THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2016-CP-46-2458
Appellate Case No.: 2016-002317

Lloyd C. (Chad) Whitmire ..... Respondent,

v.

Johnny C. (Carl) Hawkensen
and The Commons at Fort Mill, LLC, ... Appellants.

RESPONDENT'S FINAL BRIEF

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II. Whether the circuit court properly determined that a written notice, appearing at the top of a limited liability company's operating agreement and stating that "the terms and conditions of this operating agreement are subject to arbitration," was not a broadly-worded agreement requiring arbitration of one member's claims against another member.

   A. Whether the circuit court properly interpreted South Carolina's Arbitration Act to require both a written agreement to arbitrate and a notice that the contract is subject to arbitration.

   B. Whether the circuit court properly determined that, even if the notice appearing at the top of a limited liability company's operating agreement were construed as the members' written agreement to arbitrate some disputes, the notice was not sufficiently broad to cover the claims asserted by one member against another member.

III. Whether the circuit court properly denied Appellants' motion to compel arbitration where, even under the Federal Arbitration Act, Appellant could not demonstrate that the parties had entered a written agreement to resolve their disputes by arbitration.

IV. Whether this court should refuse to consider Appellant's appeal from an order denying Respondent's motion for preliminary relief, where that order was favorable to Appellant, where Appellant affirmatively consented to portions of the order, and where Appellant was not "aggrieved" by entry of the order.

STATEMENT OF THE CASE

Respondent Chad Whitmire ("Whitmire") filed this action against his long-time business associate, Carl Hawkensen ("Hawkensen"), in the Court of Common Pleas for York County, South Carolina on August 19, 2016. In his complaint, Whitmire alleged that Hawkensen had wrongfully deprived him of the benefits of their long-term business venture – a multi-year project to develop, construct and, ultimately, own and manage a 144 unit apartment complex in

York County, South Carolina. (R. pp. 17-32). At the time of suit, that asset had been placed into a single-purpose real estate holding company, The Commons at Fort Mill, LLC (the "Company"). Whitmire and Hawksensen are the only natural persons who are members of the Company, and together they own 99% of the Company's member interests.[1]

Whitmire's complaint included eight causes of action: breach of a member's duty of loyalty and care; breach of contract; breach of contract accompanied by fraud; negligence; gross negligence; and violation of South Carolina's UTPA. Id. Whitmire also sought an order under South Carolina's dissociation statute, establishing the value of his interest in the Company and requiring the Company to purchase his membership interest for fair value. (R. p. 31). In addition, Whitmire filed a motion for the appointment of a receiver or, alternatively for a preliminary injunction, pending final resolution of the parties' dispute. (R. p. 116).

Hawkensen answered and counterclaimed. (R. p. 33-45). However, before answering, Hawkensen filed a motion to stay or dismiss the action and to compel Whitmire to submit his claims to binding arbitration. (R. p. 120). Hawkensen also opposed Whitmire's motion for preliminary relief, asserting that a purported arbitration agreement between the parties required Whitmire to arbitrate his claims and deprived the circuit court of subject matter jurisdiction. (R. p. 168).

The parties' competing motions were heard by Special Circuit Court Judge S. Jackson Kimball, III on September 15, 2016. At that hearing, Judge Kimball determined that the circuit court had subject matter jurisdiction to consider Whitmire's motions for preliminary relief, but nonetheless denied those motions. (R. pp. 4-5; R. p. 58). Judge Kimball also denied

[1] The remaining one percent is held by a corporation, Blue Wave Management, Inc. Whitmire and Hawkensen are also the only shareholders of that corporation.

Hawkensen's motion to compel arbitration, finding that "there is simply no arbitration agreement for the court to consider or enforce." (R. p. 12). Hawkensen now appeals each of those orders.

STATEMENT OF FACTS

Whitmire and Hawkensen are long-standing business associates. In approximately 2007, they, along with several other men, formed a business venture for the purpose of purchasing, and developing a 29.8 acre parcel of land in York County, South Carolina. (R. p. 18, ¶¶ 7-8). While many of the venture's original investors withdrew over time, and others were added, Whitmire and Hawkensen consistently remained part of the project's ownership group.

