

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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

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Case No.: 2009-CP-26-0043

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

v.

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

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**FINAL REPLY BRIEF  
OF APPELLANT/RESPONDENT**

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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

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## TABLE OF CONTENTS

|                                                                                                                                                                                                                        |    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Table of Authorities.....                                                                                                                                                                                              | ii |
| Argument.....                                                                                                                                                                                                          | 1  |
| I. The Parker Judgment precluded any litigation or rulings<br>in the present case regarding CFI's reserve accounts.....                                                                                                | 1  |
| (A) Both <i>res judicata</i> and issue preclusion lead to the same result.....                                                                                                                                         | 1  |
| (B) The Parker Judgment did not permit the Zinn plaintiffs to<br>pursue any claims or issues involving the reserve accounts in this<br>case.....                                                                       | 3  |
| (C) CFI disputed any violations of the Payment of Wages Act at<br>the appropriate time for such arguments.....                                                                                                         | 5  |
| (D) Conclusion.....                                                                                                                                                                                                    | 7  |
| II. The trial judge lacked authority to reverse the original grant<br>of summary judgment to CFI because that reversal constituted<br>an error of law.....                                                             | 7  |
| III. The treble damages and attorneys fee granted to Laura<br>Arrington were proper only if the trial judge based those<br>remedies on the specific statutory violations stated in the<br>judge's original ruling..... | 9  |
| Conclusion.....                                                                                                                                                                                                        | 10 |
| Rule 211(b) Certification.....                                                                                                                                                                                         | 12 |

## **TABLE OF AUTHORITIES**

|                                                                                               |   |
|-----------------------------------------------------------------------------------------------|---|
| <i>Freeman v. McBee</i> ,<br>280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984).....                | 2 |
| <i>Nunnery v. Brantley Constr. Co.</i> ,<br>289 S.C. 205, 345 S.E.2d 740 (Ct. App. 1986)..... | 2 |
| <i>Pye v. Aycock</i> ,<br>325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).....                   | 2 |
| <i>Spence v. Spence</i> ,<br>368 S.C. 106, 628 S.E.2d 869 (2006).....                         | 2 |

## ARGUMENT

### **I. The Parker Judgment precluded any litigation or rulings in the present case regarding CFI's reserve accounts.**

In their Respondents' Brief, the Zinn plaintiffs appear to assert two arguments purportedly justifying the trial court's authority to conclude post-trial that the reserve account system violated the South Carolina Payment of Wages Act. First, the Zinn plaintiffs argue the impact of the previous Parker Judgment raises questions of issue preclusion rather than *res judicata*. Second, the Zinn plaintiffs claim the language of the Parker Order carved out an exception that permitted the trial court in this case to adjudicate disputes concerning the reserve accounts. Both of those assertions are legally and factually erroneous. More importantly, they fail to provide a legal basis for the post-trial ruling on the Payment of Wages Act issues.

#### **(A) Both *res judicata* and issue preclusion lead to the same result.**

The Zinn plaintiffs' argument that collateral estoppel applies here and not *res judicata* can only be characterized as a "distinction without a difference." It is nothing more than a legal fallacy. The Parker Judgment excluded all factual and legal issues related to the reserve accounts and charge-backs, including whether CFI held reserves in excess of \$3,500. The Zinn plaintiffs do not dispute that the same parties on both sides were involved in the previous Parker action or that the reserve accounts were at issue in that case. Rather, they appear to claim CFI's position fails because it couches its argument in terms of *res judicata* instead of collateral estoppel or issue preclusion. Again, this contention is a matter of semantics, not substance. Regardless of which legal term is used, the fact remains that the Parker Judgment precludes re-litigation of any questions regarding the reserve accounts or charge-back provisions.

As a threshold matter, CFI disputes the suggestion that *res judicata* is inapplicable here. A party seeking to establish *res judicata* must show the following elements:

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

*Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997) (quoting *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 742-43 (Ct. App. 1986) (emphasis added)). All of those elements are present in this case. The parties are the same in both actions, and the subject matter is identical. Indeed, the final versions of the Complaints in the two cases are functionally identical. Given those facts, which the record plainly demonstrates, CFI has successfully established all of the elements for *res judicata*.

