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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Opinion No. 6115 (S.C. Ct. App. file July 9, 2025)
Appellate Case No. 2025-002144

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

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. . . . . Petitioners-Respondents

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RESPONDENT-PETITIONER'S RETURN TO PETITIONERS-RESPONDENTS' PETITION FOR CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Did the Court of Appeals correctly rule that the trial record in this case, when properly viewed in the light most favorable to Respondent-Petitioner as the prevailing party, supported the jury's factual finding to reject the statute of limitations defense based on the discovery rule and fraudulent concealment where Petitioners-Respondents deliberately withheld from Respondent-Petitioner critical information necessary to calculate the net profits of the Lancaster practice, upon which Respondent-Petitioner's annual bonuses were supposed to be based?

(2) Did the Court of Appeals correctly base its statute-of-limitations ruling on the discovery rule and the fraudulent concealment doctrine, rather than on what Petitioners-Respondents incorrectly contend was an expansion of the duty to disclose?

(3) Did the Court of Appeals correctly rule that the trial record in this case, when properly viewed in the light most favorable to Respondent-Petitioner as the prevailing party, supported the jury's common-sense interpretation of the bonus provisions in Appendix A to the Employment Agreement, where the trial judge properly instructed the jury that any ambiguities in a contract should be construed in the light most favorable to Respondent-Petitioner because he did not draft the document, and where the calculation of the bonus was not a matter of unfettered discretion but instead was based on a fixed percentage of net profit?

(4) Did the Court of Appeals correctly rule that the notice provisions of the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-30(A), that any changes to the written terms of employment "must be made in writing at least seven calendar days before they become effective," can form the basis for a civil action under the remedies section of the Act, by an employee whose employer fails to pay him all wages due to him, without diversion or withholding, as required

by S.C. Code Ann. § 41-10-40(A) and (C)?

(5) Did the Court of Appeals correctly rule that the trial judge's award of treble damages and attorney's fees under the South Carolina Payment of Wages Act was an appropriate exercise of her discretion, where the trial record supports the factual finding that Petitioners-Respondents had no good-faith basis for failing to pay the bonuses according to the terms of the written Employment Agreement?

COUNTER-STATEMENT OF THE CASE

Although Petitioners-Respondents' Petition for Writ of Certiorari does not contain a Statement of the Case, Respondent-Petitioner hereby incorporates by reference the Statement of the Case set forth in his Petition for Writ of Certiorari on Prejudgment Interest Issue Only.

COUNTER-STATEMENT OF FACTS

Respondent-Petitioner hereby incorporates by reference the Statement of Facts set forth in his Petition for Writ of Certiorari on Prejudgment Interest Issue Only. Respondent-Petitioner needs to make one correction to his prior Statement of Facts: the email that the accountant, Defendant Alexander, sent only to Dr. Morphis on May 28, 2015 following the meeting earlier that day contained three additional lines of information for each year from 2010 through 2014 (not two as incorrectly stated): (1) "Net Income," (2) "Doctor Bonuses," and (3) "Net Income Before Doctor Bonuses." Respondent-Petitioner's counsel previously omitted the first line, "Net Income." None of these three additional lines appeared on the spreadsheet attached to the email Defendant Alexander sent to both Mr. Hess and Dr. Morphis about 15 minutes after he sent the secret email only to Dr. Morphis with the spreadsheet that was for her eyes only, which is discussed in further detail below.

By way of a counter-statement of facts, Respondent-Petitioner would note that the Questions Presented for Review and the Factual Background in Petitioners-Respondents' Petition completely disregard the well-settled principle that after a jury trial, the facts in the record must be liberally construed in the light most favorable to the prevailing party at trial. See, e.g., Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006) ("The appellate court must determine whether a verdict for a party opposing the motion [for directed verdict] would be reasonably possible under the facts as liberally construed in his favor. If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury.") (internal citation omitted). Contrary to this command, Petitioners-Respondents include in their Petition loaded phrasings of their Questions Presented for Review that are premised entirely on sharply disputed facts and that contain very dubious inferences and hyperbolic mischaracterizations of the court of appeals's decision. In addition, Petitioners-Respondents present their Statement of the Factual Background in a very argumentative and misleading fashion, cherry-picking portions of the trial testimony out of context and completely disregarding evidence in the record that contracts their position and that fully supports the jury's verdicts in favor of Mr. Hess on all of his causes of action. Petitioners-Respondents do not even acknowledge or recite the very limited standard of review that applies in this appeal at this stage of the proceedings, which prevents an appellate court from "decid[ing] credibility issues or . . . resolv[ing] conflicts in the testimony or evidence." Id. Respondent-Petitioner feels compelled to respond to a few of the more glaring misstatements of the trial record in Petitioners-Respondents' factual recitation.

