

IN THE SUPREME COURT OF THE STATE OF OREGON

**LARISA'S HOME CARE, LLC**, an Oregon  
limited liability company,  
*Plaintiff-Respondent,*  
*Petitioner on Review,*

vs.

**KAREN NICHOLS-SHIELDS**, the duly-  
appointed Personal Representative of the  
Estate of Isabell Prichard, deceased,  
*Defendant-Appellant,*  
*Respondent on Review.*

SC Case No.: S064120

Court of Appeals Case No.:  
A154950

Washington County Circuit Court  
Case No.: C124865CV

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**AMENDED BRIEF ON THE MERITS  
OF LARISA'S HOME CARE, LLC**

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Petition for Review of the Decision of the Court of Appeals  
On Appeal from the Judgment of the Circuit Court of Washington County

Opinion Filed: April 27, 2016

***Reversed***

Opinion by Hadlock, C.J.  
Before Sercombe, Hadlock, and Tookey

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**PETITIONER'S BRIEF ON THE MERITS**

*COMES NOW*, Plaintiff-Respondent-Petitioner, LARISA'S HOME CARE, LLC, an Oregon limited liability company, by and through undersigned counsel, and pursuant to ORAP 9.17, and hereby files this BRIEF ON THE MERITS, and states as follows:

**I. CITATION STANDARDS.**

1. Plaintiff-Respondent-Petitioner, LARISA'S HOME CARE, LLC, an Oregon limited liability company, will herein be referred to as "Petitioner" or "LHC."

2. Defendant-Appellant-Respondent, KAREN NICHOLS-SHIELDS, in her capacity as the duly-appointed Personal Representative of the Estate of Isabell Prichard, deceased, will herein be referred to as "Respondent."

3. The Transcript on Appeal is cited herein as: [Tr. (Page):(Line)].

4. Excerpts of the Record are cited herein as: [ER (Page)].

5. Supplemental Excerpts of the Record are cited herein as: [SER (Page)].

6. The Court of Appeals Opinion under Review, *Larisa's Home Care LLC v. Nichols-Shields*, 277 Or. App. 811 (2016), is cited herein as: [Opinion, (Page)].

**II. ORAP 9.17(2)(B)(I) – CONCISE STATEMENT OF THE LEGAL QUESTION PRESENTED ON REVIEW, AND THE RULE OF LAW PETITIONER PROPOSES BE ESTABLISHED.**

In a case where a person or their agent commits Medicaid fraud such that it denies full payment to a healthcare facility, does that facility have a reasonable expectation of being paid in full?

Proposed Rule of Law: Where Medicaid fraud can be proven, regardless of the State's determination of eligibility for Medicaid, a health care provider or long term residential care provider is entitled to recover, as a matter of equity, the difference between the Medicaid rate paid and the private pay rate that would have been charged to that patient or resident.

**III. ORAP 9.17(2)(B)(II)(A) – CONCISE STATEMENT OF THE NATURE OF THE PROCEEDING, THE RELIEF SOUGHT IN THE TRIAL COURT, AND THE NATURE OF THE JUDGMENT RENDERED BY THE TRIAL COURT.**

LHC brought a suit against Respondent, alleging Respondent had been unjustly enriched by LHC. After a trial on the merits, the trial court ruled that Respondent had been unjustly enriched, and awarded LHC damages in equity in the amount of \$48,477.00.

Respondent appealed the decision of the trial court. The Court of Appeals reversed the decision of the trial court, holding that LHC's contract with the State of Oregon precluded LHC from recovering the damages.

Jurisdiction in this Court is vested pursuant to ORS § 19.205 *et. seq.*

**IV. ORAP 9.17(2)(B)(II)(B) – ALL THE FACTS OF THE CASE MATERIAL TO DETERMINATION OF THE REVIEW**

Petitioner, LARISA'S HOME CARE, LLC, an Oregon limited liability company, provides adult foster care home services. [Tr. 162:11-13]. Isabell Prichard lived at LHC's care home from June of 2007 [Tr. 72:4-5], until she passed away on November 1, 2008 [Tr. 68:10-11].

Ms. Prichard gave a power of attorney to her son Richard Gardner. [Tr. 248:17-19; ER 1-2]. Mr. Gardner, pursuant to his power of attorney, admitted Ms. Prichard into LHC's care home. [Tr. 252:8-12].

