THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of Commons Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2024-001239
Case No. 2020-CP-42-00055

Lad Santiago, Appellant,

v.

Oscar Avila Hernandez, *et. al.* Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This appeal stems from the lower Court's granting of Defendants'/Respondents' Motion to Dismiss for failure to state a claim upon which relief can be granted.[1] The Amended Complaint, dated March 9, 2020 and styled as a "breach of contract" action, alleges that Plaintiff/Appellant entered into written and oral agreements with the various Defendants/Respondents to provide medical services whereby Defendants/Respondents, in exchange for said treatment, would pay $18,207.10 to a 3rd party, Upstate Clinical Associates, LLC.[2] Plaintiff/Appellant was *pro se* for this initial filing and remained *pro se* throughout the pendency of this action except for a brief moment to be discussed further below. In his Complaint, Plaintiff/Appellant alleged that the treatment provided to Defendants/Respondents stemmed from injuries related to an automobile collision, and further alleged that although Defendants/Respondents offered Plaintiff/Appellant $12,990.00 as resolution on a collective bill allegedly totaling $18,207.10, Plaintiff/Appellant refused to accept the alleged offer to resolve any outstanding debts.[3] Several documents purportedly forming the basis for Plaintiff's/Appellant's "breach of contract" action were attached to the Amended Complaint as Exhibits.[4]

In response to the Plaintiff's/Appellant's Amended Complaint, Defendants/Respondents filed their Motion to Dismiss alleging (1) that the Complaint did not state a claim upon which relief could be granted and (2) that the statute of limitations had run on some, if not all, of the claims

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[1] Record VOL I, p. 18.

[2] Record VOL I, p. 76; *also note* that the Amended Complaint only included a change to add the word "Plaintiff" to various paragraphs in an attempt to survive the Defendants'/Respondents' initial Motion to Dismiss.

[3] *Id.*, paragraph 15.

[4] *Id.*.

against the individual Defendants/Respondents.[5] Plaintiff/Appellant also filed a Motion to Disqualify the Defendants'/Respondents' Counsel alleging various ethical violations.[6] At the same time, Plaintiff/Appellant filed a Bar Complaint against the undersigned counsel, however, the Bar Complaint was subsequently dismissed without any finding of ethical violations. Various filings were made by the Parties to the action to support their respective positions regarding the Defendants'/Respondents' Motion to Dismiss, and ultimately, the Parties *did not object* to have the Motion to Dismiss heard on the parties' Memorandums and in lieu of a live hearing.[7] This first wave of activity ended on or about May 29, 2020.

On or about March 30, 2021, the parties attended failed mediation. Again, several months passed with no activity and with Defendants'/Respondents' original Motion to Dismiss still pending. On December 9, 2021, counsel enters an appearance on behalf of the Plaintiff/Appellant. On March 8, 2022, Plaintiff/Appellant, now with assistance of counsel, filed his Motion to Alter or Amend the Complaint seeking to add an unrepresented third party, Upstate Clinical Associates, LLC, as a Plaintiff.[8] The Motion was denied on October 4, 2022.[9] On January 19, 2023, Plaintiff's/Appellant's counsel files a Motion to Withdraw as Counsel and the Motion is granted[10], however, not before Plaintiff/Appellant made two nonsensical, *pro se* filings—(1) a Notice to

[5] Record VOL I, p. 69.

[6] Record VOL I, p. 90.

[7] *See* Record VOL I, p. 84; *see also* Record VOL I, p. 132; *see also* email exchange dated 5/13/20 between parties and Judge Cole's office regarding consent to have Motion to Dismiss decided on briefs *without* live hearing, Record VOL I, p. 401.

[8] Record VOL I, p. 180.

[9] Record VOL I, p. 1.

[10] *See* Record VOL I, p. 196; *see also* Record VOL I, pp. 8 and 10.

