THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2014-CP-04-00373

Appellate Case No.: 2016-002302

NHC HealthCare Mauldin, LLC,

Respondent,

v.

Wade Thompson and Sheila Thompson,

Defendants.

Of Whom Wade Thompson is the

Appellant.

AMENDED INITIAL BRIEF OF RESPONDENT

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1. THE TRIAL COURT DID NOT ERR IN FINDING THE APPELLANT LIABLE TO THE RESPONDENT UNDER THE DOCTRINE OF *QUANTUM MERUIT.*

STATEMENT OF THE CASE

On February 28, 2014, NHC HealthCare Mauldin, LLC ("NHC") brought this action alleging breach of contract, delinquent account and *quantum meruit* against Wade Thompson ("Father") (Summons and Complaint, pp.1-10). Father filed an Answer on July 14, 2014 (Father's Answer, pp. 1-3) Subsequently, on January 29, 2016, NHC filed an amended complaint alleging additional causes of action for misrepresentation against Sheila Thompson ("Daughter") (Amended Complaint, pp. 1-31). On March 10, 2016 Daughter answered the Amended complaint denying liability and asserted counterclaims for negligence, fraud by misrepresentation, fraud by omission, negligent misrepresentation, promissory estoppel, abuse of process, due process, violations of the South Carolina Consumer Protection Code and relief pursuant to the Unfair Trade Practices Act. (Answer to Amended Complaint, pp. 1-19). NHC filed a Reply to Daughter's counterclaims on April 5, 2016 denying any liability to Daughter and seeking dismissal of Daughter's counterclaims. (Reply, pp. 1-17).

This action was tried non-jury on September 7, 2016, and on October 14, 2016 the trial court awarded judgment to NHC and against Father in the amount of $8,869.32 on the basis of *quantum meruit*, denied judgment to NHC against Daughter, and dismissed Daughter's counterclaims with prejudice. (Order, pp. 1-8)

On November 18, 2016, Father filed and served his Notice of Appeal of the trial court's

October 14, 2016 Order. (Notice of Appeal, p.1) This appeal followed.

FACTS

On January 26, 2011, Father was admitted to NHC, a skilled nursing facility located in Mauldin, South Carolina (Tr. p. 15, line 9). Father was transferred from AnMed Hospital, a hospital located in Anderson, South Carolina (Tr. p. 6, line 12; Tr. p.8 lines 19-21). As part of the admissions process, NHC's admissions director, Jennifer Balon ("Balon") discussed and explained the admissions documents (Plaintiff's Exhibit 1) with Daughter (Tr. p. 8, lines 4-6).

At trial, Balon explained why the admissions documents were explained to Daughter rather than Father, the patient:

> Q: All right. Is it -- was it a common practice to review admission documents with a family member versus with the patient himself?
>
> A: Yes, sir.
>
> Q: Why did you do that on frequent occasions?
>
> A:Because patients, being in the hospital, not feeling well, being sick, we like to review it with a family member to make sure that -- to cut down on any confusion. It's sometimes the person coming from the hospital was just not the best person to review this with at the time because of maybe medical conditions that were going on. (Tr. p. 8, lines 7-18).

Daughter acting on Father's behalf was part of ongoing arrangement between Father and Daugher. Daughter signed checks drawn on her parents' checking account, including the prepayment to NHC for the co-pay due at the time of admission (Tr. p. 225, lines 1-10; Plaintiff's Exhibit 16). Daughter also maintains Father's rental properties, including the collection of rents and payment of expenses (Tr. p. 229 lines 10-25; p. 230 lines 1-5).

As part of the explanation of the admission documents, Balon explained to Daughter

what the charges would be for the services provided by NHC. (Tr. p. 10, lines 1-7). Additionally, the admissions documents contain the following statement: "[t]he fact that the center submits a claim for payment does not relieve the patient from liability for the cost of care for any days determined by the program administrator as noncovered or pay the patient's portion of the liability as determined by the appropriate program administrators." (Tr. p. 61, lines 18-25; Tr. p. 209 lines 18-25; Plaintiff's Exhibit 1 at Page 77) Additionally, Balon ensured that Daughter understood potential Medicare benefits available to Father to pay for his services at NHC (Tr. p. 11, lines 2-9).

Balon explained to the Court how Medicare determines eligibility for benefits at a skilled nursing facility:

> Q: Okay. Now, just for -- because this took me a while to figure out, just for our benefit, can you explain the benefit days and how that applies?
>
> A: A patient has to have a three-night inpatient hospital stay. If they have done that, then they do qualify to receive services in a skilled nursing facility for rehab as long as they meet the Medicare criteria from a medical standpoint. And then the Medicare benefits are the first -- a benefit period of a possible 100 days. The first 20 days Medicare paying 100 percent. Days 21 through 100 there being a copay that is dictated by Medicare.
>
> Q: Okay. So I think what you're saying is they have a total of 100 benefit days?
>
> A: Yes. They have a total of 100 benefit days, yes.
>
> Q: They only get 100 days per year?
>
> A: No, sir. Per benefit period.
>
> Q: How do they qualify for a new benefit period?

