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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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 BRIEF**

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Court of Appeals' decision is in conflict with the controlling law of South Carolina, and constituted error, in finding a non-signatory to a contract may pursue a claim to enforce that contract as a third-party beneficiary despite the plain and unambiguous statement of intent by the parties to the contract that the contract "is not intended to, and shall not be construed to make any person or entity a third-party beneficiary."
- II. Whether the Court of Appeals' decision is in conflict with the controlling law of South Carolina, and constituted error, in finding an insured under a health insurance policy is a direct and intended third-party beneficiary of the business (not insurance) contract between a hospital and the patient's insurance provider that addresses the business logistics of the arrangement for processing and paying claims covered by the insurer between the hospital and the insurer.
- III. Whether the Court of Appeals' decision is in conflict with the controlling law of South Carolina, and constituted error, by elevating various incidental and consequential benefits allowed to third-parties by the contract between a hospital and an insurance provider to the status of intended and direct benefits sufficient to provide non-signatory third-parties the right to sue to enforce the business contract between the hospital and insurance provider.
- IV. Whether the Court of Appeals' decision is in conflict with the controlling law of South Carolina, and constituted error, by permitting a plaintiff to pursue a claim for unjust enrichment/*quantum meruit* after having ruled that the plaintiff is a third-party beneficiary with the right to enforce the terms of an express contract related to the same alleged conduct and damages as the claim for unjust enrichment/*quantum meruit*.

STATEMENT OF THE CASE

This case is about whether a person who is admittedly not a party to a contract between two other entities may enjoy legal status as a third-party beneficiary of that contract, with the power to sue on the contract and to enforce such terms in the contract as she chooses, despite the parties to the contract having included a specific and express term in the contract disclaiming the existence of any third-party beneficiary.

On September 6, 2012, Jeanne Beverly (“Beverly”) was injured in an automobile accident. (R. 141). Beverly sought treatment for the injuries she suffered in that accident at Grand Strand Regional Medical Center, LLC (“Grand Strand”) in Horry County. (R. 141).

At the time of her injury, Beverly was party to a Blue Cross Blue Shield of South Carolina (“BCBS”) health insurance policy. (R. 141).

Separately, Grand Strand and BCBS are parties to a business contract (the “Institutional Agreement”) which covers the terms of the business relationship between Grand Strand and BCBS such as how Grand Strand will process and submit insurance claims to BCBS in connection with treatment provided to BCBS insureds. The Institutional Agreement also addresses how, and how much, Grand Strand will be paid by BCBS on those claims.

Beverly alleges that after delivering medical services to her, Grand Strand billed her directly, at standard (non-discounted) rates for those services, rather than submitting those bills first to BCBS. (R. 142). On January 6, 2016, Beverly filed a complaint against Grand Strand asserting claims for (1) breach of the Institutional Agreement between Grand Strand and BCBS—to which she allegedly was a third-party beneficiary, (2) breach of fiduciary duty, and (3) unjust enrichment. (R. 144-147).

In response to Beverly’s complaint, Grand Strand filed a motion to dismiss on March 3, 2016, arguing (1) Beverly lacks standing to sue on and enforce the Institutional

Agreement because she is not a third-party beneficiary with such rights, (2) Grand Strand does not owe Beverly a fiduciary duty to file insurance claims on her behalf, and (3) Grand Strand was not unjustly enriched by billing Beverly the standard rates for the medical services she received. (R. 149-150).

On May 25, 2016, the circuit court issued an order granting Grand Strand's Motion to Dismiss. (R. 124). In that order, the circuit court recognized and acknowledged that the Institutional Agreement contains an express provision stating that there are not, and are not intended to be, any third-party beneficiaries to the Institutional Agreement. (R. 127-130). Specifically, the circuit court relied on Section 16.16 of the Institutional Agreement to find Grand Strand and BCBS did not intend the Institutional Agreement to be enforceable by third-parties. Section 16.16 states the following:

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. 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.

(R. 128; 250). The circuit court found this language to be a clear, explicit, and unambiguous expression of BCBS and Grand Strand's intent to preclude third parties from asserting legal status as third-party beneficiaries and from suing to enforce the Institutional Agreement. (R. 128). Thus, the circuit court found the third-party beneficiary disclaimer to be enforceable as written, and to bar Beverly from suing on the Institutional Agreement. Therefore, the circuit court held that Beverly's breach of contract claim should be dismissed because she does not have standing to sue upon or enforce the Institutional Agreement. (R. 127-130).

