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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh

Circuit Court Case No. 2019-CP-07-01246
Appellate Case No. 2021-000375

Greg Marcus Simmons and Jermaine Robinson, both individually and derivatively on behalf of Simmons Family Holdings, LLC, a South Carolina Limited Liability Company,

Respondents,

v.

Palmer E. Simmons, individually and as Trustee of the Charles E. Simmons, Jr. and Rosa G. Simmons Revocable Trust dated May 5, 2016, and Charlesetta S. Aiken,

Appellants,

And Simmons Family Holdings, LLC,

as a nominal Defendant.

APPELLANTS' PETITION FOR REHEARING

Not once in the lower court's order is there a mention of "waiver," "estoppel," or "acquiescence," three highly fact-intensive equitable doctrines, the invocation of which is always based on intent, credibility determinations, and the weighing of evidence. And yet, those doctrines are the grounds provided for "affirmance."

This Court has wrongly veered from the circuit court's decision at law—and from its standard of review—to make its own fact-dependent equitable rulings that the circuit

court did not.

This Court must rehear and reverse its Opinion, because the equitable "relief" it has (improperly) imposed is anything but. This Court might not have apprehended that the ramification of its Opinion is to take (hugely valuable) property—which has been in one family for generations, since before Hilton Head Island was developed—away from the vast majority of the members of that family.

This Court needs to understand the significance of its Opinion. Despite Charles Simmons Jr.'s very different testimony, found in the Record, this Court has determined:

- Charles Simmons Jr. intended to bypass his wife with regards to family property.
- Charles Simmons Jr. intended to bypass his own children with regards to family property.
- Charles Simmons Jr. intended to bypass the vast majority of his *fourteen* grandchildren with regards to family property.
- Charles Simmons Jr. intended to bestow upon just *two* of his fourteen grandchildren a million-dollar-plus family legacy.

(*but see* R. p. 498 at p. 9, line 16–p.10, line 10).

This radical result, with radical implications, was not supported on summary judgment before the circuit court because of conflicting evidence, and nor is it proper under this Court's standard of review. This is because it is a result based upon findings of intent and credibility, which are and should have been questions of fact for trial.

For the reasons herein and in Appellants' briefs on appeal, Appellants respectfully request that this Court would rehear its Opinion and reverse the trial court's improper grant of summary judgment.[1] Without question, this Court has overlooked, weighed, and found facts that belong to the jury, and it has misapprehended the law by utterly discarding the provisions of a binding Operating Agreement.[2]

I. The Opinion wrongly invokes the equitable defensive doctrines of waiver, acquiescence, and estoppel; and, in any event those equitable doctrines cannot be decided on summary judgment, in the teeth of conflicting evidence.

This is an appeal from the circuit court's grant of summary judgment in favor of Respondents on their declaratory judgment cause of action, which held: "the undisputed evidence establishes as a matter of law, that Plaintiffs are member of SFH." (R. p. 40). On appeal, Appellants argued that the evidence (and inferences to be drawn from it) was very much disputed, that conflicting evidence made summary judgment improper, and that as a matter of law the Plaintiffs are not members. *See Appellants' Final Brief.*

A. The Opinion wrongly invokes equitable defenses to enrich Respondents.

In an apparent effort to affirm a finding of law that is patently wrong under the law,[3] this Court mistakenly and erroneously invokes the fact-intensive equitable

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[1] Appellants incorporate herein *Appellants' Final Brief* and *Appellants' Final Reply Brief* which were filed June 22, 2022.

[2] **At a minimum, the Operating Agreement is evidence of Charles Junior's and the Company's intent, which evidence contradicts Grandchildren's story that he intended them to be members. This conflicting evidence—and the inferences to be drawn from it—is alone sufficient to raise a jury question as to his intent, and to command reversal of summary judgment.**

[3] The applicable law includes the unambiguous Operating Agreement and South Carolina's Limited Liability Company Act—both of which present a legal bar to Respondents' claim to be members of SFH.

doctrines of waiver and acquiescence. Opinion pp. 2-3 ("we hold Children have waived any challenge to assert that the Trust is the sole owner of SFH or that they are members."[4]); ("[Appellants] acquiescence to Grandchildren's perceived status as members estops them from attacking the validity of the 2015 amendment."). **Respectfully, these equitable holdings do not belong in an appellate opinion on a lower court's decisions of law made on summary judgment**.[5] *See, e.g.*, S.C. Code § 14-3-330 (The Court "shall have appellate jurisdiction for correction of errors of law in law cases."). Significantly, the circuit court did not make any equitable determinations at all on the issue of membership; [6] its order does not once use any variation of the words "waiver," "acquiescence," or "estoppel." Instead, the court found—in a clear error of law—that "strict compliance with the Operating Agreement is not a prerequisite of membership." (R. p. 39).

