THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
The Honorable Roger L. Couch, Circuit Court Judge

Case No. 2006-CP-42-0108

M. Dubose Medlock, Jr., M.D. ..... Appellant,

v.

Laurens County Healthcare System ..... Respondent.

RESPONDENT'S INITIAL BRIEF

FOR THE RESPONDENTS:

Michael A. Timbes, Esquire
Matthew E. Yelverton, Esquire
Thomas J. Rode, Esquire
THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Phone: (843) 937-8000
Facsimile: (843) 937-4200
Email: mtimbes@tktylawfirm.com
Email: myelverton@tktylawfirm.com
Email: trode@tktylawfirm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

S.C. CASES

OTHER CASES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Respondent Laurens County Healthcare Systems ("Hospital") commenced this action against Appellant Melvin Dubose Medlock, Jr., M.D. ("Medlock") on January 11, 2006.[1] The Complaint alleged claims against Medlock for breach of contract, breach of contract accompanied by fraudulent act, unjust enrichment, fraud/misrepresentation, and unfair trade practices. In his answer denying liability, Medlock asserted counterclaims against the Hospital for breach of the implied covenant of good faith and fair dealing, fraud in the inducement, prevention of performance, and impossibility of performance. The parties filed cross motions for summary judgment, which were denied. The matter was then tried without a jury on April 4, 2012 before the Honorable Roger L. Couch. The trial court issued a judgment in favor of the Hospital on June 18, 2012, finding Medlock breached the Contract. (Final Judgment). The Court awarded the Hospital damages in the amount of $345,640.98. Medlock's motion for reconsideration was denied on August 26, 2013.

STATEMENT OF THE FACTS

In 1997, the Hospital assessed the then-existing needs of the Laurens County community and found a demand for a surgeon in the region to satisfy patient care needs. The community's need led to discussions with Medlock about transferring his practice to Laurens County. (Tr. pp. 23-24, 29; Ex. 1).

A. The Parties' Contract

Negotiations between the Hospital and Medlock culminated in a written agreement entitled "Not for Profit Net Income Guarantee Agreement," dated May 28,

[1] The Complaint also named Spartanburg Surgical Services as a defendant in the action. The Hospital later dismissed its claims against that defendant.

1997 (the "Contract"). (Tr. p. 24; Exhibit 1). In addition to paying Medlock's reasonable moving expenses, the Hospital agreed to assist Medlock in establishing his medical practice in Laurens County by subsidizing the income of his practice to ensure he earned at least $175,000.00 per year for a period of 24 months. (Tr. p. 29; Ex. 1, pp. 1, 3-4). Medlock admitted the subsidy was a loan to him from the Hospital to account for any shortfall between the net income of his practice and $175,000.00 per year, guaranteeing his annual income in that amount. (Tr. pp. 28-29, 32). The subsidy commenced July 1, 1997, and was limited to a maximum of $350,000.00.

At the end of the 24-month subsidy period, the Contract required Medlock repay the Hospital the balance of the subsidy payments retained by him during the term. (Ex. 1, p. 4). However, the Contact gave Medlock the option forgive the debt by maintaining his practice in Laurens County for two years after the subsidy period ended. The Contract forgave one-half of the unpaid subsidy balance if Medlock maintained his practice in the areas for 12 months, and the other half would be forgiven after maintaining his practice for the second year. (Ex. 1, p. 4). If any amount remained outstanding, it would bear interest at a rate of Wall Street Journal Prime plus two percent (2%), determined as of the last day of the 24 month subsidy period. (Tr. p. 33; Ex. 1, p. 4).

As it concerns the subsidy payments, the Contract plainly states: "**No benefit or payment hereunder shall in any way be based upon referral of patients or be volume sensitive**." (Ex. 1, p. 3)(Emphasis added). The Contract further provides:

> It is expressly understood and agreed that Physician [Medlock] is an independent contractor expected and entitled to freely and independently exercise his judgment in accordance with good medical practice in the care and treatment of his patients. Physician shall exercise his skill, learning, intelligence, and experience and evaluation,

> diagnoses, medication, treatment, and hospitalization of his patients according to his informed judgment and shall not be constrained in the exercise of his independent judgment by the terms or conditions of this Agreement. **Physician is free to admit patients to any Hospital of Physician's choice and to maintain staff privileges at other hospitals. Physician is under no obligation to admit patients to Laurens County Hospital**. The sole purpose of this Agreement is to induce Physician to establish his practice in the area of the Hospital because of the Hospital's belief that there are not a sufficient number of general/vascular surgeons in the area due to the findings documented in the Needs Assessment.

(Ex. 1, pp. 5-6) (Emphasis added).

Subject to the terms and conditions of the Contract, Medlock moved to Laurens County and opened his practice in July of 1997. (Tr. p. 23). Over the 24-month period from 1997 to 1999, Medlock admits to receiving subsidy payments from the Hospital pursuant to the Contract, which he understood he would have to repay unless he opted to maintain his practice in Laurens County and have the debt forgiven. (Tr. pp. 32-33; Ex. 1, p. 4). Medlock understood the Contract required him to immediately pay to the Hospital any unrepaid subsidies if he materially breached the Contract. (Tr. pp. 37-38).

