

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Mar 18 2021

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2016-CP-26-0166
Appellate Case No. 2020-000710

Jeanne Beverly, individually and on behalf of others similarly situated,Respondent,

v.

Grand Strand Regional Medical Center, LLC Petitioner.

**PETITIONER GRAND STRAND REGIONAL
MEDICAL CENTER, LLC'S REPLY BRIEF**

James Lynn Werner; SC Bar No. 6029
William R. Thomas; SC Bar No. 16348
Katon E. Dawson Jr.; SC Bar No. 101167
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100
Post Office Box 1509 (29202)
Columbia, South Carolina 29201
Telephone: (803) 255-8000
Facsimile: (803) 255-8017
jimwerner@parkerpoe.com
willthomas@parkerpoe.com
katondawson@parkerpoe.com

*Attorneys for Petitioner Grand Strand Regional
Medical Center, LLC*

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENTS.....	3
I. Beverly argues in favor of new standards of contract drafting and interpretation that do not conform with the well-established principles of law in South Carolina.....	3
II. The Institutional Agreement does not contain direct promises to Beverly from Grand Strand.	6
A. Article I of the Institutional Agreement.....	8
B. Article II of the Institutional Agreement	9
C. Article VI of the Institutional Agreement.....	9
III. Beverly argues for third-party beneficiary status from distinguishable, inapplicable authorities from other jurisdictions interpreting different contract language.	11
A. Authorities from other jurisdictions that do not address third-party beneficiary disclaimers in the agreements are inapplicable and unpersuasive.	11
B. The Institutional Agreement does not contain any language that exempts Beverly from the third-party beneficiary disclaimer, as in cases cited from other jurisdictions.....	14
IV. Beverly’s claim for unjust enrichment also fails, because it likewise depends on her ability to enforce the Institutional Agreement.	16
A. Beverly cannot enforce the terms of the Institutional Agreement indirectly by claiming unjust enrichment.....	16
B. Once the Court of Appeals found Beverly was a third-party beneficiary with the right to enforce the Institutional Agreement, Beverly lost her right to pursue a claim for unjust enrichment—even in the alternative.	17
CONCLUSION.....	20

TABLE OF AUTHORITIES

Page(s)

Cases

ABB, Inc. v. Integrated Recycling Grp. of SC, LLC,
854 S.E.2d 171, 175 (Ct. App. 2021), *reh'g denied* (Feb. 12, 2021).....7

Aetna Life Ins. Co. v. Huntingdon Valley Surgery Ctr.,
No. CIV.A. 13-03101, 2015 WL 1954287 (E.D. Pa. Apr. 30, 2015).....15, 16

Alabama Dep't of Revenue v. F.D.I.C.,
No. 2:11-CV-272-MEF, 2012 WL 2716273 (M.D. Ala. July 9, 2012).....4

Benton v. Vanderbilt University,
137 S.W.3d 614 (Tenn. 2004).....11, 12

Bob Hammond Const. Co. v. Banks Const. Co.,
312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994).....7, 13

Cates v. Integris Health, Inc.,
412 P.3d 98 (Okla. 2018).....12

Charleston County School District v. Laidlaw Transit, Inc.,
348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001).....19

Chet Adams Co. v. James F. Pedersen Co.,
307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992)7

Crenshaw v. Erskine Coll.,
432 S.C. 1, 850 S.E.2d 1 (2020), *reh'g denied* (Nov. 30, 2020).....5, 6

Dorr v. Sacred Heart Hospital,
597 N.W.2d 462 (Wis. Ct. App. 1999).....14, 15

Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC,
374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007).....4, 6, 7

Ellie, Inc. v. Miccichi,
358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004).....6

*GECCMC 2005-C1 Plummer St. Office Ltd. P'ship v. JPMorgan Chase Bank,
Nat. Ass'n*,
671 F.3d 1027 (9th Cir. 2012)4

Gilstrap v. Culpepper,
283 S.C. 83, 320 S.E.2d 445 (1984)13

<i>Jennings v. Rapid City Regional Hospital, Inc.</i> , 802 N.W.2d 918 (S.D. 2011)	12, 13
<i>Nahom v. Blue Cross & Blue Shield of Arizona, Inc.</i> , 885 P.2d 1113 (Ariz. Ct. App. 1994)	13
<i>Swanson v. Stratos</i> , 350 S.C. 116, 564 S.E.2d 117 (Ct. App. 2002)	17, 19
<i>Touchberry v. City of Florence</i> , 295 S.C. 47, 367 S.E.2d 149 (1988)	5
<i>Whitlock v. Stewart Title Guar. Co.</i> , 399 S.C. 610, 732 S.E.2d 626 (2012)	4
Other Authorities	
Merriam-Webster Dictionary, <i>Consensus</i> , https://www.merriam-webster.com/dictionary/consensus (last visited March 11, 2021)	3

