

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002265-MR

DR. C. BRENT HAEBERLE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 03-CI-005394

DRS. MCCALL, CURRENS, TOPOR & THOMPSON, P.S.C.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; HENRY,¹ SENIOR JUDGE.

MOORE, JUDGE: Appellant Dr. C. Brent Haerberle appeals the Jefferson Circuit Court's judgment directing a verdict in favor of his former employer Appellee McCall, Currens, Topor and Thompson, P.S.C. ("the P.S.C.") on his counter claim he also appeals a jury verdict in favor of the P.S.C. on its claim to recover overpayments made to Dr. Haerberle. Upon review, we affirm.

¹ Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

I. FACTUAL BACKGROUND

Dr. Haeberle, a dentist specializing in prosthodontics, entered into a written employment contract with the P.S.C., which was engaged in the practice of dentistry. Dr. Haeberle worked for the P.S.C. between April 2000 and May 2003.

The P.S.C. had a compensation method whereby each dentist, employed by the P.S.C., received 40% of the income he generated and the remaining 60% went to the P.S.C. Laboratory bills were the responsibility of the individual dentist and were not part of the P.S.C.'s 60% split. This method of compensation was orally explained to Dr. Haeberle when he was hired; and he began to see patients on April 10, 2000. Later, this agreement was memorialized in a three-year written employment agreement which was executed between the parties on May 12, 2000.

In relevant part, the agreement provides as follows:

Base Compensation. The PSC shall pay the Employee as compensation for the services provided under this Agreement the base compensation set forth on Schedule A to this Agreement (the "Base Amount"). The Employee and the PSC may adjust the Employee's Base Amount by mutual agreement by amending Schedule A.

Early Termination With Notice. Subject to earlier termination upon mutual agreement by the parties in their sole discretion, Employee may terminate his employment relationship with the PSC for any reason upon 120 days prior written notice to the PSC.

Effect of Termination. The PSC's obligations to pay any compensation to the Employee or to his estate or heirs shall cease upon any termination of the Employee's employment relationship with the PSC.

Schedule A To Employment Agreement

The Employee's compensation shall be the amount equal to 40% of all fees paid to the PSC by patients, or by

third party payors on behalf of such patients, for dental services performed by the Employee. The Employee shall also receive an amount equal to 40% of all fees paid to the PSC by patients, or by third party payors on behalf of such patients, for dental services performed by hygienists and other personnel of the PSC other than licensed dentists with respect to all patients the source of which is directly traceable to the efforts of the Employee. The PSC's Board of Directors shall make all determinations with respect to the source of any patient which is in dispute among the dentists employed by the PSC.

Despite the fact that the employment agreement is silent on the payment of laboratory fees, Dr. Haeberle paid his own fees for the year 2000 out of his 40% compensation -- consistent with the parties' oral agreement.

Beginning in 2001, the P.S.C. made an accounting change and generated a formula for Dr. Haeberle's salary based on his projected earnings. At this time, the P.S.C. began paying the laboratory fees rather than the dentists.

Under this method, an additional ten percent was subtracted from Dr. Haeberle's gross receipts to pay for his laboratory fees. The reason for this change was to allow the P.S.C. to begin paying for the laboratory fees as ordinary and necessary business expenses which could be deducted for the purposes of the P.S.C.'s tax liability.

As a matter of practice of the industry, there is generally a delay between the performance of dental work and the receipt of payment, especially when insurance is involved. Consequently, it became necessary to arrive at a rough estimate of the laboratory bills to maintain a regular semi-monthly flow of income to each dentist. This agreement was explained by Dr. Douglas H. McCall² at trial as follows:

² Dr. McCall is an owner of the P.S.C.

We took several months out of the year 2000, we multiplied it by four, and that would figure into what we were anticipating the gross receipts would be, and then from the gross receipts we took 40 percent, we took out 10 percent to try to keep from getting, doing overpayments with the laboratory bills, and then wrote him a check for the rest.

