

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**APPEAL FROM CLARENDON COUNTY**  
Family Court

Gordon B. Jenkinson, Family Court Judge

Opinion No. 5151 (S.C.Ct.App. filed June 26, 2013)

**Daisy Wallace Simpson**, ..... Respondent,

v.

**William Robert Simpson, Sr., Individually and as  
Shareholder/Member of Simpson Farms, LLC and  
William R. Simpson, Jr., as a Shareholder/Member  
of Simpson Farms, LLC**, ..... Petitioners.

**PETITION FOR A WRIT OF CERTIORARI**

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**SC Court of Appeals**

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## CERTIFICATE OF COUNSEL

Counsel for Petitioners certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 8, 2013.

### QUESTIONS PRESENTED

1. **DID THE COURT OF APPEALS ERR IN DETERMINING THAT THE LLC HAD BEEN MADE A PARTY TO THE PROCEEDINGS AND WAS BOUND BY THE DETERMINATION THAT THE PROPERTY IT OWNED WAS INSTEAD MARITAL PROPERTY SUBJECT TO EQUITABLE DIVISION**
2. **DID THE OPINION OF THE COURT OF APPEALS RESULT IN A VIOLATION OF THE CONSTITUTIONAL RIGHTS OF SIMPSON FARMS, LLC TO DUE PROCESS**

### STATEMENT OF THE CASE

William R. Simpson (“Husband”) and William R. Simpson, Jr. (“son”) are farmers. Husband and son each own a 50% member interest in Simpson Farms, LLC. The LLC holds legal title to a 161.1 acre tract and a 133.2 acre tract (“real estate”), which are utilized by the LLC in its farming operations. The LLC was formed on April 28, 2000. Substantial property acquired during the course of the marriage was transferred into the LLC. Daisy Wallace Simpson (“Wife”) became aware of this transaction as early as Mother’s Day 2000. (R, V. 1, pp. 9-10; R. V. 1, p21; R. V. 1 pp 23-24)

Wife commenced an action in the family court on March 4, 2004. Simpson Farms, LLC was not named as a party defendant in the original pleadings. The only named Defendants in the initial pleadings are William Robert Simpson, individually, and as shareholder/member of W.R. Simpson Farms, Inc., and William R. Simpson, Jr., as shareholder/member of W.R. Simpson

Farms, Inc. (R.V.1 pp. 4-5). W. R. Simpson Farms, Inc. is a non-entity and has never been a trade name of the LLC.

The family court conducted a trial in this case on July 7, 8, and 9, 2004; September 29 and 30, 2004; and October 22 and 26, 2004. (R. V.1 p. 1) After the evidentiary record was closed, by Order filed October 29, 2004, Wife's motion to amend the caption to substitute Simpson Farms, LLC for W.R. Simpson Farms, Inc was granted "*nunc pro tunc*." (R.V.1 pp. 4-5) The Order changed the caption to list the named defendants as William Robert Simpson, individually, and as shareholder/member of Simpson Farms, LLC, and William R. Simpson, Jr., as shareholder/member of Simpson Farms, LLC. This same Order denied Husband's motion to dismiss the corporate defendant as a party because it was initially referred to as W.R. Simpson Farms, Inc. in the caption of the case. (R.V.1 pp. 4-5) Moreover the current caption does not name the LLC as a party defendant. It names the individual defendants in a representative capacity.

Simpson Farms, LLC did not make a voluntary appearance in the case and it did not file an answer. Answers were filed by Husband, individually and as owner of Simpson Farms, LLC and by son as a shareholder of Simpson Farms, LLC. (R.V.1 p.3)

In addition to Simpson Farms, LLC not being joined as a party in the case, the issue of whether the real estate owned by the LLC was marital property was never plead or litigated. To the contrary, the family court found that the transfer of the marital property into the LLC was effective as to the son, and that the Husband should be charged with 50% of the value of the property held by the LLC. The family court further found that it would not allow the Wife to defeat the interest of the son in LLC property. (R.V.1pp. 9-10)

On December 31, 2004, the family court entered a Final Decree granting William R. Simpson and Daisy Wallace Simpson (“wife”) a divorce.

