

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2012-CP-26-05610

Appellate Case No. 2015-002638

Shaul Levy and Mier Levy,.....Respondents,

v.

Carolinian, LLC,.....Appellant.

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court properly conduct a hearing on the Levys' claims for declaratory and injunctive relief, where the Levys asserted those claims in their pleadings, the trial court did not address those claims in the original trial, and the Supreme Court's decision did not preclude further action by the trial court on those claims?
- II. Did the trial court properly conduct a hearing on the Levys' claims for declaratory and injunctive relief, where those claims, which the Levys raised in their pleadings but had not yet been adjudicated, constituted an active case or controversy between the parties?
- III. Did the trial court properly grant declaratory and injunctive relief to the Levys, where the record supports the trial court's decision and Carolinian failed to preserve any arguments to the contrary?

STATEMENT OF THE CASE

This is the second appeal arising from a dispute between the Respondents Shaul Levy and Meir Levy ("the Levys") and the Appellant 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. In the first appeal, the South Carolina Supreme Court ruled that Carolinian could not force the Levys to sell their distributional interest. The current appeal stems from an Order filed by the circuit court following the remand of the case from the Supreme Court.

I. Original Trial Dispute

The Levys filed their Summons and Verified Complaint on July 23, 2012. The Complaint alleged the following causes of action: (1) declaratory judgment, and (2) a temporary restraining order and temporary and permanent injunction. [Complaint.] On or around the same date, the Levys also filed a request for a temporary restraining order and temporary injunction. [Motion for TRO / Temporary Injunction.]

The Honorable Benjamin H. Culbertson signed an Order granting the Levys' Motion for a Temporary Restraining Order and Rule to Show Cause on July 27, 2012. [Order.] Subsequently, Carolinian agreed to a temporary restraining order and/or injunction while the litigation was ongoing. As a result, the Honorable Larry B. Hyman signed a Consent Order on August 16, 2012, granting the Levys' motion for a temporary restraining order and injunction during the pendency of the case. [Order.]

Carolinian filed a Summons, Answer and Counterclaim on August 17, 2012. The Answer and Counterclaim denied the Levys' claims and requested a declaratory judgment as to its rights. [Answer and Counterclaim.] On August 31, 2012, the Levys filed a Reply to Carolinian's Answer and Counterclaim, in which the Levys denied Carolinian's entitlement to any judgment or other relief. [Reply.]

The case was called for a non-jury trial on January 8, 2012, before the Honorable Steven H. John. The parties submitted a joint Stipulation of Facts for purposes of that trial. [Stipulation of Facts.] Both parties presented trial briefs in support of their respective positions. 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' requests for a declaratory judgment and a

permanent injunction and granting declaratory relief in Carolinian's favor ("Judge John's Trial Order"). Judge John based his ruling on a legal conclusion that Carolinian's Operating Agreement permitted it to force a sale of the distributional interest the Levys had obtained from Patel via foreclosure.

On February 4, 2013, the Levys filed a Rule 59(e) motion. [Motion to Reconsider.] The motion essentially asked Judge John to reconsider and reverse his previous decision. The Levys also filed a motion pursuant to Rule 62(b), SCRCF, requesting that the circuit court stay proceedings to enforce the judgment granted in Judge John's Trial Order. On February 15, 2013, Carolinian filed a Memorandum in Opposition to the Levys' Motion to Reconsider and Motion for Stay. The judge denied these motions by an order filed on February 22, 2013. [Order.] The Levys then filed a timely appeal of Judge John's Trial Order.

On March 22, 2013, the Levys filed a Rule 62(c) motion. Roughly two weeks later, 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. [Consent Order.]

II. First Appeal

The issue for the Levys' appeal was the trial court's determination that Carolinian could compel the purchase and sale of the Levys' distributional interest in Carolinian that they obtained from Carolinian's member, Bhupendra Patel, following a judicial foreclosure sale. After certifying the case for direct review, the Supreme Court conducted oral arguments on June 25, 2014. On September 3, 2014, the Supreme Court issued its opinion, *Levy v. Carolinian, LLC*, 410 S.C. 140, 763 S.E.2d 594 (2014), in

which the Court reversed the trial court's ruling and found in the Levys' favor on the controlling legal issue. Carolinian filed a petition for rehearing, which the Court denied in an Order dated October 24, 2014. The Supreme Court then remitted the case back to the Horry County Clerk of Court.

