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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

R. Lawton McIntosh, Circuit Court Judge

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.

RESPONDENTS' BRIEF

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INTRODUCTION

Greg "Marcus" Simmons and Jermaine Robinson ("Respondents") brought this declaratory judgment action seeking, *inter alia,* confirmation they each hold a 1/3 membership interest in Simmons Family Holdings, LLC (the "Company") (R. pp. 47-68). This appeal arises from two interlocutory orders. First, an "Order Denying [Appellants'] Motion for Summary Judgment and Granting in Part, [Respondents'] Motion for Summary Judgment" (hereinafter the "Summary Judgment Order") (R. pp. 35-43); and the second an "Order Granting [Respondents'] Motion to Compel [discovery]" dated March 18, 2021. (hereinafter "Discovery Order") (R. pp. 29-33).[1] In this brief, Respondents renew their previously made Motion to Dismiss this appeal and further articulate why even if this Court does not dismiss the instant appeal, it must nonetheless affirm.

STATEMENT OF THE CASE

The Company was created by Charles Simmons Sr., ("Senior") in 2001. (R. p. 72); (R. p. 83). After Senior's death in 2005, his son Charles Simmons Jr., ("Junior") became the sole member and manager of the Company. Unfortunately, Junior died in May of 2016. The crux of this action is whether Respondents—who are Junior's son and grandson[2]—are members of the Company. Particularly, Respondents assert that prior to his death, Junior conveyed them each a 1/3 membership interest in the Company (*i.e.*, 2/3 collectively) (R. pp. 35-43). Although Appellants—who are Junior's other son and daughter—do not dispute that Junior prepared and executed Amended Articles of Organization in 2015 which added Respondents as members, Appellants argue the addition of Respondents as members should be void. As such, Appellants deny that

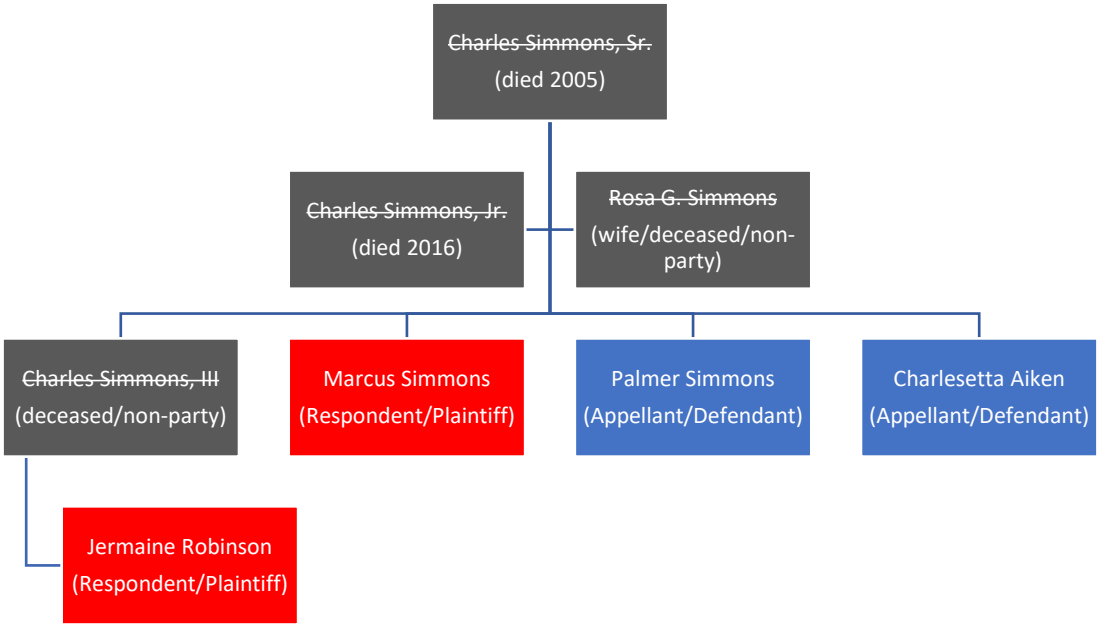
[1] This Discovery Order is not identified in the Notice of Appeal but was attached as an exhibit.

[2] Respondents are both Junior's biological grandsons; however, Junior adopted Marcus Simmons as his son.

Respondents are members of the Company. However, this lawsuit marks the first time Appellants have taken this position. The evidence conclusively shows that prior to this lawsuit Appellants repeatedly acknowledged Respondents' membership through Company resolutions, contracts, and tax returns. *See* (R. p. 84); (R. pp. 96-7); (R. pp. 107-08); (R. pp. 310-11).

The Parties

The parties to this action are three of Junior's children and one grandchild as shown below:



Addition of Respondents as Members – The Amended Articles of Organization

It is not disputed that on November 3, 2015, Junior executed and filed Amended Articles of Organization with the Secretary of State with the stated purpose being to:

> **Add the following People** in their individual capacities: Palmer E. Simmons - Co-Manager, [] Charlesetta S. Aiken - Co-Manager, [] **Greg M. Simmons [Plaintiff/Respondent] Member, Jermaine Robinson [Plaintiff/Respondent] Member**.

See (R. p. 84); (R. p. 211) (emphasis added).

Events Following Junior's Death

In May of 2016, while in hospice care with terminal cancer, Junior created the Charles E. Simmons, Jr. and Rosa G. Simmons Revocable Trust dated May 5, 2016 (the "Trust"). He died days later on May 26, 2016. During the probating of Junior's estate, on September 26, 2016, an Inventory and Appraisement (the "Inventory") was filed with the Probate Court reflecting that Junior held a 1/3 membership interest in the Company which under his will was to be transferred to the Trust. (R. p. 93). Since then, Appellant Palmer Simmons has assumed the role of Personal Representative of the Estate.

In order to transfer Junior's interest from the Estate to the Trust, on June 30, 2016, the Respondents were presented with two documents. The first being a Resolution Authorizing the Assignment and Transfer of Membership Interest (the "Resolution") (R. pp. 310-11) and a corresponding Assignment and Transfer of Membership Interest (the "Assignment Agreement") (R. pp. 96-7). Other than their title and signatories, these two documents are substantially identical and provide in relevant part:

> WHEREAS Charles E. Simmons, Jr. is a Member of Simmons Family Holdings, LLC and holds a one-third (1/3) membership interest in the company; and
>
> WHEREAS Greg M. Simmons and Jermaine Robinson are the remaining members of the Company; and
>
> WHEREAS Palmer E. Simmons and Charlesetta S. Aiken are the Co-Managers of the Company.
>
> . . .
>
> WHEREAS, the Members of Simmons Family Holdings, LLC Have adopted a resolution authorizing the assignment and transfer of [the] one-third (1/3) interest of Charles E Simmons, Junior to the [Trust].

(R. pp. 310-11); (R. pp. 96-7).

The Resolution was executed by Respondents in their capacity as members, and appellant Palmer Simmons in his capacity as personal representative of the Estate. These being all the

members of the Company at the time. (R. p. 311). The Assignment Agreement was also executed by Respondents in their capacity as members, Appellants in their capacity as co-managers, and by the trustee of the Trust as the transferee of the Estate's 1/3 interest (R. p. 97).

