THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

ELLIS B. DREW, JR., MASTER-IN-EQUITY
STEVEN C. KIRVEN, MASTER-IN-EQUITY

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Appellate Case No. 2016-001689
(2013-CP-04-02228)

Robin Johnson
and CQI Pharmacy Services, LLC . . . . . Respondents,

v.

Robert Little
and CQI Oncology/Infusion Services, LLC . . . . . .Appellants.

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# FINAL BRIEF OF APPELLANTS

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## STATEMENT OF THE CASE

Plaintiff-Respondent Robin Johnson and CQI Pharmacy Services, LLC (generally referred to as "Respondent" in the singular) filed this action on October 2, 2013 in the Anderson County Court of Common Pleas. Respondent alleged causes of action against Defendant-Appellant Robert Little and CQI Oncology/Infusion Services, LLC, (generally referred to as "Appellant" in the singular) for breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, fraud, and unfair trade practices arising out of the sale of business assets from Appellant to Respondent in May 2013.

Respondent's Complaint alleged that Appellant should be required to reimburse Respondent for invoices which Appellant should have paid prior to the closing with Respondent because Respondent paid these invoices after the closing.

Appellant filed a Motion to Dismiss the Complaint pursuant to SCRCP 12(b)(6); this motion was denied.

Appellant filed an Answer and Counterclaim generally denying that Appellant was liable to Respondent. Appellant asserted defenses that Respondent was not liable for Appellant's debts and that Appellant Robert Little should be dismissed as a party because the real party in interest was the LLC, Oncology Services.

By consent, this case was referred to the Honorable Ellis B. Drew, Jr., Master-in-Equity for Anderson County, South Carolina with the Master having the power and

authority of the Court of Common Pleas sitting without a jury. Any appeal from the decision of the Master-in-Equity would be to the South Carolina Court of Appeals.

By Form 4 Order dated September 15, 2015, Respondent's Motion to Dismiss Appellant's Counterclaim was continued because Respondent had not answered Appellant's discovery requests. Respondent agreed that Respondent would answer the discovery by October 9, 2015. Respondent finally answered Appellant's discovery requests in January 2016.

By Form 4 Order dated April 12, 2016, Appellant agreed to dismiss its Counterclaim.

This case proceeded to a non-jury trial on April 18, 2016 before Judge Drew. Judge Drew's Order filed May 31, 2016 awarded judgment to Respondent against Appellant for $50,000.00. Appellant filed a Motion for Reconsideration which requested that the Order filed May 31, 2016 be amended to include numerous findings of fact and conclusions of law not included in the Order.

Judge Drew held a hearing on June 21, 2016 to consider only whether judgment should be entered against Robert Little individually. By Order filed July 12, 2016, Judge Drew denied all relief requested in Appellant's Motion for Reconsideration.

Appellant's Notice of Appeal dated August 12, 2016 was timely filed and served.

## FACTS

On May 9, 2013, Robert Little and CQI Oncology/Infusion Services, LLC ("Oncology Services") as Seller entered into a Purchase and Sale Agreement with CQI Pharmacy Services, LLC ("Pharmacy Services") as Purchaser, in which certain assets of Oncology Services were sold to Pharmacy Services for the sum of $30,000.00 (R. p. 128).

The Purchase Agreement states that the assets of Oncology Services being sold included all contracts, files, client lists, contacts, and vendor lists of Oncology Services. The Purchase Agreement provides that Seller shall not interfere with relationships between Purchaser and its vendors. The Purchase Agreement also provides Seller warrants that the property is free and clear of liens. The parties acknowledged that in the Purchase Agreement "there is a similarity in the corporate names that may cause confusion to third parties", but this provision addressed mail delivery and change of address filings with the U.S. Postal Service (R. p. 129).

The Purchase Agreement contains mutual indemnification provisions. The Purchase Agreement does not contain any provisions which address the Seller's accounts payable and liability therefore. The Purchase Agreement does not contain any provisions which might require the Seller to pay invoices issued to the Purchaser (R. p. 128).

As stated in the Purchase and Sale Agreement, "there is a similarity in the corporate names which may cause confusion" (R. p. 129). In addition to the similarity in names, Oncology Services and Pharmacy Services conducted business in the same location (R. p. 100, line 16). However, Oncology Services was formed and operated as a medical supply company and Pharmacy Services was formed and operated for pharmaceutical sales only (R. p. 60, line 1). Respondent Robin Johnson worked for Oncology Services for more than 20 years (R. p. 53, line 20).

To further complicate matters, Appellant Robert Little was an authorized signatory on Pharmacy Services' checking account and Respondent Robin Johnson was an authorized signatory on Oncology Service's checking account (R. p. 72, line 12).

