

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

FINAL APPELLANT 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 owed to the Georgetown County Water and Sewer District?

STATEMENT OF THE CASE

This case involves a series of lawsuits concerning sophisticated and complex business deals between the parties. Pursuant to the litigation, a Consent Order was issued between the parties on January 23, 2012 wherein Divine agreed to an entry of judgment in favor of Nichols against Divine individually in the amount of Eight Million Six Hundred Forty-two Thousand Three Hundred Seventy-nine and 70/100 (\$8,642,379.70) Dollars. Nichols then brought this suit and obtained a Court Order for a Receiver to oversee the Bovine's and Divine's restaurants which were owned by Divine in order to collect the judgment (R. 17). After months of negotiations, the parties agreed to a complex settlement and further agreed as part of that settlement to execute an Agreement to Purchase and Sell certain real property and restaurants located in Murrells Inlet, South Carolina in exchange for the satisfaction of the judgment and a Five Million Dollar (\$5,000,000.00) payment by Nichols.

After disagreement as to certain terms of the settlement agreement arose, Divine filed a Motion to Compel Settlement and the circuit court was asked to interpret the written settlement agreement between the parties and to consider two central issues: (1) Whether Nichols was required to pay past trade debt (owed by Divine) upon assuming control of the restaurants; and (2) Whether Divine was required to disclose and pay excess water demand

charges on the Bovine's and Divine's restaurants with Georgetown County Water and Sewer District.

The circuit court, after an extensive review of all the settlement documents and testimony, issued an Order finding that Nichols was required to pay trade debt upon assuming control of the restaurants (Bovines and Divine's) and that Divine was required to disclose he had excess water demand charges at the time of the closing and accordingly was liable for those charges.

The Court denied both parties' motions to amend or alter the judgment and each party perfected an appeal to this Court.

STANDARD OF REVIEW

It is well settled in South Carolina that when the circuit court is sitting in a case without a jury the findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The judge's findings are equivalent to a jury's findings in a law action. See *Townes Associates, Ltd. v. The City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976). The *Townes* case is the seminal case in this state for appellate court review when a trial judge hears a case without a jury and makes a ruling. Further, settlement agreements are to be reviewed under the "any evidence standard of review." See *Sherlock Holmes Pu., Inc. v. City of Columbia*, 389 S.C. 77, 697 S.E.2d 619 (S.C. App. 2010).

ARGUMENT

I. The trial court did not err in finding that Divine was required to disclose that he had excess water demand charges on the Bovines and Divines restaurants which were past due to Georgetown County Water and Sewer District when this settlement was agreed to by the parties.

The parties entered into an extensive and comprehensive settlement agreement to settle the Judgment Nichols obtained against Divine. This settlement required Divine and his related companies to deed over to Nichols two waterfront restaurants in Murrells Inlet known as Divine's Fish House and Bovine's respectively. The settlement further provided Nichols would satisfy the Judgment he had against Divine and would pay Divine an additional Five Million Dollars (\$5,000,000.00) for the two restaurants and some additional properties which represented the mortgages on the properties.(R. p. 100). In that settlement agreement Section 15(f) is pertinent to this case. It provides:

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....
(R. p. 122).

Further, Section 15 (h) provides:

Sellers have received no notice of administrative agency action, litigation, condemnation proceedings or proceeding of any kind pending against sellers which relates to or affects the property...
(R. p. 122).

Respondent submitted in evidence a letter from the Georgetown County Water and Sewer District dated June 22, 2012 years before the sale in which Divine and the Divine Fish House had been advised by John F. Buck, CPA for Georgetown County Water and Sewer District, that additional capacity should be purchased by paying the associated impact fees. In that letter, John F. Buck noted:

You may elect to pay for the needed additional impact fees over a period of one year with 12 monthly payments at an interest rate of six percent (subject to change). Signing a financing arrangement will immediately remove the demand charges for the related capacity (impact fee) purchased. (Ex. 5). (R. pp. 481-482).

