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. 2019-000456

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

v.

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

FINAL REPLY BRIEF OF APPELLANT

Demetri K. Koutrakos, SC Bar No. 11318
Ian T. Duggan, SC Bar No. 80074
Harry A. Dixon, SC Bar No. 103509
Callison Tighe & Robinson, LLC
1812 Lincoln St, Suite 200
PO Box 1390
Columbia, SC 29202-1390
Telephone No. (803)404-6900
Facsimile No. (803)404-6900
jimkoutrakos@callisontighe.com
ianduggan@callisontighe.com
harrydixon@callisontighe.com
ATTORNEYS FOR APPELLANT
MERRITT, WEBB, WILSON & CARUSO, PLLC

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. 2019-000456

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

v.

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

FINAL REPLY BRIEF OF APPELLANT

Demetri K. Koutrakos, SC Bar No. 11318
Ian T. Duggan, SC Bar No. 80074
Harry A. Dixon, SC Bar No. 103509
Callison Tighe & Robinson, LLC
1812 Lincoln St, Suite 200
PO Box 1390
Columbia, SC 29202-1390
Telephone No. (803)404-6900
Facsimile No. (803)404-6900
jimkoutrakos@callisontighe.com
ianduggan@callisontighe.com
harrydixon@callisontighe.com
ATTORNEYS FOR APPELLANT
MERRITT, WEBB, WILSON & CARUSO, PLLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 4
BRIEF FACTUAL BACKGROUND 4
ARGUMENTS 3
I. Despite Respondent's Arguments to the Contrary, the 2006 Amendment Retained the Arbitration Provision in the Original Operating Agreement. 3
II. Respondent's Claims were Within the Scope of the Valid Arbitration Agreement, and in any event the Question of Arbitrability Should Be Resolved by an Arbitrator. 5
III. Dismissal is the Appropriate Remedy When All Claims are Subject to Arbitration. 8
CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Berkeley Cty. Sch. Dist. v. HUB Int'l Ltd.,
363 F. Supp. 3d 632 (D.S.C. 2019) 7

State Cases

Epic Games, Inc. v. Murphy-Johnson,
247 N.C. App. 54, 785 S.E.2d 137 (2016) 7
Landers v. Fed. Deposit Ins. Corp.,
402 S.C. 100, 739 S.E.2d 209 (2013) 4
McMillan v. Gold Kist, Inc.,
353 S.C. 353, 577 S.E.2d 482 (Ct. App. 2003) 4
Partain v. Upstate Auto. Grp.,
386 S.C. 488, 689 S.E.2d 602 (2010) 6, 8
Smith Barney, Inc. v. Bardolph,
131 N.C. App. 810, 509 S.E.2d 255 (1998) 7
Tritech Elec., Inc. v. Frank M. Hall & Co.,
343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000) 6
York v. Dodgeland of Columbia, Inc.,
406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013) 8

State Statutes

S.C. Code Ann. § 15-48-20 7

INTRODUCTION

Respondent misinterprets the provisions of the Original Operating Agreement and the 2006 Amendment by asserting 1) the parties did not agree to arbitration and 2) the arbitration agreement did not cover Respondent's claims. However, the Original Operating Agreement and the 2006 Amendment are clear—the parties agreed to arbitrate exactly the types of claims that Respondent asserted in the trial court. Accordingly, this Court should reverse the trial court and direct the entry of an order compelling arbitration.

BRIEF FACTUAL BACKGROUND[1]

Appellant originally implemented its operating agreement on June 11, 2002 ("Original Operating Agreement"). The Original Operating Agreement included the following arbitration provision ("Arbitration Provision"):

> 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 the 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 and payment of a partnership buyout as further provided in this agreement. **It is explicitly 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** and that the arbitration award will be enforced pursuant to the North Carolina Rules of General Statutes as to registration and enforcement of arbitration awards.

Id. at ¶1.7 (R. p. 27) (emphasis added). Moreover, the Original Operating Agreement included a method for valuing membership interests in Appellant:

---

[1] In this Initial Reply Brief, Appellant only includes those relevant portions of the Operating Agreement and the 2006 Amendment because the largely undisputed facts were stated in the Initial Brief of Appellant.

> The price of the Membership Interests shall be equal to the book value of such Membership Interests, as determined by an independent appraisal by an appraiser engaged by the Company having at least ten (10) years of experience in valuing legal practices, valued as of the date that a Member' s employment is terminated for any reason pursuant to Section 8.2 of the Operating Agreement, in accordance with generally accepted accounting principles . . . .

