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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh

Appellate Case No. 2021-000375
Opinion No. 2024-UP-194 – S.C. Ct. App. filed May 29, 2024

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

Respondents,

v.

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

Petitioners/Appellants,

and

Simmons Family Holdings, LLC, as a nominal Defendant.

RETURN TO PETITION FOR CERTIORARI

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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., in 2001. (R. p. 72); (R. p. 83). His son, Charles Simmons Jr., ("Junior") later became the sole member and manager of the Company. Unfortunately, Junior died in 2016. The crux of this action is whether Respondents—who are Junior's legally adotped son and grandson[2]—are members of the Company. 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). Petitioners are also Junior's children —do not dispute that Junior prepared and executed Amended Articles of Organization in 2015 adding Respondents as members. Rather, they argue that since Respondents cannot produce a signed share subscription

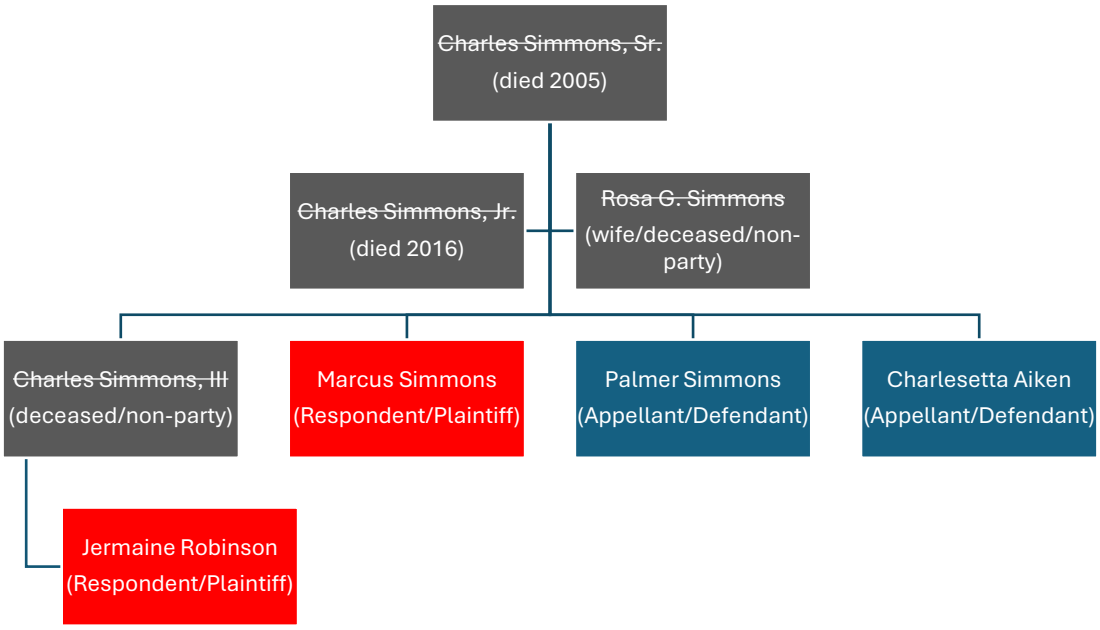
[1] This Discovery Order is not identified in the Notice of Appeal but was attached as an exhibit.

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

agreement into what was then a single member limited liability company, the addition of Respondents as members should be void. However, Petitioners' Answer in this lawsuit marks the first time they have taken this position and the evidence conclusively shows that Petitioners repeatedly acknowledged Respondents' membership in Probate Court filings, Company resolutions, contracts, tax returns and other documents. *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

The parties do not dispute 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 purportedly signed 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, an Inventory and Appraisement (the "Inventory") was filed with the Probate Court reflecting that at the time of his death on September 26, 2016, 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, Petitioner Palmer Simmons has assumed the role of Personal Representative of the Estate.