Further documentation regarding Respondents' membership interests include the Company's 2017 Federal Tax Returns—prepared by Appellant Palmer Simmons as co-manager—which identifies Respondents as members of the Company. (R. pp. 107-08). Additionally, a proposed resolution that Palmer had prepared by Antonia Lucia, Esq. of Vaux Marscher Berglind, in April 2018 identified Respondents as members. (R. pp. 114-15). This proposed resolution sought to redistribute and reduce Respondents' membership interest to 1/6 each with the intent of making Appellants each 1/3 members. However, this proposed resolution was never executed. (R. at *id.*).

PROCEDURAL HISTORY

Respondents brought this action on May 28, 2019, pursuant to the South Carolina Declaratory Judgment Action (S.C. Code Ann. § 15-53-10 *et. seq.*). In addition, Respondents alleged various causes of action against Appellants, including a claim for money had and received in which Respondents alleged Palmer, in his role as co-manager, made various unauthorized expenditures of Company money. (R. pp. 65-6). Upon motion by Respondents and after a hearing, the Special Circuit Court Judge Marvin H. Dukes, III (Master-in-Equity) issued an order granting temporary injunction on July 9, 2019. (R. pp. 1-3). Among other things, this July 9 Order required the Company to provide Respondents copies of financial statements, bank account statements, checks, tax returns, minutes, operating agreements, resolutions, mortgages, deeds, contracts, and assignments of membership interests. (R. p. 2). No appeal was taken from this Order.

On August 5, 2020, Respondents filed a Motion for Rule to Show Cause alleging Appellant Palmer Simmons violated Judge Dukes' July 9, 2019, Order and asked for the appointment of a receiver. (R. pp.129-38). On September 22, 2020, Judge Dukes issued an order finding Appellant Palmer Simmons violated the July 9, 2019, Order in various ways, including by making "substantial payments from [the Company] to himself . . . for his [own] benefit." (R. p.7). By this same Order, Judge Dukes also ordered the appointment of a receiver pursuant to §15-65-10 and directed a full accounting of the Company. (R. pp. 12-13). On January 28, 2021, Thomas Pendarvis, attorney for the receiver, issued a report on the findings of the accounting of the Company. (R. pp. 538-40). In addition to outlining numerous instances of conduct by Palmer which violated Judge Dukes' Order, the receiver's report identifies nearly $300,000.00 in disputed and dubious expenditures. (R. p. 539). On March 2, 2021, the matter came before Judge Dukes for a hearing to determine the amount of expenditures which were made in violation of the July 9 injunction. (R. p. 13 at ¶ 6). On March 12, 2021, Judge Dukes issued an Order finding that Palmer provided "no evidence that the Unauthorized Expenses [identified by the receiver] were, in fact, the legitimate business expenses of [the Company]." (R. p. 26). Judge Dukes further ordered Palmer to repay the Company $164,781.48. (R. pp. 26-7). These Orders were not appealed but provide context.

As stated above, this appeal arises from the parties cross-motions for summary judgment, and Respondents' Motion to Compel Discovery, both of which were heard by Judge McIntosh on March 1, 2021. (R. pp. 575-610). Judge McIntosh entered the "Summary Judgment Order" and the "Discovery Order" on March 18 and 19, 2021.[3] (R. p. 29); (R. p. 35).

[3] On March 2, Judge McIntosh issued a Form 4 Order indicating formal written orders would follow which were subsequently entered March 18 and 19. (R. p. 19).

The "Summary Judgment Order"

On January 18, 2021, Appellants filed a Motion for Summary Judgment on the issue of Respondents' membership, arguing that Junior's addition of Respondents as members in 2015 was void for failing to strictly comply with the ministerial technicalities of Section 3.1 of the operating agreement. (R. pp. 195-96). On February 4, 2021, Respondents similarly moved for summary judgment seeking, among other things, a declaration that Respondents were each 1/3 members in the Company. *See* (R. pp. 243-44); (R. pp. 251-56). Respondents additionally sought summary judgment on various other causes of actions—including their claim for "money had and received." (R. pp. 256-67). The Company, although a party to this action, did not oppose Respondents' Motion for Summary Judgment.

On March 19, 2021, the trial court issued an order rejecting Appellants' argument and instead finding that Respondents are members of the Company. However, the trial court left the amount of that membership to be decided by the jury at trial. (R. pp. 35-44); (R. pp. 41-3). In addition, the trial court granted partial summary judgment on Respondents' derivative claim for money had and received, finding there was no question of fact that Palmer Simmons made unauthorized expenditures of the Company's money. (R. pp. 41-3). The trial court left the amount of those distributions (*i.e.*, the element of damages) to be determined at trial.

The "Discovery Order"

On January 21, 2021, Respondents filed a Motion to Compel Appellants to produce certain documents, correspondence, and billing records related to transfers of membership interest in the Company, as well as a copy of the Trust documents. (R. pp. 213-14). The Company did not oppose this motion. Appellants opposed this motion on the basis that Respondents were not members of the Company. (R. pp. 352-59). Appellants also made a generalized assertion that this information

might be covered by the attorney-client privilege, but they did not specifically identify any document that was privileged or why. In their Motion to Compel Respondents complained Appellants' failure to provide a privilege log left them unable to evaluate the claim. (R. pp. 217-19). In response, Appellants claimed they should be immune from the privilege log requirement. (R. pp. 509-10).[4]

On March 18, 2021, the trial court granted Respondents' Motion to Compel and ordered the production of (1) business records pursuant to S.C. Code Ann. § 33-44-40, including correspondence between the managers of the Company and counsel concerning the transfer of membership interest; (2) attorney billing statements for work performed for the Company or its managers; and (3) the trust agreement for the Trust. (R. pp. 29-34). To address any concern of privilege, the trial court additionally provided: "If defendants contend any particular document(s) should not be provided, counsel shall submit said document(s) to the court for an *in camera* review within thirty (30) days from the date of this Order. (R. p. 33). However, Appellants never submitted any documents or records for *in camera* review. Consequently, the trial court has never made any ruling on the applicability of the attorney-client privilege. (R. at *id.*). Nonetheless, Appellants pursue the instant appeal on the basis that the Discovery Order violates the attorney-client privilege.

PRIOR APPELLATE PROCEDURE AND RENEWAL OF MOTION TO DISMISS

Because Appellants claim Junior's addition of Respondents as members in 2015 was void, it follows (according to them) that everything subsequent, including the conveyance of Junior's

[4] Appellants subsequently mailed a privilege log to Respondents on February 26, 2021; however, this is not in the record, and it is unclear whether it was provided to the trial court. Regardless, even if it were in the record, it would prove woefully inadequate, simply listing general categories of documents *i.e.*, various correspondence, billing statements, and trust documents.

