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.

FINAL RESPONDENT'S BRIEF OF APPELLANT/RESPONDENT

R. Hawthorne Barrett
Turner Padget Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 227-4219

John S. Wilkerson
Turner Padget Graham & Laney P.A.
40 Calhoun Street, Suite 200
Charleston, SC 29401
(843) 576-2800

Attorneys for the Appellant/Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

(A) Statute

(B) Cases

(C) Rule

STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court properly direct verdicts against the Respondent-Appellants Lanpher, Middleton, Singleton, Thoni, and Wills, where those parties failed to present sufficiently specific evidence of any breach of contract or damages?

II. Did the trial court properly deny the Zinn plaintiffs' motions for a new trial and/or JNOV, where *res judicata* barred all the arguments relied upon in those motions and there was no error in the trial court's handling of the Zinn plaintiffs' Payment of Wages Act claims?

III. Did the trial court properly direct a verdict on the claims for breach of contract accompanied by a fraudulent act, where the Zinn plaintiffs failed to establish the elements of that cause of action?

IV. Did the trial court properly limit the award of attorney's fees where only one of the twenty-five original plaintiffs obtained a favorable verdict at trial?

STATEMENT OF THE CASE

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.

[1] All of the plaintiffs in the present case were also parties in the Parker 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 completely 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 ("the Zinn plaintiffs") filed their Summons and Complaint in this action on January 5, 2009. [R. pp. 28-36.] 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] [R. pp. 28-36.] CFI filed and served a timely Answer denying those claims. [R. pp. 37-46.] After an extended discovery period, CFI filed a motion for summary judgment on December 28, 2011. [R. pp. 53-59.] 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*. [R. pp. 53-59.]

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. [R. pp. 185-86.] Such claims included, but were not limited to, the

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

validity of the reserve and charge back clauses in the parties' agreements under the Wages Act. [R. pp. 185-86.] 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. [R. pp. 459-62, 804-06.] 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. [R. pp. 839-45.]

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. [R. pp. 1011-13.] The plaintiffs' attorneys agreed to withdraw their accounting claim. 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. [R. pp. 1013-15.] 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, some of the Zinn plaintiffs testified that CFI owed them hundreds of thousands of dollars in unpaid commissions. CFI vehemently contested those claims, and indeed, several of the Zinn plaintiffs offered no specific examples of any payments owed

to them. 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. [R. pp. 1049, 1058, 1095.] Likewise, the jury returned defense verdicts on the remaining twelve plaintiffs' claims. [R. pp. 1095-96.]

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. [R. pp. 107-09.] The Zinn plaintiffs did not appeal the trial court's summary judgment ruling on behalf of CFI or the exclusion of evidence resulting from that ruling.

On June 5, 2012, the judge sent a letter to the parties delineating his post-trial rulings on the pending motions. [R. pp. 1101-02.] 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. [R. pp. 1101-02.] 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. [R. pp. 1101-02.] The letter did not address, reverse, modify or alter the trial judge's summary judgment ruling or the Parker judgment's evidentiary impact on the Zinn action based on *res judicata.*

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. [R. pp. 17-23.]

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 it inserted objectionable and unsubstantiated language invalidating CFI's employment agreements based on CFI's reserve and charge back systems, CFI filed a timely Rule 59(e) motion. [R. pp. 132-36.] CFI sought the deletion of the objectionable and unfounded language voiding CFI's employment contracts, in particular the purported findings that reserve and charge back provisions violated 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 unilaterally 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. [R. pp. 132-36.] CFI further argued this was an invalid and untimely collateral attack on the Parker judgment.

Despite the Zinn plaintiffs' inclusion in the proposed order of a ruling he did not make or announce, the trial judge denied CFI's Rule 59(e) motion without any comment in a form order filed on September 27, 2012. [R. pp. 24-25.] CFI filed a Notice of Appeal in this Court on October 5, 2012, and the plaintiffs filed a cross-appeal on October 15, 2012.

After filing their notice of a cross-appeal, the plaintiffs' attorneys filed a motion to be relieved from representing plaintiff Cynthia Reilly. [Motion.] The Court granted that motion in an order filed on June 13, 2013. [Order.] The Court gave Reilly thirty days either to find new counsel or notify the Court of her intention to pursue her appeal pro se. No new attorney ever made an appearance on Reilly's behalf, and Reilly failed to file a brief or other materials with the Court. As Reilly failed to comply with the Court's order, CFI intends to seek dismissal of Reilly's appeal.

