THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Kristi Lea Harrington, Circuit Judge

Case Tracking No. 2011201949

KRITI RIPLEY, LLC AND ASHLEY RIVER PROPERTIES II, LLC,

Appellants,

v.

EMERALD INVESTMENTS, LLC AND STUART LONGMAN,

Respondents.

PETITION FOR REHEARING

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On June 10, 2011, Circuit Judge Kristi Lea Harrington exercised her discretion and held that Appellant Kriti Ripley, LLC ("Kriti") is not entitled to involuntarily take Respondent Emerald Investments, LLC's ("Emerald") 70% financial interest in Ashley River Properties II, LLC ("ARP II") through a foreclosure or forced sale of that interest pursuant to the "charging order" provision of the South Carolina Limited Liability Company Act, S.C. CODE ANN. § 33-44-504(b). This Court reversed in an opinion filed on June 26, 2013. Emerald petitions this Court for a rehearing.

It was apparent at the oral argument conducted on May 1, 2013, that members of the Court are averse to Stuart Longman (Emerald's manager) because of negative findings made in a prior 2005 arbitration. Despite acknowledging that "[Mr.] Longman initiated [ARP II's] development project and worked long and hard on it, including rendering significant services" for the project, and even though Emerald contributed $2.5 million in capital for the project, the arbitration panel nevertheless punished Emerald for certain misconduct by divesting it of all management and voting rights in ARP II (Emerald still holds a 70% financial interest) and rendering a $706,225.00 monetary award against Emerald comprising indemnification, legal fees, and arbitrator fees. (R. pp. 1416-20). In 2005, Emerald was forced to relinquish to Kriti complete control over an extremely valuable development project on the Ashley River in Charleston with an "as is" value of $19.37 million. (R. p. 358 ¶ 5; pp. 364-485). Ever since that time, Emerald has been forced to watch from the sidelines as Kriti has steered this multi-million development project into financial ruin and insolvency.

This Court's opinion now punishes Emerald even more. It authorizes Kriti to take Emerald's remaining 70% financial interest in ARP II on the basis that the company—which Kriti exclusively controls—has not made any distributions to its members. If upheld, Kriti will completely divest Emerald of its $2.5 million capital contribution and capture its equity in ARP II.

Emerald respectfully submits that this Court's opinion unwisely jettisons or ignores its established precedents in the apparent zeal to further punish Mr. Longman for the same matters addressed in the 2005 arbitration. These precedents show that subject matter jurisdiction does not exist over this case and the wrong standard of review was applied on appeal. Many of the apparent findings in this Court's opinion lack support in the record or ignore contrary evidence, which should have impelled affirmance of the Circuit Judge if the proper standard of review had been followed. Emerald urges this Court to grant a rehearing in this matter for the reasons set forth herein.

I. SUBJECT MATTER JURISDICTION IS LACKING.

On October 17, 2008, Kriti commenced this action for an *ex parte* charging order lien against Emerald's distributional interest in ARP II pursuant to the provisions of S.C. CODE ANN. § 33-44-504. (R. pp. 235-36). On that same day, Circuit Court Roger Young granted an *ex parte* charging order lien against Emerald's interest and further ordered that a hearing be conducted "to afford [Emerald] an opportunity [after service of the *ex parte* order] to appear and respond to Plaintiff's application for a charging order and show cause why the Charging Order should not continue in full force and effect." (R. pp. 33-35). The hearing was eventually conducted before Circuit Judge Thomas Hughston, Jr. Thereafter, on February 6, 2009, Judge Hughston entered an Order continuing the charging order lien in effect as modified by his Order. (R. pp. 36-37).

Nothing in Kriti's application filed on October 17, 2008, sought permission to foreclose on any charging order lien granted by the Court. Nothing in Judge Hughston's Order authorized Kriti to foreclose on any charging order lien. Judge Hughston's Order disposed of all issues before him and reserved no issues for future adjudication. Kriti and ARP II did not move to alter or amend Judge

Hughston's Order pursuant to S.C. R. CIV. PRO. 59 or seek to vacate the Order pursuant to S.C. R. CIV. PRO. 60. Kriti and ARP II did not appeal the Order.

On February 1, 2011, nearly two years after Judge Hughston's Order had ended Kriti's claim, Kriti then decided to seek additional relief by foreclosing on the lien against Emerald's interest in ARP II. Instead of commencing a proper action in the Circuit Court asserting a cause of action for foreclosure of its charging order lien against Emerald's interest in ARP II pursuant to S.C. CODE ANN. § 33-44-504(b), Kriti simply filed a "motion" in the previously ended 2008 case attempting to obtain this relief. (R. pp. 1241-44). However, when Kriti filed its motion on February 1, 2011, the Circuit Court no longer had subject matter jurisdiction over the action.

Judge Hughston's Order entered on February 6, 2009, was a final judgment because it disposed of all issues in the case and reserved no further questions for future determination. *See Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942) (final judgment "dispose[s] of the cause, or a distinct branch thereof, as to all of the parties reserving no further questions or directions for future determination"); *Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990). Judge Hughston's Order did not retain jurisdiction over the case. Nothing in his Order authorized Kriti to foreclose on the charging order lien against Emerald's interest.

