

Fifth Circuit Court of Appeal
State of Louisiana

No. 25-CA-233

JASON P. FRANCO

versus

WRIGHT & GRAY, LLC

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 843-585, DIVISION "L"
HONORABLE DONALD A. ROWAN, JR., JUDGE PRESIDING

March 27, 2026

TIMOTHY S. MARCEL
JUDGE

Panel composed of Judges John J. Molaison, Jr.,
Scott U. Schlegel, and Timothy S. Marcel

AFFIRMED AS AMENDED, AND
JUDGMENT RENDERED

TSM

JJM

SUS

TRUE COPY



JALISA WALKER
DEPUTY CLERK

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W. J. LeBlanc, Jr.

MARCEL, J.

Defendant Wright & Gray, LLC, appeals the trial court's judgment rendered in favor of the estate of its former employee, Jason P. Franco¹, awarding unpaid wages in the amount of \$256,486.88 and statutory penalties in the amount of \$151,115.71 under Louisiana Revised Statutes 23:631, *et seq.*, also known as the Louisiana Wage Payment Act. For the following reasons, the trial court's judgment is affirmed, however, we amend the amounts awarded as unpaid wage damages and statutory penalties.

FACTS AND PROCEDURAL HISTORY

Mr. Franco was hired by the law firm of Wright & Gray, LLC ("W&G")² as an associate attorney in March 2020. W&G and Mr. Franco never entered into a written employment contract setting forth the terms and conditions of Mr. Franco's employment or his compensation. Mr. Franco was an at-will employee who provided legal representation to W&G clients in cases assigned by firm partners. On January 25, 2023, W&G terminated Mr. Franco's employment at the firm.

Following his termination, Mr. Franco transmitted an email to Daryl Gray, a firm partner, and Idrissa Upscomb dated January 27, 2023, which referenced their oral conversation concerning payment for work he performed on approximately eleven cases before his firing. The email states:

Daryl,
Appreciate the conversation yesterday. You confirmed you will pay me the other half (\$95,625) from [L.M.], [K.M.], [E.P.], and [L.H.] in February.³ I assume you will do same as last time and pay my LLC

¹ Jason P. Franco passed away on April 27, 2024, and was substituted as party plaintiff by his father Philip Franco in his capacity as Independent Administrator of the Succession of Jason Philip Franco.

² According to the record, the law firm is referred to as "Wright & Gray, LLC" and as "Wright, Pichon, and Gray, PLC".

³ The email lists the names of W&G clients. Because the email is contained in the sealed portion of the record, the clients are identified by their initials in this opinion.

and not run through pay roll.⁴ Dri – pls let me know when it's ready and I can come pick up.

In the same email, Mr. Franco provided information requested by Mr. Gray concerning seven other cases which he settled in December 2022 and January 2023. The case information provided by Mr. Franco included the client's name⁵, the total settlement amount, and the firm's contingency fee percentage. Mr. Franco received no response to this email.

Mr. Franco transmitted another email addressed to Mr. Gray and Mr. Upscomb with the subject line "JPF Pay" dated February 8, 2023, which stated:

Daryl – following up on email from a few weeks ago. You said I'd get the [L.M], et al and [L.H.] money in February so was hoping could get that before Mardi Gras break.
Also would like to get payment on the other settlements listed finalized and paid as well. If possible would like this done by end of month as well so we can move on.
Thanks and let me know if need to discuss.

Later that same month, Mr. Franco transmitted a third email to Mr. Gray and Mr. Upscomb, dated February 27, 2023, stating: "Following up on this again. Please." No response was received to this email.

On July 26, 2023, Mr. Franco wrote a letter to Wright & Gray, LLC, Eric A. Wright, Esq. and Daryl A. Gray, Esq. invoking the provisions of La. R. S. 23:631, *et seq.*, for unpaid wages. Mr. Franco's letter contained an itemized list of sums claimed as compensation in the eleven cases identified in his January 27, 2023 email. The letter contained Mr. Franco's demand for payment in the four cases in which he received partial compensation and the seven cases in which no payment was received, which all together totaled \$256,111.00. The letter also recites that payment was due within fifteen days from the date of his termination under La.

⁴ A check had been issued by "Wright, Pichon, & Gray, PLC" to Jason Franco on December 22, 2022 in the amount of \$96,000.00.

⁵ Initials of the clients identified in the January 27, 2023 email are: B.T., B.T., B.S., T.J., K.R., S.T., and T.C.

R.S. 23:631. Mr. Franco transmitted this demand letter on the same day as an attachment to an email addressed to Mr. Gray and Mr. Wright.

In his response email to Mr. Franco dated July 26, 2023, Mr. Gray wrote:

Jason:

It's very unfortunate this has come to this.

I think it's very pathetic of you to assert an interest in cases you "worked" while getting a salary from WG. That's a gross misreading of the law.

The long and the short of it is it didn't work out for you with us. We didn't lien any of the cases you generated. This is going to open a serious can of worms.

So, you can go ahead and file your lawsuit.

On July 31, 2023, Mr. Franco filed a Petition for Wages and Penalties against W&G in the 24th Judicial District Court. The petition alleges that an agreement existed for W&G to pay Mr. Franco to be paid 22.5% of contingency fees collected by the firm in cases which he handled. Paragraph 8 of the petition identifies the eleven cases by client name in which Mr. Franco performed legal work and the amount of contingency fees collected by W&G in each case, which totaled \$1,563,275. In paragraph 10, Mr. Franco lists the cases and "compensation [plaintiff] was owed for handling and settling" identified in paragraph 8 as follows:

- [L.M.], [K.M.] and [E.P.] v. [defendant name], et al and [L.M.] v. - \$95,625 (2nd half of payment per agreement with Daryl Gray)
 - [B.T.] \$945.00
 - [B.T.] (2nd case) \$748.00
 - [B.S.] \$7,593.00
 - [T.J.] \$3,600.00
 - [K.R.] \$112,500.00
 - [S.T.] \$33,750.00
 - [T.C.] \$1,350.00
- TOTAL OVERDUE: \$256,110.00

In addition to an award for unpaid wage damages in the amount of, Mr. Franco prays for penalties in the amount of 90 days' additional wages at the average daily rate of pay and an award of reasonable attorney's fees. The action was brought by summary proceedings under La. C.C.P. arts. 2591, *et seq.*

Responding to the petition, W&G filed a declinatory exception of improper venue and a motion to strike the petition or alternative motion to seal. The trial court denied the exception of improper venue after hearing on November 27, 2023; writ applications filed by W&G to this Court and the Louisiana Supreme Court from that ruling were also denied. *See Franco v. Wright & Gray, LLC*, 24-31 (La. App. 5 Cir. 2/9/24) (unpublished), *writ denied*, 24-233 (La. 4/3/24), 382 So. 3d 113. As to the motion to strike or alternatively to seal, the parties agreed to the sealing of documents in the record which contained confidential client information.

Jason P. Franco died unexpectedly on April 27, 2024. His father, Philip A. Franco, in his capacity as independent administrator of the succession of Jason Philip Franco, was substituted as party plaintiff in the action.

