UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
No. 4:22-CV-14-FL

GEORGE CANSLER, on his own behalf, and on behalf of a class of those similarly situated, ***Plaintiff***, **v.** **UNIVERSITY HEALTH SYSTEMS OF EASTERN CAROLINA, INC. and EAST CAROLINA HEALTH-CHOWAN, INC.,** ***Defendants***.	**REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO ECU HEALTH'S MOTION TO DISMISS** ***JURY DEMAND***

For the reasons set forth below, in addition to those contained in the Motion to Dismiss (Docket Entry 50) and Memorandum of Law (Docket Entry 51), Cansler's Amended Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

I. LAW AND ARGUMENT

A. The Breach of Contract and Unjust Enrichment Claims Are Time-Barred.

Cansler agrees that his breach of contract and unjust enrichment claims are subject to the three-year statute of limitations in N.C.G.S. § 1-52(1). (*See* Docket Entry 54 at 26). Further, it is clear the statute of limitations begins to run for both claims when "the cause of action has accrued." *See* N.C.G.S. § 1-15(a). Thus, the question is whether Cansler asserted his breach of contract and unjust enrichment claims within the applicable limitations period. As set forth below, he did not.

1. Cansler Knew or Should Have Known of ECU Chowan's Alleged Breach More than Three Years Before He Commenced this Action.

Cansler's breach of contract claim is time-barred. North Carolina law makes clear that Cansler's breach of contract claim accrued when he knew or should have known of ECU Chowan's

alleged breach. *See Chisum v. Campagna*, 376 N.C. 680, 701, 855 S.E.2d 173, 188 (2021). The same is true even if Cansler did not know the full extent of his alleged damages. *See DePalma v. Roman Cath. Diocese of Raleigh*, 167 N.C. App. 370, 605 S.E.2d 267 (2004) (citations omitted) (distinguishing knowledge of damage from knowledge of full extent of damage and holding that the statute of limitations is not tolled by lack of knowledge of full extent of damage).

Cansler knew or should have known of ECU Chowan's alleged breach on ***June 19, 2018***, when Blue Cross notified Cansler of its $1,326.11 payment to ECU Chowan and the $4,262.91 remaining balance that Cansler owed for the medical procedure. (Docket Entry 48; Am. Compl. ¶¶ 65-67). On this date, Cansler purportedly was "shocked and surprised to receive a bill for over $3,000 for a short visit to an in-network hospital." (*Id*. ¶ 67). At the very latest, Cansler knew or should have known of ECU Chowan's alleged breach on ***June 22, 2018***, when ECU Chowan sent Cansler "an initial bill for $4,162.91, noting that Mr. Cansler had paid $100 toward the total" and officially notifying Cansler that his "payment was due July 12, 2018." (*Id*. ¶ 70).

Cansler contends that the statute of limitations was tolled by ECU Chowan's subsequent efforts to lower his medical bill. (*See* Docket Entry 54 at 26-27). His Response does not provide any legal support, from North Carolina or otherwise, for his theory that ECU Chowan's efforts (which served to benefit Cansler) tolled the statute of limitations. To the contrary, North Carolina courts have reached the opposite result in analyzing issues similar to those presented in this case. *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 6-9, 802 S.E.2d 888, 892-94 (2017) (despite the defendant's repeated failure to pay the plaintiff in accordance with the defendant's contractual obligations, the plaintiff's breach of contract claim was time-barred because it accrued upon the defendant's first missed payment); *Liptrap v. City of High Point*, 128 N.C. App. 353, 355-56, 496 S.E.2d 817, 819 (1998) (despite the defendant's refusals of the plaintiffs' additional

payment requests, the plaintiffs' breach of contract claim was time-barred because it accrued on the date of the defendant's initial breach; and because the defendant's refusals were not additional breaches of contract and were "only aggravation of the original injury"). This Court should conclude that Cansler's breach of contract claim accrued on either June 19 or June 22, 2018, and that the claim is time-barred by the three-year statute of limitations. *See* N.C.G.S. § 1-52(1).

2. Cansler's Unjust Enrichment Claim Is Time-Barred Because the Alleged Wrong Was Completed More Than Three Years from Filing.

