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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

**JOINT APPENDIX
VOLUME I**

Charles F. Thompson, Jr.
Malone, Thompson, Summers & Ott
339 Heyward Street
Columbia, S.C. 29201

Ryan Beasley, Esq.
Ryan Beasley Law
416 E. North St. Level 2
Greenville, SC 29601

Attorneys for the Appellants

Other counsel of record:

David E. Rothstein, Esq.
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605

Attorney for the Respondent

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	FOR THE SIXTH JUDICIAL CIRCUIT
	)	
Paul David Hess, APRN-BC,	)	Case No. 2018-CP-29-01127
	)	
Plaintiff,	)	
	)	ORDER DENYING DEFENDANTS'
vs.	)	MOTION FOR JNOV AND MOTION
	)	FOR REMITTITUR
Morphis Pediatric Group of Lancaster,	)	
P.A.; Elizabeth J. Morphis, M.D.;	)	
Gregory M. Alexander, CPA; and	)	
Moore Beauston & Woodham LLP,	)	
	)	
Defendants.	)	
	)	

This matter is presently before the Court on two post-trial motions filed by Defendants Morphis Pediatric Group of Lancaster, P.A. and Elizabeth J. Morphis, M.D. on February 14, 2022: (1) Motion for JNOV (titled "Motion for Directed Verdict"), and (2) Motion for Remittitur. The Court held a hearing on these motions in person by agreement of the parties at the Richland County Courthouse on Thursday, May 19, 2022. Present at the hearing were attorneys David E. Rothstein for Plaintiff; Charles F. Thompson, Jr. and Ryan L. Beasley for Defendants Morphis Pediatric Group of Lancaster, P.A. (hereinafter "Defendant MPG") and Elizabeth J. Morphis, M.D. (hereinafter "Defendant Morphis" and collectively referred to as the "Morphis Defendants"); and Skyler C. Wilson for Defendants Gregory M. Alexander, CPA and Moore Beauston & Woodham LLP (hereinafter collectively "Accounting Defendants").¹

¹The Accounting Defendants reached a settlement with Plaintiff after the trial of this case and appeared at the hearing solely to ensure the confidentiality of the terms of the settlement agreement with Plaintiff.

I. Procedural History

The undersigned judge presided over a jury trial in this case in Lancaster County from January 25 to February 3, 2022. On February 2, 2022, the jury returned verdicts in favor of Plaintiff against Defendants MPG and Morphis in the total amount of \$548,290.42 in actual damages on Plaintiff's claims against them for breach of contract, breach of contract accompanied by a fraudulent act, violation of the South Carolina Payment of Wages Act, fraud, and negligent misrepresentation, relating to bonuses for years 2010 through 2015. On February 3, 2022, following the bifurcated, punitive damages phase of the trial, as requested by the Accounting Defendants pursuant to S.C. Code Ann. § 15-32-520(A), the jury also awarded Plaintiff \$475,000 in punitive damages against Defendants MPG and Morphis.²

On February 3, 2022, Plaintiff filed an Election of Remedies as to Defendants MPG and Morphis, electing to pursue his remedies under the South Carolina Payment of Wages Act and to forego the jury's verdict of punitive damages against the Morphis Defendants. On February 14, 2022, Plaintiff filed a Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest, seeking the following remedies from the Court against Defendants MPG and Morphis: (1) three times the jury's award of actual back-pay damages of \$548,290.42, for a total of \$1,644,871.26; (2) attorney's fees in the amount of \$215,475.00, and costs in the amount of \$9,472.54; and (3) pre-judgment interest in the total amount of \$380,950.95.³ This petition is addressed in a separate order.

²The jury also awarded Plaintiff actual damages for the 2015 bonus against the Accounting Defendants and \$10,000 in punitive damages on Plaintiff's claim for negligent misrepresentation relating to that bonus year.

³The attorney's fees and costs were through February 14, 2022, and Plaintiff's request for pre-judgment interest was calculated through February 14, 2022, the date of Plaintiff's Petition based on the jury's verdict.

Also on February 14, 2014, the Morphis Defendants filed their two post-trial motions.

II. Discussion

A. Legal Standard for JNOV Motion

The South Carolina Supreme Court has instructed that a motion for JNOV should be granted ““only when there is no evidence to support the [jury’s verdict].”” Garrison v. Target Corp., 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022) (quoting Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010)). [““A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.”” RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (quoting Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)).] The trial court must provide substantial deference to the jury’s decision and cannot weigh the evidence or make determinations regarding the credibility of witnesses. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). The Court is constrained to deny a motion for JNOV if the jury’s verdict was “reasonably possible under the facts as liberally construed in [the prevailing party’s] favor.” Jones v. General Elect. Co., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (Ct. App. 1998).

The party against whom the jury’s verdict was rendered may not raise new issues on a motion for JNOV that were not previously raised on a motion for directed verdict. RFT Mgmt. Co., 399 S.C. at 331, 732 S.E.2d at 170–71 (“[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion. A motion for a JNOV is merely a renewal of the directed verdict motion.”) (internal citations omitted).

B. Statute of Limitations

Defendants first argue that Plaintiff’s claims under the South Carolina Payment of Wages

Act are barred by the three-year statute of limitations in S.C. Code Ann. § 41-10-80(C). Under the well-established discovery rule in South Carolina, the statute of limitations begins to run when the injured party knew or reasonably should have known that its rights had been violated. The discovery rule is an objective test, which inquires when a “cause of action should have been discovered through exercise of reasonable diligence [such that] the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist.” Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). The Court acknowledges that the statute of limitations “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.’” Id. (quoting Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)). Where conflicting evidence exists about whether a plaintiff knew or reasonably should have known he had a cause of action, that issue must be submitted to the jury. Id.

The statute of limitations may also be tolled under the doctrine of fraudulent concealment where the wrongdoers deliberately conceal from the plaintiff information that would have enabled him to realize that he has a cause of action. See Strong v. University of S.C. Sch. of Med., 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994). The jury must resolve conflicting evidence as to whether a claimant knew or should have known he had a cause of action and whether to toll the statute of limitations for fraudulent concealment. See Maher, 331 S.C. at 377, 500 S.E.2d at 207.

Here, the question of the statute of limitations was properly submitted to the jury. There was substantial evidence at trial that Defendant Morphis consciously and deliberately refused to provide to Plaintiff the financial information about the profitability of the Lancaster practice upon which Plaintiff’s bonuses were supposed to be based. Only in the summer of 2018, when

Defendant Morphis solicited bids to purchase the Lancaster practice, was Plaintiff given access to the financial records of the practice. Furthermore, in early 2015, after Plaintiff received a bonus for 2014 that was exactly equal to the bonus he received in 2013, the Accounting Defendants, at the specific request of Defendant Morphis, provided a plausible explanation for why Plaintiff's bonus did not change from one year to the next. When Plaintiff knew or reasonably should have known that he had not properly been paid according to the bonus provisions of his Employment Agreement so as to start the statute of limitations was a question of fact for the jury, and the jury's carefully deliberated decision should not be vacated on a motion for JNOV.

This case is distinguished from the facts presented in the Maher case. In Maher, the plaintiff's offer letter in 1985 contained a bonus provision that 50% of the pre-tax profit of the defendant company "would be divided among the direct sales personnel, including yourself, in a manner to be determined." 331 S.C. at 375, 500 S.E.2d at 206. The company ended the "50% bonus plan" in 1987 and replaced it with new bonus plan that was more discretionary, although the plaintiff testified that he was not aware that the plan had been eliminated until shortly before his termination in 1994, when he was informed by an employee in Defendant's HR department. The plaintiff went through a number of promotions, eventually rising to the level of vice president, before he was demoted in April 1991 and eventually terminated in 1994. Id. The Maher plaintiff never received any bonus payments under the original 50% profit plan.

Here, Plaintiff Hess was never given access to the financial records of Defendant MPG from which his bonus could have been determined or verified. The testimony at trial, when properly viewed in the light most favorable to Plaintiff, indicated that Defendant Morphis consciously kept the financial information about the practice from Mr. Hess. Only in the summer of 2018, when Mr. Hess and his prospective business partner expressed an interest in purchasing

the Lancaster practice was he provided several years' worth of financial information that clearly revealed that he did not receive the 50% bonus as required by his 2010 contract. The fact that Plaintiff here received some bonus payments every year is materially different than the situation in Maher, where the plaintiff did not receive any bonus payments based on company profits.

Furthermore, the practice's outside accountant, Defendant Alexander, deliberately created two spreadsheets in connection with the May 28, 2015 meeting: one he provided to both Mr. Hess and Dr. Morphis showing average bonus paid as a percentage of gross revenue, and one he provided only to Dr. Morphis, which contained three additional rows for MPG's profits, her "Doctor bonuses," and profits before her bonuses. (Pl.'s Ex. 3). In the cover email to Defendant Morphis, Defendant Alexander stated, "This is for your benefit only, I won't share this with David [Hess]." (Id.). Defendant Alexander even discussed with Defendant Morphis his planned evasive response in the event that Mr. Hess asked if he had been receiving 50% of the profits of the Lancaster practice. (Pl.'s Ex. 2, at 2) ("If there are items you are not comfortable sharing then when asked, I will respond, *'That is part of a larger tax position we are taking for Dr. Beth [Morphis] personally & the details are not relevant.'*") (italics in original). Although Plaintiff testified that he frequently asked questions of Defendant Morphis about his bonus and the practice's expenses prior to 2015, whether he knew or reasonably should have known of a potential breach of contract by Defendant Morphis and consequent violation of the Payment of Wages Act was a disputed question of fact for a jury to decide.

C. Discretionary Nature of Bonus

Next, Defendants argue that they are entitled to JNOV because the Employment Agreement gave the board broad discretion about whether the bonus should be paid and about what criteria

should be used to determine whether Plaintiff qualified for a bonus payment in any given year. Defendants' arguments disregard the plain language of the Employment Agreement. Section 4 of the Employment Agreement provides, in relevant part, "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 (See Appendix A)." (Pl.'s Ex. 1, at 4, ¶ 4) (emphasis added). Appendix A to the Employment Agreement, which is titled "Bonus Compensation," states as follows:

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.

(Pl.'s Ex. 1, Appx. A) (emphasis added).

Because the Employment Agreement did contain an Appendix A, the "or" language in Section 4 regarding the Board's discretion is supplanted by the terms of Appendix A. Under the plain language of Appendix A, the Board retained the preliminary authority to establish criteria for qualifying for a bonus payment each year; however, if a bonus is paid, Appendix A prescribes how the bonus was to be calculated at 50% of the business' profits.

Defendants' argued at trial that the Employment Agreement is not actually a contract because the alleged discretionary nature of it renders it an illusory promise. Defendant cited numerous out-of-state cases regarding wholly discretionary bonus payments and the Court found that those cases are not applicable nor controlling to the situation here. In this case, there was sufficient evidence for the jury to construe the contract and to determine what Plaintiff's bonus payments each year should have been.

D. Indefinite and Vague Contractual Terms

Defendants assert that they are also entitled to JNOV because the bonus provision in Appendix A of the Employment Agreement contains terms such as “profit,” “royalties,” “monies,” “debts,” “expenses,” and “expenditures” that are not specifically defined in the contract. Not every word in a contract is required to be separately defined by the contract itself. As the drafter of the contract, Defendants bore the responsibility to avoid any ambiguity or uncertainty that might be contained within the language of the contract. Where the contract does not contain express definitions for certain terms, the plain, ordinary meaning of those words should be used, and any ambiguity in the contract should be construed against the party who drafted the contract and in favor of the non-drafting party. See Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (“Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.”) (quoting 17A C.J.S. Contracts § 324). This argument is not a valid basis for granting JNOV in favor of Defendants in this case.

E. Defendant Morphis’s Compensation

In their fourth argument, the Morphis Defendants contend that Plaintiff actually received more than he was entitled to as a bonus each year, if one includes Defendant Morphis’s annual compensation as an expense item, as shown in the annual financial reports for “net income” each year. The testimony at trial was that from 2010 to 2013, Morphis Pediatric Group of Lancaster, P.A. was organized as a C-Corporation and that the accountant routinely “zeroed out” the profits of the practice at the end of each fiscal year. In 2014, the company converted to an S Corporation,

with pass-through taxation, and Defendant Morphis began to pay herself a regular salary, in addition to receiving all of the profits of the company as personal income.

The spreadsheet that the Accounting Defendant Alexander sent to Defendant Morphis on May 28, 2015, to show her “what kind of profit you are receiving from the practice in Lancaster” (Pl.’s Ex. 3), completely refutes Defendants’ argument. What Defendants are now trying to assert was merely “salary for the patient care, administrative duties, and marketing functions she performed on behalf of MPG” (Defs.’ Motion for JNOV, at 16), is directly contradicted by other evidence in the case. Defendant Alexander specifically referred to Defendant Morphis’ payments as “Doctor Bonuses.” (Pl.’s Ex. 3, spreadsheet), and used the phrase “what kind of profit you are receiving from the practice.” Defendant Morphis testified that she intended to split the profits of the Lancaster practice equally with Mr. Hess each year. In fact, Defendant Morphis’ email of May 27, 2015 stated, “Also, at one point Will [Woodham]⁴ had built in a Royalty Fee to MPG so I could get compensated for my time there. These things were realized after I had split the profits with David but really hadn’t gotten paid myself. I think some of these fees were ‘created’ to help me but I never wanted to get ‘paid’ because I feared David [Hess] would question me.” (Pl.’s Ex. 2). There is clear evidence in the trial record to contradict Defendants’ argument on this point; therefore, this was a proper determination for the jury, and Defendants’ motion for JNOV on this issue is denied.

F. Payment of Wages Act Notice Provision

Finally, Defendants argue that the South Carolina Payment of Wages Act does not provide

⁴The testimony at trial was that Mr. Woodham passed away in mid-2011, and that Defendant Alexander took over accounting responsibilities for the practice thereafter.

a remedy for the 2015 bonus year because Plaintiff was aware, in June 2015, of the initial proposal to switch his bonus calculation from 50% of net profits to 5% of gross revenues; because he signed the new contract in December 30, 2015; and because the bonus payment was not actually due until February 15, 2016, more than seven days after Plaintiff's signature on the new contract. Defendants also argue that the notice provision of the SC Payment of Wages Act does not provide a civil remedy to the aggrieved employee, but is enforceable only by a fine issued by the Department of Labor, Licensing & Regulation under S.C. Code Ann. § 41-10-80(A).

Section 41-10-30(A) of the South Carolina Payment of Wages Act provides, in relevant part, "[a]ny 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(A). There was no evidence during the trial of the actual date that the revised contract was first provided to Plaintiff, other than the date of his signature, December 30, 2015. (Pl.'s Ex. 18). The 2015 Employment Agreement purports to be effective retroactively to March 1, 2015. (Pl.'s Ex. 18, ¶ 6). If Plaintiff received the contract on the date he signed it, the earliest the contract could have been "effective" was January 6, 2016, which was seven calendar days after written notice of the change was provided to him. Although the 2015 contract provides that "said payment of the annual bonus detailed herein being made on or before the 15th of February following the close of the fiscal year," (Pl.'s Ex. 18, Appx. A), Plaintiff's 2015 bonus of \$70,267.41 was actually paid by December 31, 2015 and was included in the 2015 Profit & Loss statement of the practice. (Pl.'s Ex. 9) (M13). In any event, Defendants produced no evidence to support an argument Plaintiff's bonus was actually paid after January 6, 2016.

Furthermore, the phrase "become effective" as used in the statute does not mean "payable after." Employees are often paid in arrears, such as one or two weeks after the pay period for

which such compensation was earned. If the 2015 Employment Agreement could not, as a matter of law, have “become effective” until January 6, 2016, Plaintiff’s entitlement to a bonus in 2015 would have necessarily been based on the 2010 Employment Agreement, which provided for a bonus of 50% of the net income of the Lancaster practice. (Pl.’s Ex. 1, Appx. A).

The jury awarded Plaintiff \$152,010.00 in actual damages for 2015 alone. That number was evidently derived by taking the practice’s reported net income of \$374,287.42 and adding back Plaintiff’s actual bonus of \$70,267.41, for a total profit of \$444,554.83 before consideration of any bonuses. Taking 50% of that profit number as the bonus Plaintiff should have been paid would yield a bonus amount of \$222,277.42. The difference when compared to the amount Plaintiff actually received for a bonus in 2015 yields the exact amount of the jury’s verdict for 2015: \$152,010.00.

Defendants argue that the Fourth Circuit’s decision in Barton v. House of Raeford Farms, Inc., 745 F.3d 95 (4th Cir. 2014), warrants JNOV in their favor on Plaintiff’s claims under the Payment of Wages Act for the 2015 bonus. Defendants’ reliance on Barton is unavailing. First, the Barton case is not binding precedent on this Court on matters of state statutory law. Second, the discussion in Barton about S.C. Code Ann. § 41-10-30(A) is dicta because that issue was not material to the outcome of that case.

At issue in the Barton case was whether the plaintiff group of poultry workers was entitled to additional compensable time for donning and doffing protective gear, walking to and from the production area, and/or washing the protective gear before and after work. Id. at 100. The workers were paid based on the employer’s long-standing practice of using “line time” rather than “clock time.” Id. The Fourth Circuit determined that the workers’ exclusive remedy was to pursue a grievance and arbitration under the CBA, not by filing suit under the SC Payment of Wages Act.

The Barton court's discussion of the SC Payment of Wages Act actually starts with the word "[n]onetheless," confirming that the analysis of section 41-10-30(A) is dicta.

Additionally, the claims in the Barton case are very different than Plaintiff's claims here. The Barton plaintiffs complained that the written terms of employment notices that they were given at the start of their employment did not specify that they would be paid only according to "line time" instead of "clock time." The Barton court expressed doubt that such information was even required by S.C. Code Ann. § 41-10-30(A). Barton, 745 F.3d at 108 ("First, it is far from clear whether § 41-10-30(A) required Columbia Farms to provide written notice to its employees that their 'normal hours' would be measured based on 'line time.'").

Here, by contrast, Plaintiff's claim relates to a change in his bonus formula, not to his original terms of employment notice. In other words, Plaintiff's statutory Payment of Wages claim in this case involves a question of amount of pay, not the type of activities that are considered compensable time.

Additionally, the fact that the South Carolina Department of Labor, Licensing & Regulation has the express power under Section 41-10-80(A) to issue civil penalties or fines for notice violations does not negate the private remedy in Section 41-10-80(C). Such remedies are cumulative, not mutually exclusive. Again, this is a remedial statute, which should be liberally construed to effectuate the underlying purpose of the Act, to protect employees and empower them to recover unlawfully withheld wages.

In sum, the Barton case does not provide any legitimate reason for granting Defendants' Motion for JNOV.

G. Remittur

Defendants have also filed a Motion for Remittur, arguing that Plaintiff's bonus payments

from 2016 and 2017 should be off-set against the jury's verdict in this case because Plaintiff earned more in those years under the new 2015 Employment Agreement than he would have earned under the 2010 Employment Agreement. According to Defendants, Plaintiff cannot argue to set aside the 2015 Employment Agreement, while still retaining the benefits of the 2015 Agreement for 2016 and 2017.

Defendants' Answer in this case does not include any type of counterclaim for such a set-off, nor did Defendants ever seek such a remedy at the trial of this case. Furthermore, Plaintiff has never sought to void or rescind the 2015 Employment Agreement for fraud. Plaintiff's claim as to the 2015 bonus merely challenged the Morphis Defendants' failure to comply with the seven-day advanced written notice requirement of the South Carolina Payment of Wages Act. Plaintiff's election of remedies under the Payment of Wages Act, instead of the fraud or negligent misrepresentation causes of action, makes Defendants' argument for remittur somewhat moot.

Defendants also mistakenly assert that "The evidence presented by all Defendants, without objection, was that Hess earned \$91,563.51 more in 2016 and 2017 than he would have earned under the 2010 Agreement." (Defs.' Motion for Remittur, at 3). Plaintiff's counsel did object at trial to any evidence regarding his earnings in 2016 and 2017, as not relevant to any claim or defense in the case. Although the Court overruled those objections, it is inaccurate for Defendants to represent that such evidence was presented "without objection."

III. Conclusion

Therefore, Defendants' Motion for JNOV and for Remittur are hereby DENIED.

IT IS SO ORDERED.

DeAndrea G. Benjamin
Circuit Court Judge

November _____, 2022

Columbia, SC.



Lancaster Common Pleas

Case Caption: Paul David Hess VS Morphis Pediatric Group Of Lancaster Pa ,
defendant, et al
Case Number: 2018CP2901127
Type: Order/JNOV

So Ordered

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2022-11-02 15:42:28 page 15 of 15

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2018-CP-29-01127

Paul David Hess, APRN-BC

Morphis Pediatric Group of Lancaster, P.A.; Elizabeth J. Morphis, M.D.; Gregory M. Alexander, CPA; and Moore Beauston & Woodham LLP

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

This matter comes before the Court to determine the final amount of pre-judgment interest owed to Plaintiff Hess. In Plaintiff's Petition, Plaintiff originally sought pre-judgment interest in the amount of \$380,950.95. This amount was calculated through February 14, 2022, the date of Plaintiff's Petition based on the jury's verdict.

To take into consideration the additional days from the date of Plaintiff's Petition through the date of entry of the Order granting Plaintiff treble damages, attorney's fees, and pre-judgment interest entered on November 2, 2022, the Court ordered Plaintiff's counsel to calculate and provide to the Court the additional amount of pre-judgment interest for those days. Based on Plaintiff's calculations, factoring in the settlement with the CPA firm, an additional amount of \$26,070.10 has accrued. This amount is broken down as \$4,600.38 through March 21, 2022 and \$21,469.72 after March 21, 2022 and through November 2, 2022. This rate was calculated using the statutory rate of 8.75% for pre-judgment interest.

Therefore, pre-judgment interest in the total amount of \$407,021.05 is, hereby, awarded to Plaintiff Hess.

IT IS SO ORDERED.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 _____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____



Lancaster Common Pleas

Case Caption: Paul David Hess VS Morphis Pediatric Group Of Lancaster Pa ,
defendant, et al
Case Number: 2018CP2901127
Type: Order/Form 4

So Ordered

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2022-11-08 12:23:02 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2018-CP-29-01127

Paul David Hess, APRN-BC

Morphis Pediatric Group of Lancaster, P.A.; Elizabeth J. Morphis, M.D.; Gregory M. Alexander, CPA; and Moore Beauston & Woodham LLP

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.Additional Information for the Clerk: Defendants' Motion to Amend Order Regarding Pre-Judgment Interest is respectfully **DENIED**.**IT IS SO ORDERED.**

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

ELECTRONICALLY FILED - 2022 Nov 08 1:43 PM - LANCASTER - COMMON PLEAS - CASE#2018CP2901127



Lancaster Common Pleas

Case Caption: Paul David Hess VS Morphis Pediatric Group Of Lancaster Pa ,
defendant, et al
Case Number: 2018CP2901127
Type: Order/Form 4

So Ordered

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2022-11-08 12:23:54 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2018-CP-29-01127

Paul David Hess, APRN-BC

Morphis Pediatric Group of Lancaster, P.A.; Elizabeth J. Morphis, M.D.; Gregory M. Alexander, CPA; and Moore Beauston & Woodham LLP

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

This matter comes before the Court to determine the final amount of pre-judgment interest owed to Plaintiff Hess. In Plaintiff's Petition, Plaintiff originally sought pre-judgment interest in the amount of \$380,950.95. This amount was calculated through February 14, 2022, the date of Plaintiff's Petition based on the jury's verdict.

To take into consideration the additional days from the date of Plaintiff's Petition through the date of entry of the Order granting Plaintiff treble damages, attorney's fees, and pre-judgment interest entered on November 2, 2022, the Court ordered Plaintiff's counsel to calculate and provide to the Court the additional amount of pre-judgment interest for those days. Based on Plaintiff's calculations, factoring in the settlement with the CPA firm, an additional amount of \$26,070.10 has accrued. This amount is broken down as \$4,600.38 through March 21, 2022 and \$21,469.72 after March 21, 2022 and through November 2, 2022. This rate was calculated using the statutory rate of 8.75% for pre-judgment interest.

Therefore, pre-judgment interest in the total amount of \$407,021.05 is, hereby, awarded to Plaintiff Hess.

IT IS SO ORDERED.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 _____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

ELECTRONICALLY FILED - 2022 Nov 08 1:44 PM - LANCASTER - COMMON PLEAS - CASE#2018CP2901127



Lancaster Common Pleas

Case Caption: Paul David Hess VS Morphis Pediatric Group Of Lancaster Pa ,
defendant, et al
Case Number: 2018CP2901127
Type: Order/Form 4

So Ordered

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2022-11-08 12:23:02 page 3 of 3

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	FOR THE SIXTH JUDICIAL CIRCUIT
	)	
Paul David Hess, APRN-BC,	)	Case No. 2018-CP-29-01127
	)	
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
vs.	)	PETITION FOR TREBLE DAMAGES,
	)	ATTORNEY'S FEES AND COSTS,
Morphis Pediatric Group of Lancaster,	)	AND PRE-JUDGMENT INTEREST
P.A.; Elizabeth J. Morphis, M.D.;	)	
Gregory M. Alexander, CPA; and	)	
Moore Beauston & Woodham LLP,	)	
	)	
Defendants.	)	
	)	

This matter is presently before the Court on Plaintiff's Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest. The Court held a hearing on this motion in person by agreement of the parties at the Richland County Courthouse on Thursday, May 19, 2022. Present at the hearing were attorneys David E. Rothstein for Plaintiff; Charles F. Thompson, Jr. and Ryan L. Beasley for Defendants Morphis Pediatric Group of Lancaster, P.A. (hereinafter "Defendant MPG") and Elizabeth J. Morphis, M.D. (hereinafter "Defendant Morphis" and collectively referred to as the "Morphis Defendants"); and Skyler C. Wilson for Defendants Gregory M. Alexander, CPA and Moore Beauston & Woodham LLP (hereinafter collectively "Accounting Defendants").¹

¹ The Accounting Defendants reached a settlement with Plaintiff after the trial of this case and appeared at the hearing solely to ensure the confidentiality of the terms of the settlement agreement. The Accounting Defendants were never "employers" of Plaintiff's under the South Carolina Payment of Wages Act and, therefore, have no interest in the substance of Plaintiff's post-trial petition under that statute.

The undersigned judge presided over a jury trial in this case in Lancaster County from January 25 to February 3, 2022. On February 2, 2022, the jury returned a verdict in favor of Plaintiff against Defendants MPG and Morphis in the total amount of \$548,290.42 in actual damages on Plaintiff's claims against them for breach of contract, breach of contract accompanied by a fraudulent act, violation of the South Carolina Payment of Wages Act, fraud, and negligent misrepresentation, relating to bonuses for years 2010 through 2015. On February 3, 2022, following the bifurcated, punitive damages phase of the trial, as requested by the Accounting Defendants pursuant to S.C. Code Ann. § 15-32-520(A), the jury awarded also Plaintiff \$475,000 in punitive damages against Defendants MPG and Morphis.²

On February 3, 2022, Plaintiff filed an Election of Remedies as to Defendants MPG and Morphis, electing to pursue his remedies under the South Carolina Payment of Wages Act and to forego the jury's verdict of punitive damages against the Morphis Defendants. On February 14, 2022, Plaintiff filed a Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest, seeking the following remedies from the Court against Defendants MPG and Morphis: (1) three times the jury's award of actual back-pay damages of \$548,290.42, for a total of \$1,644,871.26; (2) attorney's fees in the amount of \$215,475.00, and costs in the amount of \$9,472.54; and (3) pre-judgment interest in the total amount of \$380,950.95.³

² The jury also awarded Plaintiff actual damages for the 2015 bonus against the Accounting Defendants and \$10,000 in punitive damages on Plaintiff's claim for negligent misrepresentation relating to that bonus year.

³ The attorney's fees and costs were through February 14, 2022, and Plaintiff's request for pre-judgment interest was calculated through February 14, 2022, the date of Plaintiff's Petition based on the jury's verdict.

A. Treble Damages Under S.C. Payment of Wages Act

The civil remedy section of the South Carolina Payment of Wages Act provides, in relevant part: “In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action 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). In Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995), the South Carolina Supreme Court recognized that “[t]he award of treble damages and attorney’s fees is discretionary with the trial court. 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.” Id. at 99, 456 S.E.2d at 383 (quoting Apache East, Inc. v. Wiegand, 119 Ariz. 308, 312313, 580 P.2d 769, 773-774 (Ct. App.1978)). The South Carolina Supreme Court has found that it is “for the trial court to determine, in the first instance, whether there existed a bona fide dispute [regarding the payment of an employee’s wages] such that treble damages were not warranted.” Temple v. Tec-Fab, Inc., 381 S.C. 597, 600–601, 675 S.E.2d 414, 416 (2009).

At issue during the trial of this case was whether Plaintiff was entitled to additional bonus amounts for years 2010 through 2015. Plaintiff’s Employment Agreement with Defendant MPG provides, in relevant part, as follows, under Paragraph 4, “Compensation”:

Employer shall pay to the employee for full-time services an annual base salary [of] \$100,000, payable in regular periodic salary amounts determined by Employer’s Board of Directors. 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. (See Appendix A).

(Plaintiff’s Ex. 1). The contract contained an Appendix A, entitled “Bonus Compensation,” which provides the following:

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.

(Plaintiff's Ex. 1, Appendix A) (emphasis in original).

The Court hereby finds that Defendants MPG and Morphis did not have a good-faith, bona fide basis for disputing the amount of bonus owed to Plaintiff under the express terms of the 2010 Employment Agreement. This determination must be made by looking at the circumstances that existed at the time the compensation decisions were made. See Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 316, 698 S.E.2d 773, 782 (2010) (“[T]he relevant date for determining whether the employer reasonably withheld wages is the time at which the wages were withheld, i.e., when the employer allegedly violated the Act.”).

The best evidence of Defendant Morphis's understanding and interpretation of the contract is found in her own contemporaneous, hand-written notes where she performed the preliminary, rough calculations for the bonuses for years 2010, 2012, 2013, and 2014. (Plaintiff's Ex. 7). According to these calculations, using 2010 as an example, profit for the Lancaster practice was roughly calculated as total income minus total expenses, including staff bonuses and retirement; the resulting figure was divided by 2 to calculate “mgmt bonus,” which should have been split equally between Plaintiff and Defendant Morphis.

Furthermore, Defendant Morphis's email of December 20, 2010 to MBW accountant Will Woodham (who passed away in mid-2011) stated, “I do want to look at numbers w/ you at some point but for now can we make [David Hess's] bonus \$75000.” (Plaintiff's Ex. 6). Defendant Morphis testified at trial that when her husband and sister found out that Plaintiff's preliminary

bonus calculation for 2010 was \$75,000, they told her that she was crazy to pay a nurse practitioner that much, on top of his base salary of \$100,000. Defendant Morphis further testified that she was “more than fair” to Plaintiff in terms of his compensation and that he was probably the highest paid nurse practitioner in the State of South Carolina. Defendant Morphis did not pay Plaintiff his bonus according to Appendix A of his Employment Agreement nor did she share the details of the financial records for the company or how the annual bonus was calculated each year.

Other compelling evidence regarding Defendant Morphis’s original interpretation of the Employment Agreement is found in her email of May 27, 2015 to Defendant Alexander in preparation for a meeting with Plaintiff the next day, May 28, 2015, in which she and Mr. Alexander first proposed switching Plaintiff to a new bonus formula based on 5% of gross revenues, rather than 50% of net profits of the Lancaster practice. In that email, which was introduced at trial as Plaintiff’s Exhibit 2, Defendant Morphis states, “At our annual meeting we would sit down in Dec[ember] and discuss finances which I never pretended to completely understand. When we would get to the bottom line, it was divided by 2 to figure his bonus. . . . Also, at one point, Will [Woodham] had built in a Royalty Fee to MPG so I could get compensated for my time there. These things were realized after I had split the profits with David but really hadn’t gotten paid myself. I think some of these fees were created to help me but I never wanted to get paid because I feared that David would question me.” (Plaintiff’s Ex. 2).

Counsel for Defendants MPG and Morphis raised numerous arguments during this litigation, on summary judgment, at trial, and on motion for directed verdict, defending against Plaintiff’s allegations, including that Plaintiff’s claims were barred by the statute of limitations, that the Employment Agreement made the bonuses completely discretionary with Defendant Morphis, that the language in the Employment Agreement was so ambiguous with numerous

undefined terms so as to render the bonus provisions unenforceable, and that the bonus provision was a gratuitous promise rather than an enforceable contract. The Court will address all of these issues in detail in the order on Defendants MPG and Morphis's motion for JNOV; however, for purposes of Plaintiff's motion, these issues do not demonstrate that Defendant Morphis had a good-faith, bona fide basis for disputing the amount of compensation due to Plaintiff under the express terms of the contract. Instead, those are all arguments raised by Defendants' counsel in litigation and are not relevant to Defendant Morphis's actual mindset at the relevant time the compensation decisions were made.

The mere fact that Defendant Morphis never provided Plaintiff access to the complete financial records of the Lancaster practice is compelling evidence that she did not disclose to Plaintiff the true amount of profits that were being generated each year from the Lancaster practice, as well as some of the expenses that she ran through the Lancaster practice. Significantly, in the email of May 28, 2015 that Defendant Alexander sent only to Defendant Morphis, Defendant Alexander stated, "Attached is the spreadsheet you requested. I thought it may be helpful for you to see what kind of profits you are receiving from the practice in Lancaster. This is for your benefit only. I won't share this with David [Hess]." (Plaintiff's Ex. 3) (emphasis added). The spreadsheet that Defendant Alexander attached to the email he sent only to Defendant Morphis and deliberately withheld from Plaintiff contained three additional lines of data showing "Net Income," "Doctor Bonuses," and "Net Income Before Doctor Bonuses." (Plaintiff's Ex. 3, attached spreadsheet). Defendant Morphis testified at trial that she knew that David Hess is smart and has an MBA and that if he had seen Defendant Alexander's spreadsheet, Mr. Hess would have known immediately that he had never actually received 50% of the profits of the Lancaster practice as his annual bonus, as required by Appendix A to his Employment Agreement. It was only after Plaintiff and a co-

worker decided to submit a bid to purchase the Lancaster practice in the summer of 2018 that he was able to get some complete, detailed financial statements about the practice.

At oral argument on Plaintiff's Petition, Defendants' counsel suggested that the jury's verdict of less than the full amount of back-pay damages Plaintiff requested is evidence of a good-faith dispute over the wages. The damages number Plaintiff requested at trial were higher than the ultimate jury verdict, primarily because of lease expenses on Defendant Morphis's BMW that she ran through the Lancaster practice and salaries that she paid to herself in certain years after the company switched from a C-Corporation to an S-Corporation. This Court notes that it is well settled under the South Carolina Payment of Wages Act that "a jury's partial award of damages does not, by itself, create the existence of a bona fide dispute." Goodwyn v. Shadowstone Media, Inc., 408 S.C. 93, 100, 757 S.E.2d 560, 564 (Ct. App. 2014).

The Court also recognizes the general rule that it must exercise its discretion on treble damages and attorney's fees irrespective of the jury's verdict on the underlying liability for back pay under the Act. See Temple, 381 S.C. at 600, 675 S.E.2d at 415. Nonetheless, the jury's verdicts in Plaintiff's favor and against the Morphis Defendants on Plaintiff's claims for breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation, as well as its corresponding award of punitive damages against the Morphis Defendants, weigh heavily against any argument by the Morphis Defendants that there was a bona fide dispute about the wages due or any good-faith basis for not paying the bonus money due to Plaintiff in a timely manner.

This case is very different from cases in which appellate courts of this state have found an award of treble damages inappropriate under the Payment of Wages Act because of the employer's demonstrated good-faith dispute of the amount or circumstances of the alleged unpaid wages. See, e.g., Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 581 S.E.2d 591 (1999)

(employee's disloyalty to company during his employment provided good-faith basis for employer to dispute wages due); Morin v. Innegrity, LLC, 424 S.C. 559, 819 S.E.2d 131 (Ct. App. 2018) (CEO's bonus contingent on company's obtaining \$2 million in funding, which never occurred; although court of appeals affirmed trebling of vacation pay and 2-months' salary, which were not affected by the bonus condition); Goodwyn v. Shadowstone Media, Inc., 408 S.C. 93, 757 S.E.2d 560 (Ct. App. 2014) (hiring letter stated that employee's compensation was entirely commission based, not salary, and majority of sales were never collected); O'Neal v. Intermedical Hosp., 355 S.C. 499, 585 S.E.2d 526 (Ct. App. 2003) (bona fide dispute about whether employee was terminated for misconduct and, therefore, forfeited payment for accrued but unused vacation).

The Court does not agree with Defendants' assertion that "[a]wards of fees and trebling have, essentially, always been reversed on appeal. (Defs.' Br., at 3). In Ross v. Ligand Pharma., Inc., 371 S.C. 464, 639 S.E.2d 460 (Ct. App. 2006), the South Carolina Court of Appeals affirmed an award of treble damages and attorney's fees following a bench trial. In addition, as noted previously, in Morrin, the Court of Appeals affirmed the award of treble damages under the Act for unpaid vacation pay and two month's salary, which were not affected by the conditions required for payment of the bonus. 424 S.C. at 139, 819 S.E.2d at 575. In Temple v. Tec-Fab, Inc., 381 S.C. 597, 675 S.E.2d 414 (2009), the Supreme Court remanded the case to the trial court to make a determination, in the first instance, of whether there existed a bona fide dispute about wages due such that a treble damages award would not be warranted under the Payment of Wages Act. Similarly, in Zinn v. CFI Sales & Marketing, Ltd., 415 S.C. 93, 780 S.E.2d 611 (Ct. App. 2015), the Court of Appeals remanded the case to the trial court to determine whether treble damages were appropriate as to one of twenty-five original plaintiffs who prevailed at trial. Finally, in Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995), the Supreme Court determined that the

trial judge properly exercised his discretion not to award treble damages under the Payment of Wages Act for commissions due to departing ad salesman who was not paid, per company policy, because he left before the ads were actually broadcast, which policy is common in the broadcast advertising business to ensure that the salesperson gives continuing service to client after sale.

In considering the statutory award of treble damages and attorneys fees and costs, the Court is mindful of the underlying purpose of the South Carolina Payment of Wages Act, which is to protect employees from unjustified retention of wages by employers. South Carolina courts have repeatedly and unequivocally recognized that the Act is “remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld.” Dumas v. InfoSafe Corp., 320 S.C. 188, 194, 463 S.E.2d 641, 645 (Ct. App. 1995); see also Mathis, 389 S.C. at 317, 698, S.E.2d at 782 (recognizing that the underlying purpose of the SC Payment of Wages Act is ““to protect employees from the unjustified and willful retention of wages by the employer.””) (quoting Rice v. Multimedia, Inc., 381 S.C. 95, 98, 456 S.E.2d 381, 383 (1995)) (internal citations omitted). It is well settled in South Carolina that remedial statutes are to be liberally construed in order to effectuate the purposes of the statute. South Carolina Dep’t of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978).

Accordingly, the Court hereby grants to Plaintiff an award of three times the jury’s verdict of \$548,290.42 for back pay on Plaintiff’s first cause of action under the South Carolina Payment of Wages Act, for a total award of \$1,644,871.26 against Defendants MPG and Morphis. This amount will be reduced by the amount of the settlement Plaintiff received from the Accounting Defendants for the 2015 bonus year as discussed under seal during the May 19, 2022 hearing.

B. Attorney's Fees and Costs Under S.C. Payment of Wages Act

Plaintiff also seeks an award of attorney's fees and costs against the Morphis Defendants under Section 41-10-80(C) of the South Carolina Payment of Wages Act. As with the award of treble damages under the statute, where there is no good-faith or bona fide dispute about the wages due to the employee, the Court, in its discretion, may award attorney's fees and costs to the prevailing plaintiff employee.

The award of reasonable attorney's fees is governed by the familiar, six-factor test set forth in the landmark case of Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997): "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Id. at 308, 486 S.E.2d at 760. These factors, which are fully addressed in the Affidavits attached to Plaintiff's Petition, are discussed in order below.

1. Nature, extent, and difficulty of case

The Complaint in this case involved six substantive, legal causes of action, in addition to causes of action for declaratory judgment and an equitable accounting. All four Defendants vigorously defended the case, filing two separate motions for summary judgment, as well as numerous grounds for directed verdict and JNOV. Plaintiff was successfully able to convince the jury to go back to 2010 under the discovery rule and equitable tolling of the statute of limitations based on fraudulent concealment. As discussed below in connection with factor number 2, the case involved extensive discovery and review of complicated accounting and financial records. Plaintiff's counsel is a solo practitioner, who had limited support staff to assist him with this matter.

Employment law is a dynamic area of the law, requiring counsel to stay abreast of developments in both state and federal law. Moreover, as with any litigation in state or federal

court, attorneys in employment cases must be thoroughly familiar with developments and changes in the Rules of Civil Procedure and the Rules of Evidence.

2. Time necessarily devoted to case

As set forth in the Affidavit of David E. Rothstein, which is attached as Exhibit A to Plaintiff's Petition, Plaintiff's counsel's law firm expended a total of 506.6 hours of time in connection with this matter, which includes 470.9 hours of attorney time and 35.70 hours of paralegal time, through February 14, 2022, the date of the Petition. The case involved review of voluminous discovery, including production of over 8,000 pages of financial records from the Accounting Defendants, six depositions, and two sets of summary judgment motions. The trial in this case lasted more than one full week, with two jury qualification processes, numerous evidentiary issues and other challenging legal matters, including extensive pre-trial motions, motions for directed verdict and JNOV, cross examination of two expert witnesses, complicated jury instructions and verdict forms, and bifurcation of punitive damages. Since the filing of the Petition, Plaintiff's counsel has incurred an additional 42.6 hours of attorney time on this matter, not including any time relating solely to the Accounting Defendants and the settlement with them.

The Court finds that the amount of time and labor expended in this case is reasonable. This finding is supported by the Affidavits of not only Plaintiff's counsel, David E. Rothstein, but also of attorney M. Malissa Burnette, Esq., who is a certified specialist in employment and labor law and a seasoned litigator in South Carolina.

3. Professional standing of counsel

Mr. Rothstein's Affidavit sets forth his experience and qualifications, which support Plaintiff's request for attorney's fees. Mr. Rothstein has been a Certified Specialist in Employment and Labor Law by the South Carolina Supreme Court Commission on CLE and Specialization

continuously since February 15, 2006. In her Affidavit, Ms. Burnette has offered a favorable opinion about Mr. Rothstein's abilities and reputation among the employment and labor law community.

4. Contingency of compensation

Plaintiff's counsel testified in his Affidavit that his attorney fee agreement with Plaintiff is a hybrid contingency agreement, with an hourly portion at a reduced rate of \$125.00 per hour, plus a reduced contingency percentage of 25% of the amount of any recovery. The Court finds that an award of a higher rate above this reduced rate of \$125.00 per hour is appropriate to compensate for the additional risk involved in taking such a case on a partial contingency basis. Accordingly, the Court approves a rate of \$300.00 per hour to Plaintiff's counsel.

5. Beneficial results obtained

Plaintiff obtained significant success at the trial of this matter. The jury awarded Plaintiff verdicts in excess of \$548,000.00 on all of the causes of action asserted against the Morphis Defendants and a punitive damages award of \$475,000.00 against the Morphis Defendants. The jury verdicts represented a substantial portion of the actual damages number Plaintiff submitted to the jury. The Court finds that this factor supports Plaintiff's request for attorney's fees and costs.

6. Customary legal fees for similar service

Plaintiff's counsel, Mr. David Rothstein, testified in his Affidavit that he has received fee awards of at least \$350.00 per hour in numerous employment cases in South Carolina within the past ten years. See, e.g., Mullinax v. Parker Sewer & Fire Subdistrict, C/A No. 6:12-cv-01504-TMC (Dkt. No. 57) (D.S.C. Mar. 11, 2014) (FLSA collective action approving lodestar cross-check at \$350 per hour); DeWitt v. Darlington County, SC, C/A No. 4:11-cv-740-RBH, 2013 WL 6408371; (D.S.C. Dec. 6, 2013) (FLSA collective action settlement approving \$350.00 per hour

lode-star cross-check); Faile v. Lancaster County, SC, C/A No. 0:10-cv-2809-CMC (Dkt. No. 102) (D.S.C. Mar. 8, 2012) (FLSA collective action settlement approving \$350.00 per hour lode-star cross-check); George v. ProMed Ambulance Service, LLC, 2:10-cv-0087-RMG (Dkt. No. 50) (D.S.C. Oct. 20, 2011) (awarding fees in FLSA individual claim at \$350.00 per hour). An increase from the rate contracted for within the hybrid contingency agreement of \$125.00 per hour to \$300.00 per hour will be awarded.

In summary, the Court grants attorney's fees in the amount of \$143,947.50 to be paid by the Morphis Defendants. In addition, the Court finds that Plaintiff is entitled to an additional 42.6 hours of attorney time spent by Plaintiff's counsel after February 14, 2022, which does not include any time spent in connection with negotiating and finalizing the settlement with the Accounting Defendants. At a rate of \$300.00 per hour, that is an additional \$12,780.00. This brings the total fee award to \$156,727.50.

Plaintiff also seeks an award of costs pursuant to S.C. Code Ann. § 41-10-80(C). According to the Affidavit of Plaintiff's counsel, Plaintiff has incurred total, out-of-pocket costs in the amount of \$9,472.54. Plaintiff's counsel has made the itemized reports of time and expenses available to the Court for review in camera, which the Court finds were necessarily incurred in connection with the prosecution of this case.

Since the date of Plaintiff's original position, Plaintiff incurred an additional \$124.35 in expenses for mileage and parking to attend the hearing on May 19, 2022, which brings the total expenses sought to \$9,596.89.

C. Pre-Judgment Interest

Finally, Plaintiff's Petition seeks an award of pre-judgment interest in the total amount of

\$380,950.95 against the Morphis Defendants. In Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993), the South Carolina Supreme Court articulated the standard for pre-judgment interest:

The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. The fact that the sum due is disputed 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 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 (internal citations omitted).

Here, pre-judgment interest is appropriate because 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 have been reduced to a sum certain at the time such bonuses were payable.

Section 34-31-20(A) of the South Carolina Code sets the pre-judgment interest rate at 8.75% per annum. Pre-judgment interest under statute is simple interest, rather than compounded. See Edwards v. Campbell, 369 S.C. 572, 577–78, 633 S.E.2d 514, 517 (2006). Plaintiff's counsel calculated the pre-judgment interest on each bonus payment from February 15 in the year after the close of the bonus year through the date of Plaintiff's Petition, February 14, 2022, using a pro-rated amount of the jury verdict for each year from 2010 to 2014, and the full amount of the jury's verdict for 2015. The calculations were detailed in a spreadsheet attached to Plaintiff's Petition as Exhibit C. The total amount of pre-judgment interest initially sought by Plaintiff is \$380,950.95 through the date of the Petition, February 14, 2022.

The Court's heavy docket required some delay in scheduling the hearing on the post-trial motions in this case, which was conducted in person on May 19, 2022, and for which the Court requested proposed orders by June 1, 2022. Furthermore, between the date of Plaintiff's Petition

and the date of entry of this Order, an additional 261 days have elapsed, which would increase the pre-judgment interest for the awards for 2010-2014.

With regard to the 2015 year, as noted previously, Plaintiff reached a settlement with the Accounting Defendants after the jury's verdicts were rendered. The stipulation of dismissal was entered on March 21, 2022, which was 35 days after Plaintiff's Petition was filed. Because the settlement with the Accounting Defendants would set-off the entire amount of the verdict Plaintiff received for the 2015 bonus year, the Morphis Defendants' obligation for pre-judgment interest on that portion of the verdict stopped accruing on March 21, 2022.

In other words, pre-judgment interest is awarded to Plaintiff through November 2, 2022, which accounts for the additional days since the trial and the settlement with the Accounting Defendants. Plaintiff's counsel is to provide the Court an updated final total amount of pre-judgment interest through the above date as to the Morphis Defendants.

Conclusion

In summary, Plaintiff is hereby awarded treble damages in the amount of \$1,644,871.26 against the Morphis Defendants under the South Carolina Payment of Wages Act, less the set-off for the settlement with the Accounting Defendants for the 2015 bonus year. In addition, Plaintiff is hereby awarded \$156,727.50 in attorney's fees and \$9,596.89 in costs against the Morphis Defendants, and pre-judgment interest through the date of November 2, 2022 against the Morphis Defendants.

Post-judgment interest in this case will begin to accrue as of the date of this order on the total award of treble damages under the South Carolina Payment of Wages Act, and attorney's fees and costs, as required by S.C. Code Ann. § 34-31-20(B). For 2022, the South Carolina Supreme

Court has set the post-judgment interest rate at 7.25%, compounded annually. Order No. 2022-01-06-01 (S.C. Jan. 6, 2022).

* * *

IT IS SO ORDERED.

DeAndrea G. Benjamin
Circuit Court Judge

November _____, 2022

Columbia, SC.



Lancaster Common Pleas

Case Caption: Paul David Hess VS Morphis Pediatric Group Of Lancaster Pa ,
defendant, et al
Case Number: 2018CP2901127
Type: Order/Other

So Ordered

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2022-11-02 15:39:46 page 17 of 17

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

PAUL DAVID HESS, APRN-BC,

PLAINTIFF,

v.

MORPHIS PEDIATRIC GROUP OF LANCASTER, PA;
ELIZABETH J. MORPHIS M.D.;
GREGORY M. ALEXANDER, CPA; AND
MOORE, BEAUSTON & WOODHAM, LLP

DEFENDANTS.

) IN THE COURT OF
) COMMON PLEAS FOR
) THE SIXTH JUDICIAL
) CIRCUIT

) C. A. No. 2018-CP-29-01127

) **VERDICT FORM**

1. Do you find Plaintiff has proved, by a preponderance of the evidence, that Dr. Morphis and Morphis Pediatric breached their contract with Plaintiff for years 2010-2014?

☒ YES – If you answer yes, GO TO QUESTION 1(i).

☐ NO – If you answer no, STOP AND DELIBERATE NO FURTHER ON THIS CLAIM

1(i) – if you find for Plaintiff on this claim, what amount do you find for actual damages against Dr. Morphis and Morphis Pediatric?

396,280.42

2. Do you find Plaintiff has proved, by a preponderance of the evidence, that Dr. Morphis and Morphis Pediatric breached their contract with Plaintiff for the year 2015?

☒ YES – If you answer yes, GO TO QUESTION 2(i).

☐ NO – If you answer no, STOP AND DELIBERATE NO FURTHER ON THIS CLAIM

2(i) – if you find for Plaintiff on this claim, what amount do you find for actual damages against Dr. Morphis and Morphis Pediatric?

152,010.00

If and only if you answered YES to Questions 1 or 2, do you also find that Dr. Morphis and Morphis Pediatric committed a fraudulent act in connection with the breach of contract?

☒ Yes ☐ No

3. Do you find that Plaintiff has proved, by a preponderance of the evidence, that Dr. Morphis and Morphis Pediatric violated the Wage Payment Act for years 2010-2014?

☒ YES – If you answer yes, GO TO QUESTION 3(i).

☐ NO – If you answer no, STOP AND DELIBERATE NO FURTHER ON THIS CLAIM

3(i) – if you find for Plaintiff on this claim, what amount do you find for actual damages against Dr. Morphis and Morphis Pediatric?

376,280.42

4. Do you find that Plaintiff has proved, by a preponderance of the evidence, that Dr. Morphis and Morphis Pediatric violated the Wage Payment Act for the year 2015?

☒ YES – If you answer yes, GO TO QUESTION 4(i).

☐ NO – If you answer no, STOP AND DELIBERATE NO FURTHER ON THIS CLAIM

4(i) – if you find for Plaintiff on this claim, what amount do you find for actual damages against Dr. Morphis and Morphis Pediatric?

152,010.00

5. Do you find that Plaintiff has proved, by a preponderance of the evidence, that Alexander and MBW tortiously interfered with Plaintiff's contract with Dr. Morphis and Morphis Pediatric?

☒ YES – If you answer yes, GO TO QUESTION 5(i).

☐ NO – If you answer no, STOP AND DELIBERATE NO FURTHER ON THIS CLAIM

5(i) - If your answer to Question 5 is YES, what amount do you find for actual damages against Alexander and MBW for 2015?

\$152,010.00

6. Do you find that Plaintiff has proved, by clear and convincing evidence, that Dr. Morphis and Morphis Pediatric fraudulently misrepresented or concealed information from Plaintiff that proximately caused Plaintiff damages regarding the 2015 Contract?

☒ YES

☐ NO

6(i) If your answer to Question 6 is YES, what amount, if any, do you find for actual damages against the Defendant Dr. Morphis and Morphis Pediatric?

152,010.00 Actual Damages

7. Do you find that Plaintiff has proved, by clear and convincing evidence, that Alexander, and MBW fraudulently misrepresented or concealed information from Plaintiff that proximately caused Plaintiff damages regarding the 2015 Contract?

☐ YES

☒ NO

7(i). If your answer to Question 7 is YES, what amount, if any, do you find for actual damages against the Defendants Alexander and Moore, Beauston & Woodham?

 Actual Damages

8. Do you find that Plaintiff has proved, by a preponderance of the evidence, that Dr. Morphis and Morphis Pediatric negligently misrepresented information to Plaintiff that proximately caused Plaintiff damages regarding the 2015 Contract?

☒ YES

☐ NO

8 (i). If your answer to Question 8 is YES, what amount, if any, do you find for actual damages against the Defendants Dr. Morphis and Morphis Pediatric

152,010.00 Actual Damages

9. Do you find that Plaintiff has proved, by a preponderance of the evidence, that Alexander and MBW negligently misrepresented information to Plaintiff that proximately caused Plaintiff damages regarding the 2015 Contract?

☒ YES

☐ NO

9 (i). If your answer to Question 9 is YES, what amount, if any, do you find for actual damages against the Defendants Alexander and Moore, Beauston & Woodham.

152,010.00 Actual Damages

Stop your deliberations.


FOREPERSON

FEBRUARY 1, 2022

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

PAUL DAVID HESS, APRN-BC,

PLAINTIFF,

v.

MORPHIS PEDIATRIC GROUP OF LANCASTER, PA;

ELIZABETH J. MORPHIS M.D.;

GREGORY M. ALEXANDER, CPA; AND

MOORE, BEAUSTON & WOODHAM, LLP

DEFENDANTS.

) IN THE COURT OF
) COMMON PLEAS FOR
) THE SIXTH JUDICIAL
) CIRCUIT

) C. A. No. 2018-CP-29-01127

) **VERDICT FORM**

1. Do you find Plaintiff has proven, by clear and convincing evidence, that Alexander and MBW's interference with the contract in 2015 was aggravated, willful, wanton, malicious, or in reckless disregard of Plaintiff's rights?

___ YES – If you answer yes, GO TO NEXT QUESTION.

☒ NO – If you answer no, STOP AND DELIBERATE NO FURTHER ON THIS CLAIM

2. Do you find that Plaintiff has proven, by clear and convincing evidence, that Alexander and MBW's negligent misrepresentation in 2015 was willful, wanton, malicious or in reckless disregard of Plaintiff's rights?

☒ YES – If you answer yes, GO TO NEXT QUESTION.

___ NO – If you answer no, STOP AND DELIBERATE NO FURTHER ON THIS CLAIM

If you find for Plaintiff on EITHER Question 1 or 2, what amount, if any, do you find for punitive damages against Alexander and Moore, Beauston & Woodham?

\$10,000.00

Stop your deliberations.

 #74

FOREPERSON
FEBRUARY 2, 2022

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

PAUL DAVID HESS, APRN-BC,

PLAINTIFF,

v.

MORPHIS PEDIATRIC GROUP OF LANCASTER, PA;
ELIZABETH J. MORPHIS M.D.;
GREGORY M. ALEXANDER, CPA; AND
MOORE, BEAUSTON & WOODHAM, LLP

DEFENDANTS.

) IN THE COURT OF
) COMMON PLEAS FOR
) THE SIXTH JUDICIAL
) CIRCUIT
)
)
)

) C. A. No. 2018-CP-29-01127
)
)

) **SPECIAL VERDICT FORM**
)
)

VERDICT

You, the jury, found negligent misrepresentation against both (1) Defendants Morphis Pediatric Group and Elizabeth Morphis and (2) Defendants Gregory Alexander and Moore, Beauston & Woodham.

Please apportion the percentage of the fault as to the negligent misrepresentation claim:

Morphis Pediatric Group and Elizabeth Morphis 75 %

Gregory Alexander and Moore, Beauston & Woodham 25 %

These two above percentages must add up to 100%



FOREPERSON
FEBRUARY 2, 2022

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

PAUL DAVID HESS, APRN-BC,

PLAINTIFF,

v.

MORPHIS PEDIATRIC GROUP OF LANCASTER, PA;
ELIZABETH J. MORPHIS M.D.;
GREGORY M. ALEXANDER, CPA; AND
MOORE, BEAUSTON & WOODHAM, LLP

DEFENDANTS.

) IN THE COURT OF
) COMMON PLEAS FOR
) THE SIXTH JUDICIAL
) CIRCUIT

) C. A. No. 2018-CP-29-01127

) **VERDICT FORM**

VERDICT

1. Do you, the Jury, unanimously find for the plaintiff, by clear and convincing evidence, punitive damages as to Elizabeth J. Morphis M.D. and Morphis Pediatric Group of

Lancaster, PA?

☒ YES

☐ NO

If YES, please state the amount below:

475,000 dollars in punitive damages.


FOREPERSON

FEBRUARY 2, 2022

State of South Carolina	)	
	)	C. A. No. 2018-CP-29-01127
County of Lancaster, Court of Common Pleas	)	
Paul David Hess, APRN-BC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Morphis Pediatric Group of Lancaster, PA; Elizabeth	)	
J. Morphis M.D.; Gregory M. Alexander, CPA; and	)	
Moore, Beauston & Woodham, LLP	)	
	)	
Defendants.	)	
	)	

Defendants Morphis Pediatric Group of Lancaster PA and Dr. Elizabeth J. Morphis
 (“Defendants” unless otherwise noted) answer Plaintiff’s complaint as follows:

Defendants respond to the allegations of the Complaint by paragraph number
 corresponding to the paragraph number of the Complaint as follows:

1. Admitted.
2. Admitted.
3. Admitted except to the extent that Defendants deny that Dr. Morphis was the sole
 officer and shareholder during the relevant times stated in the Complaint.
4. Admitted on information and belief.
5. Defendants have insufficient information to admit or deny Paragraph 5 and therefore
 deny same.
6. Admitted.
7. Admitted as to Defendants MPG and Morphis. Paragraph 7 is otherwise denied.
8. Admitted.

9. Admitted.

10. Regarding Paragraph 10, Defendants admit that the referenced contract was entered into and the base pay is stated correctly. The remaining characterizations of Paragraph 10 are all denied.

11. Regarding Paragraph 11, Defendants admit that Plaintiff was an employee and at times, but not all times, his performance was good. Paragraph 11 is otherwise denied.

12. Denied. Defendants provided Plaintiff with all information to which he had any entitlement.

13. Defendants did meet with Plaintiff to discuss the bonus system and their belief a different arrangement would be mutually beneficial. Paragraph 13 is otherwise denied.

14. Regarding Paragraph 14, Defendants admit a new agreement was executed. Paragraph 14 is otherwise denied.

15. Regarding Paragraph 15, Defendants admit that Plaintiff was an employee and at times, but not all times, his performance was good. Paragraph 15 is otherwise denied.

16. Regarding Paragraph 16, Defendants admit that they expressed a willingness to sell the Lancaster practice. Paragraph 16 is otherwise denied.

17. Admitted.

18. Regarding Paragraph 18, Defendants admit that financial information was provided. Paragraph 18 is otherwise denied.

19. Admitted.

20. Regarding Paragraph 20, Defendants admit that Plaintiff's offer was not accepted. Paragraph 20 is otherwise denied.

21. Admitted.

22. Admitted.

23. Admitted.

24. Defendants respond to Paragraph 24 by reasserting the foregoing.

25. Regarding Paragraph 25, Defendants admit MPG is an employer. Paragraph 25 is otherwise denied.

26. Admitted.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

34. Defendants respond to Paragraph 35 by reasserting the foregoing.

35. Denied.

36. Denied.

37. Denied, including all subparts.

38. Denied.

39. Denied.

40. Denied.

41. Denied.

42. Defendants respond to Paragraph 42 by reasserting the foregoing.

43. Denied.

44. Denied.

45. Denied, including all sub-parts.

46. Denied.

47. Denied.

48. Denied.

49. Denied.

50. Defendants respond to Paragraph 50 by reasserting the foregoing.

51. Denied.

52. Denied.

53. Denied.

54. Denied.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. Defendants respond to Paragraph 59 by reasserting the foregoing.

60. Denied, including all sub-parts.

61. Denied.

62. Denied.

63. Denied.

64. Denied.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

70. Denied.

71. Denied.

72. Denied.

73. Denied.

74. Defendants respond to Paragraph 74 by reasserting the foregoing.

75. Denied.

76. Denied.

77. Denied.

78. Denied.

79. Denied.

80. Denied.

81. Denied.

82. Denied.

83. Defendants respond to Paragraph 83 by reasserting the foregoing.

84. Regarding Paragraph 84, Defendants admit a new agreement was executed. The remaining allegations are denied.

85. Admitted.

86. Admitted.

87. Denied. Defendants have made no attempt to enforce the referenced provisions.

88. Denied, including all sub-parts.

89. Denied.

90. Denied.

91. Defendants respond to Paragraph 91 by reasserting the foregoing.

92. Admitted.

93. Denied.

94. Denied.

95. Plaintiffs Prayer for Relief is Denied

FOR A SECOND DEFENSE

96. All allegations of the Complaint not specifically admitted are denied.

FOR A THIRD DEFENSE

97. Defendants restate and incorporate by reference the contents of the paragraphs above as if fully repeated herein.

98. Plaintiff has failed to state a claim upon which relief can be granted.

FOR A FOURTH DEFENSE

99. Defendants restate and incorporate by reference the contents of the paragraphs above as if fully repeated herein.

100. Plaintiff, although objecting on occasions, accepted the proffered bonuses.

101. Plaintiff's claims are barred by the S.C. Statutes of Limitations and through laches

and estoppel.

FOR A FIFTH DEFENSE

102. Defendants restate and incorporate by reference the contents of paragraphs above as if fully repeated herein.

103. Plaintiff, while occasionally objecting, agreed to the payments made.

104. Plaintiff's claims are barred by accord and satisfaction and acceptance of performance.

FOR A SIXTH DEFENSE

105. Defendants restate and incorporate by reference the contents of paragraphs above as if fully repeated herein

106. Defendants plead the statute of frauds, indefinite terms, lack of consideration, indefinite duration, vagueness, absence of essential terms, failure of a meeting of the minds, gratuitous nature of the alleged promise, lack of reliance, and other contractual infirmities as defenses.

FOR A SEVENTH DEFENSE

107. Defendants restate and incorporate by reference the contents of paragraphs above as if fully repeated herein

108. Defendants plead Plaintiff has not filed within the statute of limitations, laches and estoppel.

FOR AN EIGHTH DEFENSE

109. In the event Plaintiff is awarded punitive or exemplary damages, and it is determined that such award does not violate CPA Defendants' rights under the United States Constitution and the

South Carolina Constitution, the award is subject to the limitations set forth in section 15-32-530 of the South Carolina Code.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendants pray that the Plaintiff's Complaint be dismissed and that the Defendants be granted costs, expenses, and such other and further relief as this Court may deem just and proper.

Respectfully submitted,

MALONE, THOMPSON, SUMMERS & OTT

____/s/ Charles F. Thompson Jr. _____
Charles F. Thompson, Jr.
Michael D. Malone
Lake Summers
Attorneys for Defendants MPG and Morphis

339 Heyward Street
Columbia, South Carolina 29201
(803) 254-3300

Dated this 19th day of May 2020

State of South Carolina	)	
	)	C. A. No. 2018-CP-29-01127
County of Lancaster, Court of Common Pleas	)	
Paul David Hess, APRN-BC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Morphis Pediatric Group of Lancaster, PA; Elizabeth	)	
J. Morphis M.D.; Gregory M. Alexander, CPA; and	)	
Moore, Beauston & Woodham, LLP	)	
	)	
Defendants.	)	
	)	

Defendants Morphis Pediatric Group of Lancaster PA and Dr. Elizabeth J. Morphis
 (“Defendants” unless otherwise noted) answer Plaintiff’s complaint as follows:

Defendants respond to the allegations of the Complaint by paragraph number
 corresponding to the paragraph number of the Complaint as follows:

1. Admitted.
2. Admitted.
3. Admitted except to the extent that Defendants deny that Dr. Morphis was the sole
 officer and shareholder during the relevant times stated in the Complaint.
4. Admitted on information and belief.
5. Defendants have insufficient information to admit or deny Paragraph 5 and therefore
 deny same.
6. Admitted.
7. Admitted as to Defendants MPG and Morphis. Paragraph 7 is otherwise denied.
8. Admitted.

9. Admitted.

10. Regarding Paragraph 10, Defendants admit that the referenced contract was entered into and the base pay is stated correctly. The remaining characterizations of Paragraph 10 are all denied.

11. Regarding Paragraph 11, Defendants admit that Plaintiff was an employee and at times, but not all times, his performance was good. Paragraph 11 is otherwise denied.

12. Denied. Defendants provided Plaintiff with all information to which he had any entitlement.

13. Defendants did meet with Plaintiff to discuss the bonus system and their belief a different arrangement would be mutually beneficial. Paragraph 13 is otherwise denied.

14. Regarding Paragraph 14, Defendants admit a new agreement was executed. Paragraph 14 is otherwise denied.

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17. Admitted.

18. Regarding Paragraph 18, Defendants admit that financial information was provided. Paragraph 18 is otherwise denied.

19. Admitted.

20. Regarding Paragraph 20, Defendants admit that Plaintiff's offer was not accepted. Paragraph 20 is otherwise denied.

21. Admitted.
22. Admitted.
23. Admitted.
24. Defendants respond to Paragraph 24 by reasserting the foregoing.
25. Regarding Paragraph 25, Defendants admit MPG is an employer. Paragraph 25 is otherwise denied.
26. Admitted.
27. Denied.
28. Denied.
29. Denied.
30. Denied.
31. Denied.
32. Denied.
33. Denied.
34. Defendants respond to Paragraph 35 by reasserting the foregoing.
35. Denied.
36. Denied.
37. Denied, including all subparts.
38. Denied.
39. Denied.
40. Denied.
41. Denied.

42. Defendants respond to Paragraph 42 by reasserting the foregoing.
43. Denied.
44. Denied.
45. Denied, including all sub-parts.
46. Denied.
47. Denied.
48. Denied.
49. Denied.
50. Defendants respond to Paragraph 50 by reasserting the foregoing.
51. Denied.
52. Denied.
53. Denied.
54. Denied.
55. Denied.
56. Denied.
57. Denied.
58. Denied.
59. Defendants respond to Paragraph 59 by reasserting the foregoing.
60. Denied, including all sub-parts.
61. Denied.
62. Denied.
63. Denied.

64. Denied.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

70. Denied.

71. Denied.

72. Denied.

73. Denied.

74. Defendants respond to Paragraph 74 by reasserting the foregoing.

75. Denied.

76. Denied.

77. Denied.

78. Denied.

79. Denied.

80. Denied.

81. Denied.

82. Denied.

83. Defendants respond to Paragraph 83 by reasserting the foregoing.

84. Regarding Paragraph 84, Defendants admit a new agreement was executed. The remaining allegations are denied.

85. Admitted.

86. Admitted.

87. Denied. Defendants have made no attempt to enforce the referenced provisions.

88. Denied, including all sub-parts.

89. Denied.

90. Denied.

91. Defendants respond to Paragraph 91 by reasserting the foregoing.

92. Admitted.

93. Denied.

94. Denied.

95. Plaintiffs Prayer for Relief is Denied

FOR A SECOND DEFENSE

96. All allegations of the Complaint not specifically admitted are denied.

FOR A THIRD DEFENSE

97. Defendants restate and incorporate by reference the contents of the paragraphs above as if fully repeated herein.

98. Plaintiff has failed to state a claim upon which relief can be granted.

FOR A FOURTH DEFENSE

99. Defendants restate and incorporate by reference the contents of the paragraphs above as if fully repeated herein.

100. Plaintiff, although objecting on occasions, accepted the proffered bonuses.

101. Plaintiff's claims are barred by the S.C. Statutes of Limitations and through laches

and estoppel.

FOR A FIFTH DEFENSE

102. Defendants restate and incorporate by reference the contents of paragraphs above as if fully repeated herein.

103. Plaintiff, while occasionally objecting, agreed to the payments made.

104. Plaintiff's claims are barred by accord and satisfaction and acceptance of performance.

FOR A SIXTH DEFENSE

105. Defendants restate and incorporate by reference the contents of paragraphs above as if fully repeated herein

106. Defendants plead the statute of frauds, indefinite terms, lack of consideration, indefinite duration, vagueness, absence of essential terms, failure of a meeting of the minds, gratuitous nature of the alleged promise, lack of reliance, and other contractual infirmities as defenses.

FOR A SEVENTH DEFENSE

107. Defendants restate and incorporate by reference the contents of paragraphs above as if fully repeated herein

108. Defendants plead Plaintiff has not filed within the statute of limitations, laches and estoppel.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendants pray

that the Plaintiff's Complaint be dismissed and that the Defendants be granted costs, expenses, and such other and further relief as this Court may deem just and proper.

Respectfully submitted,

MALONE, THOMPSON, SUMMERS & OTT

____/s/ Charles F. Thompson Jr. _____
Charles F. Thompson, Jr.
Michael D. Malone
Lake Summers
Attorneys for Defendants MPG and Morphis

339 Heyward Street
Columbia, South Carolina 29201
(803) 254-3300

Dated this 28th day of February 2019

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF LANCASTER) FOR THE SIXTH JUDICIAL CIRCUIT

Paul David Hess, APRN-BC,) Case No. _____

)
)
 Plaintiff,)

)
 vs.)

SUMMONS

)
 Morphis Pediatric Group of Lancaster,)
 P.A.; Elizabeth J. Morphis, M.D.;)
 Gregory M. Alexander, CPA; and)
 Moore Beauston & Woodham LLP,)

)
 Defendants.)
 _____)

TO: DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said Complaint upon the subscriber at his office at 1312 Augusta Street, Greenville, South Carolina 29605, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint, and judgment by default will be rendered against you for the relief demanded in the Complaint.

 s/ David E. Rothstein
 David E. Rothstein
 ROTHSTEIN LAW FIRM, PA
 1312 Augusta Street
 Greenville, SC 29605
 (864) 232-5870 (office)
 (864) 241-1386 (facsimile)
 drothstein@rothsteinlawfirm.com

Attorney for Plaintiff, Paul David Hess

September 27, 2018
 Greenville, South Carolina.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	FOR THE SIXTH JUDICIAL CIRCUIT
Paul David Hess, APRN-BC,	)	Case No. _____
	)	
Plaintiff,	)	
	)	
vs.	)	COMPLAINT
	)	
Morphis Pediatric Group of Lancaster,	)	(Jury Trial Demanded)
P.A.; Elizabeth J. Morphis, M.D.;	)	
Gregory M. Alexander, CPA; and	)	
Moore Beauston & Woodham LLP,	)	
	)	
Defendants.	)	
_____	)	

Plaintiff, Paul David Hess, APRN-BC, complaining of Defendants above named, would respectfully show unto this Honorable Court the following:

I. Parties, Jurisdiction, and Venue

1. Plaintiff is a citizen and resident of York County, South Carolina.
2. Upon information and belief, Defendant Morphis Pediatric Group of Lancaster, P.A. (hereinafter "Defendant MPG") is a professional corporation organized and existing pursuant to the laws of the State of South Carolina, with its principal place of business in Lancaster County, South Carolina. Defendant MPG owns property, employs individuals, and conducts business in Lancaster County, South Carolina.
3. Upon information and belief, Defendant Elizabeth J. Morphis, M.D. (hereinafter "Defendant Morphis") is a citizen and resident of Darlington County, South Carolina. Upon further information and belief, Defendant Morphis is the president and sole officer and shareholder of Defendant MPG.
4. Upon information and belief, Defendant Gregory M. Alexander, CPA (hereinafter

“Defendant Alexander”) is a citizen and resident of Darlington County, South Carolina.

5. Upon information and belief, Defendant Moore Beauston & Woodham LLP (hereinafter “Defendant MBW”) is a limited-liability partnership organized and existing pursuant to the laws of the State of South Carolina, with its principal place of business in Charleston County, South Carolina. Defendant MBW conducts business within Lancaster County, South Carolina.

6. This Court has jurisdiction over the subject matter of this action and has in personam jurisdiction over all Defendants. Venue is proper in this Court, because at least one Defendant is a citizen or resident of Lancaster County, South Carolina, and the wrongful conduct at issue occurred, at least in part, within Lancaster County. The amount in controversy exceeds Twenty-five Thousand and 00/100ths Dollars (\$25,000.00).

7. At all times relevant hereto, any employees, officers, or agents of Defendants MPG and MBW described herein were acting within the course and scope of their employment or agency with Defendants MPG and MBW respectively.

II. Facts

8. Defendant MPG operates a pediatric clinic in Lancaster County, South Carolina.

9. Plaintiff began working for Defendant MPG as a nurse practitioner on or about January 1, 2009, at a base salary of \$100,000 per year. For the first year of his employment, Plaintiff did not have a written contract with Defendant MPG.

10. On or about January 1, 2010, Plaintiff entered into a written Employment Agreement (hereinafter “2010 Employment Agreement”) with Defendant MPG, a true and accurate copy of which is attached hereto as Exhibit 1. The 2010 Employment Agreement is signed by Plaintiff and by Defendant Morphis on behalf of Defendant MPG. Pursuant to the 2010 Employment Agreement,

Plaintiff was to be paid a base salary of \$100,000 per year, plus an annual bonus equal to 50% of all profits of the practice, “after all all debts, expenses, royalties, and expenditures have been allowed.” (Exhibit 1, at Appx. A). The annual bonus was payable by the 15th of February of the following year.

11. At all times relevant hereto, Plaintiff was a good and faithful employee of Defendant MPG and performed his job duties in a professional and competent manner and otherwise satisfied his obligations under the 2010 Employment Agreement.

12. Defendant MPG has failed and refused to pay Plaintiff the full amount of annual bonuses he earned pursuant to the 2010 Employment Agreement. Defendant MPG has also failed and refused to provide to Plaintiff any detailed financial information about the practice on which his annual bonuses were to be based. Plaintiff repeatedly requested information about Defendant MPG’s net profits, but Defendants Morphis and Alexander repeatedly refused to provide the information requested.

13. In or about October of 2015, Defendants Morphis and Alexander met with Plaintiff about changing his compensation structure. Defendants Morphis and Alexander presented to Plaintiff a “Bonus Analysis” for 2010-2014, which they asserted showed that Plaintiff’s annual bonuses averaged approximately 5% of gross revenues of the practice during that five-year period from 2010-2014. Defendants Morphis and Alexander also represented to Plaintiff that the newly proposed bonus structure would provide greater protection to him from unanticipated expenses of the practice and would also allow him to receive his bonus payments quicker, because the firm’s gross revenues could be determined without extensive accounting work.

14. On or about December 30, 2015, at the urging of Defendants Morphis and Alexander

and based on their representations, Plaintiff signed a new Employment Agreement (hereinafter “2015 Employment Agreement”), with the term back-dated to March 1, 2015. A true and accurate copy of the 2015 Employment Agreement is attached hereto as Exhibit 2.

15. Thereafter, Plaintiff continued fully to perform his position at the Lancaster practice location in a professional, dedicated, and competent manner.

16. On or about May 8, 2018, Defendant Alexander published a Letter of Intent on behalf of Defendant MPG indicating that Defendant Morphis intended to sell the assets of the Lancaster practice location and inviting interested parties to submit a sealed bid no later than July 2, 2018.

17. Plaintiff and a co-worker at Defendant MPG, Dr. Sandra Hussey, contemplated going into business together and purchasing the assets of Defendant MPG.

18. On or about May 17, 2018, Plaintiff and Dr. Hussey were given access to the financial records of Defendant MPG from 2013 through April 30, 2018, as part of the Due Diligence Period to enable to them to perform an evaluation of the practice’s worth and to formulate their bid to purchase the practice’s assets. This was the first time that Plaintiff had ever been allowed access to any of the practice’s financial records or accounting information, other than his own W-2 forms.

