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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No.2023-001506
Case No. 2022-CP-04-02159

Skylar Blume, Virgil Dowis, Rhi Greer, Jonathan Hudson,
Natalie Mann, Mya Ourada, Braden Terrill, & Aneil Tripathi..... Respondents,

v.

Starbucks, Inc. and Melissa Morris,..... Appellants,

INITIAL BRIEF OF APPELLANT STARBUCKS, INC.

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III. Did the trial court err in finding that Appellant waived the right to compel arbitration?

STATEMENT OF THE CASE AND FACTS

This appeal arises from the trial court's Order denying Appellant Starbucks, Inc.'s ("Starbucks" or "Appellant") motion to compel arbitration on the basis of waiver even though Starbucks: (1) raised the applicability of an arbitration agreement to Respondents' claims in its first responsive pleading; (2) moved to compel arbitration within six months of the commencement of the action; (3) did not engage in any offensive discovery and objected to Respondents' discovery requests in light of the motion to compel arbitration. The trial court also made an alternative ruling as to the scope of the relevant arbitration agreement despite it delegating gateway issues, including scope, solely to the arbitrator. This Court should reverse.

Respondents are eight current or former Starbucks employees. (*See* Compl. ¶ 1; R. __.) As a condition of employment, Starbucks provides its employees with the Starbucks Mutual Arbitration Agreement (the "Arbitration Agreement"). (Starbucks' Mot. to Compel, Ex. A – Decl. of Lara Braislin ¶ 8; R. __.) Each Respondent agreed to be bound by the Arbitration Agreement, (*id.* at ¶¶ 8-20; Starbucks' Mot. to Compel, Ex. B – E-Signature Consents; Starbucks' Mot. to Compel, Ex. C – Executed Arbitration Agreements; R. __), which they have never disputed. (*See generally* Pltfs. Resp. in Opp'n; R. __.) Likewise, Respondents have never challenged the validity of the Arbitration Agreement. (*See generally id.*)

The Arbitration Agreement expressly states that it is "enforceable under and subject to the Federal Arbitration Act." (Starbucks' Mot. to Compel, Ex. C – Executed Arbitration Agreements; R. __.) Under the Arbitration Agreement, Starbucks and Respondents agreed that any claims related to their employment with Starbucks were subject to arbitration. (*Id.*) In relevant part, it states:

> Starbucks and I agree to use binding individual arbitration to resolve any "Covered Claims" that arise between me and Starbucks, its

> subsidiaries and related companies, and/or any current or former employee of Starbucks or a related company (collectively "Starbucks"). **'Covered Claims' are those brought under any statute, local ordinance, or common law relating to my employment**, including those concerning any element of compensation, harassment, discrimination, retaliation, recovery of bonus or relocation benefits, leaves of absence, accommodations, or termination of employment.

(*Id.* (emphasis added).)

The Arbitration Agreement further provides that "[**e]xcept as provided herein, I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Starbucks and I waive the right to a trial before a judge or jury in federal or state court**." (*Id.* (emphasis in original).)

Moreover, the Arbitration Agreement contains a delegation clause providing that the arbitrator, not a court or agency, possesses the sole authority to resolve any disputes concerning "the formation, interpretation, applicability, enforceability, or implementation of this Agreement, including any claim that all or part of this Agreement is void or voidable." (*Id*.)

On August 1, 2022, Respondents, along with other unionized Starbucks employees, confronted their manager, Appellant Melissa Morris ("Morris" and together with Starbucks "Appellants"), and demanded changes to the terms and conditions of their employment with Starbucks, including, among others, wage increases. (Compl. ¶¶ 18, 49-57; R. __.) Respondents videoed this confrontation and disseminated a portion of the video via social media. (*Id.* at ¶ 22; R. __.) Following these events, Morris contacted the Anderson County Sheriff's Office and reported the events that transpired on August 1, 2022. (*Id*. at ¶ 27; R. __.)

On August 8, 2022, Starbucks issued a statement providing that Morris felt threatened and unsafe during the confrontation and had contacted law enforcement about the events. (*Id*. at ¶ 36; R. __.)

After an investigation, the Sherriff's Office declined to pursue charges against the individuals named in the police report. (*Id*. at ¶¶ 44-45; R. __.)

