

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC Court of Appeals

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

Case No. 2012-CP-26-05610

Appellate Case No.: 2015-002638

Shaul Levy and Mier Levy Respondent,

v.

Carolinian, LLC Appellant.

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

	Page
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
STANDARD OF REVIEW	10
ARGUMENT	11
I. THE SUPREME COURT GRANTED THE LEVYS ALL OF THE RELIEF SOUGHT IN THEIR APPEAL AND ENDED THIS CASE	11
II. THE TRIAL COURT LACKED JURISDICTION TO AWARD THE LEVYS THE ADDITIONAL DECLARATORY AND INJUNCTIVE RELIEF SOUGHT IN THEIR COMPLAINT	12
III. NO CASE OR CONTROVERSY EXISTED FOR ADJUDICATION BEFORE JUDGE HYMAN	15
A. JUDGE HYMAN ERRED BY ENTERING A DECLARATORY JUDGMENT FOLLOWING REMITTITUR.	16
B. JUDGE HYMAN ERRED BY ENTERING A PERMANENT INJUNCTION FOLLOWING REMITTITUR	18
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
<u>CASES</u>	
Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc. 343 S.C. 140, 146, 538 S.E.2d 672 (Ct. App. 2000)	11
Consignment Sales, LLC v. Tucker Oil Co., 391 S.C. 261, 270, 705 S.E.2d 73, 75 (Ct. App. 2010)	11
Denman v. City of Columbia, 387 S.C. 131, 140, 691 S.E.2d, 465, 470 (2010)	18
Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002)	15
J.W. Power et. al. v. McNair 255 S.C. 150, 177 S.E.2d 551 (1970)	17
Park Regency, LLC, et. al. v. R&D Development of the Carolinas, LLC, et. al. 402 S.C. 401, 411, 741 S.E.2d 528, 533 (CT. App. 2012)	11
<u>STATUTES</u>	
S.C. Code Ann. § 33-44-503(e)	5, 10, 15, 18
<u>RULES</u>	
Rule 220(a), SCACR	12
<u>OTHER AUTHORITIES</u>	
12 S.C. Jur. Equity § 19	18

STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err by scheduling a second trial on the merits of this case following remittitur from the Supreme Court without remand for further proceedings?
2. Did an active case or controversy exist for a second trial on the merits of this case following the Supreme Court's remittitur?
3. Did the Trial Court have jurisdiction to award the relief sought in Respondents' Complaint following remittitur?

STATEMENT OF THE CASE

A. SUMMARY OF APPEAL

This appeal arises from a dispute about the effect of the Supreme Court's reversal of the Trial Court's order without remand for further proceedings. Appellant Carolinian, LLC ("Carolinian") and Respondents Shaul and Meir Levy ("the Levys") tried this case on stipulated facts before the Honorable Steven H. John on January 8, 2013. The dispositive issue at trial was whether Carolinian could compel the Levys to sell the distributional interest of one of its members that the Levys had acquired at a judicial foreclosure sale. Judge John held that Carolinian could compel the sale pursuant to the terms of its Operating Agreement. The Levys moved for reconsideration, which Judge John denied. The Levys appealed, and the Supreme Court assumed jurisdiction over the appeal. The Levys asked the Supreme Court to reverse Judge John's order "and remand with instructions for the circuit court to file an Order granting the relief sought in the Levys' declaratory judgment action and requested herein." The Supreme Court reversed, declaring that Carolinian could

not compel the Levys to sell the distributional interest following the foreclosure sale. Since the Supreme Court awarded the Levys all of the relief sought in their appeal, the Court simply remitted the case to the Horry County Clerk of Court.

The Horry County Clerk of Court thereafter returned the case to the active non-jury trial roster and scheduled a second trial. The Levys sought a trial court order granting them all of the declaratory relief and injunctive relief sought in their Complaint. Carolinian argued that no trial was necessary since the Supreme Court had granted the Levys all of the relief sought in their appeal and simply remitted the case. The Honorable Larry B. Hyman presided over the second trial, which was based upon the same stipulated facts presented before Judge John over two years prior. Judge Hyman entered an order granting nearly all of the relief sought in the Levys' Complaint. Carolinian moved for reconsideration. After a hearing, Judge Hyman denied the motion. This appeal followed.

