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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Arthur M. Hayden and Joy Lynn Hayden, as co-conservators and co-guardians of Todd Lowell Hayden, and in their individual capacity and Smith Bakke Porsborg Schweigert & Armstrong, Plaintiffs and Appellants vs. Medcenter One, Inc., Medcenter One Living Centers, Billings Clinic, and Sidney Health Center, Defendants --- Medcenter One, Inc., Medcenter One Living Centers, and Billings Clinic, Appellees	Supreme Court Case No. 20120337

APPEAL FROM ORDER ON MOTION FOR SUMMARY JUDGMENT
AND JUDGMENT ENTERED JULY 30, 2012
BY THE HONORABLE THOMAS J. SCHNEIDER,
SOUTH CENTRAL JUDICIAL DISTRICT, BURLEIGH COUNTY, NORTH DAKOTA,
CIVIL NO. 08-2012-CV-00207

BRIEF OF APPELLEES MEDCENTER ONE, INC., AND MEDCENTER ONE LIVING CENTERS

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2. Whether a health care provider that is paid for services it provided a patient/debtor has been unjustly enriched.

3. Whether the Haydens' failure to pay Smith Bakke's attorney fees as they contractually agreed supports quantum meruit against Medcenter One.

4. Whether the Haydens' equitable estoppel claim fails because there is no evidence supporting it and it is contradicted by their pleadings and briefing.

5. Whether a remedy at law precludes equitable relief.

6. Whether the common fund doctrine applies to the parents of a patient/debtor or the parents' attorneys when the patient was a debtor of the health care provider obligated to pay for his medical services regardless whether he had insurance and regardless whether his parents and their attorneys prevailed in a lawsuit against the health insurer.

7. Whether Todd Hayden's parents or Smith Bakke were entitled to be paid under Todd's group health plan when payment was made according to the plan and neither the Haydens nor Smith Bakke has any rights to the plan.

STATEMENT OF THE CASE

[2] This appeal is from the trial court's order granting summary judgment in favor of Medcenter One, Inc., Medcenter One Living Centers (hereinafter collectively referred to as "Medcenter One") and Billings Clinic. Hayden Appendix 195-213. Judgment was entered August 2, 2012, dismissing the complaint of Plaintiffs Arthur and Joy Lynn Hayden, individually and as co-conservators and co-guardians of Todd Lowell Hayden (hereinafter "the Haydens"), and Smith Bakke Porsborg Schweigert & Armstrong (hereinafter "Smith Bakke"). *Id.* at 214.

[3] The Haydens and Smith Bakke sued Medcenter One by complaint dated January 4. 2012, alleging Medcenter One is responsible to pay Smith Bakke's attorney fees under three equitable theories; unjust enrichment, quantum meruit and equitable estoppel. *Id.* at 7-21. On January 30, 2012, Medcenter One answered the complaint and served written discovery on Plaintiffs. *Id.* 22-29; Docket 6. Billings Clinic made a 12(b) motion to dismiss Plaintiffs' complaint on February 2, 2012. Docket 12-14. Smith Bakke and the Haydens answered Medcenter One's discovery on February 28, 2012. Docket 37-40, 77-78. On April 3, 2012, Medcenter One moved for summary judgment. Docket 49. The Haydens and Smith opposed the motion and raised an additional equitable theory, the common fund doctrine, to support their claim for attorney fees. Docket 68.

[4] A motion hearing was held May 7, 2012. That morning, Smith Bakke served written discovery on Medcenter One. Transcript of Hearing, p. 54, line 8. Medcenter One answered Plaintiffs' discovery on June 6, 2012. MCO Appendix 88-107. On May 17, 2012, Smith Bakke and the Haydens moved to amend their complaint, adding a claim

based on the common fund doctrine. Docket 90. On July 30, 2012, the trial court granted Medcenter One's motion. Hayden Appendix 195-213.

[5] The lawsuit arose out of a dispute between Todd Hayden and his group health plan with Nabors Industries administered by Blue Cross Blue Shield of Texas ("BCBS-TX"). MCO Appendix 19-40. Todd was seriously injured in an accident in June 2009 in Sidney, Montana. He was stabilized at Sidney Health Center and then transferred to Billings Clinic in Billings, Montana and later to Medcenter One. BCBS-TX denied most of Todd's claims for hospitalization and medical services.

[6] On March 26, 2010, Todd's parents, the Haydens hired Attorney Randall Bakke of Smith Bakke to sue Nabors and BCBS-TX to reverse the denial of Todd's claim. Hayden Appendix 42-43. The Haydens, as Todd's guardians and individually, agreed to pay Bakke's attorney fees. *Id.* In June 2010, the Haydens, as Todd's guardians, sued Nabors and BCBS-TX in federal court. *Hayden v. Blue Cross and Blue Shield of Texas et.al.*, No. 1:10-cv-050 (D. N.D. filed June 28, 2010); MCO Appendix 19-40.

[7] On May 24, 2011, BCBS-TX accepted Todd's claim and directly paid the health care providers and facilities for the hospital and medical services they provided Todd. Hayden Appendix 12. When Bakke learned Medcenter One had been paid, he wrote Medcenter One, threatening to sue unless it paid his attorney fees. MCO Appendix 41-52. Medcenter One declined. Bakke thereafter sued Medcenter One, naming as plaintiffs his law firm and his clients both individually and as Todd's guardians, seeking his attorney fees for suing BCBS-TX. Hayden Appendix 7-21.

[8] The trial court granted Medcenter One summary judgment because, as a matter of law, there was no legal or factual basis supporting the complaint. Hayden Appendix 195-213. This appeal followed. *Id.* at 245.

STATEMENT OF THE FACTS

I. Medcenter One's services to Todd Hayden and payment from BCBS-TX.

[9] Todd Hayden was admitted to Medcenter One hospital on July 13, 2009. Hayden Appendix 23. He was discharged June 8, 2010, from the hospital to Mandan Care Center off Collins, a Medcenter One Living Center, where he remained until March 1, 2012. *Id.* The hospital and clinic charges for Todd's medical care totaled $717,891.79. MCO Appendix 79.

[10] Todd was incapacitated. To protect Todd and his assets, his parents, Arthur and Joy Hayden, were appointed his legal guardians on September 9, 2009. Docket 78, pp. 1-4. Todd, not his parents individually, remained responsible to pay his medical bills. Hayden Appendix 23, ¶ 4. As Todd's legal guardian, his father, signed Todd's admission agreement, in which, among other things, Todd agreed to pay for his medical services and authorized "any third party payor/insurer to make direct payment to Medcenter One of all benefits payable for [Todd's] care." *Id.* at 180.

[11] Direct payment is also provided for under Todd's group health plan when there is a contracting provider. *Id.* at 106. Medcenter One is a contracting provider with Blue Cross Blue Shield. It has a Provider Participation Agreement with Noridian Mutual Insurance Company, the parent corporation of Blue Cross Blue Shield of North Dakota ("BCBS-ND"). MCO Appendix 69-77. BCBS-ND is one of the in-network BCBS plans within the Plan Service Area of Todd's BCBS group health plan administered by BCBS-TX. Hayden Appendix 163-166. Medcenter One's agreement with Noridian is the agreement that applied to BCBS-TX. MCO Appendix 83.

