

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Arthur M. Hayden and Joy Lynn Hayden, as co-	)	Supreme Court
conservators and co-guardians of Todd Lowell	)	Case No. 20120337
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	)	
	)	

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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 APPELLANTS**  
**ARTHUR M. HAYDEN AND JOY LYNN HAYDEN, INDIVIDUALLY,**  
**AND SMITH BAKKE PORSBORG SCHWEIGERT & ARMSTRONG**

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## **STATEMENT OF THE ISSUES**

- (1.)
1. Whether the trial judge's determination Art Hayden and/or Joy Hayden agreed to be personally liable for the services provided to their adult son, Todd Hayden, by Billings Clinic and Medcenter One, was in error.
  2. Whether the trial judge's grant of summary judgment dismissing Art and Joy Hayden's unjust enrichment claim was in error.
  3. Whether the trial judge's grant of summary judgment dismissing Art and Joy Hayden's quantum meruit claim was in error.
  4. Whether the trial judge's grant of summary judgment dismissing Art and Joy Hayden's equitable estoppel claim was in error.
  5. Whether the trial judge's grant of summary judgment dismissing Art and Joy Hayden's and Smith Bakke Porsborg Schweigert Armstrong's common fund claim was in error.

## **STATEMENT OF THE CASE**

(2.) As a result of a June 12, 2009 all-terrain vehicle ("ATV") accident, Todd Hayden ("Todd") sustained permanent brain injuries and is an incapacitated person. Todd has incurred medical expenses well in excess of \$1 million and counting - far exceeding his ability to pay. But for the actions of Todd's parents, Art and Joy Hayden ("Todd's Parents") of paying COBRA premium payments out of their own pockets to maintain Todd's coverage under a group health plan while the health care services at issue were being provided, and in securing through litigation against Todd's health insurer a reversal of a denial of insurance coverage, neither Billings Clinic nor Medcenter One would have ever received payment. Todd's Parents had no legal obligation to incur these detriments which directly benefited Billings Clinic and Medcenter One. Despite the group health plan being the only available private resource for payment of

Todd's medical bills at issue, Billings Clinic and Medcenter One refused Todd's Parents' request to join in the legal proceedings against Todd's health insurer following the insurer's denial of coverage. Under the circumstances, there is no equitable justification for Billings Clinic and Medcenter One to retain the benefits, cost-free, of the detriments incurred by Todd's Parents – detriments for which Todd's Parents have received no benefit.

(3.) Todd's Parents, individually, and as co-guardians and co-conservators of Todd, as well as their legal counsel, Smith Bakke Porsborg Schweigert Armstrong ("Smith Bakke"), commenced this action on January 9, 2012 seeking reimbursement for Todd's Parents out-of-pocket expenses and payment of the attorneys' fees and costs incurred in securing the insurance payments to Billings Clinic and Medcenter One, for which Todd's Parents are individually liable, under the equitable theories of unjust enrichment, quantum meruit and equitable estoppel. On May 17, 2012, Todd's Parents and Smith Bakke moved to amend their pleadings to add a cause of action under the "common fund" doctrine. On July 30, 2012, the trial judge granted Medcenter One and Billings Clinic's summary judgment motions dismissing all claims, including the requested "common fund" doctrine claim, concluding, in relevant part, there was no unjust enrichment of Billings Clinic and Medcenter One as 1) Todd had a legal obligation to pay for the services provided by Billings Clinic and Medcenter One, 2) Todd's Parents' purportedly agreed by contract to pay for the services, and 3) Smith Bakke has a contractual remedy against Todd's Parents for the services rendered in securing the insurance payments to Billings Clinic and Medcenter One.

(4.) It is not disputed on appeal Todd had a legal obligation to pay for the services provided him by Billings Clinic and Medcenter One. It is also not disputed Smith Bakke has a legal remedy available against Todd's Parents, individually, and as the co-conservators of Todd, for

collection of its attorney's fees and costs in securing the insurance payments to Billings Clinic and Medcenter One. The trial judge's dismissal of the equitable claims of unjust enrichment, quantum meruit and equitable estoppel of Smith Bakke and Todd Hayden are not being appealed. Instead, the issues on appeal are whether the trial judge erred by concluding Todd's Parents agreed to be responsible, individually, for payment of the services provided Todd by Billings Clinic and Medcenter One, and whether the trial judge erred in dismissing Todds' Parents' equitable claims, as well as the claims of Todd's Parents and Smith Bakke under a "common fund" theory.

## **STATEMENT OF FACTS**

### **I. THE PARTIES**

(5.) Plaintiffs/Appellants Arthur M. Hayden and Joy Lynn Hayden, husband and wife, ("Todd's Parents") have at all times relevant herein been residents of South Heart, North Dakota. Their son, Todd Lowell Hayden ("Todd"), was at the time of the subject June 12, 2009 accident, an independent single adult residing near Sidney, Montana.

(6.) At the time of the subject accident, and for at least ten years prior thereto, Todd was an employee of Nabors Industries, Inc. ("Nabors") and was covered by a group health plan through his employer, and administered by Blue Cross and Blue Shield of Texas ("BCBSTX").

(7.) Plaintiff Smith Bakke Porsborg Schweigert & Armstrong ("Smith Bakke") is a legal practice organized under the laws of the State of North Dakota, having its principal place of business in Bismarck, North Dakota. Todd's Parents, individually, and as Todd's co-conservators/guardians, retained Smith Bakke on a contingency fee basis to secure insurance coverage payments from BCBSTX following a denial of coverage relative to Todd's injuries

stemming from the June 2009 ATV accident, and to pursue any other available legal remedies in relation to payment issues and injuries surrounding Todd's accident.

(8.) Defendant Medcenter One, Inc. is a non-profit corporation organized under the laws of the State of North Dakota, and is the owner of the trade name Q & R Clinic. Defendant Medcenter One Living Centers is a non-profit corporation organized under the laws of the State of North Dakota and is the owner of the trade name Medcenter One Mandan Care Center Off Collins. Both Medcenter One, Inc. and Medcenter One Living Centers shall hereinafter be referred to, collectively, as "Medcenter One".

(9.) Defendant Billings Clinic is a non-profit corporation organized under the laws of the State of Montana, is found within the State of North Dakota and conducts business in Williston, North Dakota.

## **II. THE ACCIDENT AND SUBSEQUENT CARE PROVIDED TODD HAYDEN**

(10.) On June 12, 2009, Todd sustained severe brain injuries as a result of an all-terrain vehicle accident which occurred near Sidney, Montana. As a result of the subject accident, Todd is an incapacitated person (cognitive impairment), and is expected to require significant medical and rehabilitative care for the remainder of his life.

(11.) Todd was initially treated for a traumatic brain injury in the emergency room at Sidney Health Center in Sidney, Montana.<sup>1</sup> In the early morning hours of June 13, 2009, Todd was transferred by air ambulance to defendant Billings Clinic in Billings, Montana, where he was treated for his traumatic brain injury and received other medical services for approximately one

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<sup>1</sup> Sidney Health Center was previously dismissed from this case due to an out-of-court settlement (Doc. #81).

month. Billings Clinic has billed Todd in excess of \$227,000 relative to health care provided Todd as a result of the June 2009 ATV accident.

