

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

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S.C. Supreme Court

Shaul Levy and Meir Levy,.....Appellants.

v.

Carolinian, LLC,.....Respondent.

RETURN TO RESPONDENT'S
PETITION FOR REHEARING

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The Appellants respectfully submit this Return in opposition to the Respondent's Petition for Rehearing. For the reasons set forth below, the Appellants assert this Court's decision¹ was correct and should remain in effect. Therefore, the petition should be denied.

ARGUMENT

In its Petition, the Respondent requests that the Court vacate its unanimous decision to reverse the trial court's rulings in the matter. The Petition alleges the Court reversed a finding that the trial court did not actually make, and it further contends the record does not support three of the Court's specific findings. The Court has already considered and rejected the arguments raised in the Petition, and the Respondent has not demonstrated any legal authority that the Court overlooked or misapprehended. The Respondent obviously disagrees with the Court's decision, but that is not a sufficient basis for a rehearing. Thus, as more fully argued below, the Court should deny the Petition.

I. Standard of Review

The Respondent argues primarily that this Court did not review the trial court's actual findings. In taking this position, the Respondent relies upon an erroneous view of the scope of this Court's authority on appeal. Specifically, the Respondent ignores the standard of review applicable to this matter. This case involves a novel question of law in South Carolina: Can a lawful purchaser of a distributional interest in an LLC at a judicial foreclosure sale be forced to sell the distributional interest by the other members of the LLC? Since this case involves a novel legal issue in South Carolina, the Court is free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719

¹ *Shaul Levy and Meir Levy, v. Carolinian, LLC*, Op. No. 27442 (S.C Sup. Ct. filed September 3, 2014)

(2000). In this situation, the unanimous Court appropriately decided the issue based on its assessments of which interpretation and reasoning would best comport with the law and the Court's sense of justice. *See Croft v. Old Republic Ins. Co.*, 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005). Therefore, the Petition asks the Court to apply an incorrect standard of review to this novel issue of law, and therefore should be denied.

II. This Court's Opinion appropriately considered the effect of Article 11 upon the Levys.

The Respondent contends the Court erred in analyzing the effect of Article 11 of the Operating Agreement because it focused on the effect of Article 11 on the Levys after the foreclosure sale rather than its effect upon Bhupi Patel prior to the sale. This assertion does not demonstrate any argument or legal authority that the Court overlooked or misapprehended in its unanimous decision. Rather, in making this argument, the Respondent is merely revisiting a position that the Court has already considered and rejected. Therefore, the Respondent has failed to demonstrate any grounds for rehearing.

The Respondent's argument ignores the fundamental question before the Court – i.e. whether a lawful purchaser of a distributional interest at a judicial foreclosure sale can be forced to sell the distributional interest to the company's other members based on the applicable Operating Agreement. Instead, the Respondent asks the Court to analyze a judicial transfer the same as any other transfer would be handled under the Operating Agreement. The Court's opinion and the Appellant's previous briefs have already addressed the significant problems with the Respondent's argument, and for the sake of space, the Appellant's will not fully repeat those discussions here. Nevertheless, a summary of these points may be helpful.

A. Judicial foreclosures cannot be treated the same as other transfers under Article 11.

The Petition states that the unanimous Court erred in not analyzing the applicability of the Operating Agreement to Patel, rather than to the Levys. The Respondent argues that when Patel allowed his interest to be transferred to the Levys through the foreclosure sale without the prior requisite consent of his fellow members, Patel agreed to offer his entire membership interest to the Company or his fellow members pursuant to Article 11.2 of the Operating Agreement. However, Article 11.2 does not discuss the right to purchase that membership interest from anyone but the **member**.

For any transfer other than a judicial foreclosure, the company can use Article 11.1 of the Operating Agreement to make the transfer without the requisite consent “null, void and without effect.” Once the transfer is voided under Section 11.1, the member once again owns his entire membership share, and the Company can use the rest of Article 11 to force the **member** to sell his entire membership interest. However, since the Appellants were the valid purchasers of Patel’s distributional interest at a lawful foreclosure sale, Article 11.1 cannot apply to this transfer. It is impermissible under the law to set aside a judicial sale absent some cogent reason. *See Spillers v. Clay*, 233 S.C. 99, 103 S.E.2d 759 (1958). Since the Respondent has failed to provide any such reasons why the judicial sale should be set aside, Article 11.1 cannot legally take effect, and therefore, the applicability of Article 11 to Patel has no impact on the Levys, as Patel is not in position to transfer his entire membership share as required by the Operating Agreement.