[12] In June and July 2011, two years after Todd's admission, Medcenter One received payments from BCBS-TX for Todd's medical care. Hayden Appendix 14; MCO Appendix 23-24, ¶ 5. The payments for hospital and clinic services totaled $478,285.34. MCO Appendix 79. They were made at the allowable amounts under Todd's group health plan. Hayden Appendix 99; MCO Appendix 95. The Haydens had been notified of the payments, the amount of the payments, and that: "Benefits are being paid at the higher level since you used a contracting provider [Medcenter One] in the PPO network." MCO Appendix 62-64.

[13] The payments were made at less than the billed charges, but Medcenter One had agreed, under its Provider Participation Agreement, to accept the reimbursements as "payment in full." MCO Appendix 70. Todd's debt with Medcenter One, therefore, was paid in full and he was relieved of having to pay the $239,606.45 difference between the billed medical charges and the reiumbursement amounts.[1] Hayden Appendix 23-24, ¶ 5; MCO Appendix 71. Without Medcenter One's contracting provider status, Todd would have had to pay the billed charges. Hayden Appendix 99.

II. Medcenter One's interaction with the Haydens and BCBS.

[14] Under its Provider Participation Agreement, Medcenter One is obligated to submit claims for processing on behalf of its patients. MCO Appendix 72. In that capacity, it may also request reconsideration when, for example, a claim is denied or to correct an improperly billed claim. *Id.* at 104-106. Reconsideration was requested for Todd's claims because some but not all of Todd's medical services were being paid. *Id*. BCBS-TX paid, for example, physician services but not hospital services. *Id.* Medcenter

[1] Patients remain responsible for cost-sharing amounts under their health insurance, like copayments and deductibles. Hayden Appendix 110-112.

One asked BCBS-TX and BCBS-ND to reconsider, but, by March 2010, the claims remained denied. Medcenter One otherwise had no interaction with BCBS-TX. It never discussed or “negotiated” with BCBS-TX to "settle" Todd's debt. MCO Appendix 96.

[15] The Haydens, too, wanted Todd's medical bills paid. As his guardians, "they were, of course, interested in avoiding the assets of Todd being dissipated and expended to pay for medical care and benefits which should have been covered . . . by BCBS-TX." Hayden Appendix 210; Docket 22. For this reason, in October 2009, the Haydens "began making COBRA premium payments" to ensure Todd's group health insurance did not lapse. Hayden Appendix 14, ¶ XXV. The payments were made from an account in Todd's and his parents’ name. *Id.* at 46-52.

[16] Medcenter One never asked the Haydens, individually, to pay Todd's debt. Billing statements and, later, account notices, were addressed to Todd. Hayden Appendix 62-68; Docket 77, 78. He was the financially responsible party and guarantor of his account with Medcenter One. Hayden Appendix 23, ¶ 4. Medcenter One, too, never initiated collection against Todd or the Haydens. MCO Appendix 91.

III. Smith Bakke’s demand for payment from Medcenter One and threat to sue.

[17] A couple months after BCBS-TX paid Medcenter One, Bakke wrote Medcenter One on September 6, 2011, and, for the first time, demanded payment of his attorney fees for suing BCBS-TX. MCO Appendix 45-53. Bakke had contacted Medcenter One a year and a half earlier in March 2010, asking if it would hire him and join the Haydens in a lawsuit against BCBS-TX, but this request was declined. Hayden Appendix 12, ¶ XX. Medcenter One has no legal basis to sue BCBS-TX for health insurance benefits owed

Todd under his group health plan. *Id.* ¶ 8. When Bakke was asked what legal basis or theory he would have sued BCBS-TX as Medcenter One's attorney, he answered:

> "This interrogatory is objected to as requesting information outside the scope of that allowed for by Rule 26 of the North Dakota Rules of Civil Procedure, and as requesting attorney work product and materials prepared in anticipation of litigation, and as requesting attorney-client privileged information. It is further objected to as requesting a legal opinion or conclusion which Smith Bakke is not required to provide. Smith Bakke will only provide discovery responses as required by Rule 26 of the North Dakota rules of Civil Procedure."

Docket 40, pp. 28-29.

[18] When Bakke demanded Medcenter One pay his attorney fees, he also threatened to sue unless it agreed as follows:

> "We are requesting that Medcenter One affiliated entities promptly respond and acknowledge in writing that one-third of all amounts paid to the Medcenter One affiliated entities since the date the Hayden's lawsuit was initiated, June 28, 2010, will be paid to our client/law firm, plus Medcenter One's pro-rata share of costs incurred to pursue this lawsuit."

MCO Appendix 51. The demand was further contingent on Medcenter One agreeing to hire Bakke as its attorney and "pay attorney fees based on the contingent fee agreement [between Bakke and the Haydens] and its pro-rata share of costs for all future payments made . . . ." *Id.*

[19] Medcenter One did not accept Bakke's demand. Hayden Appendix 24-25, ¶ 8.

[20] Bakke wrote a second letter dated December 19, 2011, with the same demand and threat of a lawsuit. MCO Appendix 41-44. Medcenter One, again, did not accept Bakke's demand. Hayden Appendix 24-25, ¶ 8. On January 4, 2012, Smith Bakke and the Haydens sued Medcenter One.

IV. The Haydens retain Smith Bakke and sue BCBS-TX.

[21] Nearly two years earlier, the Haydens hired Smith Bakke. On March 29, 2010, they signed a retainer agreement, in which they agreed, among other things:

> A. To pay the undersigned attorneys a fee equal to the sum of 33 1/3% of all amounts recovered by legal action, settlement, or otherwise by reason of this claim. . . .

Id. at 42-43. The agreement required the Haydens be responsible to pay attorney fees as Todd's guardians and individually. *Id.* If the Haydens failed to pay, Bakke could withdraw as their attorney and sue them "in any fee dispute." *Id.*

[22] On June 10, 2012, the Haydens sued BCBS-TX in federal court as Todd's guardians. *Hayden v. Blue Cross and Blue Shield of Texas et.al.*, No. 1:10-cv-050 (D. N.D. filed June 28, 2010); MCO Appendix 19-40. They alleged several state law claims (contract and tort) and a federal ERISA claim, and they requested an award of attorney fees. *Id*. The state law claims were dismissed because they are preempted by ERISA, but the federal court explained the following about attorney fees:

> ". . . the Plaintiffs' state law claims are preempted by ERISA. Therefore, the Plaintiffs will not be able to recover attorney fees under state law. However, the Plaintiffs have also asserted a claim for relief under ERISA. ERISA provides for the recovery of attorney fees. See 29 U.S.C. § 1132(g)(1). Should the Plaintiffs prevail on their ERISA claim, the Court may, in its discretion, award reasonable attorney fees."

MCO Appendix 6-18.

STATEMENT OF THE STANDARD OF REVIEW

> [23] "Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact of inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record."

Alerus Financial v. The Marcil Group Inc., 2011 ND 205, ¶ 9, 806 N.W.2d 160.

[24] The trial court correctly granted summary judgment in favor of Medcenter One because there is no genuine issue of material fact and Medcenter One is entitled to judgment as a matter of law in this matter in which Smith Bakke seeks attorney fees from Medcenter One, fees which its clients, the Haydens, agreed to pay under their retainer agreement with Smith Bakke.