Over the years, Whitmire, Hawkensen, and their co-investors formed a series of business associations, primarily limited liability companies, to build and operate a 144-unit apartment complex. The penultimate "owner" of that complex was a South Carolina limited liability company called Crossroads Commons Phase I, LLC. (R. p. 19, ¶17). Crossroads Commons Phase I, LLC had four members, including Whitmire and Hawkensen. Id. ¶18. In October 2014, Whitmire and Hawkensen bought out the membership interests of the two other members. Id. ¶21. Shortly thereafter, they formed the Company, and then caused Crossroads Commons Phase I, LLC to convey the apartment complex to the newly-formed Company. (R. p. 20, ¶¶ 23-24).

On October 28, 2014, Whitmire and Hawkensen executed a written operating agreement for the Company (the "Operating Agreement"). At the top of the Operating Agreement, the following notice appears:

THE TERMS AND CONDITIONS OF THIS OPERATING AGREEMENT ARE SUBJECT TO BINDING ARBITRATION PURSUANT TO S.C. CODE ANN. § 15-48-10 ET. SEQ. (1976 AS MAY BE AMENDED)

(R. p. 123). Directly below that notice appears the title:

Id. Immediately following that title is the Operating Agreement's introductory statement, or preamble ("Preamble"):[2]

> THIS OPERATING AGREEMENT for THE COMMONS AT FORT MILL, LLC ("the company") is executed by and between BLUE WAVE MANAGEMENT, INC. ("Managing Member,"), CARL HAWKENSEN and CHAD WHITMIRE (the "Members"). The Commons at Fort Mill, LLC is a duly organized limited liability company formed pursuant to the laws of the State of South Carolina as a single purpose real estate holding entity pursuant to Title 33, Chapter 43, Article I (S.C. Code Ann. 33-44-101, Et. Seq.), ***pursuant to the purposes, terms and conditions set forth below***, including all Exhibits and Attachments.

Id. (emphasis added). The "terms and conditions set forth below" the Preamble consist of seven distinct sections, titled "Articles" – (I) Members' Interest in Company; (II) Member Meetings; (III) Management; (IV) Fiscal Matters; (V) Financial Statements and Books; (VI) Dissolution and Liquidation; (VII) Operating Agreement. (R. pp. 123-129). The "terms and conditions set forth below" are devoid of any section titled "dispute resolution" or otherwise discussing procedures for resolving the parties' disputes. The "terms and conditions set forth below" the Preamble do not include any provision whereby the parties mutually agreed to resolve their disputes (or any category of disputes) through arbitration. As the circuit court noted, the terms and conditions set forth below make no mention of arbitration *at all*. (R. pp. 11-12); (R. pp. 81-82).

A few months after Whitmire and Hawkensen executed the Operating Agreement, their relationship soured. In August 2016, Whitmire filed this action alleging that Hawkensen had wrongfully excluded him from the Company's business operations and accounts since

[2] Whitmire does not intend to use "Preamble" as a term of art, but as shorthand nomenclature for the introductory paragraph of the Operating Agreement.

approximately December 2014. Despite the absence of any arbitration agreement in the "terms and conditions [of the Operating Agreement] set forth below," Hawkensen asserts that he is, nonetheless, entitled to compel arbitration of Whitmire's claims.

STANDARD OF REVIEW – APPLICABLE LAW

Whether a claim is subject to arbitration is an issue for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013)(citing Partain v. Upstate Auto Group, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010)). While the trial court's determination of arbitrability is subject to de novo review on appeal, the appellate court must affirm if that determination is "reasonably supported by the evidence." Id.

ARGUMENT

I. The circuit court properly denied Appellant's motion to compel arbitration because the parties never agreed to resolve their disputes through arbitration.

It is well-settled in the jurisprudence of this state and of the United States that arbitration "is a matter of consent, not coercion." Zabinski v. Bright Acres Assoc., 346 S.C. 580, 553 S.E.2d 110, 116 (2001)(quoting Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989)). For this reason, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960); Wilson v. Willis, 416 S.C. 395, 409, 786 S.E.2d 571, 578 (Ct. App. 2016). Courts considering whether parties have contractually agreed to arbitrate "'should apply ordinary state-law principles that govern the formation of contracts.'" The Housing Auth. of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 335, 588 S.E.2d 617, 621(Ct. App. 2003)(quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).

