THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No.: 2009-CP-26-0043

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.

INITIAL BRIEF OF RESPONDENTS/APPELLANTS

David J. Canty, Bar No. 1122
4612 Oleander Drive
Myrtle Beach, S.C. 29577
Office (843) 449-6304
Fax (843) 449-4249
mbcounsel@frontier.com

Gene M. Connell, Jr., Bar No. 1358
The Courtyard, Suite 209
1500 U.S. Hwy. 17 N.
P.O. Drawer 14547
Surfside Beach, S.C. 29587
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorneys for Respondents/Appellants

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STATEMENT OF THE CASE

This action for Breach of Contract, Accounting, Declaratory Judgment, Wages, Penalties, Attorneys Fees and Breach of Contract Accompanied by a Fraudulent Act was filed January 5, 2009. Appellant-Respondent Answered and specifically and generally denied all liability. The matter was tried before the Hon. Benjamin H. Culbertson and a jury at Conway, S.C. February 13-17, 2012. Plaintiffs Lanpher, Middleton, Singleton, Thoni and Wills suffered directed verdicts against them following their testimony.

After posing several questions the jury returned a defense verdict against all remaining Plaintiffs except Laura Arrington, who won a verdict of $2,769.00. Judge Culbertson awarded attorney's fees of $2,174 of a lodestar amount of $54,276.00. Ms. Arrington's verdict was trebled by the Court.

The amount involved in the Respondent-Appellants' appeal is as follows:

Oxentine:	$1,653.89
Singleton:	$100,000.00
Thoni:	$11,800.00
Adams:	$3,572.40
Middleton:	$15,000.00
Lanpher:	$13,695.00
Loughlin:	$14,460.00
Haynes:	$3,470.00
Arrington:	$35,960.25
Reilly:	$25,530.00
Bray:	$5,247.00
Parker:	$3,784.00
Black:	$20,490.00
LeVasseur:	$6,628.00
Wills:	$26,000.00

Zinn:	$22,054.00
D'Amico:	$8,760.00
DeVitis:	$3,400.00

Each Respondent-Appellant also seeks trebling of the unpaid wages plus interest and attorneys fees.

Respondent-Appellants appeal the Order of the Hon. Benjamin Culbertson directing verdicts against Respondent-Appellants, denying a new trial and affirming the jury verdicts as set forth in the Record and in Orders dated June 5, 2012 and July 19, 2012.

Notice of Appeal was served on October 5, 2012 and October 15, 2012. In ruling on a Summary Judgment Motion and other matters Judge Culbertson relied upon the Order of the Hon. Michael J. Baxley dated January 29, 2010 and incorporating by reference a Memorandum of Understanding dated January 11, 2010 in that class action styled Judith Parker, et al. v. CFI Sales & Marketing 07-CP-26-5478.

FACTS

Respondent-Appellants were employees of Appellant-Respondent selling timeshares in a Myrtle Beach resort for commissions. Appellant-Respondent withheld their earned wages under a scheme determined by the trial Court to be a violation of the Payment of Wages Act. In a class action suit styled Parker v. CFI, supra, Appellant-Respondent confessed Judgment in the amount of $650,000.00, $600,000.00 of which remained unpaid at the time of the instant trial. This prior action was for unpaid commissions in the "reserve fund."

The Memorandum of Understanding executed in that case and incorporated by reference into Judge Baxley's Order approving the class action settlement specifically provided that the instant case would proceed "unaffected" by the Parker settlement. At trial Appellant-Respondents argued that "right, wrong or indifferent" it had unilaterally, after the fact, redesignated the unpaid wages as "reserve funds" despite the lack of any legal or factual basis for doing so and thereby avoided any liability herein.

At trial the Court directed a verdict against several Plaintiffs following their testimony, allowed the jury to consider Appellant-Respondent's claim that it had re-characterized Respondent-Appellants' wages as "reserve funds" and, after a verdict in favor of one Respondent-Appellant, awarded 1/25 the lodestar amount of attorneys fees.

ARGUMENTS

I.

The trial Court erred in directing a verdict against Respondent-Appellants Lynn Lanpher, Khalif Middleton, Sherry Singleton, Steven Thoni and Michael Wills.

The standard for a directed verdict is clear. "When upon a trial the case presents only questions of law the judge may direct a verdict." Rule 50, SCRCP. In each of these cases the record reflects that the trial Court weighed the evidence presented and decided the weight to be insufficient.

