

IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Steven H. Johr, Circuit Court Judge

Civil Action No.: 2011-CP-26-2722

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SC Court of Appeals

Nichols Holding, LLC and J. Wade NicholsRespondents-Appellants

vs.

Divine Capital Group, LLC, John S. Divine, IV,
Nathan Anderson and Divine Dining Group, Inc.Appellants-Respondents

BRIEF OF APPELLANTS-RESPONDENTS

September 26, 2014

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE CIRCUIT COURT ERR IN HOLDING DIVINE RESPONSIBLE FOR IMPACT FEES THAT NICHOLS MAY PAY TO GEORGETOWN COUNTY WATER AND SEWER DISTRICT IF AND WHEN NICHOLS OPENS A NEW ACCOUNT?**

- II. **DID THE CIRCUIT COURT ERR IN FAILING TO GIVE EFFECT TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE AGREEMENTS BETWEEN THE PARTIES WHEN IT ALLOWED NICHOLS TO RECEIVE AN OFFSET CREDIT FOR PARTIAL PAYMENT OF TRADE DEBT OWED BY NICHOLS UNDER THE AGREEMENTS WHICH WERE NOT INCLUDED IN DIVINE'S CLAIM FOR TRADE DEBT PAYMENTS SUBMITTED TO THE COURT, THEREBY IMPROPERLY REDUCING THE TRADE DEBT NICHOLS WAS REQUIRED TO PAY?**

- III. **DID THE COURT INCORRECTLY AWARD NICHOLS DAMAGES WHEN NICHOLS HAS INCURRED NO ACTUAL LOSS?**

STATEMENT OF THE CASE

The issues in this appeal arise out of Appellants-Respondents' motion to enforce a settlement agreement executed by the parties resolving litigation between the parties in three underlying actions, which had been initiated on September 28, 2010, November 5, 2010, and March 24, 2011.¹ Pursuant to a Consent Order, filed February 10, 2012, Appellants-Respondents Divine Capital Group, LLC, John S. Divine, IV, Nathan Anderson and Divine Dining Group, Inc. ("Divine") consented to the entry of judgment in favor of Respondents-Appellants Nichols Holding, LLC and Dr. J. Wade Nichols ("Nichols") in the amount of \$8,642,379.70 (the "Judgment"). (R. p. 83, p. ¶ 4). After lengthy negotiations, the parties then executed a Settlement Agreement and Release in Full and an Agreement of Purchase and Sale ("Agreements") in which Divine agreed to convey to Nichols parcels of creek front commercial real estate located in Murrells Inlet, South Carolina, upon which two operational restaurants are located, in return for Nichols' agreement to assume certain financial obligations (including payment of trade debt) of Divine, execute a satisfaction of judgment, and terminate the receivership. (R. p. 101, ¶ 1, pp. 103-104, ¶ 8; p. 111, ¶ 1).

¹ The Litigations are:

- (i) *Bank of North Carolina (BNC Bank) as Successor In Interest to Beach First National Bank vs. Abaco Holdings, LLC; John S. Divine, IV, Individually; Lindsay and Evans, LLC and John S. Divine, IV, Co- Trustees of The John S. Divine, III Qualified Personal Residence Trust; The Conway National Bank; J. Wade Nichols and J. Wade Nichols, DMD, P.A. Profit Sharing Plan; and Kings Realty Limited Partnership*, initiated in the State of South Carolina, County of Georgetown, in the Court of Common Pleas for the Fifteenth Judicial Circuit, Case No. 2010-CP-22-1541 (the "BNC Action");
- (ii) *J. Wade Nichols and J. Wade Nichols DMD, P.A. Profit Sharing Plan v. John S. Divine, IV*, initiated in the State of South Carolina, County of Horry, in the Court of Common Pleas for the Fifteenth Judicial Circuit, Case No. 2010-CP-26-10474 (the "Nichols Action"); and
- (iii) *Nichols Holding, LLC and J. Wade Nichols vs. Divine Capital Group, LLC; John S. Divine, IV; Nathan Anderson and Divine Dining Group, Inc.*, initiated in the State of South Carolina, County of Horry, in the Court of Common Pleas for the Fifteenth Judicial Circuit, Case No. 2011-CP-26-2722 (the "Nichols Holding Action," together with the Nichols Action and the BNC Action, the "Litigation").

The specific issues on appeal arise out of a dispute as to the payment of trade debt, which Nichols is required to pay Divine pursuant to the terms of the Purchase Agreement, and whether Divine is responsible for payment of any currently unassessed impact fees to Georgetown County Water and Sewer District (“GCWSD”) that may arise should Nichols create a new customer account in its name with GCWSD.² Divine filed the Motion to Enforce Settlement Agreement on June 5, 2013, seeking an order compelling Nichols to comply with its contractual obligation under the Agreements to pay the outstanding trade debt.

A hearing was held before the Honorable Steven H. John on December 4, 2013, at the Horry County Courthouse in Conway, South Carolina. Affidavits and testimony of witnesses were presented at the hearing. At the conclusion of the hearing, Judge John ruled from the bench and requested that Nichols’ counsel, Gene Connell, prepare a proposed order. (R. pp. 819, lines 13 – p. 822, line 9). Judge John filed a Form 4C Order on December 9, 2013, in which the Court issued two separate and distinct rulings. (R. pp. 24–25). First, the Court found Nichols liable for the trade debt in the amount of \$53,786.65, minus any trade debt that Nichols could prove he had already paid, which would be credited against the total trade debt amount (even though the paid amounts were included in Divine’s invoice submission). (R. pp. 851-852). Second, the Court held that Divine had a duty to disclose certain yet unassessed or incurred GCWSD demand charges and held Divine liable for whatever impact fees may be assessed against Nichols as a result of the acquisition of the property by Nichols should he elect to open a new customer account with GCWSD. (R. pp. 853-857). The Court determined that these

² The question of GCWSD demand charges was raised by Nichols after Divine questioned Nichols’ failure to pay the trade debt. (R. pp. 564-566, ¶¶ 33-34).

future, yet unincurred, impact fees would total \$53,760.00. *Id.* A formal Order Compelling Settlement (“Order”) was filed on January 6, 2014.

