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S.C. SUPREME COURT

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' PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

Can a plaintiff avoid the applicable statute of limitations, despite admitting he understood he had a claim outside the limitations period, by merely alleging the opposing party withheld some information relevant to his claim?

Does a business have a duty to disclose all their financial data to an employee who had a discretionary bonus program based on profit?

Can a discretionary and vague bonus program form a contract?

Are money damages available for an alleged violation of the South Carolina Wage Payment Act wage change notice provisions when only an administrative fine is provided for.

Can a Wage Payment award be trebling and attorney fees awarded despite an employer having a good faith belief it paid all money due and that there was a change in law and can the trial judge rely on the jury verdict in making such an award?

FACTUAL BACKGROUND

Morphis Pediatric Group (MPG) is a pediatric clinic located in Lancaster South Carolina that was owned by Dr. Beth Morphis. (R.642, II.79 Lines 21-25, R.643, II.80 Lines 1-7). Morphis hired David Hess in 2009 to work as a nurse practitioner for MPG in Lancaster. (R.511, I.26, Lines 6-7).

In January 2010, Morphis offered Hess the opportunity to earn 50% of the profits of the Lancaster office. (R.507, I.22 Lines 4-10) (R.833, Plaintiff Ex. 1). Under the 2010 Agreement, Hess was paid a base salary of $100,000 and was "eligible" for an annual bonus. The bonus provisions are the basis for Hess's claims in this case. They are divided into two parts. The first part states:

> All or any bonuses shall be at the discretion of the Board or as determined in any appendix that is hereby signed and agreed upon by both parties.

There was an “appendix,” and it stated:

> Provided that the employee meets criteria as decided upon by the Board, the employee will be eligible for an annual bonus paid by the company based on the following formulation.
>
> 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.

(Id.).

There are no definitions of “criteria,” or “debts, expenses, royalties,” “eligible,” or “expenditures.”

Hess testified that the “Company Accountant” was Greg Alexander. (R.566, I.81 Lines 17-23). Hess also agreed that the net income numbers shown on his own exhibit (See R.923, Exhibit 19 on next page) agreed with the income on the year-end financial statements which had been determined by the Company Accountant (R.568, I.83, Lines 2-12) (R.569-571, I.84-86) and that he received at, or more than, 50% of the net income as determined by the Company Accountant.

Hess’s claim is based on the theory that net profits, for his bonus purposes, should have excluded Dr. Morphis’s salary and her automobile expenses. In other words, he claims MPG and the company accountant improperly counted these as expenses. Hess asserted at trial he was entitled to the following:[1]

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[1] 2014 was the only year covered by the 2010 Agreement that Hess did not receive at least 50% of the net income for that year. This was due, according to Dr. Morphis, because she decided to do a capital expenditure set aside which is specifically permitted under appendix A of the Agreement. (R.704.4-704.5, II.180-181 Lines 22-25 and 1-5).

Year	Gross Revenue	Net Income	Officers' Salaries	Auto Expense	Bonus Paid	Profit w/o Officer and Auto Before Split	Damages
2010	$1,116,668.87	$15,062.67	$148,662.88	$13,180.28	$75,000.00	$251,905.83	$50,952.92
2011	965,476.12	-9,359.00	180,000.00	10,786.56	25,000.00	206,427.56	78213.78
2012	1,026,916.06	520.52	330,000.00	10,838.10	46,968.48	388,327.10	147195.07
2013	1,043,897.83	23,018.93	151,000.00	11,444.50	48,000.00	233,463.43	68731.715
2014	1,191,873.15	196,623.64	81,212.80	9,100.20	48,000.00	334,936.64	119468.32
2015	1,419,101.23	374,287.42	80,000.00	758.35	70,267.41	525,313.18	192389.18
							$656,950.98

(R.923, Plaintiff Ex. 19).[2]

In February 2015, Dr. Morphis realized she had forgotten to calculate and pay Hess's bonus for 2014. At this point, Dr. Morphis felt that Hess had been harassing and intimidating her about the financial expenses, and his bonus, and she didn't want to deal with him anymore regarding the bonus. (R.705.4, II.191 Lines 1-7) (R.705.5, II.192 Lines 20-25) (R.705.6, II.193 Lines 1-7). She contacted Alexander on February 4, 2015, requesting he inform Hess why he was receiving his bonus late. (R.705.2, II.185 Lines 1-25). Alexander contacted Hess and informed him he would be receiving the same bonus as last year, $48,000. (R.705.3, II.186 Lines 6-13). In response, Hess questioned the numbers, to which Alexander responded he was not at liberty to share further information. As a result, Hess suggested a meeting to review the numbers used to calculate his bonus. This meeting occurred in May 2015. (R.529, I.44 Lines 15-16) (R.530-531, I.45-46 All Lines) (R. 845, Plaintiff Ex. 4).