Carolinian requests this Court vacate Judge Hyman's order on three grounds: First, the Supreme Court awarded the Levys all of the relief sought in their appeal and ended this case. The Supreme Court's opinion specifically declares that Carolinian may not invoke Article XI of its Operating Agreement to compel the Levys to sell the distributional interest in Carolinian they acquired at the foreclosure sale. No further action was required to provide the Levys with precisely what they sought on appeal and the Supreme Court properly remitted a copy of its Opinion into the circuit court's file. Second, since the Supreme Court's order resolved the one and only controversy between the parties, there was no case or controversy between the parties left for Judge Hyman to resolve. The nature of much of the relief sought by the Levys, such as an order instructing Carolinian to comply with the law, is purely advisory in nature. Third, the issues ruled upon by

Judge Hyman in his order that were not addressed by the Supreme Court had been abandoned by the Levys. None of those ancillary issues were ruled upon by Judge John or raised on appeal.

Carolinian has appealed Judge Hyman's order not because it necessarily disputes the substance of all of the Court's findings at this time, but because it fears that the Levys may use the order, which includes a permanent injunction, as a hammer to subvert Carolinian's inherent ability to make sound business decisions through the threat of contempt if and when they see fit to accomplish their own goals. No member of Carolinian, LLC has such a hammer. The Levys are, admittedly, sophisticated businessmen who are the holders of a mere 23.35% distributional interest in Carolinian. Their rights, by law, are limited to receiving distributions and nothing more. To cause Carolinian's management to question whether each and every business judgment made constitutes "maintaining unauthorized sole dominion and control" over their distributional interest rights, amongst other conceivable interpretations of Judge Hyman's order, could very well lead to an undue burden upon Carolinian and its members.

B. FACTUAL BACKGROUND

The following factual background contains undisputed facts which can be gleaned from the Stipulation of Facts filed with the trial court on January 8, 2013. On February 10, 2010, the Levys filed a Confession of Judgment executed by Bhupendra Patel ("Patel") in the amount of \$2,500,000.00 in the Horry County public records. Patel was a member of Carolinian, LLC ("Carolinian"). On August 12, 2011, following the commencement of supplemental proceedings against Patel, the Horry County Master in Equity imposed charging liens against Patel's distributional interest in four entities, including Carolinian. The Levys subsequently moved to

foreclose those liens and, by Order dated March 14, 2012, ordered the interests sold at public auction. The sale was thereafter scheduled and, by Order dated April 10, 2012, the Master confirmed the sale of Patel's distributional interest in Carolinian to the Levys for the purchase price of \$215,000.00.

On June 11, 2012, following the Levys' purchase of Patel's distributional interest, Carolinian notified the Levys that Patel was prohibited from transferring his distributional interest to a third party without its prior permission pursuant to Article XI of the Carolinian Operating Agreement. Carolinian also advised the Levys of its right and intention to purchase Patel's distributional interest from them pursuant to the terms of the same Article XI. The Levys responded by arguing that any right Carolinian may have had to acquire Patel's interest expired upon the conclusion of the foreclosure sale. Carolinian disagreed and responded by notifying the Levys of its intention to proceed with the appraisal process outlined in Article XI of the Operating Agreement. This action followed.

C. TRIAL BEFORE JUDGE JOHN

On July 23, 2012, the Levys commenced this action to enjoin Carolinian from taking any further action to exercise its rights under Article XI of the Operating Agreement against the Levys. The Levys' Complaint plead causes of action for a Declaratory Judgment and a Permanent Injunction. Specifically, the Levys prayed for the following relief in their Complaint:

A. An Order declaring that:

- a. Plaintiffs are the current, true and lawful owners of Patel's distributional interests in Carolinian as confirmed by the Horry County Master in Equity in its Order Confirming Sale;**