Additionally, the circuit court dismissed Beverly's claim for breach of fiduciary duty on the ground that Grand Strand does not, as a matter of law, owe Beverly a fiduciary duty to submit her bills to BCBS. (R. 130-132). Finally, the circuit court also found that Beverly failed to state

a claim for unjust enrichment, because Grand Strand was not unjustly enriched when it billed Beverly the standard rate for the medical services provided to Beverly. (R. 132-134).

On July 19, 2016, Beverly filed a Notice of Appeal of the circuit court's order granting Grand Strand's Motion to Dismiss. Following oral argument, the Court of Appeals issued its opinion, finding (1) the circuit court erred in concluding Beverly is not a third-party beneficiary with the right to sue to enforce the Institutional Agreement; (2) the circuit court properly dismissed Beverly's claims for breach of fiduciary duty because South Carolina does not recognize a fiduciary duty related to a hospital's billing practices; and (3) the circuit court erred in dismissing Beverly's claim for unjust enrichment. (R. 1- 11).

Grand Strand timely filed a Petition for Rehearing, arguing: (1) the Court of Appeals ignored South Carolina authority and improperly interpreted the plain and unambiguous language of the Institutional Agreement in holding that Beverly is an intended and direct third-party beneficiary of that Agreement; (2) the Court of Appeals erred and ignored South Carolina law controlling the interpretation of the Institutional Agreement by concluding that the second sentence of the Institutional Agreement's third-party beneficiary disclaimer creates an exception and overrides the clear and unambiguous contractual disclaimer of third-party beneficiaries; (3) the Court of Appeals erred in concluding that Beverly is a direct and intended third-party beneficiary of the Institutional Agreement; and (4) the Court of Appeals erred in reversing the circuit court's dismissal of Beverly's claim for unjust enrichment/*quantum meruit* after having found that an express contract existed, and was enforceable by Beverly, that governed the very circumstances and claims upon which Beverly's unjust enrichment claim is purportedly based.

The Court of Appeals denied Grand Strand's Petition for Rehearing on March 31, 2020. (R. 12). On April 30, 2020, Grand Strand filed its Petition for a Writ of Certiorari. On

November 25, 2020, the Court issued an order granting Grand Strand's Petition for a Writ of Certiorari.

STANDARD OF REVIEW

“On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the [circuit] court.” *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (citation omitted). “The facts are construed in the light most favorable to the nonmoving party, and all well-pled allegations are considered true.” *Delaney v. First Fin. of Charleston, Inc.*, 426 S.C. 607, 611, 829 S.E.2d 249, 25051 (2019) (citing *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005)). “However, questions of law are decided *de novo*.” *Id.* (citing *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

INTRODUCTION TO ARGUMENTS

Beverly sued Grand Strand to enforce terms of the Institutional Agreement between Grand Strand and 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.

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, BCBS made a separate contract with Grand Strand to obtain for itself the terms and rates it deemed advantageous when BCBS became obligated to pay its members' covered medical costs at 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 an utterly clear and unambiguous provision and statement of their intent:

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. . . .

(R. 250).

Despite this plain language and the Institutional Agreement's structure, Beverly asserts she is a third-party beneficiary of that agreement with the right to interject herself between Grand Strand and BCBS and enforce those provisions in the Institutional Agreement she chooses. 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 when they believe they did not receive the full benefit of their insurance contract with BCBS, interjecting themselves into the private business contract terms to which only BCBS and Grand Strand agreed.

Beverly now argues that she was supposed to benefit from terms in the Institutional Agreement and thus qualifies as a third-party beneficiary. That argument is specious. Beverly was supposed to benefit from her insurance contract with BCBS. The Institutional Agreement was intended to create the method and structure whereby Grand Strand and BCBS might benefit when 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 sue Grand Strand as a third-party beneficiary under the Institutional Agreement, it acted in conflict with prior decisions of the Supreme Court and ignored the controlling law of South Carolina.