Using this formula, the P.S.C. arrived at a semi-monthly income for Dr. Haeberle of \$4,701.50, which it maintains was exclusive of the laboratory bills. Because the laboratory bills were estimated at ten percent, this percentage was subtracted from Dr. Haeberle's semi-monthly income, thereby fixing his salary draw at \$4,231.35 starting in January of 2001.

Not long after the new compensations arrangement started, the P.S.C. complained to Dr. Haeberle that he was being overpaid under the new salary calculation method. According to the P.S.C. during the first quarter of 2001, Dr. Haeberle had received an overpayment of \$7,475.95. Apparently, Dr. Haeberle generated higher laboratory fees and did not bring in enough business to cover his semi-monthly draw of \$4,231.35.

According to the P.S.C.'s calculations for the year of 2001, Dr. Haeberle was overpaid by \$41,284.11. Dr. Haeberle assumed the P.S.C. was paying his laboratory fees.

By mid-2002, the P.S.C.'s accounting showed that Dr. Haeberle had been overpaid by \$50,639.58. The P.S.C. maintains that at that time, Dr. McCall told Dr. Haeberle that the P.S.C. was going to stop paying his laboratory bills and that the bills

would henceforth be Dr. Haeberle's own responsibility. Dr. Haeberle contends, to the contrary, that the issue of payment of laboratory bills did not come up until the end of his tenure. However, Dr. Haeberle did pay all of his laboratory bills directly to the laboratories from this point forward.

Dr. Haeberle's employment contract ended on May 12, 2003, but was renewed. However, Dr. Haeberle resigned shortly thereafter.

Dr. McCall, on behalf of the P.S.C., approached Dr. Haeberle about the overpayments, which by this time were \$59,948.50, according to the P.S.C.'s calculations. This overpayment includes \$46,042.97 for laboratory fees and \$13,905.53 for overpayment of compensation which exceeded Dr. Haeberle's entitlement irrespective of laboratory fees.

Due to the delay in receiving payment for services rendered, which is typical in the professional services industry, Dr. Haeberle maintains that he had performed work on patients for whom the P.S.C. had not yet paid him for his services. By his calculations, Dr. Haeberle estimates that approximately \$20,000 was received by the P.S.C. for work performed by Dr. Haeberle prior to his leaving. Dr. Haeberle maintains in his counter claim that he is entitled to receive this payment for services rendered pursuant to the employment agreement, which provides in relevant part:

Sole Source of Payment: The payment of the Employee's compensation is the obligation of the PSC, and the Employee agrees that in no event, including but not limited to any non-payment by the PSC or the insolvency of the PSC, shall the Employee bill, charge, collect, seek compensation or remuneration from, or have any recourse against any patient,

insurance company, managed care plan, or other payor or any sort, public or private. This provision shall survive any termination or expiration of this agreement and is intended to benefit such patients and payors. (Employment Agreement, Exhibit B, pg. 4, Clause 3(1)).

The P.S.C. refused to pay any of these fees to Dr. Haeberle relying on Provision 6(c) of the agreement which states that “[t]he P.S.C.'s obligations to pay any compensation to the Employee or to his estate or heirs shall cease upon any termination of the Employee's employment relationship with the P.S.C.”

The P.S.C. brought suit in Jefferson Circuit Court to recover the overpayments it alleges that Dr. Haeberle owed it. Dr. Haeberle filed a counter claim for \$20,728.22, which represented the fees he claimed the P.S.C. owed him for work he performed before his resignation, but for which payment was not received until after his departure.

The case was tried before a jury, and the jury rendered a verdict in favor of the P.S.C. Specifically, the jury determined that Dr. Haeberle owed the P.S.C. \$46,042.97 in unpaid laboratory fees, as well as \$13,905.53, which was the amount of salary that Dr. Haeberle was overpaid by the P.S.C. Thus, the jury found that Dr. Haeberle owed a total of \$59,948.50 to the P.S.C. Additionally, the trial court entered a directed verdict against Dr. Haeberle on his counter claim concerning the amount that he claimed he was owed by the P.S.C. for the work he performed, but for which payment had not been received, prior to his resignation.

