THE STATE OF SOUTH CAROLINA
In the South Carolina Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2020-000710

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

v.

Grand Strand Regional, Medical Center, LLC …………… Petitioner.

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals correctly applied South Carolina contract interpretation principles to find a contract that made express promises to Ms. Beverly was intended to provide her direct benefits.

2. Whether the Court of Appeals properly determined the contract's purported third-party beneficiary exclusion included an express exception for Ms. Beverly's claims.

3. Whether the Court of Appeals correctly applied South Carolina law in holding Ms. Beverly may plead breach of contract and unjust enrichment as alternative theories of relief.

STATEMENT OF THE CASE

This case is about whether a hospital may intentionally ignore its patient's health insurance to increase its revenues and then shrug off litigation when the patient later learns of the hospital's deception. Respondent Jeanne Beverly provided proof of her status as a member in Blue Cross Blue Shield of South Carolina's ("Blue Cross") preferred provider organization ("PPO") before she was treated by Petitioner Grand Strand Regional Medical Center, LLC ("Grand Strand"). But, a patient seeking diagnostic tests and a few stiches is not particularly profitable for Grand Strand, at least not when she is insured. That's because insured patients get the benefit of the insurance network their monthly premiums pay for, including the discount rate for medical services Blue Cross negotiated with providers like Grand Strand and the peace of mind of knowing Grand Strand will bill Blue Cross directly for all of an insured patient's medical care. In short, Ms. Beverly would have been a more profitable customer for Grand Strand if she was not a Blue Cross member and so Grand Strand pretended she was not. Grand Strand sent an undiscounted bill directly to Ms. Beverly. Grand Strand's response to her lawsuit has been that it cannot be sued these actions. Grand Strand now argues a unanimous panel of the Court of Appeals erred in finding Ms. Beverly could pursue contract and equitable claims for the money Grand Strand took from her.

As alleged in her complaint, Ms. Beverly was injured in an auto accident caused by another driver on September 6, 2012. (R. p. 141 ¶ 12). On that same day, she presented to Grand Strand's emergency room for diagnosis and treatment of her injuries. (R. p. 141 ¶ 13). Ms. Beverly was evaluated by an emergency room physician, and Grand Strand personnel treated a wound she suffered in the accident. (R. pp. 141-42 ¶¶ 13, 22). A short time later, Grand Strand mailed Ms. Beverly an unexpected $8,000 bill for emergency room services. (R. p. 142 ¶ 22). The bill was unexpected because Ms. Beverly previously purchased a health insurance policy from Blue Cross

that made her a Blue Cross "Member" and granted her access to Blue Cross's PPO. (R. p. 141 ¶ 14). The PPO was a network of hospitals and medical practices marketed to Blue Cross members as "preferred" providers. (R. pp. 141-45 ¶¶ 16, 41-43; Agreement at 13 § 11.2). Ms. Beverly was supposed to benefit from the PPO because PPO providers like Grand Strand were prohibited from billing her. (R. pp. 141-44 ¶¶ 17, 34; Agreement at 6 §§ 6.1-6.2).

In the Institutional Agreement ("the Agreement"), Grand Strand became a PPO provider in exchange for a promise to bill Blue Cross directly for medical services to Blue Cross members. (R. pp. 141-45 ¶¶ 17, 34, 43; Agreement at 6 §§ 6.2-6.3). Grand Strand also promised to accept from Blue Cross a discount reimbursement rate for these services. (R. pp. 141-45 ¶¶ 17, 34; Agreement at 6 § 6.4). Specifically, the Agreement[1] prohibited Grand Strand from "solicit[ing] any payment from [Blue Cross] Members" and required Grand Strand to "accept the reimbursement terms and rates" Blue Cross established for the PPO. (Agreement at 6 §§ 6.1, 6.4). After signing the Agreement in 2005, Grand Strand began aggressively marketing itself to Blue Cross members as a "preferred" provider. (R. p. 145 ¶¶ 41-43). Ms. Beverly was aware of Grand Strand's "preferred" provider status and expected Grand Strand to function accordingly when she sought out the hospital after her auto accident. (R. p. 146 ¶ 45).

However, the Complaint alleges Grand Strand chose to disregard its contractual duties for Ms. Beverly and similarly situated patients. (R. p. 144 ¶¶ 33-36). Emergency room services for auto accident victims can be a poor economic performer for Grand Strand, especially given the discount reimbursement rate Grand Strand agreed to accept from Blue Cross. (R. p. 142 ¶ 19). By charging Ms. Beverly directly and for an amount exceeding the Agreement's reimbursement rate,

[1] The Complaint alleges Ms. Beverly, as a Blue Cross member, is an intended third-party beneficiary of the Agreement. (R. p. 142 ¶ 25).

Ms. Beverly alleges Grand Strand acted in its own economic interest and in violation of its contractual duties. (R. pp. 142-46 ¶¶ 21, 22, 24, 46-49). Ms. Beverly demanded damages for Grand Strand's breach of contractual and fiduciary duties and, in the alternative, an equitable recovery to remedy Grand Strand's unjust enrichment. (R. pp. 144-47 ¶¶ 36, 50, 56).

Instead of an answer, Grand Strand filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. Based on the parties' written submissions and oral arguments to the circuit court, the Honorable Benjamin H. Culbertson granted Grand Strand's motion, finding Ms. Beverly was not an intended third-party beneficiary of the Agreement and dismissing all of her legal and equitable claims. Ms. Beverly filed and served a timely notice of appeal on July 19, 2016. (R. p. 223). The Court of Appeals heard arguments on November 8, 2018. On January 15, 2020, the Court of Appeals reversed the circuit court's ruling as to Ms. Beverly's breach of contract and unjust enrichment/quantum meruit claims and affirmed dismissal of Ms. Beverly's "bad faith"/fiduciary duty claim. Beverly v. Grand Strand Reg'l Med. Ctr., LLC, 429 S.C. 502, 839 S.E.2d 468 (Ct. App. 2020).

On the contract claim, the Court of Appeals found that, while Ms. Beverly was not one of the Agreement's parties, "the Agreement's language, structure, and purpose directly benefit" her and allowed her to enforce the Agreement's promises to her as an intended third-party beneficiary. Id. at 512, 839 S.E.2d at 473. Additionally, the Court of Appeals rejected the notion that an isolated sentence in the Agreement could exclude Ms. Beverly from enforcing the Agreement when the very next sentence unambiguously "carv[ed] out" Ms. Beverly's claims from any purported exclusion. Id. at 509, 839 S.E.2d at 472 (citing Agreement at 20 § 16.16) ("nothing in this section shall affect . . . ***a Member's right to received Covered Services pursuant to the terms of this***

Agreement") (emphasis added). Grand Strand filed a timely petition for rehearing that was denied on March 31, 2020.[2] The Court issued a writ of certiorari on November 25, 2020.