A: From the date you leave a skilled nursing facility until the day you either go back into a skilled nursing facility or back into a hospital as an inpatient, **there has to be a 60-day consecutive break. It has to be consecutive, and you have to have 60 midnights out of a skilled nursing facility and a hospital. On day 61, it would start over.** (Tr. p. 11, lines 10-25; p. 12, lines 1-9) (emphasis added).

Daughter testified at trial that she received Father's Medicare summary notices periodically through the mail, including prior to Father's admission to NHC (Tr. p. 218, lines 16-19) (Tr. p. 219, lines 7-15). These Medicare summary notices explained to Father and Daughter how benefit eligibility was determined, stating: "[a] benefit period begins the first time you receive Medicare coverage inpatient hospital care and ends when you have been out of the hospital or

skilled nursing facility for 60 consecutive days." (Tr. p. 218 lines 2-7) (Plaintiff's Exhibit 22.)

Balon's procedure during the admission's process is to ask if there were any stays in the 60 days previous to admission, and Daughter did not tell Balon about any stays that occurred in the 60 days prior to his admission at NHC:

Q: All right. And did you ask Sheila Thompson if he had been anywhere in the last 60 days prior to coming to the hospital?

A: That is our normal procedure.

Q: Okay. All right. Did you get any information from her that indicated he had been anywhere that would have -- within that 60 days prior to going to the hospital?

A: No. (Tr. p. 12 lines 10-18).

As discussed in detail below, it was determined by NHC after Father's discharge that he

had stayed at various facilities that made him ineligible for Medicare benefits. This information was not disclosed to NHC at the time of Father's admission. *infra.*

Prior to Father's admission, Balon contacted Medicare via telephone to determine benefit eligibility for Father (Tr. p. lines 17-24). The result of the telephone verification received by Balon was the Father had his full 100 benefit days available to him (Tr. p. 13, lines 20-24; Plaintiff's Exhibit 2).

Based on the telephone verification and Balon's discussions with Daughter, Balon had no information that indicated Father had no benefit days available to him for his stay at NHC at the time of his admission to NHC. (Tr. p. 14 lines 3-8).

NHC employed a secondary verification to determine Medicare benefit eligibility. Balon explains the second verification process:

> Q: Now, in addition to your telephone request, was your procedure -- is there another request that is made to Medicare?
>
> A: There is. It was our policy to e-mail -- we had to e-mail our corporate office, and then they would run the Medicare verification check as well and then it was e-mailed back. (Tr. p. 14, lines 9-14).

Balon received the e-mailed verification back the day after Father's admission (Plaintiff's Exhibit 3), and it contained inconsistent information about Father's Medicare eligibility. Balon testified that "[t]his one reflected that he had no days left, but it did say that the last bill date was November 22nd, which at that time I would have looked at, and based upon what I was looking at, he still had a 60-day break." (Tr. p. 15, lines 21-25).

Balon testified that inconsistencies between the telephonic verification and the written

verification had occurred previously, and that in her experience of twelve or thirteen years as admissions director at NHC (Tr. p. 5, lines 11-12), the telephone verification was more accurate than the written verification. (Tr. p. 18 lines 1-8).

On March 7, 2011 Lisa Bollinger ("Bollinger"), NHC's business office manager (Tr. p. 63, line 4), learned for the first time that Medicare was not going to pay the claim for the services rendered by NHC to Father (Tr. p. 71, lines 17-22). The reason given for the denial was "benefit exhaust," meaning that Father had exhausted his benefits elsewhere and did not have the sufficient 60 day break in services (Tr. p. 72 lines 8-14).

In an effort to determine why Father was ultimately determined to be ineligible for Medicare benefits, Bollinger conducted an extensive investigation into Father's whereabouts during the period preceding Father's January 26, 2011 admission to NHC (Tr. pp 72-83) (Plaintiff's Exhibits 11, 12 and 13). On March 21, 2011, she concluded her investigation (Tr. p. 81, lines 6-22) which determined that Father had stayed at the following facilities on the following dates:

1. NHC Mauldin, stay concluded on July 28, 2010 (Tr. p. 79, line 1);
2. Riverside, from August 20, 2010 through September 13, 2010 (Tr. p. 78 line 22-23);
3. Carolina Behavioral Health, from October 4, 2010 to November 22, 2010 (Tr. p. 81, lines 16-19);
4. AnMed Hospital on January 7, 2011 (Tr. p. 77 lines 20-25);
5. AnMed Hospital from January 22, 2011 until January 26, 2011 (Tr. p. 73 lines 19-22).

Father was admitted to NHC on January 26, 2011 (Tr. p. 15 lines 7-9) and was removed by Daughter on March 10, 2011 (Tr. p. 65, lines 2-3). It is the value of the unpaid portion of the services rendered during this time period that is the subject of this appeal.

Daughter was not forthcoming about Father's various stays at other facilities at the time of Father's admission to NHC in conversations with Balon or with Bollinger after Father's release despite multiple opportunities to do so.

