RECEIVED
MAR 31 2017
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2016-CP-26-0166
Appellate Case No. 2016-001499

Jeanne Beverly, Individually and on behalf of others similarly situated ..... Appellant

v.

Grand Strand Regional, Medical Center, LLC ..... Respondents.

FINAL REPLY BRIEF

John G. Felder, Jr.
McGowan, Hood & Felder
1517 Hampton Street
Columbia, SC 29201
Telephone: (803)779-0100
Facsimile: (803) 256-0702
jfelder@mcgowanhood.com

Chad A. McGowan
Jordan C. Calloway
1539 Health Care Drive
Rock Hill, South Carolina 29732
Telephone: (803) 327-7800
Facsimile: (803) 328-5656
cmcgowan@mcgowanhood.com
jcalloway@mcgowanhood.com

Roy Harmon
Harmon & Major, P.A.
PO Box 8954
Greenville, SC 29604
Telephone: (864) 467-1712
harmonmajor@gmail.com

Sidney L. Major, Jr.
Harmon & Major, P.A.
PO Box 8954
Greenville, SC 29604
Telephone: (864) 467-1712
sidmajor@bellsouth.net

Jeff C. Chandler
The Chandler Law Firm
Bank of America Building
2501 Oak Street
Myrtle Beach, South Carolina 29577
Telephone: (843)448-4357
jeffcchandler@aol.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

South Carolina

Other Jurisdictions

Statute

Other Sources

REPLY ARGUMENT

Despite her pain and stress in the hours following an auto accident, Appellant Jeanne Beverly made sure to show her Blue Cross Blue Shield of South Carolina ("Blue Cross") membership card when she arrived at Grand Strand Regional Medical Center, LLC's ("Grand Strand") emergency room. (R. p. 20 ¶ 15). To Ms. Beverly, her membership card had meaning. It meant her out-of-pocket costs would be limited to her co-pay and that Grand Strand, a Blue Cross "preferred provider," would be turning to Blue Cross for payment—not her. Moreover, it meant Grand Strand agreed to provide her care for a lower rate than for non-Blue Cross members. However, in Grand Strand's eyes Ms. Beverly's membership card meant nothing. Grand Strand charged her directly for the full cost of her medical services. There is simply no way to reconcile Grand Strand's conduct with the contractual duties Grand Strand accepted when it joined the Blue Cross Preferred Provider Organization ("PPO"). There is also no way to square Grand Strand's litigation stance with the representations it made to Ms. Beverly and the following representations it continues to make to the public to this day:

- "If you are insured, a claim will be sent to your insurance company."
- "If you have insurance or other coverage, we will expect you to pay your copayment, coinsurance and/or deductible . . ." Beyond that, Grand Strand recognizes that "the insurance company pays us."
- Grand Strand professes a commitment to "pricing transparency."

"About Our Pricing Commitment," Grand Strand Health, *available at* http://grandstrandmed.com/patient-financial/?page_name=about (last visited Jan. 11, 2017); (R. p. 24 ¶¶ 41-43).

I. Ms. Beverly May Assert a Breach of Contract Claim as a Third-Party Beneficiary.

Grand Strand argues the circuit court properly dismissed Ms. Beverly's breach of contract claim because (1) the Institutional Agreement does not directly benefit her; (2) the Institutional Agreement's purported third-party beneficiary disclaimer is the only relevant

provision for determining its parties' intent; and (3) the disclaimer's exception does not apply to Ms. Beverly's claim. However, to assert these arguments, Grand Strand takes a myopic, revisionist perspective of the Institutional Agreement's language going so far as to at one point literally rewrite a contract provision in an attempt to support Grand Strand's position. Resp't Br. at 18-19. The actual contract language does not support Grand Strand's arguments or the circuit court's order because a plain reading of the contract language demonstrates that Grand Strand was agreeing to participate in a PPO that cannot function effectively if Grand Strand behaves toward its patients as it has toward Ms. Beverly. The Institutional Agreement also includes promises by Grand Strand that could only inure to the benefit of Blue Cross members like Ms. Beverly. While it is true Ms. Beverly is not one of the Institutional Agreement's parties, she is integral to its purpose and must be permitted to enforce the promises it makes to her.

a. The Institutional Agreement Directly Benefits Ms. Beverly.