- b. **Any right to purchase the subject distributional interests pursuant to the terms of Carolinian's Operating Agreement terminated upon the sale of the distributional interests to Plaintiffs at the public auction held April 2, 2012;**
 - c. **Other than dissolution and wind-up of Carolinian's business, neither Carolinian nor its members can force Plaintiffs to sell their distributional interests in Carolinian;**
 - d. **Plaintiffs, as 'non-member transferees' of Carolinian, are not parties to Carolinian's Operating Agreement; and**
 - e. **Carolinian must abide by the requirements set forth in the Act with regards to the rights of Plaintiffs as transferees of the subject distributional interests, including right to receive distributions as more specifically set forth in Section 33-44-503(e).**
- B. A temporary restraining order, a temporary and permanent injunction, which would enjoin Carolinian and/or its members from:**
- a. **Maintaining unauthorized sole dominion and control over the distributional interests rightfully belonging to Plaintiffs;**
 - b. **Making unauthorized and wrongful distributions of Carolinian, LLC funds in a manner inconsistent to or adverse to the distributional interests of Plaintiffs;**
 - c. **Taking any actions to sell or attempting to force the sale of Plaintiffs' distributional interests in Carolinian;**
 - d. **Taking any actions inconsistent with the requirements set forth in the South Carolina Uniform Limited Liability Act, including the provisions of S.C. Code Ann. § 33-44-503(e); and**
 - e. **Taking any actions that interfere with the distributional interests of Plaintiffs in Carolinian.**

On August 17, 2012, Carolinian filed an Answer denying that the Levys were entitled to the relief sought in their Complaint and a Counterclaim seeking a declaratory judgment that Carolinian could exercise its right to buy Patel's distributional interest from the Levys pursuant to Article XI

of the Carolinian Operating Agreement. [R. pp. 73-85]. Carolinian consented to the entry of a temporary injunction to maintain the status quo of this case prior to trial. [R. pp. 10-11].

On January 8, 2013, a non-jury trial was held before the Honorable Steven H. John, Horry County Circuit Court Judge, based upon stipulated facts. [R. pp. 231-236]. By Order filed January 28, 2013, the Court denied the Levys' claim for a declaratory judgment, granted Carolinian's request for a declaratory judgment, and vacated the injunction. [R. pp. 12-21]. Judge John held that Carolinian could exercise its right to buy the Levys' distributional interest pursuant to Article XI thereof and that doing so would not void the foreclosure sale. [R. pp. 12-21].

On February 4, 2013, the Levys filed a Motion for Reconsideration and a Motion for Stay of Proceedings to Enforce Judgment. [R. pp. 90-102; R. pp. 103-105]. The Levys' raised the following issues:

THE "RIGHT TO BUY" IN SECTIONS 11.2 AND 11.3 OF THE OPERATING AGREEMENT IS INAPPLICABLE TO THE LEVYS.

CAROLINIAN, LLC CANNOT ENFORCE ITS RIGHT TO PURCHASE PATEL'S DISTRIBUTIONAL INTERESTS FROM THE LEVYS WITHOUT VOIDING THE FORECLOSURE SALE.

ANY ATTEMPT TO VOID THE FORECLOSURE SALE OF PATEL'S DISTRIBUTIONAL INTEREST IS IMPROPER AND CANNOT BE ENFORCED.

THE APPLICATION OF THE COURT'S ORDER RESULTS IN A DISPARATE IMPACT ON THE PURCHASER OF A DISTRIBUTIONAL INTEREST AS COMPARED TO ANY OTHER TRANSFER.

DECISION OF THE COURT IS INCONSISTENT WITH THE STATUTORY SCHEME ENACTED BY THE LEGISLATURE.

Carolinian filed a Motion in Opposition to Plaintiff's Motion to Reconsider and Motion for Stay on February 15, 2013. [R. pp. 106-117]. By Order filed February 22, 2013, Judge John denied both motions. [R. p. 22].

D. APPEAL TO THE SUPREME COURT

The Levys timely appealed Judge John's Order. In their Final Brief filed with the Supreme Court, the Levys raised the following four 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?**

At the conclusion of their Final Brief to the Supreme Court, the Levys requested the following relief:

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. [R. pp. 118-144] (Emphasis added).

Thus, the sole and exclusive purpose of the Levys' appeal was to request the Supreme Court to reverse Judge John's opinion on the ultimate issue in this case-whether or not Carolinian could compel the purchase of the Levys' distributional interest after the judicial foreclosure sale. Nowhere in the Levys' brief do they request any other form of declaratory relief. Nowhere in the Levys' brief do they request a permanent injunction at all.

By Order filed April 5, 2013, Carolinian again consented to the restoration of the Temporary Injunction pending the outcome of the appeal. [R. pp. 23-25].

By Order filed September 3, 2014, the Supreme Court reversed Judge John's Order, holding:

The dispositive issue in this case is whether Carolinian may compel the Levy's to sell the distributional interest they acquired through the foreclosure sale.

