

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. 2020-000710

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
REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR A WRIT OF
CERTIORARI**

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ARGUMENTS IN REPLY

Jeanne Beverly sued Grand Strand Regional Medical Center, LLC (“Grand Strand”) to enforce terms of the Institutional Agreement between Grand Strand and Blue Cross Blue Shield (“BCBS”) (her health insurer). Beverly did so on the assertion that she is a third-party beneficiary of that Institutional Agreement. However, she admits she is not an actual party to that Institutional Agreement.¹

In truth, Beverly entered a contract with BCBS for BCBS to provide her health insurance coverage. By that insurance contract between Beverly and BCBS, the insurer (BCBS) agreed to pay for Beverly’s medical costs which are subject to coverage under that insurance contract. In turn, because BCBS contracted with Beverly to pay her covered medical costs, BCBS made a separate contract with Grand Strand to obtain for itself the terms and rates it deemed advantageous when it became necessary for BCBS to pay for covered medical costs Beverly incurred with Grand Strand. That is the Institutional Agreement and its purpose.

The Institutional Agreement is not a contract between Grand Strand and Beverly regarding the terms or rates the hospital would apply when Beverly received medical care from Grand Strand. Grand Strand addressed those payment terms in its contract (Institutional Agreement) with BCBS and, in turn, BCBS and Beverly addressed the terms of how BCBS would provide the insurance benefits to Beverly in the separate contract (insurance policy) between them.

To make this distinction of relationships clear, Grand Strand and BCBS included in the Institutional Agreement between them the utterly clear and unambiguous provision and statement of their intent that:

¹ Beverly’s Return takes considerable liberties with the Record and the facts; however, her inaccurate narrative should have no bearing on the fundamental legal questions presented by Grand Strand’s Petition for a Writ of Certiorari.

No Third-party Beneficiaries. This Agreement is not intended to, and shall not be construed to, make any person or entity a third-party beneficiary. . . .

Despite this structure, Beverly asserts she is a third-party beneficiary of the Institutional Agreement and that she has the right to interject herself into that separate contract between Grand Strand and BCBS and to enforce those provisions in the Institutional Agreement she chooses in the way she wants. Beverly's contention, and the Court of Appeals' decision, opens the path for any and every person having a separate insurance contract with BCBS to sue Grand Strand directly because they do not believe they received the benefit of their insurance contract with BCBS, or to interject themselves into the private business contract terms between BCBS and Grand Strand.

Beverly now argues that she was supposed to benefit from terms in the Institutional Agreement. That argument is specious. Beverly was supposed to benefit from her insurance contract with BCBS. The Institutional Agreement was intended to create the system and structure whereby Grand Strand and BCBS might benefit where Grand Strand provided medical care to BCBS insureds for which BCBS might be obligated to pay under an insurance policy. If Beverly does not believe she is receiving the benefits she expected from her health insurance, her avenue for redress is through BCBS. If, in turn, BCBS believes Grand Strand is not performing in compliance with the Institutional Agreement, then BCBS, as a party to the Institutional Agreement may take appropriate action.

When the Court of Appeals decided to allow Beverly to take direct action against Grand Strand as a purported third-party beneficiary under the Institutional Agreement it acted in conflict with prior decisions of the Supreme Court. The Court of Appeals ignored, in practice, the controlling law of South Carolina. Grand Strand respectfully requests the Court grant its Petition for a Writ of Certiorari, review this matter, and overturn the Court of Appeals' reversal of the dismissal of Beverly's claims for breach of contract and unjust enrichment.

I. The Court of Appeals’ decision is in conflict with well-established and recognized legal principles regarding the proper interpretation of a contract and the determination of the existence of a proper third-party beneficiary.

Granting a writ of certiorari is appropriate if the decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court. Rule 242(b)(3), SCACR; *see also State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (stating that it is incumbent upon the Court of Appeals to apply the precedent set forth by the Supreme Court); S.C. CONST. ART. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”).