On October 17, 2022, Respondents filed this action asserting claims for defamation and abuse of process against Starbucks and Morris. (*See generally id.*; R. __.) In support of their claims, Respondents allege that Morris defamed them by submitting the police report about the events that occurred on August 1, 2022. (*Id.* at ¶¶ 27-30, 50-51; R. __.) Respondents further allege that Starbucks published a false/defamatory statement in its August 8, 2022 statement. (*Id*. at ¶¶ 31-38, 52; R. __.) Respondents also claim that Starbucks and Morris abused the legal process by filing a police report and did so for the purpose of "preventing [Respondents] from publicly protesting Starbucks." (*Id*. at ¶¶ 59-62; R. __.)

The gravamen of Respondents' Complaint involves allegations that Respondents were attempting to alter the terms and conditions of their employment—*i.e.*, activity which is protected pursuant to the National Labor Relations Act ("NLRA") and which was undertaken as part of their employment with Starbucks. In fact, Respondents filed unfair labor charges with the National Labor Relations Board ("NLRB") prior to initiating this action and included the same allegations from their initial unfair labor charge in their Complaint in this action. (Starbucks' Mot. to Compel p.5 n.1; R. __.)

Starbucks timely answered Respondents' Complaint on December 23, 2022. (Ans. of Starbucks; Ans. of Morris; R. __.) In its Answer, Starbucks asserted as an affirmative defense that arbitration was the only proper venue for this dispute, and as a result, the trial court lacked jurisdiction of the matter. (Ans. of Starbucks ¶ 75; R. __.)

Along with its answer, Starbucks also filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. As Starbucks explained, Respondents' claims, if true, concern rights protected by the

National Labor Relations Act ("NLRA") or would constitute unfair labor practices under the NLRA, which are under the exclusive competence of the National Labor Relations Board ("NLRB") pursuant to *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 245 (1959). (Starbucks Mot. to Dismiss; R. __.) Morris filed a similar motion a few days later. (Morris's Mot. to Dismiss; R. __.) Starbucks also contemporaneously filed a motion to have the matter administratively assigned to the Business Court pilot program. (Starbucks' Mot. for Assignment to Business Court; R. __.) The sole basis of this motion was the potential application of the complex legal issue of preemption under the NLRA. (*See id.*)

The trial court denied Appellants' motions to dismiss for lack of subject matter jurisdiction on February 15, 2023, via a single Form 4 Order. The Order found that Respondents' claims were not preempted by the NLRA and requested a formal order from Respondents' counsel. (Form 4 Order; R. __.)

The Chief Administrative Judge for the South Carolina Business Court Program denied Starbucks' request to assign this matter to the Business Court Pilot Program on March 15, 2023 without a hearing. (Order; R. __.)

On April 7, 2023, Starbucks moved to dismiss and compel arbitration. (Starbucks' Mot. to Compel; R. __.) Morris later joined in this request. (Morris's Mot. to Compel; R. __.) At the time that Starbucks filed its motion to compel arbitration, no discovery had been completed, and neither Starbucks nor Morris had initiated any discovery. (Transcript of 6/14/2023 Hrg. p. 8:9-15; R. __.) This remains the case.

On April 27, 2023, the trial court entered a Form 4 Order vacating its February 15 Order. The trial court's holding that Respondents' claims were not preempted by the NLRA remained unchanged. However, the Order clarified that no formal order would follow.

Respondents submitted a memo in opposition to the motions to compel arbitration on June 7, 2023. (Pltfs. Mem. in Opp'n; R. __.) Respondents did not challenge the validity or applicability of the Arbitration Agreement but instead argued that: (1) Appellants waived their right to compel arbitration and (2) Respondents' claims did not fall within the scope of the Arbitration Agreement. (*See generally id.*)

The trial court held a hearing on Appellants' motions on June 14, 2023. (Transcript of 6/14/2023 Hrg.; R. __.) On September 1, 2023, it entered a single Order denying both motions. (Order; R. __.) In so doing, the court held that Appellants had waived their right to compel arbitration, because "[Appellants] waited several months to seek to arbitrate" the underlying claims and filed motions to dismiss for lack of subject matter jurisdiction. (*Id.* at 1; R. __.) Additionally, the trial court cited Starbucks' request to assign this matter to the Business Court Pilot Program in support of its waiver finding. (*Id.*) In the alternative, the trial court held that it could reach the gateway issue of arbitrability and that Respondents' claims did not fall within the scope of the Arbitration Agreement. (*Id.* at 2-3; R. __.)

Appellants both timely filed motions to reconsider the trial Court's September 1, 2023 Order. The trial court denied these motions in a single Form 4 Order dated September 15, 2023. (Starbucks' Mot. to Reconsider; Morris's Mot. to Reconsider; Form 4 Order; R. __.) Appellants each filed a Notice of Appeal on September 22, 2023.

