

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jun 29 2020

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

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.

FINAL BRIEF OF RESPONDENT

Henry L. Parr, Jr., SC Bar No. 4340
hparr@wyche.com
Wade S. Kolb III, SC Bar No. 100379
wkolb@wyche.com
James E. Cox, Jr., SC Bar No. 103886
jcox@wyche.com

WYCHE, PA
200 East Camperdown Way
Greenville, SC 29602-0728
Telephone: (864) 242-8200
Facsimile: (864) 235-8900

Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
I. Factual Background	2
A. Introduction	2
B. The Employment Agreement’s Compensation Terms.....	3
C. St. Francis Makes Unilateral Changes to Dr. Jernigan’s Compensation	5
II. Procedural History	7
SUMMARY OF ARGUMENT	9
STANDARD OF REVIEW	10
ARGUMENT	12
I. The Employment Agreement Is Unambiguous and Must Be Enforced As It Is Written.....	12
II. St. Francis’s Affirmative Defenses Are Irrelevant to How to Interpret the Contract.....	20
III. Any Compensation Due Dr. Jernigan is “Wages” Under the Wage Act.	23
IV. No Additional Discovery Is Needed to Interpret the Employment Agreement.	26
CONCLUSION.....	27

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Allen v. Pinnacle Healthcare Sys., LLC</i> , 394 S.C. 268, 715 S.E.2d 362 (Ct. App. 2011)	23
<i>Baugh v. Columbia Heart Clinic</i> , 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013)	24
<i>Callawassie Island Members Club, Inc. v. Dennis</i> , 425 S.C. 193, 821 S.E.2d 667 (2018)	11, 17
<i>Columbia East Associates v. Bi-Lo, Inc.</i> , 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989)	15, 16, 26
<i>Davis v. Greenwood Sch. Dist. 50</i> , 365 S.C. 629, 620 S.E.2d 65 (2005)	25, 26
<i>Dumas v. InfoSafe Corp.</i> , 320 S.C. 188, 463 S.E.2d 641 (Ct. App. 1995)	23
<i>Facelli v. Southeast Mktg. Co.</i> , 284 S.C. 449, 327 S.E.2d 338 (1985)	22
<i>First-Citizens Bank & Tr. Co. v. Conway Nat. Bank</i> , 282 S.C. 303, 317 S.E.2d 776 (Ct. App. 1984)	11, 27
<i>Fleming v. Rose</i> , 350 S.C. 488, 567 S.E.2d 857 (2002)	11
<i>HK New Plan Exchange Property Owner I, LLC v. Coker</i> , 375 S.C. 18, 649 S.E.2d 181 (Ct. App. 2007)	16
<i>Knight v. Austin</i> , 396 S.C. 518, 722 S.E.2d 802 (2012)	10
<i>Mathis v. Brown & Brown of South Carolina, Inc.</i> , 389 S.C. 299, 698 S.E.2d 773 (2010)	25
<i>Matthews v. City of Greenwood</i> , 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991)	22
<i>Miles v. Miles</i> , 393 S.C. 111, 711 S.E.2d 880 (2011)	14

<i>Northwestern Nat'l Ins. Co. v. R.S. Armstrong & Bros. Co.</i> , 627 F. Supp. 951 (D.S.C. 1985).....	21
<i>S.C. Dep't of Nat. Res. v. Town of McClellanville</i> , 345 S.C. 617, 550 S.E.2d 299 (2001).....	11
<i>Thomas v. Waters</i> , 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994).....	26
<i>W.E. Gilbert & Assocs. v. S.C. Nat. Bank</i> , 285 S.C. 421, 330 S.E.2d 307 (Ct. App. 1985).....	19
<i>Watson v. Underwood</i> , 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014).....	11
<u>Statutes & Regulations</u>	
42 CFR § 414.22(a).....	2
Final Rule Medicare Program; Fee Schedule for Physician Services, 56 FR 59502-91, 1991 WL 245153 (F.R.)	7
South Carolina Payment of Wages Act, S.C. Code § 41-10-10.....	<i>passim</i>
<u>Other Authorities</u>	
Am. Jur. 2d Contracts § 496.....	19
Restatement (Second) of Contracts § 223 (1981).....	18
<u>Rules</u>	
S.C. R. Civ. P. 56(d)	11

STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court correctly determine that the compensation formula in Dr. Jernigan's employment agreement is unambiguous and thus did not permit St. Francis to unilaterally reduce Dr. Jernigan's compensation through the application of "payment modifiers" that are referenced nowhere in the agreement?
2. Did the circuit court rightly conclude that St. Francis's affirmative defenses are irrelevant to the question of how to interpret Dr. Jernigan's employment agreement?
3. Did the circuit court rightly conclude that the compensation due Dr. Jernigan under his employment agreement is "wages" for purposes of the South Carolina Payment of Wages Act?
4. Was the circuit court's recognition that no discovery was needed to interpret the compensation provisions of Dr. Jernigan's employment agreement correct?

STATEMENT OF THE CASE

This appeal presents a straightforward question of whether the circuit court appropriately determined that the employment agreement between Respondent, Dr. Clark Jernigan (“Dr. Jernigan”), and Appellant, St. Francis Physician Services, Inc. (“St. Francis”), was unambiguous and did not permit St. Francis to unilaterally change the agreement’s compensation terms ten years into the parties’ performance. The circuit court granted Dr. Jernigan’s motion for partial summary judgment on this narrow question of contractual interpretation, additionally determining that the compensation owed Dr. Jernigan under the agreement is “wages” for purposes of the South Carolina Payment of Wages Act. St. Francis now challenges this determination on appeal.

