

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 87079

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Elizabeth A. Brown
Clerk of Supreme Court

AIRBNB, INC.,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE GLORIA
STURMAN, DISTRICT JUDGE, DEPT. XXVI,

Respondents,

and

BRYAN LOVETT,

Real Party in Interest.

**REPLY IN SUPPORT OF PETITION
FOR WRIT OF MANDAMUS**

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I. INTRODUCTION

Airbnb, Inc.'s ("Airbnb") petition presents a pure question of law about whether online marketplaces owe a duty to protect non-user members of the public from drive-by shootings perpetrated by unknown third parties through a joint venture or negligent undertaking theory. This Court's jurisprudence and Airbnb's Terms of Service ("TOS") squarely foreclose Real Party in Interest Bryan Lovett's ("Lovett") claims. There is no set of facts under which Airbnb can be liable. Lovett fails to provide a single case supporting his novel joint venture and negligent undertaking theories against Airbnb. Nor does Lovett address the contrary authority presented in the petition.

Instead, after Airbnb filed its petition, Lovett hurriedly moved to amend his complaint in a transparent attempt to moot the petition by curing "the allegedly missing facts." (Ans. 13.) Even with the belated amendment, the substantive legal issues remain the same, and the petition is still ripe under *Orbitz*. Thus, this Court should issue a writ of mandamus directing dismissal.

II. ARGUMENT

A. Airbnb Possesses a Clear and Indisputable Right to a Writ of Mandamus under Nevada Law and the Terms of Service.

Settled Nevada law and the TOS foreclose Lovett's claims and demonstrate Airbnb's indisputable right to mandamus because the district court's ruling was clearly erroneous. Statutes, this Court's caselaw, and the TOS preclude any duty

founded on a joint venture or voluntary undertaking, and the drive-by shooting was not foreseeable as a matter of law.

1. The Terms of Service are dispositive.

a. The Terms of Service foreclose a joint venture.

As a matter of law, Airbnb is not a joint venturer with any host.¹ A joint venture is "a contractual relationship." *Radaker v. Scott*, 109 Nev. 653, 658, 855 P.2d 1037, 1040 (1993). The necessary elements to plead are "[1] a contractual relationship in the nature of an informal partnership wherein [2] two or more persons conduct some business enterprise, [3] agreeing to share jointly, or in proportion to capital contributed, in profits and losses." *Id.*

Lovett concedes that the district court did not analyze the TOS even though the TOS was before it. (Ans. 13 ("nor did the [court] analyze the document.")) The district court's failure to consider the referenced and attached foundational document for any joint venture (or voluntary undertaking) was clearly erroneous. *State v. Fourth Jud. Dist. Ct.*, 137 Nev. 37, 38, 481 P.3d 848, 849 (2021).

Airbnb detailed in the petition how the TOS undermines every necessary element for a joint venture as many other courts have observed. (Pet. 19-22.) There is no mutual control, agreement to contribute capital, agreement to share profits, or agreement to divvy up losses. (Pet. 19-22.) Sections 1.4 and 22.2 unequivocally

¹ A "host" is the owner or manager of the property being leased.

disclaim that hosts are a "joint venturer or partner of Airbnb for any reason" and "[n]o joint venture . . . exists between [hosts] and Airbnb as a result of this Agreement or your use of the Airbnb Platform." (*Id.* at 19.)

Lovett demands that this Court ignore the contractual joint venture disclaimer. (Ans. 21-23.) He contends that "it shouldn't matter that Defendants – for their own purposes – do not call their relationship a partnership, given that the rights of 'third parties' are at stake." (Ans. 22).² But NRS 87.070(1), on which Lovett relies, states "persons who are not partners as to each other *are not partners as to third persons*." (emphasis added); (Ans. 5, 17, 18.) So, if Airbnb and the other defendants have not agreed amongst themselves to be joint venturers, then they cannot be joint venturers as to Lovett. *Id.* A legal partnership does not occur by coincidence; there must be agreement between the parties to the business relationship. *Radaker*, 109 Nev. at 658, 855 P.2d at 1040. Lovett entreats the Court to disregard that the TOS, the only agreement between the parties to the alleged joint venture, which expressly refutes it. Lovett, as a stranger to the contact, cannot change the nature of the contractual relationship.