Following their appeal, Appellants sought to stay proceedings at the trial court level after Respondents filed a Motion to Compel discovery. (Starbucks' Mot. to Stay; Morris's Mem. in Supp.; R. __.) The trial court entered an Order staying this matter pending the resolution of the issues on appeal on November 22, 2023. (Order; R. __.)

STANDARD OF REVIEW

An appeal from the denial of a motion to compel arbitration is subject to de novo review. *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 382, 892 S.E.2d 112, 114 (2023), *reh'g denied* (Sept. 27, 2023) (citing *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005)).

ARGUMENT

I. A valid arbitration agreement exists, which Starbucks is entitled to enforce.

Respondents do not dispute that a valid arbitration agreement exists or that the Federal Arbitration Act ("FAA") applies.[1] The FAA provides, in relevant part, that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract…shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. When an action subject to arbitration is brought in court, the court "***shall*** make an order directing the parties to proceed to arbitration." 9 U.S.C. §§ 3-4 (emphasis added). The FAA "leaves no place for the exercise of discretion by the district court, but instead mandates that [] courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) (holding that courts have "no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in

[1] As noted above, the Arbitration Agreement expressly states that it is "enforceable under and subject to the Federal Arbitration Act." (Starbucks' Mot. to Compel, Ex. C – Executed Arbitration Agreements; R. __.) Moreover, Starbucks is engaged in interstate commerce as it owns and operates thousands of retail coffee shops throughout the United States, purchases goods from multiple states, and transports goods across state lines for ultimate sale to its customers through its retail locations. (Braislin Decl. at ¶ 3.) These activities utilize the instrumentalities of interstate commerce and people or things of interstate commerce as well as the channels of interstate commerce. *See Cape Romain Contractors, Inc., v. Wando E., LLC,* 405 S.C. 115, 122, 747 S.E.2d 461, 464 (2013) (quoting *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009)).

a case fall within its purview.") The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)).

The FAA mandates that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25; *see also Brown v. Santander Consumer USA, Inc.*, No. CA 0:12-2825-CMC-PJG, 2013 WL 4017162, at *2 (D.S.C. Aug. 5, 2013) ("Arbitration is compelled 'unless it may be said with positive assurance that the arbitration [agreement] is not susceptible of an interpretation that covers the asserted dispute." (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989))). The Supreme Court dictates that a presumption of arbitrability exists where a contract contains an arbitration clause. *AT&T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). The presumption in favor of arbitrability "is particularly applicable where the [arbitration] clause is . . . broad," as it is in this case. *Id.*

South Carolina and federal policy strongly favor arbitration, and arbitration agreements are presumed valid. *See Cape Romain Contractors, Inc.*, 405 S.C. at 125, 747 S.E.2d at 466. Accordingly, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 91 (2000). The question of validity of an arbitration agreement is based upon state contract law. *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 562, 437 S.E.2d 22, 24 (1993). To determine whether a particular matter is bound to arbitration, the court is tasked with determining two "gateway" issues: (1) whether there is a valid agreement to arbitrate; and (2) whether the agreement covers the dispute. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002).

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the ***factual allegations*** underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (emphasis added). "A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* at 598, 553 S.E.2d at 119. "[U]nless the Court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Carolina Care Plan, Inc.v. United Healthcare Services, Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004).

As noted, Respondents do not dispute that they are bound by the Arbitration Agreement, opting instead to take issue with its scope and contending Starbucks waived its rights thereunder. The Arbitration Agreement delegates any questions surrounding arbitrability to the arbitrator, which alone should end the analysis and warrant compelling Respondents' claims to arbitration. Furthermore, by its plain language, the Arbitration Agreement applies to any claims relating to their employment with Starbucks, and each Respondent executed the agreement as a condition of their employment. Respondents' own pleading notes that the August 1, 2022 incident was an effort to "alter the terms and conditions of their employment," (Compl. ¶ 20; R. __), which is a phrase used to define "protected activity" under the NLRA.[2] The statements which serve as the basis for their defamation claim all relate to this incident, which took place at their place of employment,

[2] Section 7 of the NLRA protects the rights of employees to engage in concerted activities which are "activities of employees who have joined together in order to achieve common goals." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 831 (1984). Further, Section 8 of the NLRA prohibits unfair labor practices which includes conduct that "may reasonably tend to coerce or intimidate employees" in their exercise of section 7 rights." *NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 208 (4th Cir. 2005).