I. Factual Background

A. Introduction

Dr. Jernigan has been employed by St. Francis since 2006 under an employment agreement dated September 1, 2006 (the “Employment Agreement” or the “Agreement”). (R. pp. 248-278) The Agreement initially had a term of ten years. In 2008, it was amended to (a) extend the term so that it would not expire until September 1, 2020; (b) increase the amount Dr. Jernigan would receive for each Work Relative Value Unit (“WRVU”)¹ he produced; and (c) severely limit his

¹ WRVUs are a set of numerical values assigned annually by the Centers for Medicare and Medicaid Services (“CMS”), a federal agency in the Department of Health and Human Services. *See* 42 CFR § 414.22(a) (“Physician work RVUs are established using a relative value scale in which the value of physician work for a particular service is rated relative to the value of work for other physician services.”).

ability to terminate the agreement.² (R. pp. 279-281) Because Dr. Jernigan was agreeing to be locked into a long-term contract with a rate of pay that would not increase for twelve years, it was important that the Agreement's compensation formula be straightforward and specific. Thus, the Agreement made clear that Dr. Jernigan was to be compensated based on the WRVUs he produced. St. Francis did this for the first ten years of the Agreement. In September 2016, however, St. Francis unilaterally altered the compensation formula by inserting "payment modifiers"³ to reduce Dr. Jernigan's WRVUs and, thus, reduce his compensation, leading to the present dispute.

B. The Employment Agreement's Compensation Terms

The Employment Agreement entitles Dr. Jernigan to three types of compensation: base compensation, productivity compensation, and bonus compensation. The calculation of productivity and bonus compensation is at issue here.⁴

² Although the initial agreement allowed Dr. Jernigan to terminate at will on one year's notice, (R. p. 261), the 2008 amendment prevented Dr. Jernigan from terminating at will, (R. p. 279).

³ Payment modifiers are used by CMS to determine how much the federal government pays providers like St. Francis for medical services under the Medicaid and Medicare programs. As noted by the court below, modifiers "apply to the final price the government is willing to pay" St. Francis, but they "do not affect the underlying WRVUs." (R. p. 5 n.2). The court continued, "Modifiers and WRVU's are separate concepts. CMS always determines the WRVUs separately from the modifiers." (*Id.*)

⁴ St. Francis wrongly states in its brief that "only Productivity Compensation is at issue" here. (App. Br. at 3) The changes St. Francis made in 2016 affected both Dr. Jernigan's productivity pay and bonus pay, and the circuit court's holding that the

Under the Employment Agreement Dr. Jernigan’s productivity pay and his bonus pay are determined by looking to the number of WRVUs Dr. Jernigan performs in a given period of time. WRVUs, the Agreement explains, are a way of measuring “the relative time and effort (work) that a physician will expend with each procedure.” (R. p. 274)

The Employment Agreement specifically states that the WRVUs used to determine Dr. Jernigan’s compensation will correspond to the WRVU “schedule published each year by CMS in the Federal Register.” (R. p. 274) With his affidavit in support of his motion for partial summary judgment, Dr. Jernigan submitted examples of schedules from 2006 and 2016, each of which has a column labeled “WORK RVU” with units assigned for various types of procedures. (R. pp. 89-92) There is nothing ambiguous about what a WRVU is, what entity assigns the value, and where those values are found.

In addition to dictating specifically where the WRVU values are to be found, the Employment Agreement states unambiguously how they are used to calculate Dr. Jernigan’s productivity compensation:

Any Productivity Compensation Physician receives shall be calculated . . . on the basis of actual Work Relative Value Units (WRVU’s) attributable to services personally performed by Physician each month multiplied by the appropriate WRVU conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician. The remainder, if positive, is the amount of Productivity Compensation to be paid for such month.

contract did not allow for these changes applies to St. Francis’s calculation of both types of pay.

(R. p. 271) The Agreement even includes a specific formula in italicized boldface type:

$$\textit{Monthly (WRVU's x Conversion Factor) – Monthly Base Compensation = Productivity Compensation, if positive}$$

(*Id.*) This formula does not include “payment modifiers.” Applying it is straightforward. For example, if one assumes in a given month that Dr. Jernigan’s base compensation is \$10,000, the conversion factor is \$70, and the total of his WRVUs is 200, then Dr. Jernigan would be entitled to \$4,000 in productivity pay that month (200 multiplied by \$70 = \$14,000, and \$14,000 less \$10,000 in base pay yields \$4,000 in productivity pay).

The Agreement includes another formula for calculating Dr. Jernigan’s bonus pay, and that formula also utilizes WRVUs. In the bonus formula, Dr. Jernigan’s total WRVUs are divided by the total WRVUs of physicians in his practice, creating a percentage that is then applied to an overall bonus pool. The formula is:

$$\text{(Physician WRVU's / Total WRVU's of Medical Practice) x Bonus Compensation Pool.}$$

(R. p. 272) This formula also does not include “payment modifiers.”

C. St. Francis Makes Unilateral Changes to Dr. Jernigan’s Compensation

For ten years, to the best of Dr. Jernigan’s knowledge, St. Francis calculated Dr. Jernigan’s productivity compensation and bonus compensation based on the WRVUs he produced, and St. Francis paid him for all of the WRVUs he produced.

(R. p. 63) It made no attempt to reduce them by applying “payment modifiers.”