First of all, Mr. Hess did not admit that he understood that he had a claim against Petitioners-Respondents outside of the three-year statute of limitations, as falsely asserted by Petitioners-

Respondents. (Pet., at 5). Mr. Hess received bonuses at the end of each year from 2010 to 2013, 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 or how his bonus was determined. (Hess Testimony, R. 513, ll. 9-22; 524, ll. 2-10). Whenever Mr. Hess asked a specific question about the finances of the Lancaster practice, Dr. Morphis would say that she did not know the answer to Mr. Hess's questions or that she would have get the information from the accountants, which she never did. (R. 515, ll. 17-24).

In 2014, Dr. Morphis did not simply "realize" that she had forgotten to calculate and pay Mr. Hess's bonus, as stated by Petitioners-Respondents. (Pet., at 3). In February 2015, after Mr. Hess received his W-2, which did not include any bonus payment at all, he confronted Dr. Morphis about why his gross income had decreased by almost $50,000 compared to the prior year. Dr. Morphis responded that she would have to check with the practice's outside accountant to see what happened. (R. 526, l. 23 to 527, l. 2). The accountant, Defendant Alexander, subsequently told Mr. Hess that his 2014 bonus would be identical to the one he received in 2013 ($48,000). The accountant explained to Mr. Hess that because the Lancaster practice had switched from a C-Corp to an S-Corp in 2014, they did not want to penalize Mr. Hess for the additional costs involved in the conversion, so they decided to leave the bonus the same as it had been the prior year. (R. 527, ll. 4-13); (Pl. Ex. 5, at 2) (R. 848); (Pl. Ex. 2, at 3) (R. 842). As the financial records at trial showed, however, the Lancaster practice actually had net income of over $196,600 dollars in 2014, even after Dr. Morphis paid herself over $81,000 in total compensation. (Pl. Ex. 3) (R. 844).

With respect to the meeting that occurred at the end of May 2015 between Dr. Morphis, Mr. Hess, the accountant and the practice managers from both Lancaster and Hartsville, that meeting was

not suggested by Mr. Hess and was not called to review the numbers used to calculate his bonus, as Petitioners-Respondents now assert. (Pet., at 3). The meeting occurred on May 28, 2015 and was actually pre-planned by Dr. Morphis and Defendant Alexander to try to convince Mr. Hess to change the method for calculating his bonus from one based on 50% of the net profits of the practice to one based on a lower percentage gross revenues. According to Mr. Alexander's email to Dr. Morphis on May 22, 2015, almost a week prior to the meeting, the first two items he explained as his understanding for the meeting with Mr. Hess are: (a) to negotiate a new contract with Mr. Hess, and (b) to convince Mr. Hess why his bonus should be based on gross revenues instead of net income. (R. 842). Only the third item on Mr. Alexander's draft agenda was to explain to Mr. Hess why his 2014 bonus was identical to the 2013 bonus, which explanation Mr. Alexander had previously provided to Mr. Hess over the phone.

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 during the meeting, comparing the bonus amounts with gross revenues from 2010 to 2014. (Pl. Ex. 4) (R. 845-846). Unbeknownst to Mr. Hess, Mr. Alexander also sent a similar spreadsheet only to Dr. Morphis, stating in the cover email, "Attached is the spreadsheet you requested. I thought it may be helpful for you to see what kind of profit you are receiving from the practice in Lancaster. This is for your benefit only, I won't share this with David." (Pl. Ex. 3) (R. 843) (emphasis added). The spreadsheet that Mr. Alexander sent to Dr. Morphis only, at her specific request, contained three additional lines of data below the line "Bonuses as a % of Gross Revenues" for each year from 2010 to 2014: "Net Income," "Doctor Bonuses," and "Net Income Before Doctor Bonuses." (Pl. Ex. 3) (R. 844). These last three lines were not on the spreadsheet that Mr. Alexander sent to both Mr. Hess and Dr. Morphis less than 15