Withdraw His Motion to Amend or Alter Complaint, and (2) a Notice of Termination for Ineffective Assistance of Counsel.[11]

Around the same time as these aforementioned, nonsensical filings, on March 20, 2023, Defendants/Respondents filed their Renewed Motion to Dismiss in an effort to move the Court to hear the previous Motion to Dismiss that was filed approximately 3 years earlier and in light of the new filings and Orders since the prior filing that seemingly demonstrated Plaintiff's/Appellant's admission that he failed to state a cause of action for which relief could be granted.[12] Various Memorandums were filed both in Support and Opposition to the Defendants'/Respondents' Renewed Motion to Dismiss.[13] Ultimately, Defendants'/Respondents' Renewed Motion to Dismiss was denied on grounds that there was already a pending Motion to Dismiss.[14]

Finally, on November 20, 2023, over three years from the original filing, Defendants'/Respondents' Motion to Dismiss was granted.[15] On November 30, 2023, Plaintiff/Appellant filed his "Motion for New Trial" and said motion was Denied on July 3, 2024.[16] Thereafter, Plaintiff/Appellant filed this Appeal.

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[11] *See* Record VOL I, p. 198 and 216 respectively; *see also* Record VOL I, p. 328.

[12] *See* Record VOL I, p. 199.

[13] Record VOL I, pp. 155, 167, 222, 255.

[14] Record VOL I, p. 12.

[15] Record VOL I, p. 18.

[16] Record VOL I, p. 403 and p. 24.

STANDARD OF REVIEW

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP.[17] 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.[18] The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. [19] Dismissal under Rule 12(b)(6) is proper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would not entitle the plaintiff to relief on any theory.[20] Moreover, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.[21] The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law.[22]

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[17] *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

[18] *Id.*

[19] *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007).

[20] *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

[21] *Id* at 395, 645 S.E.2d at 248.

[22] Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct.App.2007).

ARGUMENT

I. CIRCUIT COURT CORRECTLY GRANTED DEFENDANTS'/RESPONDENTS' 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

At the Circuit Court level, Defendants/Respondents, by way of a Motion to Dismiss, argued that the Plaintiff/Appellant is not a party to the purported contractual agreements attached to the Complaint and allegedly forming the basis for the causes of action of "breach of contract" and the prayer for "specific performance" of the contract."[23] The Circuit Judge agreed and Defendants'/Respondents' Motion to Dismiss was granted.[24] Put plainly, Plaintiff/Appellant does not have privity of contract with the Defendants/Respondents in any manner whatsoever with respect to the "contract(s)" attached to the Complaint. Even when viewed in the light most favorable to the Plaintiff, the Complaint and purported contracts incorporated by exhibit demonstrate an alleged contractual agreement between the Defendants/Respondents and a *limited liability company*, Upstate Clinical Associates, LLC. In fact, Plaintiff's/Appellant's allegations within the Complaint unequivocally allege a contractual agreement between the Defendants/Respondents and Upstate Clinical Associates, LLC that required payment to Upstate Clinical Associates, LLC and not the Plaintiff/Appellant.[25] Further, Plaintiff's/Appellant's

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[23] The prayer for specific performance of the contract is just one of the *many* nonsensical filings by the *pro se* Plaintiff/Appellant; the Plaintiff/Appellant alleges a breach of contract for failure to pay for medical services, however, he also seeks "specific performance" of the contract without alleging what he seeks to have the Defendants/Appellants specifically perform in lieu of money damages. From very early on, it becomes obvious that the Plaintiff/Appellant has created challenges for himself by attempting to representing himself and/or Upstate Clinical Associate, LLC, and despite being urged by the Court to seek legal counsel. *See* Record VOL I, p. 16.

[24] *See* Record VOL I, p. 18.