Divine filed a Motion to Alter or Amend on January 15, 2014. (R. pp. 731–735). On January 17, 2014, Nichols filed a Motion for Reconsideration. (R. pp. 736–737). The Court issued two Orders on February 25, 2014, denying both Motions. (R. p. 1; p. 2). Divine filed a Notice of Appeal on March 26, 2014. (R. pp. 39–51). The following day, on March 27, 2014, Nichols filed a Notice of Appeal. (R. pp. 26–38).

STATEMENT OF THE FACTS

Divine and Nichols were adversaries in three lawsuits commenced in 2010 and 2011 in the Court of Common Pleas for the Fifteenth Judicial Circuit. (R. p. 82, ¶ 3). Pursuant to a Consent Order, filed in Horry County on February 10, 2012, Divine consented to a Judgment in favor of Nichols against Divine in the amount of \$8,642,379.70. (R. p. 83, ¶ 4). At some time thereafter, Nichols concluded that the “Judgment was uncollectible.” (R. p. 101). After months of negotiations,³ the parties agreed to execute a Settlement Agreement and Release in Full (“Settlement Agreement”) and an Agreement of Purchase and Sale (“Purchase Agreement”), whereby, in summary, Divine would convey to Nichols parcels of commercial real estate located in Murrells Inlet, South Carolina, upon which two restaurants, known as Bovine’s and Divine Fish House, were located. (R. p. 83, ¶¶ 5, 6). In return for the property, Nichols agreed to assume and pay certain financial obligations of Divine, including all outstanding trade debt incurred by Divine in keeping the restaurants operational as ongoing business concerns pending takeover of the businesses by Nichols. (R. p. 814, lines 18–20; pp.

³ During these negotiations and the closing, Divine was represented by Mr. Rick Mendoza, Esquire, of Nexsen Pruet, LLC.

103–104, ¶ 8; p. 111, ¶ 1) Nichols further agreed to execute a satisfaction of judgment and terminate the receivership. (R. p. 101, ¶ 1).

The Receiver appointed by the Court on May 25, 2012, was Arlene Jaskot, a certified public accountant. (R. p. 78, ¶ 1). Ms. Jaskot’s duties included analyzing the accounting records of the restaurants to verify that all bills were paid correctly. (R. p. 806, lines 3–7). In performance of her duties, Ms. Jaskot had access to approximately one year’s worth of monthly water billing from the restaurant businesses reflecting the GCWSD demand charges. (R. p. 97, ¶ 97). That same May, Nichols hired Ernest Edwards, a consultant experienced in the operation and sale of restaurants in Horry County, to operate and manage the restaurants as well as review the historical and current operating expenses of the restaurants and advise Nichols accordingly. (R. p. 824, ¶¶ 1–3, 5, p. 825, ¶ 6).

The Settlement Agreement acknowledges the contemporaneous execution of the Purchase Agreement and addresses the terms of the Purchase Agreement. (R. p. 103, ¶ 8). In the Agreements, Divine⁴ agreed to sell “certain improved and unimproved real estate, and certain personal, intangible and intellectual property” (collectively, the “Property”) to Nichols; in exchange, Nichols agreed to assume or pay off certain existing bank loans in the approximate amount of \$5,000,000.00 and pay “certain property taxes and **trade debt** of the sellers, which amounts aggregate to a sum that either equals or exceeds the current market value of the Property.” (R. p. 103, ¶ 8) (emphasis added). Nichols’ obligations to satisfy the Judgment and perform under the Settlement Agreement were contingent upon Divine performing his obligation under the Purchase

⁴ The Sellers in the Purchase Agreement are: Tortola Holdings, LLC, John S. Divine, IV, Blue Water Foodservice, Inc., d/b/a Bovine’s Wood Fire Specialties a/k/a Bovine’s, Divine Fish House, Inc. and Abaco Holdings.

Agreement to transfer the Property in accordance with the terms and conditions of the Purchase Agreement and passage of 100 days after transfer of title to the property without Divine filing or having filed against it any insolvency proceeding, i.e., Divine relinquishing any right to file bankruptcy proceedings. *Id.*

The Purchase Agreement (incorporated by reference into the Settlement Agreement) required Divine to “sell and convey all of their right, title and interest in and to the Property to Nichols....” (R. p. 108). The Property includes, *inter alia*, certain real property and improvements on the real property, including the restaurants, Bovine’s Wood Fired Specialties, a/k/a Bovine’s, and The Divine Fish House (together, the “Restaurants”). (R. pp. 108–109). In exchange, Nichols was required to pay or acquire certain bank loans, satisfy the Judgment, terminate the receivership appointed by the Court,⁵ and, significantly as to this appeal, pay the “outstanding Trade Debt” (the “Trade Debt”) owed by the Restaurants at the time of the transfer of the Restaurants to Nichols. (R. pp. 101–104, ¶¶ 1–8; pp. 110–111, ¶ 1.). Trade Debt is defined in the Purchase Agreement as including: “all amounts *outstanding* for and from the operation of the Restaurants and Bars which are *normal operating expenses* of the Restaurants and Bars, and which are *reasonably consistent with past operating expenses* of the Restaurants and Bars.” (R. p. 111, ¶ 1) (emphasis added).

On May 2-3, 2013, Divine fully performed as required under the Settlement Agreement and transferred the Restaurants and other assets to Nichols at a closing that took place in the office of Nichols’ attorney, Fred B. Newby, Esquire, in Myrtle Beach, South Carolina. (R. p. 84, ¶¶ 11, 12). Significantly, the record is undisputed as to this one fact: at the time of the closing, no charges or sums were due by Divine to GCWSD,

⁵ See (R. pp. 10–16).

i.e., the account balance from Divine to GCWSD was current, at “\$0.00”. (R. pp. 485–498). Although Divine fully performed⁶ his obligations under the Agreements, Nichols refused and failed to pay the Trade Debt under those same Agreements. (R. p. 84, ¶¶ 13, 14).