STATEMENT OF THE FACTS

It is apparent by the Zinn plaintiffs' Appellants' Brief that they have engaged in a collateral and untimely attack on the Parker judgment, its impact on the Zinn action, and the trial judge's decision to grant partial summary judgment based on *res judicata*. In order to accept or even evaluate the arguments presented by the Zinn plaintiffs, this Court would have to accept the Zinn plaintiffs' improper and unsubstantiated conflation of facts and legal issues that the record evidence contradicts. Consequently, an understanding of the interplay between the Parker action and the present case is as necessary to the Zinn plaintiffs' appeal as it is to CFI's 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. [R. pp. 28, 38.] The Zinn plaintiffs worked for CFI as salespersons in the early-to-mid 2000s. [R. pp. 28, 38.] Before they began working for CFI, each Zinn plaintiff signed employment contracts setting forth, among other things, compensation information and obligations 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. [R. pp. 62-67.] 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"). [R. pp. 62-67.] 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. [R. pp. 62-67.] 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. [R. pp. 68-75.] All of the Zinn plaintiffs were also plaintiffs in the Parker action. [R. pp. 62-67.]

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 but not limited to the existence of the reserve and charge back provisions and 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, on the other hand, dealt *only* 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." [R. pp. 862-69.] 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. [R. pp. 862-69.] 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. [R. pp. 869-73.]

Should a timeshare purchaser default – fail or refuse to make the required payments on the purchase money mortgage – then 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 sales representatives in Parker and Zinn signed prior to beginning work for CFI. [R. pp. 214-16.]

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. [R. p. 92.]

The MOA contained the following provisions:

---

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

> 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.
>
> * * *
>
> 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.

[R. pp. 95-97 (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 as well as the validity of those contractual provisions. 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 validity, 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. [R. pp. 53-59.] The trial judge granted that motion in relevant part at the inception of the trial. [R. pp. 185-91.] 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, which did not seek reconsideration of the summary judgment ruling. That order, which the Zinn plaintiffs' attorneys drafted without input or review by CFI's counsel, contradicted without any factual or legal basis 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. This certainly included the validity of those provisions under the Wages Act.

The Zinn trial focused solely on commissions earned by the Zinn plaintiffs while active sales representatives for 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 sales representatives 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.

ARGUMENT

I. The trial court properly directed verdicts against Lanpher, Middleton, Singleton, Thoni, and Willis because those parties failed to present sufficiently specific evidence of any breach of contract or damages.

(A) Standard of Review

When reviewing an order granting a directed verdict, the appellate court views the evidence in the light most favorable to the non-moving party. *Carson v. Adgar*, 326 S.C. 212, 216, 486 S.E.2d 3, 5 (1997). However, reversal of an order granting a directed verdict is proper only when there is no evidence to support the trial court's ruling. *Hennes v. Shaw*, 397 S.C. 391, 398, 725 S.E.2d 501, 505 (Ct. App. 2011). A trial court

must grant a directed verdict when a plaintiff fails to establish all elements of a cause of action. *Id.* at 402, 725 S.E.2d at 507.

(B) These Zinn plaintiffs did not establish the required elements of their claims.

At the close of the Zinn plaintiffs' case, the trial judge directed verdicts against the following plaintiffs: Lynn C. Lanpher, Khalif Middleton, Sherry Singleton, Steven G. Thoni, and Michael Wills. [R. pp. 839-45.] The judge based this decision on these plaintiffs' failure to adduce specific evidence to establish each element of their claims – *i.e.* identifying the alleged contractual commissions owed but unpaid (breach) and the amount of such commissions (damages). [R. pp. 839-45.] Each sale the Zinn plaintiffs made was contemporaneously recorded and assigned a contract number based on the date of the transaction and the name of the customer. [R. pp. 854-61.] With each successful sale, the sales representative would earn a commission based on certain variables such as the price of the timeshare sold. Consequently, information concerning the identity and the amount of each alleged sale was readily available to the Zinn plaintiffs. Yet, none of these five Zinn plaintiffs could identify which specific commissions they contended were owed or any actual damages under their respective employment contracts. Instead, as explained below, they engaged in pure speculation by claiming CFI owed them money without any supporting evidence. Thus, the trial judge's directed verdicts against these plaintiffs were proper and supported in the record, and this Court should affirm.

Neither side disputed that employment contracts governed the relationship between CFI and the Zinn plaintiffs. Thus, all of those plaintiffs' claims for unpaid wages sounded in contract. A plaintiff in a breach of contract case must prove the existence of a contract, its breach by the defendant, and damages resulting from that

breach. *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). Lanpher, Middleton, Singleton, Thoni, and Wills ("these plaintiffs")[4] failed to establish the last two elements as a matter of law, as the trial judge correctly determined.

