ANDREW KUCHARCHUK, M.D.	*	**NO. 2001-CA-0170**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
THE LOUISIANA CLINIC, INC. AND STUART I. PHILLIPS, M.D.	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-11411, DIVISION "A"
HONORABLE CAROLYN GILL-JEFFERSON, JUDGE
* * * * * *

JAMES F. MCKAY, III
JUDGE
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay, III, Judge David S. Gorbaty)

ARMSTRONG, J., DISSENTS WITH REASONS

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AFFIRMED IN PART AND REMANDED IN PART

The defendants, The Louisiana Clinic and Stuart I. Phillips, M.D., appeal the trial court's denial of their dilatory exceptions of prematurity and lack of subject matter jurisdiction and their motion to stay based on an arbitration clause in the employment agreement between appellants and Dr. Andrew Kucharchuk.

FACTS AND PROCEDURE

On October 1, 1998, the parties, Dr. Andrew Kucharchuk, The Louisiana Clinic (Clinic), through Dr. Stewart I. Phillips, signed an employment agreement, with the effective dates from December 1, 1998 until November 30, 1999. The employment agreement stipulated Dr. Kucharchuk's base salary as $275,000 per year. The employment agreement provided that if the parties did not extend the agreement in writing at the end of the term, the agreement would continue on a month by month basis with

all terms and conditions remaining the same. Also included in the agreement were an arbitration clause and a bonus/forfeiture clause, both of which are pertinent to this appeal.

On November 30,1999, the parties failed to agree in writing to extend the employment agreement, thereby assigning the terms of the employment agreement to a month by month agreement. On January 3, 2000, the appellants sent a letter to Dr. Kucharchuk informing him that he owed a forfeiture of $137,500 for the year ending December 31, 1999 and requested payment. On January 12, 2000, the appellants sent a letter to Dr. Kucharchuk notifying him that his salary was being reduced by one-half, based on the amount they computed he owed in forfeitures. On January 15, 2000, the appellants withheld one-half of Dr. Kucharchuk's salary. In February and March of 2000, the appellants withheld Dr. Kucharchuk's whole salary. On March 20, 2000, the appellants sent a letter to Dr. Kucharchuk informing him of his employment termination and locked him out of his office. On May 22, 2000, Dr. Kucharchuk sent a letter to appellants requesting payment of the withheld wages. The appellants refused to pay. Subsequently, on July 24, 2000, Dr. Kucharchuk filed a rule

to show cause concerning his wage claim against defendants. On September 22, 2000, after a trial on the merits, the trial court rendered a judgment in favor of Dr. Kucharchuk. The defendants were ordered to reimburse the entire amount of Dr. Kucharchuk's withheld wages. The trial court held the matter open for the submission of evidence by Dr. Kucharchuk's counsel regarding attorney fees. On October 9, 2000, the trial court awarded Dr. Kucharchuk $48,681.56 in wages, $66,749.74 in penalties and $17,314.00 in attorney's fees. Pursuant to this judgment, Dr, Kucharchuk filed a motion for a new trial, which was granted. On November 3, 2000, the trial court increased the amount of penalties to $93,793.10. A final judgment was signed on November 9, 2000.

The appellants' suspensive appeal raises several errors in the trial court's judgment. Appellants argue that the trial court erred in denying their exceptions of prematurity and lack of subject matter jurisdiction based upon their motion to compel arbitration pursuant to an arbitration clause in the employment agreement. They also argue that the trial court erred in finding that the bonus/forfeiture clause in the employment agreement between the appellants and Dr. Kucharchuk were contrary to public morals or *contra*

bonos mores and by awarding him wages in the sum of $48,681.56; they dispute this calculation. They further argue that the trial court erred in awarding Dr. Kucharchuk penalties in the sum of $97, 793.10; they also dispute this amount that the trial court has concluded was appropriate. Finally, appellants argue that the trial court erred in awarding $17,314.00, in attorney's fees to Dr. Kucharchuk.

