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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' FINAL BRIEF

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I. **Did the circuit court err as a matter of law in finding that Marcus and Jermaine are members of Simmons Family Holdings, LLC despite undisputed lack of compliance with the clear, material language of Simmons Family Holdings LLC's Operating Agreement?**

II. **Alternatively, did the circuit court erroneously grant summary judgment to Marcus and Jermaine when there is more than a scintilla of evidence that Marcus and Jermaine are <u>not</u> members of Simmons Family Holdings, LLC?**

III. **Did the circuit court err in excluding testimony under the Dead Man's Statute, which testimony dispositively precludes summary judgment?**

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STATEMENT OF THE CASE AND FACTS

This case arises out of a dispute over membership in a limited liability company called Simmons Family Holdings, LLC ("SFH"). SFH is a real estate holding company, owning waterfront property in Beaufort County, South Carolina. The central issue in this case is the question of whether Respondents Greg Marcus Simmons ("Marcus"[1]) and Jermaine Robinson ("Jermaine") are members of SFH. Marcus and Jermaine allege that that membership would entitle them to distributions, a stake in the business, and an interest in extraordinarily valuable property.

On summary judgment, the circuit court wrongly ruled that Marcus and Jermaine are members of SFH, when the evidence shows that disputed facts exist for trial and jury determination. Alternatively, based on the clear and unambiguous language of SFH's Operating Agreement, Marcus and Jermaine are not members of SFH, as a matter of law.

I. Facts

SFH is a family business. It was organized in 2001 by Charles E. Simmons, Sr. ("Charles Sr."), who was its sole member. Charles Sr. appointed his son, Charles E. Simmons, Jr. ("Charles Jr.") as the manager of the LLC. Charles Jr., as manager, adopted an Operating Agreement binding SFH and delineating the terms by which the company was to be run. (R. p. 69-82).

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[1] Because several of the relevant parties and witnesses have the last name of Simmons, first names are used to identify the parties herein.

The Operating Agreement contains express provisions for the membership and management of SFH. It has stringent requirements for admitting new members to the company. Those requirements include mandatory provisions about the amount of capital contributions and percent of net profits and losses to be assigned to any new member:

> **3.1 Additional Members.**
>
> A. Additional Persons may be admitted to the Company as a Member and Memberships may be created and issued to those Persons and to the Member at the direction of the Member, on such terms and conditions as the Member may determine at the time of admission. The terms of admission or issuance must specify the percentage of Net Profit, Net Loss, allocable to such Person and the Capital Contribution applicable thereto and may provide for the creation of different classes or groups of Members and having different rights, powers, and duties. The Member shall reflect the creation of any new class or group in an amendment to this Operating Agreement indicating the different rights, powers, and duties. Any such admission also must comply with the requirements described elsewhere in this Operating Agreement and 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). If those requirements each are not met, a person is not a member of the LLC.

Charles Sr. died in 2005. Thereupon, Charles Jr. inherited his assets, including his membership in SFH. (R. p. 45).

Charles Jr. was not a lawyer, nor a particularly sophisticated layman. In 2015, he was dying of cancer. He had a wife, Rosa, with whom he had two grown children: Appellants Palmer Simmons ("Palmer") and Charlesetta Aiken ("Charlesetta"). (R. p. 139). Respondents Marcus and Jermaine are two of Charles Jr.'s biological grandchildren. (R. p. 48).

In the last years of his life, Charles Jr. made it his practice to financially help out his family members, church, and charitable causes. (R. p. 382). His son, Palmer, and his

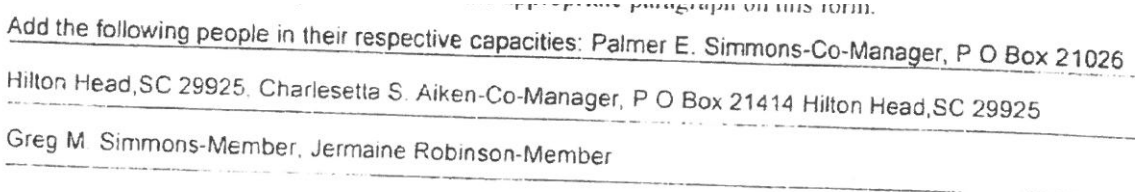
grandchildren, Marcus and Jermaine, together had a failing business venture on the property owned by SFH; they were attempting to operate a nightclub there, but it was not profitable. (R. p. 376); *see also* (J. Robinson trans. R. p. 480). This struggling business venture was (somewhat confusingly) called "SFC," Simmons Fishing Camp, LLC. (*Id.*). SFC's members are Palmer, Jermaine, and Marcus.

Although the nightclub failed, Marcus and Jermaine did do some valuable construction work on the property, repairing an old building to house the nightclub. (*Id.*). It was partly because of those repairs that a restauranteur named Brandon Reilley leased the property to open a new venture, "Fish Camp on Broad Creek." (R. pp. 376-378), (R p. 483). After negotiations with Charles Jr. and Palmer, Reilley entered into a lease with SFH for the property; Reilley also made SFC his partner in the new restaurant venture. (R. p. 376 ¶ 9).

The record indicates that it was Charles Jr.'s intent that Marcus and Jermaine receive a $1,000 monthly stipend from SFH, in order to compensate them for their work on the building, and to keep them financially afloat until SFC's venture with Reilley became profitable. (*Id.* ¶ 10). SFH began to pay Marcus and Jermaine $1,000 per month for this purpose. (R. p. 472). The record shows that SFH also made payments to Charlesetta and Rosa Simmons (Charles Jr.'s wife). (R. p. 472).

This lawsuit stems in part from actions taken by Charles Jr. shortly before his death from cancer in May of 2016, as well as from confusion among his children and grandchildren in the aftermath of his passing. In November of 2015, six months before his death, Charles Jr. filed Amended Articles of Organization with the South Carolina

Secretary of State, indicating that he was the Manager of SFH. (R. p. 83) ("Amended Articles"). The Amended Articles were written by Charles Jr. and Palmer, and they are bare-bones and confusing. They state, in part:


Add the following people in their respective capacities: Palmer E. Simmons-Co-Manager, P O Box 21026 Hilton Head,SC 29925. Charlesetta S. Aiken-Co-Manager, P O Box 21414 Hilton Head,SC 29925 Greg M. Simmons-Member, Jermaine Robinson-Member

(R. p. 84).

