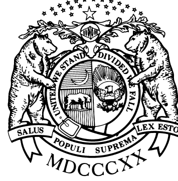


In the Missouri Court of Appeals
Eastern District

DIVISION TWO

RICHARD HOOVER, Individually, and as Class Representative,	)	No. ED97495
Plaintiff/Appellant,	)	Appeal from the Circuit Court of St. Louis County
v.	)	Honorable James R. Hartenbach
MERCY HEALTH, d/b/a MERCY HEALTH SYSTEM; MERCY HOSPITALS EAST COMMUNITIES, d/b/a ST. JOHN'S MERCY MEDICAL CENTER and/or ST. JOHN'S MERCY HEALTH SYSTEM; and ST. JOHN'S MERCY MEDICAL CENTER, d/b/a MERCY HOSPITALS EAST COMMUNITIES and/or ST. JOHN'S MERCY HEALTH SYSTEM,	)	Date: July 3, 2012
Defendants/Respondents.	)	

Plaintiff, a physician who sought and obtained health care at St. John's Mercy Medical Center, appeals from a judgment dismissing for failure to state a claim his individual and class action lawsuit seeking actual and punitive damages under the Missouri Merchandising Practices Act (MMPA), section 407.010 to 407.130 RSMo (2000),[1] against the defendant corporations, who own, operate, or do business as St. John's Mercy Medical Center. Plaintiff asserts that he sufficiently alleged a claim under the MMPA and adequately alleged that he sustained an ascertainable loss of money as a result of defendants' unfair billing practices because defendants

[1] All further statutory references will be to RSMo (2000).

charged him more than the reasonable value of the goods and services that he received. We affirm.

PROCEDURAL BACKGROUND

On June 27, 2011, plaintiff, Richard Hoover, M.D., individually and as a class representative, filed a lawsuit to recover actual and punitive damages under the MMPA against defendant Mercy Health on his claim that Mercy Health falsely and fraudulently charged him for goods and services provided during his 2009 treatment at St. John's Mercy Medical Center. Mercy Health filed a motion to dismiss on the grounds that plaintiff sued the wrong entity and failed to state a claim. Plaintiff filed a reply to the motion to dismiss and a memorandum of law in opposition to the motion to dismiss, and subsequently filed an amended petition that added Mercy Hospitals East Communities (Hospitals East) and St. John's Mercy Medical Center (St. John's) as defendants, rephrased the allegations to include all defendants, and amended his damage allegation.

In his amended petition, which is the subject of this appeal, plaintiff alleged that he was a former Professor and Chairman of the Pathology Department at St. Louis University School of Medicine. He alleged that defendants violated the MMPA by using fraud and deception in the sale of medical goods and services to the public; that "defendants require patients in need of medical care and treatment to enter into an express or implied contract that requires the patient to pay unspecified, undocumented and undetermined charges as a condition for receiving medical goods and services;" that defendants' "standard charges" for medical goods and services were unreasonable; and that defendants accept less than their "standard charges" from Medicare and medical insurance carriers. He also alleged that the "best evidence" of the reasonable value of

defendants' goods and services is what defendants accept from Medicare and insurance carriers, and because defendants' "standard charge" is higher than this amount, it is unreasonable.

For his representative claim, plaintiff alleged that he underwent medical care and treatment at St. John's in 2009, and that defendants issued a bill to him that was false and fraudulent because it was based on "standard charges" that were unreasonable in that they exceeded the charges for the same goods and services sold to Medicare and insured patients. He alleged that he was damaged because he "paid more for the goods sold and the services rendered than the reasonable value of the goods and services."

Defendants thereafter filed a motion to dismiss plaintiff's amended petition for failure to state a claim. In their motion, defendants set out certain factual matter, including that plaintiff had oral surgery at St. John's on March 10, 2009; that St. John's billed plaintiff $17,337 for medical goods and services; and that plaintiff "paid $1,000 to St. John's collection agency on June 17, 2011 and paid an additional $4,300 to St. John's collection agency on June 27, 2011." Among the grounds for their motion, defendants asserted that plaintiff had not alleged facts showing that he incurred any ascertainable loss. They attached to their motion a copy of a contract dated March 10, 2009, signed by plaintiff as the patient, and titled "Release of Information, Assignment of Benefits, and Financial Responsibility" (hereinafter, "the contract"). They further attached a newspaper article and a document titled "NCO Financial Systems, Inc. - Midwest Debtor Notes" that listed actions on plaintiff's account from November 2009 through August 2011, and showed a $1,000.00 payment on June 17, 2011, and a $4,300.00 payment on June 24, 2011.