(12.) On July 13, 2009, Todd was transferred by air ambulance from Billings Clinic to Medcenter One in order to receive medical treatment closer to Todd's Parents' home in South Heart, North Dakota. (App. 23 at ¶ 3.) From July 13, 2009 through at least the end of February of 2012, Todd received continuous care from Medcenter One. Medcenter One billed Todd in excess of \$777,000 for care stemming from the subject accident. (*Id.*) Todd has also incurred other medical bills and expenses not at issue in this case.

(13.) On August 11, 2009, nearly one month after Todd had been admitted to Medcenter One and while Todd was an incapacitated person, but prior to Todd's Parents being appointed as Todd's co-guardians and co-conservators, Art Hayden signed an Admission/Treatment Agreement with Medcenter One, Inc., listing his relationship to Todd as "father." The agreement provides, in relevant part, as follows:

I, the undersigned, acting for myself or as the legally authorized representative of, Hayden, Todd, do hereby consent to the rendering of such care, which may include routine diagnostic procedures and such medical treatment as the attending physician(s) or professional staff deem necessary or advisable. I further acknowledge with Medcenter One Inc. ("Medcenter One") as follows:

\* \* \*

3. **If I am the Patient, or an individual legally obligated to pay for medical services provided to the Patient or a guarantor of payment, I agree to pay and am financially responsible for Medcenter One's established charges for all services, facilities and supplies provided to the Patient.**

\* \* \*

(App. 180 [bold added, underline in original].) Todd's Parents did not sign any personal guaranty of payment relative to the care provided to Todd by either Billings Clinic or Medcenter One.

(14.) Todd's Parents were appointed co-guardians and co-conservators for Todd, an incapacitated person, on September 9, 2009. Medcenter One concedes, despite Todd's Parents being appointed as Todd's co-guardians and co-conservators, only "Todd remained the financially responsible party for his medical bills." (Doc. 49 at p. 2; *see* Transcript at pp. 14-15 ("Todd Hayden, their son, is the debtor, and that's who guaranteed the debt that he incurred at Medcenter One and he's the financial [sic] responsible party. . . . Medcenter One has never sought payment from Art and Joy Hayden."))

(15.) As a result of Joy Hayden receiving medical bills and telephone calls from representatives of Billings Clinic and Medcenter One requesting payment for the care provided to Todd, Todd's Parents believed either they and/or Todd would or may be responsible for paying those medical bills. (App. 44-45 at ¶ 3; App. 62-69.)

### **III. TODD'S INSURER REFUSES COVERAGE FOR INJURIES STEMMING FROM ATV ACCIDENT**

(16.) At the time of the accident, Todd was an independent adult employed by Nabors Well Services Co., an affiliate of Nabors Industries ("Nabors"), and was covered under a group health plan administered by Blue Cross Blue Shield of Texas (BCBSTX). The group health plan provides coverage up to a maximum of \$2 million.

(17.) Between June 2009 and February of 2010, Todd's Parents contacted BCBSTX on numerous occasions inquiring about health insurance benefits for Todd pursuant to the health insurance policy. Billings Clinic and Medcenter One also directly submitted claims to BCBSTX

for payment of care provided to Todd stemming from the subject accident. (Transcript at pp. 4-5, 12-13.) Although some initial claims were paid by BCBSTX, payments were quickly discontinued. BCBSTX representatives initially indicated by phone to Todd's Parents that Todd's claim for health insurance benefits was denied because his injuries were the result of an ATV accident, which was allegedly not covered by the health insurance policy. There is in fact no exclusion in the health insurance policy for injuries caused by ATV accidents. BCBSTX representatives later stated by phone the claim for health insurance benefits was being denied due to alleged involvement of alcohol in the accident. In fact there was no alcohol involved in the accident. Despite Todd's Parents' repeated requests, BCBSTX and Nabors wrongfully refused to provide health insurance coverage for Todd's injuries for which Todd was entitled.

(18.) On March 2, 2010, BCBSTX finally provided its final and only written denial of the claim for health insurance benefits for Todd, which indicated BCBSTX would not pay for any accidents where there was alcohol involved. Todd's blood alcohol level at the time of the accident was determined by testing immediately following his accident to be minimal and/or inconsequential and would not constitute a justifiable basis for denial of health care benefits per the policy terms and conditions. BCBSTX denial of coverage based on Todd having "alcohol on board" was found by Nabors on appeal to be completely without any basis whatsoever.

#### **IV. TODD'S PARENTS RETAIN LEGAL COUNSEL AND INVITE BILLINGS AND MEDCENTER ONE TO JOIN IN LITIGATION TO COMPEL INSURANCE COVERAGE**

(19.) On March 25, 2010, following preliminary discussions with Todd's Parents and prior to commencement of any litigation, Randall Bakke of Smith Bakke, contacted Medcenter One and was directed to Lori Blees. (App. 71 at ¶ 3.) Bakke advised Ms. Blees Todd's Parents would be filing a lawsuit against BCBSTX and Nabors to compel insurance coverage under Todd's group

health plan administered by BCBSTX. *Id.* Bakke requested Medcenter One join forces with Todd's Parents to pursue a lawsuit against BCBSTX to pursue recovery of medical benefits due the Medcenter One; however Ms. Blee indicated Medcenter One would not join in the lawsuit because it was a "lost cause" and Medcenter One would leave the situation between the patient and the insurance carrier. *Id.*

(20.) On March 26, 2010, Todd's Parents, individually, and as co-conservators and co-guardians of Todd Hayden, entered into a contingency fee agreement (App. 42) with Smith Bakke to represent them in attempts to compel BCBSTX to provide coverage for the medical care provided to Todd relative to his injuries stemming from the June 2009 ATV accident and in relation to other possible claims. Todd's Parents were induced to commence this lawsuit in part as a result of their belief they and/or Todd were financially responsible for payment of Todd's care provided by Billings Clinic and Medcenter One. (App. 44-45 at ¶ 3.)

(21.) On April 1, 2010, Billings Clinic was put on notice of Todd's Parents' impending lawsuit as a result of a records requests submitted by Smith Bakke to Billings Clinic which identified Smith Bakke as counsel for Todd's Parents in relation to their claims against Nabors and/or BCBSTX. (App. 30-31 at ¶ 2.) A representative of Smith Bakke also spoke with a representative of Billings Clinic on or about April 19, 2010 regarding the same. *Id.* at ¶ 3. Smith Bakke also spoke with a billing representative from Billings Clinic in approximately late February/early March 2011. All of these communications demonstrate Billings Clinic was on notice regarding the Haydens' claim against BCBSTX and Nabors for wrongful denial of health care benefits, but simply chose not to pursue the matter.