Almost immediately after closing, it became apparent that Nichols would not pay the trade debt; thus, on May 24, 2013, Mr. Rick Mendoza, counsel for Divine, emailed counsel for Nichols, Mr. Gene Connell, emphasizing that the vendors needed to be paid pursuant to the Purchase Agreement. (R. pp. 564–565, ¶¶ 33-34, pp. 608–611). Mr. Connell responded, indicating that the trade debt figure was too high. (R. p. 565, ¶ 34; p. 613). This letter did not mention GCWSD. In fact, Nichols did not bring up the issue involving the GCWSD demand charges and potential impact fees until nearly one month after the closing. (R. p. 566, ¶ 36; pp. 615–618) (“[Mr. Connell’s] client was paid a visit by GCWSD . . . they are looking to [Nichols] to pay these fees and bills . . . we were unaware of these issues at closing and cannot now pay the trade debt in light of this development.”).

Accordingly, on June 5, 2013, Divine moved to enforce the Settlement Agreement and Purchase Agreement, seeking an order compelling Nichols to comply with its obligations under the Agreements to promptly pay all Trade Debt. Divine, in an effort to get the matter resolved, adjusted the demand downward to an aggregate total of \$62,809.08. (R. pp. 63–65).

⁶ Nichols subsequently raised an additional issue with respect to Divine’s performance. Specifically, Nichols alleged that Divine failed to provide all the monies in the Restaurants’ accounts to Nichols. Determination of this amount was delayed because Divine, although not contractually bound to do so, agreed to allow Nichols to use Divine’s credit processing equipment the weekend following closing because Nichols had neglected to procure a method to receive payments from customers using credit cards. The parties agreed that counsel for Divine would hold the sum in trust pending the resolution of Divine’s Motion to Enforce Settlement. This sum has since been released and is not an issue in this case.

At the December 4, 2013, hearing before Judge John, Divine moved to compel payment of the amount Nichols owed for Trade Debt.⁷ (R. p. 851; p. 742, lines 12–17). At the hearing, Nichols contended that he was only required to pay Trade Debt that had accrued 30 days prior to closing.⁸ The contract had no such limitation, as it defines trade debt to include “all amounts outstanding for and from the operation of the Restaurants ... which are normal operating expenses ... and which are reasonably consistent with past operating expenses of the Restaurants....” (R. p. 86, ¶ 26; p. 111, ¶ 1). Nichols also argued that the Court should consider potential impact fees that may be calculated and assessed against Nichols if Nichols elected to open a new water and sewer account with GCWSD.⁹ (R. p. 743, lines 7–10).

Judge John issued an oral ruling the day of the trial, and subsequently signed a formal Order Compelling Settlement (“Order”) on January 6, 2014. (R. pp. 850-857). As to the issue of Trade Debt, the Court found that the Trade Debt was the responsibility of Nichols, and that despite Nichols’ argument to the contrary, the Agreements do not impose a 30 day limitation on the Trade Debt amount. Therefore, the Court found that Nichols owed \$62,809.08 for the Trade Debt. (R. p. 819, lines 23–25, p. 820, lines 1–11, p. 852). The Court issued one caveat, disputed by Divine in this appeal, however, that Nichols could receive credit, after proof of payment, for amounts Nichols had paid for utilities, although these amounts were not included in the list of unpaid invoices

⁷ In the Order, the Court stated that one of the two issues to be resolved at the hearing was “[w]hether Nichols was required to pay debt upon assuming control of the restaurants” (R. p. 851). Divine, however, contends that this is not a correct statement of the issue before the Court; rather, it had requested the Court to compel Nichols to pay the Trade Debt pursuant to the terms of the Settlement Agreement requiring Nichols to pay Trade Debt upon assuming control of the Restaurants. (R. p. 103, ¶ 8).

⁸ See R. pp. 78–81.

⁹ No new account had been opened at the time of the hearing. (R. p. 771, lines 21–24).

introduced at the hearing constituting the trade debt at issue submitted and claimed by Divine. (R. pp. 852-853; p. 85, ¶ 18; p. 90, ¶ 54; pp. 333-473; p. 821, lines 1-17). Relying on the testimony of the receiver, Arlene Jaskot, the Court held that the amount of Trade Debt owed should be reduced by \$9,022.43, based on the following list:

1. Roper	\$1,751.27
2. Santee Cooper	\$3,126.58 (Divine's)
3. Santee Cooper	\$3,129.66 (Bovines)
4. Horry Telephone	<u>\$1,014.92</u>
Total	\$9,022.43

(R. pp. 852-853; p. 820, lines 1-15; p. 821, lines 1-17).

The Court also held that Divine had a duty at closing to make Nichols specifically aware that Divine, like many commercial business in his situation, had elected to pay GCWSD demand charges monthly, and thus, had not elected to purchase additional water and sewer capacities for the properties during its commercial operations on the property. (R. pp. 854-855; p. 821, lines 14-17). The Court ruled that Divine's failure to bring this to Nichols' attention in the closing documents was a violation of the Agreement of Purchase and Sale, despite Newby's testimony that he did not think that the issue with GCWSD affected the title nor did he report it to his title company. (R. pp. 855; p. 802, lines 6-10; p. 820, lines 16-25; p. 821, lines 11-17). The Court held that Divine was liable for impact fees, not yet incurred, or even incurred as the date of this brief, in the amount of \$53,760.00. (R. pp. 855-856; p. 821, lines 14-17).

Thus, the Court issued two separate and distinct rulings: (1) Nichols is required to pay \$53,786.65 (after deduction of the \$9,022.43 in effect, deducted by the Court for utilities that constituted Trade Debt required to be paid by Nichols), and (2) Divine is required to pay GCWSA \$53,760.00, cancelling out the amounts of each other's claims.

(R. p. 820, lines 11–15; p. 821, lines 14–17; p. 8). Divine filed a Notice of Appeal on March 26, 2014. (R. pp. 39–51). The following day, on March 27, 2014, Nichols filed a Notice of Appeal. (R. pp. 26–38).