The Court should reject Grand Strand's suggestion that Ms. Beverly's benefits from the Institutional Agreement are "ancillary" and that her financial benefits from participating in the PPO are solely derived from her insurance policy with Blue Cross. See Resp't Br. at 9-10. Grand Strand cannot deny the Institutional Agreement's foundation is a PPO expressly created "for the benefit of [Blue Cross] Members." (R. p. 104 § 1.1). Nor can it deny that, through the Institutional Agreement, Grand Strand became a participant in the PPO and contractually required to comply with the PPO's rules. (R. p. 104 § 1.2) (noting Grand Strand's desire to join PPO "to provide Covered Services under the terms of this Agreement"). Further, Grand Strand cannot deny the PPO was intended to provide financial benefits to Ms. Beverly and all other Blue Cross members. (R. p. 106 § 2.16).

Instead, Grand Strand argues Ms. Beverly's benefits from the PPO are derived only from her policy with Blue Cross with no connection to the promises Grand Strand made in the Institutional Agreement. Resp't Br. at 9-10. Grand Strand's argument is unsupported by the contract language and a reasonable understanding of the financial benefits Ms. Beverly was guaranteed to receive from the PPO. First, the Institutional Agreement imposes duties on Grand Strand that flow to the benefit of Blue Cross members *only*, including the Agreement's payment solicitation restriction. (R. p. 109 § 6.1). Grand Strand argues this section imposes on it duties directed only to Blue Cross. Resp't Br. at 10 (quoting R. p. 109 § 6.1) (stating that Grand Strand "shall seek payment . . . solely from" Blue Cross). According to Grand Strand, this language proves Section 6.1 is nothing more than a suggestion[1] that Grand Strand route patient bills through Blue Cross rather than seeking payment from patients themselves.

However, Grand Strand ignores the very next sentence. Section 6.1 not only demands Grand Strand bill Blue Cross it also expressly forbids Grand Strand from billing patients by stating "Institution will not solicit any payment from Members . . . ." This sentence demonstrates the flaw in Grand Strand's argument. If, as Grand Strand contends, Section 6.1 was merely a discussion of administrative convenience between Grand Strand and Blue Cross, then the second sentence would be superfluous. Neither of those parties is benefited by bills not being sent to

[1] On multiple occasions in this portion of its brief, Grand Strand argues Section 6.1 is permissive only and does not even impose a mandate regarding patient bills. Resp't Br. at 10 (arguing Section 6.1 "allows Grand Strand to provide medical services" and "allows Grand Strand to collect payment" from Blue Cross). This is a misrepresentation of the Institutional Agreement's language which states that Grand Strand "shall" seek payment from Blue Cross alone and "will not" seek payment from Blue Cross members. (R. p. 109 § 6.1); see also S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 448, 590 S.E.2d 27, 30 (2003) (citing Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002) (use of words such as "shall" or "must" indicates a mandatory requirement)). There is nothing permissive or discretionary about Section 6.1's provisions.

patients. That promise is made by Grand Strand directly to Blue Cross members like Ms. Beverly and it is that promise that forms the core of Ms. Beverly's contract claim.

Second, Grand Strand's attempt to segregate the Institutional Agreement from Ms. Beverly's intended PPO benefits is at odds with the practical realities of a PPO's operation. Ms. Beverly's primary PPO benefits include decreased costs of medical services and the administrative convenience of not being billed directly by medical providers. She cannot receive either benefit *unless* Grand Strand complies with the Institutional Agreement. (R. p. 109 § 6.1) (limiting payment solicitation to patient's insurer), § 6.4 (requiring Grand Strand to accept discount reimbursements). Grand Strand contends that it is "disingenuous" to assert a connection between Ms. Beverly's benefits from the PPO and the Institutional Agreement. Resp't Br. at 10. However, this case proves just how crucial that connection can be.

