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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

REPLY BRIEF IN SUPPORT OF 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 Rules 221(a) and 240(f), SCACR, Respondent-Appellant, Paul David Hess, APRN-BC, (hereinafter "Mr. Hess"), by and through his undersigned counsel, hereby files this Reply Brief in Support of Respondent-Appellant's 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). Although Appellants-Respondents correctly acknowledge that the award of prejudgement is a matter of discretion for the trial court, Appellants-Respondents' Return (like this Court's Opinion) does not articulate how the trial judge abused her discretion in awarding prejudgment interest to Mr. Hess in the amount of over $400,000. The bottom line is that no abuse of discretion occurred with respect to the award of prejudgment interest below, and the Court should reconsider its decision to take away the trial court's award of prejudgment interest.

Appellants-Respondents wrongly argue that the jury's award of back pay was not a liquidated amount because the jury (and the trial judge) had to make several intermediate findings before the final calculation of back pay was made in rendering a verdict in the case. For example, Appellants-Respondents assert that the jury had to construe the language of the contract and had to assume a duty that was not specifically spelled out in the contract and that the jury did not award 100% of what Mr. Hess requested in damages. Of course, the counter to this is that the judge properly instructed the jury that any ambiguities in a contract are construed against the drafter and that every contract in South Carolina carries with it an implied covenant of good faith and fair dealing. These facts do not demonstrate the type of circumstances necessary to render an award of prejudgment interest inappropriate. Appellants-Respondents also incorrectly assert that the judge had to find bad faith on the part of the Morphis Defendants to award treble damages and attorney's fees and costs under the South Carolina Payment of Wages Act. The judge's post-trial award of of statutory damages under the Act has nothing to do with the award of prejudgment interest. The key question is whether the damages calculation underlying the the jury's verdict was an amount "capable of being reduced to a certainty" and whether "the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." Babb v. Rothrock, 301 S.C. 350, 353, 426 S.E.2d 789, 791 (1993) (emphasis added). All of the conditions from which the jury made its determination of damages were clearly in existence at the time the bonuses came due to Mr. Hess. Appellants-Respondents' Return does not contain a single reference or citation to the Babb case, which is binding precedent from the South Carolina Supreme Court.

Appellants-Respondents's Return uses an analogy of an unpaid vendor invoice as a "clear example" of a case that would be appropriate for an award of prejudgment interest. Of course, if the purchaser asserted that some of the goods in the invoice were damaged or defective or that certain goods were never actually delivered, that would not render the invoice unliquidated for purposes of prejudgment interest. Under these additional facts, the jury would have to resolve intermediate factual questions about whether certain items should be excluded from the total due to the vendor under the invoice without rendering the amount unliquidated. Similarly, here, the jury's determination that Dr. Morphis was allowed to run her BMW lease through the Lancaster office and that she was allowed to pay herself some compensation from Lancaster before calculating the bonus due to Mr. Hess each year does not render Mr. Hess's case "unliquidated." All of the facts needed to make the jury's determination existed at the time the bonuses came due each year, and the jury's calculation of the bonuses that should have been paid versus what were actually paid to Mr. Hess was a simple mathematical calculation–the two hallmarks of a case where prejudgment interest is appropriate.

Although the Return does not refer to the Babb case, Appellants-Respondents cite to two unpublished decisions–one from the court of appeals and one from the federal district court for the District of South Carolina–in arguing against prejudgment interest here. Not only does Rule 268(d)(2), SCACR generally prohibit the citation to unpublished opinions, these cases are also easily distinguished from facts presented here. The unpublished SC Court of Appeals case is Sundown Operating Co. v. Intedge Indus., Inc., No. 2007-UP-091, 2007 WL 8325994 (S.C. Ct. App. Feb. 23, 2007), which involved a plaintiff who was suing a manufacturer of a defective fryer for causing a fire that destroyed the plaintiff's restaurant and pub. The court of appeals affirmed the master's decision not to award the plaintiff prejudgment interest as part of the default judgment in that case, because the damages were clearly not a liquidated amount:

> The facts of this case demonstrate that Sundown's claim was not capable of being reduced to a certainly. Sundown's damages are simply not of the type that can be made certain or cannot be changed by proof. In order to determine the damages to be awarded, the master had to consider the testimony of fact witnesses, expert witnesses and exhibits admitted into evidence. There was no fixed formula used for determining the amount of Sundown's damages. At the time the claim arose, the date of the fire, conditions were not fixed for determining the amount of Sundown's damages to a sum certain. The testimony of Sundown's fact witnesses and the exhibits presented by Sundown demonstrate the measure of recovery was not fixed on the date of the fire. Furthermore, many of Sundown's damages did not even arise until after the date of the fire, such as the lost profits and revenues, loan and interest charges, legal and permit fees, storage charges, and rental income. Accordingly, Sundown's damages were not liquidated, and therefore, Sundown was not entitled to prejudgment interest as an element of damages.

Id. at *4. The damages in the Sundown case could not be more different than the damages presented here, all of which were based on facts known at the time the claim arose and all of which could be calculated by a simple mathematical formula.

Appellants-Respondents misread Dixie Bell, Inc. v. Redd, 376 S.C. 361, S.E.2d 765 (Ct.