Simmons Jr.'s intent and design—although imperfectly stated—was that Marcus and Jermaine would continue to receive the $1,000 stipend. Now, however, Marcus and Jermaine base their argument that they are "members" of the LLC on this document, although the document indisputably (i) does not specify the percentage of profit and loss allocable to them, and (ii) does not make reference to any capital contribution by them. In addition, (iii) Marcus and Jermaine never executed and delivered to SFH any document indicating their agreement to be bound by the Operating Agreement, (iv) nor did they provide legal (or other) addresses for notice. As discussed above, such terms would be mandatory under the Operating Agreement for the admission of new members. (R. p. 74).

Moreover, a few months ***after*** the amendment, Charles Jr. gave his deposition in a different lawsuit, and he testified under oath that the members of SFH were (1) himself, (2) his wife, and his two children, (3) Palmer and (4) Charlesetta. (R. p. 187). In other words, months after he filed the Amended Articles, Charles Jr. ***himself*** did not identify Marcus and Jermaine as "members" of the company. Palmer attested that his father did

not intend to make Marcus and Jermaine members of the LLC in the legal sense of the term; instead, he stated that Charles Jr. was trying to assure that they would receive $1,000/month until SFC became lucrative. (R. p. 376-378). Palmer further attested that, as manager of SFH, he was confused as a layman as to the legal meaning of a "member," and he made mistakes based on that misunderstanding. (R. p. 377).

About three years after Charles Jr.'s death, Marcus and Jermaine filed this lawsuit seeking, *inter alia*, a judgment that they are lawful members of SFH.

II. Procedural History

Marcus and Jermaine filed their Second Amended Complaint on October 27, 2020.[2] Their first cause of action is for a declaratory judgment as to whether they are members of SFH. All the additional causes of action[3] are based upon the first—a necessary antecedent finding that Marcus and Jermaine are members of SFH (and that Palmer and Charlesetta are not). (R. p. 45).

Palmer and Charlesetta filed their Answer on November 16, 2020, generally denying the allegations of the complaint, specifically denying that Marcus and Jermaine are "members" of SFH, and raising the affirmative defenses (*inter alia*) that Marcus's and Jermaine's claims (i) were barred due to the express terms of the SFH Operating Agreement, and (ii) that they lacked standing to bring a derivative action. (R. p. 116).

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[2] The original Summons and Complaint was filed on May 28, 2019, followed by a First Amended Complaint on July 9, 2019.

[3] The other causes of action are conversion, breach of contract, breach of contract accompanied by a fraudulent act, breach of duty, and interference with contractual relationship. On the premise Jermaine and Marcus are members, the complaint also alleges derivative claims on behalf of SFH for accounting, money had and received, and interference with contract.

Both sides filed motions for summary judgment, on January 18, 2021, and February 4, 2021. (R. pp. 188, 243). The motions were supported, on each side, by memoranda of law, as well as by numerous exhibits, including multiple excerpts from deposition testimony, several sworn affidavits (which themselves had exhibits), various probate documents, and corporate filings. (R. pp. 188, 245, 324, 347, 352, 360).

The key contested issue on summary judgment was the question of membership in SFH. Marcus and Jermaine argued that the evidence supported their claim to be members, while Palmer and Charlesetta argued that as a matter of law, based on the clear language of the Operating Agreement, Marcus and Jermaine are not members.

On January 21, 2021, Marcus and Jermaine filed a Motion to Compel Discovery, seeking, *inter alia*, attorney billing statements and certain corporate records belonging to SFH, on the theory that they are entitled to those records pursuant to South Carolina Code § 33-44-408, which gives to members of a corporation access to certain corporate records. (R. p. 212, 504).

On March 2, 2021, the circuit court held a hearing on the motions for summary judgment and to compel. (Transcript, R. p. 575).

The sequencing of the trial court's rulings **after** the hearing is remarkable:

- On **March 2**, the circuit court issued a Form 4 Order, granting Marcus and Jermaine's summary judgment motion in part, and specifically finding that Marcus and Jermaine are members of SFH; it also granted their motion to compel. The court requested that counsel for Marcus and Jermaine draft a written opinion supporting the order. (R. p. 19).

- On **March 11**, as required by the 10-day time limit within the Rules of Civil Procedure, Palmer and Charlesetta filed a Motion Pursuant to Rule 59. At that time, no written opinion had yet been submitted. (R. p. 550).
- On **March 12**, the very next day—without having yet filed or even reviewed a proposed written opinion—the circuit court issued a Form 4 Order denying Palmer and Charlesetta's Rule 59 Motion. (R. p. 22).
- On **March 18**, the circuit court entered its written Order Granting Motion to Compel Discovery. (R. p. 29).
- On **March 19**, the circuit court entered its written opinion, in the Order Denying Defendants' Motion for Summary Judgment and Granting in Part Plaintiffs' Motion for Summary Judgment. (R. p. 35).

Palmer and Charlesetta timely filed their Notice of Appeal on April 9, 2021.

STANDARD OF REVIEW

There are two different standards of review applicable in this appeal: (1) mere scintilla of evidence, as to factual issues; and (2) de novo, as to the construction of unambiguous contracts.

First, this is an appeal from the circuit court's improper grant of summary judgment to the Respondents. Appellate courts use the same standard of review as the trial court to review a grant of summary judgment. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Loflin v. BMP Dev., LP*, 427 S.C. 580, 588–89, 832 S.E.2d 294, 299 (Ct. App. 2019) (internal quotation marks omitted). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). A scintilla of evidence is "the smallest trace" of evidence or "any material evidence that, if true, would tend to establish the issue in the mind of a reasonable jury." *Loflin*, 427 S.C. at 589, 832 S.E.2d at 299 (internal quotation marks omitted).

"Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts" and "is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* at 588–89, 832 S.E.2d at 299 (internal quotation marks omitted). Importantly, when it rules on a summary judgment motion,

"the court does not weigh conflicting evidence with respect to a disputed material fact." *Id.* at 589, 832 S.E.2d at 294.

Additionally, there is also a contract interpretation question at the core of this appeal, as to SFH's Operating Agreement. The construction of clear and unambiguous contracts is a question of law for the court. *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 493, 821 S.E.2d 667 (2018) ("We review questions of law de novo.").

Finally, this appeal also concerns the circuit court's decisions in a discovery dispute. Although ordinarily this Court reviews discovery rulings for abuse of discretion,[4] in this case the circuit court's discovery decisions hinged on its errors on summary judgment. Because this Court should reverse the circuit court's summary judgment decision, it must also reverse the discovery ruling to the extent it relied on the grant of summary judgment as justification for compelling discovery of privileged materials.

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[4] *Fairchild v. S.C. Dep't of Transp.*, 727 S.E.2d 407, 416 (2012).

ARGUMENT

The circuit court's order granting summary judgment is riddled with errors, any one of which is sufficient to compel reversal and remand for trial. First, the lower court erred as a matter of law in misconstruing the clear terms of SFH's Operating Agreement, which has express provisions for the admission of new members. Alternatively, or in addition, the court was wrong to decide a pivotal, disputed question of fact—that Respondents Marcus and Jermaine are members of SFH—when much more than just a scintilla of evidence demonstrates the opposite.

The court compounded this error by discounting admissible evidence pursuant to the Dead Man's Statute, which does not apply, and which evidence precludes summary judgment. The lower court also improperly decided the fact-intensive question of the "money had and received" cause of action, despite contrary evidence and lack of derivative standing. Finally, the circuit court's related discovery determinations, based on the same errors, should also be reversed.

The circuit court's order itself leaves much to be desired. Although it makes a stab at reciting by rote the arguments of counsel, it contains virtually no reasoning in support of its ultimate decision on material and disputed issues of fact. Implicit in the ruling is the court's erroneous decision to exclude factual evidence, which otherwise would have prevented summary judgment, pursuant to the Dead Man's Statute . . . but the court fails to explain why it believes the statute might apply; obviously, this is because **it doesn't**. The bottom line is that the court apparently wanted to reach a particular decision (i.e., that Marcus and Jermaine are members of SFH), and so it did so, despite evidence to the

contrary—in defiance of the summary judgment standard as well as the clear language of the Operating Agreement.[5] This Court should reverse, find that Jermaine and Marcus are not members of SFH, and remand for a trial on the disputed facts.

I. As a matter of law, based on the clear language of the Operating Agreement for Simmons Family Holdings, LLC, Respondents Marcus and Jermaine are not members of the company.

As a matter of law, the circuit court erred in finding Marcus and Jermaine to be members of SFH, when their purported admission into the company did not conform with the unambiguous requirements of SFH's Operating Agreement. Because the governing documents control the relationship between the company, its members, and its manager, this Court should reverse.

SFH is a limited liability company, organized and existing under South Carolina law, including South Carolina's Uniform Limited Liability Company Act (the "Uniform LLC Act"). Pursuant to the Uniform LLC Act, Charles Sr. (as member), Charles Jr. (as manager), and SFH entered into the "Operating Agreement of Simmons Family Holdings, LLC" in 2001. (R. p. 69).

The Uniform LLC Act defines an operating agreement as a contract that governs a company:

> "Operating agreement" means the agreement under Section 33-44-103 concerning the relations among the members, managers, and limited liability company.

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[5] The circuit court's lack of meaningful reasoning is highlighted by its premature resolve to rule on Palmer and Charlesetta's Motion to Reconsider, within 24 hours, *before it had even received or entered its written opinion*, which was still being drafted by counsel for Marcus and Jermaine.

S.C. Code § 33-44-101 ("Definitions"). The statute provides that the purpose of an operating agreement is "to regulate the affairs of the company and the conduct of its business." S.C. Code § 33-44-103 ("Effect of operating agreement"). Significantly, an operating agreement, when in place, "**govern[s] relations among the members, managers, and company**." *Id*. (emphasis added). Thus, as a matter of law, SFH's Operating Agreement binds the company, its members, and its managers, and it governs the relations between and among them.

a. The Operating Agreement controls as to the admission of new members.

The lower court's error germinates in its choice to disregard SFH's Operating Agreement:

> The [circuit c]ourt finds that strict compliance with the Operating Agreement is **not** a prerequisite of membership.

(R. p. 39) (emphasis added). This is plain error under both the Uniform LLC Act and this Court's precedent. The law is clear that when a company's operating agreement contains provisions regulating a particular matter, then those provisions control the company on that matter. S.C. Code § 33-44-103(a) ("**To the extent the operating agreement does not otherwise provide**, this chapter governs relations among the members, managers, and company.") (emphasis added).

"The operating agreement of [an LLC] is a binding contract that governs the relations among the members, managers, and the company." *Clary v. Borrell*, 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012). "Generally, operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only

when an operating agreement is silent as to some matter that statutory law will apply." *Id.*, *citing* S.C. Code § 33-44-103(a).

SFH's Operating Agreement contains requirements which expressly control the admission of new members into the company. (R. p. 74, § 3.1 "Additional Members").[6] That section requires, *inter alia*, that "the terms of admission . . . **must** specify the percentage of Net Profit, Net Loss, allocable to such Person;" it also require that the terms of admission "**must** specify . . . the Capital Contribution applicable" to the new member. (*Id.*) (emphasis added). These terms are mandatory. *See, e.g., Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002) (use of words such as "shall" or "must" indicates a mandatory requirement). Also mandatory is the provision that membership is not automatic; there is a prerequisite to membership that a new member must first provide his notice address to the company and must execute a document indicating his "agreement to be bound by the terms of an Operating Agreement which reflects the existence of at least two Members." (*Id.*).