In the present case, the Court should grant Grand Strand’s Petition for a Writ of Certiorari because the Court of Appeals’ decision conflicts with the basic rules of contract interpretation established by the Supreme Court. Specifically, while the Court of Appeals’ decision recognizes some of the governing principles of contract interpretation in South Carolina, including those relating to the determination of whether a legitimate third-party beneficiary of the contract exists, the Court of Appeals seemingly ignored the controlling precedent and interpreted the contract in issue in a manner utterly inconsistent with that precedent. The applicable South Carolina law governing the interpretation of the contract to determine the existence of a legitimate third-party beneficiary is:

1. “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012).
2. There is a legal presumption a contract is not enforceable by a nonparty, and to overcome that presumption the nonparty must show that the parties to the contract intended the nonparty to be a direct beneficiary of the contract. *Touchberry v. City of Florence*, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988).
3. Courts must enforce, not write, contracts, and the contract language must be given its plain, ordinary and popular meaning. *Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628.

4. One may not create an ambiguity in a contract by pointing out a single sentence or clause and arguing that it creates an ambiguity in the face of the other unambiguous terms. *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014).

In this case, the Court of Appeals was confronted with direct and unambiguous language from the parties to the contract regarding their intention about the possible existence of a legitimate third-party beneficiary. The parties to the contract said:

No Third-party Beneficiaries. This Agreement is not intended to, and shall not be construed to, make any person or entity a third-party beneficiary. . . .

This direct and unambiguous provision is particularly instructive and important. The parties not only expressed their unqualified intent that no person or entity should be, or be made, a third-party beneficiary; they also unequivocally stated their intent that the contract should not be “construed” to make any person or entity a third-party beneficiary. Thus, the most important factor under the law in the interpretation of the contract with respect to the existence of a third-party beneficiary—the expressed intent of the parties to the contract—is undeniable in this case. There are, and can be, no third-party beneficiaries.

In this case, the clear and unambiguous statement of the parties’ intent with respect to the nonexistence of third-party beneficiaries reinforces the black-letter law of South Carolina that there is a legal presumption that a contract is not enforceable by third parties. *See Touchberry*, 295 S.C. at 48-49, 367 S.E.2d at 150.

Also important in this case is the fact that the circuit court found this language in the contract disclaiming third-party beneficiaries is clear, explicit, and unambiguous. (R. 128). A finding that was not appealed by Beverly. Nevertheless, the Court of Appeals, in the face of the clear and unambiguous expression of the intent of the parties to the contract, and the legal presumption, allowed itself to search the remainder of the Institutional Agreement for language

which it could construe to make the express disclaimer ambiguous and to allow it to construct a contrary conclusion that there could be, and were, third-party beneficiaries with the right to sue on the Institutional Agreement. Such action by the Court of Appeals violates established authority and premises its decision on an issue not on appeal before it.

The Court of Appeals did not identify a single provision in the Institutional Agreement in which Grand Strand and BCBS expressed their intent that Beverly, or anyone else, would or should be a third-party beneficiary with rights to enforce the terms of the Institutional Agreement. What the Court of Appeals did was to take certain isolated language (not even whole provisions) which the Court of Appeals said reflected “the benefits the Agreement repeatedly bestows upon BCBS PPO Members.” *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 509, 839 S.E.2d 468, 472 (Ct. App. 2020), *reh'g denied* (Mar. 31, 2020).

Of course, in its effort to ignore the stated intent of the parties to the Institutional Agreement, and the legal presumption in South Carolina against third-party beneficiaries, the Court of Appeals also ignored other language in the Institutional Agreement reinforcing the stated intent that there be no third-party beneficiaries. For instance, the Court of Appeals ignores the first sentence of Section 3.2 of the Institutional Agreement:

Institution acknowledges that this Agreement constitutes a contract solely between Institution and Plan.