On March 7, 2011 it was determined that Father was ineligible for Medicare benefits (Tr. p. 71, lines 17-22). The next day, Bollinger telephoned Daughter and asked her if she knew of any other facilities where Father had stayed after July, 2010:

Q: Now, from the records -- well, y'all knew he was at NHC Mauldin in July of 2010?

A: Correct.

Q: And did you know where else he went after that?

A: No.

Q: Okay. And did you contact -- who did you contact at the family?

A: Sheila Thompson, on the 8th.

Q: And did you tell her what you had received?

A: I told her that I had received notification that his benefit had exhausted. I was questioning her if she knew where he had been, and on the advice of Jeanie Newman, our Medicare specialist, to see if maybe she could contact Medicare to see if there was an error in billing.

Q: And what did Sheila tell you?

A: She didn't remember him going anywhere at that time.

Q: Okay. So from the time he left NHC Mauldin in July until the time he checked into the hospital --

A: She didn't recall. (Tr. p. 74 lines 4-24; Tr. p. 77, lines 10-12).

At that time, Ms. Bollinger also contacted AnMed Hospital and discovered an admission at that hospital on January 7, 2011 that she was previously unaware of:

Q: All right. Now, did you call anybody else at that time?

A: She had called AnMed to determine if he had stayed anywhere else. I advised her to call Medicare as well.

Q: Okay. Did you also call AnMed?

A: I did.

Q: What did you find out from AnMed?

A: That the only hospital stay at that point was when he was there in March of 2010, and then that's when we first found out that he had an admission in January 07, 2011.

Q: January 7th of 2011?

A: Yes.

Q: That's the first time you knew he had gone in before the January 22nd date?

A: That is correct. (Tr. p. 77 lines 14-25; Tr. p. 78 1-4).

However, even with this new information, Ms. Bollinger believed, based on the information available to her, that there was still a sixty day break between Father's last stay in a skilled nursing facility or hospital and the January 7th admission (Tr. p. 78 lines 5-9).

Later that day, March 8, 2011, Daughter called Ms. Bollinger back with new information about Father's stay. For the first time, she informed a representative of NHC that Father had

stayed at Riverside from August 20, 2010 through September 14, 2010:

Q: All right. Now, did you -- when did you next hear from Sheila Thompson?

A: She called me back on the 8th, that day, and said she had called Medicare. They would not release any of the information to her, that she -- they were going to send her copies of the explanation of benefits that she could review, as well as she told me then that she remembered or had found out that he had been at Riverside, which is a skilled nursing facility, once he left us in July of 2010.

Q: Okay. And did she give you some dates for the stay at Riverside?

A: She did. August 20, 2010, through September 13, 2010. (Tr. p. 78 lines 10-23).

Again, however, not even this new piece of the puzzle explained Medicare's denial of benefits for Father's stay at NHC, and Daughter did not volunteer any other additional information at that time:

Q: All right. He was at Riverside until September 13, 2010?

A: Huh-uh.

Q: All right. Is there still a 60-day break from that date until he went into the next facility, which you understood was AnMed?

A: Yes.

Q: All right. Did you explain that situation to Ms. Thompson and asking her again why -- why there was -- why Medicare was saying there was no break?

A: Yes. She still did not recall any. (Tr. p. 79 lines 5-15).

Finally, on March 21, 2011, eleven days after Father had been removed from NHC by Daughter, the mystery was solved and Ms. Bollinger was able to determine why Father's

Medicare benefits had been exhausted:

Q: All right. I believe the next time you talked to Ms. Thompson was on March the 21st; is that correct?

A: That's correct.

Q: All right. And did she have any further information about where he had been?

A: No. I actually gave her information where I had called Medicare and Medicare talked to me as a provider and informed me that he was at **Carolina Behavioral Health**, so that's when I contacted her and asked her about that time frame.

Q: All right. And the information you got was that he was at Carolina Behavioral from what period of time to what period of time?

A: **October 4, 2010, to November 22, 2010.**

Q: Okay. All right. And when you mentioned that to her, what was her response?

A: **"Oh, yeah. I did have to put him there."**

Q: Okay. So with that amount -- with those dates of care put in, the January 7 first admission to AnMed Hospital, had there been a 60-day break from the time he left your center on July 28th until the time he reentered your center on July 26th?

A: No, there was no break. (Tr. p. 81 lines 6-25; Tr. p. 82 lines 1-3) (emphasis added).

Bollinger explained why she undertook this exhaustive investigation to determine where Father had been during the relevant time period:

Q: Okay. Why, during this period of time he was not at your center since March the 10th, when he left your center, so from March 10th for the next several weeks, you were continuing to try to figure out the Medicare situation, why he didn't qualify for benefits

there?

A: Yes.

Q: Or why were his benefits exhausted. Why were you continuing to do this?

A: As a courtesy to the family because, I mean, everything that we had showed that he had had a 60-day break. (Tr. p. 82, lines 11-21).

It was Ms. Bollinger's efforts, and not complete information provided by Daughter, that led Ms. Bollinger to complete the timeline and determine why Father's Medicare benefits had been exhausted.