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6 The section states:

> **3.1 Additional Members.**
>
> A. Additional Persons may be admitted to the Company as a Member and Memberships may be created and issued to those Persons and to the Member at the direction of the Member, on such terms and conditions as the Member may determine at the time of admission. The terms of admission or issuance must specify the percentage of Net Profit, Net Loss, allocable to such Person and the Capital Contribution applicable thereto and may provide for the creation of different classes or groups of Members and having different rights, powers, and duties. The Member shall reflect the creation of any new class or group in an amendment to this Operating Agreement indicating the different rights, powers, and duties. Any such admission also must comply with the requirements described elsewhere in this Operating Agreement and 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.

This makes sense. SFH's Operating Agreement is a contract between the company, its member, and its manager, which is designed to protect the company and its assets. For this reason, the Operating Agreement contemplates that prospective new members are required to agree to share in the company's losses and profits, and that they make a capital contribution to the company, as prerequisites to membership. (R. p. 74, Operating Agreement § 3.01). In 2001, when the company was formed, Charles Sr. made an initial capital contribution to SFH, which the Operating Agreement has procedures in place to protect:

Initial Capital Contributions

MEMBER	CAPITAL CONTRIBUTION	FAIR MARKET VALUE
Charles Simmons, Sr.	Property located on Broad Creek off Marshland Road, Hilton Head Island, SC, as described in Beaufort County Record Book _____ at Page _____.	$900,000.00

(R. p. 82). The purpose of SFH is to hold that valuable property, and to rent, lease, develop, and operate it as a business. (R. p. 73) (Operating Agreement, § 2.6).

As a matter of law, the circuit court erred by disregarding the binding agreement between SFH, its member, and its manager.

b. The Operating Agreement trumps the Articles of Organization.

Jermaine and Marcus did not claim that they had complied with the Operating Agreement's terms for the admission of new members. Instead, the essence of their argument to the circuit court was that the Amended Articles of Organization filed by Charles Jr. as "Manager" of the company, in which he indicated that Marcus and Jermaine were "members," somehow trumped the Operating Agreement. The circuit court agreed,

and it wrongly held that "[Marcus and Jermaine] are, ***and have been since the date of the Articles of Amendment of SFH***, members of SFH." (Order, R. p. 39) (emphasis added).

This decision by the circuit court to ignore the Operating Agreement in favor of the Amended Articles was further error. The law is clear that the articles of organization are subservient to the provisions of its operating agreement. The Uniform LLC Act states: "if any provision of an operating agreement is inconsistent with the articles of organization: . . . **the operating agreement controls** as to managers, members, and members' transferees." S.C. Code § 33-44-203(c)(1) (emphasis added). Moreover, SFH's Operating Agreement is itself unequivocal that its terms control over the provisions of the articles:

> **8.9 Governing Law; Severability**
>
> THIS OPERATING AGREEMENT IS GOVERNED BY AND SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF SOUTH CAROLINA EXCLUDING ANY CONFLICT-OF-LAWS RULE OR PRINCIPLE THAT MIGHT REFER THE GOVERNANCE OR THE CONSTRUCTION OF THIS OPERATING AGREEMENT TO THE LAW OF ANOTHER JURISDICTION. In the event of a direct conflict between the provisions of this Operating Agreement and (a) a mandatory provision of the Articles, or (b) any mandatory provision of the Act, the applicable provision of the Operating Agreement shall control. If any

(R. p. 80).

In other words, under the law of South Carolina and the plain language of SFH's Operating Agreement, Charles Jr. was powerless to add new members (if that was his intent and design, which is disputed) by amending the articles of organization. As a matter of law, if Charles Jr. had wanted (which is disputed) to admit Jermaine and Marcus into the family business, making them members while bypassing his own children, then he would have had to do so by following the procedure explicitly set forth in the

Operating Agreement. There is no dispute that he did not do so, and the non-conforming amended articles are ineffective as a matter of law.

c. The lower court should have disregarded extrinsic evidence.

An additional error by the circuit court was its willingness to give weight to evidence outside the Operating Agreement, which is unambiguous in its provisions on the admission of members. The court's order indicates that it looked to "the documentation provided" and "the testimony of the parties" in determining that Marcus and Jermaine are members of SFH. (Order, R. p. 41). Specifically, the court regarded documents signed by Jermaine as owner of SFH, an estate planning document prepared for Charles Jr.'s estate indicating that he held $^1/_3$ interest at the time of his death, deposition testimony, tax returns by SFH, and records indicating that Jermaine and Marcus received $1,000/month in rental payments. (Order, R. pp. 37-38).

The lower court erred in imparting to those documents and testimony the power to circumvent the clear requirements of the Operating Agreement. A court reviewing a written contract must discern:

> the intention of the parties and the meaning[, which] are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.

McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945); *see also ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011) ("It is not the function of the court to rewrite contracts for parties."). "Where an agreement is

clear and capable of legal interpretation, **the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it**." *Park Regency, LLC v. R&D Dev. of the Carolinas, LLC*, 402 S.C. 401, 412–413, 741 S.E.2d 528, 534 (Ct. App. 2012), *quoting Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App.2001) (emphasis added). "Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly." *Southern Atl. Fin. Serv. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27 (2003).

The Operating Agreement, and its provision for the admission of new members into SFH, is plain and unambiguous. It requires that in order for a new member to be admitted into SFH, there must be terms of that admission that must specify the percentage of net profit and net loss that are allocable to the new member, and they must specify the capital contribution applicable to the new member. There is no dispute that Charles Jr. did not comply with these provisions. The amended articles were therefore ineffective to admit Jermaine and Marcus as new members of SFH, as a matter of law. Moreover, those extraneous documents wrongly looked to by the circuit court could not, and did not, vary or supersede the dispositive requirements of the Operating Agreement.

This Court should reverse the circuit court's error in finding that Marcus and Jermaine are members of SFH, which is contrary to the Operating Agreement, the Uniform LLC Act, and the common law of this State.

Under the applicable standard of review, this Court has the authority to construe unambiguous contracts, without deference to the lower court. *Dennis* at 203, 821 S.E.2d at 672, *citing Jordan v. Sec. Grp., Inc.*, 311 S.C. 277, 230, 428 S.E.2d 705, 707 (1993) ("Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect."). For the above reasons, this Court should hold as a matter of law that Jermaine and Marcus are not members of SFC.

