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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PETITION FOR REHEARING

The Respondents-Appellants, pursuant to Rule 221 of the South Carolina Appellate Court Rules, move this Court for rehearing and reconsideration of its Opinion No. 5397 submitted December 29, 2015, filed March 30, 2016 and received by counsel for Respondents-Appellants on April 1, 2016. The basis of this Petition is the attached Memorandum of Law.

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April 12, 2016
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MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING

On March 30, 2016, this Court issued is Opinion No. 5397 reversing and remanding the Circuit Court Order in this case. Respondents-Appellants request reconsideration and rehearing pursuant to South Carolina law based on Rule 221(a) and offer the following issues that were overlooked or misapprehended by the Court in issuing its Opinion.

I. THIS COURT ERRED IN FINDING THERE WAS NO DUTY TO DISCLOSE OR ADVISE BY DIVINE.

This Court found as a matter of law that the Circuit Court erred in requiring Divine to pay impact fees because (1) the Agreements did not impose on Divine a duty to advise and disclose to Nichols that Divine had not purchased additional water and sewer capacity,

and (2) paragraph 12(d) of the Agreement of Purchase and Sale required Nichols to make itself aware of the impact fees during the "Inspection Period" prior to closing.

Respondents-Appellants believe this Court misapprehended the law of this state regarding contracts. It is well settled in our state that all contracts have an implicit and implied duty of good faith in fair dealing between the parties. The Court's Opinion ignores this century old maxim in reaching its conclusion. See *Boddie-Noell Prop., Inc. v. 42 Magnolia Partnership*, 352 S.C. 437, 444, 574 S.E.2d 726, 730 (2002). Here, the parties expressly agreed to act "truthfully" under the terms of the agreement and thus this created a central factual issue for the finder of fact. In this case, the circuit court judge was that fact finder. See *Parker v. Byrd*, 309 S.C. 189, 194, 420 S.E.2d 850 (1992) (Supreme Court finds that the parties express agreement to act in good faith merely a restatement of the covenant of good faith and fair dealing implied in every contract in this state).

It is respectfully submitted that this Court's bold statement that there is "no duty to disclose or advise" is directly contra to the implied duty of good faith and fair dealing in all contracts. Respondents-Appellants assert the duty to disclose is nothing more than part and parcel of the implied duty of good faith and fair dealing. Clearly, only Divine was aware of the issue of the additional water and sewer capacity which Nichols would be required to purchase after closing. Instead Divine chose to remain silent (about a material fact) and this silence constitutes a breach of the covenant of good faith and fair dealing. Indeed, Divine expressly promised and warranted in the Agreement of Purchase and Sale that he would be truthful. This was and is a material fact which the trial court relied upon in reaching its decision. Further, there was more than ample evidence supported by the record. See *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 366-367, 147 S.E.2d 481,

484 (1996) ("there exists in every contract an implied covenant of good faith and fair dealing") *Warr v. Carolina Power and Light Co.*, 237 S.C. 121, 115 S.E.2d 799 (S.C.1960). (If either party to a transaction conceals some fact which is material which is within his or her knowledge which it has a duty to disclose then he is guilty of fraud).

Respondents-Appellants now turn to the substantial evidence that this Court had finding that Divine had no duty to disclose and advise Nichols. Specifically, Respondents-Appellants point to Record on Appeal, page 123, Paragraph 15(m) of the contract of purchase and sale (collectively the agreements) and the settlement agreement itself. Section 15(m) of the contract of purchase and sale states in pertinent part:

> (m) On the Closing Date, Sellers will have complied with all of its obligations under this Agreement, unless such compliance has been waived in writing by Buyer, and all warranties made in this Paragraph 15 shall be true and correct in all material respects on that date.

The Court also states section 15(h) of the Agreement of Purchase and Sale is not applicable to this matter. In fact, the record shows Divine had notice of an administrative agency action.[1] See Record, p. 730: "When a customer is given notice of excess use and levy of demand charges, the customer has the option to purchase the additional capacity indicated by billing history." See also Record, p. 500: Letter to Jack Divine from Tommie Kennedy: "Any commercial account holder exceeding their purchased capacity should receive a letter every year notifying them of the overage. In the notice the owner has the option of buying additional capacity or incurring a penalty."

Here Divine clearly had notice of administrative agency action by Georgetown County Water and Sewer district years before the sale. In sum, on two different occasions

[1] Divine got notice for years by the District he had gone over allocated capacity of water and sewer. (R. pp. 76-77).

Kennedy describes this process as a penalty. R. p. 500 and R. p. 831. This evidence clearly rises to the any evidence standard which this court must review the lower court's decision under in this state.