#### **IV. TODD'S PARENTS COMMENCE LITIGATION TO COMPEL INSURANCE COVERAGE**

(22.) On June 28, 2010, Todd's Parents, through Smith Bakke, commenced a lawsuit entitled *Hayden v. BCBSTX, et. al.*, Civil No. 1:10-cv-050 in the United States District Court for the District of North Dakota alleging various state and federal claims against BCBSTX, Nabors and Health Care Service Corporation for their wrongful failure to pay insurance benefits for the health care provided Todd as a result of the June 2009 ATV accident. Smith Bakke served and responded to discovery requests, filed multiple administrative appeals of BCBSTX's denial of health care benefits, has prepared and filed numerous motions and briefs requesting declaratory relief, has responded to motions filed by BCBSTX, and has performed numerous other legal tasks relative to the federal court action. Smith Bakke has spent hundreds of hours (in excess of 900 hours to date) pursuing recovery of health insurance benefits for Todd from BCBSTX and related entities. (App. 71 at ¶ 6.) Although insurance coverage for Todd's injuries stemming from the subject accident, in general, has now been conceded by BCBSTX, the federal action is ongoing relative to specific instances of care provided Todd for which coverage is yet being denied.

(23.) On May 24, 2011, Nabors, the other plan administrator, reversed BCBSTX's previous denial of health care benefits and admitted Todd was entitled to health care benefits under the provisions of his health insurance policy with BCBSTX. Smith Bakke immediately contacted counsel for BCBSTX and demanded payment of the gross amounts being billed to Todd by Billings Clinic and Medcenter One be sent directly to Smith Bakke, as counsel for the Haydens. Such a direct payment to the insured, Todd, was allowed for under the BCBSTX insurance policy. Instead, on or about June 8, 2011, BCBSTX began making payments for medical care provided Todd at discounted rates directly to Todd's medical service providers, including Medcenter One and Billings Clinic, without notifying Todd's Parents or their counsel, Smith

Bakke. (App. 23-24 at ¶ 5.) The direct payments by BCBSTX to Medcenter One and Billings Clinic did not extinguish Todd's obligations for co-pays or deductibles to Medcenter One. *See* Transcript at pp. 7-8, 53; Doc. #49 at p. 3.)

**V. TODD'S PARENTS EXPENDED THEIR OWN TIME AND MONEY IN SECURING INSURANCE COVERAGE PAYMENTS MADE DIRECTLY TO BILLINGS CLINIC AND MEDCENTER ONE – TODD'S PARENTS HAD NO LEGAL OBLIGATION TO DO SO**

(24.) Todd's Parents have expended significant amounts of time, energy, and financial expense in securing insurance coverage payments for the care provided Todd by Billings Clinic and Medcenter One. In order to preserve Todd's right to recovery of benefits under his insurance policy with BCBSTX and to prevent Todd Hayden's insurance policy from lapsing, Todd's Parents began making COBRA premium payments out of their own pockets in approximately October 2009, and continued to do so for the full duration of available COBRA coverage, through the end of February of 2012. (App. 44 at ¶ 2.) Todd's Parents paid at least \$8,891.37 in COBRA premium payments from their own funds to maintain coverage for Todd despite the fact BCBSTX was wrongfully denying coverage at the time. (App. 44 at ¶ 2; App. 70-71 at ¶ 2.) Medcenter One and Billings Clinic have been the beneficiaries of significant health insurance benefits being paid directly to them as a result of these COBRA payments – payments which Todd had no ability, and which Todd's Parents had no obligation, to make. In addition Medcenter One and Billings Clinic have been the beneficiaries of all the time and expense incurred by Smith Bakke and Todd's Parents in pursuing litigation in federal court to obtain coverage by BCBSTX for the health care benefits provided by Medcenter One and Billings Clinic.

(25.) In addition, Todd's Parents, individually, and as co-conservators and co-guardians for Todd, entered into a contingency fee contract (Doc. 43) with their legal counsel, Smith Bakke, on March 26, 2010 to compel insurance coverage from BCBSTX and Nabors for Todd's injuries stemming from the June 2009 ATV accident, among other possible claims, including pursuant to the federal action discussed above. As Smith Bakke has been successful in securing insurance coverage from BCBSTX for the care provided by Billings and Medcenter One, Todd's Parents have incurred significant personal liability for the attorneys' fees and costs associated therewith – liabilities for which Todd's Parents will receive no benefit (i.e. Todd's Parents are under no individual legal obligation to pay for the care provided to Todd).

**VI. TODD'S PARENTS COMMENCE THIS ACTION SEEKING REIMBURSEMENT FOR OUT-OF-POCKET EXPENSES AND LIABILITY INCURRED FOR THE BENEFIT OF BILLINGS AND MEDCENTER ONE**

(26.) Todd's Parents commenced this action against Billings Clinic and Medcenter One on January 9, 2012 requesting reimbursement for their out-of-pocket expenses and liabilities incurred in securing insurance coverage payments to Billings Clinic and Medcenter One on the equitable theories of unjust enrichment, quantum meruit, and equitable estoppel.

**VII. THE TRIAL JUDGE GRANTS MEDCENTER ONE AND BILLINGS CLINIC SUMMARY JUDGMENT DISMISSING ALL CLAIMS**

(27.) On March 3, 2012, just over two months after this case was commenced and prior to any meaningful discovery having occurred, Medcenter One moved for summary judgment. Billings Clinic joined therein<sup>2</sup>. Pursuant to *Order on Motion for Summary Judgment* dated July 30, 2012,

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<sup>2</sup> Although Billings Clinic had previously filed a motion to dismiss, based in part upon an alleged lack of jurisdiction by the trial court, Billings Clinic waived the jurisdictional issue and joined in Medcenter One's motion for summary judgment. See *Order on Motion for Summary Judgment* (App. 198) at p. 4 ("Further, because Billings joined MCO's summary judgment motion, which

District Judge Thomas J. Schnieder granted Billings Clinic and Medcenter One summary judgment dismissing all claims in this action, concluding, in relevant part, Billings Clinic and Medcenter One were not unjustly enriched as 1) Todd had a legal obligation to pay for the care provided him by Billings Clinic and Medcenter One, 2) Todd's Parents purportedly contractually agreed to be individually liable for payment of the care provided Todd, and 3) Smith Bakke had a legal contractual remedy against Todd's Parents for payment of attorneys fees and costs incurred.

(28.) Todd's Parents, individually, and as co-guardians and co-conservators of Todd, as well as Smith Bakke, timely filed their *Notice of Appeal* from the *Order on Motion for Summary Judgment* and *Judgment* entered July 30, 2012 on August 30, 2012. (App. 215.)

## ARGUMENT

### **I. STANDARD OF REVIEW**

(29.) The standard of review of a grant of summary judgment has recently been summarized by this Court as follows:

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 or 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 judgment 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.

*Arndt v. Maki*, 2012 ND 55, ¶ 10, 813 N.W.2d 564, 568 (citations omitted).

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is based on North Dakota law, this Court will assume Billings has agreed to application of North Dakota law to this suit.”).

(30.) The trial judge's grant of summary judgment dismissing Todd's Parents' equitable claims was in error as the trial judge's decision is premised upon an erroneous determination Todd's Parents are or were legally obligated to pay for the health care provided to Todd.