A. The First Addendum

On April 23, 1999, Medlock and the Hospital executed an Addendum to the Contract (the "First Addendum"). (Tr. p. 40; Ex. 2). The First Addendum changed the subsidy period from 24 months to 30 months, so that Medlock received subsidies through December 31, 1999. The First Addendum also amended the terms of the loan forgiveness such that the debt would be forgiven at the rate of one sixtieth (1/60) per month (rather than yearly under the original Contract terms) if Medlock maintained a fulltime medical practice in Laurens County for five (5) years after the subsidy period ended. All other terms of the Contract remained unchanged. (Tr. pp. 40-44; Ex. 2).

Pursuant to the First Addendum, Medlock continued to receive subsidy payments from the Hospital for an additional six months. (Tr. p. 42-43). By the conclusion of the subsidy period on December 31, 1999, Medlock admits he received $350,000 in subsidy payments. (Tr. p. 43-44, 48). No further subsidies were paid after that date.

B. The Second Addendum

On June 25, 2002, Medlock and Hospital executed a Second Addendum to the Contract (the "Second Addendum"), having a back-dated effective date of January 1, 2002. (Tr. p. 44-45; Ex. 4). The Second Addendum clarified[2] that the subsidy payments were a loan from the Hospital to Medlock. The Second Addendum also modified the manner in which Medlock could repay the $350,000 subsidy loan through forgiveness of the debt in exchange for continuing to maintain his practice full time in Laurens County.

From the end of the subsidy period on December 31, 1999 to January 1, 2002,[3] the subsidy loan was forgiven at previously established rate of one-sixtieth ($1/60^{th}$) per month, resulting in a reduction by $5,833.33 per month. (Tr. p. 48-50; Ex. 4, p. 1). After January 1, 2002, the rate of forgiveness was modified to $1/96^{th}$ per month.[4] (Tr. p. 48; Ex. 4, p. 2). Medlock further agreed to maintain his fulltime practice in Laurens County for a period of 120 months after December 31, 1999, and upon his failure to do so any outstanding portion of the subsidy loan then existing would be immediately due and

---

[2] Medlock testified it was always his understanding the subsidies were a loan. (Tr. p. 46).

[3] These events actually predate the execution of the Second Addendum, and therefore had already happened in this manner prior to its execution. (Tr. p. 48).

[4] Considering the Second Addendum was executed on July 25, 2002, it changed events that had already occurred. Before its execution, Medlock's subsidy loan was forgiven at the rate of $1/60^{th}$ per month from January 1, 2002 to January 25, 2002. The Second Amendment, with its back-dated effective date, modified the foregiveness rate applicable to that period to $1/96^{th}$ per month, at Medlock's request.

payable to the Hospital. (Ex. 4, p. 2). The changes set out in the Second Addendum were requested by Medlock. (Tr. p. 45-47).

C. Medlock terminates his practice in Laurens County

On May 5, 2004, Medlock notified the Hospital he was terminating his practice in Laurens County effective June 7, 2004.[5] (Ex. 4; Tr. p. 51). He then ceased his full time medical practice in Laurens County and accepted employment with another healthcare provider in Spartanburg County.[6]

The Contract states that should Medlock fail to maintain a practice in Laurens County during the repayment period, any unsatisfied portion remaining due on the subsidy loan would be immediately due and payable to the Hospital. After Medlock terminated his practice, the Hospital sent a letter to Medlock demanding repayment of the outstanding debt. (Tr. pp. 91-92) (Ex. 5).

At trial, Medlock did not dispute the amount of debt he owed at the time he closed his practice in Laurens County. The total amount of the subsidy payments was $350,000 as of December 31, 1999. Under both the First Addendum and the Second Addendum, the forgiveness rate for the period of December 31, 1999 to January 1, 2002 was the same, *to wit*, $5,833.33 per month (1/60 of $350,000 = $5,833.33). Thus, for that 24-month period, Medlock's subsidy loan was reduced by $140,000.00 (24 mo. x $5,833.33 = $140,000), leaving a balance of $210,000 remaining unpaid and unforgiven as of January 1, 2002. Medlock admitted this was correct. (Tr. pp. 50-51).

---

[5] The trial transcript contains a typo here. It is undisputed Medlock closed his practice in June of 2004, not 2007.

[6] That entity also supplemented Medlock's practice with an income guarantee. (Tr. p. 38-39).

After January 1, 2002, the $210,000.00 balance was forgiven at the rate of 1/96th per month per the Second Addendum. (Tr. p. 51; Ex. 4). Medlock agreed at trial that after January 1, 2002, the debt he owed to the Hospital therefore was forgiven at the rate of $2,187.50 per month (1/96 of $210,000 = $2,187.50)[7] for each month he continued to maintain his practice in Laurens County, which he did for only 29 months between January 2002 and June 2004. (Tr. pp. 51-52). Applying this formula to the $210,000.00 balance due over those 29 months, Medlock admitted the balance owed on the subsidy loan was $146,548.00 when he closed his practice. (Tr. pp. 53-54). Medlock further admitted the contract required him to repay this amount, and he conceded he did not repay any part of this indebtedness. (Tr. pp. 55-56).

