THE STATE OF SOUTH CAROLINA
In The Supreme Court

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 ..... 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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Respondent Julianne Foster respectfully submits this Return to the Petition for Writ of Certiorari filed by Appellant Airbnb, Inc., ("Airbnb") seeking review of the decision of the court of appeals in *Julianne Foster v. Rhett Riviere, et al.*, Op. No. 2025-UP-297 (S.C. Ct. App. filed August 20, 2025), 446 S.C. 434, 920 S.E.2d 283 (Ct. App. 2025), reh'g denied (Sept. 22, 2025) ("Opinion").

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Airbnb has raised several arguments to support its Petition for Writ of Certiorari ("Petition"). Because some of these issues are not preserved for review and none warrant the Court's review, the Court should decline to grant Airbnb's Petition.

First, contrary to Airbnb's argument, the Court of Appeals did not "skip over" any issues; rather, the court specifically declined to address the remaining issues because its finding as to waiver was dispositive. Opinion *1 n.2. Appellate courts routinely decide cases on one dispositive issue without deciding or addressing other issues. *See, e.g., Futch v. McAlister Towing of Georgetown, Inc.,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of one issue is dispositive); *see also* Rule 220(c), SCACR. This does not warrant the Court granting a petition for certiorari review.

Second, the Court of Appeals' opinion does not conflict with any binding precedent from this Court or the United States Supreme Court. Specifically, Airbnb argues that the Opinion conflicts with this Court's decision in *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 389, 892 S.E.2d 112, 118 (2023), as to who should decide waiver, and misapplies the traditional waiver test in violation of the United States Supreme Court's opinion in *Morgan v. Sundance*, 596 U.S. 411 (2022). However, Airbnb did not raise the issue that waiver should be decided by an arbitrator

to the circuit court nor was that issue ruled upon; instead it raised this issue for the first time on appeal. *See Cox v. S.C. 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)). Accordingly, this specific issue is not preserved. Even if it were preserved, as discussed herein, numerous appellate courts have held that the courts, rather than the arbitrator, should resolve claims of litigation-related waiver 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).

Airbnb's arguments that the Court of Appeals' misapplied the traditional waiver test and failed to apply the holding in *Morgan v Sundance* are also without merit. *See Morgan,* 596 U.S. at 417-19 (rebuking the creation of "arbitration-specific variants of federal procedural rules" and stating, "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration").[1] A waiver analysis should examine whether the party seeking to compel arbitration has voluntarily relinquished a known right. *Id.* This is exactly what the circuit court did. The circuit court cited to *Morgan* and applied this very standard and determined that Airbnb had knowingly and intentionally relinquished any right it may have had to arbitration. (R. p. 54). Accordingly, the Court of Appeals properly affirmed this decision.

Finally, Airbnb contends that this Court should grant its petition because the Court of Appeals failed to address the novel question of whether the Amended Complaint expanded the scope of the case so as to essentially revive an otherwise waived right to arbitration. The circuit

[1]Interestingly, despite the holding in *Morgan*, throughout this case and on appeal Airbnb has repeatedly argued that arbitration is favored. *See, e.g.*, Appellant's Final Brief at 14.

court determined that the Amended Complaint did not alter the scope of the cases so as to revive Airbnb's alleged right to arbitration (R. p. 2006), and "even if the Amended Complaint revived Airbnb's right to arbitration, Airbnb continued to actively litigate and waived its purported right to arbitrate once again." (R. p. 2007). The Court of Appeals specifically included the fact that an Amended Complaint was filed in November 2022 and that Airbnb still failed to move to compel arbitration until May 2023. In any event, this Court does not need to grant certiorari to address a purported novel issue when the case has been correctly decided. *See Hook v. Rothstein*, 283 S.C. 64, 320 S.E.2d 35 (1984). ("Although a novel question of law is presented, we deny the petition [for writ of certiorari] because we believe the case was correctly decided."). None of Airbnb's arguments demonstrate any special or important reasons for this Court to grant certiorari.