**II. THE TRIAL JUDGE'S RULING ON THE MOTION FOR SUMMARY JUDGMENT WAS PREMATURE AS TODD'S PARENTS WERE NOT AFFORDED A REASONABLE OPPORTUNITY TO CONDUCT DISCOVERY**

(31.) As a threshold matter, Billings and Medcenter One's motion for summary judgment at issue was premature. This case was commenced via *Summons & Complaint* dated January 4, 2012, served through admission of service upon Medcenter One on January 9, 2012. Medcenter One (later joined by Billings) served its motion for summary judgment on February 20, 2012, only forty-two days after this action was commenced. Todd's Parents were not afforded an opportunity to conduct meaningful discovery on several issues, including but not limited to the following:

- what negotiations occurred between Medcenter One and BCBSTX resulting in Medcenter One accepting only approximately \$500,000 when benefits under the policy were due in the amount of \$777,191 (gross amount billed Todd), and to determine what portion of the difference pertains to Todd's purported ongoing co-pay and deductibles obligation;
- what negotiations occurred between Billings Clinic and BCBSTX resulting in Billings Clinic accepting only approximately \$199,000 when benefits under the policy were due in the amount of \$227,000 (gross amounts billed Todd);
- how nursing home charges incurred by Todd while in the care of Medcenter One Living Centers were negotiated with BCBSTX under the applicable North Dakota Rate Equalization Clause; and

- what fee arrangement Medcenter One had with the collection agency it retained to pursue a recovery from the Haydens which would demonstrate Medcenter One was aware collection efforts are not free and must be paid.

### **III. THE TRIAL JUDGE'S DISMISSAL OF TODD'S PARENTS' EQUITABLE CLAIMS WAS BASED UPON A CRITICAL ERROR OF FACT – TODD'S PARENTS DID NOT AGREE TO PAY FOR TODD'S CARE**

(32.) The trial judge justified the dismissal of the equitable claims of Todd's Parents on the erroneous determination "the Haydens expressly agreed that either they [or] Todd Hayden would pay MCO for charges related to Todd Hayden's medical treatment." (*Order on Motion for Summary Judgment* [App. 203] at p. 9, citing paragraph 3 of the Medcenter One Admission/Treatment Agreement [App. 180] reproduced in relevant part in paragraph II of the Facts hereof.) Art Hayden signed the document as Todd's father over one month after Todd had already been admitted to Medcenter One, and the Admission/Treatment Agreement does not constitute a promise by Todd's Parents to pay for the care provided to Todd. Instead, paragraph 3 of the Admission/Treatment Agreement expressly states payment will be made by the patient or an individual legally obligated to pay for the medical services provided to the patient or a guarantor. The Admission/Treatment Agreement does not constitute an agreement by Todd's Parents to pay for the care provided to Todd. The Admission/Treatment Agreement specifically says "If I am the patient, or an individual obligated to pay..." (App. 180 at ¶ 3.) This is clearly not a commitment by Todd's Parents to personally pay for Todd's medical care at Medcenter One. In addition, Todd's Parents never signed any guaranty of payment on behalf of Todd and were not otherwise legally obligated to pay for his medical care. Art Hayden signed the agreement on behalf of Todd as Todd was mentally incapable of doing so on his own behalf. Although Todd's Parents were subsequently, on September 9, 2009, appointed as Todd's co-

guardians and co-conservators, such positions only obligated Todd's Parents to apply Todd's personal assets toward payment for his medical care – not the assets of Todd's Parents. In fact, Medcenter One concedes, despite Todd's Parents being appointed as Todd's co-guardians and co-conservators, only “Todd remained the financially responsible party for his medical bills.” (App. 23 at ¶ 4.) The trial judge did not cite any evidence, and none has been presented, to establish Todd's Parents agreed to pay Billings Clinic for the care provided Todd. Thus the court's findings Todd's Parents are legally obligated to pay for Todd's care at Billings Clinic is based on no evidence whatsoever, and was made despite Billing Clinic's admission in this case Todd's Parents were and are not legally obligated to pay Billings Clinic any amount. (Transcript at p. 8.)

**(33.)** Todd's medical expenses have far exceeded his financial resources and Todd's incapacity is permanent, i.e. he will not be earning any additional income. But for the efforts of Todd's Parents, neither Billings nor Medcenter One would have received payment. Todd's Parents paid \$8,891.37 in COBRA premium payments out of their own pockets following the subject accident to maintain insurance coverage under Todd's group health plan while the care at issue was being provided, and while BCBSTX was denying coverage. Todd's Parents also incurred personal liability for payment of attorneys' fees and costs associated with civil litigation which resulted in a reversal of BCBSTX's denial of coverage for Todd's injuries and payment to Billings and Medcenter One. The trial judge's decision failed to recognize Todd's Parents were under no legal obligation to incur these detriments which resulted in direct benefits to Billings Clinic and Medcenter One – benefits which Billings Clinic and Medcenter One refused to pursue.

**(34.)** The fundamental error underlying the trial judge's dismissal of Todd's Parents' equitable claims under the theories of unjust enrichment, quantum meruit and equitable estoppel was the

trial judge's imputation of Todd's personal obligation to pay for the care provided him by Billings and Medcenter One to Todd's Parents. This was despite specific admission by both Medcenter One and Billings Clinic that Todd's Parents had no legal obligation to pay for Todd's care at Medcenter One or Billings Clinic. Further, Todd's legal obligations are immaterial to the equitable claims of Todd's Parents.

#### **IV. DISMISSAL OF TODD'S PARENTS' UNJUST ENRICHMENT CLAIM WAS IN ERROR**

(35.) "To recover under a theory of unjust enrichment, one must prove (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of a justification for the enrichment; and (5) absence of a remedy provided by law." *v. C.F. Peterson Estate*, 2005 ND 40, ¶ 9, 692 N.W.2d 120. "Unjust enrichment is an equitable doctrine, applied in the absence of an express or implied contract, to prevent a person from being unjustly enriched at the expense of another." *Id.* "An essential element of recovery under unjust enrichment is the receipt of a benefit by the defendant from the plaintiff that would be inequitable to retain without paying for its value." *Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc.*, 2004 ND 117, ¶ 26, 680 N.W.2d 634. "Even when a person has received a benefit from another, that person is liable only if the circumstances of the receipt or retention are such that, as between the two persons, it is unjust to retain the benefit." *Id.* "A determination of unjust enrichment is necessarily a conclusion of law because it holds that a certain state of facts is contrary to equity." *Matter of Estate of Zent*, 459 N.W.2d 795, 798 (N.D. 1990).

(36.) In this case, Billings Clinic and Medcenter One were enriched through their receipt of health insurance payments from BCBSTX under Todd's group health plan. This enrichment was as a direct result of an impoverishment of Todd's Parents, both in terms of the time and out-of-

pocket expenses they incurred in maintaining coverage under the group health plan by paying COBRA premium payments during the period of time Todd was receiving the care at issue, and by paying out-of-pocket expenses and incurring personal liability relative to attorneys' fees and costs associated with obtaining payment from BCBSTX for the care provided by Billings Clinic and Medcenter One. Todd's Parents also spent and continue to spend significant time pursuing insurance coverage from BCBSTX for Todd's medical care, which also constitutes an impoverishment on their part. There is no equitable justification for such enrichment and impoverishment as between Billings Clinic, Medcenter One. Todd's Parents had no legal obligation to incur the impoverishment for the benefit of Billings Clinic and Medcenter One. Following the denial of insurance coverage by Todd's insurer BCBSTX, Billings Clinic and Medcenter One refused a request to join in federal civil litigation against Todd's insurer to compel coverage. Considering the group health plan administered by BCBSTX was the only private means by which Billings Clinic and Medcenter One could possibly obtain payment for the care they had, and were, providing to Todd, their refusal to join in litigation against Todd's insurer was tantamount to writing Todd's account off as uncollectible (aside from public assistance). Billings Clinic and Medcenter One sat on their hands and awaited the outcome of the federal court lawsuit while fully aware they stood to benefit freely from the efforts of Todd's Parents.