Cansler's unjust enrichment claim similarly is time-barred. This claim accrued on the date that ECU Chowan completed its alleged wrong, regardless of Cansler's notice. *See Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 83, 712 S.E.2d 221, 227 (2011). Cansler contends that ECU Chowan "caused" him to confer "monetary payments . . . in excess of the monetary amounts [he] owed toward the reasonable value of the CT scan." (Docket Entry 48, Am. Compl. ¶ 191). This alleged harm has its genesis when Cansler was in the emergency department and ECU Chowan allegedly did not disclose the medical treatment costs. (*Id*. ¶¶ 57, 59-64). Cansler contends that on ***June 6, 2018***, because of ECU Chowan's non-disclosure, he submitted an initial payment of $100.00 to ECU Chowan for the medical treatment he received that day and then three additional payments of $50.00 between ***August 2018*** and ***October 2018***. (*See id*. ¶¶ 60, 73).

Cansler does not (and cannot) dispute that these events occurred more than three years before he filed the Amended Complaint. Cansler's only argument, submitted without any legal support, centers on his single payment of $75.41 on April 7, 2019, for what he admits was an entirely "different medical event." (Docket Entry 54 at 27-28). Clearly, the date of Cansler's payment for a "different medical event" is irrelevant in determining the date that Cansler's unjust enrichment claim accrued. Cansler did not submit payment for the "different medical event" based upon the alleged wrong at issue in this case -- that is, ECU Chowan's claimed non-disclosure of

medical treatment costs. He submitted the payment for some unidentified other treatment, and the payment was followed by a separate and distinct transaction -- that is, ECU Chowan's application of Cansler's payment. Therefore, the Court should reject Cansler's argument regarding his payment for a "different medical event" and should find that Cansler's unjust enrichment claim is barred by the applicable three-year statute of limitations.

B. Because the Price Term of the Consent that Cansler Signed Is Enforceable, Cansler Fails to State a Claim for Breach of Contract or Unjust Enrichment.

1. Case Law Supports the Dismissal of Cansler's Breach of Contract Claim Because the Consent Is Enforceable and There Was No Breach.

Cansler also has failed to state a claim for breach of contract. Precedent from North Carolina and beyond establishes that the Consent, which states that Cansler would "pay all charges of [ECU Chowan] that are not covered or paid . . . by any medical insurance," is sufficiently definite to create a contract. (Docket Entry 51 at 10-14, Ex. A). In response, Cansler claims that the North Carolina cases cited by ECU Health -- *Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120, 633 S.E.2d 113 (2006), and *Gleason v. Charlotte-Mecklenburg Hosp. Auth.*, 2022-NCCOA-420, 873 S.E.2d 70 (N.C. App. June 21, 2022) -- are distinguishable because the consents in those cases used the phrase "regular rates" rather than "charges." (Docket Entry 54 at 18-20).

Cansler's attempt to draw a distinction between "regular rates" and "charges" ignores the bases for the rulings in *Shelton* and *Gleason*. In *Shelton*, the North Carolina Court of Appeals reasoned that the particular circumstances surrounding the execution of the consent -- a patient seeking emergency care for an unknown condition -- indicated a mutual intent to imply the terms of the hospital's chargemaster into the phrase "regular rates," based on the following reasoning:

> ***The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question***.
>
> ***

> ***Inherent in providing medical care and treatment is the element of the unforeseen***. It is common, almost expected, that a course of treatment embarked upon will, through unforeseen circumstances, be amended, altered, enhanced, or terminated altogether, and a completely new course of treatment begun. In light of this, ***it would be impossible for a hospital to fully and accurately estimate all of the treatments and costs for every patient before treatment has begun***. . .

Shelton, 179 N.C. App. at 123-25 (emphasis added). It was the unpredictability of healthcare service delivery, not the use of the phrase "regular rates," that led the court to conclude that the rates contained on the chargemaster necessarily were implied into the contract. *See id*. at 125.

