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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

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2023-001479

Case No. 2021-CP-02-00889

Julianne Foster, Plaintiff/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.

**RESPONDENT JULIANNE
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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court properly deny Airbnb's Motion to Compel Arbitration because even assuming a valid arbitration agreement between Foster's friend and Airbnb, Foster, a non-signatory to any arbitration agreement, was not bound to arbitration by direct benefits estoppel?
- II. Did the circuit court properly deny Airbnb's Motion to Compel Arbitration because Airbnb waived any right it may have had to arbitration by litigating extensively for over two years before filing its Motion to Compel Arbitration?
- III. Did the circuit court properly deny Airbnb's Motion to Compel Arbitration based on the outrageous tort exception?
- IV. Did the circuit court properly grant Foster's Motion for a Rule to Show Cause where Airbnb refused to follow the circuit court's orders?

STATEMENT OF THE CASE

This action stems from Plaintiff/Respondent Julianne Foster’s (“Foster” or “Plaintiff”) stay at an Airbnb rental in Aiken from May 17-18, 2019. Foster’s friend, Michelle Jain (“Jain”), booked the Airbnb rental owned and/or hosted by Airbnb Hosts Defendants Rhett Riviere (“Riviere”) and Katherine Thomas (“Thomas”). During the stay, Riviere recorded Foster in various states of undress in the bedroom of the Airbnb rental. Based on this invasion of her privacy while staying in an Airbnb rental, Foster brought several claims against Riviere, Thomas, Chase Enterprises, LLC (“Chase”), and Airbnb, Inc. (“Airbnb”).¹ (Compl., filed Apr. 28, 2021). On August 3, 2021, Airbnb moved to dismiss the complaint on the merits. (Airbnb’s Mot. To Dismiss, filed Aug. 3, 2021, and Airbnb’s Mem. In Supp., filed Aug. 26, 2021). Following full briefing and a hearing on August 31, 2021, the circuit court denied the motion, (Order Denying Airbnb’s Mot. To Dismiss, filed Dec. 30, 2021), and Airbnb answered the Complaint, (Airbnb’s Ans. filed Feb. 4, 2022).

Foster moved to amend her Complaint (Pl.’s Mot. To Amend Compl., filed Sept. 2, 2022), which Airbnb opposed (Airbnb’s Opp. To Mot to Amend, filed Oct. 13, 2022). The circuit court overruled Airbnb’s objections and granted the motion, (Order Granting Pl.’s Motion to Amend Compl., filed Nov. 30, 2022), and Foster filed her Amended Complaint adding three new negligence claims against Airbnb, (Am. Compl. filed Nov. 30, 2022). Airbnb again moved to dismiss the Amended Complaint on the merits, (Airbnb’s MTD Am. Compl., filed January 20, 2023), which the Court denied at the April 5, 2023 hearing, (April 5, 2023 Hearing Tr. 18:12-13; Form 4 Order Denying Airbnb’s Mot. to Dismiss Am. Compl., filed May 25, 2023). On April 20, 2023, Airbnb filed its Answer to the Amended Complaint and asserted cross-claims against

¹ Defendant Chase was the owner of record of the Airbnb rental in 2019 and Riviere is the sole member of Chase. (Def. Rhett Riviere’s Answer to Compl. ¶¶ 4-5, 12).

Thomas, (Airbnb's Answer and Cross Claim against Katherine Thomas, filed April 20, 2023), and a third-party complaint against Riviere, (Airbnb's Third-Party Compl. against Rhett Riviere, filed Apr. 20, 2023). On May 15, 2023, Airbnb filed its Motion to Compel Arbitration of Plaintiff's claims. (Airbnb's Mot. to Compel Arb., filed May 15, 2023).

In addition to filing the two dispositive motions, prior to Airbnb moving to compel arbitration, Airbnb was involved in discovery disputes with many involving extensive briefing and numerous hearings before the circuit court to resolve. *See generally*, Dkt. from Second Judicial Circuit Public Index (showing at least 29 orders filed, not including pro hac vice orders for Airbnb counsel). Airbnb initiated use of these judicial resources, including Airbnb's Motion for a Protective Order in regard to the deposition of its 30(b)(6) witness. In that motion, Airbnb objected to every one of the 24 noticed topics resulting in extensive briefing and a hearing on June 28, 2022. (Airbnb's Mot. for Pro. Order, filed June 14, 2022; Pl.'s Mem. in Opp. to Airbnb's Mot. for Pro. Order, filed June 24, 2022; Airbnb's Reply Mem. in Further Supp of Its Mot., for Pro Order, filed June 27, 2022). When the circuit court did not grant it relief as to the noticed topics, (Order, filed Aug. 3, 2022), Airbnb filed a 6-page Motion for Reconsideration and a 28-page Supplemental Memorandum in Support, (Airbnb's Mot. for Reconsideration, filed Aug. 4, 2022; Airbnb's Supp. Mem. in Supp. of Mot. to Reconsider, filed Sept. 2, 2022), followed by a 13-page Reply Memorandum (Airbnb's Reply Mem., filed Sept. 14, 2022).² Airbnb also filed motions for protective orders and to quash depositions. (Airbnb's Mot. to Quash Pl.'s Notice of Dep. of Tara Bunch and for a Pro. Order, filed Jan. 19, 2023; Airbnb's Mot. to Quash Pl.'s Subpoena to Depose

²Airbnb first sought reconsideration of the Order through email. (Pl.'s Resp. to Def. Airbnb's Mot. for Reconsideration, Ex. 1, filed Aug. 9, 2022). However, the circuit court informed Airbnb it needed to file a motion to alter or amend. *Id.*

Rich Baer, and for a Pro. Order filed Jan. 17, 2023). Moreover, Airbnb has taken depositions of Plaintiff and several others and participated in an unsuccessful mediation.

A. Motions for Arbitration

Plaintiff Foster never entered into any agreement with Airbnb. Only her friend, Ms. Jain, held an Airbnb account and booked the rental.³ Airbnb asserts its Terms of Service (“TOS”) in effect at the time of Jain’s rental included an arbitration provision, as follows:

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) (emphasis in original). Section 19, The “Dispute Resolution and Arbitration Agreement,” is a delegations clause that provides:

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.

³ Airbnb includes disputed facts in its Statement of the Case. *See* Rule 208(b)(1)(C), SCACR (“The statement shall not contain contested matters . . .”). Airbnb states that Jain expressly agreed to the TOS in registering for an Airbnb account and booking the rental. (Appellant’s Initial Brief at 2). However, as discussed herein, Foster disputes whether Jain ever entered an arbitration agreement. Ultimately, the circuit court stated it did not need to make any findings or rule on whether Jain had consented to arbitration with Airbnb (Order denying Airbnb’s Mot. to Compel Arb., filed Sept. 13, 2023, at 5 n.3).

Id. at 291 (emphasis in original). Airbnb contends Defendants Riviere and Thomas agreed to arbitrate any disputes by agreeing to its TOS, and that Ms. Jain “expressly agreed to the terms in booking the rental.” (Airbnb’s Mot. to Compel Arb., filed May 15, 2023, at 2-3). Further, Airbnb contends that because the TOS incorporates by reference other Airbnb policies and standards, its entire website is incorporated into the TOS. (Airbnb’s Supp. Mem. in Supp. of Mot. to Compel Arb., filed July 21, 2023, at 6; June 13, 2023 Hearing Tr. 26:1-4 (“she is trying to directly benefit from the standards, terms, policies, and everything in the website, which are all incorporated in the terms of service.”)).

Immediately after Foster filed this action on April 28, 2021, Airbnb repeatedly informed Foster’s counsel it would be filing a motion to compel arbitration. (Email chain between Foster’s counsel and Airbnb’s prior counsel, stating, *inter alia*, “I expect I may be filing a Motion to Compel Arbitration” (May 27, 2021); “my client intends to file a Motion to Compel Arbitration” (July 7, 2021); and finally, “we plan on filing a Motion to Compel Arbitration with our Answer” (July 14, 2021)). Airbnb, however, did not file a motion to compel arbitration at that time or with its Answer.

