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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2019-001415

W. Clark Jernigan, M.D., ... Respondent,

v.

St. Francis Physician Services, Inc., ... Appellant.

RESPONDENT'S MOTION TO DISMISS APPEAL AND FOR COSTS
AND
MEMORANDUM IN SUPPORT

Respondent W. Clark Jernigan, M.D. ("Respondent") respectfully moves the Court to dismiss this appeal of the trial court's order dated July 15, 2019, granting in part and denying in part Respondent's Motion for Partial Summary Judgment (the "Order"). The Order has not been certified pursuant to Rule 54(b), SCRCP, and remains subject to revision at a later date. Under the unambiguous holding of this court in *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010), the Order is therefore interlocutory and this appeal must be dismissed as premature. In addition, Respondent respectfully moves for the taxing of costs and fees against the Appellant pursuant to Rule 222, SCACR.

PROCEDURAL HISTORY

The litigation underlying this appeal is in its very early stages. In late November 2018 Respondent filed his Complaint against Appellant St. Francis Physician Services, Inc. ("Appellant"), alleging that Appellant had failed to pay him the compensation it owed him under his employment agreement with Appellant. The Complaint brought causes of action for breach of contract, violation of the South Carolina Payment of Wages Act, and declaratory relief.

On April 10, 2019, Respondent moved for partial summary judgment, requesting that the trial court address the meaning of certain (but not all) of the relevant compensation provisions in his employment agreement pursuant to his claim for declaratory relief. Respondent requested that the Court declare (a) that Appellant's method of calculating one aspect of Respondent's compensation was not permitted by the employment agreement, (b) that Respondent's compensation qualifies as "wages" for the purposes of the South Carolina Wage Act, S.C. Code § 41-10-10(2), and (c) that Appellant owes Respondent all the compensation that he would otherwise have received had Appellant not improperly reduced his compensation. Notably, Respondent did not seek a judgment on any of his claims for relief, nor could he because the compensation calculation method at issue in the motion was only one of several compensation disputes raised in Respondent's claims for relief.

On July 15, 2019, the trial court issued the Order, granting in part and denying in part Respondent's motion for partial summary judgment. *See* Exhibit A. In its Order, the trial court declared that the compensation calculation method at issue in the motion was not permitted by the employment agreement and that Respondent's compensation constituted wages. The Court denied, however, Respondent's request for a declaration that Appellant owes Respondent all the compensation that he would otherwise have received had Appellant not improperly reduced his

compensation. The Court "conclude[d] that the potential for factual issues as to whether money is actually due and owing by [Appellant] to [Respondent] requires that, at least on the limited record before the Court at this time, this issue be left to the trier of fact." Exhibit A at 12.

Most important for purposes of this Motion to Dismiss, the Order was not certified pursuant to Rule 54(b),[1] SCRCP, which allows a trial court to direct entry of judgment on one or more, but less than all, of the claims presented in an action. Certification specifically requires that the trial court include in its order "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment." SCRCP 54(b). The Order here contains no such language. *See* Exhibit A at 12.

Appellant moved the trial court to reconsider the Order on July 25, 2019, and the trial court denied Appellant's motion on July 30, 2019. Appellant filed a notice of appeal of the Order on August 23, 2019, and thereafter sought an extension until October 23, 2019, of the deadline for filing its initial brief and designation of matter.

ANALYSIS

1. Appellant's Immediate Appeal of the Trial Court's Uncertified Interlocutory Order Granting Partial Summary Judgment is Premature and Not Allowed

The trial court's order is interlocutory, and this appeal is premature and must be dismissed. This matter involves causes of action for breach of contract, violation of the South Carolina Payment of Wages Act, and a declaratory judgment. Respondent's motion for partial summary judgment on only one cause of action was granted, but even then only in part. Other

[1] Nor has Appellant filed a motion with the trial court to certify the Order, as Appellant could have done. *See Ashenfelder*, 389 S.C. at 578, 698 S.E.2d at 861-62 (noting that a motion to certify "does not present an onerous burden upon trial counsel" and "need not be extensive, if such motion is desired").

claims in this matter remain to be resolved, and the trial court did not include any language in the Order certifying its decision pursuant to Rule 54(b).