After ten years of performance under the Employment Agreement, however, St. Francis decided in 2016 to reduce physician compensation, including Dr.

Jernigan's compensation, by applying "payment modifiers" to the WRVUs in the compensation formulas. This is undisputed. (R. pp. 5, 120-121)

If St. Francis had intended when it entered the Employment Agreement to apply the payment modifiers to reduce Dr. Jernigan's actual WRVUs, it could easily have specified that in the Agreement in 2006. "Payment modifiers" existed then, and had existed for years. As noted by the circuit court, CMS began using them in 1992 to adjust the amounts that CMS would pay healthcare providers for services to Medicare and Medicaid patients. (R. p. 5 n.2) Payment modifiers were thus affecting the reimbursements St. Francis received from the federal government long before St. Francis ever employed Dr. Jernigan, and they continued to affect those reimbursements long after St. Francis employed Dr. Jernigan in 2006.

Modifiers can reflect things like "payment of an assistant at surgery, team surgery, bilateral surgery, etc.," (R. p. 68), and apply to the final price the government is willing to pay healthcare providers. But, as the circuit court observed, "modifiers do not affect the underlying WRVUs. Modifiers and WRVUs are separate concepts, and CMS determines the WRVUs separately from the modifiers." (R. p. 5 n.2) Indeed, in its original rule establishing both WRVUs and payment modifiers, CMS said that modifiers were "Adjustments to Fee Schedule Payments," thereby making clear that they are not adjustments to the underlying WRVUs. *See* Final Rule Medicare Program; Fee Schedule for Physician Services, 56 FR 59502-91, 1991 WL 245153 (F.R.) at § II.H (issued Nov. 25, 1991); *see also id.*

§ II.H.3 (“Only modifiers for which we will establish a national payment policy will affect *payment*.” (emphasis added)).⁵

Nothing in Dr. Jernigan’s Agreement allowed St. Francis to alter his compensation formulas, as it did, by suddenly inserting payment modifiers to reduce his actual WRVUs. This wrongful alteration, according to St. Francis, reduced the WRVUs credited to Dr. Jernigan for 2018 by 414.22 and for 2017 by 390.74 and thus negatively impacted the compensation he received from St. Francis. (R. pp. 314-315)

II. Procedural History

Dr. Jernigan filed his complaint on November 28, 2018, asserting three causes of action: breach of contract, violation of the South Carolina Payment of Wages Act, and declaratory judgment. (R. pp. 24-26) St. Francis answered on January 28, 2019. (R. pp. 51-58)

Dr. Jernigan filed his motion for partial summary judgment on April 10, 2019, together with a supporting affidavit and exhibits. (R. pp. 59-60) In the motion, Dr. Jernigan requested the circuit court declare three things:

1. That his employment agreement with St. Francis does not permit St. Francis to reduce the number of his Work Related Value Units

⁵ CMS’s publication explaining its fee schedule also treats WRVUs and payment modifiers as separate concepts. (R. pp. 68-88) CMS defines WRVUs as “relative value units” that measure “the physician work in the service as published in the Federal Register Fee Schedule.” (R. pp. 68, 73-74) Payment modifiers, in contrast, are “payment policy indicators needed for payment adjustment (i.e. payment of assistant at surgery, team surgery, bilateral surgery, etc.” (*Id.* at 1) (R. p. 68). For example, payment modifier no. 51 is an “applicable payment adjustment rule for multiple procedures.” (R. p. 76)

(“WRVUs”) for purposes of calculating his compensation by applying payment modifiers;

2. That the compensation due Dr. Jernigan from St. Francis under his employment agreement is considered “wages” for purposes of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq.*; and
3. That St. Francis owes Dr. Jernigan any compensation that he would have otherwise received had St. Francis not applied payment modifiers to reduce his WRVUs.

(R. pp. 59-60) Two months later, on June 18, 2019, the circuit court held a hearing on the motion. (R. pp. 152-189) The circuit court issued its order granting Dr. Jernigan’s motion in part on July 15, 2019 (the “Order”). (R. pp. 1-13) Specifically, the circuit court held Dr. Jernigan was entitled to judgment on the first two grounds but not the third. Concerning those portions of the motion it granted, the circuit court held:

[T]his Court . . . declares and holds that Dr. Jernigan’s employment agreement does not permit St. Francis to apply payment modifiers to his actual WRVUs and that any compensation due Dr. Jernigan under the agreement qualifies as “wages” for purposes of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq.*

(R. p. 12)⁶

⁶ In its brief St. Francis misrepresents the lower court’s ruling as holding that the Employment Agreement “prohibits St. Francis from applying payment modifiers to *CPT codes* used to determine work relative value units.” (App. Br. at 2 & n.1 (emphasis added)) The lower court’s ruling involved WRVUs, not CPT codes. *See, e.g.,* Order at 12 (R. p. 12) (“Dr. Jernigan’s employment agreement does not permit St. Francis to apply payment modifiers to his actual *WRVU’s* for purposes of determining his compensation (emphasis added)). The circuit court’s order did not

St. Francis filed a motion to reconsider on July 25, 2019. (R. pp. 190-192) After briefing from both parties, the circuit court denied the motion to reconsider on August 7, 2019. (R. pp. 14-15) St. Francis filed and served its notice of appeal on August 23, 2019. (R. pp. 198-216)

SUMMARY OF ARGUMENT

An employer should not be free to change, at its whim, a core provision of a long-term contract such as employee compensation. That is what occurred here.