The Joint Stipulation

On November 12, 2024, the parties filed a joint stipulation in the record that was approved and adopted by the trial court. By their stipulation, the parties agreed to submit the merits of the controversy to the trial court on their respective briefings and all affidavits and evidence filed in the record. It was further agreed that their respective arguments and testimony would be submitted to the trial court in written form. The live hearing scheduled for December 2, 2024 was removed from the trial court's docket.

Pursuant to the joint stipulation, plaintiff and defendant filed their respective memoranda in support and in opposition on November 25, 2024. In addition to its memorandum in opposition to plaintiff's petition for wages and penalties, W&G filed its answer and affirmative defenses. W&G's answer contains a general denial of the allegations that compensation was due Mr. Franco at his termination and pleads twenty-two affirmative defenses, including good faith and compliance with applicable wage and employment laws.

Memorandum in Support of Petition for Wages and Penalties

In his memorandum in support of petition for wages and penalties, plaintiff alleges that on the date of his termination from the firm, Mr. Franco was owed wages from attorney's fees earned during his tenure in the amount of \$256,486.11. Plaintiff avers that an agreement existed whereby Mr. Franco was to receive 22.5% of all contingency fees received by W&G in those cases at issue in which he performed legal work. Citing La. R.S. 23:631, plaintiff argues that the amounts due were wages to be paid within fifteen days from Mr. Franco's termination, and W&G is additionally liable for penalties and reasonable attorney's fees because of its bad faith failure to pay after written demand.

Attached to plaintiff's memorandum in support of petition for wages and penalties are six numbered exhibits.⁶ Exhibit 1 is a copy of plaintiff's petition for wages and penalties and attached demand letter from Mr. Franco to W&G dated July 26, 2023. Exhibit 2 is a copy of Defendant's Responses to Plaintiff's Interrogatories, Requests for Production of Documents, and Requests for Admission served on February 6, 2024. Exhibit 3 is an affidavit of Eric Wright dated September 13, 2023. Exhibit 4 is described as "Defendant's entire bates-stamped production in case showing bates-stamped documents as Defendant-0000001 through Defendant-000183". While many of the documents are duplicative of other exhibits in the record, this *in globo* Exhibit 4 contains documents ordered sealed in the record, which include unredacted case settlement documents and email correspondence between Jason Franco and Daryl Gray after January 25, 2023.

Affidavits of Philip A. Franco and Emily Morehiser Franco, both dated November 22, 2024, are attached to plaintiff's memorandum as Exhibit 5 and

⁶ On December 9, 2024, the trial court ordered Exhibit 1, Exhibit 4, Exhibit 5, and Exhibit 6 to Plaintiff's Memorandum in Support of Plaintiff's Petition for Wages and Penalties filed in the record under seal.

Exhibit 6 respectively. Philip A. Franco is the father of Mr. Franco and independent administrator of his succession. In his affidavit, Philip Franco identifies documents produced by W&G which he avers are supportive of plaintiff's claims. Emily Franco, Mr. Franco's widow, recounts in her affidavit the telephone conversation between her husband and Daryl Gray on January 26, 2023. She states that Mr. Franco was having the conversation on speaker phone, allowing her to hear both her husband and Mr. Gray. The conversation was about Mr. Franco's termination and 'the money owed to Jason'. In her affidavit, Emily Franco states "I heard Daryl on the speaker phone say, 'look, I'm going to get it done for Em and the kids, not for you'". She recounts her husband, responding, "I don't care who [Mr. Gray] did it for, as long as [Mr. Gray] did it." She further states in the affidavit that on "the next day, January 27, 2023, Jason sent an email to Daryl Gray confirming that Daryl had asked him to send confirming the conversation". A copy of that email from Mr. Franco to Mr. Gray is attached to Ms. Franco's affidavit.

Memorandum in Opposition to Petition for Wages and Penalties

The opposition memorandum filed by W&G asserts that Mr. Franco was an at-will employee of W&G and that no written or oral contract existed during the course of his employment. W&G contends that it is not liable for payment of compensation under the Louisiana Wage Payment Act, arguing that Mr. Franco is seeking payment of bonuses for cases settled during his tenure with the firm. Further, W&G avers that while Mr. Franco was paid a salary, the firm's employee bonus policy was discretionary.

Attached to the W&G opposition memo is an affidavit of Mr. Wright signed November 22, 2024 and an affidavit of Mr. Gray dated November 25, 2024, marked Exhibit 1 and Exhibit 2 respectively. The affidavits establish that Mr. Wright and Mr. Gray are members and managers of W&G and that Mr. Franco was

employed at-will as an associate attorney from March 2020 through January 25, 2023. Both affidavits contain identical word-for-word statements, reciting that Mr. Franco was hired in March 2020 at an annual salary of \$75,000.00. Their affidavits state no written bonus policy existed but non-guaranteed bonuses were “paid subject to the firm’s discretion and written approval of either” Mr. Gray or Mr. Wright. The affidavits also recite the following procedure for payment of bonuses:

As a general practice, upon resolution or settlement of a case, a fee sheet would be generated either by the Firm or by the attorney working on the case with a suggested percentage of the attorney’s fee portion of the proceeds. [Either Mr. Gray or Mr. Wright] would evaluate the request and, in our discretion, sign off or not sign off on the bonus. The percentage of bonuses varied case by case and was subject to the discretion of [Mr. Gray or Mr. Wright]. Payments of bonuses would be processed based upon a properly agreed upon and signed fee sheet. Wright & Gray did not pay bonuses to attorneys for work performed on a given matter after the attorney was no longer employed by the firm.

Mr. Wright’s affidavit contains additional information regarding the salary compensation paid to Mr. Franco. According to Mr. Wright’s affidavit, Mr. Franco did not receive a salary from August 2022 through November 2022; Mr. Franco’s only compensation in those months were bonuses agreed upon by him and Mr. Gray. After November 2022 until his termination on January 25, 2023, Mr. Wright’s affidavit states, Mr. Franco was paid “a salary of approximately \$75,000.00 a year and discretionary bonuses determined and agreed to by me and Mr. Gray with respect to proceeds from cases he worked on.”

Further, their affidavits controvert Mr. Franco’s demand for payment of the remaining balance of fees owed in four cases which he handled. The affidavits of Mr. Wright and Mr. Gray each state the check issued to Mr. Franco on December 22, 2022 in the amount of \$96,000.00 represented a bonus payment in-full for

work performed “on E.P. (\$39,375.00), L.H. (\$47,250.00), B.S. (\$3,037.50), and T.C. (\$2,250.00).”⁷

Attached to the affidavit of Mr. Wright are documents identified as Exhibits A through F. The first document, Exhibit A, is the Wright & Gray Employee Handbook. Mr. Franco’s job application is attached as Exhibit B. Exhibit C are various payroll check stubs issued by W&G to Jason Franco between October 6, 2021 and January 27, 2023. Under “earnings”, each payroll stub contains an amount paid as “regular”, “bonus”, and “allowance for parking”. Payroll stubs issued between August 26, 2022 and December 2, 2022 reflect Mr. Franco was not paid a salary during that period but did receive bonus earnings of approximately \$98,000.

