THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001415
Case No. 2018-CP-23-05985

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

v.

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

APPELLANT'S INITIAL REPLY BRIEF

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INTRODUCTION

At the behest of Respondent W. Clark Jernigan ("Dr. Jernigan"), the circuit court granted partial summary judgment against Appellant St. Francis Physician Services, Inc. ("St. Francis") on two narrow issues presented in isolation from the larger context of Dr. Jernigan's claims. The partial summary judgment order had the effect of short-circuiting the normal process for the orderly development of claims and defenses, as contemplated by our Rules of Civil Procedure.

One such issue addressed in the circuit court's summary judgment ruling relates to St. Francis's implementation of a policy whereby it began applying "payment modifiers"—sometimes simply referred to as "modifiers"—to work relative value units ("wRVUs") performed by employed physicians (the "Modifier Policy"). As an important matter of fact, and for purposes of context, Dr. Jernigan mistakenly refers, throughout his Initial Brief, to St. Francis's reduction of wRVUs and even goes so far as to indicate that St. Francis's policy change was meant to reduce physician compensation. (*e.g.*, Resp't Br. at 6.) Such statements are wholly incorrect. While the Modifier Policy ultimately had the effect of reducing Dr. Jernigan's compensation during the relevant time period, modifiers, in general, may either increase *or* decrease a wRVU value.

In addition to being premature, the summary judgment ruling is substantively wrong. With respect to modifiers, the Employment Agreement is ambiguous, despite Dr. Jernigan's strident contentions to the contrary, because it does not address the central question of whether it permits or prohibits application of modifiers in the calculation of wRVUs. Moreover, it is susceptible to being read in more than one way—the hallmark of ambiguity. Under applicable South Carolina precedent, Dr. Jernigan's repeated invocation of the clarity of the productivity and bonus compensation formulas does not solve the problem. No matter how clear the

formulas may be, they do not address the antecedent question of whether modifiers may be applied in calculating the number of wRVUs to be input into the formulas. In short, the Employment Agreement does not unambiguously prohibit application of the Modifier Policy.

Separate and apart from the question of whether the Employment Agreement is ambiguous, St. Francis was entitled to consideration of its affirmative defenses of waiver, estoppel, and acquiescence. There is no dispute that any one of these defenses, if established, would completely bar Dr. Jernigan's breach of contract claim. In light of this, it was illogical and unfair for the circuit court to ignore St. Francis's affirmative defenses on the spurious grounds that they are irrelevant to a summary judgment motion addressing one part of that claim.

The circuit court also erred in granting summary judgment on a portion of Dr. Jernigan's claim under the South Carolina Payment of Wages Act ("Wage Act"), S.C. Code Ann. §§ 41-10-10, *et seq.* The Wage Act defines "wages" as amounts earned and owed to an employee. Because it has not been established that St. Francis owed anything to Dr. Jernigan, the circuit court's grant of partial summary judgment was premature. Additionally, no wages are owed to Dr. Jernigan if St. Francis provided the requisite notice under the Wage Act.

Finally, the summary judgment order is premature from a procedural standpoint, because St. Francis did not have a meaningful opportunity to conduct discovery.

For all of these reasons, the order granting partial summary judgment should be reversed.

ARGUMENT

I. The Employment Agreement Does Not Unambiguously Prohibit Application of the Modifier Policy

The circuit court granted partial summary judgment on Dr. Jernigan's breach of contract claim, ruling that the Employment Agreement unambiguously prohibits application of the Modifier Policy in determining Dr. Jernigan's eligibility for productivity or bonus compensation. In order to affirm, this Court must be persuaded that the Employment Agreement "is incapable of more than one meaning, when viewed objectively by a reasonable person who has examined the context of the entire contract and is aware of the practices and terms as generally understood in the … industry." *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 335, 676 S.E.2d 139, 144 (Ct. App. 2009). This high standard has not been met.

In light of the nature of Dr. Jernigan's summary judgment motion (*i.e.*, its narrow scope and its being filed before St. Francis had a meaningful opportunity to conduct discovery), this Court should be particularly on guard against affirming a premature grant of summary judgment. Ordinarily, a summary judgment motion seeks pre-trial resolution of "a claim, counterclaim, or cross-claim." Rule 56(a), SCRCP. Here, however, Dr. Jernigan moved for summary judgment as to only one aspect of his breach of contract claim: whether the Employment Agreement permits application of payment modifiers pursuant to the Modifier Policy. While this approach is, presumably, permissible,[1] such a piecemeal, shoot-first-aim-later approach warrants particular caution against a premature grant of summary judgment. *See*

[1] St. Francis did not oppose summary judgment on the grounds that the Rules of Civil Procedure prohibit a party from moving for summary judgment on part of a claim. Accordingly, it is not seeking reversal on the grounds that Dr. Jernigan's motion was improper under Rule 56. Nevertheless, the narrowness of Dr. Jernigan's motion, and the early stage of the proceedings at which he made it, are relevant to the Court's analysis.