We find the trial court committed an error of law in finding the provisions of Article XI of the Operating Agreement applied and restricted the Levy's right to foreclose their charging lien without the consent of Carolinian for its members.

We reverse the trial court and find that the provisions of Article 11 of the Operating Agreement did not restrict the Levys' right to foreclose their charging lien against Patel's distributional interest, and we further find that Carolinian may not now invoke the provisions of Article 11 to compel the Levys to sell the distributional interest they acquired through the foreclosure sale. [R. pp. 26-33].

By Order dated October 21, 2014, the Supreme Court denied Carolinian's Petition for Rehearing. [R. pp. 34-35].

E. REMITTITUR TO HORRY COUNTY CIRCUIT COURT

The Supreme Court did not remand the case for further proceedings. Rather, on October 21, 2014, the Supreme Court mailed a letter to the Horry County Clerk of Court entitled

“REMITTITUR,” stating **“The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.”** [R. pp. 36-37].

On December 5, 2014, the Horry County Clerk of Court notified counsel for the parties via e-mail that the case had been added to the non-jury trial roster for the week of January 5, 2015, a term over which Judge John would preside. [R. p. 37]. On January 5, 2014, counsel attended the roster meeting. When the roster was called, Judge John announced that he was not going to hear the case following the disposition by the Supreme Court and continued the hearing. Ultimately, the case was added to the April 13, 2015 trial roster. [R. p. 238]. The hearing was subsequently continued to the May 12, 2015 trial roster. [R. p. 239].

F. SECOND TRIAL BEFORE JUDGE HYMAN

On May 12, 2015, a non-jury trial was held before the Honorable Larry B. Hyman. The only facts before the court were those facts as stipulated before Judge John at the January 8, 2013 non-jury trial. [R. pp. 175-206; R. pp. 231-236]. No new evidence was presented. Based upon the arguments of counsel, Judge Hyman entered an Order granting the Levys all but one form of the declaratory relief sought and all of the injunctive relief sought in their Complaint. [R. pp. 1-3]. Specifically, the Court declared:

- 1. Plaintiffs are the current, true owner of Bhupendra Patel’s distributional interest in Carolinian.**
- 2. Any right of Carolinian to purchase Patel’s distributional interest pursuant to the terms of Carolinian’s Operating Agreement terminated upon the sale of the distributional interest to Plaintiffs at the public action held April 2, 2012.**

3. **Other than dissolution and wind-up of Carolinian's business, neither Carolinian nor its member can force Plaintiffs to sell their distributional interests in Carolinian.**
4. **Carolinian must abide by the requirements set forth in the South Carolina Uniform Limited Liability Company Act with regards to the rights of Plaintiffs as transferees of the subject distributional interest.**

Further, the Defendants are PERMANENTLY ENJOINED from:

1. **Maintaining unauthorized sole dominion and control over the distributional interest rights rightfully belonging to Plaintiffs;**
2. **Making unauthorized and wrongful distributions of Carolinian, LLC funds in a manner inconsistent with or adverse to the distributional interests of Plaintiffs;**
3. **Taking any actions to sell or attempting to force the sale of Plaintiffs' distributional interest in Carolinian, and**
4. **Taking any actions inconsistent with the requirements set forth in the South Carolina Uniform Limited Liability Act, including provisions of S.C. Code Ann. § 33-44-503(e), and the Operating Agreement.**

On June 16, 2015, Carolinian timely filed a Motion for Reconsideration. [R. pp. 156-163]. A hearing was held on November 16, 2015. [R. pp. 207-229]. By Order filed December 8, 2015, Judge Hyman denied Carolinian's motion. [R. pp. 4-7]. Carolinian timely filed and served its notice of appeal on December 28, 2015. [R. pp. 165-166].

STANDARD OF REVIEW

The Levys' Complaint contained causes of action for both an injunction and declaratory relief. Carolinian's Counterclaim asserted an action for a declaratory judgment. "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for

purposes of the applicable standard of review on appeal.” Consignment Sales, LLC v. Tucker Oil Co., 391 S.C. 261, 270, 705 S.E.2d 73, 75 (Ct. App. 2010).

