

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**Sep 18 2023**

**SC Court of Appeals**

APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2018-CP-29-01127  
Appellate Case No. 2022-001589

Paul David Hess, APRN-BC,..... Respondent-Appellant

v.

Morphis Pediatric Group of Lancaster, P.A.; Elizabeth J.  
Morphis, M.D.; Gregory M. Alexander, CPA; and  
Moore Beauston and Woodham, LLP,..... Defendants

Of whom Morphis Pediatric Group of Lancaster, P.A. and  
Elizabeth J. Morphis, M.D. are. .... Appellants-Respondents

FINAL REPLY BRIEF OF RESPONDENT-APPELLANT ON CROSS APPEAL

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## ARGUMENT IN REPLY ON CROSS APPEAL

1. THE CIRCUIT COURT ERRED IN REDUCING RESPONDENT'S ATTORNEY FEE AWARD SUA SPONTE, WHERE APPELLANTS EXPRESSLY WAIVED ANY CHALLENGE TO THE REASONABLENESS OF THE HOURLY RATE IN RESPONDENT'S ATTORNEY'S FEE PETITION AND WHERE THE COURT DID NOT INCLUDE ANY EXPLANATION FOR THE REDUCED FEE AWARD

Appellants-Respondents' Initial Brief on Cross Appeal completely ignores the fact that the Morphis Defendants' counsel expressly waived any challenge to both the requested rate of \$450.00 per hour and the reasonableness of the number of hours requested by Respondent-Appellant's counsel. As set forth previously in Respondent-Appellant's Initial Brief, during the hearing on the post-trial motions, Mr. Thompson for the Morphis Defendants clearly stated, "We do not dispute the rate." (Hearing Tr., at 28, ll. 7-8) (R. 236). In his June 2, 2022 email to the court, Mr. Thompson stated, "I agree that Mr. Rothstein has now appropriately substantiated his time on the case. The lack of detail was my only objection regarding the technical requirements for his petition for fees. Of course, no fees are awarded if you agree there was a bona fide good faith dispute." (Email from C. Thompson to Judge Benjamin, 6/2/22) (emphasis added) (R. 108).

The trial judge did not provide any explanation at all for her sua sponte decision to reduce the requested hourly rate for the fee calculation from \$450.00 to \$300.00 per hour, which was an abuse of discretion. With all due respect, a reduction of \$150.00 per hour on the rate of attorneys fees is not a minor adjustment, nor was it "very close to" the rate requested by Respondent-Appellant, but instead led to a reduction of over \$75,000 in the fee award here, without providing any justification or rationale for her decision. (Order at 12) (R. 36). This was a reduction of 33.33% below the requested rate, and 25% below counsel's regular rate of \$400.00 per hour.

In footnote 3 of their Initial Brief, Appellants-Respondents' mistakenly assert that the undersigned counsel's "affidavit states that he had recently increased his standard hourly rate to \$400.00, but he submitted no evidence of this nor did he declare when his rate had increased." (Apps.' Br., at 5, n. 3). In fact, the Affidavit of Plaintiff's Counsel, which is the only evidence before the court on this issue, states, "I raised my regular hour[ly] rate from \$350.00 to \$400.00 effective January 1, 2022, which is the first increase in my hourly rate in approximately seven years." (Aff. of Pl.'s Counsel, at 4, ¶ 15) (emphasis added) (R. 100). Accordingly, at the time this case was filed in September 2018, the undersigned's regular hourly rate was \$350.00 per hour, and at the time the fee petition was filed, that rate had increased to \$400.00 per hour. Judge Benjamin's fee award was based on a rate that was even below the \$350.00 per hour that Plaintiff's counsel regularly charged from approximately mid-2014 to the end of 2021.

Appellants-Respondents also mistakenly argue that Plaintiff's requested "enhancement" of the hourly rate in his attorney fee request was really a contingency multiplier, not part of the loadstar calculation. (Apps.' Br., at 6). Counsel for the Morphis Defendants actually asserts that "Hess's failure to correctly frame his request, as a multiplier . . . is a waiver of the issue." (Apps.' Br., at 7). It is particularly ironic for the Morphis Defendants to argue waiver, because their brief completely fails to mention the express waivers their own counsel made to challenge the hourly rate during the hearing on the post-trial motions and in subsequent communications to the trial judge before the attorney's fee award was made. In any event, Respondent-Appellant was not seeking a contingency multiplier here, but was simply using the contingency nature of the fee agreement as part of the loadstar calculus, which is the fourth factor from Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (" . . . (4) contingency of compensation . . . ."). The quotation in Appellants-

Respondents' brief from the Fourth Circuit case of In re Hall, 854 F.2d 1317 (4th Cir. 1988), actually supports the premise that the contingency nature of the fee agreement is part of the lodestar calculation, although it can also be a relevant consideration for a potential "contingency multiplier." Id. at 1317 ("In determining a reasonable fee, the contingency factor should be considered in two separate instances. First, any risks associated with the contingent nature of a particular case should be considered in fixing the lodestar, as the district court did here. . . . Further, to establish 'exceptional circumstances' warranting an upward adjustment of the lodestar, an applicant must establish that without provisions for a contingency multiplier, the litigant 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'") (emphasis added)). The instant case is not the type of extraordinary case where the plaintiff would have faced substantial difficulties in finding counsel such that a contingency multiplier would have been appropriate.

