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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Deandrea G. Benjamin, Circuit Court Judge

Case. No. 2018-CP-001127
Appeal No. 2025-002144

Paul David Hess APRN-BC, Respondent-Petitioner

v.

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

Of Whom, Morphis Pediatric Group of Lancaster, PA and Elizabeth J. Morphis M.D are Petitioner--Respondents

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PETITIONER-RESPONDENTS' REPLY TO RESPONDENT-PETITIONER'S RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO HESS'S FACTUAL BACKGROUND

Hess spends two pages of his factual statement accusing Morphis of falsely representing the facts and making dubious conclusions and inferences. The accusations are both unseemly and inaccurate. Nowhere in his return does Hess cite anything specific to prove his accusations. In truth, there are no factual disputes at this point and Hess is simply attempting to confuse and obfuscate the proper legal conclusions to be drawn from the facts. He misunderstands that, simply because a jury found in his favor on certain facts does not mean that those facts support a claim of fraud and the like. *See, e.g., Humana Hosp.-Bayside v. Lightle*, 305 S.C. 214, 217, 407 S.E.2d 637, 638 (1991) ("Instead he relies on a sweeping legal assertion that summary judgment is always improper on the issues of negligence, fraudulent breach of contract, bad faith and punitive damages, because these are questions of fact for the jury. This is an incorrect proposition. These issues are only proper to present to the jury when there is a genuine issue as to some material fact for the jury to consider."); *Metro. Life Ins. Co. v. Stuckey*, 194 S.C. 469, 10 S.E.2d 3, 6 (1940) (differentiating fraud as a legal conclusion from facts that must be asserted to support the claim); *Towill v. S. Ry. Co.*, 121 S.C. 447, 114 S.E. 416, 420 (1922) (same). An example in point is that Hess repeatedly raises the strawman assertion that Morphis refused to provide him all the financial information Hess wanted. It is true. Morphis plainly informed Hess that she would not provide all the information he sought. In fact, in response to his question, "am I getting 50%," he was told that his question was not going to be answered. (R.535, I.50 lines 6-24). Far from helping Hess's case, this refusal should have made plain to him that he might have a claim. In any event, it is not correct that Hess had no financial information. He admitted Morphis gave him expense information and he, in fact, knew Morphis was taking a salary and an automobile expense before profits were calculated. (R.587, I.110 Lines 1-9); (R.547-448, I.62-

63, Lines 23-25, Lines 2-7).

Hess particularly decries, as false, the assertion that he "admitted he understood he had a claim" outside the limitations period. That is plainly incorrect. He repeatedly admitted he had formed the belief he wasn't being properly paid outside the limitations period. These admissions are set forth in detail in Morphis's Petition for Writ, beginning on page 18, and will not be repeated here. It is particularly remarkable that Hess would try to deny these admissions given that his counsel reaffirmed the admissions in oral argument before the court of appeals:

> Judge Hewitt: I don't think it's disputed, I don't think you would dispute that your client suspected well outside the three-year limitations period that he was not being compensated according to his employment agreement. You would concede that right?
>
> Rothstein: He had suspicions. No question about it.

(Recording of 11/7 Oral Argument, https://media.sccourts.org/COA_Videos/2022-001589.mp4).

Hess highlights, in his statement of facts, the accusation that he was told, in 2015, that his bonus for 2014 was the same as the 2013 bonus because of the practice's switch from C-Corp to S-Corp for tax purposes. This might be relevant to the question of whether or not there was a breach of the agreement, but it has nothing to do with the running of the statute of limitations. Hess admitted that, after being told this, he did not think the 2013 and 2014 bonuses could be the same because profit and loss could never be the exact same number from year to year. (R.557-558, I.72-73, Lines 19-25 and 1-4). In other words, he put no reliance on any representation of the practice's tax status. As will be examined below, this belies any claim for tolling or that he did not know, or have reason to know, he had a claim.

Similarly, Hess emphasizes his allegation that a spreadsheet prepared by Morphis' accountant is a "smoking gun" because it showed the 2013 and 2014 net income of the practice was not the same, therefore, his proper bonus could not possibly have been the same. This fact is

also irrelevant and a strawman because Hess never relied on it and repeatedly admitted he had formed the belief he was improperly paid. This belief is the only relevant issue—not whether or not Morphis, in fact, improperly paid Hess his bonus. (Note: In total, for the years the Agreement was in effect, Hess was paid more than 50% of the income as that income was calculated by the company accountant including Morphis compensation and automobile expense). (R.923, Plaintiff Ex. 19).