Conner v. City of Forest Acres, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002) (recognizing that summary judgment is a "drastic remedy" and "should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues").

A. The Employment Agreement is Ambiguous Because It is Silent As To the Application of Modifiers in Calculating wRVUs

1. Dr. Jernigan Acknowledges that the Employment Agreement is Silent as to Modifiers

In responding to St. Francis's argument that the Employment Agreement is ambiguous because it is silent as to the application of payment modifiers (Opening Br. at 12-13), Dr. Jernigan primarily contends that the formulas for calculating productivity compensation and bonus compensation are clearly set forth in the Employment Agreement. (Resp't Br. at 12-13.) Dr. Jernigan's argument misses the point. The clarity of the formulas for productivity and bonus compensation has never been in dispute. Regardless of how clear these formulas are, they say nothing about the question in dispute: whether the wRVU element of the formulas can be calculated using modifiers pursuant to the Modifier Policy adopted by St. Francis. The Employment Agreement is ambiguous ***not*** because the formulas are unclear, but rather because neither the formulas, nor anything else in the Employment Agreement, addresses whether St. Francis is permitted to apply the Modifier Policy when it calculates Dr. Jernigan's wRVUs. Importantly, Dr. Jernigan acknowledges that "the phrase 'payment modifiers' *does not appear anywhere in the Employment Agreement at all*." (Resp't Br. at 13 (emphasis in original).)

Dr. Jernigan goes on to argue that St. Francis sought "to revise the compensation formula to include payment modifiers" when it implemented the Modifier Policy. (Resp't Br. at 13.) To the contrary, as St. Francis explained in its opening brief, St. Francis applied modifiers in determining the value of one component of the formulas: wRVUs. (Opening Br.

at 2.) By their nature, wRVUs may be modified or unmodified. It is undisputed that Dr. Jernigan's Employment Agreement does not state whether the wRVUs referenced therein are to be modified or unmodified. As such, Dr. Jernigan's Employment Agreement is silent, and therefore ambiguous, as to the appropriate method for determining the specific number of wRVUs to which Dr. Jernigan is entitled.

2. The Exhibits to Dr. Jernigan's Affidavit Support St. Francis's Argument that the CMS Schedules Permit the Application of Modifiers

Dr. Jernigan contends that it is "absurd" for St. Francis to argue that the Employment Agreement is silent as to the applicability of modifiers because it provides that "WRVU values [are] to be taken from schedules published by CMS." (Resp't Br. at 17.) Elsewhere, Dr. Jernigan maintains that the Employment Agreement's "reference to CMS schedules is *solely* with respect to identifying where WRVU values are to be found." (Resp't Br. at 17 (emphasis in original).) Both of these assertions rest on the underlying premise that wRVUs and payment modifiers operate independently, *i.e.*, modifiers "are not adjustments to the underlying WRVUs." (Resp't Br. at 6.) However, Exhibits B, C, and D to Dr. Jernigan's affidavit in support of summary judgment suggest otherwise.

Exhibit B to Dr. Jernigan's affidavit is CMS's explanatory commentary regarding the contents of the data files that constitute the 2016 National Physician Fee Schedule, the document that specifies wRVU values. (R. p. __ (Jernigan Aff., Ex. B at 1).) Among other things, CMS identifies circumstances in which a modifier may or may not apply. For example, CMS states that the modifier for bilateral surgery does not apply to certain procedures (denoted by a "2" in the Fee Schedule) because the "RVUs are already based on the procedure being performed as a bilateral procedure." (R. p. __ (Jernigan Aff., Ex. B at 11).) In other words, the assigned wRVU value has already been adjusted, so there is no need to apply the modifier.

Thus, the commentary flatly contradicts Dr. Jernigan's claim that modifiers and wRVUs are wholly distinct concepts. To the contrary, modifiers, like wRVUs, "measure[] the relative time and effort (work) a physician will expend with each procedure." (R. p. __ (Employment Agreement at 26).)

Exhibits C and D to Dr. Jernigan's affidavit confirm the close interconnection of modifiers and wRVUs. Exhibits C and D are sample pages extracted from, respectively, the 2006 and 2016 Fee Schedules. In spreadsheet form, the Fee Schedule lists the procedure code and description for each service, followed by other information including the wRVU value. Notably, a column labeled "MOD, for "Modifier," appears immediately to the right of the procedure code—before any other information, including the description and the wRVU value.[2] (R. pp. ___.)