19. On or about July 2, 2018, Plaintiff and Dr. Hussey submitted a bid to purchase the assets of Defendant MPG.

20. Shortly thereafter, Defendant Alexander informed Plaintiff and Dr. Hussey that their bid was offensive and was not being considered.

21. On or about July 18, 2018, Defendant Morphis sent Plaintiff and Dr. Hussey a text message and email inviting them to revise their offer for the practice.

22. On or about July 20, 2018, Plaintiff and Dr. Hussey submitted a revised offer to

purchase the practice.

23. On July 31, 2018, Defendant Morphis notified Plaintiff in writing that he was being terminated on thirty (30) days' notice, without cause. A true and accurate copy of the Termination Letter is attached hereto as Exhibit 3.

FOR A FIRST CAUSE OF ACTION
(Violation of the South Carolina Payment of Wages Act)
(Against Defendants MPG and Morphis Only)

24. Plaintiff repeats and realleges Paragraphs 1-23 as if restated verbatim.

25. Defendant MPG is an "employer" as defined by the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10(1). Defendant Morphis is also considered an "employer" as defined by the Act because she is an owner, officer, or agent of Defendant MPG and had the authority and responsibility for ensuring that Defendant MPG complied with the Act.

26. Defendant MPG employed Plaintiff within the State of South Carolina.

27. Defendant MPG owes Plaintiff "wages" as defined in section 41-10-10(2) of the Act, to compensate him for labor rendered to Defendant MPG as required by his position and the 2010 Employment Agreement and Exhibit A to that Agreement specifically regarding annual bonus.

28. Defendant MPG has failed to pay Plaintiff all wages due, as required by sections 41-10-40 and -50 of the Act. Plaintiff is informed and believes that the amounts of unpaid annual bonuses are at least \$151,000 for 2015; at least \$118,000 for 2014; and at least \$44,700 for 2013. Plaintiff has never been provided any financial information for years prior to 2013 to verify whether the bonuses paid in prior years were correct.

29. The statute of limitations for Plaintiff's claims under the SC Payment of Wages Act should be tolled by Defendants MPG's and Morphis's fraudulent concealment of information

necessary for Plaintiff reasonably to discover the violations of the Act.

30. Pursuant to section 41-10-50 of the Act, all of Plaintiff's unpaid wages were due and payable to him within 48 hours of his separation of employment, or his next regularly scheduled pay date (not to exceed 30 days). Defendant failed to pay Plaintiff all wages due to him by the relevant deadline, including payment for accrued but unused vacation, allowance for continuing medical education expenses and paid time off to attend continuing education seminars, and pro-rated bonus for the first eight months of 2018.

31. Defendant MPG's failure to pay Plaintiff all wages due to him was willful, without justification, and in violation of the duty of good faith and fair dealing.

32. Upon information and belief, pursuant to section 41-10-80(C) of the Act, Plaintiff is entitled to recover in this action an amount equal to three times the full amount of his unpaid wages, plus costs and reasonable attorney's fees.

33. Defendant Morphis is individually liable for the unpaid wages owed to Plaintiff because she knowingly permitted Defendant MPG to violate the South Carolina Payment of Wages Act. Accordingly, Defendant Morphis is liable to Plaintiff to the same extent as Defendant MPG is for the amount of the unpaid wages, treble damages, and attorney's fees and costs.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)
(Against Defendant MPG Only)

34. Plaintiff repeats and realleges Paragraphs 1-33 as if restated verbatim.

35. Plaintiff had a valid contract of employment with Defendant MPG (the 2010 Employment Agreement) to provide employment services to Defendant MPG in exchange for salary, annual bonus, and other benefits.

36. Plaintiff fully performed all of his obligations under the 2010 Employment Agreement and complied with all terms and conditions of the contract.

37. Defendant MPG breached the 2010 Employment Agreement with Plaintiff, including the implied covenant of good faith and fair dealing, in the following particulars:

- a. by failing and refusing to pay Plaintiff the full amount of bonuses he earned pursuant to the contract;
- b. by failing and refusing to provide detailed information about Defendant MPG's revenues and expenses from which annual bonuses were to be determined;
- c. by running personal expenses of Defendant Morphis through Defendant MPG, such as the lease payments and other expenses of Defendant Morphis's personal automobile, which had nothing to do with the Lancaster practice, but only served unnecessarily to increase the expenses of the Lancaster practice and to decrease the amount of net income from which Plaintiff's bonuses were to be determined; and
- d. by paying Defendant Morphis an exorbitant salary (in one year in excess of \$150,000, and in other years approximately \$80,000 per year), when she performed little or no actual work for the Lancaster practice, which unnecessarily increased the expenses of the Lancaster practice and decreased the amount of net income from which Plaintiff's bonuses were to be determined.

38. Defendant MPG's breaches of contract as set forth herein have caused Plaintiff to

suffer substantial damages in the form of unpaid bonuses and other employment benefits.

39. Plaintiff is entitled to recover in this action actual damages from Defendant MPG for the amount of unpaid bonuses.

40. Furthermore, the amount of unpaid bonuses due to Plaintiff is a sum certain or is an amount that is capable of being reduced to a certainty. Upon information and belief, Plaintiff is therefore entitled to recover prejudgment interest on the amount of unpaid wages and bonuses owed by Defendant MPG, from the time each payment was demandable until the date of the judgment in this matter, at the statutory rate of 8.75% per annum.

41. The statute of limitations for Plaintiff's claims for breach of contract should be tolled by Defendant MPG's fraudulent concealment of information necessary for Plaintiff reasonably to discover the breaches of contract.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)
(Against Defendant MPG Only)

42. Plaintiff repeats and realleges Paragraphs 1-41 as if restated verbatim.

43. Defendant MPG breached its Employment Agreement with Plaintiff as alleged in detail above.

44. Defendant MPG, through its officer Defendant Morphis, had a malicious and fraudulent intent relating to the breaches of the Agreement alleged above.

45. Defendant MPG, through its officer Defendant Morphis, committed one or more fraudulent acts accompanying the breaches of the contract with Plaintiff, including the following:

- a. By providing false information about Plaintiff's Bonus Analysis for the years 2010-2014, to convince Plaintiff that his average bonus during that period

was only approximately 5% of gross revenues;

- b. By misleading Plaintiff into believing that he had received 50% of the practice's net income during years 2010-2014 as a bonus;
- c. By actively concealing from Plaintiff the fact that Defendant MPG had paid personal expenses of Defendant Morphis's from Defendant MPG's account, including automobile expenses for a luxury automobile, which had nothing whatsoever to do with the Lancaster practice location;
- d. By actively concealing the fact that Defendant MPG had paid Defendant Morphis a substantial annual salary from the Lancaster practice, despite the fact that Defendant Morphis performed little or no actual work for the Lancaster practice; and
- e. By misleading Plaintiff into believing that changing the bonus structure from 50% of net profits to 5% of gross revenues would benefit Plaintiff, despite Defendant Morphis's knowledge that such change would actually cause Plaintiff to lose over \$116,000 in annual bonus for 2015 alone.

46. The actions of Defendants MPG and Morphis as set forth herein are characterized by dishonesty in fact and/or unfair dealing.

47. The breaches of contract accompanied by a fraudulent act as set forth herein have directly and proximately caused Plaintiff to suffer substantial economic and non-economic damages.

48. Plaintiff is entitled to recover in this action actual damages from Defendant MPG sufficient to compensate him for his actual damages.

49. In addition, Plaintiff is entitled to an award of punitive damages against Defendant

MPG, in an amount to be determined by the Court at trial, sufficient to deter this Defendant and others from engaging in such wrongful and fraudulent conduct in the future.

FOR A FOURTH CAUSE OF ACTION
(Tortious Interference with Contract)
(Against Defendants Alexander and MBW Only)

50. Plaintiff repeats and realleges Paragraphs 1-49 as if restated verbatim herein.

51. A contract existed between Plaintiff and Defendant MPG as alleged in detail above.

52. Defendant Alexander, acting within the course and scope of his employment with Defendant MBW, had actual knowledge of the contract between Plaintiff and Defendant MPG.

53. Defendant Alexander, acting within the course and scope of his employment with Defendant MBW, intentionally interfered with the contact between Plaintiff and Defendant MPG by inducing, aiding, abetting, encouraging, or assisting Defendant MPG in breaching the contract.

54. Defendant Alexander had no legitimate justification for interfering in the contract between Plaintiff and Defendant MPG and used unlawful or improper means to bring about the breach of contract.

55. As a direct and proximate result of Defendant Alexander's tortious interference with contract, Plaintiff has suffered substantial economic and non-economic damages.

56. Defendant MBW is liable for Defendant Alexander's wrongful and tortious actions under the doctrine of respondeat superior because Defendant Alexander was acting within the course and scope of his employment with Defendant MBW.

57. Plaintiff is entitled to recover in this action actual damages from Defendants Alexander and MBW sufficient to compensate him for his actual damages.

58. In addition, Plaintiff is entitled to an award of punitive damages against Defendants

Alexander and MBW, in an amount to be determined by the jury at trial, sufficient to deter these Defendants and others from engaging in such wrongful and tortious conduct in the future.

FOR A FIFTH CAUSE OF ACTION
(Fraud or Constructive Fraud)
(Against All Defendants)

59. Plaintiff repeats and realleges Paragraphs 1-58 as if restated verbatim herein.

60. Defendants, by and through their owners, officers, directors, or agents, made numerous representations to Plaintiff about the financial performance of Defendant MPG's Lancaster practice location and Plaintiff's bonus compensation since 2010. Such representations included the following:

- a. Concealing or failing to provide financial reports and other accounting information to Plaintiff from which his bonuses were to be determined;
- b. Misrepresenting to Plaintiff that disclosure of Defendant MPG's financial statements and accounting information would necessarily involve disclosure of Defendant Morphis's personal, financial information about which Plaintiff had no right to know;
- c. Concealing or failing to disclose the payment of personal automobile expenses for Defendant Morphis from Defendant MPG's accounts, despite the fact that such expenses had nothing whatsoever to do with the Lancaster practice location;
- d. Concealing or failing to disclose the payment of substantial salaries to Defendant Morphis from Defendant MPG's accounts, despite the fact that Defendant Morphis performed little or no actual work for the Lancaster

practice location;

- e. Providing deliberately false information about Plaintiff's Bonus Analysis for the years 2010-2014, in an effort to convince Plaintiff that his average bonus during that period was only approximately 5% of gross revenues;
- f. Misleading Plaintiff into believing that he had received 50% of the practice's net income during years 2010-2014 as an annual bonus;
- g. Actively concealing the amount of anticipated net profit of Defendant MPG's Lancaster practice location in 2015, in an attempt to deprive Plaintiff of more than \$116,000 in bonus payments for 2015 alone; and
- h. Misleading Plaintiff into believing that changing the bonus structure from 50% of net profits to 5% of gross revenues would benefit Plaintiff, despite Defendants' knowledge that such change would actually cause Plaintiff to receive substantially reduced compensation.

61. The above representations were false.

62. The above representations were material to Plaintiff in his decisions to accept his bonus payments without dispute from 2010 to 2014 and to sign an amended Employment Agreement in 2015, agreeing to back-date the effective date of the document to March 1, 2015.

63. Defendants, through their owners, officers, directors, or agents, had knowledge of the falsity of the above representations or they had reckless disregard for the truth or falsity of the representations.

64. Defendants, through their owners, officers, directors, or agents, intended that the representations be acted on by Plaintiff.

65. Plaintiff was ignorant of the falsity of the above representations.

66. Plaintiff reasonably relied on the truth of the above representations by accepting his bonus payments from 2010-2014 as accurate and by signing the amended Employment Agreement on December 30, 2015, back-dated to March 1, 2015.

67. Plaintiff had a right to rely on the above representations in good faith.

68. Plaintiff suffered injury as a direct and proximate result of his reliance on Defendants' false and fraudulent statements.

69. In the alternative, to the extent that Defendants lacked any specific intent that Plaintiff act upon its representations, Defendants have committed a constructive fraud.

70. The statute of limitations for Plaintiff's claims for fraud or constructive fraud should be tolled by Defendants' fraudulent concealment of information necessary for Plaintiff reasonably to discover the truth of the misrepresentations.

71. Plaintiff is entitled to recover in this action actual damages from Defendants sufficient to compensate him for his actual damages.

72. The actions of Defendants as set forth herein have also directly and proximately caused Plaintiff to suffer significant emotional distress and anxiety.

73. In addition, upon information and belief, Plaintiff is entitled to an award of punitive damages against Defendants, in an amount to be determined at trial, sufficient to deter these Defendants and others from engaging in such wrongful and fraudulent conduct in the future.

FOR A SIXTH CAUSE OF ACTION
(Negligent Misrepresentation)
(Against All Defendants)

74. Plaintiff repeats and realleges Paragraphs 1-73 as if restated verbatim.

75. Defendants, by and through their owners, officers, directors, or agents, made numerous false representations to Plaintiff about the financial performance of Defendant MPG's Lancaster practice location and Plaintiff's bonus compensation since 2010 as set forth in detail herein above.

76. Defendants had a pecuniary interest in making the false statements alleged herein.

77. Defendants owed a duty of care to Plaintiff to see that they communicated truthful information to Plaintiff about the financial performance of Defendant MPG's Lancaster practice location and about Plaintiff's bonus compensation since 2010.

78. Defendants breached their duty to Plaintiff by failing to exercise due care in the communication of the statements to Plaintiff about the financial performance of Defendant MPG's Lancaster practice location and about Plaintiff's bonus compensation since 2010.

79. Plaintiff reasonably and justifiably relied on the representations Defendants made about the financial performance of Defendant MPG's Lancaster practice location and Plaintiff's bonus compensation since 2010 by accepting his bonus payments from 2010-2014 as accurate and by signing the amended Employment Agreement on December 30, 2015, back-dated to March 1, 2015.

80. Plaintiff suffered a pecuniary loss as a direct and proximate result of his reliance on the negligent representation of Defendants.

81. The statute of limitations for Plaintiff's claims for negligent misrepresentation should be tolled by Defendants' fraudulent concealment of information necessary for Plaintiff reasonably to discover the truth of the misrepresentations.

82. Plaintiff is entitled to recover in this action actual damages from Defendants sufficient

to compensate him for his actual damages.

FOR A SEVENTH CAUSE OF ACTION
(Declaratory Judgment)
(Against Defendants MPG and Morphis Only)

83. Plaintiff repeats and realleges Paragraphs 1-82 as if restated verbatim.

84. On or about December 30, 2015, Plaintiff signed a new Employment Agreement with Defendant MPG, with the term of employment back-dated to March 1, 2015.

85. On July 31, 2018, Plaintiff received a Termination Letter, without cause, from Defendant Morphis on behalf of Defendant MPG.

86. The Termination Letter specifically references the Non-Competition and Non-Solicitation Provisions of the 2015 Employment Agreement and further states, “both provisions of non-competition and non-solicitation shall remain in effect and [sic] enforceable.” (Exhibit 3, at p. 2).

87. Plaintiff has a case of actual controversy against Defendants MPG and Morphis relating to the validity and enforceability of the 2015 Employment Agreement, because Plaintiff is a person interested under a written contract and has been threatened by Defendants with legal action to enforce the Agreement.

88. Pursuant to the South Carolina Declaratory Judgment Act, S.C. Code Ann. § 15-53-30, Plaintiff brings this action for a declaration of rights, status, or legal relations under the 2015 Employment Agreement. Specifically, Plaintiff requests the Court to make the following findings of fact and conclusions of law:

- a. that the 2015 Employment Agreement is void ab initio because it was procured by fraud in the inducement;

- b. that the Non-Competition and Non-Solicitation provisions of the 2015 Employment Agreement are not enforceable because Plaintiff did not receive any additional, valuable consideration in exchange for signing the 2015 Employment Agreement, beyond his continued employment with Defendant MPG;
- c. that the Non-Competition and Non-Solicitation provisions of the 2015 Employment Agreement are not enforceable because they are substantially broader than is necessary to protect any legitimate interest of Defendant MPG;
- d. that the Non-Competition and Non-Solicitation provisions of the 2015 Employment Agreement are not enforceable because they would be unduly harsh and oppressive in curtailing the legitimate efforts of Plaintiff to earn a livelihood;
- e. that the Non-Competition and Non-Solicitation provisions of the 2015 Employment Agreement may not be amended or “blue penciled” by the Court so as to make them reasonable, valid, and enforceable; and
- f. that the Non-Competition and Non-Solicitation provisions of the 2015 Employment Agreement are not enforceable because their enforcement would violate the public policy of the State of South Carolina.

89. Defendants MPG and Morphis also should be precluded from enforcing the 2015 Employment Agreement under the equitable principles of the Unclean Hands Doctrine because Defendants MPG and Morphis made numerous misrepresentations to Plaintiff about his employment

and failed to pay Plaintiff the bonuses he rightfully earned during his employment with Defendant MPG, and because Defendant MPG committed an antecedent breach of the 2015 Employment Agreement, which excuses Plaintiff's continued obligations thereunder. Defendants MPG's and Morphis's unlawful and inequitable actions towards Plaintiff would render the Agreement unenforceable.

90. Plaintiff also requests injunctive relief necessary to carry out the Court's declaratory judgment.

FOR AN EIGHTH CAUSE OF ACTION
(Equitable Accounting)
(Against All Defendants)

91. Plaintiff repeats and realleges Paragraphs 1-90 as if restated verbatim.

92. Defendants are in possession of the financial and accounting information relating to Defendant MPG's net income and gross revenues during Plaintiff's employment with Defendant MPG, from which his annual bonuses were to be determined from 2009 to 2018.

93. Defendant MPG has a duty under the 2010 and 2015 Employment Agreements, including under the implied covenant of good faith and fair dealing, to provide to Plaintiff complete and accurate information regarding net profits and/or gross revenues of Defendant MPG's Lancaster practice location, from which Plaintiff's annual bonuses were to be calculated.

94. Plaintiff requests the Court, pursuant to its equitable powers, to order Defendants to provide a complete and accurate accounting of all relevant financial information relating to the performance of Defendant MPG's Lancaster practice location, along with every bonus payment made to Plaintiff during his employment with Defendant MPG, and any payments made to or for the benefit of Defendant Morphis personally.

WHEREFORE, having fully set forth his allegations against Defendants, Plaintiff respectfully requests the following relief:

- a. actual, compensatory damages for past due wages, bonuses, and employment benefits;
- b. treble damages pursuant to the South Carolina Payment of Wages Act;
- c. compensation for Plaintiff's non-economic damages;
- d. prejudgment interest;
- e. punitive damages;
- f. attorneys' fees and costs;
- g. declaratory judgment that the 2015 Employment Agreement is void or, in the alternative, that the Non-Competition and Non-Solicitation provisions of the 2015 Employment Agreement are invalid and unenforceable;
- h. injunctive relief necessary to carry out the Court's declaratory judgment;
- i. an equitable accounting of all revenues and expenses for Defendant MPG's Lancaster practice location during Plaintiff's employment and all bonuses paid to Plaintiff; and
- j. such further relief as the Court deems appropriate.

* * *

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY.

Respectfully submitted,

s/ David E. Rothstein
David E. Rothstein
ROTHSTEIN LAW FIRM, PA
1312 Augusta Street
Greenville, SC 29605
(864) 232-5870 (office)
(864) 241-1386 (facsimile)
drothstein@rothsteinlawfirm.com

Attorney for Plaintiff, Paul David Hess, APRN-BC

September 27, 2018

Greenville, South Carolina.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	FOR THE SIXTH JUDICIAL CIRCUIT
Paul David Hess, APRN-BC,	)	Case No. 2018-CP-29-01127
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S PETITION FOR
	)	TREBLE DAMAGES, ATTORNEY'S
Morphis Pediatric Group of Lancaster,	)	FEES AND COSTS, AND PRE-
P.A.; Elizabeth J. Morphis, M.D.;	)	JUDGMENT INTEREST
Gregory M. Alexander, CPA; and	)	
Moore Beauston & Woodham LLP,	)	
	)	
Defendants.	)	
	)	

Plaintiff, Paul David Hess, APRN-BC (hereinafter "Plaintiff" or "Hess"), by and through his undersigned counsel, hereby files this Petition for Treble Damages, Attorney's Fees and Costs, and Pre-judgment Interest. As set forth in detail below, Plaintiff seeks the following amounts supplemental to the jury's verdict in this case and Plaintiff's Election of Remedies: (1) three times the jury's award of actual back-pay damages of \$548,290.42, for a total of \$1,644,871.26 against Defendant Morphis Pediatric Group of Lancaster, P.A. and Elizabeth J. Morphis, M.D. (hereinafter "Morphis Defendants"); (2) attorney's fees against the Morphis Defendants in the amount of \$215,475.00, and costs in the amount of \$9,472.54 against the Morphis Defendants, of which \$7,356.03 in costs is jointly and severally sought against the Morphis Defendants and Defendants Gregory M. Alexander, CPA and Moore Beauston & Woodham, LLP (hereinafter "Accounting Defendants"); and (3) pre-judgment interest against the Morphis Defendants in the amount of \$301,582.99 (for 2010-2014 bonus) and jointly and severally against the Accounting Defendants in the amount of \$79,367.96 (for 2015 bonus).

The civil remedy section of the South Carolina Payment of Wages Act provides, in relevant

part, “In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action 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). In Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995), the South Carolina Supreme Court recognized that “[t]he award of treble damages and attorney’s fees is discretionary with the trial court. 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.” Id. at 99, 456 S.E.2d at 383 (quoting Apache East, Inc. v. Wiegand, 119 Ariz. 308, 312-313, 580 P.2d 769, 773-774 (Ct. App.1978). The South Carolina Supreme Court has found that it is “for the trial court to determine, in the first instance, whether there existed a bona fide dispute [regarding the payment of an employee’s wages] such that treble damages were not warranted.” Temple v. Tec-Fab, Inc., 381 S.C. 597, 600–01, 675 S.E.2d 414, 416 (2009).

Here, the jury’s verdicts in Plaintiff’s favor and against the Morphis Defendants on Plaintiff’s claims for breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation, as well as its corresponding award of punitive damages against the Morphis Defendants, preclude any argument by the Morphis Defendants that there was a bona fide dispute about the wages due or any good-faith basis for not paying the bonus money due to Plaintiff in a timely manner. This case is very different from cases where appellate courts of this state have found an award of treble damages inappropriate under the Payment of Wages Act because of the employer’s good-faith dispute of the amount or circumstances of the alleged unpaid wages. See, e.g., Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 581 S.E.2d 591 (1999) (employee’s

disloyalty to company during his employment provided good-faith basis for employer to dispute wages due); Morin v. Innegrity, LLC, 424 S.C. 559, 819 S.E.2d 131 (Ct. App. 2018) (CEO's bonus contingent on company's obtaining \$2 million in funding, which never occurred); Goodwyn v. Shadowstone Media, Inc., 408 S.C. 93, 757 S.E.2d 560 (Ct. App. 2014) (hiring letter stated that employee's compensation was entirely commission-based, not salary, and majority of sales were never collected); O'Neal v. Intermedical Hosp., 355 S.C. 499, 585 S.E.2d 526 (Ct. App. 2003) (bona fide dispute about whether employee was terminated for misconduct and, therefore, forfeited payment for accrued but unused vacation).

In considering the statutory award of treble damages and attorneys fees and costs, the court should consider the underlying purpose of the South Carolina Payment of Wages Act, which is to protect employees from unwarranted retention of wages by unscrupulous employers. South Carolina courts have repeatedly and unequivocally recognized that the Act is "remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld." Dumas v. InfoSafe Corp., 320 S.C. 188, 194, 463 S.E.2d 641, 645 (Ct. App. 1995); see also Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 317, 698, S.E.2d 773, 782 (2010) (recognizing that the underlying purpose of the SC Payment of Wages Act is "'to protect employees from the unjustified and willful retention of wages by the employer.'") (quoting Rice v. Multimedia, Inc., 381 S.C. 95, 98, 456 S.E.2d 381, 383 (1995)) It is well settled in South Carolina that remedial statutes are supposed to be liberally construed in order to effectuate the purposes of the statute. South Carolina Dep't of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978).

Accordingly, Plaintiff seeks an award of three times the jury's verdict of \$548,290.42 for back pay on Plaintiff's first cause of action under the South Carolina Payment of Wages Act, for a

total award of \$1,644,871.26 against the Morphis Defendants.

Plaintiff also seeks an award of attorney's fees and costs against the Morphis Defendants under Section 41-10-80(C) of the South Carolina Payment of Wages Act. As with the award of treble damages under the statute, where there is no good-faith or bona fide dispute about the wages due to the employee, the court should exercise its discretion to award attorney's fees and costs to the prevailing plaintiff employee.

The court's award of reasonable attorney's fees is governed by the familiar, six-factor test set forth in the landmark case of Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997): (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Id. at 308, 486 S.E.2d at 760. These factors are discussed in order below.

1. Nature, extent, and difficulty of case

The Complaint in this case involved six substantive, legal causes of action, in addition to causes of action for declaratory judgment and an equitable accounting. Although the claims did not involve any particularly novel questions of law, both sets of Defendants vigorously defended the case, filing two separate motions for summary judgment, as well as numerous grounds for directed verdict and JNOV. Plaintiff was able successfully to go back to 2010 under the discovery rule and equitable tolling of the statute of limitations based on fraudulent concealment. As discussed below in connection with factor number 2, the case involved very extensive discovery and review of complicated accounting and financial records. Plaintiff's counsel is a solo practitioner, who has limited support staff to assist him with this matter.

Employment law is perhaps one of the most dynamic areas of the law, requiring counsel to stay abreast of developments in both state and federal law. Moreover, as with any litigation in state or federal court, attorneys in employment cases must be thoroughly familiar with developments and changes in the Rules of Civil Procedure and the Rules of Evidence.

2. Time necessarily devoted to case

As set forth in the Affidavit of David E. Rothstein, which is attached hereto as Exhibit A, the undersigned counsel's law firm has expended a total of 506.6 hours of time in connection with this matter, which includes 470.9 hours of attorney time and 35.70 hours of paralegal time. The case involved review of voluminous discovery, including production of over 8,000 pages of financial records from the Accounting Defendants, six depositions, and two sets of summary judgment motions. As the court well knows, the trial in this case lasted more than a week, with numerous evidentiary issues and other challenging legal matters, including extensive pre-trial motions, motions for directed verdict and JNOV, cross examination of two expert witnesses, complicated jury instructions and verdict forms, and bifurcation of punitive damages.

As set forth in both the Affidavit of David E. Rothstein and the Affidavit of M. Malissa Burnette, Esq., who is a certified specialist in employment and labor law and a seasoned litigator in South Carolina, the amount of time and labor expended in this case is reasonable. (The Affidavit of M. Malissa Burnette, Esq., is attached hereto as Exhibit B).

3. Professional standing of counsel

The undersigned's Affidavit sets forth his experience and qualifications. In summary, the undersigned graduated from law school with honors in May 1993 and was the Editor in Chief of the South Carolina Law Review. After graduation from law school, he clerked for two prominent

federal judges (one on the United States District Court for the District of South Carolina and one on the United States Court of Appeals for the Fourth Circuit) prior to entering private practice. Since entering private practice, the undersigned has practiced extensively in the area of employment litigation and has written about and taught CLEs on numerous employment-law topics. The undersigned has been a Certified Specialist in Employment and Labor Law by the South Carolina Supreme Court Commission on CLE and Specialization continuously since February 15, 2006. Initial certification and re-certification every five years requires an applicant to submit references from practitioners and judges attesting to the applicant's abilities and experience. The undersigned has also previously served on the Specialization Advisory Committee for Employment and Labor Law and previously held leadership positions (including Chair) of the South Carolina Bar's Section on Employment and Labor Law. Additionally, the undersigned served as a associate bar examiner for nine years.

With respect to the undersigned's reputation in the legal community, Ms. Burnette, who was the undersigned's law partner for five years (July 2005-July 2010), has offered a favorable opinion about the undersigned's abilities and reputation in employment litigation.

4. Contingency of compensation

Plaintiff's attorney fee agreement with the undersigned counsel is a hybrid contingency agreement, with an hourly portion at a reduced rate of \$125.00 per hour, plus a reduced contingency percentage of 25% of the amount of any recovery. Plaintiff's counsel discounted his regular hourly rate substantially in exchange for also receiving a portion of the fee on a contingency basis. Plaintiff also is responsible for paying all out-of-pocket costs in connection with this case. The undersigned's regular rate for employment cases is \$400.00 per hour. Plaintiff's counsel generally expects to

receive a premium above his regular rate for cases taken on a contingency basis because of the additional risk involved in taking such cases.

5. Beneficial results obtained

Various courts have acknowledged that “‘the most critical factor’ in calculating a reasonable fee award ‘is the degree of success obtained.’” Brodziak v. Runyon, 145 F.3d 194, 196 (4th Cir. 1998) (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)). Plaintiff obtained significant success at the trial of this matter. As the court is aware, the jury awarded Plaintiff verdicts in excess of \$548,000 on all of the causes of action asserted against the Morphis Defendants, a verdict of actual damages for the 2015 bonus in the amount of \$152,010 against the Accounting Defendants for tortious interference with contract and negligent misrepresentation, and punitive damages awards of \$475,000 against the Morphis Defendants and \$10,000 against the Accounting Defendants. The jury verdicts represented a substantial portion of the actual damages number Plaintiff submitted to the jury. In summary, the results obtained on Plaintiff’s behalf in this case amply support the request for attorney’s fees and costs.

6. Customary legal fees for similar service

The attorney’s fees and costs requested by Plaintiff are in line with awards in other employment cases in South Carolina and in line with previous awards received by the undersigned counsel. Plaintiff’s counsel increased his regular hourly rate from \$350.00 to \$400.00 per hour on January 1, 2022 for employment cases. The undersigned has received fee awards of at least \$350.00 per hour in numerous cases in South Carolina within the past ten years. See, e.g., Mullinax v. Parker Sewer & Fire Subdistrict, C/A No. 6:12-cv-01504-TMC (Dkt. No. 57) (D.S.C. Mar. 11, 2014) (FLSA collective action approving lode-star cross-check at \$350 per hour); DeWitt v. Darlington

County, SC, C/A No. 4:11-cv-740-RBH, 2013 WL 6408371; (D.S.C. Dec. 6, 2013) (FLSA collective action settlement approving \$350.00 per hour lode-star cross-check); Faile v. Lancaster County, SC, C/A No. 0:10-cv-2809-CMC (Dkt. No. 102) (D.S.C. Mar. 8, 2012) (FLSA collective action settlement approving \$350.00 per hour lode-star cross-check); and George v. ProMed Ambulance Service, LLC, 2:10-cv-0087-RMG (Dkt. No. 50) (D.S.C. Oct. 20, 2011) (awarding fees in FLSA individual claim at \$350.00 per hour). Plaintiff is seeking a modest increase to \$450.00 per hour based on the contingent nature of the fee, as discussed in factor 4 above.

In summary, Plaintiff seeks an award of \$215,475 in attorney's fees to be paid by the Morphis Defendants.

Plaintiff also seeks an award of costs pursuant to S.C. Code Ann. § 41-10-80(C) and Rule 54(d) and (e), SCRCPP, jointly and severally against all Defendants. Plaintiff has incurred total, out-of-pocket costs in the amount of \$9,472.54. With respect to the specific categories of allowable costs itemized in Rule 54(e), SCRCPP, Plaintiff has incurred the following expenses: (1) filing fees (initial summons and complaint, plus four motions): \$307.28; (2) service of process: \$559.30; (3) depositions (7 witnesses total): \$4,148.35; (4) mediation: \$2,165.36; and (5) trial subpoenas (3 witnesses): \$175.74. Plaintiff's counsel will make the itemized report of expenses available to the Court for review in camera, if necessary.

Finally, Plaintiff seeks an award of pre-judgment interest in the total amount of \$380,950.95 against the Morphis Defendants, of which \$79,367.96 Plaintiff seeks jointly and severally against all Defendants relating to the verdict of \$152,010, for the 2015 bonus. In the leading case of Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993), the South Carolina Supreme Court articulated the standard for pre-judgment interest:

The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. The fact that the sum due is disputed 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 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 (internal citations omitted).

Here, pre-judgment interest is appropriate because 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 have been reduced to a sum certain at the time such bonuses were payable.

Section 34-31-20(A) of the South Carolina Code sets the pre-judgment interest rate at 8.75% per annum. Pre-judgment interest under statute is simple interest, rather than compounded. See Edwards v. Campbell, 369 S.C. 572, 577–78, 633 S.E.2d 514, 517 (2006). Plaintiff's counsel has calculated the pre-judgment interest on each bonus payment from February 15 in the year after the close of the bonus year through the date of the jury verdict using a pro-rated amount of the jury verdict for each year from 2010 to 2014, and the full amount of the jury's verdict for 2015. The spreadsheet showing this calculation is attached hereto as Exhibit C. The total amount of pre-judgment interest sought by Plaintiff is \$380,950.95 through the date of the jury's verdict, February 1, 2022. Of this amount, \$79,367.96 relates to the 2015 bonus year, for which all Defendants would be jointly and severally liable.

Post-judgment interest in this case would begin to accrue on the total amount of the jury's award, as well as the enhancements to the award for treble damages, attorney's fees and costs, and

pre-judgment interest as required by S.C. Code Ann. § 34-31-20(B). For 2022, the South Carolina Supreme Court has set the post-judgment interest rate at 7.25%, compounded annually. Order No. 2022-01-06-01 (S.C. Jan. 6, 2022).

For all of the foregoing reasons, Plaintiff respectfully seeks an award of treble damages in the amount of \$1,644,871.26 against the Morphis Defendants under the South Carolina Payment of Wages Act; \$214,475 in attorney's fees and \$9,472,54 in costs against the Morphis Defendants, of which \$7,356.03 in costs is jointly and severally sought against all Defendants; and pre-judgment interest in the amount of \$380,950.95 against the Morphis Defendants, with the Accounting Defendants being jointly and severally liable for \$79,367.96 in pre-judgment interest relating only to the 2015 bonus payment.

Respectfully submitted,

s/ David E. Rothstein
David E. Rothstein, SC Bar # 66295
ROTHSTEIN LAW FIRM, PA
1312 Augusta Street
Greenville, South Carolina 29605
(864) 232-5870 (office)
(864) 241-1386 (facsimile)
drothstein@rothsteinlawfirm.com

Attorney for Plaintiff, Paul David Hess, APRN-BC

February 14, 2022

Greenville, South Carolina.

Exhibit A

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	FOR THE SIXTH JUDICIAL CIRCUIT
Paul David Hess, APRN-BC,	)	Case No. 2018-CP-29-01127
	)	
Plaintiff,	)	
	)	
vs.	)	AFFIDAVIT OF PLAINTIFF'S
	)	COUNSEL, DAVID E. ROTHSTEIN
Morphis Pediatric Group of Lancaster,	)	
P.A.; Elizabeth J. Morphis, M.D.;	)	
Gregory M. Alexander, CPA; and	)	
Moore Beauston & Woodham LLP,	)	
	)	
Defendants.	)	
_____	)	
STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF GREENVILLE	)	

PERSONALLY appeared before me, David E. Rothstein, who, after being duly sworn, deposes and states the following:

1. My name is David E. Rothstein. I am older than eighteen years of age and am otherwise competent to provide this Affidavit. The statements in this Affidavit are based upon my own personal knowledge.

2. I am counsel for Plaintiff in the above-captioned case.

3. I am an attorney in good standing and have been licensed to practice law by the State of South Carolina since November 15, 1993, and by the State of North Carolina since April 11, 2008. I am also admitted to practice before the United States District Court for the District of South Carolina, the United States District Court for the Western District of North Carolina, the United States District Court for the Middle District of North Carolina, the United States District Court for



the Eastern District of North Carolina, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court.

4. I graduated cum laude from the University of South Carolina School of Law on May 14, 1993, where I was Editor in Chief of the South Carolina Law Review, a member of the Order of the Coif, and a member of the Order of the Wig and Robe.

5. Upon graduation from law school, I served as a judicial law clerk to the Hon. Joseph F. Anderson, Jr., United States District Court Judge for the District of South Carolina, from August 1993 to August 1995. Thereafter, I served as a judicial law clerk to the Hon. Robert F. Chapman, then-Senior United States Circuit Court Judge for the Fourth Circuit Court of Appeals, from August 1995 to October 1996.

6. I worked as an associate attorney at the law firm of Nexsen Pruet Jacobs & Pollard, LLP, in Columbia, South Carolina, from October 1996 to January 1999, where the majority of my practice involved employment law. While employed at the Nexsen Pruet firm, I represented both employers and employees in employment litigation and appeals.

7. I worked as an associate attorney at the law firm of Gergel Nickles & Solomon, P.A., in Columbia, South Carolina, from January 1999 to June 30, 2005, where the majority of my practice involved employment law.

8. I was a shareholder in the law firm of Burnette & Rothstein, P.A. from July 1, 2005 until June 30, 2010, when I moved to Greenville, SC and formed Rothstein Law Firm, PA, which is currently a solo practice law firm. Almost all of my law firm's current practice involves employment law and litigation.

9. I have been a Certified Specialist in Employment and Labor Law by the South



Carolina Supreme Court continuously since February 2006. Although I primarily represent individual employees (and classes of employees) in employment-related matters, my firm also represents several small employers in employment-related matters.

10. I previously served as an associate member of the South Carolina Board of Law Examiners, which position I held from January 2007 through January 2016.

11. I have had extensive experience in employment litigation, both as an attorney and as a judicial law clerk to two federal judges. In addition, I have written several articles and made numerous CLE presentations on employment law and related topics. I am a member of the Employment Law Sections of the South Carolina Bar, the South Carolina Association for Justice, and the National Employment Lawyers Association. I am a past Chair of the Employment and Labor Law Section Council of the South Carolina Bar (2011), and previously served as a member of the Specialization Advisory Board for Employment and Labor Law through the South Carolina Supreme Court Commission on CLE and Specialization (2011-17).

12. The above-captioned case involved substantial legal work. I have reviewed my contemporaneous time entries relating to this case in representing Plaintiff in this case. I have recorded my time on a computerized law-office management program called Clio. As of the date of this Affidavit, I have spent a total of 470.9 hours of time in connection with this case. My legal assistant, Lorry Miller, has spent a total of 35.7 hours of time in connection with the case. I believe that all of the time I and Ms. Miller recorded in Clio is reasonable and was necessary in the prosecution of this case.

13. I have also reviewed the summary of the costs my firm has expended in connection with this case, which is also tracked in Clio. To date, my firm has expended \$9,472.54 in out-of-

pocket costs connection with this case. This summary of costs is correct, and I believe that these expenses are reasonable and were necessarily incurred in the action.

14. I will make all of the Clio summaries of my firm's timekeeper hours and expenses available for in-camera inspection by the Court, if requested.

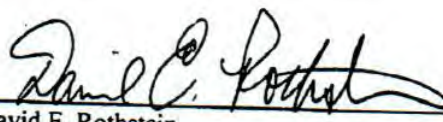
15. My regular hourly rate for employment cases is \$400.00 per hour. My legal assistant's hourly rate is \$100.00. I believe that both rates are comparable to other attorneys in the Greenville, SC with similar experience and length of practice. I raised my regular hour rate from \$350.00 to \$400.00 effective January 1, 2022, which is the first increase in my hourly rate in approximately seven years.

16. The undersigned has received fee awards of at least \$350.00 per hour in numerous cases in South Carolina within the past ten years. See, e.g., Mullinax v. Parker Sewer & Fire Subdistrict, C/A No. 6:12-cv-01504-TMC (Dkt. No. 57) (D.S.C. Mar. 11, 2014) (FLSA collective action approving lode-star cross-check at \$350 per hour); DeWitt v. Darlington County, SC, C/A No. 4:11-cv-740-RBH, 2013 WL 6408371; (D.S.C. Dec. 6, 2013) (FLSA collective action settlement approving \$350.00 per hour lode-star cross-check); Faile v. Lancaster County, SC, C/A No. 0:10-cv-2809-CMC (Dkt. No. 102) (D.S.C. Mar. 8, 2012) (FLSA collective action settlement approving \$350.00 per hour lode-star cross-check); and George v. ProMed Ambulance Service, LLC, 2:10-cv-0087-RMG (Dkt. No. 50) (D.S.C. Oct. 20, 2011) (awarding fees in FLSA individual claim at \$350.00 per hour).

17. When I take a case on a full or partial contingency basis, I generally expect to receive more than my regular hourly rate because of the additional risk involved in taking the case on a contingency basis.

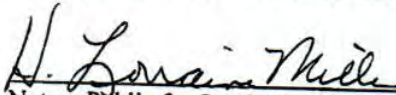


FURTHER AFFIANT SAYETH NOT.


David E. Rothstein

SWORN TO and subscribed before me,

this 14th day of February, 2022.

 (L.S.)
Notary Public for South Carolina

My commission expires: 3/28/2027

Exhibit B

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

**IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT**

Paul David Hess, APRN-BC,)
Plaintiff,)

Case No. 2018-CP-29-01127

v.)

**AFFIDAVIT OF
M. MALISSA BURNETTE, ESQ.
IN SUPPORT OF
DAVID E. ROTHSTEIN, ESQ**

Morphis Pediatric Group of Lancaster,)
P.A.; Elizabeth J. Morphis, M.D.;)
Gregory M. Alexander, CPA; and)
Moore Beauston & Woodham, LLP,)
Defendants.)

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

PERSONALLY appeared before me M. Malissa Burnette, who, after being duly sworn, deposes and states the following:

1. My name is M. Malissa Burnette. I am older than eighteen years of age.

The statements in this Affidavit are based upon my own personal knowledge.

2. I am an attorney in good standing and have been licensed to practice law by the State of South Carolina since November 9, 1977. I am also admitted to practice before the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court.

3. I have been engaged in the full-time practice of law since my admission to the Bar in 1977.

4. In addition to practicing law, I am a certified mediator for the United States

District Court since 1994. I have been a Certified Specialist in Employment and Labor since 1994 and currently serve as a member of the Employment and Labor Law Specialization Advisory Board.

5. I am the co-author and editor of all five editions of Labor and Employment Law for South Carolina Lawyers, published by the South Carolina Bar.

I have concentrated my private practice in the areas of employment litigation, civil litigation, civil rights litigation, academic tenure and promotion law, Title IX and family law.

6. I have made numerous CLE presentations on employment law and related topics, including at the South Carolina Bar Convention, the NC/SC Labor and Employment Law Program and Annual Meeting, the Columbia Society for Human Resource Professionals, the Richland County Bar Association, the South Carolina Women Lawyers Association, and the USC School of Law. I also have served for several years as a mentor for 1L students at the USC School of Law.

7. I have received the Compleat Lawyer Award from the USC School of Law, the Bissell Award from the SC Women Lawyers Association, the WomenVision Award from SC ETV, and was recently honored by Historic Columbia's City of Women program.

8. I have been active on numerous Bar committees and sections, including as President of the Senior Lawyers Division, President of the SC Women Lawyers Association, and Chair of the Judicial Qualifications Committee.

9. Along with Nekki Shutt and Kathleen M. McDaniel, I am a co-founder and partner in Burnette Shutt & McDaniel, P.A. Our nine-attorney law firm concentrates

our practice in the areas of employment law advice and litigation, employee benefits litigation, civil litigation, and appellate practice. We represent individuals, non-profit entities and companies.

10. I anticipate receiving a premium above my normal hourly rate when I take cases on a contingency basis because of the additional risks involved in taking such cases and the delay in payment. I generally charge \$475.00 per hour for contingency fee work.

11. I have known and worked with David Rothstein for about the last 28 years, have high regard for his ability as a trial lawyer and as an employment law attorney, as well as the high ethical standard he represents. We were law partners for several years in the 1990s. I refer clients to him, and he refers clients to me. During the time I have been acquainted with Mr. Rothstein, I have had the opportunity to observe his work habits and to interact with him. I can verify that he works diligently, efficiently, and effectively for his clients. He is well-qualified to handle complex employment cases such as representing Plaintiffs named in this matter, as he has successfully prosecuted similar cases. Mr. Rothstein is one of the pre-eminent employment law litigators in South Carolina.

12. I have reviewed Mr. Rothstein's timekeeping activity in the case of Hess v. Morphis Pediatric Group of Lancaster, P.A. et al., Case No. 2018-CP-29-01127 , and I am aware that his firm devoted 506.6 plus hours to representing the Plaintiff over more than three years. He tracks his time in Clio. His representation of Plaintiff included six depositions, opposing a motion to dismiss, overcoming two sets of summary

judgment motions, and a six-day jury trial. The Complaint included 8 separate causes of action. The jury returned a verdict in Plaintiff's favor. The amount of time expended appears to be very reasonable, given the amount and type of tasks involved. I believe that Mr. Rothstein's time entries are appropriate in light of the vigorous defense of this matter mounted by Defendants.

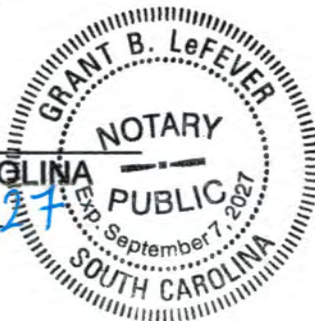
13. In my opinion, Mr. Rothstein's requested rate of \$450.00 per hour is reasonable given his years of experience and the fees customarily charged in South Carolina for this type of legal representation.

FURTHER AFFIANT SAYETH NAUGHT.


M. Malissa Burnette, Esq.
S.C. Bar No.: 1038

SWORN and subscribed to before me
this 14th day of February, 2022.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 9/7/2027



From: drothstein@rothsteinlawfirm.com
Sent: Wednesday, June 1, 2022 5:04 PM
To: 'Benjamin, DeAndrea G.'
Cc: 'Benjamin, DeAndrea G. Law Clerk (Chandler Soapes)'; 'Benjamin, DeAndrea G. Secretary (Jerrell Kirk)'; Chuck Thompson; 'Ryan Beasley'; 'Lorry Miller'
Subject: Hess v. Morphis Pediatric Group of Lancaster, P.A. et al.--Proposed Order on Plaintiff's Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest
Attachments: hessposttrialorderproposed.docx; hessposttrialorderproposed.wpd; hessposttrialorderproposed.pdf; hess--invoice_1048_Redacted.pdf; hess--invoice_1026_Redacted.pdf; hess--invoice_943_Redacted.pdf; hess--invoice_927_Redacted.pdf; hess--invoice_920_Redacted.pdf; hess--invoice_906_Redacted.pdf; hess--invoice_832_Redacted.pdf; hess--invoice_816_Redacted.pdf; hess--invoice_797_Redacted.pdf; hess--invoice_769_Redacted.pdf; hess--invoice_729_Redacted.pdf; hessdamagesanalysis--posttrialrevised6.01.2022.xlsx

Dear Judge Benjamin. As you requested at the conclusion of the hearing on May 19, 2022, attached please find a Proposed Order granting Plaintiff's Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest. I am including versions in both MS Word and .pdf, although I originally prepared the document in WordPerfect, so there may be some formatting errors in the conversion to MS Word.

As you also requested, I am also including all of my invoices to Mr. Hess that were created with Clio. I decided not to redact any of the substantive time entries, although I did redact Mr. Hess's home address. I am sending Mr. Thompson the same thing I am sending to you in the interest of full transparency, although I do not intend to waive the attorney-client privilege or the attorney work product doctrine by producing these documents. The most recent invoice dated today includes all time incurred after the original petition, less any time relating solely to the Accounting Defendants, which I calculated be 5.7 hours off of the 35.5 hours shown on the invoice. If you need for me to submit a formal affidavit regarding this updated amount, please let me know, and I will be happy to supplement my filing.

Finally, I am enclosing a revised spreadsheet showing an updated calculation of pre-judgment interest to account for the additional 107 days since the Petition was filed (Feb. 14-June 1, 2022), and the settlement with the Accounting Defendants, which was consummated on March 21, 2022 with the filing of the Stipulation of Partial Dismissal as to them. The pre-judgment interest is continuing at a daily rate of \$95.00 for the 2010-2014 bonus, through the date you actually enter an order on pre-judgment interest. If you have any questions or need any additional information, please do not hesitate to call me or email me. Thank you for your consideration of this matter. Sincerely yours,

David E. Rothstein
Certified Specialist in Employment and Labor Law
Rothstein Law Firm, PA
1312 Augusta Street
Greenville, SC 29605
(864) 232-5870 (office)
(864) 241-1386 (fax)
drothstein@rothsteinlawfirm.com
www.rothsteinlawfirm.com

Chuck Thompson

From: Chuck Thompson
Sent: Thursday, June 2, 2022 3:25 PM
To: 'Benjamin, DeAndrea G.'
Cc: 'Benjamin, DeAndrea G. Law Clerk (Chandler Soapes)'; 'Benjamin, DeAndrea G. Secretary (Jerrell Kirk)'; 'Ryan Beasley'; 'Lorry Miller'; drothstein@rothsteinlawfirm.com
Subject: RE: Hess v. Morphis Pediatric Group of Lancaster, P.A. et al.--Proposed Order on Plaintiff's Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest

Judge Benjamin,

I agree that Mr. Rothstein has now appropriately substantiated his time on the case. The lack of detail was my only objection regarding the technical requirements for his petition for fees. Of course, no fees are awarded if you agree there was a bona fide good faith dispute.

I do think the following excerpts in Plaintiff's proposed order are unsupportable. (By identifying only these two issues, I do not intend to concede any other issue).

p. 7

"Defendant Morphis testified at trial that she knew that David Hess is smart and has an MBA and that if he had seen Defendant Alexander's "secret" spreadsheet, Mr. Hess would have known immediately that he had never actually received 50% of the profits of the Lancaster practice"

Reason: I do not believe Dr. Morphis ever testified that she agreed the spreadsheet was "secret" or that Hess would have known he was not getting 50% if he saw the spreadsheet.

p. 9

"In addition, as noted previously, in Morrin, [sic] the Court of Appeals actually affirmed the award of treble damages under the Act for unpaid vacation pay and two month's salary, which were not affected by the conditions required for payment of the bonus."

Reason: The employer offered no good faith reason for denying the vacation and two month's salary. Therefore, this aspect of the Morin decision is irrelevant.

From: Chuck Thompson
Sent: Wednesday, June 1, 2022 6:53 PM
To: drothstein@rothsteinlawfirm.com; 'Benjamin, DeAndrea G.' <dbenjaminj@sccourts.org>

Cc: 'Benjamin, DeAndrea G. Law Clerk (Chandler Soapes)' <dbenjaminlc@sccourts.org>; 'Benjamin, DeAndrea G. Secretary (Jerrell Kirk)' <dbenjaminlc@sccourts.org>; 'Ryan Beasley' <rlb@ryanbeasleylaw.com>; 'Lorry Miller' <lmiller@rothsteinlawfirm.com>

Subject: RE: Hess v. Morphis Pediatric Group of Lancaster, P.A. et al.--Proposed Order on Plaintiff's Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest

Judge Benjamin,

Attached is my proposed order regarding the trebling of fees and award of attorney fees. It was my understanding that you stated you did not want a proposed order addressing prejudgment interest. I see that Mr. Rothstein has addressed prejudgment interest in his proposed order.

In the event I am wrong in my understanding, I will send you a separate proposed order regarding prejudgment interest. I should be able to send that later tonight.

From: drothstein@rothsteinlawfirm.com <drothstein@rothsteinlawfirm.com>

Sent: Wednesday, June 1, 2022 5:04 PM

To: 'Benjamin, DeAndrea G.' <dbenjaminj@sccourts.org>

Cc: 'Benjamin, DeAndrea G. Law Clerk (Chandler Soapes)' <dbenjaminlc@sccourts.org>; 'Benjamin, DeAndrea G. Secretary (Jerrell Kirk)' <dbenjaminlc@sccourts.org>; Chuck Thompson <thompson@mtsolaolawfirm.com>; 'Ryan Beasley' <rlb@ryanbeasleylaw.com>; 'Lorry Miller' <lmiller@rothsteinlawfirm.com>

Subject: Hess v. Morphis Pediatric Group of Lancaster, P.A. et al.--Proposed Order on Plaintiff's Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest

Dear Judge Benjamin. As you requested at the conclusion of the hearing on May 19, 2022, attached please find a Proposed Order granting Plaintiff's Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest. I am including versions in both MS Word and .pdf, although I originally prepared the document in WordPerfect, so there may be some formatting errors in the conversion to MS Word.

As you also requested, I am also including all of my invoices to Mr. Hess that were created with Clio. I decided not to redact any of the substantive time entries, although I did redact Mr. Hess's home address. I am sending Mr. Thompson the same thing I am sending to you in the interest of full transparency, although I do not intend to waive the attorney-client privilege or the attorney work product doctrine by producing these documents. The most recent invoice dated today includes all time incurred after the original petition, less any time relating solely to the Accounting Defendants, which I calculated be 5.7 hours off of the 35.5 hours shown on the invoice. If you need for me to submit a formal affidavit regarding this updated amount, please let me know, and I will be happy to supplement my filing.

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David E. Rothstein
Certified Specialist in Employment and Labor Law
Rothstein Law Firm, PA

1312 Augusta Street
Greenville, SC 29605
(864) 232-5870 (office)
(864) 241-1386 (fax)
drothstein@rothsteinlawfirm.com
www.rothsteinlawfirm.com



INVOICE

Invoice # 729
Date: 08/17/2018
Due Upon Receipt

Paul David Hess
[REDACTED]

18-042

Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al. (Lancaster) 2018-CP-29-01127

Type	Date	Description	Quantity	Rate	Total
Service	08/17/2018	Initial Consultation	1.00	\$250.00	\$250.00
Subtotal					\$250.00
Total					\$250.00
Payment (08/17/2018)					-\$250.00
Balance Owing					\$0.00

Please make all amounts payable to: Rothstein Law Firm, PA

Payment is due upon receipt.

Paul David Hess
[REDACTED]

18-042

**Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al.
(Lancaster) 2018-CP-29-01127**

Services

Attorney	Date	Description	Quantity	Rate	Total
DER	08/20/2018	Email from Mr. Hess re: bonus email (0.1); email from Mr. Hess re: bonus analysis (0.1)	0.20	\$125.00	\$25.00
DER	08/21/2018	Emails from Mr. Hess with documents (0.2); TC with Mr. Hess and Stephanie Hess (0.9); review documents to prepare for conference call (0.8)	1.90	\$125.00	\$237.50
DER	09/09/2018	Email from Mr. Hess about status (0.1)	0.10	\$125.00	\$12.50
DER	09/14/2018	Email to Hess about status (0.1)	0.10	\$125.00	\$12.50
DER	09/19/2018	Emails from and to Mr. Hess to schedule follow-up (0.2)	0.20	\$125.00	\$25.00
DER	09/21/2018	Review file to prepare for conference call (1.5); TC with Mr. and Mrs. Hess (0.7); prepare hybrid fee agreement (N/C); email to Hess about case and arbitration (0.1)	2.30	\$125.00	\$287.50
DER	09/23/2018	Review financial documents from Morphis (1.8)	1.80	\$125.00	\$225.00
DER	09/24/2018	Email from Mr. Hess (0.1); revise fee agreement (N/C); email to Hess about case (0.1)	0.20	\$125.00	\$25.00
DER	09/25/2018	Work on draft of complaint (2.2); emails from Mr. Hess about documents and other evidence (9) (0.3); email draft of complaint to Mr. Hess (0.1)	2.60	\$125.00	\$325.00
DER	09/26/2018	Email from Hess with additional document (0.1); email to Hess (0.1); email from Hess (0.1); review and revise draft of complaint (0.8); email from Hess re: draft of complaint (0.4); incorporate Hess revisions (0.2);	1.90	\$125.00	\$237.50

email second draft of complaint to Hess (0.2)					
DER	09/27/2018	Emails from and to Hess re: second draft (0.2); finalize and file complaint (1.0); receive NEF (0.1); email to Hess with final version of complaint (0.1); email from Hess (0.1)	1.50	\$125.00	\$187.50
DER	09/28/2018	NEF re: acceptance of filing (0.1); prepare discovery to Defendants (2.2); email discovery to Hess (0.1)	2.40	\$125.00	\$300.00
DER	09/30/2018	Email from Hess re: discovery (0.1)	0.10	\$125.00	\$12.50
DER	10/01/2018	Email from Hess re: service (0.1); email to Hess (0.1)	0.20	\$125.00	\$25.00
DER	10/02/2018	Finalize discovery to Morphis (0.5); prepare discovery to accounting firm (1.2); prepare service letters for complaint and discovery (0.2); email to Mr. Hess about service (0.1); email from Mr. Hess (0.1)	2.10	\$125.00	\$262.50
DER	10/04/2018	Email from Ms. Miller about service (0.1); email from Hess (0.1)	0.20	\$125.00	\$25.00
DER	10/05/2018	Emails from Hess with documents (0.2)	0.20	\$125.00	\$25.00
DER	10/10/2018	Email from Ms. Miller about service (0.1); email to Hess about service (0.1); email from Hess (0.1)	0.30	\$125.00	\$37.50
DER	10/15/2018	Receive affidavits of service from Bernard (0.1)	0.10	\$125.00	\$12.50
DER	10/16/2018	Message to Doug MacKelcan (0.1); review proof of service from Ms. Miller (0.1); finalize and file proof of service (0.3); receive NEFs for filing (0.1)	0.60	\$125.00	\$75.00
DER	10/17/2018	Email to Hess about case (0.1)	0.10	\$125.00	\$12.50
DER	10/19/2018	TC from Doug MacKelcan about case (0.2); email from MacKelcan confirming extension (0.1); email to MacKelcan (0.1)	0.40	\$125.00	\$50.00
DER	10/31/2018	Email from Chuck Thompson requesting extension for Morphis (0.1); email to Hess (0.1); email to Thompson (0.1); TC from Hess (0.2); email to Thompson (0.1); email from Thompson (0.1)	0.70	\$125.00	\$87.50
DER	11/04/2018	Finalize discovery to Defendants (1.4); email to Hess (0.1); email from Hess (0.1); prepare service letters (0.2)	1.70	\$125.00	\$212.50
			Quantity Subtotal		21.9
			Services Subtotal		\$2,737.50

Expenses

Date	Description	Quantity	Rate	Total
08/21/2018	Copies: 221 x .20	1.00	\$44.20	\$44.20
08/22/2018	Copies: 245 x .20	1.00	\$49.00	\$49.00
09/27/2018	Filing Fee - Summons & Complaint	1.00	\$180.32	\$180.32
09/28/2018	Copies: 44 x .20	1.00	\$8.80	\$8.80
10/02/2018	Copies: 20 x .20	1.00	\$4.00	\$4.00
10/02/2018	Copies: 428 x .20	1.00	\$85.60	\$85.60
10/02/2018	Postage [Stamps.com] - Priority Express = \$21.98; Certified Mail (2) @ \$9.51 = \$19.02	1.00	\$41.00	\$41.00

10/15/2018	Bernard Investigations - Process of Service Fees	1.00	\$518.30	\$518.30
			Expenses Subtotal	\$931.22
Time Keeper		Quantity	Rate	Total
David Rothstein		21.9	\$125.00	\$2,737.50
Quantity Total				21.9
Subtotal				\$3,668.72
Total				\$3,668.72
Payment (11/05/2018)				-\$3,668.72
Balance Owing				\$0.00

Detailed Statement of Account

Other Invoices

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
1048	06/01/2022	\$4,591.85	\$0.00	\$4,591.85

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
769	11/05/2018	\$3,668.72	\$3,668.72	\$0.00
Outstanding Balance				\$4,591.85
Amount in Trust				\$3,200.00
Total Amount Outstanding				\$1,391.85

Please make all amounts payable to: Rothstein Law Firm, PA

Payment is due upon receipt.

Paul David Hess
[REDACTED]

18-042

**Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al.
(Lancaster) 2018-CP-29-01127**

Services

Attorney	Date	Description	Quantity	Rate	Total
DER	11/19/2018	Email from MacKelcan about extension on discovery responses (0.1); email to Mr. Hess (0.1); email from Mr. Hess (0.1); emails to and from Mr. Hess about extension (0.2); email to MacKelcan (0.1)	0.60	\$125.00	\$75.00
DER	11/20/2018	Email from Mr. MacKelcan about extension (0.1)	0.10	\$125.00	\$12.50
DER	11/26/2018	Receive and review motion to compel arbitration from Defendant Morphis (0.2); receive notice of appearance re: Chuck Thompson (0.1); receive notices of appearance re: MacKelcan and Farley (0.1); receive and review answer of Defendants Alexander and MBW (0.2)	0.60	\$125.00	\$75.00
DER	11/27/2018	Email to Hess about answer from Alexander and MBW (0.1); email to Hess about motion to compel arbitration (0.1); research re: AHLA rules of procedure (0.3)	0.50	\$125.00	\$62.50
DER	11/28/2018	Email from Mr. Hess about motion to compel (0.1)	0.10	\$125.00	\$12.50
DER	12/02/2018	Email to Mr. Hess about answer (0.1)	0.10	\$125.00	\$12.50
DER	12/03/2018	Email from Hess re: arbitration (0.1)	0.10	\$125.00	\$12.50
DER	12/13/2018	Email from Will Farley re: discovery responses from accounting firm (0.1); email to Farley about confidentiality order (0.1)	0.20	\$125.00	\$25.00
DER	12/18/2018	Email from Hess about discovery responses (0.1)	0.10	\$125.00	\$12.50
DER	12/21/2018	Receive notice of hearing from Lancaster County clerk (0.1); email to Ms. Miller about docketing hearing (0.1)	0.20	\$125.00	\$25.00

DER	12/26/2018	Emails from Ms. Miller about docket (0.1); receive NEF for notice of hearing from Thompson (0.1)	0.20	\$125.00	\$25.00
DER	01/09/2019	Email from Mr. Hess about hearing (0.1); email to MBW's attorney about discovery (0.1); email to Mr. Hess about case (0.1); review arbitration clause and motion to compel arbitration; research re: SC Arbitration Act (0.6)	0.90	\$125.00	\$112.50
DER	01/10/2019	Email to Chuck Thompson about case (0.1); email from Mr. Hess about late discovery responses (0.1); email to Mr. Hess (0.1)	0.30	\$125.00	\$37.50
DER	01/12/2019	Email from Mr. Thompson about case (0.1)	0.10	\$125.00	\$12.50
DER	01/13/2019	Email to Mr. Thompson (0.1)	0.10	\$125.00	\$12.50
			Quantity Subtotal		4.2
			Services Subtotal		\$525.00

Expenses

Date	Description	Quantity	Rate	Total
11/26/2018	Copies: 38 x .20	1.00	\$7.60	\$7.60
Expenses Subtotal				\$7.60

Time Keeper	Quantity	Rate	Total
David Rothstein	4.2	\$125.00	\$525.00
		Quantity Total	4.2
		Subtotal	\$532.60
		Total	\$532.60
		Payment (01/15/2019)	-\$532.60
		Balance Owing	\$0.00

Detailed Statement of Account

Other Invoices

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
1048	06/01/2022	\$4,591.85	\$0.00	\$4,591.85

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
797	01/15/2019	\$532.60	\$532.60	\$0.00
			Outstanding Balance	\$4,591.85

Amount in Trust	\$3,200.00
Total Amount Outstanding	\$1,391.85

Please make all amounts payable to: Rothstein Law Firm, PA

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Paul David Hess
[REDACTED]

18-042

**Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al.
(Lancaster) 2018-CP-29-01127**

Services

Attorney	Date	Description	Quantity	Rate	Total
DER	01/27/2019	Receive and review Morphis Defendants' brief (0.8); email brief to Hess (0.1); research re: cases cited by Defendants (1.5); TC from Mr. Hess about hearing (0.2); prepare for hearing (1.0)	3.60	\$125.00	\$450.00
DER	01/28/2019	Travel to and from Lancaster for hearing (4.5); TC and meeting with Mr. Hess to prepare for hearing (0.5); attend hearing on motions to compel arbitration and to compel discovery responses; (3.0); confer with opposing counsel and client after hearing (0.3)	8.30	\$125.00	\$1,037.50
DER	01/29/2019	Receive Form 4 orders from Judge Gibbons (0.1)	0.10	\$125.00	\$12.50
DER	02/04/2019	Prepare proposed order for Judge Gibbons denying motion to compel arbitration (1.3); email to Judge Gibbons (0.1)	1.40	\$125.00	\$175.00
DER	02/05/2019	Email from Thompson about proposed order (0.1); email from Judge Gibbons about proposed order (0.1); email to and from Judge Gibbons about proposed order (0.1); upload proposed order via ECF (0.3)	0.60	\$125.00	\$75.00
DER	02/06/2019	Receive signed order from Judge Gibbons on motion to compel arbitration (0.1)	0.10	\$125.00	\$12.50
DER	02/11/2019	Receive supplemental discovery responses from CPA defendants (0.1); email to Hess about documents (0.1); email from and to Hess about discovery responses and Morphis's answer (0.2); confer with Ms. Miller about creating spreadsheet summary of documents (0.1)	0.50	\$125.00	\$62.50
DER	02/15/2019	Email from Thompson about case (0.1); emails to and from Hess about extension (0.2); emails to and from Hess about documents (0.1)	0.40	\$125.00	\$50.00

DER	02/17/2019	Upload documents to Dropbox (0.1); email to Hess about Dropbox (0.1); review documents from CPA Defendants (2.2); emails to Hess about documents (0.2)	2.60	\$125.00	\$325.00
DER	02/18/2019	Email from Hess about documents and net income figures (0.1); email to Hess (0.1); emails from Hess (0.1); TC to Hess (0.3); email to Thompson about case (0.2); email from Thompson (0.1); email to Hess (0.1); email to Thompson (0.2)	1.20	\$125.00	\$150.00
DER	02/19/2019	Email from Ms. Miller about spreadsheet and Dropbox folder (0.1)	0.10	\$125.00	\$12.50
DER	02/25/2019	Receive and review discovery from CPA Defendants (0.3); email discovery to Hess (0.1); email from Hess (0.1)	0.50	\$125.00	\$62.50
DER	03/07/2019	Receive and review answer from Morphis Defendants (0.2); email to Hess re: answer (0.1)	0.30	\$125.00	\$37.50
DER	03/10/2019	Review MBW's/Alexander's discovery responses (0.4); review Morphis answer (0.2)	0.60	\$125.00	\$75.00
			Quantity Subtotal		20.3
			Services Subtotal		\$2,537.50

Expenses

Date	Description	Quantity	Rate	Total
01/18/2019	Clerk of Court - filing fee for Motion to Compel Discovery Responses	1.00	\$31.74	\$31.74
01/25/2019	Copies: 56 x .20	1.00	\$11.20	\$11.20
01/28/2019	Mileage to and from Lancaster for hearing (230 miles @ \$0.58 per mi.)	1.00	\$133.40	\$133.40
01/28/2019	Breakfast on way to hearing (Chick-fil-a)	1.00	\$8.96	\$8.96
01/28/2019	Lunch on return from hearing (Taco Bell)	1.00	\$6.81	\$6.81
02/05/2019	Court Filing Fee - Order	1.00	\$31.74	\$31.74
02/06/2019	Copies: 6 x .20	1.00	\$1.20	\$1.20
02/11/2019	Copies: 2 x .20 - \$.40; Thumb Drive - \$5.00; and \$1.00 postage [Stamps.com]	1.00	\$6.40	\$6.40
03/08/2019	Copies: 8 x .20	1.00	\$1.60	\$1.60
Expenses Subtotal				\$233.05

Time Keeper	Quantity	Rate	Total
David Rothstein	20.3	\$125.00	\$2,537.50
		Quantity Total	20.3
		Subtotal	\$2,770.55
		Total	\$2,770.55
		Payment (03/11/2019)	-\$2,770.55
		Balance Owing	\$0.00

Detailed Statement of Account

Other Invoices

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
1048	06/01/2022	\$4,591.85	\$0.00	\$4,591.85

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
816	03/10/2019	\$2,770.55	\$2,770.55	\$0.00

Outstanding Balance **\$4,591.85**

Amount in Trust **\$3,200.00**

Total Amount Outstanding **\$1,391.85**

Please make all amounts payable to: Rothstein Law Firm, PA

Payment is due upon receipt.

Paul David Hess
[REDACTED]

18-042

**Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al.
(Lancaster) 2018-CP-29-01127**

Services

Attorney	Date	Description	Quantity	Rate	Total
hlm	02/12/2019	Created and worked on discovery spreadsheet (8.0)	8.00	\$75.00	\$600.00
hlm	02/13/2019	Worked on discovery spreadsheet (7.5)	7.50	\$75.00	\$562.50
hlm	02/14/2019	Worked on discovery spreadsheet (8.0)	8.00	\$75.00	\$600.00
hlm	02/15/2019	Worked on discovery spreadsheet (6.0)	6.00	\$75.00	\$450.00
DER	03/11/2019	Receive and review discovery responses from Morphis Defendants (0.5); email discovery responses to Hess (0.1); review and analyze documents from CPA Defendants, work on damages spreadsheet (3.5)	4.10	\$125.00	\$512.50
DER	03/12/2019	Review documents from CPA Defendants, work on damages spreadsheet (6.2); email to Hess re: spreadsheet (0.2)	6.40	\$125.00	\$800.00
DER	03/13/2019	Review Morphis Defendants' discovery responses (0.8); prepare letter to Thompson about discovery deficiencies (0.4); TC to Mr. Hess to discuss case (0.3)	1.50	\$125.00	\$187.50
hlm	03/14/2019	Researched past lawsuits defendants failed to respond to (3.0)	3.00	\$75.00	\$225.00
DER	03/20/2019	Emails from and to Hess re: phone call (0.1); TC to Mr. Hess to discuss case (0.4); emails from Hess about documents to produce (0.2); email to and from Hess about date of email from Alexander (0.1)	0.80	\$125.00	\$100.00
DER	03/21/2019	Perform calculations of pre-judgment interest (0.6); revise spreadsheet (0.3); email to Hess about revised spreadsheet (0.1); research re: pre-judgment interest (0.4)	1.40	\$125.00	\$175.00

DER	03/22/2019	Email to Thompson about damages and depositions (0.2); email from Thompson (0.1)	0.30	\$125.00	\$37.50
DER	03/25/2019	TC to Mr. Hess to review discovery responses (1.2); emails from Hess about text messages and documents (0.5); email to Hess (0.1); work on discovery responses (2.2); review text messages from Hess (1.2)	5.20	\$125.00	\$650.00
DER	03/26/2019	Email from Hess about text messages (0.1); email to Hess about text messages (0.2); work on discovery responses (3.5); emails to Hess about discovery responses (0.2); TC to Doug MacKelcan to discuss case (0.4); email from MacKelcan about depositions (0.1); email from Thompson (0.1); email from Hess about text messages (0.1); email from Hess about offer to Morphis for practice (0.1)	4.80	\$125.00	\$600.00
DER	03/27/2019	Email from Thompson about damages calculations (0.1); email to Hess (0.1); prepare email response to Thompson and send to Hess (0.3); email from Hess (0.1); finalize email to Thompson (0.1);	0.70	\$125.00	\$87.50
DER	03/28/2019	Finalize discovery responses and document production, Bates label documents (5.0); prepare cover letter and email for discovery responses (0.3)	5.30	\$125.00	\$662.50
DER	03/29/2019	Receive and review first set of discovery from Morphis Defendants (0.3); email to Hess about discovery (0.1)	0.40	\$125.00	\$50.00
DER	03/31/2019	Email from Farley about discovery responses (0.1)	0.10	\$125.00	\$12.50
DER	04/01/2019	Email from Farley about discovery responses (0.1)	0.10	\$125.00	\$12.50
DER	04/03/2019	Email from MacKelcan about depositions (0.1); email to MacKelcan about discovery responses (0.1); email from Thompson (0.1); email to Hess (0.1); email from Farley about email production (0.1); email from Hess (0.1); emails to and from Hess about email production (0.1)	0.70	\$125.00	\$87.50
DER	04/04/2019	Email from MacKelcan (0.1)	0.10	\$125.00	\$12.50
DER	04/10/2019	Email from Hess about uploading emails (0.1)	0.10	\$125.00	\$12.50
DER	04/11/2019	Email from Thompson about discovery responses from Morphis (0.1)	0.10	\$125.00	\$12.50
DER	04/15/2019	Review emails from Hess on Dropbox (1.5); email to Hess about attorney-client privilege email (0.1); email to Thompson (0.1)	1.70	\$125.00	\$212.50
DER	04/16/2019	Email from Hess (0.1); email from MacKelcan (0.1); email to Hess about dates re: Alexander (0.1); receive notice of protection for MacKelcan (0.1)	0.40	\$125.00	\$50.00
DER	04/18/2019	Email from Hess about deposition dates (0.1)	0.10	\$125.00	\$12.50
DER	04/22/2019	Email to MacKelcan about deposition dates (0.1); email from Thompson (0.1)	0.20	\$125.00	\$25.00
DER	04/23/2019	Receive order granting protection (0.1); email to Thompson about deposition (0.1)	0.20	\$125.00	\$25.00
DER	04/26/2019	Receive ADR notice from court (0.1); email from Thompson about depositions (0.1); email to Hess (0.1)	0.30	\$125.00	\$37.50
DER	04/29/2019	Email from MacKelcan about new deposition dates for Alexander (0.1); email to Hess (0.1); TC from Hess to discuss case (0.2)	0.40	\$125.00	\$50.00
DER	04/30/2019	Email from MacKelcan's paralegal about dates for Alexander and Hess depositions (0.1); email to Hess (0.1)	0.20	\$125.00	\$25.00
DER	05/02/2019	TC to Mr. Hess about depositions (0.2); email to Ms. Teague about deposition dates (0.1)	0.30	\$125.00	\$37.50

DER	05/06/2019	Email from Ms. Teague to Mr. Thompson about deposition dates (0.1)	0.10	\$125.00	\$12.50
				Quantity Subtotal	68.5
				Services Subtotal	\$6,937.50

Expenses

Date	Description	Quantity	Rate	Total
03/13/2019	Copies: 6 x .20	1.00	\$1.20	\$1.20
03/13/2019	Postage [Stamps.com]	1.00	\$0.50	\$0.50
03/28/2019	Copies: 60 x .20	1.00	\$12.00	\$12.00
03/28/2019	Postage: 2 @ \$1.75	1.00	\$3.50	\$3.50
04/23/2019	Copies: Copies: 2 x .20	2.00	\$0.20	\$0.40
Expenses Subtotal				\$17.60

Time Keeper	Quantity	Rate	Total
David Rothstein	36.0	\$125.00	\$4,500.00
Lorry Miller	32.5	\$75.00	\$2,437.50
		Quantity Total	68.5
		Subtotal	\$6,955.10
		Total	\$6,955.10

Detailed Statement of Account

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
832	05/07/2019	\$6,955.10	\$0.00	\$6,955.10
			Outstanding Balance	\$6,955.10
			Amount in Trust	\$3,028.13
			Total Amount Outstanding	\$3,926.97

Please make all amounts payable to: Rothstein Law Firm, PA

Payment is due upon receipt.