Instead, Airbnb aggressively litigated with Plaintiff for over two years, including propounding extensive discovery requests to Foster, attending and/or conducting numerous depositions, including a 30(b)(6) deposition, and subpoenaing many individuals, including Foster’s ex-husband, yoga instructor, and best friend. As noted above, Airbnb has also engaged in mediation (which it requested), filed two motions to dismiss based on the merits, and engaged in discovery disputes requiring many hearings and multiple circuit court judges to resolve. *See* Docket from Second Judicial Circuit Public Index.

While Airbnb made a reference to reserving its rights in the introductory paragraphs of its Answers to the Complaint and Amended Complaint (Airbnb’s Answer to Compl. at 1; Airbnb’s

Answer to Am. Compl. at 1), it failed to assert arbitration as an affirmative defense (Airbnb's Answer to Compl. at 28-33; Airbnb's Answer to Am. Compl. at 115-122), and it waited over two years to file a motion to compel arbitration while litigating aggressively utilizing limited judicial resources, (Dkt. from the Second Judicial Circuit Public Index).

After the circuit court orally denied Airbnb's second Motion to Dismiss and granted two of Foster's Motions to Compel Production at the April 5, 2023 hearing, (Apr. 5, 2023 Hearing Tr. 18:12-13; 108:13-110:15),⁴ Airbnb retained new counsel and immediately sent a letter to the circuit court judge raising the same arguments and seeking to change the court's oral ruling on the Motions to Compel, (Letter from Airbnb to Judge Jocelyn Newman, filed May 15, 2023). Airbnb also stated that it would be filing contemporaneously a Motion to Compel Arbitration. *Id.* The circuit court later memorialized her previous oral rulings in a Form 4 Order. (Form 4 Order, filed May 25, 2023).

On May 15, 2023, Airbnb filed its Motion to Compel Arbitration. (Airbnb's Mot. to Compel Arb., filed May 15, 2023).⁵ The motion was extensively briefed before and after the hearing held on June 13, 2023. (Pl.'s Resp. Opp. Airbnb Mot. to Compel Arb., filed June 6, 2023; Airbnb's Reply in Supp. of Mot. to Compel Arb., filed June 12, 2023; Letters from Airbnb to Judge Maddox, dated June 14, 2023, and June 16, 2023; Letters from Plaintiff to Judge Maddox, dated June 16, 2023, and June 29, 2023). The circuit court emailed counsel advising it was going to deny Airbnb's Motion to Compel Arbitration on three grounds:

1. The theory of direct benefits estoppel cannot be used to bind the Plaintiff non-signatory into arbitration, as she received no direct contractual benefit because

⁴Contrary to Airbnb's rendition of the facts (Appellant's Initial Br. at 5), there was no uncertainty as to Judge Newman's ruling. (April 5, 2023 Hearing Tr. 108:13-110:15).

⁵Riviere also moved to compel arbitration of Airbnb's claims against him. (Third Party Defendant Rhett Riviere's Mot. to Compel Arb., filed May 23, 2023).

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.
3. Airbnb waived its right to enforce arbitration by participating in extensive litigation for over two years.

(July 11, 2023 Email from Will Smith, Judge Maddox's Law Clerk). Thereafter, on September 13, 2023, the circuit entered its Order denying Airbnb's Motion to Compel Arbitration on three separate grounds. (Order Denying Airbnb's Mot. to Compel Arb., filed Sept. 13, 2023).

B. Discovery Disputes

During the two years of litigation, as noted above, Foster has been attempting to obtain responses to her discovery requests from Airbnb. Foster filed her first Motion to Compel discovery responses against Airbnb and the other defendants on March 3, 2022. (Pl.'s Mot. to Compel, filed Mar. 3, 2022). A hearing was held on this motion and other matters on May 31, 2022, and the motion was granted in a written Order on June 6, 2022, which specifically required Airbnb to provide certain discovery responses. (Order Granting Pl.'s Mot. to Compel, filed June 6, 2022).⁶ On June 7, 2022, Foster served Airbnb with Requests for Production Nos. 16-44, and Airbnb objected on numerous grounds. (Pl.'s Feb. 10, 2023 Mot. to Compel). On November 1, 2022, Foster served Airbnb with Requests for Production Nos. 45-48, and again Airbnb objected on numerous grounds causing Plaintiff to file her second motion to compel. (Pl.'s Jan. 18, 2023 Mot. to Compel).

⁶ Although specifically ordered to comply with the June 6, 2022 Order on the Motion to Compel, Airbnb did not comply with several of the requests and instead indicated that it did not "understand" the Court's Order to require production of certain communications – without seeking clarification from the court. (Airbnb's Response to the June 6, 2022 Order Granting Pl.'s Mot. to Compel at 3). Moreover, Airbnb did not produce a privilege log identifying any documents allegedly subject to privileges as ordered by the circuit court. *See* June 6, 2022 Order at 3 ¶8.

During a hearing on the motions on April 5, 2023, Airbnb acknowledged that it had not complied with the discovery requests based on alleged privacy concerns for third parties. (April 5, 2023 Hearing Tr. at 85:20-86:12). In response, the circuit court questioned Airbnb as to why it had not moved for a protective order. (April 5, 2023 Hearing Tr.107:14-108:12). During the hearing, the circuit court granted Foster’s motions to compel giving Airbnb 60 days within which to produce the documents. (April 5, 2023 Hearing Tr. 109:7-110:11). Subsequently on May 25, 2023, the Court entered a Form 4 Order memorializing its decision. (Form 4 Order Granting Pl.’s Mots. to Compel, filed May 25, 2023). On June 5, 2023, Airbnb finally produced a set of documents to Foster, but informed her that it was unilaterally withholding the production of some responsive documents. (June 5, 2023 Letter from Airbnb to Plaintiff). Airbnb refused to produce contact information for non-party guests (Pl.’s RFP Nos. 45, 46, 47) and the identity and related information of non-party hosts with any criminal convictions (Pl.’s RFP No. 48). (Airbnb June 5, 2023 Airbnb’s Letter to Plaintiff). On June 5, 2023, Airbnb filed a Motion for Reconsideration and to Stay raising the same arguments it had made at the April 5, 2023 hearing and in its May 15, 2023 letter to Judge Newman. (Airbnb’s Mot. for Reconsideration, filed June 5, 2023).

On June 8, 2023, Foster filed a Motion for a Rule to Show Cause (“RTSC”) asking the Court to “enter an Order finding Airbnb in contempt for failing to comply with the Court’s Orders and requiring Defendant Airbnb to immediately comply with the Court’s Orders and award such other relief as is required and permitted by the applicable Rules of Civil Procedure.” (Pl’s Mot. for RTSC at 1-2). Foster requested the Motion for the RTSC be heard at the already scheduled June 13, 2023 hearing. (Pl.’s June 8, 2023 email to the circuit court clerk of court). Airbnb responded by saying, “For Airbnb, we take no position as to the motion being sent to the judge for consideration to add to the schedule but we reserve and do not waive all rights, objections and

positions, including but not limited to those related to this motion.” (Airbnb’s June 8, 2023 email to the circuit court clerk of court). During the hearing on June 13, 2023, the RTSC motion was specifically raised and argued (June 13, 2023 Hearing Tr. at 16:16-19:21; 34:3-21); however, Airbnb failed to raise any procedural objections.

After the hearing, the circuit court’s law clerk directed Foster to draft a proposed order granting Foster’s RTSC Motion by August 1, 2023. (Circuit Court Law Clerk’s July 11, 2023 email). After Airbnb received Foster’s proposed order, Airbnb filed a Memorandum in Opposition to the Show Cause Motion and the Proposed Order. (Airbnb’s Mem. Opp. to RTSC Mot., filed July 26, 2023). Airbnb argued the contempt finding was improper for several reasons. *Id.*

On July 26, 2023, the circuit court denied Riviere’s Motion to Compel Arbitration. (Order Denying Riviere’s Mot. to Compel Arb., filed July 26, 2023). On July 28, 2023, Riviere filed his notice of appeal. (Riviere’s Not. of Appeal, filed July 28, 2023, assigned Case No. 2023-001211). Also, on July 28, 2023, Riviere and Airbnb jointly moved for an order acknowledging an automatic stay of the litigation pursuant to the Supreme Court of the United States’s opinion in *Coinbase, Inc. v. Bielski*, ___ U.S. ___, 143 S. Ct. 1915, 1918 (2023), or, alternatively, Rule 241, SCACR. (Riviere and Airbnb’s Jt. Mot. to Acknowledge Automatic Stay Applies, filed July 28, 2023). On August 24, 2023, the circuit court granted the joint motion finding the case should be stayed pursuant to *Coinbase* or, alternatively, stayed pursuant to Rule 241. (Order Granting Stay, filed Aug. 24, 2023).

