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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

APPELLANTS' BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding Hess's causes of action were not barred by the three–year statute of limitations?

2. Did the trial court err in finding that the Hess's bonus was an enforceable contractual promise despite the fact that it was entirely discretionary?

3. Did the trial court err in finding the terms of the contract were not too indefinite or unclear to be enforced?

4. Did the trial court err in finding Dr. Morphis[1] was contractually obligated to minimize certain expenses so that Hess's bonus was unaffected?

5. Did the trial court err in finding that Hess could seek a higher bonus than that based on the net income "as determined by the Company accountant," despite the fact that the bonus agreement stated the bonus was to be paid on monies determined by the accountant?

5. Did the trial court err in finding that Dr. Morphis failed to give Hess the required seven–days notice of a change in his compensation and did the trial court err in finding that a notice failure

[1] "Dr. Morphis" refers to both Dr. Morphis and Morphis Pediatric Group of Lancaster PA unless otherwise indicated.

entitles an employee to full damages including the ability to set aside the change in compensation?

6. Did the trial court err in failing to remit Hess's damages because he made more money in 2016 and 2017 under the new 2015 agreement then he would have had the 2010 agreement continued in effect?

7. Did the trial court err in finding that Hess was entitled to a treble damage award and attorneys' fees despite the fact that Dr. Morphis had a bona fide reason for believing additional compensation was not due, despite the fact that there were legitimate legal defenses to payment of his claim, despite the fact that the jury did not award all the money Hess sought, and despite the fact that the trial court was applying a new theory under § 41-10-80?

8. Did the trial court err in awarding prejudgment interest despite the fact that Hess's claims were unliquidated?

STATEMENT OF THE CASE

Hess, who was an employee of Dr. Morphis, claimed he was underpaid bonuses allegedly promised pursuant to employment contracts. Hess asserted claims under the South Carolina Wage Payment Act, for breach of contract, and related torts. Hess also asserted claims against Defendants' accountant[2] for tortious action related to the alleged underpayment. This matter was tried before Judge DeAndrea Benjamin from January 26 through February 2, 2023. The jury returned a verdict against all defendants on all causes of action and on punitive images. Following this, with respect to Dr. Morphis and MPG, Hess elected to recover solely under Wage Payment Act. Defendants filed motions for judgment notwithstanding the verdict (JNOV)

[2] During pendency of the appeal, Hess settled with Defendants Alexander and Moore, Beauston, & Woodham, and they are not parties to the appeal.

and remitter. Plaintiff filed a motion for attorney fees and trebling under the Wage Payment Act as well as a motion to recover prejudgment interest. Defendants opposed these motions. Judge Benjamin denied the motions for JNOV and Remittitur on November 2, 2022, and granted the motions for fees, trebling, and interest, also on November 2, 2022. Defendants Morphis and MPG filed a motion on November 4, 2022 to correct under S.C. R. Civ. P. 59 on the grounds that some arguments regarding prejudgment interest had not been addressed. The court denied the motion on November 8, 2022. Defendants filed a notice of appeal on November 10, 2022. Plaintiff filed a cross-notice of appeal with regard to attorney's fees on December 5, 2022.

STANDARD OF REVIEW

All questions in this appeal are questions of law which did not require fact-finding and are, therefore, reviewed *de novo*. *See, e.g. Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). As to matters within the trial court's discretion, those are also questions of law because the trial court commits an abuse of discretion if its decision rests on an error of law. *See, e.g., Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008).

FACTUAL BACKGROUND

Morphis Pediatric Group (MPG) is a pediatric clinic located in Lancaster South Carolina. Dr. Morphis founded the Lancaster office as an off shoot of the pre-existing Hartsville office. (R.642, II.79 Lines 21-25, R.643, II.80 Lines 1-7).

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 Hartsville Pediatrics, which was owned by her father-in-law "J.O. Morphis," who was also a pediatrician. J.O. Morphis worked primarily out of Hartsville, which was a separate legal entity from

Lancaster. In 2002, Dr. Beth Morphis came up with the idea of opening a practice in Lancaster and she focused on that practice for a number of years. When J.O. Morphis retired, he sold both practices to Dr. Beth Morphis. (R. 698.2-698.3, II.161-162, Lines 23-4)(R.302, III.88 Lines 18-25),

MPG also employed nurse practitioners and, over the years, Morphis hired other physicians to work at MPG. Dr. Morphis gradually reduced the number of days she worked in Lancaster as a health provider and shifted most of her clinical time back to the Hartsville practice. (R.644, II.84 Lines 2-22)(R.644.2, II.86 Lines 1-8). She always, however, worked some time in Lancaster and frequently consulted with Hess on patient issues. (R.645, II.88 Lines 7-13). Dr. Morphis continued to oversee all administrative and management aspects of the Lancaster office.

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. Hess focused his activity almost entirely on patient care. Hess admitted that Dr. Morphis handled administrative matters such as recruiting physicians, negotiating physician agreements, arranging coverage for absences, negotiating contracts with the nearby hospital, did call at the hospital, and saw patients in Lancaster, (R.511, I.26, Lines 6-7)(R.519-520, I.34-35 Lines 22-25, 1-4)(R. 521, I.36, Lines 8-22); (R.558, I.73 Lines 21-22) (R.562, I.77 Lines 13-15) (R.684, II.129 Lines 18-24) (R.687, II.132 Lines 9-25). Hess, in contrast, had none of the responsibilities of a practice owner, he didn't participate in any of the founding of MPG, worked 9-5, had every other Friday off, was not responsible for the business risks, and his four weeks of vacation was guaranteed. (R.303, III.96 Lines 11-17) (R.305, III.100 Lines 25)(R.306, III.101 Lines 1-2) (R.319, III.126 Lines 1-25) (R.320, III.128 Lines 19-25) (R.321, III.129 Lines 1-15)

(R.912, Plaintiff's Ex. 18, 2015 Agreement).