Compounding its error, after having given Beverly the third-party beneficiary status and the rights to enforce and sue upon the express written contract which is the Institutional Agreement, the Court of Appeals nonetheless granted Beverly the inconsistent and contradictory right to pursue the same claims and alleged damages on the equitable theory of *quantum meruit* / unjust enrichment. Having decided to allow Beverly the status she sought under the express Institutional Agreement, the Court of Appeals' decision to simultaneously allow Beverly to pursue the equitable claim is directly contrary to established South Carolina law. Nor can Beverly's *quantum meruit* / unjust enrichment claim stand on its own, because the benchmark of that claim is the very same contract rates her contract claim seeks to enforce. As a consequence, her unjust enrichment claim is either subsumed by the contract claim, or fails because she cannot enforce contract rates by repackaging her claim in equity.

Grand Strand respectfully requests that the Court overturn the Court of Appeals' reversal and reinstate the circuit court's dismissal of Beverly's claims for breach of contract and unjust enrichment.

ARGUMENTS

- I. **The Court of Appeals ignored the controlling law of South Carolina and erred in reversing the circuit court's dismissal of Beverly's claim for breach of contract.**
 - A. **The Court of Appeals improperly interpreted the plain and unambiguous language of the Institutional Agreement to find that Beverly is an intended and direct third-party beneficiary of the Institutional Agreement.**

The language of the Institutional Agreement is plain and unambiguous. Grand Strand and BCBS do not intend for Beverly, or anyone else, to enjoy legal status as a third-party beneficiary able to enforce the terms of their Institutional Agreement, and do not intend that their Institutional Agreement be construed to make any person a third-party beneficiary. The Court of Appeals erred in ignoring this clear, unambiguous declaration of the parties' intent.

The Court of Appeals' opinion is in conflict with the well-established law of South Carolina regarding the interpretation of contracts and the determination of third-party beneficiary status. Under South Carolina law, it is fundamental that there is a presumption that a contract is not enforceable by a person who is not a party to the contract. *See Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). In this case, since Beverly admits she is not an actual party to the Institutional Agreement, the fundamental presumption under the law means that Beverly has no right to pursue a breach of contract claim. Moreover, under South Carolina law, the expressed intent of the parties to the contract on the issue of third-party beneficiary rights shall govern the interpretation of that contract. *See id.*; *Bob Hammond Const. Co. v. Banks Const. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994); *Touchberry v. City of Florence*, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). Thus, in this case, since the actual parties to the Institutional Agreement unequivocally expressed their intent that there be no third-party beneficiaries, South Carolina law dictates that their agreement should not be construed to mean the opposite.

"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). Therefore, the necessary first step in determining whether a party is an intended direct third-party beneficiary of a contract is to ascertain and give legal effect to the language of the contract on the issue of intent.

When the parties to a contract include an express third-party beneficiary disclaimer, as Grand Strand and BCBS did in the Institutional Agreement, a court is bound to find the parties did not intend to convey a direct benefit to third parties, or to create a right for such third parties to enforce or sue upon the contract. *See Lightsey v. Toshiba Corp.*, No. 9:18-CV-190, 2019 WL 5872168, at *3 (D.S.C. Mar. 4, 2019) (applying New York law and finding that “[d]ismissal of a third-party-beneficiary claim is appropriate where the contract rules out any intent to benefit the claimant. . . .”); *1500 Range Way Partners, LLC v. JPMorgan Chase Bank, Nat. Ass’n*, 800 F. Supp. 2d 716, 721 n.3 (D.S.C. 2011) (dismissing a plaintiff’s claim for breach of contract because a court may not ignore the plain and unambiguous terms of a contract containing a third-party beneficiary disclaimer and allow a third party to bring an action to enforce a contract to which the plaintiff is not a party); *see also Old Stone Bank v. Fid. Bank*, 749 F. Supp. 147, 152 (N.D. Tex. 1990) (enforcing a contract’s third-party beneficiary disclaimer on the grounds that courts are bound to interpret the intent of the contracting parties based upon the four corners of the instrument).

It is likewise well settled in South Carolina that the law presumes that parties contract exclusively for their own benefit. *See Ancrum v. Camden Water, Light & Ice Co.*, 82 S.C. 284, 295, 64 S.E. 151, 155 (1909). In order to overcome this presumption, a non-signatory third party must show that the parties to a contract intended the third party to be a direct beneficiary of the contract. *Touchberry*, 295 S.C. at 48-49, 367 S.E.2d at 150. In fact, the established law recognizes that “[n]o third-party beneficiary status is created absent an intent by the parties to confer a substantial benefit on [a non-signatory third party].” *Windsor Green Owners Ass’n, Inc.*, 362 S.C. at 19, 605 S.E.2d at 753 (emphasis added); *see also Sec’y of State For Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 706 (4th Cir. 2007) (“[T]he intent of the parties to the contract is ‘the cornerstone of a claim for third-party beneficiary status.’” (citation omitted)).