Ms. Prichard gave a power of attorney to her son Richard Gardner. [Tr. 248:17-19; ER 1-2]. Accordingly, at all relevant and material times, Mr. Gardner was standing in the shoes of Ms. Prichard, and his actions legally were the actions of Ms. Prichard. The Court of Appeals erred when it held that "[Petitioner] is essentially blaming [Respondent] for the bad acts that Gardner committed..." [Opinion, at 818].

Mr. Gardner, pursuant to his power of attorney, admitted Ms. Prichard into Respondent's care home. [Tr. 252:8-12]. In addition, Mr. Gardner also submitted an application for Medicaid eligibility to the state of Oregon on behalf of Ms. Prichard. [Tr. 256:23-257:6; SER 2-12]. Mr. Gardner—acting as Ms. Prichard's

legal agent—misrepresented his mother's financial ability to pay for her care. As Mr. Gardner testified:

Q: ... when you signed this application did you believe your mother was actually eligible for Medicaid?

A: No.

[Tr. 258:3-6].

The Medicaid rate is substantially lower than the private pay rate. [TR. 210:7-10]. Therefore, Mr. Gardner's misrepresentations resulted in an erroneous approval for Medicaid assistance, and a substantial discount of \$48,477.00 to Ms. Prichard's cost of care from LHC. [Tr. 187:14-188:3; SER 1].

Mr. Gardner testified at trial that he and his sister, Karen Nichols-Shields, the Respondent in this matter, conspired to transfer money out of their mother's account to themselves in order to "spend down" and hide Ms. Prichard's assets in order to qualify her for Medicaid.<sup>1</sup>

Q: So these were all [...] drawn on your mother's account; is that correct?

A: That is correct.

Q: Okay. What was the purpose of these transfers?

A: Well, the \$11,000 ones, I'm trying to remember, starting in 2002—I guess that's irrelevant. All of the \$11,000 ones were

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<sup>1</sup> The trial court never held that Respondent specifically committed any act of fraud or misrepresentation, and did not comment on her conspiracy. However, the trial court did hold that Mr. Gardner, **on behalf of Ms. Prichard and acting as her legal agent**, engaged in conduct intended to defraud Petitioner.



supposed to be for gifting **to spend down my mother's account** so that money could be put away in case she needed it and **so that** doctors and **home care** and everyone else **would not get it all and that she would be able to go on Medicaid** once all that money was gone.

Q: Now, you said she would be able to go on Medicaid once all that money was gone. Did you mean she'd be able to go on Medicaid once it was all gifted to—to you and your sister?

A: Well, basically, once it was no longer in her accounts.

Q: Okay. So once you moved—the purpose was once you moved the money out of the accounts—out of her account, the purpose was then to qualify her for Medicaid. That was the plan; is that correct?

A: That's correct.

Q: Okay. **And whose plan was that? Who came up with this idea?**

A: Well, the gifting part of it was brought up to me by my sister—

Q: [Respondent] Karen Shields?

A: --who said that—

Q: **Karen Shields; is that correct?**

A: **Yes, Karen Shields. That's correct.**

[...]

Q: ... why \$11,000?

A: Well, because **I was told by Karen** that \$11,000 was the limit per person, so that you did not have to claim them on taxes.

[...]

Q: And then the plan was—**after mom died then what would happen to it?**

A: **We'd just split it up.**

Q: Who—and you say “we,” do you mean you and your two sisters?

A: [...] yes.

Q: **And didn't Mrs. Shields tell you that this plan or this scheme was called spending down?**

A: **Yes.**

[Tr. 261:12-263:23 (**emphasis added**)].

Respondent did receive and accept the transfers resulting from her conspiracy. [ER 13-14; SER 15-21]. Respondent's intention, based on the testimony presented at trial and the evidence supporting her receipt of the funds [ER 13-14; SER 15-21], was to defraud Medicaid and defraud LHC of the difference between the appropriate private pay rate and the lower Medicaid rate.<sup>2</sup> [Tr. 261:21-262:12]. This is also evidenced by the fact that Mr. Gardner testified as follows:

- Q: And you understood that then by putting her in—by putting her in Larisa's Home Care and submitting the false Medicaid application that Larisa would be getting paid the Medicaid rate and not the private pay rate; is that correct?
- A: That's correct.
- Q: Even though you knew that your mother was not eligible based on what we talked about earlier on the Medicaid application, was not eligible for Medicaid; is that correct?
- A: That is correct also.
- Q: Okay. So as you sit here today, do you think your mother should've paid the private pay rate to Larisa's Home Care?
- A: Well, as I sit here today, I realize that I listened to the wrong people. I took their advice.<sup>3</sup> I made a huge mistake in doing so.

