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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' INTIAL REPLY BRIEF

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IN REPLY

The key difference between Respondents' and Appellants' arguments? Alleged facts versus undisputed law. Respondents argue that they are members of the company because their alleged, disputed *facts* support their membership. This argument may be appropriate for trial, but not for summary judgment. The circuit court was wrong to cobble together disputed facts to support the legal conclusion that Respondents are members of the Company. From this improper conclusion sprang each and every ruling that should be reversed by this Court. In contrast, Appellants' argument is based on the clear language of the Operating Agreement, and it may be decided by this Court as a matter of law.

AS TO RESPONDENTS' RENEWED MOTION TO DISMISS

At the outset, this Court should deny Respondents' renewed motion to dismiss this appeal, for all the reasons set forth in Appellants' opposition to that motion, filed with this Court on October 1, 2021, and incorporated herein. This issue has already been settled by this Court, which denied the motion. In a nutshell, Respondents have renewed their motion based on the same argument that Appellants "have no standing to pursue this appeal," purportedly because Appellants have no interest in the Company. (Return, p. 8). This argument is wrong for a slew of reasons, already elaborated on in prior filings by Appellants, including because Appellants are <u>parties</u> to this action, against whom substantive rulings have been rendered on claims against them, and as to their key defenses, and they therefore have the statutory right to appeal. (*See* Appellants' Return to Respondents' Motion to Dismiss, filed Oct. 1, 2021).

However, if the Court wishes to dismiss this appeal based on the premise behind Respondents' argument on pp. 7-8 of their brief, then it necessarily follows that **this entire**

lawsuit should also be dismissed for lack of standing of *any* party to the case. Respondents' renewed motion to dismiss is based on the "good for the goose/good for the gander" adage. Respondents claim that if they are not themselves members of the Company, then no one in this lawsuit is a member of the Company. And, hey, that is actually correct. **No one in this lawsuit is a member of the Company**.[1] That is the thrust of Appellants' appeal: the circuit court was wrong to grant its declaratory summary judgment, finding Respondents to be members of the Company. Respondents are not members of the Company because, as a matter of law, the unambiguous Operating Agreement controls the Company, and it controls the admission of members to the Company. Because the Operating Agreement was never complied with, Respondents are not members. This is so, as a matter of law, and no amount of IRS filings or probate documents can change this necessary legal outcome. Because Respondents are not members of the Company, every one of their alleged derivative claims on behalf of a company in which they have no membership also fails.

STANDARD OF REVIEW

Respondents are wrong about the standard of review, and this Court should instead adhere to the standards as set forth in Appellants' Brief.

First, Respondents state—inaccurately—that Appellants do not claim that the question of whether Respondents are members of the Company can be decided as a matter of law; this is wrong: it can be, and it should be. The Operating Agreement is an unambiguous contract, and the construction of clear and unambiguous contracts is a question

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[1] Charles Junior's membership passed into his estate upon his death. However, the membership remains in a procedural "limbo." The Estate has filed a Petition for Subsequent Administration with the probate court, citing this litigation and arguing that the Estate properly should hold a 100% interest in the company. (R. p. _, Supp. Mem. in Support of MSJ, Ex., R. p. __). That probate action has been stayed, pending the outcome of this litigation.

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."). Appellants absolutely want a ruling as a matter of law based on the Operating Agreement's clear provisions.

The problem is that—while **Appellants** properly based their motion for summary judgment on a strictly legal question (*i.e.,* the construction of the unambiguous Operating Agreement)—**Respondents'** motion for summary judgment was based on fact-centric arguments,[2] and those facts were disputed. The summary judgment standard is not just a handful of meaningless words to be recited by rote, and then set aside or ignored. Instead, it arises out of the requirement in Rule 56 of the South Carolina Rules of Civil Procedure that judgment may be granted only as a matter of law, only when there is "no genuine issue as to any material fact." Rule 56(c), SCRCP. The rule, in turn, has its basis in the right to a trial on the facts. *See* Rule 38, SCRCP.

Respondents wrongly argue that this Court should ignore disputed facts (or—worse—construe the disputed facts in Respondents' favor) simply because the parties each had filed a motion for summary judgment, and the S.C. Supreme Court in *Wiegand v. United States Auto. Ass'n*. held that it would decide cross-motions on the same issue as a matter of law. 391 S.C. 159, 705 S.E.2d 432 (2011). This argument by Respondents ignores that, unlike

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[2] Respondents did not base their motion for summary judgment on the construction of the unambiguous Operating Agreement, which could be decided as a matter of law. Instead, Respondents set forth four pages of "facts" which they claimed were "undisputed" and argued that those "facts" compelled summary judgment. (*See* Pl. Mem. in Supp., R. pp. __). Appellants submitted factual evidence in opposition to Respondents' motion, demonstrating questions of material fact. (*See* Mem. in Opp., R. p. __, with its exhibits including an "Affidavit in Opposition" and numerous excerpts from deposition transcripts) (and arguing that **"The vast majority of the Plaintiffs' 'Material Facts Not in Dispute' are disputed."**) (emphasis added). Under the rules of civil procedure, Appellants' evidence in opposition should have been more than sufficient to withstand summary judgment.

in *Wiegand*, the motions here were not true "cross-motions" based on the same question of law. Instead, the parties here sought judgment on different causes of action, for different reasons, and according to different facts (which were largely in dispute).

