NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 0526

SCOTT MARTIN

VERSUS

IBERIA BONE, JOINT & FOOT CLINIC (A MEDICAL CORPORATION)

Judgment rendered November 9, 2015.

* * * * * *

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C615610
Honorable Bob Downing, Judge Ad Hoc

* * * * * *

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MUSCULOSKELETAL GROUP, LLC

* * * * * *

BEFORE: PETTIGREW, HIGGINBOTHAM, AND CRAIN, JJ.

Higginbotham, J. Concurs in part, dissents in part, and assigns reasons.

PETTIGREW, J.

The defendants, Iberia Bone, Joint & Foot Clinic (A Medical Corporation) (Iberia Clinic) and Greater Baton Rouge Musculoskeletal Group, LLC (GBRMG), appeal a December 1, 2014 judgment, finding that the plaintiff, Scott Martin (Martin), is not entitled to vacation or sick pay and also finding that Martin had been "laid off" (and not fired). The judgment also found that defendants are liable to Martin for "in lieu of notice" pay, that defendants were in bad faith in failing to make "in lieu of notice" payment to Martin, and that therefore, defendants are also liable to Martin for penalty wages, attorney fees, and costs. For the following reasons, we affirm in part, reverse in part, render in part, and remand in part for further proceedings consistent herewith.

FACTUAL AND PROCEDURAL HISTORY

Martin was employed as a physician's assistant to Dr. Theodore Knatt from September 27, 2010[1] to January 15, 2012.[2] During a prehire meeting, Dr. Knatt and Martin orally agreed that Martin's salary would be $75,000.00 annually ($36.06 per hour; $288.48 per day), together with bonus payments made for additional services performed, *i.e.,* surgery assists, on-call duties, and covering Southern Lab football game duties. During that meeting, the two men also discussed other particulars about Martin's employment, including vacation and sick time, which are at issue herein and discussed more fully below.[3]

On Sunday, January 15, 2012, Martin received the following text message from Dr. Knatt:

> Scott,
> I have made the, extremely difficult, decision to no longer have a physician assistant position with my office. Darla will contact you and write your final check next week. I appreciate all of your hard

[1] We note that although Martin alleged in his petition that his employment began on September 27, 2010, other references in the record indicate his first day of employment was October 5, 2010. However, this eight-day discrepancy is not critical to the issues raised herein.

[2] The record reveals (and it is undisputed) that Martin was employed by Dr. Knatt at Iberia Clinic and GBRMG, both of which Dr. Knatt was owner and director at all relevant times. Iberia Clinic was named a defendant in the original petition, and GBRMG was added by first amending and supplemental petition.

[3] Although a piece of paper on which Dr. Knatt scribbled handwritten notes, regarding the terms of employment discussed during the meeting, was entered into evidence, the district court found this document did not constitute a written contract of employment. This finding has not been challenged on appeal and the issue of its propriety is not before us.

> work and would gladly write you a positive letter of recommendation, at anytime (sic). I wish you the best. This was a difficult decision for me and I have made accommodations for you and the physician assistant position, as long as I, possibly, could. Teddy Knatt, MD

On January 16, 2012, Dr. Knatt's office manager issued a final paycheck to Martin, in the amount of $1018.85, marked "Final check/Paid in Full" for all hours worked through the last day of his employment. Martin testified (and the documentary evidence confirms) that immediately upon his request, he was issued one more check dated January 27, 2012, also marked "paid in full," in the amount of $288.46, representing payment for one additional day he had worked prior to being terminated, beyond the last pay period.

On January 19, 2012, Martin filed for unemployment benefits with the Louisiana Workforce Commission, indicating that he had been laid off from his employment due to a reduction in force. According to Martin, he received unemployment benefits for approximately two months until he began a new job in March 2012.

On April 25, 2012, Martin mailed and faxed a handwritten "formal demand" to Dr. Knatt, seeking payment "of all vacation and sick leave compensation due me at the date of termination of employment." On September 21, 2012, after Dr. Knatt failed to respond, Martin filed a petition naming Iberia Clinic as defendant, with rule to show cause "WHY EMPLOYER SHOULD NOT BE ORDERED TO PAY WAGES, PENALTY WAGES AND ATTORNEY'S FEES TO FORMER EMPLOYEE." In that petition, Martin alleged that he earned paid time off at the rate of three (3) days sick pay every six months, and two (2) weeks paid vacation every six (6) months. He further alleged that when his employment was terminated, defendant owed him ten (10) days of vacation time, or $2,884.80, and six (6) days of sick time, or $1,730.88. Additionally, he claimed that defendant's failure to pay him for that accrued paid time off was a violation of La. R.S. 23:631 *et seq.*, thus entitling him to penalty wages for ninety (90) days, or $25,963.20, plus reasonable attorney fees and all costs.

