

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

RECEIVED

Jan 13 2025

S.C. SUPREME COURT

Supreme Court Case No. 2024-001980

Circuit Court Case No. 2019-CP-07-01246
Court of Appeals 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,

Petitioners,

And Simmons Family Holdings, LLC,

as a nominal Defendant.

**PETITIONERS' REPLY
IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

This appeal stems from a grant of summary judgment to the plaintiffs, made as a matter of law, on legal causes of action, concerning the construction of a contract, within an action at law. The Respondent plaintiffs are wrong that the Court of Appeals had the jurisdiction or power—against such a backdrop—to render a decision applying the equitable defensive doctrines of waiver, acquiescence, and estoppel in the first instance. This Court should grant a writ of certiorari to review the Court of Appeals' Opinion.

The familial relationships and facts at issue in this case are complicated and contested, and the “reality” of them depends on the teller of the tale. Respondent Grandchildren have one version of the facts of their claim to membership in the family company, and, in the wake of the death of their grandfather, those Grandchildren filed suit against Children to assert it. However, Petitioner Children have a different, conflicting version of the facts, which is why in circuit court they opposed summary judgment with documentary and testimonial evidence¹ to demonstrate that the intent of Charles Simmons Jr. was not to bestow valuable ownership interests in the family company on just two of his fourteen Grandchildren.²

At the broadest level, the Court of Appeals was wrong to affirm summary judgment because of the disputed facts and the necessity of determining credibility and intent, all of which make the disposition of Grandchildren’s claims the province of the factfinder at trial. At a more cerebral level, the Court of Appeals was wrong to entirely disregard the Operating Agreement, which simply and cleanly answers the Grandchildren’s demand to be members: No. No, they are not members of the company, as a matter of law.

¹ Key among this evidence is the plain language of the Operating Agreement on the admission of members—which frankly should control here as a matter of law and which *enormously* simplifies this potentially complex litigation when heeded—as well as the testimony of Charles Simmons Jr. in which he identified his children and wife as members, but not his Grandchildren. (R. pp. 198, 202, 498 at pp. 9-10; *see also* R. p. 188, 360).

² In their Return, Grandchildren disingenuously state that their joint claim to hold a 2/3 interest in the family company does not exclude potential ownership by their numerous uncles, aunt, brothers, sisters, and cousins. They do not mention that they have filed a probate claim—stayed by this litigation—to upset their grandfather’s last will and testament. (Record pp. 342-343; p. 341; pp. 324-340, 350-351). As with nearly everything in this dispute, the facts are hotly contested.

This Court should review and reverse the Court of Appeals' Opinion in this case, because its determinations are beyond the scope of its jurisdiction and powers of review, and because it is fundamentally erroneous. Below, Petitioners will briefly address the arguments in Respondents' Return. Overarchingly, the "undisputed facts" Respondents tout are absolutely in dispute, and there is evidence in the Record that contradicts them; this Court should not accept Respondents' tacit invitation to wade into fact determinations, credibility, and intent, which the Court of Appeals was wrong to do.

I. The Court of Appeals does not have power to make fact-dependent equitable determinations in the first instance on review of ruling of law in an action at law, and it misapplied *defensive* doctrines to grant affirmative relief to plaintiffs.

Respondents are the plaintiffs, and they are the architects of this litigation, which they framed as an action at law – demanding a jury trial, seeking actual and punitive damages, and bringing legal, contractual, and duty-based claims against Petitioner defendants. (R. pp. 47-68). Respondents' claims against Petitioners include breach of contract, conversion, breach of duty, tortious interference with contract, and fraud,³ and they *all* hinge on the fact-intensive, threshold question of whether Charles Simmons Jr. intended to make plaintiff Grandchildren 2/3 members of his family company.

Below, both sides moved for summary judgment. Petitioners argued that the family company is a limited liability company, governed by an Operating Agreement

³ Each of these causes of action, seeking damages, is one at law. *See Milliken & Co. v. Morin*, 399 S.C. 23, 731 S.E.2d 288 (2012) ("An action for breach of contract is an action at law."); *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004) ("claim for conversion was an action at law"); *Hartman v. Jensen's, Inc.*, 289 S.E.2d 648, 277 S.C. 501 (1982) (action in negligence is an action at law); *Jordan v. Holt*, 362 S.C. 201, 608 S.E.2d 129 (2005) ("a claim of breach of fiduciary duty is an action at law"); *Kiriakides v. Atlas Food Systems & Serv.*, 343 S.C. 587, 541 S.E.2d 257 (2001) (action for fraud is at law).

which contains material terms⁴ on the admission of members, with which Grandchildren did not comply as a matter of law. In response, the Respondents argued that a myriad of disputed facts and certain amended articles of organization transformed them into members, notwithstanding their conflict with the Operating Agreement, as did various actions taken by the probate attorney in administering the estate of Charles Simmons Jr.⁵

