

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 22 2018

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Order (S.C. Ct. App. Filed May 24, 2018)

Shaul Levy and Mier LevyRespondent,

v.

Carolinian, LLCPetitioner,

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 24, 2018.

INTRODUCTION

On September 3, 2014, *this* Court rendered an Opinion ending *this* case, and the parties have spent nearly four years since litigating over what that Opinion meant. To be sure, that Opinion reversed the final order of the circuit court and provided the Respondents with all of the relief they sought at that trial. This Court did not remand the case, yet the county clerk returned the case to the active trial docket, sparking the debate over whether this Court intended to end the case and whether the trial court had jurisdiction to conduct further proceedings. Despite ending this case without remand, a trial court has construed this Court's Opinion as "in essence, a reversal and a remand," and the Court of Appeals has agreed. As a result, *this* case now contains an Opinion of the Court of Appeals in direct conflict with the Opinion of this Court. This case is, therefore, the quintessential case requiring a writ of certiorari under Rule 242(b)(3), SCACR.

QUESTIONS PRESENTED

1. Did this Court's Order entered September 3, 2014 end this case?
2. Did the trial court lack jurisdiction to conduct proceedings following the entry of this Court's Final Order?
3. If the trial court had jurisdiction to conduct further proceedings, did the record contain evidence upon which an injunction could have been granted?

RELEVANT BACKGROUND

On January 8, 2013, all of the facts in this case were submitted by written Stipulation of Facts at a non-jury trial before the Honorable Steven H. John. The Levys were judgment creditors of Bhupendra Patel, who owned a membership interest in Carolinian, LLC. The Levys obtained a charging lien against Patel's distributional interest in Carolinian, LLC, which the Levys subsequently acquired at a foreclosure sale. Following the sale, Carolinian attempted to compel the purchase of the distributional interest pursuant to alleged rights contained within its Operating Agreement. The Levys objected to the attempt and filed this action seeking a declaration that Carolinian had no such right against them and to enjoin Carolinian from doing so.

I. *LEVY I: Carolinian's Attempt to Compel the Purchase of the Levys' Distributional Interest*

While the Levys' Complaint may have contained a prayer for a broad range of declaratory and injunctive relief, the one and only dispositive issue presented at that trial was whether Carolinian, LLC could compel the purchase of the distributional interest which the Levys had acquired at the foreclosure sale. The record before the trial court consisted of a Stipulation of Facts prepared by counsel, legal memoranda submitted by counsel, and oral argument by counsel. The parties did not choose to present one claim at that time and reserve 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 but one trial on the one, dispositive issue presented in the record at trial.

Judge John ruled that Carolinian could compel the purchase pursuant to the terms of its Operating Agreement and under the law. As no other issues were presented, no other issues were

addressed. When the Levys moved to alter or amend the judgment, they did not seek a ruling on each and every claim of declaratory and injunctive relief prayed for in their Complaint. Rather, the Levys merely challenged Judge John's legal reasoning in construing the Operating Agreement and applying the law to the stipulated facts in the record.

Following the denial of their motion, the Levys appealed Judge John's Order to this Court, seeking a reversal of 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...." Again, the Levys appealed Judge John's order by charging error in his construction of the Operating Agreement and the application of the law to the stipulated facts. The dispositive issue on appeal, then, remained what the dispositive issue at trial had always been- whether Carolinian could compel the purchase of the distributional interest which the Levys acquired at the foreclosure sale.

Ultimately, this Court, reviewing Judge John's Order *de novo*, agreed with the Levys. This Court decided simply to reverse Judge John's Order, substituting its own Opinion for that of Judge John. In doing so, this Court held:

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].

This Court did not remand the case for further proceedings. Rather, on October 21, 2014, this 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]. This case was ended.

II. *LEVY II*: The Levys’ Attempt for a Second Bite at the Apple

This Court’s Opinion was now the law of the case—a final judgment of record in the Horry County public index, declaring that Carolinian could not compel the purchase and enjoining it from doing so in the future. Having given the Levys precisely what they sought at the trial before Judge John, this case was over. Inexplicably, the clerk soon thereafter returned this case to the non-jury trial docket and scheduled it for a hearing before the Honorable Larry B. Hyman. Under what authority had this Court vested the trial court with jurisdiction to conduct further proceedings in this case? The Supreme Court had not remanded the case for further proceedings. No new pleadings had been filed. No new evidence had been submitted. The record remained as it was before Judge John over two (2) years prior at the original trial. What, exactly, was the purpose of *this* hearing?

On the day of the hearing, May 12, 2015, the Levys announced that the purpose of this hearing was to give the Levys *all* of the injunctive and declaratory relief sought in their Complaint’s prayer for relief despite not raising those issues at the trial before Judge John. In other words, the Levys were now attempting to resurrect previously abandoned claims and issues in a new trial on the same record that had existed before Judge John.

How could this be? The Supreme Court’s Order, quoted above, gave the Levys the exact relief they sought at trial—a declaratory judgment that Carolinian could not compel the purchase of

the Levys' distributional interest following the foreclosure sale and enjoining it from attempting to do so in the future. Since no other issues other than this "dispositive issue" were raised at trial before Judge John, what was left of the case to try?

The hearing before Judge Hyman consisted primarily of an attempt by counsel and the trial Court to interpret this Court's Opinion in *Levy I*. To illustrate, Judge Hyman at one point asked counsel "isn't [the Supreme Court's Opinion] in essence a reversal and a remand for an order consistent with the position of the Court? I mean, how could it be construed as anything else?" (Record, p. 186). The Court later read aloud the introductory paragraph of this Court's Opinion and interpreted it as follows: "Isn't that essentially what they did is they reversed that finding but by implication, *by implication*, doesn't that require the Court to adjust to change ... [t]his Court to issue its own order." (Record, p. 191) (emphasis added).

