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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Jr. Circuit Court Judge

Appellate Case No. 2024-000864
Court of Appeals Appellate Case No. 2023-001479
Case No. 2021-CP-02-00889

Julianne Foster .....Respondent,

v.

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

of which

Airbnb, Inc., is the.....Appellant.

and

Rhett Riviere is a.....Respondent.

Appellant Airbnb, Inc.'s Petition for Rehearing and Suggestion for Rehearing *En Banc*

Appellant Airbnb, Inc. ("Airbnb") requests, under Rules 221(a) and 240, SCACR, rehearing of this Court's August 20, 2025 Opinion affirming the Circuit Court. *See Foster v. Rhett Riviere, et al.*, Op. No. 2025-UP-298 (S.C. Ct. App. filed August 20, 2025). Respectfully, the Court overlooked or misapprehended several important points. First, in ruling that Airbnb waived its right to arbitrate, the Court failed to address Plaintiff's amendment of her Complaint, and thereby overlooked or misapprehended several cases cited by Airbnb that permitted defendants to

seek arbitration following a material amendment of the pleadings. Second, the Court overlooked or misapprehended Airbnb's remaining arguments in favor of arbitration, as a result of its waiver ruling.

The Court should consequently grant rehearing and reverse the Circuit Court's rulings. Airbnb also incorporates into this petition and expressly reasserts all arguments raised in its prior briefing and at oral argument and does not abandon or waive such arguments.

Argument

I. Rehearing is needed because the Court overlooked that Plaintiff's Amended Complaint reset the clock on waiver, and misapprehended the time period for the waiver analysis.

In relying on the time passing between the initial Complaint and Airbnb's Motion to Compel Arbitration to establish waiver, *see* Slip Op. at 3, the Court overlooks that Plaintiff amended her Complaint to expand the litigation's scope, thereby restarting the clock for the waiver analysis. (Airbnb's Br. at 26; Airbnb's Reply Br. at 18.) In the cases Airbnb cited that the Court overlooked, the courts held that a plaintiff's amendment of the complaint resets the clock for the purposes of determining waiver, especially where the amendment "changes the theory or scope of the case," like Plaintiff's amendment did here. *Haarslev, Inc. v. Nissen*, No. 5:19-cv-06128-BCW, 2023 WL 2782313, at *7 (W.D. Mo. 2023); *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202 (11th Cir. 2011). This includes a case from South Carolina's federal district court. *See, e.g., Brown v. Green Tree Servs., LLC,* 585 F. Supp. 2d 770, 782 (D.S.C. 2008) (holding that where the amended complaint altered the lawsuit significantly by adding allegations, the defendant would not have been "deemed to have waived its right to compel arbitration merely because of the delay [of 13 months]"). While not binding, these cases are persuasive given the unique nature of this case.

Further, in relying on Airbnb's "filing multiple answers, multiple motions to dismiss, taking depositions" to conclude that Airbnb acted "inconsistently with its right to arbitrate," the Court misapprehended the record as it relates to Airbnb's actions during the applicable time period. *See* Slip Op. at 3. Instead of focusing on the full history of the litigation, the Court should have focused only on Airbnb's actions from when the Amended Complaint became operative on November 30, 2022, until the day it filed its Motion to Compel Arbitration on May 15, 2023. (Airbnb's Reply Br. at 17.) Only six months passed between the Amended Complaint becoming operative and Airbnb filing its Motion to Compel Arbitration. (Airbnb's Reply Br. at 16–19.)[1] During that time, Airbnb only filed one motion to dismiss as it relates to the operative Amended Complaint. (Mot. to Dismiss; R. at 1254.) That filing is not fatal to Airbnb's arbitration rights, though the Court does not address this point in its Opinion. *See Hall v. UBS Fin. Srvs.*, No. 6:19-cv-3316-TMC, 2022 WL 2076543, at *2 (D.S.C. Oct. 25, 2022). This is especially true when, as here, Airbnb filed its Motion to Compel Arbitration ten days *before* the lower court even ruled on the pending motion to dismiss. (*Compare* Mot. to Compel Arbitration; R. at 490, *with* Order; R. at 38.) And during the applicable six-month period, Airbnb only filed one answer to the operative complaint, not multiple answers as the Court notes. That answer was filed in response to a significantly expanded 257-paragraph Amended Complaint where Plaintiff added five claims, including a claim under the South Carolina Unfair Trade Practices Act, (Am. Compl. R. at 143–83).