ARBITRATION

The determination as to whether to stay or compel arbitration is a question of law. Hennecke v. Canepa, 96-0772 (La.App. 4 Cir. 5/21/97), 700 So.2d 521. The standard of appellate review of questions of law is to determine whether the trial court was legally correct or legally incorrect. Cangelosi v. Allstate Insurance Co., 96-0159 (La.App. 1 Cir. 9/27/96), 680 So.2d 1358. If the trial court's decision was based on its erroneous interpretation or application of law, rather than a valid exercise of discretion, such incorrect decision is not entitled to deference by the reviewing court. Conagra Poultry Co. v. Collingsworth, 30,155, p. 2 (La.App. 2 Cir. 1/21/98), 705 So.2d 1280, 1281-1282.

Our courts have determined that, in spite of La.R.S. 9:4201's provision that an arbitration clause is irrevocable, a party's conduct can effect a waiver

of its right to demand arbitration. Thomas v. Desire Community Hous. Corp., 98-2097 La.App. 4 Cir. 8/10/00) 773 So.2d 755; Albert K. Newlin, Inc. v. Morris, 99-1093 (La.App. 3 Cir. 1/5/00); 758 So.2d 222; I.D.C., Inc. v. McCain-Winkler Partnership, 396 So.2d 590 (La.App. 3 Cir.1981); Sim v. Beauregard Elec. Coop., Inc., 322 So.2d 410 (La.App. 3 Cir.1975). However, "[w]aiver of arbitration is not a favored finding and there is a presumption against it." Rauscher Pierce Refsnes, Inc. v. Flatt, 93-1672, p. 5 (La.App. 4 Cir. 2/11/94) 632 So.2d 807, 810. The burden of proof to establish waiver of arbitration is heavy, and the party seeking to establish waiver must show that it has been prejudiced by the actions of the party requesting arbitration. Id.

The appellants argue that the trial court erred in denying their exceptions of prematurity and lack of subject matter jurisdiction and by failing to compel arbitration. They assert that a valid arbitration agreement was included §12.13 a. of the employment agreement signed by the parties and that the affirmative defense of arbitration precluded a finding that arbitration had been waived.

The appellee argues that although §12.13 a. of the employment contract established a set of rules for the operation of the arbitration process, but that the appellants failed to comply with those rules thereby waiving

their right to invoke said rules. Appellee asserts that the appellants acted in bad faith and willful misconduct when it withheld Dr. Kucharchuk's wages, and such an action was not consistent with the steps the employment agreement provided to invoke arbitration. We agree.

The text of §13.13 a. is as follows:

> **Agreement of Parties:** The parties agree that for any dispute between the parties, whether past, present or future in nature and of any kind, they will meet to resolve such disputes by informal discussion in good faith. In the event the parties are unable to resolve the controversy or dispute, the aggrieved party shall submit the matter to be resolved by arbitration.

The provision in the employment agreement that appellant relies on for its authority to withhold Dr. Kucharchuk's wages during the existence of the agreement is §5.1(a)(iv) which is as follows:

> Any forfeiture due by physician to the clinic shall be paid within thirty (30) days after notice from the Clinic. The Clinic may at its sole option, allow Physician to pay the forfeiture amount over a twelve (12) month period, in which case Physician consents to a deduction from his salary in order to amortize payment of the forfeiture over a twelve (12) month period.

Although, we have been unable to find a Louisiana case on this precise issue it is clear that, once suit is filed, the party asserting the arbitration defense should file a motion to stay the court proceedings and to compel arbitration. This is the only way that a party may effectively stop a

suit and institute arbitration proceedings. The court must stay the action once it finds that the dispute is referable to arbitration and no other impediments prevent the application of the arbitration clause. The mandatory character of the rule appears from the statutory wording "shall be stayed" such as that in § 2(e) of the Uniform Arbitration Act. A party must appeal a denial of the motion to stay or a motion to compel arbitration. If the party does not do so, and participates further in the litigation, the party will be deemed to have waived its right to arbitration. John Morrell & Co. v. United Food and Commercial Workers International Union, Local 304A, AFL-CIO and CLC, 37 F.3d 1302 (C.A.8, 1994).

Appellant argues that the trial court erred in denying their exceptions of prematurity and lack of subject matter jurisdiction based on the motion to compel arbitration.

La. R.S. 9:4201 provides as follows:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

LSA-R.S. 9:4202 states:

> If any suit or proceedings be brought upon any issue referable

> to arbitration under an agreement in writing for arbitration, the court in which suit is pending, upon being satisfied that the issue involved in the suit or proceedings is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until an arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with the arbitration.