minutes later the same day. This secret spreadsheet was the "smoking gun" evidence in the case because it revealed that Mr. Alexander's explanation to Mr. Hess about why his bonus in 2014 was identical to the one he received in 2013 was a complete fabrication. Mr. Alexander and Dr. Morphis clearly knew that the net income of the practice in 2014 was over $100,000 higher than it was in 2013, even after figuring in Dr. Morphis's "Doctor Bonuses" each year. This evidence was the primary basis for the jury's finding of negligent misrepresentation and corresponding award of punitive damages against the accounting defendants. In short, Mr. Hess never received 50% of the profits of the Lancaster practice as his bonus, as promised in the 2010 Employment Agreement and the bonus formula set forth in Appendix A to that Agreement. (R. 552, ll. 11-24).

ARGUMENTS

1. THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIAL RECORD IN THIS CASE, WHEN PROPERLY VIEWED IN THE LIGHT MOST FAVORABLE TO RESPONDENT-PETITIONER AS THE PREVAILING PARTY, SUPPORTED THE JURY'S FACTUAL FINDING TO REJECT THE STATUTE OF LIMITATIONS DEFENSE BASED ON THE DISCOVERY RULE AND FRAUDULENT CONCEALMENT WHERE PETITIONERS-RESPONDENTS DELIBERATELY WITHHELD FROM RESPONDENT-PETITIONER CRITICAL INFORMATION NECESSARY TO CALCULATE THE NET PROFITS OF THE LANCASTER PRACTICE, UPON WHICH RESPONDENT-PETITIONER'S ANNUAL BONUSES WERE SUPPOSED TO BE BASED.

Petitioners-Respondents first assert that Mr. Hess's claims under the South Carolina Payment of Wages Act should have been barred by the three-year statute of limitations in S.C. Code Ann. § 41-10-80(C). The trial court and the Court of Appeals properly concluded that the application of the discovery rule and tolling for fraudulent concealment were questions of fact for the jury to decide. The trial record in this case amply supports the jury's rejection of the statute of limitations

defense.

Under the "discovery rule," 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). As both the trial court and the Court of Appeals correctly recognized, 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 wrongdoer deliberately conceals 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 plaintiff knew or should have known he had a cause of action under the discovery rule 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 according to the contract. (Morphis Testimony, R. 905.9.6, l. 25 ("I feared David would question me.")); (Hinson Testimony, R. 820, l. 22 ("I kept her privacy."). 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 clearly 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 practice's accountant, Defendant Alexander, 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. (Pl. Ex. 5, at 2) (R. 848); (Pl. Ex. 2, at 3) (R. 842).

In addition, as noted above in the Statement of Facts, the practice's accountant 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 MPGL's "Net Incomes," Dr. Morphis's "Doctor Bonuses," and "Net Income 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).

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, R. 514, ll. 23-24 ("I didn't have access to anything."); (R. 528, ll. 7-8 ("I wasn't sure exactly what was going on and they weren't providing any information."); (R. 551, ll. 7-15) ("I thought Beth [Morphis] was my friend. With the few times I had questions and stuff, I never even questioned that it was her. I thought it was the accounting firm. I even made the recommendation that we get a new accounting firm because I thought they were stealing from us, not just from me but from her also. I had like, a little bit of information and I would try to use everything I had to figure out where, why, things don't add up."); (Hinson Testimony, R. 816, l. 25 to 817, l. 1) ("Well, he wanted to know the expenses and I couldn't tell him."). 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 COURT OF APPEALS CORRECTLY BASED ITS STATUTE-OF-LIMITATIONS RULING ON THE DISCOVERY RULE AND THE FRAUDULENT CONCEALMENT DOCTRINE, RATHER THAN ON WHAT PETITIONERS-RESPONDENTS INCORRECTLY CONTEND WAS AN EXPANSION OF THE DUTY TO DISCLOSE.