In addition to an unjustified and improper reliance on opinions from other jurisdictions, the Court of Appeals relies on the second sentence of Section 16.16 of the Institutional Agreement to justify its erroneous interpretation of the unambiguous third-party beneficiary disclaimer. The second sentence of Section 16.16 states:

Notwithstanding the preceding, nothing in this section shall affect Plans rights under Article XV, or a Member’s right to receive Covered Services pursuant to the Terms of this Agreement.

It is not enough under the legal authorities in this state that a contract may in fact, bestow one or more benefits on a nonparty. What is required is evidence that the parties to the contract intended to make that nonparty a third-party beneficiary with direct rights under the contract. *Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004).

Thus, the second sentence is not a so-called “carve out” sentence. This sentence merely serves to clarify the intent for Grand Strand and BCBS regarding the exclusion of third-party beneficiaries. The second sentence of Section 16.16 establishes that a BCBS policyholder is entitled to receive “Covered Services” from Grand Strand, and the third-party beneficiary disclaimer does not allow Grand Strand to refuse to provide a BCBS policyholder a Covered Service. Filing an insurance claim is not a Covered Service under the Institutional Agreement or the insurance policy.

The Institutional Agreement does not define the terms “notwithstanding” or “pursuant to,” as contained in Section 16.16; therefore, the Court may rely on dictionary definitions to ascertain the plain meaning of the undefined terms and, thereby, to understand the context of the entire section. Black’s Law Dictionary defines “Notwithstanding” as “despite” or “in spite of.” *Black’s Law Dictionary, Notwithstanding*, (11th ed. 2019); *see also* Merriam-Webster.com. Merriam-Webster, *Notwithstanding*, n.d. Web. 28 May 2020 (“without being prevented by (something)”; “in spite of what has just been said”; “although”; “nevertheless”). Black’s Law Dictionary defines the term “pursuant to” to mean “as authorized by.” *Black’s Law Dictionary, Pursuant To*, (11th ed. 2019). Courts have also interpreted “pursuant to” to mean “as authorized by” in determining plain meaning of the phrase. *See Fruitt v. Astrue*, 604 F.3d 1217, 1220 (10th Cir. 2010) (“An on-point definition is that ‘pursuant to’ means ‘[a]s authorized by’”) (citation omitted); *Gulf Islands Leasing, Inc. v. Bombardier Capital Inc.*, No. 02 CIV. 2839 (WHP), 2006 WL 314523, at

*4 (S.D.N.Y. Feb. 10, 2006) (“Black’s Law Dictionary defines the term ‘pursuant to’ to mean ‘in compliance with; in accordance with; under; as authorized by;’ or ‘in carrying out.’” (citation omitted)).

Section 2.6 of the Institutional Agreement defines “Covered Services” as

those inpatient and outpatient hospital services, supplies, equipment and/or items to be delivered by or through [Grand Strand] to Members *that are reimbursable* under the applicable Member Benefits contract

(emphasis added).

Thus, applying these straightforward definitions, Section 16.16 may be read as follows:

This Agreement is not intended to, and shall not be construed to, make any person or entity a third-party beneficiary. [In spite of] the preceding sentence, nothing in this section shall affect [BCBS’]s rights under Article XV, or a [BCBS policyholder’s] right to receive [reimbursable inpatient and outpatient hospital services] [as authorized by] the Terms of this Agreement.

The second sentence of Section 16.16 certainly does not express an intent that Beverly or other BCBS policyholders be recognized as intended direct third-party beneficiaries. Properly read and interpreted, the second sentence does not imply a BCBS policyholder is excepted from the express third-party beneficiary disclaimer in the first sentence. It certainly does not express the intent of the parties that Beverly has the right to enforce the terms of the Institutional Agreement. The second sentence of Section 16.16 merely affirms that a BCBS policyholder has the right to receive services that are covered by their BCBS policies and authorized by the Institutional Agreement. Additionally, as noted by the circuit court, “Covered Services” are those services that *are reimbursable* under a BCBS policy. Nothing in the Institutional Agreement indicates that BCBS reimburses for costs incurred in filing an insurance claim. Therefore, filing for insurance benefits is not a “reimbursable service,” and Grand Strand does not have any obligation to file for insurance benefits on Beverly’s behalf.