The failure of a party to arbitrate in accordance with the terms of an agreement may be raised either through a dilatory exception of prematurity demanding dismissal of the suit or by a motion to stay the proceedings pending arbitration. Wied v. TRCM, LLC, 30,106 (La.App.2d Cir.7/24/97), 698 So.2d 685; La. R.S. 9:4202. When the issue is raised by the exception pleading prematurity, the defendant pleading the exception has the burden of showing the existence of a valid contract to arbitrate, by reason of which the judicial action is premature. Cook v. AAA Worldwide Travel Agency, 360 So.2d 839 (La.1978); Yokem v. Sisters of Charity of Incarnate Word, 32-402 (La.App.2d Cir.6/16/99), 742 So.2d 906. The exceptor has the initial burden of showing that an administrative remedy is available, thus making the judicial action premature. Blount v. Smith Barney Shearson, Inc., on limited rehearing, 96-0207 (La.App. 4th Cir.2/12/97), 695 So.2d 1001.

Thus, the threshold inquiry is whether the parties have agreed to arbitrate the dispute in question. Rogers v. Brown, 986 F.Supp. 354

(M.D.La.1997). This determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement. Id. See also, Succession of Taravella, 98-834 (La.App. 5th Cir.4/27/99), 734 So.2d 149. In the instant case, appellants must establish the existence of a valid and enforceable agreement to arbitrate in order for its dilatory exception of prematurity to be sustained.

It would appear from the face of this document that it was incumbent upon the appellants to have the Physician's consent prior to instigating the withholding of his funds. In any event it clearly precludes withholding his entire salary. Not only did they unilaterally and arbitrarily deduct a portion of his salary in January but they withheld his entire salary for February and March of 2000, compounded by locking him out of his office in March. Furthermore, this Court seriously questions appellants' computation of the forfeiture amount. At trial, Mr. Guy Wootman, the CEO for the Clinic, when questioned by the trial court about what formula was used for taking someone's wages, answered, "There is none, there in the contract." This withholding was accomplished without consent or informal discussion and was arbitrarily done which forces the matter into the realm of bad faith.

Furthermore, this same provision required the appellants to give the

appellee notice that forfeiture was owed and grant him a thirty (30) day period for its payment. Apparently, the only notice to appellee was a letter dated January 3, 2000, which was referenced "Salary Re-Adjustment', seemed to modify the salary provision of the employment agreement. The letter had an attached amendment, which Dr. Kucharchuk was to sign. This letter gave Dr. Kucharchuk until February 3, 2000, to make payment. Nevertheless, appellants began withholding the salary in January of 2000, and continued through March 20, 2000, when the appellants terminated Dr. Kucharchuk's employment and locked him out of his office.

Louisiana law clearly favors dispute resolution or arbitration as an alternative to litigation as it is swifter and less costly than judicial relief. We recognize that there is a strong public policy in Louisiana favoring the enforcement of arbitration clauses. Cajun Elec. Power Co-op, Inc. v. Louisiana Power & Light Co., 324 So.2d 475 (La.App. 4 Cir.1975) and Woodson Const. Co., Inc. v. R.L. Abshire Const. Co., Inc., 459 So.2d 566 (La.App. 3 Cir.1984). We also recognize that arbitration is a substitute for litigation and that its purpose is to settle disputes in a fast, inexpensive manner before a tribunal chosen by the parties. Firmin v. Garber, 353 So.2d 975 (La.1977); National Tea Co. v. Richmond, 548 So.2d 930 (La.1989), Tower Hill Trading Co., Ltd. v. Howard, Weil, Labouisse, Friedrichs, Inc.,

96-0463 (La.App. 4 Cir. 1/22/97), 687 So.2d 1096 and Pittman Const. Co., Inc. v. Pittman, 96-1079 (La.App. 4 Cir 3/12/97), 691 So.2d 268.

Although, dispute resolution is favored there are facts and circumstances in each case that may cause arbitration to be waived. In the instant matter, we believe that one who claims entitlement to arbitration cannot make a pro forma request for it, file an exception of prematurity and lack of subject matter jurisdiction after it has without warrant failed to pay plaintiff his due salary. This arbitrary withholding of appellee's salary was in bad faith and caused prejudice to Dr. Kucharchuk by the loss of three months of salary and extensive legal expenses. The trial court had no choice but to enforce Dr. Kucharchuk's legal rights in contract. The appellant also knew of the arbitration clause, in fact they drafted the contract, nevertheless they made moves contra to the arbitration clause by failing to seek arbitration in their disputes with appellee. They failed to seek the very remedy, which they are now seeking to invoke. Hence, the trial court determined that their actions connote a waiver of arbitration. We find no error in this determination.