3. The Cases Cited by St. Francis Support its Position

St. Francis supported its argument that the Employment Agreement's silence makes it ambiguous with citations to illustrative precedent. (Opening Br. at 12-13.) Dr. Jernigan attempts, without success, to distinguish the cited cases.

First, Dr. Jernigan argues that *Columbia East Associates v. BI-LO, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989), is inapposite because the contract in that case did not involve a "clear and specific formula" like those found in the Employment Agreement. (Resp't Br. at 15.) St. Francis has already explained that no matter how clear the formulas are, they do not

[2] It also bears noting that the Fee Schedules suggest that in calculating wRVUs, CMS has taken into account numerous variables that may affect the amount of effort involved in a procedure. For example, Exhibit C includes 16 separate codes for "Treatment of Ankle Fracture," each with a *different* wRVU value. (R. p. __ (Jernigan Aff., Ex. C).) In like fashion, modifiers make adjustments to account for the circumstances that may alter the level of effort expended by a physician, such as the performance of multiple procedures (modifier 51) or bilateral surgery (modifier 50). (R. pp. __ (Jernigan Aff., Ex. B at 9-10).)

speak to the disputed question of how wRVUs are calculated, *i.e.*, with or without the application of modifiers.

The lease agreement at issue in *Columbia East Associates* provided that "[t]he leased premises shall be used only for the operation of a supermarket." *Columbia East Assocs.*, 200 S.C. at 517, 386 S.E.2d at 260. The parties' dispute concerned whether BI-LO, having moved to a nearby location, could forestall competition by refusing to sublease the space and continuing to pay rent on the empty space. Similar to the Employment Agreement at issue in this case, certain aspects of the lease in *Columbia East Associates* were clear. In particular, the lease unambiguously required that any tenant in the space must operate a supermarket. Nevertheless, this Court held that the lease was ambiguous because it was silent on the question of whether the lease required that the space be occupied. *Id.* at 520, 386 S.E.2d at 262 ("[N]o provision either expressly requires BI-LO to assure continuous operation or permits it to vacate and leave the store empty[.]"). *Columbia East Associates* thus stands for the proposition that a contract does not avoid ambiguity simply because it speaks clearly to certain issues, if it is silent on the specific issue in dispute.

Columbia East Associates also negates Dr. Jernigan's claim that under the rule advocated by St. Francis, "any positive statement of obligations in a contract would have to be accompanied by a corresponding parade of prohibitions." (Resp't Br. at 15.) Not so. In *Columbia East Associates*, this Court recognized that "it would be virtually impossible for a contract to encompass all of the many possibilities which may be encountered by the parties." *Id.* at 520, 386 S.E.2d at 262. The solution to such a problem is not—as Dr. Jernigan advocates and the lower court held in this case—interpreting the contract's silence as an unambiguous prohibition. Rather, *Columbia East Associates* teaches that the contract's silence creates an

ambiguity that may be resolved by "look[ing] to the circumstances surrounding the bargain as an aid to establishing the intention of the parties." *Id.*; *see also id.* at 520-21, 386 S.E.2d at 262.

Dr. Jernigan next tries to explain why the circuit court properly relied on *HK New Plan Exchange Property Owner I, LLC v. Coker*, 375 S.C. 18, 649 S.E.2d 181 (Ct. App. 2007) ("*Coker*"), in granting summary judgment. (Resp't Br. at 16; *see* Opening Br. at 12-13.) The question in *Coker* was whether the son (Bradley) remained liable under the amended lease agreement executed by the father (Dale). *See id.* at 23, 649 S.E.2d at 184. This Court held that the contract was ambiguous because it "does not specifically state that Bradley is released from the Original Lease." *Id.* at 24, 649 S.E.2d at 184. Dr. Jernigan claims that the finding of ambiguity in *Coker* did not rest solely on "the mere absence … of express language releasing the son" but also on the facts that "the amendment listed only the father as the tenant, referred to the father as the 'successor in interest' of the son, and contained a signature line for only the father." (Resp't Br. at 16 (emphasis in original).)