As in *Shelton*, the majority of courts that have interpreted similar consents in the healthcare context have implied the chargemaster into the contract -- instead of finding the contract had an open price term -- even though such consents used various terms like "charges," "the balance due," "the account," "usual and customary charge," and "regular rates." *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255, 264 (3d Cir. 2008) ("all charges"); *Limberg v. Stanford Med. Cntr. Fargo*, 881 N.W.2d 658, 659 (N.D. 2016) ("all charges"); *Nygaard v. Sioux Valley Hosp.*, 731 N.W.2d 184, 191 (S.D. 2007) ("charges"); *Pitell v. King Cnty. Public Hosp. Dist. No. 2*, 423 P.3d 900, 905 (Wash. App. 2018) ("balance due"); *Allen v. Clarian Health Partners, Inc.*, 980 N.E.2d 306, 310 (Ind. 2012) ("the account"); *Holland v. Trinity Health Care Corp.*, 791 N.W.2d 724, 729-30 (Mich. App. 2010) ("usual and customary charge"); *see also Gleason*, 873 S.E.2d 70 ("regular rates"); *Atherton v. Tenet Healthcare Corp*., 2005 WL 7084013, at *6 (S.C. Ct. App. May 25, 2005) (same).

These courts reached the same conclusion not because of the particular term used, but for the same policy reasons identified in *Shelton* regarding the particularized nature of medical care. In *DiCarlo*, the Third Circuit noted that while "'all charges' is certainly less precise than [the] price term of the ordinary contract for goods or services . . . [i]t is . . . the ***only practical way in which the obligations of the patient to pay can be set forth***, given the fact that ***nobody yet knows just what condition the patient has, and what treatments will be necessary to remedy what ails***

him or her." 530 F.3d at 264 (emphasis added); *see also Nygaard*, 731 N.W.2d at 192-93 ("'[I]n a hospital setting it is not possible to know at the outset what the cost of the treatment will be, because it is not known what treatment will be medically necessary'").

The Court should adopt the reasoning of *Shelton*, *Gleason*, *DiCarlo*, and the other courts following the majority rule. Cansler admits that ECU Chowan maintains a chargemaster that lists "all of the hospital's billable items and the corresponding charges." (Docket Entry 48, Am. Compl. at ¶ 21). In June 2018, Cansler presented to the emergency room at ECU Chowan with an unknown condition and signed the Consent prior to receiving treatment. (*Id*. ¶¶ 57-62). Consistent with the reasoning of the above cases, at the time Cansler executed the Consent, it would have been impossible for ECU Health to project, much less know, the cost of Cansler's future treatment.[1]

ECU Chowan's inability to agree to a more precise price term is even more apparent in this case because Blue Cross negotiated discounted prices from the chargemaster on Cansler's behalf, meaning the amount Cansler ultimately would owe ECU Chowan could be one of any number of discounted prices depending on his insurance plan. (*Id*. ¶¶ 53-56). Cansler clearly was aware of this discount because he intentionally sought out treatment at ECU Chowan with knowledge that it was "in-network" for his insurance plan. (*Id*. ¶¶ 55-56). Indeed, because he knew the particular terms of his Blue Cross plan at the time he signed his Consent, Cansler arguably had ***more*** access to information about what the costs of the medical services might be than ECU Health did. Finally, as was found important in *Shelton*, *Gleason*, and other cases, Cansler does ***not*** contend that he

[1] Demanding a specific price term as a condition of service likely would have been a violation of the Emergency Medical Treatment and Active Labor Act ("EMTALA"). (*See* Docket Entry 51 at 28). It is notable that Cansler does not respond to the inherent tension created by EMTALA other than to request that the Court ignore it. (*See* Docket Entry 54 at 13, n. 1). ECU Health cannot simply ignore EMTALA. Doing so would risk violating EMTALA, discouraging medical treatment, and incurring civil penalties. *See* 42 U.S.C. § 1395dd(d).

asked ECU Health or Blue Cross, who negotiated the discounted rates on his behalf, any questions about how much his treatment would cost. *Shelton*, 633 S.E.2d at 125; *Gleason*, 873 S.E.2d at *3. Rather, he signed the Consent and immediately received treatment from ECU Chowan's emergency department, which set about to determine whether he had a life-threatening condition.

