THE STATE OF SOUTH CAROLINA
In the Court of Appeals



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APPEAL FROM HORRY COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Jr., Circuit Court Judge

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Case No.: 2009-CP-26-0043

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Timothy A. Zinn, Robert Adams, Laura Arrington, Stephen C. Black, Bradley Kirk Bray, Mark D'Amico, Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly Levasseur, John Martin Loughlin, Joe Maranville, Khalif Middleton, Chelcie Oxentine, Judith A. Parker, Matthew W. Reed, Cynthia G. Reilly, Gerald Ryba, Sherry Singleton, Steven G. Thoni, Stratton Vitikos, Michael H. Willis, and Michael J. Zanardo.....Respondents/Appellants,

v.

CFI Sales & Marketing, Ltd., d/b/a Westgate Resorts,.....Appellant/Respondent.

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# INITIAL APPELLANT'S BRIEF OF APPELLANT/RESPONDENT

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## STATEMENT OF THE ISSUE ON APPEAL

Did the trial judge err in ruling that the reserve and charge back components of the employment contracts violated the South Carolina Payment of Wages Act, where the identical parties had previously litigated that very issue in another action, the trial judge had already ruled the doctrine of res judicata precluded a subsequent re-litigation of that matter, the language in the written order contradicted the judge's ruling at trial, and the contracts were lawfully based on the satisfaction of conditions precedent?

## STATEMENT OF THE CASE

This appeal focuses on the following language in the August 7, 2012, post-trial Order ("objected language" or "improper language"):

> Here, the contact [sic] of Defendants violates all of the above code sections. First, Plaintiffs' wages were reduced without notice. Second, wages were withheld after separation from the payroll. Third, the chargeback scheme is unenforceable and is contrary to the South Carolina Payment of Wages Statute in that an employee could sell a timeshare product and actually not be paid for ten years after the sale. ...
>
> For the reasons set forth above, Defendant's employment contracts with Plaintiffs violates [sic] the Payment of Wages Act as a matter of law and this court so declares that the contract is void as against public policy.

This language, which does not reflect any ruling the judge made during the trial, radically altered the nature of the action. Despite obtaining an almost entirely favorable jury verdict, the Appellant/Respondent suddenly found itself faced with a ruling that could potentially affect its future business dealings. Therefore, despite the nearly total victory at the actual trial, the Appellant/Respondent is compelled to pursue this appeal.

This action stems from a dispute between the Appellant/Respondent CFI Sales & Marketing, Ltd. ("CFI") and several of its former salespersons over their claims of unpaid wages. As explained below, this case ("the Zinn action") is actually the second lawsuit between several former representatives and CFI regarding allegations of unpaid wages. In 2010, the parties[1] resolved the previous case, captioned "Parker v. CFI Sales & Marketing, Ltd." ("the Parker action"), through a written agreement that the circuit court incorporated into a final judgment. The Parker judgment expressly carved out a very narrow category of unpaid wages to be specifically litigated in the Zinn action. According to the Parker judgment, the only permissible wage claims in the Zinn action involved sales commissions earned while the sales representatives were still working for CFI. These commissions were unrelated to the "reserve commissions" previously adjudicated in the Parker action. The Parker action resolved and discharged all other actual or potential wage claims, which were not (and could not be) at issue in the Zinn action.

The Respondents/Appellants filed their Summons and Complaint in this action on January 5, 2009. [Summons and Complaint.] The Complaint alleged the following causes of action: (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, (3) a request for an accounting, and (4) a request for a declaratory judgment that CFI violated the South Carolina Payment of Wages Act ("Wages Act").[2] [Complaint.] CFI filed and served a timely Answer denying those claims. [Answer.] After an extended discovery period, CFI filed a motion for summary judgment on

[1] All of the plaintiffs in the present case were also parties in the Parker action.

[2] These claims were identical to those asserted by the plaintiffs in the Parker action, which included all of the Respondents/Appellants.

December 28, 2011. [Summary Judgment Motion.] CFI argued that the final Parker judgment barred substantially all of the identical claims asserted in the Zinn action under the doctrine of *res judicata*. [Summary Judgment Motion.]

The case was called to trial on February 13, 2012. Before the trial began, the presiding judge heard extensive arguments on CFI's summary judgment motion. Ultimately, the trial judge concurred with CFI and ruled that the doctrines of *res judicata* and collateral estoppel – as a result of the Parker judgment – expressly barred the Zinn plaintiffs from asserting any claims that they either raised or could have raised in the Parker action. [Trans., pp. 42-43.] Such claims included, but were not limited to, the validity of the reserve and charge back clauses in the parties' agreements under the Wages Act. [Trans., pp. 42-43.] The judge did not enter a separate or specific written order granting CFI's summary judgment motion because the trial was already underway.

There were initially 25 plaintiffs in the Zinn action. However, the following plaintiffs failed to appear at trial, and their attorneys agreed to the dismissal with prejudice of those plaintiffs' claims: Jimmy Kelly, Whitney Renee Knox, Joe Maranville, Matthew Reed, Gerald Ryba, Stratton Vitikos, and Michael Zanardo. [Trans., pp. 303-306, 616-618.] In addition, CFI successfully moved for a directed verdict as to the following plaintiffs: Steven Gregory Thoni, Khalif Middleton, Lynn Lanpher, Michael Wills, and Sherry Singleton. [Trans., pp. 651-657.]