In April 2013, Respondent Robin Johnson wrote checks to pay invoices out of the Oncology Services checking account (R. p. 18). On May 9,2013, Robert Little and Oncology Services as Seller executed the Purchase and Sale Agreement with Pharmacy Services as Purchaser in which Seller agreed to sell and Purchaser agreed to purchase the assets of Oncology Services (R. p. 128).

Prior to the sale of the assets, Respondent Robin Johnson removed Appellant Robert Little as a signatory on the Pharmacy Services' checking account (R. p. 73, line 13). Appellant Robert Little then removed Respondent Robin Johnson as a signatory on Oncology Services' checking account (R. p. 103, line 19).

As a result of Appellant Robert Little removing Respondent Robin Johnson as a signatory on Oncology Services' checking account, the checks which Robin Johnson

had written to pay vendors out of the Oncology Services checking account were not paid by Oncology Services' bank (R. p. 18 and 19). The Complaint alleges that Respondent then paid these checks because the vendors refused further business with Respondent until the invoices were paid (R. p. 19).

Plaintiff-Respondent sued Defendant-Appellant in October 2013 seeking reimbursement for the invoices paid by Respondent (R. p. 17). Appellant did not receive copies of the invoices in question until January 2016, when Respondent finally answered Appellant's discovery requests (R. p. 45). Only then did Appellant learn that the vast majority of the invoices in question were issued to Respondent, not Appellant, and many of these invoices specifically state that the orders were placed by Respondent Robin Johnson (R. p. 136, R. p. 157, R. p. 161).

The trial court's Order found that Appellant breached the contract with Respondent, that the contract required Appellant to indemnify Respondent for claims, and the trial court entered judgment against Appellant in the amount of $50,000.00 (R. p. 3).

Because Appellant had pled that Robert Little individually should be dismissed as a defendant, the trial court held a hearing to consider Appellant's Motion for Reconsideration only as to the issue whether judgment should be entered against Robert Little as well as the LLC. The trial court declined to dismiss Robert Little as a party and affirmed the Order filed May 31, 2016 (R. p. 8).

Appellant timely filed and served its Notice of Appeal.

## ARGUMENTS

Standard of Review

An action to construe a contract is an action at law reviewable under an "any evidence" standard. In an action at law, tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. Miller Construction Company, LLC v. PC Construction of Greenwood, Inc. and Safeco Insurance Company of America, S.C. Court of Appeals Opinion No. 5440, filed September 14, 2016.

In an action for breach of contract, the burden is on the Plaintiff to prove the contract, its breach, and the damages caused by the breach. Allegro, Inc. v. Emmett J. Scully, et al., S.C. Supreme Court Opinion No. 27662, filed August 24, 2016.

I. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN FINDING THAT APPELLANT BREACHED THE CONTRACT WITH RESPONDENT?

The trial court's Order for judgment against Appellant in the amount of $50,000 should be reversed because Appellant did not breach the contract with Respondent.

First, the invoices in question were, quite simply, issued to Respondent and not Appellant. At trial, Respondent submitted to the court 27 invoices, totaling $25,733.35, which Respondent claimed that Appellant should be required to pay (R. p. 136, R. p. 157, R. p. 161).

Eighteen of these invoices, totaling $18,121.83, were issued to Respondent Pharmacy Services by Cardinal Health, and the Cardinal Health invoices specifically state that the goods were ordered by Respondent Robin Johnson (R. p. 136).

Six out of the 27 invoices, totaling $7,041.52, were issued to Respondent Pharmacy Services by creditors other than Cardinal Health (R. p. 157, R. p. 161). Only 3 out of the 27 invoices, totaling $570.00, were issued to Appellant Oncology Services, and none of the 27 invoices were issued to Appellant Robert Little (R. p. 132, R. p. 135, R. p. 163).

Respondent Robin Johnson's own testimony flatly contradicts her claim that Appellant should be held liable to Respondent for the invoices which Respondent paid after the closing.

Respondent Johnson testified that her company Pharmacy Services was formed and operated to sell only pharmaceutical products. Respondent Johnson also testified that Oncology Services was formed and operated to sell only medical supply products. This clear distinction between the two companies allowed Appellant and Respondent to keep their records and bookkeeping straight - "Pharmacy" meant pharmaceuticals and "Oncology" meant medical supplies. Tellingly, Respondent Johnson testified that she ran Oncology Services as if it were her own company (R. p. 63, line 4).