1/3 interest to the Trust, is likewise "irrelevant" and ineffectual. Appellants concede under their reasoning it would stand that none of the appellants—*i.e.,* neither Charlesetta, Palmer, nor the Trust— have any interest in Company. Instead, Appellants contend the sole member of the Company is Junior's Estate (at least until the Estate transfers it to the Trust). (R. p. 191).[5] Notwithstanding that the Estate is not a party to this action, the fatal flaw in Appellants' reasoning is that without an interest in the Company, Appellants have no standing to pursue this appeal. Therefore, on September 7, 2021, Respondents moved to dismiss the instant appeal for, *inter alia,* Appellants' lack of appellate standing. On November 19, 2021, this Court, by Order of Judge Hill, denied this motion. Respondents herein renew their Motion to Dismiss, and fully incorporate by reference the arguments made therein.

ARGUMENT

While Appellants set out five separate issues on appeal (four concerning the Summary Judgment Order and one concerning the Discovery Order), it is important to recognize that each of these rests primarily, if not entirely, on their assertion that Respondents are not members of the Company. Indeed, the record reflects this was Appellants' primary contention in the trial court, and many of the additional arguments made by Appellants on appeal were never presented to or ruled on by the trial court. In this way, because the trial court properly found Respondents are members, it follows that Appellants' arguments, whether related to the Summary Judgment Order or the Discovery Order, must fail for this singular reason. Nonetheless, and in contribution to the

[5] Palmer Simmons as personal representative of the Estate filed a petition in the Beaufort County Probate Court in which he asserts for the first time that Respondents "have no interest in [the Company and] If Petitioner is successful [in this suit], the estate would have a 100% interest in [the Company]." (R. p. 328).

great length of this brief, Respondents attempt to respond to each of Appellants' various arguments despite that many are procedurally barred or otherwise not preserved.

PART ONE
THE SUMMARY JUDGMENT ORDER SHOULD BE AFFIRMED

STANDARD OF REVIEW

Appellants misapprehend the standard of review applicable to cross motions for summary judgment. "When reviewing a circuit court's order from a motion for summary judgment, appellate courts sit in the same position as the circuit court." *S.C. Pub. Interest Found. v. Calhoun Cty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021). While it is generally true that questions of fact are resolved under the "scintilla of evidence" standard, that standard does not apply in the manner Appellants suggest because "[w]here cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." *Wiegand v. United States Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

In filing their Motion for Summary Judgment, Appellants conceded that the question of whether Respondents are members of the Company is necessarily limited to a question of law, not fact. *Id.* Therefore, Appellants cannot now claim that summary judgment was improper because there are questions of fact on this very issue. Yet that is precisely what Appellants claim and precisely what distinguishes their second issue on appeal from their first. *See* (App. Br. p. 19) (entitling the argument on their second issue as "there is more than a scintilla of evidence that [Respondents] are not members of [the Company]"). Because the proper standard of review limits the inquiry in this case to a question of law, it follows that despite Appellants' attempt to frame their first and second issues on appeal as distinct, there is but one issue before the court—*i.e.,* whether, *as a matter of law*, Respondents are members of the Company. Therefore, Appellants'

first two issues on appeal are addressed collectively to demonstrate that the trial court correctly concluded Respondents are members of the Company.

I. The trial court properly found that Respondents are members of the Company as a matter of law.

Appellants do not dispute that Junior executed and recorded the Amended Articles of Organization in November 2015, which have, as their stated purpose, the addition of Respondents as members and Appellants as co-managers. (R. pp. 192-96). Instead, "the heart" of Appellant's argument is that these Amended Articles are void for failure to comply with the ministerial acts contemplated by Section 3.1 of the operating agreement, which provides in pertinent part that:

> [The admission of a new Member] is effective only after the new Member has executed and delivered to the Company, as appropriate, a document including the new Member's notice address, its agreement to be bound by the terms of an Operating Agreement which reflects the existence of at least two Members, and its representation and warranty that the representation and warranties required of new Members are true and correct with respect to the new Member.

(R. p. 74); (R. p. 192).

Although Appellants have not produced a copy of a joinder agreement in discovery (a document which, if it exists, would be in Appellants' possession), Appellants do not dispute that on July 30, 2017, after Junior's death, Appellants and Respondents executed both the Resolution and the Assignment Agreements to transfer Junior's 1/3 interest to the Trust. It cannot be denied that both of these documents affirmatively accept and identify "**Greg M. Simmons and Jermaine Robinson [i.e., Respondents] are the remaining Members of the Company**." (R. p. 96); (R. p. 310) (emphasis added). Appellants also do not dispute that in filing the Company's tax returns they affirmatively and under penalty of perjury represented that Respondents were members of the Company. (R. pp. 107-08).

Because the documentary evidence plainly supports Respondents' membership, the evidence is wholly inconsistent with Appellants' position that Respondents are not members. Thus, Appellants are left to argue that this Court should ignore that evidence. To this they claim that the Amended Articles "should be deemed void" under Section 3.1 and thus, this undisputed evidence is "irrelevant." *See* (R. p. 196) (concluding Respondents membership "should be deemed void *ab initio*" and therefore "any action that followed the 2015 [a]mendment to the Articles [] is irrelevant."). However, Appellants' reliance on this single sentence from Section 3.1 of the operating agreement is misguided.

The law in South Carolina provides that when interpreting an operating agreement, the "cardinal rule . . . is to ascertain and give legal effect to the parties' intentions" *Jones v. Builders Inv. Grp., LLC,* 415 S.C. 321, 328, 781 S.E.2d 737, 741 (Ct. App. 2015). This requires that the "**contract is read as a whole document**" and cannot focus on a "a single sentence or clause." *Id.* (emphasis added). When considered **as a whole,** the operating agreement and the evidence plainly support that Junior not only intended to make Respondents members in 2015, but because Appellants have, on multiple occasions, acknowledged and/or ratified Respondents' membership, the plain language of the operating agreement prohibits Appellants from opposing Respondents' membership now.

A. Appellants' claim that Junior's addition of Respondents as members is void must fail as matter of law because the plain language of the operating agreement permitted Junior to amend the agreement in whatever manner he wished, and the evidence plainly supports that Junior intended to add Respondents as members.

Appellants claim "[Junior] was powerless to add new members" unless he strictly complied with the ministerial requirements of Section 3.1 of the operating agreement. (App. Br. p. 16).

However, this reasoning does not hold water because the plain language of the operating agreement and the law of this state allowed Junior to amend the operating agreement.

First, Section 8.2 of the operating agreement provides that it "may be amended and modified from time to time by the Member." (R. p. 79). Similarly, South Carolina's statutes make plain that an LLC's operating agreement "need **not** be in writing." S.C. Code Ann. § 33-44-103(a). Accordingly, the law has long recognized that modification to a written agreement need not be in writing. *See e.g., Sanchez v. Tilley,* 285 S.C. 449, 452, 330 S.E.2d 319, 320 (Ct. App. 1985) ("A written contract may be orally modified by the parties even if the writing itself prohibited oral modification.") (*citing Evatt v. Campbell,* 234 S.C. 1, 106 S.E.2d 447 (1959)).