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<sup>2</sup> However, Mr. Gardner took the plan a step further than Respondent intended, and took advantage of his position as power of attorney to convert a substantial amount of Ms. Prichard's estate. In 2011, Mr. Gardner was prosecuted and convicted of criminal mistreatment. This conviction stems from Mr. Gardner's deception and unlawful taking of Ms. Prichard's property. *See, State of Oregon v. Richard Duane Gardner*, Wash. Co. Cir. Ct. No. C112363CR. [ref. ER 7-18].

<sup>3</sup> Based on the totality of his testimony, Mr. Gardner can only be referring to Respondent. At a minimum, Respondent is at least one of the people who directed and benefited from Mr. Gardner's illegal actions [ref. Tr. 261:12-263:23]. Under

And that—no, I've—I've done it. I admitted it. I went to court. I went to jail. I paid my fines and restitution. I've done everything that I could do.

Q: ... **do you believe that Larisa's Home Care should've been paid the private pay rate and not the Medicaid rate?**

A: **Yes.**

[Tr. 265:3-266:3 (*emphasis added*)].

Following Ms. Prichard's death, it was discovered that she had substantial assets to pay for the care provided by LHC, and should have been charged by LHC as a private pay resident at the higher private pay rate. [Tr. 172:16-173:5].

Respondent **admitted** that LHC should have been paid at the private pay rate, instead of the reduced Medicaid rate for the care LHC provided to Ms. Prichard. [Tr. 193:10-194:12; SER 1]. Respondent also admitted to conspiring with her brother, Mr. Gardner, to "spend down" Ms. Prichard's account, receiving and accepting funds via fraudulent transfer, and even involving Respondent's husband and third sibling in the conspiracy. [Tr. 72:22-83:13].

Importantly, the Court of Appeals left out this vital fact: **Respondent even went so far as attempting to seek these additional private pay costs as restitution in the criminal proceedings.** [Tr. 89:10-90:12; ER 7-18; SER 13-14].

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Agency Law, Mr. Gardner was "standing in the shoes" of Ms. Prichard at all times while acting on her behalf and to her benefit and the benefit of her estate—which was in fact benefitted by his actions since the Court of Appeals has not required Respondent to pay back what it wrongfully appropriated from LHC.

Respondent worked with LHC to determine the amount of money LHC was “shorted” as a result of the Medicaid fraud that occurred. As Larisa Louka, CEO of LHC, testified:

- Q: So can you explain what exactly Exhibit 14—what this represents?
- A: This represents the care provided for Isabell [Prichard] over the course of the year and a half that she was at my facility and explains what she would've been charged as a private pay client.  
And then it takes into consideration that we were paid some of that by Medicaid and the amount that we were paid and the difference that we should've had—been paid if she were not Medicaid eligible.
- Q: And what was the final total that you—the difference between the private pay rate and the Medicaid rate that you calculated?
- A: 48,477.
- Q: And, again, why did you prepare this exhibit?
- A: **Karen [Shields] had asked me to prepare this document for restitution, so she could pay us back for the damages that were caused.**
- Q: So Mrs. Shields, did she tell you that she was going to try to recover for you the difference between the private pay rate and the Medicaid rate?
- A: Yes.
- Q: And at any time while you were involved in this, did Mrs. Shields ever tell you that “Oh, guess what, you're not entitled to the—to the difference between the Medicaid rate and the private pay rate?”
- A: No. In fact, **she called me quite a bit and talked about this, how unfair it was and how I needed to get paid for this.**

[Tr. 187:14-188:19 (**emphasis** added); *ref.* SER 1].

Regarding the voicemail Respondent left LHC [Tr. 193:10-194:12], LHC testified that she appropriately understood that Respondent, “was trying to get in

the dollar amount for the damages that were caused so I could get paid.” [Tr. 194:18-20].

There were other communications between Respondent and LHC regarding this, including emails, some of which were lost to LHC when she got married and changed her email address. [Tr. 196:7-21].