At the close of the evidence, the judge granted a directed verdict to CFI on all the plaintiffs' claims for breach of contract accompanied by a fraudulent act. [Trans., pp. 799-800.] The plaintiffs' attorneys agreed to withdraw the request for an accounting. Lastly, the judge announced the issue of whether CFI violated the Wages Act as a result

of its alleged non-payment of commissions for the remaining Zinn plaintiffs was a question of law for him to determine at a later time. [Trans., pp. 799-801.] Consequently, the judge submitted to the jury only the breach of contract claims for the following thirteen plaintiffs: Robert Adams, Laura Arrington, Stephen Black, Bradley Kirk Bray, Mark D'Amico, Thomas DeVitis, Rodney Eddie Haynes, Holly LeVasseur, John Martin Loughlin, Chelcie Oxentine, Judith Parker, Cynthia Reilly, and Thomas Zinn.

As expected, the Zinn plaintiffs testified that CFI owed them hundreds of thousands of dollars in unpaid commissions. CFI vehemently contested those claims. However, CFI admitted at trial that as a result of a minor accounting oversight, Laura Arrington did not timely receive a commission totaling $2,769 – an amount well below what Arrington claimed at trial and asked the jury to award. After its deliberations, the jury awarded Arrington the exact amount stated in CFI's closing argument. [Trans., pp. 835, 843, 877.] Likewise, the jury returned defense verdicts on the remaining twelve plaintiffs' claims. [Trans., pp. 877-78.]

The Zinn plaintiffs filed timely post-trial motions, which requested: (1) a new trial for the twelve plaintiffs whose claims the jury rejected, (2) a tripling of Ms. Arrington's damages pursuant to the Wages Act, and (3) an award of attorney's fees for all plaintiff regardless of whether they were prevailing parties. [Post-Trial Motion.] On June 5, 2012, the judge sent a letter to the parties delineating his post-trial rulings on the pending motions. [Letter.] In his letter, the judge similarly alerted the parties of his conclusion that CFI had violated the Wages Act in two specified ways: (1) making a late payment of wages due to Laura Arrington, and (2) altering the terms of the contract without written

notice. [Letter.] The judge asked the plaintiffs' attorneys to prepare a proposed draft order memorializing the specific instructions and findings reflected in the trial judge's letter. [Letter.]

Shortly after receiving the judge's letter, the plaintiffs' attorneys submitted a proposed order. They did not consult with CFI's attorneys or provide a copy of the proposed order for CFI's input before sending it to the judge. The judge signed the proposed order on July 19, 2012, and filed it on August 7, 2012. [Order.]

Because the order did not accurately reflect the judge's ruling concerning CFI's entitlement to summary judgment as to all claims involved in Parker, and because it inserted objectionable language invalidating CFI's employment agreements based on CFI's reserve and charge back systems, CFI filed a timely Rule 59(e) motion. [Rule 59(e) Motion.] CFI sought the deletion of the objectionable and unfounded language voiding CFI's employment contracts, specifically the reserve and charge back provisions, as violations of the Wages Act. CFI asserted that this language was improper because those legal issues were not before the trial judge and could not have been part of the Zinn action due to the Parker judgment. CFI argued the belated, improper language inserted by the plaintiffs' counsel not only contravened the trial judge's ruling, but was also intended to circumvent the doctrine of *res judicata* as a legal bar to any subsequent re-litigation of all claims that were the subject of the Parker judgment, including the validity of the reserve and charge back provisions under the Wages Act. [Rule 59(e) Motion.]

Despite the plaintiffs' inclusion in the proposed order of a ruling he did not make or announce, the judge denied CFI's Rule 59(e) motion without any comment in a form order filed on September 27, 2012. [Form Order.] CFI filed a Notice of Appeal in this

Court on October 5, 2012, and the plaintiffs filed a cross-appeal on October 15, 2012. [Notices of Appeal.]

## STATEMENT OF THE FACTS

CFI's appeal arises out of the Respondents/Appellants' ("the Zinn plaintiffs") self-serving and unjustified attempt to *reverse* the Parker judgment and its intended effect on the previously litigated claims they tried to raise in the Zinn action. Consequently, a detailed discussion of the Parker action is crucial for a meaningful evaluation of this appeal.

### A. Operative Facts Controlling Both Actions

CFI Sales & Marketing, Ltd. ("CFI"), the Appellant/Respondent, is a developer of timeshare resorts, including one in Myrtle Beach, SC. [Complaint.] The Zinn plaintiffs worked for CFI as salespersons in the early-to-mid 2000s. [Complaint.] Before they began working for CFI, each Zinn plaintiff signed employment contracts setting forth, among other things, compensation information and requirements while employed by CFI and after their respective discharges.

### B. Parker Action Overview – First Case Filed

On September 4, 2007, four former CFI employees filed an action against CFI in the Horry County Court of Common Pleas. [Parker Complaint.] That lawsuit was captioned "Judith A. Parker, Caroline Jordan, Christopher J. DeCaro, and Charles S. Walker, Jr., individually and on behalf of others similarly situated, Plaintiffs, vs. CFI Sales & Marketing, Ltd., d/b/a West Gate Resorts" ("the Parker action"). [Parker Complaint.] The Complaint in the Parker action – first in time – alleged five causes of action: (1) accounting, (2) declaratory judgment, (3) "Wages, Penalties and Attorney's

Fees," (4) breach of contract accompanied by a fraudulent act, and (5) breach of contract. [Parker Complaint.] The Parker Complaint also sought class certification. [Parker Complaint.] The circuit court eventually certified a class consisting of *former* CFI sales representatives who previously worked in Myrtle Beach and had reserve accounts during the relevant period established by the court. [Class Certification Order.] All of the Zinn plaintiffs were also plaintiffs in the Parker action. [Parker Complaint.]

