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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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

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RESPONDENT-APPELLANT'S PETITION FOR REHEARING IN PART, ON PREJUDGMENT INTEREST ISSUE ONLY, AND SUGGESTION FOR REHEARING EN BANC

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Pursuant to Rule 221(a), SCACR, Respondent-Appellant, Paul David Hess, APRN-BC, (hereinafter "Mr. Hess"), by and through his undersigned counsel, hereby files this Petition for Rehearing in Part, on Prejudgment Interest Issue Only, and Suggestion for Rehearing En Banc with respect to the Court's opinion of July 9, 2025 (Opinion No. 6115). Respectfully, although the Court's opinion was thorough and well-reasoned with respect to every other issue on appeal, the Court's reversal of the circuit court's award of prejudgment interest in the amount of $407,021.15 overlooked or misapprehended several key points of law or fact, as discussed in detail below.

First of all, the Court correctly recognized that an award of prejudgment interest is a matter within the trial judge's discretion to be reviewed on appeal only for abuse of discretion (Opinion, at 8); however, the Court did not expressly state how the circuit judge's award of prejudgment interest constituted an abuse of discretion here. The definition of "abuse of discretion" is well settled under South Carolina law: "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009).

The circuit court's order correctly cited the applicable legal standard for an award of prejudgment interest as recognized by binding precedent from the South Carolina Supreme Court in Babb v. Rothrock, 301 S.C. 350, 426 S.E.2d 789 (1993): "'The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.'" (Order of Nov. 2, 2022) (R. 38) (quoting Babb, 301 S.C. at 426 S.E.2d at 791). Also, the circuit court's factual determination that "the measure of recovery for Plaintiff's annual bonus was fixed by the 2010 Employment Agreement as 50% of the annual net profits of the Lancaster practice,

which is plainly an amount that could of been reduced to a sum certain at the time such bonuses were payable," (R. 14), is amply supported by the record. Not only was the amount of annual profit of the Lancaster practice capable of being reduced to a certainty, Dr. Morphis's accountant, Defendant Alexander, actually performed the profit calculations for 2010-2014 in advance of the meeting he had with Dr. Morphis and Mr. Hess in May of 2025, as reflected in the spreadsheet that he provided only to Dr. Morphis. (Plaintiff's Ex. 3) (R. 844). Net profit is one of the simplest calculations in business: Profit = Revenues - Expenses. Mr. Hess's annual bonus should have been 50% of that net profit number. This calculation is even consistent with Dr. Morphis's hand-written, back-of-the-napkin bonus calculations she performed every year before the practice's books were actually finalized for the year. (Plaintiff's Ex. 7) (R. 853-856). To determine Plaintiff's damages at the conclusion of the trial, the jury merely had to compare what Mr. Hess's bonuses should have been versus what he was actually paid as a bonus each year in question. That is a quintessential example of an amount that is "capable of being reduced to a certainty" so as to warrant an award of pre-judgment interest.

The Court's acceptance of Respondents-Appellants' factual argument that "uncertainty was involved because many of the terms in Hess's employment agreement were unclear and undefined," (Op., at 17), is plainly inconsistent with the Court's prior holding that "it was MPG and Dr. Morphis's obligation to define the terms such as 'criteria,' 'eligible,' 'profit,' 'royalties,' 'monies', 'debts,' 'expenses,' and 'expenditures,'" (Op., at 11), because any dispute about the meaning of those terms should have been construed in the light most favorable to Mr. Hess since he was not involved in any way in the drafting of the 2010 Employment Agreement or Appendix A to that Agreement. The only real dispute at the trial of this case about the actual calculation of the bonuses

was Plaintiff's argument that Dr. Morphis should not have run her BMW lease through the Lancaster practice, nor should she have taken any compensation from the Lancaster practice before the calculation of net profits was performed to determine Mr. Hess's annual bonus. Although the jury did not award Plaintiff all of the actual damages he requested in his damages summary (Pl.'s Ex. 19) (R. 923), the jury's verdict form was obviously based on a calculation from numbers that were in the record and using the simple formula for net profits, not adding back the value of the car payments and a portion of Dr. Morphis's compensation. (Verdict Form, Ans. 3 & 4) (R. 43).

