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Apr 12 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable 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.

Appellant's Final Reply Brief

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I. Plaintiff's procedural and issue-preservation arguments on the Show Cause Order misapprehend the posture of the case before and after the hearing at which the Show Cause Motion, which was not properly before Judge Maddox, was not even argued.

A month after hearing Plaintiffs' two motions to compel discovery and nearly two weeks after Airbnb moved to compel arbitration, Judge Newman entered the Form 4 order granting Plaintiff's motions to compel (the "Production Order"). (Form 4 Order, May 25, 2023; R. at 44.) After her Form 4 Order, Judge Newman had before her Airbnb's Motion to Reconsider and Stay that Production Order and Airbnb's Motion to Stay the proceedings. (Motion to Reconsider and Stay, June 5, 2023; R. at 986–93; Motion to Stay, May 16, 2023; R. at 688–89.) Rather than allow Judge Newman to determine whether to enforce her Production Order after reviewing and ruling on Airbnb's Motion to Reconsider and Stay, Plaintiff sought to circumvent the process by asking a separate judge (Judge Maddox) to issue a show cause order. Plaintiff's arguments that this sequence is normal misapprehend the procedural posture of the case, as do Plaintiff's arguments that Airbnb's arguments against contempt were not preserved. Plaintiff's efforts were procedurally improper, and Airbnb's arguments are preserved.

A. The circuit court's Show Cause Order was improper in light of Airbnb's pending motion to reconsider and the automatic appellate stay.

Judge Maddox's Rule to Show Cause order was procedurally improper and premature because Airbnb's Motion to Reconsider and Stay remained pending before Judge Newman. Plaintiff's arguments to the contrary are inconsistent and mischaracterize the record. First, Plaintiff claims that Airbnb had already "essentially" moved to reconsider the Production Order by writing to Judge Newman asking for clarification of the oral directives from the April 5, 2023 hearing. (Resp. Br. at 36.) Plaintiff's argument in this regard hinges on the claim that Judge Newman only "memorialized" the previous oral order given at the hearing. This argument

misstates the law. *See Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 608, 790 S.E.2d 430, 434 (Ct. App. 2016) (order not final until written and entered); *Case v. Case*, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964). It was not until Judge Newman actually ***entered*** the Production Order that Airbnb could have moved to reconsider and moved to stay that order. (Form 4 Order, May 25, 2023; R. at 44.) Airbnb's letter to the Judge prior to that time was not "essentially" anything other than a request that Judge Newman have a status conference or otherwise clarify and address the real problem concerning privacy rights belonging to third parties and providing notice to those persons before entering its order. (Brown Ltr., to J. Newman, May 15, 2023; R. at 981–84.) The letter is, however, further evidence that Airbnb was doing everything in its power to respect the circuit court's authority while also maintaining an objection to the amount and type of non-party discovery sought by Plaintiff.

Second, Plaintiff claims Airbnb's motion to reconsider the Production Order was just a rehashing of previously filed motions. (Resp. Br. at 36.) Plaintiff appears to be suggesting the motion was improper or procedurally unnecessary. The record confirms, however, that Airbnb properly moved to reconsider and stay Judge Newman's order by raising the new non-party notice issues that Judge Newman had overlooked. (Mot. to Reconsider and Stay, June 5, 2023; R. at 986–93.) This exemplifies the purpose of a Rule 59(e) motion. *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (finding that a party may move to reconsider "when [it] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.").[1]

[1] And had Airbnb not moved to reconsider, Plaintiff would be arguing to this Court that Airbnb had failed to preserve its objections to the Production Order, much like it has done for every other issue in its brief. *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009) ("this type of motion [to reconsider] is often required for issue preservation purposes").

While Plaintiff's recollection of the procedural posture of the case as it relates to the Show Cause Order is mistaken, Plaintiff does concede that Airbnb's motion to reconsider was still pending (and remains pending) before Judge Newman. (Resp. Br. at 36.) As a result, the Show Cause Order was premature and procedurally improper. Airbnb has been unable to locate a single South Carolina case (and Plaintiff has not cited any) in which a judge held a party in contempt for violating a different judge's order while a motion to reconsider and stay was pending. The closest Airbnb can find is *Ralphs v. Trexler*, in which the circuit court concluded it could ***not*** entertain a Rule 60 motion seeking to set aside an order holding the defendant in default as a sanction for deposition conduct, because the sanctions order had been issued by a separate judge. *Ralphs v. Trexler*, No. 2005-UP-219, 2005 WL 7083860, at *1 (S.C. Ct. App. Mar. 24, 2005) (unpublished, cited only as an example of persuasive reasoning). This Court affirmed: "Judge Evans correctly determined he did not have the authority to determine whether Judge Lockemy abused his discretion in awarding sanctions under Rule 37(b). It is settled that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge." *Id.* (citing *Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979)).

