THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

RECEIVED
Dec 18 2020
SC Court of Appeals

appellate case number: 2020-001150

Josh Hawkins..... Appellant,

v.

American Airlines, The Qantas Group d/b/a Qantas Airlines, Expedia, and Travel Guard Insurance, Defendants

of which American Airlines and Expedia are the.....Respondents.

INITIAL BRIEF OF RESPONDENT EXPEDIA, INC.

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STATEMENT OF THE ISSUES ON APPEAL

The Plaintiff stated:

1. WHETHER A CASE CAN BE DISMISSED WHERE A PLAINTIFF HAS STATED A CAUSED OF ACTION FOR WHICH RELIEF MAY BE GRANTED

2. WHETHER THE PURCHASE OF SERVICES BINDS A PURCHASER TO TERMS THAT ARE NOT MADE READILY AVAILABLE

Expedia states:

3. WHETHER ARBITRATION IS CONSTITUTIONAL

4. WHETHER THE TRIAL COURT CORRECTLY HELD THAT EXPEDIA'S TERMS OF USE CONSTITUTED A VALID AND ENFORCEABLE AGREEMENT

STATEMENT OF THE CASE

This civil litigation began with the filing of a summons and complaint in the Greenville County Court of Common Pleas on March 3, 2020 by Josh Hawkins, *pro se* (Complaint, p. 7, Record on Appeal (hereinafter "R") p. ___), who is an attorney (R p. ___) and was Plaintiff below and is Appellant on appeal (hereinafter the "Plaintiff"). Complaint, p. 1, R p. ____. The lawsuit stems from a diverted flight and delayed luggage. The Defendant below and Respondent on appeal incorrectly denominated as "Expedia" by the Plaintiff (which should be correctly denominated "Expedia, Inc.") (hereinafter "Expedia") sought (Motion, R p ____) and was granted (Order, R p ___) additional time to respond to the litigation. Thereafter, Expedia timely filed to dismiss the Common Pleas case on June 29, 2020. R p ____. One of the other Defendants below (and the only other Respondent on appeal), denominated as "American Airlines" by the Plaintiff (hereinafter "American Airlines"), filed a motion to dismiss. R p ___.

On July 21, 2020, the parties to this appeal came before the Honorable Perry H. Gravely (hereinafter the "Trial Court") for a hearing. Transcript, p. 1. R p ___. Thereafter, the Trial Court issued several orders. The Trial Court's first order regarding Expedia was filed on August 5, 2020 at 10:47 a.m. (hereinafter the "Expedia Order"). R p ___. On August 7, 2020 the Plaintiff filed a motion to reconsider the Expedia Order. R p ___. On August 11, 2020 Expedia filed a memorandum in opposition to the Plaintiff's motion to reconsider the Expedia Order. R p. ____. Approximately three hours later, on August 11, 2020 at 2:53 p.m., the Trial Court issued a Form 4 Order denying the Plaintiff's motion to reconsider the Expedia Order. R p. ____.

The Trial Court also issued orders regarding the motion made by American Airlines. The slightly complex procedural history of those orders (arising from a typographical error in the name of the Judge) are set forth in American Airlines' Initial Brief.

On August 20, 2020 the Plaintiff filed a Notice of Appeal. In the Notice of Appeal, the Plaintiff only referenced the Form 4 Order denying the Plaintiff's motion to reconsider, but Plaintiff attached all the orders in the case.

STANDARD OF REVIEW

The Plaintiff's appeal with respect to Expedia regards arbitrability. "Determinations of arbitrability are subject to de novo review. However, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them." Stokes v. Metropolitan Life Insurance Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct.App. 2002) (citations and parentheticals omitted). This should be read against the backdrop of "federal and state public policy [which] strongly favor the arbitration of disputes." Partain v. Upstate Automotive Group, 378 S.C. 152, 662 S.E.2d 426, 428 (Ct.App. 2008) (citation omitted).[1]

[1] To the extent the Plaintiff's appeal is directed solely to the Trial Court's denial of the Plaintiff's motion to reconsider, the decision whether to grant or deny a motion made under Rule 59(e) rests within the sound discretion of the Trial Court. Pollard v. County of Florence, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct.App. 1994). Case law has explained the discretionary standard in other contexts as follows: "[A] matter left to the discretion of the trial judge ... will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." Historic Charleston Holdings v. Mallon, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009) (citation omitted).

