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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

Appellants,

and

Simmons Family Holdings, LLC,

as a nominal Defendant.

APPELLANTS' RETURN TO RESPONDENTS' MOTION TO DISMISS

Appellants Palmer E. Simmons and Charlesetta S. Aiken (“Appellants” or “Palmer and Charlesetta”) respectfully oppose Respondents’ Motion to Dismiss, filed on September 7, 2021. In their Motion to Dismiss, Respondents improperly seek to have this Court decide the substantive merits of this appeal, by motion. Respondents superficially argue that “this appeal should be dismissed because the subject orders are not yet appealable” and “because Appellants lack appellate standing.” (Mtn. p. 2). However,

the body of Respondents' Motion is substantive arguments on the issues on appeal, which properly belong in their appellate brief rather than by motion as an attempted "end run" around briefing.¹

As set forth below, the lower court's orders, "Granting in Part Plaintiffs' Motion for Summary Judgment," (*e.g.*), present a justiciable controversy that is ripe and appropriate for appellate review. The orders on appeal make factual and legal rulings that finally determine core issues in this lawsuit – pertaining to membership in a family business – which are the ultimate questions in this litigation and the key to Appellants' defenses against the Respondents' claims.

Moreover, Respondents failed to preserve their argument on standing, although it is without merit. The Appellants do have standing, and this Court has jurisdiction to review the orders on appeal.

This Court should deny Respondents' Motion to Dismiss and direct the parties to proceed with briefing on the merits.

¹ Respondents' Motion to Dismiss makes numerous arguments pertaining to who is – and who isn't – a member of the company called Simmons Family Holdings, LLC ("SFH"). All of these arguments go to the substantive merits of the appeal, and they belong in a brief rather than a motion. In response to Respondents' arguments on the merits of this appeal, going to membership in the company, as well as procedural history and background, Appellants incorporate herein their Initial Brief, filed with this Court on July 6, 2021. This Court should also note that the exhibits attached to Respondents' Motion are an incomplete, cherry-picked "record on appeal" of the total evidence submitted to the circuit court.

I. Appellants have standing to appeal the circuit court's orders.

Respondents' standing argument, made in two separate places within their Motion to Dismiss, consists of a complicated, convoluted, and incorrect dive into the substantive merits of this appeal. (See Mtn. to Dismiss, at pp. 8-11 and pp. 12-13).

A. Respondents failed to preserve the question of standing.

As an initial matter, this Court should disregard Respondents' unpreserved arguments that Appellants lack standing. Respondents filed this lawsuit years ago in the circuit court, and the parties have been arguing ever since about membership in the family business, and the rights and obligations of the various parties to the action. Now, for the **first time** in their Motion to Dismiss this appeal, Respondents claim that Appellants lack standing to make the same arguments that they have been making ever since they filed their Answer to the Complaint. This argument by Respondents has been waived.

The question of standing goes to the justiciability of a case or controversy. Standing is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Powell ex rel. Kelley v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008). "In appeals where a party belatedly endeavors to raise issues concerning the justiciability of a controversy for the first time on appeal, the appellate courts have employed error preservation principles to find the matter unpreserved for purposes of appellate review." Jean H. Toal *et al.*, *Appellate Practice in South Carolina*, 3rd ed., 125-126; *see also id.* at 131 ("Note that there are no material distinctions between the requirements of establishing standing under general standing principles and the requirements to

appeal pursuant to Rule 201(b), SCACR.”); *see also James v. Anne’s Inc.*, 390 S.C. 188, 701 S.E.2d 730 (2010) (error preservation rules apply to question of appellate standing; holding that the issue of standing was not preserved for appellate review where the trial court did not have the opportunity to first decide the issue). This Court should deny Respondents’ Motion to Dismiss, because Respondents failed to preserve the question of standing for appellate review.

Regardless of whether Respondents have abandoned their standing argument, it is substantively wrong.

B. Of course Appellants have standing to appeal.

Not only is Respondents’ standing argument waived, but it is nonsensical. Respondents filed a Motion for Summary Judgment, directing it

TO: MARK S. BERGLIND, ESQ., ATTORNEY FOR THE DEFENDANTS:

(Exhibit 1, Respondents’ Motion for Summary Judgment). Appellants *are the Defendants* to which the motion is directed. In sum:

- Respondents sought summary judgment on their causes of action against Appellants.
- The circuit court granted that summary judgment in favor of Respondents and against Appellants.
- Appellants appealed.
- . . . and now Respondents argue that Appellants lack standing to appeal orders specifically directed to them.

This defies logic, and the Court can stop reading here.

C. Appellants have standing as parties aggrieved by the orders on appeal.

Regardless of whether the standing argument is unpreserved and illogical, Respondents' standing argument also is incorrect.

Respondents themselves repeatedly allege in their Complaint that Appellants are co-managers of the subject business, Simmons Family Holdings, LLC ("SFH"), and they specifically bring causes of action against Appellants in their capacity as managers of the company. (Exhibit 2, Respondents' Second Amended Complaint, *e.g.*, ¶¶ 12, 26, 41-43, 67, 83, 90, 110). Appellants' fundamental defense to these claims is that Respondents are not members of SFH. The orders on appeal decide that Respondents are members of the company, and they grant to Respondents summary judgment on causes of action against Appellants, going directly to the management of the company. Appellants have standing to appeal these orders, which finally determine their key defense and grant summary judgment against them as managers of the company.

In addition to standing as managers, Appellant Palmer Simmons has been sued by Respondents individually and in his capacity as Trustee of the Charles E. Simmons, Jr. and Rosa G. Simmons Revocable Trust (the "Trust"). Respondents themselves allege in Paragraph 29 of their Complaint that the Trust is a member of SFH. (Ex. 2, p. 6). But now Respondents incongruously argue that Appellants lack standing to appeal the orders because they are not members.²

² Respondents also attempt to get unfair mileage from a typing error made by Appellants' attorney in the Answer, attached as Exhibit 8 to Respondents' Motion to Dismiss. (*See* Motion to Dismiss, p. 9 at fn. 6 and at p. 10, disingenuously arguing that Appellants themselves deny being

The right to appeal is controlled by statute. The law bestows, upon “any party aggrieved” in a civil action, the privilege to cross the appellate threshold. S.C. Code § 18-1-30 (“Who may appeal.”) (“Any party aggrieved may appeal in the cases prescribed in this title.”). This is a very broad right. Clearly Appellants meet the requirement of being a “party;” they are the Defendants in this lawsuit filed by the Respondents. As to the requirement that they be “aggrieved,” cases examining this component have looked to determine whether the party has a tangible stake in the outcome of the appeal, and whether reversal of the lower court’s order would have an identifiable benefit to the appealing party.³

members of the company, based on a single, isolated mistake in an answering pleading). It is patently obvious that the quoted paragraph, stating “Defendants deny that Defendants are members” of the company, is a typo. The spirit and letter of every other paragraph within Appellants’ answer, as well as within filed affidavits, motions, and copious other pleadings within this case make it abundantly clear that the quoted paragraph is intended to read “Defendants deny that Plaintiffs” are members of the company. Even the lower court did not imbue this obvious error with any significance. Attached hereto as Exhibit 3 is the Affidavit of Mark Berglund, Esquire, attesting that he made a typographical mistake in the Answer. This Court should not give credence to this argument by Respondents.

³ An “aggrieved party” is one who has a tangible stake (“a substantial grievance”) in the outcome of the appeal, because the judgment directly bears on his personal, property, or financial interest. *Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970) (bank that intervened to establish first priority lien was not aggrieved by the court’s order as to another debtor because it in no way altered the bank’s lien priority) (holding “There can be no benefit or improvement in the appellant’s position should we reverse the judgment of the lower court.”); *Bivens v. Knight*, 254 S.C. 10, 173 S.E.2d 150 (1970) (examining whether complaining party was injured in substance, and sagely recognizing that one definition of “aggrieved” is “damnified”); *Ex parte Whetstone*, 347 S.E.2d 881, 289 S.C. 580 (1986) (a non-party was not aggrieved because he suffered no legal injury); *Rhodes v. Lawrence*, 302 S.E.2d 343, 279 S.C. 96 (1983) (plaintiffs won at trial but appealed because punitive damages were denied by directed verdict; Supreme Court remanded for new trial); *Cobb v. Benjamin*, 325 S.C. 573, 580, 482 S.E.2d 589, 592-93 (Ct. App. 1997) (holding party was aggrieved and appeal was proper despite judgment essentially granting the relief the party requested); *North American Rescue Prods. Inc. v. Richardson* 396 S.C. 124, 134, 720 S.E.2d 53, 59 (Ct. App. 2011), *reversed on other grounds*, 411 S.C. 371, 769 S.E.2d 237 (2015) (noting that, although appellant “won” on liability, he did not receive the relief he sought and so was “aggrieved” under the rules).