Mr. Wright’s affidavit also describes the fifty-three pages attached as Exhibit D as “true and correct copies of fee sheets submitted by Mr. Franco”. Typewritten atop each page is “Wright & Gray Attorney Income & Salary Record” and “JPF” is identified as the “Attorney”. Each document contains an eight-column, two-row chart. Typewritten inside the first column of the top row is “DATE” followed by “LITIGATION PRE-SUIT”, “Amount of Settlement”, “CLIENT NAME”, “(%) CASE SETTLED”, “GROSS FEE’S” (sic), “(%)”, and “NET ASSOC ATTY FEE’S” (sic). Beginning in the second column of the second row is the printed notation of whether the case was resolved in litigation or before suit was filed, followed by the total settlement amount, the redacted client name, the percentage of attorney’s fees, the gross amount of attorney’s fees, and percentage and amount paid as associate attorney’s fees. Beneath the chart is printed “Total” with a corresponding printed dollar amount. Each contains the signature of one or both

⁷ A copy of the Wright, Pichon, & Gray, PLC check issued to Jason Franco on December 22, 2022 in the amount of \$96,000.00 is attached to the affidavit of Eric Wright as Exhibit F.

partners. None of the fifty-three documents are dated and are not connected with cases for which Mr. Franco is seeking compensation.

Exhibit E to Mr. Wright's affidavit includes an additional nine "Wright & Gray Attorney Income and Salary Record" documents, which he identifies as the fee sheets for the cases identified in Mr. Franco's petition. None of the documents are dated. Each contains the typewritten settlement amount, gross attorney's fees percentage and amount, and the associate attorney fee's percentage and amount. The associate attorney fee's percentage in each is typewritten as "22.5%". While the client's name is redacted on each page of Exhibit E, unredacted versions of the same documents containing the client's name are filed under seal as Exhibit 4 to the Memorandum in Support of Plaintiff's Petition for Wages and Penalties.⁸

The "Attorney & Salary Record" documents included in Exhibit E are for the following cases: L.M., K.M., E.P., the two B.T. cases, B.S. K.R., S.T., and L.H. Each document bears handwritten alterations. Though the affidavit evidence of Mr. Gray and Mr. Wright suggest the handwritten alterations reflect their exercise of discretion in approving the amount payable to Mr. Franco, the record does not contain evidence of when and by whom the markings were made.

Plaintiff's Reply to W&G's Memorandum in Opposition

Plaintiff filed a reply to W&G's memorandum in opposition to the petition for wages in penalties. In it, plaintiff argues that the documents produced by defendant prove that the cases for which attorney's fee wages are claimed were settled prior to Mr. Franco's termination. Preemptively addressing potential hearsay objections by W&G, plaintiff avers that the affidavits are exception to hearsay under La. C.E. art. 804(A)(1) because of Mr. Franco's death during the

⁸ Plaintiff's memorandum in support of petition for wages and penalties and exhibits thereto are filed in the record under seal.

pendency of the action. Plaintiff attaches to his reply memorandum the affidavit of Mario Sanchez, Jr. dated December 5, 2024.

Mr. Sanchez's affidavit declares that he was employed as an associate attorney by W&G from December 2022 until May 2024, and was acquainted with Mr. Franco, his position within the firm, and cases in which he was assigned as the responsible and handling attorney. In paragraph 11, Mr. Sanchez describes the internal case tracking procedures of the firm.

During my entire employment with Wright & Gray, I and other associate attorneys were routinely shown a Firm document that served as a "Attorney Settlement Tracker/Spreadsheet". This document was regularly distributed to the Firm attorneys and showed the settlements of attorneys with the respective contingency fee the Firm received from the settled case. I specifically recall seeing this Firm document in both December 2022 and January 2023. It showed a substantial list of settled cases, and each case showed Jason Franco specifically assigned a 22.5% fee for each of the Firm contingency fees collected on those cases. The case list assigned to Jason Franco was substantial as were the amounts shown as collected by Wright & Gray on those cases for which Jason Franco was assigned to work on. The "Attorney Settlement Tracker/Spreadsheet" was regularly distributed by the Firm to all attorneys on at least a weekly/monthly basis. I specifically and distinctly recall Jason Franco's assignment of 22.5% contingency fee next to each of his assigned cases set forth on the Wright & Gray "Attorney Settlement Tracker/Spreadsheet". We were required to enter our respective confirmed settlements in the sheets, as there were multiple, on a weekly basis by 12:00 p.m. every Friday.

In the preceding paragraph of Mr. Sanchez's affidavit, he states that, to his knowledge, Mr. Franco was the "responsible and handling attorney" for seven cases involving firm clients identified as B.S., K.R., S.T., T.J., K.M., B.F., and T.C.

W&G's Reply to Plaintiff's Memorandum in Support

In response to plaintiff's memorandum in support, W&G filed Defendant's Reply in Further Opposition to Plaintiff's Petition for Wages and Penalties. W&G raises hearsay objections to Exhibits 4 through 6 of plaintiff's memorandum and argues that plaintiff's showing does not satisfy the burden of proof for additional unpaid wages. Specifically pointed to by W&G are the variations in percentages contained the fifty-three "Attorney Income & Salary Record" documents approved

for Mr. Franco (referring to Exhibit D to its memorandum in opposition). Because plaintiff cannot meet the burden of proving unpaid wages, W&G argues, plaintiff is likewise not entitled to an award of penalties. W&G further argues that the calculation of penalties exceeding Mr. Franco's \$75,000.00 annual salary is contrary to law. Also in its reply memorandum, W&G argues that an award of attorney's fees is not supported by the evidence, but if awarded, an amount based on a contingency fee agreement would be unreasonable.

Attached as exhibits to W&G's reply memorandum are additional, newly executed affidavits of Mr. Wright and Mr. Gray, each dated December 5, 2024. The identical material content of each affidavit recites that neither approved additional sums beyond what was paid to Mr. Franco when he was terminated, neither guaranteed nor promised Mr. Franco would receive a bonus for all cases on which he worked during his tenure at W&G. Each affidavit also states that the check issued to Mr. Franco in December 2022 in the amount of \$96,000.00 was a full bonus payment, not a partial bonus payment as alleged by Mr. Franco.

W&G Motion to Strike and Objections to Plaintiff's Reply and Affidavit

Responding to plaintiff's reply memo, W&G filed Defendant's Motion and Incorporated Memorandum to Strike and Objections to Plaintiff's Reply and Affidavit of Mario Sanchez, Jr. in Support of Plaintiff's Petition for Wages and Penalties. Presented in this filing are two objections. The initial objection raised was an alleged service deficiency of plaintiff's reply memorandum. Additionally, W&G lodged objections to the affidavit of Mario Sanchez, Jr. W&G averred that Mr. Sanchez's affidavit is not based on sufficient personal knowledge of the firm's internal policies and practices. Additionally, W&G argues that the affidavit testimony concerning Mr. Sanchez's observations of the "Attorney Settlement Tracker/Spreadsheet" are inadmissible hearsay. The motion prayed that Mario

Sanchez, Jr.'s affidavit be stricken from the record, or alternatively, for the court to consider the objections presented "as it adjudicates this matter on the merits."

