IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Steven H. John, Circuit Court Judge

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

Nichols Holding, LLC and J. Wade Nichols .....Respondents-Appellants

vs.

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

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RESPONDENTS' BRIEF OF APPELLANTS-RESPONDENTS

September 26, 2014

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STATEMENT OF THE CASE

The issues in this appeal arise out of the motion of Appellants-Respondents Divine Capital Group, LLC, John S. Divine, IV, Nathan Anderson and Divine Dining Group, Inc. (collectively, "Divine") to enforce a settlement agreement executed by the parties resolving a (1) judgment against Appellant-Respondent John S. Divine, IV, held by Respondents-Appellants Nichols Holding LLC and J. Wade Nichols (collectively, "Nichols"), (2) a receivership in supplementary proceedings upon that judgment, and (3) the prospective sale of certain restaurants owned by companies which Jack Divine owned. The judgment and the order to appoint the receiver were entered in three related actions,[1] but constitute one judgment and one receivership. (R. pp. 100-101). Basically, the parties reached an agreement whereby Jack Divine would convey certain valuable commercial properties, including two restaurants that companies owned by Jack Divine had proposed to sell to another party, to Nichols in satisfaction of the judgment and for termination of the receivership. (R. p. 556, ¶ 2; p. 754, lines 19-25; p. 83, ¶ 6; p. 84, ¶ 9). The Settlement Agreement and Release in Full and Agreement of Purchase and Sale ("Agreements") provided that Divine, which was cash strapped, would keep the

[1] The three actions 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 Diving 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").

properties commercially operational until closing, and that Divine would not be required to bring any money to the closing table; Nichols agreed to undertake payment of certain debt obligations necessary for the closings to take place. (R. p. 101, ¶ 1; pp. 103-104, ¶ 8; p. 111, ¶ 1). With the exception of Nichols' contractual obligation to pay for trade debt incurred by Divine for continued operation of the businesses up to closing, Divine was to be paid no money by Nichols. *Id.*

The specific issues on this appeal concern the dispute as to payment of trade debt, which Nichols agreed to pay Divine under 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 its 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. p. 819, lines 13 – p. 822, line 11). 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

[2] The question of GCWSD demand charges was raised by Nichols after Divine questioned Nichols' failure to pay the trade debt. (R. p. 564, ¶ 33, p. 565, ¶34).

would be credited against the total trade debt amount (even though the paid amounts were not included in Divine's listing of unpaid trade debt for Nichols to pay). *Id.* Second, the Court held that Divine had a duty to disclose certain yet unassessed and unincurred 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 Nichols elect to open a new customer account with GCWSD. *Id.* The Court determined that these 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

The settlement agreement which is the subject of this appeal had its origins in a Consent Order filed on February 10, 2012, whereby Jack Divine consented to the entry of judgment against him in favor of Nichols in the amount of $8,642,379.70 (the "Judgment"). (R. p. 83, ¶ 4). Nichols was unable to collect on the Judgment, and obtained the appointment of a receiver to oversee the restaurants owned by Jack Divine's companies. (R. pp. 10-16). It appeared that the restaurants had no realizable value for payment on the Judgment. (R. p. 754, lines 14-21; p. 756, lines 1-12). Unable to realize value for payment of the Judgment, Nichols concluded that the "Judgment was uncollectible." (R. p. 101).

In the Fall of 2012, Divine entered into negotiations with a proposed buyer of several of his restaurants, for a sale which would pay all indebtedness of the restaurants, including secured indebtedness to a bank. (R. p. 754, lines 21–25; p. 755, lines 1–2; p. 766, lines 2–5). After payment of the debts owed by the restaurants, however, the sale would have netted no value to him, and thus no value for Nichols' Judgment. (R. p. 754, line 25; p. 755, lines 1–2). Apparently believing that certain properties in the proposed sale had substantial value for future realization, Nichols entered into negotiations with Divine for Nichols to acquire the restaurants and other commercial property owned by Divine.

