

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Family Court

Gordon B. Jenkinson, Family Court Judge

Case No. 2003-DR-14-0128

Daisy Wallace Simpson,

Appellant/Respondent,

v.

**William Robert Simpson, individually and as
shareholder/member of Simpson Farms, LLC
and William R. Simpson, Jr., as a shareholder/
member of Simpson Farms, LLC.,**

Respondents/Appellants.

FINAL APPELLANTS' BRIEF OF RESPONDENTS/APPELLANTS

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SC Court of Appeals

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TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal	1
Statement of the Case	3
Statement of Facts	4
Arguments	
1. The Family Court lacked subject matter jurisdiction to alter or amend the final decree of divorce dated December 31, 2004 ...	12
2. Because the December 31, 2004 Final Decree of Divorce is not ambiguous, the family court erred in modifying the final decree in an effort to ascertain the intent of the trial judge	15
3. Because the law of the case is controlling on the family court, the family court erred in modifying the property division.....	17
4. Because Wife had previously maintained in all judicial forums that all of the property to be transferred to her belonged to Husband, she is precluded by judicial estoppel from demanding a cash sum award or that the LLC transfer real estate to her.....	18
5. Because it is the policy of South Carolina courts to separate the parties and their business in a divorce, the court erred in requiring the LLC to transfer a 50% interest in its real estate to Wife	20
6. Family Court erred by failing to make specific findings and conclusions	21
7. Because the LLC and Simpson, Jr., had complied with all requirements imposed on them by the original property division award, it was error for the court to modify the original award	21
8. Because post-judgment interest on a monetary judgment cannot be assessed retroactively, the court erred in making an award of post judgment interest	22

9.	Because interest is not payable on an in-kind distribution, it was error for the family court to award interest to Wife.....	23
10.	The award of a cash balancing payment and requiring the LLC to transfer real estate to Wife exceed the relief requested by Wife	23
	Conclusion	24

TABLE OF AUTHORITIES

CASES

<i>Burns v. Burns</i> , 323 S.C. 45, 48, 448 S.E.2d 571, 572 (Ct. App. 1994)	12
<i>Hayes v. Hayes</i> , 312 S.C. 141, 144, 439 S.E.2d 305, 307 (Ct. App. 1993)	12
<i>Jordan v. Jordan</i> , 307 S.C. 407, 415 S.E.2d 424 (Ct. App. 1992)	12
<i>Brown v. Brown</i> , 392 S.C. 615, 709 S.E.2d 679 (S.C. Ct.App. 2011)	13
<i>Green v. Green</i> , 327 S.C. 577, 581, 491 S.E.2d 260, 262 (S.C. App. 1997)	14
<i>Kelly v. Kelly</i> , 310 S.C. 299, 423 S.E.2d 153 (S.C. App. 1992)	14
<i>Weil v. Weil</i> , 299 S.C. 84, 91-92, 382 S.E.2d 471, 475 (1989)	15
<i>Eddins v. Eddins</i> , 304 S.C. 133, 403 S.E.2d 164 (S.C.App. 1991)	16
<i>Barth v. Barth</i> , 293 S.C. 305, 308, 360 S.E.2d 309, 310 (1987)	17
<i>Huggins v. Winn-Dixie Greenville, Inc.</i> , 252 S.C.353, 357, 166 S.E.2d 297, 299 (1969)	18
<i>In Re: Morrison</i> , 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2d (1996)	18
<i>Haynes Federal Credit Union v. Bailey</i> , 327 S.C. 242, 252, 489 S.E.2d 472, 477 (S.C. 1997)	18
<i>Ducate v. Ducate</i> , 279 S.C. 246, 306 S.E.2d 218 (1983)	20
<i>Calhoun v. Calhoun</i> , 339 S.C. 96, 529 S.E.2d 14, 18 (S.C. 2000)	22
<i>Dixie Bell, Inc. V. Redd</i> , 376 S.C. 361, 656 S.E.2d 765 (S.C. 2007)	23
<i>Casey v. Casey</i> , 311 S.C. 243, 428 S.E.2d 714 (S.C. 1993)	23
<i>Coble v. Coble</i> , 293 S.C. 434, 361 S.E.2d 339 (S.C. 1987)	23

STATUTES AND OTHER AUTHORITIES

Unpublished Opinion No. 2007-UP-147	
S.C. Code Ann. § 20-3-620(c) (Supp. 2010)	13
46 AmJur.2d Judgment § 73 (1969)	16
S.C. Code Ann. § 33-44-201 (1996)	21
S.C. Code Ann. § 33-44-501(a) (1996)	22
S.C. Code Ann. § 33-44-404(c)(12) (1996)	22
S.C. Code Ann. § 33-44-401(c)(12)(1996)	22

