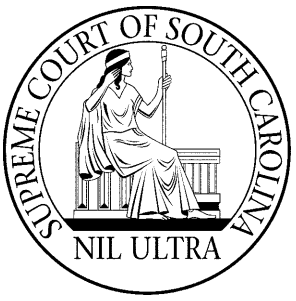

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 46
November 25, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Richard J. Breibart, Respondent.

Appellate Case No. 2015-001982

Opinion No. 27592
Submitted November 4, 2015 – Filed November 25, 2015

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Richard J. Breibart, of Lexington, *pro se*.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to disbarment with conditions. He requests the disbarment be imposed retroactively to June 1, 2012, the date of his interim suspension. *In the Matter of Breibart*, 398 S.C. 123, 727 S.E.2d 740 (2012). We accept the Agreement and disbar respondent from the practice of law in this state retroactively to the date of respondent's interim suspension. We further impose the conditions as stated hereafter in this opinion. The facts, as set forth in the Agreement, are as follows.

Facts

Matter I

From January 1, 1993 through December 31, 2003, respondent performed legal services for or rendered legal advice to Client A on more than one occasion and, as a result, established an attorney/client relationship with Client A. Respondent engaged in business transactions with and/or received loans from Client A on more than one occasion while he was respondent's client or a client of respondent's law practice.

Matter II

Respondent self-reported that, from 1994 until 2002, he borrowed significant sums of monies from several clients. He admits that some of the loans were not transmitted in writing to the clients and/or the clients did not consent in writing to essential terms of the loan and respondent's role in the transaction.

Matter III

In September 2012, respondent was indicted on ten (10) counts of mail fraud, extortion, and wire fraud. Respondent was charged with devising a scheme whereby he obtained money and property from his clients by false and fraudulent pretenses. The scheme with regard to some of respondent's clients was as follows: respondent would contact clients, former clients, or family members of former clients who had readily accessible money and inform them that the clients were in imminent danger of being arrested and/or of losing their money; he would instruct the clients or clients' family members to transfer large sums of money to him to be deposited in his trust account for safekeeping or to ensure that the investigation would be closed; he encouraged the clients or clients' family members to locate as much money as possible, including liquidating retirement accounts and asking family members for money; respondent would accept the funds from his clients or his clients' family members and convert those funds to pay for expenses and obligations relating to his law firm, to himself personally, and to other clients. There were never any civil actions or criminal investigations regarding the claims respondent made to his clients.

On August 12, 2013, respondent pled guilty to one count of mail fraud. On March 4, 2014, respondent was sentenced to sixty-three (63) months in the custody of the United States Bureau of Prisons and to three (3) years of supervised release. In addition, respondent was ordered to begin repayment of restitution of $2,419,326.50 in monthly payments of $100 sixty (60) days after his release from prison.

Matter IV

Respondent represented Complainant's son on state criminal charges. Respondent informed Complainant that he might be the target of the Federal Bureau of Investigation in relation to the son's criminal charges and, that, in addition to potential criminal charges, Complainant might be exposed to potential civil liability. Respondent instructed Complainant to liquidate and transfer all available funds to respondent to be held in his trust account for safekeeping. Complainant transferred $393,526.29 to respondent pursuant to respondent's request. Respondent accepted the funds from Complainant and converted those funds to pay expenses and obligations relating to his law firm, to respondent personally, and to other clients. Respondent represents he was contacted by the United States Attorney's Office regarding the conduct of Complainant's son and/or other family members, however, there was no formal federal investigation. Complainant filed a claim with the Lawyers' Fund for Client Protection (Lawyers' Fund) and was awarded $9,546.08.

Matter V

On or about October 2011, Client B retained respondent to represent him in a divorce action. At that time, respondent instructed Client B that his retainer fee would be $45,000. Respondent instructed Client B that it would also be in his best interests to transfer an additional $45,000 to respondent to make it more difficult for Client B's wife to find and obtain the proceeds during the divorce. Client B wired $90,000 to respondent. At the time of respondent's interim suspension, Client B's funds were gone and there was no accounting as to how the funds had been used by respondent. Client B had to secure new counsel to complete his divorce case. Client B did not file a claim with the Lawyers' Fund.

Matter VI

On or about July 2011, Clients C retained respondent to represent them in a civil action to recover damages to their property. Clients C paid respondent a $15,000 retainer which was characterized in the retainer agreement as a "non-refundable" retainer. In or around December 2011, Clients C contacted respondent because they were not satisfied with the lack of communication and diligence from respondent. Clients C informed respondent that they wished to terminate the relationship and requested the return of any unearned legal fees and their client file. Respondent informed Clients C that, pursuant to the retainer agreement he had "set up the file" and that the $15,000 retainer had been earned. Respondent informed Clients C that he could continue the representation or they could drop the case, but that, in either event, he was keeping the retainer fee. Clients C reluctantly elected to continue with the case. At the time of respondent's interim suspension, Clients C retrieved their client file from the Attorney to Protect Respondent's Clients' Interests. The client file consisted mostly of materials provided to respondent from Clients C. There was no correspondence by respondent or any documents from an alleged expert witness, as respondent had discussed with Clients C. Clients C filed a claim with the Lawyers' Fund and were awarded $11,551.24.

Matter VII

On May 12, 2011, Client D retained respondent to represent him in an action to recover misappropriated funds. Client D paid respondent a $10,000 retainer fee. In February 2012, respondent informed Client D that he was negotiating a settlement. In May 2012, Client D telephoned respondent on several occasions seeking an update about the status of his case. Respondent failed to return these calls. On June 1, 2012, respondent was placed on interim suspension. Complainant D retrieved his client file from the Attorney to Protect Respondent's Clients' Interests. The client file consisted of the retainer agreement, a copy of the cancelled retainer check, and one letter. The file did not contain any accounting of how the legal fees had been earned by respondent. Client D filed a claim with the Lawyers' Fund and was awarded $1,193.26.

Matter VIII

Client E retained respondent on April 12, 2012, to represent him on pending criminal charges. As of May 2012, Client E had paid respondent $25,000 in legal fees. On June 1, 2012, respondent was placed on interim suspension. There were insufficient funds in respondent's trust account to return any unearned fees to Client E. Client E filed a claim with the Lawyers' Fund and was awarded $2,983.15.

Matter VIX

On April 27, 2012, Client F retained respondent to represent her on pending criminal charges. Client F paid respondent $7,500 in legal fees. On June 1, 2012, respondent was placed on interim suspension. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client F. Client F filed a claim with the Lawyers' Fund and was awarded $724.90.

Matter X

In June 2011, Complainant retained respondent to represent her son who had pending federal and state criminal charges. Complainant paid respondent $25,000 in legal fees to handle the case. Respondent assured Complainant that he would be able to consolidate both federal and state criminal charges.

