STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2018-CP-40-2730
Appellate Case No. 2019-000456

Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr., Respondent,

v.

Merritt, Webb, Wilson & Caruso, PLLC, Appellant.

FINAL BRIEF OF RESPONDENT

Matthew Richardson (S.C. Bar 15647)
Lucy Dinkins (S.C. Bar 101177)
Wyche, P.A.
801 Gervais Street, Suite B
Columbia, South Carolina 29201
Telephone: 803-254-6542
Facsimile: 803-254-6544
Email: mrichardson@wyche.com
ldinkins@wyche.com

Eric B. Amstutz (S.C. Bar No. 0363)
Wyche, P.A.
200 East Camperdown Way (29601)
P.O. Box 728
Greenville, South Carolina 29602-0728
Telephone: 864-242-8200
Facsimile: 864-235-8900
Email: eamstutz@wyche.com

Attorneys for Respondent

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2018-CP-40-2730
Appellate Case No. 2019-000456

Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr., Respondent,

v.

Merritt, Webb, Wilson & Caruso, PLLC, Appellant.

FINAL BRIEF OF RESPONDENT

Matthew Richardson (S.C. Bar 15647)
Lucy Dinkins (S.C. Bar 101177)
Wyche, P.A.
801 Gervais Street, Suite B
Columbia, South Carolina 29201
Telephone: 803-254-6542
Facsimile: 803-254-6544
Email: mrichardson@wyche.com
ldinkins@wyche.com

Eric B. Amstutz (S.C. Bar No. 0363)
Wyche, P.A.
200 East Camperdown Way (29601)
P.O. Box 728
Greenville, South Carolina 29602-0728
Telephone: 864-242-8200
Facsimile: 864-235-8900
Email: eamstutz@wyche.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

STATEMENT OF THE ISSUES ON APPEAL

I. Did the circuit court err in holding that Respondent's claims are not subject to an arbitration agreement?

II. Did the circuit court err in holding that, even if the arbitration provision in Appellant's original operating agreement were still in effect, it is inapplicable to Respondent's statutory claims?

III. Did the circuit court err in declining to dismiss or stay Respondent's claims pending arbitration?

STATEMENT OF THE CASE

Zachary M. Merritt ("Respondent"), acting as Personal Representative of the Estate of his father, James A. Merritt, Jr. ("Mr. Merritt"), filed this action after Merritt, Webb, Wilson & Caruso, PLLC ("Appellant") failed to pay Mr. Merritt's estate (the "Estate") the fair value of Mr. Merritt's ownership interest in Appellant. Respondent filed his initial complaint in this matter on May 18, 2018, and an amended complaint ("Complaint") on October 8, 2018. In the Complaint, Respondent asserts statutory claims requesting that the Court order Appellant to pay the Estate the fair value of Mr. Merritt's ownership interest in Appellant and wages owed to Mr. Merritt and to turn over Mr. Merritt's personal property and effects to the Estate.

Appellant sought to compel arbitration of Respondent's claims and filed a Motion to Dismiss, Or, Alternatively, to Stay and to Compel Arbitration on October 18, 2018 ("Motion to Dismiss"). Respondent filed a memorandum in opposition to Appellant's Motion to Dismiss on January 8, 2019. The circuit court held a hearing on Appellant's Motion to Dismiss on January 10, 2019, at which counsel for both parties and Zachary Merritt were present.

On January 25, 2019, the circuit court issued an Order denying's Appellant's Motion to Dismiss on the grounds that Respondent's claims are not subject to an arbitration provision

because the arbitration provision upon which Appellant relies has been superseded and that, even if the arbitration provision were still in effect, it is inapplicable to Respondent's claims.

On February 1, 2019, Appellant filed a motion to reconsider ("Motion to Reconsider") the circuit court's January 25, 2019, Order denying its Motion to Dismiss. The circuit court denied Appellant's Motion to Reconsider in identical orders filed February 27, 2019, and March 4, 2019. Appellant filed a notice of appeal of the circuit court's Orders denying its Motion to Dismiss and Motion to Reconsider on March 19, 2019.