In their second question presented for review, Petitioners-Respondents incorrectly assert that the Court of Appeals's 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," (Pet., at 8), and that "an employer has a duty to disclose full financial information to an employee if that information might impact a financial decision the employee is considering regarding his employment." (Pet., at 9). Petitioners-Respondents' argument in this regard is simply a "parade of

horribles" fallacy. The Court of Appeals did not recognize a fiduciary duty between Dr. Morphis and Mr. Hess, as falsely argued by Petitioners-Respondents, even though there is evidence in the record that Dr. Morphis referred to Mr. Hess as the "managing partner" of the Lancaster practice on several occasions. (R. 591, ll. 1-8). The Court of Appeals did not create a new type of fiduciary duty to disclose here, but rather held that the jury must decide when the statute of limitations begins to run under the discovery rule and the fraudulent concealment doctrine. This is not the type of equitable tolling of the statute of limitations as recognized in Hopkins v. Floyd's Wholesale, 299 S.C. 127, 382 S.E.2d 907 (1989), where a plaintiff is mislead into believing that he does not need to file suit because the defendant falsely promised him that his claim would be paid.

Dr. Morphis's duty under the contract and under the South Carolina Payment of Wages Act was to pay Mr. Hess a bonus of 50% of the annual net profits of the Lancaster practice, as promised in Appendix A of the Employment Agreement. If Dr. Morphis breached the contract, unbeknownst to Mr. Hess because he did not have access to the financial records from which the bonus should have been calculated and because of affirmative steps taken by Dr. Morphis and her accountant to mislead Mr. Hess about his bonus payments, she took the risk that a jury might rule in Mr. Hess's favor on the discovery rule and on fraudulent concealment. Petitioners-Respondents' misreading or overstatement of the Court of Appeals's decision is simply not a basis for this Court to grant a writ of certiorari in this case.

3. THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIAL RECORD IN THIS CASE, WHEN PROPERLY VIEWED IN THE LIGHT MOST FAVORABLE TO RESPONDENT-PETITIONER AS THE PREVAILING PARTY, SUPPORTED THE JURY'S COMMON-SENSE INTERPRETATION OF THE BONUS PROVISIONS IN THE ATTACHMENT TO THE EMPLOYMENT AGREEMENT, WHERE THE TRIAL JUDGE PROPERLY

INSTRUCTED THE JURY THAT ANY AMBIGUITIES IN A CONTRACT SHOULD BE CONSTRUED IN THE LIGHT MOST FAVORABLE TO RESPONDENT-PETITIONER BECAUSE HE DID NOT DRAFT THE DOCUMENT AND WHERE THE RECORD CONTAINS AMPLE EVIDENCE THAT THE BONUS AMOUNT WAS NOT A MATTER OF UNFETTERED DISCRETION BUT INSTEAD WAS BASED ON A FIXED PERCENTAGE OF NET PROFIT.

Petitioners-Respondents 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. Petitioners-Respondents' 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 its calculation 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, Appendix A to the 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, once the threshold decision was made to pay a bonus to Mr. Hess in each year, then Appendix A prescribes how the bonus was supposed to be calculated: he was entitled to 50% of the Lancaster practice's net profits. The operative phrases of Appendix A–"shall be divided," "is granted," and "will be determined"–are written 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 a particular 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 Testimony, R. 653, ll. 17-21; at 654, ll. 3-9, 17-22; at 655, ll. 3-6). Furthermore, Dr. Morphis testified repeatedly that she always used the profit calculation for Mr. Hess's bonus, never any type of discretionary powers she might have had as the Board of MPGL. (R. 322, ll. 11-13, at 339.2, l. 24 to 340, l. 5).

Petitioners-Respondents' 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. (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). Petitioners-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, amount to a failure to preserve those issues for appellate review, and such issues cannot be considered by an appellate court. 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, issues newly raised in the JNOV motion were not preserved for review).

The out-of-state cases cited by Petitioners-Respondents that involved purely discretionary bonus payments are not applicable to the situation here, because the bonus payments in this case were based on a set percentage of the practice's net profits.