Iberia Clinic answered Martin's petition, denying that any amounts were owed, and also asserted a claim for an award of attorney fees and costs. In an accompanying memorandum, Iberia Clinic specifically asserted that the clinic had a "use it or lose it"

leave policy and there was no "accrual" of either vacation or sick time benefits. Alternatively, Iberia Clinic asserted that Martin did not earn any vacation or sick time benefits for the first six months of his employment and that during the remaining nine and a-half months, he had exhausted all of his vacation and sick time allotments.

On January 31, 2013, Martin filed a first supplemental and amending petition, naming as an additional defendant, GBRMG, as an employer of Martin. Iberia Clinic and GBRMG answered this petition generally denying all allegations, and making the same assertions Iberia Clinic made in its answer to the original petition.

On August 29, 2014, approximately three weeks before the scheduled trial date, Martin was granted leave of court to again amend his petition. The second supplemental and amending petition asserted that Martin had been laid off, and not "terminated" (fired) as previously alleged. Additionally, Martin asserted that according to defendants' policies, employees who were laid off without sufficient notice were entitled to "in lieu of" notice pay in the amount of forty (40) hours pay for every year of employment. In addition to re-asserting his claim for earned and unpaid vacation and sick time pay that he had set forth in his previous petition, Martin asserted a claim for "in lieu of" notice pay for forty (40) hours at $36.06 per hour ($1,442.40); and penalty wages under La. R.S. 23:632, in the amount of $25,963.20 ($288.48 x ninety (90) days), plus reasonable attorney fees and costs.

Trial was held on September 18, 2014, and continued on October 29 and 30, 2014. The court, in oral reasons, made the following findings: there was no written contract of employment between Martin and Dr. Knatt; that nothing in Louisiana's wage statutes, La. R.S. 23:631, *et seq.*, prevents an employer from, pursuant to its internal policy, restricting an employee's rights regarding the accrual of annual (vacation) leave as provided in the employer's internal policy; that the defendants' policies applied to Martin as an employee, even if not signed by him; that according to those policies, vacation time was not accrued -- it was a "use-it-or-lose-it" contract, and therefore, it was not considered "wages" that must be paid, under La. R.S. 23:631; that sick time is either used or lost, so Martin was not entitled to any sick time pay; that based on Dr. Knatt's text to Martin, Martin was laid

off due to a reduction in force; and therefore, under defendants' policies, he was entitled to "in lieu of" notice pay for the fifteen months worked, in the amount of $1,442.40. Finally, referring to penalty wages allowed under La. R.S. 23:632, the district court stated:

> I can hold good-faith or bad-faith. What I would rather do is say you won two out of three, and split penalty wages one-third, two-thirds. It is not exactly what the statute says, but it sounds just to me.

However, before rendering its order, the district court instructed the attorneys to discuss an amount and attempt to settle the penalty wages. After a brief recess, the parties were unable to agree, and the district court ordered, "I find that not paying wages in lieu of notice was in bad faith. I am awarding penalty wages in the amount of one-third of twenty-five thousand nine hundred and sixty-three dollars and twenty cents, whatever that figure is...." (That finding -- 1/3 of the ninety days wages owed -- resulted in an award of $6,923.07 in penalty wages.) Additionally, the district court ordered defendants to pay attorney fees in the amount submitted by Martin, $23,925.00. Those findings were reduced to judgment signed by the district court on December 1, 2014, and the defendants appeal.[4]

