

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2018-CP-29-01127
Appellate Case No. 2022-001589

Paul David Hess, APRN-BC,..... Respondent-Appellant

v.

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

Of whom Morphis Pediatric Group of Lancaster, P.A. and
Elizabeth J. Morphis, M.D. are. Appellants-Respondents

FINAL BRIEF OF RESPONDENT-APPELLANT ON CROSS APPEAL

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STATEMENT OF ISSUE ON CROSS APPEAL

(1) Did the Circuit Judge err in reducing Respondent’s attorney’s fee award sua sponte, where during the hearing on Respondent’s Petition for Attorney’s Fees and Costs, Appellants’ counsel expressly waived any arguments regarding the reasonableness of hourly rate sought by Respondent’s counsel and where the order awarding attorney’s fees and costs did not contain any explanation for the reduced award?

STATEMENT OF THE CASE

This is a cross-appeal from an award of attorney’s fees by the Circuit Court under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-80(C), following jury verdicts in favor of Respondent-Appellant, Paul David Hess, APRN-BC (hereinafter “Plaintiff” or “Mr. Hess”), in Lancaster County following a six-day trial. Plaintiff received jury verdicts in his favor on February 1, 2022, in the total amount of \$548,290.42 on all of the causes of action he raised in his complaint, which included breach of contract, breach of contract accompanied by a fraudulent act, violation of the South Carolina Payment of Wages Act, fraud, and negligent misrepresentation against Appellants-Respondents, Morphis Pediatric Group of Lancaster, P.A. and Elizabeth J. Morphis, M.D. (hereinafter “Morphis Defendants”).¹ After additional closing arguments and jury instructions on punitive damages during the bifurcated portion of the trial, the jury returned a verdict of \$475,000

¹The complaint also included claims for fraud, negligent misrepresentation, and tortious interference with contract against Defendants Gregory M. Alexander, CPA, and Moore Beauston and Woodham, LLP (hereinafter “Accounting Defendants”). The Accounting Defendants provided accounting service to the Morphis Defendants throughout the relevant period covered by the complaint. The jury awarded a verdict in favor of Mr. Hess, including punitive damages, against the Accounting Defendants on some of the causes of action for one of the years in dispute. The Accounting Defendants reached a settlement with Mr. Hess while the post-trial motions were pending.

in punitive damages against the Morphis Defendants on February 2, 2022, based on the causes of action for breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation.

Plaintiff filed an Election of Remedies on February 3, 2022, electing to pursue his full remedies under the South Carolina Payment of Wages Act, including treble damages and attorney's fees and costs, for all years in question (2010-2015), and to forego the jury's verdict on punitive damages. On February 14, 2022, Plaintiff filed a Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest.

On November 2, 2022, the Circuit Court entered an order denying the Morphis Defendants' Motion for JNOV and Motion for Remittitur. Also on November 2, 2022, the Court entered an order granting Plaintiff's Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest.

The Morphis Defendants served their Notice of Appeal on November 9, 2022. Plaintiff Hess served his Notice of Cross Appeal on December 2, 2022.

FACTS

Respondent-Appellant will include a more detailed statement of facts of the underlying case in his responsive brief to Appellants' main appeal. For purposes of the cross-appeal, the facts regarding the award of attorney's fees under the South Carolina Payment of Wages Act are fairly straightforward.

This is essentially a claim for wage theft. Mr. Hess is a nurse practitioner and was employed in a pediatrics practice owned and operated by Defendant Morphis in Lancaster, South Carolina. Pursuant to a written employment agreement starting January 1, 2010, Mr. Hess was promised an

annual base salary, plus a bonus based on 50% of the Lancaster practice's net profits. (Employment Agreement, and Appendix A) (R. 835, 839). Plaintiff received bonuses at the end of each year from 2010 to 2014, although he was never given any details about how his bonus was calculated and was denied access to the financial records of the practice whenever he raised questions about the profitability of the practice. In 2014, no bonus was included in Plaintiff's W-2 for that year. When he questioned Dr. Morphis about the omission, she said that she was late in getting the information to the accountant, which caused the bonus to be paid in early 2015 instead of by December 31, 2014. When the 2014 bonus was identical to the bonus Plaintiff received in 2013, he asked the practice's accountant about the coincidence, and the accountant told him that the practice had switched from a C-Corp to an S-Corp in 2014, and that Dr. Morphis did not think it was fair to Mr. Hess to burden him with the additional legal and accounting expenses from the conversion, so they decided to leave the bonus the same as it had been the prior year.

The Morphis Defendants attempted to change Plaintiff's employment contract on December 30, 2015, purporting to be retroactive as of March 1 2015, which would have changed the bonus calculation from 50% of the net profits to 5% of gross receipts of the Lancaster Practice. (2015 Employment Agreement, and Exhibit A thereto) (R. 916, 922).

Only in the summer of 2018, when Dr. Morphis announced that she had decided to sell the Lancaster practice, was Mr. Hess finally able to see the accounting records for the practice. Mr. Hess and one of the other providers in Lancaster decided to make a bid to purchase the Lancaster practice, so they were able to obtain the prior five full years of accounting records for the practice as part of the due diligence process. As soon as Mr. Hess saw the accounting records going back to 2014, he knew that he had not been paid properly according to his contract and that he was misled into signing

the 2015 contract at the end of December 2015.

