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.

REPLY BRIEF
OF
RESPONDENTS/APPELLANTS

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<u>ARGUMENTS</u>

1. The Trial Court Erred in Directing a Verdict against Plaintiffs Lanpher, Middleton, Thoni and Willis.

In its brief CFI states that this Court is required to "rummage through the record" looking for relevant testimony on this point. (Brief of Appellant/Respondent, p. 15).

Each witness presented evidence of a contract, breach of the contract, and consequential damages. The trial Court improperly weighed the evidence and found it to be lacking.

Lynn C. Lanpher:

Q "...how long did you work at Westgate?
A: Three Months
Q: And what was your contract, what was your arrangement for how you were going to be paid?
A: Ten percent on your sales and minimum wage hourly." (Tr. p. 248)

Q: "And were you given notice in advance that there would be changes in the employment contract?
A. No."

Q: "Okay did you get paid all wages that were due within 30 days of separation from the company?
A: No, no."

Q: "-do you think the Defendant complied with the contract?
A: No."
(Tr. p. 249)

"Q: Okay so what number did you come up with?
A: $13,695.00"
(Tr. p. 250)

Khalif Middleton:

"Q: Okay and where did you work?
A: Westgate"

"Q: How long?

A: Three months.
Q: All right and what was your job at Westgate?
A. I was a sales rep."

"Q: Okay, were you paid your wages that you claim due within 30 days of leaving the job?"
A: No.
Q: Do you think the Defendants complied with the contract?
A: No."

"Q. Have you been able to determine what you believe Westgate Resorts owes you?
A: Yes."

Mr. Connell: "All right, your Honor, the witness has written $15,000.00, signed his name." (Tr. p. 235).

"Q: Okay, I understand that, but you sold $160,000.00-
A: Yes.
Q: Worth of timeshare-
A. Yes, sir.
Q: –to customers?
A: Yes, sir.
Q: All right and you got paid on one?
A: Got paid on one.
Q: And that's why you took that off?
A: Yes."
(Tr. p. 243)

Sherry Singleton:

"Q: Okay how did you as the timeshare employee at Westgate get paid?
A: We would get paid every two weeks…"
(Tr. p. 152)

"Q: And why did you get the highest commission?
A: Because I was the highest salesperson there. I was salesperson of the year for two years straight..."
(Tr. p. 153)

"Q: Was there a contract signed between you and Westgate as to what you would

be paid?
A: Yes."
(Tr. p. 158)

"Q: Okay, now have you had a chance to look at the records and to determine how much you believe based on the records is owed to you?
A: Yes."
(Tr. p. 162)

"Q: Now you wrote down $100,000?
A: Yes, sir."
(Tr. p. 163)

Steven G. Thoni:

"Q: How long did you work at Westgate?
A: The numbers that I have on your sheets show me going through August, but I actually worked through October..."
(Tr. p. 191)

"Q: Okay, so, what was, what was the arrangement that you had as to how much you would be paid?
A: Ten percent on my sales when I got a full down, full 10 percent down payment and they also paid us minimum wage for the time we were there."

"Q: All right, what number did you write down there so the court reporter can take that down?
A: $11,800.00."
(Tr. p. 194)

"Q: Okay, were you given any advance notice or were you given any notice in advance of the changes of your employment contract?
A: No.
Q: Okay, were you paid within 30 days of the separation from the payroll?
A: No.
Q: Do you think Westgate complied with the terms of your agreement?
A: No."
(Tr.p. 197)

Michael Wills:

"Q: And about when did you get employed there?
A: February of '06."
(Tr.p. 485)
"Q: Were you continuously employed at Westgate from March of '06 to September of '08?
A: Yes, except for during the winter of the first year."

"Q: Allright did you win any awards at Westgate as a salesperson?
A: Numerous, I was salesman of the month for several times...I sold $890,000 worth in 2008 before they let me go."
(Tr.p. 487)

"Q. All right, and how much, excuse me, how much was owed in your bonus that time?
A: They owed me the bonus that month for a little over $8,000.00.
Q: All right, was that money ever paid to you?
A: No, the bonuses were not paid. The additional amount of sales commission were not paid..."
(Tr.p. 492)

"Q: All right, come down here and tell me how much you're owed and write it on this board if you would, please sir...
A: The amount that I turned in to you on this suit?
Q: Yes, sir.
A: That was $26,000.00"
(Tr.p. 493)

In granting the directed verdict motions the trial court improperly weighed the evidence. The trial court's duty is not to weigh the evidence or determine matters of credibility. Rather, those matters are left to the jury. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2[d] 653, 663 (2006), Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2[d] 272 (2003)

Appellant/Respondent's reliance upon Hennes v. Shaw, 397 S.C. 391, 725 S.E.2[d] 501(Ct. App. 2011) is misplaced. In Hennes the directed verdict was affirmed because the Appellant therein failed to produce any evidence of public harm under the UTPA, a scenario readily distinguishable from the instant record.

