No. DA 19-0357

IN THE

Supreme Court of the State of Montana

CHERYL BRATTON, individually and on behalf of a class of similarly situated Montanans,

Appellant,

V.

SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM, INC. D/B/A SCL HEALTH

Appellee,

ON APPEAL FROM THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY, HON. GREGORY R. TODD, PRESIDING
CASE NO. DV 18-1609

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES

Based on the district court's order granting summary judgment to Sisters of Charity of Leavenworth Health System, Inc. (SCL Health) on all of Cheryl Bratton's claims, the issues on appeal are:

1. Whether the district court erred by granting summary judgment in SCL Health's favor, rather than in Bratton's favor, on Bratton's declaratory judgment claim where the undisputed facts demonstrate that SCL Health violated Montana Code Annotated section 28-1-1002 by transferring to Bank of America its obligation to refund a credit balance on Bratton's account without obtaining her consent and then forcing her to accept payment from Bank of America while disclaiming any further responsibility for making the payment itself.

2. Whether the district court erred by granting summary judgment in SCL Health's favor on Bratton's unjust enrichment and constructive trust claims where SCL Health has admittedly benefited by hundreds of thousands of dollars from its wrongful transfer to Bank of America of its obligation to refund patients' credit balances.

3. Whether the district court erred by granting summary judgment on Bratton's claim under the Montana Consumer Protection

Act where: (a) fact issues remain about whether SCL Health's transfer to Bank of America of its patient refund obligation constitutes a deceptive or unfair practice; (b) Bratton is legally entitled to obtain her refund from SCL Health; and (c) it is undisputed that SCL Health will not pay Bratton her refund unless she deals with Bank of America.

4. Whether the district court erred by granting summary judgment in SCL Health's favor, rather than in Bratton's favor, on her claim for "money had and received" where the undisputed facts demonstrate that SCL Health paid Bratton's refund to Bank of America rather than to her and now disclaims liability for the refund in violation of Montana law.

STATEMENT OF THE CASE

A. Nature of the Case

This is a putative consumer class action that poses basic questions about whether a healthcare provider may divulge its patients' federally protected information to a national bank and then force those patients to deal with the bank to obtain refunds the healthcare provider indisputably owes. For well over a century, Montana Code Annotated section 28-1-1002 has precluded parties from unilaterally relieving

themselves of an obligation without the consent of the beneficiary. The statute provides, in full:

> The burden of an obligation may be transferred with the consent of the party entitled to its benefits, *but not otherwise*, except as provided by Title 70, chapter 17, part 2.

Mont. Code Ann. § 28-1-1002 (emphasis added).

The statute effects a logical result. If an obligor could freely transfer its duty to a third party, the risk to beneficiaries would be extreme. The third party might, for example, be incapable of performing or condition its performance on terms to which the beneficiary did not agree. Thus, to protect beneficiaries, the statute requires consent if an obligor wants to transfer its burden.

In endorsing SCL Health's use of Bank of America's Patient Refund Card Program (the Program)—under which SCL Health pays Bank of America to issue refunds to patients via prepaid debit cards—the district court eschewed any analysis of section 28-1-1002. Instead, it analogized the Program to a wire transfer or cashier's check, reasoning that SCL Health did not transfer its obligation to repay credit balances on patient accounts because it merely authorized Bank of America to withdraw money from SCL Health's general account.

That reasoning, however, is belied by the undisputed facts. In truth, although SCL Health periodically transfers money to Bank of America to cover the refunds, it relinquishes all control over the funds after 14 days. The prepaid debit cards patients receive draw on funds from an account owned by Bank of America, not from SCL Health's account. And if a patient prefers to receive a refund by check, it must request and accept the check from Bank of America, not from SCL Health. Simply put, after two weeks following SCL Health's transfer to Bank of America—a period during which a patient may not even know he or she is entitled to a refund—the patient has no choice but to accept payment from Bank of America if he or she wants the money SCL Health owes.

Worse, Bank of America requires patients to enter into an onerous, restrictive contract to access their own money. With each prepaid debit card, Bank of America includes a lengthy contract of adhesion to which patients must agree if they want to use their card. The terms include, among others: (1) the card remains Bank of America's property and may be cancelled or repossessed at any time; (2) Bank of America may amend the contract at any time, including by increasing fees; and (3) any disputes are governed by North Carolina

law, not Montana law. Moreover, the record reflects a factual dispute about whether patients who refuse to relinquish their rights must nevertheless activate their prepaid debit cards through Bank of America's automated system before they can reach a Bank of America customer service agent to request a check.

In short, this case is about far more than SCL Health refunding money in a manner that patients find inconvenient, as the district court characterized it, or about customer service issues, as SCL Health contends. If SCL Health obtained patients' consent to the Program up front, before treating them, there would be no issue. But as it stands, SCL Health's use of the Program reflects precisely the harm section 28-1-1002 is designed to prevent. Left uncorrected, the decision below will allow SCL Health to transfer its obligation to refund credit balances on patient accounts without consent. If patients want money SCL Health admits it owes them, they will be forced to acquiesce to a scheme where SCL Health shares their confidential information with Bank of America, pays Bank of America instead of them, and then requires them to accept performance from Bank of America under terms dictated by Bank of America. By extension, endorsing the district court's

decision would allow other merchants and service providers across Montana to do the same.

B. Course of Proceedings and Disposition Below

Bratton filed this case as a putative class action seeking to enjoin SCL Health's continued illegal transfer to Bank of America of its obligation to pay patient refunds and to obtain damages from SCL Health's wrongful conduct. Her First Amended Complaint alleged six causes of action: (1) equitable constructive trust; (2) conversion; (3) unjust enrichment; (4) unfair trade practices and violation of the Montana Consumer Protection Act (MCPA); (5) money had and received; and (6) declaratory judgment and injunctive relief.[1] *See* App. 21-32.[2]

SCL Health denied liability and moved for summary judgment on all of Bratton's claims. Bratton, in turn, filed cross-motions for partial summary judgment on her claims for conversion, money had and

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[1] Bratton alleged each claim both individually and on behalf of the putative class. She acknowledges, however, that her MCPA claim is solely an individual claim and not a class action. *See* Mont. Code Ann. § 30-14-133(1).