Dr. Haeberle now appeals, raising the following claims: (1) The trial court erred when it allowed the P.S.C. to present evidence of records, including laboratory fees, that the P.S.C. claimed it had paid on Dr. Haeberle's behalf; and (2) the trial court erred when it sustained the P.S.C.'s motion for a directed verdict on the amount of \$20,728.22, for work performed by Dr. Haeberle.

1. CLAIM CONCERNING THE ADMISSION OF RECORD EVIDENCE AT TRIAL

A. STANDARD OF REVIEW

Dr. Haeberle first claims that the trial court erred when it allowed the P.S.C. to present evidence of records, including laboratory fees, that the P.S.C. claimed it had paid on his behalf. We review a trial court's evidentiary rulings for an abuse of discretion. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). “[T]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004).

B. ANALYSIS OF CLAIM

1. Business record exception

During trial, the P.S.C. sought to introduce evidence of the quarterly reports indicating the total amount of Dr. Haeberle's billings, the amount of salary that he should have received based on those billings, the amount of salary that he actually received, the amount of laboratory bills that the P.S.C. paid on his behalf, and the total amount that Dr. Haeberle was overpaid for the quarter. Dr. Haeberle's counsel objected at trial to the

introduction of the quarterly reports, arguing that they were inadmissible hearsay evidence, pursuant to KRE 802,³ because they were summaries that had been prepared by a former employee of the P.S.C. who did not testify at trial. The P.S.C.'s counsel asserted that the quarterly reports fell within the business records exception to the hearsay rule, KRE 803(6).⁴ The trial court overruled the objection of Dr. Haeberle's counsel. Dr. Haeberle now appeals the trial court's decision overruling the objection.

"Business records . . . must be authenticated by a live foundation witness or meet one of the foundation exceptions listed in KRE 803(6), namely . . . KRE 902(11)." *Matthews v. Commonwealth*, 163 S.W.3d 11, 27 (Ky. 2005).

KRE 902(11)(A) states that business records fall under the self-authentication exception so long as there is no indication of a lack of trustworthiness in the sources of the information and the custodian of the record certifies that the record:

(i) Was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

³ KRE 802 provides: "Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky."

⁴ KRE 803 provides:

The following are not excluded by the hearsay rules, even though the declarant is available as a witness: . . . (6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. . . .

- (ii) Is kept in the course of the regularly conducted activity; and
- (iii) Was made by the regularly conducted activity as a regular practice.

Id. (discussing KRE 902(11)(A)).

During trial, Dr. McCall, who is one of the owners of the P.S.C., laid a foundation for the admission of the quarterly reports. Dr. McCall testified that the quarterly report was prepared by the P.S.C.'s bookkeeper. The bookkeeper prepared this report for every dentist working at the P.S.C. The computer software that was used to produce the report was called "Peachtree," and Dr. McCall understood how Peachtree operated because he was trained on how to use the software at the same time that the bookkeeper received Peachtree training.

Dr. McCall testified that he knew the sources for the numbers that were reflected in the quarterly reports. Specifically, he attested that a transmittal form was provided to each dentist with each patient's chart. The dentist would mark on each form the code reflecting the types of evaluations and procedures that were performed on the patient. The code was then provided to the P.S.C.'s accounts manager, and she entered it into her journal which generated a day sheet. The accounts manager provided the information to the bookkeeper every day that the bookkeeper was at work, i.e., two days per week. At the end of the month, a monthly summary was produced by the accounts manager and given to the bookkeeper. The bookkeeper entered the information from the monthly summary into the Peachtree computer program and generated the quarterly reports from that information. *Id.* at p. 170. Dr. McCall attested that he discussed the

first quarterly report with Dr. Haeberle and explained to him how his salary would be calculated as reflected in the report and that ten percent would be withheld as an estimate of the amount of laboratory fees that the P.S.C. would pay for Dr. Haeberle. After the report was explained to him, Dr. Haeberle did not have any questions or complaints concerning it.