Wiegand's standard for cross-motions for summary judgment only applies where the parties each have asked the Court to answer the same question of law. *Id*. In *Wiegand*, the case before the court concerned the question of whether an insurance form complied with statutory requirements, which is indeed a question of law. *Wiegand*, 391 S.C. 159, 705 S.E.2d 432, *citing Grinnell Corp. v. Wood*, 389 S.C. 350, 357 n.3, 698 S.E.2d 796, 799 n.3 (2010). The *Wiegand* parties were not arguing over facts, and none were in dispute. Instead, they both asked the Court to construe an unambiguous statute and an unambiguous form document. *Id*. Hence, the *Wiegand* Court properly described the standard for cross-motions on the same question of law.

The *Wiegand* case cannot and should not be interpreted to eviscerate Rule 56 of the South Carolina Rules of Civil Procedure (which does not permit a court to grant summary judgment unless the facts are undisputed), nor the right of a party to have a jury decide questions of fact. *See* Rule 38, SCRCP (right to jury trial "shall be preserved to the parties inviolate"). Where (as with Respondents' argument here) a summary judgment motion springs from factual (rather than legal) arguments, then the motion should be denied. The Rules of Civil Procedure are designed to ensure that parties are given a trial on disputed facts. No amount of conflicting affidavits and snippets of deposition testimony permit the circuit court to weigh evidence and circumvent a trial, in which witnesses and parties appear in

person to be cross-examined under oath. Therefore, where a party's motion for summary judgment hinges on disputed material facts, it must be denied.[3]

As to facts, the applicable standard is that "in 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). 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.

The proper, differing, standards of review are why Appellants' Brief has five sections, with alternative arguments. This Court has the power to construe the unambiguous Operating Agreement as a matter of law, and it should do so to find that Respondents are not members of the company. (Appellants' Issues I and IV). Alternatively, Respondents' arguments on summary judgment hinged on disputed facts, and the lower court therefore should have denied Respondents' motion (Appellants' Issues II, III, and IV).

ARGUMENTS IN REPLY

For the reasons below and in Appellants' brief, this Court should reverse the circuit court's rulings, construe the Operating Agreement as a matter of law, and remand for trial on the facts.

I. Respondents are not members of Simmons Family Holdings LLC as a matter of law.

Respondents are not members of the Company as a matter of law. This is a double entendre: (1) as a matter of law, Respondents are not members; alternatively, (2) questions of

[3] Put another way: simply because Appellants first filed a motion for summary judgment asking the court to construe an unambiguous contract, as a matter of law, does not and should not mean that Appellants somehow "conceded" (in advance) the facts later alleged in the subsequently-filed "cross-motion" by Respondents.

fact preclude judgment being rendered as a matter of law.

A. The Operating Agreement's express requirements control the admission into the Company of additional members, and there is no dispute those requirements were not met.

Respondents' case depends on (disputed) parol evidence, which evidence is inapplicable because the governing contract is clear and unambiguous. Respondents do not argue that the Operating Agreement is unclear or ambiguous, and nor do they contend that they complied with it. Their claim to be members is therefore defeated as a matter of law by the mandatory language governing admission of members, which was not followed:[4]

> 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 Members **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 **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 representations and warranties required of new Members are true and correct with respect to the new Member.

(R. p. __ , Art. III, Members, § 3.1 Additional Members) (emphasis added). Here, there is no evidence that any memberships were created or issued. There are no terms of admission, nor any other document specifying the percentage of profit and loss allocable to Respondents. There are no terms indicating the amount of Capital Contribution to be paid by the Respondents. Respondents never executed a document indicating their agreement to be

[4] In their Brief, Respondents tellingly omit the first several sentences of this provision in an attempt to incorrectly characterize the section as purely ministerial. (Resp. Br. p. 10).

bound by the terms of the Operating Agreement. There was never an amendment to the Operating Agreement which would reflect the existence of at least two members. Respondents never signed a document verifying the truth or correctness of the representations and warranties required of them as new members. Respondents never even provided to the Company their notice address. It is undisputed that none of these required actions were taken.