(37.) Todd's Parents also have no available remedy at law. There is no express contract between Todd's Parents and Billings or Medcenter One, and ERISA regulations only pertain to claims which may be asserted by Todd directly against his insurer. No remedy is available to Todd's Parents under ERISA.

(38.) As discussed below, all of the cases relied upon by the trial judge to support its decision

are factually distinguishable from the present case. None of the cases relied upon by the trial judge involved a claim by someone who incurred a detriment, with no obligation to do so, which resulted in a direct benefit to the health care provider, and for which no other legal remedy was available. The trial judge in this case simply misapplied the law by improperly tying the detriments incurred by Todd's Parents in securing the payments to Billings Clinic and Medcenter One with Todd's legal obligation to pay for the care provided him by Billings Clinic and Medcenter One. Billings Clinic's and Medcenter One's entitlement to payment for the care provided Todd, and Todd's financial obligation to pay for said care, are simply irrelevant to the equitable claims of Todd's Parents, individually.

(39.) The cases relied upon by the trial judge are further distinguishable from the present case, as discussed below.

A. **Zuger v. N.D. Insurance Guaranty Assoc., et. al. (Supreme Court of North Dakota)**

(40.) In *Zuger v. N.D. Insurance Guaranty Assoc., et. al.*, 494 N.W.2d 135 (N.D. 1992), attorney/plaintiff Zuger was hired by an insurance company, Great Global, to represent an insured group of hospitals in relation to malpractice cases brought against the insured hospitals. When Great Global became insolvent, attorney/plaintiff Zuger continued to represent the insured hospitals through the North Dakota Guaranty Association ("Association"). Zuger subsequently brought suit against the Association and the insured hospitals, in relevant part, for recovery of unpaid attorney's fees incurred prior to Great Global's insolvency. Zuger's claim against the Association and insured hospitals was under a theory of unjust enrichment. In denying Zuger's unjust enrichment claim against the Association, this Court noted Zuger had a legal (contractual) remedy against Great Global, and therefore, an equitable remedy against the Association was

unavailable to him. The fact Great Global was insolvent was immaterial – Zuger was simply a creditor of Great Global.

(41.) Similarly, in denying Zuger’s unjust enrichment claim against the insured hospitals, this Court again noted Zuger had a legal remedy against Great Global precluding an equitable remedy. In addition, the Court determined any enrichment of the insured hospitals was not unjust as the insured hospitals in effect paid for the legal services by paying the insurance premiums to Great Global – such insurance included the provision of Zuger’s legal representation in defending against the malpractice actions at issue. *Zuger*, 494 N.W.2d at 139.

(42.) *Zuger* is factually distinguishable from the equitable claims of Todd’s Parents in the present case. Unlike the attorney in *Zuger*, Todd’s Parents have no legal remedy for recovery of the detriments they have incurred in securing the insurance payments to Billings Clinic and Medcenter One. In addition, unlike the insured hospitals in *Zuger* which actually paid, indirectly, for the legal services provided them, there is no justification in the present case, as between Todd’s Parents and Billings Clinic and Medcenter One, for the health care providers to retain freely the benefits derived solely as a result of the detriments incurred by Todd’s Parents. *Zuger* also did not involve a situation where the claimant paid insurance premiums to maintain coverage for the financially responsible person out of their own pockets for nearly two and one half years, as did Todd’s Parents.

**B. Lynch v. Deaconess Medical Center (Supreme Court of Washington)**

(43.) In *Lynch v. Deaconess Medical Center*, 776 P.2d 681 (Wash. 1989), the plaintiff/attorney Lynch had represented a patient in an action against the patient’s insurer and obtained a refund from the insurer which was subsequently paid to the hospital for medical expenses incurred by the patient. Lynch then sued the hospital to recover his attorney fees pertaining to recovery of the

refund, in relevant part, under the theory of unjust enrichment. *Id.* at 682-83. The Supreme Court of Washington upheld the summary judgment dismissal of the unjust enrichment claim finding the evidence did not reflect the hospital had been “unjustly” enriched by Lynch’s services. *Id.* at 683. Specifically, the court concluded Lynch’s patient client had a legal obligation to pay for the services received from the hospital. *Id.* In addition, the court concluded the hospital only received an incidental benefit derived from Lynch’s services to his patient client- services which Lynch contracted to provide to his patient client. *Id.*

(44.) As a preliminary matter, the decision in *Lynch* is of no precedential value to this Court, it being a case from the state of Washington. In addition, although some of the facts in *Lynch* are similar to those involved in this case, the critical distinction is the nature of the claimant in the present case. Todd’s Parents, unlike the patient in *Lynch*, have no personal legal obligation to pay for the services provided to Todd. Further, Todd’s Parents, unlike the attorney in *Lynch*, had no contractual or other legal obligation to incur the detriments they incurred in securing the insurance payments made directly to Billings Clinic and Medcenter One. Further, unlike the attorney in *Lynch* who could seek compensation for the services rendered from his patient client per contract, Todd’s Parents have no available remedy at law. Further, the amount of health care benefits recovered in *Lynch* (\$8,056.86) was significantly less than the amount in excess of one million dollars secured by Todd’s Parents for Billings Clinic and Medcenter One. *Lynch* also did not involve a situation where the claimant paid insurance premiums to maintain coverage for the financially responsible person out of their own pockets for nearly two and one half years, as did Todd’s Parents.

C. **Wilson v. Sisters of St. Francis Health Services Inc. (Court of Appeals of Indiana)**

(45.) In *Wilson v. Sisters of St. Francis Health Services, Inc.*, 952 N.E.2d 793 (Ind. Ct. App. 2011), the plaintiff/attorney had represented an insured patient on a contingency fee arrangement in an action against the patient's health insurer after the insurer denied coverage for the patient's hospital bills. The insurer subsequently paid the hospital directly for services provided to the patient. The attorney subsequently brought a claim, in relevant part, for unjust enrichment against the hospital contending the hospital had been unjustly enriched at the expense of the attorney. *Id.* at 796.