The mere conclusion that a third party may derive some benefit from the terms of an agreement made by other parties is not sufficient to allow a finding that such third party is a direct beneficiary of the agreement with rights to enforce or sue upon it. Again, the intent of the actual parties to the contract is what distinguishes an intended beneficiary of the contract with rights to enforce it from a mere incidental or consequential beneficiary. The line between the two is first drawn by examining the clear intent expressed by the actual parties to the contract. *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997). Absent an expression that the actual contracting parties clearly intended to directly benefit the third party, that third party is merely an incidental beneficiary with no right to enforce the contract. *See id.*; *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (granting summary judgment in favor of the defendant on the plaintiff's claim to enforce a contract as a third-party beneficiary because the plaintiff's expected benefit was "merely incidental" and a "third-party beneficiary is a party that the contracting parties intend to directly benefit.").

The Court of Appeals ignored the clear and unambiguous language of the Institutional Agreement which plainly and directly expresses Grand Strand and BCBS's intent to bar third parties from enforcing the Institutional Agreement. This intent is unequivocally stated in Section 16.16 of the Institutional Agreement:

This Agreement is not intended to be, and shall not be construed to make any person or entity a third party beneficiary.

(R. 250). Despite observing that the actual parties to the Institutional Agreement plainly stated their intention, the Court of Appeals, contrary to well-established law in South Carolina, impermissibly ignored that direct statement of the parties' intentions and turned the contract's express language on its head. Remarkably, the Court of Appeals found this language did not preclude it from construing the Institutional Agreement to make Beverly a third-party beneficiary.

Rather than accepting and enforcing the plain and unambiguous language of the contract and its express disclaimer of third-party beneficiaries, the Court of Appeals improperly chose to search for and give greater weight to other jurisdictions' interpretations of other contracts. The Court of Appeals ignored South Carolina authority and strained to find an unspoken, completely contrary intent of Grand Strand and BCBS at the time the Institutional Agreement was drafted.

The Court of Appeals' initial and determinative step in reviewing the Institutional Agreement should have been to review its plain and unambiguous language. Review of the plain and unambiguous language must result in a finding that Grand Strand and BCBS did not express, and did not have, an intent to allow Beverly—or anyone else—to enforce the Institutional Agreement as a third-party beneficiary. What could be more clear? This intent was directly and unambiguously expressed, and the Court of Appeals ignored this stated intention in finding otherwise. Such action by the Court of Appeals violated fundamental legal tenets of contract interpretation in South Carolina. Accordingly, the Court should reverse the Court of Appeals and affirm the circuit court's dismissal of Beverly's breach of contract claim on the grounds that Beverly is not a third-party beneficiary with standing to pursue a claim against Grand Strand for breach of the Institutional Agreement.

- B. The Court of Appeals ignored the controlling law of South Carolina and erred in its interpretation of the Institutional Agreement by concluding that the second sentence of the Institutional Agreement's third-party beneficiary disclaimer creates an exception to the clear and unambiguous disclaimer of third-party beneficiaries.**

The second sentence of the Institutional Agreement's third-party beneficiary disclaimer (Section 16.16) does not alter the direct expression of the intent of Grand Strand and BCBS that there be no third-party beneficiaries. The second, and independent, sentence of the Institutional Agreement's third-party beneficiary disclaimer states:

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

(R. 250).

Interestingly, the Court of Appeals did not find this second sentence created an ambiguity. In fact, the Court of Appeals found no ambiguity in the clear expression of Grand Strand and BCBS that "[t]his Agreement is not intended to, and shall not be construed to, make any person or entity a third-party beneficiary." Instead, the Court of Appeals asserted that the second sentence created an exception to the first sentence. In this regard, the Court of Appeals sought to elevate what is, at most, a qualification of the disclaimer to a so-called exception—one that totally eviscerates the clear expressed intention that there be no third-party beneficiaries.