The Court's analysis may end here, without review of the lower court's additional errors, which depend upon its error of law as to membership.

However, *arguendo*, the circuit court further erred in granting summary judgment to Marcus and Jermaine, as set forth below.

II. Alternatively, there is more than a scintilla of evidence that Marcus and Jermaine are not members of Simmons Family Holdings, LLC.

The question of whether Greg and Jermaine are members of SFH, entitling them to a stake in the operation and ownership of extremely valuable waterfront property, as well as significant distributions from rental income, is the pivotal question in this litigation. Setting aside the Operating Agreement for the moment, which the circuit court erroneously believed did not control, the court wrongly granted summary judgment to Marcus and Jermaine on this keystone question.

The parties submitted conflicting evidence on the issue, and it is a question of fact that is properly for the jury. *See, e.g., Guerin v. Hunt*, 118 S.C. 32, 110 S.E. 71 (1921) ("It may be premised that, where there is no conflict in testimony, or where there is no evidence upon a material matter, the question presented is one of law, and not of fact. If, however, the evidence is contradictory, then the question is ordinarily one of fact, and not of law.").[7] On summary judgment, a circuit court is not empowered to determine questions of fact; its capacity is limited to deciding matters of law. Rule 56, S.C.R.C.P. (judgment is appropriate when there "is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.").

SFH is a family business that had been passed down from father to son. But on summary judgment the circuit court found as a matter of law that Charles Jr. intended to leave his son, Palmer, and his daughter, Charlesetta, **out** of the business, and to instead give the company and its assets to Greg and Jermaine. (R. pp. 361, 364-365). This in and of itself is a counterintuitive and unsupported rewriting of the contact, especially because the evidence indicates that Palmer was extremely involved in SFH, whereas Greg and Jermaine had little to no involvement in it. (*Id*.).

In opposition to Marcus and Jermaine's motion for summary judgment, Palmer and Charlesetta submitted the following evidence—more than a scintilla—which should

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[7] Alternatively, as a matter of law, Greg and Jermaine are not members, because there is **no evidence** that the clear procedures of the Operating Agreement on admission of members were followed. *See*, *supra*, Issue I.

have compelled denial of the motion, and which required submission to a jury on the question of membership in SFH:

- Charles Jr.'s own testimony on the identity of the members of the company (in which he did not name either Greg or Jermaine as members)[8] (R. p. 498 at p. 10);
- The Affidavit of Palmer Simmons, in which he explained that there was a layman's misunderstanding as to what it means to be a "member" of a corporation (R. p. 377);
- Palmer's testimony that his father, Charles Jr., did not intend or plan for Jermaine and Greg to have an ownership interest in the business; he simply wanted for them to receive a monthly stipend to help them out in a financially difficult time for them (R. pp. 376-377);
- Jermaine's testimony that neither he nor Marcus had ever contributed any money to SFH (R. p. 481 at p. 34);
- Marcus's testimony that he had never contributed any money to SFH (R. p. 489 at pp. 18-19);
- Palmer's testimony that he contributed financially to SFH (R. p. 474 at p. 17);
- SFH's Operating Agreement, and its provisions on the admission of members, with which Jermaine and Marcus did not comply. (R. p. 74).

The circuit court's decision to disregard conflicting testimony and evidence improperly removed the question of fact from the province of the jury. This is especially significant

[8] This revealing and probative testimony by Charles Jr. was wrongly disregarded by the lower court in a misapplication of the Deadman's Statute. *See, infra,* Issue III.

in this disputed, fact-laden case, where the assessment of credibility of the witnesses is particularly important, and where a jury trial was demanded.

The circuit court's error lies in its failure to apply the correct standard on summary judgment (*inter alia*). There was voluminous evidence before the court (*res ipsa loquitor*: the Record on Appeal), and both sides were asserting their version of disputed facts. Properly, the court should have looked to see whether there was *any* evidence (the proverbial "mere scintilla"), or inference to be drawn therefrom, which could possibly tend to establish Palmer's and Charlesetta's case in the mind of a reasonable jury. *Hancock*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). In opposition to summary judgment, Palmer and Charlesetta submitted sworn affidavits, deposition excerpts, and other evidence which indicated that the facts were in dispute. If triable issues of fact exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991) ("In determining whether summary judgment is appropriate, **a court must not try issues of fact**, but must discern whether genuine issues of fact exist to be tried.") (emphasis added).

Accordingly, the conflicting evidence in the record should have precluded summary judgment. This Court should reverse and remand for trial.

III. The circuit court erred when it excluded deposition testimony under the Dead Man's Statute, which testimony precludes summary judgment.

The circuit court incorrectly concluded that sworn deposition testimony of Charles Jr. was excluded under S.C. Code § 19-11-20 (the "Dead Man's Statute"). (R. pp. 579, lines 9–15; p. 586, lines 6–8); (R. p. 39). That legal error was material and prejudicial because it wrongly eliminated one of Palmer's and Charlesetta's key pieces of evidence against summary judgment.

The excluded evidence shows that Jermaine and Marcus were not members of SFH, and that Charles Jr. had not planned, intended, or designed them to be members of SFH. At deposition, under oath, Charles Jr. identified all the members of SFH, which did not include Jermaine and Marcus:

> Q. All right. What's the purpose of the Simmons Family Holdings?
>
> A. Well, it was a way of getting the property down in Broad Creek off of a person — one person's — in fact, we thought it was something like a corporation that it would fall under other than an individual, but —
>
> Q. Now, who was the — the original member of that corporation, the limited liability company?
>
> A. Charles Simmons, Sr.
>
> Q. **Who are the officers and — and members now**?
>
> A. **Charles Simmons, Jr.**
>
> Q. Yourself.
>
> A. **Rosa Simmons.**
>
> Q. Your wife.
>
> A. **Charlesetta Aiken**, daughter. And **Palmer Simmons**.