App. 2007), in arguing that "If a jury is needed to fix the obligation, it is not liquidated." (Return, at 3). The quotation from Dixie Bell uses the word "and" to connect the four factors identified by the court of appeals to determine whether damages are unliquidated: "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, 376 S.C. at 371, 656 S.E.2d at 770 (emphasis added). Here, because the jury's award of actual damages was based on a fixed standard as set forth in Appendix A, and the amounts needed to plug into the mathematical formula were known quantities at the time the claims arose, not some indeterminate amount, the damages were clearly capable of being reduced to a certainty.

The unpublished federal case cited by Appellants-Respondents is Builders Source Direct v. Cosco Logistics (Americas) Inc., No. C.A. 2:07-CV-531-PMD, 2008 WL 3823864 (D.S.C. Aug. 12, 2008), which was a non-jury trial involving bailment claims arising out of missing lumber from a warehouse operated by defendant. United States District Judge Duffy applied the South Carolina Supreme Court's case of Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993), to decide that prejudgment interest was not appropriate in that case: "The amount of the claim could not be ascertained by a simple mathematical calculation. Throughout this litigation, Defendant asserted that it lost no lumber at all. Furthermore, while the three pieces of evidence presented by Plaintiff . . . concerning the amount of lumber lost may be considered reasonably consistent, all reveal different amounts and values of lumber missing. Even the method for computing the value of the lost lumber is disputed. The court therefore concludes that the method of recovery was not fixed at the time the claim arose." Builders Source, 2008 WL 3823864, at *16. In the Builder Source case, the trial judge made the discretionary call not to award prejudgment interest because of factual disputes about how to calculate the amounts and about value of the missing lumber, information that was not readily determinable at the time the claims arose. Here, by contrast, there was no dispute about the numbers themselves that went into the calculation of the profits of the Lancaster practice each year, and those numbers were known to, or readily ascertainable by, the Morphis Defendants at the time. The fact that the jury did not accept Mr. Hess's argument that the lease payments for Dr. Morphis's car and other compensation for Dr. Morphis should not have been included as expenses does not render the claim unliquidated.

Appellants-Respondents also rely heavily on Vaughn Dev., Inc. v. Westvaco Dev. Corp., 372 S.C. 576, 642 S.E.2d 757 (Ct. App. 2007), which involved a dispute between a developer and seller of land about who was responsible for installing the sewer infrastructure for a residential development. The Vaughn court found that prejudgment interest was not appropriate in that case because the contract was not sufficiently specific about the extent of the sewer work required, the methods of installation, and whether the seller was required to do the necessary work or whether the purchaser could hire a subcontractor to perform the sewer installation. Id. at 581, 642 S.E.2d at 760. Furthermore, in Vaughn, both parties were sophisticated business entities. Here, by contrast, any ambiguity in the 2010 Employment Agreement or in Appendix A setting forth the bonus calculation, must be construed against Appellants-Respondents and in favor of Mr. Hess because he was not involved in the drafting of either document.

The two cases referenced in the Vaughn quotation in Appellants-Respondents' Return are strongly supportive of the trial court's award of prejudgment interest here. The first case, Smith-Hunter Constr. Co. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005), involved a dispute between a builder and a homeowner about the amounts of work set forth in the builder's invoices. The homeowner argued that the builder did not follow the change-order procedures as spelled out in the contract. The court of appeals applied the Babb v. Rothrock standard and held that prejudgment interest was appropriate: “The measure of recovery was fixed by conditions existing at the time the claim arose. The costs of the work completed by Builder at the time of Homeowners' breach of contract were established via Builder's invoices. Builder was also entitled to 13% in profits and overhead on the jobs completed. The mere fact that Homeowners disagreed with Builder regarding the amounts, which were stated in the invoices, representing completed work did not preclude an award of prejudgment interest. The trial court did not err by awarding prejudgment interest because the measure of recovery was fixed by conditions existing at the time the claim arose.” Smith-Hunter Constr., 365 S.C. at 128–29, 616 S.E.2d at 421. The second case is Butler Contr., Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006), where the South Carolina Supreme Court ruled that the trial court erred in not awarding prejudgment interest in a dispute between a subcontractor and a contractor involving a commercial renovation project. The Butler court stated, “The fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.” Id. at 133, 631 S.E.2d at 259 (citing Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421, and Babb, 310 S.C. at 353, 426 S.E.2d at 791). The Butler court also recognized the underlying purpose of an award of prejudgment interest: “A judgment debtor is required to pay interest on his debt as compensation for his continued retention and use of the creditor’s money beyond the date payment was due.” Butler, 369 S.C. at 134, 631 S.E.2d at 259. Here, there can be no doubt that the Morphis Defendants retained the use of significant money that rightfully should have been paid to Mr. Hess as additional bonuses.

Appellants-Respondents do not even attempt to respond to Mr. Hess's argument that the fact that Defendant Morphis's own accountant was able to calculate the "net profit before Doctor bonuses" in the spreadsheet he provided only to Dr. Morphis, (Plaintiff's Ex. 3) (R. 844), provides compelling evidence that damages here were capable of being reduced to a certainty, so as to support an award of prejudgment interest.

For all of the foregoing reasons, and for the reasons stating in Respondent-Appellant's Petition for Rehearing in Part, the Court should affirm the circuit court's award of prejudgment interest.

August 6, 2025

s/ David E. Rothstein

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PROOF OF SERVICE

I certify that I have served the Reply Brief in Support of 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 August 6, 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.

August 6, 2025

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