Both this Court and the South Carolina Supreme Court have "repeatedly maintained that, as a general rule, ***only final judgments are appealable.***" 15 SOUTH CAROLINA JURISPRUDENCE *Appeal & Error* § 15 (emphasis added). As this Court has recognized, the final judgment rule supports the important policy aim of avoiding the waste of both judicial and litigants' resources:

> The final judgment rules serves the laudatory goal of ***preventing piecemeal review of matters that merely steps toward a final judgment.*** In light of the policy underpinnings of the final judgment rule, exceptions should be recognized cautiously.

Doe v. Howe, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004) (emphasis added).

In *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010), *cert. denied* (Dec. 20, 2012), this Court addressed whether to recognize as an exception to the final judgment rule a trial court's decision to grant a directed verdict on certain claims in a jury trial that preceded the trial court's grant of a mistrial on other claims. Following the mistrial but before any re-trial, both parties appealed. As in this case, the order on appeal in *Ashenfelder* granting a directed verdict had not been certified pursuant to Rule 54(b), SCRCP, and there were other claims yet to be resolved at trial. In reaching its determination that the directed verdict was not immediately appealable, this Court specifically addressed and reasoned from key language in Rule 54(b), which provides in relevant part that

> When more than one claim for relief is presented . . . the court may direct entry of a final judgment as to one or more but fewer than all the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, ***any order or form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . ., and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. . . .***

SCRCP 54(b) (emphasis added). This specific language indeed "suggests that when fewer than all claims have been adjudicated, those claims may not be final if the decisions are subject to revision." Jean H. Toal et al., APPELLATE PRACTICE IN SOUTH CAROLINA 161 (3d ed. 2016).

The *Ashenfelder* Court held that because the directed verdict before it had not been certified, the Court confronted a decision that contained the "potential for revision" rather than one that "don[ned] a veil of appealability." *Ashenfelder*, 389 S.C. at 576, 698 S.E.2d at 860. "Appellate courts should not," this Court explained, "delve into the realm of reviewing decisions that may be altered by the trial judge." *Id.* at 576, 698 S.E.2d at 860.

In reaching that holding, this Court relied upon federal precedent interpreting the analogous federal rule of civil procedure, observing that "'absent a certification under Rule 54(b), any order in a . . . multiple claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory'" and that "'an appeal from a decision adjudicating a portion of the case must be dismissed.'" *Ashenfelder*, 389 S.C. at 577, 698 S.E.2d at 861 (quoting 10 Wright & Miller, *Federal Practice and Procedure* §§ 2654 & 2660 (3d ed. 2010)).

Although the appeal now before this Court is from an order granting partial summary judgment rather than one granting a directed verdict, this case is no different from *Ashenfelder.* The Order has not donned "a veil of appealability" and may still be revisited by the trial court as this litigation proceeds below. In filing this appeal at this preliminary stage, long before there is a final judgment adjudicating all the claims or even all the issues involved in any of the claims, Appellant is essentially inviting this Court to "question" – as it declined to do in *Ashenfelder* – "whether or not the possibility of revision [of the Order] exists." *Id.* at 576, 698 S.E.2d at 861. The binding precedent of this Court mandates that invitation again be declined, and this appeal

dismissed. A decision otherwise would open the floodgates to piecemeal appellate litigation, burdening parties and this Court with review of matters that are not ripe for appellate review.

2. Respondent Should Be Awarded Costs Pursuant to Rule 222 of the South Carolina Appellate Court Rules

Rule 222(a) of the South Carolina Appellate Court Rules provides that "costs shall be taxed against the appellant when the appeal is dismissed . . . ." SCACR 222. Rule 222(b) further states that a party is entitled to recover enumerated costs as well as "attorney's fees in an amount which shall be set by order of the Supreme Court." *Id.* As addressed above, Appellant has improperly appealed the trial court's Order, and that appeal is premature. As a result, Respondent has incurred unnecessary costs and fees in seeking to have this premature appeal dismissed. As such, Respondent respectfully moves for the award of costs and attorney's fees pursuant to Rule 222.

CONCLUSION

There is no right of appeal in this case at this time. The Order is interlocutory and this appeal should be dismissed forthwith with an award of costs and fees given to the Respondent.