The Show Cause Order was also premature and procedurally improper because of the automatic appellate stay mandated by the Federal Arbitration Act as interpreted in *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1918 (2023). As the circuit court explained in its Stay Order, the stay of the entire case (triggered by Riviere's appeal of the circuit court's order denying his motion to compel arbitration) was both automatic and mandated by federal law—and the circuit court's order was acknowledging that the action was stayed by virtue of the appeal. (Stay Order at 1–2; R. at 62–63.) Plaintiff did not seek reconsideration of the Stay Order or appeal from it, (*see, generally,*

Circuit Court Docket, R. at 1890), which constitutes a concession that the notice of appeal filed by Riviere nearly a month earlier prevented the circuit court from issuing its Show Cause Order.

B. Airbnb's arguments against contempt are preserved for review.

Plaintiff also argues Airbnb's objections to the Show Cause Order are not preserved for appellate review. Plaintiff is incorrect for several reasons. First, Plaintiff takes the position she argued the Show Cause Motion to the circuit court. (Resp. Br. 34.) She cites to five pages of the hearing transcript in support of this contention. (Hr'g Tr. 17:11–18:11, 19:16–21; 23:14–18; 34:4–21, June 13, 2023; R. at 445, 461–67, 478.) However, a review of the hearing demonstrates it concerned principally Airbnb's motion to compel arbitration argued primarily by the undersigned, and Riviere's short argument in favor of his own motion to compel arbitration. (*Id.* 6:21–13:25, 14:11–15:11; R. at 450–59.) The portions of the hearing record cited by Plaintiff show Plaintiff's counsel summarizing some general disputes about Airbnb's discovery and Plaintiff's case theory. Airbnb's counsel raised, by general statement, a disagreement regarding the various statements made by Plaintiff's counsel in general, but indicated that the issues before the circuit court were the arbitration motions. (*Id*. 37:16–22; R. at 481 ("And again, we are new, as she points out, to this case, but and I want you to understand we in no way agree with her hyperbole, accusations, misstatements that she made. And we don't need to get in a fight here today. We can do that on another day. But I know you've got 20 other people waiting to have a hearing.").)

Plaintiff's counsel in a single sentence did state: "And so as we have stated in our rule to show cause, which is also before you today, they're just refusing to produce documents that Judge Newman ordered them to produce." (*Id*. 17:7–9; R. at 461.). Airbnb, however, had already reserved all objections to the rule to show cause being heard before Judge Maddox. (Brown Email to Clerk, June 8, 2023; R. at 1944.)

A complete review of the hearing transcript confirms Plaintiff, at most, presented a truncated recitation of the procedural history of the case, and argued against Airbnb's arbitration motion. As a result, Plaintiff cannot establish that she "has made a prima facie case" for contempt sufficient to impose any burden on Airbnb to establish its "defense and inability to comply with the order." (Resp. Br. at 32 (quoting *Miller v. Miller*, 375 S.C. 443, 454, 652 S.E.754, 760 (Ct. App. 2007).) And based on the court's comments, Airbnb also believed the circuit court would be holding another hearing, presumably to address what had not yet been argued. (Hr'g Tr. 39:14–17, June 13, 2023; R. at 483 ("[A]nd then I'm almost positive we're at least going to have to have an informal conference, so, you know, by Zoom or whatever, whenever you want to. I'll make myself available to you.").) Yet, the circuit court held no second hearing.

The record shows that Airbnb was not on notice that Plaintiff was urging the circuit court to impose contempt until after the hearing. When Airbnb appeared for the hearing and Plaintiff's counsel submitted no evidence and did not even mention the word "contempt," Airbnb reasonably understood that either the motion was not being entertained by the circuit court or that Plaintiff had decided to postpone arguing the motion until the requisite 10-days' notice period had expired. The motion for Rule to Show Cause had been filed just over two business days prior to the hearing before Judge Maddox, and Airbnb had reserved all objections to it being heard. (Brown Email to Clerk, June 8, 2023; R. at 1944.) Only when Plaintiff submitted a proposed order after the hearing in which they projected the circuit court holding Airbnb in contempt—something the circuit court did not tell the parties it planned to do (J. Maddox Email to Counsel, July 11, 2023; R. at 1959–60)—did Airbnb realize Plaintiff was trying to have the court hold Airbnb in contempt based on the hearing. This scenario is exactly what Rule 6, SCRCP and the procedural protections discussed in Airbnb's opening brief were intended to avoid before such an "extreme measure" as a finding

of contempt is imposed. (Airbnb's Br. At 29–30 (quoting *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975).) After receipt of the proposed order which contained contempt "findings" (which "findings" could not have been based on facts or arguments), Airbnb filed its memorandum objecting to the procedure used and arguing against the merits of the Rule to Show Cause motion. (Mem. Opp. Show Cause Mot.; R. at 1220–27.) This memorandum was the first meaningful opportunity Airbnb had to address the arguments Plaintiff had not made at the hearing.

