

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Steven H. John

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Case No. 2011-CP-26-2722

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**RECEIVED**  
AUG 08 2014  
**SC Court of Appeals**

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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REPLY BRIEF OF RESPONDENTS-APPELLANTS

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Nichols Holding, LLC and J. Wade Nichols, the Respondents-Appellants offer the following response to the Brief of Appellants-Respondents filed July 28, 2014.

## ARGUMENT

### **I. The plan of the Defendant was unworkable.**

The Defendants argue in great detail that the water and sewer account on the restaurants in question could remain forever in Divine's name and be paid for by Nichols. See Page 13, FN 10: "Nichols is not required by GCWSD to open a new account but may continue to use the existing account, thereby avoiding such a fee (Aff. of Divine, p. 16, ¶102). Divine offered to allow Nichols to continue using his account at GCWSD because Divine understood that the impact fees would not be assessed against Dr. Nichols if he were to continue using the existing water/sewer account."

Divine offers a totally unworkable situation. These parties had already been in litigation for years. Nichols had just paid Divine Five Million Dollars (\$5,000,000.00) for these restaurants. Nichols' business manager, Ernest Edwards, had gone to Georgetown County Water and Sewer District to change the water account into Nichols' name when it was learned that Divine had been paying additional charges and penalties rather than pay to purchase additional capacity. It hardly goes without dispute that allowing Divine to keep the water account in his name while Nichols paid such penalties rather than paying additional capacity would have resulted in further litigation. Also, it begs the question that Divine was required by the Purchase Agreement to tell Nichols that additional impact fees should have been purchased and that he had been so advised by Georgetown County Water and Sewer District's employees for years to do so. (See Letter of John F. Buck of Georgetown County Water and Sewer District dated June 22, 2012). (R. \_\_\_\_).

Accordingly, Divine's argument that the status quo could have been maintained begs the very question set forth in the Court's Order as to the violation by Divine of the Agreement of Purchase and Sale, specifically Section 15 (f) and 15 (h), both of which affect the property. See Sections 15(f) and 15(h) which state in pertinent part:

15. (f) There are no service, maintenance, property management, leasing or other contracts affecting the Property....

15. (h) Sellers have received no notice of administrative agency action, litigation, condemnation proceedings....

It is without dispute that Georgetown County Water and Sewer District sent letters to Divine about not purchasing additional capacity which were at the very least an administrative agency action (about a water service contract) warning him that additional charges had been incurred because Divine failed to purchase such additional capacity.

Divine in his Brief also indicates that the purchase of additional capacity would have been costly by Divine Fish House. (See Affidavit of Divine, p. 11, ¶¶ 63-66, p. 12, ¶70). Again, it is without dispute that this is the very reason why Divine should have advised Nichols prior to the closing that these additional monies were owed and that Divine had been putting off purchasing additional capacity for years. Again, such failure to advise Nichols was a violation of Sections 15(f) and(h) of the Purchase and Sale Agreement between the parties.

**II. The trial court properly refused to consider the Divine Affidavit.**

Divine, rather than take the stand during the trial, decided to offer his Affidavit as testimony. Divine cites to his Affidavit chapter and verse throughout his Brief. However, the trial judge chose to discount and not consider Divine's Affidavit because of his failure to testify in the trial. South Carolina has long recognized the rule that trials are not by

affidavits but by witness testimony. The right to cross-examine and determine credibility of witnesses is the key in most decisions by the court. South Carolina Rule of Civil Procedure 43(a) provides as follows:

**(a) Form and admissibility.** In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes or rules of evidence heretofore applied in the courts of this State. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in a like manner.

South Carolina Rule of Civil Procedure 43 does not allow for the presentation of affidavits at trial. Trials in this state are not about affidavits but about witness testimony. Truth is not determined from the face of an affidavit because the trial judge cannot determine from conflicting affidavits what is the more truthful version of events. The trial court is in a better position to gauge the truth from the review of the witnesses on the stand. Credibility decisions are made by the trial judge based upon the witnesses' testimony not upon affidavits. It is for this reason that the trial court should discount Divine's extensive affidavit in toto just as the trial court did in reaching its decision.

### **CONCLUSION**

In sum, the trial court applied the law to the facts and found that Sections 15(f) and (h) of the Agreement of Purchase and Sale have been violated. The court used common sense and sound judgment in finding Georgetown County Water and Sewer District was taking administrative agency action on its service contract by advising Divine of the issues his restaurants had with the water demand charges. Further, under 15(h) of the Agreement of Purchase and Sale, the court found that the Georgetown County Water and Sewer District

agreement to supply water to Divine's restaurants were service agreements and thus within the contemplation of Section 15(f) of the Agreement of Purchase and Sale.

In conclusion, all the evidence supports the trial court's decision that settlement agreements are to be reviewed under the "any evidence standard" of review. See *Sherlock Holmes Pub, Inc. v. City of Columbia*, 389 S.C. 77, 697 S.E.2d 619 (S.C. App. 2010).

Accordingly, this Court should affirm the trial court's ruling regarding the excess water and demand charges on the Bovine's and Divine's restaurants.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.



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August 7, 2014  
Surfside Beach, South Carolina

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PROOF OF SERVICE

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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 **Reply 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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Myrtle Beach, SC 29577

DATE OF MAILING: August 7, 2014

  
Shelia Y. McCumbee

**SWORN AND SUBSCRIBED** before me,  
this 7<sup>th</sup> day of August, 2014

  
Notary Public for South Carolina  
My Commission Expires: 2-25-19

KELAHER, CONNELL & CONNOR, P.C.

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August 7, 2014

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The Honorable Jenny Abbot Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

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 Reply Brief of Respondents-Appellants, with Proof of Service;
- (2) Self-addressed, stamped envelope for return of a filed copy to this office.

By copy of this letter, we hereby serve copies of the above-stated documents on Appellants-Respondents through counsel of record.

With best regards, I am

Sincerely yours,

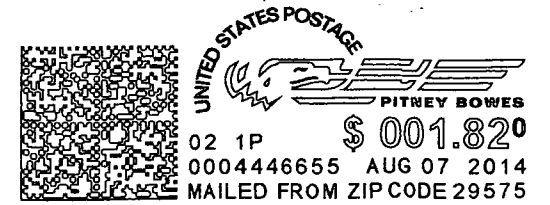


Gene M. Connell, Jr.

GMC,Jr.:sm

Enclosures

cc w/enc.: Emma Ruth Brittain, Esquire  
Julio E. Mendoza, Jr., Esquire  
Frederick Miles Adler, Esquire  
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