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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 HessRespondent-Appellant

APPELLANTS' RETURN TO RESPONDENT'S PETITION FOR REHEARING

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Attorney for the Respondent

PREJUDGMENT INTEREST

The award of pre-judgment interest is not a matter of right but is committed to the sound discretion of the court. In applying § 34–31–20(A), “[t]he decision whether to award pre-judgment interest lies in the discretion of the court.” *Security Ins. Co. of Hartford v. Arcade Textiles, Inc.*, 40 F. App'x. 767, 770 (4th Cir.2002) (citing *Jacobs v. Am. Mut. Fire Ins. Co. of Charleston*, 287 S.C. 541, 340 S.E.2d 142, 143 (S.C.1986)); see *APAC–Carolina, Inc. v. Towns of Allendale and Fairfax*, 868 F.Supp. 815 (D.S.C.1993).

In Respondent’s Petition for Rehearing on this issue, he focuses solely on the formula “50% of net profits,” and argues that nothing could be simpler to calculate. However, whether or not an award of pre-judgment interest is appropriate is not decided solely on the last step--the final calculation. Many questions had to be answered by the judge and jury prior to reaching that calculation. As the court of appeals noted, these questions preclude the award of pre-judgment interest. Hess ignores the facts that: the contractual obligation was uncertain, the jury had to construe the language of the contract, the jury did not award exactly what Hess sought, the jury had to find a duty to exclude Dr. Morphis’s compensation and a duty to disclose information, and the trial judge had to find bad faith on the part of Dr. Morphis in awarding treble damages and jury fees.

Our Supreme Court, in *Llewelyn v. Dobson Bros.*, 274 S.C. 177, 262 S.E.2d 726 (1980), recognized “[i]n the absence of agreement or statute, interest is not recoverable on an unliquidated demand.” *Id.* at 178, 262 S.E.2d at 727 “A claim is liquidated if the sum claimed 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).

A clear example of a liquidated amount would be a supplier suing over a specific unpaid invoice. It is true that 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); *Sundown Operating Co. v. Intedge Indus., Inc.*, No. 2007-UP-091, 2007 WL 8325994, at *3 (S.C. Ct. App. Feb. 23, 2007) (same); *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 207, 600 S.E.2d 105, 110 (Ct. App. 2004). In this case, of course, Hess' theory of recovery required the assumption of obligations not set forth in the Agreement. It required the removal of expenses that were not part of any formula set forth in that Agreement. Thus, the jury award was not pursuant to a simple calculation that had been agreed to by the parties. It required the assumption of a duty of good faith, a matter which could only be ascertained by a jury. And, of course, the judge had to determine if Dr. Morphis acted in good faith before she awarded trebling and attorney fees.

The amount is not liquidated if there are "intermediate questions" that must be settled before damages can be ascertained.

Unlike *Smith–Hunter* and *Butler Contracting* the measure of damages was not fixed in this case. There was an intermediate question that had to be decided before the measure of damages could be ascertained. Under the terms of the contract, the scope of the work required was not certain and the damages could only be measured after that determination was made.

Vaughn Dev., Inc. v. Westvaco Dev. Corp., 372 S.C. 576, 580–81, 642 S.E.2d 757, 759–60 (Ct. App. 2007).

Intermediate decisions had to be made by the jury in this case. 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 appropriately made. The jury had much to decide prior to calculating damages. If a jury is needed to fix the obligation, it is not liquidated. "In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict." *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 371, 656 S.E.2d 765, 770 (Ct. App. 2007). This case is analogous to *Builders Source Direct v. Cosco Logistics (Americas) Inc.*, in which the damages depended on the amount of lumber that was lost. The Defendant contended no lumber was lost and the calculation involved three different methods. No. C.A. 2:07-CV-531-PMD, 2008 WL 3823864, at *16 (D.S.C. Aug. 12, 2008). It was disputed that Hess was even entitled to a bonus and his theory of recovery involved the subtraction of expenses that was not a computation method in the contract.

Also, "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) (holding that uncertainty regarding the extent and nature of the obligations required under a construction contract precluded the court from finding that the amount due was fixed at the time the claim arose). 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 was appropriately denied.

MALONE, THOMPSON, SUMMERS & OTT LLC

 /s/Charles F. Thompson Jr. _____

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Dated this 1st day of August 2023

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SC Court of Appeals

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM KERSHAW COUNTY
Court of Common Pleas**

Deadra Jefferson, Circuit Court Judge

C. A. NO. 12-CP-26-4852

Town of Surfside Beach. Appellant

v.

Jacklyn J. DonevantRespondent

CERTIFICATION

I hereby certify that the accompanying return to Respondent's petition for rehearing and suggestion or rehearing *en banc* was served on Respondent by email and United States mail addressed to:

David E. Rothstein
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Greenville, SC 29605

August 1, 2025

s/ Charles F. Thompson, Jr.
Charles F. Thompson, Jr.