Plaintiff's issue preservation argument alleging that Airbnb's memorandum was untimely ignores three key points. *First*, the Court directed the parties to file anything else the parties wished the court to consider near the conclusion of the hearing. (Hr'g Tr. 41:4; 43:18–24, June 13, 2023; R. at 485, 487.) *Second*, Airbnb's memorandum in opposition was filed and provided to the circuit court roughly a month before the circuit court entered its Show Cause Order. (Show Cause Order, Aug. 24, 2023; R. at 57.) *Third*, both Plaintiff *and* the circuit court revised the Show Cause Order after Airbnb filed the memorandum. (*Compare* First Proposed Order, July 24, 2023, R. at 1947, 1953–55, *with* Second Proposed Order, July 27, 2024, R. at 1961, 1974–77, *and* Show Cause Order, Aug. 24, 2023; R. at 57–61.) Although the circuit court did not explain why it removed certain language about holding Airbnb in contempt from the last paragraph of the proposed order, Plaintiff's counsel did explain in an email to the circuit court accompanying the second proposed motion that "we have addressed Airbnb's 'comments' as set forth in their July 26 Response in Opposition." (Few Email to W. Smith, Law Clerk, July 27, 2023; R. at 1956–57.)

Our "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." *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023). Plaintiff's arguments in favor of affirming the Show Cause Order run afoul of this admonition.

This Court should reject them, and instead vacate the Show Cause Order as being procedurally deficient, premature, and not properly before Judge Maddox.

II. Airbnb properly established that Plaintiff's friend agreed to arbitrate claims with Airbnb such that Airbnb can enforce that agreement against Plaintiff under a direct benefits estoppel argument.

A. The record shows that Jain had to accept the Terms of Service before making the reservation and she did accept the Terms of Service.

During the hearing on Airbnb's arbitration motion, Plaintiff argued that no evidence had been filed confirming Jain had accepted the Terms of Service. (Hr'g Tr. 34:4–35:10, June 13, 2023; R. at 478–79.) In response, the circuit court specifically invited additional evidence and briefing. (*Id*. 35:11–13; 38:10–16; 39:12–40:1; 41:4; 43:18–24; R. at 479, 482, 484, 485, 487.) Airbnb complied the next day, filing the referenced evidence and an affidavit from its Legal Investigations Coordinator, Monique Chauvet. (Brown Ltr. to J. Maddox, June 14, 2023; R. at 625–27.) That evidence conclusively established that Plaintiff's friend could not have even made the Airbnb reservation at issue unless she electronically accepted the Terms of Service on April 11, 2019, as established by Airbnb's records. (*Id.*, Ex. A, Chauvet Aff. ¶¶ 2, 4; R. at 627–31.) For her part, Plaintiff's friend Michell Jain provided an affidavit appearing on the surface to contradict this evidence. (Jain Aff., June 16, 2023; R. at 672–73.) (*Id*. ¶¶ 3–5.)[2] Jain's affidavit does, however, concede that she remembered creating an Airbnb account in April 2019—corroborating Airbnb's records showing her account being created and the Terms of Service being accepted in that exact same timeframe. While Plaintiff may wish to create a conflict between these two affidavits, no meaningful disagreement exists here.

[2] Jain's subjective recollection has no relevance to contract formation.

This Court need not defer to Maddox's failure to resolve this issue under *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609–10, 571 S.E.2d 711, 713 (Ct. App. 2002) as Plaintiff suggests, (Resp. Br. at 21), because the circuit court did not—and could not have—made a factual finding *against* arbitration given the sworn evidence presented by Airbnb. At a minimum, Judge Maddox would have had to apply the traditional summary judgment standard to the evidence, determined whether Plaintiff carried her burden of establishing a factual issue existed, and then summarily tried the issue. *See Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 (4th Cir. 2019) (citing *Chorley Enters., Inc. v. Dickey's Barbecue Rests., Inc.*, 807 F.3d 553, 564 (4th Cir. 2015)). Because there is no direct contradiction in the evidence, there can be no issue of material fact calling into question whether Jain actually accepted the Terms of Service.[3]

B. Direct benefits estoppel applies when a litigant relies on the contract to assert claims in litigation while trying to avoid the arbitration provision in the same agreement.