Judgment of the Trial Court

Per the joint stipulation, the parties submitted the case to the trial court for a determination on the merits of Mr. Franco's claims. On January 30, 2025, the trial court issued a written judgment in favor of plaintiff, Philip A. Franco as independent administrator of the succession of Jason P. Franco and against W&G. Finding the plaintiff met his burden of proof, the trial court awarded damages for unpaid wages in the amount of \$256,486.88, statutory penalties in the amount of \$151,115.71, and attorney's fees in an amount to be determined following contradictory hearing.⁹

On motion of W&G, the trial court issued written reasons for judgment on February 19, 2025. The trial court found the evidence established an agreement for Mr. Franco to be paid 22.5% of the contingency fees collected by W&G in the cases identified in plaintiff's Petition for Wages and Penalties to be wages under La. R.S. 23:631. Supporting that conclusion, the trial court pointed to the "Attorney Income & Salary Record" documents, and finding those records were prepared by W&G and discounted the credibility of handwritten alterations to those documents. The trial court also pointed to the contents of Mr. Sanchez's affidavit, finding it to be non-hearsay corroborative evidence of the agreement between W&G and Mr. Franco.

This timely suspensive appeal follows.¹⁰

⁹ Following hearing on March 24, 2025, the trial court awarded plaintiff attorney's fees in the amount of \$105,000.00. That judgment is the subject of a separate appeal to this Court in case 25-CA-249.

¹⁰ The trial court initially set an appeal bond of \$125,000.00, which W&G posted timely. Plaintiff filed a Motion to Amend Order for Suspensive Appeal moving the trial court ex parte to reset the bond at \$459,672.58 pursuant to Louisiana Code of Civil Procedure Article 2124. Without hearing, the trial court amended the ordered appeal bond to \$407,602.59 plus interest. W&G filed an emergency writ application. This Court granted the writ, in part, ordering a

ASSIGNMENTS OF ERROR

On appeal, W&G raises three assignments of error, reproduced as follows:

- A. The trial court erred when it held there was an agreement between the Parties that entitled Appellee to a 22.5% bonus for all cases that he worked on, tacitly denying W&G's Motion to Strike and Objections to Plaintiff's Reply and Affidavit of Mario Sanchez, Jr., and thereby awarding Appellee damages for unpaid wages in the amount of \$256,486.88.
- B. The trial court erred when it held that Appellant acted in bad faith, thereby awarding Appellee statutory penalties.
- C. Even if Appellee were entitled to statutory penalties, which is specifically denied, the trial court erred when it calculated the statutory penalties in the amount of \$151,115.71.

We consider these assignments of error in turn in our discussion below.

DISCUSSION

In its first assignment of error, W&G argues the trial court erred in finding an agreement between the parties for Mr. Franco to receive a 22.5% "bonus" for all cases in which he worked. As an initial matter, we observe this was not the trial court's finding. Rather, the trial court found an agreement whereby Mr. Franco would receive 22.5% of the attorney's fees collected by W&G for those cases identified in the Petition for Wages and Penalties. As to the second argument raised in the first assignment of error, the trial court expressly overruled the objections raised by W&G's motion to strike and objections.

While the first assignment of error misstates the trial court's finding, we will nonetheless undertake a review of (1) the trial court's judgment as to the existence of an agreement between the parties and (2) whether that agreement created the obligation for payment of wages under La. R.S. 23:631 and penalties under La. R.S. 23:632.

contradictory hearing. Following the ordered hearing, the trial court set the appeal bond at \$444,103.97. Thereafter, W&G timely posted its bond on April 11, 2025.

Compensation Agreement

Our analysis begins with whether the trial court erred in finding that there was an oral agreement between the parties for Mr. Franco to receive 22.5% of attorney's fees collected by W&G in those cases identified by his petition. The existence or non-existence of an oral contract is a question of fact. *Read v. Willwoods Community*, 14-1475 (La. 3/17/15), 165 So. 3d 883, 888. The proponent of an oral contract for the payment of money above \$500.00 in value must prove the existence and terms of the contract by at least one credible witness and other corroborating circumstances. La. C.C. art. 1846; *Archaga v. Johnson*, 19-85 (La. App. 5 Cir. 10/16/19, 340), 280 So. 3d 331, 341, *writ denied*, 19-1837 (La. 1/14/20), 291 So. 3d 682; *Seale & Ross, P.L.C. v. Holder*, 19-1487 (La. App. 1 Cir. 8/3/20), 310 So. 3d 195, 200. A party may offer his own testimony in support of a claim of an oral contract. *Archaga, supra*. When supported only with the plaintiff's own testimony, the source of corroborative evidence proving an oral contract must come from a source other than the plaintiff. *Seale & Ross, P.L.C., supra*. The corroborating evidence need only be general in nature and independent proof of every detail of the agreement is not required. *Id.* at 201. The question of whether evidence presented is sufficient to corroborate a claim under article 1846 is a finding of fact to be made by the trier of fact and will not be overturned unless it is clearly wrong. *Knight v. Magri*, 15-543, p. 7 (La. App. 5 Cir. 2/24/16), 188 So. 3d 311, 315, *writ denied*, 16-741 (La. 6/3/16), 192 So. 3d 747.

Under the manifest error, clearly wrong standard, where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review. *Salgado v. Tri-Par. Roofing & Home Improvements*, 19-407 (La. App. 5 Cir. 5/27/20), 296 So. 3d 1201, 1206-07, (citing *Glob. Constr. & Equip., L.L.C. v. Rathborne Properties, L.L.C.*, 18-169 (La. App. 5 Cir. 5/29/19), 274 So. 3d 837.) If the trial court's findings are reasonable in light

of the record reviewed in its entirety, the appellate court may not reverse. *Ardoin v. Firestone Polymers, L.L.C.*, 10-0245 (La. 1/19/11), 56 So. 3d 215, 219. When there are two permissible views of the evidence, the fact-finder's choice between them cannot be manifestly erroneous. *Stobart v. State, Through Department of Transportation and Development*, 617 So. 2d 880, 883 (La.1993).

The threshold question in this case is whether there was a binding agreement between the parties regarding compensation payable to Mr. Franco for legal work performed on W&G cases identified in the petition for wages and penalties. It is uncontroverted that Franco was an at-will employee and that there is no written employment agreement between Mr. Franco and W&G regarding the terms of his employment or his compensation. Also uncontroverted is evidence of salary compensation paid to Mr. Franco from the date of his hire until his termination on January 25, 2023.

The agreement, as the petition claims, was for Mr. Franco to receive 22.5% of attorney's fees collected by W&G in December 2022 and January 2023 for work performed in eleven cases prior to his termination. For four of those cases, L.M., K.M., E.P., and L.H., plaintiff contends W&G paid one-half of the amount due by check dated December 22, 2022, but the remaining balance of \$95,625.00 remained outstanding at the time of Mr. Franco's termination (sometimes referred to as the "balance claim"). As to the remaining seven cases listed, B.S., T.J., K.R., S.T., T.C., and two settlements for the client B.T., plaintiff claims no compensation was paid by W&G. The total amount plaintiff claims Mr. Franco was due for those seven cases is \$160,486.00.

