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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Deandrea G. Benjamin, Circuit Court Judge

Case. No. 2018-CP-001127
Appeal No. 2022-001589

Morphis Pediatric Group of Lancaster, PA and
Elizabeth J. Morphis M.D, …… Appellants-Respondents

v.

Paul David Hess ……..Respondent-Appellant

APPELLANTS' BRIEF ON CROSS-APPEAL

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FACTUAL BACKGROUND OF RESPONDENT

There are two claims in Respondent's statement of facts that require correction or clarification. First, Respondent claims he was "denied access to the financial records whenever he raised questions about the profitability of the practice." (Reply Brief p. 4). It is true that Dr. Morphis did not give him the annual profit and loss statements. However, Hess admitted that he was occasionally given expense statements from Dr. Morphis. (R.556-557, Vol I. p. 71-72, lines 24-25, 1-10). He also saw the Lancaster checking account records and was aware that Dr. Morphis was putting her automobile expense through the Lancaster books and was aware that Dr. Morphis was taking additional compensation through the Lancaster practice. (R.547-548, I.62-63, Lines 23-25, Lines 2-7) (R. 557, I.72 lines 11-13) (R.587, I.110 Lines 1-9).

Second, Respondent claimed that Dr. Morphis took "pass through" income from Lancaster in addition to the officers' compensation shown on the profit and loss statements (and Hess's damages spreadsheet R.923, P. Ex. 19) to the tune of $196,000 in one year and $374,000 in another year. (See pp. 6-7 of Respondent's Brief). Respondent has no citation to the Record to support this assertion. The company accountant, however, in his testimony, did testify that "pass-through" income is a tax number. It is the income on which the Subchapter-S owner is taxed and is not the amount that Dr. Morphis received in cash (compensation). (R.751, II. p. 333 Lines 6-7). There is no testimony that Dr. Morphis received an "extra" $196,000 and $374,000 in cash from the Lancaster practice over and above the compensation reported on the Profit and Loss statements and Plaintiff's Ex. 19 (R.923, Damages Spreadsheet).

ARGUMENT

Statute of Limitations

Respondent is confusing the law concerning the tolling of a statute of limitations. He asserts that the refusal of Dr. Morphis to give him full financial disclosure, *i.e.*, fully open the books to him, is "concealment" that mandates tolling the statute of limitations.

As stated in Appellant's brief, what matters is whether or not Hess knew, or should have known, he had a claim. As the quoted testimony demonstrates, he had formed such a belief outside the statute of limitations period. Not only that, he knew about the two expenses that he claimed were improper (automobile and Dr. Morphis's salary) outside the statute of limitations.

Tolling would only arise if Dr. Morphis took some action to forestall Hess from filing, such as agreeing to settle with him. (See p. 20 of Appellant's Brief). It might also apply if Morphis had a duty to disclose and concealed information that caused Hess to postpone initiation of his lawsuit. The case Hess cites in support of his argument explicitly states this. *Strong v. Univ. of S.C. Sch. of Med.*, 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994) (" . . . acts of deception by a defendant calculated to conceal from a potential plaintiff that he has a cause of action, thereby inducing him to postpone institution of suit.").

It is simply incorrect, and contrary to the caselaw, that a plaintiff, like Hess, who has already concluded he was not being paid properly, may nevertheless toll the statute because full information was not given to him. (See caselaw cited on p. 19 of Appellant's Brief).

In any event, as explained in Appellant's brief more fully, there must be a duty to disclose. In *Strong*, the duty arose from the patient-physician relationship. A business owner has no duty to open his books to an employee who has a bonus plan based on profits, so that the

employee may dissect and object to whatever expenses he doesn't like. Relatedly, Hess would have needed to show reliance. Because he had already formed the belief he was being underpaid, there can be no reliance.

Hess attempts to distinguish the *Maher* case on the grounds that Maher received no bonuses under his challenged plan, whereas Hess received bonuses. However, no part of the *Maher* decision rested on the fact that Maher received no bonuses at all under the plan. The holding of the case that Maher should have known he had a claim rested on the fact that Maher asked his superiors about his bonus outside the statute cutoff and was given no answers.

