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 FINAL OPENING BRIEF

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2. Whether the circuit court erred in holding that St. Francis's affirmative defenses failed to preclude summary judgment in favor of Dr. Jernigan.

3. Whether the circuit court erred in holding that Productivity Compensation that is not due to Dr. Jernigan constitutes "wages" for purposes of the South Carolina Payment of Wages Act.

4. Whether summary judgment was premature because additional discovery was necessary.

STATEMENT OF THE CASE

This appeal arises from a contract dispute between a physician, Respondent W. Clark Jernigan, M.D. ("Dr. Jernigan"), and his employer, Appellant St. Francis Physician Services, Inc. ("St. Francis"). St. Francis appeals an order of the circuit court granting Dr. Jernigan's motion for partial summary judgment as to two discrete issues. First, the circuit court ruled that Dr. Jernigan's Employment Agreement prohibits St. Francis from applying modifiers to the CPT codes[1] used to determine the work relative value units ("wRVUs") attributable to Dr. Jernigan for his services. wRVUs are one component of the formula used to determine the amount of productivity compensation Dr. Jernigan may earn above his base salary. Second, the circuit court ruled that productivity compensation Dr. Jernigan alleges he would have earned, if St. Francis had not reduced his wRVUs by applying the modifiers, constitutes "wages" under the South Carolina Payment of Wages Act.

I. Statement of Facts

A. The Employment Agreement

Dr. Jernigan is an orthopedic surgeon.[2] He has been employed by St. Francis since 2006, when he executed the Employment Agreement that is the subject of the parties' dispute. (R. pp. 254-283 (Employment Agreement).) The Employment Agreement includes various terms and

[1] "CPT" stands for Common Procedural Terminology. CPT codes are four-digit numeric codes that identify the particular services performed by a physician. Modifiers are two-digit codes that are appended to the CPT code in certain circumstances to provide more detailed information about the service provided. For example, the CPT code for "application of an external fixator performed with a uniplane" is 20690. If a physician assisted with this procedure, an appropriate modifier (*e.g.*, modifier -80) would be appended to indicate the less intensive work of assisting with, rather than performing, the surgery. The resulting CPT code would be 20690-80, and the wRVU attributable to the assisting physician would be based on the modified CPT code.

[2] The facts and all reasonable inferences therefrom must be viewed in the light most favorable to St. Francis, the non-movant on summary judgment. *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 211, 826 S.E.2d 285, 290 (2019).

conditions of Dr. Jernigan's employment, including multiple provisions setting forth his obligations as a St. Francis employee. In particular, the Employment Agreement requires Dr. Jernigan to comply with St. Francis's policies, bylaws, rules, and regulations (§ 2.8); its billing practices (§ 2.5); and all statutes, regulations, and rules pertaining to payors, including Medicare, and St. Francis's coding compliance plan (§§ 2.4.4, 2.9). (R. pp. 258, 259.)

Under the Employment Agreement, Dr. Jernigan receives a base salary. He is eligible for additional payment in the form of "Productivity Compensation," based on his personal productivity, and "Bonus Compensation," based partly on the overall financial performance of his practice group. (R. pp. 271-273 (Employment Agreement, at 23-25).) Only Productivity Compensation is at issue in this appeal. Productivity Compensation is determined according to a formula in which the wRVUs attributable to services personally performed by Dr. Jernigan each month are multiplied by a conversion factor (which is confidential) stated in dollars, and then Dr. Jernigan's monthly base pay is subtracted:

> *Monthly (WRVU's x Conversion Factor) – Monthly Base Compensation = Productivity Compensation, if positive*[3]

(R. p. 271 (Employment Agreement, at 23).)

The Employment Agreement includes "Definitions and Notes" that provide additional information regarding physician compensation. Note 1 provides:

> Work Relative Value Units (WRVU'S) are updated in the billing practice management software each year according to the schedule published each year by CMS in the Federal Register. The WRVU measures the relative time and effort (work) a physician will expend with each procedure. The WRVU's reflect the increased level of work performed by the physician as the level of complexity of procedures increases.

(R. p. 274 (Employment Agreement, at 26).)

[3] If the result is negative, the deficit is carried forward and used to offset Productivity Compensation earned, if any, in future months. (R. p. 271 (Employment Agreement, at 23).)

B. Implementation of the Modifier Policy

St. Francis regularly makes policy changes that affect its physician employees, and for which physician consent is not required. (R. p. 120 (Affidavit of Bill Gay ("Gay Aff.") ¶ 3).) In 2016, after evaluating the market and industry practices, St. Francis made such a policy change, providing for application of modifiers to physician wRVUs (the "Modifier Policy"). (R. p. 120 (Gay Aff. ¶ 4).) St. Francis made the business decision to adopt the Modifier Policy for a variety of reasons, including current industry practices. (R. p. 121 (Gay Aff. ¶ 5).) Additionally, certain physician compensation surveys, such as those produced by the Medical Group Management Association ("MGMA"), use modifier-adjusted wRVUs. (*Id.*) Implementation of the Modifier Policy further integrated the measurement of physician productivity with the way payors such as Medicare, Medicaid, and private insurance companies pay for physicians' services. (R. p. 121 (Gay Aff. ¶ 6).)