Dr. McCall testified that the quarterly reports were a regular part of the P.S.C.'s business activity. He further attested that the bookkeeper prepared the initial quarterly report within a few days of the end of the quarter.⁵ In addition to the amount of billings that a particular dentist had during the month, the amount of the dentist's laboratory bills was reflected on the quarterly report.

Dr. Haeberle contends that the quarterly reports should not have been admitted as evidence under the business records exception because Dr. McCall was not the person who created the reports and he was not the custodian of the reports. Therefore, Dr. Haeberle argues that Dr. McCall was not the proper person to lay the foundation for those reports to be admitted.

However, Dr. Haeberle's argument is misplaced. Kentucky Rule of Evidence 803(6) provides that a report may be admitted into evidence under the business records exception to the hearsay rule if "the custodian or other qualified witness" testifies that the report was produced in the regular course of business. "A qualified witness is one who has sufficient personal knowledge to explain how the offered record was made

⁵ The parties did not submit any evidence concerning when the remainder of Dr. Haeberle's quarterly reports were prepared.

and kept, and who can testify that the record comports with the business record exemption to the hearsay rule." Robert G. Lawson, *The Kentucky Evidence Law Handbook* 682 (4th ed., Matthew Bender & Co. 2003) (internal quotation marks and citations omitted).

Dr. McCall satisfied this "qualified witness" standard, as he clearly had an in-depth understanding of how the quarterly reports were created and kept, as discussed *supra*. Dr. McCall testified that the information in the quarterly reports was based on the information from the transmittal sheets that were completed by the dentists. He also testified concerning the process by which the quarterly reports were created. Dr. McCall attested that the quarterly reports were generated near the time of the matters set forth in the reports and by the bookkeeper who had knowledge of the matters contained therein; that the reports were kept in the course of the regularly conducted business; and that they were generated as a regular practice. *See* KRE 902(11)(A). Thus, Dr. McCall was a "qualified witness."

Furthermore, there was no lack of trustworthiness regarding the sources of the information contained in the reports. Dr. McCall testified that each dentist was responsible for reviewing his or her quarterly reports and for notifying the bookkeeper of any errors therein. There was one error in one of Dr. Haeberle's reports that he had brought to the attention of the P.S.C., and that error was corrected by the following day. Because that error was corrected, Dr. Haeberle never reported other errors, and he did not present evidence at trial showing that there were other errors to his knowledge; there was

no indication that the quarterly reports possessed a "lack of trustworthiness in the sources of the information." KRE 902(11)(A). Therefore, the trial court did not abuse its discretion when it admitted the quarterly reports as evidence under the business records exception to the hearsay rule. *See generally Goodyear Tire & Rubber Co.*, 11 S.W.3d at 577.

2. Best evidence rule

Dr. Haeberle also asserts that, pursuant to the best evidence rule, the P.S.C. should have been required to produce the individual laboratory bills, rather than the summaries reflecting the total amount of laboratory bills received during a particular time period. The "best evidence rule" provides that if a party intends to "prove the contents of a writing, [the party] must produce the writing itself." *Hall v. Commonwealth*, 817 S.W.2d 228, 230 (Ky. 1991) (internal quotation marks and citation omitted), *overruled on other grounds by Commonwealth v. Ramsey*, 920 S.W.2d 526 (Ky. 1996). Under this rule, because the P.S.C. sought to prove the contents of the laboratory summaries, the P.S.C. was required to produce the summaries themselves, and it did so, as part of the quarterly reports.