III. Second Trial

After the remittitur, the Horry County Clerk of Court's office originally placed the case on the non-jury trial roster for the week of January 5, 2015. However, during the roster meeting for this term, the Honorable Steven H. John announced he would not hear any further argument on the case since he had ruled on this original trial dispute, and he decided to continue the matter to another term. Neither side moved to dismiss the action at that roster meeting or at any subsequent time. Eventually, the case was scheduled for the non-jury term of court before the Honorable Larry B. Hyman during the week of May 12, 2015.

On May 12, 2015, Judge Hyman conducted a bench trial based on the same stipulated facts submitted at the original trial. After hearing arguments from counsel, Judge Hyman entered an Order granting the Levys some, but not all, of the declaratory and injunctive relief they requested in their Verified Complaint. [Order.] On June 16, 2015, Carolinian filed a Motion for Reconsideration. [Motion to Reconsider.] Judge Hyman held a hearing on Carolinian's motion on November 15, 2015 and denied the motion in an Order filed on December 8, 2015. [Order.] Carolinian responded by filing a timely notice of appeal.

STATEMENT OF THE FACTS

At both the first trial before Judge John on January 8, 2012 and at the second trial before Judge Hyman, on May 12, 2015, the parties submitted and agreed to proceed based on the following stipulated facts:

1. Carolinian, LLC 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.

2. Carolinian, LLC also holds the rental management rights over 112 managed condominium units.

3. Carolinian, LLC is a closely-held company consisting of nine members.

4. Bhupendra Patel is one of nine members of Carolinian, LLC.

5. Shaul Levy and Meir Levy are residents of the States of Florida and New York, respectively, who conduct business in Horry County, South Carolina and have extensive experience in real estate investment.

6. The rights of the members of Carolinian, LLC, are established in the Operating Agreement for Carolinian, LLC, last revised on January 1, 2003 (“Operating Agreement”).

7. Bhupendra Patel is the owner of a 23.35% Membership Share in Carolinian, LLC, 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.”

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.

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 Bhupendra Patel's distributional interests in four limited liability companies, including Carolinian, LLC (collectively the "Patel Distributional Interests").

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 the Carolinian, LLC.

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.

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

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 possible business deal without counsel present. The parties did not reach an agreement.

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.

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.

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

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.

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.

19. By Order dated April 10, 2012, the Horry County Master in Equity confirmed the sale of Patel's Distributional Interests to the Levys.

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

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.

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."

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 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.

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 Levy's [sic] are not subject to any of the terms of the Operating Agreement."

25. By letter, dated June 27, 2012, counsel for Carolinian asserted that the Levys were subject to the terms of Carolinian, LLC's Operating Agreement and that the company was obtaining an appraisal and purchasing the Patel Distributional Interest held by Plaintiffs pursuant to the terms of the Operating Agreement. A

26. On July 23, 2012, Plaintiffs commenced this action.

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.

STANDARD OF REVIEW

Declaratory judgments are neither legal nor equitable in nature. *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991). “The standard of review for a declaratory judgment action is, therefore, determined by the nature of the underlying issue.” *Bundy v. Shirley*, 412 S.C. 292, 301, 772 S.E.2d 163, 168 (2015).

The primary underlying issue in this case involved the interpretation of a statute. Ordinarily, “[t]he determination of the proper interpretation of statute is a question of law, which the appellate court reviews de novo.” *Glassmeyer v. City of Columbia*, 414 S.C. 213, 218, 777 S.E.2d 835, 838 (Ct. App. 2015). In a previous appeal arising from this case, however, the South Carolina Supreme Court has already determined the proper interpretation of the relevant statute. *Levy v. Carolinian, LLC*, 410 S.C. 140, 763 S.E.2d 594 (2014). Thus, the de novo standard of review does not apply.

“The grant of an injunction is reviewed for abuse of discretion.” *Hook Point, LLC v. Branch Banking & Trust Co.*, 397 S.C. 507, 510, 725 S.E.2d 681, 683 (2012). “An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law.” *Id.* at 511, 725 S.E.2d at 683.