Dr. Jernigan and St. Francis executed a multi-year contract, with clear and unambiguous provisions specifying that Dr. Jernigan's productivity pay and bonus pay would be calculated using WRVU values. The contract said where those values were to be found, and for ten years, St. Francis calculated Dr. Jernigan's salary based on his actual WRVUs. But in 2016, St. Francis began applying "payment modifiers" to reduce Dr. Jernigan's WRVUs and his salary. A foreign concept from outside the Agreement, payment modifiers were not new to the healthcare world, but they were new to St. Francis's compensation plans and its agreements with its physicians, including Dr. Jernigan.

St. Francis now argues that because the Agreement does not reference "payment modifiers" or expressly prohibit them, they must be allowed.

mention CPT codes, nor, for that matter, did St. Francis's briefing below. CPT codes are numeric codes developed by the American Medical Association and associated with healthcare providers' billing and reimbursement practices. *See* Exhibits C and D to Dr. Jernigan's Affidavit (R. pp. 89-92) (noting that "CPT codes and descriptions only are copyright" of the AMA). The circuit court made no ruling regarding how St. Francis might use "payment modifiers" in connection with calculating the amount it might be paid by the federal government for any particular procedure indicated by a CPT code.

There is nothing unclear in the compensation provisions of Dr. Jernigan's Agreement, and the language in the four corners of that Agreement squarely does not permit application of payment modifiers. Accepting St. Francis's "silence" argument would undermine basic contract principles. It would prevent employers and employees from relying on simple, specific compensation formulas. Rather than simply stating the compensation formula, under St. Francis's approach, parties wishing to rely on a specific compensation formula would have to add extra language specifically stating that no other factors may be applied to alter the formula or specially excluding every imaginable factor that might be used to alter the formula. That is not the law.

This Court should affirm the judgment of the circuit court and hold the Agreement means what it says: St. Francis may not alter the compensation formula by applying payment modifiers. A necessary corollary of that holding is that any compensation that may be owed Dr. Jernigan is "wages" as that term is broadly defined under the South Carolina Payment of Wages Act. Neither of these narrow holdings on partial summary judgment requires consideration of St. Francis's affirmative defenses, whether meritorious or not, nor do they benefit from discovery, which is irrelevant to these questions of law.

STANDARD OF REVIEW

This Court utilizes the same standard of review as the trial court to review the grant of summary judgment. *Knight v. Austin*, 396 S.C. 518, 521, 722 S.E.2d 802, 804 (2012). "Summary judgment is appropriate when there is no genuine issue

as to any material fact such that the moving party must prevail as a matter of law.” *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

South Carolina Rule 56 allows a plaintiff to bring a motion for partial summary judgment to streamline the issues in a case. S.C. R. Civ. P. 56(d). “The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder.” *Watson v. Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014).

Summary judgment is a particularly appropriate tool when it comes to contract cases because “[i]t is a question of law for the court whether the language of a contract is ambiguous.” *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018) (quoting *S.C. Dep’t of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001)). “[S]ummary judgment is proper and a trial unnecessary where the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself.” *First-Citizens Bank & Tr. Co. v. Conway Nat. Bank*, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984).

In addition, “[b]ecause the ambiguity of contracts and statutes are questions of law, [this Court does] not view the evidence in any particular light.” *Callawassie Island*, 425 S.C. at 198, 821 S.E.2d at 669. This particular principle of blackletter law squarely refutes St. Francis’s repeated and mistaken assertion that the Employment Agreement and all reasonable inferences must be construed in the light most favorable to it. (*See e.g.*, App. Br. at 2 n.2, 10, 13)

ARGUMENT

This Court should uphold the judgment of the circuit court. The Employment Agreement is clear and unambiguous, and it does not permit application of payment modifiers to reduce Dr. Jernigan's compensation. St. Francis's arguments to the contrary strain credulity, and are a desperate attempt to justify a unilateral decision to alter the compensation terms of the Employment Agreement ten years into the Agreement's performance.

I. The Employment Agreement Is Unambiguous and Must Be Enforced As It Is Written.

There is no ambiguity in the Employment Agreement, and it consequently must be enforced as written. The Agreement spells out in clear terms how Dr. Jernigan's productivity pay is calculated: "Any Productivity Compensation Physician receives shall be calculated . . . on the basis of actual Work Relative Value Units (WRVU's) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician." (R. p. 271) That language does not include the application of payment modifiers in the compensation determination.

The formula that follows is similarly clear: "Monthly (WRVU's x Conversion Factor) – Monthly Base Compensation = Productivity Compensation, if positive." (R. p. 271) That formula likewise does not include payment modifiers in the compensation determination. Nor does the formula for calculating bonus pay: "(Physician WRVUs / Total WRVUs of Medical Practice) x Bonus Compensation

Pool.” (R. p. 272) In other words, the concept of payment modifiers is not part of the determination of Dr. Jernigan’s productivity pay or bonus pay. In fact, the phrase “payment modifiers” *does not appear anywhere in the Employment Agreement at all*. The net of this is that the Agreement lacks any ambiguity as to the permissibility of applying payment modifiers. They are an entirely foreign concept to the Employment Agreement.