As a threshold matter, these plaintiffs have not presented any basis in the record for reversal in their Appellants' Brief. In relevant part, their brief contains only the following conclusory statement: "Each of these Respondent-Appellants testified to facts sufficient to take their case to the jury ...." [Appellants' Brief of Respondents-Appellants, p. 5.] The brief does not even describe those purported facts in general terms, let alone include citations to specific record testimony. There is a complete dearth of any discussion of the record evidence, and the Appellants' Brief gives no indication at all of why these plaintiffs believe their testimony created jury questions or legally warranted jury considerations, which is part of their burden of proof. Indeed, their brief fails to discuss the actual basis for the trial judge's decision to direct verdicts against these plaintiffs. These plaintiffs have failed to accurately identify the nature of the trial judge's ruling, and it must logically follow that they cannot present any credible challenge to that decision. It is not CFI's job, or this Court's, to cure this fatal defect in these plaintiffs' appeal.

These plaintiffs have not carried their legally mandated burden of demonstrating error in the trial judge's decision to direct verdicts against them, and their unsupported, generic requests for reversal are simply insufficient to warrant reversal. *See Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (where

[4] For the sake of space and ease of reference, CFI will refer to Lanpher, Middleton, Singleton, Thoni, and Wills as "these plaintiffs" for the remainder of this section, except where it is necessary to discuss one or more them individually.

an appellant fails to cite supporting authorities and makes only conclusory arguments, the issue is deemed abandoned on appeal). As the appealing parties on this issue, these plaintiffs are required at the very minimum to show specifically how and why they believe the trial judge erred. They fall woefully short of achieving this threshold showing, let alone establishing entitlement to reversal of the directed verdicts. As a result of these plaintiffs' omissions, this Court has little, if any, basis to evaluate the merits of this issue and should affirm. *See Sweatt v. Norman*, 283 S.C. 443, 448, 322 S.E.2d 478, 481 (Ct. App. 1984) (the appealing party "has the burden of furnishing a sufficient record from which [the appellate court] can make an intelligent review; otherwise, there is nothing from which [the appellate court] can conclude that the lower court erred.").

Even if the Court accepts these plaintiffs' implicit invitation to rummage through the record looking for relevant testimony, that attempt would be futile because no such evidence exists. These plaintiffs were unable (and sometimes unwilling) to offer the requisite details to support their claims for unpaid wages. These plaintiffs did not testify as to any *specific* sales for which commissions were owed but not paid.[5] Rather, they invented their own dollar amounts – unrelated to any specific transactions and lacking any supporting details or documentation – and claimed CFI owed them that money. In other words, these plaintiffs made guesses based solely on what they characterized as their "best estimates" without regard to any corroborating documents or evidence to prove their contractual claims. As the trial judge correctly concluded, that type of

[5] The plaintiffs whose claims survived the directed verdict stage were all able to give the jury at least some specifics about sales for which they did not receive the compensation they believed they were due. For example, the plaintiffs whose claims went to the jury testified as to the names of the purchasers and/or the account numbers for those sales.

speculation fails to establish a *prima facie* claim for breach of contract or an adequate basis for jury verdicts in these plaintiffs' favor. *See Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981) ("neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation").

In addition, the lack of specific details concerning the alleged breaches (*i.e.* commissions allegedly owed) would have made it impossible for the jury to evaluate, let alone determine, whether the dollar amounts these plaintiffs claimed were ever actually owed to them under the governing contracts. All of these plaintiffs conceded that commissions were not earned and payable until two conditions precedent were satisfied: (1) the purchaser making a full down payment, and (2) the rescission period passing without the purchaser backing out of the sale. Without identifying specific disputed transactions, it was legally impossible for these plaintiffs to prove, as they are required to do, the satisfaction of those conditions precedent, an integral element of their breach of contract claims. Thus, these plaintiffs' testimony (or the lack thereof) presented only conjecture as to not only amounts actually owed, but also the very *existence* of their claims for unpaid wages.

While these plaintiffs had a right to a jury trial, they had no right to burden the jury with deciding allegations that failed, at the very minimum, to assert *prima facie* claims. The trial judge justifiably directed verdicts against these plaintiffs to prevent the jury from having to consider those unsupported claims. Indeed, situations such as this are why the remedy of a direct verdict exists. The trial judge properly grounded his decision on these plaintiffs' inability to adduce admissible evidence establishing the second and third elements of their breach of contract claims. There was no cognizable issue for the

jury to decide, as these plaintiffs failed to give the jury any proper evidentiary basis for determining whether CFI owed these plaintiffs unpaid wages or, if so, how much. The jury would have had to engage in impermissible guesswork to reach any decision. For this reason, the trial judge properly directed verdicts against these plaintiffs.