Despite this clear distinction, Respondent now claims that invoices issued to Pharmacy Services were, in fact, for medical supplies and should be paid by Oncology Services. This claim is not credible, especially in light of the fact that Respondent Robin Johnson placed the orders herself.

There is no evidence in the Record on Appeal to support the trial court's Order that Oncology Services should be required to pay invoices issued to Pharmacy Services.

Second, there is no provision in the contract between the parties which requires Appellant to pay the invoices in question. The Purchase and Sale Agreement executed between the parties contains no provision addressing the seller's accounts payable or liability therefor. The Purchase Agreement does contain provisions that the property being sold is free and clear of any liens or encumbrances, that seller will defend the title to the property, and mutual indemnification provisions. The Purchase Agreement contains no provision which might possibly be construed to require that seller shall be liable for invoices issued in the name of the purchaser.

In Nichols Holding, LLC and J. Wade Nichols v. Divine Capital Group, LLC, John S. Divine, IV, Nathan Anderson, and Divine Dining Group, Inc., (S.C. Court of Appeals Opinion No. 5397, filed March 30, 2016 ), a breach of contract action, the Court of Appeals reversed the trial court because the trial court imposed a duty on Divine which the contract between the parties did not require.

Nichols and Divine previously settled other litigation between the parties by executing, among other documents, an Agreement of Purchase and Sale in which Nichols purchased real estate and other assets from Divine. The Agreement of

Purchase and Sale required Nichols to pay Divine's "trade debt" that remained outstanding as of the date of the closing of the sale and the Agreement specifically defined "trade debt".

After the closing, Nichols was informed that to change ownership of utility accounts, Nichols would have to pay impact fees to Georgetown County Water and Sewer District in the approximate amount of $53,000.00. Litigation followed concerning liability between the parties for the impact fees and the trade debt.

The Circuit Court issued an order requiring Divine to pay impact fees to the Water and Sewer District in the amount of $53,760.00 on Nichols' behalf and the Circuit Court required Nichols to pay outstanding trade debt in the amount of $53,786.65. Each side appealed.

Divine argued that the Circuit Court erred as a matter of law in requiring Divine to pay the impact fees because the Purchase and Sale Agreement did not impose on Divine a duty to advise Nichols that Divine had not purchased additional water and sewer capacity.

The Court of Appeals agreed with Divine and reversed the Circuit Court. In other words, the Court of Appeals held that Divine could not be held responsible for payment of the impact fees when the Agreement of Purchase and Sale did not require Divine to do so.

The Court of Appeals adjusted the amount of trade debt which Nichols was required to pay, but there was no dispute that the Agreement of Purchase and Sale specifically required Nichols to pay Divine's "trade debt".

In summary, the Court of Appeals in Nichols v. Divine held that Divine could not be held liable for an obligation not imposed upon Divine by the contract between the parties, but Nichols was held liable for an obligation which was imposed by the contract.

In this case, the trial court held Appellant Oncology Services liable for invoices issued to Respondent Pharmacy Services despite the fact that the Purchase and Sale Agreement did not impose on Oncology Services an obligation for such liability. Stated differently, the trial court ordered "A" to pay invoices issued to "B", with no legal basis for doing so.

The Purchase and Sale Agreement does contain a warranty that the property being sold is free and clear of any liens or encumbrances. "Liens" and "encumbrances" are security interests and are not applicable to the sale of the business assets here.

Like Nichols v. Divine, the trial court in this case held Appellant Oncology Services liable for obligations not imposed by the contract between the parties. Like Nichols, the trial court should be reversed on this issue.

II. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN REQUIRING APPELLANT TO INDEMNIFY RESPONDENT AGAINST CLAIMS ARISING FROM THE SALE OF BUSINESS ASSETS FROM APPELLANT TO RESPONDENT?

The trial court's Order found that the indemnification clause in the Purchase and Sale Agreement rendered Appellant liable to Respondent in the amount of $50,000.00.

The Purchase Agreement provides that seller will defend, indemnify and hold purchaser harmless from any and all actions, causes of actions, claims or demands which arise or are asserted from arising from seller's conduct prior to closing (R. p. 128).

Appellant's failure or even refusal to pay invoices issued to Respondent cannot render Appellant liable to Respondent under the indemnity provision because the vast majority of the invoices in question were issued to Respondent.

Other than the indemnity clause, there is no provision in the Purchase Agreement which might hold Appellant liable for the invoices.

When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 449 S.E. 2d 487 (S.C. 1994).

Appellant committed no wrongful act to trigger the indemnity clause and there is no other provision in the contract which would impose liability on Appellant for the invoices issued to Respondent.