Until the adoption of the South Carolina Rules of Civil Procedure, the well-settled rule in South Carolina was that a trial judge possessed jurisdiction to modify his own judgment only until the expiration of the term of court at which the judgment was issued. *See Doran v. Doran,* 288 S.C. 477, 343 S.E.2d 618 (1986); *Center v. Center,* 269 S.C. 367, 372, 237 S.E.2d 491, 494 (1977). Except to correct clerical errors, a trial judge lost jurisdiction to modify an order at the end of the term during which it was issued. *Whittle v. Multiple Service, Inc.,* 283 S.C. 559, 324 S.E.2d 62

(1984). Furthermore, "[n]o authority is given to [the Circuit Judge] to hear and determine [a] new matter, even though such new matter may arise in the same case." *Shillito v. City of Spartanburg*, 215 S.C. 83, 54 S.E.2d 521, 523 (1949); *State v. Best,* 257 S.C. 361, 186 S.E.2d 272, 276 (1972); *see also Pitman v. Republic Leasing Co., Inc.*, 351 S.C. 429, 570 S.E.2d 187, 189 n.1 (Ct. App. 2002).

Since the adoption of the South Carolina Rules of Civil Procedure, our appellate courts have steadfastly held that when a party does not make a timely motion to alter or amend an Order pursuant to S.C. R. CIV. PRO. 59, the Circuit Judge lacks jurisdiction to *sua sponte* rescind, vacate, alter, or amend the Order more than ten days after it was issued. *Heins v. Heins*, 543 S.E.2d 224 (S.C. Ct. App. 2001); *Ness v. Eckerd Corp.*, 566 S.E.2d 193 (S.C. Ct. App. 2002); *Dion v. Ravenel, Eiserhardt Associates*, 316 S.C. 226, 230, 449 S.E.2d 251, 253-54 (Ct. App. 1994); *Pitman*, 570 S.E.2d at 189-90 (refusing to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment because "[s]uch an interpretation would run counter to our established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed"). Numerous cases have recognized the principle that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed. *Ness*, 566 S.E.2d at 195; *In re Beard*, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004); *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006).

As noted above, Kriti and ARP II did not file a motion to alter or amend Judge Hughston's Order pursuant to Rule 59 or seek relief from the Order pursuant to Rule 60. Moreover, Judge Hughston did not *sua sponte* alter or modify his Order so as to retain jurisdiction over the case or any future claim seeking to foreclose on the charging order lien. Thus, even if the Circuit Court had been inclined on February 1, 2011, to modify its prior Order entered on February 9, 2009, so as to allow

Kriti to seek foreclosure of its charging order lien, the Circuit Court lacked subject matter jurisdiction to do so. Because Kriti made no timely Rule 59 motion to alter or amend Judge Hughston's Order, that Order "matured" into a final judgment and the Circuit Court no longer had jurisdiction over the matter. *Leviner v. Sonoco Products Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000). Further, any orders issued thereafter in the Circuit Court were a nullity because the Circuit Court no longer had subject matter jurisdiction. *Id.*

Subject matter jurisdiction is a question of law for the court. *Bargesser v. Coleman Co.*, 230 S.C. 562, 96 S.E.2d 825 (1957). "The issue of subject matter jurisdiction may be raised at any time including when raised for the first time on appeal." *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002). "[I]ssues relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by [the appellate courts] on [their] own motion." *Bunkum v. Manor Properties*, 321 S.C. 95, 99-100, 467 S.E.2d 758, 761 (Ct. App. 1996); *see also Johnson v. State,* 319 S.C. 62, 459 S.E.2d 840 (1995); *Pitman*, 570 S.E.2d at 188 (appellate court must always take notice of the lack of subject matter jurisdiction). A court lacking subject matter jurisdiction has no authority to act regardless of the consent of the litigants. *Nix v. Mercury Motor Express, Inc.*, 270 S.C. 477, 242 S.E.2d 683 (1978).

"It is axiomatic that an order entered by a court without subject matter jurisdiction is utterly void." *Simmons v. Simmons*, 370 S.C. 109, 116, 634 S.E.2d 1, 4 (Ct. App. 2006); *see also Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005) (citing *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)). "Additionally, a court lacking subject-matter jurisdiction cannot enforce its own decrees." *Simmons*, 634 S.E.2d at 4 (citing *Hallums v. Bowens,* 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct.App.1993)).

Kriti did not initiate a proper action asserting a claim for foreclose of its charging order lien against Emerald's membership interest in ARP II. Instead, on February 1, 2011, Kriti improperly filed a motion in the previously ended 2008 action. At that time, the Circuit Court lacked subject matter jurisdiction over the case. Consequently, any orders issued thereafter in the Circuit Court were made without subject matter jurisdiction and are a nullity. Likewise, because the Circuit Court lacked subject matter jurisdiction over the action, Kriti's appeal is a nullity. Kriti's appeal should be dismissed for a lack of subject matter jurisdiction.

II. THE COURT APPLIED THE INCORRECT STANDARD OF REVIEW.

The Court's opinion eschews an abuse of discretion standard of review; instead, the Court holds it can find the facts in accordance with its own view of the evidence. *See* Opinion dated 6.26.13 p. 11. This holding is erroneous.