On August 24, 2023, the circuit court also contemporaneously granted Foster’s Motion for a RTSC finding that “Airbnb’s stated plans to not comply with this Court’s May 25, 2023 Order on the Motions to Compel and violate this Court’s order. (Order Granting Pl.’s Mot. for RTSC,

filed Aug. 24, 2023, at 3).⁷ The circuit court ordered Airbnb to comply with this Court’s May 25, 2023 Order on the Motions to Compel and produce all responsive documents to Foster within forty-five (45) days of the date of this order. *Id.* Airbnb did not file a Rule 59 motion.

On September 13, 2023, the circuit court issued an order denying Airbnb’s Motion to Compel Arbitration. (Order Denying Airbnb’s Mot. to Compel Arb., filed Sept. 13, 2023). On September 15, 2023, instead of complying with the Court’s orders, Airbnb filed its Notice of Appeal of the Order Denying its Motion to Compel Arbitration and the order granting Foster’s Motion for a RTSC. (Airbnb’s Not. of Appeal, filed Sept. 15, 2023, resulting in this appeal, Case No. 2023-001479).

STANDARD OF REVIEW

“Determinations of arbitrability are subject to *de novo* review,” but if any evidence reasonably supports the circuit court’s factual findings, this court will not overrule those findings. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002); *see also Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) “[w]hether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to *de novo* review by an appellate court.”).

A determination of contempt rests within the sound discretion of the trial court and will be reversed only if the trial court abused its discretion. *Brandt v. Gooding*, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006). An abuse of discretion occurs when the trial court’s ruling is based upon

⁷ The docket shows that the orders were entered at the same time, 11:32 AM. (Dkt. from the Second Judicial Circuit Public Index). Moreover, while Notice of Electronic Filing (“NEF”) shows that the RTSC Order was officially stamped at 11:32:43 AM, the Order shows that it was electronically signed by the circuit court at 11:19:34. (Order Granting Mot. for RTSC at 5). The Stay Order’s NEF stamp shows 11:32:15 AM, and the Order shows that it was electronically signed by the circuit court at 11:30:45. (Order Granting Mot. to Stay at 5).

factual conclusions that are without evidentiary support or when the trial court's decision is based upon an error of law. *Fontaine v. Peitz*, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987).

ARGUMENT

As arbitration is a matter of consent, Foster should not be forced into arbitration because she never entered into any agreement with Airbnb. Moreover, Foster challenges whether Airbnb met its burden to establish an enforceable arbitration agreement between Foster's friend, Michelle Jain, and Airbnb. However, assuming there was an arbitration agreement between Airbnb and Jain, the circuit court correctly found that Foster was not subject to arbitration under an estoppel theory and that Airbnb had waived any right it had to compel arbitration based upon Airbnb's active and extensive litigation of this case for over two years—including filing two motions to dismiss, attending mediation, participating in numerous depositions, and engaging in frequent discovery disputes often requiring the court's intervention. Further, the circuit court also correctly held that the outrageous tort exemption, which is still viable in South Carolina, precludes arbitration of Foster's claims against Airbnb.

There are two initial matters that need to be addressed which may impact the Court's review and analysis of the issues on appeal. First, Airbnb repeatedly argues that the law favors arbitration. (App. Initial Brief at 10-11, 13-14, 24, 34). However, the South Carolina Supreme Court dispelled that notion clarifying, "statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) (citation omitted); *see also Sanders v. Savannah Highway Auto. Co.*, 440

S.C. 377, 892 S.E.2d 112 (2023). Accordingly, the court should disregard Airbnb's arguments that the law favors arbitration.

Second, many of Airbnb's arguments in its brief are premised upon a disingenuous argument that there was an enforceable arbitration agreement between Jain and Airbnb. (App.'s Initial Brief at 2, 12-13, 14, 15). The record establishes the parties argued over whether Jain entered into an enforceable arbitration agreement with Airbnb. In its Order denying Airbnb's Motion to Compel Arbitration, the circuit court stated the issue was disputed, but held it did not need to decide the issue because it determined other issues were dispositive. (Order Denying Airbnb's Mot. to Compel Arb. filed Sept. 13, 2023, at 5 n.3).

Despite recognizing the circuit court's ruling that the matter was disputed and the circuit court's disinclination to decide the issue, Airbnb terms this as "merely dicta" and argues there is "no serious dispute" that Jain entered into an arbitration agreement. (App.'s Initial Brief at 12-13). This argument and the assumptions that follow are wholly contradicted by the record and legally flawed. Whether Jain entered into an enforceable arbitration agreement with Airbnb was disputed at the hearing.

In its Motion to Compel Arbitration, Airbnb stated that Jain had expressly agreed to the TOS and its arbitration provision; however, Airbnb did not include any affidavits or other evidence to establish that Jain had entered into an arbitration agreement. (Airbnb's Mot. to Compel Arb. at 2, 7, 10). Thus, in her Response, Foster argued Airbnb failed to establish Jain entered into an arbitration agreement. (Pl.'s Resp. in Opp.to Def. Airbnb's Mot. to Compel Arb. filed June 6, 2023, at 5, 7-8). Accordingly, this disputed issue was discussed in depth at the hearing on the Motion to Compel Arbitration. (*See* June 13, 2023 Hearing Tr. at 9:19-20:11; 20:6-12;19:15-20:12; 21:15-22:8; 28:22-30:11; 36:8-38:20; 39:23-25). Following the

hearing, the parties continued to disagree as to whether Jain had entered into an arbitration agreement. (*See* Airbnb’s June 14, 2023 Letter to the Court & Ex.; Pl.’s June 16, 2023 Letter to the Court & Ex.; Airbnb’s June 16, 2023 Letter to the Court; Pl.’s June 29, 2023 Letter to the Court & Ex.).⁸ Foster provided an Affidavit from Jain affirmatively indicating that she did not agree to Airbnb’s TOS or agree to arbitration. (Pl.’s June 16, 2023 Letter to the Court, Ex. A).

Despite these facts, Airbnb persists in its argument to this Court there is no serious dispute and that Foster offered in support only an affidavit from Jain that she does not recall agreeing to the arbitration. (App. Initial Brief p. 13). This is a mischaracterization of the record, as set forth above.⁹ Airbnb also ignores Foster’s arguments that the evidence Airbnb offered in support was inadequate to establish an enforceable arbitration agreement. Foster

⁸ Foster, *inter alia*, challenged Airbnb’s affidavit and declaration and raised the Uniform Electronics Transactions Act (“UETA”), S.C. Code Ann. § 26-6-10, *et seq.*, which sets out the requirements that must be met when an agreement is made electronically. (Pl.’s June 16, 2023 Letter to the Court at 3-5) (citing S.C. Code Ann. 26-6-90 and *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1330 (11th Cir. 2016) (affirming denial of arbitration where corporation’s declaration was “woefully inadequate” and there was no evidence about what appeared on plaintiff’s computer screen and how declarant could determine she had consented)). Moreover, Foster reiterated what was raised at the hearing, that the affidavits and declarations Airbnb filed after the hearing were improper under Rule 6(d), SCRC (“When a motion is to be supported by affidavit, the affidavit shall be served with the motion . . .”). (*See* June 13, 2023 Hearing Tr. at 35:7-13).