In order to transfer Junior's 1/3 interest from the Estate to the Trust, on June 30, 2016, the Respondents were presented with two documents presumably prepared at Petitioner Palmer Simmon's direction, by the law firm Vaux, Marscher & Berglind, P.C., which firm also represents Petitioners in this lawsuit. 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, Petitioners 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 includes the Company's 2017 Federal Tax Returns—prepared by Petitioner Palmer Simmons as Co-Manager—which identifies Respondents as members of the Company. (R. pp. 107-08). Additionally, a proposed resolution that Palmer also had prepared by 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 Petitioners 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 Petitioners, 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 Petitioner 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 Petitioner 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 dating back to Petitioners' appointment as Co-Managers. (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).

The "Summary Judgment Order"

On January 18, 2021, Petitioners 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 Petitioners' 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.

[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 "Discovery Order"

On January 21, 2021, Respondents filed a Motion to Compel Petitioners 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. Petitioners opposed this motion on the basis that Respondents were not members of the Company. (R. pp. 352-59). Petitioners 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 Petitioners' failure to provide a privilege log left them unable to evaluate the claim. (R. pp. 217-19). In response, Petitioners 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, Petitioners never submitted any documents or records for *in camera* review. Consequently, the trial court has never made any

[4] Petitioners 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.

ruling on the applicability of the attorney-client privilege. (R. at *id.*). Nonetheless, Petitioners pursue the instant appeal on the basis that the Discovery Order violates the attorney-client privilege.

PRIOR APPELLATE PROCEDURE

On May 29, 2024, the Court of Appeals issued Opinion No.: 2024-UP-194 affirming the trial court. Specifically, the Court of Appeals held that Summary Judgment in favor of Respondents was properly granted because Petitioners waived any right to demand strict compliance with the operating agreement, and in the alternative held there was no question of material fact concerning Respondents' membership in the Company. The Court of Appeals also affirmed the grant of partial summary judgment on Respondent's claim for money had and received. Finally, the Court of Appeals affirmed the trial court's discovery order as not immediately appealable.

ARGUMENT IN RETURN TO PETITION FOR CERTIORARI

None of the considerations relevant to granting certiorari are present here. *See* Rule 242(b)(1)-(5), SCACR (setting forth considerations such as: a novel question of law, a dissent from the Court of Appeals, where the decision of the Court of Appeals is in conflict with the decisions of this Court, where substantial constitutional questions are implicated, or where the Court of Appeals' decision on a federal question conflicts with the decisions of the U.S. Supreme Court).

Petitioners have mischaracterized the nature of this appeal and the effect of the trial court's ruling. Petitioners claim that the purpose of this suit is to obtain a ruling that Respondents are members of the Company "to the exclusion of their uncles, aunt, many cousins, brothers, and/or sisters." (Pet. for Cert. p. 3) (emphasis removed). Petitioners also claim that Respondents are

seeking to establish that Junior "bestow[ed] exclusive ownership interests only on two of his Grandchildren." (Pet for Cert p. 3). This is simply wrong. Respondents have only claimed to be 1/3 members. **Respondents have never claimed to be the sole members of the Company**.

Moreover, the trial court's order only confirms Respondents' have a membership interest. The order does not resolve the extent of Respondents' membership interest. This question is left to be settled at trial—but in no event will Respondents' interest exceed 2/3 collectively. Thus, Petitioners' claim that Respondents are seeking exclusive ownership is flatly wrong.