ARGUMENT

Hess Mistakes the Proper Legal Standards Regarding the Statute of Limitations

Hess begins by, once again, raising a strawman that, because he got a jury verdict on the issues, the statute of limitations defense cannot be ruled on as a matter of law. As stated above, this is untrue. He also offers the red herring that he, at least at times, blamed the company accountant and not Dr. Morphis for his underpayment. Neither is relevant to the question of whether he know of should have known he had a claim outside the limitations period. He admitted he did. Morphis will not repeat these many admissions that are already set forth in the Petition for Writ. They include his admissions he (outside limitations period) questioned whether he was getting paid 50%, that he knew about the automobile expense and Dr. Morphis's salary before net income, knew that the net profit and expenses did not match to his bonus, knew his 2013 and 2014 bonuses should not be the same amount, was told he was not going to be given access to all financial information, was told he would get no answer to whether his bonus was 50% of net income, and admitted he thought he was not getting 50% of net income. (See Petition for Writ p. 18 and following).

Hess also continues to misapprehend the caselaw differences regardinng tolling, estoppel, and the discovery rule. The statute of limitations begins to run once the requirements of the

discovery rule are met, *i.e.*, that a plaintiff knows, or by exercise of reasonable diligence, should have known, he has a claim. *See, e.g., Walbeck v. I'On Co., LLC*, 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019). The test is objective and the South Carolina's statute of limitations requires "very little to start the clock." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir.1994) (applying South Carolina law).

Concealment of financial data Hess might have found useful to verify his bonus is just not relevant. Hess made plain that he believed he wasn't getting properly paid and that he formed this belief outside the limitations period. Concealment of data, and even providing misleading information regarding his bonus, is just not germane to the discovery rule. "Discovery" is what matters-not the accuracy of what a plaintiff is told regarding the contract payment.

Hess asserts that "tolling" applies to the statute of limitations if there is any concealment of information. This is confusing the caselaw. The statute begins to run as soon as plaintiff learns, or should have learned, he had a claim. How much was concealed from him is irrelevant to that question. Hess cites *Strong v. Univ. of S.C. Sch. of Med.*, as support for this assertion. 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994). However, *Strong* is actually the opposite of what Hess argues. In *Strong*, the court held that the statute would not begin to run if there was a duty to disclose (in that case, the doctor-patient relationship). However, once a doctor disclosed that Strong had been mistreated, the court held that the statute began to run, even though the disclosure was not full and complete. Hess admits he had formed the belief outside the statute of limitation, based on information available to him, that his bonus was not correct. *Strong*, therefore supports Morphis's arguments.

It is notable that, unlike in *Strong*, a business has no duty of disclosure to an employee. *See, In re Hunnicut*, 466 B.R. 797, 801 (Bankr. D.S.C. 2011) ("No trust exists in a simple

employer/employee relationship. Such a relationship is merely comprised of an agreement for the employee to perform work and the employer to compensate him for the work he performs.") (citing *Burwell v. S.C. Nat. Bank*, 340 S.E.2d 786, 790 (S.C. 1986)). Similarly, a contract, unless it is "intrinsically fiduciary" does not create a duty to disclose. *See, e.g., Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601, 605 (1967). Therefore, Morphis did not have an obligation to disclose her full financial information to Hess.

Hess just ignores all the caselaw that holds it takes very little to start the clock, and that full awareness, or the receipt of nearly all information needed, is not a requirement. In *Maher v. Tietex Corp.*, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) the court held that the employer's refusal to answer questions about bonus calculations was enough to start the statute of limitations running. Hess admitted to far more awareness of his claims than did Maher. *Strong* was similar in that, as soon as a doctor made a medical note that lack of care caused the injury, the clock began to run. The fact that Strong was blind and didn't know of this note until someone read the records for him could not toll the clock. 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994). *See also, Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996) (The fact an injured party may not comprehend the full extent of the damage is immaterial.). In other words, the discovery rule does not "require absolute certainty [that] a cause of action exists before the statute of limitations begins to run." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 126, 542 S.E.2d 736, 741 (Ct. App. 2001); *Joubert v. South Carolina,* 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000) ("We have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist.") (quoting *Dean v. Ruscon Corp.,* 321 S.C. 360, 364, 468 S.E.2d 645, 647

