THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Case No. 2013-CP-10-00444

The Honorable R. Markley Dennis
Circuit Court Judge

Appellate Case No. 2013-001933

Jeremy Greene,

Appellant,

v.

Medical University of South Carolina,

Respondent.

Initial Brief of Respondent Medical University of South Carolina

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STATEMENT OF THE ISSUE PRESENTED ON APPEAL

The Respondent Medical University of South Carolina would restate the issue presented on appeal as:

Did the Trial Court properly dismiss the breach of contract cause of action because the allegations that MUSC wrongfully terminated the Patient from the kidney transplant program sounds in medical malpractice, not in breach of contract?

Or as otherwise stated,

Did the Trial Court properly dismiss the breach of contract cause of action because the complaint fails to allege facts to establish an obligation, enforceable in contract, by MUSC to provide the Plaintiff Patient with a kidney transplant?

STATEMENT OF THE CASE

This is an appeal from the dismissal of a breach of contract cause of action brought by a former MUSC patient based on the allegation that he was terminated from the kidney transplant program. As alleged in the complaint, the Plaintiff, Jeremy Greene, first became a patient at MUSC in 1994, when he received treatment for renal failure and eventually he received a successful kidney transplant in 1999, but in February 2010, when it appeared that the Patient might need a second transplant, MUSC terminated him from the kidney transplant program. The Plaintiff was accepted into another kidney transplant program in Florida, and he does not allege his discharge from the program caused any medical injury. However, the Patient filed this action on January 24, 2013,

asserting a cause of action for breach of contract and defamation[1] and seeking damages for the increased time and expense of travel to and from the program in Jacksonville, Florida. [ROA ___; Complaint.]

The Defendant, MUSC, filed a Rule 12(b)(6) motion to dismiss, and an answer on March 20, 2013, denying that there was any contract and asserting privilege as to the defamation action as well as other defenses including immunity under the Tort Claims Act. [ROA __, ___; Motion to Dismiss, Answer.]

The motion came for hearing before the Honorable R. Markley Dennis, on August 8, 2013. [ROA ___; Hearing Transcript.] The Trial Court issued an order dismissing the breach of contract action, but denying the motion as to the defamation action. [ROA ___; Order, filed August 13, 2013.] The defamation action has been dismissed with prejudice. [ROA ___; Stipulation of Dismissal, September 26, 2013.]

The Plaintiff timely served his Notice of Appeal.

STATEMENT OF THE FACTS

Since the breach of contract action was dismissed on a Rule 12(b)(6) motion, the facts as alleged in the Complaint are accepted as true, but only for the purposes of this motion.

MUSC provides treatment to patients suffering from renal conditions, including kidney transplants. Prospective patients seeking kidney transplants must submit applications to the MUSC kidney transplant program. If accepted into the program, MUSC tracks the patients' kidney functions, maintains the patients on dialysis, and profiles the patients for an appropriate donor match. [ROA ___; Complaint ¶4-6.] Since

[1] The Plaintiff alleged that the publication in his medical record of a history of severe non-compliance was false and caused his termination from the transplant program. [ROA ___; Complaint ¶38-42.]

the Plaintiff lives in Summerville, the MUSC program is "the safest and most convenient transplant program available to the Plaintiff." [ROA ___; Complaint ¶7.]

In May 1994, the Plaintiff began dialysis under the supervision of MUSC, and he began the application process to receive a kidney transplant. [ROA ___; Complaint ¶9.] Five years later, in 1999, the Plaintiff underwent a successful transplant of a cadaver kidney at MUSC. [ROA ___; Complaint ¶ 11.] After the transplant, he remained a patient at MUSC in the kidney transplant program and received care and monitoring of his transplanted kidney. [ROA ___; Complaint ¶ 14.]

At the time of the transplant in 1999, it was anticipated that with proper care the transplant kidney could last from 4 to 7 years, before the Plaintiff might need another transplant. The Plaintiff's kidney ultimately lasted for 12 years before failing to the point where a subsequent kidney transplant became necessary. [ROA ___; Complaint ¶ 16.]

In June 2010, when the Plaintiff's kidney began to fail, the Plaintiff was suffering from extremely high blood pressure and other conditions which became life threatening. After consultation with MUSC physicians, the Plaintiff traveled to Boston in late 2010 for care for his renal condition, after which he returned to South Carolina in better health. [ROA ___; Complaint ¶¶19-22.]