[2] Citations to "App." refer to Bratton's separately bound appendix. Cross-references to the district court's docket numbers appear in the appendix's table of contents.

received, and declaratory judgment. The district court held a hearing on May 30, 2019 and subsequently issued an order granting SCL Health's motion in full and denying Bratton's cross-motions. *See* App. 1-17.

The district court's order considered each of Bratton's claims separately. First, it held that her conversion claim failed as a matter of law because SCL Health effectively owed Bratton a general debt obligation—as opposed to an obligation to return identical money—which cannot be converted. App. 7-9. Bratton does not challenge that ruling on appeal, but the remainder of the district court's order was erroneous.

The court's reasoning on the rest of Bratton's claims largely followed the same theme. As a somewhat threshold issue, the court held that SCL Health did not need Bratton's consent to transfer to Bank of America its obligation to refund her overpayments. App. 9-10. In fact, the court held that SCL Health did not transfer its duty at all because it merely authorized Bank of America to withdraw money from SCL Health's general account, just as it would have with a wire transfer or cashier's check. *Id*. In doing so, the court made no mention of the operative statute, section 28-1-1002, and offered no support for its

analogy of prepaid debit cards accompanied by contracts of adhesion to wire transfers or cashier's checks. *Id.* Without discussing the restrictions imposed by Bank of America or potential fact disputes, the court simply concluded that SCL Health refunded Bratton's money "in a manner [she] found inconvenient." *Id.*

From there, the district court denied summary judgment on all of Bratton's remaining claims. The court held that SCL Health was not unjustly enriched, and that a constructive trust was not warranted, because SCL Health authorized Bank of America to issue Bratton a refund and thus did not retain the benefit of her overpayment. App. 11-13. Given its earlier conclusion that SCL Health did not need Bratton's consent to transfer its obligation to Bank of America, the court did not consider whether SCL Health had unjustly benefited via cost savings inuring from its use of the Program. *Id.*

Next, the district court rejected Bratton's MCPA claim. Implicitly relying on its lack-of-consent ruling again, the court held that Bratton did not suffer any ascertainable loss and that SCL Health's use of the Program was not a deceptive practice. App. 13-14. Likewise, the court granted summary judgment on Bratton's money had and received claim and her declaratory judgment claim because, in the court's view,

Bratton was obligated to accept payment from Bank of America if she wanted her money. App. 14-16. This appeal followed.

STATEMENT OF THE FACTS

A. SCL Health's Adoption of the Patient Refund Card Program

SCL Health is a Colorado-based healthcare organization that owns and operates a $2.6 billion health network, including three hospitals in Montana. For various reasons, SCL Health's patients, like Bratton, sometimes end up with credit balances on their accounts that SCL Health needs to refund. App. 34, 14:12-15:4. Before 2015, SCL Health processed those refunds through its accounts payable department. App. 35-36, 20:25-21:14. Once a week, the department received a file with patient refunds and manually created refund checks. *Id*. The checks were then couriered from SCL Health's offices in Broomfield, Colorado to Lutheran Medical Center in Denver—where SCL Health's main postal services were located at the time—and the checks were metered and mailed from there. *Id*.

Via that method, SCL Health controlled the entire process. App. 40, 45:21-46:7. But there was a downside, at least from SCL Health's perspective. At the time, the industry standard cost on a per-refund basis was approximately $5 to $6 to produce a paper check.

App. 36-37, 24:18-25:14. And, according to SCL Health, its cost was even higher because of its manual processes and use of courier services. *Id.*

So, when Bank of America approached SCL Health about a program under which patient refunds would be issued by prepaid debit cards, SCL Health discussed it with its revenue service center, accounts payable department, and treasury department and decided it was worth pursuing. App. 34, 15:15-16:11. SCL Health implemented the Program at the beginning of 2015 and estimated it would process some 30,000 refunds through the Program the first year. *Id.*, 13:9-14:3; 15:18-24. Because Bank of America charges SCL Health about $3.50 per refund, SCL Health stood to save more than $75,000 per year. App. 45, 72:14-17; *see also* App. 36-37, 24:18-25:14. Indeed, SCL Health admits that cost savings was a factor in its decision to adopt the Program. App. 37, 25:15-23.

B. The Mechanics of the Patient Refund Card Program

Under the Program, SCL Health sends Bank of America the names and contact information of patients entitled to a refund once a week, notwithstanding that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) precludes health care providers

from disclosing individually identifiable healthcare information.[3] App. 46, 78:2-79:5; App. 56, ¶ 5; *see also* 42 U.S.C. § 1320d-6. Bank of America takes that list and debits the amount of each patient refund from an account SCL Health maintains at Bank of America and typically keeps funded at a balance of around $300,000. App. 46, 77:1-9; 79:20-80:25; App. 48, 85:4-18; App. 56, ¶¶ 4-5. Bank of America then loads each refund onto a prepaid debit card (Patient Refund Card) to be sent to the patient. App. 46, 79:20-80:1; App. 56, ¶ 5. Meanwhile, the funds remain in Bank of America's own account until the patient activates and uses the Patient Refund Card. App. 47, 81:1-84:1.

According to SCL Health, it retains the ability to ask Bank of America to unload a Patient Refund Card for 14 days in case a refund has been mistakenly authorized. App. 56, ¶ 6. After that, SCL Health

[3] Although the full definition is more expansive, HIPAA defines "individually identifiable health information" to include information—even demographic data—that: (1) is created or received by a health care provider; (2) relates to the provision of health care to an individual, or to the past, present, or future payment for the provision of health care to the individual; and (3) identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual. 42 U.S.C. § 1320d(6); 45 C.F.R. § 106.103. Providing patients' names and contact information certainly identifies them, and information about refunds relates to both the provision of health care to the patients and the patients' payment for the provision of health care.

relinquishes to Bank of America all control over and access to funds constituting a patient's refund. *Id.*; App. 49, 93:21-95:14. Specifically, the Patient Refund Cards draw from "whatever bank account" Bank of America funds; the money "is no longer SCL [Health's]." App. 47, 81:1-83:7. And if a patient wants a check instead of a prepaid debit card, the check is issued by Bank of America. App. 40, 46:14-47:1.