Dr. Jernigan seriously misreads *Coker*. In finding the lease amendment was ambiguous, this Court identified ways in which the lease amendment clearly applied only to Dale and noted that the contract also provided that if the amendment and the original lease contradicted each other, the amendment would control. *Coker*, 375 S.C. at 24, 649 S.E.2d at 184. Despite the presence of such clear and specific terms in the amendment, this Court nevertheless held that the amendment was silent, and therefore ambiguous, on the question of whether Bradley was released from liability on the original lease. *Id.*

Like the lease amendment at issue in *Coker*, the Employment Agreement in this case contains some specific language. For example, the Employment Agreement provides that "actual wRVU's" will be used in the calculation of bonuses, sets a specific conversion factor

per wRVU, and explains that wRVU's are determined "according the schedule published each year by CMS." (R. pp. __ (Employment Agreement at 24-26).) But, also like the lease amendment in *Coker*, the Employment Agreement does not specifically state whether St. Francis is prohibited from adopting the Modifier Policy. *Coker* therefore supports St. Francis's argument that summary judgment was improper.

In addition to his attempts to distinguish St. Francis's cases, Dr. Jernigan argues that *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018), supports affirmance. (Resp't Br. at 17 (citing *Callawassie Island* for the proposition that a litigant cannot establish a contract's ambiguity by introducing a "novel concept" that contradicts the clear language of the contract).) In *Callawassie Island*, unlike this case, the contract was clear and spoke directly to the disputed question, which was whether the Dennises were required to continue paying dues after resigning their membership. The 2008 membership plan in effect when the Dennises resigned stated clearly that resigning members were "obligated to continue to pay … all dues, fees and other charges associated with … membership until [the membership] is reissued." *Id.* at 200, 821 S.E.2d at 670 (emphasis omitted). The Court of Appeals held there was ambiguity in the 2008 plan because the 1994 plan regarding "termination" of a membership did not include the "until reissued" language. The Supreme Court reversed, holding that there was no ambiguity because termination and resignation "are two separate events," and Mr. Dennis "unequivocally testified he resigned" from the club. *Id.* at 201, 821 S.E.2d at 671. *Callawassie Island* is inapposite because, unlike the Dennises' membership plan, the Employment Agreement does not directly address the disputed question.

B. Dr. Jernigan Cannot Avoid the Employment Agreement's Ambiguity by Isolating the Term "wRVU"

Dr. Jernigan contends that this Court need not look beyond the productivity and bonus compensation formulas to conclude that application of the Modifier Policy was unambiguously prohibited. (Resp't Br. at 4-6.) However, it is well recognized in South Carolina that "[a] contract must be read as a whole document such that litigants may not create ambiguity by pointing to a single sentence or clause." *Maybank v. BB&T Corp.*, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016). By the same token, Dr. Jernigan cannot *avoid* ambiguity by focusing only on the productivity and bonus formulas, or even more narrowly on the term wRVU. "Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract." *Williams v. Gov't Employees Ins. Co. (GEICO)*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014).

This Court has recognized that a seemingly clear word may be ambiguous when considered in context of the contract as a whole. For example, in *Evans v. Taylor Made Sandwich Co.*, 337 S.C. 95, 522 S.E.2d 350 (Ct. App. 1999), this Court held that the word "sandwich" was, in light of the surrounding circumstances, ambiguous. In that case, employees were hired to make sandwiches, which were then put into packages for delivery to customers. Each package could contain one, one and a half, or two sandwiches. The employer posted a sign stating, "'Each employees [sic] pay will be .6133 per sandwich.'" *Id.* at 100, 522 S.E.2d at 352. The employees sued under the Payment of Wages Act, alleging that instead of paying them *per sandwich*, the employer had paid them *per package*. This Court held that the contract was ambiguous, reasoning that "[t]he posted sign is susceptible to more than one interpretation because the employees and [the employer] differed on what constituted a sandwich." *Id.* at 101, 522 S.E.2d at 353.

Applying South Carolina law, the court in *Osborn v. University Medical Associates of MUSC*, 278 F. Supp. 2d 720 (D.S.C. 2003), also held that a seemingly clear contractual term was ambiguous when considered in the context of the parties' agreement. Under his employment contract with MUSC, Osborn was entitled to certain severance payments, but those payments would cease "upon [Osborn's] *acceptance of hire* by another organization." *Id.* at 737 (emphasis in original; internal quotation marks omitted). After MUSC terminated him, and while he was receiving severance payments, Osborn accepted part-time consultation work. MUSC moved for summary judgment, contending that Osborn's consulting work satisfied the "acceptance of hire" condition, ending its obligation to make severance payments. *Id.* In particular, MUSC argued that the word "hire" is unambiguous and its plain and ordinary meaning does not distinguish between being a full-time employee and a part-time independent contractor. *See id.* The district court ruled that the contract was ambiguous, reasoning:

> In the context in which the Agreement was drafted, the term "acceptance of hire" could plausibly refer to "full-time employment"—the status Osborn carried with [MUSC] upon the start of his employment—just as it could refer to any form of "part-time" employment, as [MUSC] … argues. … [I]n applying common sense and good faith in construing the term "acceptance of hire" in the manner and with the purpose it was used in Osborn's Agreement, this court is unable to conclude that, as a matter of law, the parties intended that Osborn's severance benefits terminate in the event that he found any "part-time" employment[.]