> Maher's testimony reveals he believed at the time of these conversations that he was not getting the bonus money to which he felt entitled . . . he raised his "questions" [and] "walked away" without "really getting" a satisfactory response to his concerns. Even though Maher denied that Lawson told him to "forget about the bonus plan," it is clear from his testimony that he understood Lawson was telling him that his advancement would lead to other forms of bonus compensation which would offset the fact that he was not getting the money from the "fifty percent bonus plan." In our view, Maher's admitted dissatisfaction with this response is clear evidence that he knew, could have known, or should have known at that time that he might have a cause of action over the fifty percent bonus plan.

Maher v. Tietex Corp., 331 S.C. 371, 379, 500 S.E.2d 204, 208 (Ct. App. 1998). The fact that Maher got no bonuses under the plan was irrelevant. The fact that he questioned his superiors, was rebuffed, and walked away unsatisfied, was enough to run the statute. In this case, of course, not only did Hess, like Maher, question his bonus, he investigated the expenses, knew about the expenses he now questions, and formed the belief he was not getting the proper bonuses.

Hess also brings up the accountant, Greg Alexander's, spreadsheet showing bonuses which was presented in conjunction with a May 2015 meeting. Hess infers that Alexander planned to mislead him if Hess asked detailed information by saying "this is part of a larger tax position . . .." There was no evidence that the "tax position" statement was ever made, nor any evidence indicating it wasn't truthful. The relevance of these points is not clear. To the extent

Hess is trying to assert he was misled by the accountant into not filing his claim, the argument is unsustainable. First, Hess had already formed the belief he was not being properly paid and was aware of the expenses he now challenged. In fact, he admitted his doubts continued after the May 2015 meeting. (R.590, I.113 Lines 5-15). In any event, the spreadsheet does not go into any detail about expenses and showed his bonuses at 50% or more of the profit numbers (which were also shown). Because Hess had already concluded that profit should have been higher, the spreadsheet numbers presented by Alexander could have had no effect on his conclusions.

In summary, what matters is whether Hess had enough information to conclude he might have a claim. Tolling does not apply and lack of full knowledge of all the facts does not excuse Hess sitting on his rights.

A Discretionary Bonus is Not an Enforceable Contractual Promise

Hess argues that, once the Board (Dr. Morphis) decided to give him any bonus, she had effectively decided he met the "criteria as set by the Board" and was then required to pay him the bonus according to the formula in Appendix A. First, Respondent entirely misses the point of Dr. Morphis's initial discretion. The point is that if an employer has the discretion to give, or not give, the bonus at the outset, then then the "promise" is unenforceable regardless of whether the employer chooses to give the bonus. (See pp. 22-23 of Appellant's Brief). For the same reason, it doesn't matter if Dr. Morphis testified that Hess met the criteria every year. The point is that he had to meet whatever discretionary criteria Dr. Morphis chose to create. Hess does not cite a single case in support of his theory that initial discretion is ignored once the employer decides it will pay a bonus. Hess has not refuted Appellant's caselaw other than to point out irrelevant factual differences. For example, he attempts to distinguish *Mathews v. Marietta Toyota, Inc.,* on the grounds that there was testimony the bonus was "undefined" and the manager "used his

discretion." *Mathews v. Marietta Toyota, Inc.*,270 Ga. App. 337, 606 S.E.2d 862 (2004). This is precisely the point. There was discretion on whether or not to give the bonus. Respondent distinguishes *McLaughlin v. Sternberg Lanterns, Inc.*, on the grounds that the bonus in that case was "clearly conditional." *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill.App.3d 536 (2009). Again, this is exactly the reason the case is cited. Hess's bonus was also clearly conditional. The reason *McLaughlin* is particularly persuasive is that it makes clear that it is the initial discretion that matters. The qualification in that case was that "You will earn a bonus of $2,000 for every 1% increase in released incoming orders." If the qualifier was met, then the employee received varying amounts such as "if Incoming Sales increase 5% per year, your Bonus will be $10,000, or . . . ." *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d 536, 538, 917 N.E.2d 1065, 1066 (2009). The court held that it was the initial conditional "increase" qualifier that made the bonus unenforceable. The bonus depended on a contingent event. Hess's bonus provision sounds even more discretionary because it depends on completely undefined "criteria." Effectively, Hess has not distinguished any of the caselaw cited by Appellant that holds that when the employer has initial discretion to give a bonus, the promise is unenforceable.