In response to the summary judgment arguments made by both sides, the circuit court issued the order on appeal, which, tellingly, never—not once—indicate that the court is deciding the membership question as a matter of equity, and nor does the order employ any variation of the word “waive,” “estop,” or “acquiesce” as part of its ruling on membership. (R. p. 35-43). Instead, the order clearly states that it is deciding the question “as a matter of law.” (R. p. 39; p. 41) (holding “the Declaratory Judgment Act authorizes this court to make determinations of questions of writings that constitute a contract, this court may evaluate the terms of the Operating Agreement, the Articles, and the related assignments and resolutions, and the other documentation provided in this case to determine the intent of the parties.”). Respondents themselves, in their brief to the Court of Appeals, conceded that the question is one of law: “Because the proper

⁴ To psychologically undermine the Operating Agreement, the Respondents refer to its provisions on membership as “ministerial” and “technical,” when the provisions are neither. The terms are substantial and material, requiring a capital contribution, assumption of company liability, and agreement to be bound by a new operating agreement (which Charles Junior notably never created). (R. p. 202).

⁵ Pursuant to both the LLC Act and the Operating Agreement here, the amended articles are hierarchically inferior to the Operating Agreement; thus Petitioners argued they were legally incapable of bestowing membership on Grandchildren, absent compliance with the Operating Agreement. (*See* Appellants’ Brief, pp. 12-19). Further, probate filings made by an estate in the course of probate would not be legally effective to bind a limited liability company. (*See* App. Reply Br. pp. 9-10).

standard of review limits the inquiry in this case to a **question of law**, it follows that . . . 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 added). In other words, by Respondents’ own acknowledgment, the Court of Appeals was tasked with review of a decision of law— and not a ruling in equity.

In opposition to certiorari, Respondents incorrectly argue that Rule 220(c), SCACR, vests the Court of Appeals with the power to make equitable rulings in the first instance. Respondents claim that because they cursorily uttered the words “waive” and “estop” as part of their arguments to the trial court, then the Court of Appeals was correct to use those equitable doctrines as the basis of its Opinion affirming a decision of law. But **merely speaking a word does not establish a claim**— and especially not an equitable claim dependent on numerous factual elements and findings, 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 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.**”) (emphasis added).

The circuit court’s order before the Court of Appeals for review discusses none of these essential elements for equity, let alone the doctrines they embody, and therefore there is no prerequisite framework nor factual findings within the Record to support the Court of Appeals’ original employment of equitable doctrines. Moreover, Rule 220(c), SCACR, does not trump the statutory, jurisdictional constraints on the Court of Appeals, nor alter its scope of review on appeal. S.C. Code § 14-3-330 (The appellate court “shall have appellate jurisdiction for correction of errors of law in law cases”); S.C. Code § 14-3-340; *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.”).

Respondents do not even address Petitioners’ additional ground for reversal of the Opinion, which is that even *if* the Court of Appeals was correct to summon equity, it abused that equity by employing defensive doctrines to grant an affirmative windfall to Plaintiffs. The law is clear that equitable defenses are not a platform for affirmative relief.

Petitioners respectfully ask this Court to grant a writ of certiorari, and to review and reverse the Court of Appeals’ errors in invoking and employing equity because it lacked the power to do so.

II. The Court of Appeals did ignore the Operating Agreement.

Aside from a pat recitation of Children's arguments, the Opinion makes *no reference whatsoever to the Operating Agreement* or its terms, nor to the circuit court's erroneous legal ruling on its application. Respondents cursorily dispute this reality solely in their heading for Section II, and they otherwise spend this section of their Return bogged down in complicated, disputed-fact-driven arguments that are not appropriate for summary judgment (the posture of this case) nor appellate determination. Given that the Operating Agreement is the controlling governing document of the limited liability company, pursuant to the LLC Act, and given that the keystone of the circuit court's order is its erroneous ruling "as a matter of law" about the application of the operating agreement, and given that the constitutional and statutory *function* of the Court of Appeals is to review and correct errors of law, it is alarming that the Opinion is utterly silent about the governing contract, in favor of equity.

Recognizing that the plain language of the Operating Agreement is a big problem for them, Respondents in Section II of their Return double down on their untenable characterization of the Operating Agreement's clear and unambiguous requirements for the admission of members as merely "ministerial," when they are in fact material and substantive. *See, e.g.,* Appendix, 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.").

Next, Respondents argue that maybe Charles Simmons Junior might-could have amended the Operating Agreement. This is a nonsense argument because there is no

evidence whatsoever that Charles Junior 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 *orally*. Petitioners incorporate the arguments from their Reply Brief in opposition to Respondents' conjecture about Charles Juniors' actions or intent, both of which are jury questions and not grounds for affirmance of summary judgment. *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**). (Appendix, Reply Br., pp. 11-12).