Lastly, it should be noted that for at least two of these plaintiffs, an examination of the record testimony is neither necessary nor appropriate. The trial judge granted motions to strike the testimony of Steven G. Thoni and Khalif Middleton. [R. pp. 397, 404, 839-40.] Although the Zinn plaintiffs opposed those motions at trial, they have not appealed the trial judge's decisions to strike Thoni's and Middleton's testimony. Thus, the Zinn plaintiffs have waived any issues relating to those decisions, and the judge's decisions are now the law of the case. *See, e.g., Carolina Chloride, Inc. v. Richland Co.*, 394 S.C. 154, 714 S.E.2d 869 (2011) (an unchallenged ruling becomes the law of the case, regardless of whether it is right or wrong); *Caprood v. State*, 338 S.C. 103, 525 S.E.2d 514 (2000) (where the appealing party does not challenge a ruling, it becomes the law of the case and will not be considered on appeal); *see also* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Consequently, the trial testimony of Thoni and Middleton is not properly a part of the record, and the Court cannot consider that testimony.[6]

All of these plaintiffs failed to present sufficient evidence to create a jury issue for their claims for unpaid wages. The trial judge properly recognized that deficiency and granted directed verdicts in CFI's favor. Neither these plaintiffs' Appellant's Brief nor the record itself offers any basis for disturbing the trial judge's rulings on this issue.

---

[6] As previously noted, however, even if the Court were to consider the testimony of Thoni and/or Middleton, that testimony fails to raise any basis for reversal.

Therefore, this Court should affirm the directed verdicts entered against Lanpher, Middleton, Singleton, Thoni, and Wills.

II. The trial court properly denied the Zinn plaintiffs' motions for a new trial and/or JNOV.

CFI in an untenable position in attempting to respond to Section II of the Appellants' Brief, as it fails to articulate an identifiable argument and, in fact, appears to conflate a number of incongruent arguments premised on issues that were not part of the Zinn case. In many respects, however, Section II of that brief seems to mirror the Respondents-Appellants' motions for a new trial and/or JNOV. Therefore, CFI will respond to the issues asserted in that motion (and presumably in Section II of the Appellant's Brief) to the extent those issues are not addressed in other sections of this Respondent's Brief.

(A) *Res Judicata*

As discussed in the Statement of the Case and the Statement of the Facts, CFI filed a summary judgment motion in this case asserting that *res judicata* prevented the Zinn plaintiffs from litigating any issues that were raised, or could have been raised, in the previous Parker action. The trial judge granted that motion at the beginning of trial. [R. pp. 185-86.] Among other things, this ruling barred the Zinn plaintiffs from raising any claims relating *in any way* to the reserve and charge back clauses in the parties' agreements. [R. pp. 185-86.] Under the rules of *res judicata*, this scope encompassed all arguments and claims the Zinn plaintiffs could have raised in the Parker action, even if they never expressly did so.

Significantly, the Zinn plaintiffs have not appealed the trial judge's decision to grant CFI summary judgment on the issue of *res judicata*. Their Notice of Appeal makes

no reference to that decision, and the issue does not appear in their statement of the issues on appeal. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Furthermore, the Zinn plaintiffs' Appellants' Brief contains no arguments or authorities relating to *res judicata* or its application to this case. Thus, even if the Zinn plaintiffs intended to challenge the trial judge's decision, they have waived and abandoned any arguments on that issue. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1993) (failure to argue an issue or provide supporting authority for it constitutes an abandonment of that issue on appeal). As a result of this abandonment, the trial judge's decision to apply *res judicata* based on the Parker judgment is now the law of the case, irrespective of the Zinn plaintiffs' belated additions to the order. *See Shirley's Iron Works, Inc. v. Tindall Corp.*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case").

CFI has previously discussed the broad preclusive effects of the Parker judgment in its Appellant's Brief. To avoid unnecessary repetition, CFI respectfully directs the Court's attention to section I of its Appellant's Brief for its substantive arguments on that point. For present purposes, it is sufficient to note that *res judicata* prevents the Zinn plaintiffs from raising *any* claims or arguments relating to CFI's reserve accounts, whether such claims involve creation, implementation or payment. This necessarily includes matters concerning how and why CFI placed money into those reserve accounts, as well as whether those accounts complied with statutory law. All of those issues (and anything else having to do with the reserve accounts) were raised, or should have been raised, in the Parker action. Consequently, those issues cannot be raised or argued in the

present case. Again, this is the natural result of the trial judge's unchallenged ruling on the issue of *res judicata.*

The Zinn plaintiffs appear to argue they are entitled to relief because CFI's alleged arbitrary placement of certain funds into reserve accounts (*i.e.* amounts over 10% of the commission or $3,500) violated South Carolina law. CFI disputes that allegation, but any dispute on this issue is now only academic. The Zinn plaintiffs could have raised all such arguments in the Parker action, which means those arguments fall within the preclusive scope of the Parker judgment. In short, those arguments were not properly raised at trial, and they are not properly raised in this appeal. By making those assertions at this juncture, the Zinn plaintiffs are merely attempting to sidestep a ruling that they have not directly challenged on appeal. Therefore, this Court should disregard those arguments and affirm the result below as to the Zinn plaintiffs' claims.

