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 RESPONDENTS/APPELLANTS

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STATEMENT OF THE ISSUE ON APPEAL

Did the trial judge properly rule that Appellant/Respondent violated the Payment of Wages Act?

STATEMENT OF THE CASE

This action for wages, penalties, declaratory judgment and other relief was commenced on January 5, 2009 after it became apparent that the named Plaintiffs were entitled to unpaid wages far in excess of the amounts in the "reserve accounts" maintained by Defendant and sued for in the Parker class action described by Appellant/Respondent.

The Appellant/Respondent Answered, Counterclaimed and Cross-Complained alleging payment, the validity of the contract, lack of a justiciable controversy, that wages were not yet earned, that it was not an "employer" under the Act, unclean hands, overpayment, res judicata and collateral estoppel.

The case came on for trial before the Hon. Benjamin Culbertson and a jury in Conway February 13-17, 2012. Some Plaintiffs were dismissed for failing to appear for trial (and are not included in this appeal) and others suffered a dismissal of their claims by the Court after their testimony. Of the remaining Plaintiffs all but one suffered defense verdicts.

The amount involved on appeal is set forth infra and equals approximately $192,000.00 before trebling, pre judgment interest and attorneys fees. Judge Culbertson's Order dispositive of all post-trial motions and entering Judgment was filed August 7, 2012. This appeal followed.

STATEMENT OF THE FACTS

Although the Defendant's contract limited the withholding of wages to 10% of commissions not to exceed $3,500.00, through discovery it became apparent that Defendant had violated those terms. After Defendant produced a list of reserve account balances in the Parker case it became apparent that the instant Plaintiffs were owed wages far beyond the reserve account balances admitted by Defendant.

After admittedly withholding wages in excess of the contract terms and settling the Parker action for reserve account balances, Defendant then took the position in the instant case that any and all unpaid wages were somehow "paid" into the reserve account and therefore not recoverable by the workers in this action. (R. p. 927-928)

There is no separate reserve account maintained by Defendant. When Defendant's witness testified the earned wages were "paid" to the Plaintiffs she indicated no money moved from Defendant's cash management system, there was nothing more than a bookkeeping notation. (R. p. 932-933)

Appellant/Respondent erroneously asserts that the instant action "dealt with commissions due and payable while the sales representatives were employed by CFI." (Brief of Appellant/Respondent, p. 7). In fact the instant action was for unpaid wages whenever they were due. Since the reserve account was limited by contract to $3,500.00 and 10% of commissions earned, those in excess were plainly not adjudicated in Parker. At best, from Appellant/Respondent's perspective, these workers would be limited in the instant action to their unpaid wages minus those amounts (even in excess of $3,500.00) admittedly withheld in Parker discovery.

Appellant/Respondent claimed at trial, however, that its affirmative representation to the Parker court should be disregarded. With the exception of two Plaintiffs the testimony was that the unpaid wages far exceeded the representation of the amount in the reserve account:

		Testimony	Parker Reserves
1.	Khalif Middleton (R. p. 393)	$15,000.00	$6,376.00
2.	Lynn C. Lanpher (R. p. 413)	$13,695.00	$2,110.00
3.	John Loughlin (R. p. 429)	$14,460.00	$725.00
4.	Rodney Haynes (R. p. 473)	$3,470.00	$2,180.00
5.	Laura Arrington (R. p. 499)	$35,960.25	$5,692.18
6.	Cynthia Reilly (R. p. 546)	$25,530.00	$1,105.00
7.	Bradley Kirk Bray (R. p. 564)	$5,247.00	$2,782.00
8.	Michael Wills (R. p. 681)	$26,000.00	$12,210.60
9.	Stephen Black (R. p. 623)	$20,490.00	$6,005.00

10.	Holly Levasseur (R. p. 643)	$6,628.00	$600.00
11.	Timothy Zinn (R. p. 712)	$22,054.00	$5,850.00
12.	Mark D'Amico (R. p. 766)	$8,760.00	$2,800.00