The Operating Agreement's numerous, specific requirements for the admission of new members are not discretionary. The use of words such as "shall" and "must" indicate, as a matter of law, that the terms are mandatory. *Southern Atl. Fin. Serv. v. Middleton*, 356 S.C. 444, 590 S.E.2d 27 (2003), *citing 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); *see also Ex Parte Tolbert*, 206 S.C. 300, 34 S.E.2d 49 (1945) ("Taken literally, the word 'shall' is mandatory."). The Operating Agreement governs the relationship between the Company, its manager, and its members. *Levy v. Carolinian, LLC*, 410 S.C. 140, 763 S.E.2d 594, 597 (2014) ("The operating agreement is the essential contract that governs the affairs of an LLC."). Its terms make clear that it was the intent of the parties to require that specified affirmative actions be taken to admit new members: the Operating Agreement would need to be amended to reflect multiple members and their relationship and obligations to the Company; there would need to be some Capital Contribution made; there would need to be terms specifying the percentage of net profit and loss to be allocated to any new member. None of the "documentary evidence" asserted by the Respondents meets, or even touches on, these mandatory terms. **Thus, the failure of Respondents and the Company to comply with the mandatory provisions of the Operating Agreement is fatal to Respondents' claim to be members.**

The Operating Agreement is a contract, and the construction of a clear and unambiguous contract is a matter of law for the court. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014). Because the Operating Agreement contains clear provisions governing the admission into the Company of members, this Court may construe it as a matter of law to find that Respondents are not members. "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties . . . If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required, and the contract's language determines the instrument's force and effect." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013) (internal citations omitted); *see also Celtig, LLC v. Patey*, 326 F. Supp. 3d 1299, 1303-1306 (D. Utah 2018)[5] (despite prospective member's delivery of capital contribution in the amount of $750,000, it never became a member of the company due to the company's failure to comply with the operating agreement's procedure for the admission of new members); *In re Louis J. Pearlman Enterprises, Inc.*, 398 B.R. 59, 64-65 (Bankr. M.D. Fla. 2008) (finding no membership interest where Operating Agreement's unambiguous provisions on the process for membership were not strictly followed).

Here, the force and effect of the Operating Agreement (and the lack of compliance with it) is that Respondents are not members of the Company. This Court should reverse the circuit court's finding that Respondents are members of the company, which is error of law. Limited liability companies have operating agreements precisely to avoid the sort of factual disputes described in the next section.

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[5] This interesting case, out of our sister state of Utah, discusses federal diversity jurisdiction, including the citizenship of a limited liability company with a member who was a citizen of South Carolina.

B. Respondents' fuzzy "ratification," "waiver," and "intent" arguments are fact-intensive, and the facts are disputed and inapplicable.

The basis for Respondents' claim that they are members of the company is that certain "documentary evidence" trumps the Operating Agreement and demonstrates that "Appellants have, on multiple occasions, acknowledged and/or ratified Respondents' membership." (Resp. Br., pp. 10-11, *e.g.*). This argument cannot prevail on summary judgment, and it is immaterial because the governing contract is not ambiguous in its bar to the sort of back-door membership admission that Respondents allege. Respondents fail in their attempt to thrust their factual arguments into the legal realm by quoting isolated snippets of the Operating Agreement, which do not apply for the reasons discussed below.

First, context and history are important about the "documentary evidence" on which Respondents wrongly rely:

- Simmons Family Holdings, LLC ("SFH" or the "Company") was organized in 2001, by Charles Senior. He entered into an Operating Agreement that bound the company, its members, and its manager.
- When Charles Senior passed away, his membership passed to his son, Charles Junior. Charles Junior was also bound by the Operating Agreement. Under South Carolina law and the agreement itself, the Operating Agreement is the primary governing document of the Company, and all other documents are subservient to it. *See* S.C. Code § 33-44-103(a); *see also* R. p. __ , Operating Agreement § 8.9.
- Charles Junior filed Amended Articles of Incorporation of SFH, which were legally ineffective to confer membership on Respondents for their failure to comply with the Operating Agreement. Moreover, pursuant to statute and the Operating Agreement,

the articles are hierarchically inferior to the operating agreement and an attempted amendment to them did not trump the mandatory requirements of the Operating Agreement. (*See* App. Br., pp. 13-15; R. p. __ , § 8.9).

- After the alleged amended articles, Charles Junior testified that the members of the company were himself, his wife, and his children Palmer and Charlesetta. (*i.e.*, no mention of Respondents) (R. p. _) (*see infra*, pp.__).
- In the probating of Charles Junior's estate, the estate's attorney indicated on a probate form that Charles Junior held a 1/3 membership in the Company.[6] This probate form document had no legal effect whatsoever *on the Company*: the probate form could not have bound the Company or altered its membership composition. In other words, a standard form used in probating an estate could not have somehow "given" Respondents an interest in a separate legal entity (*i.e.*,the Company).
- In probating Charles Junior's estate, the estate attorney also had Respondents sign certain forms with the purpose of transferring Charles Junior's membership interest into the Trust. (*See* Resp.' Br., pp. 3-4, *e.g.*). Merely signing these forms could not have legally bestowed upon Respondents something they did not have in the first place (*i.e.*, a membership in the Company). If anything, these forms are invalid for lack of authority,