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action." *Townes Associates, Ltd. v. Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976) (citing *Chapman v. Allstate Ins. Co.,* 263 S.C. 565, 211 S.E. (2d) 876 (1974)). The trial court's factual conclusions have the same effect as a jury verdict, "unless the evidence is reasonably susceptible of the opposite conclusion only." *Auto-Owners Ins. Co. v. Horne*, 356 S.C. 52, 56 (Ct. App. 2003) (emphasis added). In reviewing the factual findings, an

[7] At trial, these simple calculations did not factor in the accrued interest on the debt over that period. (Tr. p. 52).

appellate court views the evidence and all its reasonable inferences in "the light least favorable to the losing party below." *Id.*

ARGUMENT AND POINTS OF AUTHORITY

At trial, the focus of the testimony elicited by the defense was in support of Medlock's contention that the Hospital breached the Contract by failing to support his vascular practice (a purported requirement he admits is not found in the Contract). (Tr. pp. 77-79). On appeal, Medlock abandons this approach, opting instead to attack the enforceability of the Contract long after he received and enjoyed all the subsidies provided to him thereunder. For the reasons adopted by the trial court and as set forth herein, this Court should affirm the judgment against Medlock finding him responsible to repay the Hospital all amounts due to it.

I. MEDLOCK CANNOT RELY ON THE PURPORTED FAILURE OF A CONDITION PRECEDENT CONTAINED IN THE SECOND ADDENDUM TO THE CONTRACT

As an initial matter, Medlock elicited no testimony to support this issue at trial, nor was there any argument of this issue before the parties rested their cases and submitted the action to the trial court for determination. (Tr. p. 112-113). Thus, this issue is not preserved for appellate review. *See e.g., Stuabes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). In the very least, this argument is unsupported by evidence in the record.

A condition precedent to a contract is "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." *M&M Group, Inc. v. Holmes*, 379 S.C. 468, 477 (Ct. App. 2008); (quoting *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct.

App. 2005) (citing *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994)) (emphasis added). Whether the language of a contract constitutes a condition precedent is a question of law. *Id.* at 475-76 (rejecting the argument that whether a contract contains a condition precedent is a question of fact). However, the issue of whether a condition precedent was satisfied is a question of fact. *Id.* (finding that a lack of evidence in the record to contradict the ruling of the trial court as to the satisfaction of the condition precedent was reason enough to affirm).

Under the applicable standard of review, the trial court's findings of fact will not be disturbed on appeal unless they are without evidentiary support. Here, the evidence demonstrates Medlock knowingly and voluntarily continued his practice in Laurens County for years after the Second Addendum was executed, and he benefitted from the Contract's loan forgiveness terms during his continued practice. Placed into proper context, the only meaningful effect of the Second Addendum was to lengthen the forgiveness period and modify the forgiveness rate to 1/96 per month. (Final Order, p. 2-3, Ex. 1). In the roughly two-year period after the Second Amendment was signed, Medlock never complained that a condition was unsatisfied. Rather, long after December 31, 2002, (the deadline for satisfying the purported condition precedent under the Second Addendum), Medlock continued to perform the Contract and accept and enjoy forgiveness of the subsidy loan at the provided for rate. (Tr. pp. 50-52).

There is no testimony in the trial transcript regarding this belatedly asserted contention. To the contrary, Medlock admitted at trial that he always understood he would have to repay the subsidy loan to the Hospital to the extent it was not forgiven over time by his continued practice in Laurens County. (Tr. pp. 53-54). Accordingly, the

evidence in the record easily supports the conclusion that if a condition precedent existed, it was excused by Medlock in the very least, as he continued to operate by and enjoy the benefits provided to him under the Contract long after the deadline for this purported condition. *See M&M Group*, 379 S.C. at 477 (noting a condition precedent is any fact other than the lapse of time, **which, unless excused**, must exist or occur before a duty of immediate performance arises).

The trial court likewise specifically found Medlock breached the Contract by failing to repay the subsidy loan upon demand after he closed his practice. (Final Judgment, p. 4-5). An inescapable conclusion that implicitly lies within the trial court's findings is that Medlock's performance was due, otherwise there would be no breach occasioned by his failure to pay.[8] *See Hill v. Edwards*, 262 S.C. 409, 205 S.E.2d 139 (1974)(where the trial court's order directed the ex-husband to make payments toward the arrearage in child support, it was implicit the trial court had found no agreement was made whereby ex-husband did not have to make such payments); *see also Fisher v. Carolina Door Products, Inc.*, 286 S.C. 5, 331 S.E.2d 368 (Ct. App. 1985) ("[T]his court is bound by the finding of fact made by the trial judge even though the finding of fact is implicit rather than explicit."); *Shannon v. Shannon*, 301 S.C. 107, 390 S.E.2d 380 (Ct. App. 1990) (concluding the trial court implicitly found no valid prior order was ever entered directing husband to make child support payments because the trial court ruled the husband was not obligated to pay wife for the back child support she had claimed were due under that purported order).

---

[8] The trial court also specifically found that Medlock failed to establish any of the counterclaims asserted in his answer.

Even if Medlock were correct on this issue, the outcome would not change because the error was harmless. *See McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S. E.2d 67 (Ct. App. 1996) (finding that an appellant seeking reversal must show error and prejudice); *Wells v. Halyard*, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000) (an alleged error is harmless if the court finds beyond a reasonable doubt that it did not affect the verdict). Medlock offered no evidence or testimony of any kind to suggest that ***if*** the Contract failed for want of a condition precedent ***after*** the subsidy payments were paid to him, he was free to terminate his Laurens County practice whenever he desired without obligation to repay the subsidy loan. There being no evidence of this absurd result, the only evidence found in the record easily demonstrates Medlock always viewed the subsidies as a loan and expected to have to repay it. (Tr. p. 46). Thus, even if the the purported condition precedent was not excused, the Hospital is nevertheless entitled to recover the unpaid subsidies due to it under the doctrine of unjust enrichment, just as the trial court specifically found. (Final Judgment, p. 5). The Hospital addresses in more detail its remedy of unjust enrichment in Section IV of this Brief, and incorporates those arguments here.