To evade liability herein Appellant/Respondent now asserts that it may contradict its prior representations to the Court of the amounts in reserve accounts and "right, wrong or indifferent" (R. p. 250) retroactively re-characterize its unpaid wages as reserve account funds, despite lacking any contractual or legal authority to do so and despite the fact that the funds never actually left the account in which they were deposited. (R. p. 737-740)

ARGUMENT

I. The trial court properly concluded that Appellant/Respondent's reserve chargeback scheme violated the Payment of Wages Act, Section 41-10-10, et seq., S.C.C.A. (1994)

It is undisputed that the relationship between the parties is governed by, inter alia, the Payment of Wages Act, Section 41-10-10, et seq. S.C. Code Ann. (1994). Section 100 expressly provides that no provision of the Act "...may be contravened or set aside by a private agreement." Section 40(c) of the Act expressly provides: "An employer shall not withhold or divert any portion of an employee's wages..." Section 50 provides that discharged employees are entitled to payment in full "...within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days."

It is noteworthy that Appellant/Respondent does not contend that its chargeback scheme complies with the Act but rather that the trial Court was somehow procedurally precluded from making such a determination, either because of a previous oral ruling or because of the Parker settlement.

Appellant/Respondent correctly points out that the legality of its contract and of its conduct are two distinct questions. Its contract provides it needn't pay wages until long after the statutory deadline. Its admitted conduct includes withholding and diverting Plaintiffs' wages. For the reasons set forth infra Appellant/Respondent's contentions regarding the trial Court's ruling are without merit.

By statute Defendant's commission agreement could not be altered except upon written notice. The agreement expressly limited the reserve accounts to 10% of wages, not to exceed $3,500.00. The Defendant admittedly gave no notice of any alteration of those terms and admittedly withheld in excess of 10% and in excess of $3,500.00, a plain violation of the Act.

As a class action the Parker case was subject to the provisions of Rule 23 SCRCP which provides, inter alia, for a judicial determination of the fairness of a proposed class action settlement. Judge Baxley in Parker conscientiously executed that responsibility, adducing evidence based upon the representations of the parties. At trial in the instant matter Defendant took the position that its representations regarding the reserve funds in Parker should be disregarded as all unpaid wages were unilaterally, without notice to the workers, converted to reserve funds in violation of the statute and without any contractual or other authority to do so.

A.) Res Judicata is inapplicable by virtue of the express language in the prior case's Order.

The instant case expressly includes a Declaratory Judgment cause of action (Complaint, R. pp. 102-103) as to the Appellant/Respondent's violation of the Payment of Wages Act. The Memorandum of Understanding in the prior case expressly provides that the instant case shall proceed "unaffected" by the prior settlement (Memorandum, R. p. 97). The transitive verb "affect" is defined as "to produce a material influence upon or alteration in." U.S. v. Caldwell, 463 F.2^{d} 590 (3^{d} Cir. 1972). Appellant/Respondent's argument is precluded by its own agreement. Given these circumstances it is difficult to envision how the previous settlement is res judicata as to the issues herein.

Appellant/Respondent confuses two concepts. In the Pye case upon which it relies it is expressly held:

> "Res Judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." Pye v. Aycock, 325 S.C. 426, 436, 480 S.E.2^{d} 455, 460, (Ct. App. 1997).

While couching its argument in terms of a cause of action what it actually complains of is a factual or issue determination by the trial court. Following Appellant/Respondent's argument to its logical conclusion all causes of action in the instant case would be barred by res judicata, a result which the parties by express written agreement waived, with the approval of the Parker Court.

B.) The Order does not contradict the oral ruling and if it did it would be of no consequence.