⁹ Airbnb’s description of Jain’s affidavit is not accurate. Jain averred to much more, including: that she “had no recollection of being presented with Airbnb’s terms of Service, “ that she did not physically sign or electronically sign an agreement to arbitrate with Airbnb,” and that she “did not physically sign or electronically sign Airbnb’s Terms of Service.” (Pl.’s June 16, 2023 Letter to the Court, Ex. A ¶¶ 3-5).

has always disputed whether Jain entered an arbitration agreement, and the circuit court recognized this issue was disputed in his Order.¹⁰

Moreover, the circuit court's statement that the matter was in dispute is not dicta. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40, 650 S.E.2d 81, 83 (Ct. App. 2007) (holding dicta is a statement on a matter not necessarily involved in the case). Even if the Court were to determine that the circuit court's recognition of this disputed issue is somehow dicta, that determination would not render the issue undisputed. The circuit court expressly declined to decide whether an arbitration agreement existed between Jain and Airbnb. Attempting to frame this declination as dicta on appeal does not provide any resolution to that issue. The issue is still disputed. If Airbnb wanted a ruling on whether Jain and Airbnb had an enforceable arbitration agreement, it could have filed a Rule 59 motion. *See Summer v. Carpenter*, 328 S.C. 36, 43, 492 S.E.2d 55, 58 (1997) (stating that when a trial court did not explicitly rule on an issue in its order and appellant did not make a Rule 59 motion for a ruling, the issue is not preserved for appellate review); *see also Tupper v. Dorchester Cnty.*, 326 S.C. 318, 328 n.7, 487 S.E.2d 187,192 n.7 (holding "we decline to rule on the merits of an issue not ruled on below"). Airbnb's conclusory argument that there was an enforceable arbitration agreement with a delegation clause between Jain and Airbnb is flawed from the outset.

I. The circuit court properly denied Airbnb's Motion to Compel Arbitration because Foster, a non-signatory, was not bound to arbitration by direct benefits estoppel.

"Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44; *Wilson*, 426 S.C. at 336, 827 S.E.2d

¹⁰ In fact, Foster requested a jury determination of the issue. (Pl.'s Response in Opp. to Def. Airbnb's Mot. to Compel Arb., filed June 6, 2023, at 17-18) (citing *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 242 (4th Cir. 2019)).

at 173. “The familiar requisites to a binding contract are a meeting of the minds of the parties as to all essential and material terms, supported by consideration.” *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 242, 877 S.E.2d 486, 489 (Ct. App. 2022).¹ “State law controls when an arbitration agreement may be enforced against someone who has not signed it.” *Weaver v. Brookdale Sr. Living*, 431 S.C. 223, 230, 847 S.E.2d 268, 272 (Ct. App. 2020). *See also Lampo*, 437 S.C. at 242, 877 S.E.2d at 489. Even if the FAA applies, the parties must still have agreed, as a matter of general state contract law, to arbitrate.” *Berry v. Spang*, 433 S.C. 1, 15, 855 S.E.2d 309, 317 (Ct. App. 2021) (citation and internal quotation marks omitted)

A. The circuit court properly determined that it should decide the issue of whether there was a valid arbitration agreement.

Initially, Airbnb contends on appeal that the arbitrator, and not the circuit court, should determine whether there was a valid enforceable agreement to arbitrate. (Appellant’s Initial Brief at 18-20). The circuit court properly held that the court, not the arbitrator, is to determine whether a valid arbitration agreement was formed. (Order Denying Airbnb’s Mot. to Compel Arb., filed Sept. 13, 2023 at 4).

Recently, the South Carolina Supreme Court unequivocally held that the court is to determine whether the parties entered into an arbitration agreement rather than the arbitrator. *Sanders*, 440 S.C. at 388, 892 S.E.2d at 118, reh’g denied Sept. 27, 2023. The Court held that “the court is always the proper body to determine whether the parties agreed to arbitrate in the first instance. *Id.* at 388, 892 S.E.2d at 118 (citing *Melaas v. Diamond Resorts, U.S. Collection Dev. , LLC*, 953 N.W.2d 623, 633 (N.D. 2021) (“If the contract containing the arbitration agreement was never formed and therefore does not exist, then the parties never agreed to arbitrate.”); *MZM Constr. Co. v. N.J. Bldg. Labs. Statewide Benefit Funds*, 974 F.3d 386, 400 (3d Cir. 2020) (“Lack of assent to the container contract necessarily implicates the status of the arbitration agreement,

when the container contract and the arbitration provision depend on the same act for their legal effect.”). *See also Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 5, 881 S.E.2d 646, 648 (Ct. App. 2022) (“[t]he ‘making’ or formation of—in the sense of the very existence of—the agreement to arbitrate is always a question for the court, not the arbitrator.”), cert. denied (Mar. 30, 2023).¹¹ “It is clear—the court must determine issues of contract formation. If [the plaintiff] challenged arbitration by claiming the contract was never formed (*e.g.*, because he never signed it or because there was no meeting of the minds), the court would decide the gateway question of arbitrability.” *Sanders*, 440 S.C. at 388, 892 S.E.2d at 118. “To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, — U.S. —, 139 S. Ct. 524, 530, 202 L.Ed.2d 480 (2019). Accordingly, the circuit court did not err in finding the court was to determine if there was an enforceable arbitration agreement rather than an arbitrator.

B. The circuit court properly held that Foster, a non-signatory, was not bound to arbitration by direct benefits estoppel.

Turning to the merits of this issue, Airbnb argues that Foster should be estopped from refusing to comply with an arbitration agreement because there is a valid arbitration agreement and she benefited from the contractual relationship. (App. Initial Brief at 12). “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.” *Wilson*, 426 S.C. at 344, 827 S.E.2d at 177. Estoppel applies to a nonsigner “if (1) the nonsigner’s claim arises from

¹¹ Foster challenged both the formation and validity of the arbitration agreement and the delegation clause. (*See* Pl.’s Resp. Opp. Airbnb’s Mot. to Compel Arb., filed June 8, 2023, at 6, n.1; *see also* Order Denying Airbnb’s Mot. to Compel Arb. at 4 n.2).

the contractual relationship, (2) the nonsigner has ‘exploited’ other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability.” *Id.* at 340–44, 827 S.E.2d at 175–77.

“A nonsignatory is estopped from refusing to comply with an arbitration clause when it [is seeking or] receives a direct benefit from a contract containing an arbitration clause.” *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (quotation marks and citations omitted). “This legal principle rests on a simple proposition: it is unfair for a party to ‘rely on [a] contract when it works to its advantage, and repudiate it when it works to its disadvantage.’ “ *Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006) (citation omitted). However, “direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen ‘but for’ a contract’s existence.” *Wilson*, 426 at 176, 426 S.E.2d at 343.

First, “[a] presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.” *Id.* at 337-38, 827 S.E.2 at 173. Airbnb has not and cannot overcome this presumption and force Foster, a nonsignatory, to arbitrate.

Second, there can be no third-party beneficiary unless a valid contract exists, *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687, which as discussed above, Airbnb has failed to establish and the circuit court expressly declined to rule on whether there was a valid arbitration agreement between Jain and Airbnb. Moreover, even assuming as the circuit court did that Jain agreed to the arbitration agreement, “[a] third-party beneficiary is a party that the contracting parties intend to directly benefit.” *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). There is nothing to establish that the parties agreed to arbitrate to directly benefit Foster.

Finally, an essential element to an estoppel argument is that the party is attempting to enforce a contract while at the same time refusing to comply with an arbitration provision. Airbnb contends that Foster is trying to directly benefit from the standards, terms, policies and everything on its website, which are all incorporated in the TOS. (Airbnb’s Supp. Mem. in Supp. of Mot. to Compel Arb., filed July 21, 2023, at 6; June 13, 2023 Hearing Tr. 26:1-4 (“she is trying to directly benefit from the standards, terms, policies, and *everything* in the website, which are all incorporated in the terms of service.” (emphasis added)).¹² Here, however, Foster is not attempting to enforce the TOS while also asserting she is not bound by the arbitration provision included in the TOS. Her claims are based on statutory or tort law, not contract.

Foster is not attempting to enforce the arbitration agreement or any other contractual provision. *See Hodge*, 422 S.C. at 563, 813 S.E.2d at 302 (holding because respondents are not suing for a breach of the Admission Agreement, equitable estoppel does not apply). “[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law,” direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen ‘but for’ the contract’s existence.” *Wilson*, 426 S.C. at 176, 426 S.E.2d 343 (citation omitted); *see also Int’l Underwriters v. Triple I: Int’l Inv. Inc.*, 533 F.3d 1342, 1347 (11th Cir. 2008) (holding that a dispute does not arise out of or in connection with a contract for the purposes

¹² The entire website is not incorporated into the TOS. The TOS states that only “other Policies applicable to your use of the Airbnb Platform are incorporated by reference into this Agreement.” (Airbnb’s TOS at 273). Moreover, claiming that its *entire* website is incorporated is absurd as Airbnb’s website and its policies are continuously being revised and would require Airbnb to establish that a user agreed to each revision—which would be untenable and something Airbnb has not done.

of arbitration “just because the dispute would not have arisen if the contract had never existed.”).“Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly.” *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177 (citing *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849, 852 (2013) (observing equitable estoppel should be used sparingly to compel arbitration and noting it “is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration”)).