The Zinn plaintiffs appear to argue that the damages claimed in the Zinn action were outside the scope of the Parker judgment's *res judicata* effect because they allege CFI arbitrarily designated commissions as paid when they were actually sent to reserve accounts. This argument does not withstand any serious scrutiny.

The Zinn plaintiffs base this position on the false premise that they could not prove their claims because CFI unilaterally designated the disputed commissions as part of the reserve accounts addressed in the Parker action. As discussed above, however, each Zinn plaintiff (with the exception of the five discussed in Section I of this brief) identified multiple sales transactions for which they believed they were owed a commission. The substantial majority of the transactions involved commissions that would have been earned – if all the conditions precedent had been met – while the Zinn

plaintiffs still worked for CFI, and they would have been payable at that time. These commissions, contrary to the Zinn plaintiffs' belated claims, were not arbitrarily assigned to the reserve accounts to preclude litigation of wages based on the Parker judgment. Only commissions that were earned after the sales representatives left their employment went to the reserve accounts, and that very issue was one of the central disputes in the Parker case.

Indeed, the Appellants' Brief misstates the bulk of the testimony from the Zinn plaintiffs and from CFI's own witness about which commission claims were excluded based on *res judicata* and which were not proven. The jury heard all of the evidence and rejected the Zinn plaintiffs' claims. The Zinn plaintiffs cannot seek reversal of the unfavorable jury verdicts simply because they disagree with them. In order to challenge those verdicts, the Zinn plaintiffs must point to specific legal errors that caused those verdicts, and they have not met that burden. The Zinn plaintiffs have presented only generic and vague complaints about the outcome of the case. This is insufficient as a matter of law to reverse the trial judge's decision to allow the jury verdicts to stand.

Section II of the Zinn plaintiffs' Appellants' Brief might also be construed as asserting arguments based on the trial judge's jury charges regarding the preclusive effects of the Parker action. Again, though, any such argument fails because the Zinn plaintiffs have not appealed the legal ruling that led to the charge in the first place.

The trial judge gave the jury the following charge regarding *res judicata* and the Parker action:

> Under a legal doctrine known as res judicata a party is barred from recovery in a lawsuit if that party's entitlement to recovery has already been decided in a previous lawsuit involving the same parties, same subject matter and

> adjudication of the same issues. In other words a party cannot bring another lawsuit against the same Defendant for the same relief based upon the same causes of action already decided in a previous lawsuit.
>
> Some of the testimony in this case has referred to a reserve account maintained by the Defendant. Testimony in this case has also referred to another lawsuit known as the Parker case. The Parker case was a class action lawsuit by a number of the people, by a number of people including the Plaintiffs in this case against the Defendant in this case for funds in the reserve account maintained by the Defendant that the Plaintiffs in that case, class action allege were due and owing to them. By court order dated January 29th, 2010, the Parker case was settled by all of the parties in that lawsuit, including the parties in this lawsuit. Therefore, under the doctrine of res judicata the Plaintiffs in this case are not entitled to judgment against the Defendant for commissions if any that were placed in the reserve account on or before January 29th, 2010.

[R. p. 1073, line 6 – p. 1074, line 4.] This language simply reflects the ruling the trial court made at the beginning of the trial. Having now failed to challenge that ruling on appeal, the Zinn plaintiffs cannot claim this portion of the jury charge was erroneous. To the contrary, the quoted passage accurately states what has become the law of the case. The Zinn plaintiffs should not be permitted to circumvent the trial judge's unappealed ruling by attacking it under the guise of a jury charge argument. Thus, to the extent the Zinn plaintiffs seek reversal based on this portion of the jury charge, their contentions must fail.

(B) Payment of Wages Act

The Zinn plaintiffs also appear to argue the trial judge erred in not permitting the jury to consider and determine their claims under the Payment of Wages Act ("the Act"). Although the arguments on this point in their Appellants' Brief are sparse and unsupported by any cited legal authorities, the Zinn plaintiffs unjustifiably conclude the

jury was required to rule on the claims under the Act. This assertion is erroneous, and somewhat puzzling, for the reasons discussed below.

