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S.C. SUPREME COURT

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. 2025-002540
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.....Petitioner,

and

Rhett Riviere is a.....Respondent.

Petitioner's Reply in Support of the Writ of Certiorari

Certiorari is warranted when a case presents novel questions of law or a conflict with binding precedent. Rule 242(b), SCACR. Respondent Julianne Foster concedes that Airbnb, Inc. ("Airbnb") has raised novel issues, so this Court should grant certiorari to address those novel arguments. Further, the Court of Appeals' opinion stands in contravention of this Court's precedents, as is again explained below. Foster primarily advances various erroneous procedural arguments in an effort to convince the Court to deny certiorari. Foster's procedural arguments are

incorrect and unsupported by the record, so they do not undermine the grounds for this Court's discretionary review. Thus, this Court should exercise its discretion to grant certiorari.

I. Airbnb preserved its arguments about the non-waiver provision and that the issue of waiver should have been decided by the arbitrator.

A. Non-waiver was preserved and warrants consideration.

Foster's claims that Airbnb raised the impact of the non-waiver provision argument "for the first time in a footnote" on appeal. (Return at 14–15.) This is incorrect. Airbnb explicitly made such an argument in its Motion to Compel Arbitration: "Moreover, the Terms of Service, which apply here for the reasons discussed above, contain an express non-waiver provision. . . . This also supports that Airbnb did not waive its right to arbitrate." (Mot. to Compel at 14; R. at 503.) Airbnb raised the issue at the hearing as well. (Hr'g Tr. 8:1–8; R. at 452.) Indeed, Foster even responded to this argument in her opposition brief, (Mem. Opp. at 15; R. at 564), so it is hard to understand why Foster mistakenly tells this Court that Airbnb did not raise this important issue.

Foster concedes the non-waiver provision is valid and may afford Airbnb refuge in some "other circumstances" that do not involve Airbnb's participation in litigation. (Return at 15.) The validity of the non-waiver provision in some circumstances, but not in arbitration, would violate the equal-footing-of-contracts principle set forth in *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). Any authorities standing for the proposition that litigation waiver in the arbitration context, as opposed to waiver of other types of contracts, should be analyzed and treated differently can no longer be viable in light of *Morgan*, and are erroneous. In any event, Foster's attempt to graft a litigation carve-out onto the non-waiver clause would be to re-write it, which the courts do not do. *See S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard

their rights carefully."); *Lowcountry Open Land Tr. v. Charleston S. Univ*., 376 S.C. 399, 411, 656 S.E.2d 775, 781 (Ct. App. 2008) (holding that "a court has no authority to rewrite a contract").

The out-of-state cases Foster cites lend no additional support to her argument. In *Home Gas Corp. of Massachusetts v. Walter's of Hadley, Inc.*, 403 Mass. 772, 772, 532 N.E.2d 681, 682 (1989), the Massachusetts court interpreted the then existing American Arbitration Association's "no waiver clause" and did not interpret the contract between the parties. The Court held that such a contract provision did not preclude waiver where a defendant waited until the conclusion of a 14-day trial before a Master resulting in a report suggesting judgment for the plaintiff before finally demanding arbitration. *Id*. Similarly, in *Momentum Project Controls, LLC v. Booflies to Beefras LLC*, No. 14-22-00712-CV, 2023 WL 4196584, at *4 (Tex. App. June 27, 2023), the Texas court found waiver where the parties waited four years and tried to compel arbitration after losing summary judgment, on the eve of trial. In contrast, Airbnb moved to compel arbitration mere months after the amended complaint was filed and *before* receiving a ruling on Airbnb's motion to dismiss. (*Compare* Mot. to Compel Arbitration; R. at 490, *with* Order; R. at 38.)

In another case Foster mistakenly relies on, the California appellate court reversed a trial court's waiver ruling in an action for rescission because there was not an unequivocal refusal to arbitrate. *Seidman & Seidman v. Wolfson*, 50 Cal. App. 3d 826, 836, 123 Cal. Rptr. 873, 879 (Ct. App. 1975). The Court suggested that suing for rescission was more like forum-shopping or gamesmanship than it was to an "intentional relinquishment of a known right." *Id.* at 837, 123 Cal. Rptr. at 879. The court emphasized that "although the right to arbitration may be waived, courts must closely scrutinize any allegation of waiver of such favored right." *Id*. at 835, 123 Cal. Rptr. at 879. This ruling can hardly be said to support Foster's argument that the non-waiver provision cannot apply here.

In any event, this question is a novel one, so the Court should reject Foster's issues-preservation arguments and instead grant certiorari.

B. Airbnb argued that arbitrability must be resolved by the arbitrator, so that threshold issue is preserved.

Foster also erroneously claims that Airbnb did not argue that the Terms of Service delegate the waiver issue. (Return at 1–2.) Indeed, this was the *first* argument Airbnb made in the Argument section of its Motion to Compel Arbitration. (Mot. to Compel Arbitration at 5–6, R. at 494–95.) This delegation argument was developed in Section II of the Motion to Compel, titled "**The Court should compel the matter to arbitration because *the issue of arbitrability is for the arbitrator to decide***." (*Id*.) Airbnb, therefore, argued to the Circuit Court that the arbitrator should decide all issues of arbitrability, which the United States Supreme Court has defined to include waiver. *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 84 (2002).