[25] *See* Record VOL I, pp. 78-81, paragraphs 6 ("Defendants promised to pay Upstate Clinical Associates, LLC; paragraph 7 ("…Defendants to defer payment to Upstate Clinical Associates LLC"); paragraph 10 ("Copies of invoices for payment to Upstate Clinical Associates LLC… are attached as Exhibit B"); paragraph 14 ("The non-conveyance and delivery of funds to (Upstate Clinical Associates, LLC) was in direct violation of written and oral contracts…"); paragraph 15 (…amount incurred and owed by the Defendants to Upstate Clinical Associates, LLC…"); paragraph 25 ("…[D]efendants… have failed to perform their obligations under said contracts which is to

allegations within the Amended Complaint failed to state *any* privity of contract between the Plaintiff/Appellant and the Defendants/Respondents in the form of either beneficiary of the contract nor assignee of contract. "Privity denotes [a] mutual or successive relationship to the same rights of property."[26] "Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of contract between the defendant and a third-party is not, as such, recoverable by the plaintiff."[27] "The general rule at common law is that an action on a contract must be brought by the party in whom the legal interest is vested, and this legal interest is ordinarily vested only in the promisee or promisor."[28] Consequently, they or those in privity with them are generally the only persons who can sue on the contract."[29] Put plainly, the Plaintiff's/Appellant's Amended Complaint fails to allege any facts that would place him in a position as a promisor and/or promissee of the attached contract, and further, the plain language of the attached contracts show no promisor/promissee relationship between Plaintiff/Appellant and Defendants/Respondents. The Plaintiff's/Appellant's Amended Complaint fails to state a cause of action upon which relief can be granted.

Continuing, the Amended Complaint alleges that Plaintiff/Appellant—rather than Upstate

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render professional fees in the amount of $17,990.00 to Upstate Clinical Associates LLC").

[26] *Fabian v. Lindsay, III*, 410 S.C. 475, 482, 765 S.E.2d 132, 135 (2014) *citing Thompson v. Hudgens*, 161 S.C. 450, 462, 159 S.E. 807, 812 (1931); *see also Black's Law Dictionary* 1394 (10th ed. 2014) (defining "privity" as "the connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property; mutuality of interests").

[27] *Fabian v. Lindsay, III*, 410 S.C. 475, 488, 765 S.E.2d 132, 139 (2014) *citing Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004); *see also Clardy v. Bodolosky*, 383 S.C. 418, 679 S.E.2d 527 (Ct. App. 2009); *Good v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997); *Bob Hammond Const. Co. v. Banks Const. Co.*, 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994).

[28] *Pro. Bankers Corp. v. Floyd*, 285 S.C. 607, 612–13, 331 S.E.2d 362, 364–65 (Ct. App. 1985), *citing Cemetery Consultants, Inc. v. Tidewater Funeral Directors Association, Inc.,* 219 Va. 1001, 254 S.E.2d 61 (1979).

[29] *Id.*

Clinical Associates, LLC—entered into *written* agreements with the Defendants/Respondents. However, the purported "contracts" attached to the Amended Complaint and alleged to form the basis for this action paint a different picture altogether.[30] If the pleadings are taken in the light *most* favorable to the Plaintiff/Appellant, the purported contract(s) attached to the Complaint show(s) an alleged contractual agreement between Defendants/Respondents and Upstate Clinical Associates, LLC—*not* the Plaintiff.[31] Although Claimant alleges that there is an extrinsic *verbal* agreement between the Plaintiff and Defendants that creates some sort of privity of contract (in violation of the parol evidence rule)[32], where a conflict exists between the complaint and the attached exhibit, the exhibit usually prevails.[33] The purported "contracts" or invoices attached to the Complaint contain no language whatsoever that would suggest privity between the Plaintiff/Appellant and the Defendants/Respondents—either implicitly or explicitly. Again, the Amended Complaint fails to state a cause of action upon which relief can be granted.

Consider the following: Exhibit A to the Amended Complaint contains the alleged "contract," titled "Informed Consent for Treatment", which in part—using the

[30] *See* Record VOL I, pp. 40-60.

[31] *Id*.

[32] Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a written contract. *Penton v. J.F. Cleckley Co.*, 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997); *see also e.g., Levy v. Outdoor Resorts,* 304 S.C. 427, 405 S.E.2d 387 (1991).

