THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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

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

v.

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

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

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FINAL BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF THE CASE

Respondent-Appellant, Paul David Hess, APRN-BC (hereinafter "Plaintiff" or "Mr. Hess"), filed the Complaint in this matter on September 27, 2018, in the Lancaster County Court of Common Pleas, asserting causes of action against Appellants-Respondents, Morphis Pediatric Group of Lancaster, P.A. (hereinafter "MPGL") and Elizabeth J. Morphis, M.D. (hereinafter "Dr. Morphis" and collectively, with MPGL, "Morphis Defendants") for breach of contract, breach of contract accompanied by a fraudulent act, violation of the South Carolina Payment of Wages Act, fraud, negligent misrepresentation, declaratory judgment, and an equitable accounting.[1] Following a five-day trial, the jury found in Plaintiff's favor on all causes of action on February 1, 2022, and awarded Plaintiff damages in the total amount of $548,290.42 on all of the causes of action asserted against the Morphis Defendants. (Jury Verdict I) (R. 42-45). 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 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

[1]The 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.

misrepresentation.[2] (Jury Verdict II) (R. 49).

Plaintiff filed an Election of Remedies on February 3, 2022, electing to pursue his full remedies under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-80(C), 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.

Also on February 14, 2022, the Morphis Defendants filed a Motion for Directed Verdict as well as a separate Motion for Remittitur.

The Circuit Court held oral argument on the post-trial motions on May 19, 2022, in Richland County, by consent of the parties.

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 Circuit Court entered a supplemental order updating the amount of pre-judgment interest on November 8, 2022, after requesting supplemental calculations from Respondent-Appellant's counsel.

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

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[2]The jury also awarded punitive damages against the Accounting Defendants on Mr. Hess's claim for negligent misrepresentation with respect to the 2015 bonus year. The Accounting Defendants reached a settlement with Mr. Hess while the post-trial motions were pending.

FACTS

Mr. Hess is a nurse practitioner and was employed by MPGL, a pediatrics practice in Lancaster, SC, from January 2009 to July 31, 2018. Pursuant to a written employment agreement starting January 1, 2010, Mr. Hess was promised an annual base salary of $100,000 (which never changed throughout his entire tenure with MPGL), plus a bonus based on 50% of the Lancaster practice's net profits. (2010 Employment Agreement, and Appendix A thereto) (R. 835-836, 839).

With regard to the bonus payments, the Contract provides, "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." (2010 Employment Agreement, at 4, ¶ 4) (emphasis added) (R. 836). Mr. Hess's Contract contains an Appendix A, sub-titled "Bonus Compensation," which states as follows:

> Provided that the employee meets criteria as decided upon by the Board, the employee will be eligible for an annual bonus paid by the company based on the following formulation.
>
> All end of the year profits generated by this above-mentioned business shall be divided and the employee is granted 50% (fifty percent) of the said monies after all debts, expenses, royalties and expenditures have been allowed. These monies will be determined by the Company Accountant after the close of the year on December 31st of each calendar year and payable by the 15th of February.

(2010 Employment Agreement, Appendix A) (emphases added) (R. 839). Appendix A was signed by Dr. Morphis and Mr. Hess and was witnessed by Sandra Tyner, who was the office manager of MPGL. (Id.).

Mr. Hess 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 repeatedly denied access to the financial records of the practice whenever he raised questions about the profitability of the practice. (Hess Testimony, Tr. Vol. 1, at 28, ll. 9-22; at 39, ll. 2-10) (R. 513, 524). In 2014, no bonus was

included in Mr. Hess's W-2 for that year. (Id. at 40, ll. 11-17) (R. 525). When Mr. Hess 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 (paid in 2015) was identical to the bonus Mr. Hess 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. (Pl. Ex. 5, at 2) (R. 848); (Pl. Ex. 2, at 3) (R. 842).

On May 28, 2015, Dr. Morphis, Defendant Alexander (MPGL's outside accountant), and Tom Hinson (MPG Hartsville's office manager) met with Mr. Hess to discuss a proposal to change his bonus formula, from being based on 50% of net profits to 5% of gross revenues of the Lancaster practice. Mr. Alexander brought some financial analysis to the meeting purporting to demonstrate the fairness of the new proposed bonus formula and to show Mr. Hess that his bonuses from 2010 to 2014 had historically averaged approximately 5% of gross revenues. When Mr. Hess asked Mr. Alexander whether he had been receiving 50% of the net profits of the Lancaster practice since 2010, Mr. Alexander refused to answer, instead stating that Mr. Hess's question would require him to reveal confidential information about Dr. Morphis's tax situation. (Hess Testimony, Tr. Vol. 1, at 44 to 51) (R. 529-536). Shortly after the meeting, Mr. Alexander sent an email to Mr. Hess and Dr. Morphis with a copy of the financial information he had discussed comparing the bonus amounts with gross revenues from 2010 to 2014. (Pl. Ex. 4) (R. 845-846).

At the end of 2015, the Morphis Defendants presented to Mr. Hess a proposed Employment

Agreement changing the bonus formula as discussed during the May 28, 2015 meeting. Mr. Hess signed the new 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. 912-922). Unbeknownst to Mr. Hess at that time, the new bonus calculation resulted in a bonus for 2015 that was over $190,000 less than he would have earned under the 2010 Employment Agreement. Mr. Hess was paid bonuses in 2015, 2016, and 2017 under the new contract.

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 some of the accounting records for the practice. (Hess Testimony, Tr. Vol. 1, at 61, ll. 7-20) (R. 546). 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. (Id. at 61, ll. 7-20) (R. 546). As soon as Mr. Hess saw the accounting records going back to 2013, 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.

In 2010, Mr. Hess received a bonus of $75,000, and Dr. Morphis received over $148,000. In 2011, Mr. Hess's bonus dropped to $25,000; yet Dr. Morphis took a bonus of $180,000. In 2012, Mr. Hess's bonus was just under $47,000, but Dr. Morphis received a bonus of $330,000. In 2013, Mr. Hess's bonus was $48,000, and Dr. Morphis's bonus was $151,000. As discussed above, in 2014, Mr. Hess's bonus was not paid until early 2015 and was exactly the same as it had been in 2013 ($48,000), and Dr. Morphis took a salary of $81,212, plus pass-through income of over $196,000 in profit from the Lancaster practice, which had been converted to an S-Corporation that

year for the first time. Finally, in 2015, Mr. Hess received a bonus of $70,267.41, and Dr. Morphis took a salary of $80,000 and received pass-through income of over $374,000 in profits from the Lancaster practice. (Pl. Ex. 19) (R. 923). Mr. Hess never received 50% of the profits of the Lancaster practice as his bonus, as promised in the 2010 Employment Agreement.

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.

STANDARD OF REVIEW

The applicable standard of review in this case was best described by the South Carolina Supreme Court in Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 629 S.E.2d 653 (2006):

> In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings.