St. Francis seeks to revise the compensation formulas to include payment modifiers. Rather than calculating Dr. Jernigan’s productivity compensation according to the stated formula:

$$\text{Monthly (WRVU's x Conversion Factor) – Monthly Base Compensation} \\ = \text{Productivity Compensation, if positive}$$

(R. p. 271) St. Francis would insert another factor, payment modifiers, making the formula as follows, including the new term indicated in boldface:

$$\text{Monthly ((WRVU's – less Payment Modifier reduction) x Conversion Factor) –} \\ \text{Monthly Base Compensation} = \text{Productivity Compensation, if positive}$$

Similarly, rather than following the stated formula for bonus compensation which is:

$$\text{Physician WRVU's / Total WRVU's of Medical Practice) x Bonus} \\ \text{Compensation Pool}$$

(R. p. 272) St. Francis would insert another factor, payment modifiers, making the formula as follows, including the new terms indicated in boldface:

$$\text{(Physician WRVU's – less Payment Modifier reduction) / (Total WRVU's of} \\ \text{Medical Practice – less Payment Modifier reduction) x Bonus Compensation} \\ \text{Pool}$$

But St. Francis is not free to unilaterally revise key provisions of Dr. Jernigan's long-term Employment Agreement in this way.

"Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (quotation omitted).

Confronting the clarity of the Agreement's language and recognizing the utter absence of any reference to payment modifiers, St. Francis is left to make the astonishing argument that the Agreement is nevertheless ambiguous because it is "silent" as to the application of payment modifiers and at any rate does not "expressly prohibit" their application. (App. Br. at 12-13) That is absurd.

The Agreement is not "silent." The parties stated in the Agreement how productivity and bonus pay would be calculated. They reiterated this in formulas. Those formulas included WRVUs, and made clear the WRVU values were to be taken from schedules published by CMS.⁷ The parties were not further required to include a vast list of prohibitions saying what they could *not* do to calculate productivity and bonus pay.

⁷ All of which undermines St. Francis's bizarre suggestion, relegated to a footnote, that it did not "change the formula" for calculating productivity pay, rather it only "change[d] how one of the inputs into the formula – wRVUs – is calculated." (App. Br. at 19 n.6) First of all, St. Francis is just playing with language; changing an input to a formula is the same as changing a formula. Second, neither the language of the Agreement nor the formulas set out in the Agreement provide for any process of "modification" or calculation of WRVUs beyond simply totaling the number of actual WRVUs attributable to Dr. Jernigan in a given month or year.

Under St. Francis's reasoning, to avoid ambiguity, any positive statement of obligations in a contract would have to be accompanied by a corresponding parade of prohibitions. That cannot be correct. In this situation it is enough to say "thou shalt" without needing to add "thou shalt not."

The cases St. Francis cites are, unsurprisingly, unavailing. In *Columbia East Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989), for example, this Court was not dealing with a clear and specific formula, like the one involved here. Instead, the Court confronted the question of whether the parties to a commercial lease intended to allow the anchor tenant in a shopping center, Bi-Lo, to vacate its premises and leave them empty so long as it continued to pay rent. The two other tenants in the shopping center had entered leases "which made specific provisions regarding the operation of Bi-Lo in the center," given that Bi-Lo was located "in the center of the parking lot and in the center of the traffic flow." *Id.* at 517-18, 386 S.E.2d at 260-61. In addition, Bi-Lo's relocation to an "adjacent shopping center" and determination to keep its old space free of another grocery store was designed in part to eliminate Bi-Lo's competition.

Of the lease in question this Court observed, "While certain terms . . . are consistent with the proposition that the parties contemplated an operating supermarket, no provision either expressly requires Bi-Lo to assure continuous operation or permits it to vacate and leave the store empty." 299 S.C. at 520, 386 S.E.2d at 262. Recognizing that "it would be virtually impossible for a contract to encompass all of the many possibilities which may be encountered by the parties" in

the good faith performance of a lease, this Court held that when a question of intent “is left unaddressed,” the court could look to extrinsic evidence, and the law would “imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made.” *Id.* at 520-21, 386 S.E.2d at 262. In other words, in *Columbia East*, this Court determined that while there was neither an express “thou shalt” nor a “thou shalt not,” all the facts and evidence demonstrated the parties’ intent was “that an operating supermarket would occupy the leased space.” *Id.* at 521, 386 S.E.2d at 262.

HK New Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 649 S.E.2d 181 (Ct. App. 2007), likewise does not fit. There the question was whether a son who signed a commercial lease along with his father was subsequently released from that lease when an amendment that included only his father was executed. This Court found ambiguity existed under the circumstances in *HK New Plan* because 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. 375 S.C. at 24, 649 S.E.2d at 184. There was also a related dispute over when the amendment even became effective. *Id.*, 649 S.E.2d at 184. In other words, the mere absence from the amendment of express language releasing the son was *not* the only reason this Court found an ambiguity.

St. Francis does not present a case with anything like the facts of this case. The absence of any express prohibition on the use of payment modifiers cannot be construed, as St. Francis would have it, as a vast opening for the introduction of an

entirely novel concept to the Agreement, and one moreover that contradicts the clear language of the Agreement and the clear formulas about how pay is calculated. *See Callawassie Island*, 425 S.C. at 200, 821 S.E.2d at 670 (reversing Court of Appeals and holding that summary judgment was appropriate when contract language was “unambiguous[]” and not “contradict[ed]” by any other contractual provisions).

St. Francis makes a second wrongheaded argument, (App. Br. at 14-15), proposing that because the Employment Agreement references CMS schedules in “Definition/Note 1” of the Agreement, that reference must incorporate payment modifiers, which also appear in those schedules along with WRVU values (and numerous other values for that matter). That too is absurd.

First, the Agreement’s reference to CMS schedules is *solely* with respect to identifying where WRVU values are to be found. The Agreement says nothing about incorporating any and all information that happens to be published alongside WRVU values in the schedules. *See* Employment Agreement at 22 n.1 (R. p. 274) (stating that “Work Relative Value Unites (WRVU’s) are updated . . . each year according to the schedule published each year by CMS in the Federal Register.”)