STATEMENT OF ISSUES ON APPEAL

1. **THE FAMILY COURT LACKED SUBJECT MATTER JURISDICTION TO ALTER OR AMEND THE FINAL DECREE OF DIVORCE DATED DECEMBER 31, 2004**
2. **BECAUSE THE DECEMBER 31, 2004 FINAL DECREE OF DIVORCE IS NOT AMBIGUOUS, THE FAMILY COURT ERRED IN MODIFYING THE FINAL DECREE IN AN EFFORT TO ASCERTAIN THE INTENT OF THE TRIAL JUDGE**
3. **BECAUSE THE LAW OF THE CASE IS CONTROLLING ON THE FAMILY COURT, THE FAMILY COURT ERRED IN MODIFYING THE PROPERTY DIVISION**
4. **BECAUSE WIFE HAD PREVIOUSLY MAINTAINED IN ALL JUDICIAL FORUMS THAT ALL OF THE PROPERTY TO BE TRANSFERRED TO HER BELONGED TO HUSBAND, SHE IS PRECLUDED BY JUDICIAL ESTOPPEL FROM DEMANDING A CASH SUM AWARD OR THAT THE LLC TRANSFER REAL ESTATE TO HER**
5. **BECAUSE IT IS THE POLICY OF SOUTH CAROLINA COURTS TO SEPARATE THE PARTIES AND THEIR BUSINESS IN A DIVORCE, THE COURT ERRED IN REQUIRING THE LLC TO TRANSFER A 50% INTEREST IN ITS REAL ESTATE TO WIFE**
6. **FAMILY COURT ERRED IN FAILING TO MAKE SPECIFIC FINDINGS AND CONCLUSIONS**
7. **BECAUSE THE LLC AND SIMPSON, JR., HAD COMPLIED WITH ALL REQUIREMENTS IMPOSED ON THEM BY THE ORIGINAL PROPERTY DIVISION AWARD, IT WAS ERROR FOR THE COURT TO MODIFY THE ORIGINAL AWARD**
8. **BECAUSE POST-JUDGMENT INTEREST ON A MONETARY JUDGMENT CANNOT BE ASSESSED RETROACTIVELY, THE COURT ERRED IN MAKING AN AWARD OF POST JUDGMENT INTEREST**
9. **BECAUSE INTEREST IS NOT PAYABLE ON AN IN KIND DISTRIBUTION, IT WAS ERROR FOR THE FAMILY COURT TO AWARD INTEREST TO WIFE**

10. **THE AWARD OF A CASH BALANCING PAYMENT AND REQUIRING THE LLC TO TRANSFER REAL ESTATE TO WIFE EXCEED THE RELIEF REQUESTED BY WIFE**

STATEMENT OF THE CASE

This is the second appeal in this domestic case. In the previous appeal, The Final Decree of Divorce dated December 31, 2011 was affirmed by Unpublished Opinion No. 2001-UP-147, filed April 4, 2007. Appellant Husband's Request for a Rehearing and Petition for Certiorari were denied. On April 29, 2008, Wife file a motion and a Complaint for a Rule to Show Cause.

The Final Decree of Divorce included an equitable division of property.

By Order entered March 6, 2009, the issues raised in the Rule to Show Cause were partially resolved. Wife filed a second Motion and Complaint for a Rule to Show Cause on January 21, 2009. Hearing on the second Rule to Show Cause were conducted on September 15 and December 21, 2009. An Order was entered May 28, 2010 finding that the Husband was not in contempt and that certain property that the husband was required under the Final Decree to convey to the Wife did not belong to him.

Wife filed a Motion for Reconsideration and to Alter/or Amend the May 28, 2010 Order. The family court conducted hearings on December 15, 2010 and January 6, 2011. The family court entered an Order on March 18, 2011 which modified the property division set out in the Final Decree. Respondents/Appellants appeal this Order.

STATEMENT OF FACTS

William Robert Simpson (Husband) and Daisy Wallace Simpson (Wife) were divorced by a Final Decree of Divorce entered December 31, 2004. In that proceeding, the court also apportioned the marital estate and awarded Wife a total of \$784,055.00 as an equitable division of property. (R. V.1, p. 39). This award required a cash payment to Plaintiff of \$244,904.00, plus an in-kind distribution that awarded to Wife her accounts at filing, required Husband to transfer the Edward R. Jones accounts to Wife, and to convey seven parcels of real estate to the Wife. The family court placed a value of \$539,151.00 on the real estate and accounts to be transferred to Wife. (R. V.1, p. 40, lines 3-12).

The property to be transferred to Wife is identified in paragraph 106, at page 40, Final Decree of Divorce dated December 31, 2005, as follows:

a.	Plaintiff retains her accounts at filing	\$ 18,209.00
b.	Edward R. Jones accounts	\$ 83,442.00
c..	2.1 acres	\$ 7,500.00
d.	1.4 acres	\$ 5,000.00
e.	161.1 acres	\$175,000.00
f.	1.3 acres	\$ 15,000.00
g.	6.7 acres	\$ 35,000.00
h.	133.2 acres	\$150,000.00
i.	House and 16 acres	\$ 50,000.00

(R. V.1, p. 40, lines 3-11).