Plaintiff misconstrues the direct benefits estoppel test. Plaintiff first argues that her claims are based on statutory or tort law, not the Terms of Service. (Resp. Br. at 18.) However, that assertion is belied by the Amended Complaint itself. Plaintiff has included more than 25 references to the Terms of Service—which incorporate Airbnb's policies, procedures, and standards—in the Amended Complaint. (*See* Am. Compl. ¶¶ 47, 59–61, 66–68, 72, 73, 78–79, 84–86, 96, 139, 144, 146, 154, 170, 172, 200, 215, 222, and 242; R. at 153–58, 160, 162, 167–69, 171, 175, 177–78, 180.)[4] Plaintiff includes these 25 references while boldly arguing that she has not "exploited an

[3] Even if some dispute existed, Airbnb's direct benefits estoppel argument would still be preserved for review because the circuit court's order states that it expressly considered and rejected Airbnb's arguments on this point. (Order Denying Airbnb's Mot. to Compel Arbitration, Sep. 13, 2023; R. at 67.)

[4] Plaintiff misunderstands Airbnb's incorporation by reference argument. (Resp. Br. at 18 n.12.) Airbnb did say at the hearing with Judge Maddox that "everything in the website which are all

agreement to any degree." (Resp. Br. at 19.) The more accurate reading of the Amended Complaint, however, is that Plaintiff must rely on these Terms of Service in her efforts to argue that Airbnb owed her a duty of care and that Airbnb has engaged in unfair trade practices through its enforcement of its policies nationwide. Plaintiff relies on the Terms of Services over twenty times to try to assert claims to her advantage and benefit, while also repudiating her arbitration obligation in the same contract. This is exactly the type of "unfairness" and "injustice" that the direct benefits estoppel doctrine seeks to remedy. *See Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006); *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177.

Plaintiff also conflates the direct benefits estoppel doctrine with the third-party beneficiary doctrine. "The third-party beneficiary doctrine, while similar in some ways to estoppel, is a distinct ground for compelling a nonsignatory to arbitrate." *Ouadani v. TF Final Mile LLC*, 876 F.3d 31, 39 (1st Cir. 2017). Airbnb has not argued that Plaintiff is a third-party beneficiary. The record does confirm that at least Jain intended to confer a benefit on Plaintiff by making the Airbnb reservation for the group, and then by Plaintiff conceding the group paid Jain for the Airbnb. (Am. Compl. ¶ 100; R. at 162.) Plaintiff intentionally conflates these two distinct doctrines so she can argue she could not have received a benefit from Jain's agreement with Airbnb because it is offset by the alleged invasion of privacy. (Resp. Br. at 20.) Yet Airbnb need not establish Jain's intent

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incorporated into the terms of service." (Hr'g Tr. 25:15–16, June 13, 2023; R. at 469.) But this reference to "everything" was to the Terms of Service's clear incorporation of "everything" from the website that Plaintiff had cited in her Amended Complaint. (*See, e.g.*, Am. Compl. ¶¶ 47, 62–63, 66–68, 72, 73, 78–79, 84–86, 96, 139, 144, 146, 154, 170, 172, 200, 215, 222, 224, and 242; R. at 153, 155–58, 160, 162, 167–68, 169, 171, 175, 177–78, 180.) It is uncontradicted that these policies, procedures, and standards form a part of the Terms of Service. (Terms of Service at 272–73, 286, and 293; R. at 507–08, 521, 528.) Airbnb explained in detail how each of the policies Plaintiff relied on in the Amended Complaint had been incorporated. (*See* Brown Ltr. to J. Maddox, June 14, 2023; R. at 625–27.) Thus, relying on Airbnb's policies and standards is also reliance on the Terms of Service.

to benefit Plaintiff with the performance of the contract under the distinct direct benefits estoppel doctrine. *See Thompson v. Pruitt Corp*., 416 S.C. 43, 57, 784 S.E.2d 679, 687 (Ct. App. 2016) (discussing requirement of parties' intent to benefit third-party). Nor does direct benefits estoppel require the type of balancing between the contractual benefit received at the time of performance with the alleged injury.

Instead, Airbnb's burden under direct benefits estoppel is easily established as Plaintiff has made her reliance for her claims on the Terms of Service evident on the face of the Amended Complaint repeatedly. Given Plaintiff's simultaneous reliance on the Terms of Service and repudiation of the arbitration provision in those same Terms, this Court should reverse the circuit court's refusal to apply direct benefits estoppel.