As the circuit court recognized, the reference to the CMS schedules actually supports Dr. Jernigan’s position, in that “[t]he language in note 1 about a CMS schedule refers clearly and specifically to WRVU’s and requires that St. Francis update the WRVU values each year as they are revised by CMS,” thereby

demonstrating that “WRVU values, not payment modifiers, determine Dr. Jernigan’s compensation.” (R. p. 8)

Second, the parties’ longstanding course of dealing confirms that payment modifiers were never contemplated and never incorporated in the Agreement. *See* Restatement (Second) of Contracts § 223 (1981) (“[A] course of dealing between the parties gives meaning to or supplements or qualifies their agreement.”). For the first ten years after the Agreement was executed, St. Francis determined Dr. Jernigan’s compensation without applying payment modifiers. It simply looked to the WRVU values assigned by CMS and put those values in the agreed formula. During those same ten years – and indeed for fifteen years before the Employment Agreement was ever signed – payment modifiers existed in the CMS schedules and were affecting St. Francis’s payments from the federal government. Not until 2016, though, did St. Francis suddenly decide the modifiers should apply to Dr. Jernigan’s Agreement.

St. Francis also appears to make yet a third absurd argument that it had the ability to change the compensation terms of the Agreement because the Agreement requires Dr. Jernigan to “comply with St. Francis’s policies” and altering the compensation terms was simply a “policy change.” (*See* App. Br. at 3, 4-5 (“St. Francis regularly makes policy changes . . . for which physician consent is not required.”)) As the circuit court rightly recognized, however, “none of the provisions of the Agreement cited by St. Francis” as addressing its policies “have anything to do with Dr. Jernigan’s compensation.” (R. p. 7) Accepting St. Francis’s argument

would in effect render any of its obligations in the Agreement a nullity so long as it could characterize a proposed change to those obligations as a mere change in “policy.” Generic, boilerplate provisions requiring Dr. Jernigan to comply with “all applicable federal and state laws, regulations, and rules” and “the administrative and ethical policies of [St. Francis]” in the way he provides his “services,” (R. p. 259), cannot be bent and stretched into an opening for an employer to make unilateral alterations to a material term like compensation.⁸

Blackletter law provides that “[o]ne party to a contract may not unilaterally alter its terms without the assent of the other party.” Am. Jur. 2d Contracts § 496. This is especially so when dealing with material terms in a contract, such as compensation. *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) (“In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation.”).

To suggest that the Agreement’s “silence” regarding payment modifiers somehow counteracts clear language and formulas saying how compensation is to be

⁸ That the Agreement did not allow St. Francis to make unilateral changes in Dr. Jernigan’s compensation is further shown by section 3.4 of the Agreement. Unlike many agreements which contain language to the effect that any provision that is illegal is unenforceable and the remainder of the agreement remains enforceable, Section 3.4 takes a different approach. It provides that if St. Francis received “advice of counsel that there [was] a substantial risk that the Agreement does not comply with an applicable law,” St. Francis was entitled to cancel the entire agreement if it could not agree with Dr. Jernigan on a modification. (R. p. 263) If St. Francis had believed that the application of payment modifiers was required by law, its sole option was to cancel the Agreement, absent some other agreement with Dr. Jernigan. St. Francis has not cancelled the Agreement. It has required Dr. Jernigan to remain bound by the Agreement. Thus, it must honor the compensation provisions as stated.

calculated, or that a reference to CMS schedules somehow incorporates any and all information in those schedules and alters the plain language and formulas of the Agreement, or that an employee's obligation to follow his employer's policies in performing his work provides *carte blanche* for the employer to change his pay, is to disregard reason and logic. This Court should confirm the contract means what it says: Dr. Jernigan's compensation must be determined without regard to payment modifiers.

II. St. Francis's Affirmative Defenses Are Irrelevant to How to Interpret the Contract.

St. Francis wrongly asserts that its affirmative defenses have some bearing on the circuit court's determinations about how to interpret the contract. (App. Br. at 16-20) They do not, and St. Francis's allegations as to facts supposedly supporting a theory of waiver are entirely beside the point. (*See* App. Br. at 16-17)

As an initial matter, St. Francis appears to be laboring under a fundamental misunderstanding that the circuit court granted summary judgment on Dr. Jernigan's breach of contract claim. (*See e.g.*, App. Br. at 16 ("[t]his Court should reverse summary judgment *as to the breach of contract claim* because Dr. Jernigan waived his rights . . ."); *id.* at 17 ("the doctrines of waiver, estoppel, and/or acquiescence bar Dr. Jernigan's *breach of contract claim*"); *id.* at 19-20 ("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.") (emphases added)). The circuit court did not grant judgment for breach of contract. The court's Order only interpreted the Employment Agreement, holding that the plain

language of that Agreement did not permit St. Francis to apply payment modifiers. (R. pp. 2, 11, 12) In fact, the circuit court declined to address “whether St. Francis owes Dr. Jernigan any compensation.” (R. p. 12)

St. Francis can, if it wishes, assert its affirmative defenses another day. None of them dictates, or even has a bearing upon, how to resolve the interpretive issues the circuit court did address. As the court itself recognized in reference to St. Francis’s affirmative defense of waiver, “the . . . waiver defense has no relevance to the meaning of the employment agreement and whether it permitted St. Francis to apply modifiers. Dr. Jernigan would be entitled to summary judgment on that point even if St. Francis’s waiver argument were valid.”⁹ (R. p. 9)

