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.

APPELLANTS' REPLY IN SUPPORT OF PETITION FOR REHEARING

Tellingly, Respondents balk at Appellants' "regurgitation" of contract arguments in this contract dispute, in which **the contract is material**, ***and the contract is evidence contrary to Respondents' claim to be members***. The circuit court's order wrongly found, "as a matter of law," that "compliance" with the contract was unnecessary. (R. p. 38). But this Court's Opinion improperly veers away from contract (and matters of law) to delve into equity in the first instance, notwithstanding that the Record below is devoid of the arguments and factual findings necessary to support the invocation of equity, and notwithstanding that the equitable doctrines the Opinion invokes are <u>defensive</u> doctrines

incapable of yielding such an affirmative **windfall** for Plaintiff-Respondents.[1]

In addition to wrongly invoking equity, the Opinion improperly ignores and discounts the contract altogether. Because this is a dispute over Respondents' membership[2] in a limited liability company, the Operating Agreement has to be considered as evidence going to the question of their membership. Because the Operating Agreement conflicts with Respondents' claim to be members, it implicates an issue of material fact. The Opinion must be withdrawn, and this case must be remanded for trial on the facts and evidence—including the contract—particularly if evidentiary inferences and credibility are to be the basis of judgment.

Appellants hereby reply to Respondents' arguments:

I. Apology and request for relief.

The undersigned counsel mistakenly overlooked the page limitation on petitions for rehearing, and she is sincerely sorry.[3] Appellants respectfully move this Court to accept the Petition for Rehearing as it was filed. Alternatively, Appellants ask that they would be given leave to file a corrected Petition.

II. This Court should withdraw its Opinion, which improperly employs fact-

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[1] Respondents themselves characterize this as dispute of law: "there is but one issue before the court—*i.e., whether, as a matter of law*, Respondents are members of the Company." (Resp. Br. at p. 9) (emphasis in original). On summary judgment, a ruling as a matter of law requires the absence of disputed fact. But the Operating Agreement contradicts Respondents' membership claims; this contradiction means there is a dispute on the material question of membership.

[2] Appellants do not claim to be members of SFH—an extremely important point that this Court overlooked and misapprehended. (*See App. Reply Brief*, at p. 2: "**No one in this lawsuit is a member of the Company**.") (emphasis in original); *cf.* Op. at p. 3, misapprehending that: "if Children believed Grandchildren were receiving distributions that belonged to . . . themselves as the rightful shareholders of SFH . . . ").

[3] By way of explanation, please see Appellants' Motion for Extension, filed July 11, 2024.

intense equitable doctrines on review of a summary judgment of law.

Put simply: the order on appeal contains no equitable rulings on membership for this Court to review or affirm. Despite Respondents' use of quite a lot of sound and fury to support their protestations, it is simply not correct that Respondents more than cursorily asserted—much less proved—estoppel or waiver or acquiescence in the record below. Respondents pluck two isolated instances from the record, where they once uttered the word "estopped," or spoke the word "waived,"[4] amidst their arguments for judgment "as a matter of law." (Resp. Return at pp. 2-3). But **merely saying a word does not establish a claim**—and especially not an equitable claim dependent on numerous elements, each of which require proof. *Southern Development Land and Golf Co., Ltd. v. South Carolina Public Service Authority*, 426 S.E.2d 748, 311 S.C. 29 (1992) ("The essential elements of estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.") (cleaned up); *Provident Life and Acc. Ins. Co. v. Driver*, 451 S.E.2d 924, 317 S.C. 471 (Ct. App. 1994) ("Waiver is the [1] voluntary and [2] intentional

[4] Variations of the word "waive" do appear in the record, particularly with regard to discovery arguments on attorney-client privilege.

relinquishment of a known right . . . Waiver, like estoppel, is an affirmative defense and the burden of proof is upon the party who asserts it."); *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**.").

This Court improperly ruled in equity and on the disputed facts. Appellants respectfully request that this Court would rehear and withdraw its Opinion and remand this case for trial on the facts.

III. Respondents misrepresent Appellants' arguments: Appellants never conceded that there were not questions of fact.

Because they ***know*** that the facts are in dispute—and that those facts are for trial—Respondents try to divert by mischaracterizing Appellants' legal arguments as a concession on the facts. All this Court needs to look to, in order to appreciate the material dispute on the question of Respondents' membership in SFH, is: (1) the Operating Agreement's provision on the admission of members, **which requires a capital contribution and specification of a share in company losses**[5]; (2) the Respondents' admissions that they did not make a capital contribution or to agree to share in company losses[6]; and (3) the testimony of Respondents' own Grandfather, Charles Junior, who did not identify them in his sworn statement identifying the company's members—from which the inference can obviously be drawn that Respondents' Grandfather (or adopted

[5] R. p 74, Sec. 3.1 ("The Terms of admission or issuance must specify the percentage of Net Profit, Net Loss allocable to such [new member] and the Capital Contribution applicable thereto.")

[6] *e.g.* R. pp. 489-491 ("Q: Have you contributed anything to Simmons Family Holding, LLC, in the way of money? A: No.").

father) did not intend for Respondents to be members.[7]

These are not "new" facts that have "changed with the wind," as Respondents doth protest (too much) on pages 4-5 of their Return. Instead, Appellants have asserted these same facts from the outset of their defense of this lawsuit, which was filed against them by Respondents as plaintiffs.[8] If the above three items (or any one of them) do not create a dispute of fact sufficient to require a trial—where Respondents can be put under oath and cross-examined, and where a jury can decide whether their story is credible that their Grandfather intended for only them to be members of his million-dollar company—then it would be helpful to know what *does*.