Speculative arguments about whether (or not) Charles Simmons 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.⁶ This Court should grant certiorari and remand for trial on the question of whether Charles Junior intended to change the structure of the company to benefit Respondents, only.

The bottom line is that this is an action of law for damages, involving the governance and control of a limited liability company, which company has a comprehensive, unambiguous Operating Agreement which should dictate the result. The circuit court was wrong to discount the Operating Agreement in favor of disputed parole evidence. And the Court of Appeals was wrong to ignore the Operating Agreement altogether—without explanation or justification—in favor of inapplicable

⁶ This applies also to Respondents' fuzzy ratification argument, which similarly hinges on disputed facts. Petitioners incorporate their Reply Brief, pages 9-16, in response to this argument on which neither the circuit court nor the Court of Appeals ruled.

equitable doctrines.

Petitioners respectfully ask this Court to grant certiorari to review the Court of Appeals' Opinion, which wrongly and completely fails to address the application of the company's controlling governing document.

III. Waiver, acquiescence, estoppel, and the intent of Charles Simmons Junior are each and every one questions of fact for trial, and the existence of conflicting evidence made summary judgment on the material question of membership improper.

Because they *know* that the facts are in dispute – and that those facts are for trial – Respondents try to divert by mischaracterizing Petitioners' legal arguments as a concession on the facts. But the only evidence this Court needs to look to, in order to appreciate the material dispute on the question of Respondents' membership in the family company, 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**⁷; (2) the Respondents' admissions that they did not make a capital contribution or to agree to share in company losses⁸; and (3) the testimony of Respondents' own Grandfather, Charles Simmons Junior, who did not identify them in his sworn statement identifying the company's members – from which the reasonable inference can obviously be drawn that Respondents' Grandfather did not intend for

⁷ 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.")

⁸ e.g. R. pp. 489-491 ("Q: Have you contributed anything to Simmons Family Holding, LLC, in the way of money? A: No.").

Respondents to be members.⁹

These are not “new” facts that have “changed with the wind,” as Respondents doth protest (too much) on pages 16-22 of their Return. Instead, Petitioners have asserted these same material facts from the outset of their defense of this lawsuit, which was filed against them by Respondent Plaintiffs.¹⁰ 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 multi-million-dollar company – then it would be helpful to know what *does*.

Further, Petitioners 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 Petitioners properly opposed Respondents’ fact-centric motion for summary judgment by demonstrating disputes of material fact.

In Section III of their Return, 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 this Court in *Wiegand v. United States Auto. Ass’n* held that it would decide cross-motions – on the same legal question – as a matter of law. 391 S.C. 159, 705 S.E.2d 432 (2011). *Wiegand’s*

⁹ See R. p. 498. 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.

¹⁰ See Petitioners’ 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.”).

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 summary judgment motions in this case were not "cross-motions" based on the same question of law. Instead, the parties here sought summary 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, SCRPC.

This Court's *Wiegand* decision 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, SCRPC (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 proceed to trial on the facts. (*See* Appendix, App. Reply Brief, pp. 2-5, 9-12).

Appellate courts are not fact-finding courts, and the multitude of disputed facts and evidence-centric claims that are the basis for Respondents' arguments in Section III do nothing more than highlight the impropriety of summary judgment. 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).

Petitioners respectfully request that this Court would grant certiorari to correct the erroneous grant of summary judgment, and remand for trial by jury on the disputed facts.

IV. The rulings in the so-called “discovery order” are substantive, decide the merits, and they are immediately appealable. This Court should accept certiorari to correct the circuit court’s error on the scope of the LLC Act.

To set the record straight, Petitioners did produce a privilege log. See R. pp. 510, 514-518, and p. 602: 12-16. Moreover, the Respondents’ contention that they were “unable to evaluate” Petitioners’ claim of privilege as to “correspondence between the managers of the Company and counsel,” and “attorney billing statements for work performed for the Company or its managers” is obviously far-fetched. Resp. Return, at p. 7. *Of course* Respondents could evaluate whether correspondence between the company and its lawyers is privileged, and whether those lawyers’ itemized, descriptive billing statements are privileged. These items are textbook examples of privileged materials.

But, in any event, privilege was not the basis for the circuit court’s ruling requiring the law firm of Vaux Marscher Berglind, P.A., to produce (self-evidently) privileged documents, including attorney-client communications. Instead, the circuit court made the ruling based on its incorrect and erroneous decisions that (a) Respondents are members of the family limited liability company, as a matter of law, and (b) South Carolina’s Limited Liability Company Act entitles company 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.

Petitioners respectfully ask this Court to grant certiorari to clarify the limitations and scope of a member's inspection rights under the LLC Act. *See* S.C. Code § 33-44-408 ("Member's right to information."). The statute does not and is not intended to give (purported) members access to attorney-client communications.

CONCLUSION

Respondents' arguments depend upon disputed facts and error of law, neither of which can justify the Opinion's mistakes. 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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January 13, 2025
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