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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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

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Greg Marcus Simmons and Jermaine Robinson, individually and derivatively on behalf of Simmons Family Holdings, LLC……..…….……..…..Respondents

vs.

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 all of whom are defendants and Simmons Family Holdings LLC, as a nominal defendant,

of whom,

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 are ……. Appellants

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**Respondents' Reply in Support of Respondents' Motion to Dismiss Appeal**

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COME NOW the Respondents, pursuant to Rule 240, SCACR, in reply to Appellants' Return to Respondents' Motion to Dismiss.

REINTRODUCTION

Respondents' Motion to Dismiss this interlocutory appeal rests on the premise that *appellate standing* cannot be determined because there remains an unanswered factual question of whether Appellants have an interest in Simmons Family Holdings, LLC (the "Company"). As a

result, regardless of whether this Court affirms or reverses the lower court, this case must still proceed to trial. To the extent Appellants (or any party) are "aggrieved" at the conclusion of the trial, appeal could be had at that time. As it stands, this Court cannot issue an order that offers final resolution of the disputed issues in this case, and therefore, this interlocutory appeal should be dismissed because it is not yet appealable.

## ARGUMENT IN REPLY

This appeal concerns two distinct interlocutory orders; (1) an order denying cross-motions for summary judgment and granting partial summary judgment (the "Partial Summary Judgment Order"); and (2) a discovery order (the "Discovery Order") concerning the production of certain business records of the Company.

The Partial Summary Judgment Order found that Respondents are members of the Company albeit the amount of that interest is an issue that remains to be determined at trial. On the other hand, the Discovery Order compels the Company to produce certain business records, which Appellants contend through this appeal would violate *the Company's* attorney-client privilege. *The Company*—which is a party to this suit—would likely have appellate standing. However, *the Company has not appealed.* The fundamental problem is that Appellants are improperly attempting to assert the rights of the Company through this appeal. Regardless, neither of these interlocutory orders are presently appealable.

### I. The Partial Summary Judgment Order is not yet appealable.

Despite Appellants' contention, Respondents do not argue this Order is *never* appealable. Instead, this Order is *not yet* appealable because there remains an unanswered question of fact as to whether Appellants have an interest in the Company. Until this factual question has been resolved, there is no basis for *appellate standing.*

Appellants' reliance on the rules of issue preservation is misplaced and demonstrates they are conflating *appellate standing* with their standing in the trial court. The notion that *appellate standing* need not be raised at trial is self-evident. Moreover, Appellants misapprehend that the rules of issue preservation operate to constrain an *appellant's* arguments on appeal not a *respondent's* arguments. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules [of issue preservation], a respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.") (emphasis added). Thus, the rules of issue preservation do nothing to support Appellants' claim that they have appellate standing. [1]

Rule, 201, SCACR, constricts *appellate standing* to those parties aggrieved by an order. As previously explained, whether Appellants have been aggrieved requires them to have an interest in the Company. Resolution of this factual inquiry, while not necessary for Appellants to defend the suit in the circuit court (*See* Footnote 1, *supra)*, is nonetheless an indispensable requirement for them to prosecute this appeal. Until that occurs, Appellants standing to pursue this appeal is hypothetical.

Other than their misplaced reliance on the rules of issue preservation, Appellants offer the summary conclusion that "of course" they have standing because they would "benefit from this

[1] Appellants' trial court standing is a non-issue. To the extent they suggest otherwise this is wrong. By definition, "[s]tanding refers to a party's right to make a legal claim" and is a "fundamental requirement for instituting an action." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219-20, 746 S.E.2d 478, 480 (Ct. App. 2013) (citations omitted). In this lawsuit Appellants are the defendants and did not assert any counterclaims against Respondents. The law does not impose a standing requirement to *defend* a claim, only to *prosecute* a claim. *See Brock v. Bennett,* 313 S.C. 513, 517, 443 S.E.2d 409, 411 (Ct. App. 1994) ("to *prosecute* an action, *a plaintiff* must have [standing].") (emphasis added). Therefore, Appellants' standing was not an issue that would have, or could have, been raised to the trial court.

Court's reversal of the circuit court's error." (Applts. Return, p. 7). However, Appellants offer no explanation of how. *Contra Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013) (generally the party requiring standing has the burden of demonstrating it).[2] In arguing the Partial Summary Judgment Order is immediately appealable under S.C. Code Ann. § 14-3-330, Appellants suggest they are aggrieved because this Order resolved their "key defense" that Respondents are not members of the Company. However, this overlooks that Respondents' membership is only germane to Appellants' affirmative defense No. 9 which asserts: "The [Respondents] lack standing to bring this action." *See* (Applts. Answer to 2d Amend. Complaint at p. 12, ¶ 9).