STANDARD OF REVIEW

A defending party may assert in its answer or in a pre-answer motion a defense alleging any claim against it fails to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP. When reviewing a Rule 12(b)(6) motion, a court must view a complaint in the light most favorable to the plaintiff and every doubt must be resolved in the plaintiff's favor. Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). If the "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case," then the court may not grant a 12(b)(6) motion. Sloan Constr. Co. v. Southco Grassing Co., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). A court may not dismiss a complaint merely because the court doubts the plaintiff will prevail. Plyler, 373 S.C. at 645, 647 S.E.2d at 192. An appellate court must apply the same standard. Dawkins v. Union Hosp. Dist., 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014).

ARGUMENT

Ms. Beverly alleges she was denied the most basic benefit of the most basic financial transaction an insured patient faces in the American healthcare system. A hospital cannot bypass an insurer to charge its patient directly or else the patient would have no reason to select an in-network hospital over its competitors or to pay for insurance at all. This principle is not just a matter of logic; it is formalized in a direct promise Grand Strand made to Ms. Beverly and all Blue Cross PPO Members in the Agreement she seeks to enforce. Agreement at 6 § 6.1 ("***[Grand***

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[2] Ms. Beverly did not file a petition for rehearing regarding the Court of Appeals' ruling on her "bad faith"/breach of fiduciary duty claim.

Strand] will not solicit any payment from Members . . ."). (emphasis added). Grand Strand seems unwilling to even acknowledge this promise—it appears nowhere in Grand Strand's brief. Instead, Grand Strand argues it is "specious" for Ms. Beverly to claim a direct benefit from this contract that made a direct promise to her. (Pet. Br. at 6). Grand Strand cannot credibly criticize the Court of Appeals' opinion as reductive or dismiss Ms. Beverly as an Agreement interloper without at least attempting to explain away the explicit promise it made to her.

Yet, that is the tack Grand Strand chooses here. Regardless of what the Agreement's substantive provisions promise, Grand Strand argues, its parties had no intention of conferring direct benefits on Blue Cross Members like Ms. Beverly. The Court of Appeals correctly determined South Carolina contract law does not support this conclusion. Intent is determined by a thorough review of *all* a contract's terms. While one sentence in the Agreement's section 16.16 purports to exclude third-party enforcement, the very next one expressly authorizes Members' pursuit of the benefits the Agreement offers them. Plus, the Agreement references Blue Cross Members more than seventy times in its twenty pages, with Grand Strand agreeing the PPO it joined was "for the benefit of . . . Members" (Agreement at 1 § 1.1) and the Agreement would be interpreted accordingly. By finding the Agreement's full text demonstrated its parties' intent to offer Ms. Beverly direct benefits, the Court of Appeals joined state supreme courts in Tennessee, Oklahoma, South Dakota, and Alaska, as well as lower appellate courts in several other jurisdictions—some of which addressed Blue Cross entities and contracts that are nearly identical to the Agreement.

Finally, the Court should consider the real, lasting damage Grand Strand's success in this appeal would wreak for the PPO on which so many South Carolina Blue Cross Members rely. It is hard to conceive—and Grand Strand offers no explanation—how this intrinsically tripartite

health insurance model remains functional if Members are stripped of any legal or equitable claim against a hospital that illegally charges them. Considering such a broad, systemic, even existential concern does not stray from the Court's straightforward contract interpretation duty. In fact, the Court would err if it accepted Grand Strand's invitation to ignore such considerations. No part of the canon of contract interpretation principles recognized by South Carolina law should be deployed in a way that ignores what is "practical" or "reasonable," and the Agreement must be viewed in light of "the subject matter, the surrounding circumstances, the situation of the parties, and the object in view" when it was formed.[3] In the end, the Court of Appeals' ruling should be affirmed because it is true to the Agreement's language, South Carolina contract law, and the bargained-for financial arrangement Grand Strand is accused of violating in Ms. Beverly's suit.

1. Taken as a Whole, the Agreement Intended to Confer Direct Benefits on Ms. Beverly Through the Substantive Promises Grand Strand Made to Her.

Grand Strand's argument largely begins and ends with one sentence in one of the Agreement's more than one hundred numbered provisions. As the Court of Appeals acknowledged, that sentence purports to exclude third-party enforcement. Beverly, 429 S.C. at 508, 839 S.E.2d at 471 (quoting Agreement at 20 § 16.16). But, the search for what the Agreement's parties intended relative to Blue Cross Members like Ms. Beverly simply cannot end with that sentence. Not when another sentence in the same provision expressly protects Ms. Beverly. Not when Grand Strand directly promised Ms. Beverly elsewhere in the Agreement that she would not receive the bill her breach of contract claim challenges. Not when the Agreement's interpretative provisions—which Grand Strand helped write—state that the PPO Grand Strand

[3] Reyhani v. Stone Creek Cove Condominium II Horizontal Prop. Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 385); Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 498-99, 649 S.E.2d 494, 502 (Ct. App. 2007) (quoting Brady v. Brady, 222 S.C. 242, 246-47, 72 S.E.2d 193, 195 (1952))

joined must be construed "for the benefit of [Blue Cross] Members." South Carolina contract interpretation rules do not accept Grand Strand's myopic view of Section 16.16 or any reading of the Agreement that undermines the operation of the PPO at its center.

a. Grand Strand Fails to Interpret the Agreement as a Whole Including Section 6.1's Express Promise to Blue Cross Members.

Ms. Beverly agrees with Grand Strand that the Court's task is to apply South Carolina contract interpretation principles guided by the intent of the Agreement's parties as expressed in the language they chose. However, Grand Strand does not consider the full range of pertinent interpretative principles or the full scope of the Agreement's language. South Carolina law allows a non-party to enforce a contract when it provides her direct benefits, and Grand Strand cites no case to even suggest a non-party is precluded from to enforcing a contract that makes a direct promise to her. Beverly, 429 S.C. at 507, 839 S.E.2d at 470-71 (citing Touchberry v. City of Florence, 295 S.C. 47, 49, 367 S.E.2d 149, 150 (1988); Kingman v. Nationwide Mut. Ins. Co., 243 S.C. 405, 412, 134 S.E.2d 217, 221 (1964); Jennings v. First of Ga. Underwriters Co., 283 S.C. 455, 457, 322 S.E.2d 694, 695 (Ct. App. 1984)). A court's search for contract parties' intent demands a broad examination of all the contract's pertinent text. Ecclesiastes Prod. Ministries, 374 S.C. at 498, 649 S.E.2d at 502 ("The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof"); Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc., 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) (contract parties' intent "to be gathered from the whole scope and effect of the language used"). No one sentence may be elevated over another and no substantive provision may be ignored. Popocar Enters. By and Through Fin. Mgmt. Corp. v. McGowan, 300 S.C. 178, 386 S.E.2d 795 (Ct. App. 1989) (citing Bruce v. Blalock, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962) ("The intent and purport of a written contract must be gathered from the contents of the entire agreement and not from any

particular clause or provision thereof")). Grand Strand cites this principle but makes no effort to apply it. Resp. Br. at 14 (citing Ecclesiastes Prod. Ministries, 374 S.C. at 498, 756 S.E.2d at 153).