Further, KRE 1006 provides as follows:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. A party intending to use such a summary must give timely written notice of his intention to use the summary, proof of which shall be filed with the court. The originals, or duplicates, shall be made available for examination or

copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

On appeal, Dr. Haeberle does not allege that the P.S.C. violated KRE 1006 by failing to give timely notice of its intent to use the summary, or by failing to make the originals or duplicates available for examination or copying at a reasonable time and place. Rather, Dr. Haeberle merely asserts that the P.S.C. failed to show that the laboratory bills were "voluminous" to the extent that they were "too burdensome to produce." It is important to note that Dr. Haeberle admitted in his appellate brief that the laboratory bills were "numerous" because they reflected approximately four years of his practice at the P.S.C., but he argues that the number of laboratory bills was not "so voluminous that they would be too burdensome to produce." However, Dr. Haeberle misinterprets KRE 1006, which provides that summaries may be admitted of voluminous records that "cannot conveniently be examined in court," as opposed to records that are "too burdensome to produce," as argued by Dr. Haeberle. Dr. Haeberle has not alleged, much less shown, that the admittedly numerous laboratory bills could "conveniently be examined in court." KRE 1006.

Furthermore, although Dr. Haeberle asserts that the P.S.C. failed to lay a foundation for the admission of the bill summaries, the summaries were included as part of the quarterly reports, and the P.S.C. properly laid the foundation for the admission of the quarterly reports, as discussed *supra*. Therefore, the P.S.C. also properly laid the foundation for the admission of the bill summaries contained in the quarterly reports. Consequently, Dr. Haeberle has failed to show that the trial court abused its discretion

when it permitted the P.S.C. to introduce the summaries of his laboratory bills. *See generally Goodyear Tire & Rubber Co.*, 11 S.W.3d at 577.

3. Unjust enrichment

Dr. Haeberle also alleges that the trial court erred when it denied his request to introduce evidence concerning the P.S.C.'s decision to begin paying the laboratory fees in order to receive a tax benefit, and then to seek reimbursement of those laboratory fees from the dentists. Dr. Haeberle argues that this practice by the P.S.C. amounted to unjust enrichment. "[F]or [his] unjust enrichment claim to be viable, [Dr. Haeberle] must show the following elements: (1) a benefit conferred upon the [P.S.C.] at [Dr. Haeberle's] expense, (2) a resulting appreciation of the benefit by the [P.S.C.], and (3) an inequitable retention of the benefit without payment for its value." *Tractor and Farm Supply, Inc. v. Ford New Holland, Inc.*, 898 F.Supp. 1198, 1206 (W.D. Ky. 1995). The doctrine of unjust enrichment "is applicable as a basis of restitution to prevent one person from keeping money or benefits belonging to another." *Haeberle v. St. Paul Fire and Marine Ins. Co.*, 769 S.W.2d 64, 67 (Ky. App. 1989).

Dr. Haeberle has failed to show that the P.S.C.'s actions in paying his laboratory bills, taking a tax deduction for the laboratory bills, then seeking repayment of those bills from him, constituted unjust enrichment. Specifically, Dr. Haeberle has not demonstrated that the P.S.C.'s actions amounted to a benefit received by the P.S.C. at Dr. Haeberle's expense, as Dr. Haeberle failed to repay the P.S.C. for approximately \$46,000.00 of his laboratory bills.

Nevertheless, the trial court denied as irrelevant Dr. Haeberle's request to introduce evidence concerning the tax deduction. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Because evidence concerning the P.S.C.'s laboratory bill tax deduction did not have any consequence to the determination of whether Dr. Haeberle owed money to the P.S.C., the evidence was irrelevant. Thus, the trial court did not abuse its discretion when it denied Dr. Haeberle's request to admit evidence of the tax deduction. *See generally Goodyear Tire & Rubber Co.*, 11 S.W.3d at 577.

III. CLAIM CONCERNING THE DIRECTED VERDICT

A. STANDARD OF REVIEW

Dr. Haeberle next claims that the trial court erred when it sustained the P.S.C.'s motion for a directed verdict on the amount of \$20,728.22, for work performed by Dr. Haeberle. When we review a trial court's ruling on a motion for a directed verdict, we must "ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party." *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). "Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Id.* "Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Id.* at 18-19.