LHC subsequently made a claim on the estate of Isabell Prichard, relying on promises made by Respondent that LHC would be compensated for the difference between what Ms. Prichard would have paid under a private pay plan versus what LHC received in Medicaid payments.<sup>1</sup> LHC's claim was denied by the personal representative of Ms. Prichard's estate, who happens to be Respondent, **despite the fact that Respondent represented to the District Attorney in her brother's criminal trial that LHC was owed approximately \$48,477.00.** [SER 1].

Thereafter, LHC filed the equitable action underlying this appeal, claiming Ms. Prichard's estate was unjustly enriched because of the fraudulent conduct undertaken on behalf of the estate by Respondent.

LHC's expert, Garvin Reiter, Esq., testified that this type of scheme would have to be reported to Medicaid **and would have disqualified Ms. Prichard from**

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<sup>1</sup> The State of Oregon also made a claim against Prichard's estate. The claim was settled by the estate for roughly \$35,000.00.

**Medicaid.** [Tr. 159:5-9]. During trial, Respondent, through her counsel, admitted that Ms. Prichard did not qualify for Medicaid because she had “too many assets.” [Tr. 217:7-9].

The trial court determined this was an equity claim, not a statutory one, and found in favor of LHC and awarded LHC \$48,477.80. [Tr. 337:9-338:25; ER 50-52]. As the trial court stated in its ruling:

Through no fault of the plaintiff's own, she took Ms. Prichard in as a Medicaid resident because her personal representative clearly committed fraud.

It is no mistake that he did so. It is also no mistake that he—we know that she would have been able to pay and should have paid at the time but for his fraud.

And, therefore, as a whole, there is no reason why, as we look at this case as an equitable one and fundamental fairness, that because of that fraud, the fraud on the applications, the fraud on all the paperwork that was presented, that the estate of Ms. Prichard should not now be basically paying their debt.

They cannot now benefit from all that has come before to this particular point. It would be unfair for the plaintiff to be left holding the bag and to—and for the estate to now benefit from the fraud.

I do believe that the plaintiff has proven the unjust enrichment claim. And so I do find that they are entitled to the \$48,477.80.

[Tr. 338:3-25].

### **Procedural History**

LHC filed its Complaint against Respondent on August 8, 2012. Respondent filed a motion for summary judgment on October 24, 2014. The Trial Court denied Respondent's motion. This case went to trial on June 12, 2013. On July 11, 2013, the trial court ruled in LHC's favor on two of the three issues presented at trial. On July 25, 2013, a general judgment and money award was entered, in which the trial court concluded that the Oregon Administrative Rules did not prohibit LHC from bringing an equitable claim for unjust enrichment, that Respondent was unjustly enriched to the detriment of LHC, and that it would be unfair to force LHC to suffer said detriment.

Respondent appealed. The Court of Appeals found that Respondent's assignments of error were not proper, and as such did not consider Respondent's first assignment of error. The Court of Appeals found that Respondent's *ore tenus* motion to dismiss during closing arguments sufficiently preserved her second assignment of error. On April 27, 2016, the Court of Appeals reversed the trial court's judgment.

LHC's Petition for Review was timely pursuant to ORAP 9.05(2)(a).

### **V. ORAP 9.17(2)(B)(III) – SUMMARY OF PETITIONER'S ARGUMENT**

The Court of Appeals erred when it held the third element of LHC's unjust enrichment claim—that it would be unjust to allow a recipient to retain a benefit

without paying for it—was not satisfied as a matter of law. LHC had a reasonable expectation of being paid the private pay rate by any and all residents who did not properly and legally qualify for Medicaid. Society reasonably expects people to pay the appropriate price for services they receive.

The Court of Appeals erred when it failed to link the fraud perpetrated by Ms. Prichard's agent (power of attorney) to her estate.

The Court of Appeals erred when it required a posthumous finding of Medicaid ineligibility to prove an equitable claim.

## **VI. ORAP 9.17(2)(B)(IV) – PETITIONER'S ARGUMENT**

### **A. The Court of Appeals Erred When it Held the Third Element of LHC's Unjust Enrichment Claim—that it Would be Unjust to Allow a Recipient to Retain a Benefit Without Paying for it—Was Not Satisfied as a Matter of Law.**

The Court of Appeals held that, “[LHC] could establish that it had a reasonable expectation of being paid the private-pay rate only if it presented evidence from which a factfinder, here the trial court, could find that Prichard was not a Medicaid Client.” [Opinion, 816]. The Court of Appeals concluded that, given the contract between LHC and the State of Oregon, LHC could not have had a reasonable expectation to be paid the private-pay rate. [Opinion, 816-817].