Justice O'Connor's concurring opinion in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987), does not support the trial judge's reduction of fees in this case. The Delaware Valley case has nothing to do with this case and was not cited by Circuit Judge Benjamin here as a basis for reducing the attorney's fee request by one-third. The Delaware Valley case was a successful claim under the Clean Air Act by an environmental action group to limit air pollution in the State of Pennsylvania. At issue before the Supreme Court was whether the district court's fee award, which actually doubled the lodestar calculation, was appropriate. The Delaware Valley plurality and Justice O'Connor's concurring opinion dealt with "extra enhancement" for "exceptional cases" beyond the normal lodestar calculation. Id. at 732 (O'Connor, J., concurring).

The case of Bowen & Smoot v. Plumlee, 308 S.C. 325, 417 S.E.2d 855 (1992), which is cited in Appellants-Respondents' responsive brief, does not support the trial judge's sua sponte decision

to reduce the hourly fee request in this request by 33.33%. The Plumlee case was not a contingency fee case and had nothing to do with any enhancements to the regular hourly rate in calculating the loadstar in a contingency case, nor did it involve any contingency multipliers for exceptional cases. The Plumlee court merely cited to the Delaware Valley case for the simple and unremarkable proposition that “it is within the trial judge’s authority to determine the appropriate amount and attorney’s fees for service rendered as a result of this case being remanded.” 308 S.C. at 327, 417 S.E.2d at 856.

The only evidence in the record about the appropriate amount to use for the hourly rate in the loadstar calculation in this case to adjust for the contingency nature of the compensation is provided in the two affidavits submitted in support of the petition. See Rothstein Aff., at 4, ¶ 17: “When I take a case on a full or partial contingency basis, I generally expect to receive more than my regular hourly rate because of the additional risk involved in taking the case on a contingency basis.” (R. 100); Burnette Aff., at 3, ¶ 10: “I anticipate receiving a premium above my normal hourly rate when I take cases on a contingency basis because of the additional risks involved in taking such cases and the delay in payment. I generally charge \$475.00 per hour for contingency fee work.” (R. 105).

The trial court’s unexplained reduction of the award to \$300.00 per hour, which is \$100.00 less than even the undersigned’s regular hourly rate for non-contingency employment cases, would result in a diminution of the value of this case based on the contingency nature of the fee agreement, not an increase.

The fact that the fee agreement between Mr. Hess and the undersigned counsel was not actually filed as an exhibit to the fee petition is not material. As noted above, the Morphis Defendants’ counsel expressly stated to Judge Benjamin during the hearing that they are not

challenging the requested rate of \$450.00 per hour. The detailed time records that Plaintiff's counsel submitted to the court in camera after the hearing showed Plaintiff's counsel's time billed at \$125.00 per hour, which confirms the hybrid nature of the fee agreement for a reduced hourly rate combined with a reduced contingency percentage of 25% of any recovery, as represented in the petition itself. (R. 111-152). In addition, Plaintiff's counsel orally asserted during the oral argument that the fee agreement with Plaintiff was a hybrid-contingency agreement, with an hourly component at the reduced rate of \$125.00 per hour, plus a reduced contingency fee of 25% of any recovery on Plaintiff's behalf.

The exemplar cases that Plaintiff's counsel cited to in support of his petition were from between October 2011 and March 2014, when Plaintiff's counsel's regular rate was \$300.00 per hour. All four of those cases were contingency cases, in which the court added a \$50.00 per hour enhancement to counsel's regular hourly rate during the loadstar calculation, or loadstar cross-check. Furthermore, most of those cases resulted in court approval of a percentage-of-the-fund fee award in a collective action under the Fair Labor Standards Act in which counsel's effective hourly rate was well above the \$450.00 rate requested here.

Finally, the lower court's award of attorney's fees at only \$300.00 per hour does not adequately fulfill the purposes of the fee-shifting provision of the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-80(C) of making the plaintiff whole and encouraging employers to comply with the Act. The trial court's use of \$125.00 per hour as the starting point in the loadstar calculation was erroneous because it did not reflect the true nature of the fee agreement between Mr. Hess and his counsel by disregarding the contingency portion of the fee agreement whereby he is also obligated to pay one quarter of his recovery to his counsel. The court should have used Plaintiff's

counsel's regular hourly rate of \$400.00 as the starting point for the loadstar calculation and then increased the hourly award based on the hybrid-contingency nature of the case, to compensate for the additional risks involved in taking this case.

#### CONCLUSION

For all of the foregoing reasons and for the reasons previously stated in Respondent-Appellant's Initial Brief on Cross Appeal, Respondent-Appellant respectfully requests that this Court increase the attorney's fee award for the trial in this case based on a hourly rate of \$450.00, instead of \$300.00, which would bring the total award of attorneys' fees and costs to \$220,972.50. In addition, any further attorney's fee awards in connection with a successful appeal of this matter should also be awarded at the rate of \$450.00 per hour.

#### CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief of Respondent-Appellant on Cross Appeal complies with Rule 211(b), SCACR.

September 18, 2023

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PROOF OF SERVICE

I certify that I have served the Final Rely Brief of Respondent-Appellant on Cross Appeal upon Appellants-Respondents, Morphis Pediatric Group of Lancaster, PA and Elizabeth J. Morphis, M.D., by email and by depositing a copy of it in the United States Mail, postage prepaid, on September 18, 2023, addressed to their attorney of record, Charles F. Thompson, Jr. (thompson@mtsolawfirm.com), Malone, Thompson, Summers & Ott, 339 Heyward Street, Columbia, SC 29201.

September 18, 2023

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