STANDARD OF REVIEW

In an equity action tried by a judge without a reference, the court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. In an action seeking recovery under the equitable doctrine of quantum meruit, this scope of review applies. Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 262, 440 S.E.2d 129, 131, (1994).

"While this standard permits a broad scope of review, an appellate court will not disregard the findings of the [circuit] court, which saw and heard the witnesses and was in a better position to evaluate their credibility." Buffington v. T.O.E. Enters. , 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009).

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN FINDING THE APPELLANT LIABLE TO THE RESPONDENT UNDER THE DOCTRINE OF *QUANTUM MERUIT.*

The sole question presented in this appeal is whether the trial court erred in awarding judgment against the Appellant on the basis of the equitable doctrine of *quantum meruit.*

> Our Courts have recognized "quantum meruit as an equitable doctrine to allow recovery for unjust enrichment. See Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). Absent an express contract, recovery under quantum meruit is based on quasi-contract, the elements of which are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value. Webb v. First Federal Savings and Loan Ass'n., 300 S.C. 507, 388 S.E.2d 823 (Ct. App. 1989); Ellis v. Smith Grading and Paving, Inc., 294 S.C. 470, 366 S.E.2d 12 (Ct. App. 1988)." Columbia Wholesale Co. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). See also Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 684 S.E.2d 756 (2009), Rose Electric, Inc. v. Cooler Erectors of Atlanta, Inc., 418 S.C. 424, 794 S.E.2d 382 (Ct. App. 2016), LandBank Fund VII, LLC v. Dickerson, 369 S.C. 621, 632 S.E.2d 882 (Ct. App. 2006).
>
> Restitution is awarded on the theory that the plaintiff conferred a benefit at the request of

the defendant in the mutual expectation· that it was to be paid for. If the defendant receives the benefit of the services without paying for it, he will be unjustly enriched. Johnston v. Brown,290 S.C. 141, 348 S.E.2d 391 (Ct.App. 1986).

A. THERE WAS A BENEFIT CONFERRED UPON THE DEFENDANT BY THE PLAINTIFF

In the instant case, NHC conferred benefits upon Father including skilled nursing care and therapy. (Tr. p. 65 l. 6,18-19; Pl. Exhibit 5 pp. 165-168; 390-443; 446-448; 494; 597). Bollinger testified that Father "had therapy. He had 24-hour nursing care around the clock with CNA, which is a certified nursing assistant, as well as a nurse on duty. Of course, there was (sic) doctors that would be in the facility as well, physical/ occupational therapy both." (Tr. pp. 65 lines 22-25; p. 66 line 1; Pl. Exhibit 5 pp. 165-168; 390-443; 446-448; 494; 597). These services were provided to Father over a period of forty-five days, from January 26, 2011 to March 10, 2011. (Tr. p. 65, lines 2-3). Father accepted these services and he does not contend that these services were gratuitous.

The value of the services that remained unpaid at the time of trial was $8,869.32. (Tr. p. 87 lines 23-25) (Tr. p. 88 line 1); (Plaintiff's Exhibit 14).

Appellant contends that "[i]t is not enough for NHC to show Father benefitted from the residential care. NHC must show *it* conferred the benefit." (Brief of Appellant, p.30).

Without question, NHC conferred and Father received the benefits of skilled nursing and therapy as set forth above. There is no mention in the record that a third party has conferred the care received by Father. The parties in the case at bar had direct dealings with each other.

Appellant cites three authorities for the proposition that "NHC was required to prove a

benefit other than what was already expected as a result of the relationship of the parties that existed upon his admission to NHCC (sic)." (Appellant's Initial Brief, p. 30). *Sauner, Niggell, and Inglese.* However, each of these cases is distinguishable from the facts of the case at bar.

The *Sauner* Court's analysis focused on the fact that the parties had a valid lease that contemplated the very situation the plaintiff alleged to be the basis for unjust enrichment:

> Restitution is a remedy designed to prevent unjust enrichment. Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 434, 322 S.E.2d 474, 478 (Ct. App. 1984). To recover on a theory of restitution, the plaintiff must show (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. Niggel Assoc., Inc. v. Polo's of North Myrtle Beach, [**168] Inc., 296 S.C. 530, 374 S.E.2d 507 (Ct. App. 1988).In Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989), this Court [***19] found that the record failed to establish a cause of action for unjust enrichment. In Player, the plaintiffs leased property from the defendant, and built a restaurant on the property. Id. The lease contemplated improvements to the premises and established that plaintiffs could enjoy the use of the improvements during the term of the lease. Id. The dispute between the parties arose after plaintiffs offered to purchase the property, and defendant declined to sell, but said that he might be willing to extend the lease term. Id. The day after this conversation, plaintiffs began construction of a second restaurant on the property. Three weeks later, defendant told plaintiffs he would not extend the term of the lease unless additional terms and conditions were met. Id. The plaintiffs claimed that defendant was unjustly enriched by refusing to extend the lease. This Court disagreed, and found the plaintiffs would be able to enjoy their improvements for the term of the existing lease and that any retention of benefit by the defendant was a result of the initial terms of the lease. Id.
>
> In our opinion, the facts here are similar to those in Player. Appellants' [***20] lease agreements provided that all improvements to the leased property would become the property of Santee Cooper upon termination of the lease (other than upon termination by Santee Cooper). The leases in this case were for very long terms, and Appellants were able to enjoy the [*410] improvements they made for many years. Therefore, we find no genuine issue of material fact to support Appellants' claim for unjust enrichment. Sauner v. Public Serv. Auth., 354 S.C. 397, 409-410, 581 S.E.2d 161, 167-168, (2003)