ROTHSTEIN LAW FIRM, PA

1312 Augusta Street ♦ Greenville, SC 29605

Invoice # 906
Date: 12/03/2019
Due Upon Receipt

Paul David Hess
[REDACTED]

18-042

Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al. (Lancaster) 2018-CP-29-01127

Services

Attorney	Date	Description	Quantity	Rate	Total
DER	05/08/2019	Email from Ms. Mebane about depositions (0.1); email to Ms. Beband (0.1); email from Thompson (0.1); email from Thompson about deposition dates (0.1); prepare deposition notice for Alexander (0.3); email from Ms. Mebane confirming address (0.1); email to Hess about depositions (0.1); TC from Mr. Hess (0.2); prepare cover letter and email (0.2); TC to court reporter (0.1); email from Thompson (0.1); email from court reporter (0.1); text messages with court reporter (9) (0.2)	1.80	\$125.00	\$225.00
DER	05/09/2019	Email from Thompson (0.1); email to Thompson about court reporter conflict (0.1); email from court reporter (0.1); email from Thompson (0.1)	0.40	\$125.00	\$50.00
DER	05/10/2019	Text message from court reporter (0.1); email to opposing counsel (0.1); email from Thompson about Hess depo (0.1); email to Hess (0.1); email to Thompson and MacKelcan (0.1); email from Thompson (0.1); email to Hess (0.1)	0.70	\$125.00	\$87.50
DER	05/11/2019	Email from Hess (0.1)	0.10	\$125.00	\$12.50
DER	05/12/2019	Emails from MacKelcan (0.1); email from Thompson (0.1); email to counsel (0.1)	0.30	\$125.00	\$37.50
DER	05/13/2019	Email from Ms. Mebane (0.1); prepare amended deposition notice (0.1); email and cover letter for deposition notice (0.1); email from Hess about deposition (0.1); email to Hess (0.1)	0.50	\$125.00	\$62.50
DER	05/24/2019	Email from Thompson about email search (0.1); email to Hess (0.1)	0.20	\$125.00	\$25.00

DER	05/30/2019	Receive and review supplemental discovery responses from Thompson (0.3); email to Hess (0.1)	0.40	\$125.00	\$50.00
DER	06/03/2019	Email from Thompson with second RFP (0.1); email to Hess (0.1); add documents to Dropbox folder (0.1); receive shells from Ms. Miller about RFP responses (0.1); email from MacKelcan about Alexander's jury duty (0.1)	0.50	\$125.00	\$62.50
DER	06/05/2019	Email to Hess (0.1)	0.10	\$125.00	\$12.50
DER	06/06/2019	Email from Thompson with second set of interrogatories (0.1); receive shell from Ms. Miller (0.1); receive updated COS from Ms. Miller (0.1)	0.30	\$125.00	\$37.50
DER	06/13/2019	TC to MacKelcan about case (0.2)	0.20	\$125.00	\$25.00
DER	06/17/2019	Email from Ms. Teague (0.1); email from Thompson (0.1)	0.20	\$125.00	\$25.00
DER	06/18/2019	Email from MacKelcan about jury duty of Alexander (0.1); email to MacKelcan (0.1); email from Hess (0.1); email to Hess (0.1); email from Hess about schedule for July and August (0.1); email to Hess about Alexander's depo (0.1); email from Hess (0.1); email to Defendants' counsel canceling Alexander depo (0.1); email from Thompson (0.1); email from Ms. Teague (0.1); email to Hess (0.1); email from MacKelcan about Alexander (0.1); email to Hess (0.1); email from Hess (0.1); TC to Ms. Teague (0.1); text messages with court reporter (7) (0.2)	1.70	\$125.00	\$212.50
DER	07/01/2019	Email from Ms. Teague about rescheduling depositions (0.1); email to Ms. Teague (0.1); email from Hess (0.1); email to Hess (0.1); email from Hess (0.1); email to Ms. Teague (0.1); email from Ms. Teague to Thompson (0.1)	0.70	\$125.00	\$87.50
DER	07/03/2019	Email from Ms. Teague about Alexander's availability in August (0.1); email to Ms. Teague (0.1); email from Ms. Teague (0.1); email from Thompson (0.1); email from Thompson confirming Aug. 15 (0.1); text messages with court reporter (4) (0.1)	0.60	\$125.00	\$75.00
DER	07/08/2019	Email from Thompson about August dates (0.1)	0.10	\$125.00	\$12.50
DER	07/09/2019	Email from Ms. Teague (0.1)	0.10	\$125.00	\$12.50
DER	07/18/2019	Email from Thompson about location of depo (0.1)	0.10	\$125.00	\$12.50
DER	07/19/2019	Email from Teague to Thompson about location (0.1); email from Thompson (0.1); email from Teague (0.1)	0.30	\$125.00	\$37.50
DER	07/22/2019	Email from Hess about Aug. availability (0.1)	0.10	\$125.00	\$12.50
DER	07/24/2019	Email from Hess nixing Aug. 23 (0.1)	0.10	\$125.00	\$12.50
DER	08/06/2019	Email from Teague confirming deposition on Aug. 15-16 (0.1); email to Ms. Teague (0.1)	0.20	\$125.00	\$25.00
DER	08/08/2019	Email from Ms. Teague (0.1)	0.10	\$125.00	\$12.50
DER	08/09/2019	Email from Hess (0.1); email to Hess (0.1); email from Hess (0.1); email to Defendants' counsel about moving depositions (0.1); email from Thompson (0.1); email from Hess (0.1); email to Defendants' counsel about moving deposition to Sept. (0.1); email to Hess (0.1); text messages with court reporter (4) (0.1)	0.90	\$125.00	\$112.50
DER	08/13/2019	Receive and review ADR letter (0.1); email from Hess about Sept. dates (0.1)	0.20	\$125.00	\$25.00
DER	08/15/2019	Email from Thompson about discovery responses (0.1)	0.10	\$125.00	\$12.50

DER	08/20/2019	Email from Farley with proposed scheduling order (0.1)	0.10	\$125.00	\$12.50
DER	08/27/2019	Email from Hess re: Sept. availability updated (0.1)	0.10	\$125.00	\$12.50
DER	09/02/2019	Email from Hess (0.1)	0.10	\$125.00	\$12.50
DER	09/09/2019	Receive NEF for protection request (0.1); NEF for order of protection (0.1); email from Ms. Miller about protection order (0.1)	0.30	\$125.00	\$37.50
DER	09/10/2019	Text message from Hess re: Oct. schedule (0.1)	0.10	\$125.00	\$12.50
DER	09/11/2019	Email from Thompson about deposition (0.1)	0.10	\$125.00	\$12.50
DER	09/12/2019	Email from MacKelcan about proposed scheduling order (0.1)	0.10	\$125.00	\$12.50
DER	09/13/2019	Email from Hess (0.1); email to MacKelcan about proposed scheduling order and depo scheduling (0.1)	0.20	\$125.00	\$25.00
DER	09/15/2019	Email from MacKelcan to Thompson about scheudling order (0.1)	0.10	\$125.00	\$12.50
DER	09/16/2019	Receive NEF for proposed scheduling order (0.1); receive NEF for notice of appearance by Skyler Wilson (0.1); email from Ms. Miller (0.1)	0.30	\$125.00	\$37.50
DER	09/18/2019	Receive NEF for scheduling order (0.1); email from Ms. Miller about order (0.1)	0.20	\$125.00	\$25.00
DER	09/24/2019	Email from Ms. Miller about call from Hess (0.1)	0.10	\$125.00	\$12.50
DER	10/07/2019	Message from Hess (0.1)	0.10	\$125.00	\$12.50
DER	10/09/2019	TC to David Hess to discuss depositions (0.2); email to Defendants' counsel about depositions (0.1); email from Ms. Teague (0.1); email to Teague (0.1); email from Ms. Teague about Nov. 18-20 (0.1); email from Ms. Teague (0.1); text messages with court reporter (0.1)	0.80	\$125.00	\$100.00
DER	10/10/2019	Text messages with court reporter (2) (0.1)	0.10	\$125.00	\$12.50
DER	10/11/2019	Prepare deposition notice and cover letter (0.4); email to Defendants' counsel with deposition notice (0.1); text messages with court reporter (3) (0.1)	0.60	\$125.00	\$75.00
DER	10/12/2019	Email from Thompson about depositions (0.1); email from Thompson about text messages (0.1); email to Thompson (0.1); email from Thompson (0.1)	0.40	\$125.00	\$50.00
DER	10/14/2019	Email from Ms. Teague about jury trial roster during the week of Nov. 18 (0.1); email from Thompson (0.1); email to Hess (0.1); email from Hess (0.1)	0.40	\$125.00	\$50.00
DER	10/15/2019	Text messages with court reporter (3) (0.1)	0.10	\$125.00	\$12.50
DER	10/23/2019	Email from Hess (0.1); email to Hess (0.1)	0.20	\$125.00	\$25.00
DER	10/24/2019	TC to Hess to discuss case (0.2)	0.20	\$125.00	\$25.00
DER	10/29/2019	Email to Defendants' counsel about depositions (0.1); email from Lyn Hudson about Dec. schedule for depositions (0.1)	0.20	\$125.00	\$25.00
DER	10/30/2019	Email from Hess about Nov. 11 (0.1); email from Thompson (0.1); email to Hess (0.1); email to Defendants' counsel (0.1); email from Ms. Teague (0.1); email to Hess (0.1); email to Hess about Nov. 11 (0.1); email to Thompson asking for clarification (0.1); email from Thompson (0.1); email to Defendants' counsel about week of Dec. 16 (0.1)	0.90	\$125.00	\$112.50
DER	11/04/2019	Email from Ms. Teague (0.1)	0.10	\$125.00	\$12.50

DER	11/21/2019	Text message from Hess (0.1)	0.10	\$125.00	\$12.50
DER	11/22/2019	Email from Thompson about conflict with week of Dec. 16 (0.1)	0.10	\$125.00	\$12.50
DER	11/25/2019	Email from Ms. Teague (0.1); email to Hess (0.1); email from Hess about week of Jan. 20 (0.1)	0.30	\$125.00	\$37.50
DER	12/03/2019	Email to Defendants' counsel about week of Jan. 20 (0.1); email to Hess (0.1); email to Defendants' counsel about mediation (0.1); finalize Morphis discovery responses (1.2); TC to Mr. Hess to discuss case (0.2); prepare cover letter for discovery responses (0.1); email to Defendants' counsel re: discovery responses (0.1)	1.90	\$125.00	\$237.50
			Quantity Subtotal		19.3
			Services Subtotal		\$2,412.50

Expenses

Date	Description	Quantity	Rate	Total
05/08/2019	Copies: Copies: 12 x .20	12.00	\$0.20	\$2.40
05/08/2019	Postage: Postage [stamps] 2 x .55	2.00	\$0.55	\$1.10
05/13/2019	Copies: Copies: 12 x .20	12.00	\$0.20	\$2.40
05/13/2019	Postage: Postage [Stamps.com] 2 x .50	1.00	\$1.00	\$1.00
10/11/2019	Copies: Copies: 11 x .20	11.00	\$0.20	\$2.20
10/11/2019	Postage: Postage [stamps]: 2 x .55	2.00	\$0.55	\$1.10
Expenses Subtotal				\$10.20

Time Keeper	Quantity	Rate	Total
David Rothstein	19.3	\$125.00	\$2,412.50
		Quantity Total	19.3
		Subtotal	\$2,422.70
		Total	\$2,422.70

Detailed Statement of Account

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
906	12/03/2019	\$2,422.70	\$0.00	\$2,422.70
			Outstanding Balance	\$2,422.70
			Amount in Trust	\$3,073.03

Total Credit	\$650.33

Please make all amounts payable to: Rothstein Law Firm, PA

Payment is due upon receipt.



ROTHSTEIN LAW FIRM, PA

1312 Augusta Street ♦ Greenville, SC 29605

Invoice # 920
Date: 01/27/2020
Due Upon Receipt

Paul David Hess
[REDACTED]

18-042

Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al. (Lancaster) 2018-CP-29-01127

Services

Attorney	Date	Description	Quantity	Rate	Total
DER	12/04/2019	Email from Ms. Teague about Alexander's availability for deposition (0.1); email to Teague (0.1); email to Teague about mediation (0.1); email from Teague about Fred Crawford (0.1); email from Thompson about mediators (0.1); research re: Fred Crawford (0.2); email to Ms. Teague about Crawford (0.1); email to Hess about Crawford (0.1); email to Chuck Thompson about deposition dates (0.1); email from MacKelcan about Crawford (0.1); email to MacKelcan about Crawford (0.1)	1.20	\$125.00	\$150.00
DER	12/06/2019	Email from Ms. Teague about depositions (0.1); email to Hess (0.1); email to Teague about deposition notice (0.1); email from MacKelcan about mediation (0.1); email from Hess about depositions (0.1); email to Hess about deposition dates (0.1); email from Thompson about dates (0.1); email from Hess (0.1); email to Hess (0.1); email from Thompson about Morphis's availability (0.1)	1.00	\$125.00	\$125.00
DER	12/10/2019	Email from Ms. Teague about mediator's availability (0.1); email to Hess (0.1); email from Hess (0.1); email to Ms. Teague and opposing counsel about mediation date (0.1)	0.40	\$125.00	\$50.00
DER	12/20/2019	Receive and review subpoena to Clark Moore (0.1)	0.10	\$125.00	\$12.50
hlm	12/23/2019	Deposition: Scheduled court reporter for Alexander and Morphis depositions	0.10	\$75.00	\$7.50
DER	12/23/2019	Prepare deposition notice for Alexander and Morphis and cover letter (0.2); email to opposing counsel about depositions (0.1); confer with Ms. Miller about scheduling depositions (0.1); email from court reporter confirming depositions (0.1); email from Hess about other depositions	0.60	\$125.00	\$75.00

(0.1)					
DER	12/30/2019	Messages from Hess about depositions and subpoena to accountant (0.1); email to Hess (0.1); email to opposing counsel about other depositions (0.1)	0.30	\$125.00	\$37.50
DER	12/31/2019	Email from Ms. Miller about subpoena to Clark Moore (0.1)	0.10	\$125.00	\$12.50
DER	01/08/2020	TC from Mr. Hess about depositions (0.2); email to opposing counsel (0.1); email from Thompson (0.1); email to Thompson (0.1); email from Thompson (0.1); email to Hess (0.1); email to Thompson about location of depositions (0.1); email from Thompson about accepting subpoenas for Tyner and Henson (0.1); email to Thompson (0.1); email from Thompson about Morphis's deposition (0.1); email from Thompson about conflict with 1/22 (0.1); email to Thompson about conflict with 1/22 (0.1)	1.40	\$125.00	\$175.00
DER	01/09/2020	Email from MacKelcan about depositions (0.1); message from Hess (0.1); TC to Hess about schedule (0.2); email to Ms. Miller (0.1)	0.50	\$125.00	\$62.50
DER	01/13/2020	Email from MacKelcan (0.1); email to Hess (0.1); message to MacKelcan (0.1)	0.30	\$125.00	\$37.50
DER	01/14/2020	Email to opposing counsel about deposition scheduling (0.1); TC to MacKelcan and Thompson (0.2)	0.30	\$125.00	\$37.50
hlm	01/16/2020	Deposition: Rescheduled court reporter for Alexander and Morphis depositions.	0.10	\$75.00	\$7.50
DER	01/16/2020	Message from Hess (0.1); email from Thompson with deposition notice (0.1); email to MacKelcan and Thompson (0.1); email from Thompson (0.1); email to Hess (0.1); email from MacKelcan confirming depositions (0.1); email from Hess (0.1)	0.70	\$125.00	\$87.50
DER	01/17/2020	Message to Ms. Teague about court reporter (0.1); email from Teague to Thompson (0.1); email from Thompson (0.1); email from Ms. Teague (0.1)	0.40	\$125.00	\$50.00
DER	01/19/2020	TC to Mr. Hess to prepare for deposition (0.5); review documents to prepare for depositions (2.8); prepare amended deposition notice and cover letter (0.2); email to opposing counsel re: amended deposition notice (0.1)	3.60	\$125.00	\$450.00
hlm	01/20/2020	Prepared spreadsheet for Morphis Income and Expense Report	3.00	\$75.00	\$225.00
DER	01/20/2020	Travel to and from Columbia for Hess deposition (3.2); meeting with Hess to discuss deposition (0.4); attend/defend Hess deposition (3.5); TC from Mr. Hess to discuss damages calculation (0.4)	7.50	\$125.00	\$937.50
DER	01/21/2020	Email to MacKelcan about availability of TV screen for use during deposition (0.1); email to Hess (0.1)	0.20	\$125.00	\$25.00
DER	01/22/2020	Email from MacKelcan (0.1); prepare for depositions and copy deposition exhibits (4.8); TC to Hess to discuss depositions (0.3)	5.20	\$125.00	\$650.00
DER	01/23/2020	Travel to Hartsville for Alexander deposition (3.2); meeting with Hess to discuss deposition (0.3); take deposition of Greg Alexander and lunch with Hess to discuss deposition (5.5); prepare for Morphis deposition (2.2)	11.20	\$125.00	\$1,400.00
DER	01/24/2020	Meeting with Hess to discuss Morphis deposition (0.3); take Morphis deposition and lunch with Hess to discuss deposition (6.0); return travel to Greenville and call to Hess to discuss depositions and case (3.2)	9.50	\$125.00	\$1,187.50
DER	01/26/2020	Email from Clark Moore's office re: subpoena responses (0.1); review documents from Moore's office (0.4); email to Ms. Miller about documents (0.1); email to court reporter firm about deposition exhibits (0.1)	0.70	\$125.00	\$87.50

Quantity Subtotal 48.4

Services Subtotal \$5,890.00

Expenses

Date	Description	Quantity	Rate	Total
12/03/2019	Copies: Copies: 66 x .20	66.00	\$0.20	\$13.20
12/03/2019	Postage: Postage [Stamps.com] 2 x \$1.45	2.00	\$1.45	\$2.90
01/19/2020	Copies: Copies: 11 x .20	11.00	\$0.20	\$2.20
01/19/2020	Postage: Postage stamps 2 x .55	2.00	\$0.55	\$1.10
01/20/2020	Mileage to and from Columbia for Hess deposition (210 miles @ \$0.575 per mi.)	1.00	\$120.75	\$120.75
01/22/2020	Copies: Copies: 450 x .20	450.00	\$0.20	\$90.00
01/22/2020	Copies: Copies: 192 x .20	192.00	\$0.20	\$38.40
01/23/2020	Breakfast on way to deposition	1.00	\$12.50	\$12.50
01/23/2020	Mileage to Hartsville for deposition (160 miles @ \$0.575 per mi.)	1.00	\$92.00	\$92.00
01/24/2020	Mileage from Hartsville return to Greenville from depositions (160 miles @ \$0.575 per mi.)	1.00	\$92.00	\$92.00
Expenses Subtotal				\$465.05

Time Keeper	Quantity	Rate	Total
David Rothstein	45.2	\$125.00	\$5,650.00
Lorry Miller	3.2	\$75.00	\$240.00
Quantity Total			48.4
Subtotal			\$6,355.05
Total			\$6,355.05

Detailed Statement of Account

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
920	01/27/2020	\$6,355.05	\$0.00	\$6,355.05
Outstanding Balance				\$6,355.05
Amount in Trust				\$4,650.33
Total Amount Outstanding				\$1,704.72

Please make all amounts payable to: Rothstein Law Firm, PA

Payment is due upon receipt.



ROTHSTEIN LAW FIRM, PA

1312 Augusta Street ♦ Greenville, SC 29605

Invoice # 927
Date: 03/10/2020
Due Upon Receipt

Paul David Hess
[REDACTED]

18-042

Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al. (Lancaster) 2018-CP-29-01127

Services

Attorney	Date	Description	Quantity	Rate	Total
DER	01/27/2020	Email from Mr. Hess about discovery (0.1); email from Ms. Miller re: original deposition exhibits for Hess and Morphis (0.1); email to Ms. Miller about subpoena responses from Clark Moore (0.1); email to Hess about case (0.1); email from EveryWord re: discount for Morphis deposition (0.1)	0.50	\$125.00	\$62.50
DER	01/28/2020	Email from Ms. Teague about mediation dates (0.1); emails from Thompson about mediation (0.1); emails to and from opposing counsel about dates of mediation (0.1); TC to Mr. Hess about mediation dates (0.1)	0.40	\$125.00	\$50.00
DER	01/30/2020	Email from Ms. Teague about moving mediation after tax season (0.1); email to Hess about delay (0.1)	0.20	\$125.00	\$25.00
DER	01/31/2020	TC to Mr. Hess (0.1)	0.10	\$125.00	\$12.50
DER	02/04/2020	Receive email re: deposition transcript for Mr. Hess (0.1); email to Hess re: errata sheet for deposition (0.1); email to Mr. MacKelcan about mediation (0.1)	0.30	\$125.00	\$37.50
DER	02/05/2020	Email from Mr. MacKelcan about mediation (0.1)	0.10	\$125.00	\$12.50
DER	02/06/2020	Email from Everyword about Alexander deposition (0.1); email to and from Ms. Miller about transcript (0.1); email from Ms. Teague about mediation week of April 20 (0.1)	0.30	\$125.00	\$37.50
DER	02/08/2020	Email from Mr. Thompson about mediation date (0.1)	0.10	\$125.00	\$12.50

DER	02/10/2020	Email from Hess about mediation (0.1); email to Defendants' counsel about mediation dates (0.1); email to Hess (0.1)	0.30	\$125.00	\$37.50
DER	02/12/2020	Email from Everyword about Morphis deposition (0.1)	0.10	\$125.00	\$12.50
DER	02/18/2020	Email from Ms. Teague about mediation dates (0.1); email to Ms. Teague (0.1)	0.20	\$125.00	\$25.00
DER	02/19/2020	Email from Ms. Teague to firm up mediation date (0.1); email from Hess re: additional discovery (0.1);	0.20	\$125.00	\$25.00
DER	02/20/2020	Email from Ms. Miller to Garber about transcript (0.1); email from Garber about Hess file (0.1)	0.20	\$125.00	\$25.00
DER	02/23/2020	Receive errata sheet from Hess (0.1)	0.10	\$125.00	\$12.50
DER	02/24/2020	Email from Ms. Teague to Mr. Thompson about mediation date (0.1); email from Thompson (0.1); email to Hess confirming mediation (0.1)	0.30	\$125.00	\$37.50
DER	02/26/2020	Email and letter from MacKelcan about amending answer (0.1); email from Thompson about amending answer (0.1); review punitive damages statute and case (0.2); email to Defendants' counsel about amending answer (0.1); email from Ms. Wilson about amended answer (0.1); TC to Hess to discuss issue and mediation (0.1); email from and to Hess about letter (0.1); email from Ms. Teague about moving mediation date (0.1); email to Hess (0.1); emails to and from Ms. Teague (0.1)	1.10	\$125.00	\$137.50
DER	02/27/2020	Email from Mr. Hess confirming availability for mediation (0.1); email from Thompson (0.1); email to Defendants' counsel about mediation (0.1); email to Hess (0.1)	0.40	\$125.00	\$50.00
DER	03/02/2020	Receive and review amended answer (0.1)	0.10	\$125.00	\$12.50
DER	03/03/2020	Email from Fred Crawford about mediation (0.1); email to Hess (0.1); email re: Alexander errata sheet (0.1)	0.30	\$125.00	\$37.50
Quantity Subtotal					5.3
Services Subtotal					\$662.50

Expenses

Date	Description	Quantity	Rate	Total
01/26/2020	Copies: Copies: 2 x .20	2.00	\$0.20	\$0.40
01/27/2020	Copies: Copies: 28 x .20	28.00	\$0.20	\$5.60
02/05/2020	Deposition: Garber Court Reporting (Invoice 17063)	1.00	\$337.40	\$337.40
02/11/2020	Deposition: EveryWord (Inv. 32952) - Deposition of Gregory M. Alexander	1.00	\$1,111.80	\$1,111.80
02/13/2020	Deposition: EveryWord (Inv. 33030) - Deposition of Elizabeth J. Morphis, MD	1.00	\$871.70	\$871.70
03/03/2020	Copies: Copies: 6 x .20	6.00	\$0.20	\$1.20
Expenses Subtotal				\$2,328.10

Time Keeper	Quantity	Rate	Total
David Rothstein	5.3	\$125.00	\$662.50

Quantity Total	5.3
Subtotal	\$2,990.60
Total	\$2,990.60

Detailed Statement of Account

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
927	03/10/2020	\$2,990.60	\$0.00	\$2,990.60
Outstanding Balance				\$2,990.60
Amount in Trust				\$2,895.28
Total Amount Outstanding				\$95.32

Please make all amounts payable to: Rothstein Law Firm, PA

Payment is due upon receipt.

Paul David Hess
[REDACTED]

18-042

**Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al.
(Lancaster) 2018-CP-29-01127**

Services

Attorney	Date	Description	Quantity	Rate	Total
DER	03/10/2020	Email to court reporter about errata sheet (0.1); email to Ms. Miller about transcripts (0.1); email from Mr. Greathouse about errata sheet (0.1); email from MacKelcan about errata sheet (0.1)	0.40	\$125.00	\$50.00
DER	03/11/2020	Email from Thompson about errata sheet (0.1); email from MacKelcan with letter re: dismissal (0.2); email to Hess (0.1); emails from Hess about letter (0.1)	0.50	\$125.00	\$62.50
DER	03/20/2020	Review errata sheet (0.2); email errata sheet to court reporter (0.1)	0.30	\$125.00	\$37.50
DER	03/23/2020	Email from court reporter confirming receipt of errata sheet (0.1)	0.10	\$125.00	\$12.50
DER	04/13/2020	Email to Fred Crawford about mediation (0.1); email from Crawford (0.1); email to and from Crawford about mediation logistics (0.1)	0.30	\$125.00	\$37.50
DER	04/14/2020	Email from Crawford about mediation (0.1); email from MacKelcan about mediation (0.1); email to Hess about mediation (0.1)	0.30	\$125.00	\$37.50
DER	04/15/2020	Email to Hess about mediation agreement (0.1); email from Hess with signed mediation agreement (0.1)	0.20	\$125.00	\$25.00
DER	04/16/2020	Work on revised damages calculations (1.6); TC from Fred Crawford to discuss mediation (0.5); email to Hess with revised damages calculations (0.1); email from MacKelcan's office re: expert witness (0.1); TC to David and Stephanie Hess to prepare for mediation (1.0); email to Crawford about mediation and attaching signed mediation agreement (0.1); email from Thompson about mediation (0.1)	3.50	\$125.00	\$437.50

DER	04/17/2020	Review/annotate deposition transcripts (2.2); prepare updated spreadsheet calculations (0.7); email from Crawford (0.1); email from Crawford with directions for mediation conference (0.1); email to Hess (0.1); receive and review NEF for MBW and Alexander's Motion for Summary Judgment (0.1); email to Hess about motion (0.1)	3.40	\$125.00	\$425.00
DER	04/18/2020	Review and annotate deposition transcripts (2.0)	2.00	\$125.00	\$250.00
DER	04/19/2020	Review and annotate deposition transcripts (2.2); email from Hess about motion (0.1); email to Hess (0.1); prepare chart for mediation (0.6); email from Thompson to Crawford about mediation (0.1); email from MacKelcan about summary judgment motion (0.1); prepare for mediation (4.0); email from Thompson about summary judgment arguments (0.1); emails to Hess (0.1); TC from Mr. Hess to discuss mediation (0.4)	7.80	\$125.00	\$975.00
DER	04/20/2020	Work on outline for mediation (0.6); TC from Hess to prepare for mediation (0.2); attend Zoom mediation (6.9); TC from Fred Crawford (0.2)	7.90	\$125.00	\$987.50
DER	04/21/2020	Email from Mr. Crawford about mediation agreement (0.1)	0.10	\$125.00	\$12.50
DER	04/23/2020	Receive NEF re: proof of ADR (0.1)	0.10	\$125.00	\$12.50
DER	04/24/2020	Email signed mediation engagement letter to Crawford (0.1)	0.10	\$125.00	\$12.50
DER	04/27/2020	Email from Crawford about mediation invoice (0.1)	0.10	\$125.00	\$12.50
DER	04/28/2020	Work on additional discovery to Defendants (0.5); prepare summons to Springs Hospital (0.4)	0.90	\$125.00	\$112.50
			Quantity Subtotal		28.0
			Services Subtotal		\$3,500.00

Expenses

Date	Description	Quantity	Rate	Total
01/23/2020	Breakfast on way to Alexander deposition (McDonald's Clinton--Visa)	1.00	\$12.50	\$12.50
01/24/2020	Hampton Inn Hartsville--Lodging for depositions (Visa)	1.00	\$150.19	\$150.19
03/18/2020	Copies: Copies: 150 x .20	150.00	\$0.20	\$30.00
04/20/2020	Color Copies: Color Copies: 34 x .60	34.00	\$0.60	\$20.40
04/20/2020	Copies: Copies: 365 x .20	365.00	\$0.20	\$73.00
05/01/2020	Mediation: Richardson Plowden & Robinson, PA - mediation (Inv. #005924-00008)	1.00	\$2,165.36	\$2,165.36
Expenses Subtotal				\$2,451.45

Time Keeper	Quantity	Rate	Total
David Rothstein	28.0	\$125.00	\$3,500.00
		Quantity Total	28.0
		Subtotal	\$5,951.45
		Total	\$5,951.45

Detailed Statement of Account

Other Invoices

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
927	03/10/2020	\$2,990.60	\$2,895.28	\$95.32

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
943	05/01/2020	\$5,951.45	\$0.00	\$5,951.45

Outstanding Balance **\$6,046.77**

Amount in Trust **\$5,000.00**

Total Amount Outstanding **\$1,046.77**

Please make all amounts payable to: Rothstein Law Firm, PA

Payment is due upon receipt.



Invoice # 1026
Date: 02/23/2022
Due Upon Receipt

Paul David Hess
[REDACTED]

18-042

**Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al.
(Lancaster) 2018-CP-29-01127**

Services

Attorney	Date	Description	Quantity	Rate	Total
DER	05/19/2020	Receive and review amended answer for Morphis Defendants (0.2)	0.20	\$125.00	\$25.00
DER	06/01/2020	Receive notice of summary judgment hearing (0.1); email to Ms. Miller to docket hearing (0.1); email to Mr. Hess (0.1)	0.30	\$125.00	\$37.50
DER	06/02/2020	Receive NEF for proposed order of protection from MacKelcan (0.1); email from Ms. Miller about NEF (0.1)	0.20	\$125.00	\$25.00
DER	06/03/2020	Email from Clerk's office about inadvertent scheduling of hearing (0.1); email to Hess (0.1); receive NEF for order of protection (0.1)	0.30	\$125.00	\$37.50
DER	06/05/2020	Receive and review motion for summary judgment from Morphis Defendants (0.5)	0.50	\$125.00	\$62.50
DER	06/15/2020	Receive and review discovery from CPA Defendants (0.2)	0.20	\$125.00	\$25.00
DER	07/19/2020	Review CPA Defendants' discovery (0.2); email to Doug MacKelcan to request extension (0.1)	0.30	\$125.00	\$37.50
DER	07/21/2020	Email from MacKelcan (0.1); email to MacKelcan (0.1)	0.20	\$125.00	\$25.00
DER	07/22/2020	Email from MacKelcan (0.1)	0.10	\$125.00	\$12.50
DER	08/06/2020	Receive notice of summary judgment hearing (0.1); email from Ms. Miller about motions roster (0.1)	0.20	\$125.00	\$25.00
DER	08/07/2020	Email from Judge McCaslin's law clerk about hearing (0.1); email from MacKelcan to law clerk (0.1); email from law clerk to MacKelcan (0.1);	0.40	\$125.00	\$50.00

email from Thompson to law clerk (0.1)					
DER	08/11/2020	Email from MacKelcan's paralegal to law clerk about conflict during week of 8/31 (0.1)	0.10	\$125.00	\$12.50
DER	08/17/2020	Email from law clerk about hearing schedule (0.1)	0.10	\$125.00	\$12.50
DER	08/28/2020	Receive and review Morphis Defendants' memo in support of summary judgment and attachments (1.0); email from Ms. Miller about brief (0.1); receive and review CPA Defendants' motion to deem requests admitted (0.2)	1.30	\$125.00	\$162.50
DER	08/29/2020	Review and annotate depositions (3.2)	3.20	\$125.00	\$400.00
DER	08/30/2020	Review summary judgment motions and brief (1.5); prepare memo in opposition to motion for summary judgment and Rule 56(f) affidavit (1.5); review and annotate deposition transcripts (4.5)	7.50	\$125.00	\$937.50
DER	08/31/2020	Finalize and file summary judgment opposition brief (0.2); email to Judge McCaslin with courtesy copy of brief (0.1); research re: Judge McCaslin (0.2); participate in hearing (0.8); email to Hess about hearing (0.2)	1.50	\$125.00	\$187.50
DER	09/01/2020	Email from Judge McCaslin's law clerk with copy of Form 4 order (0.1); receive NEF for order (0.1); email to Hess (0.1); email from Hess (0.1); email from Hess about statute of limitations issue (0.1)	0.50	\$125.00	\$62.50
DER	09/10/2020	Email from Mr. Wilson about deposition of Clark Moore (0.1); email to Mr. Wilson about depositions (0.1)	0.20	\$125.00	\$25.00
DER	09/11/2020	Email from Mr. Wilson about deposition dates (0.1)	0.10	\$125.00	\$12.50
DER	09/28/2020	Email from Ms. Miller about message from Hess re: retainer check (0.1)	0.10	\$125.00	\$12.50
DER	09/30/2020	Receive notice from court about motions hearing (0.1)	0.10	\$125.00	\$12.50
DER	10/02/2020	Email from Ms. Teague about deposition dates (0.1)	0.10	\$125.00	\$12.50
DER	10/05/2020	Email from Ms. Teague about depositions (0.1); TC to Mr. Hess about availability (0.2); email to Ms. Teague (0.1)	0.40	\$125.00	\$50.00
DER	10/06/2020	Email from Ms. Teague about deposition dates (0.1)	0.10	\$125.00	\$12.50
DER	10/07/2020	Email from Thompson (0.1); email from Teague (0.1); email from Thompson (0.1); email to everyone re: deposition dates (0.1)	0.40	\$125.00	\$50.00
DER	10/08/2020	Email from MacKelcan about deposition (0.1)	0.10	\$125.00	\$12.50
DER	10/09/2020	TC to Mr. Moore to discuss deposition (0.3); email to counsel about Moore's deposition (0.1); email from Ms. Teague (0.1)	0.50	\$125.00	\$62.50
DER	10/12/2020	Prepare deposition notices for Hostetler, Henson, and Tyner and cover letter (0.3); emails from court reporter confirming depositions (0.1); email to counsel (0.1); email from Thompson (0.1); email to counsel re: deposition notices (0.1)	0.70	\$125.00	\$87.50
DER	10/13/2020	Email from Ms. Miller to court reporter about moving Henson and Tyner's depositions (0.1); email from Ms. Miller with amended deposition notice (0.1); receive confirmation of deposition from court reporter (0.1); email from Mr. Wilson with documents subpoenaed from Moore (0.1); review documents from Moore (0.5)	0.90	\$125.00	\$112.50
DER	10/14/2020	Email from Ms. Teague to Mr. Thompson (0.1); email from Thompson (0.1); receive notice of deposition for Clarke Moore (0.1); receive deposition subpoena for Moore (0.1)	0.40	\$125.00	\$50.00

DER	10/15/2020	Email from MacKelcan about exhibits for deposition (0.1); email from Ms. Miller about confirming deposition (0.1); email from court reporter with Zoom link for deposition (0.1); email from Ms. Teague (0.1); email to Ms. Teague (0.1); email to opposing counsel with Zoom link (0.1); prepare for deposition of Ms. Hostetler (4.2); prepare exhibits for deposition (1.4); email from Ms. Teague (0.1)	6.30	\$125.00	\$787.50
DER	10/16/2020	Finalize scanning of exhibits (0.8); work on deposition outline (1.1); email to opposing counsel and court reporter about deposition exhibits (0.1); take deposition of Ms. Hostetler (2.1); email additional document to court reporter (0.1); emails from court reporter about exhibits (0.1); prepare amended deposition notice for Tyner and Henson (0.3); email to opposing counsel with amended deposition notice (0.1); email to Mr. Moore (0.1); email from Mr. Moore (0.1); email from Ms. Miller to court reporter about upcoming depositions (0.1)	5.00	\$125.00	\$625.00
DER	10/19/2020	Email from Ms. Teague with link for Moore deposition (0.1); email from Ms. Teague about forwarding link to Mr. Moore (0.1); email to Mr. Moore (0.1); TC to Mr. Moore to prepare for deposition (0.6); email to Mr. Hess about deposition (0.1); email exhibits to Mr. Moore (0.1); email from Mr. Moore (0.1); emails to Mr. Moore with key documents (0.1); email from Thompson about rescheduling depositions (0.1); email to Hess about rescheduling depositions (0.1); email from Ms. Miller to court reporter (0.1); email from Hess (0.1); prepare and file motion for leave to file RFA responses late (0.7); email to Judge Gibbons (0.1); email from MacKelcan to Thompson (0.1); message to MacKelcan (0.1); email from MacKelcan (0.1); prepare outline for Moore deposition (0.6)	3.40	\$125.00	\$425.00
DER	10/20/2020	Deposition of Clarke Moore (1.8); receive NEF about motion (0.1); email from Ms. Miller about hearing (0.1); email from Judge Gibbons's secretary about upcoming roster (0.1); email to Ms. Penland (0.1); email to Mr. Thompson about discovery deficiencies (0.1); email to Mr. Hess (0.1); email from Thompson (0.1); review Morphis discovery responses (0.5)	3.00	\$125.00	\$375.00
DER	10/21/2020	Email from Ms. Miller about May 28 letter from Thompson (0.1)	0.10	\$125.00	\$12.50
DER	10/22/2020	Email from Judge Henderson about hearing (0.1); prepare responses to CPA Defendants' RFAs (0.4); email to Hess about responses (0.2); email from Thompson about rescheduling depositions (0.1); email to Hess (0.1); revise damages spreadsheets (0.8); TC to Hess (0.4); email from Hess (0.1)	2.40	\$125.00	\$300.00
DER	10/23/2020	Email from court reporter to MacKelcan about read-and-sign (0.1); receive Hostetler deposition transcript (0.1); work on CPA's discovery responses (2.2)	2.40	\$125.00	\$300.00
DER	10/25/2020	Email to MacKelcan with discovery responses (0.1)	0.10	\$125.00	\$12.50
DER	10/26/2020	Email from Thompson about deposition dates (0.1); TC from Mr. Hess to discuss demand against CPAs (0.4); email from MacKelcan to court reporter about Hostetler transcript (0.1); TC from MacKelcan (0.3); email to MacKelcan with demand as to CPAs (0.2); email to MacKelcan about confidentiality of demand (0.1)	1.20	\$125.00	\$150.00
DER	10/27/2020	Email from Ms. Miller about call from Lancaster clerk about hearing (0.1); email courtesy copy of motion to Judge Henderson (0.1); email from MacKelcan to Judge Henderson (0.1); receive and review brief from MacKelcan (0.6); email from MacKelcan (0.1)	1.00	\$125.00	\$125.00
DER	10/28/2020	Email from Judge Henderson's law clerk about log-in instructions to virtual courtroom (0.1); prepare outline for hearing (0.8)	0.90	\$125.00	\$112.50
DER	10/29/2020	Email from MacKelcan (0.1); email from MacKelcan with counter-offer (0.2); prepare for hearing (0.5); email from Thompson (0.1); email to	2.50	\$125.00	\$312.50

		Thompson (0.1); attend motions hearing (1.0); email to Hess (0.1); emails from Hess about offer (0.2); email to MacKelcan (0.2)			
DER	11/04/2020	Email to opposing counsel about rescheduling depositions (0.1); TC from Hess (0.2); email to opposing counsel (0.1); email from Ms. Teague (0.1); email from Mr. Thompson (0.1)	0.60	\$125.00	\$75.00
DER	11/05/2020	Email from Thompson about deposition dates (0.1); email to Thompson (0.1); email from Thompson (0.1); email from Ms. Teague (0.1); email to Ms. Miller to schedule depositions (0.1); email from Ms. Miller (0.1); email from Ms. Miller confirming court reporter (0.1); email from Ms. Miller with draft of notice (0.1)	0.80	\$125.00	\$100.00
DER	11/06/2020	Email from Ms. Miller about deposition notice (0.1); email to Ms. Miller (0.1); email from Ms. Miller to counsel with copy of deposition notice (0.1)	0.30	\$125.00	\$37.50
DER	11/09/2020	Email from Judge Henderson to MacKelcan requesting proposed order (0.1)	0.10	\$125.00	\$12.50
DER	11/10/2020	Email from Mr. Wilson to Judge Henderson (0.1)	0.10	\$125.00	\$12.50
DER	11/11/2020	Email from Mr. Wilson to Judge Henderson (0.1); review proposed order (0.2)	0.30	\$125.00	\$37.50
DER	11/18/2020	Email from Ms. Miller about confirmation of depositions (0.1); email from court reporter about Zoom link for depositions (0.1); email to opposing counsel with link for depositions (0.1); prepare for depositions of Tyner and Henson (3.8); copy and scan deposition exhibits (2.0)	6.10	\$125.00	\$762.50
DER	11/19/2020	Email to opposing counsel and court reporter re: deposition exhibits (0.1); finalize outlines for depositions (1.6); email to Hess about depositions (0.1); email from Thompson with exhibits (0.1); email from court reporter (0.1); take deposition of Sandra Tyner (2.6); take deposition of Tom Henson (3.2)	7.80	\$125.00	\$975.00
DER	11/23/2020	Email from court reporter about Tyner and Henson depositions (0.1); email to Ms. Miller about transcripts (0.1)	0.20	\$125.00	\$25.00
DER	11/26/2020	Prepare additional discovery to Defendants (2.8); email to counsel about discovery (0.1)	2.90	\$125.00	\$362.50
DER	12/03/2020	Email from Hess about additional discovery (0.1); email to Hess (0.1)	0.20	\$125.00	\$25.00
DER	12/07/2020	Email from clerk about motions hearing (0.1)	0.10	\$125.00	\$12.50
DER	12/08/2020	Email from MacKelcan to clerk (0.1); receive NEF for proposed order (0.1); email from Mr. Wilson to Judge Henderson (0.1); email from clerk (0.1); email from Wilson to clerk (0.1); email from clerk (0.1); receive NEF for signed order from Judge Henderson (0.1)	0.60	\$125.00	\$75.00
DER	12/29/2020	Receive and review renewed motion for summary judgment from MacKelcan (0.4)	0.40	\$125.00	\$50.00
DER	01/12/2021	Receive certificate in lieu of signatures for Henson and Tyner (0.1)	0.10	\$125.00	\$12.50
DER	01/17/2021	Email from Hess about status of case (0.1)	0.10	\$125.00	\$12.50
DER	01/29/2021	Email from Hess (0.1)	0.10	\$125.00	\$12.50
DER	02/01/2021	Email from Ms. Miller to Hess (0.1)	0.10	\$125.00	\$12.50
DER	02/04/2021	Email to opposing counsel about discovery responses (0.1)	0.10	\$125.00	\$12.50
DER	02/15/2021	Email from Thompson (0.1)	0.10	\$125.00	\$12.50

DER	02/16/2021	Email to Thompson (0.1); email from Thompson (0.1)	0.20	\$125.00	\$25.00
DER	02/17/2021	Email to Thompson (0.1); email from Thompson (0.1); review responses to RFAs (0.2)	0.40	\$125.00	\$50.00
DER	02/19/2021	Email from Thompson about discovery (0.1); receive notice of hearing (0.1); email to Ms. Miller about hearing (0.1); email from Ms. Miller about docket (0.1); email to Thompson (0.1); email from Thompson (0.1)	0.60	\$125.00	\$75.00
DER	02/23/2021	Email from Hess (0.1)	0.10	\$125.00	\$12.50
DER	02/25/2021	Email from Wilson about discovery responses (0.1)	0.10	\$125.00	\$12.50
DER	03/02/2021	Receive NEF for Morphis's renewed motion for summary judgment (0.1); review motion (0.6)	0.70	\$125.00	\$87.50
DER	03/03/2021	Email from Mr. Wilson about document production (0.1); email to Mr. Wilson about confidentiality (0.1); email from Mr. Wilson (0.1)	0.30	\$125.00	\$37.50
DER	03/04/2021	Email from MacKelcan's office about documents (0.1); email to Ms. Miller about new document production (0.1); review documents (2.5)	2.70	\$125.00	\$337.50
DER	03/13/2021	Review new deposition transcripts to prepare for summary judgment hearing (4.8)	4.80	\$125.00	\$600.00
DER	03/14/2021	Review roster (0.1); email to Hess about hearing (0.2); work on summary judgment brief (4.5); review and annotate depositions (4.0); finalize and file brief and exhibits (2.2)	11.00	\$125.00	\$1,375.00
DER	03/15/2021	Email to Judge Griffith re: brief and exhibits (0.1); prepare for hearing (2.0); attend summary judgment hearing (2.2); email from Hess (0.1)	4.40	\$125.00	\$550.00
DER	03/16/2021	Prepare for hearing (0.8); continuation of summary judgment hearing (1.5)	2.30	\$125.00	\$287.50
DER	03/24/2021	Receive and review Form 4 order denying summary judgment (0.1); TC to Hess (0.4)	0.50	\$125.00	\$62.50
DER	04/01/2021	Receive and review MacKelcan's motion for reconsideration (0.2)	0.20	\$125.00	\$25.00
DER	04/23/2021	Email from Thompson to MacKelcan's office to renew link (0.1); email from MacKelcan's office (0.1); email from Thompson (0.1)	0.30	\$125.00	\$37.50
DER	05/12/2021	Email to Thompson about discovery responses from Morphis (0.1)	0.10	\$125.00	\$12.50
DER	05/25/2021	Receive NEF for order of protection for MacKelcan (0.1)	0.10	\$125.00	\$12.50
DER	05/27/2021	Email from Wilson to Judge Griffith re: motion for reconsideration (0.1)	0.10	\$125.00	\$12.50
DER	06/08/2021	Receive copy of order of protection for MacKelcan (0.1)	0.10	\$125.00	\$12.50
DER	08/03/2021	Receive form 4 order denying motion for reconsideration (0.1); email to Hess (0.1)	0.20	\$125.00	\$25.00
DER	08/04/2021	TC to Mr. Hess (0.3); revise damages spreadsheet (0.5); email to opposing counsel about case (0.2)	1.00	\$125.00	\$125.00
DER	08/05/2021	Email from MacKelcan (0.1); email to MacKelcan (0.1)	0.20	\$125.00	\$25.00
DER	08/06/2021	Email from MacKelcan about call (0.1); TC from Mr. MacKelcan (0.2); TC to Mr. Hess (0.4)	0.70	\$125.00	\$87.50
DER	08/26/2021	Receive notice of jury trial roster from Lancaster County (0.1); email to and from Ms. Miller about roster (0.1); email to opposing counsel about jury trial roster (0.1); email from MacKelcan (0.1); email from Thompson	0.80	\$125.00	\$100.00

		(0.1); email from Thompson about continuance (0.1); email to Thompson about discovery responses (0.1); email from Thompson (0.1)			
DER	08/27/2021	Email from MacKelcan (0.1)	0.10	\$125.00	\$12.50
DER	08/31/2021	Email to MacKelcan (0.1); email to Thompson (0.1); email from Thompson (0.1)	0.30	\$125.00	\$37.50
DER	09/01/2021	Receive NEF for motion for continuance (0.1); receive NEF rescinding motion (0.1); email from Thompson (0.1); email to Thompson (0.1); email from Thompson about day certain trial (0.1); receive re-filed motion for continuance from Thompson (0.1); email from Thompson to Judge Griffith's law clerk (0.1)	0.70	\$125.00	\$87.50
DER	09/02/2021	Email from MacKelcan (0.1); receive NEF of rescinded motion (0.1)	0.20	\$125.00	\$25.00
DER	09/07/2021	Receive re-filed motion for continuance (0.1); receive NEF for order granting continuance (0.1)	0.20	\$125.00	\$25.00
DER	09/09/2021	Email from MacKelcan about call (0.1); email to MacKelcan (0.1); emails among counsel about call (0.3); TC with opposing counsel to discuss settlement negotiations (0.3); TC to Hess (0.3)	1.10	\$125.00	\$137.50
DER	09/14/2021	Email from Judge Griffith's law clerk about status conference (0.1); email from MacKelcan (0.1); email from Thompson (0.1); email from Thompson about Springs contract (0.1); review discovery responses from Thompson (0.3)	0.70	\$125.00	\$87.50
DER	09/17/2021	Email from Judge Griffith's law clerk about status conference (0.1); email from Thompson (0.1)	0.20	\$125.00	\$25.00
DER	09/22/2021	Email from Judge Griffith's law clerk (0.1); email to clerk about problem signing in (0.1); email from Thompson (0.1); participate in status conference with Judge Griffith (0.4); email to Ms. Miller about day certain trial (0.1); TC to Mr. Hess (0.3); email to opposing counsel about settlement discussions (0.1)	1.20	\$125.00	\$150.00
DER	10/01/2021	Receive and review settlement offer from CPA Defendants (0.2); email to Hess (0.1); email from Hess (0.1)	0.40	\$125.00	\$50.00
DER	10/11/2021	Receive notice of day certain trial (0.1); email from Ms. Miller about trial roster (0.1)	0.20	\$125.00	\$25.00
DER	10/15/2021	Receive and review Defendant Morphis's amended discovery responses (0.4)	0.40	\$125.00	\$50.00
DER	11/03/2021	TC to CNA Adjuster to discuss case (0.3); message to Hess (0.1)	0.40	\$125.00	\$50.00
DER	11/05/2021	TC to Mr. Hess to discuss case (0.3)	0.30	\$125.00	\$37.50
DER	11/08/2021	TC to Mr. Hess (0.2); email to MacKelcan about settlement negotiations (0.2); receive NEF for motion for protection (0.1); email to MacKelcan (0.1); email from Thompson (0.1); email from MacKelcan about protection motion (0.1); email from Mr. Wilson about moving trial date (0.1); email from Thompson (0.1); email to Hess (0.1); email to opposing counsel (0.1); email from Wilson (0.1); email from Judge Gibbons's law clerk about continuance (0.1); email to Hess (0.1); email from Hess (0.1)	1.60	\$125.00	\$200.00
DER	11/10/2021	Email from Ms. Miller about Lancaster jury list (0.1)	0.10	\$125.00	\$12.50
DER	11/15/2021	Receive form 4 order continuing case (0.1); email to MacKelcan about CNA response (0.1); email to Gibbons's law clerk (0.1); email from Judge Gibbons (0.1)	0.40	\$125.00	\$50.00
DER	11/23/2021	Email from Wilson about new trial date (0.1); email from Thompson about	0.50	\$125.00	\$62.50

		trial date (0.1); email from Wilson with counteroffer (0.1); email to Hess about scheduling trial (0.1); email to Hess about counteroffer (0.1)			
DER	11/28/2021	Email from Hess (0.1)	0.10	\$125.00	\$12.50
DER	11/29/2021	Email from Hess (0.1); email to opposing counsel about trial date (0.1); email to MacKelcan (0.2)	0.40	\$125.00	\$50.00
DER	11/30/2021	Email from Wilson to Judge Gibbons's law clerk about trial date (0.1); email from Judge Gibbons's law clerk (0.1); email from Wilson to law clerk (0.1); email to Hess about trial date (0.1)	0.40	\$125.00	\$50.00
DER	12/01/2021	Email from Judge Gibbons about trial (0.1); research re: Judge Benjamin (0.2); email to Hess (0.1); email from Hess (0.1)	0.50	\$125.00	\$62.50
DER	12/07/2021	Email from MacKelcan's paralegal about pre-trial deadlines from Judge Benjamin's law clerk (0.1); email to Ms. Miller about docketing deadlines (0.1)	0.20	\$125.00	\$25.00
DER	12/15/2021	Email from MacKelcan about settlement discussions (0.1); email to Hess (0.1); TC to Mr. Hess (0.3)	0.50	\$125.00	\$62.50
DER	12/17/2021	TC to Hess (0.3); TC to MacKelcan to discuss case (0.3)	0.60	\$125.00	\$75.00
DER	12/22/2021	Receive notice of jury trial (0.1); email from Ms. Miller about docket (0.1)	0.20	\$125.00	\$25.00
DER	01/04/2022	Email from Ms. Miller to clerk about jury list (0.1); email from Ms. Miller about clerk's response (0.1)	0.20	\$125.00	\$25.00
DER	01/10/2022	Email from Judge Gibbons's law clerk about trial (0.1); email to law clerk (0.1); email from MacKelcan (0.1); email from Thompson (0.1)	0.40	\$125.00	\$50.00
DER	01/14/2022	TC to Hess to discuss trial (0.5); review depositions to prepare for trial (3.8); text message to Ms. Tyner (0.2); TC from Ms. Tyner (0.4)	4.90	\$125.00	\$612.50
DER	01/18/2022	Email from Judge Benjamin's law clerk about case (0.1); email from MacKelcan to law clerk (0.1); email to Thompson about Tom Henson (0.1); email from Thompson to law clerk (0.1); email from Thompson re: Henson (0.1); email to Thompson (0.1); work on pre-trial brief (3.5); TC to Ms. Tyner (0.2); prepare subpoena to Ms. Tyner (0.3)	4.60	\$125.00	\$575.00
DER	01/19/2022	Email from Judge Benjamin's law clerk about pre-trial motions (0.1); email to law clerk about trial (0.1); email from Ms. Miller about jury list (0.1); review discovery responses of Defendants to prepare for trial, work on pre-trial brief (4.8); email to Ms. Miller about discovery responses (0.1); email to Thompson about Morphis documents (0.1); email froms Thompson (0.1); email from Ms. Miller to Hess about jury list (0.1); email to Hess about Morphis documents (0.1); email to law clerk about pre-trial motions (0.1); email to Hess about Hartsville documents (0.1); email from MacKelcan about hearing (0.1); review deposition transcripts (2.5)	8.40	\$125.00	\$1,050.00
DER	01/20/2022	Prepare and file motion in limine (3.8); email from law clerk about hearing (0.1); email from Thompson about hearing (0.1); email to Judge Benjamin re: motion in limine (0.1); receive and review motion to bifurcate from CPA Defendants (0.2); research re: bifurcation of punitive damages (0.2); receive and review motion in limine from CPA Defendants (0.4); email from law clerk about motions (0.1); email from clerk about pre-trial briefs (0.1); email from Thompson re: motions (0.1); email from Wilson to law clerk about motions (0.1); finalize pre-trial brief, voir dire, and jury instructions (3.9); email from Wilson with pre-trial brief and other documents, review documents (0.6); email from law clerk about hearing (0.1); email from Wilson to law clerk (0.1); email to clerk with pre-trial brief, voir dire, and jury instructions (0.1); email from Thompson (0.1)	10.20	\$125.00	\$1,275.00
DER	01/21/2022	Receive and review CPA Defendants' response (0.5); prepare for hearing	9.20	\$125.00	\$1,150.00

		(1.6); email from Thompson about hearing (0.1); email from law clerk (0.1); receive and review Morphis Defendants' brief (0.3); attend pre-trial motions hearing (1.7); email from Wilson to law clerk about requests for admissions (0.1); email from Ms. Soapes (0.1); email from Thompson with memorandum of law re: admissions (0.2); prepare for trial (4.5)			
DER	01/22/2022	Trial prep (5.5); revise spreadsheet for damages calculations (0.3); email to Hess about damages summary (0.1); email from Hess (0.1); email to Hess about removing Christmas bonus numbers (0.1); email from Hess (0.1)	6.20	\$125.00	\$775.00
DER	01/23/2022	Trial prep, assemble trial exhibits (7.5); travel to Hesses' house (2.2); discuss direct with Hess (1.5); review and rate juror information (1.0)	12.20	\$125.00	\$1,525.00
DER	01/24/2022	Travel to and from Courthouse for jury trial (1.5); attend jury roll call (3.5); email from Ms. Soapes (0.1); emails from opposing counsel about cell phone numbers (0.1); email to Ms. Soapes (0.1); email from Thompson re: exhibits (0.2); revise damages summary (0.2); trial prep (6.8)	12.50	\$125.00	\$1,562.50
DER	01/25/2022	Travel to and from courthouse for jury selection (1.5); attend jury selection (3.5); trial prep (7.5)	12.50	\$125.00	\$1,562.50
DER	01/26/2022	Travel to and from trial (1.5); attend trial (8.0); trial prep (4.2)	13.70	\$125.00	\$1,712.50
DER	01/27/2022	Travel to and from trial (1.5); attend jury trial (7.5); trial prep (5.2)	14.20	\$125.00	\$1,775.00
DER	01/28/2022	Travel to and from trial (1.5); attend jury trial (8.0); return home from trial (3.2)	12.70	\$125.00	\$1,587.50
DER	01/30/2022	Travel to Hesses' house (2.2); trial prep (5.8); prepare and file memo re: SC Payment of Wages Act (1.2); email to Judge Benjamin with courtesy copy of memo (0.1)	9.30	\$125.00	\$1,162.50
DER	01/31/2022	Travel to and from trial (1.5); attend trial (8.0); trial prep (3.0); receive and review proposed jury charge (0.6)	13.10	\$125.00	\$1,637.50
DER	02/01/2022	Travel to and from trial (1.5); attend trial (DV motions, charge conference, closing arguments, and jury deliberations) (8.5); prep for closing arguments on punitives, review jury instructions (3.0)	13.00	\$125.00	\$1,625.00
DER	02/02/2022	Travel to and from trial (1.5); attend trial on punitive damages, jury charge and deliberations (5.5); return home from trial (2.2)	9.20	\$125.00	\$1,150.00
DER	02/03/2022	Prepare election of remedies document (0.3); email to Mr. Hess about election of remedies (0.1); file election of remedies document and email to Judge Benjamin with copy (0.2)	0.60	\$125.00	\$75.00
DER	02/08/2022	Receive and review objections to election of remedies (0.3)	0.30	\$125.00	\$37.50
DER	02/09/2022	Email from MacKelcan's paralegal to Judge Benjamin with courtesy copy of objections (0.1); email from MacKelcan to Judge Benjamin (0.1)	0.20	\$125.00	\$25.00
DER	02/11/2022	Receive NEF for JNOV motion by MacKelcan (0.1)	0.10	\$125.00	\$12.50
DER	02/12/2022	Update billing records and work on post-trial motion (3.3)	3.30	\$125.00	\$412.50
DER	02/13/2022	Email to Hess re: objections (0.1); work on post-trial motion and updating billing records (4.2)	4.30	\$125.00	\$537.50
DER	02/14/2022	Finalize petition for treble damages, attorney's fees and costs, and pre-judgment interest (2.5); TC to Stephanie Lewis about fee affidavit (0.1); TC to Ms. Burnette about affidavit (0.1); revise affidavit and email to Ms. Burnette (0.4)	3.10	\$125.00	\$387.50

Quantity Subtotal 292.8

Services Subtotal \$36,600.00

Expenses

Date	Description	Quantity	Rate	Total
10/12/2020	Copies: Copies: 28 x .20	28.00	\$0.20	\$5.60
10/12/2020	Postage: Postage [Stamps.com] 2 x \$1.40	2.00	\$1.40	\$2.80
10/16/2020	Copies: Copies: 11 x .20	11.00	\$0.20	\$2.20
10/16/2020	Postage: Postage [stamps] 2 x .55	2.00	\$0.55	\$1.10
10/19/2020	Filing Fee: Clerk of Court - Motion	1.00	\$31.74	\$31.74
10/28/2020	Copies: Copies: 62 x .20	62.00	\$0.20	\$12.40
11/05/2020	Deposition: EveryWord (Inv. 35226) - Jennifer Newsom Depo	1.00	\$470.75	\$470.75
11/06/2020	Copies: Copies: 11 x .20	11.00	\$0.20	\$2.20
11/06/2020	Postage: Postage - 2 x .50	2.00	\$0.50	\$1.00
11/25/2020	Deposition: Esquire (INV1787233) Deposition of Clark Moore	1.00	\$384.25	\$384.25
12/02/2020	Deposition: EveryWord Inv. 35539 (Tyner & Henson depos)	1.00	\$1,322.45	\$1,322.45
12/29/2020	Copies: Copies: 228 x .20	228.00	\$0.20	\$45.60
12/29/2020	Binder Notebooks: Binder notebook & dividers	1.00	\$5.00	\$5.00
02/16/2021	Copies: Copies: 34 x .20	34.00	\$0.20	\$6.80
02/16/2021	Postage: Postage [stamps] \$3.20	2.00	\$1.60	\$3.20
03/03/2021	Copies: Copies: 24 x .20	24.00	\$0.20	\$4.80
03/15/2021	Copies: Copies: 85 x .20	85.00	\$0.20	\$17.00
04/01/2021	Copies: Copies: 36 x .20	36.00	\$0.20	\$7.20
06/08/2021	Copies: Copies: 3 x .20	3.00	\$0.20	\$0.60
01/18/2022	Witness Fees: Sandra Tyner - Operating check #7317	1.00	\$82.45	\$82.45
01/18/2022	Postage: Postage [Stamps.com]	1.00	\$7.75	\$7.75
01/18/2022	Copies: Copies: 12 x .20	12.00	\$0.20	\$2.40
01/20/2022	Copies: Copies: 166 x .20	166.00	\$0.20	\$33.20
01/20/2022	Filing Fee: Clerk of Court - filing fee for Motion in limine	1.00	\$31.74	\$31.74
01/21/2022	Copies: Copies: 104 x .20	104.00	\$0.20	\$20.80
01/23/2022	Copies: Copies: 424 x .20	424.00	\$0.20	\$84.80
01/31/2022	Witness Fees: Witness fee and mileage - Beverly M. Lanier (Operating Check #7318)	1.00	\$63.61	\$63.61
01/31/2022	Witness Fees: Witness fee and mileage - Evelyn Martinez-Jennette (Operating Check #7319)	1.00	\$29.68	\$29.68

02/03/2022	Mileage for trial	590.00	\$0.585	\$345.15
02/14/2022	Copies: Copies: 64 x .20	64.00	\$0.20	\$12.80
02/15/2022	Copies: Copies: 67 x .20	67.00	\$0.20	\$13.40
02/21/2022	Copies: Copies: 44 x .20	44.00	\$0.20	\$8.80
Expenses Subtotal				\$3,063.27

Time Keeper	Quantity	Rate	Total
David Rothstein	292.8	\$125.00	\$36,600.00
Quantity Total			292.8
Subtotal			\$39,663.27
Total			\$39,663.27

Detailed Statement of Account

Other Invoices

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
927	03/10/2020	\$2,990.60	\$2,988.60	\$2.00
943	05/01/2020	\$5,938.95	\$4,906.68	\$1,032.27

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
1026	02/23/2022	\$39,663.27	\$0.00	\$39,663.27
Outstanding Balance				\$40,697.54
Amount in Trust				\$3,600.00
Total Amount Outstanding				\$37,097.54

Please make all amounts payable to: Rothstein Law Firm, PA

Payment is due upon receipt.

Paul David Hess
[REDACTED]

18-042

**Paul David Hess, APRN-BC v. Morphis Pediatric Group of Lancaster, PA, et al.
(Lancaster) 2018-CP-29-01127**

Services

Attorney	Date	Description	Quantity	Rate	Total
DER	02/14/2022	Email to Judge Benjamin with courtesy copy of petition for treble damages, attorney's fees, and prejudgment interest (0.1); email from Thompson to Judge Benjamin (0.1); receive NEF for Morphis Defendants motion for JNOV (0.1); email from Thompson to Judge Benjamin (0.1); review motion for JNOV (0.4); receive NEF for motion for remittitur from Thompson (0.1); text messages to and from Hess (6) (0.2)	1.10	\$125.00	\$137.50
DER	02/15/2022	Email from MacKelcan about costs (0.1); receive NEF accepting petition for attorney's fees (0.1); receive and review post-trial motions (0.5); email to MacKelcan about costs (0.2); text messages to and from Hess about motions (3) (0.1)	1.00	\$125.00	\$125.00
DER	02/16/2022	Email from MacKelcan about costs (0.1); text messages from and to Hess about Lancaster News article (3) (0.1)	0.20	\$125.00	\$25.00
DER	02/20/2022	Receive NEF for Thompson's brief in opposition to petition for treble damages, fees, and interest (0.1); email from Thompson to Judge Benjamin with courtesy copy of brief (0.1)	0.20	\$125.00	\$25.00
DER	02/21/2022	Receive and review Thompson brief (0.4); receive NEF re: MacKelcan's brief (0.1); review MacKelcan's brief opposing pre-judgment interest (0.2); text messages from and to Hess about motions (6) (0.1)	0.80	\$125.00	\$100.00
DER	02/23/2022	Email to Hess about invoice (N/C); Emails to court reporter about recordings of opening statements and closing arguments (N/C); email from Hess about appeal (0.1); text to Hess about status of case (0.1)	0.20	\$125.00	\$25.00
DER	02/28/2022	Text messages from and to Hess about hearing (2) (0.1)	0.10	\$125.00	\$12.50

DER	03/02/2022	Email from MacKelcan about settlement offer (0.1); receive roster notices from Lancaster County (0.1); email to Hess about offer from Accounting Defendants (0.1); TC from Mr. Hess to discuss case (0.3); TC to Mr. and Mrs. Hess to discuss settlement (0.2); text message to Hess (0.1)	0.90	\$125.00	\$112.50
DER	03/03/2022	Email to MacKelcan with counter-offer (0.2); text message to and from Hess confirming settlement (2) (0.1)	0.30	\$125.00	\$37.50
DER	03/04/2022	TC from MacKelcan accepting counter (0.2); TC to Mr. Hess (0.2); receive NEF for notice of appearance from Ryan Beasley (0.1); email to MacKelcan (0.1); research re: Beasley (0.2); text messages to and from Hess (6) (0.2)	1.00	\$125.00	\$125.00
DER	03/07/2022	Email form MacKelcan about settlement (0.1); email to MacKelcan (0.1); email to Ryan Beasley (0.1); email from and to Beasley (0.1)	0.40	\$125.00	\$50.00
DER	03/08/2022	Email from Thompson about Ryan Beasley and motions hearing (0.1); receive email from MacKelcan with draft of settlement agreement (0.1); review and revise draft of agreement (0.4); email to Hess about red-lines to agreement (0.1); email from Hess (0.1); text messages from Hess (2) (0.1); email to MacKelcan with red-lines to settlement agreement (0.1)	1.00	\$125.00	\$125.00
DER	03/09/2022	Email from Thompson to clerk about motions (0.1); emails from Thompson to Judge Benjamin about hearing (2) (0.1); email from Judge Benjamin's law clerk (0.1); email from Thompson to Judge Benjamin's law clerk (0.1); email to Judge Benjamin (0.1); forward MacKelcan email to Hess (0.1); email from Judge Benjamin's law clerk to Lancaster clerk about motions (0.1); email from Judge Benjamin's law clerk (0.1); email from Thompson (0.1); email from MacKelcan about accepting red-lines (0.1); email to MacKelcan (0.1)	1.10	\$125.00	\$137.50
DER	03/10/2022	Email form MacKelcan about settlement payment (0.1); email from Ms. Soapes about hearing date (0.1); email to Hess (0.1); email from Hess (0.1); email to Ms. Soapes (0.1); email to and from Ryan Beasley about hearing (0.1); email from Thompson to Soapes about hearing (0.1); email from Hess (0.1)	0.80	\$125.00	\$100.00
DER	03/14/2022	Email to Ms. Soapes about hearing date (0.1); email to Hess about final agreement (0.1); email from MacKelcan with signed settlement agreement (0.1); email to Hess (0.1); email from Hess with signed agreement (0.1); email to MacKelcan (0.1); text messages with Hess (9) (0.2)	0.80	\$125.00	\$100.00
DER	03/15/2022	Email from MacKelcan about settlement payment (0.1); email to MacKelcan with wiring instructions (0.1); TC from adjuster to confirm wiring instructions (0.1); draft email to Thompson (0.2); TC to Hess to discuss draft of email (0.2); email from Hess (0.1); texts to Hess (2) (0.1)	0.90	\$125.00	\$112.50
DER	03/16/2022	Email from MacKelcan about wire (0.1); email from Hess about wiring instructions (0.1); finalize and send email to Thompson and Beasley about settlement demand (0.1); email from Thompson (0.1); email to Hess (0.1); TC from Mr. Hess (0.2); email to Thompson and Beasley (0.2); email to Hess (0.1)	1.00	\$125.00	\$125.00
DER	03/17/2022	Email to and from Ryan Beasley (0.2); TC to Mr. Beasley to discuss case (0.4); TC to bank to order wire (0.1); complete wire instruction form (0.1); TC to Mr. Hess to discuss case (0.2); receive and review amended motion for remittitur (0.3); prepare settlement disbursement statement and email to Hess (N/C); email motion to Hess (0.1); email from Thompson to Judge Benjamin about settlement with accounting Defendants (0.1); email from Hess with signed settlement disbursement statement (N/C)	1.50	\$125.00	\$187.50
DER	03/18/2022	Email from MacKelcan with proposed stipulation of dismissal (0.1); review	0.30	\$125.00	\$37.50

		proposed stipulation (0.1); email to MacKelcan (0.1); prepare spreadsheet with payment history (N/C); email to Hess regarding settlement disbursement statement and payment summary (N/C); email to Hess regarding amended spreadsheet (N/C)			
DER	03/21/2022	Email from Wilson about revised stipulation of dismissal (0.1); email from Ms. Soapes about scheduling hearing (0.1); receive NEF for stipulation of dismissal (0.1); email from Thompson to Soapes about scheduling hearing (0.1)	0.40	\$125.00	\$50.00
DER	03/23/2022	Email to Ms. Soapes about availability for May 19 hearing (0.1)	0.10	\$125.00	\$12.50
DER	03/24/2022	Email from Ms. Soapes (0.1); email from Wilson to Soapes about stipulation of dismissal as to accounting defendants (0.1); email from Thompson to Soapes (0.1); email from Soapes (0.1); email from Thompson to Soapes about amended motion for remittitur (0.1); email from Thompson to Soapes about in-person hearing (0.1); email from Soapes about hearing (0.1)	0.70	\$125.00	\$87.50
DER	04/06/2022	Email from Wilson to Soapes re: letter to Judge Benjamin re: confidentiality of settlement (0.1)	0.10	\$125.00	\$12.50
DER	05/04/2022	Email from Lancaster County about pending motions roster (0.1); email from Ms. Miller about motions roster before Judge Gibbons (0.1)	0.20	\$125.00	\$25.00
DER	05/05/2022	Email from Thompson to Lancaster County clerk about motions roster (0.1)	0.10	\$125.00	\$12.50
DER	05/11/2022	TC from David Hess about status of case (0.1)	0.10	\$125.00	\$12.50
DER	05/12/2022	Email to Ms. Soapes about motions hearing (0.1); email from Ms. Soapes (0.1)	0.20	\$125.00	\$25.00
DER	05/17/2022	Message from Mr. Hess about motions (0.1); email from Ms. Soapes about hearing (0.1); email from Thompson to Soapes about hearing (0.1); email to Thompson (0.1); email from Thompson (0.1)	0.50	\$125.00	\$62.50
DER	05/18/2022	Email from Mr. Shiver about court reporter (0.1); receive NEF for amended motion for remittitur (0.1); email from Thompson to Judge Benjamin with courtesy copy of brief (0.1); review amended motion (0.3); prepare for motions hearing (2.5); text message to Hess (0.1)	3.20	\$125.00	\$400.00
DER	05/19/2022	Travel to and from Columbia for hearing on post-trial motions, TC to Mr. Hess to discuss anticipated arguments (3.0); prepare for hearing (0.9); attend hearing on post-trial motions (2.3); TC to Mr. Hess to discuss hearing (0.4); email from Wilson to Soapes re: proposed order sealing record (0.1)	6.70	\$125.00	\$837.50
DER	05/30/2022	Email from Thompson about proposed orders (0.1); email to and from Thompson (0.1)	0.20	\$125.00	\$25.00
DER	05/31/2022	Work on proposed order (4.5)	4.50	\$125.00	\$562.50
DER	06/01/2022	Work on proposed order, revised pre-judgment interest calculations, and updating billing records (4.8); email proposed order to Judge Benjamin (0.1);	4.90	\$125.00	\$612.50
			Quantity Subtotal		35.5
			Services Subtotal		\$4,437.50

Expenses

Date	Description	Quantity	Rate	Total
03/17/2022	Outgoing wire fee (Southern First to Bank of America)	1.00	\$30.00	\$30.00
05/19/2022	Mileage to and from Columbia for hearing on post-trial motions	210.00	\$0.585	\$122.85
05/19/2022	Parking for hearing at Richland County courthouse	1.00	\$1.50	\$1.50
Expenses Subtotal				\$154.35

Time Keeper	Quantity	Rate	Total
David Rothstein	35.5	\$125.00	\$4,437.50
Quantity Total			35.5
Subtotal			\$4,591.85
Total			\$4,591.85

Detailed Statement of Account

Current Invoice

Invoice Number	Due On	Amount Due	Payments Received	Balance Due
1048	06/01/2022	\$4,591.85	\$0.00	\$4,591.85
Outstanding Balance				\$4,591.85
Amount in Trust				\$3,200.00
Total Amount Outstanding				\$1,391.85

Please make all amounts payable to: Rothstein Law Firm, PA

Payment is due upon receipt.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	FOR THE SIXTH JUDICIAL CIRCUIT
Paul David Hess, APRN-BC,	)	Case No. 2018-CP-29-01127
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S ELECTION OF
	)	REMEDIES
Morphis Pediatric Group of Lancaster,	)	
P.A.; Elizabeth J. Morphis, M.D.;	)	
Gregory M. Alexander, CPA; and	)	
Moore Beauston & Woodham LLP,	)	
	)	
Defendants.	)	
	)	

Plaintiff, Paul David Hess, APRN-BC (hereinafter "Plaintiff" or "Hess"), by and through his undersigned counsel, hereby files this Election of Remedies. With respect to Defendants Morphis Pediatric Group of Lancaster, P.A. and Elizabeth J. Morphis, M.D., Plaintiff elects to pursue his full remedies under the South Carolina Payment of Wages Act for all years (2010-2015) and to forego the jury's verdict for punitive damages against these Defendants under the common-law claims. Plaintiff will submit his motion under the S.C. Payment of Wages Act for treble damages, attorney's fees and costs, and pre-judgment interest within ten (10) days of the date of the jury's verdicts.

With respect to Defendants Gregory M. Alexander, CPA, and Moore Beauston & Woodham, LLP, Plaintiff elects his remedies for the cause of action for negligent misrepresentation, under Item No. 9 in the Special Interrogatories on the first Verdict Form, and the jury's verdict for punitive damages on that claim under Item No. 2 of the punitive damages verdict form.

Plaintiff believes that all Defendants are jointly and severally liable for actual damages for the 2015 bonus year in the amount of \$152,010, and that no apportionment of the verdict among Defendants would be appropriate under S.C. Code Ann. § 15-38-15(F), because the jury specifically

found that all Defendants' conduct was willful, wanton, reckless, grossly negligent, or intentional. S.C. Code Ann. § 15-38-15(F) ("This section does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional"). Plaintiff understands and acknowledges that he is entitled to obtain only one full recovery for the underlying amount of actual damages of \$152,010 for the 2015 bonus, except that Plaintiff can pursue treble damages for that amount under the South Carolina Payment of Wages Act against the Morphis Defendants.

Respectfully submitted,

s/ David E. Rothstein
David E. Rothstein, SC Bar # 66295
ROTHSTEIN LAW FIRM, PA
1312 Augusta Street
Greenville, South Carolina 29605
(864) 232-5870 (office)
(864) 241-1386 (facsimile)
drothstein@rothsteinlawfirm.com

Attorney for Plaintiff, Paul David Hess, APRN-BC

February 3, 2022

Greenville, South Carolina.

State of South Carolina	)	
	)	C. A. No. 2018-CP-29-01127
County of Lancaster, Court of Common Pleas	)	
Paul David Hess, APRN-BC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Morphis Pediatric Group of Lancaster, PA; Elizabeth	)	
J. Morphis M.D.; Gregory M. Alexander, CPA; and	)	
Moore, Beauston & Woodham, LLP	)	
	)	
Defendants.	)	
	)	

**DEFENDANTS' MORPHIS PEDIATRIC AND MORPHIS MOTION FOR
REMITTITUR AND MEMORANDUM IN SUPPORT**

**HESS CANNOT RECOVER UNDER THE 2010 CONTRACT IN 2015 AND YET
RETIAN THE BENEFITS OF THE 2015 CONTRACT IN 2016 AND 2017**

At trial, evidence was introduced by all Defendants that Hess made more money in 2016 and 2017, under the 2015 Agreement than he would have had the 2010 Agreement continued in effect.

Hess should not be permitted to benefit from a claim that sets aside the 2015 Agreement but yet claim the benefits of the 2015 Agreement in 2016 and 2017.

When a vendee ascertains that he has been induced to make a contract of purchase by the fraudulent misrepresentations of his vendor, he has a choice of remedies. He may rescind the contract, restore what he has received, and recover back what he has paid, or he may affirm the contract, and recover the damages he has sustained by the fraud. He cannot, however, do both. It is as difficult a feat to maintain a cause of action for the consideration paid for the purchase on the ground of rescission, and one for damages for the fraud which induced it, and for a breach of the contract of purchase itself, in the same action, as it is to ride at the same time two horses that are traveling in opposite directions. Upon a rescission of a contract of purchase, the measure of damages is the consideration paid and the moneys naturally expended on account of the purchase before the fraud was discovered.

Wilson v. New U.S. Cattle-Ranch Co., 73 F. 994, 997 (8th Cir. 1896)(reasoning adopted in *Stuckey v. Metro. Life Ins. Co.*, 195 S.C. 358, 11 S.E.2d 391, 392 (1940) ("the illuminating opinion of Judge Sanborn in the case of *Wilson v. New United States Cattle-Ranch Company*").

that law is to the effect that a purchaser cannot treat a contract as valid for the purpose of recovering damages thereon and at the same time recover damages for fraudulent inducement of the contract

Parks-Cramer Co. v. Mathews Cotton Mills, 36 F. Supp. 236, 238 (W.D.S.C. 1940) (applying North Carolina caselaw).

