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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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

Circuit Court Case No. 2019-CP-07-01246

Court of Appeals Case No. 2021-000375
Opinion No. 2024-UP-194

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,

Petitioners,

And Simmons Family Holdings, LLC,

as a nominal Defendant.

PETITION FOR A WRIT OF CERTIORARI

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November 21, 2024

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CERTIFICATION OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, the undersigned counsel for Petitioners certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on October 22, 2024.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals have jurisdiction to find facts and make equitable determinations in the first instance, on review of a summary judgment decision of law?

II. Having wrongly invoked equity, did the Court of Appeals then misapply equitable defensive doctrines to grant affirmative relief to Respondent plaintiffs?

III. Did the circuit court err as a matter of law to disregard the plain language of a limited liability company's Operating Agreement?

IV. Was summary judgment inappropriate where the operating agreement and significant testimony conflicted with Respondents' assertions on the material question of membership in the family company?

V. Were Respondents entitled to attorney-client privileged materials simply by virtue of their alleged but disputed membership in a limited liability company?

Petitioners 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 ("Petitioners" or "Children") respectfully ask this Court to issue a writ of certiorari to review the Court of Appeals' final decision in this case (Opinion No. 2024-UP-194, the "Opinion"). The Opinion is contrary to constitutional and statutory law, and

it is beyond the scope of the Court of Appeals' powers and jurisdiction. Moreover, on the merits, the Opinion is contrary to this Court's clear precedent.

This is an action at law, in which the lynchpin question was decided on summary judgment as a matter of law, based on the construction and application of an operating agreement for a limited liability company. Petitioners appealed, asking the Court of Appeals to correct the lower court's error of law. Instead, the Court of Appeals issued a decision in equity. This Court should grant a writ of certiorari because the Court of Appeals lacked jurisdiction to make original, equitable rulings, in the first instance.

BACKGROUND

The outcome of this case dictates the ownership of historically and economically significant land that has been in the Simmons family for generations.[1] The family patriarch was Charles Simmons, Sr.[2] Twenty years ago, Charles Simmons, Sr., put his waterfront real property in a limited liability company called Simmons Family Holdings, LLC ("SFH"). (R. pp. 81-82). Thus, SFH is a real estate holding company which owns valuable ancestral waterfront property on Hilton Head Island, in Beaufort County, South Carolina. The property has belonged to the Simmons Family since before Hilton Head Island was developed. When Charles Simmons, Sr., died, his interest in SFH passed to his son, Charles Simmons, Jr.

This lawsuit was filed by two specific grandchildren of Charles Simmons, Jr.

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[1] Lowcountry Gullah, "First Families of Hilton Head," https://lowcountrygullah.com/first-families-of-hilton-head-the-simmons/

[2] https://static1.squarespace.com/static/5802c4d9414fb5e45ce4dc44/t/599a5db3a803bb42d1991784/1503288799175/Simmons%2C+Sr.+Charles.pdf

("Respondent Grandchildren"), against two of his children ("Petitioners" or "Children") who are the managers of SFH. The motive behind Grandchildren's lawsuit is to get a ruling from a court that Respondent Grandchildren are the members of the family limited liability company, **to the exclusion of their uncles, aunt, many cousins, brothers, and/or sisters.** In other words, in this lawsuit, the two Plaintiffs (Respondent Grandchildren) claim that the family patriarch, Charles Simmons Jr., intended to shut out his children and numerous other grandchildren by purportedly bestowing exclusive ownership interests only on two of his Grandchildren.

Without a trial, and despite significant evidence to the contrary—including the testimony of Charles Simmons, Jr., himself, and the clear requirements of the Operating Agreement—the circuit court wrongly agreed with Grandchildren.

STATEMENT OF THE CASE

Petitioners are the defendants in this action, and they are a son and daughter ("Children") of Charles Simmons, Jr.[3] Respondent Grandchildren are two of many biological grandchildren[4] of Charles Simmons, Jr., and they filed this lawsuit to ask a court to find (*inter alia*) that they are statutory members of Simmons Family Holdings, LLC ("SFH"), entitled to ownership of the property and to distributions of significant income. (R. pp. 47-68). This is an action at law, encompassing claims for conversion,

[3] To be thorough, the Petitioners/Defendants also include a trust managed for their late mother, Rosa G. Simmons, who was the wife of Charles Simmons, Jr. Rosa died after this lawsuit was filed, at the age of ninety.