Because of Hess's repeated questions regarding the numbers, Dr. Morphis decided to propose a new employment agreement to Hess with a simplified and easier bonus calculation that

[2] The $180,000 and $330,000 Dr. Morphis received in 2011, she testified, was entirely due to a windfall reimbursement from the hospital to pay for after-hours calls and the salaries of physicians whom Dr. Morphis recruited. (R.689-690, II.144-145, Lines 25 – 12) (R.698.7, II.167 Lines 7-25) (R.702-703, II.171-172, Lines 15-13).

would result in bonuses comparable to Hess's past bonuses. (R.705.7, II.195 Lines 6-25) Alexander determined that Hess's bonuses for the years 2010-2014 were comparable to 5% of gross revenues. (R.705.8-705.9, II.197-198, Lines 23-25, 1-25) (R.845, Plaintiff Ex. 4).

The meeting with Hess took place on May 28, 2015. At the meeting, Hess asked Alexander if the bonuses he received previously were equal to 50% of the net profits, to which Alexander responded he could not answer that because it would divulge Dr. Morphis's personal tax information. The meeting concluded and negotiations over Hess's new employment contract continued. After the meeting, Alexander prepared a spreadsheet analysis showing Hess's previous bonuses (2010-14) were equal to an average of 5% in gross revenue as a bonus. (R.705.12, II.206 Lines 20-25; R.705.13, II.207 Lines 1-25).

In June 2015, Hess emailed that he would accept the new contract. (R.723, II.268 Lines 15-23) (R. 925, Def. Ex. 5). On December 30, 2015, Hess executed his new employment agreement which governed his bonus for 2015. (R.504, I.19) (R.912, Pl. Ex. 18). Pursuant to the 2015 Agreement, Hess would receive a bonus equal to 5% of MPG's gross receipts for the year. Hess's 2015 bonus was calculated pursuant to the 2015 Agreement. Hess was paid bonuses for 2016 and 2017 that he concedes were more than what he would have received under the 2010 Agreement. (R.600, I.129 Lines 12-25 and R.601, I.130 Lines 1-25).

ARGUMENT

The Court of Appeals Overlooked Issues Regarding the Statute of Limitations and the Decision is Inconsistent with S.C. Supreme Court Precedent

An action under the Wage Payment Act must be brought in three years**.** S.C. Code Ann. § 41-10-80(c). An action is commenced when the summons and complaint is filed. S.C. Code Ann. § 15-3-20(b). Pursuant to the "discovery rule," the statute of limitations begins to run when the injured "person knew or by the exercise of reasonable diligence should have known that he

had a cause of action." S.C. Code. Ann. § 15-3-535; *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019). The test is objective and the South Carolina's statute of limitations requires "very little to start the clock." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir.1994) (applying South Carolina law).

This lawsuit was filed September 27, 2018. The "cut off" date relevant to the application of the statute of limitations discovery rule is, therefore, September 27, 2015.

The court of appeals held that it was a question of fact whether or not Hess knew he had a cause of action because Morphis withheld information that she was taking a salary from MPG before net income for bonus calculations was determined.

The court, however, ignored the undisputed evidence that Hess had formed the belief that he was not being paid the correct bonus outside the statute of limitations period, that he formed the belief that income should have been higher than reported, and that he knew Morphis was taking a salary

> Q. **So it caused you to question whether or not you were getting 50 percent of the net income?**
>
> **A. Correct.**

(R.557-558, I.72-73, Lines 19-25 and 1-4) (emphasis added).

> Q. And you testified something about, you couldn't understand why there wasn't more money?
>
> A. Correct.
>
> Q. **And that was a concern you had somewhere in 2010 to 2014?**
>
> A. Right. 'Cause it showed more money coming in and there wasn't enough going out to account for the lack of bonuses.

(R.576, I.93 Lines 1-18).

> A: . . . . We would rather be high on the expenditures than low on the expenditures,

because that way it's a safer bet. And no matter how high we can estimate everything to be, there's -- the numbers just could never add up.

Q. **And that caused you to question in your mind whether or not you were getting the bonus?**

A. That caused a lot of things. We weren't giving the girls pay raises half the time.

Q. And your bonus was one of those things?

A. **My bonus was one of those things.**

(R.577-578, I. 94-95, Lines 20-25 and 1-5).

Hess also testified at trial that he went to great lengths to calculate what the net profit was and his number came up bigger than his bonus indicated it was. (R.550, I.65 Line 15). He testified he made these efforts because he doubted his bonus was correct and he didn't think his contract was being met. (R.550, I.65 Lines 21-25). When Hess spoke with Alexander in February 2015, and was informed of his 2014 bonus, Hess immediately questioned how his bonus could be the exact same as the previous year, questioned the numbers, and asked for a meeting with Alexander and Dr. Morphis to discuss the numbers. This meeting occurred on May 28, 2015, and Hess testified that he asked Alexander whether he had received 50% of the profits in the past.

Q. Did you ask Mr. Alexander any questions during that meeting?

A. I did.

Q. What did you ask?

A. **I asked him if I was getting 50 percent of the profits because even though my bonus** said that, I did not actually know if that is 50 percent of the profits. That was just a number that I was given. **I specifically asked, "Am I getting 50 percent of the profits of the practice?"**

Q. And what was Mr. Alexander's response?

A. I can't divulge that information. That is Dr. Beth's private tax information.

Q. What was your response to that?

A. **I asked him not to divulge the information. That, "yes" or "no". "Am I getting 50 percent of the profits?"** You're not divulging any information, yes or no. He should know that, he's an accountant. He's the company accountant.