Here, there is no agreement between NHC and Father that, if there were no Medicare benefits available to Father to pay for his stay, Father would not be liable to pay NHC for the

services it provided. Rather, the converse is true: the admissions documents signed by Daughter state that Father would be liable for the services rendered if Medicare would not pay for them. (Tr. p. 61, lines 18-25; Tr. p. 209 lines 18-25; Plaintiff's Exhibit 1 at Page 77)

The *Niggel* case is likewise distinguishable from the case at bar. *Niggel* involved a claim by a contractor against the owner of real property. The contractor made improvements to real property owned by a third party at the behest of a sublessee and had no contract to perform services directly with the owner of the real property. The *Niggel* Court held that

> In this case, the Contractors did the work under contracts with Beach (the sublessee). They expected to be paid by Beach. They had no dealings whatever with Windy Hill. Indeed, they did not know Windy Hill had an interest in the property when they agreed to perform the work.Windy Hill did not request the work. It did nothing to cause the [***5] Contractors to rely on it for payment. It had no reason to suppose the Contractors looked to it for payment. The Contractors were not induced to furnish their labor and materials by any expectation that Windy Hill would pay for them. In these circumstances, Windy Hill had no duty to make restitution to the Contractors. Any benefit it received was an incidental result of dealings between others in which it did not participate and over which it assumed no control.
>
> Additionally, the Contractors failed to prove the value of any benefit Windy Hill may have received from their work. Niggel Associates, Inc. v. Polo's of North Myrtle Beach, Inc., 296 S.C. 530, 533, 374 S.E.2d 507, 509, (Ct.App. 1988)

The facts in this appeal are distinguishable from the *Niggel* case because Father and Daughter dealt directly with NHC and received services directly from NHC. By Daughter signing the admissions documents, Daughter caused NHC to rely on Father for payment at the time of admission and NHC expected Father to pay NHC for those services if Medicare did not. Indeed, Father paid NHC for his co-pay at the time of admission, and cannot now argue that he had no direct dealings with NHC or that they were not looking to him for payment.

Furthermore, the *Niggel* case is distinguishable because the plaintiff in that case failed to

prove any benefit the defendant received from the plaintiff's work. In this case, NHC has offered sufficient evidence of the value of the services it rendered to Father.

Inglese v. Beal, 742 S.E. 2d; 403 S.C. 290 (Ct. App. 2013) is likewise distinguishable from the facts in this appeal. In Inglese, a lawyer, was retained to close a real estate transaction. Inglese failed to obtain a written release of a judgment lien of which he had actual knowledge, and as a result, a title insurance company was forced to pay the judgment creditor $10,000. The title insurance company sought reimbursement from Inglese, which he paid. Inglese then sued the seller for unjust enrichment and equitable indemnity. Inglese v. Beal, 403 S.C. 290, 742 S.E.2d 687 (Ct. App. 2013).

The Inglese Court focused its inquiry on the fact the title insurance company, and not the plaintiff, conferred the benefit upon the defendant. *Id.* While the plaintiff reimbursed the title insurance company for the claim it paid, there was no direct benefit conferred upon the defendant by the plaintiff and the plaintiff reimbursed the title company out his own self interest to settle a lawsuit. *Id.*

In the case at bar, NHC did directly confer a benefit upon Father: skilled nursing services and therapy. There was no intervening third party who conferred the benefit, as in Inglese.

B. THE APPELLANT REALIZED THE BENEFIT CONFERRED UPON HIM BY THE RESPONDENT

Appellant does not contend that he did not realize the benefits and the services conferred upon him by the Respondent. Appellant received around the clock nursing care and therapy from Respondent benefitted from these services. (Tr. pp. 65 lines 22-25; p. 66 line 1; Pl. Exhibit 5 pp. 165-168; 390-443; 446-448; 494; 597). There is no evidence in the record that Appellant

rejected these services or was dissatisfied with these services. To the contrary, Daughter implies that she was satisfied with the services NHC rendered to her Father, testifying at trial that "I'm not saying anything bad about National Health Care, the care he got or – you know." (Tr. p. 225, line 15-16) Accordingly, the second prong of the *Scudder May* test is satisfied by the facts in the record.