II. THE TRIAL COURT PLAINLY HAD SUBJECT MATTER JURISDICTION TO DETERMINE THIS ACTION

Generally, "subject matter jurisdiction is the power [of the Court] to hear and determine cases of the general class to which the proceeding in question belong." *Ex parte Cannon*, 385 S.C. 643, 654 (Ct. App. 2009) (citing *Majors v. S.C. Secs. Comm'n*, 373 S.C. 153, 159, 644 S.E.2d 710, 713 (2007)). "The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental." *Cannon*, at 654.

Here, Medlock misinterprets *Ward v. W. Oil Co*, 387 S.C. 268, 692 S.E.2d 516 (2010) in suggesting the trial court lacked subject matter over the action because Medlock claims (also incorrectly) the Contract is illegal. Medlock conflates the concept of subject matter jurisdiction (the lack of which can be raised at any time) with the decision in *Ward* finding it appropriate to except illegal contracts from traditional rules of issue preservation. *Id.* at 272, 692 S.E.2d at 518. *Ward* does not stand for the premise that illegal contracts are beyond the subject matter of the courts—the two issues have nothing to do one another. It cannot be reasonably disputed that the trial court had subject matter jurisdiction over this contract action—a point Medlock seemed to concede at trial but now re-raises on appeal. (Tr. pp. 19-20).

III. THE CONTRACT IS NOT ILLEGAL

An action for breach of contract is an action at law. *Sterling Dev. Co. v. Collins*, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992). On appeal from an action at law tried by a jury, we sit merely to correct errors of law. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 464, 629 S.E.2d 653, 663-64 (2006). "Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." 17B C.J.S. *Contracts* § 1030. This Court will review questions of law *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). *See also Milliken & Co. v. Morin*, 399 S.C. 23, 30 (2012).

Medlock argues the Contract was illegal because it violates the Federal Anti-Kickback Act of 1986 and its enforcing regulations. It does not. The Anti-kickback statute is a penal statute codified at 42 U.S.C. 1320a-7b, and at its core it criminalizes the

solicitation[9] and offering of payments **in exchange for patient referrals**. As noted by Medlock, the Act states in pertinent part:

> **(b)** Illegal remunerations.
>
> **(1)** Whoever **knowingly and willfully solicits or receives any remuneration** (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind--
>
> **(A) in return for referring an individual** to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, [] . . .
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $ 25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-7b(b)(1) (Emphasis added). Similarly, subsection (b)(2) prohibits the payment of a kickback to induce another person to refer a patient or to purchase goods or services for which payment may be made pursuant to a federal health care program. *See id.* § 1320a-7b(b)(2).

As a threshold determination, it is necessary to consider first whether the Contract is of the kind subject to the provisions of the Anti-Kickback statute. Otherwise the statute is inapplicable to the analysis.

The express language of the Contract proves the Contract is not subject to the Anti-Kickback statute and did not violate its provisions. The Contract plainly states on page three (3) that "**No benefit or payment hereunder shall in any way be based upon**

---

[9] The Anti-Kickback Statute criminalizes **soliciting and receiving** remuneration in exchange for patient referrals. If the Contract and its Addenda violate the Anti-back statute as Medlock now claims, it is axiomatic that he is now admitting to a felony under the laws of the United States, as it is firmly established in the record that Medlock received the subsidy payments and solicited the changes set out in the Addenda, which he now argues rendered the arrangement illegal. This incredible, after-the-fact strategy by Medlock is plainly unsupported by the evidence in the record and is nothing more than a dangerous ruse to avoid his obligation to repay the debt owed to the Hospital.

referral of patients or be volume sensitive." (Exhibit 1)(Emphasis added). The Contract further provides:

> It is expressly understood and agreed that [Medlock] is an independent contractor expected and entitled to freely and independently exercise his judgment in accordance with good medical practice in the care and treatment of his patients. [Medlock] shall exercise his skill, learning, intelligence, and experience and evaluation, diagnoses, medication, treatment, and hospitalization of his patients according to his informed judgment and shall not be constrained in the exercise of his independent judgment by the terms or conditions of this Agreement. **Physician is free to admit patients to any Hospital of physician's choice and to maintain staff privileges at other hospitals. Physician is under no obligation to admit patients to Laurens County Hospital. The sole purpose of this Agreement is to induce [Medlock] to establish his practice in the area of the Hospital because of the Hospital's belief that there are not a sufficient number of general/vascular surgeons in the area due to the findings documented in the Needs Assessment.**

(Exhibit 1, pp. 5-6) (Emphasis added).

By its very terms the Contract makes clear the subsidy payments to Medlock were **not** in exchange for the referral of patients, and he was free to admit patients to and maintain privileges at other hospitals of his choosing. Thus, the Contract does not create a relationship that is governed or criminalized by the Anti-Kickback statute.