COUNTER-STATEMENT OF THE CASE AND FACTS

This action stems from 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. Based on this invasion of her privacy, on April 28, 2021, Foster filed the Complaint in this action alleging several claims against Riviere, Thomas, Chase Enterprises, LLC ("Chase"), and Airbnb. (R. pp. 83-93). On August 3, 2021, Airbnb moved to dismiss the Complaint on the merits. (R. pp. 1233-53). After the motion was fully briefed and a hearing held, the circuit court denied the motion, (R. pp. 1-6), and Airbnb answered the Complaint (R. pp. 184-317).

On September 2, 2022, Foster moved to amend her Complaint (R. pp. 1729-31), which Airbnb opposed (R. pp. 1773-74). The circuit court granted the motion on November 3, 2022, (R. pp. 33-37), and Foster filed her Amended Complaint adding three new negligence claims and a

claim under the South Carolin Unfair Trade Practice Act ("SCUTPA") against Airbnb, (R. pp. 143-83). Airbnb again moved to dismiss the Amended Complaint on the merits, (R. pp. 1254-1260), which the Court denied at the April 5, 2023 hearing, (R. p. 351, lines 12-13; R. p. 38). On April 20, 2023, Airbnb filed its Answer to the Amended Complaint and asserted cross-claims against Thomas, (R. pp. 184-317), and a third-party complaint against Riviere, (R. pp. 320-333). During this entire time, Airbnb failed to move for arbitration.[2]

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. (R. pp. 1890-1919) (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 wherein Airbnb objected to every one of the 24 noticed topics resulting in extensive briefing and a hearing. (R. pp. 1367, 1454, 1533, 1552-86). When the circuit court did not grant it relief as to the noticed topics, (R. pp. 13-15), Airbnb filed a 6-page Motion for Reconsideration and a 28-page Supplemental Memorandum in Support, (R. pp. 1545-50, 1633-62) followed by a 13-page Reply Memorandum (R. pp. 1670-1683). Airbnb also filed motions for protective orders and to quash depositions. (R. pp. 1784-94; 1829-39). Moreover, Airbnb has taken depositions of Plaintiff and several others and participated in two unsuccessful mediations.

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, (R. pp. 351, lines 12-13;

[2]While Airbnb made a reference to reserving its rights in the introductory paragraphs of its Answers to the Complaint and Amended Complaint (R. pp. 109, 184), it failed to assert arbitration as an affirmative defense (R. pp. 136-141; 298-305), and it waited over two years to file a motion to compel arbitration while litigating aggressively and utilizing limited judicial resources (R. pp. 1890-1919).

441, line 13- p. 443, line 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, (R. p. 981). 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 written Form 4 Orders. (R. pp. 38-46).

On May 15, 2023, two years after Foster filed this action, Airbnb filed its Motion to Compel Arbitration. (R. pp. 490-506). The motion was extensively briefed before and after a hearing on the matter (R. pp. 550- 67; 598-605; 625-663, 664-671), the circuit court emailed counsel on July 11, 2023, advising it was denying Airbnb's Motion to Compel Arbitration on three grounds:

> 1. The theory of direct benefits estoppel cannot be used to bind the Plaintiff nonsignatory into arbitration, as she received no direct contractual benefit because she suffered harm while staying at the residence that was the subject of the contract.
>
> 2. South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers.
>
> 3. Airbnb waived its right to enforce arbitration by participating in extensive litigation for over two years.

(R. p. 1959-60). Thereafter, on September 13, 2023, the circuit entered its written Order denying the motion on these grounds. (R. pp. 67-79). Airbnb did not file a Rule 59(e) motion. Instead, on September 15, 2023, Airbnb filed its Notice of Appeal.

A. **Arbitration Provision**

It is undisputed that Foster never entered into an arbitration (or any agreement) with Airbnb. Her friend, Jain, held an Airbnb account and booked the rental. Airbnb's Terms of Service ("TOS") 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.

(R. p. 507) (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.

(R. p. 526) (emphasis in original).[3] Despite Airbnb's statement that Jain agreed to the TOS, (Pet. at 4), the record clearly established that the parties disputed whether Jain had actually agreed to the TOS, and the circuit court declined to decide that issue. (R. p. 71).