First, the Zinn plaintiffs moved for a directed verdict on the issue of whether or not CFI violated the Act. This constituted an acknowledgment (or, at the very least, a belief) that the trial judge could rule on that issue without submitting it to the jury. Having moved for a directed verdict, the Zinn plaintiffs cannot now suddenly shift their position and claim the issue was one for the jury.

Second, and perhaps more importantly, the trial judge concluded there was a violation of the Act, at least with respect to one of the Zinn plaintiffs.[7] Indeed, the judge told the attorneys before deliberations began that he planned to triple any damages awards the jury might return. [R. pp. 1012-13.] Thus, it is difficult to see how the trial judge's decision not to submit the purported statutory claims to the jury resulted in any prejudice to the Zinn plaintiffs. They asked for a legal ruling in their favor, and that is at least partially what they received. Consequently, the Zinn plaintiffs are not in any position to allege error based on the trial judge's decision regarding the Act.

Third, the trial judge permitted the jury to consider the breach of contract claims for all of the Zinn plaintiffs who offered actual evidence (as opposed to speculation) of breaches and resulting damages.[8] That decision gave those plaintiffs a full and fair opportunity to receive favorable verdicts if the jury believed they had proved entitlement

---

[7] As discussed in its Appellant's Brief, CFI contends any ruling of a violation of the Act was limited to the plaintiff Laura Arrington, and the trial judge never found – or intended to find – that CFI committed other violations of the Act, or that the employment contracts constituted *per se* violations of the Act. Nothing in the current argument should be deemed to conflict with the positions set forth in CFI's Appellant's Brief.

[8] The trial judge granted directed verdicts on the breach of contract claims only as to the plaintiffs Lanpher, Singleton, Middleton, Thoni, and Wills.

to unpaid wages. In addition, as mentioned above, the trial judge told the attorneys he would consider tripling any damages awards the jury returned. Thus, the Zinn plaintiffs had their chance to recover damages and to reap the remedial benefits of the Act that they alleged. The jury simply did not rule in their favor.

Finally, even though the trial judge declined to submit the statutory "claims" to the jury, he charged the requirements and standards of the Act upon which the Zinn plaintiffs relied. Specifically, the judge instructed the jury that an employer was required to implement changes to an employee's terms of compensation in writing at least seven days before the changes were to take effect. [R. p. 1072, lines 10-11.] The judge further instructed the jury that "the employer shall pay all wages due to the employee within 48 hours of the time of separation or the next regular payday which may not exceed 30 days." [R. p. 1072, lines 14-17.] These were the requirements the Zinn plaintiffs claimed CFI violated. While the judge did not identify the specific statutes that created those statutes, he presented them to the jury as "South Carolina law" that CFI was supposed to follow. As a result, the jury wound up considering – and rejecting – the Zinn plaintiffs' statutory claims in everything but name.

The Zinn plaintiffs cannot demonstrate any reversible error on this issue. The trial judge gave them what they wanted in large part, and he essentially allowed the jury to consider the Zinn plaintiffs' statutory claims without identifying the Act by name. The jury clearly found no violations of the Act's requirements or any other breaches with regard to the Zinn plaintiffs' contracts. This Court should affirm that result and allow the jury's verdicts to stand.

(C) Conclusion

Regardless of what the Zinn plaintiffs intend to argue in section II of their Appellant's Brief, they have failed to show any basis for reversing the result in the trial court. The Zinn plaintiffs were able to present and argue their breach of contract claims to the jury, and the jury rejected them. They are understandably disappointed in that result, but the adverse verdicts in and of themselves do not entitle the Zinn plaintiffs to any further relief. The Zinn plaintiffs bear the burden of showing reversible error by the trial court, and they have not carried that burden in their Appellant's Brief. Therefore, this Court should affirm the trial judge's decision not to disturb the jury's verdicts.

III. The trial court properly directed verdicts against the Zinn plaintiffs on the claims for breach of contract accompanied by a fraudulent act.

At the close of evidence, the trial judge granted a directed verdict to CFI on all the Zinn plaintiffs' claims for breach of contract accompanied by a fraudulent act. [R. pp. 1011-13.] In making this decision, the trial judge concluded the Zinn plaintiffs had not presented evidence of any fraudulent acts or intent by CFI related to breaches of contracts. [R. pp. 1011-13.] While the Zinn plaintiffs focus on the allegedly erroneous language the trial judge used in articulating his ruling, they sidestep the fact that the ruling was ultimately correct under the applicable law. Therefore, this Court should affirm the trial judge's decision on this issue.