In that Decree, the family court equitably divided the marital estate and ordered Husband to convey the following property to Wife:

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

(R. V1. P. 40).

The family court found that all of the above real estate was titled in the name of Husband, individually. (R. V1. p. 28, line 1).

This is the second appeal in this domestic case. Previously, husband, William Robert Simpson, appealed the Final Decree of Divorce filed December 31, 2004. (R. V1. pp. 44-46). Wife did not appeal the Final Decree of Divorce. She did appeal a separate Order Regarding Attorney’s Fees filed February 17, 2005. (R. V1. p. 49, lines 5-7). The Order Regarding Attorney’s Fees was reversed and remanded, and is not an issue in the second appeal. (R. V1. p. 66, lines 17-207).

In the first appeal, Husband raised the issue of ownership of certain real estate that the family court ordered him to convey to Wife. Husband contended that three of the properties, the 161.1 acres, the 133.2 acres, and the House and 16 acres were not in his name individually, but

titled in the name of a limited liability company in which Husband and son each owned a 50% interest. (R. V1. p. 53, lines 3-18).

The Final Decree of Divorce dated December 31, 2011 was affirmed by Unpublished Opinion No. 2001-UP-147, filed April 4, 2007. Appellant Husband's Request for a Rehearing and Petition for Certiorari were denied. (R. V1. pp. 67-68).

On April 29, 2008, Wife filed a motion and a Complaint for a Rule to Show Cause. By Order entered March 6, 2009, the issues raised in the Rule to Show Cause were partially resolved by Husband paying \$597,829.01 to Wife. (R. V1. p. 73, lines 13-17). This payment represented the cash portion of the equitable division award (including the Edward Jones account), attorney's fees of \$85,000.00, plus judgment interest through July 17, 2008. (R. V1. p. 73, lines 17-20).

On October 28, 2008, Husband tendered to the wife quit-claim deeds in his name individually to all of the properties, including the real estate titled in the name of the LLC. (R. V1. p. 81, lines 12-14). Wife refused to accept the quit-claim deeds and demanded general warranty deeds. (R. V2. p. 415, lines 13-19).

Wife filed a second Motion and Complaint for a Rule to Show Cause on January 21, 2009. Hearings on the second Rule to Show Cause were conducted on September 15 and December 21, 2009. An Order was entered May 28, 2010 finding that the Husband was not in contempt, that he had made a good faith effort to comply with the family court's Order, and that certain property that the husband was required under the Final Decree to convey to the Wife did not belong to him. (R. V1. p. 81, lines 6-9; lines 15-16).

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

Final Decree. The March 18, 2011 Order requires husband, son, and Simpson Farms, LLC to convey a 50% interest in the 161.1 acres, the 133.2 acres, and the house and 16 acres (actually 13.5 acres), properties titled in the name of the LLC, to Wife, and in addition, requires Husband to pay to Wife a cash payment of \$144,625.00, with interest from January 30, 2005. (R. VI. p. 103, lines 23-24; p. 104, lines 1-14).

Husband and Wife filed separate appeals. Both Husband and Wife argued that the family court erred in modifying the division of property in the decree because it lacked subject matter jurisdiction to change the original Order of equitable division. Wife also appealed the failure of the family court to award attorney's fees. Husband appealed on six additional grounds.

The Court of Appeals reversed the family court's modifications to the property division of the Final Decree. In addition, the Court of Appeals made a finding that Simpson Farms, LLC was made a party to the divorce action, that the family court determined that the real estate owned by the LLC was marital property, and ordered Husband, son, and the LLC to convey the properties to wife. Daisy Wallace Simpson v. William Robert Simpson, Sr., Individually and as Shareholder/Member of Simpson Farms, LLC and William R. Simpson, Jr., as a Shareholder/Member of Simpson Farms, LLC, Op. No. 5151, (S.C.Ct.App. filed June 26, 2013).  
Petitioner seeks a writ of certiorari to review that decision.