We will begin our analysis with Mr. Franco's balance claim. Submitted in support of the balance claim is the January 27, 2023 email from Mr. Franco to Mr. Gray, which states "[Y]ou confirmed you will pay me the other half (\$95,625) from [L.M., K.M., E.P., and L.H.] in February." The balance claim is also

contained in Mr. Franco's demand letter to W&G dated July 26, 2023. Plaintiff also points to the content of Emily Franco's affidavit describing the telephone conversation between Mr. Franco and Mr. Gray on January 26, 2023.

In response to plaintiff's balance claim, W&G contends the check it issued for \$96,000.00 was payment in full for approved bonuses in four cases. Submitted in support of its contention is the November 22, 2024 affidavit of Eric Wright, which itemizes those bonuses as follows: \$39,375.00 (EP), 47,250.00 (LH), \$3,037.50 (BS), and \$2,250.00 (TC). Regarding plaintiff's balance claim, we note that fees from cases for E.P. and L.H. are identified by both plaintiff and W&G.

Contained in the sealed record are the W&G settlement statements and "Attorney Income & Salard Record" documents for the four cases identified in plaintiff's balance claim – L.M., E.P., K.M., and L.H. The settlement statement for L.H. is dated November 30, 2022; the corresponding typewritten "Attorney Income & Salary Record" reflects a net associate attorney's fee of \$47,250.00, equaling 22.5% of the fees collected by W&G. No alterations appear on this document, and it bears one partner's signature. The settlement statement for E.P. is dated December 2, 2022. In the signed and unaltered "Attorney Income & Salary Record" for the E.P. case reflects a net associate attorney's fee percentage of 22.5% and an amount of \$39,375.00. Settlement statements for L.M. and K.M. are each dated in December 2022. In the "Attorney Income & Salary Record" for the L.M. case, "22.5%" is typewritten below "(%)" and "65,250.00" as net associate attorney's fee. The "Attorney Income & Salary Record" for the K.M. case, in the column below "(%)" is "22.5%" and the net associates attorney's fee is listed as "39,375.00". However, a diagonal line is drawn over the table and 12.5% is handwritten on each document. There is no evidence as to who altered these two documents. However, W&G argues the alterations are evidence that its bonus policy was discretionary.

Turning to the two cases W&G identifies in response to plaintiff's balance claim, B.S. and T.C., for which it asserts bonuses to Mr. Franco were paid in full. The record includes the settlement statement and "Attorney Income & Salary Record" for the B.S. case. The settlement statement for the B.S. case is dated December 27, 2022. Handwritten notes on the "Attorney Income & Salary Record" reflect a reduction in the gross contingency fee from the typewritten amount of 40% to the handwritten amount of 25%. Also handwritten on the page is "3037.50" and an arrow drawn to the struck through typewritten amount of \$12,150.00 beneath the column of net associate attorney's fees. No handwritten alteration appears to the typewritten net associate attorney's fee of 22.5%. The adjusted gross attorney's fees to W&G were \$33,750.00; 22.5% of the adjusted attorney's fees is \$7,593. However, in his affidavit, Mr. Wright states the approved amount of Mr. Franco's bonus in the B.S. case was \$3,037.50

As to the T.C. case, the record reflects evidence of two settlements identified by the client initials T.C. An undated "Attorney Income & Salary Record" having that client name contains a settlement amount of \$25,000, a gross contingency fee of 40%, and a 22.5% associate attorney's fee of \$2,250.00. The document also bears one signature, and the typewritten notation "*Progressive liability settlement". According to the affidavit of Mr. Wright, the approved bonus for Mr. Franco in the T.C. case was \$2,250.00.

The trial court found that plaintiff proved there was an agreement for Mr. Franco to receive the remaining one-half balance owed for fees collected by W&G in the L.M., E.P., K.M., and L.H. cases. We do not find the trial court manifestly erred in rejecting W&G's explanation of the \$96,000.00 payment on December 22, 2022, and determining that Mr. Franco was due \$95,625 for work performed in the four named cases. In its written reasons, the trial court found the "Attorney Income & Salary Statements", including the typewritten associate attorney's fee

percentages, were prepared by W&G, and discounted the credibility of the handwritten alterations appearing on those documents.

In addition, we find arithmetic supports plaintiff's balance claim. The check issued by W&G on December 22, 2022, which plaintiff claims was in partial payment of the total compensation due Mr. Franco, was in the amount of \$96,000.00. W&G contends the check was full payment of bonuses for the four cases identified in Mr. Wright's affidavit. The sum of those bonuses equals \$91,912.50¹¹ and there is no explanation why an additional \$4,000.00 was paid to Mr. Franco. We observe that the total amount of compensation claimed by Mr. Franco for the four named cases he names equals \$191,250.00¹², one half of which is \$95,625.00.

We turn now to plaintiff's demand for compensation from fees collected by W&G in the remaining seven matters for which Mr. Franco received no payment. Because client names are contained in the sealed record, those seven cases are identified by client initials B.S., K.R., S.T., T.J., B.T. (2 cases), and T.C. Plaintiff avers there was an agreement for Mr. Franco to receive 22.5% of attorney's fees collected by W&G as compensation for work he performed in those cases. Conversely, W&G contends there was no such compensation agreement and that any amount it previously paid to Mr. Franco from fees collected in other cases was a discretionary bonus, and neither Mr. Wright nor Mr. Gray approved a bonus for those seven cases. It is uncontested that in the seven cases identified by Mr. Franco, fees were collected by W&G in December 2022 and January 2023.

Plaintiff points to "Attorney Income & Salary Report" for each of the named cases as having "22.5%" typewritten beneath "(%)". Also contained in those documents is the typewritten amount equal to that percentage of the attorney's fees

¹¹ E.P.: \$39,375.00, L.H.: \$47,250.00, B.S.: \$3,037.50, and T.C.: \$2,250.00

¹² L.M.: \$65,250, K.M.: \$39,375, E.P.: \$39,375, and S.H.: \$ 47,250

collected by W&G in the associate's attorney's fee column, which are the same dollar amounts for each case listed in Mr. Franco's demand letter. According to the affidavit of Mario Sanchez, Jr., the "Attorney Settlement Tracker/Spreadsheet" distributed to all associate attorneys by W&G listed the cases settled by Mr. Franco in December 2022 and January 2023 and the assigned fee for each was 22.5%.

Supporting its contention that bonuses paid to associate attorneys, including Mr. Franco, were discretionary, W&G points to the verbatim testimony contained in the November 2024 affidavits of Eric Wright and Daryl Gray. W&G refers to the unsigned "Attorney Income & Salary Report" for each of the seven cases as corroborative evidence of the statements contained in the respective affidavits.

Except for the T.C. and T.J. matters, the record contains a W&G settlement statement and an "Attorney Income & Salary Report" for the B.S., K.R., S.T., and the two B.T. cases. In each "Attorney Income & Salary Report", the typewritten percentage of net associate's attorney's fees is 22.5%. On the "Attorney Income & Salary Report" for the K.R., and two B.T. cases, associate's attorney's fees are printed as \$112,500, \$4945.00, and \$748.00 respectively. However, on each, a diagonal line is drawn through the chart, "12%" is handwritten and initialed, and neither partner's signature appears on the page.

