

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No.: 2012-CP-26-5610

Appellate Case No. 2013-000650

Shaul Levy and Meir LevyAppellants,

vs.

Carolinian,LLC.....Respondent.

APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in ruling that the April 2, 2012, foreclosure sale transferred Bhupendra Patel's interest in the Carolinian, LLC, to the Levys?
2. Did the circuit court err in ruling that the Carolinian, LLC, may exercise its "Right to Buy" under Section 11.2 of the Carolinian, LLC's Operating Agreement against the Levys as transferees of Patel's distributional interest?
3. Did the circuit court err in ruling that the Levys' rights, as nonmember transferees, would exceed the rights of the transferor, Patel, if the Levys were not subject to all sections of the Operating Agreement?
4. Did the circuit court err in ruling that Carolinian, LLC, may compel the purchase and sale of the Levys' distributional interest in Carolinian, LLC, without voiding the foreclosure sale of Bhupendra Patel's distributional interest in Carolinian, LLC, to the Levys?

STATEMENT OF THE CASE

This appeal arises from a dispute between Appellants Shaul Levy and Meir Levy ("the Levys") and Respondent Carolinian, LLC, ("Carolinian") related to Carolinian's attempt to compel the purchase and sale of the Levys' distributional interest in Carolinian that they obtained from Bhupendra Patel ("Patel") following a judicial foreclosure sale. The Appellants filed their Summons and Verified Complaint on July 23, 2012. [R. pp. 20-52.] The Complaint alleged the following causes of action: (1) declaratory judgment, and (2) a temporary restraining order and temporary and permanent injunction. [R. pp. 21-28.]

Appellants' counsel signed a Motion for Temporary Restraining Order and Temporary Injunction and Rule to Show Cause on July 23, 2012. [R. pp. 53-55.] The Honorable Benjamin H. Culbertson signed an Order granting Appellants' Motion for a Temporary Restraining Order and Rule to Show Cause on July 27, 2012. [R. pp. 1-2.] The Honorable Larry B. Hyman signed an order on August 16, 2012, granting Appellants' motion for a temporary restraining order and injunction during the pendency of the case. [R. pp. 3-4.]

Carolinian filed a Summons, Answer and Counterclaim on August 17, 2012. [R. pp. 56-62.] The Answer and Counterclaim denied the Levys' claims and requested a declaratory judgment as to its rights. [R. pp. 57-62.] The Levys filed a Reply to Carolinian's Answer and Counterclaim denying Carolinian's claims on August 31, 2012. [R. pp. 63-65.]

The case was called for a non-jury trial on January 8, 2013, before the Honorable Steven H. John based on stipulated facts. [R. pp. 174-179.] Both parties submitted trial briefs in support of their respective positions. [R. pp. 147-173.] After considering arguments from counsel for both the Levys and Carolinian, Judge John took the matter under advisement. On January 23, 2013, Judge John issued an Order denying the Levys' claims and granting a declaratory judgment in Carolinian's favor. [R. pp. 5-15.]

On February 4, 2013, the Levys filed a Rule 59(e) motion. [R. pp. 66-78.] The motion essentially asked the judge to reconsider and reverse his previous decision. [R. pp. 66-78.] The Levys also filed a Rule 62(b) Motion. [R. pp. 79-81.] The motion requested that the circuit court stay proceedings to enforce the judgment granted in the Trial Order. [R. pp. 79-81.] On February 15, 2013, Carolinian filed a Memorandum in

Opposition to the Levys' Motion to Reconsider and Motion for Stay. [R. pp. 82-92.] The judge denied these motions by an order filed on February 22, 2013. [R. p. 16.] The Levys then commenced this appeal. [R. pp. 96-110].

On March 22, 2013, the Levys filed a Rule 62(c) motion. [R. pp. 93-95.] On April 5, 2013, the Honorable Benjamin H. Culbertson filed a consent order granting that motion and restoring the Honorable Larry B. Hyman's Order Granting TRO and Injunction during the pendency of the appeal. [R. pp. 17-19.]

