

STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON

Frank Busterna, on behalf of himself and all  
others similarly situated,

Plaintiff,

v.

AnMed Health, a South Carolina Corporation,  
and DOES 1 through 25, inclusive

Defendants.

IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

RECEIVED

C/A NO. 2012-CP-04-02321

AUG 22 2014

SC Court of Appeals

ORDER OF DISMISSAL  
AND AMENDING CAPTION

A TRUE COPY

AUG - 5 2014

*Richard M. Kelly*  
CLERK OF COURT

This matter came before me for a hearing on three motions. First, Plaintiff moved to sever this case from Stanfield v. AnMed Health, 2004-CP-04-3017. This case, however, has never been and is not now consolidated with the Stanfield case or any other case. Accordingly, Plaintiff's motion to sever is denied.

Second, AnMed Health (Defendant) moved to strike "DOES 1 through 25" as defendants. Plaintiff consented to this motion at the hearing and, therefore, Defendant's motion to strike is granted. The caption of this case is hereby amended accordingly such that that AnMed Health is the only defendant.

Third, Defendant moved to dismiss Plaintiff's complaint under Rule 12(b)(1) and (6), SCRCF. That motion is granted and the complaint is dismissed with prejudice for the reasons set forth below and for the reasons presented by Defendant.

Dismissal of a complaint is appropriate when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action. Williams v. Condon, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct. App. 2001). In considering a motion to dismiss, this court

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*# 1 of 6*

focuses solely upon the allegations in the complaint. *Id.* The well pleaded facts in the complaint are assumed to be true and are binding upon the court, but any conclusions of law drawn by the plaintiff are not binding on this court. Jensen v. S.C. Dep't of Soc. Servs., 297 S.C. 323, 326, 377 S.E.2d 102, 104 (Ct. App. 1987).<sup>1</sup>

Plaintiff's complaint sets forth three causes of action. The first two claims are actions at law for breach of contract and breach of the implied covenant of good faith and fair dealing. The third claim is an action in equity for unjust enrichment or quantum meruit. Each claim fails to state a cause of action under South Carolina law.<sup>2</sup>

As to his breach of contract claim, Plaintiff alleges the following operative facts: (1) he presented himself for treatment at the hospital emergency room operated by Defendant; (2) he had no health insurance coverage and he entered a contract with Defendant to pay Defendant's "Hospital charges"; (3) he received treatment at Defendant's hospital and was released; (4) he thereafter received a bill from Defendant for the services rendered to Plaintiff; and (5) the contract between Plaintiff and Defendant does not have a set price or any method for setting the price. In short, Plaintiff alleges that he entered a contract with Defendant that has no price term. (See Complaint at ¶ 15, alleging that the contract between Plaintiff and Defendant contained "open pricing terms ... which are neither fixed, certain, nor capable of being made so.")<sup>3</sup>

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<sup>1</sup> Plaintiff attached documents to his memorandum in opposition to Defendant's motion to dismiss. At times during the hearing, Plaintiff referred to factual matters outside the four corners of the complaint, including the documents attached to his memorandum in opposition. Defendant objected to all attachments to Plaintiff's memorandum, and all arguments based on such documents, because the facts in this case are established solely by the facts alleged in the Complaint. Such matters have not been considered by me in ruling upon the motion to dismiss – any consideration of such matters would convert the motion to dismiss into a motion for summary judgment. See Rule 12(b), SCRPC. The dismissal of the complaint is based solely on the matters alleged in the complaint.

<sup>2</sup> In the prayer for relief, Plaintiff's complaint also seeks an injunction against Defendant but does not set forth any separate cause of action for an injunction. Plaintiff's claim for an injunction fails as a matter of law, because the three claims in his complaint fail to state a cause of action under South Carolina law.