(1996)). *See also Burgess v. American Cancer Soc'y,* 300 S.C. 182, 386 S.E.2d 798 (Ct.App.1989) (holding statute starts to run upon discovery of such facts as would have led to knowledge thereof if pursued with reasonable diligence). In fact, constructive receipt of information that should cause a party to conduct an investigation which would lead to knowledge of a claim is all that is required. See, e.g., *Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 187, 386 S.E.2d 798, 801 (Ct. App. 1989) (in malpractice action, client's knowledge his attorney was having affair with agent of the defendant "constitutes such knowledge of existing facts which were sufficient to put Burgess on inquiry and had she pursued such inquiry, it would have disclosed the alleged communications [of privileged information from attorney to defendant]."); *see also*, *Walter J. Klein Co. v. Kneece,* 239 S.C. 478, 123 S.E.2d 870 (1962) (all that is needed is information "sufficient to put said party on inquiry which, if developed, will disclose the alleged fraud." (citing *Tucker v. Weathersbee,* 98 S.C. 402, 82 S.E. 638 (1914)).

It is true that tolling (a separate concept from the discovery rule) can stop the statute from running but only if the fraud is to forestall a plaintiff from filing—such as agreeing to settle or pay the amount due. Hess misapplies tolling by claiming that the statute is stopped anytime there is some evidence of concealment of information. *Strong,* and the cases cited above, prove the opposite. As soon as there was enough disclosure to put the plaintiff on notice of a claim, the courts hold that the statute is running. *See, also, Hopkins v. Floyd's Wholesale,* 299 S.C. 127, 382 S.E.2d 907 (1989) (plaintiff promised claim would be paid).

> **("[E]quitable tolling is a doctrine that should be used sparingly** and only when the interests of justice compel its use."); *Kelly v. Logan, Jolley, & Smith, L.L.P.,* 383 S.C. 626, 639, 682 S.E.2d 1, 8 (Ct.App.2009) **("[F]or equitable estoppel to apply, a plaintiff must be *aware* that a claim might exist prior to the expiration of the statute of limitations, but due to some conduct or representation by the defendant, the plaintiff is induced ... to delay in filing suit**." (alteration in original) (internal quotation marks omitted)).

Campbell v. Guignard, No. 2015-UP-293, 2015 WL 3819059, at *1 (S.C. Ct. App. June 17, 2015) (emphasis added).

Because there is no assertion Morphis tried to induce Hess not to file suit, tolling does not apply to this case.

Hess Argument Regarding the Language "Or As Determined by any Appendix" is Another Red Herring

On page 11 of his Response, Hess asserts that Morphis is arguing that the language "All and any bonuses shall be at the discretion of the board" means the bonus is discretionary. He then goes on to argue that the language following this trumps that discretion. That language is "All and any bonuses shall be at the discretion of the board **or as determined in any appendix** …."

This another strawman argument because Morphis argues no such thing. Morphis agrees that the existence of an Appendix makes the language "discretion of the board" irrelevant. However, as is discussed in the Petition for Writ, and below, the Appendix language itself makes the bonus completely discretionary.

Morphis Clearly Preserved the "Discretionary therefore Unenforceable" Argument[1]

Hess's argument that Morphis did not preserve the "Discretionary" argument is incorrect. Indeed, it is difficult to understand how Hess mistakenly argues this. Morphis' counsel clearly made this argument at the close of Hess's case, at the close of all evidence, and in the JNOV motion.

At the close of Hess's case:

> I'm gonna combine two arguments. So we're talking about **discretion** and lack of essential terms.

[1] The Court of Appeals did not rule on this preservation argument but did reject it by implication because it addressed Morphis's discretionary language arguments.

(R.785, Vol. II p. 432 Lines 22-24) (emphasis added).

> You don't get past go unless you meet criteria, which is undefined, and could be **anything that Dr. Morphis decides it's going to be**. And then it says if you pass the criteria, I suppose, the employee will be eligible for, not the employee shall receive, the employee will be eligible for an annual bonus based on the following formulation. So, again, **discretionary language**

(R.786, Vol. II p. 433 Lines 1-9) (emphasis added).

> Your Honor, appendix A and the language up above it is **highly discretionary**. If a bonus or any kind of payment is discretionary on the part of the employer, it's not enforceable promise. An overwhelming number of courts have held that a **discretionary** bonus is not a contractual promise.

(R.786, Vol. II p. 433 Lines 24-25, p. 434 Lines 1-4) (emphasis added).

Counsel also filed a written directed verdict motion at the same time as oral argument was made, with the same arguments regarding the discretionary nature of the bonus. (R.174, Directed Verdict Motion filed 1/28/2022).

In fact, Defendant's counsel had to remind the court to rule on this argument because she missed it when initially ruling on the directed verdict motions.