CFI answered the Parker Complaint and vigorously disputed the claims alleged in it. As discovery progressed, it became clear the Parker plaintiffs (including the Zinn plaintiffs) were focusing on the reserve account and charge back provisions of the CFI employment contracts as the basis for the recovery of "unpaid wages." Among other allegations, the plaintiffs claimed those provisions violated the Wages Act in several respects, including the timing of final payments made after a sales representative was discharged from employment. Again, though, the claims in the Parker action involved requirements or triggers for payment of the reserve accounts and the imposition of charge backs, all which arose *after* discharge and were completely unrelated to the requirements needed to establish payment for commissions to be received during employment. The Zinn action dealt with commissions due and payable while the sales representatives were employed by CFI.

### C. CFI's Reserve and Charge Back Clauses Litigated in the Parker Action

CFI compensated its sales representatives ("Employees") solely on a commission basis for each sale of a timeshare interest. The commission due to each Employee was paid within a prescribed period after each sale, less a contractually agreed percentage of such commission that was allocated to a "reserve account." [Trans., pp. 675-681.] Such

commissions, net of the reserve allocations, were paid to the Employees shortly after the sale even though the timeshare purchaser paid only a small percentage of the total purchase price at closing. [Trans., pp. 675-681.] The purchaser usually financed, through a purchase money promissory note and mortgage held by the seller, as much as 95% of the purchase price. The unpaid wages that the plaintiffs in Parker sought to recover were the contractually agreed percentages of those sales commissions – in other words, the monies that the Employees paid into the respective reserve accounts.

The reserve account each of the Parker plaintiffs contractually agreed to fund with a portion of the commissions they earned was designed to provide a measure of protection to CFI against defaults by the timeshare purchasers in the purchase money promissory notes and mortgages through which the lion's share of the purchase price was paid. Each Parker plaintiff agreed that the reserve portion of his or her commissions would be retained in reserve until the timeshare purchaser made six timely consecutive monthly payments on the purchase money promissory note and mortgage. If that occurred, the reserve was "released" as to that sale. After each of the Parker plaintiffs terminated as timeshare salespersons for CFI, each sale they had made was evaluated for the timeliness and frequency of the payments of the purchase money mortgage and the reserve account appropriately reconciled. [Trans., pp. 681-683.]

Should a timeshare purchaser default – fail or refuse to make the required payments on the purchase money mortgage – than the amount of the commission *already paid and received by* the Parker plaintiffs was charged against the balance of the reserve (commonly referred to as a "charge back"). Each such defaulted sale resulted in a charge back until the reserve balance was exhausted. In this fashion, CFI was able to recoup a

portion of the commissions paid to the Parker plaintiffs for sales on which CFI did not receive the purchase price the timeshare purchaser agreed to pay and upon which the commission has already been paid to the Parker plaintiffs. These terms appeared in the employment contracts that the Employees in Parker and Zinn signed prior to beginning work for CFI. [Trans., pp. 72-73, 196.]

**D. Parker Judgment**

On the eve of trial, the parties[3] to the Parker action reached an agreement as set forth in a Memorandum of Understanding ("the MOA"), which the circuit court incorporated into a final judgment. As a result, the circuit court filed an Order Approving Class Settlement and Granting Judgment to Plaintiff Class ("the Parker Order"). The Parker Order incorporated the MOA by reference and included a copy of it as an exhibit. [Parker Order, p. 5.]

The MOA contained the following provisions:

> As payment for and satisfaction of all claims made or asserted by the Class Claimants or which could or should have been made or asserted by the Class Claimants for any and all matters occurring or arising during the Class Period in connection with commission reserves alleged to be due to Class Claimants and owed by CFI, including all claims for enhanced (double or triple) or punitive damages and pre-judgment interest and all claims for future payments of commission reserves, and inclusive of attorneys' fees and recoverable litigation costs (for which there shall be no separate award or recovery), a stipulated judgment shall be entered, in behalf of all Class Claimants (other than those who had opted-out) and Class Counsel (to the extent of their entitlement to payment of attorneys' fees and reimbursement of litigation costs) and against CFI in the amount of Six Hundred Fifty Thousand ($650,000) Dollars.
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> * * *

[3] The same attorneys represented both the Parker plaintiffs and the Zinn plaintiffs.

> There shall be no further reconciliation or payment of reserves following the entry of the Stipulated Judgment. This Settlement shall not dispose of the **claims for unpaid wages (not commission reserves) set forth in the matter styled *Timothy Zinn et al. v. CFI Sales & Marketing, Ltd.***, Civil Action No. 2009-CP-26-0043 (S.C. Ct. Comm. Pleas, 15th Judicial Circuit, Horry Cty., SC), which shall continue unaffected by the Settlement of the Civil Action.

[MOA, pp. 2-4 (emphasis added).] Thus, the Parker Order, through its incorporation of the MOA, resolved all the claims the Parker plaintiffs (inclusive of the Zinn plaintiffs) raised, or could have raised, against CFI involving unpaid commissions associated with CFI's reserves and the charge back system. The only exceptions were "claims for unpaid wages (not commission reserves) set forth in" the Zinn case. Simply stated, the Parker Order disposed of all claims and causes of action directly or indirectly relating to the funding and distribution of the reserves and/or the charge back system.

The Parker plaintiffs did not appeal or otherwise challenge the Parker Order. Consequently, the Parker Order became *res judicata* and the final law of the case as to these former Employees and CFI with respect to all disputes concerning the commission reserve accounts, the charge back system, and the employment contracts that established them. Indeed, the Zinn plaintiffs have never directly disputed that fact.