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[6] Respondents attempt to make much of this and other probate-related filings made by attorney Antonia Lucia in the probating of Charles Junior's Estate. (*See* Resp.' Br., pp. 3-4, 14-15). Importantly, Lucia did not represent the Company, and she did not represent Respondents. Lucia was not drafting the materials at issue on Respondents' behalf; instead, she was trying to get the estate probated. Importantly, the Estate has since filed a Petition for Subsequent Administration, citing this litigation and arguing that the Estate properly should hold a 100% interest in the company. (R. p. __, Supp. Mem. in Supp. of Mtn. for Summary Judgment; Exhibit). Among other things, Respondents seem to be arguing that these probate filings somehow bind the Company, or that they evidence Charles Junior's intent (although he was deceased at the time they were made). Respondents have no legal basis to argue that these probate filings by the Estate bound the company. Moreover, Charles Junior's intent is a question of fact. *See infra*.

and Charles Junior's estate needs to be re-administered. (*See* Supp. Mem. in Support of Motion for Summary Judgment and Exhibit, R. p. __).

- In 2017, Appellant Palmer Simmons' accountant prepared tax returns which incorrectly identified Respondents as members of the Company. Again, this document would not have legally affected Respondents' membership status (or lack thereof).[7]

In other words, the "documentary evidence" relied upon by Respondents **is not evidence of their actual membership in the Company, as a matter of law**. None of the items above could have legally imparted membership in the Company to Respondents.

i. Intent is a question of fact.

To the extent that Respondents argue that some of their "documentary evidence" may be evidence of intent, this argument ignores that intent is a question of material fact which should have rendered summary judgment improper.[8] *DNR v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001) (determination of the parties' intent is a question of fact). For every one of the factual bases that Respondents urged on summary judgment, Appellants marshalled evidence to the contrary, including affidavits, sworn deposition testimony by Palmer, Jermaine, Marcus, and Charles Junior, and other persuasive, conflicting evidence. (R. pp. __, Def. Mem. in Opp. to Sum. Judgment and exhibits; Aff. of P. Simmons and exhibits). At the least, this evidence was sufficient to show a genuine issue for trial as to

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[7] The potential tax impact on the Company of this document has nothing to do with Respondents. *See* Memo. in Opp. to Pl. MSJ, Aff. of Palmer Simmons, Exhibits, for further detail as to the dispute over facts allegedly supporting Respondents' Motion for Summary Judgment (R. pp. __) ("The vast majority of the Plaintiffs' 'Material Facts Not in Dispute' are disputed.")

[8] Respondents strangely argue on p. 12 of their Brief that "Appellants do not argue Junior did not intend to add Respondents as members." *But see, e.g.,* App.' Br., pp. 5-6, 21, and 23 (The "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.").

Marcus and Jermaine's factual claim that membership in SFH was conferred upon them.

Respondents wrongly argue that Section 8.2 of the Operating Agreement applies: "The Operating Agreement may be amended and modified from time to time by the Member." (Resp.' Br., p. 12). But ***the Operating Agreement was never amended***; the attempted amendment was to the articles, which are hierarchically inferior to the Operating Agreement and must conform to the Operating Agreement's requirements for addition of new members. And, if Respondents' argument is really that the Operating Agreement was "orally modified," then that too would be a material question of fact. *U.S. Bank Trust Nat. Ass'n v. Bell*, 684 S.E.2d 199, 385 S.C. 364 (Ct. App. 2009) (parties' intent to modify a contract is a question of fact). Whether Charles Junior "orally modified" or otherwise intended to fundamentally change the company's primary governing document by purportedly inducting members in a manner completely contrary to the Operating Agreement's express terms, would depend on Junior's intent. Indeed, Respondents concede this point on page 12 of their Brief. **Intent is a question of fact and not a matter of law for summary judgment.** *Id.* Appellants opposed summary judgment with Junior's own sworn testimony (given before he died and after the amended articles) that the only members of the Company were himself, his wife, and his two children, Palmer and Charlesetta. (R. pp. _). This testimony created a dispute of fact as to Junior's purported intent to admit Respondents as members of the Company. The court was wrong to find as a matter of law that Respondents are members.

ii. Respondents' waiver/statute of limitations/ratification mishmash is wrong.

As an initial matter, Respondents cite no law to support the arguments on pages 13-15 of their Brief. That is because no law supports Respondents' novel twist on those legal doctrines.

With regard to waiver and the statute of limitations, Respondents partially quote to the non-waiver provision in the Operating Agreement and attempt to transform it into a bar to Appellant's defenses. To try to do this, Respondents' Brief leaves important language out of its quote of the non-waiver provision, which reads in full:

> **8.7 Effect Of Waiver Or Consent**
> A waiver or consent, express or implied, to or of any breach or default by any Person in the performance by that Person of its obligations with respect to the Company is not a consent or waiver to or of any other breach or default in the performance by that Person of the same or any other obligation of that Person with respect to the Company. Failure on the part of a Person to complain of any act of any Person or to declare any Person in default 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. ___ (Op. Agreement, p. 9 (underlining added)). The clear intent and effect of this provision is that rights are not waived for failure to act.