Id. at 464, 629 S.E.2d at 663-64 (emphasis added). It is well established that a claim under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-80(C), is an action at law. Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010) ("Actions seeking damages for breach of contract and actions for violation of the Payment of Wages Act are actions at law.").

Review of the trial court's decision on a motion for JNOV is extremely narrow. The South Carolina Supreme Court has repeatedly cautioned that a motion for JNOV should be granted "'only when there is no evidence to support the [jury's verdict].'" Garrison v. Target Corp., 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022) (quoting Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 42,

691 S.E.2d 135, 145 (2010) (emphasis added)). "'A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.'" RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (quoting Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)). In considering a motion for JNOV, the trial court must provide substantial deference to the jury's decision and cannot weigh the evidence or make determinations regarding the credibility of witnesses. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). The trial court is required to deny a motion for JNOV if the jury's verdict was "reasonably possible under the facts as liberally construed in [the prevailing party's] favor." Jones v. General Elect. Co., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (Ct. App. 1998).

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

The trial court's decision to award treble damages and attorney's fees and costs under the Payment of Wages Act is a matter of discretion for the trial judge and, therefore, should be reviewed only for abuse of discretion. See Morin v. Innegrity, LLC, 424 S.C. 559, 573–74, 819 S.E.2d 131, 139 (Ct. App. 2018) ("Section 41-10-80(C) grants the trial court the discretion to award treble damages if it finds there was no bona fide dispute the wages were owed and the withholding was unreasonable and done in bad faith."). Although a trial court's award of damages, even exemplary damages, is usually a discretionary matter reviewed under an abuse-of-discretion standard, see, e.g.,

McCourt v. Abernathy, 318 S.C. 301, 310, 457 S.E.2d 603, 608 (1995), the SC Court of Appeals has held that an appellate court can take its own view of the facts when reviewing an award of treble damages and attorney's fees under the Payment of Wages Act. Morin, 424 S.C. at 574, 819 S.E.2d at 139.

The trial court's decision to award pre-judgment interest is a matter of discretion and "will not be disturbed on appeal unless the trial court committed an abuse of discretion." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 435, 673 S.E.2d 448, 457–58 (2009).

ARGUMENTS ON APPEAL

1. THE TRIAL COURT PROPERLY DETERMINED THAT THE STATUTE OF LIMITATIONS WAS A MATTER OF DISPUTED FACT TO BE DECIDED BY THE JURY UNDER THE DISCOVERY RULE AND THE FRAUDULENT CONCEALMENT DOCTRINE

The Morphis Defendants first argue that Mr. Hess's claims under the South Carolina Payment of Wages Act are barred by the three-year statute of limitations in S.C. Code Ann. § 41-10-80(C). Under the "discovery rule," which is well established in South Carolina, the statute of limitations begins to run when the injured party knew or reasonably should have known that its rights had been violated. See, e.g. Brown v. Sandwood Dev. Corp., 277 S.C. 581, 583, 291 S.E.2d 375, 376 (1982). The discovery rule is an objective test, which inquires when a "cause of action should have been discovered through exercise of reasonable diligence [such that] the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist." Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). The trial court properly recognized that where conflicting evidence exists about whether a plaintiff knew or reasonably should have known he had a cause of action, that issue

must be submitted to that jury. Id.

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

Here, the question of the statute of limitations was properly submitted to the jury. There was substantial evidence at trial that Dr. Morphis consciously and deliberately refused to provide to Mr. Hess the financial information about the profitability of the Lancaster practice upon which his annual bonuses were supposed to be based, thereby depriving him of crucial information that would have been necessary to know that his promised bonuses were not being calculated and paid appropriately. (Morphis Testimony, Tr. Vol. 2, at 203, l. 25 ("I feared David would question me.")) (R. 705.9.6); (Hinson Testimony, Tr. Vol. 2, at 511, l. 22 ("I kept her privacy.") (R. 830). Only in the summer of 2018, when Dr. Morphis solicited bids to purchase the Lancaster practice, was Mr. Hess finally given access to the preceding five years of financial records of the practice. Mr. Hess filed this lawsuit in late September 2018, within a couple of months of the disclosure of MPGL's financial records. Mr. Hess plainly did not sit on his rights.

Furthermore, in early 2015, after Mr. Hess received a bonus for 2014 that was exactly equal to the bonus he received in 2013, the Accounting Defendants, at the specific request of Dr. Morphis, provided a deliberately false but plausible explanation for why the 2014 bonus did not change from the prior year. (Plaintiff's Ex. 5, at 2) (R. 848); (Plaintiff's Ex. 2, at 3) (R. 842). When Plaintiff

knew or reasonably should have known that he had not properly been paid according to the bonus provisions of his 2010 Employment Agreement so as to start the statute of limitations under the discovery rule was clearly a question of fact for the jury, and the trial court properly refused to vacate the jury's carefully deliberated decision on this issue when the court denied the Morphis Defendants' motion for JNOV.

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

Here, by contrast, Mr. Hess did receive annual bonuses every year from 2010 to 2014 under the 2010 Employment Agreement, but he was never given access to the financial records of MPGL from which his bonus could have been determined or verified. The record evidence at trial indicated that Dr. Morphis consciously and deliberately kept the financial information about the practice from him. Only in the summer of 2018, when Mr. Hess and his prospective business partner expressed an interest in purchasing the Lancaster practice was he finally provided several years' worth of

financial information that clearly revealed that he never received the full bonus based on 50% of the net profits as required by his 2010 contract. The fact that Mr. Hess received some bonus payments every year is materially different than the situation in Maher, where the plaintiff did not receive any bonus payments based on company profits and had to know that he did not receive any profit-based bonuses.

Furthermore, MPGL's outside accountant, Defendant Alexander, deliberately created two spreadsheets in connection with the May 28, 2015 meeting: one he provided to both Mr. Hess and Dr. Morphis showing average bonus paid as a percentage of gross revenue, and the other one he provided only to Dr. Morphis, which contained three additional rows for MPG's profits, her "Doctor bonuses," and profits before doctor bonuses. (Pl.'s Ex. 3) (R. 844). In the cover email to Defendant Morphis, Defendant Alexander stated, "This is for your benefit only, I won't share this with David [Hess]." (Id.) (R. 843). Defendant Alexander even discussed with Defendant Morphis his pre-planned evasive response in the event that Mr. Hess asked if he had been receiving 50% of the profits of the Lancaster practice. (Pl.'s Ex. 2, at 2) (R. 841) ("If there are items you are not comfortable sharing then when asked, I will respond, *'That is part of a larger tax position we are taking for Dr. Beth [Morphis] personally & the details are not relevant.'*") (italics in original). Although Mr. Hess candidly testified that he frequently asked questions of Dr. Morphis about his bonus and the practice's expenses prior to 2015, Mr. Hess never had any information from which he could have discovered that his contract had been breached until the summer of 2018. (Hess Testimony, Tr. Vol. 1, at 29, ll. 23-24 ("I didn't have access to anything.")) (R. 514); (Id. at 43, ll. 7-8 ("I wasn't sure exactly what was going on and they weren't providing any information.") (R. 528); (Tyner Testimony, Tr. Vol. 2, at 47, ll. 12-20; at 48, ll. 4-8) (R. 629-630); (Hinson Testimony,

Tr. Vol. 2, at 493, l. 25 to 494, l. 1 ("Well, he wanted to know the expenses and I couldn't tell him.")) (R. 816-817). Thus, when Mr. Hess knew or reasonably should have known of a potential breach of contract by Defendant Morphis and consequent violation of the Payment of Wages Act was a disputed question of fact for a jury to decide.