The circuit court did observe, however, that St. Francis’s waiver defense faces a formidable obstacle given that the Agreement has a non-waiver provision. (R. p. 9) That provision provides that “failure . . . to demand strict performance . . . on any of the terms . . . shall not be construed as a . . . waiver or relinquishment of any rights under this Agreement, and each party may at any time demand strict and complete performance by the other party . . . of this Agreement.” (R. p. 267) Such provisions are enforceable as a matter of law, *see Northwestern Nat’l Ins. Co. v. R.S. Armstrong & Bros. Co.*, 627 F. Supp. 951, 954 (D.S.C. 1985), and indeed, both cases cited by St. Francis for the proposition that a party’s failure to object constitutes consent are distinguishable because the application of a non-waiver

⁹ The circuit court’s logic applies with equal force to St. Francis’s affirmative defenses of estoppel and acquiescence as well.

provision was not at issue in either case.¹⁰ But again, whatever obstacles this defense may face are not now before this Court.

Still attempting to escape the reach of the non-waiver clause, St. Francis makes a related, and confusing, argument that its application of payment modifiers to Dr. Jernigan's compensation "does not change any term of Dr. Jernigan's Employment Agreement" but was only a new policy.¹¹ (App. Br. at 19) First, that argument disregards the broad language of the non-waiver clause, which applies to a failure to demand strict performance of "*any* of the terms, covenants, or conditions of this Agreement" and provides that such failure shall not constitute a waiver of "*any* rights under this Agreement." (R. p. 267 (emphasis added)) But more importantly, St. Francis appears to suggest that it was incumbent upon Dr. Jernigan to refuse to see his patients or work for no pay in order to preserve his claims for full compensation. That cannot be right.¹²

¹⁰ See App. Br. at 17 (citing *Facelli v. Southeast Mktg. Co.*, 284 S.C. 449, 452, 327 S.E.2d 338, 339 (1985), and *Matthews v. City of Greenwood*, 305 S.C. 267, 271, 407 S.E.2d 668, 669-70 (Ct. App. 1991)).

¹¹ This argument appears to be related to St. Francis's argument addressed in part I, pp. 18-19 *supra*, that changing Dr. Jernigan's compensation was only a "policy change" and therefore permitted under provisions requiring Dr. Jernigan to follow St. Francis's policies.

¹² Although not material here, St. Francis is also wrong on the facts in asserting, (App. Br. at 17), that Dr. Jernigan's counsel did not object in mid-2017 to application of the payment modifiers. Dr. Jernigan's counsel in fact sent a letter to St. Francis on August 24, 2017. (R. pp. 193-197) That letter reminded St. Francis that Jernigan's counsel represented a number of POA Physicians regarding St. Francis's "breach of its contractual compensation obligations to them" and stated, "*[b]ased on our conversations, I assume that St. Francis and its affiliates understand that some or all of my clients will be forced to bring suit on their claims*

III. Any Compensation Due Dr. Jernigan is “Wages” Under the Wage Act.

The South Carolina Payment of Wages Act protects employees like Dr. Jernigan and mandates St. Francis pay him any compensation he is due, including productivity or bonus pay withheld as a result of St. Francis’s application of payment modifiers. The Act provides that “every employer . . . shall pay wages due” their employees, S.C. Code § 41-10-40(A), and this Court has recognized the Act is “remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld,” *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 194, 463 S.E.2d 641, 645 (Ct. App. 1995). For this reason, the Act broadly defines wages as “all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount.” S.C. Code § 41-10-10(2).

That broad statutory definition covers the type of pay at issue here, as this Court has held before. In *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 271, 715 S.E.2d 362, 364 (Ct. App. 2011), an employer agreed to pay a physician “a bonus of sixty percent of collections to apply to all electrodiagnostic procedures or techniques performed, as well as other diagnostic procedures developed or used by [physician], less his regular salary.” *Id.* That bonus pay was considered wages under the Wages Act. That method of pay is similar to the productivity and bonus pay in this case. Dr. Jernigan here is entitled to a fixed sum of money for every WRVU he performs, less his base pay, and he is also entitled to a bonus based on

if they are not resolved in some other way.” (*Id.* (emphasis added)). The truth is that Dr. Jernigan’s counsel immediately raised the breach of contract issue.

the WRVUs his practice generates. There is thus no question that his productivity pay and bonus pay qualify as “wages,” and that any amount of pay St. Francis has withheld must be paid to Dr. Jernigan. *See id.*

St. Francis’s two arguments to the contrary are hyper-technical, and bend the language of the Wage Act to a logical breaking point. The first appears to be simply an extension of St. Francis’s primary argument that the Employment Agreement permitted application of payment modifiers and that wages withheld as a result of the modifiers were never amounts “due” Dr. Jernigan and therefore not “wages” pursuant to the Wage Act.¹³ (App. Br. at 20-22) St. Francis then cites a case, *Baugh v. Columbia Heart Clinic*, 402 S.C. 1, 29, 738 S.E.2d 480, 495 (Ct. App. 2013), where this Court determined that a forfeiture provision in an employment contract was enforceable against former employees, thereby invalidating their claims to being owed compensation under the Wage Act.

For all the reasons discussed above, St. Francis is wrong. The Employment Agreement is clear and unambiguous, and it does not permit the application of payment modifiers to the straightforward provisions addressing compensation. *See generally* part I, *supra*. Assuming *arguendo* amounts are “due” Dr. Jernigan, they are wages.