Id. at 738. In light of its determination that the phrase "acceptance of hire" was ambiguous, the court denied summary judgment. *See id.*

If the commonplace words "sandwich" and "hire" can be ambiguous when considered in the context of the entire contract, as *Evans* and *Osborn* hold, there can be little doubt that the relatively esoteric term "wRVU" is ambiguous in the context of the Employment Agreement. This is especially true given the fact that the Employment Agreement explicitly links wRVUs to the CMS schedules, which themselves anticipate the use of modifiers. (R. p.

__ (MSJ Hrg. Tr., at 23:23-24:22).)

Dr. Jernigan also contends that reversal of the summary judgment order would leave St. Francis free to nullify its contractual obligations simply by characterizing contract breaches as "policy changes." (Resp't Br. at 19.) But that is not what happened here. The undisputed facts, which must be viewed in the light most favorable to St. Francis, are that St. Francis adopted the Modifier Policy for business reasons and that the policy applied broadly to physicians employed by St. Francis. (R. p. __ (Affidavit of Bill Gay ("Gay Aff.") ¶¶ 4-7).) The Modifier Policy is one example of many instances in which St. Francis has made a policy change that affects physician employees without requiring their consent. (R. p. __ (Gay Aff. ¶ 3).). It defies credulity for Dr. Jernigan to suggest that the parties or the courts are incapable of distinguishing between a broadly applicable policy change and a breach of a specific contract.[3]

[3] Dr. Jernigan further claims that § 3.4 of the Employment Agreement shows that it unambiguously prohibits application of the Modifier Policy. (Resp't Br. at 19 n.8.) Section 3.4 is not relevant, however. Section 3.4 addresses the possibility that the terms of Dr. Jernigan's specific Employment Agreement may need to be reformed in order to ensure continuing compliance with applicable laws, particularly federal provisions that govern financial relationships between physicians and hospitals. Under § 3.4, if St. Francis and Dr. Jernigan cannot agree to reform his Employment Agreement "so that it complies with applicable law," St. Francis is entitled to terminate the contract rather than potentially violating the law. (R. p. __ (Employment Agreement § 3.4).) Far from undermining St. Francis's position, § 3.4 highlights that ongoing compliance with industry standards and applicable laws is a core aspect of the Employment Agreement. Section 3.4, along with other provisions of the Employment Agreement requiring Dr. Jernigan's adherence to St. Francis's policies (Opening Br. at 2-3), reflect the undeniable reality that the contracting parties are operating within the broader context of the healthcare industry, where financial arrangements of all kinds are heavily regulated and where the sands are constantly shifting. Importantly, § 3.4 is not relevant because St. Francis did not invoke its provisions, a fact which Dr. Jernigan does not dispute.

II. St. Francis's Affirmative Defenses Raise Genuine Disputes of Material Fact

In the circuit court summary judgment proceedings and its opening brief in this Court, St. Francis argued that summary judgment on any part of Dr. Jernigan's breach of contract claim was improper in light of its affirmative defenses. (Opening Br. at 16-20.) In response, Dr. Jernigan contends that the affirmative defenses are "entirely beside the point" and, in any event, can be "assert[ed] … another day." (Resp't Br. at 20-21.) Dr. Jernigan is wrong on both points.

Echoing the circuit court, Dr. Jernigan contends that St. Francis's affirmative defenses of waiver, estoppel, and acquiescence have no bearing the question of whether the Employment Agreement unambiguously prohibits application of the Modifier Policy. (Resp't Br. at 20-21.) In essence, Dr. Jernigan argues that seeking partial summary judgment on a narrow "interpretive issue[]," rather than on the claim as a whole, enables him to slip past St. Francis's affirmative defenses.

This cannot be correct. Acceptance of such reasoning would enable Dr. Jernigan to avoid entirely St. Francis's affirmative defenses simply by filing a series of "partial" summary judgment motions, each directed to a specific aspect of his breach of contract claim. This is both illogical and unfair. There is no question that St. Francis's affirmative defenses, if proven, would bar Dr. Jernigan's breach of contract claim in its entirety. Logically, it makes no sense to say that affirmative defenses can preclude summary judgment on an entire claim but cannot defeat summary judgment on part of that same claim.