Next, Petitioners-Respondents 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 "criteria," eligible," "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)); 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 Employment Agreement or Appendix A and that those documents were created solely by the Morphis Defendants' attorney. (Hess Testimony, R. 508, ll. 20-23; 509, ll. 3-7); (Morphis Testimony, R. 646, l. 24 to 647, l. 4; 648, ll. 17-21).

4. THE COURT OF APPEALS CORRECTLY RULED THAT THE NOTICE PROVISIONS OF THE SOUTH CAROLINA PAYMENT OF WAGES ACT, S.C. CODE ANN. § 41-10-30(A), THAT ANY CHANGES TO THE WRITTEN TERMS OF EMPLOYMENT "MUST BE MADE IN WRITING AT LEAST SEVEN CALENDAR DAYS BEFORE THEY BECOME EFFECTIVE," CAN FORM THE BASIS FOR A CIVIL ACTION UNDER THE REMEDIES SECTION OF THE ACT, BY AN EMPLOYEE WHOSE EMPLOYER FAILS TO PAY HIM ALL WAGES DUE TO HIM,

WITHOUT DIVERSION OR WITHHOLDING AS REQUIRED BY S.C. CODE ANN. § 41-10-40(A) AND (C).

Petitioners-Respondents' next argument is that the South Carolina Payment of Wages Act cannot provide a remedy for the 2015 bonus year because, they assert, Mr. Hess was aware, in May or June 2015, of the initial proposal to switch his bonus calculation from 50% of net profits to 5% of gross revenues and because the bonus payment was not actually due until February 15, 2016, more than seven days after Mr. Hess's signature on the new contract on December 30, 2015. Petitioners-Respondents 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). None of these arguments is valid.

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) (emphasis added). No evidence was presented at trial of the actual date 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). Mr. Hess testified that during the May 28, 2015 meeting described above, the concept of changing the bonus to a percentage of gross revenue, rather than net income, "was brought up briefly. There was no paperwork, there was no nothing. It was just let's convert from this to this." (R. 588, ll. 9-11).

Furthermore, 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) (emphasis added), 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). Petitioners-Respondents produced no evidence to support an argument that Mr. Hess'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.

Moreover, 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 after December 21, 2025), Mr. Hess's entitlement to a bonus in 2015 would have necessarily been based on the 2010 Employment Agreement, which 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, R. 503, l. 14 to 504, l. 5); (Morphis Testimony, R. 650, ll. 2-18).

Petitioners-Respondents 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. Petitioners-Respondents' 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 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), as 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 a civil lawsuit 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 initial, written terms of employment notices 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. Under the plain language of Section 41-10-30(A), that change was not "effective" as a matter of law until 7 days after the written notice of the new bonus provisions was provided to Mr. Hess.

Perhaps more importantly, the Barton court's overly narrow analysis of the Payment of Wages Act is contrary to the well-established, underlying, remedial 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 civil remedy in Section 41-10-80(C). Such remedies are cumulative, not mutually exclusive. Again, this is a remedial statute that should be liberally construed to effectuate its underlying purpose: to protect employees and empower them to recover unlawfully withheld wages.

The interplay between Section 41-10-30(A) and the remedies provision Section 41-10-80(C) is also significant. Section 41-10-80(C) provides that an employee can bring a civil case for violations of Sections 41-10-40 or 41-10-50 to remedy an employer's failure to pay wages due. As relevant here, Section 41-10-40(A) provides that every employer in the State shall pay all wages due

to the employee and that such payments must be made in lawful United States money or by negotiable warrant or check dated the same day as the pay date. S.C. Code Ann. § 41-10-40(A). In addition, Section 41-10-40(C) provides, "An employer shall not withhold or divert any portion of an employee's wages . . . without written notification to the employee of the amount and terms of the deductions as required by subsection (A) of Section 41-10-30. S.C. Code Ann. § 41-10-40(C). Because subsection 41-10-40(C) specifically refers to the notice provision of the Act (S.C. Code Ann. § 41-10-30(A)), a civil action under Section 41-10-80(C) can be brought where an employer diverts or withholds any pay that is not made pursuant to a valid and effective written notice. Dr. Morphis's wrongfully diverting a portion of Mr. Hess's full 50% share of the Lancaster profits as his annual bonus to herself is plainly a violation of Section 41-10-40(C) and, therefore, is the proper subject of a civil action by Mr. Hess under Section 41-10-80(C).