INTRODUCTION

This appeal involves the issue of whether a non-party (“Beverly”) to a private business contract (the “Institutional Agreement”) between two sophisticated business entities—Grand Strand Regional Medical Center, LLC (“Grand Strand”) and Blue Cross Blue Shield of South Carolina (“BCBS”)—can sue to enforce that business contract despite the fact that the actual parties to the contract included in it direct, express statements that those contracting parties do not intend there to be any third-party beneficiaries to their contract and that the contract shall not be construed to make anyone a third-party beneficiary. Beverly would have the Court ignore the plain language of the Institutional Agreement which stipulates that there are no third-party beneficiaries and that the Agreement should not be construed to create them, and invites the Court to search for the potential existence of ancillary or incidental benefits which she or others might claim and thus allow her to enforce the Institutional Agreement as though she was a party. South Carolina law does not sanction either of Beverly’s positions.

In opposing Grand Strand’s positions and arguments, Beverly has made numerous assertions of fact not in the record and lectured the Court about how the marketplace for healthcare and health insurance should work and be controlled. Furthermore, Beverly’s opposition relies overwhelmingly on the following false premises and outright misstatements:

1. Beverly falsely asserts, time and time again, that Grand Strand made “a direct” promise to her in the Institutional Agreement. (Respondent’s Brief p. 4).
2. Beverly falsely asserts that section 6.1 of the Institutional Agreement constitutes another “direct” promise by Grand Strand to her. (Respondent’s Brief p. 7-8).
3. Beverly falsely asserts that in Section 1.1 of the Institutional Agreement Grand Strand agreed that the Institutional Agreement was “for the benefit of . . . members.” (Respondent’s Brief p. 5).
4. Beverly falsely asserts that Grand Strand participated in writing an “interpretive provision” in the Institutional

Agreement acknowledging that it “must be construed for the benefit of [Blue Cross] Members.” (Respondent’s Brief p. 7).

In truth, the record in this case reflects the simple and basic facts that:

1. Beverly was never a party to, or signatory of the Institutional Agreement and never had any communications with BCBS or Grand Strand about it.
2. Beverly never alleges that she was aware of the Institutional Agreement, or its terms, when she obtained health insurance coverage from BCBS or sought and received medical services from Grand Strand; and, in fact, the Institutional Agreement is a confidential document intended to be shared only between Grand Strand and BCBS.
3. Grand Strand did not make any direct promises to Beverly in, or through, the Institutional Agreement.
4. Section 1.1 of the Institutional Agreement is a mere recital and a unilateral statement by BCBS that it established its PPO for the benefit of its Members. There is no statement by Grand Strand, or BCBS, that the Institutional Agreement was in any way for the benefit of the PPO Members. (R. 231).
5. There is no expression of agreement, or statement, in the Institutional Agreement that it “must be construed for the benefit of [Blue Cross] Members.”
6. Section 3.2 of the Institutional Agreement, a general provision of the entire Agreement, expressly sets forth the agreement of the contracting parties (BCBS and Grand Strand) that “this Agreement constitutes a contract solely between [Grand Strand] and [BCBS].” (R. 233).
7. Section 16.16 of the Institutional Agreement states clearly and unequivocally,

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

(R. 250).

In further editorializing her arguments, Beverly falsely asserts that “across the country, a growing consensus is lining up against Grand Strand’s position.” (Respondent’s Brief p. 19). Of

course this is not true. A “consensus,” which requires general agreement, group solidarity and unanimity, for Beverly’s assertions does not exist. *See* Merriam-Webster Dictionary, *Consensus*, <https://www.merriam-webster.com/dictionary/consensus> (last visited March 11, 2021). The absence of a consensus in support of her arguments is fairly obvious from Beverly’s citation to cases from, at most, about nine (9) state courts and three (3) federal districts out of the fifty (50) states and well more than one hundred (100) federal districts. The fact is that a small minority of courts have issued decisions upon which Beverly seeks to justify her contentions, and virtually all of those involve readily distinguishable contract language, facts, and circumstances in states with less well-settled law than South Carolina’s.

Finally, in the current posture of this case, Beverly cannot continue with her equitable claim for unjust enrichment. Under the existing Court of Appeals’ decision, the issue of the existence a valid contract covering this dispute has been resolved. With the existence of an undisputed express contract no longer an issue (and based on Beverly’s claim that the contract exists and covers her claim) she can no longer pursue the equitable claim. Furthermore, regardless of Beverly’s ability to enforce the Institutional Agreement as a third-party beneficiary, Beverly’s claim for unjust enrichment fails because it is nothing more than an alternative attempt to enforce the terms of the Institutional Agreement, and such claim is wholly dependent upon the enforcement of the discount terms of the Institutional Agreement (an express contract).

ARGUMENTS

I. Beverly argues in favor of new standards of contract drafting and interpretation that do not conform with the well-established principles of law in South Carolina.