The Consent's use of "all charges of the Facility that are not covered or paid . . . by any medical insurance/coverage" is an explicit reference to the chargemaster, as well as the discounts that were negotiated on Cansler's behalf by Blue Cross. As set forth above, the majority of cases that have faced this issue demonstrate that the use of the term "charges" does not change the conclusion that ECU Chowan's chargemaster was implied into the Consent based on the circumstances of the transaction at issue -- a patient seeking care in an emergency department for an unknown condition. For these reasons, the Court should follow the majority rule and conclude that the Consent is a clear, enforceable contract and, thus, the Court need not imply a price term.[2]

2. <u>ECU Chowan's Alleged Policy of Refusing to Disclose Its Chargemaster Does Not Change the Outcome with Regard to Cansler</u>.

Cansler also contends that because ECU Health allegedly had a policy of refusing to disclose its chargemaster to patients, the price of medical care was not "capable of being made" definite under *Shelton*. (Docket Entry 54 at 19). This argument lacks merit with regard to Cansler because ***he never attempted to find out more information about the potential costs of treatment***. Throughout his Amended Complaint, Cansler repeatedly references ECU Health's alleged policy

[2] Cansler cites to the dissent in *Charlotte-Mecklenurg Hosp. Auth. v. Talford*, 214 N.C. App. 196, 714 S.E.2d 476 (2011), for the position that the North Carolina Court of Appeals would hold that "charges" is not the same as "rates," making this case distinguishable from *Shelton*. That dissent obviously is not legally binding, and as set forth above, is not consistent with the reasoning on *Shelton* or the majority rule on the issue. Cansler also cites to *Forsyth Cnty. Hosp. Auth., Inc. v. Sales*, 82 N.C. App. 265, 346 S.E.2d 212, in support of its open price term argument, but that case did not specifically address the issue before the Court, which is whether the reference to charges in a consent implies the terms of the chargemaster. These cases do not help Cansler's position.

of refusing to provide pricing information. While that allegation, if true, ***may*** be relevant to the claims of class members who asked for such pricing but were refused that information, this was not the case for Cansler. Rather, Cansler executed the Consent and received treatment without asking any further questions about prices.

Perhaps more importantly, the alleged policy itself did not prevent Cansler from learning that the phrase "all charges" referred to ECU Chowan's chargemaster. Indeed, Cansler could have asked whether the phrase "all charges" referred to the hospital's chargemaster without running into the alleged policy. He also could have asked his insurer -- Blue Cross -- about the discounted rates that it had negotiated on his behalf. He did not do either. Such a lack of inquiry was cited as supporting dismissal of the breach of contract claims in both *Shelton* and *Gleason*. *See Shelton*, 633 S.E.2d at 125; *Gleason*, 873 S.E.2d at *3. Even if he did ask, it still would be the case, as discussed above, that ECU Chowan could not have told him what any unknown future services would have cost. For these reasons, ECU Chowan's alleged policy of refusing to provide its chargemaster rates has no bearing on the outcome of Cansler's breach of contract claim.

3. Cansler Cannot State an Unjust Enrichment Claim Because the Parties Had an Express Contract.

The Consent is an enforceable contract, barring Cansler's unjust enrichment claim. The existence of an express contract precludes recovery for unjust enrichment. *Reaves v. Seterus, Inc.*, 2015 WL 2401666, at *4 (E.D.N.C. May 20, 2015) ("[T]he existence of an express contract precludes recovery for unjust enrichment and in quantum meruit."). Thus, "[i]f there is a contract between the parties the contract governs the claim and the law will not imply a contract." *Id*. Here, Cansler cannot state a claim for unjust enrichment because there is an enforceable contract between the Parties -- the Consent. (Docket Entry 51, Ex. A). Cansler does not dispute the existence of the Consent. Indeed, he asserts a breach of contract claim based on the Terms of the Consent.

(Docket Entry 48, Am. Compl. ¶¶ 62, 181-87). Cansler contends that the Consent is unenforceable because it lacks a price term. (*See id*. ¶¶ 45,189). However, his contention is wrong. As a matter of law, the Consent's price term is unambiguous, and the Consent is enforceable. Because the existence of an enforceable contract precludes recovery for unjust enrichment, Cansler's unjust enrichment claim should be dismissed as a matter of law. *See Reaves*, 2015 WL 2401666, at *4.