ARGUMENT

LEGAL STANDARD

A settlement agreement is a contract; accordingly, when interpreting a settlement agreement, a court must apply the principles of contract law. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799 (Ct. App. 2009). “An action to construe a contract is an action at law.” *Silver v. Aabstract Pools & Spas, Inc.*, 658 S.E.2d 539, 541, 376 S.C. 585, 591 (Ct. App. 2008) (citing *Pruitt v. S.C. Med. Malpractice Liability Joint Underwriting Ass’n.*, 343 S.C. 355, 339, 540 S.E.2d 843, 845 (2001)). South Carolina case law is well settled that in construing a contract, the court must determine the intent of the parties and give effect to that intent. *CoastalStates Bank v. Hanover Homes of South Carolina, LLC*, --- S.E.2d ---, 2014 WL 2600552 at *4 (Ct. App. March 26, 2014). “In an action at law, on an appeal of a case tried without a jury, the appellate court’s standard of review extends only to the correction of errors of law.” *Electro Lab of Aiken v. Sharp Const.*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) (citing *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.*, 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003)). Accordingly, “the trial judge’s findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge’s findings.” *Id.*

In the present case, the lower Court’s ruling requiring Divine to pay GCWSD for impact fees of Nichols is neither correct as a matter of law nor supported by the record

evidence; likewise, the lower Court lacked reasonable or sufficient evidence upon which to reasonably support its ruling that Nichols may receive credit for the amount of trade debt he had allegedly already paid.

I. THE CIRCUIT COURT ERRED IN HOLDING DIVINE RESPONSIBLE FOR IMPACT FEES THAT NICHOLS MAY PAY TO GEORGETOWN COUNTY WATER AND SEWER DISTRICT IF AND WHEN NICHOLS OPENS A NEW ACCOUNT.

A. Summary of Arguments

The Circuit Court erred in requiring Divine to pay GCWSD \$53,769.00 for impact fees that may arise if and when Nichols opens a new customer account with GCWSD because:

- a. The amount of GCWSD demand charges paid by Divine monthly before closing and the amount paid by Nichols after closing are the same; these payments had been included in records provided to the Receiver and listed as trade debt at the closing, i.e., it was a known and acknowledged monthly expense of operating the restaurants. (R. p. 768, lines 14-21). The buyer, Nichols, is attempting to turn his failure to investigate or understand the GCWSD rules of water and sewer charges into a misrepresentation of the seller. In fact, Divine, as an existing customer of GCWSD, was not even subject to the same rules that Nichols will be if he chooses to open a new account. (See R. pp. 640-643, 647-648, 668-670).
- b. The Agreements do not mention an attempt to provide or otherwise handle the demand charge issue. Accordingly, the Court's ruling that Divine pay GCWSD rewrites the contractual agreement between the parties and is in contravention of the evidence before the Court.
- c. The Circuit Court erred in ruling that Divine is responsible for the impact fees

attributed to Nichols' ownership and use of the property after closing, such ruling being beyond the scope and language of the applicable agreements. Specifically, neither the impact fees nor monthly demand charges fall within Section 15(f) or (h) of the Agreement of Purchase and Sale, or the title insurance affidavit requested at closing. (R. pp. 121-122, ¶15, §§ (f) & (h)). Specifically:

- i. As a matter of law, a monthly demand charge does not constitute a "lien" upon the property (R. p. 477, ¶ 2, "I found no records of GCWSD ever placing a lien on the referenced restaurant, property, or account."). Furthermore, at the time of closing, the amount of charges and sums due by Divine to GCWSD was "\$0.00". (R. p. 93, ¶¶ 72-74; pp. 485-555). Instead, as for all new commercial water and sewer customers in Georgetown County, a new GCWSD demand charge is calculated at the time a new account is opened and this fee is assessed based upon a number of factors, including whether water and sewer usage tends to increase or decrease. (R. pp. 640-643, 647-648).
- ii. As a matter of law, a monthly demand charge does not constitute an "assessment" upon the property (R. pp. 477, ¶ 3, ("I found no records of GCWSD ever making an assessment on the referenced restaurant, property, or account.")). The monthly demand charges do not violate or fall within the definition of an "assessment against the owner" in the Owner's Affidavit of Title Insurance because no such charges constitute an assessment against the real estate at the time of closing and, as Mr. Newby testified, he reported no violation reported to his title insurance company

because he did not think the monthly demand charges triggered a duty to report. (R. p. 802, lines 6-11).

- iii. A monthly demand charge is not a “penalty,” and the Court’s reference to it as such was in error. (R. p. 478, ¶ 10, “Nowhere in the Rates and Charges Resolution is the demand charge called a penalty...”).

B. The Lower Court’s Ruling is erroneous because Divine owes no “Fee” to GCWSD.

Divine, and his restaurants, owed no “fee” to GCWSD at the time of the closing. (R. p. 93, ¶ 75). Any sums that Nichols may be required to pay GCWSD for additional water capacity is triggered due to the change in ownership at such time as Nichols may elect to open a new account with GCWSD; if this occurs, water usage amounts incurred by Nichols since he began operating the restaurants will be a factor in calculating what Nichols will owe at that time. (R. pp. 640-643, 647-648).

After the closing, Ernest Edwards, hired by Nichols to operate and manage the restaurants, requested that GCWSD change the name on the water and sewer account from Divine’s companies to the Nichols Holdings’ companies. (R. pp. 825-826, ¶ 8). According to Mr. Edwards, at that time, he was informed by GCWSD that in order to change the name on the water and sewer account to Nichols, Nichols would have to pay an additional \$53,000 in water impact fees for additional water capacity usage. *Id.* This payment was required by the Resolution Prescribing Rates and Regulations for the Water and Sewer System of Georgetown County Water and Sewer District, in Georgetown County, South Carolina, dated June 7, 2012 and effective, 1, 2012. (*See* R. pp. 641-643, 647-648, 668-670).

A “water impact fee . . . applies to anyone requesting new water service or

reserving capacity within the service area of the District as well as to existing customers who require additional capacity from the system.”¹⁰ (R. p. 647). Thus, Divine, as an existing customer at the time of passage of the 2012 GCWSD Resolution, had no obligation to purchase additional capacity; however, as a new customer, Nichols may be required to purchase additional capacity by paying certain impact fees at the time of application for service if he elects to open a new account with GCWSD. (R. pp. 640–643, pp. 647–648, pp. 668–670).