A party cannot recover on an implied contract, if he has made a special contract which is void for fraud; he is not at liberty to say, I have made two contracts, and if one of them is void for fraud, I will set up the other. Vide, *Selway v. Fogg*, 5 Mees & W., 83; 9 Car. & P., 59; 1 Adol. & El., 40.

It is at the option of the party, to be affected by a fraud, whether or not, he will treat the contract as void, or rescind it; but the right to rescind is subject to this restriction, that if, after the discovery of the fraud, he still avail himself of the benefit of the contract, or permit the other party to proceed with the execution of it, he will thereby be held to have waived the tort, and affirmed the contract.

McCorkle v. Doby, 32 S.C.L. 396 (S.C. App. L. 1847)

A person is not at liberty to say, I have made two contracts; and if one of them is avoided for fraud, I will set up the other. *Selway v. Fogg*, 5 Mees & W., 83; 9 Car. & P., 59; 1 Adol & El., 40. It is generally affirmed as a rule, that fraud avoids all contracts. But it would be more correct to say, fraud makes all contracts voidable: for it is at the option of the party to be affected by the fraud, whether or not, he will treat the contract as void, and rescind it. The right to rescind, however, is subject to this restriction: that if, after discovery of the fraud, one party still avails himself of the benefit of the contract, or permits the other to proceed with the execution of it, he will thereby be held to have waived the tort and affirmed the contract.

McCorkle v. Doby, 32 S.C.L. 396, 400 (S.C. App. L. 1847)

The general law on the subject, in which practically all the previous cases are cited, is very fully discussed in *King v. Pilot Life Ins. Co.*, supra [181 S.C. 238, 187 S.E. 370]. The Court there quoted the following from *Brown v. Walker Lumber Co.*, supra: “‘The underlying principle of the rule laid down in the *Levister Case* is that the right of one to rescind a contract for fraud is subject to the condition that if, after discovery of the fraud, he still avails himself of the benefit of the contract, or permits the other party to proceed with the execution of it, he will be held to have waived the tort and affirmed the contract. The plaintiff here knew of the alleged fraud, certainly, before the trial; he set it up in his reply to the answer. But he did not return or offer to return the money paid him until all the evidence had been adduced at the trial and a motion made to direct a verdict. In that situation we think there was clearly a waiver of any right the plaintiff might have had to avoid the contract for fraud.’”

Taylor v. Palmetto State Life Ins. Co., 196 S.C. 195, 12 S.E.2d 708, 711 (1940)

As a general rule, a party induced to enter a contract by fraud has a choice among causes of action and remedies. If the fraud gives rise to a breach of promise or warranty, he may elect to sue in contract or in tort. *Houston v. Gilbert*, 5 S.C.L. (3 Brev.) 63 (1812). If he sues in contract, he may seek his expectancy damages under the contract or rescission and restitution of the contract price. *Ebner v. Haverty Furniture Company*, 128 S.C. 151, 122 S.E. 578 (1924). At common law, a party seeking rescission of an executed contract and return of his money must be able to return or tender the benefits he received under the contract. *Id.*

Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc., 279 S.C. 468, 472, 309 S.E.2d 763, 766 (Ct. App. 1983)

The evidence presented by all Defendants, without objection, was that Hess earned \$91,563.51 more in 2016 and 2017 than he would have under the 2010 Agreement.¹ Defendants MPG and Morphis therefore move that, in the event judgment notwithstanding is not granted, the judgment be remitted by \$91,563,51,

¹ Plaintiff admitted 2016 bonus was \$57,527.69 pursuant to the 2015 agreement and that it would have been only \$16,956.62 under the 2010 Agreement. He admitted he would have gotten no bonus in 2017 under the 2010 Agreement but received \$50,992.44 pursuant to the 2015 agreement. (\$57,527.69 less \$16,956.62 plus \$50,992.44 is (\$91,563.51).

**MORPHIS AND MPG ARE ENTITLED TO OFFSET FOR ANY AMOUNTS PAID BY
DEFENDANTS ALEXANDER AND MOORE, BEAUSTON AND WOODHAM IN
SETTLEMENT**

Plaintiff's counsel has represented that Hess has entered into a settlement agreement with Alexander and Moore, Beauston, and Woodham (MBW). Defendants Morphis and MPG request remittitur in the amount of that settlement so that there is no double-recovery by Hess.

In this case, the damages sought against all Defendants was based on the alleged underpayment of bonuses. Hess did not recover any unique damages against Alexander and MBW. Where a plaintiff seeks the same money damages from two or more Defendants and recovers a portion of those monies from one defendant, the remaining defendants are entitled to an offset for that amount. *See, e.g., Jolly v. Gen. Elec. Co.*, No. 2017-002611, 2021 WL 6694067, at *25 (S.C. Ct. App. Sept. 1, 2021), reh'g denied (Feb. 25, 2022) (“When the settlement is for the same injury, the non-settling defendant's right to a setoff arises by operation of law.”). Although some courts speak of the need for the settlement to be on the same cause of action, in those cases, the injury was different between the causes. *See, e.g., Ward v. Epting*, 290 S.C. 547, 351 S.E.2d 867 (Ct.App.1986) (refusing to apply settlement for pain and suffering cause of action to judgment in wrongful death action). As explained in *Smith v. Widener*, when the injury is the same, it doesn't matter how many theories of recovery (causes) were pursued to recover for that injury.

In this case, Smith's claim against CitiStreet was for the same injury for which she sought damages from Widener and Currie. The essence of all Smith's claims was that the actions of the defendants denied her the right to the remaining \$35,410.38 after she withdrew the initial \$40,000.00. While Smith stated that claim in various causes of action, some of which overlapped between Widener and Currie and CitiStreet and some of which did not, the injury Smith alleged she suffered as a result of the tortious conduct of all defendants was the same. Therefore, the trial court was required to grant the request for a setoff.

Smith v. Widener, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012)

In this case, the injury was the same (lost bonus). The jury verdict reflected this as well because the jury awarded the same \$152,000 for Hess's claims in 2015 under every theory: breach of contract against Morphis, Wage Payment Act against Morphis, negligence against Morphis and Alexander, and tortious interference against Alexander. Clearly, it was the same injury, using the same measure of damages, and offset is, therefore, appropriate.

Respectfully submitted,

MALONE, THOMPSON, SUMMERS & OTT

/s/Charles F. Thompson, Jr.
Charles F. Thompson Jr. 64219
Lake Summers
Attorneys for Defendant MPG and Morphis

339 Heyward Street
Columbia, South Carolina 29201
(803) 254-3300

Dated this 16th day of March 2022

State of South Carolina	)	
	)	C. A. No. 2018-CP-29-01127
County of Lancaster, Court of Common Pleas	)	
Paul David Hess, APRN-BC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Morphis Pediatric Group of Lancaster, PA; Elizabeth	)	
J. Morphis M.D.; Gregory M. Alexander, CPA; and	)	
Moore, Beauston & Woodham, LLP	)	
	)	
Defendants.	)	
	)	

**DEFENDANTS' MORPHIS PEDIATRIC GROUP AND DR. BETH MORPHIS'
MEMORANDUM IN OPPOSITION TO: (1) TREBLING AND FEES UNDER THE
WAGE PAYMENT ACT, (2) PREJUDGMENT INTEREST, AND (3) APPLICATION
FOR FEES AND COSTS**

(1) TREBLING AND FEES UNDER THE WAGE PAYMENT ACT

**Essentially, if there is any grounds to dispute the compensation, the court may not award
trebling or fees under the Wage Payment Act**

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). However, an award of treble damages and attorney's fees 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).

The standard is a unique one in the law. 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. And, contrary to Hess's assertions, it cannot be based on the jury verdict. Therefore, it is a rare case that warrants the award. In fact, **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.**

The following elements are well-established.

1. The Legislature used the word "may" regarding such awards and did not intend to deter litigation of wage disputes.¹
2. Trebling and a fee award is discretionary and may not be awarded if there was a "bona fide dispute."²
3. The judge determines the award in her discretion.
4. The judge finds her own facts independent of anything the jury did.³
5. It is error to award trebling and fees based on the jury verdict.
6. A close question of law or fact establishes a bona fide dispute.⁴

¹ *Rice v. Multimedia, Inc.*, 318 S.C. 95, 99, 456 S.E.2d 381, 383 (1995)

² *Id.*

³ *Morin v. Innegrity, LLC*, 424 S.C. 559, 574, 819 S.E.2d 131, 139 (Ct. App. 2018)

⁴ *Id. 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) (

Awards of Fees and Trebling have, Essentially, Always Been Reversed on Appeal

There are ten published South Carolina Appellate court cases dealing with treble damages and fees and the bona fide dispute.⁵ In all but two, the appeal courts either reversed an award, upheld the denial of the award, or sent the case back for further findings. In only two cases has the court upheld the award. In *Mathis*, it did so on procedural grounds. *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 *Ross*, it did so because the employee had admittedly earned the bonus. The court found is what not a good faith argument to assert the employee must be employed on the day the bonus payment was made because the payment days were undefined nor was there any mention of the employment requirement prior to the denial of payment. *Ross v. Ligand Pharmaceuticals*, 639 S.E.2d 460 (S.C. Ct. App. 2006). The other cases are:

1. *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009) (employee not entitled to trebling of compensation based on a customer order based only on the court's determination that the failure to pay was a violation of the Act).

⁵ Other cases which touch on the trebling provision but do not involve the good faith basis defense (or are unpublished) include *Bennett v. Lambroukus* 401 S.E.2d (S.C. Ct. App. 1991) (Court did affirm trebling of award of \$184.25 and attorney fees of \$250.00, however, there was no discussion of any good faith basis nor an indication that the employer raised this defense at all); *Gilmore v. Holiday Network Int.* 2004 Westlaw 6331786 (S.C. Ct. App. 2004) (Unpublished); *Johnson v. Brock*, 2021 Westlaw 5101489 (S.C. Ct. App. 2021) (Unpublished); *Adamson v. Marianne Fabrics*, 391 S.E.2d 249 (S.C. 1990) (no discussion of good faith. Held that employee cannot recover trebling and punitive damages.); *Mathis v. Brown & Brown*, 698 S.E.2d 773 (S.C. 2010) (Reduced trebling because future wages not covered by Act. Did not discuss good faith basis because issue had been waived.); *Evans v. Taylor Made Sandwich*, 522 S.E.2d 350 (S.C. Ct. App. 1999) (Trebling affirmed but no discussion of good faith basis and this case was overturned by *Barron v. Labor Finders*, 713 S.E.2d 634 (S.C. 2011)); *Dumas v. InfoSafe Corp.*, 463 S.E.2d 641 (S.C. Ct. App. 1995) (This is a piercing the veil case. The court did not address any arguments about good faith nor does it seem any were made.); *Jayroe v. Newberry County*, 2018 Westlaw 3689489 (S.C. Ct. App. 2018) (Unpublished. Refused to find compensation was due and therefore no trebling could be awarded.).

2. *O'Neal v. Intermedical Hosp. of S.C.*, 355 S.C. 499, 509, 585 S.E.2d 526, 532 (Ct. App. 2003) (jury awarded accrued vacation pay but court erred in awarding treble damages because it was disputed as to whether she was fired for misconduct and therefore not entitled under the employer's policy).
3. *Morin v. Innegrity, LLC*, 424 S.C. 559, 574, 819 S.E.2d 131, 139 (Ct. App. 2018) (even though jury awarded compensation claimed, trebling was inappropriate because, in the court's own view of the facts, the employer had a belief that Morin had agreed to forgo the compensation).
4. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 612, 518 S.E.2d 591, 598 (1999) (employee entitled to wages but not treble damages as there was a dispute as to whether he had forfeited pay due to disloyalty and there was a clarification of pre-existing law.).
5. *Rice v. Multimedia, Inc.*, 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995) (employee awarded commissions on contract but not granted trebling because it was in trial judge's discretion).
6. *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009) (treble damages improper even though wages were admittedly due. Employer had promised to pay when money came in. Bona fide dispute because employee might have diverted a customer payment).
7. *Goodwyn v. Shadowstone Media, Inc.*, 408 S.C. 93, 99, 757 S.E.2d 560, 563 (Ct. App. 2014) (jury awarded damages on claim employer guaranteed \$300 per week but hiring letter, which Goodwyn claimed she never got, said commissions were reduced if sale was discounted).
8. *Zinn v. CFI Sales & Mktg., Ltd*, 415 S.C. 93, 114, 780 S.E.2d 611, 622 (Ct. App. 2015) (although employee was awarded compensation, appeal court remanded for further findings on the trebling issue)

In all of the above cases, the judge or jury awarded the employee compensation, sometimes the full amount claimed. The cases make clear that the judge, in considering trebling and fees is confronted with an entirely different question than is the jury: Was there a "bona fide" dispute. As stated in *Rice* and *Morin*, the Legislature absolutely did not want to deter an employer from litigating and, therefore, required the absence of any legitimate grounds for doing so before authorizing the penalty. A "bona fide" dispute can be any close question of law or fact.

The fact that the jury ruled in favor of Hess has no bearing on what the court rules on trebling and fees. In fact, it is reversible error to award trebling and fees based only on the jury's verdict in favor of the employee. In all of the above cases, the employee got an 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 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.

The trial court found the jury's verdict proved there was no reasonable or good faith dispute. . . . While the jury rejected Innegrity's rationale, we must determine whether it constituted a "valid close question of law or fact," *Rice*, 318 S.C. at 99, 456 S.E.2d at 383, 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. We hold that it was, and therefore reverse the trial court's trebling

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

Similarly, in *Futch* and *O'Neal*, the employees appeared to have been awarded full relief, however, the appellate courts found bona fide disputes in each. In *Futch*, the employer alleged the employee had been disloyal. In *O'Neal*, the employer alleged the employee was properly fired for misconduct and therefore not entitled to the compensation. Both of these arguments were rejected for purposes of awarding lost wages, but established a "bona fide" dispute for trebling and fees purposes.

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. 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, 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.

Year	Net Income	Morphis Compensation	Hess Total Compensation	Bonus Paid to Hess
2010	\$17,869.00	\$148,662.88	\$175,000.00	\$75,000.00
2011	-9,359.00	180,000.00	125,000.00	25,000.00
2012	520.52	330,000.00	146,968.48	46,968.48
2013	23,018.93	151,000.00	148,000.00	48,000.00
2014	196,623.64	81,212.80	148,000.00	48,000.00
2015	374,287.42	80,000.00	170,267.41	70,267.41
	Totals	970,875.68	913,235.89	313,235.89
2016		86,699.00	157,527.00	57527
2017		86153	150992	50992
Total		1143727.68	1221754.89	421,754.89

Because we are considering Dr. Morphis' good faith belief, it is also important to consider her level of business sophistication. It was clear from the evidence that she had neither background nor experience in financial matters. She relied on her attorney and accountants to

guide her. It was apparent she had no appreciation that she might not be giving Hess a proper bonus.

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.

Finally, Hess was not awarded all the money he asked for and the punitive damage award 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. 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. 701 S.E.2d 5, 390 S.C.203 (2010) (evidence concerning net worth appears the safest harbor . . . the retrial shall be confined to such evidence . . . Branham went far beyond the pale in submitting evidence of management compensation . . . "). Therefore, even if we were to look at the jury's award for guidance (which the court may not) it does not elucidate the bona fide dispute question.

***Futch* Precludes an Award with Regard to the 2015 Contract Claim**

The holding in *Futch v. McCallister Towing*, in particular, precludes a trebling or fee award with regard to the 2015 Wage Payment Act claim. That claim rests on the argument that Morphis violated the notice provision of the Wage Payment Act. However, the only precedent on the remedy available for a notification violation clearly states that there is no civil damages remedy available. *Barton v. House of Raeford Farms, Inc.*, 745 F.3d 95, 108 (4th Cir. 2014). This court denied directed verdict based on *Barton* on the basis that § 41–10–40 (medium of payment) mentions 41-10-30, and the remedy for a violation of § 41-10-40 includes, in § 41-10-

80, full remedies. As stated in Defendants' Motion for Judgment Notwithstanding, this is an incorrect construction. The mention in § 41-10-40 concerns only wage deductions. This case does not involve wage deductions. In any event, the specific remedy provision of § 41-10-80 is very clear. It provides no civil remedy for a notification violation.

The point is that the court's holding in this case represents a departure from *Barton* and is a new construction of the statutes. 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. The court held:

However, we decline to reinstate the award of treble damages and attorney's fees because there was a bona fide dispute about whether Employer owed Futch any wages. The balancing approach we adopt today is a new development in South Carolina employment law, and it would be unfair to penalize Employer because the rules of liability were not fully developed when the case was tried.

Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 612, 518 S.E.2d 591, 598 (1999).

Therefore, if this court does not reconsider its earlier ruling on the *Barton* case, it should deny trebling and fees related to Hess's 2015 claims (assuming it does not deny them for all claims based on the above reasoning).

(2) 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 prejudgment 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).

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. However, as Plaintiff's counsel points out, 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 (Dr. Morphis's salary and car expense) that were no 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.

Furthermore, 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 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.

Finally, "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 in Defendant's Motion for Judgment Notwithstanding, there were many terms in the contract that were unclear. Even Hess and his attorney admitted this. Since uncertainty was involved, prejudgment interest should be denied.

For the foregoing reasons, prejudgment interest should be denied.

(3) ATTORNEY FEES AND COSTS

It is well settled in South Carolina, that when a party asks for attorney's fees it must provide a detailed itemized statement of fees and costs. In this case, there is no such detailed itemized statement of fees or costs. In *Johnson v. Johnson*, 288 S.C. 270, 277-78, 341 S.E.2d 811 (Ct. App. 1986), the Court of Appeals held that average estimations of time and labor devoted to the case and the extent of legal services rendered are insufficient to sustain an attorney fee award. In *Johnson*, a one-half page statement of estimated time devoted to the case, totaling 90 hours, coupled with vague testimony of attorney as to time and labor, was found insufficient to support award of attorney's fees. Similarly, in *Strickland v. Strickland*, 297 S.C. 248, 376 S.E.2d 268 (1989), the Supreme Court reversed an award of attorney's fees because the fee affidavit was insufficient for the family court to determine the fee award factors.

Thus, in South Carolina, a fee petition is incomplete without an itemized statement of time. Failing to include such itemized statements is fatal to a fee claim and the court should deny the fee and cost requests in this case.

Conclusion

For all the foregoing reasons, Defendants request the motion for trebling and fees, interest, and costs be denied.

Respectfully submitted,

MALONE, THOMPSON, SUMMERS & OTT

/s/Charles F. Thompson, Jr.
Charles F. Thompson Jr. 64219
Lake Summers
Attorneys for Defendant MPG and Morphis

339 Heyward Street
Columbia, South Carolina 29201
(803) 254-3300

Dated this 20th day of February 2022

State of South Carolina	)	
	)	C. A. No. 2018-CP-29-01127
County of Lancaster, Court of Common Pleas	)	
Paul David Hess, APRN-BC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Morphis Pediatric Group of Lancaster, PA; Elizabeth	)	
J. Morphis M.D.; Gregory M. Alexander, CPA; and	)	
Moore, Beauston & Woodham, LLP	)	
	)	
Defendants.	)	
	)	

MOTION TO AMEND ORDER REGARDING PREJUDGMENT INTEREST

Defendant moves, under S.C. Rule of Civil Procedure 59, for the court to amend its order regarding prejudgment interest in this matter. Under Rule 59, and caselaw interpreting it, a non-prevailing party must at least make a motion to amend if an Order does not “explicitly” address an argument. *See, e.g., Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding an issue is not preserved where the trial court does not explicitly rule on an argument and the appellant fails to make a Rule 59(e), SCRCP motion to alter or amend the judgment on that ground); *see also In re Estate of Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct.App.1998) (holding when a party receives an order granting relief not previously contemplated or presented to the trial court, the aggrieved party must move to alter or amend the judgment, pursuant to Rule 59(e), SCRCP, in order to preserve the issue for appeal).

Defendants respectfully asserts that the court’s order of November 2, 2022, in which the court granted Plaintiff’s motion for prejudgment interest, does not address the following arguments.

Defendant argued¹ that Plaintiff was not entitled to pre-judgment interest because such interest was not capable of determination by a simple calculation because:

- (1) the jury would have to decide whether to reject and remove Dr. Morphis' compensation and auto expenses; and
- (2) Because the terms of the bonus were uncertain and the jury necessarily had to determine the meaning of essential terms, the sum is not readily ascertainable as a matter of law.

Defendant respectfully asserts that the court did not explicitly address these matters in its Order and amendment is required.

Respectfully submitted,

MALONE, THOMPSON, SUMMERS
& OTT LLC

/s/Charles F. Thompson Jr.

Charles F. Thompson, Jr.
Attorney for Defendants

November 4, 2022

339 Heyward Street
Columbia, South Carolina 29201
(803) 254-3300

¹ Beginning page 8 of its Memorandum of Law filed February 20, 2022

State of South Carolina	)	
	)	C. A. No. 2018-CP-29-01127
County of Lancaster, Court of Common Pleas	)	
Paul David Hess, APRN-BC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Morphis Pediatric Group of Lancaster, PA; Elizabeth	)	
J. Morphis M.D.; Gregory M. Alexander, CPA; and	)	
Moore, Beauston & Woodham, LLP	)	
	)	
Defendants.	)	
	)	

**DEFENDANTS' ELIZABETH MORPHIS'S AND MORPHIS PEDIATRIC GROUP OF
LANCASTER'S MOTION FOR DIRECTED VERDICT**

Elizabeth Morphis, M.D. ("Morphis") and Morphis Pediatric Group of Lancaster ("MPG") (collectively, "Defendants") moves and submits the following memorandum in support of their motion for directed verdict.

FACTUAL BACKGROUND

MPG is a pediatric clinic located in Lancaster South Carolina. It is one of the few located in this small town. It is owned by Dr. Beth Morphis.

Dr. Morphis has been practicing pediatric medicine since 1995. She also provides expert testimony in child abuse cases. (**Ex. 1, Morphis Dep. p. 18**).¹ In the beginning of her career, Dr. Morphis worked at MPG, which was owned by her father-in-law "J.O. Morphis," also a

¹ References are the exhibits filed in Defendants' first motion for summary judgment filed in August 2020.

pediatrician. J.O. worked primarily out of Hartsville which was a separate legal entity. **(Id. at 22)**. When J.O. Morphis retired, he sold both practices to Dr. Beth Morphis. He received an annual royalty of \$80,000 beginning in 2012. **(Ex. 1, pp. 41-42)**.

MPG also employed nurse practitioners. Over the years, Morphis hired other physicians to work at MPG and she gradually reduced the number of days she worked there as a health provider and shifted most of her clinical time to the Hartsville practice. **(Id at 24-26)**. She always, however, worked some time in Lancaster and frequently consulted with Hess on patient issues. **(Ex 1 pp. 35-40)**. Dr. Morphis continued to oversee all administrative and management aspects of the Lancaster office. Hess focused his activity almost exclusively on patient care. **(Id.)**.

Morphis hired David Hess in 2009 as a nurse practitioner. During Hess' employment he worked there with a doctor whom Morphis hired to work exclusively in Lancaster. **(Id. at 26)**. In January 2010, Hess agreed to an employment contract (2010 Agreement) with MPG. **(Ex. C)²**. 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.

(Clause 4, Exhibit B),

The Appendix States:

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,

² All Exhibits with a letter designation are the Exhibits filed by Defendant Alexander on April 17, 2020.

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.

Notably, there is no definition of “criteria,” or “debts, expenses, royalties” or “expenditures.”

Although the Company Accountant (Defendant Alexander) asserts he did not determine all the “monies” mentioned in the clause, he did determine the net profit of the Lancaster practice each year. With perhaps the exception of the 2010 profit number, the parties agree on the following numbers:

	2010	2011	2012	2013	2014
MPG Net Income	17869	-9359	520	23021	196626
Hess Bonus	75000 ³	25000	46968	48000	48000

Hess now claims that MPG and Morphis improperly included, in expenses, a salary for Dr. Morphis and Dr. Morphis’ automobile expenses. He asserts he is entitled to the following:⁴

Year	Net Income	Officers' Salaries	Auto Expense	Bonus Due	Bonus Paid	X-Mas Bonus	Damages
2010	\$305,815.11	\$148,662.88	\$13,180.28	\$233,829.14	\$75,000.00	\$5,414.19	\$153,414.95
2011	-9,359.00	180,000.00	10,786.56	90,713.78	25,000.00	5,299.41	60,414.37
2012	520.52	330,000.00	10,838.10	170,679.31	46,968.48	5,299.41	118,411.42
2013	23,018.93	151,000.00	11,444.50	92,731.72	48,000.00	5,414.18	39,317.54
2014	196,623.64	81,212.80	9,100.20	143,468.32	48,000.00	7,543.94	87,924.38
2015	374,287.42	80,000.00	9,100.20	231,693.81	70,267.41	6,854.21	154,572.19
							\$614,054.84

³ Plaintiff wants to use the figure 305,922 as the income for 2010. This number is shown on a report produced by Alexander for 2010 (Bates 728), as was the figure 17,869 at Bates 703. Alexander testified that the financial statement the 305,922 number came from was not part of the complete year-end report and he therefore doubted that was the correct number. (Ex. 2 Alexander testimony pp. 125-131). The figure of 17,869 is the one reported on the actual tax return. (Bates 915) (Ex. 3).

⁴ From responses to Defendants’ Interrogatories.

In February 2015, Dr. Morphis realized she had forgotten to calculate and pay Hess's bonus for 2014. She contacted Alexander on February 4, 2015, requesting he inform Hess why he was receiving his bonus late. (**Exhibit G; Exhibit E (pg. 87); Exhibit B (pg. 174-75), Exhibit F.2).** Alexander contacted Hess and informed him he would be receiving the same bonus as last year, \$48,000. (**Exhibit G).** In response, Hess questioned the numbers, to which Alexander responded he was not at liberty to share at the moment. (**Exhibit G).** As a result, Hess suggested a meeting to review the numbers used to calculate his bonus. (**Exhibit G).** (**Exhibit E (pg. 78)).** A meeting occurred in May 2015.

Because of Hess's repeated questions regarding the numbers, Dr. Morphis decided to propose a new employment agreement to Hess with a simplified bonus calculation that would result in bonuses comparable to Hess's past bonuses and be easier and faster to calculate. (**Exhibit F (pgs. 148-50); Exhibit B (pg. 88); Exhibit H.**). As a result, Alexander determined that Hess's bonuses for the years 2010-2014 were comparable to 5% of gross revenues, which could be calculated earlier than the 50% of net profits. (**Exhibit H; Exhibit D).**

The meeting with Hess took place on May 28, 2015. (**Exhibit E (pg. 35)).** 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. (**Exhibit E (pg. 32)).** 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. (**Exhibit I).** He prepared a second spreadsheet for Dr. Morphis only that also included the profits of Morphis Pediatric. (**Exhibit J).** Alexander provided Hess and Dr. Morphis the spreadsheet that excluded the profits. (**Exhibit K).**

On December 30, 2015, Hess executed his new employment agreement (2015 Agreement). (**Exhibit L**). Pursuant to the 2015 Agreement, Hess would receive a bonus equal to 5% of Morphis Pediatric's gross receipts for the year. (**Exhibit L**.) Hess's 2015 bonus was calculated pursuant to the 2015 Agreement, and Hess was paid bonuses for 2016 and 2017.

In 2018, Dr. Morphis decided to try to sell MPG. On May 8, 2018, Alexander published a Letter of Intent on behalf of Dr. Morphis and Morphis Pediatric indicating the assets of the Lancaster office were being sold and inviting bids to purchase the assets. (**Complaint., p. 4**.) Hess and a co-worker contemplated purchasing the assets of Morphis Pediatric and they were given access to financial records of Morphis Pediatric from 2013 to April 30, 2018, allowing them to conduct due diligence to evaluate the practice's worth and prepare their bid. (**Complaint., p. 4**.) Hess and his co-worker submitted their bid to purchase the assets of Morphis Pediatric on July 2, 2018. (**Complaint, p. 4**.) Their bid was rejected, but they were invited by Dr. Morphis to revise their offer. (**Complaint., p. 4**.) On July 20, 2018, Hess and his co-worker submitted a revised offer. (**Complaint., p. 4**.)

On July 31, 2018, Dr. Morphis decided to terminate Hess's employment with Morphis Pediatric, due to underperformance of the office. (**Exhibit M; Exhibit F (pg. 192)**). Hess filed the present action on September 27, 2018, against Morphis Pediatric, Dr. Morphis, Alexander, and MBW.

LEGAL STANDARD OF REVIEW

General Standard: In *Matter of Estate of Smith*, 796 S.E.2d 158, 160 – 61 (S.C. Ct. App. 2016), articulated the following legal standard applicable to the Court's consideration of the Defendants' motion:

“In reviewing the grant of summary judgment motion, the [appellate court] applies the same standard as the trial court under [SCRCP 56(c)]

....” [*Dawkins v. Fields*, 580 S.E.2d 433, 438 – 39 (2003)]. [SCRCP 56(c)] states summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [SCRCP 56(c)]. “In determining whether any triable issue of fact exists, the evidence and all inferences which can *reasonably* be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” [*Grimsley v. S.C. Law Enf’t Div.*, 780 S.E.2d 897, 900 (2015)]. **“Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, ‘it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.’”** *Id.* (quoting [*Town of Hollywood v. Floyd*, 744 S.E.2d 161, 166 (2013)]). **“The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.”** [*Bennett v. Inv’rs Title Ins. Co.*, 635 S.E.2d 649, 654 (S.C. Ct. App. 2006)]. **If the moving party is successful, the nonmoving party must then come forward with specific facts showing there is a genuine issue for trial. *Id.***

[emphasis supplied].

Standard Regarding Fraud Claims: In response to a summary judgment motion, a heightened showing must be made by a plaintiff regarding any claim of fraud:

[T]he fraud claim requires proof by clear and convincing evidence; thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment. *See Hancock*, 381 S.C. at 330–31, 673 S.E.2d at 803. Due to the heightened standard of review applied to fraud claims, we find the grant of summary judgment on the fraud claim appropriate.

Turner v. Milliman, 392 S.C. 116, 124–25, 708 S.E.2d 766, 770 (2011).

ARGUMENT

Introduction

Hess’s claims against MPG are: (1) violation of the South Carolina Wage Payment Act for failure to pay his proper bonuses in 2015, 2014, and 2013; (2) Breach of Contract for Failure to pay proper bonuses in 2010 through 2014; (3) Breach of Contract accompanied by a

fraudulent act for providing false information relating to the 2010 through 2014 bonus payments; (4) Fraud regarding the 2014 and the 2015 payment; and (5) negligent misrepresentation as to the 2014 through 2015 payments.

Hess' Seventh and Eighth causes of actions are moot. The Seventh requests a declaratory judgment as to a non-competition agreement, however, Morphis never attempted to enforce that agreement. The Eighth cause of action requests an accounting, however, the parties have fully exchanged discovery on all matters with no objections as to completeness.

Hess's causes of action are barred by the statute of limitations because Hess knew or should have known he had a claim more than three years prior to initiating this lawsuit.

An action for breach of contract must be brought within three years from the date the action accrues. S.C.Code Ann. § 15-3-530(1) (Supp.1997). Claims of fraud and negligent misrepresentation must be commenced within three years. S.C. Code Ann. § 15-3-530(5). 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).

"A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might

exist.” *Maier v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). With respect to fraud, the discovery rule focuses on whether the injured party acquired knowledge of any existing facts “sufficient to put said party on inquiry, which, if developed, will disclose the alleged fraud.” *Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (quoting *Walter J. Kline Co. v. Kneece*, 239 S.C. 478, 483, 123 S.E.2d 870, 874 (1962)). Even if the injured party claims ignorance of existing facts or circumstances, the same result follows if such facts and circumstances could have been known to the party by exercise of ordinary care and reasonable diligence. *Id.* Further, the fact an injured party may not comprehend the full extent of the damage is immaterial. *Dean*, 321 S.C. at 364, 468 S.E.2d at 647. In other words, the discovery rule does not “require absolute certainty [that] a cause of action exists before the statute of limitations begins to run.” *Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001).

Maier is a remarkably similar case. In that case, the court of appeals determined an employee’s breach of contract claim based on his employer failing to pay a bonus was barred by the statute of limitations because his testimony revealed he had conversations with his employer outside of the statute of limitations that showed he believed he was not receiving the bonus money to which he felt entitled. *Maier*, 331 S.C. at 379, 500 S.E.2d at 208. Pursuant to a 1985 employment agreement, the employee was part of a “fifty percent bonus plan” that entitled a group of employees to a share of 50% of the company’s pre-tax profit. *Id.* 331 S.C. at 375, 500 S.E.2d at 206. The bonus program was ended in 1987, but the employee stated he was never notified the program ended. *Id.* Between 1987 and the employee’s termination in 1994, the employee had conversations with his superior regarding the fifty percent bonus plan. *Id.* Specifically, he testified he remembered raising concerns about the bonus plan with his superior

in 1989 and 1990, but was not satisfied with his superior's response. *Id.* 331 S.C. at 379, 500 S.E.2d at 208. The court held that the employee's dissatisfaction with his superior's response was "clear evidence that he knew, could have known, or should have known that at that time he might have a cause of action over the fifty percent bonus plan." *Id.*

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

The contract at issue is the 2010 Agreement. The allegations in the Complaint state "Alexander . . . intentionally interfered with the contract between Plaintiff and [Morphis Pediatric] by inducing, aiding, abetting, encouraging, or assisting [Morphis Pediatric] in breaching the contract." (**Complaint, p. 10**). Hess alleges Morphis Pediatric breached the 2010 Agreement by (1) failing or refusing to pay Hess the full amount of bonuses he earned, (2) failing and refusing to provide detailed information about MPG's financials, (3) running automobile expenses of Dr. Morphis through MPG, and (4) paying Dr. Morphis a salary.

Hess was on notice of these alleged bonus deficiencies outside of the statute of limitations period. Hess testified that he went to great lengths to calculate what the net profit was and his number came up bigger than the bonus he was given.

I knew that the numbers just never seemed to work. . . . Sandra and I would sometimes sit down and try to come up with numbers that we see -- that would appear to be appropriate for the practice. I mean we were there every day. We did the day-to-day, in-and-out billing, financial billing, supplies, stuff like that. We tried to calculate salaries for the other employees. We had an idea of what they were paid and multiply it -- you know, come up with an annual salary, you know those kind of things. I mean they were never exact numbers. They were always -- we were trying to figure out what was going on because there always seemed to be more money coming in and less money going out -- or not -- or there was more money coming in than what was having to be paid out.

(Ex. 4 Hess Dep. pp. 39-40).

Second, Hess was on notice he may not have been receiving an appropriate bonus when

he 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.

Third, Hess was on notice because of the May 28, 2015 meeting that he may have not received the bonuses to which he felt he was entitled. Hess testified he asked Alexander whether he had received as a bonus 50% of the profits in the past.

Q. Okay. Let's start with, what do you remember specifically being discussed in the meeting?

A. I remember asking [Alexander] straight up did I get 50 percent of the profits?

Q. Okay. And was there any discussion about –

A. His response was, I can't divulge that information because it's Beth's personal tax information.

Q. And why were you concerned at that time about whether or not you were getting 50 percent of profits?

A. Because when I would try to figure out the numbers and what was going on and I would – it always seemed like there was a huge discrepancy, a couple hundred-thousand dollars. And we could never pinpoint and place it with the limited information that we had. And we'd bring that up with Beth and that's when I was -- suggested that we look at a new accountant because I was concerned there was some monies being lost.

....

Q. But you did feel there was a discrepancy, perhaps, between what your bonus was getting calculated on versus what you thought was the profit of the practice?

A. Yes

(Id.).

Hess even was on notice of the main issue (Dr. Morphis taking a salary from MPG) he is now complaining about long before 2105. He testified he was told by the MPG accountant at the time Dr. Morphis took over the practice that Dr. Morphis was receiving compensation from the practice. **(Id. at 43).**

Hess, therefore, had even more notice of his claims than did the plaintiff in *Maher*. Not only did Hess object and question his bonus, he was aware of the specific expenses which he now claims were improper. He also went to great efforts to calculate the profit and loss of MPG and was sure the profit should have been hundreds of thousands higher. His claims, therefore, are barred by the applicable statutes of limitations.

A Discretionary Bonus is Not an Enforceable Contractual Promise

As stated above, the Board of MPG could use any “criteria” it wished to decide if Hess would receive a bonus or not. Thus, his bonus was completely discretionary. An overwhelming number of courts have 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) (claims for breach of contract lack merit in view of the unambiguous language of their contracts and the employee handbook plainly making bonus awards solely and completely a matter of defendant's discretion); *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324, 834 N.Y.S.2d 44, 865 N.E.2d 1210 [2007] (Language that bonuses would be contingent on criteria such as performance and profitability cannot be interpreted as a limitation on defendant's discretion, since doing so would render the clear language of discretion meaningless); *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill.App.3d 536 (2009) (holding that offer to McLaughlin of a bonus was not guaranteed. If no unequivocal promise was made, then the employee is not entitled to any part of the bonus pursuant to Section 2 of the IWPCA.); *Mathews v. Marietta Toyota, Inc.*, 270 Ga. App. 337, 606 S.E.2d 862 (2004) (where no method of calculating a promised bonus was established, and the awarding of a bonus was purely discretionary with an employer's vice president and general manager, there was no definite promise to pay the employee an annual bonus of 1% of the

employer's profits despite the fact that the employee had received a bonus of 1% of annual profits in other years and that the vice president had directed the company's comptroller to set aside during the year at issue 1% of monthly profits for possible future payment of such a bonus to the employee); *Mirzaie v. Smith Cogeneration, Inc.*, 1998 OK CIV APP 123, 962 P.2d 678 (Div. 1 1998) (If a bonus is not part of the parties' employment contract, then there is no obligation to pay any amount; whether to pay the bonus and the amount to pay is totally discretionary with the employer).

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: “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 situation 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. [where there is] 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). *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).

Without a Binding Contractual Right to the Bonus, Hess' Wage Payment Claim also Fails

If there was no enforceable contract to pay a certain bonus, then there can be no Wage Payment Act claim for the bonus. Relatedly, or perhaps stated a different way, if the bonus was within the employer's discretion, there can be no Wage Payment Act claim for failure to pay a bonus.

bonuses are not considered wages unless the contingencies for the awarding of such bonuses have been established and met. See *Neisendorf*, 143 Cal.App.4th at 522, 49 Cal.Rptr.3d 216 (“[B]onuses are considered ‘wages’ within the meaning of Labor Code section 200.... [O]nce a bonus has been promised as part of the compensation for service, and the employee fulfills all agreed-to conditions, the promised bonus is considered wages that must be paid.”). For the foregoing reasons, the bonus conditions were not established and thus could not have been met. Attorney's fees are, therefore, not recoverable.

Stevens v. Mavent, Inc., No. SACV 07-245 AHS RNBX, 2008 WL 2824956, at *9 (C.D. Cal. July 21, 2008).

Profit Sharing Plans are Excluded from the Wage Payment Act

S.C. Code Ann. 41-10-10 states that monies owed from profit sharing plans are not covered by the Wage Payment Act.

Profit sharing plans do not have to be ERISA plans under wage payment acts to be excluded. *Kaplon*, 39 So.3d 725 (La. 2010).

Breach of Contract Accompanied by a Fraudulent Act Requires an Underlying Enforceable Contractual Promise

If, as is true, Hess does not have a breach of contract claim, then he cannot assert a fraudulent act claim based on the 2010 contract.

In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention, and (3) that the breach was accompanied by a fraudulent act.

Smith v. Canal Ins. Co., 275 S.C. 256, 269 S.E.2d 348 (1980).

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

MPG Was Not Required to Minimize or Avoid any Particular Expenses so as to Maximize Hess' Bonus

First, even if it could be said that there was a contractual promise, Defendants did not breach that promise. The Agreement states that the discretionary bonus is based on a determination of profit and loss by the Company Accountant. There is no dispute that Hess received at, or more than, the net income shown by the Company Accountant (if one does not eliminate the Morphis salary and auto expense).

Second, nothing in the Agreement states that the net income is to be derived in any

particular manner. To the contrary, it states that other things, such as “debts, expenses, royalties and expenditures” may be deducted. There simply was no promise to not give Morphis a salary or allow her to deduct automobile expenses.

It is notable that Hess agreed that Morphis was entitled to a salary for the patient care, administrative duties, and marketing functions she performed on behalf of MPG. **(Ex. 4 Hess Dep. p. 26).**⁵

Relatedly, an employer simply is not required to avoid, or fail to take, certain expenses so that an employee’s bonus is maximized. See, *Lessley v. Hardage*, 240 Kan. 72, 84–85, 727 P.2d 440, 449 (1986) (“To require every employer to take into consideration, in making every business decision, the possible and ultimate effect upon each of his employees would impose an intolerable burden upon business management. We decline to do so.”).

Hess’s Fraud and Misrepresentation Claims Fail Because He Has No Viable Claim Under the 2010 Employment Contract

Hess’s Fraud and Misrepresentation claims are both based on the premise that the Defendants misrepresented to him that he received the correct bonuses under the 2010 Agreement. He claims he was lured into accepting the 2015 Agreement which paid less than what he would have received under the 2010 Agreement. However, he cannot assert fraud or misrepresentation claims if, for any of the above reasons, he did not have a legal right to more than he received. For the reasons stated above, he did not, and, therefore, he has no basis to make a tort claim by comparing to the bonuses he received under the 2010 Agreement.

Hess Cannot Assert Fraud or Negligence Claims Where the “Duty” is Solely Contractual

⁵ Although Hess claimed Morphis was entitled to no salary under his view of the 2010 Agreement.

Even if MPG made a promise to Hess to calculate his bonus in the manner he claims, there was no duty independent of the 2010 Agreement to support any tort claim.

The economic loss rule bars a tort action “where duties are created *solely* by contract.” *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 384 S.E.2d 730, 737 (1989); *Eaton Corp. v. Trane Carolina Plains*, 350 F. Supp. 2d 699, 701–02 (D.S.C. 2004)

The *Kennedy* court explained the economic loss rule as follows:

This rule exists to assist in determining whether contract or tort theories are applicable to a given case. Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only “economic losses.” Conversely, where a purchaser buys a product which is defective and physically harms him, his remedy is in either tort *or* contract. This is so, ... because his losses are more than merely “economic.”

Kennedy, 384 S.E.2d at 736.

It is true that, “[w]here there is a special relationship between the parties that is independent of the contract, ... there exists a duty of care whose breach will support a tort action.” See *Palmetto Linen Service, Inc. v. U.N.X., Inc.*, 205 F.3d 126, 129 (4th Cir.2000); see also *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85, 88 (1995). However, South Carolina courts have permitted negligence actions to proceed only against parties such as builders, engineers, and lawyers based on their professional duties to plaintiffs. See *Tommy L. Griffin*, 463 S.E.2d at 89; *Lloyd v. Walters*, 276 S.C. 223, 277 S.E.2d 888 (1981). The reason for allowing these actions is that in certain circumstances, an individual may have breached an independent legal duty owed to the plaintiff which does not arise from the contract. See, e.g., *Tommy L. Griffin*, 463 S.E.2d at 89 (“We see no logical reason to insulate design professionals from liability when the relationship between the design professional and the plaintiff is such that the design professional owes a professional duty to the plaintiff arising separate and distinct from any contractual duties between the parties....”);

Kennedy, 384 S.E.2d at 737 (“If a builder performs construction in such a way that he violates a contractual duty *only*, then his liability is only contractual. If he acts in a way as to violate a legal duty, however, his liability is both in contract and in tort.”).

Hess has not identified any such special relationship between him and Defendants. Therefore, his tort claims against MPG and Morphis fail.

CONCLUSION

For all of the above reasons, Defendants request summary judgment as to all claims.

Respectfully submitted,

MALONE, THOMPSON, SUMMERS & OTT LLC

/s/Charles F. Thompson Jr. _____

Charles F. Thompson, Jr.

Lake Summers

Michael D. Malone

Attorneys for Defendant

339 Heyward Street

Columbia, South Carolina 29201

(803) 254-3300

Dated this 28th of August 2020

State of South Carolina	)	
	)	C. A. No. 2018-CP-29-01127
County of Lancaster, Court of Common Pleas	)	
Paul David Hess, APRN-BC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Morphis Pediatric Group of Lancaster, PA; Elizabeth	)	
J. Morphis M.D.; Gregory M. Alexander, CPA; and	)	
Moore, Beauston & Woodham, LLP	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' ELIZABETH MORPHIS'S AND MORPHIS PEDIATRIC GROUP OF LANCASTER'S MOTION FOR DIRECTED VERDICT

Elizabeth Morphis, M.D. ("Morphis") and Morphis Pediatric Group of Lancaster ("MPG") (collectively, "Defendants") move and submit the following memorandum in support of their motion for judgment notwithstanding the verdict.

BACKGROUND

MPG is a pediatric clinic located in Lancaster South Carolina. It is one of the few located in this small town. It is owned by Dr. Beth Morphis.

Dr. Morphis has been practicing pediatric medicine since 1995. She also provides expert testimony in child abuse cases. In the beginning of her career, Dr. Morphis worked at MPG, which was owned by her father-in-law "J.O. Morphis," also a pediatrician. J.O. worked primarily out of Hartsville which was a separate legal entity. When J.O. Morphis retired, he sold both practices to Dr. Beth Morphis.

MPG also employed nurse practitioners. Over the years, Morphis hired other physicians to work at MPG and she gradually reduced the number of days she worked there as a health provider and shifted most of her clinical time to the Hartsville practice. She always, however, worked some time in Lancaster and frequently consulted with Hess on patient issues. Dr. Morphis continued to oversee all administrative and management aspects of the Lancaster office. Hess focused his activity almost exclusively on patient care.

Morphis hired David Hess in 2009 as a nurse practitioner. During Hess' employment, he worked there with several doctors (at varying times) whom Morphis hired to work exclusively in Lancaster. In January 2010, Hess agreed to an employment contract (2010 Agreement) with MPG. 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.

The Appendix States:

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.

There are no definitions of "criteria," or "debts, expenses, royalties" or "expenditures."

Although the Company Accountant (Defendant Alexander) asserts he did not determine all the "monies" mentioned in the clause, he did determine the net profit of the Lancaster practice

each year.

Hess claims that MPG and Morphis improperly included, in expenses, a salary for Dr. Morphis and Dr. Morphis' automobile expenses. He asserted at trial he was entitled to the following:

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

In February 2015, Dr. Morphis realized she had forgotten to calculate and pay Hess's bonus for 2014. She contacted Alexander on February 4, 2015, requesting he inform Hess why he was receiving his bonus late. Alexander contacted Hess and informed him he would be receiving the same bonus as last year, \$48,000. In response, Hess questioned the numbers, to which Alexander responded he was not at liberty to share at the moment. As a result, Hess suggested a meeting to review the numbers used to calculate his bonus. A meeting occurred in May 2015.

Because of Hess's repeated questions regarding the numbers, Dr. Morphis decided to propose a new employment agreement to Hess with a simplified bonus calculation that would result in bonuses comparable to Hess's past bonuses and be easier and faster to calculate. As a

result, Alexander determined that Hess's bonuses for the years 2010-2014 were comparable to 5% of gross revenues, which could be calculated earlier than the 50% of net profits.

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. He prepared a second spreadsheet for Dr. Morphis only that also included the profits of MPG. Alexander provided Hess and Dr. Morphis the spreadsheet that excluded the profits.

In June 2015, Hess emailed that he would accept the new contract. On December 30, 2015, Hess executed his new employment agreement (2015 Agreement). 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.

In 2018, Dr. Morphis decided to try to sell MPG. On May 8, 2018, Alexander published a Letter of Intent on behalf of Dr. Morphis and Morphis Pediatric indicating the assets of the Lancaster office were being sold and inviting bids to purchase the assets. Hess and a co-worker contemplated purchasing the assets of Morphis Pediatric and they were given access to financial records of Morphis Pediatric from 2013 to April 30, 2018, allowing them to conduct due diligence to evaluate the practice's worth and prepare their bid. Hess and his co-worker submitted their bid to purchase the assets of Morphis Pediatric on July 2, 2018. Their bid was rejected, but they were invited by Dr. Morphis to revise their offer. On July 20, 2018, Hess and

his co-worker submitted a revised offer. (**Complaint., p. 4**).

On July 31, 2018, Dr. Morphis decided to terminate Hess's employment with Morphis Pediatric, due to underperformance of the office. Hess filed the present action on September 27, 2018, against Morphis Pediatric, Dr. Morphis, Alexander, and MBW.

LEGAL STANDARD OF REVIEW

General Standard: The standard for deciding a motion for judgment notwithstanding is essentially the same as that for summary judgment except that the "scintilla of evidence" is no longer an issue since the court has all the evidence it may properly consider.

This court will reverse the trial court's ruling on a directed verdict motion only if no evidence exists to support the ruling, or if the decision was controlled by an error of law. *ty. Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999); *Mullinax v. Brown Amusement*, 326 S.C. 453, 456, 485 S.E.2d 103, 105 (Ct.App.1997) *aff'd* 333 S.C. 89, 508 S.E.2d 848 (1998). "The appellate court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor." *Jones v. General Electric Co.*, 331 S.C. 351, 356, 503 S.E.2d 173, 176 (Ct.App.1998). 78 This court will reverse the trial court's ruling on a directed verdict motion only if no evidence exists to support the ruling, or if the decision was controlled by an error of law. *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006); *McMillan*, 367 S.C. at 564, 626 S.E.2d at 886; *19 *Clark v. S.C. Dep't of Pub. Safety*, 362 S.C. 377, 382–83, 608 S.E.2d 573, 576 (2005); *Swinton Creek Nursery*, 334 S.C. at 477, 514 S.E.2d at 130; *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct.App.2000). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663.

ARGUMENT

Introduction

Hess's elected claims against Morphis and MPG are solely under the South Carolina

Wage Payment Act for failure to pay his proper bonuses in 2010 through 2015. With respect to 2010 through 2014, his theory is that the proper bonus was not paid because Morphis took compensation before the calculation. With respect to 2015, Hess claims he was not given proper notification of the change under the Act and, therefore, he must be paid under the 2010 Agreement.

Hess's causes of action are barred by the statute of limitations because Hess knew or should have known he had a claim more than three years prior to initiating this lawsuit.

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).

“A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist.” *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). With respect to fraud, the discovery rule focuses on whether the injured party acquired knowledge of any existing facts “sufficient to put said party on inquiry, which, if developed, will disclose the

alleged fraud.” *Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (quoting *Walter J. Kline Co. v. Kneece*, 239 S.C. 478, 483, 123 S.E.2d 870, 874 (1962)). Even if the injured party claims ignorance of existing facts or circumstances, the same result follows if such facts and circumstances could have been known to the party by exercise of ordinary care and reasonable diligence. *Id.* Further, the fact an injured party may not comprehend the full extent of the damage is immaterial. *Dean*, 321 S.C. at 364, 468 S.E.2d at 647. In other words, the discovery rule does not “require absolute certainty [that] a cause of action exists before the statute of limitations begins to run.” *Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001).

Maher is a remarkably similar case. In that case, the court of appeals determined an employee’s breach of contract claim based on his employer failing to pay a bonus was barred by the statute of limitations because his testimony revealed he had conversations with his employer outside of the statute of limitations that showed he believed he was not receiving the bonus money to which he felt entitled. *Maher*, 331 S.C. at 379, 500 S.E.2d at 208. Pursuant to a 1985 employment agreement, the employee was part of a “fifty percent bonus plan” that entitled a group of employees to a share of 50% of the company’s pre-tax profit. *Id.* 331 S.C. at 375, 500 S.E.2d at 206. The bonus program was ended in 1987, but the employee stated he was never notified the program ended. *Id.* Between 1987 and the employee’s termination in 1994, the employee had conversations with his superior regarding the fifty percent bonus plan. *Id.* Specifically, he testified he remembered raising concerns about the bonus plan with his superior in 1989 and 1990, but was not satisfied with his superior’s response. *Id.* 331 S.C. at 379, 500 S.E.2d at 208. The court held that the employee’s dissatisfaction with his superior’s response was “clear evidence that he knew, could have known, or should have known that at that time he

might have a cause of action over the fifty percent bonus plan.” *Id.*

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

The contract at issue is the 2010 Agreement. Hess alleges Morphis Pediatric breached the 2010 Agreement by failing or refusing to pay Hess the full amount of bonuses he earned because MPG took Dr. Morphis' automobile expenses and salary prior to calculating his bonus.

Hess was on notice of these alleged bonus deficiencies outside of the statute of limitations period. Hess testified at trial that he went to great lengths to calculate what the net profit was and his number came up bigger than the bonus he was given. His efforts included recreating income and expenses from the medical production software of MPG and going through expenses with the local MPG administrator. He also testified that he questioned Dr. Morphis as to the profitability of MPG repeatedly. He even accused the accountant of ineptitude or malfeasance because he was sure the numbers were "not right." He testified he made these efforts because he doubted his bonus was correct. 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 as a bonus 50% of the profits in the past. The deposition testimony below was consistent with his trial testimony:

Q. Okay. Let's start with, what do you remember specifically being discussed in the meeting?

A. I remember asking [Alexander] straight up did I get 50 percent of the profits?

Q. Okay. And was there any discussion about –

A. His response was, I can't divulge that information because it's Beth's personal tax

information.

Q. And why were you concerned at that time about whether or not you were getting 50 percent of profits?

A. Because when I would try to figure out the numbers and what was going on and I would – it always seemed like there was a huge discrepancy, a couple hundred-thousand dollars. And we could never pinpoint and place it with the limited information that we had. And we'd bring that up with Beth and that's when I was -- suggested that we look at a new accountant because I was concerned there was some monies being lost.

....

Q. But you did feel there was a discrepancy, perhaps, between what your bonus was getting calculated on versus what you thought was the profit of the practice?

A. Yes

Hess even was on notice of the main issue (Dr. Morphis taking a salary from MPG) he is now complaining about long before 2105. He testified he was told by the MPG accountant at the time Dr. Morphis took over the practice that Dr. Morphis was receiving compensation from the practice.

Hess, therefore, had even more notice of his claims than did the plaintiff in *Maher*. Not only did Hess object and question his bonus, he was aware of the specific expenses which he now claims were improper. He also went to great efforts to calculate the profit and loss of MPG and was sure the profit should have been hundreds of thousands higher. His claims, therefore, are barred by the applicable statutes of limitations.

The court has denied directed verdict on this argument on the basis that Maher received no bonus at all whereas Hess received some bonus. However, the decision in *Maher* turned on the fact that Maher expressed awareness of his claim. The fact that he was not paid any bonus played no part in the decision. The operative fact was that "he believed at the time of the conversations that he was not getting the bonus money to which he felt entitled." *Id.* at 379. Hess' belief was exactly the same. At trial, there was no claim that he lacked such a belief. To the

contrary, he repeatedly admitted it.

Although the court did not rule on the argument, Hess asserts that the statute should be tolled because he was never given the proper financial information to calculate his bonus. Tolling is a form of estoppel. *See, e.g., Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009); *Campbell v. Guignard*, No. 2015-UP-293, 2015 WL 3819059, at *1 (S.C. Ct. App. June 17, 2015). Tolling, however, only applies to situations where a plaintiff is aware of the claim but the defendant takes some action to induce the plaintiff from filing suit. There is no such allegation or evidence that Morphis did anything to induce Hess not to file suit.

Campbell argues the trial court erred in failing to find (1) Potterfield's actions tolled the statute of limitations and (2) Potterfield was estopped from asserting the statute of limitations as a defense. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: . . . *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (“Under [South Carolina's] discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.” (emphasis omitted) (citations omitted)); *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009) (“**[E]quitable tolling is a doctrine that should be used sparingly** and only when the interests of justice compel its use.”); *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 639, 682 S.E.2d 1, 8 (Ct.App.2009) (“**[F]or equitable estoppel to apply, a plaintiff must be aware that a claim might exist prior to the expiration of the statute of limitations, but due to some conduct or representation by the defendant, the plaintiff is induced ... to delay in filing suit.**” (alteration in original) (internal quotation marks omitted)).

Campbell v. Guignard, No. 2015-UP-293, 2015 WL 3819059, at *1 (S.C. Ct. App. June 17, 2015) (emphasis added).

There was no evidence Morphis did anything to induce Hess not to file his claim. As such, tolling does not apply.

A Discretionary Bonus is Not an Enforceable Contractual Promise

As stated above, the Board of MPG could use any “criteria” it wished to decide if Hess would receive a bonus or not. 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) (claims for breach of contract lack merit in view of the unambiguous language of their contracts and the employee handbook 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) (Language that bonuses would be contingent on criteria such as performance and profitability cannot be interpreted as a limitation on defendant's discretion, since doing so would render the clear language of discretion meaningless); *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill.App.3d 536 (2009) (holding that offer to McLaughlin of a bonus was not guaranteed. If no unequivocal promise was made, then the employee is not entitled to any part of the bonus pursuant to Section 2 of the IWPCA.); *Mathews v. Marietta Toyota, Inc.*, 270 Ga. App. 337, 606 S.E.2d 862 (2004) (where no method of calculating a promised bonus was established, and the awarding of a bonus was purely discretionary with an employer's vice president and general manager, there was no definite promise to pay the employee an annual bonus of 1% of the employer's profits despite the fact that the employee had received a bonus of 1% of annual profits in other years and that the vice president had directed the company's comptroller to set aside during the year at issue 1% of monthly profits for possible future payment of such a bonus to the employee); *Mirzaie v. Smith Cogeneration, Inc.*, 962 P.2d 678 (Ok. Div. 1 1998) (If a bonus is not part of the parties' employment contract, then there is no obligation to pay any amount; whether to pay the bonus and the amount to pay is totally discretionary with the

employer). 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. The phrase "illusory promise" means "words in promissory form that promise nothing." 2 Corbin on Contracts § 5.28 (1995). That is all the Hess contract is--a purely discretionary, illusory promise.

The court denied directed verdict on this issue on the grounds that the contract should be construed against the drafter. However, interpretation is not the issue. Morphis clearly did have discretion as to whether she would give Hess a bonus or not. Plaintiff argues that, once she did decide Hess was qualified, there was no discretion. First, this is beside the point. What matters is that there is 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.

Hess argues that the covenant of good faith and fair dealing would require any discretion to be applied in good faith. However, the covenant does not apply unless there first exists a binding contract. The covenant cannot create a contract. *See, e.g., Mountain Highlands, LLC v. Hendricks*, 616 F.3d 1167, 1171 (10th Cir. 2010) ("because the existence of th[e] covenant [of good faith and fair dealing] depends on the existence of an underlying contractual relationship, there is no claim for a breach of this covenant where a valid contract has not yet been formed." (internal quotation marks omitted); *AccuSoft Corp. v. Palo*, 237 F.3d 31, 45 (1st Cir. 2001) ("[T]he covenant applies only to conduct during performance of the contract, not to conduct

occurring prior to the contract's existence.”); *Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 941 (2d Cir. 1998) (“[T]he implied covenant of good faith and fair dealing does not apply to.. .pre-contract conduct....”); *Crenshaw v. Erskine Coll.*, 432 S.C. 1, 24–25, 850 S.E.2d 1, 13 (2020), reh'g denied (Nov. 30, 2020) (“The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly. No jury—nor any judge—is permitted by law to rewrite a contract to impose liability based on some vague personal sense of what is fair.”) (internal citations and quotation marks omitted); *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.”).

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: “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 situation 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. [where there is] 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). *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).

If there was no enforceable contract to pay a certain bonus, then there can be no Wage Payment Act claim for the bonus. Relatedly, or perhaps stated a different way, if the bonus was within the employer's discretion, there can be no Wage Payment Act claim for failure to pay a bonus.

bonuses are not considered wages unless the contingencies for the awarding of such bonuses have been established and met. See *Neisendorf*, 143 Cal.App.4th at 522, 49 Cal.Rptr.3d 216 (“[B]onuses are considered ‘wages’ within the meaning of Labor Code section 200.... [O]nce a bonus has been promised as part of the compensation for service, and the employee fulfills all agreed-to conditions, the promised bonus is considered wages that must be paid.”). For the foregoing reasons, the bonus conditions were not established and thus could not have been met. Attorney's fees are, therefore, not recoverable.

Stevens v. Mavent, Inc., No. SACV 07-245 AHS RNBX, 2008 WL 2824956, at *9 (C.D. Cal. July 21, 2008).

The court denied directed verdict on this argument on the basis that any ambiguity is

construed against the drafter. 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 did not know what they meant and Morphis testified they gave her discretion. There was no, nor could there be, any evidence of their meaning. There is nothing to construe.

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).

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

**MPG Was Not Required to Minimize or Avoid any Particular Expenses so as to Maximize
Hess’ Bonus**

First, even if it could be said that there was a contractual promise, Defendants did not breach that promise. The Agreement states that the discretionary bonus is based on a determination of profit and loss by the Company Accountant. There is no dispute that Hess received at, or more than, the net income shown by the Company Accountant (if one does not eliminate the Morphis salary and auto expense).

Second, nothing in the Agreement states that the net income is to be derived in any particular manner. To the contrary, it states that other things, such as “debts, expenses, royalties and expenditures” may be deducted. There simply was no promise to not give Morphis a salary

or allow her to deduct automobile expenses.

It is notable that Hess agreed that Morphis was entitled to a salary for the patient care, administrative duties, and marketing functions she performed on behalf of MPG.

Relatedly, an employer simply is not required to avoid, or fail to take, certain expenses so that an employee's bonus is maximized. See, *Lessley v. Hardage*, 240 Kan. 72, 84–85, 727 P.2d 440, 449 (1986) (“To require every employer to take into consideration, in making every business decision, the possible and ultimate effect upon each of his employees would impose an intolerable burden upon business management. We decline to do so.”).

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.”).

A Plaintiff May No 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 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 2016. By that time, Hess was well aware of the change to 5% of revenue, had agreed to it in June, and had signed the contract in December. He received well more than 7 days notice.

Second, there is no damages remedy available to Plaintiff for a notification violation. As stated in the following case, the only remedy for a notification violation is a fine by the Department of Labor.

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 denied directed verdict on this argument on the basis that § 41-10-40 (medium of payment) 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 in § 41-10-40 concerns only wage deductions. This case does not involve wages deductions. In any event, the specific remedy provision of § 41-10-80 is very clear. It provides no civil remedy for a notification violation. To the extent § 41-10-40 is at all unclear, the specific language of § 41-10-80 should control.

CONCLUSION

For all of the above reasons, Defendants request judgment notwithstanding the verdict as to all claims.

Respectfully submitted,

MALONE, THOMPSON, SUMMERS & OTT LLC

/s/Charles F. Thompson Jr.
Charles F. Thompson, Jr. (64219)
Lake Summers
Michael D. Malone

Attorneys for Defendant
339 Heyward Street
Columbia, South Carolina 29201
(803) 254-3300

Dated this 14th of February 2022

State of South Carolina
County of Richland

Court of Common Pleas

Paul David Hess,	)	
	)	
Plaintiff,	)	Transcript of Record
v.	)	2021-CP-29-01127
	)	
Morphis Pediatric Group	)	
of Lancaster, PA, et al.,	)	
	)	
Defendants.)	)	

May 19, 2022
Columbia, South Carolina

B E F O R E:

The Honorable Deandrea Benjamin, Judge.

A P P E A R A N C E S:

David Rothstein, Esquire
Attorney for the Plaintiff

Charles Thompson, Esquire
Skyler Wilson, Esquire
Attorneys for the Defendants

Bethanie K. Creppon
Circuit Court Reporter

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P R O C E E D I N G S

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THE COURT: All right. We're here on the record on case 2018-CP-29-1127, Paul David Hess vs. Morphis Pediatric Group of Lancaster, PA, and Mr. J. Morphis, M.D.

It's my understanding that Gregory and Alexander and Moore, Beauston & Woodham LLP has been -- that part of the case has been resolved?

MR. ROTHSTEIN: That's correct.

MR. WILSON: Yes, Your Honor. Skyler Wilson here on behalf of -- and the other defendants.

THE COURT: Thank you for that.

All right. And so I am in receipt of your posttrial motions. And, Mr. Rothstein and Mr. Thompson, I'll be glad to hear from -- I guess we'll start with the plaintiff, Mr. Thompson.

MR. ROTHSTEIN: Good morning, Your Honor. It's good to see you again.

As you'll recall, we filed an election of remedies on February 3rd, following the jury verdict in this case, and elected our remedies under the South Carolina Payment of Wages Act for the years 2010 to 2015 and sought -- filed a motion within ten days of that seeking treble damages under the

1 statute; attorneys' fees, costs, and prejudgment
2 interest. We elected to forego the punitive damages
3 against Dr. Morphis and Morphis Pediatric Group
4 under the common law claims for fraud and negligent
5 representation.

6 Your Honor, I submitted an affidavit in this
7 case addressing the fees and costs issue and the six
8 factors of Jackson vs. Speed. I'm sure Your Honor
9 is familiar with the six-pack of tests; I don't feel
10 I need to repeat that. That attorneys' fee request
11 was for \$215,000 and \$475 which represented 479
12 hours of my time through February 14th of 2022. So
13 there's some additional time, you know, in reviewing
14 the other posttrial motions that the defendants
15 filed.

16 I'm not counting, obviously, any time for
17 negotiating and reviewing the settlement agreement
18 with the accounting defendants but, obviously,
19 coming out here today and preparing for a hearing,
20 that's going to add some additional time as well.
21 So the fee request that we -- and I just wanted to
22 point that out to the Court. I know that's only
23 through February 14th, the date of my affidavit.

24 In terms of treble damages, Your Honor, I think
25 the South Carolina Payment of Wages Act is very

1 clear that treble damages is the default rule under
2 the statute; it is the rule and not the exception.
3 So, you know, I think it's sort of like the federal
4 Fair Labor Standards Act, which has a double damages
5 remedy in there. Again, that's designed to
6 encourage employers to comply with the Act, because
7 there's a pretty heavy stick waiting for them if
8 they don't comply with the Act and pay the wages as
9 they're required to under the Act.

10 It's very clear that the South Carolina Payment
11 of Wages Act is a remedial statute, designed to
12 protect working people and to assist them in
13 collecting compensation or wrongfully held. And the
14 treble damages remedy is the way that the
15 Legislature has set forth to do that. If the
16 employee can only recover the backpay, again, that's
17 no disincentive to the employer from withholding
18 wages improperly. So we have requested treble
19 damages in the case.

20 I know that Mr. Thomson filed a response saying
21 that all of the appellate decisions under the
22 Payment of Wages Act have taken away treble damages.
23 With all due respect, that's completely unfounded.
24 There are a number of published decisions from the
25 appellate courts that have taken away the treble

1 damages in unusual circumstances, like if the
2 employee was disloyal during the period he's
3 claiming unpaid wages. Not only is he not entitled
4 to treble damages, he is not entitled to any pay
5 during that period of disloyalty. That was the case
6 down out of Charleston.

7 And we cited this in our brief, too. In my
8 initial brief, I attempted to distinguish all of
9 those cases where the appellate courts have
10 recognized an unusual -- that was the
11 Futch vs. McAllister case with the disloyal
12 employee.

13 Other cases where the condition of receiving a
14 bonus was -- for example, an executive had -- the
15 company had to achieve a certain level of revenue or
16 performance, and the company didn't achieve that,
17 and the employee sued to recover his promised
18 bonuses in the employment contract, and the employer
19 had a good-faith argument or at least some reason
20 for disputing the amount of payment.

21 Here, the legal offense is not so much
22 disputing the amount of payment, their main defense
23 is statute of limitations bars my client's claims.
24 And, as Your Honor knows, you correctly charged the
25 jury on the discovery rule under South Carolina law,

1 as well as fraudulent concealment. You'll recall
2 that Mr. Hess, as his bonus started to go down then
3 one year was exactly the same, continued to ask for
4 explanations; you know, please show me the books;
5 I'm trying to, you know, make the Lancaster practice
6 more profitable; if the practice does better, we
7 both do better.

8 Dr. Morphis was never willing to share that
9 information with him until 2018 when she decided to
10 try to sell the practice after claiming, for several
11 years, that the practice was hemorrhaging money.
12 And that's the first time my client was able to get
13 at least a limited amount of financial information
14 and, at that point, was able to determine that
15 Dr. Morphis had never paid him 50 percent of the
16 bonus, as was promised.

17 So, you know, I think the fact that the jury
18 awarded -- came back with a fraud verdict and
19 awarded punitive damages takes away any argument
20 that Dr. Morphis would have for saying, well, I, you
21 know, tried to pay this in good faith, you know, and
22 I shouldn't be hit with the treble damages under the
23 statute.

24 She also raised issue about whether -- or she
25 said: Well, it couldn't have been bad faith if I

1 relied on my accountant and my attorney in
2 determining how much to pay Mr. Hess. Well, the
3 testimony at trial, your Honor, was she never relied
4 on any attorney or any accountant to calculate the
5 bonus; she did that on herself -- all by herself.

6 And in the trial of the case, your Honor, we
7 introduced several exhibits talking about that. We
8 had her -- Plaintiff's Exhibit 7 was her handwritten
9 calculations for the bonus numbers. The one thing
10 she did rely on the account for was to try to
11 mislead David Hess into thinking that changing the
12 bonus formula in 2015 from a model based on 50
13 percent of the net profits to 5 percent of the gross
14 revenues would not cause a decrease in his bonus
15 compensation.

16 And you'll recall, during the trial, there were
17 two spreadsheets that were produced which I thought
18 was the smoking gun of the case. One was sent to
19 both Dr. Morphis and Mr. Hess, Plaintiff; and the
20 other one was sent shortly before that only to
21 Dr. Morphis. And in that, you can see, he
22 calculated profits and showed Dr. Morphis how much
23 bonus Dr. Morphis had been taking out of the company
24 in terms of profits. He had no problem calculating
25 the amount of the profit according to the contract.

1 So for her to now claim that she was somehow
2 relying on advice of an accountant or an attorney in
3 determining how much bonus to pay is -- I think, is
4 disingenuous.

5 She also makes the same arguments that -- and
6 I'll let Mr. Thompson respond on the -- or his
7 directed verdict motion. We've argued this -- I
8 think this would be the fifth time now between
9 summary judgment consideration, directed verdict at
10 the end of our case, directed verdict at the end of
11 their case, and now the directed verdict motion or
12 judgment, notwithstanding the verdict, this will
13 make the fifth time that these issues have been
14 argued about discretionary bonus, and I don't feel
15 like I need to belabor that point too much.

16 You properly instructed the jury on the law.
17 The jury was very careful in its deliberations in
18 this case. It didn't give us everything we asked
19 for, didn't give Mr. Hess any emotional distress
20 damages, which he could have been entitled to under
21 the tort theories; the amount of the punitive
22 damages was less than the amount of the actual, so
23 this is a case where you have a multiplier of
24 punitive damages awarded here; it was a
25 conservative, reasonable, well-reasoned decision by

1 the jury, and we think this is a fairly
2 straightforward Payment of Wages claim that's
3 entitled under treble damages.

4 I don't know if your Honor needs me to address
5 the prejudgment interest issue going back to 2010 at
6 the statutory rate of 8-and-3-quarter percent. This
7 wasn't an amount that was capable of being reduced
8 to a sum certain. I think the jury decided to leave
9 in the auto expenses and some of Dr. Morphis' salary
10 that she took out from the practice before the bonus
11 was calculated. But this was well within the jury's
12 discretion.

13 Everything that the jury did was supported by
14 evidence in the case. And, again, this standard at
15 this point is -- was whether there was any evidence
16 to support the jury's verdict. But I think we're
17 entitled to treble damages, attorneys' fees and
18 costs, and prejudgment interest. Thank you.

19 THE COURT: All right.

20 MR. THOMPSON: So I'll address your Honor,
21 since we started with the plaintiff trebling their
22 request for motion -- for trebling the fees under
23 the Wage and Payment Act. Of course, we also have a
24 motion for judgment notwithstanding and a motion
25 for a remittitur that we've also filed the briefs on

1 that, your Honor.

2 With respect to trebling and attorneys' fees
3 under the South Carolina Wage and Payment Act, it's
4 not at all like the Fair Labor Standards Act or the
5 other federal laws that we have, for example, in all
6 the various discrimination statutes. But the
7 discrimination statute, basically, all you have to
8 do is be a prevailing party. It's a little bit
9 tougher under the FLSA in that you have to show a
10 willful violation.

11 It is far tougher under the South Carolina Wage
12 Payment Act. Mr. Rothstein is simply incorrect
13 about the standard. He has to show lack of a
14 good-faith or bona fide dispute regarding not paying
15 the compensation and choosing to, instead, litigate
16 the issue. The courts have held that they,
17 therefore, should not be penalized for a failure to
18 pay wages upon the assertion of a valid defense
19 payment.

20 And it is the trial court -- you, your Honor --
21 that must determine whether a bona fide dispute
22 exists or not. And, contrary to Mr. Rothstein's
23 brief, the trial court may not look to what the jury
24 did. It has to be an independent evaluation of
25 whether or not there's good-faith events.

1 And this is why -- well, actually, there's a
2 lot of reasons why: The employer -- and this is
3 borne out in several of the cases I cited in my
4 brief -- can actually be wrong. The jury can reject
5 the employer's reason for not paying the
6 compensation and, still, there's a good-faith reason
7 for not paying that compensation.

8 And I never said that there were no cases
9 affirming fees and trebling. I cited -- there are
10 ten cases that I cited in my brief where our
11 appellate courts examined requests for trebling and
12 fees and also considered the question of whether or
13 not there was a bona fide dispute.

14 In only two of those ten cases, your Honor, did
15 the appellate courts affirm the award of trebling
16 and fees. And in one of those cases -- and that's
17 the Mathis case -- it really only upheld it only
18 because it was on procedural grounds. And what
19 happened there was the employer kind of created
20 their reasons for not paying the compensation during
21 litigation. And the Court in that case said, no,
22 we're really concerned with what were your reasons
23 at the time to deny the compensation, not reasons
24 that you concoct later on.

25 So, really, we've only got one case, and that's

1 the Ross case -- Ross vs. Ligen Pharmaceuticals --
2 in which the appellate courts have examined the
3 good-faith, bona fide defense and held that, yeah,
4 this is a case where we feel trebling is
5 appropriate; we're going to affirm the trial court
6 judges on this award.

7 And they did so in that case because, in Ross,
8 the employer admitted that the employee had earned
9 the bonus. And the reason they didn't pay it was
10 they said, well, we don't pay the bonus unless
11 you're employed on the day of the payment. Well,
12 okay. So what's the date of the payment?

13 Well, the date of the payment is whenever we
14 decide we want to pay you. There was some target
15 dates for payments, but the employer routinely made
16 payments outside the target date. So, basically,
17 the employer in that case, all they had to do was,
18 like, wait around and, according to their argument,
19 they didn't have to pay you. Even though the
20 employer had done everything they need to award the
21 bonus, and there really was no dispute other than,
22 hey, you weren't here on the day, we cut the checks,
23 so you don't get one. In that case, yes, the
24 appellate court said there's no bona fide dispute
25 here.

1 But in the other cases, the other eight out of
2 the ten, the trial court has even been reversed.
3 Or, I think in one case -- one or two cases, it was
4 sent down because the trial court didn't explain
5 what is the -- but what did you do with the bona
6 fide defense? What was your consideration of that?
7 What was your ruling on that?

8 In three of the cases, Moren, O'Neill, and
9 Temple, the appellate courts expressly told the
10 trial courts: You may not rely on what the jury
11 did; that is not your role in determining whether or
12 not there exists a bona fide dispute regarding the
13 payment of wages.

14 And, in fact, your Honor, in some of these
15 cases, and I'll use Moren as an example -- in Moren,
16 the jury awarded \$73,000 in unpaid wages to the
17 employee. The hospital's defense in that case was
18 that, hey, you were -- you committed misconduct and
19 that's why, and our policy says, we don't pay you --
20 I'm sorry. It wasn't the hospital. In Equity was
21 the business that Moren had founded and then became
22 an employee.

23 The Board had accused him of misconduct. The
24 jury awarded him all the unpaid wages he requested.
25 And the employer said: Hey, you agreed to defer the

1 wages because the company was in trouble, and we had
2 an agreement on that.