CONTRA BONOS MORES

The appellants also argue that the trial court erred in finding that the bonus/forfeiture clause in the employment agreement was contrary to public

morals or contra bonos mores. The trial court found that “the defendant’s concept and process is *contra mores bonum* and as such it will not be enforced by this court.” Therefore, in its application of the forfeiture clause, the appellants’ unilateral actions were manifestly unjust and against public policy.

Stipulations voluntarily entered into between the parties may be considered null if contrary to public policy established by laws enacted for the preservation of social order or if contrary to moral conduct (*contra bonos mores*). Civil Code Articles 11, 1968, 2031. See Planiol, Civil Law Treatise, Part I, Nos. 288--295 (La.State Law Institute translation, 1959).

It is not necessary that the entire agreement containing the stipulation against public order or policy be declared null.

As Planiol notes, laws of 'public order' (see Article 11, footnote 5) include laws which, in the interest of the public, prohibit private persons from entering into certain contracts. Planiol, Civil Law Treatise, Vol. I, Section 292 (LSLI translation, 1959):

'The modern law-maker, considering that the two parties to a certain juridical act are not equally able to defend their interests, prohibits them from departing from certain rules which he has laid down for their protection. It is for this reason that almost all provisions relating to contracts

of labor are of public order because the law-maker desires to protect the laborer or the employee against the master.' Id. at p. 201.

The appellants forfeiture claims against the appellee is for a total of $123,674.77. They base this figure upon the assertion that appellee failed to produce sufficient receipts to cover his share of the overhead expenses generated by the orthopedic division at the clinic. Also included in appellants' calculations of these expenses was appellee's liability malpractice insurance. §4.2 of the employment agreement states that this was to be paid by the employer not employee. The expenses also include depreciation expenses for the orthopedic unit, but appellee is not an owner nor employer. Rent was also included but nothing in the record indicates that appellee rented space or equipment from appellants. Medical supplies and salaries for personnel were also included in expenses attributed to appellee. As the trial court found, none of these costs are enumerated in the contract as comprising elements of the forfeiture calculation. Accordingly, we find no error in the trial court's judgment finding that the bonus/forfeiture clause of the employment agreement is *contra bonos mores* or against public morals, as applied.

WAGES AND PENALTY AWARDS

Appellants argue that the trial court erred in awarding Dr. Kucharchuk

$48,681.56 in wages. It is incumbent upon this Court to determine if the trial court was manifestly erroneous or clearly wrong in this factual determination. It is a well-settled principle that an appellate court may not set aside a trial court's finding of fact unless it is clearly wrong. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. Rosell v. ESCO, 549 So.2d 840 (La.1989); Arceneaux v. Domingue, 365 So.2d 1330 (La.1978). Where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly wrong. Rosell, supra at 845; Watson v. State Farm Fire & Casualty Ins. Co., 469 So.2d 967 (La.1985); Arceneaux, supra at 1333. Where the factfinder's conclusions are based on determinations regarding credibility of the witnesses, the manifest error standard demands great deference to the trier of fact, because only the trier of fact can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Rosell, supra at 844. The reviewing court must always keep in mind that if a trier of fact's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even if convinced that if it had been sitting as trier of fact, it

would have weighed the evidence differently. Stobart v. State, Through DOTD, 617 So.2d 880 (La.1993); Housley v. Cerise, 579 So.2d 973 (La.1991); Sistler v. Liberty Mutual Ins. Co., 558 So.2d 1106 (La.1990). For the reviewing court, the issue to be resolved is not whether the trier of fact was wrong but whether the factfinder's conclusions were reasonable. Stobart, supra at 883; Theriot v. Lasseigne, 640 So.2d 1305 (La.1994).

The appellants began withholding Dr. Kucharchuk's salary on January 14, 2000. The trial court found that the Dr. Kucharchuk's gross earnings from January 1, 2000, through March 20, 2000 were $60,464.39 and that the appellants had paid Dr. Kucharchuk $11,782.83. Therefore, the trial court concluded that the appellee was owed $48,681.56.