Put another way, the distinction between the instant facts and Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E. 2[d] 67 (Ct. App. 1996), relied upon by the Appellant/Respondent, is that therein the alleged fraudulent act was the construction of an auto lubrication shop whereas herein it is the patently unlawful, secret, retroactive recharacterization of wages.

2. The Trial Court erred in denying Motions for New Trial and Judgment NOV.

Appellant/Respondent's brief completely ignores the fact that there was and is:

> 1. No legal authority for it to transfer unpaid commissions to the reserve account in excess of 10% of commissions earned or in excess of $3,500.00;
>
> 2. No contractual authority for it to do so;
>
> 3. No disclosure by it to the Court of recharacterization of accounts in excess of that disclosed in the Parker case until long after Judge Baxley's determination of the fairness of the Parker prior settlement;
>
> 4. A specific statutory prohibition against such an act. § 41-10- 30(A), 100, S.C. Code Ann (1986).

Appellant/Respondent merely reiterates its contention that it is entitled twice to the benefit of its misconduct, first by unlawfully appropriating its workers' wages and then by recharacterizing its conduct ex post facto to evade liability in the instant action.

This issue was expressly raised with the trial court and, contrary to CFI's assertions, was not determined to be res judicata:

> Mr. Canty: "Again, our apprehension is that whatever was unpaid commissions at the time of the settlement the Defendant may now say, 'Well all of that has been magically moved into the reserves. So you can't recover it'." (Tr. pp. 44-45).
>
> The Court: "I don't know. They may say that. They may not. I don't know what they're going to say. We're going to have to wait and listen to the witnesses and see what they say and deal with it then; okay? All right." (Tr. pp. 45).
>
> Mr. Wilkinson: "...could you explain to the jury what happens after an employee leaves the employ as it relates to the management of the reserve and the chargebacks?
> Connie Sharp: "After the sales person is no longer with us then any of the commissions paid after he has left goes into the reserve account." (Tr. p. 710).

The reserve accounts and the chargebacks system become relevant when the evidence reflects that Appellant/Respondent engaged in a shell game of representing to Judge Baxley that the reserve accounts represented a smaller sum than they represented them to be to Judge Culbertson.

Appellant/Respondent mischaracterizes Respondent/Appellant's contention regarding its illegal recharacterization of unpaid wages. While it plainly violates South Carolina law the more relevant fact is that Judge Baxley and these Plaintiffs were apparently misled by CFI as to the amounts in their reserve accounts at the time of the Parker settlement approval.

3. The Trial Court's directed verdict on the Breach of Contract Accompanied by a Fraudulent Act claim was error.

CFI argues pp. 26-27 of its brief, that because of the jury's verdicts the unpaid workers cannot complain of an adverse ruling by the Court before submitting the cases to the jury. Because the Court mistakenly struck the breach accompanied by a fraudulent act claim the workers are thereby precluded from arguing such error because it was "invalidated" by the jury verdict. This circular, self-fulfilling reasoning cannot substitute for a legal basis to affirm the error.

CFI argues there is no independent fraudulent act connected to the breach and therefore the workers' claims based upon this cause of action were insufficient as a matter of law. Simultaneously its sole witness candidly admits the practice of recharacterizing unpaid wages as reserve funds with no legal or factual basis for doing so, without notice to the workers or the Parker court, in plain violation of statutory law:

> Connie Sharp: "...if the salesperson is gone from the company then the commission is put into the reserve account." (Tr. p. 710).
>
> "Q: Can you show the jury where it says that after you separate from the payroll 100 percent of your commission, not 10 percent goes into the reserve fund?
>
> A: It doesn't state that in the contract.
>
> Q: To your knowledge have any of the Plaintiffs ever been given written notice that when they separated from the payroll 100 percent of their commissions would go into the reserve rather than the 10 percent that's set forth in the contract?
>
> A: Not that I know of." (Tr. pp. 723-724).

This act was independent of the breach and therefor legally sufficient to support the cause of action.