In January 2010, Morphis offered Hess the opportunity to earn 50% of the profits of the Lancaster office. Hess had not asked for such an opportunity and was shocked "in a good way," that Dr. Morphis offered this. (R.507, I.22 Lines 4-10, R.508, I.23 Lines 19-23). Hess agreed to the employment contract (2010 Agreement) with MPG. (R.833, Plaintiff Ex. 1). Under the 2010 Agreement, Hess was paid a base salary of $100,000 and was "eligible" for an annual bonus. The bonus provisions are the basis for Hess's claims in this case. They are divided into two parts. The first part states:

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

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.

(Id.).

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

Hess testified that the Company Accountant was Greg Alexander. (R.566, I.81 Lines 17-23). Hess also agreed that the net income numbers shown on his own exhibit (See R.923, Exhibit 19 on next page) agreed with the income on the year-end financial statements[3] which had been

[3] The Company Accountant, Greg Alexander, confirmed in his testimony that his firm prepared the financial statements (R.875, Plaintiff Ex. 9) and that the net income numbers in those

determined by the Company Accountant (R.568, I.83, Lines 2-12) (R.569-571, I.84-86) and that he received at, or more than, 50% of the net income as determined by the Company Accountant.

However, Hess claims that MPG and Morphis and the Company Accountant improperly included, in MPG expenses, a salary for Dr. Morphis and Dr. Morphis' automobile expenses. These, he alleges, were improperly taken out before net profits (and therefore his bonus) was determined. Under Hess's theory of the case, he was entitled to a salary before net profit (the $100,000) but Dr. Morphis was not entitled to any compensation before net profit was determined. Dr. Morphis testified that, of course, she was entitled to take compensation before net profit (and bonuses) were determined. (*See, e.g.*, R.705.14, II.213, Lines 1-8) (R.705.15, II.214 Lines 14-21). Hess asserted at trial he was entitled to the following:[4]

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

(R.923, Plaintiff Ex. 19).[5]

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statements agree exactly with those in Plaintiff's Ex. 19. (R.739, II.296 Lines 21-25; R.740, II.297 Lines 1-4) (R.765, II.367 Lines 15-25)(R.766, II.368 Lines 1-15) (where he verified the same net income numbers he uses on his spreadsheet are the net income numbers he got from his records). Plaintiff's counsel also acknowledged these were the reported numbers in his closing arguments. (R.777.2, III.386 Lines 1-6).

[4] 2014 was the only year covered by the 2010 Agreement that Hess did not receive at least 50% of the net income for that year. This was due, according to Dr. Morphis, because she decided to do a capital expenditure set aside which is specifically permitted under appendix A of the Agreement. (R.704.4-704.5, II.180-181 Lines 22-25 and 1-5).

[5] The $180,000 and $330,000 Dr. Morphis received in 2011, she testified, was entirely due to a windfall reimbursement from the hospital to pay for after-hours calls and the salaries of

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

Because of Hess's repeated questions regarding the numbers, Dr. Morphis decided to propose a new employment agreement to Hess with a simplified bonus calculation that would result in bonuses comparable to Hess's past bonuses and be easier and faster to calculate. (R.705.7, II.195 Lines 6-25) As a result, Alexander determined that Hess's bonuses for the years 2010-2014 were comparable to 5% of gross revenues. (R.705.8-705.9, II.197-198, Lines 23-25, 1-25) (R.845, Plaintiff Ex. 4).

The meeting with Hess took place on May 28, 2015. At the meeting, Hess asked Alexander if the bonuses he received previously were equal to 50% of the net profits, to which Alexander responded he could not answer that because it would divulge Dr. Morphis's personal tax information. The meeting concluded and negotiations over Hess's new employment contract continued. After the meeting, Alexander prepared a spreadsheet analysis showing Hess's

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physicians whom Dr. Morphis recruited. (R.689-690, II.144-145, Lines 25 – 12) (R.698.7, II.167 Lines 7-25) (R.702-703, II.171-172, Lines 15-13).

previous bonuses (2010-14) were equal to an average of 5% in gross revenue as a bonus. (R.705.12, II.206 Lines 20-25; R.705.13, II.207 Lines 1-25).

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

In 2018, Dr. Morphis decided to try to sell MPG due to declining performance. (R.713, II.236 Lines 1-25; R.714, II.237 Lines 1-16) (R.716, II.239 Lines 22-25; R.717, II. 240 Lines 1-5). 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 invited 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. (R.546.547, I.61-62, Lines 1-25, 1-25) (R.719, II.242 Lines 8-25). In this disclosure, Dr. Morphis gave Hess access to all financial records including all expenses and her compensation out of Lancaster. (R.719, II.242 Lines 8-25). 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. (R.66, Complaint., p. 4).

On July 31, 2018, Dr. Morphis decided the offers were insufficient and she would see if she could turn things around. She therefore decided to terminate Hess's employment with Morphis Pediatric, and start again with new staff. (R.720, II.246 Lines 10-18). Hess filed the present action on September 27, 2018, against MPG, Dr. Morphis, Alexander, and MBW.

ARGUMENT

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); *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 v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996). 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 *Maher*, the court of appeals determined that 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, Those conversations showed that 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, Maher 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 Maher claimed he was never notified the program ended. *Id.* Between 1987 and Maher's termination in 1994, Maher had several 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. Hess was clearly on notice of his claim outside of the statute of limitations period. Hess testified that, at the time, he thought it was "pretty strange" his 2013 and 2014 bonuses were even numbers. (R.525, I.40 Lines 8-9). If it

were 50% of profits, he reasoned, the number should have come out to be a random number.

(Id.).