Overlooking the law, this Court's Opinion misuses fact-dependent equitable defenses to grant affirmative, offensive relief. In so doing, the Court has misapprehended the reality that *Grandchildren are the Plaintiffs*, and they filed this lawsuit to seek affirmative relief against Children, including a declaratory judgment that Grandchildren

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[4] Among other things, this holding misapprehends that Children did not contend they were members—instead, they contended that Charles Junior's Estate is the sole member of SFH.

[5] The lower court made a decision of law; it did not invoke equity. Ordinarily, equity is not proper where the law provides a framework for court decision. Here, there is an Operating Agreement and an entire statute (the LLC Act) devoted to limited liability companies, both of which control and make the employment of equity unnecessary and improper.

[6] To be forthright, the court did invoke equity on the monies had and received claim. However, its order is unambiguous that its decision on the membership question was made as a matter of law.

are members of SFH. Waiver, estoppel, and acquiescence are defenses, only, and they cannot be employed to gain the sort of windfall that Grandchildren are seeking here:

> Estoppel and waiver are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the party in whose favor they arise and **should not, in any case, be made the instruments of gain or profit**. While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, **they may not be asserted in a complaint as offensive weapons**.

Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1991) (cleaned up, emphasis added). Because this Court's equitable decision contradicts established Supreme Court precedent on the limited uses of equitable defenses, this Court must rehear and retract its decisions in equity.

Moreover, even <u>if</u> the equitable doctrines of waiver, acquiescence, and estoppel[7] were somehow appropriate here, every single one of them requires fact-dependent determinations of credibility and intent that are the exclusive province of a jury—and are not for this Court to make. *See* S.C. Code § 14-3-340 (appellate courts may not decide issues of fact, which are for the jury). "Waiver is a **question of fact for the finder of fact**." *S.C. Lawyers Weekly, By & Through Its Principal, Dolan Publ'g Co. v. Wilson*, 813 S.E.2d 527, 530 (Ct. App. 2018). "Waiver is a voluntary and <u>intentional</u> abandonment or relinquishment of a known right." *Id.* Similarly, "**acquiescence is a question of fact**

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[7] Respondents' Brief does not even argue acquiescence or estoppel, which makes sense because they are fact-dependent affirmative defense, and here the Respondents were acting offensively (not defensively). There are numerous factual prerequisites to a finding of estoppel, which were not made in the first instance here. *See, e.g., Ingram v. Kasey's Associates,* 340 S.C. 98, 531 S.E.2d 287 (2000) (discussing elements of estoppel). Ditto for acquiescence. Because Respondents did not argue them (and the lower court did not find their elements) **this Court's imposition of estoppel and acquiescence amounts to an unfair ambush—Appellants were given no opportunity to brief the questions.** Appellants request rehearing.

determined by the intent of the parties." *Kirkland v. Gross*, 332 S.E.2d 546, 286 S.C. 193 (Ct. App. 1985). Appellants' own sworn testimony creates an issue of material fact as to Palmer's intent in his actions as manager, making the question of whether he waived the Company's rights a question for the jury at trial. *DNR v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001) (determination of the **parties' intent is a question of fact**); *U.S. Bank Trust Nat. Ass'n v. Bell*, 684 S.E.2d 199, 385 S.C. 364 (Ct. App. 2009) (parties' **intent to modify a contract is a question of fact**); *Laser Supply v. Orchard Park Associates*, 676 S.E.2d 139, 382 S.C. 326 (Ct. App. 2009) ("the determination of whether one's actions constitutes **waiver is a question of fact**.").

Further, there are no antecedent factual findings by the lower court to support the invocation by this Court of equitable (defensive) doctrines. This is an appeal from a grant of summary judgment, in which the circuit court itself did not have jurisdiction to decide questions of fact. The lower court thus made its rulings as a matter of law, erroneous though they are. This Court has not so much "affirmed" as it has tried the case itself and made its own independent, fact-based, equitable determinations. This is improper under this Court's standard of review, and Appellants respectfully submit that **if this case is to be tried, then it should be tried by jury and not an appellate court**.[8]

Contrary evidence of the intent here—the foundation of each of the equitable doctrines this Court has wrongly invoked—includes:

- the Operating Agreement and its terms for the admission of members, which indicates

[8] *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023), *citing Callawassie Island Members Club, Inc. v. Martin*, 437 S.C. 148, 157, 877 S.E.2d 341, 345 (2022) ("When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.") (emphasis added).

the intent of the Company and Charles Junior for the admission of members,

- multiple affidavits and exhibits
    - some of which, perhaps confusingly to this Court, refers to Grandchildren as members of a <u>different</u> company called Simmons Fishing Camp, LLC; *e.g.* R. pp. 462-466)
    - Grandchildren *are* members of Simmons Fishing Camp LLC; but they are *not* members of Simmons Family Holdings LLC –- **perhaps this Court misapprehended this evidence**?
- sworn deposition testimony by Children, Grandchildren, and Charles Junior himself, **which is inconsistent and contradictory** on the material question of membership,[9]
- and other persuasive, conflicting evidence. (*See* R. pp. 360-503; R. pp. 139-187).

This Court misapprehends that, at the least, this evidence was sufficient to show a genuine issue of fact for trial.