(R.535, I.50 lines 6-24).

Q. **And there was a meeting in May of 2015**

. . .

Q. And one of the questions you asked was, "Am I getting 50 percent of the profits?"

A. That is correct.

Q. And you asked that question in part because you thought you weren't getting 50 percent of the profits; is that correct?

A. That is correct. . . .

(R.578, I.95 Lines 6-18).

Hess even went so far as to discuss the issue with his personal accountant immediately after the May 2015 meeting.

Q. When do you think is the first time you had those discussions with Clark Moore?

A. It would have been sometime after our meeting on May 28th.

Q. Within a couple months at least?

A. Probably.

Q. **And did you express concern about whether or not you got 50 percent of the profit of the prior years to Clark Moore?**

A. I did. I believe I probably discussed that with him.

(R.590, I.113 Lines 5-15).

The court of appeals ignored these admissions in its order.

The court of appeals decision is inconsistent with *Dean v. Ruscon Corp.* (and other cases) in which this court held that it does not matter that a plaintiff is fully aware of his claim and,

relatedly, does not know all the facts relevant to his claim., 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996).

> Here, the evidence establishes that Dean acted promptly by retaining consultants in November 1984 to inspect the damage. As a result, Dean was warned that the crack might expand. In fact, Dean conceded that she believed the damage to her building resulted from the pile driving activities of 1984 … the fact that Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial.

Dean v. Ruscon Corp., 321 S.C. 360, 365–66, 468 S.E.2d 645, 648 (1996).

The decision is also inconsistent with this court's decisions *Benton v. Roger C. Peace Hosp., Snell v. Columbia Gun Exch., Inc., Wiggins v. Edwards,* and *Garner v. Houck.* In those cases, this court held: (1) The statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to "act with some promptness;" (2) The statute of limitations begins to run when a cause of action reasonably ought to have been discovered. In determining whether the cause of action should have been discovered, it must be decided when the facts and circumstances of the injury would put a person of common knowledge on notice that some right has been invaded or the claim against another party exists; and (3) "The date on which discovery should have been made is an objective, not subjective, question." *Benton v. Roger C. Peace Hosp.,* 313 S.C. 520, 443 S.E.2d 537 (1994); *Snell v. Columbia Gun Exch., Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981); *Wiggins v. Edwards,* 314 S.C. 126, 442 S.E.2d 169 (1994); *Garner v. Houck,* 312 S.C. 481, 435 S.E.2d 847 (1993); *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) (Defendant stonewalled requests for information.).

The decision in this case establishes that a plaintiff is now entitled to all information concerning a financial decision prior to the statute of limitations starting on his claim. The decision is inconsistent with the above caselaw because the court of appeals held that Hess's

alleged unawareness of all the facts prevents the statute of limitations from running. In fact, similar to the plaintiff in *Kreutner*, MPG flatly told Hess he wasn't going to get all the information he sought.

It is incredible that the court of appeals held the statute did not run when Hess admitted that, outside the limitations period, he formed the belief he was being underpaid, consulted with a CPA on the issue, took significant steps to investigate whether he was getting 50%, was flatly told he was not going to be given further financial information, and the MPG accountant refused to answer his question of whether he was really getting 50%.

The decision also establishes that an employer has a duty to disclose full financial information to an employee if that information might impact a financial decision the employee is considering regarding his employment. The court of appeals opinion did not address Morphis's argument that no such duty to disclose is created by the mere existence of the employment relationship. *See, In re Hunnicut*, 466 B.R. 797, 801 (Bankr. D.S.C. 2011) ("No trust exists in a simple employer/employee relationship. Such a relationship is merely comprised of an agreement for the employee to perform work and the employer to compensate him for the work he performs.") (citing *Burwell v. S.C. Nat. Bank*, 340 S.E.2d 786, 790 (S.C. 1986)). Similarly, a contract, unless it is "intrinsically fiduciary" does not create a duty to disclose. *See, e.g., Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601, 605 (1967). Therefore, Morphis did not have an obligation to disclose her full financial information to Hess.

Finally, the court of appeals decision to toll the statute until such time as full financial disclosure was made (if ever) is contrary to this court's precedent that tolling only applies in "extraordinary" circumstances. Further, it only applies if a defendant lulls a plaintiff into not filing a lawsuit by promising settlement or cure. MPG did no such thing and, in fact, told Hess he

wasn't going to get the information he sought. *See, e.g., Hopkins v. Floyd's Wholesale,* 299 S.C. 127, 382 S.E.2d 907 (1989) (plaintiff promised claim would be paid).

Therefore, for all the above reasons, Hess's claims should have been barred by the three-year statute of limitations.