4. The trial Court improperly divided the lodestar amount of attorneys fees.

The award of fees in this case was pursuant to statute, S.C. Code Ann. § Section 41-10-80 (1986). Accordingly, the appropriate method of determining fees is the lodestar amount. Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008). In this instance the trial court took the lodestar amount and simply divided it by 25. The lodestar amount reflects the cost of bringing the case to trial, whether there are ten Plaintiffs or one hundred. While some consideration based upon result may be appropriate it is apparently important enough to Appellant/Respondent that the workers

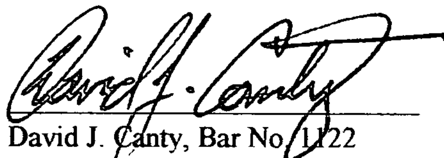
prevailed in their declaratory judgment action that it saw fit to appeal. Accordingly, the division by 25 was enough of an abuse of discretion to amount to an error of law.

Conclusion

The trial Court improperly weighed the evidence presented by the Plaintiffs who suffered a directed verdict, this was the province of the jury. CFI made affirmative representations to these Plaintiffs, their counsel and the Court regarding the balances in the reserve accounts of these Plaintiffs. After settling the reserve account claims and a judicial determination of the fairness of that settlement CFI contended, successfully, in the instant case that those balances were much higher. It admits there is no legal nor factual basis for such a retroactive recharacterization and simply contends it is entitled to the benefit of its unlawful conduct.

The court's division of the lodestar amount of attorneys fees by 25, particularly in light of the ruling on CFI's violation of the Act, was an abuse of discretion amounting to an error of law.

Respectfully submitted,



November 4, 2013

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Respondents/Appellants on CFI Sales & Marketing, Ltd., d/b/a Westgate Resorts by depositing a copy of them in the United States Mail, postage prepaid, on November 5, 2013, addressed to the attorneys of record, R. Hawthorne Barrett, Esq., Turner Padget Graham & Laney, P.A., P.O. Box 1473, Columbia, S.C. 29202; and John S. Wilkerson, Esq., Turner Padget Graham & Laney, P.A., 40 Calhoun Street, Ste. 200, Charleston, S.C. 29401.

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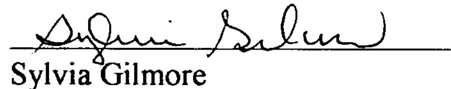
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DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

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Appellant proposes the following be included in the Record on Appeal:

1. Order of Hon. Benjamin H. Culbertson dated July 19, 2012;

2. Plaintiffs' Notice of Motion and Motion and Memorandum in Support for New Trial for Declaratory Judgment as to contract being in violation of the Payment of Wages Act, for treble damages and attorneys' fees dated February 27, 2012;

3. Summons and Complaint dated December 15, 2008;

4. Answer dated May 4, 2009;

5. Supplemental Answer dated December 22, 2011;

5. Transcript of Proceedings p. 23 - 34; 37 - 45; 75 - 89; 97 – 102; 106 – 121; 126 - 128; 130 - 140; 148 – 189; 190-198; 201-218, 232-256, 258-259, 262-263, 265-273, 277-278, 280-281, 283, 297 - 348; 351 - 411; 414 - 471; 474 - 529; 566 - 584; 594 - 629; 632 -

633; 635 - 641; 643 - 645; 664 - 665; 675 - 705; 717 - 720; 725 - 743; 746 - 747; 750 - 751; 761 - 762; 764 - 777; 780 - 787; 790 - 792; 796 - 800; 802 - 805; 832 - 833; 862 - 869

6. Exhibit 4 attached to Judge J. Michael Baxley's Order Authorizing Disbursement of Class Settlement Proceeds dated June 14, 2010;

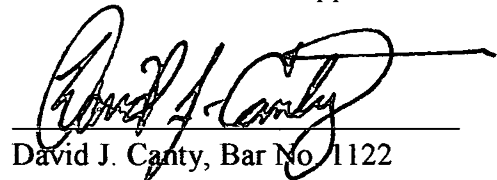
7. Plaintiffs' Exhibit 1-9, Court's exhibits 3-8;

8. Form 4 Judgment in a Civil Case (Jury Verdict) dated on June 5, 2012;

9. Form 4 Judgment in a Civil Case (Decision by the Court) dated on September 27, 2012.

I certify that this designation contains no matter which is irrelevant to this appeal.

November 4, 2013



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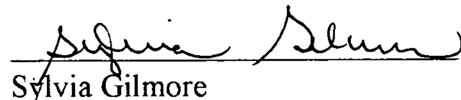

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