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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Appellant Case No.: 2018-001159

Shaul Levy and Mier LevyRespondent,

v.

Carolinian, LLCPetitioner.

**PETITIONERS' REPLY TO RESPONDENTS' RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

Petitioner offers this Reply responsive to Respondents' Return to Petition for Writ of Certiorari. Petitioner believes this Reply is necessary as this case is easily confused when mischaracterized in terms of generalities rather than specifics. As is demonstrated below, a full trial was conducted on all matters pled and this Court's prior Opinion resolved all claims presented. There was no remand for a second trial making it improper to have conducted a second trial.

ARGUMENT

I. A WRIT OF CERTIORARI IS IMPERATIVE BECAUSE THE CIRCUIT COURT AND COURT OF APPEALS HAVE MODIFIED THIS COURT'S PRIOR ORDER.

This case is simply about whether Petitioner could compel the sale and purchase of Respondents' distributional interest in Carolinian, LLC. No additional claims were presented at trial and no additional claims were raised to this Court in the first appeal. This Court conclusively resolved this case in full when it ruled:

We reverse the Trial Court and find that the provisions of Article 11 of the Operating Agreement did not restrict the Levy's 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 Levy's to sell the distributional interest they acquired through the foreclosure sale. (Emphasis added)

This Court did not merely reverse the Trial Court's Order; it declared the rights of the parties as to all claims presented at trial and ordered that Carolinian may not compel the sale of the Levys' interest. This Court, exercising *de novo* review of the Trial Court's Order, thus provided Respondents the precise injunctive relief sought at trial. Accordingly, this Court did not remand

for further proceedings; it simply remitted its Opinion to the Horry County Clerk of Court for filing as an enforceable judgment. This case was over.

Despite the clarity of this Court's Order, the Trial Court later undertook to modify this Court's ruling, stating "I know they didn't say remanded for -- and -- it should have been reversed and remanded for further proceedings" [Appx. p. 221] and "it's a situation where I wish the Court had used that magic language, remanded for further proceedings, but they didn't, but I think by implication the Order says that the Plaintiffs in this matter are entitled to an injunctive order and there is no injunctive order" Appx. p. 232]. The Court of Appeals has affirmed the Trial Court's modification of this Court's ruling. Both have exceeded their authority in doing so, thus triggering the necessity for Certiorari pursuant to Rule 242(b)(3), SCACR.

II. A SECOND BENCH TRIAL WAS NOT NECESSARY

Respondents appeal to our sense of fair play by generally asserting that this Court's reversal in their favor entitles them to then seek their requested relief in the Circuit Court. While at first blush this argument is appealing, it does not survive closer scrutiny. The simple truth of the matter is that the Respondents offered no evidence or arguments at trial in support of the injunctive relief they now seek. To the contrary, the Respondents presented one dispositive issue at trial: whether Carolinian could compel the purchase of the Levys' distributional interest pursuant to Article XI of its operating agreement after the foreclosure sale. Respondents' Complaint and the joint Stipulation of Facts are clear in this regard.

The Trial Court received any and all evidence the parties chose to offer on any and all claims pled. There was no evidence offered as to any other claim, including injunction, other than the declaratory judgment claims on the one dispositive issue. Accordingly, this Court's resolution of that issue ended this case.

Why does it matter? Judge Hyman's Order modifying this Court's Order recites the following:

Therefore, it is hereby ORDERED:

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 auction 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 (emphasis added).*

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 (emphasis added);*
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. Section 33-44-503(c), and the Operating Agreement (emphasis added).*

Most of these findings were already disposed of pursuant to this Court's prior Order, rendering them unnecessary. However, Judge Hyman's Order includes blanket advisory injunctions (shown in italics) obligating Petitioner under penalty of contempt. These are unsupported advisory rulings proscribing unspecified and unsupported future violations of the law and of the Operating

Agreement. Any future disagreement among these parties will now be coupled with the threat of contempt.

The italicized portions of Judge Hyman's Oder are purely advisory. As this Court stated in Power v. McNeal, 255 S.C. 150, 177 S.E.2d 551 (1970), "it is uniformly held that the Declaratory Judgment Act does not require the Court to give a purely advisory opinion as to the issues sought to be revised." Id. at 154, 553. "We simply refuse to enter the field of advisory opinions." Id. at 155, 553.

There exists no basis in the Stipulation of Facts upon which an injunction may be issued. Respondents presented no additional evidence at the second bench trial to even attempt to support the premise that a case or controversy existed between the parties. The fact is that the one and only dispute between the parties-the issue of whether Carolinian could compel the purchase of the Levys' distributional interest after the foreclosure sale-had been resolved with finality when this Court entered its prior ruling. When the second bench trial took place, no irreparable harm existed. Judge Hyman's Order set forth no reasons for issuing the injunctions, was not specific in terms, nor did it describe in detail the acts to be restrained as is required by Rule 65, SCRPC. Nor could it, for there exists no facts in the entire record which would provide a basis for doing so.

III. PETITIONER PRESERVED ITS SUBSTANTIVE CHALLENGE TO JUDGE HYMAN'S ISSUANCE OF AN INJUNCTION.

Carolinian challenged the issuance of an injunction *ad nauseam* at the hearing before Judge Hyman. 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 injunctive relief. The Court and counsel spent the better part of the hearing discussing the merits of these forms of relief. See Appendix pp. 194, 202, 204-205, 207, and 208.

What follows is one highlight from the transcript of that hearing on May 12, 2015:

Carolinian's Counsel: 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 ... **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.**

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. (Appx. pp. 204-205)(emphasis added).

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." (App. p. 207). 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." (Appx. p. 208). 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.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court to grant its petition for a Writ of Certiorari to settle, once and for all, what this Court's prior Order meant.

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August 1, 2018

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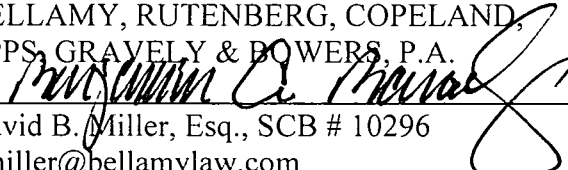
PROOF OF SERVICE

I hereby certify that I served Petitioners' Reply to Respondents' Return to Petitioners' Petitioners' Petition for Writ of Certiorari upon all parties, by placing a copy of the United States mail, postage prepaid, to the below listed parties on August 1, 2018, addressed to the following:

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