South Carolina law is clearly contra. In 1932 our Court decided that where each party offered evidence the other breached the contract a directed verdict was error. Retailer's Service Bureau v. Smith 165 S.C. 238, 163 S.E. 649 (1932). Roberts v. Sheriff Constr. Co., Inc. 284 S.C. 618, 328 S.E.2^{d} 123 (Ct. App. 1985). The evidence must be viewed in the light most favorable to the non-moving party and if more than one reasonable inference can be drawn then the case must be submitted to the jury. Champion v. Whaley 280 S.C. 116, 311 S.E.2^{d} 404 (Ct. App. 1984). Further, if there was evidence from which the jury could have found the condition precedent was prevented by the Defendant, they were entitled to make that determination. Id. at 120.

Throughout the trial the Appellant-Respondent stuck to its theme that these wages were not due until conditions precedent had been met. At issue, however, was whether Appellant-Respondent itself was responsible for preventing the occurrence of these conditions. Huffines Co. v. Lockhart 365 S.C. 178, 617 S.E.2^{d} 125 (Ct. App. 2005). Each of these Respondent-Appellants testified to facts sufficient to take their case to the jury and the trial Court's directed verdicts were error. Maro v. Lewis, 389 S.C.216, 697 S.E.2^{d} 684 (Ct. App. 2010).

Further, had these five employees' cases gone to the jury perhaps Appellant-Respondent would have found errors in their accounting entitling them to a verdict as was the case with Ms. Arrington. By dismissing these claims before the defense case the Court eliminated the necessity of such a search.

II.

The trial Court erred in allowing the jury to consider terms of the contract which it subsequently determined to be illicit.

Central to the defense of this case was Appellant-Respondent's contention that it had unilaterally altered the terms of payment of wages without notice to its employees. Appellant-Respondent contended that its unpaid wages due discharged employees in excess of the reserve fund limits (themselves unlawful) were magically and mysteriously transformed into reserve funds.

The trial Court charged the jury that they could not consider claims for wages in the reserve fund prior to January, 2010. Appellant-Respondent's sole witness repeatedly testified that monies earned, due and payable to Respondent-Appellants which were the subject of the instant action were "paid." Upon cross-examination it became apparent that these wages were never paid, merely re-characterized by Appellant-Respondent which retains them to this day.

Unfortunately the trial Court's decision to grant partial summary judgment and instruct the jury not to consider reserve funds prior to January, 2010 had the effect of precluding an aware of wages earned, due and payable.

The Payment of Wages Act becomes a part of every S.C. employment contract. The parties cannot, with effect, exclude its terms and provisions. Among other things, the Payment of Wages Act says no change in the time and manner of Payment of Wages are effective unless seven days written notice is provided § 41-10-100 (1976). No written notice was ever given of a change of terms under which all unpaid commissions (not 10%, not up to $3,500) go "into the reserve" therefore those funds never went "into the reserve" prior to January 11, 2010, because those admittedly undisclosed changes were not legally effective.

Appellant-Respondent freely concedes:

a.) There is no contractual provision authorizing withholding wages as "reserve" funds in excess of 10% of earnings or of the sum of $3,500.00; (Tr. p. 785, ll. 2-4, p. 745, l. 14 – p. 746, l.12, p. 749, ll. 9-12)

b.) That no notice in writing of such a change in terms of employment was ever communicated to any of the Respondent-Appellants herein prior to the commencement of this action. (Tr. p.785, ll. 8-14, p. 745, l. 14 – p. 746, l. 12, p. 748, ll. 9-12)

c.) That Appellant-Respondent has acted in a "wrong" and self-serving manner with regard to payment of wages; (Tr. p. 751, l. 9 – p. 752, l. 2, p. 753 ll. 13-22)

d.) That the "reserve account" is a fictitious entity in that there is no separate fund, merely a unilateral, after the fact characterization by the Appellant-Respondent. (Tr. p. 757, ll. 14-22)

Having conceded these things next at issue is the effect of the Parker case. Appellant-Respondent argues that Parker means it can unilaterally and unlawfully characterize all unpaid wages as reserve funds and thereby evade liability in this case. In effect, Appellant-Respondent argues it must be permitted to profit from its statutorily prohibited conduct not once, by illegally withholding wages, but twice, by also evading liability herein.

To the contrary, Appellant-Respondent's attempt to characterize these unlawfully withheld funds as reserve funds is and was utterly without legal effect. The Memorandum of Understanding expressly provided that this matter would be "unaffected" by the Parker settlement. At issue in this case were unpaid wages not in the reserve account. Appellant-Respondent's contention that all unpaid wages, even those in excess of 10% or $3,500.00 were unilaterally, illicitly, effectively characterized as reserve funds cannot be sustained as a matter of law. The attempted change in characterization was wholly ineffective, by statute. (Tr. p. 749, ll. 9-12)

On page 801 of the transcript the Court states its opinion that Appellant-Respondent has not complied with the Payment of Wages Act (ll. 9-10). Thereafter, the Court declines to instruct the jury that there has been a violation of the Act "...because that has nothing to do whether or not there's a breach of contract." (ll. 23-25). This ruling was error and effectively deprived the jury of its ability to award the Respondent-Appellants their unpaid wages. Appellant-

Respondent's entire defense was premised upon the notion that it had violated the Act with impunity.