This Court was wrong to invoke equity on an appeal from a decision made "as a matter of law," and to employ affirmative equitable defenses to bestow an enormous windfall on plaintiffs, without an antecedent finding that Grandchildren are entitled to equity, and because the doctrines it invokes rely on questions of fact.

Appellants respectfully request that this Court would withdraw its Opinion, rehear this appeal, and remand for trial by jury on the disputed facts.

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[9] **Does this Court *believe* Grandchildren?** Does this Court ***disbelieve*** Children? Are they ***all*** incentivized toward untruthfulness by the lure of million-dollar waterfront property? Do Grandchildren have clean hands? What did all these people intend? In what capacity were they acting? **These are jury questions.**

II. This Court's own discussion of Charles Junior's testimony as to the membership of his company compels reversal rather than affirmance.

Simmons Family Holdings was a property-holding company that was started by the family patriarch and passed down from generation to generation. The nutshell-summary of this Court's Opinion is that Charles Junior intended to bypass his wife and children as members, in favor of just two of his fourteen grandchildren. However, shortly before he died, Charles Simmons Junior testified under oath that the members of the company were himself, his wife, his daughter, and his son:

> Q. All right. What's the purpose of the Simmons Family Holdings?
>
> A. Well, it was a way of getting the property down in Broad Creek off of a person — one person's — in fact, we thought it was something like a corporation that it would fall under other than an individual, but —
>
> Q. Now, who was the — the original member of that corporation, the limited liability company?
>
> A. Charles Simmons, Sr.
>
> Q. **Who are the officers and — and members now**?
>
> A. **Charles Simmons, Jr.**
>
> Q. Yourself.
>
> A. **Rosa Simmons.**
>
> Q. Your wife.
>
> A. **Charlesetta Aiken**, daughter. And **Palmer Simmons,** [son].

(R. p. 498 at p. 9, line 16–p.10, line 10) (emphasis added).

If the circuit court did not actually exclude this testimony by Charles Junior, then there is literally no way[10] that Charles Junior's testimony does not create a fact question on the material issue of his intent for the membership of the company. This is because Charles Junior did not identify either of the Respondent Grandchildren as members, even though they filed this action seeking a declaratory judgment that he intended for them to be members.

Respectfully, the Opinion's own discussion of Charles Junior's deposition testimony, taken at face value, should result in reversal and not affirmance. This Court points out that the circuit court did not make the decision to exclude Charles Junior's testimony, in which he listed the members of SFH as being his wife and his Children. Instead, this Court observes that the circuit court's order indicates that the lower court did indeed consider the testimony. The Opinion contains this insightful point:

> In opposition to Grandchildren's motion for summary judgment, Children filed sworn affidavits and excerpts of depositions from prior, unrelated cases involving SFH. Children assert the circuit court improperly excluded Decedent's deposition testimony from a prior, unrelated case, which bolstered their contention that a genuine issue of material fact existed . . .
>
> In fact, at the beginning of the order, the court states, "Upon reviewing the verified pleadings, the record, the affidavits, and memoranda submitted, **including the deposition excerpts** . . . , the Court finds . . . ."

(Opinion at pp. 3-4, quoting R. pp. 35-36) (emphasis added).

Given that the Opinion correctly finds that the circuit court did not exclude the testimony—which creates an issue of fact as to whether Charles Junior intended Grandchildren to be members—**then the only possible conclusion is that the circuit**

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[10] As my teenager aptly says.

court erred in granting summary judgment. *See, e.g.*, Jean H. Toal et al., *Appellate Practice in South Carolina* at p. 550 (3rd ed. 2016) ("Where there is no conflicting testimony . . . the question presented is one of law; if the evidence is contradictory, the question is one of fact."); *see also Guerin v. Hunt*, 118 S.C. 32, 110 S.E. 71 (1921) ("It may be premised that, where there is no conflict in testimony, or where there is no evidence upon a material matter, the question presented is one of law, and not of fact. If, however, the evidence is contradictory, then the question is ordinarily one of fact, and not of law.").

This Court has overlooked the import of its own analysis: because it holds that the circuit court did consider Charles Junior's testimony, it must find the court erred in failing to find a material dispute of fact for trial. Appellants respectfully request that the Court would rehear and reissue its Opinion, to reverse the lower court's error in granting summary judgment in the face of contradictory evidence and questions of fact.

III. This Court is powerless under its standard of review to utterly disregard the Operating Agreement, which—at a *minimum*—creates a genuine issue of material fact and which should control as a matter of law.

This Court has wrongly overlooked (and seems to have completely discarded) the company's Operating Agreement, which was key evidence before the lower court, the legal significance of which is dictated by statute. By disregarding a controlling corporate governing document, this Court has arrived at an unjust and unlawful result.

A. The Operating Agreement is evidence of a material fact in dispute.

Simmons Family Holdings is a limited liability company, and this is an action to determine membership in that limited liability company. As such, the company's

Operating Agreement is evidence (the best evidence) as to the mechanism for admission of new members. Because Grandchildren did not comply with the operating agreement's terms for the admission of new members, the reasonable inference exists that Grandchildren are not members of SFH.