Respondent appeared with Complainant's son in October 2011 for him to enter a plea to the state charges. Respondent informed his client that he would receive an eight (8) year sentence when, in fact, the client received a twelve (12) year sentence. Respondent failed to communicate with client after the plea. At the time of respondent's interim suspension, the client's federal charges were still pending.

Complainant filed a claim with the Lawyers' Fund and was awarded $1,193.26.

Matter XI

Client G paid respondent $125,000 to represent him in various matters. On June 1, 2012, respondent was placed on interim suspension. There were insufficient funds

in respondent's trust account to return any unearned legal fees to Client G. Client G filed a complaint with the Lawyers' Fund. He was awarded $4,773.04.

Matter XII

In December 2009, Client H retained respondent to represent her in a criminal matter. Client H paid respondent $7,500 in legal fees. Client H's case was unresolved at the time of respondent's interim suspension on June 1, 2012. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client H. Client H filed a claim with the Lawyers' Fund and was awarded $417.64.

Matter XIII

In July 2011, Client I retained respondent to handle a child custody modification case. Client I paid respondent $7,500 in legal fees. On June 1, 2012, respondent was placed on interim suspension. At that time, Client I's case was still unresolved. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client I. Client I filed a claim with the Lawyers' Fund and was awarded $447.47.

Matter XIV

Client J retained respondent in June 2009 to represent him in two disability actions against Liberty Mutual and Wells Fargo and paid respondent $25,000 in legal fees. In October 2009, respondent informed Client J that he needed an additional $15,000 in legal fees. Respondent had Client J execute an Agreement in which respondent guaranteed that the $15,000 would be refunded to Client J regardless of the result of the cases. Both cases were resolved by the end of March 2010. On June 1, 2012, respondent was placed on interim suspension. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client J. Client J filed a claim with the Lawyers' Fund and was awarded $4,057.08.

Matter XV

On April 7, 2011, Client K retained respondent to represent her in a custody matter and paid respondent $7,500 in legal fees. Client K's case was still unresolved when respondent was placed on interim suspension on June 1, 2012. There were

insufficient funds in respondent's trust account to return any unearned legal fees to Client K. Client K filed a claim with the Lawyers' Fund and was awarded $447.47.

Matter XVI

In early 2009, Client L had retained respondent to handle a domestic matter. In early 2011, Client L met with respondent to discuss another matter regarding her husband. Respondent convinced Client L that her husband was involved in a tax evasion scheme and that Client L needed to set up a trust account for the benefit of her four children. Client L transferred $130,000 from her money market account to respondent's trust account. In fact, Client L's husband was not being investigated for any criminal scheme.

On June 1, 2012, respondent was placed on interim suspension. There were insufficient funds in respondent's trust account to return any monies to Client L. Client L filed a claim with the Lawyers' Fund and was awarded $4,773.04.

Matter XVII

In May 2009, Client M retained respondent to represent her in a civil matter. Client M paid respondent $40,000 in legal fees. On June 1, 2012, respondent was placed on interim suspension. At that time, Client M's case was still unresolved. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client M. Client M filed a claim with the Lawyers' Fund and was awarded $3,221.80.

Matter XVIII

In November 2010, Client N retained respondent to set up a conservatorship for his son who was due to be released from prison. On November 30, 2010, Client N transferred $125,000 to respondent's trust account to fund the conservatorship. Respondent informed Client N that he would file the appropriate documents with the Probate Court to establish the conservatorship.

In May 2011, Client N's son was released from prison. Client N's son died in June 2011. At the time, respondent had not set up the conservatorship. Client N requested respondent return the $125,000. Respondent rebuffed Client N's request and told him he would release the funds after the probate of the son's estate.

In August 2011, Client N sold his home. At the closing, Client N learned that the Department of Justice held a $17,500 lien on the property relating to the son. Respondent instructed Client N to deposit $27,000 into his trust account and that he would work to resolve the lien. Client N transferred $27,000 into respondent's trust account. As months passed, respondent failed to keep Client N apprised of his progress on both matters.

On June 1, 2012, respondent was placed on interim suspension. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client N. Client N filed a claim with the Lawyers' Fund and was awarded $4,773.04.

Matter XIX

Client O retained respondent for a domestic matter and paid respondent a $5,000 retainer fee. On June 1, 2012, respondent was placed on interim suspension. Client O's case was still unresolved. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client O. Client O filed a claim with the Lawyers' Fund and was awarded $298.31.

Matter XX

On March 31, 2012, Complainant retained respondent to represent her son in a criminal matter. Complainant paid respondent $25,000. Respondent went to Complainant's son's first hearing. On June 1, 2012, respondent was placed on interim suspension. Complainant son's case was still unresolved. There were insufficient funds in respondent's trust account to return any unearned legal fees to Complainant. Complainant filed a claim with the Lawyers' Fund and was awarded $2,386.52.

Matter XXI

On May 15, 2012, Client P retained respondent to represent him on a charge of Public Disorderly Conduct. Client P paid a $5,200 retainer fee to respondent. On June 1, 2012, respondent was placed on interim suspension. Client P's case was unresolved at the time of respondent's suspension. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client P. Client P had to retain another attorney to complete his case. Client P filed a claim with the Lawyers' Fund and was awarded $596.63.

Matter XXII

Client Q retained respondent to represent her on a criminal charge of Harassment in the 2nd degree and paid respondent a $7,500 retainer fee. Respondent failed to handle Client Q's case in a diligent manner.

On June 1, 2012, respondent was placed on interim suspension. Client Q's case was unresolved at the time of respondent's suspension. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client Q. Client Q had to retain another attorney to complete her case. Client Q filed a claim with the Lawyers' Fund and was awarded $313.23.

Matter XXIII

On April 16, 2012, Client R retained respondent to represent him on a criminal charge. Client R paid respondent $8,974.14. On the same date, respondent sent a letter to the court requesting a jury trial.

On June 1, 2012, respondent was placed on interim suspension. Client R's case was unresolved at the time of respondent's suspension. No other work than the jury trial request had been performed by respondent. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client R. Client R had to retain another attorney to complete his case. Client R filed a claim with the Lawyers' Fund and was awarded $856.76.

Matter XXIV

Client S retained respondent on May 18, 2011, to represent him in a domestic matter and paid respondent a $5,000 retainer fee. On October 13, 2011, respondent made a court appearance on Client S's behalf.

On June 1, 2012, respondent was placed on interim suspension. Client S's case was unresolved at the time of respondent's suspension. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client S. Client S filed a claim with the Lawyers' Fund and was awarded $298.31.