(46.) In upholding the summary judgment dismissal of the attorney's unjust enrichment claim in *Wilson*, the Court of Appeals of Indiana determined the hospital had not been unjustly enriched as the hospital was entitled to payment for the services rendered to the patient and the hospital was "a stranger" to the contingency fee agreement between the attorney and the patient and "should not be forced to carry the burden of [the patient's] contractual obligations." *Wilson v. Sisters of St. Francis Health Services, Inc.*, 952 N.E.2d at 797. The court also noted if the hospital were required to pay the legal expenses associated with obtaining the insurance payments, the patient would essentially be receiving the benefits of the attorney's work (with whom the patient contracted) without having to pay for it at the hospital's expense. *Id.*

(47.) As with *Lynch*, *Wilson* is of no precedential value to this Court, it being a case from Indiana. In addition, the facts of *Wilson* are distinguishable from the present case. Todd's Parents, unlike the patient in *Wilson*, have no personal legal obligation to pay for the services provided to Todd. Further, Todd's Parents, unlike the attorney in *Wilson*, had no contractual or other legal obligation to incur the detriments they incurred in securing the insurance payments made directly to Billings Clinic and Medcenter One. Unlike the attorney in *Wilson* who could seek compensation for the services rendered from his patient client per contract, Todd's Parents

have no available remedy at law. There is no legal mechanism, aside from an equitable remedy in this action, through which Todd's Parents can obtain reimbursement for their out-of-pocket expenses incurred to maintain insurance coverage for Todd under COBRA, or for their individual liability for attorney's fee and costs incurred in securing the health insurance payments made directly to Billings Clinic and Medcenter One. Further, unlike in *Wilson*, Billings Clinic and Medcenter One were offered the opportunity to participate in the litigation against BCBSTX to compel coverage for the care they were providing to Todd and expressly refused to do so following BCBSTX's denial of coverage for those services. There can be no justification for this enrichment as Billings Clinic and Medcenter One would have had to expend their own resources, including legal resources and other collection efforts, in order to obtain payment for Todd Hayden's medical bills *but for* the legal and other efforts of Todd's Parents in securing the insurance payments from BCBSTX to Billings Clinic and Medcenter One. Further, the amount of medical benefits recovered in *Wilson* (\$26,524.27) was significantly less than the amount in excess of one million dollars secured by Todd's Parents for Billings Clinic and Medcenter One. *Wilson* also did not involve a situation where the claimant paid insurance premiums to maintain coverage for the financially responsible person out of their own pockets for nearly two and one half years, as did Todd's Parents.

**V. DISMISSAL OF TODD'S PARENTS' QUANTUM MERUIT CLAIM WAS IN ERROR**

(48.) Determinations of whether awards in quantum meruit are available to a party are based upon questions of fact which are for the jury to decide, making summary judgment inappropriate. *See, e.g. Jenkins, Inc. v. Walsh Bros., Inc.*, 776 A.2d 1229 (Maine 2001). Recovery under the theory of quantum meruit in North Dakota requires "an implied contract, under which it was the

obligation of the defendant to pay the plaintiff on a quantum meruit basis for the reasonable value of the services furnished by the plaintiff, inasmuch as said implied contract did not specify an amount.” *Bismarck Hospital Ass’n v. Burleigh County*, 146 N.W.2d 887, 889 (N.D. 1966).

(49.) In quantum meruit, recovery is allowed for services performed for another on the basis of a contract implied in law or an implied promise to pay the performer for what the services were reasonably worth. *Id.* Where an implied-in-law contract is asserted, the question is not merely what is or is not the case but, rather, what in equity ought to be the case. *Matter of Estate of Zent*, 459 N.W.2d at 800. Further, 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.*

(50.) In the present case, Billings Clinic and Medcenter One were expressly advised of Todd’s Parents’ efforts in pursuing a claim against BCBSTX to compel payment of insurance benefits relative to the care being provided Todd by Billings Clinic and Medcenter One. Medcenter One was on notice regarding Todd’s Parents’ federal lawsuit against BCBSTX at least as early as March 25, 2010, when counsel for Todd’s Parents contacted Lori Blees of Medcenter One. Ms. Blees indicated to Mr. Bakke Medcenter One would leave the situation between patient and insurance carrier, and would not join in a lawsuit with the Haydens because said lawsuit would likely be a lost cause. Billings Clinic was on notice regarding the lawsuit against BCBSTX at least as early as April 1, 2010, when Smith Bakke sent a records request to Billings Clinic notifying them of the lawsuit and requesting Todd’s medical records. Both Billings Clinic and Medcenter One had directly submitted claims for payment to BCBSTX and had been denied.

(51.) In addition, Medcenter One and Billings Clinic received significant value for the services

rendered by Todd's Parents and their legal counsel, Smith Bakke, in obtaining insurance payments for the care provided Todd. Although Todd's Parents were not afforded an opportunity to complete discovery on this issue, it is believed Billings Clinic received payment from BCBSTX for the services provided Todd in the approximate amount of \$199,934.46. Medcenter One admits receipt of direct payments from BCBSTX for the services provided Todd in the approximate amount of \$500,000.

(52.) Further, as both Billings Clinic and Medcenter One clearly utilize and pay collection agencies to pursue unpaid medical bills, they were aware such legal and other efforts by Todd's Parents in the federal court case would not come cost-free in the event Billings Clinic and/or Medcenter One received a benefit from plaintiffs' services. Billings Clinic and Medcenter One were on notice regarding the federal lawsuit, and should have reasonably expected Todd's Parents would seek reimbursement for out-of-pocket expenses and attorneys' fees from them if Billings Clinic and/or Medcenter One ultimately received any insurance payments from BCBSTX, which they did.

## **VI. DISMISSAL OF TODD'S PARENTS' EQUITABLE ESTOPPEL CLAIM WAS IN ERROR**

(53.) Equitable estoppel claims are ordinarily questions of fact for a jury to decide. *Rath v. Armour & Co.*, 136 N.W.2d 142, 148 (N.D. 1965). There are questions of fact for a jury to decide in relation to Todd's Parents' equitable estoppel claim making summary judgment on this claim inappropriate.

(54.) To establish a claim for equitable estoppel under North Dakota law, a plaintiff must show on the part of the defendant:

“(1) Conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are

otherwise than those which the [defendant] subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or will influence, the [plaintiff]; and (3) knowledge, actual or constructive, of the real facts.”

*Matter of Helling*, 510 N.W.2d 595, 597 (N.D. 1994).

A plaintiff must also show, on their own part:

“(1) Lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the [defendant]; and (3) action or inaction based thereon, of such a character as to change the position or status of the [plaintiff], to his injury, detriment, or prejudice.”

*Id.*

(55.) The statement made by Lori Blees during her March 25, 2010 telephone conversation with counsel for the Haydens that a lawsuit against BCBSTX was a “lost cause” conveyed the impression to plaintiffs a lawsuit against BCBSTX was the only option left in order to ensure the Hayden’s would not be responsible for Todd Hayden’s medical bills. Lori Blees told plaintiffs a claim or lawsuit was a “lost cause”, and plaintiffs relied upon that. Plaintiffs were told through Lori Blees Medcenter One would not be pursuing a claim against BCBSTX. This conversation, in addition to Todd’s Parents’ continuous receipt of medical bills and telephone calls from representatives of Billings Clinic and Medcenter One requesting payment for the care provided to Todd, caused a change in the position of Todd’s Parents because they continued to make COBRA payments totaling \$8,891.37 to extend Todd’s health insurance coverage, hoping they could secure a reversal of BCBSTX’s wrongful denial of insurance coverage for Todd’s care.

**VII. THE “COMMON FUND” DOCTRINE SHOULD BE APPLIED TO EQUITABLY ALLOCATE THE COSTS ASSOCIATED WITH SECURING INSURANCE COVERAGE AMONGST THOSE WHO BENEFIT**

(56.) Pending before the trial court at the time of the July 30, 2012 *Order on Motion for*

*Summary Judgment* was *Plaintiffs' Motion to Amend Complaint* dated May 17, 2012 (Doc #90). Said motion requested leave to add a cause of action against Billings Clinic and Medcenter One under the "common fund" doctrine, as well as additional factual allegations pertaining thereto. See *Plaintiffs' Amended Complaint* (proposed) (App. 181). Although the trial judge did not directly rule on said motion, the trial judge implicitly allowed the amendment by addressing such cause of action in the July 30, 2012 *Order on Motion for Summary Judgment* at pages 16 through 18. The trial judge determined the common fund doctrine to be inapplicable in this case.

