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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RESPONDENT-APPELLANT'S RETURN TO APPELLANTS-RESPONDENTS' PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

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Pursuant to Rule 221(a), SCACR, and as requested by the Court's letter of July 24, 2025, Respondent-Appellant, Paul David Hess, APRN-BC, (hereinafter "Mr. Hess"), by and through his undersigned counsel, hereby files this Return to Appellants-Respondents' Petition for Rehearing and Suggestion of Rehearing En Banc filed on July 23, 2024. Appellants-Respondents fail to "state with particularity the points supposed to have been overlooked or misapprehended by the court," as required by Rule 221(a), SCACR. Instead, Appellants-Respondents merely repeat most of their final briefs, often using verbatim passages simply copied-and-pasted into their Petition for Rehearing or changing the phrase "the trial court's ruling" to the "the court of appeals decision" at various occasions from their original brief. A petition for rehearing is not supposed to be used merely to echo virtually everything that was in the party's final briefs.

The Court's thorough and well-reasoned opinion leaves no justifiable basis for rehearing, other than with respect to the pre-judgment interest issue, which was not mentioned at all by the court or by Appellants-Respondents' counsel during oral argument in this case, and which is the subject of Respondent-Appellant's own Petition for Rehearing in Part. The Court's opinion carefully examined the conflicting evidence in the trial record that created numerous questions of fact for the jury to determine, despite Appellants-Respondents' continued efforts to cherry-pick certain testimony out of context and improperly to paint disputed evidence in the light most favorable to themselves.

Respondent-Appellant incorporates by reference the Final Brief of Respondent-Appellant, which set forth the applicable standard of review for each issue and refuted Appellants-Respondents' slanted recitation of the factual record (especially after a jury trial) and ineffective or misplaced legal arguments. The Court's Opinion methodically examined and rejected almost all of Appellants-

Respondents' arguments and did not overlook or misapprehend any of them.

Respondent-Appellant does need to take the opportunity of this Return to respond to a few of Appellants-Respondents' new points.

With respect to the first argument regarding the statute of limitations, Appellants-Respondents hyperbolically state in their petition that "The decision in this case establishes that a plaintiff is now entitled to all information concerning a financial decision prior to the statute of limitations starting on his claim" and that, under the Court's decision, "an employer [now] has a duty to disclose full financial information to an employee if that information might impact a financial decision the employee needs to make regarding his employment." (Petition, at 9). These arguments are obvious examples of the "parade of horribles" fallacy. The Court's Opinion contains no such holdings and will not cause large companies like Boeing to flee the State of South Carolina, as falsely suggested by Appellants-Respondents' counsel during oral argument. This Opinion merely stands for the unremarkable proposition that if an employee of a small, closely held corporation has an employment contract that specifies a bonus equal to 50% of the net profits of a particular office, that employee is entitled to have the contract enforced through the South Carolina Payment of Wages Act.

With respect to the second and third arguments about the discretionary nature of the bonus, Appellants-Respondents assert that "the court of appeals simply held that the language [from the 2010 Employment Agreement and Appendix A] is construed against the drafter." (Petition, at 11). The court thoroughly addressed both the "indefinite contract terms" and the alleged discretionary nature of the bonuses in Section B of the Opinion. The Court quoted the language from the Employment Agreement that "suggests Dr. Morphis was required to use the method of calculation

in Appendix A to determine Hess's bonus." (Opinion, at 11). The Court also correctly noted that the fact that Hess received some bonus payment every year was evidence that he obviously met whatever criteria the board used to find him eligible to receive a bonus every year. (Id.).

With respect to the fourth argument about the notice requirement of the SC Payment of Wages Act, Appellants-Respondents cite to an unpublished decision from this Court from 2019, Gould v. Worldwide Apparel LLC, No. 2016-002469, 2019 WL 3216893 (S.C. Ct. App. July 17, 2019). Even though Appellants-Respondents acknowledge the prohibition in Rule 268(d)(2), SCACR, against citing unpublished decisions other than in proceedings in which the case is directly involved, they nevertheless assert that the Gould case provides support for their arguments for rehearing. Significantly, Appellants-Respondents never mentioned the Gould case before–not to the trial judge, not in their final appellate briefs, nor at oral argument in this appeal; therefore, they cannot raise it for the first time on a petition for rehearing. See Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.") (quoting Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, Appellate Practice in South Carolina 309 (1999)).