Considering that the orders on appeal **grant summary judgment against the Appellants** on two of Respondents' causes of action against Appellants, including Respondents' first cause of action for declaratory judgment (which is the lynchpin of the entire case), and eliminate Appellants' primary defense to Respondents' lawsuit, there is no question that Appellants are aggrieved by the orders and would benefit from this Court's reversal of the circuit court's errors.

Appellants have standing, and they have properly sought appellate review of orders entered against them, which directly affect their interests as defendants in this litigation. This Court should deny Respondents' Motion to Dismiss.

II. The circuit court's orders granting summary judgment to Respondents are immediately appealable.

Ignoring the titles of the orders on appeal, which are clearly captioned as grants of relief on causes of action,⁴ Respondents also argue that the orders are not immediately

⁴ There are four orders on appeal, issued by the circuit court in rapid succession and all arising out of the same hearing: (1) a Form 4 order dated March 2, 2021; (2) an order denying Appellants' Motion to Reconsider, dated March 12, 2021; (3) a formal written order granting a motion to compel, dated March 18, 2021, which hinges on substantive rulings to be made in (4) a formal written order granting partial summary judgment to Respondents, dated March 19, 2021. The unusual sequencing of these orders is discussed in Appellants' brief at pp. 7-8.

Respondents attach only two of the four orders to their Motion to Dismiss. All four of the lower court's orders are attached to Appellants' Notice of Appeal, filed with this Court on April 9, 2021.

appealable.⁵ Respondents' arguments are incorrect both under the law and under the orders themselves.

A. S.C. Code § 14-3-330 allows appeal of the orders.

South Carolina Code § 14-3-330 addresses appellate jurisdiction:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and **shall** review upon appeal:

(1) Any **intermediate** judgment, **order** or decree in a law case **involving the merits in actions commenced in the court of common pleas** and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

S.C. Code § 14-3-330(1) (emphasis added);⁶ *see also* Rule 201, SCACR (appeal may be taken from any final order, by a party aggrieved by the order). The South Carolina Supreme Court has stated that:

an order which "involves the merits," [is] an order which "must finally determine **some substantial matter forming the whole or a part of some cause of action or defense**. . . ."

Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780, (1993) (internal citations omitted; emphasis added). The bolded wording above instructs that a party may appeal a substantive ruling on part of some action or defense. As our Supreme Court has stated, "[T]he question of whether an order is immediately

⁵ See *supra*, footnote 1. A primary defense by Appellants against Respondents' claims was the defense that Respondents are not members of Simmons Family Holdings, LLC.

⁶ Arguably, §§ 14-3-330(2) and (3) apply here as well. This Response will address the arguments under § 14-3-330(1) because that section appears to be most on-point; however, the same arguments apply as to §§ 14-3-330(2) and (3), and those points are asserted and preserved.

appealable is determined on a case-by-case basis. . . .” *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (S.C. 2019); *see also id.* (“Accordingly, the court weighed the evidence and finally determined a substantial matter forming **part** of Stone’s **causes of action**, as well as Thompson’s **defense**, which satisfies the test we clarified in *Mid-State*. . .”). (emphasis added)).

In this case, a key defense by Appellants against Respondents’ claims is Appellants’ argument that Respondents are not members of the company, Simmons Family Holdings, LLC. But the lower court finally decided the merits of this issue, by granting summary judgment in favor of Respondents: it expressly held that Respondents are members of the company. The discovery order on appeal grants relief that is necessarily based on this same holding. *See* Appellants’ Initial Brief, Issue V (discovery was granted not under rules of civil procedure but under statutory law pertaining to rights of members of limited liability company).

Here, the four interrelated orders on appeal meet the test for immediate appellate review, because they finally determine “some substantial matter forming the whole or a part of some cause of action or defense.” *Id.* For example, the March 19 formal written order’s title acknowledges that it is “GRANTING IN PART, PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT.” (Order of March 19, 2021, at p. 1). In at least eight places the order emphasizes that it is adjudicating the substantive rights and defenses of Appellants Palmer Simmons and Charlesetta Aiken:

- “Upon reviewing the verified pleadings, the record, the affidavits and memoranda submitted, including the deposition excerpts, the evidence and the applicable law, and hearing statements and representations of counsel, the **Court finds that Plaintiffs are entitled to partial summary judgment** on their first cause of action

in so far as it seeks a declaratory judgment establishing that they are members of SFH. . . ." (*Id.* at p. 2) (emphasis added).

- "The Court further finds that Defendant Palmer E. Simmons made an unauthorized distribution to himself or to his company and that the **Plaintiffs are entitled to partial summary judgment** on their ninth cause of action for money had and received. . . ." (*Id.* at p. 2) (emphasis added).
- "Considering all the facts in the light most favorable to the Defendants, the **Court further finds that there is no issue of material fact** as to Plaintiffs' status as member of SFH" (*Id.* at p. 5) (emphasis added).
- "Having found that Plaintiffs are, and have been since the date of the Articles of Amendment of SFH, members of SFH, Defendant Palmer E. Simmons made unauthorized payments and/or distributions to himself, his business, his family members, and others, for his personal benefit. . . ." (*Id.* at pp. 5-6).
- "**By applying the summary judgment standard to the instance case, 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" (*Id.* at p. 6) (emphasis added).
- "In the instant case, the documentation provided, the testimony of the parties, and undisputed facts, **conclusively establish that Plaintiffs are entitled to the declaratory relief** they request as to the issue of their membership in SFH. . . ." (*Id.* at p. 7) (emphasis added).
- "Having determined that Defendant, Palmer E. Simmons wrongfully expended monies belonging to SFH for the benefit of the Trust, in the form of mortgage payments, insurance payments, and real property taxes on property owned by it, and further determined that it would be inequitable for the Trust to retain such funds, SFH is **entitled to summary judgment** as to the issue of his liability for such payments under this cause of action." (*Id.* at p. 8) (emphasis added).
- "IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that . . . (b) **Plaintiffs are granted declaratory judgment** as to their membership in Simmons Family Holdings, LLC; . . . (d) **judgment is entered** for Simmons Family Holdings, LLC for monies had and paid, brought derivatively on its behalf, with the amount of damages flowing therefrom to be determined by the trier of fact. . . ." (*Id.* at pp. 8-9) (emphasis added).

Additionally, in its Form 4 Order, the circuit court specified that it was granting summary judgment on substantive issues:

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT IS GRANTED AS FOLLOWS: PLAINTIFFS ARE MEMBERS OF THE SIMMONS FAMILY LLC-- THE AMOUNT OF SHARES TO BE DETERMINED. ALSO, PALMER SIMMONS MADE UNAUTHORIZED DISTRIBUTIONS FROM THE SIMMONS FAMILY LLC TO HIMSELF OR TO HIS BUSINESS-- THE AMOUNT OF WHICH IS TO BE DETERMINED. . . .

(Form 4 Order, March 2, 2021, at p. 1) (emphasis added).⁷

In short, the circuit court expressly ruled upon key substantive issues, construing the facts and law in favor of Respondents. The language of the orders on appeal is clear – the circuit court repeatedly “finds,” “determines,” “establishes,” and “grants” – meaning the court is issuing legal and factual rulings on substantive issues.⁸ “An order ‘involves the merits,’ as that term is used in § 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense.” *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (internal quotation and alteration marks omitted).

⁷ The Order Granting [Respondents’] Motion to Compel, dated March 18, 2021, holds Respondents “are entitled to examine and copy the business records of Simmons Family Holdings pursuant to S.C. Code § 33-44-408 [members entitled to review corporate records] . . . ” (Order, pp. 2-3). The entire order is based upon the lynchpin premise that Respondents are members of the company, a holding which is antagonistic to Appellants’ primary defense against the lawsuit. Respondents’ Motion to Dismiss delves deeply into the merits of this appeal on pages 12-15. These arguments do not belong in a motion. Appellants incorporate herein by reference the arguments within their Initial Brief.

⁸ Respondents argue that the orders are not final because, in some instances, the amount of damages remains to be determined. However, on those issues the actual substantive right has been decided by the circuit court; the damages go instead to the amount of the remedy. Moreover, judicial efficiency is served by determining whether the substantive ruling was indeed correct, before proceeding with the remedy phase and then having to start over again if the substantive ruling is reversed.

Given that the lower court finally and conclusively decided causes of action against Appellants, and eliminated their defenses pertaining to membership and similar substantive issues, Appellants have appropriately sought review of the trial court's errors, as permitted by S.C. Code § 14-3-330.