Through her expert witness (R. V.2, p. 397, lines 15-24), Wife introduced Exhibit 25 at trial, which was a summary of the expert's opinion of the value of property owned 100% by Husband, property owned 100% by the LLC, and one-half of the property titled in the name of S&T Land Developers Partnership, a partnership in which the Husband owned a

50% interest. (R. V.2, pp. 697-698). Using this Exhibit as a reference, the family court found the following property on Exhibit 35 (sic) to be owned individually by Husband:

(1)	2.1 acres	\$ 7,500.00
(5)	1.4 acres	\$ 5,000.00
(21)	161.1 acres	\$175,000.00
(51)	1.3 acres	\$ 15,000.00
(54)	6.7 acres	\$ 35,000.00
(62)	133.2 acres	\$150,000.00
(64)	House and 16 acres	\$ 50,000.00

(R. V.1, p. 28, lines 1-8).

Wife is familiar with the property set out in Exhibit 25, and was able to identify property by referring to the tax map number. (R. V.2., p. 408, lines 17-24); (R. V.2, p. 410, lines 13-25; p. 411, lines 1-5).

Despite the finding of the family court in the Divorce Decree, the 133.2 acre tract and the house and 16 acres are titled in the name of W.R. Simpson Farms, LLC and the 161.1 tract is titled in the name of Simpson Farms, LLC. (R. V.1, p. 81, lines 1-9). Furthermore, the tax map number associated with the 6.7 acre tract indicates that the property consists of 3 acres and not 6.7 acres. (R. V.2, p. 437, lines 12-19). Husband and Wife later determined that the 6.7 acre tract surrounds the real estate that the parties intended to convey to their daughter and they transferred the 6.7 acre tract to their daughter. (R. V.1, p. 7, lines 16-23; p. 8, lines 1-2).

The family court's findings that the above real estate belonged to the Husband resulted in a quiet title action in the circuit court involving the house and 16 acres. In that action, a Consent Order was entered that recognized that the grantors reserved a house and

3 acres surrounding the house when the conveyance was made to the LLC. (R. V.2, p. 538, lines 3-14); (R. V.1, p. 45, lines 20-24; p. 96, lines 1-4).

Title to the remaining properties is in the name of Husband individually. (R. V.1., p. 97, lines 14-16).

Wife has been a real estate agent since 2001. (R V.1, p. 11, lines 31-32); (R V.2, p. 404, lines 18-25; p. 405, lines 1-17).

Husband is a farmer. (R. V.1, p. 12, lines 1-2). The parties' son, William R. Simpson, Jr. (Simpson, Jr), worked on the farm from 1981 to 1989 at reduced wages in order to acquire an interest in the farm. (R. V.1, p. 22, lines 1-5).

On April 28, 2000, Husband and Simpson, Jr. formed Simpson Farms, LLC and signed an LLC operating agreement. Substantial property acquired during the marriage was transferred into the LLC. Husband and Simpson, Jr. each owned a 50% interest in the LLC. (R. V.1, p. 9, lines 20-23).

Wife was aware of the discussions regarding the LLC before it happened, knew that it occurred as soon as Mother's Day 2000 (R. V.1, p. 10, lines 1-2), and allowed her son Simpson, Jr. to continue to work on the family farm thinking that he owned 50% of the property in the LLC. Wife took no action to challenge Simpson, Jr.'s interest until filing the marital litigation in March 2003. (R. V.1, p. 21, lines 20-23).

The family court found that Wife was aware of this arrangement all along and that she could not come in and defeat the interest of Simpson, Jr. in the property. (R. V.1, p. 22, lines 6-8).

The family court further found that the transfer of the marital property into the LLC is effective as to Simpson, Jr. and that Husband should be charged with 50% of the value of the LLC. (R. V.1, p. 23, lines 18-20).

Although Simpson, Jr. and the LLC were party defendants, the family court ordered only Husband to convey the real property. The order did not require Simpson, Jr. or the LLC to transfer real estate or to take any other action. (R. V.1, p. 40, lines 1-2). The validity of the LLC's interest in the real estate was never litigated in the family court.

By separate Order, the family court required Husband to contribute \$85,000.00 to Wife's attorney's fees. Wife appealed the Order regarding attorney's fees. Wife did not appeal the family court's Final Decree of Divorce. (R. V.1, p. 49, lines 5-7).

William Robert Simpson, Sr. filed a Motion to Reconsider or Alter the Judgment. However, on the day that motion was scheduled to be heard by the family court, Husband filed his notice of Intent to Appeal. Upon learning that the Notice of Appeal had been filed by Husband, the family court determined that it no longer had jurisdiction to hear the Motion. (R. V.1, p. 48, lines 1-6).

In his appeal, Husband raised the issue of ownership of the real estate to be conveyed to Wife and noted that the properties were titled in the name of the LLC. Husband contended that the family court erred by awarding to Wife property titled in the name of an LLC in which the Husband held a 50% member interest. (R. V.1, p. 52, lines 24-26; p. 53, lines 3-18).

The Court of Appeals affirmed Wife's equitable distribution award as set forth in the Final Decree of Divorce, finding that the property the family court awarded to Wife was

individually owned by Husband and was not property owned by the LLC. (R. V.1, p. 53, lines 25-26). Husband then sought Certiorari from the South Carolina Supreme Court, which was denied on February 21, 2008. (R. V.1, pp. 66-68).