The "Attorney Income & Salary Report" for the B.S. case contains \$12,150.00 as the associate's attorney's fee; 22.5% is listed as the associate's attorney's fee percentage. However, we note multiple handwritten notations appear on the document without explanation, including reference to a reduced gross attorney's fee of \$33,750.00. Applying the 22.5% to the reduced gross attorney's fee produces an associate's attorney's fee for this case of \$7,593.75.

The settlement statement for the S.T. case, dated January 24, 2023, reports a contingency fee to W&G in the amount of \$150,000.00. Printed on the "Attorney Income & Salary Record" for that case is an associate's attorney's fee of

\$33,750.00, which is equal to the 22.5% written on the document. The document is unsigned and a hand drawn diagonal line crosses over the chart.

An “Attorney Income & Salary Record” for the case identified as “T.C.” in plaintiff’s petition is not in the record. The record does contain evidence of two settlements identified by the client initials “T.C.” In one case, an undated “Attorney Income & Salary Record” having that client name reports a settlement amount of \$25,000, a gross contingency fee of 40%, and a 22.5% associate attorney’s fee of \$2,250.00. The document also bears one signature, and the typewritten notation “*Progressive liability settlement”. Also in the record is the copy of a settlement check issued by Geico Casualty Co., dated January 20, 2023, in the amount of \$15,000.00, lists T.C. as a payee, and contains the notation “In Payment of Bodily Injury Coverage”. While the record contains neither a settlement statement nor a “Attorney Income & Salary Record” connected to this Geico payment, applying the same gross contingency fee percentage contained in the Progressive “Attorney Fee & Salary Record” settlement, W&G received \$6,000.00; 22.5% of that contingency fee equals \$1,350.00.

As to the matter identified by the client initials T.J., a settlement statement for that case is filed in the record which reflects a gross attorney’s fee of \$16,000.00. There is no “Attorney Fee & Salary Record” for that case filed in the record. However, based on Mario Sanchez’s affidavit testimony, documents created by the firm assigned Mr. Franco a 22.5% associate’s attorney’s fee, or \$3,600.00, for this case.

The trial court determined that the evidence supported plaintiff’s claim that an agreement existed for Mr. Franco to receive 22.5% of attorney’s fees collected by W&G in those seven cases listed in the petition. Specifically, the court found that the “Attorney Income & Salary Record” in those matters was prepared by W&G, not Mr. Franco. Also, the court pointed to the affidavit of Mario Sanchez,

Jr. as evidence of an agreement for Mr. Franco to receive 22.5% of attorney's fees collected in those cases. As previously addressed, the trial court, in weighing the evidence, clearly did not find the handwritten alterations to the typewritten "Attorney Income & Salary Report" prepared by W&G to be credible.

On appeal, W&G argues that plaintiff failed to present adequate admissible evidence to prove the oral agreement by a preponderance of evidence. Specifically, W&G avers that plaintiff failed to present Mr. Franco's own sworn testimony or any corroborating evidence supporting an agreement. W&G further contends that the "Attorney Income & Salary Records" for the cases at issue were either slashed through and unsigned, which evidences its rejection of Mr. Franco's requested bonus. Additionally, W&G points to the "Attorney Income & Salary Records" of other cases to demonstrate that Mr. Franco was not paid a 22.5% bonus on every case.

In his appellee's brief, plaintiff counters that Mr. Franco's emails and demand letter are admissible evidence of the agreement and that Mr. Sanchez was in fact competent to testify regarding the contract between Mr. Franco and W&G. Because Mr. Franco died before the case was submitted to the trial court for decision, he was an unavailable witness under La. C.E. art. 804. Further, plaintiff contends that the testimonial and documentary evidence produced by W&G is corroborative evidence of the agreement, particularly that Mr. Franco received commission compensation as shown in the "Attorney Income & Salary Record" for all prior cases, and after-the-fact alterations appear only on those records for this controversy.

We agree. It cannot be overlooked that in the fifty plus "Attorney Income & Salary Record" documents contained in the record, only those connected to cases resolved in the several weeks leading to Mr. Franco's termination contain handwritten alterations. A finding that those alterations were made after-the-fact

was not an unreasonable inference from the evidence presented. Additionally, the trial court did not err in considering the emails and demand letter composed by Mr. Franco prior to his death, as well as contents of the Mario Sanchez, Jr. and Emily Franco affidavits.

For the foregoing reasons, we find the trial court's determination that an agreement existed for Mr. Franco to receive 22.5% of fees collected in the eleven cases identified in the petition to be supported by the evidence presented. The amounts Mr. Franco was due under that agreement are as follows: B.T.: \$945.00, B.T.: \$748.13, B.S.: \$7,593.80, T.J.: \$3,600.00, K.R.: \$112,500.00, S.T.: \$33,750.00, T.C.: \$1,350.00. As to L.M., K.M., E.P., and L.H. cases, we find no error in the trial court's determination that an oral contract existed for W&G to pay Mr. Franco the remaining one half of the associate's attorney's fees. However, the record does not support a balance amount due of \$95,625.00 for those four cases. The sum of associate's attorney's fees due in those cases is \$191,250.00, one half of which equals \$95,625.00. However, W&G previously paid Mr. Franco \$96,000.00 towards one-half of the amounts owed, leaving a balance due in the amount of \$95,250.00. Consequently, we find the trial court manifestly erred in the amount due Mr. Franco to be \$256,486.88 and determine that the total sum of amounts owed Mr. Franco to be \$255,736.93.

“Wages” under the Louisiana Wage Payment Act

Having found the trial court was not manifestly erroneous in finding the existence of a compensation agreement between W&G and Mr. Franco, we turn to the question of whether the trial court erred in finding the amounts due Mr. Franco to be wages under the Louisiana Wage Payment Act. The LWPA strictly prohibits the forfeiture of wages upon discharge or termination. La. R.S. 23:634(A)(“[e]mployees shall be entitled to the wages actually earned up to the time of their discharge or resignation.”) Wages, though not defined in the statutes,

are equivalent to the amount then due under the terms of employment. *Boyd v. Gynecologic Associates of Jefferson Par., Inc.*, 08-1263 (La. App. 5 Cir. 5/26/09), 15 So. 3d 268, 272. Black’s Law Dictionary (12 ed. 2024) defines “wage” as:

Payment for labor or services, [usually] based on time work or quantity produced; [specifically], compensation of an employee based on time worked or output of production. Wages include every form of remuneration payable for a given period to an individual for personal services, including salaries, commission, vacation pay, bonuses, ...

Louisiana jurisprudence has deemed wages to include compensation that is earned during a pay period. *Boudreaux v. Hamilton Med. Grp., Inc.*, 94-879 (La. 10/17/94), 644 So. 2d 619, 622.