Hess has not addressed, at all, Appellant's point that, even if the court ignored Dr. Morphis's initial discretion and proceeded to the Appendix A formula, that Appendix is also discretionary. Appendix A states that even if Hess met the criteria, he was only "eligible" for a bonus. This is a discretionary word which, as the caselaw cited by Appellant makes clear, makes the bonus completely discretionary. Hess has not addressed any of the caselaw offered by Appellant on this point. He has chosen instead to just ignore it. An appellate court may regard this as a confession that the argument is correct. *Turner v. S.C. Dep't of Health & Env't Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) (quoting *First Union Nat'l Bank v.*

FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App.1996) ("if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct.") *reversed on other grounds,* 328 S.C. 290, 494 S.E.2d 429 (1997).

Hess also failed to address Appellant's argument that the formula itself gives Dr. Morphis huge discretion to deduct anything she wishes in making the bonus determination, including, for example, compensation for herself, or a capital reserve, as she did in 2014. (R.704.4-704.5, II.180-181 Lines 22-25 and 1-5).

Therefore, Dr. Morphis had complete discretion regarding the bonus and, therefore, an enforceable contract did not arise from it. The court erred in ruling otherwise.

Appellant Clearly Preserved the "Discretionary therefore Unenforceable" Argument

Hess's argument that Morphis did not preserve the "Discretionary" argument is clearly incorrect. Indeed, it is difficult to understand how Respondent could have mistakenly argued this. Morphis' counsel clearly made this argument at the close of Hess's case, at the close of all evidence, and in the JNOV motion.

At the close of Hess's case:

> I'm gonna combine two arguments. So we're talking about **discretion** and lack of essential terms.

(R.785, Vol. II p. 432 Lines 22-24) (emphasis added).

> You don't get past go unless you meet criteria, which is undefined, and could be **anything that Dr. Morphis decides it's going to be**. And then it says if you pass the criteria, I suppose, the employee will be eligible for, not the employee shall receive, the employee will be eligible for an annual bonus based on the following formulation. So, again, **discretionary language**

(R.786, Vol. II p. 433 Lines 1-9) (emphasis added).

> Your Honor, appendix A and the language up above it is **highly discretionary**. If a bonus or any kind of payment is discretionary on the part of the employer, it's not enforceable promise. An overwhelming number of courts have held that a **discretionary** bonus is not a contractual promise.

(R.786, Vol. II p. 433 Lines 24-25, p. 434 Lines 1-4) (emphasis added).

Counsel also filed a written directed verdict motion at the same time as oral argument was made, with the same arguments regarding the discretionary nature of the bonus. (R.174, Directed Verdict Motion filed 1/28/2022).

In fact, Defendant's counsel had to remind the court to rule on this argument because she missed it when initially ruling on the directed verdict motions.

> MR. THOMPSON: I think just for issue preservation purposes.
>
> THE COURT: Yes, sir, please do.
>
> MR. THOMPSON: I have to say that I don't believe the Court addressed all my arguments. Of course, I can't make the Court do that.
>
> THE COURT: Which ones did I not address? Y'all had a lot of them.
>
> MR. THOMPSON: Well, there's an argument about terms of **discretionary** and therefore cannot form [an] enforce[ible] contract. That was one.

(R.811, Vol. II p. 477 Lines 16-25, p. 478 Lines 1-2) (emphasis added).

This argument was renewed again at the close of all evidence.

> MR. THOMPSON: Issue two, Your Honor, is that a discretionary bonus is not an enforceable contractual promise. As its stated in his agreement Morphis Pediatric, Dr. Morphis could use any criteria they wished to decide if Mr. Hess would receive a bonus or not, therefore, **his bonus was completely discretionary**. I cite quite a few cases that talk about if it's discretionary . . .

(R.354-355, Vol. III p. 238 Lines 25, p. 239 Lines 1-6) (emphasis added).

Finally, the argument was renewed in the JNOV motion both within Morphis' filed written motion and at oral argument. (R.191, Motion for JNOV p. 11) (R. 233, May 19 Hearing p. 22 Lines 4-10).