The Court held, erroneously, that Divine is liable to GCWSD for the additional impact fees because Divine had been operating the restaurants for years without purchasing additional water and sewer capacity, and that Divine had a duty to disclose this fact to Nichols on a real estate form signed at the closing. (R. p. 855). Divine, however, was never required to purchase additional capacity, because he elected the second of the two following options: (1) pay for additional capacity, or (2) pay extra demand charges each month and try to reduce usage on their own.¹¹ Pursuant to these options, Divine chose to pay a monthly demand charge to GCWSD in lieu of buying additional capacity. (R. pp. 482). The GCWSD demand charge was a cost of operating the Restaurants. (R. p. 93, ¶ 71).

Accordingly, for years prior to the closing of the transaction, the Restaurants paid

¹⁰ The impact fee applies as follows: “When reservation of capacity was not previously made and the applicant is requesting water service or a building permit, an impact fee equal to the pro rata residential equivalent capital costs associated with all treatment, transmission, and storage is paid. For all developed properties or building for which an impact fee has not been paid, payment shall be required at the time of application for service.” (R. pp. 647-648).

¹¹ In a letter from GCWSD to Divine Fish House, dated June 22, 2012, the Finance/Administration Director, John F. Buck, stated, “[y]ou have the **option** of purchasing the additional capacity by paying the associated impact fees or eliminating or reducing the monthly Demand Charge(s).” (R. p. 482) (emphasis added).

a demand charge to GCWSD as allowed by the GCWSD Resolution which describes a demand charge as follows:

A water demand charge . . . applies to **existing commercial** accounts whose monthly usage exceeds their water capacity, purchased as impact fees, and decline the opportunity to purchase additional impact fees to compensate for the excess usage.¹²

(R. p. 668) (emphasis added). By the terms of the relevant GCWSD schedule, an existing commercial user has the option of paying a monthly demand charge or purchasing additional capacity.¹³ *Id.* Specifically, the GCWSD Resolution states that “[c]ommercial accounts will have the **option** of purchasing additional Residential Equivalent Units at the prevailing impact fee rate or be charged the monthly demand charge hereafter defined.” (R. p. 669) (emphasis added). Accordingly, existing commercial customers, such as the Restaurants, generally, are not required to purchase additional capacity¹⁴ and

¹² The GCWSD procedure for charging a monthly demand charge is as follows:

When a commercial applicant requests water service, an impact fee equal to the pro rata residential equivalent capital costs associated with all treatment, transmission, and storage facilities is paid. Thereafter, when the monthly water usage is in excess of the purchased capacity for any quarter ... by more than 1 residential equivalency unit, the District will provide the customer with notification that such excess usage has occurred, and will provide an opportunity to reduce the usage to conform to the previously purchased capacity. Where such usage cannot be achieved, the customer will:

1. Incur a monthly demand charge beginning in August of each year; or
2. Be required to purchase the needed capacity by paying the additional impact fees.

¹³ At the hearing, Mr. Mendoza explained that “...the district gives you really two options if you exceed a certain level of usage. And if you don’t accept either option they cut off service. So, it’s not as if you contract and negotiate; you either – if you have a certain level of service and you exceed it, you either pay a demand charge or you purchase additional units and if you don’t want to do either one, they cut off service. So it’s not like a negotiated contract. It’s a take-it-or-leave-it type situation with the District. So, in regard, you know, this provision to me – for contract and agreements negotiated by parties, not by a utility provider who is, again, essentially the sole source with whom you have no negotiating leverage.” (R. p. 783, lines 10-22).

¹⁴ In accordance with this GCWSD procedure, GCWSD sent a letter, annually, to existing commercial customers, including the Divine Fish House that exceeded the “water and sewer district capacity assigned to them.” (R. pp. 480–484). In the letter, GCWSD explains that each year GCWSD assigns a monthly “Demand Charge” to “those commercial customers that consistently exceed the water and sewer district capacity assigned to them.” (R. pp. 480–482). Per GCWSD, the purpose of the monthly demand charge is to encourage water/sewer conservation and “more equitably distribute costs associated with providing

may instead choose to pay the GCWSD demand charge and attempt to reduce their consumption. *Id.*

Divine made a business decision to pay the GCWSD demand charge, which is akin to a surcharge. (R. p. 93, ¶ 70). As the GCWSD Resolution Schedule No.: W-15 and the letters to Divine Fish House notes, customers can successfully reduce their consumption and the amount paid as a monthly demand charge. Divine Fish House did in fact successfully reduce its usage. (R. p. 92, ¶¶ 63-66). In June of 2012, Divine Fish House was assessed a peak usage of 66 residential equivalency units and a corresponding monthly demand charge of \$606.06 and an additional availability charge of \$301.56. (R. pp. 480-482). In June of 2013, Divine Fish House was assessed a peak usage of 57 residential equivalency units and a corresponding monthly demand charge of \$476.19 and an additional availability charge of \$236.94. (R. pp. 483-484). Thus, because Divine Fish House successfully reduced its consumption, the corresponding monthly demand charge was reduced \$129.87 without Divine having to purchase additional capacity. (R. p. 92, ¶¶ 63-66).

The fees that the Court ordered Divine to pay GCWSD are fees that Nichols is solely responsible for as a result of the change in ownership of the restaurant if Nichols decides to open a new account. (R. pp. 94-95, ¶¶ 82-85).

water and sewer service to commercial customers.” (R. p. 481).

GCWSD provides its customers the opportunity to explain the high usage before making a final determination as to the amount of the monthly demand charge. (R. p. 482). Once a final determination is made, “commercial accounts with Demand Charges shall be billed as normal plus two additional charges defined below: a base charge (availability charge) for each additional impact fee determined from the quarterly peak average, and a Demand Charge for each additional impact fee.” *Id.* Each existing commercial customer “assessed a Demand Charge has the *option of purchasing additional capacity* by paying the associated impact fees and eliminating or reducing the monthly Demand Charge(s).” *Id.* (emphasis added). A user demand analysis is performed annually to provide the customer the opportunity to reduce consumption and/or to lower or eliminate the monthly demand charge for the following year. *Id.* The GCWSD letters do not even quote a purchase price for additional capacity. (R. pp. 481-484).