Yet Respondents try to flip this into a statute of limitations argument. Importantly, the statute of limitations does not apply to Appellants' defenses. The South Carolina statute of limitations applies when a "civil action is commenced"[9] by a plaintiff for a cause of action—"the summons and complaint [must be] served within the statute of limitations . . ."[10] "Civil actions may only be **commenced** within the periods prescribed in this title . . ." S.C. Code § 15-3-20 (emphasis added). When a plaintiff files a lawsuit, the statute of limitations does not prevent *the defendant* from asserting a defense against that civil action, such as (here) showing that the corporate action alleged by Respondents is invalid under the

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[9] S.C. Code §§ 15-3-20, - 530; *Walbeck v. I'On Co.*, 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2018) ("With the exception of medical malpractice actions, 'all actions initiated under [s]ection 15-3-530(5) must be **commenced** within three years after the person knew or by the exercise of reasonable diligence should have known that he [or she] **had a cause of action**.'") (emphasis added).

[10] *Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 346, 732 S.E.2d 395 (2012).

Operating Agreement. *See City of Saint Paul, Alaska, v. Evans*, 344 F.3d 1029 (9th Cir. 2003) (holding that the statute of limitations is a "shield, not a sword" and remarking that otherwise, "potential plaintiffs could simply wait until all available defenses are time barred and then pounce on the helpless defendant.").

This makes sense. Appellants were not required to monitor Respondents' erroneous interpretation of documents, and then preemptively bring a lawsuit within three years to debunk Respondents' erroneous interpretations, which had not been asserted. Instead, once Respondents sued Appellants in this lawsuit, Appellants have properly responded that the alleged claims are wrong under the Operating Agreement and applicable law. Those defenses are timely and correct.

Moreover, Respondents' touted membership document was void *ab initio*—it never had legal effect. The passage of three years did not incarnate invalid action—which never had life to begin with—into valid corporate action.

Respondents' ratification argument similarly fails. Again, Respondents cite no law or legal precedent for their ratification argument, and ignore the specific legal requirements.[11] Section 5.3 of the Operating Agreement relates to powers of the manager to, for example, execute contracts for the Company and to "carry[] on in the usual way the Company business or businesses of the kind carried on by the Company"—Section 5.3 is not *carte blanche* to disregard the mandatory provisions of the Operating Agreement for admission of members.

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[11] "Ratification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent. *Barber v. Carolina Auto Sales*, 236 S.C. 594, 115 S.E.2d 291 (1960). Ratification exists upon the concurrence of three elements; (1) acceptance by the principal of the benefits of the agent's acts, (2) full knowledge of the facts, and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements. *See* 2A C.J.S. Agency Section 71 (1972)." *Lincoln v. Aetna Cas. & Sur. Co.*, 386 S.E.2d 801, 803, 300 S.C. 188 (Ct. App. 1989).

In addition to the questions of fact surrounding the "documentary evidence" purportedly evidencing ratification, it is well-settled that *ultra vires* acts cannot be ratified. *See White v. Commercial & Farmers' Bank*, 66 S.C. 491, 45 S.E. 94, 98 (1903) ("It amounts to saying that a prohibited act done despite the prohibition is, by reason of the doing of said act, upon the doctrine of estoppel, released and relieved of the prohibition."). Ratification is not available when fundamental, core requirements of the governing documents (here, the Operating Agreement) are ignored and violated.[12] Moreover, ratification is a question of fact that is not appropriate for summary judgment. *Anthony v. Padmar, Inc.*, 307 S.C. 503, 514, 415 S.E.2d 828, 835 (Ct. App. 1991) ("Again, we find further development of the facts is desirable to clarify the application of this [ratification] theory to the facts at hand.").

Each of Respondents' arguments is an attempt to invalidate the mandatory provisions ("shall") of the Operating Agreement, and each fails under the law of South Carolina. Because Respondents concede that the Operating Agreement is unambiguous, this Court should construe and apply its clear requirements for the admission of members.

C. The plain language of the Operating Agreement controls, by its own terms as well as under statutory law.

As discussed, above, the Operating Agreement mandates the mechanism for the admission of additional members in § 3.1. The section's requirements are not merely "ministerial," as Respondents attempt to characterize them; they are substantive, and they make a material difference to and are binding on the Company. For example, the terms of admission "must specify the percentage of Net Profit, Net Loss, allocable to such [additional

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[12] "The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." *White*, 66 S.C. 491, 45 S.E. at 99.

member] and the Capital Contribution applicable thereto." (R. p. __). The Operating Agreement contemplates that it must ("shall") be amended to reflect the powers, duties, and rights of new members, and it requires any new member to agree "to be bound by the terms of an Operating Agreement which reflects the existence of at least two Members." (R. p. __). These terms are mandatory, and they are material. **There is no evidence they were ever complied with.** Under Respondents' improper theory, Respondents were spontaneously transformed into members without any capital contribution, with no liability to the Company for its losses, and without the confines of a necessarily amended operating agreement binding them to the company or each other.