Plaintiff did not file a new memorandum in opposition to the motion to dismiss the amended petition, but in his reply to the original motion to dismiss, he acknowledged the

existence of the contract and that he signed it. In his memorandum in opposition to the original motion to dismiss, plaintiff acknowledged that the original balance on his account was $17,337.29 and that the current balance was $12,037.29, demonstrating that he had paid over $5,000.00 on this account. He attached a June 28, 2011 letter from NCO Financial Systems to his attorney showing a balance then due of $12,037.29 and bills from St. John's Mercy Medical Center showing that on March 27, 2009, he had been charged $17,337.29 for outpatient services.

The trial court entered a judgment sustaining defendants' motion to dismiss. Plaintiff appeals from this judgment.

DISCUSSION

Although neither party has raised the question of whether this motion to dismiss should have been considered as a motion for summary judgment, we may *sua sponte* consider this issue. See, e.g., WEA Crestwood Plaza v. Flamers Charburgers, 24 S.W.3d 1, 5 (Mo.App. 2000); Shores v. Express Lending Services, Inc., 998 S.W.2d 122, 125-26 (Mo.App. 1999). Here, defendants attached documents outside the pleadings to their motion to dismiss and relied on information contained in those documents to support their motion. Plaintiff also attached documents to his memorandum in opposition to the first motion to dismiss.

Rule 55.27(a) provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 74.04.

Thus, once matters outside the pleadings are presented to and considered by the trial court, the court is required to treat a motion to dismiss as a motion for summary judgment. Raster v. Ameristar Casinos, Inc., 280 S.W.3d 120, 127 (Mo.App. 2009). Ordinarily, this requires the

court to give notice and an opportunity to present all materials pertinent to a motion for summary judgment. Rule 55.27(a); Raster, 280 S.W.3d at 126-27; WEA Crestwood Plaza, 24 S.W.3d at 5; Shores, 998 S.W.2d at 126.

However, if it is apparent that the parties and the court were informed of the issues, and there is no genuine factual dispute with respect to the documents attached to the motion, then we need not remand for failure to give notice. Chaney v. Cooper, 954 S.W.2d 510, 515 (Mo.App. 1997). In such a situation, "[t]he purpose of the rule [Rule 74.04] has been met in that the requirement to apprise the opposing party, the trial court, and the appellate court of the specific basis on which the movant claims he is entitled to summary judgment has been met." Id. See also Wilson v. Cramer, 317 S.W.3d 206, 208-09 (Mo.App. 2010); WEA Crestwood Plaza, 24 S.W.3d at 5; Shores, 998 S.W.2d at 126. Further, "[w]hen both parties introduce evidence beyond the scope of the pleadings, the motion to dismiss is converted to a motion for summary judgment and the parties are charged with knowledge that the motion was so converted." Mitchell v. McEvoy, 237 S.W.3d 257, 259 (Mo.App. 2007).

Here, it is apparent that certain facts were undisputed: namely, that plaintiff was treated at St. John's in 2009; that the March 10, 2009 contract existed; that St. John's billed plaintiff $17,337.29 in March 2009; that plaintiff paid a total of $5,300.00 in June 2011; and that the unpaid balance on June 28, 2011, was $12,037.29. Likewise, in this court, the parties do not dispute these facts. In this situation, the parties, the trial court, and the appellate court have been properly apprised of the specific basis on which defendants claimed a right to judgment in their favor. We therefore treat the motion to dismiss as a motion for summary judgment. We will treat as admitted the undisputed facts as set out in this paragraph. We will disregard all other

matters of "fact" appearing in defendants' motion that plaintiff did not allege or admit in his pleadings, reply, or memoranda. We will review the trial court's judgment accordingly.

Standard of Review

Because we consider the trial court judgment as a summary judgment, our review is *de novo*. ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is appropriate when no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. Rule 74.04(c)(6); ITT Commercial Finance, 854 S.W.2d at 377. We view the record in the light most favorable to the party against whom summary judgment is entered and accord the non-movant the benefit of all reasonable inferences from the record. Id. at 376. "The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." Id. at 380. When the movant is a defendant, a right to summary judgment can be established by showing, inter alia, that facts exist that negate any one of the plaintiff's elements. Id. at 381.