B. The law of the case doctrine requires immediate appeal of the orders.

Moreover, Appellants are required to appeal the orders now, or risk them becoming the law of the case and impervious to future challenge. This Court recently issued a thoughtful summary of the law of the case doctrine:

"An unappealed ruling is the law of the case and requires affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ; *see also Berry v. McLeod*, 328 S.C. 435, 442, 492 S.E.2d 794, 798 (Ct. App. 1997) ("There is no appeal from this ruling, and thus, it becomes the law of the case."). **"Where no exception is taken to findings of fact or conclusions of law, they become the 'law of the case.'"** *Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct. App. 1987) (quoting *Ashy v. WeCare Distribs., Inc.*, 289 S.C. 526, 528, 347 S.E.2d 123, 125 (Ct. App. 1986)). **"The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former case."** *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). "This State has a long-standing rule that one judge of the same court cannot overrule another." *Shirley's*, 403 S.C. at 573, 743 S.E.2d at 785.

Ralph v. McLaughlin, 428 S.C. 320, 341, 834 S.E.2d 213, 224 (Ct. App. 2019) (emphasis added), *rev.'d on other grounds*, Op. No. 28015 (S.C. Sup. Ct., March 17, 2021). As this Court articulated, a substantive ruling on the merits of a lawsuit must be appealed, or it becomes the law of the case going forward.

So too here. The circuit court's orders are final, substantive rulings on many key aspects of the membership and expenditure issues, which are core legal and factual disputes in this lawsuit. Appellants are *required* to appeal such a portentous decision, or

risk having it become the law of this case and not subject to challenge later. *See id.* (“Where no exception is taken to findings of fact or conclusions of law, they become the ‘law of the case.’”). This falls squarely within the language of S.C. Code § 14-3-330(1), which identifies matters that this Court “shall review upon appeal.”

C. The procedural posture does not override the substantive rulings by the trial court.

Respondents’ Motion to Dismiss makes the point that the orders on appeal include a denial of a summary judgment motion, and such denials rarely are appealable. To be more accurate, the orders contain: (1) the grant of a motion for summary judgment; and (2) the denial of a motion for summary judgment. The first of those is, without question, immediately appealable.

Moreover, here the circuit court’s orders go much further than to simply deny Appellants’ motion for summary judgment. The typical denial of summary judgment is based on the trial court’s decision that there is a “mere scintilla of evidence” raising factual issues for a trier of fact. Affirmative rulings are not made; often only a Form 4 is issued without elaboration. The parties then move forward on the substantive questions, which are to be decided by the trier of fact. Here, however, the orders on appeal decide numerous *substantive, dispositive* questions of fact and law, and makes corresponding *substantive, dispositive* factual and legal determinations, that (as discussed above) finally resolve substantive matters, claims, and defenses at issue, including (i) granting summary judgment that Respondents are members of SFH, and (ii) granting summary judgment that unauthorized distributions were made from SFH by Appellant Palmer Simmons as manager. In sum, and as discussed above, substantive issues, claims, and

defenses have been fully and finally determined by the trial court. The inevitable next step is for this Court to review whether the trial court's rulings were erroneous as a matter of law. This falls squarely within the language of S.C. Code § 14-3-330(1), which identifies matters that this Court "shall review upon appeal."

D. The discovery order is a wolf in discovery clothing.

Respondents also argue that the discovery order is not immediately appealable. (Mtn. to Dismiss pp. 13-15). This is a shell game. Although the discovery order is captioned as an order granting a motion to compel, it arises out of the same hearing, it was drafted by the Respondents at the request of the lower court in conjunction with the order granting summary judgment,⁹ and it also makes the *substantive, dispositive* determination that Respondents are members of Simmons Family Holdings, LLC. The rulings of the circuit court in the discovery order are discussed at length in Appellants' Initial Brief, filed with this Court on July 7, 2021 and incorporated herein by reference.

In short, Respondents argued to the lower court that Respondents were members of Simmons Family Holdings, LLC, and that as members of the limited liability company they are statutorily entitled to inspect all the company's records, including the company's communications with its attorneys, pursuant to South Carolina Code § 33-44-408 ("Member's right to information"). The circuit court wrongly agreed, and it ordered the law firm Vaux Marscher Berglind to produce privileged documents, including but not limited to legal opinions given by Attorney Berglind to Appellant Palmer Simmons

⁹ See Form 4 Order of March 2, 2021: "MR. HAIGHT [counsel for Respondents] TO PREPARE A FORMAL ORDER. THE FORMAL ORDER SHALL SPECIFICALLY DISCUSS THE COURT'S AUTHORITY TO ISSUE THE ABOVE ORDER."

regarding membership interests.¹⁰ (Exhibit 4, Excerpts from hearing transcript: *e.g.*, Counsel for Respondent: “Thank you, Your Honor. Earlier you did find that our clients were members, and as members are entitled to the records of the company. And in that regard, we’d asked in our third request . . . to provide copies of all communications between Palmer E. Simmons manager or comanager of Simmons Family Holdings, and the Law Firm of Vaux, Marscher, and Berglind pertaining to the membership interest of Simmons Family Holdings.”)

Importantly, a discovery order is appealable if the order contains appealable issues that are properly before the court. *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). Also, when a final, appealable order on the merits is issued, discovery orders become appealable. *See, e.g., Hamm v. S.C. Pub. Serv. Comm’n*, 312 S.C. 238, 439 S.E.2d 852 (1994). Here, the circuit court’s decision on discovery was predicated on its final determination on the merits of the lawsuit’s claims and defenses—particularly its holding that Respondents are members of Simmons Family Holdings. All of the orders, which work together to nail shut the door to Appellants’ key defense to the lawsuit, are properly before this Court for appellate review.

¹⁰ “THE COURT: Okay. Then that’s granted as to do [Respondents] have a membership interest . . . Entitlement to inspect the records is under the LLC statute. They absolutely have a right to inspect the records. So if you would draft me an order to that effect.” (Exhibit 4).

III. Respondents' arguments belong in an appeal brief, to be considered with a complete record.

Throughout their Motion to Dismiss, including in their arguments about discovery and privilege, Respondents cite frequently to Appellants' Brief. (*See, e.g.*, pp. 7, 9, 12). The proper place to respond to substantive arguments made in an appellate brief is within a responsive brief, and not by motion. Moreover, Respondents attach to their Motion to Dismiss isolated, incomplete portions of the overall evidence that was before the circuit court, and they ask this Court to decide the issues on appeal based on Respondents' partial "record." (*See, e.g.*, Mtn. to Dismiss, p. 11, fn. 8, arguing "[t]his point is borne out by the evidence submitted to the Circuit Court" and attaching as exhibits three, isolated pieces of the voluminous evidence before the lower court).

Respondents' arguments in their Motion to Dismiss improperly require this Court to affirm, by motion, the lower court's decision (on appeal) of who is (and who isn't) a member of Simmons Family Holding LLC. This Court should not rule on Respondents' substantive arguments about membership in the company at this juncture; instead, it should deny the Motion to Dismiss and instruct Respondents to make substantive arguments in their briefing to this Court, based on the Record on Appeal. *See* C.J.S., Appeal and Error, vol. 5, § 752, p. 21 (West 2007) (footnotes omitted). ("Unless the ground urged for dismissal is free from doubt, an appeal should not be dismissed.").

CONCLUSION

For the reasons discussed above, this Court should deny Respondents' Motion to Dismiss and direct the parties to continue with briefing.

Respectfully submitted,

FORD WALLACE THOMSON LLC

s/Ainsley F. Tillman

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Attorneys for Appellants

*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

October 1, 2021
Charleston, South Carolina

EXHIBIT 1

ELECTRONICALLY FILED - 2021 Feb 04 3:24 PM - BEAUFORT - COMMON PLEAS - CASE#2019CP0701246

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 GREG MARCUS SIMMONS and)
 JERMAINE ROBINSON, both)
 individually and derivatively on behalf)
 of Simmons Family Holdings, LLC,)
 a South Carolina Limited Liability)
 Company,)
)
 Plaintiffs,)
)
 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,)
)
 Defendants.)
)
 and)
)
 SIMMONS FAMILY HOLDINGS, LLC,)
)
 as a nominal Defendant.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FOURTEENTH JUDICIAL CIRCUIT
 CIVIL ACTION NO. 2019-CP-07-01246

NOTICE OF MOTION AND MOTION FOR
 SUMMARY JUDGMENT

TO: MARK S. BERGLIND, ESQ., ATTORNEY FOR THE DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs, by and through their undersigned attorneys, will move before this Court, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an order granting summary judgment to the Plaintiffs pursuant to Rule 56, SCRPC. In support of the motion, the Plaintiffs would respectfully show the following to the court:

The Plaintiffs' claims against the Defendants should be granted pursuant to Rule 56, SCRPC, for the reason that there is no genuine issue to any material fact and the Plaintiffs are entitled to a judgment as a matter of law.