The Clinic complains that the trial court miscalculated by failing to take into consideration that Dr. Kucharchuk owed them $8,685.00, pursuant to the doctor's failure to dictate patients' reports resulting in a financial loss to the Clinic. They claim that they are entitled to a set off in this amount pursuant to the contract agreement. At trial, the trial court refused to entertain any evidence of this purported setoff, but did allow the information to be proffered. The Clinic once again asserts that Dr. Kucharchuk still owes $97,732.56 in forfeitures. The forfeiture issue has been disposed of above and will not be revisited. Therefore, at issue in this assignment of

error is the trial court correctness in its $48,681.56 calculation.

To address the set off issue, the Clinic may or may not be entitled to a set off for monies owed by the employee. In the instant matter it is clear that the Clinic failed to prove to the court that they sustained any perceivable loss based on Dr. Kucharchuk's purported failure to dictate patient reports. During the course of the trial an exchange ensued between the attorneys and the judge. The pertinent exchanges are as follows:

> BY THE COURT:
> Let's get to the heart of this, it's almost five o'clock and we have been here all day with this. It is my understanding that your claim is a set off, right?
> BY MR. EDELMAN:
> Yes, your honor, that's one of our defenses.
> BY THE COURT:
> What's the other one?
> BY MR. EDELMAN:
> It's set out in our pleadings, your honor, there's several. There's a failure to dictate timely—
> BY THE COURT:
> That's for termination, we're talking about termination, wait. That's where the confusion comes in. I understand that as a reason for termination—
> BY MR. EDELMAN:
> I'm sorry your honor, I misunderstood, let me move on to another area.
> BY THE COURT:
> Let's move on to the area of set off because we are talking about the wage claim here.
> BY MR. EDLEMAN:
> Q. Mr. Wootan, did the Louisiana Clinic lose any money as a result of Dr. Kucharchuk's failure to timely dictate reports?
> A. Yes.
> Q. Would you please direct us to the exhibit that documents that?
> A. Give me a second, please. Turn to tab 8, it's two pages long. Pages that they were seen but the issue never happened—
> BY MR. HARVEY:
> I'm sorry you honor, what is the list, there's no foundation.
> BY THE COURT:

Its says a disability evaluation seen but not dictated by Dr. Kucharchuk.

BY MR. HARVEY:

What's the date of the list?

BY THE COURT:

It says 3/9/00.

BY Mr. EDELMAN:

Q. Is this a true and correct list of patients that Dr. Kucharchuk failed to timely dictate on which resulted in a loss of fees to the Louisiana Clinic?

A. Yes.

BY THE COURT:

Wait as minute, hold it right there, stop. How in the world his failure to dictate something that occurs on 3/9/00 going to account for your calculations for forfeitures that are due on December31, 1999? It's not there.

BY MR. EDELMAN:

It's an additional set off, your honor, and I have—

BY THE COURT:

No, as I understand the list, you say he didn't dictate it in March of 2000, how are you going to claim that there's some set off for the wages that you are claiming a forfeiture for? You said the forfeiture was established as of December 31, 1999 and because he was earning wages from you in January through March 2000 you were taking that money. This is probably what you're telling me you are go[sic] to come get him for 2000.

MR. HARVEY:

Exactly.

BY THE COURT:

But that is not fore the forfeiture here is it?

BY MR. EDELMAN:

I understand your honor, it is not relevant to the forfeitures—

BY THE COURT:

Well, I don't need to hear it then.

BY MR. EDELMAN:

Yes you do.

BY THE COURT:

No, I don't.

BY MR. EDELMAN:

This is a set off, if any money is owed to plaintiff we are entitled to set off any other sums which are entitled to set off any other sums which were owed by the plaintiff. It may not be a justification for the withholding of his salary but it is certainly a proper set off. And I have a right to proof up the amount of the set off. And I have a right to proof up the amount of the setoff owed to Louisiana Clinic.