But this Court has overlooked the Operating Agreement in its entirety, without any explanation or justification for ***why*** it has wholly discounted such strong evidence (and the inferences to be drawn from it). The Operating Agreement should control as a matter of law as to the admission of members.[11] Nonetheless, at the very least, the Operating Agreement was before the court as evidence in opposition to summary judgment. **Neither the lower court nor this Court has the authority on summary judgment to choose to be blinded to the best evidence that exists on the material question of membership at issue in this lawsuit.**

This Court's Opinion contains an incorrect (and rather painful) statement:

> Children base their arguments on the position that they have presented a mere scintilla of evidence to raise a question of fact. '[T]he 'mere scintilla' standard does not apply under Rule 56(c).'

(Opinion p. 4, *citing Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023)). But importantly: (1) at the time the case was heard below, and when this appeal was briefed, the 'mere scintilla' standard was alive and well; and (2) although Appellants did use the phrase "mere scintilla" in their brief (because it was good law at the time), they clearly and repeatedly urged the correct standard. For example,

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[11] However, the lower court found (without legal explanation) "that strict compliance with the Operating Agreement is not a prerequisite of membership." (R. p. 38). This is the sort of error of law that this Court ought to exist to correct.

Appellants argued:

> The summary judgment standard is not just a handful of meaningless words to be rattled off by rote, and then set aside or ignored. Instead, it arises out of the requirement in Rule 56 of the South Carolina Rules of Civil Procedure that judgment may be granted only as a matter of law, only when there is "no genuine issue as to any material fact." Rule 56(c), SCRCP. The rule, in turn, has its basis in the right to a trial on the facts. *See* Rule 38, SCRCP.

Reply Brief pp. 2-3; *see also Appellants' Final Brief*, pp. 9-10, p. 20 ("On summary judgment, a circuit court is not empowered to determine questions of fact; its capacity is limited to deciding matters of law. Rule 56, SCRCP (judgment is appropriate when there 'is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.')").

Because of this Court's own standard of review (the same as that of the circuit court on summary judgment), this Court simply *cannot* discount or disregard evidence on the material question of membership. That evidence includes the Operating Agreement, in addition to the testimony of Charles Junior discussed above. Again, there is **literally no way**[12] that this evidence does not create a genuine dispute of material fact for the jury; from it may be drawn the clear inference that Grandchildren were not intended to be members of SFH.

Because the conflicting evidence shows a clear dispute of material fact, Appellants respectfully ask this Court to rehear its Opinion, reverse the lower court's erroneous grant of summary judgment, and remand for trial by jury of the facts. *Loflin v. BMP Dev., LP*, 427 S.C. 580, 588, 832 S.E.2d 294, 298–99 (Ct. App. 2019) (providing that appellate courts

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[12] *see fn. 10, supra.*

review a grant of summary judgment under the same standard applied by the circuit court under Rule 56(c), SCRCP), *aff'd as modified on other grounds*, 432 S.C. 246, 851 S.E.2d 713 (2020).

B. The Operating Agreement properly controls the outcome of this case.

This Court misapprehends its standard of review, which is not to evaluate, weigh, and decide disputed facts, but is instead to correct error of law. *Callawassie Island Members Club, Inc. v. Martin*, 437 S.C. 148, 877 S.E.2d 341, 345-346 (2022) ("When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. . . . This Court applies de novo review to questions of law, so it need not defer to the determination of the court below.").

As a matter of law, the circuit court erred in finding Granchildren to be members of SFH, when their purported admission into the company did not conform with the unambiguous requirements of SFH's Operating Agreement. This Court misapprehended that the circuit court was not entitled to deference on its clear error of law in disregarding the Operating Agreement and the controlling statute. Because under South Carolina law the governing documents control the relationship between the company, its members, and its manager, this Court should rehear its Opinion and reverse summary judgment.

SFH is a limited liability company, organized and existing under South Carolina law, including South Carolina's Limited Liability Company Act (the "LLC Act"). Pursuant to the LLC Act, Charles Sr. (as member), Charles Jr. (as manager), and SFH entered into the "Operating Agreement of Simmons Family Holdings, LLC" in 2001. (R.

p. 70 *et seq.*). The LLC Act defines an operating agreement as a contract that governs a company:

> "Operating agreement" means the agreement under Section 33-44-103 concerning the relations among the members, managers, and limited liability company.

S.C. Code § 33-44-101 ("Definitions"). The statute provides that the purpose of an operating agreement is "to regulate the affairs of the company and the conduct of its business." S.C. Code § 33-44-103 ("Effect of operating agreement"). Significantly, an operating agreement, when in place, "**govern[s] relations among the members, managers, and company**." *Id*. (emphasis added). Thus, as a matter of law, SFH's Operating Agreement binds the company, its members, and its managers, and it governs the relations between and among them.

a. The Operating Agreement controls as to the admission of new members.