After lengthy negotiations,[3] the parties executed a the Settlement and Purchase 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 (Bovine's and Divine Fish House) were located, and certain other properties; in return, Nichols agreed to assume certain financial obligations of Divine, pay the trade debt and business expenses incurred by Divine in keeping the restaurants operational pending closing, satisfy the Judgment, and terminate the receivership. (R. p. 814, lines 18–20; p. 101, ¶ 1; pp. 103-104, ¶ 8; p. 111, ¶ 1). These payments by Nichols were necessary to match the sale terms of the proposed other purchaser. (R. p. 753, lines 14-21; p. 754, lines 21–25; p. 755, lines 1–2; and p. 766, lines 2–5). Had Nichols not agreed to them, Divine proposed to file Chapter 11 bankruptcy cases for his companies to provide for the sale of the restaurants and the payment of the debts owed by them. (R. p. 753, lines 16–21; p. 765, lines 8–11; and p. 766, lines 2–5.)

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

Central to the structuring of the agreements between the parties was a clear understanding that the deal was being structured in a manner that did not require Divine to bring any cash to the closing table (nor could it), and required Nichols to undertake such actions as required of it to allow the properties to be transferred to it (thus the assumption and payment of certain financial obligations of Divine), and that Divine would keep the restaurants operational until closing so that the businesses would be transferred, as a "going concern", for which Divine would be reimbursed by Nichols for all associated trade debt. (R. p. 757, lines 18–25).

The Receivership Order filed on May 25, 2012, appointed Arlene Jaskot, a certified public accountant, to serve as receiver (the "Receiver"). (R. pp. 10-16). 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). Also in May 2012, Nichols hired Ernest Edwards, a consultant experienced in the operation and sale of restaurants in Horry County, to consult with Nichols about Divine's operation of 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. pp. 103–104, ¶ 8). In the Agreements, Divine[4] agreed to sell "certain improved and unimproved

[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.

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. pp. 103–104, ¶ 8). Nichols' obligations to satisfy the Judgment and perform under the Settlement Agreement were contingent upon Divine performing his obligation under the Purchase 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. p. 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:

[5] *See* R. pp. 10-16.

> 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 fact: at the time of the closing, no charges or sums were due by Divine to GCWSD, i.e., the account balance from Divine to GCWSD was current, at "$0.00". (R. pp. 485–498). Although Divine fully performed[6] 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; pp. 612–614). This letter made no mention of GCWSD or demand charges. 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, and then only after Divine had

[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.

respectfully requested payment of the trade debt. (R. p. 67, ¶ 7 ("I only learned of [the GCWSD] issue when Nichols went to GCWSD . . . [i]t was at that time that I learned that additional capacity was necessary which would include twenty-four additional impact fees of $53,760.00 to change the water over from the Divine group to the Nichols Group.")).

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. (R. pp. 63–65). Divine, in an effort to get the matter resolved, adjusted the demand downward to an aggregate total of $62,809.08.

At the December 4, 2013, hearing before Judge John, the Affidavit of John S. Divine, IV, with attachments was introduced without objection in support of the motion to compel payment of the amount Nichols owed for Trade Debt incurred by Divine in keeping the businesses operational prior to closing.[7] (R. p. 851; p. 742, lines 12–17). Nichols, however, contended that he was only required to pay Trade Debt that had accrued 30 days prior to closing,[8] despite the fact that the contract contains 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; R. p. 111, ¶ 1). Nichols also argued that the Court should consider potential impact

[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. pp. 103-104, ¶ 8).

[8] *See* R. pp. 78-81.

fees that may be calculated and assessed against it if Nichols elected to open a new water and sewer account with GCWSD.[9] (R. p. 743, lines 7–10).