I. Ascertainable Loss of Money or Property

In his first point, plaintiff asserts that the trial court erred in entering judgment against him because he adequately alleged that he sustained an ascertainable loss of money as a result of defendants' unfair and deceptive billing practices in that defendants "charged [plaintiff] more than the reasonable value of goods and services rendered to him."

Section 407.025.1 provides:

> Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action . . . to recover actual damages.

An ascertainable loss of money or property is an essential element of a cause of action brought under the MMPA. Chochorowski v. Home Depot U.S.A., Inc., 295 S.W.3d 194, 198 (Mo.App. 2009); Freeman Health System v. Wass, 124 S.W.3d 504, 506-07 (Mo.App. 2004). The MMPA gives a private cause of action "'only to one who purchases and suffers damage.'" Freeman, 124 S.W.3d at 507 (quoting Jackson v. Charlie's Chevrolet, Inc., 664 S.W.2d 675, 677 (Mo.App. 1984)).

Plaintiff argues that he sufficiently alleged an ascertainable loss of money in paragraph 46 of his amended petition, in which he alleged:

> 46. As a direct and proximate result of the conduct of defendants, and each of them, plaintiff Richard Hoover, M.D. paid more for the goods sold and the services rendered than the reasonable value of the goods and services, and has sustained substantial and significant financial losses, and damage to his reputation.

Although plaintiff did not allege the amount that he was charged or the amount that he paid, it was undisputed that he was charged $17,337.29 and paid $5,300.00.

Defendants argue that plaintiff did not allege an ascertainable loss. They primarily rely on Freeman, 124 S.W.3d at 509. In Freeman, a health system had filed a lawsuit against an uninsured patient to collect the amount it had billed for goods and services that it had provided to the patient. The patient had signed an admittance form stating that he would be responsible for the costs of his medical care, but he did not make any payment on the amount billed. The patient filed a counterclaim and a petition for class action status, alleging that the health system had violated the MMPA because it charged him a higher amount than the usual and customary charges for such goods and services in the locale, after it had represented that the stated prices were the usual and customary values for such goods and services. The trial court dismissed the counterclaim and the petition for class action status. On appeal, the patient argued that the trial

court erred in dismissing his counterclaim based on its finding that he had not suffered an ascertainable loss of money or property. He argued that the health system's act of charging him, and its corresponding attempt to collect on those charges, had caused him to suffer an ascertainable loss of money and property, and put him in jeopardy of having a judgment entered against him with its concomitant risk of adversely affecting his credit record. The court of appeals affirmed the dismissal, holding that the patient had not suffered an ascertainable loss because he had paid nothing for the medical goods and services provided. 124 S.W.3d at 507-09.

In light of Freeman, we examine the allegations of the petition and the admitted facts in the case before us. Like the defendant in Freeman, plaintiff entered into a contract to pay the hospital's charges, received goods and services from the hospital, and sought to recover damages from the hospital under the MMPA by challenging the basis for the charges. Unlike the defendant in Freeman, plaintiff did pay $5,300.00 of the amount that he was billed. Freeman clarified that an "ascertainable loss" results from the payment of money, not from the fact a bill was issued. Thus, the issue in this case is whether plaintiff pleaded facts demonstrating that he suffered an ascertainable loss because the amount that he paid, $5,300.00, was more than the reasonable value of the goods and services that he received.

Rule 55.05 requires that a petition must contain "a short and plain statement of the facts showing that the pleader is entitled to relief." Missouri is a "fact pleading" state, and it requires a party to plead "ultimate facts" as opposed to factual or legal conclusions. ITT Commercial Finance, 854 S.W.2d at 379. In the context of a pleading, "ultimate facts" are "issuable, constitutive, or traversable facts essential to the statement of the cause of action." Musser v. Musser, 221 S.W. 46, 50 (Mo. 1920). "[L]egal conclusions cannot be pleaded as ultimate facts."

Id. "Missouri rules of civil procedure demand more than mere conclusions that the pleader alleges without supporting facts." Pulitzer Pub. v. Transit Cas. Co., 43 S.W.3d 293, 302 (Mo. banc 2001). "Some explanation in one's pleading beyond vague assertion of harm is required." Id.