Matter XXV

Complainant retained respondent to represent her juvenile son in a criminal matter. She paid a $25,000 retainer fee to respondent. Other than a few telephone calls, respondent performed little to no work on the case.

On June 1, 2012, respondent was placed on interim suspension. Complainant's son's case was unresolved at the time of respondent's suspension. Complainant had to borrow additional funds to hire another attorney. There were insufficient funds in respondent's trust account to return any unearned legal fees to Complainant. Complainant filed a claim with the Lawyers' Fund and was awarded $2,983.15.

Matter XXVI

On April 3, 2012, Client T retained respondent to represent him in a domestic matter. Client T paid respondent a retainer of $500. On June 1, 2012, respondent was placed on interim suspension. Client T's case was unresolved at the time of respondent's suspension. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client T. Client T filed a claim with the Lawyers' Fund and was awarded $47.73.

Matter XXVII

Client U retained respondent to represent her in connection with injuries suffered in an automobile accident. Respondent was able to negotiate a $23,000 settlement. Client U executed the necessary release and endorsed the settlement check in March 2012. The funds were deposited in respondent's trust account. On June 1, 2012, respondent was placed on interim suspension. There were insufficient funds in respondent's trust account to return any settlement monies to Client U. Client U filed a claim with the Lawyers' Fund and was awarded $2,571.83.

Matter XXVIII

In May 2010, Client V retained respondent to handle a criminal matter. Client V paid a $40,000 retainer fee to respondent. On June 1, 2012, respondent was placed on interim suspension. Client V's criminal matter was still pending at that time. There were insufficient funds in respondent's trust account to return any unearned

legal fees to Client V. Client V filed a claim with the Lawyers' Fund and was awarded $4,057.08.

Matter XXIX

In September 2007, Client W retained respondent to handle civil litigation against his partners in SouthCable, LLC. Client W paid respondent an initial retainer fee of $25,000. Respondent later informed Client W that the South Financial Group was going to bring litigation against Client W. Client W paid respondent $100,000 to defend this alleged litigation. The litigation did not materialize. Over the years, Client W paid respondent an additional $134,000 for this matter. At the time of respondent's interim suspension on June 1, 2012, the SouthCable, LLC, matter had been tried and the court was waiting for a proposed order from the parties. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client W. Client W filed a claim with the Lawyers' Fund. Client W was awarded $4,773.04.

Matter XXX

In March 2012, Client X retained respondent to handle a domestic matter. Client X paid respondent a $7,500 retainer fee. On June 1, 2012, respondent was placed on interim suspension. Client X's domestic matter was still pending at that time. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client X. Client X filed a claim with the Lawyers' Fund and was awarded $626.46.

Matter XXXI

Client Y retained respondent in October 2011 to represent him against an allegation of child molestation. Client Y paid respondent a $25,000 retainer fee. On June 1, 2012, respondent was placed on interim suspension. Client Y's client file contained no evidence of any work completed by respondent. No criminal charges were ever brought against Client Y. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client Y.

Matter XXXII

In May 2011, Client Z retained respondent to represent him in a suit against Michelin North America, Inc. in an effort to remove his ex-wife from being a

beneficiary for death benefits. Client Z paid respondent a $20,000 retainer fee. On June 1, 2012, respondent was placed on interim suspension. Client Z learned that very little work had been done on his case. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client Z. Client Z filed a claim with the Lawyers' Fund. Client Z was awarded $2,016.61.

Matter XXXIII

Client AA retained respondent in July 2009 because of a concern about potential criminal charges. Client AA paid respondent a $7,500 retainer fee. Periodically, Client AA would call respondent to find out the status of the potential charges. Respondent would inform Client AA that he was "working" on the case. On June 1, 2012, respondent was placed on interim suspension. Client AA obtained his client filed from the Attorney to Protect Respondent's Clients' Interests. The only document in the file was a notation that respondent had reviewed the file in August 2011. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client AA. Client AA filed a claim with the Lawyers' Fund and was awarded $894.94.

Matter XXXIV

On March 6, 2012, Client BB retained respondent for a child support modification case. Client BB paid respondent a $5,250 retainer fee. On June 1, 2012, respondent was placed on interim suspension. Client BB's domestic matter was still pending at that time. There were insufficient funds in respondent's trust account to return any unearned legal fees to Client BB. Client BB filed a claim with the Lawyers' Fund. Client BB was awarded $544.36.

Matter XXXV

Client CC retained respondent in early 2009 to represent him on drug-related criminal charges. Client CC paid respondent a $20,000 retainer fee. On March 4, 2010, Client CC pled guilty to Trafficking in Cocaine, more than twenty-eight (28) grams. Client CC only pled guilty because of misrepresentations made by respondent. Specifically, respondent told Client CC that a suppression motion had been filed and denied by the court. This was untrue. In addition, respondent did not allow Client CC to cooperate with law enforcement officials. Client CC's cooperation could have resulted in a reduced sentence. On September 24, 2013,

Client CC's Application for Post-Conviction Relief was granted based on respondent's misrepresentations.

Matter XXXVI

Client DD retained respondent to handle various legal matters for him and his businesses. Over the years, respondent held substantial monies in trust for Client DD. At the time of his interim suspension, respondent should have held $236,500 in trust for Client DD. Respondent admits that Client DD's monies were misappropriated by him to pay for expenses and obligations related to his law firm, to himself personally, and to other clients. There were insufficient funds in respondent's trust account to return any monies to Client DD. Client DD filed a claim with the Lawyers' Fund and was awarded $4,773.04.[1]

Claims Awarded and Paid by the Lawyers' Fund

According to the Agreement for Discipline by Consent, the Lawyers' Fund received claims totaling $5,606,281.33 against respondent and approved awards in the amount of $1,676,081.96. Due to the cap on payments, the Lawyers' Fund paid a total of $200,000.07 to the claimants, most of whom only received a small percentage of the amount approved.[2]

Law

Respondent admits that by his conduct he violated the following provisions of the Rules of Professional Conduct (RPC) contained in Rule 407 of the South Carolina Appellate Court Rules (SCACR): Rule 1.1 (lawyer shall provide competent representation); Rule 1.2 (lawyer shall abide by client's decisions regarding objectives of representation); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall reasonably consult

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[1] Not all instances of client misconduct are necessarily identified in this opinion; instances of misconduct are addressed in the Plea Agreement and Judgment in a Criminal Case which are attached to the Agreement for Discipline by Consent and are matters of public record.