> Q. You mentioned that you thought it was odd that you get $48,000 even as a bonus, I believe that was in 2013?
>
> A. Two years in a row, correct.
>
> Q. Why did you find that amount to be odd?
>
> A. That means I would have had the exact same number of patients doing the exact same thing for two years in a row.
>
> Q. **So it caused you to question whether or not you were getting 50 percent of the net income?**
>
> **A. Correct.**

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

> Q. But you did have some access to financial information I think you said; right?
>
> A. I had access to APRIMA and every now and then I would get a very generalized monthly expenditure report.
>
> Q. And you testified something about, you couldn't understand why there wasn't more money?
>
> A. Correct.
>
> Q. And that was a concern you had somewhere in 2010 to 2014?
>
> A. Right. 'Cause it showed more money coming in and there wasn't enough going out to account for the lack of bonuses.

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

> A: . . . . We would rather be high on the expenditures than low on the expenditures, because that way it's a safer bet. And no matter how high we can estimate everything to be, there's -- the numbers just could never add up.
>
> Q. And that caused you to question in your mind whether or not you were getting the bonus?
>
> A. That caused a lot of things. We weren't giving the girls pay raises half the time.

Q. And your bonus was one of those things?

A. My bonus was one of those things.

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

Hess also testified at trial that he went to great lengths to calculate what the net profit was and his number came up bigger than what his bonus indicated it was. He had formed a belief that "things don't add up." (R.550, I.65 Line 15). He admitted that he had access to at least some financial reports and that he and the Lancaster Office Manager (Sandra Tyner) had access to the bank statements and would review the expenses. (R.550, I.65 Lines 17-18) (R.556-557, I.71-72 Lines 21-25 and 1-18). His efforts included re-creating income and expenses from the medical production software of MPG and going through expenses with Tyner. 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." (R.550, I.65, Lines 7-25). He testified he made these efforts because he doubted his bonus was correct and he didn't think his contract was being met. (R.550, I.65 Lines 21-25). When Hess spoke with Alexander in February 2015, and was informed of his 2014 bonus, Hess immediately questioned how his bonus could be the exact same as the previous year, questioned the numbers, and asked for a meeting with Alexander and Dr. Morphis to discuss the numbers. This meeting occurred on May 28, 2015 and Hess testified that he asked Alexander whether he had received as a bonus 50% of the profits in the past.

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

A. I did.

Q. What did you ask?

A. I asked him if I was getting 50 percent of the profits because even though my bonus

said that, I did not actually know if that is 50 percent of the profits. That was just a number that I was given. I specifically asked, "Am I getting 50 percent of the profits of the practice?"

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

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

Q. What was your response to that?

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

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

Q. And there was a meeting in May of 2015

. . .

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

A. That is correct.

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

A. That is correct. . . .

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

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

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

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

Q. Within a couple months at least?

A. Probably.

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

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

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

Hess was actually on notice of the main issue of Dr. Morphis taking a salary from MPG. He testified he was told by the MPG accountant that Dr. Morphis was receiving compensation from the practice.

> Q. Do you recall hearing something from Tom who gave you the idea that Dr. Morphis might be taking compensation out of the practice?
>
> A. Yes.

(R.587, I.110 Lines 1-9).

Hess also was aware Dr. Morphis was taking an automobile expense out of Lancaster. He saw it on bank statements that he obtained. (R.547-448, I.62-63, Lines 23-25, Lines 2-7).

Hess, therefore, had even more notice of his claims than did the plaintiff in *Maher*. Not only did Hess object to 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 higher. His claims, therefore, are barred by the applicable statutes of limitations.

The court denied JNOV on this argument, in part, 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.

The court also seemed to be ruling the statute should be tolled because Hess 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. . . . ("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).

Hess also argued, and the trial court agreed, that Dr. Morphis's failure to disclose full financial data to Hess constituted concealment warranting her being estopped from asserting the statute of limitations. However, although estoppel concepts do overlap with tolling, the touchstone is whether or not Hess knew or should have known he had a claim. This standard is framed by the proposition that it requires very little to start the clock. It is uncontested, as shown above, that Hess had formed such a belief. It does not matter that he did not have the full information he feels he needed. *See, e.g., Austin v. Conway Hosp., Inc.*, 292 S.C. 334, 356 S.E.2d

153 (Ct.App.1987) (statute of limitations began to run when plaintiff witnessed events at hospital leading to her husband's death, rather than when she later developed a full theory of recovery after receiving and reviewing the hospital's records); *Johnston v. Bowen*, 313 S.C. 61, 64–65, 437 S.E.2d 45, 47 (1993) ("The date of discovery is not when the plaintiff discovers a witness to support or prove his case."); *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996) ("the fact an injured party may not comprehend the full extent of the damage is immaterial"); *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001) (the discovery rule does not "require absolute certainty [that] a cause of action exists before the statute of limitations begins to run.").

It simply does not matter that Dr. Morphis refused to give Hess the full financial statements showing her compensation and automobile expense because Hess had already clearly formed the belief he was not being paid the correct bonus without this information. Once this is established, unless a defendant is taking an action to convince the plaintiff not to file (such as accepting financial responsibility) estoppel/tolling cannot apply. *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct.App.2001) ("for 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.").

To the extent the trial court used general elements of estoppel to depart from the standard of "knew or should have known," that was error. For example, even if there was some evidence of concealment of facts, if Hess had already formed, or should have formed, a belief he had a claim, that concealment would be irrelevant. Nevertheless, even under an examination of general estoppel elements, Defendants may not be estopped from asserting the statute of limitations.

General estoppel is:

> (1) conduct amounting to a false representation or concealment of material facts, or conduct calculated to convey the impression that the facts are otherwise than, and inconsistent with, the party's subsequent assertions; (2) intention or expectation that such conduct be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. As to the party claiming estoppel, the essential elements are: (1) lack of knowledge or the means of acquiring, with reasonable diligence, knowledge of the true facts; (2) reasonable reliance on the other party's conduct; and (3) a prejudicial change in position.