Ms. Beverly was forced to pay a bill she never should have received at an amount that never should have been charged only because Grand Strand ignored its duties under the Institutional Agreement. In every setting other than this litigation, Grand Strand openly acknowledges a connection between its contract with an insurer and the price of services provided to the insurer's customers. See "About Our Pricing Commitment," Grand Strand Health, *available at* http://grandstrandmed.com/patient-financial/?page_name=about (last visited Jan. 11, 2017) (advertising to its insured patients that "[t]he prices for your services are based on the contract terms negotiated by your insurance company with the hospital"). The PPO system malfunctioned for Ms. Beverly, and she rightly seeks compensation from the party responsible for the breakdown.

b. Ms. Beverly is an Intended Third-Party Beneficiary of the Institutional Agreement Viewed as a Whole.

Relying solely on one sentence from Section 16.16, Grand Strand argues the Institutional Agreement unambiguously excludes third-party enforcement by Blue Cross members. Resp't Br. at 8, 11. However, Grand Strand's argument fails to give effect to other portions of Section 16.16 and other Institutional Agreement provisions.

The Institutional Agreement is replete with provisions that both recognize and benefit Blue Cross members. Ms. Beverly was promised that a Blue Cross membership card (or other equivalent indications of membership status) would relieve her of any responsibility to guarantee payment for medical treatment. (R. p. 108 § 5.3). She was also promised she would not be billed even for "medically unnecessary" treatment in most instances. (R. p. 113 § 10.2). Most crucially, Ms. Beverly was directly promised that she would not be billed for any covered services. (R. p. 109 § 6.1). As such, it is not an anomaly or a surprise that the Institutional Agreement identifies Blue Cross members as the PPO's intended beneficiaries. (R. p. 104 § 1.1). The contract was based on the understanding that Grand Strand's participation in the PPO depended on how it behaved toward Blue Cross *and* how it behaved toward Blue Cross's members.

Grand Strand's argument suggests Section 16.16 is a blanket third-party beneficiary disclaimer and that a disclaimer provision is the only pertinent contract language for determining whether its parties intended to benefit third-persons. However, intent is derived from the contract's language examined as a whole. Schulmeyer v. State Farm Fire & Cas. Ins. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). While South Carolina's courts have not addressed the effect of a purported disclaimer on a third-party beneficiary claim,[2] this foundational contract

[2] Grand Strand relies on an unpublished court of appeals ruling to suggest South Carolina has applied a disclaimer to prevent hospital patients from asserting third-party beneficiary status.

interpretation rule must guide the analysis. Consistent with this rule, several courts have allowed third-parties to enforce a contract with a disclaimer because, taken as a whole, the contract intended to provide direct third-party benefits. See e.g., Osprey-Troy Officentre L.L.C. w. World Alliance Fin. Corp., 822 F. Supp. 2d 700, 707 (E.D. Mich. 2011) (finding that purported disclaimer provision "cannot be viewed in isolation from the foregoing provisions, which paints a compelling picture of [the plaintiff] as an intended third-party beneficiary"); Versico, Inc. v. Engineered Fabrics Corp., 520 S.E.2d 505, 508-09 (Ga. App. 1999) (finding trial court's decision to allow third-party contract enforcement despite third-party beneficiary disclaimer was proper application of contract interpretation rule requiring application of specific over general provisions).

An analysis of contract parties' intent toward third-persons cannot begin and summarily end with a purported disclaimer provision. Determining a litigant's status as a third-party beneficiary "is not always all or nothing." Futurewei Techs., Inc. v. Acacia Research Corp., 737 F.3d 704, 709 (Fed. Cir. 2013) (citing Prouty v. Gores Tech. Group, 121 Cal. App. 4th 1225, 1234-35 (Cal. App. 2004)). When a contract contains a general third-party beneficiary disclaimer and separate provisions conferring benefits on a third-party, the proper interpretation of the disclaimer may be to apply it only to those portions of the contract not conferring benefits on third parties. Prouty, 121 Cal. App. 4th at 1235 (finding provision granting third person a direct

---

Resp't Br. at 7 (citing Atherton v. Tenet Healthcare Corp., No. 2005-UP-362, 2005 WL 7084013, at *4 (Ct. App. May 25, 2005)). This opinion should not be considered by the Court. See Rule 268(d)(2), SCACR (stating that unpublished memorandum opinions "should not be cited except in proceedings in which they are directly involved"). Moreover, Grand Strand's reliance on Atherton is misplaced. Atherton does not provide "clear and directly applicable guidance" in this case. Resp. Br. at 7 n. 1. There, the court of appeals considered a construction contract between a governmental entity and hospital. Atherton did not concern the relationship among a PPO insurer, provider, and insured. Unlike this case, the contract at issue in Atherton did not guarantee patients would not be billed and did not establish firm reduced payments the hospital must accept.