According to District policy, change in ownership triggers a review of the account and requires that all additional capacity needed for the commercial business be purchased as if it were a new business opening up for the first time. During this review, staff uses historical data from the account to calculate the capacity required for the business. *However, staff has the ability in the policy to consider this a new account and review it according to the South Carolina Department of Health and Environmental Control's unit contributory loadings as defined in regulation 61-67 instead of using the historical data.*

(R. p. 500).

Significantly, the Restaurants' accounts with GCWSD were current at the time of the closing. (R. pp. 485-498). The GCWSD customer reports for the Restaurants contain no outstanding amount due and do not reference any unpaid impact fees due because there was no outstanding amount due or impact fee required to be paid. *Id.* In sum, the Restaurants owed no "fee" to GCWSD because the Restaurants had properly paid the monthly demand charges attributable to Divine's operations. (R. p. 93, ¶ 75). The Court's Order requiring Divine to pay GCWSD a fee that Nichols has neither applied for nor is entitled to receive under the governing agreements is clearly erroneous as a matter of law and fact.

C. Divine did not violate the contract by failing to specifically point out the GCWSD monthly demand charge to Nichols prior to the closing.

The Circuit Court's ruling that Divine had a duty to inform Nichols of the GCWSD fee as a matter of disclosure under the Purchase Agreement is in error. First, Paragraph 12(d) of the Purchase Agreement provides the following condition:

Buyer, during the Inspection Period, shall have satisfied itself, in its sole discretion, as to the physical condition of the Improvements, and **as to the availability of and capacity of water, sanitary sewer, storm water management, electricity, natural gas, telephone, cable television and other utilities serving the Property.**

(R. p. 120, ¶ 12(d)) (emphasis added). The contract places the burden on Nichols to

investigate issues involving the water and sewer. Thus, Nichols' attempt to turn his own failure to investigate or understand the GCWSD rules of water and sewer charges into a breach by Divine is without merit. As mentioned *supra*, Divine, as an existing customer of GCWSD, was not even subject to the same rules that Nichols will be if he chooses to open a new account. (See R. pp. 668-670). Moreover, the Purchase Agreement provided Nichols with a remedy, termination of the agreement, in the event that any of the conditions were not satisfied. (R. p. 120, ¶ 12).

Second, pursuant to the Due Diligence provision in the Purchase Agreement, Nichols had an extended period of time¹⁵ prior to the closing on the Restaurants, during which he could investigate the likely costs of operation. (R. p. 112, ¶ 2(k)); p. 768, lines 9-25; p. 801, lines 8-17; p. 96, ¶ 95). At the hearing Mr. Mendoza testified that the GCWSD fee should be a “non-issue” because it “is typical of sales of this kind, there was a due diligence for the Buyer to review things.”¹⁶ (R. p. 767, lines 24–25; p. 768, lines 1-5). Certainly, it cannot be disputed that the water and sewer service is an expected operating cost.¹⁷ For one year prior to the closing of the transaction, Nichols had the

¹⁵ The Due Diligence section of the Purchase Agreement provided that Divine would deliver: “A complete and accurate list of all outstanding and/or upcoming trade debt relating to the ownership of the Property, stating the creditor’s name and address, the nature of the services or goods provided, and the total amount owed.” (R. p. 112, ¶ 2(k)). Divine delivered the Trade Debt, in the form of outstanding invoices and a general ledger, to Nichols for the first time on or about February 14, 2013. (R. p. 87, ¶ 31).

¹⁶Mr. Mendoza testified that he has “been involved in literally dozens, many dozens of sales of this kind during [his] thirty-year career, ranging from small sales of a few thousand dollars to sales involving hundreds of millions of dollars, and ranging from, you know, representing the seller, representing the buyer, representing the secured creditors, representing lenders, representing unsecured creditors, pretty much every role, often in bankruptcy, often not in bankruptcy.” (R. p. 767, lines 2-10).

¹⁷ With respect to the “impact fee,” Nichols could have – and should have – contacted GCWSD to inquire whether there would be any charge or fee for the opening of a new account. Significantly, not only did the Purchase Agreement provide a mechanism by which Nichols could notify Divine that Nichols had not received information requested, it specifically required that “within Five (5) business days of the full execution of this Agreement, [Nichols] shall notify [Divine] in writing which of [the Due Diligence] items ... it still needs.” (R. pp. 111–112, ¶ 2; p. 563, ¶ 28; p. 768, lines 1–13). No such writing was referenced

benefit of having the entire operations and finances of the Restaurants, including utility bills, reviewed by the court-appointed receiver, who summarized and reported the information to Nichols. (R. pp. 96-97, ¶ 96). Thus, Nichols (through the Receiver) had access to approximately one year's worth of water billings, and, therefore, had actual or constructive knowledge of the monthly demand charge.¹⁸ (R. p. 97, ¶ 97; p. 801, lines 16-17) (Fred Newby, Counsel for Nichols, testified as follows: "I have no reason to believe [Nichols and his consultant] were not given access to whatever they asked for.")). Mr. Mendoza testified at trial that Nichols had the opportunity to review all invoices, including water usage fees and utility charges, and that Nichols never questioned these invoices. (R. p. 768, lines 14-25). Moreover, Nichols hired a special restaurant consultant, Mr. Ernest Edwards, to review the operating expenses of the restaurants and historical debts of the restaurants and advise him accordingly. (R. pp. 824-825, ¶ 5, ("I have had extensive experience in the payment of trade debt for restaurants and bars over the past 30 years as an operator and/or manager of restaurants and bars.)); p. 825, ¶ 6).

Despite this knowledge, Nichols contends that Divine should have set forth the GCWSD demand charge on what is commonly known as the "Mechanics Lien" affidavit of the Closing Documents. (R. pp. 69-74). Significantly, no provision in the Agreements places that onus on Divine as to disclosing GCWSD new account requirements, rather, the Agreements put the onus on Nichols in the due diligence period to review the information provided, request additional information and ask questions – such as what is

or placed in evidence at the hearing. (See R. pp. 739–823).