Any fair reading of Section 16.16 does not support the Court of Appeals decision. 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. Thereby, it is possible to understand the context Section 16.16 in its entirety. Breaking down the language of this second sentence of Section 16.16, one finds:

- 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.

In this light, it is clear that the second sentence is at most a qualification of the first sentence. It does not state or imply any contrary intent to the absolute third-party beneficiary disclaimer set forth in the preceding independent sentence. Nor does the second sentence provide third parties, like Beverly, the right to enforce the terms of the Institutional Agreement. This sentence merely serves to clarify the intent of 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 and Beverly never established—and the Court of Appeals never found—that it was.

The Court of Appeals incorrectly construed this second sentence of Section 16.16 to effectively delete the third-party beneficiary exclusion of the first sentence. Thus, the Court of

Appeals created from whole cloth the authorization for non-parties—like Beverly—to bring actions to enforce the Institutional Agreement as direct and intended third-party beneficiaries. Indeed, the Court of Appeals’ incorrect interpretation of the second sentence of Section 16.16 renders the first sentence—rejecting third-party beneficiaries—moot. This interpretation violates a cardinal rule of contract interpretation in South Carolina: a court should interpret an agreement so as to give effect to all of its provisions. *See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007). The Court should enforce the Institutional Agreement as written and give meaning to all parts of the contract—including the clear disclaimer of third-party beneficiaries—rather than render the third-party beneficiary disclaimer meaningless and superfluous. *See Stevens Aviation, Inc. v. DynCorp Int’l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014).

The Court of Appeals lacks authority to rewrite the contract and impose unwanted and unintended rights, obligations, and terms. *Lowcountry Open Land Tr. v. Charleston Southern Univ.*, 376 S.C. 399, 656 S.E.2d 775, 781 (2008); *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) (“It is not the function of the court to rewrite contracts for parties.”). Thus, the Court of Appeals ignored well-established rules of contract construction and erred in finding the second sentence of Section 16.16 establishes an unspoken (in fact, a denied) intent of the parties to permit third parties, like Beverly, to sue to enforce the Institutional Agreement. Accordingly, the Court should reverse the Court of Appeals and affirm the circuit court’s finding that the Institutional Agreement does not allow third-party beneficiaries.

C. The Court of Appeals ignored the controlling law of South Carolina and erroneously concluded that Beverly is a direct and intended third-party beneficiary of the Institutional Agreement.

In its decision, the Court of Appeals concluded that those terms in the Institutional Agreement between Grand Strand and BCBS from which Beverly and other Members could or

would derive benefit were sufficient to endow them with the status of third-party beneficiaries. Largely relying on the sweeping, non-specific statement that “the remaining twenty pages of the Agreement impose requirements on Grand Strand specifically intended to benefit Beverly and other Members,” the Court of Appeals effectively excised the direct and unequivocal denial of third-party beneficiaries in Section 16.16. In doing so, the Court of Appeals failed to recognize the distinction between an intended and direct benefit on the one hand, and mere incidental or consequential benefit on the other hand. The conclusion that a party may or does derive benefit from an agreement between other parties does not by itself create intended third-party beneficiary status and the right to sue upon the contract.

The primary distinguishing factor between an intended and direct benefit and a mere incidental or consequential benefit is the stated intent of the contracting parties. *See, e.g., Pearson v. Gardere Wynne Sewell LLP*, 814 F. Supp. 2d 592, 601 (M.D.N.C. 2011) (“A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person.” (internal citations and quotation marks omitted)); *see also Friedman v. Wellspring Capital Mgmt., LLC*, No. AP 19-80071-DD, 2020 WL 5083319, at *7 (Bankr. D.S.C. Aug. 27, 2020) (“A third party is an intended beneficiary where either (1) ‘no one other than the third party can recover if the promisor breaches the contract’ or (2) ‘the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party.’” (citation omitted)). All other benefits should be considered indirect, incidental, or consequential. *See U.S. v. Chester Heights Assocs.*, 406 F.Supp. 600, 604 (D.S.C. 1975) (“It is not sufficient to show that one is only an incidental beneficiary under such an agreement or that one benefits through the mere operation of the contract.”).