Although a charging order has its roots in equity and has equitable components, the right to this relief is entirely statutory. *The Cadle Co. v. Bourgeois*, 821 A.2d 1001, 1009 (N.H. 2003) ("[Charging orders] are purely statutory tools that judgment creditors use to reach partnership interests of indebted partners."); *Green v. Bellerive Condominiums Limited Partnership*, 763 A.2d 252, 256 (Md. Ct. Spec. App. 2000) (same); *Monroe v. Berger*, 297 B.R. 97, 99 n.1 (S.D. Ohio 2003) ("A charging order is a statutory procedure whereby an individual partner' creditor can satisfy its claim from the partner's interest in the partnership."). Kriti's application sought a charging order lien pursuant to S.C. CODE ANN. § 33-44-504(b). (R. pp. 235-36). The Orders granting the application state that the charging order lien was issued pursuant to § 33-44-504(b). (R. pp. 33-37). Kriti's subsequent motion seeking to foreclose on the charging order lien against Emerald's interest was brought pursuant to § 33-44-504(b). (R. pp. 1241-44). In short, Kriti sought a statutory remedy.

Under these circumstances, this Court has held that the action is one at law, not in equity. *See Harvey v. S.C. Dep't of Corrections,* 338 S.C. 500, 507, 527 S.E.2d 765, 769 (Ct.App.2000) (holding that where the right to relief is entirely statutory, the action is one at law); *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 127, 631 S.E.2d 252, 255 (2006) ("A proceeding for the enforcement of a statutory lien, such as a mechanic's lien, is legal in nature."); *Willard v. Finch*, 123 S.C. 56, 116 S.E. 96, 96 (1923) ("A proceeding for the enforcement of a statutory lien is essentially legal in its nature."); *see also Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 436, 673 S.E.2d 448, 458 (2009) (A claim for attorneys' fees pursuant to a statute "is an action at law resting within the sound discretion of the trial court and may not be disturbed on appeal absent an abuse of discretion."); *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 143, 641 S.E.2d 53, 57 (Ct. App. 2007) ("The determination of the appropriateness of an award of pre-judgment interest, on the other hand, is a question of law because the right to relief is entirely statutory."). Therefore, the Court's opinion incorrectly applies the standard of review for equity actions to this appeal.

Furthermore, because it is a drastic remedy,[1] foreclosure on a member's distributional interest in a limited liability company under the South Carolina LLC Act is discretionary—not mandatory—with the Court. The LLC Act states that the trial court "*may* order a foreclosure of" charging order lien. S.C. CODE ANN. § 33-44-504(b) (emphasis added). This Court has repeatedly held that the use of the word "may" in a statute "signifies permission and generally means that the action spoken of is

[1] Despite this Court's conclusion that "generally, foreclosure [of a charging order lien] is not a drastic remedy," *see* Opinion dated 6.26.13 p. 12, other courts applying charging order statutes similar to § 33-44-504(b) have held to the contrary. *Green*, 763 A.2d at 257 (noting that foreclosure of charging order lien is "drastic course of action"); *91st Street Joint Venture v. Goldstein*, 691 A.2d 272, 283 (Md. Ct. Spec. App. 1997) ("Ordinarily, the trial court should consider whether the judgment can be satisfied out of the debtor partner's profits prior to resort to the more drastic method of sale of the debtor partner's interest.").

optional or discretionary." *Edge v. State Farm Ins. Co.*, 345 S.C. 136, 139, 546 S.E.2d 647, 648-49 (2001); *State v. Wilson,* 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980); *see also Rice v. Multimedia, Inc.*, 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995) ("Thus, by using 'may', rather than 'shall', the legislature has provided that the penalty is discretionary with the judge."). "[T]he word "may" in [a] statute . . . is a permissive and not a mandatory term." *Edge*, 546 S.E.2d at 648-49.

This Court has also repeatedly adhered to an abuse of discretion standard of review when considering whether trial judges properly applied statutes stating they "may" order certain relief. *See, e.g.*, *Rice*, 456 S.E.2d at 384 (holding that trial judge did not abuse his discretion in refusing to award treble damages under the South Carolina Payment of Wages Act, which states that a prevailing employee "may" recover treble damages); *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) (applying abuse of discretion standard in reviewing trial judge's decision to award attorneys' fees under a statute providing that the court "may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs" under certain circumstances); *Heath v. Cnty. of Aiken*, 302 S.C. 178, 181, 394 S.E.2d 709, 710 (1990) (applying abuse of discretion standard in reviewing whether trial judge properly awarded attorneys' fees under S.C. CODE ANN. § 15-77-300, which states that "[i]n any civil action brought by the State . . . or any party who is contesting state action, unless the prevailing party is the State . . ., the Court may allow the prevailing party to recover reasonable attorney's fees to be taxed as Court costs against the appropriate agency . . . ."); *see also S. Carolina Dep't of Transp. v. Revels*, 399 S.C. 423, 427, 731 S.E.2d 897, 898-99 (Ct. App. 2012) (applying abuse of discretion standard of review to determine whether trial judge properly awarded attorneys' fees to a landowner under the South Carolina condemnation statute, which provides that a

landowner "who prevails in the trial of a condemnation action . . . may recover his reasonable litigation expenses" including attorneys' fees).