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. (R. pp. 722-34). 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.(R. pp. 7-11). Although specifically ordered to comply with the June 6, 2022 Order, 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

[3] Airbnb contends that because the TOS incorporates by reference other Airbnb policies and standards and its entire website. (R. p, 679; R. p. 469, lines 13-16) ("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.")).

clarification from the court. (R. p. 1927). Moreover, Airbnb did not produce a privilege log16-44, and Airbnb objected on numerous grounds. (R. pp. 801-20). 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 a second motion to compel. (R. pp. 736-45).

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. (R. p. 418, line 20 - p.419, line 12). In response, the circuit court questioned Airbnb as to why it had not moved for a protective order. (R. p. 440, line 14 – p. 441, line 12). During the hearing, the circuit court granted Foster's motions to compel giving Airbnb 60 days within which to produce the documents. (R. p. 442, line 7- p. 443, line 11). Subsequently, on May 25, 2023, the Court entered a Form 4 Order memorializing its decision. (R. p. 44). 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. (R. p. 1942). Airbnb refused to produce contact information for non-party guests and the identity and related information of non-party hosts with any criminal convictions. (R. p. 1942). 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. (R. pp. 986-993).

On June 8, 2023, Foster also 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." (R. p. 1141). On August 24, 2023, the circuit court 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. (R. p. 59). 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*. On September 15, 2023, instead of complying with the Court's orders, Airbnb filed its Notice of Appeal of the Order granting Foster's Motion for a RTSC. (R. pp. 1991-93).

C. Court of Appeals' Opinion

On August 20, 2025, the Court of Appeals issued its Opinion affirming the circuit court's decision denying Airbnb's Motion to Compel Arbitration and declining to address the circuit court's decision granting Plaintiff's RTSC. Airbnb timely petitioned for Rehearing and Rehearing en banc. (Pet. for Reh'g, Sept.4, 2025). On November 24, 2025, the Court of Appeals denied the Petition for Rehearing. Airbnb now petitions for a writ of certiorari to review the Court of Appeals' Opinion only as to the Motion to Compel Arbitration. Airbnb has not raised any issues as the Court of Appeals' decision regarding the RTSC.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals correctly affirm the circuit court's ruling that Airbnb had voluntarily relinquished a known right based on Airbnb's actions, including 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 before moving to compel arbitration?

II. Did the Court of Appeals, rather than the arbitrator, correctly determine that Airbnb waived any arbitration rights it may have had based on its litigation conduct?

III. Did the Court of Appeals properly decline to address Airbnb's direct benefits estoppel and remaining arguments because the waiver issue was dispositive?

ARGUMENT

Because the Court of Appeals properly affirmed the circuit court's decision denying Airbnb's Motion to Compel Arbitration, this Court should deny Airbnb's Petition for Writ of Certiorari.

I. The Court of Appeals correctly affirmed the circuit court's ruling that Airbnb had voluntarily relinquished any right it may have had to arbitration based on Airbnb's conduct in this action, including aggressively litigating numerous issues 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.

As discussed more fully below, Airbnb aggressively litigated this action with Plaintiff for over two years before it moved to compel arbitration, including propounding extensive discovery requests, 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. Airbnb also engaged in mediation (which it requested), filed two motions to dismiss based on the merits, and engaged in numerous discovery disputes requiring many hearings and multiple circuit court judges to resolve. (R. 1890-1919 - Docket from Second Judicial Circuit Public Index). The Court of Appeals held that "[t]he record unequivocally demonstrates that Airbnb acted inconsistently with its right to arbitrate and actively participated in discovery for a prolonged period of time, including filing multiple answers, multiple motions to dismiss, taking depositions, etc." Opinion at 2.

Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, the appellate courts 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). The Court of Appeal correctly affirmed the circuit court's ruling that Airbnb knowingly and intentionally relinquished any right it may have had to arbitrate based upon its litigation activity.

A. The Court of Appeals did not apply an erroneous waiver analysis.

Airbnb contends that the Court of Appeals ruled that it had waived any right it had to arbitration "due to alleged discovery costs incurred by Plaintiff. " (Pet. at 2, 16-17).