during the course of their employment, and relate to their employment and activities as employees. Moreover, Respondents' abuse of process claim is based upon similar allegations, contending that Appellants reported the incident to the police "for the illegitimate collateral purpose of preventing [them] from public protesting Starbucks." (*Id.* at ¶ 20; R. __.) The foundation of this claim is also Respondents' employment with Starbucks.[3]

Therefore, this Court should enforce the Arbitration Agreement according to its terms and carry out the federal and state policy favoring arbitration of disputes.[4] *See Parsons v. John Wieland*

[3] Contrary to Respondents' arguments to the trial court, South Carolina courts have routinely held that tort claims brought by employees against their employer, including defamation, fall within (and are subject to) arbitration agreements even though the claims are not "traditional employment-law claims." *See, e.g., Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 110, 739 S.E.2d 209, 214 (2013) (holding that claims for defamation and intentional infliction of emotional distress were subject to the arbitration agreement between an employer and its employee); *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 244-45, 877 S.E.2d 486, 491 (Ct. App. 2022) (holding that arbitration agreement between employer and employee applied to employee's tort claims for defamation and interference with prospective contractual relations). Notably, the United States District Court for the District of California reached a similar conclusion in *Sabouhi v. Starbucks Corp.*, Case No. 2:21-04446, 2022 WL 2101727, at *2 (C.D. Cal. Mar. 14, 2022) (district court granting motion to compel arbitration where the claims at issue included a common law defamation claim).

[4] Many other courts presented with the Arbitration Agreement have held the agreement is enforceable under the FAA and state contract law principles. *Walters v. Starbucks Corp.*, No. 22CV1907 (DLC), 2022 WL 3684901, at *3 (S.D.N.Y. Aug. 25, 2022) (holding that Starbucks' arbitration agreement is valid and enforceable and "the FAA requires the enforcement of the Arbitration Agreement"); *Sabouhi*, 2022 WL 2101727, at *7 (granting Starbucks' motion to compel arbitration pursuant to the Arbitration Agreement; *Wilson v. Starbucks Corp.*, 385 F. Supp. 3d 557, 565 (E.D. Ky. 2019); (granting motion to compel arbitration and dismissing complaint because Starbucks' Arbitration Agreement is valid and enforceable under state contract law); *Armstead v. Starbucks Corp.*, No. 17-CV-1163 (PKC), 2017 WL 5593519, at *3 (S.D.N.Y. Nov. 17, 2017) (holding that Starbucks' Arbitration Agreement is valid and enforceable under the FAA); *Horne v. Starbucks Corp.*, No. 216CV02727MCECKD, 2017 WL 2813170, at *3 (E.D. Cal. June 29, 2017) (noting that Starbucks' Arbitration Agreement is valid and enforceable); *Rezaeian v. Starbucks Corp.*, No. LACV1604599JAKASX, 2017 WL 11635407, at *9 (C.D. Cal. Feb. 8, 2017) (upholding Starbucks' Arbitration Agreement and finding no waiver where Starbucks' removed the case to federal court and six months transpired between the filing of the complaint and the motion to compel arbitration).

Homes & Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

II. The trial court erred by reaching the issues of waiver and whether Respondents' claims fall within the scope of the Arbitration Agreement where the contract delegated gateway issues to the arbitrator.

A. The trial court erred by overriding the parties' delegation clause.

The Arbitration Agreement expressly delegated any disputes regarding its "formation, interpretation, applicability, enforceability, or implementation" to the arbitrator rather than the court. Therefore, questions regarding waiver and the Arbitration Agreement's scope are properly reserved for the arbitrator and the trial court erred by reaching these issues.

South Carolina courts recognize that the parties to an arbitration agreement may delegate authority to an arbitrator to resolve "gateway issues" concerning the enforceability, scope and interpretation of the agreement. *DOE v. TSCS, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995)). Moreover, "a court may not override the contract" to arbitrate and decide issues when "the parties' [arbitration] agreement delegate[s]" authority to the arbitrator to resolve such issues. *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 699-70, 869 S.E.2d 859, 864 (Ct. App. 2022) (finding a delegation clause was valid and enforceable and required the court to abstain from ruling on gateway issues).

South Carolina precedent comports with that of the U.S. Supreme Court, which has likewise held that "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S.