### E. Zinn Action – The Second Case

On January 5, 2009, the Zinn plaintiffs, a subset of the Parker plaintiffs, filed the Summons and Complaint in the present action ("the Zinn Complaint"). The claims set forth in the Zinn Complaint – including the wording of the allegations – are identical to those in the Parker Complaint. Consequently, CFI moved for summary judgment as to any claims or issues relating to the employment contracts arising out of reserve account

or charge back systems. [Summary Judgment Motion.] The trial judge granted that motion in relevant part as the trial in this case was starting. [Trans., pp. 42-43.] However, the judge did not issue a written order for that decision. The judge's only substantive written order in this case involved his rulings on the Zinn plaintiffs' post-trial motions. That order, which the Zinn plaintiffs' attorneys drafted without input or review by CFI's counsel, contradicted the judge's earlier decision to grant CFI summary judgment. The summary judgment granted by the judge applied to all claims involving – directly or indirectly – CFI's reserve accounts or the charge back system or its implementation based on the employment contracts executed by the parties.

The Zinn trial focused solely on commissions earned by the Zinn plaintiffs while active Employees of CFI. Specifically, the Zinn plaintiffs alleged they made sales while they were employed by CFI for which they did not receive commissions that were due and payable, as defined by the employment contracts. Sales commissions became due to current Employees only after the occurrence or two conditions precedent: (1) the purchaser did not cancel the deal within the allotted rescission period (seven days), and (2) the purchaser made a full down payment that was typically 10% of the purchase price. CFI only became obligated to pay commissions *after* those two conditions were satisfied.

Neither the reserve accounts nor the charge back systems were remotely relevant to determine or evaluate commissions due to current or active Employees, which was the inquiry at the heart of the Zinn case. Indeed, these two topics were only relevant to determine wages owed *after* discharge, and the trial judge ruled that *res judicata* barred the re-litigation of these two topics in the Zinn action. The written Order, however, did not reflect that ruling; rather, the Order contradicted it.

## STANDARD OF REVIEW

This case involves a legal ruling by the circuit court. An appellate court "is free to decide questions of law with no particular deference to the lower court." *Dreher v. Dreher*, 370 S.C. 75, 79, 634 S.E.2d 646, 648 (2006).

## ARGUMENT

### I. The trial court erred in finding that the reserve and charge back components of the employment contracts – claims that were not before the court in the Zinn action – violated the Wages Act.

As discussed above, CFI's appeal is limited in scope to the objectionable language in the Zinn post-trial Order. CFI's appeal does not seek to challenge the jury verdict awarding damages to Laura Arrington for unpaid wages.[4] Indeed, CFI's trial counsel conceded in closing arguments that Arrington was entitled to receive the amount the jury awarded her. CFI does, however, challenge the portion of the trial court's order finding that CFI's employment contracts, in particular the reserve and charge back clauses, violated the Wages Act. The language of the post-trial order does not accurately mirror the judge's ruling at trial, which effectively barred any litigation as to the validity of the commission reserve system based on the preclusive effect of the Parker Order and the doctrine of *res judicata*. Therefore, this Court should reverse in part and remand with instructions for the trial court to file an amended order striking the challenged language.

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[4] Likewise, CFI will not challenge the award of treble damages to Arrington if that award is based on CFI's failure to timely pay Arrington's commission while she was employed by CFI. However, CFI does challenge that ruling to the extent the trial judge based his decision to triple Arrington's damages on some other purported violation of the Wages Act, including the reserve and charge back components of CFI's contract.

(A) *Res judicata* barred the trial court's post-trial review of the legality of CFI's reserve and/or charge back systems under the Wages Act.

CFI's use of a reserve system for commissions, including the charge back provision, was the central disputed issue in the Parker litigation. The Parker Complaint included the identical request for a declaratory judgment on violation of the Wages Act as the Zinn Complaint. Consequently, the final judgment in the Parker case operated as a bar to any future litigation on that issue, and the trial judge had no authority to address the claim for a declaratory judgment or any other issues relating to the validity of the reserve account or charge back systems implemented by contractual agreement between CFI and its Employees. Notably, the trial judge reached this very conclusion when he granted CFI's summary judgment motion based on *res judicata* at the inception of trial. He continued to reaffirm this crucial finding several times during the trial when the Zinn plaintiffs improperly sought to re-litigate the validity of CFI's reserve and charge back systems and to revisit the judge's unfavorable summary judgment decision. Therefore, the judge committed reversible error by inexplicably reversing[5] his prior trial ruling that the Zinn plaintiffs were barred from re-litigating the validity or CFI's reserve and charge back systems, and further determining that these systems violated the Wages Act.

As this Court has recently explained:

> Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. ... Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. ...

[5] Obviously, this "reversal" resulted from the Zinn plaintiffs' belated insertion of the objectionable and improper language in a proposed order, which the trial court subsequently signed.

* * *

> Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action. ... The doctrine [of res judicata] flows from the principle that *public interest* requires an end to litigation and no one should be sued twice for the same cause of action.

*South Carolina Pub. Int. Found. v. Greenville Co.*, 401 S.C. 377, 385-86, 737 S.E.2d 502, 506-07 (Ct. App. 2013) (emphasis in original) (internal citations omitted). To establish *res judicata*, a party must show the following elements:

> (1) The parties must be the same or their privies; (2) the subject matter must be the same; and (3) while generally the precise point must be ruled, yet **when the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but of what might have been decided.**

*Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997) (quoting *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 742-43 (Ct. App. 1986) (emphasis added)).