2. THE TRIAL COURT PROPERLY RULED THAT THE EXPRESS LANGUAGE OF THE 2010 EMPLOYMENT AGREEMENT AND THE ATTACHED BONUS APPENDIX A DID NOT GIVE UNFETTERED DISCRETION TO DR. MORPHIS ABOUT THE AMOUNT OF MR. HESS'S ANNUAL BONUS

The Morphis Defendants argue that the trial judge should have directed a verdict in their favor or granted JNOV because the 2010 Employment Agreement gave the MPGL Board (i.e., Dr. Morphis) broad discretion about whether the bonus should be paid, what criteria should be used to determine whether Mr. Hess qualified for a bonus payment in any given year, and the amount of any such bonus. The Morphis Defendants' arguments disregard the plain language of the 2010 Employment Agreement.

Section 4 of the Employment Agreement provides, in relevant part, "All or any bonuses shall be at the discretion of the Board or as determined in any appendix that is hereby signed and agreed upon by both parties (See Appendix A)." (Pl.'s Ex. 1, at 4, ¶ 4) (emphasis added) (R. 836). A fair reading of the phrase "any appendix" is to give the contracting parties the option to establish the bonus criteria in advance, rather that to relegate it entirely to the Board's discretion. Because Mr. Hess's 2010 Employment Agreement did, in fact, contain an Appendix A, the language before the "or" in Section 4 regarding the Board's discretion is supplanted by the terms of the Appendix A. In other words, a fair reading of the contract is that the Appendix A to Mr. Hess's Employment Agreement superceded what otherwise would have been unfettered discretion of the Board over the

payment of annual bonuses to Mr. Hess.

Appendix A to the 2010 Employment Agreement, which is titled "Bonus Compensation," states as follows:

> Provided that the employee meets criteria as decided upon by the Board, the employee will be eligible for an annual bonus paid by the company based on the following formulation.
>
> All end of the year profits generated by this above mentioned business shall be divided and the employee is granted 50% (fifty percent) of the said monies after all debts, expenses, royalties and expenditures have been allowed. These monies will be determined by the Company Accountant after the close of the year on December 31st of each calendar year and payable by the 15th of February.

(Pl.'s Ex. 1, Appx. A) (emphasis added) (R. 839).

Under the plain language of Appendix A, the Board retained the preliminary authority to establish criteria for Mr. Hess to meet before he could qualify for a bonus payment each year; however, if the threshold decision is made to pay a bonus to Mr. Hess, then Appendix A plainly prescribes how the bonus was to be calculated: he was entitled to 50% of the Lancaster practice's net profits. The operative language of Appendix A–"shall be divided," "is granted," and "will be determined"–is phrased in mandatory, not permissive, terms.

The theoretical possibility that Dr. Morphis, as the MPGL Board, could have decided not to pay Mr. Hess a bonus in some year is irrelevant to Mr. Hess's claims in this case because Dr. Morphis acknowledged that Mr. Hess met whatever bonus criteria was necessary, as he received a bonus every year. (Morphis trial testimony, Vol. 2, at 96, ll. 17-21; at 97, ll. 3-9, 17-22; at 98, ll. 3-6) (R. 653, 654, 655). Furthermore, Dr. Morphis testified repeatedly that she always used the profit calculation for Mr. Hess's bonus, never the Board's discretionary powers. (Morphis trial testimony, Vol. 3, at 132, ll. 11-13, at 162, l. 24 to 163, l. 5) (R. 322, 339.2-340).

In any event, Appellants' argument that the 2010 Employment Agreement is not actually a binding contract because the alleged discretionary nature of it renders it an illusory promise and, therefore, lacking in mutual consideration, cannot be considered on appeal and was properly rejected by the trial court on the motion for JNOV because that argument was not raised on the Morphis Defendants' initial motion for directed verdict on January 28, 2022. (Trial trans., Vol. 2, at 428-439) (R. 781-792). See RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 331, 732 S.E.2d 166, 170-71 (2012) ("[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion. A motion for a JNOV is merely a renewal of the directed verdict motion.") (internal citations omitted)).

Here, the Morphis Defendants filed a written Motion for Directed Verdict on January 28, 2022, in addition to arguing their motion orally in court. (Morphis Defendants' Motion for Direct Verdict) (R. 174-190). Appellants-Respondents' attempt to raise new arguments for the first time, either in their second Motion for Directed Verdict at the close of all evidence or on their Motion for JNOV for the first time are not preserved for appellate review and cannot be considered here. See Chapman v. Upstate RV & Marine, 364 S.C. 82, 88, 610 S.E.2d 852, 856 (Ct. App. 2005) ("Failure to raise the issue that is now on appeal in the directed verdict motion bars review on appeal."); In re McCracken, 346 S.C. 87, 93, 551 S.E.2d 235, 238 (2001) (noting that since only issues raised in the directed verdict motion may be raised in the JNOV motion, motions newly raised in the JNOV motion were not preserved for review); Roland v. Palmetto Hills, 308 S.C. 283, 286, 417 S.E.2d 626, 628 (Ct. App.1992) ("A motion for judgment notwithstanding the verdict is a renewal of the directed verdict motion and cannot raise grounds beyond those raised in the directed verdict.").

Furthermore, the out-of-state cases cited by Appellants-Respondents that involved purely

discretionary bonus payments are not applicable to the situation here. In Kaplan v. Capital Co. of America LLC, 747 N.Y.S.2d 504 (App. Div. 2002), the court specifically noted that "the bonus compensation sought was clearly stated in the company handbook to be purely discretionary." Id. Similarly, in Hunter v. Deutsche Bank AG, 866 N.Y.S.2d 670 (App. Div. 2008), the court affirmed summary judgment in favor of the employer because "of the unambiguous language of [the plaintiffs'] contracts and the employee handbook plainly making bonus awards solely and completely a matter of defendant's discretion." Id. (emphasis added). The Illinois case of McLaughlin v. Stermberg Lanterns, Inc., 917 N.E.2d 1065 (Ill. App. Ct. 2009), also does not support the Morphis Defendants' position because the bonus provision in the employment contract there "was clearly conditional, dependent on whether sales for the defendant increased over the previous year." Id. at 1071. The McLaughlin case involved the Illinois Wage Act as interpreted by the Illinois Department of Labor in a regulation that defined the terms "earned bonus" and "proportionate share of a bonus earned." Id. (quoting 56 Ill. Admin. Code § 300.500). The Appellate Court of Illinois held that the plaintiff was not entitled to a pro rata share of the bonus because such bonus "was not guaranteed to be paid." Id. Closer to home, the Georgia case of Mathews v. Marietta Toyota, Inc. 606 S.E.2d 862 (Ga. Ct. App. 2004), is also not particularly germane to this case. In Mathews, the plaintiff himself testified that "the 'bonus was not defined much more than that, other than it would be fair . . . [and related to] dealership profits.'" Id. at 863. The employer's VP and general manager in charge of operations testified that "he used his discretion in awarding year-end bonuses to the dealership's management personnel, and the amount did not depend on an employee's level of responsibility." Id. Finally, Appellants-Respondents' citation to Mirzaie v. Smith Congeneration, Inc., 962 P.2d 678 (Okla. Ct. App. 1998), is particularly puzzling. In Mirzaie, the bonus provision