STATEMENT OF FACTS

At the trial of this case, the parties submitted a Stipulation of Facts to the circuit court. Those stipulated facts and exhibits are set forth as follows:

1. Carolinian is the owner of certain real property located in Horry County, South Carolina. This real property consists of the Best Western Carolinian Resort, a 10-story high-rise oceanfront building that contains a total of 102 hotel units and certain commercial units located within the adjacent 129-unit, 20-story condominium tower. [R. p. 174].
2. Carolinian also holds the rental management rights over 112 managed condominium units. [R. p. 174.]
3. Carolinian is a closely-held company consisting of nine members. [R. pp. 174, 180.]
4. Patel is one of nine members of Carolinian. [R. p. 174.]
5. Shaul Levy and Meir Levy are residents of Florida and New York, respectively, who conduct business in Horry County, South Carolina and have extensive experience in real estate investment. [R. p. 174.]

6. The rights of the members of Carolinian are established in the Operating Agreement for Carolinian last revised on January 1, 2003 (“Operating Agreement”). [R. pp. 175, 181-214.]

7. Patel is the owner of a 23.35% Membership Share in Carolinian, which is defined in Section 2.1(r) of the Operating Agreement as “all of the rights of a member under this Agreement and under the Act, but not limited to a member’s Financial Rights and Voting Rights.” [R. pp. 175, 186.]

8. On February 10, 2010, the Levys caused a Confession of Judgment (the “Confession”) in the amount of Two Million Five Hundred Thousand and no/100 (\$2,500,000.00) Dollars to be filed in the Horry County public index against Bhupendra Patel, Arkadiusz Grabara, and Harry Pavilack. [R. pp. 175, 215-216].

9. As a result of the Levys’ collection efforts on the Confession, by Order dated August 12, 2011, in the case bearing Civil Action Number: 2010-CP-26-1161, the Horry County Master in Equity imposed charging liens against Patel’s distributional interests in four limited liability companies, including Carolinian (collectively the “Patel Distributional Interests”). [R. pp. 175, 217-220.]

10. Counsel for the Levys sent a certified letter dated August 30, 2011, to the Registered Agent for Carolinian giving it notice of the Order of the Horry County Master in Equity dated August 12, 2011, creating the charging lien against Patel’s distributional interest in Carolinian. [R. pp. 175, 217-220.]

11. The Levys filed a Petition to foreclose the aforementioned charging liens of Patel’s Distributional Interests on September 26, 2011 with the Horry County Master in Equity. [R. pp. 176, 222-223.]

12. On February 9, 2012, a hearing was held on the Levys' Petition to foreclose their charging liens. [R. p. 176.]

13. Prior to the hearing, Lloyd Daniel, on behalf of Carolinian, and Meir Levy on behalf of the Levys, together with their counsel, discussed the Levys' action against Patel. Lloyd Daniel expressed interest in the Carolinian acquiring the Levys' interest in Carolinian, and the parties agreed to discuss a potential business deal without counsel present. The parties did not reach an agreement. [R. p. 176.]

14. By Order dated March 14, 2012, the Horry County Master in Equity ordered the foreclosure and sale of Patel's Distributional Interests at public auction, with the proceeds thereof being applied against the amounts due the Levys on the Confession. [R. pp. 176, 224-227.]

15. Prior to the foreclosure sale, the Levys, by and through their counsel, were provided a copy of the Operating Agreement for Carolinian by counsel for Patel and/or counsel for Carolinian, and financial information of Carolinian, including tax returns of 2007-2011, balance sheets and income statements for 2008-2011, and an appraisal of April 4, 2011 from counsel for Carolinian. [R. p. 176.]

16. Each of Patel's Distributional Interests were sold separately at the public auction held April 2, 2012, with the Levys being the high bidder on each of the four Patel Distributional Interests, including Patel's distributional interests in Carolinian, which was purchased at the winning bid of \$215,000. [R. p. 177].

17. Carolinian's legal counsel attended the public auction and bid \$190,000 on behalf of Carolinian and/or Southwestern Equities, LLC, a member of Carolinian, for Patel's distributional interest in the company. [R. p. 177.]

18. Neither Patel nor the Levys requested or were given permission by Carolinian or its members to transfer Patel's distributional interest to the Levys prior to the foreclosure hearing or subsequent sale. [R. p. 177.]

19. By Order dated April 10, 2012, the Horry County Master in Equity confirmed the sale of Patel's Distributional Interests to the Levys. [R. pp. 177, 228-231.]

20. Pursuant to the Order Confirming Sale, the proceeds of the \$215,000 high bid for Patel's distributional interest in Carolinian at the foreclosure sale were applied towards the satisfaction of the Levys' Judgment. [R. p. 177.]