ARGUMENT

I. The trial court properly conducted a hearing on the Levys' claims for declaratory and injunctive relief.

Although Carolinian also appears to challenge the actual decision to grant injunctive relief to the Levys, its primary argument is that the trial court lacked authority to conduct any proceedings after the first appeal. Carolinian frames this position in different ways, but all its arguments stem from this one premise. Thus, the central issue in this appeal is whether the Supreme Court's decision terminated the entire case and precluded any further proceedings in the trial court. An examination of the record, and the nature of the Supreme Court's decision, demonstrates that it did not.

This action began when the Levys filed and served a Summons and Verified Complaint that sought both a declaratory judgment and injunctive relief. Specifically, the Levys requested judicial declarations that Carolinian could not force them to sell their distributional interest or interfere with their associated rights in any way, and the Levys also asked for an injunction forbidding Carolinian from doing those things.

Carolinian responded with an Answer that denied the Levys' entitlement to the declarations or injunctions they requested in the Verified Complaint. The Answer also asserted a counterclaim for a declaratory judgment. Essentially, Carolinian asked the trial court to declare and recognize a right under Carolinian's Operating Agreement to force the Levys to sell their distributional interest to Carolinian.

Thus, this was not a case in which one side asserted claims for relief and the other side merely denied the entitlement to that relief. Instead, this was a case in which both sides requested relief, and the determination of which side was entitled to receive it depended upon a central question of law – *i.e.* whether Carolinian could use the

Operating Agreement to compel the Levys to sell the distributional interest they obtained from a Carolinian member pursuant to a statutory foreclosure.

The case proceeded to a bench trial based on stipulated facts, after which the trial court granted the declaratory judgment Carolinian requested. The trial court reached that result based on its legal decision that Carolinian's Operating Agreement allowed Carolinian to purchase the distributional interest, regardless of whether or not the Levys wanted or intended to sell it. Relying on that legal decision, the trial court determined Carolinian was entitled the relief it sought and the Levys were not. Specifically, the trial court's original Order allowed Carolinian to force the Levys to sell the distributional interest. The trial court did not, therefore, fully address the merits of the Levys' claims for relief. Rather, it just stated, in summary fashion, that any such claims were denied.

In that scenario, the Levys were not required to ask the trial court to grant them the relief they sought in their Rule 59(e) motion.¹ The trial court obviously did not grant the Levys any relief because, under its erroneous determination of the dispositive legal issue, the Levys had no viable claims for any relief. Conversely, the Levys would have valid claims for relief if the legal issue were decided in their favor. Thus, the Levys' Rule 59(e) motion properly focused only on their arguments against the trial court's legal decision. Had the trial court reversed itself on that issue as a result of the motion, then the Levys could have further pressed their claims for relief. Unless and until such a reversal occurred, however, the Levys had no recourse or ability to seek rulings on those

¹ Carolinian argues the Levys waived or abandoned the claims for relief granted in the trial court's second order because the Levys did not include them in their Rule 59(e) motion after the first order. However, Carolinian appeared to make this argument for the first time in their own Rule 59(e) motion after the second order. By that point, it was too late to raise that issue. *See Dixon v. Dixon*, 362 S.C. 388, 289, 608 S.E.2d 849, 855 (2005) (issue raised for the first time in a post-trial motion is not preserved for appeal).

claims. Those claims simply were not ripe for decision under the trial court's erroneous legal decision.

Due to the limited nature of the trial court's original ruling, the sole issue in the first appeal was whether the trial court committed a legal error in concluding, essentially, that the Operating Agreement required the Levys to sell the distributional interest to Carolinian. The broader issue of what relief the Levys should receive if the trial court had erred in that regard was not part of the appeal – nor could it have been – because the trial court had not reached or ruled upon that question. Stated another way, the Levys challenged only the legal basis for the trial court's declaratory judgment in Carolinian's favor because, at that point, they had nothing else to challenge. The Levys also could not ask the Supreme Court to award them relief above and beyond reversal of the trial court's legal ruling because granting such relief would be the province of the trial court after the reversal. Carolinian's argument on appeal overlooks this crucial point.