Similarly, there is no basis to support Petitioners' claim that Respondents are seeking to disenfranchise other members. Contrary to Petitioners' suggestion, to date, no evidence has been produced to suggest that any aunts, uncles, cousins, siblings or others have a claim to membership. However, to the extent such evidence does exist, those individuals remain free to intervene and assert those interests as part of the trial. Simply put, there is no substance to Petitioners' claim that the trial court's ruling will prejudice any (as yet) unidentified members of the Company. This Court should not be fooled by Petitioners' hollow claims.[5]

Finally, Petitioners assert it is "important" to their Petition that they are not claiming to be members. *See* (Pet. for Cert. p. 4) (stating "Importantly, [Petitioners] themselves do not claim to be members of [the Company]. Instead, [Petitioners] are defending this lawsuit on the basis that [Respondents] are <u>not</u> members, as a matter of law, based on non-compliance with the [] Operating Agreement.") (emphasis original). **However, this "important" point is simply false**. Petitioners—particularly Petitioner Palmer Simmons—have repeatedly claimed to be members.

[5] It should be noted that the Trust, which is believed to hold a membership in the Company, might include, as beneficiaries, the family members that Petitioners suggest are being disenfranchised. However, to date, Petitioners have refused to turn over a copy of the trust agreement as ordered by the circuit court. Therefore, whether any family member has an interest in the Company as a beneficiary of the Trust is known only to the Petitioners.

See (R. p. 377) (Affidavit of Petitioner Palmer swearing the Trust, himself, and Charlesetta were 1/3 members); *see also* (R. p. 590 ln. 10 – 592 ln. 15) (Petitioners' trial counsel asserting that Palmer was a member of the Company). The most "important" point about this case, is that the only thing that remains consistent is Petitioners' inconsistency.

These mischaracterizations aside, the subject Petition for Certiorari appears to present two re-occurring themes. First that the Court of Appeal's apparently invoked the concepts of waiver and estoppel *sua sponte,* and in doing so allegedly resolved disputed questions of fact about Respondents' membership status in the Company. The second, which is the heart of Petitioners' argument in this case boils down to the assertion that Respondents are not members because, according to Petitioners, there must be strict and absolute compliance with the terms of the operating agreement concerning addition of members. Alternatively, Petitioners claim that irrespective of the operating agreement, there is a question of fact concerning whether Respondents are members.

Assuming, for the sake of argument only, that Petitioners (who concede they are not members) have standing to enforce the terms of the operating agreement, Petitioners' argument overlooks some very fundamental points as set forth below.[6]

[6] Respondents have previously argued that Petitioners do not have standing to pursue their arguments. Respondents incorporate those arguments herein by reference. *See* Resp. Mot. to Dismiss Appeal – Filed Sept. 2, 2021; *and* Resp. Reply to Mot. to Dismiss Appeal – Filed Oct 7, 2021.

I. The concepts of waiver and estoppel are not outside the Court of Appeal's jurisdiction, and it did not misapply or improperly invoke concepts as alleged by Petitioners.[7]

Petitioners first two questions concern their complaints that the issues of waiver/estoppel/ratification (or whatever other title may be given to these equitable concepts) were not before the Court of Appeals. This is simply wrong and plainly misapprehends the trial court's ruling. In the trial court, Petitioners claimed that they were entitled to summary judgment, because Respondents were not members for failure to strictly comply with the terms of the operating agreement. The trial court rejected this argument, finding that strict compliance with the operating agreement was not required, because "the record reflects that [Petitioners] consistently acknowledged that [Respondents] were members of SFH throughout the four years preceding this litigation." (R. p. 37). The Court then identifies a litany of undisputed documentary evidence acknowledging Respondents as members. (*Id.*). While the trial court did not explicitly use the term "waiver" this does not change the plain effect of the trial court's ruling was that the Petitioners did not have the right to deny or object to Respondents' membership based on a perceived lack of technical compliance with the operating agreement.

Upon review of the record, the Court of Appeals affirmed for the same reason. Rejecting Petitioners' claim that strict compliance was necessary because, "as Co-Managers of [the Company] and Palmer, in his capacity as personal representative of [Junior's] estate and trust of the Trust, operated as if [Respondents] were members of the [Company] and failed to challenge the validity of the of their membership. . ." (Opinion at p. 1). Thus, Petitioners' contention that they waived, or were otherwise estopped from demanding strict compliance were not before the court is simply wrong.