St. Francis notified Dr. Jernigan and other physician employees of the Modifier Policy well in advance of its effective date on September 1, 2016. (R. p. 121 (Gay Aff. ¶¶ 8-10).) For example, Dr. Thomas Baumgarten, a physician who held an administrative role as leader of Dr. Jernigan's practice group, conveyed information about the Modifier Policy, including the reasons for its implementation, to Dr. Jernigan. (R. p. 121 (Gay Aff. ¶ 8).) The exhibits to Dr. Jernigan's affidavit in support of summary judgment ("Jernigan Aff.") included a memorandum about the Modifier Policy dated April 14, 2016 and minutes of a meeting in July 2016 that included a discussion of the Modifier Policy. (R. pp. 284-288 (Jernigan Aff., Exs. E, F).)

The Modifier Policy was implemented on September 1, 2016. Dr. Jernigan did not individually protest or object to the Modifier Policy prior to or at the time of its implementation.[4]

[4] In his affidavit submitted in support of his Motion for Partial Summary Judgment, Dr. Jernigan states that he "never agreed" to the Modifier Policy. (R. p. 64 (Jernigan Aff. ¶ 16).) Not

(R. p. 121 (Gay Aff. ¶ 12).) Following implementation of the Modifier Policy, he has continued his employment with St. Francis and has been paid productivity compensation calculated in accordance with the Modifier Policy. (R. p. 121 (Gay Aff. ¶ 11).) Indeed, Dr. Jernigan raised no individual objection to the Modifier Policy until mid-2017, when he retained counsel, who communicated with St. Francis regarding the Modifier Policy. (R. p. 121 (Gay Aff. ¶ 12).)

II. Procedural History

A. Complaint and Motion for Partial Summary Judgment

Dr. Jernigan filed his complaint on November 28, 2018, alleging three causes of action: (1) breach of contract; (2) violation of the South Carolina Payment of Wages Act ("Wage Act"), S.C. Code Ann. §§ 41-10-10, *et seq.*; and (3) declaratory judgment. (R. pp. 24-26 (Complaint ¶¶ 33-54).) As relevant to this appeal, Dr. Jernigan alleged that St. Francis breached the Employment Agreement by "reduc[ing] the number of WRVU's attributable to Dr. Jernigan by applying Payment Modifiers." (R. pp. 22, 24 (Complaint ¶¶ 24(a), 34-38).) Dr. Jernigan also alleged that St. Francis violated the Wage Act by paying him less than the full amount of Productivity Compensation he was entitled to under the Employment Agreement. (R. pp. 24-25 (Complaint ¶¶ 40-45).) St. Francis denied the allegations and asserted numerous affirmative defenses, including waiver, estoppel, acquiescence, and proper notification under the Wage Act. (R. pp. 57-58 (Answer ¶¶ 55-61).)

Before discovery had meaningfully developed, Dr. Jernigan moved for partial summary judgment on three issues:

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agreeing with something is not the same as objecting to it. As the non-movant on summary judgment, St. Francis is entitled to the inference that Dr. Jernigan voiced no opposition to the Modifier Policy at the time of its adoption.

1 That his employment agreement with St. Francis does not permit St. Francis to reduce the number of his [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 [Wage Act]; 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].

(R. pp. 1-2 (MSJ Order, at 1-2).)

B. Circuit Court Orders

Following briefing and a hearing, the circuit court entered a written Order on July 15, 2019, granting in part and denying in part Dr. Jernigan's motion for partial summary judgment. The court granted summary judgment on the first two issues but denied summary judgment as to the third. (R. pp. 1-13 (MSJ Order).) The court ruled that the Employment Agreement is unambiguous and that it "does not permit St. Francis to apply payment modifiers to [Dr. Jernigan's] actual WRVUs." (R. p. 12 (MSJ Order, at 12).) The court further ruled that "any compensation due Dr. Jernigan under the agreement qualifies as 'wages' for purposes of the [Wage Act]." (*Id.*) The court denied summary judgment on the third issue, reasoning 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." (*Id.)* The circuit court rejected St. Francis's arguments that its equitable defenses of waiver, estoppel, and acquiescence presented genuine issues of material fact that precluded summary judgment and summary judgment was premature because additional discovery was needed. (R. pp. 9-10 (MSJ Order, at 9-10).)

St. Francis timely moved for reconsideration on July 25, 2019. (R. pp. 190-191 (Motion for Reconsideration).) The circuit court denied reconsideration on August 7, 2019. (R. p. 14-15

(Reh'g Order).) St. Francis timely filed and served its Notice of Appeal on August 23, 2019. (R. pp. 198-199 (NOA).). On September 13, 2019, Dr. Jernigan moved to dismiss the appeal. (R. p. 216 (11/7/19 Order).) This Court denied the motion on November 7, 2019. (*Id.*)

SUMMARY OF ARGUMENT

The circuit court erred in granting the motion for partial summary judgment, inasmuch as multiple genuine issues of fact exist which preclude summary judgment, the circuit court's order contains errors of law, and summary judgment was premature.