The circuit court's error starts at its choice to ignore SFH's Operating Agreement:

> The [circuit c]ourt finds that strict compliance with the Operating Agreement is **not** a prerequisite of membership.

(R. p. 39) (emphasis added). This is plain error under both the LLC Act and this Court's precedent. The law is clear that when a company's operating agreement contains provisions regulating a particular matter, then those provisions control the company on that matter. S.C. Code § 33-44-103(a) ("**To the extent the operating agreement does not otherwise provide**, this chapter governs relations among the members, managers, and company.") (emphasis added). "The operating agreement of [an LLC] is a binding contract that governs the relations among the members, managers, and the company." *Clary v. Borrell*, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012). "Generally,

operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply." *Id.*, *citing* S.C. Code § 33-44-103(a).

SFH's Operating Agreement contains requirements which expressly control the admission of new members into the company. (R. p. 74, § 3.1 "Additional Members").[13] That section requires, *inter alia*, that "the terms of admission . . . **must** specify the percentage of Net Profit, Net Loss, allocable to such Person;" it also require that the terms of admission "**must** specify . . . the Capital Contribution applicable" to the new member. (*Id.*) (emphasis added). These terms are mandatory. *See, e.g., Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002) (use of words such as "shall" or "must" indicates a mandatory requirement). Also mandatory is the provision that membership is not automatic; there is a prerequisite to membership that a new member must first provide his notice address to the company and must execute a document indicating his "agreement to be bound by the terms of an Operating Agreement which reflects the existence of at least two Members." (*Id.*).

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[13] The section states:

3.1 Additional Members.

A. Additional Persons may be admitted to the Company as a Member and Memberships may be created and issued to those Persons and to the Member at the direction of the Member, on such terms and conditions as the Member may determine at the time of admission. The terms of admission or issuance must specify the percentage of Net Profit, Net Loss, allocable to such Person and the Capital Contribution applicable thereto and may provide for the creation of different classes or groups of Members and having different rights, powers, and duties. The Member shall reflect the creation of any new class or group in an amendment to this Operating Agreement indicating the different rights, powers, and duties. Any such admission also must comply with the requirements described elsewhere in this Operating Agreement and is effective only after the new Member has executed and delivered to the Company, as appropriate, a document including the new Member's notice address, its agreement to be bound by the terms of an Operating Agreement which reflects the existence of at least two Members, and its representation and warranty that the representation and warranties required of new Members are true and correct with respect to the new Member.

SFH's Operating Agreement is a contract between the company, its member, and its manager, **which is designed to protect the company and its assets**. For this reason, the Operating Agreement state that prospective new members are **required to agree to share in the company's losses and profits,** and that they make a capital contribution to the company, as prerequisites to membership. (R. p. 74, Operating Agreement § 3.01). In 2001, when the company was formed, Charles Sr. made an initial capital contribution to SFH, which the Operating Agreement has procedures in place to protect:

Initial Capital Contributions

MEMBER	CAPITAL CONTRIBUTION	FAIR MARKET VALUE
Charles Simmons, Sr.	Property located on Broad Creek off Marshland Road, Hilton Head Island, SC, as described in Beaufort County Record Book _____ at Page _____.	$900,000.00

(R. p. 82). The purpose of SFH is to hold that same valuable property, and to rent, lease, develop, and operate it as a business. (R. p. 73) (Operating Agreement, § 2.6).

As a matter of law, the circuit court erred by disregarding the binding agreement between SFH, its member, and its manager. This Court should rehear its Opinion, which misapprehended the law.

b. The Operating Agreement trumps the Articles of Organization.

Notably, Grandchildren did not claim that they had complied with the Operating Agreement's terms for the admission of new members. Instead, the essence of their argument to the circuit court was that the Amended Articles of Organization filed by Charles Jr. as "Manager" of the company, in which he indicated that Grandchildren were "members," somehow trumped the Operating Agreement. The circuit court agreed, and

it wrongly held that "[Grandchildren] are, ***and have been since the date of the Articles of Amendment of SFH***, members of SFH." (Order, R. p. 39) (emphasis added).

This decision by the circuit court to ignore the Operating Agreement in favor of the Amended Articles was further error. Statutory law is clear that the articles of organization are subservient to the provisions of its operating agreement. The LLC Act states: "if any provision of an operating agreement is inconsistent with the articles of organization: . . . **the operating agreement controls** as to managers, members, and members' transferees." S.C. Code § 33-44-203(c)(1). Moreover, SFH's Operating Agreement is itself clear that its terms control over the provisions of the articles:

> **8.9 Governing Law; Severability**
>
> THIS OPERATING AGREEMENT IS GOVERNED BY AND SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF SOUTH CAROLINA EXCLUDING ANY CONFLICT-OF-LAWS RULE OR PRINCIPLE THAT MIGHT REFER THE GOVERNANCE OR THE CONSTRUCTION OF THIS OPERATING AGREEMENT TO THE LAW OF ANOTHER JURISDICTION. In the event of a direct conflict between the provisions of this Operating Agreement and (a) a mandatory provision of the Articles, or (b) any mandatory provision of the Act, the applicable provision of the Operating Agreement shall control. If any

(R. p. 80).