3 So the point is, your Honor, the jury
4 necessarily rejected the employer's disloyal conduct
5 defense, and they rejected the employer's defense
6 of, hey, you agreed to defer these wages. There's
7 no way they could have awarded the full amount,
8 plus, without rejecting those defenses.

9 In our appellate courts, Court of Appeals says
10 to the trial court: That is not enough. You can't
11 just say, oh, well, because the jury necessarily
12 rejected these defenses in reaching its burden,
13 therefore, there's no bona fide good-faith defense.

14 No. What is important or what is critical is
15 that -- what did the employer think? They could
16 ultimately be proved to be wrong to the jury, at
17 least according to the jury, but if they thought
18 they had a bona fide reason for denying the
19 compensation in this case, disloyal conduct in the
20 agreement, then they are entitled to assert the bona
21 fide defense.

22 In another case, your Honor, O'Neill -- this is
23 the one involving the hospital -- in this case, the
24 employee was terminated for not showing up for her
25 shift. The jury, nevertheless, awarded damages she

1 claims she was due for accruing vacation. The
2 Hospital said: Hey, it's in our policy; you commit
3 misconduct, get terminated for that reason, you do
4 not get accrue vindication; we are not required to
5 pay that to you. The jury had to reject that
6 defense in reaching its verdict.

7 And, nevertheless, the Court of Appeals says:
8 No, that's not enough. Trial court, you can't just
9 rely on that. The hospital, even though the jury
10 says they were wrong and, as a matter of law,
11 they're wrong that she was fired for misconduct, you
12 thought that. And so, therefore, you had a
13 good-faith defense, which precludes the award of
14 attorneys' fees or trebling in a Wage Payment Act
15 case.

16 In the Futch case that Mr. Rothstein mentioned,
17 that's sort of a slightly different -- that
18 establishes a different principle or different
19 reason to deny trebling an attorney's fees. In that
20 case, Futch was an employee of McAlister Towing of
21 Georgetown. They were tug -- a tugboat company.
22 And he started making plans to form his own
23 business.

24 McAlister, on a wage payment part, they denied
25 him completely the wages that he was owed. And the

1 Court said: Well, we're going to -- what we're
2 going to do on that is, we're going to say the
3 preexisting law was that, yes, you're correct,
4 employer; but, from now on, you're only entitled to
5 hold wages for a period while the employee was
6 disloyal. We are clarifying the law that's on the
7 books. And, if we do that, then trebling in
8 attorneys' fees is -- should be denied, if there is
9 a closed question of fact or the law.

10 And that was reiterated in the Rice case where
11 the Court said a valid closed question of law or
12 fact is a bona fide dispute. They further went on
13 to say: We don't believe the Legislature intended
14 to defer litigation of reasonable, good-faith
15 disputes.

16 I'd also like to talk to your Honor about the
17 Goodwyn case, Goodwyn vs. Shadowstone Media. In
18 this case, a sales-commissioned employee claimed
19 that she was, one, entitled to a floor of \$300 a
20 week plus commissions, whereas an employer says, no,
21 no, you're commission only, and I gave you a letter,
22 it's all in your hiring letter. Employee's defense
23 was, I didn't get any hiring letter. And the jury
24 awarded her not everything that she asked for, but
25 about half of what she asked for. And the trial

1 court trebled it, finding there was not a
2 sufficiently closed question. And the Appellate
3 Court reversed saying: It was enough that the
4 employer said, "I did give you that hiring letter,"
5 and even though she said, "I didn't get it," and the
6 jury necessarily accepted her version of events, the
7 Court said: Nevertheless, the fact that the
8 employer testified "I did do this" established a
9 good-faith, bona-fide dispute, which prohibited the
10 awarding of trebling or attorneys' fees on the Wage
11 Payment Act question.

12 So, your Honor, we're left with some principles
13 from all these cases: First of all, the statute
14 itself gives the courts discretion. It uses the
15 word "may," so in the Court's discretion. And we
16 have, from the case law that I mentioned, that the
17 Legislature did not intend to deter the litigation
18 of these disputes. Second, the award may only be
19 made if there is no bona fide or good-faith dispute
20 concerning the payment of the wages.

21 You, your Honor, determine that award within
22 your discretion, and you do so based on your own
23 independent finding of the facts, regardless of what
24 the jury did. And it is, in fact, in error to rely on
25 what the jury did, to award trebling and fees. And,

1 finally, a closed question of law establishes a bona
2 fide dispute.

3 I would like to mention one thing about what
4 the jury does. We have a couple cases, I mentioned
5 them, where the jury awarded full relief and,
6 nevertheless, the treblings should have been denied.
7 But there are a couple of mentions in the cases
8 where the jury awarded less than what the plaintiff
9 demanded.

10 And that's what we have here: Mr. Hess did
11 pretty good with the jury, but he didn't get
12 everything he asked for. There was about a hundred
13 thousand dollars' difference between what he asked
14 for and what he got from the jury.

15 And we don't know -- I know Mr. Rothstein is
16 speculating but, frankly, he can't say that that
17 difference ties into any evidence. It doesn't
18 closely tie into those things. I don't know what
19 the jury did. I mean, it's probably a case that we
20 always give on the template, the jury compromised on
21 something. But we don't know what they did.

22 It certainly did not award the full amount
23 requested. And, to loop back to my initial thought,
24 that has been mentioned in a couple cases as an
25 indication that there was a bona fide dispute.

1 The Appellate Courts have never said that if
2 the jury awards the full amount, then there is no
3 bona fide dispute. But they have said, a couple of
4 times -- and one of the cases is the Goodwyn case --
5 that the fact that the jury awarded on the part of
6 what was claimed is some evidence that there is a
7 bona fide dispute, and we have that in this case.

8 So what was the evidence, your Honor, of
9 Dr. Morphis' good-faith belief that she was not
10 required to pay Hess more than she did? Well, I
11 think your Honor will agree -- I hope so -- that her
12 testimony was consistent and clear that she reviewed
13 the bonus as completely within her discretion.

14 And, just to remind you, your Honor, what the
15 agreement said in the body of the agreement, it
16 first said: Any and all bonuses shall be at the
17 discretion of the Board, and -- or as determined in
18 the appendix. And the appendix says: Providing
19 Employee meets criteria as decided upon by the
20 Board. Criteria was not defined anywhere. And then
21 it goes on to say: All end-of-the-year profits
22 shall be divided and the employee's grant of 50
23 percent of said monies after debts -- another
24 undefined term -- expenses -- actually none of these
25 terms are defined. Royalties aren't defined.

1 Expenditures -- who knows what the difference is
2 between expenses and expenditures, as determined by
3 the company accountant.

4 So Dr. Morphis had a good-faith reason to think
5 that she did have discretion, and her testimony was
6 consistent about her discretion. She could apply
7 any criteria that she wanted regarding his
8 eligibility, and even if she decided the criteria
9 was met, it only made Hess eligible that the word
10 "eligible" was in the defense.

11 Moving on to -- the jury, obviously, had to
12 deduct her salary and some of her car expenses in
13 order to reach to the number they came to, or at
14 least the salary. But there's no mention of her
15 salary in the contract; there was no indication in
16 the contract that she could not take a salary.

17 And, even though the jury necessarily said, no,
18 you couldn't take a salary, in reaching their
19 verdict, that's like these cases we would have where
20 that doesn't matter what the jury did; what matters
21 is, did Morphis -- could we find a good-faith reason
22 for what she did? And, frankly, it's there in the
23 discretion; it's there in the lack of a preclusion
24 that she could take a salary apart and put her car
25 expenses in there.

1 And even if, your Honor, we've reached the
2 50/50 formula, the allowed deductions are so poorly
3 defined -- in fact, they're not defined at all that
4 there was no clear computation possible. We needed
5 the jury to reject everything we said and then to
6 somehow come up with a computation.

7 Your Honor, it's also undisputed that Hess
8 actually did get more compensation for the years
9 2010 through 2015, how that links to the practice
10 and to Dr. Morphis. And it is important that we
11 consider Dr. Morphis' business sophistication in --
12 when we go to look at what her good-faith beliefs
13 were.

14 And it's clear from the evidence. I would
15 assert, your Honor, that she did not have an
16 extensive background or experience in financial
17 matters. And she didn't liably own a company, your
18 Honor. And speaking of the company accountant and
19 the provision that says the monies are determined by
20 the company accountant, even though Mr. Rothstein
21 points out that she did do some of her own
22 calculations, it's clear from the record that
23 Mr. Hess got bonuses in excess of 50 percent, as
24 determined by the company accountant.

25 So there are all kinds of reasons why Mr. Hess

1 would have no indication that what she knew was
2 doing was incorrect. She would have a good-faith
3 belief that she could dispute this compensation that
4 Mr. Hess claimed was due.

5 Moving on to the closed question of law
6 standard that we get out of the Futch case. This
7 case was full of closes questions of law. I'll go
8 over the statute, but I'm not going to, you know,
9 beat it again.

10 But, assuming we go through the JNOV arguments,
11 the statute of limitations defense is a close kept
12 question of law. Then we have the discretionary
13 language. And in all of the case law that I've
14 discussed in my brief about, hey, do you have
15 discretionary language, it's not an enforceable
16 promise. We have a lack of clear terms in the
17 contract.

18 And, your Honor, you'll recall that you did
19 something a little bit different with regard to the
20 2015 claim. Their claim to 2015 damages was based
21 on a failure to provide notice under the Wage
22 Payment Act. And our only law -- the law we had
23 before that indicated, your Honor, that the
24 violation of the notice provision does not carry
25 with it a right to full damages, that there was only

1 a penalty provided, which could be asserted by the
2 Department of Labor to give failure to give notice.

3 Your Honor decided, based on a reading of
4 41-10-40, that 41-10-40 was sort of a backdoor to
5 incorporating full damages for a notice of
6 violation. That was -- that is something new.
7 That's not what the case law said previously. And I
8 would certainly, your Honor, just like -- as in
9 Futch, that creates, at minimum, a closed question
10 of law which would preclude the awarding of fees and
11 trebling of damages. And that was the Martin case,
12 the Fourth Circuit Case which held that a violation
13 of the notice provision did not carry with it full
14 damages.

15 We're also opposing the plaintiff's request for
16 prejudgment interest, your Honor. Prejudgment
17 interest under 34-31-29 is not awarded where the
18 damages are unliquidated. And a good example of a
19 liquidated damage -- and I cite the Dixie Bell
20 case -- and the Luellen case in which it involved
21 something clear. It was like an invoice that had
22 not been paid. It was not at all clear what was due
23 in this case. And, in fact, we don't even know, as
24 I said, what the jury did.

25 It is true that if the damages are -- can be

1 determined by a simple mathematical calculation --
2 that's a phrase used by the Court in the Builders
3 Transport case -- but cannot be anything more than a
4 simple matter of mathematical calculation.

5 And I know Mr. Rothstein is going to say, well,
6 all you had to do was deduct the salary for the car,
7 that's simple. But that's not what the jury did.
8 They came up with something different. We don't
9 know what mathematical calculation they did.
10 Certainly, not a simple one. They had to consider
11 her discretion; they had to consider the unclear
12 terms; they had to consider competing calculations;
13 they had to consider the profit-and-loss statements
14 by the accountant and determine whether or not that
15 was the basis on which to award -- and, basically,
16 your Honor, if you have to resort -- this is the
17 Dixie Bell case.

18 If you have to -- for your resolution, have to
19 refer to the wise discretion of a jury to make
20 things certain, to make a court-ordered verdict
21 certain, then that is not a liquidated damage; that
22 is not something that is set forth clearly or that
23 is capable of reduction by use of a simple
24 calculation.

25 I'd also add, your Honor, and this is kind of

1 related that the courts have held long and dealt
2 with: If they are intermediate questions that the
3 jury must answer before damages can be ascertained,
4 then the damages are not liquidated.

5 In this case, we had the discretion that the
6 jurors had to go through, through the language of
7 the contract, which was not clear, and these had to
8 be done for also the calculations by the
9 accountants, the calculations by Dr. Morphis. The
10 jury had to answer a bunch of intermediate questions
11 concerning what does the criteria requirement mean?
12 What does eligible mean? What does it mean, because
13 the contract doesn't mention what expenses could be
14 removed or should be removed from the
15 profit-and-loss statement, as determined by the
16 company account? What does the language mean as
17 determined by the company accountant? There were
18 all kinds of intermediate questions the jury had to
19 answer before reaching a verdict. And then they
20 come up with a verdict which, frankly, nobody
21 presented to them that number; they came up with it
22 on their own.

23 Finally, your Honor, where there is a dispute
24 over contractual damages -- I'm citing from the
25 Vaughn case, that involves uncertainty surrounding

1 the terms of the contract, the sum due is not a
2 ascertainable, and we certainly had that in this
3 case. In short, your Honor, this is simply not a
4 liquidated damages case and, therefore, prejudgment
5 interest on the statute should not be awarded.

6 Finally, your Honor, the plaintiff has also
7 asserted a claim to attorneys' fees. We do not
8 dispute the rate, but I cannot dispute the time
9 because the counselor has not given us the required
10 detailed, itemized statements of fees and costs.
11 He's presented his fees and time in a very summary
12 fashion.

13 There's no detail itemization. And, under the
14 South Carolina case law, I cite Johnson vs. Johnson,
15 you simply cannot submit a summary of your time and
16 say, oh, this is what I'm entitled to. He has to
17 submit detailed itemization, including descriptions
18 of his time. I can't evaluate his time without
19 that.

20 So, your Honor -- and, your Honor, frankly,
21 because he's had plenty of time to do it and he
22 hasn't done it, even after I filed my memorandum in
23 opposition, we've had months and he's not updated
24 his fee position.

25 You don't have to waive or give him a chance to

1 do so, because it's within your discretion to simply
2 deny the fee because an itemized statement was not
3 provided.

4 So, your Honor, that's not opposition for his
5 motion for trebling the fees and to prejudgment
6 interest. I can -- I don't know what you want to
7 hear on my motion for judgment notwithstanding and
8 remittitur. We've filed briefs. I'd be happy to go
9 ahead and start addressing that motion.

10 THE COURT: Let's let Mr. Rothstein respond,
11 and then we'll go into that motion.

12 MR. ROTHSTEIN: Judge, one of the first things
13 Mr. Thompson said when he stood up, he referred to a
14 case. I didn't write the case down, but I did write
15 the principle of law down, and it is that you look
16 at the good faith at the time the compensation
17 decisions were made, not defenses that will come
18 up -- that a lawyer came up with during litigation.

19 All this stuff about discretion, statute of
20 limitations, and ambiguous terms in the contract,
21 that's all stuff that Mr. Thompson came up with
22 after the lawsuit was filed. That wasn't part of
23 the calculus that Dr. Morphis made in determining
24 what the bonus was or should have been. So I think
25 it's iron ic. And he cited that as the first thing

1 he said, and then proceeded to ignore that principle
2 of law.

3 The bona fide good-faith issue is a defense,
4 it's an affirmative defense. And affirmative
5 defense, again, Hornbook law is something that the
6 defendant has the burden of proof on, not the
7 plaintiff to negate that burden.

8 There are cases that he cited in his own brief
9 that says that the good-faith defense was waived by
10 the defendant by not bringing it up at trial.
11 Again, that's something that the defendant has to
12 convince you of, not that the plaintiff has the
13 burden of disproving a negative.

14 And although Mr. Thompson is right, the Court
15 can't just say, well, because the jury gave you
16 money, you're automatically entitled to treble
17 damages. I agree with that principle wholly. But
18 if you look here, the jury didn't just award actual
19 damages, they awarded punitive damages to Mr. Hess
20 to punish Dr. Morphis for acting maliciously. And
21 that award was made by clear and convincing
22 evidence.

23 And I think you can look at the jury's
24 determination on punitive damages and say, well,
25 Dr. Morphis did not have a good-faith basis for

1 refusing to pay Mr. Hess the bonus money. Why else
2 would Dr. Morphis have concealed the financial
3 records for over eight years if it wasn't to hide
4 the fact that she wasn't paying him according to the
5 contract? There's no reason for her to conceal the
6 financial records, unless she's doing something she
7 doesn't want Mr. Hess to know about.

8 With regards to the salary, I think the other,
9 I guess, smoking gun is Plaintiff's Exhibit 2, your
10 Honor. And that was -- if you'll recall, shortly
11 before this meeting in the middle of -- or it was in
12 the middle of May of 2015 when they were -- the
13 account and Dr. Morphis were trying to convince
14 Mr. Hess to switch the bonus formula from being paid
15 50 percent of the net to 5 percent of the gross.

16 And shortly before that meeting, Dr. Morphis
17 sent an e-mail to Greg Alexander. And in that
18 e-mail -- the subject line was "preparing for
19 meeting with Hess" -- she says: When we would get
20 to the bottom line, it was divided by two to figure
21 his bonus. Okay?

22 And then she said: There was a royalty fee
23 that was talked about at some point. And then she
24 said: I think some of these fees were, quote,
25 created to help me, but I never wanted to get paid

1 because I feared David would question me.

2 So Mr. Hess has to -- his understanding of the
3 way the contract worked was he gets \$100,000 base
4 salary; 50 percent of the profit goes to him, and 50
5 percent goes to Dr. Morphis. That was the only
6 thing that was said about any compensation or bonus
7 that Dr. Morphis would receive from Lancaster.

8 You would expect, if that contract were
9 followed through, that Mr. Hess would have earned
10 more money out of Lancaster than Dr. Morphis took
11 out during the period of time, because he's getting
12 \$100,000 base salary on top of splitting the profits
13 equally.

14 So if the contract were followed, you would
15 think Mr. Hess would have gotten \$100,000 more out
16 of Lancaster than Dr. Morphis got. So, naturally,
17 his compensation from Lancaster would be greater.
18 Her main focus was the Darlington practice -- I'm
19 sorry, the Hartsville practice where there was
20 testimony and evidence in the record that, some
21 years, she took over a million dollars in profits
22 after -- millions of dollars in compensation or
23 income out of the Hartsville practice.

24 So I would submit, your Honor, that there is no
25 good-faith defense here. All these issues about

1 whether the contract was ambiguous or whether these
2 terms were not defined, your Honor has already
3 rejected that issue and said -- I think you said
4 it's Hornbook law that if there's an ambiguity in
5 the contract, it's construed against the party who
6 drafted the contract. And, here, that would be
7 Dr. Morphis.

8 So there really is no good-faith defense here,
9 certainly not one that they can prevail on to
10 convince you not to exercise your discretion under
11 the statute to award treble damages and attorneys'
12 fees.

13 With regard to the attorneys' fees, I made it
14 very clear that I would provide, if you want to see,
15 my Clio time entries. I'll make those available to
16 you in-camera. I will also make those available to
17 Mr. Thompson. The problem is I didn't want to put
18 that on the record, because that's potentially
19 waiving attorney-client privilege. There's a lot of
20 stuff in there about our litigation strategies and
21 things that I don't want the public to know because
22 I'm concerned about waiving the attorney-client
23 privilege. But I will happily make those available.

24 You know, the 490 hours or whatever that I
25 asked for, if Mr. Thompson thinks that's

1 unreasonable -- he knows what his own time sheets
2 show for the same work. We attended the same
3 depositions, the same hearings, filed the same, you
4 know, briefs in opposition to each other. If he
5 thought my 490 hours were outrageous, he could say,
6 look, I've only billed Dr. Morphis a hundred hours
7 in this case, how can you bill 490 hours, that's
8 unreasonable. And -- but he hasn't done that.

9 He hasn't attacked the reasonableness of my fee
10 request, he's just saying, well, I have no way to
11 judge whether that's reasonable or not when he can
12 look at his own time records and see how much he's
13 billed Dr. Morphis and compare it to how much time
14 I've recorded in the case and see if it's reasonable
15 or not. He hasn't done that.

16 And, again, your Honor, if you have any
17 question about any of mine, I'm happy to give you my
18 entire Clio file. Your Honor, it's very detailed.
19 It goes through every day, how much time I spent on
20 each task, how many hours it was as a
21 contemporaneous time record. And I'm happy to make
22 those available.

23 But I've sworn in an affidavit under -- you
24 know, as an officer of the court, this is what the
25 time records show. I believe they're reasonable. I

1 submitted an affidavit who is a well-regarded
2 employment attorney in Columbia who is familiar with
3 these types of cases and how much time it takes to
4 bring all these cases to trial.

5 With regard to the prejudgment interest, he
6 cited the law that this is a simple mathematical
7 calcu- -- if it's capable of being reduced to a sum
8 certain, it's entitled to prejudgment interest.
9 This is a -- one of the simplest mathematical
10 calculations you can have. Profit is income less
11 expenses. To determine your bonus, you divide that
12 number by two.

13 All we did was compare what that number would
14 have been versus what he was paid. We did a
15 spreadsheet, submitted it to the jury; we did put a
16 separate line item for the adding back the car
17 expenses, and a second line item for adding back the
18 salary that she took out after they switched from a
19 C corporation to an S corporation.

20 I spoke to the jury -- and I understand this is
21 not in the record. The guy who actually calculated
22 the amount of the verdict told me that's how they
23 calculated the damages. There was a dispute about
24 the car, so they said, all right, we'll give her the
25 car expenses. You can -- and I know this is not

1 part of the record --

2 MR. THOMPSON: That's absolutely not part of
3 the record.

4 MR. ROTHSTEIN: But you --

5 MR. THOMPSON: He can't talk about the juror
6 told me --

7 MR. ROTHSTEIN: What I'm saying is what's in
8 there is the car -- the auto expenses and the
9 salaries. If you look and you take that column out,
10 it matches up with exactly what the jury awarded in
11 terms of the verdict.

12 And the purpose of prejudgment interest is
13 twofold; number one, it's to compensate the
14 plaintiff for their time and value of money. It's
15 money that he lost -- if he had that extra 5- or
16 \$600,000 over this period of time, he could have
17 invested that money and that money could have grown.

18 The flip side of that is Dr. Morphis has had to
19 use that money. She hadn't had to pay that 600,000
20 or 500 and whatever it was, the amount of the
21 verdict during that period of time, so that money
22 grew interest. And the purpose of prejudgment
23 interest is to avoid the windfall to the defendant
24 from having the use of the money and to compensate
25 the plaintiff for not having the opportunity that he

1 or she could have had during the pendency of the
2 wrongful actions here. So I believe that we're
3 entitled to prejudgment interest as well as treble
4 damages and attorneys' fees, your Honor. Thank you.

5 THE COURT: Thank you.

6 All right. I'll be glad to hear your JNOV
7 motions next.

8 MR. THOMPSON: Your Honor, I would like to ask
9 just a couple things, your Honor. One is that the
10 discretion of the Court regarding trebling of fees
11 and good-faith defense is built into the statute.
12 It's not an affirmative defense. I'm not aware of
13 any case in which -- and I -- the Court overturned
14 a -- or denied an appeal of trebling attorneys' fees
15 upon the basis that the employer somehow didn't
16 assert affirmative defense.

17 And Dr. Morphis' good faith and bona fide
18 reasons were certainly set forth in the answer, and
19 they were certainly tried in the case, so I won't
20 revisit all that.

21 THE COURT: Let me ask you a question real
22 quick. His argument that the -- that you look at
23 good faith at the time that the decision was made.

24 MR. THOMPSON: Right, your Honor. I think that
25 is relevant and -- for that part. But, your Honor,

1 her testimony was clear that these were not defenses
2 of she had discretion, is basically what the
3 ambiguity in the contract language -- frankly, the
4 discretion that's built into the contract, when we
5 talk about things like criteria and eligibility and
6 things she could deduct, those are absolutely the
7 bases for her believing she had discretion. She
8 testified to that. So they go hand-in-hand.

9 Certainly, a lawyer is going to take the facts
10 that the client -- hey, I thought I had discretion,
11 okay, and this is why, because, you know, the
12 contract. I'm only going to apply it with the legal
13 theory. That's all that happened in this case. The
14 factual -- the facts that were presented were that
15 she had the discretion and these things did exist in
16 the contract, obviously, at the time the
17 compensation was denied.

18 I do want to mention his mention of punitives
19 because, frankly, he doesn't get any credit for --
20 our assertion would be, for anything that the jury
21 did on punitives. One, they waived that; they
22 elected their remedies and they alleged the Wage
23 Payment Act, so the punitives are gone; two, your
24 Honor, you'll recall that, contrary to your ruling,
25 it took him about 20 seconds after you told him

1 "you're not supposed to be mentioning income to the
2 jury" for him to walk all over that ruling and
3 mention it anyway. So that punitives award is
4 tainted by Mr. Rothstein's conduct at trial. He
5 doesn't get any credit for that. And that's not
6 what the law says anyway.

7 All right. Moving on to my motion for
8 judgment. And there's nothing new here, your Honor.
9 It's the same arguments that you've been presented
10 with before -- stop me at any point if you have
11 any -- anything that you have further questions
12 about. But I will go over them.

13 First, of course, your Honor, is the discretion
14 built into the contract. Bonuses were at the
15 discretion of the Board, Hess had to meet criteria
16 as decided upon by the Board, which was defined, and
17 even after all that, we have these debts, expenses
18 for all these expenditures which could be deducted.

19 And all that ties into, your Honor, our
20 argument concerning her discretion. And that is, if
21 it's a discretionary promise and if I have the right
22 not to give it to you in my discretion, it is not an
23 enforceable contract.

24 And I know Mr. Rothstein would argue that,
25 well, there's a duty to good faith and all that, but

1 you don't even reach the duty of good faith unless
2 there's an enforceable contract to begin with. She
3 had discretion on whether or not to award any bonus,
4 and, therefore, it is an unenforceable promise.

5 Regarding the statute of limitations defense,
6 Mr. Hess very plainly testified repeatedly that he
7 went at great lengths to calculate the net profit of
8 the Lancaster practice, and he kept coming up with
9 numbers to indicate his bonus was way off.

10 His efforts included recreating the income and
11 expenses from the medical production software and
12 meeting with her office administrator at Lancaster,
13 going through the checkbook, all in an effort to
14 re-create the profit-and-loss number, which he
15 questioned why it was so low. He even accused
16 Mr. Alexander of ineptitude and malfeasance because
17 he was sure that the numbers were not right.

18 He testified that he did all this because he
19 doubted his bonuses were correct. And then they had
20 the big meeting where he was informed about his 2014
21 bonus in early 2015. How could it be the same as
22 what it was in the previous year? If this is a --
23 you know, based on profit and loss, how could it be
24 the same? We need to have a meeting.

25 And they had a meeting dated May 28. And three

1 years before they filed the complaint would have
2 been September of 2018 -- I'm sorry, September of
3 2015. They had a meeting in May of 2015, and he
4 directly asked, "Did I get 50 percent of the
5 profits?" And he asked that question, he testified,
6 because he doubted that he had.

7 So -- and not only that, your Honor, but he
8 testified that he was told by Mr. Alexander or maybe
9 it was -- or maybe Mr. Alexander's predecessor, I
10 don't remember which one. But testified that he was
11 told by the accountant that Dr. Morphis was
12 receiving compensation from the Lancaster practice.
13 He knew all this.

14 And the Maher case is on all fours. In the
15 Maher case, the employee testified that he --
16 outside of the statute of limitations period, he had
17 discussions about, "Am I getting my bonus? Hey,
18 where is my bonus?" Same things -- actually, even
19 less than Mr. Hess did.

20 And in the Maher case, of course they said,
21 that's enough; this so-called discovery rule isn't
22 when you discover all the facts, it's when you're
23 put on notice of at least enough facts to realize --
24 where you should have realized you might have a
25 claim.

1 You don't have to know all the facts; just as
2 if, in Maher, that employee didn't know all the
3 facts. Mr. Hess expressed, repeatedly, an awareness
4 that he might have a claim, he was being underpaid,
5 and he sat on his rights until after the statute of
6 limitations period expired, and then he tries to
7 file a complaint.

8 Now, the Court, as I understand it, denied my
9 directed verdict motions on this and my argument
10 that Mr. Maher receive no bonus at all, whereas Hess
11 received some bonus. But, with respect, the
12 decision in Maher turned on whether or not Maher had
13 expressed some awareness that he might have a claim,
14 not the fact that he was not paid any bonus, didn't
15 play any part in the Maher decision.

16 The operative fact is, do you believe the
17 time -- or outside the statute of limitations part
18 period, that you're not getting the bonus of money
19 to which you think you might be entitled to getting.

20 And, clearly, Hess inserted such awareness in
21 his testimony. I didn't hear Mr. Rothstein mention,
22 and he didn't mention it in response, but one of the
23 motions that tolling would apply -- the tolling only
24 applies to situations where the defendant makes an
25 effort to induce the plaintiff from filing suit.

1 That does not apply in this case. I already spoke
2 to the discretionary language and how that is not an
3 enforceable contract claim.

4 In addition, your Honor, relatedly, the terms
5 of the bonus provisions are too indefinite and
6 unclear to be enforced. The criteria -- we have the
7 language about criteria. That's not defined
8 anywhere. None of the other critical terms were
9 defined, such as what's meant by profit, royalties,
10 monies, debts, expenditures. Those terms are
11 nowhere defined.

12 Of course, your Honor, there's nothing in the
13 contract about whether or not she could take
14 compensation from the Lancaster practice; could or
15 could not, either way. Simply put, critical terms
16 are missing from the agreement. Where critical
17 terms are missing from an agreement, there can be no
18 enforceable promise. The jury simply does not have
19 enough information, based on the discretionary
20 language to have reached a fair verdict in this
21 case.

22 Additionally, your Honor, even if there was a
23 contractual promise, Dr. Morphis didn't breach any
24 promise. She never promised she wouldn't take
25 compensation; she never promised she wouldn't take

1 an automobile expense out of the Lancaster practice.
2 There's simply nothing in there the agreement
3 addressing those issues. There were no restrictions
4 in the agreement, so, therefore, there was no
5 breach.

6 With respect to the -- his claim for 2015
7 damages, you'll recall, your Honor, he entered into
8 a new contract regarding the 2015 bonus. And that
9 bonus payment -- his theory is you didn't give me
10 seven days' notice under the Wage Payment Act before
11 the change becomes effected, because the agreement
12 was retroactive to January 1 of 2015.

13 But the bonus payment, your Honor, was not due
14 until February of 2016 under the agreement. So Hess
15 was well aware of the change from 50/50 to 5 percent
16 revenue. He had agreed to it in June, and he signed
17 the contract in December, well before the payment
18 was due in February. So, therefore, he did receive
19 advance notice.

20 Furthermore, your Honor, although I understand
21 your ruling on this prior, I'll assert the statute
22 is clear that there is no damages remedy available
23 to the plaintiff for a notification violation. I
24 understand the Court's ruling on this is that the
25 notification provision is mentioned in 41-10-40.

1 41-10-40 concerns the medium of payment holding or
2 averting payments. And in that section, it mentions
3 the 41-10-30. And the 41-10-40 violations do
4 envision full remedies. But I was certain, your
5 Honor, that's incorrect construction.

6 The mention of 41-10-30 and 41-10-40 only
7 concerns wage deductions. This case did not involve
8 wage deductions, so the provision simply does not
9 apply. And even if there were some ambiguity, your
10 Honor, 41-10-80 is very clear. And it very clearly
11 provides no civil remedy for a notification
12 violation. And that's what the Fourth Circuit held
13 in the decision that it reached on the subject.

14 So that's going through our motion for judgment
15 notwithstanding. I don't know if you want me to
16 stop here before going into the motion for
17 remittitur or continue.

18 THE COURT: I'll give Mr. Rothstein an
19 opportunity to respond, and then I'll come back to
20 you.

21 MR. ROTHSTEIN: Your Honor, to address the last
22 point Mr. Thompson made that the notice only applies
23 to deductions, I'll read the statute 41-10-30 (a):
24 Every employer shall notify each employee in writing
25 at the time of hiring of the normal hours and wages

1 agreed upon, the time and place of payment, and the
2 deductions which would be made from wages.

3 So there's three things you have to notify:
4 How much you're getting paid, when and where you're
5 getting paid, and are there any deductions in your
6 pay. That's the notice requirement. It's not
7 limited to deductions to pay.

8 And it says: Any changes in these terms must
9 be made in writing at least seven calendar days
10 before they can become effective. This section does
11 not apply to wage increases.

12 It couldn't be more clear. The statute says
13 that to be an effective change, it has to be given
14 to the employer in writing. If you're going to
15 change the employee's pay, give them more money, you
16 have to give it to them in writing seven days before
17 it becomes effective. It doesn't say when you get
18 paid on that, it says when it becomes effective.

19 A lot of times employees get paid two weeks or
20 a month in arrears. You may have worked the 1st
21 through the 15th and you get paid on the 31st for
22 that time. The seven-day notice provision doesn't
23 say, well, you got 14 days' notice, because you
24 didn't get paid for the 1st through the 15th until
25 the -- that's not what the statute says.

1 So Mr. Thompson's argument that the 2015
2 damages, because they were payable in -- as late as
3 February 15th of 2016, that Mr. Hess did get notice
4 seven days before it became effective.

5 Well, actually, Mr. Hess was paid his bonus for
6 2015 in 2015. They didn't wait until February 15th
7 of 2016. And that's clear in the record from what
8 his W-2 was for that year. So I think that's a
9 specious argument, your Honor.

10 Now, in terms of the discretion issue, if you
11 look carefully at the contract, the contract says
12 bonus is discretionary with the Board or as set
13 forth in appendix A. Okay? There was an appendix A
14 set forth in this contract, so that removed the
15 discretion of the Board.

16 Now, if Dr. Morphis, as the only board member
17 most of the time, came up and said, hey, we're not
18 going to pay bonuses this year, we're expecting, you
19 know, next year to be kind of tough and we need the
20 cash flow from this year to cover, you know, next
21 year, there would be no dispute with Mr. Hess about
22 whether or not he's entitled to a bonus or not; or
23 if they came out and said, Mr. Hess, you didn't --
24 you refused to take call most of the nights, we're
25 not going to give you a bonus this year, we're going

1 to exercise our discretion and not to give you a
2 bonus because you haven't met the criteria of each
3 establishment, that's not what happened here.

4 Dr. Morphis, every year, made a calculations of
5 a bonus. And it's a handwritten statement that
6 says: Income, expenses; split the two, that's our
7 profit. The problem was, the first year she tried
8 to do that, she was sick at home with the flu.
9 There's an e-mail where she sent her accountant an
10 e-mail that says, based on my rough calculation,
11 here's how we think the bonus is; let's just make it
12 \$75,000 this year and, you know, we'll go back and
13 true up the numbers after we get -- you know, after
14 I start feeling better, after the year closes.

15 Well, they never went back and did that because
16 Dr. Morphis' husband said, "Wait, you paid him a
17 \$75,000 bonus? No nurse practitioner in the state
18 of South Carolina makes that much money. I can't
19 believe you're going to pay him that much money."

20 So after she did that the first year, the bonus
21 went down every year after that. And then the year
22 that it was exactly the same -- that was 2014 from
23 2013 -- Dr. Morphis forgot to pay the bonus, just
24 forgot to pay it.

25 And the accountant, you'll recall, sent

1 Mr. Hess an e-mail that says: The reason we didn't
2 pay you the bonus in 2014 was because we switched
3 over from a C corp to an S corp, and that took a lot
4 of time and we didn't want to ding you in your
5 expenses because of the additional expenses -- we
6 didn't want to ding you in your bonus, so we just
7 made the bonus the same as it was the prior year.

8 That's what happened in this case, your Honor.
9 The record is very clear that if they had paid Mr.
10 Hess the bonus that he was entitled to, it would
11 have been substantially higher than the same bonus
12 they paid him from 2013.

13 On the statute of limitations issue,
14 Mr. Thompson says, well, he tried to calculate the
15 profits and that he was questioning whether he was
16 getting 50 percent of the profits or not because,
17 you know, the practice seemed to be doing better,
18 but his bonus kept going down.

19 Well, as I mentioned earlier in my
20 presentation, profit equals income minus expenses.
21 He knew what the income was because he had the
22 electronic medical records and knew what the
23 revenues were. He didn't know all the expenses.

24 The testimony was that the office manager in
25 Lancaster had a handful of checks that,

1 occasionally, she would write if they need
2 something. But most of the expenses and checks came
3 out of the Hartsville office. There were also
4 expenses in the accounting records that show "due
5 to" or "due from," "due to Harstville" or "due from
6 Harstville to Lancaster." There was a lot of stuff
7 that Mr. Hess had no clue about that would have been
8 the expense part of the equation there.

9 And when he asked for the expense part of the
10 equation, Dr. Morphis never gave it to him. And
11 there was some information in here that says he's
12 not privy to the books of the business, I'm not
13 going to get him to give that stuff.

14 Again, as I mentioned before, there's only one
15 reason she wouldn't show the expenses to Mr. Hess,
16 and that is because she knew that she was hiding the
17 fact that she was getting a salary and the fact that
18 she was running her car through the business and
19 there were all kinds of credit card charges that
20 were on there. She didn't want Mr. Hess digging
21 through all that and questioning all those expenses.

22 She said, "I was more than fair to Mr. Hess."
23 Well, the question isn't whether you were fair to
24 Mr. Hess, the question is whether you complied with
25 the contract. And there's no good-faith argument.

1 That Maher case that Mr. Thompson repeatedly
2 brings up is not on all fours with this case. It's
3 not even on one. The only thing that's similar in
4 this case is the bonus was 50 percent of the
5 profits.

6 In the Maher case, your Honor, you'll recall
7 that they discontinued the bonus question like five
8 or six years before the plaintiff tried to raise it
9 or found out that it had been discontinued. But
10 there's a big difference between getting no bonus
11 and the thing being completely discontinued. You
12 know you're not getting that bonus as opposed to
13 saying here is your bonus this year, this is 50
14 percent of the profits of the practice, and not
15 really paying the 50 percent of the profits.

16 And so the Maher case has absolutely nothing to
17 do with this case. That's a clear statute of
18 limitations issue where, you know, you're on notice
19 by not getting any bonus, that that starts your
20 statute of limitations run.

21 And, again, Mr. Thompson keeps saying, well,
22 the criteria to get the bonus is not defined in the
23 contract. Well, Dr. Morphis testified, every year,
24 the Board approved a bonus for Mr. Hess. So he met
25 the criteria to receive a bonus. The question is,

1 you know, what was the net profits? There's really
2 no dispute about what the net profit is. You can
3 look at Greg Alexander's e-mail that he sent only to
4 Dr. Morphis and find out what the net profits are.

5 And Mr. Thompson said, well, we don't know what
6 expenditures, debts, royalties, we don't know what
7 any of those terms mean because they're not defined
8 in the contract. You don't just throw out the
9 contract if there's no definition for those terms.
10 What you do is you apply the plain, ordinary meaning
11 of those terms to the contract.

12 And, again, this is -- this is something that's
13 creative learning on Mr. Thompson's part. But you
14 can't -- I mean, think he said, well, if it was a
15 discretionary promise, it's an illusory promise and
16 there's no contract at all, or something to that
17 effect. That argument was actually, I think, raised
18 for the first time on their JNOV motion.

19 And it's -- as your Honor well knows, to
20 preserve an issue for a JNOV motion, you had to
21 raise it at the directed verdict motion after the
22 plaintiff's case; you had to raise it at the
23 directed verdict motion before the jury got the
24 case, and only then can you continue to raise that
25 on a JNOV motion.

1 With regard to the treble damages issue,
2 Mr. Thomson said -- I was surprised he said this.
3 He said that there's no case law that says you can't
4 waive the good-faith defense by not bringing -- I
5 mean, if you look at page 3, footnote 5 of the
6 supplemental brief or the supplemental brief or the
7 amended brief that he filed yesterday, that
8 Bennett vs. Lambroukos case from South Carolina
9 Court of Appeals, 1991, the first case he cites
10 there, he says: A Court did affirm the trebling
11 award of \$184 and attorneys' fees of \$250; however,
12 there was no discussion of any good-faith basis, nor
13 an indication that the employer raised this defense
14 at all.

15 So he's saying, well, that case isn't helpful
16 because the employer didn't raise the good-faith
17 defense. If the good-faith defense was
18 automatically a part of the statute -- which it's
19 actually not; that was created -- and the Court
20 says -- it uses the words "the Court may award
21 treble damages and attorneys' fees" and that creates
22 discretion of the Court. And the Supreme Court case
23 that recognized that said: If the employer had a
24 good-faith basis for disputing the wages paid, that
25 can be a defense to an award of treble damages.

1 Later on, he cites Mathis vs. Brown. The 2010
2 South Carolina Court says: Reduced to trebling
3 because future wages not covered by the Act. It
4 says in his parenthetical: Did not discuss
5 good-faith basis because issue had been waived. I
6 mean, his own parenthetical shows that defendants
7 can waive the good-faith argument.

8 If it's a waivable defense, it's an affirmative
9 defense that the defendant has the burden of proving
10 a good-faith basis for how they calculated the
11 wages.

12 I think that was it on the JNOV motion, your
13 Honor, unless you've got any questions for me.

14 THE COURT: All right. Thank you.

15 MR. THOMPSON: Your Honor, the -- first of all,
16 I'd like to address the discretionary nature of the
17 promise. I have raised that going way back to the
18 summary judgment motion we filed the week before
19 trial. It's been raised at every point: Directed
20 verdict -- both directed verdicts and again in JNOV.
21 This is not a good argument.

22 Briefly, regarding his discussion with the
23 Bennett case, which I have in footnote 5, the
24 Bennett case doesn't say anything about, hey, this
25 is an affirmative defense requirement which you must

1 plead. And once again, your Honor, we spent
2 extensive time at trial presenting evidence of why
3 Dr. Morphis didn't pay the bonus that Mr. Hess said
4 she should have paid him, and it all went to her
5 belief that she thought she had discretion. And so
6 those facts absolutely were tried. There was no --
7 there's no waiver.

8 The problem in Bennett, for the employer, was
9 they didn't even raise a good-faith defense. That's
10 what that language in the parenthetical means: They
11 didn't raise the good-faith defense.

12 We have raised it, we tried the facts, and the
13 appropriate time to raise it is in the posttrial
14 motions, so long as, you know, you've got the facts,
15 which we certainly did, which was presented during
16 the trial of the case.

17 You know, I did not mention and I would like to
18 remind the Court of the testimony about -- that
19 Dr. Morphis presented, that she had a large payment
20 from the hospital which she did not believe was part
21 of the contract. And I'll assert, again, your
22 Honor, that goes to her belief that she did pay the
23 bonus that was appropriate under the contract and,
24 therefore, trebling the fees is inappropriate.

25 All right. Moving on to our motion for

1 remittitur. I believe -- if you don't mind, split
2 that in two and take care of Mr. Alexander and
3 Tyler's part. The first part of my motion is that
4 we're entitled to a setoff, based on their
5 settlement. And, at this point, because it's
6 confidential, I don't know what their settlement is.
7 I don't -- apparently they've -- it was mentioned
8 that they allocated part between punitives and
9 actuals that were awarded.

10 I understand Mr. Rothstein has stated that he
11 does not dispute our position, that we're entitled
12 to setoff for the amount that was allocated to
13 actual damages. Depending on how they allocated
14 that, and the amounts, I may have an argument that
15 it was -- that it's up to the Court to do an
16 allocation.

17 But I think, first of all, before we even get
18 there, we need to know what was the CPA defendant's
19 settlement, and what was the allocation between
20 actuals and punitives and -- because I can't really
21 address the rest of it until I know those facts.

22 If you want me to go ahead and address the rest
23 of my remittitur motion, I can.

24 THE COURT: Let me hear from Mr. Rothstein.

25 MR. ROTHSTEIN: Your Honor, I don't dispute

1 that I can't recover twice for the amount we
2 recovered. They're entitled to set-off. My client
3 was required to sign and I was required to sign a
4 confidentiality agreement. I'm happy to provide
5 that to the Court in-camera. You know, I don't want
6 to get crosswise with Mr. Wilson and Mr. Mackelcan
7 about that. It's not a huge -- I mean, there's no
8 reason for us to dispute it. I'm happy to give you
9 that information.

10 It was the amount of the jury verdict for
11 actual damages plus 5,000 and half of the punitive
12 damages. So I think they're entitled to the
13 \$152,010 for 2015. But I think that that would
14 occur after the Court makes a decision as to whether
15 to treble those damages or not for 2015. So if you
16 made an award of treble damages for 2015, the
17 set-off occurred after that was the sum determined,
18 not before, because otherwise you'd be --

19 THE COURT: Back up one second. So you said if
20 several-hundred-and-52 --

21 MR. ROTHSTEIN: \$152,010 was the amount of the
22 jury -- if I'm remembering that correctly -- was the
23 amount of the jury verdict.

24 THE COURT: Against --

25 MR. ROTHSTEIN: And I'm happy to seal this part

1 of the record. Again, I don't want to do anything,
2 you know, to -- I mean, it's not a big allocation
3 issue. It's, you know, this is what we settled for,
4 you know, the full amount of the jury verdict plus
5 half of the punitives. And they're not entitled to
6 any part of the punitives.

7 My point was that you'd do the set-off at the
8 very end rather than before you just made the
9 decision about treble damages under the Payment of
10 Wages Act. Basically -- otherwise, you're basically
11 punishing my client \$300,000 for the \$150,000
12 settlement, roughly.

13 And, again, I fully consent to sealing this
14 part of the record so that it's not, you know, part
15 of the public domain.

16 THE COURT: So you're saying that I would need
17 to do the set-off after I decided whether or not we
18 would do treble damages?

19 MR. ROTHSTEIN: Correct.

20 So if you said Mr. Hess is entitled to treble
21 damages under the Payment of Wages Act for 2015,
22 he'd be entitled to three times the 152-, then you'd
23 reduce the amount he's already gotten paid for the
24 settlement with the accounting defendants. So he
25 would, essentially, only get double damages for that

1 year rather than get treble damages.

2 MR. THOMPSON: Yeah, I'm not going to argue
3 that the set-off reduces it as zero and, therefore,
4 he loses any argument that he's entitled to treble.
5 So -- but I'm not clear. So the settlement on the
6 actuals was 152- plus 5? Is that what you're
7 saying?

8 MR. ROTHSTEIN: The 152- and --

9 MR. WILSON: I have the settlement agreement
10 with me, and I'd be happy to share it with the Court
11 in response to some kind of Court order. But the
12 purpose of my presence here today was to ensure the
13 confidentiality of the amount and that it doesn't
14 enter the public record.

15 So I agree with Mr. Rothstein then that we
16 would seal this portion of the record where we're
17 discussing the amount. And I'd move before your
18 Honor to request that, but then I'm happy to divulge
19 the settlement agreement in response to your order.

20 THE COURT: And that's Mr. Wilson -- Scott
21 Wilson, for the Court Reporter's purposes.

22 And I don't have a problem -- I don't think
23 there's any objection to sealing the record as it
24 pertains to the settlement agreement. Right, no
25 objection?

1 MR. THOMPSON: No objection. I'm still unclear
2 as to the amount he's talking about. But I guess
3 he's getting ready to tell us.

4 THE COURT: I think what I can do is seal the
5 record as to the amount. You'll get me an order
6 saying that?

7 MR WILSON: I can send you an order, yes,
8 ma'am.

9 THE COURT: Okay. And then now you can share
10 the amount of the settlement agreement. But I think
11 he's already said it's the 152- --

12 MR WILSON: Yes, your Honor. The full amount
13 of the settlement agreement was \$157,010. And
14 that's comprised of the verdict amount for the
15 negligent misrepresentation. And then, if you'll
16 recall, the jury entered a verdict for \$10,000 on
17 punitives, and we came to the agreement that we'd
18 just pay half of that.

19 So it's the full amount of actuals the jury
20 awarded against Moore, Beauston & Woodham and
21 Mr. Alexander, and then just half of what the jury
22 awarded for punitive damages.

23 MR. THOMPSON: In all agreement with
24 Mr. Rothstein about we don't get set-off about
25 punitives, I was going to argue about allocation,

1 but I'm okay with allocation. So we only get
2 set-off on the actual -- the settlement portion
3 related to actual damages, which is --

4 THE COURT: Okay.

5 MR. THOMPSON: -- which is 157- -- is that what
6 you said?

7 MR. ROTHSTEIN: No. The --

8 THE COURT: The 152.

9 MR. ROTHSTEIN: The 152,010.

10 MR. THOMPSON: Okay. After trebling.

11 THE COURT: Yes. All right.

12 MR. WILSON: Which leaves us only one thing left
13 to address.

14 THE COURT: Okay.

15 MR. WILSON: And just real quick --

16 THE COURT: I think this is the first time
17 you-all have agreed on anything.

18 MR. WILSON: You just want a Form 4 just
19 representing the order to seal the record and the
20 agreement regarding settlement?

21 THE COURT: Yeah, or either just a little brief
22 order.

23 MR. WILSON: Okay. Thank you, your Honor.

24 MR. THOMPSON: All right. Your Honor, the last
25 part of my motion for remittitur has to do with the

1 amount awarded for the 2015 bonus. You'll recall
2 Mr. Hess and my clients entered into a new contract
3 for the year 2015, but that he claimed damages under
4 the 2010 agreement based on the violation of the
5 notice provisions of the Wage Payment Act.

6 And, your Honor, I would assert that the cases
7 that I have cited indicate that you can't sit on two
8 horses like this, and that if you do so -- what he's
9 doing is, okay, give me the 2010 contract for the
10 year 2015, but I want to keep the 2015 contract for
11 the years 2016 and 2017 when, admittedly, he did
12 better in those years than he would have under the
13 2010 agreement.

14 He admitted in requests to admit and again at
15 trial that he received roughly \$40,000 more in 2016
16 than he would have gotten under the 2010 agreement,
17 and he admitted for -- in 2017, he received \$50,992
18 when he would have gotten nothing under the 2010
19 agreement. He can't have his cake and eat it, too.

20 We're entitled to an off-set -- if he's going
21 with the 2010 contract for the year 2015, we're
22 entitled to an off-set as if the 2010 agreement were
23 in effect in 2016 and 2017. He can't deny the
24 contract for one year and retain the benefits in the
25 next two years. So he earned \$91,563 more in 2016

1 and '17 than he would have had the 2010 agreement
2 applied.

3 The party is not at liberty to say I've made
4 two contracts and if one of them I can set aside, I
5 will just set up the other. You have to decide what
6 you're going to do. And, in this case, he's going
7 with the 2010 agreement. If he's going to do that,
8 we're entitled to an additional subtraction of
9 \$91,563.

10 I would like to correct one thing -- I think
11 Mr. Rothstein misunderstands me -- our argument
12 concerning the notice provisions. Just a moment.
13 And, basically, what they're saying, your Honor --
14 and I'll just read from the Barton Fourth Circuit
15 case, which I understand you don't agree with.

16 But in the Barton case, the Court held that
17 under the notice provisions of the Wage Payment Act,
18 which are at 41-10-30, no remedy is -- full remedies
19 are not provided; instead, and I'll quote, 40-10-30
20 is a written warning by the director of the
21 Department of Labor, Licensing, and Regulation or
22 its designee. But the first defense in a civil
23 penalty of not more than \$100 for each subsequent
24 offense, that is the remedy defined for a violation
25 of 41-10-30.

1 Now, what I was arguing is that -- my
2 understanding of how the Court says, well, I -- the
3 Court disagrees with Barton. The reason the Court
4 disagrees with Barton, and my understanding is that
5 you've looked at -- you, the Court -- you looked at
6 section 41-10-40, which deals with medium of
7 payment.

8 And it also says: An employer may not withhold
9 or divert any portion of wages. And this part of
10 41-10-40, subsection C that concerns withholding or
11 diversion, it mentions 41-10-30. And if you violate
12 41-10-40, it does provide for full remedies.

13 So what I was trying to argue -- and, I'm
14 sorry, I didn't make it clear, obviously -- is two
15 things: One, even if 41-10-40 provides for full
16 remedies, it is separate and apart from 41-10-30,
17 which is the notice requirement, and 41-10-40's mere
18 mention -- the only place it mentions 41-10-30 is
19 this stuff about you can't withhold or divert a
20 portion of the wages, which was not our case.
21 That's not the violation that's alleged.

22 So I guess I'm disagreeing with the Court on
23 two levels. And the reason is, one, 41-10-40 has
24 nothing to do -- or very little to do with the
25 notice of the requirements of the statute. And the

1 remedy section of the statute very clearly says:
2 Your remedy for violation is the fine and warning by
3 the Department of Labor. You don't have full
4 remedies. So I wasn't trying to argue how you --
5 what Mr. Rothstein said. But my thought was the
6 Barton logic should apply.

7 The clear remedy and only remedy is for
8 violation of notification part of the statute is the
9 fine. You don't get full damages for that. And
10 41-10-40's mention of 41-10-30 only has to do with a
11 diversion of a portion of the employee's wages and
12 has nothing to do with the case.

13 But, anyway, I stood up to address the second
14 half of our remittitur motion. I believe I did
15 that. And our proposition is that we're entitled to
16 an off-set for the benefit he got for 2016 and 2017,
17 over and above what he would have gotten under the
18 2010 contract.

19 THE COURT: And that's the 40 -- what was the
20 amount?

21 MR. THOMPSON: The total amount --

22 THE COURT: The \$91,563?

23 MR. THOMPSON: Correct, your Honor.

24 THE COURT: And so that's \$40,000 from 2016 and
25 \$50,992 -- what was the exact number for 2016?

1 MR. THOMPSON: It is -- it's the bonus he got,
2 \$57,527 -- this is in footnote 1 in my memo -- minus
3 what he would have gotten under the 2010 agreement,
4 which was \$16,956. And what he got in 2017, he
5 admitted he didn't -- he wouldn't have gotten
6 anything out of the 2010 agreement. So he got
7 \$50,992 in 2017. So, basically, it's \$57,527 minus
8 \$16,956 plus \$50,992, and that should add up to
9 \$91,563.

10 THE COURT: All right.

11 Mr. Rothstein?

12 MR. ROTHSTEIN: Your Honor, I mean, I agree
13 this is not a deductions case. But I think
14 Mr. Thompson's using an overly narrow reading of the
15 Barton case, which is not binding on your Honor.
16 It's a Fourth Circuit case, a federal decision.

17 And the issue in that case was -- had -- and
18 we've addressed this before. It had nothing to do
19 with whether or not -- I mean, I think that case had
20 to do with whether an employee was properly notified
21 that time moving from one part of the building to
22 another, I think, after changing into your
23 protective gear or whatever was compensable or not.

24 It really is not at all analogous to this case
25 where there's no dispute about what the bonus

1 provision said. The dispute is, you know, whether
2 the bonus was paid or not. So it's not a deduction
3 issue; it's a -- the only issue on notice is that
4 the change is not effective, per the statute, to
5 reduce someone's pay unless you give them seven
6 days' advance notice of the effective date.

7 So I don't know that that really makes much of
8 a difference. I think your Honor has already
9 addressed that issue. I think it's law of the case.
10 There's nothing that has changed since the jury
11 verdict on that.

12 With regard to the remittitur, your Honor, two
13 things: Number one, we elected our remedy under the
14 Payment of Wages Act for 2010 through 2015. We
15 didn't make a claim under the Payment of Wages Act
16 for 2016 and 2017. Our theory, as to 2015, was that
17 the 2015 contract, which was not provided to
18 Mr. Hess with the requisite seven days' advance
19 notice was not effective as to 2015. It was only
20 effective as to 2016 and 2017. So they complied
21 with the statute.

22 The fraud that we're talking about with the
23 2015 is the fraud that Mr. Hess would receive the
24 same -- his pay wouldn't go down switching -- or the
25 bonus wouldn't go down switching from the net

1 profit -- 50 percent of the net profit number to 5
2 percent of the gross revenue number.

3 That year alone, when they made that promise to
4 him, that representation to him in May, they already
5 had over \$200,000 in profits to the practice
6 year-to-date. Mr. Hess would have gotten well over
7 \$100,000. I think we showed later, in December,
8 that that number had grown to over -- I think he
9 would have gotten over \$200,000 in bonus that year
10 alone, and he only got 70-. So that was the fraud
11 part of the case.

12 We never asked the Court to rescind the
13 contract. I think what Mr. Thompson is talking
14 about is you can't say, well, this contract is
15 induced by fraud, therefore, I'd like to rescind
16 that contract and act as if it never happened and
17 then later try to gain a benefit from the contract
18 that you've rescinded. We've never asked the Court
19 to rescind the 2015 contract for year 2016 and 2017.

20 The other thing in his remittitur motion, your
21 Honor, he said that the evidence came into trial
22 about what Mr. Hess would have earned in 2016 or
23 2017 without objection. I objected every time they
24 tried to bring up something from 2016 to 2017, and
25 your Honor overruled those objections. So for him

1 to represent to the Court that that evidence came
2 into trial without objection is simply wrong. I
3 mean, I hope that was not an intentional misleading
4 to the Court. But I remember --

5 MR. THOMPSON: I didn't say that.

6 MR. ROTHSTEIN: So I objected repeatedly during
7 the trial to anything that had to do with 2016 or
8 2017. And, I mean, we're not trying to have our
9 cake and eat it, too. They're trying to -- I mean,
10 they're trying to say, well, you know, we changed
11 the way we paid your bonus and -- and, you know,
12 that ended up hurting us, so we want to get a credit
13 for \$91,000 of money that you would have -- the 2016
14 and 2017 were not subject to discovery.

15 What he's talking about with admissions was the
16 accountants provided requests for admissions, which
17 were deemed admitted because we didn't respond
18 within 30 days. You know, I'm not going to
19 relitigate that issue. But, again, I objected to
20 that anything relating to 2016 or 2017 is not
21 relevant to the case. So for him to say it was
22 admitted without objection is simply incorrect.

23 Again, this is not a rescission case where
24 we're saying, Judge, we want you to completely throw
25 out the 2015 contract. What we said is the 2015

1 contract was not effective until 2016 or 2017. So
2 they do not get any type of remittitur for that. I
3 mean -- and that's something that, you know, they
4 should have argued to the -- I mean, if that's
5 something that they wanted the jury to decide, they
6 should have raised that with the jury or your Honor
7 before the, you know, posttrial motion.

8 Again, that would be something that -- they
9 could have asked the jury to pick up those amounts.
10 But, you know, this is not a proper issue for any
11 type of posttrial remittitur motion.

12 THE COURT: All right. Anything else?

13 MR. THOMPSON: Nothing further, your Honor.

14 THE COURT: All right. I'm going to -- let's
15 see. I'm going to ask that you-all send me proposed
16 orders on the treble damages and, of course -- on
17 the treble damages under the Wage Payment Act, and
18 also in there the discussion regarding attorneys'
19 fees and any proposed orders -- attorneys' fees and
20 also the prejudgment interest.

21 And, Mr. Rothstein, I will need you to send
22 me -- I think you said you could send an itemized
23 statement under your --

24 MR. ROTHSTEIN: Yes, ma'am.

25 THE COURT: I need you to send that to me

1 in-camera. And if there's a way to send the
2 itemized statement and redact the things that are --
3 you can send it to me un-redacted and you can send a
4 copy to Mr. Thompson redacted with any
5 attorney-client privilege.

6 MR. ROTHSTEIN: Okay.

7 THE COURT: And then send me a copy of what you
8 redacted.

9 MR. ROTHSTEIN: Okay.

10 THE COURT: And Mr. Wilson is going to get me
11 an order to seal the discussions on the record
12 regarding the settlement. And I'm -- I believe
13 that's it. I mean, we'll do -- how much time do
14 y'all need? How much time do you need? I know
15 there's a lot going on right now.

16 MR. THOMPSON: I might be in trial next week.
17 Let's see --

18 THE COURT: Well, I am in trial next week, so I
19 don't need it next week. So that's why I'm asking.
20 So just let me know how much time.

21 MR. THOMPSON: I can get it to you by the 27th.

22 THE COURT: Of May?

23 MR. THOMPSON: Yes.

24 THE COURT: What's the date?

25 MR. ROTHSTEIN: Well, you're just asking for

1 trebling in the case that goes toward --

2 THE COURT: Yes.

3 MR. THOMPSON: You're going to do the -- an
4 order on JNOV and remittitur?

5 THE COURT: Yes.

6 MR. THOMPSON: You don't need anything from us?

7 MR. ROTHSTEIN: Yeah. So I -- I'll get it by
8 the end of the month.

9 THE COURT: Okay. Well, let's just -- by the
10 end of the month?

11 MR. ROTHSTEIN: Yes, your Honor.

12 THE COURT: We'll say June 1st.

13 MR. THOMPSON: Your Honor, I apologize. I
14 should have introduced Mr. Beasley. And, of course,
15 you know the defendant. Dr. Morphis is here and her
16 husband James Morphis.

17 THE COURT: Thank you for driving down.

18 -- END OF TRANSCRIPT OF RECORD --

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23

24

25

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Richland County, South Carolina, on the 19th of May, 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

April 11, 2023

s/Bethanie K. CrepponBethanie K. Creppon
Circuit Court Reporter

State of South Carolina) In The Court of Common Pleas
) Sixth Judicial Circuit
County of Lancaster) 2018-CP-29-1127

Paul David Hess, APRN-BC,)
)
 Plaintiff,)
)
 vs.) Transcript of Record
)
Morphis Pediatric Group of)
Lancaster, PA; Elizabeth)
J. Morphis M.D.; Gregory M.)
Alexander, CPA; and)
Moore, Beauston & Woodham, LLP))
)
 Defendants.)
_____)

Lancaster South Carolina
January 31, 2022
thru February 2, 2022

B E F O R E:

The Honorable Deandre Benjamin

A P P E A R A N C E S:

Mr. David E. Rothstein
Attorneys for Plaintiff

Mr. Charles F. Thompson, Jr.
Attorney for Defendant, Morphis

Mr. Douglas W. MacKelcan, III
Attorney for Defendants, Alexander and MBW

Mr. Skyler C. Wilson
Attorney for Defendants, Alexander and MBW

Lisa Carter
Circuit Court Reporter

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1 MR. THOMPSON: You're talking about the Aprima
2 Reports.

3 MR. ROTHSTEIN: The Aprima Report, yeah.

4 MR. THOMPSON: That's not even in evidence yet, but --
5 I withdraw my objection then, Your Honor.

6 THE COURT: Okay. All right. Bring them on in.
7 (Whereupon, the jury enters the courtroom at 9:59 a.m.)

8 THE COURT: All right. Good morning, ladies and
9 gentlemen of the jury, I hope you had a restful evening,
10 weekend, a good weekend and we are ready to continue with
11 our case. I will ask
12 Mr. Thompson to call his next witness?

13 MR. THOMPSON: The defense calls Mr. Donny Burkett.

14 THE BAILIFF: Would you raise your right hand please?
15 Do you solemnly swear or affirm the testimony you're about
16 to give to be the truth, the whole truth, and nothing but
17 the truth so help you God?

18 MR. BURKETT: Yes, sir.

19 THE BAILIFF: Please be seated and the witness stand.

20 DONNY BURKETT, first being
21 duly sworn, testified as follows:

22 **Direct Examination by Mr. Thompson:**

23 Q. Good morning, Mr. Burkett.

24 A. Good morning.

25 Q. Can you give us your full name for the record please?

1 A. My full name is Donny H. Herbert Burkett. I go by
2 Donny.

3 Q. And what is your profession?

4 A. I'm a CPA.

5 Q. And how long have you been a CPA?

6 A. Since 1976.

7 Q. All right. And where have you -- what, what firms have
8 you practice with during your career?

9 A. When I got out of school I went to work for a Regional
10 Firm Cherry, Bekaert, & Holland in Florence. I worked for a
11 CPA in Florence, Cherry Bekaert & Holland. It was a large
12 firm. Size thirteen in the nation. I got my experience
13 there in September of 1976. I started a CPA firm with Donny
14 H. Burkett, CPA's which is now Burkett, Burkett, CPA -
15 Burkett, Burkett, and Burkett Certified Public Accountants,
16 PA. We have offices in West Columbia and Rock Hill

17 Q. All right. And other than your CPA license, do you
18 have any other certificates or....

19 A. I've got my Profession Financial Planning Certificate
20 through the AICPA?

21 Q. Have you done any teaching in the field?

22 A. No. Not in that field, no, sir.

23 Q. I'm talking about ---

24 A. But I'm -- but I've done teaching. I taught at the
25 business school for three years. I taught tax law at

1 higher cost of living than South Carolina, right?

2 A. Certainly have a much higher cost of living.

3 Q. Okay. And your experience recruiting physicians in
4 Lexington South, Lexington County, South Carolina, do you
5 pay doctors the same amount that starting doctors in New
6 York or Chicago or LA make?

7 A. Yes, sir. We go by the WRVYU values and we pay based
8 on average WRVU's based on what they perform.

9 Q. Okay. And WRVU is a Relative Value Unit for doctors,
10 is that right?

11 A. It is a Work Relative Value, yes, sir. It, it
12 specifically identifies work that the physician does, not
13 the work that the hospital or the practice that other
14 people would do.

15 Q. Okay. Were you aware that Dr. Morphis, that her full-
16 time job was in Hartsville, South Carolina?

17 A. I know that you worked for both practices. Yes, sir.

18 Q. Okay.

19 A. I was not, not aware that it was full-time.

20 Q. Okay. So you've never seen Dr. Morphis's
21 representations to the IRS about how much she worked in
22 Hartsville versus how much you worked anywhere else?

23 A. I've never seen a representation. I wasn't informed
24 about those representations. I never seen the tax returns
25 to look at.

1 Q. I'm gonna show you Exhibit 15 which is US Corporate
2 Income Tax Return for Morphis Pediatric from Hartsville. I
3 assume, as an account, you're familiar with this type of
4 document?

5 A. Yes, sir.

6 Q. Okay. All right. And do you see Line 12, let me back
7 out a little bit here, Line 12 compensation of officers,
8 officers refers to Schedule E?

9 A. Yes, sir.

10 Q. Okay. Seven hundred and eight-nine thousand in
11 compensation that year?

12 A. Was that a year? I couldn't -- I'm sorry. I hate to --
13 -

14 Q. In 2010 ---

15 A. Okay. Thank you, sir.

16 Q. --- \$789,000 for officers. And if you look over at the
17 Schedule E, then here she's representing under penalty of
18 perjury to the IRS that she works hundred percent of her
19 time devoted to this business, correct?

20 A. Yes, sir.

21 Q. Okay. Do you know how much she told the IRS she was
22 working at Lancaster?

23 A. I think my memory is twenty-five, is that correct?

24 Q. Okay. So if you use your annual salary of \$230,000 and
25 she only worked twenty-five percent of the time that would

1 be about \$57,500, isn't it?

2 A. Well, and I'd ask the question, was that the same
3 year, the twenty-five percent as the hundred percent?

4 Q. Well, you don't know. You never saw that information?

5 A. No. I never saw the tax returns.

6 Q. Okay.

7 A. So I never looked at that data other than....

8 Q. All right. Exhibit 14 is the Morphis Pediatric Group
9 of Lancaster, right?

10 A. Yes, sir.

11 Q. All right. This is the 2010 numbers, same return but
12 just for the Lancaster practice rather than the Hartsville.
13 Compensation officers \$148,663, do you see that?

14 A. Yes, sir.

15 Q. Okay. So on this Schedule E Ms. Morphis, Dr. Morphis
16 is telling the IRS under penalty of perjury that she only
17 work twenty-five percent of the time at the Lancaster
18 Practice, do you see that?

19 A. Yes, sir.

20 Q. Okay. So that would reduce your number from \$230,000
21 as a reasonable salary for her on an annual basis to
22 \$57,500, isn't that right?

23 A. If the twenty-five percent was correct. But if I had
24 a hundred percent and twenty-five percent that's more than
25 hundred percent.

1 Q. Right. And you ---

2 A. I'm not sure -- I'm not sure about the math in what
3 you're doing.

4 Q. I'm not sure either, but this -- I didn't create this
5 document.

6 A. Well, the document has some, I'm not trying to be
7 argumentative, you can't work hundred and twenty-five
8 percent of your time at two different places.

9 Q. I completely agree with you about that. So the
10 contract that you looked at a few minutes ago, that
11 Appendix A about bonus compensation, do you have any
12 trouble figure out how to calculate profit in Lancaster? As
13 an accountant would you be able to calculate the profit in
14 Lancaster?

15 A. I used the financial statements and tax returns
16 prepared by the practice.

17 Q. Okay. But just reading this language, "all end of the
18 year profits generated by this abovementioned business
19 shall be divided and the employee is granted fifty percent
20 of said monies after all debts, expenses, royalties and
21 expenditures have been allowed." If you saw the financial
22 statements of this firm, do you think you'd be able to
23 calculate the net profits?

24 A. Yes, sir. That's what my compensation did.

25 Q. Okay. And Mr. Hess was entitled half of that. Who was

1 entitled to the other half?

2 A. Dr. Morphis.

3 Q. Okay. So the, the income that's shown for Dr. Morphis
4 includes not only a salary component, but also this bonus
5 component, right?

6 A. I have no way of knowing it include the bonus. That
7 was her compensation on the tax return.

8 Q. So what you did in your calculations is you looked and
9 you said oh, I think \$230,000 a year is a reasonable salary
10 for Dr. Morphis to take based on full-time work in
11 Lancaster, right?

12 A. Yes, sir.

13 Q. Okay. We already know at least from the tax returns
14 that she only worked twenty-five percent in Lancaster,
15 right?

16 A. Again, that's what the tax return says, but it's
17 hundred and twenty-five percent so....

18 Q. Right. Well, you didn't, you didn't figure out
19 anything about what she earned from, from Hartville, right?

20 A. No, sir.

21 Q. Okay. So every year you looked and saw if Dr.
22 Morphis's salary was less than \$230,000, you didn't, you
23 just said well that's fair compensation for her to take,
24 right?

25 A. Yes, sir.

1 Q. Okay. And then one year I think it was 2011, I'm
2 sorry, 2012 she took \$330,000 out, right?

3 A. Yes, sir.

4 Q. Okay. And even you think that's overly generous on
5 her part to take \$330,000 out?

6 A. It's more than 230, yes, sir.

7 Q. Okay. In your, your revised report it didn't look
8 like you adjusted two hundred, ah, let me see if I can show
9 you - this is my copy of Exhibit 10, maybe I should get the
10 actual one. Do you see there's nothing in here about Dr.
11 Morphis's taking money out of the practice, right?

12 A. Yes, sir.

13 Q. Okay. When you were figuring out your columns here,
14 you added that Mr. Hess's bonus why didn't you add back Dr.
15 Morphis's bonus?

16 A. I did -- I considered Dr. Morphis's compensation not
17 bonus.

18 Q. Okay. And that's something Mr. Thompson told you to
19 do?

20 A. No, sir. That is what I considered.

21 Q. Okay.

22 A. I didn't find any evidence as to bonus.

23 Q. All right. Let me ask you this, have you ever seen Mr.
24 Alexander -- you know who Mr. Alexander is, right, the Greg
25 Alexander over here that's standing up?

1 A. I met him today when I came in.

2 Q. Okay. You've never talked to him before?

3 A. To answer the question I was, I was, I was chair of
4 the South Carolina Associate CPA's. I was the Chair of the
5 Board of Accountancy ---

6 Q. Nah, I'm not talking about. I'm talking about ---

7 A. Let me -- let me -- can I answer?

8 Q. Sure.q

9 A. So I may have -- your question is have I ever talked
10 to him? I may have, but not about this case.

11 Q. Okay. So you create an opinion in this case without
12 even talking to the accountant that actually did the work?

13 A. Yes, sir. My review of the books and records.

14 Q. All right. Let me show you Exhibit 2 in this case
15 which is an email that Dr. Morphis, it's already in
16 evidence, May 27, 2015 email that she sent to Greg
17 Alexander. Do you see down here she says, "I never wanted
18 to get paid from Lancaster." Do you see that?

19 MR. THOMPSON: Objection, Your Honor. Relevance?

20 THE COURT: Overruled.

21 Q. Have you ever seen this email where Ms., Dr. Morphis
22 said she'd never want to get paid out the Lancaster
23 practice?

24 A. No, sir.

25 Q. Have you ever seen Exhibit 3 to this case? This is

1 an email that Greg Alexander sent the Beth Morphis where he
2 said

3 attached is the spreadsheet you requested. I thought it
4 might be helpful for you to see what kind of profit you are
5 receiving from the Lancaster practice. Do you see that?

6 A Yes, sir.

7 Q. Okay. Have you ever seen this email before?

8 A. No, sir.

9 Q. Okay. So you wouldn't have seen the spreadsheet that
10 was attached to that email, would you?

11 A. No, sir.

12 Q. Let me put that up on the screen. All right. Let's
13 start over here with 201 - I think I went a little too far
14 - can you guys see that?

15 (Whereupon, there is a gesture of yes)

16 A. I can't see the columns. I think I know what they are
17 on the left, I'm sorry. Yeah.

18 Q. Okay.

19 A. Thank you.

20 Q. Okay. So down here net income, doctor bonuses, and net
21 income before doctor bonuses, okay. And the accountant
22 that actually did the work call it doctor bonuses, right?
23 He didn't call it salary or fair salary for being a
24 pediatrician, right?

25 A. Yes, sir.

1 Q. Okay. Were you aware that the accountant for the
2 practice called these bonuses and not salary?

3 A. I've never seen this document.

4 Q. Okay. All right. So when the accountant is telling
5 Dr. Morphis I want you to see what kind of practice you're
6 getting out, what he does is he takes the reported net
7 income, which is the number here, right, he adds any
8 doctor, docker bonuses that were paid that year and comes
9 up with net income before docker bonuses. Do you see that?

10 A. Again, you've moved it that way.

11 Q. Okay.

12 A. I think that's what it. I mean, I'm not trying to be
13 argumentative. Net income before doctor bonuses, that's
14 what he says, yes, sir.

15 Q. Right. Sorry. All right. We'll do it backwards so you
16 can see both at one time.

17 A. I'm sorry. Thank you.

18 Q. So what he did is he took, this is the reported net
19 income for 2015, \$196,626.14, he added back in Dr.
20 Morphis's salary and it has this number, net income before
21 doctor bonus, right? So if David Hess were truly getting
22 half of the bonus, or half of the profits of the Lancaster
23 practice, he should have gotten half of this number, right?
24 And Dr. Morphis should have gotten the other half?

25 A. I'm trying to -- and I can't understand where he got

1 Q. All right. Well, didn't she take out an \$80,000 salary
2 also?

3 A. I'm not sure because what I was focused on that was
4 the five percent.

5 Q. Okay. And she took, I think she admitted already that
6 she took a \$411,000 S distribution that year?

7 A. Yes, sir.

8 Q. Okay. And that's, essentially, this the equivalent of
9 a dividend, of a dividend for an S Corporation, right?

10 A. Yes, sir.

11 Q. All right. So on top of \$80,000 salary, she took out
12 \$411,000, she got paid almost half a million dollars from
13 Lancaster that year, right?

14 A. She took a distribution and that distribution was
15 based on the cash in the bank from previous year that had
16 not been distributed as well as that year.

17 Q. Okay. So that basically ---

18 A. Let me -- please, I don't consider that to be complete
19 compensation for that years because if you go back and look
20 at the financial statements and tax returns there was cash
21 on hand at the end of the year before. In fact, there was
22 cash on hand at the beginning when she started this
23 contract. So I just don't consider that, that to be
24 compensation for that year.

25 Q. All right. Let's look back at Mr. Alexander's bonus

1 A. We were told who the office managers were, who the
2 office manager was and we used twenty-nine percent Of that
3 amount to from the payroll records.

4 Q. So you have no idea what the other office managers job
5 duties entail prior to Mr. Henson starting there?

6 A. We used twenty-nine percent based on his deposition,
7 on his deposition.

8 Q. All right. So what you did was you took the reported
9 net income from the firm off the tax returns every year,
10 and prior to 2014 right there, the company was an S, uh, C
11 corporation, right?

12 A. I think so, yes, sir.

13 Q. Okay. So their reported net income, I mean, the goal
14 was to try and get that as close to zero as possible,
15 right? Try to zero out the income of the S corporation, I
16 mean, the C corporation?

17 A. I have not idea that was the goal.

18 Q. Okay. All right. And so what you did was you took,
19 reported net income, you added Mr. Hess's bonus back, why
20 did you add the Christmas bonus back?

21 A. Because that was the bonus he was paid.

22 Q. Okay. If it was a gift, why would you add it back into
23 the calculation of profits?

24 A. Well, gift would not be a bonus. I'm not trying to
25 split hairs with you but it was part of the bonus he was

1 that. Was there other income for that year?

2 Q. In other income.

3 A. Yeah.

4 Q. And in your experience might an owner, physician, pay
5 himself that, that amount from some, some other income type
6 item on top of his normal compensation?

7 A. If they've earned that income is not unusual to pay
8 that in addition to what they, with what they pay
9 otherwise.

