STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John

Case No. 2011-CP-26-2722

Nichols Holding, LLC and J. Wade Nichols ..... Respondents-Appellants

vs.

Divine Capital Group, LLC; John S. Divine, IV;
Nathan Anderson; and Divine Dining Group, Inc. ..... Appellants- Respondents

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INITIAL RESPONDENT BRIEF OF RESPONDENTS-APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in requiring that Nichols pay the trade debt upon assuming control of Divine's and Bovine's restaurants?

II. Did the trial court err in finding that Divine was required pursuant to the settlement agreement to disclose that he had excess water demand charges on the Divine's and Bovine's restaurants which were owed to the Georgetown County Water and Sewer District?

STATEMENT OF THE CASE

The Respondents-Appellants have already provided a Statement of the Case in their Initial Brief filed on June 26, 2014. Respondents-Appellants turn directly to the issues raised in this case for disposition.

ARGUMENT

I. The Legal Standard in this case is "any evidence" to affirm the trial court.

Respondents-Appellants generally agree with the legal standard set forth by Divine in his Brief. However, Respondents-Appellants would offer the following additional legal principles. First, the Findings of Fact of the Circuit Court Judge will not be disturbed unless found to be without evidence which supports the judge's findings. This has been the law in South Carolina for well over thirty-five years. The judge's findings are equivalent to a jury's findings in a law action and are entitled to respect. See *Townes Associates, Ltd. v. The City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976).

Further, in construing the terms of a contract, any evidence is sufficient. The "any evidence standard" has been upheld as the standard by which this Court must review the findings of the circuit court. See *Sherlock Holmes Pub, Inc. v. City of Columbia*, 389 S.C. 77, 697 S.E.2d 619 (S.C. App. 2010).

Finally, this Court will not vacate the circuit court for lack of specific factual findings if the order adequately states the basis for the result. *Pawleys Island Civic Assoc. v. Johnson*, 292 S.C. 208, 355 S.E. 2d 541 (Ct.App. 1986).

Respondents-Appellants now turn to the factual findings which support the circuit court's decision on the issue of the water demand charges and Divine's liability for those charges.

II. The trial court did not err in finding Divine was required to disclose he had excess water demand charges owed on the Bovine's and Divine's restaurants prior to closing.

Divine argues at great length that he is not responsible for the excess water and sewer charges when the Bovine's and Divine's restaurants were sold. Divine's argument is

approximately 14 pages and consistently and continually argues the facts of the case which were disputed by the parties. Under the "any evidence rule" as cited above, this Court will not disturb findings of fact regarding settlement agreements unless they are without evidence or support in the record. Further, questions of credibility and weight are for the judge and the judge's findings are equivalent to the jury's findings of fact. See *Ward v. West Oil Co.*, 379 S.C. 225, 665 S.E.2d 618 (S.C.App. 2008).

III. All the evidence supports the Judge's decision.

The record is replete with evidence and testimony supporting the judge's findings. The evidence and testimony is as follows:

- Divine signed a Settlement Agreement which provided in Section 15(f) that there were no service, maintenance, property management, leasing or other contracts affecting the property which would be in existence as of the closing date other than the Operating Agreement described on Exhibit C.
- Divine was aware as early as June 22, 2007 that he should purchase additional water and sewer impact fees because he had received a letter from John F. Buck of the Georgetown County Water and Sewer District advising him to do so.
- Attorney Fred Newby, the transactional lawyer involved in this case, stated he did not become aware of the demand charge issue with Georgetown County Water and Sewer District until after Nichols had paid Five Million Dollars for the Bovine's and Divine's restaurants.[1] (Tr. p. 55, lines 20-23).

[1] This sum is in addition to the $8,642,379.70 which Divine already owed Nichols. Thus, Nichols effectively "double downed" when he bought the restaurants.