(57.) In addressing the common fund doctrine, this Court has explained:

The common fund doctrine is a recognized exception to the general principle that every litigant should bear his own attorney's fees, and the doctrine provides that a litigant who recovers a common fund for the benefit of others is entitled to reasonable attorney's fees from the fund as a whole. 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. The common fund doctrine is consistent with the American rule because the expense is spread out among those who benefit from the suit rather than requiring the losing party to pay the cost of the litigation.

*Mann v. North Dakota Tax Commissioner*, 2007 ND 117, ¶ 38, 736 N.W.2d 464 (quotations and citations omitted). This Court also quoted the following common fund principles enunciated by the Nebraska Supreme Court in *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489, 493 (1954) in *Horst v. Guy*, 211 N.W.2d 723, 732 (N.D. 1973):

15. Where one has gone into a court of equity, and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees of the litigant's counsel.

16. This rule is based on the theory that all in the class benefited should contribute to the expense, their share thus being necessarily entirely dependent upon the success of the litigation.

(58.) Although this Court has most often addressed the common fund doctrine in the context of

class action lawsuits, the equitable principles underpinning the doctrine, discussed above, are not so limiting. In *In re Estate of Rohrich*, 496 N.W.2d 566, 572 (N.D. 1993), this Court applied the common fund doctrine, or at least the principles underlying the doctrine, to uphold an equitable award of attorney's fees to a beneficiary who successfully challenged the fees requested by the estate's co-personal representatives, thereby benefiting all beneficiaries of the estate, stating:

It has been held that the equitable power of a court authorizes an award of attorney fees in an action by one person which benefits a class of persons, thus making it equitable to spread the costs of the action among the members of the benefited class. *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). More specifically, some states allow beneficiaries to recover fees in equity when, at their own expense and not for their sole benefit, their attorney's services benefited the estate as a whole by increasing a common fund in which other beneficiaries might share. *Rogers v. Rogers*, 71 Or.Ap. 133, 691 P.2d 114 (1984); *In re Estate of Katschor*, 637 P.2d 855 (Okla. 1981); *In re Estate of Lappy*, 202 Or. 571, 277 P.2d 781 (1954); *In re Estate of Parr*, 287 P.2d 906 (Okla. 1955); cf. *In re Estate of O'Brien*, 18 Ariz.App. 375, 502 P.2d 176 (1972).

This "common fund" concept has long been a part of our jurisprudence. See, e.g. *Hildreth v. Western Realty Co.*, 62 N.D. 233, 242 N.W. 679 (1932); *Kilby v. Movius Land & Loan Co.*, 55 N.D. 830, 215 N.W. 284 (1927) [stockholders bringing successful suit on behalf of himself and other stockholders entitled to costs and attorney fees from corporation]; *Beyer v. North American Coal & Mining Co.*, 43 N.D. 401, 175 N.W. 216 (1919) [an action brought by minority shareholders to recover attorney fees incurred in representing corporations in former litigation]. The theory of these cases is equally applicable when a beneficiary benefits the estate.

*In re Estate of Rohrich*, 496 N.W.2d at 572.

(59.) The Supreme Court of Illinois elaborated on the equitable principles underlying the common fund doctrine, and their proper application, in *Bishop v. Burgard*, 765 N.E.2d 24 (Ill. 2002). In *Bishop*, an employee incurred medical expenses as a result of injuries she sustained in an automobile accident. *Id.* at 27. The injured employee was covered under her employer's ERISA plan. *Id.* The plan paid for medical expenses pertaining to the employee's injuries. *Id.* The employee later retained an attorney on a contingency fee basis to pursue recovery from the at-fault driver of the other vehicle involved in the accident. *Id.* The attorney ultimately secured a

settlement in a personal injury action against the at fault driver. *Id.* The ERISA plan claimed a lien on the settlement proceeds to the extent of the medical expenses paid on behalf of the injured employee. *Id.* The attorney subsequently filed a petition with the Circuit Court for adjudication of the lien claiming the ERISA plan's entitlement to reimbursement should be reduced by the amount of the attorney's contingency fee in securing the recovery. *Id.* The Circuit Court agreed. *Id.* In upholding the Circuit Court's determination under a common fund theory, the Supreme Court of Illinois reasoned as follows:

But for [the employee's] action, and the efforts of her attorney, there would have been no fund from which the plan could have obtained reimbursement. For purposes of applying the common fund doctrine, it is irrelevant that the party who benefits from a lawyer's services has a *right* to compensation, be it an undifferentiated right of reimbursement or subrogation as is asserted here, or a right to compensation under some other theory. Obviously, everyone who brings a legal action is asserting some claim of right. However, a mere right may amount to nothing more than a possibility unless it is properly asserted. That is the point. The real question is whether the plan obtained the benefit of a lawsuit without contributing to its costs. *See Boeing [Co. v. Van Gemert, 444 U.S. 472, 478 (1980)]*. If so, it was unjustly enriched for purposes of applying the common fund doctrine. The policy behind the fund doctrine is to prevent subrogees from "freeloading." If the costs of litigation are not spread to the beneficiaries of the fund, they will be unjustly enriched by the attorney's efforts. These principles undoubtedly apply to the facts of this case.

*Id.* at 34 (citations and quotations omitted)(italics in original).

**(60.)** These same equitable principles should apply equally to the present case. Todd's Parents incurred out-of-pocket expenses and individual liability for attorneys' fees and costs associated with securing a common fund (insurance coverage) for payment of Todd's health care service providers, without any legal obligation to do so. Smith Bakke has also expended considerable time in securing the insurance benefits. The common fund benefits not only Billings Clinic and Medcenter One, but also numerous additional health care providers, including Dakota Alpha, Inc., 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 or have the ability to receive a benefit as a result of Todd's Parents and Smith Bakke obtaining a reversal of BCBSTX's wrongful denial of coverage. As discussed in *Bishop*, under a common fund theory, it is immaterial whether Billings Clinic and Medcenter One had a right to payment – such a right is only a possibility of payment absent some action on their part to procure the payment. In the present case, the only private source of funds that was potentially available to Billings Clinic and Medcenter One for payment was the BCBSTX policy. Neither Billings Clinic nor Medcenter One took any action to seek a reversal of BCBSTX's denial of coverage for Todd's care and refused to join in Todd's Parents' action to secure such coverage (Medcenter One believing it to be a lost cause). Instead, they chose to free-load on the efforts of Todd's Parents and Smith Bakke and have greatly and unjustly benefited by doing so.

**(61.)** It is important to note Todd's Parents will receive virtually nothing for their efforts in obtaining the common fund for payment of the health care providers who would not have otherwise received payment (aside from possible government assistance) for the care provided Todd. Todd's Parents are merely attempting to recoup their out-of-pocket expenses and extinguish their personal liability for attorneys' fees and costs incurred in obtaining the insurance payments made to Billings and Medcenter One. Todd's Parents will not profit if successful on their equitable claims.