Ms. Beverly's breach of contract claim alleged three improper actions by Grand Strand: (1) failing to bill Blue Cross for her medical services; (2) charging her directly for those services; (3) seeking payment in the unwarranted bill in excess of the discount reimbursement rate Grand Strand agreed to accept. (R. p. 142 ¶¶ 18, 21, 24; R. p. 144 ¶¶ 34-35). Ms. Beverly alleged these as contract breaches because they violate Grand Strand's express promises in the Agreement:

- Grand Strand "shall seek payment for Covered Services solely from [Blue Cross]." (Agreement at 6 § 6.1)
- Grand Strand "will not solicit any payment from [Blue Cross] Members" except for deductibles and copays. (Agreement at 6 § 6.1)
- Grand Strand "shall accept the reimbursement terms and rates for Covered Services" that are attached to the Agreement and provide a discount to Blue Cross for services rendered to its Members (Agreement at 6 § 6.4)

See also Beverly, 429 S.C. at 509, 839 S.E.2d at 472 (finding Ms. Beverly's contract claim viable because "pursuant to the terms of the agreement, Grand Strand agreed to bill Blue Cross and to accept a discounted reimbursement for Member Beverly's benefit").

Section 6.1 is key because its second sentence can only be read as an exclusive promise from Grand Strand to Blue Cross Members like Ms. Beverly using the most basic contractual promise sentence structure: promisor-promise-promisee. Agreement at 6 § 6.1 ("Institution [promisor] will not solicit any payment [promise] from Members [promisee] . . ."). This sentence is not, as Grand Strand has suggested (R. p. 59), a private agreement between Grand Strand and Blue Cross since Blue Cross is not referenced. Plus, Grand Strand's obligation to bill Blue Cross is covered elsewhere in the Agreement (section 6.1's first sentence, section 6.2). Section 6.1's second sentence was written for the distinct purpose of Grand Strand promising Ms. Beverly (and

all Blue Cross Members) that they would not be billed as Ms. Beverly alleges in this case. Section 16.16's purported third-party beneficiary exclusion must be read in light of this direct promise Grand Strand chose to make.

Even if section 6.1's explicit promise to Blue Cross Members was not enough to show the parties intended to directly benefit Ms. Beverly, the Agreement goes further. The Agreement's foundation is a PPO expressly created "for the benefit of [Blue Cross] Members." Agreement at 1, § 1.1. By entering the Agreement, Grand Strand became a participant in the PPO and was required to comply with the PPO's rules. Agreement at 1 § 1.2 (noting Grand Strand's desire to join PPO "to provide Covered Services under the terms of this Agreement"). Grand Strand also cannot deny the PPO was intended to provide financial benefits to Ms. Beverly and all other Blue Cross members. Agreement at 3, § 2.16. Those financial benefits included the discounted rate Grand Strand was required to accept for the services it provided Blue Cross Members. Beverly, 429 S.C. at 512, 839 S.E.2d at 473 (referencing Agreement at 6 § 6.4).

Since Grand Strand does not even acknowledge these terms, its argument seems to be that one sentence in Section 16.16 renders inoperable direct promises to non-parties elsewhere in the Agreement or, more generally, that a third-party beneficiary exclusion makes it unnecessary for the Court to consider any other portion of a contract. Yet, like any other contract term, an exclusion may not be read in isolation or enforced when fundamentally at odds with the remainder of the contract. MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct. App. 1999) (rejecting argument that insurance contract exclusion should be read in isolation and noting party's admission that "one could not simply skip straight to [the] exclusion" since "the contract must be viewed in its entirety"); Id. (citing Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 225 S.E.2d 344 (1976) ("the contract must be read as a whole, giving the

appropriate weight to all of its provisions")). Courts in other jurisdictions applying the same interpretive principle have refused to enforce a third-party beneficiary exclusion to bar a claim by a non-party to whom direct promises were made elsewhere in the same contract.[4]

Grand Strand's final plea comes in the form of a question through which Grand Strand suggests the Court of Appeals must have erred because the exclusion was stated in plain terms. Pet. Br. at 11 (asking, "What could be more clear?"). Though the question may have been rhetorical, it has many answers. Assuming without conceding that a hospital-insurer contract could ever immunize Grand Strand's conduct by barring patients' claims, the Agreement would have to have been drafted much differently. If that was truly Grand Strand's intent when the Agreement was drafted, Grand Strand should not have chosen to include in section 6.1 a sentence that can only be fairly interpreted as a direct promise from Grand Strand to Blue Cross Members. Likewise, it should have insisted on removing language in provisions in sections 6.2-6.4 and other sections that provide Members direct benefits. Grand Strand should have also negotiated the removal of

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[4] See e.g., Osprey-Troy Officentre L.L.C. w. World Alliance Fin. Corp., 822 F. Supp. 2d 700, 707 (E.D. Mich. 2011) (finding that purported disclaimer provision "cannot be viewed in isolation from the foregoing provisions, which paints a compelling picture of [the plaintiff] as an intended third-party beneficiary"); Versico, Inc. v. Engineered Fabrics Corp., 520 S.E.2d 505, 508-09 (Ga. App. 1999) (finding trial court's decision to allow third-party contract enforcement despite third-party beneficiary disclaimer was proper application of contract interpretation rule requiring application of specific over general provisions). A third-party beneficiary disclaimer may be some evidence on the parties' intent but it cannot override contrary indications of intention elsewhere in the same contract. Walsh Chiropractic, Ltd. v. StrataCare, Inc., 752 F. Supp. 896, 907 (S.D. Ill. 2010) (quoting Roche v. Zenith Ins. Co., Civ. No. 07-875-MJR, 2009 WL 635503, at *4 (S.D. Ill. March 12, 2009) (finding that "the presence of [a disclaimer provision] in a contract is not dispositive of whether a third party is entitled to enforce an agreement"); Twin City Constr. Co. of Fargo, N.D. v. ITT Indus. Credit Co., 358 N.W.2d 716, 719 (Minn. App. 1984) (finding contract intended to benefit third-party "regardless of the disclaimer"). When a contract contains a general third-party beneficiary disclaimer and separate provisions conferring benefits on a third-party, the proper interpretation of the disclaimer may be to apply it only to those portions of the contract not conferring benefits on third parties. Prouty v. Gores Tech. Group, 121 Cal. App. 4th 1225, 1234-35 (Cal. App. 2004) (finding provision granting third person a direct benefit was an "exception" to the contract's third-party beneficiary disclaimer).

recitals, definitions, and other sections that reiterate the Agreement's underlying purpose is to support a PPO for the Members' benefit. Finally, as discussed below, Grand Strand should not have limited the third-party beneficiary exclusion's reach with an express exception that covers Ms. Beverly's claims.