This motion is based upon the pleadings herein, including the verified Complaint, the Plaintiff's memorandum of law filed or to be filed herein, any affidavits or deposition testimony filed or to be filed herein, and such law as may be applicable.

MINOR, HAIGHT & ARUNDELL, P.C.

By: s/ Ehrick K. Haight, Jr.

Ehrick K. Haight, Jr.

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Attorneys for Plaintiffs

Hilton Head Island, South Carolina
This 4th day of February, 2021

EXHIBIT 2

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2019-CP-07-01246

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
GREG MARCUS SIMMONS and)
JERMAINE ROBINSON, both)
individually and derivatively on behalf)
of Simmons Family Holdings, LLC,)
a South Carolina Limited Liability)
Company,)
)
Plaintiffs,)
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,)
)
Defendants,)
and)
)
SIMMONS FAMILY HOLDINGS, LLC,)
)
as a nominal Defendant.)
_____)

SECOND AMENDED
COMPLAINT
(Jury Trial Requested)

The Plaintiffs, Greg Marcus Simmons and Jermaine Robinson (hereinafter “Marcus Simmons” and “Jermaine Robinson” respectively, or when referred to jointly, “Plaintiffs”) on their own behalf and derivatively on behalf of Simmons Family Holdings, LLC (“SFH”), complaining of the Defendants, Palmer E. Simmons, individually and as Trustee of the Charles S. Simmons, Jr. and Rosa G. Simmons Revocable Trust date May 5, 2016 (the “Trust”), and Charlesetta S. Aiken (hereinafter “Palmer Simmons” and “Charlesetta Aiken” respectively, or when referred to jointly, “Defendants”), would respectfully show this Court as follows:

This lawsuit centers upon the ownership and operation of SFH, a family owned South Carolina limited liability company. SFH was originally created by the family patriarch, Charles E. Simmons, Sr. as a real estate holding company, and was a single-member limited liability company up until his death, whereupon all of the membership interest therein transferred to his

son Charles E. Simmons, Jr. Like his father, Charles E. Simmons, Jr. operated SFH as a single-member limited liability company for the purpose of holding real estate, specifically, that certain property known as 11 Simmons Road, on Hilton Head Island on which the restaurant "Fish Camp on Broad Creek" now operates (the "Fish Camp Tract"). For several years, Charles E. Simmons, Jr.'s adopted son and biological grandson, Plaintiff Marcus Simmons, and another of his grandchildren, Plaintiff Jermaine Robinson, operated a bar and club on the Fish Camp Tract. In recognition of Plaintiffs' efforts with respect to improvements to the Fish Camp Tract, Charles E. Simmons, Jr. made Plaintiffs members of SFH and appointed Defendants, Palmer Simmons and Charlesetta Aiken as Co-Managers.

Subsequently, Plaintiff Jermaine Robinson entered into discussions with Brendan Reilley, a prominent Hilton Head Island restaurateur, regarding the establishment of a restaurant on the site and a lease of the Fish Camp Tract for that purpose. On or about August 2, 2016, a lease was signed with Camp Creek Partners, LLC and the new venture, Fish Camp on Broad Creek was formed. The venture has proven very successful and provides a significant source of income for SFH and its members.

Charles E. Simmons, Jr. died in May of 2016, a few months after adding Plaintiffs as members of SFH. His one-third interest in SFH, together with the remainder of his estate, was transferred to the Trust, for the care of his surviving spouse, Rosa G. Simmons. On information and belief, Rosa G. Simmons was the Trustee of the Trust initially. On further information and belief, Defendant Palmer Simmons has taken over that responsibility. This action was instigated following, what Plaintiffs allege, was an attempt by Defendant Palmer Simmons, to wrest them of their membership interest in SFH. It also addresses various actions and/or inactions on the part of Defendants, in particular Defendant Palmer Simmons, in their capacity as Co-Managers of SFH.

PARTIES

1. The Plaintiffs are citizens and residents of Beaufort County, South Carolina.
2. The Defendants are citizens and residents of Beaufort County, South Carolina.
3. That the Trust is domiciled in Beaufort County, South Carolina and owns real property therein.
4. That this honorable court has jurisdiction over the parties hereto and the subject matter hereof.
5. That Nominal Defendant, Simmons Family Holdings, LLC, is a single member South Carolina limited liability company.
6. That Plaintiffs, in addition to their individual claims against the Defendants, are suing derivatively on behalf of SFH, which is named as a nominal defendant in this action pursuant to S.C. Code Ann. §33-44-1101 (2006).

ALLEGATIONS PERTAINING TO PLAINTIFFS'
MEMBERSHIP IN SIMMONS FAMILY HOLDINGS, LLC

7. That on or about September 14, 2001, Charles E. Simmons, Jr., as organizer, formed SFH, by filing Articles of Organization with the South Carolina Secretary of State.
8. That at the time of its formation, the sole member of SFH according to that certain Single Member Operating Agreement for SFH dated September 14, 2001, a true and correct copy of which is attached hereto as **Exhibit "A"** (the "Operating Agreement"), was Charles E. Simmons, Sr.
9. That at the time the Articles of Organization for SFH were filed, the manager of SFH was Charles E. Simmons, Jr., the son of the sole member, Charles E. Simmons, Sr.
10. On information and belief, Charles E. Simmons, Sr. died and his estate was probated in Beaufort County in 2005.

11. On information and belief, Charles E. Simmons, Sr. was the sole member of SFH at the time of his death and all of his interest therein transferred to his son, Charles E. Simmons, Jr.

12. On or about November 9, 2015, Charles E. Simmons, Jr., as the sole member and manager of SFH, executed and filed Amended Articles of Organization for SFH, a true and correct copy of which is attached hereto as **Exhibit "B"**, naming Plaintiffs as additional members and appointed Defendants as Co-Managers of SFH.

13. That immediately prior to executing and filing the foregoing Amended Articles of Organization, Charles E. Simmons, Jr. was the sole member and manager of SFH.

14. The Amended Articles of Organization for SFH granted the Plaintiffs each a one-third interest in the company, with Charles E. Simmons, Jr., retaining a one-third interest therein.

15. That the Plaintiffs and Charles E. Simmons, Jr. collectively owned one hundred (100%) percent of the membership interests in SFH at the time of Charles E. Simmons, Jr. death on May 26, 2016.

16. That on June 21, 2016, Rosa G. Simmons, spouse of decedent, Charles E. Simmons, Jr., filed a Petition for Informal Probate of Will and Appointment (the "Petition"), prepared by Antonia Lucia, Esq. of the law firm, Vaux Marscher Berglind, P.A. A true and correct copy of said Petition, with birth date information redacted, is attached hereto as **Exhibit "C"**.

17. That said Petition included what purports to be the original Last Will and Testament of Charles E. Simmons, Jr. executed on or about May 5, 2016 (the "Will"), just two weeks prior to his death on May 16, 2016, due to cancer.

18. That Charles E. Simmons, Jr. was in hospice care at the time the purported Will was executed and, on information and belief, was prescribed morphine for his pain.

19. That the purported Will was prepared by Vaux Marscher Berglind, P.A. and witnessed by persons affiliated with that firm.

20. That as of the date of execution of the purported Will, Charles E. Simmons, Jr. had four living children, to wit: Defendants, Palmer E. Simmons and Charlesetta S. Aiken, Benjamin Elliot, and Plaintiff, Greg Marcus Simmons.

21. In the purported Will, Charles E. Simmons, Jr. failed to correctly identify all of his living children, specifically, he failed to mention Benjamin Elliot and Plaintiff, Greg Marcus Simmons.

22. Likewise, the Petition failed to identify Benjamin Elliot and Plaintiff, Greg Marcus Simmons, as intestate heirs.

23. That the purported Will bequeathed all of the assets of his estate, including his one-third (1/3rd) interest in SFH, to the Trust.

24. That Palmer Simmons was appointed by the Probate Court as the Personal Representative of the Estate of Charles E. Simmons, Jr. on or about June 24, 2016.

25. That the Inventory filed in the administration of Charles E. Simmons, Jr. identified that his estate owned a one-third interest in SFH. A true and correct copy of the Inventory is attached hereto as **Exhibit "D"**.