of the contract at issue provided that the plaintiff "shall be entitled to receive at least two percent of the net profits." Id. at 679. The court of appeals in Mirzaie affirmed a jury's award of a 9% bonus, rather than the 2% minimum, based on a peculiar statue in Oklahoma that provides, "'When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be as much money as the object of the contract is reasonably worth.'" Id. at 680 (quoting Okla. Stat., tit. 15, § 112 (1991)). The Oklahoma statute in question appears to have no analog in South Carolina law. The Mirzaie court actually affirmed the jury's award of a 9% bonus because the contract specified only a minimum bonus amount, but no maximum amount. Id. at 681.

In the instant case, the trial court properly determined that there was sufficient evidence for the jury to construe the contract and to determine what Mr. Hess's bonus payments each year should have been based on the language in the contract.

3. THE TRIAL COURT CORRECTLY DETERMINED THAT ANY VAGUE OR AMBIGUOUS PORTIONS OF THE 2010 EMPLOYMENT AGREEMENT AND BONUS APPENDIX A MUST BE CONSTRUED AGAINST THE MORPHIS DEFENDANTS AND IN FAVOR OF MR. HESS BECAUSE MR. HESS WAS NOT INVOLVED IN THE DRAFTING OF THE CONTRACT

The Morphis Defendants next assert that the trial court should have granted directed verdict or JNOV in their favor because the bonus provision in Appendix A of the 2010 Employment Agreement contains numerous terms such as "profit," "royalties," "monies," "debts," "expenses," and "expenditures" that are not specifically defined in the contract. The trial judge properly recognized that not every word in a contract is required to be separately defined by the contract itself. The trial judge properly instructed the jury that where the contract does not contain express

definitions for certain terms, the plain, ordinary meaning of those words should be used and that any ambiguity in the contract should be construed against the party who drafted the contract and in favor of the non-drafting party. See DD Dannar, LLC v. SC LAUNCH!, Inc., 431 S.C. 9, 17, 846 S.E.2d 883, 887 (Ct. App. 2020) ("The terms the parties have used [in their contract] must 'be taken and understood in their plain, ordinary and popular sense.'") (quoting C.A.N. Enters., Inc. v. SC Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988)); Southern Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) ("Ambiguous language in a contract . . . should be construed liberally and interpreted strongly in favor of the non-drafting party."); Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) ("Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.") (quoting 17A C.J.S. Contracts § 324)).

Here, the record is undisputed that Mr. Hess did not have any involvement in the drafting of the contract, but that the document was created solely by the Morphis Defendants' attorney. (Hess Testimony, Tr. Vol, 1, at 23, ll. 20-23; at 24, ll. 3-7) (R. 508, 509); (Morphis Testimony, Tr. Vol. 2, at 89, l. 24 to 90, l. 4; at 91, ll. 17-21) (R. 646, 647, 648). The well-established law clearly places the onus on the Morphis Defendants, as the drafters of the contract, to avoid any ambiguity or uncertainty that might be contained within the language of the contract. As the trial court noted in denying the Morphis Defendants' motion for directed verdict on this point, first-year law students are taught this fundamental principle in Contracts 101. (Trial transcript, Vol. 2, at 478, ll. 15-21) (R. 812).

4. THE TRIAL COURT CORRECTLY RULED THAT THE JURY'S DETERMINATION THAT THE MORPHIS DEFENDANTS BREACHED THEIR CONTRACT AS TO THE BONUS PAYMENTS TO MR. HESS WAS SUPPORTED BY EVIDENCE IN THE TRIAL RECORD

The Morphis Defendants contend that even if the bonus provision of the 2010 Employment Agreement were a contractual promise, Dr. Morphis had the right to deduct her salary and vehicle expenses before determining the Lancaster practice's net profits every year. The Morphis Defendants argue that Mr. Hess actually received more than he was entitled to as a bonus each year, if one includes Defendant Morphis's annual compensation as an expense item, as shown in the annual financial reports for "net income" each year created by the outside accountant, before the final bonus calculation is made. Appellants-Respondents' assertions are a gross distortion of the trial record.

The testimony at trial was that from 2010 to 2013, Morphis Pediatric Group of Lancaster, P.A. was organized as a C Corporation and that the accountant routinely "zeroed out" the profits of the practice at the end of each fiscal year. (Morphis Testimony, Tr. Vol. 2, at 163, ll. 9-17) (R. 698.6). In other words, reported net income was deliberately minimized each year to essentially zero or even a small loss by showing Dr. Morphis's bonus payments as a salary expense. In 2014, the company converted to an S Corporation, with pass-through taxation, and Dr. Morphis began to pay herself a regular salary, in addition to having all of the profits of the company flow through to her as personal income.

Interestingly, Appellants-Respondents now argue that "[b]ecause the Agreement makes the accountant's determination the final word [on the bonus amount], the jury should not have been permitted to recalculate profit [of the Lancaster practice] by eliminating some expenses." (Br., at 28). The glaring problem with this argument is that both Dr. Morphis and the CPA Defendant,

Alexander, testified that Alexander never had anything to do with the calculation of Mr. Hess's bonuses. (Morphis, Trial Tr., Vol. 2, at 102, l. 11 to 103, l. 4) ("Q. So your testimony is that you never asked the accountants to provide or calculate or determine the bonus that Mr. Hess was getting, right? A. They did not calculate that, no, sir.") (R. 657-658); (Alexander, Trial Tr., Vol. 2, at 303, ll. 3-6) ("I was never involved in the calculation of the bonuses. . . . I was not even aware of [Mr. Hess's contract] until 2015.") (R. 741); (Alexander, Trial Tr., Vol., 2, at 353, l. 7 ("Oh, no, I never messed with the bonus.") (R. 759).