[33] In general, if a conflict exists between a document and an exhibit to a document, the exhibit prevails. *See*, e.g., *Estate of Revis by Revis v. Revis*, 326 S.C. 470, 481, 484 S.E.2d 112, 118 (Ct. App. 1997) ("[W]here a conflict exists between a stipulation and an exhibit attached to the stipulation, then it must be resolved in accordance with the exhibit."). Similarly, when federal courts address a motion to dismiss, if an exhibit to the complaint or motion conflicts with the allegations in a complaint, the exhibit usually prevails. See, e.g., *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991) ("[I]n the event of conflict between the bare allegations of the complaint and any exhibit attached…, the exhibit prevails.") For example, in a breach of contract action, if the contract is an exhibit to a complaint, the contract's description of the parties' duties prevails over the plaintiff's characterization of the contract. See *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 167-168 (4th Cir. 2016). (For credit to this entire footnote, see SC Lawyer, March 2018, The Scrivener, p. 48 through 50, by Scott Moïse.)

Plaintiff's/Appellant's own words—allegedly forms the basis for this breach of contract action.[34] Exhibit A also contains an alleged assignment agreement, titled "Irrevocable Assignment, Lien and Authorization", which, in conjunction with the "Informed Consent for Treatment", in part—using the Plaintiff's/Appellant's own words—allegedly forms the basis for breach of contract action.[35] The "Irrevocable Assignment, Lien and Authorization", according to the allegations in the Amended Complaint, is the document which sets forth the purported, bargained-for exchange whereby Upstate Clinical Associates, LLC—and *not* the Plaintiff/Appellant—would provide treatment to the Defendants/Respondents and in exchange, it is the purported obligation of the Defendants/Respondents to pay Upstate Clinical Associates, LLC—and not the Plaintiff/Appellant—for the said treatment. The heading of the "Informed Consent for Treatment" document contains the name, address and contact information for Upstate Clinical Associates, LLC—and not the Plaintiff/Appellant personally. The only time that the Plaintiff's/Appellant's name appears on *either* document is as a witness's signature on the document titled "Informed Consent for Treatment."[36] Neither the "Informed Consent for Treatment" nor the "Irrevocable Assignment, Lien and Authorization" establish any privity whatsoever between Plaintiff and Defendants. Again, the Amended Complaint fails to state a cause of action upon which relief can be granted.

By any metric, there exist no privity between Plaintiff/Appellant and Defendants/Respondents. The granting of the Defendants'/Respondents' Motion to Dismiss was

[34] *See* Record VOL I, pp. 40-47.

[35] *Id.*

[36] *See* Amended Complaint, Exhibit A.

proper. Respectfully, the Appealed Order must be affirmed.

II. PLAINTIFF'S/APPELLANT'S POSITION THAT LACK OF PRIVITY IS OVERCOME BY WAY OF PLAINTIFF AS AN IMPLIED BENEFICIARY TO THE ALLEGED CONTRACT AND/OR BY WAY OF PLAINTIFF AS AN IMPLIED ASSIGNEE OF THE CONTRACT IS A LEGAL FALLACY AND UNSUPPORTED BY ANY AUTHORITY.

As previously argued by the Defendants/Respondents, "generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable by the plaintiff."[37] Without an assignment, a nonparty to a contract does not have standing to sue on the contract.[38] Stated even more so clearly, "South Carolina contract law carries a *presumption* that an individual who is not a party to a contract lacks privity to enforce it."[39] Plaintiff's/Appellant's Complaint fails to meet this presumption, and further, fails to state *any* privity whatsoever between Plaintiff/Appellant and Defendants/Respondents. Instead, by his own allegations and attachments, Plaintiff/Appellant alleges the existence of a contractual agreement between the Defendants/Respondents and a third-party—Upstate Clinical Associates, LLC.[40]

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[37] *Fabian v. Lindsay, III*, 410 S.C. 475, 482, 765 S.E.2d 132, 135 (2014) *citing Thompson v. Hudgens*, 161 S.C. 450, 462, 159 S.E. 807, 812 (1931); *see also Black's Law Dictionary* 1394 (10th ed. 2014) (defining "privity" as "the connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interests"). *See also, Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct.App.2004).