Provident Life & Acc. Ins. Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct. App. 1994); *Brading v. County of Georgetown*, 327 S.C. 107, 490 S.E.2d 4 (1997); *LaRosa v. Johnston*, 328 S.C. 293, 493 S.E.2d 100 (Ct.App.1997) (both cases also noting the additional requirement of prejudicial change of position). In addition, where, as in this case, the conduct amounts to a failure to disclose, there must be a duty to disclose. *See, e.g., S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993) ("Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts.") (citing other supporting cases).

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

Also, Hess did not rely on the alleged failure to disclose. As stated above, he repeatedly questioned his bonus, and believed he had not received the full bonus, even after the May meeting. If he never accepted that his bonus was proper, he cannot be said to have relied on any failure to disclose. A plaintiff cannot be said to have relied on a failure to disclose when it is clear the other party simply is not going to give the information sought. For example, it was noted in *Maher*, that it should have been apparent to Maher that the company was not going to pay the bonus he sought. *Maher v. Tietex Corp.*, 331 S.C. 371, 379, 500 S.E.2d 204, 208 (Ct. App. 1998) ("Maher's admitted dissatisfaction with this response is clear evidence that he knew, could have known, or should have known at that time that he might have a cause of action over the fifty percent bonus plan."). Similarly, in *Kreutner v. David*, the court held it was not reasonable reliance to support estoppel when the defendant failed to respond for over eighteen months to repeated requests for information. *Kreutner v. David*, 320 S.C. 283, 286, 465 S.E.2d 88, 90 (1995) ("In finding Kreutner should have discovered the deception by May 1986 at the latest, however, we rely not only on the state of the mortgage, but also on David's failure for over eighteen months to produce the mortgage despite repeated requests . . . .").

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

A Discretionary Bonus is Not an Enforceable Contractual Promise

As stated above, the Board of MPG[6] could use any "criteria" it wished to decide if Hess would receive a bonus or not. Even if he met the "criteria," he was only "eligible" for a bonus. Abundant caselaw makes clear that "eligible" is a discretionary word. Thus, his bonus was completely discretionary. Courts have uniformly held that a discretionary bonus is not a

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

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 JNOV verdict on this issue on the grounds that once the Board (Dr. Morphis) decided any bonus would be given, that bonus had to be under Appendix A. Even if that interpretation were correct. 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.

In any event, Appendix A is also written in discretionary language. It states that even if Hess met the criteria, he was only "eligible" for a bonus. This is a discretionary word. *ClearChoiceMD, PLLC v. Henriques, No.* 2020-0449, 2021 WL 4169616, at *2 (N.H. Sept. 14, 2021) ("it was also objectively reasonable for [the employer] to interpret 'eligible' to mean that it retained the discretion not to award a bonus."); *De Vries v. Regents of Univ. of California*, 6 Cal. App. 5th 574, 592, 211 Cal. Rptr. 3d 435, 447 (2016) ("Thus, the ordinary meaning of "eligibility" connotes qualification for a benefit, not entitlement to that benefit."); *Jefferson v. Univ. of Toledo*, 2012 Westlaw 4883203 (Ohio Ct. App. 2012) ("phrases "may be eligible" and "to be considered eligible" indicate the drafters' intent to condition remediation on the University's discretion."); *Haag v. AOT Energy Am. LLC*, 2022 WL 242750, at *4 (Tex. App. Jan. 27, 2022) ("The use of the terms eligible and discretionary in the contract conveys that AOT was not promising that Haag would absolutely receive an annual bonus."); *Lewis v. Vitol, S.A.,*

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

Finally, the formula itself gives Dr. Morphis huge discretion to deduct anything she wishes in making the bonus determination, including, for example, compensation for herself, or a capital reserve, as she did in 2014. (II.180-181 Lines 22-25 and 1-5).

Therefore, Dr. Morphis had complete discretion regarding the bonus and therefore an enforceable contract did not arise from it. The court erred in ruling otherwise.

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

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

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

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

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

Judge Rogers decision in *Amelia Salters* (adopted by Judge Hendricks) is particularly persuasive. He was evaluating a very similar bonus provision that stated: "The phone calls are picking up so this is our time to focus on reservations. Our efforts will be rewarded with a nice bonus in April. This is not a competition. We will all receive an equal bonus." Like the Hess bonus, the promise set forth no criteria to obtain the bonus. As such, as the above quotation makes clear, it fails to set forth proper terms for enforcement. *See also, Lessley v. Hardage*, 240 Kan. 72, 727 P.2d 440 (1986). (In order for a bonus agreement to be binding, it must be sufficiently definite as to its terms and requirements as to enable a court to determine what acts are to be performed and when performance is complete); *Pratt v. Seventy-One Hawthorne Place Associates, L.P.*, 106 S.W.3d 608 (Mo. Ct. App. W.D. 2003) (An agreement to pay a bonus of an indefinite amount is unenforceable); *Taylor v. CNA Corp.*, 782 F. Supp. 2d 182 (E.D. Va. 2010) (when a bonus is tied to vague, discretionary criteria, there can be no enforceable contractual obligation to provide such a bonus because a fact finder would have no standard to apply).

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 trial court denied JNOV on this argument on the basis that any ambiguity is construed against the drafter and the ordinary meanings of such words should apply. However, as with discretionary language, the rule on construing ambiguities only applies if it a matter of interpretation. In this case, the essential terms "criteria, expenditures, eligibility" had no definition or varying interpretations. Hess testified he had no understanding of any of these terms including “criteria,” “eligible,” “debts,” “expenditures,” or “expenses” (other than some of the terms’ general usage). (R.564-566, I.79-81). He further agreed that the Agreement did not define any of these terms. (R.505, I.20, Lines 6-9). (R.564, I.79 Line 23-24) (R.566, I.81 Lines 1-2). Morphis testified they gave her discretion. There was no, nor could there be, any evidence of their meaning. 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).