benefit was an "exception" to the contract's third-party beneficiary disclaimer). A third-party beneficiary disclaimer may be some evidence on the parties' intent but it cannot override contrary indications of intention elsewhere in the same contract. Walsh Chiropractic, Ltd. v. StrataCare, Inc., 752 F. Supp. 896, 907 (S.D. Ill. 2010) (quoting Roche v. Zenith Ins. Co., Civ. No. 07-875-MJR, 2009 WL 635503, at *4 (S.D. Ill. March 12, 2009) (finding that "the presence of [a disclaimer provision] in a contract is not dispositive of whether a third[-]party is entitled to enforce an agreement")); Twin City Constr. Co. of Fargo, N.D. v. ITT Indus. Credit Co., 358 N.W.2d 716, 719 (Minn. App. 1984) (finding a contract intended to benefit third-party "regardless of the disclaimer").

Courts taking a holistic view of similar hospital-insurer contracts have consistently held that insurance customers are intended third-party beneficiaries. In fact, at least two states have reached this conclusion in their review of contracts between hospitals and Blue Cross entities. Benton v. Vanderbilt University, 137 S.W.3d 614 (Tenn. 2004); Nahom v. Blue Cross & Blue Shield of Arizona, Inc., 885 P.2d 1113 (Ariz. App. 1994). Grand Strand does not offer any authority to counter Benton and Nahom, rather Grand Strand asserts baseless speculation over matters these courts did not consider. Resp't Br. at 12-13. Grand Strand attempts to distinguish these cases by suggesting the contracts at issue in Benton and Nahom did not contain purported third-party beneficiary disclaimers equivalent to Section 16.16. Grand Strand goes on to argue that the outcome would have been different if the Tennessee and Arizona courts had been confronted with such a disclaimer. Resp't Br. at 12-13. Notably, these arguments are presented without citation. Grand Strand has no basis for concluding either of these cases lacked a purported disclaimer and no basis for concluding a disclaimer would have altered their outcome.

Significantly, at least three cases have found hospital patients are third-party beneficiaries notwithstanding a contract provision purporting to exclude them. App. Br. at 13 (citing Aetna Life Ins. Co. v. Huntingdon Valley Surgery Ctr., Civil Action No. 13-03101, 2015 WL 1954287 (E.D. Pa. Apr. 30, 2015); Cates v. Integris Health, Inc., No. CIV-12-0763-F, 2013 WL 3923512, at *6-7 (W.D. Okla. July 29, 2013); Dorr v. Sacred Heart Hospital, 597 N.W.2d 462, 475 (Wis. App. 1999)). For these cases, Grand Strand merely counters that the contractual intent to benefit third-parties was stronger than in the Institutional Agreement. Resp't Br. at 16. However, as discussed *supra*, the Institutional Agreement makes promises directly to Blue Cross members and imposes on Grand Strand duties that could inure only to their benefit. As recognized by other courts considering this issue, insurance customers are third-party beneficiaries of hospital-insurer contracts and the circuit court erred in refusing to allow Ms. Beverly to enforce the Institutional Agreement.

c. Ms. Beverly May Demand Grand Strand Provide Covered Services "Pursuant To" the Institutional Agreement's Terms.

The circuit court's finding that Ms. Beverly may not enforce the Institutional Agreement as a third-party beneficiary is inconsistent with the contract language as a whole and ignores the unambiguous language of the purported third-party beneficiary disclaimer provision. As stated in that provision, Grand Strand agreed Blue Cross members like Ms. Beverly were entitled to "receive Covered Services *pursuant to the terms of*" the Institutional Agreement. (R. p. 123 § 16.16) (emphasis added). The medical treatment Ms. Beverly received at Grand Strand was a "covered service." (R. p. 20 ¶¶ 14-17). Yet, as alleged in the Complaint, that service was not provided pursuant to the Institutional Agreement's terms. Specifically, Ms. Beverly's services were not provided pursuant to the Institutional Agreement's mandatory claim submission requirement, payment solicitation restriction, or reimbursement rate cap. (R. p. 21 ¶¶ 18, 21; R.

p. 109 §§ 6.1-6.4). Accordingly, what Ms. Beverly alleges in her Complaint is exactly the type of suit Grand Strand should have envisioned when it negotiated and entered the Institutional Agreement.