¹⁸Nichols employed a number of consultants as part of his due diligence review prior to closing, including Ernest Edwards. (R. p. 571, ¶ 46(b)). In his Affidavit, Ernest Edwards admits that he "had the opportunity to look at all of the historical debts for the operation of the restaurant and bars when he became general manager." (R. p. 824, ¶5).

the basis of the monthly demand charge, and to inquire with GCWSD as to new account policy and procedures. At no time did Mr. Nichols or his attorneys ever inquire as to the amount of water capacity the Restaurants had purchased or water and sewer service for the Restaurants. (R. p. 97, ¶ 100).

Third, Divine was not aware (nor did he have reason to inquire) that GCWSD would impose an impact fee upon the opening of a new account for the former Divine Fish House restaurant. (R. p. 96, ¶ 91). GCWSD had for years imposed a demand charge on the restaurant, which was annually assessed and incorporated into the Divine Fish House monthly billings. (R. p. 96, ¶ 92). The GCWSD demand charge, as explained above, was consistent with demand charges charged to other area restaurants. A similar charge had been assessed against Bovine's, but Divine and his management team were able to reduce the volume of water usage at Bovine's and, thus, eliminate the demand charge. (R. p. 96, ¶ 93). Significantly, Divine had not experienced a lump sum impact fee, as GCWSD proposes to impose on Nichols, and there was no reason for Divine to know that one would arise upon the transfer of the Restaurants to Nichols. (R. p. 96, ¶ 94). Simply put, Divine cannot be deemed to have failed to disclose detailed and complicated water usage rules that are publically available to buyers wishing to know how their water and sewer bills will be calculated.

In sum, what Divine and his attorney did not know at closing and what Nichols and his attorney and consultants claim they did not know at closing was a matter of law that applied only to the buyer when and if it opened a new account. It was an error for the Court to hold Divine responsible for Nichols' own failure to investigate pursuant to his duty as set forth in the Purchase Agreement. (R. p. 120, ¶ 12(d)).

Fourth, no provision of the Agreements requires Divine to advise Nichols of: (i) options presented to Divine as an existing commercial customer of GCWSD – to pay a “monthly demand charge” or purchase to additional capacity or (ii) the impact fee that would be imposed upon Nichols. Specifically, the monthly demand charges do not fall within the Representations and Warranties of Sellers and Divine, as set forth in Section 15(f)¹⁹ and (h)²⁰ of the Agreement of Purchase and Sale because, as a matter of law, a monthly demand charge does not constitute a “lien” or “assessment,” nor is a monthly demand charge a “penalty,” as described by the Court. (R. p. 855).

As to Nichol’s argument that the monthly demand charge constitutes an “assessment” that should have been disclosed pursuant to the Agreements, the monthly demand charge and the option to purchase additional capacity are simply not assessments as a matter of law. The GCWSD Resolution neither utilizes the term “assessment” to describe either the monthly demand charge or the purchase of additional capacity nor otherwise treats the monthly demand charge or option to purchase additional capacity as an assessment. (R. pp. 640-643, 647-648, 668-670). In a letter to Mr. Divine, GCWSD Engineering Director Tommie Kennedy stated that he had found “no records of GCWSD ever making an assessment on the referenced restaurant, property, or account.” (R. p. 477, ¶ 3) (emphasis added). Thus, because the “demand charge” and the option to

¹⁹ Paragraph 15, Section H of the Purchase Agreement provides, in part, “[t]here 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 that Buyer elects to assume” (R. p. 122, ¶ 15, § f).

²⁰ Paragraph 15, Section H of the Agreement of Purchase and Sale provides, in part, that “Sellers 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 requests for public dedication, nor do Sellers know of any basis for any such action, other than collection actions relating to the debts. Sellers have no knowledge of any pending or contemplated public improvements in or about the Property which may in any manner increase the taxes or assessments in or about the property which may increase the taxes or assessments levied against the real property. . . .” (R. p. 122, ¶ 15, § H).

purchase additional capacity are not “assessments,” Divine violated no duty under the terms of the Agreement.

Moreover, the monthly demand charges do not fall within the definition of an “assessment against the owner” in the Owner’s Affidavit of Title Insurance because no such charges constituted an assessment against the real estate at the time of the closing. At the time of the closing, the total balance of charges and sums due by Divine to GCWSD was “\$0.00”. (R. pp. 485-498). At the hearing, Nichols’ legal counsel had reported no claim to his title insurance company because he did not think the demand charges triggered any such duty to report a violation of the technical language of the Owner’s Affidavit. (R. p. 802, lines 6-11).

Likewise, the monthly demand charge does not constitute a “lien” upon the property. In fact, the “express purpose” of the statements contained in the Owner’s Affidavit are to induce the title insurance company “to insure title to said property to be free from *adverse claims of liens* not herein stated...” (R. pp. 69-74) (emphasis added). The monthly demand charge and option to purchase additional capacity, which have not even been triggered by Nichols because it is still operating under Divine’s customer account, are not liens. (R. p. 477, ¶ 2, (“I found no records of GCWSD ever placing a lien on the referenced restaurant, property, or account”); pp. 640–643).

Significantly, neither the applicable GCWSD regulation nor the template letter sent by GCWSD to commercial customers reference a “lien” or “assessment.” Indeed, GCWSD has never placed a lien or assessment on the Restaurants, the property locations of the restaurants, or the GCWSD accounts associated with the Restaurants and property. (R. p. 91, ¶ 58; pp. 476-479).

Furthermore, the Court's Order stating that Divine paid the monthly demand charges as a "penalty" was in error. (R. p. 855). As a matter of law, a monthly demand charge is not a "penalty". (R. p. 478, ¶ 10 ("Nowhere in the Rates and Charges Resolution is the demand charge called a penalty. ...")). Specifically, the regulations and letters sent by GCWSD to its commercial customers do not reference a penalty. (R. pp. 480-484). Thus, the term "penalty" is inapplicable to a demand charge. In sum, the demand charge and optional additional capacity that may be purchased by existing commercial customers are not properly termed a "lien," "assessment" or "penalty;" accordingly, the Court's ruling that the GCWSD demand charge is a penalty was an error.