As to the notion that there could be an ordinary meaning for these terms, that conclusion is plainly incorrect. There is no ordinary meeting for “criteria,” “eligible,” “debts,” “expenditures,” “expenses.” Or even “profits.” Such terms could have wildly different meanings. As Judge Thomas noted in *Amelia Salters*, bonus “criteria” must be defined. *See also, Behrends v. White Acre Acquisitions*, LLC, 54 A.D.3d 700, 701, 865 N.Y.S.2d 227, 228–29 (2008) (“Here,

the formula for determining the sale price is not sufficiently definite to be enforceable . . . Several terms utilized in the contracts, such as, "stabilized," "gross annual income," and "expenses" are ambiguous.") (citing other caselaw).

For all the above reasons, the Agreement simply contains too many terms, individually and cumulatively, that are undefined, for it to be enforceable.

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

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. Hess testified that he agreed this was a stipulation of the Agreement and that the Company Accountant was Greg Alexander. (R.566, I.81 Lines 17-23). Hess also agreed that the net income numbers shown on his own exhibit (exhibit 19 infra) were those determined by the Company Accountant (R.568, I.83, Lines 2-12) (R.569-571, I.84-86) and that he received at, or more than, 50% the net income determined by the Company Accountant.[7] It is only by eliminating some of the expenses, that the Company Accountant determined, does Hess have a theory he is owed anything. Because the Agreement makes the accountant's determination the final word,[8] the jury should not have been permitted to recalculate profit by eliminating some expenses.

[7] As shown on Plaintiff's Exhibit 19 (R.924) (reproduced above in this brief) the total net income, as determined by the company accountant, over the years of the contract was $600,154 and Hess received $313,235 in bonuses, which is more than 50% of the net income.

[8] The Company Accountant, Greg Alexander, confirmed in his testimony that his firm prepared the financial statements (R.875, Plaintiff Ex. 9) and the net income numbers in those statements agree exactly with those in Plaintiff's Ex. 19. (R.739, II.296 Lines 21-25; R.740, II.297 Lines 1-4) (R.765, II.367 Lines 15-25)(R.766, II.368 Lines 1-15) (where he verified the same net income numbers he uses on his spreadsheet are the net income numbers he got from his records). Plaintiff's counsel also acknowledged these were the reported numbers in his closing arguments. (R.777.2, III.386 Lines 1-6).

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. He likewise agrees the Agreement says nothing restricting Dr. Morphis's ability to take compensation before net income is determined. (R.573, I.88 Lines 7-19).

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.").

In addition, while Hess challenged the allocation of the BMW and Dr. Morphis compensation to Lancaster, he refused to acknowledge expenses borne by the Hartsville office that could have been, but were not allocated to, Lancaster. The greatest of these was office manager Tom Henson's compensation. As Hess admitted, Henson performed work to support both the Hartsville and Lancaster office, yet none of his compensation was allocated to Lancaster. (R.585-586, I.108-109 Lines 3-25, 1-15). Henson testified he spent 25-30% of his time on Lancaster issues and none of his $42,000 salary was charged to Lancaster. (R.815, II.492 Lines 9-13)(R.821, II.498 Lines 8-12).

In its order denying JNOV regarding this argument, the court held only that the evidence conflicted as to how Dr. Morphis' compensation was described in testimony and evidence. The

court cited some inconsistent testimony about "profit," "bonus," "salary," and "compensation." The terms were used both by witnesses and in the documents to refer to the compensation that Dr. Morphis received. (R.705.10, II.204 Lines 1-10) (R.704.3, II.179 Lines 23-25) (R.705.10, II.204 Line 8) (R. 779, II.417 Lines 6-13). In fact, Hess's counsel himself, and Hess's witnesses, sometimes referred to her before-computation compensation as "salary." (R.633, II.51 Lines 6-14) (R.742, II.304 Lines 5-14). The court seemed to be reasoning that because there was evidence her compensation was not actually described as an expense, it was not properly classified as such. However, the question is how was it treated by the "Company Accountant" in his "determination" of "profit?" The accountant clearly included Dr. Morphis' compensation in the year-end termination of profit and loss shown at Plaintiff's Exhibit 9. It is irrelevant whether this money is called profit, bonus, fees, or how it is described. Regardless of description, it was treated as an expense of the Lancaster office.

A Plaintiff May Not Recover a Bonus on the Theory that the Employer Failed to Provide Notice. In any Event, Hess Got Prior Notice

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

First, the Act requires 7 days notice before the change "becomes effective." The 2015 bonus payment was not due until February 15, 2016. By that time, Hess was well aware of the change to 5% of revenue, had agreed to it in June, (R.723, II.268 Lines 15-23) (R.925, Def. Ex. 5) ("I agree") and had signed the contract in December. He therefore received well more than 7 days notice. (R.912, Plaintiff Ex. 18).

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

In its ruling on JNOV, the trial court cited evidence that, because the bonus may have been paid before February 15 (as early as December 31), the agreement became effective before 7 days had elapsed. However, the date of payment is irrelevant to the actual effective date and it is non-sensical to penalize the employer for paying the bonus before it was due.

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 JNOV on this argument on the basis that § 41–10–40 (medium of payment and withholding and diverting) mentions 41-10-30, and the remedy for a violation of § 41-10-40 includes, in § 41-10-80, full remedies. This is an incorrect construction. The mention of § 41-10-30 in § 41-10-40 concerns only wage deductions. This case does not involve wage deductions. 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.