The Terms of the Bonus are Too Indefinite and Unclear to be Enforced

Respondent has not addressed the Appellant's points regarding the indefinite and unclear nature of the essential terms of the bonus agreement. Hess's argument that terms should be construed against the drafter simply doesn't apply unless there is something to construe. The initial critical term "criteria" is not only undefined, it is expressly made to be whatever conditions that Dr. Morphis wished to create. A bonus that has undefinable pre-conditions simply cannot be enforced. Respondent has not addressed any of the cases on this point. *See, e.g., Taylor v. CNA Corp.,* 782 F. Supp. 2d 182 (E.D. Va. 2010) (when a bonus is tied to vague, discretionary criteria, there can be no enforceable contractual obligation to provide such a bonus because a fact finder would have no standard to apply); (other cases at Appellant's Brief pp. 24-25).

The other essential terms "eligible," "profit," "royalties," "monies," "debts," "expenses," and "expenditures" are similarly undefined and, therefore, the bonus arrangements is simply too indefinite to be enforced.

Even if there Was a Contractual Promise, Defendants Did Not Breach that Promise by Deducting a Salary for Morphis or her Vehicle Expenses

Appellants argue that even if it could be said that there was a contractual promise, nothing in the Agreement prohibited Dr. Morphis from taking compensation before Hess's bonus was calculated, Appellant also argues that the company accountant's determination of profit was final and determinative. In answer, Respondent seems to be arguing: (1) Dr. Morphis was "zeroing out" income from 2010 through 2013 and, in 2014 began paying herself a salary; (2) the company accountant did not do any bonus calculations; (3) Dr. Morphis testified that she did not take a salary before profits were determined; (4) the accountant's spreadsheet showed Dr.

Morphis's compensation to actually be her intended "bonus," and (5) the implied covenant of good faith precluded her taking compensation before the bonus was calculated.

The first point seems to be a non-sequitur. Whether or not Dr. Morphis was zeroing out Lancaster income or not does not affect her right to take compensation before profit is determined. In any event, the profit and loss statements for 2010 through 2015 show that income was not zeroed out. Also, Hess received bonuses in each of these years.

Regarding the company accountant's determinations, Alexander did testify that he did not do the bonus calculation, however, this is not the operative "determin[ation]" under the Agreement. The company accountant's determination is of "monies," which is defined by the Agreement as "profits," and "debts, expenses, royalties and expenditures." The Agreement does not say the company accountant is to actually calculate the bonus.

> All end of the year profits generated by this above mentioned business shall be divided and the employee is granted 50% (fifty percent) of the said monies after all debts, expenses, royalties and expenditures have been allowed. These monies will be determined by the Company Accountant after the close of the year on December 31st of each calendar year and payable by the 15th of February.

Regarding point 3, in the email Respondent referred to, Dr. Morphis wrote she feared getting paid because [Hess] would question it. This is not some sort of admission that she had a belief she wasn't entitled to payment. In any event, her feelings about getting paid are irrelevant to the legal question of whether she was entitled to get paid under the Agreement.

Regarding the accountant's description of Dr. Morphis' compensation as a "bonus" on a spreadsheet, again, it is irrelevant to the question of whether or not she could take that compensation before profits were determined. In any event, it is uncontested that she did so, as the yearly profit and loss statements, determined by the company accountant, show.

Finally, Hess argues that the duty of good faith requires expenses to be fairly calculated.

However, that duty does not trump something the contract permits. There simply was no restriction on the expenses that Morphis could take. *Greene v. Life Care Ctrs. Of Am., Inc.*, No. 2:07-cv-1648, 2008 WL 5378259, at *4 (D.S.C. Dec. 23, 2008) ("[T]here is no breach of the implied covenant of good faith by conduct which is authorized under the law."). Therefore, Dr. Morphis could not have violated a duty of good faith and fair dealing.

A Plaintiff May Not Recover a Bonus on the Theory that the Employer Failed to Provide Notice. In any Event, Hess Got Prior Notice

Hess argues that the *Barton* case is not binding on this court. This is both true and irrelevant. It does not change the fact that it is persuasive authority as the only published decision on the remedies provided by § 41-10-30. The South Carolina appellate courts have not ruled on this issue in a published decision, although they have done so in an unpublished decision. In any event, *Barton* is persuasive and clearly ruled that the only remedy for a 41-10-30 violation is a penalty from the Department of Labor. *Barton v. House of Raeford Farms, Inc.*, 745 F.3d 95, 108 (4th Cir. 2014). It is incorrect that the decision on this point was mere dicta. It was actually an alternative holding which is more than dicta. Judith M. Stinson, Why Dicta Becomes Holding and Why It Matters, 76 Brook. L. Rev. 219, 264 (2010) ("most courts recognize alternative rulings as binding holdings, not dicta."). In any event, even dicta is regarded as persuasive authority where, as here, the issue is squarely examined and ruled upon. *City of Columbia v. Pearman*, 180 S.C. 296, 185 S.E. 747 (1936) ("What he said in this respect was dicta, but his reasoning is persuasive.").