B. The Appellants 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. Sections 11.2(b) and 11.3 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.

The Operating Agreement defines a “Member” as “the parties to this Agreement from time to time. For purposes of ARTICLES IX, X, XI, the term ‘Member’ includes any Member who has withdrawn or dissociated from the Company.” [Operating Agreement.] The Levys, as transferees, do not fall within that definition. 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 Respondent asks the Court to extend the “Right to Buy” under Section 11.2 beyond the defined term “Member” to the Levys as non-member transferees. This request would require the Court to ignore the well-established legal principle that courts are bound to give effect to the meaning of an agreement’s terms, which are to be taken and understood in their plain, ordinary and popular sense. See *Schulmeyer v. State Farm Fire & Cas. Co.*, 335 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *C.A.N. Enters. Ins. v. S.C Health & Human Servs. Fin Comm’n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

C. Patel did not transfer the distributional interest.

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.” [Operating Agreement.] 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. 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. At that point, the sale was finalized, and there was no longer an *attempted* sale as discussed in Section 11.2 of the Operating Agreement, but rather a *completed* sale. Since the Respondent stated that it 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 one that was *attempted* as described in the Operating Agreement. Therefore, the unanimous Court correctly construed the Operating Agreement according to the express, plain and unambiguous terms used in their ordinary and popular sense.

D. The Appellants 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.” [Operating Agreement § 2.1(r).] By purchasing Patel’s distributional interest at the foreclosure sale, the Appellants 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. First, the provision refers to a “**Member**”

offering his entire interest. As is discussed in detail above, the Appellants 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.”

Since the Appellants do not own the entire membership share, they would be unable to transfer the entire membership share as Sections 11.2 and 11.3 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. The Operating Agreement contains no provisions that allow for the apportionment of value between the “Voting Rights” and “Distributional Rights.” Section 11.3 only describes the process for obtaining the purchase price for the entire “Membership Share.” [Operating Agreement.] There is also no language that discusses how the nonmember would be compensated solely for the member’s distributional interest. Thus, viewing the applicability of Article 11 only to Patel rather than to the Appellants would require the Court to ignore the Operating Agreement’s clear and unambiguous terms.

For these reasons, the unanimous Court was correct in analyzing Article 11’s applicability to the Appellants rather than to Patel. The Petition offers no new arguments to demonstrate otherwise. The Respondent’s arguments as to the applicability of Article 11 are the

same arguments made at the trial level and are the same arguments the Court has already considered and unanimously rejected.

III. The Appellants, as transferees, do not acquire any more than the transferor.

The Respondent argues the unanimous Court's opinion violates the fundamental legal principle that a transferee can acquire no more than his transferors had. The trial court considered this exact issue, which both parties briefed extensively and discussed during oral arguments. The Court ultimately addressed that issue in its opinion. Since the Respondent's argument merely disagrees with the unanimous Court's finding and does not show how the Court overlooked or misapprehended any legal authorities, this argument is not appropriate in a Petition for Rehearing. However, in this interest of being fully responsive, the Appellants will summarize their position below.

The Appellants, as transferees, have the very same, but not greater rights as any other member whose distributional rights have been transferred by judicial foreclosure sale. Pursuant to the South Carolina Uniform Limited Liability Company Act of 1996, a non-member transferee cannot take advantage of other rights afforded to members, even though he steps into the member's shoes for some limited purpose. The company cannot enforce rights against a transferee that the transferee does not possess and are only applicable to the member. Since the Appellants were not admitted as members, their rights were limited to those of a non-member transferee, and the Respondent could not enforce rights against the Appellants that it only had against its members. Therefore, the Appellant's rights are limited to: (1) receiving the distributions owed Patel during the term of the Company and (2) at the dissolution of the company, receiving the distributions owed Patel. These rights are the same ones that other

transferee would hold and in no way exceed the rights of any of other member or similarly situated transferee.

