**David Whitten, M.D. v. Anesthesiologist Group, Inc.[[1]](#footnote-1)©**

**COMMON FACTS**

Anesthesiologist Group, Inc. was owned by four medical doctors. Dr. Whitten, an owner and managing director, decided to lease the corporation and practice on his own. He gave the corporation the required notice. He estimated he was entitled to receive $250,000 in severance pay and one-fourth of a $300,000 bonus which the group paid two weeks after Dr. Whitten terminated his relationship with the group.

The corporation offered to pay Dr. Whitten $75,000 in full and complete settlement of all claims he had against the corporation. Dr. Whitten then brought suit seeking damages of $250,000 for the severance, $76,250 for the bonus, and a to be determined amount for attorney’s fees, costs, and prejudgment interest. The corporation **counterclaimed seeking $180,000** against Dr. Whitten. It claimed that the office manager, who acted under Dr. Whitten’s supervision when he was managing, embezzled this money by charging for unearned overtime, by using the corporation’s credit card for personal items, and charging for travel costs and expenses that were not incurred. Defendants’ pleaded that Dr. Whitten had a fiduciary responsibility to correct these frauds and failing to do so made him liable. As it turned out, Dr. Whitten was having a sexual relationship with the office manager, whom he married after he got a divorce.

Plaintiff’s expert determined that the severance package was worth $256,000 and defendant’s expert found it was worth $193,000. Defendant claimed that Dr. Whitten was not entitled to any portion of the bonus because it was given after he left the corporation. **Dr. Whitten agreed to settle the entire matter for $175,000 but the corporation refused. It gave a final offer of $100,000.**

During four years of pretrial discovery, **the defendant corporation spent $340,000 in legal and expert fees and costs.** **Dr. Whitten spent $265,000 in fees and expert costs.** (His attorney was working on an hourly rate.) Both sides recognized they would spend another $50,000 to $75,000 in fees to try the case.

During the course of the litigation, the office manager filed for bankruptcy. The defendant corporation filed a claim against her estate for the $180,000. The bankruptcy judge held a hearing concerning the viability of the defendant corporation’s claim against the office manager’s estate. **He rejected the entire claim** except for $9000 which was incurred when the office manager used the corporation’s credit card.

At the mediation, Dr. Whitten made an initial demand of:

Severance pay $256,000 (∏s Expert’s Amount)

Bonus 76,000 (originally $300K, came down to $76250)

Attorney’s fees 260,000 ($265K total)

Interest 150,000

$742,250

The defendant corporation increased its offer to $150,000. You have been asked to mediate.

∆: $75 offer. Counterclaim for $180. Final Offer of $100K. Now $150K

∏: $550K (Severance & Bonus); $326250+; $175000; $742,250**ADDITIONAL FACTS – DR. DAVID WHITTEN**

Dr. Whitten desperately needs funds now and not six months or one year later, or he will have to file for bankruptcy. He has been informed that going to trial will cost him another $50,000 to $60,000 which he simply cannot afford. He has also been informed that the trial is set seven months later and an appeal will take another two years after that.

Dr. Whitten’s attorney, who is a very aggressive trial lawyer, is concerned about collecting his fees. At the time of the mediation $62,500 in fees was owed and if Dr. Whitten files for bankruptcy, he will not be able to collect his fee. He is too busy to continue investing time and money in the case.

Dr. Whitten’s claim for attorney’s fees and costs are based on a state statute which allows them when an employee wrongfully withholds wages. Dr. Whitten claims his severance pay comes under the definition of wages. The mediator pointed out that an employee who is the owner of the corporation or company is not an employee for purposes of the statute. He also pointed out prejudgment interest is not available under state law.

**ADDITIONAL FACTS – ANESTHESIOLOGIST GROUP, INC.**

The Anesthesiologist Group recognize, that except for $9000, they have no counterclaim because of the bankruptcy proceeding. The bankruptcy judge threw out its claim against the office manager. Having litigated this issue, collateral estoppel forecloses it from litigating the issue against Dr. Whitten. Dr. Whitten also benefits from the bankruptcy determination because he is in privy with the office manager – he is her managing partner and if he is to be liable for her improper conduct, a determination that she has not acted improperly benefits him also.

The mediator pointed out that if you take the $193,000 which defendant’s expert said was the actual severance figure and add to it the additional costs of going to trial of $50,000 to $60,000, and prejudgment interest on the $193,000 for four years of $64,000, defendant’s best net case is in excess of $300,000.

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