The lower court ruled from the bench the day of the hearing on the motion to enforce settlement and subsequently signed a formal Order Compelling Settlement ("Order") on January 6, 2014. (R. pp. 850-857). As to the Trade Debt issue, the Court found that the Trade Debt was Nichols' responsibility, and that despite Nichols' argument to the contrary, the Agreements do not impose a 30 day limitation on the Trade Debt amount. The Court found that Nichols owed $62,809.08 for the Trade Debt. (R. p. 5; p. 819, lines 23–25; p. 820, lines 1–11). The Court issued a caveat, however, disputed by Divine in this appeal, however, that Nichols could receive credit, after proof of payment, for amounts Nichols contended it had paid for utilities, although these amounts were not included in the list of unpaid invoices introduced at the hearing constituting the trade debt at issue submitted and claimed by Divine. (R. p. 852-853; p. 85, ¶ 18; p. 90, ¶ 54; p. 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:

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

(R. pp. 852-853; p. 821, lines 8–11). This ruling is incongruous because Divine had never submitted these items as matters for Nichols to pay since it was apparent that these invoices had already been paid.

The Court also held that Divine had a duty at closing to make Nichols specifically

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

aware that Divine, like many commercial business in its situation, had elected to pay GCWSD demand charges monthly in lieu of purchasing additional water and sewer capacities for the properties during its commercial operations on the property. (R. pp. 854-855; p. 820, lines 16–25; 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 counsel for Nichols' testimony that he did not think that the issue with GCWSD affected the title nor did he report it to his title company. (R. p. 802, lines 6-10; p. 820, lines 16-25; p. 821, lines 1, 11–17; p. 855). On this basis, the lower court held that Divine was liable for unincurred impact fees (which are still unincurred as the date of this brief) in the amount of $53,760.00. (R. p. 821, lines 14–17; p. 855).

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 GCWSD $53,760.00, cancelling out the amounts of each other's claims. (R. p. 820, lines 11–15; p. 821, lines 14–17). Divine filed a Notice of Appeal on March 26, 2014. (R. pp. 39-51). 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 Nichols may incur if he elects to open a new account with GCWSD is neither correct as a matter of law nor supported by the record evidence. Although the Court was correct in requiring Nichols to pay the outstanding trade debt pursuant to the Settlement and Purchase Agreements between the parties, the Court erred in allowing Nichols to receive an offset credit for partial payment of trade debt 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.

I. THE CIRCUIT COURT ERRED IN ORDERING DIVINE TO PAY GEORGETOWN COUNTY WATER AND SEWER DISTRICT FOR POTENTIAL IMPACT FEES THAT MAY BE ASSESSED IF AND WHEN NICHOLS OPENS A NEW WATER AND SEWER ACCOUNT IN HIS NAME.

A. The Circuit Court's ruling is erroneous because Divine was never required to purchase additional water and sewer capacity and Divine owes no "fee" to GCWSD.

In its Order, the Court found that Divine's failure to disclose that he "had not purchased additional water and sewer capacity, and instead had been paying additional charges as a ***penalty***" constituted "a violation of the Agreement of Purchase and Sale, specifically Section 15(f)(h)." (R. p.855) (emphasis added). This ruling is incorrect, and reflects a complete misunderstanding of the differences between the water demand charges that Divine chose to pay monthly and the yet to be assessed water impact fees that Nichols may be required to pay to purchase additional capacity if he elects to open a new account with GCWSD.[10] A water impact fee "applies to anyone requesting ***new*** water service or reserving capacity within the service area of the District . . . ." (R. p. 647) (emphasis added). A water demand charge, on the other hand, is defined in the GCWSD Resolution, 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.

(R. pp. 668–670) (emphasis added).

[10] Nichols is not required by GCWSD to open a new account but may continue to use the existing account, thereby avoiding such a fee. (R. p. 97, ¶ 102). Divine offered to allow Nichols to continue using his account at GCWSD because Divine understood that the impact fees would not be assessed against Dr. Nichols if he were to continue using the existing water/sewer account. (R. p. 771, lines 19-24). 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. *Id.* Accordingly, at the time of the hearing, Nichols had incurred no damages because he had not been required to pay the impact fees for the extra capacity due to his continued use of Divine's existing account. *Id.*

Furthermore, contrary to the language of the Order, GCWSD never required Divine to purchase additional capacity; instead, it gave Divine, as an existing customer, the option of paying a water demand charge each month and the opportunity to reduce water usage on its own. (R. p. 477, ¶ 5). Divine, like many businesses, chose the latter option of paying the demand charge in lieu of buying the additional water and sewer capacity, and had been operating the restaurants for years without purchasing additional capacity. (R. p. 93, ¶ 70). No administrative proceedings were involved and no penalties were applicable or assessed. The lower court's assertion that the water demand charges were paid to GCWSD as a penalty for Divine's election not to pay for additional capacity is entirely incorrect and refuted by the record evidence. (R. p. 478; ¶ 10; p. 855).