STATEMENT OF THE FACTS

This action arises out of Appellant's refusal to pay Mr. Merritt's Estate the fair value of Mr. Merritt's ownership interest in Appellant as required by statutory law. Appellant is a law firm operating as a professional limited liability company organized under North Carolina law. ((Am. Compl. ¶ 5) (R. p. 72); Defendant's Motion to Dismiss, Or, Alternatively, to Stay and to Compel Arbitration filed July 2, 2018 ("July Motion to Dismiss"), Ex. A (R. pp. 24-51)) Appellant is authorized to do business in South Carolina and maintains an office in Columbia, South Carolina. (Am. Compl. ¶ 5) (R. p. 72) Mr. Merritt was an attorney practicing in Columbia, South Carolina until he joined Appellant in August 2006 and became its managing member. ((July Motion to Dismiss, Ex. B) (R. pp. 52-56); Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, p. 1) (R. p. 86)) Respondent is the personal representative of Mr. Merritt's Estate. (Am. Compl. ¶ 2) (R. p. 71)

Simultaneous with Mr. Merritt's admission to Appellant in August 2006, Appellant's members, including Mr. Merritt, adopted an amended operating agreement ("Amended Operating Agreement") and executed an admission agreement ("Admission Agreement") admitting Mr. Merritt as a member of the Law Firm. (July Motion to Dismiss, Exs. B, C) (R. pp. 52-59) Mr.

Merritt did not sign Appellant's original operating agreement ("Original Operating Agreement"), which had been adopted in 2002 before Mr. Merritt joined the Law Firm. (*Id.*, Ex. A) (R. pp. 24-51) The Amended Operating Agreement superseded and deleted any conflicting terms in the Original Operating Agreement. (*Id.*, Ex. B) (R. pp. 52-56) Pursuant to the Admission Agreement, Mr. Merritt agreed to be bound by the Amended Operating Agreement. (*Id.* Ex. C) (R. pp. 57-59)

Mr. Merritt held a 25% ownership interest in Appellant when he died on July 12, 2017. (Am. Compl. ¶ 10) (R. p. 72) Under North Carolina statutory law, Mr. Merritt ceased being a member of Appellant when he died, and Appellant was required to purchase his ownership interest in Appellant from his Estate within one year of his death. *See* N.C.G.S. §§ 55B-7, 57D-2-02, 57D-3-02(a)(2). Mr. Merritt and Appellant had no agreement regarding the value of Mr. Merritt's ownership interest in Appellant. (Am. Compl. ¶ 13) (R. p. 73)

Appellant has refused Respondent's requests to agree to a process for obtaining an independent third party appraisal of the value of Mr. Merritt's ownership interest and for various financial information necessary for an independent valuation. (*Id.* ¶ 15) (R. p. 73) Furthermore, Appellant has failed to pay wages owed to Mr. Merritt under statutory law and has wrongfully retained certain personal property and effects belonging to Mr. Merritt, including non-client related communications. (*Id.* ¶¶ 16, 17) (R. p. 73) Consequently, Respondent brought this action to enforce the statutory rights of the Estate to recover the fair value of Mr. Merritt's ownership interest in Appellant, to recover wages owed to Mr. Merritt, and to obtain possession of Mr. Merritt's personal property and effects.

In its Motion to Dismiss, Appellant argued that Respondent's claims are subject to an arbitration provision in the Original Operating Agreement. (Motion to Dismiss) (R. pp. 78-85) The arbitration provision is located in Section 1.7 of the Original Operating Agreement, which is

titled "Nature of Members' Interests" and sets forth how proceedings "for determination and payment of a partnership assets [sic] and payment of a partnership buyout" are to be conducted. (July Motion to Dismiss, Ex. A, § 1.7) (R. p. 27) Section IV.E of the Amended Operating Agreement also sets forth a procedure for determining the value of a departing member's interest in Appellant. (*Id.*, Ex. B, § IV.E) (R. p. 55) The Amended Operating Agreement lacks an arbitration provision. (*See id.*) (R. p. 55)

After briefing and oral argument on Appellant's Motion to Dismiss, the circuit court entered its Order denying Appellant's Motion to Dismiss. In the Order, the court held that Respondent's claims are not subject to an arbitration agreement because Section IV.E of the Amended Operating Agreement supersedes Section 1.7 of the Original Operating Agreement with respect to valuation of a member's interest and the valuation rights of a departed member, and the Amended Operating Agreement lacks an arbitration provision. (Order Denying Motion to Dismiss, p. 4) (R. p. 6) The court further held that, even if the arbitration provision were still in effect, it is inapplicable to Respondent's statutory claims because such claims are based upon statutory law, not the Original or Amended Operating Agreements. (*Id.* pp. 4-5) (R. pp. 6-7)

STANDARD OF REVIEW

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (citations omitted); *see also, e.g., AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986); *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("[A]rbitration is a matter of contract law and is available only when the parties

involved contractually agreed to arbitrate.").[1] Because arbitration clauses are contractual, "[g]eneral contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause," *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (citation omitted), and "general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute," *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999).