The standard of review applicable to declaratory judgment actions depends upon the nature of the underlying controversy. Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc., 343 S.C. 140, 146, 538 S.E.2d 672 (Ct. App. 2000). Since the underlying controversy concerns the construction of the Carolinian Operating Agreement, that portion of the Trial Court’s order is reviewed to correct errors of law. Barnacle Broadcasting, Inc., 675, 146.

Conversely, the Levys’ action for a permanent injunction is one in equity. Therefore, an appellate court “may determine facts in accordance with its own view of the preponderance of the evidence.” Park Regency, LLC, et. al. v. R&D Development of the Carolinas, LLC, et. al., 402 S.C. 401, 411, 741 S.E.2d 528, 533 (CT. App. 2012).

ARGUMENT

I. THE SUPREME COURT GRANTED THE LEVYS ALL OF THE RELIEF SOUGHT IN THEIR APPEAL AND ENDED THIS CASE.

This Court should vacate the order of Judge Hyman since the Supreme Court granted the Levys the precise declaratory judgment sought by them on appeal and ended this case. Considering each of the four issues raised by the Levys on appeal, the Court found the “dispositive issue” in the case and on appeal to be “whether Carolinian may compel the Levys to sell the distributional interest they acquired through the foreclosure sale.” [R. pp. 26-33]. The Supreme Court first found that Judge John committed an error of law by finding that Article XI of the Carolinian Operating Agreement could effectively restrict the Levys’ right to foreclose their charging lien against Patel’s

distributional interest. The Supreme Court next entered a declaratory judgment as follows: “We ... find that the provisions of Article 11 of the Operating Agreement did not restrict the Levys’ right to foreclose their charging lien against Patel’s distributional interest, and we further find that Carolinian may not now invoke the provisions of Article 11 to compel the Levys to sell the distributional interest they acquired through the foreclosure sale.” [R. pp. 26-33]. The Supreme Court had the opportunity to “affirm, reverse, or modify the decision below or remand all or any issues for further proceedings.” Rule 220(a), SCACR. The Levys requested the Supreme Court “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.” [R. pp. 118-144]. The Supreme Court decided to enter its own declaratory judgment and remit a copy thereof into the circuit court’s file. This judgment awarded the Levys all of the relief they sought both at trial and on appeal, and it ended this case. Therefore, this Court should vacate the order of Judge Hyman.

II. THE TRIAL COURT LACKED JURISDICTION TO AWARD THE LEVYS THE ADDITIONAL DECLARATORY AND INJUNCTIVE RELIEF SOUGHT IN THEIR COMPLAINT.

As stated by the Supreme Court, the “dispositive” issue in this case was precisely the issue argued about by counsel for the Levys and Carolinian in their letters exchanged prior to the commencement of this lawsuit. Carolinian argued that it could exercise its right to buy Patel’s distributional interest from the Levys after the judicial foreclosure sale pursuant to Article XI of the Operating Agreement as Patel’s transferees. The Levys argued that Carolinian only had a pre-sale right of redemption pursuant to Article III of the Operating Agreement, and that any post-sale purchase would effectively void the foreclosure sale. The trial court ordered that Carolinian could exercise its right to buy Patel’s distributional interest from the Levys pursuant to Article XI and

move forward with the appraisal process to value the interest. The Levys appealed only this ultimate issue to the Supreme Court. The Supreme Court reversed, finding Carolinian could not exercise its Article XI right to buy against the Levys following the foreclosure sale. Following the receipt of the Supreme Court's denial of Carolinian's Petition for Rehearing, Carolinian conceded that it could not purchase their interest pursuant to Article XI of the Operating Agreement because that is what the Supreme Court's declaratory judgment says.

All other issues raised in the Levys' Complaint were ancillary issues that were neither the subject of any dispute or controversy at the time nor material to the ultimate issue in this case. These ancillary issues include, for example, whether Carolinian must abide by the provisions of the South Carolina Limited Liability Company Act of 1996 and whether Carolinian should be permanently enjoined from making wrongful distributions at some unknown time in the future. Judge John's order did not rule on any of these ancillary issues and the Levys did not request Judge John rule on these issues when they moved for reconsideration. The Levys' appeal addresses none of these ancillary issues. As such, the Levys abandoned these issues at trial and Judge Hyman lacked jurisdiction to entertain further proceedings on them in a second trial.