The presence of the first two elements is undisputed. Each Zinn plaintiff was also a member of the class certified in the Parker action, and CFI was the lone defendant in both cases. The parties are identical. The subject matter of the Parker action likewise is virtually indistinguishable from the Zinn action, as the seemingly identical Complaints attest.[6] More importantly, the two actions assert duplicate claims arising from a common nucleus of shared facts, thus satisfying the second element of *res judicata*. Indeed, the Zinn plaintiffs effectively conceded these points at trial.

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[6] The only insignificant difference between the two is that the Parker Complaint contains a request for class certification and the Zinn Complaint does not. Otherwise, the Zinn Complaint is a verbatim recitation of the allegations and claims in the Parker Complaint.

The only disputed legal inquiry left for the trial court to resolve was whether CFI satisfied the third element. The Zinn plaintiffs challenged the existence of the third element because they argued the court in Parker did not specifically rule on whether CFI's reserve or charge back systems – as contractually implemented – violated the Wages Act. However, this argument is fundamentally flawed because it rests upon a misguided and overly narrow interpretation of the scope – and resulting impact – of *res judicata*. Contrary to the Zinn plaintiffs' arguments, *res judicata* bars not only claims actually decided in a previous case, but also all claims that *could have been* decided. *Pye, supra*. The validity of the reserve and charge back systems – claims aggressively litigated in Parker – fall under the purview of claims that "could have been decided" as discussed in *Pye*. Consequently, the third element of the doctrine of *res judicata* has likewise been satisfied.

The fact that the Parker case was resolved by a consent judgment, and not by a ruling on the merits, is of no consequence on the applicability of *res judicata*. Under the law of South Carolina, the consent judgment expressed in the Parker Order *was* an adjudication on the merits of that case because it resulted in a termination of the action *with prejudice*. As this Court has enunciated as a universally accepted principle of law, a dismissal with prejudice "operates as an adjudication on the merits terminating the action and concluding the rights of the parties." *Freeman v. McBee*, 280 S.C. 490, 493, 313 S.E.2d 325, 327 (Ct. App. 1984). This is true even when the dismissal with prejudice of an action is the result of a consensual agreement between the parties. *Id.* The case – and the claims comprising that action – are extinguished as a matter of law, as a dismissal

with prejudice "is intended to bar relitigation of the same claim." *Spence v. Spence*, 368 S.C. 106, 128, 628 S.E.2d 869, 881 (2006).

The Parker Order resolved all the claims involved in that case, and it effectively terminated the action. After the Parker court filed the order, the only task remaining was to hold a hearing for individual class members to object to their respective shares of the judgment. [Parker Order.] However, that hearing did not affect the amount or validity of the judgment, nor did it alter the terms of the Memorandum of Understanding signed by the class representatives and CFI. The parties intended the Parker Order to resolve all claims and terminate the litigation, and the Parker Court filed the order with those litigation goals in mind. Thus, even though the Parker Order lacks the phrase "dismissed with prejudice," it had the identical effect under the law.

Having determined the Parker Order functioned as a dismissal with prejudice, the only remaining question is whether the Wages Act issues "might have been decided" in Parker. *Pye*, *supra*. The answer to this inquiry is clear, as the Parker and Zinn Complaints included identical requests for a declaratory judgment. It must factually and logically follow that if the Wages Act allegations lying at the heart of the identical declaratory judgment claim were raised in the present case, as the Zinn plaintiffs contend, those allegations must have been equally raised in the Parker case. Consequently, these issues not only might have been decided, but *were* actually decided in the Parker litigation. *See Freeman*, *supra* (a dismissal with prejudice "operates as an adjudication on the merits").

The preclusive effect of *res judicata* is not magically diminished because the Parker Court did not conduct a hearing on these specific issues or ultimately issue a

merits ruling. All that matters is that the same plaintiffs attempted to assert identical claims against the same defendant after the previous litigation was terminated with prejudice, as is the case here. *Res judicata* prevents the Zinn plaintiffs from doing just that, and the trial judge erred in failing to apply that doctrine and in reaching the merits of the declaratory judgment claim. Therefore, this Court should reverse on this issue and remand with instructions for the trial judge to file an amended order removing the language stating that the reserve and/or charge back components of the employment contracts violated state law or public policy.

(B) The order contradicts the trial judge's stated ruling.

At the conclusion of the trial, the judge announced he would take under advisement the issue of whether a violation of the Wages Act occurred. As a threshold matter, that decision itself constituted error because the Parker Order had already disposed of that issue. But even if that issue had properly been before the trial court, the language in the written order under appeal contradicted the nature of the trial judge's ruling. At a minimum, this Court should reverse that ruling and remand with instructions for the trial judge to clarify his decision in an amended order.

On June 5, 2012, several months after the trial's conclusion, the trial judge sent a letter to the attorneys of record requesting the Zinn plaintiffs' counsel to draft an order. The trial judge asked the attorneys to set forth several rulings. As to the POWA issue, the judge instructed the attorneys to include a specific finding that:

> The defendant violated the *South Carolina Payment of Wages Act* **by modifying the employment contract without written notice to the employees and by failing to pay Ms. Arrington within the time specified by law**.

[June 5, 2012 Letter, p. 2 (emphasis added).] It is clear from the express language of the letter that the Wage Act violation was limited to two discrete acts, one of which applied only to Laura Arrington. The trial judge did not find any other violation of the Wages Act, and he certainly made no ruling whatsoever on the reserve or charge back components of the employment contracts. As the judge correctly concluded during trial, *res judicata* prevented him from considering or ruling upon those two issues.

