

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge
Case No. 2021-CP-02-00889

Appellate Case No. 2023-001479

Julianne Foster,Respondent,

v.

Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC
of South Carolina, and Airbnb, Inc., Defendants,

Of which Airbnb, Inc. is the.....Appellant,

And Rhett Riviere is a.....Respondent.

**Airbnb, Inc.’s Return to Respondent’s Motion to Dismiss in Part and
Respondent’s Motion to Expedite Appeal**

Respondent Julianne Foster (“Respondent”) moved to dismiss this appeal in part and to expedite its consideration. Respondent’s arguments confirm that no exigency or other emergency exists warranting resolution of this appeal on truncated briefs and an incomplete record, or a departure from this Court’s standard briefing process. Further, Respondent’s arguments that Airbnb, Inc.’s (“Airbnb”) appeal is frivolous should be rejected. As a result, Airbnb requests the Court deny Respondent’s motions.

Background

A. The Underlying Action

This action arose from an incident that allegedly occurred from May 17–18, 2019. (Am. Compl. ¶ 89.) Respondent alleges that her friend used Airbnb to locate and rent a property in Aiken, South Carolina. (*Id.* ¶ 93.) The subject property was owned by Defendant Chase Enterprises, which was managed by Defendant Riviere. (*Id.* ¶¶ 89–91.) Defendant Thomas was the host for the property. (*Id.* ¶ 95.) Respondent alleges that during the time she was staying at the property, Defendant Riviere had a hidden camera placed in a bedroom. (*Id.* ¶ 100; Order Denying Airbnb’s Mot. Compel Arbitration at 1.)¹

On April 28, 2021, Respondent filed an initial Complaint. That pleading was 83 paragraphs and asserted claims for: (1) negligence (all Defendants), (2) invasion of privacy (Defendant Riviere), (3) intentional infliction of emotional distress (Defendant Riviere), (4) constructive fraud/misrepresentation (Defendant Riviere), and (5) negligence per se (Defendants Riviere, Thomas, and Airbnb). On November 30, 2022, Respondent filed an Amended Complaint. This new pleading ballooned to 257 paragraphs and added a significant amount of new factual allegations as well as several new claims and prayers for relief. The Amended Complaint asserts claims for: (1) negligence (all Defendants), (2) *negligent hiring, supervision, or retention of employees (Defendant Airbnb)*, (3) *negligent hiring, supervision, or retention of employees, or alternatively independent contractors (Defendant Airbnb)*, (4) *premises liability (all Defendants)*, (5) invasion of privacy (Defendant Riviere), (6) *vicarious liability for invasion of privacy (Defendant Airbnb)*, (7) intentional infliction of emotional distress (Defendant Riviere), (8) constructive fraud/misrepresentation (Defendant Riviere), and (9) negligence per se (all

¹ This order is attached to Respondent’s Motion to Dismiss in Part as Exhibit B.

Defendants), and (10) *violation of the South Carolina Unfair Trade Practices Act (all Defendants)*.
(The newly added claims are italicized above.)

B. The Underlying Motions and Orders on Appeal

Defendant Airbnb and Third-Party Defendant Riviere separately moved the Circuit Court to compel arbitration of all claims brought by Respondent and arising from the underlying allegations in the Amended Complaint of Respondent, and based on the arbitration agreement at issue. Airbnb sought arbitration of all claims in Respondent's Amended Complaint and Riviere sought to compel arbitration of Airbnb's third-party claims in the same civil action against him for breach of contract and indemnity. Both Airbnb and Riviere asserted that Respondent's claims belonged in arbitration in their motions. Both asserted that the entire case be compelled to arbitration. Respondent argued to the Circuit Court that it should deny both Airbnb's and Riviere's motions to compel arbitration.

On April 5, 2023, the Circuit Court considered both motions to compel arbitration at a single hearing. In an email dated July 11, 2023, the Circuit Court noted its intention to deny both motions to compel arbitration. On September 13, 2023, the Circuit Court issued an order on Airbnb's motion to compel arbitration.

C. This Appeal

Two days later after the Circuit Court denied Airbnb's motion to compel arbitration, on September 15, 2023, Airbnb noticed this appeal.² Respondent has filed a Motion to Dismiss and Motion to Expedite this appeal.³ For the reasons set forth below, those motions should be denied.