Yet, even if this situation involved issue preclusion rather than *res judicata*, the end result would be the same. As the Zinn plaintiffs note in their Respondents' Brief, collateral estoppel or issue preclusion "bars relitigation of the same facts or issues necessarily determined in the former proceeding." *Pye*, 325 S.C. at 436, 480 S.E.2d at 460. The reserve accounts were a primary focus of the Parker action, and the Parker Judgment necessarily determined all issues involving those accounts. *See Freeman v. McBee*, 280 S.C. 490, 493, 313 S.E.2d 325, 327 (Ct. App. 1984) (a dismissal with prejudice, even if entered with the consent of the parties, "operates as an adjudication on the merits terminating the action and concluding the rights of the parties."); *Spence v. Spence*, 368 S.C. 106, 128, 628 S.E.2d 869, 881 (2006) (a dismissal with prejudice "is intended to bar relitigation of the same claim."). Thus, the Parker Judgment precluded

any relitigation of issues involving the reserve accounts, regardless of whether that preclusive effect stems from *res judicata* or issue preclusion.

All of the Zinn plaintiffs asserted claims addressing the reserve accounts in the Parker action. The parties litigated those issues and then entered into a stipulated judgment and dismissal with prejudice. The resulting Parker Judgment ended the Zinn plaintiffs' opportunity to make any claims attacking the reserve accounts or addressing those accounts in any way. If the Zinn plaintiffs wanted a "merits ruling" regarding the impact of the Payment of Wages Act on the reserve accounts, they had the chance to press for one in the Parker action. They chose not to do so. By overlooking that procedural history and ruling on the Payment of Wages Act issues, the trial court gave the Zinn plaintiffs the second bite at the apple that *res judicata* is specifically designed to prevent. Thus, the trial court committed reversible error on this issue.

(B) The Parker Judgment did not permit the Zinn plaintiffs to pursue any claims or issues involving the reserve accounts in this case.

The Zinn plaintiffs next claim that the language of the parties' Memorandum of Understanding ("MOU"), which was incorporated into the Parker Judgment, allowed the claims in the Zinn action to proceed "unaffected" by the Parker Judgment. This position erroneously focuses on a single word ("unaffected") without considering the entire relevant passage from the MOU. When viewed in its proper context, the language of the MOU (and thus of the Parker Judgment) clearly did not carve out the type of expansive exception claimed by the Zinn plaintiffs. Furthermore, this is the first time the Zinn plaintiffs have asserted this argument after the trial court's decision to grant CFI partial summary judgment, and thus, it is untimely.

The MOU, which memorialized the agreement between the Zinn plaintiffs and CFI in the Parker action, contained the following language:

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, 15<sup>th</sup> Judicial Circuit, Horry Cty., SC), which shall continue unaffected by the Settlement of the Civil Action.

[R. p. 97 (emphasis added).] As this passage plainly demonstrates, the only claims in the Zinn action that would be “unaffected” by the Parker settlement were claims for unpaid wages not related to the reserve accounts (*i.e.* “commission reserves”). In other words, the Zinn plaintiffs retained the ability to seek any unpaid wages that did not involve the reserve accounts. That was supposed to be the sole remaining focus of the Zinn action, as the trial court correctly determined at the outset of the trial. Through the MOU and the Parker Judgment, the Zinn plaintiffs surrendered the ability to seek any other claims against CFI.

The Zinn plaintiffs argue that taking CFI’s position to its “logical conclusion” would mean the Parker Judgment barred all claims in the present case. As explained above, that assertion is not accurate. The parties’ agreement in the Parker action allowed the Zinn plaintiffs to seek any unpaid wages that did not implicate the reserve accounts. CFI did not believe any such unpaid wages existed, and the trial results justified that belief with one minor exception (*i.e.* the small amount owed to Laura Arrington). Nevertheless, the Parker Judgment preserved the Zinn plaintiffs’ ability to pursue that limited category of damages. But that was the only type of claim the Parker Judgment did not terminate. All other claims, especially those addressing the reserve accounts in

any way, ended with the Parker Judgment. There is simply no other way to read the language of the MOU, which became part of that final judgment.

CFI's position does not create any preclusive effect where it otherwise would not exist. It merely applies the doctrine of *res judicata* to the appropriate extent, while acknowledging the narrow exception to which the parties agreed in the MOU. In other words, CFI's argument does not take anything away from the Zinn plaintiffs that they did not give up on their own, and it leaves them only what the parties expressly agreed would be preserved. Thus, CFI's position does not distort or misapply the law.