Grand Strand's brief argues the Institutional Agreement does not permit third-party claims under any circumstances, but Grand Strand misconstrues both the language of Section 16.16 and the substance of Ms. Beverly's claims. After initially purporting to disclaim third-party beneficiaries generally, Section 16.16's second sentence makes an express exception for Blue Cross members like Ms. Beverly demanding covered services pursuant to the Institutional Agreement's terms. Grand Strand argues this crucial sentence does not authorize Ms. Beverly's claims but only bars Grand Strand from refusing to treat her. Resp't Br. at 17, 19. The Court should reject this interpretation because it is both illogical and incomplete. Grand Strand need not promise by contract to provide medical treatment to emergency room patients like Ms. Beverly because mandatory treatment of emergency room patients is already guaranteed by federal law. Pursuant to the Emergency Medical Treatment and Labor Act, Grand Strand "must provide" medical treatment to "any individual [that] comes to the emergency department." 42 U.S.C. § 1395dd(a). Grand Strand asks the Court to construe Section 16.16's second sentence as a superfluous reiteration of an existing statutory duty when the logical and plain reading of this sentence is as a recognition of Blue Cross members' role in the PPO and their right to core benefits as provided in the PPO.

Grand Strand's argument also fails to account for a key portion of Section 16.16's second sentence. Blue Cross members are not just promised covered services, they are promised covered services provided "pursuant to" the Institutional Agreement's terms. Grand Strand argues the "pursuant to" clause intends only to define the parameters of the term "covered services" and

does not address Grand Strand's compliance with the contract's payment provisions. Resp't Br. at 19. In support of this argument, Grand Strand relies on the same dictionary definition for "pursuant to" that Ms. Beverly cites in her brief. Resp't Br. at 18; App. Br. at 15 n. 8 (both citing Black's Law Dictionary entry for "pursuant to"). The only difference is that Grand Strand relies on the term's secondary definition. See Black's Law Dictionary (10th ed. 2014) (defining "pursuant to" first as "in compliance with" or "in accordance with" and second as "authorized by"). Given South Carolina's policy of adopting an undefined contract term's "plain, ordinary, and popular" meaning, Grand Strand offers no explanation for why the secondary meaning of "pursuant to" should be applied here. MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency, 336 S.C. 542, 549, 520 S.E.2d 820, 823 (Ct. App. 1999) (citing Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315, 440 S.E.2d 367 (1994)). Thus, the reimagining of Section 16.16's text in Grand Strand's brief (Resp't Br. at 18-19) should be rejected as an effort to support its misguided position. Properly interpreted, the crucial sentence recognizes not only Ms. Beverly's right to receive medical services but also her right to receive those services "in compliance with" all the Institutional Agreement's terms including those related to Grand Strand's compensation and how it may be pursued.

Finally, Grand Strand contends that what Ms. Beverly challenges in her Complaint is actually unrelated to the covered services she received. Resp't Br. at 17 (arguing that filing an insurance claim is not a covered service). Grand Strand portrays Ms. Beverly's claim as an officious endeavor to enforce two other parties' insurance claim submission agreement. However, claim submission is not the core of Ms. Beverly's suit. She is suing because Grand Strand ignored its express promise not to bill her. Candidly, whether Grand Strand seeks reimbursement from Blue Cross for Ms. Beverly's emergency room visit is far less important to

Ms. Beverly than Grand Strand's illicit yet successful efforts to extract payment from her. If Grand Strand is uninterested in seeking reimbursement from Blue Cross at the agreed upon reimbursement rate, then Grand Strand is perhaps at liberty to write the debt off. But, Grand Strand has agreed it "will not solicit any payment from" Ms. Beverly (R. p. 109 § 6.1), and this case seeks primarily to vindicate that promise.