Argument

I. Respondent's motions attack the merits of Airbnb's appeal and should not be decided without the benefit of more complete briefing.

The introduction to Respondent's motion opens with a direct attack on Airbnb's claim that the underlying orders denying arbitration was incorrect, arguing "the evidence supports the circuit court's determinations that Respondent never agreed to arbitration; she is not bound to arbitrate by estoppel because she is not raising any contract claims and has not benefitted from any contract with Airbnb[.]" Although it takes the form of a motion instead of an appellate brief, Respondent's motion is simply an attack on the merits of Airbnb's appeal.

South Carolina's courts have established procedures for efficiently briefing issues presented for consideration. These procedures allow for fair administration of the appellate process via the briefing procedures and oral argument in order to provide the Court with sufficient information about the underlying matter with which to make an appropriate decision. The Court's motions practice is not a substitute for this briefing procedure. Consistent with this Court's established procedures, the merits of an action are appropriately decided only after the benefit of

² This is the second appeal from the same underlying action. Although the Circuit Court notified the parties in a single email that it would be denying both motions to compel arbitration, the court issued an order on Riviere's motion to compel on July 26, 2023, and Riviere noticed his appeal the next day, creating Appellate Case No. 2023-001211.

³ This Court's docket reflects that briefing deadlines in this appeal are stayed by the pending motion to dismiss this appeal.

complete briefs. Dismissal on the merits before complete briefing would improperly circumvent these established procedures and should not be permitted in this case.

Dismissal would also be premature because the record before the Court is incomplete. Respondent asks this Court to consider the merits of Airbnb's appeal on a 13-page motion and 41 pages of select exhibits. Respondent is essentially trying to convert the normal appellate procedures regarding briefing and the creation of the Record on Appeal into a motions practice. If this was permitted, especially in cases like this where no exigency exists, it would become a frequent occurrence before this Court. Thus, Airbnb respectfully requests that this Court deny Respondent's motions and instead require her to adhere to this Court's procedure for responding to Airbnb's appeal as set forth in the briefing schedule pursuant to the South Carolina Appellate Court Rules.⁴

II. Airbnb's appeal is meritorious; there was extensive briefing and arguments below and the lack of any suggestion from the Circuit Court that Airbnb's arguments were made in bad faith.

Respondent seeks dismissal and sanctions under Rule 269, SCACR, arguing that this appeal is frivolous. In the Circuit Court, Respondent specifically argued that Airbnb's motion to compel arbitration was frivolous and sought to have the court strike it. *See* Hr'g Tr. 34:18 (“[F]rankly, Your Honor, this is a frivolous motion. This is a frivolous motion that you should strike . . .”). Yet the Court below did not find anything frivolous about Airbnb's arguments. Although the Circuit Court ultimately disagreed with the arguments, it did so only after reviewing

⁴ Should this Court desire to fully assess the merits as improperly urged by Respondent in Respondent's motion to dismiss, this Court would need all materials and arguments that were actually before the Circuit Court, as well as the motions hearing transcript, and not just select materials furnished by Respondent. Should Respondent attempt to submit all of those materials to this Court along with its Reply to this Return, Appellant Airbnb reserves the right to request to address those materials in a supplemental filing.

additional briefing and carefully considering the arguments. Just because the trial court ultimately did not agree with Airbnb does not mean its arguments were unfounded. Yet it is a strong indicator that sanctions under Rule 269, SCACR are inappropriate. *Cf. Culbertson v. Clemens*, 322 S.C. 20 n.5, 25, 471 S.E.2d 163, 165 n.5 (1996) (denying motion for sanctions under precursor to Rule 269, SCACR because sanctions were determined as not appropriate in underlying matter by trial judge).