[2] *See* Rule 411(c) (1), SCACR (payment to any claimant by Lawyers' Fund shall not exceed sum of $40,000 per claim; provided, however, that the aggregate total of claims paid per attorney shall not exceed $200,000).

with client about means by which client's objectives are to be accomplished, keep client reasonably informed about status of matter, and promptly comply with reasonable requests for information); Rule 1.5 (lawyer shall not make agreement for, charge, or collect unreasonable fee or unreasonable amount for expenses); Rule 1.8 (lawyer shall not enter into business transaction with client or knowingly acquire pecuniary interest adverse to client unless transaction and terms on which lawyer acquires interest are fair and reasonable to client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by client, client is advised in writing of desirability of seeking and is given reasonable opportunity to seek advice of independent legal counsel on transaction, and client gives informed consent, in a writing signed by client, to essential terms of transaction and lawyer's role in the transaction, including whether lawyer is representing client in transaction); Rule 1.15 (lawyer shall hold property of clients or third persons in lawyer's possession in connection with representation separate from lawyer's own property; lawyer shall deposit into client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by lawyer only as fees are earned or expenses incurred, unless lawyer and client have entered into written agreement concerning handling of fees paid in advance pursuant to Rule 1.5(f), RPC; lawyer shall promptly deliver to client or third person any funds or other property client or third person entitled to receive); Rule 1.16 (upon termination of representation, lawyer shall refund any advance payment of fee or expense that has not been earned or incurred); Rule 3.4 (lawyer shall not falsify evidence); Rule 8.1 (in connection with disciplinary matter, lawyer shall not knowingly make false statement of material fact or fail to disclose fact necessary to correct misapprehension known by lawyer to have arisen in disciplinary matter, or knowingly fail to respond to lawful demand for information from disciplinary authority); Rule 8.4 (a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); Rule 8.4(b) (it is professional misconduct for lawyer to commit criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as lawyer in other respects); Rule 8.4(c) (it is professional misconduct for lawyer to commit criminal act involving moral turpitude); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice). In addition, respondent admits his conduct violated the Lawyer's Oath contained in Rule 402(k),SCACR. Respondent further admits his conduct violated provisions of Rule 417, SCACR.

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it is ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(5) (it is ground for discipline for lawyer to engage in conduct tending to pollute administration of justice or bring courts or legal profession into disrepute or conduct demonstrating unfitness to practice law).

Conclusion

We accept the Agreement for Discipline by Consent and disbar respondent from the practice of law in this state, retroactively to June 1, 2012, the date of his interim suspension. *In the Matter of Breibart, supra*. In addition, we impose the following conditions:

1. within thirty (30) days of the date of this opinion, respondent shall enter into a payment plan with the Commission on Lawyer Conduct (the Commission) to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission ($1,059.41) and to reimburse the Lawyers' Fund for all amounts paid to the claimants ($200,000.07); the payment plan shall consider respondent's ability to pay and all obligations are subject to the terms and conditions of prior judicial orders;

2. respondent shall not apply for readmission until he has completed all terms and conditions of his criminal sentence, including the payment of fines and restitution;[3]

3. respondent shall not apply for readmission until he has paid in full a) all parties whose claims approved by the Lawyers' Fund were only partially paid;[4] b) $90,000 to Client B who did not file a claim with the Lawyers' Fund and is not covered by the criminal restitution plan; and c) $25,000 to Client Y who did not file a claim with the Lawyers' Fund and is not covered by the criminal restitution plan; and

[3] *See* Matter III.

[4] Payments to these parties may be offset by any amount paid by respondent through the criminal restitution plan.

4. respondent shall complete the Trust Account School prior to applying for readmission.

Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 Ozentine, Judith A. Parker, Matthew W. Reed, Cynthia G. Reilly, Gerald Ryba, Sherry Singleton, Steven G. Thoni, Stratton Vitikos, Michael H. Willis, Michael J. Zanardo, Respondents/Appellants,

v.

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

Appellate Case No. 2012-213193

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5364
Heard March 17, 2015 – Filed November 25, 2015

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

R. Hawthorne Barrett, of Columbia, and John S. Wilkerson, of Charleston, both of Turner, Padget, Graham & Laney, P.A., for Appellant/Respondent.

David J. Canty, of Myrtle Beach, and Gene M. Connell, Jr., of Surfside Beach, both for Respondent/Appellant.

MCDONALD, J.: In this wage dispute action, Appellant/Respondent CFI Sales & Marketing, Ltd., d/b/a Westgate Resorts (CFI), appeals the circuit court's post-trial ruling that the reserve and charge back components of CFI's employment contracts with Respondents/Appellants (the Zinn Plaintiffs)[1] violated the South Carolina Payment of Wages Act.[2] On cross-appeal, the Zinn Plaintiffs argue the circuit court erred in (1) directing a verdict against Lynn Lanpher, Khalif Middleton, Sherry Singleton, Steven Thoni, and Michael Wills; (2) allowing the jury to consider terms of the employment contract that the circuit court subsequently determined to be illicit; (3) directing a verdict on their causes of action for breach of contract accompanied by a fraudulent act; and (4) limiting the amount of attorney's fees awarded. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

CFI is a timeshare developer of several resorts, including the Westgate Myrtle Beach Oceanfront Resort. The Zinn Plaintiffs worked for CFI as sales representatives (Sales Representatives) in the early-to-mid 2000s. The Zinn Plaintiffs' employment contracts with CFI addressed, among other things, their compensation both during their employment and after their respective discharges from CFI. The present case (the Zinn action) is the second lawsuit involving several former Sales Representatives' allegations of unpaid wages against CFI. All plaintiffs in the Zinn action were also parties in the case of *Judith A. Parker, Caroline Jordan, Christopher J. DeCaro, and Charles S. Walker, Jr., individually and on behalf of others similarly situated v. CFI Sales & Marketing, Ltd. d/b/a Westgate Resorts*[3] (the Parker action).

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[1] As there are thirteen individual Respondents/Appellants, we will name them individually only when necessary.

[2] S.C. Code Ann. §§ 41-10-10 to -110 (Supp. 2014).

[3] Civil Action Number 2007-CP-26-5478.

The Parker Action

On September 4, 2007, Judith A. Parker, Caroline Jordan, Christopher J. DeCaro, and Charles S. Walker, Jr. (the Parker Plaintiffs) filed a civil action against CFI, seeking class certification and setting forth causes of action for recovery of the following: (1) "wages, penalties, and attorney's fees," (2) breach of contract, and (3) breach of contract accompanied by a fraudulent act. The Parker Plaintiffs also sought an accounting and a declaratory judgment "finding CFI's practices regarding payment of wages to be in degradation of statutory laws." Among other allegations, the Parker Plaintiffs claimed that the reserve account and charge back provisions of the CFI employment contracts violated the South Carolina Payment of Wages Act (Wages Act) in several respects, including the timing for final payments made after a Sales Representative had been discharged from employment. *See* S.C. Code Ann. §§ 41-10-10 to -110 (Supp. 2014). The Honorable J. Michael Baxley 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.