A Discretionary Bonus is Not an Enforceable Contractual Promise

As stated above, the Board of MPG[3] could use any "criteria" it wished to decide if Hess would receive a bonus or not. Even if he met the "criteria," he was only "eligible" for a bonus. Abundant caselaw makes clear that "eligible" is a discretionary word. Thus, his bonus was completely discretionary. Courts have uniformly held that a discretionary bonus is not a contractual promise. *See, e.g., Kaplan v. Capital Co. of Am.,* 298 A.D.2d 110, 111, 747 N.Y.S.2d 504 (2002) (language plainly making bonus awards solely and completely a matter of defendant's discretion); *Hunter v. Deutsche Bank AG, New York Branch*, 56 A.D.3d 274, 274, 866 N.Y.S.2d 670, 671 (2008) (bonuses would be contingent on criteria such as performance and profitability cannot be interpreted as a limitation on discretion); *Mathews v. Marietta Toyota, Inc.,* 270 Ga. App. 337, 606 S.E.2d 862 (2004) (no method of calculating a promised bonus was established, and there was no definite promise to pay the employee an annual bonus of 1% of the employer's profits). The above cases all fit within the general law concerning illusory promises. *See, e.g., Armstrong v. Collins*, 366 S.C 204, 222-23, 621 S.E.2d 368, 377 (Ct. App. 2005) (holding that mutual consideration is a necessary element of a bilateral contract). If a party's "obligation" under an alleged contract is such that the party has sole discretion whether or not to perform, the promise is illusory, and the writing is not a contract. 2 Corbin on Contracts § 5.28 (1995). That is all the Hess's contract is--a purely discretionary, illusory, promise.

[3] It is uncontested that Dr. Morphis was the Board. (R.700, II.169 Lines 7-21).

Regarding this argument, the court of appeals simply held that the language is construed against the drafter. In so doing, the court failed to address many of Morphis's arguments regarding her discretion. The court of appeals is required to address issues raised by appealing parties. *See, e.g.*, *State v. Johnson*, 334 S.C. 78, 86, 512 S.E.2d 795, 799 (fn.1) (1999). First, the court did not address Morphis' argument about discretion at the point of qualifying. For example, in the *McLaughlin* case cited above, there was a detailed formula for calculating the bonus but the court held it was unenforceable because it depended on increasing sales. In *Matthews*, the bonus was promised if the year was profitable but was taken away for a reason having nothing to do with profitability. When an employer has discretion at the outset, it is irrelevant that the employer decided that the employee was eligible for the bonus, because the discretionary nature of the bonus remains.

The court also did not address Morphis's argument that Appendix A is also written in discretionary language which only makes Hess "eligible" for a bonus. There is nothing to construe regarding "eligible." This is a discretionary word. *ClearChoiceMD, PLLC v. Henriques, No.* 2020-0449, 2021 WL 4169616, at *2 (N.H. Sept. 14, 2021) (" … 'eligible' mean[s] that it retained the discretion not to award a bonus."); *De Vries v. Regents of Univ. of California*, 6 Cal. App. 5th 574, 592, 211 Cal. Rptr. 3d 435, 447 (2016) ("Thus, the ordinary meaning of "eligibility" connotes qualification for a benefit, not entitlement …."); *Jefferson v. Univ. of Toledo*, 2012 Westlaw 4883203 (Ohio Ct. App. 2012) ("phrases "may be eligible" and "to be considered eligible" indicate the drafters' intent to condition remediation on the University's discretion."); *Haag v. AOT Energy Am. LLC*, 2022 WL 242750, at *4 (Tex. App. Jan. 27, 2022) ("The use of the terms eligible and discretionary in the contract conveys that AOT was not promising that Haag would absolutely receive an annual bonus."); *Lewis v. Vitol, S.A.,* 2006 WL

1767138, at *4 (Tex. App. June 29, 2006) ("The word "eligible" is a limitation that is not present in any of the other compensation provisions, thereby indicating that Lewis is not guaranteed a bonus, but is qualified, or eligible, to be considered for a bonus.").

Finally, 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. (II.180-181 Lines 22-25 and 1-5). This language is clear and unambiguous, therefore, the court of appeal's "ambiguous language" holding has no applicability to this point.

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

Even if the bonus was not discretionary, it cannot be enforced because the terms are too indefinite. The bonus provision of the 2010 contract is replete with undefined and uncertain terms.

The "criteria" to be used by the Board is explicitly made undefinable. None of the other critical terms are defined nor is it apparent on their face what they mean: "criteria," "eligible," "profit," "royalties," "monies," "debts," "expenses," and "expenditures." We cannot know what these terms mean and, therefore, it is impossible for the court to fix the obligations, if any. In such situations, it is hornbook law that this makes the agreement unenforceable.

> Certain terms, such as price, time and place, are considered indispensable and must be set out with reasonable certainty. Where a contract does not fix a definite price, there must be a definite method for ascertaining it. The January 14, 2012, memo does not specify any particular terms that must be met by plaintiff or any other reservationist to obtain a bonus, nor does it fix a definite price for the amount of the bonus. It includes no definite method for ascertaining what the amount of the bonus would be. The evidence in the record is insufficient to establish the existence of a contract between Defendant and Plaintiff for the payment of a bonus. Therefore, summary judgment is appropriate on both the breach of contract and breach of contract with fraudulent intent causes of action.

Amelia Salters, f/k/a Amelia Woods v. Condolux, Inc., No. 4:14-CV-2435-BHH-TER, 2016 WL 3411555, at *10 (D.S.C. May 20, 2016), report and recommendation adopted sub nom. *Salters v. Condolux Inc.*, No. CV 4:14-2435-BHH, 2016 WL 3351357 (D.S.C. June 16, 2016).