LAW AND ARGUMENT

I. The Haydens' failure to invoke and comply with Rule 56(f) precludes any complaint on appeal about discovery.

[25] A party cannot defeat summary judgment with conclusory allegations that discovery needs to be done without invoking Rule 56(f), N.D. R. Civ. P., and explaining how discovery would preclude summary judgment. *E.g.*, *Alerus Financial*, 2011 ND 205, ¶ 35. The Haydens opposed Medcenter One's summary judgment, complaining summary judgment was "premature" because they "need to conduct discovery on several fact issues." MCO Appendix 53-54. As the party opposing summary judgment, the Haydens

were required under Rule 56(f), N.D. R. Civ. P., to "show[] by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition . . . ." This court has further explained:

> "It is not enough, however, for a party invoking N.D. R. Civ. 56(f) to merely recite conclusory, general allegations that additional discovery is needed. Rather, N.D. R. Civ. P. 56(f) requires that the party, preferably by affidavit, identify with specificity what particular information is sought, and explain how that information would preclude summary judgment and why it has not previously been obtained."

Alerus Financial, 2011 ND 205, ¶ 35.

[26] The Haydens neither invoked Rule 56(f) nor showed by affidavit why they could not respond to Medcenter One's motion. MCO Appendix 53-54. Instead, they fully briefed their opposition in 66 pages of briefing, adding the following six paragraphs about fact issues they claimed required discovery:

- The deposition of Lori Blees and possibly other Medcenter One representatives needs to be taken in relation to this litigation. Ms. Blees is the representative of Medcenter One whom attorney Randall Bakke spoke to on or about March 25, 2010 in relation to plaintiffs pursuing a claim against BCBSTX and requesting Medcenter One join in the lawsuit—discovery needs to be conducted on what Ms. Blees represented to Mr. Bakke about Medcenter One's position on plaintiffs' claims;

- Plaintiffs need to conduct discovery on what negotiations occurred between the Medcenter One defendants and BCBSTX, including but not limited to written discovery and potentially depositions so as to determine what negotiations occurred between the Medcenter One defendants and BCBSTX and to determine why the Medcenter One defendants accepted only approximately $500,000 when benefits under the policy were due in the amount of $777,191;

- Discovery needs to be conducted in relation to what amount Billings Clinic accepted from BCBSTX to extinguish the medical payments due to Billings Clinic for Todd Hayden's medical care;

- Plaintiffs need to conduct discovery in relation to how nursing home charges incurred by Todd Hayden while in the care of Medcenter One

> Living Centers were negotiated with BCBSTX under the applicable North Dakota Rate Equalization Clause;
>
> - Plaintiffs needs to conduct discovery on what fee arrangement the Medcenter One defendants had with the collection agency that was retained by the Medcenter One defendants to pursue a recovery from the Haydens and which asserted the Haydens were liable to pay Todd Hayden's medical bills, which would demonstrate the Medcenter One defendants' were aware collection efforts are not free and must be paid; and
>
> - Plaintiffs needs to conduct discovery as there are questions of fact in relation to the amount of co-pays and deductibles which Art and Joy Hayden may still be exposed to in this matter, and in regard to what part the co-pays and deductibles played in the settlement negotiations between the Medcenter One defendants and BCBSTX.

MCO Appendix 53-54. The Haydens gave no explanation how discovery on these issues would preclude summary judgment. Accordingly, they cannot now complain on appeal when they failed to invoke and comply with Rule 56(f). *E.g.*, *Alerus Financial*, 2011 ND 205, ¶ 36 (involving party opposing summary judgment who "argued in their brief" about additional discovery but "did not adequately explain . . . how the information would have precluded summary judgment").

[27] Moreover, the Haydens conducted discovery on these issues. The morning of the motion hearing on May 7, 2012, they served written discovery on Medcenter One. Transcript of Hearing, p. 54, line 8. Medcenter One answered the discovery on June 6, 2012. MCO Appendix 88-107. Each of the Haydens' issues was answered. For example, Medcenter One did not retain a collection agency for payment of Todd's medical bills; Medcenter One had no discussions or "negotiations" with BCBS-TX to "settle" Todd's debt; and payment was not made by BCBS-TX for Todd's skilled nursing care at Medcenter One Living Centers. *Id.* The Haydens "apprise[d] the court" of this "additional

evidence" with a supplemental brief on July 3, 2012. Docket 113-115. The additional evidence did not establish summary judgment was precluded. Hayden Appendix 195-213.

II. The Haydens' personal liability was created by Smith Bakke under its retainer agreement with the Haydens.

[28] Medcenter One has never claimed the Haydens were personally responsible for Todd's medical bills. Hayden Appendix 23, ¶ 4. It never demanded payment from the Haydens and it never initiated collection against them or Todd. Hayden Appendix 62-68; Docket 77, 78; MCO Appendix 91. The trial court, too, did not determine the Haydens were personally responsible to pay Todd's medical debt. Hayden Appendix 195-213. Rather, the trial court concluded the Haydens, individually and as Todd's guardian, and Smith Bakke "failed to raise any factual issues regarding their unjust enrichment, quantum meruit, or equitable estoppels claims," thereby entitling Medcenter One to summary judgment as a matter of law. *Id.* at 198.

[29] Yet, the Haydens and Smith Bakke stubbornly continue to insist the Haydens have "personal liability" and, for this reason, are entitled to recover attorney fees from Medcenter One. The only reason the Haydens have personal liability is because Smith Bakke created that liability when it required the Haydens sign its retainer agreement both as Todd's legal guardians and individually. Hayden Appendix 43. By doing so, the Haydens personally accepted responsibility to pay Bakke's attorney fees. They otherwise had no personal liability either in their lawsuit against BCBS-TX because they were named plaintiffs only as Todd's guardians or to pay Todd's medical bills because their relationship with Medcenter One was only as Todd's guardians. MCO Appendix 19, 88-107.

III. There is no legal precedent in North Dakota or elsewhere supporting Medcenter One is responsible to pay Smith Bakke's attorney fees.

[30] The trial court dismissed the Haydens and Smith Bakke complaint and each of the four equitable theories alleged by the three plaintiffs; the Haydens as Todd's guardians and individually, and Smith Bakke. The appeal is limited to the dismissal of the Haydens' claims individually as well as their and Smith Bakke's claim under the common fund doctrine. Brief of Appellants, p. 8. The dismissal of Todd's claims and Smith Bakke's other claims are not appealed. *Id.* But Todd is the only party (through his parents as guardians) who had any relationship with Medcenter One or BCBS-TX. Todd is the insured under his group health plan. Hayden Appendix 9, ¶ VII. His parents individually have no rights under the plan. Todd's relationship with Medcenter One was patient-provider and debtor-creditor. *Id.* 23, ¶¶ 3, 4. His parents individually have no contractual or other relationship with Medcenter One. Docket 6-9. Likewise, Smith Bakke has no relationship with Medcenter One. There is no employment or attorney-client relationship between Medcenter One and Smith Bakke. *Id.* And there is no contract, written or otherwise, between Medcenter One and either the Haydens or Smith Bakke in which Medcenter One agreed to pay Smith Bakke's attorney fees for suing BCBS-TX. *Id.* Nonetheless, according to Smith Bakke and the Haydens, their efforts in suing BCBS-TX resulted in obtaining benefits owed Todd and, therefore, Medcenter One is somehow legally obligated to pay Smith Bakke's attorney fees under the terms of his retainer agreement with the Haydens. The trial court correctly rejected this theory.

