IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shaul Levy and Meir Levy, Respondents,

v.

Carolinian, LLC, Appellant.

Appellate Case No. 2015-002638

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Unpublished Opinion No. 2018-UP-099
Heard November 7, 2017 – Filed March 7, 2018

APPELLANT'S PETITION FOR REHEARING

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Misapprehension of two fundamental facts in the record has led this Court to render an erroneous opinion. Logical reasoning must be predicated upon truth to be correct. And so it is with the case at bar. The primary purpose of this Petition for Rehearing is not to reargue the merits of this appeal, but to direct this honorable Court's attention to those two fundamental misapprehensions in an effort to achieve a correct opinion.

I. IN *LEVY I*, JUDGE JOHN TRIED ALL CLAIMS RAISED IN THE LEVYS' COMPLAINT.

This Court, like the trial court before it, has failed to recognize that the trial of *Levy I* before Judge John on January 8, 2013 was a full and complete trial of all the claims set forth in the Levys' Complaint. The Levys conceded this fundamental fact at the hearing before Judge Hyman. (See R. pp. 185-87 and pp. 189-90 ("With specificity, we had included [all claims for a declaratory judgment and permanent injunction] in our complaint, it was before Judge John. Those issues were tried to Judge John and he denied our permanent injunction and declaratory judgment."). At no time did the Levys argue that only some, but not all, of the relief sought in their Complaint were tried before Judge John.

To be sure, at the trial before Judge John, the Levys and Carolinian chose to present their entire case, inclusive of all claims and counterclaims, to Judge John by way of a Stipulation of Facts, legal memoranda, and oral arguments. No factual evidence was presented to the Court beyond that which was contained in those stipulated facts. Both parties were given a full and fair opportunity at that time to present any and all issues to the trial court for disposition at that time, and they did so. The parties did not choose to present one claim at that time and reserve the other claims for a later time. There was no bifurcation of claims, no bifurcation of issues, no summary

ruling, and no involuntary non-suit. There was one trial on all claims and all issues presented in the parties' pleadings. Judge John issued one final order, ruling upon all that was before him.

As the Supreme Court correctly held in *Levy I*, there was but one "dispositive issue" presented in that trial before Judge John: whether Carolinian could compel the purchase of Patel's distributional interest from the Levys after the foreclosure sale pursuant to Article XI of its Operating Agreement. That was the only issue presented before Judge John, the only issue raised on appeal, and the Supreme Court reversed Judge John's ruling. At that point in time, the case was over. The Supreme Court deliberately did not remand the case for further proceedings because there were no more proceedings left to be tried.

This Court correctly found that "*Levy I* addressed only the provision of the Operating Agreement providing Carolinian the right to purchase Patel's distributional interest prior to the foreclosure sale." The error in this Court's opinion is its next statement: "... it did not address the Levys' further requests for declaratory and injunctive relief as set forth in their complaint." As set forth above, and as is abundantly clear from the record in *Levy I* and in this appeal, the Levys and Carolinian tried their entire case before Judge John, not a part of it.

It is upon this fundamental misapprehension of the trial and appeal in *Levy I* that this Court makes the following erroneous conclusion: "Because neither the circuit court nor the supreme court addressed the Levys' claims for declaratory and injunctive relief in *Levy I*, the supreme court's reversal logically required the circuit court to conduct additional proceedings to consider any remaining claims set forth in the complaint." There were no "remaining claims." As stated above, even the Levys' counsel agreed that all claims in the Levys' Complaint were raised before Judge John that the Levys' elected to raise before him. As the Supreme Court correctly held in *Levy I,* the Levys and Carolinian presented but one issue for Judge John's determination at trial:

whether Carolinian could compel the purchase of Patel's distributional interest from them after the sale pursuant to Article XI of its Operating Agreement, or not. The Supreme Court ultimately ruled it could not, thereby disposing, dispositively, of all claims presented at trial. None remained for a later trial.