The spreadsheet that the Accounting Defendant Alexander sent to Defendant Morphis on May 28, 2015, to show her "what kind of profit you are receiving from the practice in Lancaster" (Pl.'s Ex. 3) (R. 843), completely refutes the Morphis Defendants' argument on this issue. What Defendants are now trying to assert was not actually a "bonus" to Dr. Morphis but was merely "salary for the patient care, administrative duties, and marketing functions she performed on behalf of MPG," (Defs.' Motion for JNOV, at 16) (R. 206), is directly contradicted by other evidence in the case. Defendant Alexander specifically referred to Defendant Morphis's payments as "Doctor Bonuses." (Pl.'s Ex. 3, spreadsheet) (R. 844), and used the phrase "what kind of profit you are receiving from the practice" in describing the smoking gun spreadsheet. Defendant Morphis clearly testified that the intention of the bonus provision in Appendix A to the 2010 Employment Agreement was to split the net profits of the Lancaster practice equally (50/50) with Mr. Hess each year, as her compensation from the Lancaster practice. In fact, Defendant Morphis's email or May 27, 2015, stated, "Also, at one point Will [Woodham][3]' had built in a Royalty Fee to MPG so I could get

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

compensated for my time [in Lancaster]. These things were realized after I had split the profits with David [Hess] but really hadn't gotten paid myself. I think some of these fees were 'created' to help me but I never wanted to get 'paid' because I feared David [Hess] would question me." (Pl.'s Ex. 2) (R. 840) (emphasis added).

The Morphis Defendants' arguments also disregard the implied covenant of good faith and fair dealing that is inherent in every contract. See Hall v. UBS Fin. Servs., Inc., 435 S.C. 75, 85, 866 S.E.2d 337, 342 (2021) (recognizing the well-established "principle that '[t]here exists in every contract an implied covenant of good faith and fair dealing.'") (quoting Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995)). The fundamental purpose of the implied covenant of good faith and fair dealing is "'to protect the intentions of the parties to the contract'" and to "'imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.'" Hall 435 S.C. at 87, 866 S.E.2d at 342-43 (internal quotations omitted)). As both Dr. Morphis and Mr. Hess testified, the clear intention of the bonus provision in the 2010 Employment Agreement was for the two of them to split the annual net profits of the Lancaster practice after all expenses relating to the Lancaster practice had been paid. (Hess Testimony, Tr. Vol. 1, at 20, ll. 18-25; at 27, ll. 16-23; at 66, l. 23 to 67, l. 4; at 88, ll. 1-13) (R. 505, 512, 551-552, 573); (Morphis Testimony, Tr. Vol. 2, at 99, ll. 9-12 ("Q. So you would expect that your bonus was never being more that Mr. Hess' bonus, right, at least under the [2010] contract. A. Right.")) (R. 656); (Id. at 103, ll. 11-18) (R. 658).

There is clearly evidence in the trial record to contradict the Morphis Defendants' argument on this point. Therefore, the question of what the appropriate bonus payments to Mr. Hess should

have been under the 2010 Employment Agreement was a question of fact for the jury, and their verdict is amply supported by the trial record here. Accordingly, the trial judge properly denied the Morphis Defendants' motion for JNOV on this point.

5. THE TRIAL COURT CORRECTLY SUBMITTED TO THE JURY MR. HESS'S CLAIM THAT THE 2015 EMPLOYMENT AGREEMENT WAS LEGALLY INEFFECTIVE FOR THE 2015 BONUS YEAR AS VIOLATIVE OF THE NOTICE PROVISION OF THE SOUTH CAROLINA PAYMENT OF WAGES ACT

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

Section 41-10-30(A) of the South Carolina Payment of Wages Act provides, in relevant part, "Any changes in these terms [of employment] must be made in writing at least seven calendar days before they become effective." S.C. Code Ann. § 41-10-30(A). There was no evidence during the trial of the actual date that the revised contract was first provided to Mr. Hess, other than the date of his signature, December 30, 2015. (Pl.'s Ex. 18) (R. 912). The 2015 Employment Agreement purports to be effective retroactively to March 1, 2015. (Pl.'s Ex. 18, ¶ 6) (R. 914). If Mr. Hess received the contract on the date he signed it, the earliest the contract could have been "effective" would have been January 6, 2016, which was seven calendar days after written notice of the change

was provided to him. Although the 2015 contract provides that "said payment of the annual bonus detailed herein being made on or before the 15th of February following the close of the fiscal year," (Pl.'s Ex. 18, Appx. A) (R. 922), Mr. Hess's 2015 bonus of $70,267.41 was actually paid by December 31, 2015 and was included in the 2015 Profit & Loss statement of the practice. (Pl.'s Ex. 9) (M13) (R. 880). The Morphis Defendants produced no evidence to support an argument that Plaintiff's bonus was actually paid after January 6, 2016, or that they provided written notice of the 2015 contract to Mr. Hess before December 24, 2015, such that they somehow satisfied the seven-day notice provision from the Act. Furthermore, the phrase "become effective" as used in the statute does not mean "payable after." Employees are often paid in arrears, such as one or two weeks after the pay period for which such compensation was earned. If the 2015 Employment Agreement could not, as a matter of law, have "become effective" until January 6, 2016 (or sometime in early January 2016), Plaintiff's entitlement to a bonus in 2015 would have necessarily been based on the 2010 Employment Agreement, was still in effect and which provided for a bonus of 50% of the net income of the Lancaster practice. (Pl.'s Ex. 1, Appx. A)) (R. 830); (Hess Testimony, Tr. Vol. 1, at 18, l. 14 to 19, l. 5) (R. 503-504); (Morphis Testimony, Tr. Vol. 2, at 93, ll. 2-18) (R. 650).

The jury awarded Plaintiff $152,010 in actual damages for 2015 alone. That number was evidently derived by taking the practice's reported net income of $374,287.42, adding back Plaintiff's actual bonus of $70,267.41, for a total profit of $444,554.83 before consideration of any bonuses. Taking 50% of that profit number as the bonus Plaintiff should have been paid would yield a bonus amount of $222,277.42, per the terms of the 2010 Employment Agreement. The difference when compared to the amount Plaintiff actually received for a bonus in 2015 of $70,267.41 yields the exact amount of the jury's verdict for 2015: $152,010.

The Morphis Defendants argue that the Fourth Circuit's decision in Barton v. House of Raeford Farms, Inc., 745 F.3d 95 (4th Cir. 2014), should have compelled a judgment in their favor as a matter of law on Mr. Hess's claims under the Payment of Wages Act for the 2015 bonus. The Morphis Defendants' reliance on Barton is unavailing. First of all, the Barton case is not binding precedent on a South Carolina court on matters of state statutory law. Secondly, the discussion in Barton about S.C. Code Ann. § 41-10-30(A) is clearly dicta because that issue was not material to the outcome of that case since the Fourth Circuit Court of Appeals determined that the state-law wage claims were pre-empted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), because the issue of compensable work time was covered by the collective bargaining agreement ("CBA") between the defendant employer and the plaintiffs' labor union. Barton, 745 F.3d at 99, 108-09.