Here, Foster has not sued Airbnb under any provision of the TOS, and she has not exploited an agreement to any degree, let alone to the degree which would warrant the application of estoppel. Rather, Foster is bringing claims imposed by statute or common law. “ [W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law,” direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen “but for” the contract’s existence.” *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (citing *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 637 (Tex. 2018)); *see also Aiken v. World Fin. Corp.*, 373 S.C. 144, 150, 644 S.E.2d 705, 708 (2007) (rejecting an oversimplified “but-for” causation standard as illogical); *Smith Jamison Constr. V. APAC-Atlantic, Inc.*, 811 S.E.2d 635 (N.C. Ct. App. 2018) (holding that although the existence of the contract provided part of the factual foundation for the plaintiff’s claims, the claims were dependent upon legal duties imposed by statutory or common law rather than contract law).

In *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, the court declined to apply equitable estoppel against nonsignatories to an arbitration agreement between a nursing home and a decedent because “[t]he only agreement from which Respondents even arguably received a benefit was the Admission Agreement because [plaintiff] was admitted to the

Facility as a result of it. However, because the Facility allegedly caused [plaintiff's] injuries that later led to her death, we find it difficult to find she benefited even from being admitted.” 422 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018). Likewise, here, it would be difficult to find Foster received a benefit from staying at the Airbnb in Aiken where her privacy rights were violated. Foster did not receive any benefit from any agreement with Airbnb, “any more than a pedestrian run over by a truck has benefitted from the contract for the purchase of the truck.” *Walker v. Brookdale Sr. Living, Inc.*, 431 S.C. 223, 232, 847 S.E.2d 268, 273 (Ct. App. 2020).

The Illinois Court of Appeals recently rejected these same arguments. *Peterson v. Devita*, 2023 WL 6166964, 2023 Il. App. (1st) 230356 (Ill. App. Ct. Sept. 22, 2023). There, the plaintiff was permanently injured when the railing on a deck gave way at an Airbnb rented by the plaintiff's friend. The court held that because the plaintiff was not a party or participant in booking the Airbnb property, the arbitration provision in the TOS did not apply and he could not be required to arbitrate. 2023 WL 6166964, *5. Further, the court noted that Airbnb invoked another “nonstarter” argument, and held that direct benefits estoppel did not apply because the plaintiff's negligence claims did not rely on the TOS, and the plaintiff did not receive any benefits. *Id.* at 7.

Likewise, here, Foster did not rely on the TOS nor did she receive a benefit from staying at the Airbnb rental when Airbnb caused her injuries and her privacy rights to be violated. Because the circuit court's determination that Airbnb cannot use estoppel to bind Foster to arbitration is supported by the evidence, this finding also must be affirmed.

II. The circuit court properly denied Airbnb's Motion to Compel Arbitration because Airbnb waived any right it may have had to compel arbitration by extensively litigating this action in court for over two years.

Even assuming that the Court finds Foster is subject to arbitration, the circuit court also held that Airbnb waived any right it had to arbitration by engaging in extensive litigation for over two years before moving to compel arbitration, which is reasonably supported by the evidence. *Stokes*, 351 S.C. at 609-10, 571 S.E.2d at 713 (holding that if any evidence reasonably supports the circuit court’s factual findings, this court will not overrule those findings). Moreover, as the circuit held, Foster’s Amended Complaint does not rescind Airbnb’s waiver and allow Airbnb to seek arbitration for the first time after two years of aggressively litigating.

A. Airbnb failed to raise the issue of whether the court or arbitrator should determine whether Airbnb waived any right it may have had to arbitration, and even if it had, the issue should be determined by the court, not the arbitrator.

Airbnb contends that the arbitrator, not the court, should have determined whether Airbnb waived any right it may have had to arbitrate and whether the outrageous tort exception applies. (App.’s Initial Brief at 19). This issue is unpreserved and further Airbnb has not cited any binding case law in support of this proposition. Moreover, even if there was not a procedural bar, there has not been a determination as to whether there is an enforceable delegation clause.

Airbnb did not raise the issue that waiver should be decided by an arbitrator to the circuit court and raises it for the first time on appeal. Accordingly, this issue is not preserved for appellate review as it was not raised to nor ruled upon by the circuit court. *Cox v. South Carolina Educ. Lottery Comm’n*, 441 S.C. 209, 893 S.E.2d 342 (Ct. App. 2023) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review)). In any event, the circuit court, rather than the arbitrator, should properly determine whether Airbnb waived any right it may have had to arbitration in this case.

Airbnb cites one outlier case, *Chatman v. Jimmy Gray Chevrolet, Inc.*, No. 3:16-cv-00008-GHD-SAA, 2016 WL 4975044, at*6 (N.D. Miss. Sept. 12, 2016), in support of this proposition. (App. Initial Brief at 20). There, the court, after finding a valid and enforceable delegation clause, subsequently explained that the issue of waiver was expressed as a challenge to the delegation clause and “the scope of arbitrable issues.” *Chatman*, 2016 WL 5745697, at *4 (N.D. Miss. Sept. 30, 2016). “A delegation clause is merely a specialized type of arbitration agreement.” *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539, 586 U.S. ___ (2019) (citing *Rent-A-Ctr.*, 561 U.S. at 70). And as with any arbitration agreement, “before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.” *Henry Schein*, 139 S. Ct. at 530 (citing 9 U.S.C. § 2).

Here, Foster has challenged whether there was an enforceable arbitration agreement and delegation clause, *supra* n.11, and the Court must first determine whether there is an enforceable arbitration agreement and delegation clause. As discussed above, “[i]t is clear courts must determine issues of contract formation. If [the plaintiff] challenged arbitration by claiming the contract was never formed (*e.g.*, because he never signed it or because there was no meeting of the minds), the court would decide the gateway question of arbitrability.” *Sanders*, 440 S.C. at 388, 892 S.E.2d at 118.

Moreover, while the South Carolina appellate courts have not addressed this issue, other state appellate courts have determined that the court should resolve claims of litigation-related waivers because “when waiver turns on conduct in court, the court is obviously in a better position to decide whether it amounts to waiver.” *See e.g., Ocwen Loan Servicing, LLC v. Washington*, 939 So.2d 6, 14 (Ala. 2006); *Radil v. Nat’l Union Fire Ins. Co.*, 233 P.3d 688, 695 (Colo. 2010); *Cassedy v. Hofmann*, 15 So.3d 938, 942 (Fla. App. Ct. 2014); *Ford Motor Credit Co. v. Cornfield*,

918 N.E.2d 1140, 1154 (Ill. App. Ct. 2009); *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 552 (Ky. 2008); *Good Samaritan Coffee Co. v. LaRue Distrib.*, 275 Neb. 674, 683 (2008); *Perry Homes v. Cull*, 258 S.W.3d 580, 589 (Tex. 2008). Accordingly, the Court should determine whether Airbnb waived any right it may have had to arbitration.

B. The circuit court properly determined that Airbnb waived any right it may have had to arbitration by extensively participating in this litigation for two years before moving to compel arbitration.

Airbnb has been aggressively litigating this action in court for the past two years – participating in mediation; filing two motions to dismiss based on the merits; and engaging in numerous discovery disputes. Airbnb filed its Motion to Compel Arbitration only after the circuit court denied its second motion to dismiss; granted multiple motions to compel, and ordered Airbnb to retake the Rule 30(b)(6) deposition because its designee was unprepared to testify on the noticed topics.¹³ In *Liberty Builders, Inc. v. Horton*, the court found the defendant waived its right to arbitration where the parties sought the court’s assistance numerous times on matters such as motions to amend, compel, dismiss, and add parties. 336 S.C. 658, 666, 521 S.E.2d 749, 753 (1999).

To allow litigants to participate fully in discovery, make motions going to the merits, and delay assertion of a right to compel arbitration defeats the reasons behind the arbitration, which are to quickly and inexpensively resolve claims. “Acting in a manner inconsistent with one’s arbitration rights and then changing course mid-journey smacks of outcome-oriented gamesmanship played on the court and the opposing party’s dime.” *Gutierrez v. Wells Fargo Bank, NA*, 889 F.3d 1230, 1236 (11th Cir. 2018).