The Operating Agreement and the law of South Carolina are designed to thwart arguments such as Respondents'. The South Carolina Limited Liability Company Act (the "Act") considers the operating agreement to be the primary governing document of a company, which controls the "relations among the members, managers, and company." S.C. Code § 33-44-103. The Operating Agreement is equally clear that other company documents are inferior to its provisions:

> 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.

(R. p. __, § 8.9). Here, there is a conflict between (a) a purported amendment to the articles by Charles Junior, which amendment does not at all comply with the mandatory terms for the admission of members, and (b) the Operating Agreement's unequivocal requirements for the admission of members. Under the law of South Carolina and the Operating Agreement's plain terms, the Operating Agreement controls. Respondents are therefore wrong to argue that an alleged, improper amendment to the Company's articles could somehow trump the

mandatory requirements of the Operating Agreement on the admission of members into the Company.

II. In reply to Respondents' Issue II, the issue was preserved in a Rule 59 motion, and Respondents miss the critical point that the testimony of Charles Junior raises a dispute of fact as to whether Respondents are members of the company.

Initially, Respondents argue that the circuit court did not rule on the question of whether the sworn deposition testimony of Charles Junior was admissible and that the question is therefore unpreserved for appeal. This is wrong for several reasons: (1) because the question was argued below in memoranda and at the hearing (R. pp. __); (2) because the court referred to the Dead Man's statute and deliberately excluded Junior's testimony—and the dispute of material fact that it creates—in finding that there was no evidence contrary to its ruling that Respondents were members (R. p. __, Order pp. 2-5); and (3) because regardless of whether the circuit court made a cogent ruling on the question, Appellants raised the issue as a fundamental basis of their Rule 59(e) Motion. (R. pp. __: **"I. The deposition testimony of Charles E. Simmons, Jr. is not excluded by the Dead Man's Statute and in and of itself rises to a scintilla of evidence."**). A purpose of Rule 59(e) motions is to preserve issues that were raised but not ruled upon; once an issue is properly raised in such a motion, the issue is preserved for appeal, and a second motion is not necessary if the circuit court does not specifically rule on the issue. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006). Because the Appellants extensively argued the issue in their Rule 59(e) motion, as well as at the hearing, the question of whether the circuit court wrongly excluded Charles Junior's testimony is undeniably preserved for appeal. For the reasons set forth in Appellants' Brief, this Court should find that the Dead Man's Statute does not affect the admissibility of Junior's testimony as to the membership of the company, which did not include Respondents.

Respondents go on for several pages about whether Charles Junior's testimony is "dispositive" of the question of Respondents' membership in his company. This argument misses the point. The testimony was submitted ***in opposition to Respondents' fact-based arguments on summary judgment***, and not as proof of Appellants' own motion.[13] Regardless of whether it is "dispositive," the testimony is material because it demonstrates a question of fact, sufficient to withstand Respondents' motion for summary judgment, as to whether Charles Junior intended for Respondents to be members of his company; his own testimony suggests that he did not.

It is important to remember that Respondents' summary judgment motion was based on disputed and inapplicable facts, which facts Respondents wrongly contended eclipsed the plain language of the Operating Agreement as to the admission of members. In opposition to Respondents' summary judgment motion, Appellants submitted affidavits, exhibits, and deposition testimony to demonstrate genuine issues for trial. Rule 56(e), SCRCP. Charles Junior's testimony was such evidence.

The sequence of the motion filings also matter, in response to Respondents' repeated argument that Appellants somehow conceded the facts here. Appellants filed for summary judgment first, based on the unambiguous membership provisions of the Operating Agreement. Weeks later, Respondents filed a motion for summary judgment, which was not a true "cross motion" because it did not move for judgment on the Operating Agreement at all; instead, Respondents characterized disputed facts as "undisputed" and sought summary judgment based on those "facts." This second-filed motion did not somehow transmogrify

[13] Appellants' Motion for Summary Judgment was based solely on the clear language of the Operating Agreement, and not on testimony. (R. p. __ , Motion and Exhibits filed Jan. 18, 2021).

Appellants' first-filed motion into a concession by them that all facts on every issue, be they fish or fowl, were undisputed. Respondents' arguments on pages 16-19 of their Brief are plainly wrong in this regard.

