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SC Court of Appeals

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. 2023-001211

Julianne Foster, Plaintiff,

v.

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

Of which Rhett Riviere is the Appellant,

And Airbnb, Inc. is the Respondent.

Initial Brief of Respondent Airbnb, Inc.

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STATEMENT OF THE ISSUES ON APPEAL

Airbnb agrees with the statement of issues as set forth by Riviere in his opening brief, although to the extent Riviere characterizes Airbnb's third-party claims against Riviere as all being for "indemnification" in his statement of issues numbers II and III, that is incorrect¹.

¹ As set forth herein, Airbnb agrees with Riviere, who is not an employee or agent of Airbnb, that the circuit court erred in denying arbitration, but Airbnb disagrees with certain statements and points made by Riviere, as detailed *infra* in Argument section III of this brief.

STATEMENT OF THE CASE AND FACTS

This action arose from an incident that occurred in May 2019. (Am. Compl. ¶ 89; R. __.) Plaintiff alleges that her friend used Airbnb to locate a rental property in Aiken, South Carolina. (*Id.* ¶ 93; R. __.) Defendant Chase Enterprises, which Defendant Riviere managed, owned the property. (*Id.* ¶¶ 89–91; R. __.) Defendant Thomas held herself out to be the “host” or property manager for the property. (*Id.* ¶ 95; R. __.) Plaintiff alleges that during the time she was staying at the property, Defendant Riviere had a hidden camera placed in a bedroom which captured recordings of her. (*Id.* ¶ 100; R. __.) Airbnb asserted third-party claims against Riviere alleging four causes of action: (1) breach of contract; (2) contractual indemnification; (3) interference with contractual relationship; and (4) equitable indemnification. (*See generally* Airbnb’s 3d Party Compl.; R. __.)

Airbnb’s Terms of Service governed the transaction. (*See* Airbnb’s Mot. Compel Arbitration, Ex. A – Terms of Service, AIRBNB-000272–314 (“Terms of Service”); R. __.) Riviere and Thomas both agreed to the Terms of Service as a condition of their being allowed to list their properties on Airbnb’s online marketplace. (Airbnb’s 3d Party Compl. ¶ 1; R. __.) Plaintiff’s friend also expressly agreed to the terms when she booked the rental. (Ltr. & Aff. in Supp. of Airbnb’s Mot.; R. __.) Finally, Plaintiff directly benefited from the transaction and related agreement, and relies upon them for her claims, which also made her subject to those Terms.

The Terms of Service in effect at the time of the booking provide in bold on page one:

Please note: Section 19 of these Terms contains an arbitration clause and class action waiver that applies to all Airbnb Members. If your country of residence is the United States, this provision applies to all disputes with Airbnb. If your country of residence is outside of the United States, this provision applies to any action you bring against Airbnb in the United States. It

affects how disputes with Airbnb are resolved. By accepting these Terms, you agree to be bound by this arbitration clause and class action waiver. Please read it carefully.

(Terms of Service at 272; R. __.) Section 19 is entitled “Dispute Resolution and Arbitration Agreement” and provides that it applies to all residents of the United States. (*Id.* at 290–93.)

Section 19.4 then states in bold:

Agreement to Arbitrate. You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to these Terms or the applicability, breach, termination, validity, enforcement or interpretation thereof, or to the use of the Airbnb Platform, the Host Services, the Group Payment Service, or the Collective Content (collectively, “Disputes”) will be settled by binding individual arbitration (the “Arbitration Agreement”). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.

(*Id.* at 291; R. __.) Section 19.6 provides that the Arbitration Agreement “evidences a transaction in interstate commerce and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision.” (*Id.*)

Plaintiff’s operative complaint alleges numerous claims against Airbnb, Riviere, and Thomas.² (*See generally* Am. Compl.; R. __.)