The Circuit Court may—but is not required—to order a judicial sale of the judgment debtor's interest in the company subject to the right of redemption prior to foreclosure. The Circuit Court has "broad discretion" to "determine whether or not to order a foreclosure and judicial sale of charged interests." *Nigri v. Lotz*, 453 S.E.2d 780, 783-84 (Ga. Ct. App. 1995); *Stewart v. Lanier Park Med. Office Bldg., Ltd.*, 578 S.E.2d 572, 574-75 (Ga. Ct. App. 2003) ("The trial court has broad discretion in deciding whether to order a foreclosure and sale of charged interests."); *cf. Stanley v. Reef Sec., Inc.*, 314 S.W.3d 659, 671 (Tex. Ct. App. 2010) ("The [charging order] statute does not mandate that a court appoint a receiver. Instead, it gives the trial court discretion to appoint a receiver when it deems it is appropriate and to not appoint a receiver when it deems it is not appropriate."). Other courts have utilized an "abuse of discretion" standard in reviewing trial court decisions involving the foreclosure of charged interests. *Stewart*, 578 S.E.2d at 574-75; *91st Street Joint Venture*, 691 A.2d at 282; *TCAP Corp. v. Gervin*, 320 S.W.3d 549, 551-52 (Tex. Ct. App. 2010).

Under the abuse of discretion standard, the appellate court "cannot substitute its judgment for that of the trial judge and will not disturb the trial court's discretion absent a clear showing of abuse of discretion." *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535, 536 (Ct. App. 1987); *Ammons v. Hood*, 288 S.C. 278, 341 S.E.2d 816, 818 (Ct. App. 1986); *see also Simon v. Flowers*, 231 S.C. 545, 550, 99 S.E.2d 391, 393 (1957) ("Discretionary power under [the statute] is vested in the trial, not the appellate, court. In an appeal from such an order of the circuit court it is not our function, nor is it within our power, to substitute our judgment for that of the circuit judge simply because we might have reached a different conclusion had we been in his place."). In the present case, this Court

expressly stated that it was authorized to "find facts in accordance with its own view of the preponderance of the evidence." *See* Opinion dated 6.26.13 p. 11. The Court's opinion applies the incorrect standard of review and constitutes an error of law. The Court's opinion should be corrected to apply the proper standard of review.

III. THE RECORD DOES NOT SUPPORT THE COURT'S GRATUITOUS AND OVERREACHING STATEMENTS THAT EMERALD "ENGAGED IN A PATTERN OF ABUSIVE LITIGATION" AND "ATTEMPTED TO GAME THE SYSTEM".

The Court's opinion criticizes Emerald (and apparently its legal counsel) by including gratuitous and overreaching assertions that "Emerald and Longman . . . have engaged in a pattern of abusive litigation" and "Emerald and Longman have attempted to game the system in order to avoid any consequences for their wrongful acts while at the same time trying to make a profit at Kriti and Ashley River II's expense." *See* Opinion dated 6.26.13 pp. 2 & 14. The opinion does not cite any evidence in the record to support these statements, thus their purported basis is unknown. Emerald respectfully submits that the statements have no factual basis and should be removed from the Court's opinion.

The Court's opinion discusses the fact that the New York arbitrators issued decisions in 2005 and 2010 that were partially unfavorable to Emerald's position; however, neither of those arbitration panels found that Emerald had engaged in "abusive litigation" or had "attempted to game the system." The simple fact that the arbitrators ruled against Emerald on certain issues does not mean that Emerald engaged in abusive litigation. *Bacon v. Volvo Serv. Ctr., Inc.*, 654 S.E.2d 225, 227 (Ga. Ct. App. 2007) (fact that party was ultimately unsuccessful in the litigation does not automatically mean it engaged in abusive litigation); *E.E.O.C. v. Maricopa Cnty.*, 339 F. App'x 688, 689 (9th Cir.

2009) (fact arguments were ultimately unsuccessful or even weak is not tantamount to a frivolous case). Indeed, both of the arbitration panels included findings in their awards that were favorable to Emerald and critical of Kriti.

In the 2005 arbitration, which Kriti—not Emerald—initiated, the New York arbitration panel found that Kriti had engaged in improper conduct towards Emerald. The panel found that Emerald had just cause to challenge a capital call which Kriti had made in 2005 in an improper attempt to "squeeze down" or dilute Emerald's 70% interest in ARP II. The panel said:

> [W]e believe that the Emerald Member had probable cause for such a challenge thereby obviating forfeiture pursuant to applicable South Carolina law. The portion of the claim seeking the forfeiture of the Respondent's Membership Shares is denied based on our finding that the Emerald Member had probable cause to challenge the capital call thereby obviating forfeiture pursuant to applicable South Carolina law and the inequity of such forfeiture. Probable cause existed because of [the] question about the proprietary (sic) of Kriti's capital call because (a) Kriti demanded that Emerald immediately fund a full 70% of a $2 million capital call even though it knew that Emerald and/or Longman did not have the funds available to meet such a call; (b) Kriti demanded such a large capital call without an adequate explanation of the need for such an amount; (c) Kriti demanded that Emerald and/or Longman make a full deposit of 70% of the $2 million capital call, even though its own deposits later proved that this was not necessary; and (d) funding might have been available from the lender, Marshall Bank, thereby obviating the need for all or part of the capital call. Kriti's insistence upon the capital call therefore provided probable cause for Emerald's challenge of Kritis's assertion of the above remedies.