In sum, Grand Strand is bound by the full scope of the language it chose for the Agreement. None of the Agreement's language was forced on Grand Strand. Agreement at 20 § 16.17 (stating that the Agreement's terms were part of an arms-length negotiation with each side given adequate time for input and review). If Grand Strand wanted to make a sincere argument the Agreement was not intended to benefit Ms. Beverly and other Blue Cross Members, then Grand Strand should have drafted, negotiated, or insisted on language *throughout the Agreement as a whole* that at least nominally supported that conclusion.

b. Ms. Beverly's Benefits from the Agreement are Direct and Intended.

The Court of Appeals correctly determined Ms. Beverly has standing to enforce the Agreement as a third-party beneficiary because the benefits it offers her are direct and intended. Grand Strand's argument that Ms. Beverly's benefits are merely incidental (Pet. Br. at 14-17) fails to acknowledge section 6.1's direct promise to Blue Cross Members. Grand Strand cannot credibly claim its promise to "not solicit any payment from Members" was not intended to directly benefit those Members. Similarly, Grand Strand's duty to submit bills to Blue Cross (Agreement at 6 §§ 6.1-6.2) and its duty to accept a negotiated reimbursement rate from Blue Cross for Members' covered services (Agreement at 6 § 6.4) provide direct benefits to Members like Ms. Beverly in addition to their benefits to the Agreement's parties. See e.g. Jennings v. Rapid City Reg'l Hosp. Inc., 802 N.W.2d 918, 923 (S.D. 2011) (finding members of self-insured health plan were "directly and primarily benefited" by plan's contract with hospital); Nahom v. Blue Cross & Blue Shield of

Ariz., Inc., 885 P.2d 1113, 1117 (Ariz. App. 1994) (finding discount reimbursement rate in Blue Cross entity's contract with a hospital contract was "clearly a benefit to" Blue Cross insureds and "that benefit is both intentional and direct").

Grand Strand points to two things to suggest Ms. Beverly's benefits from the Agreement are merely incidental. Bypassing sections 6.1-6.4 entirely, Grand Strand argues section 3.2 limits the Agreement's scope to its parties alone. (Pet. Br. at 16). But, section 3.2's purpose is to limit Grand Strand, not Ms. Beverly. This section goes to some lengths to state that Grand Strand's contract is with Blue Cross, not the independent "BlueCross BlueShield Association" ("the Association") from which Blue Cross obtained a license to use the "Blue Cross" moniker and trademarks. Grand Strand is advised by Blue Cross that the Association is not a party and that Blue Cross does not act as the Association's agent. Grand Strand also errs in relying on Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc., 362 S.C. 12, 605 S.E.2d 750 (Ct. App. 2004). Windsor Green refused a homeowners association's attempt to enforce a provision in a lease agreement between a condo owner and its tenant but is distinguishable in several ways. First, the association's third-party beneficiary claim was substantially weakened by the fact that it was "not mentioned" in the contract it sought to enforce. Id. at 15, 605 S.E.2d at 751. It is far more difficult to argue a contract intended to benefit a person if that person does not make it into the contract's language. In contrast, the Agreement references Blue Cross "Members" like Ms. Beverly **more than seventy times** in twenty pages. Second, Windsor Green focused on the fact that the pertinent contract made no direct promises to the homeowners' association attempting to enforce it. While there was a promise by the tenant to pay for damages to the condo complex's common areas, that promise was made solely by the tenant to its landlord, not to the association. Id. at 20, 605 S.E.2d at 754. Here, however, the Agreement includes a promise by Grand Strand directly and exclusively to Blue

Cross Members like Ms. Beverly. (Agreement at 6 § 6.1) ("[Grand Strand] will not solicit any payment from Members . . .").

In sum, by making a direct promise to them in the Agreement, Grand Strand unambiguously expressed its intent to directly benefit Blue Cross Members like Ms. Beverly. Additionally, as other courts have held, payment solicitation restrictions, claim submission requirements, and reimbursement rate caps like those in the Agreement extend direct benefits beyond the parties to insured patients.

c. Grand Strand Overlooks Other Crucial Contract Interpretation Rules.

Grand Strand's nearly exclusive focus on section 16.16's first sentence violates other contract interpretation rules this Court has established. First, a contract must be interpreted not in the abstract but in the specific context in which it was formed, and a contract adding a hospital to a PPO cannot be reasonably construed to authorize that hospital to charge insured patients directly. Second, a court's goal of enforcing a contract's every provision is bounded by practical considerations and may not be possible where a general exclusion is contradicted earlier by a specific promise.

While Grand Strand correctly argues intent is the driving force for contract interpretation, it fails to acknowledge that part of determining intent from contract language is considering the context in which it was drafted. Along with its analysis of the Agreement's language, the Court of Appeals also found Ms. Beverly's third-party beneficiary claim was supported by the Agreement's "structure" and "purpose." Beverly, 429 S.C. at 512, 839 S.E.2d at 473. These were necessary and proper considerations under South Carolina law. Courts can only derive a contract's meaning by considering its language as well as "the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties." Ecclesiastes

Prod. Ministries, 374 S.C. at 499, 649 S.E.2d at 502 (quoting Brady, 222 S.C. at 246-47, 72 S.E.2d at 195; see also Ellie, Inc. v. Miccichi, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004) ("In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered")). In fact, a court should look back to the time of contract formation and place itself in the parties' position in an attempt to understand the purpose of the Agreement's terms. Klutts Resort Realty, Inc. v. Down'round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20 (1977) (citing 17 Am. Jur. 2d Contracts § 272 (1964)).

The Agreement's states its "subject matter" directly—adding Grand Strand as a PPO provider for a PPO "established . . . for the benefit of [Blue Cross] Members" like Ms. Beverly. Beverly, 429 S.C. at 512, 839 S.E.2d at 473; Agreement at 1 §§ 1.1-1.2. The Court of Appeals also carefully noted "the surrounding circumstances" for the Agreement's specific promises. As part of a PPO, the Agreement's structure inherently recognizes three groups of actors making promises to, and receiving benefits from, one another. Beverly, 429 S.C. at 512, 839 S.E.2d at 473 (quoting Drs. Steur & Latham, P.A. v. Nat'l Med. Enters., Inc., 672 F. Supp. 1489, 1513 (D.S.C. 1987)). An insurer like Blue Cross gets cost control and the ability to offer its members access to a variety of medical providers within its geographical area. Hospitals like Grand Strand get access to the insurer's sizable membership base. Blue Cross Members like Ms. Beverly get to avoid all bills from hospitals beyond deductibles and copays. Beverly, 429 S.C. at 513, 839 S.E.2d at 473. Along with the Agreement's express promises to Ms. Beverly, the Court of Appeals was correct to find she was a direct, intended beneficiary because if you remove any of these parties' benefits (or the ability to protect them through litigation where necessary), the purpose underlying the Agreement is defeated.