² Although Lovett is not a party to the TOS, his "only connection to Defendant Airbnb is [through] the rental of the Property conducted pursuant to the Terms of Service, and so the document is relevant to describe the nature of Defendant Airbnb's role in the transaction." *Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767, 773 n.43 (E.D. La. 2017).

Lovett asserts that the weight of authority outside Nevada rejects contractual joint venture disclaimers. (Ans. 21-22.) But his cited cases do not consider statutes like NRS 87.070(1) and many other jurisdictions reject Lovett's broad proposition that disclaimers are always non-dispositive. *See, e.g., Binkley v. Palmer*, 10 S.W.3d 166, 171 (Mo. Ct. App. 1999) (holding that contractual disclaimers of any partnership or joint venture demonstrated that no such relationship existed between the parties); *Rocky Mountain Expl., Inc. v. Davis Graham & Stubbs LLP*, 420 P.3d 223, 235 (Colo. 2018) (reasoning that contractual joint venture disclaimer established there was no joint venture between the parties).

This Court enforces contractual disclaimers at the motion to dismiss stage. *See Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 277-78, 283, 21 P.3d 16, 18-29, 23 (2001) (enforcing unambiguous contractual disclaimer at the motion to dismiss stage and stating "[t]he parol evidence allegations contained in the complaint cannot be used to supersede the express unambiguous provisions of the Agreement we conclude that the district court did not err in dismissing Kaldi's breach of contract claim").

Lovett identifies no case even hinting that Airbnb could be a joint venturer with its hosts given the contractual disclaimer. He strains to find Nevada-based authority for his position. (Ans. 4, 14, 21-22). These cases involve different contexts, statutory rights, or federal court predictions of Nevada law. *See Myers v.*

Reno Cab Co., Inc., 137 Nev. 365, 369, 492 P.3d 545, 550 (2021) (holding contractual disclaimer is not dispositive of statutory rights but could be dispositive of contractual rights "under the applicable legal test"); *ECM, Inc. v. Placer Dome U.S., Inc.*, 132 F.3d 38 (9th Cir. 1997) (before *Kaldi*, stating "[t]here is no Nevada law on point").

Under NRS 87.070(1) and *Kaldi*, the TOS is dispositive: Airbnb is not a joint venturer with its hosts. Authority from other jurisdictions provides confirmation. Therefore, the district court clearly acted erroneously when it did not dismiss Lovett's complaint.

b. The Terms of Service foreclose any voluntary undertaking.

The TOS is also dispositive of Lovett's negligent undertaking claim. Lovett relies on the TOS in this Court to assert that "[u]sing its contractual power over Han, Airbnb took over the entire guest screen aspect of the rentals." (Ans. 24.)³ Not so. The TOS renounces any duty to background check or screen hosts, guests, guests of guests, or anyone else. (Pet. 23-24.) As discussed in Airbnb's petition, this Court held in *PetSmart, Inc. v. Eighth Judicial District Court*, 137 Nev. 726, 731, 499 P.3d 1182, 1187 (2021), that a contract may disclaim any voluntary undertaking. (Pet. 22-23.)

³ See also *infra* note 5.

Lovett tries to distinguish *PetSmart* by arguing that "the chain store's contract with the charity played no more than a cameo role in the Court's analysis." (Ans. 26.) But the contractual disclaimer took center stage in the Court's decision in the factual background, procedural history, and analysis sections. The opinion contains an entire paragraph reciting the contract's terms and provisions stating "the agency partner is 'fully responsible' for its adoptable pets" and there is no "'legal partnership, joint venture, landlord-tenant or employee-employer relationship' between the agency partner and PetSmart." *PetSmart*, 137 Nev. 727, 499 P.3d at 1184-85. The Court's opinion also highlighted that "the agreement between PetSmart and AH4S expressly disclaimed any agency relationship between them." *Id.* at 733, 499 P.3d at 1188.

Since *PetSmart* shows Airbnb's entitlement to a writ of mandamus, Lovett tries to shoehorn his (new) allegations into *Wright v. Schum*, 105 Nev. 611, 781 P.2d 1142 (1989). But *Wright* involved a landlord who made *specific, individualized representations* of his duty to members of the neighborhood. *Id.* at 616-17, 781 P.2d at 1145. In those circumstances, the Court held that the landlord *assumed* a duty to secure the dog once he acceded to the neighbor's request to *do* something about it and when the landlord *did* something by enlisting possible eviction. *Id.* at 617, 781 P.2d at 1145.