FACTS

In February 2019, the Plaintiff traveled to New Zealand. Complaint, R p ____, ¶9. The Plaintiff "booked an American Airlines Trip through Expedia." *Id*. The Plaintiff avers "[s]ome trivial issue arose" that delayed the first flight (R p ___, ¶10) but after arriving for a connecting flight in Dallas, "by running through the airport" the Plaintiff "was able to get to his gate." R p ___, ¶11. When the Plaintiff arrived at the gate, the Defendant The Qantas Group d/b/a Qantas Airlines (which is not a party to this appeal) (hereinafter "Qantas"), because it "has no sense of doing right", initially "sold the [P]laintiff's seat" but after "pleading" by the Plaintiff, Qantas allowed the Plaintiff to board. R p ___, ¶11.

"While the [P]laintiff was in the air, the pilot alerted everyone that the Qantas airplane would not be going to the city it was destined for, but instead would be going to another city..." R p ____, ¶13. The Plaintiff "was able to get a connecting flight to his final destination." R p ____, ¶14. However, "American [Airlines] and Qantas lost the [P]laintiff's luggage" (R p ___, ¶12) for "[t]hree days" (R p ___, ¶15) (brackets by counsel). "On top of all this, the plaintiff never received the miles he earned for buying the airplane ticket" despite the Plaintiff's contacting American Airlines "through numerous avenues." R p ___, ¶19. Finally, Qantas gave the Plaintiff some type of physical card which "turned out to have no value whatsoever." R p. ___, ¶14.

About a year after the New Zealand trip, the Plaintiff brought suit against American Airlines, Qantas, Expedia, and the Defendant denominated by the Plaintiff as Travel Guard Insurance (hereinafter "Travel Guard"). Neither Qantas nor Travel Guard are parties to this appeal. In the complaint, the Plaintiff seeks recovery of "actual and punitive damages"

(R p ___, ¶29), "multiple damages," "reasonable attorney's fees," (R p ___, ¶37), and "costs" (Complaint, p. 7, R p ____) from Expedia.

At all relevant times, all customers, including the Plaintiff, who booked a trip through Expedia (R p ____, ¶9) were required to agree to Expedia's Terms of Use (hereinafter the "Terms") in order to use the website in the manner described in the complaint. Abreu Affidavit, ¶6, R p ___. The Terms themselves provide: "If you do not agree to the Terms of Use, please do not use or book any reservations through this Website..." (Terms, p. 1, R p ____).

Among other matters, Expedia's Terms require that disputes with Expedia be brought in other forums: "**Any and all Claims will be resolved by binding arbitration, rather than in court**, except you may assert Claims on an individual basis in small claims court if they qualify. ... **There is no judge or jury in arbitration, and court review of arbitration is limited**." Terms p. 2, R p. ____ (bold in original). Notwithstanding this, the Plaintiff brought suit against Expedia in the Court of Common Pleas, which is not permitted under the Terms.

ARGUMENT

The Plaintiff makes arguments regarding the Montreal Convention (Plaintiff's Initial Brief, p. 4) and the doctrine of preemption (Plaintiff's Initial Brief, p. 5). These arguments are addressed to American Airlines and do not impact the Expedia Order. As to the Plaintiff's arguments, Expedia hereby incorporates by reference the Initial Brief of American Airlines.

The Plaintiff essentially makes two arguments in support of his appeal with respect to Expedia. First, the Plaintiff challenges the constitutionality of arbitrations in general. Second, the Plaintiff challenges the Trial Court's determination that the agreed-upon Terms (especially its arbitration provision) govern the parties. For the reasons set forth below, these two arguments should not persuade this Court.