Accordingly, the Court should reverse the circuit court's finding that Ms. Beverly's claim is barred by a third-party beneficiary disclaimer provision. That provision recognizes Ms. Beverly's right to receive covered services "pursuant to" the Institutional Agreement's terms, and the Complaint alleges Grand Strand violated those terms.

II. Grand Strand Breached a Fiduciary Duty by Billing Ms. Beverly.

Ms. Beverly placed special trust in Grand Strand to function as the Blue Cross "preferred provider" Grand Strand held itself out to be, and she sustained damages when forced to pay an unwarranted bill. Grand Strand argues it was merely Ms. Beverly's creditor and owed her no fiduciary duty. Grand Strand also contends Ms. Beverly improperly constructs her claim on unilateral conduct that does not match Grand Strand's alleged breach. The first argument misunderstands the nature of the parties' relationship and the second misconstrues the Complaint's allegations.

Grand Strand argues its relationship with Ms. Beverly is akin to a creditor and debtor and, therefore, Grand Strand does not qualify as fiduciary under South Carolina law. Resp't Br. at 22 (citing Regions Bank v. Schmauch, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003)). However, the parties' relationship lacks an inherent component of the typical debtor-creditor—namely, a debt. Pursuant to the Institutional Agreement, Ms. Beverly owed Grand Strand nothing for the covered services Grand Strand provided her the hours following her auto

accident. (R. p. 109 § 6.1) ("[Grand Strand] will not solicit any payment from [BCBS] Members"). The effect of contracts like the Institutional Agreement is to eliminate any prospective debt obligation from patient to hospital for covered services. Morgan v. Saint Luke's Hospital of Kansas City, 403 S.W.3d 115, 120 (Mo. App. 2013) (finding that a contract requiring claim submission and barring bills to patients "extinguished" the patient's alleged debt to the hospital and precluded hospital from asserting a lien).

Moreover, South Carolina law on the scope of fiduciary relationships is not as narrow as Grand Strand suggests. South Carolina courts "broadly construe" fiduciary duties to encompass the many different situations in which one party places special trust in another. Armstrong v. Sch. Dist. 5 of Lexington & Richland Counties, 26 F. Supp. 2d 789, 797 (D.S.C. 1998). Even Regions Bank refused to draw the hard line Grand Strand suggests and instead noted there are instances where a bank takes on duties that extend the relationship with its customer beyond the typical creditor-debtor. 354 S.C. at 671, 582 S.E.2d at 444. Grand Strand's relationship with Ms. Beverly is also quite different than those at issue in the foreign-state cases Grand Strand cites. Resp't Br. at 21 (citing Burton v. William Beaumont Hosp., 373 F. Supp. 2d 707, 724 (E.D. Mich. 2005); DiCarlo v. St. Mary Hosp., 530 F.3d 255, 269 (3d Cir. 2008)). In both of those cases, uninsured patients alleged hospitals took advantage of their lack of insurance by charging unreasonably high prices for medical services. Burton, 373 F. Supp. 2d at 710; DiCarlo, 530 F.3d at 259. When there is no underlying insurance arrangement in place, the hospital-patient relationship is limited to creditor-debtor, and the patient may not complain about standard prices because they not are entitled to a discount. Here, however, Ms. Beverly had insurance and reasonably trusted Grand Strand to respect her status as a Blue Cross member.

This Court should also reject Grand Strand's argument that Ms. Beverly's fiduciary duty claim is pled improperly by focusing on claim submission and failing to demonstrate how Grand Strand participated in the alleged breach. First, Grand Strand is incorrect in suggesting the fiduciary duty claim alleges only that Grand Strand failed to file an insurance claim. A review of the Complaint demonstrates that Ms. Beverly alleges Grand Strand breached its fiduciary duty when it prioritized profits over its responsibilities as a Blue Cross preferred provider and billed Ms. Beverly when it had agreed not to. (R. p. 24 ¶ 46). By focusing on the improper bill rather than the unsubmitted insurance claim, Ms. Beverly's Complaint is further distinguished from Wogan v. Kunze, 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005), where the court found no fiduciary duty for a physician to submit a Medicare claim that he told his patient he would not submit.