Because both the operating agreement and the law permitted Junior (who was the sole member) to amend the agreement in whatever way, and through whatever means, he desired, it follows that the question of whether the Amended Articles served to add Respondents as members becomes simply a question of whether Junior *intended* to add Respondents as members. Plainly, the Amended Articles which were prepared, executed, and recorded by Junior with the stated purpose of adding Respondents as members evidence his intent to add Respondents as members. Appellants do not argue Junior did not intend to add Respondents as members, but instead suggest that the absence of technical compliance with Section 3.1 should operate to defeat that intent. However, because Junior was free to modify the operating agreement as he wished, including dispensing with the formalities of Section 3.1, Appellants' reasoning is precisely backward.[6] Juniors' intent must prevail over the ministerial technicalities. To the extent Junior took action in the absence of those ministerial technicalities this would evidence an intent to waive those

[6] It bears further mention that the ministerial requirements of Section 3.1 were, on their face, designed only to apply after the Company was no longer a sole-member entity, not before. (R. pp. 74-75).

technicalities. *Accord Jones, LLC,* 415 S.C. at 328, 781 S.E.2d at 741 (the "cardinal rule" of interpreting an operating agreement is "to ascertain and give legal effect to the parties' intentions"). This is particularly true when, as here, the plain language of the operating agreement demonstrates Appellants have waived their objection to Juniors' means of adding Respondents.

B. The trial court's ruling is supported by the plain language of the operating agreement which demonstrates that Appellants have waived their opposition to Respondents' membership by failing to timely complain about the means of their addition and further by affirmatively acknowledging and ratifying Respondents' membership.

Even if the means of adding Respondents as members were improper (which it was not) the plain language of Sections 8.7 and 5.13 of the operating agreement nonetheless preclude Appellants from opposing Respondents' membership now.

First, Section 8.7 provides that the "Failure of a Person to complain of an act of any Person . . . with respect to the Company, irrespective of how long that failure continues, does not constitute a waiver by that Person of its rights with respect to that default until the applicable statute-of-limitations period has run." (R. p. 80). Because it is undisputed that Junior recorded the Amended Articles on November 9, 2015 (at which point Appellants also became co-managers), Section 8.7 requires that Appellants, as the newly appointed co-managers, had three years—the length of the statute of limitations—to "complain of" the means by which Junior added Respondents as members. (R. p. 80). They failed to do this. It was not until after Respondents commenced this lawsuit in 2019—*i.e.,* more than three years after Junior added Respondents as members in 2015—that Appellants first raised any claim that Respondents were not members. Therefore, by failing to timely complain, the plain language of the operating agreement dictates that Appellants have waived their objection to Respondents' addition as members.

This is further supported by the fact that Appellants have affirmatively ratified and/or acknowledged Respondents' membership through the Resolution, the Assignment Agreement, and the Company's tax returns. Section 5.13 of the operating agreement provides "[t]he Manager in his discretion may submit any act or contract for approval or ratification to the Member." (R. p. 78).

Here, it is not disputed that Appellants, prepared and executed both the Resolution and the Assignment Agreement in order to transfer the Estates' 1/3 membership interest to the Trust. (R. pp. 310-11); (R. pp. 96-7). As stated above, because both of these agreements affirmatively identify and rely on Respondents having a membership interest there can be little debate that Appellants have ratified Respondents' membership. *See e.g.,* (R. at *id.*) (both reciting that "Greg M. Simmons and Jermaine Robinson [*i.e*., Respondents] are the remaining Members of the Company" who's authorization is necessary). Further, since these documents were executed by all the appellants—*i.e.,* Charlesetta, Palmer, and the Trust in their various capacities—Respondents' membership interest was plainly acknowledged and established by the affirmative act of the very parties which come before this Court with the audacity to deny it. *See* (R. p. 311); (R. p. 97).

But it does not end there. In March of 2018, when filing the Company's 2017 Federal Income Tax Returns, Palmer (as co-manager of the Company) represented to the Internal Revenue Service on the Company's tax returns, under penalty of perjury, that both Respondents were members of the Company. (R. pp. 107-08).

Thus, not only have Appellants waived their claim under the plain language of Section 8.7 but Appellants have also ratified Respondents' membership under Section 5.13. Either of these reasons serve to confirm the trial court's conclusion that Respondents are members of the Company. Therefore, this Court should affirm the trial court's partial grant of summary judgment

and allow the matter to proceed to trial for determination of the extent of Respondents' membership interest. Furthermore, to the extent that the balance of Appellants' arguments rest in whole or in part on the suggestion that Respondents are not members, those arguments must fail for the reasons stated above.

II. Appellants' argument that the trial court erred by excluding certain deposition evidence is baseless because the trial court never made a ruling regarding the admissibility of this evidence, but even if it had excluded this evidence, that would not have been error.

Appellants' third issue on appeal concerns the admissibility of deposition testimony given by Junior in an unrelated lawsuit on May 3, 2016 (while in hospice care). The testimony at issue concerns a single question posed to Junior and his answer:

> Q: Who are the officers and - - and members [of the Company] now?
>
> A: Charles Simmons, Jr. [myself] . . . Rosa Simmons [my wife] . . . Charlesetta Aiken, daughter, and Palmer Simmons.

(R. p. 498 at p. 10, lines 3-10).

Appellants offer a lengthy argument that the trial court "incorrectly concluded [this] sworn deposition testimony [] was excluded under S.C. Code § 19-11-20 (the "Dead Man's Statute"). (App. Br. p. 23).[7] However, the trial court made no such ruling. Appellants also argue—for the first time—that this testimony is admissible under the exception to the hearsay rule for statements of existing mental, emotional, or physical condition, provided at Rule 803(3), SCRE.

[7] Respondents' reference to the Deadman's statute at trial was generally concerned with the characterization of this testimony contained in the proffered affidavit of Palmer Simmons which purported to speak for Junior.

While it is generally true that only admissible evidence will be considered in evaluating summary judgment,[8] it is important in this case that the trial court made no finding whatsoever on the admissibility of the deposition testimony. *Contra* (R. pp. 35-43). Instead, it seems that Appellants simply assume the trial court excluded this evidence because, at least according to them, this evidence would "preclude[] summary judgment" in favor of Respondents. *See* (App. Br. p. 23) (claiming the deposition testimony "shows [Respondents] were not members of [the Company]"). However, that assumption is simply wrong because even in the light most favorable to Appellants, the deposition testimony cannot be dispositive of Respondents' membership status. The testimony is offered in response to a compound question, asking Junior to identity the people who are **both** "officers and members." (R. p. 480 at p. 10, lines 3-10). Viewed in the light most favorable to Appellants, the only inference to be drawn from this testimony is that Respondents are not officers *and* members. However, Respondents have never claimed to be *officers and members,* they have only ever claimed to be members. The trial court's conclusion that Respondents are members (but not managers) is not inconsistent with this deposition evidence.

Further, Appellants cannot claim that this evidence creates a question of fact regarding membership, because as explained above, in filing their Motion for Summary Judgment Appellants conceded there was no question of fact as to Respondents' membership. *Wiegand*, 391 S.C. at 163, 705 S.E.2d at 434 ("Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law."). Thus, Appellants' suggestion that this

[8] *See Heslin v. Lenahan (In re Eleanor McCarthy Lenahan Tr.)*, 428 S.C. 598, 605, 836 S.E.2d 793, 797 (Ct. App. 2019) (holding that "only admissible evidence counts in the summary judgment calculus."); *see also* Rule 56(e), SCRCP; *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence.").

evidence creates a question of fact on the issue of membership is not only improper, but it is also wrong—a point belied by Appellants' own arguments and confirmed by the evidence in the record.