Appellants moved for and were denied summary judgment on this "key defense," which (if true) would have entitled them to judgment as a matter of law because it would mean Respondents lacked standing to pursue their claims. *See* (App. Br. pp. 27) (Section (IV)(a) entitled "[Respondents] lack derivative *standing*") (emphasis added). Simply put, whether Appellants were entitled to summary judgment on their defense would require the circuit court to determine whether Respondents are members. Now Appellants seek to appeal that very issue which would serve to *deny* their Motion for Summary Judgement. This demonstrates why the Partial Summary Judgment

[2] Appellants assert that Respondents attempt to exploit a typing error made in Appellants' answer wherein they deny any membership in the Company. (Applts. Return at p. 5, n. 2). Appellants have submitted, for the first time, an affidavit attesting to this typographical error. Practically, this simply creates yet another factual question. *See generally, Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc.,* 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001) ("It is well settled that parties are judicially bound by their pleadings.") However, typing error or not, this misses the point. The pleadings are not evidence. Regardless of the allegations of the pleadings, whether Appellants have a membership interest in the Company is a question of fact which this Court has no authority to resolve. This is the fundamental problem here. The circuit court must address these factual issues *first,* and only after that can Appellants appeal if they are aggrieved. Until there has been a ruling on these factual issues, there is simply no way for this Court to know its opinion is anything more than advisory.

Order—despite its title suggesting it was a partial grant of Respondents' motion—had the substantive effect of *denying* Appellants' Motion for Summary Judgment. This bolsters Respondents' argument that the Partial Summary Judgment Order is not immediately appealable. *See e.g., Olson v. Faculty House of Carolina, Inc*., 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003) (stating the Supreme Court has "repeatedly held that the denial of summary judgment is not immediately appealable"); *see* (Resp. Mot. to Dismiss at pp. 7-11).[3]

**II. The Discovery Order is not yet appealable.**

Appellants argue the "discovery order is a wolf in discovery clothes." (Applts. Return at p. 14). Presumably, Appellants use this analogy to suggest that appealability turns on the substance of the order and not its title (or the "clothes" it wears). First this seems at odds with Appellants' argument concerning the Partial Summary Judgment Order which focused largely on the title and not effect of that order. However, this inconsistency aside, the substance of the Discovery Order compels *the Company* to produce certain information. The relevant statutory law relied on by the circuit court, codified at S.C. Code Ann. § 33-44-408, places the obligation of production on *the Company*, not Appellants.

Similarly, Appellants' opposition to the Discovery Order is grounded on a claim of attorney-client privilege. However, even assuming the Discovery Order implicates the attorney-client privilege, that privilege belongs to *the Company*—and has been waived. *See* (Resp. Mot. to

[3] Appellants argue that the law of the case doctrine supports appealability of the Partial Summary Judgment Order because the failure to appeal now would render this ruling the law of the case. However, the law does not support this claim. Even where a party might otherwise be entitled to take an interlocutory appeal, they are not *required* to, and the ruling does not become the law of the case where the party elects to wait until the end of the case to appeal. *See e.g., Link v. Sch. Dist. of Pickens Cty.*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990) (the Supreme Court explaining that although an appellant could have taken interlocutory appeal under Section 14-3-330, he was also "entitled . . . to wait until final judgment to appeal the summary judgment ruling against him.").

Dismiss, at pp 12-13). Therefore, and waiver notwithstanding, even if the Discovery Order is erroneous (which it is not), the right of appeal would belong to *the Company*, not Appellants. *See Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589-90 (Ct. App. 2001) ("A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests.").

The plain and unavoidable problem here is that although the Company is a party to the underlying suit, the *Company did not appeal* the trial court's interlocutory orders. Rather than explaining how they are aggrieved by the Discovery Order, Appellants simply assume this order is appealable because it is joined with their purported appeal of the Partial Summary Judgment Order. Even if the Partial Summary Judgment Order is appealable (which it is not), that does not give Appellants the ability to assert rights to which do not belong to them. *Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589-90 (*supra*).

## CONCLUSION

For the reasons above, this instant appeal should be dismissed. The case should proceed to trial, whereupon all the factual issues necessary for meaningful and effective appellate review can be resolved, and after the trial, appeal may be had by any aggrieved party.

[signature to follow]

Respectfully submitted,

s/TJ Rode
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and

Simmons Family Holdings, LLC, as a nominal Defendant.

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## PROOF OF SERVICE

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The undersigned certifies that she served a copy of the foregoing **Respondents' Reply in Support of Respondents' Motion to Dismiss Appeal** to all counsel of record on October 7, 2021, by mailing a copy of same, electronically or with proper postage affixed thereto, as follows:

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