

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No.: 2013-00-1964

Greenville Hospital System and GHS Partners
in Health, Inc., Respondents, V. Juliet Elizabeth
Cromer, Defendant, and Assurant Health, Third-
Party Defendant, of Whom Juliet Elizabeth
Cromer is the Appellant.

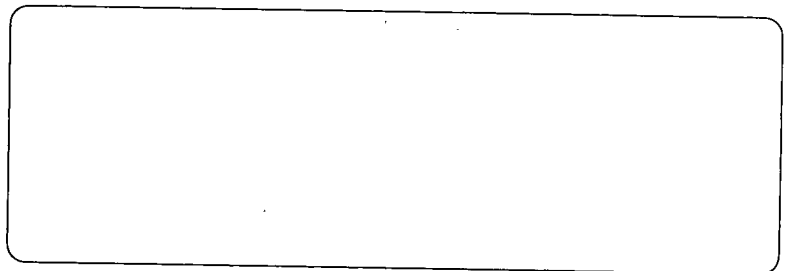
FINAL BRIEF

David L. Thomas
23 Wade Hampton Blvd.
Greenville, SC 29609
(864)-271-6371
Attorney for Appellant

RECEIVED

APR 10 2014

SC Court of Appeals



CASES

Hammond v. Banks, 312 S.C. 422, 440 S.E.2d 890, 891 (Ct. App. 1994).....3
Spaulding v. Wells Fargo Bank, N.A., 714 F.3d 769, (4th Cir. Md. 2013).....4
O’Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992).....4
Rice-Marko v. Wachovia Corporation, et al, 398 S.C. 301, 728 S.E.2d 61 (Ct. App 2012).....5
Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012).....5
Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003).....7

STATUTES

S. C. Code Ann §44-6-150 (1985).....1
S.C. Code Ann. §44-7-260(A)(1) (1976).....3
S.C. Code Ann. §44-6-150 (g) (1985).....4

OTHER AUTHORITIES

Medically Indigent Assistance Program Manual.....2
Unfair Trade Practice Act.....3
South Carolina Constitution, Art 1, §1, Art 1, §3.....6

STATEMENT OF ISSUES ON APPEAL

1. THE APPELLANT FAILED TO PROPERLY WEIGH THE RESPONDENT’S RIGHTS IN PRIVACY AND AS A THIRD PARTY BENEFICIARY TO INDIGENT CARE PAYMENT IN THE ESTABLISHMENT OF SPECIFIC DUTIES OF CARE RESULTING IN INEQUITABLE TREATMENT BY THIS COURT.....3
2. THE COURT ERRONEOUSLY GRANTED APPELLANT’S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6), *SOUTH CAROLINA RULES OF CIVIL PROCEDURE* AS THE APPELLANT FULLY COMPLIED WITH ALL MANDATORY PLEADING REQUIREMENTS.....5
3. DID THE TRIAL COURT FAIL TO RECOGNIZE THAT RESPONDENTS VIOLATED THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS OF APPELLANT?.....6

STATEMENT OF THE CASE

This appeal follows a collection action filed by the Respondent against the Appellant herein for costs associated with the provision of certain non-emergency medical care at the Respondent’s Greenville, South Carolina health care facility in 2011¹. At the time of her admission to the facility, the Appellant did not possess adequate third-party private insurance, Medicare or Medicaid to cover the costs of this procedure.

That as a general hospital in the State of South Carolina, the Respondent receives certain disproportionate share monies through Medicare, Medicaid and the South Carolina Department of Health and Human Services Medically Indigent Assistance Program (“MIAP”) for the purposes of offsetting or otherwise paying for indigent care patient care. This indigent care program was established by the South Carolina General Assembly in 1985, later codified under S. C. Code Ann §44-6-150 (1985 as amended) divesting all authority and control of the program, including regulatory control to the South Carolina Department of Health and Human Services (hereinafter “SCDHHS”).

¹ As a point of reference, the Respondent is admittedly a general hospital pursuant to the definition of S.C. Code Ann. §44-7-260(A)(1) (1976 as amended).

In the development of the indigent program, SCDHHS created a manual under its regulatory authority for those general hospitals in this state who receives state supported monies in the implementation of this indigent care program, of which the Respondent is a member facility. It is undisputed that §101 of the MIAP manual imposes a duty upon the Respondent to refer an individual to the county designee for SCDHHS who is without sufficient third-party insurance or Medicaid or Medicare to pay for the services rendered or to be rendered. The determination of whether the individual would qualify for assistance would fall to SCDHSS upon the individual's application and depending upon where that person may fall under the federal poverty guidelines. The MIAP program further provides for rights of administrative relief including the right of appellate review. The Respondent failed to refer the Appellant to the MIAP program despite having a clear duty to do so and afterward filed their collection action in Greenville County.

That the Appellant answered the collection complaint of the Respondent further counterclaiming complaining of the Respondent's Unfair Trade Practice Act violations for willful failure to comply with its duties under MIAP, Negligence *per se*, Negligence, Gross Negligence and Breach of Fiduciary Duty. The Appellant further pled Unclean Hands, Failure to Mitigate and Unfair Trade Practice Act violations as affirmative defenses.