> MR. THOMPSON: I think just for issue preservation purposes.
>
> THE COURT: Yes, sir, please do.
>
> MR. THOMPSON: I have to say that I don't believe the Court addressed all my arguments. Of course, I can't make the Court do that.
>
> THE COURT: Which ones did I not address? Y'all had a lot of them.
>
> MR. THOMPSON: Well, there's an argument about terms of **discretionary** and therefore cannot form [an] enforce[ible] contract. That was one.

(R.811, Vol. II p. 477 Lines 16-25, p. 478 Lines 1-2) (emphasis added).

This argument was renewed again at the close of all evidence.

> MR. THOMPSON: Issue two, Your Honor, is that a discretionary bonus is not an enforceable contractual promise. As its stated in his agreement Morphis Pediatric, Dr. Morphis could use any criteria they wished to decide if Mr. Hess would receive a bonus

> or not, therefore, **his bonus was completely discretionary**. I cite quite a few cases that talk about if it's discretionary . . .

(R.354-355, Vol. III p. 238 Lines 25, p. 239 Lines 1-6) (emphasis added).

Finally, the argument was renewed in the JNOV motion both within Morphis' filed written motion and at oral argument. (R.191, Motion for JNOV p. 11) (R. 233, May 19 Hearing p. 22 Lines 4-10).

Hess Fails to Address the Primary Argument that he Did get 7 Days Prior Notice

Hess's arguments regarding whether or not he got seven days prior notice of the change to the 2015 Agreement are adequately addressed in the Petition for Writ. However, Morphis notes that Hess completely failed to address the line of cases holding that the notice requirement is not onerous. Mere text messages are sufficient to satisfy the requirement of a writing. *Mathis v. Brown & Brown of S.C., Inc*., 389 S.C. 299, 308–09, 698 S.E.2d 773, 777–78 (2010) (as applied in *Gould v. Worldwide Apparel LLC*, No. 2016-002469, 2019 WL 3216893, at *4 (S.C. Ct. App. July 17, 2019)). As stated in the Petition, Hess was presented a written explanation of the change in May 2014, had accepted it in June, and signed the contract in December—all well before the February due date for payment.

There is No Civil Remedy for a Notice Violation

Hess argues that the *Barton* case is not binding on this court. This is both true and irrelevant. It does not change the fact that it is persuasive authority as the only published decision on the remedies provided by § 41-10-30. The South Carolina appellate courts have not ruled on this issue in a published decision, although they have done so in an unpublished decision. In any event, *Barton* is persuasive and clearly ruled that the only remedy for a 41-10-30 violation is a penalty from the Department of Labor. *Barton v. House of Raeford Farms, Inc.*, 745 F.3d 95,

108 (4th Cir. 2014). It is incorrect that the decision on this point was mere dicta. It was an alternative holding which is more than dicta. Judith M. Stinson, Why Dicta Becomes Holding and Why It Matters, 76 Brook. L. Rev. 219, 264 (2010) ("most courts recognize alternative rulings as binding holdings, not dicta."). In any event, even dicta is regarded as persuasive authority where, as here, the issue is squarely examined and ruled upon. *City of Columbia v. Pearman*, 180 S.C. 296, 185 S.E. 747 (1936) ("What he said in this respect was dicta, but his reasoning is persuasive.").

Hess also attempts to distinguish *Barton* on the grounds that the dispute in that case was an alleged change of how hours of work were counted (line time versus clock time) whereas his dispute is over a change in his bonus formula. This is a distinction without meaning. Both disputes were over alleged changes that caused less compensation to be paid. Although the *Barton* court expressed doubt that the notice provision applied to a dispute over whether preparation time was counted as compensable hours, it analyzed the claim as if 41-30-30 did apply. Therefore, this is not a factor upon which the case may be distinguished.

In summary, § 41-10-80(A) clearly provides that the remedy for a 41-10-30 violation is a penalty imposed by the Department of Labor. Only in a separate provision at 41-10-80(B) (which governs Hess's claims for the years 2010 through 2014) does the Act provide an employee the right to bring a civil action for failure to pay wages due. If the legislature had intended to impose any consequences for violation of section 41-10-30 in addition to those imposed by section 41-10-80(A), it would have expressly provided for them, and there is no provision in the Act other than section 41-10-80(A) addressing the failure of an employer to comply with the notice requirement of section 41-10-30(A). It is simply clear that the only

consequences the legislature intended to impose for a violation was a fine by the Department of Labor.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed.

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Dated this 1st of December 2025