The deposition evidence identifies Charlesetta and Palmer (both of whom are appellants) as members. However, as Appellants articulated to the trial court, their argument is that the Trust is the sole member of the Company. (R. p. 191) (conceding under their argument it would be "the Trust owning a 100% interest in [the Company]" which would necessarily preclude Charlesetta and Palmer as members); *see also* (R. pp. 96-7) (Appellants acknowledging Respondents and the Trust to be members and that Charlesetta and Palmer are managers but not members); *but see* (R. p. 328) (Palmer, as personal representative of the Estate asserting the Estate is the sole member which would preclude Charlesetta and Palmer as members). Thus, it is incongruous for Appellants to suggest that this evidence is determinative of membership when this evidence, if accepted, would be wholly inconsistent with the position they have taken in this litigation. *See e.g., McMaster v. Dewitt*, 411 S.C. 138, 151, 767 S.E.2d 451, 458 (Ct. App. 2014) (providing that generally a party cannot manufacture a question of fact to defeat summary judgment by offering evidence that contradicts its own position or testimony).

Furthermore, the suggestion that this deposition testimony is germane to the issue of Respondents' membership is inconsistent with the very foundational premise of Appellants' argument—*i.e.,* claiming that because the 2015 Amended Articles are purportedly void, everything that post-dated these Amended Articles is "irrelevant." (R. p. 191); (R. p. 196) (asserting that "any action that followed the 2015 [a]mendment to the Articles [] is irrelevant."). The problem is the deposition evidence was taken in 2016, after the Amended Articles. As a result, both logic and fair play preclude Appellants from suggesting this testimony is germane to the issue of membership if it favors them, while simultaneously suggesting it is irrelevant if it does not favor them. Having

moved for summary judgment on the issue of Respondents' membership, Appellants cannot have it both ways. *See Wiegand,* 391 S.C. at 163, 705 S.E.2d at 434 (in filing a motion for summary judgment a party concedes there are no questions of material fact). Certainly, the trial court was not ignorant of this when it was considering summary judgment.

Therefore, even if it were assumed that the trial court erred in excluding this evidence under the Deadman's statute (an assumption for which there is no basis), that exclusion would have been harmless error because this evidence is not determinative of whether Respondents are members in the Company and therefore would not have changed the outcome. *See e.g., State v. Blackburn,* 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978); *and State v. Daise,* 421 S.C. 442, 459, 807 S.E.2d 710, 718 (Ct. App. 2017) (recognizing that where the trial court's evidentiary rulings will not change the outcome the error is deeded harmless and will not serve as the basis for reversal).

Similarly, even if this evidence was excluded as Appellants claim it was, this would not have been error because this evidence is inadmissible hearsay regardless. (R. p. 586, lines 6-9). Therefore, if it were somehow determined that the trial court found this evidence inadmissible, as an additional sustaining ground this Court should find the evidence was inadmissible hearsay. *Repko v. Cty. of Georgetown*, 424 S.C. 494, 503-04, 818 S.E.2d 743, 748 (2018) ("an appellate court may affirm a lower court judgment for any reason appearing in the record."); *quoting I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (confirming "that different preservation rules apply to an appellant—the losing party in the lower court" than to a respondent) (underline original).[9]

[9] At the hearing on the cross-motions for summary judgment, in addition to suggesting that this deposition testimony may be excluded by the Dead Man's Statute, Respondents' counsel also argued it was improper hearsay. (R. p. 586, line 6).

Appellants do not dispute that the deposition testimony is hearsay, instead they suggest—albeit in a single conclusory sentence—that it should be admissible under the exception for statements regarding the declarants' mental, emotional, or physical condition set out in Rule 803(3), SCRE. (App. Br. p. 25) (arguing it is evidence of Junior's "intent, plan, or design, with regard to ownership of [the Company]" admissible under Rule 803(3)); *see also* (R. 552-53) (Appellants' Rule 59 Motion also offering the single conclusory sentence that the testimony was offered to show "the decedent's intent, plan, or design with regard to ownership of [the Company and] is admissible as state of mind exception to the hearsay rule."); *accord* Rule 802, SCRE (providing that hearsay is inadmissible unless it falls within the scope of an exception).

First, Appellants' single-sentence argument that this evidence is admissible under a hearsay exception is not only abandoned, but because it was never raised to or ruled on by the trial court it is also not preserved. *See Glasscock, Inc. v. United States Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (stating that short conclusory argument which are not developed with supporting authority are abandoned) (citing *Brown v. Theos*, 338 S.C. 305, 309 n.2, 526 S.E.2d 232, 235 n.2 (Ct. App. 1999) for the proposition that a one sentence argument in a party's brief was insufficient to bring the issue before the appellate court); *see also, Poch v. Bayshore Concrete Prods./South Carolina*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009); and *Dixon v. Dixon,* 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (both finding issues raised for first time in a Rule 59, SCRCP, motion are not preserved for review).

Abandonment and lack of preservation notwithstanding, the suggestion that this evidence falls within the exception created by Rule 803(3) for statements regarding mental, emotional, or physical condition borders on the absurd. The rule plainly states it does "not includ[e] a statement of memory or belief to prove the fact remembered or believed." Rule 803(3), SCRE. The Supreme

Court has explained that to be considered a statement of the declarant's intent, plan, or design (as Appellants claim) the statement must be forward looking, meaning that it must "cast[] light upon the **future**" and does not encompass statements speaking "to a past act." *State v. Garcia*, 334 S.C. 71, 76 n.3, 512 S.E.2d 507, 509 (1999) (citing *Shepard v. United States*, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933)).

Here, Junior's statement is made in response to the question: "Who are the officers and members **now**?" (R. p. 498 at p. 10, line 6) (emphasis added). Plainly this question does not inquire of Junior's intent for the future. Although it is unclear due to the conclusory nature of Appellants' argument, presumably Appellants seek to use the testimony to suggest that Junior's previous act of amending the Articles of Organization to add Respondents as members was not done with the intent, plan, or design to actually do the very thing that it did—*i.e*., add Respondents as members. However, this is precisely the kind of evidence that Rule 803(3) **does not permit** because it would be inquiring of Junior's recollection of some past act. *See State v. Tennant,* 394 S.C. 5, 16, 714 S.E.2d 297, 302 (2011) (explaining that the exception of Rule 803(3) does not permit statements of memory or belief, regarding a past act); *see also Garcia*, 334 S.C. at 76 n.3, 512 S.E.2d at, 509 (*supra*). Therefore, there is simply no colorable argument that this evidence is of the type contemplated by Rule 803(3). As a result, even if the trial court "excluded" the evidence as Appellants imply, this would not have been error because this evidence is inadmissible hearsay which does not fall within the exception set forth in Rule 803(3), SCRE.

III. This Court should affirm the trial court's grant of Summary Judgment on Respondents' Claim for Money Had and Received because Appellants' allegations of error are neither preserved, compelling, nor supported by evidence.