In general, "[w]aiver . . . is the intentional relinquishment or abandonment of a known right." *Morgan*, 596 U.S. at 417 (internal quotation marks omitted). A contracting party's right to have a dispute resolved by arbitration may be relinquished by "acting inconsistently with that right[.]" *Id.* at 419. In affirming the circuit court and determining that Airbnb had waived any right it may have had to arbitration, the Court of Appeals stated that the record unequivocally demonstrated that Airbnb had acted inconsistently with any right to arbitrate citing cases in which litigation conduct waiver has been addressed. (Opinion at 2) (citing *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 514–15, 788 S.E.2d 216, 219 (2016) (holding party waived its right to arbitration when it participated in discovery prior to filing its motion to compel arbitration despite having pled arbitration as a defense in its pleadings); *Liberty Builders, Inc.*, 336 S.C. at 668, 521 S.E.2d at 754 (holding a party waived its right to enforce an arbitration clause "by submitting the dispute to the court and availing itself of that system for two and one-half years" even though the arbitration agreement contained a no-waiver provision.). While the Court of Appeals mentioned the reality that when a party pursues discovery before moving for arbitration, costs are incurred, the Court of Appeals in its unpublished memorandum opinion did not apply an incorrect analysis that conflicts with the holding in *Morgan*. The Court of Appeals affirmed the circuit court's decision that Airbnb had intentionally unequivocally relinquished a known right it may have had to arbitrate based on its review of the record.

Airbnb was obviously aware of its arbitration provision in its TOS and the fact that it could seek to compel arbitration from the time the Complaint was first filed. In fact, soon after the

Complaint was filed, Airbnb stated its unequivocal intention to file a motion to compel arbitration based upon its TOS Agreement as is standard practice for Airbnb when facing any potential claims. (R. pp. 1923) ("I expect I may be filing a Motion to Compel Arbitration."); (R. p. 1922) ("my client intends to file a Motion to Compel Arbitration."); (R. p. 1920) ("we plan on filing a Motion to Compel Arbitration with our Answer."). Despite planning and promising to do so for months in 2021, Airbnb did not file any such motion, not until Airbnb had aggressively litigated this action in the circuit court for over 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.

Airbnb makes much of its statement in its Answers that it was reserving its arbitration rights. It argues that reserving its arbitration rights are the opposite of relinquishing a known right. (Pet. at 17). However, Airbnb's reservation demonstrates its knowledge of its purported arbitration rights from the beginning of this lawsuit - and yet it failed to seek to compel arbitration for two years. Moreover, Airbnb cannot "reserve" its purported arbitration rights while taking inconsistent actions for almost two years. *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."). "A reservation of rights is not an assertion of rights." *See also Hooper v. Advance Am., Cash Advance Ctrs. of Missouri, Inc.*, 589 F.3d 917, 923 (8th Cir. 2009).

In a hearing before the circuit court on its Motion to Compel Arbitration, Airbnb referred to the holding in *Morgan* and argued that lower **courts** are to "just use the old timey did you

knowingly relinquish a known right waiver test. That's what they said, okay." (R. p. 452, lines 12-20) (emphasis added). This is exactly what the circuit court did; it set out the holding in *Morgan* and applied this very standard and determined that Airbnb had knowingly and intentionally relinquished any right it may have had to arbitration:

> Waiver "is the intentional relinquishment or abandonment of a known right" a party "knowingly relinquish[es] the right to arbitrate by acting inconsistently with that right." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713-14, U.S. (2022) (internal quotation marks omitted); *see also Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) ("Waiver is a voluntary and intentional abandonment or relinquishment of a known right.") (quoting *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). A party may waive its contractual right to arbitration if it knew of the right and acted inconsistently with that right. *In re Mercury Const. Corp.*, 656 F.2d 933, 939 (4th Cir. 1981), aff'd sub nom. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) (quoting *Hyload, Inc. v. Pre–Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)).

(R. p. 75). Airbnb did not make any argument that the delegation clause precluded the court from making a ruling about waiver.