## ARGUMENT

### **I. DID THE COURT OF APPEALS ERR IN DETERMINING THAT THE LLC HAD BEEN MADE A PARTY TO THE PROCEEDINGS AND WAS BOUND BY THE DETERMINATION THAT THE PROPERTY IT OWNED WAS INSTEAD MARITAL PROPERTY SUBJECT TO EQUITABLE DIVISION**

An underlying premise of the Court of Appeals' decision is that Simpson Farms, LLC was a party to the family court proceedings at the trial of the matter and became bound by the

action taken by the family court. The presumption that the LLC was bound somehow by either notions of *res judicata*, *stare decisis*, or law of the case cannot be relied upon when the fundamental right to due process; that being to present evidence and witnesses on all issues affecting the LLC was never afforded the entity. The Court of Appeals overlooked the procedural history of what occurred at the trial.

Simpson Farms, LLC has never been a named party to this case. The only named parties at the time that the action was filed were William Robert Simpson, individually, and as shareholder/member of W.R. Simpson Farms, Inc., and William R. Simpson, Jr., as shareholder/member of W.R. Simpson Farms, Inc. The only named parties in the current appeal are the same individuals in their representative interests. The LLC is still not a party. It is the same circumstance as naming a shareholder of a corporation to subject the corporation itself, to jurisdiction.

The trial of the case occurred over a period of seven days in July, September, and October, 2004. The evidentiary record was closed after the final day of testimony on October 26, 2004. Thereafter, on October 29, 2004, the family court entered its Order *nunc pro tunc* March 5, 2003 granting Wife's motion to amend the caption to substitute Simpson Farms, LLC for W.R. Simpson Farms, Inc. The Order changed the caption to list the named defendants as William Robert Simpson, individually, and as shareholder/member of Simpson Farms, LLC, and William R. Simpson, Jr., as shareholder/member of Simpson Farms, LLC.

The October 29, 2004 Order stands in stark conflict with the current caption filed in the case, as well as with an important finding in the Final Decree of Divorce filed on December 31, 2004. The family court found in Paragraph 3 of the Decree that responsive pleadings were filed by Husband individually and as owner of Simpson Farms, LLC and by son as a

shareholder/member of Simpson Farms, LLC. (R. V. 1, p. 3). As set out above, Simpson Farms, LLC has never been named a party defendant to this equitable division of marital property. All references to the LLC arise in the context of Husband or son as “shareholder/member.” Despite the language that appears in the October 29, 2004 Order, Simpson Farms, LLC did not file an answer. The trial court and the lower appellate court repeated as if there was a factual recorded basis that the LLC filed an answer to the cause. The LLC did not file an answer or appearance.

If the October 29, 2004 Order made Simpson Farms, LLC a party for the first time, then the use of a *nunc pro tunc* order to make the LLC a party was an improper and erroneous exercise of the family court's authority. Obviously, the intended purpose of the Order was to correct the error or omission by the Wife for failing to join a necessary party to the action which had been commenced more than a year prior. The Order by the family court attempted to do a reset of the parties without affording the new party the opportunity to present evidence or witnesses on issues common to it including, *inter alia*, the LLC's ownership of property that the family court incorrectly concluded belonged to the Defendant, Billy Simpson, and was therefore marital property; thus subject to equitable apportionment and distribution.

*Nunc pro tunc* orders can only be used to place into the record evidence of judicial action that has taken place; not to correct an error or supply an omission of judicial action. *Ex parte, J.P. Strom, Jr.*, 343 S.C. 257, 539 S.E.2d 699 (2000). Once parties are added, they must be given an opportunity to present evidence on any issues involving them. *Frye v. Frye*, 323 S.C. 72, 448 S.E.2d 586 (S.C. App. 1994). The LLC was not afforded such an opportunity.

This failure to properly and timely join a necessary party is a matter of subject matter jurisdiction and can be raised by an aggrieved party at any time. See *Austelle v. Austelle*, 294 S.C. 19, 362 S.E.2d 181 (1987). In its appeal, the LLC raised the issue of its ownership of in-

kind property the family court had decided was marital. When the LLC continued to raise the issue of its ownership on appeal, the Court of Appeals ruled that the matter could not be litigated anew. This ruling subverts the LLC's right to due process of law by preventing it from raising and presenting evidence on the issue of its ownership of property.