In South Carolina, those "ordinary state-law principles" require "a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014). Courts "first look at the language of the contract to determine the intentions of the parties." C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). Where a "contract's language is plain, unambiguous and capable of only one reasonable interpretation . . . [the contract's] language determines the instrument's force and effect." Ecclesiates Prod. Ministries v. Outparcel Assoc., LLC, 374 S.C. 483, 499, 649 S.E.2d 494, 502 (Ct. App. 2007)(citing Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993)). Courts must "enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Id. at 500, 649 S.E.2d at 503.

In this case, an application of South Carolina's "ordinary state-law principles" leads to one, inescapable conclusion - Hawkensen and Whitmire never agreed to resolve their disputes through arbitration. By its express terms, the Operating Agreement provides that the "purposes, terms and conditions *set forth below*" govern the Company's activities and operations. Yet those purposes, terms and conditions "set forth below" do not mention arbitration; much less prescribe it as a mandatory method for resolving members' disputes. There is simply no term or condition of the Operating Agreement requiring arbitration of any dispute or class of disputes. The terms and conditions of the Operating Agreement evidence no meeting of the minds concerning arbitration. The trial court, therefore, properly determined that the parties had not entered any enforceable arbitration agreement and denied Hawkensen's motion to compel arbitration.

On appeal, as below, Hawkensen attempts to elevate a notice appearing at the top of the Company's Operating Agreement into a binding agreement to arbitrate the members' disputes. As the circuit court noted, Hawkensen's argument is incongruous with the plain language of S.C. Code § 15-48-10.[3] More importantly, though, Hawkensen's argument is irreconcilable with the terms of the Operating Agreement itself. The Operating Agreement's Preamble plainly states that the "purposes, terms and conditions" of the Company's governance and operations are "set forth below." (R. p. 123). Yet, the notice Hawkensen now seeks to enforce as an arbitration "agreement" is not "set forth below" at all; it appears *above* the Preamble.

"Where [a] contract evidences care in its preparation, it will be presumed that its words were employed deliberately and with intention." McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 510 (1945); *see also* 17B C.J.S. Contracts § 942 ("The court will presume that words in a contract will have their plain, ordinary, and generally accepted meanings unless the instrument itself shows that the terms were used in a technical or different sense."). Had the Company's members intended the notice appearing at the top of the Operating Agreement to also be an agreement to arbitrate the members' disputes, they could have written the Operating Agreement to accomplish that purpose. They did not. The court must presume that the members intended to be governed only by the terms and conditions "set forth below" the Preamble, because that is what their contract says. Id.

Furthermore, this court must not accept Hawkensen's veiled invitation to re-write the Operating Agreement -- to transform a notice printed at the top of the document into an agreement requiring arbitration of the members' disputes. As Hawkensen has noted in his brief,

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[3] "By its express terms, § 15-48-10 requires both an 'agreement' to arbitrate and a 'notice' that the parties agreement is subject to arbitration. It is clear that an 'agreement' to arbitrate and a 'notice' of arbitration are separate and distinct requirements, both of which must exist before arbitration may be compelled." (R. p. 11).

South Carolina's courts "do not perform" that "service" for contracting parties. MailSource, LLC v. M.A. Bailey & Assoc., 356 S.C. 363, 369, 588 S.E.2d 635, 639 (Ct. App. 2003)("re-writ[ing] the parties' contract [is] a service the courts of South Carolina do not perform."); Appellant's Brief at 9. Whether through intentional omission, negotiated revision, or mere inadvertence, the parties did not include an arbitration agreement in the terms and conditions of their Operating Agreement. This court may not infer an agreement that does not exist. "Courts do not have the authority to alter contracts or make new contracts for the parties." Lowcountry Open Land Trust v. Charleston So. Univ., 376 S.C. 399, 410, 656 S.E.2d 775, 781 (Ct. App. 2008).

As the circuit court recognized, "there is simply no arbitration agreement for the court to consider or enforce" in the Operating Agreement. (R. p. 12.) The circuit court's factual finding on that issue is "reasonably supported by the evidence." Its order denying Hawkensen's motion to compel arbitration must, therefore, be affirmed. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013)(citing Partain v. Upstate Auto Group, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010)).