(R. p. 1417 § B(4)). The panel also expressly "question[ed] Kriti's conduct in encouraging some of [the] third [party vendees] to assert claims against ARP II and not accept partial reimbursement of their deposits." (R. p. 1418 § F). The panel further noted that "[Mr.] Longman initiated the development project and worked long and hard on it, including rendering significant services even

after Kriti's" notice of default. (R. p. 1418 § B(4)). Nothing in the panel's 2005 award intimates that Emerald's claims in the arbitration proceedings were abusive or pursued in bad faith.[2]

Following the 2005 arbitration, Kriti continued to issue K-1 forms to Emerald and filed tax returns for ARP II asserting that Emerald's shares in the company were unilaterally diluted from 70% to 21% because of the same capital call criticized by the arbitrators. (R. pp. 1341-42 ¶ 10; pp. 350-55, 1428, 1688-89). Because of Kriti's repeated refusals to correct these filings, Emerald was forced to initiate another arbitration proceeding in New York in 2010 seeking a declaration that Emerald is still a 70% owner of ARP II. (R. pp. 636-51). Prior to commencing that arbitration, Mr. Longman made several demands to Kriti to correct ARP II's past tax filings which had asserted that Emerald's interest was diluted from 70% to 21%. (R. pp. 1341-42 ¶ 10; pp. 1428, 1688-89). Kriti refused these demands. Thereafter, on October 28, 2010, the New York arbitrators issued their award confirming that Emerald still owns 70% of ARP II, finding that Kriti's 2005 capital call was defective and did not dilute Emerald's interest, and ordering Kriti to pay $59,527.74 to Emerald. (R. pp. 755-62).[3] The panel specifically found that the capital call "imposed conditions on the application of Emerald's capital contribution which were contrary to the terms of the [ARP II] Operating Agreement." (R. p. 756). The award also expressly noted that "dissolution may be in the best interests of all parties" and

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[2] This Court's opinion notes that on February 15, 2008, the New York state court eventually entered an Order confirming the 2005 arbitration award over Emerald's opposition. (R. pp. 92-97). However, nothing in the New York Court's confirmation order finds or suggests that Emerald's opposition was abusive or pursued in bad faith. *Id.*

[3] Despite the 2010 award, Kriti has continued to refuse to file corrected K-1 forms and tax returns for ARP II for past tax years showing that Emerald owned 70% of ARP II.

that "Kriti and Emerald cannot work together in any constructive manner." (R. pp. 757-58). Nothing in the panel's 2010 award intimates that Emerald's claims were abusive or pursued in bad faith.[4]

This Court's opinion further discusses the separate litigation filed in the New York state court in 2006 in which Kriti sought a ruling that it had bought Emerald's interest in ARP II pursuant to the option granted in the 2005 arbitration award. According to this Court's opinion, Kriti "attempted to exercise the option to purchase Emerald's interest but was rebuffed, litigation ensued in New York, and the attempt to purchase ultimately failed." *See* Opinion dated 6.26.13 p. 4 n.4. In fact, Kriti withdrew its claim that it had exercised the option to buy Emerald's interest and consented to an order granting summary judgment in favor of Emerald on that issue. *See* Order of Justice Gammerman filed 12.17.09 (attached hereto as "Exhibit A"). The 2010 arbitration award noted this order. (R. p. 755) ("Emerald sought a judicial determination, also in the Supreme Court of the State of New York, that Kriti's right to acquire Emerald's interest in the Company had expired, *which motion was granted in 2009*.") (emphasis added). In short, Emerald prevailed in the 2006 New York litigation, which should certainly dispel any notion that it acted in an abusive manner.

Finally, this Court's opinion discusses Circuit Judge Deadra Jefferson's Order issued on April 26, 2013, in the separate lawsuit entitled *Emerald Investments, LLC v. Ashley River Properties II, LLC, et al.*, Case No. 09-CP-10-553, and states that Judge Jefferson "found that Kriti had not engaged in any misconduct." *See* Opinion dated 6.26.13 p. 14. Emerald timely filed a motion to alter or amend Judge Jefferson's Order in that case, which motion has not been resolved. *See* Motion filed 5.9.13 (attached hereto as "Exhibit B). Thus the Order is not a final judgment. *Bone v. U.S. Food*

[4] By stipulation of the parties, the New York state court later entered an Order on December 29, 2011, confirming the 2010 arbitration award. (R. pp. 2021-2047). This undoubtedly does not indicate abusive litigation by Emerald.