Schedule II, ¶1(R. p. 47). The Original Operating Agreement also stated that it "shall be governed and construed in accordance with the laws of the State of North Carolina without giving effect to the conflicts of laws provisions therein." *Id.* at ¶10.8 (R. p. 44).

On August 31, 2006, Jim Merritt joined Appellant and signed the "Members' Agreement for the Election and Admission of New Members to Browne, Flebotte, Wilson & Webb, PLLC[2] and Amendment of the Firm's Operating Agreement" (the "2006 Amendment"). The 2006 Amendment used the Original Operating Agreement as a base but amended certain provisions:

> [To] 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 . . . [and] any conflicting terms are deleted from the Operating Agreement and replaced by the terms of this Agreement.

(R. p. 53, § II). Importantly, the 2006 Amendment also stated:

> 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. 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 departing rights of valuation will be set forth in a further Amendment. There is no lump sum, artificially or arbitrarily determined "buyout amount."

(R. p. 55, § IV.E). The parties' arbitration dispute turns on the interpretation of § IV.E and how it changes the Original Operating Agreement.

---

[2] Appellant's former name.

ARGUMENTS

I. Despite Respondent's Arguments to the Contrary, the 2006 Amendment Retained the Arbitration Provision in the Original Operating Agreement.

Respondent asserts the 2006 Amendment implicitly superseded or contradicted the Arbitration Provision in the Original Operating Agreement. Specifically, Respondent asserts 1) the terms of the 2006 Amendment apply where it contradicts the Original Operating Agreement; 2) § IV.E of the 2006 Amendment addressed the valuation of membership interests; 3) the 2006 Amendment does not address arbitration and shifts the valuation decision from an arbitrator to an appraiser; and 4) therefore, the 2006 Amendment—with no arbitration provision—prevails over the Original Operating Agreement's Arbitration Provision.

Respondent, like the trial court, misreads the 2006 Amendment's change in the valuation method as also changing the method and forum for resolving disputes. Certainly, § IV.E of the 2006 Amendment displaced Schedule II of the Original Operating Agreement. However, § IV.E did not address and thus did not supersede the Arbitration Provision (R. p. 27, ¶1.7).

As Respondent and Appellant agree, the 2006 Amendment supersedes any conflicting provisions of the Original Operating Agreement. And the 2006 Amendment is clear in what it provides: 1) a member's "interest in the Firm will be determined by valuation of the Firm as an on-going concern"; 2) the members would receive "their share of the value of the Firm less their debts to the Firm"; and 3) "[t]he 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." *See* § IV.E (R. p 55). Indisputably, § IV.E of the 2006 Amendment does not expressly address arbitration or disputes over valuation. It only expressly sets the method for valuation.

Importantly, Schedule II of the Original Operating Agreement provided for valuing the membership interests by setting a price based on a book value calculation rather than as an on-

going concern. *See* (R. p. 47)("The price of the Membership Interests shall be equal to the book value of such Membership Interests, as determined by an independent appraisal by an appraiser engaged by the Company having at least ten (10) years of experience in valuing legal practices"). Accordingly, the 2006 Amendment's on-going concern valuation provision clearly contradicts and supersedes the book value method contained in Schedule II of the Original Operating Agreement.[3] It does not speak to arbitration or create an implicit contradiction with the arbitration provision. The law is clear that courts decide whether these provisions contradict, and where these provisions do not contradict, both provisions are enforceable. *See, e.g., Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) ("Whether a party has agreed to arbitrate an issue is a matter of contract interpretation."); *McMillan v. Gold Kist, Inc.*, 353 S.C. 353, 358, 577 S.E.2d 482, 484 (Ct. App. 2003) (When the existence of an agreement is not in question, the construction of the agreement is a matter of law.).

Respondent further errs by claiming the 2006 Amendment conflicts with the Arbitration Provision by shifting decision making from an arbitrator to an appraiser. Clearly, the Original Operating Agreement included provisions for both arbitration and for valuation by an appraiser. *Compare* ¶1.7(R. p. 27)("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"), *with*, Schedule II, ¶1 (R. p. 47)("The price of the Membership Interests shall be equal to the book value of such Membership Interests,

[3] Respondent also argues that Schedule II in the Original Operating Agreement states "[For Discussion Purposes Only; there are many possible models]" and that this phrase makes it non-binding. Perhaps Respondent is correct that it was non-binding prior to the 2006 Amendment. No matter. The 2006 Amendment superseded Schedule II of the Original Operating Agreement whether it was previously binding or not. After the 2006 Amendment there is no question that the binding valuation method would be as an on-going concern because that is what the 2006 Amendment stipulated.

as determined by an independent appraisal by an appraiser . . ."). By changing the valuation method but retaining the requirement that an appraiser perform the valuation, the 2006 Amendment no more implicitly contradicts the Arbitration Provision in the Original Operating Agreement than Schedule II of the Original Operating Agreement contradicted the Arbitration Provision.