Further, on page 124 of the Record on Appeal in the Agreement of Sale and Purchase, Divine (the Seller) represents and warrants as follows:

> Sellers hereby agree that the truthfulness of each of the foregoing representations and warranties, and of all other representations and warranties made in this Agreement, as of the Effective Date and as of the Closing Date (except as may be limited by the express terms of this Agreement), is a condition precedent to the performance by Buyer of its obligations under this Agreement. If any of the foregoing representations or warranties is of a material nature and is not true in any material respect when made, or when re-certified at Closing, Buyer may consider such material representation to be a default under this agreement....

Also, on page 125 of the Record on Appeal, Section (iv) of the Agreement of Purchase and Sale states as follows:

> To the best knowledge of Divine, there are no service, maintenance, property management, leasing or other contracts affecting the Property which will be in existence as of the Closing Date other than the Operating Agreements described on Exhibit C.[2]

Respondents-Appellants also refer the Court to the sworn testimony of Fred Newby who appeared as a witness in the case.[3] His testimony is found at page 793 of the Record on Appeal. Newby stated as follows:

> ...but I do believe that from what I've seen in the affidavits, there was an agreement between Georgetown Water and Sewer and the selling entities that required an additional -- and I'm gonna use round numbers -- $600 a month for water and sewer. Apparently, that was an agreement, which I would call a contract, most agreements are contracts, that the provision that you referred to previously, in my view, should've been disclosed or -- it should have been disclosed and the Nichols would have decided whether

[2] Clearly, the additional water and sewer capacity "affects the property" based on the testimony of Newby which was relied on by the Court in its ruling. (R. p. 819, lines 15-25; p. 820, lines 1-25; p. 821, lines 1-24).
[3] The Court does not discuss his testimony in the Opinion which satisfies the "any evidence" rule this Court is bound by in deciding cases heard by a circuit judge sitting without a jury.

> they wanted to assume the debt or not and if they agreed to assume it, it would go on Schedule C of the contract.
>
> (R. p. 794, lines 20-25; p. 795, lines 1-6).

Newby also noted during his testimony that there were representations and warranties of the sellers , and he further noted that the selling entities representation was that there were no service, maintenance or other contract affecting the property which would be in existence at the closing date other than as described on Exhibit C. (R. p. 795, lines 14-22).

Of significance to the Opinion of this Court, Newby further testified:

> "Mr. Divine individually is making the same warranty and representations that there are no contracts that would be in existence at the time of the closing other than as set forth in Exhibit C. And I'm not sure if the exhibits are attached but my recollection -- let me see -- my recollection is there is no mention of or discussion of, of the Georgetown Water and Sewer agreement and I'm looking now at Exhibit C and the only thing listed is the boat slip rental agreements.... (R. p. 795, line 25; p. 796 lines 1-8.)

It is respectfully submitted that this Court's Opinion does not address this testimony of Newby or his testimony that the provisions of the contract imposed a duty upon Divine to disclose and advise to Nichols. Further, Newby's testimony is competent evidence coupled with the above cited provisions in the contract that Divine did have duties to Nichols including that of being truthful which in effect meant he had an implied covenant of good faith and fair dealing. Also, the above testimony clearly establishes under the "any evidence" rule that this Court should affirm the trial court on this issue. The "any evidence standard" has been upheld as the standard by which this Court must review the findings of the circuit court and this Court erred in not addressing it in its Opinion. See *Sherlock Holmes Publishing, Inc. v. City of Columbia*, 389 S.C. 77, 697 S.E.2d 619 (S.C.App. 2010).

It should also be noted that normally the question of whether a contract has been breached in South Carolina is an issue to be decided by the finder of fact. In this case any conflicting evidence used by the circuit court must be affirmed by the Court. Our Supreme Court has held in *Townes Associates, Ltd. v. The City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976) that an action at law tried without a jury the appellate court will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings.[4] Further, the trial court's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E.2d 876, 877 (1975). In sum, this Court erred in not looking at the evidence in the light most favorable to the Respondents-Appellants and if it had done so it would have affirmed the trial court on this issue. See *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct.App. 1989). Accordingly, Respondents-Appellants respectfully submit that the above quoted evidence and law require this Court to withdraw its Opinion since in effect this Court cannot vacate a circuit court sitting without a jury if there is adequate factual findings for the basis of the court's order. See *Pawleys Island Civic Assoc. v. Johnson*, 292 S.C. 208, 355 S.E.2d 541 (Ct.App. 1986). At best, the statements of Tommie Kennedy, the employee of Georgetown County Water and Sewer, are conflicting. Thus, the circuit court was free to weigh the evidence under the "any evidence" standard. In effect, Kennedy's letter of June 17, 2013 described the payment by Divine as a "penalty" (R. p. 831). Further, in his September 16, 2013 letter Kennedy stated the demand charge is an additional charge separate from the usage charge incurred by existing commercial accounts whose monthly usage has exceeded their water capacity...and have declined the opportunity to purchase additional impact fees.