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[4] The record before us includes two judgments signed by the district court on December 1, 2014. One of the judgments has a handwritten notation, "Denied" struck through the last two paragraphs of the judgment -- the paragraph assessing defendants with the payment of costs and the "Judgment Rendered .... Read and Signed...." paragraph. The meaning of the district court's notation is unclear and undiscernible. As such, that judgment lacks the appropriate decretal language that would render it a valid, final, and appealable judgment. Under Louisiana law, a final judgment is one that determines the merits of a controversy in whole or in part. La. C.C.P. art. 1841. A final judgment must be identified as such by appropriate language. La. C.C.P. art. 1918. A valid judgment must be precise, definite, and certain. **Laird v. St. Tammany Parish Safe Harbor**, 2002-0045 (La. App. 1 Cir. 12/20/02), 836 So.2d 364, 365. A final appealable judgment must contain decretal language, and it must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied. These determinations should be evident from the language of a judgment without reference to other documents in the record. **Gaten v. Tangipahoa Parish School System**, 2011-1133 (La. App. 1 Cir. 3/23/12), 91 So.3d 1073, 1074. Because it is undeterminable what the district court intended by its handwritten notation, that judgment is not final or appealable. However, the record contains a "second" judgment, also signed on December 1, 2014, that comports with the district court's oral reasons for judgment, and does not contain the confusing "denied" notation. The "second" judgment does contain decretal language, rendering it a final and appealable judgment. Moreover, it is, otherwise, substantively identical to the "first" judgment. Finally, upon questioning at oral argument no party was confused about which judgment or which provisions had been appealed; nor did Martin allege he suffered any prejudice by the inclusion in the record of the two judgments. See **Phi Iota Alpha Fraternity, Inc. v. Schedler**, 2015 WL 5547231, at p. 3 2014-1620 (La. App. 1 Cir. 9/21/15), ___ So.3d ___, in which this court recently found that although there were two judgments, rendered on separate dates included in the record, it was clear which judgment was being appealed because the appellant assigned errors relative to the second judgment and the appellee did not assert that he was prejudiced by the appellant's specifying the wrong of the two judgments as the one being appealed in his notice and order for appeal. Noting further that appeals are favored by law, this court denied a motion to dismiss and maintained the appeal. Similarly, in this case, although there are two judgments signed on the same date in the record, there is no confusion resulting therefrom, and we will review the "second" judgment (that does not contain the "Denied" notation), a valid, final judgment, as the one before us on appeal.

ASSIGNMENTS OF ERROR

Defendants urge the following assignments of error on appeal:

1. The trial court erred in finding the plaintiff entitled to "in lieu of" pay as "in lieu of" pay is not "wages" under Louisiana's wages laws, and when the plaintiff, by his own repeated judicial admissions, confessed he had been terminated and even cashed his final check marked "paid in full".

2. The trial court erred in awarding penalty wages where "in lieu of pay" does not constitute "wages", plaintiff never made demand for "in lieu of" wages until the eve of trial and defendants had a bona fide dispute and equitable defenses – clearly evident from the fact plaintiff continuously confirmed he was "terminated", did not make this claim until the eve of trial, and cashed his final check marked "paid in full".

3. The trial court erred in finding the defendants in "bad faith" where no demand was ever made by the plaintiff for "in lieu of" pay, which are not "wages" under Louisiana's wage laws, until the eve of trial, where plaintiff had repeatedly judicially confessed and alleged he had been "terminated" rendering him completely ineligible for any possible "in lieu of" pay. "In lieu of" pay is not "wages".

4. The trial court erred in awarding plaintiff all of his attorney's fees and costs, spanning over two (2) years of plaintiff's litigation involving plaintiff's claims for unpaid vacation and sick pay on which he was unsuccessful, and, solely in the alternative, should be drastically reduced reflecting only the singular claim first posited by plaintiff on the eve of trial if said claim is upheld on appeal.

Martin answered the appeal and asserted the district court improperly ruled that:

1. Defendants were liable for only one-third (1/3) of the total 90 days of penalty wages;

2. [T]hat Defendants were not liable for vacation pay; and

3. [T]hat Defendants were not liable for sick pay.

For the sake of clarity and ease in understanding the issues raised and our analysis and resolution thereof, we address below all issues presented by the foregoing assignments, but not necessarily in the chronology in which they are presented.