If Medlock believed the subsidy payments he received were in some way the kind prohibited by the statute, he should have offered testimony or at least a shred of evidence that he accepted those payments in exchange for prohibited referrals. He did not, and the above-quoted language from the Contract is fatal to Medlock's argument.

There is another fatal flaw in Medlock's argument. Medlock never argues (because he cannot) that the subsidy payments he accepted where in exchange for patient

referrals, making them illegal kickbacks. Instead, he skips this necessary arrangement and complains only that the Contract was illegal because its did not satisfy certain "safe harbor" provisions. Specifically, Medlock argues the Contract is illegal because it fails to meet two safe harbor requirements, *to wit*: (1) it exceeds the 3-year benefit cap under the statute; and (2) it was twice prematurely renegotiated. (Medlock's Brief, pp. 5-7). Medlock's argument is like the tail wagging the dog.

The safe harbors to the Anti-Kickback statute were developed by the Office of Inspector General for the United States Department of Health and Human Services ("OIG"). The safe harbors are exactly as described: if an arrangement fits within the safe harbor, it is safe, and cannot, as a matter of law, be in violation of the Anti-Kickback statute. However, arrangements that do not fit within one of the safe harbors, do not necessarily violate the Anti-Kickback statute, they just do not receive the protection of the safe harbor. *42 C.F.R. Part 1001.952.* And the OIG made very clear in a detailed discussion appearing in the Federal Register that simply because an arrangement does not qualify for safe harbor protection does not render it suspect, stating:

> **The issue of the scope and effect of the safe harbors is important and often misunderstood.** We addressed this issue in our preamble to the 1991 final rule:
>
> This (safe harbor) regulation does not expand the scope of activities that the statute prohibits. **The statute itself describes the scope of illegal activities. The legality of a particular business arrangement must be determined by comparing the particular facts to the proscriptions of the statute.**
>
> The failure to comply with a safe harbor can mean one of three things. First * * * **it may mean that the arrangement does not fall within the ambit of the statute**. In other words, the arrangement is not intended to induce the referral of business reimbursable under (a Federal health care program); so there is no reason to comply with the safe harbor standards, and no risk of prosecution.

> Second, at the other end of the spectrum, the arrangement could be a clear statutory violation and also not qualify for safe harbor protection. In that case, assuming the arrangement is obviously abusive, prosecution would be very likely.
>
> Third, the arrangement may violate the statute in a less serious manner, although not be in compliance with a safe harbor provision. . . .
>
> **Thus, it is not true that every arrangement that does not comply with a safe harbor is suspect under the antikickback statute**, though such arrangements may be suspect in particular circumstances.

Medicare & State Health Care Programs: Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions, 64 Fed. Reg. 63,518, 63,521 (Nov. 19, 1999) (citing *Medicare & State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions*, 56 Fed. Reg. 35,952, 35,954, Prt. III Sec. A (July 29, 1991)) (Emphasis added).

Medlock seems to concede the fact that the Contract must first be illegal before the safe harbor provisions need be considered, noting in his Brief at page 6, "As long as the safe harbor provisions are met, **agreements that would otherwise be illegal are legitimized**." (Emphasis added). But, as noted by the OIG, while safe harbor provisions can rescue an otherwise illegal contract, failure to comply with the safe harbor provisions is irrelevant unless the contract is, in fact, illegal without their protection.

Accordingly, Medlock's focus on the duration of the Contract and the fact that he twice requested renegotiation of its terms as violating the safe harbor provisions is meaningless unless Medlock can first show the Contract was an illegal scheme whereby he accepted remuneration in exchange for patient referrals, which is what the Anti-Kickback statute prohibits. He offered no such evidence. Therefore, as a threshold matter, the Contract was not "otherwise illegal" and did not need to fall within the safe harbor provisions to be "legitimized." Instead, the arrangement here falls within the first of the three scenarios cited by the OIG in the federal register: It is an agreement that was

not intended to induce patient referrals in violation of the statute and, therefore, the "arrangement does not fall within the ambit of the statute" *Id.* There being no evidence in the record to the contrary, this Court must affirm the trial court's finding that the Contract did not violate the Anti-Kickback statute, and in doing so affirm the result below finding Medlock in breach.

As a final point, private citizens like Medlock do not have standing to prosecute cases under the Anti-Kickback statute. *See Rzayeva v. United States*, 492 F. Supp. 2d 60, 78 (Dist. of Conn. 2007) (observing only the government has standing to assert claims for violations of 42 U.S.C. 1320a-7b). *See also Donovan v. Rothman*, 106 F. Supp. 2d 513, 516 (S.D.N.Y. 2000) ("There is no private cause of action to redress violations of the federal, anti-kickback statute, 42 U.S.C § 1320a-7b, the infraction of which is a crime."). Rather, the Ant-Kickback statute creates an intent-based crime under which the Government must prove beyond a reasonable doubt a person "knowingly and willfully" paid or received remuneration in exchange for a patient referral. In this way, in order to establish the Hospital and Medlock entered into a contract to "knowingly and willfully" engage in such criminal acts, Medlock necessarily would have had to have introduced evidence at trial that the Government had proved beyond a reasonable doubt the parties' arrangement violated the statute. He did not.

This extraordinary strategy by Medlock, who willingly accepted the financial benefits of the Contract he now claims was illegal, should be seen for what it is: a ruse to keep those payments without fulfilling his end of the bargain he struck. This Court should affirm the trial court's finding that Medlock breached the Contract and is liable for the damages so awarded.