During the course of the litigation, Plaintiff settled her claims against Riviere and sought to dismiss him from the case. Around that same time, however, Airbnb requested leave to assert

² The Amended Complaint states 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 Defendants), and (10) violation of the South Carolina Unfair Trade Practices Act (all Defendants). (*See* Am. Compl. ¶¶ 123–257; R. __.)

crossclaims against Thomas and Riviere. The court permitted the crossclaims against Thomas and directed Airbnb to assert its claims against Riviere via third-party complaint in light of Plaintiff's dismissal of her claims against him. (4/5/2023 Hr'g. Tr. 22:22–23:9; R. __.) Airbnb then filed its Third-Party Complaint against Riviere asserting claims for (1) breach of contract; (2) contractual indemnification; (3) interference with contractual relationship; and (4) equitable indemnification. (*See generally* Airbnb's 3d Party Compl.; R. __.)

On May 15, 2023, Airbnb moved to dismiss and compel arbitration of the entire case. (Airbnb Mot. to Compel; R. __.) On May 26, 2023, Riviere also moved to dismiss and compel arbitration of Airbnb's third-party claims ("Riviere's Motion"). (Riviere Mot. to Compel; R. __.)

On June 16, 2023, Plaintiff submitted a letter in opposition to both Airbnb and Riviere's motions to compel arbitration, relying on three arguments: (1) the inapplicability of direct benefits estoppel, (2) the outrageous tort exception, and (3) waiver. (*See* Barbier Ltr. to Judge Maddox, June 16, 2023; R. __.)³

On July 26, 2023, the circuit court entered an order denying Riviere's Motion to Compel Arbitration. (*See* Order; R. __.) The court agreed with each of Plaintiff's arguments in her letter, finding that: "(1) [t]he theory of direct benefits estoppel cannot be used to bind the Plaintiff non-signatory into arbitration, as she received no direct contractual benefit because she suffered harm while staying at the residence that was the subject of the contract; (2) South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers; and (3) Riviere waived the right to enforce arbitration by participating in

³ Plaintiff filed a motion to intervene in this matter, claiming she did not oppose Riviere's Motion. (Mot. To Intervene; R. __.) This was not the case. Airbnb filed a Return to the motion to intervene citing to and attaching Plaintiff's letter opposing Riviere's motion to compel arbitration. (Ret. to Mot. To Intervene; R. __.) The intervention motion has yet to be decided by this Court as of the time of filing of this brief.

the litigation before his dismissal and the third-party claims against him.” (*Id.* at 3; R. ___.) No party moved to reconsider, and Riviere appealed this Order on July 28, 2023.

Following Riviere’s appeal, Riviere and Airbnb jointly moved to acknowledge the existence of the automatic stay emanating from the Riviere appeal of the Order denying his motion to compel arbitration, and to otherwise stay the case. (Joint Mot. to Stay; R. ___.) On August 24, 2023, the circuit court granted the joint motion. (*See* Order; R. ___.) That stay order has not been appealed.

On September 13, 2023, the circuit court entered an order denying Airbnb’s motion to dismiss and compel arbitration. (*See* Order; R. ___.)⁴ Airbnb timely appealed on September 15, 2023, and that appeal also is pending before this Court with Appellate Case Number 2023-001479.

ARGUMENT

I. The circuit court erred by denying Riviere’s Motion.

The entire case should be compelled to arbitration.⁵ All of the claims at issue arise out of a transaction involving interstate commerce and are subject to a binding arbitration agreement that is governed by the FAA. The Airbnb Terms of Service provide, among other things, that *any dispute, claim, or controversy* arising out of or relating to the Terms and Conditions *or* the use of the Airbnb platform. (*See* Terms of Service at 291; R. ___.) Airbnb’s third-party claims against

⁴ The Court held similarly in denying Airbnb’s motion: “(1) direct benefits estoppel cannot be used to bind the non-signatory Plaintiff into arbitration, as she received no direct contractual benefits and suffered harm while staying at the residence that was the subject of the contract; (2) South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers; and (3) Airbnb waived its right to enforce arbitration by participating in extensive litigation for over two years.” (*Id.* at 5; R. ___.)

⁵ Airbnb’s arguments addressing the circuit court’s error in denying its motion to compel arbitration of Plaintiff’s claims will be fully addressed in Airbnb’s brief on the merits in the appeal of that Order.

Defendant Riviere and crossclaims against Defendant Thomas fall within the Arbitration Agreement's broad scope. Likewise, all of Plaintiff's claims against Airbnb fall within the Arbitration Agreement's broad scope. Regardless, under the Arbitration Agreement the issue of arbitrability is for the arbitrator to decide. As Riviere correctly contends, the circuit court erred by refusing to acknowledge these points and finding instead that direct benefits estoppel, the outrageous tort exception, and waiver supported denying Riviere's Motion.