Judge Rogers decision in *Amelia Salters* (adopted by Judge Hendricks) is particularly persuasive. He was evaluating a very similar bonus provision that stated: "The phone calls are picking up so this is our time to focus on reservations. Our efforts will be rewarded with a nice bonus in April. This is not a competition. We will all receive an equal bonus." Like the Hess bonus, the promise set forth no criteria to obtain the bonus. As such, as the above quotation makes clear, it fails to set forth proper terms for enforcement. *See also, Lessley v. Hardage*, 240 Kan. 72, 727 P.2d 440 (1986). (In order for a bonus agreement to be binding, it must be sufficiently definite as to its terms and requirements as to enable a court to determine what acts are to be performed and when performance is complete); *Pratt v. Seventy-One Hawthorne Place Associates, L.P.,* 106 S.W.3d 608 (Mo. Ct. App. W.D. 2003) (An agreement to pay a bonus of an indefinite amount is unenforceable); *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).

The court of appeals rejected this argument on the basis that any ambiguity is construed against the drafter and the ordinary meanings of such words should apply. However, as with discretionary language, the rule on construing ambiguities only applies if it a matter of interpretation. In this case, the essential terms "criteria, expenditures, eligibility" had no definition or varying interpretations. Hess testified he had no understanding of any of these terms including "criteria," "eligible," "debts," "expenditures," or "expenses" (other than some of the terms' general usage). (R.564-566, I.79-81). He further agreed that the Agreement did not define

any of these terms. (R.505, I.20, Lines 6-9). (R.564, I.79 Line 23-24) (R.566, I.81 Lines 1-2). Morphis testified they gave her discretion. There was no, nor could there be, any evidence of their meaning.

> although ambiguities in an agreement are construed against the drafter, *see Hurt v. Leatherby Ins. Co.,* 380 So. 2d 432, 434 (Fla. 1980), an agreement is only ambiguous if "it is reasonably or fairly susceptible to different constructions*." Friedman v. Va. Metal Prods. Corp.*, 56 So. 2d 515, 517 (Fla. 1952).

Hill v. Hospice of The Emerald Coast, Inc., No. 3:20CV4755-TKW-HTC, 2020 WL 12189180, at *2 (N.D. Fla. Apr. 27, 2020).

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' claim to damages in 2015 is based on a notification requirement within the South Carolina Wage Payment Act. That notification requirement requires that "Any changes in these terms must be made in writing at least seven calendar days before they become effective." S.C. Code Ann. § 41-10-30.

First, the Act requires 7 days notice before the change "becomes effective." 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, (R.723, II.268 Lines 15-23) (R.925, Def. Ex. 5) ("I agree") and had signed the contract in December. He therefore received well more than 7 days notice. (R.912, Plaintiff Ex. 18).

Notably, this court has held that the notice requirement is not onerous. Mere text messages are sufficient to satisfy the requirement of a writing. *Mathis v. Brown & Brown of S.C., Inc*., 389 S.C. 299, 308–09, 698 S.E.2d 773, 777–78 (2010) (as applied in *Gould v. Worldwide Apparel LLC*, No. 2016-002469, 2019 WL 3216893, at *4 (S.C. Ct. App. July 17, 2019)).

The court of appeals ruled that notice could only have occurred when Hess signed his contract on December 30, 2015 and the contract provided that the bonus would be calculated on December 31, therefore, the notice requirement was violated. This is contrary to the above caselaw holding any communication constitutes notice. Pegging the notice to the date an agreement is signed is contrary to this court's decisions. The court of appeals further ignored the fact that payment was not to be made until February 15. The court of appeals has mistakenly equated the day numbers are finalized for computation with the effective date of the change in compensation. The court of appeals erroneously stated that Hess had no notice before December 31 by ignoring the admitted facts that he was told in May of the change and had agreed to it in June.

Second, the court of appeals held, without addressing any of Morphis's arguments, that a notice violation, which is at 41-10-30(A), includes full civil remedies even though 41-10-80(A) defines the remedy for a 41-10-30(A) violation as a only a fine. Only 41-10-80(C) provides remedies beyond a fine for failure to pay wages due (not notice violations).

The court of appeals did not even mention *Barton v. House of Raeford Farms, Inc* which held there was no damages remedy available to Plaintiff for a notification violation.

> Nonetheless, reading § 41–10–30(A) as plaintiffs would have it would still not provide the plaintiffs with a remedy, as the S.C. Wages Act specifies that the remedy for an employer's violation of § 41–10–30 is "a written warning by the Director of the Department of Labor, Licensing, and Regulation or his designee for the first offense and ... a civil penalty of not more than one hundred dollars for each subsequent offense." S.C. Code Ann. § 41–10–80(A).

Barton v. House of Raeford Farms, Inc., 745 F.3d 95, 108 (4th Cir. 2014).

The court of appeals decision is also directly contrary to the earlier unpublished decision in *Gould v. Worldwide Apparel LLC*, 2019 WL 3216893 (S.C. Ct. App. 2016) (unpublished) in which the court held that a notice violation does not give a plaintiff a right to money damages. In

contrast to this case, the *Gould* court conducted a careful examination of the statutory construction and held that the clear meaning of the statutes dictated that there was no remedy for a notice violation. In summary, the court ruled that, because the legislature created a separate remedy for notice violations and a separate remedy for "failure to pay" violations, a court could not merge the two. The Appellant understands that *Gould* is an "unpublished" decision and that, under Rule 268(d)(2) normally should not be cited, however the rule against citation is in conflict with Rule 219 requiring uniformity of decisions. Because of the direct conflict of these two decisions, Appellant feels it is obligated to bring the matter to the court's attention.