The Court of Appeals reversed the award of attorney's fees and remanded the matter to the family court. (R. V.1, p. 66, lines 17-20)

Wife filed a Motion and Complaint for Issuance of an Order and Rule to Show Cause with the family court on April 29, 2008. (R. V.1, p. 108). In that Motion and Complaint, Wife sought to enforce various aspects of the December 31, 2004 Final Decree. (R. V.1, pp. 113-114).

On April 29, 2008, the family court issued a Rule to Show Cause scheduling a hearing on Wife's Motion. The issues in the Order and Rule to Show Cause included Wife's request for enforcement of the Decree requiring Husband to pay the cash portion of the equitable division judgment, plus interest, to pay the \$85,000.00 attorney fee award, plus interest, and to transfer the real estate identified above. (R. V.1, p. 71, lines 12-15).

On July 17, 2008, the family court, with the consent of the parties, conducted a hearing by conference call. As a result of that hearing, issues involving the cash payment and payment of attorney's fees were resolved by Husband paying to Wife the sum of \$597,829.01. This payment represented the cash portion of the equitable division award (including the Edward Jones accounts), plus interest, and attorneys fees of \$85,000.00, plus interest. The other issues were left open for future determination as set out in the family court's Order entered March 6, 2009. (R. V.1, p. 74, lines 1-2).

By letter to Wife's attorney dated October 28, 2008, Husband tendered seven quit-claim deeds to all of the real estate to Wife. The deeds were signed by Husband individually. (R. V.1, p. 81, lines 12-14).

Wife's attorney refused to accept the deeds, and returned them to Husband's attorney. Wife's attorney demanded general warranty deeds even though the family court order did not require general warranty deeds. (R. V.1, p. 371, lines 7-20).

On January 21, 2009, Wife filed a second Motion and Complaint for Issuance of Order and Rule to Show Cause. Wife sought the following relief from all of the defendants:

- 1) Require Defendants to comply with the Final Order and Divorce Decree dated December 31, 2004;
- 2) That Defendants be held in contempt for violating the order;
- 3) That Defendants be required to pay fees and costs incurred by Wife; and
- 4) If Defendants' actions rendered it impossible to comply with the Final Order and Divorce Decree, that Defendants be required to compensate Wife for the loss suffered as a result of the wilful act.

(R. V.1, pp. 211-212).

The family court conducted a hearing on the Rule to Show Cause on September 15, 2009. Simpson, Jr. testified that as a 50% member of the LLC, that he would not consent to the LLC transferring LLC property to the Wife. (R. V.1, pp. 425, lines 17-25; p. 426, lines 1-4).

Steven S. McKenzie, Husband's former attorney, testified that he used the tax map numbers set out in Exhibit 25, which was introduced by Wife's expert at trial, to determine that the 133.2 acre tract, identified as Parcel (h) on page 40 of the Final Decree, and the 161.1

acre tract, identified as Parcel (e) on page 40 of the Final Decree, were owned by the LLC. (R. V.2, p. 433, lines 17-25; p. 434, lines 1-8, lines 15-17; p. 435, lines 19-22).

During the hearing on September 15, 2009, Wife's attorney indicated that only Husband was required to respond to the Rule to Show Cause, contending that Husband and the LLC were one and the same. (R. V.2, p. 400, lines 7-10).

Subsequent to the September hearing, the attorney for the Simpson, Jr. requested an opportunity to be heard stating that he had not been notified of the September 15, 2009 hearing. The family court granted this request over the objection of Wife's attorney and conducted a second hearing on December 21, 2009. (R. V.1, p. 77, lines 9-11).

The family court entered its Order on May 28, 2010, finding that Husband was not the record titleholder of the 161.1 acre tract, the 133.2 acre tract, and the house and 16 acres. (R. V.1, p. 81, lines 1-7). The family court found that the 161.1 acre tract and the 133.2 acre tract were titled in the name of the LLC, and concluded that Husband individually does not have a transferable interest in property belonging to the LLC. (R. V.1, p. 82, lines 17-20). The family court also concluded that Husband was not in contempt as he had made a good faith effort to comply with the family court order. (R. V.1, p. 82, lines 15-16). The court denied Wife's request for attorney's fees related to the Rule to Show Cause. (R. V.1, p. 82, lines 21-22; p. 83, lines 1-3).

Wife filed a Motion to Reconsider and/or Alter or Amend the May 28, 2010 Order. The family court granted Wife's motion and entered an Order on March 18, 2011 modifying the May 28, 2010 Order. The March 18, 2011 Order requires the LLC transfer a 50% interest in the LLC property to the Wife. (R. V.1, p. 103, lines 23-24; p. 104, lines 1-14). The

family court also found that the tract identified as a “house and 16 acres” was actually 13.5 acres as the grantor had reserved the house and three acres surrounding the house when the property was conveyed to the LLC. (R. V.1, p. 95, lines 20-24; p.96, lines 1-4). As a result, the Wife receives a 50% interest in the 161.1 acre tract, the 133.2 acre tract, and a 13 acre tract.

In addition to requiring Husband, Simpson, Jr., and the LLC to convey a 50% interest in the LLC real estate, the family court required Husband to pay a “cash balancing payment” in the amount of \$144,625.00 to Wife with interest from the original due date of January 30, 2005. (R. V.1, p. 99, lines 9-11; p. 105, lines 3-5).