On February 2, 2011, the Plaintiff received a letter from the MUSC Transplant Center informing the Plaintiff that he would not "be placed on the MUSC kidney transplant list" because of his alleged "history of severe noncompliance." [ROA ___; Complaint ¶ 23.] The letter did not offer any explanation of the alleged non-compliance, and the Plaintiff had not been offered any explanation as of the filing of the complaint. [ROA ___; Complaint ¶24.]

The Plaintiff applied to the Mayo Clinic in Jacksonville, Florida, and was accepted into its transplant program. [ROA ___; Complaint ¶ 27.]

ARGUMENT

Standard of Review ~ Motion to Dismiss

A Rule 12(b)(6) motion to dismiss a cause of action challenges the legal sufficiency of the pleading. 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. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). All properly stated allegations and reasonable inferences therefrom must be deemed true. Gressette v. S. Carolina Elec. & Gas Co., 370 S.C. 377, 378, 635 S.E.2d 538 (2006). If the plaintiff fails to plead facts to support each of the elements of the cause of action, it should be dismissed. In reviewing the dismissal pursuant to Rule 12(b)(6), the appellate court applies the same standard of review as the trial court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001).

Pleading Breach of Contract ~ Indefiniteness as to Essential Terms of Contract

Any action for breach of contract is predicated on the existence of a contract. Therefore, the complaint must contain allegations establishing a valid contract. Tidewater Supply Co. v. Indus. Elec. Co., 253 S.C. 483, 485, 171 S.E.2d 607, 608 (1969). "[I]n alleging a breach of contract, the plaintiff's pleadings must allege facts sufficient to indicate the terms of the contract claimed to have been breached." 17B C.J.S. *Contracts* § 872 (citing to Tidewater.).

Conclusory allegations that a contract exists are not sufficient. Jones v. Gilstrap, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986)("the allegations regarding breach of contract clearly are conclusory only and are therefore demurrable"). "[I]t is

essential in setting forth a breach of contract, either that the substance of the instrument be averred in the pleading, or that the contract itself be set forth. 61A Am.Jur.2d Pleading Section 92 (1981)." *Id.*

A cause of action for breach of contract will be dismissed where there is a failure to allege the terms of the contract with sufficient certainty. Kentucky Ref. Co. v. Saluda Oil Mill Co., 70 S.C. 89, 48 S.E. 987, 988-89 (1904). "In an action for damages arising *ex contractu* it is essential that the contract be stated correctly, and with certainty." *Id.*

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) "In general, a binding contract requires a manifestation of mutual assent to its terms. Terms such as price, time, and place are indispensable to a binding contract and must be set out with reasonable certainty. Where a contract fails to fix a price, there must be a definite method for ascertaining it." Consignment Sales, LLC v. Tucker Oil Co., 391 S.C. 266, 271, 705 S.E.2d 73, 76 (Ct. App. 2010)(citations omitted). "In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation." W.E. Gilbert & Associates v. S. Carolina Nat. Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985).

"The requirement of certainty in contracts ensures that the parties intend to conclude a binding agreement and provides the court a reasonably certain basis for granting a remedy." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct. App. 1998)(citations omitted). If an agreement does not contain the material, essential terms, the court cannot support the omitted terms and the

contract will be unenforceable for indefiniteness. Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995)(citations omitted); Lindsay v. Lindsay, 328 S.C. 329, 337-38, 491 S.E.2d 583, 588 (Ct. App. 1997)

"The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound." Restatement (Second) of Contracts § 33 (1981).

> Definiteness as to material matters is of the very essence of contract law, and impenetrable vagueness and uncertainty will not do. In order to be enforceable, a contract must be sufficiently definite as to its "material terms," which include, e.g., subject matter, price, payment terms, quantity, duration, compensation, and the dates of delivery and production, so that the promises and performance to be rendered by each party are reasonably certain. Vagueness or indefiniteness as to an essential term of an agreement prevents the creation of an enforceable contract because the contract must be definite as to the parties' basic commitments and obligations. Thus, if a contract omits a term or is too vague with respect to the essential terms, the contract may be invalid.

17A Am. Jur. 2d *Contracts* § 190 (footnotes omitted).