¹³See Order Denying Airbnb’s Mot. to Dismiss Compl., filed Dec. 30, 2021; Form 4 Order Denying Airbnb’s Mot. to Dismiss Am. Compl., filed May 25, 2023; Order Granting Pl.’s Mots. to Compel, filed May 25, 2023; April 5, 2023 Hearing Tr. 56:6-16.

Generally, the factors to consider in determining whether a party waived its right to compel arbitration are: “(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.” *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). The prejudice factor, however, is no longer required to establish waiver pursuant to the recent United States Supreme Court ruling in *Morgan v. Sundance*, 142 S.Ct. 1708 (2022).

Airbnb has knowingly and intentionally relinquished any right it may have had to arbitrate. Airbnb was obviously aware of its arbitration provision in its TOS. And, at the beginning of this action, as is standard practice for Airbnb when facing any potential claims, Airbnb stated its unequivocal intention to file a Motion to Compel Arbitration based upon its TOS Agreement. (Exhibit A – Email chain with Airbnb’s prior counsel, stating, *inter alia*, “I expect I may be filing a Motion to Compel Arbitration” (May 27, 2021); “my client intends to file a Motion to Compel Arbitration” (July 7, 2021); and finally, “we plan on filing a Motion to Compel Arbitration with our Answer” (July 14, 2021)). Despite planning and promising to do so for months in 2021, Airbnb did not file any such motion, not until two years of “testing the waters” of litigation.

Airbnb’s actions are inconsistent with its alleged right to arbitration. Airbnb moved to dismiss the Complaint on the merits (Airbnb’s Mot. to Dismiss Compl., filed August 3, 2021), which the Court denied (Order Denying Airbnb’s Mot. to Dismiss Compl., filed Dec. 30, 2021). Foster subsequently moved to file an Amended Complaint (Pl.’s Mot. to Amend Compl., filed Sept. 2, 2022), which Airbnb naturally opposed (Airbnb’s Opp. to Mot to Amend, filed Oct. 13, 2022).

The Court granted the Motion to Amend (Order Granting Pl.’s Motion to Amend Compl., filed Nov. 30, 2022). Airbnb moved to dismiss the Amended Complain on the merits (Airbnb’s MTD Am. Compl., filed January 20, 2023), which the Court denied (Form 4 Order denying Airbnb’s Mot. to Dismiss Am. Compl., filed May 25, 2023).¹⁴ On April 20, 2023, Airbnb filed its Answer to the Amended Complaint and asserted cross-claims against Thomas. Despite extensive briefing and numerous hearings, Airbnb did not raise the issue of arbitration in either its Motion to Dismiss or in its opposition to Foster’s Motion to Amend.

Airbnb argues that it has not waived its rights to the compel arbitration of the Amended Complaint because it reserved its rights to arbitration in its Answers and there is an express non-waiver provision in the TOS. (App. Initial Brief at 27-28). However, in the cases Airbnb cites, the defendants asserted arbitration as an affirmative defense. *Id.* (citing *Soriano v. Experian Info. Sols., Inc.*, No. 2:22-CV-197-SPC-KCD, 2022 WL 6734860, *3 (M.D. Fla. Oct. 11, 2022) (highlighting the importance of a party’s pleading of arbitration as an affirmative defense in assessing waiver); and *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (compelling arbitration and noting that defendant pleaded arbitration as an affirmative defense in its two filed answers and in the initial case management conference)). Here, while Airbnb asserted nineteen affirmative defenses in its Answer to the initial complaint and twenty-five in its Answer to the Amended Complaint, it did not include arbitration. (Airbnb’s Answer, filed Feb, 4, 2022, 28-32; Airbnb’s Answer to Am. Compl. ¶¶ 115-122). Instead, Airbnb stated in its introductory paragraph that it was “reserving” its rights to compel mandatory contractual arbitration. (Airbnb’s Answer at 1; Airbnb’s Answer to Am. Compl. at 1).

¹⁴ The circuit court orally denied Airbnb’s Motion to Dismiss at the April 5, 2023 Hearing. (April 5, 2023 Hearing Tr. at 18:8-13).

However, “[a] reservation of rights is not an assertion of rights.” *Hooper v. Advance Am., Cash Advance Ctrs. of Missouri, Inc.*, 589 F.3d 917, 923 (8th Cir. 2009). “A statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver.” *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016); *see also Bombardier Trans. (Holdings) USA, Inc. v. HDR Eng’g, Inc.*, No. CV-21-01460-PHX-SPL, 2022 WL 17811661, * 3 (D. Ariz. Dec. 19, 2022). Moreover, Airbnb cannot claim to be reserving its purported arbitration rights while actively litigating the merits of Foster’s claims and taking inconsistent actions for almost two years. *See In Re Mirant Corp. v. Castex Energy, Inc.*, 613 F.3d 584, 591 (5th Cir. 2010) (“A party cannot keep its right to demand arbitration in reserve indefinitely while it pursues a decision on the merits before the district court.”). Further, contrary to Airbnb’s argument that the circuit court ignored the non-waiver provision in its TOS, (App. Initial Br. at 28 n.7), the circuit court specifically held that “the right to arbitrate can be waived even in the face of a no-waiver provision.” (Order Denying Airbnb’s Mot. to Compel Arb. at 12) (citing *Liberty Builders*, 336 S.C. at 667, 521 S.E.2d at 754).

Finally, Airbnb contends that it moved for arbitration as late as it did because of the filing of the Amended Complaint, and, in particular, the claim for a violation of South Carolina’s Unfair Trade Practices Act somehow revived its right to arbitrate. (App. Initial Brief at 25-26, 28). Airbnb’s claim that the Amended Complaint revived its right to arbitrate has no basis in law or fact.

First, Airbnb’s failed to move for arbitration when it first became aware of the claims alleged in the Amended Complaint. Airbnb was aware of these new claims on September 2, 2022, when Foster filed her Motion to Amend, which Airbnb strenuously opposed. (Airbnb’s Mot. Opposing Pl.’s Mot. to Amend Compl. filed Oct. 13, 2022). However, Airbnb did not raise

arbitration to the circuit court or assert its alleged arbitration rights. Then, when Foster was granted leave to file the Amended Complaint and filed her Amended Complaint on November 30, 2022, Airbnb still did not move to compel arbitration; instead, it continued litigating the claims alleged in the Amended Complaint on their merits in court by filing a Motion to Dismiss the Amended Complaint. (Airbnb’s Mot. to Dismiss Am. Compl., filed Jan. 20, 2023). When its Motion to Dismiss was denied and Airbnb answered the Amended Complaint on April 20, 2023, it still did not raise arbitration as an affirmative defense in its Answer, (Airbnb’s Ans. to Am. Comp., filed April 20, 2023), or by a separate motion.

Airbnb only moved to compel arbitration after the circuit court denied Airbnb’s Motion to Dismiss the Amended Complaint and granted Foster’s Motions to Compel and it hired its second set of new counsel. In sum, after Airbnb first learned of the new claims in Foster’s Amended Complaint, Airbnb litigated for almost nine months until May 15, 2023, until it filed its Motion to Compel Arbitration. A party cannot test the waters of the merits of claims in court and then when it loses, assert its purported right to arbitration. “A party may not use a motion to dismiss to see how the case is going in federal district court, while holding arbitration in reserve for a second chance in another forum.” *Solo v. United Parcel Serv. Co.*, 947 F.3d 968, 974 (6th Cir. 2020) (internal quotation marks and citation omitted).

In any event, Foster’s SCUTPA claim does not expand the theory or scope of this litigation in a way which would revive Airbnb’s alleged right to arbitration *See Manasher v. NECC Telecom*, 310 F. App’x 804, 807 (6th Cir. 2009) (holding additional claims contained in amended complaint did not substantially alter the scope or theory of case so as to revive defendant’s right to compel arbitration). In *Krinsk v. Sun Trust Banks*, 654 F.3d 1194 (11th Cir. 2011), the Eleventh Circuit noted that “in limited circumstances, fairness dictates that a waiver of arbitration be nullified by

the filing of an amended complaint.” *Id.* at 1202 (emphasis added). The Eleventh Circuit found that because the amended complaint’s new class definition “greatly broadened the potential scope of this litigation by opening the door to thousands—if not tens of thousands—of new class plaintiffs not contemplated in the original class definition. . . .” *Id.* at 1204.