<sup>3</sup> At the hearing, Plaintiff specifically disavowed any intent to allege that the parties' contract was for the payment of Defendant's Charge Master prices, and he affirmatively stated that his only allegation regarding the contract price

It is axiomatic under South Carolina law that price is an essential term for an enforceable contract. Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009); McPeters v. Yeargin Constr. Co., 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986). It is equally axiomatic that South Carolina courts cannot and will not supply a missing essential term such as price and, therefore, when a contract states no price and does not set forth a method for determining the price, there is no contract between the parties. Ellis v. Taylor, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994); McPeters, 290 S.C. at 331, 350 S.E.2d at 211; see also Edens v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978); Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 434, 322 S.E.2d 474, 477 (Ct. App. 1984). Since Plaintiff alleges the parties' contract has no price term, there is no contract between the parties and, therefore, Plaintiff's breach of contract claim is dismissed for failure to state a cause of action.<sup>4</sup>

As to Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, it is axiomatic under South Carolina law that this implied covenant exists only if there is a contract between the parties. Here, there is no contract between the parties and, therefore, there can be no breach of the implied covenant. Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 340-41, 574 S.E.2d 502, 513 (Ct. App. 2002); Williams v. Riedman, 339 S.C. 251, 274, 529 S.E.2d 28, 40 (Ct. App. 2000). Accordingly, Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is dismissed for failure to state a cause of action.

Plaintiff's last claim is for unjust enrichment, a claim properly referred to as quantum meruit. Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8 n.10, 532 S.E.2d 868, 872

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was that the contract had an open price term with no set price and no method for determining the price, *i.e.*, that the parties' contract did not have a price term.

<sup>4</sup> Plaintiff cites S.C. Code Ann. § 36-2-305 as authority for this court to supply the missing price term. Reliance on this Article 2 provision of the Uniform Commercial Code is misplaced, because Article 2 does not apply to services or goods provided by healthcare providers during the course of medical treatment. In re: Breast Implant Product Liability Litigation, 331 S.C. 540, 552, 553, 503 S.E.2d 445, 451-52 (1998).

n.10 (2000). A plaintiff seeking quantum meruit relief must allege and prove three essential elements: “(1) [a] benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.” Myrtle Beach Hosp. v. City of Myrtle Beach, 341 S.C. 1, 8, 581 S.E.2d 868, 872 (2000); accord Gignilliat v. Gignilliat, Savitz & Bettis, LLP, 385 S.C. 452, 467, 684 S.E.2d 756, 764 (2009). Each of these elements must be shown for a plaintiff to have a quantum meruit or unjust enrichment claim. Sauner v. South Carolina Public Serv. Auth., 354 S.C. 397, 409, 581 S.E.2d 161, 167-68 (2003). Here, Plaintiff does not allege that he conferred a benefit upon Defendant, that Defendant realized that benefit, or that he is entitled to payment from Defendant for any conferred benefit. Thus, Plaintiff’s claim for unjust enrichment is dismissed for failure to state a cause of action. See Myrtle Beach Hosp., 341 S.C. at 9-10, 532 S.E.2d at 873 (rejecting plaintiff’s quantum meruit claim because there was no evidence defendant received and retained any benefit conferred by plaintiff).

The gravamen of Plaintiff’s complaint, which underlies all of his claims, is that Defendant has a duty to charge “reasonable prices,” and Defendant breached this duty by charging “unreasonable prices.” Duty under the law comes from one of four sources: the Constitution, statutes (including regulations promulgated under statutory authority), contracts, and the common law. Plaintiff’s complaint does not make any constitutional or statutory claims and, as held above, there is no contract between the parties.<sup>5</sup> Thus, the alleged duty to charge “reasonable prices” must come from the common law. There is no such duty under the common law and, therefore, Plaintiff’s complaint fails to state a cause of action.

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<sup>5</sup> As noted earlier, Plaintiff mistakenly relies on the UCC as statutory authority for this court to set the price in this case. See n.4, *supra*.