Moreover, as Klutts directs, the Court should place itself in Grand Strand's position when the Agreement was formed to evaluate the merits of its current argument. For Grand Strand to conclude Ms. Beverly may not sue for breach of the Agreement, Grand Strand must argue it did not understand section 6.1 to be a direct promise to Blue Cross Members. More broadly, Grand Strand would have to convince the Court that, when the Agreement was formed, Grand Strand believed it could take the Agreement's benefits (e.g. advertising itself as a Blue Cross "preferred provider" and receiving guaranteed reimbursements from Blue Cross for covered services)[5] while also ignoring its obligation to refrain from charging Blue Cross Members directly. No reasonable hospital setting out to negotiate and execute a contract with an insurer could hold such an inequitable belief about its purpose and function.

A final set of contract interpretation rules also supports the Court of Appeals' ruling. Grand Strand argues the Court simply must apply the third-party beneficiary exclusion to bar Ms. Beverly's claim or else the Court has read the exclusion out of the Agreement and violated the rule demanding every contract provision be enforced. (Pet. Br. at 8-11). This argument fails for several reasons. First, Grand Strand's proposed interpretation violates the same rule. Grand Strand has offered the Court no explanation for how barring Ms. Beverly's claims gives effect to the section 6.1 promise Grand Strand made to her. Second, as discussed below, allowing Ms. Beverly's claims based on the section 6.1 promise and other direct benefits from the Agreement does not eliminate the third-party beneficiary exclusion because the Agreement includes an express exception to the exclusion that encompasses Ms. Beverly's claims. Allowing Ms. Beverly to vindicate the promises

[5] Agreement at 5 § 5.1 (requiring Blue Cross to make timely payments for covered services Grand Strand provides Blue Cross Members); Agreement at 13 § 11.2 (authorizing Grand Strand to market itself as a Blue Cross preferred provider).

the Agreement makes her does not allow her to step in and enforce the Agreement's marketing, rate setting, or other provisions that do not involve her.

Third, South Carolina law does not demand the Court twist or torture the Agreement's language to enforce a third-party beneficiary exclusion that contradicts the Agreement's substantive provisions. Giving effect to every contract provision is certainly a goal but only if doing so is both possible and practical. Ecclesiastes Prod. Ministries, 374 S.C. at 502, 649 S.E.2d at 498-99 (quoting Brady, 222 S.C. at 246-47, 72 S.E.2d at 195 ("*where possible*, all the language used should be given a reasonable meaning" (emphasis added); Reyhani v. Stone Creek Cove Condominium II Horizontal Prop. Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 385) (contracts "will be interpreted so as to give effect to all of their provisions, *if practical*") (emphasis added). After all, "[c]ommon sense and good faith are key principles of contract construction." Richland-Lexington Airport Dist. v. American Airlines, Inc., 306 F. Supp. 2d 548, 564 (D.S.C. 2002) (citing C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988)).

There are real practical problems in allowing Grand Strand to manipulate the payment process in Blue Cross's PPO as Ms. Beverly's claims allege. It would upset every Blue Cross Member's reasonable understanding about how their insurance coverage works. For them, it is a fairly simple three-party transaction which, as its core, means that if a Member provides proof of insurance and stays in network, then the bills go to Blue Cross not the Member. Plus, reading the Agreement's third-party beneficiary exclusion to bar Ms. Beverly's claims effectively means her losses are without a remedy. Grand Strand claims otherwise, suggesting that, while a PPO is a three-party system, there is a distinct dichotomy between the contracts in which the hospital and insured patient derive their benefits. (Pet. Br. at 6-7). Accordingly, Grand Strand argues, Ms.

Beverly's only potential breach of contract claim arises from her insurance contract and her only possible opponent is Blue Cross. Id. Grand Strand cedes only that Blue Cross could allege a claim under the Agreement. Id.

But, offering up Blue Cross as an alternative defendant is not a viable means for Ms. Beverly to seek redress. It was Grand Strand, not Blue Cross, who demanded and accepted $ 8,000 from Ms. Beverly after making a contractual promise not to. (R. p. 142 ¶¶ 22-24). Under the elements of her breach of contract and unjust enrichment claims, Ms. Beverly has chosen the proper party to account for her losses. Finally, the Court should consider whether Grand Strand's proposed interpretation of the Agreement clears the low bar of good faith. Grand Strand insists there is a strict dichotomy between Ms. Beverly's insurance contract with Blue Cross and Grand Strand's Agreement with Blue Cross that bars Ms. Beverly from claiming intended third-party beneficiary status. (Pet. Br. at 6-7). Yet, if the need arose, Grand Strand would likely have no qualms with seeking to enforce a contract between an insurer and its insured. Hospitals routinely claim they are third-party beneficiaries of insurance contracts when they believe doing so is their only means to ensure payment for their services. See e.g. Vencor Hosps. v. Blue Cross Blue Shield of R.I., 169 F.3d 677, 680 (11th Cir. 1999); U.S. v. Allstate Ins. Co., 910 F.2d 1281, 1283 n. 2 (5th Cir. 1990) (collecting cases where medical providers claimed to be beneficiaries of auto insurance policies). Thus, Grand Strand's reading of the Agreement is at odds not only with its language but the context in which it was written and the generally understood way in which a PPO operates.

d. Grand Strand's Argument Conflicts with Other Courts' Interpretations of Similar Contracts.

Other courts have refused to extend a third-party beneficiary exclusion in a hospital-insurer contract to bar claims by health insurance customers like Ms. Beverly. Beverly, 429 S.C. at 510, 839 S.E.2d at 472 (citing Dorr v. Sacred Heart Hospital, 597 N.W.2d 462, 475 (Wis. App. 1999)

and Aetna Life Ins. Co. v. Huntingdon Valley Surgery Ctr., Civil Action No. 13-03101, 2015 WL 1954287 (E.D. Pa. Apr. 30, 2015)). Grand Strand faults the Court of Appeals for citing these cases, arguing they were used as an improper substitute for supportive South Carolina law. Resp. Br. at 11. However, these courts ruled based on the same interpretive principles South Carolina applies.

Dorr considered very similar facts involving a car accident victim whom a hospital charged directly at non-discount rates in violation of its contractual obligations because the hospital hoped to collect a non-discounted fee for its services. 597 N.W.2d at 433. As part of a "Provider Agreement" between the hospital and the plaintiff's insurer, the hospital agreed that "in no event . . . shall [the hospital] bill, charge . . . or have any recourse against Members" of the health insurance plan. Id. The Wisconsin Court of Appeals read this provision as a promise by the hospital that "unambiguously negates the existence" of the plaintiff's payment obligation. Id. at 443-44. While the contract also included a broad third-party beneficiary exclusion[6], Dorr found it did not apply at least not to the "clear and unambiguous" promise the contract made to the plaintiff in a different provision as that provision's terms were "designed specifically for the purpose of protecting [the insurance plan's] subscribers." Id. at 450; see also Aetna Life Ins. Co., 2015 WL 1954287, at * 8-9 (denying motion to dismiss where substantive portions of contract rendered third-party beneficiary exclusion ambiguous).