[1] Since briefing concluded in this case, the Fourth Circuit has also issued a decision on the issue of waiver post-*Morgan* and reversed a finding of waiver following a nine-month delay. *SZY Holdings, LLC v. Garcia*, No. 23-1305, 2024 WL 3983944, at *3 (4th Cir. Aug. 29, 2024) ("But we give little significance to the failure to file a formal demand for arbitration when the party invoking that right persisted in its claim for arbitration.") (alterations and quotations omitted) (unpublished, cited only as an example of persuasive reasoning).

Regardless of the number of answers filed, Airbnb *preserved* its arbitration rights in each responsive pleading, a point the Opinion overlooks. (Ans.; R. at 109; Ans. Am. Compl.; R. at 184.) Such action is inconsistent with knowingly giving up and relinquishing any arbitration rights. *See Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387–88 (1992) (analyzing traditional waiver test). *Morgan v. Sundance* requires that the traditional waiver test be applied to arbitration rights just as the Court would apply that waiver test to other contractual rights. 142 S. Ct. 1708, 1714 (2022).

Our Supreme Court's opinion in *Johnson*, on which this Court relies but the parties did not, *see* Slip Op. at 3, does not mandate the result reached by the Court. *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 514–15, 788 S.E.2d 216, 219 (2016). There, over the course of three years, the parties engaged in extensive litigation involving a TRO, appointment of a Guardian *ad litem*, multiple motions to compel, at least two depositions, and even an appeal before the defendant moved to compel arbitration. *Id*. at 511–12, 788 S.E.2d at 217. The record here does not show the same degree of court involvement or the same extent of litigation before moving to compel arbitration.

Additionally, the Court overlooked Airbnb's argument about the non-waiver provision in its Terms of Service. (Airbnb's Br. at 28 n.7.) That provision is broad and should apply here: "Airbnb's failure to enforce any right or provision in these Terms will not constitute a waiver of such right or provision unless acknowledged and agreed to by us in writing." (Terms of Service at 294, § 22.5; R. at 529.) There is support for this position, albeit unpublished, which the Court did not address. *See Catwalk, LLC v. Sea Pines S. Beach Owners' Ass'n, Inc*., No. 2016-000637, 2018 WL 774827, at *1 (S.C. Ct. App. Feb. 7, 2018) (unpublished, cited as example of persuasive reasoning). Instead, the Court relies on *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d

749 (Ct. App. 1999), for the proposition that waiver could be found even in the face of a non-waiver provision. *See* Slip Op. at 3. However, not only does *Liberty Builders* pre-date *Morgan v. Sundance* and heavily rely on the prejudice to the non-moving party, but the case was interpreting a non-waiver provision in the AAA Rules, not a direct non-waiver provision in the parties' contract. *Id*. at 666, 521 S.E.2d at 754 (citing Rule 48(a), AAA Construction Industry Arbitration Rules). Moreover, the facts of *Liberty Builders* stand in stark contrast to the facts here because the party moving to compel arbitration there did so on the eve of trial and despite being the very same party that filed the lawsuit in the first place. *Id*. at 660, 521 S.E.2d at 750. These factual differences matter because, as the Court correctly notes, *see* Slip Op. at 3, the waiver question "depends on the facts of each case." *Evans v. Accent Manufactured Homes, Inc*., 352 S.C. 544, 550, 575 S.E.2d 74, 77 (Ct. App. 2003) (quoting *Liberty Builders, Inc*., 336 S.C. at 665, 521 S.E.2d at 753). The Court respectfully overlooked these legal and factual points in refusing to apply the non-waiver provision from the Terms of Service.