A. A health care provider that is paid for services it provided a patient/debtor is not unjustly enriched.

[31] Medcenter One indisputably provided services to Todd for which it was entitled to be paid. It was entitled to be paid regardless whether Todd was insured and regardless of the Haydens' or Smith Bakke's efforts in the lawsuit against BCBS-TX. Medcenter One had legal remedies in its own right to seek and collect payment from Todd for the debt he owed Medcenter One. Todd's debt was paid in full when BCBS-TX paid Medcenter One, but this did not create any legal obligation by Medcenter One to pay Smith Bakke's attorney fees that are owed by his clients, the Haydens. This is the conclusion reached by the trial court when it rejected their unjust enrichment claim based on the following law cited by Medcenter One from other jurisdictions that is factually and legally on point.

[32] In *Wilson v. Sisters of St. Francis Health Svcs. Inc.*, 952 N.E.2d 793 (Ind. Ct. App. 2011), an attorney (plaintiff Wilson) sued a hospital seeking payment of a one-third contingency fee under the fee agreement with his client because the attorney sued his client's health insurer for health benefits that had initially been denied but were subsequently paid directly to the hospital. 952 N.E. 2d at 795. On appeal, the court affirmed summary judgment in favor of the hospital. *Id.* at 794.

[33] The attorney's client, T.W., had been admitted to the Defendant St. Francis, a hospital. *Id.* at 795. T.W.'s health insurer, Kaiser Permanente, "refused to pay for services rendered to T.W. . . ." *Id.* St. Francis had billed T.W. $26,524.27 for its medical services. *Id.* T.W. hired Wilson to sue Kaiser Permanente "for its failure to pay the St. Francis bill and T.W. agreed to pay Wilson on a contingency fee basis." *Id.* On T.W.'s behalf, Wilson sued Kaiser Permanente and succeeded in obtaining health benefits for

T.W. *Id.* "Kaiser Permanente paid $25,524.27 directly to St. Francis" for the medical services it had provided T.W. *Id.*

[34] Wilson then wrote a letter to St. Francis, demanding it pay one-third of the amounts it was paid by Kaiser Permanente based on Wilson's one-third contingency fee agreement with his client, T.W. *Id.* St. Francis declined. *Id.* Wilson then sued St. Francis claiming he was entitled to payment of his contingency fee based on unjust enrichment/quantum meruit. *Id.* Rejecting Wilson's claim and affirming summary judgment for St. Francis, the court explained:

> "According to Wilson, St. Francis has been unjustly enriched because it benefited from Wilson's work without having to pay for the work. The trial court noted that T.W. also benefited from Wilson's work. St. Francis provided medical services to T.W., and T.W. owed $26,524.27 to St. Francis as a result. T.W. retained Wilson to contest Kaiser Permanente's denial of his health insurance claim, and Kaiser Permanente ultimately paid the amount owed by T.W. There is no evidence that T.W. retained Wilson to challenge St. Francis's claim for medical services as being improper, nor has he ever asserted that T.W. did not owe St. Francis.
>
> Under Wilson's argument that St. Francis's recovery from Kaiser Permanente should be reduced by his attorney fees, T.W. would benefit from Wilson's work and would not have to pay, resulting in T.W.'s enrichment at St. Francis's expense. However, as the trial court and St. Francis point out, even if Kaiser Permanent's payment to St. Francis were reduced by Wilson's attorney fees, T.W. would still owe that amount to St. Francis.
>
> We agree with St. Francis that the hospital, which is 'a stranger' to the contingency fee agreement between T.W. and Wilson, 'should not be forced to carry the burden of [T.W.'s] contractual obligations. . . . There is no dispute that St. Francis provides services to T.W. and is entitled to full payment for its services. Wilson presented no evidence that a measurable benefit has been conferred on St. Francis under such circumstances that St. Francis's retention of the Kaiser Permanent insurance payment without payment of attorney fees to Wilson would be unjust."

Id. at 797 (citations omitted).

[35] In *Mitchell v. Huntsville Hospital*, 598 So.2d 1358 (Ala. 1992), the Supreme Court of Alabama reached the same result based on similar facts, except the hospital had filed a hospital lien because there was potential third-party tortfeasor liability and initiated collection efforts against the patient for the medical services provided the patient. *Id.* at 1359. The patient had hired an attorney, Mitchell, to sue the tortfeasor allegedly responsible for the patient's injuries in a car accident. *Id.* The patient's bill at the hospital totaled over $56,000. *Id.* Mitchell discovered his client was insured under a health insurance policy with Connecticut General. *Id.* Connecticut General initially denied the claim, but ultimately paid Mitchell's client's hospital bill directly to the hospital. *Id.* Mitchell then complained that Connecticut General should have paid him directly "so that he could deduct his one-third attorney fee" from the payment. *Id.* He sued the hospital "for the recovery of a one-third attorney fee from the proceeds of the check, based on the 'common fund' theory and/or a purported attorney fee lien." *Id.*

[36] Rejecting Mitchell's claims, the court determined: "Mitchell's argument . . . is without merit." *Id.* at 1362. It explained:

> "Mitchell has done an outstanding job in representing his clients and is to be commended for the zealousness with which he has pursued their claims. Mitchell performed a valuable service for his clients in determining the existence of coverage by Connecticut General and in pursuing the insurance company until it paid the claim. Mitchell's service prevented his clients from being sued [for an amount] in excess of $50,000.00. Such efforts clearly merit compensation; however, such compensation is due to paid under the American system by Mitchell's clients, for whom he rendered the service."

Id.

[37] The Supreme Court of Washington likewise rejected "an attorney is entitled to compensation, from one other than his client, when services rendered to his client

incidentally benefit another." *Lynch v. Deaconess Medical Center*, 776 P.2d 681, 682 (Wash. 1989). In *Lynch*, the patient, Tenney, was treated at Deaconess hospital. *Id.* She had a health insurance policy with Medical Services Corporation (MSC). *Id.* Her medical bill at Deaconess was $8,056.86. *Id.* MSC initially refused to pay her bill, but later reversed its decision and paid Deaconess. *Id.* Tenney hired an attorney, Lynch, to sue MSC. *Id.* Lynch also wrote Deaconess, asking it to hire him as its attorney and, along with Tenney, sue MSC. *Id.* Deaconess declined. *Id.* Lynch sued Deaconess seeking to recover attorney fees on a one-third contingency fee basis based on unjust enrichment and equitable subrogation. *Id.*

[38] Rejecting Lynch's theories and affirming summary judgment for Deaconess, the court explained: "Generally, an attorney's claim for compensation of legal services rendered must rest upon either an express or implied contract of employment." *Id.* Since it was undisputed there was no express employment contract between Lynch and Deaconess, Lynch relied on a supposed "quasi contract." *Id.* at 683. The court explained:

> ". . . it is apparent that a quasi contract did not exist between Mr. Lynch and Deaconess Hospital. . . . First, Deaconess Hospital was not *unjustly* enriched by Mr. Lynch's services. Ms. Tenney owed Deaconess $8,056.86 for its medical services. Deaconess only recovered that amount which was owed and which had been declared uncollectible. Deaconess has been incidentally benefited by Mr. Lynch's services. A person can be enriched by merely receiving a benefit. However, the mere fact that a person benefits another is not sufficient to require the other to make restitution. It is well established that unjust enrichment and liability only occur where money or property has been placed in a party's possession such that in equity and good conscience the party should not retain it.
>
> In the case at hand, it is clear that it would not be unjust for Deaconess to retain the $8,056.86 since this amount simply reflects the amount owed by Ms. Tenney. . . . Here, Ms. Tenney had incurred a debt, Deaconess is entitled to full compensation and should not be required to pay attorney fees to Mr. Lynch for this compensation. Furthermore, the fact that Deaconess eventually recovered this amount is only an incidental benefit

> derived from Mr. Lynch's services to his client. Mr. Lynch was hired by Ms. Tenney to pursue a claim against MSC for failing to pay Ms. Tenney's medical expenses. Mr. Lynch was obligated to pursue this claim diligently on behalf of his client. Thus, the receipt of an incidental benefit by Deaconess does not create an implied contract between the parties, nor does it impose the obligation of restitution upon the recipient."