1. Divine was never required to purchase additional capacity.

The lower 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 incorrectly held that Divine had a duty to disclose this fact to Nichols. (R. p. 854). The record is undisputed that GCWSD never required Divine to purchase additional capacity, but allowed it, as well as other customers, the option of purchasing additional capacity or paying the water demand charge.[11] (R. pp. 481–482). Divine made the business decision to pay the water demand

[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. pp. 481-482) (emphasis added).

Additionally, the GCWSD Resolution specifically states that "[c]commercial 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, ¶ 6) (emphasis added).

Accordingly, existing commercial customers, such as the Restaurants, generally, are not required to purchase additional capacity and may instead choose to pay the GCWSD demand charge and attempt to reduce their consumption on their own.

charge in lieu of buying new capacity, and attempted to reduce consumption through the Restaurants' own efforts. (R. p. 93, ¶ 70). In fact, one of the Restaurants, Divine Fish House, successfully reduced its usage through its own efforts without having to purchase additional capacity.[12] (R. p. 92, ¶¶ 63–66; p. 93, ¶ 70 ("The purchase of additional capacity would have been costly for [Divine Fish House], and as demonstrated by the successful reduction of consumption, unnecessary.")).

2. At closing, Divine owed no "fee" to GCWSD.

Nichols' assertion that the water demand charges were past due is in error. The record is undisputed as to this fact: at the time of the closing, no charges or sums were due by Divine to GCWSD; the record evidence that the account balance from Divine to GCWSD at closing was current, at "$0.00," is unrefuted. (R. pp. 485–498). The GCWSD customer reports for the Restaurants reference no unpaid impact fees due because there were no impact fees 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, a business option available to Divine, as with other customers, pursuant to GCWSD's procedures. (R. p. 93, ¶¶ 72–75).

Any sums that Nichols may be required to pay GCWSD post closing for water "impact fees" will be triggered due to the change in ownership and Nichols' election to open a new account with GCWSD. (R. pp. 647–648). While an existing customer, such as Divine, may choose to pay a monthly water demand charge, Nichols, if he elects to

[12] 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. 481-482). 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).

open a new account, may be required to purchase additional capacity by paying water impact fees at the time of application for service. (R. pp. 476–479). The lower court's ruling failed to appreciate the differences between the two distinct charges. Thus, 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.

B. The Circuit Court's Order incorrectly held that the water demand charges are a penalty.

In its Order, the lower court incorrectly held that Divine "had been paying [water demand] charges as a ***penalty***." (R. p. 855) (emphasis added). The lower court's conclusion that the charges are a penalty is completely without evidentiary or legal support. 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. 480–482; pp. 483–484). As described above, paying the monthly demand charge was a viable option GCWSD provided to its existing customers. (R. pp. 476–479). Thus, the term "penalty" is inapplicable to a water demand charge, and the lower court's characterizing it as otherwise is in error.

C. The Circuit Court erred in finding that Divine had an independent duty to disclose the water demand charges that Nichols should have discovered during his own investigation pursuant to the Due Diligence Provision in the Purchase Agreement.

The lower 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. (R. p. 855). 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. Moreover, the buyer had complete access to the historical GCWSD bills and payments up to closing. (R. p. 768, lines 14–21). Divine in no manner, nor has there been any allocation of such effect, attempted to conceal the amounts and nature of payments to GCWSD. (R. p. 768, lines 14–25).