IV. The unanimous Court's Opinion did not contradict the South Carolina Limited Liability Act and the basic principles of partnership law.

The Respondent also makes several arguments against the Court's opinion based on equity. Again, though, the Respondent made those arguments at the trial level, extensively briefed them and discussed them at oral arguments in the Court. The Petition does nothing but repeat those unsuccessful arguments.

The Respondent claims that the South Carolina Uniform Limited Liability Act allows members to enter into Operating Agreements to regulate the operations of the Company. The Appellants do not dispute members have the right to enter into Operating Agreements that ultimately determine the rules and regulations for the company. However, the Respondent's argument ignores the fact that while members are given the right to enter into Operating Agreements, these agreements cannot violate South Carolina law. The Operating Agreement cannot void a valid judicial sale; doing so would go directly against established South Carolina law. Also, the Operating Agreement cannot restrict the rights of transferees outside of the rights they actually hold.

The Respondent further argues the unanimous Court's opinion holds that judgment creditors can unilaterally decide to become partners with individuals whether they like it or not and gives the judgment creditors a windfall. This assertion has several clear errors. The Court has in no way allowed judgment creditors to become partners in a company unilaterally. If the judgment creditor forecloses on its charging lien, the creditor only becomes the owner of the member's distributional interest. The purchaser of the distributional interest is not admitted as a member of the company and has no rights other than the rights afforded to any other non-

member transferees. The purchaser of the distributional interest is not a partner in the company and has no control over the company's corporate decisions.

The Respondent also argues that the Court's opinion provides a windfall to the Appellants. This argument ignores several important factors, all of which were extensively briefed and discussed before the Court. First, when the Appellants, as judgment creditors, foreclosed on their charging lien, they did nothing more than exercise their **exclusive remedy** under South Carolina law. *See. Kristi Ripley, LLC v. Emerald Invs., Inc.*, 2013 S.C. LEXIS 160. The Appellants had no other recourse. For that reason, the Respondent's argument appears to be a disagreement with ultimate finding of the *Kristi Ripley* and not the kind of assertion that would be proper grounds for a Petition for Rehearing. Contrary to the Respondent's argument, the Appellants did not receive any windfall. The Horry County Master-In-Equity sold Patel's distributional interest at a public foreclosure sale and the proceeds were applied against the underlying judgment. The fact that the Appellants may receive future distributions above the amount they paid at the foreclosure sale is irrelevant and does not differ from any other purchaser of any other property sold at foreclosure that ultimately may collect more than they paid for at the foreclosure sale.

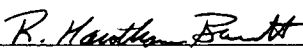
Finally, the Respondent argues that the company's right to redeem a member's distributional interest does not provide the company adequate ability to purchase the distributional interest before the foreclosure because the company would be forced to pay the entire judgment amount in order to redeem the interest. This position also fails to acknowledge that the redemption right is only one of two chances the company has to purchase the distributional interest. If the company feels the price to redeem is too high, it still has the right to bid at the foreclosure sale in an amount less than the full judgment amount. If the company's bid

met or exceeded the future distributions the creditor would likely receive, it is likely the creditor would accept the company's bid, even though lower than the ultimate judgment amount. However, the Respondent wants the company to have a third chance to purchase the distributional interest and wants it to be under the company's own terms at the significant detriment of the Appellants. If there is any inequity possible, it would come from the company's ability to force the Appellants to sell Patel's distributional interest at an amount far below the amount paid at the foreclosure hearing. Under this scenario, the Appellants' judgment against Patel would have been reduced at a greater amount than they actually received from the company.

CONCLUSION

The Court has fully addressed, and correctly decided, all of the issues on appeal. The Respondent's Petition for Rehearing does not demonstrate otherwise, and there is no reason for this Court to revisit its unanimous decision. Therefore, the Court should deny the petition.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Appellants' **Return to the Petition for Rehearing** on the Respondent via U.S. Mail, on **October 6, 2014**, to its attorneys of record at the address listed below.

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[Signature page to follow.]

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