III. Strangers to the corporation cannot bring derivative claims on its behalf.

Quite simply, Respondents' cause of action on behalf of the Company for "Money Had and Received," rises and falls on the Respondents' alleged membership status in the Company. If Respondents are not members as a matter of law (or if there is a question of fact as to whether they are members), then summary judgment on this claim must be reversed. If Respondents are not members, there is no need for this Court to consider how much money might hypothetically have been had and received. If Respondents are not members, then the receivership-related filings are similarly irrelevant until such time as Respondents' standing to represent the Company in receivership is proven (or disproven).[14]

Moreover, Appellants certainly preserved their arguments that Respondents do not have standing to bring derivative claims against a company of which they are not members. Respondents themselves point out that "the cornerstone of Appellants' defense to this lawsuit is their claim that Respondents are not members." (Resp. Br. p. 22). (*See also,* R. p. _ , Memo. in Opp. to MSJ, pp. 9-12, "the Plaintiffs must first prove they have a membership

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[14] In their Brief, Respondents wrongly assert that an order filed by Judge Dukes *after* Judge McIntosh made the rulings on appeal herein, is somehow the "law of the case" or was determinative of Judge McIntosh's previous decisions. (Resp. Br. pp. 22-24). Likely, it is the other way around (Judge Dukes was adhering to Judge McIntosh's prior-filed orders). In any event, Judge Dukes' unappealable, interlocutory consent orders making ministerial receivership determinations during this litigation are unequivocally not the law of this case, nor binding on this Court. Moreover, because Judge McIntosh himself identified the record that was a basis of his order, there is no question that Judge Dukes' order does not bear on the appealed rulings: "[1] The Verified Second Amended Complaint, [2] the Answer thereto, [3] the various affidavits and [4] memoranda filed with this Court, and [5] the deposition excerpts filed of record therewith, **constitute the factual record of this case** . . ." (R. p. _, Order).

interest in SFH before they can assert [their Second, Third, Fourth, Fifth, Sixth, and Seventh Causes of Action]."; *see also* R. p. _ , Mot. to Reconsider, arguing that the lower court's decision on monies had and received "is predicated on the Court's finding that the individual Plaintiffs have a membership interest."; *see also* R. p. _, Answer to Second Amended Complaint, denying each derivative standing allegation and raising the affirmative defense that "Plaintiff's derivative action fails to comply with Rule 23, SCRCP, and therefore should be dismissed.").

Summary judgment was not proper on Respondents' derivative claim for money had and received, for the reasons discussed herein and in Appellants' Brief. This Court should reverse the circuit court's rulings on Respondents' derivative claim for money had and received because there is at a minimum a question of fact as to whether Respondents are members with standing to assert the cause.

IV. The lower court's discovery orders depend upon its improper finding that Respondents are members of the Company.

Only a few points in Respondents' Brief require reply as to the discovery issue, which also rises and falls on the improper antecedent finding on Respondents' purported membership status in the Company. The lower court's improper decision to permit access by Respondents to Company records, including materials protected by attorney-client privilege, was purportedly based on the South Carolina Uniform Limited Liability Company Act's (the "LLC Act") provision permitting members to inspect the company's records. S.C. Code § 33-44-408 ("Member's right to information"). This ruling was wrong, primarily because **Respondents are not members** of the Company, and also because—even if (*arguendo*) they were members—the scope of a member's right to information under the LLC

Act is not so broad as to permit inspection of privileged communications between the company and its attorneys.

Respondents' brief spends a great deal of time ruminating about appealability and ripeness, but the calculus for the Court on this issue is simple and straightforward:

1. Are the Respondents members of the Company? If the answer is no or that there is a question of fact for trial as to their membership, then quite simply Respondents have no right to access company documents under a statute governing "**member's** rights to information."
2. *Arguendo*, even if the Respondents were members of the Company, would they then have unfettered access to the Company's privileged communications? The answer is again NO: (a) The LLC Act limits members' access to company records "concerning the company's business or affairs" to that which is proper and reasonable, and (b) the Operating Agreement here limits the scope of records required to be kept by the Company to "books on the cash method of accounting." S.C. Code § 33-44-408(b); (R. p. __ , Op. Agreement § 8.1). Moreover, the LLC Act contains no provision requiring the Company's attorney to turn over privileged materials on behalf of the Company.[15]

Respondents' Brief skirts the substantive merits of the above two points and instead rehashes arguments about appealability, previously made in their Motion to Dismiss this appeal, which this Court has already denied.[16] In short, the discovery order is immediately

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[15] Here, the potential "Parade of Horribles" is, truly, horrible. If upheld, the circuit's ruling would mean that in the manifold cases pending in South Carolina courts between companies and their members, attorney-client privileged materials are fair game in discovery. This is untenable, as further discussed in Appellants' Brief.

[16] This Court has already denied Respondents' Motion to Dismiss this appeal, which was based on many of the arguments repackaged by Respondents in their Brief. Appellants therefore incorporate

appealable because it makes a final determination on the substantive merits of the lawsuit (*i.e.*, by making a declaratory judgment that Respondents are members of the Company). The lower court made the following rulings:

> Entitlement to inspect the records is under the LLC statute. They absolutely have the right to inspect the records. So if you would draft me an order to that effect. (R. p. __ , Trans. p. 24, lines 5-7).
>
> I've determined that [Respondents] are members, and I think they are entitled to [attorney-client communications][17] . . . But if I'm wrong, and I'm sure somebody's gonna appeal me, then there's no harm, no foul. (R. p. __, Trans. p. 30: 11-19).
>
> [Respondents] are entitled to examine and copy the business records of Simmons Family Holdings pursuant to S.C. Code § 33-44-408 . . . [including] any correspondence from [Appellants] . . . with counsel . . . [and] attorney billing statements for work performed for Simmons Family Holdings, LLC or Defendant Palmer E. Simmons in his capacity as Manager. (Order, pp. 2-3).