This argument is best presented in a form illustrated by Judge Hyman's Order in bold with argument beneath in normal font. In addition to Judge John's trial order and order denying the Levys' Motion for Reconsideration, this Court should reference the issues raised by the Levys in their Motion for Reconsideration [R. p. 95] and in the Levys' Final Brief to the Supreme Court [R. pp. 128]. Neither of the foregoing orders or pleadings address any of the ancillary issues raised by the Levys in their Complaint.

- 1. Plaintiffs are the current, true owner of Bhupendra Patel's distributional interest in Carolinian.**

This ancillary issue was pleaded by the Levys in their Complaint, but has never been disputed by Carolinian, either at trial or on appeal.

- 2. Any right of Carolinian to purchase Patel's distributional interest pursuant to the terms of Carolinian's Operating Agreement terminated upon the sale of the distributional interest to Plaintiffs at the public action held April 2, 2012.**

This issue was the dispositive issue for trial that was ruled upon by Judge John and appealed to the Supreme Court. The Supreme Court's order specifically ruled on this issue as discussed in detail above.

- 3. Other than dissolution and wind-up of Carolinian's business, neither Carolinian nor its member can force Plaintiffs to sell their distributional interests in Carolinian.**

This ancillary issue was pleaded by the Levys in their Complaint, but was not ruled upon by Judge John, not preserved for appeal to the Supreme Court, and not ruled upon by the Supreme Court.

- 4. Carolinian must abide by the requirements set forth in the South Carolina Uniform Limited Liability Company Act with regards to the rights of Plaintiffs as transferees of the subject distributional interest.**

This ancillary issue was pleaded by the Levys in their Complaint, but was not ruled upon by Judge John, not preserved for appeal to the Supreme Court, and not ruled upon by the Supreme Court.

Further, the Defendants are PERMANENTLY ENJOINED from:

- 1. Maintaining unauthorized sole dominion and control over the distributional interest rights rightfully belonging to Plaintiffs;**

2. **Making unauthorized and wrongful distributions of Carolinian, LLC funds in a manner inconsistent with or adverse to the distributional interests of Plaintiffs;**
3. **Taking any actions to sell or attempting to force the sale of Plaintiffs' distributional interest in Carolinian, and**
4. **Taking any actions inconsistent with the requirements set forth in the South Carolina Uniform Limited Liability Act, including provisions of S.C. Code Ann. § 33-44-503(e), and the Operating Agreement.**

The Levys pleaded for all of the foregoing injunctive relief, but none were tried by Judge John, none were preserved for appeal to the Supreme Court, and none were ruled upon by the Supreme Court. As such, Judge Hyman made an error of law by entering an order declaring rights and enjoining Carolinian from engaging in certain acts that were abandoned by the Levys at trial and on appeal. Therefore, Carolinian requests this Court vacate Judge Hyman's Order.

III. NO CASE OR CONTROVERSY EXISTED FOR ADJUDICATION BEFORE JUDGE HYMAN.

Judge Hyman should have denied the Levys' request to grant them all of the relief sought in their Complaint since no justiciable controversy existed between the parties. When the Supreme Court ordered that Carolinian could not exercise its right to buy Patel's distributional interest from the Levys pursuant to Article XI of the Operating Agreement, the only dispute or controversy that existed between the parties ended. "A threshold inquiry for any court is a determination of justiciability, *i.e.* whether the litigation presents an active case or controversy." Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, **as distinguished from a dispute or difference of a contingent, hypothetical, or abstract character.**" Id. (emphasis added).

All other issues raised by the Levys in their Complaint, such as whether dissolution and wind-up of Carolinian's business constitute the only basis upon which Carolinian may sell the Levys' distributional interest, or whether Carolinian must abide by the requirements of the South Carolina Uniform Limited Liability Company Act, were not ruled upon by Judge John, not raised on appeal, and never have been in controversy in this case. Judge Hyman should have denied the additional relief sought by the Levys as any ruling on those issues would be of a "contingent, hypothetical, or abstract character" and were, therefore, not justiciable.