To justify the rejection of plain contract language, the Court of Appeals’ order contains little more than a conclusory statement that “the remaining twenty pages of the Agreement impose

requirements on Grand Strand specifically intended to benefit Beverly and other Members.” The Court of Appeals’ opinion fails to identify where in those “remaining twenty pages” Grand Strand and BCBS expressed any intent to convey to Beverly the direct right to enforce the Institutional Agreement. In fact there are no such provisions.

Section 3.2 of the Institutional Agreement reiterates and emphasizes the third-party disclaimer when it states clearly that “this Agreement constitutes a contract solely between [Grand Strand and BCBS].” Beverly’s claimed benefit from the Institutional Agreement derives merely by the operation of that agreement. *See Bob Hammond Const. Co.*, 312 S.C. at 424, 440 S.E.2d at 891.

In *Windsor Green Owners Association, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 20, 605 S.E.2d 750, 754 (Ct. App. 2004), a condominium homeowners’ association (“Windsor”) sued to enforce a provision of the rental agreement between a tenant and the owner of the condominium that obligated the tenant to pay for damage to the property after the tenant’s son burned down the condominium and damaged the common area of the condominium complex. Windsor argued that it was a third-party beneficiary with the right to enforce the rental agreement between the condominium owner and the tenant because it was an intended and direct beneficiary of the rental agreement’s provision obligating the tenant to pay for damage to the “Property.” *Windsor*, 362 S.C. at 16-17, 605 S.E.2d at 752. The circuit court found that “Property” included the common areas that were damaged by the fire. *Id.* at 18, 605 S.E.2d at 753. The circuit court further held that Windsor was a third-party beneficiary to the contract because Windsor “is the entity which maintains and controls the ownership interests of the common elements and because [the tenant] agreed to be financially responsible for damage to the property caused by it or its guests, with the term ‘property’ encompassing the common elements.” *Id.* (internal quotation marks omitted). On appeal, the Court of Appeals reversed the circuit court’s finding that Windsor was an intended and

direct third-party beneficiary to the rental agreement. *Id.* at 20, 605 S.E.2d at 754. In analyzing the issue, the court stated:

We do not think a rental agreement between a condominium owner and the owner's tenant by which the tenant voluntarily agreed to pay *the owner* for any property damage caused by the tenant, his family, or guests, goes so far as to make the homeowners association a third-party beneficiary of the contract, notwithstanding the fact that, by law, the tenant has the right to use the common areas. Under this rationale, a homeowners' association could directly hold a tenant contractually responsible for assessments, association dues, or any other expenses even though the parties did not intend this result by virtue of entering into a rental agreement.

Id. (emphasis in original).

The rationale applied by the court in *Windsor* is applicable to the present case. Like the rental agreement in *Windsor*, the benefits the Institutional Agreement provides to Beverly are merely indirect, incidental, or consequential benefits that do not entitle Beverly to sue for breach of contract. The Institutional Agreement does not contain a clear expression that Grand Strand and BCBS intended to provide such rights to Beverly. To the contrary, the Institutional Agreement contains a clear and unequivocal expression of their intent that neither Beverly, nor anyone else, should be granted third-party beneficiary status. Therefore, the Court of Appeals erred in construing the Institutional Agreement to make Beverly a third-party beneficiary. The fact that Beverly might experience some benefits from the operation of the Institutional Agreement does not justify overriding the expressed intent of the parties. Accordingly, the Court should reverse the Court of Appeals and affirm the circuit court's holding that Beverly is not a third-party beneficiary.

II. The Court of Appeals ignored the controlling law of South Carolina and erred in reversing the circuit court's dismissal of Beverly's claim for unjust enrichment/*quantum meruit*.

The Court of Appeals' ruling that Beverly is a third-party beneficiary with the right to enforce the terms of the Institutional Agreement affirmatively determines that an express contract

governs the rights that Beverly seeks to enforce. Therefore, having made that ruling, the Court of Appeals erred in concluding that Beverly may also pursue a claim for unjust enrichment/*quantum meruit*.