On the other hand, the Zinn plaintiffs' position would eliminate any and all preclusive effects of the Parker Judgment. The Zinn plaintiffs argue the Zinn action was allowed to proceed completely "unaffected" by the Parker Judgment. Stated another way, the Zinn plaintiffs contend they were entitled to pursue all of the claims originally included in the Zinn Complaint, regardless of the outcome of the Parker action. The Zinn plaintiffs have cited no legal authority to support this position, and they rely solely on one word from the MOU. The Zinn plaintiffs quote that single word out of context, however, and their assertion fails when the entire passage in which that word appears is considered. Therefore, the Court should reject the Zinn plaintiffs' argument on this issue.

(C) CFI disputed any violations of the Payment of Wages Act at the appropriate time for such arguments.

The Zinn plaintiffs' belated suggestion that CFI conceded its reserve accounts and charge-back provisions violated the Payment of Wages Act is simply incorrect. First, it is factually inaccurate, as CFI has disputed (and continues to dispute) that it engaged in any violations of the Act in this case or that the contracts themselves violated the Act. When it became clear the trial court was not going to honor the full preclusive effect of the

Parker Judgment, despite previously granting CFI summary judgment on that issue, CFI presented merits arguments on the Payment of Wages Act issues as it was required to do. CFI preserved those arguments in its post-trial motion, and it has raised them in its Appellant's Brief. [See Appellant's Brief of Appellant-Respondent, pp. 17-23.] Thus, the Zinn plaintiffs have mischaracterized CFI's position in this issue.

Second, and more significantly for present purposes, CFI vehemently argued against any violations of the Payment of Wages Act throughout the Parker action, when that issue was properly before a court. The legality of the reserve accounts and charge-back provisions was squarely at issue in the Parker action, and if that case had gone to trial, the circuit court would have had to resolve those questions. When the Parker Judgment ended that action, however, there was no longer any need for CFI to present merits arguments on those issues. The Parker Judgment terminated the Zinn plaintiffs' ability to assert claims of statutory violations based on the reserve accounts and charge-back provisions. As a result, there were no legitimate claims to which CFI could respond.

For all practical purposes, it does not matter what arguments the opposing sides did (or did not) assert regarding purported violations of the Payment of Wages Act based on the reserve accounts and charge-back provisions. The Parker Judgment disposed of all such claims, whether actual or potential, and the Parker action represented the only valid opportunity for the Zinn plaintiffs to pursue them. The Zinn plaintiffs were free to pass up that opportunity in exchange for a settlement, but they were not free to accept the settlement, stipulate to the Parker Judgment, and then relitigate those claims in the Zinn

action. Yet, this is precisely what the trial court's ruling on this issue allowed the Zinn plaintiffs to do.

(D) Conclusion

By granting partial summary judgment to CFI at the outset of the trial, the judge honored the proper scope of *res judicata* with respect to the Parker Judgment. This ruling allowed the Zinn plaintiffs to pursue the narrow type of claim remaining after the Parker action, but barred any relitigation of issues involving the reserve accounts and charge-back provisions. Unfortunately, the judge deviated from that correct initial ruling by finding violations of the Payment of Wages Act in his post-trial Order. That deviation resulted in legal error, and this Court should reverse and remand with instructions for the trial court to file an amended order that omits any findings of statutory violations with regard to the reserve accounts or charge-back provisions.

**II. The trial judge lacked authority to reverse the original grant of summary judgment to CFI because that reversal constituted an error of law.**

The Zinn plaintiffs argue the trial judge acted properly in signing the proposed post-trial Order submitted by the Zinn plaintiffs, even though it contradicted the judge's previously stated ruling. The gist of the Zinn plaintiffs' position is that a trial judge has the discretion to change his or her oral ruling between the time it is announced and the time a written order is filed. Even if this statement is accurate in a general sense, it fails to address two significant problems with the scenario actually involved in this case. When those points are considered, the error on this issue becomes clear.

First, this was not simply a matter of a judge amending an oral ruling at trial in a subsequent written order. Several months after the trial concluded, the trial judge sent a

letter requesting the Zinn plaintiffs' attorneys to draft a proposed order, which was to include a specific finding that:

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

[R. p. 1102 (emphasis added).] The letter did not state or request any other rulings regarding the Payment of Wages Act, and it said nothing about the reserve accounts or charge-back provisions. Despite that clearly stated ruling, the Zinn plaintiffs submitted a proposed order that contained findings of much broader statutory violations which have absolutely no evidentiary support in the record. The judge signed that proposed order, even though it did not reflect his previously stated ruling.