Id.

[39] North Dakota law, too, rejects that a third party incidentally benefited from an agreement between others has been unjustly enriched. *E.g.*, *Zuger v. N.D. Ins. Guaranty Assoc.*, 494 N.W.2d 135 (N.D. 1992). In *Zuger*, attorney Zuger had been hired by the professional malpractice insurance carrier (Great Global) to defend malpractice cases against insured hospitals of the carrier. *Id.* at 136. Great Global went insolvent and the North Dakota Insurance Guaranty Association assumed the defense of the cases. *Id.* It hired Zuger, who continued to represent the hospitals. *Id.* It paid Zuger's attorney fees and litigation expenses after, but not before, Great Global's insolvency. *Id.* Zuger sued the Guaranty Association and the hospitals to collect his pre-insolvency attorney fees. *Id.*

[40] The trial court granted summary judgment for the defendants. On appeal, the supreme court affirmed. One of Zuger's theories was unjust enrichment. He claimed the Guaranty Association and the hospitals, as a third party, directly benefited from his pre-insolvency legal work. *Id.* at 138-39. Rejecting the theory, the court held Zuger to his contract with Great Global. It explained: "Zuger has a valid compensation agreement for his services with Great Global. The declaration of Great Global's insolvency does not destroy the existence of that valid agreement; it merely leaves Zuger in the position of a creditor, albeit one in a precarious position." *Id.* at 138. The court likewise held Zuger to his contract with the Guaranty Association, which did not extend to pre-insolvency legal work. *Id.* Accordingly, the court determined, as a matter of law, the Guaranty Association

was not unjustly enriched and there was no obligation by the Guaranty Association "to pay Zuger for those pre-insolvency services or expenses." *Id.* at 139.

[41] The hospitals, too, as purported third party beneficiaries of Zuger's services, were not unjustly enriched. *Id.* at 139. "Zuger's contract for providing services was with Great Global, and the defendant hospitals have no contractual obligation to pay for the legal services." *Id.* The hospitals "purchased insurance from Great Global to have those legal services provided and paid for by Great Global." *Id.* The court, therefore, held:

> ". . . persons who have not contracted for legal services do not become legally obligated to pay for those services merely because they have received benefit from the rendering of those services. All parties, including Zuger, were fully aware from the outset that Zuger's contract for providing legal services was with the insurer and that it was the insurer to whom Zuger must look for payment. We hold that Zuger is not entitled to his pre-insolvency attorney fees and litigation expenses from the defendant hospitals on a theory of unjust enrichment."

Id. (underlining added).

[42] Because Smith Bakke and the Haydens have no supporting authority, they try to distinguish the above cases. They claim none involved a party like the Haydens who, in their individual capacity, sued a hospital to recover attorney fees they owe their attorney after, in their representative capacity, they succeeded in getting their patient son's medical debt paid. It is a distinction that establishes there is absolutely no legal basis for the Haydens, individually, to sue Medcenter One for unjust enrichment. The debt to Medcenter One was owed by Todd, not his parents. It was paid by BCBS-TX, Todd's insurer, not his parents. The Haydens have no relationship, legally or otherwise, with any of these entities and, therefore, are without standing to sue in their individual capacity. *Rebel v. Nodak Mut. Ins. Co.*, 1998 ND 194, ¶ 8, 585 N.W.2d 811 ("A person cannot invoke the jurisdiction of the court to enforce private rights or maintain a civil action for

the enforcement of those rights unless the person has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy."); Hayden Appendix 28, ¶ 16.

[43] Instead, the Haydens hired Smith Bakke and contractually agreed to pay attorney fees. They benefited because, as Todd's guardians, his medical debt was paid. They claim impoverishment because they paid COBRA premiums "out of their own pocket" and incurred personal liability for attorney fees, but they ignore their personal liability was created by Smith Bakke and the COBRA premiums were paid on Todd's behalf from an account in Todd's name months before they claim any purported reliance on Medcenter One's refusal to join their lawsuit against BCBS-TX. Hayden Appendix 50. The Haydens' failure to pay Smith Bakke's attorney fees does not create any legal obligation by Medcenter One to "carry the burden of [their] contractual obligations" with Smith Bakke. Rather, it is a legal matter between them and Smith Bakke as provided under their contract. *Lochthowe v. C.F. Peterson Estate*, 2005 ND 40, ¶ 10, 692 N.W.2d 120 ("When an impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity and there has been no unjust enrichment.").

B. The Haydens' failure to pay Smith Bakke's attorney fees does not support quantum meruit against Medcenter One.

[44] There likewise is no authority supporting a quantum meruit claim against Medcenter One. It is an equitable theory that is essentially indistinguishable from unjust enrichment. *Estate of Zent*, 459 N.W.2d 795, 800 (N.D. 1990). For the same reasons the Haydens' individual unjust enrichment claim fails, so, too, does their quantum meruit claim.

[45] According to the trial court, "[t]o prevail on a 'quantum meruit' claim [seeking recovery of attorney fees], the claimant must establish the recipient accepted benefits under circumstances which would reasonably notify the recipient that the claimant had an expectation of payment for the services rendered." Hayden Appendix 204 (citing *Discipliniary Bd. v. Moe*, 1999 ND 110, ¶ 14, 594 N.W.2d 317). This means:

> ". . . to be compensable, the services rendered are of such a nature that, under the circumstances of a particular case, fairness and justice compel the conclusion that they ought to be compensated on an implied-in-law contractual theory because the recipient ought to have been forewarned that such services do not come cost free."

Id. (citing *Estate of Zent*, 459 N.W.2d at 800). Necessary to recovery is a legal status, contractually or otherwise, between the parties. *Moe*, 1999 ND 110, ¶ 15 (rejecting that attorney was entitled to recover fees from former client in quantum meruit based on attorney's unilateral agreement with client and when attorney's claim for fees was with another entity); *Bismarck Hospital v. Burleigh Cty.*, 146 N.W.2d 887 (N.D. 1966) (explaining an implied contract requires the parties occupy toward each a "contract status").