At the least, the ambiguity of the Employment Agreement should have precluded summary judgment on the question of St. Francis's contractual right to apply modifiers to the wRVUs attributed to Dr. Jernigan. To begin, the Employment Agreement indisputably does not prohibit application of modifiers but rather is silent as to how wRVUs are to be calculated. Under South Carolina law, this silence indicates ambiguity, not prohibition. Moreover, what the Employment Agreement does say about wRVUs suggests that application of modifiers is permitted. In view of the Employment Agreement's ambiguity, summary judgment was improper.

Aside from this, there are genuine issues of fact as to the timing of Dr. Jernigan's knowledge of St. Francis's implementation of the relevant policy, implied acceptance thereof, and waiver and/or estoppel of Dr. Jernigan's claims, thereby precluding summary judgment on St. Francis's affirmative defenses. Further, no additional wages were "due" to Dr. Jernigan under the Wage Act, and St. Francis provided more than sufficient advance written notice of the Modifier Policy, thereby precluding his Wage Act claim. Finally, the circuit court granted summary judgment prematurely because when Dr. Jernigan filed his motion for partial summary judgment, St. Francis had not had a full and fair opportunity to conduct discovery.

Dr. Jernigan's interpretation of the Employment Agreement ignores both the general realities of the complex and ever-changing healthcare industry in which St. Francis compensates him, as well as the specific flexibility written into the Employment Agreement itself, the latter of which expressly permits policy changes like the Modifier Policy. In other words, the Employment Agreement cannot be read in a vacuum. *See Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452

S.E.2d 628, 631 (Ct. App. 1994) ("[I]n determining the intent and purport of a contract, the court should not look solely to one clause read in isolation from the rest of the document; rather, it should consider the contents of the whole instrument."). Health care providers must monitor changes and trends in the industry, including *inter alia*, as to how certain medical procedures are to be coded and how payors, like Medicare, Medicaid and private insurance companies, will pay for these procedures. Because of the complexity of the industry, medical groups like St. Francis must continually re-evaluate their practices, develop new policies, and revise existing policies to improve clinical and financial performance. The flexibility required to do all of these things is built into the Employment Agreement, including because it contains numerous examples whereby Dr. Jernigan agrees to comply with St. Francis's policies and procedures.

For these reasons and the reasons discussed more fully below, St. Francis respectfully requests that the Court reverse the circuit court's order granting partial summary judgment to Dr. Jernigan.

ARGUMENT

I. Standard of Review

When reviewing the grant of a summary judgment motion, this Court applies the same standard that governs the trial court under Rule 56(c), SCRCP. *See Epstein v. Coastal Timber Co*., 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011). Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. When determining whether triable issues of fact exist, this Court "must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005).

Because summary judgment is a "drastic remedy," it "should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues." *Conner v. City of Forest Acres*, 348 S.C. 454, 462, 560 S.E.2d 606, 610 (2002). "Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusions to be drawn from those facts." *Piedmont Eng'rs, Architects & Planners, Inc. v. First Hartford Realty Corp.,* 278 S.C. 195, 196, 293 S.E.2d 706, 707 (1982).

When a motion for summary judgment presents a question as to the construction of a written contract, and the contract is ambiguous, summary judgment is improper. *See Gilliland v. Elmwood Props.*, 301 S.C. 295, 299, 391 S.E.2d 577, 579 (1990); *see also HK New Plan Exch. Prop. Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007) ("[S]ummary judgment is improper where the motion presents a question as to the construction of a written contract, and the contract is ambiguous because the intent of the parties cannot be gathered from

the four corners of the instrument.").

II. The Circuit Court Erred in Granting Summary Judgment on the Breach of Contract Claim Because the Employment Agreement Does Not Unambiguously Prohibit Application of the Modifier Policy

Dr. Jernigan and St. Francis dispute whether the Employment Agreement permits the application of modifiers in the calculation of wRVUs, as required by the Modifier Policy. Dr. Jernigan argues that it does not, and points to language in the Employment Agreement that he views as supporting his position. St. Francis argues that the Employment Agreement *does* permit application of modifiers, and it also points to language in the Employment Agreement that supports its position. Fortunately, "[t]his Court need not decide that it favors [Dr. Jernigan's] or [St. Francis's] view of the contractual provision at this juncture; [it] need only opine on whether the provision is ambiguous." *Gilliland*, 301 S.C. at 299, 391 S.E.2d at 579.

"Once a contract is before the court for interpretation, the main concern of the court is to give effect to the intention of the parties." *Columbia East Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 519, 386 S.E.2d 259, 261 (Ct. App. 1989). "[W]here the language of . . . the agreement is ambiguous, summary judgment is improper because the intent of the parties would then be a genuine issue of fact." *Lyles v. BMI, Inc.*, 292 S.C. 153, 157, 355 S.E.2d 282, 284 (Ct. App. 1987). Whether a contract is ambiguous is a question of law for the court. *See S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001). Ambiguity "is to be determined from the entire contract and not from isolated portions." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). "An ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." *Bruce v. Blalock*, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962); *see Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977) (holding that a contract is ambiguous when it is capable of being understood in more

than one way or its meaning is unclear because its terms are indefinite).

A. The Employment Agreement's silence as to the application of payment modifiers creates ambiguity precluding summary judgment.