A. The circuit court erred by finding that the outrageous torts exception remains viable under South Carolina law.

As detailed below, the "outrageous torts" exception has been eliminated by applicable precedent from the Supreme Court of the United States. Regardless of its viability, however, the circuit court erred by applying this doctrine in examining Riviere's motion. The circuit court correctly acknowledged that Airbnb does not assert any outrageous tort claims against Riviere. Likewise, no party is contending that Riviere committed any outrageous tort against Airbnb. Therefore, the doctrine simply has no applicability in assessing whether Airbnb's claims against Riviere should be compelled to arbitration.

Moreover, although Riviere in his brief states that the outrageous tort exception is of "questionable validity," it is, in fact, no longer viable following *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) because it is a judicially created exception that places arbitration agreements on a lesser footing than normal contracts.

In 2007, the Supreme Court of South Carolina judicially created the outrageous torts exception by "pronounce[ing] a more definitive rule" that the State's courts "will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007); *see also Parsons v. John Wieland Homes*

& Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 9, 791 S.E.2d 128, 132 (2016) (discussing the history of the doctrine).

Four years later, the Supreme Court of the United States analyzed California's unconscionability precedent and held that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" under the Federal Arbitration Act ("FAA").⁶ *Concepcion*, 563 U.S. at 352. As the *Concepcion* court explained, California precedent classified most collective-arbitration waivers in consumer contracts as unconscionable. *Id.* at 340. Because, among other things, this failed to place arbitration agreements on equal footing with other contracts, the Court concluded that the California unconscionability precedent was preempted by the FAA. *See generally id.*

Like the California unconscionability precedent in *Concepcion*, South Carolina's outrageous torts exception is "unique" and "restricted" to the field of arbitration. *Parsons*, 418 S.C. at 11, 791 S.E.2d at 133 (Pleicones, J.) (plurality opinion). No South Carolina precedent has definitively addressed whether the doctrine remains viable following *Concepcion*, although two justices in *Parsons* would have held that the "exception cannot survive." *Id.* at 13, 791 S.E.2d at 134.⁷

All cases that have applied the outrageous torts exception since *Aiken* have focused explicitly on arbitration.⁸ In fact, the one opinion that tried to apply the exception outside the

⁶ As Riviere's brief correctly notes, the FAA applies to this dispute. The parties agree the FAA applies, and the transaction involved a company and individuals in two different states passing funds electronically over interstate wires.

⁷ Three justices in *Parsons*, in statements spread across multiple, non-plurality opinions, expressed their view that *Concepcion* did not eliminate the doctrine under South Carolina law.

⁸ *See, e.g., MCE Auto., Inc. v. Wetherald*, No. 6:10-cv-00409-JMC, 2010 WL 5257233, at *3 (D.S.C. Dec. 17, 2010); *Timmons v. Starkey*, 389 S.C. 375, 378, 698 S.E.2d 809, 810 (2010); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 493-94, 689 S.E.2d 602, 605 (2010); *Osborne v. Marina Inn at Grande Dunes, LLC*, No. 4:08-cv-0490, 2009 WL 3152044, at *8 (D.S.C. Sept. 23,

arbitration context was reversed by our Supreme Court. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 333–34, 755 S.E.2d 437, 444 (2014) (“[H]owever, we reverse the portion [of the Court of Appeals opinion] finding that the outrageous and unforeseeable torts exception to arbitration applies in the jury trial waiver context, and find instead that Respondents waived their right to a jury trial on all of their counterclaims.”).

South Carolina’s unique application of the exception only to arbitration agreements requires the exception to yield to the Federal Arbitration Act’s “national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (citing 9 U.S.C. § 2). The circuit court erred by finding that this exception remains viable following *Concepcion*. This Court should reverse.