Respectfully submitted,

James E. Cox with permission HLP

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Greenville, South Carolina

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EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS
W. Clark Jernigan, M.D., Plaintiff, v. *St. Francis Physician Services, Inc.*, Defendant.	Case No. 2018-CP-23-5985 **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff, Dr. Clark Jernigan, moved for partial summary judgment in this action. Both Dr. Jernigan and defendant, St. Francis Physician Services, Inc. ("St. Francis"), have submitted memoranda with supporting documents as well as oral arguments regarding the motion. In his motion for partial summary judgment, Dr. Jernigan asked the Court to declare three things:

1. That his employment agreement with St. Francis does not permit St. Francis to reduce the number of his Work Relative Value Units ("WRVUs") for purposes of calculating his compensation by applying payment modifiers;
2. That the compensation due Dr. Jernigan from St. Francis under his employment agreement is considered "wages" for purposes of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq.*; and
3. That St. Francis owes Dr. Jernigan any compensation that he would have otherwise received had St. Francis not applied payment modifiers to

reduce his WRVUs.

After consideration of the parties' submissions and oral argument, for the reasons set forth more fully below, the court grants Dr. Jernigan's motion and makes the requested declarations with respect to items one and two but declines to grant it with respect to item three.

STANDARD OF REVIEW

South Carolina Rule 56 allows a plaintiff to bring a motion for partial summary judgment to streamline the issues in a case. S.C. R. Civ. P. 56(d). "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Watson* v. *Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014). "Summary judgment is appropriate when there is no genuine issue of any material fact such that the moving party is entitled to judgment as a matter of law." *Fleming* v. *Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

Summary judgment is a particularly appropriate tool when it comes to contract cases because "the construction of a contract is a question of law for the court." *HK New Plan Exchange Property Owner I, LLC* v. *Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007). "Summary judgment is proper and a trial unnecessary where the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself." *Id.*; *see also Environmental Solutions International, Inc.* v. *J.C. Const., Inc.*, 2008 WL 9841725, at *6 (S.C. Ct. App. June 2, 2008). In addition, "[b]ecause the ambiguity of contracts and statutes are questions

of law, [this Court does] not view the evidence in any particular light." *Callawassie Island Members Club, Inc.* v. *Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018).

UNDISPUTED FACTS

Plaintiff Dr. Clark Jernigan is an orthopedic surgeon. He has been employed by St. Francis since September 1, 2006 under an employment agreement that became effective on that date and remains in effect until September 1, 2020, with slight modifications. Dr. Jernigan's agreement is set forth in Exhibit A[1] to the affidavit he submitted in support of his motion for partial summary judgment.

The terms of Dr. Jernigan's Employment Agreement

Dr. Jernigan's employment agreement with St. Francis lays out, in clear language, a compensation model that entitles Dr. Jernigan to three types of compensation: base pay, productivity pay, and potential bonus. *Id.* at 23–25. He is first guaranteed an established base rate of pay. But through the productivity pay and bonus pay, he can earn more than the base rate of compensation.

The contract provides that Dr. Jernigan's productivity pay, and to some extent his bonus pay, are determined by looking to the number of WRVUs Dr. Jernigan performs in a given period of time. *Id.* at 23-24. Those WRVU values are assigned by the federal agency known as the Centers for Medicare and Medicaid Services ("CMS"). The agreement explicitly dictates that the WRVUs used to determine Dr. Jernigan's compensation will correspond to the WRVU "schedule published each year

[1] Unless specifically stated otherwise, all exhibit references are to the exhibits to the Jernigan Affidavit previously filed with his motion for partial summary judgment.

by CMS in the Federal Register." Exhibit A at 26. The schedule has a column of WRVU values clearly labeled Work RVU's that provides the WRVUs assigned for each procedure. See Exhibits C and D.

The contract also makes clear how St. Francis must use WRVUs to calculate Dr. Jernigan's performance compensation. It states, "Any Productivity Compensation Physician receives shall be calculated ... on the basis of actual Work Relative Value Units (WRVU's) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician." Exhibit A at 23. The conversion factor is stated in dollars. *Id.* at 32. The contract then says, "The remainder, if positive, is the amount of Productivity Compensation to be paid for such month." *Id.* at 23. The contract also details how the WRVUs affect Dr. Jernigan's bonus pay. Exhibit A at 24–25.