Serv., 399 S.C. 566, 733 S.E.2d 200, 205 (2012) ("The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so. Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal."). Furthermore, even if Emerald's motion to alter or amend is denied, Judge Jefferson's Order makes no finding that Emerald's litigation was abusive. (R. pp. 2469-2482). Her Order notes in part: "While it is clear that these parties have a heightened degree of acrimony toward one another and a lack of trust, the Court has heard no evidence forming a sufficient basis for dissolution or warranting the Court to order such relief." (R. p. 2479). It nowhere suggests that Emerald's lawsuit was abusive or improper.[5]

Judge Jefferson's Order was entered almost two years *after* Judge Harrington issued her Order in this case, thus Judge Harrington obviously did not consider Judge Jefferson's Order when making the rulings in this case. This Court's consideration of Judge Jefferson's Order as a basis for overturning Judge Harrington's Order disregards axioms of appellate review. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000) ("An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. . . . Imposing this preservation

[5] Judge Jefferson's Order cannot be the "law of the case" in this matter because it was issued in a different lawsuit. *Ross v. Med. Univ. of S. Carolina*, 328 S.C. 51, 492 S.E.2d 62, 68 (1997) ("The doctrine of the law of the case prohibits issues which have been decided in a prior appeal from being relitigated in the trial court *in the same case*." (emphasis added)).

requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments."); *Marathon Fin. Co. v. HHC Liquidation Corp.*, 325 S.C. 589, 483 S.E.2d 757, 762 (Ct. App. 1997) ("Because the trial court did not address this argument, we have no authority to decide it on appeal.").

In sum, there is no factual basis for this Court's gratuitous and overreaching statements that "Emerald and Longman . . . have engaged in a pattern of abusive litigation" or that "Emerald and Longman have attempted to game the system in order to avoid any consequences for their wrongful acts while at the same time trying to make a profit at Kriti and Ashley River II's expense." *See* Opinion dated 6.26.13 pp. 2 & 14. These statements should be eliminated from the Court's opinion.

IV. THE COURT ERRED BY REVERSING THE CIRCUIT COURT'S FINDING THAT FORECLOSURE OF EMERALD'S DISTRIBUTIONAL INTEREST IN ARP II IS UNNECESSARY.

Foreclosure on a member's distributional interest is a drastic remedy because it means that the member permanently loses all of the economic benefit of its interest. Kriti argued to Judge Harrington that foreclosure of Emerald's distributional interest was *mandatory* because ARP II has not made any distributions pursuant to the charging order to satisfy Kriti's money judgment. However, Kriti has no absolute right to foreclose upon Emerald's interest in ARP II. See S.C. CODE ANN. § 33-44-504(b). Judge Harrington properly exercised her discretion and ruled that foreclosure of the charging order lien is not warranted under the facts of this case. The evidence in the record amply supports her decision. No abuse of discretion was shown.

There is no third-party judgment creditor in this case. Kriti seeks to execute on its money judgment against Emerald by charging Emerald's right to distributions from ARP II, an entity which Kriti wholly controls. Since 2005, Kriti has unilaterally controlled Kriti's business operations,

including when and in what manner ARP II makes distributions. Kriti controls whether the monies paid out by ARP II are distributions, management fees, wages, salaries, or bonuses. Unlike other judgment creditors, Kriti has the ability to make distributions from ARP II whenever and in what amount it chooses. Kriti's judgment will be paid whenever Kriti decides to cause ARP II to make distributions to its members. In those cases where courts have held that a forced sale of the judgment debtor's interest could be proper, the courts granted such relief *only when* they were convinced that the judgment creditor's claim could not be satisfied in a reasonably expedient manner other than by a forced sale—*i.e.*, it was necessary to sell the debtor's interest for the creditor to protect its judgment. *See FDIC v. Birchwood Builders*, 573 A.2d 182, 182 (N.J. Super. Ct. 1990); *Nigri*, 453 S.E.2d at 783; *91st St. Joint Venture*, 691 A.2d at 282-83.

Judge Harrington held that foreclosure was unnecessary because Kriti could have satisfied the judgment without forcing a sale of Emerald's interest. Kriti had multiple opportunities to sell ARP II's assets at a profit and make distributions to its members. (R. pp. 1345-49 ¶¶ 19-28). Kriti failed to take advantage of those opportunities. This Court held on appeal that "Kriti and Ashley River II bear no obligation to forego what they believe to be a potentially profitable business venture in order to aid Emerald and Longman in paying their debt" through the "sale of the property and resulting distributions" to ARP II's members. *See* Opinion dated 6.26.13 p. 14. Apparently this Court's view is that Kriti has the unfettered right to refuse to sell ARP II's assets for a profit and, instead, unilaterally pursue a strategy which it concedes has rendered ARP II financially insolvent and then simultaneously use ARP II's insolvency as grounds for taking Emerald's interest in the company.

The Court's opinion ignores provisions in the ARP II Operating Agreement showing that a sale of the company's assets to satisfy a judgment creditor's judgment against a member of ARP II is

preferred to a foreclosure sale of the member's interest under the charging order statute. (R. p. 1777; pp. 1357-1405). Paragraph 3.5 of the ARP II Operating Agreement states:

> 3.5 Redemption of Member's Financial Rights Subjected to Charging Order.
>
> In the event a Member's Financial Rights are subjected to a charging order under the Act, the Company may redeem the Member's Financial Rights so charged, with Company Property, at any time prior to foreclosure of said Financial Rights in accordance with the Act. Nothing in this Section shall be construed as affecting or limiting the rights of the judgment debtor and the other Members to redeem any Financial Rights subjected to a charging order with their own property in accordance with the Act.

(R. p. 1364 ¶ 3.5). The Operating Agreement contemplates that ARP II can sell its property to prevent a foreclosure upon a member's interest in the company under a charging order. This provision is nowhere discussed in this Court's opinion. The Court's opinion also ignores the fact that Kriti owes a fiduciary duty to Emerald to "discharge [its] duties and exercise any of [its] rights consistently with the obligation of good faith and fair dealing which [it] owes to" Emerald. (R. p. 1377 ¶ 6.3). Kriti violates this duty by placing its own economic interests above those of Emerald. *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 538 S.E.2d 15, 29 (Ct. App. 2000).