21. At no time after receiving notice of the charging lien and prior to the foreclosure sale did Carolinian redeem Patel's distributional interest per the terms of the Operating Agreement. At no time after the foreclosure sale, but prior to being served with the Order Confirming Sale, did Carolinian redeem Patel's distributional interest pursuant to the terms of the Operating Agreement. [R. p. 177].

22. By letter dated April 16, 2012, a copy of the Order Confirming Sale was served on Carolinian through its registered agent, Lloyd Daniel, requesting "that any and all distributions to be made by the Company be properly allocated and distributed to my clients." [R. pp. 177-178, 232].

23. By letter dated June 11, 2012, counsel for Carolinian responded to the letter dated April 16, 2012, and asserted that Carolinian was exercising its right to purchase the Levys' Distributional Interest in Carolinian pursuant to its Operating Agreement. The letter set forth Carolinian's calculation of the purchase price pursuant to the terms of the Operating Agreement and an offer to purchase the distributional interest for \$100,000. [R. pp. 178, 233-234.]

24. By letter dated June 18, 2012, through counsel, the Levys denied that Carolinian had the right to purchase the distributional interest from the Levys, stating “[t]he Levys’ are not subject to any of the terms of the Operating Agreement.” [R. pp. 178, 235-236.]

25. By letter dated June 27, 2012, counsel for Carolinian asserted that the Levys were subject to the terms of the Carolinian’s Operating Agreement and that the company was obtaining an appraisal and purchasing the Patel Distributional Interest held by the Levys pursuant to the terms of the Operating Agreement. [R. pp. 178, 237-238.]

26. On July 23, 2012, the Levys commenced this action. [R. p. 178.]

27. By letter dated September 6, 2012, Carolinian, through counsel, served a letter upon Levys’ counsel enclosing an appraisal of the distributional interest in Carolinian and assigning a value thereto of \$51,000.00. [R. pp. 178-179, 239-347.]

STANDARD OF REVIEW

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.Ed.2d 716, 718-19 (2000). In such situations, the appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and the Court’s sense of justice. *Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005). Since this case involves a novel legal question, the Court essentially has *de novo* review of the lower court’s decision.

ARGUMENT

I.

The circuit court erred in ruling that the April 2, 2012, foreclosure sale transferred Bhupendra Patel's interest in the Carolinian, LLC to the Levys.

In the Trial Order, the circuit court judge ruled that the April 2, 2012, foreclosure sale transferred Patel's interest in the Carolinian to the Levys. [R. p. 11.] The Operating Agreement defines a "Membership Share" to be "all of the rights of a Member under this Agreement and under the Act, including, but not limited to, a Member's Financial Rights¹ and Voting Rights." [R. p. 186.] The April 10, 2012, Order signed by the Horry County Master in Equity, indicates that only Patel's distributional interest in the Carolinian was transferred and conveyed to the Levys. [R. pp. 224-227.] Therefore, the Levys only purchased Patel's distributional interest, not Patel's voting rights. Patel retained his voting rights in Carolinian, which meant the foreclosure sale did not transfer all of Patel's interest in the Carolinian to the Levys. Therefore, this Court should reverse the circuit court's ruling and conclude that the April 2, 2012, foreclosure sale only transferred Patel's financial rights or distributional interest in Carolinian to the Levys and that Patel retained his voting rights.

II.

The circuit court erred in ruling that the Carolinian, LLC, may exercise its "Right to Buy" under Section 11.2 of the Carolinian, LLC's Operating Agreement against the Levys as transferees of Patel's Distributional Interest.

In the Trial Order, the circuit court correctly held that the "Right to Buy" in Section 11.2 of the Operating Agreement is not a redemption under S.C. Code Ann. § 33-

¹ Per the Operating Agreement, "Financial Rights" have the same meanings as "Distributional Interest." [R. p. 186.]

34-504, but a separate right created by the Operating Agreement. [R. p. 13.] However, the circuit court incorrectly applied the “Right to Buy” under Section 11.2 to the Levys as transferees of a Member’s “Financial Rights.” The circuit court’s Trial Order specifically found that the Operating Agreement is clear and unambiguous. [R. p. 12.] “When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.” *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) (citing *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C 529, 514 S.E.2d 327 (1999)). “The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.” *Id.* (citing *S.S. Newell & Co. v. American Mut. Liab. Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463 (1942)). “When a contract is unambiguous a court must construe its provisions according to the terms that the parties used; understood in their plain, ordinary, and popular sense.” *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Despite the circuit court’s finding that the Operating Agreement is clear and unambiguous, the circuit court’s ruling is inconsistent and misapplies the terms of the Operating Agreement and applicable state law.