[38] *Egrets Pointe Townhouses Prop. Owners Ass'n, Inc. v. Fairfield Communities, Inc.*, 870 F. Supp. 110, 117 (D.S.C. 1994), *interpreting South Carolina law.*

[39] *See Touchberry v. City of Florence,* 295 S.C. 47, 48–49, 367 S.E.2d 149, 150 (1988)(emphasis added).

[40] *See* Record VOL I, pp. 78-81, paragraphs 6 ("Defendants promised to pay Upstate Clinical Associates, LLC; paragraph 7 ("…Defendants to defer payment to Upstate Clinical Associates LLC"); paragraph 10 ("Copies of invoices for payment to Upstate Clinical Associates LLC… are attached as Exhibit B"); paragraph 14 ("The non-conveyance and delivery of funds to (Upstate Clinical Associates, LLC) was in direct violation of written and oral contracts…"); paragraph 15 (…amount incurred and owed by the Defendants to Upstate Clinical Associates,

Plaintiff's/Appellant's fatal flaw is failing to allege in his Amended Complaint any facts that would state, with any specificity, the basis for his position that privity of contract exists between the Plaintiff/Appellant and Defendants/Respondents. Plaintiff/Appellant now incorrectly argues that privity can somehow be *implied* by looking within the four corners of the Amended Complaint. It cannot, but how does Plaintiff/Appellant attempt to make this connection? Simply put, Plaintiff/Appellant *now* attempts to argue that the presumption of lack of privity can be overcome because (1) he is the assignee of the contract and/or (2) he is a 3rd party beneficiary of the contract.[41] Plaintiff's position is misguided.

As to the issue of assignor/assignee, Plaintiff/Appellant did not plead that he was an assignee of the contract at any point, and did not even *mention* the existence of an assignor/assignee relationship in his Memorandum in Opposition to Defendants' Motion to Dismiss dated March 9, 2020—the Memorandum that the parties agreed would be considered in lieu of oral arguments.[42] The *only* time the Plaintiff/Appellant *even mentions* the existence of an assignor/assignee relationship was in his Memorandum in Opposition to Defendants' Renewed Motion to Dismiss dated May 22, 2023, after the denial of his Motion to Amend the Complaint

LLC…"); paragraph 25 ("…[D]efendants… have failed to perform their obligations under said contracts which is to render professional fees in the amount of $17,990.00 to Upstate Clinical Associates LLC"). *See also,* Complaint, Exhibits A and B.

[41] Note that the Defendants/Respondents are making a concerted effort to bring to this Court's attention that the Plaintiff/Appellant failed to plead any form of privity in his Complaint (and instead, made clear allegations demonstrating lack of privity), *but also*, in his Memorandum in Opposition to the Defendants'/Respondents' Motion to Dismiss, the Plaintiff/Appellant ***neither argued that he was a 3rd party beneficiary nor that he had been assigned the contract.*** You will not find the words "assignee" nor "3rd party beneficiary" in his arguments in his Memorandum in Opposition to the Defendants'/Appellants' Motion to Dismiss. (*See* Memorandum in Opposition to Defendants' Motion to Dismiss). In fact, the argument of "assignee" and/or "3rd party beneficiary" did not appear anywhere in the record until *after* the Plaintiff's/Appellants' Motion to Amend was denied (nearly 3 years after the filing of the Amended Complaint).

[42] *See* Record VOL I, p. 84; *see also* Record VOL I, pp. 401-402.