63, 68-69 (2010)). "This line of cases merely reflects the principle that arbitration is a matter of contract." *Rent-A-Ctr., W., Inc.*, 561 U.S. at 69. As long as the parties' agreement delegates the arbitrability question to an arbitrator "by 'clear and unmistakable' evidence," a court may not override the contract and decide the arbitrability question. *Henry Schein, Inc.*, 139 S. Ct. at 529-30 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

Here, the trial court adopted Respondents' arguments challenging the scope of the Agreement and claiming that Starbucks waived the right to enforce the Agreement. However, these arguments concerned the "interpretation, applicability, enforceability, or implementation of [the] Agreement," which are all issues ***exclusively*** delegated to the arbitrator. As a result, the challenges raised by Respondents are only proper before the respective arbitrator, and it was error for the trial court to reach those issues in contravention of the parties' agreement and established South Carolina law.[5]

Importantly, courts may only pass judgment on gateway issues where the "party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause ***specifically***." *TSCS, LLC*, 430 S.C. at 608, 846 S.E.2d at 877 (citing *Rent-A-Ctr., W., Inc.*, 561 U.S. at 68 (2010)) (emphasis added). Respondents made no such challenge here and effectively conceded that: (1) the Agreement is valid and enforceable and (2) they are bound by the Agreement. The record here is devoid of any argument disputing that the existence or validity of the delegation clause or that it delegates ***sole authority*** to address gateway issues to the arbitrator. Thus, Respondents never made a "direct and discrete challenge" to the relevant delegation clause. *See TSCS*, 430 S.C. at 608, 846 S.E.2d at 877. Given Respondents' failure, there

[5] Deferring these issues to the arbitrator is consistent with this South Carolina policy that "arbitration is a matter of contract, and courts must enforce contracts according to their terms." *Palmetto Wildlife*, 435 S.C. at 699, 869 S.E.2d at 864.

is no basis for the trial court's conclusion that the relevant delegation clause does not delegate questions of arbitrability solely to the arbitrator.

The trial court's Order also incorrectly found that that the Arbitration Agreement does not "clear[ly] and unmistakabl[y]" delegate questions of arbitrability" to the arbitrator because it "excludes '(c) actions to enforce this Agreement, compel arbitration, [or] compel arbitration.'" (Order at 3; R. __.)[6] This was also a gateway issue for the arbitrator to decide. Regardless, contrary to the trial court's finding, this "action" was initiated by Respondents and is not one to enforce the Agreement, which would take the form of a declaratory judgment action seeking to declare that the Agreement is valid and enforceable. Instead, Respondents' action seeks civil relief from events which took place as part of Respondents' employment with Starbucks and Respondents' efforts to alter (and negotiate changes to) the terms and conditions of their employment with Starbucks. The trial court erred in finding that this language—which applies to ***separate actions*** solely seeking to ***enforce*** that agreement or to compel arbitration—is applicable here.

Therefore, for all these reasons, the trial court erred by concluding that it could reach gateway issues concerning arbitrability. This Court should reverse.

B. Starbucks timely raised the applicability of the delegation clause.

The trial court alternatively found that Starbucks failed to preserve its argument regarding the delegation clause, citing to *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E. 2d 475, 577 (Ct.

[6] The trial court relied on *Wilson v. Starbucks Corp.*, 385 F. Supp. 3d 557, 561 (E.D. Ky. 2019) to support its conclusion that the arbitration agreement did not clearly and unmistakably delegate questions of arbitrability to the arbitrator. The *Wilson* court found that the Arbitration Agreement was "ambiguous" as to whether the parties intended to make such a delegation, citing this language. As noted, that language is not applicable under these facts. Moreover, the *Wilson* court ultimately found that ***arbitration should be compelled*** and granted Starbucks' motion to dismiss on that basis.

App. 1989) to support this conclusion. (*See* Order at 2; R. __.) However, *Bouchette* is inapposite since Starbucks timely raised the issue of delegation to the trial court.

Bouchette concerned the issue preservation rules ***on appeal***, with the Court of Appeals stating that a party cannot use a reply brief or oral argument to raise an issue that was not argued in its opening brief. *Id.* at 112, 386 S.E. 2d at 577 (stating that "[a]n ***appellant*** may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the ***appellant's*** brief" (emphasis added)). This appellate issue preservation rule has never been imposed on the trial courts where there is no set briefing schedule. Parties frequently submit supporting memoranda, response briefs, and reply briefs until the time of the hearing, and even post-hearing submissions are not uncommon.