"In order to have a claim for breach of contract accompanied by a fraudulent act, the plaintiff must establish three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986). The "fraudulent act" element requires proof of an independent

fraudulent act sufficiently connected in time and character to the alleged breach. *D.R. Horton, Inc. v. Wescott Land Co.,* 398 S.C. 528, 555-556, 730 S.E.2d 340, 354-355 (Ct. App. 2012); *Minter v. GOCT, Inc.*, 322 S.C. 525, 529-530, 473 S.E.2d 67, 70-71 (Ct. App. 1996). When a plaintiff fails to prove all of these elements, judgment as a matter of law is warranted. *Id.*

In their Appellants' Brief, the Zinn plaintiffs focus on what they contend to be evidence of an alleged fraudulent scheme to withhold wages. CFI contends the Zinn plaintiffs' argument is erroneous on the merits, but this Court need not reach that issue because a much more basic defect negates the Zinn plaintiffs' position: They have failed to establish the first element for this cause of action. Without that threshold showing, all of the Zinn plaintiffs' arguments regarding fraudulent intent become moot.

The trial judge allowed all the Zinn plaintiffs who had presented evidence of breaches and damages to submit their breach of contract claims to the jury. With only one exception, the jury returned defense verdicts on all of those claims.[9] The Zinn plaintiffs have not argued on appeal that there was no evidentiary basis for those defense verdicts. Indeed, such a basis existed for multiple reasons, including the contractual conditions precedent and the Zinn plaintiffs' inability to claim damages barred by the Parker judgment. Thus, it is settled for purposes of this appeal that the Zinn plaintiffs failed to establish a breach of contract by CFI. This fact, in turn, invalidates the Zinn plaintiffs' arguments against the directed verdicts for breach of contract accompanied by a fraudulent act.

---

[9] The one exception was the claim by Laura Arrington, who received a verdict only because CFI admitted during the trial it owed her $2,769 in unpaid wages.

Even if this issue were not moot, however, the Zinn plaintiffs' arguments on appeal do not demonstrate error. The Zinn plaintiffs list eight allegations that they claim show fraudulent intent and acts. Four of those items (labeled "d," "e," "f," and "h") were not related in time or character to the alleged breach. The other four (labeled "a," "b," "c," and "g") were not *independent* acts connected to the breach; they were the alleged breaching acts themselves. As a result, the items cited in the Zinn plaintiffs' Appellants' Brief were insufficient as a matter of law to establish a cause of action for breach of contract accompanied by a fraudulent act.

Two decisions by this Court support this point. In *D.R. Horton, Inc. v. Wescott Land Co.*, 398 S.C. 528, 730 S.E.2d 340 (Ct. App. 2012), the allegations centered on the breach of a contract for the sale of real property. There was evidence suggesting that the breaching party had a fraudulent intent in dealing with the other party to the sale, but there was no evidence of an independent fraudulent act related to the breach. For this reason, the Court affirmed summary judgment in favor of the alleged breaching party with regard to the claim for breach of contract accompanied by a fraudulent act.

The Court reached a similar result in *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996). There, the defendant built a car repair business and leased it to the plaintiff. The lease agreement gave the plaintiff a right of first refusal for a lease if the defendant opened another car repair business in a two-county area. The plaintiff told the defendant that it would enforce that provision and would consider it a breach of the agreement if the defendant opened another business without offering the first refusal opportunity. Despite that warning, the defendant developed and opened another business

without informing the plaintiff. The plaintiff then sued the defendant for breach of contract and breach of contract accompanied by a fraudulent act.

In affirming a directed verdict for the defendant on the latter claim, this Court focused on the absence of any independent fraudulent act by the defendant. While opening a second location without telling the plaintiff or offering the right of first refusal might have resulted from a fraudulent intent, there was no fraudulent act connected to the breach. Thus, the directed verdict for the defendant was proper.

The same reasoning applies to the present case. The Zinn plaintiffs failed to show any independent fraudulent act or any fraudulent intent on the part of CFI connected to the breach. Furthermore, as previously discussed, the Zinn plaintiffs could not even establish the threshold element of a breach of contract. Therefore, there was no reversible error on this issue, and this Court should affirm the trial judge's decision regarding the Zinn plaintiffs' claims for breach of contract accompanied by a fraudulent act.

IV. The trial court properly limited the award of attorney's fees because only one of the twenty-five original plaintiffs obtained a favorable result.

The Zinn plaintiffs contend the trial court erred in awarding only a fraction of the attorney's fees requested in their post-trial motion. For the reasons set forth below, the Zinn plaintiffs' arguments on this issue must fail, and the Court should affirm the trial judge's decision.