The fact that the jury partially rejected Plaintiff's assertion that the implied covenant of good faith and fair dealing that exists in every contract in South Carolina would have precluded the Morphis Defendants from paying Dr. Morphis a salary and from running her luxury automobile lease through the Lancaster practice before Plaintiff's bonuses were calculated does not render the jury's damages calculation "unliquidated" for purposes of prejudgment interest. This is not like an intangible award of damages, such as for pain-and-suffering or emotional distress, where the damages determination is entirely up to the jury to determine based on some type of gut feeling or other undefined or amorphous standard that is not knowable until the jury concludes its deliberations. Here, the jury's award of actual damages on Plaintiff's claim under the South Carolina Payment of Wages Act was calculated to the penny. The jury's actual damages award was "capable of being reduced to a certainty" based on numbers that were in the record that were known at the time the bonuses were payable; therefore, the verdict for Plaintiff met the standard for the circuit court properly to make an award of prejudgment interest.

Also, the Court improperly accepted Appellants-Respondents' argument that intermediate questions existed that would preclude an award of prejudgment interest, such as whether Mr. Hess

met the "criteria" for a bonus each year, as required by the language of the 2010 Employment Agreement and its Appendix A. The Court previously rejected the "criteria" argument in Section B of the Opinion because Mr. Hess was, in fact, paid a bonus every year for which the 2010 Employment Agreement applied, demonstrating that he met any criteria to receive a bonus. Importantly, the Court of Appeals has previously recognized that "'It is the character of the claim and not of the defense to it that determines whether prejudgment interest is allowable.'" Lee v. Thermal Engineering Corp., 352 S.C. 81, 89, 572 S.E.2d 298, 302 (Ct. App. 2002) (quoting Southern Welding Works, Inc. v. K & S Constr. Co., 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985)). The Court incorrectly focused on the phrase "sum certain" instead of the equally important phrase "capable of being reduced to certainty" routinely set forth in the standard for awarding prejudgment interest.

The cases cited by the Court in its opinion are easily distinguished from the facts of this case. The case of Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 673 S.E.2d 448 (2009), involved a dissolution of a limited-liability company. The Mallon court ruled that the master-in-equity's award of prejudgment interest was improper because a dispute existed about the method of accounting for the proceeds of the sale of one of the LLC's properties that had been placed in escrow pending the outcome of a complete accounting amid allegations of self-dealing and expenses related to other projects. The Supreme Court concluded that an award of prejudgment interest was inappropriate because "the measure of recovery for prejudgment interest was unliquidated at the time the parties' claims to the proceeds arose." Id. at 458, 637 S.E.2d at 436. Here, by contrast, the income and expense numbers were readily determinable by Dr. Morphis and her accountant at the time, as was the formula for calculating Plaintiff's bonuses as set forth in Appendix A to the 2010

Employment Agreement.

Similarly, Dibble v. Sumter Ice & Fuel Co., 283 S.C. 278, 322 S.E.2d 674 (Ct. App. 1984), involved a dispute over the ownership of a business entity. The crux of the dispute in Dibble focused primarily on the proper method for valuing the good-will of the corporation, an inherently intangible asset. The court of appeals noticed, "Stock of closely held corporations . . . cannot reasonably be valued by application of any inflexible formula; one tailored to the particular case must be found. That can be done only after a discriminating consideration of all relevant facts and circumstances bearing upon the stock's value." Id. at 284, 322 S.E.2d at 678. After extensive analysis, the court of appeals determined that the plaintiff's stock in the defendant corporation was undervalued by less than $5,600.00. Because the value of the plaintiff's "claim was not capable of being reduced to a certainty" at the time the claim arose, the court reversed the award of prejudgment interest. Id. at 287, 322 S.E.2d at 679. Here, there was no dispute about the formula that should have been used to calculate Mr. Hess's bonus, only a deliberate effort by the Morphis Defendants and their accountant to hide the underlying numbers from Mr. Hess.

The final case cited by this court's opinion was Beckmann Concrete Contractors, Inc. v. United Fire & Case. Co., 360 S.C. 127, 600 S.E.2d 76 (Ct. App. 2004). The Beckmann case did not involve pre-judgment interest at all, but addressed the question of whether the plaintiff's claims were "unliquidated" such that the defendant was entitled to notice of a damages hearing under Rule 5(a), SCRCP, before a default judgment was entered. The court of appeals in Beckmann agreed that the amount of the claim at issue in that case was unliquidated because the additional construction work in dispute with the contractor was beyond the scope of the original construction bond provided by the insurer. Id. at 132, 600 S.E.2d at 79. The court of appeals stated that "'damages are unliquidated

where they are an uncertain quantity, depending on no fixed standard, referred to with wise discretion of a jury, and can never be made certain except by accord or verdict.'" Id. (quoting 22 Am.Jur.2d Damages § 489 (2003)).