"The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise." *Partain v. Upstate Auto. Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010); *see also, e.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." (citations omitted) (alterations in original omitted)); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). When one party denies the existence of an arbitration agreement, the court must determine whether the arbitration agreement exists. S.C. Code § 15-48-20(a) ("[I]f the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised . . . ."); *Simpson*, 373 S.C. at 22-24, 644 S.E.2d at 667-68 ("Although the clause specifically stated that arbitration applied to issues involving the validity and scope of this contract

[1] Appellant notes in its Initial Brief that Section 10.8 of the Original Operating Agreement provides that the agreement shall be governed and construed in accordance with North Carolina law. (Appellant's Initial Brief, p. 13 n. 3) The circuit court held that the relevant standards are the same under North Carolina and South Carolina law and declined to decide which body of law applies to the arbitration provision in the Original Operating Agreement. (Order Denying Motion to Dismiss, p. 3 n. 1) (R. p. 5) Appellant has failed to take a position on what law applies to the arbitration provision at issue and has taken the position that "this Court need not decide any choice of law issue" because relevant South Carolina and North Carolina law are "substantially similar in their treatment of contract interpretation and questions of arbitrability" and are "not in conflict with the FAA [Federal Arbitration Act]." (Appellant's Initial Brief, p. 13 n. 3) Accordingly, Respondent will cite primarily to South Carolina law for efficiency.

. . . the question of this clause's validity was for the court to decide." (citation omitted) (internal quotations omitted)).

When an appellate court reviews a circuit court's arbitrability decision, "[a]rbitrability determinations are subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667 (citations omitted); *see also, e.g.*, *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014); *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

ARGUMENT

I. The circuit court correctly held that Respondent's claims are not subject to an arbitration agreement because the arbitration provision in Appellant's Original Operating Agreement has been superseded by Appellant's Amended Operating Agreement.

The arbitration provision upon which Appellant relies is contained in Section 1.7 of Appellant's Original Operating Agreement, which was adopted in June 2002 before Mr. Merritt joined Appellant. (*See* July Motion to Dismiss, Ex. A) (R. pp. 24-51) Section 1.7, titled "Nature of Member's Interests," clarifies that members' interests are personal property, sets forth how company assets are titled, and governs how proceedings for the determination and payment of a partnership buyout and related valuations are to be conducted. (*Id.* § 1.7) (R. p. 27) Section 1.7 states in relevant part:

> 1.7 *Nature of Members' Interests.* The interests of the Members in the company shall be personal property for all purposes. Legal title to all Company assets shall be held in the name of the Company. Neither any Member nor a successor, representative, or assign of any Member, shall have any right, title, or interest in or to any Company property or the right to partition any Property owned by the Company, other than the right to initiate an arbitration proceeding pursuant to the rules of the American Arbitration Association Rules **for determination and payment of a partnership assets [sic] and payment of a partnership buyout** as further provided in this agreement. It is expressly agreed by and between the parties

> that no civil action shall be maintained against an individual or the company **as to the determination of any rights, liabilities, obligations, valuations, or payment plans**, and that all matters will be resolved by arbitration . . . .

(*Id.* (emphasis added)) (R. p. 27) Read in context and in a common sense manner, the arbitration provision in Section 1.7 applies to disputes regarding partnership assets and a member's interest in the firm only. *See, e.g.*, *Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) (explaining that courts must give effect to the intention of the parties in construing contracts and that contract language must be interpreted according to its "plain, ordinary, and popular meaning").

Section I of the Amended Operating Agreement, which was adopted in August 2006 when Mr. Merritt joined Appellant, provides:

> It is the unanimous intent of the Members to alter, amend and change the PLLC's [Appellant] current Operating Agreement as previously amended so as to elect new members, change and redefine PLLC governance and other changes in the PLLC. . . . It is also the unanimous intent of the Members that any change to the PLLC's Operating Agreement that is necessary to accomplish this intent and to put into effect the specific provisions noted below is and will be done even if not specifically noted below.

(July Motion to Dismiss, Ex. B, § I) (R. p. 53) Section II states that "[t]o the extent anything in the PLLC's existing Operating Agreement, as previously amended, conflicts with any provision of this Agreement, the terms of this Agreement prevail and control . . . ." (*Id.* § II) (R. p. 53) Section II further dictates that "any conflicting terms are deleted from the Operating Agreement and replaced by the terms of this Agreement." (*Id.*) (R. p. 53) Thus, Appellant's members, including Mr. Merritt, intended to change and did change Appellant's Original Operating Agreement by adopting the Amended Operating Agreement, and the Amended Operating Agreement supersedes any conflicting terms in the Original Operating Agreement, regardless of

whether the change is specifically noted in the Amended Operating Agreement. (*See id.* §§ I, II) (R. p. 53)

Section IV.E of the Amended Operating Agreement governs the valuation of a dissociated member's interest in Appellant. It provides in full:

> Should any Member decide to leave or disassociate themselves from the Firm their interest in the Firm will be determined by valuation of the Firm as an on-going concern. They will receive their share of the value of the Firm less their debts to the Firm. The value of the Firm will be determined by third party appraisal of both the Fair Market Value of all Firm assets less the Fair Market Value of all Firm liabilities. A further explanation of departing Member's rights of valuation will be set forth in a further Amendment. There is no lump sum, artificially or arbitrarily determined "buyout" amount.