First, in point, this Court's attention is drawn to Paragraph 12(d) of the Purchase Agreement which 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 clearly places the burden on Nichols to investigate issues involving the water and sewer. 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."[13] (R. p. 767, lines 24 –25; p. 768, lines 1–12). 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.

Second, pursuant to the Purchase Agreement's Due Diligence provision, Nichols had an extended period of time prior to the closing on the Restaurants, during which he could investigate the likely costs of operation. (R. p. 87, ¶ 32; p. 96, ¶ 95; p. 112, ¶ 2(k);

[13] Mr. 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 . . . 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).

p. 768, lines 9–25; p. 801, lines 8–17). Certainly, it cannot be disputed that the water and sewer service is an expected operating cost. For approximately one year prior to closing, Nichols had the benefit of having all operations and finances of the Restaurants, including utility bills, reviewed by the Receiver, who summarized and reported the information to Nichols. (R. pp. 96–97, ¶ 96). 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, ¶¶ 5-6, ("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.")). In his Affidavit, Mr. Edwards admitted that he "had the opportunity look at all of the historical debts for the operation of the restaurant and bars when [he] became general manager." (R. pp. 824–825, ¶ 5).

The record is unrefuted that Nichols, personally and through his consultant, and the Receiver who sent him information, had access to approximately one year's worth of water billings, and, therefore, had actual or, at the very least, constructive knowledge of the monthly costs, including the demand charge. (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.")). 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 prior to closing. The Rate Regulations for GCWSD, which include descriptions of both the

impact fee and demand charge, are available to the public. (R. p. 572, ¶ 47; R. pp. 640–643, 647–648, 668–670).

Significantly, the Purchase Agreement, in addition to providing a mechanism by which Nichols could notify Divine that he had not received information requested, also specifically required Nichols, "within Five (5) business days of the full execution of this Agreement, "[to] notify [Divine] in writing which of [the Due Diligence] items ... [he] still needs." (R. p. 768, lines 1–13; p. 112, ¶ 2; p. 563, ¶ 28). The record is devoid of evidence of any such notice having been necessary, or provided by Nichols.[14] (*See* R. pp. 739–823).

Third, Divine was unaware (nor did he have reason to inquire) that GCWSD would impose an impact fee upon the opening of a new account because the Restaurants had been paying a monthly water demand charge for years. (R. p. 96, ¶ 92). As mentioned above, as an existing customer of GCWSD, Divine was not subject to the same rules that will apply to Nichols if he chooses to open a new account. (*See* R. pp. 668–670). Significantly, Divine experienced no requirement for payment of a lump sum impact fee, as GCWSD proposes to impose on Nichols, because no such fee was applicable to Divine and there was no reason for Divine to inquire or know that one would arise upon the transfer of the Restaurants to Nichols. (R. p. 96, ¶ 94). Simply put, Divine had no reason to inquire as to how the property transfer would offset water usage rules applicable to Nichols and cannot be deemed to have failed to disclose detailed and complicated water usage rules inapplicable to its situate, and which are publically available to buyers seeking to know how their water and sewer bills will be calculated.

[14] The Purchase Agreement also provided Nichols with a remedy, termination of the agreement, in the event that any of the conditions were not satisfied. (R. pp. 119-120, ¶ 12).

In summary, the lack of knowledge at closing by Divine and Divine's attorney that different publicly available procedures applied to new customer accounts does not create a legal duty upon the Seller to evaluate the Buyer as to such rules. Accordingly, the lower court erroneously held Divine responsible for Nichols' own failure to investigate the water and sewer usage rules and policies applicable to it, clearly pursuant to the Buyer's duty as set forth in the Purchase Agreement. (R. p. 120, ¶ 12(d)).

D. The Circuit Court erred in ruling that Divine is responsible for the impact fees that may be assessed against Nichols, such ruling being beyond the scope and language of the applicable agreements.

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 upon election to open a new account. To the contrary, the evidence is uncontroverted that 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 making appropriate inquiries of GCWSD as to the availability of water and sewer and capacity, and to inquire with GCWSD as to any new account policy and procedures applicable to Nichols. At no time did Nichols or his attorney ever inquire of Divine as to the amount of water capacity the restaurants had purchased or water and sewer service for the restaurants. (R. p. 97, ¶ 100).