Airbnb's appeal of the arbitration issue is meritorious. Each of Airbnb's arguments to the Circuit Court were properly supported by existing case law:

- Arbitrability: Airbnb appropriately argued below that the question of whether the arbitral agreement should apply to Respondent is a question reserved for the arbitrator. This arbitrability issue is amply supported by binding precedent. *See Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 699–700, 869 S.E.2d 859, 864 (Ct. App. 2022) (discussing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010)); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529–30 (2019). Therefore, Airbnb argued that even if Respondent's arguments attacking the validity of the arbitration agreement in this case could be accepted, they would have to be accepted by an arbitrator and not the Circuit Court.
- Direct Benefits Estoppel: The doctrine of direct benefits estoppel is deeply rooted in arbitration case law and Airbnb's request that the Court apply the doctrine was supported by an array of cases from this court and the Fourth Circuit. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012); *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 230–31, 847 S.E.2d 268, 272 (Ct. App. 2020); *R.J. Griffin & Co. v. Beach Club II Homeowners Assoc., Inc.*,

384 F.3d 157, 160 (4th Cir. 2004). Although the Circuit Court rejected this argument, Airbnb will argue in this appeal that the court below erred in doing so because Foster directly benefited from use of the rental property booked pursuant to Airbnb's Terms of Service, and because Respondent referenced and relied on Airbnb policies, terms, and standards *more than 20 times* to support her claims against Airbnb. (See, e.g., Am. Compl. ¶¶ 47, 62–63, 66–68, 72, 73, 84–86, 96, 139, 144, 146, 154, 170, 172, 200, 215, 222, 224, and 242.) Thus, Airbnb's argument that direct benefits estoppel is supported by the law and the record.

- Outrageous Torts Exception: South Carolina's Supreme Court justices have questioned the continued validity of the outrageous tort exception. *Parsons v. John Wieland Homes & Neighborhoods, of the Carolinas, Inc.*, 418 S.C. 1, 12, 791 S.E.2d 128, 133–34 (2016) (plurality opinion asserting that South Carolina case law recognizing the outrageous tort exception should be overruled). In *Parsons*, two justices indicated their view that the judicially created exception conflicted with the United States Supreme Court's opinion in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), because the exception is not a general contract principle and applies only to arbitration clauses. *Parsons*, 418 S.C. at 11–12 (Pleicones, C.J., joined by Kittredge, J.) (plurality opinion); see also *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 56–57 (2015). Airbnb's position is that *Concepcion* vitiates this exception as a matter of United States Supreme Court precedent. This is a meritorious argument. Further, even if this exception could apply in some cases, whether it could apply here is a question for the arbitrator. *Palmetto Wildlife Extractors*, 435 S.C. at 702, 869 S.E.2d at 865.

- No Waiver: Although Respondent argued Airbnb waived its right to arbitration by prejudicing her rights, this argument is based on an outdated understanding of arbitral waiver. Airbnb appropriately pointed out below that the United States Supreme Court recently clarified the appropriate waiver analysis in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). See also *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (compelling arbitration and noting that defendant pleaded arbitration as a defense in its two filed answers and in the initial case management conference). Airbnb repeatedly referenced its reservation of the right to compel arbitration in this matter, as opposed to knowingly relinquishing such rights. Moreover, Plaintiff made the decision to amend the complaint to add entirely new causes of action and grossly expand the scope and type of claims being litigated. Thus, Respondent’s amended pleadings revived Airbnb’s right to compel arbitration, even if there was somehow a waiver regarding the original pleadings. *Solis v. Experian Info. Sols., Inc.*, No. SACV2200102CJCKESX, 2022 WL 4376077, at *3 (C.D. Cal. Sept. 21, 2022) (“The Court need not—and therefore does not—decide whether Experian in fact waived its right to compel arbitration, because Cantong’s amended complaint revived the right even if it were waived.”); *Haarslev, Inc. v. Nissen*, No. 5:19-CV-06128-BCW, 2023 WL 2782313, at *7 (W.D. Mo. Jan. 30, 2023); *Cannon Equip. Co. v. Troisi*, No. CV 08-2391 (PAM/AJB), 2009 WL 10710732, at *2 (D. Minn. Oct. 30, 2009); *Brown v. Green Tree Servs., LLC*, 585 F. Supp. 2d 770, 782 (D.S.C. 2008). This is not a frivolous argument by Airbnb.

