

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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,Respondent,

v.

Grand Strand Regional Medical Center, LLCPetitioner.

**PETITIONER GRAND STRAND REGIONAL MEDICAL CENTER, LLC'S
MOTION TO FILE CONFIDENTIAL DOCUMENTS UNDER SEAL**

Petitioner Grand Strand Regional Medical Center, LLC (“Grand Strand”) hereby moves the Court for an order permitting Grand Strand to file the Institutional Agreement between Grand Strand and Blue Cross Blue Shield of South Carolina—previously filed under seal in the Court of Appeals as Volume 2 of the Record on Appeal and identified as Item (8) in the Appendix filed with Grand Strand’s Petition for a Writ of Certiorari—under seal.

INTRODUCTION

Respondent Jeanne Beverly (“Beverly”) filed this action as a purported third-party beneficiary, with the right to enforce the terms of the provider agreement between Grand Strand and Blue Cross Blue Shield of South Carolina (the “Institutional Agreement”). The Institutional Agreement is a private contract between Grand Strand and Blue Cross Blue Shield of South Carolina (“BCBS”). In Section 16.13 of the Institutional Agreement, Grand Strand and BCBS

recognized and agreed its terms constitute valuable trade secrets and confidential proprietary business information.

On April 29, 2016, the circuit court entered a Consent Protective Order to maintain the confidentiality and non-disclosure of the Institutional Agreement and protect its legitimate trade secrets. By virtue of having agreed to and having executed the Consent Protective Order, Beverly, and the circuit court, were provided a copy of the Institutional Agreement.

The circuit court granted Grand Stand's Motion to Dismiss, in part, because Beverly was not a third-party beneficiary with standing to enforce the Institutional Agreement. Beverly appealed the dismissal of her claims.

To protect the continuing confidentiality of the Institutional Agreement, Grand Strand filed a motion to file the Institutional Agreement under seal with the Court of Appeals. On March 2, 2017, the Court of Appeals issued an order permitting Grand Strand to file the Institutional Agreement under seal, and thereafter Grand Strand filed the Institutional Agreement under seal with the Court of Appeals.

The Court of Appeals issued its opinion on January 15, 2020. Grand Strand timely filed a Petition for Rehearing. On March 31, 2020, the Court of Appeals denied Grand Strand's Petition for Rehearing.

On April 30, 2020, Grand Strand filed its Petition for a Writ of Certiorari and the accompanying Appendix. Grand Strand moves the Court for an order permitting it to supplement the Appendix and file the Institutional Agreement under seal as Volume 2 of the Appendix.

LEGAL STANDARD

The Court must consider the following factors in determining whether to grant a party's motion to seal:

- (1) ensuring the parties' right to a fair trial or hearing;

- (2) the need for witness cooperation;
- (3) the reliance of the parties upon expectations of confidentiality of the proceeding;
- (4) the public or professional significance of the proceeding;
- (5) the perceived harm to the parties from disclosure;
- (6) why alternatives other than sealing the documents are not available to protect legitimate private interests; and
- (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 12, 630 S.E.2d 464, 470 (2006); *In re Revised Order Concerning Pers. Identifying Info. & Other Sensitive Info. in Appellate Court Filings*, 407 S.C. 607, 608-09, 757 S.E.2d 421, 422 (2014); Rule 41.1, SCRC.P.

The Court may also consider the following factors:

- (8) public interest in the proceeding;
- (9) the private or public status of the litigants and case generally;
- (10) whether release would enhance the public's understanding of an important historical event;
- (11) whether the public already has access to information contained in the records;
- (12) whether a particular decision will sustain or offend the fundamental interests of public access; and
- [(13)] any other relevant factors.

Id.

ARGUMENT

The Court should grant Grand Strand's Motion to file the Institutional Agreement under seal for the following reasons: (1) Beverly's right to a fair trial or hearing will not be impacted, because she and the Court have full access to the Institutional Agreement; (2) sealing the Institutional Agreement will not impact any witness cooperation; (3) Grand Strand and BCBS

expressly stipulated and agreed the terms of the Institutional Agreement would be confidential, and each party relied upon that confidentiality provision in executing the Institutional Agreement; (4) the public or professional significance of this proceeding is not impacted by whether the public has access to the Institutional Agreement; (5) the exposure of legitimate trade secrets and proprietary information will harm Grand Strand and BCBS; (6) there is no alternative to sealing the Institutional Agreement; (7) the public interest is best served by sealing the Institutional Agreement because when parties agree the terms of a private contract are confidential they should be able to rely on the Court to maintain their privacy; (8) the public interest in the proceeding is not impacted by sealing the Institutional Agreement; (9) the private status of the litigants and the nature of this case does not merit the disclosure of a confidential contract; (10) release of the Institutional Agreement will not enhance the public's understanding of an important historical event; (11) the public does not currently have access to the information in the Institutional Agreement; and (12) sealing the Institutional Agreement does not offend the fundamental interests of public access.