At the initial hearing before Judge Hyman, and in response to his question seeking clarification of precisely what occurred in the *Levy I* appeal, the Levys' counsel explained, "[w]e appealed Judge John's order in its entirety and argued every claim in the appeal that was addressed by our complaint and by Judge John's ruling." (R. p. 186).

Thus, both Carolinian and the Levys agree on this point: Judge John tried one trial on all claims raised in the Levys' Complaint, not some of them. The disagreement, as discussed *ad nauseum* before Judge Hyman at the initial hearing, was simply whether the Supreme Court's Order and subsequent remittitur of this case was intended to end this case or to give the trial court the ability to grant the Levys all of the declaratory and injunctive relief sought in their Complaint.

II. NO ADVERSARIAL RELATIONSHIP EXISTED BETWEEN THE LEVYS AND CAROLINIAN AT THE TIME OF THE HEARING BEFORE JUDGE HYMAN.

Assuming, arguendo, that there were "remaining claims," for a second trial before Judge Hyman in *Levy II*, this Court, like the trial court before it, has misapprehended another fundamental fact in the record before it. There was no active dispute between the Levys and Carolinian at that time, nor did the Levys present Judge Hyman with any evidence to the contrary.

Following remittitur from the Supreme Court, the factual record presented before Judge Hyman on May 12, 2015 consisted of the same Stipulation of Facts presented before Judge John on January 8, 2013. No new evidence was presented. The last chronological fact contained in that Stipulation was a letter from Carolinian's counsel to the Levys' counsel dated September 6, 2012,

just ten (10) days prior to the Levys' filing their Complaint and obtaining a Temporary Restraining Order, in which Carolinian stated it would be proceeding with the valuation and purchase of the Levys' distributional interest.

The record before Judge Hyman is without contradiction that Carolinian posed no threat to the Levys or their distributional interest at any time prior to the May 12, 2015 trial before him. Following service of the Complaint and Temporary Restraining Order, Carolinian consented to the entry of a Temporary Injunction during the pendency of the action. When the Levys appealed Judge John's order and petitioned the trial Court to restore the temporary injunction during the pendency of the appeal, Carolinian again consented to such relief. Although not even raised by the Levys at the hearing, Carolinian's counsel specifically addressed any possible or potential concern that Carolinian may be seeking to take action in derivation of the Levys' interest in Carolinian. "[The Supreme Court's Order] is adverse to us [and] we're not arguing with that. There's no funny business here going on behind the scenes where we're trying to get something, you know, circumvent the Supreme Court order here." (R. p. 192). The Levys presented Judge Hyman with no evidence contradicting this statement.

Thus, when this Court found, in its opinion, that "[t]he Levys and Carolinian *remain* in an ongoing adversarial relationship," this finding is without any factual support (emphasis added). When this Court found that "Carolinian *wants*" the Levys' distributional interest, this finding is likewise without any factual support. (emphasis added). A more accurate account of the record would show that Carolinian *was*, presumably, in an adversarial relationship with the Levys and *wanted* their distributional interest over two years prior to the hearing before Judge Hyman. But, this presumptively adversarial relationship ended when the Supreme Court entered its ruling, approximately seven months before the second trial before Judge Hyman in *Levy II*. Such is the

fundamentally untrue premise upon which this Court bases its conclusion that a justiciable controversy existed at the time of the trial before Judge Hyman.

What's more is that this Court went even farther than Judge Hyman did, when it made the following finding of fact that neither existed in the record before Judge Hyman, nor formed the basis for Judge Hyman's own order. "The record illustrates *that at the time of the second nonjury trial*, Carolinian was still attempting to use the language of the Operating Agreement to interfere with the Levys' distributions. (emphasis added)." This finding is simply not accurate.