IV. THERE IS NO BASIS TO VACATE THE TRIAL COURT'S FINDING THAT MEDLOCK WAS UNJUSTLY ENRICHED

As a threshold matter, Medlock's assertion that the trial court "concurrently awarded" damages for both breach of contract and unjust enrichment is unfounded. The rulings are alternatives. Specifically, the trial court found Medlock breached the Contract and awarded damages accordingly. As an alternative additional sustaining ground justifying the damages awarded from Medlock's breach, the trial court also found that Medlock was unjustly enriched. (Final Judgment, p. 5).

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Corley v. Ott,* 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997). In an action in equity, tried by the master, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Fox v. Moultrie,* 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008). *See also JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 639 (Ct. App. 2011) (indicating that unjust enrichment sounds in equity and this court will review the findings of fact in accordance with its view of the preponderance of the evidence).

A. The Hospital was entitled to pursue alternative remedies

Medlock incorrectly argues the Hospital was required to elect between its claims for breach of contract and unjust enrichment. This is not so, because there was only a single recovery of damages resulting from Medlock's failure to repay the subsidies he received, which he admitted was a loan to him. *See Franke Associates v. Russell*, 295 S.C. 327, 368 S.E.2d 462 (1988) (reversing the trial court for requiring the plaintiff to elect, prior to submission of the case to the jury, between remedies for breach of contract and quantum meruit). In *Franke*, the Supreme Court made clear, "if a party pleads different causes of

action but seeks only one recovery, he need not elect between causes of action." That is what happened here. The trial court did not award separate damages for unjust enrichment; rather, it found Medlock equitably liable for repayment of the subsidy loan, plus accrued interest, as an alternative remedy for the Hospital.

Medlock also contends the existence of an express agreement precludes the Hospital's claim for unjust enrichment. Again, Medlock is incorrect, and this argument contradicts the balance of his Brief. Under the instant facts, South Carolina law permits parties to pursue alternative claims for breach of contract and unjust enrichment. *See Boldt Co. v. Thomason Elec. & Am. Contractors Indem. Co.*, 820 F. Supp. 2d 703, 707 (D.S.C. 2007) (noting "parties are permitted under South Carolina law to pursue quasi-contractual claims when there is no valid contract between parties, or there is some question as to whether contract is enforceable or applies to dispute."). Because Medlock complains the Contract under which he accepted the subsidy loan was illegal and also failed of a condition precedent, his challenge calls into question the enforceability of the agreement, permitting the Hospital to pursue an alternative remedy in equity for unjust enrichment.

B. The preponderance of the evidence supports the trial court's alternative award of damages for unjust enrichment

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). "To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." *Inglese v. Beal,* 403 S.C. 290, 297, 742 S.E.2d 687, 691 (Ct. App. 2013).

Each of these elements is easily satisfied by the evidence in the record. It cannot be questioned that Medlock received and enjoyed a non-gratuitous benefit because he admitted he received $350,000 in subsidy payments, and further conceded, "It was my understanding it [the subsidy] was always legally a loan." (Tr. 46, *see also* pp. 28, 32, 47, 51, etc.). Medlock inescapably realized value from the subsidy loan, as the money supplemented the income of his medical practice for 30 months, ensuring he earned at least $175,000 per year during the subsidy period. (Tr. pp. 28-29, 32). Further, Medlock always contemplated that he must repay the unforgiven balance to the Hospital should he prematurely close his medical practice in Laurens County. (Tr. p. 55-56). Notwithstanding this clear expectation, Medlock closed his practice, accepted new subsidy payments from another medical provider in Spartanburg, and left Laurens County behind without repaying the subsidies he owed to the Hospital. (Ex. 4; Tr. pp. 51, 56). These facts and admissions easily support the trial court's alternative finding in favor of the Hospital on its claim for unjust enrichment.

C. Medlock failed at trial to establish any viable defense to the Hospital's claim for unjust enrichment

Medlock's assertion on appeal that the Hospital is barred from an equitable remedy due to its own conduct is unavailing. At trial, Medlock elicited no testimony from either witness to support his present assertion that the hospital should be precluded from recovery in unjust enrichment for any reason. Having failed to develop any factual support this argument at trial, Medlock effectively left unchallenged the Hospital's ample evidence cited above, which satisfies each element of its claim for unjust enrichment. Accordingly, this argument has no merit and should not be considered.

Also, the Hospital is constrained to respond to Medlock's suggestion at footnote 4 of this brief that he should be allowed further briefing and a hearing with regard to the amount of damages for unjust enrichment. He apparently claims he would offer evidence that he conferred value upon the Hospital that should offset the damages awarded to the Hospital. This request was properly rejected by the trial court. (Tr. p. 112-113).