The factual record before the Court consisted of a Stipulation of Facts, which was filed with the Trial Court on January 8, 2013. The factual record before Judge Hyman remained unchanged and was stale when he heard the case on May 12, 2015, over two years later. Those undisputed facts reveal no controversy in existence between the parties other than the controversy surrounding whether Carolinian could compel the purchase of the Levys' distributional interest following the foreclosure sale. This controversy was resolved when the Supreme Court reversed Judge John and entered its own declaratory judgment as to the issues on appeal:

We reverse the trial court and find that the provisions of Article 11 of the Operating Agreement did not restrict the Levys' right to foreclose their charging lien against Patel's distributional interest, and we further find that Carolinian may not now invoke the provisions of Article 11 to compel the Levys to sell the distributional interest they acquired through the foreclosure sale.

A. JUDGE HYMAN ERRED BY ENTERING A DECLARATORY JUDGMENT FOLLOWING REMITTITUR.

None of the declaratory relief granted by Judge Hyman was the subject of a justiciable controversy at the time of the second trial. What follows is a list of the declaratory relief ordered by Judge Hyman following remittitur:

1. **Plaintiffs are the current, true owner of Bhupendra Patel's distributional interest in Carolinian.**
2. **Any right of Carolinian to purchase Patel's distributional interest pursuant to the terms of Carolinian's Operating Agreement terminated upon the sale of the distributional interest to Plaintiffs at the public action held April 2, 2012.**
3. **Other than dissolution and wind-up of Carolinian's business, neither Carolinian nor its member can force Plaintiffs to sell their distributional interests in Carolinian.**
4. **Carolinian must abide by the requirements set forth in the South Carolina Uniform Limited Liability Company Act with regards to the rights of Plaintiffs as transferees of the subject distributional interest.**

The first declaration was never in dispute. It was and remains conceded by Carolinian that the Levys owned Patel's distributional interest following the foreclosure sale. What was in dispute was whether that interest was purchased subject to Carolinian's right to buy it back pursuant to Article XI of its Operating Agreement. The second declaration was futile since the Supreme Court had entered a declaratory judgment ruling upon that very issue. Neither the third nor the fourth declarations were ever in dispute, either at trial, on appeal, or thereafter. The resolution of an issue that will settle no controversy amounts to an advisory opinion. See J.W. Power et. al. v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970) (finding no justiciable controversy in action brought to determine whether an individual could simultaneously hold positions of city policeman and State constable as ruling would not settle any present dispute and, therefore, amounted to an advisory opinion).

B. JUDGE HYMAN ERRED BY ENTERING A PERMANENT INJUNCTION FOLLOWING REMITTITUR.

None of the injunctive relief granted by Judge Hyman was the subject of a justiciable controversy at the time of the second trial. What follows is a list of the permanent injunctive relief ordered by Judge Hyman following remittitur:

Further, the Defendants are PERMANENTLY ENJOINED from:

- 1. Maintaining unauthorized sole dominion and control over the distributional interest rights rightfully belonging to Plaintiffs;**
- 2. Making unauthorized and wrongful distributions of Carolinian, LLC funds in a manner inconsistent with or adverse to the distributional interests of Plaintiffs;**
- 3. Taking any actions to sell or attempting to force the sale of Plaintiffs' distributional interest in Carolinian, and**
- 4. Taking any actions inconsistent with the requirements set forth in the South Carolina Uniform Limited Liability Act, including provisions of S.C. Code Ann. § 33-44-503(e), and the Operating Agreement.**

“To obtain an injunction, a party must demonstrate irreparable harm, . . . success on the merits, and the absence of an adequate remedy at law. “Denman v. City of Columbia, 387 S.C. 131, 140, 691 S.E.2d, 465, 470 (2010); “An injunction is a drastic remedy issued . . . to prevent irreparable harm suffered by Plaintiff.” 12 S.C. Jur. Equity § 19.

Based upon the record before Judge Hyman, there was simply no cause upon which an injunction of any kind was properly based for three reasons. First, there was no threat of harm because there was no case or controversy in existence at the time of the second trial. By then, all issues had been resolved with finality. The one and only conceivable controversy or threat of harm-

namely Carolinian moving forward with the appraisal process to enforce its right to buy the Levys' interest pursuant to Article XI of the Operating Agreement, ceased when the Supreme Court declared Carolinian could not purchase the Levys' distributional interest pursuant to Article XI of the Operating Agreement. That threat is long over and no injunction is necessary. Again, Judge Hyman was presented only with the same stale factual record stipulated by the parties over two years prior. Those facts provided no factual basis for an injunction of any kind. Second, the Levys' obtained a sufficient resolution to this dispute via a declaratory judgment, thereby rendering the need for a permanent injunction unnecessary. Third, as will be explained below, the injunctive relief sought by the Court is vague, ambiguous, and overly broad.