To affirm summary judgment on the breach of contract claim, this Court must conclude, *de novo*, that the plain and unambiguous language of the Employment Agreement prohibits application of the Modifier Policy. *See Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018). However, there is *no* language in the Employment Agreement that expressly prohibits St. Francis's application of the Modifier Policy. Indeed, Dr. Jernigan, St. Francis, and the circuit court all agree that Employment Agreement, on its face, is *silent* as to the application of modifiers to wRVUs. (R. p. 23 (Complaint ¶ 26); R. pp. 6, 9 (MSJ Order, at 6, 9).) The circuit court wrongly construed the Employment Agreement's silence as *ipso facto* proof that it *prohibits* application of modifiers. (R. pp. 6-7 (MSJ Order, at 6-7).).

An agreement's silence often indicates ambiguity. *See Columbia East Assocs.*, 299 S.C. at 519-20, 386 S.E.2d at 261-62 ("[W]here a contract is silent as to a particular matter, and ambiguity thereby arises, parol evidence may be admitted to supply the deficiency and establish the true intent."); *see also Frewil, LLC v. Price*, 411 S.C. 525, 531, 769 S.E.2d 250, 253 (Ct. App. 2015) (finding ambiguity existed where an agreement did not "explicitly" state which appliances were included in a rental unit).

The proposition that silence indicates ambiguity is confirmed by a case the circuit court itself cited. (R. p. 6 (MSJ Order, at 6) (citing *Coker*, 375 S.C. at 24, 649 S.E.2d at 184).) The question in *Coker* was whether an amendment to a lease released the original tenant, Bradley Coker, from the lease. Similar to the circuit court's ruling in this case, the trial court in *Coker* granted summary judgment against Bradley because the amendment was silent on that point. *Id.* at 22, 649 S.E.2d at 183 ("The trial court found nothing in the Amendment released Bradley from

his obligation under the Original Lease or modified the Original Lease."). This Court reversed, holding that the amendment was ambiguous where it referred to Bradley's father, Dale Coker, "as Bradley's 'successor in interest' and [had] a signature line only for Dale" but did not "specifically state that Bradley [was] released from the Original Lease." *Id.* at 24, 649 S.E.2d at 184. This Court found that because the amendment was silent as to whether the parties intended to release Bradley Coker from the original lease, the agreement was ambiguous and that its meaning must be determined by a jury. *Id.*

The circuit court in this case relied on the same flawed reasoning as the trial court in *Coker*. Specifically, the circuit court held that because the Employment Agreement does not specifically state that St. Francis can apply payment modifiers, it must therefore be prohibited from applying them. (R. p. 9 (MSJ Order, at 9).) This Court should reject this reasoning, just as it did in *Coker*. When the facts and inferences are viewed in the light most favorable to St. Francis, the non-movant, the Employment Agreement's silence regarding the application of payment modifiers creates an ambiguity that must be resolved by a jury. Accordingly, the circuit court's grant of summary judgment on this issue should be reversed. *See Bishop v. Benson*, 297 S.C. 14, 16, 374 S.E.2d 517, 518 (Ct. App. 1988) (stating that summary judgment is improper where there is a question as to the construction of a written contract, and the language employed in the contract is ambiguous); *see also Nat'l Sec. Fire & Cas. Co. v. Jenrette*, No. 2011-CP-26-9199, 2013 WL 10100686 (Ct. of Common Pleas, Feb. 11, 2013) (granting reconsideration of order granting summary judgment where the court made an incorrect conclusion of law).

B. A genuine issue of material fact exists as to whether the Employment Agreement's reference to CMS schedules permits the application of modifiers

While the Employment Agreement is silent regarding the specific issue of applying modifiers, what it does say about wRVUs further undermines the circuit court's ruling that the

Employment Agreement unambiguously prohibits modifiers. In Definition/Note 1, the Employment Agreement explains, with reference to the Productivity Compensation formula, that wRVUs "are updated in the billing practice management software each year *according to the schedule published each year by CMS in the Federal Register*." (R. p. 274 (Employment Agreement, at 26) (emphasis added).) The CMS schedules referenced in the Employment Agreement allow for and anticipate the use of payment modifiers. (R. p. 30 (Jernigan Aff., Ex. B).)

The Employment Agreement explicitly links wRVUs to the CMS schedules, which themselves anticipate the use of payment modifiers. (R. pp. 174-175 (MSJ Hrg. Tr., at 23:23-24:22).) In other words, application of payment modifiers is permissible under the terms of the Employment Agreement because it incorporates by reference the CMS schedules, and further provides St. Francis the ability to update wRVUs annually. Dr. Jernigan, on the other hand, contends that nothing in the Employment Agreement's reference to the CMS schedules suggests that St. Francis is permitted to apply modifiers. (R. p. 165 (MSJ Hrg. Tr., at 14:11-17).) Accordingly, a genuine issue of material fact arose as to whether the Employment Agreement's incorporation by reference of the CMS schedules allows for application of the Modifier Policy.[5]

The circuit court ultimately held that because the Employment Agreement does not specifically use the term "payment modifiers," the reference to the CMS schedules does not permit the application of modifiers. (R. p. 9 (MSJ Order, at 9).) More specifically, the circuit court's

[5] Notably, Dr. Jernigan supported his motion for partial summary judgment by referencing CMS publications. (R. pp. 62-64 (Jernigan Aff. ¶¶ 8–9, 14–15).) Dr. Jernigan's reference to these materials confirms that the meaning of the Employment Agreement and the parties' intent requires examination beyond the four corners of the Employment Agreement, and therefore precludes summary judgment. *See Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (holding that summary judgment is improper when the intent of the parties cannot be gathered from the four corners of the instrument).