C. THE CIRCUMSTANCES PRESENTED IN THIS APPEAL ARE SUCH THAT IT WOULD BE UNJUST FOR THE APPELLANT TO RETAIN THE BENEFITS WITHOUT PAYING THEIR VALUE TO RESPONDENT

The primary focus of this appeal is whether the third prong of the *Scudder May* test is satisfied. That is, whether retention by Father of the benefits and services provided by NHC without paying NHC the value of these services and benefits would be unjust under the circumstances and facts in this case. The dispositive facts that lead to this conclusion are as follows:

(1) At the time of Father's admission, NHC received telephonic verification that Father had eligible Medicare benefits for his stay at NHC's facility (Tr. p. 13, lines 20-22);

(2) The day after Father's admission, NHC received inconsistent information by e-mail that stated that Father had no benefit days available to him but that his last bill date was more than 60 days prior to the date of his admission to NHC (Tr. p. 15, lines 21-25);

(3) Father and Daughter failed to disclose to NHC that Father had stayed at Carolina Behavior Health, Riverside, and AnMed Hospital immediately prior to his admission

at NHC until after Father had been discharged from NHC despite having knowledge of those facts (Tr. p. 12 lines 10-18) (Tr. p. 74 lines 4-24; Tr. p. 77, lines 10-12) (Tr. p. 79 lines 5-15) (Tr. p. 81 lines 6-25; Tr. p. 82 lines 1-3);

(4) Father and Daughter had received Medicare summary notices previously which explained the Medicare benefit eligibility) (Tr. p. 218 lines 2-7) (Plaintiff's Exhibit 22);

(5) NHC made no guarantee to Father or Daughter that Medicare would cover Father's stay at NHC (Tr. p. 61, line 18-25; Plaintiff's Exhibit 1 at Page 77);

(6) To the contrary, the written agreement signed by Daughter at the time of admission contemplated that Medicare may not cover NHC's services to Father, and in that event, Father would be liable to pay to NHC the cost of its services to Father; (Tr. p. 61, lines 18-25; Tr. p. 209 lines 18-25; Plaintiff's Exhibit 1 at Page 77);

(7) There is no evidence in the record that either Father or Daughter informed NHC that they had no intention of paying for NHC's services if there was no Medicare coverage available;

(8) Daughter routinely conducted Father's business and medical affairs; (Tr. p. 229 lines 10-25; p. 230 lines 1-5)

(9) NHC did not conclusively learn of Father's lack of benefits until March 7, 2011 (Tr. p. 71, line 19; Plaintiff's Exhibit 9);

(10) Father was removed from NHC at the request of Daughter on March 10, 2011 (Tr. p. 79, lines 22-24);

(11) There is evidence in the record that Father was competent during his stay at NHC

(Tr. p. 90 lines 2-25; Tr. p. 91 lines 1-18; Plaintiff's Exhibit 5 at pp. 446, 597);

(12) There is no evidence in the record that Father was incompetent at the time of admission or at any time during his stay;

(13) There is no evidence in the record that Father rejected the services provided by NHC or was dissatisfied with those services;

(14) Father received services from NHC and benefitted from those services (Tr. p. 65 l. 6,18-19; Pl. Exhibit 5 pp. 165-168; 390-443; 446-448; 494; 597).

The equities in this case favor NHC rather than Father. Father and Daughter knew the very information necessary to determine whether or not Father would have been eligible to received Medicare benefits: what skilled nursing facilities and hospitals Father had stayed in since his last stay in July, 2010 at NHC. Daughter failed to disclose this information to NHC at the time of admission, and it was only through Bollinger's diligence and thorough investigation that this information was ultimately discovered.

Father's brief relies heavily on the argument that "NHC bears responsibility for the charges not paid by Medicare because it provided care, despite the fact that it knew or should have known, that Medicare would not pay for NHS's services." (Appellant's Initial Brief, pp. 32-33). However, this argument makes assumptions that are inconsistent with the record.

First, the information received by NHC was inconsistent. The telephone verification conducted by Balon indicated that Father had his full one hundred benefit days available to him. (Tr. p.13, l. 20-22; Plaintiff's Exhibit 2). The second verification, conducted by e-mail, gave inconsistent information. Balon testified that the e-mail verification "reflected that he had no days left, but it did say that the last bill date was November 22nd, which at that time I would have

looked at, and based upon what I was looking at, he still had a 60-day break." (Tr. p. 15, lines 21-25.)

The 60-day break is significant, because it affects whether or not a patient is eligible to receive benefits from Medicare at a skilled nursing facility. Ms. Balon explains the Medicare benefits eligibility:

> Q: Okay. Now, just for -- because this took me a while to figure out, just for our benefit, can you explain the benefit days and how that applies?
>
> A: A patient has to have a three-night inpatient hospital stay. If they have done that, then they do qualify to receive services in a skilled nursing facility for rehab as long as they meet the Medicare criteria from a medical standpoint. And then the Medicare benefits are the first -- a benefit period of a possible 100 days. The first 20 days Medicare paying 100 percent. Days 21 through 100 there being a copay that is dictated by Medicare.
>
> Q: Okay. So I think what you're saying is they have a total of 100 benefit days?
>
> A: Yes. They have a total of 100 benefit days, yes.
>
> Q: They only get 100 days per year?
>
> A: No, sir. Per benefit period.
>
> Q: How do they qualify for a new benefit period?
>
> A: From the date you leave a skilled nursing facility until the day you either go back into a skilled nursing facility or back into a hospital as an inpatient, **there has to be a 60-day consecutive break. It has to be consecutive, and you have to have 60 midnights out of a skilled nursing facility and a hospital. On day 61, it would start over.** (Tr. p. 11, lines 10-25; p. 12, lines 1-9) (emphasis added).