B. Direct benefits estoppel is not implicated here.

Second, the circuit court erred by relying on direct benefits estoppel in denying Riviere’s Motion. (Order at 3; R. ___.) This appeal concerns *Riviere’s* Motion seeking to compel arbitration of the claims asserted by Airbnb against him. Direct benefits estoppel has no applicability to the question of whether Airbnb’s claims should be compelled to arbitration since there is no dispute as to whether Airbnb is a signatory to its own arbitration agreement.⁹

2009); *Chassereau v. Glob. Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007); *Simpson v. World Fin. Corp. of S.C.*, 373 S.C. 178, 179, 644 S.E.2d 723, 724 (2007) (affirming in Rule 220, SCACR opinion relying on *Aiken*); *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 553, 666 S.E.2d 294, 297 (Ct. App. 2008); cf. *Davis v. ISCO Indus., Inc.*, 434 S.C. 488, 499, 864 S.E.2d 391, 397 (Ct. App. 2021) (declining to rule on the exception by affirming on another ground); *Woods v. Dolgencorp, Inc.*, No. 7:20-CV-04399-DCC, 2021 WL 5989965, at *3 (D.S.C. Dec. 17, 2021) (rejecting application of the exception); *Edens v. Synovus Fin. Corp.*, No. 3:17-cv-0806-MBS, 2017 WL 5001290, at *3 (D.S.C. Nov. 2, 2017) (same); *Doe v. TCSC, LLC*, 430 S.C. 602, 615–16, 846 S.E.2d 874, 881 (Ct. App. 2020) (declining to rule on exception given delegation clause); *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 702, 869 S.E.2d 859, 865 (Ct. App. 2022) (same).

⁹ Under this doctrine, South Carolina law estops a non-signatory from avoiding an arbitration cause when Plaintiff receives a direct benefit from the contract containing the clause. *Pearson v. Hilton*

C. Riviere did not waive the right to seek arbitration.

1. No waiver occurred under South Carolina’s established test.

Finally, South Carolina traditionally followed a three-part test in assessing whether a party has waived its right to compel arbitration: “(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.” *Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 250 (Ct. App. 2007). “These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others.” *Id.* Waiver “is an affirmative defense and the burden of proof is upon the party who asserts it.” *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994).

As Riviere noted, he promptly submitted a motion to compel arbitration upon being served with Airbnb’s Third-Party Complaint. This pleading stated new claims and were the first claims asserted by Airbnb against Riviere. Airbnb served its Third-Party Complaint on April 20, 2023, and Riviere submitted his motion to compel arbitration in lieu of an answer on May 26, 2023. Riviere never engaged in any discovery (either offensive or defensive) specific to Airbnb’s claims against him. Finally, Airbnb has never asserted that it was prejudiced by Riviere’s motion.

Although the circuit court’s order correctly notes that Riviere litigated and settled Plaintiff’s claims, this could not effectuate a waiver of Riviere’s right to compel arbitration of

Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012); *Wilson v. Willis*, 426 S.C. 326, 344, 827 S.E.2d 167, 177 (2019) (“[A] party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.”).

Airbnb's *new* claims against him that were first asserted (with permission of the court) only after his dismissal from Plaintiff's complaint. The circuit court's waiver finding was error and this Court should reverse.

2. *Morgan v. Sundance* does not alter this conclusion.

The viability of South Carolina's arbitration-specific waiver test is questionable in light of the Supreme Court's opinion last year in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). *Morgan* emphasized the general waiver rule of "voluntary relinquishment of a known right" and noted that the analysis should focus on the actions of the party who held the right. *Id.* This aligns with Supreme Court precedent providing that a court cannot create arbitration-specific rules to refuse to enforce an otherwise valid arbitration agreement. *See Doctor's Assocs.*, 517 U.S. at 687; *Perry*, 482 U.S. at 492 n.9. Therefore, the waiver analysis, both within and without the arbitration context, should examine whether the party seeking to compel arbitration has voluntarily relinquished its right. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992).

For the same reasons as detailed in Part I.C.1, Riviere did not take any action which would demonstrate a voluntarily relinquishment of a known right since he promptly moved to compel arbitration of Airbnb's claims at the first opportunity and did not otherwise take any actions inconsistent with his right to compel arbitration. Therefore, regardless of *Morgan's* impact on South Carolina's arbitration-specific waiver test, the circuit court erred and this Court should reverse.

II. Questions as to the arbitrability of Riviere's claims should be decided by the arbitrator.

The circuit court further erred by reaching the issues of the outrageous torts exception and waiver in the first instance since the parties delegated questions of arbitrability to the arbitrator.