CFI compensated its Sales Representatives on a commission basis for each sale of a timeshare interest. The commission due to each Sales Representative was paid within a prescribed period after each sale, less a contractually agreed upon percentage of such commission allocated to a "reserve account." Such commissions—less the amount allocated to the reserve account—were paid to the Sales Representatives shortly after the sale even though the timeshare purchaser paid only a small percentage of the total purchase price at closing, often financing as much as 95% of the purchase price through a note and mortgage (collectively, Note and Mortgage) held by the seller.

Each Sales Representative contractually agreed to fund the reserve account with 10% of the commissions earned. This was designed to provide a measure of protection to CFI against defaults by timeshare purchasers on the Notes and Mortgages. The Sales Representatives agreed that the reserve portion of his or her commissions would be retained in the reserve account until the timeshare purchaser made six timely, consecutive monthly payments on the Note and Mortgage. The maximum amount of the reserve under the employment contracts was $3,500. However, the maximum reserve amount was subsequently increased

to $7,000. CFI was unable to confirm whether the Sales Representatives received advance written notice of this increase in the reserve limit.[4]

If and when a timeshare purchaser made six timely, consecutive monthly payments on the Note and Mortgage, the reserve was "released" as to that sale. However, if a timeshare purchaser upgraded or downgraded their timeshare before making six timely, consecutive monthly payments, the account would show that a final payment had not been made, and the Sales Representative would not receive a commission from that sale. CFI explained that should a timeshare purchaser default, the amount of the commission already paid to the Sales Representative was charged against the balance of the reserve, which is commonly referred to as a "charge back." Each such defaulted sale resulted in a charge back until the reserve balance was exhausted. This allowed CFI to recover a portion of the commissions paid to Sales Representatives for sales on which CFI did not receive payment of the purchase price. However, pursuant to Exhibit A of CFI's employment contract:

> **VI. CHARGEBACK ON CANCELED DEALS**
>
> A. During the term that Employee is engaged by Employer, no sales originated by Employee for which Employee has been paid a commission will be subject to charge back except as otherwise set forth herein.
>
> B. In the event Employee is no longer engaged by Employer . . . Employee shall be charged back for all sales upon which commissions have been paid in the event the purchaser(s) has/have not made six (6) timely and consecutive monthly payments as well as the ten percent (10%) minimum down payment.

Timeshare sales were evaluated based on the timeliness and frequency of the payments on the Note and Mortgage, and the reserve account appropriately reconciled. CFI's commission supervisor, Connie Sharp, testified that when a Sales Representative separated from CFI, 100% of their commissions went to fund

[4] Pursuant to Exhibit A of CFI's employment contract, "any changes, modifications or adjustments" to the terms of employment "shall be effective upon notice to [e]mployee without further modification to this [a]greement."

the reserve account and was not "released" without a written demand after termination of the employment.

> Q: To your knowledge[,] have any of the Plaintiffs ever been given written notice that when they separate from the payroll 100 percent of their commissions would go into the reserve rather than the 10 percent that's set forth in the contract?
>
> A: Not that I know of.
>
> . . . .
>
> Q: And prior to that date, I believe it was in April of '09[,] if a salesman for any reason failed to make that demand then [CFI] kept his commissions; correct?
>
> A: We–when they notified us[,] then we would do the research but if they didn't[,] then we would [not].
>
> Q: So, if a salesman was fired one day in October and he was hit by a bus crossing the street as he left the resort[,] then no request would ever be made; correct?
>
> A: Right.

This practice was not mentioned in the CFI employment contract. Conversely, the contract did provide that once an employee was no longer engaged by CFI, "the funds remaining in the reserve account will be reimbursed to the [e]mployee only after the [e]mployer has determined that six (6) consecutive and timely monthly payments have been made on each sale made by [e]mployee for which [e]mployee has been paid a commission."

Sharp further testified that Sales Representative positions are "seasonal," meaning that Sale Representatives are hired in the spring and laid off in the fall.

On January 11, 2010, the parties to the Parker action reached an agreement as set forth in a memorandum of understanding (the MOU). By order dated January 29, 2010, Judge Baxley approved the class settlement and incorporated the MOU into

the final judgment (the Parker Order).[5] The MOU contained the following provisions:

> **2. Stipulated Judgment.** 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 Claimant[s] for any and all matters occurring or arising during the Class Period in connections [sic] with commission reserves alleged to be due to Class Claimants and owed by CFI, including all claims for enhanced (double or treble) 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, [on] behalf of all Class Claimants (other than those who have 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 . . ., which *shall continue* unaffected by the Settlement of the Civil Action.

(emphasis added).

[5] The Parker Order incorporated the MOU by reference and included a copy of it as an exhibit.

The Zinn Action

The Zinn Plaintiffs filed their summons and complaint on January 5, 2009, alleging they were entitled to unpaid wages far in excess of the amounts maintained in the reserve accounts maintained by CFI and previously claimed in the Parker action. The Zinn Plaintiffs sought damages for: (1) wages, penalties, and attorney's fees; (2) breach of contract; and (3) breach of contract accompanied by a fraudulent act. The Zinn Plaintiffs further requested an accounting and a declaratory judgment "finding [CFI's] practices regarding payment of wages to be in derogation of statutory law." Following an extended discovery period, CFI moved for summary judgment, arguing the final Parker Order barred substantially all of the identical claims asserted in the Zinn action under the doctrine of res judicata.

The Honorable Benjamin H. Culbertson called the Zinn action to trial on February 13, 2012. Before trial began, Judge Culbertson heard extensive arguments on CFI's summary judgment motion. Ultimately, the circuit court ruled that the doctrine of res judicata expressly barred the Zinn Plaintiffs from asserting any claims that they either raised or could have raised in the Parker action.[6] Such claims included, but were not limited to, the validity of the reserve and chargeback clauses under the Wages Act. *See* S.C. Code Ann. §§ 41-10-10 to -110 (Supp. 2014).

At trial, the Zinn Plaintiffs testified CFI owed them hundreds of thousands of dollars in unpaid commissions. Specifically, the Zinn Plaintiffs alleged they made sales while employed by CFI for which they did not receive commissions due and payable as defined by the employment contracts. CFI contested these allegations and presented testimony that sales commissions became due to Sales Representatives only after the occurrence of two conditions precedent: (1) the purchaser did not cancel the deal within the allotted rescission period of seven days; and (2) the purchaser made a full down payment, typically 10% of the purchase price. CFI admitted that if the final installment of the timeshare purchaser's down payment were moved to the end of the ten-year note, the Sales Representative would not receive the sales commission for ten years. CFI further admitted that the contract did not contain any notice of this fact. Moreover, CFI

[6] The circuit court did not enter a written order granting CFI's motion for summary judgment.

admitted as a result of a minor accounting oversight, Laura Arrington did not timely receive a commission totaling $2,769.