More succinctly, the number of WRVUs Dr. Jernigan performs in a month is multiplied by the amount of the conversion factor. If the result exceeds Dr. Jernigan's base pay for the month, then Dr. Jernigan is entitled to the difference as productivity compensation. For example, if the conversion factor were $75 and if Dr. Jernigan performed 200 WRVUs in a particular month, his productivity pay would be $15,000 (200 multiplied by $75). If his base pay were $10,000 a month, he would be entitled to $5,000 in productivity pay ($15,000 less $10,000).

St. Francis's Decision to Apply Payment Modifiers to reduce Dr. Jernigan's WRVUs

For the first ten years of Dr. Jernigan's employment, St. Francis calculated his WRVU's without applying payment modifiers[2] to reduce them. Then, St. Francis made a unilateral decision that as of September 1, 2016, it would begin applying payment modifiers to reduce Dr. Jernigan's WRVUs.[3] St. Francis's new modifier policy "require[d] all wRVUs to be modifier-adjusted inside of all ... physician compensation plans." Exhibit E.

Even though Dr. Jernigan's employment agreement makes no reference to payment modifiers, St. Francis applied its new policy to him. Beginning September 1, 2016, St. Francis applied these modifiers to reduce Dr. Jernigan's WRVUs for purposes of calculating his compensation.

CONCLUSIONS OF LAW

Does the agreement permit St. Francis to apply payment modifiers to reduce Dr. Jernigan's WRVUS?

Dr. Jernigan's motion seeks a declaration that his agreement does not permit St. Francis to apply payment modifiers to reduce his WRVU's for purposes of determining his productivity and bonus compensation. The Court finds that there are

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[2] Payment modifiers were established in 1991. *See Final Rule Medicare Program; Fee Schedule for Physicians' Services*, 56 FR 59502-01, 1991 WL 245153 (F.R.) (issued Nov. 25, 1991) (hereinafter "CMS Fee Schedule 1991"). Since 1992, payment modifiers have been a part of how the federal government determines how much to pay providers like St. Francis for medical services under the Medicare and Medicaid programs. *Id.* ("These regulations apply to services furnished beginning January 1, 1992."). They were affecting the reimbursement St. Francis receives from the federal government before and after St. Francis employed Dr. Jernigan. These modifiers can reflect "team surgery, bilateral surgery, etc." Exhibit B at 1. Importantly, the modifiers apply to the final price the government is willing to pay. But modifiers do not affect the underlying WRVUs. Modifiers and WRVUs are separate concepts. CMS always determines the WRVUs separately from the modifiers. *See* Exhibit D.

[3] Gay Aff. ¶¶ 4 and 5, submitted by St. Francis in opposition to summary judgment.

no material facts in dispute regarding this issue and grants this portion of the motion for partial summary judgment. As noted above, "Summary judgment is proper and a trial unnecessary where," as in Dr. Jernigan's case, "the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself." *HK New Plan Exchange Property Owner I, LLC* v. *Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007); *see also Environmental Solutions International, Inc.* v. *J.C. Const., Inc.*, 2008 WL 9841725, at *6 (S.C. Ct. App. June 2, 2008). "Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Miles* v. *Miles,* 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (quotation omitted). Here the four corners of Dr. Jernigan's agreement make clear that payment modifiers are not part of the formula for determining his compensation. The contract's language is plain: "Any Productivity Compensation Physician receives shall be calculated ... on the basis of actual Work Relative Value Units (WRVU's) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician." Exhibit A at 23. There is a similarly specific description of how bonus compensation must be calculated using actual WRVUs.

The contract's specific compensation formula does not include the application of payment modifiers. It does not use the term "payment modifiers." *See* Exhibit A at 23–26. The formula for his productivity compensation does not include payment

modifiers. It is as follows:

> Monthly (WRVU's x Conversion Factor) – Monthly Base Compensation = Productivity Compensation, if positive
>
> Ex. A at 23.

Nor does the formula for calculation of his bonus compensation refer to payment modifiers. It is as follows:

> (Physician WRUV's / Total WRVUs of Medical Practice) x Bonus Compensation Pool.
>
> Ex A at 24.