¹³ At times St. Francis appears to argue a different variety of this same point, namely that because the circuit court has not yet fixed the specific amount of damages, there has been no determination about what amounts are “due” for purposes of Wage Act, and to be wages, the amounts must be “due.” *See e.g.*, St. Francis Memo in Support of Motion to Alter or Amend at 9.

St. Francis should also be attentive to what the circuit court actually held, which is that “*any compensation due* Dr. Jernigan under the Agreement qualifies as “wages” for purposes of the South Carolina Payment of Wages Act.” (R. p. 12 (emphasis added)). In other words, the Court’s holding takes as a starting point the assumption that compensation *may* be due, and goes on to declare that *if* such compensation is due, it is “wages” for purposes of the Act. Nothing more. That should not be a controversial contention.

St. Francis’s second argument essentially boils down to this: because we gave Dr. Jernigan plenty of notice we were going to breach his contract, we cannot be held liable for violating the Wage Act. (App. Br. at 22-23) Not so. The Supreme Court made that perfectly clear in *Mathis v. Brown & Brown of South Carolina, Inc.*, 389 S.C. 299, 317, 698 S.E.2d 773, 782-83 (2010) holding that an employer “cannot comply with the Payment of Wages Act, while breaching the contract, simply by providing seven days’ notice of the breach.” The Court also made the point that the notice provision in the Act applies to notice of salary “deductions,” which in the statute are understood as “taking away from a salary in order to fund some benefit,” and not to salary “reductions,” which is plainly what resulted to Dr. Jernigan from St. Francis’s actions. *See id.* at 317, 698 S.E.2d at 782.

The sole case cited by St. Francis, *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 637, 620 S.E.2d 65, 69 (2005), is inapposite. The employees in that case were teachers who had year-to-year contracts, with each new yearlong contract subject to a change in terms as determined by the district board. The district had made an

oral representation it would provide an incentive at a particular level and announced it would be lowering that incentive in a new contract year. 365 S.C. at 634, 620 S.E.2d at 67. The Supreme Court rejected the teacher’s Wage Act claim under those narrow circumstances, noting the required notice had been provided, and more importantly rejected the underlying breach of contract claim, noting the terms of the contract were subject to change and that the alleged agreement was not in writing and therefore was void under the Statute of Frauds as well. *Id.*, 620 S.E. 2d at 67. In other words, the circumstances before the court in *Davis* were nothing like those alleged here.

The Court should affirm the circuit court’s ruling that any compensation that may be due Dr. Jernigan’s is “wages” for purposes of the Wage Act.

IV. No Additional Discovery Is Needed to Interpret the Employment Agreement.

No additional discovery was necessary for the narrow issues of contractual interpretation on which the circuit court ruled. That is because any such discovery would be only parol evidence, and inadmissible. For the reasons discussed above, the Employment Agreement is a complete statement of the parties’ agreement, and unambiguous. Discovery will not aid the Court in interpreting the compensation provisions at issue here. *See Columbia East Assocs.*, 299 S.C. at 520, 386 S.E.2d at 26 (“If a writing, on its face, appears to express the whole agreement between the parties, parol evidence cannot be admitted to add another term thereto.”).¹⁴

¹⁴ Notably too, it is St. Francis’s burden to “demonstrate a likelihood that further discovery will uncover additional evidence relevant to the issue” at hand, *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994), and for the related reasons discussed in this section, that burden has not been met.

Aside from its meritless argument that the Agreement is ambiguous, St. Francis otherwise argues that discovery is needed on (i) whether and when Dr. Jernigan objected to the application of payment modifiers to reduce his pay; and (ii) whether St. Francis provided seven days' notice under the Wage Act. (App. Br. at 26) For the reasons already discussed in parts II and III, *supra*, whether and when Dr. Jernigan objected to his pay reductions has nothing to do with how to interpret the Agreement, and whether St. Francis provided notice pursuant to the Wage Act is wholly irrelevant as well.

Discovery would not have aided the court's inquiry into the intention of the parties for Dr. Jernigan's compensation; that intention was made abundantly clear by language within the Agreement and formulas. That intent was further confirmed over ten years of undisputed application by the parties. Where, as here, "the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself," then "summary judgment is proper." *First-Citizens Bank & Tr. Co.*, 282 S.C. at 305, 317 S.E.2d at 777.

CONCLUSION

The Employment Agreement is clear and does not permit the application of the "payment modifiers" that St. Francis introduced for the first time ten years into the Agreement's performance. This Court should affirm the judgment of the circuit court.

Respectfully submitted,

/s/ Henry L. Parr, Jr.

Henry L. Parr, Jr., SC Bar No. 4340

hparr@wyche.com

Wade S. Kolb, III, SC Bar No. 100379

wkolb@wyche.com

James E. Cox, Jr., SC Bar No. 103886

jcox@wyche.com

WYCHE, PA

200 East Camperdown Way

Greenville, SC 29602-0728

Phone: (864) 242-8200

Fax: (864) 235-8900

Date: June 29, 2020
Greenville, South Carolina

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jun 29 2020

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

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.

CERTIFICATE OF COUNSEL

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

/s/ James E. Cox, Jr.

James E. Cox, Jr., SC Bar No. 103886

jcox@wyche.com

WYCHE, PA

200 East Camperdown Way

Greenville, SC 29602-0728

Telephone: (864) 242-8200

Facsimile: (864) 235-8900

Attorneys for Respondent