C. Cansler Fails to State a UDTPA Claim Because the Alleged Conduct at Issue Falls Squarely Within the Learned Profession Exemption.

ECU Health's alleged misconduct -- all of which occurred during the screening process for Cansler's emergency medical visit -- falls within the Unfair and Deceptive Trade Practices Act's ("UDTPA") learned profession exemption. This issue properly is analyzed under a two-prong test: (1) whether the entity is a "member of a learned profession," and (2) whether the conduct at issue sufficiently affects a "professional service." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 334, 828 S.E.2d 467, 472 (2019). There is no question, and Cansler does not seriously dispute, that ECU Health falls within the definition of a member of a learned profession. (Docket Entry 51 at 19). Thus, the Court must determine whether ECU Health satisfied the second prong. It did. As mentioned in ECU Health's Memorandum of Law, *Shelton* is instructive. (*See id.* at 20-21).

To avoid the similarities with *Shelton*, Cansler argues that *Shelton* was overruled by *Sykes v. Health Network Sols., Inc*., 828 S.E.2d 467 (N.C. 2019). (Docket Entry 54 at 32-35). To the contrary, *Sykes* cites favorably to *Shelton*, and its ultimate holding -- the learned profession exemption applies to the termination of providers' in-network status for exceeding certain costs -- actually supports ECU Health's position in this case. S*ykes*, 828 S.E.2d at 472-74 (2019).[3]

[3] Cansler's other cited authority is also favorable to ECU Health. *See Phillips v. A Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 573 S.E.2d 600 (2002) (exemption applied to alleged misrepresentations to patients); *Cameron v. New Hanover Memorial Hospital, Inc.*, 58 N.C. App. 414, 293 S.E.2d 901 (1982) (exemption applied to denial of hospital privileges); *Gaunt v. Pittaway*, 139 N.C. App. 778, 534 S.E.2d 660 (2000) (exemption applied to statements about

Indeed, the genesis of the alleged wrong in this case -- the execution of the Consent while Cansler was receiving treatment in the emergency room -- is far more directly related to patient care that the termination of a provider's in-network status by an insurance intermediary, as in *Sykes*. In sum, *Sykes* does nothing but enhance *Shelton's* well-reasoned holding that applies equally to this matter. Likewise, North Carolina case law post-dating *Sykes* still favorably cites to *Shelton* just as North Carolina case law pre-dating *Sykes* did. *See e.g.*, *Se. Anesthesiology Consultants, PLLC v. Rose*, 2019 WL 5090364, at *9 (N.C. Super. Oct. 10, 2019) (citing *Shelton* favorably and applying the exemption to use of funds, contractual negotiations, and control over medical facility operations); *McNew v. Fletcher Hosp., Inc.*, 2022 WL 4359246, at *7 (N.C. Super. Sept. 20, 2022).

McNew, which post-dates *Sykes*, is noteworthy. The plaintiff in *McNew* received certain medical treatment at a hospital and subsequently was charged at a rate he believed to be unreasonably high. *McNew*, 2022 WL 4359246, at *1-2. The court held that the plaintiff's UDTPA claim fell within the learned profession exemption because the hospital's alleged "overbilling without disclosing its actual rates to [the] [p]laintiff at the time of treatment" was sufficiently "entwined with, and directly tied to, the provision of [the] [p]laintiff's medical care at the [h]ospital's emergency room." *Id*. at *7. Contrary to Cansler's arguments, North Carolina law is clear: medical billing procedures for emergency medical treatment services fall within the learned profession exemption. As such, Cansler's UDTPA claim should be dismissed.

II. CONCLUSION

For these reasons and those in ECU Health's Memorandum of Law, the Court should dismiss the Amended Complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6).

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medical facility). Further, *Anderson v. Lab'y Corp. of Am. Holdings*, 2019 WL 3858320 (M.D.N.C. Aug. 16, 2019), is unpersuasive as it did not address the learned profession exemption.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served upon all counsel of record via the Clerk of Court's ECF system, this October 28, 2022.

/s/ Erin Palmer Polly