Further, Attorney Fred Newby, who was the closing counsel for Nichols on the restaurants, was called to testify. He stated the settlement agreement provided that Nichols would purchase from Divine both Bovine's and Divine's Fish House and related entities for Five Million Dollars (\$5,000,000.00) and the satisfaction of the Judgment against Divine. (R. p. 804).¹ Newby was assigned the task of closing this transaction on behalf of the Nichols. Newby noted he did not become aware of the demand charge issue from Georgetown County Water and Sewer until after the closing (R. p. 793, lines 20-23); that this was a service agreement and that when the Nichols went to change it over to their name they found that Divine had past due demand charges on the account (R. p. 794, lines 5-10); that Divine was required to notify Nichols pursuant to the agreement to purchase of the charges owed to Georgetown County Water and Sewer District; that 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 closing other than those set forth in Exhibit C (R. p. 796, lines 1-5); that Divine signed an Owner's Title Affirmation as it relates to liens that there were no water assessments (R. p. 796, lines 19-23); and that there were no assessments against Divine regarding street lighting, water and sewer construction and that all sanitary assessments and other governmental services had been paid in full (R. p. 797, lines 1-5).

¹ The \$5,000,000.00 would satisfy the mortgages on Bovine's and Divine's and some additional property Divine owned.

Nichols also offered into evidence the Affidavit of Ernest Edwards. He testified that he was the general manager of Bovines and Divine's Fish House once the Nichols took over and that once the restaurants were transferred to the Nichols companies he went to Georgetown County Water and Sewer District to change the name on the water and sewer account for the Nichols Holding Company. At that time, Edwards was informed by Georgetown County Water and Sewer District employees that in order to change the water and sewer account over to the name of Nichols Holding Company "we would have to pay an additional \$53,000.00." (R. p. 825). This \$53,000.00 was because John S. Divine did not purchase additional demand capacity for the restaurants and was paying penalties and additional demand charges monthly rather than pay for the additional capacity. (R. p. 825). Edwards further testified neither he nor Nichols were aware when we went to change the water and sewer account that monies were owed by Divine. He further stated that he had never been advised by Divine or any of his employees that this was an issue nor had he been advised by anyone that Divine chose to pay additional charges rather than purchase additional capacity. Edwards also testified by Affidavit that the water and sewer account has remained in the name of John S. Divine because Georgetown County Water and Sewer District wanted an additional \$53,000.00 to transfer the water and sewer accounts to the Nichols name. (Affidavit of Edwards, R. p. 826).

Also presented at the hearing as Exhibit 4 (R. pp. 66-68) was the Affidavit of Fred Newby. Attached to Exhibit 4 was an Owners Affidavit to Fidelity National Title Insurance Company. This Affidavit in Section 11 stated:

That the undersigned make(s) this statement for the express purpose of inducing Fidelity National Title Insurance Company to insure the title to said property to be free from adverse claims of liens not herein stated, and of enabling said owner(s) to receive the consideration for sale, lease or

mortgage or said property. Affiant(s) guarantee and warrant the statements of fact herein, which shall be construed as a continuing contractual obligation in favor of said Company.

The Affidavit was signed by John S. Divine as its sole member upon the sale of the restaurants to Nichols and was dated May 2, 2013. Nichols relied on the Affidavits and paid Divine Five Million Dollars (\$5,000,000.00 for the purchase of the restaurants. (See Exhibit 4, R. pp. 70-71).

Further, Exhibit 5 was presented to the Court which was a letter (written prior to the sale to Nichols) from Georgetown County Water and Sewer District to Divine Fish House explaining the demand charges to Divine Fish House and giving options to purchase additional capacity. The letter was signed by John F. Buck, CPA for Georgetown County Water and Sewer District. (See. Ex. 5) (R. p. 480).