10 Q. And would it be -- would it be reasonable to classify
11 that as a, as a separate amount from patient revenue?

12 A. It was classified separate on their financial
13 statements so it is separate from that.

14 Q. Would that be a reasonable accounting practice to
15 classify it separately?

16 A. Yes, sir.

17 Q. And regarding the Mr. Henson's compensation and there
18 was mentioned of his testimony, where would you have
19 gotten the amount of his compensation?

20 A. I could have gotten from MGMA data or other data or
21 other sources, I just didn't look at it.

22 Q. Did you look at, in the course of your analysis, did
23 you or your staff look at payroll records?

24 A. Oh, yes, sir. Yes, sir.

25 Q. Did you look at W-2 statements?

1 A. Yes, sir.

2 Q. And do you know if Mr. Henson's salary was verified
3 against those documents?

4 A. Yes, sir.

5 MR. THOMPSON: No other questions.

6 THE COURT: Anything else?

7 (Whereupon, no request from any of the attorneys)

8 THE COURT: All right. You may step down. Any
9 objection to this witness being excused.

10 MR. BURKETT: Thank you, Your Honor.

11 THE COURT: All right. You're free to leave, sir.
12 All right. We're gonna take our morning break and we'll see
13 you in about 15 minutes.

14 All right. Thank you.

15 (Whereupon, the jury exits the courtroom at 11:42 am)

16 THE COURT: Y'all ready to bring them in?

17 (Whereupon, all attorneys agrees)

18 THE COURT: All right. Let's bring them on in.

19 (Whereupon, the jury enters the courtroom at 12:06 pm)

20 THE COURT: All right. Yes, sir, call your, call
21 your next witness?

22 MR. THOMPSON: Elizabeth, Dr. Elizabeth Morphis.

23 THE BAILIFF: Raise your right hand, please. You
24 solemnly swear or affirm the testimony about to give will
25 be the truth, the whole truth, nothing but the truth so

1 help you God?

2 DR. MORPHIS: Yes.

3 THE BAILIFF: Please be seated in the witness stand.

4 ELIZABETH MORPHIS, first being
5 duly sworn, testified as follows:

6 **Direct Examination by Mr. Thompson:**

7 Q. All right. Dr. Morphis?

8 A. Yes, sir.

9 Q. What do the folks in the practice typically call you?

10 A. Usually Dr. Beth.

11 Q. And did that start to differentiate you from Dr.
12 Morphis?

13 A. Yes, sir. He -- sometimes he was Big Doc and I was
14 Little Doc. Now, I'm kind of Big Doc. But, yes, sir, it was
15 easier.

16 Q. Could you, and I know you did some of this earlier,
17 but could you go through your, what -- what sort of
18 training and education does it take to become a
19 pediatrician? Go through that please.

20 A. So I went to probably say high school in Cheraw and
21 then I went to College of Charleston and I got my degree in
22 biology. And then I went to MUSC to medical school in
23 Charleston. And then I did my residency in Greenville,
24 South Carolina in pediatrics.

25 Q. How long, how long -- All right. College of Charleston

1 And so we make rounds and are on call for that. And then I
2 still take call from the -- now, since I don't have to take
3 full-time call from the hospital, I still take call for the
4 child abuse cases and our office patients and then the
5 Saleeby Center.

6 Q. Is your day typically over at 5:00, 5:30?

7 A. Not, it's not. Kind of laughing when they're talking
8 about the hundred percent because I don't know if that's
9 forty hours or what that consist of. But, yeah, so I keep
10 my beeper or my phone, now it's my phone, I don't have the
11 beeper anymore, but it's on for, you know, twenty-four
12 hours for call. I do have a nurse practitioner at the
13 Durant Children's Center that kind of helps take some of
14 the call but I'm still backup.

15 Q. And at this time you, you own the Hartsville and
16 Lancaster practices?

17 A. Yes, sir.

18 Q. And when did -- when did you become the, the full
19 owner of the Hartsville and Lancaster practices?

20 A. So they or Dr. Morphis, Dr. J.O. Morphis retired in
21 2012 and so at that point, technically, I've been the sole
22 owner of both practices. He did still maintain his license
23 and his educational requirements and still worked some and
24 would come in. But he was having some problems with his
25 hearing and so his hearing aids it was hard for him have a

1 about at your Lancaster practice?

2 A. He didn't do the management, he did the day to day
3 employee like, processes like staffing and procedural flow,
4 how the patients are going to come in, how are they going
5 to come out. Keeping things rolling day to day.

6 Q. And is it, is it -- you typically have to handle some
7 of these issues after hours ---

8 A. Yes, sir.

9 Q. --- in your workday?

10 A. Yes, sir.

11 Q. Was David required to work after hours to handle sort
12 of management issues?

13 A. No, sir.

14 Q. Typically, what -- when did his work day end?

15 A. At five or if he had to stay over and see patients, he
16 would, if they stayed open until 5:30 or whatever, they
17 would stay.

18 Q. And what kind of vacation benefit did he get, do you
19 remember?

20 A. I do not. It seems like in the beginning it may have
21 been two or three weeks and went up to four but I'm not
22 sure. I'd have to look.

23 Q. Do you get -- do you take four weeks of vacation every
24 year?

25 A. No, sir. I usually don't. I'm entitled but I usually

1 don't get to take it.

2 Q. And how about days off, did he have days off as well?

3 A. He did. And it's hard for me to remember because in
4 the very beginning like from 2002 to 2009 - before he came
5 I was going back and forth a lot and then once he came I
6 didn't have to go quite as often. And then when Dr. Green
7 left, and some of the timeline is getting a little bit
8 mixed up, but David was seeing patients in the office. He
9 and Dr. Hussey were there five days and I think we went to
10 - I hired a nurse practitioner that would come up part-time
11 and it was every other Friday that they would get off.

12 Q. And what's your partnership like with, uh, with Big
13 Doc?

14 A. It was -- it was good. He was very generous to me.
15 Very kind to me and it's, it was pretty easy.

16 Q. And did he influence to how you practice medicine? If
17 so, how?

18 A. Yes, sir. He, um, at the very beginning when the
19 hospital recruited me they wanted to put me on an income
20 guarantee. And said absolutely not because if you do that
21 then - what that meant was I had to see a certain amount of
22 patients to get paid - and so he said all patients are
23 going to come in and they're gonna want to see me. They're
24 not gonna want to see some new doctor so then you're not
25 gonna make your quota. So he agreed -- he had the agreement

1 Lancaster, you should come up here and take over his
2 practice. They don't have anybody. And so I've talked with
3 Janice Dabney (ph) at the hospital and she said, you know,
4 we have this space that Dr. Cook just left and we would be
5 happy to put you in that space and so that's how that came
6 to be.

7 Q. And, and business health wise, how was the Lancaster
8 practice when you took it over?

9 A. So when Dr. Cook left that practice was basically
10 dissolved and I just started from ground one, from ground
11 zero. I started from scratch. We named Morphis Pediatric
12 Group Lancaster. And so I hired a nurse practitioner --
13 well, the nurse practitioner had been there. I offered her
14 job to stay and she, she took it. And so it was me and her
15 and then I hired an office manager and some, some office
16 staff to stay there and start up.

17 Q. Okay. And how'd you get sort of the seed capital
18 money to run it at first?

19 A. We didn't have a lot of capital to start with. Dr.
20 Morphis covered Hartsville for me to come to Lancaster. And
21 I know at one point we took the loan from Hartsville, I
22 don't recall what year that was, but we just, we did not
23 have a lot of capital to start with, we just used what we,
24 what we had and got started from that.

25 Q. And so if the Lancaster practice had gone under, what

1 would have happened on that loan?

2 A. I probably would have to pay that back, I guess.

3 Q. And how long did you work -- well, backup, how much
4 did you work in the Lancaster practice's first couple of
5 years? What was your ---

6 A. In the very beginning I came up every day because I
7 had to get started and I work five days a week in the
8 beginning. And then I dropped back to like three days a
9 week. And then I gradually dropped back to one day a week.
10 And as I got more help I decreased my time there.

11 Q. All right. And after Mr. Hess, after you hired Mr.
12 Hess, your time there -- did you still see patients there
13 after Mr. Hess?

14 A. I did.

15 Q. Okay. And what were the circumstances on which you
16 might see a patient in Lancaster after, after his hiring?

17 A. I often went up there to cover if somebody else we
18 need to be absent or if David took a vacation I would
19 cover. And then we also had, tried to have monthly meetings
20 when I would go up there and do other stuff besides direct
21 patient care.

22 Q. All right. And other management duties that you talked
23 about before, we you, were you doing those from Hartsville?

24 A. Most of the time. Sometimes it would be in Lancaster.
25 I also, before David, we had another nurse practitioner

1 that I believe was right before David, but I would have to
2 go up frequently to do chart reviews and - because that's
3 before we had electronic medical system. Once we got EMR or
4 our electronic medical record, I could log on from, from
5 Hartsville and look, but it other times I'd have to get the
6 chart and look.

7 Q. Were you at all times David hess's supervising
8 physician?

9 A. Yes. I think there may have been a year or two. We
10 were trying to transfer that obligation to Dr. Carter or
11 Dr. West since they were new doctors coming in. But they
12 didn't stay long enough, they may have been on his board
13 certification for some time, I maintained his supervision.

14 Q. All right. What is, what is a supervising physician
15 required to do with regards to a nurse practitioner?

16 A. So that's changed over the years. Initially, you had
17 to do chart reviews, I think initially you may have had to
18 be in a fifty mile radius and they changed that. But
19 they've done a lot of changes and now it's just a
20 collateral to the physician. But ultimately if you're named
21 in a lawsuit or if there's any medical malpractice you're
22 obligated for that risk as well.

23 Q. So if he screws up the patient, you get sued?

24 A. Yes, sir, along with him.

25 Q. How often would you say that you would hear from David

1 after hours on issues?

2 A. It would -- on patient issues, not often. It wasn't --
3 he would call me when he needed. Most of the time when I
4 saw a message from David it was about accounting issues or
5 numbers. And if he needed me about a patient he would text
6 me and say, hey, can you call me I have a patient. And
7 that, that way I know I needed to get with him right away
8 and not wait until that evening or some other time.

9 Q. I think you've already testified about how David got
10 hired. In hiring, you made, you ultimately made the hiring
11 decision, correct, about David?

12 A. Yes, sir.

13 Q. Okay. What were your plans or hopes for David and the
14 Lancaster practice? What did you hope for him and how ---

15 A. Um ---

16 Q. Go ahead.

17 A. Well, we needed a provider, we were growing. And we
18 needed somebody that could get in there and see patients.
19 He had, um, he's family practice trained but he had a good
20 experience in the ER and he could get through the patient
21 volume well. And he -- I just needed somebody to come in
22 and see the patients and maintain sort of day-to-day
23 activities. Dr. Green was there when I hired David, um, so
24 initially, I just needed somebody to help Dr. Green. And
25 then after Dr. Green left I needed somebody that could, you

1 know, kind of hold the fort down until I could get some
2 more doctors in.

3 Q. And what is a nurse practitioner and what are the
4 limits to what a nurse practitioner can do versus a
5 physician?

6 A. So again it's changed a lot. The nurse practitioner
7 goes through the nursing training program and gets their
8 Master's of Nursing, I suppose you could say or PhD of
9 Nursing. And then they're, they're limitations in a general
10 pediatric offices, not a lot. They are, um, depending on
11 how you get, how they are trained but I always like to hire
12 people that were well trained they could do the general
13 outpatient population and they can do inpatient as well.
14 But I'd say in pediatrics there's, there's not a whole lot
15 of limitations to, as to what we did that they can do.

16 Q. And was David a good practitioner?

17 A. He was.

18 Q. And from that aspect you were happy with his
19 performance?

20 A. Yes, sir.

21 Q. Let's take a look at what's been marked, I'm sorry,
22 already admitted, from the 2010 contract, and do you
23 recognize this document, Dr Morphis?

24 A. Yes, sir.

25 Q. All right. And what is it?

1 A. This is the Appendix A of his 2010 contract.

2 Q. All right. What was his annual salary?

3 A. A hundred thousand dollars.

4 Q. And did that changed during his employment?

5 A. No, sir.

6 Q. All right. And going up in the agreement, do you
7 recognize Clause 4, compensation?

8 A. Yes, sir.

9 Q. This is part of the 2010 agreement, is that correct?

10 A. Yes, sir.

11 Q. All right. The language under the bottom of part 4,
12 "all or any bonuses shall be the discretion of the board or
13 is determined in Appendix that is hereby signed and agreed
14 upon by both parties." Did you have an understanding as to
15 what that meant to you?

16 A. Yes, sir. Any bonus that we determined could be either
17 at my discretion because I, at mine and Dr. Morphis's
18 discretion until 2012. Or we could use the Appendix A and
19 determine his bonus.

20 Q. All right. Let's look at Appendix A - all right,
21 Appendix A, the first sentence, "provided the employee
22 meets criteria as decided upon by the board," what was your
23 understanding as to what that meant? What did it mean to
24 you?

25 A. So the years prior -- well, not sure when it was, but

1 one of the criteria that was always in place is that they
2 had to be employed at the end of that year to get the
3 bonus. Because it had been several times where we need
4 somebody that could see a high volume in Hartsville
5 especially so that was one of our criteria. But the main
6 criteria was that you'd be employed at the end of the year
7 and some of the other criteria may, may vary depending on
8 what our needs were.

9 Q. And what did you feel, or did you have -- in terms of
10 your discretion on criteria, what would you -- how would
11 you how describe that?

12 A. We had full discretion for criteria.

13 Q. All right. And going down to the second paragraph,
14 "all end of the year profits generate -- Oh, I'm sorry, I
15 skipped over. It says, the first part also says, "if you
16 meet criteria the employee will be eligible for an annual
17 bonus." What does will be eligible mean to you?

18 A. Again, I think it's discretionary if, you know,
19 sometimes you're eligible to enter a drawing that doesn't
20 mean you're gonna win but you're eligible. You -- he
21 would've been able to be considered for a bonus.

22 Q. All right. So going down the next paragraph, "all end
23 of the year profits generated by this above mentioned
24 business shall be divided and employees granted fifty
25 percent of said monies after debts, expenses, royalties and

1 expenditures," what do debts mean to you, a debt deduction?

2 A. Anything that was owed from the practice to someone
3 else.

4 Q. And do you know what the difference between expenses
5 and expenditures, do you have any understanding or belief
6 as to that?

7 A. I do not other than -- there's a lot of accounting
8 language that I sometimes don't understand. And to me I
9 think expenses are something that just may have been a
10 recurring thing and expenditure is anything that you spend
11 money on. I'm not sure about the legal terms.

12 Q. All right. How about if you had like cash flow
13 deficiencies or something you might need to buy in the next
14 year, do you feel like you could have adjusted David's
15 bonus to allow for, for that money, set aside?

16 A. I think so. I think I could have adjusted it at, for
17 any reason at my discretion. But a lot, I know a lot of
18 times they would talk about we had to have some major
19 capital expenditures or something that was coming up that
20 we needed to set money aside and that's what I think
21 happened in 2011 because we had that APRIMA software. It
22 was a large expense that we didn't anticipate.

23 Q. And there's been a lot of testimony about your car
24 that you, expense. Do you expense that through the
25 Lancaster practice?

1 Q. Going back to David's salary, he got that as part of
2 expenses, correct, before the bonus compensation?

3 A. Yes, sir.

4 Q. And did you feel you were entitled to compensation as
5 well before the bonus calculation?

6 A. I did.

7 Q. Did you ever actually take a bonus to match David's
8 bonus?

9 A. I don't recall because it really wasn't thought of
10 that way.

11 Q. How did you think of it? What way did you think of it?

12 A. Well, you know, I did work hard for the Lancaster
13 office but I also owned that practice and I had owned it
14 since 2002. And so we would look at the end of the year to
15 see if there was enough money for me to take a modest
16 salary because in years past sometimes I didn't get that
17 and so that's how that -- I deserved that as my total
18 compensation. I know fifty percent of the profit had to go
19 to David but it did not say that I had to take the other
20 fifty or I could have put it back into the practice or I
21 could've, could've taken it as a bonus. We just didn't
22 really split out bonus versus total compensation in our
23 discussions.

24 Q. Did you receive any advice from Dick or your CPAs
25 about whether or not you could take X amount of

1 Q. Did you ever charge Lancaster office for any portion
2 of Mr. Henson's salary?

3 A. No, sir.

4 Q. All right. Did he spend time on Lancaster issues?

5 A. Yes, sir. And there was a lot of things that often
6 times Hartsville would pay for that did not get attributed
7 to Lancaster. But, doctor, I mean, Tom's salary or the
8 other financial parts were not charged to the Lancaster.

9 Q. All right. And why is it -- well, what are these other
10 parts you're talking about? What are some other things that
11 were never charged in Lancaster?

12 A. Well, sometimes our -- some of the legal fees were
13 never charged and then when we converted to an S Corp.
14 which again, that's an accounting thing that I don't
15 completely understand. But we, when we were trying to
16 change that and our retirement plan, we had to meet all of
17 these people to make these decisions and that, that cost
18 was never pushed, pushed over to Lancaster as well.

19 Q. And why didn't you go through in detail on all these
20 expenses in Hartsville and decide, oh, that's what we
21 should charge Lancaster for that. We should charge
22 Lancaster for this. Why didn't you ever do that?

23 A. I'm not hundred percent sure but I know we'd asked --
24 at times up, I mean, Hartsville had loan money to
25 Lancaster and so was reflected somewhere. But the, the

1 end of the year?

2 A. I don't recall when he would get it. It seems like
3 it's after the end of the year but it was, I think, in the,
4 we had some deadline, it was before 15th of February.

5 Q. Right.

6 A. But I don't recall him getting them before the 31st of
7 December. That's why we did the little Christmas bonus so
8 that he would get something for that.

9 Q. And going back and looking at Appendix B, what was,
10 what was the deadline to pay the bonus?

11 A. The 15th of February.

12 Q. And do you recall if you typically paid it before the
13 15th of February or not?

14 A. I'm sorry, say that again.

15 Q. Did you recall like -- did you usually pay for the
16 15th of February?

17 A. Yes, sir.

18 Q. You didn't wait for the 15th of February as practiced?

19 A. Oh, not intentionally. I don't think we ever

20 Q. All right. There's some, some emails that you got
21 asked about that related to the May meeting to discuss the
22 possible new contract. How did that come about? What was
23 the reason that -- how did this discussion of the new 2015
24 agreement come up?

25 A. So from 2010 to 2014 there were just constant

1 questions and there was a sense of doubt from David and
2 distrust on my part and I was becoming resentful when I
3 didn't think -- I just couldn't, I couldn't deal with that
4 anymore. And so I had reached out to Will, I had reached
5 out to Greg, I had reached out to Tom, I had reached out to
6 my husband, Jamie, as to how I handled this because it was,
7 he was never intimidating to, to Tom or Greg but to me it
8 was, it was I just didn't want to handle that anymore. And
9 so the idea of just making his bonus based off of total
10 compensation then you don't have to argue about it, you
11 don't have to prove anything, you don't have to, you know,
12 feel distrusted and hopefully to save our relationship
13 because we had a great working relationship, I thought, and
14 it didn't need to be that way.

15 Q. And so how are these -- how was this questioning Of
16 the finances, how was it affecting your relationship with
17 David?

18 A. I was becoming resentful. And he sent me an email
19 saying that he didn't, somehow, he didn't trust me and
20 that, that, that was tough for me because I felt like I had
21 done and done and done to try to make things fair. To try
22 to be fair. To take care of him and the staff there. And,
23 and, and that was just sort of what tipped me over and
24 maybe more resentful and bitter and angry.

25 Q. Now, this, this 2015 agreement, were you trying to

1 trick David into doing something that would result in less
2 money to him?

3 A. No, sir.

4 Q. Did you have any other intent other than what you just
5 testified to?

6 A. No, sir. I just wanted to have some peace. I just
7 wanted this argument to not exist, to go away. I wanted to
8 be crystal clear.

9 Q. And let's go back, I did have a question for you on --
10 all right, this, this has come up a couple of times. And
11 several witnesses I think, even including you, have been
12 asked about this statement- if you see it before let me
13 know - here we go, that statement right there, this from
14 your email, right?

15 A. Yes, sir.

16 Q. What did you mean by, did you never want to get paid
17 out of Lancaster practice?

18 A. No, sir. I was, I was afraid to take a salary or a, I
19 was afraid to make David mad if he saw a depth in his
20 numbers and saw that, that was money that went to me.

21 Q. And what did you mean, "because I fear David would
22 question me?"

23 A. He questioned everything I did and I was afraid that
24 if I said, well, this is how I'm getting compensated, he
25 would, he would question me about that. And he wasn't just

1 questioning, I guess I want to be clear because I don't
2 want my somebody questioning me, you need to question me
3 all the time. You need to say, are you sure this is the
4 right dose? Are you sure you're doing the right thing? I
5 understand that but this was further than that. This was,
6 this was intimidating. This was different than just a line
7 of questioning.

8 Q. And so the idea behind the 2015 agreement was that was
9 five percent of revenue?

10 A. Yes, sir.

11 Q. And after he agreed to that, did the questions drop
12 off?

13 A. Yes, sir.

14 Q. And were there any more intimidating questions after
15 that?

16 A. He, he sent me an email I think it being in a text in
17 June of 2015 saying, okay, I thought about over the
18 weekend, I agree. We'll do, we'll do the new compensation
19 for my bonus. And then at some point and he really didn't
20 question me about it. He, he -- we seem fine. He seem fine.
21 And then later he said, so, yeah, I've agreed to this but
22 could we consider changing it at some point in the future.
23 You know, there was a question but it was not badgering, it
24 was not bullying, and it was intimidating. That part seemed
25 to ease off.

1 A. No, sir.

2 Q. David have to oversee the accountants or lawyers?

3 A. No, sir.

4 Q. Did he have to oversee the accounts payable or
5 accounts receivable in Lancaster?

6 A. No, sir.

7 Q. Did he have to deal with any kind of collections type
8 stuff for Lancaster?

9 A. No, sir.

10 Q. Other than the computers, did you recall him dealing
11 with any vendors or purchases?

12 A. He saw some drug reps in the office when they would
13 come in.

14 Q. All right. Did he have to deal with any sort of
15 marketing issues?

16 A. No, sir.

17 Q. How about physician recruitment and dealing with
18 physicians, did he have to work with them at all?

19 A. He did work with the physicians. He did not -- I would
20 invite him to, you know, meet or we if had a discussion
21 with the different physician, he did not have to negotiate
22 contracts with the hospital or the attorneys or any of that
23 part. But I would invite him to meet these people that we
24 were interviewing and to the interviews.

25 Q. But did he supervise them on human, HR type issues ---

1 times where we needed a provider for our night clinic and
2 he agreed to come to do that or maybe during the day or
3 sometime if somebody was sick, he agreed to come to
4 Hartsville a couple of times.

5 Q. Did he do it as often as you went down to Lancaster to
6 cover Lancaster?

7 A. No, sir.

8 Q. And typically what time of day does his workday end?

9 A. Five.

10 Q. And other than the call contract where he handled a
11 bit of call, did, did David handle call in the Lancaster
12 hospital?

13 A. So in the beginning we tried to do regular call in the
14 hospital but that hospital was very resistant to have a
15 nurse practitioners take call. And so they were, they did
16 not trust a nurse practitioner for whatever reason. So they
17 -- he would take call and then I would have to usually go
18 in and sign off on these charts within twenty-four hours.

19 Q. And if the Lancaster office went under financially who
20 would be on the hook for that?

21 A. I would.

22 Q. And would David bear any financial responsibility for
23 Lancaster if it went under?

24 A. No, sir. We, at one point, had an audit, a Medicaid
25 audit, and we went through and he had been paid on those

1 numbers and then we had to pay back some money to Medicaid
2 for different charges and that was not, he was not
3 responsible for any of that.

4 Q. You bore that risk?

5 A. I did.

6 Q. Who bears the risk of loss ---

7 A. I do.

8 Q. --- with respect to the Lancaster office?

9 A. Me.

10 Q. And was David in any way an owner?

11 A. No, sir.

12 Q. Did you ever regard him as owner or a legal partner?

13 A. No, sir. He asked to be a legal partner but, and
14 again, I went to our legal counsel and they said that he
15 could not or he did not recommend that because he did not
16 have a liability or the risks, did not have the same
17 background, educational background and so he was not made a
18 legal partner.

19 MR. THOMPSON: Mark this as our next exhibit. If I can
20 shows the document to the witness.

21 Q. And the title to this document, to make sure we're on
22 the same line, Morphis Pediatric Group of Lancaster, PA,
23 general ledger and these are selected pages from the
24 general ledger. Do you recognize this type of document?

25 A. Yes, sir.

1 Q. How many employees -- how many nurse practitioners,
2 practitioners have you employed over the years?

3 A. Probably six or eight.

4 Q. Have you paid any of them anything approaching that
5 kind of money?

6 A. I do not think so.

7 Q. Do you feel that, that you were fair to David Hess?

8 A. I do.

9 Q. And in terms of setting his bonuses, do you feel that,
10 that you did a fair computation each year?

11 A. I do. I had the discretion to the bonus, discretionary
12 bonus or the calculation and I always chose the
13 calculation.

14 Q. And when did the Lancaster practice start to decline
15 in terms of revenue and patients being seen?

16 A. Towards the end of 2016.

17 Q. What kinds of things did you do to try to improve
18 those numbers?

19 A. We would have meetings, I met with Sandra weekly. And
20 then in 2000, that was mostly 2017. And we still continued
21 our monthly meetings and to try to like court the newborns,
22 court the OB/GYN's to market ourselves. We wanted to open
23 up the night clinic in Lancaster because that had been very
24 successful in Hartsville. And we considered doing weekend
25 hours as well. And then in 2018 I started having almost

1 every other week meetings with Sandra and David and Dr.
2 Hussey to try to see, Lancaster has a great Spanish
3 speaking population, so we thought maybe we could reach out
4 to some of them and go to the schools and and try to, to
5 enhance patients that way. But we had a lot of ideas.

6 Q. And did any of that help?

7 A. The night clinic was attempted. And I hired two nurse
8 practitioners to try to help cover the nights for my clinic
9 because we couldn't get it covered. But it really never
10 seemed to take off and I don't have any, none of the other
11 things got done, the GYN, the OB/GYN marketing, the
12 pamphlets, the schools that was never done.

13 Q. And so why did you reach the decision to terminate
14 David and Dr. Hussey?

15 A. Because I felt like we had met and met and met, I'm
16 trying to increase revenue and it wasn't happening. And I
17 felt like their interest levels had dropped off. Because in
18 the past any time we had a new idea there was a lot of
19 enthusiasm and effort and there was no effort or
20 enthusiasm. We will continue to decline into 2018 and so I
21 had talked with some other people about covering the
22 Lancaster office and to try to revise it.

23 Q. Okay. So what did you end up doing following their
24 termination? How did you save the practice?

25 A. So I went up several days a week and I had another

1 nurse practitioner that went up several days a week to try
2 to continue to see patients.

3 Q. All right. And so how long did you continue going back
4 there several days a week to see patients?

5 A. Into the middle of 2019.

6 Q. And then what happened? What happened then?

7 A. I was able to hire a full-time, actually two full-time
8 nurse practitioners and keep the part-time nurse
9 practitioner to cover and I would only, I would go when I
10 was needed for vacations or for time off or if somebody was
11 sick. That type of thing.

12 Q. And how are your patients numbers now compared to the
13 decline?

14 A. They're back up.

15 Q. And is Lancaster a going concern?

16 A. Lancaster has improved. Covid hit everybody pretty
17 hard in 2020, 2020 and then in 2021 we've really seen an
18 increase in volume - '19 was increased. And then '20 hit us
19 pretty hard with Covid and then now we're, we're up.

20 Q. Now, Dr. Hess, do you now regret entering into any
21 bonus agreements?

22 A. I'm sorry, say that ---

23 Q. Do you now regret entering into these bonus
24 agreements?

25 A. You know, I'd say if I to do it over, I'd probably do

1 the same thing. I always look forward to bonuses and
2 Christmas parties. We had good time. We had parties and we
3 would ask the staff and their spouses to come and that's
4 when the Christmas bonuses were distributed. And bonuses
5 were supposed to be a happy time. This is about a bonus. An
6 extra thing over the salary. And so now sitting here,
7 excuse me, and I don't mean to sound disrespectful, but to
8 be in this courtroom and to go through what I've gone
9 through the past three years I probably have a few regrets.

10 MR. THOMPSON: Thank you, Dr. Morphis. Answer any
11 questions
12 that Mr. Rothstein might have for you.

13 THE COURT: We are going to that after lunch.

14 MR. ROTHSTEIN: Okay.

15 THE COURT: So it's 1:28, 1:30 practically. We're
16 gonna go ahead and take our lunch break. And ladies and
17 gentlemen of the jury, I'll see you back around 2:30, is
18 that enough time for y'all. We'll see you back around 2:30.

19 Thank you.

20 (Whereupon, the jury exits the courtroom at 1:28 pm)

21 THE COURT: You can step down. All right. We will
22 start back, I don't know if are going to finish testimony.
23 I was hoping we were going to finish testimony today.

24 MR. THOMPSON: We will.

25 MR. ROTHSTEIN: I have to cross, sorry.

1 (Whereupon, the jury enters the courtroom 2:50 pm)

2 THE COURT: All right. Ladies and gentlemen of the
3 jury, I hope you had a good lunch. At this time we will
4 continued with cross-examination of Dr. Morphis.

5 **Cross-Examination by Mr. Rothstein:**

6 Q. Good afternoon, Dr. Morphis.

7 A. Good afternoon.

8 Q. Your attorney marked into evidence Exhibit 11, which
9 is a list of text messages. I'm gonna had this to to the
10 bailiff, and I may have missed it but can you point to the
11 text messages from David Hess that you think were
12 intimidating or abusive towards you?

13 A. These ones?

14 Q. Yes, ma'am.

15 A. I would have reread just a second if you don't mind.

16 Q. Yeah, I'll give you a second. Take all the time you
17 need.

18 A. I don't think these, um, so much of intimidation.
19 There was one that you could tell there's an urgency that
20 he needed to talk because his W2 was not correct. But other
21 than that, you know, there's no intimidation. I don't see
22 anything ---

23 Q. Okay.

24 A. --- in this text.

25 Q. Can I get those back? And I think what you're talking

1 about urgency is right here, "Hi, I need to talk with you
2 today"?

3 A. Act, well, actually he did say that a then I'm like
4 I'm in this song and dance, about I got makeup and hair
5 which is not very important to him and I would agree. And I
6 say, Can I call you tomorrow unless it can't wait? And he
7 said, got W-2 today and according to it there's no bonus,
8 etc., etc.

9 Q. Okay. And you say song and dance, you literally met
10 song and dance ---

11 A. Just about.

12 Q. Okay. You're doing the dancing with the Harts with
13 Stars rehearsal that day, right?

14 A. Yes, sir.

15 Q. So you're ---

16 A. It was a fundraiser for the domestic violence.

17 Q. Okay. And then Mr. Hess says right there, "Got my W-2
18 today and according to it there's no bonus, is that
19 correct, right?

20 A. Yes.

21 Q. And your response was, "It should not be. I will have
22 to talk to the accountant because they switched us to an S
23 Corp from a partnership and I have not seen the final
24 figures for 2014", right? And then you say, "I can call
25 them tomorrow and get straight", right?

1 A. Yes.

2 Q. And then he responded, "Okay. Thanks Let me know that
3 was over a \$50,000 hit." Meaning his W-2 from 2014 was
4 about \$50,000 less than it was for 2013, right?

5 A. Yes.

6 Q. Okay. And you responded, "No, it should not be that
7 bad. I know we were down net probably because of offset
8 from Hussey's salary but not to that degree." Okay. And
9 when you say we were down net, you're talking about the net
10 profit to Lancaster had gone down at least what you're
11 telling Mr. Hess from, from '14 as opposed to what they
12 weren't '13, right?

13 A. I'm not sure if I was preferring to profits at that
14 point or net, patients, I'm not sure what I was referring
15 to at that point.

16 Q. Okay. And I'm gonna show you this is Exhibit 9, it's
17 already in evidence. If we look at the 2013 financial
18 statement, net ordinary income was \$23,018.92, right?

19 A. Yes, sir.

20 Q. Okay. Then you change over to the S Corp in 2014,
21 correct?

22 A. Yes, sir.

23 Q. All right.

24 MR. THOMPSON: Your Honor, I actually think that
25 hasn't been admitted yet according to my notes.

1 MR. ROTHSTEIN: This is plaintiff's 9, it's in.
2 Plaintiff's 9?

3 THE COURT: Is it marked?

4 COURT REPORTER: It is -- yes, it is, profit and
5 loss statement?

6 MR. THOMPSON: Yes.

7 COURT REPORTER: Yes, it's in.

8 Q. Okay. So this is the 2019, 2014 profit loss statement
9 where you told Mr. Hess you were down net, you were
10 actually up \$170,000 from '13, ah, '14, isn't that right?

11 A. I would not have had this at that point.

12 Q. Okay. Well, what did you base your statement on to
13 Mr. Hess that said we were down net?

14 A. Like I said it may have been net volume of patients
15 but what I understood from the attorney and the accounting,
16 accountant is that moving from the C Corp to and S Corp was
17 gonna change that bottom line. You had to - forgive me,
18 forgive my ignorance - but you had to move that monies
19 through. It didn't zero out. And so we took -- we estimated
20 for a \$100,000 for some capital expenditures and then that
21 other money would go through and it's going to change our
22 bottom line.

23 Q. Okay.

24 A. But that had not -- that number wasn't -- that was the
25 discussion we had in December and then I wasn't aware of

1 that number even on the day, I think I talked to Hess.

2 Q. Okay. But you've seen the numbers since then, right?

3 A. Yes, sir.

4 Q. And you know that you're actually up \$170,000 in 2014
5 compared to where you were in 2013, isn't that right?

6 A. Well, I know that the net ordinary income shows a
7 difference, not the different number for that amount. But
8 for accounting purposes it wasn't the same. We couldn't
9 compare the 2013 C Corp net income that you can for an S
10 Corp, is my understanding.

11 Q. Okay. I'm gonna ask you if you look here, in 2014 you
12 took out \$81,000 and some change in salary, correct?

13 A. Yes, sir.

14 Q. Okay. So \$196,000 includes your \$81,200 in salary,
15 right?

16 A. I would assume so. Yes, sir.

17 Q. Okay. And that also includes \$47,000 for legal, do you
18 see that?

19 A. Yes, sir.

20 Q. Okay. Those were expenses that you spent trying, ah,
21 in connection with the Markita West (ph) contract, right?

22 A. I don't know what this -- legal -- it probably was
23 some of that but it may have also been some of this
24 transition stuff. I'm not sure what that entails.

25 Q. Okay. That was substantially higher than you've ever

1 had legal expenses in the time Mr. Hess was there, right?

2 A. Probably so.

3 Q. Well, usually it was like eight or \$900 a year?

4 A. If it was eight or 900 that wouldn't be correct

5 because that was back we were, we were not putting the

6 legal percentage into Lancaster they should have been.

7 Because our legal fees were much more than eight or \$900.

8 Q. Okay. For this year we spent almost \$50,000 in legal

9 fees you still had almost \$200,000 in profit, right?

10 A. I see that on there but again, the profit was

11 considered differently other than S Corp to C Corp.

12 Q. Okay. And Mr. Thompson also went through this Exhibit

13 12 that he marked which was the general, or the journal

14 entries, do you remember that?

15 A. The Ledger?

16 Q. I'm sorry, the general ledger entries?

17 A. Yes, sir.

18 Q. Okay. All right. And I think what he pointed out to

19 you was right here, they called it a salary, your \$180,000

20 was called a salary, not a bonus, right?

21 A. Yes, sir.

22 Q. Okay. But he didn't show this, this entry right here,

23 \$25,000 to Paul Hess, that was bonus, wasn't it? You don't

24 disagree with that, that was bonus?

25 A. Yes, sir. I think that was.

1 Q. Okay. Okay. And that's ---

2 A. I think that was the year that we didn't have any
3 monies left in the bonus pool and that was what we assigned
4 to him as bonus. It wasn't calculated because we didn't
5 have any money to get, to get that number.

6 Q. Okay. But that journal entry was also in salary 'cause
7 that wasn't ---

8 A. Oh, I see what you're saying. I'm sorry. Yes, sir.

9
10 Q. Okay. Then in 2012, again, we're in the category of
11 salaries/employees, do you see that?

12 A. Yes, sir.

13 Q. Okay. And among the salaries/employees there's one,
14 two, three paychecks to you in the gross amount of \$110,000
15 each, do you see that?

16 A. Yes, sir.

17 Q. Okay. And Mr. Thompson was trying to point out
18 without, those were called salaries not bonuses, right?

19 A. Yes, sir.

20 Q. Well he didn't point out Mr. Hess's bonus check of
21 \$46,000 there, right?

22 A. Okay.

23 Q. So clearly Mr. Hess's was a bonus even though you
24 called it salary, right?

25 A. Yes, sir.

1 Q. Or the accountant ---

2 A. Well, I, I didn't call -- yes, on this page, yes, sir.

3 Q. All right, 2015, I'm sorry, 2013, salaries officers,
4 you wrote three checks to yourself last day of the year in
5 2013. One for \$51,000; one for \$50,000; another one for
6 \$50,000 for a total of \$151,000, right?

7 A. Yes, sir.

8 Q. Okay. Mr. Hess got a bonus check of \$48,000, in the
9 gross amount of 48,000 and that was also called salaries,
10 right?

11 A. On this page it is. Yes, sir.

12 Q. See where it says salaries/employees?

13 A. Mmm, hmm.

14 Q. Okay. So the fact that the general journal entries or
15 general ledger entries is called a salary instead of bonus
16 doesn't really mean much, does it?

17 A. Well, to me, I mean, I didn't do that part. To me you
18 can call it, like I said before, they called it
19 compensation to me or salary, I think you can name it
20 different things. But that wasn't produced by me. That's
21 just a general ledger entry that I would review.

22 Q. And then we also talked about the contract that Dr.
23 West and Dr. Carter had with the hospital?

24 A. Yes, sir.

25 Q. Let me find the page here, 2011, I was having a little

1 trouble following. So you, you think that this \$180,000
2 that you took out was basically to sort of compensate you
3 for the good job you did negotiating the contract with the
4 Springs Hospital for Dr. Carter and Dr. West?

5 A. I'm not sure -- yes -- well, I did do think I did a
6 good job negotiating that contract but that's what was
7 left, that was the money that we had. And so rather than
8 dipping into the income that was not there that year, I
9 took that as my compensation.

10 Q. Okay. But when Dr. Carter and Dr. West got paid, Dr.
11 Carter got a paycheck on, on 12/9 for 67, I'm sorry,
12 \$7,700. Dr. West got paid the same day for \$6,730, right?

13 A. Yes, sir.

14 Q. Same thing later in the month on December 23rd,
15 correct?

16 A. Yes, sir.

17 Q. Okay. Those expenses were accounted as
18 salaries/employees, right? So they would show up in the
19 expense part of the accounting, right?

20 A. Yes, sir.

21 Q. Okay. So you thought it was okay to, to make a
22 Lancaster Firm pay the expenses of those salaries but the
23 money that Springs Hospitals paid Lancaster to reimburse
24 both salaries was money you just took out of Lancaster,
25 right?

1 5.

2 Q. Okay. Do you ever sleep?

3 A. I do.

4 Q. All right. You also described Dr. J.O. Morphis as
5 being a very generous person. Do you agree with that?

6 A. He is.

7 Q. Okay. Was there ever a year when Dr. J.O. Morphis a
8 partner in Hartsville where you did not pay profit sharing?

9 A. I don't recall. But I know that -- I don't recall.

10 Q. Okay. Well, when, I guess it was the '11, '12
11 timeframe when Dr. Morphis was sort of phasing out?

12 A. Yes, sir.

13 Q. Okay. That's the first year that I saw on the records
14 that you didn't pay the profit sharing was the year that
15 you took out \$180,000 in salary?

16 A. In Hartsville?

17 Q. In Lancaster.

18 A. Oh, I'm sorry, in -- yes, sir, I don't recall.

19 Q. Okay. And that was on top of your six hundred and
20 something thousand dollar salary in Hartsville?

21 A. Yes, sir. I know there have been a lot of big numbers
22 shown up on the screen and some of those didn't come to me
23 directly as a paycheck. And so I don't recall. But I know,
24 I know that we had some accounting reasons for changing
25 from a profit, a pension and profit sharing, we used to

1 A. I think what Dr., I mean, Greg Alexander was trying to
2 say is that the red tape that was required to get the
3 pension profit sharing plan changed and the S Corp C Corp
4 plan changed was what caused me to forget his bonus. I
5 think that's what he was saying there. But I can't tell you
6 for sure. I think it was still the amount, I think it was
7 the stuff going on.

8 Q. Okay. Now, you testified also about a bunch of
9 administrative task ---

10 A. Yes.

11 Q. --- the outpatient care that you have to do in
12 Hartsville?

13 A. Yes.

14 Q. Mr. Hess did that in Lancaster, didn't he?

15 A. No, sir. Not what I described.

16 Q. Okay. How do you know that? Were you ---

17 A. Well, those decisions would have to be made by me.
18 They would go through Sandra or Shirley or Jamie or Tom. I
19 mean, we all, we talked about that stuff. But, you know,
20 major changes or major decisions in that practice would've
21 had to go through me.

22 Q. I'm not talking about major, major changes. I'm
23 talking about things like, you know, employee says, you
24 know, my timecard was off or, you know, there's a leak in
25 the roof. I mean, the things that Mr. Hess and Sandra Tyner

1 handled up in Lancaster, right?

2 A. No, sir. Well, they did handle that some, yes, sir.
3 And Sandra usually did that and I think Sandra was the one
4 that came to me and said we've gotta a problem because the
5 timecards are off, reading the same times, rather than the
6 actual timing that was on there. So there's, there's a lot
7 that Sandra would, would come to me with. Now, rather she
8 had discussed that with David Hess prior, I don't know. But
9 that would ultimately come to me.

10 Q. Okay. You also mentioned one of -- I think you
11 testified last week when we were talking about you saying
12 that Hess was sort of the managing partner and Lancaster,
13 right, you referred to him repeatedly as the managing
14 partner there?

15 A. Yes, sir. Again, I think I said and I may not have but
16 I meant to, that we didn't really have those type titles. I
17 mean, I wasn't the CEO and founder of Moraphis. I mean, it
18 wasn't likek that. We didn't -- I didn't think of things
19 like that.

20 Q. Yeah.

21 A. But because I couldn't make him a legal partner, my
22 attorney said maybe you can call him a managing partner or
23 call him something because that would suit David. That
24 would settle some of this disputes. And so I said, okay,
25 let's use that term.

1 Q. Okay. And you also said something, I wasn't quite
2 sure, you said that the lawyer advise you not to make him a
3 legal partner because of some, like a liability concern or
4 something like that?

5 A. Yes. Because me being an MD and him being a nurse
6 practitioner - this was years ago to when there were some
7 differences in the nurse practitioner than they are now -
8 but he said his risk would not be the same and his
9 liabilities would not be the same and he did not recommend
10 us forming, or did not recommend him being a legal partner.

11 Q. Okay. You're talking about liability for medical
12 malpractice thing, right, if somebody, Mr. Hess or somebody
13 in that office messed up that ---

14 A. That's what ---

15 Q. --- the patient might sue?

16 A. That's what I assumed, yes, sir.

17 Q. Okay. But the entire time that Mr. Hess was at
18 Morphis from 2009 to 2018, you never had a medical
19 malpractice claim for anything he did or failed to do, did
20 you?

21 A. No, sir.

22 Q. Okay. And you never told David Hess that you intended
23 to take a modest salary out of the Lancaster office, did
24 you?

25 A. I never discussed my salary with David Hess.

1 Q. Okay. Now, you also mentioned, and I think Mr.
2 Thompson asked you, if you had other nurse practitioners, I
3 think you said you employed six to eight nurse
4 practitioners?

5 A. Over the course -- I thought he meant over the course
6 of time, yes, sir.

7 Q. Right. That's what I'm talking about. But you never
8 had a contract with any of those other nurse practitioners
9 to split the profits in Lancaster fifty/fifty, did you?

10 A. No, sir.

11 Q. And I think Mr. Thompson asked you some questions
12 about your interpretation of the 2010 contract, that
13 Exhibit ---

14 A. Yes, sir.

15 Q. --- Appendix A, right?

16 A. Yes, sir.

17 Q. I'm gonna ask the court reporter to unseal this
18 deposition transcript please.

19 (Whereupon, I unsealed the transcript)

20 Q. Dr. Morphis ---

21 THE COURT: All right. Ladies and gentlemen of the
22 jury, a deposition is testimony that it contains sworn
23 testimony given by a witness outside of court in the
24 presence of lawyers for each party who may ask questions of
25 the witness. If any objections were made at the deposition,

1 Yes, sir?

2 Q. So we were -- let me go back to the question where we
3 were interrupted. On page 125, Line 20, question, "But if
4 you decide to pay in the bonus, if you say, yes, he meets
5 the criteria. The the second paragraph of Appendix A spells
6 out how the bonus is supposed to be calculated, isn't that
7 right?" And your answer was, "Yes, sir." And I said, "And
8 it says that if you decide to pay Mr. Hess a bonus he's
9 supposed to get fifty percent of the net profits for the
10 year, isn't that right?" And you said, "Yes, sir." Right?

11 A. Yes, sir. But I think the confusion is back on line,
12 on Page 124, Line 21, you say, "to look back at the
13 discretion we had on Exhibit A, Appendix A", and then you
14 say, "that the discretion you have was whether to pay the
15 bonus or not." And then you start talking about down at
16 Line 20, "But if you decide pay any bonus if you say, yes,
17 he meets the criteria. The second paragraph of Appendix A
18 spells out how the bonus is calculated, is that right?" And
19 I said, "Yes, sir." The -- you're talking about Appendix A
20 but in the meat of the contract of the compensation part it
21 says, "I have the discretion or to use Appendix A." Once we
22 get to Appendix A if I choose that, that's where the
23 criteria and the eligibility come in. But not ---

24 Q. But, but you also testified earlier when Mr. Thompson
25 was asking, do you always use the formula? You didn't just

1 use ---

2 A. I chose to use the formula ---

3 Q. --- pure discretion ---

4 A. Yes, sir. I was trying to be fair and I thought that
5 was the right thing to do and I chose the formula. I the
6 discretion or the Appendix A.

7 Q. Okay. Go back to 11, those test message, it look like
8 the 29th was the day you were getting ready for your
9 rehearsal, was the Dancing with the Stars on the 30th?

10 A. Um ---

11 Q. Remember when ---

12 A. --- I feel like it must have been. Yes, sir.

13 Q. And then late -- later that next week you told Mr.
14 Hess, "I left a message with Greg and I'm trying to set up
15 a meeting this week. We'll keep you posted," right?

16 A. Yes, sir.

17 Q. And Mr. Hess said, "Let me know what it is, I would
18 like to go with you then we can meet afterwards," right?

19 A. Yes, sir.

20 Q. And then two days later he'd asks, "Hi, have you heard
21 anything", right?

22 A. Yes, sir.

23 Q. You didn't think there was anything intimidating in
24 that, did you?

25 A. I'm sorry.

1 Q. You didn't think there was anything intimidating him
2 saying, "Hi ---

3 A. No, sir. Text usually are not.

4 Q. Okay. So that 4th, February 4th is the same time, the
5 same day that Mr. Alexander said, "We can take care of it.
6 How much would you like to bonus him," right?

7 A. Yes, sir.

8 Q. Okay. And I think you testified a few minutes ago
9 that you weren't sure you had all the financial, final
10 financials for 2014, right?

11 A. On 1/29.

12 Q. Okay. Then you said, "I'm not sure. I guess I need to
13 look at the profit numbers for Lancaster office again,"
14 right?

15 A. Yes, sir.

16 Q. So you had seen them at least once by February 5th
17 because you're asking maybe I should go back and look at
18 them again, right?

19 A. Yes, sir. I'm not sure at what I was saying I'm not
20 sure about.

21 Q. Okay. But at the time you sent this email you had
22 seen the what profit number for Lancaster. So within a week
23 of you sending the email or the text back and forth to Mr.
24 Hess you had looked at the actual profit numbers, right?

25 A. I may have looked at a draft or I may have looked at a

1 final. I have no idea.

2 Q. Okay. And if you looked at the profit and loss
3 statement for 2019, I'm sorry, 2014, Mr. Hess should have
4 gotten half of that as his bonus, right?

5 A. No, sir.

6 Q. Okay. Well, wouldn't that be half of the profits in
7 Lancaster even after your salary, the legal fees and Mr.
8 Hess's bonus?

9 A. No, sir. Not under the S Corp direction that I was
10 given.

11 Q. Okay.

12 MR. ROTHSTEIN: I don't have any further questions.
13 Thank you.

14 THE COURT: Thank you. Any redirect?

15 MR. THOMPSON: Briefly, Your Honor.

16 **Redirect Examination by Mr. Thompson:**

17 Q. So keep that, keep that deposition transcript Dr.
18 Morphis?

19 A. Okay.

20 Q. All right. Dr. Morphis, let's look little bit further
21 down Now, from the testimony that your questioned about,
22 looking at Page 125, let's go up above 125, on Line 5, what
23 was your answer there? You can read it.

24 A. It says, "I always had a discretion on whether to pay
25 it and how much to pay it."

1 Q. All right. Go down to next Page 126, read us your
2 answer
3 beginning on Line 12?

4 A. I said, "After these monies are deducted the debts,
5 expenses, royalties and expenditures and that would be at
6 my discretion to determine."

7 Q. And read your answer begin at Line 21?

8 A. "That was, they give us the monies and it would be my
9 discretion as to how to use those monies."

10 Q. On Page 127 read your answer beginning on Line 21?

11 A. "So the said the monies after all debts, expenses,
12 royalties and expenditures have been allowed would be at my
13 discretion. The accountant would show me an income
14 statement based on the numbers that they had."

15 Q. All right. Going up to line, Page 111 read your answer
16 beginning at Line 5?

17 A. "Again, that's at my discretion but I probably did do
18 that. That's what I....

19 MR. THOMPSON: That's all the questions I have, Your
20 Honor.

21 THE COURT: All right. Anything else?
22 (Whereupon, hearing no response from the other attorneys)

23 THE COURT: All right. You may step down. Call your
24 witness.

25 MR. THOMPSON: That's all from Morphis and Morphis

1 Pediatrics.

2 THE COURT: All right. Yes, sir, call your witness.

3 MR. MacKELCAN: John Hamilton.

4 THE COURT: Yes, sir.

5 THE BAILIFF: Raise your right hand please. Do you
6 solemnly swear or affirm the testimony you're about to give
7 be the truth, the whole truth and nothing but the truth so
8 help you God?

9 MR. HAMILTON: I do.

10 THE BAILIFF: Please be seated at the witness stand.

11 JOHN HAMILTON, first being
12 duly sworn, testified as follows:

13 **Direct Examination by Mr. MacKelcan:**

14 Q. Mr. Hamilton, please state your full name for the
15 record?

16 A. John F. Hamilton. Is that too loud.

17 THE BAILIFF: Back up just a bit.

18 A. The nicest thing about being a witness is I can take
19 my mask off.

20 Q. What is your profession and area of expertise?

21 A. I'm a CPA and I deal with financial statements, audits
22 review, compilations, tax returns, peer review, and so
23 expert testimony.

24 Q. Are you a licensed CPA in the State of South Carolina?

25 A. I am. I am.

1 Q. When did you first become a licensed CPA in South
2 Carolina?

3 A. 1970.

4 Q. Have you been continuously licensed and engaged in
5 public accounting in South Carolina since 1970?

6 A. Yes, I am.

7 Q. Where do you currently practice accounting?

8 A. A currently practice with a firm in Columbia, South
9 Carolina called Hamilton, McKinney and Moss.

10 Q. Where are you from originally?

11 A. Fort Mill.

12 Q. Okay. And can you look, walk us through your education
13 and how you became an accountant?

14 A. Well, I went to the University of South Carolina,
15 majored in accounting. And during that period of time I
16 worked as an intern for a CPA firm for three years while I
17 was in college. And then I graduated and went to work for
18 that firm for a few years. And then went to work with a
19 International CPA Firm for about four years. And then I,
20 several of us had left and started a new firm, called the
21 International Firm. And we built it up from three people to
22 seventy people in about ten years. And then that firm broke
23 up into halves and I was with that firm, one of the halves
24 for most of my career until about twelve, thirteen years
25 ago. Walked away from there with two of my fellow

1 COURT REPORTER: Mr. Thompson, what's the name of
2 your witness?

3 MR. ROTHSTEIN: Beg your pardon?

4 COURT REPORTER: What's the name of your witness?

5 MR. ROTHSTEIN: Evelyn Martinez Jeanette.

6 COURT REPORTER: Jeanette, you said?

7 MR. ROTHSTEIN: Yes.

8 THE BAILIFF: The jury is coming in.

9 (Whereupon, the jury enters the courtroom at 5:20 pm)

10 THE COURT: All right. Ladies and gentlemen of the
11 jury, the defendant has rested. At this time I will ask the
12 plaintiff to call any rebuttal witnesses.

13 MR. ROTHSTEIN: The plaintiff calls Everlyn Martinez
14 Jeanette.

15 THE BAILIFF: Raise your right hand please. Do you
16 solemnly swear or affirm the testimony you're about to give
17 will be the truth, the whole truth and nothing but the
18 truth so help you God?

19 MS. JEANETTE: Yes.

20 THE COURT: Please be seated in the witness stand.

21 EVERLYN JEANETTE, first being
22 duly sworn, testified as follows:

23 **Direct Examination by Mr. Rothstein:**

24 Q. Good afternoon, Ms. Martinez. Can you please state
25 your full name for the record?

1 A. Everlyn Martinez Jeanette.

2 Q. Okay.

3 THE COURT: Can you spell the last name?

4 Q. Can you spell -- can you spell your last name for the
5 court?

6 A. J-e-a-n-e-t-t-e.

7 THE COURT: Okay. Yes, sir.

8 Q. And do you prefer me to call you Ms. Jeanette or Ms.
9 Martinez Jeanette or

10 A. Just Jeanette.

11 Q. Jeanette, Ms. Jeanette. Can you tell the jury what you
12 currently do for a living?

13 A. Nothing.

14 Q. Okay. And when did you retire?

15 A. Last January 1st -- yeah, last January 1st.

16 Q. January of 2021? About a year ago?

17 A. Yes, one year.

18 Q. Okay. What did you do prior to your retirement?

19 A. Worked for sixteen years for Morphis Pediatrics.

20 Q. What did you do for Morphis Pediatrics for sixteen
21 years?

22 A. I was the translator for Spanish/English and I was
23 receptionist in the front office.

24 Q. And which, which practice location did you work at?

25 A. First behind the hospital and then 838 West Meeting

1 Steet and then at 106 Woodland Drive. And then 112 Woodland
2 Drive, Woodland Drive.

3 Q. Okay. So always at the Lancaster office, not the
4 Hartsville office?

5 A. I believe in the Hartville office once.

6 Q. Okay. Did you work at the Moprhis Pediatric Group in
7 Lancaster the entire time that David Hess worked there?

8 A. Mmm, hmm. Yes.

9 Q. Okay. Did you ever work with other providers at the
10 Morphis Pediatrics of Lancaster ---

11 A. All the ones that came.

12 Q. Okay. And was a large percentage of the patient
13 population Spanish speaking?

14 A. Maybe a quarter.

15 Q. Okay.

16 A. Quarter to a third.

17 Q. Okay. Would you ever go in with the providers if
18 there was not a Spanish speaking patients?

19 A. Not usually.

20 Q. Not usually. Were you physically present most of the
21 days during regular office hours at Morphis Pediatric Group
22 of Lancaster?

23 A. Yes.

24 Q. What were your normal office hours?

25 A. From 8 to 5. Sometimes 8:30 to 5 depended on year.

1 Q. All right. Since Mr. Hess started in 2009, how
2 regularly did Dr. Elizabeth Morphis come to Lancaster to
3 see patients?

4 A. Sporadically.

5 Q. Okay. Would you say ---

6 A. Not very often but sporadically.

7 Q. Okay. When you say sporadically, would you say it was
8 more or less than once a month?

9 A. Depends. Sometimes she came a lot more sometimes she
10 didn't come for months.

11 Q. Okay. Sometimes were there four or five months in a
12 row where she didn't come to the Lancaster office?

13 A. Well, it would depend. She would come to Lancaster but
14 sometimes she didn't come as a doctor, she would come as a,
15 as an administrator but not too often as a doctor, doctor -
16 --

17 Q. Okay.

18 A. --- 'cause she did other things.

19 Q. And when, when she did work as a doctor, would she
20 have regular office hours or would she typically filling in
21 for one of the other providers that was on vacation?

22 A. Mostly she was filling in.

23 Q. Okay. Did, did Dr. Morphis's attendance or regularity
24 of attendance at the Lancaster office to work as a doctor
25 changed much from 2009 to 2018?

1 A. Uh, uh.

2 Q. And that was a no?

3 A. No.

4 Q. Okay.

5 MR. ROTHSTEIN: I don't have any further questions.

6 Thank you, ma'am.

7 MR. THOMPSON: No questions.

8 MR. WILSON: No questions, Your Honor.

9 THE COURT: All right. You may step down, ma'am.
10 Call your next witness.

11 MR. ROTHSTEIN: Your Honor, the the plaintiff rest on
12 rebuttal.

13 THE COURT: All right. Thank you. Let me see the
14 lawyers one second.

15 (Whereupon, a bench conference was held off the record)

16 THE COURT: All right. Ladies and gentlemen of the
17 jury, as you can see all the parties have rested their
18 cases and at this time we are ready with -- at this time in
19 the trial we're ready for closing arguments and the charge
20 on the law. But there's, there is a good bit of legal
21 issues that I need to take up outside your presence and I'm
22 not going make you sit in the jury room when you can go
23 home and enjoy your evening. And so I'm going to go ahead
24 and release you for the evening. We were just over here
25 talking it may take us a couple of hours in the morning so

1 charges tonight and you can come in and I'll give you
2 another - start at 9:30, add another two hours to try -- I
3 shouldn't say two hours because we got to still fix the
4 jury charge, get everything in a verdict form and all that
5 stuff done. So another hour and half to object to whatever
6 is in the jury charge and whatever law you email us tonight
7 and we'll take a look at.

8 All right. And it's -- it also feels like the air
9 conditioner is off in here so it's hot. So, yeah, all
10 right. Yes sir?

11 MR. THOMPSON: All right. Your Honor, at this time the
12 defendants, Morphis and Morphis Pediatric move for a
13 directed verdict as to all claims. Mr. Hess -- all of Mr.
14 Hess's causes of action are barred by the applicable
15 statute of limitations because he knew or should have known
16 he had a claim more than three years prior to initiating a
17 lawsuit. Three years statute of limitations for fraud and
18 other tort claims. And there's a three year statute of
19 limitations for breach of contract. And, Your Honor, the
20 discovery rule applies to this and I think we have
21 misunderstood what discovery rule is. It is not that you
22 know all facts which would support your cause of action. It
23 is when you knew of our exercise of reasonable diligence
24 should have known that you have a cause of action. The test
25 is objection, objective and as the Roe vs. Doe court held

1 it requires "very little to start the clock." If you should
2 have discovered that you might have a cause of action
3 through exercise of reasonable, reasonable diligence then
4 the clock starts to tick. Mr. Hess repeatedly testified and
5 the evidence repeatedly supported, I don't even think it's
6 contested it. But he was questioning whether or not he was
7 getting the proper bonus well before September, 2015. He
8 testified that he questioned the financials and part of the
9 reason was that he questioned his bonus. He questioned Mr.
10 Alexander directly in the May meeting, "am I getting the
11 right bonus?" And he testified that he repeatedly tried to
12 recreate the profit and loss statements that he wasn't
13 getting from Dr. Morphis in an attempt, in part, to
14 determine if he was getting the right bonus. All of these
15 things occurred before September, 2015 which was the magic
16 date three years before we filed the lawsuit. So he was on
17 notice of facts which would have given a reasonable person
18 cause to believe they might have a cause of action. He
19 should have brought his case before, well before September,
20 2018 and therefore, the statute of limitations has run as
21 to those claims. Statute limitations on wage payment is the
22 same three years, Your Honor. I won't go back through the
23 Maier case. It is -- I contended it's remarkably similar
24 case not just because it involved a fifty percent bonus but
25 because Mr. Mayher raised concerns with his supervisor

1 about the bonus well before the statute of limitations
2 period and the court held, "That's enough." The fact that
3 he raised concerns, he asked about the bonus, that is
4 enough to start the clock running. Mr. Hess did far more
5 than just raise the question of the bonus.

6 THE COURT: All right. Yes, sir.

7 MR. THOMPSON: I'm sorry.

8 THE COURT: I'm just figuring will go through the
9 issues and then we'll go -- he can respond ---

10 MR. THOMPSON: Do you want to go one issue at a time?
11 I'm still going.

12 THE COURT: You're still on the same ---

13 MR. THOMPSON: I still have arguments.

14 THE COURT: On statute of limitations?

15 MR. THOMPSON: No, sir. No, ma'am.

16 THE COURT: All right. No that's what I mean. Do
17 you want to respond now?

18 MR. ROTHSTEIN: I can do it either way, Your Honor. I
19 think you've already addressed this in the initial directed
20 verdict motion. There's nothing new that's come up in the
21 defendant's case in chief. The question is whether Mr. Hess
22 knew or reasonably should have known that he got a claim.
23 The question about whether somebody reasonably should have
24 known something is an issue of fact for the jury and that
25 needs to be presented to the jury. We do have the discovery

1 rule but more importantly we also have fraudulent
2 concealment here, Your Honor. I mean, there's, there's a
3 lot of testimony in the record from both Mr. Alexander and
4 Dr. Moprhis that anytime that Mr. Hess tried to raise
5 questions about can I see these expenses or what, how are
6 you coming up with his calculations, he was never allowed
7 information -- I mean, I think Mr. Alexander said, well
8 that would require me to get into Dr. Morphis's personal
9 tax situation, that's confidential. And he didn't -- he
10 refused to give the information to, for Mr. Hess. I don't
11 know how else Mr. Hess could have known or reasonably
12 should have known that he got a claim until he actually got
13 access to the financial records in the the summer of 2018
14 when as part of the due diligence process he was allowed
15 free access to, at least, five years of financial records.
16 And at that point, he knew immediately that his bonus was
17 not calculated appropriately and we filed a lawsuit within
18 weeks of him knowing that, Your Honor. So the statute of
19 limitations issue is a question of fact for the jury. As
20 Your Honor knows everything has to be taken in the light
21 most favorable to Mr. Hess at this point of the case and
22 that's a jury issue and the directed verdict should be
23 denied on the statute of limitations.

24 THE COURT: Thank you. Issue two?

25 MR. THOMPSON: Issue two, Your Honor, is that a

1 discretionary bonus is not an enforceable contractual
2 promise. As it's stated in his agreement Morphis Pediatric,
3 Dr. Morphis could use any criteria they wished to decide if
4 Mr. Hess would receive a bonus or not, therefore, his bonus
5 was completely discretionary. I cite quite a few cases
6 that talk about if it's discretionary on the front end, you
7 don't have to give it, then it is not an enforceable
8 contractual promise. I'll quote from one case, this is a
9 New York case, Kaplan vs. Capital Company, 298 A. D. 2d,
10 110, "claims for breach of contract lack merit in view of
11 the unambiguous language of their contracts and employ
12 handbook claiming making the bonus award solely and solely
13 and completely a matter of defendant's discretion."

14 Second, Your Honor, I'm sorry it's new issue. That's,
15 that's the next issue.

16 THE COURT: All right. You want to stand there, you
17 can stand where you are.

18 MR. ROTHSTEIN: I'll just stand here, Your Honor. What
19 Mr. Thompson is overlooking is if there's an ambiguity in
20 the contract that's construed and like most favorable to
21 Mr. Hess, it doesn't say the contract is enforceable.
22 There's also an implied covenant of good faith and fair
23 dealing in every contract, Your Honor. So if, you know, if
24 you look at the actual language of the contract it says,
25 "that bonuses either at the discretion of the board or as

1 set forth in any Appendix A." There isn't an Appendix A. So
2 the absolute discretion of the board is out. And Dr.
3 Morphis testified that she always used the fifty percent
4 bonus formula not just her pure discretion to award the
5 bonuses. So Mr. Thompson suggest that because this is
6 completely discretionary it's, it's an unenforceable
7 promise is, is out.

8 MR. THOMPSON: And, Your Honor, it's just not the
9 criteria. It's the -- even if we go to Appendix A as Mr.
10 Rothstein wishes, it merely says, "even if you meet the
11 criteria you're only eligible for annual bonus". That is
12 permissive language and so there's, there's discretion
13 built in -- plus, Your Honor, in the next paragraph Dr.
14 Morphis is allowed to deduct pretty much what she wants to
15 in making the computation. Debts, expenses, royalties and
16 expenditures, very broad discretion as to what she gets to
17 deduct to make that, that bonus allocation. If I can ---

18 THE COURT: All right. Next ---

19 MR. THOMPSON: --- move on to the next issue?

20 THE COURT: Yes, sir. Issue three? I want to make
21 sure I keep up with all of them so....

22 MR. THOMPSON: The terms of the bonus are to
23 indefinite and unclear to be enforced. Even if the bonus
24 was not discretionary, Your Honor, it cannot be enforced
25 because the terms are too indefinite. The term criteria

1 isn't never defined. And no, neither are other critical
2 terms such as profit, royalties, monies, debts,
3 expenditures. We cannot know what these terms mean and the
4 parties didn't know what they meant. And you are required
5 to have, Your Honor, certainty as to terms such as price
6 time, and place if they are indispensable. These are all
7 indispensable terms. And if, if definite terms aren't set
8 forth there must be a definite method for ascertaining the
9 amount due. We cannot do that in this case given the
10 undefined terms and really the lack of testimony as to the
11 meaning of many of these terms. The, the court must be able
12 to look at a contract and to determine what acts are to
13 performed and how performances is to be performed and you
14 need sufficient definiteness as to terms and requirements
15 to be able to do that. If you don't have it, as in this
16 case with so many important terms undefined and no evidence
17 as to what they mean, you can't enforce contractual right.

18 MR. ROTHSTEIN: Your Honor, again, Mr. Hess did not
19 draft this contract. If the Morphis defendants want to vary
20 terms from their ordinary meaning, plain competent ordinary
21 meaning, they should have put that in contract. The terms
22 profit, monies, debts, expenses, expenditures, those are
23 all commonly used terms in the English language and, you
24 know, if Dr. Morphis wanted to change that somehow that was
25 on her to change that in the contract. Now, Mr. Alexander

1 didn't have any trouble calculating profits when he sent
2 that email to Dr. Morphis alone saying, "See the attached
3 spreadsheet. I just wanted you to see what kind of profits
4 you're taking out Lancaster." You know, clearly he knew
5 what the word profits meant. And Dr., Dr. Morphis never
6 provided the Mr. Hess half of the profits in the Lancaster
7 practice.

8 THE COURT: All right. Next issue.

9 MR. THOMPSON: Next issue, Your Honor, is really just
10 to point out to the court that Mr. Hess wage payment claims
11 sit on top of the breach of contract and, I guess perhaps
12 the fraud claims, and that is if there's no enforceable
13 contract to pay that bonus, then there's no way to wage
14 payment claim. He's got to, he's got to have an enforceable
15 contract in order to be entitled to wages. Obviously, if
16 there's no breach in not paying the bonus ---

17 THE COURT: So you're saying -- so, basically,
18 you're saying that if the jury finds the - did not breach
19 the contract then he can't get the violation of the wage
20 claim, Payment Claim Act and the fraudulent, is that what
21 you said?

22 MR. THOMPSON: Correct, Your Honor.

23 THE COURT: Okay.

24 MR. THOMPSON: And that's perhaps why, I don't know,
25 they want to bring this failure to notify and try and make

1 that into, Oh, if you failed to notify then, therefore,
2 you're not entitled to change an employees wages, and I'll,
3 I'll get back to that in a moment, but state it another way
4 and I'm still on the Wage Payment Act - sitting on top of
5 the contract and the fraud claims - and maybe this is a new
6 argument - but if, if there's no enforceable contract pay
7 because it was discretionary or because it's unenforceable
8 because it lacks essential terms, then the wage payment
9 claim is going to fail as well. And it also fails, Your
10 Honor, if it is discretionary it's really the same reason.
11 But there's another case I cite dealing with Wage Payment
12 Act. If, if, the payment of something to the employee is
13 discretionary they can be no Wage Payment Act Claim. That's
14 my argument on that, discretionary.

15 THE COURT: Yes, sir, Mr. Rothstein?

16 MR. ROTHSTEIN: Judge, again, this gets to the notice
17 issue if there was under the Wage Payment statute the
18 employer has the burden of notifying the employee of what
19 the terms and conditions of their employment are. If
20 they've fallen short of that duty and not sufficiently
21 described to Mr. Hess what is bonus plan was that's a
22 violation of Payment of Wages Act. It's not -- it doesn't
23 make that unenforceable contract or discretionary contract.
24 And So, I mean, I agree that with Your Honor that if the
25 court find, I mean, if a jury were to rule that there was

1 no breach of contract, but ruled that there was a violation
2 of the Payment of Wages Act that maybe an inconsistent
3 verdict. But, you know, I think the issue of elected
4 remedies is something we deal with after the verdicts are
5 brought back, not beforehand. So I think our, you know,
6 same issues about the implied covenant good faith and fair
7 dealing under the contract and any ambiguities duties have
8 to been construed in the like most favorable to Mr. Hess
9 apply equally with regard to the Payment Wages statute.

10 THE COURT: All right. Thank you. Issue five?

11 MR. THOMPSON: Well, it's still unclear to me that the
12 jury might get charged on this notification thing, so I'mma
13 gonna argue, Your Honor, that directed verdict is
14 appropriate as to that claim because (1) 41-10-40, sorry,
15 41-10-30 regarding notification, does state that
16 "notification is to be given seven days, change in the
17 terms mostly made seven days before they become effective."
18 His payment didn't become effective until February. He'd
19 already signed the contract. He'd already agreed to the
20 June. And he'd already discussed all the relevant
21 particulars in the May meeting. So he got a notification in
22 writing of what change was going to be well more than seven
23 days before the changes became effective. And, Your Honor,
24 the, ah, sorry, the Barton case, that is not -- what they
25 were doing, if I if I remember correctly, what they were

1 doing in that case, the employee was trying to argue around
2 preemption and somehow assert that the notification should
3 not be preempted and the court did rule you cannot have a
4 claim for a, a plaintiff cannot have a claim for wages for
5 failure under the notification requirement because that
6 remedy is limited solely to the Department of Labor. And,
7 and the court said -- the court ruled that as to the entire
8 part of 41-10-30 (A) (B) (C) that, that remedy is solely to
9 the Department of Labor. So the plaintiff has no remedy in
10 this case for failure to give a written notification seven
11 days before the change becomes effective.

12 THE COURT: Yes, sir?

13 MR. ROTHSTEIN: Your Honor, I think I address this a
14 minute ago that 41-10-40 incorporates 40-10-30 and that
15 remedy provisions is in 41-10-80 which refers back to 41-
16 10-40. So although there's no independent cause of action
17 under the notice provisions it is incorporated by reference
18 into, into the remedy section in 41-10-80(C) which again,
19 we have pleaded, uh, clearly. And again, what was an issue
20 in the House of Raeford case was not a change in the
21 chicken plant workers terms and conditions of employment,
22 this was their initial notice did not distinguish between
23 whether they were gonna be paid by clock time or by "line
24 time." And the House of Raeford case has nothing to do
25 with, you know, an attempt to retroactive change in the

1 amount of employees to receive for their pay. Has nothing
2 to do with what the case we're talking about here. In that
3 case, Your Honor, again, the Fourth Circuit Court of
4 Appeals said that because the poultry workers had a
5 collective bargaining agreement, the National Labor
6 Relations Act, uh, the Labor Management Relations Act
7 preempted the South Carolina notice provision. Any
8 discussions about the South Carolina Act, again, this is
9 the Fourth Circuit Court of Appeals of Federal Court, and
10 he did this certainly not bonding on this court. This is a
11 remedial statute that's designed to protect employees. It's
12 supposed to be liberally construed in favor of employee, in
13 favor of workers and allowing them to recover their wages.
14 I think the strain interpretation of Mr. Thompson is
15 advocating is just not there, Your Honor.

16 THE COURT: All right. Well, we have talked about
17 that issue over and over again so we'll go to six.

18 MR. THOMPSON: I think you've already ruled on this,
19 Your Honor, the profit sharing plans but I'll renew my
20 motions over again. Profit sharing plans are excluded from
21 the Wage Payment Act.

22 THE COURT: Go ahead.

23 MR. THOMPSON: Keep going?

24 THE COURT: Mmm, hmm.

25 MR. THOMPSON: And I don't think Mr. Rothstein

1 actually disagree with me on the next one that a breach of
2 contract accompanied by fraudulent act cause of action does
3 require an underlying enforceable contractual promise.

4 THE COURT: Yes. So there's no breach of contract,
5 there's no breach of contract by fraud.

6 MR. ROTHSTEIN: I agree with that principle but I don't
7 agreed that there's not been an underlying breach of
8 contract.

9 MR. THOMPSON: All right. Next, Your Honor, even if
10 there was a contractual promise the plaintiff's theory for
11 recovery of damages requires a promise that Morphis would
12 handle expenses in a certain way and there was no promise
13 not to deduct in salary or not to take her vehicle expenses
14 and, therefore, no breach.

15 THE COURT: Yes, sir?

16 MR. ROTHSTEIN: Again, Your Honor, this gets to the
17 covenant, implied covenant of good faith and fair dealing
18 inherent in every contract. I mean, if Dr. Morphis's theory
19 is that she could've taken whatever she wanted before the
20 profits were determined there would never be any profits
21 because, you know, she can zero out whatever she wanted and
22 Mr. Hess would never receive the bonus. So clearly that,
23 that's not be the law. If look at the way that Ms. or Dr.
24 Morphis attempted to calculate the bonus she's, she's doing
25 exactly how we're suggesting, I mean, you take the income

1 minus the expenses of the firm divide it by two and if you
2 look at the first year of her handwritten calculations
3 that's exactly what she tried to do. The problem was that
4 she never went back and trued up numbers and the
5 anticipated profit sharing expenses were not \$130, \$135,000
6 that year they were \$85,000. And she had an undercounted
7 the income by \$15,000. The additional \$65,000 she didn't
8 split with Mr. Hess she took herself and never split the
9 profits fairly with Mr., With Mr. Hess. This, sort of
10 after-the-fact, revisionist attempt at some accounting
11 trickery it is not a valid basis for defending this case,
12 Your Honor. So the motion on that issue should be denied as
13 well.

14 THE COURT: All right. And what about seven?

15 MR. THOMPSON: Well ---

16 THE COURT: Uh, six, the issue six regarding profit
17 sharing, profit sharing plans are excluded from the Wage
18 Payment Act?

19 MR. ROTHSTEIN: Judge again, if you look at the
20 definition of wages under the statute it say, "Wages means
21 all amounts at which labor renders is recommend." If the
22 sharing of fifty percent split of the profits is wages,
23 the last sentence says, "Funds placed in pension plans or
24 profit sharing plans," meaning "Funds placed in profit
25 sharing plans are not wages subject to this chapter." If

1 you look at that, I mean, there's no argument that the
2 funds that were, that are in dispute here were never put
3 into any type of profit sharing plan. The first year, 2010,
4 they did have a profit sharing plan. They funded it by
5 \$85,000. That was completely separate from the bonus that
6 was paid to Mr. Hess. What's an issue here is bonus is not
7 funds placed into a profit sharing plan. Again, Mr. Hess --
8 the second year and third year, 2011 and 2012, there was no
9 profit sharing plan. If you look on their financial
10 statements it says, as expense, it says, profit sharing
11 plans and there's zero. There's nothing there. So for them
12 now to try to argue that somehow because the bonus was
13 based on the Lancaster practice profits that somehow it
14 turns, converted into a profit sharing plan is an absurd
15 argument, Your Honor.