II. The circuit court properly held that a written notice printed at the top of the Company's Operating Agreement and stating "the terms and conditions of this operating agreement are subject to arbitration" was not a broadly-worded arbitration agreement requiring Whitmire to arbitrate his claims.

Hawkensen's motion to compel arbitration and his entire appeal are predicated on his mistaken assertion that the notice appearing at the top of the Company's Operating Agreement is a contractual agreement requiring arbitration of all disputes between the Company's members. Appellants' Brief at 13. The circuit court recognized the fallacy of Hawkensen's assertion, and refused to compel arbitration of Whitmire's claims. This court should affirm.

A. The trial court properly concluded that South Carolina law requires both a written agreement to arbitrate and a statutorily-prescribed notice before a party may require arbitration of disputes.

As the circuit court recognized, "a party seeking to compel arbitration . . . has the initial burden of 'showing an agreement described in § 15-48-10 . . .' has been entered into by the parties." (R. p. 11) (citing S.C. Code Ann. §15-48-20 (Law. Co-op. 2017)).

> In turn, § 15-48-10 describes that agreement as "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. . . ." § 15-48-10(a). [Section] 15-48-10 further provides that, in order for the parties' arbitration agreement to be enforceable under state law, "notice that a contract is subject to arbitration" must be "typed in underlined capital letters or rubber-stamped prominently on the first page of the contract."

Id. "By its express terms, § 15-48-10 requires both an 'agreement' to arbitrate and a 'notice' that the parties' agreement is subject to arbitration." Id.

The trial court's reading of South Carolina's Arbitration Act is entirely consistent with the language of the Act and with well-established principles of statutory construction. Where a statute's language is "plain and unambiguous, and conveys a clear and definite meaning" courts have "no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Furthermore, courts must presume that "the legislature . . . fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense." Pee v. AVM, Inc., 344 S.C. 162, 168, 543 S.E.2d 232, 235 (Ct. App. 2001). As "plainly and unambiguously" prescribed by the legislature, South Carolina's Arbitration Act requires that a party seeking to compel arbitration must initially "show" that the parties have included "a provision in a written contract" whereby they agreed to "to submit to arbitration any controversy thereafter arising between the parties." *See* S.C. Code Ann. §§ 15-48-10 and -20 (Law. Co-op.

2017). The Act also imposes a separate, and distinct, requirement that "notice that [the] contract is subject to arbitration" must be "typed in underlined capital letters or rubber-stamped prominently on the first page of the contract." S.C. Code §15-48-10 (Law. Co-op. 2017).

There is no doubt that the phrase "THE TERMS AND CONDITIONS OF THIS OPERATING AGREEMENT ARE SUBJECT BINDING ARBITRATION" was an attempt by the Operating Agreement's drafter to satisfy South Carolina's statutory requirement for *notice*. The statement appears in underlined capital letters, and it is prominently displayed on page one of the Operating Agreement, all as mandated by S.C. Code Ann. § 15-48-10. It is not, however, a "provision in a written contract to submit to arbitration any controversy thereafter arising between the parties." The trial court properly concluded that, by its plain language, § 15-48-10 requires "both an 'agreement' . . . and a 'notice'..." (R. p. 11). While a "notice" appears at the top of the Operating Agreement, the Operating Agreement does not contain any provision whereby Hawkensen and Whitmire agreed to "submit any controversy thereafter arising between the parties" to arbitration. S.C. Code Ann. §15-48-10

B. Even if the notice appearing at the top of the Company's Operating Agreement were construed as the members' written agreement to arbitrate some of their disputes, the trial court properly determined that the notice was not sufficiently broad to require arbitration of Whitmire's claims.