(R. p. 498 at p. 9, line 16–p.10, line 10) (emphasis added). At the time of the summary judgment hearing in this case, Charles Jr. was deceased, and the circuit court incorrectly excluded his testimony under the Dead Man's Statute.

The statute "bars the testimony of a person with an interest from testifying regarding a conversation with a deceased individual." *Osterneck v. Osterneck*, 649 S.E.2d 127, 131 (Ct. App. 2007) (*quoting Brooks v. Kay*, 339 S.C. 479, 486, 530 S.E.2d 120, 124 (2000)). The statute states:

> Notwithstanding the provisions of Section 19-11-10, **no party to an action or proceeding,** no person who has a legal or equitable interest which may be affected by the event of the action or proceeding, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and no assignor of anything in controversy in the action **shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased**, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, **when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him**. But when such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf in regard to such transaction or communication or when testimony of such deceased or insane person or lunatic in regard to such transaction or communication, however the same may have been perpetuated or made competent, shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing.

S.C. Code § 19-11-20 (emphasis added).

"The rule prohibits any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest. . . . The rule is founded on the principle that it is against public policy to allow a witness thus interested to testify as to such matters when such testimony, if untrue, cannot be contradicted." *Brooks*, 530 S.E.2d 120 (2000) (internal citations omitted). "[T]he purpose of the statute is to prevent fraud"[9]—namely, to prevent an interested party from testifying that a deceased said "x" in the interested party's favor, when the deceased is not able to verify his or her alleged statements. The statute "is to be read restrictively, and the party requesting its use bears the burden of establishing its applicability." *Estate of Revis by Revis v. Revis*, 484 S.E.2d 112, 118 (Ct. App. 1996) (internal citations omitted); *see also Hanahan v. Simpson*, 485 S.E.2d 903, 910 (1987) (summarizing exceptions).

Here, the proffered evidence was not (i) testimony by an interested witness, (ii) regarding a transaction[10] or communication (iii) between such witness and a person at the time of such examination deceased. Instead, the proffered evidence was direct testimony of the decedent himself, which had been taken under oath and was subject to cross examination at the time it was given. The testimony is otherwise admissible as evidence of the decedent's intent,[11] plan, or design with regard to the ownership of SFH. *See* S.C. R. Evid. 803(3) (state of mind exception to hearsay); *see also State v. Daise*, 421 S.C.

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9 *Estate of Fabian, In re,* 483 S.E.2d 474, 477 n.2 (Ct. App. 1997).

10 "[T]he word 'transaction', as used in the statute, implies mutuality; something done in concert, in which both [the testifying witness and the decedent] take some part." *Starnes v. Miller*, 266 S.E.2d 790, 791 (1980).

11 At the March 2, 2021 circuit court hearing on the motions, counsel for Jermaine and Marcus acknowledged that the issue involved the intent of Simmons Jr. (R. p. 586, lines 14–15).

442, 460, 807 S.E.2d 710, 719 (S.C. App. 2017). As such, the circuit court erred in excluding and failing to consider this evidence; Charles Jr.'s testimony should have constituted a "mere scintilla" which would prohibit summary judgment.

Because the Deadman's Statute would not apply to preclude the sworn testimony of Charles Jr. regarding the membership of SFH, this Court should reverse the circuit court and remand for trial.

For the reasons discussed above, the circuit court was wrong to grant summary judgment in Marcus and Jermaine's favor. This is because, either as a matter of law they were not members, due to noncompliance with the Operating Agreement, or, alternatively, because conflicting evidence defied their fact-based arguments to the lower court. Having wrongly found that Marcus and Jermaine were members of SFH, the circuit court went on to base its subsequent findings on the same error.

IV. The circuit court wrongly granted summary judgment on Marcus and Jermaine's derivative cause of action for "monies had and received," because they are not members of SFH, and because the questions decided were disputed questions of fact.

There is very little reasoning to reveal how the circuit court arrived at its erroneous conclusion that Marcus and Jermaine had standing to bring a derivative claim against Palmer for "monies had and received." There is even less analysis to support the court's

improper determination, despite disputed facts, that summary judgment on the claim was appropriate as a matter of law.

a. Marcus and Jermaine lack derivative standing.

First and foremost, Marcus and Jermaine cannot bring derivative claims on behalf of SFH because they are not members of SFH. The Uniform LLC Act states:

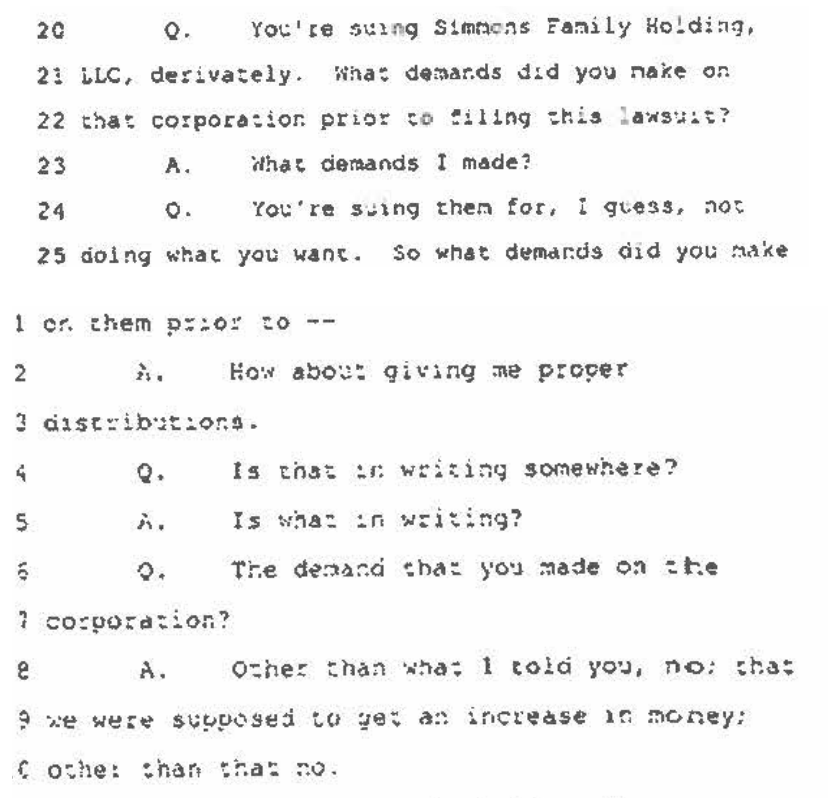
> In a derivative action for a limited liability company, the **plaintiff must be a member of the company** when the action is commenced.