The only argument Appellants made to the trial court opposing summary judgment on the claim of money had and received, was their contention that Respondents were not members of the

Company. (R. p. 364-67).[10] Nonetheless, on appeal Appellants now make two new arguments: first, that there is a question of fact whether Respondents made the statutory demand necessary to acquire derivative standing, and second, there is a question of fact on whether Palmer "wrongfully expended monies belonging to [the Company.]" (App. Br. pp. 27-30); *contra* (R. pp. 360-73); (R. p. 550-58) (Appellants did not make these arguments in their memos, nor raise them by way of Rule 59).

As a threshold matter, because neither of these arguments were raised to the trial court, neither is preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Miller v. Dillon*, 432 S.C. 197, 207, 851 S.E.2d 462, 468 (Ct. App. 2020) ("A party may not argue one ground at trial and an alternate ground on appeal." (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)).

Regardless, even if these arguments were preserved, they are not compelling. First, Appellants' suggestion that Respondents lack derivative standing is wrong. Section 33-44-1100 makes clear that derivative standing does not require a pre-suit demand for action when "an effort to cause those members or managers to commence the action is not likely to succeed." S.C. Code Ann. § 33-44-1101. Whether the demand would have been futile is a factual question, the resolution of which should be affirmed unless unsupported by the evidence or influenced by error of law. *See Grant v. Gosnell,* 266 S.C. 372, 374, 223 S.E.2d 413, 414 (1976).

[10] As addressed above in Section I, the trial court properly concluded that Respondents are members of the Company. Therefore, this argument must fail.

Here, the trial court's ruling is supported by the evidence. That is most apparent when considering that the cornerstone of Appellants' defense to this lawsuit is their claim that Respondents are not members. Because a demand for derivative action can only be made by a member, Appellants' contention that Respondents are not members serves to confirm that any demand would have been futile. Similarly, the fact that Palmer testified before Judge Dukes, that he was unable to repay his improper expenditures of Company money suggests that even had a demand been made, Palmer would not have taken action against himself to repay money he conceded he could not afford to repay. This further confirms that any demand would be futile. *See* (R. p. 26) (Judge Dukes finding that "the Court heard testimony from [] Palmer Simmons regarding his alleged inability to reimburse [the Company] for the unauthorized expenses").

Moreover, because Appellants personally benefited from the wrongful expenditures, even if a demand had been made and even if Palmer had sued himself to return the money he took, he would have no incentive to vigorously pursue a claim against themselves. *See* Rule 23(b)(1), SCRCP (a plaintiff cannot properly pursue a derivative action if it "appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."). Thus, even if this issue were preserved, the trial court did not err in granting partial summary judgment on the claim for money had and received.

Similarly, Appellants' claim that there is a question of fact on whether Palmer Simmons wrongfully expended Company money, even if preserved, is nonetheless wrong. To support the claim for money had and received, Respondents submitted the report of the accounting performed by the Company's receiver as ordered by Judge Dukes. (R. p. 538-49). The report outlines more than $50,000.00 in unauthorized distributions—including more than $14,500.00 to Charlesetta,

who Palmer claims is not a member in the Company. (R. p. 541). This report also outlines more than $188,000 in unauthorized expenditures of Company funds, including more than $13,000.00 in automobile expenses (R. p. 541); over $11,000.00 for Palmer's personal tax liability (R. p. 542); over $32,000.00 paid to Palmers' mortgage company (R. p. 542); more than $5,000.00 in "meals and entertainment" (R. p. 542); and nearly $32,000.00 of Palmer's personal expenses. (R. p. 542). Altogether, between July 2019 and September 2020, the receiver accounted for nearly $270,000.00 in unauthorized payments, plus more than $15,000.00 in disputed legal fees doled out by the Company at Palmer's direction. Appellants did not provide any evidence in opposition to this report in response to Respondents' Motion for Summary Judgment.

Moreover, on March 12, 2021, in response to Respondents' Rule to Show Cause, Judge Dukes determined that $164,781.48 of the nearly $300,000.00 in wrongful expenditures outlined in the receiver's report were made in violation of his prior injunction issued in July of 2019. (R. pp. 26-7). Appellants have not appealed Judge Dukes' Order. Thus, there is no question that Palmer made wrongful expenditures, the only question remaining is whether the amount ordered to be repaid by Judge Dukes accounts for all of Palmer's unauthorized expenditures.[11] Therefore, in

[11] Judge Dukes first determined that Palmer made wrongful expenditures of Company money in September of 2020, long before Judge McIntosh granted summary judgment in March of 2021. *See* (R. p. 7) (September 22 Order finding Palmer "made substantial payment from [the Company] to himself, his family, and others for his [own] benefit, the benefit of his family, or the benefit of his [business]."). After the receiver's accounting and report, Palmer testified at a hearing before Judge Dukes on March 2, 2021 (the day after the hearing on the cross-motions for summary judgment in front of Judge McIntosh). Based on Palmer's own testimony, Judge Dukes concluded in his March 12, 2021, Order there was "no evidence that the Unauthorized Expenses [identified by the receiver] were, in fact, the legitimate business expenses of [the Company]." (R. p. 26). Appellants have not appealed any of Judge Dukes' orders. Thus, this Court could consider the factual determination that Palmer made improper expenditures of the Company's money has become the law of the case. *See Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (holding that an "unappealed ruling is the law of the case."); *citing Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.").

ruling on the Motion for Summary Judgment, Judge McIntosh (like Judge Dukes) properly found there was no question of fact as to whether Palmer made wrongful expenditures of Company money. As a result, the trial court (*i.e.*, Judge McIntosh) was correct to grant partial summary judgment on the issue of liability and leave the question of damages to be decided at trial. This Court should affirm.

PART TWO
THE DISCOVERY ORDER SHOULD BE AFFIRMED

STANDARD OF REVIEW

Generally, "[a]n order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14-3-330." *Ex parte Whetstone*, 289 S.C. 580, 580-81, 347 S.E.2d 881, 881-82 (1986). However, assuming it is appealable, "a discovery [order] will not be disturbed on appeal absent a clear showing of an abuse of discretion" which occurs only "when the trial judge's ruling is based upon an error of law or . . . is without evidentiary support." *Bayle v. S.C. DOT*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) (*citing Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989) and *Osborne v. Adams*, 338 S.C. 82, 525 S.E.2d 268 (Ct. App. 1999)).

IV. This Court should either dismiss Appellants' appeal of the Discovery Order because it is not ripe, or in the alternative, affirm the trial court's ruling because Appellants' claim of privilege is neither preserved nor supported by any evidence.

After hearing Respondents' Motion to Compel, the trial court's Discovery Order directed Appellants to produce the following information: (1) Business Records pursuant to § 33-44-408—including resolution(s) regarding membership interest and any correspondence from Appellants, in their capacity as co-managers of the Company, concerning the transfer of membership interest(s) in the Company; (2) attorney billing information from Case No. 2015-CP-07-02284 or

any other matters related to membership interest in the Company; and (3) a copy of the Trust Agreement.