The trial court's interpretation violates statutory construction precedent in South Carolina. If the legislature had intended to impose any consequences for violation of section 41-10-30 in addition to those imposed by section 41-10-80, it would have expressly provided for them, and there is no provision in the Act other than section 41-10-80 addressing the failure of an employer to comply with the notice requirement of section 41-10-30(A). *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) ("In interpreting a statute, the court will give words their plain and ordinary meaning[ ] and will not resort to forced construction that would limit or expand the statute."); *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (holding that a statute "must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect" *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011) (quoting *S.C. State Ports Auth. v. Jasper Cty*., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). ("We therefore should not concentrate on isolated phrases within the statute."); *id.* ("Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose."). Even if there were any ambiguity, it must be resolved by the canon "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*," which means "to express or include one thing implies the exclusion of another, or of the alternative." *State v. Leopard*, 349 S.C. 467, 472–73, 563 S.E.2d 342, 345 (Ct. App. 2002) (*quoting S.C. Dep't of Consumer Affairs v. Rent-A-Center, Inc.*, 345 S.C. 251, 256, 547 S.E.2d 881, 883–84 (Ct. App. 2001)); *see also Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 117, 580 S.E.2d 100, 109 (2003) ("We may apply ... rules of statutory construction when the meaning of the act is ambiguous."). This canon dictates that the only consequences the legislature intended to impose for a violation was a fine by the Department of Labor.

In addition, it is uncontested that, in total, Hess received more money under the 2015 Agreement than he would have under the 2010 Agreement. Therefore, there was no prejudice. There can be no complaint under the act when there was no prejudice. *Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul.*, 337 S.C. 476, 486, 523 S.E.2d 795, 800 (Ct. App. 1999) (no violation of wage payment act notice provision found where employee received more than the wage she was promised).

The trial court also reasoned that the notice violation alleged in *Barton* related to a change in the plaintiffs' original terms of employment whereas Hess was complaining about a change in his bonus formula. This, however, is a distinction without any meaning. The question is whether appropriate notice of the change was made or not. Whether it had to do with an original term of employment or a term of employment that was imposed later, is of no moment.

Even if the Court was Correct in Refusing to Direct a Verdict, It Erred in Not Remitting the Verdict by the Amounts Hess Benefited Under the 2015 Agreement

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. In 2015, his bonus was less than it would have been under the 2010 Agreement so he wants to avoid its effect in 2015 but he wants to keep the beneficial 2016 and 2017 bonuses.

Hess should not be permitted to benefit from a claim that sets aside the 2015 Agreement in 2015, but yet retains 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.

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).

> 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.

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.

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

> 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).

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, which Hess admitted, was that Hess earned $91,563.51 more in 2016 and 2017 than he would have under the 2010 Agreement.[9] (I.129 Lines 12-25 and I.130 Lines 1-25).

[9] Plaintiff admitted his 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 16956.62 plus 50,992.44 is (91,563.51) (R.596, I.122 Line 15-

The court denied remitter on the grounds that Morphis had not asserted this argument as a counterclaim and because Hess elected to proceed solely under the Wage Payment Act. The court cited no case law in support of this reasoning. As the above indicates, the basis of the motion goes to both tort and contract claims. It is not in the nature of a counterclaim but rather a principal of law. As to Hess' election of remedy, his Wage Payment claim entitlement rests entirely on a contractual right. Without a contractual right to a bonus, he has no Wage Payment Act claim. Therefore, the principles apply and the award should have been remitted.

Trebling and Fees Should Not Have Been Awarded

The South Carolina Payment of Wages Act provides that when an employer fails to pay wages, an employee may recover "an amount equal to three times the full amount of the unpaid wages, plus costs, and reasonable attorney's fees as the court may allow." S.C. Code Ann. § 41–10–80(C). 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 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,

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25)(R.597, I.123 Lines 1-25) (R.600, I.129 Lines 1-25) (R.601, I.130 Lines 1-11) (R.932, Defendant Ex. 4 Interrogatory Answers).

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;[10] (2) Trebling and a fee award is discretionary and may not be awarded if there was a "bona fide dispute."[11] (3) The judge determines the award in her discretion; (4) The judge finds her own facts independent of anything the jury did.[12] (5) It is error to award trebling and fees based on the jury verdict; and (6) A close question of law or fact establishes a bona fide dispute.[13]

As stated, there are ten published South Carolina Appellate court cases dealing with treble damages and fees and the bona fide dispute. 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 *Ross* court found it was 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:

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[10] *Rice v. Multimedia, Inc.*, 318 S.C. 95, 99, 456 S.E.2d 381, 383 (1995)
[11] *Id.*
[12] *Morin v. Innegrity, LLC*, 424 S.C. 559, 574, 819 S.E.2d 131, 139 (Ct. App. 2018)
[13] *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)

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).

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).[14]

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

[14] Trebling was allowed on a small portion of the award for vacation pay because Morin offered no good faith reason at all regarding vacation pay.

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

> 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. She thought she was absolutely entitled to compensation before bonuses were calculated. 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 and discretionary, 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.[15]

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
			150992	
2017		86153		50992
Total		1143727.68	1221754.89	421,754.89

[15] See R.923-924, Plaintiff Ex. 19, 20 Analysis of Financial Declaration.

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.

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). As stated above, this court rejected *Barton* and created a previously-unknown standard. 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).

The trial court granted the motion to treble and for fees on several grounds. One of these was clearly improper. The court specifically noted that the jury's award, including punitive damages "weigh heavily against any argument by Morphis defendants that there was no bona fide dispute about the wages do or any good faith basis not paying the bonus money due to plaintiff in a timely manner." As explained above, any reliance on the jury's verdict is, by itself,

grounds to reverse the award, much less a belief that the jury's award "weighs heavily" with the court. Because the trial court improperly relied on the jury's decision to decision, the award must be reversed. *Morin v. Innegrity, LLC*, 424 S.C. 559, 574, 819 S.E.2d 131, 139 (Ct. App. 2018) (reversed because judge relied on jury verdict to justify trebling award "finding that an employee is entitled to recover unpaid wages [by jury] is not equivalent to a finding that there existed no bona fide dispute as to the employee's entitlement to those wages."). *O'Neal v. Intermedical Hosp. of S.C.*, 355 S.C. 499, 509, 585 S.E.2d 526, 532 (Ct. App. 2003) ("to the extent the trial court found the jury's verdict was equivalent to a finding that no bona fide dispute existed, such finding was erroneous.").