Husband, Simpson, Jr., and Simpson Farms, LLC filed timely Motions to Reconsider and/or Alter or Amend the March 18, 2011 Order. The family court denied their motions.

(R. V.1, pp. 106-107).

ARGUMENT

I. THE FAMILY COURT LACKED SUBJECT MATTER JURISDICTION TO ALTER OR AMEND THE FINAL DECREE OF DIVORCE DATED DECEMBER 31, 2004

Husband appealed the Final Decree of Divorce filed December 31, 2004. In that Decree, the family court equitably divided the marital estate. The family court order was affirmed on appeal, without modification. (R. V.1, p. 66). Thus, the equitable division of the marital estate as set out in the Final Decree of Divorce is final.

On March 18, 2011, the family court entered an Order that modified the property division set out in the Final Decree of Divorce. The Order required the LLC to convey a 50% interest in the LLC real estate to Wife, and it required Husband to pay an additional \$144,625.00 to Wife. This modification imposed obligations on the Defendants that were not in the original property division. It also re-characterized a portion of the Wife's award.

The family court was without subject matter jurisdiction to alter or amend the original order issued by the family court because it was a Final Order, and being a final judgment of equitable distribution, it is non-modifiable. The law in South Carolina "is clear that the family court does not have the authority to modify property divisions". *Burns v. Burns*, 323 S.C. 45, 48, 448 S.E.2d 571, 572 (Ct. App.1994). "A family court order can be modified only when jurisdiction was specifically reserved in the decree or if allowed by statute." *Hayes v Hayes*, 312 S.C. 141,144, 439 S.E.2d 305, 307 (Ct. App. 1993) citing *Jordan v. Jordan*, 307 S.C. 407, 415 S.E.2d 424 (Ct. App.1992).

The December 31, 2004 family court Order in this case did not reserve jurisdiction. As such, the family court cannot rely on a reservation of jurisdiction for authority to modify the property division set out in the Final Decree of Divorce.

Furthermore, there is no statutory authority to modify the property division. S.C. Code Ann. § 20-3-620(c)(Supp. 2010) provides in relevant part “The court's order as it affects distribution of marital property shall be a final order not subject to modification except by appeal or remand following proper appeal”.

Because there is no statutory authority for modifying an order of equitable distribution or a reservation of jurisdiction in the original decree, the family court did not have jurisdiction to modify the division of property as set out in the December 31, 2004 order. It was error for the family court to order the LLC to convey a 50% interest in its property to wife, to require husband to pay an additional sum of money, and to order that interest be paid retroactively on the monetary award.

The Court of Appeals recently addressed the issue of a family court’s modification of a property division in *Brown v. Brown*, 392 S.C. 615, 709 S.E.2d 679 (S.C. Ct App. 2011). In *Brown*, the family court distributed the marital property by giving the Wife the option of purchasing the Husband’s equity in the marital residence. If Wife did not exercise that option, the house would be placed on the market with an agreed upon realtor at a listing price of at least \$225,300. The order did not address what would happen if the house did not sale. Wife did not exercise her option to purchase. The parties could not agree on a realtor or a listing price.

In response to a motion for relief filed by Mr. Brown, the family court imposed new requirements for the sale of the home and awarded the husband post judgment interest on his equity in the marital home. The family court based its decision on the authority to correct clerical errors under Rule 60(a), SCRCP. The Court of Appeals reversed the family court, holding that the family court's order significantly altered the substance and scope of the original judgment, and that it "recharacterized a portion of the Husband's award and imposed additional terms upon the parties that did not exist at the time the divorce decree was entered." *Brown v. Brown*, 392 S.C. 615, 623, 709 S.E.2d 679, 683 (S.C. Ct App. 2011).

In another case dealing with modification of a court approved property settlement agreement, approximately 8 months after issuing its order approving a property settlement agreement, the family court entered a subsequent order that made an adjustment to the value of a building received by the Wife, because of structural damage to the building, and ordered the Husband to pay an additional \$23,116.56. The Court of Appeals held that "the family court erred in concluding that it was within the "equitable powers" of the court to reopen and modify the parties agreement." *Green v. Green*, 327 S.C. 577, 581, 491 S.E.2d 260, 262 (S.C. App. 1997).

Kelly v. Kelly, 310 S.C. 299, 423 S.E.2d 153 (S.C. App. 1992) involved a case in which the family court ordered the wife to convey her one-half interest in the marital home to her ex-husband, which was inconsistent with the terms of the original divorce decree. The Court of Appeals held that the family court "did not have subject matter jurisdiction to modify the division of the marital property because the question of how to apportion the

marital property had been settled in the original divorce decree, an order neither party appealed. *Id.*, at 302, 155.

The family court lacked subject matter jurisdiction to modify the original division of property.

