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**Jul 20 2020**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Larry B. Hyman, Circuit Court Judge

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Appellate Case No. 2019-001814

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Shaul Levy and Meir Levy,.....Appellants,

v.

Carolinian, LLC,.....Respondent.

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**RETURN TO RESPONDENT’S MOTION  
TO STRIKE AND MOTION TO STAY**

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Pursuant to Rule 240(e), SCACR, the Appellants respectfully submit this Return to the Respondent’s Motion to Strike and Motion to Stay Deadline for Respondent to File Initial Brief and Designation of Matter to be Included in the Record on Appeal.

**PRELIMINARY STATEMENT**

As an initial point, it is important for the Court to understand the relief the Appellants are seeking in this matter, and the reason why they must request that relief. Only then can the Court fairly consider the “Statement of the Facts” set forth in the Initial Appellants’ Brief.

This is the most recent chapter in a much more protracted story that dates back to 2012 and has already led to two previous appeals. For present purposes, however, it is unnecessary to

recount that full story. A briefer and more generalized explanation will suffice for this response to the pending motion.

When this case first began back in 2012, the Appellants obtained a temporary restraining order that prohibited the Respondent from engaging in certain types of conduct. After several years of litigation, the Circuit Court converted that temporary order into a permanent injunction, the entry and terms of which this Court affirmed in 2018. *Levy v. Carolinian, LLC*, 2018 S.C. App. Unpub. LEXIS 101. That injunction, in one form or another, has been in place since 2012 and remains in force today.

At some point during the time when the viability and specific terms of the injunction were still being litigated, the Appellants gained reason to suspect that the Respondent's managing members engaged in self-serving conduct during a business transaction that occurred while the injunction was in place. In an attempt to investigate those suspicions, the Appellants requested financial records from the Respondent, which produced some, but not all, of the materials being sought. Most significantly, the Respondent produced only a redacted version of the primary document from the business transaction in question. The Respondent then refused to provide an un-redacted version of that document.

In response, the Appellants attempted to conduct limited discovery into the matter, including depositions of the Respondent's managing members. The Respondent refused to produce the witnesses for depositions or to provide the requested information in any other manner. At that point, the Appellants filed a motion asking the Circuit Court to enforce the injunction and allow them to conduct the requested discovery. The Circuit Court's denial of that motion led to the current appeal.

The Appellants now ask this Court to reverse and remand with instructions for the Circuit Court to allow and order the requested discovery. Until the Appellants are permitted to do that discovery, they cannot possibly produce “facts” or “record evidence” of misconduct by the Respondent. The Court must proceed from that basic truth when considering the pending motion to strike.

**I. The Court should deny the Motion to Strike.**

The Respondent asserts that “many of”<sup>1</sup> the statements in the “Statement of the Facts” section of the Initial Appellants’ Brief do not contain citations to the record and were not presented to the Circuit Court. The first assertion is more or less accurate, albeit misleading. The second assertion is false.

(A) Citations to the record were impossible at this stage, and unnecessary.

As noted in the Preliminary Statement, this is a highly unusual scenario in which a proper appeal arises before any discovery takes place. No traditional sources of “facts” (e.g. depositions, discovery responses) exist yet because the Appellants have not been allowed to conduct discovery. Thus, some of the assertions contained in the “Statement of the Facts” are only allegations at this point. The Appellants are confident in the truth of those assertions, and they further believe that the requested discovery will prove many, if not all, of them. But the Appellants cannot cite to materials and information they do not yet have.

It is worth noting that the Respondent and its managing members do have this information and the requested materials, but are refusing to provide them. This fact reveals the

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<sup>1</sup> The Respondent does not even attempt to identify which statements it believes were not presented to the Circuit Court and/or should be stricken. The Appellants respectfully submit that, as the moving party, the Respondent had an obligation to make that identification, if it could. The Respondent’s failure to provide that specific information, in and of itself, should be cause to deny the motion.

hypocrisy of the current motion, in which the Respondent faults the Appellants for not citing to information and materials that the Respondent itself is withholding. The Court should not reward that type of gamesmanship and should deny the motion.

Admittedly, some of the assertions in the “Statement of the Facts” are not allegations incapable of proof based on the current record. But those other assertions also do not require record citations because they are basic facts that the Respondent could not possibly dispute in good faith. For example, the statement identifies by name the Respondent’s managing members and the entities involved in the business transactions that gives rise to the present dispute. Surely the Respondent does not need record citations for that information, some of which Respondent’s counsel provided to the Circuit Court himself. [See, e.g., June 15, 2019, Hearing Transcript, pp. 19-20.]

Again, this appeal arrives in an unusual setting in which “evidence” and “facts” are not yet available – at least not to the Appellants. Trying to obtain that evidence is the whole purpose of the underlying motion and the current appeal. For that reason, the “Statement of the Facts” is not a recitation of evidence, as it would be in most appeals. Rather, it is an explanation of the underlying reasons for the Appellants’ attempts to conduct discovery and obtain information from the Respondent. Given this unique situation, if the Respondent (or the Court) would prefer for the “Statement of the Facts” to be renamed as something like “Background Statement,” the Appellants are willing to submit an amended initial brief that makes that change. Similarly, if the Respondent (or the Court) wants the Appellants to omit footnote 3, or revise it to substitute the word “allegations” for “facts,” the Appellants will do so. Those semantics are ultimately unimportant, as the function of the section of the brief in question remains the same.