Similarly, the extent of the Supreme Court's review in the first appeal was limited to the trial court's ruling on the central legal question. The Supreme Court found the trial court's answer to that legal question was erroneous. Based on that finding, the Supreme Court reversed the trial court's decision and, along with it, the declaratory judgment in Carolinian's favor. Due to the posture of the case during the first appeal, this was all the Supreme Court could do. The question of what relief the Levys should receive under the correct interpretation of the law was not before the Court because the trial court obviously had not addressed it. Thus, that issue remained unresolved after the Supreme Court's decision, and further proceedings in the trial court were required. This is not

only the clear implication of the Supreme Court's decision, but also a necessary corollary to it.

Carolinian appears to rely on the absence of the phrase "remanded for further proceedings" from the Supreme Court's opinion as support for its assertion that the action terminated once the Supreme Court had ruled. This argument elevates form over substance. Regardless of what phrase did or did not appear at the end of the published opinion, the fact remains that the Levys still had pending claims for declaratory and injunctive relief. The trial court had not had the opportunity to address those claims under the correct interpretation of the applicable law as determined by the Supreme Court. The logical – and mandatory – next step was for the trial court to conduct additional proceedings to determine the specific nature of the relief the Levys should receive in light of the Supreme Court's decision. This is, of course, exactly what happened.

Furthermore, the Supreme Court gave no indication that it intended its opinion to terminate the case. The Record on Appeal demonstrated the existence of the Levys' claims for relief, which means the Court was aware of them. It was also clear that the Supreme Court's decision on the legal question on appeal entitled the Levys to at least some of the relief they sought. By declining to discuss the Levys' claims for relief, the Court was not only implicitly, but also necessarily allowing the trial court to address those claims. This is the only fair and reasonable interpretation of the Supreme Court's silence on that issue.

Carolinian's interpretation of the Court's silence, on the other hand, is neither fair nor reasonable under the circumstances. As discussed above, the Levys sought a

declaratory judgment and an injunction based on their interpretation of the superiority of their statutory foreclosure rights over Carolinian's Operating Agreement. Although the trial court ruled against the Levys on that legal issue, they pursued the matter to the Supreme Court, which vindicated their position by reversing the trial court. The Levys thus won on the central legal issue in the state's highest court, and that victory cleared the way for them to obtain the relief they had sought in the first place. But under Carolinian's interpretation of the Supreme Court's decision, the Levys' victory on the legal issue would be rendered effectively meaningless; the Levys would win on the law, but not be entitled to any practical relief. This absurd result cannot possibly be what the Supreme Court intended when it ruled in the Levys' favor. Therefore, this Court should reject Carolinian's arguments.

It is also important to consider the practical effect of Carolinian's position if one follows that position to its logical conclusion. Assuming for the sake of this argument that Carolinian were correct and the trial court did not have any authority or ability to conduct any further proceedings, the resulting order could arguably be reversed as a nullity. Even if that were to happen, however, the eventual end result would be the same. The Levys would simply commence a new action seeking the same declaratory and injunctive relief, using the law established by the Supreme Court's opinion as the basis for that relief pursuant to the doctrine of collateral estoppel / issue preclusion. *See Carolina Renewal, Inc. v. South Carolina Dept. of Transp.*, 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009). With the fundamental legal issue already resolved in their favor, the Levys would be entitled to declaratory and/or injunctive relief. The only purpose of the subsequent action, therefore, would be for a judge to determine the nature and extent of

the Levys' remedies – *i.e.* the exact same function the trial court performed after the remand from the Supreme Court.