As a matter of fairness, St. Francis should not be required to wait for another day to assert its affirmative defenses when those defenses, if established, would completely bar Dr. Jernigan's claim. *See Facelli v. Southeast Mktg. Co.*, 284 S.C. 449, 452, 327 S.E.2d 338, 339 (1985) (employee's continued work and acceptance of compensation barred a claim based on

a change to the way commissions were calculated); *Matthews v. City of Greenwood*, 305 S.C. 267, 271, 407 S.E.2d 668, 669–70 (Ct. App. 1991) (employee who initially protested a new policy which purportedly changed his compensation, but remained employed following the change, could not assert a breach of contract claim).

This Court should also reject Dr. Jernigan's argument that St. Francis's affirmative defenses fail in light of the Employment Agreement's non-waiver provision. As St. Francis explained in its opening brief, the non-waiver provision provides that a failure to object to nonperformance of an obligation under the Employment Agreement will not be treated as a waiver or relinquishment of any right under the Agreement. (Opening Br. at 19.) The non-waiver provision does not preclude St. Francis's affirmative defenses because there has not been any nonperformance of the Employment Agreement. Dr. Jernigan does not dispute that St. Francis paid him productivity and bonus compensation; his complaint is that the outcomes of the productivity and bonus compensation formulas are wrong because St. Francis applied the Modifier Policy to the wRVU component of those formulas. Under these circumstances, the non-waiver provision does not shield Dr. Jernigan from the consequences of his failure to timely object to application of the Modifier Policy.

Seeking to avoid this result, Dr. Jernigan resorts to hyperbole, claiming that St. Francis expected him "to refuse to see his patients or work for no pay in order to preserve his claim for full compensation." (Resp't Br. at 22.) This is utter nonsense. St. Francis does not suggest that such extreme measures are required to preserve Dr. Jernigan's breach of contract claim. However, it certainly behooved Dr. Jernigan to say *something* to register his disagreement at or near the time the Modifier Policy was adopted. Dr. Jernigan's claim is barred because he said nothing at all until mid-2017, long after implementation of the Modifier Policy in

September 2016, and even longer after announcement of the Modifier Policy earlier in 2016.

III. Summary Judgment Was Improper as to the Wage Act Claim

Dr. Jernigan asserts that the circuit court properly granted partial summary judgment on the question of whether productivity and bonus compensation are "wages" under the Wage Act. He cites *Allen v. Pinnacle Healthcare Systems, LLC*, 394 S.C. 268, 715 S.E.2d 362 (Ct. App. 2011), for the proposition that bonus pay is "wages" under the Wage Act. *Allen* is not helpful, however, because St. Francis does not dispute that *earned but unpaid* bonuses are "wages." St. Francis argues that summary judgment on the Wage Act claim was improper for two reasons. First, the Wage Act defines "wages" as amounts "which are ***due to*** an employee under [an] … employment contract." S.C. Code Ann. § 41-10-10(2) (emphasis added). Because St. Francis has fully complied with the Employment Agreement, no "wages" are "due to" Dr. Jernigan, and his claim necessarily fails. Second, St. Francis provided the notice required under the Wage Act.

A. No wages are "due to" Dr. Jernigan

The Wage Act defines "wages" as amounts "due to" an employee. S.C. Code Ann. § 41-10-10(2). Under this Court's decision in *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013), summary judgment is improper on a Wage Act claim if no wages are "due to" the plaintiff under the terms of the employment contract. *See id.* at 28-29, 738 S.E.2d at 495. *Baugh* establishes, therefore, that the circuit court's summary judgment order jumped the gun. Under *Baugh*, there are no "wages"—and thus, no Wage Act claim—unless and until a jury determines that application of the Modifier Policy breached the Employment Agreement.

Dr. Jernigan's response to this argument is twofold. First, he attempts to minimize the

circuit court's summary judgment ruling by stating that it stands only for the limited proposition that that "*if* … compensation is due [to Dr. Jernigan], it is 'wages' for purposes of the Act." (Resp't Br. at 25.) If that is a correct interpretation of the circuit court's order, then the ruling amounted to no more than a confirmation of the statutory text. A ruling that merely parrots and confirms the statutory language does not resolve any portion of Dr. Jernigan's Wage Act claim. Regardless of the position Dr. Jernigan is now taking on appeal, St. Francis is unwilling to assume that his counsel filed such a pointless motion for partial summary judgment, or that the circuit court would grant such a motion.