While the instructions were clear, the Zinn plaintiffs' attorneys proposed order in to the judge contained a discussion of certain substantive provisions of the POWA, which concluded with the following passages:

> Here, the contact [sic] of Defendants violates all of the above code sections. First, Plaintiffs' wages were reduced without notice. Second, wages were withheld after separation from the payroll. **Third, the chargeback scheme is unenforceable and is contrary to the South Carolina Payment of Wages Statute in that an employee could sell a timeshare product and actually not be paid for ten years after the sale.** ...
>
> **For the reasons set forth above, Defendant's employment contracts with Plaintiffs violates [sic] the Payment of Wages Act as a matter of law and this court so declares that the contract is void as against public policy.**

[Order, p. 4 (emphasis added) (internal citation omitted).]

Although this passage includes the two decisions announced in the trial judge's letter, it inexplicably contains two game-changing rulings the trial judge never stated or made. And more importantly, these were two rulings that CFI never had the opportunity to litigate, as they arose arbitrarily after the trial. The emphasized language concludes the charge back system in and of itself violated the Wages Act, and it also finds the employment contracts are "void as against public policy." Those statements do not

reflect the true nature of the trial judge's decision, as a comparison of this passage and the instructions in the judge's letter makes abundantly clear.

The primary problem with this unwarranted overreaching is that the Zinn plaintiffs drafted an order with broad, general statements about Wages Act violations that were not part of the record and which exceeded the two specific violations the trial judge identified. Indeed, one of those findings was so specific that it applied only to a single plaintiff (i.e. Laura Arrington). Thus, no reasonable interpretation of the judge's ruling at trial could justify the kinds of sweeping holdings the Zinn plaintiffs included in their proposed order.

A second concern is that the judge could not have found a wholesale violation of the Wages Act for modifying the terms of the employment contracts without written notice because any such ruling would have contradicted the jury's verdicts. The jury considered and rejected this claim as to all of the Zinn plaintiffs except Laura Arrington. By awarding damages for unpaid wages only to Arrington, instead of the *other twelve* plaintiffs, the jury also necessarily concluded CFI did not commit any wrong as to the other twelve plaintiffs. Thus, the language in the proposed order not only exceeded the scope of the judge's ruling, but it was also wholly incompatible with the jury's verdicts.

Despite those clear errors, the trial judge signed the proposed order "as is" and did not delete any of the objectionable language contradicting his announced ruling and the jury's findings. For this reason, CFI filed a Rule 59(e) motion calling those passages to the judge's attention and asking him to strike them. The trial judge denied the motion without holding a hearing, and he issued only a "Form 4" order stating: "Defendant's Rule 50(e) Motion is DENIED." [Order.] Consequently, there is no way to determine

how, if at all, the judge reconciled his actual decision with the extraneous and improper statements in the proposed order. The record shows only a signed proposed order containing conclusions that neither accurately reflect the judge's written rulings, nor honor the jury's verdicts. Therefore, this Court should reverse on this issue and remand with instructions for the trial judge to submit an amended order that conforms to the ruling announced at trial and deletes the unsupported findings.

(C) The employment contracts did not violate the statute.

1. The provisions regarding the reserves and charge back system were not at issue and the trial judge could not have adjudicated them.

The claims in the Zinn action focused solely on commission amounts that CFI allegedly failed to pay during the Zinn plaintiffs' employment, not after their discharge. The reserve and charge back systems that were trigged after discharge were not at issue in the Zinn action based on *res judicata* and the trial court's grant of summary judgment on CFI's behalf as discussed *supra*. Neither of these systems was relevant or necessary for the Zinn plaintiffs to show entitlement to unpaid commissions earned and payable while there were still employed by CFI. Accordingly, there was no reason for the trial judge to consider the reserve accounts or charge back provisions of CFI's agreement. More importantly, the trial judge never made this drastic ruling of invalidating CFI's contract at any time during the trial. On the contrary, the genesis of this controversy arises from the Zinn plaintiffs' post–trial self-serving insertion of this objectionable language. But even if the trial judge intended to make that ruling, it finds no support in the record or in the law of South Carolina. Therefore, this Court should reverse that decision.

Based on the actual issues litigated in the Zinn action, the only provision upon which the court could have relied to support a violation under the Wages Act would have been the commission structure payable to the sales representative while they were still working for CFI. However, as discussed in the next section, this commission structure is compatible with the requirements of the Wages Act and therefore lawful. In fact, none of the Zinn plaintiffs ever challenged the propriety or legality of this specific provision.

2. The Zinn plaintiffs never challenged the commission system implemented for those who were CFI's employees, and that system is consistent with the requirements of the Wages Act.