Beverly's ability to pursue a claim for unjust enrichment/*quantum meruit* in the alternative only existed when the existence of the express contract, or its applicability to the claims in issue, was in dispute. See *Charleston County School District v. Laidlaw Transit, Inc.*, 348 S.C. 420, 422-23, 559 S.E.2d 362, 363 (Ct. App. 2001); *Swanson v. Stratos*, 350 S.C. 116, 118-21, 564 S.E.2d 117, 118-20 (Ct. App. 2002); see also *Boldt Co. v. Thomason Elec. & Am. Contractors Indem. Co.*, 820 F. Supp. 2d 703, 707 (D.S.C. 2007); *United States v. Savannah River Nuclear Sols., LLC*, No. 1:16-CV-00825-JMC, 2016 WL 7104823, at *26 (D.S.C. Dec. 6, 2016). When no such dispute remains (based on the Court of Appeals' decision on the breach of contract claim), Beverly's ability to maintain even an alternative claim based on a theory of *quantum meruit* or quasi-contract ends. Thus, upon the Court of Appeals' decision that Beverly is a third-party beneficiary with the right to pursue a claim for breach of an express contract (the Institutional Agreement), Beverly was foreclosed from pursuing an alternative claim for *quantum meruit*.

It is axiomatic under South Carolina law that "[i]f the tasks the plaintiff is seeking compensation for under a *quantum meruit* theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under *quantum meruit*." See *Swanson*, 350 S.C. at 122, 564 S.E.2d at 120; see also 66 Am.Jur.2d *Restitution and Implied Contracts* § 81 (2001) ("[I]t is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished.").

A careful exposition and summary of South Carolina law on this point was recently discussed by the United States District Court for the District of South Carolina in *Gee v. Delta Speir Plantation LLC*, No. 9:18-CV-02755-DCN, 2020 WL 4674150, at *6 (D.S.C. June 11,

2020). In that case, the District Court correctly summarized, analyzed, and applied South Carolina law to find that a plaintiff is only permitted to pursue a claim for unjust enrichment as an alternative to a claim for breach of contract where there is “no valid contract between the parties, or there is some question as to whether the contract is enforceable.” *Gee*, 2020 WL 4674150, at *6 (quoting *Boldt*, 820 F. Supp. 2d at 707). The court in *Gee* dismissed the plaintiff’s claim for unjust enrichment/*quantum meruit* on the grounds that when the existence and applicability of an express contract is not in question, or has already been determined, the equitable claim for unjust enrichment/*quantum meruit* may not continue—even in the alternative. *Id.* at 6-7. Therefore, if the Court of Appeals’ decision on the existence of third-party beneficiary rights under the Institutional Agreement stands, then Beverly’s suit on that agreement forecloses her separate claim for unjust enrichment.

Under South Carolina law a claim for unjust enrichment is an equitable claim and “‘equity will not intervene’ where a plaintiff ‘possesses an adequate remedy at law.’” *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430 (2009); *Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co.*, 272 S.C. 127, 128-29, 249 S.E.2d 744 (1978)). In South Carolina “to be adequate, a legal remedy need not guarantee success.” *EllisDon Constr., Inc. v. Clemson Univ.*, 391 S.C. 552, 555, 707 S.E.2d 399 (2011). Ultimately, under South Carolina law a plaintiff has an adequate remedy at law when she has the ability to pursue a claim for breach of an express contract and, therefore, the plaintiff cannot maintain a claim for unjust enrichment—even in the alternative. *Gee*, 2020 WL 4674150, at *6-7.

In *Charleston County School District*, 348 S.C. at 422-23, 559 S.E.2d at 363, the Charleston County School District sought to recover alleged overpayments to a bus company under a transportation contract. The bus company counterclaimed under a *quantum meruit* theory for set-off and payment for extra services rendered. *Id.* at 423-24, 559 S.E.2d at 364. The circuit

court dismissed the *quantum meruit* counterclaim and the Court of Appeals affirmed, agreeing that “there was a specific contract between the parties and they were limited to that contract.” *Id.* at 424-26, 559 S.E.2d at 364. The Court of Appeals explained:

By admitting the contract and its terms, . . . the parties have defined their relationship, and their rights and obligations are governed solely by the contract terms.

Id. at 425, 559 S.E.2d at 364.