[4] To be thorough again, Respondent Greg Marcus Simmons is both the biological grandchild and an adopted son of Charles Simmons, Jr. To avoid confusion, and to track the Court of Appeals' decision, Respondents/Plaintiffs are called "Grandchildren" herein.

breach of contract, breach of contract accompanied by fraud, breach of duty, and interference with contract. (*Id.*). The contract sued upon is the Operating Agreement for the limited liability company, SFH. (*Id.*).

Importantly, Children themselves do not claim to be members of SFH. Instead, Children are defendants, defending this lawsuit on the basis that Grandchildren are not members, as a matter of law, based on noncompliance with the clear and unambiguous Operating Agreement for SFH. (R. pp. 116-127). The Operating Agreement has a specific, mandatory provision on the mechanism for membership, which requires that new members make a capital contribution and sign a document agreeing to be responsible for the liabilities of the company, as well as multiple other conditions for membership. (R. pp. 74-75). **Grandchildren did none of these things**, but they claim that the Operating Agreement's comprehensive terms devoted to membership are merely "ministerial technicalities." (Resp. Br. p. 6). Grandchildren also argue that it was their Grandfather's intent that they be made members, notwithstanding his own testimony to the contrary. Obviously, intent is a question of fact, and it is a particularly complicated question here, because Charles Simmons, Jr., died before his Grandchildren filed suit.

The question of company membership came to the circuit court on summary judgment. The circuit court found, as a matter of law, that "strict compliance" with the Operating Agreement was not necessary and that Grandchildren were members of SFH "as a matter of law." (R. pp. 39-40: "The Court finds that strict compliance with the Operating Agreement is not a prerequisite of membership . . . I find that there is no genuine issue of material fact that must be submitted to the fact finder, and that the

undisputed evidence establishes as a matter of law, that Plaintiffs are member of SFH"). Having made the legal determination that Grandchildren were members of the company, the circuit court went on to rule that, under South Carolina's Limited Liability Company Act, Grandchildren's membership entitled Grandchildren to the company's and Children's attorney-client privileged materials, as well as a ruling on Grandchildren's derivative claim on behalf of the company. (R. pp. 30-31, 42).

Children appealed the summary judgment order to the Court of Appeals arguing (in a nutshell) (1) that the circuit court erred as a matter of law to disregard the unambiguous operating agreement of a limited liability company; (2) at a minimum, summary judgment was improper on the disputed material question of membership; and (3) regardless of alleged membership, the Grandchildren were not entitled to attorney-client privileged materials in discovery. (*See* Notice of Appeal; App. Br.; App. Reply Br.).[5]

However, the Court of Appeals did not decide the questions of law or make a ruling on the application of the Operating Agreement at all. Instead, the Opinion makes new, factual, equitable determinations that Children "waived" and "acquiesced" to Grandchildren's membership on behalf of the company, and that they were "estopped" to challenge the membership.[6] (Op. at pp. 2-3). Remarkably, the words "waiver," "acquiescence," and "estoppel" do not appear anywhere in the lower court's order—which made its rulings on membership "as a matter of law" and not in equity. **In**

[5] Petitioners incorporate herein *Appellants' Final Brief* and *Appellants' Final Reply Brief* which were filed with the Court of Appeals on June 22, 2022.

[6] Significantly, Grandchildren filed this lawsuit to claim membership, and Children challenged Grandchildren's alleged membership as a defense to Grandchildren's claims.

other words, the Court of Appeals invoked equity and decided **factual questions in the first instance, notwithstanding a complete lack of prerequisite findings by the lower court.** Petitioners have filed this Petition because the Opinion is not fair, right, just, or equitable—and it is violative of the Constitution, State statute, and standard of review. If there are facts to be found that might permit Grandchildren to dodge the plain language of the Operating Agreement, then the remedy is a trial and not an appellate decision invoking equity for the first time.

SPECIAL CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI

This Petition involves the constitutional and statutory limitations of appellate review in an action at law. This Court should grant a writ of certiorari to review the Court of Appeals' decision to act as a court of equity and a finder of fact, on issues that were not ruled upon by the lower court.