For example, the named plaintiff in this case, Cheryl Bratton received two Patient Refund Cards totaling $27.75. App. 57-58, ¶¶ 10-12. That means that SCL Health transmitted Bratton's name and contact information, along with the amount of her refunds, to Bank of America. Bank of America transferred $27.75 from SCL Health's account to its own account and issued prepaid debit cards to Bratton in that amount. Even though the $27.75 is indisputably Bratton's money, it remains in Bank of America's possession unless she activates and uses the Patient Refund Cards under terms dictated by Bank of America or otherwise engages with Bank of America to receive a check from Bank of America, not from SCL Health. App. 47, 81:1-84:1; App. 49, 93:21-95:14. As it stands, Bank of America has exclusive control over the money SCL Health owes Bratton. App. 49, 95:6-14.

C. The Terms of the Patient Refund Card Program

SCL Health does not obtain patients' consent to the Program. Indeed, it admits it never obtained Bratton's consent. App. 50, 102:14-19. Patients learn of Bank of America's involvement for the first time when they receive a Patient Refund Card and accompanying letter in the mail. App. 38, 33:5-16; App. 59-60. But even then, the patient is not always informed about the amount of the refund, App. 40-41, 48:14-49:18, and there was an approximately six-month period in 2018 where patients did not receive a letter with their card either, App. 42-43, 58:19-61:8.

Along with any Patient Refund Card, Bank of America also mails patients a fine-print Commercial Prepaid Card Account Agreement (the Card Agreement). App. 61-62; *see also* App. 39, 43:11-23. The Card Agreement explains that it "is the agreement between you and Bank of America with respect to the issuance and use of the enclosed [Patient Refund Card]" and provides that by using the Patient Refund Card—or allowing anyone else to use it—the patient agrees to be bound by the terms and conditions of the Card Agreement. App. 62. In other words, if a patient wants to use her card to access her own money, she must

enter into a contract of adhesion with Bank of America. App. 54, 117:24-118:6.

Many of the Card Agreement's twenty-seven sections contain one-sided terms that waive or diminish patients' rights, some of which also contradict SCL Health's characterization of the Program. Foremost, while SCL Health believes that a refund is the patient's property, App. 47-48, 83:25-84:1, the Card Agreement provides precisely the opposite. The very first section emphasizes that the Patient Refund Card is Bank of America's property and may be revoked at any time for no reason:

> Your Card is our property and we may revoke your Card at any time without cause or notice. You may not use an expired or revoked Card. No interest is paid on the balance on your Card for any period of time.

App. 62. Section 20 also reiterates that Bank of America retains complete control over the Card:

> Your Card remains our property and we may repossess it at any time.

App. 61.

Similarly, section 19 permits Bank of America to unilaterally amend the terms and conditions of the Card Agreement, including by increasing the amount of any fees. *Id*. Patients have no option with

respect to amendments or increased fees; they can either continue to use their card and accept the changes or destroy the card:

> If you continue to use your Card, you accept and agree to the change. If you do not agree with the change, you must close your Account and destroy your Card(s).

Id.

The Card Agreement also contains myriad conditions limiting the way a patient may use its Patient Refund Card, or waiving rights in exchange for its use. Just some of the restrictions in the Agreement include the following:

- Section 22 forces patients to agree to the applicability of North Carolina law to any dispute;
- Section 12 provides a fee disclosure obligating patients to pay any fees imposed by Bank of America and explaining, among other things, that patients will be charged fees for accessing their refunds at ATMs not owned by Bank of America;
- Section 13 permits Bank of America to share information related to patients' accounts in connection with potential sales of any of Bank of America's businesses; and
- Section 3 contains a broad prohibition requiring patients to use their Patient Refund Cards only as permitted by the Card Agreement, with the additional restriction that Bank of America may decline any transaction it deems inconsistent with the Agreement.

App. 61-62.

SCL Health insists that patients may avoid the Card Agreement by requesting a check. App. 49, 93:21-94:9; App. 50, 101:15-102:5. But the record contains evidence that, for at least some time, Bank of America told patients that there was a $5 fee for receiving a check, App. 43, 62:18-63:1, and SCL Health's initial training documents effectively instructed its customer service team to arrange checks through Bank of America only if absolutely necessary:

> Only for those cardholders who are very upset or adamant that they will not utilize the patient refund card, then SCL Health will arrange to close the prepaid account and the bank will send a check to the cardholder.

App. 44, 66:5-14.

The record also contains an affidavit and the transcript of a recording demonstrating that a patient who received a Patient Refund Card and called the Bank of America phone number included in the mailing materials reached an automated menu requiring her to activate the card before she could speak to a customer service agent to request a check. App. 19-20, 63-64.

D. The Results of the Patient Refund Card Program

The logistics of the Program result in significant funds remaining in a Bank of America general ledger account earning interest for Bank

of America. For instance, of the 202 refunds issued to Montana patients via Patient Refund Cards on October 1, 2018, some 63% still had a balance five months later, including an uncashed $1,700 refund. App. 51-53, 107:12-113:3. And those are just the refunds for a single week.

STATEMENT OF THE STANDARD OF REVIEW

An order granting summary judgment is reviewed de novo, using the same Rule 56 criteria applied by the district court. *Hajenga v. Schwein*, 2007 MT 80, ¶ 11, 336 Mont. 507, 155 P.3d 1241. "Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law." *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704. In evaluating cross-motions for summary judgment, this Court's de novo review must evaluate each party's motion on its own merits, "taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Hajenga*, ¶¶ 18-19 (quoting reference omitted). "[T]he fact that both parties have moved for summary judgment does not establish, in and of itself, the absence of genuine issues of material fact." *Id*., ¶ 18 (quoting reference omitted).

SUMMARY OF THE ARGUMENT

The district court failed to consider or apply Montana Code Annotated section 28-1-1002, which bars SCL Health from transferring to Bank of America—or any other third party—its obligation to refund credit balances on patient accounts without its patients' consent. The court's erroneous conclusion that SCL Health can force patients to accept their refunds from Bank of America infected its summary judgment ruling on each of the specific claims at issue on appeal.

Declaratory Judgment. The district court wrongly held that SCL Health, not Bratton, is entitled to summary judgment on her declaratory judgment claim. Under even the most liberal interpretation of section 28-1-1002, the undisputed facts demonstrate that SCL Health violated Montana law by transferring its refund obligation to Bank of America without consent and then disclaiming any continuing liability of its own.