Second, Grand Strand errs in arguing the Complaint attempts to construct a fiduciary duty claim on Ms. Beverly's unilateral acts. The Complaint alleges Grand Strand performed multiple acts to create a fiduciary relationship including affirmative efforts to court Blue Cross members' business and direct representations that Grand Strand would adhere to the requirements imposed on Blue Cross preferred providers. (R. p. 24 ¶¶ 42-44). Grand Strand also overstates the unilateral conduct objection to a fiduciary duty claim. Regions Bank held only that a defendant cannot be charged with a fiduciary duty if it has no reason to believe it is the recipient of the plaintiff's trust. 354 S.C. at 671, 582 S.E.2d at 444 (finding that a fiduciary "must have actually accepted or induced the confidence placed in him"). The Complaint alleges Grand Strand induced Ms. Beverly to trust it and accepted that trust when Ms. Beverly sought treatment in Grand Strand's emergency room. (R. p. 24 ¶¶ 42-44).

Finally, Grand Strand is wrong in concluding Grand Strand's alleged fiduciary duty and its alleged violation are fatally inconsistent. Resp't Br. at 24. Ms. Beverly alleges she trusted Grand Strand would do all things required of a Blue Cross preferred provider and Grand Strand breached this duty by billing her at an undiscounted rate. (R. p. 24 ¶ 45) (alleging Ms. Beverly trusted Grand Strand would act "based on [Grand Strand's] status as a preferred provider); (R. p. 24 ¶ 46) (alleging Grand Strand breached its duty by billing Ms. Beverly). In sum, the Complaint properly alleges all required elements for a breach of fiduciary duty, and Ms. Beverly should be allowed to proceed to discovery on this claim.

III. South Carolina Law Provides an Equitable Remedy for Grand Strand's Dishonest Conduct.

The circuit court erred in finding Ms. Beverly may not pursue an equitable claim for unjust enrichment. In support of the circuit court's order, Grand Strand argues Ms. Beverly may not seek equitable relief without standing to enforce the contract. Resp't Br. at 24-25. However, as discussed *supra*, Ms. Beverly is the Institutional Agreement's intended third-party beneficiary and may enforce its terms. Moreover, Grand Strand's argument falsely equates contract and unjust enrichment claims. Unjust enrichment is the modern designation of a quasi-contract claim. Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 473 366 S.E.2d 12, 14 (Ct. App. 1988). Unjust enrichment sounds in equity and does not graft in any of the elements or requirements for a breach of contract claim. Instead, an unjust enrichment claim has its own distinct elements, and each is properly alleged in the Complaint. See Gignilliat v. Gignilliat, Savitz & Bettis, 385 S.C. 452, 684 S.E.2d 756 (2009) (listing elements for unjust enrichment claim). Ms. Beverly alleges she conferred a benefit on Grand Strand when she paid over $8,000 for medical treatment. (R. pp. 21-25 ¶¶ 22, 52). Ms. Beverly alleges it is inequitable for Grand Strand to retain that benefit because it was barred from pursuing payment from Ms. Beverly. (R. p. 25 ¶ 54).

Rather than limiting its argument to the unjust enrichment elements, Grand Strand affirmatively asserts that its conduct in this case is perfectly equitable. Grand Strand concludes there was nothing unfair, dishonest, or untoward in billing Ms. Beverly. Resp. Br. at 23 ("It is not inequitable for Grand Strand to charge Beverly non-discounted rates . . ."). However, what Grand Strand has done here is an affront to equity. Equity "stands on the very foundations of right and fair dealing, and it considers and weighs conduct of men in their dealings with each other and gives that effect and meaning to their actions which common sense and justice dictate." Kelly v. McCray, 278 S.C. 88, 90, 292 S.E.2d 587, 589 (1982) (citing Gen. Motors Acceptance Corp. v. Herlong, 248 S.C. 55, 159 S.E.2d 51 (1966)). A court may "look beneath the rigid rules of the law" or even search beyond a document's language to resolve a dispute because equity's primary objective is to "seek substantial justice" and to prevent a party from profiting from its own wrongdoing. State ex rel. Daniel v. Strong, 185 S.C. 27, 192 S.E. 671, 681 (1937); Smith v. Todd, 155 S.C. 323, 152 S.E. 506, 509 (1930).