If the parties intended that Oncology Services would be responsible for and pay the invoices in question, then the Purchase Agreement should have included a provision to that effect. The court cannot correct Respondent's failure to protect itself in the contract.

The trial court's ruling on this issue should be reversed.

III. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN ORDERING JUDGMENT AGAINST APPELLANTS IN THE AMOUNT OF $50,000?

Plaintiff-Respondent's Complaint rests upon the claim that Appellant should reimburse Respondent for sums which Respondent paid to Appellant's creditors because these creditors would not continue to do business with Respondent unless the debts were paid (even though the invoices were, in fact, issued to Respondent).

From the bench, the trial judge ordered judgment against Appellant in the amount of $20,000.00 for the invoices which Respondent paid. The trial judge also ordered judgment against Appellant in the amount of $30,000.00 based upon the indemnity provision in the Agreement (R. p. 114, line 10).

The order filed May 31, 2016 found that Respondent's damages included more than $24,000.00 for the disputed invoices. The Order mentions the indemnity provision, but, without further explanation, the Order entered judgment against Appellant for $50,000.00.

As set forth above, Appellant should not be held liable for invoices issued to Respondent. By assessing additional damages against Appellant in the amount of

$30,000.00, the trial judge effectively rescinded the Agreement between the parties. The result of these rulings is that Appellant must pay invoices issued to Respondent, and Respondent received the assets of Appellant without having to pay for the assets.

These rulings are clearly errors of law and should be reversed.

IV. DID THE TRIAL COURT ERR AS A MATTER OF LAW BY ENTERING JUDGMENT AGAINST APPELLANT UPON A THEORY OF SUCCESSOR LIABILITY?

The Purchase and Sale Agreement (R. p. 128) recites that Robert Little and CQI Oncology/Infusion Services, LLC as Seller would sell to CQI Pharmacy Services, LLC as Purchaser "certain assets" of Oncology Services.

The Purchase Agreement states that:

> "WHEREAS Seller is selling to CQI Pharmacy Services, LLC... certain Assets of CQI Oncology/Infusion Services, LLC", and
>
> "WHEREAS Seller desired to sell and Purchaser desires to purchase all contracts, titles, client lists, contacts, vendor lists of CQI Oncology/Infusion Services, LLC", and
>
> "1. Purchase and Sale: ... Seller agrees to sell the Assets of CQI Oncology/Infusion Services, LLC...". (R. p. 128)

Assuming that Appellant was liable for the invoices in question, Respondent, as the purchaser of Appellant's assets, was not liable for paying the invoices. In the absence of a statue, a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability unless: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction

indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully denying creditor claims. Walton v. Mazda of Rock Hill, Mazda USA, Lee Faile, Ken McManus, Eric Sigmon, and C.A.R.S. 376 S.C. 301, 657 S.E.2d 67 (S.C.App. 2007).

The Purchase Agreement contains no provision that Respondent assumed Appellant's debts; there was no consolidation of the two companies; Respondent's company was not a mere continuation of Appellant's company; and there is no evidence that the transaction was fraudulent as to creditors.

If Respondent could not be held liable for Appellant's debts, then it was error for the trial court to hold Appellant liable to Respondent for those debts. The trial court's decision should be reversed.

## V. DID THE TRIAL COURT ERR AS A MATTER OF LAW BY ENTERING JUDGMENT AGAINST APPELLANT ROBERT LITTLE INDIVIDUALLY?

As set forth above, the Purchase Agreement states that Respondent was purchasing assets from Appellant Oncology Services. Also, none of the disputed invoices were issued to Robert Little, individually. If there is any legal basis to hold Appellant Oncology Services liable for invoices issued to Respondent Pharmacy Services, then such liability should fall upon Appellant Oncology Services, the LLC, and not Robert Little, individually.

S.C. Code Section 33-44-303 provides that the debts, obligations, and liabilities

of an LLC, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.

It is uncontroverted that the assets were sold to Respondent by Oncology Services, LLC and not Robert Little. The trial court's entry of judgment against Robert Little should be reversed.

## CONCLUSION

This Court should reverse the trial court's entry of judgment against Robert Little and CQI Oncology/Infusion Services, LLC. In the alternative, this Court should reverse the trial court's entry of judgment against Robert Little.

Respectfully submitted,

March 28, 2017

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CERTIFICATE OF COUNSEL

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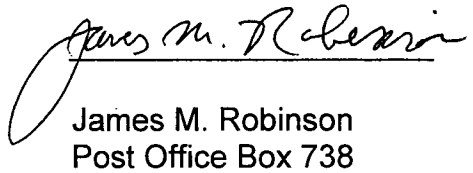
The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

April 4, 2017



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