- Nichols found out about this service agreement when he went to change the restaurants over to his name (after paying Five Million Dollars at closing) and further became aware that Divine had past due demand charges. (Tr. p. 56, lines 5-10).
- Newby testified Divine was required to notify Nichols pursuant to the agreement to purchase of the charges owed to Georgetown County Water and Sewer District. (Tr. p. 58, lines 1-5).
- Newby testified Article 15 of the Settlement Agreement relates to warranties between Divine and Nichols and that Divine represented to Nichols there are no contracts that would be in existence at the time of the closing other than those set forth in Exhibit C of the Agreement. (Tr. p. 58, lines 1-5).
- Divine signed an Owner's Title Affirmation at closing stating there were no liens. (Tr. p. 58, lines 11-20).
- Divine had further stated in writing that all governmental services had been paid in full including water and sewer construction. (Tr. p. 59, lines 1-5).
- Nichols' manager, Ernest Edwards, went to Georgetown County Water and Sewer District to change the name on the water and sewer accounts to the Nichols Holding Company after the closing and was informed that in order to change the water and sewer account over, Nichols would have to pay an additional $53,000.00. (Ex. 1 Affidavit of Earnest Edwards) (R. ___).
- Divine did not purchase additional water demand capacity for the restaurants and was paying penalties and additional demand charges monthly rather than

purchasing the additional capacity. (Ex. 1 Affidavit of Earnest Edwards) (R. ___).

- Neither Edwards, nor Nichols, nor Newby were aware at the time of the closing that $53,000.00 was owed by Divine to Georgetown Water and Sewer District. (Tr. p. 55, lines 17-25).
- Neither Divine, nor any of his employees, had notified Edwards that this was an issue prior to the closing. (Ex. 1 Affidavit of Earnest Edwards) (R. ___).
- The Owner's Affidavit from Fidelity National Title Insurance was offered as Exhibit 4 which Divine signed stating there were no adverse claims. (R. ___).
- Rick Mendoza, counsel for Divine, testified that the settlement provided Nichols was to pay Five Million Dollars for the restaurants, plus the satisfaction of the judgment. (Tr. p. 34, lines 24-25).
- Mendoza further testified that Divine and Nichols should not be linked by a water and sewer account after the closing based on their long history of litigation. (Tr. p. 36, lines 9-12).
- Divine was aware of the additional water demand charges before the closing. (Tr. p. 37, lines 5-10).
- There were no liens on file at the Courthouse for Newby to find in regard to the water demand charges. (Tr. p. 37, lines 14-7).
- The water demand charges were never disclosed to Newby. (Tr. p. 38, lines 6-8).

- Divine proposed a settlement which was to allow the water sewer demand charge account to remain in Divine's name forever. (Tr. p. 47, lines 1-5).
- Nichols offered Exhibit 10 (the Agreement of Purchase and Sale) which was signed by Divine and which stated in paragraph 15(h) that Sellers (Divine) had received no notice of administrative agency action, litigation, condemnation proceeding or proceeding of any kind pending against Sellers which relates to or affects the property. (Ex. 10 Agreement of Purchase and Sale).

The Court recessed at the close of the case, went to Chambers, and then rendered a verdict at 12:20 p.m. The Court stated as follows:

> RULING OF THE COURT
> THE COURT:
> All right. The Court has examined the matters as filed by the parties in this case, all of their memorandum, the affidavits of the parties, as well as today I've heard the testimony of the witnesses that have been presented. Based upon the Court's examination of all of the matters submitted, and I may make reference to one or two documents but that's just by way of emphasis, but I have relied upon the entirety of the record before me as reflected in the Clerk of Court's file and through the testimony here today. Pursuant to the purchase and sale agreement entered into by the parties, the Court finds that the trade debt that is the responsibility of the Defendant includes the sum of $62,809.08. Now, the Plaintiff can receive, after proof, credit for all amounts they have already paid. It's the testimony of receiver that certain amounts of that $62,809.08 have been paid to the vendors and she specifically referenced certain of those such as Roper, Santee Cooper, HTC and a portion of a debt owed to JFC debt was not paid but a portion of it was paid. Upon proof supplied by the Defendants -- I'm sorry, by the Plaintiffs that they have paid those vendors those amounts, that amount can be deducted from the $62,809.08 which is the responsibility of the Plaintiff. If those -- by the Court's calculation, if those amounts are correct, I believe the amount due and payable would be the sum of $53,799.04. But by