In fact, Grand Strand's scheme only works because it is dishonest. If Grand Strand candidly admitted to Blue Cross members walking through its doors that Grand Strand refuses to honor its promises to submit claims, refrain from sending bills to patients, and to accept discount reimbursements, then rational Blue Cross members would seek medical services elsewhere. What Blue Cross members receive, however, are unambiguous representations that Grand Strand is a Blue Cross "Preferred Provider" and the implicit promise that Grand Strand will act accordingly. (R. p. 24 ¶¶ 41-45). With those representations, Grand Strand attracts participants from a major private health insurance pool. Patients are unlikely to discover they have been misled until they receive a surprise bill like the one that arrived in Ms. Beverly's mailbox.

Dishonesty is not an ancillary or collateral component here. Grand Strand needs the lie at the center of this case to secure the revenue bump its scheme yields.

In arguing that its handling of Ms. Beverly's case was equitably sound, Grand Strand also does not explain how its conduct could possibly lead to a functioning PPO. If the Institutional Agreement allows Grand Strand to charge patients directly at non-discounted rates, then there is no reasonable basis for Ms. Beverly to "prefer" Grand Strand to other similarly competent medical providers. Grand Strand was sold to Ms. Beverly as a "preferred" provider specifically because Grand Strand promised not to do the very things it has done in this case. What's worse, Grand Strand was the one doing the selling. Grand Strand negotiated for the right to tout its preferred provider status to patients and made that representation to Ms. Beverly. (R. p. 116 § 11.2; R. p. 24 ¶¶ 42-43).

Grand Strand's conduct is all the more insidious because it is easily repeatable. The circuit court's order dismissed Ms. Beverly's claims on a Rule 12(b)(6), SCRCP motion, which challenged the legal sufficiency of her claims. In essence, the circuit court found Ms. Beverly and similarly situated Blue Cross members can have no legal or equitable qualms with a hospital that disregards the claim submission and discount reimbursement duties a hospital undertakes when joining a PPO. Should this Court affirm that order, the implications are substantial. This case would become a sword Grand Strand may use to quell any complaints Blue Cross members dare raise regarding an unwarranted bill like the one Ms. Beverly received. Nothing would stop Grand Strand from expanding this practice to patients covered by other insurers. Nothing would stop other unscrupulous hospitals from adopting a similar tactic. Ultimately, what Grand Strand seeks here is nothing less than a judicially sanctioned license to bait-and-switch its customers.

CONCLUSION

Based on the arguments stated above and those in her earlier brief, Ms. Beverly requests the Court reverse the circuit court's order dismissing Ms. Beverly's contract, fiduciary duty, and equitable claims. Grand Strand's conduct is a blatant attempt to increase its profits at the expense of all Blue Cross members like Ms. Beverly. Grand Strand should not get to reap the benefits of being a Blue Cross "preferred provider" without accepting the corresponding duties to Blue Cross members. Ms. Beverly is directly contemplated and intentionally benefitted by the Institutional Agreement, and she should be permitted to enforce it. Alternatively, Grand Strand must at the very least disgorge the proceeds of its inequitable conduct.

Respectfully submitted,

John G. Felder, Jr.
McGowan, Hood & Felder, LLC
1517 Hampton Street
Columbia, SC 29201
Telephone: (803)779-0100
Facsimile: (803) 256-0702
jfelder@mcgowanhood.com

Chad A. McGowan
Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
Telephone: (803) 327-7800
Facsimile: (803) 328-5656
cmcgowan@mcgowanhood.com
jcalloway@mcgowanhood.com

Roy Harmon
Harmon & Major, P.A.
PO Box 8954
Greenville, SC 29604
Telephone: (864) 467-1712
harmonmajor@gmail.com

Sidney L. Major, Jr.
Harmon & Major, P.A.
PO Box 8954
Greenville, SC 29604
Telephone: (864) 467-1712
sidmajor@bellsouth.net

Jeff C. Chandler
The Chandler Law Firm
Bank of America Building
2501 Oak Street
Myrtle Beach, South Carolina 29577
Telephone: (843)448-4357
jeffcchandler@aol.com

March __, 2017
Columbia, South Carolina