Moreover, the cases cited by Airbnb, (App. Initial Brief at 25-26), do not stand for the blanket rule that the filing of a new complaint revives the opposing party’s arbitration rights that were previously waived. For example, in *Cannon Equipment Co. v. Troisi*, the court held that the defendant waived his right to arbitrate the claims in the original Complaint and the “ship has sailed” as to the original claims which he strenuously litigated for almost a year and a half. No. 08-2391 (PAM/AJB), 2009 WL 10710732, *4 (D. Minn. Oct. 30, 2009). Likewise, in *Haarslev, Inc. v. Nissen*, the court held that “arbitration of newly pled claim is separate from the arbitrability of the original claims.” No. 5:19-CV-06128, 2023 WL 2782313, *7 (W.D. Mo. Jan. 30, 2023). There are no South Carolina cases holding that the filing of an amended complaint somehow revives a party’s right to compel arbitration any claims, let alone all of the claims. Moreover, even if there were, as discussed above, Airbnb waived its rights as to the claims in the Amended Complaint by continuing to litigate this case on the merits without moving for arbitration.

Finally, Airbnb argues that South Carolina Courts have found waiver only after a party has waited years – not mere months—to file a motion to compel arbitration. However, South Carolina courts have specifically resisted applying a formulaic approach as to the time that has lapsed and instead have focused on the actions of the parties. *See Rhodes.*, 374 S.C. at 126-27, 647 S.E.2d at 251 (holding that what constitutes “a substantial length of time” varies from one case to the next, depending on the extent of discovery conducted”); *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding a five-and-a-half year

period where the parties “conducted a significant amount of discovery, resulting in the production of thousands of documents” demonstrated waiver); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 75-75 (Ct. App. 2003) (finding a nineteen month period where the parties exchanged written interrogatories, requests to produce, and the party requesting arbitration took two depositions demonstrated waiver); and *Liberty Builders*, 336 S.C. at 666, 521 S.E.2d at 753-54 (finding a two-and-a-half year period where the parties sought assistance from the court on approximately forty occasions demonstrated waiver); *Toler’s Cove Homeowners Ass’n, Inc., v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen month period where discovery was “very limited in nature and the parties had not availed themselves of the court’s assistance” and where “Respondent had not held any depositions” did not demonstrate waiver).

The almost six months that lapsed after Foster filed her Amended Complaint and Airbnb’s continued litigation on the merits are evidence which supports the circuit court’s finding Airbnb waived its right to arbitrate. *Stokes*, 351 S.C. at 609-10, 571 S.E.2d at 713 (if any evidence reasonably supports the circuit court’s factual findings, this court will not overrule those findings). Accordingly, the circuit court’s finding of waiver should be affirmed.

III. The circuit court properly denied Airbnb’s Motion to Compel Arbitration based on the outrageous tort exception.

South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers. *Aiken v. World Fin. Corp.*, 373 S.C. 144, 644 S.E.2d 705 (2007)). “Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this [c]ourt 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.” *Id.* at 151, 644 S.E.2d at 709.¹⁵ The circuit court correctly found Foster’s invasion of privacy claims arising from the outrageous and unforeseeable secret video recording of her undressing in her bedroom outside of any arbitration agreement. (Order Denying Airbnb’s Mot. to Compel. Arb. at 8-9) (citing *Aiken v. World Fin. Corp.*, 373 S.C. 144, 644 S.E.2d 705 (2007)).

First, citing to *Palmetto Wildlife, LLC v. Ludy*, 435 S.C. 690, 869 S.E.2d 859 (Ct. App. 2022), Airbnb contends that whether the outrageous tort exception applies must be decided by the arbitrator. (App.’s Initial Brief at 20). Airbnb admittedly raised this issue to the circuit court. (Airbnb’s Supplemental Mem. in Supp. of its Mot. to Compel Arb., filed July 21, 2023, at 4-5). However, the circuit court did not specifically rule on this issue, and Airbnb failed to file a Rule 59(e) motion. *See Summer*, 328 S.C. at 43, 492 S.E.2d at 58; *see also Tupper*, 326 S.C. at 328 n.7, 487 S.E.2d at 192 n.7. In any event, in *Palmetto Wildlife*, there was a delegation clause which the plaintiff did not contest, and thus the court determined the arbitrator should decide the issue. Here, Foster has challenged the arbitration agreement and the delegation clause (Pl’s Mem. Opp. Airbnb’s Mot. to Compel Arb. at 6 & n.1), and the circuit court did not rule on whether there was an enforceable arbitration agreement or delegation clause.

Turning to the merits, Airbnb contends the outrageous and unforeseeable tort exception to arbitration is not a general contract principle and pursuant to the holding in *Concepcion* cannot be applied to arbitration agreements. (App. Initial Brief at 23). In *Concepcion*, the Supreme Court struck down a California legal doctrine that explicitly declared unconscionable, and thus unenforceable, all arbitration clauses in consumer contracts containing class action waivers. *AT&T*

¹⁵ The Court need not reach this issue if it finds that Airbnb waived any right it may have had to arbitrate or it finds that Foster is not bound to arbitrate by estoppel.

Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011). The Supreme Court explained that arbitration agreements can be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply solely to arbitration contacts because this disproportionate application would conflict with the FAA’s objectives. *See generally, Concepcion*, 563 U.S. at 333.

Citing *Parsons v. John Weiland Homes & Neighborhoods of the Carolina, Inc.*, 418 S.C. 1, 791 S.E.2d 128 (2016), Airbnb argues “the exception cannot remain viable following the Supreme Court’s opinion in *Concepcion*.” (App. Initial Brief at 23). However, as Airbnb acknowledges in a footnote, *id.* at 23 n.5, the South Carolina Supreme Court in *Parsons* addressed this question, and “the majority of [the] Court finds the outrageous torts exception to arbitration remains viable” after *Concepcion*. *Id.* at 13, 791 S.E.2d at 134. As the exception remains viable, the circuit court did not err in applying it in this case.

Airbnb additionally argues Foster has not alleged an outrageous tort against Airbnb and that the circuit court failed to conduct any analysis of the different claims against the different parties. (App.’s Initial Brief at 21-22). However, Airbnb did not make this argument to the circuit court. Airbnb argued only that the outrageous exception was not viable after *Concepcion* (Airbnb Jul 21, 2023 Letter to the Court at 2-3), and thus, cannot make this argument for the first time on appeal. *See Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review.”). Moreover, the circuit court did not err in applying the outrageous tort exception in light of Airbnb’s negligent conduct in the face of a known danger of hidden cameras in Airbnb rentals. *See Parsons*, 418 S.C. at 6, 791 S.E.2d

at 130 (applying outrageous tort exception where seller sold property with a known environmental hazard). Accordingly, Airbnb's arguments are without merit.

IV. The circuit court properly granted Foster's Motion for a Rule to Show Cause because Airbnb has consistently refused to comply with the circuit court's orders.

"All courts have the inherent power to punish for contempt, which 'is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.' " *Ex parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 824 (Ct. App. 2009) (quoting *Miller v. Miller*, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (Ct. App. 2007)). Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct. *Henderson v. Henderson*, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989).

"In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." *Miller*, at 454, 652 S.E.2d at 760 (quoting *Hawkins v. Mullins*, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004)). "[B]efore a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct." *Id.* (alteration in original) (quoting *Widman*, 348 S.C. at 119, 557 S.E.2d at 705).

Once the moving party has made out a prima facie case, the burden shifts to respondent to establish his or her defense and inability to comply with the order. *Henderson*, 298 S.C. at 197, 379 S.E.2d at 129. A determination of contempt is within the sound discretion of the trial judge, but his decision will be reversed when the finding is without evidentiary support or there is an abuse of discretion. *Wilson v. Walker*, 340 S.C. 531, 538, 532 S.E.2d 19, 22 (Ct. App. 2000).