The appellate court may affirm any ruling, order, decision or judgment upon any grounds appearing in the Record on Appeal. Rule 220(c), SCACR. *See also I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding appellate court may affirm circuit court's ruling using any additional reasons that are raised by the respondent's brief and found within the record). The record unequivocally demonstrates that Airbnb clearly waived any right it had to arbitration through its litigation conduct.

B. The Court of Appeals did not err in declining to address the issue of whether Plaintiff's Amended Complaint expanded the scope of the litigation so as to reset the waiver determination.

Airbnb contends that the Amended Complaint revived its right to compel arbitration. (Pet, at 18). It contends that it subsequently moved for arbitration because the Amended Complaint filed

on November 30, 2022, and, in particular, the claim for violations of South Carolina's Unfair Trade Practices Act ("SCUTPA") expanded the scope of discovery (Pet. at 19) (citing to Pl.'s discovery requests). However, the SCUTPA claim did not expand the scope of this litigation in a way which would revive Airbnb's alleged right to arbitration.

As an initial matter, the "expanded" discovery which Airbnb cites to was served on Airbnb on June 7, 2022 (R. 802), and November 1, 2022 (R. pp. 747-754), prior to the Complaint being amended. Prior to even filing a motion to amend her Complaint, in March 2022, on August 19, 2021, Plaintiff served Airbnb with discovery requests regarding other Airbnb guests and rentals. (R. p. 732). As Plaintiff argued in her Motion to Compel this discovery, information as to other Airbnb guests and hosts was necessary to show Airbnb has been on notice of the risk of this type of behavior. (R. p. 732). Plaintiff's Amended Complaint did not expand discovery as Airbnb contends.

Moreover, in *Krinsk v. Sun Trust Banks*, the Eleventh Circuit noted that "in limited circumstances, fairness dictates that a waiver of arbitration be nullified by the filing of an amended complaint." 654 F.3d 1194, 1202 (11th Cir. 2011) (emphasis added). The Eleventh Circuit found that, even though the amended complaint asserted new claims based on the same operative facts as the claims in the original complaint, 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. Plaintiff has not broadened the scope of this litigation in her Amended Complaint into a class action type of claim so as to revive Airbnb's waiver. As the circuit court determined, this case has always been about only Plaintiff and the harm caused to her during her stay at an Airbnb, (R. p. 79), and the Amended Complaint did not alter the scope in such a way as to revive Airbnb's

alleged right to arbitration. *See Manasher v. NECC Telecom*, 310 F. App'x 804, 807 (6th Cir. 2009) ("[W]e hold that the additional claims contained in the amended complaint did not substantially alter the scope or theory of this matter in such a way as to revive the defendant's right to compel arbitration . . . .").

C. The Court of Appeals did not err in addressing the non-waiver provision in the Terms of Service.

Airbnb contends that "[t]his Court has also not yet addressed the impact that a non-waiver provision in a party's contract may have on the arbitration-waiver analysis" and thus "[t]he Court should grant certiorari to address this novel legal question that has only partially been addressed by our Court of Appeals." (Pet. at 24). The Court of Appeals cites *Liberty Builders,* 336 S.C. 658, 521 S.E.2d 749, for the proposition that that waiver could be found even in the face of a non-waiver provision. This was not error.

First, this argument is premised on the parties having entered into a contract with Airbnb and the TOS being applicable to Plaintiff – neither of which is accurate. As the circuit court determined, "Plaintiff was not a party to **any** contract with Airbnb and did not agree to the TOS or its arbitration provision." (R. p. 68) (emphasis added). The arbitration provision would have only been applicable through a direct benefits estoppel theory. Airbnb fails to make any argument as to how the general non-waiver provision found in the TOS would be enforceable against the non-signatory Plaintiff which is probably why it did not raise this issue to the circuit court

Airbnb raised this issue for the first time in a footnote in its Appellant's Brief before the Court of Appeals:

> Additionally, the circuit court's order ignores the effect of the non-waiver provision in the Terms of Service, which provides that "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." (See Airbnb's Mot. to Compel Arbitration, Ex. A – Terms of Service at 294, § 22.5; R. at 529.) This

> provision is enforceable. *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) (relying on non-waiver provision in covenants).