Order states as follows:

> St. Francis also contends that the reference to the CMS schedule of WRVU values in note 1 on page 26 of the [Employment A]greement suggests that St. Francis had discretion to reduce Dr. Jernigan's WRVUs 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 WRVUs and requires that St. Francis update the WRVU values each year as they are revised by CMS. It shows that WRVU values, not payment modifiers, determine Dr. Jernigan's [productivity] compensation. It makes no reference to payment modifiers.

(R. p. 8 (MSJ Order, at 8 (footnote omitted)).)

The circuit court's order never grapples with the fact that modifiers are included in the CMS schedules which are, in turn, incorporated by reference into the Employment Agreement. Given that the CMS schedules include payment modifiers, the circuit court's statement that the Employment Agreement's "reference to the CMS annual WRVU schedule actually supports summary judgment" is simply incorrect. (R. p. 8 (MSJ Order, at 8).) To the contrary, the Employment Agreement's reference to the CMS schedules gives rise to an ambiguity creating a question of fact. The divergent interpretations of the reference to the CMS schedules establish a genuine dispute of fact that should not have been resolved by the circuit court at the summary judgment stage, and therefore, requires reversal of summary judgment.

III. The Circuit Court Erred in Granting Summary Judgment on the Breach of Contract Claim Because St. Francis's Affirmative Defenses Raise Genuine Disputes of Material Fact

In opposing summary judgment, St. Francis argued that it had asserted equitable affirmative defenses, including waiver, estoppel, and acquiescence, all of which raised genuine issues of material fact precluding summary judgment on Dr. Jernigan's breach of contract claim. (R. p. 176 (MSJ Hrg. Tr., at 25:7-14); *see* R. p. 57 (Answer ¶ 56).) Addressing only the affirmative equitable defense of waiver, the circuit court rejected St. Francis's arguments on the grounds that

(1) "the affirmative waiver defense has no relevance to the meaning of the employment agreement"; and (2) the non-waiver provision of the Employment Agreement "foreclose[d]" St. Francis's argument. (R. p. 9 (MSJ Order, at 9).) The circuit court's reasoning was erroneous and incomplete. This Court should reverse summary judgment as to the breach of contract claim because Dr. Jernigan waived his rights, is estopped from asserting a claim for breach of the Employment Agreement, and/or acquiesced in St. Francis's implementation of the Modifier Policy.

A. There are genuine issues of material fact underlying St. Francis's affirmative defenses

Dr. Jernigan was aware of St. Francis's Modifier Policy for weeks, if not months, prior to its implementation. (R. p. 121 (Gay Aff. ¶ 10).) Indeed, Dr. Jernigan's own affidavit in support of summary judgment motion includes two exhibits establishing notice of the Modifier Policy ***months*** before it became effective on September 1, 2016. (R. p. 285 (Jernigan Aff., Ex. E (4/14/2016 memo)); R. pp. 287-288 (Jernigan Aff., Ex. F (July 2016 meeting minutes)).) St. Francis also informed Dr. Jernigan, among others, of the implications of the Modifier Policy. (R. p. 121 (Gay Aff. ¶ 8–9).) Nevertheless, Dr. Jernigan raised no individual objection to the Modifier Policy prior to its effective date of September 1, 2016.

After the Modifier Policy became effective, Dr. Jernigan continued working and accepting compensation, including Productivity Compensation, from St. Francis without objecting to the change to his compensation resulting from the implementation of the Modifier Policy. (R. p. 121 (Gay Aff. ¶ 11).) Although Dr. Jernigan's counsel began communicating with St. Francis in or around May 2017, such communications involved discussions about revisions to Dr. Jernigan's Employment Agreement—not about St. Francis's application of the Modifier Policy.

Dr. Jernigan's failure to object to the Modifier Policy before its implementation, and his

continued acceptance of compensation, including Productivity Compensation, from St. Francis afterward, is evidence of his implied consent to the policy change and its effect on his compensation. Consequently, the doctrines of waiver, estoppel, and/or acquiescence bar Dr. Jernigan's breach of contract claim. *Cf. Facelli v. Southeast Mktg. Co.,* 284 S.C. 449, 452, 327 S.E.2d 338, 339 (1985) (holding that an employee who continued to work and accept compensation following a change to his commission multiplier was estopped from seeking damages based on the change); *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, had no viable breach of contract claim).

In his Affidavit in support of summary judgment, Dr. Jernigan states that he "never agreed to modify" the Employment Agreement. (R. p. 64 (Jernigan Aff. ¶ 16).) But not agreeing to something is not the same as not objecting. One can disagree and remain silent, but objecting means making the disagreement known. Dr. Jernigan's Complaint alleges that the Modifier Policy was implemented "without [his] consent and in spite of his objections." (R. p. 22 (Complaint ¶ 24(a)).) However, this allegation is contradicted by the sworn statement of St. Francis's CFO that Dr. Jernigan "did not individually raise an objection or contest the Modifier Policy" prior to mid-2017. (R. p. 121 (Gay Aff. ¶ 12).) These contradictory statements obviously create a genuine issue of material fact regarding St. Francis's equitable affirmative defenses.