Whether a bonus constitutes a “wage” under Louisiana Revised Statute 23:631 is a mixed question of law and fact generally reviewed under the manifest error standard. *Locke v. MADCON Corp.*, 22-630 (La. App. 1 Cir. 12/22/22), 360 So. 3d 519, 526, *writ denied*, 23-95 (La. 4/4/23), 358 So. 3d 866; *Kaplon v. Rimkus Consulting Grp., Inc. of Louisiana*, 09-1275, p. 13 (La. App. 4 Cir. 4/28/10), 39 So. 3d 725, 733, *writ denied*, 10-1207 (La. 7/2/10) 39 So. 3d 587. The trial court determined the amounts due from the agreement for Mr. Franco to receive 22.5% of the attorney’s fees collected by W&G in cases identified in the petition to be non-discretionary wages. It is uncontroverted that Mr. Franco performed legal work leading to receipt of attorney’s fees by W&G in those cases.

On appeal, W&G asserts Mr. Franco received a salary and the amounts at issue were not wages owed to Mr. Franco. W&G argues that the associate’s attorney’s fees that Mr. Franco is seeking in this case were bonuses and not wages under La. R.S. 23:631. Conversely, plaintiff contends the amounts owed to Mr. Franco were not bonuses but commissions for work performed.

A “bonus” is defined by Black’s Law Dictionary (12th ed. 2024) as “A premium paid in addition to what is due or expected; [especially], a payment by way of division of a business's profits, given over and above normal

compensation.” On the other hand, a “commission” is defined by Black’s Law Dictionary (12th ed. 2024) as “A fee paid to an agent or employee for a particular transaction, [usually] as a percentage of the money received from the transaction.” Applying those definitions, the evidence presented in the record of this case establishes that the compensation owed to Mr. Franco was not bonus income but commission.

This Court has previously addressed the question of whether bonus compensation is considered wages under the Louisiana Wage Payment Act. *Russo v. OnPath Fed. Credit Union*, 23-537 (La. App. 5 Cir. 5/29/24), 388 So. 3d 1274. In *Russo*, we determined that compensation from an incentive plan to encourage production is more in the nature of commissions and are considered wages under La. R.S. 23:631 rather than bonuses. *Id.* at 1279.

In *DiVittorio v. Seale & Ross, PLC*, 22-392 (La. App. 1 Cir. 12/27/22), 360 So. 3d 841, the Louisiana First Circuit analyzed an attorney compensation arrangement and distinguished between different types of bonuses in the legal practice under the Louisiana Wage Payment Act. *Id.* The First Circuit, applying Louisiana Revised Statute 23:631, found that compensation “based on actual work performed by the plaintiffs” were non-discretionary wages.” *Id.*

Upon examination of the record before us, we conclude that the trial court did not err in finding that Mr. Franco’s compensation based upon fees collected on cases he worked were “wages” for the purposes of Louisiana Wage Payment Act. Evidence that amounts at issue were tied to legal services or work performed by Mr. Franco during his employment with W&G is undisputed. Thus, we find the trial court’s determination that sums due under the agreement for Mr. Franco to be paid commissions from fees collected by W&G are wages due under the Louisiana Wage Payment Act was not manifestly erroneous. However, we do not find the evidence supports the calculation that Mr. Franco was due wages in the amount of

\$256,480.88. Rather, the record reflects \$255,736.93 in wages that were due Mr. Franco when his employment was terminated by W&G.

Statutory Penalties

In its second assignment of error, W&G raises the question of whether the trial court erred in awarding statutory penalties. Having concluded that the trial court was not manifestly erroneous in determining that Mr. Franco was due wages under La. R.S. 23:631, we now review the trial court's determination that plaintiff was entitled to recover statutory penalties under La. R.S. 23:632, which states in pertinent part:

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.

* * * * *

To recover penalties under the Louisiana Wage Payment Act, an employee must prove three elements: (1) wages were due and owing; (2) demand for payment was made at the place where the employee was usually paid; and (3) the employer failed to pay upon demand. *Sandrock v. KFB Investment Holdings, L.L.C.*, 23-676 (La. App. 1 Cir. 1/26/24), 383 So. 3d 992, 999; *Reaver v. Degas House, L.L.C.*, 22-464, p. 7 (La. App. 4 Cir. 3/13/23), 359 So. 3d 570, 576, *writ denied*, 23-532 (La. 6/7/23), 361 So. 3d 985; *Berard v. L-3 Communications*

Vertex Aerospace, LLC, 09-1202 (La. App. 1 Cir. 2/12/10), 35 So. 3d 334, writ denied, 2010-0715 (La. 6/4/10), 38 So. 3d 302. Where all three elements are met for an award of damages for failure to pay wages under Louisiana Revised Statute 23:631, an employer is liable for an additional amount as a penalty if the failure to pay the amount due was in bad faith. La. R.S. 23:632. Statutes providing for the imposition of a penalty are to be strictly construed. *Harrelson v. UTC Laboratories, LLC*, 23-64 (La. App. 5 Cir. 11/2/23), 376 So. 3d 1038, 1043.

The assignment of error raises the question of whether W&G's failure to pay upon demand was arbitrary or in a bad faith manner justifying penalty wages under La. R.S. 23:632. A trial court's determination of whether an employer is arbitrary or in bad faith for purposes of imposing penalty wages is a question of fact and is, therefore, subject to the manifest error standard of review. *Kaplon*, 39 So. 3d at 733; *Loup v. Louisiana State School for the Deaf*, 98-329, (La. App. 1 Cir. 2/19/99), 729 So. 2d 689, 693.

In *Berard, supra*, the First Circuit held that penalty wages will be assessed when the employer is arbitrary, sets out procedural pitfalls for the employee, or is merely negligent in failing to pay past due wages. *Berard*, 35 So. 3d at 345. W&G, relying on our recent decision in *Russo, supra*, argues that there existed a "bona fide dispute" as to what was owed to Mr. Franco, pointing to its characterization that the fees were "bonuses" and not wages. In *Russo*, there was a written policy for paying employee bonuses, but we found there was a "bona fide dispute" over the formula for calculating bonus compensation that arose prior to the employee's termination.

In his appellee brief, plaintiff argues that W&G did not present evidence to support of a "bona fide" dispute or good faith defense to its failure to pay Mr. Franco timely. Plaintiff further points out that the altered "Attorney Income & Salary Record" for cases in dispute reflect that an associate's attorney's fee of 12%

was approved, yet it failed to pay Mr. Franco an amount equal to that percentage for those cases.

The dispute presented in this controversy is not the formula for calculating bonus wages but whether any compensation was due Mr. Franco at all. In this case, the trial court made a factual determination that W&G's failure to pay Mr. Franco the amounts due was arbitrary and unreasonable. We agree.

After receiving Mr. Franco's demand letter by email, W&G partner Daryl Gray responded "...go ahead and file your lawsuit". Supporting W&G's position that the amounts paid to Mr. Franco were discretionary bonuses are alterations to "Attorney Income & Salary Record" in several cases, which the trial court found not to be credible. The only evidence of the firm's unwritten "discretionary bonus policy" are affidavits of firm partners created as part of the litigation. W&G presents no contemporaneous corroborating evidence proving this fact. Additionally, as plaintiff points out on appeal, if W&G's explanation of a discretionary bonus policy was accepted, Mr. Franco was not paid that undisputed portion of associate's attorney's fees based on the 12% contained in the altered "Attorney Income & Salary Record" documents. Hence, we do not find the trial court was manifestly erroneous in its finding that W&G's failure to pay Mr. Franco timely was arbitrary and in bad faith.