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[7] Respondents respond to issues I & II of the Petition for Certiorari collectively.

Not only did the Court of Appeals affirm for the same reasons as the trial court, but it is plain that the concepts of estoppel and waiver formed the basis for Respondents' arguments made in their memoranda and in oral argument. In Respondents' memorandum in support of summary judgment, they explicitly argued that because Petitioners consistently recognized Respondents as members of the Company "[Petitioners] should [therefore] be **estopped** from asserting otherwise." Respondents also argued that Petitioners had "**waived** or consented [to]" to the way in which Respondents were added as members. (R. p. 225) (emphasis added). It borders incredulity for Petitioners to suggest that these issues were not properly before the Court when they themselves acknowledged this was the issue in their own memorandum in reply to Respondents' motion for summary judgement. *See* (R. p. 352) (Petitioners characterizing Respondents' argument that "the requirements for addition of members have been **waived**.") (emphasis added).

"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). Moreover, "[t]he **appellate court may affirm** any ruling, order, decision or judgment **upon any ground(s) appearing in the Record** on Appeal." Rule 220(c), SCACR (emphasis added); *see also, Covil Corp. v. Pa. Nat'l Mut. Cas. Ins. Co.*, 436 S.C. 85, 94, 870 S.E.2d 191, 196 (Ct. App. 2022) (this Court finding waiver to be a reason appearing in the record that served as the basis to affirm the trial court's grant of summary judgment).

Therefore, Petitioners' assertion that this issue was beyond the bounds of the Court of Appeals' jurisdiction is plainly and demonstrably wrong.

II. The Court of Appeals did not ignore the terms of the operating agreement.

As a threshold matter, the specific terms that Petitioners seek to enforce here were not ignored. As explained above, Petitioners consistently acknowledged Respondents as members, waived any right they had to enforce these terms, and were estopped from relying on these terms as dispositive of the question of Respondents' membership status. Further, if those terms were essential, it was incumbent on the Petitioners, as the Co-Managers of the Company, to present Respondents with the described subscription documents. However, assuming for argument only, that this waiver did not occur, the outcome remains the same.

Petitioners have explained that "the heart" of their argument is that any effort to add members that fails to comply with the ministerial requirements of Section 3.1 of the Operating agreement is void. (App. Br. pp. 13-15): (Resp. MSJ p. 5) (describing the premise "at the heart of" their motion for summary judgment). Petitioners would have this Court believe that Junior, as the sole member and manager of the Company, "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 assertion rests on the incorrect assumption that the terms of an operating agreement are permanent and immune from any change or amendment. Both the plain language of the operating agreement and the law of South Carolina, would permit Junior to unilaterally amend the operating agreement to dispense with any ministerial requirements for adding members. *See* (Resp. Br. pp. 11-14)

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)).

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. He did not need to have a meeting with himself in the mirror to evidence some consent to add Respondents as members. Because there was no impediment to his unilateral action, it follows that whether the Amended Articles served to add Respondents as members is simply a question of whether Junior *intended* to add Respondents as members. Plainly, the Amended Articles (which were admittedly prepared, executed, and recorded by Junior with the stated purpose of adding Respondents as members) evidence this intent. Petitioners do not deny Junior intended to add Respondents as members, rather they seek to have that intent frustrated by citing their own failure to demand technical compliance with Section 3.1. However, because Junior was free to modify the operating agreement as he wished, including dispensing with the formalities of Section 3.1, Petitioners' reasoning is precisely backward.[8] Juniors intent must prevail over the ministerial technicalities, particularly when the adherence with those technicalities rested squarely on the Company's Co-Managers appointed coincidently via the same Amended Articles, namely Petitioners. To the extent Junior acted in the absence of those ministerial technicalities, his filing of the Amended Articles must be deemed sufficient evidence of an intent to waive those technicalities. *Accord Jones v. Builders Inv. Grp., LLC,* 415 S.C. 321, 328, 781 S.E.2d 737, 741 (Ct. App. 2015) (the "cardinal rule" of interpreting an operating agreement is "to ascertain and give legal effect to the

[8] 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. p. 74).

parties' intentions"). This is particularly true when, as here, the plain language of the operating agreement demonstrates Petitioners have waived their objection to the means by which Junior added Respondents as members.