[46] Applying this standard, the trial court correctly concluded the quantum meruit claim of the Haydens, individually and as Todd's guardians, and Smith Bakke failed. *E.g.*, *Wilson*, 952 N.E.2d at 797 (rejecting attorney's unjust enrichment/quantum meruit claim for attorney fees against hospital in part because attorney had contingency fee agreement with his own client). "Bakke did not tell . . . MCO he would seek attorney's fees from them if they received payment from BCBSTX" and "neither Todd Hayden's contract with BCBSTX nor the contract between Bakke and the Haydens was for . . . MCO's benefit." Hayden Appendix 205. Furthermore, this appeal is limited to the

Haydens individually. In that capacity, they have no legal status in relation to Medcenter One and they conferred no benefit on Medcenter One based on, as they argue, the federal court lawsuit they brought against BCBS-TX as Todd's guardians. Accordingly, the Haydens' failure to pay Smith Bakke's attorney fees as they contractually agreed does not support quantum meruit against Medcenter One. *See, e.g., Thurston v. Cedric Sanders Co.*, 125 N.W.2d 496, 498 (S.D. 1963) ("the rights of the parties are controlled by the[ir] contract, and under such circumstances recovery cannot be had on the theory of a quantum meruit").

C. The Haydens' equitable estoppel is contradicted by their pleadings and briefing and fails as a matter of law.

[47] The doctrine of equitable estoppel is codified at N.D.C.C. § 31-11-06. It provides:

> "When a party, by that party's own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, that party shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission."

Id. Among other things necessary to invoke estoppel, a plaintiff must allege and show "proof of fraud, positive misrepresentation, or unconscionable conduct akin to fraud . . . ." *E.g.*, *Karch v. Equilon Enterprises L.L.C.*, 286 F.Supp.2d 1075, 1078-79 (D. N.D. 2003).

[48] The trial court correctly determined there is no evidence Medcenter One "made any false representations, concealed any material facts, or engaged in any deceptive conduct." Hayden Appendix 208. The Haydens, however, complain they made COBRA payments because of Medcenter One's "continuous" demands for payment by them of Todd's debt and refusal to join their lawsuit against BCBS-TX, and they sued BCBS-TX because otherwise they would be responsible to pay Todd's debt. Brief of Appellants, p.

30. This is flatly contradicted by their complaint and the record. The Haydens alleged in their complaint: "In order to preserve Todd Hayden's right of recovery of benefits under his insurance policy with BCBSTX and to prevent Todd Hayden's insurance policy from lapsing, the Haydens began making COBRA premium payments in approximately October 2009," six months before Medcenter One declined Bakke's request to sue BCBS-TX. Hayden Appendix 14, ¶ XXV. Further, the Haydens sued BCBS-TX because, as Todd's guardians, "they were, of course, interested in avoiding the assets of Todd Hayden being dissipated and expended to pay for medical care and benefits which should have been covered" by BCBS-TX. Docket 22, p. 11. Accordingly, based on the Haydens' own pleadings and briefing the trial court correctly rejected any basis for an equitable estoppel claim, explaining in part:

> ". . . the Haydens were induced to file their lawsuit out of a desire to prevent Todd Hayden's assets from being used to pay his medical bills, and the Haydens understood, and continue to understand, that they are not primarily responsible for Todd Hayden's medical bills. . . . there is no evidence that Billings or MCO ever sought to hold Arthur or Joy Hayden liable for Todd Hayden's medical bills."

Hayden Appendix 210; *Karch*, 286 F.Supp.2d at 1078-79 (granting defendant judgment on the pleadings because plaintiffs' complaint failed to "reveal any allegations of fraud, positive misrepresentation, or unconscionable conduct"); *see Dalan v. Paracelsus Healthcare Corp. of N.D.*, 2002 ND 46, ¶¶ 19-22, 640 N.W.2d 726 (affirming summary judgment dismissal of plaintiff's equitable estoppel claim because failed to establish the elements of the claim).

D. The Haydens' lawsuit against BCBS-TX is a "remedy at law" that precludes any equitable action against Medcenter One.

[49] Equity is a potential remedy only in the "absence of a remedy provided by law." *E.g.*, *Lochthowe*, 2005 ND 40, ¶ 9. When a plaintiff has a legal remedy, equity is precluded as a matter of law. *Id.* ¶ 14.

[50] *Lochthowe* involved the plaintiff Lochthowe who had an agreement with an estate to cash rent farm land. The land was later offered for sale, and Lochthowe submitted a bid, but it was not accepted and other negotiations failed. *Id.* ¶¶ 2-4. The land was sold to an heir of the estate. *Id.* Lochthowe sued the estate, the estate's PR, and the estate's heir who bought the land. *Id.* ¶ 5. Lochthowe settled before trial with all defendants except the heir. *Id.* ¶ 6. Lochthowe's theory against the heir was unjust enrichment. *Id.* It failed because the heir was not "a party to the lease agreement" between Lochthowe and the estate, and Lochthowe "had a legal remedy for breach of contract against [the other defendants] but settled with them before trial." *Id.* ¶ 13. Accordingly, Lochthowe "had an adequate legal remedy which precluded him from pursuing an unjust enrichment action against [the heir] as a matter of law." *Id.* ¶ 14.

[51] Likewise, in *D.C. Trautman Co. v. Fargo Excavating Co.*, 380 N.W.2d 644 (N.D. 1986), the plaintiff Trautman's unjust enrichment claim against a purported third-party beneficiary defendant was dismissed because Trautman had a legal remedy for breach of contract against the other defendants with whom Trautman had a contract but had settled with before trial. *Id.* at 644-46. The court held: "A party is not entitled to equitable relief if there is a remedy provided by law which is equally adjusted to rendering complete justice." *Id.* at 645.

[52] The trial court correctly determined the Haydens and Smith Bakke have a legal remedy that precludes their lawsuit seeking equitable relief. The Haydens, as Todd's guardians, sued BCBS-TX and, according to the federal court, are entitled to attorney fees if they prevail on their ERISA claim. *E.g.*, MCO Appendix 17. Smith Bakke, too, has a remedy because it can sue the Haydens under the retainer agreement if they fail to pay attorney fees. Hayden Appendix 43, 203-204.

[53] The Haydens now complain in this appeal, however, that they, individually, have no remedy to recover the COBRA premiums or the attorney fees they owe to Smith Bakke. The Haydens and Smith Bakke distort the law and the facts. The Haydens paid COBRA premiums from an account in Todd's name and to protect Todd's assets and prevent insurance from lapsing. Hayden Appendix 14, 46-61. Their personal liability was created by Smith Bakke. *Id.* at 42-43. There is a complete disconnect in how they could plausibly maintain Medcenter One is, therefore, legally responsible to pay their attorney fees owed Smith Bakke. Moreover, the remedy the Haydens have in their representative capacity in the federal court lawsuit is a remedy to pay Smith Bakke's attorney fees.

E. The common fund doctrine does not apply because Todd Hayden was a debtor of Medcenter One obligated to pay for his medical services regarding whether he had insurance and regardless whether his parents prevailed in the lawsuit against BCBS-TX.