> indicating that the amount owed is the 62,809.08 with credit after proof of the payment. So, whatever that ends up being.
>
> Now, pursuant to the closing documents signed by the parties and the purchase and sale agreement in the matters set forth therein and again make reference to some documents that the transactional attorney talked about, Mr. Newby, but in making reference to all of the documentation, the prior service agreement by the Defendants with the Georgetown County Water and Sewer District should have been disclosed pursuant to the obligations they agreed to in the closing documents signed by the Defendants and in the purchase and sale agreement. Therefore, the Defendants are responsible to the Plaintiffs for the sum of $53,760. The sum held in trust by either -- I was uncertain whether it was in Ms. Brittain's firm or Mr. Mendoza's firm in the amount of $2,795.41 shall be immediate transferred to the trust account of Mr. Connell for proper distribution. So, to be clear, it's the Plaintiff's responsibility under the purchase and sale agreement for the trade debt and I established that trade debt to be $62,809.08. Again, the Plaintiff can receive credit if they actually paid for some of those things as reflected by the testimony of the receiver. And upon proof of payment of that, then they gave credit for what has actually been paid to a vendor. The Defendants should have disclosed what was in writing, the prior agreement, service agreement as reflected by the documentation supplied to the Court. The prior service agreement with Georgetown County Water and Sewer District, therefore the Defendants are responsible to the Plaintiffs for sum of $53,770. These are not set by the Court as offsets. These are two respective judgments and decisions. One is -- the practical effect of one, one decision may be -- may have an effect on the other but they are two -- I want to be clear that they are to separate distinct decisions. And again, the amount held in trust needs to be transferred immediately from the -- whatever attorney's account, trust account it's being held into Mr. Connell's trust account for proper distribution.
>
> (Tr. p. 81 lines 15-25; p. 82, lines 1-25; p. 83, lines 1-24)

The Court issued the above ruling based on the evidence cited above and using the "any evidence standard" which is required by the circuit court to construe a settlement agreement. See *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991). See also

Pruitt v. South Carolina Medical Malpractice Liability Joint Underwriter's Association, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001).

In sum, the judge's decision is supported by specific findings of fact. (Order Compelling Settlement filed January 6, 2014) (R. ___). His oral order was dictated in the record and the written Order supports his decision on this issue. Appellant Divine spends many pages in his brief arguing the facts.[2] This the Court cannot do since if there is any evidence in the record to support the circuit court's decision it must be affirmed. As has been cited above, the evidence is substantial and the standard is low for affirming the ruling (any evidence in the record). Accordingly, Respondent-Appellant Nichols requests the Court affirm the trial court on this ruling.

IV. The Court correctly determined Nichols' damages and Divine failed to request the circuit court to rule on that issue.

Divine argues that the record is uncontroverted that there was no amount owed to Georgetown County Water and Sewer District at the time of the closing and thus Divine had no duty to inform Nichols of the potential fees that would be assessed if he opened a new account. Respondents-Appellants point out that the arguments made on pages 26 and 27 of Divine's Brief need not be considered. The reason is that this issue was not raised before the judge nor was it raised by Divine's motion to alter or amend. At no time during the hearing of thereafter was an argument ever made that Nichols had incurred no actual loss. The transcript of record reveals that Divine's counsel stated the parties are in disagreement over what compromises the trade debt and that Dr. Nichols has asserted there are impact fees owed to Georgetown County Water and Sewer District. (Tr. p. 4, lines 12-20).

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[2] Shakespeare once said: "The lady doth protest too much methinks." (A quote from Hamlet used as a figure of speech to convince others of something when one has helped to convince others that the opposite is true.)

Further, at the close of the case, the Court stated "Anything else?" and Divine's counsel said "Thank you, your Honor." (Tr. pp. 80-81). Finally as has been mentioned above, the motion to alter or amend the judgment does not argue that Nichols had no actual damages. Accordingly, this issue need not be considered because the circuit court did not rule on it and issues not ruled on are deemed abandoned and need not be addressed by the court. See *Noisette v. Ismail*, 304 S.C.56, 403 S.E.2d 122 (S.C. 1991) (cited with approval by the courts of this state some ninety times). As a result, this Court should not consider Appellant's argument that Nichols incurred no actual loss.