(*Id.* § IV.E) (R. p. 55) Thus, this Section of the Amended Operating Agreement dictates a procedure and method for the valuation of a departing member's interest in Appellant. Notably, neither this Section nor any other section of the Amended Operating Agreement contains an arbitration provision. (*See id.*) (R. pp. 52-56)

Because Section IV.E of the Amended Operating Agreement and Section 1.7 of the Original Operating Agreement both address partnership buyouts and the determination of the value of a member's interest in Appellant, the circuit court correctly held that Section IV.E supersedes Section 1.7 with respect to such matters. (*See* Order Denying Motion to Dismiss, p. 5) (R. p. 7) Pursuant to the plain language of Section II of the Amended Operating Agreement, the terms of Section IV.E prevail and control. Section IV.E establishes a new procedure and method for valuing a departing member's ownership interest, and it omits any requirement that such valuations be determined in arbitration. Therefore, the Amended Operating Agreement does not require arbitration of disputes relating to the valuation of a former member's interest, and, with regard to such disputes, it supersedes the arbitration provision in the Original Operating Agreement. Mr. Merritt agreed to be bound by Appellant's Operating Agreement *as modified* by the Amended

Operating Agreement. (*See* July Motion to Dismiss, Ex. C, ¶ 1) (R. p. 58) Thus, Mr. Merritt did not agree to the superseded arbitration provision in the Original Operating Agreement. The circuit court correctly held that Respondent's claims are not subject to any arbitration provision.

Appellant maintains that the Court should consider Section IV.E of the Amended Operating Agreement in conjunction with the Original Operating Agreement and asserts, in conclusory fashion, that Section IV.E does not change the arbitration provision in the Original Operating Agreement. (Appellant's Initial Brief, pp. 14-18) Respondent agrees that the Amended Operating Agreement and the Original Operating Agreement should be construed together. As further explained below, however, the two documents read together make clear that the Amended Operating Agreement replaces the Original Operating Agreement with regard to the buyout valuation issue in this case.

Appellant argues that, with respect to the valuation issue, the Amended Operating Agreement simply changes the valuation methodology to a "going concern" approach from a "book value" approach, which Appellant argues was mandated by Schedule II to the Original Operating Agreement. (*Id.* p. 17) Schedule II to the Original Operating Agreement, however, was and remains non-binding, for it explicitly states it is "[f]or discussion purposes only; there are many possible models." (July Motion to Dismiss, Ex. A, Schedule II) (R. p. 47)

More significantly, the Amended Operating Agreement does not just specify the valuation methodology to be applied in an ownership interest buy-out. It also requires that the valuation be conducted by a third party appraiser, not by an arbitrator. This inconsistency between the Amended Operating Agreement and the Original Operating Agreement as to the valuation decision-maker further makes clear that the more recent document (the Amended Operating

Agreement) replaces the former document (the Original Operating Agreement) with regard to the issue of valuing Mr. Merritt's ownership interest.

Appellant also relies upon *Plaza Development Services v. Joe Harden Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988), to suggest that the arbitration provision is not superseded by the Amended Operating Agreement. The facts in *Plaza Development*, however, are distinguishable from the facts of this case. In *Plaza Development*, the South Carolina Court of Appeals considered whether a party was required to arbitrate pursuant to an arbitration provision contained in a construction contract when the parties subsequently entered into a settlement agreement over a payment dispute that did not include an arbitration provision. *Id.* The court explicitly held that the settlement agreement did not address or concern the dispute at issue in the case, and the court stated that the original contract remained in full force and effect except as provided in the settlement agreement. *Id.* at 433, 365 S.E.2d at 233 ("The dispute is actually over who is responsible for the defective brickwork, an issue not addressed by the settlement agreement.")