and *more than three years after the Plaintiff/Appellant filed his Amended Complaint!*[43] Regardless, the trial court's ruling on a Rule 12(b)(6) motion must be bottomed and premised solely upon the allegations set forth by the plaintiff in the Complaint.[44] It therefore stands to reason that the statements in subsequent filings by the Plaintiff/Appellant could not have been considered by the lower Court in considering the Motion to Dismiss. A trial court is limited to reviewing the Complaint and only the Complaint (and attachments thereto), and a memorandum in support of a motion is not evidence nor should it be considered.[45] (This principle also nullifies one of the Plaintiff's/Appellant's *other* arguments—that the Judge granting the Defendants'/Respondents' Motion to Dismiss should have considered his allegation(s) in a Memorandum unrelated to the Motion to Dismiss and not properly pleaded in his Complaint.) The only mechanism available to the Plaintiff/Appellant under the Rules of Civil Procedure to correct his pleading deficiency in failing to delineate the existence of an assignor/assignee relationship would have been to file a motion for leave to amend. The Plaintiff/Appellant, while briefly represented by counsel, *did* file a Motion for Leave to Amend dated March 7, 2022 (about 2 years after the filing of the Amended Complaint), but get this—the only *specific* request for amendment was for leave to add another Plaintiff. Can you even imagine who that 3rd Party was that the Plaintiff/Appellant sought leave to add? The Plaintiff/Appellant sought leave to add Upstate Clinical Associates, LLC as a Plaintiff![46] Yes—*that* Upstate Clinical Associates, LLC—the same entity that Defendants/Respondents have maintained all along were the proper parties to the alleged

[43] *See* Record VOL I, p. 226.

[44] *See Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001).

[45] *Brown v. Odom*, 425 S.C. 420, 432, 823 S.E.2d 183, 189 (Ct. App. 2019).

[46] *See* Record VOL I, p. 180..

"contracts" *according to the Plaintiff's/Appellant's own pleadings*.[47] The Plaintiff/Appellant's Motion for Leave to Amend was denied (and more importantly, leave to amend to include an allegation of assignment is not an issue on review before this Honorable Court as the Plaintiff/Appellant has not raised that as an issue in this Appeal).[48] Nonetheless, the notion that the Plaintiff/Appellant has overcome the deficiency of lack of privity because he was the assignee of the contracts is a fallacy. The Plaintiff/Appellant has never pleaded that issue nor has he requested leave to amend his Complaint to allege same. It is worth noting that in his Brief to this Honorable Court, the Plaintiff/Appellant blatantly misrepresents to this Court that paragraph 6 of his Amended Complaint contained the allegation of assignment of the contract to him by Upstate Clinical Associates, LLC.[49] Dishonest representation aside, quite frankly, this notion of assignment can only be seen as a last-ditch and entirely dishonest attempt to survive the lower Court's granting of the Motion to Dismiss. Nonetheless, the argument fails on its face because the Plaintiff/Appellant failed to allege the existence of an assignment in his Amended Complaint.

Continuing, Plaintiff/Appellant also attempts to cure his clear privity deficiency by also arguing that he is a 3rd party beneficiary to the alleged "contracts." This is a gross misunderstanding of the law regarding the right of 3rd party beneficiaries to bring a direct action for breach of contract. If a contract is made for the benefit of a third person, that person may

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[47] *See* Record VOL I, p. 132; *see also See* Record VOL I, p. 182.

[48] Note that Plaintiff/Appellant mentions in his Initial Brief, page 16, that in his Motion for New Trial, he sought leave of the Court to file supplemental pleadings to address any deficiencies. While it is Defendants'/Respondents' position that Plaintiff's/Appellant's request for leave to amend in his "Motion for New Trial" was improper on various grounds—specifically, that there were no deficiencies specifically offered to be corrected by Plaintiff/Appellant—nonetheless, this issue was not preserved by the Plaintiff/Appellant as it was not set forth in the Plaintiff's/Appellant's Statement of Issues on Appeal.

[49] *See* Plaintiff/Appellant's Initial Brief, page 6, line 22 through page 7, line 2.

enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.[50] Because the Plaintiff/Appellant failed to plead the existence of a 3rd Party Beneficiary relationship (and failed to seek leave to amend to add that allegation), the argument fails for the same reasons that the aforementioned argument regarding assignor/assignee relationship fails. However, the Plaintiff's/Appellant's argument regarding his status as a 3rd party beneficiary, quite frankly, is absurd. There is *nothing* to which the Plaintiff/Appellant can point in the attached, alleged "contracts" that states that he is a *direct* beneficiary therein. Plaintiff/Appellant appears to argue that because he would have been paid from the proceeds paid to Upstate Clinical Associates, LLC, that therefore, he is a direct 3rd party beneficiary of the contract. The Defendants/Respondents argue that this, *at best*, would classify the Plaintiff/Appellant as an incidental beneficiary and *not* a direct beneficiary. An incidental beneficiary has no privity of contract as a 3rd party, and therefore, the Plaintiff's/Appellant's argument that he has standing as a 3rd party beneficiary also fails.