26. That on June 30, 2017, the Plaintiffs, as the surviving members of SFH, together with the Defendants in their capacity as Co-Managers of SFH, executed that certain SFH Assignment and Transfer of Membership Interest, a true and correct copy of which is attached hereto as **Exhibit "E"** (the "Assignment").

27. The Assignment was prepared by Vaux Marscher Berglind, P.A.

28. The Assignment transferred the one-third (1/3rd) interest in SFH belonging to the decedent, Charles E. Simmons, Jr., to the aforementioned Trust.

29. On information and belief, from the date of the Assignment to the time of the filing of this action, SFH has been comprised of three members, to wit: the Plaintiffs and the aforesaid Trust.

30. On or about March 13, 2018, at the instruction and direction of the Defendants, SFH filed that certain U.S. Return of Partnership, Form 1065, a true and correct copy of which, with tax identification number redacted, is attached hereto as **Exhibit "F"** ("2017 Return").

31. That the 2017 Return, signed by Defendant Palmer Simmons under penalty of perjury, incorrectly showed Defendants each owning a one-third (1/3rd) interest in SFH, with Plaintiffs' interests being reduced to one-sixth (1/6th) each.

32. That Defendant Palmer Simmons has continued to file tax returns, again under penalties of perjury, showing Plaintiffs as owners of a one-sixth (1/6th) interest in SFH.

33. That, on information and belief, at no time relevant to this action have Defendants owned any membership interest in SFH.

34. That at no time relevant to this action have Defendants executed any membership subscription agreement or other agreement establishing their interest in SFH or otherwise indicating their agreement to be bound by the Operating Agreement for SFH.

35. That the Plaintiffs have never give written or verbal consent to the addition of Defendants as members of SFH.

36. That the 2017 Return further shows that Defendants received distributions from SFH.

37. That the 2017 Return was signed by Defendant Palmer E. Simmons under penalty of perjury.

38. That in April of 2018, Plaintiffs were presented with a document entitled “Simmons Family Holdings, LLC Resolution Authorizing Assignment and Transfer of Membership Interest”, a true and correct copy of which is attached hereto as **Exhibit “G”** (the “Proposed Assignment”).

39. That on information and belief, the Proposed Assignment was prepared by or at the behest of Defendant, Palmer Simmons.

40. That the Proposed Assignment was never fully executed by the members of SFH.

ALLEGATIONS PERTAINING TO DEFENDANTS’ DUTIES AS CO-MANAGERS

41. Plaintiffs bring this action, in part, as a declaratory judgment action pursuant to §15-53-10, et seq., Code of Laws of South Carolina (1976), for the purpose of determining questions in controversy between the parties as more fully set forth herein. Plaintiffs also bring this action pursuant to the common law and statutory general jurisdiction of this Court.

42. Under South Carolina Code Ann. §33-44-409(h)(2), the Defendants, as Co-Managers, owe a duty to SFH and to the Plaintiffs to:

- a) account to the company and to hold as trustee for it any property, profit or benefit;
- b) to refrain from dealing with the company in the conduct of the company’s business, as or on behalf of a party having an interest adverse to the company;
- c) to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law; and
- d) to discharge their duties consistently with the obligation of good faith and fair dealing.

43. Defendants owe a fiduciary duty to the Plaintiffs. A fiduciary duty is created in any situation in which one person justifiably places confidence and trust in someone else and seeks that person’s help or advice in some matter. The Defendants’ relationship with the Plaintiffs, is a

fiduciary one because the Plaintiffs, as members of SFH, trust that Defendants, as Co-Managers, will act properly in managing the affairs of SFH.

44. The Defendants have breached the foregoing duties in the following particulars:
 - a) transferring, or purporting to transfer, membership interests in SFH from the Trust to themselves without the consent of the Plaintiffs in violation of South Carolina Code Ann. §33-44-404(c);
 - b) making unlawful distributions to themselves individually, as Managers and, in the case of Defendant Palmer Simmons, as Trustee of the Trust;
 - c) with respect to Defendant Palmer Simmons, engaging in willful misconduct by making payments and/or distributions directly to, or for the benefit of, himself, his family members, his company Carolina Trucking HH, LLC, and others;
 - d) with respect to Defendant Palmer Simmons, engaging in willful misconduct by making loans directly to, or for the benefit of, himself, his family members, his company Carolina Trucking HH, LLC, and others, without executing promissory notes or other indicia of the debt, without charging interest, and without making adequate provision for the repayment thereof;
 - e) with respect to Defendant Palmer Simmons, on information and belief, unilaterally discharging the foregoing indebtedness owed to SFH to the detriment of SFH;
 - f) knowingly violating the law by filing tax returns for SFH reflecting Defendants' membership interest in SFH, with the knowledge that the Plaintiffs had not consented to or otherwise authorized Defendants' acquisition of a membership interest therein;
 - g) by failing to hold annual meetings or maintain records; and

- h) by engaging in grossly negligent or reckless conduct by failing to make the necessary and proper arrangements to allow SFH to comply with that certain Final Order entered in the matter of J&W Corporation of Greenwood, LLC v. Simmons Family Holdings, LLC, Civil Action File No. 2015CP072284 (the "Litigation") placing SFH in jeopardy of a confession of judgment, whilst also causing SFH to have insufficient cash reserves to cover same, thereby placing SFH at risk of losing the Fish Camp Tract, its single largest source of income.

DERIVATIVE ACTION ALLEGATIONS

45. Pursuant to Rule 23(b)(1), SCRCPC, Plaintiffs bring this action derivatively on behalf of and for the benefit of SFH to redress injuries suffered and yet to be suffered by it as a direct and proximate result of the Defendants' conduct. SFH is a named Defendant solely as party necessary to effectuate complete relief to the Plaintiffs in their representative capacities.

46. Plaintiffs will adequately and fairly represent the interests of SFH and its similarly situated members in this litigation.

47. At all times relevant to this action, Plaintiffs have been and continue to be members of SFH.

48. The wrongful acts complained of herein subject SFH to harm.

49. Plaintiffs are the proper parties to enforce the rights of SFH, where, as here, SFH and Defendants failed to enforce such rights. In particular, Plaintiffs have asserted that SFH has a duty to file proper tax returns and to fulfil its obligations under various Court orders, to no avail. Moreover, their assertions were futile and further efforts would have been futile because the Defendants responsible for the acts complained of herein remain in control of SFH and have steadfastly denied the relief requested for the benefit of Plaintiffs.

50. The Defendants' actions complained of herein were not authorized under South Carolina law and are therefore ultra vires, unlawful, and unauthorized. As a result, the actions complained of herein are not subject to protection under the business judgment rule, and any reasonable, good faith inquiry into the wrongdoing would conclude that Plaintiffs' claims are legitimate and in the best interests of SFH.

51. The acts complained of herein are and will continue to be to the detriment of the SFH and its members.

52. Defendants' wrongful actions set out herein were willful, in bad faith, and beyond the scope of the authority granted to Defendants and served no legitimate business purpose. As a result, the acts described herein were not, nor could have been, the product of a reasonable, valid, or good faith exercise of business judgment.

53. The Defendants are antagonistic, adversely interested, and have continued and/or initiated the improper practices complained of herein.

54. In order to bring this suit, the Defendants would be forced to sue themselves, which they will not do, thereby excusing a specific demand on them.

55. That the Plaintiffs are entitled to recover their attorneys' fees and costs in bringing the derivative claims asserted herein on behalf of SFH pursuant to S.C. Code Ann. §33-44-1104 (2006).

FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment as to Membership Interests – Pursuant to S.C. Code Ann. §15-53-10 et seq. and Rule 57, SCRCP as to all Defendants)

56. For this cause of action, Plaintiffs incorporate all allegations set forth in Paragraphs 1 through 55 above as if fully set forth herein.

57. Plaintiffs bring this cause of action against Defendants pursuant to S.C. Code Ann. §15-53-10 through §15-53-140, Rule 57, SCRCPP, and the common law of the State of South Carolina, seeking declarations pertaining to the membership interests in SFH:

- a. That Defendants are not now, nor have they ever been, members of SFH;
- b. That pursuant to the Amended Articles of Organization, Plaintiffs were made members of SFH;
- c. That at the time of his death, Charles E. Simmons, Jr. owned a one-third interest in SFH and Plaintiffs owned the remaining two-thirds;
- d. That Rosa G. Simmons, acting as the Personal Representative of the Estate of Charles E. Simmons, Jr. prepared, or had prepared, an Inventory (see **Exhibit "D"**), indicating decedent's estate held a one-third interest in SFH, which Inventory was not amended by Defendant Palmer Simmons when he took over as Personal Representative of the Estate;
- e. That Defendant Palmer Simmons, acting as Personal Representative of the Estate of Charles E. Simmons, Jr., prepared, or had prepared, an Assignment of that Membership Interest from the Estate of Charles E. Simmons, Jr. (see **Exhibit "E"**) transferring decedent's one-third interest in SFH to the Trust;
- f. That pursuant to the aforesaid Assignment, the Trust is the holder of a one-third membership interest in SFH; and
- g. That in light of said filings and under South Carolina common law theories of waiver and estoppel, Defendants cannot now deny that (i) Plaintiffs hold a membership interest in SFH; (ii) Plaintiffs, together with Charles E. Simmons, Jr., were the exclusive members of SFH at the time of Charles E. Simmons, Jr.'s death; (iii) Charles E. Simmons, Jr. was possessed of a one-third (1/3rd) interest in SFH at

the time of his death; and (iv) the Trust received no more than a one-third (1/3rd) interest in SFH.