St. Francis makes a number of arguments in support of its decision to apply payment modifiers but none of them overcome the clear and specific terms of Dr. Jernigan's employment agreement or show that St. Francis was entitled to apply payment modifiers to reduce Dr. Jernigan's WRVUs for purposes of determining his compensation.

St. Francis insists that the agreement gives it unlimited discretion to revise Dr. Jernigan's compensation formula based on its internal "policies." St. Francis' Memorandum in Opposition ("Opp'n") at 12-13. In support of this position, St. Francis refers to a number of provisions in the agreement that reference St. Francis policies. This argument distorts and confuses different provisions in the agreement. None of the provisions of the agreement cited by St. Francis have anything to do with Dr. Jernigan's compensation.[4] The agreement requires St. Francis to

[4] Exhibit A, § 2.8 pertains only to "services" to be provided by Dr. Jernigan; § 2.5 pertains only to charges, fees, and billing for his services; § 2.9 only to the requirement that his services comply with certain standards; § 1.2.6 requires that

compensate Dr. Jernigan according to the formula provided in the agreement. St. Francis is not free to adjust this formula whenever it chooses based on its own "policies." "One party to a contract may not unilaterally alter its terms without the assent of the other party." Am. Jur. 2d Contracts § 496. This is especially so when dealing with material terms in a contract, such as compensation. *W.E. Gilbert & Assocs.* v. *S.C. Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) ("In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation."). Allowing unilateral modification would upend contract law and create vast uncertainties for employees and employers alike.

St. Francis also contends that the reference to the CMS schedule of WRVU values in note 1 on page 26 of the agreement suggests that St. Francis had discretion to reduce Dr. Jernigan's WRVU's by applying payment modifiers. But, in fact, the reference to the CMS annual WRVU schedule actually supports summary judgment. The language in note 1 about a CMS schedule refers clearly and specifically to WRVU's and requires that St. Francis update the WRVU values each year as they are revised by CMS.[5] It shows that WRVU values, not payment modifiers, determine Dr. Jernigan's compensation. It makes no reference to payment modifiers.

St. Francis asserts that the agreement's lack of any reference to payment

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he abide by applicable codes of conduct; and § 2.13 pertains only to his performance of administrative services.

[5] Note 1, page 26 of Exhibit A states "(WRVU's) are updated ... each year according to the schedule published each year by CMS."

modifiers, i.e. its "silence" as to payment modifiers, creates ambiguity as to whether they may be applied. But, as noted above, the compensation formula is clear as to how Dr. Jernigan's compensation is to be determined. Its "silence" regarding payment modifiers does not create ambiguity but makes clear that they are not part of the formula.[6]

St. Francis asserts that its affirmative waiver defense prevents summary judgment. Opp'n at 16-17. This argument fails for two reasons. First, the affirmative waiver defense has no relevance to the meaning of the employment agreement and whether it permitted St. Francis to apply modifiers. Dr. Jernigan would be entitled to summary judgment on that point even if St. Francis's waiver argument were valid. Second, the Agreement includes a non-waiver provision that forecloses St. Francis's argument. Ex. A, Section 7.11, page 19 (Failure ... to demand strict performance . . . on any of the terms . . . shall not be construed as a . . . waiver or relinquishment of any rights under this Agreement, and each party may at any time demand strict and complete performance by the other party . . . of this Agreement."). Such unambiguous, non-waiver provisions are enforceable as a matter of law, *see Nw. Nat. Ins. Co. v. R.S. Armstrong & Bros. Co.*, 627 F. Supp. 951, 954 (D.S.C. 1985), and the

[6] The one case cited by St. Francis, at Opp'n at 14, regarding "ambiguity" is distinguishable on this basis. In *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 243, 672 S.E.2d 799, 803 (Ct. App. 2009), summary judgment was not appropriate because the contractual term at issue – "landlord/tenant claims" – was not defined and was not a term of art. Here, on the other hand, the Agreement specifically defines the compensation formula and defines WRVU.

cases cited by St. Francis (Opp'n at 16) are distinguishable because the application of a non-waiver provision was not involved.

Dr. Jernigan was not required to stop seeing patients or work for no pay in order to preserve his claim to his full compensation.