Although there are numerous references to Simpson Farms, LLC as a party, by the family court, and by Husband and Wife, Simpson Farms, LLC was never made a party defendant in the case, and has never been listed in the caption of the case as a Defendant. Naming William Robert Simpson and William R. Simpson, Jr. as Defendants, in their capacity as shareholder/members of Simpson Farms, LLC, does not ipso facto make the LLC a party to the case and any determination regarding property owned by the limited liability company is void for lack of jurisdiction.

Naming individuals shareholders of a corporation in an action is not sufficient to subject the corporation to the case action. "It is recognized that a corporation is an entity separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders. This is expressed on the presumption that the corporation and its stockholders are separate and distinct ... and this oft-stated principal is equally applicable, whether the corporation has many or only one stockholder." *Costas v. First Federal Sav. and Loan Ass'n*, 321 S.E.2d 51,56, 283 S.C. 94, 102 (S.C. 1984), quoting *Olin Matherson Chemical Corp. v. Planters Corp.* 236 S.C. 318, 144 S.E.2d 321 (1960).

Simpson Farms, LLC is a separate legal entity, possessing claims and defenses that only it may assert. See *TPI Corp. v. Merchandise Mart of South Carolina, Inc. et al*, 61 F.R.D. 684 (D.S.C. 1974) wherein the court, in addressing the right of two sister corporations and a sister partnership to intervene, holds "... one corporation cannot assert a legal claim of another separate

corporation. Neither may the individual defendant, as either a partner, officer, or shareholder, assert the legal claim of the petitioner-intervenors. In order for the legal claims of the petitioner-intervenors to be properly adjudicated, they themselves must be before the court. Sister corporations and individual partners, corporate officers or shareholders cannot adequately represent before a court a legal claim of a partnership or a corporation." id at 688.

"Except as provided in § 12-2-25 for single-member limited liability companies, a limited liability company is a legal entity distinct from its members." S.C. Code Ann. § 33-44-201 (2006 & Supp. 2012). The official comment to this section states: "a limited liability company is legally distinct from its members who are not normally liable for the debts, obligations and liabilities of the company. . . . Accordingly, members are not proper parties to suits against the company unless an object of the proceeding is to enforce members' rights against the company or to enforce their liability to the company."

"A member is not a co-owner and has no transferrable interest in property of the limited liability company." S.C. Code Ann. § 33-44-501(a) (2006 & Supp. 2012). Because the individual members have no individual property interest in property owned by a corporate entity, any determination of whether limited liability company property is marital property is void if the limited liability company has not been joined as a party in the action. The limited liability company has not appeared in the trial of the case and it did not file responsive pleadings. Defendant Simpson, Sr., individually, and Simpson, Jr., however, filed and served responsive pleadings dated April 28, 2003. (R. VI. p. 3, para. 6, in the Final Decree of Divorce.) which did not and does not subject the corporate entity to the jurisdiction of the court.

Because Simpson Farms, LLC was not a party in the family court action, the family court did not have jurisdiction to determine whether property owned by Simpson Farms, LLC was

marital property. It was error for the Court of Appeals to ignore this fundamental aspect of jurisdiction to reach the conclusion that the family court had the authority to award full ownership of real estate owned by the LLC to the wife.

**II. DID THE OPINION OF THE COURT OF APPEALS RESULT IN A VIOLATION OF THE CONSTITUTIONAL RIGHTS OF SIMPSON FARMS, LLC TO DUE PROCESS**

Not only was the LLC not joined in the case, but there has never been a determination by the family court that the LLC real property was marital property. Simpson Farms, LLC has been denied due process of law.

In order for the family court to determine that property owned by a third-party is marital property, due process considerations require that the third-party have notice and an opportunity to appear to protect its interest. Typically, this issue is framed in the pleadings and the third-party is given the opportunity to litigate the issue of whether the property is marital property.

