its breach, even if the contract embraces medical services. By analogy, a patient could contract with his or her physician to be provided with "concierge" medical care. Under the plan of care, the physician would contract to provide all medical care and services required by the

patient, including diagnostic and radiographic testing, for a fixed fee. If the physician later refused to provide the services and the patient were required to go elsewhere to locate the same services at greater cost, the cause of action would lie in contract, not in tort. This is precisely the circumstance that now presents itself.

Beyond mere concierge medical services, the Complaint in the present action introduces far more serious issues with great public policy underpinning. MUSC is the administrator of the kidney transplant program in South Carolina. It alone decides who will participate in the program, who will not participate and who will be rejected mid-stream. Its policies and procedures provide for no notice of alleged deficiencies by the patients which may result in their suspension from the program and no right of appeal from its decisions. Presumably, the Respondent would be so bold as to suggest to this Court that it likewise lacks the power of review for its life and death decision making. In the end, a South Carolina citizen who had been a participant in the MUSC kidney transplant program since 1994 was summarily told with a single letter that he has been discharged from the program. Fortunately, the Appellant was able to replace the same services in the State of Florida, but at significantly higher financial cost. The law affords the Appellant with the right to seek compensation for those additional costs.

#### CONCLUSION

Unlike the Banks plaintiff, the Appellant here makes no complaint at to the “adequacy” of the care he was provided while a patient of the MUSC kidney transplant program. To the contrary, the Appellant complains that he was wrongfully discharged from the program and that he will incur significant additional expense in securing the same services elsewhere. The Appellant’s cause of action sounds in contract, not tort. The Trial Court erred in relying on Banks to find that there can be no breach of implied contract cause of action against a medical provider under any circumstances. The stakes are particularly high in the present action because public policy should provide for a review of the life and death power that is entrusted to MUSC

through the administration of its kidney transplant program and a review of the decision to force a South Carolina resident to locate life-saving treatment in Florida that should have remained available to him in his own back yard.

Respectfully submitted,



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