Finally, St. Francis seeks to delay summary judgment contending that the motion is premature and that additional discovery is needed. But, again, the clear and specific language of the agreement defeats this argument. The Court need not look any further to resolve the motion. Any parol evidence offered for the purpose of interpreting the terms of the contract[7] as to the calculation of Dr. Jernigan's pay would be inadmissible. *See Columbia*, 299 S.C. at 519, 386 S.E.2d at 261 ("If a writing, on its face, appears to express the whole agreement between the parties, parol evidence cannot be admitted to add another term thereto."). Thus, it is impossible for St. Francis to meet its burden of "demonstrat[ing] a likelihood that further discovery [will] uncover additional evidence relevant to the issue" at hand. *Thomas* v. *Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994).[8] There is

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[7] St. Francis also asserts a need for further discovery on its affirmative waiver defense, whether it provided the notice required under the Wages Act, and whether a bona fide dispute exists under the Wages Act. Opp'n at 9. But none of those of those issues are material to Dr. Jernigan's motion for partial summary judgment. As noted above, the affirmative waiver defense is irrelevant to the contract interpretation issue and, furthermore, is barred by the specific language of the agreement. Additionally, Dr. Jernigan is not seeking summary judgment regarding any notice issue or question about a bona fide dispute under the Wages Act.

[8] St. Francis's argument to the contrary is curious because even St. Francis seems to recognize that the evidence it seeks is inadmissible for purposes of Dr. Jernigan's motion. Opp'n at 15 ("While parole evidence may be allowed for the

no reason for further discovery on this issue of contract interpretation. Dr. Jernigan is entitled to partial summary judgment in his favor as to his contention that his employment agreement does not permit St. Francis to reduce his WRVUs by the application of payment modifiers.

Is the compensation due Dr. Jernigan under his contract "wages" for purposes of the South Carolina Payment of Wages Act?

St. Francis asserts that its affirmative waiver defense prevents summary judgment. Opp'n at 16-17. This argument fails for two reasons. First, the affirmative waiver defense has no relevance to the meaning of the employment The Act defines wages as "all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount." S.C. Code Ann. § 41-10-10(2). This broad definition covers the pay at issue here.

Does St. Francis owe Dr. Jernigan any compensation he would have otherwise received had St. Francis not applied payment modifiers to reduce his WRVUs?

Dr. Jernigan also seeks a declaration as to this point. Although Dr. Jernigan has an argument that this ruling logically flows from the Court's ruling regarding the application of payment modifiers, the Court declines to grant this part of the

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purpose of determining the intent of the parties and clearing up any ambiguity with respect to Definition/Note 1, consideration of such evidence is for the trier of fact, and is not appropriate at the summary judgment stage."). In other words, the need for discovery cannot be a basis for denial of Dr. Jernigan's motion. Rather, the only issue is whether the method for calculating Dr. Jernigan's pay stated in the contract (and which St. Francis used for 10 years) is unambiguous as to payment modifiers. If it is (and it is), then no discovery can affect that conclusion.

motion at this time. It concludes that the potential for factual issues as to whether money is actually due and owing by St. Francis to Dr. Jernigan requires that, at least on the limited record before the Court at this time, this issue be left to the trier of fact.

CONCLUSION

For the foregoing reasons, this Court grants the motion for partial summary judgment as to points one and two and declares and holds that Dr. Jernigan's employment agreement does not permit St. Francis to apply payment modifiers to his actual WRVUs and that any compensation due Dr. Jernigan under the agreement qualifies as "wages" for purposes of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq.* The Court denies summary judgment as to whether St. Francis owes Dr. Jernigan any compensation that Dr. Jernigan would have otherwise received had St. Francis not applied payment modifiers.

IT IS SO ORDERED.

Greenville Common Pleas

Case Caption: W Clark Jernigan vs. St Francis Physician Services Inc

Case Number: 2018CP2305985

Type: Order/Summary Judgment

So Ordered

s/ Robin B. Stilwell 2158

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2019-001415

W. Clark Jernigan, M.D., ... Respondent,

v.

St. Francis Physician Services, Inc., ... Appellant.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within and foregoing **Respondent W. Clark Jernigan, M.D.'s Motion to Dismiss Appeal and For Costs and Memorandum in Support** has been served upon the Appellant's counsel pursuant to Rule 262(b), SCACR, by hand delivering a copy of the same, on this 13th day of September, 2019, to the following addresses:

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