III. Plaintiff's outrageous torts exception and waiver arguments should be rejected.

A. Whether an arbitrator, and not the Court, should decide waiver and the outrageous torts exception are preserved for *de novo* review.

Plaintiff misunderstands Airbnb's arbitrability and delegation argument. (Resp. Br. at 15–16.) Airbnb does not argue to this Court that an arbitrator must decide the issue of direct benefits estoppel. Instead, it argues that the outrageous torts exception and waiver were questions delegated to an arbitrator under the arbitration agreement. (*See* Airbnb's Br. at 18.)

Contrary to Plaintiff's assertions, (Resp. Br. at 21), the record confirms that these delegation arguments are preserved. In its original motion, Airbnb argued that arbitrability issues should be decided by the arbitrator. (Mot. to Compel Arbitration at 6, May 15, 2023; R. at 495.) It reiterated that argument in its reply brief, arguing that the issue of arbitrability was reserved for the arbitrator before arguing waiver. (Reply in Supp. Mot. to Compel Arbitration at 5, June 12, 2023; R. at 602.) Then when Plaintiff raised the outrageous torts exception for the first time after the hearing with Judge Maddox, Airbnb supplemented its briefing to argue that the delegation

clause also reserved that issue for the arbitrator under *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 702, 869 S.E.2d 859, 865 (Ct. App. 2022). (Airbnb's Supp'l Br. in Supp. Mot. to Compel Arbitration at 4–5, July 21, 2023; R. at 677–78.)

Judge Maddox then ruled (albeit erroneously) that Airbnb had waived the right to compel arbitration and that the outrageous torts exception applied. (Arbitration Order at 2, 4; R. at 68, 70.) In so ruling, the circuit court necessarily determined that it had the authority to decide these arbitrability issues and that they had not been delegated to an arbitrator. This is evidenced by the circuit court confirming that it had "considered and rejected all of the arguments made by Airbnb in favor of its motion to compel arbitration by way of written submission and in the oral argument on the motion." (Arbitration Order at 13; R. at 79.) Hence, Plaintiff's error preservation arguments should be rejected.

A similar preservation argument was made and rejected about arbitrability in *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 892 S.E.2d 112 (2023). There, a car dealership argued that the effect of an assignment of a car purchase agreement to a financing company should be resolved by an arbitrator, not the Court. The car buyers argued the issue was not preserved because the circuit court did not expressly rule it had authority to decide the effect of the assignment on the arbitration motion. The Court rejected this argument and held the issue was for the arbitrator to decide. *Id.* at 391, 892 S.E.2d at 119.[5]

[5] Although arbitrability and delegation "are distinct concepts," like the issues of waiver and estoppel at issue in *Singh v. Singh*, the issues of arbitrability and delegation "sometime merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins." *Singh v. Singh*, 434 S.C. 223, 232, 863 S.E.2d 330, 334 (2021) (quotations omitted). Even our Supreme Court has explained that this area of arbitration law is "unnecessarily muddled." *Sanders*, 440 S.C. at 384, 892 S.E.2d at 116.

In light of Airbnb's repeated arguments that issues of enforcement and arbitrability must be decided by the arbitrator and the circuit court's confirmation that it had entertained and rejected those arguments, it can hardly be said that the delegation issue is being "raised for the first time on appeal" as Plaintiff claims. (Resp. Br. at 21 (citing *Cox v. S.C. Educ. Lottery Comm'n*, 441 S.C. 209, 218, 893 S.E.2d 342, 346 (Ct. App. 2023).) Thus, these arguments are preserved.

Because the delegation issue is preserved, the Court should review whether the parties delegated the waiver and outrageous torts exception determinations to an arbitrator and should reverse the circuit court's failure to respect that delegation. Plaintiff concedes that arbitrability issues like these delegation issues are reviewed *de novo*. (Resp. Br. at 10.) She also argues that factual findings receive some deference if reasonably supported by the record. (*Id.*) Yet there are no factual findings for this Court to defer to on the delegation issue itself. Although the underlying merits of the waiver and exception may require some factual analysis, those underlying questions may only be answered by the circuit court if no delegation occurred. Thus, the Court should apply its standard *de novo* review to this delegation question before reviewing any types of factual issues related to the merits. *See Sanders*, 440 S.C. at 382, 892 S.E.2d at 114; *Gissel v. Hart*, 382 S.C. 235, 676 S.E.2d 320, 323 (2009). In applying that *de novo* review, this Court should find that the parties' agreement to delegate these issues should have been respected, and the circuit court should be reversed.