Here, the Amended Operating Agreement does address and concern the very dispute now before the Court—the rights of a dissociated member and the valuation of that member's ownership interest—and omits any arbitration requirement. (*See* July Motion to Dismiss, Ex. B, § IV.E) (R. p. 55) Additionally, the Amended Operating Agreement specifically provides that its terms prevail and control over conflicting terms in the Original Operating Agreement and that the Original Operating Agreement is changed to effectuate the provisions of the Amended Operating Agreement, even if such changes are not specifically noted. (*See id.* §§ I, II) (R. p. 53) When the Amended and the Original Operating Agreements are read together, as Appellant urges, it is apparent that Section IV.E of the Amended Operating Agreement establishes an entirely new

procedure for determining the value of a departing member's interest that displaces the procedure set forth in the Original Operating Agreement. (*Compare* July Motion to Dismiss, Ex. A *with* Ex. B) (R. pp. 24-56)

Additionally, Section IV.E provides that "further explanation of departing Member's rights of valuation will be set forth in a further Amendment."[2] (July Motion to Dismiss, Ex. B, § IV.E) (R. p. 55) This expression of a plan to create additional amendments further detailing departing members' rights of valuation unequivocally reveals the members' intention to institute through the Amended Operating Agreement a different procedure for the determination of departing members' rights from the one set forth in the Original Operating Agreement, a new procedure that does not involve arbitration.

Contrary to Appellant's suggestion, the circuit court's finding that the Amended Operating Agreement supersedes the arbitration provision in the Original Operating Agreement does not rest on a rule that omission in the Amended Operating Agreement necessarily equals replacement. The Amended Operating Agreement does not supersede the arbitration provision solely because it omits an arbitration clause or omits to reference the Original Operating Agreement's arbitration provision. The Amended Operating Agreement supersedes the Original Operating Agreement's arbitration provision because the Amended Operating Agreement creates an entirely new third party appraisal process for valuation that is incompatible with arbitration determining valuation. Furthermore, and as explained above, the Amended Operating Agreement clarifies that it is the "unanimous intent of the Members that any change to the [Original Operating Agreement] that is necessary . . . to put into effect" the provisions set forth in the Amended Operating Agreement "is

[2] As far as Respondent is aware, no such further amendment was adopted. Respondent, however, has not had the benefit of discovery in this case.

and will be done even if not specifically noted below." (*Id.* § I) (R. p. 53) Under these express terms of the Amended Operating Agreement, it is immaterial that the Amended Operating Agreement fails expressly to state that the arbitration provision in the Original Operating Agreement is superseded.

Appellant also argues that Section IV.E of the Amended Operating Agreement is inapplicable to this case because that section applies only to voluntary decisions to leave the firm, not involuntary deaths. In making this argument, Appellant parses the language in Section IV.E and reaches a conclusion that is unsupported by a common sense interpretation of the provision. The opening sentence of Section IV.E, upon which Appellant relies, states: "Should any Member decide to leave or dissociate themselves from the Firm their interest in the Firm will be determined by valuation of the Firm as an on-going concern." (*Id.* § IV.E) (R. p. 55) Pursuant to this language, the provision applies to members who either decide to leave the firm or who become dissociated from the firm for any reason. Mr. Merritt became dissociated from the firm by death. Moreover, Section IV.E later references "departing Member's rights of valuation" without making any distinction between voluntary and involuntary departures, thereby clarifying it applies to all departing members.[3] (*Id.*) (R. p. 55) Section IV.E therefore applies to the valuation and buy-out of Mr. Merritt's interest in the Law Firm.

For the reasons set forth above, the circuit court correctly held that the Amended Operating Agreement supersedes the arbitration provision in the Original Operating Agreement and that Respondent's valuation and buy-out claims are not subject to an arbitration agreement.

[3] Respondent offers no rationale for why Section IV.E would provide one valuation process for voluntary departures and a different one for involuntary departures, which further supports reading Section IV.E as applying to all kinds of departures.

II. The circuit court correctly held that, even if the arbitration provision in the Original Operating Agreement were still in effect, it is inapplicable to Respondent's claims because such claims are based upon statutory law, not the Original or Amended Operating Agreement.

Respondent's Complaint asserts causes of action for declaratory judgment, breach of the statutory requirement to purchase a departing members' ownership interest, payment of wages, and claim and delivery/replevin. (Am. Compl. ¶¶ 18-36) (R. pp. 73-75) These causes of action are based upon S.C. Code Ann. § 15-53-10, *et seq.* and N.C.G.S. §§ 55B-7(b), 57D-2-02, 57D-3-02, 95-25.22, 1-472, respectively. The Complaint neither asserts a cause of action for breach of Appellant's Original or Amended Operating Agreement nor seeks enforcement of any provision of either Agreement. (*See* Am. Compl.) (R. pp. 71-77)

Thus, Respondent's claims are entirely separate and independent from the Original and Amended Operating Agreements. Respondent would be entitled to recover the value of Mr. Merritt's ownership interest and on his other claims regardless of the terms of Appellant's operating agreement and regardless of whether Appellant even had a written operating agreement. The circuit court correctly held that the arbitration provision in the Original Operating Agreement is inapplicable to this action and fails to provide a basis for compelling Respondent to submit his statutory claims to arbitration. *See, e.g.*, *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." (citations omitted)).