The Court of Appeals—and Beverly—ignore this plain and unambiguous interpretation of Section 16.16 of the Institutional Agreement. Instead, Beverly argues in favor of interpreting the Institutional Agreement through a tortured and incorrect method that does not comply with the fundamental principles of contract interpretation established by this Court. Accordingly, the Court should grant Grand Strand’s Petition for a Writ of Certiorari so that it may correct the Court of Appeal’s improper application of the fundamental principles of South Carolina contract law and find that Beverly is not a third-party beneficiary with the right to enforce the Institutional Agreement.

II. The law of South Carolina does not permit a plaintiff to pursue a claim for unjust enrichment as an alternative remedy after a court recognizes the existence of an express contract covering the same claims.

Beverly attempts to misconstrue Grand Strand’s opposition to her claim for unjust enrichment. Grand Strand does not dispute that under South Carolina law a plaintiff is permitted initially to plead claims for unjust enrichment and breach of contract in the alternative. However, the Court of Appeals erred, and deviated from the recognized precedent in South Carolina, when it decided to allow the unjust enrichment claim to continue after it decided there was a contract which governed the rights and obligations at issue between the parties and found that Beverly was authorized to proceed with the claim for breach of the contract. Once the existence of the contract is no longer in issue, and Beverly’s right to sue for breach of that contract was validated by the Court of Appeals, Beverly’s rights are governed solely by that contract. *See Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364 (Ct. App. 2001).

Grand Strand’s Petition for a Writ of Certiorari correctly states that South Carolina law bars a plaintiff—like Beverly—from continuing to pursue a claim for unjust enrichment/*quantum meruit* after the express contract at issue in the breach of contract claim is no longer in dispute. Beverly lost the right to pursue a claim for unjust enrichment after the Court of Appeals decided

that she has the right to pursue the claim for breach of the express contract, which contract is not in dispute from either side. The Court of Appeals refused to recognize that its decision that the undisputed Institutional Agreement applied to the claim and established the rights and obligations between the parties (and that Beverly could sue to enforce it), terminated Beverly's ability to continue to pursue an equitable claim for unjust enrichment. Grand Strand requests that this Court grant its Petition for a Writ of Certiorari to correct this error, and decision by the Court of Appeals not to apply the established law of South Carolina.

Beverly and the Court of Appeals seek to rely on the holding in *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 322, 734 S.E.2d 177, 178 (Ct. App. 2012) for the proposition that a party is permitted to allege a claim for unjust enrichment in the alternative to a claim for breach of contract. This reference to *Williams* is overly generalized and inapposite. In *Williams*, the plaintiff filed an action for unjust enrichment and breach of contract, but the plaintiff dismissed the claim for breach of contract prior to the trial of the merits. *Williams*, 400 S.C. at 324, 734 S.E.2d at 179. Apparently, the express contract at issue was never admitted and never proven to exist. *Id.* Thus, the court in *Williams* noted that “[b]ecause a finding was never made on whether there was an express contract, [the plaintiff] could pursue recovery under quantum meruit.” *Id.* at 329, 734 S.E.2d at 182. The court in *Williams* stated that the defendant “never raised this issue at trial.” *Id.* Therefore, the court in *Williams* was not properly presented with the argument that the plaintiff was attempting to pursue a claim for unjust enrichment/*quantum meruit* after a valid express contract was admitted or proven to exist.