The issue in the Barton case was whether the plaintiff group of poultry workers were entitled to additional compensable time for donning and doffing protective gear, walking to and from the production area, and/or washing the protective gear before and after work. Id. at 100. The workers were paid based on the employer's long-standing practice of using "line time" rather than "clock time." Id. The Fourth Circuit determined that the workers' exclusive remedy was to pursue a grievance and arbitration under the CBA, not by filing suit under the SC Payment of Wages Act. The Barton court's discussion of the SC Payment of Wages Act actually starts with the word "nonetheless," confirming that the analysis of section 41-10-30(A) is purely dicta.

In any event, the claims in the Barton case are very different than the claims that Mr. Hess raised in the instant case against the Morphis Defendants. In Barton, the plaintiffs complained that the written terms of employment notices that they were given at the start of their employment did

not specify that they would be paid only according to "line time" instead of "clock time." The Barton court expressed doubt that such information was even required by S.C. Code Ann. § 41-10-30(A). Barton, 745 F.3d at 108 ("First, it is far from clear whether § 41–10–30(A) required Columbia Farms to provide written notice to its employees that their 'normal hours' would be measured based on 'line time.'").

Here, by contrast, Mr. Hess's claim under the South Carolina Payment of Wages Act for the 2015 bonus relates to a change in his bonus formula, not to his original terms of employment notice. In other words, Mr. Hess's statutory Payment of Wages claim in this case involves a question of amount of pay, not the type of activities that are considered compensable time.

More importantly, the Barton analysis of the Payment of Wages Act is contrary to the well-established remedial underlying purpose of the Act in protecting workers from unjustifiably withheld wages. See Dumas v. InfoSafe Corp., 320 S.C. 188, 194, 463 S.E.2d 641, 645 (Ct. App. 1995) (holding that the SC Payment of Wages Act is "remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld."); see also Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 317, 698, S.E.2d 773, 782 (2010) (recognizing that the underlying purpose of the SC Payment of Wages Act is "'to protect employees from the unjustified and willful retention of wages by the employer.'") (quoting Rice v. Multimedia, Inc., 381 S.C. 95, 98, 456 S.E.2d 381, 383 (1995)).

The trial court correctly recognized that the South Carolina Department of Labor, Licensing & Regulation's express power under Section 41-10-80(A) to issue civil penalties or fines to employers for notice violations of the Act does not negate the private remedy in Section 41-10-80(C). Such remedies are cumulative, not mutually exclusive. Again, this is a remedial

statute, which should be liberally construed to effectuate the underlying purpose of the Act, to protect employees and empower them to recover unlawfully withheld wages.

The Morphis Defendants incorrectly assert that "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." (Apps.' Br., at 32). The Morphis Defendants are misleadingly including Mr. Hess's 2016 and 2017 bonus years in the "in total" qualifier, arguing that Mr. Hess's hypothetical bonus for those two years and 2015 combined, if calculated based on 50% net income under the terms of the 2010 Employment Agreement, would have been less than the bonuses he received under the 2015 Employment Agreement based on 5% of gross revenues for those three years. The notice violation under the seven-day requirement of Section 41-10-30(A) only occurred with respect to the 2015 Agreement. There is no question that Mr. Hess received more than seven-days' advance notice prior to the payment of the 2016 and 2017 bonuses.

6, THE TRIAL COURT PROPERLY RULED THAT THE MORPHIS DEFENDANTS ARE NOT ENTITLED TO ANY TYPE OF REMITTITUR WITH RESPECT TO THE BONUSES MR. HESS RECEIVED IN 2016 AND 2017 UNDER THE NEW EMPLOYMENT AGREEMENT DATED DECEMBER 30, 2015

In their second post-trial motion, the Morphis Defendants filed a Motion for Remittitur, arguing that they are entitled to some type of set-off with respect to 2016 and 2017 against the jury's verdict in this case because Mr. Hess actually earned a larger bonus in those two years under the new 2015 Employment Agreement than he would have earned under the 2010 Employment Agreement. According to the Morphis Defendants, Mr. Hess cannot argue to set aside the 2015 Employment Agreement, while still retaining the benefits of the 2015 Agreement for 2016 and 2017. This argument is unavailing for several reasons.

First of all, Mr. Hess elected his remedies under the South Carolina Payment of Wages Act, not the jury's verdicts for fraud and negligent misrepresentation against the Morphis Defendants. Mr. Hess's recovery under the South Carolina Payment of Wages Act did not include anything for 2016 and 2017. Plaintiff's election of remedies under the Payment of Wages Act, instead of the fraud or negligent misrepresentation causes of action, renders the Morphis Defendants' argument for some type of remittitur completely moot.

Secondly, Mr. Hess's Complaint never sought rescission of 2015 Employment Agreement in total as an equitable remedy in this case; he merely alleged that with respect to 2015, the Morphis Defendants (along with the Accounting Defendants) misled him into believing that his bonus for 2015 based on 5% of MPGL's gross revenues would have roughly approximated the bonus based on 50% of MPGL's net income as provided in the 2010 Employment Agreement. As noted in the previous section, Mr. Hess also alleged that the 2015 Employment Agreement violated the seven-day notice provision of the South Carolina Payment of Wages Act.

Thirdly, and perhaps most importantly, the Morphis Defendants' Answer in this case does not include any type of counterclaim or affirmative defense for such a set-off, (Morphis Defendants' Answer, at 6-8) (R. 55-57), nor did Defendants ever seek such a remedy during the trial of this case.[4] The fact that the trial court's order "cited no case law in support of [its] reasoning [denying the Morphis Defendants' Motion for Remittitur]" (Apps.' Br., at 34) is immaterial to the trial court's

[4]The trial court should have never allowed any evidence of the 2016 and 2017 bonus payments to come into evidence at trial in this case in the first place, because such evidence was not relevant to any claim or defense in this case. The undersigned counsel repeatedly objected to such proffered evidence as being irrelevant. (Tr. Vol. 1, at 102, ll. 12-16; at 124, l. 21 to 125, l. 1; at 134, ll. 17-19) (R. 579, 598-599, 601.2). Nevertheless, the trial court's evidentiary rulings were harmless error because the jury still awarded verdicts in Mr. Hess's favor against the Morphis Defendants on all of the causes of action asserted against them.

appropriate rejection of that motion.

The post-trial election of remedies that Mr. Hess filed with respect to the Morphis Defendants renders this a complete non-issue on this appeal, even if this issue were somehow not waived by the Morphis Defendants and otherwise properly preserved for appeal.

7. THE TRIAL JUDGE'S AWARD OF TREBLE DAMAGES AND ATTORNEY'S FEES AND COSTS WAS A PROPER EXERCISE OF DISCRETION BECAUSE THERE WAS NO REASONABLE, GOOD-FAITH DISPUTE ABOUT THE BONUS CALCULATIONS FOR 2010 TO 2015

The civil remedy section of the South Carolina Payment of Wages Act provides, in relevant part, "In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow." S.C. Code Ann. 41-10-80(C). In Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995), the South Carolina Supreme Court recognized that "'[t]he award of treble damages and attorney's fees is discretionary with the trial court. We do not believe the legislature intended to deter the litigation of reasonable good faith wage disputes; we do believe the legislature intended to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute.'" Id. at 99, 456 S.E.2d at 383 (quoting Apache East, Inc. v. Wiegand, 580 P.2d 769, 773-774 (Ariz. Ct. App.1978)). The South Carolina Supreme Court has found that it is "for the trial court to determine, in the first instance, whether there existed a bona fide dispute [regarding the payment of an employee's wages] such that treble damages were not warranted." Temple v. Tec-Fab, Inc., 381 S.C. 597, 600–01, 675 S.E.2d 414, 416 (2009).