The Circuit Court expressly addressed (and rejected) Airbnb's delegation argument when it "considered and rejected all of the arguments made by Airbnb in favor of its motion to compel arbitration." (*See* Order at 13, R. at 79.) Thus, Airbnb's argument satisfies all preservation requirements for *de novo* review. *See Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 25 n.5, 602 S.E.2d 772, 781 n.5 (2004) (We do not mean to imply by our emphasis on the potential importance of such a [Rule 59(e)] motion that one is necessary or desirable in every case."); *see also Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007) (establishing de novo review of orders denying arbitration); *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) ("We are mindful that issue preservation rules should not be applied in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue.").

Delegation remains a threshold issue that must be decided *before* the parties can get to the waiver issue. Foster's claim that this issue is not preserved is incorrect. As a result, the decision of the Court of Appeals stands in contravention of this Court's prior precedent regarding delegation of issues of arbitrability to arbitrators. *Sanders v. Savannah Highway Auto. Co*., 440 S.C. 377, 389, 892 S.E.2d 112, 118 (2023). Hence, certiorari should be granted.

II. Whether Foster's Amended Complaint revived Airbnb's rights to move to compel arbitration—a concededly novel issue—warrants consideration.

The Circuit Court incorrectly concluded that Foster's Amended Complaint did not revive Airbnb's right to compel arbitration. Foster concedes this is a novel issue in this State. (Return at 2.) Foster opposes certiorari on this point by claiming she "only" added three new negligence claims and a SCUTPA claim against Airbnb. (Return at 3–4.) Foster's attempts to minimize the impact of her decision to amend her pleadings fall flat.

In reality, Foster added over 150 new paragraphs of allegations, five new claims, and several new remedies, including injunctive relief and an expanded damages request—which Foster ignores in her Return. (*Compare* Compl. at 11; R. at 93, *with* Am. Compl. at 38; R. at 182.) Foster's Amended Complaint made the case about more than just herself; it significantly expanded her claims and, thus, Airbnb's discovery obligations to cover a nationwide search for other allegedly similar potential plaintiffs. Even the Circuit Court recognized this, noting that Airbnb "could mark [certain discovery productions] confidential and give you names and addresses [of Airbnb Members], but the only reason you want names and addresses is to reach out to those people as potential—either potential witnesses or potential plaintiffs. So are you trying to get more clients?" (*See* April 2023 Hr'g Tr. 78:10–15, R. at 411.) This is potentially why Foster's counsel asserted in a motions hearing that Foster "added more detail about the misconduct of Airbnb and the notice that they have had for over a decade that this problem has been occurring and *the public*

safety issue that it presents to not just South Carolinians, but people all over the world who are being injured and who are being victimized by people that host Airbnb." (June 13, 2023 Hr'g Tr. 32:2–9; R. at 475 (emphasis added).) Airbnb of course denies these assertions and would defend them in an arbitration. But the assertions demonstrate the expansion of the case by the Amended Complaint.

Foster's reliance on the unpublished Sixth Circuit case, *Manasher v. NECC Telecom*, 310 F. App'x 804, 807 (6th Cir. 2009), to diminish the impact of her amended pleading, is misplaced. The court in *Manasher* found two added claims—unjust enrichment and a violation of federal law regarding "unjust and unreasonable" billing practices—did not substantially alter the scope or theory of the plaintiff's existing case because it was already about the defendant's improper billing of multiple parties and clients. *Id.* As a result, the added claims did not create any new or different issues. In contrast, Foster's amendment added five new claims that significantly expanded the litigation beyond Foster's then-existing case against Airbnb for mere negligence and negligence per se. These claims introduced allegations about unfair trade practices and sought information about Airbnb hosts, guests, and rentals unrelated to the Foster, thereby creating entirely new and different issues that fundamentally altered the case.

Whether Foster's decision to expand the scope of this litigation by adding five new claims revived Airbnb's right to compel arbitration warrants clarification and consideration by this Court. Declining to address this issue and adopting a waiver-revival rule incentivizes gamesmanship. For example, plaintiffs would be best served by filing very truncated and limited complaints, seeking discovery, and then amending later to dramatically expand the case, thereby springing a supposed "waiver trap" on defendants who previously did not move to compel arbitration of the much more

limited litigation. South Carolina litigants and the bar would benefit from this Court bringing clarity to an unsettled area of the law by addressing what Foster concedes is a novel legal issue.