The Court of Appeals reasoned that, because the State of Oregon made the determination that Ms. Prichard was eligible for Medicaid coverage, and because



the State of Oregon never made a subsequent determination that Ms. Prichard was **not** eligible for Medicaid coverage, then under the terms of the contract LHC had with the State of Oregon, LHC could not have reasonably expected to be paid anything other than the Medicaid rate for LHC's services. [Opinion, 816-817].

The Court of Appeals' reasoning skips a crucial step in the analysis. The State of Oregon's determination of whether someone is Medicaid eligible is wholly reliant on the representations made to the State of Oregon with respect to the applicant's financial resources. *See*, OAR 461-160-0010 through OAR 461-160-0855. Oregon Statutes specifically prohibit an individual from making false representations regarding their financial status in order to qualify for financial assistance. ORS § 411.630. While it is true that the State of Oregon made the determination that Ms. Prichard was eligible for Medicaid coverage, that decision was made based upon fraudulent information provided by Respondent.

The uncontroverted evidence in the record establishes that, had Respondent been truthful on her Medicaid application, Ms. Prichard would not have qualified for Medicaid coverage and therefore would have paid LHC the private-pay rate.

**1. LHC had a reasonable expectation to be paid the private-pay rate.**

LHC provides adult foster care services for adults who cannot otherwise live by themselves. LHC has two separate rates for providing these services: a

Medicaid rate and a private-pay rate. The private-pay rate is higher than the Medicaid rate, so naturally LHC prefers to have private-pay residents over Medicaid residents.

LHC reasonably expects its residents to pay at the rate they are qualified to pay. If a resident can pay the private-pay rate, LHC expects that resident to pay the private-pay rate. If a resident can no longer pay the private-pay rate, LHC agrees to accept the resident at the approved Medicaid rate.

This case presents an instance where the resident **should** have been paying the private-pay rate, but because the resident (through her power of attorney) intentionally submitted inaccurate Medicaid forms to the State of Oregon to fraudulently qualify for Medicaid coverage, the resident ended up paying LHC the Medicaid rate. During trial, Respondent, through her counsel, admitted that Ms. Prichard did not qualify for Medicaid because she had “too many assets.” [Tr. 217:7-9].

Now, LHC is left to suffer the consequences of that fraud. As the trial court pointed out, LHC “was left holding the bag, as I’ve already said. And [LHC] is now entitled to get the money that [LHC] is owed.” [Tr. 339:14-17].

Importantly, Respondent did, in fact, benefit from the Medicaid fraud. When the power-of-attorney returned the money to Ms. Prichard’s estate, the estate was now flush with money that should have been paid to LHC. By not requiring Ms.

Prichard's estate to pay LHC the difference between the private-pay rate and the Medicaid rate, Respondent directly benefitted from the fraud.

**2. Society reasonably expects people to pay for the services they receive.**

If Respondent is not required to pay the Restitution Amount to LHC, this would result in an injustice that defeats societal expectations of conduct. *See, Robinowitz v. Pozzi*, 127 Or App 464, 467–68 (1994). It would also encourage beneficiaries in the future to commit what amounts to Medicaid fraud, because beneficiaries would be able to misrepresent to service providers like LHC that a client is only “Medicaid eligible,” knowing that there is no consequences to such fraudulent conduct. *See, Scoggins v. State Const. Corp.*, 259 Or. 371, 376 (1971) (“Fraud is only one of many grounds for claiming that the other party was unjustly enriched.”); *Hornbuckle v. Harris*, 69 Or. App. 272, 278 (1983) (holding that a “mistake” committed by the deprived party caused by the conduct of the person benefitting from the mistake is grounds for finding unjust enrichment).

This issue is vital to healthcare and long-term care facilities, patients, and Oregon taxpayers.