Further, 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. The court therefore should not have weighed the award at all in deciding there was not a bona fide dispute.

> MR. ROTHSTEIN: Ability to pay, you know, Mr. Thompson's right, we could have brought in new evidence here. We could have brought in evidence about the vacation homes and rental properties and commercial properties of things that she had. But we didn't do that. I have more respect for your time than that. We could've had a whole second trial on her ability to pay punitive damages, but you already have enough information here. You have the tax returns for –
>
> MR. THOMPSON: Your Honor -- Your Honor, I object. May we approach?
>
> THE COURT: Yes.
>
> (Whereupon, a bench conference was held off the record)
>
> THE COURT: Objection is sustained.
>
> MR. ROTHSTEIN: We don't new evidence of net worth, ladies and gentlemen. You've heard the testimony about the type of income she received, not just from Hartsville ---
>
> MR. THOMPSON: Your Honor, and he rolled through your [ruling] sustained ---

> THE COURT: Hold on! Hold on! Hold on! Hold on! Objection is sustained.

(R.484, III.551 Lines 5-25).

The court later attempted a curative instruction.[16]

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

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

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

Second, the court held that whether Morphis had a reasonable belief must be viewed only at the time payment was denied. This view is incorrect. It perhaps is true as to some issues, as in *Mathis* where the employer reduced the employee's pay and had no contemporaneous bona fide reason for doing so. But it clearly cannot be true as to all bona fide reasons. As demonstrated in *Futch, infra*, a legal defense can establish a bona fide dispute. The issue of law making the dispute bona fide cannot have arisen at the time of the pay decision. Also, as noted above, in *Rice* and *Morin*, the court specifically noted that the Legislature absolutely did not want to deter an

[16] The transcript inaccurately attributes the request for the curative instruction to Mr. Mackelcan (counsel for Alexander). The request was from Mr. Thompson, counsel for Dr. Morphis. The transcript is clearly incorrect on this point because the instruction refers to an objection raised during Mr. Rothstein's rebuttal and Mr. Thompson was the only attorney to make an objection during this rebuttal.

employer from **"litigating"** by imposing a penalty for doing so in good faith and that the defense extended to a "question of law . . ."

> there are some wage disputes when the issue may involve a valid close question of law or fact which should properly be decided by the courts. We do not believe the legislature intended to deter the **litigation** of reasonable good faith wage disputes; we do believe the legislature intended to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute.

Rice v. Multimedia, Inc., 318 S.C. 95, 99, 456 S.E.2d 381, 383 (1995) (quoting *Apache East, Inc. v. Wiegand*, 119 Ariz. 308, 580 P.2d 769 (Ct.App.1978)) (emphasis added). Therefore, the defense is clearly not restricted to what an employer had in mind at the time it did not pay. It includes litigation which necessarily means legal issues arising in the course of such litigation. To rule otherwise would be to punish employers who seek counsel when claims are made, are advised that they have strong legal defenses, and therefore choose to litigate the matter.

In any event, Morphis did have bona fide reasons for the bonuses she paid Hess. She clearly believed she had discretion, that Hess was getting 50% of the profits, in fact more than 50%, and that she had the right to take compensation before net income was determined.

The trial court discussed several categories of evidence as indications of what Dr. Morphis had in mind at the time of payment. Presumably, the court felt this indicated she did not have a bona fide dispute in mind at the time bonuses were paid. The court first examined Dr. Morphis' hand-written bonus calculations. The reason for the court's reliance on this as a significant act is unclear. It is uncontested that these were done before the final end-of year numbers were available. They, in fact, support Dr. Morphis' belief that she had complete discretion as to the bonus amount and, in any event, represent a good-faith attempt to pay Hess sooner rather than delay the arrival of final numbers. Morphis consistently testified that she had discretion and, as stated above, that is what the Agreement states. (R.655, II.98 Lines 1-2) (R.311, III.106 Lines 9-21) (R.312, III.107 Lines 16-20) (R.322, III.132 Lines 11-13). Therefore,

the calculation of bonuses before the numbers were available does not indicate Dr. Morphis acted in bad faith. In any event, what matters is whether or not he was paid 50% of the profit compared to the income determined by the company accountant. As is explained above, he clearly was. Second, the trial court cited an email in which it is mentioned that Dr. Morphis's husband and sister expressed incredulity over the amount of the bonus Dr. Morphis was paying Hess in 2010. First, it would be inappropriate to view their objection as evidence of Dr. Morphis's motive. Their statements also amount to double hearsay. Further, Dr. Morphis paid Hess $75,000 that year which was more than 50% of the profits thus refuting the notion that anything they said had an effect on her. Third, the trial court considered an email dated May 27, 2015, however, nowhere in that email does Dr. Morphis indicate that she was calculating the bonus in a manner inconsistent with the Agreement. The court quotes Dr. Morphis' statements about dividing profit in two and that, at one point, a royalty was built in to compensate her. It is unclear why the trial court thinks this email indicates Dr. Morphis knew she did not have a good-faith belief the bonuses were appropriate. (R.840, Plaintiff Ex. 2). Her statements are entirely consistent with her testimony concerning discretion and how the bonus might be calculated under the Agreement. Nowhere in the email is there even a suggestion that Dr. Morphis felt she was paying Hess inconsistently with the Agreement. Fourth, the trial court next cited Dr. Morphis's refusal to provide complete financial records to Hess. However, as explained above, she had no duty to do so and, in any event, Hess was paid 50% of the bonuses compared to the year-end profit and loss statements. Fourth and finally, the court cited testimony of Dr. Morphis which the court felt was an admission by Dr. Morphis that if Hess had seen the full financial statements he would've realized she was not giving him 50% of the profits.