Appellants-Respondents also argue that the rule against citing unpublished decision somehow conflicts with the goal of Rule 219, SCACR, to ensure or maintain the uniformity of the court's decisions. Of course, as a fundamental matter, the Court of Appeals cannot change the South Carolina Appellate Court Rules, which are promulgated by the South Carolina Supreme Court. In any event, an unpublished decision of the court of appeals, which has "no precedential value" under

the express language of Rule 268(d)(2), SCACR, should not be a consideration at all in maintaining the "uniformity of decisions" of this Court.

Even if this Court were to look at the unpublished Gould case, this Court's holding on the notice provision of the Payment of Wages Act does not inconsistent with the holding of Gould because the facts of this case are easily distinguished from the facts presented here. First of all, the Gould case was an appeal from summary judgment in favor of the plaintiff employee. Id. at * 1. The instant case is an appeal from a final judgment after jury verdicts in Mr. Hess's favor. Secondly, the Gould case involved an employee whose hours and pay were cut in connection with the imminent sale of the defendant employer. Id. The record also included deposition testimony and copies of text messages showing that the plaintiff employee agreed to the reduction of hours and compensation. Id. The plaintiff in Gould asserted that the attempts to change his hours and pay were void because they did not comply with the advanced, written notice requirement of the Payment of Wages Act and that his agreement constituted an unenforceable attempt to circumvent the provisions of the Act. Id. Here, Mr. Hess did not assert that the 2015 contract was void, just that it could not become "effective" under S.C. Code Ann. § 41-10-30, until sometime in 2016 because of the 7-day requirement. Even the employer defendant in Gould argued that the word "effective" as used in Section 41-10-30 "is 'merely used as a timing mechanism for the giving of written notice, not a potential nullification of an act.'" Gould, at *2 (quoting Appellants' brief). Thirdly, the court of appeals in Gould concluded that "the writing requirement of section 41-10-30 is an improper basis to preclude a jury from resolving the issues concerning the existence and terms of a novation between the parties." Gould, at * 4. The jury's consideration of the entire case here is consistent with the Gould court's obvious preference for the jury to resolve genuine issues of material fact, as

happened in this case.

Next, Appellants-Respondents complain that the Court "did not even mention" the case from the Fourth Circuit Court of Appeals, Barton v. House of Raeford Farms, Inc., 745 F.3d 95 (4th Cir. 2014). (Petition, at 15). As this Court knows (and as counsel for Appellants-Respondents certainly must know), decisions from the Fourth Circuit Court of Appeals are not binding authority in the state courts on issues of state law, such as the South Carolina Payment of Wages Act. Furthermore, as pointed out in Respondent-Appellant's final brief on the main appeal, the Barton court's discussion of the South Carolina Payment of Wages Act was plainly dicta, and the facts of Barton are readily distinguishable from the facts presented here because the notice issue in Barton involved the initial terms of employment notice, not a subsequent change to the terms and conditions of employment, which cannot be "effective" without first complying with the seven-day, advanced written notice requirement of S.C. Code Ann. § 41-10-30(A).

Relatedly, with respect to the treble damages arguments, Appellants-Respondents state that this Court "failed to address Appellant's argument that awarding treble damages in this case constitutes a change in the law which precludes the award." (Petition, at 21). Appellants-Respondents cite to the case of Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 612, 518 S.E.2d 591, 598 (1999), for the proposition that treble damages would be inappropriate under the SC Payment of Wages Act if there was a "new development in South Carolina employment law . . . [that was] not fully developed when the case was tried." (Petition, at 22). Appellants-Respondents wrongly state that "the only precedents" on this issue are the Barton and Gould cases discussed above. The most glaring flaw in this argument (apart from the fact that neither case is actually a "precedent" under South Carolina law), is that there is no evidence in the record that Dr.

Morphis relied on the Barton case in making any decisions regarding the attempted change to Mr. Hess's employment contract in 2015. (Of course, the Gould case did not even come out until approximately ten months after the complaint in this case was filed). The Court properly determined that the award of treble damages by the trial judge was properly within her discretion in this case.

For all of the foregoing reasons, Appellants-Respondents' Petition for Rehearing and Suggestion of Rehearing En Banc should be denied.

July 25, 2025

s/ David E. Rothstein

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PROOF OF SERVICE

I certify that I have served Respondent-Appellant's Return to Appellants-Respondents' Petition for Rehearing and Suggestion of Rehearing En Banc on Appellants-Respondents, Morphis Pediatric Group of Lancaster, PA and Elizabeth J. Morphis, M.D., on July 25, 2025, by email addressed to their attorney of record, Charles F. Thompson, Jr. (thompson@mtsolawfirm.com), Malone, Thompson, Summers & Ott, 339 Heyward Street, Columbia, SC 29201.

July 25, 2025

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