(Appellant's Brief at 28 n.7).[4] Relying on *Catwalk*, Airbnb contends that "[t]here is support in South Carolina, albeit unpublished, for the proposition that a non-waiver provision prevents implied waiver of a party's arbitration rights." (Pet. at 24). This support is tenuous at best.

Second, in *Catwalk*, in an unpublished opinion, the Court of Appeals held that action or inaction in enforcing restrictive covenants with a nonwaiver provision is not germane to a determination of their applicability. This case had nothing to do with arbitration and whether a party can rely on a general nonwaiver provision as to TOS to defeat a waiver of arbitration rights. Airbnb argues that the non-waiver provision in the TOA "must mean something" and that a non-waiver provision in the arbitration context should not be treated differently than other non-waiver provisions.

First, the no waiver provision in the TOS is not rendered meaningless by a court finding that a party has waived its right to arbitration under certain circumstances. The TOS is a general, broad non-waiver provision: "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." (R. at 529.). In other circumstances, it may well provide Airbnb the refuge it seeks. However, the mere fact that an arbitration agreement incorporates such a clause would not prevent a court from finding that a party has waived arbitration by actively participating in protracted litigation of an arbitrable dispute. *See, e.g., Home Gas Corp. v. Walter's of Hadley, Inc.,* 403 Mass.

[4]Airbnb did raise this issue in its filings concerning its right to arbitration with Rhett Riviere, which the circuit court rejected. (R. p. 54) ("The Court finds that the nonwaiver provision in the Terms of Service is not dispositive on the issue of whether Riviere or Airbnb waived the right to arbitrate.") (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. NCR Corp.*, 376 F. App'x 70, 73 (2d Cir. 2010)).

772, 532 N.E.2d 681, 684–85 (1989) ("no waiver" clause did not prevent finding of waiver where party engaged in one year of discovery and a fourteen-day hearing); *Seidman & Seidman,* 50 Cal.App.3d at 835, 123 Cal. Rptr. 873 ("The purpose behind [the 'no waiver' clause] was to permit . . . provisional remedies, not to allow a party to seek solely judicial relief of its controversy and later to switch course and demand arbitration.")

In *National Union Fire Ins. Co. of Pittsburgh, P.A. v. NCR Corporation,* the court held that "notwithstanding the non-waiver provision, NCR would be prejudiced by National Union's lengthy participation in multiple aspects of litigation prior to its demand for arbitration." 376 F. App'x 70, 73 (2d Cir. 2010). "[T]o allow the 'no waiver' clause to preclude a finding of waiver would permit parties to waste scarce judicial time and effort . . . . Further, delay in demanding arbitration until after judicial proceedings are almost complete permits the losing party to test the water before taking the swim." *S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 86 (2d Cir. Ct. App. 1998). [5]

Additionally, boilerplate nonwaiver provisions can be waived just as easily as the provisions they purportedly protect. *See Momentum Project Controls, LLC v. Booflies to Beefras LLC*, No. 14-22-00712-CV, 2023 WL 4196584 (Tex. App.—Houston [14th Dist.] June 27, 2023, pet. denied) (mem. op.) (rejected this argument, holding that party's actions of waiting four years to seek arbitration, attempting to compel arbitration just before trial, and doing so only after losing summary judgment demonstrated a waiver of the right to arbitrate and the nonwaiver clause itself). The nonwaiver provision here in the TOS does not preclude a waiver of the arbitration clause.

[5] The court held that a nonwaiver provision absolutely barring waiver in the most general of terms might be wholly ineffective. *Shields L.P. v. Bradberry*, 526 S.W.3d 471, 482–83 (Tex. 2017). But a nonwaiver provision is wholly ineffective in preventing waiver through conduct the parties explicitly agree will never give rise to waiver. *Id.* at 484. The court further held that a nonwaiver clause could be waived by an act inconsistent with its terms. *Id.* at 474

Thus, even when an arbitration agreement includes a non-waiver provision, courts must still consider the totality of the circumstances to determine whether a party waived its arbitration rights. Here, the circuit court determined that Airbnb had waived its rights based on its litigation conduct despite a non-waiver provision, and the Court of Appeals correctly affirmed that decision.