It was upon these fundamentally untrue premises that this Court logically concluded "[t]hus, there is a real and substantial risk that without the circuit court's order, Carolinian will continue to seek ways to circumvent or undermine the Levys' distributional interest." However, there simply is no evidence in the record to support this conclusion. The Stipulation of Facts before Judge Hyman on May 12, 2015 ended with the same September 6, 2012 letter from Carolinian's counsel to the Levys' counsel stating it planned to exercise its right under Article XI to buy their distributional interest. The Supreme Court's order squarely declared that Carolinian could not exercise such a right, and Carolinian represented to Judge Hyman at the hearing that it had accepted the ruling. Judge Hyman did not find that an adversarial relationship existed between Carolinian and the Levys at that time because one did not. This Court should find no differently.

III. THE TERMS OF THE LEVYS' DESIRED INJUNCTION WERE CHALLENGED AT THE INITIAL HEARING.

This Court's opinion erroneously holds that Carolinian failed to "challenge the terms of the injunctive relief awarded to the Levys ... at the initial hearing." This finding is simply untrue. To the contrary, Carolinian argued this point *ad nausem* at the initial hearing. At that hearing, Carolinian's counsel presented Judge Hyman with a copy of the Complaint and directed his

attention to the Levys' Prayer for Relief, in which they sought five specific forms of declaratory relief and five specific forms of injunctive relief. The Court and counsel spent the better part of the hearing discussing the merits of these forms of relief. What follows are highlights from the transcript of that hearing on May 12, 2015:

Carolinian's Counsel: [I]f you look under the temporary injunction part [of the Levys' Complaint], if you go down to Section B, preferably, Your Honor. Another thing they ask for is we want an injunction – one of the things they're asking you for today, Judge, is we want you to give us a permanent injunction that says that Carolinian cannot take any actions that interfere with the distributional interests of Plaintiffs in the Carolinian. Well, what in God's name does that mean? (R. p. 189).

Carolinian's Counsel: This is very, very important and I need to emphasize this to you again. *** If you look at ... the breadth of the complaint, they're not just seeking a ... permanent injunction that says ... Carolinian cannot compel the purchase of this distributional interest; it's not limited to that. If it were, we wouldn't be here today. *** What they're asking you to do today, which we squarely object to is they want [you] to ... enter ... a ... permanent injunction today that says, for example, you Carolinian cannot take any actions that interfere with the distributional interest of the Plaintiffs in Carolinian.... (R. p. 197).

Carolinian's Counsel: Your Honor, we get it. We're gonna do what the operating agreement says and what the law says; there isn't any question about that. What we don't want to have is an order entered today that gives in essence an advisory opinion for something that [has not] even come up yet and that's what they're asking you to do. And that's the problem with the procedural aspect of where we are today is that you can't – how can this Court today enter an injunction today that says that, for example, Carolinian cannot take any actions inconsistent with the requirements of the LLC Act at this point in time. First, are we gonna abide by the law; of course, we are. Are we gonna abide by the operating agreement; of course, we are. There is no justiciable controversy before this Court today that would require the necessity of the issuance of an injunction. We aren't doing anything contradictory to the law or to the operating agreement right now. That's not before you. We tried this case two years ago and it – and the issues were disposed of then and was over. And then it went up to the Supreme Court and the only – the real issue in the case which was whether we could

compel the purchase after the foreclosure sale was dealt with squarely by the Court. That's it. If they think that they need an injunction at this stage of the game, two years later, after the evidence and testimony went in two years ago, it's stale now. 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. But to sit here today, two years later, and to ask for a permanent injunction enjoining us to – in a purely advisory capacity just doesn't make sense. (R. pp. 199-200).

Carolinian's Counsel: That one and A, what does maintaining unauthorized sole dominion and control over the distributional interest rightfully belonging to Plaintiffs mean? What does that mean? I don't know. (R. p. 202).

Following these arguments by Carolinian's counsel, Judge Hyman asked the Levys' counsel if there was "something here that you suspect or you're afraid might happen ... I need to hear it." (R. p. 202). Judge Hyman thereby opened the door to allow the Levys to present the Court with any evidence upon which a permanent injunction could properly be based, all in the context of Carolinian's argument that no active, justiciable controversy existed at that time.