Further, Petitioners argument on this point conveniently focuses only on a single provision of the operating agreement regarding the ministerial requirements for addition of members. Not surprisingly, Petitioners ignore that even if the means of adding Respondents as members were improper (which they were not) the plain language of Sections 8.7 and 5.3 of the operating agreement nonetheless precluded Petitioners 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 Petitioners also became Co-Managers), Section 8.7 requires that Petitioners, 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 Petitioners first raised any claim that Respondents were not members. Therefore, by failing to timely complain, the plain language of the operating agreement dictates that Petitioners have waived their objection to Respondents' addition as members.

This is further supported by the fact that Petitioners 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).

It is not disputed that Petitioners prepared and executed both the Resolution and the Assignment Agreement to transfer the Estate's 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 Petitioners 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 Petitioners—*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 Petitioners waived their claim under the plain language of Section 8.2 but Petitioners 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 and that such findings are supported by the plain language of the operating agreement.

III. There is no material question of fact concerning Respondents' membership in the Company.

Petitioners further assert the Court of Appeals erred in affirming the grant of summary judgment because there is a disputed question of fact concerning Respondents' membership status.

Specifically, Petitioners point to two pieces of evidence—the operating agreement and the deposition testimony of Junior—which Petitioners contend conflict with the finding that Respondents are members. (Pet. for Cert. pp. 16-17).

As a threshold point, Petitioners have waived the right to claim there is a disputed question of fact concerning Respondents' membership because Petitioners conceded to the trial court there was no question of material fact on this issue. Petitioners conveniently overlook that this case involved cross-motions for summary judgment. Petitioners filed for summary judgement seeking a declaration that Respondents are *not* members of the Company. Meanwhile Respondents filed summary judgement asserting that they *are* members of the Company. This is significant, 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).

Petitioners expressly conceded that there was no question of fact in their motion for summary judgment, stating: "Because the [Respondents] are unable to demonstrate the existence of any indication that their inclusion as members of [the company] is compliant with the terms of the operating agreement, **there is no genuine dispute of material fact as to whether [Respondents] are members of [the company]**." (R. p. 196) (emphasis added). Yet now, Petitioners want this ignored.

Petitioners cannot have it both ways. Either Respondents are members, or they are not. Petitioners cannot claim that they are entitled to summary judgment because there is no question of material fact, while simultaneously asserting there is a question of material fact. Yet Petitioners' argument boils down to precisely this illogical and plural assertion. This flaw poisons all aspects

of Petitioners' argument and demonstrates why this Court should deny this petition. *See also* (Resp. Br. pp. 15-24).

This flaw aside, the terms of the operating agreement and the deposition testimony of Junior do not create a genuine question of material fact sufficient to defeat summary judgment.

As to the terms of the operating agreement, this does not present a question of fact. *See e.g., South Carolina Dept. of Natural Resources v. Town of McClellanville,* 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001) (interpretation of a contract is a question of law). Whether the terms that Petitioners rely on concerning ministerial requirements apply to the question of Respondents membership status is an issue of law. *Id.* Thus, this does not create a question of fact.

Finally, Petitioners point to an excerpt from a deposition of Charles, in an unrelated lawsuit. This testimony was elicited while Junior was in hospice care, under mediation, and concerns a single *but compound* question:

> 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).

There are a number of reasons why this testimony does not create a material question of fact sufficient to defeat summary judgment.

First the evidence is inadmissible hearsay. *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."); *see also* Rule 802, SCRE (providing that hearsay is inadmissible unless it falls within the scope of an exception).