In equating SCL Health's use of the Program to receiving direct payment from SCL Health, the district court went far astray. It is undisputed that SCL Health relinquishes any control over patient refund money to Bank of America and that patient refunds are paid out of Bank of America accounts. And, to use Bank of America's Patient

Refund Cards, patients must stipulate to a burdensome contract of adhesion, which is not even arguably the equivalent of receiving an unqualified refund from the party owing it. The fact that patients may request a check from Bank of America does not change the analysis. The method of performance Bank of America proffers does not excuse SCL Health's violation of section 28-1-1002 and there are fact issues about whether patients may request a check without activating their Patient Refund Cards in any event.

Under the correct analysis, Bratton is entitled to a declaration that: (1) SCL Health violated Montana law by transferring to Bank of America its obligation to refund the credit balance on her account without her consent; (2) SCL Health remains liable for paying the refund; and (3) SCL Health cannot force her to accept performance from Bank of America.

Unjust Enrichment and Constructive Trust. The district court incorrectly granted summary judgment for SCL Health on Bratton's unjust enrichment and constructive trust claims. Reasoning only that SCL Health did not benefit from retaining Bratton's refund, the court ignored SCL Health's violation of section 28-1-1002 and the bigger picture.

SCL Health admits that it has saved hundreds of thousands of dollars by using the Program. Allowing SCL Health to retain that benefit—which inures directly from an illegal transfer of its refund obligations without patient consent—would be the very definition of unjust. That is especially true here. Unjust enrichment is a flexible tool used to remedy inequities and SCL Health insists that its patients have no recourse because they can obtain their refunds in a manner they are not legally obligated to accept.

Montana Consumer Protection Act. The district court erred in granting summary judgment on Bratton's MCPA claim. The court's conclusory ruling was significantly lacking.

On the issue of whether SCL Health's use of the Program was deceptive or unfair, multiple fact issues preclude summary judgment. Specifically, it is inappropriate to conclude as a matter of law that the Program is *not* deceptive or unfair where SCL Health: (1) fails to obtain patients' consent to transfer its refund obligation to Bank of America; (2) does not inform patients of Bank of America's involvement until they receive a letter in the mail with a Patient Refund Card and a restrictive, fine-print contract to which they become bound by using the card; (3) does not always inform them about the amount of the refund;

(4) has, at times, allowed Bank of America to send Patient Refund Cards without any letter at all; (5) formerly instructed its customer service agents to discourage patients from requesting checks; (6) allows Bank of America to use an automated system under which patients must activate their cards before speaking to a person to request a check; and (7) never informs patients that they are legally entitled to obtain their refund directly from SCL Health if they prefer not to deal with Bank of America.

On the issue of whether Bratton suffered an ascertainable loss of money, the answer is yes. She is legally entitled to collect her refund from SCL Health and SCL Health admits that she cannot do so. Her money is exclusively controlled by Bank of America and she cannot obtain it without dealing with Bank of America.

Money Had and Received. The district court should have granted summary judgment for Bratton, not SCL Health, on her money had and received claim. The claim is a simple one, premised on an implied promise to return that which should—in equity and good conscience—be returned by one party to another.

Here, it is undisputed that SCL Health received dual payments from Bratton and a secondary insurer and was obligated to return

Bratton's overpayment. But rather than returning the overpayment directly to Bratton, SCL Health paid it to Bank of America, ceded all control over the funds, and disclaimed any further liability. Not only does that scheme violate section 28-1-1002, it entitles Bratton to summary judgment for money had and received.

ARGUMENT

I. Bratton, Not SCL Health, Is Entitled to Summary Judgment on Her Declaratory Judgment Claim.

The district court missed the mark badly in granting SCL Health summary judgment on Bratton's declaratory judgment claim. At base, the court's ruling was premised on its conclusion that "SCL Health refunded Bratton's money" and that she "has had full access to her money." *See* App. 16. Effectively, the court took Bank of America out of the equation. Properly analyzed, both the law and facts reveal that SCL Health transferred its obligation to refund patients' money in violation of Montana law. Under even the most expansive reading of Montana Code Annotated section 28-1-1002, SCL Health could not force Bratton to accept payment from Bank of America without her consent, which is precisely what it did.

A. SCL Health Violated Montana Law by Transferring Its Refund Obligation to Bank of America.

SCL Health's ability to transfer its refund obligation is controlled by section 28-1-1002, which the district court did not discuss, much less apply. There is nothing the least bit ambiguous about the statute; it plainly forecloses an obligor's ability to transfer the burden of an obligation to a third party without the beneficiary's consent. Mont. Code Ann. § 28-1-1002.

Here, the burden at issue is refunding credit balances on patient accounts. The obligor is SCL Health and the beneficiary is Bratton. Yet, when SCL Health determined it owed Bratton a refund, it did not simply pay her. Instead, it included her name and contact information in a weekly report to Bank of America and paid Bank of America, not Bratton, the amount of her refund. App. 46, 80:2-15. Then, via the Program, it relied exclusively on Bank of America to satisfy the obligation of refunding Bratton's money, relinquishing all control over the funds. App. 47, 81:1-84:1; App. 49, 93:21-95:14. And, critically, SCL Health admits it did not obtain Bratton's consent. App. 50, 102:14-19.

If those facts do not constitute a transfer of an obligation without a beneficiary's consent, it is difficult to imagine a scenario that would.

Still, if the Court is not satisfied by the plain language of section 28-1-1002 and wants to delve further, there are two lines of cases from other jurisdictions interpreting identical language. Under either line, the result is the same.

1. Under the North Dakota line of cases, SCL Health impermissibly transferred its obligation.

The first line stems from *Skinner v. Scholes*, 229 N.W. 114 (N.D. 1930) and strictly applies the language of the statute. There, a land company entered an installment contract to sell property to the plaintiff. *Id.* at 115. The contract provided that the land company would convey title by a warranty deed with the land company's covenants, including a covenant against incumbrances. *Id.* at 116. During the term of the contract, however, the land company transferred the property and assigned the installment contract to one of its owners (Mrs. Scholes) without the plaintiff's knowledge or consent. *Id.* at 115-16. When the plaintiff made his final installment payment, he insisted on a deed from the land company, not Mrs. Scholes, raising the question of whether the land company could assign its obligations under the contract.

Applying the North Dakota equivalent of section 28-1-1002, the court had little trouble rejecting the assignment. Even though Mrs. Scholes "was ready and willing to assume the burden of the contract and deed to the plaintiff with full covenants," the court found her willingness inadequate to satisfy the land company's obligation because "[t]he plaintiff had never consented to accept her deed with covenants in lieu of a deed from the land company." *Id.* at 116.