Although there were initially twenty-five plaintiffs in the Zinn action, the following seven plaintiffs failed to appear at trial, and the Zinn Plaintiffs consented to their dismissal with prejudice: Jimmy Kelly, Whitney Renee Knox, Joe Maranville, Matthew W. Reed, Gerald Ryba, Stratton Vitikos, and Michael J. Zanardo. Thereafter, CFI successfully moved for directed verdict as to the following five plaintiffs: Steven G. Thoni, Khalif Middleton, Lynn C. Lanpher, Michael H. Wills, and Sherry Singleton.

At the close of the evidence, the judge directed a verdict in favor of CFI as to all of the Zinn Plaintiffs' claims for breach of contract accompanied by a fraudulent act, and the Zinn Plaintiffs agreed to withdraw the request for an accounting. Judge Culbertson then concluded that the issue of whether CFI violated the Wages Act as a result of its alleged non-payment of commissions to the remaining Zinn Plaintiffs was a question of law for the court to determine at a later time. Consequently, the circuit court submitted to the jury only the breach of contract claims of the following thirteen plaintiffs: Robert Adams, Laura Arrington, Stephen C. Black, Bradley Kirk Bray, Mark D'Amico, Thomas DeVitis, Rodney Eddie Haynes, Holly Levasseur, John Martin Loughlin, Chelcie Ozentine, Judith A. Parker, Cynthia G. Reilly, and Thomas A. Zinn. Thereafter, the jury awarded Arrington the exact amount presented in CFI's closing argument. The jury returned defense verdicts on the remaining twelve plaintiffs' claims.

The Zinn Plaintiffs filed post-trial motions requesting a new trial for the twelve plaintiffs whose claims the jury rejected, a tripling of Arrington's damages pursuant to the Wages Act, and an award of attorney's fees for all plaintiffs regardless of whether they were prevailing parties. On June 5, 2012, Judge Culbertson sent a letter to the parties delineating his post-trial rulings on the pending motions and instructing the Zinn Plaintiffs to prepare a proposed order memorializing the instructions and findings reflected in his letter.

As to the Wages Act issue, Judge Culbertson specifically instructed plaintiffs' counsel to include the following finding: "The defendant violated the [Wages Act] by modifying the employment contract without written notice to the employees and by failing to pay [Arrington] her wages within the time specified by law." Thus, it appears that Judge Culbertson's ruling as to the Wages Act violation was limited to two issues, one of which applied only to the sole prevailing plaintiff, Arrington.

Judge Culbertson had previously concluded on summary judgment (and at trial) that res judicata barred the court from considering or ruling upon the reserve or charge back components of the employment contracts.

Despite the circuit court's instructions, the proposed order (Zinn Order) contained the following proposed findings:

> Here, the contact [sic] of Defendants violates all of the above code sections. First, Plaintiffs['] wages were reduced without notice. Second, wages were withheld after separation from the payroll. *Third, the chargeback scheme is unenforceable and is contrary to the South Carolina Payment of Wages Statute in that an employee could sell a timeshare product and actually not be paid for ten years after the sale. . . .*
>
> *For the reasons set forth above, Defendant's employment contracts with Plaintiffs violates [sic] the Payment of Wages Act as a matter of law and this court so declares that the contract is void as against public policy.*

(emphasis added). Judge Culbertson signed the proposed order as presented on July 19, 2012, and it was filed on August 7, 2012.

CFI subsequently filed a timely Rule 59(e), SCRCP, motion, arguing that the Zinn Order (1) did not accurately reflect the court's ruling concerning CFI's entitlement to summary judgment on claims involved in the Parker action, and (2) inserted objectionable language invalidating CFI's employment agreements based on CFI's reserve and charge back systems. 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 provision violated the [Wages] Act."

CFI argues "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." CFI further asserted the circuit court could not have found such a wholesale violation of

the Wages Act as to all of the Zinn Plaintiffs—for modifying the terms of the contracts without written notice—without contradicting the jury's defense verdicts as to all of the Zinn Plaintiffs with the exception of Arrington. By form order filed on September 27, 2012, the circuit court denied CFI's Rule 59(e), SCRCP, motion.

ISSUES ON APPEAL

CFI raises one issue on appeal:

I. Did the circuit court err in finding that the reserve and charge back components of CFI's employment contracts with the Zinn Plaintiffs violated the South Carolina Payment of Wages Act?

The Zinn Plaintiffs raise four issues on cross-appeal:

I. Did the circuit court err in directing a verdict against Lanpher, Middleton, Singleton, Thoni, and Wills?

II. Did the circuit court err in directing a verdict against the Zinn Plaintiffs on their cause of action for breach of contract accompanied by a fraudulent act?

III. Did the circuit court err in allowing the jury to consider terms of the contract that the court subsequently determined to be illicit?

IV. Did the circuit court err in limiting the amount of attorney's fees awarded?

ANALYSIS OF CFI'S APPEAL

CFI asserts the circuit court erred in finding the reserve and charge back components of CFI's employment contracts with the Zinn Plaintiffs violated the Wages Act, arguing that: (1) the doctrine of res judicata barred the circuit court's post-trial review of the legality of CFI's reserve and charge back systems under the Wages Act; (2) the language in the Zinn Order contradicts its oral ruling at trial as well as the jury's verdicts against all plaintiffs except Arrington; (3) CFI's employment contracts do not violate the Wages Act; and (4) the circuit court should not have tripled Arrington's damages or awarded attorney's fees without specifically basing those remedies on the late payment to Arrington.

I. Res Judicata

CFI argues that because identical parties previously litigated the legality of CFI's reserve and/or charge back systems under the Wages Act in the Parker action, the circuit court properly ruled the doctrine of res judicata precluded any subsequent re-litigation.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). "Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" *Id.* (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "[T]he fundamental purpose of res judicata . . . is to ensure that 'no one should be twice sued for the same cause of action.'" *Judy v. Judy*, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011) (quoting *First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)). "Res judicata is shown if (1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as in the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction." *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250–51, 452 S.E.2d 832, 833 (1994). "Our courts, however, have found that the doctrine of res judicata is not an 'ironclad bar' to a later lawsuit." *Judy*, 393 S.C. at 167, 712 S.E.2d at 412. "Although there is no dispute in our jurisprudence regarding the three elements of res judicata, our courts have utilized at least four tests in determining whether a claim should have been raised in a prior suit."[7] *Id.* at 171, 712 S.E.2d at 414 (citation omitted).

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[7] *See* James F. Flanagan, *South Carolina Civil Procedure* 649–50 (2d ed. 1996) ("South Carolina courts have used at least four tests to determine when a claim should have been raised in the first suit: (1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and recently, (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action.").