Mr. Hess's lawsuit here under the South Carolina Payment of Wages act was not based simply on the Morphis Defendants' technical failure to provide the notice itself, like the South Carolina Department of Labor, Licensing & Regulation might enforce through a warning and administrative penalty for each occurrence under Section 41-10-80(A); rather, Mr. Hess's lawsuit sought money damages because the change in his pay could not have become "effective" until 7 days after he received written notice of the change, which was sometime in 2016 at the earliest.

The fact that the Court of Appeals did not mention either the Fourth Circuit's Barton case or the unpublished decision in Gould v. Worldwide Apparel LLC, Unpublished Op. No. 2019-UP-262, 2019 WL 3216893 (S.C. Ct. App. July 17, 2019) (unpublished) does not provide grounds for this Court to grant Petitioners-Respondents' Petition for Writ of Certiorari. As noted previously, the Barton case is not binding authority on South Carolina state courts on matters of state law, and is not

particularly persuasive since it is largely dicta. With respect to the Gould case, as Petitioners-Respondents state, Rule 268(d), SCACR expressly provides, "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d), SCACR. There is not conflict here between Rule 268(d) and Rule 219(a), SCACR, which lists as one basis for the court of appeals to rehear cases en banc "when consideration by the full court is necessary to secure or maintain uniformity of its decisions." Rule 219(a)(1), SCACR. Because unpublished decisions of the court of appeals have no precedential value beyond the same case, they cannot create a conflict with actual, published decisions by the court of appeals. Petitioners-Respondents' essentially copying-and-pasting most of the legal analysis from the unpublished opinion in Gould should not be condoned as a way to get around the clear command of Rule 268(d), SCACR.

5. THE COURT OF APPEALS CORRECTLY RULED THAT THE TRIAL JUDGE'S AWARD OF TREBLE DAMAGES AND ATTORNEY'S FEES UNDER THE SOUTH CAROLINA PAYMENT OF WAGES ACT WAS AN APPROPRIATE EXERCISE OF HER DISCRETION, WHERE THE TRIAL RECORD SUPPORTS THE FACTUAL FINDING THAT PETITIONERS-RESPONDENTS HAD NO GOOD-FAITH BASIS FOR FAILING TO PAY THE BONUSES ACCORDING TO THE TERMS OF THE WRITTEN EMPLOYMENT AGREEMENT.

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).

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. 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 well after the fact, 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, R. 697, 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. Although Dr. Morphis testified that she believes she was "more than fair" to Mr. Hess in terms of his compensation, (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.

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 have raised numerous arguments during this litigation, on summary judgment, at trial, on motion for directed verdict, and on appeal in an effort to defend against Mr. Hess's allegations that his bonuses were improperly paid. 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 fact that Dr. Morphis never provided Mr. Hess access to the complete financial records of the Lancaster practice is itself compelling evidence that she was hiding from Mr. Hess the true amount of profits that were being generated each year from the Lancaster practice.

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 same facts and evidence that supported the jury's verdicts in Mr. Hess's favor on his claims for breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation, as well as its corresponding award of punitive damages[1] against the Morphis Defendants, supported the trial court's rejection of the Morphis Defendants' arguments that they had a good-faith basis to dispute the amount of Mr. Hess's bonuses.

As the Court of Appeals correctly found, the trial judge was well within her discretion to reject the Morphis Defendants' claim of good-faith dispute and to award Mr. Hess three times the jury's verdict of $548,290.42 for back pay, as well as attorney's fees and costs, pursuant to the South

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[1] The Morphis Defendants' argument that the punitive damages award was "contaminated" by an allegedly improper reference to Dr. Morphis's income, (Pet., at 21), 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, by 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. (R. 485, ll. 4-13).

Carolina Payment of Wages Act.

CONCLUSION

For all of the foregoing reasons, Respondent-Petitioner respectfully suggests that Petitioners-Respondents have not made a sufficient showing under Rule 242, SCACR, that this case presents "special and important reasons" that would justify granting their Petition for Writ of Certiorari. Accordingly, their Petition should be denied.

Respectfully submitted,

November 18, 2025

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