If the Court of Appeals decision is upheld, then patients and their families are encouraged to commit Medicaid fraud in order to avoid paying the private pay rate at long term care facilities. The Court of Appeals’ decision stands for the proposition that a person, directly or through their power of attorney, could lie

about Medicaid eligibility, get declared eligible, live at a long-term care facility at the reduced Medicaid rate, knowing that the worst that will happen is the person may have to pay back the State, but not the service provider. That's what happened here, and the benefit to Respondent was almost \$50,000.00.

This directly encourages Medicaid fraud, because people like Respondent know there will be no consequences. In other words, they know the most the estate would have to do is pay back the state for the Medicaid expenses, as if they did not qualify in the first place. This puts the State in the position it was in before the fraud occurred, making the State whole. Why not make facilities like LHC whole as well? If it's fair and just to make the State whole, why is it unfair and unjust to make the provider whole?

The Court of Appeals' decision further has the potential to limit the services Medicaid can provide to those legitimately in need of Medicaid. It discourages facilities from accepting Medicaid patients in favor of legitimate private pay patients, harming those who actually need Medicaid and the care that those facilities provide. Because facilities rely on private pay patients to cover their overhead, this encouragement to Medicaid fraud further reduces the already small amount of beds available to those who legitimately need Medicaid beds. All of this limits access to Oregonians who are legitimately in need, thus undermining the entire purpose for Medicaid.

Lastly, this increases the tax burden on the citizenry at large, as we are all forced to pay for the care provided to people like Respondent—who could have paid but intentionally chose not to.

The Court of Appeals erred when it held that “societal expectations” are that “facilities like [LHC’s] will not exploit their residents by trying to extract payment above the Medicaid rates when those residents have been deemed Medicaid eligible.” [Opinion, 818].

While this statement is true on its face, that is not the risk here. Society also expects that people don’t defraud governmental assistance programs. Society also expects that people will pay what they rightly owe, not what they can con someone out of through fraud and deceit. Medicaid will not posthumously find someone ineligible, so this equitable claim is the only way that LHC, who discovered the fraud only **after** Ms. Prichard passed, can hope to be made whole.

Ms. Prichard, Mr. Gardner, and Ms. Nichols-Shields did not just swindle LHC out of the difference between the Medicaid and private pay rates, they also swindled the Oregonian taxpayers out of Medicaid money, and they harmed those who legitimately needed that Medicaid money and Medicaid-dedicated beds for their healthcare. The Court of Appeals decision directly encourages con-men like Ms. Prichard, Mr. Gardner, and Ms. Nichols-Shields to cheat the system that’s

designed and intended to help those without the ability to afford private care rooms.

Society expects that the courts will not encourage and support fraud, deceit, and cons. Society expects that the courts will support and encourage the recovery of amounts legitimately owed to healthcare providers—especially right now when our healthcare system is in crisis.

The Court of Appeals decision directly encourages Medicaid fraud and illegal “pay down” schemes intended to maximize the estate to the detriment of healthcare providers, facilities, taxpayers, and those in legitimate need of Medicaid and similar services.

**B. The Court of Appeals Erred When it Failed to Link the Fraud Perpetuated by Ms. Prichard's Agent to Her Estate.**

The Court of Appeals erred when it held that “[LHC] is essentially blaming [Respondent] for the bad acts that Gardner committed...” [Opinion, at 818].

This specific matter is a case of first impression in Oregon. However, other jurisdictions can be helpful.

The Supreme Court of Texas has carved out an exception to the normal rule that an administrator of an estate cannot bind the estate in circumstances where the estate unjustly benefitted from the administrator's fraudulent conduct. The Court held that:

[In] his dealings with third persons, in respect to the estate, he is not, by his representative character, absolved from the universal obligation to observe the dictates of natural justice and common honesty, which require that he shall act fairly and not fraudulently. **Nor can the estate which he represents be permitted to derive an unjust and unconscientious advantage, to the injury of those with whom its legal representative contracts, by means of his unauthorized fraudulent conduct.**

*Able v. Chandler*, 12 Tex. 88, 92-93 (1854) (**emphasis added**).

Similarly, the Indiana Court of Appeals also acknowledges circumstances where the general rule that the estate is normally not liable for the fraud of an administrator does not apply.