Second, Dr. Jernigan contends that wages are "due to" him because St. Francis breached the Employment Agreement by applying the Modifier Policy. (Resp't Br. at 24.) As an initial matter, this position is incompatible with Dr. Jernigan's assertion that the partial summary judgment order does no more than confirm the statutory text. More importantly, this argument puts the cart before the horse. Productivity and bonus compensation are "wages" only if application of the Modifier Policy breaches the Employment Agreement. It was improper for the circuit court to grant summary judgment on grounds that assume a contractual violation Dr. Jernigan has not yet proven.

B. Dr. Jernigan's Wage Act claim fails because St. Francis provided the requisite notice

The Wage Act provides that an employer does not violate the Wage Act if it provides at least seven days' notice of any change in the terms of employment, including "the normal hours and wages agreed upon." S.C. Code Ann. § 41-10-30(A). It is undisputed that St. Francis notified Dr. Jernigan and other physicians of the Modifier Policy *months* before it went into effect. Therefore, there can be no violation of the Wage Act.

In response, Dr. Jernigan cites *Mathis v. Brown & Brown of South Carolina*, 389 S.C.

299, 698 S.E.2d 773 (2010), for the proposition that an employer cannot escape liability under the Wage Act simply by providing advance notice of intent to breach an employment contract. The employment contract in that case guaranteed Mathis two years of employment with a specific salary. *See id.* at 309, 698 S.E.2d at 778. Consequently, Mathis could only be terminated for cause. *See id.* at 311, 698 S.E.2d at 779. The employer contended that its reduction of Mathis's guaranteed salary and subsequent termination of Mathis did not breach the contract because it had at least a good faith belief that there was cause for these actions. *See id.* The Supreme Court affirmed the judgment for breach of contract on the basis that the employer had failed to preserve this argument. *See id.* Turning to Mathis's Wage Act claim, the Court rejected the employer's argument that it was not liable under the Wage Act because it had given Mathis at least seven days' notice of the reduction of his guaranteed salary. *See id.* at 316-17, 698 S.E.2d at 782. Having already affirmed the judgment against the employer on Mathis's claim for breach of his employment contract, the Court held that merely providing notice of its upcoming breach of the contract could not shield the employer from liability under the Wage Act.

Mathis is not similar to the circumstances of this case. Because the employment contract in *Mathis* required payment of a specific salary for each year of its two-year term, the employer could not reduce that salary unless it had cause to do so. Thus, the without-cause reduction of Mathis's salary was a breach of contract that could not be cured by providing notice.[4] *Mathis* might be analogous to this case if St. Francis had cut Dr. Jernigan's guaranteed

[4] The Supreme Court's analysis of the Wage Act's notice provision is somewhat muddled. Section 41-10-30(A) provides that an employer may change the "terms" of employment, including "the normal hours and wages agreed upon," so long as it provides seven days' notice of the changed terms. Section 41-10-40(C) provides that an employer must provide seven days' notice before "withhold[ing] or divert[ing] any portion of an employee's wages." The *Mathis*

base compensation without cause to do so. But those are not the facts of this case. Here, St. Francis adopted a broadly applicable policy that affected the outcome of the formulas for productivity and bonus compensation. St. Francis did not "reduce" or "deduct from" Dr. Jernigan's guaranteed base salary. Accordingly, *Mathis* is not relevant.

Dr. Jernigan also challenges St. Francis's reliance on *Davis v. Greenwood School District 50*, 365 S.C. 629, 620 S.E.2d 65 (2005). St. Francis cited *Davis* as holding that the Wage Act's notice requirement was satisfied by meetings where the employer explained an upcoming change to certain incentive policies. (Opening Br. at 23.) Dr. Jernigan argues that the policy change in *Davis* is unlike St. Francis' adoption of the Modifier Policy because the teachers in *Davis* entered into new contracts each year, and the policy change applied only to the upcoming contract year. (Resp't Br. at 25-26.) But the Court's statement of facts and analysis of the Wage Act claim do not support Dr. Jernigan's claim. To the contrary, the Court stated that "*[d]uring the 2002-03 year* …the District had a budget shortfall," which it dealt with by "offering a flat-rate incentive of $3,000" rather than a ten percent salary increase. *Id.* at 633, 620 S.E.2d at 67. In addressing the Wage Act claim, the Court held that the District was not liable because it had provided notice of the change "well in advance of the seven-day statutory requirement." *Id.* at 636, 620 S.E.2d at 68-69. Importantly, the Court did not hold that the Wage Act was not violated because the policy change applied only to the upcoming contract year. Therefore, Dr. Jernigan's attempt to undermine *Davis* fails.