(A) The Levys are not “Members” under the express terms of the Operating Agreement

Section 11.2 of the Operating Agreement discusses the Carolinian’s right to purchase the membership share of a member who attempts to transfer his membership share without the consent of the other Members of Carolinian, LLC. Section 11.2(b) states:

...if a Member attempts to transfer all or a portion of his Membership Share without obtaining the other Members’ consent as required in

SECTION 11.1 . . . such **MEMBER** is deemed to have offered to the Company all of his Membership Share at the price determined in accordance with SECTION 11.2(a), SECTION 11.3 and upon the terms contained in SECTION 11.4.

[R. p. 206.] (emphasis added). Section 11.3 of the Operating Agreement discusses the Purchase Price for the membership share. It states:

...the price to be paid for a Withdrawn or Withdrawing Member's Membership Share shall be the purchase price agreed upon by the **Withdrawn or Withdrawing Member** and the Company Appraised value shall mean the value obtained . . . by agreement of two (2) appraisers, one appointed by the Company . . . and one appointed by the **Withdrawing or Withdrawn Member**.

[R. pp. 206-207.] (emphasis added). Sections 11.2(b) and 11.3 of the Operating Agreement discuss Carolinian, LLC's right to purchase from the *withdrawing member*, but these sections are silent as to the right to purchase from a transferee. [R. pp. 206-207.]

The Operating Agreement defines a "Member" as "the parties to this Agreement from time to time. For purposes of ARTICLES IX, X and XI, the term 'Member' includes any Member who has withdrawn or dissociated from the Company." [R. p. 186.] The Levys, as transferees, do not fall within the definition of a member in the Operating Agreement. Therefore, Sections 11.2 and 11.3 of the Operating Agreement are silent as to Carolinian's right to purchase the membership share from non-members, who hold a distributional interest legally acquired pursuant to a court order.

Despite the clear and unambiguous nature of the Operating Agreement, the circuit court extended the "Right to Buy" under Section 11.2 outside of the defined term "Member" to the Levys as non-member transferees.

(B) Patel did not attempt to transfer the distributional interest

In the Trial Order, the circuit court holds that the April 2, 2012, judicial sale constituted a “transfer falling under the category of ‘all other transfers’ pursuant to Section 11.1 ‘Restrictions on Transfers’ of the Operating Agreement.” [R. p. 13.] The circuit court then makes the quantum leap to the conclusion that because Section 11.1 applies, the provisions of 11.2(b) control. [R. p. 13.]

Section 11.2(b) of the Operating Agreement is only applicable if a **Member** attempts “to transfer all or a portion of his Membership Share without obtaining the other Members’ consent as required in SECTION 11.1, a member wrongfully dissociates under Section 11.2(a), or if a member properly dissociates . . . [under] Article X.” [R. p. 206.] Patel never attempted a “conveyance or encumbrance of all or a portion of a membership share” as described in the last sentence of Section 11.1, upon which the circuit court relied. It is undisputed that the transfer of Patel’s distributional interest occurred at a foreclosure sale on April 2, 2012, and the distributional interest was conveyed by Order of the Horry County Master in Equity. The Master in Equity was the transferor, not Patel. It is also undisputed that Patel neither wrongfully dissociated nor properly dissociated under the terms of Section 11.2(a) or Article X. Since the Master in Equity, not Patel, was the transferor of his distributional interest, and since Patel did not wrongfully dissociate or properly dissociate, the circuit court again erred in not construing the Operating Agreement as written.

Section 11.2(b) of the Operating Agreement discusses the Carolinian’s right to purchase a Member’s Membership Share if the Member *attempts* to transfer all or a portion of his Membership Share without obtaining the consent of 67% of the Voting

Rights of the Company. [R. p. 206.] Paragraph 1(d) of the Conclusions of Law section of the Trial Order specifically concluded that the April 2, 2012, sale of the distributional interest to the Levys was proper. [R. p. 11.] Paragraph 2 of the Order concluded that the April 2, 2012 sale resulted in a transfer of Patel's distributional interest. [R. p. 11.] At that point, the sale was finalized, and there was no longer an *attempted* sale, but rather a *completed* sale. Since the circuit court found that the Carolinian was not attempting to challenge the foreclosure sale, then under the plain language of Section 11.2, the sale was a *completed* sale rather than *attempted* as is described in the Operating Agreement. Again, the circuit court erred in not construing the Operating Agreement according to the express, plain, and unambiguous terms used in their ordinary and popular sense.