16 THE COURT: All right. Number nine?

17 MR. THOMPSON: Your Honor, Mr. Hess's fraud and
18 misrepresentation claims are, are all based on the premise
19 that the defendants misrepresented to him that he received
20 the correct bonuses under the 2010 agreement. In other
21 words, he claims he was lured into accepting 2015 agreement
22 and it paid less than what he would have received under the
23 2010 agreement in the year 2015. Of course, Your Honor, for
24 any of the reasons that I've already discussed, if he
25 cannot assert a fraud or breach of contract or

1 misrepresentation claim, or he cannot assert those claims
2 if he did not have a legal right to more than he received
3 under the 2010 agreement. So, therefore, if the court rules
4 there was no enforceable contract or rules in our favor on
5 any of the agreement, uh, arguments have already made,
6 then he had no right to more under the 2010 agreement, and
7 therefore, cannot assert a fraud or misrepresentation claim
8 as to the 2015 agreement.

9 THE COURT: Yes, sir?

10 MR. ROTHSTEIN: And Your Honor, our claim for fraud is
11 not limited to the 2015 agreement, it also includes the
12 2014 agreement. And as Your Honor will recall Mr.
13 Alexander sent Mr. Hess an email saying that you're bonus
14 for 2014 would have been less because of the switch to the
15 S Corporation and our, our change to the 401(k) plan and
16 therefore, you know, we didn't want to harm you so we left
17 your bonus at the same level it was in 2013, In reality the
18 profit in 2014 was, even under their calculations, 1.96,
19 \$196,000, Your Honor, and that included hefty expenses for
20 legal fees. I think almost \$150,000 and included \$80,000
21 salary to Dr. Morphis. So the bonus should have been at
22 least about \$100,000. It would have been substantially more
23 than the 2013 bonus. And they mis, misled Mr. Hess into
24 believing that they were giving him a gift by keeping the
25 bonus at the same level as 2013. With respect to 2015, Your

1 Honor, that was the best year Morphis Pediatrics ever had
2 in its history in terms of profitability. By May of that
3 year, they had already booked over \$200,000 in profit. By
4 the end of the year they had booked almost \$500,000 in
5 profit based on one \$1.4 million. For them to suggest to
6 Mr. Hess that, oh, your bonus based on five percent of the
7 gross would approximate what your bonus would be under the
8 2010 agreement is an absolute fraud. There's
9 misrepresentation very misleading to Mr. Hess, you know,
10 even as late as, you know, I think he signed the agreement
11 on December 30th, certainly by December 20th or so they
12 already knew that the company was on, on pace to have a
13 record year and again, they mis, misled Mr. Hess into
14 believing that the new bonus calculation would not harm him
15 in terms of what he actually recovered in bonus money for
16 the company and that was made known false misrepresentation
17 under the basis for fraud.

18 THE COURT: Yes, sir?

19 MR. THOMPSON: I don't really understand the 2014
20 fraud assertion maybe it's in the complaint, I didn't
21 understand it that way. So to the extent they're arguing
22 that something -- I mean, I can see in their claim --
23 they've got a claim for, hey, you underpayment 2014. But
24 how would, how would representation by the CPA regarding
25 why it wasn't paid on time it caused him to have some sort

1 of fraud damages. I don't, you know, did he shift his
2 position based on that representation. There's no fraud
3 claim there.

4 THE COURT: All right. Next issue?

5 MR. THOMPSON: All right. Next issue, Your Honor, Dr.
6 Morphis's duties to him, to Mr. Hess regarding all this
7 were solely contractual. The economic loss rule bars a tort
8 action where duties are created solely by contract. As the
9 court explained in the Kennedy vs. Columbia Lumber 384 S.E.
10 2d 730, "the rule exists to assist in determining whether
11 contract or tort, tort theories are applicable to a given
12 case." This case involves purchasers. "Where a purchaser's
13 expectations in a sale are frustrated because the product
14 he bought is not working properly, his remedy is said to be
15 in contract alone, for he has
16 suffered only "economic losses. Conversely, where a
17 purchaser buys a product which is defective and harms him,
18 his remedy is in either tort or contract. In this is case
19 the losses are than merely economic." The only relationship
20 between the parties is a contractual one. The courts have
21 recognized limited exceptions in cases involving builders,
22 engineers, lawyers, and CPAs based on their professional
23 duties to a plaintiff. Here it is solely a contractual duty
24 and there is no independent tort duty to the plaintiff in
25 this case. And so, therefore, the tort claim should be, you

1 should grant a directed verdict as to tort claims.

2 THE COURT: Yes, sir?

3 MR. ROTHSTEIN: Your Honor, I don't recall whether the
4 economic loss rule was raised as an affirmative defense by
5 the Morphis defendants. But in any event, Mr. Thompson
6 applied wrong on the application of the economic loss rule.
7 In the Kennedy case the purchaser had a financial purchase
8 contract and suffered no loss other than economic an loss.
9 The court said there that he cannot bring a tort claim for,
10 you know, a strict liability claim or negligent design
11 claim or something like that as to that product when your
12 remedies is in contract. Again, that has nothing to do
13 with this case. We have a breach of contract claim. We have
14 a fraud claim. We're not bringing any type of warranty
15 claim or strict liability tort type of claim here. The
16 Kennedy case just has no application for the situation.

17 MR. THOMPSON: That's our directed verdict, Your
18 Honor.

19 THE COURT: All right. And you did it in thirty
20 minutes.

21 MR. THOMPSON: Did I? Did I make it?

22 THE COURT: Yes. Exactly.

23 MR. THOMPSON: Thank you.

24 THE COURT: So Mr. Wilson, thirty minutes or less.

25 MR. WILSON: I believe that time will be more than

1 adequate.

2 THE COURT: You said what now?

3 MR. WILSON: I said I believe that time will be more
4 than adequate ---

5 THE COURT: Okay.

6 MR. WILSON: --- thirty minutes.

7 THE COURT: And we'll do it the exact same way.
8 Each issue, let him respond. I'll come back in the morning
9 and rule on every issue to make sure we have preserved the
10 record.

11 MR. WILSON: I'll take it in a similar fashion and
12 I'll began with our first grounds which is to grant
13 directed verdict on the statues of limitations, Your Honor.
14 I think, Your Honor, is well aware of the Maher case so I
15 won't get into too many of the facts of that case which we
16 believe is very similar to the case here. But I did want to
17 note for the court that it was based on a fifty percent
18 pre-tax profit sharing plan. And the plaintiff in that case
19 did not receive a bonus the first year. Received a bonus
20 the second year of, for \$28,000 and they did no longer
21 receive bonuses and the company discontinued that. The
22 plaintiff then asked for information about the fifty
23 percent bonus plan; was never satisfied with the response;
24 and waited seven years to bring the action and Judge
25 Cureton in that case just stated at that the plaintiff's

1 testimony showed that he asked questions about the issue.
2 He never got a satisfactory response and that was enough to
3 start the clock for the statute of limitations. I think
4 with respect to our client, Alexander and this interaction
5 with May 28, 2015 meeting, the undisputed testimony
6 establishes that Hess asked if he was getting fifty percent
7 of the profits and Mr. Alexander said he couldn't answer
8 that question without revealing the information,
9 confidential information of his client. At that point in
10 time, there was nothing else to do that my client couldn't
11 have said or done that would have shown the, uh, Hess that
12 he had, had or didn't have a cause of action. The
13 fraudulent concealment as a basis for tolling the statute
14 of limitations, Your Honor, I would argue that it doesn't
15 apply in this scenario, especially with fraud claims. If
16 you look at the case law I believe plaintiff's counsel in
17 his request to charge has cited this Doe vs. Bishop of
18 Charleston for support as apply the fraudulent concealment
19 to toll statute of limitations. In that case involved a I
20 guess, sexual abuse by the diocese in covering up those
21 claims. And it wasn't decided whether or not the, it was a
22 jury issue in the fraudulent concealment but the claim
23 there was negligent supervision. The basis of that doctrine
24 also arises from the physician/patient relationship and
25 that's established in South Carolina law under Strong vs.

1 University of South Carolina which is 316 S.C. 189. I
2 believe that, or I would submit that fraudulent concealment
3 could not as a matter of law toll a fraudulent concealment
4 claim in and of itself because that would be akin to
5 eradicating the statute of limitations for fraud and
6 misrepresentation. And then just -- that, that would be
7 the grounds for statute of limitations for my, my client.

8 THE COURT: Yes, sir?

9 MR. ROTHSTEIN: The same arguments with respect to the
10 breach of contract claim, Your Honor. Again, it's a
11 discovery rule when Mr. Hess knew or should have known that
12 he had a claim. Again, that's a question of fact for the
13 jury. And the issues of fraudulent concealment, again,
14 it's, it's very clear that, that the information that Mr.
15 Hess needed, you know, to determine whether he had a claim
16 was uniquely in the possession of both the accountant and
17 Dr. Morphis. I think Mr. Hess asked about it, you know, Mr.
18 Alexander, basically, spit out his preplanned statement
19 about he couldn't reveal that because that would require
20 him to reveal the personal financial or tax strategies of
21 Dr. Morphis, which again, was, was completely untrue.
22 Whether or not he had receive the appropriate bonuses in
23 the past had nothing to do with future taxes plan issues.
24 That was just a premeditated pre-planned diversionary
25 tactic to hide paperwork information that dR. Morphis

1 clearly, clearly did not want to get out. So under the
2 discovery rule the first time he knew or should have known
3 about the claims was in the summer of 2018 after we had
4 brought the lawsuit well within the three year statute of
5 limitations.

6 THE COURT: All right. Yes, sir?

7 MR. WILSON: The next issue, Your Honor, get to be
8 substance of the three claims that Hess has asserted
9 against our clients. We would request the court enter a
10 directed verdict on tortious interference claim because
11 without a duty to disclose this information Hess can't
12 establish that. Alexandra, MBW intended to procure court,
13 intended to procure a breach of contract for Dr. Morphis.
14 Now, our courts have relied on the Restatement (Second) of
15 Torts and other jurisdictions for interpretation of a
16 tortious interference claim and citing with approval
17 Childress v. Abeles, which is 240 N.C. 667. If a third-
18 party has a lawful reason for inducing the breach of
19 contract then you're exempt from liability from doing so.
20 Here the testimony through Mr. Hamilton and through the
21 rest of the witnesses establishes that Alexander complied
22 with the legal and ethical obligations to his client and
23 all of his dealings with Hess. To the extent there was any
24 breach of contract then - the only testimony and evidence
25 establishes that Mr. Alexander just complied or at least

1 had a lawful reason for doing so by complying with his
2 legal and ethical obligations.

3 THE COURT: All right. Yes, sir?

4 MR. ROTHSTEIN: Your Honor, the issue of Mr. Hamilton
5 testified about only dealt with confidentiality, the duty
6 of confidentiality. He didn't discuss the duty of integrity
7 that is actually a more important duty under the AICPA Code
8 of Conduct. It's actually on Page 5 of the information that
9 the standard discusses integrity before it discusses
10 confidentiality. So I don't believe there was any lawful
11 reason that compelled Mr. Alexander to induce this breach
12 of contract here. So there's no, you know, I think that
13 would be an affirmative defense and the questions, you
14 know, that they would have the burden of proof on, you
15 know, whether there was some type of privilege or it's an
16 excuse for them to induce the breach of contract. I think
17 if you would look at everything again the record and the
18 like most favorable to Mr. Hess at this point, there's
19 ample testimony that covered this for each of the elements
20 of cause of action for tortious interference of contract.
21 He knew about the contract. The contract and him had an
22 underlined breach of, bargain before and he brought about
23 or assisted Dr. Morphis in bringing about the breach of the
24 contract so I believe there's a valid claim here for
25 tortious interference against the accountant defedants.

1 MR. WILSON: Just a quick reply to that argument. I
2 don't believe John Hamilton testified this duty of
3 integrity overrides a duty of confident to, not to disclose
4 confidential information or that somehow this duty of
5 integrity would absolve an accountant from liability
6 criminally or civilly for disclosing that information. In
7 fact, if you read the wording of the rule that's in the
8 record it states that any, uh, in the absence of a rule
9 that a specific, specific rule would, of course, be the
10 confidential client information rule and the obligation not
11 to disclose that to third-parties without consent of the
12 client. Regarding our next grounds for the directed
13 verdict or to continue it would be as to be fraud and
14 constructive fraud, constructive fraud claims because there
15 is no fiduciary duty or confidential relationship between
16 Hess and Alexander. Again, the undisputed testimony in
17 addition to what John Hamilton has testifies is that
18 accountants do not owe a duty to third-parties. And in a
19 specific situation, the confidential client information
20 rule prevents an accountant from disclosing confidential
21 information without the client's consent. I believe Your
22 Honor has already ruled on the past directed verdict motion
23 if there is no duty and there was a question of this
24 implied consent and whether or not that would satisfy the
25 requirements. John Hamilton clearly testified that the rule

1 requires specific consent and sitting down at a meeting or
2 having a phone conversation is not something that amounts
3 that specific consent. So according to the experts
4 testimony which is undisputed is that Alexander complied
5 with that rule and did not pass specific consent to
6 disclose the information that Hess requested during that
7 meeting.

8 In addition, Your Honor, there are also the
9 requirements of, you know, a representation and it's
10 falsity adheres reliance on it's truth. To the extent that
11 the fraud and constructive fraud claims are based on non-
12 disclosure. That is where the fiduciary duty comes in and
13 the relevance of the AICPA and civil and criminal laws
14 governing accountants disclosure of confidential
15 information. When we get to misrepresentation I believe the
16 evidence has been presented that - and this is only with
17 respect to the 2015 claim because there are no damage
18 claims against our clients for 2010 to 2014 - that this
19 information that Alexander supplied in this spreadsheet
20 that he emailed to Hess was somehow false that is
21 inaccurate. The numbers utilized in that spreadsheet were
22 true for fraud and constructive fraud there has to be a
23 representation that's false. That information was true.
24 There's no getting around it. And for that reason because
25 it is true representation it will be an absolute defense to

1 fraud based on those, the disclosure.

2 And additionally, Your Honor, the fraud and
3 constructive for fraud require the adheres reliance on a
4 truth of the representation. Again, it is true but when we
5 get to justified reliance we have Hess continuing to
6 question whether or not he received bonuses that were equal
7 to fifty percent of the net profits. On December 21, 2015
8 he sent an email to Dr. Beth still questioning whether or
9 not the bonus and the recalculation was based on fifty
10 percent of net profits. Stating my accountant had -- my
11 accountant had some questions, he said that the five
12 percent was based on previous amounts of bonus and not
13 fifty percent of the net profits, yet he still move forward
14 with the agreement. So I don't think under any light that
15 you can establish that Hess justifiably relied on any
16 representation or non-disclosure by my client and that
17 would apply, Your Honor, both to the fraud and constructive
18 fraud, constructive fraud claims. And I would point Your
19 Honor's attention to two cases specifically that kind of
20 discuss the accountants duties and disclosure would be the
21 Johnson versus Robert E. Lee Acad., Inc., 401 S.C. 500,
22 wherein an accountant who's engaged by authorities to
23 assist with investigating a plaintiff and whether or not
24 she had misappropriated funds from a school owed a, when
25 the accountant owed a duty to the plaintiff and the court

1 in that case found, you don't owe the duty because you
2 weren't providing services to this plaintiff. And then
3 another case would be ML, uh, ML-Lee Acquisition Fund, L.P.
4 v. Deloitte and that's 327 S.C. 238, also discussing duties
5 and in that -- I will address that case as well on the
6 negligent misrepresentation claim but that would be the
7 grounds for our directed verdict motion on the fraud and
8 constructive fraud claims.

9 MR. ROTHSTEIN: Your Honor, Mr Wilson may have a good
10 point if the accountant simply said I can't sit down and
11 meet with Mr. Hess because that would require the
12 disclosure of confidential information. But when he agreed
13 to sit down and actually meet and go over the numbers and
14 knew that Mr. Hess was not receiving complete information,
15 he had a duty not to participate in that, in that ruse. I
16 mean, this kind of almost reminds me of a situation I think
17 we learned about in our first year of torts class where,
18 you know, somebody is walking by a lake, may not have a
19 duty to rescue a drowning person in the lake, but, you
20 know, once they undertaken the duty or undertake to try and
21 rescue the person that they assume the duty for that person
22 to carry out that, that rescue in a reasonable manner. Here
23 if Mr. Alexander simply said, you know, I can't participate
24 in this meeting because, you know, without Dr. Morphis's
25 consent that would require me to disclose confidential

1 information that would be one thing. But what he did was
2 pick and chose what limited information to provide during
3 that meeting and it was by some nature incredibly
4 misleading. If you look at the two email messages with two
5 different spreadsheets it became very clear that Mr.
6 Alexander was participating in an effort to hide from David
7 Hess what the true bonus numbers in Rock, I mean, in the
8 Lancaster practice were because Ms. Hess, obviously, would
9 have known immediately that he wasn't receiving the bonuses
10 that he was promised under this, under the, under the
11 agreement. You know, Mr. Alexander continued this
12 misleading information by providing not the whole truth to
13 Mr. Hess, but only a selected portion of the truth to try
14 and convince Mr. Hess that changing the bonus formula would
15 have no adverse financial impact as to what his existing
16 contract at a time would have provided. And again, they
17 knew at that time that Morphis Pediatrics was on forward to
18 having the best year ever in terms of profit ability and
19 Mr. Hess would have been entitled to about a half -- he
20 would be entitled to split a half million dollars in
21 profits that year and instead, he ended up with \$70,000.
22 So, you know, to the extent of that there was constructive
23 fraud or knowing - and if we had trouble proving some
24 intent and intent to mislead, we can, we can bring the
25 claim under constructive fraud. And as to negligent

1 misrepresentation when Mr. Alexander undertook the effort
2 to advise Mr. Hess about his, you know, how you fair under
3 one scenario versus another he had a duty to communicate
4 the information truthfully.

5 THE COURT: Yes ---

6 MR. WILSON: Uh, just a in response -- just a quick
7 reply, Your Honor, is that plaintiff's counsel is pointing
8 to the spreadsheet that Alexander sent his client which is
9 consistent with his obligations to his client. He can
10 discuss the information, her own information. That would
11 never representation made to Hess. The information that was
12 conveyed to Hess was all truthful. And John Hamilton
13 testified that he complied with his legal obligations to
14 his client and acted, acted along with his legal and
15 ethical obligations, Your Honor. So I believe that that's
16 enough that there really is no testimony to establish the
17 fraud claim with respect to the duty of the truth.

18 THE COURT: Issue four?

19 MR. WILSON: Sorry, yes, Your Honor?

20 THE COURT: Issue four?

21 MR. WILSON: Issue four, negligent
22 misrepresentation, You Honor, we would request a directed
23 verdict as to that cause of action. And first, directing
24 your attention to the ML-Lee the case where the court
25 adopted the negligent misrepresentation claim with respect

1 to accountants, in footnote three, they clearly state that
2 the section imposes no duty to disclose information. So to
3 the extent that Hess claims negligent misrepresentation
4 based on non-disclosure that is a matter of law, it cannot
5 -- where entitled to a directed verdict on that.

6 Again, there's a duty element to negligent
7 misrepresentation I think that Your Honor has already ruled
8 about the duty. There was no duty to a third-party. The
9 issue was complied consent. And the issue is you need
10 specific consent. Alexander did not have specific consent.
11 He was told what he could and could not share and he
12 operated from the confines of the consent of his client,
13 Dr. Morphis at that meeting. And ---

14 THE COURT: Yes, sir?

15 MR. ROTHSTEIN: And, Your Honor, again, this gets back
16 to if Mr. Alexander had simply remain silent and not
17 disclosed anything anything that would be one thing. Here
18 he didn't remain silent. He disclosed what he knew to be a
19 did a half truth that was incredibly misleading to David
20 Hess and leading him to think that this new change in the
21 bonus formula would not have an adverse financial impact on
22 what he would've earned under the bonus plan for 2010. We
23 know that, that that was a knowingly false plan
24 misleading statement and this is way beyond the, we can't
25 base the negligent misrepresentation case on just a failure

1 to disclose. Here Mr. Alexander did disclose but the
2 information being disclosed was not the whole picture. It
3 was a very selective misleading piece of the picture.

4 THE COURT: All right. Next issue?

5 MR. WILSON: That would conclude our directed
6 verdict motion, Your Honor.

7 THE COURT: All right. I will, I will get you a
8 ruling on those first thing in the morning. We will send
9 out the jury charge that we have tonight as I started. If
10 the lawyer see the charge and they always think, oh, she's
11 charging this and everybody's is open arms about it. This
12 is just a rough draft. She basically just put everything in
13 there that you requested so I -- because it's in there does
14 not mean that I've ruled on it. I will rule on it tomorrow.
15 And then we will delete what we needs to be deleted and add
16 what needs to be added. If you have additional charges
17 please send those to my law clerk tonight whose gonna be up
18 ---

19 MR. ROTHSTEIN: Your Honor, we'll that ---

20 THE COURT: --- all night or early in the morning.

21 MR. ROTHSTEIN: Will that set charges also include the
22 verdict form itself?

23 THE COURT: I'm assuming y'all have some special
24 verdict form that y'all ---

25 MR. ROTHSTEIN: I think Mr. Thompson circulated a draft

1 of one earlier today. I haven't had a chance to really look
2 at it. But I think it looked fairly good when I skimmed it.

3 THE COURT: If you all consent on it, I'll -- if
4 you consent, I'll -- I will -- that's what I will use.
5 But, obviously, -- oh, she did do one -- oh, she used his
6 -- so she'll send you -- what she did on the punitives was
7 -- and I've done it two different ways. One way is to not
8 even mention it. And the second was is to say do you find
9 the defendants acted recklessly, willfully, wantonness
10 disregarding cause in plaintiff's interest in damages if
11 plaintiff has proven by clear and convincing evidence. And
12 then she has, yes, as to defendant Morphis and Morphis
13 Pediatrics. And she has a blank as to Gregory - that's it,
14 she has a blank. So yes or no as to Morphis and then a yes
15 or no as to Alexander, CPA, Moore, Beauston and Woodham. So
16 you -- I've done it both ways where I put that language in
17 there. Obviously, they say no, that we don't have phase
18 two. If they say yes, then we come back and have the second
19 part of the punitives. I'm not sure what evidence you're
20 gonna present in the second part, but....

21 MR. ROTHSTEIN: I'm not either.

22 THE COURT: I mean, it's your motion to bifurcate,
23 right?

24 MR. THOMPSON: It is.

25 THE COURT: Because usually when we bifurcate it's,

1 um, evidence that you don't want in front of the jury. I'm
2 assuming, I mean, unless you're going to put additional
3 information in there regarding the ability to pay or that,
4 I mean, that's the whole purpose of the bifurcation statute
5 is to not put the financial amounts in front of the jury or
6 some other, for example, and wreck cases when someone has
7 an extensive DUI record or something and we bifurcate it
8 and put the -- if they find it in this case, then we'll go
9 over the fact that the behavior, this was behavior - what's
10 the term ---

11 MR. MacKELCAN: Pattern of behavior?

12 THE COURT: Yeah, the pattern of behavior but not,
13 not that ---

14 MR. MacKELCAN: So if the fugitives are mentioned on
15 special verdict form does that mean they will also get a
16 charge on punitives ---

17 THE COURT: No. But what we normally do is we'll
18 give, we have to give a charge on clear and convincing. So
19 we put it on the verdict form - this verdict form I have to
20 charge it as to what clear and convincing is. And so I
21 would put a clear and convincing charge and so there is a
22 Question Number 6, you have to do is decide, Bam! Bam! Bam!
23 Bam! The standard is clear and convincing. And then have to
24 explain to them what clear and convincing -- we don't just,
25 we don't bring up the word punitive. And if they come back

1 and they say, no, we don't find by clear and convincing
2 evidence that there's any reckless, willful, wantonness
3 disregard for the plaintiff's injuries or damages and then
4 that's it. If they come back and say, yes, then we have the
5 second portion of the trial. You following, following what
6 I'm saying? So you can do it one or two ways. It's up to
7 you all. I done it both ways. I did it last, well, it
8 wasn't last week, but two weeks ago.

9 MR. MacKELCAN: My concern, Your Honor, is this case is
10 confusing enough as it is with different parties in
11 different causes of action. We've got two different burdens
12 of proof already because of the fraud claims.

13 THE COURT: Mmm, hmm.

14 MR. MacKELCAN: We throw in punitive damage, I mean, if
15 I think the reason for the bifurcation is that you deal
16 with liability in this case and if there is liability then
17 you, you know, address punitive damage. I'm just concerned
18 that it's, would maybe require more of instruction. And
19 then brings in punitive damages that shouldn't be brought
20 in yet. But I'd like to think about it overnight, if we
21 could. And we were gonna ---

22 THE COURT: And I guessing you're with him?
23 Probably not?

24 MR. ROTHSTEIN: I'd rather not bifurcate.

25 THE COURT: Huh?

1 MR. ROTHSTEIN: I'd rather not bifurcate ---

2 THE COURT: But I have to. The statute says I have
3 to.

4 MR. ROTHSTEIN: Well, I understand that but I think
5 you've got to establish that whether or not the jury finds
6 by clear and convincing evidence that there some type of
7 willful, reckless, wanton disregard for the plaintiff's
8 rights. I think you have to ask that question.

9 THE COURT: But I can ask it on the second, on the
10 back end.

11 MR. ROTHSTEIN: I agree with you. But you don't tell
12 the jury if they find, yes, that there is a second phase of
13 the trial. I mean, I ---

14 THE COURT: No. I don't tell them anything. The
15 problem is -- I've had cases when you deliberate that
16 midnight and they come back and they say, they come back
17 and they've answered that question yes or they don't answer
18 it, we don't put it in there at all. And, um, the problem
19 is having to explain to the jury -- the judge becomes very
20 unpopular at that point that oh, yeah, they think they're
21 done, you gotta come back in the morning for part two. But,
22 I mean, that's what the statute says and so that's what
23 we'll have to do. But it's just a question of how we go
24 about doing it. Do we put it, that language in there on
25 this and I understand your concern about confusion or you

1 just leave it off and then we just automatically charge it.
2 We would come back -- normally, I don't know if you all
3 will be putting up any testimony or we'll you just be ---

4 MR. ROTHSTEIN: The plaintiff doesn't intend to offer
5 any testimony. I mean, you know, that's not ---

6 THE COURT: I mean, her financial at the time are
7 already in so....

8 MR. ROTHSTEIN: Yeah. That's right.

9 THE COURT: So it's not a ability to pay -- and
10 y'all don't have to decide tonight. I mean, like I said
11 it's in the jury charge, we can take it out or put it back
12 or leave it in. You don't have to decide tonight. But, I
13 mean, that is the two schools thought of way that it can be
14 done.

15 MR. MacKELCAN: So does that mean if it's on the --
16 what does that do to our closing statements in terms of
17 addressing punitive damages and a standard?

18 MR. ROTHSTEIN: Well, the standard overall is clear and
19 convincing evidence. I mean, if they find in plaintiff's
20 favor on fraud, punitives are gonna go to the jury anyway,
21 right?

22 MR. MacKELCAN: I would agree with that.

23 MR. ROTHSTEIN: Yeah.

24 MR. MacKELCAN: Because that's the standard for that.
25 But I, you know, I guess what I'm saying is I'm gonna

1 approach the closing statement differently if punitives are
2 on the table. Now that's the whole point of bifurcation.

3 THE COURT: No, you don't get -- if we do it, it's
4 not on the table. The only issue that's on, that's in there
5 is just the -- and I won't say who usually wants what. But
6 usually there's a way the defense attorney usually asked
7 for it and the plaintiff's attorney don't monitor asked
8 for. So ---

9 MR. MacKELCAN: I'll just look at it.

10 THE COURT: Yeah. So what would happen is you, we
11 would charge them as to is there any regular's behavior,
12 wanton, in this case, fraud. And if they said, yes. Then
13 you would get another jury charge, I mean, you would get
14 another chance to argue in the second phase - if we don't
15 put up any witnesses you would just be arguing about
16 punitives. He would be asking for punitives. You'd be
17 arguing against them. So it's just, um, it just depends on
18 how you, how you wish to do it and you all decide. I guess,
19 you and Mr. Thompson and Mr. Rothstein can see if you can
20 consent, if not, I'll just make a decision on it. But I --
21 but I do understand what you mean by it could possibly
22 confuse the jury. Because I do have to -- we don't use the
23 word punitive but you do have to define what it is, what
24 clear and convincing is and you also have to define what
25 recklessness is and wanton -- yeah?

1 MR. MacKELCAN: I can -- the standard, Your Honor, but
2 what if they were to find something in favor of the
3 plaintiff on the fraud and misrepresentation claim, then
4 they answer no, on the punitive damages part ---

5 THE COURT: Yeah, then we got a problem ---

6 MR. MacKELCAN: That'd be -- that would be
7 inconsistent?

8 THE COURT: Yeah, it would be.

9 MR. MacKELCAN: I think it would be.

10 THE COURT: Yeah, it would be.

11 MR. ROTHSTEIN: That's something the jury ---

12 MR. MacKELCAN: Procedure standard, I'm not sure ---

13 MR. ROTHSTEIN: I think that would be something the
14 jury would have to fix before you release them if it's an
15 inconsistent verdict.

16 THE COURT: Yeah, this is a little bit different
17 because you would have to -- if they found, yes, on the
18 fraud. I mean -- and maybe we don't even need to -- let me
19 say this, so - and I'm just thinking out loud, on the
20 breach of contract we won't even charge -- if they find
21 that there's no fraudulent intent and they find that there
22 is no fraud on the contract claims that's what gets you to
23 the punitives, right?

24 MR. MacKELCAN: If they find there's no fraud?

25 THE COURT: If they say that there's no breach of

1 contract -- so say for example they find there is a breach
2 of contract and you get to breach of contract by fraudulent
3 intent and they say, no fraudulent intent ---

4 MR. MacKELCAN: Right.

5 THE COURT: --- that's what gets you to punitive on
6 the breach of contract claim.

7 MR. MacKELCAN: But if they so no to fraudulent intent
8 there be no punitives made to the breach of contract ---

9 THE COURT: Yes. Yes.

10 MR. MacKELCAN: I think I said that on my verdict form.

11 THE COURT: And then if they say no to any fraud --
12 -

13 MR. MacKELCAN: Then punitives are ---

14 THE COURT: As -- I'm talking about your client
15 right now.

16 MR. MacKELCAN: Right.

17 THE COURT: Then I'm not sure how you, how you get
18 to punitive damages charge.

19 MR. MacKELCAN: I don't think you would if they say,
20 No! No!

21 THE COURT: Now, as you to your client on the
22 interference of contract ---

23 MR. ROTHSTEIN: I think if you showed a gross negligent
24 misrepresentation I think you can get punitives. But I
25 agree if they said no on fraud and no on breach of contract

1 accompanying by our fraudulent act, those two claims you
2 can't award punitives on. But there could still be a
3 grossly negligent, reckless, willful or wanton
4 misrepresentation that could allow punitives.

5 MR. MacKELCAN: By definition I don't think that's
6 possible. And I, I mean ---

7 MR. ROTHSTEIN: Negligent.

8 MR. MacKELCAN: Let's just stay within
9 misrepresentation. Anyway, we, we argued we don't think
10 punitives should go to the jury anyway so maybe Your Honor
11 will resolve this dispute tomorrow morning but....you know,
12 we'll think about it and prepare a verdict form.

13 THE COURT: She'll send you what we have. But,
14 yeah, it's gonna be interesting how we do it. And we may
15 have to just wait and see what they come back with and
16 figure it out then. But that's a good point that if they
17 do, if they come back with fraud and they come back with no
18 fraud and no fraudulent intent then I'm not sure how you
19 get the punitives on breach of contract claim.

20 MR. MacKELCAN: You don't.

21 THE COURT: You say you don't, right?

22 MR. ROTHSTEIN: You can't.

23 THE COURT: Yeah.

24 MR. ROTHSTEIN: Just a straight breach of contract
25 claim ---

1 THE COURT: Exact -- yeah, on a breach of contract
2 I don't think you do.

3 MR. ROTHSTEIN: Right.

4 THE COURT: But then you're saying on the negligent
5 misrepresentation and the fraud claims that there still a
6 way on there, on those tort claims where they get, we would
7 have to ---

8 MR. ROTHSTEIN: I can do some research on that.

9 THE COURT: --- look at the punitives.

10 MR. MacKELCAN: I think I will as well.

11 THE COURT: Yeah. We'll -- I'll look into it also.
12 It gets confusing. Y'all have a good night. I'll see y'all
13 at 9:30. I know you'll be preparing for your closing. I was
14 gonna try to say an hour each, is that good?

15 MR. MacKELCAN: That's more than enough for me.

16 THE COURT: I mean, an hour, y'all, you know, y'all
17 share the closing so if you need more time than thirty
18 minutes, thirty minutes probably.

19 MR. MacKELCAN: I do not.

20 MR. THOMPSON: No, Your Honor.

21 THE COURT: And that means that Mr. Rothstein an
22 hour, meaning your closing and your rebuttal.

23 MR. ROTHSTEIN: Okay.

24 THE COURT: So we can get them -- I mean, I think
25 they've heard it all. If we can stay in that range.

(Whereupon, court is adjourned at 7:03 pm for the evening)

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1 **Tuesday, February 1, 2022**

2 _____(WHEREAS, this matter was scheduled for a trial, all
3 parties have appeared with their respective attorneys of
4 record. The proceedings began at 9:35 a.m.)

5 THE COURT: All right. Good morning. You may be
6 seated.

7 All right. We're gonna start -- first I'm just gonna rule
8 as to the motions from yesterday. I'll rule as to the
9 motions and then we'll start working on charge, have a
10 charge conference.

11 All right. So and I'll go through each of them as
12 issued so you can make sure the record is clear and
13 everything has been resolved and this properly put on the
14 record.

15 As to MBG and defendant, Morphis, defendants the
16 statute of limit -- the first issue was statute of
17 limitations claims as far as discovery rule, and that
18 motion was for directed verdict, and Mr. Thompson cited the
19 Maher case. As I stated previously in the Maher case that
20 that plaintiff was not receiving a bonus at all. So that
21 case is distinguishable from case because that case, he was
22 not receiving a bonus at all. So he knew, definitely knew
23 he was on notice that he, that there was some, some
24 potential violation. Here the plaintiff in the case was
25 receiving a bonus. It was not until the question of whether

1 or not it was when he knew or should have know after,
2 beyond that is an issue for the jury in terms of when he
3 should or shouldn't have known and I see that we do have
4 that in the jury charge for the jury to determine so I did
5 see that jury charge in there. So I'm gonna denied motion
6 as to statute of limitations claim.

7 As to discretionary bonus, the second issue is not
8 enforceable contractual promise. You cite some New York
9 cases, there's no South Carolina law that supports that.
10 But at the end of the day it goes back to the Contracts
11 101, any ambiguity in a contract is construed against the
12 drafter and not against the - and in this case the drafter
13 would have been Ms. Morphis, would have been Dr. Morphis
14 and so for that reason I'm going to deny the motion for
15 directed verdict as to that issue.

16 Same thing with the third issues, terms of bonus to, I
17 think it's the issuance in terms of the bonus were to
18 indefinite to be enforced. The criteria is never describe
19 profits, royalty, profit sharing. Once again, here the
20 contract Hess, plaintiff Hess, did not draft the contract,
21 Dr. Morphis did and testified and I understand there was
22 some testimony that she's not an attorney but she also
23 testified that she had retained counsel, Dick Jones, from
24 Greenville who has been her attorney for the firm for, for
25 years so taking all of that the totality under certain

1 circumstances I'm going to deny the directed verdict as to
2 that.

3 On the second, next issue the Wage Payment Claim Act,
4 I looked at the statute last night and again this morning,
5 40, 40, 42-10-30, if you look at 41-10-30, if you look at
6 41-10-40 it incorporates 41-10-30 and so does 41-10-80; 41-
7 10-40 specifically talks about the notice issue in 41-10-
8 30. And, and although, he doesn't cite 41-10-30, this court
9 finds that the, that it is placed, that it is in contract,
10 it is in the complaint. If the sufficient puts notice,
11 enough notice on the defendant as to the issue and as to
12 the claim, the complaint and so on my motion was to, was
13 denied his -- my order was to deny his motion to amend. And
14 as I stated last week I think this doesn't need to be
15 amended because it's sufficient the way it's written. He
16 cites 41-10-10; 41-10-40; 41-10-50; 41-10-80 (C) in which
17 everything is incorporated in, which incorporates the 41-
18 10-30 and notice issues. So I am going to deny the directed
19 verdict as to that issue. I think that covers four and
20 five.

21 Number -- issue six was regarding profit sharing
22 plans, that this was involving a profit sharing plan that
23 it would be excluded from the Wage Payment Act. There's no
24 testimony that this was a profit sharing plan. This is a
25 contract that discusses profits and, and distribution of

1 the profit, but a profit sharing plan as it -- a profit
2 sharing plan and retirement plan that is not - this was
3 never set up in this contract and there was nothing where
4 it shows that it was set up as a profit sharing plan. And
5 furthermore, I believe there's testimony they he previously
6 had a profit sharing, profit sharing plan aside of this
7 so....which was an actual profit sharing plan so I'm gonna
8 deny the motion for directed verdict as to that also. I
9 agree with Mr. Thompson if it's found that on issue Number
10 seven that there's no breach of contract, then we can't
11 have a breach of contract by fraud.

12 Then the next one was a theory of damage no breach, if
13 there's no breach of contract, I think that - and Mr.
14 Thompson you can correct me, I think your position was that
15 if there's no breach of contract, then they can't claim the
16 damages on the other charges, meaning the fraud and the --
17 is that correct?

18 MR. THOMPSON: Essentially, yes, Your Honor.

19 THE COURT: That fraud and the misrepresentation --
20 and what was your position on it, Mr. Rothstein?

21 MR. ROTHSTEIN: Your Honor, I believe that's the
22 question of fact for the jury. They're, they're really two
23 aspects of the fraud claim; one is the misrepresentation
24 relating to the 2014 bonus and why that was the exact
25 payment as the 2013 bonus. And then the second part of the

1 fraud claim is the 2015 bonus, you know, the new, where the
2 new bonus plan in 2015 would not lower Mr. Hess's, you
3 know, based on the five percent of the gross revenues did
4 not lower his bonus amount from 2010. So I do think that
5 the fraud claim is not necessarily dependent on the 20, on
6 the 2010 bonus issue. I think those two things are, are
7 somewhat distinguishable. It would possible for a jury to
8 say, yes, there was fraud here even if they found there was
9 no breach of contract.

10 THE COURT: All right. Well, at this stage we'll
11 see what they come up with, but I'm gonna deny the motion
12 for directed verdict. Well, I'm gonna deny the motion at
13 this point, obviously I'll give -- if that happens when
14 they come back with the verdict, I'll give Mr. Thompson an
15 opportunity to argue at the end. If they come back and
16 fighting over breach of contract but then come back fraud
17 negligent and misrepresentation then we can argue that at
18 the end of the trail.

19 And then the last issue I believe brought up by Mr.
20 Thompson was the economic loss rule that the duties were
21 solely contractual and involves all tort theories and there
22 were limited exceptions. I wanted to hear from Mr.
23 Rothstein as to - an exception dealt, I think, with the
24 lawyers, CPAs but it did not say doctors ---

25 MR. ROTHSTEIN: Your Honor, I went back and looked at

1 the, at Mr. Thompson's answer and the economic loss was not
2 pleaded as a defense in that case.

3 MR. THOMPSON: It's affirmative defense, Your Honor.

4 MR. ROTHSTEIN: I believe it wouldn't be a affirmative
5 defense. But in any event the economic loss rule from that
6 Kennedy vs. Lumber, Kennedy Lumber, Kennedy v. Columbia
7 Lumber case, Your Honor. That was a case where there was a,
8 it was a purchase and the remedy was contractual rather
9 than some type of a warranty or strict liability claim. So
10 the court, basically, said that he can't have, I mean, if
11 your loss is purely economic from a essentially a breach of
12 warranty claim then you're limited to your contractual
13 remedies in that situation, you can't bring a tort claim
14 for negligent design or strict liability because if there
15 was a personal injury involved in that, then you could
16 bring a claim under both a warranty theory and a tort
17 theory.

18 THE COURT: Yes.

19 MR. ROTHSTEIN: So that I nothing to do in this case,
20 Your Honor. This is not a warranty type of a claim. This is
21 a, I mean, if Mr. Thompson's theory were correct, he could
22 never have a breach of contract accompanied by a fraudulent
23 act claim because, you know, that has sort of a high risk
24 of breach of contract and the court, you know, that opens
25 up court remedies. So I think Mr. Thompson is just mistaken

1 about what the economic loss rule is and it really has no
2 application in this case.

3 MR. THOMPSON: Your Honor, the case didn't, didn't
4 limited to, it's a negligent actions so it is limited to
5 strict liability warranty type actions. I have a case for
6 you ---

7 THE COURT: She said speak up.

8 MR. THOMPSON: I'm sorry. I had a case for you on the
9 affirmative defense - bear with me I'm sure I can find it.
10 I thought it was a South Carolina case, I'm sorry, I don't
11 see it now but.... it was a Texas case, economic loss rules
12 is not affirmative defense 240 S.W. 3d 864.

13 THE COURT: You don't have the South Carolina case?

14 MR. THOMPSON: I do not have a South Carolina case,
15 um....

16 THE COURT: All right. Well, I want to agree with
17 in looking at the Kennedy and Columbia Lumber and Mfg case,
18 I agree with him. That's a warranty case dealing, a client
19 warrant case dealing with issue of a home built, home
20 builder and the house, and the house that was built and
21 apparently had issues. And so I'm going to deny the motion
22 for directed verdict as to that issue. Furthermore, I think
23 the election of remedies states here that end, at the end
24 of trial where he can't recover under both.

25 All right. So I think, Mr. Thompson, that covers

1 everything that you presented yesterday.

2 MR. THOMPSON: Well ---

3 THE COURT: Did I miss something?

4 MR. THOMPSON: I hate to disagree. There was an
5 argument that I made that there could be no breach because
6 there was no promise on how or what could be deducted into
7 destroying that profit and relatedly no requirements to
8 minimize expenses. No promises on that so, therefore, they
9 can be no breach by including currently compensation in the
10 net profits and profit analysis.

11 THE COURT: I thought that -- is that where you
12 said that because they ---

13 MR. THOMPSON: I believe Mr. Rothstein's answer was
14 that was breach of covenant accompanied by fraudulent act
15 there is a duty in good faith and fair dealing.

16 THE COURT: All right. Well, as to that issue with
17 directed verdict, verdict, once again will be denied. And I
18 didn't -- I don't see in my notes but I did see it in the
19 proposed, in the proposed jury charge.

20 All right.

21 MR. THOMPSON: One more thing.

22 THE COURT: Oh!

23 MR. THOMPSON: I argued with respect to the
24 notification cause of action that it's uncontested that he
25 did receive notification because of the meeting in May,

1 acceptance by him in June, and signing the contract before
2 the date on which the wages were due.

3 THE COURT: So that's an issue of fact for the jury
4 to decide so that's denied also. But that's an issue that
5 you can, you can argue that all day long to the jury. But
6 that's, that's an issue of fact.

7 All right. As to Dr., I mean, Mr. Alexander and MBW,
8 defendants, as to the statute of limitations, once again,
9 you all cited the Maher case and this is a question,
10 question of fact for the jury at this point as to whether
11 or not he had information he needed and was in possession
12 of back in May, on May 28, 2015, so I am going to deny the
13 motion for directed verdict as to the statute of
14 limitations. I'mma skip over the tort interference and go
15 to the fraud, um, constructive fraud, I think the rule, the
16 ruling as to the fraud and constructive fraud and the
17 negligent misrepresentation, um, those are, directed
18 verdict motions denied. We saw that there was no duty but I
19 understand what, um, your expert testified to, but although
20 there is no duty, um, there's an issue whether or not there
21 were some type of implied consent when they sit down with
22 the plaintiff and he made representations to the plaintiff
23 regarding a contract, um, Mr., I believe Mr. Alex, Mr.
24 Rothstein's position is that he was selective and
25 misleading as to certain issues regarding the contract and

1 that is where the fraud and constructive fraud and
2 negligent misrepresentation claim to rise. So I'mma deny
3 directed verdict as to those two.

4 I want to hear, as I was reading the jury charge as to
5 tortious interference with a contract and maybe more so,
6 more so from Mr. Rothstein. I was trying to recall what
7 testimony are you relying on as to that claim? Because if
8 you read the law, the law says that you - I can pull it up
9 - that there has to be -- that one who intentionally and
10 improperly interferes with the performance of a contract
11 between another and a third-person by inducing or otherwise
12 causing a third-person not to perform the contract is
13 subject to liability to the other for damages resulting
14 from the failure of third-party to perform the contract.
15 I'm trying to what testimony you're, you are referring to,
16 to support that claim?

17 MR. ROTHSTEIN: So there's two things, Your Honor,
18 number (1) the 2014 bonus that was paid late and the 2015.
19 Clearly Mr. Alexander knew what the contract, knew what the
20 contract was. There was a breach of the contract, I'm
21 certain about that, give that case to the jury. He, Mr.
22 Alexander induced the breach by, I mean, he knew that Dr.,
23 that Mr. Hess's bonus or that half of the profits for 2014
24 would have been about \$100,000, almost \$98,000. And he
25 said, the reason, the reason we paid your bonus late and

1 the reason it was the exact same amount as the 2013 bonus
2 is because we switched to, you know, from a C Corp to an S
3 Corp or we changed the retirement plan. And we didn't think
4 it was fair for you to suffer for these additional
5 expenses, therefore, we're gonna keep your bonus at the
6 same level that was in 2013. That was an improper
7 misleading statement. It was a breach of the contract under
8 the 2010 agreement and Dr. Morphis, you know, sort of
9 relied on Mr. Alexander. Mr. Alexander said I'll be the bad
10 guy in this and he's the one that, that essentially helped
11 Dr. Morphis commit the breach. So he induced the breach of
12 the 2010 contract in 2014. As to the 2015 contract, Your
13 Honor, you know, again this kind of gets into the
14 misleading nature of the claim and there was a contract, he
15 knew about a contract. The contract
16 was breached and, you know, Mr. Alexander's this so called
17 analysis that he, analysis that he did and presented at the
18 May 28, 2015 meeting where he was trying to convince Mr.
19 Hess there would be no financial impact to him switching to
20 this new, new product formula. You know, it caused him to
21 breach -- caused Dr. Morphis to breach the 2010 agreement.
22 Again, he signed the new agreement on the 30th of December
23 of 2015 and attempted to make it retroactive back to March
24 1, 2015 which again, that violates the, the South Carolina
25 Payment of Wages Act. The earliest that new contract could

1 have gone into place was in 2016. They didn't pay Mr. Hess
2 according to the 2010 bonus in 2015, but rather use this
3 new formula so that was a breach of the contract there.
4 Again, that was something that Mr. Alexander knew about,
5 was involved in and, you know, essentially, provided the
6 documentation to commit the breach and allow Mr. or induce
7 Mr. Hess to, to go under the new contract rather than the
8 old contract.

9 THE COURT: Yes sir?

10 MR. WILSON: Just to respond to Mr. Rothstein, there
11 are no claims our client for the 2014 bonus damages even
12 though they were paid in 2015. I think that's well settled
13 and we disputed that. That's not an issue for the court. So
14 I'm not sure that this conversation in February about why
15 the bonus was not paid until later is relevant to this
16 tortious interference claim because the tortious
17 interference claim is only limited to the 2018 bonus
18 recalculation. And even if it was relevant, Your Honor, the
19 only testimony in the record right now is that Mr.
20 Alexander did not know what the contract said when he
21 contacted Mr. Hess in February of 2014 and that he did not
22 know the profits. That's the testimony. I understand that
23 the plaintiff would like to argue the opposite, but the
24 only testimony in record is that he didn't know that
25 information during that phone call. And it appears also

1 that the plaintiff is relying upon fraud and
2 misrepresentation at this meeting to support the tortious
3 interference in language which I don't believe that is,
4 that is proper. If the -- and also, Your Honor, regarding
5 the 2015 analysis and the spreadsheet that was given to Mr.
6 Hess at this meeting that information was true and that
7 there is absolutely no testimony in the record from Mr.
8 Alexander from Dr. Morphis or from Hess that our client
9 represented or show or tried to convince Mr. Hess to accept
10 the bonus payment because there will be no financial
11 impact. The testimony is that here is your bonus
12 calculation, here are the bonuses that you previously
13 received, I am not allowed to make any representations or
14 discuss with you whether or not that's fifty percent of the
15 profits. This is what it equals under gross revenues, it's
16 five percent. Hey, did I get fifty percent of profits? I
17 can't answer that question. There was no representation at
18 that meeting about to misleading Mr. Hess or tortious
19 interfere with contract previous to that there was no
20 finance, there will be no financial impact if he accepted
21 this according to the previous bonus calculation.

22 And then I think finally, Your Honor, Hess agreed with
23 the new contract even though he apparently had some
24 misgivings about this meeting. I think the February email
25 shows that hey, this bonus calculation I'm not really sure

1 that this was fifty percent profits and my accountant has
2 questions about it, but I'm still going to agree to this
3 new agreement. So I don't think that there's any testimony
4 in the record to support theory tortious interference and
5 that directed verdict be proper.

6 MR. ROTHSTEIN: In response, Your Honor, the
7 fraudulent, the fraud and the negligent misrepresentation
8 is not mutually exclusive. I mean, they, the same testimony
9 that supports both of those claims can also support the
10 tortious, the tortious interference claim.

11 THE COURT: Well, the problem you have with that
12 claim is ---

13 MR. ROTHSTEIN: And if ---

14 THE COURT: He would -- he would have to be,
15 according to the law, introducing her not to, they need
16 testimony he was inducing her not to perform under the
17 contract.

18 MR. ROTHSTEIN: Right.

19 THE COURT: And I don't know if there was any
20 testimony to support that.

21 MR. ROTHSTEIN: Well, he, he ---

22 THE COURT: I mean, I understand the fraud and the
23 negligent misrepresentation, I understand what you, I mean,
24 I -- and that's why I've already directed the verdict on
25 that one. But I'm struggling with this because there's no

1 testimony to support that I can think of that why I'm
2 asking you would she, would he induced her to breach the
3 contract, I just -- I'm not -- I mean, the record is void
4 of that. Where Mr. Alexander - yeah, you're saying he
5 misrepresented to him what the contract might have said -
6 but he never told her to terminate the contract, there is
7 no testimony he told her to terminate the contract. There's
8 no testimony that he told her not to sign the new contract.
9 I mean, it's just, they actually the signed the contract.

10 MR. ROTHSTEIN: But he, he was -- he said I'll be the
11 bad guy. I mean, he's the one that actually provided the
12 information to, or sort of provided the tools to Ms. Or Dr.
13 Morphis to enable her to breach the contract. I don't -- I
14 think the tortious interference claim, I think inducing the
15 contract doesn't mean, you know, it was his intention to, I
16 mean, he didn't have any personal gain himself for, for
17 breaching the contract but he certainly helped his client.
18 He had a, you know, vested interest, I mean, you know, he
19 did testify that Dr. Morphis and her family were, you know,
20 one of, worked for a major client of his served in the top
21 fifty percent of rule ---

22 THE COURT: Well, that gets you to the problems of
23 number four under the things have to be proved by the
24 plaintiff, the absence of justification. I mean, he, she
25 was his client, so he was supposed to advisor as to what

1 she was supposed to do. So....

2 MR. ROTHSTEIN: But you can't -- just, just because
3 someone is your client doesn't mean you can assist them and
4 knowingly breach a contract. I mean ---

5 THE COURT: Well -- but I guess what I'm saying is
6 there's no testimony as to how -- I'm asking you what
7 testimony because you keep taking me back to the testimony
8 regarding the fraud and negligent misrepresentation. I've
9 denied directed verdict as to those.

10 MR. ROTHSTEIN: Right.

11 THE COURT: But what testimony says that he induced
12 her to - and, I mean, that's the language in the statute.
13 That's not -- I'm not -- the word inducement is the
14 statutory language. It's not something I'm just making up.
15 What -- where is it where he induced her? What evidence do
16 we have in the record he induced her to terminate the
17 contract, to not sign the contract....

18 MR. ROTHSTEIN: Your Honor, if I could -- it is -- the
19 testimony is somewhat coincidence with the, the, the fraud
20 and negligent misrepresentation theory. But in 2014 and,
21 you know, if the request for admission is one issue, but
22 Mr. Alexander's email says, I advised Morphis Pediatric
23 Group not to cut the bonus check in 2014 because of these
24 reasons. He said ---

25 THE COURT: But you not seeking any -- you're --

1 you're not asking for the '14, right?

2 MR. ROTHSTEIN: No, we are. But the way to request for
3 admission says, is that admit that you're not seeking
4 damages for bonuses paid in 2010 to 2014. This bonus was
5 not paid in 2014.

6 THE COURT: I know ---

7 MR. ROTHSTEIN: It was not ---

8 THE COURT: --- but we've already ruled on it.

9 MR. ROTHSTEIN: But it was -- the testimony showed that
10 the bonus that was actually paid to Mr. Hess was not based
11 on 2014 profits. What they said is were not gonna base it
12 on 2014 profits. Mr. Alexander said, "I advised Morphis
13 Pediatric Group to cut the check after the end of the year
14 of 2014 for two reasons: Number (1) the switch from the C
15 Corp to the S Corp; Number (2) the change in the retirement
16 plan to the 401(k)." Again, that happened in 2013 not 2014.
17 But those are the two reasons he said, "We didn't think it
18 was fair to you to cut your bonus from 2013 so we're just
19 gonna give you a bonus at the same level that you earned in
20 2014, I'm sorry, 2013." At that time he knew and he's the
21 one that prepared the financial statements, Your Honor, and
22 there's testimony, I think there was, ah, email back and
23 forth on I think it was February 4th or 5th of 2015 and Dr.
24 Morphis said, "I'm happy to go back and look at the
25 financials again." Mr., Mr. Alexander knew that the

1 financial showed a net income of \$196,000 that year. It
2 wasn't a decrease from 2013 it was a substantial increase
3 from 2013. And he communicated to Mr. Hess your bonus is
4 \$46,000 because that's what we paid in 2013 and we didn't
5 want you to suffer from these costly changes of the
6 decrease in profitability of the firm. So he misled Mr.
7 Hess, knowingly misled Mr. Hess into thinking that the,
8 that they were giving him a gift in 2014 or for the 2014
9 bonus when actuality Alexander knew that he wasn't getting
10 half the profit. He knew at that time what the contract
11 said. I mean, Dr. Morphis actually said, you know, I don't
12 have the contract in front of me but, you know, we sort of
13 loosely based on the, on half of the profits of the firm
14 which I can't remember exactly what that email says right
15 off the top of my head, but I mean, Mr. Alexander can't
16 hide behind confidentiality when it suits him or advances
17 his clients interest and then tell, you know, a half truth
18 to Mr. or actually this was a complete lie to Mr. Hess to
19 further his client's interest. That's a tortious
20 interference with contract and the contract was clearly
21 breached and it was breached because of Mr. Alexander's
22 involvement. He's the one that, you know, provided the
23 ammunition in the gun.

24 THE COURT: All right.

25 MR. WILSON: Your Honor, I think you've already

1 ruled on the 2014 issue, I don't think it's relevant to any
2 type of tortious interference claim. We're focused in on
3 what happened at this 2015 meeting which was the end of my
4 client's involvement with the 2015 contract. There simply
5 is no testimony that he advised or induced Dr. Morphis to
6 require Hess to sign that contract in 2015 or not to renew
7 the contract or not to pay the bonus under the 2010
8 agreement. So I think we asked that testimony on
9 inducement. And then just the relevance of the 2014 and
10 2010 issues for that directed verdict.

11 MR. ROTHSTEIN: Your Honor, again, this is something we
12 can fix at the election of remedy stage. I mean, if he
13 denies -- if you said I'm not gonna instruct the jury on
14 tortious interference and they come back with a, you know,
15 defense verdict, you know, I'm gonna have to appeal that
16 case to the, to the Court of Appeals. If the Court of
17 Appeals agrees with me that tortious interference would
18 have gone to the jury, we'll have to retry the whole case
19 again. If you let everything go to the jury and the jury
20 comes back with a verdict against Mr. Alexander for fraud,
21 then I'm probably not gonna elect the tortious interference
22 claim. So it's sort of an academic point. I mean, I can't
23 imagine the jury coming back and saying yes on fraud and no
24 on tortious interference. So I don't, you know, from a
25 judicial economy standpoint it doesn't make any sense to

1 throw that one claim out here and risk, you know, if that
2 had an adverse ruling on appeal that would require to have
3 to try that case all over again.

4 THE COURT: All right. I'mma take a look at the
5 cases and I'll let you, I'll get you all a decision on
6 that issue. I understand what the law is and - but there
7 has to be some existence in the record, just a scintilla so
8 that's why I ask you the question that I asked.

9 MR. ROTHSTEIN: And that's another thing too, Your
10 Honor, I mean, the burden of proof in a fraud case is clear
11 and convincing evidence. The burden of proof in a tortious
12 interference claim is preponderance of the evidence. I
13 mean, the jury could very well say, yeah, there's no clear
14 and convincing evidence of fraud here but there is enough
15 preponderance of the evidence that Mr. Alexander interfered
16 with this contract. So, I mean, I think that's a fairly
17 critical issue but again, I think this is something, Your
18 Honor, could sort out very easily on post-trial motion if,
19 if you later had some concerns or reservations about
20 tortious interference claim.

21 THE COURT: All right. I am, in looking at the case
22 law and considering in the light most favorable to the non-
23 moving party, I'm gonna deny the motion as to directed
24 verdict. As to the tortious interference, I think that in
25 reading the case law, I'm looking at Vortex Sports & Entm.

1 Vs. Ware which is a Court of Appeals case 378 S.C. 197 it
2 says, "any in inference makes it an issues for the jury to
3 decide." So the jury has got to decide whether or not he
4 interfered and then if he -- and if there's justification
5 issue that I brought up earlier is also an issue for the
6 jury to decide if he was justified in, in acting and
7 advising his client which would be Dr. Morphis in this
8 case.

9 All right. I think ---

10 MR. WILSON: Your Honor?

11 THE COURT: Yes, sir.

12 MR. WILSON: Just for -- we had argued some other
13 grounds of fraud and negligent misrepresentation so I would
14 like to ---

15 THE COURT: Oh, yeah, I was gonna get to that.
16 'Cause on -- you also had the ground of duty to disclose
17 and as I stated earlier if you look at the cases on
18 tortious interference, I don't - there's no case law that
19 says that he had to have a duty, third-party has a duty to
20 the person in the contract. So I, I understand your
21 argument and I receive your jury, proposed jury charges
22 regarding his duties to his client and we'll discuss that
23 shortly, but in terms of that case, in terms of tortious
24 interference there's no duty - I'm sure there's a duty
25 requirement as to that. Now, the next two, um, fraud and

1 constructive fraud, I think your argument is that there was
2 no fiduciary duty, no duty to a third-party arises. And
3 then Mr. Rothstein's argument was that the duty arose when
4 he began to discuss certain things, I think, his exact
5 words was "he picked and chose what he represented to the
6 plaintiff" and at point, he, there's some implied consent
7 at that point in time not to represent based on what he's
8 saying "false information" to the -- he had the duty not to
9 represent false information to the plaintiff and so that is
10 denied as to that issue.

11 And I believe the last was on the negligent
12 misrepresentation, and I believe plaintiff's position
13 there, again, is that once he met with them, the three of
14 them met together, there was implied consent and also that
15 once he began to make representations to the plaintiff that
16 he assumed some, some, duties by making those
17 representations to the plaintiff's, to the plaintiff. And
18 so I'm going to deny the motion as to negligent
19 misrepresentation as to the duty issue.

20 All right ---

21 MR. WILSON: And, Your Honor, I do just a couple of
22 points for clarification, I promise it won't take long.

23 THE COURT: Okay.

24 MR. WILSON: So the other grounds that we had argued
25 for negligent misrepresentation and fraud were that the

1 representations made were truthful and there were, there
2 was no evidence or testimony to justify reliance based on
3 emails the truth of the allegations.

4 THE COURT: And that will be an issue of fact for
5 the jury to decide.

6 MR. WILSON: Okay. And then for the -- just, just to
7 be clear, I guess, on our position for the duty argument, I
8 know, Your Honor is saying there may have been implied
9 consent by meeting with Dr. Morphis and Hess at this
10 meeting, I believe that the only testimony established that
11 specific consent and not implied. I think that would
12 necessarily prevent any instruction to the jury or for on
13 implied consent. I think another segue from that is that I
14 believe there's argument of some voluntary undertaking. I
15 don't know if that's where plaintiff is going. By sitting
16 down at this meeting voluntarily that he assumed the duty
17 to communicate truthful information, I would just bring to
18 the court's attention to I believe the Robert E. Lee
19 Academy case that I mentioned directed verdict motion that
20 for voluntary undertaking to create a duty there has to be
21 a physical harm to the plaintiff. And in this case there
22 has been no physical harm. So it's only been financial.
23 That would mean that there can't be any voluntary
24 undertaking to create a duty. We are limited only to the
25 obligations to communicate truthful information in light of

1 an accountant's duty under the AICPA and requirement for
2 specific consent. So those, those were just the additional
3 grounds and a couple of clarification that I wanted to
4 bring to the court's, the court's attention.

5 THE COURT: All right. Thank you. All right. Do
6 y'all want to talk about the jury charge.

7 MR. MacKELCAN: Before we get into the jury charges,
8 can I make a motion now or do you prefer I wait until after
9 we discussed the charges? I'd like to move for an order
10 requiring the plaintiff to elect his remedies at this
11 stage. I recognize that the judge has discretion to force
12 an election really at any time during, during a case. It
13 can be certainly after a verdict, but can also be at any
14 time. And I think over the course of the last couple of
15 days it's become very clear that there is a conflict and a
16 potential, significant potential for a double recovery and
17 that it is inconsistent. And that is you've got this
18 Payment of Wages Claim that I promise to Your Honor we've
19 been quiet about it not because, because it's not related
20 to our clients so we take no position on Payment of Wages.
21 But I understand plaintiff's theory to be that if he, that
22 if the plaintiff, excuse me, the Payment of Wages Act
23 invalidates the 2015 agreement as to the 2015 bonus, okay.
24 I've heard that a few times. That's the whole argument
25 related to the notice. So all of the claims against my

1 clients are related to allegations that Mr. Alexander
2 somehow induced Mr. Hess into signing the 2015 agreement,
3 therefore, causing damages to him arising out of the bonus
4 that he received for 2015. Those are totally in conflict.
5 And I understand that the plaintiff wants to throw
6 everything that he can possible against the wall and see
7 what sticks but this is already a complicated case. And to
8 me at this point is the improper point for the plaintiff to
9 decide. Which is it? Are you saying that the contract is
10 invalid? Or are you saying that my client and Dr. Morphis
11 induced you to sign this new contract? It's the same
12 damages claim, okay. It's the same amount. He's claiming
13 the amount is the delta from what he believes he would have
14 received under the 2010 agreement to what he actually
15 received under the 2015 agreement. All case law is very
16 clear that this is exactly the type of scenario that the
17 election of remedies is designed to prevent. So, you know,
18 I understand, -- I know what Mr. Rothstein is gonna say
19 because we've heard already a couple of times recently that
20 suggesting how Your Honor serve as the judge and what gets
21 to go to the jury and what doesn't get to go to the jury
22 and we can deal with things after the verdict and all that.
23 I'm sure he'll say the same thing here. And certainly we
24 will renew this motion if that, if that comes about. But
25 we've already got a very complicated special verdict form,

1 numerous causes of action, very little overlap and the
2 causes of action amongst the defendants and I think at this
3 stage allowing him to proceed on two, essentially, getting
4 two different bites of the apple on the same facts is not
5 appropriate. For that reason we would asked that the
6 plaintiff be forced to elect his remedies prior to closing.

7 THE COURT: Yes, sir?

8 MR. ROTHSTEIN: Judge, the case law is very clear that
9 you have discretion as to when to force an election of
10 remedy. Most of the time the election of remedies is done
11 after the jury trial and that makes complete sense.
12 Because, you know, if there's not a threat of double
13 recovery here, if, um, until the jury comes back and says,
14 you know, there's multiple causes of action on which a
15 recovery can be based. As Your Honor know, I mean, you
16 know, the damages available under fraudulent concealment or
17 fraudulent or fraud negligent misrepresentation and
18 tortious interference are very different than remedies
19 under the South Carolina Payment of Wages Act. And, you
20 know, Mr. Alexander's and the accounting firm liability is
21 not, ah, they have no potential liability under the South
22 Carolina Payment of Wages Act. I mean, I told -- I would
23 imagine that their or hope that Dr. Morphis would, would
24 join in my opposition to this motion to elect remedies
25 because, you know, if the jury comes back with award where

1 they've jointly and severally liable for the same damages,
2 I'm sure the Dr. Morphis would, would like to have the
3 ability to obtain contribution and indemnification from Mr.
4 Alexander. But this is not appropriate for electing
5 remedies prior to trial. There's absolutely, I mean, no
6 reason to do that. But I think Mr. ---

7 THE COURT: All right. I'm gonna deny the motion
8 and do it at this time. Obviously, we'll have to review the
9 election of remedies depending on what the jury does. But I
10 think based on the verdict forms that you all have sent we
11 can alleviate any, hopefully alleviate any confusion
12 regarding each of the claims. We'll definitely separate,
13 each claim is separated and the questions are separate. So
14 we -- yes, but I'm not gonna make him elect a remedy at
15 this point. We will do it after the trial depending on what
16 the jury comes back with.

17 All right. Anything else before we talk about the jury
18 charges because the jury will be here at 11:30 and I would
19 like to start at 11:30. So let me pull up the ones that I
20 have. I understand they sent more -- yes, sir, Mr.
21 Thompson?

22 MR. THOMPSON: Well, if we're starting on jury charges
23 I had, think I got one that is, it's fairly broad and it
24 touches on many things. So I thought maybe I'll go first
25 with this one. And that has to do with the Wage Payment Act

1 Claim.

2 THE COURT: Mmm, hmm.

3 MR. THOMPSON: That is an action that is tried at law,
4 it's for the, for the judge. Now, I anticipate and I think
5 in almost all of the cases you see except for a couple that
6 we've allowed the jury to do the Wage Payment Act and I'm
7 okay with that if the charge is something like breach of,
8 you know, so I'll use -- we need to combine breach and the
9 Wage Payment Act in the same charge because otherwise, if
10 it's on two different line items like Doug has this, I
11 think it's a big danger for double recovery. So I think I'm
12 okay with submitting the Wage Payment Claim to the jury if
13 the verdict form says something like, do you find the
14 plaintiff has proven by preponderance of evidence that Dr.
15 Morphis and Morphis Pediatric breached their contract and
16 violated the Wage Payment Act, combine those that way as I
17 did in my proposed group form because otherwise, it's a
18 danger of recovery. Relatedly, Your Honor --- so if we can
19 do that and I'm okay with the jury taking the Wage Payment
20 Act Claim. If we're not gonna do that then I object to any
21 charge to the jury on the Wage Payment Act Claim and ask
22 that the court take that up following the jury's verdict.

23 Relatedly, Your Honor, there's a charge in there that
24 mentions attorneys fees and treble damages, normally, the
25 way it is done for an agreement between the attorneys, the

1 jury will do the Wage Payment Claim along with the breach
2 and then afterwards - and that's okay, but ---

3 THE COURT: The damages ---

4 MR. THOMPSON: --- treble and attorney fees is you.

5 THE COURT: Yes. We understand.

6 MR. THOMPSON: I'd ask that everything be you but I'm
7 okay with ---

8 THE COURT: No, that has to come before the court
9 so we'll take that part out for sure.

10 MR. ROTHSTEIN: And, judge, if I can respond. An action
11 of law is actually tried with a jury. I think Mr., Mr.
12 Thompson is confused. The old distinction between law and
13 equity, a court decide equitable things. I agree that
14 remedies in terms of travel damages and attorneys fees is
15 for the court to decide. Under the statute it specifically
16 says, "for the court or at the discretion of the court".
17 But the issue of back pay under the South Carolina Payment
18 of Wages Act is a jury question.

19 MR. THOMPSON: I mean, I don't agree with that but I'm
20 okay the jury taking that if it's, if the, if the verdict
21 forms gonna say breach of contract and Wage of Payment Act
22 as opposed to two different line items and having the
23 danger of a double recovery.

24 THE COURT: Well, a double recovery expect after
25 the trial with an election of remedies question. I mean,

1 that's something that the judge does -- I'm mean, it's not
2 a concern for the jury.

3 THE COURT: So it's your position that if the jury
4 comes back and gives you, gives you money on Wage Payment
5 Act and a breach of contract at that point in you're gonna
6 have to elect remedy between the both of them?

7 MR. ROTHSTEIN: Correct.

8 THE COURT: Does that not resolve your concern?

9 MR. THOMPSON: Give me ten seconds please.

10 THE COURT: Okay. And that was gonna further down.
11 I was gonna start on the first page to make sure everybody
12 is working off the same ---

13 MR. THOMPSON: If he's conceding to that then, yes, I
14 think that takes care of my objection.

15 THE COURT: Yeah.

16 MR. THOMPSON: I still think we can -- you already
17 said that you not gonna charge on treble and attorneys
18 fees.

19 THE COURT: No. I'm saying we've already taken that
20 out. The attorneys fees ---

21 MR. THOMPSON: In which case, I'm okay - I'm sure
22 David's not - but I'm okay with Doug's verdict form.

23 THE COURT: So we all just need to take all,
24 all of the damages part out 41-10-80(C). There's nothing --
25 the only thing left once she takes out the treble damages

1 and the attorneys fees and it says "any civil action for
2 the recovery of wages must be commenced within three years
3 after the wages become due." I mean, I can leave that in
4 there since you....on the statute.

5 MR. ROTHSTEIN: I'm fine with that.

6 THE COURT: Yeah. I mean, since that's an issue in
7 case anyway.

8 MR. ROTHSTEIN: One, one thing I do think needs to come
9 out is on the definition of wages that exception for funds
10 placed in pension or profit sharing plan. I think Your
11 Honor has already ruled that there's no evidence of bonus
12 money in dispute was ever placed in a pension or profit
13 sharing plan so I think that last exception as a matter of
14 law needs to be taken out.

15 THE COURT: Let's do this so it will be, so we
16 won't miss anything and I'll everyone the opportunity to
17 speak, let's start from Page 1 of the jury charge and then
18 we'll go to the verdict form at the end because right now
19 we're kind of jumping all over the place. Obviously, I
20 can't imagine anyone has an objection to Page 1 and Page 2?

21 MR. ROTHSTEIN: I just had a - on Page 2, under
22 preponderance of the evidence.

23 THE COURT: Yes, sir.

24 MR. ROTHSTEIN: You said elements of his claim, there's
25 more than one claim. So I would just add, make that plural.

1 THE COURT: Yes. But nothing substantive?

2 MR. ROTHSTEIN: No. It's nothing substantive.

3 THE COURT: Okay.

4 MR. WILSON: Your Honor, I would ask, we send in a
5 jury request that was based on the Anderson's Request to
6 Charge that included a little bit more language about how
7 parties can meet the burden that I think explains that
8 metaphor analogy based on tipping the scales in a little
9 bit better, ah, manner than what has been proposed in here.
10 And so I think there's a paragraph that we had proposed
11 about instructing the jury that a party in proving the
12 claim of defense is not limited solely to the testimony
13 given by the party and witnesses but may rely on any
14 evidence presented and introduced by the opposing party and
15 upon any testimony presented by opposing parties witnesses
16 on direct and cross-examination. I think that offers
17 further elaboration and allows the jury to consider
18 everything when they envision the scales of justice being
19 tipped.

20 MR. ROTHSTEIN: I don't necessarily object to that. I
21 think what you have written is fine.

22 THE COURT: I -- the problem with Anderson is so
23 wordy ---

24 MR. ROTHSTEIN: That's what I was gonna say.

25 THE COURT: --- and the jury gets confused. With

1 all do respect, I mean, this is Judge Anderson. I mean,
2 it's, it's just so wordy and sometimes after you read it,
3 you be like, okay, what did I just say. Because it -- it
4 just goes on and on and on and on. This is the
5 preponderance of evidence that's in, that came from the
6 desk book I think it's pretty clear. I can look at the
7 paragraph ---

8 MR. WILSON: And Your Honor, these, copies of these
9 charges are going to be going to the jury so they can refer
10 to them when they ---

11 THE COURT: Yes. And I don't want to confuse them
12 any further.

13 MR. WILSON: I think it would help to elaborate but,
14 of course, Your Honor.... if we want to limit it to one
15 sentence, I believe it would be adequately addressed if we
16 instructed the jury that the parties allegations can be
17 proved by any evidence regardless of that evidence, whether
18 that evidence is brought out or introduced by the opposing
19 party or their opposing party witnesses so that's only just
20 one extra sentence that I believe would help elaborate on,
21 um, elaborate ---

22 THE COURT: I mean, I'll put it in there. I mean,
23 he's - there's no objections to it so I'm not -- I'll put
24 the entire paragraph in, but that, that is my only concern.
25

1 All right. And what about the clear and convincing
2 evidence charge?

3 (Whereupon, no response from any of the attorneys)

4 THE COURT: All right. Direct and circumstantial
5 evidence Page 3?

6 (Whereupon, no response from any of the attorneys)

7 THE COURT: No objections on Page 3. What about
8 Page 4?

9 (Whereupon, no response from any of the attorneys)

10 THE COURT: Page 5 ---

11 MR. WILSON: Is that ---

12 THE COURT: --- statement of counsel?

13 MR. WILSON: Is that the expert witness, Your Honor,
14 is Page 5?

15 THE COURT: Yes.

16 MR. WILSON: I did, I did have one suggestion for
17 that last paragraph, Your Honor. The last paragraph that
18 talks about it leads with an expert witnesses testimony is
19 to be given no greater weight than that of other witnesses
20 simply because the witness is an expert. I think the way
21 that that is phrased that almost instructs the jury that an
22 expert's, on the weight of the evidence which I think it's
23 solely a jury issue and again, referring to the Anderson's
24 request to charge, I think it would be better instruction
25 if the jury was given that instruction in an affirmative

1 manner stating that they can get, assigned whatever weight
2 they choose to the expert's opinion rather than emphasizing
3 the fact that an expert's opinion is due no greater weight.

4 THE COURT: Yes, sir, anything you want to add?

5 MR. ROTHSTEIN: I think the charge already says that,
6 Your Honor. I mean, this is - your charge that's written on
7 experts is fine.

8 THE COURT: It had already says that should
9 consider any any expert opinion by a witness and like any
10 other evidence, give it the weight you think it deserves.
11 And so I think this is sufficient but your objection is
12 noted for the record.

13 All right. Statement of counsel? Statements of
14 counsel?

15 (Whereupon, no response from any of the attorneys)

16 THE COURT: Statute of limitations, any objections?
17 I believe this is the one that you submitted -- any
18 objection from Mr. Rothstein?

19 MR. ROTHSTEIN: Yes, sir. I think we need to have -- so
20 this is on Page 6, nothing, nothing wrong on Page 5?

21 THE COURT: Mmm, hmm.

22 MR. ROTHSTEIN: I think it needs to add on the fifth
23 line down, where you say reasonable diligence, I think it's
24 missing some language. It says -- it needs to say, knew or
25 should have known that is legal rights have been violated

1 by a specific defendant and that he has suffered damages or
2 loss. The sentence that's written does not, it looks like,
3 it's kind of a combination of the two sentences that don't
4 make sense together.

5 MR. WILSON: Your Honor, I noticed that as well. I
6 believe something may have been inadvertently deleted just
7 -- the one that we had sent also included after reasonable
8 diligence should have known that he had a cause of action.
9 He exercised with reasonable diligence means simply.

10 THE COURT: So you want it to say meaning the
11 statue of limitations begins to run when the injured person
12 knew or should have no known, oh, I'm sorry, knew or by the
13 exercise of reasonable diligence should have known?

14 MR. WILSON: Yes, Your Honor. Should have known that
15 he had a cause of action. And the exercise of reasonable
16 diligence means simply that an injured party.

17 MR. ROTHSTEIN: And I'm fine with change by Mr. Wilson.

18 THE COURT: All right.

19 MR. ROTHSTEIN: The other issue I had on three line, or
20 two more lines down, the end, where it say, person of
21 common, there's an extra s there. So to be common
22 knowledge, not commons knowledge.