Procedural due process did not occur in the trial of this case. The LLC's due process rights have been violated because it was not given notice and an opportunity for a hearing on the issue of whether the real estate owned by the LLC is marital property.

The family court's erroneous finding that the 161.1 acre tract and the 133.2 acre tract were titled in the name of husband is the only determination affecting the property. In fact, the family court never actually found the property to be marital property. Instead, the property was found by the family court (albeit erroneously) to be titled in the name of the husband. (R.V. 1 p. 28)

Wife never argued that the real estate at issue was marital property titled in the name of a third-party. Instead, wife contended that husband and the limited liability company were one and the same. (R. VII, p. 400, lines 17-18 and p. 404, lines 5-12.) This was likely a calculated

decision to avoid the impact of wife's failure to name the LLC as a necessary party defendant. The effect denied the family and lower appellate court from ordering the LLC to comply with the decree.

The action of the family court in awarding property belonging to Simpson Farms, LLC to Wife is a taking of the LLC's property interest without due process of law and violates rights granted to the LLC by Article I, § 3 of the South Carolina Constitution, as well as by the Fifth and Fourteenth Amendments of the United States Constitution.

Simpson Farms, LLC holds legal title to its property and, correspondingly a legitimate claim of entitlement to retain its real property under state law without outside forces interfering with that ownership. This legitimacy of the LLC's entitlement to protect its property right from outside forces is buttressed by the family court's finding that the transfer by of real estate by Husband to Simpson Farms, LLC was a legitimate transfer, that wife was aware of the transfer, and that the family court would not allow the wife to defeat the transfer of the property from Husband to the LLC.

Prior to a taking of its property, the LLC is entitled to its "day in court" and to due process, The Due Process Clause of the United States Constitution requires notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950). "Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007) (citing *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)); accord *Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008).

At a minimum, due process has been denied Simpson Farms, LLC. Not only was the LLC not named as a party defendant but also to the attempted taking of its property or property belonging, instead to the LLC the issue of whether property titled in the name of the LLC was marital property was never pled litigated in the family court. The family court found that the transfer of the marital property by the Husband into the LLC was effective as to the son, and that the Husband's marital share should be charged with 50% of the value of the property held by the LLC. The family court further found that it would not allow Wife to defeat the interest of son in LLC property.

Absent due notice, a court lacks jurisdiction to adjudicate the party's personal rights *Blanton v. Stanthos*, 351 S.C. 534, 542, 570 S.E. 2d 565, 569 (Ct. App. 2002). A judgment by a court without jurisdiction over both the parties and the subject matter is a nullity and must be so treated by the courts. Id.

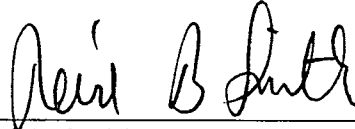
Husband and son recognize that issues not raised in the pleadings may be tried by consent. See Rule 15(b), SCRPC. However the issue of the ownership by the LLC of property did not arise in the trial made of this case because the record owner of the property, Simpson Farms, LLC was not a party to the case.

The family court is limited by the scope of the due process created by the Wife's action, and the rule that its pleadings are to be liberally construed may not be stretched so as to permit the court to award relief not contemplated by the Wife's pleadings. *Henry v. Henry*, 296 S.C. 285, 287, 372 S.E.2d 104, 106 (Ct. App. 1988); see also *Murdock*, 338 S.C. at 334, 526 S.E.2d at 248.

## CONCLUSION

For the reasons stated, Petitioners ask the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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September 6, 2013

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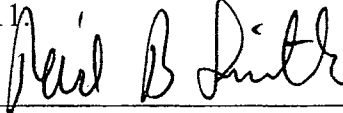
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I certify that I have served the Petition for a Writ for Certiorari by depositing a copy of it in the United States mail, postage prepaid, on September 6, 2013, addressed to attorneys of record, Carrie Ann Warner, Post Office Box 2628, Columbia, SC 29202 and James T. McLaren and C. Dixon Lee, Post Office Box 11089, Columbia, SC 29211



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