On or about July 16, 2013 the Honorable Letitia H. Verdin issued her Order (Order 1) granting Respondent's Motion to Dismiss pursuant to Rule 12(b)(6), *South Carolina Rules of Civil Procedure* stating that no private right to a cause of action existed to Appellant for Respondent's failure to conform to the MIAP requirements. On August 8, 2013, Judge Verdin issued her further Order (Order 2) denying the Appellant's Motion for Reconsideration pursuant to Rule 52(b), *South Carolina Rules of Civil Procedure*.

ARGUMENTS

I. DID THE TRIAL COURT ERR IN FAILING TO FIND THE APPELLANT ESTABLISHED A PRIVATE RIGHT TO ACTION AS A RESULT OF PRIVACY OF CONTRACT?

The Appellant contends the trial court erred in finding no private right to a cause of action existed due to the issues in privity between the parties.

While at first blush the initial argument no private right of action may exist as a result of a failure to conform to the policies relating to the above indigent programs, it is ultimately in error as the issue of privity exists as a result of the (1) contract between the parties, and (2) the Respondent's duty to protect the Appellant's interests under the contract, particularly where the Respondent has superior knowledge of certain key elements.

Privity, or "horizontal privity" in this instance, includes any additional benefit under the contract which would extend a direct benefit to the Appellant (Respondent below) as a third party beneficiary. The Appellant contracted with Respondent for certain services as an indigent patient. Due to the Appellants' statutory and regulatory duty to comply with MIAP provisions as a "General Hospital" under S.C. Code Ann. §44-7-260(A)(1) (1976 as amended)², a special duty in privity exists thereby creating a private right to a cause of action in contract.(R.p.17 lines 2-9)

Where this statutory and regulatory duty exists only for the sole purpose of providing payment for third party individuals who are otherwise indigent, the benefit of that bargain may then only be considered for the direct benefit of that indigent third party; as such, the third party may move to enforce those terms of the contract intended for their benefit, see *Hammond v. Banks*, 312 S.C. 422, 440 S.E.2d 890, 891 (Ct. App. 1994), "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intend to create a direct, rather than an incidental or consequential, benefit to such third person." It is abundantly clear the State of South Carolina, by virtue of the creation of MIAP and MIAA

² As such, the Appellant GHS is considered a provider of certain emergency and non-emergency medical services on behalf of indigent patients in Greenville County, South Carolina under the auspices of MIAA, MIAP and other indigent care programs, see S.C. Code Ann. §44-6-150 (g) (1985 as amended) and S.C. Regs §§126-500, *et. seq.* (1986 as amended).

intended to provide third party indigent patients such as the Appellant with the ability to obtain medical care without cost as a direct benefit. The duty to inform and refer to the program, however, falls squarely upon the Respondent.(R.p. 88 lines 16-18)

Where the Respondent, in privity with the Appellant, has knowledge of certain rights and obligations due the Appellant and fails to inform or act in a manner consistent with that duty, the Appellant clearly has the right to seek relief under any ground upon which a breach of contract may lie. As the actions pled by the Appellant arise in privity of contract and the breach of that contract results from the Respondent's failure to comply with a binding duty to inform, the Appellant is entitled to raise those issues in its individual actions relating to unfair trade practices, negligence *per se*, negligence, gross negligence and breach of fiduciary duty as each are individually actionable as a result of the Respondents material breach, see *Spaulding v. Wells Fargo*, 714 F.3d 769, (4th Cir. Md. 2013).(R.p. 88 lines 16-18)

Where the Court finds the Respondent owed any duty of care to the Appellant, it should additionally find a specific fiduciary duty exists between the parties in privity as the Appellant placed the upmost trust and confidence in the Respondent to act for her benefit and best interests, see *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) ("A fiduciary relationship exists where one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." citing *Regions*, id at 444).

It is unquestionable that the Respondent held a special position of trust over the Appellant as she most certainly reposed a special confidence in the Respondent to act in her best interest; this is inferred by the fact she sought out the Respondent specifically for care and later contracted for that care thereby creating issues at privity between the parties as argued above.(R.p. 89 3-8) As such, the Respondent was imposed with a specialized duty in equity to, and again, act in good faith in executing its duties, moral and legal. As it is inarguable the Respondent is duty bound to

act within the scope of binding statutory and regulatory authority, it is equally inarguable that, given the facts and very nature of this transaction, an additional fiduciary duty imposes itself as well.

As a result, the Appellant believes this issue should be remanded to the circuit court for rehearing upon the merits.

II. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT’S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6), *SOUTH CAROLINA RULES OF CIVIL PROCEDURE* AS THE APPELLANT FULLY COMPLIED WITH ALL MANDATORY PLEADING REQUIREMENTS?

The Appellant next contends the trial court erred in granting the Respondent’s Motion to Dismiss pursuant to Rule 12(b)(6), *South Carolina Rules of Civil Procedure*,

From the binding law of this state, it is abundantly clear the only factors the Court may consider in a motion to dismiss pursuant to Rule 12(b)(6), *Id.* are:

1. The complaint
2. Whether the facts and inferences drawn from the complaint would entitle the non-moving party to relief.