The trial judge's order concluded CFI violated the Wages Act because it failed to make timely payments to the plaintiffs and because it altered the terms of the employment contracts without prior written notice to the employees. CFI conceded at trial that a single accounting error led to a late payment to Arrington, and it admitted there was a jury question as to whether it unilaterally altered the contracts. Pursuant to the employment contracts, CFI paid its salespeople commissions for each completed sale. Before those commissions became due, however, two things had to happen. First, the rescission period provided by state law allowing a customer to cancel a time share purchase had to pass without the customer rescinding the purchase. Second, the buyer had to make a full down payment. When those conditions were met, the Employee became entitled to receive a commission for the sale. If one or both of the conditions were not satisfied, there was no sale and, thus, the employee did not earn or receive a

commission. The employment contracts set forth these conditions, and the sales representatives knew about them before they began selling timeshares for CFI.[7]

The South Carolina Supreme Court has held that employers do not violate public policy or the Wages Act by establishing prerequisites for paying commissions. *See Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995). The plaintiff in *Rice* was a salesperson for a radio company who received commissions for the advertisements he sold. However, the company had a policy that an advertisement had to air through the month in which an employee worked his or her last day in order for that employee to receive a commission. If the advertisement did not air during the month of the employee's departure, the company paid no commission. When the plaintiff left, he claimed he was due commissions for three such unaired advertisements. The company refused to pay those commissions, and the plaintiff sued. After the trial court directed a verdict for the company on that issue, the plaintiff appealed.

The Supreme Court affirmed the decision to grant a directed verdict, finding no violation of public policy or the Wages Act. The Court noted the established principle that "[a]n employee and employer can set forth by contract the terms for payment of commissions." 318 S.C. at 100, 456 S.E.2d at 384. The Court further warned, "[c]ourts should not annul contracts on doubtful grounds of public policy." *Id.*

Applying those standards, the Court concluded the company's policy was neither illegal nor against public policy. The policy "establish[ed] the manner in which [the

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[7] The trial judge erroneously concluded CFI improperly altered the holdback percentages without prior written notice to the Former Employees. Even if that is true, that involved the manner in which CFI treated those employees, not the foundational validity of the employment contracts. A finding that CFI changed the percentages or made late payments *in some specific instances* does not warrant or support a finding that the contracts were illegal. Those are two entirely separate legal questions.

company would] pay sales commissions" and it served the legitimate economic purpose of ensuring the salesperson's continued loyalty after a sale took place." *Id.* Therefore, the policy was not arbitrary and did not violate any law or public interest. *Id.*

The trial judge erred in declining to follow *Rice* and instead relying on *Ross v. Ligand Pharm., Inc.*, 371 S.C. 464, 639 S.E.2d 460 (Ct. App. 2006). In *Ligand*, the defendant company adopted a policy that in order to receive certain performance bonus payments, an employee still had to working for the company on the date when the company wrote the bonus checks. The company provided trimester-based "target dates" for writing those checks, but retained total discretion over when it actually issued them. The evidence showed the company often waited well beyond the target dates to write the checks. After the company used this policy to deny payment of a bonus to him, the plaintiff sued under the Wages Act. The trial court determined the company's policy violated that statute, and this Court affirmed.

The Court acknowledged *Rice* as controlling authority, but concluded it was distinguishable for three reasons. First, the Court believed *Rice* involved only a question of public policy, not the Wages Act.[8] Second, the Court noted the policy in *Rice* served an economic purpose, whereas the defendant Ligand Pharmaceuticals admitted its policy served "no purpose whatsoever." 371 S.C. at 469, 639 S.E.2d at 463. Third, the Court found Ligand's policy to be "arbitrary," as opposed to the policy in *Rice*, which established a set condition for payment of a commission. *Id.* Because the defendant's

[8] CFI respectfully asserts the Court's first distinguishing factor was erroneous because the Supreme Court did address the Wages Act in *Rice*. *See* 318 S.C. at 100, 456 S.E.2d at 384 ("[The plaintiff] argues that the departure policy violates the Wage Payment Act since it determines, by private agreement, what wages are 'due' under the Act. We disagree. ... "[The defendant's policy] is not arbitrary nor does it violate any law.") (emphasis added).

policy left the timing of payment solely up to the company's whim, the Court found the policy violated the Wages Act.

The instant case and CFI's agreements fall under the Supreme Court's decision in *Rice*. CFI's employment contracts set forth conditions that had to be met before certain payments were due to its salespeople. The conditions (*i.e.* the passage of the rescission period and a full down payment) were clearly articulated and measurable. In addition, these conditions served the legitimate economic purpose of making sure CFI did not pay full commissions for sales that never actually took place, either because the buyers changed their minds or failed to make the required down payment. Thus, CFI's policy, like the one at issue in *Rice*, was neither arbitrary nor pointless.

CFI's specific and easily established conditions precedent denied CFI the type of unfettered ability to arbitrarily manipulate the timing of commission payments that doomed the bonus policy in *Ligand* and resulted in a violation of the Wages Act. Simply stated, CFI's contract does not involve the type of arbitrary discretion that the Court found to be repugnant to the principles of the Wages Act. Once the cancellation period expired and the purchaser made a full down payment, the employee was entitled to receive a commission. When those conditions occurred, CFI had absolutely no discretion to deny or delay paying the commission under the express terms of its own contract, the amount of which could be calculated with precision.[9] That distinguishing fact makes the trial judge's reliance on *Ligand* unsound.

To prove their claims for unpaid wages in this case, the Zinn plaintiffs were required to present credible evidence that they made specific "sales" (i.e. purchases that

[9] The validity of CFI's reserve and charge back provisions – while not directly litigated in Zinn – are equally consistent with those approved in *Rice*.

were not canceled within seven days and for which full down payments were made) and that CFI failed to timely pay the commissions for those sales when due. Despite having nearly a full week of trial, all but one of the Zinn plaintiffs failed to do carry their burden as evidence by the jury's verdict. The evidence showed only that an accounting oversight resulted in a failure to make payments totaling $2,769 to Laura Arrington. All of the other claims failed, either as a matter of law or based on the jury's findings. Therefore, no basis existed for the judge to find wholesale violations of the Wages Act as to all of Zinn plaintiffs, let alone for the judge to base that conclusion on perceived problems with the reserve accounts or charge back provisions.