That result makes sense. After all, the statute speaks to whether a burden "may be transferred." Mont. Code Ann. § 28-1-1002. So, if a beneficiary does not consent, it follows that the burden may *not* be transferred, irrespective of whether the transferee is willing to perform.

Applying that line of cases here, it is irrelevant that Bank of America is willing to perform on SCL Health's behalf. Because Bratton never consented to accept a Patient Refund Card or check from Bank of America in lieu of payment from SCL Health, Bank of America's proffered performance did not satisfy SCL Health's obligation.[4]

[4] As discussed below, Bank of America's performance is not equivalent to receiving a refund directly from SCL Health in any event.

2. Under the California line of cases, SCL Health impermissibly transferred its obligation.

The second line of cases, interpreting California Civil Code section 1457, applies the statutory language more liberally. Under California's reading, the statute does not preclude a third party from assuming the burden of a contract. *See, e.g.*, *Advanced Indus. Prods., S.C.S. v. Alcoa Global Fasteners, Inc.*, 2006 WL 8433939, at *5 (C.D. Cal. Feb. 6, 2006) (quoting *AICCO, Inc. v. Ins. Co. of N. Am.*, 90 Cal. App. 4th 579, 588 (Cal. Ct. App. 2001)). It means only that assignment may not relieve the original obligor of its duties without consent. *Id.*

Both the district court and SCL Health seemingly invoked this reasoning, suggesting that the Program does not constitute an impermissible transfer of SCL Health's refund obligation because SCL Health would remain liable for any breach that might occur. *See* App. 9. But they missed an important piece of the analysis. That is, a current or prospective breach on the part of the third-party assignee is not a prerequisite to the obligor's continued liability. *AICCO*, 90 Cal. App. 4th at 591; *Advanced Indus. Prods.*, 2006 WL 8433939, at *5. Consequently, the statute is violated when the obligor disclaims liability for the burden "even if the party to whom a [burden] has been transferred is not in default." *AICCO*, 90 Cal. App. 4th at 591.

For instance, in *AICCO*, the complaint alleged that one insurance company transferred the burden of its policies to another insurance company without consent of the policyholders and then disclaimed any further responsibility. *Id*. at 589. The court held that those facts sufficiently pled a violation of Civil Code section 1457, which allowed the plaintiff to proceed on its other claims. *Id*.

If the Court is persuaded that the California line of cases applies, the procedural posture of *AICCO* does not make it any less instructive. SCL Health's position below was that it did not impermissibly delegate its duty because it remained liable *if Bank of America defaulted*. *See* App. 9. But *AICCO* establishes the fallacy of that argument. Even if Bank of America's assumption of SCL Health's refund obligation did not itself violate section 28-1-1002, the law required SCL Health to remain liable regardless of whether Bank of America defaulted after assuming the obligation. *AICCO*, 90 Cal. App. 4th at 591.

Thus, the question on summary judgment—an issue not reached in *AICCO*—becomes whether SCL Health disclaimed liability such that its transfer to Bank of America violated the statute. The district court never reached that step. Had it done so, it should have concluded that

the undisputed facts demonstrate that SCL Health's use of the Program runs afoul of section 28-1-1002.

First, SCL Health admits that after the 14-day period following its transfer of funds to Bank of America, patients must obtain their refunds from Bank of America, not SCL Health. App. 40, 46:14-47:1; App. 47, 81:1-83:7; App. 49, 93:21-95:14. Said differently, SCL Health disclaims liability for providing the refunds once the 14-day period passes, just as the defendant disclaimed liability for the insurance policies it transferred in *AICCO*.

Second, if that is not enough, this lawsuit serves as the perfect illustration. SCL Health's briefing below repeatedly and insistently urged that Bratton's claims fail because she has "unfettered" access to her $27.75 refund *from Bank of America*. Implicit in that argument is the notion that SCL Health is not liable for paying Bratton's refund because she can obtain it either by contracting with Bank of America and using her Patient Refund Cards, or by requesting a check from Bank of America. Simply put, SCL Health told the district court over and over that it has no obligation to pay Bratton's refund because she can get it from Bank of America.

That position flies in the face of the statute, even under California's more liberal interpretation. Section 28-1-1002 does not permit SCL Health to use the Program as a shield to escape its own liability for the refund obligations it transferred to Bank of America without its patients' consent.

This is not just an esoteric legal argument. Nor is it an attempt by Bratton to claim that SCL Health's use of the Program is per se illegal or that SCL Health could never appropriately use the Program to issue patient refund cards. To the contrary, it would be easy. SCL Health could simply obtain patients' consent *before* treating them as part of its lengthy terms-of-service agreement.

But under the existing facts, SCL Health violated Montana law regardless of which line of cases applies. The district court thus should have exercised its power under Montana Code Annotated section 27-8-201 to grant Bratton a declaratory judgment that: (1) SCL Health could not transfer to Bank of America its obligation to refund Bratton's money absent her consent; (2) SCL Health is legally obligated to refund Bratton's money; and (3) SCL Health cannot mandate that Bratton accept her refund from Bank of America, whether by contracting with Bank of America by use of her Patient Refund Cards or by requesting a

check. The court's grant of summary judgment in SCL Health's favor on those points should be reversed.

B. Bank of America's Performance Is Not Equivalent to Receiving a Refund Directly from SCL Health.

The district court sidestepped the analysis above by concluding that SCL Health did not, in fact, transfer its duty at all. *See* App. 10. To get there, the court equated SCL Health's use of the Program to a direct payment from SCL Health to Bratton via a wire transfer or cashier's check. *Id.* The court's analysis is utterly wrong on multiple levels.

1. The district court's analogy is unsupported and incorrect.

To start, the district court offered no support for its conclusion that SCL Health would not have needed Bratton's consent to have Bank of America wire her money or send her a cashier's check. With respect to a wire, the court presumably meant that SCL Health would instruct Bank of America to wire Bratton funds directly from SCL Health's account. If so, that payment mechanism might not have constituted a transfer of an obligation because SCL Health would have been paying Bratton directly from its own funds, not relying exclusively on Bank of America to pay Bratton with Bank of America's funds. But Bratton

certainly would have needed to consent because SCL Health could not have wired her money unless she provided her bank account information.