Appellate courts are not fact-finding courts; this jurisdictional limitation is constitutional and statutory. S.C. Const. Article V, § 5 ("The [appellate court] shall constitute a court for the correction of errors of law under such regulations as the General Assembly may prescribe."); S.C. Code § 14-3-330; *Mims v. Coleman*, 248 S.C. 235, 149 S.E.2d 623 (1966). Instead, the function of an appellate court in a law case is the review and correction of error of law. *Id.* These constitutional and statutory limitations are especially important on review of a grant of summary judgment, rendered as a matter of law, in which the lower court itself could not weigh conflicting evidence. Troublingly, if this Court does not enforce the statutory and constitutional rules of appellate review, then the Constitution and statutes are effectively meaningless.

Petitioners respectfully request that this Court would grant a writ of certiorari to review the Court of Appeals opinion as a finder of fact.

ARGUMENT

The lower court's order at issue in this appeal does not mention "waiver," "estoppel," or "acquiescence." Those each are fact-driven equitable doctrines, the invocation and application of which is ***always*** based on intent, credibility, and the weighing of evidence. And yet, those fact-laden equitable doctrines are the grounds provided in the Opinion for "affirmance" of a summary judgment at law. Thus, the Court of Appeals' equitable Opinion is not actually an "affirmance" of the circuit court's decision at law; it is a wholly original decision made in equity. Moreover, the Opinion's equitable decisions—employing defenses offensively—are distressingly *wrong*.

Rather than delving into equity, the Court of Appeals should have reviewed the circuit court's error of law and found that the circuit court's decision to disregard the company's operating agreement was in clear contrast to statutory and contract law. **Instead, the Court of Appeals produced a radical result, with radical implications for the Simmons family, without a trial on the conflicting evidence and despite its standard of review.** Without question, the Court of Appeals lacked jurisdiction to invoke equity, improperly weighed conflicting evidence, and it misapprehended the law by utterly discarding the provisions of a binding Operating Agreement. Petitioners respectfully request that this Court would review the Opinion.

I. The Court of Appeals was without jurisdiction or power to invoke equity on review of an error of law within a grant of summary judgment.

The Court of Appeals is a creature of the South Carolina Constitution. The

Constitution delegates to the General Assembly the obligation to set limitations on the court's jurisdiction. S.C. Const. art V, § 9 (the Court of Appeals "shall have such jurisdiction as the General Assembly shall prescribe by general law."). The Legislature enacted section 14-8-200 of the South Carolina Code, designating the jurisdiction and standard of review of the Court of Appeals: "This jurisdiction is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case." *See* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* (3rd ed. 2016), at pages 21-26, 222-223. The Court of Appeals therefore has "**appellate jurisdiction for correction of errors of law in law cases**." S.C. Code § 14-3-330. Importantly, the "Court of Appeals should not address an issue which was not explicitly ruled on below." *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 675 S.E.2d 414, 416 (2009).

In actions at law, the Court of Appeals lacks the authority to weigh facts—a limitation which is also constitutional and statutory. *See* S.C. Const. art. V, § 5 ("the [appellate court] shall constitute a court for the correction of errors of law"); *Mims v. Coleman*, 248 S.C. 235, 149 S.E.2d 623 (1966) ("this court has no power to weigh conflicting evidence in a law case."). Instead, factual disputes are for trial. Or, if facts are needed to review an error, then the Legislature allows certification to the circuit court for findings of fact, or appointment of a special referee to hear and determine testimony. S.C. Code § 14-3-340. In any event, in a law case, the Court of Appeals does not have jurisdiction to act as a factfinder.

Litigants have a right to expect that these jurisdictional limitations will control the outcome of their appeals. The jurisdictional boundaries imposed by the General

Assembly dictate and drive the standard of review on appeal. Therefore, on summary judgment, where the circuit court itself is making no factual determinations but is instead deciding a legal question as a matter of law, the appellate court is required to evaluate whether the moving party was "entitled to judgment as a matter of law," within the constraint that "all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party." *See* Rule 56, SCRCP; *Vaughan v. Town of Lyman*, 370 S.C. 436, 635 S.E.2d 631 (2006). In other words, on summary judgment, when reviewing a decision made as "a matter of law," an appellate court is limited to the correction of error of law and may not adjudge credibility or weigh conflicting evidence or rule as a matter of equity.