Accordingly, Respondent's position requires an unreasonable interpretation of the contract language in both the Original Operating Agreement and the 2006 Amendment. To be sure, the 2006 Amendment displaced certain provisions of the Original Operating Agreement. Nevertheless, it did not address, modify, or supersede the Arbitration Provision, which remained in full force and effect between the members when Jim Merritt joined Appellant.

II. Respondent's Claims were Within the Scope of the Valid Arbitration Agreement, and in any event the Question of Arbitrability Should Be Resolved by an Arbitrator.

In his brief, Respondent asserts his claims are not subject to arbitration even if the Arbitration Provision applies. Specifically, Respondent assert his claims arise under statutes, not the Operating Agreement, and therefore the Arbitration Provision does not apply to his claims.

Respondent again misinterprets the language of the Arbitration Provision, which states:

> 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 the 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 and payment of a partnership buyout as further provided in this agreement. **It is explicitly 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** and that the arbitration award will be enforced pursuant to the North Carolina Rules of General Statutes as to registration and enforcement of arbitration awards.

¶1.7 (R. p. 27)(emphasis added). Importantly, Respondent's membership interest and any rights

to property only arise by virtue of the 2006 Amendment, and the plain language of this Arbitration Provision does not limit arbitration to breaches of the Operating Agreement. Rather, the Arbitration Provision provides: 1) membership interests are personal property of the Members; 2) company assets are property of the company; and 3) disputes over the membership interests and company property shall be resolved via arbitration. The Arbitration Provision further makes clear 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." ¶1.7 (R. p. 27).

What are Respondent's claims filed in the Richland County Court of Common Pleas except a civil action to determine Respondent's rights to property and the value of his membership interest? Applicable law tells courts to look at the language of the arbitration provision, construe the language broadly,[4] and decide whether the claim falls within that broadly construed language. *See, e.g., Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000) ("[a] motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute."). Notably, Respondent did not cite any case law holding that claims arising under statutes cannot be decided by arbitration when a valid arbitration agreement covers the subject matter of the claim.

---

[4] Respondent points out that the Arbitration Provision does not use the words "arising out of or related to" and asserts this omission means the phrase "**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**" is not broadly worded. *See* ¶1.7 (R. p. 27)(emphasis added). Notwithstanding the fact that the Arbitration Provision is broadly worded, this distinction is irrelevant—Respondent's claims for company property and membership interests are within the scope of the Arbitration Provision. *See, e.g., Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 689 S.E.2d 602 (2010) ("Because we find that the factual allegations underlying Partain's claim are encompassed by the terms of the arbitration clause, we need not reach the "significant relationship" question.").

Moreover, Respondent incorrectly asserts the trial court properly addressed whether Respondent's claims were subject to arbitration. While Respondent correctly notes that whether the parties agreed to arbitrate is for the court,[5] *see* S.C. Code Ann. § 15-48-20, North Carolina law is clear that the express adoption of a set of arbitration rules that grant the arbitrator authority to decide arbitrability means the parties agreed to give that power to the arbitrator. *See Epic Games, Inc. v. Murphy-Johnson*, 247 N.C. App. 54, 63–64, 785 S.E.2d 137, 144 (2016) ("incorporation of the AAA rules demonstrate that the parties agreed the arbitrator should decide issues of substantive arbitrability"); *see also Smith Barney, Inc. v. Bardolph*, 131 N.C. App. 810, 817, 509 S.E.2d 255, 259–60 (1998) (same). Indeed, Respondent acknowledges North Carolina law resolves this question in favor of Appellant. *See* Respondent's Initial Brief at 17, n. 8. And the parties do not dispute that the Original Operating Agreement required the agreement to be construed under North Carolina law and that the 2006 Amendment did not supersede this provision. *See* ¶10.8 (R. p. 44)(the Operating Agreement "shall be governed and construed in accordance with the laws of the State of North Carolina without giving effect to the conflicts of laws provisions therein."). Even if South Carolina law applied, the weight of authority indicates that South Carolina should follow North Carolina's rationale even though South Carolina's appellate courts have not yet addressed this issue. *See, e.g., Berkeley Cty. Sch. Dist. v. HUB Int'l Ltd.*, 363 F. Supp. 3d 632, 646 (D.S.C. 2019)("Courts are frequently and consistently finding that when an arbitration clause incorporates arbitration rules, whether they be JAMS or AAA rules,