Therefore, this Court should reverse the result below and find that the "Right to Buy" under Section 11.2 of the Operating Agreement is not applicable to the Levys as transferees of a distributional interest from an otherwise valid judicial sale pursuant to the Operating Agreement's clear and unambiguous language.

III.

The circuit court erred in ruling that the Levys' rights, as nonmember transferees, would exceed the rights of the transferor, Patel, if the Levys were not subject to all sections of the Operating Agreement.

In the Trial Order, the circuit court held that the Levys, as non-member transferees of Patel's distributional interest in Carolinian, are subject to and governed by the Operating Agreement, and their rights cannot, through contract law or statute, exceed the transferor's rights. [R. p. 12.] As previously discussed, Patel was not a transferor of his interest. Instead, the Horry County Master in Equity was the transferor of Patel's

distributional interest. However, even if this Court rules Patel was the transferor, the Levys' rights as transferees do not exceed the rights of Carolinian's members.

South Carolina Code §33-44-503 establishes the transferee's rights. This statute provides that the rights of a non-member transferee are limited to: (1) receiving the distributions owed to the member; (2) at the dissolution of the company, receiving the distributions owed to the member; and, (3) the ability to seek judicial dissolution of the company under South Carolina Code Ann. § 33-44-801(5). S.C. Code Ann. § 33-44-503. Section 3.4 of the Carolinian's Operating Agreement further restricts these rights by restricting the transferee's right to seek judicial dissolution of the company by statute. [R. p. 188.] Therefore, the only rights the Levys have as transferees are the rights to receive the distributions owed to Patel during the term of the company, and the right to receive the net distributions owed Patel upon the dissolution of the company. Under the South Carolina Limited Liability Act, the Levys, as transferees, have no other rights. Contrary to the circuit court's finding, these rights do not exceed Patel's as a member. Members of the Carolinian have multiple other rights that a transferee does not receive.

Paragraph 8 of the Trial Order's Conclusions of Law, found that "Plaintiffs cannot . . . have greater rights than the transferor." [R. p. 12.] However, the Trial Order did not specifically describe the right or rights which the circuit court perceived to be "greater" than Patel's.² Perhaps the circuit court suggested that because the transferees could not be forced to sell their interest back to Carolinian, their rights were greater than Patel's. Yet, none of the Operating Agreement's provisions address rights where there has been a judicial sale. The Levys, as transferees, have the very same, but not greater,

² Patel is not a transferor.

rights as any other member whose distributional rights a court has transferred pursuant to statute.

Although the transferee steps into the shoes of the transferor, his rights are still limited to the transferee's rights. South Carolina Code Ann. §§ 33-44-502 and 33-44-503 expressly discuss a transferee's rights. Section 33-44-502 states: "a transfer of distributional interest does not entitle the transferee to become or to exercise any rights of a member. A transfer entitles the transferee to receive, to the extent transferred, only the distributions to which the transferor would be entitled." S.C. Code Ann. § 33-44-502. Section 33-44-503(b) applies to a transferee that has become a member and states that "a transferee that has become a member, to the extent transferred, has the rights and powers, and is **subject to the restrictions and liabilities**, of a member under the operating agreement." (*Emphasis added*). S.C. Code Ann. § 33-44-503(b).

Pursuant to these statutes, a transferee cannot take advantage of other rights afforded to the members, even though he steps into the member's shoes for some limited purposes. Therefore, the company cannot enforce rights against a transferee that the transferee does not possess and that are applicable only to a member. In this case, it is undisputed that the Levys were not admitted as members, so their rights were limited to the rights of a non-member transferee. It necessarily follows that Carolinian could not enforce rights against the Levys that it only had against its members. Therefore, this Court should reverse the result below and find that the "Right to Buy" under Section 11.2 of the Operating Agreement was not applicable to the Levys as non-member transferees, and the Levys' rights as transferees did not exceed the rights of the transferor.

IV.

The circuit court erred in ruling that Carolinian may compel the purchase and sale of Levys' distributional interest in Carolinian without voiding the foreclosure sale of Patel's distributional interest in Carolinian to the Levys.