A. Identity of Parties

Our review of the record reveals that all of the Zinn Plaintiffs were also plaintiffs in the Parker action, and CFI is the sole defendant in both cases. Respondents/Appellants do not contend that the parties are not identical.

B. Subject Matter

CFI asserts the subject matter of the Parker action "is virtually indistinguishable from the Zinn action," as the Parker Plaintiffs and the Zinn Plaintiffs set forth the same causes of action and request the same relief in their complaints. Moreover, the Parker Plaintiffs and Zinn Plaintiffs sought an accounting as well as a declaratory judgment "finding [CFI's] practices regarding payment of wages to be in derogation of statutory law . . ." The only noticeable difference in the two complaints is that the Parker Plaintiffs requested class certification while the Zinn Plaintiffs did not. Therefore, we find CFI has established the identical nature of the subject matter in the Parker action and the Zinn action.

C. Adjudication of the Issue

CFI argues res judicata bars not only claims actually decided in the Parker action, but those which could have been so decided. The Zinn Plaintiffs challenge the existence of this third element of the res judicata doctrine, arguing the court in Parker did not specifically rule on whether CFI's contractually implemented reserve and/or charge back procedure violated the Wages Act. As Judge Baxley's order in the Parker action (the Parker Order) addressed with finality the validity of the reserve and charge back procedure under the Wages Act, we agree with CFI that this issue has been adjudicated for purposes of the Zinn action.

"[R]es judicata[, which] is more commonly referred to simply as claim preclusion . . . bars plaintiffs from pursuing a later suit where the claim (1) was litigated or (2) could have been litigated." *Catawba Indian Nation v. State*, 407 S.C. 526, 537, 756 S.E.2d 900, 906 (2014) (citations omitted). "Although *res judicata* normally applies to issues that were previously raised or that could have been raised in the prior action, declaratory judgments are distinguishable." *Id.* at 539, 756 S.E.2d at 908.

> As one legal treatise has observed, res judicata does apply to declaratory judgments, but only as to issues *actually decided* by the court:
>
> Suits for declaratory judgments do not fall within the rule that a former judgment is conclusive not only of all matters actually adjudicated thereby but, in addition, also of all matters which could have been presented for adjudication. *A declaratory judgment is not res judicata as to matters not at issue and not passed upon. Unlike other judgments, a declaratory judgment determines only what it actually decides and does not preclude, under res judicata principles, other claims that might have been advanced.*

Id. at 539–40, 756 S.E.2d at 908.

The Parker Order incorporates by reference "Exhibit A," which is the parties' January 11, 2010 MOU. The MOU provides, in pertinent part, as follows:

> **2. Stipulated Judgment.** 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 Claimant[s] for any and all matters occurring or arising during the Class Period in connections [sic] with commission reserves alleged to be due to Class Claimants and owed by CFI, including all claims for enhanced (double or treble) 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 . . . .

Consequently, we agree with CFI that res judicata barred Judge Culbertson's post-trial review of the legality of CFI's reserve and/or charge back systems under the Wages Act. Thus, we reverse the circuit court as to this issue and remand with instructions for the circuit court to issue an amended order deleting the unsupported findings.

ANALYSIS OF THE ZINN PLAINTIFFS' CROSS-APPEAL

The Zinn Plaintiffs raise four issues on appeal, asserting the circuit court erred in: (1) directing a verdict against Lanpher, Middleton, Singleton, Thoni, and Wills; (2) directing a verdict against the remaining Zinn Plaintiffs on their causes of action for breach of contract accompanied by a fraudulent act; (3) allowing the jury to consider terms of the contract that the court subsequently determined to be illicit; and (4) limiting the amount of attorney's fees awarded.

I. Directed Verdict

When reviewing the circuit court's ruling on a motion for a directed verdict, this court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004). The circuit court must deny a motion for a directed verdict if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429, 445 S.E.2d 439, 440 (1994). In considering a motion for directed verdict, neither the circuit court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). "The appellate court will reverse the trial court's ruling on a [directed verdict] motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006).

A. Lanpher, Middleton, Singleton, Thoni, and Wills

The Zinn Plaintiffs argue the circuit court erred in directing a verdict against Lanpher, Middleton, Singleton, Thoni, and Wills. We disagree.

1. Preservation

Initially, we question whether the Zinn Plaintiffs have abandoned this issue on appeal as their argument is conclusory. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal). In their appellate brief, the Zinn Plaintiffs argue they "testified to facts sufficient to take their case to the jury" but

fail to offer any facts to support their argument. In their reply brief, the Zinn Plaintiffs offer testimony from each of these plaintiffs, including when they were employed by CFI, how they were paid, whether they were paid all wages due within thirty days of separation from CFI, and the amount they believed they were owed by CFI. The circuit court granted CFI's motion to strike the testimony of Thoni and Middleton. As this was not appealed, the circuit court's ruling on the motion to strike stands. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). Therefore, we find this argument is preserved for appellate review only as to Lanpher, Singleton, and Wills.

2. Merits

In *Huffines Co. v. Lockhart*, 365 S.C. 178, 190, 617 S.E.2d 125, 131 (Ct. App. 2005), this court explained that "[a] real estate broker suing on a conditional sales contract has the burden of proving that all conditions precedent to his right to a commission have occurred." *See also Champion v. Whaley*, 280 S.C. 116, 120, 311 S.E.2d 404, 406 (Ct. App. 1984).

> Thus, a broker who sues for his commission ordinarily has the burden of proving that any conditions precedent to the duty of the seller to pay have been fulfilled. But if the seller prevents a condition from occurring, then the condition is excused and his obligation to pay becomes unconditional. This is simply an instance of the general rule that one who prevents a condition of a contract cannot rely on the other party's resulting nonperformance in an action on the contract.

Champion, 280 S.C. at 120, 311 S.E.2d at 406 (internal citations omitted).

CFI's commission supervisor, Connie Sharp, testified commissions became due to a Sales Representative only after the occurrence of two conditions precedent:[8] (1)

[8] "A condition precedent to a contract is 'any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.'" *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct. App. 2005) (quoting *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994)).

the purchaser did not cancel the deal within the allotted rescission period of seven days; and (2) the purchaser made a ten percent down payment.