Nichols' argument that Divine had a duty to point out the water demand charges to Nichols prior to the closing pursuant to the Representations and Warranties of Sellers and Divine contained in Section 15(f) and (h) of the Agreement of Purchase and Sale, and the Owner's Affidavit, must fail because the water demand charges do not fall within the

clear language of these documents. The water demand charges do not fall within the Representations and Warranties of Sellers and Divine, because, as a matter of law, a water demand charge does not constitute an "administrative action" or "contract". (R. p. 783, lines 10-22; p. 784, lines 6-9; pp. 121–122, ¶15, §§ (f) & (h)). Likewise, a water demand charge does not constitute a lien, which would be listed on the Owner's Affidavit. (R. p. 91, ¶ 58; pp. 476–479).

1. Divine did not violate either Section 15(f) or Section 15(h) of the Agreement of Purchase and Sale because a water demand charge does not fall within the purview of said sections.

A water demand charge is not a negotiated contract. A water billing is a utility, not a service agreement. Section 15(f) of the Purchase Agreement provides, in part, as follows:

> 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 that Buyer elects to assume . . . .

(R. p. 122, ¶ 15, § f). At the hearing, Mr. Mendoza testified that the water demand charges were not "in the realm" of the type of contract referred to in Section 15(f). (R. p. 782, lines 14–25). Mr. Mendoza testified that a water demand charge is not a contract because:

> [t]he 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 . . . 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). Further, Mr. Mendoza testified that he did not remember seeing any such written "contract." (R. p. 784, lines 6–9).

Likewise, a water demand charge is not an administrative action. Section 15(h) provides, in part, as follows:

> 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.

(R. p. 122, ¶ 15, § H). At the hearing, Mr. Mendoza unequivocally testified that a water demand charge is not an administrative action.

> Q: Do you consider Georgetown Water and Sewer's demand charge . . . an administrative action that Mr. Newby should've been advised of when he paid the $5,000,000?
>
> A: No.

(R. p. 781, lines 14–18).

2. A water demand charge is not a lien.

Nichols contends that Divine should have set forth the GCWSD demand charge on the Owner's Affidavit of the closing documents. (See Brief of Respondents-Appellants, Argument I). Section 11 of the Affidavit states, in part, as follows:

> That the undersigned make(s) this statement for the express purpose of introducing Fidelity national Title Insurance Company to insure the title to said property to be free from **adverse claims of liens not herein stated** . . . .

(R. pp. 69–74) (emphasis added). The water demand charges are not liens. Indeed, GCWSD had never placed a lien on the Restaurants, the property locations of the Restaurants, or the GCWSD accounts associated with the Restaurants and property. (R. pp. 641–643; pp. 477, ¶ 2 ("I found no records of GCWSD ever placing a lien on the

referenced restaurant, property, or account.")). There is no record evidence of any lien for water capacity or availability having been placed on the property at or prior to closing.

In fact, at the hearing, Nichols' legal counsel candidly admitted that he had reported no claim to his title insurance company because he did not think the water 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). 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). Thus, because the monthly demand charge and option to purchase additional capacity through the payment of impact fees do not constitute "lien" upon the property, Divine violated no duty under the terms of the Agreements.

In sum, GCWSD's imposition of an impact fee upon Nichols application for new customer service triggers no disclosure obligation from Divine to Nichols under the Agreements, and the Court's finding to the contrary was in error.

II. THE CIRCUIT COURT PROPERLY HELD THAT NICHOLS WAS REQUIRED TO PAY THE TRADE DEBT PURSUANT TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE SETTLEMENT AGREEMENT.