Balon testified that inconsistent verifications had occurred in the past, and that in her experience (12-13 years at NHC) the telephonic verifications were more accurate. (Tr. p.)

Neither Father nor Daughter told NHC that Father had stayed at three different facilities from July 2010 until January 7, 2011 which would make him ineligible to receive benefits from Medicare for his stay at NHC. Balon testified that she asked Daughter if Father had a stay anywhere in the 60 days previous to Father's admission to NHC, and received no information from Daughter that he had.

Had Daughter been truthful and forthcoming about Father's stay at Riverside, Carolina Behavioral Health and the January 7, 2011 AnMed admission, Ms. Balon would have had the necessary information to advise Daughter and Father that his stay at NHC would not be covered by Medicare. Daughter was in a superior position to NHC to obtain the information about Father's stays at Riverside, Carolina Behavioral Health and AnMed.

Taking the telephonic verification, the written verification's statement concerning Father's last bill date, and Daughter's failure to disclose Father's stay at, it was reasonable under the circumstances for NHC to conclude that Father had his full 100 benefit days available to him.

Appellant contends that if Daughter or Father had been advised on the day after admission that the Medicare benefits were exhausted, Daughter would have removed Father from NHC and the charges for his services would not have been incurred. However, NHC did not have conclusive information that Father was ineligible for benefits until March 7, 2011. Rather, at the time of admission and the day after admission, NHC at best had inconsistent information: telephonic verification that benefits were available, and an inconsistent e-mail verification that indicated zero benefit days were available but that the last bill date was more than 60 days prior

to admission at NHC. If NHC's admission staff had told Daughter what it knew on the day after Father's admission to NHC, they would told daughter not that Father was ineligible to receive benefits, but rather that NHC had inconsistent information and that the more reliable information it had was the Father did have Medicare benefits available to him. While Daughter testified she would have removed Father from NHC had she been told that no benefits were available, the record does not indicate what Daughter would have done had she been told that the verifications gave inconsistent information.

Appellant argues that "Father was entirely unaware of his lack of remaining Medicare days because NHC withheld this information from his and his daughter for approximately 40 days..." (Appellant's Brief, pp. 37-38.) However, there is no testimony from Father or Daughter in the record about what he knew concerning his remaining Medicare benefit days. Conversely, there is testimony and evidence in the record that Father had stayed at various facilities that ultimately exhausted his eligibility and that Father and Daughter received Medicare summaries explaining the Medicare benefit eligibility determination process.

Appellant next contends that "[t]here was a mutual assumption as to the Medicare coverage when NHC admitted Father." (Appellant's Brief, p. 38). While NHC did, in good faith, believe that Father would be eligible for benefits based on the information provided to it by the telephonic verification, the last bill date contained in the written e-mail verification, and Daughter's failure to disclose his stays at Riverside, Carolina Behavioral Health and AnMed during the period from July, 2010 until January 7, 2011, NHC contemplated and informed Daughter that it did not guarantee (and thus did not assume) Medicare coverage would be available to Father and that Father would be personally liable to NHC to pay for the services

rendered if Medicare denied coverage.

To the extent Father and Daughter assumed Medicare coverage was available to pay for the services NHC provided to Father, they did so despite NHC's written statement to them that Medicare coverage was not guaranteed to them and Father would be responsible to pay for the services rendered if Medicare did not cover them. Therefore, Father's and Daughter's assumption was misplaced considering the information given to them at the time of admission and thus they are responsible for such an assumption in equity. Furthermore, neither Daughter nor Father informed NHC that they would not pay for NHC's services if Medicare benefits were not available to Father.

Appellant also contends that NHC " never really expected Father to pay for (the services) in the first place... Despite the boilerplate language in the form admission document that Sheila Thompson, not Father, signed stating that Father was no relieved from the cost of care (**Order p.5**), there is no evidence that NHC realistically expected Father to pay for the services if Medicare did not pay." (Appellant's Brief, pp. 39-40). However, the language in the admissions form referenced in Appellant's argument is evidence itself of NHC's expectations: if Medicare did not cover the charges, then Father would have to do so. Appellant offered no evidence at trial and makes no argument in his brief to contradict NHC's written, stated expectation that Father would have to pay for the services rendered to him if Medicare benefits were not available.

II. THIS COURT SHOULD AFFITM THE TRIAL COURT UPON ANY GROUND APPEARING IN THE RECORD ON APPEAL

Respondent incorporates SCACR 220 (c) herein and asks the Court to affirm the trial

court's order upon any ground(s) appearing in the Record on Appeal.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

Date: 6/29/17
Greenville, South Carolina

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2014-CP-04-00373

Appellate Case No.: 2016-002302

NHC HealthCare Mauldin, LLC,

Respondent,

v.

Wade Thompson and Sheila Thompson,

Defendants.