Kriti refused to sell ARP II's assets for a profit even while it urges this Court for permission to sell off Emerald's interest in the company based on the bare assertion that "[t]here have not been any distributions from ARP II to its members and it does not appear that there will be any distributions by ARP II to its members in the foreseeable future." (R. p. 1246 ¶ 8). This Court's opinion states that "[t]he *only* evidence presented as to [ARP II's] financial health were [its unaudited] financial statements for 2008, 2009, and 2010." *See* Opinion dated 6.26.13 pp. 13-14. However, the Court disregarded evidence showing that Kriti is in exclusive custody of ARP II's financial and business records and further showing that Kriti has repeatedly refused to produce ARP

II's records and information to Emerald despite numerous requests. Kriti refuses to produce ARP II's financial records, which has allowed it to conceal ARP II's true financial condition. (R. pp. 1349-55 ¶¶ 29-46; pp. 1658-92). Kriti has presented the "only evidence" of ARP II's financial condition because it improperly thwarted Emerald's attempts to obtain a true picture of ARP II's financial situation. This Court has effectively rewarded Kriti's refusal to produce ARP II's financial records despite Kriti's contractual and statutory duties to provide this information to Emerald.[6]

Remarkably, this Court states that "throughout the events underlying this case, Kriti has repeatedly been found to have acted appropriately." *See* Opinion dated 6.26.13 p. 14. The Court apparently ignores the contradictory findings in the 2005 and 2010 arbitrations discussed above and the evidence showing that Kriti significantly undervalued ARP II's assets by $3.25 million to bolster its argument that the *only* way to satisfy its money judgment is to sell off Emerald's interest, Kriti's efforts to unilaterally dilute Emerald's membership interest in ARP II from 70% to 21% by making a bogus capital call and filing false financial statements and tax documents, Kriti's numerous failures to sell ARP II's property and generate distributions that could be used to satisfy Kriti's judgment, and Kriti's repeated refusals to provide Emerald with ARP II's financial information despite numerous requests for same.

Furthermore, even though the Court's opinion acknowledges that the limited financial data provided by Kriti shows that ARP II's financial condition has deteriorated (and continues to deteriorate) since Kriti took over control of the company from Emerald, the Court nevertheless turns

[6] As a member of ARP II, Emerald has a statutory right to access, inspect, download, and copy ARP II's company records pursuant to the provisions of the LLC Act. *See* S.C. CODE ANN. § 33-44-408. Further, under Section 12.1 of the ARP II Operating Agreement, Emerald has a right to access, inspect, download, and copy ARP-II's books and records and has a right to be kept informed of ARP-II's business and affairs to the extent reasonably required for the proper

a blind eye to the fact that Kriti has had exclusive management of ARP II since 2005. Kriti's own mismanagement of ARP II caused its insolvency and the lack of distributions to its members. (R. pp. 1345-49). None of the cases cited in Kriti's brief hold that a managing member of a LLC should be allowed to involuntarily sell off the non-managing member's interest in the company because the managing member's own actions have rendered the company financially insolvent.

CONCLUSION

The Court's opinion erroneously disregards well-established precedents in reversing the Circuit Court's Order. The Court's opinion creates bad law, will cause uncertain consequences for future cases, and will leave the state of the law in confusion. Respondent respectfully requests this Court to grant a rehearing or, in the alternative, to issue a revised opinion affirming the Circuit Court's Order denying the Appellant's Motion to Foreclose Charging Order Lien.

Respectfully submitted,

ROSEN, ROSEN & HAGOOD, LLC

By: _____

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July 9, 2013.

ATTORNEYS FOR RESPONDENTS

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exercise of its rights. (R. pp. 1393-94 ¶ 12.1).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EMERALD INVESTMENTS, LLC

PLAINTIFF,

INDEX NO.111957/2006

-against-

ORDER

KRITI RIPLEY, LLC

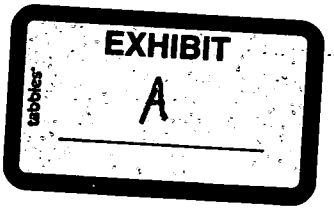
DEFENDANT.

WHEREAS, Plaintiff Emerald Investments, LLC filed a Summons and Complaint in the Supreme Court of the State of New York, County of New York, on October 27, 2006, commencing the above-captioned action against Defendant Kriti Ripley, LLC;

WHEREAS, Defendants filed a First Amended Answer and Counterclaim on April 9, 2008, which, among other things, asserted a counterclaim against Plaintiff;

WHEREAS, the claims and counterclaims in this action relate to whether Defendant is entitled to purchase plaintiff's interest in Ashley River Properties II, LLC ("ARP-II") pursuant to a certain Award of the Arbitrators (the "Award") in *Kriti Ripley, LLC & Ashley River Properties II, LLC and Emerald Investments, LLC and Stuart Longman* (American Arbitration Association Case No. 13 115 Y 00698 05), which Award was confirmed by this Court, by Decision and Order dated February 15, 2008, in a special proceeding entitled *Kriti Ripley LLC and Ashley River Properties II v. Emerald Investments, LLC and Stuart Longman* (Index No. 650196/2006).