More broadly, several state supreme courts have held that similarly situated insured patients are intended third-party beneficiaries of their insurer's contract with a hospital for the purpose of securing the patient's right to avoid unpermitted bills. In 2014, the Tennessee Supreme Court noted that a decade earlier the court had "already held that persons insured by an insurance

[6] The exclusion provided that "Except as otherwise specifically provided herein, this Agreement shall not create or be construed to create any rights in any manner whatsoever in any other person or entity as a third party beneficiary." Dorr, 597 N.W.2d at 450.

company are intended third party beneficiaries of the contract between their insurance company and a hospital." West v. Shelby Cnty. Healthcare Corp., 459 S.W.3d 33, 45 (Tenn. 2014) (citing Benton v. Vanderbilt Univ., 137 S.W.3d 614, 620 (Tenn. 2004)). Benton is especially persuasive authority because, while the issue arose in an arbitration context, its crucial facts are nearly identical to the current case. The Benton plaintiff was an insurance customer of Blue Cross of Tennessee and claimed third-party beneficiary status based on promises made to her in a contract between her insurer and a hospital entitled "Institution Agreement." 137 S.W.3d at 616. Like Ms. Beverly, the Benton plaintiff relied primarily on the contract's section 6.1, which the court described as including a provision requiring that the hospital "would not bill any Blue Cross member . . . ." Id. More recently, the Oklahoma Supreme Court reached a similar conclusion, holding that "we have no trouble inferring that a PPO agreement is made for the express benefit of the insurance beneficiaries receiving services under it." Cates v. Integris Health, Inc., 412 P.3d 98, 103 (Okla. 2018); see also Smallwood v. Cent. Peninsula Gen. Hosp., 151 P.3d 319, 325 (Alaska 2006) (finding Medicaid recipient was third-party beneficiary to contract between hospital and state that demanded the hospital "make no additional charge to the recipient").

Across the country, a growing consensus is lining up against Grand Strand's position. The South Dakota Supreme Court has held that a self-insured medical plan's members are "directly and primarily benefitted" by a contract between the plan and a hospital. Jennings, 802 N.W.2d at 923. In Nahom, a review of another Blue Cross-hospital contract led the Arizona Court of Appeals to find a provision requiring the hospital to accept a discount reimbursement rate from the insurer was "clearly a benefit" to the insurer's custom and that the benefit was "both intentional and direct." 885 P.2d at 1117; see also Scroggins v. LifePoint Health, Inc., Case No. 2:16-cv-338-ALB, 2020 WL 1126172, at * 3 (M.D. Ala. Mar. 6, 2020) ("As an intended beneficiary of her

health insurance company's contract with the hospital, [insured car accident victim] almost certainly has a breach of contract claim against the hospital").

In sum, the Court of Appeals correctly determined the Agreement's third-party beneficiary exclusion did not bar Ms. Beverly's claims because the Agreement's full language and its context show its parties intended to provide direct benefits to Blue Cross Members.

2. The Agreement's Purported Third-Party Beneficiary Exclusion Excepts Ms. Beverly's Claims.

The Court of Appeals found Ms. Beverly was the Agreement's intended third-party beneficiary for two reasons. First, as discussed above, the purported exclusion from section 16.16 on which Grand Strand relies does not undo the unambiguous promises and direct benefits Ms. Beverly receives elsewhere in the Agreement. Second, the exclusion expressly limits its scope with an exception encompassing Ms. Beverly's claims. Section 16.16 reads in pertinent part:

> 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 . . . a Member's right to receive Covered Services pursuant to the terms of this Agreement.

Grand Strand dismisses sentence 2 as a "qualification," not an exception, to what it insists is sentence 1's "absolute" disclaimer of third-party beneficiaries. (Pet. Br. at 12-13). Grand Strand only reaches this conclusion by literally rewriting section 16.16's language to fit its theory (Pet. Br. at 13)—a function Grand Strand later acknowledges the Court may not perform. Pet. Br. at 14 (citing <u>Lewis v. Premium Inv. Corp.</u>, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002)). The key here is sentence 2's protection of Ms. Beverly's right to obtain medical services from Grand Strand "pursuant to" the Agreement's terms. Since Ms. Beverly's Complaint alleges Grand Strand refused to heed those terms, the exclusion does not apply to her claims.

The meaning of section 16.16's second sentence must be determined by evaluating the language the Agreement's parties chose. Each operative word must be given its "plain, ordinary, and popular" meaning to determine what its parties intended when the Agreement was formed. MGC Mgmt. of Charleston, Inc., 336 S.C. at 549, 520 S.E.2d at 823 (citing Fritz-Pontiac-Cadillac-Buick v. Goforth, 312 S.C. 315, 440 S.E.2d 367, 369 (1994)). The "notwithstanding" clause at the beginning of sentence 2 intends to provide an exception or limitation to sentence 1's third-party beneficiary exclusion.[7] The remainder of sentence 2 defines the exception's scope. The purported third-party beneficiary exclusion would not bar a Blue Cross Member's pursuit of "Covered Services pursuant to the terms of this Agreement." By its plain and ordinary meaning, the key phrase "pursuant to" means "in compliance with" or "in accordance with." Black's Law Dictionary 1272 (8th ed. 1999).

This is the dominant interpretation of the phrase among courts across the country. See e.g. State v. Niesen-Pennycuff, 973 N.E.2d 221, 225 (Ohio 2012) (noting the phrase "pursuant to" demands "rigid compliance" with the designated authority); Risdall v. Brown-Wilbert, Inc., 753 N.W.2d 723, 730 n. 6 (Minn. 2008) (noting that "pursuant to" is defined as "[i]n compliance with, 'in accordance with,' 'as authorized by' and 'under'"); Dep't of Human Resources v. Long, 458 S.E.2d 914, 915 (Ga. App. 1995) (finding "pursuant to" designated statute meant "in accordance with the procedures and criteria set forth in that chapter"). Even when the words of the phrase are considered individually, they both connote a need for compliance or conformity with the

[7] See e.g. Record Town, Inc. v. Sugarloaf Mills Ltd. P'ship of Ga., 687 S.E.2d 640, 643 (Ga. App. 2009) (defining "notwithstanding" to mean "without prevention or obstruction from"); See e.g., Wells Fargo Bank, Minnesota, N.A. v. North Cent. Plaza, L.P., 194 S.W.3d 723, 728 (Tex. App. 2006) (finding "notwithstanding" clause in contract meant items following clause "will not be subject to the obligations imposed by" the preceding clause); Waliczek v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago, 741 N.E.2d 272, 275 (Ill. App. 2000) (interpreting "notwithstanding" clause as "an exception" to previous statutory provision).

designated rule or contract provision. Getz v. Peace, 918 N.W.2d 233 (Minn. App. 2018) (citing The American Heritage Dictionary of the English Language 1423, 1814 (4th ed. 2006) (defining "pursuant" to mean "proceeding from and conformable to" and defining "to" to mean "in accord with"). Thus, regardless of the purported third-party beneficiary exclusion, Ms. Beverly may pursue claims designed to ensure she receives medical services from Grand Strand in a manner that complies with and conforms to the Agreement's terms.