That discussion is a red herring though. Factually, that's not what happened here. No payment was ever tendered to Bratton directly from an SCL Health account; she had to accept her money from Bank of America under its terms, or not at all. Additionally, as discussed in the brief of amici Montana Legal Services, National Consumer Law Center, and National Association of Consumer Advocates, there are multiple forms of wire transfers, some of which do not even involve banks, and all of which are governed by laws different than those governing prepaid debit cards. *See* Amicus Br., at 10-11. So, even if the analogy were not factually irrelevant, it is impossible, without more information, to conclude that receiving a Patient Refund Card under the terms of the Program is equivalent to a wire transfer.

With respect to cashier's checks, the issue is different. Admittedly, they are more like Patient Refund Cards in that SCL Health would transfer funds to a bank and then the bank would issue the cashier's check drawn on its own account. *See id*. But analogizing the Program to cashier's checks is also inaccurate.

As a practical matter, patients probably wouldn't balk if they received a cashier's check in the mail with an explanation that it constituted their refund. The reason is that it wouldn't come with a 70-paragraph contract of adhesion to which patients would have to agree to deposit or cash the check. Nor would patients have to deal with an automated system that forces them to activate a prepaid debit card in order to request the check in the first place. Moreover, patients' practical likelihood of accepting a certain payment method does not bear on the legality of SCL Health transferring its refund obligation to Bank of America without consent.

To that point, the district court also ignored any analysis of whether SCL Health would remain liable if it hypothetically used cashier's checks to pay refunds. If SCL Health paid a bank instead of its patients and then relied exclusively on the bank to pay refunds via cashier's checks out of its own funds while disclaiming any obligation to pay the refund itself, section 28-1-1002 would mandate the patients' consent for all the reasons discussed above, despite the court's unsupported conclusion to the contrary.

2. The district court misunderstood the nature of the Patient Refund Cards.

Perhaps the largest flaw in the district court's reasoning was its equation of Patient Refund Cards to a direct payment drawn from SCL Health's "general account." *See* App. 10. In making that comparison, the court conflated two different fact patterns.

It would be one thing if SCL Health had transferred $27.75 to Bank of America, received a prepaid debit card for that amount, activated it, and tendered it to Bratton as payment. In that scenario, SCL Health, not Bratton, would have agreed to Bank of America's contractual terms. SCL Health would have simply converted its own money into a different form; it would have been free to use the prepaid debit card for any purpose deemed permissible by Bank of America's contract. If it chose to give the prepaid debit card to Bratton as a refund, she would have received the $27.75 that SCL Health owed her directly from SCL Health. *See* App. 4, 16, 17. Accordingly, SCL Health's arguments about the equivalency of a prepaid debit card to other forms of payment and the district court's conclusion that Bratton could not complain about receiving her money in a way she found inconvenient would probably carry some weight.

But there is a stark distinction between SCL Health obtaining a prepaid debit card and agreeing to Bank of America's terms *itself* so that it can convey an arguably cash equivalent to its patients and forcing *the patients* to agree to those terms to access their own money. That distinction might be best understood by turning the fact pattern around. Assume Bratton saw a doctor at an SCL Health-owned facility and received a $100 invoice for the services. Also assume that Bratton called her bank and said, "I don't want to be on the hook to pay SCL Health directly. Please debit my checking account for the $100 that I owe (plus a $3.50 administrative fee) and send a prepaid debit card to SCL Health's accounts receivable department drawn on your account, not mine. And include a form letter and a term sheet instructing SCL Health that if it wants payment for the services it provided me, it must agree that the debit card remains your property, you can impose any terms or fees you'd like, you can disclose SCL Health's information in your business dealings, and SCL Health needs to submit to whatever state law you deem most favorable." There

is not a chance that SCL Health would accept payment under those terms, nor should it have to.[5]

The inaptness of the district court's analogy is only amplified by the restrictions imposed by Bank of America on Patient Refund Cards. If SCL Health sent its patients cash, checks drawn on its own account, or some other form of payment from its own "general account," the payment would not remain Bank of America's property subject to cancellation at Bank of America's whim. Nor would it be subject to amendment, or the imposition of fees, or require patients to agree to share their contact information or to stipulate to another state's law.

It is essential to reiterate that this discussion pertains only to the overarching question of whether Bratton is entitled to declaratory judgment that SCL Health: (1) illegally transferred to Bank of America its obligation to pay refunds; and (2) remains liable and cannot force her to accept payment from Bank of America. Thus, the Court need not linger on theoretical discussions about the circumstances under which the use of prepaid debit cards *might* function as the equivalent of a

[5] SCL Health represented it would accept Patient Refund Cards as payment for services. App. 38, 33:21-34:7. The difference is that the patients, not SCL Health, must first activate the card and agree to Bank of America's terms.

direct payment from the obligor. The only issue is whether, under the facts here, SCL Health transferred its obligation to Bank of America. Really, it is not a close call—it did.

For all the reasons discussed above, forcing a patient to contractually agree with Bank of America to receive payment from Bank of America rather than from SCL Health is not even arguably the equivalent of SCL Health paying the patient refund from its own general account. But if the Court disagrees, it should still conclude that the scores of conditions Bank of America imposes on the Patient Refund Cards create a fact issue about whether the cards can reasonably be interpreted as the equivalent of a direct payment. *See, e.g.*, *Siciliano v. Mueller*, 149 A.3d 863, 865-66 (Pa. Super. Ct. 2016) (prepaid debit cards not the functional equivalent of a check or lawful money); *Faigman v. AT&T Mobility, LLC*, 2007 WL 2088561, at *4 (N.D. Cal. July 18, 2007). Thus, even if summary judgment is not appropriate for Bratton, SCL Health is certainly not entitled to summary judgment.

3. The option to receive a check from Bank of America does not change the analysis.

Finally, the result does not change merely because Bratton could request a check from Bank of America. In its summary judgment briefing, SCL Health urged that Bratton did not have to agree to Bank

of America's contractual terms to receive her refund. SCL Health will undoubtedly advance the same argument on appeal, but this Court should reject it for two reasons.