A. Nichols is required to pay the Trade Debt under the terms of the Agreements.

The Court correctly ruled that Nichols is obligated to pay all outstanding trade debt,[15] as this ruling gives effect to the clear and unambiguous language of the Agreements. Because the Agreements, and specifically, the provisions governing trade debt, are clear and unambiguous, they should be enforced according to their terms. *See*

[15]However, as explained in Argument III, the Court was incorrect in allowing Nichols to offset credits for certain trade debt already paid, but which was not included in Divine's claim for trade debt payments submitted to the Court. (See Argument III, p. 26).

Erie Ins. Co. v. Winter Const. Co., 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011) ("When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning"). Section 1 of the Purchase Agreement specifically provides that the Purchase Price for the Property includes the "outstanding Trade Debt . . . of the Restaurants and Bars on the Closing Date." (R. pp. 110–111, ¶ 1). "Trade Debt" is defined in the Purchase Agreement as follows:

> **"Trade Debt" includes 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.** The Trade Debt includes the fee for administrative services provided to the Restaurants and Bars by Divine Dining Group, Inc. ("DDG"); provided, however, that the administrative service fees of DDG shall not exceed DDG's actual cost and shall not exceed normal rates for fees of this kind in the greater Myrtle Beach, South Carolina market area. The Trade Debt shall not include, but specifically excludes, intercompany debt owed to Divine or companies owned by Divine other than the fees due to DDG for its administrative services for the Restaurants and Bars.

(R. p. 111, ¶ 1) (emphasis added). The Purchase Agreement, which contains no monetary (or temporal) limit or cap on the amount of the Trade Debt, defines as qualifying Trade Debt, expenses that are: (i) normal operating expenses of the Restaurants and (ii) reasonably consistent with past operating expenses. *Id.* This provision requiring the payment of the outstanding Trade Debt was a bargained for Agreement term intended to protect the Restaurant vendors and service providers, requested by Seller in light of the Buyer and Seller's knowledge that sufficient revenue would not be forthcoming. (R. p. 755, lines 2–10; p. 756, lines 1–5). The documented Trade Debt expenses Divine presented to Nichols at closing are normal operating expense of the Restaurants,

reasonably consistent with past operating expenses which entitle Divine to full reimbursement under the Agreements. (R. p. 85, ¶ 21).

B. Nichols' Argument that Trade Debt excluded debt incurred more than 30 days prior to closing is an improper attempt to rewrite the Agreement between the Parties and the Lower Court properly rejected this contention.

At the hearing, Nichols' counsel agreed that Nichols owed "some trade debt," but disagreed as to the amount. (R. p. 743, lines 6–7). Despite the Court's rejection of his argument, Dr. Nichols continues to unilaterally maintain, with no legal or factual support, that the Agreement should be rewritten to define "trade debt" as arbitrarily limited to trade debt incurred no later than 30 days prior to closing. (See Brief of Respondents-Appellants, Argument II). This limitation contravenes the intent of the parties in signing the Agreements. The lower court correctly held that Nichols has no contractual or factual basis for his contention. The Agreements contain no such temporal limitation. There is no clause stating that the Trade Debt cannot be past due more than 30 days; to the contrary, the Purchase Agreement provides that Trade Debt includes all amounts "outstanding." (R. p. 111, ¶ 1). Had the parties intended to exclude debt that was outstanding past a specified time period, they certainly could have, as they excluded intercompany debt. As Mr. Mendoza testified at trial, the 30 day limitation was not included in the definition of trade debt in the Agreements and no such limitation was ever discussed during the negotiations. (R. p. 786 lines 18–22 ("I still don't understand the rationale paying off in thirty days is because the circumstances where, where it was understood that this trade debt was going to the give the restaurants till the closing date and thirty days had never been discussed. It was not included in the definition.")).

In Arlene Jaskot's Affidavit, relied upon by Nichols, Jaskot arbitrarily discounted

the amount of trade debt by only including the trade debt incurred 30 days prior to closing. (*See* R. pp. 78–81). Jaskot's figure was thus substantially lower than the total outstanding trade debt. Aside from her imposition of an arbitrary 30 day cap on trade debt, without the support of any contractual provision, Jaskot admitted at the hearing that she had no knowledge of, and failed to familiarize herself with the restaurant's payroll procedures or payment of trade debt, further drawing into question the credibility of her contention that a 30 days cap was "reasonable."