The cases cited in Respondent-Appellant's brief are fully supportive of the circuit court's award of pre-judgment interest here. In Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993), the South Carolina Supreme Court found that the master in equity erred in refusing to award prejudgment interest from the date the complaint was filed until the date of the judgment, because the defendants were not actually aware that the plaintiff had personally paid the note until the lawsuit was filed. Id. at 353-54, 426 S.E.2d at 791. The Babb court stated, "The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." Id. at 353, 426 S.E.2d at 791 (emphasis added). Here, the ability to calculate the Lancaster practice's annual profits–and, thus, Mr. Hess's proper bonus payments–was clearly "fixed by conditions existing at the time" Mr. Hess's claims arose; therefore, he is entitled to prejudgment interest.

Similarly, in Lee v. Thermal Engineering Corp., 352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002), the court of appeals stated, "'The right of a party to prejudgment interest is not affected by rights of discount or setoff claimed by the opposing party.'" Id. at 88-89, 572 S.E.2d at 302 (quoting Southern Welding Works, Inc. v. K & S Constr. Co, 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985)). Here, like in Lee, the calculation of profit of the Lancaster practice was a straight-forward, mathematical calculation based on numbers that existed at the time the claims arose, which is clearly an amount that was "capable of being reduced to a certainty." Whether the jury made certain determinations about what expenses to include or exclude from that calculation does not

change the basic foundation of the underlying mathematical formula. Accordingly, the trial court was correct in making the award of pre-judgment interest in this case.

In most cases, the award of pre-judgment interest is not nearly as significant as it is here. Because the jury found that Mr. Hess could go back to 2010 under the discovery rule and/or fraudulent concealment by the Morphis Defendants, and because the amount of actual damages for each year was substantial, the award of punitive damages was almost 75% of the actual damages verdict in this case prior to the statutory award of treble damages and attorney's fees and costs by the trial judge. The Morphis Defendants had the benefit of being able to use that additional money not only during the pendency of this case, but also before Mr. Hess realized that he had a claim against her, which is one of the underlying bases for the statutory mandate of prejudgment interest found in S.C. Code Ann. §34-31-20(A).

For all of the foregoing reasons, the Court should reconsider its ruling disallowing prejudgment interest to Respondent-Appellant and should re-instate the circuit court's award. In addition, because the panel's opinion this case diverges from the Supreme Court's opinion in Babb and this Court's previous opinion in Lee, the Court should grant rehearing en banc to secure or maintain the uniformity of its decisions and to respect binding precedent from the South Carolina Supreme Court.

Respondent-Appellant hereby incorporates by reference the brief he previously filed in this case on the issue of prejudgment interest.

* * *

July 23, 2025

s/ David E. Rothstein

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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served the Respondent-Appellant's Petition for Rehearing in Part on Prejudgment Interest Issue Only, and Suggestion for Rehearing En Banc on Appellants-Respondents, Morphis Pediatric Group of Lancaster, PA and Elizabeth J. Morphis, M.D., on July 23, 2025, by email addressed to their attorney of record, Charles F. Thompson, Jr. (thompson@mtsolawfirm.com), Malone, Thompson, Summers & Ott, 339 Heyward Street, Columbia, SC 29201.

July 23, 2025

s/ David E. Rothstein

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July 23, 2025

VIA EMAIL (ctappfilings@sccourts.org)
AND U.S. MAIL
Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, P.A. et al.,
Appellate Case No. 2022-001589

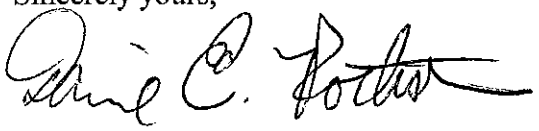
Dear Ms. Kitchings:

Enclosed please find a copy of Respondent-Appellant's Petition for Rehearing in Part, on Prejudgment Interest Issue Only, and Suggestion for Rehearing En Banc in the above-referenced appeal, along with a Proof of Service. Please send a file-stamped copy of these documents to me for my records. The $50.00 filing fee for this petition is being sent with the hard copy of this letter via regular mail.

By copy of this letter, I am hereby serving the Notice on counsel for Appellants-Respondents.

If you have any questions or need any additional information, please do not hesitate to call me or email me.

Sincerely yours,



David E. Rothstein

Enclosures

cc: Charles F. Thompson, Jr., Esq. (both via email w/ encl.)
Ryan L. Beasley, Esq.