I. ARBITRATION IS CONSTITUTIONAL

Without citation to authority, the Plaintiff makes the sweeping assertion that all arbitrations are unconstitutional. (Plaintiff's Initial Brief, p.5, fn.4). Thereafter, the Plaintiff further asserts (again without citation to authority) that in this case arbitration is impermissible because it serves to "invalidate fundamental constitutional rights" (Plaintiff's Initial Brief, p.6), to wit, the Plaintiff's "constitutional right to a jury trial." (*Id.*).

The Plaintiff's blanket objections to arbitration are wholly unsupported by either argument or citation to authority. Statements made without support are deemed abandoned on appeal. See, Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.App. 2003) ("This court has noted that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.") (citation omitted).

The Trial Court correctly rejected the Plaintiff's unfounded arguments. As discussed below, it is well-settled that parties can waive their constitutional rights.

Parties are free to resolve disputes via arbitration and waive their right to proceed in court. Not only is arbitration constitutional, this Court has long observed that South

Carolina has a "strong policy favoring arbitration." Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct.App. 1999) ("There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration.") (citations omitted). This has been recognized by both the South Carolina Supreme Court and the United States Supreme Court. See, e.g., C-Sculptures v. Brown, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) ("Arbitration is a favored method of disputes in South Carolina.") (citations omitted) and Epic Systems v. Lewis, __ U.S. __, 138 S.Ct. 1612, 1621 (there is "a liberal federal policy favoring arbitration agreements.") (citations omitted).

Moreover, the waiver of the right to a jury does not invalidate the resolution of disputes by arbitration. Expedia's Terms (which were presented to the Trial Court) explicitly inform the Plaintiff, in bold font, that in the event the Plaintiff chooses to arbitrate, "**[t]here is no judge or jury in arbitration**..." Terms, p. 2, R p. ____ (bold in original). Further, this Court has recognized that arbitration necessitates the waiver of a jury. Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct.App. 2016) ("executing an agreement to resolve legal claims by arbitration, [is] thereby waiving the principal's right of access to the courts and to a jury trial.") (citation omitted) (brackets by counsel).

The United States Supreme Court squarely ruled against the Plaintiff's argument in Kindred Nursing Centers v. Clark, __ U.S. __, 137 S.Ct. 1421 (2017). In that case, the Kentucky Supreme Court invalidated an arbitration agreement by reasoning in part it undermined the "sacred" and "inviolate" right to a jury trial. However, the United States

Supreme Court reversed, holding that the "Kentucky Supreme Court ... flouted the FAA's command to place those agreements [to arbitrate] on an equal footing with all other contracts." 137 S.Ct. at 1429 (brackets by counsel).

The Trial Court's factual determination on the merits that Expedia's Terms and the arbitration provision are enforceable (and apply to the Plaintiff) is supported by both the applicable jurisprudence and the language of the Terms. Therefore, "the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them." Stokes v. Metropolitan Life Insurance Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct.App. 2002) (citations and parentheticals omitted).

If the Plaintiff's position were correct, it would upend decades of settled jurisprudence and the Courts would be flooded with lawsuits from past and present participants to arbitration.

Accordingly, the Plaintiff's first argument should not persuade this Court.

II. THE TRIAL COURT'S RULINGS ARE CORRECT

The Plaintiff's second argument centers around challenges to the arbitration provision and Expedia's Terms to this case. For the following reasons, this Court should not be persuaded by the Plaintiff's arguments.

A. THE PLAINTIFF'S ATTEMPTED INCLUSION OF FACTS NOT PRESENTED TO THE TRIAL COURT SHOULD BE DISREGARDED

As an initial matter, many of the assertions in the Plaintiff's argument should be disregarded by this Court since they were not presented to the Trial Court. In particular, the Plaintiff's Initial Brief contains the following statements:

> Upon visiting Expedia's site, there are no terms that even appear on the screen. Rather, a customer enters a destination and dates, choses a travel option [fn 5], and is presented with a screen where the purchaser enters credit card information. On a mobile phone, the "Policies" tab is not even visible unless the user continues to scroll down unnecessarily. That usually does not happen because at that point, the "Check out" button has already immediately appeared. If the price is acceptable and the "Check out" button is used to take the customer to the payment screen, the customer is 1) never put on notice that extra terms may hurt them or invalidate fundamental constitutional rights, or 2) that the terms can only be viewed by first clicking on the inconspicuous (and not visible on a mobile phone) "Policy" tab, then taking further action to click on the small print words, which read "Terms of Use." If a customer takes each of these steps – none of which is required to purchase a ticket – the customer is then presented with a screen that again contains no mention of arbitration. It is only after taking each of these steps and scrolling down far enough that the customer is even able to see the word "arbitration." The fact that Expedia's arbitration terms are hidden and only visible after clicking on words in very small font is important.
>
> ***
>
> Expedia requires multiple extra steps to even see its hidden terms, and one of those steps involves clicking on words in smaller font than nearly everything else.
>
> [fn 5] On this screen there is a small, inconspicuous tab labeled "policies," but the purchaser is not required to click the button to continue.

Initial Brief, pp. 6-7 (brackets by counsel).

The statements quoted above should be disregarded by this Court. There is no citation to the record on appeal for these statements because these extensive details were not presented to the Trial Court. The closest thing to this information was the Plaintiff's denial he was required to agree to the Terms when he attempted to use the Expedia website, which Plaintiff stated at the July 21, 2020 proceeding before the Trial Court. However, this was made in the context of a summary proceeding and the transcript of this proceeding was not designated by the Plaintiff as a matter to be included in the Record on Appeal. The

Courts have explained "the appellant bears the burden of providing a record on appeal sufficient for intelligent review." Beverly S. v. Kayla R., 395 S.C. 399, 402, 718 S.E.2d 224, 226 (Ct. App. 2011) (citation omitted). Even if this Court were to consider the transcript, it does not contain the level of detail found in the Plaintiff's Initial Brief quoted above. "The appellate court will not consider any fact which does not appear in the Record on Appeal." *Id*. And see Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.").

In the alternative, in the event the Court considers the quoted language (which Expedia strongly denies should occur), it should not persuade this Court. The Plaintiff concedes he was able to find the Terms on Expedia's website, including being "able to see the word 'arbitration.'" Plaintiff's Initial Brief, p. 7. Also, the Plaintiff acknowledges Expedia's website has a place to "click on the small print words, which read 'Terms of Use.'" *Id.* The Plaintiff implies such clickable words are found in the lower portion of Expedia's webpages if "the user continues to scroll down unnecessarily." Plaintiff's Initial Brief, p. 6. And the Plaintiff utilizes unclear language in describing the location of the clickable "Terms of Use" in relation to what the Plaintiff refers to as the "'Check out' button." Plaintiff's Initial Brief, p. 6. However, the only evidence in the Record is that the Plaintiff must agree to the Terms to book a trip (Abreu Affidavit, ¶6).

Moreover, South Carolina Courts will enforce a party's being required to "agree" to online terms. This Court recently observed that "[t]oday, arbitration agreements pop up in almost every imaginable transaction…" and that "[a]s more and more transactions are

conducted online, arbitration agreements are not presented face to face but digitally, in such forms as 'browsewrap,' 'clickwrap,' 'scrollwrap,' and 'sign-on wrap.'" Doe v. TCSC, LLC, appellate case 2017-001216, __ S.C. __, __ S.E.2d __, 2020 WL 3551780 (Ct.App. July 1, 2020) (pp. 10-11). Where, as here, a website requires a party must agree (Abreu affidavit, ¶6) to terms of use, the South Carolina District Courts have recognized these as valid and enforceable agreements. See, e.g., Kraft Real Estate Investments, LLC v. HomeAway.com, Inc., 2012 WL 220271 (D.S.C. 4:08-cv-3788) (Jan. 24, 2012). In Church v. Hotels.com L.P.; Expedia, Inc.; *et al.*, 2018 WL 313061 (D.S.C., 2:18-cv-0018) (June 26, 2018), Expedia was a named Defendant in a case pending in the District of South Carolina. In the context of a hotel reservation through hotels.com, the District Court found that terms of use are enforceable when "the customer is indeed required to accept those terms of part of making a reservation." (p. 4). After determining the terms of use were binding, the Church Court required the case be arbitrated.