Finally, any assertion that Divine would have knowingly withheld information on the GCWSD monthly demand charge is illogical and without any factual basis. It was in Divine's best interest to ensure that all expenses and trade debts were known by Nichols, as Nichols is obligated to pay them. The record is completely devoid of testimony that any such information was withheld. (R. p. 97, ¶ 101).

Thus, GCWSD's imposition of an impact fee upon Nichols application for new customer service would not constitute a breach of Divine's obligations to Nichols, and the Court's finding to the contrary was in error.

II. THE CIRCUIT COURT ERRED IN FAILING TO GIVE EFFECT TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE AGREEMENTS BETWEEN THE PARTIES WHEN IT ALLOWED NICHOLS TO RECEIVE AN OFFSET CREDIT FOR PARTIAL PAYMENT OF TRADE DEBT OWED BY NICHOLS UNDER THE AGREEMENTS WHICH WERE NOT INCLUDED IN DIVINE'S CLAIM FOR TRADE DEBT PAYMENTS SUBMITTED TO THE COURT, THEREBY IMPROPERLY REDUCING THE TRADE DEBT NICHOLS WAS REQUIRED TO PAY.

The Circuit Court erred in its calculation of the amount of trade debt owed to

Divine by Nichols in that it granted an improper credit to the following entities:

Roper	\$1,751.27
Santee Cooper	\$3,126.58 (Divine's)
Santee Cooper	\$3,129.66 (Bovines)
Horry Telephone	<u>\$1,014.92</u>
Total	\$9,022.43

Nichols had an obligation to pay all outstanding trade debt; the fact that he paid a portion of the trade debt (as listed above) is a reflection and confirmation of this obligation. Significantly, none of the above listed entities or amounts were included in the trade debt claimed by Divine, which only included *unpaid* trade debt in the total figure. (R. p. 90, ¶ 54; pp. 333-473). The trade debt payment owed Divine should not have been reduced by the amounts paid by Nichols who had agreed to pay all of the reasonable Trade Debt under the Settlement Agreements.

III. THE COURT INCORRECTLY AWARDED NICHOLS DAMAGES WHEN NICHOLS HAS INCURRED NO ACTUAL LOSS.

Although the evidence before this Court is uncontroverted that there was no amount owed to GCWSD at the time of closing and that Divine had no duty to inform Nichols of the potential fees that, as a matter of law, may be assessed if Nichols chooses to open a new account, should this Court determine otherwise, it should still hold that the Circuit Court's ruling requiring Divine to pay GCWSD is erroneous because Nichols has suffered no such damages.

In an action for breach of contract, "damages serve to place the non-breaching party in the position he would have enjoyed had the contract been performed." *Money First Financial Services, Inc. v. W.E. Montgomery*, --- S.E.2d ---, 2005 WL 7083597 at *2 (Ct. App. 2005). The law places the burden on the plaintiff to prove damages for

breach of contract. *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App. 1988). “A party proves damages by showing an **actual loss** that would not have been incurred but for the defendant’s breach of the contract.” *Money First*, 2005 WL 7083597 at *2 (emphasis added). In the present case, Nichols has failed to demonstrate that he has suffered an actual loss as a result of the impact fees that may be assessed if he chooses to open a new account with GCWSD.²¹

At the hearing, Mr. Mendoza testified that Divine offered to let Nichols continue using his current account with GCWSD because “based on his investigation, Mr. Divine’s understanding [was] that there would be no impact fee charged if . . . the existing account were used.” (R. p. 771, lines 8-13). As of the date of the hearing, Nichols had continued to use Divine’s GCWSD account rather than opening a new account in his name; because Nichols has chosen to use Divine’s existing account, Nichols has not been required to pay the impact fees for the extra capacity. (R. p. 771, lines 19-24). Thus, Nichols has incurred no damages.

Further, for the reasons mentioned above, the decision rendered by the Court requiring Divine to pay GCWSD is no more than an advisory decision because no justiciable controversy exists.

CONCLUSION

Based on the above, it is respectfully submitted, that this Court: (1) should

²¹ Furthermore, South Carolina law requires that Nichols prove his damages were “a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made.” *South Carolina Federal Savings Bank v. Thornton-Crosby Development Company, Inc.*, 303 S.C. 72, 77, 399 S.E.2d 8, 11 (Ct App. 1990). However, as explained *supra*, any potential impact fees that Nichols may incur in the future if he chooses to open a new account with GCWSD were not contemplated by the parties when entering into the Agreements. In fact, Divine testified that he “was not aware that GCWSD would require that Dr. Nichols pay an “impact fee” upon the opening of a new account” (R. p. 96, ¶ 91).

reverse the lower Court's ruling and award of excess GCWSD impact fees (totaling \$53,760.00) to be paid to GCWSD on behalf of Nichols; and (2) reverse the lower Court's subtraction of \$9,022.43 in legitimate operational and utility costs from the Trade Debt, thereby allowing full recovery of the Trade Debt in the amount of \$62,809.08.

September 26, 2014

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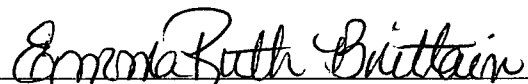
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CERTIFICATE OF COUNSEL

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

September 26, 2014

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IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM Horry COUNTY
Court of Common Pleas

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SC Court of Appeals

Honorable Steven H. John, Circuit Court Judge

Civil Action No.: 2011-CP-26-2722

Nichols Holding, LLC and J. Wade NicholsRespondents-Appellants

vs.

Divine Capital Group, LLC, John S. Divine, IV,
Nathan Anderson and Divine Dining Group, Inc.Appellants-Respondents

PROOF OF SERVICE

I certify that I have served the Brief of Appellants-Respondents by depositing a copy of it in the United States mail, postage prepaid, on September 29, 2014, addressed to the following:

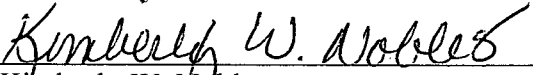
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