This was not a situation in which a judge made a spontaneous oral ruling at trial and later tweaked it for purposes of a formal written order. Here, the judge set forth his ruling in writing, only to file a subsequent order that went far beyond his stated decision to include findings he never made or intended. The trial judge erred by signing such a proposed order, and CFI's motion to alter or amend the Order should have been granted. Consequently, this Court should reverse the trial judge's ruling on the Payment of Wages Act issues and remand with instructions to enter an amended Order that accurately reflects the ruling stated in the judge's letter.

Second, as previously discussed, the trial judge had no authority to find that the reserve accounts or charge-back provisions violated the Payment of Wages Act. The Zinn plaintiffs' statutory claims were duplicative of claims they previously asserted in the Parker action. The Parker Judgment terminated those claims with prejudice, and the doctrine of *res judicata* prevented the Zinn plaintiffs from relitigating them. Thus, those

claims were not properly before the trial judge in this case, and any attempt to rule on the claims constituted legal error. Any conclusion to the contrary improperly limits the preclusive scope and effect of the Parker Judgment.

In short, CFI is not arguing that a trial judge cannot change his or her mind. That is not the problem here. The real problem is that the written Order contained findings and conclusions on issues that were not – and could not have been – properly before the judge. *Res judicata* prevented the judge from making those kinds of broad rulings, as he recognized at the outset of trial when he granted partial summary judgment to CFI. Nevertheless, the judge signed the Zinn plaintiffs' proposed order, which went far beyond the scope of the Zinn action. This is why the section of the Order dealing with the Payment of Wages Act constitutes reversible error.

**III. The treble damages and attorneys fee granted to Laura Arrington were proper only if the trial judge based those remedies on the specific statutory violations stated in the judge's original ruling.**

The trial judge concluded CFI violated the Payment of Wages Act “by failing to pay Ms. Arrington within the time specified by law.” [R. p. 1102.] Based on that finding, the judge granted Arrington's request for treble damages and an attorney's fee. As explained in its Appellant's Brief, CFI does not challenge that decision to the extent the judge based it solely on the ground stated in his letter of June 5, 2012. CFI admitted that it had mistakenly failed to pay Arrington a small amount of wages owed to her within the time permitted by the statute. Thus, the trial judge acted within his discretion in granting the statutory remedies.

The only problem on this issue is that the Order filed by the judge might arguably be construed as basing the decision to grant Arrington the statutory remedies based on

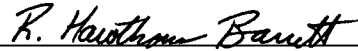
additional, broader violations of the Payment of Wages Act. Therefore, if the Court reverses based on CFI's *res judicata* arguments, the instructions to the trial court should include filing an amended order that removes any doubt as to the additional remedies granted to Arrington. Such an amended order should plainly state that those remedies are based solely on the failure to pay Arrington all of her earned wages within the time set forth in the Payment of Wages Act.

### **CONCLUSION**

Despite losing all but one of their claims at trial, the Zinn plaintiffs used an improperly worded proposed order to obtain a ruling that CFI's reserve accounts and charge-back provisions violated South Carolina law. The trial judge neither made that type of broad ruling, nor expressed such an intention. Yet, even if he had, the trial judge would have been in error because those issues were not properly before him. The Zinn plaintiffs previously sought those rulings in the Parker action, and that was the only proper forum for them to do so. When the Parker Judgment concluded that action, *res judicata* barred the Zinn plaintiffs from requesting those rulings in this case. More importantly, *res judicata* barred the trial judge from making such rulings in this case. Therefore, the Court should reverse the portion of the Order addressing the Payment of Wages Act and remand with instructions to file an appropriately amended order.

(Signature on next page)

Respectfully submitted,



R. Hawthorne Barrett  
Turner Padgett Graham & Laney P.A.  
P.O. Box 1473  
Columbia, SC 29202  
(803) 227-4219  
[TBarrett@TurnerPadgett.com](mailto:TBarrett@TurnerPadgett.com)

John S. Wilkerson  
Turner Padgett Graham & Laney P.A.  
40 Calhoun St., Suite 200  
Charleston, SC 29401  
(843) 576-2800  
[JWilkerson@TurnerPadgett.com](mailto:JWilkerson@TurnerPadgett.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 Reply Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

*R. Hawthorne Barrett*

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

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

Attorneys for the Appellant/Respondent

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**PROOF OF SERVICE**

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The undersigned, an attorney in this matter for the Appellant/Respondent, certifies that I have this 24<sup>th</sup> 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.  
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Charleston, SC 29401  
(843) 576-2800  
JWilkerson@TurnerPadget.com

Attorneys for the Appellant/Respondent

January 24, 2014