B. The circuit court's reasoning in rejecting St. Francis's affirmative defenses was erroneous

The circuit court rejected St. Francis's affirmative defenses of waiver, estoppel, and/or acquiescence on the grounds that (1) "the affirmative waiver defense has no relevance to the meaning of the employment agreement and whether it permitted St. Francis to apply modifiers,"

such that "Dr. Jernigan would be entitled to summary judgment on that point even if St. Francis's waiver argument were valid"; and (2) the Employment Agreement's non-waiver provision "forecloses St. Francis's argument" on its affirmative defenses. (R. p. 9 (MSJ Order, at 9).) The circuit court erred on both counts.

First, the circuit court made an error of law in ruling that "Dr. Jernigan would be entitled to summary judgment on [the meaning of the Employment Agreement] even if St. Francis's waiver argument were valid." (R. p. 9 (MSJ Order, at 9).) This statement constitutes an error of law. Contrary to the circuit court's conclusion, decisions of the South Carolina Supreme Court and this Court show that any of St. Francis's affirmative defenses, if established, would serve as a complete bar to Dr. Jernigan's breach of contract claim. *See Facelli,* 284 S.C. at 452, 327 S.E.2d at 339 (continued work and acceptance of compensation barred claim based on change in calculating commissions); *Matthews*, 305 S.C. at 271, 407 S.E.2d at 669–70 (continued work and acceptance of compensation barred claim based on a policy change that reduced compensation). In that case, the court would never even reach the issue of interpreting the terms of the Employment Agreement, because it would never reach any part of the merits of Dr. Jernigan's breach of contract claim.

Second, St. Francis's affirmative defenses are not "foreclose[d]" by the Employment Agreement's non-waiver provision. (R. p. 9 (MSJ Order, at 9).) The non-waiver provision provides that "failure … to demand strict performance of any of the terms … of this Agreement shall not be construed as a continuing waiver or relinquishment of any rights under this Agreement." (R. p. 267 (Employment Agreement, at 19.) However, Dr. Jernigan's failure to object to the Modifier Policy does not fall under the non-waiver provision because the Modifier

Policy does not change any term of Dr. Jernigan's Employment Agreement.[6] St. Francis's implementation of the Modifier Policy changes how wRVUs are calculated, a subject on which the Employment Agreement is, at best, ambiguous, as explained in Part II, *supra*. Consequently, the non-waiver provision does not shield Dr. Jernigan from St. Francis's affirmative defenses.

St. Francis's affirmative defenses raise genuine issues of material fact. Importantly, if a jury finds in St. Francis's favor on the affirmative defenses, Dr. Jernigan would not be entitled to any relief on his breach of contract claim—not even the partial summary judgment granted by the circuit court. Accordingly, this Court should reverse summary judgment on the breach of contract claim because St. Francis's affirmative defenses create questions for the trier of fact. *See Estate of Weekley* v. *Weekley*, No. 2015-001721, 2017 WL 4616847, at *1 (Ct. App. May 17, 2017) (reversing summary judgment granted to the plaintiff because genuine issues of material fact regarding the affirmative defenses of laches and estoppel); *Lyles*, 292 S.C. at 157, 355 S.E.2d at 284 (reversing summary judgment granted to the plaintiffs and holding that the affirmative defense of waiver was a question for the trier of fact).

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

Dr. Jernigan's motion for partial summary judgment asked the circuit court to declare "[t]hat the [productivity] compensation due Dr. Jernigan from St. Francis under his employment agreement is considered 'wages' for purposes of the [Wage Act]." (R. p. 1 (MSJ Order, at 1).) St.

[6] For this reason, the circuit court erred in chastising St. Francis for "insisting that the [Employment Agreement] gives it unlimited discretion *to revise Dr. Jernigan's [productivity] compensation formula*," in contravention of the principle that "'[o]ne party to a contract may not unilaterally alter its terms without the assent of the other party.'" (R. pp. 7-8 (MSJ Order, at 7-8) (emphasis added) (quoting Am. Jur. 2d *Contracts* § 496).) But St. Francis never made any such claim. The Productivity Compensation formula is the same now as it was in 2006, when the parties first executed the Employment Agreement: "*Monthly (WRVU's x Conversion Factor) – Monthly Base Compensation = Productivity Compensation, if positive*." (R. p. 271 (Employment Agreement, at 23).) The Modifier Policy does not change the formula, it changes how one of the inputs into the formula—wRVUs—is calculated.

Francis raised two arguments in opposition. First, St. Francis argued that because its application of the Modifier Policy did not violate the Employment Agreement, no wages were "due" to Dr. Jernigan. Second, St. Francis argued that it had provided the statutorily required notice of the Modifier Policy pursuant to the Act.

The circuit court granted summary judgment on the Wage Act issue in a single paragraph that did not address St. Francis's arguments. (R. p. 11 (MSJ Order, at 11).) Instead, with respect to Dr. Jernigan's Wage Act claim, the circuit court merely stated:

> 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 counseling the same." S.C. Code Ann. § 41-10-10(2). This broad definition covers the pay at issue here.