Carolinian rightfully argued that the Supreme Court had ended this case and that the trial court lacked jurisdiction over the case to conduct further proceedings. Without specific instructions to remand the case for further proceedings, under what authority could the trial court exercise jurisdiction of the case to conduct further proceedings? Moreover, to grant the Levys all of the injunctive relief sought in their Complaint at this juncture would be in error because the additional relief sought by the Levys was not only vague, but purely advisory in nature as no active case or controversy existed at the time of the second trial. No evidence was presented at the hearing that Carolinian had taken steps to thwart the Supreme Court's order. To the contrary, Carolinian represented at the hearing that it intended to abide by this Court's Order.

Despite the foregoing, Judge Hyman ultimately interpreted the Supreme Court's Opinion to provide it jurisdiction to provide the Levys with all of the relief sought in their Complaint.

Based upon this interpretation of this Court's Opinion, he entered an order granting the Levys nearly all of the extraneous declaratory and injunctive relief prayed for in their Complaint yet abandoned by them at the trial before Judge John. This action gave the Levys, two non-member transferees of a mere distributional interest, a permanent injunction to challenge all business operations of Carolinian. The Levys were now vested with more rights than Carolinian's own members. The Levys now had what they wanted- a hammer to exert control over a company in which they had no voting rights. This appeal followed.

III. The Court of Appeals' Misinterpretation of this Court's Opinion and the Conflicting Opinion which Followed

On March 7, 2018, the Court of Appeals affirmed Judge Hyman's order, finding that the trial court had jurisdiction to conduct subsequent proceedings despite this Court not remanding the case for those proceedings and ending the case. Carolinian petitioned the Court for rehearing, which was denied by Order filed May 24, 2018.

The Court of Appeals' Opinion correctly framed the issue on appeal in this case when it stated, "This appeal arises from a dispute over the effect of the supreme court's opinion in ... *Levy I*..." However, the Court misapprehended the record before this Court in *Levy I* when it assumed the parties had agreed to try the dispositive issue before Judge John and reserve the other claims raised in its prayer for relief for a second trial. As set forth above, such is not the case.

As this Court correctly held in *Levy I*, there was but one "dispositive issue" presented in the trial before Judge John, whether Carolinian could compel the purchase of Patel's distributional interest from the Levys after the foreclosure sale pursuant to the terms of its operating agreement. That very issue was the only issue presented before Judge John, the only issue raised on appeal,

and the only issue addressed by the Supreme Court. Upon reversal and remitter of this Court's Opinion into the Horry County public index, this case was over and the trial court lacked jurisdiction to conduct further proceedings. No more issues were left to be tried.

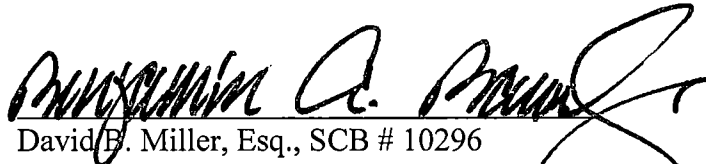
Even assuming, *arguendo*, that there were "remaining claims" for a second trial before Judge Hyman in *Levy II*, there was no active dispute between the Levys and Carolinian at that time. The factual record presented before Judge Hyman on May 12, 2015 consisted of the same Stipulation of Facts presented before Judge John on January 8, 2013. No new evidence was presented. That stale record quite simply contained no facts upon which the trial court or the Court of Appeals could have found a threat of harm giving rise to a permanent injunction. Stated another way, even had these claims been presented at trial to Judge John, Judge John likewise would have been without any factual basis upon which to enter such relief.

The Stipulation of Fact is part of the Record on Appeal. It is but six pages long. The Stipulation contains no facts as to any issue other than the one "dispositive issue" this Court decided. Had the Levys desired to pursue other avenues of relief then it was their burden to submit evidence in support; they did not do so. There are no facts anywhere in the record, whether Levy I or Levy II, to support the relief given by Judge Hyman.

In sum, the Court of Appeals rendered an opinion contravening this Court's Opinion by resurrecting the Levys' previously abandoned claims and then upholding a permanent injunction that was founded upon its own misapprehension of the record before it.

CONCLUSION

For the foregoing reasons, Carolinian respectfully requests this honorable court grant a writ of certiorari to review the opinion of the Court of Appeals in all respects.

A handwritten signature in black ink, appearing to read "Benjamin A. Baroody", is written over the printed name and firm information.

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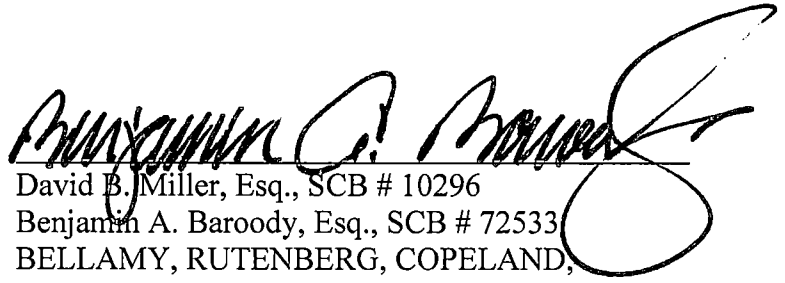
PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on the person(s) whose name and address appear below by depositing a copy of it in the United States Mail, postage prepaid, on June 21, 2018.

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A large, stylized handwritten signature in black ink, which appears to read "Benjamin A. Baroody". The signature is written over the printed name and extends to the right, with a large loop at the end.

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