These erroneous rulings on membership and the statutory rights of members are now on appeal, they are inextricably linked to the court's error in granting summary judgment discussed above, and they are ripe for reversal by this Court.

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herein their Return to Appellants' Motion to Dismiss, filed with this Court on October 1, 2021, which thoroughly discusses the question of appealability of the discovery orders.

[17] These rulings by the circuit court were in response to argument by counsel for Respondents built on the preliminary finding that Respondents are members of the Company:

> Thank you, Your Honor. Earlier you did find that our clients were members, and as members are entitled to the records of the company. And in that regard, we'd asked . . . for copies of . . . [listing privileged communications and work product] . . . And in this case, I know Ms. Lucia [attorney] said that she had never represented the company Simmons Family Holdings LLC, but Vaux, Marscher, Berglind had [Ms. Lucia is an attorney with Vaux Marscher Berglind PA]. And, for example, in the J&W case that was handled by their firm. . . . And we believe those are records of the company that we are entitled to see, and we don't know, you know, what the representation was necessarily limited to. And we think as far as records of the company, that [Vaux Marscher Berglind PA's files] . . . are things we things that we think we are entitled to see.

(R. p. __ , Trans. pp. 25: 3 - 27:18).

Respondents' arguments in Section IV.C of their Brief can be dispensed with swiftly. As to IV.C.1, Appellants certainly did provide a privilege log, and they identified the materials withheld and the privilege claimed. (R. pp. _, Return to Mot. to Compel). Respondents' argument to the contrary is just wrong. As to IV.C.2, Respondents' arguments about waiver are misleading. It is unclear from the record precisely what Attorney Pendarvis[18] "waived" during Attorney Lucia's deposition, but the context matters: (a) the purported "waiver" was made during a deposition at which Lucia had only just testified that **she did not represent the Company**; it does not reasonably follow that Pendarvis used the deposition as a platform to make a blanket waiver of any and all privilege between the Company and all its attorneys; and (b) prior to the deposition, counsel for Respondents stipulated "we do not intend to ask [Lucia] to disclose anything legitimately subject to attorney client confidentiality," which again makes it contextually unlikely that Pendarvis actually made a blanket waiver of all privilege held by the Company at Lucia's deposition. (R. p. _, Return to Motion to Compel, Ex. C). Tellingly, in their Motion to Compel, Respondents argued only that Pendarvis waived the Company's claim of privilege as to "business records." (R. p. _, Motion, p. 7). Moreover, considering Pendarvis' limited role as the attorney for the receiver of the Company pending the outcome of this litigation, in which one key issue is who is, and who is not, a member of the company in receivership, Pendarvis would lack authority to waive the company's privilege as to non-members or disputed members, or to waive the privilege held by Palmer and Charlesetta. Finally, and significantly, the circuit court did not base its decision on a purported "waiver"

[18] Attorney Pendarvis represents the Company's receiver, appointed to operate the Company pending this outcome of this litigation. Attorney Lucia is the attorney for Charles Junior's estate.

of privilege—before this Court on appeal is its holding that disputed members of a company have access to the company's litigation file, as a matter of right under the LLC Act. There is no real question that they do not.

Respondents wrongly argue that Appellants should have waited to appeal the discovery order until the circuit court made particular, individual rulings on whether particular, individual documents are privileged. (Resp. Br. pp. 26-28). This is wrong for two reasons: First, because a discovery order may be immediately appealed along with an accompanying order that is immediately appealable (such as the grant of summary judgment on appeal here), particularly where both orders involve the same ruling on the substantive merits of the action (here, the court's declaratory summary judgment grant finding Respondents are members). *Ferguson v. Charleston Lincoln/Mercury, Inc.*, 344 S.C. 502, 544 S.E.2d 285 (Ct. Ap. 2001), *aff'd as modified*, 564 S.C. 558, 564 S.E.2d 94 (2002); *see also, e.g., Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 439 S.E.2d 852 (1994). Second because the question on appeal is not whether particular, individual documents are privileged, it is whether a disputed member of a company has the right **under the LLC Act** to access a certain category of document, namely the company's documents which would otherwise be protected by attorney-client privilege. This Court should find members have no such right.

Appellants otherwise rely on the arguments in their initial Brief, and they urge this Court to reverse the circuit court's legally erroneous ruling that Respondents are members of the Company.

CONCLUSION

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

Respectfully submitted,

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March 28, 2022
Charleston, South Carolina

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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

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.

PROOF OF SERVICE

I certify that pursuant to the Supreme Court's Order Regarding Methods of Electronic Filing and Service, I served the Appellants' Initial Reply Brief on counsel for the Respondents, on March 28, 2022, at their email addresses of record with the AIS:

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