(*Id.*)[7]

A. As a matter of law, no wages are "due" to Dr. Jernigan

The Wage 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 … **which are *due* to an employee under any … employment contract**." S.C. Code Ann. § 41-10-10(2) (emphasis added). The theory underlying Dr. Jernigan's Wage Act claim is that because the Employment Agreement allegedly prohibits application of the Modifier Policy, the amount of Productivity Compensation he actually received after September

[7] The paragraph also includes—presumably by mistake—three sentences related to St. Francis's waiver affirmative defense. St. Francis's Motion to Reconsider sought a ruling on the arguments it actually raised in its opposition to summary judgment. (Def.'s Mem. in Support of Motion to Reconsider, at 9 & n.3.) The circuit court did not address these arguments in its Order denying reconsideration. (R. pp. 14-15 (Reh'g Order).) Accordingly, St. Francis has preserved these issues for appeal. *See Town of Kingstree v. Chapman*, 405 S.C. 282, 312, 747 S.E.2d 494, 509 (Ct. App. 2013) ("If an issue has been raised at trial, and the trial court fails to rule on it, and it is raised again in a motion for reconsideration, the issue is preserved for appellate review even if the trial court does not rule on it.").

1, 2016 when the Modifier Policy was implemented was less than the amount he should have received (*i.e.*, calculated without application of the Modifier Policy). (R. p. 24-25 (Complaint ¶¶ 40-45).).

Because St. Francis did not breach the Employment Agreement by applying the Modifier Policy, Dr. Jernigan's Wage Act claim necessarily fails. For the reasons discussed in Part II, *supra*, the Employment Agreement permitted application of the Modifier Policy, and certainly did not prohibit it; thus, the amount of Productivity Compensation Dr. Jernigan would have received had St. Francis not applied the Modifier Policy never became wages "due" to Dr. Jernigan under the Wage Act.

A decision of this Court supports reversal of summary judgment on the Wage Act claim. *See Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013). In *Baugh*, this Court held that two cardiologists' employment agreements controlled whether they were "due" compensation under the Wage Act. *Id.* at 29, 738 S.E.2d at 495. The cardiologists sought payment from their former practice under the Wage Act for amounts allegedly owed for their defined share of accounts receivable, unpaid draws, and director's fees. *Id.* This Court found, however, that under the specific provisions of their employment agreements, the amounts claimed by the cardiologists were not "due" to them under the employment agreements and therefore were not "wages" for purposes of the Wage Act. *Id.*

Like the cardiologists in *Baugh*, Dr. Jernigan is asserting a claim under the Wage Act for compensation that is not "due" to him under the Employment Agreement. Therefore, the circuit court erred in granting summary judgment to Dr. Jernigan on the issue of whether unpaid Productivity Compensation is "wages" under the Wage Act. Because Dr. Jernigan's Wage Act claim is derivative of his breach of contract claim, the existence of a genuine issue of material fact

precluding summary judgment on the contract claim likewise precluded summary judgment on the Wage Act claim.

B. Regardless of whether Productivity Compensation is "wages," there is no Wage Act violation because St. Francis provided the required statutory notice.

Assuming, *arguendo*, that Productivity Compensation allegedly not paid to Dr. Jernigan as a result of application of the Modifier Policy constitutes "wages" "due" under the Wage Act, which it does not, St. Francis did not violate the Wage Act because it provided Dr. Jernigan the required statutory notice of implementation of the Modifier Policy. *See* S.C. Code Ann. § 41-10-30(A).

The Wage Act requires employers to provide seven days written notice prior to changing an employee's wages. S.C. Code Ann. § 41-10-30(A). Providing notice in accordance with § 41-10-30(A) precludes a Wage Act claim. *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 637, 620 S.E.2d 65, 69 (2005) (holding that the employer did not violate the Wage Act where it informed employees of a change in an incentive policy at least seven days before the reduction became effective).

St. Francis provided Dr. Jernigan ample notice of its plan to implement the Modifier Policy, and it explained the reasons for implementing the policy. (R. p. 121 (Gay Aff. ¶¶ 8–10).) In fact, two of the exhibits attached to Dr. Jernigan's affidavit in support of the summary judgment motion—a written memorandum, dated April 14, 2016, explaining the upcoming implementation of the Modifier Policy, and minutes of a July 2016 meeting during, which the Modifier Policy was discussed—establish that St. Francis provided substantially more than seven days' notice of the implementation of the Modifier Policy. (R. pp. 284-288 (Jernigan Aff., Exs. E, F)); *see Davis*, 365 S.C. at 636, 620 S.E.2d at 68–69 (finding Wage Act notice requirement satisfied on the basis of meetings where employer explained the incentive policy change and answered questions about the policy change in holding that the employer properly notified the employee of the change in policy

under the Wage Act).