As a threshold matter, it is important to note that the trial judge had broad discretion in considering what attorney's fees, if any, to award. The trial judge awarded attorney's fees pursuant to S.C. Code § 41-10-80. This section, which is part of the Payment of Wages Act, states that when the Act has been violated, "... the employee *may*

recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees *as the court may allow.*" S.C. Code Ann. § 41-10-80(C). This language is unambiguous. The award of an attorney's fee under this section is discretionary, not mandatory. This Court cannot disturb the trial judge's ruling absent a showing "that the conclusion reached by the trial [judge] was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Kershaw Co. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). Furthermore, "the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

Here, the trial judge acted well within his discretion in making the attorney's fee award. The Zinn plaintiffs requested a total of $54,276 in attorney's fees, and the trial judge awarded only $2,171.04. The much lower award is reasonable, however, because only one of the original twenty-five Zinn plaintiffs prevailed in her claim and received a damages award. According to the numbers in their Appellants' Brief, the Zinn plaintiffs claimed a total of $321,504.54 in damages. The Zinn plaintiffs also sought to have those damages tripled, which would raise the number to $964,513.62. Yet, only a single plaintiff (Laura Arrington) obtained a favorable verdict, and even her award was greatly reduced from the $35,960.25 she claimed to $2,769 (which the trial judge tripled to $8,307). In short, the total amount of recovery was less than one percent of the damages sought in the case. This fact underscores the inherent reasonableness in the trial judge's attorney's fee award, which was roughly four percent of the requested amount.

The Zinn plaintiffs also claim that the trial judge gave "no consideration" to the favorable decision they obtained on their declaratory judgment claim. [Appellants' Brief, p. 8.] This assertion is simply incorrect. The trial judge devoted a separate section of his Order to explain his decision not to award attorney's fees pursuant to the Declaratory Judgment Act. [R. p. 20.] This fact belies any contention that the trial judge ignored or failed to consider the Declaratory Judgment Act as a potential basis for an attorney's fee award.

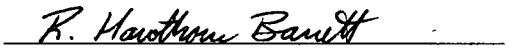
The trial judge awarded attorney's fees that were proportional to the attorneys' rate of success in this case. Twenty-five plaintiffs brought this case against CFI, but only one of them obtained a favorable result. The trial judge's decision to award only one-twenty-fifth of the requested fees was, therefore, completely reasonable and justifiable. For this reason, the Court should affirm the trial judge's decision on this issue.

CONCLUSION

The Zinn plaintiffs had previously agreed and knew at the inception of the trial that the reserve accounts addressed in the Parker action were not part of the Zinn trial. Nevertheless, they conducted a week-long trial attempting to prosecute claims for alleged wages they knew they could not collect. Several of the plaintiffs failed to attend the trial, and it soon became clear that many others had no actual evidence of any breach or resulting damages. By the end of the trial, only thirteen plaintiffs remained with claims to submit to the jury, and only one of those obtained a recovery. Thus, a case in which the plaintiffs were claiming in excess of $900,000 in damages yielded a recovery of less than $10,000.

The Zinn plaintiffs have now appealed the results of the trial, but they have not demonstrated any reversible error. Their Appellants' Brief is largely devoid of any supporting legal authorities or citations to the record, and it does not present any justifiable basis for this Court to disturb the result below. Therefore, the Court should affirm on all of the issues raised by the Zinn plaintiffs' in their Appellants' Brief.

Respectfully submitted,



R. Hawthorne Barrett
Turner Padget Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 227-4219
TBarrett@TurnerPadget.com

John S. Wilkerson
Turner Padget Graham & Laney P.A.
400 Calhoun Street, Suite 200
Charleston, SC 29401
(843) 576-2801
JWilkerson@TurnerPadget.com

Attorneys for the Appellant-Respondent

RULE 211(b) CERTIFICATION

The undersigned, an attorney in this matter for the Appellant-Respondent, certifies that this Final Respondent's Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

R. Hawthorne Barrett

R. Hawthorne Barrett
Turner Padget Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 227-4219

John S. Wilkerson
Turner Padget Graham & Laney P.A.
40 Calhoun Street, Suite 200
Charleston, SC 29401
(843) 576-2800

Attorneys for the Appellant/Respondent

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.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant/Respondent, certifies that I have this **24th day of January, 2014,** served copies of this party's **Final Appellant's Brief of Appellant/Respondent, Final Respondent's Brief of Appellant/Respondent,** and **Final Reply Brief of Appellant/Respondent** 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.

R. Hawthorne Barrett
R. Hawthorne Barrett
Turner Padget Graham & Laney P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 227-4219
TBarrett@TurnerPadget.com

John S. Wilkerson
Turner Padget Graham & Laney P.A.
40 Calhoun Street, Suite 200
Charleston, SC 29401
(843) 576-2800
JWilkerson@TurnerPadget.com

Attorneys for the Appellant/Respondent

January 24, 2014