Hess argues that the notice must be given more than 7 days prior to the time he was paid his 2015 bonus and that the only "notice" that could count under the Act is when he signed the contract. He claims he was paid prior to December 31 and the date of his signature on the

contract was December 31. This argument is baseless for several reasons. First, the 2015 bonus payment was not due until February 15, 2016. By that time, Hess was well aware of the change to 5% of revenue, had agreed to it in June via email, (R.723, I.268 Lines 15-23) (R.925, Def. Ex. 5) ("I agree")[1] and had signed the contract in December. (R.912, Plaintiff Ex. 18). Second, there actually is no evidence of when he was paid the bonus. Hess infers payment occurred before December 31 because the bonus is reflected on the 2015 Profit and Loss statement. This statement may or may not have been a cash-basis report. There was no evidence as to when the bonus was actually paid.

Hess also attempts to distinguish *Barton* on the grounds that the dispute in that case was an alleged change of how hours of work were counted (line time versus clock time) whereas his dispute is over a change in his bonus formula. This is a distinction without meaning. Both disputes were over alleged changes that caused less compensation to be paid. Although the *Barton* court expressed doubt that the notice provision applied to a dispute over whether preparation time was counted as compensable hours, it analyzed the claim as if 41-30-30 did apply. Therefore, this is not a factor upon which the case may be distinguished.

Hess has not addressed Appellant's argument that Hess's construction of the remedies violates the rules of statutory construction. 41-10-80(A) clearly provides that the remedy for a 41-10-30 violation is a penalty imposed by the Department of Labor. Only in a separate provision at 41-10-80(B) (which governs Hess's claims for the years 2010 through 2014) does the Act provide an employee the right to bring a civil action for failure to pay wages due. If the legislature had intended to impose any consequences for violation of section 41-10-30 in addition to those imposed by section 41-10-80(A), it would have expressly provided for them,

[1] An email has been accepted as sufficient to establish the terms of employment. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 308–09, 698 S.E.2d 773, 777–78 (2010).

and there is no provision in the Act other than section 41-10-80(A) addressing the failure of an employer to comply with the notice requirement of section 41-10-30(A). It is simply clear that the only consequences the legislature intended to impose for a violation was a fine by the Department of Labor.

Finally, Hess contends the court should not consider the fact that, in total, he received more money under the 2015 Agreement than he would have under the 2010 Agreement. However, there can be no complaint under the Act when there is no prejudice. *Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul.*, 337 S.C. 476, 486, 523 S.E.2d 795, 800 (Ct. App. 1999) (no violation of wage payment act notice provision found where employee received more than the wage she was promised). Hess cites no law contrary to *Carolina Alliance* to the effect that the court may not consider the overall effect of the change in employment terms.

Even if the Court was Correct in Refusing to Direct a Verdict, It Erred in Not Remitting the Verdict by the Amounts Hess Benefited Under the 2015 Agreement

The evidence presented by all Defendants, which Hess admitted, was that Hess earned $91,563.51 more in 2016 and 2017 than he would have under the 2010 Agreement. (R. 684, I.129 Lines 12-25 and R.601, I.130 Lines 1-25).

Hess argues that, because he elected only to recover his 2015 damages, he may ignore the beneficial elements in years 2016 and 2017. He cites no caselaw in support of this argument. Hess argues that Morphis did not assert this argument as a counterclaim or affirmative defense and because Hess elected to proceed solely under the Wage Payment Act, setoff does not apply. As the Appellant's brief explains, the basis of the motion goes to both tort and contract claims. It is not in the nature of a counterclaim but rather a principal of law. As to Hess' election of

remedy, his Wage Payment claim entitlement rests entirely on a contractual right. Without a contractual right to a bonus, he has no Wage Payment Act claim. Therefore, the principles apply and the award should have been remitted.