B. ANALYSIS OF CLAIM

Dr. Haeberle argues that the P.S.C. violated Kentucky's Wage and Hour Laws when it failed to pay him for the billings that he brought in, but which were not paid by patients or their insurance companies until after he resigned from the P.S.C. Dr. Haeberle cites KRS 337.055 in support of this argument. That statute states:

Any employee who leaves or is discharged from his employment shall be paid in full all wages or salary earned by him; not later than the next normal pay period following the date of dismissal or voluntary leaving or fourteen (14) days following such date of dismissal or voluntary leaving whichever last occurs. Any employee who is absent at the time fixed for payment by an employer, or who, for any other reason, is not paid at that time, shall be paid thereafter at any time or upon fourteen (14) days' demand. No employer shall, by any means, secure exemption from this section.

However, Dr. Haeberle's argument is misplaced. Kentucky Revised Statutes 377.385 provides that an employee who is paid less than he is due under KRS 377.055, *supra*, may sue his employer for the amount due. Furthermore, KRS 377.010 provides that, for purposes of bringing a claim against one's employer for unpaid wages under KRS 377.385, an "[e]mployee" is any person employed by or suffered or permitted to work for an employer, but shall not include: Any individual employed in a . . . professional capacity. . . ." As a dentist, Dr. Haeberle was employed by the P.S.C. in a "professional capacity" and therefore, he was not permitted to bring his counter claim against the P.S.C. for unpaid wages pursuant to KRS 337.055 or 377.385.

Moreover, Section 6(c) of Dr. Haeberle's employment contract provided that "[t]he PSC's obligations to pay any compensation to the Employee or to his estate or

heirs shall cease upon any termination of the Employee's employment relationship with the PSC." Where a contract provision is unambiguous, we construe the provision "according to the strict, plain, common meaning of the words themselves." *Bennett v. Consolidated Realty Co.*, 226 Ky. 747, 11 S.W.2d 910, 911 (Ky. App. 1928). However, as noted by Dr. Haeberle in his appellate brief, ambiguities in a written employment contract are "construed more strongly against the party who wrote it." *Simon v. Neptune Mfg. Co.*, 285 Ky. 340, 147 S.W.2d 1024, 1027 (Ky. App. 1941).

Nevertheless, section 6(c) of Dr. Haeberle's employment contract is unambiguous, as it plainly states that once Dr. Haeberle's employment with the P.S.C. ended, the P.S.C. was no longer obligated to pay any compensation to Dr. Haeberle. *See generally Bennett*, 226 Ky. 747, 11 S.W.2d at 911. Thus, we construe the provision according to the plain meaning of the words therein and conclude that the trial court's decision granting a directed verdict regarding Dr. Haeberle's counter claim was not clearly erroneous. *See Bierman*, 967 S.W.2d at 18.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

HENRY, SENIOR JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

COMBS, CHIEF JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I dissent solely as to the disposition of the amount of \$20,728.22 for work performed by Dr. Haeberle prior to his departure from the PSC. It is undisputed that Dr. Haeberle performed services for which this compensation was paid after his departure.

Nonetheless, that amount inexplicably was never applied as a set-off to reduce the amount of \$59,948.50 awarded by the jury to the PSC. There is no ambiguity in the employment agreement as to the effect of termination. It clearly provides that the obligation of the PSC to pay “compensation ... shall cease upon termination of the employee's employment....” However, allowing a proper set-off for monies clearly earned by Dr. Haeberle does not equate with compensation. But failure to do so assuredly results in unjust enrichment to the PSC.

I am persuaded that the court clearly erred in granting a directed verdict to the PSC for the \$20,728.22. On the contrary, the proper outcome would have been entry of a directed verdict setting off this amount against the total sum claimed. Failure to properly account for this sum of money has undoubtedly resulted in unjust enrichment to the PSC. Consequently, I would vacate and remand on this issue.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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