> Q: Have you seen anything that shows that that was the procedure used by the Defendants?
>
> A: **I have never analyzed the procedure of his paying his bills.**
>
> Q: Okay. Were you present when the parties discussed the negotiation of the trade debt provision in the contract?
>
> A: No, ma'am.

(R. p. 814, lines 8–13) (emphasis added).

C. Nichols' argument that the Court erred to write a 30 day temporal limit on reimbursement of Trade Debt into the Parties' Agreement is without merit because Nichols failed to question the Trade Debt as was his right under the Due Diligence provision, and consummated the transaction.

If Nichols disagreed with the amount of the trade debt, he should not have consummated the transaction, as was his right under the Due Diligence Provision of the Purchase Agreement. (R. p. 113, ¶ 2). The Due Diligence Provision 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, and the nature of the services or goods provided, and the total amount owed.

(R. p. 112, ¶ 2(k)). Pursuant to this Due Diligence Provision, the Trade Debt was

delivered to Nichols, in the form of outstanding invoices and a general ledger, on or about February 14, 2013, and again at closing. (R. pp. 87, ¶ 31; p. 88, ¶ 39). At no time has Nichols or his counsel provided Divine, or Divine's counsel, with a list of the invoices that he deems "unreasonable." (R. p. 87, ¶ 35).

Moreover, it is disingenuous for Nichols to contest the amount of the trade debt when, for a year prior to closing the transaction, Nichols also retained the right to verify the propriety of the uses of the Restaurant income by review and inspection through the court-appointed Receiver. (R. p. 88, ¶ 39; pp. 96–97, ¶ 96). During the year prior to the transaction, the court-appointed Receiver received documentation related to the Restaurants' expenses, including the Trade Debt. Nichols, accordingly, had inquiry notice and actual notice of the amount of the outstanding Trade Debt. At closing, in Mr. Newby's office, Divine gave the outstanding Trade Debt documentation to Nichols, literally placing the invoices that represented the Trade Debt, in Mr. Newby's hands. (R. p. 85, ¶ 18). Nichols neither inquired as to the amount of the Trade Debt nor questioned any of the invoices presented. (R. p. 85, ¶ 22). Nichols' acceptance of the documentation and failure to question the invoices prior to closing is clearly bad faith on his part and calls into question the credibility of any testimony on his behalf regarding this issue.

III. THE CIRCUIT COURT ERRED WHEN IT ALLOWED NICHOLS TO RECEIVE AN OFFSET CREDIT FOR PARTIAL PAYMENT OF CERTAIN TRADE DEBT OWNED BY NICHOLS UNDER THE SETTLEMENT AGREEMENT WHICH WAS NOT INCLUDED IN DIVINE'S CLAIM FOR TRADE DEBT PAYMENTS SUBMITTED TO THE COURT, THEREBY IMPROPERLY REDUCING THE TOTAL AMOUNT NICHOLS WAS REQUIRED TO PAY FOR TRADE DEBT.

The lower 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	$1,014.92
Total	$9,022.43

(R. p. 853).

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 included in the trade debt claimed by Divine (at the hearing) , 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 already paid by Nichols who had agreed to pay all of the reasonable Trade Debt under the Settlement Agreements. Moreover, none of these items were addressed prior to closing as set forth on pages 25 and 26 of Argument II. C. above which is incorporated herein.

CONCLUSION

Based on the above, it is respectfully submitted, that this Court: (1) reverse the lower Court's ruling requiring Divine to pay GCWSD impact fees (totaling $53,760.00) on behalf of Nichols for an unestablished account and for fees currently unincurred; 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 by Divine as provided by the contract documents in the amount of $62,809.08.

September 26, 2014

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Respondents' 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

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Steven H. John, Circuit Court Judge

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

Nichols Holding, LLC and J. Wade Nichols .....Respondents-Appellants

vs.

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

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PROOF OF SERVICE

I certify that I have served the Respondents 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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