Trebling and Fees Should Not Have Been Awarded

In this case, Dr. Morphis had a good-faith belief she was not required to pay Hess more than she did. Her testimony was consistent and clear: she viewed the bonus as completely within her discretion. She thought she was absolutely entitled to compensation before bonuses were calculated. The wording of the contract supports this view. She could apply any "criteria" she wished regarding Hess's "eligibility." Even if she decided the criteria was met, Hess was merely "eligible." Nothing in the contract precluded Morphis from taking a salary. And even if we reach the 50/50 formula, the allowed deductions are so poorly defined and discretionary that no clear computation is possible.

It is also undisputed that Hess actually did get more compensation out of the Lancaster practice than did Dr. Morphis.[2]

Also, as stated above, any close question of law establishes a bona fide dispute. This case had many justifiable legal defenses. They need not be repeated in detail, but include the statute of limitations defense, the discretionary language, the lack of clear terms in the contract, and the lack of a remedy based on the Wage Payment Act notice requirement.

Hess continues to argue that the jury verdict supports the conclusion there was no good faith dispute. In doing so, he, and the trial court, ignored the requirement that the court make its own decision on trebling, independent of the jury decision. As explained in Appellant's brief, any reliance on the jury's verdict is, by itself, grounds to reverse the award, and the trial court

[2] See R.924, Plaintiff Ex. 20 Analysis of Financial Declaration.

went further than that, stating the award "weigh[ed] heavily" with the court. *Morin v. Innegrity, LLC*, 424 S.C. 559, 574, 819 S.E.2d 131, 139 (Ct. App. 2018) (reversed because judge relied on jury verdict to justify trebling award "finding that an employee is entitled to recover unpaid wages [by jury] is not equivalent to a finding that there existed no bona fide dispute as to the employee's entitlement to those wages.").

Regarding Hess's reference to the punitive damage award as supporting the idea there could be no good faith, Hess minimizes his knowing violation of the judge's ruling not to refer to Morhpis's income. He does so on the grounds that the court issued a curative instruction. However, Appellant is not challenging the award of punitive damages. Hess elected to forgo it. The point is that the court cannot look to the punitive damage award to justify a "no good faith" finding.

Hess and the court also reason that whether Morphis had a reasonable belief must be viewed only at the time payment was denied. This view is incorrect. It perhaps is true as to some issues, as in *Mathis* where the employer reduced the employee's pay and had no contemporaneous bona fide reason for doing so. But it clearly cannot be true as to all bona fide reasons. As demonstrated in *Futch, infra*, a legal defense can establish a bona fide dispute. The issue of law making the dispute bona fide cannot have arisen at the time of the pay decision. Also, as noted above, in *Rice* and *Morin*, the court specifically noted that the Legislature absolutely did not want to deter an employer from **"litigating"** by imposing a penalty for doing so in good faith and that the defense extended to a "question of law . . ." *Rice v. Multimedia, Inc.*, 318 S.C. 95, 99, 456 S.E.2d 381, 383 (1995) (quoting *Apache East, Inc. v. Wiegand*, 119 Ariz. 308, 580 P.2d 769 (Ct.App.1978)) (emphasis added). Therefore, the defense is clearly not restricted to what an employer had in mind at the time it did not pay. It includes litigation which necessarily means

legal issues arising in the course of such litigation. To rule otherwise would be to punish employers who seek counsel when claims are made, are advised that they have strong legal defenses, and therefore choose to litigate the matter.

In any event, Morphis did have bona fide reasons for the bonuses she paid Hess. She clearly believed she had discretion, that Hess was getting 50% of the profits, in fact more than 50%, and that she had the right to take compensation before net income was determined.

The reason for Hess's reference to Dr. Morphis' hand-written bonus calculations is unclear. It is uncontested that these were done before the final end-of year numbers were available. They, in fact, support Dr. Morphis' belief that she had complete discretion as to the bonus amount and, in any event, represent a good-faith attempt to pay Hess sooner rather than delay the arrival of final numbers. Morphis consistently testified that she had discretion and, as stated above, that is what the Agreement states. (R.655, II.98 Lines 1-2) (R.311, III.106 Lines 9-21) (R.312, III.107 Lines 16-20) (R. 322, III.132 Lines 11-13).

Hess next argues that Dr. Morphis's refusal to provide complete financial records to Hess. However, as explained in Appellant's brief, she had no duty to do so and, in any event, Hess was paid 50% of the bonuses compared to the year-end profit and loss statements.