The cross-examination of Rick Mendoza who testified produced additional evidence supporting the decision of the Court including the following: that he was closing counsel for Divine along with handling the litigation (R. p. 772, lines 18-25; p. 773, lines 1-25); that the settlement provided Nichols was to pay Five Million Dollars (\$5,000,000.00) for the restaurants (R. p. 772, lines 24-25; p. 773, lines 1-25); that he agreed that Divine and Nichols should not be linked by a water bill based on their long history of litigation (R. p. 774, lines 9-12); that Divine knew of the additional water demand charges before the closing (R. p. 775, lines 5-10); that Mr. Newby was not advised of the additional water demand charges prior to the closing and sale (R. p. 775, lines 11-14); that there was no lien on file at the Courthouse for Newby to find in the records (R. p. 775, lines 14-17); that the water demand charges were never disclosed to Newby (R. p. 776, lines 6-8); that the settlement he

proposed was to allow the water/sewer demand charges to remain in Divine's name forever (R. p. 785, lines 1-5).

Finally, Exhibit 10, the Agreement of Purchase and Sale which was signed by Jack Divine on behalf of the holding companies for the restaurants indicated in Section 15(h) :

Sellers [Divine] have 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, including any request for public dedication, nor do Sellers know of any basis for any such action other than collection actions relating to the Debts.... (Ex. 10, Section 15(h) (R. p. 842).

Based on this evidence, the Court's decision finding that Divine should have notified Nichols of the water demand charges prior to closing is supported by the evidence. An action to construe a settlement agreement is an action at law reviewable under the "any evidence standard." Here there was more than sufficient evidence to support the trial court. 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) (enforcement of the terms of a settlement agreement is a matter of contract law). Further, the *Pruitt* case has been reinforced by a line of South Carolina cases which allows the circuit court without a jury to construe a settlement agreement based on any evidence presented. *Byrd v. Livingston*, 398 S.C. 237, 727 S.E.2d 620 (S.C.App. 2012); *Sherlock Holmes Pu., Inc. v. City of Columbia*, 389 S.C. 77, 697 S.E.2d 619 (S.C. App. 2010) (settlement agreements are contracts and reviewable under the "any evidence standard").

In this case Respondent offered the testimony of Fred Newby, the lawyer who had closed the transaction, the Agreement of Purchase and Sale, the settlement agreement and release, the demand charges and payments made by Nichols, the Affidavit of Ernest

Edwards, and the cross-examination of Rick Mendoza, all of which support the circuit court's decision finding that Divine owed Nichols those demand charges which had been incurred by him prior to the purchase of the restaurant. For these reasons, Respondents assert that the trial court's decision on this point should be affirmed.

II. The trial court erred in finding that Nichols was required to pay trade debt upon assuming control of the Bovines and Divines restaurants pursuant to the Agreement of Purchase and Sale.

The trial court in its Order Compelling Settlement found that Nichols owed trade debt at the time of the purchase of the restaurants in the amount of \$53,786.65. The trial court noted:

... the Court finds that Nichols shall immediately comply with the terms of the Agreement of Sale and Purchase and pay the vendors as per the Agreement of Purchase and Sale in the Settlement Agreement in the amount of \$53,786.65. (R.p. 6).

Appellant Nichols argues that this was erroneous and that there was no evidence in the record to support this decision of the trial court.

In support of his argument, Nichols offered the testimony of Arlene Jaskot, the Receiver in this case, who had been appointed by the Court prior to the settlement being reached between the parties. Jaskot testified she had been a CPA for 31 years (R. p. 805, lines 11-13); that she was the receiver in this case (R. p. 805, lines 13-15); that she actually looked at the invoices and the accounts payable (R. p. 806, lines 18-23); that she looked at the actual accounts payable to make sure it was reasonable, R. p. 806, lines 18-20); that she looked at the actual invoices a second time (R. p. 806, lines 21-23); that the amount of trade debt owed is \$45,673 (R. pp. 810-811); that the amount in the Bovine's/Divine's bank accounts at the closing was \$2,795.41 (R. p. 811, lines 1-25); and that the total amount owed is \$42,877.59 for past trade debt (R. p. 811, lines 24-25) (which amount takes into

consideration the amount left in Bovine's/Divine's bank accounts on the day the property was purchased by Nichols).