Here, the jury's verdicts in Mr. Hess's favor and against the Morphis Defendants on the

causes of action for breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation, as well as its corresponding award of punitive damages against the Morphis Defendants, which was based on clear and convincing evidence, preclude any argument by the Morphis Defendants that there was a good-faith dispute about the bonus monies due to Mr. Hess.

This case is very different from cases where appellate courts of this state have found an award of treble damages inappropriate under the Payment of Wages Act because of the employer's good-faith dispute of the amount or circumstances of the alleged unpaid wages. See, e.g., Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 581 S.E.2d 591 (1999) (employee's disloyalty to company during his employment provided good-faith basis for employer to dispute wages due); Morin v. Innegrity, LLC, 424 S.C. 559, 819 S.E.2d 131 (Ct. App. 2018) (CEO's bonus contingent on company's obtaining $2 million in funding, which never occurred); Goodwyn v. Shadowstone Media, Inc., 408 S.C. 93, 757 S.E.2d 560 (Ct. App. 2014) (hiring letter stated that employee's compensation was entirely commission-based, not salary, and majority of sales were never collected); O'Neal v. Intermedical Hosp., 355 S.C. 499, 585 S.E.2d 526 (Ct. App. 2003) (bona fide dispute about whether employee was terminated for misconduct and, therefore, forfeited payment for accrued but unused vacation).

In considering the statutory award of treble damages and attorney's fees and costs, the trial court properly considered the underlying purpose of the South Carolina Payment of Wages Act, which again is to protect employees from unwarranted retention of wages by unscrupulous employers. As noted previously, South Carolina courts have repeatedly and unequivocally recognized that the Act is "remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld." Dumas, 320 S.C. at 194, 463 S.E.2d at 645. It

is well settled in South Carolina that remedial statutes are supposed to be liberally construed in order to effectuate the purposes of the statue. South Carolina Dep't of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978).

The determination of whether an employer had a good-faith dispute about wages due to an employee must be made by looking at the circumstances that existed at the time the compensation decisions were made, not by the creative and often technical arguments raised by the employer defendant's counsel during the litigation, at trial or on post-trial motions. See Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 316, 698 S.E.2d 773, 782 (2010) ("[T]he relevant date for determining whether the employer reasonably withheld wages is the time at which the wages were withheld, i.e., when the employer allegedly violated the Act.").

The best evidence of Dr. Morphis's understanding and interpretation of the contract is found in her own contemporaneous, hand-written notes where she performed the preliminary, rough calculations for the bonuses for years 2010, 2012, 2013, and 2014. (Plaintiff's Ex. 7) (R. 853-855). According to these calculations, using 2010 as an example, profit for the Lancaster practice was roughly calculated as total income minus total expenses, including staff bonuses and retirement; and the resulting figure was divided by 2 to calculate "mgmt bonus," which should have been split equally between Mr. Hess and Dr. Morphis. (R. 853). Furthermore, Defendant Morphis's email of December 20, 2010 to MBW accountant Will Woodham (who passed away in mid-2011) stated, "I do want to look at numbers w/ you at some point but for now can we make [David Hess's] bonus $75000." (Plaintiff's Ex. 6) (emphasis added) (R. 852). Defendant Morphis testified at trial that when her husband found out that her preliminary bonus calculation for Mr. Hess for 2010 was $75,000, he told her that she was crazy to pay a nurse practitioner that much, on top of his base

salary of $100,000. (Morphis Testimony, Tr. Vol. 2, at 152, ll. 5-21) (R. 697). Dr. Morphis never went back to "true up" the 2010 numbers for Mr. Hess based on the actual financial performance, but left his bonus at $75,000. Dr. Morphis further testified that she was "more than fair" to Mr. Hess in terms of his compensation and that he was probably the highest paid nurse practitioner in the State of South Carolina. (Id.) (R. 697). The jury ultimately found that Dr. Morphis never properly paid Mr. Hess the full amount of his bonus according to Appendix A of the 2010 Employment Agreement and repeatedly refused to share the details of the financial records for the company or how the annual bonus was calculated each year and fraudulently concealed the details of the expenses of the Lancaster practice from Mr. Hess for years. (Morphis Testimony, Vol. 2, at 193, ll. 19-20 ("Yes . . . he would have seen everything if I'd shown him the financials.")) (R. 705.6).

Other compelling evidence regarding Dr. Morphis's original interpretation of the Employment Agreement is found in her email of May 27, 2015 to Defendant Alexander in preparation for a meeting with Mr. Hess the next day, May 28, 2015, in which she and Mr. Alexander first proposed switching Mr. Hess to a new bonus formula based on 5% of gross revenues, rather than 50% of net profits of the Lancaster practice. In that email, Dr. Morphis stated, "At our annual meeting we would sit down in Dec[ember] and discuss finances which I never pretended to completely understand. When we would get to the bottom line, it was divided by 2 to figure his bonus. . . . Also, at one point, Will [Woodham] had built in a Royalty Fee to MPG so I could get compensated for my time there. These things were realized after I had split the profits with David but really hadn't gotten paid myself. I think some of these fees were 'created' to help me but I never wanted to get 'paid' because I feared that David would question me." (Plaintiff's Ex. 2) (R. 840).

Counsel for the Morphis Defendants raised numerous arguments during this litigation, on

summary judgment, at trial, and on motion for directed verdict defending against Mr. Hess's allegations that his bonuses were improperly paid, including some that have been raised in this appeal. These arguments do not demonstrate that Dr. Morphis herself had a bona fide, good-faith basis for disputing the amount of compensation due to Mr. Hess under the express terms of the contract at the time she made the payment decisions for Mr. Hess's bonus. Instead, those are all post hoc arguments raised by Defendants' counsel in litigation and are not relevant to Defendant Morphis's actual mind-set at the relevant time the compensation decisions were made.