Finally, Hess cites testimony of Dr. Morphis which the court felt was an admission by Dr. Morphis that if Hess had seen the full financial statements he would've realized she was not giving him 50% of the profits. This is already addressed in Appellant's brief. It is a misreading of the testimony in answer to counsel's confusing compound question. She said "no." The rest of her answer was only acknowledging that if she had shown Hess the financial statements, Hess would indeed see her compensation and the automobile expense and he would understand the financials. She did not concede that she understood she was paying him incorrectly. Dr. Morphis

was quite clear in her testimony (when asked the question clearly) that she regarded her compensation and automobile expenses to be proper deductions from net income. (R.674, II.119 Lines 16-18)("the 65[000] that was calculated for my compensation was for the work I had done that year at the office); (R.675, II.120 Lines 14-15) (". . . I could take compensation for the work that I had done and that was my earnings."); (R.678, II.123 Lines 1-3, 23) ("well, it wasn't a bonus. . . . I took a modest salary of $65,000 . . .); (R.706.16, II.214 Lines 19-21) ("I built this and I worked hard for it, and I think I'm entitled to compensation for that.")

It is clear, therefore, that the testimony cited by the court was not an admission that Dr. Morphis believed her compensation and automobile expense violated her promise to pay Hess 50% of the profits.

PREJUDGMENT INTEREST

As stated more fully in Appellant's brief, prejudgment interest is only permitted on liquidated claims, i.e., "A claim [that]is certain or capable of being reduced to a certainty." *Dibble v. Sumter Ice & Fuel Co.,* 283 S.C. 278, 287, 322 S.E.2d 674, 679 (Ct.App.1984). An amount is liquidated if it is "capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties." *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 370, 656 S.E.2d 765, 769 (Ct. App. 2007). However, the "calculation" cannot be anything more than a "simple mathematical calculation." *Builders Transp., Inc. v. S.C. Prop. & Cas. Ins. Guar. Assoc.,* 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct.App.1992). Hess argues his claim is a simple mathematical exercise because all one must do is subtract Dr. Morphis' compensation and auto expense and award him half the corrected number. He places great weight on *Lee v. Thermal Engineering* on this point. However, in *Lee,* there was no dispute about the amount owed if the court held that Lee was entitled to commissions for six months after termination. *Lee v. Thermal*

Eng'g Corp., 352 S.C. 81, 84, 572 S.E.2d 298, 300 (Ct. App. 2002). In this case, the jury had to decide what, if any, compensation Dr. Morphis was entitled to and whether she was allowed to take her automobile expense and, with respect to 2015, determine whether there was fraud. The jury also had to consider Dr. Morphis's alleged duty of good faith. And the jury awarded an amount different from what Hess sought. It is not at all clear how they arrived at $548,290 as opposed to the $656,950 that Hess requested.

Hess completely ignored Appellant's argument that the amount is not liquidated if there are "intermediate questions" that must be settled before damages can be ascertained. *Vaughn Dev., Inc. v. Westvaco Dev. Corp.*, 372 S.C. 576, 580–81, 642 S.E.2d 757, 759–60 (Ct. App. 2007). In *Vaughn*, that question was the extent of the work the underlying contract required. Here, the jury, at a minimum, had to determine if Hess had met the "criteria" requirement in the Agreement bonus provision. The jury also had to determine that he was "eligible" and whether expenses could be removed from the profit and loss statement. The jury also had to evaluate the other deductions authorized and reject that any were made. The jury had much to decide prior to calculating damages. If a jury is needed to fix the obligation, it is not liquidated. *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 371, 656 S.E.2d 765, 770 (Ct. App. 2007).

Hess has likewise failed to address Appellant's argument that, "where a dispute over contract damages involves uncertainty surrounding the terms of the contract, the sum due is not ascertainable." *See Vaughn Dev., Inc. v. Westvaco Dev. Corp.,* 372 S.C. 576, 642 S.E.2d 757 (S.C.Ct.App.2007). As stated more fully above, there were many terms in the contract that were unclear. Even Hess and his attorney admitted this. Since uncertainty was involved, prejudgment interest should have been denied.

CONCLUSION

For all the foregoing reasons, the verdict in this matter should be reversed. If it is not reversed as to actual damages, remitter should be awarded, and the trebling damages and fee award should be reversed, and prejudgment interest should be denied.

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