Beverly contends that if Grand Strand wanted to exclude her from being able to enforce the Institutional Agreement as a third-party beneficiary then it should have “drafted, negotiated, or insisted on language *throughout the Agreement as a whole* that at least nominally supported that conclusion.” (Respondent’s Brief p. 11). This proposition flies in the face of the basic rules of

contract drafting and interpretation recognized in South Carolina. Beverly—a non-signatory to the commercial agreement between BCBS and Grand Strand—argues that a plain statement of the parties’ expressed intent is not enforceable unless it is repeated throughout an agreement. Notably, she cites no authority for this proposition, because it is not the law in South Carolina.

In South Carolina, “[t]he 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). This cardinal rule of contract interpretation does not require parties to repeat, over and over, a plain and unambiguous statement of their intentions. A plain and unambiguous statement of intent is effective. In South Carolina “[p]arties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.” *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 501-02 (Ct. App. 2007) (quoting *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976)). Under South Carolina law, courts may not seek to impose secret and unstated intentions that are contrary to a contract’s plain language. *See id.*

In other words, when parties to a contract plainly and directly state their intention that there are no third-party beneficiaries to their agreement, and that their intention is that the contract is not to be construed so as to create any, that outward expression of intent is controlling. *See, e.g., Alabama Dep’t of Revenue v. F.D.I.C.*, No. 2:11-CV-272-MEF, 2012 WL 2716273, at *4 (M.D. Ala. July 9, 2012) (finding a plaintiff was not an intended third-party beneficiary of a contract containing an express disclaimer of third-party beneficiaries because the plaintiff could not overcome the burden of proving it was an intended and direct beneficiary of a contract that expressly stated the contrary); *GECCMC 2005-C1 Plummer St. Office Ltd. P’ship v. JPMorgan Chase Bank, Nat. Ass’n*, 671 F.3d 1027, 1033-34 (9th Cir. 2012) (stating that the court examines the “precise language of the contract for a ‘clear intent’ to rebut the presumption that the [third

parties] are merely incidental beneficiaries” and there was no language in the contract sufficient to rebut the clear intent established through contract’s express disclaimer of third-party beneficiaries).

In this case, BCBS and Grand Strand stated their intention that the Institutional Agreement not be enforceable by third parties or be construed to create any third-party beneficiaries. Beverly now inappropriately invites the Court to rewrite the Institutional Agreement by declaring a secret intention contrary to the express language chosen by BCBS and Grand Strand. This goes against black-letter South Carolina law—which starts from the presumption that contracts are not enforceable by third parties. *See Touchberry v. City of Florence*, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988); *see also Crenshaw v. Erskine Coll.*, 432 S.C. 1, 24-25, 850 S.E.2d 1, 13 (2020), *reh'g denied* (Nov. 30, 2020) (“No jury—nor any judge—is permitted by law to rewrite a contract to impose liability based on some vague personal sense of what is fair.”). The Court should reject Beverly’s argument and reiterate that a clear and overriding statement of the parties’ intent need not be repeated *ad nauseam* to be enforced. Nothing in South Carolina law requires parties to repeat and restate their intention in a contract once that intention has been plainly set forth.

In truth, the intention that the Institutional Agreement remain a contract that is solely between Grand Strand and BCBS, with no third-party beneficiaries is repeated in the contract. For instance, the first sentence of Section 3.2 of the Institutional Agreement, states:

this Agreement constitutes a contract solely between Institution and Plan.

(R. 233) (emphasis added). Again, in Section 16.16, BCBS and Grand Strand reiterated and made the unequivocal statement that they do not intend for the Institutional Agreement to be enforceable by third-parties:

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).

The rules of contract interpretation in South Carolina mandate that these plain and unambiguous statements be given their full force and effect and that these terms be enforced as written. *See Ecclesiastes Prod. Ministries*, 374 S.C. at 498-99, 649 S.E.2d at 502-03. “The parties’ intention must, in the first instance, be derived from the language of the contract.” *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004) (citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). Specific language of a contract controls over any general language. *See Crenshaw*, 432 S.C. at 28, 850 S.E.2d at 15 (citing RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1979)).

The specific language of the Institutional Agreement regarding the intent of the parties to the contract as it relates to third-party beneficiaries is clear—the parties do not intend for the Institutional Agreement to be enforceable by third-parties. Beverly’s attempt to rely on possible ancillary benefits to BCBS plan members and tortured readings of the more general language of the Institutional Agreement is unavailing. The express, specific language of the Institutional Agreement disavowing third-party beneficiaries controls. A single direct statement of that intent by the parties is sufficient. “[T]he court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly.” *Id.* (quoting *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)). In sum, the Court should reject Beverly’s contention that the contract must include multiple repeated statements of the parties’ intent for that intent to be enforced. *See Ecclesiastes Prod. Ministries*, 374 S.C. at 498-99, 649 S.E.2d at 502-03.