S.C. Code § 33-44-1102 ("Proper plaintiff"). As a matter of law, Marcus and Jermaine lack standing, for failure to fulfill this statutory requirement. This Court should reverse on this basis alone.

Second, there is no evidence in the record that Marcus and Jermaine made a statutorily sufficient demand on the managers of the company, in an effort to first convince the managers to take the action for which they are now suing. Moreover, the circuit court made no finding that such a demand would be futile. Pursuant to the Uniform LLC Act, such a showing is mandatory for derivative standing. S.C. Code § 33-44-1101 ("A member of a limited liability company may maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed.").

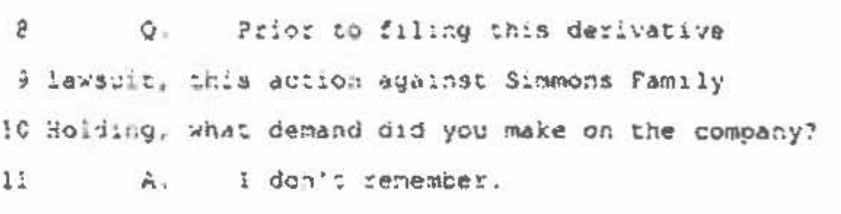
The evidence shows that Jermaine and Marcus failed to make any sort of demand on the managers. For example, Jermaine testified that he believed that SFH was badly managed, because bills were not paid on time, and money was loaned out while the company was already in debt. (R. p. 484, p. 62, line 6-20). However, when questioned as

to whether he first attempted to convince the managers of SFH to take action, Jermaine provided no evidence that he actually did so:



Q. You're suing Simmons Family Holding, LLC, derivately. What demands did you make on that corporation prior to filing this lawsuit?
A. What demands I made?
Q. You're suing them for, I guess, not doing what you want. So what demands did you make on them prior to --
A. How about giving me proper distributions.
Q. Is that in writing somewhere?
A. Is what in writing?
Q. The demand that you made on the corporation?
A. Other than what I told you, no; that we were supposed to get an increase in money; other than that no.

(R. pp. 484 at pp. 62-63). Marcus was similarly unclear:



Q. Prior to filing this derivative lawsuit, this action against Simmons Family Holding, what demand did you make on the company?
A. I don't remember.

(R p. 495 at p. 48, lines 8-11).

This testimony, at a minimum, creates a question of fact as to whether a demand was made on the company prior to its alleged members filing a derivative suit, and it defeats summary judgment. This Court should therefore reverse and remand for trial on the question.

b. Summary Judgment was improper due to disputed facts.

The circuit court cites two cases purportedly justifying its fact-intensive decision on summary judgment. *Marvin v. McRae*, 24 S.C.L. (Rice) 171 (1839) ("In order to recover on a count for money had and received, . . . the plaintiff must show he has equity and conscience on his side, and that he could recover in a court of equity."); *Okatie River v. Southeastern Site Prep.*, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003) ("In theory and actual practice, an action for money had and received is subsumed and amalgamated under the theories of quantum meruit/quasi-contract/implied by law actions."). Both cases require an antecedent finding that the plaintiff is entitled to an equitable remedy. There is no discussion whatsoever in the circuit court's decision going to such a necessary prerequisite finding. The order should be reversed for this reason, alone, and remanded for a determination of whether an equitable remedy is warranted in this instance.

Moreover, both *Okatie* and *Marvin* militate against a ruling on the cause of action for "monies had and received" on summary judgment, without a trial on the facts. Both cases discuss at length the evidence at issue, ultimately reaching their conclusions based upon the weight of the testimony of witnesses and other evidentiary facts. The courts in those cases were empowered to weigh the evidence, and to assess the credibility of witnesses, **only because those courts did so as the factfinders at trial**.

On summary judgment, which is the posture of this case, the circuit court is not permitted to weigh the evidence, and it must view the facts in the light most favorable to the non-moving party. *See Rothrock*, 409 S.E.2d at 367–368 (noting that on summary

judgment, all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Here, the circuit court improperly made credibility determinations (apparently giving Palmer's testimony less weight than Marcus's and Jermaine's), wrongly viewed the evidence in the light most favorable to the moving parties (*i.e.*, Marcus and Jermaine), and inappropriately weighed the evidence. Among other things, Palmer's affidavit explains that his expenditures of money on behalf of SFH were unchanged from similar disbursements made by SFH in the past, when the company was managed by Charles Jr. (R. pp. 377-378, ¶¶ 23-26). Marcus testified that he had no problem with the way Charles Jr. ran the company. (R. p. 495 at p. 46, lines 8–15). This evidence, taken as true, defeats summary judgment. In other words, the question of whether Palmer "wrongfully expended monies belonging to SFH"[12] is a question of disputed fact, which makes summary judgment improper.

Because Jermaine and Marcus lack standing as derivative plaintiffs on behalf of a company in which they are not members, and because the circuit court failed to make necessary prerequisite findings, and because a scintilla of evidence exists to the contrary, this Court should reverse the circuit court's grant of summary judgment on "monies had and received."

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[12] (Order, R. p. 42).

V. Jermaine and Marcus are not "members" of a company entitled by statute to view company records, nor are they entitled to view Palmer's or the company's privileged communications with attorneys.

Finally, this Court should reverse the circuit court's error in holding that Jermaine and Marcus are entitled as members of SFH to view the records of the company, including communications between SFH and its attorneys pertaining to this litigation, *inter alia*. This ruling by the court was wrong for at least two reasons: (1) Jermaine and Marcus are not members of SFH, as discussed above, and they therefore are not entitled to view any records of the company, whatsoever; and (2) the court's order affirmatively requires Vaux Marscher Berglind, P.A. law firm to violate its attorney-client privilege.