BY THE COURT:

No, it is not, not when you sit here—you all keep changing on me in the middle of the stream here. You tell me you are claming the setoff

> based on forfeiture as Mr. Wootan says as of December 31, 1999. Now you are telling me he has lost money in 2000 and you are coming to look for him for that period of time later on, isn't that what you are telling me? Now, when I look at these dates how can you tell me that the set off for the forfeiture of 1999 you are going to claim that for stuff that was—
> BY Mr. Edelman:
> I'll more [sic] on, your honor, I'll proffer these documents if you refuse to admit them into evidence.
> BY THE COURT:
> I sure am.
> BY MR. EDLEMAN:
> Okay, it will be proffer 1, the list entitled--

It is clear from this colloquy that the trial court found a lack of foundation for this evidence to be admitted. We agree. Furthermore, the proffered evidence is no more that a list of names, dates and amounts. There is no proof in this documentation that Dr. Kucharchuk saw these patients, nor does the documentation prove that the Clinic lost monies as a result of the doctor's failure timely dictate the patients records. The Clinic has failed to offer any concrete evidence in this proffer that they sustained any loss to even trigger a set off argument or for this Court to reverse the trial court. The trial court's award of

$48, 681.56 can be reasonably supported by the evidence and will not be disturbed on appeal. This assignment is without merit.

PENALTIES AND ATTORNEY FEES

The appellants argue that the trial court erred in awarding Dr. Kucharchuk penalty wages and attorney's fees. They argue that good faith

defenses existed for withholding Dr. Kucharchuk's wages and that appellee failed to prove that they were in bad faith. They further argue that the trial court erred in finding that their assertion that they relied on their contractual rights to a set off was not a proper defense to a claim for penalties pursuant to La. R.S. 23:632. Bad faith is a factual determination and as such will be reviewed by this Court using the manifestly erroneous clearly wrong standard.

The applicable statutes concerning wage disputes are as follows:

Louisiana Revised Statute 23:631 provides in pertinent part:

> A. Upon discharge or resignation of any laborer or other employee of any kind whatever, it shall be the duty of the person employing such laborer or other employee to pay the amount then due under the terms of employment, whether the employment is by the hour, day, week, or month, not later than three days following the date of discharge or resignation. Said payment shall be made at the place and in the manner which has been customary during the employment except that payment may be made via United States mail to the laborer or other employee, ...
> B. In the event of a dispute as to the amount due under this Section, the employer shall pay the undisputed portion of the amount due as provided for in Subsection A of this Section. The employee shall have the right to file an action to enforce such a wage claim and proceed pursuant to Code of Civil Procedure Article 2592.

Louisiana Revised Statute 23:632 provides:

> Any employer who fails or refuses to comply with the provisions of R.S. 23:631 shall be liable to the employee either for ninety days wages at the employee's daily rate of pay, or else for full wages from the time the employee's demand for

> payment is made until the employer shall pay or tender the amount of unpaid wages due to such employee, whichever is the lesser amount of penalty wages. Reasonable attorney fees shall be allowed the laborer or employee by the court which shall be taxed as costs to be paid by the employer, in the event a well-founded suit for any unpaid wages whatsoever be filed by the laborer or employee after three days shall have elapsed from time of making first demand following discharge or resignation.

Appellants argue that if the employer has good faith defenses to the employee's claim for unpaid wages, including the defense of set off, then a court should not impose penalties pursuant to La. R.S. 23:632. Domite v. Imperial Trading Company, 94-16 (La. App 3 Cir. 8/3/94) 641 So. 2d 715, 719. In Domite, the court of appeal reversed the trial court's award of penalties to a former employee on the grounds that the jurisprudence interpreting the current version of 23:632, requires that there be a showing of bad faith on the part of the employer in order for an employee to be awarded penalties. Louisiana courts have furthermore refused to award penalties pursuant to 23:632 when a *bona fide* dispute exist regarding the amount of wages due. Winkle v. Advance Products & System, Inc., 98-694 (La. App. 3 Cir. 10/28/98) 721 So. 2d 983.

Additionally, appellants cite directly to the employment agreement for authority to claim a set off and withhold the physician's compensation. §3.2 states in pertinent part that "The Clinic may withhold the payment of

compensation until the patient's charts, dictations and records are brought up to date." They aver that the physician's alleged failure to dictate patients' record provided them with the good faith necessary to withhold the physician's salary. The papers presented to the court show a list of patients' names purportedly attributable to Dr. Kucharchuk, from the dates 3/9/00 through 3/17/00. This is important because, as previously argued this document failed to have the proper foundation established at trial for its admission as evidence and was therefore proffered. Further, Dr. Kucharchuk was locked out of his office on March 20, 2000, the same day that he received his notice of termination. The employment agreement provided a thirty-day curative period during which the physician would have the opportunity to correct the alleged causes for termination. There was no time to cure the problem, assuming *arguendo* that the record listing the patients and dates attributable to Dr. Kucharchuk is accurate or reliable.