As the *Gould* court reasoned, the decision in this case violates statutory construction precedent in South Carolina. If the legislature had intended to impose any consequences for violation of section 41-10-30 beyond a fine, it would have expressly provided for it, and there is no provision in the Act other than section 41-10-80 addressing the failure of an employer to comply with the notice requirement of section 41-10-30(A). *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning[ ] and will not resort to forced construction that would limit or expand the statute."); *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (holding that a statute "must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect" *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) (quoting *S.C. State Ports Auth. v. Jasper Cty*., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). ("We therefore should not concentrate on isolated phrases within the statute."); *id.* ("Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose."). Even if there were any ambiguity, it must be resolved by the canon "*expressio unius est exclusio alterius*" or "*inclusio*

unius est exclusio alterius," which means "to express or include one thing implies the exclusion of another, or of the alternative." *State v. Leopard*, 349 S.C. 467, 472–73, 563 S.E.2d 342, 345 (Ct. App. 2002) (*quoting S.C. Dep't of Consumer Affairs v. Rent-A-Center, Inc.,* 345 S.C. 251, 256, 547 S.E.2d 881, 883–84 (Ct. App. 2001)); *see also Wigfall v. Tideland Utils., Inc.,* 354 S.C. 100, 117, 580 S.E.2d 100, 109 (2003) ("We may apply ... rules of statutory construction when the meaning of the act is ambiguous."). This canon dictates that the only consequences the legislature intended to impose for a violation were a fine by the Department of Labor.

Trebling and Fees Should Not Have Been Awarded

The South Carolina Payment of Wages Act provides that when an employer fails to pay wages, an employee may recover "an amount equal to three times the full amount of the unpaid wages, plus costs, and reasonable attorney's fees as the court may allow." S.C. Code Ann. § 41–10–80(C). This award is appropriate only when "there [i]s no good faith wage dispute" because "an employer should not be penalized . . . for failure to pay wages upon assertion of a valid defense to payment." *Rice v. Multimedia, Inc.,* 318 S.C. 95, 98–99, 456 S.E.2d 381, 383 (1995). The trial court must determine whether "a bona fide dispute" exists as to an employee's entitlement to wages before awarding treble damages or attorney's fees or costs. *Goodwyn v. Shadowstone Media, Inc.*, 408 S.C. 93, 98, 757 S.E.2d 560, 563 (Ct. App. 2014). In addition, this court has held that the award is not appropriate if the litigation is of a good faith disputes. *Rice v. Multimedia, Inc.*, 318 S.C. 95, 99, 456 S.E.2d 381, 383 (1995). The court of appeals decision is contrary to all these principles.

The court of appeals reasoned that the trial judge appropriately found there was no good faith dispute because there was evidence Dr. Morphis did not divulge her compensation to Hess and that she did not use the accountant's financial determination to calculate the yearly bonus.

The court also treated the trial judge's improper reliance on the jury award as, essentially, a stray remark. In doing so, the court misapprehended the record and ruled contrary to clearly established precedent.

The court, independent of the jury, is to determine if the employer had a good-faith belief the compensation was not due. The employer can ultimately be wrong in that belief and still the award is not justified. The standard is not based on a preponderance of the evidence. It cannot be based on the jury verdict. Therefore, it is a rare case that warrants the award.[4]

The court of appeals, by dismissing it as a stray remark, misconstrued the trial judge's improper reliance on the jury award. The *Morin* case is particularly illustrative. The jury ruled completely in the employee's favor, and necessarily rejected the employer's defense that it had informed the employee, in writing, that the bonus in question was not paid if the employee was terminated. The judge awarded trebling and fees based on the jury's verdict. Nevertheless, the appeals court reversed the award because the writing (a letter) although ultimately ineffectual, gave the employer a good faith basis for disputing the compensation allegedly due. Therefore, the employer can be ultimately wrong and yet trebling and fees is not be awarded.

> we must determine whether it constituted a valid close question of law or fact, sufficient to create a bona fide dispute over the withholding. Perhaps, as Morin suggests, the jury concluded the bonus letter did not override his Agreement. **But we are concerned only with whether Innegrity's view of the enforceability of the bonus letter was reasonable enough to form a good faith basis for withholding** Morin's wages.

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[4] In eight of the nine appellate cases dealing with trebling and fees, the trial court's award was reversed, sent back, or the denial affirmed. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 316, 698 S.E.2d 773, 782 (2010); *Ross v. Ligand Pharmaceuticals*, 639 S.E.2d 460 (S.C. Ct. App. 2006); *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009); *O'Neal v. Intermedical Hosp. of S.C.*, 355 S.C. 499, 509, 585 S.E.2d 526, 532 (Ct. App. 2003); *Morin v. Innegrity, LLC*, 424 S.C. 559, 574, 819 S.E.2d 131, 139 (Ct. App. 2018); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 612, 518 S.E.2d 591, 598 (1999); *Rice v. Multimedia, Inc.*, 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995); *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009); *Goodwyn v. Shadowstone Media, Inc.*, 408 S.C. 93, 99, 757 S.E.2d 560, 563 (Ct. App. 2014); *Zinn v. CFI Sales & Mktg., Ltd*, 415 S.C. 93, 114, 780 S.E.2d 611, 622 (Ct. App. 2015).