It is black letter law that a trial judge has discretion to change his mind and amend a previous oral ruling until the Order is written, endorsed and entered. Ford v. State Ethics Commission, 344 S.C. 642, 646, 545 S.E.2^{d} 821, 823 (2001). Bowman v. Richland Memorial Hospital, 335 S.C. 88, 91-92, 515 S.E.2^{d} 259, 260-61 (Ct. Appt. 1999) cited in McComb v. Conrand, 715 S.E.2^{d} 662, 394 S.C. 416 (S.C. App. 2011). Appellant/Respondent's exception based upon this issue is of no moment.

It is also black letter law that a trial Judge is not inextricably bound by the terms of a pretrial Order. Barnes v. Jones Chevrolet, Inc., 292 S.C. 607, 358 S.E.2d 156, 159 (Ct. App. 1987).

Here the Appellant/Respondent submitted its own proposed Order, drafted to suit its tastes, which the trial Judge declined to endorse.

C.) The Employment Contract and Appellant/Respondent's performance under it blatantly violate the statute.

1. The provisions regarding reserves and chargebacks were the central issue and the trial Court expressly was required to adjudicate them.

Appellant/Respondent admits that, by design, it retained the wages of workers who did not wait six months following termination and then submit a written demand. This is a blatant and egregious violation of the statute. (R. p. 927-929)

Appellant/Respondent premises its argument on the erroneous notion that Respondent/Appellants "focused solely on commission amounts that CFI allegedly failed to pay during the Zinn plaintiffs' employment, not after their discharge," (Brief of Appellant/Respondent, p. 20). It presupposes the validity of Appellant/Respondent unlawfully and without any factual or other basis whatsoever retroactively recharacterizing unpaid wages as reserve funds.

Appellant/Respondent simultaneously argues that there was no need to consider the reserve accounts or charge back provisions and that it evades liability herein by virtue of those provisions. Important to note, however, is that it concedes it has no contractual, legal, factual or other basis for recharacterizing unpaid commissions in excess of the contractual terms as reserve funds, yet contends it is nevertheless free to do so even if it is "wrong." (R. p. 250)

2. The Zinn Plaintiffs' challenge to the commission system is set forth in the pleadings and the scheme is entirely inconsistent with the Payment of Wages Act.

Appellant/Respondent's reliance upon Rice v. Multimedia, Inc. 318 S.C. 95, 456 S.E. 2d 381 (1995) is misplaced. In Rice the parties' rights, duties and obligations were fixed as of the date of separation from the payroll. Appellant/Respondent contends it is thereby authorized to delay payment of wages up to ten (10) years after separation from the payroll, depending upon future variables, a plainly absurd result. Appellant/ Respondent's logic further leads it to the conclusion that it is free to simply withhold wages earned from all former employees who fail to follow its procedure requiring that they wait six months after termination and then submit a written demand, an equally absurd result.

D.) The trial Court was fully justified in trebling Arrington's damages and awarding attorney's fees.

Appellant/Respondent argues that the trial Court properly trebled Arrington's damages and awarded attorneys fees based upon its untimely payment of her wages. Simultaneously it argues that trebling and attorneys fees must be reversed if awarded upon any other ground.

The only basis for this position is that otherwise the court would "[run] afoul of res judicata" (Brief of Appellant/Respondent, p.26). As shown supra the parties expressly agreed in writing, approved by the Court and unappealed, that the instant action would proceed "unaffected" by the former suit.

Appellant/Respondent expressly states this Court should reverse to "...harmonize the results in Parker and in this case." (Brief of Appellant/Respondent, p.27). Such harmonization is precisely what the Appellant/Respondent and the lower court agreed was unnecessary when it was ordered the instant action proceed "unaffected" by Parker.

CONCLUSION

The trial court properly concluded Appellant/Respondent violated the Payment of Wages Act. No procedural bar precluded such a claim and the substance of the finding is amply supported by the record.

Respectfully submitted,

July 29, 2014

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

August 8, 2014

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PROOF OF SERVICE

I certify that I have served the Final Appellant's Brief of Respondents/Appellants and Final Respondent's 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 July 30, 2014, 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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