That is precisely the purpose of the contract and equitable claims in Ms. Beverly's Complaint. She alleges the medical services Grand Strand provided were not "pursuant to" the Agreement's terms because, while the Agreement prohibited Grand Strand from billing Blue Cross members (Agreement § 6.1), Ms. Beverly was billed directly on two occasions for a total of $ 8,000. (R. p. 142 ¶¶ 21-22); Beverly, 429 S.C. at 509, 839 S.E.2d at 472 (finding Grand Strand's failure to bill Blue Cross was not "pursuant to" the Agreement because "the language of the Agreement required Grand Strand to do just that"). Ms. Beverly also alleges Grand Strand did not act "in compliance with" or "in accordance with" with the terms of Agreement §§ 6.2-6.4 when it failed to submit bills for her care to Blue Cross and when it failed to abide by the agreed-upon discount reimbursement rate. (R. p. 142 ¶¶ 18, 24; R. p. 144 ¶¶ 33-36; R. p. 146 ¶¶ 52-55).

The essence of Grand Strand's argument is that the Court should apply a different meaning to the phrase "pursuant to." Grand Strand claims sentence 2 only prevents it from denying medical services to Blue Cross Members. (Pet. Br. at 12-13). However, this reading is not true to the Agreement's language. If sentence 2 only guaranteed Blue Cross Members would be treated, then it would have been much shorter. A provision that guaranteed a "Member's right to received

Covered Services[8]" would have accomplished that purpose. But, by adding the final phrase ("pursuant to the terms of this Agreement"), the Agreement's parties showed they intended to guarantee Grand Strand provided services to Blue Cross Members in the ways the Agreement required. The parties also chose not to restrict the scope of that final phrase. Instead of guaranteeing Members' right to some subset of the Agreement's terms, Grand Strand and Blue Cross extended the exception to all such terms that confer benefits on Blue Cross Members.

Moreover, to read sentence 2 as Grand Strand suggests overlooks the Agreement's purpose. The Agreement did not just require Grand Strand to bandage Ms. Beverly's wounds and diagnose her injury, it also required Grand Strand to process the bill for those services in a very specific way to a very specific source for a predetermined amount of compensation. In fact, when viewed as a whole, the Agreement focused heavily on how Covered Services would be paid for and how payment would be processed. Portions of Article IV and Article VIII discuss the quality of medical care Grand Strand provides, but the voluminous provisions of Articles VI and VII are dedicated to the administrative and financial aspects of providing Covered Services.

Finally, Grand Strand errs in its claim that reading sentence two as an exception "effectively delete[s]" sentence one. (Pet. Br. at 13-14). Ms. Beverly never claimed to be a party to the Agreement with rights to enforce all of its provisions. She does not, for example, claim power to challenge Grand Strand's conduct in the operation of the "Utilization Management Program," through which Grand Strand and Blue Cross address the medical necessity of various

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[8] The Court should also reject Grand Strand's contention that the exception does not apply based on the Agreement's definition of "Covered Services." (Pet. Br. at 13) (quoting Agreement at 1 § 2.6). The medical care Ms. Beverly received on September 6, 2012, meets that definition since the Complaint alleges she was treated on an outpatient basis at Grand Strand for medical diagnostic services reimbursable under Ms. Beverly's Blue Cross health insurance policy. (R. p. 141 ¶¶ 12-17).

services Grand Strand offers. (Agreement §§ 7.1-7.10). Ms. Beverly only seeks to enforce those promises made directly to her (e.g. Grand Strand "will not solicit any payment from [Blue Cross] Members") or that directly benefit her (e.g. Grand Strand "shall seek payment for Covered Services solely from [Blue Cross]"). In contrast, accepting Grand Strand's interpretation of section 16.16 sentence 2 would "effectively delete" these direct promises because it would remove any viable means for enforcing them.

In sum, even if the Court were to find the Agreement, taken as a whole, intended to generally exclude third-party beneficiaries, the Court of Appeals correctly determined the plainly stated exception to that exclusion applies to the legal and equitable claims in Ms. Beverly's complaint.

3. Ms. Beverly May Allege Contract and Equitable Claims Together at the Pleading Stage, and Grand Strand Should Not be Permitted to Retain Ms. Beverly's Payment Under Any Circumstances.

Ms. Beverly's third cause of action alleges unjust enrichment, an equitable claim grounded in the notion that Grand Strand has Ms. Beverly's money under circumstances that make it unfair for Grand Strand to retain it. As the Court of Appeals determined, Ms. Beverly may plead this claim as an alternative to her breach of contract claim. Moreover, Grand Strand errs in arguing Ms. Beverly cannot recover under this theory in the absence of a contract claim. Even if Grand Strand's dubious contract defenses were eventually successful, it would still be grossly inequitable for Grand Strand to keep Ms. Beverly's money.

Grand Strand first argues breach of contract and unjust enrichment cannot coexist when the latter claim is based on contractual violations. Pet. Br. at 18-21. Ms. Beverly agrees she cannot recover on both claims, but, South Carolina law allows her to plead both as alternative theories for relief. Beverly, 429 S.C. at 515, 839 S.E.2d at 475 (citing Williams Carpet Contractors, Inc. v.

Skelly, 400 S.C. 320, 327-29, 734 S.E.2d 177, 181 (Ct. App. 2012) (allowing quantum meruit claim to continue in contract action because case law only "bars *recovery* under both theories") (emphasis in original); see also JASDIP Props. SC, LLC v. Estate of Richardson, 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App. 2011) (citing Franke Assocs. v. Russell, 295 S.C. 327, 332, 368 S.E.2d 462, 465 (1988) (describing breach of contract and unjust enrichment as "alternative rather than inconsistent remedies")). Grand Strand cites a series of cases holding that, once a contract is established as viable and applicable, then a breach of contract claim is an aggrieved party's sole means for recovery.

However, as Grand Strand admits, these cases arose at later procedural stages. Pet. Br. at 20 (acknowledging different "procedural history" here than in cited cases). Grand Strand spotlights one unreported federal district court order addressing the issue on summary judgment. Id. at 18-19 (citing Gee v. Delta Speir Plantation LLC, Civil Action No. 9:18-cv-02755-DCN, 2020 WL 4674150 (D.S.C. June 11, 2020)). Even when Grand Strand points to a case decided on a Rule 12(b)(6), SCRCP motion, the circumstances are crucially different. Pet. Br. at 19-20 (citing Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 423-24, 559 S.E.2d 362, 364 (Ct. App. 2001)).[9] Charleston County School District dismissed an unjust enrichment counterclaim where, through the paragraphs in its answer, the defendant admitted a valid contract governed their relationship. Id. at 425, 559 S.E.2d at 364. A pleading acknowledgment constitutes a judicial admission. Id. (citing Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)).

[9] Grand Strand also cites Swanson v. Stratos, 350 S.C. 116, 564 S.E.2d 117 (Ct. App. 2002) which was decided on post-judgment motions and Boldt Co. v. Thompson Electrical & American Contractors Indemnity Co., 820 F. Supp. 2d 703 (D.S.C. 2007), decided on a Fed. R. Civ. P. 12(c) motion on the pleadings.