B. The circuit court erred in entertaining whether the outrageous torts exception applied or waiver occurred.

Judge Maddox's ruling that the arbitration agreement did not delegate waiver and the outrageous torts exception is erroneous. Our courts have expressly held that the outrageous torts exception is an issue of arbitrability to be decided by an arbitrator. *See Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 702, 869 S.E.2d 859, 865 (Ct. App. 2022) (holding that

outrageous torts exception "relates to . . . the arbitrability of the dispute," so it is for an arbitrator to decide (quoting *Doe v. TCSC, LLC*, 430 S.C. 602, 615–16, 846 S.E.2d 874, 881 (Ct. App. 2020))). The circuit court erred by entertaining the outrageous torts exception in the face of these authorities and the delegation clause. (*See* Airbnb's Supp'l Br. in Supp. Mot. to Compel Arbitration at 4–5, July 21, 2023; R. at 677–78.)

As for waiver, the United States Supreme Court has held that "the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (quoting *Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)). This is in part because these types of "questions do not present any legal challenge to the arbitrator's underlying power[.]" *Del Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 874 (4th Cir. 2016) (citations omitted). Some courts have interpreted "waiver" in the *Howsam* context to refer to contractual waiver instead of litigation-conduct waiver, which is reserved for the court to decide. *See, e.g., JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 394 (6th Cir. 2008).[6] Yet the Supreme Court's recent directive that courts must return to the standard "intentional relinquishment" test for waiver suggests that there should be no distinction between contractual waiver and litigation-conduct waiver, as the distinction would place arbitration agreements on unequal footing in the waiver context. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). This shift in the law necessitates revisiting the nonbinding authorities Plaintiff cites that conclude litigation-conduct waiver is an issue for the court. (Resp. Br. at 22–23.)

[6] At least one Circuit Court disagrees, holding that litigation-conduct waiver is appropriately determined by the arbitrator. *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003).

Even setting aside *Howsam*, Plaintiff's cited case from our Supreme Court, *Sanders*, supports the conclusion that the two arbitration-enforcement questions are properly delegated to the arbitrator for resolution. Plaintiff relies on *Sanders* to argue that the circuit court was correct to decide the waiver issue. (Resp. Br. at 15–16.) To the contrary, *Sanders* does not support that position.

In *Sanders*, car buyers argued that the car dealership could no longer enforce an arbitration provision in a purchase agreement because the dealership had assigned that agreement to a third-party financing company. *Id*. at 380–81, 892 S.E.2d at 113–14. The dealership argued under *Prima Paint* that the arbitrator should determine whether the assignment prevented enforcement of the arbitration provision considering the agreement's delegation clause, but the circuit court and this Court rejected that argument. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Our Supreme Court reversed, holding that a "challenge to the right to invoke" arbitration agreements are to be decided by an arbitrator when such issues have been delegated. *Id*. at 383, 892 S.E.2d at 115. In so holding, the Court distinguished between challenges to the container contract, and direct challenges to the arbitration provision only: "the scope of the challenge to a party's right to invoke arbitration is critical." *Id*. at 385, 892 S.E.2d at 116. Whether "a contract existed in the first place," is a question for the courts; whether the contract *continued* to exist after a certain point" so that it could still be enforced by the party moving to compel is properly decided by the arbitrator. *Id*. at 389, 892 S.E.2d at 118.

Plaintiff did not meaningfully challenge the existence of the delegation clause except to say that she could not be bound by direct benefits estoppel; rather, her arguments below were directed towards the agreement as a whole. Although she argues differently in her brief to this Court, the portions of the record she cites offer her no support for the claim that she attacked the

delegation clause in proceedings below. (Resp. Br. at 16 n.11.) In Plaintiff's memorandum in opposition to the motion to compel arbitration, she summarily claimed to be challenging the arbitration agreement and delegation clause. (Pl.'s Resp. Opp. Mot. to Compel Arbitration at 6, June 6, 2023; R. at 555.) Yet she offered no reasoning for why she was challenging the delegation clause, except to say that she could not be bound by any arbitration provision as a whole because she did not expressly agree to the Terms of Service. (*Id*.) The same is true for the footnote of the circuit court's Arbitration Order that Plaintiff relies on—the footnote includes no reasoning or explanation for Plaintiff's "challenge" to the delegation clause. (Arbitration Order at 4 n.2; R. at 70.)

Here, Plaintiff merely advanced a challenge to the contract as a whole, which necessarily includes a claim that no arbitration agreement existed. Such a challenge mirrors the rejected car buyers' challenge in *Sanders*. Like in *Sanders*, questions of waiver or the application of an exception fall under the *Prima Paint* doctrine and are questions that the arbitration provision in this case properly delegated to the arbitrator. (*See* Terms of Service at 291, § 19.4, R. at 526("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.").)