Consider the absurdity of the Plaintiff's/Appellant's position regarding 3rd party beneficiary status: if the *alleged* fact that the Plaintiff/Appellant might have been paid from the proceeds of any payment owed to Upstate Clinical Associates, LLC converts Plaintiff/Appellant to a 3rd party beneficiary, that would also open the door for a whole slew of 3rd parties to maintain an action against the Defendants/Respondents under similar theory. For instance, under such an absurd theory, Upstate Clinical Associates, LLC's landlord could maintain an action against the Defendants/Respondents, or even Upstate Clinical Associates, LLC's cleaning crew, or any of the number of nurses that provided services (or *did not* provide services) to the Defendants/Appellants,

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[50] *Bob Hammond Const. Co. v. Banks Const. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994), *citing Cothran v. Rock Hill,* 211 S.C. 17, 43 S.E.2d 615 (1947).

or maybe even the receptionist, or lessor of medical equipment—the list is nearly unlimited—and would create an *absurd* result.

Plaintiff's/Appellant's reliance on caselaw to support his position is *also* badly flawed. Plaintiff/Appellant points to *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, in support of his position that he should be classified as a 3rd party beneficiary (and with other various citations which our taken out of context).[51] However, the *Beverly* case involved a patient who brought an action against a hospital for breach of contract, bad faith, and unjust enrichment, asserting that the hospital breached their contract with the health insurance network, of which patient was a member, by attempting to bill the patient in excess of the contract's reduced services rate. The *Beverly* Trial Court and the Appellate Court(s) found that the patient was a *direct* beneficiary of the contract between the hospital and the health insurance network, and as such, had privity to bring a direct action against the hospital for breach of contract (among other claims). The fact pattern in *Beverly* is not analogous and has no relationship to the fact pattern in the instant matter. The Plaintiff/Appellant offers no support for his classification as a 3rd party beneficiary.

Plaintiff/Appellant attempts to argue a workaround for his lack of privity with the Defendants/Respondents. Every single argument fails. (Consider this, too—the very fact that the Plaintiff argues that he should be seen as an assignee and/or a 3rd party beneficiary *is a clear admission that the Plaintiff/Appellant is not a party to the "contracts" made subject by this action!)* Again, the dismissal of Plaintiff's/Appellant's Amended Complaint was proper.

[51] *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 839 S.E.2d 468 (Ct. App. 2020), *aff'd*, 435 S.C. 594, 869 S.E.2d 812 (2022).

III. PLAINTIFF/APPELLANT ARGUES THAT BECAUSE HIS COMPLAINT COULD SURVIVE UNDER *AT LEAST* ONE THEORY, DISMISSAL IS IMPROPER, HOWEVER, PLAINTFF/APPELLANT FAILS TO STATE WHAT THAT ONE THEORY MIGHT BE. FURTHER PLAINTIFF/APPELLANT ARGUES THAT HIS COMPLAINT PASSES THE PLAUSABILITY STANDARD, BUT HE DOES NOT STATE HOW SO.

Just as the above title reads, Plaintiff/Appellant, in support of his position that dismissal of his Complaint was improper, argues that his Complaint "meets the requirements for Relief on Any Theory." (sic) Plaintiff/Appellant further argues that the "Complaint meets the necessary criteria to qualify as a bona fide legal complaint." Both of these positions essentially make the same conclusory argument: that because the Plaintiff's/Appellant's Breach of Contract claim is valid, that therefore, the Complaint must be valid. What Plaintiff/Appellant fails to recognize is that taking his own allegations as true—specifically that Defendants/Respondents entered into a contract with the non-party, Upstate Clinical Associates, LLC and *not* the Plaintiff/Appellant—the Complaint fails to state a cause of action upon which relief can be granted *under any theory* and fails to meet the "Plausibility" standard upon which he so desperately relies. Plaintiff/Appellant offers no additional theories that might be supported by the facts alleged in his Complaint.