On June 7, 2022, Foster served Airbnb with her Requests for Production Nos. 16-44, and in its responses, Airbnb objected on numerous grounds. On February 10, 2023, Foster filed a Motion to Compel regarding her Requests for Production (“RFP”) Nos. 16-44. (Pl.’s Mot. to Compel, filed Feb. 10, 2023). On November 1, 2022, Foster served Airbnb with her Requests for Production Nos. 45-48. Again, in its responses, Airbnb objected on numerous grounds. On January 18, 2023, Foster filed her Motion to Compel regarding Requests for Production Nos. 45-48.(Pl.’s Mot. to Compel, filed Jan. 18, 2023).

In her Motion to Compel, Foster noted that, in its response to Foster’s RFP, Airbnb acknowledged many of her RFP requests overlap with the topics raised in Foster’s 30(b)(6) topics. (Pl.’s Mot. to Compel filed Feb. 10, 2023, Ex. B, Airbnb’s Responses to Pl.’s Am. RFP Nos. 16-44 at 2). Airbnb had previously objected to all twenty-four 30(b)(6) topics and even sought reconsideration after the circuit court denied its first motion for a protective order. (*Id.*, Ex. C, Court’s Order Aug. 3, 2022). After extensive briefing, the circuit court denied the motion for reconsideration and ordered that the deposition take place on all of the noticed topics. (*Id.*, Ex. D, Court Order filed Oct. 11, 2022). Thus, the circuit court had already considered (and re-considered) and rejected Airbnb’s objections to the substantially identical twenty-four (24) topics set forth in the Plaintiff’s 30(b)(6) deposition notice.

Foster’s Motions to Compel were heard during the April 5, 2023 hearing, during which the circuit court granted the motions and gave Airbnb sixty (60) days to produce the requested documents. A month and a half later, Airbnb attempted to change the circuit court’s oral ruling in a letter dated May 15, 2023. (Airbnb’s May 15, 2023 Letter to Judge Jocelyn Newman) (again raising *Hollman v. Wolfson*, 384 S.C. 571, 577-78, 683 S.E.2d 495, 498-99 (2009)). However, on May 25, 2023, the circuit court memorialized the ruling granting the motions to

compel that it had made during the hearing in a Form 4 Order. (Order Granting Pl.’s Motions to Compel, filed May 25, 2023). Thus, Airbnb had sixty days from April 5, 2023, to comply. Airbnb waited until the last day to produce any documents, and on June 5, 2023, Airbnb produced some documents to Foster, but informed her that it was unilaterally withholding the production of other responsive documents, and was seeking further reconsideration of the circuit court’s order.(Airbnb’s June 5, 2023 Letter to Plaintiff).

Thereafter, on June 8, 2023, Foster filed her Motion for RTSC, and the motion was set for a hearing on June 13, 2023. At the hearing, Foster argued her motion should be granted because Airbnb was refusing to produce documents that it had been ordered by the court to produce. (June 13, 2023 Hearing Tr. 17:11-18:11). Foster argued that, when motions had been granted in the past, Airbnb “repeatedly thumbed their noses at the orders of the judges” and simply refuse[s] to comply.” (June 13, 2023 Hearing Tr. 19:16-19; 32:14-18; 34:4-7; 34:15-21). Foster noted Airbnb has a record of not producing other responsive documents and, in fact, has not yet produced a single internal email. (June 13, 2023 Hearing Tr. 19:19-21).

Importantly, Airbnb failed to raise any alleged procedural issues at the hearing on the RTSC Motion. Despite Airbnb’s alleged generic statement to the Clerk of Court that it was reserving and not waiving all of its rights and objections, to preserve any error, Airbnb should have raised any specific objections to the circuit court for a ruling. Failing to do so, Airbnb waived any right to object. Moreover, Airbnb failed to file a Rule 59 motion. *See Summer*, 328 S.C. at 43, 492 S.E.2d at 58; *see also Tupper*, 326 S.C. at 328 n.7, 487 S.E.2d at 192 n.7.

Furthermore, a summons was not needed for Airbnb when hearing this RTSC motion. *See State ex rel. v. Sanders*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920) (“The purpose of the summons is to acquire jurisdiction of the person of the defendant . . .”). This failure to object resulting in

waiver of personal jurisdiction applies equally in constructive contempt cases. *See Bakala v. Bakala*, 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003) (finding constructive contempt proceedings are commenced by a rule to show cause and that the record indicated service of the rule to show cause was not accomplished correctly, but because the appellant never raised the issue, his objections to personal jurisdiction were waived). A court ordinarily obtains personal jurisdiction by the service of a summons. *See Sanders*, 118 S.C. at 502, 110 S.E. at 810; *cf.* Rule 3(a), SCRCF (“A civil action is commenced by filing and service of a summons and complaint.”).

As to the merits, contrary to Airbnb’s argument, the circuit court did not rely on counsel’s arguments; it found clear and convincing evidence of contempt by Airbnb. The circuit court noted that the underlying facts were not in dispute (Order Granting Pl.’s Mot. for RTSC at 2), and that Airbnb had produced some documents to Foster on June 5, 2023, but informed her that it was unilaterally withholding production of other responsive documents, quoting from Airbnb’s letter to Foster as follows:

Contemporaneous with this production, Airbnb is filing a motion for reconsideration and to stay enforcement with respect to Plaintiff’s Request for Production Nos. 45, 46, 47 (Non-Party Guest Contact Information) and 48 (Non-Party Host Criminal Convictions). Consequently, Airbnb is withholding production of documents responsive to these requests at this time.

(Order Granting Pl.’s Mot. for RTSC, filed Aug. 24, 2023, at 2). The circuit court held that Airbnb’s production of only certain documents and purposefully withholding documents was “undeniable in view of the block quote above taken from Airbnb’s June 5, 2023 letter to Plaintiff’s counsel.” *Id.* at 3.

Further, the circuit court was fully aware of the “ongoing discovery dispute,” *id.* at 2, and that Airbnb had already litigated the same discovery issues in regard to the topics noticed for a

30(b)(6) deposition, *id.* at 3-4 n.i, and it specifically addressed Airbnb's pending motion for reconsideration:

Airbnb has already filed two motions to reconsider this Court's discovery orders, as follows as follows: (i) Motion to Reconsider Denial of Airbnb's Motion for Protective Order [as relates to Plaintiff's 30(b)(6) deposition notice], filed August 4, 2022; and (ii) Airbnb, Inc.'s Motion to Reconsider and to Stay Enforcement, filed June 5, 2023. By the time Airbnb's Aug. 4, 2022 first motion to reconsider was fully briefed, Airbnb had filed and presented 51 pages (6 + 30 + 15 = 51) of argument in support of its motion, which was denied in all substantive respects by order dated October 11, 2022.

Id. at 4, n. ii. In its motion for reconsideration of the May 25, 2023 Order, Airbnb was not raising new caselaw or some other perhaps justifiable reason for reconsideration; it was raising the same arguments and the same case, *Hollman v. Woolfson*, 348 S.C. 571, 683 S.E.2d 495, that it had raised in regard to the 30(b)(6) topics, in its response to the motion to compel, at the April 5, 2023 hearing, and in its May 15, 2023 letter (which in essence was a motion to reconsider the Court's oral order during the April 5, 2023 hearing), which the circuit court considered and rejected when she entered her Form Order on May 15, 2023. (Form 4 Order, filed May 15, 2023). There was clear and convincing evidence of Airbnb's willful noncompliance with the court's orders.

Finally, Rule 241(a), SCACR, which governs stays on appeal, provides:

As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 241(a), SCACR. Thus, pursuant to Rule 241, the circuit court properly proceeded with matters not affected by the appeal after the notice of appeal was served. Based on the foregoing, the RTSC Order should be affirmed.

CONCLUSION

Because arbitration requires consent and Foster never agreed to arbitration, the circuit court properly denied Airbnb's Motion to Compel Arbitration. Additionally, because Foster is not subject to estoppel under the direct benefits estoppel doctrine, the circuit court properly denied Airbnb's Motion to Compel Arbitration for that reason too.

Because Airbnb waived any right it may have had to arbitrate by choosing to litigate in the courts for over two years, the circuit court properly denied Airbnb's Motion to Compel Arbitration.

Because the secret recording of a renter nude in her bedroom is outrageous, the circuit court properly denied Airbnb's Motion to Compel Arbitration based on the outrageous tort exception.

Finally, Because the record supports the trial court's finding of contempt, the order on Plaintiff's RTSC should be affirmed.

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Respectfully submitted,

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