V. The Circuit Court did not properly give an offset to the amount owed for the trade debts.

Divine offered no argument about the amount of the trade debt owed nor did he offer any argument about any credit owed. The only evidence in the record concerning the amount of the trade debt was offered by Nichols. The Court had previously appointed a Receiver, Arlene Jaskot, who is a CPA and has been one for 31 years. (Tr. p. 67, lines 11-13). She stated she actually looked at the invoices and the accounts payable (Tr. p. 68, lines 18-23; that she looked at the actual invoices a second time (Tr. p. 68, lines 221-23); that the amount of the trade debt owed was $45,673.00 (Tr. pp. 72 and 73); at the close of the businesses and the sale to Nichols, the amount of money in the Divine/Bovines bank account was $2,795.41 and that the total amount owed for past due trade debt was $42,877.59. (Tr. p. 73, lines 24-25).

The trial court in its ruling stated:

> Upon proof supplied by the Defendants – I'm sorry, by the Plaintiffs that they have paid those vendors those amounts, that amount can be deducted from the $62,809.08 which is the responsibility of the Plaintiff. If those -- by the Court's calculation, if those amounts are correct, I believe the amount due and payable would be the sum of $53,799.04. But by indicating that the

amount owed is the $62,809.08 with credit after proof of the payment. So, whatever that ends up being (Tr. p. 82, lines 1-15).

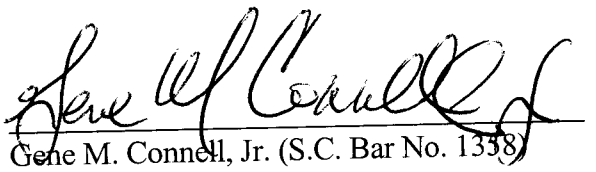
The testimony and the record clearly establish the amount of trade debt owed was $42,877.59. The trial judge had no evidence in the record for the amount he determined was owed in the amount of $53,799.04. See *Townes Associates, Ltd. v. The City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976). (Findings of Fact of a judge sitting without a jury will not be disturbed upon appeal unless findings to be without evidence which reasonably supports the judge's findings.) Thus this Court should find as a matter of fact the amount owed as trade debt is $42,877.59.

CONCLUSION

Accordingly, Respondents-Appellants submit to the Court that as to the issue of the excess water demand charges, the trial court should be affirmed, and as to the issue of the trade debt, this Court should find under the "any evidence standard" that the amount of $53,786.65 was an error based on the testimony of Arlene Jaskot and that the amount owed was $42,877.59. The basis of this ruling is there was no evidence in the record of an amount owed in excess of $42,877.59 after an extensive audit performed twice by the court appointed Receiver. (Tr. p. 68, lines 1-12).

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.



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July 25, 2014
Surfside Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John

CASE NO. 2011-CP-26-2722

Nichols Holding, LLC and J. Wade Nichols ..... Respondents-Appellants

vs.

Divine Capital Group, LLC; John S. Divine, IV;
Nathan Anderson; and Divine Dining Group, Inc. .....Appellants-Respondents

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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served **Initial Respondent Brief of Respondents-Appellants** on the Appellants-Respondents, through their attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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DATE OF MAILING: July 25, 2014

Shelia Y. McCumbee

Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 25th day of July, 2014

Barbara A. Smith

Notary Public for South Carolina
My Commission Expires: 3-12-24

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July 25, 2014

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Re: *Nichols Holding, LLC and J. Wade Nichols v. Divine Capital Group, LLC; John S. Divine, IV; Nathan Anderson; and Divine Dining Group, Inc.*
Appellate Case No. 2014-000662
C/A No. 2011-CP-26-2722
Our File No. 2011-0037C

Dear Ms. Kitchings:

Enclosed please find the following for filing in the above-captioned matter:

(1) Original and one copy of Initial Respondent Brief of Respondents-Appellants, with Proof of Service;

(2) Original and one copy of Respondents-Appellants' Designation of Matter to be Included in Record on Appeal, with Proof of Service;

(3) Self-addressed, stamped envelope for return of a filed copy of each to this office.

By copy of this letter, we hereby serve copies of the Initial Respondent Brief and Designation of Matter on Appellants-Respondents through counsel of record.

With best regards, I am

Sincerely yours,

Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures
cc w/enc.: Emma Ruth Brittain, Esquire
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