The Affidavit of Ernest Edwards was also offered. (Ex. 1) (R. p. 824) In that Affidavit, Ernest Edwards testified that he had been involved in the operation and sale of restaurants in Horry County for many years; that he had reviewed the settlement agreement and release between the parties and had also reviewed the definition of trade debt; that he had looked at the historical debts for the operation of the restaurants and bars known as Bovine's and Divine's when he became general manager; that he found that prior to the Nichols taking over the restaurants and bars known as Bovine's and Divine's they normally paid their vendors within thirty days of being invoiced; that this was a common practice in the restaurant industry; that it was his opinion to a reasonable degree of certainty as a person who had extensive experience in the management of restaurants and bars that when a restaurant or bar sold, the new owner will normally pay the past thirty days trade debt from date of purchase of the restaurant (R. p. 825).

The Affidavit of Edwards complimented the testimony of Arlene Jaskot who testified that the most trade debt which could be owed based on an exhaustive review of the records was \$42,877.59. (R. p. 811). Jaskot was subject to cross examination and offered testimony in Court which was the most reliable and credible versus the Affidavit of Jack Divine who did not offer any testimony in Court but simply stood on his Affidavit. As a result, the trial court erred in finding that Nichols owed trade debt in excess of \$42,877.59 since there was no evidence to support this ruling.

The Respondent (Divine) (on this issue) offered the testimony of the Director of Corporate Operations to the Court (R. p. 747, lines 6-8); that she offered no testimony as to

the amount of the trade debt owed (R. p. 751, lines 12-22); that on cross examination she testified she didn't know the amount of the trade debt owed by Nichols (R. p. 751, lines 13-19); that she was not prepared to testify about the dollar amount owed (R. p. 751, lines 20-22); that she brought no records with her (R. p. 751, lines 23-24); and that she couldn't offer any numbers on anything (R. p. 752, lines 10-12);

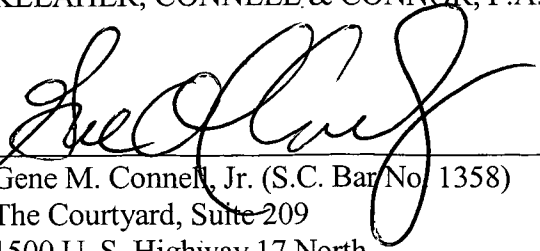
Further, there was no live testimony offered by Divine as to the amount owed by Nichols only his Affidavit. Accordingly, under the "any evidence standard" the circuit court erred in finding the amount owed was \$53,786.65 based on the testimony of Jaskot (R. p. 751, lines 24-25).

CONCLUSION

The trial court properly found that Divine owed back due water and sewer demand charges to Georgetown County Water and Sewer District. However, the trial court erred in finding Nichols owed trade debt of \$53,786.65 since the only reliable evidence submitted to the court was from the receiver who testified that the most which could be owed was \$42,877.59. Accordingly, Nichols requests that the Order concerning the amount of trade debt owed be reversed and remanded consistent with the evidence presented at the circuit court.

Respectfully submitted,

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September 26, 2014

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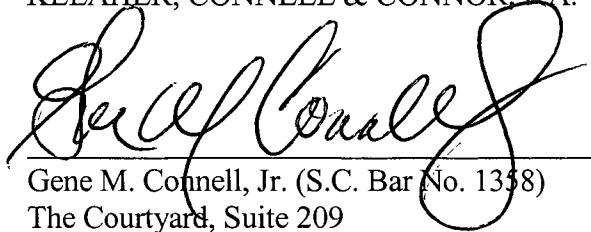
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Appellant Brief of Respondents-Appellants complies with Rule 211(b) SCACR.

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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 **Final Appellant 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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Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 26 day of September, 2014

Sharon M. Tyler
Notary Public for South Carolina
My Commission Expires: 2-25-19