In other words, under the law of South Carolina and the plain language of SFH's Operating Agreement, Charles Jr. was powerless to add new members (if that was his intent and design, which is disputed) by amending the articles of organization. As a matter of law, if Charles Jr. had wanted (which is disputed) to admit Grandchildren into the family business, making them members while bypassing his own children and his numerous other grandchildren, then he would have had to do so by following the procedure explicitly set forth in the Operating Agreement. There is no dispute that he did not do so, and the non-conforming amended articles are ineffective as a matter of law.

c. The lower court should have disregarded extrinsic evidence.

An additional error by the circuit court, overlooked by this Court, was its willingness to give weight to evidence outside the Operating Agreement, which is unambiguous in its provisions on the admission of members. The court's order states that it looked to "the documentation provided" and "the testimony of the parties" in determining that Grandchildren are members of SFH. (Order, R. p. 41). Specifically, the court regarded documents signed by Jermaine as owner of SFH, an estate planning document prepared for Charles Jr.'s estate indicating that he held $^1/_3$ interest at the time of his death, deposition testimony, tax returns by SFH, and records indicating that Grandchildren received $1,000/month in rental payments. (Order, R. pp. 37-38).

This Court must rehear this case to find that the lower court erred in imparting to those documents and testimony the power to circumvent the clear requirements of the Operating Agreement. A court reviewing a written contract must discern:

> the ***intention*** of the parties and the meaning[, which] are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.

McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945); *see also ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011) ("It is not the function of the court to rewrite contracts for parties."). "Where an agreement is clear and capable of legal interpretation, **the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement,**

and give effect to it." *Park Regency, LLC v. R&D Dev. of the Carolinas, LLC*, 402 S.C. 401, 412–413, 741 S.E.2d 528, 534 (Ct. App. 2012), *quoting Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App.2001) (emphasis added). "Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly." *Southern Atl. Fin. Serv. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27 (2003).

The Operating Agreement, and its provision for the admission of new members into SFH, is plain and unambiguous. It requires that in order for a new member to be admitted into SFH, there must be terms of that admission that must specify the percentage of net profit and net loss that are allocable to the new member, and they must specify the capital contribution applicable to the new member. There is no dispute that Charles Jr. did not comply with these provisions. The amended articles were therefore ineffective to admit Grandchildren as new members of SFH, as a matter of law. Moreover, those extraneous documents wrongly looked to by the circuit court could not, and did not, vary or supersede the dispositive requirements of the Operating Agreement.

This Court has misapprehended the above statutory law pertaining to limited liability companies such as SFH, as well as the plain language of the contract which controls the parties before it. Appellants respectfully request that it rehear its Opinion and reverse the circuit court's error in finding that Grandchildren are members of SFH, which is contrary to the Operating Agreement, the LLC Act, and the law of this State.

IV. Disputes of fact on the cause of action for money had and received should have thwarted summary judgment.

This Court's statement on page 4 of its Opinion, that "Children assert the circuit court improperly granted partial summary judgment to Grandchildren on their claim for monies had and received because they are not members of SFH," **shows that the Court has overlooked broad swathes of Appellants' Final Brief**, including pages 26-30. Appellants not only argued that Grandchildren are not members (an argument that Appellants preserve and do not abandon), but they also argued that Grandchildren lacked derivative standing and also that the lower court improperly ignored both this Court's precedent and disputed facts which should have precluded summary judgment.

Appellants argued that the circuit court cites just two cases purportedly justifying its fact-intensive decision on the case for monies had and received on summary judgment. *Marvin v. McRae*, 24 S.C.L. (Rice) 171 (1839) ("In order to recover on a count for money had and received, . . . the plaintiff must show he has equity and conscience on his side, and that he could recover in a court of equity."); *Okatie River v. Southeastern Site Prep.*, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003) ("In theory and actual practice, an action for money had and received is subsumed and amalgamated under the theories of quantum meruit/quasi-contract/implied by law actions.").

Both cases cited by the circuit court require an antecedent finding that the plaintiff is entitled to an equitable remedy. There is no discussion whatsoever in the circuit court's decision going to such a necessary prerequisite finding. This Court has overlooked that equity is to be cautiously invoked, and only in particular circumstances. The lower court's order should be reversed for this reason, alone, and remanded for a determination

of whether an equitable remedy is warranted in this instance.

Moreover, Appellants argued that *Okatie* and *Marvin* militate against a summary judgment ruling on the cause of action for "monies had and received," without a trial on the facts. Both cases discuss at length the evidence at issue, ultimately reaching their conclusions based upon the weight of the testimony of witnesses and other evidentiary facts. The courts in those cases were empowered to weigh the evidence, and to assess the credibility of witnesses, only because those courts did so as the factfinders at trial.