The circuit court's Trial Order found that the Carolinian has the right to force the sale of Patel's distributional interest from the Levys under §11.2 of the Operating Agreement. [R. p. 13.] The Trial Order further finds that this enforced sale can occur without voiding the foreclosure sale through which the Levys purchased Patel's distributional interests. [R. p. 11.] These findings and conclusions are inconsistent with the clear and unambiguous terms of the Operating Agreement and applicable state law.

(A) The Levys do not own and cannot transfer Patel's entire "Membership Share" as the Operating Agreement requires.

The Operating Agreement defines a "Membership Share" to be "all of the rights of a Member under this Agreement and under the Act, including, but not limited to, a Member's Financial Rights and Voting Rights." [R. p. 186.] By purchasing Patel's distributional interest at the foreclosure sale, the Levys acquired only Patel's financial rights, not his entire membership share.

This distinction is important because Section 11.2 of the Operating Agreement clearly states that any attempted transfer of all or a portion of a Member's Membership Share will result in such **Member** offering his entire Membership Share at a price determined in accordance with the other sections of the Operating Agreement. [R. pp. 205-206.] First, the provision refers to a "**Member**" offering his entire interest. [R. p. 205]. As is discussed in detail above, the Levys are not "members," and any interpretation to the contrary contradicts the Operating Agreement's plain, unambiguous language. Also, since the Levys only own Patel's "Financial Rights," they would be

unable to sell Patel's entire Membership Share as discussed in the Operating Agreement. Article XI of the Operating Agreement is silent as to the Company's ability to purchase less than the entire Membership Share, and it gives no procedure for separate purchases of a member's "Voting Rights" and "Financial Rights." [R. pp. 205-208.] The Levys cannot transfer or convey something which they do not own, and the circuit court cannot interpret the Operating Agreement outside its plain, unambiguous terms.

Since the Levys do not own the entire membership share, they would be unable to transfer the entire membership share as Sections 11.2 and 11.3 of the Operating Agreement require. The Operating Agreement contains absolutely no provision that permits the Company or its members to purchase any interests from anyone but the member. More problematic is how the apportionment of value between the "Voting Rights" and "Distributional Rights" could be accomplished under the circuit court's ruling. The Operating Agreement contains no provisions that allow for the apportionment of value between the "Voting Rights" and "Distributional Rights." Section 11.3 of the Operating Agreement only describes the process for obtaining the purchase price for the entire "Membership Share." [R. pp. 206-207.] There is also no language found in the Operating Agreement that discusses how the nonmember would be compensated solely for the member's distributional interest. Therefore, the circuit court's ruling is contrary to the Operating Agreement's plain, clear and unambiguous terms addressing the purchase price of the "Membership Share."

The last sentence of Section 11.1 of the Operating Agreement, upon which the circuit court relied, says that any attempted sale is "null, void and without effect." [R. p. 205.] This provision makes sense and works in a situation where a member attempts to

sell all or a portion of his interest because the attempted transaction is “void.” Therefore, the entire interest is left intact. However, in the current circumstances, there was a judicial sale which cannot be voided. The Operating Agreement cannot abrogate a state statute or court order. Without voiding the sale, Carolinian would only be purchasing the distributional interests and not the entire membership share from the Levys, an option not discussed anywhere in the Operating Agreement and an option that the circuit court erred in allowing under the Operating Agreement’s clear, unambiguous terms.

Under the plain language of the Operating Agreement, it is necessary to declare the sale null and void to allow the Carolinian to purchase Patel’s entire membership share. Section 11.1 allows the company to void the sale and purchase the entire membership share from the member. [R. p. 205.] But this is impermissible under the law. A judicial sale should not be set aside except for cogent reasons. *Spillers v. Clay*, 233 S.C. 99, 103 S.E.2d 759 (1958). To set aside a judicial sale, there must be such irregularity in the proceedings as to show that the sale was not fairly made, or that the Defendant was defrauded or misled, which eventually led to his injury and loss. *Wooten v. Seanch*, 187 S.C. 219, 196 S.E.2d 877 (1938). In this matter, the circuit court ruled that the foreclosure sale was a valid sale, and there is no evidence in the record to support voiding the judicial sale.

(B) The clear and unambiguous language of Section 11.1 of the Operating Agreement requires that all other transfers done without the consent of Sixty Seven (67%) percent of the voting share of the company be null and void.

The last sentence of Section 11.1 of the Operating Agreement is absolute. It provides that all other transactions shall be null, void and without effect. [R. p. 205.] The

Trial Order contradicts the express terms of 11.1 of the Operating Agreement by holding that the company is not attempting to challenge the foreclosure sale.