See *Rice-Marko v. Wachovia Corporation, et al*, 398 S.C. 301, 728 S.E.2d 61 (Ct. App 2012), “[T] trial court *must* base its ruling *solely* on allegations set forth in the complaint ... If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the Appellant, would entitle the Appellant to relief on *any* theory, then the grant of a motion to dismiss for failure to state a claim is improper. (*emphasis added*)”, see also *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012) (replacing Appellant with nonmoving party; further stating “If the facts alleged and inferences deducible therefrom would entitle the Appellant to *any* relief, then dismissal under Rule 12(b)(6) is improper (*emphasis added*)”)728 S.E.2d at 43. There is no requirement that each element of each cause of action must be addressed in the pleadings as to escape dismissal under Rule 12(b)6), *id.* Conversely, Rule 8(a), 8(e)(1) and 8(f), *South Carolina Rules of Civil Procedure* sets out the standard drafting of pleadings as:

8(a) “Claims for Relief. A pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the courts jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.”

8(e)(1) “Pleading to be Concise and Direct “Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required.”

8(f) “Construction of Pleadings. All pleadings shall be so construed as to do substantial justice to all parties.”

Pleadings exist solely for the purposes of placing the adverse party on notice of the moving party’s claims for relief and nothing more. The Appellant has cleverly disguised a summary judgment motion under the guise of a Rule 12(b)(6), *id.*, motion to dismiss, requesting this Court to go beyond the standard scope of review on such a motion under the prevailing rule set and make a determination generally reserved for motions for summary judgment or upon the pleadings³. Based upon the standard of review under *Rice-Marko* and *Freemantle, Id.*, and further viewing the counterclaim in a light most favorable to the Respondent, the Court may only find the pleadings clearly conform to the pleading requirements expressed above, *Id.*

As the trial court went well outside the standard of review allowed under 12 (b)(6), *Id.*, the Appellant believes she is entitled for this matter to be remanded for rehearing upon the merits as set forth above.

III. DID THE TRIAL COURT FAIL TO RECOGNIZE THAT RESPONDENTS VIOLATED THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS OF APPELLANT?

The Respondent is informed and believes the Appellant is, for all intents and purposes, considered a state agency subject to local and state funding and regulation; being supported, in part by the taxpayer citizens of this county and state, a class in which includes this very Respondent. As such, the Appellant most certainly owes a very specific duty of care to every

³The issues forwarded by the Appellant in its motion are best reserved for summary judgment, and then only if no material issue of fact relative to the Respondents allegations exists.

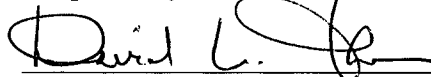
citizen of this county and state by virtue of the South Carolina Constitution, Art 1, §1, Art 1, §3 (as amended) which clearly situates a very specific duty upon the government of this state, including all agencies, to act in a manner consistent with the best interests of its citizenry.

The Respondent is further informed and believes the Court must view the totality of the circumstances in determining whether the Appellant owed the Respondent some special duty of care, specifically determining whether it was foreseeable that the Respondent, as an indigent person, would be unable to pay for services rendered without assistance; that the Appellant held a position of trust and fidelity in the negotiations to act in good faith and ; that the Respondent was in a vulnerable position in the negotiations; the Respondent's previous history relating to indigent care programs and funding; and, whether any other specific duty to the Appellant may exist, see *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003).

CONCLUSION

For the reasons stated above, the Appellant hereby respectfully asks this Court to reverse the judgment of the circuit court and remand *in toto*, for rehearing upon the merits.

Respectfully Submitted,



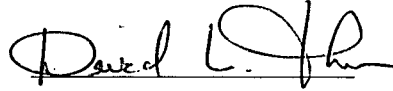
David L. Thomas (SC Bar #09952)
23 Wade Hampton Blvd.
Greenville, South Carolina 29609
Telephone: (864) 271-6371
Attorney for the Appellant

April 9, 2013

Certificate of Counsel

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b).

April 9, 2014

A handwritten signature in black ink, appearing to read "David L. Thomas". The signature is written in a cursive style with a horizontal line underneath.

David L. Thomas S.C. Bar No. 09952
Smith and Thomas, P.A.
23 Wade Hampton Blvd.
Greenville, South Carolina 29609
(864)-271-6371
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No.: 2013-001964

Greenville Hospital System and GHS Partners in Health, Inc.....Respondent,

Juliet Elizabeth Cromer,Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Final Brief by personally depositing a copy of same in the United States Mail postage prepaid, on the 10th day of April, 2014, addressed to Respondent, by and through Respondent's Counsel of Record at the following address:

Charles M. Sprinkle
Sarah T. Clemmons
Post Office Box 2048
Greenville, SC 29602

RECEIVED

APR 10 2014

SC Court of Appeals

By:

SMITH and THOMAS, P.A.

David L. Thomas
David L. Thomas (SC Bar #09952)
23 Wade Hampton Blvd.
Greenville, South Carolina 29609
(864) 271-6371

Attorneys for the Appellant