58. Accordingly, Plaintiffs are entitled to a declaratory judgment, ruling that they, together with the Trust, have been the exclusive members of SFH and that they each hold a one-third (1/3rd) interest each. Plaintiffs are further entitled to a true and accurate accounting of all loans, distributions and/or payments made to Defendants Palmer Simmons and Charlesetta Aiken and an order directing that all such distributions and/or payments be reimbursed to SFH.

59. Plaintiffs are further entitled to have amended Federal and State Tax Returns filed on behalf of SFH for the years 2016 through present reflecting the correct membership interests in SFH.

FOR A SECOND CAUSE OF ACTION

(Conversion as to Defendants in their Individual Capacity)

60. That the allegations of Paragraphs 1 through 59 of this Complaint are realleged as fully as if repeated verbatim herein.

61. That at least as early as 2017, Defendants unilaterally and without the required written consent of the Plaintiffs, did name themselves members of SFH and did each take for themselves a purported one-third (1/3rd) ownership interest, as evidenced by the 2017 Return.

62. That 2017 Return further shows that Defendant, Palmer Simmons, received the sum of Thirty-Two Thousand Five Hundred and Thirty-Two and No/100 (\$32,532.00) Dollars in withdrawals and distributions from SFH.

63. That the 2017 Return also shows that Defendant, Charlesetta Aiken received the sum of Twelve Thousand Four Hundred Eighty and No/100 (\$12,480.00) Dollars in withdrawals and distributions from SFH.

64. That the taking of a membership interest in SFH by the Defendants, without the written consent of the members including Plaintiffs, constituted an illegal taking of the Plaintiffs' property.

65. That Defendant Palmer Simmons, individually and as Trustee, has further made significant payments directly to or for the benefit of, himself, his family members, his company Carolina Trucking HH, LLC, the Trust, and others.

66. That such payments and/or distributions taken by the Defendants also constitute an illegal taking of the Plaintiffs' property.

67. That as a result of the foregoing actions, Plaintiffs suffered damages for the loss of their respective membership interest in SFH, as well their respective shares of the distributions paid to Manager/Plaintiffs.

68. That the actions of the Manager/Plaintiffs were willful, wanton, and undertaken with a conscious indifference to the rights of the Plaintiffs.

69. That by reason of and as a consequence of the aforementioned conduct of the Defendants, the Plaintiffs suffered financial losses in such amounts as may be determined by a full accounting, are entitled to judgment against the Defendants for actual and punitive damages, and are further entitled to have their respective membership interests restored to their rightful percentage, to wit: a one-third (1/3rd) interest each.

FOR A THIRD CAUSE OF ACTION

(Breach of Contract as to Defendants in their Individual Capacity)

70. That the allegations of Paragraphs 1 through 69 of this Complaint are realleged as fully as if repeated verbatim herein.

71. That the Operating Agreement does not permit the addition of members without the written consent of all of the members of SFH.

72. That in purportedly granting themselves a membership interest in SFH without the written consent of the Trust and the Plaintiffs, the Defendants did breach the express terms of the Operating Agreement.

73. That by reason of and as a consequence of the aforementioned breach of the Defendants, the Plaintiffs suffered financial losses in such amounts as may be determined by a full accounting, are entitled to judgment against the Defendants for actual damages, and are further entitled to have their respective membership interests restored to their rightful percentage, to wit: a one-third (1/3rd) interest each.

FOR A FOURTH CAUSE OF ACTION

**(Breach of Contract Accompanied by Fraudulent Act
As to Defendant Palmer Simmons Individually)**

74. That the allegations of Paragraphs 1 through 73 of this Complaint are realleged as fully as if repeated verbatim herein.

75. That in an attempt to legitimize his membership interest in SFH, and that of Defendant Charlesetta Aiken, Defendant Palmer Simmons did further breach the Operating Agreement and his duties to Plaintiffs thereunder, by preparing, or directing the preparation of, the Proposed Assignment.

76. That, on information and belief, Defendant Palmer Simmons did arrange for his son Rory Rice, to take the Proposed Assignment to Plaintiffs, together with legitimate documents necessary and proper for the business of SFH, for their signature.

77. That on information and belief, Defendant Palmer Simmons instructed Mr. Rice to advise Plaintiffs that the documents were necessary for certain dock repairs on that certain Six acre (more or less) piece of property owned by SFH and located at 11 Simmons Road, Hilton Head Island, South Carolina (hereinafter, the "Fish Camp Tract") in a deliberate attempt to

unlawfully appropriate an even greater share of the membership interest in SFH for himself and his sister, Defendant Charlesetta Aiken.

78. That Defendant Marcus Simmons did execute the Proposed Assignment in reliance on the aforesaid representation, but upon learning of its import withdrew his execution.

79. That Defendant Jermaine Robinson questioned the Proposed Assignment and refused to sign.

80. That Plaintiffs are entitled to actual and punitive damages as against Defendant Palmer Simmons as a result of his breach of the Operating Agreement and unlawful dealing for the purpose of appropriating Plaintiffs' membership interests in and to SFH.

FOR A FIFTH CAUSE OF ACTION

(Breach of Duty as to Defendants in their Individual Capacity)

81. That the allegations of Paragraphs 1 through 80 of this Complaint are realleged as fully as if repeated verbatim herein.

82. That in their capacity as the Co-Managers of SFH, Defendants owed various duties to Plaintiffs, including a fiduciary duty, duty of loyalty and duty of good faith and fair dealing.

83. That Defendants used their position as Co-Managers, to illegally and without the consent of the Plaintiffs, grant themselves an interest in SFH and to take distributions from the income therefrom in violation of the Operating Agreement, S.C. Code Ann. §33-44-405 and the common law of South Carolina.

84. That in making such distributions, Defendants caused Plaintiffs to receive less than their equal distributional interest in and to SFH.

85. That Defendant Palmer Simmons, in his capacity as Co-Manager, did prepare, or cause to be prepared State and Federal tax returns based on the purloined membership interests with full knowledge of the falsity of such representations.

86. That the filing of a false or inaccurate return will necessitate the filing of amended corporate returns by SFH and may result in the assessment of additional taxes, penalties, and interest, as against Plaintiffs.

87. That by reason of and as a consequence of the aforementioned conduct of the Defendants, jointly, and/or by Defendant Palmer Simmons, individually, the Plaintiffs suffered financial losses in such amounts as may be determined by a full accounting, are entitled to judgment against the Defendants for actual and punitive damages, and are further entitled to have their respective membership interests restored to their rightful percentage, to wit: a one-third (1/3rd) interest each.

88. That by reason of and as a consequence of the aforementioned conduct of Defendant Palmer Simmons, individually, in preparing false or inaccurate tax returns, the Plaintiffs will sustain damages in the form of accounting expenses, interest, and possible penalties, in amounts as yet to be determined; and Plaintiffs are entitled to judgment against Defendant Palmer, individually for their actual damages arising therefrom.

**FOR A SIXTH CAUSE OF ACTION
DERIVATIVELY ON BEHALF OF SIMMONS FAMILY HOLDINGS, LLC**

(Breach of Duty as to Defendants in their Individual Capacity)

89. That the allegations of Paragraphs 1 through 88 of this Complaint are realleged as fully as if repeated verbatim herein.

90. That in their capacity as the Co-Managers of SFH, Defendants owed various duties to SFH, including a fiduciary duty, duty of loyalty and duty of good faith and fair dealing as set forth in Paragraph 42 hereinabove.

91. That Defendants breached said duties as more particularly described in Paragraph 44 hereinabove.

92. That as a result of such breach, SFH will incur additional expenses for filing amended corporate returns, which may result in the assessment of additional taxes, penalties, and interest, as against SFH.