II. The Institutional Agreement does not contain direct promises to Beverly from Grand Strand.

Beverly is admittedly not a party or signatory to the Institutional Agreement. Therefore, her ability to enforce that Agreement is dependent upon her qualifying as a recognized, direct and intended third-party beneficiary of the Institutional Agreement. Beverly’s roadblock is that the

Institutional Agreement contains an unequivocal express statement that the parties to the Institutional Agreement do not intend for any person to be a third-party beneficiary, and do not intend for it to be construed to create such a third-party beneficiary. *See Bob Hammond Const. Co. v. Banks Const. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994) (stating that a third party to a contract may not enforce that contract unless the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person). In her attempt to satisfy the burden of demonstrating that she is a direct and intended third-party beneficiary of the Institutional Agreement, Beverly misrepresents the facts and seeks to misconstrue multiple sections of the Institutional Agreement, while simultaneously ignoring the plain and unambiguous statement from the actual parties to the Institutional Agreement that they do not intend for the Agreement to be enforceable by third parties—like Beverly.

Pervasive in Beverly’s argument is the misstatement that Grand Strand made her a “direct promise.” (Respondent’s Brief p. 4).¹ The assertion of any direct promise by Grand Strand to Beverly in the Institutional Agreement is baseless. Interestingly, Beverly never alleged any such “direct promise” in her Complaint. Furthermore, review of the Institutional Agreement plainly reveals that Grand Strand makes no “direct promises” to Beverly (or anyone other than BCBS) in the Institutional Agreement. To the contrary, Grand Strand and BCBS expressly state that the Institutional Agreement is a contract solely between the two of them, and BCBS is not contracting as an agent for any other party (Section 3.2; R. 233), and that they both agree and expressly state that third parties like Beverly are not intended to be direct third-party beneficiaries with the right

¹ Beverly’s argument that the Institutional Agreement makes a “direct promise” to her was first raised in this case in her Reply Brief to the Court of Appeals and, therefore, she waived this argument by failing to timely assert it. *See ABB, Inc. v. Integrated Recycling Grp. of SC, LLC*, 854 S.E.2d 171, 175 (Ct. App. 2021), *reh’g denied* (Feb. 12, 2021) (“[A] party cannot raise an issue for the first time in an appellate reply brief.”); *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992) (holding an issue was waived when the appellant raised it for the first time in its reply brief).

to enforce the Institutional Agreement (Section 16.16; R. 250). While Beverly seeks to avoid the plain and unambiguous exclusion of third-party beneficiaries, she can cite no actual support for the contention about “direct promises” from Grand Strand to her. Review of the fragmented references from the Institutional Agreement argued by Beverly clearly demonstrates that no “direct promises” were made to Beverly in the Institutional Agreement. Indeed, she never saw the Agreement before filing her lawsuit to enforce it as a third-party beneficiary, and she had no knowledge of its actual terms. (R. 173). In fact, in opposing Grand Strand’s Motion to Dismiss Beverly argued that the terms of the Institutional Agreement were not enforceable against her because the terms are “secret” and “undisclosed.” (R. 173).

A. Article I of the Institutional Agreement

Beverly asserts that Grand Strand agreed “the PPO it joined was ‘for the benefit of . . . Members (Agreement at 1 § 1.1) and the Agreement would be interpreted accordingly.” (Respondent’s Brief p. 5). The Institutional Agreement does not say this. Beverly’s argument blatantly misstates the actual terms of the Institutional Agreement. The language of the Agreement supports only that BCBS, in a recital, represented it had established a PPO “for the benefit of its Members” (R. 231). Nowhere in the Institutional Agreement itself does it state that the Institutional Agreement was for the benefit of the BCBS policyholders—and nowhere does it say that the interpretation of the Institutional Agreement’s terms are to be in accordance with the formation of a PPO for the benefit of BCBS policyholders. To the contrary, when addressing the intention of BCBS and Grand Strand, those parties said unequivocally that the Institutional Agreement was a contract solely between them. As to the interpretation of their contract, Grand Strand and BCBS stated:

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

(R. 250). Beverly's assertion that the Institutional Agreement contains any other expression regarding the intent of Grand Strand and BCBS as to third-party beneficiaries is unsupported by the actual terms of the Institutional Agreement and is false.

B. Article II of the Institutional Agreement

Beverly argues that Section 2.16 of the Institutional Agreement supports her argument that the Institutional Agreement includes "direct promises" to her. (Respondent's Brief p. 9). Beverly contends that by signing the Institutional Agreement, Grand Strand made promises to her and intended to provide direct benefits to her as a Member of the PPO. Not so.

Section 2.16 of the Institutional Agreement is a "definition." (R. 233). In its entirety, it provides that a "'Preferred Provider Organization' means a network of providers under contract with [BCBS] whereby Benefit Contracts contain financial incentives for Members to seek Covered Services from such providers." (R. 233). Under the Institutional Agreement (Section 2.2), a "Benefits Contract" is the insurance policy between BCBS and a BCBS policyholder entitling the policyholder to receive "Covered Services." (R. 231). The BCBS policyholder's individual insurance policy (Benefits Contract) provides the financial benefits to the policyholder—not the Institutional Agreement.