II. BECAUSE THE DECEMBER 31, 2004 FINAL DECREE OF DIVORCE IS NOT AMBIGUOUS, THE FAMILY COURT ERRED IN MODIFYING THE FINAL DECREE IN AN EFFORT TO ASCERTAIN THE INTENT OF THE TRIAL JUDGE

The family court erred by attempting to find the existence of ambiguous language in the decree of divorce in order to ascertain the intent of the trial judge and, therefore, construe a conclusion that the Plaintiff is entitled to a cash balancing award and a transfer of real estate from the LLC. The family court required only William Simpson to convey his ownership in certain properties to Wife. This language in the order is neither ambiguous nor subject to an ascertainment of the intent of the trial judge's express language.

The language in the December 31, 2004 divorce decree is clear and unambiguous. The language is not subject to more than one interpretation. The relevant portions of the order identify the property to be transferred and the party who is to make the transfer. There was no need for the family court to interpret the original order.

In construing an ambiguous order or decree, the determinative factor is to ascertain the intent of the judge who wrote the order. *Weil v. Weil*, 299 S.C. 84, 91-92, 382 S.E.2d 471, 475 (1989).

As the Court of Appeals noted in *Eddins v. Eddins*, 304 S.C. 133, 403 S.E.2d 164 (S.C. App. 1991). “The general rules for construing judgment are succinctly set forth in 46 AmJur.2d Judgments § 73 (1969), we quote:

§ 73. General rules of construction.

As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intention of the court, as gathered, not from an isolated part thereof, but from all parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety. Such construction should be given to a judgment as will give force and effect to every word of it, if possible, and make it as a whole consistent and reasonable. In applying this rule, effect must be given to that which is unavoidably and necessarily implied in a judgment, as well as to that which is expressed in the most appropriate language. Sometimes, it is declared that the interpretation or construction of a judgment must be characterized by justice and fairness.

Eddins v. Eddins 304 S.C. 133, 135-36, 403 S.E.2d 164, 166 S.C. App 1991).

Viewing the order in its entirety, it is clear that the family court judge recognized the LLC ownership of real estate, that the LLC was valid, and that Simpson, Jr. held a 50% interest in the LLC. The effect of the March 18, 2011 family court order defeats the intent of the family court. Specifically, Wife was aware of the transfers of real estate into the LLC and did nothing. Simpson, Jr. holds a 50% interest in the LLC, and the family court did not want to defeat that interest. By making the Wife a 50% owner of real estate owned by the LLC, the family court defeats Simpson, Jr.’s interest in the farm.

The family court to attempt to construe and modify an unambiguous Order.

III. BECAUSE THE LAW OF THE CASE IS CONTROLLING ON THE FAMILY COURT, THE FAMILY COURT ERRED IN MODIFYING THE PROPERTY DIVISION

The Court of Appeals found that the properties in Paragraph 75 of the Decree of Divorce were owned by the Husband, and that the decree ordered Husband to convey his interest to Wife. In determining that the act of transferring title meant that less than complete ownership would result in Daisy Simpson receiving less than her percentage share of the marital, the family court disregarded the law of the case. This legal position was never preserved by Wife. She did not appeal the Final Decree of Divorce in order to raise the issue on remand. The Final Decree of Divorce was affirmed on appeal. It was not remanded for the family court to re-visit or rule anew on this issue.

Matters decided on appeal become the law of the case. "[t]he rule of the 'law of the case' means that what was decided on former appeal is, if evidence is the same on another trial, controlling on the trial court and an appellate court on another appeal, unless on re-examination the appellate court is convinced that the first decision was wrong." *Barth v. Barth*, 293 S.C. 305, 308, 360 S.E.2d 309, 310 (1987). However, because the family court lacked subject matter jurisdiction to modify the original property division award, Husband submits that the Court of Appeals is precluded from reviewing the issue of ownership of the LLC real estate in this appeal. "[i]t is well settled in this jurisdiction that a decision of this court on a former appeal is the law of the case. The questions therein decided are *res judicata* and this Court will not on a subsequent appeal review its former decision.... We are not convinced that our former opinion was erroneous, but even if it were, we are precluded,

under the settled rule from reviewing it on this subsequent appeal."). *Huggins v. Winn-Dixie Greenville, Inc.*, 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969)(citation omitted).

Wife did not appeal the family court's findings regarding ownership of the real estate to be transferred to her. This un-appealed finding is the law of the case and precludes Wife from raising the issue of ownership on appeal. See *In re: Morrison*, 321 S.C. 370, 372 n. 2, 468 S.E.2d 651, 652 n. 2 (1996) (noting an un-appealed ruling becomes law of the case and precludes further consideration of the issue on appeal).

IV. BECAUSE WIFE HAD PREVIOUSLY MAINTAINED IN ALL JUDICIAL FORUMS THAT ALL OF THE PROPERTY TO BE TRANSFERRED TO HER BELONGED TO HUSBAND, SHE IS PRECLUDED BY JUDICIAL ESTOPPEL FROM DEMANDING A CASH SUM AWARD OR THAT THE LLC TRANSFER REAL ESTATE TO HER.

At trial and in the first appeal, Wife contended that the real estate to be transferred to her belonged to Husband. She maintained this position even though the records obtained by her expert indicated otherwise. Judicial estoppel precludes from adopting a different position in her actions in the family court after the first appeal, and in this appeal.