C. The circuit court and Plaintiff's reading of the outrageous torts exception would allow the exception to swallow the rule.

The circuit court and Plaintiff both erroneously apply the outrageous torts exception based on Plaintiff's alleged invasion of privacy by a third party. (Arbitration Order at 8–9; R. at 74–75; Resp. Br. at 29–31.) Both conclude that no consumer could have foreseen such tortious conduct. Based on this reading of the exception, any potential tort, regardless of a defendant's action or inaction in relation to that tort, would fall under the exception. Such an argument must be rejected. The cases applying the exception require more than the commission of a tort by a third party for

the exception to apply. They require an intentional act, *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc*., 418 S.C. 1, 9, 791 S.E.2d 128, 132 (2016) (seller intentionally failing to disclose toxic sludge to homebuyer), or blatantly fraudulent conduct, *Partain v. Upstate Auto. Grp*., 386 S.C. 488, 494, 689 S.E.2d 602, 605 (2010). The facts here do not involve such conduct, and thus the exception cannot apply in any event. *See e.g., Timmons v. Starkey*, 380 S.C. 590, 598, 671 S.E.2d 101, 106 (Ct. App. 2008), *aff'd*, 389 S.C. 375, 698 S.E.2d 809 (2010) (bank's inaction while funds were being withdrawn from the plaintiff's account); *Osborne v. Marina Inn at Grande Dunes, LLC*, No. 4:08-CV-0490, 2009 WL 3152044, at *2 (D.S.C. Sept. 23, 2009) (negligent failure to identify mold spores in rental units that sparked the plaintiffs' claims). In such cases the courts conclude that the actions by the parties seeking to compel arbitration were insufficient to apply the exception.

Plaintiff makes a technical argument that Airbnb failed to argue to the circuit court that the exception did not apply. (Resp. Br. at 31.) However, Airbnb ***did*** argue to the circuit court that the exception did not apply: "In any event, whether the outrageous torts exception applies—and it does not—must be decided by an arbitrator[.]" (*See* Airbnb's Supp'l Br. in Supp. Mot. to Compel Arbitration at 1, July 21, 2023; R. at 674.) And Airbnb did so even though Plaintiff did not even raise the outrageous torts exception to the circuit court until after the hearing on Airbnb's Motion to Compel Arbitration. (*See* Barbier Ltr. to J. Maddox, June 16, 2023; R. at 671.) Thus, if this Court determines the exception is not an arbitrability issue that has been properly delegated, this Court should reverse the circuit court's ruling applying the exception given the circumstances.

D. Plaintiff misstates the relevant time period and procedural history relevant to the waiver argument.

Assuming *arguendo* this Court reaches the merits of the waiver argument, Plaintiff's argument should be rejected. Plaintiff repeatedly argues that Airbnb waited two years to move to

compel arbitration in the Response Brief. (Resp. Br. at 1, 5–7, 11, 20–21, 23–24, 26, and 37.) This argument ignores that Airbnb moved to compel arbitration just six months after the circuit court accepted the Amended Complaint for filing.[7] Contrary to Plaintiff's urging, this Court should focus on the litigation occurring between November 30, 2022 (the date the Amended Complaint became operative) and May 15, 2023 (the date Airbnb filed its Motion to Compel Arbitration).

While Airbnb did move to dismiss during this period, the circuit court had not yet ruled on Airbnb's Motion to Dismiss the Amended Complaint by the time Airbnb moved to compel arbitration. Although the circuit court orally suggested it might deny the motion to dismiss at the April 5, 2023, hearing, it did not enter an order denying the dismissal motion until two weeks after Airbnb moved to compel arbitration. (Form 4 Order, May 25, 2023, 11:11 a.m.; R. at 38.) In any event, merely moving to dismiss does not conclusively establish that Airbnb knowingly relinquished its arbitration rights. *See Hall v. UBS Fin. Srvs.*, No. 6:19-cv-3316-TMC, 2022 WL 2076543, at *2 (D.S.C. Oct. 25, 2022) (compelling arbitration after defendants moved to dismiss and the district court certified questions notwithstanding 303-day delay in moving to compel); *Hobbs v. Yodel Techs. LLC*, No. 4:19-cv-0009-CDL, 2021 WL 816946, at *5 (M.D. Ga. Mar. 3, 2021) (compelling arbitration after movant (1) joined co-defendant's motions to dismiss and for judgment on the pleadings, along with two other motions, (2) retained and disclosed expert witnesses, and (3) served deposition notices on plaintiff's two experts).