On summary judgment, which is the posture of this case, neither this Court nor the circuit court is permitted to weigh the evidence; both courts must view the facts in the light most favorable to the non-moving party. *See Rothrock*, 409 S.E.2d at 367–368 (noting that on summary judgment, all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Here, the circuit court improperly made credibility determinations (apparently giving Palmer's testimony less weight than Grandchildren's), wrongly viewed the evidence in the light most favorable to the moving parties (*i.e.*, Grandchildren), and inappropriately weighed the evidence. Among other things, Palmer's affidavit explains that his expenditures of money on behalf of SFH were unchanged from similar disbursements made by SFH in the past, when the company was managed by Charles Junior. (R. pp. 377-378, ¶¶ 23-26). Marcus testified that he had no problem with the way Charles Junior ran the company. (R. p. 495 at p. 46, lines 8–15). This evidence, taken as true, defeats summary judgment. In other words, the question of whether Palmer

"wrongfully expended monies belonging to SFH"[14] is a **question of disputed fact**, which makes summary judgment improper.

Appellants request a ruling from this Court on this issue, which should be reversed regardless of whether Grandchildren are members of SFH. (*See* Op. at p. 4) ("we decline to address this issue.") Respectfully, because Grandchildren lack standing as derivative plaintiffs on behalf of a company in which they are not members, and because the circuit court failed to make necessary prerequisite findings, and because a scintilla of evidence exists to the contrary, this Court should reverse the circuit court's grant of summary judgment on Grandchildren's claim "monies had and received."

V. The discovery order made dispositive rulings which were immediately appealable and should be decided by this Court for purposes of judicial economy.

If this Court does not rehear its decision not to decide the questions on the discovery order, these very same parties surely will be right back before this Court in no time at all.

The Opinion actually provides the roadmap for such a swift return, stating that Appellants will need to go back to the circuit court, refuse to adhere to the order's requirement that they produce attorney-client privileged materials, and then be found in contempt of the order **. . . at which point then they can immediately appeal the exact same ruling this Court has declined to decide** despite having discretion to do so within this ongoing appeal. Opinion, pp. 4-5, *citing Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014) ("[T]o challenge the specific rulings of the discovery orders,

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[14] (Order, R. p. 42).

the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding.").

Respectfully, to require the parties and the courts (circuit and appellate) to trot through this process would be a ***senseless*** use of the parties' and the courts' resources. This Court overlooks that its own precedent permits appellate review of a discovery order in conjunction with the contemporaneous review of an appealable order. *See, e.g., Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 439 S.E.2d 852 (1994) (when a final, appealable order on the merits is issued, discovery orders become appealable.). This is an economical, efficient practice, which prevents duplicative appeals and preserves the courts' resources.

In addition to requiring the spinning of wheels, this Court has overlooked that the term "discovery order" is a misnomer here. The order makes immediately appealable rulings that finally decide claims and defenses as the basis for its decision to order discovery. *See* R. p. 598 lines 5-7; R. p. 604 lines 11-19; R. p. 31. The "discovery order" is therefore immediately appealable, on its own steam. *Ferguson v. Charleston Lincoln/Mercury, Inc.*, 344 S.C. 502, 644 S.E.2d 285 (Ct. App. 2001), *aff'd as modified*, 564 S.C. 558, 564 S.E.2d 94 (2002) (discovery order is appealable if the order contains appealable issues on the merits that are properly before the court).

Respondents argued that a member of a limited liability company is statutorily entitled to inspect all the company's records, including the company's privileged communications with its attorneys, pursuant to South Carolina Code § 33-44-408 ("Member's right to information"). The circuit court wrongly agreed, and it ordered the

law firm of Vaux Marscher Berglind P.A. to produce privileged documents, including but not limited to legal opinions. (R. p. 30-31; R. p. 598, lines 5-6; p. 599, lines 3-5; p. 604, lines 4-19; p. 605, line 13 - p. 606, line 6).

First, the circuit court based its discovery order on the incorrect premise that Respondents were members of SFH as a matter of law. *Id*. As discussed above, this was error, of law and/or fact. Because Respondents are not members[15] of SFH, they have no right to invoke the LLC Act's provisions on a member's right to inspect records.

Second, *arguendo*, even if Respondents were lawful members of SFH, the circuit court was still wrong. **Regardless of whether they are members, Respondents are <u>not</u> entitled to access to information protected by the attorney-client privilege.** The circuit court's error—which is an error of law that this Court must correct—flows from its incorrect belief that all members of an LLC are entitled to inspect all documents of the LLC,[16] including those protected by the attorney-client privilege. But under the law, only manager(s) of the LLC (or the board of directors, depending on how the entity is structured) have the right to access such documents. (Otherwise, every LLC and similar entity could have its legal files, and other confidential materials, regularly rummaged through by any and all members of a corporation, at their whim).

It is a fundamental principle of the legal system that communications between an

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[15] Or, at a minimum, because there are disputed questions of fact as to their membership.