From the outset and through trial, the Hospital pursued its breach of contract and unjust enrichment claims. If Medlock wished to offer the kind of mitigating evidence about which he speculates in footnote 4 of his brief, the opportunity to do so was at the trial so that the trial court would have an opportunity to hear and evaluate its weight and merit. Instead, Medlock offered no such arguments, and presented no such evidence. Considering whatever value he claims he contributed must have occurred between 1997 and 2004, when he practiced in Laurens County, it is impossible this purported evidence was not available to present at trial. The time to proffer such evidence was then, and this Court should ignore Medlock's conjectural footnote. *See generally Gold Kist, Inc. v. Citizens & Southern National Bank of South Carolina,* 286 S.C. 272, 333 S.E. (2d) 67 (Ct. App. 1985) (failure to proffer evidence prevents consideration on appeal); *Benya v. Gamble*, 282 S.C. 624; 321 S.E.2d 57 (Ct. App. 1984) (where appellant failed to proffer the particular evidence she wished to introduce, the appellate court could not evaluate whether appellant suffered any prejudice by its exclusion and, therefore, refused to consider appellant's argument on the issue). Having failed to introduce any evidence whatsoever to support Medlock's post-trial contention, this Court should ignore footnote 4 of his brief.

D. If it was error to alternatively award the Hospital the same recovery under a theory of unjust enrichment, the error was harmless.

Because this Court should affirm the trial court's finding that Medlock breached the Contract, any error in alternatively awarding the same damages under a theory of unjust enrichment it harmless, as it did not prejudice the Appellant. *See McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S. E.2d 67 (Ct. App. 1996) (finding that an appellant seeking reversal must show error and prejudice); *Wells v. Halyard*, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000) (an alleged error is harmless if the court finds beyond a reasonable doubt that it did not affect the verdict).

Similarly, because the trial court's finding that Medlock breached the agreement has gone unchallenged on appeal,[10] this ruling stands as an independent sustaining ground on which this Court must affirm. *See generally, I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (affirming that the appellate court may affirm for any reason appearing in the record); *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993) (providing that it is fundamental an unappealed issue become the law of the case); *Anderson v. South Carolina Dep't of Highways and Pub. Transp.*, 322 S.C. 417, 472 S.E.2d 253 (1996) (describing the "two issue rule" to demand affirmance where the verdict is supported by multiple theories and at least one of those theories goes unchallenged on appeal).

---

[10] Medlock has raised various defenses to his contractual liability. But, he has never denied the facts upon which the trial court's findings of breach are based, *to wit*, the premature closing of his practice and failure to repay any of the outstanding balance of the subsidy loan.

V. THE AWARD OF CONSEQUENTIAL DAMAGES DOES NOT WARRANT REVERSAL

An action for consequential damages resulting from a breach of contract is an action at law and on appeal of such a case tried without a jury the findings will not be disturbed unless found to be without any evidentiary support. *See e.g., Parker v. Shecut*, 340 S.C. 460, 490, 531 S.E.2d 546, 562 (Ct. App. 2000) (reversed on other grounds by *Parker v. Shecut*, 349 S.C. 226, 562 S.E.2d 620 (2002)). Here, the trial court's award of consequential damages is supported by the evidence in the record, which was introduced without any objection from Medlock. Even if this separate and distinct award is erroneous, reversal and remand is not required. Instead, only that portion of the damages should be vacated without affecting the remainder of the judgment.

Our Supreme Court has announced that "consequential damages occasion by breach of contract may be recovered when such damages may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made." *Stern & Stern Assocs. v. Timmons*, 310 S.C. 250, 252, 423 S.E.2d 124, 126 (1992) (*citing Godwin v. Hilton Head Co.*, 273 S.C. 758, 761, 259 S.E.2d 611, 613 (1979)). Medlock's assertion that the award of consequential damages must be expressly provided for in the language of the contract is unfounded; instead, such an award rests upon the trial court's determination as to what was contemplated by the parties. *See id.* (reversing the trial court and awarding consequential damages for a breach of contract even though the subject contract did not expressly provide for such damages because there was evidence supporting that such was contemplated by the parties).

Here, the Hospital offered testimony that the Hospital incurred costs to recruit another surgeon to replace Medlock after he prematurely terminated his practice, including the payment of moving costs, just as were paid to Medlock. (Tr. pp. 97-99).

This evidence was heard without objection or contradiction from Medlock, and it reasonably established the consequential damages suffered by the Hospital were the same in kind as the costs paid by the Hospital to Medlock. (Tr. p. 99-100). Consequently, the record supports that such costs and expenses were contemplated by the parties and are therefore properly awarded as consequential damages. Because the trial court's award of such damages is not without evidentiary support, it must be affirmed. *See id.*

On the other hand, if this Court were to find the award of consequential damages was in error, the remedy is to vacate only that separate and distinct portion of the trial court's order. The trial court's calculation of consequential damages is entirely separate from its determination of the principal and interest otherwise due under the Contract. Thus, in the interest of judicial economy this court need only vacate that portion of the trial court's order and affirm as so modified. *See e.g., Madden v. Bent Palm Invs., LLC*, 386 S.C. 459, 688 S.E.2d 597 (2010) (demonstrating that when the trial court's award of damages is incorrectly calculated the appellate court should correct the calculation and affirm as modified). Such a result would provide Medlock the relief he requests in his Brief, where he states, "[t]he award of consequential damages should be **vacated** . . . ." (App. Br. pp. 10, 13)(Emphasis added).

VI. MEDLOCK CANNOT COMPLAIN OF THE INTEREST RATE DEFINED IN THE CONTRACT HE VOLUNTARILY ENTERED INTO, AND AMOUNT OF ACCRUED INTEREST IS NOT A PENALTY

Medlock belatedly contends the award of interest calculated under the Contract is unjust because it constitutes an unlawful penalty for breach of the agreement. (App. Br. p. 12). Not only is this argument not preserved, it has no merit.