> Q And it would show your payments that you took out of the profit, I mean, out of the business that you hadn't told Mr. Hess about, right?

A I didn't need to tell Mr. Hess about that.

Q Okay. But if you had shown [sic] on the financials, it would have shown that?

A Yes, it would have seen -- he would have seen everything if I'd shown him the financials.

Q: and he would have known if he looked at the financials that you weren't holding up your end of the deal about paying him half of the profits of Lancaster, right?

MR. THOMPSON: I object, Your Honor.

. . .

A: And I said no, I disagree because he's too smart. He has an MBA; he's told me that multiple times. And he would understand the numbers if I had shown him those numbers.

(R.705.6, II.193 Lines 12-25) (R.705.6.2, II.194 Lines 1-25).

This, however, is a misreading of the testimony in answer to counsel's confusing compound question. She said "no." The rest of her answer was only acknowledging that if she had shown Hess the financial statements, Hess would indeed see her compensation and the automobile expense and he would understand the financials. She did not concede that she understood she was paying him incorrectly. Dr. Morphis was quite clear in her testimony (when asked the question clearly) that she regarded her compensation and automobile expenses to be proper deductions from net income. (R.674, II.119 Lines 16-18)("the 65[000] that was calculated for my compensation was for the work I had done that year at the office); (R.675, II.120 Lines 14-15) (". . . I could take compensation for the work that I had done and that was my earnings."); (R,678, II.123 Lines 1-3, 23) ("well, it wasn't a bonus. . . . I took a modest salary of $65,000 . . .); (R.705.16, II.214 Lines 19-21) ("I built this and I worked hard for it, and I think I'm entitled to compensation for that.")

Q All right. So it was your intention that your sole compensation from Lancaster would have been half of the bonus that you paid to Mr. Hess; isn't that correct?

A No, sir. I assumed that my compensation would not be a monthly salary because I knew that I would get questions from David. I assumed that we would take my compensation towards the end of the year when I could see that there were profits or that there were other income that I could get paid by.

(R.705.10, II.204 Lines 1-11).

Q: So what Mr. Alexander did was take the . . . net income number that was shown on the spreadsheet, added back your doctor bonuses and came up with, really, **the true profit number** of Lancaster. You take out your bonus, that shows how much profit Lancaster earned before you took anything out of the company; isn't that right?

A **No, sir. I -- that is my compensation**.

(R.715.14, II.212 Lines 17-25) (emphasis added).

Q What you did was, you took it upon yourself to reduce Mr. Hess' bonus and take the extra money for yourself; isn't that right?

A No, sir.

(R.698, II.153 Lines 2-6)

A And so when I realized all these contracts were gonna add up some to money, I was proud and I said let's put this separate and **so that would be my compensation**. I did the work. I recruited the physicians. I managed the contracts. I worked with the hospital, negotiated it, and took some of the call and covered the patients when they needed to be covered, I mean, the doctors when they need to be covered so.

(R.698.7-699, II.167-168 Lines 20-25 and 1-4) (emphasis added).

Q So basically, by running your car through the Lancaster practice, you're making Mr. Hess subsidize half of your lease payments of your car; isn't that right?

A No, sir. I have every right to run my vehicle through the office, and he was always paid 50-percent.

Q And why didn't you tell David Hess that you were running the BMW through the business?

A I didn't need to. I didn't have to have his permission to do that. With all due respect, sir, he was a nurse practitioner that worked with me and who I very much appreciated; but I didn't need to ask him about that or tell him about that.

(R.704.2-704.2.2, II.176-77 Lines 16-25 and Lines 1-4).

It is clear, therefore, that the testimony cited by the court was not an admission that Dr. Morphis believed her compensation and automobile expense violated her promise to pay Hess 50% of the profits.

For all of the above reasons, Dr. Morphis clearly had a bona fide dispute and, therefore, an award of traveling and attorney's fees was improper.

PREJUDGMENT INTEREST[17]

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).

[17] In its order of November 2, 2022, the trial court awarded prejudgment interest, however, the court did not address Dr. Morphis' objections and arguments in opposition to the award. Defendant therefore filed a rule 59(e) motion. This was denied via a form order on November 8, 2022. The form order did not specifically address the arguments either. Defendant was not required to file a second 59(e) motion. *See, e.g., Pye v. Est. of Fox,* 369 S.C. 555, 565, 633 S.E.2d 505, 509 (2006) (citing multiple cases) (overruled on other grounds by *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021)) ("Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised.")

A clear example of a liquidated amount would be a supplier suing over a specific unpaid invoice. It is true that an amount is liquidated if it is "capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties." *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 370, 656 S.E.2d 765, 769 (Ct. App. 2007). However, the "calculation" cannot be anything more than a "simple mathematical calculation." *Builders Transp., Inc. v. S.C. Prop. & Cas. Ins. Guar. Assoc.*, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct.App.1992); *Sundown Operating Co. v. Intedge Indus., Inc.*, No. 2007-UP-091, 2007 WL 8325994, at *3 (S.C. Ct. App. Feb. 23, 2007) (same); *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 207, 600 S.E.2d 105, 110 (Ct. App. 2004). In this case, of course, Hess' theory of recovery required the assumption of obligations not set forth in the Agreement. It required the removal of expenses that were 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 above, there were many terms in the contract that were unclear. Even Hess and his attorney admitted this. Since uncertainty was involved, prejudgment interest should have been denied.

CONCLUSION

For all the foregoing reasons, the verdict in this matter should be reversed. If it is not reversed as to actual damages, remitter should be awarded, and the trebling damages and fee award should be reversed, and prejudgment interest should be denied.

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