Further, Appellants did not "concede" factual issues by asking the court for a ruling on a question of law (*i.e.,* the construction of the unambiguous Operating Agreement), and the record bears out that Appellants properly opposed Respondents' fact-centric motion for summary judgment by demonstrating disputes of material fact.[9] Respondents wrongly argue that this Court should ignore disputed facts (or—worse—construe the disputed facts in Respondents' favor) simply because the parties each filed a motion for summary judgment, and the South Carolina Supreme Court in *Wiegand v.*

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[7] *See* R. p. 498. Despite Respondents' footnote 4, Appellants did not mean to confuse the relationships here; frankly, it does not matter to the core point: Charles Junior's family is very large, including numerous children and grandchildren; there thus is an inference of the incredible (as in, not credible) that he would single out Respondents to inherit his fortune in waterfront property.

[8] *See* Answer, Affirmative Defenses, R. pp. 126-127 ("The Plaintiffs' Second Amended Complaint should be dismissed due to the sworn testimony of Charles Simmons, Jr., naming the members SFH." and "The Plaintiffs' Second Amended Complaint is barred due to the terms of the SFH Operating Agreement.").

[9] *See, e.g.* R. pp. 361-373, where Appellants began their opposition to summary judgment by explaining, **"The vast majority of the Plaintiffs' 'Material Facts Not in Dispute' are disputed."**) (emphasis added).

United States Auto. Ass'n held that it would decide cross-motions—made on the same legal question— as a matter of law. 391 S.C. 159, 705 S.E.2d 432 (2011). *Wiegand*'s standard for cross-motions for summary judgment only applies where the parties each have asked the Court to answer the same question of law. *Id*. The *Wiegand* parties were not arguing over facts, and none were in dispute; instead, both parties asked the Court to construe an unambiguous statute and an unambiguous form document. *Id*. Respondents' argument conceals that, unlike in *Wiegand*, the motions here were not "cross-motions" based on the same question of law. Instead, the parties here sought judgment on different causes of action and defenses, for different reasons, and according to different facts (which were largely in dispute), as permitted by Rule 56, SCRCP.

The *Wiegand* case cannot and should not be interpreted to eviscerate Rule 56 of the South Carolina Rules of Civil Procedure (which does not permit a court to grant summary judgment unless the facts are undisputed), nor the right of a party to have a jury decide questions of fact. *See* Rule 38, SCRCP (right to jury trial "shall be preserved to the parties inviolate"). Where (as with Respondents' argument here) a summary judgment motion springs from factual (rather than legal) arguments, then the motion should be denied and the case should proceed to trial on the facts. *See* App. Reply Brief, pp. 2-5, 9-12.

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

IV. Respondents are wrong: the Operating Agreement was never amended.

Recognizing that the plain language of the Operating Agreement is a big problem for them, Respondents next argue that maybe Charles Junior might-could have amended

the Operating Agreement. This is a nonsense argument because there is no evidence whatsoever that he ever actually did amend the Operating Agreement. Without citing ***anything*** in the record, Respondents go on to assert that Charles Junior might-could have amended the Operating Agreement *verbally*. Appellants incorporate the arguments from their Reply Brief in opposition to Respondents' conjecture about Charles Juniors' actions or intent, both of which are jury questions. *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). Reply Br. pp. 11-12.

Speculative arguments about whether or not Charles Junior (who is dead) maybe could have (orally) modified a company governing document—in a way by which Respondents alone conveniently benefit—are exactly why trials are governed by the Rules of Evidence. Facts and credibility belong in the realm of juries. This Court should rehear this appeal and remand for trial on the question of whether Charles Junior intended to change the structure of the company to benefit Respondents only.

V. King George, III, in *Hamilton*.

For purposes of judicial economy, this Court should rehear and decide the question of whether the circuit court improperly ordered Appellants to produce privileged materials to Respondents. To set the record straight, Appellants did produce a privilege log. *See* R. pp. 510, 514-518, and p. 602: 12-16. In any event, the privilege log was not the basis for the circuit court's ruling requiring the law firm of Vaux Marscher Berglind, P.A., to produce privileged documents. Instead, the circuit court made the ruling based on its incorrect and erroneous understanding that South Carolina's Limited

Liability Company Act entitles members to inspect attorney-client privileged materials. This error of statutory construction is egregious; if upheld, the circuit's ruling would mean that in the manifold cases pending in South Carolina courts between companies and their members, attorney-client privileged materials are fair game in discovery.

Appellants respectfully ask this Court to rehear its decision on this issue, for purposes of judicial efficiency, rather than requiring Appellants and their attorneys to be held in contempt first, before commencing another appeal on the same question. *See* Opinion at 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, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding."). Appellants incorporate herein the arguments in their opening and reply briefs on this important issue.

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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PROOF OF SERVICE

I certify that I have served the Appellants' Reply in Support of Petition for Rehearing on counsel for the Respondents, on August 29, 2024, at their email addresses of record with the AIS:

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