Section 11.1 of the Operating Agreement states:

No Member may voluntarily or involuntarily sell, transfer, gift, assign, pledge, mortgage, hypothecate, or otherwise convey or encumber any portion or all of his Membership Share to any Person without the prior written consent of those Members who own more than Sixty Seven (67%) percent of the Voting Rights in the Company With regard to all other transfers, Article XI shall control, and any attempted conveyance or encumbrance of all or a portion of a membership share in contravention of this Article XI shall be null, void, and without effect.

[R. p. 205.] This section is unequivocal and requires any such transfer to be null and void. Thus, the circuit court's interpretation of Section 11.1 requires a finding that Carolinian is attempting to make the judicial sale "null, void, and without effect." As is discussed above, there is no evidence before this Court to support voiding the judicial sale.

(C) A determination that the foreclosure sale of Patel's distributional interest is null and void is necessary to implicate the terms of Section 11.2(b) of the Operating Agreement.

Article XI of the Operating Agreement addresses restrictions on transfers of members' "Membership Shares." [R. pp. 205-208.] Under the plain, clear and unambiguous language of the Operating Agreement, Sections 11.1, 11.2, and 11.3 of the Operating Agreement are meant to be read jointly and all aspects of these sections are necessary to address the so-called improper transfers.

Section 11.2(b) of the Operating Agreement discusses the company's ability to purchase a Membership share from the Member when he *attempts* a sale or transfer. [R. p. 206.] The circuit court erroneously applied Section 11.1 of the Operating Agreement to the judicial sale. As is discussed above, there was no attempted sale or transfer of Patel's

distributional interest, if the judicial sale is not “null and void.” If it is “null and void,” there was no transfer under Section 11.1. Without voiding the transfer, it is not an *attempted* sale, it is a *completed* sale, and Section 11.2 does not apply.

The entirety of Section 11.1 of the Operating Agreement is necessary in order to put all parties back into the position they would have been before the alleged attempted improper sale or transfer of the Membership Share occurred. Sections 11.2 and 11.3 do not contemplate or address any situation where the “Voting Rights” and “Distributional Rights” are held by different parties. [R. pp. 205-207.] Under the express terms of the Operating Agreement, Carolinian has the ability to purchase the entire Membership Share from **the member** pursuant to the terms of Section 11.2. [R. pp. 205-206]. Due to the Operating Agreement’s plain, unambiguous language, Sections 11.2 and 11.3 of the Operating Agreement cannot be enforced without applying the terms of Section 11.1 to void any voluntary or involuntary transfer of any portion of the Membership share.

(D) The circuit court’s decision is inconsistent with the statutory scheme enacted by the General Assembly.

As discussed above, Carolinian cannot enforce its right to force the sale of Patel’s distributional interest from the Levys without attempting to treat the foreclosure sale as “null and void.” The South Carolina General Assembly, by enacting the current limited liability laws, determined that a creditor can attach a member’s interest in a limited liability company by providing for the charging lien. The Uniform Limited Liability Act of 1996 (“the Act”) determines that the charging order is “the exclusive remedy by which a judgment creditor of a member or a transferee may satisfy a judgment out of the judgment debtor’s distributional interest in a limited liability company.” S.C. Code Ann. §33-44-504(e).

The Act then provides a mechanism for the company and the members to have the first right to purchase the member's distributional interest before a foreclosure. Section 33-44-504(c) states that "[a]t any time before foreclosure, a distributional interest in a limited liability company which is charged may be redeemed: (1) by the judgment debtor; (2) with property other than the company's property, by one or more of its members; or (3) with the company's property, but only if permitted by the operating agreement." S.C. Code Ann. § 33-44-504(c). Therefore, the statute gives the company and/or its other members the first right to redeem the distributional interest before the judicial sale. The statute also does not prevent the company and/or its members from bidding on the distributional interest at the foreclosure sale. Thus, the statute gives the Company and/or its members a second opportunity to obtain the distributional interest before it is purchased by a third party. These mechanisms provide the company and its members two bites at the apple to obtain the distributional interest before the foreclosure sale. However, nowhere in the Act does the legislature provide a third bite at the apple for the company or its members to purchase the distributional interest once it is sold at foreclosure.