Judicial estoppel prohibits a party from taking a position in conflict with one earlier taken in the same or related litigation. "Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Haynes Federal Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 S.C. 1997).

In the course of the first appeal, Husband raised the issue of ownership of real estate that the order required him to convey to Wife. He pointed out that a portion of the real estate was titled in the name of the LLC, and not his individual name as found by the family court. Unfortunately, his efforts were unsuccessful.

Wife resisted Husbands efforts to correct the findings as to title to the property. Both she and her expert at trial failed to carefully review the information assembled by Wife's expert. For example, Exhibit 25, which was entered as an exhibit by Wife during the trial, sets out a listing of real property in which the Husband held an interest. Beside each parcel, the expert had included the tax map number for that parcel.

It would have been a simple matter for the Wife, who is a real estate agent, her expert, or her attorneys to examine the records at the county treasurer's office, and use the tax map number set out in Exhibit 25 to determine the record owner of the property. Had that simple step been taken by Wife, or if Wife had considered the issues that Husband attempted to raise on appeal, she would have discovered that the 133.2 acre tract, the 161.1 acre tract, and the house and 16 acres was not titled in the name of Husband individually, but titled in the name of the LLC.

During cross examination at a hearing on September 15, 2009, Wife testified that she was a real estate agent. Her testimony indicated a familiarity with the property set out in Exhibit 25, and she recognized property that the parties intended to transfer to their daughter by its tax map number.

Steven S. McKenzie, who represented Husband at trial, testified at the September 15, 2009 hearing that he used the tax map numbers in Exhibit 25 to determine ownership of the property.

Wife had previously maintained that the properties to be titled to her belonged to Husband. Husband complied with his obligation by tendering quit-claim deeds to Wife. She is judicially estopped from demanding additional compensation or that the LLC transfer real estate to her.

V. BECAUSE IT IS THE POLICY OF SOUTH CAROLINA COURTS TO SEPARATE THE PARTIES AND THEIR BUSINESS IN A DIVORCE, THE COURT ERRED IN REQUIRING THE LLC TO TRANSFER A 50% INTEREST IN ITS REAL ESTATE TO WIFE

The order entered on March 18, 2011 erroneously concludes that awarding the Wife part ownership in LLC properties is an appropriate solution. This is error because this distribution method keeps the parties in business together. It is an abuse of discretion to leave a husband and wife in business together after a divorce. See *Ducate v. Ducate*, 279 S.C. 246, 306 S.E.2d 218 (1983).

Are we to assume that Wife will allow the farming operations to continue on the real estate in which she owns a 50% interest? If so, will the Wife receive land rent? How will this affect the farming operations bottom line? As indicated by the record in this case, the divorce action has been hard fought and acrimonious. This is reason in and of itself not to leave the parties in business as co-owners of farm real estate.

VI. FAMILY COURT ERRED BY FAILING TO MAKE SPECIFIC FINDINGS AND CONCLUSIONS

The Court erred by not setting forth specific findings of fact of any errors or conclusions it reached in its May 28, 2010 order to effectively reverse or overturn its prior rulings by the current order filed March 18, 2011. Such findings and conclusions are required by Rule 26(a) of the South Carolina Rules of Family Court.

VII. BECAUSE THE LLC AND SIMPSON, JR. HAD COMPLIED WITH ALL REQUIREMENTS IMPOSED ON THEM BY THE ORIGINAL PROPERTY DIVISION AWARD, IT WAS ERROR FOR THE COURT TO MODIFY THE ORIGINAL AWARD

Because William Simpson, Jr. and the LLC have performed all acts ordered to be performed under Judge Turbeville's original Order issued on December 31, 2004, it was error for the Court to modify the original division of property.

After the appeal was over and the family court Order was final, Husband complied with the Order by tendering deeds in his individual capacity for the real estate that the Order required him to convey. The deeds were quit-claim deeds, for two reasons. First, Husband could not convey title to property that he did not own. Additionally, the family court did not require that the conveyances be made under a general warranty deed.

Neither Simpson, Jr., nor the LLC were required by the Final Decree of Divorce to make any cash payments or to transfer any property. The property division award required husband only to pay a monetary award and to transfer property.

Husband does not have authority individually to convey real estate titled in the name of the LLC. A Limited Liability Company is a separate legal entity distinct from its members. South Carolina Code § 33-44-201 (1996). A member of an LLC "is not a

co-owner of, and has no transferable interest in, property of a limited liability company.”
South Carolina Code § 33-44-501(a) (1996) .

Husband owns 50% of the LLC. As a 50% member, Husband cannot compel the LLC to transfer LLC real estate. The sale or disposal of all, or substantially all, of the company’s property requires the consent of all members. South Carolina Code § 33-44-404 (c) (12) (1996). Simpson, Jr. testified at the September 15, 2009 hearing that he will not consent to the transfer of LLC property to Wife.

Although the LLC and Simpson, Jr. were named as party defendants, the validity of the LLC’s interest in its real estate was never litigated. To the contrary, the trial Judge found the LLC to be valid, recognized its ownership of real estate, and refused to allow the Wife to defeat Simpson’s Jr.’s interest in the LLC.