[54] The common fund doctrine is an equitable doctrine recognized in North Dakota, but "applie[d] only in limited types of cases," like class actions and probate. *First International Bank & Trust et.al. v. Peterson et.al.*, 2011 ND 87, ¶ 24, 797 N.W.2d 316. It is an exception to the American rule that "parties bear their own costs of litigation." *E.g., id.* "The purpose of the common fund doctrine is to spread out the attorney's fees proportionately among those who benefit from the suit, recognizing 'that persons who

obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense.'" *Id.* The Haydens and Smith Bakke claim "the common fund benefits not only Billings Clinic and Medcenter One, but also numerous additional health care providers, including Dakota Alpha, Q&R Clinic, American Medical Response, Medcenter One Pharmacy, Face & Jaw Surgery, and Billings Anesthesiology, all of which provided medical services to Todd and all of which received . . . a benefit as a result of Todd's parents and Smith Bakke obtaining a reversal of BCBSTX's wrongful denial of coverage." Brief of Appellants, pp. 33-34. First, it cannot be said BCBS-TX paid benefits only because of the Haydens' lawsuit. BCBS-TX paid some, but not all, benefits before the Haydens sued it. MCO Appendix 105. Second, the Haydens and Smith Bakke did not sue any providers other than Medcenter One and Billings. Despite urging application of the common fund doctrine, they do not propose the Haydens or the other non-defendant providers "proportionately" share Bakke's attorney fees, rather they propose the fees should be borne wholly by Medcenter One and Billings Clinic. Accordingly, they apparently ask for a "modified" application of the common fund doctrine. The trial court correctly determined it does not apply. Hayden Appendix 210-212,

[55] No authority has been found in North Dakota or elsewhere applying the common fund doctrine to a debtor-creditor relationship, and no authority is cited by the Haydens and Smith Bakke supporting its application.

[56] Courts elsewhere, by overwhelming majority, have rejected its application in circumstances like this case, but unlike this case in that they involved third party tortfeasor liability and a hospital lien on the third party settlement proceeds. *Wendling v.*

Southern Illinois Hospital Svcs., 950 N.E.2d 646 (Ill. 2011); *Trevino v. HHL Financial Svcs., Inc.*, 945 P.2d 1345 (Colo. 1997); *City & Cty. of San Francisco v. Sweet*, 906 P.2d 1196 (Calif. 1995). For example, *Wendling* involved plaintiffs who were injured in car accidents, received medical care at the defendant hospitals, and sued the drivers of the cars (third party tortfeasors) for their injuries. The hospitals asserted statutory liens against the third party lawsuits. *Id.* at 647. The plaintiffs settled with the tortfeasors and their attorneys then "alleged that, under the common fund doctrine, [they] were entitled to additional attorney fees equal to one-third of the amount of the Hospitals' liens." *Id.* at 648. In other words, plaintiffs sought to have the hospitals pay their "proportionate share" of attorney fees for recovering the settlements from which the hospitals' liens would be satisfied. *Id.* The Illinois Supreme Court rejected this argument, explaining:

> "Illinois courts have never applied the common fund doctrine to a creditor-debtor relationship, such as the one between the Hospitals and the plaintiffs in the instant case. . . . this court [has] expressly held that the doctrine was inapplicable to a hospital holding a statutory lien. . . . In contrast to other 'common fund' cases, where the beneficiaries of the fund would not be paid absent the creation of the fund, the hospital's recovery of its charges did not depend on the creation of the fund. 'Plaintiff was a debtor obligated to pay for the services rendered by the hospital out of any resources which might become available to him.
>
> The benefit to the hospital resulting from [the attorney's] services was merely incidental to the primary purpose of obtaining compensation for plaintiff's injuries. We cannot justify extending the common fund doctrine to require a mortgagee or a furniture store or any other creditor of a plaintiff to contribute to the fees of the plaintiff's attorney if the funds recovered by litigation are used to satisfy the plaintiff's obligations."

Id. at 648-649 (citations omitted). A majority of other courts addressing this issue have likewise "held that the hospital is not required to pay a share of attorney fees generated in creating a fund from which the hospital's lien is paid." *Trevino*, 945 P.2d at 1349.

[57] In these cases, however, the plaintiffs at least had a statutory basis—the hospital lien statutes—for their argument. Here, there is no hospital lien by Medcenter One and there is no third party tortfeasor liability upon which a lien could attach. N.D.C.C. § 35-18-01. But, like the plaintiffs in the above cases, Todd Hayden was a debtor of Medcenter One obligated to pay for its services regardless whether he was insured and regardless whether his parents prevailed against BCBS-TX. It is a debtor-creditor relationship, and no court has applied the common fund doctrine in this context.

[58] The Haydens and Smith Bakke liken Medcenter One to a subrogated insurer in a third party tortfeasor situation. It is why they cite *Bishop v. Burgard*, 764 N.E.2d 24 (Ill. 2002) (applying the common fund doctrine to a third party liability settlement because the health insurer "benefitted from the fund by obtaining a reimbursement 'which it would not have received absent the fund's creation'"). But Medcenter One is not a subrogated insurer. It is a creditor of Todd's and its right to be paid for the medical services it provided Todd "w[as] not contingent on [Todd's] rights against a third party or the creation of a fund." *E.g.*, *Wendling*, 950 at 651. Medcenter One's right to be paid is "based upon a debt owed the hospital by its patient" and "existed irrespective of the outcome of any personal injury litigation" or the Haydens' first party lawsuit against BCBS-TX. *Id.* Further, unlike a subrogated insurer, Medcenter One had no standing or legal basis upon which it could seek payment of Todd's debt from anyone other than Todd. *E.g.*, *Trevino*, 945 P.2d at 1349.

[59] Moreover, "in a typical common fund case, the fund has been 'created for the benefit of the entire class'" and from which attorney fees are shared proportionately among all beneficiaries. *Wendling*, 950 N.E.2d at 652. Here, there is neither a "common

fund" nor a proposed proportionate sharing of attorney fees. The Haydens and Smith Bakke do not ask for proportionate sharing of attorney fees among all the purported beneficiaries, which includes themselves and other medical providers whom they did not sue. Instead, they ask that Bakke's attorney fees be borne wholly by Medcenter One and Billings Clinic. *City & Cty. of San Francisco v. Sweet* 906 P.2d 1196, 1203 (Calif. 1995) (rejecting that a plaintiff who obtained a third party tortfeasor settlement is "permitted to reduce county [hospital's] lien by a share of his attorney fees [because] he would receive a benefit denied other debtors whose debt for hospital care has to be paid in full regardless of the source of their after-acquired funds and regardless of whether they had to resort to litigation to acquire them"). Likewise, there is no "common fund" because Todd's health insurer simply fulfilled its contractual obligation to Todd under the group health plan and paid benefits under the plan, relieving him of the debt he owed Medcenter One. *Wendling*, 950 N.E.2d at 648-652 (explaining "Plaintiff was a debtor obligated to pay for the services rendered by the hospital out of any resources which might become available to him").

F. Neither Todd Hayden nor Arthur and Joy Hayden or Smith Bakke were entitled to be paid the billed amounts for Todd's medical care.

[60] The Haydens complain they were entitled to be paid the gross amounts billed for Todd's medical care and Medcenter One improperly accepted less "in settlement with BCBS-TX." They complain because the difference between these amounts, $239,606.45, is what Bakke intended to pay his attorney fees, not because he was legally entitled to do, but because he intended to force Medcenter One to compromise what it was owed. This is what he told counsel for BCBS-TX when he demanded direct payment to his law firm's trust account, a demand described by BCBS-TX as one with "no authority in support"

and "driven by his desire to increase the size of the contingency payment he anticipates receiving." MCO Appendix 59. Bakke wrote: "Following receipt of payment from BCBSTX and/or Nabors, Plaintiffs' counsel would then negotiate with the various medical providers and institutions to resolve their claims for compensation due for health care benefits and treatment provided to Todd Hayden . . . ." *Id.* at 67 (underlining added). His plan was thwarted when BCBS-TX properly made direct payments to Medcenter One rather than his trust account.