In this case, despite having notice of the upcoming foreclosure sale, Carolinian and/or its other members never made any formal redemption attempt under the statute. Carolinian and/or its other members made the informed decision not to exercise the redemption provisions under the Act. Further, the Company and/or its other members were present at the judicial sale and chose not to purchase the distributional interest. Carolinian instead is trying to circumvent the Act and have a third bite at the apple at a

price far below the purchase price would have been under the Act or at the foreclosure sale.

The Act only allows the purchaser of the distributional interest certain rights as a transferee. The legislature left the member with the voting rights, but not a financial interest. Therefore, the member has not lost all interest in the limited liability company and has not dissociated from it.

To interpret the Operating Agreement as the circuit court has done changes the debtor–creditor law, the creditor’s rights as they relate to interests in a limited liability company, and allows the Operating Agreement to circumvent the legislative intent. The Trial Order provides Carolinian’s members greater rights than the legislature intended. Under the trial court’s interpretation, a judgment creditor’s ability to foreclose on the charging lien is limited by companies’ operating agreements. An operating agreement may not abrogate or contravene statutory law.

The trial court’s interpretation of the Operating Agreement further indicates the problems that arise from the trial court’s rationale. A reading of Section 11.3 of the Operating Agreement speaks of appraisals and appraisers being chosen by the Withdrawing Member. [R. pp. 206-207.] Patel is not a “Withdrawing Member,” as he still has a vote. The Levys are not members, as they acquired no voting interests. Consequently, there is no “Withdrawing Member.” The provision goes on to provide the “Appraised Value” shall mean the value taking into account the applicable minority, lack of marketability and other discounts. [R. pp. 206-207.] The application of this provision could result in a creditor who purchased the interest at a foreclosure sale receiving less than the fair market value paid at the judicial foreclosure sale.

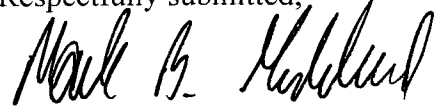
The problem with the trial court's rationale is evident in this case. The Levys purchased the distributional interests as the high bidder at the foreclosure sale for \$215,000. Under the last appraisal sent by the Carolinian, the distributional interest was now allegedly valued at \$50,000. [R. pp. 239-347.] Under the trial court's rationale, the Levys, as the purchaser of the distributional interest at the judicial sale, may lose \$165,000 solely due to a provision of the Operating Agreement applicable to members. However, in arm's length transactions in which a member attempts to transfer or sell all or a portion of his Membership share, the Carolinian can apply Section 11.1 of the Operating Agreement and void the transaction. In that scenario, the purchaser of the distributional interest would receive the full value he paid from the member, and any pricing discount applicable under 11.3 of the Operating Agreement would only be against the member who attempted the transfer, not the putative transferee of the member's interest.

For these reasons, this Court should reverse the circuit court's decision that the "Right to Buy" under Section 11.2 of the Operating Agreement can be accomplished without voiding the foreclosure sale. This court should further reverse the circuit court's decision by holding that the Operating Agreement cannot void an otherwise valid judicial sale, and therefore, Carolinian cannot compel the sale and purchase of the Levys distributional interest.

CONCLUSION

For the reasons discussed above, this Court should reverse the circuit court's rulings and remand with instructions for the circuit court to file an Order granting the relief sought in the Levy's declaratory judgment action and requested herein.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Case No.: 2012-CP-26-5610

Appellate Case No. 2013-000650

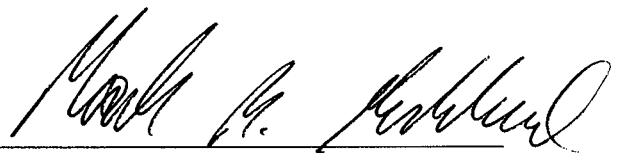
Shaul Levy and Meir Levy Appellants,

vs.

Carolinian, LLC Respondent.

APPELLANTS' RULE 211 CERTIFICATION

The undersigned, attorney for Appellants Shaul Levy and Meir Levy, certifies, pursuant to Rule 211, SCACR, that Appellants' Final Brief and Reply Brief comply with Rule 211(b), SCACR.



Mark B. Goddard
Attorney for the Appellants

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PROOF OF SERVICE OF
APPELLANTS' FINAL BRIEF AND APPELLANTS' REPLY
BRIEF

I certify that I have served the Appellants' Final Brief and Appellants' Reply Brief on the Respondent via U.S. Mail, on October 1, 2013, to its attorneys of record at the address listed below.

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[Signature page to follow.]

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