1. The Institutional Agreement is entitled to confidentiality protections.

The Institutional Agreement is entitled to confidentiality protections, because disclosure of its terms will likely harm Grand Strand and BCBS and their legitimate business interests and expectations. The Institutional Agreement is one of many such contracts between various insurers and hospitals that operate in South Carolina. The pricing and other terms of these agreements are critical competitive interests and concerns to both businesses. While individual contracts may share certain basic features, such as reimbursement for services rendered, they differ in their specific terms. The contracts are heavily negotiated, often over many months. The concessions made, and won, by the respective parties can have a profound impact on business performance. Accordingly, knowing the terms of a competitors' contract is of great value. For, example,

payment provisions, utilization management requirements, quality assurance provisions, and alternative dispute resolution processes, among others, all constitute competitive information of keen interest to the hospital's, and insurer's, competitors. For this reason alone, the Court should grant Grand Strand's motion.

2. Grand Strand and BCBS expressly agreed the terms of the Institutional Agreement would be confidential and they relied upon that confidentiality agreement when they entered into the Institutional Agreement.

In Section 16.13 of the Institutional Agreement, Grand Strand and BCBS agreed the terms of the Institutional Agreement are confidential. Additionally, Grand Strand and BCBS agreed that if either party breaches the terms of section 16.13, then the other party shall be entitled to seek monetary damages. Grand Strand and BCBS relied upon this section when they entered into the Institutional Agreement and they had an expectation of privacy in the Institutional Agreement. Moreover, Grand Strand had an expectation of confidentiality when it provided copies of the Institutional Agreement to Beverly and the Court pursuant to a Consent Protective Order. *See U-Drive-It, Inc.*, 369 S.C. at 12, 630 S.E.2d at 470 (stating that a court should consider “the reliance of the parties upon expectations of confidentiality of the proceeding” when determining whether to file a document under seal). The fact that Beverly's lawsuit seeks to implicate certain terms of the Institutional Agreement does not alter or abrogate Grand Strand and BCBS's expectation of confidentiality in the Institutional Agreement.

3. There is no alternative to sealing the Institutional Agreement.

There is no alternative to filing the Institutional Agreement under seal. The contents of the Institutional Agreement are either available to the public or they are not. The publication of the Institutional Agreement will be detrimental to and will harm Grand Strand and BCBS. Neither Grand Strand, nor Beverly, will suffer any harm if the Institutional Agreement is filed under seal.

4. Sealing the Institutional Agreement does not offend the fundamental interests of public access.

Grand Strand only requests the Court file the Institutional Agreement under seal and allow the other filings to be made available to the public. This case will not be resolved based on information that is kept confidential. This case should be resolved based on this Court's interpretation of the Institutional Agreement's third-party beneficiary disclaimer. That provision has been quoted in prior filings in this action. The fundamental interest of public access is in no way offended by sealing the Institutional Agreement. No party to this litigation will be prejudiced by filing the Institutional Agreement under seal.

5. Analysis of the remaining *U-Drive-it* and Rule 41.1 factors supports the decision to file the Institutional Agreement under seal in this case.

The remaining *U-Drive-it* and Rule 41.1 factors support the decision to file the Institutional Agreement under seal in this case for the following reasons:

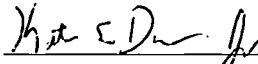
- (a) Neither Beverly's, nor Grand Strand's, right to fair trial or hearing will be impacted by sealing the Institutional Agreement, because Grand Strand, Beverly, and the Court all have access to the Institutional Agreement and the controlling language is available to the public in the prior filings by the parties.
- (b) Sealing the Institutional Agreement will not impact any witness cooperation because witness cooperation is not relevant at this stage of the litigation.
- (c) The public and professional significant of this proceeding is not impacted if the Institutional Agreement is filed under seal, because the public will still be aware that a contract between BCBS and Grand Strand exists and the public will know that the contract contains express language disclaiming third-party beneficiaries.
- (d) The disclosure of the Institutional Agreement would diminish the value of the confidential and proprietary information it contains, thereby harming Grand Strand and BCBS.

- (e) Allowing a party to invade the privacy of a private contract and publish its confidential terms would be detrimental to South Carolina businesses and diminish the public's confidence in any agreement to maintain confidentiality. Therefore, the public interest is best served by sealing the Institutional Agreement.
- (f) The public interest in an appeal of the circuit court's interpretation of the express language of a contract is not impacted if the Institutional Agreement is filed under seal. The disputed terms of the Institutional Agreement are included in the motions and briefs filed in this action and the undisclosed provisions have no impact on this litigation.
- (g) The private status of the litigants and the nature of the case do not merit the disclosure of a confidential contract.
- (h) This litigation does not involve issues of historical importance and, therefore, the disclosure of the Institutional Agreement will not impact the public's understanding of an important historical event.
- (i) The public does not have access to the contents of the Institutional Agreement, and the public should not have access to the Institutional Agreement because it is a private and confidential contract between two private business entities.

CONCLUSION

For the reasons set forth herein, Grand Strand respectfully requests the Court grant its Motion to File Confidential Documents Under Seal and order a separate volume of the Appendix be created for the Institutional Agreement and filed under seal.

Respectfully submitted,



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April 30, 2020
Columbia, South Carolina