III. The Court of Appeals and Circuit Court focused on the incorrect time period for the waiver analysis.

The Court of Appeals and the Circuit Court erred by focusing on Airbnb's conduct at the start of the case, because such conduct is not determinative of waiver in light of Foster's Amended Complaint.[1] In the relevant post-amendment time period, Airbnb moved to compel arbitration within six months and before the court's ruling on its motion to dismiss the amended complaint. Foster tries to inflate Airbnb's post-amendment litigation by tallying "29 orders" filed. (Return at 4.) Again, Foster still focuses on the wrong time period. Only 14 total orders were filed between when Foster amended her complaint on November 30, 2022, and when Airbnb moved to compel arbitration on May 15, 2023. (R. at 1890.) Of those 14 orders, two are the rulings on the motions to compel arbitration; four are orders on motions filed by Foster related to discovery disputes pre-dating the amendment; and several others are procedural (continuances, stays, extensions, and taking matters under advisement). The remaining few orders relate to defensive filings by Airbnb in response to Foster's expansive discovery requests for confidential non-party host and guest information, information about unrelated incidents, and deposition testimony of the highest level of company officials—all resulting from the Amended Complaint and requiring immediate action from Airbnb to protect confidentiality.

Airbnb has already admitted it did engage in *some* discovery after the Amended Complaint, including the deposition of Foster and document requests to some parties. But this minimal

[1] Foster also references statements made by Airbnb's counsel before Foster filed the Amended Complaint, which are immaterial to the analysis of Airbnb's post-amendment conduct. (Return at 11.)

discovery does not amount to "litigating aggressively." (Return at 8.) And such discovery would have been available in the American Arbitration Association anyway. (*See* Pet. Writ Cert. at 16–17.) If anyone engaged in aggressive litigation post-amendment, it is Foster, who asked to take at least 12 depositions of Airbnb employees and a continued 30(b)(6) deposition of Airbnb, along with numerous additional discovery requests. Foster also tries to weaponize Airbnb's participation in mediation and confidential ADR communications by asserting Airbnb "requested" the mediation. (Return 10.) That is improper under Rule 8(a)(1) and (3), SCADR, and Rule 408, SCRE, and underscores why allowing mediation to support waiver would be contrary to the longstanding "policy of the court to encourage settlement in lieu of litigation[.]" *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992). Likewise, the American Arbitration Association Consumer Rules, incorporated in the terms of service, do not require a party to give up arbitration rights to participate in mediation, but instead allow any party to request mediation. Rule 11, Am. Arbitration Assoc. Consumer Rules (May 1, 2025), https://www.adr.org/rules-forms-and-fees/consumer/consumer-arbitration-rules-and-mediation-procedures-2025/. Certiorari should thus be granted.

IV. Airbnb preserved its arguments about the outrageous torts exception.

The Circuit Court incorrectly declined to enforce the arbitration agreement on the grounds that an outrageous act occurred that was unforeseeable to reasonable consumers. Foster contends that Airbnb cannot argue that Foster failed to allege an outrageous tort because it did not make this argument to the Circuit Court. (Return at 22.) This misses the main point raised by Airbnb. There is no need to reach the issue of whether Foster adequately alleged an outrageous tort because the exception is not viable in South Carolina after the United States Supreme Court's decision in *AT&T*

Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011), and even if it were, whether it applies to Foster must be decided by the arbitrator.

Foster concedes that Airbnb raised the issue of whether the outrageous torts exception should be decided by the arbitrator instead of the Circuit Court. (Return at 22; *see also* Supp'l Memo in Supp. of Motion to Compel, R. at 674–81.) Yet Foster contends that the issue is unpreserved because the Circuit Court did not consider it and Airbnb did not file a motion for reconsideration under Rule 59(e), SCRCP. (*Id*.) This is wrong. While the Circuit Court declined to consider the Court's ruling in *Concepcion*, it necessarily ruled on the gateway issue when it decided that it, rather than an arbitrator, could decline to enforce the arbitration agreement on the grounds that an outrageous act occurred that was unforeseeable to reasonable consumers. (Order at 8; R. at 74–75.) That ruling is enough for this Court to address subsidiary arbitrability issues, just as it did in *Sanders v. Savannah Highway Auto. Co*., 440 S.C. 377, 389, 892 S.E.2d 112, 118 (2023). Additionally, as discussed above, the Circuit Court expressly ruled that it "considered and rejected all of the arguments made by Airbnb in favor of its motion to compel arbitration." (*See* Order at 13, R. at 79.) Airbnb was under no obligation to file a Rule 59(e) motion asking the Circuit Court to reconsider its ruling in order to preserve the issue for appeal. *Elam*, 361 S.C. at 25, 602 S.E.2d at 781; *Morales*, 439 S.C. at 609, 889 S.E.2d at 556 (2023). Accordingly, Foster's preservation argument fails. The issue of whether the arbitrator should have decided the applicability of the outrageous torts exception is properly before the Court. This is an important issue that deserves this Court's consideration and yet another reason certiorari should be granted.

CONCLUSION

For the reasons stated above and in those set forth in Airbnb's prior briefing, the Court should grant Airbnb's Petition for Writ of Certiorari.

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