Since this case is only at the earliest pleading stage, the Court of Appeals properly relied on Skelly as permitting Ms. Beverly to plead both claims.

Finally, Grand Strand argues Ms. Beverly's unjust enrichment claim should be dismissed even if the Court finds she lacks authority to enforce the Agreement as a third-party beneficiary. (Pet. Br. at 21-22). In other words, Grand Strand asks the Court to find, as a matter of law at the pleading stage, Ms. Beverly has no legal *or equitable* remedy for the misconduct her complaint alleges. That contention cannot be squared with the elements of unjust enrichment under South Carolina law or the broader notion of equity. Ms. Beverly's equitable claim is for unjust enrichment, which South Carolina courts equate with pursuit of the equitable remedy of restitution. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003) (citing Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 434, 322 S.E.2d 474, 478 (Ct. App. 1984)). To defeat a Rule 12(b)(6) motion on this claim, Ms. Beverly must only allege (1) she conferred on Grand Strand a non-gratuitous benefit; (2) Grand Strand realized some value from the benefit; and (3) it would be inequitable for Grand Strand to retain the benefit without paying Ms. Beverly for its value. Sauner, 354 S.C. at 409, 581 S.E.2d at 167 (citing Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988)).

Ms. Beverly's complaint alleges all three elements. She conferred a benefit on Grand Strand in the form of $ 8,000 in payments. (R. p. 142 ¶ 22; p. 146 ¶ 52). Those payments were not gratuitous; they were made only because Grand Strand sent a bill demanding them. (R. pp. 142 ¶¶ 21-22). In turn, Grand Strand profited from receiving the payments and, as the third element requires, Ms. Beverly alleges it would be unfair for Grand Strand to retain her payments under the circumstances. (R. p. 142 ¶ 20; p. 146 ¶¶ 53-55). Unambiguous allegations like these, which are

backed with factual allegations, successfully state a claim for equitable relief under the unjust enrichment/quantum meruit/restitution claim recognized by South Carolina law.

Grand Strand offers two flawed opposing arguments. First, Grand Stand contends that, should the Court reverse the Court of Appeals on Ms. Beverly's intended third-party beneficiary status, then allowing an equitable claim to stand would allow her to claim the same status under the guise of equity. (Pet. Br. at 21). But, Grand Strand misunderstands the essential nature of Ms. Beverly's equitable claim and equity more generally. An unjust enrichment/restitution claim is a modern designation for the historic doctrine of quasi-contracts, which presents an equitable remedy in some circumstances where strict contract requirements would prevent recovery at law. Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988) (citing Martin v. Bozeman, 173 So.3d 382 (La. Ct. App. 1965) ("The terms 'restitution' and 'unjust enrichment' are modern designations for the older doctrine of quasi-contracts")). Even assuming some rule of contract law could prevent Ms. Beverly from qualifying as an intended third-party beneficiary, that rule should not prevent her from pursuing an equitable claim.

Second, Grand Stand argues Ms. Beverly has not properly pled unjust enrichment's third element because, if she lacks intended third-party beneficiary status under the Agreement, then it was not inequitable for Grand Strand to charge her or to demand a non-discounted rate for her medical care. (Pet. Br. at 22-23). Like the remainder of Grand Strand's brief, this argument ignores Grand Strand's explicit promise to Blue Cross Members like Ms. Beverly in the Agreement's section 6.1. Beyond that, Grand Strand does not even attempt to explain how, regardless of Ms. Beverly's status relative to the Agreement, its bill to her comports with notions of equity and fairness. Grand Strand seems to say that, if Ms. Beverly cannot enforce the Agreement, then its bill to her was not unfair. But, the conclusion does not follow its premise. Even in that scenario,

Grand Strand promised it would "seek payment . . . solely from" Blue Cross. (Agreement at 6 § 6.1). With that provision alone, a court could find Grand Strand's bill to Ms. Beverly was improper and its retention of her money inequitable. The unfairness is further amplified by Grand Strand's unambiguous promise to accept a discount rate as payment in full. (Agreement at 6 § 6.4). In short, even if the Agreement had omitted Ms. Beverly entirely, Grand Strand still committed wrongdoing and still should not be permitted to profit from it.

For the crucial third element of unjust enrichment, the Court should be guided by the notion that equity "stands on the very foundations of right and fair dealing, and it considers and weighs conduct of men in their dealings with each other and gives that effect and meaning to their actions which common sense and justice dictate." Kelly v. McCray, 278 S.C. 88, 90, 292 S.E.2d 587, 589 (1982) (citing Gen. Motors Acceptance Corp. v. Herlong, 248 S.C. 55, 149 S.E.2d 51 (1966)). A court may "look beneath the rigid rules of the law" or even search beyond a document's language to resolve a dispute because equity's primary objective is to "seek substantial justice" and to prevent a party from profiting from its own wrongdoing. State ex rel. Daniel v. Strong, 185 S.C. 27, 192 S.E. 671, 681 (1937); Smith v. Todd, 155 S.C. 323, 152 S.E. 506, 509 (1930).

At its core, the deal Grand Strand made when it joined the PPO was simple. Grand Strand obtained benefits (e.g. access to Blue Cross's extensive membership, guaranteed reimbursements from Blue Cross for Covered Services) and undertook responsibilities (e.g. accepting less than open market value for services to Blue Cross Members, billing Blue Cross alone for those services). Ms. Beverly's lawsuit alleges Grand Strand wants to claim all the benefits while reserving the right to decline a crucial responsibility. Grand Strand used an aggressive, ongoing marketing campaign to draw in Blue Cross Members with the implicit promise Grand Strand had accepted the PPO structure with all that entailed. (R. p. 84). If Ms. Beverly's complaint allegations

prove true, then Grand Strand's intentional effort to subvert that structure supports her breach of contract claim. Failing there, equity demands Ms. Beverly be allowed the chance to claw back from Grand Strand a payment it had no right to demand for an amount far above what it had agreed to accept.

CONCLUSION

Based on the arguments stated above, Ms. Beverly and the putative class respectfully request the Court affirm the Court of Appeals' ruling. Grand Strand made a direct promise to Ms. Beverly and other Blue Cross Members in the Agreement that she should be allowed to enforce as an intended third-party beneficiary. Section 16.16's purported third-party beneficiary exclusion does not undo this promise and its express exception authorizes Ms. Beverly's claims. Reading the Agreement as Grand Strand suggests would violate South Carolina contract interpretation rules, undermine the structure on which a PPO operates, and place this Court at odds with state supreme courts across the country. Moreover, Ms. Beverly's equitable claim is proper at the pleading stage even though she also seeks a contract remedy. Grand Strand's assertion that its bill to Ms. Beverly was fair game does not respect the Agreement language it co-wrote and does not comport with the most basic notions of equity.

Respectfully submitted,

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