STATUTORY WAGE PAY REQUIREMENTS/PENALTIES UPON EMPLOYEE'S DISCHARGE OR RESIGNATION

The following two statutes apply to all issues presented in the appeal and the answer to the appeal. The statute addressing an employer's obligation to pay its employees upon discharge or resignation, La. R.S. 23:631, provides as follows:

> **Discharge or resignation of employees; payment after termination of employment**
>
> A. (1)(a) Upon the discharge 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, on or before the next regular payday or no later than fifteen days following the date of discharge, whichever occurs first.
>
> (b) Upon the 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, on or before the next regular payday for the pay cycle during which the employee was working at the time of separation or no later than fifteen days following the date of resignation, whichever occurs first.
>
> (2) 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, provided postage has been prepaid and the envelope properly addressed with the employee's or laborer's current address as shown in the employer's records. In the event payment is made by mail the employer shall be deemed to have made such payment when it is mailed. The timeliness of the mailing may be shown by an official United States postmark or other official documentation from the United States Postal Service.
>
> (3) The provisions of this Subsection shall not apply when there is a collective bargaining agreement between the employer and the laborer or other employee which provides otherwise.
>
> 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.
>
> C. With respect to interstate common carriers by rail, a legal holiday shall not be considered in computing the fifteen-day period provided for in Subsection A of this Section.
>
> D. (1) For purposes of this Section, *vacation pay will be considered an amount then due only if, in accordance with the*

> *stated vacation policy of the person employing such laborer or other employee, both of the following apply:*
>
> (a) The laborer or other *employee is deemed eligible for and has accrued the right to take vacation time with pay.*
>
> (b) The laborer or other *employee has not taken or been compensated for the vacation time as of the date of the discharge or resignation.*
>
> (2) The provisions of this Subsection *shall not be interpreted to allow the forfeiture of any vacation pay actually earned by an employee pursuant to the employer's policy.*

(Emphasis added.)

Additionally, when there is a failure to pay as required by La. R.S. 23:631, La. R.S. 23:632 provides for the payment of penalty wages, a good faith exception thereto, and the payment of attorney fees and costs as follows:

> A. Except as provided for in Subsection B of this Section, 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.
>
> B. When the court finds that an employer's dispute over the amount of wages due was in good faith, but the employer is subsequently found by the court to owe the amount in dispute, the employer shall be liable only for the amount of wages in dispute plus judicial interest incurred from the date that the suit is filed. If the court determines that the employer's failure or refusal to pay the amount of wages owed was not in good faith, then the employer shall be subject to the penalty provided for in Subsection A of this Section.
>
> C. 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 the first demand following discharge or resignation.

Thus, penalty wages in the amount of ninety days wages may be due an employee whose employment has been terminated, by either a discharge or resignation, and who has not been paid "the amount due under the terms of employment" (see La. R.S. 23:631(A)(1)(a) and (b)), when the employer's failure to pay has been found to be "not in good faith." See La. R.S. 23:632(B) and (C).

Additionally, there are specific statutory requirements that must be met for an employee to be statutorily entitled to the payment of "vacation pay." First, the employer's policy must explicitly provide for vacation pay. See La. R.S. 631(D)(1). If so, then vacation pay is owed if the employee is "deemed eligible for and has accrued the right to take vacation time with pay;" *and,* as of the date of termination of employment, the employee has not taken or been compensated for the vacation time for which he is eligible. See La. R.S. 631(D)(1)(a) and (b). Finally, the statute makes clear that vacation pay *actually earned by an employee pursuant to the employer's policy,* cannot be forfeited. See La. R.S. 631(D)(2).

DEFENDANTS' VACATION/SICK PAY PROVISIONS
MARTIN'S ASSIGNMENTS OF ERROR TWO AND THREE
(IN ANSWER TO THE APPEAL)

In answer to the defendants' appeal, Martin asserts that the district court erred in finding that he was not entitled to vacation pay or sick pay.[5] For the following reasons, we agree with Martin and find that he is entitled to vacation pay for vacation time earned. We reverse that portion of the court's judgment and find that the defendants are liable to Martin for unused vacation time pay that he earned during the last six month period of his employment. (We note that Martin only worked approximately three and a half months of this final six month period of employment, from September 2011 to January 2012.) We remand to the district court for a determination of the number of days and amount to which he is entitled, and an award in accordance therewith.