In the context of a summary proceeding, the Trial Court considered the testimony of both sides and rejected the Plaintiff's factual assertions that he was not required to "agree" to Expedia's Terms when he used Expedia's website. The Trial Court made a factual finding in the summary proceeding, holding: "The Court is not persuaded by the Plaintiff's statements denying he was required to agree to the Terms of Use." Expedia Order, pp. 2-3, R. p. ___. The Trial Court went on to explicitly hold that "Expedia has proven the Terms of Use apply." Expedia Order, p. 3, R. p. ___. The Trial Court's ruling on the merits is supported by evidence and as such "will not be overruled." Stokes v. Metropolitan Life Insurance Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct.App.

2002). Accordingly, the Plaintiff's attempt to inject new facts into the record in an effort to overturn the Trial Court's decision is impermissible, factually incorrect, unsupported by the law, and unpersuasive.

B. THE PLAINTIFF MISAPPREHENDS THE STANDARD OF REVIEW

The Plaintiff asserts the Trial Court must be reversed because the Plaintiff denies he was required to "agree" to arbitration as part of using Expedia's website. Plaintiff's Initial Brief, p. 4, 6. This should not persuade this Court for the following two reasons.

First, the Plaintiff misapprehends the standard of review. In the context of a summary proceeding, the Trial Court considered the Plaintiff's denial and rejected it in favor of Expedia's assertion that the Plaintiff was required to agree to Expedia's Terms (including the arbitration provision) in order to use the Expedia website. These factual findings are entitled to great deference by this Court.

The Trial Court was acting in accordance with the procedures found in the 1976 South Carolina Code of Laws, as amended (the "Code"). The Code provides that "if the opposing party denies the existence of the agreement to arbitration, the court shall proceed summarily to the determination of the issue so raised..." S.C. Code Ann. § 15-48-20(a).

In the present case, the Trial Court followed these procedures when it did proceed summarily to the determination of the issue at the hearing on July 21, 2020. Expedia Order, p. 3, R p. ____. As set forth in the Expedia Order, the Trial Court "weighed the matter on the merits" and "weighed conflicting evidence." Expedia Order p. 3, R p. ___. The Trial Court considered the Plaintiff's averments that he was not required to agree to the Terms

when experimenting with Expedia's website but ultimately the Trial Court sided with the contrary sworn testimony provided by Expedia. The Trial Court explicitly found Expedia's sworn testimony to be "persuasive, credible, sensible, comport with case law, and believable" and held it was "not persuaded by the Plaintiff's statements denying he was required to agree to the Terms of Use." Expedia Order, p. 3, R. p. ___. The Trial Court therefore ruled that the Terms (including the arbitration provision) applied to the Plaintiff. Expedia Order, p. 3, 4, 6, R p. ____.

The Trial Court's factual findings are entitled to great deference. As noted above, "the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them." Stokes v. Metropolitan Life Insurance Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct.App. 2002) (citations and parentheticals omitted). Expedia's sworn testimony that the Plaintiff must agree to the Terms to use its website constitutes more than sufficient evidence to support the Trial Court's determinations. Accordingly, the Plaintiff's argument should not persuade this Court to overturn the Trial Court's Expedia Order.

Second, even if the Plaintiff's argument were correct (which is strongly denied by Expedia), the Trial Court's Order should be upheld. Essentially, the Plaintiff argues that the July 21, 2020 hearing did not have a summary proceeding component but instead was solely some type of ill-defined motion where the Court this Court must "resolve every inference in the appellant's favor." (Plaintiff's Initial Brief, p. 6).

However, if this matter is treated as a motion, the Trial Court found the Plaintiff's denial was not timely made: "The Plaintiff's denial should have been brought to the Court's attention prior to the start of the hearing. The Plaintiff therefore cannot refute the assertions

made by Expedia." Expedia Order, p. 3, R. p. ___. As the Trial Court stated in the transcript "there's nothing in front of me on that." Transcript, p. 21, lines 14-15, R. p. ___. It is only where this matter is a summary proceeding that the Plaintiff's denial is considered by the Trial Court.