Like *PetSmart*, *Wright* acknowledged "mere advice or warning by one person to another that care should be taken to avoid a certain risk does not in itself create an undertaking and consequent liability on the part of one giving such advice." *Id.* at 616, 781 P.2d at 1145. "Trying to prevent harm by warning or advising is certainly not the kind of 'undertaking' contemplated by the quoted Restatement section." *Id.* at 617, 781 P.2d at 1145. Thus, Airbnb's general guidelines, webpages, safety recommendations, or hotlines do not assume a duty to protect the public at large from random violence or drive-by shootings. (*Cf.* Ans. 2, 14, 24.); *Esposito v. Airbnb Action, LLC*, 2022 WL 2980700, at *6 (W.D. Ark. July 27, 2022). ("[N]o facts in this case indicate that Airbnb voluntarily assumed a duty to protect them from unforeseen crimes.").

c. The Terms of Service were properly before the district court.

Lovett suggests the TOS was not properly before the district court. But the TOS was properly presented because Lovett's original complaint referenced and necessarily implicated the TOS. (Pet. 8, 18.) In response to Lovett's opposition to the motion to dismiss, Airbnb appropriately attached the TOS and requested judicial notice without objection. (Pet. 8, 18); *see Holmes v. Spencer*, 685 F.3d 51, 66 (1st Cir. 2012).⁴ And the TOS was also before the district court – and this Court –

⁴ Lovett's contention that "[t]he trial court decided to wait until summary judgment to consider Airbnb's Terms," (Ans. 13 (citing PA0105)), is false: the

when Lovett's co-plaintiff was compelled to arbitration. *Airbnb, Inc. v. Rice*, 138 Nev. Adv. Op. 65, 518 P.3d 88, 90 (2022).⁵ Lovett's arguments to the contrary, and his curious assertions that Airbnb's arguments based on the TOS were waived, underdeveloped, or reserved for summary judgment, are unfounded. (Ans. 13-14.)

2. *Lovett has not alleged Airbnb is a joint venturer.*

Aside from the TOS' dispositive effect, Lovett's amended pleading is a confession that his original complaint failed to "allege facts sufficient to establish all necessary elements of the claim for relief" and the district court was duty-bound to dismiss the negligence and negligent security claims. *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973). Lovett's new pleading fares no better. There are no allegations indicating "profit-sharing," "revenue-sharing" or "loss-sharing" between Airbnb and hosts as needed to allege a joint venture. Rather the allegations reflect that Airbnb provides a service to hosts – and guests – for a fee.

Loaded with qualifiers and hedging, Lovett posits that "[p]ractically speaking, Airbnb splits profits" and "Airbnb's fee structure is *often tantamount* to

passage that Lovett cites relates to a statement about the shooter's identity, not about the timing of consideration of the TOS. (PA0105.) The court did not suggest that it was "defer[ing] consideration of the Terms until summary judgment." (*Cf.* Ans. 4.)

⁵ Lovett's amended pleading and answer to the petition also incorporate the TOS, "contracts," "agreements," "policies," "procedures," "website" pages, and "guidelines" between Airbnb and its hosts. (RP037, 041, 042, 049, 050; Ans. 8 n.5. (citing <https://www.airbnb.com/help/article/2799>).)

profit sharing." (Ans. 11-12 (emphases added).) But Lovett's allegations and the website pages that he incorporates show no more than a typical fee for service relationship. (*Id.* at 5, 11-12, 17 (citing <https://www.airbnb.com/resources/hosting-homes/a/how-much-does-airbnb-charge-hosts-288>; <https://www.airbnb.com/help/article/1857>)).

Merely exchanging fees for services does not create a joint venture. The parties still must show additional, express *contractual* provisions for the sharing of profit and losses. *See, e.g., In re Wilson Yachts, LLC*, 605 F. Supp. 3d 695, 707 (D. Md. 2022) (holding that providing a boat to another "for purpose of booking and managing charters . . . for a fee" is insufficient to establish a joint venture when "[n]o provision of the agreement pertains to a sharing of profits and losses"); *Canel & Hale, Ltd. v. Tobin*, 710 N.E.2d 861, 871 (Ill. App. Ct. 1999) ("Without more, 'the mere fact that attorneys associate on a fee for service basis does not make them joint venturers.'"); *see also* NRS 87.070(4).