In opposing Respondents' Motion to Compel, Appellants suggested that some of this information might be subject to attorney-client privilege. However, because Appellants did not identify any specific documents or information they claimed to be privileged, the trial court struggled to understand how to evaluate Appellants' claim of privilege. When Appellants' counsel asked the trial court "do you understand our concern?" the court responded: "No, sir, I don't actually." (R. p. 605 line 25). Nonetheless, to assuage the unspecific concerns regarding privilege, the trial court directed that "If [Appellants] content that any particular document(s) should not be provided, counsel shall submit said documents to the Court for an *in camera* review within thirty (30) days from the date of this Order." (R. p. 33). Appellants never submitted any documents for *in camera* review, nor did they file a Rule 59 motion on this ruling. Instead, they took immediate appeal. Consequently, the trial court never ruled on whether any particular document is privileged.

On appeal, Appellants make the summary conclusion that the Discovery Order should be reversed because "the lower court was wrong to find that Vaux Marscher Berglind, P.A., must surrender privileged materials" to Respondents. (App. Br. p. 35). However, Appellants neglect that because they have failed to identify any document which they claim is privileged, their claim of privilege is neither ripe, nor preserved for appellate review. Regardless, even if the claim were before this Court, it fails on its merits.[12]

[12] Appellants additionally argue the Discovery Order should be reversed because Respondents are not members of the Company. At the hearing on the Motion to Compel, Appellants conceded that if Respondents are members, then they would have to turn over the disputed information. (R. p. 607). However, as discussed in Section I, the trial court properly concluded that Respondents are members. Therefore, this argument must fail.

A. Appeal from the Discovery Order should be dismissed because it is not ripe.

Because Appellants failed to comply with the trial court's directive to identify and submit information claimed to be privileged for *in camera* review, the instant appeal is not ripe.

In *Tillman v. Tillman* this Court confirmed that dismissal of an appeal is proper where the trial court's Order provides the appealing party the ability to take further action, but the appealing party fails to do so. *See Tillman v. Tillman*, 420 S.C. 246, 250-51, 801 S.E.2d 757, 760 (Ct. App. 2017). In *Tillman*, the trial court dismissed a defendant's counterclaims, but in doing so, specifically invited the defendant to "make a formal motion to amend their counterclaims." *Id.* at 248, 801 S.E.2d at 759. But rather than moving to amend, the defendant immediately appealed, and as a result, this Court dismissed the appeal because the issue was not finally resolved. *Id.*

The concept is equally applicable to the appeal of a discovery order. Our Supreme Court has instructed:

> Instead of appealing immediately, [the purported appellant] has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal or refuse to comply with the order and appeal after he is held in contempt for his failure to comply.

Whetstone, 289 S.C. at 580-81, 347 S.E.2d at 881-82 (citations omitted).

It is well settled that an appellate court will not consider an appeal unless it is "ripe"—meaning the issue is not "contingent, hypothetical, or abstract." *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) (explaining an appeal is ripe only when "[a] justiciable controversy" exists, and that an appeal is not ripe where it merely raises "a contingent, hypothetical or abstract dispute").

In this case, Appellants failed to submit documents for *in camera* review, or otherwise identify any particular document that is privileged. As a result, they are left with only a generalized and abstract assertion that the Discovery Order could *potentially* implicate the attorney-client

privilege. However, "the function of appellate courts is not to give opinions on merely abstract or theoretical matters." *Sloan v. Greenville Cty.*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) (*citing Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981)). In failing to comply with the trial court's directive, Appellants failed to seek or obtain a specific ruling on the issue of privilege. As a result, there is no decision to be appealed and any ruling by this Court would be purely academic. Therefore, this Court should dismiss the appeal because it is not ripe.

B. Appellants' claim of attorney-client privilege is not preserved.

Further the same act which renders this appeal unripe—*i.e.*, the failure to seek a ruling on privilege by submitting documents *in camera* review—also leaves Appellants' claim of attorney-client privilege not preserved. It is fundamental that "an issue must be [both] raised to and ruled upon by the circuit court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). This Court has often held that it "will not examine [an issue] on appeal" where the trial court has not ruled on the issue and where the appellant fails to seek a ruling by way of Rule 59, SCRCP. *Watson v. Underwood*, 407 S.C. 443, 456, 756 S.E.2d 155, 162 (Ct. App. 2014) (holding "because these issues were not [ruled on] . . . we will not examine them on appeal"); *see also Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.") (*citing Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)); *I'On,,* 338 S.C. at 422, 526 S.E.2d at 724 (articulating that the rules of issue preservation are "meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments").

Here, in failing to identify any specific document which they claim to be privileged Appellants failed to give the trial court the opportunity to rule on the question of privilege. Thus, Appellants' failure to raise the issue, and the resulting absence of a ruling from the trial court, make two separate and independent reasons why the issue is not preserved. *See generally Pye*, 369 S.C. 555, 633 S.E.2d 510 (*supra*). Furthermore, in the absence of a ruling on this question of privilege, the rules of issue preservation require Appellants to seek a ruling by way of Rule 59. *See e.g., BMW of N. Am., LLC v. Complete Auto Recon Servs.*, 399 S.C. 444, 454, 731 S.E.2d 902, 908 (Ct. App. 2012) (stating "a party **must** file a Rule 59(e), SCRCP motion to preserve an issue for review that has been raised to but not ruled upon by the trial court") (emphasis added, citation omitted). Although Appellants filed a Rule 59 Motion on March 11, 2021, this motion only concerned the trial court's ruling on the cross-motions for summary judgment. Appellants made no arguments related to the Discovery Order. *See* (R. pp 550-58). Therefore, Appellants' claim of privilege is not preserved.

C. Even if Appellants' claim of attorney-client privilege were preserved, it nonetheless fails on its merits.

Even if Appellants' claim of privilege were preserved, which it is not, it would nonetheless fail on the merits because (1) it is not supported by the facts in the record; and (2) the evidence shows any such privilege has been waived.

1. Appellants' claim of privilege is without any evidentiary support.

Confidential information provided from a client to his lawyer may be subject to the attorney client privilege if the proponent of the privilege proves that he:

> (1) [sought] legal advice of any kind [] (2) from a professional legal adviser in his capacity as such, (3) the communications relat[ed] to that purpose (4) [and were] made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by

> himself or by the legal adviser, (8) except where the protection be waived."

Tobaccoville, 387 S.C. at 293, 692 S.E.2d at 530.

"[T]he party claiming the privilege has the burden of establishing the confidential nature of the communication, including the absence of waiver." *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 168, 829 S.E.2d 707, 712 (2019) (*citing State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980); *Wilson v. Preston*, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008) ("In general, the burden of establishing the privilege rests upon the party asserting it."). This burden is likewise encapsulated in Rule 26, SCRCP, which requires what is commonly referred to as "privilege log." *See* Rule 26(b)(5)(A), SCRCP (mandating that "the party **shall** make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection.") (emphasis added).