Morin v. Innegrity, LLC, 424 S.C. 559, 574, 819 S.E.2d 131, 139 (Ct. App. 2018) (emphasis added) (internal quotes omitted).

The trial court in this case clearly based its ruling on the jury award by stating "the jury's verdicts … against Morphis Defendants … as well as its corresponding award of punitive damages … weigh heavily against any argument … that there was a bona fide dispute about the wages due or any good-faith basis for not paying the bonus money due …." (R. 33).

The court of appeals dismissed the trial court's language on the grounds that the trial judge, before making this statement, recognized that "it must exercise its discretion on treble damages and attorney's fees irrespective of the jury's verdict . . .." The fact that the trial judge recognized the proper standard does not erase the fact that she immediately disregarded that standard. The trial judge literally stated she felt it was the "general" rule that the jury verdict cannot be considered. In fact, it is not a general rule at all. It is an explicit prohibition. Further, her use of the word "nevertheless," by definition, means that she is deliberately departing from the rule. Therefore, the court of appeals misapprehended the judge's reasoning.

The court of appeals also failed to address Morphis's argument that this case presented close questions of law and, under clear precedent, treble damages cannot be awarded in such cases. This case had many justifiable legal defenses which are outlined above and following this section. *See, e.g., Morin v. Innegrity, LLC*, 424 S.C. 559, 574, 819 S.E.2d 131, 139 (Ct. App. 2018) ("we must determine whether it constituted a "valid close question of law"); *Rice v. Multimedia, Inc.*, 318 S.C. 95, 99, 456 S.E.2d 381, 383 (1995) ("We do not believe the legislature intended to deter the litigation of reasonable good faith wage disputes."); *See also, Ross v. Ligand Pharm., Inc.,* 371 S.C. 464, 471, 639 S.E.2d 460, 464 (Ct.App.2006); *see also*

O'Neal v. Intermedical Hosp. of S.C., 355 S.C. 499, 509–511, 585 S.E.2d 526, 532 (Ct.App.2003).

Importantly, the employer does not have to have the close legal question in mind at the time the litigated decision was made. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 316, 698 S.E.2d 773, 782 (2010) (reasons given to establish bona fide dispute all concerned factual arguments that employer did not have in mind at the time of the failure to pay). In *Rice* and *Morin*, the courts specifically noted that the Legislature 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 . . ."

> We do not believe the legislature intended to deter the **litigation** of reasonable good faith wage disputes; we do believe the legislature intended to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute.

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. The court of appeals did not address this argument.

The court of appeals also failed to address Appellants' argument that awarding treble damages in this case constitutes a change in the law which precludes the award. The holding of this court, in *Futch v. McCallister Towing*, precludes a trebling or fee award with regard to the 2015 Wage Payment Act claim. Hess's 2015 claim rests on the argument that Morphis violated the notice provision of the Wage Payment Act. However, the only precedents on the remedy available for a notification violation clearly held that there is no civil damages remedy available for a notice violation. *Barton v. House of Raeford Farms, Inc.*, 745 F.3d 95, 108 (4th Cir. 2014) and *Gould v. Worldwide Apparel LLC*, No. 2016-002469, 2019 WL 3216893, at *4 (S.C. Ct. App. July 17, 2019) (unpublished). The *Futch* court held, in part, that trebling and fees should

not be awarded when liability rests on a new interpretation of law. In *Futch*, the court announced a new interpretation regarding the amount of pay a disloyal employee forfeits. Prior to *Futch*, the forfeiture was fairly broad. *Futch* established that pay is forfeited only if the employee's disloyalty adversely effected his work performance. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 612, 518 S.E.2d 591, 598 (1999).

The court of appeals did not address the argument that the punitive damage award, improperly relied upon by the trial judge, was contaminated by Hess's counsel specifically drawing the jury's attention to Morphis' income, in violation of the court's instruction, only moments before. The court therefore should not have weighed the award at all in deciding there was not a bona fide dispute. (R.484, III.551 Lines 5-25). The court later attempted a curative instruction.

> THE COURT: All right. Ladies and gentlemen of the jury, during Mr. Rothstein's rebuttal or reply, there was an objection raised and the objection was sustained. I'll ask that you disregard any consideration as to that portion of where the objection was sustained, all right.

(R.485, III.561 Lines 8-12).

Such use of income evidence in the punitive damage phase was clearly prohibited by *Branham v. Ford Motor Co.*, and other cases, and the award would have been reversed had Hess not elected to abandon the punitive remedy. 701 S.E.2d 5, 390 S.C.203 (2010). Therefore, it was doubly improper for the court to "weigh heavily" the punitive damage award in deciding the bona fide dispute issue.

The court of appeals rested its decision that Morphis acted in bad faith on two rationales: (1) that she withheld financial information from Hess and the accountant refused to answer his questions about his bonus, and (2) she calculated the bonus "without the input of the company accountant."