VIII. BECAUSE POST-JUDGMENT INTEREST ON A MONETARY JUDGMENT CANNOT BE ASSESSED RETROACTIVELY, THE COURT ERRED IN MAKING AN AWARD OF POST JUDGMENT INTEREST

Judgment interest on a money judgment cannot be assessed until and unless a monetary judgment amount has been determined and ordered to be paid. A court cannot issue a monetary award sum *nunc pro tunc* to correct an error or supply an omission of judicial action under a prior order.

A claimant is entitled to interest from the date of the rendition of the verdict, or post-judgment interest, as a matter of course. See, *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14, 18 (S.C. 2000). It was error in this case for the family court to award post-judgment interest retroactive to January 30, 2005.

Because the sum awarded to Wife in the March 18, 2011 Order was not a liquidated amount, or a sum certain, the family court could not award pre-judgement interest. See, *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 656 S.E.2d 765 (S.C. 2007).

IX. BECAUSE INTEREST IS NOT PAYABLE ON AN IN KIND DISTRIBUTION, IT WAS ERROR FOR THE FAMILY COURT TO AWARD INTEREST TO WIFE

The payment required to be made by Husband under the terms of the March 18, 2011 family court Order results from a modification of an "in-kind distribution" and such a distribution is not subject to an award of interest on the value of the distribution. Post judgment interest applies only to monetary awards and not an "in kind distribution." See, *Casey v. Casey*, 311 S.C. 243, 428 S.E.2d 714 (S.C. 1993).

X. THE AWARD OF A CASH BALANCING PAYMENT AND REQUIRING THE LLC TO TRANSFER REAL ESTATE TO WIFE EXCEED THE RELIEF REQUESTED BY WIFE

A court cannot provide a remedy to a litigant that has neither requested it nor set forth the specific form of remedial relief the Court provides. See, *Coble v. Coble*, 293 S.C. 434, 361 S.E.2d 339 (S.C. 1987). In her second Motion and Complaint for a Rule to Show Cause, Wife sought the following relief:

- 1) Require Defendants to comply with the Final Order and Divorce Decree dated December 31, 2004;
- 2) That Defendants be held in contempt for violating the order;
- 3) That Defendants be required to pay fees and costs incurred by Wife; and
- 4) If Defendants' actions rendered it impossible to comply with the Final Order and Divorce Decree, that Defendants be required to compensate Wife for the loss suffered as a result of the wilful act.

(R. V.1, pp. 211-212).

The family court did not find that the Defendants' actions made it impossible to comply with the Final Order. Title to the LLC property had been in the name of the LLC since the commencement of the marital litigation.

Because the Wife did not request a transfer of the LLC property or a cash balancing payment, the family court erred in providing this relief to the Wife.

CONCLUSION

Respondents/Appellants William Robert Simpson, Sr., Simpson Farms, LLC, and William R. Simpson, Jr. respectfully submit that the family court was without jurisdiction to alter, amend, or modify the property division set out in the Final Decree of Divorce dated December 31, 2004, as that property division had become final and unmodifiable. Respondent/ Appellants request that the March 18, 2011 Order be declared void for lack of subject matter jurisdiction.

In addition, the law of the case and judicial estoppel preclude Daisy Wallace Simpson from seeking a modification of the property division.

Respondents/Appellants William Robert Simpson, Sr., Simpson Farms, LLC, and William R. Simpson, Jr. further submit that it was error to award post judgment interest retroactively, and to award interest on modification of an "in-kind" distribution. Respondents/Appellants further submit that it was an abuse of the family court's discretion to grant relief beyond the scope of the pleadings and for the family court's failure to completely sever the relationship between the parties.

For these reasons, the Order of the family court should be declared void for lack of subject matter jurisdiction, or in the alternative, that the March 18, 2011 family court Order be reversed.

Respectfully submitted,



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May 2, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

MAY 03 2012

SC Court of Appeals

Appeal from Clarendon County
In the Family Court

Hon. Gordon B. Jenkinson, Family Court Judge

Docket #: 2003-DR14-0128

Daisy Wallace Simpson Appellant/Respondent,

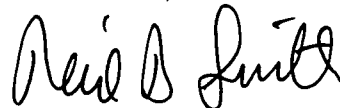
v.

William Robert Simpson, Individually and as a
Shareholder/Member of Simpson Farms, LLC, and
William R. Simpson, Jr., as a Shareholder/Member of
Simpson Farms Respondents/Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondents/Appellants, William Robert Simpson, Individually, and as a Shareholder/Member of Simpson Farms, LLC and William R. Simpson, Jr., as Shareholder/Member of Simpson Farms, LLC, hereby certifies that the Final Appellant's Brief of Appellants/Respondents in this case complies with the provisions of Rule 211(b), SCACR.

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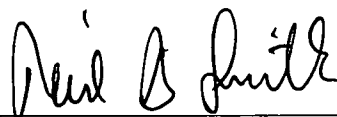
CERTIFICATE OF SERVICE

Counsel certifies he has served the foregoing Final Brief of Respondents/Appellants w/Certificate of Compliance on all parties by depositing a copy of the same in the United States Mail, postage prepaid and addressed as follows:

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This 3rd day of May, 2012.



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