> A petition must contain allegations of fact in support of each essential element of the cause sought to be pleaded. *Cady v. Hartford Accident and Indemnity Co.*, 439 S.W.2d 483, 485 (Mo.1969). In ruling on the sufficiency of the facts pleaded to state a claim, courts consider whether material and essential allegations have not been made. *Langenberg v. City of St. Louis*, 355 Mo. 634, 197 S.W.2d 621, 625 (1946). Where a petition contains only conclusions and does not contain the ultimate facts or any allegations from which to infer those facts a motion to dismiss is properly granted. *Sofka v. Thal*, 662 S.W.2d 502, 509 (Mo. banc 1983).

Berkowski v. St. Louis County, 854 S.W.2d 819, 823 (Mo.App. 1993). See also Charron v. Holden, 111 S.W.3d 553, 555 (Mo.App. 2003); Westphal v. Lake Lotawana Ass'n, Inc., 95 S.W.3d 144, 152 (Mo.App. 2003). A conclusion must be supported by factual allegations that provide the basis for that conclusion, that is, facts "that demonstrate how or why" the conclusion is reached. Westphal, 95 S.W.3d at 152. If a petition fails to state a claim upon which relief can be granted, the trial court may properly order it to be dismissed, regardless of whether the order is treated as a summary judgment or as an order pursuant to a motion to dismiss. Johnson v. Jackson County, 910 S.W.2d 303, 306 (Mo.App. 1995).

The issue in this case is whether plaintiff alleged an ascertainable loss, that is, whether he paid more than the reasonable value of the goods and services that he received. As previously stated, plaintiff alleged in paragraph 46 that he was damaged because he "paid more for the goods sold and the services rendered than the reasonable value of the goods and services." However, he alleged no facts that supported this conclusion. The factual allegations in his petition are directed solely to plaintiff's claims that defendants' bills were based on "standard

charges" that exceeded the reasonable value of the goods and services provided. Plaintiff did not allege that he paid the amount that he was billed or that he paid the "standard charges." Rather, it is undisputed that he paid only $5,300.00. The amended petition does not contain any allegation demonstrating how or why the amount that he paid, $5,300.00, was more than the reasonable value of the goods and services that he received. Plaintiff has not alleged any facts that would support a conclusion that his payment of $5,300.00 was more than the reasonable value of the goods and services that he received. As a result, he did not plead facts showing that he had suffered an "ascertainable loss."

In his amended petition, plaintiff also alleged that he had suffered "damage to his reputation." In his brief, plaintiff argues that defendants "threaten[ed his] credit rating" by attempting to collect the amount owed. However, he did not allege any facts in his amended petition that defendants threatened his credit rating. In the absence of any such allegations, plaintiff has failed to state a claim for relief on this basis, if such a claim exists. See Lonero v. Dillick, 208 S.W.3d 323, 329 (Mo.App. 2006).

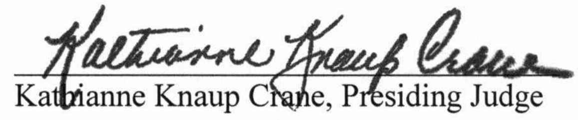
Plaintiff failed to allege facts demonstrating that he suffered an "ascertainable loss." Point one is denied.

II. Remaining Points

In his second point, plaintiff contends that the trial court erred in dismissing his claim for punitive damages. In his third point, plaintiff challenges the dismissal of a separate defendant, Mercy Health. Given our disposition of point one, these points are denied as moot.

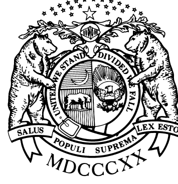
Conclusion

The judgment of the trial court is affirmed.



Kathianne Knaup Crane, Presiding Judge

Kenneth M. Romines, J., concurs in separate concurring opinion.
Lawrence E. Mooney, J., dissents.



In the Missouri Court of Appeals Eastern District

DIVISION TWO

RICHARD HOOVER, Individually, and as Class Representative,	)	No. ED97495
Plaintiff/Appellant,	)	Appeal from the Circuit Court of St. Louis County
v.	)	Honorable James R. Hartenbach
MERCY HEALTH, d/b/a MERCY HEALTH SYSTEM; MERCY HOSPITALS EAST COMMUNITIES, d/b/a ST. JOHN'S MERCY MEDICAL CENTER and/or ST. JOHN'S MERCY HEALTH SYSTEM; and ST. JOHN'S MERCY MEDICAL CENTER, d/b/a MERCY HOSPITALS EAST COMMUNITIES and/or ST. JOHN'S MERCY HEALTH SYSTEM,	)	
Defendants/Respondents.	)	Date: July 3, 2012

CONCURRING OPINION

I concur in the opinion of Judge Crane. I arrive at my result somewhat differently than does Judge Crane.