Regardless of whether the outrageous torts exception remains viable in South Carolina or the facts implicate waiver, the delegation clause of the arbitration agreement and applicable precedent confirm that an arbitrator—not the circuit court—must decide whether the dispute may continue in arbitration.

As Riviere’s brief correctly notes, Airbnb’s arbitration agreement provides that “[i]f there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.” (Terms of Service at 291, § 19.4; R __.)

As the Supreme Court of the United States recently explained, “[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019); *see also Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 699–700, 869 S.E.2d 859, 864 (Ct. App. 2022) (applying *Henry Schein*). In this scenario, the court “possesses no power to decide the arbitrability issue.” *Henry Schein*, 139 S. Ct. at 529.

Last year, this Court confirmed that the question of the outrageous torts exception and foreseeability is one for the arbitrator:

In the present case, the [Arbitration] Agreement provided, “Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding.” This statement is clear that issues of arbitrability are [to] be determined by the arbitrator. This includes claims arising out of conduct that Respondents assert was unforeseeable.

Palmetto Wildlife Extractors, LLC v. Ludy, 435 S.C. 690, 702, 869 S.E.2d 859, 865 (Ct. App. 2022) (citation omitted); *Doe v. TCSC, LLC*, 430 S.C. 602, 615–16, 846 S.E.2d 874, 881 (Ct. App. 2020) (“We express no opinion on whether the 2011 arbitration contract covers Doe’s claims, or, if so, whether the claims are still subject to arbitration due to the ‘outrageous and unforeseen torts’

exception. The dissent argues this exception does apply, but whether the exception applies is a question the parties delegated to the arbitrator, not the court.”) (citation omitted). The same is true with respect to the question of waiver—it too must be decided by the arbitrator. *See, e.g., Chatman v. Jimmy Gray Chevrolet, Inc.*, 2016 WL 4975044, at *6 (N.D. Miss. 2016) (“Given that the waiver issue goes to the scope of arbitration, which in this case must be decided by the arbitrator given the existence of the delegation clause, unquestionably, the issue must be decided by the arbitrator and not this Court.”).

Therefore, the circuit court erred by failing to compel the matter to arbitration and reaching the issues of waiver and the outrageous torts exception in contravention of the delegation clause.

III. Riviere’s brief misstates several key points.

As detailed above, Airbnb agrees with Riviere that the circuit court erred as a matter of law, and Airbnb takes the position that the entire case should be compelled to arbitration. However, Airbnb does take issue with three key points made by Riviere.

First, as noted, although Riviere characterizes the outrageous tort exception as having “questionable validity,” he fails to assert outright, as Airbnb does, that the outrageous tort exception is no longer viable. Thus, it was error for the circuit court to rely on it *as a matter of law* under *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Second, Riviere contends that only Thomas agreed to the Airbnb Terms of Service as she was the “host” of this property, and that he did not agree to the terms. (Br. of Appellant at 6, n.1.) However, as Airbnb alleged in its Third-Party Complaint, Riviere and Thomas both entered into binding agreements with Airbnb on or about January 23, 2018, and July 29, 2016, respectively. (3d Party Compl. ¶ 1; R. ___.) In those agreements, as a condition of their being allowed to list the properties on Airbnb’s online platform, Thomas and Riviere expressly promised to follow all of

Airbnb's policies, which were incorporated by reference into the agreement. (3d Party Compl. ¶ 1; R. __.) Riviere did not submit any pleading, affidavits, or other evidence disputing these allegations.

Finally, Riviere asserts in his brief that Plaintiff did not oppose his motion. (Br. of Appellant at 2.) However, this is factually inaccurate. As noted above, on June 16, 2023, Plaintiff submitted a letter to the Circuit Court confirming Plaintiff's position that both Airbnb and Riviere's motions should be denied. (See Barbier Ltr. to Judge Maddox, June 16, 2023; R. __.) The three positions advanced by Plaintiff in her letter opposing the motions to compel ultimately formed the basis of the circuit court's order.

CONCLUSION

For the reasons set forth above, the circuit court erred by denying Riviere's Motion. This Court should reverse the circuit court's order denying Riviere's Motion.

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