First, the question of whether SCL Health impermissibly transferred its refund obligation to Bank of America does not depend on the payment method Bank of America employed. Whether the Court relies on the North Dakota line of cases, the California line, or simply applies the plain language of section 28-1-1002, the manner of performance proffered by the third-party assignee is irrelevant. Under the statutory language and the North Dakota line, the only question is whether SCL Health transferred its obligation to pay its patients. Under the California line, the question asks whether SCL Health disclaimed liability for its obligation after transferring it to Bank of America. As discussed above, the answer is indisputably yes under either inquiry. Whether Bank of America gave patients an option to receive their refund by check does not change the fact that they must accept performance by Bank of America for an obligation owed by SCL Health. Therefore, the Court should conclude the check issue is inapposite to Bratton's declaratory judgment claim.

Alternatively, if the Court thinks the issue germane, there is a fact dispute about Bank of America's procedure for authorizing a check in lieu of a Patient Refund Card. SCL Health contends that the record conclusively demonstrates that patients may receive a check without activating their Patient Refund Card and thus consenting to Bank of America's contract. To be sure, SCL Health submitted an affidavit and pointed to deposition testimony supporting its position. But Bratton submitted evidence to the contrary. Specifically, she submitted an affidavit from a patient who received a Patient Refund Card, attempted to contact Bank of America to request a check, and could not reach a live person through Bank of America's automated system unless she activated her card. *See* App. 63-64. Bratton also played the district court a recording during the summary judgment hearing confirming the facts in the affidavit. *See* App. 19-20.

For purposes of considering SCL Health's summary judgment motion, the district court was obligated to credit Bratton's evidence; it could not weigh the conflicting evidence or adopt SCL Health's evidence, no matter how vociferously SCL Health asserted that its proof was superior. *See, e.g.*, *Johnston v. Centennial Log Homes & Furnishings, Inc.*, 2013 MT 179, ¶ 32, 370 Mont. 529, 305 P.3d 781

("Our well-established summary judgment standard dictates that we may not weigh the evidence or choose one disputed fact over another."). As such, if Bank of America's procedure for providing checks as an alternative to Patient Refund Cards informs the analysis—and it should not—the Court must assume that patients cannot request a check without first activating their cards, meaning that receiving a check from Bank of America is not the equivalent of receiving direct payment from SCL Health.

* * *

In sum, SCL Health's use of the Program violates Montana law. The undisputed facts demonstrate that SCL Health transferred to Bank of America its obligation to refund the credit balance on Bratton's account without her consent and forced her to accept payment from Bank of America with no recourse to recover from SCL Health even though SCL Health owes the refund. The Court should reverse the district court's grant of summary judgment in SCL Health's favor on Bratton's declaratory judgment claim and direct that summary judgment be entered in her favor.

II. SCL Health Is Not Entitled to Summary Judgment on Bratton's Unjust Enrichment and Constructive Trust Claims.

The district court's analysis of Bratton's unjust enrichment claim did not differ significantly from its declaratory judgment analysis. Ultimately, the court held that Bratton could not prove unjust enrichment "because SCL Health authorized Bank of America to issue Bratton a refund." *See* App. 12-13. That holding, however, both implicitly endorses SCL Health's violation of section 28-1-1002 and ignores a benefit SCL Health is unjustly retaining.

Unjust enrichment requires proof of three elements: "(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value." *Northern Cheyenne Tribe v. Roman Catholic Church ex rel. Dioceses of Great Falls/Billings*, 2013 MT 24, ¶ 36, 368 Mont. 330, 296 P.3d 450. Unjust enrichment is a "flexible and workable doctrine" that "plays an important role as a tool of equity:" it may remedy injustice where other areas of the law may not. *Id.* Boiled down, it "simply requires that a party hold property under such circumstances

that in equity and good conscience he ought not to retain it." *Id*., ¶ 33 (internal quotation marks omitted).

Correspondingly, a constructive trust is a remedy courts may impose "when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if he were permitted to retain it." Mont. Code Ann. § 72-38-123. No wrongdoing is necessary for imposition of a constructive trust. *Volk v. Goeser*, 2016 MT 61, ¶ 45, 382 Mont. 382, 367 P.3d 378.

Here, in holding that Bratton did not confer a benefit that SCL Health unjustly retained, the district court ignored the larger context of this case. The court narrowly concluded that SCL Health did not retain any benefit from Bratton's overpayment because it transferred $27.75 to Bank of America for Bank of America to refund under the terms of the Program. But as discussed above, SCL Health's use of the Program while disclaiming any continuing liability of its own violates Montana law. And, from that violation of Montana law, it is undisputed that SCL Health has financially benefited.

Specifically, where SCL Health used to pay $6-plus in costs for each refund and pay the patient the amount of its refund directly, it

now pays Bank of America $3.50 for each refund and pays the amount of the patient's refund to Bank of America. App. 45, 72:14-17; *see also* App. 36-37, 24:18-25:14. Although the exact figures remain unknown, based on SCL Health's estimates of the number of refunds it processes each year, it saves more than $75,000 annually by doing so. *Id.* The upshot is that SCL Health has benefited by hundreds of thousands of dollars—and retained that benefit—solely because it has transferred its refund obligation to Bank of America without obtaining patients' consent.

Below, SCL Health asserted that even if it benefited financially from the Program, Bratton did not confer that benefit. That simply is not true. On an individual level, Bratton was an SCL Health patient entitled to a refund. When SCL Health illegally transferred to Bank of America its obligation to pay Bratton's refund without her consent, SCL Health benefited by at least $5—Bratton had two refunds for which SCL Health paid $3.50 each, where it would have paid more than $6 each had it refunded her directly. *See* App. 45, 72:14-17; *see also* App. 36-37, 24:18-25:14. Consequently, even considering only Bratton, there remain fact issues about whether SCL Health was unjustly enriched through its wrongful use of the Program.

Additionally, Bratton is not claiming—as SCL Health implied—that she is individually entitled to SCL Health's entire financial gain from the Program. This is a putative class action, which may eventually include thousands of patients as class members. *See, e.g.*, *Knudsen v. Univ. of Mont.*, 2019 MT 175, 396 Mont. 443, 445 P.3d 834 (affirming, in part, certification of class consisting of current and former students who received student loan disbursements via prepaid debit cards from a third-party vendor). Because the analysis of the benefit conferred on SCL Health by each patient will be the same, the class as a whole will be entitled to the amount by which SCL Health has been unjustly enriched.

If anything, SCL Health's arguments demonstrate why unjust enrichment is a particularly fitting claim. SCL Health violated the law and continues to profit significantly as a result, yet seeks to retain its profits by arguing that its patients are not damaged because they can obtain the full amount of their refunds in a manner they are not legally obligated to accept. Unjust enrichment exists to remedy precisely that type of inequity, and the district court wrongly granted summary judgment in SCL Health's favor.