[G]enerally speaking an estate will not be rendered liable for any damages resulting from any false statements, representations, or warranties made by the administrator. [...] This is so because an administrator as such has no authority to make such statements, representations, or warranties for or on behalf of his estate, and hence, if liable at all, he is individually liable. However, **we do not believe that this principle should be applied to a case where the administrator by the order of the court was authorized to carry on the business of his deceased, and where, in so carrying on such business, he fraudulently obtains and retains for such estate an unconscionable advantage and benefit.**

*Bright Nat'l Bank v. Hanson*, 68 Ind. App. 61, 71, 113 N.E. 434, 437 (1916)

(internal citations omitted; **emphasis added**).

Importantly, in defining circumstances where the estate can be held liable for the fraudulent actions of its administrator, the *Hanson* Court determined that

where the administrator acts as the estate's agent, the estate can be liable for those fraudulent actions.

She was given authority to carry out the contracts of her deceased husband to employ persons to assist her therein, and to sell such notes held by her as administratrix as might be necessary in the carrying on and continuing of said business. **In other words, the order, in effect, permitted the administratrix to step into the shoes of her deceased husband and continue and carry on his business for the benefit of his estate and employ agents to assist her therein. The acts of such administratrix in the matter were therefore akin to the acts of an agent of the estate of her deceased husband, rather than the acts of an administratrix proper of his estate.**

*Id.* (**emphasis** added).

If estates can be liable for the actions of the agents of the decedent, then normal agency law applies.

[U]nder general rules of agency law, principals are liable when their agents act with apparent authority and commit torts.... For instance, a principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority. ... Similarly, **a principal is liable for an agent's misrepresentations that cause pecuniary loss to a third party**, when the agent acts within the scope of his apparent authority....

*Am. Soc'y of Mech. Eng'Rs v. Hydrolevel Corp.*, 456 US 556, 565-66 (1982)

(internal citations omitted; **emphasis** added).

Ms. Prichard gave a power of attorney to her son Richard Gardner. [Tr. 248:17-19; ER 1-2]. Therefore, at all relevant and material times, Mr. Gardner was standing in the shoes of Ms. Prichard, and his actions legally were the actions of



Ms. Prichard. As the power of attorney and agent-in-fact for Ms. Prichard, Mr. Gardner's actions and Ms. Nichols-Shields actions are directly attributable to her.

Ms. Prichard assigned Mr. Gardner as her power of attorney, making him her agent with actual and apparent authority to fill out her Medicaid forms and to handle her financial affairs. Therefore, her estate is liable for the fraudulent actions of her agent—which Ms. Prichard ratified by accepting the services provided by LHC at the Medicaid rate—that resulted in pecuniary loss to LHC in the amount of the difference between the Medicaid rate and the private pay rate.

The simple fact is, Ms. Prichard, Mr. Gardner, and Ms. Nichols-Shields all conspired to and did commit Medicaid fraud, and avoided paying the appropriate private pay rate.

Let us not forget that Respondent **admitted** that LHC should have been paid at the private pay rate, instead of the reduced Medicaid rate for the care LHC provided to Ms. Prichard. [Tr. 193:10-194:12; SER 1]. Respondent also admitted to conspiring with her brother, Mr. Gardner, to “spend down” Ms. Prichard's account, receiving and accepting funds via fraudulent transfer, and even involving Respondent's husband and third sibling in the conspiracy. [Tr. 72:22-83:13]. The undisputed credible testimony at trial clearly demonstrated that Respondent was a conspirator in this “pay-down” scheme [Tr. 261:12-263:2], and by selling her

conspirator, Mr. Gardner, up the river, she was able to secure the entire \$48,477.80 for herself.

After their fraud was discovered and Mr. Gardner took the fall for his co-conspirators, **Respondent then used LHC's legal entitlement to the difference between the Medicaid rate and the private pay rate to get additional restitution for Respondent.**<sup>4</sup> [Tr. 89:10-90:12; ER 7-18; SER 13-14]. This unjustly enriched the estate of Ms. Prichard and unjustly increased Respondent's inheritance by \$48,477.80—all to the detriment of LHC.

Accordingly, the Court of Appeals erred when it found that there was no evidence of any wrongdoing by Ms. Prichard.

**C. The Court of Appeals Erred When it Required a Posthumous Finding of Medicaid Ineligibility to Prove an Equitable Claim.**

The Court of Appeals erred when it held that:

The record includes evidence suggesting that Prichard was approved for Medicaid coverage, and no evidence suggests that the state later determined that Prichard was not Medicaid eligible. In the absence of such evidence, [LHC] was bound by the contract with the state to accept the Medicaid rate as payment in full and not to charge Prichard any additional amounts.