**(62.)** Todd's Parents have expended well in excess of one hundred hours of their personal time in pursuing the federal court action on their own dime which resulted in the payment of insurance benefits directly to Billings Clinic and Medcenter One, as well as other entities and individuals who have provided health care to Todd stemming from the 2009 accident. Coverage under Todd's group health plan (the common fund) would not have been obtained for these care

providers had it not been for the efforts of Todd's Parents and their attorneys. The "common fund doctrine" should be applied to effectuate reimbursement of Todd's Parents for their out-of-pocket expenses and personal liability for the attorneys' fees and costs incurred in securing such common fund. It is not equitable to permit Billings Clinic and Medcenter One to knowingly free-load on the efforts of Todd's Parents and Smith Bakke.

**VIII. THE AMOUNT OF BILLINGS CLINIC'S AND MEDCENTER ONE'S UNJUST ENRICHMENT WAS THE GROSS AMOUNT THEY BILLED TODD FOR THE CARE THEY PROVIDED, LESS CO-PAYS AND DEDUCTIBLES, NOT THE DISCOUNTED AMOUNTS THEY ACCEPTED IN SETTLEMENT FROM BCBSTX**

(63.) The amount of Billings Clinic's and Medcenter One's unjust enrichment at the expense of Todd's Parents is the gross amount of their respective bills submitted to Todd for payment, less Todd's co-pay and deductible obligations, despite the fact they accepted discounted amounts from BCBSTX in settlement. Of the gross amount of \$777,191 billed by Medcenter One to Todd as of June of 2011, Medcenter One accepted approximately \$500,000 in settlement with BCBSTX. Similarly, of the gross amount in excess of \$227,000 billed by Billings Clinic to Todd, Billings Clinic accepted approximately \$199,000 in settlement with Billings Clinic. There is no evidence to establish they were allowed or required to accept these discounted amounts. As a result of BCBSTX's reversal of its prior improper denial of coverage, both Billings Clinic and Medcenter One were entitled to payment for the full amounts billed to Todd, less Todd's co-pays and deductibles.

(64.) Medcenter One contends it was required to accept a lesser payment from BCBSTX pursuant to the terms of a Noridian Mutual Insurance Company Provider Participation Agreement (Doc. 113). However, no evidence has been presented to establish BCBSTX is an affiliate of Noridian Mutual Insurance Company or otherwise a party to said provider agreement.

It is not disputed Blue Cross Blue Shield of North Dakota (“BCBSND”) is a division of Noridian Mutual Insurance Company, which itself is a North Dakota corporation. The only connection between BCBSND and BCBSTX of which plaintiffs are aware is the fact they are both independent licensees of the Blue Cross Blue Shield Association (i.e. they are private companies authorized to use the Blue Cross Blue Shield name). BCBSTX is a division of Health Care Service Corporation, a Mutual Legal Reserve Company. In other words, Medcenter One apparently relies solely upon a provider agreement it has with Noridian (BCBSND) as justification for extending provider discounts to BCBSTX. BCBSND and BCBSTX are two separate legal entities. There is no reference in the provider agreement to BCBSTX. No evidence has been provided to establish Medcenter One had a contractual obligation to apply a provider discount to amounts due from BCBSTX relative to the treatment of Todd.

(65.) The Hayden’s have not yet had an opportunity to conduct discovery to fully ascertain the basis for Billings Clinic’s acceptance of less than the gross amount billed to Todd from BCBSTX.

(66.) The acceptance of the discounted amounts was detrimental to Todd. The gross amounts due under the BCBSTX policy should have been paid to Todd’s Parents directly due to their efforts to secure the payments in the federal lawsuit – efforts Billings Clinic and Medcenter One decided not to join in. Had such direct payment been made to Todd’s Parents, they would have had money to pay their attorneys whose work secured the insurance benefits, and Todd’s Parents could have negotiated with Billings Clinic and Medcenter One for a complete settlement of Todd’s balance owed them, including co-pays and deductibles. There may have also been money left over for Todd’s ongoing care. The backdoor dealings of BCBSTX with Billings Clinic and Medcenter One following BCBSTX concession of coverage as a result of the federal court

litigation served no purpose other than to cheat the Hayden's out of benefits they were entitled to under the BCBSTX policy.

(67.) As explained by this Court in *Dewitz by Nuestel v Emery*, 508 N.W.2d 334, 340 (N.D. 1993), it is not equitable for a tortfeasor to receive the benefit of any health care provider discounts when ascertaining damages. Although there is no allegation Billings Clinic or Medcenter One committed any tort in this case, the same equitable principles should apply in this situation. Whether Billings Clinic and Medcenter One agreed to accept less compensation from BCBSTX for the services provided Todd than the gross amount billed Todd for those services should not affect the equitable remedy afforded Todd's Parents.<sup>3</sup> Todd and Todd's Parents should obtain the full benefits associated with securing insurance coverage from BCBSTX which resulted in the payments to Medcenter One and Billings Clinic. The gross amount of medical bills submitted by Billings Clinic and Medcenter One to Todd for payment was in the approximate amount of \$1,060,586.23.

## **IX. CONCLUSION**

(68.) The trial judge inappropriately dismissed the equitable claims of Todd's Parents on the basis of Todd Hayden's underlying legal obligation to pay for health care provided to him. Todd's Parents, individually, had no legal obligation to pay for the health care provided to Todd. Billings Clinic and Medcenter One would not have received any payment had it not been for the out-of-pocket expenses and attorneys' fees and costs incurred by Todd's Parents in securing said payments from BCBSTX. There is no equitable justification for Billings Clinic and Medcenter One to retain the benefits obtained as a result of the efforts of Todd's Parents, particularly

considering Billings Clinic and Medcenter One refused to join in the efforts to secure the insurance payments at issue. Todd's Parents request the trial judge's dismissal of their unjust enrichment, quantum meruit and equitable estoppel claims, as well as the common fund doctrine claim of Todd's Parents and Smith Bakke, be reversed, and this matter be remanded to the trial court for completion of discovery and for a jury trial.

Dated this 10<sup>th</sup> day of October, 2012.

SMITH BAKKE PORSBORG SCHWEIGERT  
& ARMSTRONG

By:           s/ *Randall Bakke*          

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<sup>3</sup> No contractual agreements between BCBSTX and either Billings Clinic or Medcenter One were produced in this case, despite plaintiffs' requests for any such agreements during discovery and during the hearing on the summary judgment motions. (Transcript at pp. 35-36.)

**CERTIFICATE OF COMPLIANCE**

(69.) The undersigned, as attorneys for the Plaintiffs/Appellants in the above matter, and as the authors of the above brief, 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 10, 323.

Dated this 10<sup>th</sup> day of October, 2012.

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Arthur M. Hayden and Joy Lynn Hayden, as co-	)	Supreme Court
conservators and co-guardians of Todd Lowell	)	Case No. 20120337
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	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing [Corrected] Brief Of Appellants Arthur M. Hayden And Joy Lynn Hayden, Individually, And Smith Bakke Porsborg Schweigert & Armstrong and [Corrected] Appendix was on the 11<sup>th</sup> day of October, 2012, emailed to the following:

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