Further, the denial is not properly before this Court because the Plaintiff failed to designate the Transcript as a matter to be included in the Record on Appeal.[2] Nor does the denial appear elsewhere. The Plaintiff's pleadings do not address (much less deny) the Plaintiff's agreement to Expedia's Terms and arbitration. The Plaintiff filed no documents with the Court ahead of the July 21, 2020. Accordingly, there are ***no*** "inferences" in the Record on Appeal showing the Plaintiff did not agree to Expedia's Terms. As such, this argument should not persuade this Court.

C. THE AGREEMENT TO ARBITRATE IS NOT UNCONSCIONABLE

The Plaintiff argues that the "terms of Expedia's arbitration clause are also oppressive and one-sided" in particular because it "limits the customer's ability to recover under the law, as well as robs the customer of the right to have a jury determine damages." Plaintiff's Initial Brief, p. 7. In support of this, the Plaintiff cites Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) (hereinafter "Simpson").

[2] As discussed above, the transcript should not be considered because "the appellant bears the burden of providing a record on appeal sufficient for intelligent review." Beverly S. v. Kayla R., 395 S.C. 399, 402, 718 S.E.2d 224, 226 (Ct. App. 2011) (citation omitted). "The appellate court will not consider any fact which does not appear in the Record on Appeal." *Id*. And see Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.").

With respect to the arguments regarding jury trials, Expedia incorporates herein Section I, above. The remainder of the Plaintiff's argument should not persuade this Court for two reasons.

First, the Plaintiff's argument that the Terms limit his damages (and therefore are unenforceable) was not presented to the Trial Court and accordingly should not persuade this Court. "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." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1997) (citation omitted). Accordingly, this issue should not persuade this Court.

Second, even if the argument is considered on the merits (to which Expedia strongly objects), it should not persuade this Court. Limitations on damages are not sufficient, alone, to invalidate an agreement between parties. In Maybank v. BB&T, 416 S.C. 541, 787 S.E.2d 498 (2016) the Supreme Court addressed Simpson but nevertheless upheld an agreement prohibiting seeking punitive, special, consequential, or indirect damages, as follows:

> Turning to Paragraph F.1, we find the clause is neither violative of public policy nor unconscionable. Under its terms, it does not deprive Maybank of all damages arising under the contract but merely limits the type of damages he is entitled to recover. Specifically, Maybank is precluded from seeking consequential damages, indirect damages, special damages, or punitive damages in claims arising from his relationships with Appellants; he is still entitled to actual damages. While clauses limiting liability are to be strictly construed, we find no reason to ignore the plain language of the clause based on either public policy or unconscionability grounds.

Maybank v. BB&T, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016).

The Maybank Court reasoned that limitations on damages may be one of "numerous one-sided provisions [that] cumulatively impact the oppressive nature of an adhesion contract" (Maybank v. BB&T Corp., 416 S.C. 541, 575, 787 S.E.2d 498, 516 (2016) (citation to Simpson)) but was not, alone, sufficient grounds to invalidate an agreement. In the present case, the Plaintiff has argued no additional Simpson factors (other than the alleged inconspicuous nature of the language, which is addressed below). And were the Court to review the Record on Appeal for evidence to support such a challenge, it would only find factors that distinguish this case from Simpson. Among other differences, in the present case the Plaintiff is an attorney; was travelling for a vacation to New Zealand and not purchasing a modern-day necessity; and the Terms about which the Plaintiff complains were presently clearly and in some cases in bold font.

In light of these two separate and independent reasons, the Plaintiff's argument should not persuade this Court.

D. THE AGREEMENT TO ARBITRATE IS NOT "INCONSPICUOUS AND BURIED IN OTHER TERMS"

The Plaintiff's next argument is that "[e]ven if Expedia actually had required review and agreement of an arbitration clause, the clause would still be unenforceable." Plaintiff's Initial Brief, p. 6. This is because the requirement is "inconspicuous and buried in other terms." *Id*. For the reasons set forth below, this argument should not persuade the Court.

The Plaintiff cites Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) (hereinafter "Simpson") for the proposition "that an arbitration clause was invalid where it was inconspicuous and buried in other terms." Plaintiff's Initial Brief, p. 6.