III.

The trial Court erred in directing a verdict against the Respondent-Appellants on their cause of action for breach of contract accompanied by a fraudulent act.

In directing a verdict against Respondent-Appellants for their claim for breach of contract accompanied by a fraudulent act the trial Court expressed a misapprehension of the law on the subject, stating that proof was required of "...a knowing misrepresentation relied upon by the Plaintiffs, known to be false by the Defendant, that the Plaintiffs relied upon to their detriment..." (Tr. p. 799, l. 23-p. 800, l. 1)

In the case of Ball v. American Express Co., Inc. 314 S.C. 272, 442 S.E.2^{d} 620 (S.C. App. 1994) our Court defined the elements differently:

> "Breach of contract accompanied by a fraudulent act is not simply a combination of a claim for breach of contract and a claim for fraud. The action for breach of contract accompanied by a fraudulent act is not based on the same elements as an action for fraud (deceit). Harper v. Ethridge 290 S.C. 112, 348 S.E.2^{d} 374 (Ct. App. 1986)."

and

> "Breach of contract accompanied by a fraudulent act is different. It requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making. (Harper v. Ethridge, supra). Such proof, may or may not involve false representations. See id. (the fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the **unlawful appropriation of another's property by design**.)"

(emphasis added), Maro v. Lewis, supra at 688.

Here that is precisely the proof presented by the Respondent-Appellants, that Appellant-Respondent unlawfully appropriated their wages by design. Accordingly the trial Court's directed verdict was error.

Respondent-Appellants presented the following evidence of Appellant-Respondent's misappropriation of their wages by design.

Appellant-Respondent:

a.) Withheld in excess of 10% of commissions;

b.) Withheld in excess of $3,500.00;

c.) Kept all earned, due and payable wags for which no written demand was made;

d.) Attracted Job Applicants by advertising "no chargebacks";

e.) Did not allow applicants to review the written contract prior to signing;

f.) Affirmatively represented during training that there were "no chargebacks";

g.) Re-classified unpaid wages as "reserve funds" without any authority or excuse whatsoever;

h.) Engaged in a persistent, pervasive pattern of fraud to unlawfully withhold wages owed its employees.

The trial Court's dismissal of this cause of action was error.

IV.

The trial Court erred in awarding attorneys fees of 1/25 Lodestar amount.

The trial Court awarded 1/25 of the Lodestar amount premised upon the directed verdicts against Respondent-Appellants Lanpher, Middleton, Singleton, Thoni and Wills' claims and the dismissal of the claims of Kelly, Knox, Maranville, Reed, Ryba, Vitikos and Zanado for failure to prosecute. Further, the jury returned Defense verdicts against Zinn, Adams, Black, Bray, D'Amico, De Vitis, Haynes, Levasseur, Loughlin, Oxentin, Parker, and Reilly after inquiring whether they could find for the Plaintiffs without awarding damages.

As discussed supra both the directed verdicts and the considerations by the jury of illegal contract terms were improper. Further, no consideration is afforded for Respondent-Appellants prevailing in their Declaratory Judgment Action, a finding which Appellant-Respondent regarded as so significant as to merit an appeal.

The trial Court's award amounts to an abuse of discretion sufficient to be characterized as an error of law. Williamson v. Middleton, 374 S.C. 419, 649 S.E.2^{d} 57 (Ct. App. 2007).

CONCLUSION

The trial Court erred in directing verdicts against the testifying Respondent-Appellants. It was also error to permit the jury to consider unlawful contract terms. The Court misapprehended the elements of breach of contract accompanied by a fraudulent act and erroneously dismissed those claims. The award of attorneys fees was an abuse of discretion amounting to an error of law. For the foregoing reasons the matter must be reversed and remanded for trial of the claims of those Respondent-Appellants who suffered a directed verdict against them below and a damages hearing for those who suffered a defense verdict as well as Ms. Arrington, together with a suitable sum as attorneys fees.

Respectfully submitted,

August 9, 2013

David J. Canty, Bar No. 1122
4612 Oleander Drive
Myrtle Beach, S.C. 29577

Office (843) 449-6304
Fax (843) 449-4249
mbcounsel@frontier.com

Gene M. Connell, Jr., Bar No. 1358
The Courtyard, Suite 209
1500 U.S. Hwy. 17 N.
P.O. Drawer 14547
Surfside Beach, S.C. 29587
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorneys for Respondents/Appellants