Appellant erroneously argues that the arbitration provision in the Original Operating Agreement applies to Respondent's statutory claims because the provision is broadly-worded, and, according to Appellant, there is a significant relationship between the statutory claims and Appellant's operating agreement. Assuming that the arbitration provision remains in effect, which

Respondent denies, it is not broadly-worded and stands in contrast to arbitration provisions that have been found to be broadly-worded.

The South Carolina courts have held that an arbitration provision containing language requiring arbitration of all disputes "arising out of or relating to" an agreement is broadly-worded such that it applies to claims having a significant relationship to the contract containing the arbitration provision. *See Aiken*, 373 S.C. at 149, 644 S.E.2d at 708 n.2 ("Courts typically characterize arbitration agreements purporting to govern disputes 'arising out of or related to' the underlying contract between the parties as 'broad' arbitration clauses encompassing a wide range of issues." (citations omitted)); *see also, e.g.*, *Landers*, 402 S.C. at 109, 739 S.E.2d at 213 ("A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." (citation omitted)); *Zabinski*, 346 S.C. at 597-98, 553 S.E.2d at 119 (finding that a provision requiring arbitration of "any controversy or claim arising out of the partnership agreement" was broadly-worded).

As explained above, the arbitration provision in the Original Operating Agreement applies only to certain disputes—those regarding partnership assets and a member's interest in Appellant.[4] The provision lacks language stating that it applies to all claims arising out of or relating to the Agreement.[5] (*See* July Motion to Dismiss, Ex. A, § 1.7) (R. p. 27) Therefore, pursuant to well-

[4] The provision states that a member has no "right, title, or interest in or to any Company property or the right to partition any Property owned by the Company, other than the right to initiate an arbitration proceeding . . . **for determination and payment of a partnership assets [sic] and payment of a partnership buyout** . . . [N]o civil action shall be maintained . . . as to the determination of any rights, liabilities, obligations, valuations, or payment plans . . . ." (July Motion to Dismiss, Ex. A, § 1.7) (R. p. 27)

[5] The phrase at the end of Section 1.7 that "all matters will be resolved by arbitration" must be read in the context of Section 1.7 as whole and of Section 8.2, which relate to valuation disputes regarding members' ownership interests and create a contractual right, without reference to any statutory right, to a "determination and payment of a partnership assets [sic] and payment of a partnership buyout."

established precedent, the provision is not broadly-worded such that it applies to all claims having a significant relationship to the Agreement.

Moreover, Respondent's claims lack any significant relationship to the Original or Amended Operating Agreement. The claims neither seek to enforce nor rely upon the terms of the Original or the Amended Operating Agreement in any way. (*See* Am. Compl.) (R. pp. 71-77)

Appellant also incorrectly maintains that the arbitration provision delegates questions of arbitrability to the arbitrator. Language delegating questions of arbitrability to an arbitrator must be "clear and unmistakable," and courts should not assume that parties agreed to arbitrate arbitrability in the absence of such language. *See, e.g.*, *Kaplan*, 514 U.S. at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." (citations omitted) (alterations in original omitted)); *AT&T Techs., Inc.*, 475 U.S. at 649; *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 102 (4th Cir. 2012) ("The 'clear and unmistakable' standard [for delegating arbitrability to the arbitrator] is exacting, and the presence of an expansive arbitration clause, without more, will not suffice." (citation omitted)); *Towles*, 338 S.C. at 41 n.5, 524 S.E.2d at 846 n.5. The South Carolina Supreme Court has explained that "[t]he question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118; *see also, e.g.*, *Chassereau*, 373 S.C. at 171, 644 S.E.2d at 720.

Furthermore, when a party challenges the existence of an arbitration agreement, the court must first determine whether a valid agreement to arbitrate exists, regardless of whether the purported arbitration agreement delegates arbitrability to the arbitrator. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010) (recognizing that parties can agree to arbitrate arbitrability issues but explaining that a court must consider any challenges to the validity of the arbitration

agreement before ordering arbitration); *Berkeley County Sch. Dist. v. HUB Int'l Limited*, 363 F.Supp.3d 632, 646-48 (D.S.C. 2019) (holding that a court must decide a challenge to the existence of an arbitration provision regardless of whether the purported provision delegates issues of arbitrability); *Simpson*, 373 S.C. at 23-24, 644 S.E.2d at 668 (holding that, even though a purported arbitration provision delegated arbitrability to the arbitrator, a party's challenge to the validity of the provision was for the court to decide).[6]