All that is required for preservation at the trial court stage is that the question presented "must first have been fairly and properly raised in the lower court and passed upon by that Court." *Sloan v. S.C. Dep't of Rev.*, 409 S.C. 551, 555 n.4, 762 S.E.2d 687, 689 n.4 (2014) (quoting *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011)). Thus, at the trial court level, an issue is timely raised so long as it is made prior to the Court's final ruling. This comports with long established precedent that until there is a final order entered by the court, there is no ruling, and the court is free to change its mind. *See Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 608, 790 S.E.2d 430, 434 (Ct. App. 2016) (order not final until written and entered); *Case v. Case*, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964) (same). An issue only becomes untimely if a party attempts to raise it for the first time, when he could have raised it earlier, on a ***motion to reconsider***. *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005) ("A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.").

Even on appeal, the issue preservation rules are not intended to be "a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). Thus, where it cannot be said that an argument is "clearly unpreserved and the 'question of issue preservation is subject to multiple interpretations, ***any doubt*** should be resolved in favor of preservation.'" *Johnson v. Roberts*, 422 S.C. 406, 411-12, 812 S.E.2d 207, 210 (Ct. App. 2018) (emphasis added) (quoting *Atl. Coast Builders*, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in part and dissenting in part)).

The trial court's reliance on *Samuel v. Schumacher Homes of S.C.* in support of its conclusion that waiver was an issue for the court despite the delegation clause was equally improper and erroneous. *See Samuel v. Schumacher Homes of S.C.*, Unpublished Opinion No. 2022-UP-148 (S.C. Ct. App. filed Mar. 23, 2022), *available at* 2022 WL 854380. The *Samuel* opinion is unpublished and plainly provides that it has "**NO PRECEDENTIAL VALUE**." Rule 268(d)(2), SCACR expressly notes that such an opinion should not be cited except in the proceeding in which it is directly involved. Thus, it was error for the trial court to rely on this for precedent.

Starbucks timely raised its argument that the parties delegated authority to the arbitrator to address challenges to the formation, interpretation, validity or enforceability, or application of the Arbitration Agreement for this case. Indeed, Starbucks' briefs, submitted ***prior to*** the trial court's hearing raised this issue. Moreover, at oral argument before the trial court, Starbucks argued that the delegation clause in the Arbitration Agreement precluded the trial court from ruling on any gateway issues concerning arbitrability. As such, this Court should reverse the trial court's finding to the contrary.

III. The trial court erred by finding that Starbucks waived its right to compel arbitration.

As detailed in Section II, waiver was a gateway issue delegated to the arbitrator pursuant to the Arbitration Agreement and the trial court's Order should be reversed on that basis alone. However, reversal is also appropriate because the trial court erroneously determined that even if Respondents' claims were subject to the Arbitration Agreement, Starbucks waived the right to compel arbitration. Starbucks raised the Arbitration Agreement in its initial responsive pleading and has consistently maintained and asserted its right to compel arbitration. The parties have not conducted discovery, and the only filings were a motion to administratively assign this matter to business court and a motion asserting that Respondents' claims were potentially preempted and were required to be litigated before the NLRB (meaning they could be heard neither in court nor in arbitration). As detailed below, Starbucks' actions have not constituted a knowing and intentional relinquishment of its rights under the Arbitration Agreement.

When considering the issue of waiver, courts in South Carolina consider (1) whether a ***substantial length*** of time passed between the commencement of the underlying action and the filing of the motion to compel arbitration, (2) whether the party seeking to compel arbitration engaged in ***extensive*** discovery before moving to compel arbitration, and (3) whether the non-moving party was prejudiced by the delay in seeking to compel arbitration. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (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).

The validity of the prejudice prong of the waiver test is questionable following the U.S. Supreme Court's opinion last year in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). *Morgan* reiterated that courts may not create "custom-made rules, to tilt the playing field in favor of (***or against***) arbitration." *Id.* at 1712. It 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 harkens back to the basic principle that court cannot create arbitration-specific rules to refuse to enforce an otherwise valid arbitration agreement. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). 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).

A. No substantial length of time passed between the commencement of this case and Starbucks' motion to compel arbitration.

Generally, South Carolina courts have found waiver of a right to compel arbitration where a dispute is several years old before a party seeks to compel arbitration. *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (more than five-year delay in seeking to compel arbitration was sufficient to constitute waiver of right to compel arbitration); *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 666, 521 S.E.2d 749, 753-54 (Ct. App. 1999) (more than two year delay in seeking to compel arbitration was enough to constitute a waiver of the right to do so). Courts have routinely held that the passage of mere months is insufficient to constitute a "substantial length of time." *Rhodes*, 374 S.C. at 128, 647 S.E.2d at 252; *see also Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (a thirteen (13) month delay in seeking to compel arbitration was insufficient to constitute waiver); *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (same);

Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) (less than eight (8) month delay was insufficient to constitute waiver).