Unlike the plaintiff in *Williams*, Beverly continues to pursue a claim for breach of contract and in this case, the Court of Appeals has decided that the contract exists and Beverly has a right to enforce it. Upon this finding by the Court of Appeals, Beverly may no longer pursue her claim for unjust enrichment in the alternative. After finding Beverly has the right to pursue a claim for

breach of the Institutional Agreement, the Court of Appeals expressly acknowledged that Beverly's claim for unjust enrichment is derived from the very terms of the Institutional Agreement:

When Grand Strand billed Beverly for covered services, it declined to bill her at the contracted for, discounted rate, and it sent her the bill in violation of its contract with BCBS.

Beverly, 429 S.C. at 516, 839 S.E.2d at 475.

In support of the argument that she has the right to pursue a claim for breach of contract under the Institutional Agreement, Beverly cites to the Alabama District Court opinion in *Scroggins v. LifePoint Health, Inc.*, No. 2:16-CV-338-ALB, 2020 WL 1126172, at *3 (M.D. Ala. Mar. 6, 2020). However, careful and complete review of the decision in *Scroggins* undercuts Beverly's position. In *Scroggins*, the Alabama District Court found the plaintiff could pursue a claim for breach of a contract between a hospital and an insurance carrier; however, after making this finding, the court concluded that dismissal of the unjust enrichment claim was necessary and appropriate. The court in *Scroggins* reasoned:

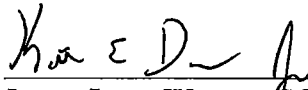
Scroggins's claim for unjust enrichment is predicated on her claim that "medical services should have been determined by the discounted rates provided in the contracts between the hospitals and the health insurance carriers." Defendants argue that Scroggins cannot bring an unjust enrichment claim when the issue is covered by an express contract. . . . Defendants have the better argument. Alabama law does not recognize an equitable unjust enrichment claim when there is an express contract that governs the same subject. The reason that Alabama law does not recognize an unjust enrichment claim when an express contract exists is that unjust enrichment is an equitable remedy that may be relied upon only when there is no adequate remedy at law. Accordingly, the deciding factor is not whether the specific defendants are parties to the contract, but that an express contract governs the same subject. The existence of an express contract on a subject means a plaintiff has an adequate remedy at law—a breach of contract claim—no matter whether the named defendants are parties to the express contract. [The plaintiff's claim for unjust enrichment] is due to be dismissed as to all Defendants.

Scroggins, 2020 WL 1126172, at *3 (internal citations omitted).

If the Court allows the decision of the Court of Appeals, that Beverly may pursue a claim for breach of contract, to stand, then the same analysis applied by the court in *Scroggins* is applicable to Beverly's claim for unjust enrichment under South Carolina law. A claim for unjust enrichment is an equitable claim that is predicated on the lack of an adequate remedy at law. *See EllisDon Const., Inc. v. Clemson Univ.*, 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011) (“[E]quity is only available when a party is without an adequate remedy at law.”). Beverly's claim for breach of contract is an action at law and establishes that she has access to an adequate remedy at law. *See South Carolina Fed. Sav. Bank v. Thornton–Crosby Dev. Co., Inc.*, 310 S.C. 232, 235, 423 S.E.2d 114, 116 (1992) (stating that a cause of action for breach of contract seeking money damages is an action at law). Upon finding that Beverly has an adequate remedy at law (a claim for breach of contract), Beverly may no longer pursue an equitable claim. *See Rodarte v. Univ. of S.C.*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (agreeing with the Supreme Court of Rhode Island and stating that “quasi-contractual remedies such as equitable estoppel are inapplicable when the parties are bound by an express contract.” (citation omitted)). The Court must reverse the Court of Appeals and affirm the dismissal of Beverly's claim for unjust enrichment.

CONCLUSION

For the reasons stated, Grand Strand respectfully requests the Court grant its Petition for a Writ of Certiorari, review this matter, and overturn the Court of Appeals' reversal of the dismissal of Beverly's claims for breach of contract and unjust enrichment.



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