Forcing the Levys to go through that pointless exercise would not only be unnecessary, it would also require the kind of piecemeal litigation that South Carolina's courts have consistently discouraged. *See, e.g., Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000) (avoiding piecemeal litigation is a "salutary consideration"); *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000) (avoiding piecemeal litigation is "the best policy to follow"). The exact same parties would repeat the same arguments in the same venue to the same end. The only difference would be a later docket number and the gratuitous delay associated with it. Yet, this undesirable result is the logical conclusion of Carolinian's argument, which this Court should reject.²

The Supreme Court's decision left the Levys with a legal victory, but in need of an order to set forth their resulting remedies. The trial court properly conducted additional proceedings to determine the nature and scope of that relief. In doing so, the trial court neither exceeded its authority, nor prejudiced Carolinian in any way. Simply put, the trial court did the job it was supposed to do in light of the Supreme Court's

² Carolinian's suggestion that the Levys somehow waived their claims for relief by not arguing them in the Supreme Court must also fail. As previously explained, the Levys could not assert those claims in the Supreme Court because the trial court had not made any rulings on their merits. The claims were not ripe for any review or decision by an appellate court during the first appeal. Thus, the Levys properly limited their arguments in that appeal to the one issue that was before the Supreme Court, and absolutely no waiver or abandonment occurred. Carolinian has not cited any applicable authority to the contrary.

ruling. Carolinian has failed to demonstrate otherwise, and this Court should affirm the trial court's decision in full.

II. The trial court's additional proceedings addressed an active case or controversy between the Levys and Carolinian.

The arguments in Carolinian's second and third issues on appeal are essentially the same.³ Carolinian argues the additional proceedings amounted to error because the Supreme Court's decision completely ended the dispute between the two parties. Stated another way, Carolinian claims there were no longer any active or viable claims for the trial court to address and determine. As discussed below, this argument cannot withstand any serious scrutiny.

Carolinian asserts the Supreme Court's decision rendered the rest of the case moot and left no remaining "justiciable controversy." This assertion is erroneous. As the Supreme Court has recently explained, "a justiciable controversy is a real and substantial controversy that is ripe and appropriate for judicial determination, as opposed to a dispute or difference of contingent, hypothetical or abstract character." *Bundy v. Shirley*, 412 S.C. 292, 302-303, 772 S.E.2d 163, 169 (2015) (citing *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 227-228, 467 S.E.2d 913, 917-918 (1996)). Here, such a controversy continued to exist after the Supreme Court's opinion because the Levys sought more than just a declaration that Carolinian could not force them to sell the distributional interest. If that had ever been the sole issue in the case, then perhaps

³ For this reason, the Levys will address those arguments under this single heading, rather than repeating essentially the same position in two different sections.

further proceedings might not have been necessary.⁴ From the commencement of the action, however, the Levys asked the trial court to do more than issue that one declaration. The Levys also prayed for additional declarations, as well as injunctions. The scope and nature of that relief remained in dispute, even after the Supreme Court decided the first appeal.

Indeed, Carolinian's assertions that no disputes exist between the parties ring hollow when Carolinian continues to challenge the relief granted to the Levys. If, as Carolinian suggests, the Supreme Court resolved the only real dispute and all other relief requested by the Levys was redundant, then it is difficult to see why Carolinian has pursued this appeal.⁵ Why would Carolinian bother to appeal if the trial court's Order did not relate to an active dispute between the two sides? Clearly such a "real and active" controversy lingered on, despite the Supreme Court's decision. On this issue, the Court should look to Carolinian's actions rather than its words.

Carolinian also argues that the request for injunctive relief (beyond ordering Carolinian to follow the law and the Operating Agreement) was so vague that it could not address any actual controversy. The problem with that assertion is that it ignores the reality of an ongoing, adversarial relationship. The Levys own the distributional interest associated with Patel's membership in Carolinian. Carolinian obviously would prefer that the Levys not hold that interest. This creates a state of perpetual conflict that

⁴ Even under that hypothetical scenario, the trial court would at least have had to file an amended order stating that Carolinian could not, in fact, force a sale of the distributional interest.

⁵ During the hearing after remand from the Supreme Court, Carolinian's counsel claimed an injunction was unnecessary because "We're gonna do what the operating agreement says and what the law says; there isn't any question about that." [Transcript, p. 25, lines 8-9.] Yet, Carolinian continued to oppose the request for an injunction. Something had to still be in dispute for that continued opposition to make any sense.

underlies the parties' relationship, even if it does not always rise to the surface. The existence of this conflict creates a constant risk of Carolinian seeking ways to undermine or circumvent the Levys' ownership of the distributional interest. This is simply the reality the Levys face when a hostile entity is responsible for making any distributions to which the Levys are entitled.