[16] The LLC Act is designed to give members access to certain records of the corporation, in certain instances. An additional reason that Grandchildren are not entitled to SFH's legal file is because the Operating Agreement itself identifies and defines the records that SFH must maintain, and those records are generally accounting and financial books and records. (Operating Agreement § 8.1) (R. p. 79). **This Court again mistakenly disregards the import of the Operating Agreement.**

attorney and his client are protected from disclosure. *See* Rule 1.6, S.C. Rules of Professional Conduct ("Confidentiality of Information," which states among other things that "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."). **This privilege is so sacrosanct that a lawyer may only reveal confidential information in extreme circumstances, such as "to prevent reasonably certain death."** *Id.* "The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." *Wilson v. Preston*, 378 S.C. 348, 662 S.E.2d 580, 585 (2008).

The circuit court wrongly disregarded arguments that SFH's privileged documents were protected, as were communications between the law firm and Palmer, both in his individual capacity and as manager of SFH. In South Carolina, the Rules of Professional Conduct make it clear that the privilege belongs to the client. *Id*. Furthermore, the Rules are equally clear that when an organization is the client, the attorney's duty is to the organization—and not to its individual constituents. Rule 1.13, S.C.R.P.C. ("Organization as Client"); *see also* Comment 7 (". . . the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) [*i.e.,* to prevent a violation of law] does not apply with respect to information relating to the lawyer's engagement by the organization to . . . defend the organization . . . against a claim . . . . This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or

defending against a claim.").

Importantly, South Carolina's LLC Act incorporates the principles of law and equity, which would include the doctrine of attorney-client privilege. S.C. Code § 33-44-104. Although South Carolina courts have not directly addressed the question of whether a member of a limited liability company has a right to access the company's otherwise privileged attorney-client communications, the privilege has been upheld in similar circumstances. *See, e.g., Wilson,* 662 S.E.2d at 585 (holding that county council member did not have the right to review attorney-client privileged documents, because "the privilege belongs to the client County; and the Council, as a whole, is authorized to release that information and has to waive the privilege before an individual council member can review the privileged documents."). Moreover, courts in general have found that individual members do not have the right to view a company's attorney-client privileged materials. This is because the attorney represents the organization, and not its members. Thus, the attorney must maintain in confidence communications with the organization (acting through its designated director, officer, or manager). *See, e.g., Commodity Futures Trading Commission v. Weintraub,* 471 U.S. 343, 105 S. Ct. 1986, 85 L.Ed.2d 372 (1985) (discussing which corporate actors have the right to waive the corporation's attorney-client privilege and noting that it is the manager who has this power, with regard to solvent corporations); *Milroy v. Hanson*, 875 F. Supp. 2d 646 (D. Neb. 1995) (a corporation has the right to assert the attorney-client privilege in litigation against one of its directors; rejecting the argument that the privilege evaporates in derivative suits); *Montgomery v. Etreppid Technologies, LLC,* 548 F. Supp. 2d 1175, 1186-

1187 (D. Nev. 2008) (discussing at length the analysis behind its conclusion that constituents of the entity do not have a right to the corporation's communications with its attorney because "the corporation is the sole client. While the corporation can only communicate with its attorneys through human representatives, those representatives are communicating on behalf of the corporation, not on behalf of themselves as corporate managers or directors."); *see also Marketel Media, Inc. v. Mediapotamus, Inc.*, 5:13-CV-427-D, Order of June 11, 2015 (E.D. N.C. 2015) ("status as a shareholder and officer of Marketel does not entitle [plaintiff] to confidential attorney-client communications," which belong to the company and can be waived only by management).

This makes sense. Otherwise, any time there was litigation between a member and a company, the shareholder could obtain all of the corporation's privileged communications with its attorneys relevant to that ongoing litigation, simply by asking for them. This would strip the corporation of an effective legal defense.

This Court should find that the lower court was wrong to hold that Vaux Marscher Berglind, P.A. must surrender privileged materials to (disputed) members of a company that the law firm represents.

CONCLUSION

This Court's Opinion misapprehends the law (contractual and statutory), overlooks key evidence, improperly weighs the evidence, and wrongly invokes fact-driven equitable defenses to enrich Grandchildren. Appellants respectfully request that this Court would rehear this case; its Opinion should be withdrawn and the circuit court reversed. Trial by jury on the disputed facts is the proper appellate disposition here.

Respectfully submitted,

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July 31, 2024
Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh

Appellate Case No. 2021-000375

Greg Marcus Simmons and Jermaine Robinson, both individually and derivatively on behalf of Simmons Family Holdings, LLC, a South Carolina Limited Liability Company,

Respondents,

v.

Palmer E. Simmons, individually and as Trustee of the Charles E. Simmons, Jr. and Rosa G. Simmons Revocable Trust dated May 5, 2016, and Charlesetta S. Aiken,

Appellants,

and

Simmons Family Holdings, LLC,

as a nominal Defendant.

PROOF OF SERVICE

I certify that I have served the Appellants' Petition for Rehearing on counsel for the Respondents, on July 31, 2024, at their email addresses of record with the AIS:

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