Somewhere there is a person – one of the huddled masses yearning to have equal bargaining power with Mercy Hospital – for which Judge Mooney finds the Merchandising Practice Act was enacted. Dr. Hoover is not that person.

Dr. Hoover is not Judge Mooney's everyman. Dr. Hoover made a critical conscious choice to not have health insurance. Whether Dr. Hoover intended to rely on

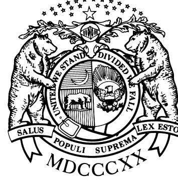
"professional courtesy", to just pay the bills, or is just eccentric, the record does not reveal. Dr. Hoover has been the beneficiary of the very type of contract he now assails. If this were equity – Dr. Hoover would have unclean hands.

The foregoing analysis aside this is a summary judgment case. Simply, two of the most accomplished trial lawyers in St. Louis – one for Dr. Hoover and one for Mercy – themselves made a critical conscious choice, tactically done, to present evidence beyond mere argument, and they made this a summary judgment case – not the Draconian application of some arcane rule. Both counsel, and the trial judge, knew what was happening, Judge Hartenbach had been on the bench thirty years when this case came before him – this was not his first summary judgment rodeo. In sum everyone knew the matter was going to be decided by Judge Hartenbach.

To have rendered Judgment it seems to me Judge Hartenbach had to conclude that fifty-three hundred dollars ($5,300.00) was the reasonable value of the services, that amount had been paid and thus Dr. Hoover could not prove damages. This conclusion resolves the present case and any attempt to collect any amount beyond the tendered amount.

I concur.

KENNETH M. ROMINES, JUDGE



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DISSENT

The contract between the plaintiff and the hospital obligates the plaintiff to the payment of charges for services to be rendered. But the contract provides no price for the services. Although the hospital in its brief assures us of the existence of a "charge master" list of prices, the contract makes no reference to such a list. Indeed, the contract offers no guidance to the uninsured patient how to discover the undiscounted charges that the hospital will impose. Under these circumstances, Missouri law is crystal clear. The hospital can only recover a "reasonable" price. *Brunner v. Stix, Baer & Fuller Co.*, 181 S.W.2d 643, 645 (Mo. 1944); *City of Fulton v.*

Central Elec. Power Coop., 810 S.W.2d 349, 351 (Mo. App. W.D. 1991); *see also* 17A Am. Jur.2d *Contracts* §488 (2d ed. 2011).

The hospital charged the plaintiff $17,337.29. The plaintiff has paid $5,300.00. The balance owing of $12,037.29 has been referred to a collection agency as a delinquent account. The fact that plaintiff has paid on his account meaningfully distinguishes our circumstances from those present in *Freeman Health System v. Wass*, 124 S.W.3d 504 (Mo. App. S.D. 2004).

In enacting the Missouri Merchandising Practice Act, the legislature expressed a clear policy to protect consumers. *Huch v. Charter Communications*, *Inc.*, 290 S.W.3d 721, 725-27 (Mo. banc 2009). The act is broad in scope, paternalistic, and designed to protect those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices. *Id*. To prevail, the MMPA simply requires that plaintiff suffer an "ascertainable loss of money or property, real or personal," as a result of an unlawful practice.

Here, the plaintiff alleged that he "paid more for the goods sold and the services rendered than the reasonable value of the goods and services," and that he has "sustained substantial and significant financial losses." We are supposed to take plaintiff's allegations are true, and liberally grant plaintiff all reasonable inferences. *City of Lake St. Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010). The plaintiff has invoked substantive principles of law that entitle him to relief under the MMPA and he has informed the defendant of what he will attempt to establish at trial.

Yet the majority holds that his failure to particularize his allegation of damages is fatal to his cause of action. He has pleaded that he has paid more than he owed. While plaintiff is required to state ultimate facts, he is not required to plead the facts or circumstances by which the ultimate facts will be established. *Scheibel v. Hillis*, 531 S.W.2d 285, 290 (Mo. banc 1976).

Plaintiff is hardly in a position to further plead how damages are to be ascertained because it rightly rests with the finder of fact to determine the reasonableness of the charges he has paid. The most the plaintiff can presently allege as damages is that which he has pleaded. He paid more than a reasonable amount.

I respectfully dissent.

LAWRENCE E. MOONEY, JUDGE