Under these circumstances, asking for an injunction that prohibits hyper-specific types of conduct by Carolinian would be an invitation to gamesmanship and future litigation. If the Levys had requested and received an order with such specific injunctions,⁶ the resulting laundry list of prohibited acts would conceivably give Carolinian a roadmap for contrary actions it could take. Carolinian could do those things and then argue that the injunction did not cover them, even if they constituted obvious attempts to interfere with the Levys' rights. The Levys' only recourse in those situations would be to return to the trial court for interpretations of the order. Such a result would be impractical, costly and unfair to the Levys, and it would also constitute a waste of judicial resources.

The only way to avoid that undesirable result was for the Levys to request an injunction that would be broad enough to prevent all interferences with their rights as owners of the distributional interest (other than any actions by Carolinian that are proper under the applicable law). This is exactly the kind of injunction the Levys wanted, and their request for it remained outstanding – and in dispute – after the Supreme Court's decision. Consequently, the trial court had the jurisdiction and authority to address the

⁶ For example, at the conclusion of the hearing after remand, the trial court cited “not putting enough stamps on the envelope to send a [distribution] check” as something Carolinian should be prohibited from doing. [Transcript, p. 31, lines 11-12.]

Levys' remaining claims, and it committed no error in conducting further proceedings or granting the Levys relief.

The Levys' position on this issue is straightforward. In their Verified Complaint, they requested declaratory judgments, as well as injunctive relief to prevent Carolinian from attempting in any way to interfere with their rights as holders of the distributional interest. Neither the trial court's original proceedings nor the Supreme Court's ruling fully resolved those claims. Thus, a real and active dispute between the two sides remained after the first appeal, which meant there was still a justiciable controversy for the trial court to address. For this reason, the Court should reject Carolinian's arguments and affirm the trial court's decision.

III. The trial court properly granted injunctive relief to the Levys.

Although this is not entirely clear, Carolinian further appears to challenge the trial court's injunction on substantive grounds, as opposed to the procedural arguments addressed above. To the extent Carolinian attempts to raise such arguments, they are not preserved for appellate review.

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004). Here, Carolinian did not assert any substantive challenges to the injunction in the trial court. As the transcript from the hearing on May 12, 2015, demonstrates, Carolinian devoted its entire argument to the proposition that no justiciable controversy existed and the trial court should not issue any kind of order in light of the Supreme Court's decision. Those arguments were based on matters of procedure and jurisdiction; they had nothing to do with the substantive issue –

i.e. whether the record established a need for injunctive relief in the Levys' favor. Carolinian simply did not raise that issue at the hearing following the remand from the Supreme Court.

Perhaps for that reason, the trial court also did not rule on the issue. The trial court's Order briefly recounted the action's procedural history and the expressly adopted the reasoning of the Supreme Court's decision. [Order, p. 1.] The Order then proceeded to list the trial court's four declarations and the four parts of the injunction it granted. The trial court did not address any arguments that the injunction lacked a proper factual basis or was otherwise unsupported in the record. Again, the simple reason for this omission is that Carolinian had not previously made those arguments.

Carolinian also failed to raise this issue in the Rule 59(e) motion it filed in response to the Order. Carolinian might have hinted at the argument during the hearing on the motion,⁷ but it never asserted any substantive challenges to the injunction with the requisite specificity. Furthermore, even if the arguments at the hearing had been specific, Carolinian could not properly have asserted them at that juncture, having failed to raise them in the first hearing. *See Dixon v. Dixon*, 362 S.C. 388, 289, 608 S.E.2d 849, 855 (2005) (issue raised for the first time in a post-trial motion is not preserved for appeal).

Carolinian did not really attempt to raise any substantive challenges to the injunction, if at all, until its Appellant's Brief. [App. Brief, pp. 20-21.] At that point, it was too late for Carolinian to make this part of its appeal. "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Buist v. Buist*, 410 S.C. 569, 574, 761 S.E.2d 381, 383

⁷ See November 16, 2015 Transcript, p. 14.

(2014). “While ‘a party is not required to use the exact name of a legal doctrine in order to preserve the issue,’ ... the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error.” *Id.* at 574-575, 761 S.E.2d at 383-384 (internal citation omitted). “If the party is not reasonably clear in his objection to the perceived error, he waives his right to challenge the erroneous ruling on appeal.” *Id.* at 575, 761 S.E.2d at 384.