Contract Actions against Healthcare Providers

In regards to contract actions against healthcare providers, our Court has held that a patient may recover for breach of an express pre-treatment warranty for a particular result. Burns v. Wannamaker, 281 S.C. 352, 355, 315 S.E.2d 179, 181 (Ct. App. 1984) aff'd as modified, 288 S.C. 398, 343 S.E.2d 27 (1986)(dentist gave and breached express pretreatment warranty as to manufacture and fit of dentures purchased from him by patient). However, the Court has declined to recognize a cause of action for breach of implied contract arising from an alleged failure to provide adequate medical treatment. Any such allegation "sounds tort, not in contract; therefore, [the patient's] remedy is an action for malpractice, not breach of contract." Banks v. Med. Univ. of S. Carolina, 314 S.C. 376, 379-80, 444 S.E.2d 519, 521 (1994)(citation omitted.)

THE PLAINTIFF PATIENT DID NOT PLEAD SUFFICIENT FACTS TO ESTABLISH A BREACH OF CONTRACT CLAIM AGAINST MUSC FOR DISCHARGING HIM FROM THE KIDNEY TRANSPLANT PROGRAM.

A. The Patient's complaint does not allege sufficient facts to establish an independent, enforceable contract with the Defendant Hospital apart from the ordinary tort-based patient-healthcare provider relationship.

In this case, the Plaintiff alleges that his action is brought pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 et seq. [ROA ___; Complaint ¶3.] However, the Plaintiff is not alleging any deviation from a medical standard of care and he has not alleged any damage to his medical condition. In fact, the Patient affirmatively disavows any potential medical malpractice, negligence-based cause of action. [ROA ___; Transcript, p. 4, ll. 24-25 – "This is not a medical malpractice action."] As the Plaintiff Patient maintains in his brief, he never uses the terms "standard of care" and he has not alleged any traditional tort concepts of proximate cause and harm -- "There is no complaint as to the 'adequacy' of care." Appellant's Brief, p. 7. Rather, the Plaintiff Patient contends his complaint "simply" alleges that a contractual relationship existed and that MUSC breached that contract which is sufficient to state a claim under Banks v. MUSC, supra.

While the legal standard requires that well-pled allegations in a complaint be accepted as true on a motion to dismiss, the Plaintiff Patient's conclusory allegations amounting to legal conclusions do not have to be accepted as true. The allegations of the Plaintiff's complaint are not sufficient to state a cause of action for breach of contract because they do not establish an enforceable contract existed between MUSC and the Plaintiff Patient apart from the usual healthcare provider – patient relationship.

In the Complaint, the Plaintiff alleges that "the Plaintiff and Defendnant were in a contractual relationship in which the Defendant was contractually bound to provide

medical care and services to the Plaintiff, including specifically providing him with a kidney transplant should his condition require it." [ROA ___; Complaint ¶ 30.] To the extent that there was any contractual relationship between MUSC and the Plaintiff Patient -- by the Plaintiff's own allegation – it arose from and related to medical services. And, the Court has held that "the tort of medical malpractice fully covers all acts performed in relation to medical services" – including the termination of those services. Melton v. Medtronic, Inc., 389 S.C. 641, 654, 698 S.E.2d 886, 893 (Ct. App. 2010)(quoting from Linog v. Yampolsky, 376 S.C. 182, 656 S.E.2d 355, 358 (2008)).

Plaintiff Patient proposes a hypothetical in which he argues that a breach of contract claim could be founded on a contract for "concierge" medical care with a physician for a fixed fee if the physician refused to provide the agreed upon services and the patient were required to go elsewhere at a higher cost. Appellant's Brief, p. 8. He argues that his claim presents the same circumstances. However, the Plaintiff has not alleged any such comparable contract whereby MUSC agreed to provide him with comprehensive kidney treatment for a fixed fee. In fact, by the affirmative allegations of the complaint, the alleged contract is void for indefiniteness.

The Plaintiff Patient alleges that he was summarily and wrongfully discharged from the kidney transplant program administered by MUSC and argues that he is entitled to prosecute a breach of contract because the discharge letter afforded no explanation of how they determined he was noncompliant and MUSC did not give him any opportunity to cure any alleged non-compliance. Appellant Brief, p. 4-5. However, the Plaintiff Patient affirmatively alleges that when he was accepted into the kidney transplant program: "MUSC did not have or did not provide to the Plaintiff a written policy setting forth with specificity what was required of the Plaintiff in order to remain in the program

and/or what the Plaintiff's rights were in the event that he allegedly deviated from any program requirement." [ROA ___; Complaint ¶ 10.]