[5] There is no dispute that the trial court, despite erring in its conclusion, had jurisdiction to determine whether the parties validly agreed to arbitrate. *See* S.C. Code Ann. § 15-48-20 ("if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised . . ."). Had the trial court reached the correct ruling and found an arbitration agreement existed, the court should have dismissed Respondent's claims and let an arbitrator decide whether those claims were within the scope of the arbitration agreement.

there is clear and unmistakable evidence that the parties intended to arbitrate arbitrability.").[6] Accordingly, whether Respondent's claims are subject to arbitration should be decided by an arbitrator as the parties agreed.

III. Dismissal is the Appropriate Remedy When All Claims are Subject to Arbitration.

Finally, Respondent asserts dismissal is inappropriate because various arbitration statutes say the court shall stay a claim pending a decision from the arbitrator. While Respondent correctly quotes the language of the statutes, the law is clear that dismissal is appropriate where all of a party's claims are subject to arbitration. *See, e.g., York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 96, 749 S.E.2d 139, 154 (Ct. App. 2013) (when "every dispute [is] within the scope of at least one valid arbitration agreement," a trial court did not err in compelling arbitration and dismissing a suit completely). Accordingly, this matter need not be remanded to the trial court, and this Court should enter an order directing that Respondent's claims be dismissed if this Court determines Respondent is bound by a valid arbitration agreement that covers all of Respondent's claims.

Respondent is also incorrect that his cause of action for claim and delivery should proceed because it is outside of the arbitration agreement. Respondent asserts Appellant must give him property that he says he owns while Appellant says it owns the property. It is a dispute over property that could be (in fact, will be) determined to be Appellant's property, which is clearly within the scope of the Arbitration Provision as discussed above. Accordingly, the claim and delivery cause of action is subject to arbitration.

---

[6] Importantly, *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 689 S.E.2d 602 (2010) did not reject this position as Respondent asserts because the question does not appear to have been before the court in that case.

CONCLUSION

For the reasons set forth herein and for the reasons explained in Appellant's initial brief, Appellant respectfully requests the Court reverse the trial court's ruling on Appellant's Motion to Dismiss, or Alternatively, to Stay and Compel Arbitration and direct the entry of an order dismissing this case and compelling arbitration.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC

Demetri K. Koutrakos, SC Bar No. 11318
Ian T. Duggan, SC Bar No. 80074
Harry A. Dixon, SC Bar No. 103509
Callison Tighe & Robinson, LLC
1812 Lincoln St, Suite 200
PO Box 1390
Columbia, SC 29202-1390
Telephone No. (803)404-6900
Facsimile No. (803)404-6900
jimkoutrakos@callisontighe.com
ianduggan@callisontighe.com
harrydixon@callisontighe.com
ATTORNEYS FOR APPELLANT
MERRITT, WEBB, WILSON & CARUSO, PLLC

September 16, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2019-000456

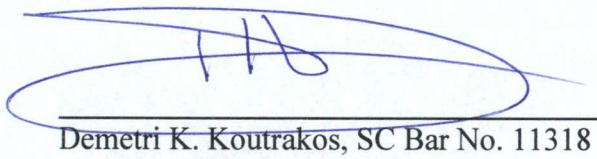
Zachary M. Merritt, as personal representative of the Estate of James A. Merritt, Jr., Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.



Demetri K. Koutrakos, SC Bar No. 11318
Ian T. Duggan, SC Bar No. 80074
Harry A. Dixon, SC Bar No. 103509
Callison Tighe & Robinson, LLC
1812 Lincoln St, Suite 200
PO Box 1390
Columbia, SC 29202-1390
Telephone No. (803)404-6900
Facsimile No. (803)404-6900
jimkoutrakos@callisontighe.com
ianduggan@callisontighe.com
harrydixon@callisontighe.com
ATTORNEYS FOR APPELLANT
MERRITT, WEBB, WILSON & CARUSO, PLLC

Columbia, South Carolina
September 16, 2019