Lovett's pleading – new or old – does not meet this test. Lovett does not allege that two or more persons "agree[d] to share jointly, or in proportion to capital contributed, in profits and losses." *Radaker*, 109 Nev. at 658, 855 P.2d at 1040. The district court had, and has, a clear indisputable duty to dismiss.

B. Short-Term Rentals Do Not Foreseeably Lead to Violence.

Drive-by shootings are not a remotely foreseeable result of renting a property. Parties are not foreseeable, and shootings near them are even more attenuated. Nor is *violence* a natural consequence of hosting or attending a party. As courts have observed, parties, even noisy ones, are not inherently dangerous. *Melton v. Boustred*, 183 Cal. App. 4th 521, 532-41 (2010); *Doe v. Messina*, 349 S.W.3d 797, 803 (Tex. Ct. App. 2011); *Hanouchian v. Steele*, 264 Cal. Rptr. 3d 234, 237-38, 243-46 (Ct. App. 2020). A social event is not comparable to a casino. *Cf. Early v. N.L.V. Casino Corp.*, 100 Nev. 200, 204, 678 P.2d 683, 685 (1984); (Ans. 28).⁶ The Court need not accept Lovett's fanciful slippery slope arguments to the contrary. (Ans. 28-30.)

As described in the petition, courts across the country hold that drive-by shootings are unforeseeable as a matter of law. (Pet. 26-27.) Lovett does not address these cases or cite any authority where any court has held that a drive-by shooting *could* be foreseeable. *See Mangeris v. Gordon*, 94 Nev. 400, 403, 580 P.2d 481, 483 (1978) (holding that location where a taxi picked up a passenger was not liable for

⁶ Foreseeability is still an element of the other supposed violations Lovett tosses around, including negligence per se and NRS 41.1305 (Nevada's social host statute). While drunk driving might be foreseeable from underage intoxication, violent criminal acts are not under social host laws. *Rogalski v. Tavernier*, 527 N.W.2d 73, 75-76 (Mich. App. 1995).

murder because it was unforeseeable that the passenger would murder the driver); *see also Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023) (holding that providing an online platform does not create a duty to protect from violence).⁷

Instead, Lovett employs a contorted version of inn-keeper statute cases. (Ans. 30.) But NRS 651.015 does not apply because Airbnb is not an "owner or keeper of any hotel, inn, motel, motor court, boarding house or lodging house." *Esposito*, 2022 WL 2980700, at *5 (stating Airbnb is not analogous to an innkeeper). In addition, liability under the statute requires prior incidents of similar crimes on the premises, which Lovett has not, and cannot, plead. *Humphries v. New York-New York Hotel & Casino*, 133 Nev. 607, 612, 403 P.3d 358, 362 (2017); *Est. of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 862, 265 P.3d 688, 693 (2011); (Ans. 27, 31.)⁸ Short term rentals do not foreseeably lead to violence, let alone drive-by shootings, as a matter of law.

⁷ Lovett mentions a "special relationship." (Ans. 27.) He waived this theory below and cannot resurrect it. (PA043-44, 48.) Regardless, courts have uniformly held Airbnb has no special relationship with strangers. (Pet. 14 n.4.)

⁸ Lovett's argument that foreseeability means only that landowners must know that their conduct increases the "risk of harm" from "unwelcome third parties with nefarious intentions," (Ans. 5, 27, 29-30), is based on a single, inapposite case in which the construction-company defendant was physically on the premises of the property at issue and acknowledged it undertook a duty to lock doors to vacant apartments, yet failed to do so. *Scialabba v. Brandise Construction Co.*, 112 Nev. 965, 921 P.2d 928 (1996).

C. Lovett's Amended Complaint Does Not Moot the Petition.

Lovett asserts that his amended complaint "add[ing] the allegedly missing facts" "moot[s] some of Airbnb's arguments." (Ans. 13.) But, as this Court recently clarified, a writ petition is not moot when "the amended complaint neither renders the legal issue abstract nor prevents us from granting effectual relief to the prevailing party." *Orbitz Worldwide, LLC v. Eighth Jud. Dist. Ct.*, 139 Nev., Adv. Op. 40, 535 P.3d 1173, 1178 n.5 (2023).⁹

The legal issues presented in Airbnb's petition have not substantively changed in Lovett's amended complaint. Lovett still alleges that he was injured in a drive-by shooting at or near an Airbnb listing. (RP046; *see also* Ans. 5, 15, 28.) Lovett maintains that Airbnb is liable as a joint venturer with the other defendants, except now he uses the phrase "joint venture" three times instead of just two. (*Compare* RP051, 052, 054, *with* PA002, 008.) And, Lovett finally advances his previously-unpled negligent undertaking theory and alleges Airbnb "assumed the duties of the other Defendants." (RP051.)