Vacation Time Policy Provisions

In addition to the requirements of La. R.S. 23:631(D)(1)(a) and (b)[6], an employer's own policy also applies in determining whether an employee is entitled to the payment of

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[5] Although Martin assigns error to the failure of the district court to award the payment of unused sick pay, the assignment is not briefed. An appellate court may consider as abandoned any assignment of error or issue for review that has not been briefed. Therefore, we will not review the portion of the judgment finding Martin not entitled to sick pay. Uniform Rules, Courts of Appeal, Rule 2-12.4(B)(4); See **Shropshire v. ANCO Installation**, 2014-0902 (La. App. 1 Cir. 12/23/14), 168 So.3d 601, 607.

[6] Cited earlier herein, these subsections of La R.S. 23:631(D) provide that vacation pay will be considered an amount then due "*only if, in accordance with the stated vacation policy of the* [employer] ... the employee is *deemed eligible for* ***and*** *has accrued the right to take"* paid vacation, ***and*** the employee has not yet taken or been compensated for the earned vacation time. (Emphasis added.)

earned and unpaid vacation time at the time of the termination of his employment, and if so, how that vacation time is earned and how it is to be paid at termination. The record contains the following pertinent documentary evidence. First, a memo dated November 11, 2011, signed by Martin (as well as nine other employees), entitled "Vacation," provides as follows:

> A regular full time employee will receive 40 hours of vacation every six months of continuous employment. Vacation should be submitted for approval at least 6 weeks in advance. Vacation time cannot be taken two weeks at a time, and is not accrued. No vacation time can be scheduled in conjunction with any holiday. Scheduled vacation has to be taken in one week increments, cannot be broken up. No vacation time can be taken two weeks before or two weeks after Easter, Thanksgiving and Christmas.

Secondly, an "Employee Policy & Procedures Manual" for Greater Baton Rouge Musculoskeletal Group (A Medical Corporation), containing the following, almost identical, provision, entitled "Vacation," states:

> A regular full-time employee will receive 40 hours of vacation every six months of continuous employment. Vacation should be submitted for approval by the Office Manager at least 6 weeks in advance. Vacation time cannot be taken two weeks at a time, and is not accrued. No vacation time can be scheduled in conjunction with any holiday.[7]

At the outset, we note an internal inconsistency in the written provisions of the vacation time provisions set forth above. Both provisions state that an employee will receive 40 hours, or one week, of vacation every six months, and also that vacation does not accrue. This is wholly incongruent with the following provision -- that vacation time cannot be taken "two weeks" at a time. If only forty hours is earned in six months and that time does not accrue, then it would be impossible to take two weeks at a time in the same six-month period of time worked. The limitation that such cannot be done is therefore, rendered meaningless.

[7] The record also contains two other Employee Policy & Procedures Manuals for Iberia Clinic, which were introduced into evidence at trial and contain vacation and sick pay provisions identical in all relevant respects to the Musculoskeletal Group's provisions cited above. One of the manuals indicates it was revised October 10, 2004; the other is dated April 2005 and indicates it was revised on February 20, 2006. While the vacation provisions differ slightly between the manuals, they are identical in all aspects relevant to the issues presented herein. Additionally, the sick pay provisions are identical in all three manuals.

The testimony is also in conflict regarding the terms of defendants' vacation time policies. Martin testified that during the prehire meeting, Dr. Knatt told him that he would be entitled to two weeks (80 hours) vacation every six months. The defendants maintain all of their employees, including Martin, were entitled to only one week (40 hours) every six months. Further, defendants maintain an employee was not eligible to earn vacation time until after first having worked for six months. Contrarily, Martin claims he was never told he had to work for six months before becoming eligible to earn paid vacation time; in fact, he claims Dr. Knatt cautioned him that the first year of working was the most stressful, and advised him to begin scheduling his vacation time as soon as possible. In support of this testimony, Martin introduced documentary evidence that he had requested, and been granted, paid vacation time during the first six months of his employment. Additionally, although Martin acknowledged that the policies and a memo he signed state that vacation time did not accrue, he denied having any understanding of what "accrued" meant in the context of those policies or that the vacation time he earned was on a "use-it-or-lose-it" basis.