Respondents commenced this action in October 2022. Starbucks, in its initial responsive pleading (filed in December 2022), raised the issue of arbitration as an affirmative defense, explaining: "Respondents' claims ***should be dismissed because those claims are subject to and governed by a binding agreement to arbitrate*** and, as such, this Court lacks jurisdiction over this dispute and/or is the improper venue for this action." (Def.'s Answer at ¶ 75) (emphasis added).

By maintaining this right in its pleading and providing Respondents' notice, Starbucks made it clear that it was maintaining this right and was not voluntarily relinquishing it. *Cf. Soriano v. Experian Info. Sols., Inc.*, No. 2:22-CV-197-SPC-KCD, 2022 WL 6734860, at *3 (M.D. Fla. Oct. 11, 2022) (highlighting the importance of a party's pleading of arbitration as an affirmative defense in assessing waiver); *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (compelling arbitration and noting that defendant pled arbitration as a defense in its two filed answers and in the initial case management conference). Indeed, expressly referencing arbitration is the opposite of knowingly relinquishing the right to compel it. Respondents' reservation of its right is sufficient to preclude Respondents from meeting their burden of establishing waiver. *Driver*, 317 S.C. at 478, 451 S.E.2d at 929.

The Court did not hear argument on Starbucks' initial Motion to Dismiss based on the *Garmon* preemption doctrine until February 9, 2023. After the trial court indicated it was denying that motion, Starbucks promptly filed its Motion to Dismiss or, in the alternative, Stay Proceedings and Compel Arbitration on April 7, 2023, and did so before the final Order from the *Garmon* doctrine motion was even issued.

Even considering the minimal delay while the trial court considered the preemption issue, only six months passed between the date Respondents filed their Complaint and the filing of the Motion to Dismiss and Compel Arbitration. Pursuant to established South Carolina precedent, six months is insufficient to constitute a "substantial length of time" to establish the defense of waiver. *See Gen. Equip.*, 344 S.C. at 556, 544 S.E.2d at 645; *Toler's Cove*, 355 S.C. at 612, 586 S.E.2d at 585; *Rich*, 357 S.C. at 67, 590 S.E.2d at 507. The trial court's Order essentially overrules the factually analogous precedent detailed above by imposing this new six-month ceiling. This Court should reverse.

B. Starbucks did not engage in any discovery prior to moving to compel arbitration.

South Carolina courts have found that the moving party must engage in ***substantial*** discovery (and other tasks) to sufficiently evidence an intent not to pursue arbitration and to litigate in court. *See, e.g. Deloitte*, 358 S.C. at 184, 594 S.E.2d at 526 (finding waiver where the parties "conducted a significant amount of discovery" including "the production of thousands of documents" while the matter had been pending for "approximately five and one-half years" before the relevant motion to compel arbitration); *see also Liberty*, 336 S.C. at 666, 521 S.E.2d at 753-54 (holding that the moving party waived right to compel arbitration where it the parties sought assistance from the trial court on numerous occasions, submitted and argued several motions, and the proceedings were more than two years old prior to the motion to compel arbitration); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App. 2003) (finding party had waived right to compel arbitration by engaging in written discovery and conducting multiple depositions).

In several instances, courts have declined to find that a party waived its right to compel arbitration ***even after*** limited discovery had been completed. *Gen. Equip.*, 344 S.C. at 556, 544

S.E.2d at 645 (no waiver of right to compel arbitration where the parties engaged in "limited discovery which did not involve the taking of depositions or extensive interrogatories"); *Toler's Cove*, 355 S.C. at 612, 586 S.E.2d at 585 (responding to written discovery requests were insufficient to constitute waiver of right to compel arbitration); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014) (engaging in limited discovery was insufficient to constitute a waiver of right to compel arbitration).

Here, Starbucks has not engaged in any discovery. Neither Appellant has served offensive discovery and no depositions have been conducted. The only discovery which has been served in this matter was initiated by Respondents, not Starbucks.[7] Thus, the record does not reflect that Starbucks has engaged in "extensive discovery" (or any discovery at all) before seeking to compel arbitration.

C. Starbucks' procedural motions did not effectuate its right to compel arbitration.

Despite the waiver factors weighing in Starbucks' favor, the trial court nevertheless found that Starbucks waived its right to compel arbitration because it sought to dismiss this matter on jurisdictional grounds. (Order; R. __.) South Carolina precedent does not support this conclusion, and thus this Court should reverse.