⁹ At the time of filing this reply, Lovett has neither submitted the order granting the motion to amend nor filed the amended complaint. It was improper for Lovett to introduce, and rely on, new allegations in this Court from a proposed amended complaint that was not yet approved or filed. *See Election Integrity Project of Nevada, LLC v. Eighth Jud. Dist. Ct.*, 136 Nev. 804, *2 n.2, 473 P.3d 1021, *2, n.2 (2020) (unpublished disposition).

The amendment does not obviate or render abstract the legal issues presented. *See Orbitz*, 535 P.3d at 1178 n.5. The duty, foreseeability, and embedded joint venture and negligent undertaking issues remain alive and disputed. There remains no need for discovery despite Lovett's pleas (Ans. 5, 15, 17, 28), because duty and foreseeability can be resolved as a matter of law, *Lee v. GNLV Corp.*, 117 Nev. 291, 296, 22 P.3d 209, 212 (2001). A joint venture's existence is also a legal question when the (amended) complaint and related exhibits reveal the necessary elements cannot be alleged. *Lafayette Bank & Tr. Co. v. Price*, 440 N.E.2d 759, 762 (Ind. Ct. App. 1982) ("Where the [joint venture] facts are undisputed and only a single reasonable inference can be drawn therefrom, the question is one of law."). The Court can, and should, resolve the legal issues presented here.

D. The Court May Entertain the Petition Despite Lovett's Amended Complaint.

Lovett misconstrues Airbnb's petition as seeking solely advisory mandamus. (Ans. 3, 12-15.) However, as shown above, Airbnb invoked this Court's authority to issue traditional mandamus. (Pet. 10-13.) Airbnb contends that the district court was obligated to dismiss Lovett's action against it pursuant to clear legal authority. (*Id.* at 10 & n.2.) Airbnb argues that its right to dismissal is "clear and indisputable" under settled law and the TOS. (*Id.* at 3, 11, 22.) A future appeal is not adequate or speedy given the early stage of the litigation and the far-away trial date.

(*Id.* at 12.) Thus, traditional mandamus is appropriate. *Endo Health Sols., Inc. v. Second Jud. Dist. Ct.*, 137 Nev. 390, 392, 492 P.3d 565, 568 (2021).

III. CONCLUSION

The district court clearly erred when it denied Airbnb's motion to dismiss. Under Nevada law and the TOS, Airbnb is not a joint venturer with hosts because there is no mutual control or agreement to share profits or losses. The TOS also disclaim any joint venture or voluntary undertaking. Finally, there is no set of facts under which a drive-by shooting is a foreseeable consequence from using an online marketplace's service. Thus, as a matter of law, Airbnb cannot be directly or indirectly liable and it has an indisputable right to a writ of mandamus. For these reasons, this Court should issue a writ of mandamus directing dismissal.

DATED this 6th day of November, 2023.

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VERIFICATION/DECLARATION

I, Jordan T. Smith, Esq., declare as follows:

1. I am counsel for Petitioner.
2. Under NRAP 21(a)(5), I verify that I have read this Reply in Support of Petition for Writ of Mandamus and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.
3. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

This declaration is executed on 6th day of November, 2023, in Las Vegas, Nevada.

/s/ Jordan T. Smith
JORDAN T. SMITH, ESQ.

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman.

I certify that I have read this reply and that it complies with the page or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted, it is proportionately spaced, has a typeface of 14 points or more, and 3,273 words.

I further certify that, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this reply regarding matters in the record to be supported by appropriate references to the appendix filed with the petition. I understand that I may be subject to sanctions in the event that

the reply is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of November, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 6th day of November, 2023, I caused to be electronically filed and served via United States mail and/or the Court's CM/ECF website a true and correct copy of the above and foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** properly addressed to the following:

Hon. Gloria Sturman
District Judge, Dept. XXVI
Eighth Judicial District Court
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