In contrast to the Benefit Contracts between BCBS and its policyholders, the Institutional Agreement sets forth the terms of the relationship between Grand Strand and BCBS. It is wrong to represent that the Institutional Agreement contains direct and intended financial benefits for BCBS policyholders. Any direct and intended financial incentives in the Institutional Agreement are for Grand Strand and BCBS.

C. Article VI of the Institutional Agreement

Beverly repeatedly and incorrectly contends that section 6.1 of the Institutional Agreement is a "direct promise Grand Strand made to Ms. Beverly and all Blue Cross PPO Members."

(Respondent’s Brief p. 4). This claim is belied by—among other things—the fact that Beverly did not know the actual terms of the Institutional Agreement prior to initiating her lawsuit. (R. 173). The terms of the Institutional Agreement are confidential between Grand Strand and BCBS. (R. 248-49).

Contrary to Beverly’s false assertions, Article VI, section 6.1 of the Institutional Agreement does not contain a “direct promise” from Grand Strand to Beverly. The “promise,” as Beverly seeks to label it, in section 6.1, is a simple one between Grand Strand and BCBS that Grand Strand will send bills and seek payments which BCBS might owe under the other terms of the Institutional Agreement to BCBS. Section 6.1 then also describes the four categories of claims for which Grand Strand will seek payment directly from a BCBS policyholder. (R. 236).

Section 6.1 of the Institutional Agreement merely allows Grand Strand to provide medical services to BCBS policyholders and submit a bill to BCBS for the medical services rendered. This provision lets Grand Strand collect payments from a single entity even though it provides treatment to multiple patients. It allows Grand Strand to avoid having to bill and collect for covered services from multiple individual patients. The simplification of the billing process is merely more economical and solely for the benefit of Grand Strand and BCBS. (R. 236).

While individual BCBS policyholders, such as Beverly, might regard this billing and payment process to be beneficial for them, that benefit is merely incidental to the Institutional Agreement. Thus, section 6.1 in no way contradicts the express disclaimer of section 16.16 against third-party beneficiaries—*i.e.*, the clear renunciation of any right of BCBS policyholders to independently enforce the Institutional Agreement.

Based on the foregoing, the Court should reverse the Court of Appeals, and affirm the circuit court’s holding that Beverly is not a third-party beneficiary with the right to sue to enforce the Institutional Agreement.

III. Beverly argues for third-party beneficiary status from distinguishable, inapplicable authorities from other jurisdictions interpreting different contract language.

Beverly relies on a series of plainly inapplicable and distinguishable authorities from other jurisdictions in an effort to support her argument that BCBS and Grand Strand should be deemed to have intended to make her a third-party beneficiary of the Institutional Agreement. The authorities relied upon by Beverly are distinguishable from the instant case in two primary ways. First, Beverly cites several cases that do not involve provider agreements containing express third-party beneficiary disclaimers such as that set forth in section 16.16 of the Institutional Agreement. Second, Beverly cites to several cases in which the contract at issue contained a third-party beneficiary disclaimer but also contained express language that exempted the plaintiff's specific claim from the third-party beneficiary disclaimer.

A. Authorities from other jurisdictions that do not address third-party beneficiary disclaimers in the agreements are inapplicable and unpersuasive.

Beverly cites to the Tennessee Supreme Court's holding in *Benton v. Vanderbilt University*, 137 S.W.3d 614, 616 (Tenn. 2004) for the support of her argument that "several state supreme courts have held that similarly situated insured patients are intended third-party beneficiaries of their insurer's contract with a hospital." (Respondent's Brief p. 18). In *Benton*, the court found the plaintiff was a third-party beneficiary to the provider agreement between Vanderbilt Hospital and Blue Cross Blue Shield of Tennessee (and, therefore, the court compelled the plaintiff to arbitration pursuant to the arbitration clause in the provider agreement). *Benton*, 137 S.W.3d at 616.

Importantly, when the court in *Benton* found the patient was a third-party beneficiary of the provider agreement, it specifically noted that the patient was only entitled to enforce the terms of the provider agreement if "the parties to the contract have not otherwise agreed." *Id.* at 618. Unlike the circuit court in this case, the court in *Benton* did not find, and, made no reference to, a

clause in the agreement in that case precluding the existence of third-party beneficiaries. A third-party beneficiary disclaimer in the applicable agreement—such as in the Institutional Agreement—would clearly have altered the *Benton* court’s analysis and conclusion. Such a clause would have provided undeniable evidence to the court that the parties to the contract had “otherwise agreed” and third-parties were not entitled to enforce the terms of the contract. Therefore, reliance on the holding in *Benton* is unwarranted and inappropriate because the contract at issue in that case was evidently different from the Institutional Agreement here.