Medlock never objected to the interest calculation nor did he offer any testimony of a competing rate of interest. (Tr. pp. 93-94, 96-97). Only after the parties rested their respective cases and submitted the matter to the court for a decision did Medlock mention his desire to bifurcate the trial and offer other evidence pertaining to the damages calculation. (Tr. pp. 112-113). The trial court rejected this last-minute request. Thus, there is neither testimony nor any argument to support Medlock's assertion that the interest calculation amounted to an unlawful penalty. Accordingly, the issue is not preserved and not properly before this court. *See e.g., Stuabes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). *See also Gold Kist, Inc.,* 286 S.C. 272, 333 S.E.2d 67 (failure to proffer evidence prevents consideration on appeal).

Even if it is preserved, this argument does not hold water. From the outset, Medlock admitted that the agreement was, and had always been, a loan that he knowingly and voluntarily entered into. (Tr. pp. 28, 32, 46-47, 51). Medlock also admitted he owed the Hospital $146,548.00 when he closed his practice 2004. (Tr. pp. 53-54). Medlock further agreed to repay any balance owed to the Hospital under the Contract, and that any unpaid balance "shall bear interest at the rate of Wall Street Journal Prime plus 2% . . . ." (Tr. pp. 33, 43). The record demonstrates the appropriate interest rate was therefore 10.5%, and that when applied to the outstanding balance totaled $188,792.48. (Tr. 94-97). This is nothing more than simple application of arithmetic, offered by the Hospital at trial, to which Medlock did not object nor offer and evidence that such calculation was incorrect. South Carolina law does not permit Medlock to escape his contractual obligations simply because he now claims the terms are unfavorable. *See e.g., United States ex rel. Williams Elec. Co. v. Metric Constructors*, 325 S.C. 129, 136, 480 S.E.2d

447, 450 (1997) (stating it is the "duty of the court [] to enforce [a] contract as written, regardless of the wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." (*citing C.A.N. Enterprises v. S.C. Health and Human Servs.*, 296 S.C. 373, 373 S.E.2d 584 (1988)).

Medlock's conclusory statement that it would be "manifestly unjust" to award interest because of the length of time the matter spent in litigation also is unavailing. (App. Br. p. 12). This contention was not raised until after the trial, and there is no evidence supporting this argument. *See Stuabes*, 339 S.C. at 412, 529 S.E.2d at 546 (noting preservation requirements). Regardless, this argument is so conclusory and without citation to authority that it has been abandoned. *See Rivera v. Newton*, 401 S.C. 402, 415, 737 S.E.2d 193, 199 (Ct. App. 2012) (finding an issue argued without citation to legal authority is deemed abandoned on appeal); *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (noting where an argument consists of short, conclusory statements without citation to legal authority the argument is deemed abandoned and will not be considered on appeal).

Assuming for the sake of argument this argument is properly before the court, it is simply unsupported by the facts. The Contract clearly contemplates the accrual of interest, and Medlock always understood the subsidies were a loan. There is ample evidence supporting the trial court's finding that Medlock breached the Contract by failing to repay the balance of the subsidy loan after he prematurely terminated his Laurens County practice.

In an effort to avoid these plain facts, Medlock asserts a new argument that he should not have to pay the accrued interest in full because of the length of time the

litigation was pending before the trial court. First, such a contention places the consequences of any such delay on the Hospital despite the fact that there is no evidence whatsoever that the Hospital controlled, caused, or contributed to the duration of the litigation. Second, Medlock's argument presumes this case at some point went from one of normal duration (which would not support his argument), to one of abnormal length (hence, his argument). Yet, Medlock offered no evidence whatsoever to enable the trial court, or this Court, to understand when this purported shift occurred. Even if this argument received any consideration, it would be patently unfair to reduce the interest that accrued during the normal pendency of this litigation. *See Benya*, 282 S.C. 624, 321 S.E.2d 57 (appellant has the burden of providing an adequate record for this Court's review of an issue). The only meaningful effect of the duration of this litigation is that the Hospital continues to be due the payment of the monies Medlock owes to it, plus the interest he agreed to pay thereon—monies which Medlock possessed and enjoyed since December of 1999.

Third, by suggesting the parties' should "**equally bear** the consequences by an equitable reduction of the interest..." (App. Br. p. 12) (emphasis added). Medlock in the very least concedes he is no more deserving of equity than the Hospital as it concerns this issue. Thus, this Court should enforce the plaint language of the Contact and its interest provision. *See generally Crosby v. Wiggins Land Co.*, 96 S.C. 68, 73, 79 S.E. 897, 899 (1913) (recognizing that "where [the] equities are equal, Courts will not interfere"). Thus, Medlock is not entitled to any equitable consideration—but for his breach, the interest he complains of would not have accrued.

CONCLUSION

For the reasons set forth herein, the Hospital respectfully requests this Court to affirm the judgment of the trial court.

Respectfully submitted,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.

BY: _____

MATTHEW E. YELVERTON
S.C. Bar No. 69734
MICHAEL A. TIMBES
S.C. Bar No. 69730
THOMAS J. RODE
S.C. Bar No. 77480
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Telephone: (843) 937-8000
Facsimile: (843) 937-4200
Email: myelverton@tktylawfirm.com
mtimbes@tktylawfirm.com
trode@tktylawfirm.com

Attorneys for Respondent