II. The Court of Appeals, rather than the arbitrator, correctly determined that Airbnb waived any arbitration rights it may have had based on litigation conduct.

Airbnb contends that the Court of Appeals' opinion conflicts with this Court's opinion in *Sanders*, 440 S.C. at 389, 892 S.E.2d at 118, as to who should decide arbitrability. (Pet. 8-10). Airbnb contends that the arbitrator, not the court, should determine whether Airbnb waived any right it may have had to arbitrate. *Id.* at 10. Further, Airbnb contends that the delegation clause in the TOS (R. at 526) prevented the court from resolving any questions of arbitrability, including waiver, and that "[b]y holding that Airbnb waived its arbitration rights, the Court of Appeals **implicitly** held that the delegation clause in the Terms of Service does not apply to the waiver issue. (Slip Op. at 3)." *Id.* (emphasis added). The Court should not grant certiorari to review non-decisions.

First, Airbnb did not raise this specific issues nor did the circuit court rule on these issues, and Airbnb did not file a Rule 59(e) motion. *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).[6] Airbnb's argument that the circuit court implicitly addressed this issue has been routinely

[6] Airbnb also argued to the Court of Appeals that it raised the issue of whether waiver should be determined by the courts or arbitrator when it argued generally that the arbitrator should decide enforceability of the arbitration agreement. (Pet.at 10). In light of the arguments made to the circuit court, it defies logic that Airbnb would not have raised this as a separate issue.

rejected. *See State v. Blackwell–Selim*, 392 S.C. 1, 4, 707 S.E.2d 426, 428 (2011) (holding because circuit court failed to make specific findings of fact to support its ruling, "there was nothing for the Court of Appeals to review"); *Noisette v. Ismail,* 304 S.C. 56, 403 S.E.2d 122 (1991) (absent an explicit ruling on a party's argument, the issue raised by the argument is not properly before the Court of Appeals and should not be addressed); *Van Blarcum v. City of N. Myrtle Beach*, 337 S.C. 446, 453, 523 S .E.2d 486, 490 (Ct. App. 1999) (stating a reviewing court cannot address an issue on which there is an implicit rather than explicit ruling).

This is especially true when here, before the circuit court, Airbnb argued that the delegation clause precluded the court from determining **only** whether there was a binding arbitration agreement between Plaintiff and Airbnb and whether the outrageous tort exception applies.[7] Airbnb did not argue that whether Airbnb waived any right to arbitration must be decided by the arbitrator. In fact, as to waiver. Airbnb, instead of arguing that the court should not decide the issue, informed the circuit court that it is "supposed to just use the old timey did you knowingly relinquish a known right waiver test." (R. p. 541). Because the issue of whether waiver should be decided by the arbitrator and this issue was not raised to nor ruled upon by the circuit court, this issue is not preserved for appellate review. [8]

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[7] Airbnb argued that because the outrageous tort exception was not a general contract principle and was only applicable in arbitration, its application was precluded by the holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 33, 339 (2011). Airbnb then and now continues to misstate the Court's subsequent holding in *Parsons v. John Weilnad Homes & Neighborhoods of the Carolina, Inc*, 418 S.C. 1, 791 S.E.2d 128 (2016), where this Court squarely addressed this question, and determined that the outrageous tort exception is a general contract principle applicable to arbitration and specifically held that "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.

[8] Airbnb argues that in *Sanders*, a similar preservation argument was rejected. However, *Sanders* is easily distinguished because there the Petitioners challenged only the contract as a whole and not the delegation clause.

Turning to the merits of this issue, in its Reply Brief to the Court of Appeals, Airbnb erroneously argued for the first time to the Court of Appeals that Plaintiff only summarily challenged the arbitration agreement and delegation claims, and because she only challenged the contract as a whole, pursuant to S*anders*, questions about arbitrability and waiver were to go to the arbitrator. (Reply Br. at 14-15). This is unequivocally refuted by the record as Plaintiff specifically challenged both the arbitration clause and the delegation clauses (R. at p. 555 & n.1), and the circuit court agreed holding that "Plaintiff is challenging both the formation and validity of the arbitration agreement and the delegation clause, not simply whether some issues are subject to arbitration." (R. 70 n.2).