For these reasons, this Court should reverse the trial judge's decision on this issue. The Court should then remand with instructions for the judge to file an amended order finding no violation of the Wages Act or public policy as to any of the Zinn plaintiffs except Laura Arrington, and omitting any references to, or rulings on, the reserve accounts or charge back provisions previously adjudicated in the Parker action.

(D) The trial judge should not have tripled Arrington's damages or awarded attorney's fees without specifically basing those remedies on the late payment to Arrington.

The trial judge tripled Laura Arrington's damages and awarded her an attorney's fee of $2,171.04. As indicated above, CFI does not challenge the award of treble damages to the extent the trial judge awarded it exclusively on the late payment to Arrington. In that event, CFI concedes it would be within the trial judge's discretion to triple those damages. However, CFI must challenge the award of treble damages to the extent that decision resulted from an erroneous conclusion that CFI violated the Wages Act in some different or broader way. Therefore, if this Court reverses on any the

grounds discussed above, it must also reverse the awards of treble damages and attorney's fees pending the entry of an amended order.

The specific issue arises from the inclusion of the challenged language in the post-trial order. As previously explained, the order commingled the judge's actual ruling on the question of a Wages Act violation with the Zinn plaintiffs' proposed conclusions. This makes it impossible to determine from the order itself whether the treble damages and attorney's fee stemmed from the finding of a limited violation as to Arrington, or from the purported broader violations involving the commission reserves and/or charge back provisions.[10] Because the former would support the extra relief based on the record but the latter would not, it is imperative that the order accurately state the specific basis for that relief. Accordingly, this Court should reverse and remand with instructions for the trial judge to file an amended order that deletes the improper language regarding Wages Act violations and expressly states the limited basis for the treble damages and the attorney's fee award to Arrington.

The filing of such an amended order would preserve the result of the trial – a verdict in Arrington's favor – without running afoul of *res judicata*. An express finding that CFI violated the Wages Act only by issuing a late payment to Arrington would also clarify the limited nature of the judge's decision. This, in turn, would give full force and credit to the Parker judgment by avoiding any ruling on issues that were, or could have

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[10] As it stands, the order can support an inference that the additional damages stem solely from a violation of the Wages Act involving late payments to Arrington. After all, none of the other Zinn plaintiffs received any relief pursuant to that statute. The jury returned defense verdicts on the other Zinn plaintiffs' claims, however, which means they had no damages to be tripled and they were not prevailing parties for purposes of their Wages Act claims. Thus, even with the additional relief limited to Arrington, the judge's basis for awarding additional relief remains ambiguous.

been, litigated in that case. Such a finding would also provide a proper basis for the judge's decision to award Arrington treble damages and an attorney's fee. Simply put, an amended order removing the improper language and unjustified findings would solve all of the problems discussed in this brief and would harmonize the results in Parker and in this case. Therefore, this Court should reverse and remand with instructions to file a properly limited amended order.

## CONCLUSION

For the reasons discussed above, this Court should reverse the trial judge's Wages Act rulings and remand with instructions to file an amended order that (1) finds a Wages Act violation only as to the late payment to Laura Arrington, and (2) deletes any findings or conclusions invalidating CFI's contracts.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Jr., Circuit Court Judge

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Case No.: 2009-CP-26-0043

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Timothy A. Zinn, Robert Adams, Laura Arrington, Stephen C. Black, Bradley Kirk Bray, Mark D'Amico, Thomas A. DeVitis, Rodney Eddie Haynes, Jimmy Kelly, Whitney Renee Knox, Lynn C. Lanpher, Holly Levasseur, John Martin Loughlin, Joe Maranville, Khalif Middleton, Chelcie Oxentine, Judith A. Parker, Matthew W. Reed, Cynthia G. Reilly, Gerald Ryba, Sherry Singleton, Steven G. Thoni, Stratton Vitikos, Michael H. Willis, and Michael J. Zanardo.....Respondents / Appellants,

v.

CFI Sales & Marketing, Ltd., d/b/a Westgate Resorts,.....Appellant / Respondent.

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**Designation of Matter to be Included in Record on Appeal**

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The Appellant / Respondent CFI Sales & Marketing, Ltd., d/b/a Westgate Resorts designates the following materials to be included in the Record on Appeal for purposes of its Initial Appellant's Brief:

1. Summons and Complaint;
2. Answer;
3. Defendant's Summary Judgment Motion (including all attachments and exhibits);
4. Trial Transcript (pp. 4-48, 68-78, 196, 323-362, 616-844, 876-879);
5. Letter from judge requesting proposed order (dated June 5, 201
6. Proposed Order from attorneys for plaintiffs;
7. Order (filed August 7, 2012);

8. Defendant's Rule 59(e) Motion;
9. Order Denying Rule 59(e) motion (filed September 27, 2012).

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**PROOF OF SERVICE**

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The undersigned, an attorney in this matter for the Appellant/Respondent, certifies that I have this **12th day of August, 2013,** served copies of this party's **Initial Appellant's Brief of Appellant/Respondent** and **Designation of Matter to be Included in Record on Appeal** upon counsel of record for the Respondents/Appellants by causing them to be deposited in the United States mail with sufficient postage affixed, addressed to: Gene M. Connell, Jr., Kelaher, Connell & Connor, P.C., P.O. Drawer 14547, Surfside Beach, SC 29587; and David J. Canty; David J. Canty, P.A.; 4612 Oleander Drive; Myrtle Beach, SC 29577.

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