Analysis re: Vacation Time Pay

We find the district court erred in finding Martin was not entitled to vacation time pay to the extent that Martin, during the last six months of his employment, became eligible, and for three and a-half months, actually earned vacation time; and therefore, is entitled to payment upon termination. In so doing, for reasons explained below, it matters not whether the defendants' policies constitute a "use-it-or-lose-it" policy; therefore, we need not resolve the factual dispute concerning the nature of the pay allowed. The fact that the policies clearly state that the vacation time does not accrue, means only that hours not taken as a vacation in a six-month period of employment do not "roll over" as add-on hours that can be taken during the next six months of employment. However, nothing in the defendants' policies does, nor can it, eliminate the employee's statutory right to be paid, upon termination, for any unpaid vacation time earned prior to termination. In **Wyatt v. Avoyelles Parish School Board**, 2001-3180 (La. 12/4/02), 831 So.2d 906, the supreme court held that, while a "use-it-or-lose-it"

policy is not proscribed by La. R.S. 23:631 and 632, an employer is nonetheless required to compensate an employee for unused annual leave that "accrues" under the terms of employer's "use-it-or-lose-it" policy. The supreme court so held even in light of the employer's argument that its policy disallows accumulation of unused annual leave due to an employee's conscious failure to timely utilize his annual leave. *Id.*, 831 So.2d at 911. (Defendants herein raised the same argument.) Instead, the supreme court found that the employer's policy could only legally subject an employee to a condition that the employee use the leave by a certain date (in this case, by the end of a six-month period of employment) or that leave is lost. *Id.*, 831 So.2d at 913-914. The supreme court held, however, that an employer could not allow the forfeiture of vacation time actually earned by the employee, and is obligated under La. R.S. 23:631 to compensate an employee for the amount of the unused leave he accrues prior to termination. *Id.*, 831 So.2d at 913-914; see La. R.S. 23:634.

Accordingly, the district court erred in finding that Martin was not entitled under La. R.S. 23:361 to be paid for vacation time earned and not taken or compensated. That finding is hereby reversed. Having found that Martin is entitled to receive vacation time pay for the time earned during the last six month period of his employment, which he did not take and for which he was not compensated, we remand to the district court for a determination of the number of days and the amount of the award to which Martin is entitled.

The supreme court in **Wyatt** further held that any failure to compensate an employee that violates La. R.S. 23:631, subjects the employer to the imposition of penalties and attorney fees under La. R.S. 23:632. It also, however, acknowledged that an employer may have a reasonable basis for failing to timely pay an amount that is due a terminated employee that permits a court to excuse the employer from imposition of the penalty wages authorized by La. R.S. 23:632. *Id.*, 831 So.2d at 917; **Chesterfield v. Genesis Hospice, L.L.C.**, 2013-0179 (La. App. 1 Cir. 12/19/13), 137 So.3d 22, 23-24. In this case, the district court erroneously ruled that Martin was not entitled to vacation time pay, and therefore it never reached a determination of whether the defendants'

failure to pay in this case was based on a reasonable basis and in good faith. Because we are a court of review, and not one of original jurisdiction, we must remand to the district court to make the determination of whether the defendants' failure to pay Martin the vacation time owed escapes the imposition of penalty wages by being in good faith, and if not, the amount of penalty wages due Martin.

In **Chesterfield**, this court also held, unlike penalty wages, courts do not permit equitable defenses to an award of attorney fees in the event a well-founded suit for amounts due under La. R.S. 23:631 is filed. **Chesterfield**, 137 So.3d at 25. Although in this case, the district court did not render an award of attorney fees based on defendants' failure to pay vacation time, it did render such an award for the defendants' failure to pay "in lieu of" wages.

In this matter, although we find the district court's award of penalty wages for defendants' failure to pay "in lieu of" notice pay is reversible (upon finding such pay was not an amount owed under La. R.S. 23:631), our finding, in accordance with the holding in **Chesterfield**, that defendants' failure to pay Martin's vacation leave as owed under La. R.S. 23:631 entitles Martin to an award of attorney fees. The district court awarded Martin attorney fees in accordance with the documentary evidence presented by him reflecting the attorney fees incurred in litigating his entitlement to such pay. The defendants did not introduce any contradictory evidence. Therefore, we find no manifest error in the district court's award; that finding is affirmed.

"IN LIEU OF" PAY
DEFENDANTS' ASSIGNMENTS OF ERROR NUMBERS ONE & TWO

The aforementioned manuals also contain identical provisions regarding termination, and the "in lieu of" notice pay provisions that are at issue in this appeal. Under the provision entitled "Termination," the policies state that "termination employees are entitled to receive all earned pay, including vacation pay."