Because this breach of contract lawsuit is an action at law, and because the circuit court was called upon to construe a contract—*i.e.* the Operating Agreement for SFH—the Court of Appeals lacked jurisdiction in this matter to make equitable determinations for the first time. Moreover, even if the equitable doctrines of waiver, acquiescence, and estoppel were appropriate here, each requires fact-dependent determinations of credibility and intent that are the exclusive province of a trial—and are not for an appellate 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 intentional abandonment or relinquishment of a known right." *Id.* Similarly, "**acquiescence is a question of fact** determined by the intent of the parties." *Kirkland v. Gross*, 332 S.E.2d 546, 286 S.C. 193 (Ct. App. 1985); *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**.").

Finally, there were no antecedent factual findings by the lower court to support the invocation by the Court of Appeals of equitable doctrines.[7] The lower court made its rulings as a matter of law, and not in equity.

Petitioners respectfully request that this Court review the Court of Appeals' Opinion in this case, which violates the constitutional and statutory limitations of appellate jurisdiction.

II. The Opinion wrongly invokes the equitable <u>defensive</u> doctrines of waiver, acquiescence, and estoppel to enrich Respondent Grandchildren.

This is an appeal from the circuit court's grant of summary judgment in favor of Respondent Grandchildren on their declaratory judgment cause of action, which order held: "the undisputed evidence establishes as a matter of law, that Plaintiffs are member of SFH." (R. p. 40). On appeal, Petitioners 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 Grandchildren are not members.

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[7] For example, do the Grandchildren have clean hands? Is there a remedy at law (*i.e.* monetary damages) that precludes the invocation of equity? There is no lower court decision on these questions, which are pre-requisites to equity. *Temple*, 675 S.E.2d 414, 381 S.C. 597 (2009) ("Court of Appeals should not address an issue which was not explicitly ruled on below"), *citing Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991).

The circuit court's finding of law is patently wrong under the law.[8] But in "affirming" that legally erroneous decision, the Opinion wrongly sidesteps that legal error by misusing the fact-intensive equitable defensive doctrines of waiver, acquiescence, and estoppel. Opinion pp. 2-3 ("we hold [Defendant] Children have waived any challenge to assert that the Trust is the sole owner of SFH or that they are members."[9]); ("[Defendants'] acquiescence to [Plaintiff] Grandchildren's perceived status as members estops them from attacking the validity of the 2015 amendment.").

The Opinion improperly uses equitable defenses to grant affirmative, offensive relief. In so doing, the Court of Appeals misapprehended the reality that *Grandchildren are the Plaintiffs*, and they filed this lawsuit to obtain lucrative, affirmative relief, including a declaratory judgment that Grandchildren are members of SFH, entitled to distributions and ownership interests in valuable real estate. Waiver, estoppel, and acquiescence are defensive, only, and they cannot be employed by plaintiffs 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**.

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[8] The circuit court found that "strict compliance with the Operating Agreement is not a prerequisite of membership." (R. p. 39). 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. *see infra*.

[9] 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.

Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1991) (cleaned up, emphasis added). Because the Court of Appeals' equitable decision contradicts established Supreme Court precedent on the limited uses of equitable defenses, this Court should grant a writ of certiorari to review the Opinion.

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

As a matter of law, the circuit court erred in finding Grandchildren to be members of SFH, when their purported admission into the company did not conform with the unambiguous, mandatory requirements of SFH's Operating Agreement. Under South Carolina law, the governing documents control the relationship between the company, its members, and its manager, and they should be enforced by courts as written.

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. 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. It is essentially the law of that relationship, and

it must be followed as written.

The circuit court's error germinated in its choice to disregard SFH's Operating Agreement. (R. p. 39) ("strict compliance with the Operating Agreement is **not** a prerequisite of membership."). This is plain error under both the LLC Act and court 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). "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").[10] The contract requires 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

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[10] 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.

"**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 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." (R. p. 74).

The circuit court erred to find that compliance with the operating agreement was unnecessary, and the Court of Appeals was wrong to discount this legal error entirely, by invoking equity. "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 circuit court committed further error of law when it ignored the Operating Agreement entirely, in favor of unclear amended articles of organization, the meaning and intent of which was disputed. (Order, R. p. 39). Statutory law dictates that the articles of organization are subservient to the provisions of a company's 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 explicitly states that its terms control over the provisions of the articles. (R. p. 80, § 8.9) ("In the event of a direct conflict . . . the applicable provision of the Operating Agreement shall control").