[7] Plaintiff's attempt to measure the time from the filing of the motion to amend is also incorrect as the Amended Complaint only became operative once the circuit court granted the motion to amend on September 2, 2023. *See* Rule 15(a), SCRCP; *cf. Timothy C. Doughtie Advert., Inc. v. Nelsen Steel & Wire Co.*, 284 S.C. 27, 30, 324 S.E.2d 329, 331 (Ct. App. 1984) (explaining that amended complaint was not operative until order allowing it was entered).

Nor does Airbnb's engaging in limited discovery and related motions after the Amended Complaint became operative establish waiver. Airbnb's defensive actions and limited discovery fail to establish "outcome-oriented gamesmanship" or that it was "testing the waters . . . in court" necessary for Plaintiff to carry the burden of establishing waiver.[8]

Although Plaintiff may wish to downplay the import of the Amended Complaint on the waiver analysis, one of the very cases Plaintiff cites, (Resp. Br. at 27–28), confirms an amended pleading that expands the scope of a case or theory of the plaintiff's claims will revive the right to compel arbitration, *Krinsk v. SunTrust Banks, Inc*., 654 F.3d 1194, 1202 (11th Cir. 2011). In that case the Eleventh Circuit concluded that an amended complaint that "merely assert[ed] new claims based on the same operative facts as the claims" from the first complaint was still sufficient to revive the right to compel arbitration. *Id*. at 1203. The Eleventh Circuit explained that the "unforeseen alteration in the shape of the case" was sufficient "in plain fairness" to allow the defendant to compel arbitration despite a prior waiver. *Id*. at 1204.

Plaintiff's Amended Complaint goes further than the amendment in *Krinsk*. Plaintiff amended both her factual allegations *and* her claims to encompass new theories of liability and expanding the damages being sought. No longer was Plaintiff seeking merely actual, compensatory, special, consequential, and punitive damages, but also liquidated and treble damages, attorneys' fees, and pre- and post-judgment interest. (*Compare* Compl. at 11; R. at 93;

[8] Plaintiff also raises Airbnb's participation in mediation as an indication of waiver three times. (Resp. Br. 4–5, 11, 23.) Plaintiff even suggests waiver is appropriate because Airbnb requested this mediation. (*Id.* at 5.) This argument is inappropriate under Rule 8(a)(1) and (3), SCADR, and Rule 408, SCRE. This Court should not consider a party's request for, or participation in, mediation as a part of the waiver analysis or parties may refuse to participate in mediation the future. That would 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).

with Am. Compl. at 38; R. at 182.) Plaintiff even added a new claim seeking injunctive relief, an expansion from the monetary damages sought previously. (*See* Am. Compl. ¶ 257; R. at 182.)

There is no doubt Plaintiff wishes to focus on the full litigation history to try to carry her "heavy burden of proving waiver" here. *Hall*, 2022 WL 2076543, at *4. But focusing on the full litigation history ignores the effect of Plaintiff's decision to amend the complaint after litigating roughly 20 months to add 174 new paragraphs, including new discussion about unrelated incidents in other states spanning all the way to the west coast. (*Id.* ¶¶ 7–10, 79–82; R. at 146–47, 158–60.)[9] By repeatedly beating the "two-year" drum to this Court, Plaintiff ignores how adding five new claims to the Amended Complaint expanded this litigation exponentially. Contrary to the statement in the Response Brief that Plaintiff "filed her Amended Complaint adding three new negligence claims against Airbnb," the Amended Complaint did much more. Although Plaintiff did add three negligence-based claims, Plaintiff also added a claim for vicarious liability for invasion of privacy and a claim for violating the South Carolina Unfair Trade Practice Act. (Am. Compl. ¶¶ 196–213, 246–57; R. at 174–77, 180–82.)

Finally, it should not be overlooked that from the first Answer filed and served by Airbnb to the time it moved to compel arbitration, Airbnb always expressly reserved its rights to compel arbitration in its pleadings. Under all of the above facts and circumstances, the circuit court's waiver ruling must be reversed.

[9] Plaintiff's discovery requests and arguments since filing the Amended Complaint confirm Plaintiff's intent to expand this litigation to include other, unrelated incidents beyond Plaintiff's claims. (Hr'g Tr. 17:10–25, June 13, 2023; R. at 461.)

CONCLUSION

For the reasons above, this Court should reverse the circuit court and remand the matter for entry of an order dismissing Plaintiff's claims without prejudice and compelling the claims to arbitration. Airbnb further requests that the Court reverse and vacate the Show Cause Order as procedurally improper, and devoid of evidence meeting the requisite standard of contempt.

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April 12, 2024