The Defendant MUSC denies that acceptance into the kidney program created a contractual obligation to provide the Patient with a transplant should his condition require it. The reality of the transplant process is medically and administratively complicated, but most simply the transplant center evaluates the transplant candidate and makes a medical decision of whether/when to place the patient on the national patient waiting list, but UNOS makes the ultimate medical decision of whether a patient receives a donor kidney. See generally http://www.unos.org. Thus, if any such contractual obligation could be created, it would be dependent on medical questions as to whether his condition required a transplant and thus, any complaints of breach would be one outside of contract remedies under Banks v. MUSC.

As a general rule, there is no legal duty imposed on a hospital to admit or treat a person seeking medical care except in certain situations as may be covered by the Federal Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C.A. § 1395dd (West). Concomitantly, a healthcare provider who undertakes treatment may terminate the relationship upon reasonable notice to allow the patient to arrange for alternative care. Melton, 389 S.C., 654; 61 Am. Jur. 2d *Physicians, Surgeons, Etc.* § 216.

As the Court held in Melton v. Medtronic, Inc., 698 S.E.2d at 892, claims for medical abandonment are properly analyzed under the traditional medical malpractice framework.

> "[O]nce employed, a physician must attend the case as long as it requires attention, unless the relation of physician and patient is ended by mutual consent or is revoked by the dismissal of the physician. A physician cannot abandon a case without reasonable notice to the patient." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 56, 677 S.E.2d 32,

37 (Ct.App.2009) (citing *Johnston v. Ward,* 288 S.C. 603, 610, 344 S.E.2d 166, 170 (1986)).

Ultimately, if a patient sues a healthcare provider based on conduct that is related to a medical treatment or involves medical judgment, the claim sounds in medical malpractice. *See also* Boone v. William W. Backus Hosp., 272 Conn. 551, 562-63, 864 A.2d 1, 12 (2005) (claim sounds in medical malpractice if the alleged wrongful conduct is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment). Here, MUSC is sued in its capacity as a healthcare provider, the Plaintiff was a Patient receiving treatment, and the question of whether the Patient was noncompliant and whether/when he would need a kidney transplant involved a medical judgment and any complaint about that medical judgment sounds in medical malpractice, not contract.

Even if, for the sake of argument, acceptance into the kidney transplant program created a "contract," it is void for indefiniteness as to any terms for terminating the medical treatment. The Plaintiff Patient cannot predicate a breach where, by the Plaintiff's own allegation, the "contract" did not have any terms or conditions relating to MUSC's rights to terminate the Patient from the program or the Patient's rights to an explanation or opportunity to cure. Accordingly, the Trial Court properly dismissed the breach of contract cause of action.

B. The Plaintiff Patient cannot state a contractual claim on public policy arguments.

While the Plaintiff Patient argues that he adequately pled a breach of contract claim in his complaint, he has posed his question on appeal as "an important and novel issue regarding the availability of kidney transplants to the citizens of South Carolina."

Throughout his brief, the Plaintiff makes a zealous, dogmatic argument about the "enormous power and responsibility" MUSC has over life and death:

> [T]he 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. ... 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 hours of its hospital to travel to and from Jacksonville, Florida to receive the same services which should be available to him here.

Appellant's Brief, p. 6. He argues that his complaint introduces "far more serious issues with great public policy underpinning," and contends that "public policy should provide for a review of the life and death power that is entrusted to MUSC." Appellant's Brief, p. 8. Despite the Plaintiff's fervent rhetoric, this civil action is not about public policy. His complaint alleges breach of contract and any alleged failure by MUSC to provide policies or explain patient's rights does not state a claim for breach of contract where there is no allegation that the contract included any terms obligating MUSC to do so.

CONCLUSION

The complaint fails to allege facts to establish an obligation, enforceable in contract, by MUSC to provide the Plaintiff Patient with a kidney transplant. The allegation that MUSC wrongfully terminated the Patient from the kidney transplant program sounds in medical malpractice, not in breach of contract; yet, the Plaintiff Patient affirmatively maintains that he has no allegations of malpractice. Accordingly, the Trial Court properly dismissed the breach of contract cause of action.

WHEREFORE, based on the foregoing, the Respondent Medical University of South Carolina respectfully submits that the order of dismissal should be affirmed.

Respectfully submitted,

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December 13, 2013

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Certificate of Service

I certify that on this 13th day of December, 2013, a copy of the foregoing Initial Brief was served on Appellant by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to his Counsel of Record of as listed below:

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