Again, Defendants/Respondents argue that Plaintiff's/Appellant's Complaint does not allege any form of privity with the Defendants/Respondents. Plaintiff/Appellant has failed to state even one cause of action that survives the proffered standards upon which he relies. Respectfully, Plaintiff's/Appellant's argument regarding "any theory" doctrine and/or "plausibility" doctrine must fail and the granting of Defendants'/Respondents' Motion to Dismiss must be affirmed.

IV. PLAINTIFF/APPELLANT ATTEMPTS TO ARGUE ISSUES NOT RULED UPON BY THE LOWER COURT AND NOT SOUGHT TO BE RULED UPON IN PLAINTIFF'S/APPELLANT'S POST-ORDER "MOTION FOR NEW TRIAL".

Plaintiff/Appellant states two separate issues in his Statement of Issues on Appeal—specifically, No. 5 and No. 6 regarding the issues of statute of limitations and breach of fiduciary duty respectively—that were not ruled upon by the lower court nor called to the attention of the Lower Court with any specificity by a post-order motion for reconsideration. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." [52] A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. [53]

As to the issue of statute of limitations, the Lower Court, in its Order made subject by this appeal, specifically stated that it was not passing judgment on the statute of limitations defense raised by the Defendants/Respondents.[54] Plaintiff/Appellant did not seek a finding or order on this issue in his "Motion for New Trial" and therefore, this issue is not preserved. Respectfully, this issue cannot be considered by this Honorable Court on Appeal nor does it a warrant a response on the merits from the Defendants/Respondents.

Likewise, the issue of whether the Lower Court erred in finding that there was no failure of fiduciary performance and duty on the part of the Respondents and the Respondents' attorney was neither ruled upon by the Lower Court nor raised as an issue in the Plaintiff's/Appellant's

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[52] *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998), *citing Creech v. South Carolina Wildlife and Marine Resources Dep't,* 328 S.C. 24, 491 S.E.2d 571 (1997).

[53] *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

[54] *See* Record VOL I, p. 18.

"Motion for New Trial." This issue cannot be considered by this Honorable Court on Appeal nor does it a warrant a response on the merits from the Defendants/Respondents.

CONCLUSION

At times, Plaintiff/Appellant has suggested he should be granted deference as a *pro se* litigant. Plaintiff/Appellant is a *pro se* litigant by choice. The Plaintiff/Appellant has had representation at times throughout the pendency of these proceedings and he has willfully (and with open hostility) terminated the relationship(s) with his counsel.[55] He has been openly advised of the Court's opinion regarding the dangers of self-representation.[56] There is no mitigating circumstance for Plaintiff's/Appellant's failure to state a cause for which relief can be granted. Plaintiff/Appellant has had *years* to correct any errors or omissions in his Amended Complaint. Plaintiff/Appellant has not once asked the Court to grant leave to amend his Complaint with any specificity, and when Plaintiff/Appellant finally did ask for leave to amend, his request did not include a request for leave to amend to add allegations of assignment of contract nor 3rd party status to overcome the presumption of lack of privity (even while represented). The Plaintiff/Appellant has failed to demonstrate, in any way, that his Amended Complaint states a cause of action upon which relief can be granted. The Plaintiff/Appellant has failed to demonstrate any error on the part of the Circuit Court. Respectfully, the Circuit Court's Order Granting Defendants'/Respondents' Motion to Dismiss *must* be affirmed.

(SIGNATURE ON FOLLOWING PAGE)

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[55] *See* Record VOL I, p. 216. *See also* Record VOL I, p. 222.

[56] *See* Record VOL I, p. 24.

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