Even if this court were to disregard the plain language of § 15-48-10[4] *and* the plain language of the Operating Agreement,[5] and even if it were to consider the notice appearing at the top of the Company's Operating Agreement as both a "notice" and an "agreement" by the members to arbitrate some class of disputes, the circuit court's order still must be affirmed. As

[4] *See* Respondent's Argument II A., supra.
[5] *See* Respondent's Argument I, supra.

the circuit court recognized, the parties' purported "arbitration agreement" (the notice appearing above the Operating Agreement's title) is not a broad agreement requiring arbitration of all of the members' disputes. Rather, it is narrowly-drawn statement, intended to draw attention that the "terms and conditions" of the Operating Agreement are subject to arbitration. (R. p. 12). But, none of Whitmire's claims seek enforcement or interpretation of the "terms and conditions" of the Operating Agreement.[6] Id. Consequently, none of those claims could be compelled to arbitration, even if the notice appearing at the top of the Operating Agreement were also an agreement between the Company's members to arbitrate their disputes. Id. Because arbitration rests upon the parties' contractual agreement, "the range of issues that can be arbitrated is restricted by the terms of the agreement. A party cannot be compelled to arbitrate a particular dispute unless his agreement expressly encompasses the subject matter of the dispute." Simmons v. Lucas & Stubbs Assocs., Ltd., 283 S.C. 326, 322 S.E.2d 467 (Ct. App. 1984)(internal citations omitted).

Hawkensen overlooks the limited scope of the printed notice, repeatedly (and erroneously) labeling it a "broad" arbitration agreement. Appellants' Brief at 13, 20. However, the notice is neither an agreement to arbitrate nor is it broad in scope. As the circuit court recognized, the Company's members could have included a provision in the Operating Agreement whereby they agreed that "any and all disputes" between the members must be arbitrated. They did not. The notice appearing at the top of the Operating Agreement states only that the "terms and conditions of this operating agreement are subject to arbitration." *See R. p. 12.*

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[6] Hawkensen even sought to compel arbitration of claims that are based entirely upon the parties' prior business dealings and entities. Those claims have no colorable connection to the "terms and conditions" of the Operating Agreement. (R. pp. 25-26, ¶¶ 56-69).

The Operating Agreement's narrowly-drawn notice stands in stark contrast to the broadly-worded agreements interpreted in much of Hawkensen's cited authority.[7] Hawkensen places far too much reliance on a line of cases that have interpreted and enforced what those courts recognized as "very broad" arbitration agreements. The purported "agreement" in this case, the notice printed at the top of the Operating Agreement, is not broad at all. In fact, the circuit court found it to be narrow in scope – contemplating arbitration only of the "terms and conditions" of the Operating Agreement. (R. p 12). That factual finding is reasonably supported by the evidence, and it cannot be reversed on appeal. Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). A notice that the "terms and conditions" of an LLC's operating agreement are subject to arbitration is not the equivalent of an agreement between the company's members to arbitrate all of their disputes.

Even in those cases interpreting or enforcing broad arbitration agreements, the courts have not elevated such agreements to "super-contractual" status. Those courts have, instead, echoed the oft-repeated refrain that "[a]rbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *E.g.*, Wilson v. Willis, 416 S.C.395, 409, 786 S.E.2d 571, 578 (Ct. App. 2016)(quoting Chassereau v. Glob.-Sun Pools, Inc., 363 S.C.628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005)(in turn, quoting Zabinski v. Bright Acres Assoc., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001))). Fundamentally, those

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[7] Compare Operating Agreements to notice the text of the arbitration agreements interpreted in the following cases:

(a) Landers v. Federal Deposit Ins. Grp., 402 S.C. 100, 739 S.E.2d 209 (2013);
(b) Zabinski v. Bright Acres Assoc., 346 S.C. 580, 553 S.E.2d 110 (2001);
(c) Wilson v. Willis, 416 S.C. 395, 786 S.E.2d 571 (Ct. App. 2016);
(d) York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013);
(e) Partain v. Upstate Auto. Grp., 386 S.C. 488, 689 S.E.2d 602 (2010);
(f) The Housing Auth. of City of Columbia v. Cornerstone Hous., LLC, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003).

cases have all turned upon well-established principles of contract interpretation – nothing more. As the Zabinski Court (among others) recognized, "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." 346 S.C. at 596–97, 553 S.E.2d at 118 (internal citations omitted). When parties have entered contractual agreements to arbitrate (for example) "any dispute or disagreement aris[ing] in connection with the interpretation of this Agreement, its performance or nonperformance, its termination, the figures or calculations used or any nonpayment of accounts,"[8] the courts have recognized the breadth of those agreements and have required the parties to honor them.