Beverly also argues that the Oklahoma Supreme Court opinion in *Cates v. Integris Health, Inc.*, 412 P.3d 98, 103 (Okla. 2018), reached a similar conclusion to the court in *Benton* in finding a PPO agreement was made for the benefit of the insured receiving services under it. (Respondent’s Brief p. 19). In truth, the Supreme Court of Oklahoma provided no rationale or support for its conclusion in that case and even stated in its opinion that the agreement at issue in that case was not included for review in the record on appeal. *Id.* at 101 n.8. Thus, the Supreme Court of Oklahoma’s holding in *Cates* provides no valid consideration for the issue before this Court: the proper interpretation of the Institutional Agreement.

Beverly also relies on the South Dakota Supreme Court holding in *Jennings v. Rapid City Regional Hospital, Inc.*, 802 N.W.2d 918, 922-23 (S.D. 2011). In *Jennings*, the South Dakota Supreme Court found that the plaintiff employees were third-party beneficiaries of their employer’s self-insurance contract with a managed care organization and the managed care organization’s contract with a hospital. 802 N.W.2d at 923-24. The South Dakota Supreme Court found that even though the agreements provided benefits to the contracting parties, the primary beneficiaries of the contracts were the employees. *Id.* at 923. In reaching this conclusion, the South Dakota court’s analysis of the applicable contract language made no mention of a third-party beneficiary disclaimer.

Next, Beverly relies on the Arizona Court of Appeals' opinion in *Nahom v. Blue Cross & Blue Shield of Arizona, Inc.*, 885 P.2d 1113, 1118 (Ariz. Ct. App. 1994) for the proposition that “a provision requiring the hospital to accept a discount reimbursement rate was ‘clearly a benefit’ to the insurer’s custom[er] and that benefit is ‘both intentional and direct.’” (Respondent’s Brief p. 19) (quoting *Nahom*, 885 P.2d at 1117). In *Nahom*, the agreement before the court apparently did not contain an express provision disclaiming or excluding third-party beneficiaries. The Arizona Court of Appeals’ conclusion that the plaintiff was a third-party beneficiary was therefore based on a very different analysis from the one required here. The existence of such a provision in the relevant agreement would have altered the court’s analysis because the *Nahom* court recognized that under Arizona law (like South Carolina law), the determining factor in interpreting the intent of the parties to a contract is the clear and unambiguous language they expressly use. *Id.* The holding in *Nahom* is simply inapplicable here, where the parties expressly disavowed third-party beneficiaries. *See Bob Hammond Const. Co.*, 312 S.C. at 425, 440 S.E.2d at 892 (stating that without evidence that the parties to a contract intended to create a direct, rather than incidental or consequential, benefit to a third party, the third party is not entitled to enforce the contract).

In the instant case, Beverly provides no argument or justification to overcome the plain language of the Institutional Agreement that there are no intended third-party beneficiaries. A court’s role is to interpret the language of a contract—not redraft it. *See Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984). The Institutional Agreement expressly disclaims third-party beneficiaries. The circuit court was correct in relying on the contract’s plain language to find that Beverly lacked standing to bring her claim. Accordingly, this 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 lacks standing to enforce the Institutional Agreement.

B. The Institutional Agreement does not contain any language that exempts Beverly from the third-party beneficiary disclaimer, as in cases cited from other jurisdictions.

Beverly likewise seeks to rely on authorities from other jurisdictions, interpreting different contract language, to support her attempted end-run around the Institutional Agreement's express disclaimer of third-party beneficiaries. Beverly argues that other contract terms cut against the disclaimer. She is wrong. In fact, section 16.16 of the Institutional Agreement not only disclaims the existence of any third-party beneficiary, it expresses the contracting parties' overriding intent that the Agreement "*shall not be construed to make any person or entity a third-party beneficiary.*" (R. 250) (emphasis added). This language removes all doubt and expresses an absolute prohibition on the roundabout interpretation Beverly seeks to apply.

The authorities upon which Beverly relies are readily distinguishable from the instant case, because in each of those cases the courts relied upon separate specific provisions in the contract that clearly exempted the plaintiff from the third-party beneficiary disclaimer.

In *Dorr v. Sacred Heart Hospital*, 597 N.W.2d 462, 472 (Wis. Ct. App. 1999) the Wisconsin Court of Appeals found the third-party beneficiary disclaimer in the applicable hospital services agreement did not apply to the plaintiff because the "Hold Harmless" provision of the agreement that the plaintiff was attempting to enforce expressly stated that it "shall be construed to be for the benefit of [the policyholders]; and shall supersede any oral or written contrary agreement now existing or hereinafter entered into between Provider and [policyholders] or persons acting on their behalf." Although the provider agreement in *Dorr* contained a third-party beneficiary disclaimer, the contract expressly carved-out the Hold Harmless provision by stating it was "for the benefit of" the policyholders. The instant case is distinguishable from *Dorr*, because the Institutional Agreement nowhere states that any of its provisions should be construed to provide Beverly or other third parties with a direct benefit.