As the South Carolina Supreme Court has explained, there can be no clear and unmistakable language revealing an intent of the parties to delegate arbitrability issues to an arbitrator when one party challenges the validity of the purported arbitration agreement. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 ("[B]ecause Simpson has challenged the validity of the entire arbitration clause on grounds of unconscionability, there can be no 'clear and unmistakable' evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause's validity."); *see also Berkeley County Sch. Dist.*, 363 F.Supp.3d at 647 ("It simply makes no sense for a court to determine that a party clearly and unmistakably chose to give arbitrability issues to an arbitrator based on the content of an arbitration clause, namely the incorporation of AAA Rules, when the party argues that it did not agree to an arbitration clause in the first place." (emphasis in original)).

Here, as discussed in Part I above, Respondent maintains that there is no arbitration agreement because the arbitration provision in the Original Operating Agreement has been

---

[6] Respondent relies upon the recent United States Supreme Court opinion in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019), to support its contention that the question of arbitrability in this case should have been sent to an arbitrator. The Court in *Schein*, however, reaffirmed the principle that a court must determine the existence of a valid arbitration agreement before referring questions of arbitrability to an arbitrator. *Id.* at 530 ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.") (citation omitted).

superseded by the Amended Operating Agreement, and Mr. Merritt never agreed to the arbitration provision. Respondent's gateway challenges to the existence of the arbitration agreement were properly determined by the circuit court and, contrary to Appellant's assertion, should not have been sent to an arbitrator to be decided. *See Rent-A-Center*, 561 U.S. at 71; *Berkeley County Sch. Dist.*, 363 F.Supp.3d at 646-48; *Simpson*, 373 S.C. at 23-24, 644 S.E.2d at 668.

Moreover, there is no clear and unmistakable language in the purported arbitration provision at issue delegating issues of arbitrability to the arbitrator. (*See* July Motion to Dismiss, Ex. A, § 1.7) (R. p. 27) Appellant claims that the provision's reference to American Arbitration Association ("AAA") rules evidences an intent to arbitrate arbitrability,[7] but the South Carolina Supreme Court has implicitly rejected this argument. In *Partain v. Upstate Auto. Group*, 386 S.C. 488, 689 S.E.2d 602 (2010), the court held that a plaintiff's claims were not subject to arbitration pursuant to an arbitration provision stating that arbitration was to be conducted according to AAA rules. *Id.* at 492-95, 689 S.E.2d at 604-05. In so holding, the court decided issues of arbitrability even though the arbitration provision referenced AAA rules. Similarly, in *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016), the Fourth Circuit held that the parties to an arbitration agreement had not delegated an issue of arbitrability to an arbitrator despite the provision's

---

[7] Appellant relies upon *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017), and *Berkeley County. Sch. Dist.*, 363 F. Supp. 3d at 646, to support this contention. *Simply Wireless*, however, involved an arbitration provision that incorporated JAMS rules, not AAA rules. *Simply Wireless*, 877 F.3d at 525-28. Furthermore, the arbitration provision in *Simply Wireless* was in a contract between two large, national mobile phone service providers, and the court limited its holding to "the explicit incorporation of JAMS Rules" in the "context of a commercial contract between sophisticated parties." *Id.* at 528.

The language from *Berkeley County School District* upon which Appellant relies is dicta because the court held that the school district had not agreed to the arbitration clause at issue, and the arbitration clause therefore failed to delegate arbitrability to the arbitrator. *Berkeley County Sch. Dist.*, 363 F. Supp. 3d at 647-48.

incorporation of AAA rules. *Id.* In *Schein*, upon which Appellant relies,[8] the United States Supreme Court "express[ed] no view about whether the contract at issue . . . delegated the arbitrability question to an arbitrator" despite the fact that the contract provided for arbitration in accordance with AAA rules. *Schein*, 139 S.Ct. at 528-31.

Thus, the reference in the Original Operating Agreement's arbitration provision to generic rules of the AAA[9] fails to demonstrate a clear and unmistakable intent of Mr. Merritt and Appellant to delegate questions of arbitrability to an arbitrator. For the foregoing reasons, the circuit court properly held that, even if the arbitration provision were still in effect, it is inapplicable to Respondent's statutory claims.

III. The circuit court correctly declined to dismiss or stay Respondent's claims because such claims are not subject to an arbitration provision.

Appellant contends that the lower court should have dismissed or, alternatively, stayed Respondent's claims pending arbitration. The circuit court correctly declined to dismiss or stay Respondent's claims because, for the reasons set forth above, the claims are not subject to an arbitration provision.