In this case, Whitmire and Hawkensen never executed an agreement whereby they agreed to arbitrate "all disputes" between them, or even all disputes arising from their membership in the Company. It would defy both logic and "general contract principles of state law"[9] to foist that obligation upon Whitmire when he never so agreed. The trial court correctly found that the Operating Agreement does not contain a provision requiring Whitmire to arbitrate his claims. That determination is factually and legally sound, and it should be affirmed.

III. Even under the Federal Arbitration Act, Hawkensen failed to show the existence of an "agreement for arbitration" and the circuit court, therefore, properly refused to compel arbitration.

On appeal, Hawkensen also argues that the circuit court erred in determining that the Federal Arbitration Act (FAA) does not apply to the Company's Operating Agreement. Legally, and factually, Hawkensen is incorrect. *See* R. p. 10. ("Per the terms of the Operating Agreement, the Company is a 'single purpose real estate holding entity.' Its only purpose is to own and operate an apartment complex . . . in Fort Mill, South Carolina."). *See also* Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2010)("development of real

[8] Wilson v. Willis, 416 S.C. 395, 414, 786 S.E.2d 571, 580 (Ct. App. 2016)
[9] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

estate is an inherently intrastate transaction."); Zabinski, 346 S.C. at 595, 553 S.E.2d at 117-18 ("the development of land within South Carolina borders is the quintessential example of a purely intrastate activity."). Practically, though, the circuit court's determination that the FAA does not apply is of no real consequence.

While both the FAA and the South Carolina Arbitration Act express a consistent policy favoring arbitration of disputes, neither the FAA nor South Carolina's Arbitration Act requires a party "to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)(interpreting FAA); Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989)(FAA - "arbitration is a matter of consent, not coercion."); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007)(South Carolina Arbitration Act – "[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate."). Aside from the "notice" requirement of S.C. Code Ann. §15-48-10, South Carolina's courts have interpreted and enforced the FAA and South Carolina Arbitration Act in a very similar manner. Both the state and federal arbitration acts "require[] courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Zabinski v. Bright Acres Assoc., 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001)(quoting Volt, 489 U.S. at 478).[10] Even under the FAA, courts interpreting an arbitration agreement are guided by "general contract principles of state law." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

[10] Of course, where a contract "evidencing a transaction involving interstate commerce" (9 U.S.C. § 2) contains an arbitration agreement, the FAA will preempt any conflicting state law that "completely invalidates the parties' agreement to arbitrate." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538 n.2, 542 S.E.2d 360 n.2 (2001).

Nothing in the circuit court's consideration of Hawkensen's motion hinges upon a conflict between state and federal arbitration law. The circuit court determined, and properly so, that the parties had not entered an enforceable agreement to submit their dispute to arbitration. Neither the Federal Arbitration Act nor the South Carolina Arbitration Act would permit the court to enforce a non-existent agreement. Neither the FAA nor South Carolina's Arbitration Act would require Whitmire to arbitrate claims that he never agreed to arbitrate. Volt, 489 U.S. 468 at 479 (FAA); Simpson, 373 S.C. at 24, 644 S.E.2d at 668 (South Carolina Arbitration Act).

The circuit court properly concluded that, because the Operating Agreement was not a contract "evidencing a transaction in interstate commerce," the FAA does not apply. In any regard, Hawkensen has failed to demonstrate that his motion would have been decided differently under the FAA. He has shown no prejudice by the court's supposed error. At worst, the circuit court's determination that the FAA does not apply is harmless error. Judy v. Judy, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009)(error is harmless where it could not reasonably have affected the outcome below).

IV. This court should decline to consider Hawkensen's appeal from the circuit court's order denying Whitmire's motion for preliminary relief, because that order was favorable to Hawkensen, because Hawkensen consented to the only "relief" granted by that order, and because Hawkensen was not "aggrieved" by entry of the order.