Finally, the Court's two references to incurring attorneys' fees and costs misapprehends the waiver test in the wake of *Morgan v. Sundance, Inc.* Slip Op. at 3. Whether Plaintiff incurred fees and costs in this litigation has no bearing on whether Airbnb voluntarily relinquished a known right. *See Janasik*, 307 S.C. at 344, 415 S.E.2d at 387–88. Regardless, the Court's opinion also fails to appreciate that the main driver of discovery costs in this case was Plaintiff's pursuit of expansive discovery including discovery about non-parties to the litigation—efforts Airbnb had to oppose, regardless of its arbitration rights. Similarly, the Court's conclusion that the parties would not have to incur discovery costs in arbitration misapprehends the extent to which the discovery involved in this case would be available in an arbitration before the American Arbitration Association ("AAA"). Slip Op. at 3. As set forth in the parties' Arbitration Agreement, the AAA's

Consumer Rules apply. (Terms of Service at 291–92, §§ 19.2, 19.6–19.8; R. at 526–27.) Those Rules empower the arbitrator to manage any necessary exchange of information among the parties, including "depositions, interrogatories, document production, or by other means . . ." Rule 20(a), Am. Arbitration Assoc. Consumer Rules (May 1, 2025), https://www.adr.org/rules-forms-and-fees/consumer/consumer-arbitration-rules-and-mediation-procedures-2025/. Although the discovery contemplated by those Rules and our Rules of Civil Procedure are different, it is not the case that the parties would not have incurred fees and costs for discovery in arbitration.

For these reasons and those set forth in Airbnb's briefing, the Court should grant rehearing on the issue of waiver.

II. Because the Court's holding on waiver is incorrect, it also overlooked Airbnb's delegation, direct benefits estoppel, and remaining arguments supporting arbitration.

Relying on *Futch*, the Court's opinion does not address Airbnb's remaining arguments in favor of compelling arbitration. Slip Op. at 3 n.2 (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)).

The Court's affirmance on the issue of waiver here is not dispositive, however. Airbnb asserted that the parties' delegation of arbitrability issues to the arbitrator to decide in the first instance included the issue of waiver. Whether Airbnb had "waived" the right to assert its arbitration rights is a question "about whether this Arbitration Agreement can be enforced or applies," (Terms of Service at 291, § 19.4; R. at 526), so it is an issue properly delegated to the arbitrator. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). Whether Airbnb has waived its arbitration rights is not a question of whether "a contract existed in the first place," *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 389, 892 S.E.2d 112, 118 (2023), but is a question of the "right to invoke an arbitration provision," which must be decided by an arbitrator,

id. at 383, 892 S.E.2d at 115. The Court has overlooked the import of *Sanders* and misapprehended the effect of *Futch* on this issue not otherwise disposed of by the Court's waiver ruling.

By misapprehending the application of *Futch*, the Court also overlooks Airbnb's other arguments in favor of arbitration, such as its direct benefits estoppel and the inapplicability of outrageous torts exception (an issue also delegated to the arbitrator). Airbnb properly detailed at least 25 instances in which Plaintiff relied on the Terms of Service to bring her claims in the Amended Complaint. (Airbnb Br. at 16–17; Airbnb Reply Br. at 8–9.) So too did Airbnb argue that the outrageous torts exception must be decided by the arbitrator in the first instance and that it did not apply in any event. (Airbnb Br. at 19–24; Airbnb Reply Br. at 10–16.) Airbnb's remaining arguments in favor of arbitration were properly before the Court and should have been addressed.

Conclusion

For the reasons stated above and in Airbnb's prior briefing, the Court should grant rehearing, reverse the Circuit Court and remand the matter for entry of an order dismissing Plaintiff's claims without prejudice and compelling her to submit her claims against Airbnb to arbitration.

[Signature on following page.]

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Proof of Service

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Airbnb, Inc., do hereby certify that I have served all counsel in this action with a copy of the document(s) set forth below under Supreme Court Order dated April 24, 2024, and a copy of that electronic mail will be attached to this certificate.

Document(s): **Appellant Airbnb, Inc.'s Petition for Rehearing and Suggestion for Rehearing *En Banc***

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