Because Dr. Jernigan was notified of the implementation of the Modifier Policy more than seven days prior to its effective date of September 1, 2016, St. Francis did not violate the Wage Act, as a matter of law. At a minimum, summary judgment for Dr. Jernigan is inappropriate because a genuine issue of material facts exists as to whether St. Francis provided the requisite statutory notice.[8]

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

The circuit court should have denied Dr. Jernigan's motion for partial summary judgment as premature because when Dr. Jernigan filed his motion, St. Francis had not had a sufficient time to conduct discovery. "[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); *see also Gary v. Askew*, 423 S.C. 47, 49, 813 S.E.2d 717, 718 (2018) ("Because the record contains minimal evidence about the nature of the collision and the parties have not had an opportunity to conduct significant discovery, we find summary judgment is premature.").

The South Carolina Supreme Court has made clear that summary judgment is inappropriate when further inquiry into issues of fact is required, or where the opposing party was not dilatory in seeking discovery and demonstrates a likelihood that further discovery will uncover additional relevant evidence. *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

[8] Even if St. Francis violated the Wage Act, which it expressly denies, St. Francis would not be liable for treble damages due to the existence of a bona fide dispute about wages due to Dr. Jernigan. *See Rice v. Multimedia, Inc.*, 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995) ("The imposition of treble damages in those cases where there is a bona fide dispute would be unjust and harsh.").

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*, 306 S.C. at 112–14, 410 S.E.2d at 544 (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).

A. Discovery was still in its initial stages when Dr. Jernigan filed for summary judgment

By way of background, St. Francis served its initial responses to Dr. Jernigan's discovery requests in February 2019. St. Francis subsequently spent the next several months reviewing thousands of documents and responding to numerous and continued complaints from Dr. Jernigan's counsel about purported discovery deficiencies, all of which left St. Francis with very little time to pursue its own discovery. Suffice it to say that prior to Dr. Jernigan filing the motion for partial summary judgment on April 10, 2019, St. Francis had no reason to suspect that the parties were anywhere near to concluding the discovery process, including because neither party had taken any depositions at that time. In fact, the summary judgment hearing was *immediately* followed by a hearing on Dr. Jernigan's first motion to compel.

As a result of Dr. Jernigan's pursuit of discovery responses from St. Francis, and St. Francis's fruitless attempts to assuage his counsel's purported concerns about deficiencies in those responses, St. Francis had little time to conduct discovery of its own. This is demonstrated by the fact that Dr. Jernigan's responses to St. Francis's first discovery requests were not due until June 24, 2019, ***after*** St. Francis filed its opposition to the summary judgment motion. Given Dr. Jernigan's aggressive pursuit of discovery from St. Francis, it certainly cannot be said that St. Francis was dilatory. *See Baughman*, 306 S.C. at 113, 410 S.E.2d at 544 (attributing any delay on

the part of the non-moving party to the fact that "from the beginning, discovery was dominated by [the opposing party's] demands and [the non-moving party's] efforts to respond"). In any event, it is not unreasonable that only six months into the case, St. Francis had not yet not yet completed depositions or secured a qualified expert witness.

B. The circuit court erred in disregarding St. Francis's need for additional discovery to defend against summary judgment

The circuit court brushed aside St. Francis's substantial concerns that it was being forced to defend a summary judgment motion without having had adequate time for discovery, simply asserting that "the clear and specific language of the [Employment Agreement] defeats this argument." (R. p. 10 (MSJ Order, at 10).) It most certainly does not. As St. Francis has explained, there are genuine disputes of material fact regarding Dr. Jernigan's claims for breach of the Employment Agreement and violation of the Wage Act, including but not limited to: (1) the ambiguity of the Employment Agreement, which requires that its meaning be decided by a jury; (2) the genuine issue of material fact as to whether Dr. Jernigan objected to implementation of the Modifier Policy, and if he did not, whether St. Francis's equitable affirmative defenses would bar his breach of contract claim; and (3) the genuine dispute of material fact regarding whether and when St. Francis notified Dr. Jernigan about the Modifier Policy, and if St. Francis provided notification more than seven days before the Modifier Policy became effective on September 1, 2016. In opposition to summary judgment, St. Francis outlined, in detail, the additional evidence needed to address the issues of fact relevant to summary judgment and to support its defenses to Dr. Jernigan's claims. (R. pp. 124-126 (Affidavit of Nikole S. Mergo ¶¶ 4-8).) However, the circuit court granted summary judgment in favor of Dr. Jernigan without St. Francis ever having the opportunity to conduct such discovery, including without the deposition of Dr. Jernigan, which is forthcoming.

South Carolina law mandates that St. Francis have had a "full and fair" opportunity to pursue discovery prior to the entry of summary judgment. *See Baughman*, 306 S.C. at 112, 410 S.E.2d at 543. Because St. Francis should have the opportunity to conduct discovery on relevant factual issues before being forced to defend a summary judgment motion, the circuit court's order should be reversed as premature. *See Pallares*, 407 S.C. at 373, 756 S.E.2d at 135 (reversing the circuit court's grant of summary judgment because summary judgment was premature).

CONCLUSION

For the reasons set forth above, this Court should reverse the circuit court's order granting in part summary judgment to Respondents and remand it for further proceedings.

Respectfully submitted,

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In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

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Case No. 2018-CP-23-05985

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Opening Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing *Final Opening Brief* has been served upon Respondent's counsel pursuant to the Supreme Court's Order *Re: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020)*, by electronic mail, on the 9th day of June, 2020, addressed as shown below:

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