Mr. Hess brought this lawsuit on September 27, 2018, approximately two months after Dr. Morphis rejected his and the other provider's offer to purchase the practice and immediately terminated their employment without cause.

After the jury returned a substantial verdict in his favor on all causes of action, Respondent-Appellant elected his remedies under the South Carolina Payment of Wages Act and timely filed a motion for post-trial remedies, including an award of attorney's fee and costs under the Wage Payment Statute and Rule 54(d), SCRPC. In support of the motion for attorney's fees and costs, the undersigned counsel for Respondent-Appellant submitted a detailed Affidavit in support of the Petition for Attorney's Fees and Costs setting forth his education, experience, and other credentials and summarizing the amount of time he spent on the case through the date of the fee petition. (Rothstein Aff.) (R. 97-101). In addition, Respondent-Appellant submitted an Affidavit from attorney M. Malissa Burnette, who is a Certified Specialist in Employment and Labor Law in Columbia, to corroborate the reasonableness of the fees and the customary going rate for experienced employment attorneys in South Carolina. (Burnette Aff.) (R. 103-106). The Morphis Defendants did not submit any factual material in opposition to the motion for attorney's fees and costs or to counter affidavits submitted by Respondent-Appellant.

ARGUMENT ON CROSS APPEAL

1. THE CIRCUIT COURT ERRED IN REDUCING RESPONDENT'S ATTORNEY FEE AWARD SUA SPONTE, WHERE APPELLANTS EXPRESSLY WAIVED ANY CHALLENGE TO THE REASONABLENESS OF THE HOURLY RATE IN RESPONDENT'S ATTORNEY'S FEE PETITION AND WHERE THE COURT DID NOT INCLUDE ANY EXPLANATION FOR THE REDUCED FEE AWARD.

The civil remedies section of the South Carolina Payment of Wages Act provides, in relevant part, “In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney’s fees as the court may allow.” S.C. Code Ann. 41-10-80(C). In Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995), the South Carolina Supreme Court recognized that an award of attorney’s fees, like the statutory award of treble damages, under Section 41-10-80(C) “is discretionary with the trial court.” Id. at 99, 456 S.E.2d at 383. It is well established under South Carolina law that “[t]he decision to award or deny attorneys’ fees and costs will not be disturbed on appeal absent an abuse of discretion.” Maybank v. BB&T Corp., 416 S.C. 541, 579–80, 787 S.E.2d 498, 518 (2016). The South Carolina Supreme Court in Maybank recognized that ““An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.”” Id. at 580, 787 S.E.2d at 518 (quoting Kiriakides v. School Dist. of Greenville Cty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009)). A reduction of the hourly rate must be made on “a sound evidentiary record and [must be] adequately explained with specific findings.” Horton v. Jasper Co. School Dist., 423 S.C. 325, 331, 815 S.E.2d 442, 445 (2018).

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

Respondent-Appellant’s counsel submitted evidence to the Circuit Court about each of the

Jackson v. Speed factors and requested an award of attorney's fees based on a rate of \$450.00 per hour, which was a modest increase of \$50.00 above Plaintiff's counsel's regular hourly rate of \$400.00 per hour. Because of the hybrid contingency nature of counsel's fee arrangement with Mr. Hess and the inherent risks in taking a case partially on a contingency bases, as provided for in the fourth factor from Jackson v. Speed, the undersigned counsel reasonably anticipated receiving a higher return on his time if the case were successful. (Rothstein Aff., at 4, ¶ 17) (R. 100); (see also Burnette Aff., at 3, ¶ 10) (R. 105).

Mr. Hess's attorney fee agreement with the undersigned counsel is a hybrid contingency agreement, with an hourly portion at a substantially reduced rate of \$125.00 per hour, plus a reduced contingency percentage of 25% of the amount of any recovery. The undersigned counsel agreed to discount his regular rate for employment cases of \$400.00 per hour to the lower amount in exchange for also taking a percentage of any recovery obtained on behalf of Mr. Hess. (Rothstein Aff., at 4, ¶ 15) (R. 100). As the undersigned counsel testified in his Affidavit, whenever he takes a case on a contingency basis, he expects to receive a premium above his hourly regular rate because of the additional risk involved in taking such cases, which should produce an additional reward if successful. (Rothstein Aff., at 4, ¶ 17) (R. 100).

Importantly, counsel for Appellants-Respondents did not contest the reasonableness of the fee request based on the requested rate of \$450.00 per hour. In fact, during the hearing on the post-trial motions, Appellants-Respondents' counsel expressly stated, "We do not dispute the rate." (Hearing Tr., at 28, ll. 7-8) (R. 236). The only thing Appellants-Respondents questioned was summary nature in which the total amount of hours was presented in the Affidavit. On rebuttal, the undersigned made the following argument to the court:

[Defendants' counsel] hasn't attacked the reasonableness of my fee request, he's just saying, well, I have no way to judge whether that's reasonable or not when he can look at his own time records and see how much he's billed [Defendants] and compare it to how much time I've recorded in the case and see if it's reasonable or not. He hasn't done that.