Indeed, the complexity of this issue is borne out by the fact that the trial court accepted several rounds of extensive briefing (as Foster concedes), denied the arbitration motions, but then issued a stay of this litigation pending resolution of appellate proceedings.⁵

III. Foster provides no valid reason to expedite the appeal.

Our Supreme Court's orders and state law mandate expedited consideration of certain cases. *See, e.g., In Re: Expediting Appeals in Matters Involving Child Custody and Visitation*, Appellate Case No. 2022-001278 (S.C. Sup. Ct. November 17, 2012) (requiring expedited consideration of child-custody actions); *In re Expediting Appeals from Termination of Parental Rts. Proc.*, 366 S.C. 670, 623 S.E.2d 661 (Ct. App. 2005) (similar); *In Re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* (S.C. Sup. Ct. March 18, 2009); *In Re: Extensions in Cases Seeking a Petition for a Writ of Certiorari to Review a Decision of the South Carolina Court of Appeals* (S.C. Sup. Ct. July 16, 2014) (limiting extensions for matters on certiorari); S.C. Code Ann. § 17-30-110 (requiring expedited consideration of wiretap claims by this Court); S.C. Code Ann. § 63-15-376 (requiring expedited appellate consideration under the UCCJEA); S.C. Code Ann. § 44-41-34 (requiring expedited appellate review of judicial bypass actions by minors seeking abortions). Our Supreme Court has also expedited consideration of important healthcare matters, *Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control*, 423 S.C. 50, 55, 813 S.E.2d 719, 721 (2018), of an order incarcerating a journalist for failing to reveal a source, *Matter of Decker*, 322 S.C. 212, 214–15, 471 S.E.2d 459,

⁵ Like its non-waiver argument was supported by recent Supreme Court precedent, the motion to stay was also supported by the Supreme Court's opinion issued just this last term. *See Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1918 (2023). Airbnb's reliance on relatively new cases, or extension of those cases to new circumstances is wholly permissible. *Cf.* Rule 3.1, SCRPC, Rule 407, SCACR (permitting claims that include "a good faith argument for an extension, modification or reversal of existing law," because "the law is not always clear and never is static.").

461 (1995), in an appeal involving a state grand jury investigation of the Speaker of the House, *Ex parte Harrell v. Att’y Gen. of State*, 409 S.C. 60, 64, 760 S.E.2d 808, 810 (2014), and in various termination of parental rights actions, *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 502, 757 S.E.2d 388, 390 (2014).

Each of these types of cases involve matters of significant public interest, minors, or potential criminal prosecutions. A common thread between these types of cases garnering expedited consideration is the potential for immediate and irreparable harm absent expedited consideration on appeal. Although interlocutory appeals from an order denying arbitration are expressly permitted by state law, these types of cases are not included in the types of cases requiring (or justifying) expedited consideration under state law or procedure. Although this case certainly raises important questions to the litigants, this appeal does not involve the welfare of children, potential incarceration, or the possibility of irreparable harm.

This is likely why Respondent cites no cases supporting her position that expedited consideration is necessary here. The two cases she does cite offer no support. First, *Coinbase* does not purport to alter the Court’s standard appellate procedure for accepting full briefing and argument in an appeal. The Supreme Court merely explained in *Coinbase* that if a truly frivolous appeal were filed, procedures already exist for rectifying such an affront to the judicial process. For the reasons set forth above, there is no reason for the Court to resort to such procedures given the strength of the arguments Airbnb has presented. Second, *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76–77 (Ct. App. 2003) is the type of case deciding arbitrability on grounds of “prejudice” that was overruled by the Supreme Court’s opinion last year in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). Prejudice should not be a factor in the analysis under *Morgan v. Sundance*. Neither case supports expediting this appeal.

Conclusion

For the foregoing reasons, Airbnb asks this Court to deny Respondent's Motion to Dismiss in Part and Motion to Expedite.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ C. Mitchell Brown

C. Mitchell Brown, South Carolina Bar 012872

E-Mail: mitch.brown@nelsonmullins.com

Blake T. Williams, SC Bar 100794

E-Mail: blake.williams@nelsonmullins.com

Matthew A. Abee, SC Bar No. 101100

E-Mail: matt.abee@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

RICHARD A. HARPOOTLIAN, P.A.

Richard A. Harpootlian, SC Bar No. 2725

1410 Laurel Street (29201)

Post Office Box 1090

Columbia, South Carolina 29202

(803) 252-4848

rah@harpootlianlaw.com

BEATTIE B. ASHMORE, PA

Beattie B. Ashmore, SC Bar No. 10419

beattie@beattieashmore.com

650 East Washington Street

Greenville, SC 29601

PH: (865) 467-1001.