Petitioners do not dispute this evidence is hearsay, but (in an abandoned argument)[9] suggested this statement falls within the Rule 803(3) exception regarding mental, emotional, or physical condition as Appellant suggested to the Court of Appeals. The exception contemplated by Rule 803(3) plainly 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 Petitioners 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 not made in response to the question: "Who are the officers and members **now**?" (R. p. 498 at p. 10, lines 3-10). Plainly this question does not inquire of Junior's intent for the future. Although it is unclear due to the conclusory nature of Petitioners' argument, presumably Petitioners 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

[9] Petitioners' argument on this point at both the trial court and at the Court of Appeals was limited to a single conclusory sentence, and thus abandoned. *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).

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*).

Second, even in the light most favorable to Petitioners, 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. at *id.*). Viewed in the light most favorable to Petitioners, 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 officers) is not inconsistent with this deposition evidence.

At best, Junior's deposition, taken when he was suffering with terminal cancer, suggests he may have been confused as to who the members and officers were, mistakenly identifying Petitioners as members and officers. However, as Petitioners articulated to the trial court, their argument is that despite the Amended Articles and the Probate filings to the contrary, the Trust is the sole member of the Company. (Jan 18, 2021 – App. MSJ p. 4) (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* (Assignment & Transfer) (Petitioners acknowledging Respondents and the Trust to be members and that Charlesetta and Palmer are managers but not members); *but see* (Petition) (Palmer, as personal representative of the Estate asserting the Estate is the sole member which would preclude Charlesetta and Palmer as members). Further, neither Charlesetta or Palmer have produced any evidence of their own compliance with the technicalities of the operating agreement. Thus, it is incongruous for Petitioners 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.

Petitioners are not permitted to fabricate or manufacture questions of fact simply by contradicting themselves or pointing to their own inconsistencies. *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). Yet this single piece of deposition testimony is contradicted by Petitioners' position and testimony at every turn.

For example, *after* the commencement of this lawsuit, the Petitioner Palmer Simmons, as trustee of the Trust, filed a petition with the Probate Court, under oath, asserting that Junior was the sole member of the Company at the time of his death. (R. p. 328). Petitioners nevertheless devote pages of their Petition to Junior's deposition testimony which Petitioners allege to demonstrate the wholly inconsistent premise that the Company had four members—*i.e.*, himself, his wife, and the Petitioners (Palmer and Charlesetta). (R. p. 498 at p. 10, ln. 3-10). Both of these assertion cannot be true.

It's boggling how Petitioners can suggest this deposition testimony has any probative value when it is incapable of being reconciled with their own statements and actions. *See* (R. p. 328) (Petitioners' filed Probate Court petition asserting Junior's estate to be the sole member of the Company, which is which is inconsistent with Junior's alleged deposition testimony about alleged multiple members); *contra* (R. pp. 107-08) (the Company's tax returns, signed under oath by Petitioner Palmer, and identifying Respondents as members, which is also inconsistent with Junior's alleged deposition testimony, and inconsistent with the Probate Court filing); *and* (R. pp. 310-11 & R. pp. 96-7) (assignment agreements and resolutions signed by Petitioner Palmer and

recognizing Respondents as members, which is also inconsistent with the Probate filing); *contra* (R. p. 377) (Affidavit of Petitioner Palmer swearing the Trust, himself, and Charlesetta were 1/3 members, a position which is still further inconsistent with Junior's alleged deposition testimony, as well as the sworn tax returns, and Palmer's probate filing); *see also* (R. p. 590 ln. 10 – 592 ln. 15) (Petitioners' trial counsel asserting that Palmer was a member of the company which is contrary to Petitioner Palmer's affidavit and his Probate Court filing both of which asserted that Juniors' estate was the sole member).