Penalty Damages Calculation

In its final assignment of error, W&G contends the trial court erred in calculating its award of penalty damages. Louisiana Revised Statute 23:632, in pertinent part, states "... 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, ..." The trial court awarded plaintiff \$151,117.71 statutory penalties based upon its calculation of Mr. Franco's 2022 earnings.

On appeal, W&G argues that the penalty should have been based on a daily wage using his yearly salary of \$75,000.00. Initially, we observe that this argument is undermined by W&G's own evidence that Mr. Franco was not paid an annual salary in each of the twelve-month period preceding his termination. The affidavit of W&G principal Eric Wright states that Mr. Franco was not paid a salary from August 2022 to November 2022. Rather, his income for those four months was based only on the firm's "discretionary bonus" policy. It is not credible that an employee would agree to perform work based solely on the hope that he might receive remuneration for his work.

Nonetheless, citing this Court's decision in *Harrelson, supra.*, W&G contends that "[I]t is well established that any penalty wages awarded are only based upon their base pay and not commissions/bonuses." In response, plaintiff argues that the commission income due Mr. Franco is wages to be included in the calculation of penalties under La. R.S. 23:632. That statute, plaintiff points out, instructs that statutory penalties are to be based on either ninety days of wages or full wages until paid, and that "wages have been defined by jurisprudence to include bonuses, commission, and/or the amount earned or relied upon for work or services" (citing *Bourdreaux, supra*; *Kaplon, supra.*). Plaintiff further argues that Mr. Franco relied on the commissions as his total wages and statutory penalties should be calculated accordingly.

In *Harrelson*, cited by W&G in support of its argument to limit statutory penalties to Mr. Franco's salary, the employees were paid a base salary plus earned commissions. *Id.* The commissions were based upon a percentage of revenue to the employer from samples the respective sales teams under their supervision sent in for DNA and toxicology testing. *Id.* This Court affirmed the trial court's exclusion of that commission income in its calculation of the employees' daily rate of pay. *Id.* We find the commission wages due Mr. Franco to be distinguishable

from the employees' claims in *Harrelson*. The basis for Mr. Franco's commission compensation in this case was the product of his own effort and skill in producing contingency fee revenue for the firm individual cases.

In cases where courts have limited calculation of ninety-days wages to salary, the additional compensation awarded was akin to bonus income, not commission wages. See *Harrelson, supra*; *Stegall v. Orr Motors of Little Rock, Inc.*, 48,241 (La. App. 2 Cir. 6/26/13), 121 So. 3d 684, 688. However, where the employee is due commission wages, courts have calculated statutory penalties based on commission wages and salary wages. See *DiVittorio, supra*. After affirming the trial court's finding that bonuses based on work actually performed by the attorney were non-discretionary wages, the First Circuit upheld inclusion of production bonus compensation for calculating the attorney's daily rate of pay. *Id.* We find this rationale persuasive, and accordingly, find the trial court was not manifestly erroneous by including Mr. Franco's commission wages in its determination of his daily rate of pay for the purpose of calculating a statutory penalty award.

Next, we review the calculation of the trial court's penalty award of \$151,115.71. La. R.S. 23:632 does not specify a formula for calculating an employee's daily rate of pay. In *Wortham v. Acadia Healthcare, LLC*, 14-718 (La. App. 3 Cir. 3/18/15), 160 So. 3d 602, the Louisiana Third Circuit Court of Appeal applied a formula of dividing the employee's annual wages by twelve months, then dividing the monthly wage by twenty-two workdays per month. In *DiVittorio*, the First Circuit calculated the employee's annual wages using both actual wages paid and the amounts it determined should have been paid during the year to the employee. *DiVittorio, supra*. We agree that, in calculating Mr. Franco's average daily wage for purposes of statutory penalties under La. R.S. 23:632, the court

should consider both the wages actually paid and the wages that should have been paid during the calendar year.

The trial court does not identify the formula it used to arrive at the statutory penalty award in either its judgment or its written reasons for judgment. But it appears that the trial court applied something like the *Wortham* formula to the evidence in this case. Dividing the amount awarded, \$151,115.71, by 90 days yields a daily rate of pay of \$1,679.06.

Attached to the Memorandum in Support of Plaintiff's Petition for Wages and Penalties as Exhibits 27 and 28 respectively are copies of the W-2 and 1099 issued by W&G to Mr. Franco for 2022. The former reports wages of \$260,360.00 and the latter reports non-employee compensation of \$96,000.00¹³. The record also reflects unpaid commissions due Mr. Franco for the following cases that settled prior to the end of 2022: \$36,625.00 (L.M.), \$19,687.50 (E.P.), \$19,687.50 (L.H.), \$945.00 (B.T.), \$748.13 (B.T.), \$7,593.80 (B.S.), and \$3,600.00 (T.J.). Thus, according to the record, Mr. Franco's "should have been" wages in 2022 was \$436,246.93. We therefore find the trial court erred by including evidence of wages which should have been paid to Mr. Franco in 2023 in its determination of his annual wages for calculating statutory penalties.

We also find that it was error to apply the *Wortham* formula to the evidence in this case. As noted above, Mr. Franco's annual compensation was salary and commission. Unlike hourly wage employees, his compensation was not based on a fixed workday or workweek schedule. Hence, we determine that in the absence of evidence of an actual work schedule, the objectively reliable calculation of a salaried employee's average daily wage is to be based on a thirty-day month. Applying this formula to Mr. Franco's "should have been" 2022 wages of

¹³ The amount reported in the 1099 is equal to the check issued to Mr. Franco on 12/22/2022 for \$96,000.00, which has been found to be wages under the Louisiana Wage Payment Act, and is therefore included in the calculation of statutory penalties.

\$436,246.93 results in a daily rate of pay for 2022 of \$1,211.80 and an appropriate statutory penalty award of \$109,061.73. Based on the foregoing, we find the trial court manifestly erred in its calculations of the penalty damage award.

Consequently, we amend the penalty damage award of \$151,115.71 and determine the proper amount of statutory penalties due plaintiff under La. R.S. 23:632 to be \$109,061.73.

CONCLUSION

For the reasons assigned, we affirm the trial court's judgment rendered in favor of Phillip A. Franco, as independent administrator of the succession of Jason P. Franco. However, we amend the amount of wage damages and statutory penalties, and render judgment in favor of Phillip A. Franco, as independent of the succession of Jason P. Franco, and against Wright & Gray, LLC in the amount of \$255,736.93 as unpaid wage damages and \$109,061.73 as statutory penalties.

**AFFIRMED AS AMENDED, AND
JUDGMENT RENDERED**

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
STEPHEN J. WINDHORST
JOHN J. MOLAISSON, JR.
SCOTT U. SCHLEGEL
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **MARCH 27, 2026** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

25-CA-233

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)

HONORABLE DONALD A. ROWAN, JR. (DISTRICT JUDGE)

P. M. DONOVAN (APPELLEE)

SCOTT C. STANSBURY (APPELLEE)

SCOTT E. DELACROIX (APPELLEE)

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