Beverly also cites to the United States District Court for the Eastern District of Pennsylvania's opinion in *Aetna Life Ins. Co. v. Huntingdon Valley Surgery Ctr.*, No. CIV.A. 13-03101, 2015 WL 1954287, at *2 (E.D. Pa. Apr. 30, 2015) as support for her argument. In that case the court denied the defendant's motion to dismiss on the grounds that the contractual language regarding the exclusion of third-party beneficiaries was ambiguous. Huntingdon Valley Surgery Center contracted with two insurers—Beech Street and Multiplan—to provide medical services to the two insurers' policyholders at reduced rates. *Huntingdon Valley*, 2015 WL 1954287, at *1-2. Aetna, a health insurance provider like BCBS, contracted with Beech Street and Multiplan so that the Aetna policyholders could receive the negotiated rates that Huntingdon Valley agreed to in its contracts with Beech Street and Multiplan. *Id.* Aetna did not have a direct contract with Huntingdon Valley and, instead, used its contracts with Beech Street and Multiplan to obtain access to the rates negotiated between Huntingdon Valley and those insurers. Aetna's agreements with Beech Street and Multiplan included third-party beneficiary disclaimers. *Id.* at *8-9. Aetna subsequently failed to pay for the services rendered to its policyholders at the rates negotiated in the Beech Street and Multiplan contracts. Therefore, Huntingdon Valley sued Aetna to enforce the rates that Aetna contracted to pay under Aetna's contracts with Beech Street and Multiplan. *Id.* at *1. Aetna argued that Huntingdon Valley could not sue under Aetna's contracts with Beech Street and Multiplan because Huntingdon Valley was not a party to those contracts, and those contracts contained express disclaimers of third-party beneficiaries. *Id.* at *7. The court determined that Aetna could not be a third-party beneficiary with the right to enforce Beech Street and Multiplan's contracts with Huntingdon Valley, while also arguing that Huntingdon Valley was not a third-party beneficiary to Aetna's contracts with Beech Street and Multiplan. *Id.* at 10. Ultimately, the court found the agreements were "somewhat ambiguous on whether Huntingdon Valley [was] an intended third party beneficiary" and denied Aetna's motion to dismiss. *Id.*

Unlike the agreements in *Huntingdon Valley*, the Institutional Agreement’s disclaimer of third-party beneficiaries is not ambiguous. Beverly has not so argued, and the Court of Appeals did not find that it is. Unlike Aetna in *Huntingdon Valley*, Grand Strand is not attempting to enforce a contract as a third-party beneficiary while also disclaiming another parties’ right to enforce a contract as a third-party beneficiary. Rather, Grand Strand simply asserts that the Court must find the plain language of the Institutional Agreement does not permit third-party claims to enforce that agreement. The convoluting factors that created an ambiguity in *Huntingdon Valley* are not present in this case and the terms of the Institutional Agreement are not ambiguous.

Unlike the cases relied upon by Beverly, there is no evidence BCBS and Grand Strand intended Beverly to be a direct beneficiary of the Institutional Agreement. The mere argument that Beverly may experience incidental or consequential benefits from the Institutional Agreement does not change anything.

To the contrary, the Institutional Agreement contains an express disclaimer of third-party beneficiaries. Therefore, the authorities Beverly relies upon in support of her argument are distinguishable and inapplicable to the instant case.

IV. Beverly’s claim for unjust enrichment also fails, because it likewise depends on her ability to enforce the Institutional Agreement.

A. Beverly cannot enforce the terms of the Institutional Agreement indirectly by claiming unjust enrichment.

Beverly’s unjust enrichment claim is undeniably tethered to her ability to enforce the Institutional Agreement’s terms. In an effort to avoid this obvious connection, Beverly argues that it would be inequitable for her not to receive the benefits which the Institutional Agreement provides to BCBS. Beverly’s use of the term “equity” does not change her claim into anything more than a claim for breach of contract (the Institutional Agreement). If Beverly is not entitled to enforce the Institutional Agreement’s discounted rates, then those rates cannot form the

benchmark of her unjust enrichment claim. Therefore, Beverly's unjust enrichment claim fails because her claim is based on her purported right to enforce the Institutional Agreement's contracted rates for BCBS. *See Swanson v. Stratos*, 350 S.C. 116, 122, 564 S.E.2d 117, 20 (Ct. App. 2002) ("If 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*.").

Beverly argues that in opposing her claim for unjust enrichment, Grand Strand "ignores Grand Strand's explicit promise to Blue Cross Members like Ms. Beverly in the Agreement's section 6.1." (Respondent's Brief p. 27). This statement, although false, plainly reveals that Beverly's unjust enrichment claim is merely a veiled attempt to enforce the terms of the Institutional Agreement. Beverly's reliance on the Institutional Agreement's terms as the basis for, and measure of, her unjust enrichment claim demonstrates that this claim likewise seeks to enforce the Institutional Agreement's pricing terms. However, Beverly may only enforce the Agreement if she is a third-party beneficiary. She is not.