93. That by reason of and as a consequence of the aforementioned conduct of the Defendants, jointly, and/or by Defendant Palmer Simmons, individually, SFH has suffered financial losses in such amounts as may be determined by a full accounting, and is entitled to judgment against the Defendants for actual and punitive damages.

**FOR A SEVENTH CAUSE OF ACTION
DERIVATIVELY ON BEHALF OF SIMMONS FAMILY HOLDINGS, LLC**

**(Interference with Contractual Relationship
as to Defendant Palmer Simmons Individually)**

94. That the allegations of Paragraphs 1 through 93 of this Complaint are realleged as fully as if repeated verbatim herein.

95. That SFH entered into a settlement agreement with J&W Corporation of Greenwood, LLC (hereinafter "J&W") resolving the Litigation.

96. That as part of that settlement agreement, SFH was to convey to J&W, a one-half acre portion of the Fish Camp Tract on or before August 31, 2020, all as reflected in the Final Order filed in the Litigation on or about April 28, 2020 (the "Final Order").

97. That having negotiated the terms of the settlement on behalf of SFH, Defendant Palmer Simmons was aware of the terms thereof.

98. That in order to fulfil the conditions of the Final Order, it was necessary for Defendant Palmer Simmons to seek approval of a plat of subdivision of the Fish Camp Tract from the Town of Hilton Head Island and to refinance or secure a partial release of that certain Mortgage in the original principal amount of \$400,509.50 in favor of Mary Lee Simmons, as Mortgagor, originally recorded in the Office of the Register of Deeds for Beaufort County, South

Carolina on May 14, 2009 in Book 2844 at Page 1811, as amended in Deed Book 3725 at Page 1463 and also Deed Book 3750 at Page 3061 and assigned to Marcus T. Hall, Jerome Michael Hall, Juanita Hall, Sabrina Hall, and Sarah Louisa Hall by Assignment recorded in Deed Book 3774 at Page 415 (the "Mortgage").

99. That on information and belief, Defendant Palmer Simmons did willfully cause the breach of the settlement agreement as set forth in the Final Order by failing to timely obtain and submit the plat of subdivision to the Town of Hilton Head Island.

100. That Defendant Palmer Simmons did further cause the breach of the settlement agreement by failing to take any action to secure a partial release of the Mortgage or to make timely application for the refinancing of same on such terms as would permit the conveyance of the half-acre parcel as contemplated in the Final Order.

101. That Defendant Palmer Simmons' actions and/or inactions were wholly unjustifiable.

102. That as a result of Defendant Palmer Simmons' actions and/or inactions, he has caused SFH to be in breach of the settlement agreement and exposed SFH to the potential filing of a confession of judgment in the amount of \$226,400.00 Dollars, as provided for in the Final Order.

103. That by making unauthorized distributions and/or payments, directly to, or on behalf of, himself, his family, his company Carolina Trucking HH, LLC, the Trust and others, Defendant Palmer Simmons further caused SFH to have insufficient funds with which to satisfy said confession of judgment.

104. That by reason of and as a consequence of the aforementioned conduct of Defendant Palmer Simmons, SFH has suffered financial losses in such amounts as may be

determined by a full accounting, and is entitled to judgment against the Defendants for actual and punitive damages.

**FOR AN EIGHTH CAUSE OF ACTION
ON BEHALF OF PLAINTIFFS AND DERIVATIVELY
ON BEHALF OF SIMMONS FAMILY HOLDINGS, LLC**

(Accounting as to all Defendants)

105. That the allegations of Paragraphs 1 through 104 of this Complaint are realleged as fully as if repeated verbatim herein.

106. That due to the extent of the payments, loans, purchases, and/or distributions made by Defendants as set forth herein, and the complexity of evaluating the Federal and State tax returns for SFH to determine rightful membership and distributional interests therein, a full accounting for the years 2016 through present is required.

107. That the information necessary for such accounting either resides with Defendant Palmer Simmons and has not been produced in response to discovery or sufficient records do not exist for Plaintiffs, on behalf of SFH, to adequately determine the extent of such payments, loans, purchases, and/or distributions and/or distributions, loans, or evaluate the tax treatment thereof and therefore no adequate remedy at law exists and an accounting should be granted.

108. That SFH is entitled to recover the cost of such accounting from Defendant Palmer Simmons.

**FOR AN NINTH CAUSE OF ACTION
DERIVATIVELY ON BEHALF OF SIMMONS FAMILY HOLDINGS, LLC**

**(Money Had and Received – as to Defendant Palmer Simmons
Individually and as Trustee)**

109. That the allegations of Paragraphs 1 through 108 of this Complaint are realleged as fully as if repeated verbatim herein.

110. That Defendant Palmer Simmons, in his capacity as Co-Manager of SFH, was in sole possession and control of the bank account and debit card of SFH.

111. That Defendant Palmer Simmons was responsible for collecting the receivables belonging to SFH.

112. That Defendant Palmer Simmons, as Trustee of the Trust, did wrongfully take a portion of such funds and pay the expenses of the Trust, namely its insurance and tax expenses, mortgage payments and other expenses.

113. That Defendant Palmer Simmons, individually, did further wrongfully take cash and make payments to himself, all in an amount as yet to be determined, for his own use and benefit.

114. That Defendant Palmer Simmons is not entitled, in equity or good conscience, to retain the monies rightfully belonging to and inequitably taken from SFH, by him individually or as Trustee.

115. That SFH is entitled to recoup such monies from Defendant Palmer Simmons, individually and as Trustee, together with prejudgment interest thereon.

**FOR A TENTH CAUSE OF ACTION
ON BEHALF OF PLAINTIFFS AND DERIVATIVELY
ON BEHALF OF SIMMONS FAMILY HOLDINGS, LLC**

(Dissociation Pursuant to §33-44-601(6) as to all Defendants)

116. That the allegations of Paragraphs 1 through 115 of this Complaint are realleged as fully as if repeated verbatim herein.

117. That Defendants have engaged in wrongful conduct, all as more particularly set forth herein, which conduct has materially affected the business of SFH.

118. That Defendants have willfully and persistently committed material breach of the Operating Agreement and their duties owed to SFH and the Plaintiffs under S.C. Code Ann. §33-44-409, all as more fully set forth herein.

119. That Defendants have further engaged in conduct relating to the business of SFH that makes it not reasonably practicable to carry on such business with them as members, individually or in any representative capacity.

120. That by reason of and as a consequence of such conduct, Plaintiffs and SFH are entitled to have Defendant Palmer Simmons, individually and as Trustee of the Trust, and Defendant Charlesetta Aiken, expelled by judicial determination.

121. That in determining the rights to distributions of Defendant Palmer Simmons, individually and as Trustee of the Trust, and of Defendant Charlesetta Aiken, Plaintiffs and SFH are entitled to have all payments, loans, and/or distributions made to them credited against their right of distribution, if any.

WHEREFORE, the Plaintiffs pray that this honorable court inquire into the matter set forth herein and

- A. Issue a declaratory judgment in favor of Plaintiffs affirming that from the date of the Amended Articles of Incorporation, they have each been possessed of a one-third (1/3rd) interest and are entitled to their equitable share of the distributions from SFH in accordance with such interest;
- B. order an accounting be performed at the expense of the Defendants and enter a judgment in favor of the Plaintiffs and SFH as against the Defendants for all payments, loans and/or distributions unlawfully taken by them;
- C. order that Defendant Palmer Simmons, individually and/or as Trustee, and Defendant Charlesetta Aiken, be dissociated and divested of any interest in SFH and that the Plaintiffs each be restored to their rightful interest therein;
- D. award punitive damages in favor of the Plaintiffs and against the Defendants;

- E. award a judgment in favor of the Plaintiffs and against Defendant Palmer Simmons for all expenses, interest and penalties incurred by Plaintiffs resulting from amended tax returns;
- F. award a judgment in favor of Plaintiffs and SFH as against Defendants, jointly and severally, for all attorneys' fees and costs sustained by them in the course of this litigation;
- G. award a judgment in favor of SFH and against Defendant Palmer Simmons, individually, for all expenses, interest and penalties incurred by it resulting from amended tax returns;
- H. set-off, as against any sums due to the Trust and/or Defendants as a result of such dissociation, such sums as may be awarded to Plaintiffs and/or SFH in this action; and
- I. for such other and further relief as may be just and proper.

MINOR, HAIGHT & ARUNDELL, P.C.
By: s/Stacey S. Collins
Ehrick K. Haight, Jr.
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Attorneys for Plaintiffs

Hilton Head Island, South Carolina
This 27th day of October, 2020.

EXHIBIT 3

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

and

Simmons Family Holdings, LLC,

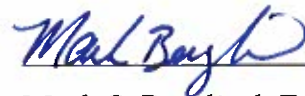
as a nominal Defendant.