Attorneys for Airbnb, Inc.

Columbia, South Carolina
October 16, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge
Case No. 2021-CP-02-00889

Appellate Case No. 2023-001479

Julianne Foster,Respondent,

v.

Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC
of South Carolina, and Airbnb, Inc., Defendants,

Of which Airbnb, Inc. is the.....Appellant,

And Rhett Riviere is a.....Respondent.

Proof of Service

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Airbnb, Inc., certify that I have served all counsel in this action with a copy of the documents(s) set forth below under Supreme Court Order 2022-05-06-04, and a copy of that email is attached to this certificate.

Document(s): **Appellant Airbnb, Inc.’s Return to Respondent’s Motion to Dismiss in Part and Respondent’s Motion to Expedite Appeal**

Served: Deborah B. Barbier, Esquire
Deborah B. Barbier, LLC
1811 Pickens Street
Columbia, SC 29201
dbb@deborahbarbier.com

Damon C. Wlodarczyk, Esquire
Riley Pope & Laney, LLC
PO Box 11412
Columbia, SC 29211
damonw@rplfirm.com
Attorney for Katherine A. Thomas

Ryan L. Beasley, Esquire
Ryan L. Beasley, Attorney at Law, PA
416 East North Street
Greenville, SC 29601-2931
rlb@ryanbeasleylaw.com

John W Harte, Esquire
John W Harte Attorney at Law, LLC
PO Box 7215
Aiken, SC 29804
john@jwhartelaw.com

Wesley D. Few, Esquire
Wesley D. Few LLC
PO Box 9398
Greenville, SC 29604
wes@wesleyfew.com;
cassy@wesleyfew.com
Attorneys for Julianne Foster

Joseph M. McCulloch Jr., Esquire
Kathy R. Schillaci, Esquire
McCulloch and Schillaci
PO Box 11623
Columbia, SC 2921
joe@mccullochlaw.com
kathy@mccullochlaw.com
Attorneys for Rhett Riviere

Margaret Nicole Fox, Esquire
James Mixon Griffin, Esquire
Griffin Humphries LLC
4408 Forest Drive, Suite 300
Columbia, SC 29206
jgriffin@griffinhumphries.com
mfox@griffinhumphries.com
jharmon@griffinhumphries.com
*Attorneys for Rhett Riviere and Chase
Enterprises LLC of South Carolina*

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Matthew A. Abee

Matthew A. Abee, SC Bar No. 101100
E-Mail: matt.abee@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorney for Airbnb, Inc.

Columbia, South Carolina
October 16, 2023

Matt Abee

From: Matt Abee
Sent: Monday, October 16, 2023 5:42 PM
To: dbb@deborahbarbier.com; rlb@ryanbeasleylaw.com; wes@wesleyfew.com; cassy@wesleyfew.com; damonw@rplfirm.com; john@jwhartelaw.com; joe@mccullochlaw.com; kathy@mccullochlaw.com; mfox@griffindavislaw.com; jgriffin@griffindavislaw.com; Jaime Harmon
Cc: Mitch Brown; Blake Williams; Eileen Hindman; beattie@beattieashmore.com; pdb@harpootlianlaw.com; Dick Harpootlian; dsestito@omm.com; dtaylor@omm.com
Subject: Service Copy: Airbnb's Return - Foster v. Airbnb (No. 2023-001479)
Attachments: Airbnb's Return to Motions to Dismiss and Expedite - Foster v. Airbnb (2023-001479).pdf; MAA Proof of Service - Airbnb Appeal (2023-001479).pdf

Counsel:

For service on you by email under Supreme Court Order No. 2022-05-06-03, please find Appellant Airbnb, Inc.'s Return to Respondent's Motion to Dismiss in Part and Respondent's Motion to Expedite Appeal. Please feel free to contact me should you have any questions. Thanks.

-Matt



MATT ABEE **PARTNER**
matt.abee@nelsonmullins.com

*Licensed in South and North Carolina

MERIDIAN | 17TH FLOOR

1320 MAIN STREET | COLUMBIA, SC 29201

T 803.255.9335 F 803.256.7500

NELSONMULLINS.COM [VCARD](#) [VIEW BIO](#)