The analysis employed by courts when analyzing waiver in the context of a motion to compel arbitration does not include any consideration of the moving party's efforts to address the court's lack of subject matter jurisdiction in initial pleadings before seeking to compel arbitration. *See Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251; *Gen. Equip.*, 344 S.C. at 556, 544 S.E.2d at 645;

[7] In responding to Respondents' discovery, Starbucks objected and noted its position that arbitration was the only proper forum for this dispute because Respondents' claims are subject to mandatory arbitration, making discovery improper. Starbucks did not substantively respond to Respondents' discovery requests.

Toler's Cove, 355 S.C. at 612, 586 S.E.2d at 585; *Rich*, 357 S.C. at 67, 590 S.E.2d at 507. Moreover, South Carolina courts have made it clear that engaging a court to address administrative or procedural issues before seeking to compel arbitration ***does not*** constitute a waiver of a right to compel arbitration. *See, e.g.*, *Gen. Equip.*, 344 S.C. at 557, 544 S.E.2d at 645 (finding that a party's consent to have the case referred to the Master-in-Equity was not a waiver of its right to compel arbitration); *Rich*, 357 S.C. at 67, 590 S.E.2d at 507 (reaching the same conclusion where the movant consented to substitution of a party defendant and to referral of the case to the Master-in-Equity); *Toler's Cove*, 355 S.C. at 612, 586 S.E.2d at 585 (finding that motions concerning procedural/jurisdictional issues related to counterclaims and third-party practice were insufficient to constitute waiver of right to compel arbitration). Neither Respondents nor the trial court identified any South Carolina case law supporting that a party waives the right to compel arbitration by filing a motion to dismiss for lack of subject matter jurisdiction due to potential preemption or to administratively refer the case to the business court.

Carlson is instructive. In that case, this Court held that a party did not waive its right to compel arbitration by filing a motion to dismiss on jurisdictional/procedural grounds before seeking to compel arbitration. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 257, 743 S.E.2d 868, 872. In so holding, the appellate court noted that the moving party, like Starbucks here, had "raised the issue of arbitration since the inception of the action" and that no discovery had been completed by the moving party. *Id*. In fact, the Court of Appeals noted that the moving party's two-year delay in seeking to compel arbitration was insufficient to warrant a finding that the moving party waived its right to compel arbitration. *Id*. at 258, 743 S.E.2d at 872-73.

Here, Starbucks has only (1) answered the Complaint (in which it asserted the right to compel arbitration as an affirmative defense) and (2) contemporaneously moved to dismiss based

upon a lack of subject matter jurisdiction. Starbucks' Motion to Dismiss centered upon a complex jurisdictional issue regarding the exclusive jurisdiction of the NLRB. Starbucks' motion to assign the matter to the business court was based on the complexity of this preemption issue. Thus, Starbucks' prior motions practice was solely a procedural matter related to jurisdiction. South Carolina precedent does not support the trial court's conclusion that these actions effectuated a waiver of its right to compel arbitration.

D. The trial court's waiver finding was error.

Starbucks raised the issue of arbitrability from the inception of this case, and the relief Starbucks sought in its motion came as no surprise to Respondents. (Def.'s Answer at ¶ 75.) Moreover, Starbucks engaged in no affirmative discovery. Under the applicable standard and South Carolina precedent, Starbucks' actions in this case were insufficient as a matter of law to constitute a knowing and intentional relinquishment of its right to compel arbitration sufficient to satisfy the requirements for waiver.[8] *See Carlson*, 404 S.C. at 257-258, 743 S.E.2d at 872-73.[9] The trial court erred in finding otherwise and this Court should reverse as a result.

CONCLUSION

The parties delegated consideration of gateway issues related to arbitrability, including waiver and the scope of the Arbitration Agreement, to the arbitrator. Furthermore, even if it was appropriate for the court to reach the issue of waiver, it further erred by finding that Starbucks

[8] Quite the contrary, Starbucks' actions prior to seeking to compel arbitration are inherently consistent with its request to dismiss and compel arbitration as each of those acts was to further its argument(s) that the trial court was not the proper venue for this dispute. Simply put, Starbucks' actions have remained consistent throughout the pendency of this action and have continuously furthered the concept that this action should is not properly before the Circuit Court.

[9] To the extent waiver remains part of the analysis following *Morgan*, Respondents suffered no prejudice for these same reasons.

relinquished its right to rely on the Arbitration Agreement. This Court should reverse and remand to the trial court with instructions to compel the dispute to arbitration.

Respectfully submitted,

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