In other words, under the law of South Carolina and the plain language of SFH's Operating Agreement, members cannot be admitted by an alleged amendment of the articles of organization. As a matter of law, if Charles Simmons 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. Therefore, under its standard of review, and pursuant to the LLC Act, the Court of Appeals should have reversed the circuit court's error of law as to the construction and application of the Operating Agreement. Petitioners respectfully request a ruling from this Court on this issue of law, or remand to the Court of Appeals to decide it.

IV. The Court of Appeals was powerless under its standard of review to disregard the conflicting evidence of the Operating Agreement and Charles Simmons Jr.'s testimony, both of which negated Grandchildren's membership claim.

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. On summary judgment, the court is not empowered to determine questions of fact; its capacity is limited to deciding matters of law. Rule 56, SCRCP. And yet the Court of Appeals ignored two key pieces of evidence which conflict with Grandchildren's story that they are members of SFH: (1) the Operating Agreement, and (2) their grandfather's own testimony, in which he identified his wife and Children as the only members of the company.

1. Grandchildren's failure to comply with the Operating Agreement implicates a factual dispute.

Simmons Family Holdings, LLC, 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 requirements 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. The Court of Appeals disregarded the Operating Agreement in its entirety, without any explanation or justification for ***why*** it wholly discounted such strong evidence (and the inferences to be drawn from it) on appeal from a grant of summary judgment. The Operating Agreement should control as a matter of law as to the admission of members.[11] Nonetheless, at the

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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 was error of law that the Court of Appeals exists to correct. *See infra*.

very least, the Operating Agreement was evidence in opposition to summary judgment. **Neither the lower court nor the Court of Appeals had authority on summary judgment to ignore the best evidence that exists on the material question of membership at issue in this lawsuit.** Indeed, the existence of such evidence, alone, should have defeated summary judgment.

Because Grandchildren did not comply with the Operating Agreement's provisions on membership, a summary judgment of law was not proper.

2. Charles Simmons, Jr. did not identify Grandchildren as members of his company.

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

> Q. Now, who was the — the original member of [Simmons Family Holdings], 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).

Charles Simmons Jr.'s testimony unequivocally implicates a fact question on the material issue of his intent for the membership of the company. This is because Charles Simmons Jr. 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. Summary judgment was therefore not proper.

Because of the standard of review (the same as that of the circuit court on summary judgment), the Court of Appeals simply *could not* discount or disregard probative, conflicting evidence on the material question of membership. Because the conflicting evidence shows an obvious dispute of material fact, Petitioners respectfully ask this Court for a ruling reversing the lower court's erroneous grant of summary judgment, and remanding for trial on 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 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).[12]

[12] The Court of Appeals' holding on Grandchildren's shareholder derivative claim (for money had and received) depends and is contingent upon its affirmance of the ruling that Grandchildren are company members (and thus capable of bringing a derivative suit). The derivative claim ruling should therefore be reversed because, for the reasons herein, Grandchildren are not members as a matter of law. Children preserve and do not waive their additional grounds for reversal of the derivative ruling, although the Court of Appeals declined to address them having found that the issue of membership controlled.

V. The so-called "discovery order" made dispositive rulings which were immediately appealable and should be decided by this Court. The question of (disputed) company members' entitlement under the LLC Act to attorney-client privileged information is a novel issue in South Carolina.

This Court should review the Court of Appeals' erroneous decision that the "discovery order" on appeal was not immediately appealable. The term "discovery order" is a misnomer here. Almost contemporaneously with its summary judgment order, the circuit court issued what was titled as a discovery order, but which in reality made substantive rulings that finally decided claims and defenses. *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). Further, this Court's precedent permits appellate review of even a discovery order, when done 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.

Respondent Grandchildren argued that a (purported, disputed) member of a limited liability company is statutorily entitled to inspect <u>all</u> 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"). **This is a novel issue in this State.** The circuit court wrongly agreed with Grandchildren, 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 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 of fact. Because Respondents are not members[13] 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 Respondents are members, members of an LLC are not 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,[14] 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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[13] Or, at a minimum, because there are disputed questions of fact as to their membership.

[14] 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).

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 defendant Palmer Simmons, 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.").

South Carolina's LLC Act expressly 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 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 company 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 grant a writ of certiorari to review this novel question of South Carolina law, and it 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

For the reasons set forth herein, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari to review and reverse the Opinion of the Court of Appeals, which is contrary to constitutional and statutory law, and beyond the scope of the Court of Appeals' powers and jurisdiction.

Respectfully submitted,

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