Carolinian did not raise any substantive arguments against the injunction at the first hearing after remand, and the only conceivable reference to such an argument at the second post-remand hearing was far too vague to “draw the court’s attention to the precise nature of the alleged error.” *Buist*, 410 S.C. at 575, 761 S.E.2d at 384. Therefore, Carolinian failed to preserve this issue for appeal, and the Court should disregard any such arguments to the extent Carolinian is attempting to assert them.

Even if the issue were properly raised, however, Carolinian has not established any basis for reversing the injunction. As previously discussed, the Levys and Carolinian find themselves in an ongoing adversarial relationship. The Levys want to receive all distributions to which their interest entitles them, whereas Carolinian has made every attempt to get that interest out of the Levys’ ownership. Notwithstanding Carolinian’s representations to the trial court that it intends to follow its Operating Agreement and the applicable law, this statement of intent does not guarantee that it will always treat the Levys and their distributional interest fairly. This is not meant to impugn Carolinian’s willingness to comply with the law; it simply reflects the reality of two parties who find themselves in the position of being, in essence, unwilling business partners. While the Supreme Court’s decision cemented that relationship by acknowledging the validity of

the Levys' distributional interest, it gave no guidelines for how Carolinian is to treat the Levys. This is why further proceedings were necessary after the Supreme Court's ruling, and it also establishes the substantive need for an injunction.

The injunction granted by the trial court is broad, but only because that wide scope is necessary to protect the Levys' rights. The injunction ensures that Carolinian must honor the Levys' distributional interest, and it prevents Carolinian from taking any actions that violate or ignore that interest. The injunction also establishes the basis for a future remedy if Carolinian disregards it and undertakes those kinds of actions. While it would be preferable if everyone involved in this dispute could simply "play nice" and proceed without any involvement by the courts, the history of the relationship between Carolinian and the Levys demonstrates that judicial oversight is necessary. The trial court agreed with the Levys that the best way to provide that guidance was to grant an injunction broad enough to protect the Levys' interest. Carolinian has failed to present any argument to the contrary or any reason why the record fails to support the injunction.

In addition, as discussed above in Section I, if the trial court had failed to grant an injunction in this case, it would merely have been issuing an invitation for future litigation between the Levys and Carolinian. Such repetitive, piecemeal litigation would not be in either side's best interests, and it would constitute a needless waste of judicial time and resources. This fact, which Carolinian has not disputed,⁸ provides another reason for this Court to affirm in full the injunction granted by the trial court.

⁸ Indeed, rather than seeking to avoid future litigation, Carolinian appeared to invite it during the hearing on May 12, 2015, when counsel for Carolinian said, "If they want to come forward in a separate action and say that we're doing something wrong and put that before you and get a new injunction ordering us to do something, fine." [Transcript, p. 26, lines 6-9.]

CONCLUSION

The Supreme Court in the first appeal decided the controlling legal issue in the Levys' favor, but that did not end the case. The Levys still had claims for relief for the trial court to address. Although the Supreme Court's decision meant the Levys were entitled to at least some remedies, the nature and scope of those remedies were not before the Supreme Court. Thus, the trial court had to hold additional proceedings to determine what relief the Levys would receive. Conducting that second hearing was neither legal error, nor an abuse of discretion by the trial court. Accordingly, for the reasons set forth above, and based on any and all other supporting grounds in the Record on Appeal, this Court should affirm the result below.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAY 24 2016

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2012-CP-26-05610

Appellate Case No. 2015-002638

Shaul Levy and Mier Levy,.....Respondents,

v.

Carolinian, LLC,.....Appellant.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondents, certifies that I have this **24th day of May, 2016**, served copies of the **Initial Respondents' Brief and Respondents' Designation of Matter to be Included in the Record on Appeal** upon counsel for the Appellant by causing them to be deposited in the United States mail with sufficient postage attached, addressed to: David B. Miller, Esq. and Benjamin A. Baroody, Esq.; Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A.; P.O. Box 357; Myrtle Beach, SC 29578.

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May 24, 2016