The policies further classify "termination" as normally occurring as the result of one of three actions: resignation (a voluntary termination by the employee); dismissal

(involuntary termination for substandard performance or misconduct; or layoff (termination due to a reduction in work force or elimination of a position).

It is undisputed that Martin's termination was not a voluntary departure or a resignation under the policies. Martin contends that he was laid off, as reflected in the text message Dr. Knatt sent him. The defendants, on the other hand, assert that Martin was terminated for misconduct, and also contend that he admitted as much in his pleadings. The distinction is significant because the policies provide differently, depending on the type of termination. Under the section entitled "Dismissal," defendants' policies state that for termination resulting from misconduct, "[n]o salary continuance or severance pay will be allowed." The defendants rely on that provision in asserting that no vacation, sick, or "in lieu of" notice pay is due to Martin.

In the sections entitled "Layoff," the policies state as follows:

> The Office Manager and by direction of The Physician Counsel will personally notify employees of a layoff. ... The employee, the Office Manager, after consultation with the Physician Counsel, will follow one of the following procedures:
>
> The employee will receive at least two weeks advance notice of termination date;
>
> [or]
>
> The employee *will be terminated immediately and will receive one week of pay for each year of employment with the company in lieu of notice* up to a maximum of four weeks. The payment will be based on a 40-hour workweek at the employee's straight time rate or salary.

(Emphasis added to portion of policy relied on by Martin in asserting a claim for "in lieu of" notice wages.)

The district court made a factual finding that Martin was laid off and not fired for misconduct. In reaching that finding, the district court referred to the written text sent to Martin by Dr. Knatt, informing him that he was being terminated, that it was an extremely difficult decision, but that he had decided "to no longer have a physician assistant position" in his office. The district court also noted that, although Dr. Knatt asserts the text "does not mean what it says," ... "I find that it says – it means what it says."

The factual findings of the district court will not be overturned unless they are clearly wrong or manifestly erroneous. The contents of the text by which Dr. Knatt informed Martin of his termination are set forth earlier in this opinion. We find the language is quite clear and reflects that Dr. Knatt made the extremely difficult decision to "no longer have a physician assistant" and that he accommodated that position as long as he possibly could. Based on that clear language, we cannot say the district court manifestly erred in concluding that Martin's employment termination was a result of a reduction in force, or a layoff.

Based on that factual finding, the court found Martin was entitled to "in lieu of" notice pay as provided in the defendants' policies under "Layoff," and ordered the defendants to pay him "in lieu of" notice pay for forty (40) hours in the amount of $1,442.40, consistent with the provisions in the policies. Because the applicable provisions clearly entitle Martin to such payment if his termination was a result of a layoff, the district court's finding is not manifestly erroneous and that portion of the judgment, ordering the defendants to pay Martin "in lieu of" notice pay in the amount of $1,442.40 is affirmed.

However, we *do* find the district court erred as a matter of law in finding that Martin was thereby entitled to penalty wages, attorney fees, and costs under La. R.S. 23:631 and 632, based on the defendants' failure to pay him "in lieu of" notice pay. The supreme court, in **Boudreaux v. Hamilton Medical Group, LLC**, 94-0879 (La. 11/17/94), 644 So.2d 619, 622, held that contractual severance compensation did not constitute "wages" and, therefore, did not fall within the scope of the penalty statutes. (The supreme court reversed a judgment that had found a doctor's employer liable for statutory penalties and attorney fees under La. R.S. 23:631 and 632 based on the employer's failure to pay contractual severance compensation after the doctor's voluntary resignation.) While we recognize that **Boudreaux** is factually distinguishable from the issue before us, the following analysis employed by the supreme court in interpreting the statutes and determining whether severance compensation fell within the ambit of La.

R.S. 23:631 and 632 is equally applicable and controlling in determining whether Martin's claim for "in lieu of" notice payments falls within the ambit of those same statutes.