[4] Here, the reasonable evidence is Newby's testimony and the contracts themselves which require Divine to be truthful.

In reality, this was an additional charge Nichols was faced with that he had no knowledge of and that Divine was clearly aware of prior to the sale (R. p. 476).

II. THIS COURT ERRED IN FINDING NO EVIDENCE OF AN OFFSET.

It is respectfully submitted this Court erred in failing to offset the trade debt by $9,220.43. The Court in its Opinion held: "Based on the foregoing, there was no evidence to support the circuit court's finding that Nichols' payments to Roper, Santee Cooper and Horry Telephone should be deducted from the amount of outstanding trade debt indicated in John Divine's affidavit." (Opinion 14-15).

Respondents-Appellants respectfully direct the Court to the testimony at trial of Arlene Jaskot, the Court appointed receiver. More specifically, page 845 of the transcript of record is applicable to this issue. Jaskot extensively testified about her affidavits and her review of the trade debt (R. p. 806, lines 5-14). Jaskot also noted: "The second time, I actually had the invoices that I could actually verify the names and dates on." (R. p. 806, lines 20-21). Jaskot stated that she prepared two spreadsheets, one for Divine's trade debt and one for Bovine's trade debt (R. p. 808, lines 13-20). Jaskot verified the amounts paid by the Nichols based on the checks – that she actually saw the checks (R. p. 809, lines 1-13). These same checks are found in the Record at pages 845, 846 and 847. The Court is directed to the Record at page 845 for specific line items regarding Santee Cooper bills which shows Nichols paid $3,129.66 for the Santee Cooper electric bill for Bovine's restaurant. It should also be noted that the next amount this Court says should not be deducted is the Santee Cooper bill on Divines restaurant in the amount of $3,126.58 which is found in the Record at page 847. This was also paid by Nichols. Finally, the Court is directed to the Record at page 845 showing the Roper bill of $1,751.27 was paid by Nichols.

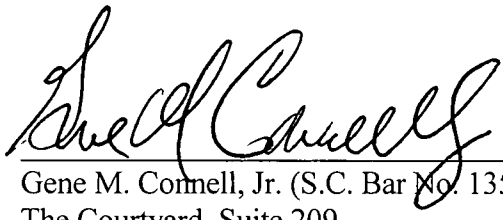
In sum, the circuit judge did not have to believe every part of each witness's testimony. He could believe some of each witness's testimony. (This is a standard jury charge in our state.) In this case, the trial court started with Divine's affidavit and then considered the testimony of Jaskot as to the appropriate deductions. There is ample testimony in the Record to support the circuit court judge's decision. Jaskot's testimony clearly established the spreadsheets found in the Record on Appeal at pages 845, 846 and 847 which showed the deductions she took in reaching the amount owed.[5] Accordingly, based on the "any evidence standard" required to be applied by this Court, it should vacate that part of the Opinion where it failed to provide credits to the trade debt owed by Nichols.

This Court also found that there was nothing in the Record to show the circuit court "chose to discount and not consider Divine's affidavit because of his failure to testify at the trial." In fact, the above testimony from a live witness, Arlene Jaskot, and the circuit court's decision to use her reconciliation of the trade debt shows that as to the issue of the credits owed on the trade debt that the court implicitly rejected Divine's calculation as to the credits. In effect, in doing so the court relied upon the entirety of the record in coming to its conclusion. Accordingly, Respondents-Appellants request the Opinion of this Court be vacated consistent with this Petition.

Respectfully submitted,

[5] This Court makes no mention of these spreadsheets and its logic in reaching its holding is difficult to follow. The decision of the trial court was based on actual trial testimony of Arlene Jaskot and her reconciliation of all checks and deductions. (R. pp. 845, 846 and 847).

KELAHER, CONNELL & CONNOR, P.A.



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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 **Respondents-Appellants' Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** 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: April 12, 2016

Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 12th day of April, 2016

Barbara A. Smith
Notary Public for South Carolina
My Commission Expires: 3-12-24

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April 12, 2016

VIA FEDERAL EXPRESS
The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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 an original and seven (7) copies of Respondents **Petition for Rehearing, Memorandum of Law in Support of Petition for Rehearing** and **Proof of Service** of same in the above-captioned matter. I enclose our check for $25.00 for the filing fee. Please return a filed copy to this office in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated document on Appellant 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