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

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

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

I. Procedural History

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

On February 3, 2022, Plaintiff filed an Election of Remedies as to Defendants MPG and Morphis, electing to pursue his remedies under the South Carolina Payment of Wages Act and to forego the jury's verdict of punitive damages against the Morphis Defendants. On February 14, 2022, Plaintiff filed a Petition for Treble Damages, Attorney's Fees and Costs, and Pre-Judgment Interest, seeking the following remedies from the Court against Defendants MPG and Morphis: (1) three times the jury's award of actual back-pay damages of $548,290.42, for a total of $1,644,871.26; (2) attorney's fees in the amount of $215,475.00, and costs in the amount of $9,472.54; and (3) pre-judgment interest in the total amount of $380,950.95.[3] This petition is addressed in a separate order.

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

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

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

II. Discussion

A. Legal Standard for JNOV Motion

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

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

B. Statute of Limitations

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

Act are barred by the three-year statute of limitations in S.C. Code Ann. § 41-10-80(C). Under the well-established discovery rule in South Carolina, the statute of limitations begins to run when the injured party knew or reasonably should have known that its rights had been violated. The discovery rule is an objective test, which inquires when a "cause of action should have been discovered through exercise of reasonable diligence [such that] the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist." Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). The Court acknowledges that the statute of limitations "is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" Id. (quoting Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)). Where conflicting evidence exists about whether a plaintiff knew or reasonably should have known he had a cause of action, that issue must be submitted to the jury. Id.

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

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

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

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

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

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

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

C. Discretionary Nature of Bonus

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

should be used to determine whether Plaintiff qualified for a bonus payment in any given year. Defendants' arguments disregard the plain language of the Employment Agreement. Section 4 of the Employment Agreement provides, in relevant part, "All or any bonuses shall be at the discretion of the Board or as determined in any appendix that is hereby signed and agreed upon by both parties (See Appendix A)." (Pl.'s Ex. 1, at 4, ¶ 4) (emphasis added). Appendix A to the Employment Agreement, which is titled "Bonus Compensation," states as follows:

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

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

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

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

D. Indefinite and Vague Contractual Terms

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

E. Defendant Morphis's Compensation

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

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

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

F. Payment of Wages Act Notice Provision

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

[4]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.

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

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

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

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

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

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

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

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

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

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

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

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

G. Remittur

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

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

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

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

III. Conclusion

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

IT IS SO ORDERED.

_____
DeAndrea G. Benjamin
Circuit Court Judge

November _____, 2022

Columbia, SC.

Lancaster Common Pleas

Case Caption: Paul David Hess VS Morphis Pediatric Group Of Lancaster Pa , defendant, et al

Case Number: 2018CP2901127

Type: Order/JNOV

So Ordered

s/DeAndrea Gist Benjamin, #2161