23 THE COURT: Yeah, I'll correct all of that. I'm
24 just really interested in the substantive.

25 MR. ROTHSTEIN: Right.

1 THE COURT: I'll catch it when I -- I'm gonna read
2 through it while y'all are doing your closings.

3 MR. ROTHSTEIN: There's two typos, advice to advise;
4 and a theory of recovery, needs a y at the end of it. And
5 the other thing I have on the next paragraph, Your Honor,
6 we need to list, concept of accrual date is not three years
7 before the statute, before the lawsuit is filed. The
8 accrual date means when, when the clock starts running. And
9 so the way they have it here it says the accrual date for
10 the statute of limitations is September 27, 2015, that's
11 not accurate. The accrual date is when the plaintiff knew
12 or reasonably should have known that he had a claim.

13 THE COURT: I think your dates have to come out of
14 there. This, I mean, that's for them to decide when he
15 knew. I mean, by putting those dates in there then I'm
16 basically telling them when he knew.

17 MR. ROTHSTEIN: That's right. And then ---

18 THE COURT: And so that is -- and that would a
19 comment ---

20 MR. ROTHSTEIN: Right.

21 THE COURT: --- on the facts. So those dates need
22 to come out ---

23 MR. ROTHSTEIN: And we also need to include fraudulent
24 concealment in the discussions of statute of limitations. I
25 think it's later on in the charge, somewhere else but, you

1 know, if you're talking about the section on statute of
2 limitations, I think we need to bring up the fraudulent
3 concealment issue at that time in the charge. Does that
4 make sense?

5 THE COURT: Yes, sir?

6 MR. THOMPSON: Your Honor, I think it's important for
7 the jury to know what is the date three years before they
8 file the complaint and if counselor doesn't like the
9 accrual date, we can, we can use different words but I
10 think it's important for the jury to be instructed on, on
11 that, that date, September 27, 2018. But I'm ---

12 THE COURT: You want -- they need -- you say they
13 need to know what date the complaint was filed?

14 MR. ROTHSTEIN: And I'm fine with that.

15 MR. THOMPSON: They need to know the date three years
16 before the complaint was filed. Or you can say the
17 complaint was filed, you know, September or whatever,
18 20....

19 THE COURT: '18. And then as opposed to ---

20 MR. THOMPSON: And ---

21 MR. ROTHSTEIN: Well, there's no magic date three years
22 prior to that. The question is, did you filed your lawsuit
23 ---

24 MR. THOMPSON: I mean, yes, it is.

25 MR. ROTHSTEIN: --- within three years of the accrual

1 date?

2 MR. THOMPSON: I don't care about taking out accrual
3 date, but I think September 25, 2015 date should be
4 mentioned.

5 MR. ROTHSTEIN: No ---

6 MR. THOMPSON: That's three before they filed their
7 complaint.

8 MR. ROTHSTEIN: But that's not relevant if the
9 discovery rule has a later date. I mean, the question the
10 jury can subtract three years from the date from the date
11 the complaint was filed. MR. THOMPSON: But yeah,
12 that's two separate questions. When he, when he discovered
13 it, as Your Honor as ruled, that's, that's a fact question.
14 But if he discovered it before September 27, 2015, then
15 they're out. I think it's -- I think the jury needs to know
16 that date.

17 MR. ROTHSTEIN: I think you can argue that but I don't
18 think the 2015 date needs to be in the charge of all. In
19 fact, I fine with you putting the date the actual date the
20 complaint was filed, September of 2018.

21 THE COURT: Yeah, I'm gonna take -- I mean, they
22 can count what three years is. I'mma take the '15 date out
23 and the accrual date language out. But we do need to put in
24 there the date that the complaint was filed. So we'll leave
25 the September 27, 2018 date in there.

1 MR. ROTHSTEIN: And then I ---

2 THE COURT: But, I guess Mr. Rothstein, you're
3 confusing me because you're saying that, that's not the
4 date. That would be the date, the three years before, '15.

5 MR. ROTHSTEIN: I think he filed it way before three
6 years went by. The question is when the accrual date starts
7 you count three years forward. You don't look at when the
8 date was, the complaint was filed and look three years
9 back.

10 THE COURT: So, so you're saying that if he, if he
11 discovered it in '18 that his statute actually didn't ---

12 MR. ROTHSTEIN: It expired in '21. And he, he filed the
13 lawsuit -- I think just telling them what the filing date
14 is the, is the key question so....

15 THE COURT: And that's what we're planning on
16 doing, okay.

17 MR. ROTHSTEIN: And the only other comment I had on
18 that was fraudulent concealment. I think, you know, I would
19 recommend something like the statute of limitations may be
20 tolled or suspended if the defendant or defendants
21 fraudulently concealed from the plaintiff the facts
22 necessary to be put the plaintiff on notice that we had a
23 legal claim.

24 MR. THOMPSON: And that charge is in there later.

25 THE COURT: Yeah.

1 MR. ROTHSTEIN: I know. I'm just saying it needs to be
2 moved up to the discussion of statute of limitations.

3 THE COURT: And I thought Mr. Thompson have an
4 objection to the way it read. Didn't you see something this
5 morning about the way ---

6 MR. THOMPSON: Yes, Your Honor. If we're gonna move
7 it up ---

8 MR. ROTHSTEIN: I saw Mr. Thompson's email. The
9 language is ---

10 MR. THOMPSON: Can I finish?

11 MR. ROTHSTEIN: --- to flowery to me. I mean, I think
12 that, you know, phrasing it in common English so the jury
13 can understand is a better way to do it. I mean, I think
14 the concept is right. I just think the language is a little
15 awkward.

16 MR. THOMPSON: First of all, Your Honor, the Strong
17 vs. the University of South Carolina School of Medicine,
18 it says, "that concealment such as would be necessary to
19 toll the statute is deception by defendant calculated to
20 conceal from a potential claimant that he has a cause of
21 action. Thereby, inducing him to an, to postpone initiation
22 of his lawsuit and I'm paraphrasing a little bit. "It's
23 thereby inducing him to postpone institution of suit will
24 be held to toll the statute." There's no evidence Your
25 Honor that Dr. Morphis did anything calculated to conceal

1 from David, ah, Mr. Hess that he had a cause of action with
2 the intent of inducing him to postpone his lawsuit. There's
3 no evidence on that. I'm sure there's, there's -- according
4 to them fraud and misrepresentation, you didn't tell me
5 about you were taking a salary, but there's no acts that
6 could be said to have been designed to induce him to delay
7 filing his complaint. So I think the charge is, is
8 inappropriate at all, but if you're going to do the charge
9 the quote and language that I gave from the Strong case is
10 more accurate than paraphrasing that we have been there
11 now.

12 MR. ROTHSTEIN: Judge, the fraudulent concealment
13 claims are of the Diocese of the, I mean, the Catholic
14 Diocese of Charleston cases where it wasn't saying to the
15 plaintiff, I'mma mislead you into not filing a lawsuit
16 within three years, it's fraud concealing the underlying
17 facts of the, of the abuse and cover by the leadership of
18 the Roman Catholic Church. I mean, it's, I think Mr.
19 Thompson is misreading the language. You're not -- it's not
20 a specific intent. Don't file this lawsuit right now, hold
21 off on it. This is you're hiding the facts that would lead
22 a reasonable plan to know he had a claim.

23 THE COURT: Yes, sir, Mr. Wilson? Mr. Wilson hasn't
24 had a chance. He's been standing up here.

25 MR. WILSON: Thank you, Your Honor. I would join in

1 Mr. Thompson's motion really to, I guess, exclude this jury
2 charge. I don't think there's been any evidence under that
3 meeting of Strong vs. Medical University, University of
4 South Carolina School of Medicine that my clients or his
5 clients took separate acts calculates conceal that
6 plaintiff had a cause of action against any of us. And I'd
7 note that the Strong case also indicates and I'll quote,
8 "the fraudulent concealment defense, the statute of
9 limitations flows from the patient/physician relationship.
10 When the relationship ends, the duty to disclose, which is
11 the basis of fraudulent concealment claim, ceases to exist
12 absent extenuating circumstances such as the withholding or
13 altering of plaintiffs medical records."

14 THE COURT: But those are claim -- he's not asking
15 -- he's not claiming, he just -- he's not asking for it as
16 a claim like in a medical....and that's where someone fails
17 to give you your medical records and you end up having some
18 type of issue as a result of telling -- I think -- he's
19 just asking for a charge requiring the statute of
20 limitations as to you can't use fraudulent, you can't
21 fraudulently conceal information that would lead to him
22 knowing that there's, that there was an issue with his
23 contract. And so I think that case, that case is probably
24 not on point. It's a little bit different than this ---

25 MR. WILSON: Yes, Your Honor, the case is different.

1 This case is it different from other cases that fraudulent
2 concealment has been applied, this case involves covering
3 up of negligent treatment after the fact that an Archbishop
4 of the Diocese case involves sexual abuse of children. I
5 mean, this is a fraudulent, a fraud and negligent
6 misrepresentation claim. But just two quick points Your
7 Honor is that the basis for the fraudulent concealment
8 claim arises from a duty to disclose. I think the only
9 evidence in the case that there wasn't a duty to disclose
10 on circumstances that it would be improper to charge, at
11 least with respect to my client, that the fraudulent
12 concealment would tolled the statute of limitations.
13 Second, what the plaintiff is advocating for is that
14 anytime there's fraudulent, if there's a claim of fraud
15 where some fact is being concealed that the statute of
16 limitations is automatically tolled due to fraudulent
17 concealment. This is equivalent to eradicating the statute
18 of limitations for any misrepresentation or fraudulent
19 representation claim. I don't this it's proper. I don't
20 think there's enough evidence in the record to warrant
21 submitting to the jury and I believe it will just cause
22 confusion to the jury because most of the claims are based
23 on concealing or non-disclosure.

24 MR. ROTHSTEIN: With all due respect, he's just re-
25 arguing the direct verdict motion again, Your Honor, which

1 is already been on. We're talking about the language of the
2 jury charge.

3 (Whereupon, the judge takes a moment to read what's before
4 her)

5 MR. ROTHSTEIN: Your Honor, the language you have on
6 Page 19 on fraudulent concealment I'm fine with that. If
7 you want me to just move that up to the statute of
8 limitations discussion, I think that would be appropriate.

9 (Whereupon, the judge takes a moment to read what's before
10 her)

11 THE COURT: All right. I'm gonna leave it as is and
12 we just moved it up, but your objections is noted for the
13 record.

14 All right. The next is, and the pages are gonna
15 change, is plaintiff's admissions?

16 MR. ROTHSTEIN: Your Honor, I don't think that's
17 appropriate to ---

18 THE COURT: It's, it's not. And it's -- you can't
19 put those admission -- those our comments on the facts.
20 They can't go on the jury charge. So we will take those
21 out. Did we resolve everything in terms of the Wage Payment
22 Act?

23 MR. THOMPSON: Well, you've already ruled so I don't
24 think I have to object.

25 THE COURT: I mean, as to the substance of the jury

1 charge. We took out -- she's taken out that language
2 regarding three times the damages and attorneys fees.

3 MR. THOMPSON: Yes, I think there's one more, Your
4 Honor ---

5 THE COURT: Yeah, but I think ---

6 MR. ROTHSTEIN: The definition of wages, the last
7 sentence, funds placed in pension plans or profit sharing
8 plans are not wages, that needs to be taken out.

9 THE COURT: That's based on the ruling earlier.

10 MR. ROTHSTEIN: Yes, yes, yes, Your Honor.

11 MR. THOMPSON: On 41-10-40 ---

12 THE COURT: Huh, huh!

13 MR. THOMPSON: --- Part B, I don't think that has
14 anything to do with this case. And C I don't think there's
15 any allegation that we have withheld or diverted pay. I
16 think that can be taken out.

17 MR. ROTHSTEIN: I disagree. I think C needs to be in
18 there because he's entitled to half of the profit, she
19 diverted that to her own account so I think that is proper.

20 THE COURT: You said B or D?

21 MR. ROTHSTEIN: B as in boy should be out, I agree with
22 that, un-applicable. C as in Charlie should stay in. I
23 think withholding or diverting half of the profit, I mean,
24 you know, more than half of the profits to her own account
25 is, is a violation of the Payment of Wages Act.

1 MR. THOMPSON: And while you're looking at it, Your
2 Honor, I think D as well needs to come out. I don't there's
3 been any allegation that Dr. Morphis didn't pay at the time
4 and place she should have paid.

5 MR. ROTHSTEIN: I think it needs to stay in. It say,
6 "shall pay all wages due". I'm not disputing the time or
7 the place of where it was paid. But all wages due is the
8 key, is the key phrase there that needs to stay in.

9 MR. THOMPSON: Let's not, not differentiated the
10 phrase you need it all together. The time and place is the
11 operative language there, Your Honor. It's got nothing to
12 do with this case.

13 MR. ROTHSTEIN: He wants to take out that "the time and
14 place" I'm fine. It just says, "all wages due as required
15 by subsection (A)", I think that would be appropriate.

16 MR. THOMPSON: That changes, that changes the meaning
17 of it.

18 MR. ROTHSTEIN: Well, I ---

19 THE COURT: You said what now, I'm sorry, Mr.
20 Thompson?

21 MR. THOMPSON: That changes the meaning, you already
22 have in there.

23 THE COURT: I'll leave it in there. I mean, is an
24 accurate statement of the law. I'm gonna leave C in there
25 and D. And -- but your objection is noted for the record.

1 Yes, we need to take A, D, C, out. Let's go to 41-10-50,
2 41-10 the section, citing 41-10-50, y'all want that to stay
3 in or....

4 MR. ROTHSTEIN: Yes.

5 MR. THOMPSON: And I just don't see that it has
6 anything to do with the case, Your Honor.

7 THE COURT: Yeah, what does it have to do with the
8 case?

9 MR. ROTHSTEIN: It's an accurate statement of the law
10 and it describe what the civil action is for, a violation
11 of 40 and, Subsection 40 and 50.

12 THE COURT: No! No! No, 41-10-50, "when an employee
13 separates an employee from the payroll, from the payroll
14 for any reason, employee should pay all wages." Do you're
15 not claim that he, that she owed him ---

16 MR. ROTHSTEIN: There is testimony that if she didn't
17 pay him the C&E and vacation after, after, after he left.

18 MR. THOMPSON: I'm not sure that came in, Your Honor.

19 THE COURT: I don't know if I recall -- who
20 testified to that?

21 MR. ROTHSTEIN: Mr. Hess. The termination letter said,
22 we'll check, we're gonna your, your vacation balance and
23 you're C&E balance and we'll get back to you and they never
24 did.

25 MR. THOMPSON: Well, he never said ---

1 THE COURT: He testified ---

2 MR. THOMPSON: Sorry.

3 THE COURT: Did he testify to that?

4 MR. ROTHSTEIN: I believe so.

5 MR. THOMPSON: The letter, the letter it was discussed
6 but I don't think ever said and I never got it.

7 THE COURT: I mean, I don't recall. I can have the
8 court reporter try to find it but she would not even be ---

9 MR. ROTHSTEIN: It's not a lot of money involved. I'll
10 just, I mean, that's fine -- but I do think that-- that's
11 fine. If you wanna strike 50, I'm fine with that.

12 THE COURT: I just don't recall the testimony
13 regarding any, but I maybe -- I've been at this, it seemed
14 like a long time ago, very long time ago even though it
15 just last week. But I don't recall any testimony regarding
16 that so we'll take that out. And then your 41-10-80(C),
17 you're -- we're taking that out? We know we got to take out
18 the three times and the attorneys fees.

19 MR. ROTHSTEIN: I think you could put the employee has
20 a, may have a civil action or may recovered any civil
21 action from that, you know, three years after the wages
22 become due. Just take out the three times and the cost and
23 attorneys fees.

24 THE COURT: Mr. Thompson?

25 MR. THOMPSON: Yeah. If you take everything after 41-

1 10-50 then that's okay with me.

2 THE COURT: All right.

3 MR. ROTHSTEIN: Then the sentence wouldn't make sense
4 then. You'd have to ---

5 THE COURT: The employee may recover in a civil
6 action.

7 MR. ROTHSTEIN: Yeah.

8 MR. THOMPSON: Yes.

9 THE COURT: Yeah. That's what we're taking -- we're
10 stopping it right here.

11 MR. ROTHSTEIN: Yeah. That's fine.

12 THE COURT: What about the last sentence, you want
13 that in or out? I mean, I can ---

14 MR. THOMPSON: In, in Your Honor.

15 THE COURT: Yeah. I mean, it's just restating the
16 statute of limitations.

17 MR. ROTHSTEIN: Right.

18 THE COURT: Okay. And so now I'm moving to Page, I
19 think it's, 10, regarding discretionary promises are not
20 enforceable, I think I've already rule on that. As to ---

21 MR. ROTHSTEIN: Yes.

22 MR. THOMPSON: Well, I think you ruled as fact
23 question. There's still an accurate description of the law.
24 The jury is going to decide if it was discretionary ---

25 THE COURT: Do you have any ---

1 MR. THOMPSON: I think that's a quote straight from
2 the case.

3 THE COURT: I know but that's a North -- it's a New
4 York case. Do you have any local authority on that?

5 MR. THOMPSON: Sure, Your Honor.

6 MR. ROTHSTEIN: If he puts the word purely in front of
7 the word discretionary, I'm fine with that statement of the
8 law. But -- so it says, "a purely discretionary bonus is
9 not a contractual promise," I'm fine with that.

10 MR. THOMPSON: I'll accept that.

11 THE COURT: All right. So we're putting that at the
12 -- you want that in the title or the second, "a purely
13 discretionary bonus is not a contractual promise."

14 MR. ROTHSTEIN: Right. And that sentence is in the, I
15 think it's the third sentence of the charge, just at the
16 word purely in front of discretionary bonus.

17 THE COURT: We got -- it's not a contractual
18 bonus.

19 MR. ROTHSTEIN: Yeah. That's fine. Just that one
20 sentence.

21 THE COURT: What about the next paragraph, any
22 objection to that?

23 MR. ROTHSTEIN: About the unclear and indefinite?

24 THE COURT: Yes.

25 MR. ROTHSTEIN: That need to come -- all that needs to

1 come out. Ambiguity in contract construed against the
2 drafter, there's an implied covenant of good faith and fair
3 dealing, I think you've already ruled on that on the
4 directed verdict motion.

5 MR. THOMPSON: Your Honor, I thought -- I assume your
6 ruling was that it's gonna be a question for the, for the
7 jury to decide. And it absolutely if the court -- if the
8 jury cannot fix -- if the jury decides they it cannot fix
9 the obligation of the parties because the terms can not be,
10 any of the terms cannot be ascertained then they can't find
11 for the contract.

12 THE COURT: This -- and this language came from
13 that Fourth Circuit case, I believe.

14 MR. ROTHSTEIN: I'll find it. Well, the sentence says,
15 "a promise to pay a bonus or other contractual promise to
16 pay cannot be enforced if the terms of the promise are
17 indefinite." That's not a statement of a -- it has to be a
18 material terms of the contract and not every term of the
19 contract has to be defined in the contract. If the contract
20 doesn't define the term the jury applies the plain ordinary
21 meaning of the contract. Again, if there's ambiguity in the
22 contract or if the contract terms are not specifically
23 defined to include one thing or the other, that is the
24 problem with the party that drafted the contract. Terms
25 such as price, time, and place, second paragraph, has

1 nothing to do with this case. If you have a contract to buy
2 something and you don't specify what the time, price, and
3 place are, then it's not forcible. That's not what this,
4 this case is about.

5 MR. THOMPSON: It is a necessary term and this is a
6 jury question, and they can't find it then they need to
7 know that about what that means and they, they can't
8 discern what it means then they cannot find, they cannot
9 fix the obligations of the parties.

10 MR. ROTHSTEIN: And Your Honor, Mr. Thompson can make
11 that argument to the jury. I mean, existence of a contract
12 under the central terms of a cause of action for breach of
13 contract. But that's not -- I view that as a commentary on
14 the evidence and not an accurate statement of the law.

15 THE COURT: Give me a second to look at this case
16 again. 'Cause this is -- I believe, and this case, this one
17 was dealt with at the summary judgment level.

18 MR. THOMPSON: That's true. But we're passed that,
19 obviously, and we're letting the jury decide. I mean, I
20 think the judge, I think the court should decide but you
21 ruled against me. So I now I think the jury should be
22 allowed to decide is it, is it so vague and undefinable or
23 critical terms missing that it cannot be discern.

24 THE COURT: Well, I think that's a legal question
25 and I've already denied it. And so I don't think -- I don't

1 see where there's a question, where's there's a question of
2 fact.

3 MR. THOMPSON: Well, the question of fact, Your Honor,
4 would be was there evidence of what debts mean? Was there
5 evidence of what criteria means? Royalties means?
6 Expenditures means? We spent some good bit of testimony on
7 that and I think the jury would be entitled to decide that
8 there is insufficient evidence to determine what those
9 terms mean and, therefore, we can't decide who owes what.

10 THE COURT: All right. I ---

11 MR. ROTHSTEIN: There's no -- no evidence is needed on
12 that, Your Honor. The construction of the terms of the
13 contract is for the jury to apply the plain ordinary
14 meaning of the term.

15 THE COURT: All right. I -- I find that this is a
16 question of law and the court has already decided it so we
17 will take that out over your objection, obviously. Next, is
18 without a binding contractual right to payment there can be
19 no wage payment claim. Any objection to that?

20 MR. ROTHSTEIN: I think the word 'absolute' needs to be
21 added between the word "employers" and "discretion" on the
22 fourth line of the requested charge. "So if the bonus was
23 within the employers absolute discretion there can be no
24 wage payment act claim for failure to pay bonus."

25 THE COURT: Any problem with that?

1 MR. THOMPSON: Yeah, I mean, I think, I think he's
2 just trying to strengthen the word discretion. It means, I
3 mean, discretion is discretion. He's trying to draw, narrow
4 it down in the jury's mind I don't think that's
5 appropriate. It's find like it is.

6 THE COURT: I'mma leave it as is. You're exception,
7 you're exception is noted for the record. All right. Breach
8 of contract, any objection to that language?

9 MR. ROTHSTEIN: No objection.

10 MR. THOMPSON: No objection.

11 THE COURT: Good faith and fair dealing?

12 MR. ROTHSTEIN: No objection.

13 MR. THOMPSON: No objection.

14 THE COURT: Ambiguity in contract construed against
15 drafter?

16 MR. THOMPSON: No objection.

17 MR. ROTHSTEIN: No objection.

18 THE COURT: Do we want -- do you want the discovery
19 rule in there again, I'm guessing? I mean, it's in the
20 there. I mean, we've had -- well, that was as to the wage
21 claim and we also discussed the statute of limitations in
22 the beginning but I can leave it in there. Any objection to
23 the breach of contract discovery rule?

24 MR. THOMPSON: No.

25 MR. ROTHSTEIN: I'm fine with leaving it in but the

1 word reasonable needs to be added to ---

2 THE COURT: It's in there, exercise reasonable
3 diligence.

4 MR. ROTHSTEIN: Well, when it says either discover the
5 breach or could or should have discovered the breach, I
6 think the word reasonably needs to be added in there again,
7 um, which mean reasonably could or reasonably should have
8 discovered.

9 THE COURT: I don't know where you are.

10 MR. THOMPSON: I think that's just confusing. I think
11 the next sentence clarifies it and this is an accurate
12 statement of the law.

13 THE COURT: It says reasonable in there twice.

14 MR. ROTHSTEIN: Okay.

15 THE COURT: All right. Breach of contract damages?

16 MR. THOMPSON: No, judge.

17 MR. ROTHSTEIN: I'm fine with it but it seems like it
18 repeats, I mean, I'm fine with repeating damages as much as
19 you want to. I'm fine with it.

20 THE COURT: All right. Breach of contract
21 accompanied by fraudulent acts?

22 MR. THOMPSON: No objection.

23 MR. ROTHSTEIN: I don't have any objection to that
24 except for I think after the three number paragraphs, I
25 think that, um, it's redundant. I think you've already said

1 that?

2 THE COURT: Where?

3 MR. ROTHSTEIN: That's what the three elements are and
4 then you just repeat them in text. So other than that I
5 think it's fine.

6 THE COURT: She said she combined them so.... let
7 me read it real quick.

8 (Whereupon, the judge takes a moment to read the charge)

9 THE COURT: So the last paragraph explains it.
10 You're saying the next, the paragraph above it, I'mma leave
11 it in there. I think it explains it. It's gives the
12 elements and then it explains.

13 MR. ROTHSTEIN: Okay. That's fine, Your Honor.

14 THE COURT: Next paragraph, breach of contract
15 accompanied by a fraudulent, fraudulent act requires an
16 underlying enforcement contractual promise?

17 MR. ROTHSTEIN: That's fine.

18 THE COURT: All right. All right. Tortious
19 interference with a contract?

20 MR. THOMPSON: Judge, do you have a breach, breach of
21 accompanied by fraudulent act and you mentioned punitive
22 damages I think that needs to come out.

23 THE COURT: Oh, she took that out already.

24 MR. THOMPSON: Oh, okay.

25 THE COURT: Yeah, I'm sorry. That's why I missed

1 it. MR. ROTHSTEIN: I agree with that based on the
2 bifurcation motion.

3 THE COURT: All right. That's out. It's not on my -
4 - she's already taken it out so.... All right. Tortious
5 interference with a contract?

6 MR. ROTHSTEIN: The language about the contract being
7 terminal on what will it's not applicable in this case so I
8 think that paragraph needs to come out.

9 MR. WILSON: I think this was an, I think this was
10 an at will contract, Your Honor.

11 THE COURT: You said what now?

12 MR. WILSON: I think it was an at will employment
13 contract.

14 MR. ROTHSTEIN: No, it wasn't. It was a term contract
15 for a year and it rolled over year to year and it was only
16 terminal on a thirty days notice. It's not an at will
17 contract.

18 THE COURT: Was there any testimony that it was an
19 at will contract? I haven't heard any.

20 MR. WILSON: We're find with taking it out, Your
21 Honor.

22 THE COURT: All right.

23 MR. ROTHSTEIN: There's an R missing in outsider in the
24 next paragraph down. It says, "the plaintiff must prove
25 that the outsider" the R is missing in outsider.

1 THE COURT: She got it.

2 MR. ROTHSTEIN: Okay.

3 THE COURT: Fraud, fraud actual or constructive,
4 any objection to that language?

5 MR. ROTHSTEIN: I think you need to add by clear and
6 convincing evidence to the non-elements.

7 THE COURT: It says it under ---

8 MR. THOMPSON: You have it.

9 THE COURT: It says to establish constructive fraud
10 the plaintiff must establish all elements of actual fraud
11 except for the element of intent to deceive. Each and every
12 one of these elements must be proven by clear and
13 convincing evidence. Anything else?

14 MR. ROTHSTEIN: It just made it sound like you're
15 talking about only constructive fraud has to be proven by
16 clear and convincing evidence, um, yeah, and I'm ---

17 THE COURT: She's gonna add it at the top also.

18 MR. ROTHSTEIN: Thank you.

19 THE COURT: That's fine.

20 MR. ROTHSTEIN: Okay.

21 THE COURT: I'm sure y'all don't object to that.

22 MR. THOMPSON: No objection.

23 THE COURT: Okay. She's gonna add that, that
24 following that elements must be proven by clear and
25 convincing evidence. And then she put it in a paragraph

1 again below it. But we can leave it -- any objection to
2 leaving it in and I'll explain again, clear and convincing
3 evidence. I'm assuming no objection from you all.

4 MR. WILSON: No objection.

5 MR. THOMPSON: No.

6 MR. ROTHSTEIN: No objection.

7 THE COURT: All right. Negligent misrepresentation?

8 MR. ROTHSTEIN: Can I mentioned one thing on the fraud
9 before we go to ---

10 THE COURT: Yes, sir.

11 MR. ROTHSTEIN: And I don't if this is, this is the
12 only verse I got it's kind of the lighter color font. It's
13 the second to the last paragraph on fraud, it uses the word
14 "uncover down to another" and I think it, it should be
15 "disclosed down to another." Uncover seems to be a little
16 bit different than disclosed to me.

17 THE COURT: Any objection to using the word
18 "disclosed" instead of "uncovered".

19 MR. WILSON: One second, Your Honor.

20 (Whereupon, the attorney takes a moment to look over the
21 charge)

22 MR. WILSON: Your Honor, I think I would request the
23 language stay as it is because that is the language from
24 the request to charge and I believe the language that the
25 cases use. And I believe that there is a substantial risk

1 that if we convert that to disclose that we might run a
2 foul of, I think this court's previous ruling, there's no
3 duty to disclose, at least with respect to my clients. So I
4 would prefer, I think, to have the language stay as to what
5 is in the, in the charge.

6 MR. ROTHSTEIN: That's fine.

7 THE COURT: Is that an accurate statement? It came
8 from the law, is that an accurate statement of case law?

9 MR. ROTHSTEIN: The phrase "uncover them to the other"
10 is kind of an awkward phrase.

11 MR. WILSON: I think it's straight from Anderson's
12 requested charge, but I believe it's also in the case law
13 discussing fraud.

14 MR. MacKELCAN: I thought they already agreed.

15 THE COURT: Hmm?

16 MR. THOMPSON: I thought they already agreed to let
17 him have it.

18 THE COURT: You said they agreed to do what?

19 MR. THOMPSON: I think Mr. Rothstein said he was okay.

20 MR. ROTHSTEIN: Yeah, I'm fine with it.

21 THE COURT: Oh, okay. I didn't hear that part, I'm
22 sorry.

23 MR. ROTHSTEIN: I don't have any other issues with the
24 balance of the charge, I mean, the rest of the pages look
25 fine to me.

1 THE COURT: Anything else? Oh, no, we added in,
2 you're looking at the old one. Remove fraudulent
3 concealment and then the approximate cause. You put that
4 after the negligent misrepresentation.

5 MR. THOMPSON: And I'm okay with everything else as
6 well, Your Honor.

7 THE COURT: All right. Well, before you say that,
8 we added ---

9 MR. THOMPSON: Okay.

10 THE COURT: --- she added the CPA language. I'm
11 assuming everybody, is that what you have?

12 MR. ROTHSTEIN: No. I would have an objection to that.
13 I didn't know that was supposed to be in there.

14 THE COURT: You said you have no objection to that?

15 MR. ROTHSTEIN: No. I do have objection to that. I was
16 not aware that it was added in.

17 THE COURT: Yeah. They, they sent that over this
18 morning so those were the last two to consider.

19 MR. ROTHSTEIN: Okay. Let me pull that up.

20 THE COURT: But I -- did I not rule on that
21 already?

22 MR. WILSON: I thought Your Honor requested jury
23 instructions on those issues so that's why we had provided
24 them. And I believe the testimony from Hess and John
25 Hamilton establish what the standard is and it's necessary

1 for the jury to understand that. I think the knowledge of
2 those rules in addition to the testimony will help explain
3 some of these more complicated issues especially with
4 respect to an accountant's obligation to their clients in
5 the case request for information from non-clients.

6 MR. ROTHSTEIN: And those are ---

7 MR. WILSON: And those are just accurate statements
8 of the law and what a standard is, a legal standard is.

9 MR. ROTHSTEIN: The standard of care is a factual
10 question it's not a legal issue, Your Honor. It's not an
11 appropriate -- I think that would be an inappropriate
12 comment on the law. I don't have a problem if you're
13 reading the statute again, but I think if you say -- I
14 mean, this AICPA standard is, is not the -- and that's the
15 not the law that's, that's a, you know, private industry
16 watchdog group or whatever that word group of accountants
17 places themselves. That's not -- it does not have a force
18 of law.

19 MR. WILSON: And, Your Honor, I think, you know,
20 we're kind of running into an issue here too with the
21 arguments about implied consent and whether or not that
22 applies. I think the jury would need to know the consent
23 rules that are applicable to accountants, if the plaintiff
24 intends to say that they sat down at this meeting and there
25 was consent implied. I think that language about specific

1 "consent" is very important and the standard that was
2 established by expert testimony.

3 MR. ROTHSTEIN: And the experts testified about that.
4 But if you read, read that in the law, they didn't
5 testified to standards for integrity which is also part of
6 that same code of conduct. I mean, just because there was
7 testimony about something doesn't mean the court reads it
8 as an instruction to the jury.

9 THE COURT: I just need the statutory -- I want
10 just put what's the statutory, I mean, what the expert
11 says, testified to is fine, but I just need the, I need the
12 statutory language to put in there regarding what the CPAs
13 are supposed to do.

14 MR. WILSON: Just the statutory language from the
15 Internal Revenue Code of the State of statutes ---

16 THE COURT: I think it says -- you said state and
17 federal rules of governing accountants. Are you objecting
18 to that?

19 MR. ROTHSTEIN: No. I mean, I prefer you to read the
20 statute instead of interpreting the statute or summarizing
21 the statute.

22 THE COURT: I'm assuming the statute is very long.

23 MR. WILSON: The statutes are about a page a piece,
24 at least. I think I pulled that language directly from ---

25 THE COURT: And you've got to take out the language

1 that guilty by imprisonment, I assume all that needs to be
2 taken out.

3 MR. WILSON: Is it not relevant for the jury to
4 understand what's at stake when my client is aimed to ask
5 to disclose confidential information? And that's the
6 statutory language, Your Honor.

7 THE COURT: Let me read it again.

8 (Whereupon, she takes a moment to read the statute)

9 THE COURT: "So except by permission of the client
10 from whom the CPA perform services, the CPA must not
11 voluntary disclosing information to anybody's client
12 related to any connection with services rendered." Really
13 that's all you need. But I'll keep reading.

14 (Whereupon, the judge continues to read off the record)

15 THE COURT: So the problem I have with that is I
16 don't want the jury to get -- so what -- I think it's gonna
17 lead to confusion to the jurors so -- 'cause that, we're in
18 a civil trial and then you're putting in criminal
19 penalties. And so what if the jury says, yeah, I think he
20 violated, he violated the confidentiality, is she gonna put
21 him in jail. I mean, I think that's, I think that's why you
22 leave you all of that out for purposes of -- I think you
23 don't have to have that in there because there is no, there
24 is no evidence that he was charged or convicted of any --
25 really the only thing it sounds, to me, it sounds like all

1 we need to say is, "except by permission of the client for
2 whom the CPA perform services. The CPA must not voluntary
3 disclose information to anybody by the client related to
4 any connection with the services rendered." I mean, you can
5 say to them, you can add that into a third-party. But, I
6 mean, a lot of this is just going to make confusing. Let me
7 read the CPA confidential claim.

8 (Whereupon, the judge takes a moment to read the claim)

9 THE COURT: So on Page, the last, 20, where it say,
10 "accountants confidential client information" that comes
11 from that Association, right?

12 MR. WILSON: Yes, Your Honor.

13 THE COURT: So that's not law. He's testify to it
14 and it's in evidence but I don't think the court can
15 comment on that. As to the law, I mean, I ---

16 MR. WILSON: Well, Your Honor, I do, I do believe it
17 is relevant for the jury to -- if we just excerpt what that
18 leaves is the South Carolina Code without referencing any
19 the fact that they face penalties, it appears almost like
20 is an empty promise. But the jury needs to understand
21 accountants face real penalties if, if they divulge this
22 information. So if Your Honor is inclined remove the actual
23 penalties I would request that we at least informed the
24 jury that there are civil and criminal penalties associated
25 with disclosing any information.

1 MR. ROTHSTEIN: And I think they can arguments to the
2 jury in their closing arguments but that's not something, I
3 agree with Your Honor that seems to be confusing to the
4 jury to include penalties and potential jail time that are
5 not ---

6 THE COURT: Let's just put in there can be subject
7 to civil and criminal penalties. Instead of -- I just don't
8 like having the actual penalties and maybe that's just --
9 and so we'll take out the -- I mean, he testified to it,
10 you can argue it - take all of that out because that's not
11 -- unless there's a statute that adopts it. That's an
12 organization rule.

13 MR. WILSON: Actually, Your Honor, the South
14 Carolina Board of Accountancy has adopted the AICPA
15 governing standard. That's in the statute.

16 THE COURT: But is the language in the statute?

17 MR. WILSON: The language itself is not in statute
18 but the, ah, the South Carolina Board of the Accountancy
19 through -- well, the legislature through agreement Board of
20 Accountancy adopted the AICPA governing standard holding
21 accountants accountable for violations of those standards
22 and then the Board of Accountancy regulations also adopt
23 those standards. So if we're thinking about incorporation
24 and I believe that the South Carolina civil law would
25 actually incorporate those. So it then would actually

1 become standard under South Carolina law.

2 MR. ROTHSTEIN: But he's picking and choosing one
3 standard. He's not mentioning any integrity standards. I
4 mean, I don't have a problem with saying the South Carolina
5 Board of Accountancy has adopted the standards from the
6 AICPA, that's fine. But what he's asking you to do is
7 comment on, you know, the confidentiality rule as he's
8 written it. This is not a quote from the, the statute or
9 from the ---

10 MR. WILSON: It's quoted directly from the AICPA.

11 THE COURT: All right. But what about the standard
12 regarding integrity, we'll gone put all of that in there
13 just because ---

14 MR. WILSON: Well, they will have the book, Your
15 Honor. I mean, ---

16 THE COURT: That's why you don't need to put it in
17 the jury charge, yeah, because it's in evidence and it's
18 for them to determine.

19 MR. WILSON: What -- what's, what's the actual
20 language of the integrity rule, Your Honor? Because it
21 actually says that in the, in the -- there's specific rules
22 like confidential information rule that integrity gives
23 away but....

24 THE COURT: I'm gonna -- I'm gonna charge the
25 statutory language and we're gonna take -- they have it.

1 They can read it. You can talk about. Your expert already
2 testified to it. So we're going to change the last portion
3 to just say, charge the statute and ---

4 MR. WILSON: And, Your Honor, with that I believe
5 you had mentioned earlier, would be okay to also instruct
6 the jury that the Board of Accountancy is adopted the AICPA
7 as the governing standard? We can pull the language from
8 the statute and, and send it to Your Honor.

9 THE COURT: And I believe he had no objection to
10 that?

11 MR. ROTHSTEIN: Right.

12 THE COURT: So we can put that language in there
13 that the
14 statute whatever is adapted the Board of Accountancy
15 standards as law and then they'll have the book.

16 (Whereupon, the judge takes time to read the jury charge)

17 THE COURT: Oh, we haven't even talked about the
18 verdict form.

19 MR. ROTHSTEIN: I like Mr. Thompson's verdict form. I'm
20 fine with it.

21 MR. THOMPSON: I like Mr. MacKelcan's now.

22 THE COURT: Okay.

23 MR. ROTHSTEIN: I mean, I strongly object to Mr.
24 MacKelcan's verdict form.

25 MR. MacKELCAN: What's the objection?

1 MR. ROTHSTEIN: It's unnecessarily confusing.

2 THE COURT: Huh?

3 MR. ROTHSTEIN: I think it's unnecessarily confusing.

4 MR. MacKELCAN: I mean, it's written like you can
5 choose your own adventure, I think ---

6 THE COURT: Hold on! I haven't even gotten to the
7 verdict. We're still working on trying to fix -- and then I
8 need the last language that you just said that, um, if you
9 email it to Ms. Soapes - stick it in there.

10 All right. The verdict forms so -- where's the one --
11 Mr. Thompson's verdict form is not, easier to read. The
12 other one is like a roadmap. Go right, left, right.

13 MR. THOMPSON: Mine is missing some things.

14 THE COURT: Huh?

15 MR. THOMPSON: Mine is missing things because ---

16 THE COURT: Yeah, it is. It's missing ---

17 MR. THOMPSON: --- of developments since I sent that.

18 THE COURT: Yeah.

19 MR. ROTHSTEIN: I really haven't -- let me pull of his,
20 the other one - you emailed that this morning, Skyler?

21 MR. WILSON: Yes.

22 MR. ROTHSTEIN: It needs to include the word reasonably
23 should have known. If you find that plaintiff knew ---

24 COURT REPORTER: You've got to speak up for me.

25 MR. ROTHSTEIN: I'm sorry. It needs to include the word

1 reasonably should have know in the first -- if you find
2 that the plaintiff knew ---

3 THE COURT: What a minute! What a minute! Which one
4 are we working on because that one ---

5 MR. ROTHSTEIN: I'm looking at Mr. Wilson's, one that
6 Mr. Wilson sent this morning ---

7 THE COURT: Well, I was looking at Mr. Thompson's.
8 That's why I asked which one are we working off of. I
9 thought Mr. Thompson's was fine when I read it earlier
10 other than ---

11 MR. MacKELCAN: It's missing statute of limitations and
12 I think we ---

13 THE COURT: Well, I don't think you have ---

14 MR. MacKELCAN: --- wage payment is gonna be a separate
15 line item. It's "whereas I combined".

16 MR. ROTHSTEIN: Your Honor, are you looking at Mr.
17 Thompson's ---

18 THE COURT: I was.

19 MR. ROTHSTEIN: Okay. Yeah, I agree that this specific
20 special interrogatory and statute limitations does not need
21 to be asked.

22 MR. THOMPSON: I want to ask 'cause it's, the main
23 reason that I think -- and I think that's developed since I
24 sent my proposed form out, that issue weren't developed
25 so....

1 MR. ROTHSTEIN: That's been the whole issue -- how's
2 has it developed anymore. That's been the whole issue, the
3 issue the whole case.

4 MR. THOMPSON: I mean, since I sent out my proposed
5 instructions. We've touched on that issue quite
6 extensively. And I'm okay with sticking reasonable person
7 or something like that in there if that's the only
8 objection.

9 MR. ROTHSTEIN: It's not. I just looked at the first
10 line, that just popped out at me.

11 MR. THOMPSON: Oh, you weren't done, okay. I should
12 have known.

13 (Whereupon, the judge takes a moment to look over verdict
14 form)

15 MR. WILSON: And, Your Honor, for the verdict form
16 to be sent around this morning I think we do need a
17 decision on each separate cause of action especially in
18 light of the court's -- the parties discussion of election
19 of remedies and certainly it's gonna make a difficult
20 burden for the court to decide or for us to discuss what
21 remedies can be elected if we're lumping together the
22 parties or lumping together causes of action. I believe ---

23 THE COURT: Well, I wasn't going to lump together,
24 I was trying to decide if the statute of limitations needs
25 to be in there because it's already -- I need to go back

1 and look at the jury charge and see how it's written. But
2 inherently they find that the statute of limitations, if
3 they find that the statute of limitations, that he wasn't
4 within the statute of limitations, I mean, I think the way
5 that the jury charge reads then he is not -- I think it
6 says the other charges don't -- he can't make any of his
7 claims, so which would automatically be an verdict for the
8 defendant. But I'm still reading through the charge because
9 it just, I mean, through the verdict form just came in this
10 morning so I have not and I'm trying to process it because
11 it's, like I said a roadmap, go left this way; turn this
12 way....

13 MR. ROTHSTEIN: If you add -- the special
14 interrogatories on statute of limitations doesn't include
15 fraudulent concealment either. I think ---

16 THE COURT: That's -- so I got to put all of that
17 in. So, basically, that's the whole purpose of the jury
18 charge. We're not gonna put the entire jury charge in the
19 verdict form. So I'mma go back and look at the statute of
20 limitations and if we need to even tweak it in the jury
21 charge and say something to the affect that if you find
22 that he, this was not filed within the appropriate statue
23 of limitations then you're not to consider anything else. I
24 mean, I can put that in the jury charge. But I don't want
25 to get into putting the fraudulent -- well, did you find --

1 is there a violation of statute of limitations? Did you
2 find if there's any fraudulent concealment? I mean, after a
3 while we're gonna have a whole book in a send back to them.
4 And that's the whole purpose of the jury charge. They'll
5 have the jury charge back there. But if I need to clarified
6 in the jury charge, I can.

7 MR. THOMPSON: And ---

8 MR. ROTHSTEIN: The statute of limitations only applies
9 to the claims for, before 2015. I mean, there's, I mean,
10 there's no dispute that we were timely in filing the claim
11 as to the 2015.

12 THE COURT: He's disputes it ---

13 MR. MacKELCAN: Oh, yes.

14 THE COURT: --- because he said they met in May of
15 2015.

16 MR. ROTHSTEIN: The breach didn't occur until, until he
17 was paid his bonus - well, I mean, he signed a new contract
18 on December 30th that's when the breach would've occurred
19 when the statute or that cause of action would've accrued.

20 MR. WILSON: Not for our client, Your Honor. His
21 only involvement was that meeting. The breach maybe with
22 the breach of contract having allegedly in December of
23 2015. But my client had no other further involvement and he
24 only allegedly made representation at this meeting.

25 MR. ROTHSTEIN: The causation and damages are an

1 essential element of a claim for fraud and that wouldn't
2 have happened until the three years. So he wouldn't have
3 been able to bring a claim until after December 30, 2015.
4 Our claim was filed and then three years of that date so
5 it's not an issue with 2015 bonus.

6 MR. THOMPSON: But, Your Honor, the 2010 to the 2014
7 breaches cause, causes of actions are out because of the
8 statute of limitations, he has no 2015 claim. Because his
9 2015 claim is I would've kept the 2010 contract and the
10 only reason I have damages is because the 2010 gives me
11 more than the 2015. That's his cause of action. So if 2010
12 is out because of the statute of limitations he has not
13 2015 claim.

14 MR. ROTHSTEIN: That, that doesn't make any sense, Your
15 Honor.

16 THE COURT: And y'all want to put it on the verdict
17 form? Let me finish reading this.

18 (Whereupon, the judge is reading the verdict form)

19 THE COURT: So like Question 10, "if you find in
20 the affirmative for Question 8 or 9, do not deliberate on
21 negligent misrepresentations for the party against whom you
22 found in the affirmative."

23 MR. WILSON: I think that is fairly clear isn't,
24 Your Honor? I mean, if you find that there is no ---

25 THE COURT: Hold on! She can't hear you. his MR.

1 WILSON: MR. WILSON: I believe that is an accurate,
2 accurate statement of how the progression of deciding each
3 claim.

4 THE COURT: It's confusing is the problem. It's con
5 -- it leads to confusion. "If you find an affirmative for
6 Question 8 or 9, do not deliberate on negligent
7 misrepresentation for the party against whom you found in
8 the affirmative." What if they found in the affirmative for
9 both?

10 MR. WILSON: That 8 or 9, I mean, that's -- that
11 doesn't include both -- I mean ---

12 THE COURT: I'm talking about the second part of
13 what you have there. This -- I mean -- read -- just read it
14 -- I'm just saying it does not read correct. It's
15 confusing.

16 MR. WILSON: I'd be happy to try and make it less
17 confusing. The point being just that I'm think in from what
18 Mr. Thompson has submitted a jury instruction is that, if
19 you find there was a fraudulent misrepresentation against
20 the party that there's no need to address negligent
21 misrepresentation against that party, in conjunction with
22 trying to keep the fraud and misrepresentation claims
23 separate between the parties because they're based on
24 different facts.

25 THE COURT: And I'm find keeping them separate -

1 actually that was my suggestion is, I spoke with her
2 earlier, that they needed to separate the parties. But, I
3 guess my point is that, that paragraph is, is the portion
4 that says, "if you find in the affirmative for Questions 8
5 or 9, do not deliberate on negligent misrepresentation for
6 the party against whom you found in the affirmative." So
7 let's try to figure out a better way to say that because
8 that's, it's confusing.

9 MR. WILSON: And, Your Honor, as an alternative, we
10 could strike that portion, the parties have shared the
11 understanding that if there's a finding on fraud that, you
12 know, they're, you have to elect remedies between fraud and
13 negligent misrepresentation and find for both. I think just
14 the importance -- instructing the jury like that is to
15 avoid them sitting back there and deciding on a cause of
16 action that doesn't necessarily need to be deliberated,
17 they've already found her for fraud. But we can remove it
18 and ---

19 THE COURT: Well, they do both then, once again, we
20 have to deal with the election of remedies at the end.

21 MR. ROTHSTEIN: Yeah. I may want, want to keep the
22 negligent misrepresentation in. I think that it's stronger
23 on appeal. I mean, you know, you can't just say, okay, the
24 jury found on one, don't go any further. I think they need
25 to return a verdict ---

1 THE COURT: Well, some of this, we have, we'll have
2 to sort out afterwards, maybe.

3 MR. WILSON: Such as removing that instruction
4 telling them not to go ---

5 THE COURT: If they find, I mean, if they find
6 fraud and negligent misrepresentation then he's gonna have
7 to elect a remedy on it.

8 MR. WILSON: So then at the end of the page that
9 would be removed?

10 THE COURT: Yes, I think. But does that throw off
11 your other ---

12 MR. WILSON: I don't think it does, Your Honor.

13 THE COURT: Okay.

14 MR. WILSON: I think it just continue ---

15 MR. ROTHSTEIN: So are, are we going off of the new
16 verdict form now? Is that, I mean, ---

17 THE COURT: Well, he's saying that his was missing,
18 Mr. Thompson is saying is missing, in light of ---

19 MR. WILSON: I think we can ---

20 THE COURT: --- the rulings ---

21 MR. WILSON: Sorry, Your Honor. I'd be happy to go
22 with one that Ms. Soapes sent around earlier because it
23 included tortious interference claim. I include the
24 tortious interference claim in mine.

25 THE COURT: Well, that's the one -- that's the one

1 she got from Mr. Thompson so.... maybe he's trying to help
2 you out. MR. ROTHSTEIN: So you've, so you've agreed to
3 take out 1 and 2 on the statute of limitations, right?

4 MR. THOMPSON: Did we?

5 THE COURT: They didn't agree to that.

6 MR. ROTHSTEIN: I, I thought that was your ruling.

7 THE COURT: I haven't ruled on it yet.

8 MR. ROTHSTEIN: Okay.

9 THE COURT: I'm still, I'm still looking at it.

10 MR. ROTHSTEIN: It's an adequate statement of the law
11 the way it's written because it says, "should have known or
12 could have known." The question is whether he knew or
13 reasonably should have
14 known that he had a cause of action.

15 THE COURT: I think the way to fix that is by
16 putting - and making it clear - putting that language in
17 the jury charge as opposed to....

18 MR. ROTHSTEIN: I agree.

19 MR. THOMPSON: Or we could simply say, rely on the
20 jury charge and say something like, do you find the
21 plaintiff's causes of action are outside the statute of
22 limitations? And the jury charge would inform of that to
23 answer it.

24 MR. WILSON: I'd be in favor of reducing it.
25 Simplify it and just say, do you find that the statue of

1 limitation bars claims instead of putting all of that
2 information if we are going to instruct the jury.

3 MR. ROTHSTEIN: Isn't it implicit in the, on their
4 answer to Number 3? I mean, if they find that it's on the
5 outside the statute of limitations they're going to return
6 a verdict in favor of the defendant.

7 THE COURT: Well, that is my -- yes. Yes. And
8 that's what I was saying earlier. But I think I can put
9 some language in the jury charge to say - when I talk about
10 the statute of limitations, "if you find that they're
11 outside of statute of limitations -- yeah, so we say in the
12 jury charge, "if you so find then the plaintiff's claims
13 are barred by the statute of limitation." I don't think you
14 need that, put the question in there regarding the statute
15 of limitations because it's pretty much incorporated in
16 each of the claims. So if you find this then none of these
17 claims matter because it's basically what it says.

18 MR. THOMPSON: Well, it's not in none of -- again, but
19 the 2015 claim even under the three year statute of
20 limitations with no discovered rule and with no fraudulent
21 it's still timely under these ---

22 THE COURT: But he's -- but there's a....

23 MR. ROTHSTEIN: But the way he's written it he said, if
24 you find that a claim was older than 2015 the whole, you
25 don't deliberate any further. That's not, that's not at all

1 right because, you know, that wouldn't be a win for
2 everybody on the statute of limitations. You still have to
3 look at the 2015 claim.

4 THE COURT: My inclination is to take that language
5 out. I'd never put the statute of limitations, um, question
6 in. We charge it under the law and I think it's, under the
7 law it's appropriate there. So I -- we will take that out,
8 Number 1 and 2.

9 (Whereupon, the judge takes a moment to read the verdict
10 form)

11 THE COURT: All right. Other than that, anything
12 else that needs to be changed -- and your -- if you want to
13 mark this as a court exhibit with the statute of
14 limitations language in the verdict form, you can. Go ahead
15 and mark it as Court Exhibit. Your special verdict form.

16 MR. WILSON: I don't have a printed copy with me,
17 Your Honor.

18 THE COURT: Okay. We're mark it as -- what will be
19 it be Court Exhibit?

20 MR. WILSON: Two, I believe.

21 THE COURT: Two. And then we'll email it -- and
22 she's got to reformat the numbers so give her a second.
23 We'll take a break also. And send it to them and look at it
24 before we send it to the jury because the more eyes on it
25 to make sure it reads right. Mr. Thompson?

1 MR. THOMPSON: Your Honor, Item Number 4, and I guess
2 I didn't notice what was being done there before, but ---

3 THE COURT: On yours or his?

4 MR. THOMPSON: I think, both actually. But Mr.
5 MacKelcan is the one I'm looking at. It allows the jury to
6 respond to breach of contract for the 2015 year. There's no
7 allegation that they didn't properly pay the five percent
8 of the revenues under the 2015 agreement. I always thought
9 his 2015 claim was based on fraud and misrepresentation and
10 he had to compare, and he's, essentially, saying, I would
11 stayed with 2010 contract except you misrepresented,
12 engaged in a fraudulent act and, therefore, I signed the
13 2015 agreement. I mean, there would be fraud and
14 misrepresentation but not a breach of contract claim for
15 2015.

16 MR. ROTHSTEIN: The 2015 agreement, as a matter of
17 law, could not have been effective until January of 2016.
18 So, therefore, you default back to the 2010 agreement to
19 determine what his bonus should have been under 2015. So
20 it's a, it's a -- there's a breach of contract component
21 with and there's also a fraud component.

22 THE COURT: He's put the year 2015. So you're
23 referring to the 2010 contract?

24 MR. ROTHSTEIN: Right.

25 THE COURT: Not the 2016?

1 MR. ROTHSTEIN: Correct. The 20 -- yes. If he wants to
2 add under the 2010 contract that's, I mean, I'm fine with
3 that. And actually their own expert said that he, that they
4 under calculated his bonus for 2015 by \$600. The 2015
5 agreement was valid and enforceable.

6 MR. THOMPSON: This is a different question. He
7 actually did enter into the 2015 agreement for the 2015
8 year. There was no breach of that agreement.

9 MR. ROTHSTEIN: There own expert said there was but
10 that's not the theory of our case. There own expert ---

11 MR. THOMPSON: It's not in the case. He's trying to
12 say I get the 2010 agreement as a breach and as the, and
13 under my theory of fraud and misrepresentation.

14 MR. ROTHSTEIN: I'm just pointing out ---

15 MR. THOMPSON: I think you get both.

16 MR. ROTHSTEIN: Even under Mr. Thompson's argument
17 there is a potential breach of the 2015 agreement. I mean,
18 if the jury were to find, somehow, that there was agreement
19 between Mr. Hess and Dr. Morphis prior to the actual signed
20 contract in 2015, their own expert is saying that he was
21 underpaid by six hundred and seventy something dollars.

22 MR. THOMPSON: He's already admitted twice that,
23 that's not part of his claim.

24 MR. ROTHSTEIN: You're making it part of the claim.

25 MR. THOMPSON: He only, he only gets the 2010

1 agreement if, if the jury finds fraud and
2 misrepresentation. It's already covered in those causes of
3 action.

4 MR. ROTHSTEIN: That's not true. Under the Payment of
5 Wages Act because he didn't comply with the notice
6 requirements or Dr. Morphis didn't comply with the seven
7 day notice requirement in the South Carolina Payment of
8 Wages Act that contract is of no force and effect until
9 January of 2016.

10 MR. THOMPSON: And that's already covered under the
11 Wage Payment Act claim question in the verdict form. Again,
12 that would not be a breach of contract.

13 MR. ROTHSTEIN: It could be both and we'd elect the
14 remedies, Your Honor.

15 MR. THOMPSON: But there's no breach of contract for
16 2015. You can't elect between something that's not there to
17 something that you did sign.

18 THE COURT: What's the allegation of the breach of
19 contract in 2015?

20 MR. ROTHSTEIN: That's be -- I'm not making an
21 allegation that there was a breach of the 2015 agreement.

22 THE COURT: Just, I'm sorry, the year you're
23 seeking -- y'all got me ---

24 MR. ROTHSTEIN: So for the year 2015 our argument is
25 the attempt to change the contract, I mean, we do have a

1 theory that it was fraud and negligent misrepresentation --
2 -

3 THE COURT: Yes.

4 MR. ROTHSTEIN: But we also had a theory that it
5 violated the South, the notice provision of the South
6 Carolina Payment of Wages Act.

7 THE COURT: Uh, uh.

8 MR. ROTHSTEIN: Therefore, the 2015 bonus should have
9 been determined by the 2010 contract, the fifty percent of
10 the net ---

11 THE COURT: As of ---

12 MR. ROTHSTEIN: --- not based on five percent of the,
13 of the gross ---

14 THE COURT: --- 2016 contract?

15 MR. ROTHSTEIN: Well, you're claiming the 2016 contract
16 but it's, I think, it's been referred to as 2015 contract.

17 THE COURT: When was it signed?

18 MR. THOMPSON: December 30, 2015.

19 THE COURT: To go in effect?

20 MR. THOMPSON: They tried to make it retroactive to
21 March 1, 2015 which is illegal. It's an illegal contract.
22 It's of no force and effect until 2016. Were not making a
23 claim that his 2016 and 2017 bonuses were calculated
24 incorrectly.

25 MR. THOMPSON: Then it's a Wage of Payment Act claim.

1 He's saying he didn't give us notice so, therefore, you
2 can't do the 2015. Well, that's covered in the Wage of
3 Payment question. I didn't hear him say anything. He didn't
4 give you any information that there was any breach ---

5 MR. ROTHSTEIN: It's both ---

6 MR. THOMPSON: It's a contract cause of action. It's
7 only -- but it's only because he's trying to use Wage of
8 Payment to create a breach of contract cause of action. He
9 can't -- he's already got it covered. I'm not sure I
10 understand what the big deal is here.

11 THE COURT: Mr. Rothstein?

12 MR. ROTHSTEIN: Yes, ma'am.

13 THE COURT: 2015, you're saying there's evidence of
14 breach as to year 2015 because the 2015 wages -- I'm still
15 unclear on what the, what the evidence is as to the breach
16 of the contract as to the year of 2015?

17 MR. ROTHSTEIN: Okay. As to the year of 2015 the
18 effective, the contract attempting to change the bonus
19 calculation that year was not effective under the notice
20 provisions of the Payment of Wages Act.

21 THE COURT: All right. And it's in there for the
22 Payment of Wages. He's saying it shouldn't be in there for
23 both.

24 MR. ROTHSTEIN: But the contract itself, Your Honor,
25 renewed -- the original contract said January 1, 2010 per

1 year. And if there's no -- if it wasn't cancelled it
2 renewed for another year.

3 THE COURT: Mmm, hmm.

4 MR. ROTHSTEIN: So it continued to renew January of
5 2015, that contract was in effect until the end of 2015.

6 THE COURT: Okay.

7 MR. ROTHSTEIN: They tried to change the contract and
8 make it retroactive to March which is illegal. It's not --
9 you can't do that under the South Carolina Payment of Wages
10 Act. I'm not making a -- I am making a claim under the
11 Payment of Wages Act but I'm also making a claim under the
12 2010 contract which existed on January 1, 2015. Again, it
13 renewed for another year. So their attempt to change the
14 contract was not effective until 2016. Because they didn't
15 pay him the fifty percent bonus in 2015 they breached that
16 contract. Now, they're trying to say the oh, we changed, we
17 altered or changed the contract, it was like an accord of
18 satisfaction or whatever it was, they'd say, it's going
19 back to May. He emailed Dr. Morphis and said I agree or
20 something to that effect. If, even if that were the case
21 and the new 2015 contract were in effect, they didn't even
22 pay according to that. According to their own experts,
23 testimony that's in the record, they undercounted his
24 bonus. Mr. Burkett's spreadsheet shows that the
25 undercounted his bonus by six hundred and something

1 dollars. I mean, that's just, it's not my theory. My theory
2 is still reapplying the 2010 contract in 2015. But you can
3 have both, a breach of contract and Payment of Wages Act
4 claim for the same thing. You just have to elect your
5 remedies at the end of the case and that's what we're
6 trying to do.

7 THE COURT: All right. I'mma leave it in there and
8 we can deal with it afterwards in terms of the election of
9 remedies depending on what they come back with. But you're
10 objection is noted for the record.

11 All right. She's gonna email you all a verdict form.
12 We'll take a break so we can get ready for closings and try
13 to see if we can get everything printed. And you'll print
14 him a copy of the first verdict so he can, we can mark that
15 as a Court Exhibit. And that will be Court - which exhibit
16 did you say it was, two?

17 (Whereupon, the Verdict Form has been marked and entered
18 into evidence as Court's Exhibit No. 2)

19 (Whereupon, the Judge's Charge has been marked and entered
20 into evidence as Court's Exhibit No. 3)

21 COURT REPORTER: (indicates yes)

22 THE COURT: Okay. All right. How much time do y'all
23 need?

24 MR. THOMPSON: For what?

25 THE COURT: A break.

1 MR. THOMPSON: Oh!

2 THE COURT: Are you ready?

3 MR. THOMPSON: Six minutes. You ready, right, Mr.
4 Thompson?

5 MR. THOMPSON: I'm ready.

6 THE COURT: All right.

7 MR. THOMPSON: Well, he goes first, he needs to be
8 ready. I'm ready.

9 THE COURT: But you get to go after him.

10 MR. THOMPSON: I'm ready to go to the bathroom. Yes,
11 Your Honor.

12 THE COURT: Yes. And I -- okay. And the jury has
13 been here.

14 MR. THOMPSON: And I know the bailiff does to.

15 THE COURT: All right. So we'll get everything, try
16 to get everything printed. Let's take about 10 minutes
17 then we'll be ready to start.

18 (Whereupon, the court takes a short break)

19 THE COURT: Are you we ready to bring them in?

20 MR. ROTHSTEIN: The plaintiff is ready, Your Honor.

21 THE COURT: All right. She's gonna print -- she'll
22 bring copies of the verdict form and the jury charge, get
23 it to you all and -- email it to them also so they can look
24 at it and see.

25 All right. Let's bring them on in.

1 gentlemen? When you look at this summary, again, this is
2 Exhibit 19, it's in evidence, okay. These are the gross
3 revenue figures from 2010 to 2015. Next, is what's called
4 reported net income, okay. This is what they told the
5 government or the IRS that they were making after you take
6 out all of the expenses. Remember that number includes the
7 bonuses. It includes compensation to officers. It includes
8 Ms. Hess's salary. Mr. Hess's bonus. So if you're gonna try
9 and find out what the profit is before any bonuses are
10 figured out, what you gotta do is you take the reported net
11 income, you add Dr. Morphis's compensation and Mr. Hess's
12 compensation, I mean, the bonus part of his compensation
13 and, then I added this BMW expense, because I didn't think
14 it was right for Dr. Morphis not to tell Mr. Hess that
15 she's running this expense through the practice. Basically,
16 what she's doing, remember her lease payment was about,
17 almost \$900 a month for the car. By adding that as an
18 expense to Lancaster she's actually asking Mr. Hess to
19 subsidized half of her car payment a year. I don't know if
20 any of y'all have \$400 or a \$450 a month car payment. But
21 hers was twice that, \$900 a month. That was an expense that
22 should never have been in there. So what we did is we added
23 that back in. So this is the true net profit to Lancaster
24 before any of the bonus should have been split up, okay.
25 You'd take the reported net income add Dr. Morphis's

1 the truth about her and that Dr. Hussey knew the truth
2 about the finances. She fired them both on the spot. Do you
3 remember that? That's not something someone with remorse
4 would do or regret would do.

5 Ability to pay, you know, Mr. Thompson's right, we
6 could have brought in new evidence here. We could have
7 brought in evidence about the vacation homes and rental
8 properties and commercial properties of things that she
9 had. But we didn't do that. I have more respect for your
10 time than that. We could've had a whole second trial on her
11 ability to pay punitive damages, but you already have
12 enough information here. You have the tax returns for ---

13 MR. THOMPSON: Your Honor -- Your Honor, I object. May
14 we approach?

15 THE COURT: Yes.

16 (Whereupon, a bench conference was held off the record)

17 THE COURT: Objection is sustained.

18 **Conti. argument- Mr. Rothstein:**

19 We don't new evidence of net worth, ladies and
20 gentlemen. You've heard the testimony about the type of
21 income she received, not just from Hartsville ---

22 MR. THOMPSON: Your Honor, and he rolled through your
23 sustained ---

24 THE COURT: Hold on! Hold on! Hold on! Hold on!
25 Objection is sustained.

1 MR. ROTHSTEIN: Nothing from the plaintiff, Your Honor.

2 MR. THOMPSON: No, Your Honor.

3 THE COURT: Okay.

4 MR. MacKELCAN: Your Honor, I'm gonna ask for curative
5 instruction, can I approach?

6 THE COURT: Yes.

7 (Whereupon, a bench conference was held off the record)

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

13 Thank you.

14 All right. You all can go back and I think he has
15 lunch back there. I'm not sure where it came from, I hope
16 it's not cold because I told earlier.... all right. You can
17 follow the bailiffs and you can begin your deliberations.
18 And your lunch should be back there.

19 (Whereupon, the jury enters the courtroom at 1:45 pm)

20 THE COURT: All right. Anything else? At the
21 sidebar Mr. Thompson asked for a -- well, the first sidebar
22 was regarding getting into anything regarding net worth and
23 I sustain the objection of Mr. Thompson ---

24 MR. THOMPSON: Income, Your Honor.

25 THE COURT: Income. Income. And that the case law

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STATE OF SOUTH CAROLINA: COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT: LANCASTER COUNTY

Paul David Hess,)
) Docket No.
 PLAINTIFF,) 2018-CP-29-01127
)
)
 V.)
)
)
 Morphis Pediatric Group) **Jury Trial**
 of Lancaster, Elizabeth)
 Morphis, M.D., Gregory)
 Alexander, and Moore,)
 Beauston & Woodham, LLP)
)
 DEFENDANT.)

January 26, 2022
Lancaster, South Carolina

B-E-F-O-R-E:

THE HONORABLE D'ANDREA BENJAMIN

A-P-P-E-A-R-A-N-C-E-S:

David Rothstein, ESQ.
Attorney for the Plaintiff

Charles Thompson, ESQ.
Attorney's for the Defendant's

Douglas Mackelcan, ESQ.
Attorney's for the Defendant's

Maria DiScioscia, RPR
Official Court Reporter

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I N D E X

<u>WITNESS</u>	<u>EXAMINATION BY</u>	<u>PAGE</u>
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1 THE COURT: I think we're ready to bring in
2 the jury.

3 ((Jury entered.))

4 THE COURT: I hope you had a good lunch. We
5 are ready to start with our first witness.

6 I will ask the Plaintiff to call their first
7 witness.

8 MR. ROTHSTEIN: I'd like to call, Paul David
9 Hess, for the Plaintiff, your Honor.

10

11 P-A-U-L D-A-V-I-D H-E-S-S, the Witness herein, having
12 been sworn by the Clerk of Court, was examined and
13 testified as follows:

14

15 MR. ROTHSTEIN: May it please the Court?

16 THE COURT: Yes, sir.

17

18 DIRECT EXAMINATION

19 BY MR. ROTHSTEIN:

20 Q. Mr. David, will you please introduce yourself
21 to the jury?

22 A. My name is Paul David Hess. I live in Fort
23 Mill, South Carolina now.

24 Q. And do you go by David or Paul?

25 A. I go by David.

1 Q. And who lives in Fort Mill with you?

2 A. My wife, Stephanie and my stepdaughter,
3 Jocelyn.

4 Q. How long have you been married to Stephanie?

5 A. 13 years.

6 Q. And what does she do for a living?

7 A. She's an HR Director.

8 Q. How old is your stepdaughter?

9 A. 17.

10 Q. What does she do for a living?

11 A. She's a student at Winthrop University.

12 Q. How long have you lived in South Carolina?

13 A. Total?

14 Q. Yes.

15 A. I was here from 2002 to 2005. The Army sent
16 me to Fort Benning, Georgia. Then I retired in 2007 and
17 we moved back, basically, December of 2006. So from
18 2006 to the present.

19 Q. Can you speak into the microphone a little bit
20 better.

21 A. Is that better?

22 Q. Yeah, perfect.

23 A. Sorry.

24 Q. That's okay. Tell the jury what you do
25 currently for a living?

1 A. I'm a nurse practitioner at Concentra Medical
2 Center. I do mostly occupational health and summary
3 care.

4 Q. Explain to the jury what the difference is
5 between a nurse practitioner and what a registered nurse
6 is?

7 A. A registered -- a nurse practitioner is a
8 registered nurse who has just gone on for two years or
9 three years of additional training in diagnosis,
10 advanced physiology, pharmacology, to get more time to
11 be able to treat patients.

12 Q. Is there a difference in the scope of practice
13 between what a nurse practitioner can do versus what a
14 doctor -- a physician or physician's assistant can do?

15 A. There's little difference between a PA and a
16 nurse practitioner. There are some differences and
17 that's usually by more of a legislative law than the
18 actual abilities of the individuals.

19 Nurse practitioners are PA's and physicians
20 differ in the aspects of, some of our trainings, scope
21 of care. Primary care, there's probably less of a
22 difference then there is in a specialty area. We focus
23 more on wellness, health, and maintaining the
24 individuals wellbeing.

25 Q. As a nurse practitioner are you able to

1 prescribe medications to your patients?

2 A. I am.

3 Q. What's the difference between what you can
4 prescribe as a nurse practitioner versus what an actual
5 doctor or MD or DM?

6 A. In South Carolina, right now, about the only
7 difference is, is there are some restrictions on the
8 scheduled drugs. It's not that we can't prescribe them,
9 but there are some restrictions on how much or how often
10 we can prescribe them.

11 Q. And when you talk about "scheduled drug"
12 you're talking about --

13 A. -- it's mostly narcotics.

14 Q. How long have you actually been licensed as a
15 nurse practitioner?

16 A. I got licensed in 2002.

17 Q. So almost 20 years?

18 A. Yes, sir.

19 Q. Are you board certified in any area of nurse
20 practice?

21 A. I am. I'm board certified as a family nurse
22 practitioner.

23 Q. And where did you receive your education and
24 training to be a nurse practitioner?

25 A. I went to the Uniformed Services University of

1 Health Sciences, which is in Bethesda, Maryland. It's a
2 military -- it's a medical school there and they also
3 have a graduate school there, It's combined. And I went
4 to the School of Nursing, Graduate School of Nursing
5 there.

6 Q. How long were you actually in the Army?

7 A. How long?

8 Q. Yes. When did you start?

9 A. I enlisted in the Army in -- I can't remember
10 what month, 1983.

11 Q. What was your initial role -- what did you
12 join the Army to be?

13 A. I went in as a combat medic as an E-1,
14 Private.

15 Q. Where were you stationed throughout your
16 career in the Army?

17 A. I started out, after I went to basic training
18 in Fort Leonard Wood, I went to San Antonio for combat
19 medic training. I was then stationed at Fort Myer,
20 Virginia as a Presidential Escort in the 3rd US
21 Infantry. I was there for approximately three
22 and-a-half yeas.

23 Q. And you mentioned at some point you were
24 stationed at Fort Jackson?

25 A. I was. I got to Fort Jackson in 2002 after I

1 graduated from the Uniformed Services.

2 Q. During your tenure in the Army, did you
3 receive any other degrees or educational advancements?

4 A. I did. They offered me a 52-week program to
5 become a basic nurse and work in a hospital and stuff
6 like that; I went to that. About a year after I
7 graduated, they offered me a full scholarship to go to
8 any university I wanted to go to, to get my bachelors in
9 nursing; which now, I was going from enlisted to an
10 officer, and I did that. While I was at West Virginia,
11 I actually got two degrees. I got a BA degree in just
12 Liberal Arts because I had previous college and finished
13 my BS in '92.

14 Q. Was that through the Army GI Bill?

15 A. That was on an ROTC scholarship.

16 Q. Would you receive any masters degrees in the
17 Army?

18 A. I did. Under the GI Bill, I can't tell you
19 exactly when I started, but it was approximately 1997.
20 I started my MBA program and I completed it in July of
21 2000.

22 Q. And MBA, can you explain to the jury what --

23 A. -- masters of Business Administration.

24 Q. Was that specifically for health related
25 fields?

1 A. No. It's just a generalized business
2 administration. If you were to progress in the military
3 as an officer, you're required to have at least a
4 masters degree. I'd always been interested in business
5 and the management aspect of it was good. I did not
6 want to focus just for hospital administration or
7 nursing administration or anything like that. I wanted
8 to have a generalized understanding, because I dealt
9 with nonmedical people in the military and I figured at
10 some point in time, I'm going to look outside the
11 military. So I thought it would be beneficial.

12 Q. You mentioned, you, at some point, I think
13 after you got your bachelors, you became an officer in
14 the Army; is that right?

15 A. When I graduated in May of 1992, I was
16 commissioned a 2nd Lieutenant in the Army Reserve.

17 Q. What rank did you hold when you retired from
18 the Army?

19 A. Major.

20 Q. Tell me how you ended up in the Rock Hill,
21 Lancaster, South Carolina area?

22 A. I had previously lived in Columbia and I was
23 licensed in both New Mexico and in South Carolina. I
24 didn't see myself moving to New Mexico, so I came back
25 to South Carolina -- well, I started looking for jobs

1 and found a couple of opportunities in the Rock Hill
2 area.

3 Q. Where did you start to work when you returned
4 back to South Carolina?

5 A. My initial job was with Piedmont Medical
6 Center. I was contracted with the ER company that
7 provided the providers, the doctors, the nurse
8 practitioners, and the PA's, to cover the emergency room
9 at Ped.

10 Q. At some point did you end up working for
11 Springs Memorial Hospital here in Lancaster?

12 A. I did. They lost the contract about 9 months
13 after I moved here -- for that contract. And I started
14 working for "In-Care", which is just another contracting
15 company. They're more of a national company. So they
16 had the contract at Springs, McLeod, and Dillon, and a
17 couple others. So I started working through them. I
18 would work at Lancaster. They would send me over to
19 Dillon sometimes and Union, South Carolina.

20 Q. At some point during your assignment at
21 Springs Hospital, in the ER, did you come to meet Dr.
22 Christy Green?

23 A. I did.

24 Q. Tell the jury, how you came to meet Dr. Green?

25 A. I can't tell you any specifics. Dr. Green was

1 a pediatrician and working in the emergency room, would
2 see various patients and sometimes those patients would
3 need to be either admitted or evaluated by the
4 specialty, which it would go under whether cardiology,
5 orthopedics, general surgery, or pediatrics. She was
6 on-call. And if she was on-call that night, we would
7 call her and either discuss the case with her, have her
8 direct admit, or even her coming in and actually seeing
9 the patient.

10 Q. How much interaction did you have with
11 Dr. Green?

12 A. For the most part, it's just passing through
13 the emergency room and passing off the patient or
14 talking with the patient on the telephone and stuff like
15 that.

16 Q. At some point, did she suggest to you a job
17 opportunity at Morphis Pediatrics of Lancaster?

18 A. She did. There was an incident, I delivered a
19 baby in the -- I'm sorry. I delivered a baby in the
20 parking lot and we resuscitated and she came in.

21 Q. And did you, at some point, interview for a
22 position at Morphis Pediatrics of Lancaster?

23 A. I did.

24 Q. Do you recall who you interviewed with?

25 A. Sandra Tiner.

1 Q. Did you ever interview with Dr. Morphis --
2 Dr. Beth Morphis, when you first were thinking about
3 joining Morphis Pediatrics?

4 A. I know there were some emails between us. I'm
5 sure we probably talked on the telephone, but other than
6 that, that's all I can recall.

7 Q. Do you recall about when you started at
8 Morphis Pediatrics of Lancaster?

9 A. January 1, 2009.

10 Q. And when you started in 2009, what providers
11 either -- and when I use the term "providers" I'm
12 talking about doctors, nurse practitioners, or PA's.
13 What providers were actually working for Morphis
14 Pediatrics?

15 A. In Lancaster?

16 Q. Yes.

17 A. Dr. Christy Brown -- Dr. Christy Green, sorry.

18 Q. And what were your job responsibilities when
19 you started at Morphis Pediatrics of Lancaster?

20 A. When I started, I was just to see basically
21 the medical side of the pediatrics. Dr. Green was doing
22 more of the ADHD and some behavioral health and stuff
23 like that. I was just doing the generalized pediatrics,
24 the acute visits, the well visits, the physicals, those
25 kinds of things, immunizations.