Specifically, the first instruction is both vague and abstract. "Unauthorized sole dominion and control" are vague, terms that can be construed too broadly to redress a specific threatened act or harm. It resolves no current dispute between the parties, redresses no threatened harm, and amounts to a prior restraint against an unknown act. The second instruction concerns an issue that was never raised before Judge John, never ruled upon by Judge John, never the subject of a motion for reconsideration, and never the subject of the Levys' appeal to the Supreme Court. As such, any opinion on this subject would not settle any current dispute in existence between the parties and amount to an advisory opinion. Likewise, the words "wrongful" and "unauthorized" are vague and ambiguous. The third instruction prevents Carolinian from ever, under any circumstance, selling or attempting to sell the Levys' distribution interest in Carolinian. This order is likewise futile in light of the Supreme Court's order, but is drafted so broadly that it may easily be misused and misconstrued at some future date when the context of this case is long forgotten and the Court is left with only the words of Judge Hyman's order. The Supreme Court specifically declared that

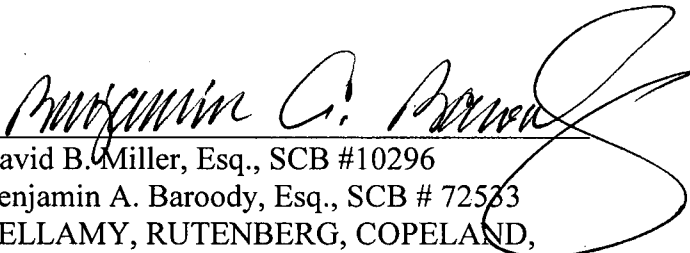
Carolinian could not compel the purchase of the Levys' distributional interest pursuant to Article XI of the Operating Agreement as it had attempted to do prior to trial, nearly three years before the hearing before Judge Hyman. That issue became moot upon the entry of the Supreme Court's order. Thus, any remaining instruction to Carolinian that it may not sell or attempt to sell the Levys' distributional interest does not resolve any dispute and amounts to an advisory opinion. Finally, Judge Hyman's order that Carolinian shall be enjoined from taking any action inconsistent with its own Operating Agreement and the law likewise resolves no controversy between the parties and amounts to an advisory opinion. This specific injunctive relief is wholly speculative and abstract.

Since no case or controversy remained for adjudication between the parties following the resolution of the Levys' appeal, this Court should vacate the Order of Judge Hyman.

CONCLUSION

For the forgoing reasons, Carolinian respectfully requests this honorable court vacate Judge Hyman's order entering a declaratory judgment and permanent injunction.

Respectfully submitted,


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July 80, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM HORRY COUNTY
Court of Common Pleas

JUL 26 2016

SC Court of Appeals

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

Case No. 2012-CP-26-05610

Appellate Case No.: 2015-002638

Shaul Levy and Mier Levy Respondent,

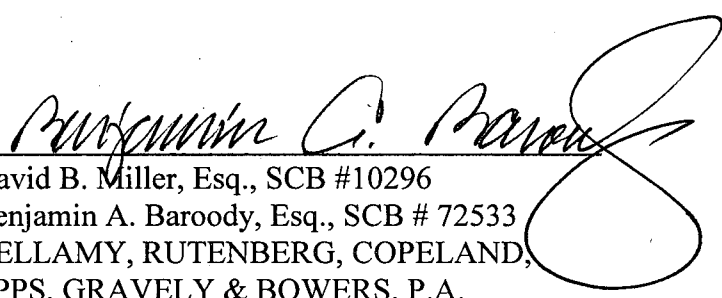
v.

Carolinian, LLC Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief complies with Rule 211(b)
SCACR.

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THE STATE OF SOUTH CAROLINA
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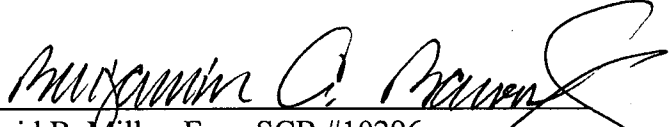
PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief on the person(s) whose name and address appear below by depositing a copy of it in the United States Mail, postage prepaid, on July 25, 2016.

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