Of Whom Wade Thompson is the

Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent's Amended Initial Brief and Respondent's Amended Designation of Matter on Wade Thompson by depositing a copy of it in the United States Mail, postage prepaid, on August 29, 2017, addressed to his attorneys of record, Susan Ingles, 701 South Main Street, Greenville, South Carolina 29601 and Sharon Young Ward, 16 Jamestown Road, Charleston, South Carolina, 29407.

August 29, 2017

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Ronald F. Barbare

Erick M. Barbare

August 29, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: NHC HealthCare Mauldin, LLC, Respondent, v. Wade Thompson and Sheila Thompson, Defendants Of Whom Wade Thompson is the. Appellant.
Appellate Case No.: 2016-002302

Dear Ms. Kitchings:

Enclosed for filing is the original and one copy each of Respondent's Amended Initial Brief, Respondent's Amended Designation of Matter, and the proof of service in the above-referenced appeal.

Please return the clocked-in copies to me in the envelope provided.

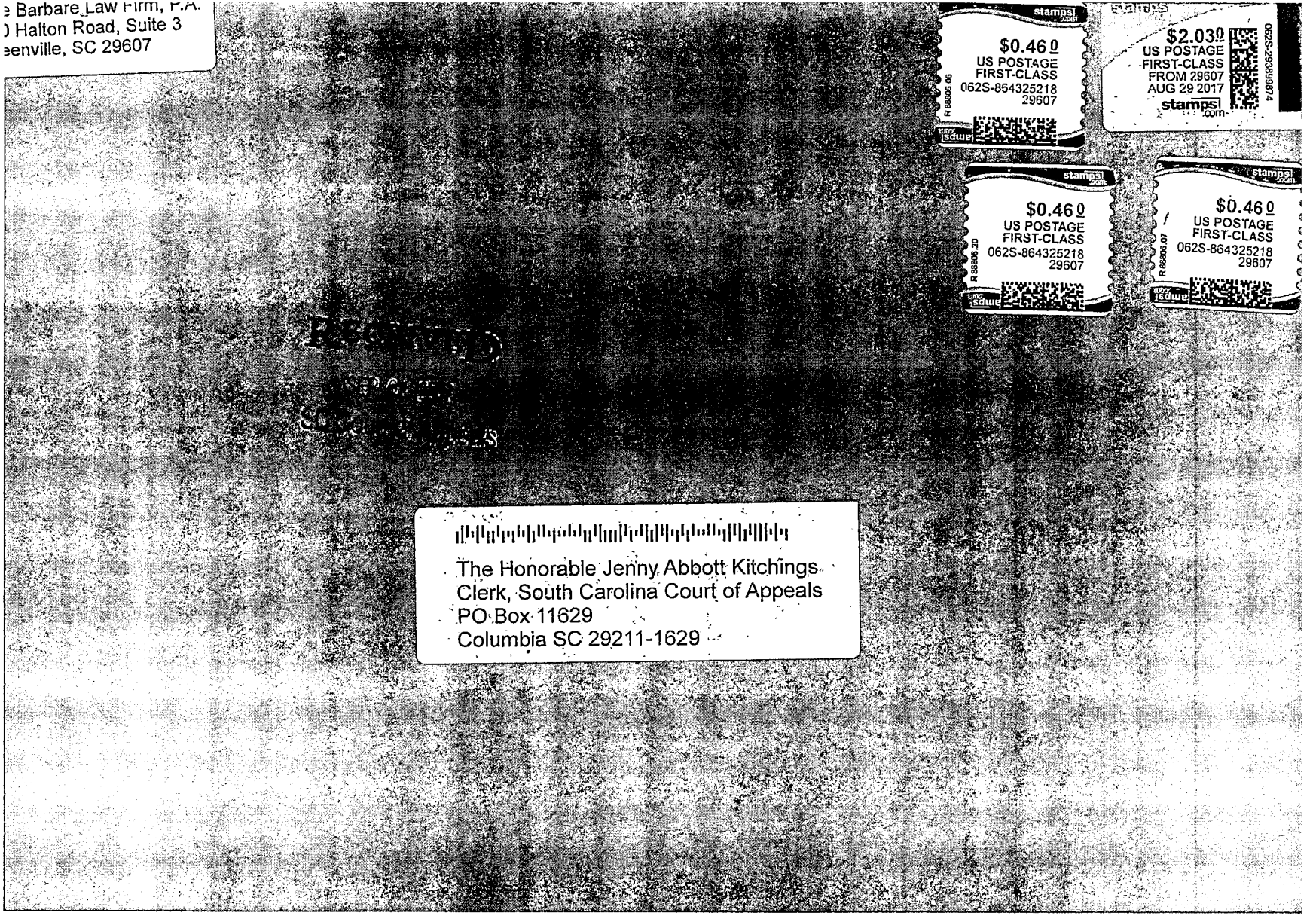
Sincerely,

Erick M. Barbare
Attorney for Respondent

cc: Susan Ingles, Esquire
Attorney for Appellant

Sharon Young Ward, Esquire
Attorney for Appellant

Craig Allen, Esquire
Attorney for Respondent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