Similarly, in *Swanson*, 350 S.C. at 118-21, 564 S.E.2d at 118-20, the court was asked to determine whether a forester was entitled to recover under *quantum meruit* against a property owner when the forester had an express written contract with the property owner. *Id.* at 119, 564 S.E.2d at 118. The court held that the forester was not entitled to the recover under *quantum meruit* because the work performed by the forester was within his obligations under the express contract. *Id.* at 123, 564 S.E.2d at 120. The court explained that a claim for *quantum meruit* fails in the face of an enforceable contract governing the relationship between the parties. *Id.*

In this case, the procedural history and setting may be novel; however, the Court of Appeals resolved that an enforceable contract (the Institutional Agreement) exists and applies between the litigants when it found that Beverly is a third-party beneficiary under the Institutional Agreement with the right to sue Grand Strand for breach of that express contract. Following the Court of Appeals’ ruling on the breach of contract claim, it recognized no continuing dispute as to the existence of the express contract or its application to the current case. Having done that, the Court of Appeals ignored existing South Carolina law when it nonetheless sanctioned an alternative equitable claim (unjust enrichment/*quantum meruit*) to continue as well.

The Court of Appeals misplaced its reliance 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. 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 determined 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 applies and Beverly has a right to sue to enforce it. Upon this finding by the Court of Appeals, if it stands, Beverly may no longer pursue her claim for unjust enrichment in the alternative.

Furthermore, Beverly’s unjust enrichment claim fails even if the Court of Appeals’ decision on her third-party beneficiary status is reversed, because the unjust enrichment claim is merely an attempt to repackage the breach of contract claim under a different label. As the Court of Appeals expressly recognized, Beverly’s unjust enrichment claim is based entirely on the proposition that Beverly is entitled to enforce BCBS’s contracted rates. Either Beverly can sue under the Institutional Agreement, or she cannot. If Beverly is a third-party beneficiary able to enforce the contract, South Carolina law restricts her to that remedy, and she may not separately pursue unjust enrichment. Alternatively, if Beverly is not entitled to enforce the contract, then she cannot obtain this legal remedy, effectively granting herself third-party beneficiary status, by calling it equity.

Beverly's claim is not based on any allegation that Grand Strand is unjustly enriched by having billed standard, non-discounted rates for the hospital services. Indeed, Beverly has no basis in fact to claim unjust enrichment by Grand Strand merely because Grand Strand billed her at standard rates.

In its opinion, the Court of Appeals stated that the basis of Beverly's unjust enrichment claim was that Grand Strand "is not permitted to bill a Member for its services at a higher payment rate than it contractually agreed to accept." (emphasis added). The Court of Appeals based its conclusion that it was error to dismiss the *quantum meruit* claim on the grounds that when Grand Strand billed Beverly for covered services "it declined to bill her at the contracted for rate, and it sent her a bill in violation of its contract with BCBS." (emphasis added). Thus, it could not be more clear that the Court of Appeals recognizes that the purported foundation of the equitable claim exists in and arises from the terms of the express contract, not from any allegation that Grand Strand is unjustly enriched merely by charging the standard non-discounted rates for medical services.

It is not inequitable for Grand Strand to charge Beverly non-discounted rates, because the discounted rates she seeks to obtain are only available through the Institutional Agreement as part of the bargain between Grand Strand and BCBS. When it is determined that Beverly is neither a party to, nor a third-party beneficiary of the Institutional Agreement, and she does not have the right to enforce its terms, she has no basis for an unjust enrichment claim.

Beverly's unjust enrichment claim is ineluctably tied to her ability to enforce the Institutional Agreement's terms. The alleged unjust benefit to Grand Strand is derived exclusively from Beverly's alleged right to receive medical services at the discounted rates in the Institutional Agreement. But if Beverly cannot enforce the Institutional Agreement, its discounted rates cannot form the basis for her unjust enrichment claim. She did not confer a non-gratuitous benefit on

Grand Strand just because Grand Strand billed her at standard rates. Therefore, the circuit court properly held that Beverly failed to allege Grand Strand received an unjust benefit.

In short, if the Court of Appeals decision granting Beverly status as a third-party beneficiary is reversed, then Beverly does not have the right to enforce the payment rates set forth in the agreement between Grand Strand and BCBS. If she is not entitled to those rates, then they cannot form the benchmark of an unjust enrichment claim. Accordingly, the Court should reverse the Court of Appeals and affirm the circuit court's dismissal of Beverly's claim for *quantum meruit* / unjust enrichment.

CONCLUSION

For the reasons set forth above, Grand Strand respectfully requests the Court reverse the Court of Appeals, and affirm the circuit court's prior dismissal of Beverly's claims for breach of contract and unjust enrichment/*quantum meruit*.

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