Nor can Petitioners' reliance on this deposition excerpt be reconciled with Petitioners statement *in this very petition* wherein they reiterate "[i]mportantly, [Petitioners] do not claim to be members of SFH." (Pet. for Cert. p. 4).

The bottom line is that the facts—at least as Petitioners want this Court to see them—apparently change with the wind depending on what suits them best. The only undisputed fact here is that Appellant Palmer had no qualms with lying under oath or making contradictory representations to the trial court regarding Respondents' membership, Respondent Marcus' adoptive status, or the fact that Respondents are somehow seeking "exclusive ownership" to "the exclusion of their [family members]." (Pet. for Cert. p. 3). Petitioners want this Court to question the overwhelming reliable evidence supporting Respondents' claim of membership based on the arguable hearsay testimony, of a sick and dying man in an out-of-context deposition excerpt. In actuality, the only question this deposition testimony creates is: "How many times have Petitioners told a contrary story?" Therefore, this Court should deny the instant Petition.

IV. The Court of Appeals properly dismissed the appeal of the trial court's order compelling Petitioners' discovery responses.

Finally, the Court of Appeals properly dismissed Petitioners' appeal of the trial court's discovery order as interlocutory. Petitioners do not seem to dispute that the discovery order is

interlocutory. Instead, they argue the Court of Appeals should nonetheless reverse the order because it mandates the disclosure of privileged information. However, the fatal flaw in this argument is that Petitioners have neither identified nor logged any purportedly privileged information as required by the law. *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."); *and In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 168, 829 S.E.2d 707, 712 (2019) ("[T]he party claiming the privilege has the burden of establishing the confidential nature of the communication, including the absence of waiver.") (all emphasis added).

Having failed to offer any basis that the discovery order implicates any privileged information, Petitioners' bald invocation of privilege is purely hypothetical and without any evidentiary support. Simply put, there is no basis to assume the required discovery will disclose any privileged information because if any such material existed, it would have been logged as required by law. *See* (Resp. Br. pp. 24-31).

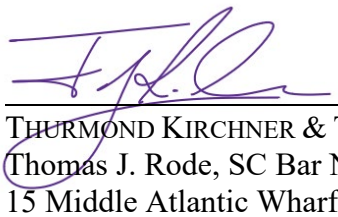
Moreover, Petitioners declined to provide any purportedly privileged information to the trial court *in camera* when given the opportunity. Accordingly, this issue of whether the information subject to the order was privileged was neither raised to nor ruled on by the trial court. As a result, Petitioners' argument is neither ripe nor preserved. *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); *see also* (Resp. Br.

pp. 25-27). Therefore, even if this Court were to entertain the Petitioners' interlocutory appeal (which it should not) there is no basis in the record on which it could reverse the trial court's ruling.

CONCLUSION

For the reasons set forth herein, this Court should deny the instant Petition for Writ of Certiorari.

Respectfully submitted,



THURMOND KIRCHNER & TIMBES, P.A.
Thomas J. Rode, SC Bar No. 77480
15 Middle Atlantic Wharf
Charleston, SC 29401
T: 843-937-8000
F: 843-937-4200
Attorneys for the Respondents

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh

Appellate Case No. 2021-000375
Opinion No. 2024-UP-194 – S.C. Ct. App. filed May 29, 2024

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

Respondents,

v.

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

Petitioners/Appellants,

and

Simmons Family Holdings, LLC, as a nominal Defendant.

PROOF OF SERVICE

The undersigned certifies that she served a copy of the foregoing **Respondents' Return to Petition for Certiorari** to all counsel of record on December 23, 2024, by mailing a copy of same, electronically or with proper postage affixed thereto, as follows:

Ainsley F. Tillman
Ian S. Ford
Ford Wallace Thomson LLC
715 King Street
Charleston, SC 29403
Ainsley.tillman@fordwallace.com
Ian.ford@fordwallace.com
Attorneys for Appellants

Kaitlyn Nobles

Kaitlyn Nobles, Paralegal