In their Motion to Compel, Respondents pointed out that Appellants' failure to provide a privilege log left it impossible to evaluate any claim of privilege. *See* (R. pp. 217-19). In response, Appellants argued they should be immune from having to provide the privilege log required by the rules because "[a] privilege log would contain no more detail than contained in [Respondents'] requests themselves." (R. p. 509).[13] The only inference that can reasonably be drawn from the fact that Appellants' claim they cannot identify what makes the information privileged is that the information is not privileged. Regardless, the trial court correctly disagreed with Appellants' suggestion that a claim of privilege could be evaluated in the absence of a proper privilege log. This is apparent from the trial court's decision to allow Appellants the opportunity to submit

[13] Appellants later mailed a privilege log to Respondents, but it is not in the record. Regardless that woefully inadequate log provided no information that would support a claim of privilege. *See supra* at Footnote 4.

purported privileged material for *in camera* review—an opportunity Appellants were neither entitled to, nor availed themselves of.

What Appellants' blanket and non-specific claim of privilege neglects is that information "does not become privileged merely because it was communicated to an attorney." *Mt. Hawley Ins. Co.*, 427 S.C. at 168, 829 S.E.2d at 712 (*citing Booker*, 260 S.C. at 256, 195 S.E.2d at 621). The question of whether any communication is privileged does not turn on the fact that the communication was sent to a lawyer, but on whether the proponent of the privilege has established the communication contains confidential information which meets the necessary elements for privilege to apply. *Accord id.; see also Tobaccoville*, 387 S.C. at 293, 692 S.E.2d at 530 (setting forth the eight elements that a proponent of the attorney-client privilege has the burden to establish in order to shield the information from discovery). This is precisely why the proponent of the privilege cannot rely on a blanket assertion of privilege, but instead has the burden to provide a specific factual basis to support the privilege. *See Mt. Hawley,* 427 S.C. at 164, 829 S.E.2d at 710 ("the burden of establishing the privilege rests upon the party asserting it."); *see also Rivers v. Rivers*, 292 S.C. 21, 26, 354 S.E.2d 784, 787 (Ct. App. 1987) (recognizing that like the clergyman privilege, the "burden of showing the facts required to establish the [attorney-client] privilege rests on the party objecting to the disclosure of the communication").

In sum, there are two indispensable questions that cannot be answered by Appellants' argument or the record: (1) What evidence is in Appellants' possession that they are withholding? And (2) What is it about that evidence that makes it privileged? Appellants' blanket claim of privilege cannot carry the day. The record is utterly devoid of any evidence to establish Appellants met, or even attempted to meet, their required burden to provide support for their claim of

privilege. Therefore, even if this issue were properly before this Court, the trial court's Discovery Order should still be affirmed.[14]

2. The attorney-client privilege asserted by Appellants, even if it exists, has been waived.

Finally, and for the sake of completeness, it is plain from their argument that the attorney-client privilege which Appellants assert belongs, if at all, to the Company. *See* (App. Br. pp. 33-34) (arguing that Respondents "do not have the right to view [the C]ompany's attorney-client privileged materials").[15]

It is well settled that privilege is not absolute and will not operate to prevent disclosure where the facts suggest it has been **expressly or implicitly** waived. *See Tobaccoville*, 387 S.C. at 293, 692 S.E.2d at 530 ; *Doster*, 276 S.C. 647, 284 S.E.2d 218; *Floyd v. Floyd*, 365 S.C. 56, 88-90, 615 S.E.2d 465, 483 (Ct. App. 2005) (citing *South Carolina State Highway Dep't v. Booker*, 260 S.C. 245, 254, 195 S.E.2d 615, 620 (1973)) (all confirming that attorney client privilege is not absolute, and is waivable, and the burden is on the party claiming privilege to demonstrate the absence of waiver) (emphasis added); *accord Wilson v. Gordon*, 73 S.C. 155, 158, 53 S.E. 79, 80

[14] It bears mention that much of the information that is subject to the Discovery Order is not information supplied by the client to the lawyer, but instead from the lawyer to the client—for instance correspondence and billing. Generally, this type of evidence is not subject to the attorney-client privilege, but the entirely separate attorney work-product doctrine. Such lawyer originating communication would only be subject to privilege if it contains confidential information originally obtained from the client. *See generally Brinton v. Department of State,* 204 U.S. App. D.C. 328, 636 F.2d 600 (C.A.D.C. 1980). This further illustrates the need to explain the basis for the assertion of privilege. Nonetheless, to the extent Appellants imply they are immune from producing documents sent from counsel to them, they have not asserted the separate work-product doctrine or otherwise asserted these documents contain confidential information originally provided by the client.

[15] The fact that Appellants are not asserting their own rights, but rights that belong to the Company demonstrates they lack appellate standing, and this Court should consider Respondents' renewed Motion to Dismiss the instant appeal. *See* (Apps. Mot. to Dismiss Appeal).

(1905) (recognizing privilege will not attach as against a party who's interest is the subject of or could be affected by the communication).

Here, the Appellants' claim of privilege concerns information possessed by the law firm of Vaux Marscher Berglind, P.A. *See* (App. Br. p. 35) (concluding "the lower court was wrong to find that Vaux Marscher Berglind, P.A., must surrender privileged materials"). However, the Company has specifically waived this privilege. This waiver was made on the record during the deposition of Antonia Lucia—an attorney with Vaux Marscher Berglind, P.A.—wherein Mr. Pendarvis, counsel for the Company's receiver expressly stated: "So in addition to just communication, information related to the representation is **hereby waived**." (R. p. 308). Moreover, had the Company wished to pursue a claim of privilege it could have. But it did not. The Company neither opposed Respondents' Motion to Compel, nor did it appeal the trial court's Discovery Order. Thus, the Company's privilege has been explicitly waived.

Secondly, the privilege, regardless of who it belongs to, has been implicitly waived. In July 2019, Judge Dukes issued an Order granting temporary injunctive relief, which among other things required Appellants to provide Respondents with certain business and financial records of the Company. (R. p. 2 at ¶¶ G & H). Appellants made no claim of privilege at that time. Subsequently, in September of 2020, Judge Dukes later found Appellants violated this interim Order, and issued a second order appointing a receiver and, among other things, directing the receiver conduct a full accounting of the Company and investigate the propriety of all expenses for which Palmer expended Company funds. (R. p. 12). Included among the purportedly improper expenditures were disputed attorney fees paid to Vaux Marscher Berglind, P.A. (R. p. 543). Again, Appellants neither appealed this Order nor made any claim of privilege at that time. Thus, the record supports the conclusion that the privilege has been implicitly waived. *See generally e.g., Prince v. Beaufort*

Mem'l Hosp., 392 S.C. 599, 609, 709 S.E.2d 122, 127 (Ct. App. 2011) (recognizing that the failure to take appeal from a ruling of the trial court will render the issue waived on appeal under the principle that it is the law of the case).

In close, even if Appellants' arguments were preserved, the trial court did not abuse its discretion because its ruling is supported by evidence in the record. Therefore, this Court should affirm. *See Bayle*, 344 S.C. at 128, 542 S.E.2d at 742 (holding "a discovery [order] will not be disturbed on appeal absent a clear showing of an abuse of discretion").

CONCLUSION

For the reasons stated above this Court should either dismiss the instant appeal, or in the alternative, affirm the trial court's Summary Judgment Order and its Discovery Order.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that the enclosed complies with Rule 211, SCACR.

Respectfully submitted,

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