WHEREAS, Plaintiff moved on August 29, 2008, for summary judgment pursuant to CPLR 3212 for an order granting Plaintiff its requested declaratory relief and dismissing Defendant's counterclai m;



WHEREAS, Defendant cross-moved on September 29, 2008 for an order pursuant to CPLR 3212 granting summary judgment against Plaintiff;

WHEREAS, by letter dated May 28, 2009, Defendant informed the Court that it is withdrawing its counterclaim and pending motion for summary judgment, and did not oppose entry of an order declaring that the right Defendant had pursuant to the Award to purchase Plaintiff's Membership Shares in ARP-II has expired and is of no further force or effect;

WHEREAS, Plaintiff has agreed to withdraw, without prejudice, its claims for relief declaring that (i) Defendant's rights under §13.02 of the parties' Operating Agreement have irrevocably elapsed and (ii) Plaintiff has and continues to hold 70% of the Membership Shares of ARP-II;

NOW, on application of Defendant Kriti Ripley, LLC, by its attorneys, Rand Rosenzweig Radley & Gordon, it is HEREBY ORDERED that:

1. Defendant's counterclaim and cross-motion for summary judgment are dismissed on consent, with prejudice and without costs; and

2. So much of Plaintiff's complaint and motion for summary judgment is granted as seeks an Order declaring that the right Defendant had pursuant to the Award to purchase Plaintiff's Membership Shares in ARP-II has expired and is of no further force or effect, and otherwise dismissed without prejudice and without costs.

The clerk is hereby directed to enter judgment accordingly.

W 6/17/09

IRA GAMMERMAN, J.H.O.

IRA GAMMERMAN

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON EMERALD INVESTMENTS, LLC Plaintiff, vs. ASHLEY RIVER PROPERTIES II, LLC; KRITI RIPLEY, LLC, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO.: 2009-CP-10-553 **NOTICE & MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e), SCRCP**

FILED
2013 MAY -9 PM 2:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLEASE TAKE NOTICE that Plaintiff, Emerald Investments, LLC ("Emerald"), pursuant to Rule 59(e), SCRCP, will move before the Honorable Deadra L. Jefferson in the Court of Common Pleas at the Charleston County Courthouse, Charleston, South Carolina on the 10th day after or at such time as counsel may be heard, for an order amending and altering the Court's Order entered April 26, 2013 in this matter by Judge Jefferson. Emerald received written notice of the aforementioned Order on April 29, 2013.

The grounds for this motion are that (a) the Order erred in finding that the Third Arbitration Award, by itself, resolves Emerald's judicial dissolution action even though the arbitrators did not (and could not) consider the grounds for judicial dissolution found in the LLC Act; (b) the Order erred by treating Kriti's concealment of the marina expansion permits as an "everyday managerial function" and finding that Kriti had no duties to convey this information toEmerald, where, in fact, such duties exist under the Operating Agreement, the LLC Act, and the common law of this state according to Chief Justice Toal; and, finally, (c) the Order erred by finding that a sale of the ARP-II property

EXHIBIT
B

was the only available remedy should dissolution had been ordered because the Court has broad and flexible powers to shape a fair resolution based on the unique circumstances of this case.

This motion is being supported by a memorandum being filed contemporaneously with this notice & motion.

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

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5 9, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO.: 2009-CP-10-553
	)	
Emerald Investments, LLC,	)	
	)	
Plaintiff,	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
Ashley River Properties II, LLC and Kriti Ripley, LLC	)	
	)	
Defendants.	)	

I hereby certify that a true and correct copy of the **Notice & Motion to Alter or Amend Judgment Under Rule 59(e), SCRCP** has been served upon the following by mailing a copy properly addressed and with sufficient postage affixed thereto on this 9TH day of May, 2013.

FILED
2013 MAY -9 PM 2:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

William C. Cleveland, Esquire
Womble Carlyle Sandridge &Rice, PLLC
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Charleston, SC 29401

Counsel for Defendant Ashley River Properties II, LLC and Kriti Ripley, LLC

Elizabeth Plasters, Paralegal

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Kristi Lea Harrington, Circuit Judge

Case Tracking No. 2011201949

KRITI RIPLEY, LLC AND ASHLEY RIVER PROPERTIES II, LLC,

Appellants,

v.

EMERALD INVESTMENTS, LLC AND STUART LONGMAN,

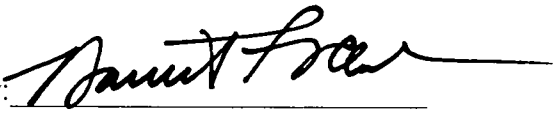
Respondents.

PROOF OF SERVICE

I certify that I have served the Respondents' Petition for Rehearing on the Appellants by causing a copy of same to be deposited in the United States Mail, first class postage prepaid, on July 9, 2013, addressed to their attorneys of record as follows:

William C. Cleveland, Esquire
Womble Carlyle Sandridge & Rice, LLP
Post Office Box 999
Charleston, South Carolina 29402

ROSEN, ROSEN & HAGOOD, LLC

By: 

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July 9, 2013.

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