

**ANDREW KUCHARCHUK,
M.D.**

VERSUS

**THE LOUISIANA CLINIC,
INC. AND STUART I.
PHILLIPS, M.D.**

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NO. 2001-CA-0170

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

Armstrong, J., dissents with reasons.

I respectfully dissent. The defendants, The Louisiana Clinic, Inc. (“The Clinic”) did not waive arbitration. The Clinic filed exceptions of prematurity and lack of subject matter jurisdiction, and a motion to stay, all based upon the arbitration clause. The trial court overruled those exceptions and denied that motion. The Clinic applied to this court for supervisory writs. Another panel of this court declined to exercise our discretionary supervisory jurisdiction. Thus, The Clinic did not participate voluntarily in the litigation and, consequently, did not waive arbitration by such participation.

The Clinic did not waive arbitration by withholding the plaintiff’s salary or by the manner of calculating the amount withheld. The plaintiff allegedly owed certain amounts to The Clinic. The Clinic set off those

amounts against the plaintiff's salary. Whether the plaintiff owed those amounts to The Clinic is an issue to be arbitrated. Necessarily, an alleged breach of contract does not waive arbitration because the very purpose of arbitration is the resolution of alleged breaches of contract.

Moreover, The Clinic did not act improperly by including in the amount of the withholding a share of the orthopedic division's medical malpractice insurance, depreciation, rent, medical supplies and staff salaries. The contract calculation provides that the bonus/forfeiture includes allocable overhead. The orthopedic division's insurance, depreciation, rent, medical supplies and staff salaries are all "overhead", a portion of which was to be allocated to the plaintiff per the contract.

For the foregoing reasons, I would vacate the judgment of the trial court and order the parties to proceed by arbitration.