And, again, your Honor, if you have any question about any of [my time], I'm happy to give you my entire Clio file [(law-office management software that includes time-keeping and billing functions)]. Your Honor, it's very detailed. It goes through every day, how much time I spent on each task, how many hours it was as a contemporaneous time record. And I'm happy to make those available.

But I've sworn an affidavit under – you know, as an officer of the court, this is what the time records show. I believe they're reasonable. I submitted an affidavit [from a colleague] who is a well-regarded employment attorney in Columbia who is familiar with these types of cases and how much time it takes to bring all these cases to trial.

(Hearing Tr., at 34, l. 9 to 35, l. 4) (R. 242-243). After the hearing, and at the request of the Circuit Judge, on June 1, 2022, the undersigned submitted all of his invoices to Mr. Hess generated by Clio to the court for in camera review, with a copy to counsel for Appellants-Respondents. (Email from D. Rothstein to Judge Benjamin, 6/1/2022) (R. 109-152). On June 2, 2022, counsel for Appellants-Respondents sent an email to Judge Benjamin stating, in relevant part, "I agree that Mr. Rothstein has now appropriately substantiated his time on the case. The lack of detail was my only objection regarding the technical requirements for his petition for fees. Of course, no fees are awarded if you agree there was a bona fide good faith dispute." (Email from C. Thompson to Judge Benjamin, 6/2/22) (emphasis added) (R. 108).

Despite two separate instances where Appellants-Respondents' counsel expressly waived any objection to the requested rate of \$450.00 per hour for attorney's fees, the Court sua sponte reduced

the hourly rate for the fee calculation from \$450.00 to \$300.00 per hour, without providing any reasoning. (Order at 12) (R. 36). This was a reduction of 33.33% below the requested rate, and 25% below counsel's regular rate of \$400.00 per hour. The Court's order does not contain any explanation for the reduction, and there is nothing in the record that would support the reduction, which constitutes an abuse of discretion. See Horton, 423 S.C. at 331-32, 815 S.E.2d at 445 (holding that circuit court abused its discretion by reducing fee award to \$100.00 per hour, instead of \$295 and \$250 per hour as requested by successful plaintiff in FOIA action, without providing any explanation for its decision and without making any findings under the fourth factor—contingency of compensation).

The only portions of the Order where the Court discusses the decision to award attorney's fees at \$300.00 per hour are in connection with the fourth and sixth factors from Jackson v. Speed (contingency of compensation and customary legal fees for similar service, respectively). (Order at 12-13) (R. 36-37). Unfortunately, neither section of the Order contains any rationale at all for the decision to reduce the amount of the fee request to \$300.00 per hour. With respect to the contingency factor, the Court incorrectly used the reduced hybrid rate of \$125.00 per hour, rather than Plaintiff's counsel's regular hourly rate of \$400.00 per hour, as the starting point for her enhancement of the hourly rate. (Order at 12) (R. 36). The fact that the case was handled on a contingency basis should have increased the award of hourly fees over Plaintiff's counsel's regular hourly rate, not decreased it.

With respect to the customary fees portion of the analysis, the Court referred to several cases cited by Plaintiff's counsel where courts approved fee awards to the undersigned based on \$350.00 per hour, (Order at 12-13) (R. 36-37); however, the attorneys' fee awards in those cases were from

eight to over ten years old by the time of the Court's order here. There was no evidence in the record to support a fee award based on a rate of \$300.00 per hour, which was substantially less than Plaintiff's counsel's regular hourly rate and even lower than the hourly rate used in fee awards that were made more than a decade ago.

The net effect of the Court's unilaterally cutting the hourly rate used to calculate the award by \$150 per hour was to reduce the total fee award by \$77,025.00 (513.5 hours @ \$150.00 per hour). With all due respect, this was an abuse of discretion, which this Court should reverse and recalculate the fees for the trial and this appeal based on \$450.00 per hour as requested by Plaintiff's counsel.

CONCLUSION

For all of the foregoing reasons, Respondent-Appellant respectfully requests that this Court increase the attorney's fee award for the trial in this case based on a hourly rate of \$450.00, instead of \$300.00, which would bring the total award of attorneys' fees and costs to \$220,972.50. In addition, any further attorney's fee awards in connection with a successful appeal of this matter should also be awarded at the rate of \$450.00 per hour.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent-Appellant on Cross Appeal complies with Rule 211(b), SCACR.

September 18, 2023

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent-Appellant on Cross Appeal on Appellants-Respondents, Morphis Pediatric Group of Lancaster, PA and Elizabeth J. Morphis, M.D., by email and by depositing a copy of the same in the United States Mail, postage prepaid, on September 18, 2023, addressed to their attorney of record, Charles F. Thompson, Jr. (thompson@mtsolvlawfirm.com), Malone, Thompson, Summers & Ott, 339 Heyward Street, Columbia, SC 29201.

September 18, 2023

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