In holding that Dr. Morphis needed to share her own compensation information with Hess, the court of appeals is establishing a duty on the part of employers to share such information with employees who have a profit-based compensation plan. This is an extraordinary and new anti-business/anti-employer standard and contrary to existing caselaw. As the above-cite caselaw makes clear, no duty is created by the mere existence of the employment relationship or by a normal contract. *Supra* p. 9.

Regarding needing to get "input" from the company accountant, the court has misapprehended the accountant's role in the bonus calculation. Regarding this role, the Agreement provides that "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. (R. 833). Therefore, the only input from the accountant was for him to provide the net income and any "debt, royalty or expenditure" figures. It is uncontested that the net profit numbers provided by the accountant would have resulted in a lower bonus for Hess than what he received.

	Net Income per Accountant	50% of NI	Bonus paid
2010	14624	7312	75000
2011	-9446	-4723	25000
2012	521	260	46968
2013	23019	11509	48000
2014	196624	98312	48000
		112670	242968

(R. 923).

Therefore, Morphis could not be said to have acted in bad faith in paying Hess more than he would have been paid based on "monies determined by the accountant."

Finally, and related to the immediately preceding point, the court of appeals misapprehended Morphis's argument that she could not have breached the Agreement because

she paid Hess more than the net income "determined by the Company Accountant." The court of appeals rejected this argument on the grounds that there was evidence that Morphis calculated Hess's bonus on her own, without consulting the final year end profit and loss determined by the accountant. This is beside the point, because her own calculation yielded a higher number than the bonus based on the accountant's determination. There can be no breach of contract if a party actually pays more than they are required to under a contract. *Rush v. S.C. Nat. Bank*, 288 S.C. 560, 563, 343 S.E.2d 667, 669 (Ct. App. 1986) ("it must be conceded that, since Wright actually received the money, there are no damages at law . . .").

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' claim to 2015 damages is based on a notification requirement within the South Carolina Wage Payment Act that "Any changes in these terms must be made in writing at least seven calendar days before they become effective." S.C. Code Ann. § 41-10-30.

First, the Act requires 7 days notice before the change "becomes effective." Hess's 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, (R.723, II.268 Lines 15-23) (R.925, Def. Ex. 5) ("I agree") and had signed the contract in December. He therefore received well more than 7 days notice. (R.912, Plaintiff Ex. 18).

Notably, this court has held that the notice requirement is not onerous. Mere text messages are sufficient to satisfy the requirement of a writing. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 308–09, 698 S.E.2d 773, 777–78 (2010) (as applied in *Gould v. Worldwide Apparel LLC*, No. 2016-002469, 2019 WL 3216893, at *4 (S.C. Ct. App. July 17, 2019)).

The court of appeals applied no analysis to its ruling that full money damages are available for a wage notice violation. The statutes make clear there is no damages remedy available to Plaintiff for a notification violation.

> Nonetheless, reading § 41–10–30(A) as plaintiffs would have it would still not provide the plaintiffs with a remedy, as the S.C. Wages Act specifies that the remedy for an employer's violation of § 41–10–30 is "a written warning by the Director of the Department of Labor, Licensing, and Regulation or his designee for the first offense and ... a civil penalty of not more than one hundred dollars for each subsequent offense.

Barton v. House of Raeford Farms, Inc., 745 F.3d 95, 108 (4th Cir. 2014).

The trial court denied JNOV on this argument on the basis that § 41–10–40 (medium of payment and withholding and diverting) mentions 41-10-30, and the remedy for a violation of § 41-10-40 includes, in § 41-10-80, full remedies. This is an incorrect construction. The mention of § 41-10-30 in § 41-10-40 concerns only wage deductions. This case does not involve wage deductions. 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, it would have expressly provided for them, and there is no provision in the Act other than section 41-10-80 addressing the failure of an employer to comply with the notice requirement of section 41-10-30(A). *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("the court will give words their plain and ordinary meaning[ ] and will not resort to forced construction … "); *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (statute "must be read as a whole and sections [that] are part of the same general statutory law must be construed together …."); *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("isolated phrases [are irrelevant] Instead, we read the statute as a whole and in a manner consonant and in harmony …."). Ambiguity, must be resolved by the canon "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius,*" which means "to express or include one thing implies the

exclusion of another, or of the alternative." *State v. Leopard*, 349 S.C. 467, 472–73, 563 S.E.2d 342, 345 (Ct. App. 2002). This canon dictates that the only consequences the legislature intended to impose for a violation was a fine by the Department of Labor. To read a full money damages remedy into the stature, one must improperly read out the only remedy mentioned: the fine.

In addition, it is uncontested that, in total, Hess received more money under the 2015 Agreement than he would have under the 2010 Agreement. Therefore, there was 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).

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed.

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Dated this 22d of October 2025

RECEIVED
Oct 22 2025
S.C. SUPREME COURT

CERTIFICATION BY COUNSEL UNDER S.C. RULE APP. P. 242(d)(1)

The Court of Appeals decision in this matter was filed on July 9, 2025 and counsel certifies that a petition for rehearing and suggestion of rehearing *en banc* was denied on September 22, 2025.