[Opinion, 816].

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<sup>4</sup> This constituted a fraud in and of itself, as the very fact and circumstances of this case demonstrate that Respondent never actually intended to pay LHC the restitution amount as she had promised.

Again, this is an equitable claim, not a contractual or statutory claim. Were this a claim for breach of contract, the Court of Appeals would have been correct. But not with regard to an equitable claim—especially in light of the fact that Respondent used the inequity to obtain additional restitution in the criminal case to further unjustly benefit herself and the estate.

LHC's expert, Garvin Reiter, Esq., testified that this type of scheme would have to be reported to Medicaid **and would have disqualified Ms. Prichard from Medicaid**. [Tr. 159:5-9]. During trial, Respondent, through her counsel, admitted that Ms. Prichard never qualified for Medicaid because she had "too many assets." [Tr. 217:7-9]. All of this led the trial court to correctly conclude that "Through no fault of [LHC's] own, [LHC] took Ms. Prichard in as a Medicaid resident because her personal representative clearly committed fraud." [Tr. 338:3-6].

Moreover, there have been no cases offered by Respondent or relied upon by the Court of Appeals—and indeed there are none—that hold or even suggest that a finding of Medicaid ineligibility by the state is a condition precedent to obtaining an **equitable** remedy such as that sought by LHC.

Had LHC brought a claim for breach of contract, the Court of Appeals would have been correct. This is why LHC sued in equity and not in contract. Unjust enrichment is an "equitable stopgap for occasional inadequacies in contractual remedies at law." *Mass. Eye & Ear Infirmary v. QLT Phototh., Inc.*, 412

F.3d 215, 234 (1<sup>st</sup> Cir. 2005). The instant case presents a clear circumstance where the contractual remedies available at law are inadequate. It is inequitable to estop a healthcare provider from recovering their private pay rate from a patient/estate who commits fraud in order to obtain a reduced rate.

**1. The underlying contract was void because it was fraudulently induced.**

Another way of looking at this is that the underlying contract was voided as a matter of law by the fraud that caused the contract to be entered into by the parties. Because Ms. Prichard obtained Medicaid under fraudulent circumstances, the contract LHC entered into with the State of Oregon to provide her services at the Medicaid rate was based on a fraudulent mistake of fact. This means there was no real meeting of the minds, so no valid contract. Respondent's fraud voided the contract, which means that the private pay rate applies, and LHC should, in equity under a quasi-contractual theory, recover the private pay rate.

**VII. ORAP 9.17(2)(B)(V) – CONCLUSION**

Currently, the law protects and provides for the State to recover in cases of Medicaid fraud. However, contractual and statutory law currently does nothing to protect the caregivers—those doctors, hospitals, and long-term care facilities who provide vital care for the sickest members of our society—when they, too, are victimized by Medicaid fraudsters. Equity provides a needed “stopgap” for this

inadequacy. It is inequitable to allow the estate to perpetuate a fraud against a healthcare provider, and then allow that estate to benefit from the very same fraud.

And this inequity encourages further fraud—the estate only had to repay Medicaid approximately \$35,000, but were able to keep the \$48,477.80 they swindled from LHC. In this case, the estate and its beneficiaries benefitted \$48,477.80 because of the fraud of the estate through the estate's agent. That is money LHC needed to run its business, to provide care for other patients, to maintain a high-quality staff and facility, and to maintain high standards of care.

Equity is intended to make the injured party whole when there is no legal remedy available. LHC should have charged Ms. Prichard the private pay rate, but didn't because it relied upon her fraudulent statements (through her agent) to the State of Oregon. That is all LHC is asking: to be made whole.

**WHEREFORE**, Petitioner, LARISA'S HOME CARE, LLC, respectfully requests this Court REVERSE the Court of Appeals decision and AFFIRM the trial court's decision in this case.

**RESPECTFULLY SUBMITTED** this 28<sup>th</sup> day of October, 2016.

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## CERTIFICATES OF COMPLIANCE

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**DATED** this 28<sup>th</sup> day of October, 2016.

Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

*I HEREBY CERTIFY* that true and correct copies of the document(s) identified below were served in the following manner, to:

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**DATED** this 28<sup>th</sup> day of October, 2016.

by: /s/ Heather Walker  
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