Appellee contends that all of appellants' actions concerning this wage dispute were in bad faith and that their withholding of the physician's salary was illegal and in violation of La. R.S. 23:631 and 23:632. Based on this violation they argue that the trial court was correct in awarding penalties.

Appellee argues that in Brown v. Navarre Chevrolet, Inc., 610 So. 2d 165, 172 (La. App. 3 Cir. 1992), the court awarded penalty wages to the

employee for the employer's deduction of illegal fines from employee's wages. The court held that the employer did not have a bona fide belief that it was entitled to deduct fines as it acted in direct violation of the statute, and employer had no equitable justification for action in direct violation of a statute.

In the instant matter, the trial court awarded Dr. Kucharchuk $93,793.10, in penalties. The appellants argue that they had good faith defenses for withholding Dr. Kucharchuk's wages. The Clinic withheld one half of his salary in January and the total salary in February and March of 2000, which the court calculated to be $48,681.56. The appellants based their good faith argument on the amount of forfeitures allegedly owed to them including in the amount of $123,674.77, and a claim for $8,685.00, in losses which they claim are due to the failure of Dr. Kucharchuk to timely dictate patients records. As discussed above we have found no error in the trial court's judgment finding the application of the forfeiture clause to be *contra bonos mores* and that the claim of $8,685.00, was not supported by the evidence. We also found no error in the trial court's judgment that the appellant had waived their right to arbitration by their actions in pursuing wage withholding action in lieu of immediately seeking arbitration to determine the amount of forfeitures that Dr. Kucharchuk owed, if any. This

unwarranted withholding in of itself can be connotative of bad faith. They had no specific system in place to determine how a forfeiture is determined and their actions were totally unilateral. The appellants assert that the set off of $8,685.00, was in good faith yet all they presented to the trial court was a mere list of names and dated with no supporting proof linking it to Dr. Kucharchuk nor did it provide proof of incurred losses. We find no error in the trial court's awarding of penalties to the appellee.

Appellant next argues that the trial court erred in the method it employed in calculating $93,793.10 in penalties, which it awarded to appellee.

According to §5.1(a) of the employment agreement, appellee's annual salary was for the amount of $275,000 dollars per year. According to §3.3 (a) of the agreement, appellee was to work four and one half (4 1/2) days per week. Therefore, the salary was calculated to be $1,175.21 per day. The trial court took all the evidence and testimony and calculated that pursuant to statute the appellee would be awarded $93, 793.10.

The appellant disputes the base daily salary amount and the fact that the trial court calculated the amount on a three month cycle instead of a ninety day cycle. The trial court heard both sides of the argument and obviously found the appellee's version to be the correct method of

calculation. We find that the trial court's method of computation in light of the evidence and testimony to be reasonable and will not disturb its judgment on appeal.

Appellant finally argues that the trial court erred in its assessment of attorney fees. Referencing our conclusions above, the instant matter boils down to a suit for unpaid wages in the amount of $48,681.56. The trial court issued a judgment for $17,314.00 in attorney's fees. They contend that no evidence regarding the issue of attorney's fees was offered at trial prior to the plaintiff resting its case. The trial court then held the matter open for the filling of documentation to support the claim for attorney's fees. At that time the plaintiff's attorney memorandum asserts that he spent approximately fifty-six hours in the matter. It is unclear to this court if the award of the attorney's fees was taxed as cost of court or as an element of damages. It is further unclear from the record how the amount of the attorney's fees was determined. Therefore, after a careful review of the record it is unclear to this Court how and why attorney's fees were awarded in this case. Accordingly, we remand this issue to the trial court for clarification of its attorney's fees award.

For the foregoing reasons we affirm the matter in part and remand the matter to the trial court for the sole purpose of the clarification of the

attorney’s fee issue.

AFFIRMED IN PART AND REMANDED IN PART