The agreement in Simpson was found deep in the document at the tenth of sixteen paragraphs, utilized the same font as other provisions, and utilized standard small print. Simpson at 373 S.C. at 28, 644 S.E.2d at 670.

This is in stark contrast to the present case. The agreements at issue are found in the "**DISPUTES**" section of Expedia's Terms. Terms, p. 2. R p. ___ (bold and capitalization in original). The heading is in bold and is capitalized. *Id.* The Terms are organized in an orderly manner and are grouped logically. The agreements at issue are found in their own section, which has a clear name and identifier —"**DISPUTES**"— and the section is written in easy to understand language. *Id*. Unlike Simpson, the agreements at issue are prominently placed and appear near the beginning or "top" of the document. Terms, p. 2, R p ___. Also unlike Simpson, the information regarding arbitration utilizes a bold font[3] which draws the eye. Finally, the Court can take judicial notice that the size of the font would vary depending on the size of the screen on which they are placed but in the printed version in the Record, all the Terms are in a large font, unlike Simpson. See Terms, R. p. ____.

[3] By way of example, the Terms provide: (a) "**Any and all Claims will be resolved by binding arbitration, rather than in court**, except you may assert Claims on an individual basis in small claims court if they qualify" and (b) "**There is no judge or jury in arbitration, and court review of an arbitration award is limited**." Terms, p. 2, R p. ___.

Further, the Court has explained under Simpson "the proper test is whether an important clause was particularly inconspicuous, as if the drafter intended to obscure the term." Gladden v. Boykin, 402 S.C. 140, 146 739 S.E.2d 882, 885 (2013) (citations omitted). In the present case, there is no evidence Expedia intended to obscure the terms at issue. Quite the opposite: they appear at the "top" near the beginning, utilize bold font in portions, are in their own titled section, and print in a large font. Terms, p. 2, R p. ___.

Even assuming the Plaintiff's assertions are correct (which Expedia strongly denies), this fact alone is not sufficient to carry the day. As discussed above, it is merely one factor in the Court's consideration of an agreement. See Maybank v. BB&T, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016). As discussed above, the Plaintiff has failed to argue to this Court or the Trial Court the presence of the other Simpson factors.

Accordingly, the Plaintiff's argument should not persuade this Court.

E. THE TERMS ARE NOT VAGUE

The Plaintiff's final argument is that the Terms are "vague" because they allow an action to be brought "in 'small claims court.'" Plaintiff's Initial Brief, p. 7. This argument should not persuade this Court.

The South Carolina Supreme Court has found that "small claims court" is "equivalent to our magistrate's court." Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 652, 515 S.E.2d 257, 259 (1999). Further, the Courts have looked favorably on agreements that permit resolution via either arbitration or in small claims court. See, Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010). As observed by the Trial Court, the definition of small claims court is one which "provides

expeditious, informal, and inexpensive adjudication of small claims." (Black's Law Dictionary, 6th ed.) Expedia Order, R p. ___.

The Trial Court correctly determined that the phrase "small claims court" was not vague. Accordingly, the Plaintiff's final argument should not form a basis to overturn the Trial Court's Expedia Order.

CONCLUSION

For the foregoing reasons, Expedia respectfully requests this Court affirm the Trial Court's orders and deny the Plaintiff's appeal.

Respectfully submitted,

Greenville, South Carolina
December 18, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

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appellate case number: 2020-001150

Josh Hawkins..... Appellant,

v.

American Airlines, The Qantas Group d/b/a Qantas Airlines, Expedia, and Travel Guard Insurance, Defendants

of which American Airlines and Expedia are the.....Respondents.

PROOF OF SERVICE

THE UNDERSIGNED hereby certifies that on December 18, 2020 the undersigned served Expedia's Initial Brief, Expedia's Designation of Matter to be included in the Record on Appeal, and Expedia's Rule 209(c), SCACR Certification upon all counsel by mailing same via the United States Post Office with sufficient first class postage and by transmitting same via email to the following persons at the following addresses:

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Greenville, South Carolina
December 18, 2020

/s/ William S. F. Freeman

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