Assuming, *arguendo*, that application of the Modifier Policy changed the terms of the

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Court seemed to read § 41-10-40(C) as restricting an employer's ability, under § 41-10-30(A), to change the "terms" of employment upon seven days' notice. This statement appears to be *dicta*, however, since the Court ultimately held that there was a *re*duction, rather than a *de*duction, from Mathis's salary.

Employment Agreement, St. Francis is entitled to summary judgment on Dr. Jernigan's Wage Act claim because St. Francis satisfied the Wage Act's notice requirement for making such a change.

IV. Summary Judgment Is Premature Because St. Francis Did Not Have a Full and Fair Opportunity to Conduct Discovery.

Lastly, St. Francis argued that summary judgment was premature because it had no meaningful opportunity to conduct discovery. (Opening Br. at 24-26.) In response, Dr. Jernigan contends that because the Employment Agreement is unambiguous, any additional discovery "would be only parol evidence, and inadmissible." (Resp't Br. at 26.) The Court should reject Dr. Jernigan's argument.

As an initial matter, and as St. Francis has explained at length in this brief and its Initial Brief, the Employment Agreement is ambiguous as to whether it permits application of the Modifier Policy. Accordingly, parol evidence is admissible to discern the parties' intent, and St. Francis should have been entitled to discovery before any grant of summary judgment, even if only partial.

Additionally, Dr. Jernigan's argument fails to grapple with St. Francis's explanation of why it had conducted little discovery prior to the filing of the motion for partial summary judgment. Dr. Jernigan's counsel inundated St. Francis' counsel with document requests and then bombarded counsel with constant demands to fix perceived deficiencies in St. Francis's discovery responses. Consequently, St. Francis was unable to pursue its own discovery requests before Dr. Jernigan filed his summary judgment motion. As noted in St. Francis's Initial Brief, Dr. Jernigan's tactics resulted in St. Francis having to oppose summary judgment before it had received Dr. Jernigan's responses to St. Francis's initial discovery requests. (Opening Br. at 25 (explaining why St. Francis was not dilatory in conducting discovery).)

The Supreme Court has repeatedly emphasized the importance of providing a meaningful opportunity to conduct discovery *before* summary judgment. *See, e.g.*, *Pallares v. Seinar*, 407 S.C. 359, 373, 756 S.E.2d 128, 135 (2014) (holding summary judgment was granted prematurely, and reversing, where development of the record was required regarding a question of material fact); *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) (reversing order granting summary judgment, holding that the opposing party should have been permitted to complete discovery, which was ongoing at the time of the summary judgment hearing); *Baughman v. AT&T*, 306 S.C. 101, 112-14, 410 S.E.2d 537, 544 (1991) (holding that, although three years had elapsed between the filing of the action and summary judgment, the trial court erred in granting summary judgment prematurely). The circuit court's premature summary judgment ruling unfairly deprived St. Francis of any meaningful opportunity to conduct discovery on highly relevant factual questions including the ambiguity of the Employment Agreement, whether Dr. Jernigan waived his claims by failing to raise a timely objection to implementation of the Modifier Policy, and the adequacy of the notice provided by St. Francis. Dr. Jernigan attempts to brush off St. Francis's need for discovery by doggedly insisting that the Employment Agreement is unambiguous and that St. Francis is not protected by the Wage Act's notice provision. Simply saying it—even repeatedly—does not make it so. Moreover, Dr. Jernigan's position that St. Francis does not need discovery is difficult to square with his own voluminous discovery requests and constant demands for additional information.

CONCLUSION

For the reasons set forth above, this Court should reverse the circuit court's order granting partial summary judgment and remand the case for further proceedings, so that any future motion for summary judgment will be made in the context of a sufficiently developed record.

Respectfully submitted,

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April 20, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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Apr 20 2020
SC Court of Appeals

Appellate Case No. 2019-001415
Case No. 2018-CP-23-05985

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

v.

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

PROOF OF SERVICE

The undersigned hereby certifies that on April 20, 2020, she caused a copy of the *Appellant's Initial Reply Brief* to be served on all parties of record by e-mailing a copy of the same, addressed as follows:

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April 20, 2020

VIA E-MAIL (CTAPPFILINGS@SCCOURTS.ORG)

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *W. Clark Jernigan v. St. Francis Physician Services, Inc.*
Appellate Case No. 2019-001415

Dear Ms. Kitchings:

Enclosed for filing please find a PDF copy of the *Appellant's Initial* ***Reply Brief*** in the above-referenced matter.

As further evidenced by the Proof of Service, respondent's attorneys are being served via e-mail.

Please contact me if you need anything further. Thank you for your assistance in this matter.

Very truly yours,

Nikole Setzler Mergo

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