In short, Beverly's claim for unjust enrichment is encompassed within the terms of the Institutional Agreement, and South Carolina law is clear that she may not enforce that Agreement under a theory of unjust enrichment / *quantum meruit*. *See id.* 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.

B. Once the Court of Appeals found Beverly was a third-party beneficiary with the right to enforce the Institutional Agreement, Beverly lost her right to pursue a claim for unjust enrichment—even in the alternative.

This case presents a unique procedural history regarding the conflict between Beverly's claims for unjust enrichment and for breach of contract.

First, the circuit court dismissed Beverly's claims on the basis that she lacked the standing to enforce the Institutional Agreement and Beverly's claim for unjust enrichment failed because her complaint contained no allegation that the standard rates that she was charged were inequitable. (R. 132-134).

Next, the Court of Appeals ruled that Beverly is a third-party beneficiary with the right to enforce the terms of the Institutional Agreement and affirmatively determined that a contract governs the rights that Beverly is seeking to enforce. (R. 5-8). Furthermore, in its opinion, the Court of Appeals expressly recognized that the facts upon which an alleged unjust enrichment claim might arise in this case are the very same facts upon which the breach of contract claim was purportedly based. (R. 10-11). The Court of Appeals stated that the basis of an 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." (R. 11) (emphasis added). Additionally, 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." (R. 11) (emphasis added).

The Court of Appeals ruling presents a relatively novel procedural history; however, the current authority in South Carolina provides guidance as to its resolution. In South Carolina a party may pursue a claim for unjust enrichment as an alternative to a claim for breach of contract so long as there is a dispute as to the plaintiff's ability to enforce the contract or the existence of a contract. *See Charleston County School District v. Laidlaw Transit, Inc.*, 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001); *Swanson*, 350 S.C. at 122, 564 S.E.2d at 120. However, upon determination that a contract exists a plaintiff loses the ability to proceed on a claim for unjust enrichment in the alternative. *See id.* The Court of Appeals—for the first time—ruled that Beverly had the right to sue to enforce the Institutional Agreement as a direct and intended third-party beneficiary. (R. 10-

11). When the Court of Appeals made this ruling, it affirmatively decided that a contract existed and Beverly had the right to sue to enforce its terms as a third-party beneficiary. This ended her claim for unjust enrichment because her ability to enforce the contract was no longer in dispute.

Although the procedural history of this case is different from the procedural history in *Charleston County School District*, 348 S.C. at 422-23, 559 S.E.2d at 363 (affirming the circuit court's granting of a motion to dismiss a claim for unjust enrichment after finding the Complaint and the Answer and Counterclaim all acknowledged the existence of the same written contract) and *Swanson*, 350 S.C. at 122, 564 S.E.2d at 120 (affirming the Master's finding that a contract was formed and, therefore, the plaintiff did not have the right to pursue a claim for unjust enrichment / *quantum meruit*), the principle that a party may not proceed on a claim for unjust enrichment / *quantum meruit* as an alternative to a claim for breach of contract after the contract governing the relationship has been found to control the relationship between the parties remains the same.

In the present case, the Court of Appeals held (1) Beverly was a third-party beneficiary with the right to sue to enforce the Institutional Agreement and (2) 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.” (R. 10-11) (emphasis added). Thus, it could not be more clear that the Court of Appeals recognized that the purported foundation of the equitable claim exists in and arises from the terms of the Institutional Agreement.

Upon making this determination, the Court of Appeals found a valid contract governed the dispute between Beverly and Grand Strand and Beverly's ability to pursue an alternative claim for unjust enrichment was terminated. 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.

If the Court determines that Beverly is not a third-party beneficiary to the Institutional Agreement, as it should for the reasons explained in Sections I-III, above, then her claim for unjust enrichment should still be dismissed because it attempts merely to enforce that Agreement by other means or another name. *See* Section IV. A, *supra*.

CONCLUSION

For the reasons set forth above and in Grand Strand's Petitioner's Brief, 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*.

s/James Lynn Werner
James Lynn Werner; SC Bar No. 6029
William R. Thomas; SC Bar No. 16348
Katon E. Dawson Jr.; SC Bar No. 101167
PARKER POE ADAMS & BERNSTEIN LLP
1221 Main Street, Suite 1100
Post Office Box 1509 (29202)
Columbia, South Carolina 29201
Telephone: (803) 255-8000
Facsimile: (803) 255-8017
jimwerner@parkerpoe.com
willthomas@parkerpoe.com
katondawson@parkerpoe.com
*Attorneys for Petitioner Grand Strand Regional
Medical Center, LLC*

March 18, 2021
Columbia, South Carolina