Under the common law of South Carolina, the "right of an owner of property to fix the price at which he will sell is an inherent attribute of the property itself." Rogers-Kent, Inc. v. General Elec. Co., 231 S.C. 636, 645, 99 S.E.2d 665, 668 (1957). "[O]ne's ownership of property consists not only of [the owner's] right to possess it, but also of his right to use it as he pleases, to sell it at his own price, and to give it away if he wishes to do so." Gwynette v. Myers, 237 S.C. 17, 24, 115 S.E.2d 673, 676 (1960). Accordingly, there is no duty under South Carolina's common law to charge a "reasonable price" and, therefore, Plaintiff's complaint fails to state a cause of action.<sup>6</sup>

Any attempt by this court to set prices for Defendant's hospital services and products would violate the South Carolina Constitution, because price regulation is a legislative function that cannot be performed by the courts. The regulation of business in our free enterprise system is a legislative function. Board of Bank Control v. Thomason, 236 S.C. 158, 165-66, 113 S.E.2d 544, 547 (1960). In particular, price regulation or price setting, like one of its subsets, rate-making, is exclusively a legislative function. The impropriety of judicial price setting or rate-making has been settled in South Carolina for decades. Southern Bell Tel. & Tel. v. S.C. Pub. Serv. Comm'n, 270 S.C. 590, 597, 244 S.E.2d 278, 282 (1978) (disclaiming both "the expertise [and] the authority" to "fix a rate of return" for public utilities); Berry v. Lindsay, 256 S.C. 282, 290, 182 S.E.2d 78, 82 (1971) (holding "ratemaking is not a judicial function . . . but is a legislative one, whether exercised by the legislature directly or by an administrative body under delegated authority . . ."). Thus, this court does not have the power to set Defendant's hospital prices.

The fact that the General Assembly has chosen not to regulate prices in a particular business or industry does not allow a court to step in and set prices because, under the South

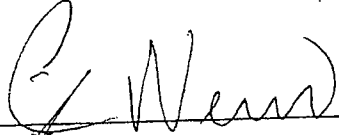
<sup>6</sup> If the common law required "reasonable" prices, courts would have the power to supply missing price terms or change existing price terms in contracts. Courts clearly cannot do so under South Carolina law. See n.4 and accompanying text, *supra*. Accordingly, the common law does impose a duty of "reasonable" pricing.

Carolina Constitution, such legislative functions rest solely and only with the General Assembly. Edwards v. State, 383 S.C. 82, 90, 678 S.E.2d 412, 416 (2009) (holding powers of each branch of government are separate and distinct and powers of one branch cannot be exercised by another branch). Moreover, Plaintiff's complaint seeks to set Defendant's prices based on some ratio of the reduced reimbursement rates paid by Medicare and private insurance companies. The General Assembly has repeatedly refused to require hospitals like Defendant to give uninsured patients like Plaintiff the benefit of those reduced reimbursement rates. See, King v. AnMed (In re: Hospital Pricing Litig.), 377 S.C. 48, 55-58, 659 S.E.2d 131, 135-36 (2008). This court cannot use the common law to impose a remedy that the General Assembly has declined to provide. Dantzler v. Callison, 230 S.C. 75, 97, 94 S.E.2d 177, 189 (1956); South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

### CONCLUSION

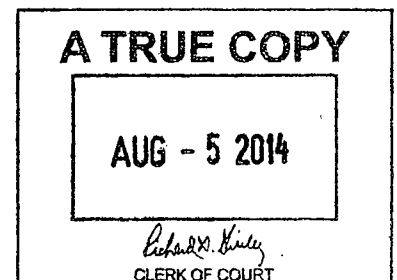
Plaintiff's motion to sever is denied. Defendant's motion to strike defendants DOES 1 through 25 is granted with the consent of the Plaintiff, and the caption is hereby amended accordingly. Defendant's motion to dismiss Plaintiff's complaint for failure to state a cause of action is granted.

IT IS SO ORDERED.