(B) The information in the “Statement of the Facts” was before the Circuit Court.

Contrary to the Respondent’s assertion, the information contained in the “Statement of the Facts” was raised and presented during the proceedings below. The Appellants’ motion and supporting exhibits, the Respondent’s responses in opposition, and the hearing transcripts<sup>2</sup> collectively contain that information. Some of that information might have been discussed in more general terms during the hearings, but it was presented. Any facts that were not specifically discussed in the submissions or hearings were matters of which the Circuit Court and the parties were already well aware, given the long history of the case. All of that was sufficient to present the basic facts and allegations contained in the challenged section of the brief.

Furthermore, the Respondent has not specifically identified exactly which statements it contends were not presented below. Nor should the Respondent be permitted to do so in a reply to this Return. The Appellants would have no ability to respond to specific challenges in that scenario, which would be fundamentally unjust. Therefore, the Appellants respectfully submit that the Respondent has waived any such specific challenges, and the motion should be denied.

Nevertheless, if necessary, the Appellants can file an amended initial brief that inserts references to the written submissions and/or oral arguments into the “Statement of the Facts.” The Appellants could prepare such an amended brief quickly, and doing so would not delay the progress of the appeal to any appreciable extent. The substance of the brief would not change, meaning the Respondents would not have any additional or new arguments to consider.

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<sup>2</sup> Arguments by counsel are not “evidence,” per se, but as previously explained, the Appellants can only present basic facts and allegations at this stage because discovery has been denied to them. Thus, arguments by counsel (along with written submissions) were essentially the only way for the Appellants to present their position to the Circuit Court under these circumstances.

Although the Appellants believe this approach is unnecessary under the circumstances, it can complete that task in short order if necessary.

(C) The Appellants' argument section does not contain any "statements of fact."

After providing the necessary background information in the "Statement of the Facts," the Appellants devote the entirety of the "Argument" section to a discussion of why the Circuit Court erred and why the Appellants are entitled to relief. The only things that could even possibly be considered "statements of fact" in the "Arguments" section are references to the names of the Respondent's managing members. In this situation, those names are not the types of "facts" contemplated by Rule 210(h), SCACR. Furthermore, those names were mentioned multiple times in the submissions and hearings below. Thus, even if the Court were to strike certain statements from the "Statement of the Facts," that would not impact or alter any of the Appellants' legal arguments.

As with its objection to the "Statement of the Facts," the Respondent does not identify or discuss any specific "statement of fact contained in the Appellants' 'Argument' section of their brief." [Motion, p. 3.] The essence of the Respondent's argument appears to be that if there are any such "statements of fact," the Court should strike them. By not identifying any actual examples, however, the Respondent has not given the Appellants anything to which they can respond. Nor has the Respondent given this Court any basis on which to grant the motion. If nothing else, therefore, the Court should deny the motion to strike to the extent it pertains to the "Arguments" section of the Appellants' brief.

(D) Conclusion

The Respondent's hyper-technical motion ignores the unusual nature of this appeal. Much like a party filing an initial Complaint, the Appellants at this stage have only some basic facts and then allegations as to what they believe the Respondents did wrong. That is all the Appellants have presented (both in the Circuit Court and in their initial brief) because it is all they can present right now. It would defy logic and fairness to fault the Appellants for not including citations to "record evidence" when the very issue on appeal is their ability to seek and obtain that evidence. This is especially true when the party asking the Court to impose that unfair result is the same party that continues to withhold the information the Appellants seek. For these reasons, the Court should deny the motion to strike.<sup>3</sup>

**II. A stay is unnecessary under the present circumstances.**

The Respondent also requests that the Court stay its deadline for filing and serving its initial brief and designation of matter while the motion to strike is pending. Although the Appellants do not believe a stay is required or warranted in this case, they take no official position as to the motion to stay.

As discussed above, the Respondent's motion to strike does not object to, or challenge, any specific part of the "Arguments" section of the Appellants' initial brief. Thus, even if the Court were to strike certain portions of the "Statement of the Facts,"<sup>4</sup> that would not alter or impact the Appellants' arguments as presented in their brief. Those arguments would remain the same as they were on April 8, 2020, when the Appellants served their initial brief. With the

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<sup>3</sup> In the alternative, as discussed above, if the Court does not deny the motion, it should allow the Appellants to file an amended initial brief that includes references to the materials that will comprise the Record on Appeal.

<sup>4</sup> Again as previously noted, the Respondent also fails to identify any specific parts of the "Statement of the Facts" that it believes should be removed, and that, standing alone, is enough reason to deny the motion.

multiple extensions (to which the Appellants consented), the Respondent has had ample time to digest those arguments and develop its responses. This is why the Appellants believe a stay is unnecessary.

Obviously, if the Court instructs the Appellants to file and serve an amended initial brief, the Respondent would be entitled to some amount of time after receiving it to submit its own initial brief. Even in that scenario, however, a full 30-day period would not be necessary, as any amended initial brief from the Appellants would include only minor changes that would not affect the legal arguments.

### **CONCLUSION**

For these reasons, the Court should deny the motion to strike and instruct the Respondent to file and serve its initial brief and designation of matter within a reasonably limited time period.

Respectfully submitted,

**s/ Mark B. Goddard**

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