The record reveals the Zinn Plaintiffs whose claims survived directed verdict *were able* to provide the jury with details regarding sales for which they did not receive compensation, including the names of the timeshare purchasers and the corresponding account numbers. On the other hand, Lanpher, Singleton, and Willis—plaintiffs against whom the verdicts were directed—failed to provide such sales specifics. Thus, we agree with the circuit court's ruling that any judgments awarded to Lanpher, Singleton, and Willis would have been "based exclusively on speculation, conjecture or surmise." *See Parrish v. Allison*, 376 S.C. 308, 319–20, 656 S.E.2d 382, 388 (Ct. App. 2007) (explaining that the trial court may not submit "speculative, theoretical, and hypothetical views to the jury"). Accordingly, we affirm the directed verdicts granted against Lanpher, Middleton, Singleton, Thoni, and Wills.

B. Breach of Contract Accompanied by a Fraudulent Act

The Zinn Plaintiffs argue that the circuit court erred in directing a verdict in favor of CFI regarding their claims for breach of contract accompanied by a fraudulent act. In order to maintain a claim for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: (1) a breach of contract; (2) "[f]raudulent intent relating to the breaching of the contract and not merely to its making;" and (3) "[a] fraudulent act accompanying the breach." *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 53–54, 336 S.E.2d 502, 503–04 (Ct. App. 1985) (citations omitted). "The fraudulent act is any act characterized by dishonesty in fact or unfair dealing." *Conner v. City of Forest Acres*, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002).

> "Fraud," in this sense, "assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence."

Id. (quoting *Sullivan v. Calhoun*, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921)). "Breach of contract accompanied by a fraudulent act . . . requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making. Such proof may or may not involve false representations." *Ball v. Canadian Am. Express Co.*, 314 S.C. 272, 276, 442 S.E.2d 620, 623 (Ct. App. 1994) (citation omitted). "Fraudulent intent is normally proved by circumstances surrounding the breach." *Floyd*, 287 S.C. at 54, 336 S.E.2d at 503–04. "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." *Id.* at 54, 336 S.E.2d at 504.

Although each Sales Representative contractually agreed to fund the reserve account with 10% of the commissions earned up to a maximum amount of $3,500, CFI withheld more than 10% of their commissions and increased the maximum reserve amount to $7,000 without notice. Despite attracting job applicants by advertising "no commission chargebacks," testimony established that should a timeshare purchaser default, the amount of the commission already paid to the Sales Representative was indeed charged against the balance of the reserve. Further, although such a provision is not contained in the employment contract, Sharp testified that when a Sales Representative separated from CFI, 100% of their commissions went to fund the reserve account and were not "released" without a written demand six months after termination.

The circuit court allowed the jury to consider the remaining plaintiffs' breach of contract claims; however, only Arrington received an award. The jury returned defense verdicts on all other breach of contract claims. Thereafter, the Zinn Plaintiffs moved for a new trial and for JNOV on the claims for breach of contract accompanied by a fraudulent act. However, the Zinn Plaintiffs did not make any post-trial motions regarding their claims for breach of contract. Therefore, we find the Zinn Plaintiffs, with the exception of Arrington, failed to preserve or establish that CFI breached their employment contracts. Accordingly, we reverse the circuit court's directed verdict only as to Arrington's claim for breach of contract accompanied by a fraudulent act. We affirm the circuit court's ruling as to all other

plaintiffs whose claims for breach of contract went to the jury and resulted in defense verdicts.[9]

II. Terms of the Contract

As best as we can determine, the Zinn Plaintiffs next argue the circuit court erred in granting partial summary judgment and instructing the jury not to consider reserve funds prior to January 2010. The Zinn Plaintiffs further assert the circuit court erred in not permitting the jury to consider their claims under the Wages Act.

We question whether the Zinn Plaintiffs have abandoned this issue on appeal as they failed to cite any authority on this point in either their appellate brief or reply brief. *See Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (finding an issue abandoned where the party's brief cited only one family court rule and presented no argument as to how the family court's ruling was an abuse of discretion or constituted prejudice); *First Sav. Bank*, 314 S.C. at 363, 444 S.E.2d at 514 (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal); *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.").

Additionally, the Zinn Plaintiffs appear to change their argument in reply to "the trial court erred in denying motions for a new trial and JNOV," but the basis for the argument is not reasonably clear. *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."); *but see Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments."); *see also Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[A]n argument made

[9] "In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 663–64 (2006).

in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief"). Therefore, we find unpreserved the Zinn Plaintiffs' remaining arguments challenging the granting of partial summary judgment and the denial of their motions for a new trial and JNOV.

III. Attorney's Fees and Treble Damages

The Zinn Plaintiffs contend the circuit court erred in awarding only 1/25 of the attorney's fees requested in their post-trial motions.

"[T]he 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).

Pursuant to South Carolina Code section 41-10-80(C), "[i]n case of any failure to pay wages due to an employee as required by [s]ection 41-10-40 or 41-10-50 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) (Supp. 2014). "The language of § 41-10-80(C) is discretionary and not mandatory." *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 600, 675 S.E.2d 414, 415 (2009). "In *Rice v. Multimedia, Inc.*, 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995), [our supreme court] held that the imposition of treble damages in those cases where there is a bona fide dispute would be unjust and harsh." *Id*. The Court explained:

> [T]here are some wage disputes when the issue may involve a valid close question of law or fact which should properly be decided by the courts. We do not believe the legislature intended to deter the litigation of reasonable good faith wage disputes; we do believe the legislature intended to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute.

Id. (quoting *Rice*, 318 S.C. at 99, 456 S.E.2d at 384).

The Zinn Plaintiffs sought attorney's fees of $54,276. However, because only Arrington prevailed, the circuit court awarded a pro rata share of the requested

attorney's fees in the total sum of $2,171.04 and trebled damages to Arrington. While we see no abuse of discretion here, we remand the award of attorney's fees and treble damages to Arrington so that the circuit court may articulate the bases for these awards.

CONCLUSION

We hold the doctrine of res judicata barred the circuit court's post-trial review of the legality of CFI's reserve and charge back systems under the Wages Act. We also find the challenged language in the post-trial Zinn Order contradicts the circuit court's res judicata ruling and the jury's verdicts against all plaintiffs save Arrington. Thus, we reverse and remand with instructions for the circuit court to issue an amended order deleting the unsupported findings.

We affirm the circuit court's directed verdicts against Lanpher, Middleton, Singleton, Thoni, and Wills. As to all remaining Zinn Plaintiffs, other than Arrington, we affirm the circuit court's directed verdicts on the claims for breach of contract accompanied by a fraudulent act. We reverse the circuit court's directed verdict only as to Arrington's claim for breach of contract accompanied by a fraudulent act. We hold unpreserved the Zinn Plaintiffs' remaining arguments challenging the circuit court's granting of partial summary judgment and denial of the motions for a new trial and JNOV. We remand the award of attorney's fees and treble damages to Arrington so the circuit court may articulate the bases for these treble damages and attorney's fee awards. Accordingly, the findings and decisions of the circuit court are

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and LOCKEMY, JJ., concur.