[61] The Haydens and Smith Bakke individually have no basis to challenge the direct payments made by BCBS-TX to Medcenter One. They have no rights under Todd's group health plan. *Rebel*, 1998 ND 194, ¶ 8 ("A party is entitled to have a court decide the merits of a dispute only after demonstrating the party has standing to litigate the issues placed before the court.").

[62] Even if they did, there is nothing improper about direct payments being made to Medcenter One or at the allowable amount, or less than the billed amount. Todd's group health plan is the contract that determines, among other things, who will receive payment and the allowable amount for medical services. Hayden Appendix 77-176. As to direct payments, it instructs:

> "Benefit payments will be made directly to contracting Providers when they bill the Claim Administrator."

Id. at 106. Medcenter One is a contracting provider that billed BCBS-TX for Todd's medical care. Smith Bakke asked Medcenter One to produce its provider agreement. It answered:

> **REQUEST 12**: Please produce copies of the provider agreement between BCBS-TX and Medcenter One as referred to in the *Answer* of Medcenter One dated January 30, 2012.

. . .

> **SECOND SUPPLEMENTAL RESPONSE**: The Noridian Mutual Insurance Company Provider Participation Agreement is the agreement that applies to BCBS-TX. This agreement was produced by Medcenter One under its first supplemental response.

MCO Appendix 83(underlining added). Direct payment was also authorized by Arthur Hayden. As Todd's guardian, he authorized "any third party payer/insurer to make direct payment to Medcenter One of all benefits payable for the Patient's care." Hayden Appendix 180, ¶ 4.

[63] Todd's group health plan also establishes the amount that will be paid for medical and other services:

> "The Allowable Amount is the maximum amount determined by the Claims Administrator to be eligible for consideration for payment for a particular service, supply or procedure. The Claims Administrator has established an Allowable Amount for Medically Necessary services, supplies, and procedures provided by Providers that have contracted with the Claims Administrator or any other Blue Cross and/or Blue Shield Plan, and Providers that have not contracted with the Claims Administrator or any other Blue Cross and/or Blue Shield Plan. When you choose to receive services, supplies, or care from a Provider that does not contract with the Claims Administrator, you will be responsible for any difference between the Claims Administrator's Allowable Amount and the amount charged by the non-contracting Provider. You will also be responsible for charges for services, supplies, and procedures limited or not covered under the Plan, and any applicable Deductibles, Co-Share Amounts, and Copayment Amounts."

Id. at 99. Consistent with this provision, BCBS-TX informed Todd of the billed services, the amount billed, and the amount paid. *E.g.*, MCO Appendix 62-64. The notice further explained: "Benefits are being paid at the higher level since you used a contracting provider [Medcenter One] in the PPO network" and: "The amount billed is greater than the amount allowed for this service. You will not be billed for this amount." *Id.*

[64] Accordingly, the undisputed evidence establishes Medcenter One is a contracting provider with BCBS-TX. Direct payments were properly made under the contracts. Todd's medical debt was paid in full. And, because of Medcenter One's status, Todd did not have to pay the $239,606.45 difference between billed charges and reimbursement amounts. Without Medcenter One's status, Todd would have had to pay the billed charges.

[65] According to Smith Bakke, however, Todd and the Haydens were entitled to the gross billed charges with payment to them directly. It is an argument premised on Smith Bakke's claim that Medcenter One is not a contracting provider because there is no provider agreement that applied to BCBS-TX and the "backdoor dealings" of Medcenter One and BCBS-TX "to cheat the Haydens out of benefits they were entitled to under the BCBSTX policy." Brief of Appellants, at pp. 36-37. It is an unsupported claim.

[66] Medcenter One did not discuss or negotiate a "settlement" with BCBS-TX or "meddle" between Todd, his parents and BCBS-TX. Medcenter One's interaction with BCBS was only in its role as a covered provider obligated under to submit claims for processing on behalf of its patient. It otherwise had no interaction with BCBS-TX, which is what Smith Bakke was told when it asked Medcenter One:

> **INTERROGATORY NO. 19**: Please provide the names of the individuals at Medcenter One who were involved in any discussions with BCBSTX, after BCBSTX reversed its previous wrongful denial of coverage for health insurance benefits for Todd Hayden, regarding the determination that Medcenter One would accept approximately $500,000 in payment when benefits under the policy were due in the amount of $777,191. Please state the dates and substance of any such communications.
>
> **ANSWER**: None.

MCO Appendix 96.

[67] Moreover, Smith Bakke's argument places it at odds with Todd and the Haydens. If it is assumed there is no provider agreement and they were entitled to be paid the billed charges of $777,191, Todd would have had to pay that amount to Medcenter One because, based on his group health plan, that is what he owed. Hayden Appendix 99; *Wilson*, 952 N.E.2d at 797 (explaining "even if Kaiser Permanente's payment to St. Francis were reduced by Wilson's attorney fees, T.W. would still owe that amount to St. Francis"). Accordingly, there would have been no amount from which Bakke could withhold his attorney fees—unless, as he said, he forced Medcenter One to compromise Todd's debt, an admission which necessarily concedes there is no legal basis supporting that Medcenter One is legally responsible to pay his attorney fees.

CONCLUSION

[68] For the foregoing reasons, Medcenter One, Inc., and Medcenter One Living Centers respectfully request the court affirm the trial court's order granting summary judgment.

Dated this 12th day of November 2012

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CERTIFICATE OF COMPLIANCE

[69] The undersigned, as attorneys for the Appellees Medcenter One, Inc., and Medcenter One Living Centers in the above matter, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 9,960.

Dated this 12th day of November, 2012

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Arthur M. Hayden and Joy Lynn Hayden, as co-conservators and co-guardians of Todd Lowell Hayden, and in their individual capacity and Smith Bakke Porsborg Schweigert & Armstrong, Plaintiffs and Appellants vs. Medcenter One, Inc., Medcenter One Living Centers, Billings Clinic, and Sidney Health Center, Defendants --- Medcenter One, Inc., Medcenter One Living Centers, and Billings Clinic, Appellees	)	Supreme Court Case No. 20120337

APPEAL FROM ORDER ON MOTION FOR SUMMARY JUDGMENT
AND JUDGMENT ENTERED JULY 30, 2012
BY THE HONORABLE THOMAS J. SCHNEIDER,
SOUTH CENTRAL JUDICIAL DISTRICT, BURLEIGH COUNTY, NORTH DAKOTA,
CIVIL NO. 08-2012-CV-00207

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

The undersigned, being first duly sworn on oath, deposes and says that I am a United States citizen, over 18 years of age, and on November 12, 2012, I served true and correct copies of the attached:

1. **BRIEF OF APPELLEES MEDCENTER ONE, INC., AND MEDCENTER ONE LIVING CENTERS; and**
2. **APPENDIX**

by electronic mail upon counsel at the below e-mail addresses:

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Victoria Szklarski

Subscribed and sworn to before me, today, November 12, 2012.

NOTARY PUBLIC,
Burleigh County, North Dakota

BRENDA K VITEK
Notary Public
State of North Dakota
My Commission Expires October 6, 2018