

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

RECEIVED
APR 28 2016
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

REPLY TO RETURN TO PETITION FOR REHEARING

The Respondents-Appellants, replying to the Appellants-Respondents Return, would offer the following additional argument to the Court:

I. ***TOWNES ASSOCIATES, LTD V. THE CITY OF GREENVILLE, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976) IS CONTROLLING HERE.***

In the return by Divine many factual issues are argued. This is in response to the Memorandum of Law in Support of Petition for Rehearing filed by Nichols and succinctly proves the point that *Townes Associates, Ltd. v. The City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976)* is controlling in this matter. If the evidence is susceptible of two inferences then it is the providence of the finder of fact to make the decision. This decision will be affirmed if there is any evidence in the record to support it. This has been the law in South Carolina for a century and the *Townes* case has been cited in law cases such as this

one over 621 times by state appellate courts. The scope of review in civil cases is often quoted because the trial court's finding of facts in a law case are equivalent to a jury's findings of fact and are entitled to special deference. This is such a case. Here there is significant evidence offered by Respondents-Appellants which was ignored by the Court in reversing the decision of the lower court. In particular, the testimony of Newby, a live witness subject to cross examination, is not mentioned in this Court's opinion. Newby's testimony provides ample authority for affirming the Circuit Court. He noted in the Record:

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 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).

It is respectfully submitted that Newby's testimony in conjunction with Jaskot's testimony at trial about her review of the trade debt require this Court affirm these issues. Jaskot noted particularly: "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 further 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).

In sum, these two pieces of evidence offered in a law case such as this require that this Court affirm the trial court's decision in this matter. It is well settled in this state there is deference to trial court in actions at law. *Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 719 S.E.2d 656, 658 (2011).

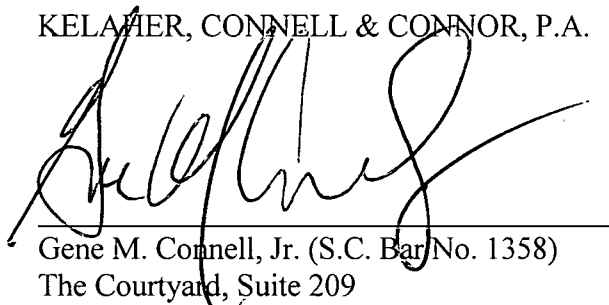
The trial court was in a better position to weigh the credibility of the witnesses than the Appellate Court. In this case the trial court had the testimony of both Jaskot and Newby

on the two issues before this Court on motion for reconsideration. Because the trial court heard this case and there was evidence (any evidence is the standard), these issues must be affirmed by this Court. See *Tiger v. Fisher Argo, Inc.*, 301 S.C.229, 391 S.E.2d 538 (1989) (The special referee was in a better position to weight the credibility of the witnesses than this court).

While Appellants-Respondents argue at great length about the facts, those facts were subject to more than one inference as seen from the petition for reconsideration and this response; and thus this Court should affirm the trial court's rulings regarding Divine paying impact fees and as to the calculation of the trade debt as both issues are supported by the "any evidence" standard and the seminal case of *Townes Associates, Ltd. v. The City of Greenville*; 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976).

Respectfully submitted,

KELAMER, CONNELL & CONNOR, P.A.



Gene M. Connell, Jr. (S.C. Bar No. 1358)

The Courtyard, Suite 209

1500 U. S. Highway 17 North

Post Office Drawer 14547

Surfside Beach, South Carolina 29587-4547

(843) 238-5648 (phone)

(843) 238-5050 (facsimile)

gconnell@classactlaw.net

Attorney for Respondents-Appellants

April 27, 2016
Surfside Beach, South Carolina

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PROOF OF SERVICE

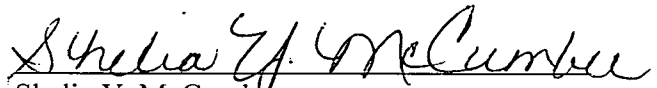
PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served **Respondents-Appellants' Reply to Return to Petition for Rehearing** on the Appellants-Respondents, through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

Emma Ruth Brittain, Esquire
Leah Montgomery Cromer, Esquire
Thomas & Brittain, P.A.
Post Office Box 1290
Myrtle Beach, SC 29578

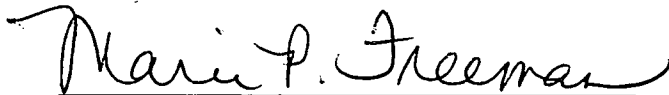
Julio E. Mendoza, Jr., Esquire
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202

Frederick Miles Adler, Esquire
Post Office Box 4743
Pawleys Island, SC 29585

DATE OF MAILING: April 27, 2016


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 27th day of April, 2016


Notary Public for South Carolina
My Commission Expires: 6/11/24

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

SUITE 209

THE COURTYARD

1500 U.S. HIGHWAY 17 NORTH

P.O. DRAWER 14547

SURFSIDE BEACH, SOUTH CAROLINA 29587

EDWARD T. KELAHER*
GENE M. CONNELL, JR.
L. SIDNEY CONNOR, IV
LISA POE DAVIS

* OF COUNSEL

April 27, 2016

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238-5648
FAX: 238-5050

APR 28 2016

SC Court of Appeals

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

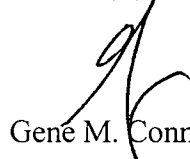
Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondents-Appellants **Reply to Return to Petition for Rehearing and Proof of Service** of same in the above-captioned matter. 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 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
J. Wade Nichols