Even if Respondent's claims were subject to arbitration, which they are not, the claims should be stayed pending arbitration, not dismissed. *See* S.C. Code Ann. § 15-48-20(d) ("Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable,

---

[8] Appellant also cites several cases from the North Carolina Court of Appeals. The arbitration agreements in those cases, however, were governed by the FAA. This Court should look to the Fourth Circuit's interpretation of requirements for delegating arbitrability to an arbitrator under the FAA, not the North Carolina Court of Appeals. Appellant has failed to cite any Fourth Circuit opinions holding that reference to AAA rules demonstrates a clear and unmistakable intent to arbitrate arbitrability, and Respondent is likewise unaware of any.

[9] The AAA has multiple sets of rules, but the arbitration provision in the Original Operating Agreement fails to specify a particular set. (*See* July Motion to Dismiss, Ex. A, § 1.7) (R. p. 27)

the stay may be with respect thereto only."); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 128, 747 S.E.2d 461, 468 (2013) ("Because arbitration will proceed, the trial court proceedings shall be stayed pending the outcome of arbitration." (citation omitted)); *see also* 9 U.S.C. § 3 (directing the court to stay an action subject to arbitration under the Federal Arbitration Act ("FAA")); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) (explaining that the FAA requires a court to stay a proceeding pending arbitration and that "[t]his stay-of-litigation is mandatory").

Furthermore, even if Respondent's claims for declaratory judgment, breach of the statutory requirement to purchase a departed member's ownership interest, and payment of wages were subject to the arbitration provision in the Original Operating Agreement, which again Respondent disputes, Respondent's claim and delivery cause of action is not subject to arbitration pursuant to the plain terms of the arbitration provision. As explained on pages 6-7 *supra*, the arbitration provision, when read in context and in a common sense manner, applies solely to disputes regarding partnership assets and a member's interest in Appellant. (*See* July Motion to Dismiss, Ex. A, § 1.7) (R. p. 27) Respondent's claim and delivery cause of action is not such a dispute. (*See* Am. Compl. ¶¶ 32-36) (R. p. 75)

Additionally, the claim and delivery cause of action is severable from Respondent's other claims, in that it is entirely unrelated to the claims for payment for Mr. Merritt's ownership interest in Appellant and wages owed to Mr. Merritt, and it involves separate and distinct evidence. *See* Rule 42(b), SCRCP; *Winthrop Univ. Trs. for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 166, 791 S.E.2d 152, 165 (Ct. App. 2016) (holding bifurcation was appropriate in part because the evidence for the bifurcated issues did not overlap).

Accordingly, even if Respondent's other claims were sent to arbitration, Respondent's claim and delivery cause of action should not be stayed pending arbitration of the other claims but instead should be severed and permitted to proceed. *See* S.C. Code Ann. § 15-48-20(d); *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 70, 620 S.E.2d 86, 90-91 (Ct. App. 2005) (explaining that a trial court may "order the non-arbitrable issues to proceed with only the arbitrable issues being stayed"); *see also Summer Rain v. Donning Co./Publishers, Inc.*, 964 F.2d 1455, 1461 (4th Cir. 1992) ("The decision whether to stay the litigation of the non-arbitrable issues is a matter largely within the district court's discretion to control its docket." (citation omitted)).

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that this Court affirm the circuit court's Orders denying Appellant's Motion to Dismiss and Motion to Reconsider.

Respectfully submitted,

Wyche, P.A.

Matthew Richardson (S.C. Bar 15647)
Lucy Dinkins (S.C. Bar 101177)
801 Gervais Street, Suite B
Columbia, South Carolina 29201
Telephone: 803-254-6542
Facsimile: 803-254-6544
Email: mrichardson@wyche.com
ldinkins@wyche.com

Eric B. Amstutz (S.C. Bar No. 0363)
200 East Camperdown Way (29601)
P.O. Box 728
Greenville, South Carolina 29602-0728
Telephone: 864-242-8200
Facsimile: 864-235-8900
Email: eamstutz@wyche.com

September 16, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2018-CP-40-2730
Appellate Case No. 2019-000456

Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr., — Respondent,

v.

Merritt, Webb, Wilson & Caruso, PLLC, — Appellant.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

Respondent hereby certifies that the Final Brief of Respondent complies with the requirements of Rule 211(b), SCACR.

Respectfully submitted,

Lucy Dinkins
Matthew T. Richardson (S.C. Bar 15647)
Lucy Dinkins (S.C. Bar 101177)
Eric B. Amstutz (S.C. Bar 0363)
Wyche, P.A.
Post Office Box 12247
Columbia, SC 29211

September 16, 2019

ATTORNEYS FOR RESPONDENT