In any event, the court, rather than the arbitrator, should properly determine whether Airbnb waived any right it may have had to arbitration through its litigation conduct in this case."[O]rdinarily a defense of waiver brought in opposition to a motion to compel arbitration . . . is a matter to be decided by the arbitrator." *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 80–81 (2d Cir. 2017) (quoting *S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 82–83 (2d Cir. 1998)). However, "[w]hen the party seeking arbitration has participated in litigation regarding the dispute, the district court can properly decide the question of waiver." *Id.* (citing *Bell v. Cendant Corp.*, 293 F.3d 563, 569 (2d Cir. 2002)); *see also Pacelli v. Augustus Intel., Inc.*, 459 F. Supp. 3d 597, 613 (S.D.N.Y. 2020) ("Where the question is whether the movant has waived the right to compel arbitration by actively litigating, courts and judges have a peculiar expertise—not necessarily shared by arbitrators—in determining the answer."); *Alvarez v. Experian Info. Sols., Inc.*, 661 F. Supp. 3d 18, 28 (E.D.N.Y. 2023), aff'd, No. 19-CV-3343 (JS)(JMW), 2024 WL 3643269 (E.D.N.Y. Aug. 2, 2024); *Lawrence c. NYC Med. Practice*, No. 1;18-cv-8649-GHW, 2023 WL 4706126 *5 (S.D.N.Y. July 21, 2023).

"[W]hen 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). Here, the circuit court, rather than the arbitrator, properly determined that Airbnb has knowingly relinquished any right it may have had to arbitration.

III. In light of its dispositive decision on the waiver issue, the Court of Appeals properly declined to address Airbnb's direct benefits estoppel, outrageous tort exception, and other remaining arguments.

There is nothing improper about the Court of Appeals declining to address other issues after it ruled on the waiver issue. Appellate courts routinely decide cases on one dispositive issue without deciding or addressing other issues. *See Bergstrom v. Palmetto Health All.*, 358 S.C. 388, 400, 596 S.E.2d 42, 48 (2004) (citing Rule 220); *Davenport v. Island Ford, Lincoln, Mercury, Inc.*, 320 S.C. 424, 428–29, 465 S.E.2d 737, 740 (Ct. App. 1995) (citing Rule 220). This is not a ground for the Court to grant Airbnb's Petition.

Turning to the merits of these issues, the circuit court correctly determined that direct benefits estoppel did not apply. "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). 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, Foster is not attempting to enforce the TOS while also asserting she is not bound by the arbitration provision. Her claims are based on statutory or tort law, not contract. *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). Foster also 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).

These same arguments were recently rejected in *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 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. at7. 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. The circuit court's determination that Airbnb cannot use estoppel to bind Foster to arbitration is supported by the evidence and must be affirmed.

The circuit court also 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. Airbnb additionally argues Foster has not alleged an outrageous tort against Airbnb. However, Airbnb did not make this argument to the circuit court. Airbnb argued only that the outrageous exception was not viable after *Concepcion* (R. 675-29 76), 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. 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. (R. pp. 74-75) (citing *Aiken*, 373 S.C. 144, 644 S.E.2d 705).

Airbnb contends that whether the outrageous tort exception applies must be decided by the arbitrator. Airbnb admittedly raised this issue to the circuit court. (R. pp. 677-78). However, the circuit court did not specifically rule on this issue, and Airbnb failed to file a Rule 59(e) motion. Further, Airbnb contends the outrageous tort exception is not a general contract principle and pursuant to the holding in *Concepcion* cannot be applied to arbitration agreements. 563 U.S. at

339. However, as discussed above, this Court in *Parsons* has held that this exception remains viable, and thus the circuit court did not err in applying it. Accordingly, Airbnb's arguments are without merit.

CONCLUSION

Airbnb has not set forth any convincing arguments to support its argument as to why their Petition for Writ of Certiorari should be granted. Accordingly, the Petition must be denied.

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