The mere fact that Dr. Morphis never provided Mr. Hess access to the complete financial records of the Lancaster practice is compelling evidence that she was hiding from Mr. Hess the true amount of profits that were being generated each year from the Lancaster practice, as well as some of the expenses that she secretly ran through the Lancaster practice, such as the lease of her BMW convertible. Significantly, in the email of May 28, 2015 that Defendant Alexander sent only to Dr. Morphis, Defendant Alexander stated, "Attached is the spreadsheet you requested. I thought it may be helpful for you to see what kind of profits you are receiving from the practice in Lancaster. This is for your benefit only. I won't share this with David [Hess]." (Pl. Ex. 3) (emphasis added) (R. 843). The spreadsheet that Defendant Alexander attached to the email he sent only to Dr. Morphis and deliberately withheld from Mr. Hess contained three additional lines of data showing "Net Income," "Doctor Bonuses" and "Net Income Before Doctor Bonuses." (Pl. Ex. 3, attached spreadsheet) (R. 844). Dr. Morphis testified at trial that she knew that David Hess is smart and has an MBA and that if he had seen Defendant Alexander's "secret" spreadsheet, Mr. Hess would have known immediately that he had never actually received 50% of the profits of the Lancaster practice as his annual bonus, as required by Appendix A to his Employment Agreement. (Morphis

Testimony, Tr. Vol. 2, at 193, l. 21 to 195, l. 20) (R. 705.6-705.7). It was only after Mr. Hess and a co-worker decided to submit a bid to purchase the Lancaster practice in the summer of 2018 that he was finally able to get some complete, detailed financial statements about the practice. (Hess Testimony, Tr. Vol. 1, at 61, ll. 7-20) (R. 546); (Morphis Testimony, Tr. Vol. 2, at 242, ll. 17-21) (R. 719); (Alexander Testimony, Tr. Vol. 2, at 420, ll. 19-25) (R. 780); (Hinson Testimony, Tr. Vol. 2, at 508, l. 21 to 509, l. 6) (R. 827-828).

The fact that the jury's verdict in this case was less than the full amount of back-pay damages Mr. Hess requested is also not evidence of a good-faith dispute over the wages. It is well settled under the South Carolina Payment of Wages Act that "a jury's partial award of damages does not, by itself, create the existence of a bona fide dispute." Goodwyn v. Shadowstone Media, Inc., 408 S.C. 93, 100, 757 S.E.2d 560, 564 (Ct. App. 2014).

The trial court properly recognized the general rule that it must exercise its discretion on treble damages and attorney's fees irrespective of the jury's verdict on the underlying liability for back pay under the Act. See Temple, 381 S.C. at 600, 675 S.E.2d at 415. Nonetheless, the jury's verdicts in Plaintiff's favor and against the Morphis Defendants on Plaintiff's claims for breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation, as well as its corresponding award of punitive damages against the Morphis Defendants, weigh heavily against any argument by the Morphis Defendants that they had a good-faith basis to dispute the amount of Mr. Hess's bonuses.

The Morphis Defendants' argument that "the punitive damages award was contaminated" by an allegedly improper reference to Dr. Morphis's income (Apps.' Br., at 40) is completely immaterial to this appeal. The incident that the Morphis Defendants complain about occurred during

the bifurcated phase of the trial on February 2, 2022, to consider the propriety and amount of a punitive damages award against both sets of Defendants in this case (the Morphis Defendants and the Accounting Defendants). The issue of Dr. Morphis's income, as opposed to evidence of her net worth, would only have been relevant to the jury's decision of the amount of punitive damages, not whether to award punitive damages against her in the first instance. The jury had already rendered a verdict against the Morphis Defendants on February 1, 2022 for fraud, negligent misrepresentation, and breach of contract accompanied by a fraudulent act, on a special verdict form, including clear and convincing evidence of fraud. (Verdict I, Feb. 1, 2022, Nos. 2, 6, and 8) (R. 43-44). Moreover, the trial judge gave an appropriate curative instruction on this issue, and the Morphis Defendants did not object to that instruction or move for a mistrial. (Tr. Vol. 3, at 561, ll. 4-13) (R. 485). On February 2, 2022, the jury returned special verdict forms awarding punitive damages against the Morphis Defendants and apportioning fault on Mr. Hess's negligent misrepresentation claim as 75% Morphis Defendants and 25% Accounting Defendants. (Verdict Forms 2 & 3, Feb. 2, 2022) (R. 48, 49).

The trial judge was well within her discretion to reject the Morphis Defendants' claim of good-faith dispute and in awarding Mr. Hess three times the jury's verdict of $548,290.42 for back pay, as well as attorney's fees and costs, on Mr. Hess's first cause of action under the South Carolina Payment of Wages Act. The award of treble damages should be affirmed, and the award of attorney's fees and costs should be enhanced as argued in Respondent-Appellant's Cross Appeal in this matter.

8. THE TRIAL COURT'S AWARD OF PRE-JUDGMENT INTEREST WAS A PROPER EXERCISE OF HER DISCRETION BECAUSE THE BONUS AMOUNTS PROPERLY PAYABLE TO MR. HESS WERE A SUM CAPABLE OF BEING REDUCED TO CERTAINTY

Finally, the Morphis Defendants attack the trial court's award of pre-judgment interest to Mr. Hess. Although the Morphis Defendants concede that an award of pre-judgment interest is "committed to the sound discretion of the [trial] court," (Apps.' Br., at 46), the Morphis Defendants nevertheless argue that the trial court's award of pre-judgment interest in this case was not warranted.

In the leading case of Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993), the South Carolina Supreme Court articulated the standard for pre-judgment interest:

> The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose.

Id. at 353, 426 S.E.2d at 791 (internal citations omitted).

Here, the award of pre-judgment interest is appropriate because the measure of recovery for Plaintiff's annual bonus was fixed by the 2010 Employment Agreement as 50% of the annual net profits of the Lancaster practice, which is plainly an amount that could have been reduced to a sum certain at the time such bonuses were payable. In Lee v. Thermal Engineering Corp., 352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002), the court of appeals recognized that "'The right of a party to pre-judgment interest is not affected by rights of discount or setoff claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is

allowable.'" Id. at 88-89, 572 S.E.2d at 302 (quoting Southern Welding Works, Inc. v. K & S Constr. Co., 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985) (emphasis in original)). The Lee case involved a dispute over unpaid commissions to a sales representative under the notice terms of a contract. Although there was a dispute about whether the contract had been orally modified to include both engineered products and pre-engineered products, the court of appeals upheld the award of pre-judgment interest under the statute.

Here, like in Lee, the calculation of profit of the Lancaster practice was a straight-forward, mathematical calculation of income minus expenses, and Mr. Hess's bonus should have been 50% of that net profit number. Mr. Hess's damages were the mathematical difference between what Hess should have been paid based on the profit calculations each year versus what he was actually paid in bonus by the Morphis Defendants. That is a prime example of an amount that is capable of being reduced to a certainty. Accordingly, the trial court was correct in making the award of pre-judgment interest in this case.

CONCLUSION

For all of the foregoing reasons, Respondent-Appellant respectfully requests that this Court affirm the jury's verdict in this case and the trial judge's consequent award of treble damages, attorney's fees and costs under the South Carolina Payment of Wages Act (although the award of attorney's fees should have been based on the higher hourly rate as argued in Respondent-Appellant's Cross Appeal), as well as the award of prejudgment interest.

CERTIFICATE OF COUNSEL

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

September 18, 2023

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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

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

v.

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

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

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PROOF OF SERVICE

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

September 18, 2023

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