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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' REPLY
to Respondents' Return to Appellants' Motion to Strike

Appellants' Motion requests this Court to require Respondents to strike from Respondents' Brief all arguments relying on a later-filed receivership order by Judge Dukes that (a) is not properly a part of the Record on Appeal, (b) is not the subject of this appeal, and (c) was not in any way a basis for the orders properly before this Court in this appeal.

Appellants have appealed various orders by Judge McIntosh granting summary judgment on certain of Respondents' causes of action pertaining to membership in a limited liability company. The materials properly to be included in this Record on Appeal are those materials that Judge McIntosh relied on in rendering his summary judgment rulings. There is no question that the basis for Judge McIntosh's judgment was not Judge Dukes' receivership-related order, which was rendered after Judge McIntosh ruled, and after Judge McIntosh denied Appellants' Motion to Reconsider.[1] This is patently clear from Judge McIntosh's own recitation of the record before him:

> [1] The Verified Second Amended Complaint, [2] the Answer thereto, [3] the various affidavits and [4] memoranda filed with this Court, and [5] the deposition excerpts filed of

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[1] Judge McIntosh made the rulings relating to company membership (which are the subject of this appeal) at least four times.

First, Judge McIntosh ruled from the bench at the hearing on March 1. Obviously, Judge Dukes' order of March 18 was not before him then, because it did not yet exist. Next, Judge McIntosh ruled again on March 2 in a Form 4 Order which summarized his substantive decisions made from the bench. Obviously, Judge Dukes' order was not before him then, because it did not yet exist. Then, Judge McIntosh ruled again by denying Appellants' Motion to Reconsider the substantive rulings in the Form 4 and bench orders. Obviously, Judge Dukes' order was not before him then, because it did not yet exist.

Meanwhile, as they were instructed to do from the bench and in the Form 4 order, Respondents drafted Judge McIntosh's written orders to reflect his rulings from the bench and in the Form 4 orders. Respondents took several weeks to draft the written orders, which is not a criticism of Respondents but rather an observation, to highlight two points: (1) the written orders drafted by Respondents, which do post-date Judge Dukes' order, were nonetheless drafted by Respondents and signed by Judge McIntosh to reflect the rulings Judge McIntosh had already made, prior to Judge Dukes' order; and (2) as the authors of the orders, who were writing at around the same time as Judge Dukes issued his order, it is hypothetically possible that Respondents *could have* referred Judge Dukes' order . . . but they chose not to do so since it was irrelevant to the orders they were drafting. In fact, Respondents themselves drafted the order's paragraph which itemizes the record that was before Judge McIntosh.

Respondents cannot now, and in their brief, pretend that Judge McIntosh relied on an order by Judge Dukes that **they themselves elected to exclude** from Judge McIntosh's written order's recitation of the record, which they themselves drafted and which tellingly reveals that Judge Dukes' order has nothing to do with this appeal.

> record therewith, **constitute the factual record of this case** and that the Court may dispose of this case as a matter of law.

Order, p. 1. In several sections of their Brief, Respondents improperly attempt to pull in—as probative—later factual determinations by Judge Dukes, which have nothing to do with the summary judgments on appeal and which are neither binding nor relevant to Judge McIntosh's previous decisions.[2]

The Record on Appeal should contain only those materials which are germane to the appeal because they were presented to the court below. Rules 209 and 210, SCACR. The Rules of this Court admonish: "A party **shall not** include any matter in his Designation which is not relevant to the appeal." Rule 209(b), SCACR (emphasis added). Respondents have improperly included an irrelevant order which indisputably was not before Judge McIntosh, and which indisputably was not in any way a basis for the decisions by Judge McIntosh which are the subject of this appeal.

Appellants respectfully request that the Court would grant this Motion, strike the improper designation of matter, and order Respondents to correct their Brief and Designation of Matter to reflect the proper record on appeal.

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[2] Judge Dukes' order was not immediately appealable, and Appellants have not appealed it. In their brief, Respondents wrongly cast Judge Dukes' decision as "the law of the case," which it isn't. Hence, this Motion to Strike.

Respectfully submitted,

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March 4, 2022
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PROOF OF SERVICE

I certify that I served the Appellants' Reply to Respondents' Return to Motion to Strike and to Stay Deadlines on counsel for the Respondents on March 4, 2022, at their email addresses of record with the AIS:

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