AFFIDAVIT OF MARK S. BERGLIND, ESQUIRE

Personally appeared before me Mark S. Berglind, Esquire, who, after being duly sworn, deposes and states under oath that the facts stated in this Affidavit are true of his own personal knowledge:

1. I am a citizen and resident of the State of South Carolina, and I am over 18 years old and otherwise capable of making this Affidavit.
2. I am an attorney with the law firm of Vaux Marscher Berglind, P.A.
3. I represent Palmer Simmons and Charlesetta Aiken, who are the Defendants in the circuit court and the Appellants in this appeal.
4. I drafted the Answer (the "Answer") to the Plaintiffs' (i.e., the Respondents') Second Amended Complaint, which is attached as Exhibit 8 to the Respondents' Motion to Dismiss.
5. On the first page of the Answer, I made a typographical error. I mistakenly typed that "the Defendants deny that *the Defendants* are 'members' of Simmons Family Holdings, LLC as stated throughout the Complaint and demand strict proof thereof." (emphasis added).
6. Instead, I meant to type that "the Defendants deny that *the Plaintiffs* are 'members' of Simmons Family Holdings, LLC as stated throughout the Complaint and demand strict proof thereof." (emphasis added).
7. That this is a typing error is abundantly clear from the context of the Answer, which otherwise categorically denies all allegations by the Plaintiffs that they are members of Simmons Family Holdings, LLC.
8. That this is a typing error is abundantly clear from the context of numerous other filings in this case, including the Motion for Summary Judgment that I filed on behalf of the Defendants, seeking (*inter alia*) a ruling that Plaintiffs are not members of Simmons Family Holdings, LLC.

9. We repeatedly stated throughout the litigation that the Defendants deny that the Plaintiffs (*not* Defendants) are members of Simmons Family Holdings, LLC. No reasonable person could construe the typo in one line of the initial Answer as a repudiation of that clear and repeated position.



Mark S. Berglind, Esq.

SWORN to and subscribed before me

This 1st day of October, 2021



Notary Public for South Carolina

My Commission Expires: 3/30/30

1 his company; that plaintiff's are entitled to inspect the
2 LLC records as being members; and I will deny the request to
3 disassociate the Trust; that the defendants' motion for
4 summary judgment is denied in its entirety. Now, that's
5 assuming, Mr. Haight, you can show me you have a right to do
6 that. Otherwise, you know, I kind of operate under the idea
7 that summary judgment, that's a liability across the board
8 as to certain things, may be appropriate. But if that's the
9 case in your cause of actions, do you have a claim that you
10 are members? And if so, under what cause of action?

11 MR. HAIGHT: We certainly have, certainly, allegations
12 to that effect. Are we asking for if there's a declaratory
13 judgment?

14 THE COURT: Yeah, I guess that's what I'm asking. Is
15 there claim in there that the Court determined that they are
16 in fact members?

17 MR. HAIGHT: We think so.

18 THE COURT: Well, we think so and know so is a
19 different thing. Can you look at it right quick and let me
20 know?

21 MR. HAIGHT: First cause of action, declaratory
22 judgment as to membership interests.

23 THE COURT: Okay. Then that's granted as to do they
24 have a membership interest, that's the first cause of
25 action. The unauthorized distribution would be under the

1 cause of action for monies had and received. Is that
2 correct?

3 MR. BERGLIND: Correct, Judge.

4 THE COURT: That's granted as to liability only.
5 Entitlement to inspect the records is under the LLC statute.
6 They absolutely have a right to inspect the records. So if
7 you would draft me an order to that effect.

8 MR. HAIGHT: Okay.

9 THE COURT: And as to the amount of unauthorized
10 distributions, that has to be determined. The amount of
11 plaintiffs' percentage of their shares has to be determined
12 as the trial goes forward, okay.

13 MR. HAIGHT: Thank you, Your Honor.

14 THE COURT: All right. Thank you, guys. Thank you.

15 MR. BERGLIND: Thank you.

16 (The hearing concluded at 12:49 p.m. and then
17 resumed at 1:13 p.m.)

18 THE COURT: All right. Gentlemen, I apologize. I let
19 you get out of here before hearing plaintiffs' motion to
20 compel discovery. And once we get this resolved, that will
21 be all the outstanding motions in this case. Is that
22 correct?

23 MR. HAIGHT: Yes, Your Honor.

24 THE COURT: All right. And this is your motion to
25 compel?

1 MR. HAIGHT: Yes, Your Honor.

2 THE COURT: All right. I'll be glad to hear from you.

3 MR. HAIGHT: Thank you, Your Honor. Earlier you did
4 find that our clients were members, and as members are
5 entitled to the records of the company. And in that regard,
6 we'd asked in our third request with respect to the estate
7 of Charles E. Simmons, Jr., provide copies of all
8 communications between Palmer E. Simmons' manager or
9 comanager of Simmons Family Holdings, and the Law Firm
10 of Vaux, Marscher, and Berglind pertaining to the membership
11 interest of Simmons Family Holdings. Again, we've been
12 trying to find who other than the Trust, because there seems
13 to be claims that it's something other than the Trust, how
14 that one-third membership has been dealt with. And they've
15 not provided us anything in that regard. The fifth question
16 was --

17 THE COURT: Hang on a second. That was -- in your
18 motion, that was number 1, 2, 3, 4, 5. Which one was it?

19 MR. HAIGHT: That would be number 1.

20 THE COURT: Okay. Go ahead.

21 MR. HAIGHT: And, yeah, the first one, Your Honor, is
22 with regard to the estate, copies of all communications
23 between Palmer E. Simmons as manager of Simmons Family
24 Holdings and the Law Firm of Vaux, Marscher, Berglind
25 pertaining to the membership interest of Simmons Family

1 THE COURT: Right. But I think that if -- if I'm
2 reading this correctly that the request is limited to
3 transfers of membership in Simmons Family Holding.

4 MR. BERGLIND: Well, Your Honor, that's a part of this
5 litigation. I mean, this technically would require us to
6 turn over any correspondence between us and Palmer Simmons
7 with regard to this present litigation.

8 THE COURT: That's what you ---

9 MR. MEYER: -- membership is at the heart of the issue
10 in this litigation.

11 THE COURT: That's right. And I've determined that
12 they are members, and I think they're entitled to it. So I
13 want you to tell me why if they are members? If I'm wrong,
14 I can make it confidential and they can't use it beyond
15 scope of this litigation, I mean, if you stamp it
16 confidential. But if I'm wrong, and I'm sure somebody's
17 gonna appeal me, then there's no harm, no foul. But if it
18 is -- if I'm not wrong, which I don't believe I am, then
19 they're entitled to this information. Do you agree?

20 MR. MEYER: Your Honor, with information they're
21 requesting just with regard to the LLC, I would agree. But
22 this would be so expansive that it would allow us to -- it
23 would allow in any litigation for any member of a company to
24 just request everything from the other attorney and be able
25 to have to provide everything. There would be --

1 THE COURT: Well, Mr. Berglind [sic] ---

2 MR. MEYER: --- expectation of privacy.

3 THE COURT: Let's look at this: Copies of any
4 correspondence between defendant Palmer Simmons and the firm
5 regarding transfers of membership in Simmons Family
6 Holdings. That's pretty well contained and limited in this
7 scope. Do you not agree?

8 MR. MEYER: If it's between Simmons Family Holdings.
9 But, again, on the issue of membership ---

10 THE COURT: Mr. Berglind, let me ask you this: If the
11 plaintiffs are actually members and determined to be
12 members, they're entitled to that. Do you disagree?

13 MR. BERGLIND: Your Honor, Mark Berglind here. I think
14 that the issue is Palmer Simmons hired me and this law firm
15 for this litigation. And so what the plaintiffs are
16 requesting for is, with regard to this litigation, anything
17 that I communicated with Palmer Simmons regarding this case
18 because it's been about membership.

19 THE COURT: No. It's says regarding transfers of
20 membership. It doesn't say about anything. It says
21 regarding transfers of membership.

22 MR. BERGLIND: Well, what if I gave him an opinion
23 letter as to transfers of membership? Do you understand
24 what our concern is with regards to that particular request?

25 THE COURT: No, sir, I don't actually.

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Oct 01 2021

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PROOF OF SERVICE

I certify that pursuant to the Supreme Court's Order Regarding Methods of Electronic Filing and Service, I served the Appellants' Return to Respondents' Motion to Dismiss on counsel for the Respondents, on October 1, 2021, at their email addresses of record with the AIS:

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stacey@mhalawfirm.com

thomas@tktlawyers.com

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