Marcus and Jermaine argued that a member of a limited liability company is 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 Vaux Marscher Berglind to produce privileged documents, including but not limited to legal opinions given by Attorney Berglind to Palmer regarding membership interests. (R. p. 30-31; R. p. 598, lines 5-6; p. 599, lines 3-5; p. 604, lines 4-19; p. 605, line 13 - p. 606, line 6).

First, the circuit court based its Order Granting Motion to Compel Discovery on the incorrect premise that Marcus and Jermaine were members of SFH as a matter of law. *Id*. As discussed above, this was error, of law and/or fact. Because Jermaine and Marcus

are not members[13] of SFH, they have no right to invoke the Uniform LLC Act's provisions on a member's right to inspect records. This Court's analysis may therefore stop here.

However, *arguendo*, even if Jermaine and Marcus were lawful members of SFH, they are nonetheless not entitled to access to any information protected by the attorney-client privilege. The circuit court's error flowed from its incorrect belief that all members of an LLC are entitled to inspect all documents of the LLC,[14] including those protected by the attorney-client privilege. In fact, only manager(s) of the LLC (or the board of directors, depending on how the entity is structured) have the right to access such documents. (Otherwise, every LLC and similar entity could have its legal files, and other confidential materials, regularly rummaged through by any and all members of a corporation, at their whim.)

It is a fundamental principle of the legal system that communications between an attorney and his client are protected from disclosure. *See* Rule 1.6, S.C. Rules of Professional Conduct ("Confidentiality of Information," which states among other things that "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."). This privilege is so sacrosanct that a lawyer may only reveal confidential information in extreme circumstances, such as "to prevent reasonably certain death." *Id*. "The attorney-client privilege is based upon a public

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[13] Or, at a minimum, because there are disputed questions of fact as to their membership.

[14] The Uniform LLC Act is designed to give members access to certain records of the corporation, in certain instances. An additional reason that Marcus and Jermaine are not entitled to SFH's legal file is because the Operating Agreement itself identifies and defines the records that SFH must maintain, and those records are generally accounting and financial books and records. (Operating Agreement § 8.1) (R. p. 79).

policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." *Wilson v. Preston*, 378 S.C. 348, 662 S.E.2d 580, 585 (2008).

The circuit court wrongly disregarded arguments that SFH's privileged documents were protected, as were communications between the law firm and Palmer, both in his individual capacity and as manager of SFH. In South Carolina, the Rules of Professional Conduct make it clear that the privilege belongs to the client. *Id*. Furthermore, the Rules are equally clear that when an organization is the client, the attorney's duty is to the organization—and not to its individual constituents. Rule 1.13, S.C.R.P.C. ("Organization as Client"); *see also* Comment 7 (". . . the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) [*i.e.,* to prevent a violation of law] does not apply with respect to information relating to the lawyer's engagement by the organization to . . . defend the organization . . . against a claim . . . . This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.").

Importantly, South Carolina's Uniform LLC Act incorporates the principles of law and equity, which would include the doctrine of attorney-client privilege. S.C. Code § 33-44-104. Although South Carolina courts have not directly addressed the question of whether a member of a limited liability company has a right to access the company's otherwise privileged attorney-client communications, the privilege has been upheld in

similar circumstances. *See, e.g., Wilson,* 662 S.E.2d at 585 (holding that county council member did not have the right to review attorney-client privileged documents, because "the privilege belongs to the client County; and the Council, as a whole, is authorized to release that information and has to waive the privilege before an individual council member can review the privileged documents.").

Moreover, courts in general have found that individual members do not have the right to view a company's attorney-client privileged materials. This is because the attorney represents the organization, and not its members. Thus, the attorney must maintain in confidence communications with the organization (acting through its designated director, officer, or manager). *See, e.g., Commodity Futures Trading Commission v. Weintraub,* 471 U.S. 343, 105 S. Ct. 1986, 85 L.Ed.2d 372 (1985) (discussing which corporate actors have the right to waive the corporation's attorney-client privilege and noting that it is the manager who has this power, with regard to solvent corporations); *Milroy v. Hanson*, 875 F. Supp. 2d 646 (D. Neb. 1995) (a corporation has the right to assert the attorney-client privilege in litigation against one of its directors; rejecting the argument that the privilege evaporates in derivative suits); *Montgomery v. Etreppid Technologies, LLC,* 548 F. Supp. 2d 1175, 1186-1187 (D. Nev. 2008) (discussing at length the analysis behind its conclusion that constituents of the entity do not have a right to the corporation's communications with its attorney because "the corporation is the sole client. While the corporation can only communicate with its attorneys through human representatives, those representatives are communicating on behalf of the corporation, not on behalf of themselves as corporate managers or directors."); *see also Marketel Media,*

Inc. v. Mediapotamus, Inc., 5:13-CV-427-D, Order of June 11, 2015 (E.D. N.C. 2015) ("status as a shareholder and officer of Marketel does not entitle [plaintiff] to confidential attorney-client communications," which belong to the company and can be waived only by management).

This makes sense. Otherwise, any time there was litigation between a member and a company, the shareholder could obtain all of the corporation's privileged communications with its attorneys relevant to that ongoing litigation, simply by asking for them. This would strip the corporation of effective legal defense.

This Court should find that the lower court was wrong to find that Vaux Marscher Berglind, P.A. must surrender privileged materials to (disputed) members of a company that the law firm represents. Moreover, because the foundation of the circuit court's order compelling discovery was tainted by error as to Jermaine's and Marcus's alleged membership in SFH, this Court should reverse and deny Jermaine and Marcus access to confidential attorney-client materials belonging to a company of which they are not a part.

CONCLUSION

For the reasons set forth above, this Court should reverse the lower court, hold as a matter of law that Jermaine and Marcus are not members of SFH, and remand this case for trial.

Respectfully submitted,

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June 22, 2022
Charleston, South Carolina