  
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Clifton Newman  
Presiding Judge

July 21, 2014

Chollister, SC



STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-04-02321

Frank Busterna, on behalf of himself and all others similarly situated

AnMed Health, a South Carolina Corporation, and DOES 1 through 25, inclusive

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk :

**A TRUE COPY**  
AUG - 5 2014

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or ~~if the amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.~~

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2127  
Judge Code

July 22, 2014  
Date



# McGowan, Hood & Felder, LLC

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Daniel "Ernie" Peagler Robert  
V. Phillips  
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Writer's Email: [wharrison@mcgowanhood.com](mailto:wharrison@mcgowanhood.com)

August 20, 2014

**Via Regular Mail**

Richard A. Shirley  
Anderson County Clerk of Court  
PO Box 8002  
Anderson, SC 29622

RE: Notice of Appeal *Frank Busterna, on behalf of himself and all others similarly situated v. AnMed Health, a South Carolina Corporation.*  
(12-CP-04-02321)

Dear Mr. Shirley

Appellant's counsel has filed a Notice of Appeal in the above referenced matter. Enclosed please find the materials provided to the Court of Appeals and opposing counsel.

Sincerely,

A handwritten signature in black ink that reads 'Whitney B. Harrison'.

Whitney B. Harrison,

Enclosures

cc: The Honorable Jenny Kitchings  
Wm. Douglas Gray  
Jane W. Trinkley  
Robert L. Widener  
Chad A. McGowan  
Ashley W. Creech  
Barry L. Kramer

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2012-CP-04-02321

**RECEIVED**  
AUG 22 2014  
SC Court of Appeals

Frank Busterna, on behalf of himself and all others similarly situated. ....Appellant,

v.

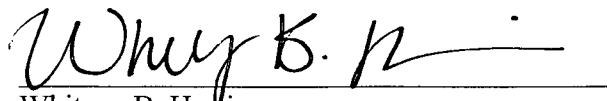
AnMed Health, a South Carolina Corporation ..... Respondent.

**PROOF OF SERVICE**

I, Whitney B. Harrison, an attorney with McGowan, Hood & Felder, LLC do hereby certify that on August 20, 2014, I served a copy of the following **Letter and Order** by depositing in the United States mail in Columbia, South Carolina with proper postage prepaid to the following:

Wm. Douglas Gray  
McNair Law Firm, P.A.  
Post Office Box 447  
Greenville, SC 29602

Jane W. Trinkley  
McNair Law Firm, P.A.  
Robert L. Widener  
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James Stephen Welch\* (SC,OK)  
Joseph G. Wright, III\*  
Of Counsel\*

Writer's Email: [wharrison@mcgowanhood.com](mailto:wharrison@mcgowanhood.com)

August 20, 2014

The Honorable Jenny Kitchings  
Clerk of South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211

RE: Filing of Notice of Appeal in *Frank Busterna, on behalf of himself and all others similarly situated v. AnMed Health, a South Carolina Corporation.* (12-CP-04-02321)

Dear Madam Clerk:

Enclosed for filing please find the Order in the above referenced case, which was filed August 19, 2014 with the Court of Appeals. The Order was inadvertently left out of the documents filed with the Clerk's Office. I apologize for this oversight and any inconvenience that this may have caused you or your staff.

Thank you for your assistance and if you have any questions please feel free to contact me.

Sincerely,

A handwritten signature in black ink that reads 'Whitney B. Harrison'. The signature is fluid and cursive.

Whitney B. Harrison

Enclosures

cc: Anderson County Clerk  
Wm. Douglas Gray  
Jane W. Trinkley  
Robert L. Widener  
Chad A. McGowan  
Ashley W. Creech  
Barry L. Kramer

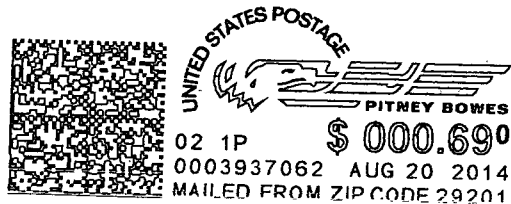
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AUG 22 2014

**SC Court of Appeals**



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The Honorable Jenny Kitchings  
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