In addition to challenging the circuit court's order that denied Hawkensen's motion to compel arbitration, Hawkensen has appealed an order denying *Whitmire's* motions for preliminary statutory and equitable relief. (R. p. 1). As Hawkensen makes clear in his brief, his appeal from that order is really a "belt and suspenders" argument. *See* Appellant's Brief at 26 ("Appellants do not want to have waived their objection to the circuit court's assertion of jurisdiction [by failing to assert it]."). Hawkensen's entire argument is predicated upon, and

intertwined with, his erroneous argument that the circuit court was required to compel arbitration, even in the absence of an enforceable arbitration provision. Presumably, Hawkensen does not object to the substance of the circuit court's ruling.[11] Rather, he objects that the court considered the motion.

As an initial matter, Hawkensen has no right to appeal the trial court's September 29, 2016 order because that order was decided in his favor. South Carolina's courts have long recognized "the general rule . . . that a plaintiff or defendant cannot appeal . . . from or to a judgment, order or decree in his own favor, since he is not aggrieved thereby." Wilson v. Southern Ry., 123 S.C. 399, 115 S.E. 764 (1923). Even South Carolina's appellate court rules dictate that "[o]nly a party aggrieved by an order, judgment, sentence or decision may appeal." Rule 201(b) S.C.A.C.R. It does not matter *why* the circuit court denied Whitmire's claims for preliminary relief, as long as it did so. Hawkensen was the prevailing party with regard to the matters decided by the circuit court's September 29, 2016 Order, and he was not "aggrieved" when the circuit court decided those matters in his favor.

Furthermore, Hawkensen has no legitimate right to appeal from that portion of the court's September 29, 2016 order entered with Hawkensen's affirmative consent. *See* R, p. 4. ("The court notes that Defendants, through their counsel, affirmatively consented to provide regular reports to Plaintiff during the pendency of this action."). "Ordinarily, where a judgment or order is entered by consent, it is binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding." Johnson v. Johnson, 310 S.C. 44, 46, 425 S.E.2d 46, 48 (Ct. App. 1992).

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[11] The circuit court denied Whitmire's motion to appoint receiver, as well as his motion for a preliminary injunction. (R. p. 4). The only interim relief afforded to Whitmire (a right to receive the Company's periodic financial reports) was granted with Hawkensen's express consent. Id.

Even if this court were to reverse the trial court and compel arbitration, the arbitrator's authority would still be defined, and limited, by the terms of the parties' arbitration agreement. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). The United States Supreme Court has made clear that arbitration agreements must be enforced in precise accordance with their terms, "even if the result is 'piecemeal litigation.'" Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985). Assuming Hawkensen were entitled to compel arbitration of the "terms and conditions" of the Operating Agreement, it does not follow that he could also require arbitration of Whitmire's non-arbitrable claims. The mere presence of an arbitration agreement, limited in scope, does not entirely divest the circuit court of subject matter jurisdiction. Whitmire's motions for preliminary relief were not premised upon the "terms and conditions" of the Operating Agreement, but upon the provisions of South Carolina's receivership statute. The circuit court undoubtedly had subject matter jurisdiction to consider those motions. *See* S.C. Code Ann. § 15-65-10 (Law. Co-op. 2005)("A receiver may be appointed by a judge of the circuit court. . . ."). More on point, Hawkensen has no reason to complain about an order that favors him and he has no right to "pre-emptive appeal" from future orders that have not been issued.

CONCLUSION

The circuit court properly determined that the parties never entered an enforceable agreement to resolve their disputes through arbitration. As the circuit court recognized, the purported arbitration agreement upon which Hawkensen relies is not an agreement at all; it is a drafters' attempt to comply with a statutory requirement by providing notice that the "terms and conditions" of the LLC's Operating Agreement "are subject to arbitration." The circuit court did not compel arbitration because the Company's members never agreed that they would arbitrate

their disputes. The circuit court's determination is legally sound, and it is reasonably supported by the factual record. The circuit court's order denying Hawkensen's motion to compel arbitration must be affirmed.

June 9, 2017

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2016-CP-46-2458
Appellate Case No.: 2016-002317

Lloyd C. (Chad) Whitmire ..... Respondent,

v.

Johnny C. (Carl) Hawkensen
and The Commons at Fort Mill, LLC, ... Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Respondent Final Brief complies with Rule 211(b).

June 9, 2017

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