III. SCL Health Is Not Entitled to Summary Judgment on Bratton's MCPA Claim.

The MCPA is "broad in scope" and should be "liberally construed with a view to affect its object and to promote justice." *Baird v. Norwest Bank*, 255 Mont. 317, 327, 843 P.2d 327, 333 (1992). A consumer like Bratton may bring an MCPA claim if she has suffered "any ascertainable loss of money or property" resulting from another person's use of a "method, act, or practice declared unlawful by" Montana Code Annotated section 30-14-103. Mont. Code Ann. § 30-14-133(1). Section 30-14-103, in turn, makes unlawful any "unfair or deceptive acts or practices in the conduct of any trade or commerce." Mont. Code Ann. § 30-14-103.

The district court's analysis of Bratton's MCPA claim was scant. After reciting the parties' arguments and finding that Bratton is a "consumer" under Montana law, it concluded, without analysis, that SCL Health's use of the Program is not a "deceptive business tactic" and that Bratton cannot not demonstrate an ascertainable loss. App. 13-14. The court was wrong on both points.

A. SCL Health's Use of the Program Is Both Deceptive and Unfair.

The court seized only on whether SCL Health's use of the Program is deceptive. There are certainly fact issues on that point. The record reveals that not only does SCL Health fail to obtain patients' consent to transfer its refund obligation to Bank of America, it does not inform them of Bank of America's involvement until they receive a letter in the mail with a Patient Refund Card and a fine-print contract to which they become bound by using the card. *See* App. 38, 33:5-16; App. 39, 43:11-23; App. 59-62. On top of that, patients are not always informed about the amount of the refund, App. 401-41, 48:14-49:18, and have, at times, received a card without any letter at all, App. 42-43, 58:19-61:8. All the while, SCL Health never informs the patients that they are legally entitled to obtain their refund directly from SCL Health if they prefer not to deal with Bank of America. *See AICCO*, 90 Cal. App. 4th at 591.

SCL Health's use of the Program is also unfair. "[A]n unfair act or practice is one which offends established public policy and which is either immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Rohrer v. Knudson*, 2009 MT 35, ¶ 31, 349 Mont. 197, 203 P.3d 759.

Applying the first part of that test, SCL Health's use of the Program offends established public policy because it violates section 28-1-1002. As to the second part, there are fact issues regarding whether SCL Health's use of the Program is unethical, oppressive and substantially injurious to consumers for all the same reasons fact issues remain about whether it is deceptive and whether Bank of America's performance is equivalent to receiving direct payment from SCL Health. Namely, patients must consent to a contract of adhesion to access their own money.

B. Bratton Suffered an Ascertainable Loss.

Montana has not developed any law on the meaning of "ascertainable loss of money or property." In their respective summary judgment briefing, the parties cited conflicting interpretations about whether unquantifiable damages suffice. In reality, the Court need not grapple with that issue. Bratton's ascertainable loss is intertwined with SCL Health's deceptive or unfair practice and adequately demonstrates a quantifiable loss of money.

In short, Bratton's loss is the $27.75 she cannot obtain from SCL Health. Of course, SCL Health's response has been that Bratton has "unfettered" access to her money from Bank of America. Putting

aside SCL Health's suspect understanding of the word "unfettered" and fact issues about the hoops through which Bratton must jump in dealing with Bank of America, SCL Health's position still fails.

Indeed, SCL Health's argument completely excuses the deceptive and unfair practice at issue. Under any interpretation of section 28-1-1002, SCL Health violates the law by forcing Bratton to obtain her refund from Bank of America. Put differently, Bratton has an absolute right to collect $27.75 from SCL Health. Yet, it is undisputed that she cannot obtain her money from SCL Health, *see* App. 40, 46:14-47:1; App. 47, 81:1-83:7; App. 49, 93:21-95:14, and SCL Health has disclaimed all liability for paying it.

Thus, to side with SCL Health, the Court would have to conclude that Bratton has not suffered an ascertainable loss of $27.75 because she can obtain her money if she is willing to deal with Bank of America. Doing so, though, would obliterate her legal right to collect from SCL Health. The Court would be effectively endorsing SCL Health's deceptive and unfair practice by forcing Bratton to accept repayment from someone other than SCL Health.

IV. Bratton, Not SCL Health, Is Entitled to Summary Judgment on Her Money Had and Received Claim.

The easiest claim to resolve is Bratton's money had and received claim because the claim itself is so simple. "An action to recover money had and received is one based on an implied contract." *Sch. Dist. No. 18 of Pondera Cnty. v. Pondera Cnty.*, 89 Mont. 342, 297 P. 498, 503 (1931). It is a common law claim for money and "is the simplest action known to the law." *Grady v. City of Livingston*, 115 Mont. 47, 141 P.2d 346, 366 (Adair, J., dissenting) (citing *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386 (1934)). The claim "rests upon the legal fiction of a promise implied by law to return that which in equity and good conscience should be returned to him from whom it was received." *McFarland v. Stillwater Cnty.*, 109 Mont. 44, 98 P.2d 321, 323 (1940).

Applying the claim to the facts here is straightforward. Due to dual payments from Bratton and a secondary insurer, SCL Health received $27.75 from Bratton to which it was not entitled. App. 57-58, ¶¶ 10-12. But the district court's holding that SCL Health "paid Bratton the money it owed her" is erroneous. *See* App. 16. Rather than returning the money to Bratton, SCL Health paid it to Bank of America. App. 47, 81:1-84:1; App. 49, 93:21-95:14. Now, SCL Health claims that Bratton can obtain her money from Bank of America or not at all, even

though it remains liable to pay Bratton under Montana law. *See* Mont. Code Ann. § 28-1-1002. Accordingly, Bratton, not SCL Health, is entitled to summary judgment on her money had and received claim.

CONCLUSION

For the foregoing reasons, Bratton respectfully requests that the Court reverse the district court's grant of summary judgment in SCL Health's favor on every claim except conversion and reverse the district court's denial of summary judgment in Bratton's favor on her claims for declaratory judgment and money had and received.

Dated: October 3, 2019.

Respectfully submitted,

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I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,955 words, as determined by the undersigned's word processing program.

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