First, the supreme court cited the two statutes, and noted they are penal in nature and subject to strict construction. Further, the court noted that the statutes refer to "wages" and subject an employer to the payment of penalties and attorney fees if the wages are not paid timely. **Boudreaux**, 644 So.2d at 621. The court continued:

> In *Mason v. Norton*, 360 So.2d 178, 180 (La. 1978), we stated that these statutes are designed to compel prompt payment of *wages* upon an employee's discharge or resignation. The term "wages" is defined as money that is paid or received for work or services, as by the hour, day or week. In La. R.S. 23:631, the "amount due under the terms of employment" is modified by the phrase "whether the employment is by the hour, day, week, or month, ..." [sic] We have held that this phrase in La. R.S. 23:631 ... refers to the pay period for the compensation.

Id., at 621-22. (Citations omitted) The court also cited with approval **Stell v. Caylor**, 223 So.2d 423, 426 (La. App. 3 Cir.), writ denied, 254 La. 778, 226 So.2d 770 (1969), wherein the third circuit stated:

> [T]he inclusion in the statute of the words "whether the employment is by the day, week, or month" seems to signify that *only amounts due as wages* are contemplated. Otherwise these words would be superfluous. If the statute is intended to cover all amounts due by the employer to the employee, regardless of whether they are wages, there is no need for the statute to specify the pay periods of wages.

(Emphasis added.) The supreme court concluded that only compensation that is earned *during a pay period* will be considered wages under the statute. **Boudreaux**, 644 So.2d at 621.

The "in lieu of" notice payment to which Martin is entitled in this matter is a one-time lump sum similar to the severance compensation at issue in **Boudreaux**. Likewise, it cannot be considered "wages" under the statute since it is not compensation earned during the two-week pay period. Defendants' failure to pay does not subject them to the imposition of penalties, fees, and costs under La. R.S. 23:631 and 632; therefore, the district court erred in its award of penalties, attorney fees and costs. Accordingly, the portion of the December 1, 2014 judgment awarding $6,923.07 in penalty wages is hereby reversed.

CONCLUSION

In light of the foregoing findings, it becomes unnecessary to address defendants' assignments of error three and four, and Martin's assignment of error number one in answer to the appeal, as the issues raised therein are now moot.[8] For the reasons discussed herein, the award of penalty wages for the nonpayment of "in lieu of" notice payment is reversed. Further, the portion of the district court judgment denying Scott Martin's claim for earned and unpaid vacation time is reversed; it is adjudged defendants are liable to Martin for unused vacation time pay earned. The matter is remanded for a determination of the appropriate amount of such award. The remand will include specifically a determination of how the vacation time was earned under Martin's employment and the amount of paid vacation earned by Martin every six months (being eighty hours as claimed by Martin, or 40 hours as claimed by the defendants); the amount of unused vacation earned by Martin during his final "six month period" of his employment, which actually extended only three and a half months, from September 27, 2011 through January 15, 2012; and the amount of compensation owed for that unused vacation.

The matter is also remanded for a determination of whether the defendants lacked good faith when they failed to pay Martin's earned/unused vacation time so as to trigger the imposition of penalty wages under La. R.S. 23:631 and 632 and, if so, the amount of said penalty wages. In all other respects, not modified herein, the December 1, 2014 judgment is affirmed. Costs of this appeal are assessed equally to plaintiff/appellee, Scott Martin, and to the defendants/appellants, Iberia Bone, Joint & Foot Clinic and Greater Baton Rouge Musculoskeletal Group, LLC.

AFFIRMED IN PART; REVERSED IN PART; RENDERED IN PART; AND REMANDED IN PART.

[8] Because we have found that the wage penalty statute is not applicable to "in lieu of" notice pay, we do not reach the issues concerning the district court's determination that the defendants acted in bad faith. Likewise, the same determination renders moot Martin's assignment concerning the district court's awarding only one third of the penalty wages instead of the ninety days provided in the statute.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0526

SCOTT MARTIN

VERSUS

IBERIA, JOINT & FOOT CLINIC (A MEDICAL CORPORATION)

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TMH

HIGGINBOTHAM, J. dissenting in part, and concurring in part.

I respectfully disagree with the portion of the majority opinion that affirms the award of attorney fees. In this case, the amount of attorney fees awarded by the trial court was based on the trial court's determination that the defendants are liable to Martin for "in lieu of notice" pay and that the defendants were in bad faith in failing to make "in lieu of notice" payment to him. The majority opinion reverses that determination by the trial court and instead concludes that Martin is entitled to vacation pay. In light of that difference, the issue of attorney fees should also be remanded to the trial court. Otherwise, I concur with the opinion of the majority.