In response, the Levys' counsel provided the Court with no evidence. Rather, counsel informed the Court, "[t]hey've already done it, okay. They started off in clear violation of our rights saying to Judge John Paragraph 11 of this ... operating agreement ... gives us the right to buy it back. It was clear that it didn't." (R. 203). This statement truly and accurately described the matter at hand, as no new evidence had been presented to Judge Hyman of any action taken in derivation of the Levys' interest since Carolinian's counsel sent a letter to the Levys' counsel nearly three years prior to the hearing. Carolinian consented to temporary injunctions preventing them from doing so until the Supreme Court finally declared that they could not. When the Supreme Court so ruled, Carolinian abided by that order.

Thus, Carolinian vehemently challenged, and preserved for appeal, the propriety of the Levys' requests for all forms of injunctive relief so sought in their Complaint before Judge Hyman. The Levys' confined their presentation at the initial hearing before Judge Hyman to an academic exercise of interpreting the Supreme Court's order. The Levys simply argued that, because the Supreme Court's order reversed Judge John's order, they were entitled to each and every form of declaratory and injunctive relief sought in their Complaint.

It was Carolinian that expanded the discussion at the hearing to argue that, not only did the Supreme Court's order dispose of the one and only issue raised by the Levys in *their appeal*, but that Judge Hyman was also constrained by a stale record that contained no evidence of any risk to the Levys or their distributional interest. The Levys presented no evidence contradicting its arguments, and despite that fact, Judge Hyman entered further permanent injunctive relief anyway. Carolinian preserved these arguments for review by this Court, and this Court's opinion, as set forth above, is in plain error.

IV. CONCLUSION

This Court has misapprehended the factual record and procedural history of this long case, which has led to its erroneous findings and conclusions. By the Levys' own acknowledgement, Judge John tried this case in full, inclusive of *all* of the Levys' claims for declaratory and injunctive relief. By the Levys' own acknowledgement, Judge John ruled upon all issues presented to him at that trial. The Levys appealed that order, the Supreme Court reversed, and, in spite of the Levys' request for a remand, the Supreme Court determined there was but one dispositive issue on appeal, issued a declaratory judgment and permanent injunction on that issue, and simply remitted the case. At that time, this case, in its entirety, was over.

For these reasons, Carolinian respectively requests this Honorable Court grant its petition, vacate its prior opinion, and enter a new opinion that is predicated upon a true and accurate record.

Respectfully submitted,

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March 21, 2018

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PROOF OF SERVICE

The undersigned certifies that he is employed with the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., that he has mailed a copy of the Appellant's Petition for Rehearing to counsel listed below this 21st day of March, 2018, with proper postage attached thereto:

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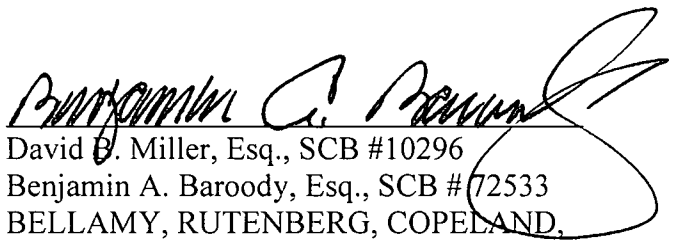

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Petition for Rehearing complies with Rule 267 SCACR.

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March 21, 2018

VIA FEDERAL EXPRESS
The Honorable Jenny Abbott Kitchings
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Re: Shaul Levy and Mier Levy v. Carolinian, LLC
Appellant Case No. 2015-002638

Dear Ms. Kitchings:

Enclosed herewith please find the original and six (6) bound copies of Appellant's Petition for Rehearing in the above-referenced matter. Also included with this Petition is a $25.00 check for the filing fee along with a copy of the Proof of Service for service upon opposing counsel.

Yours very truly,

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