THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2018-000857
Civil Action No. 2017-CP-42-03283

Daniel Lee Davis, individually and on behalf of all those similarly situated, ... Respondents,

v.

ISCO Industries, Inc., ... Appellant.

FINAL BRIEF OF RESPONDENTS DANIEL LEE DAVIS, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED

John S. Simmons #10260
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201
Tel: (803) 779-4600

John B. White, Jr. # 5996
Marghretta H. Shisko # 100106
Ryan F. McCarty # 74198
HARRISON | WHITE, P.C.
178 West Main Street
Spartanburg, SC 29306
Tel: (864) 585-5100

Attorneys for Respondents

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COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in applying the unforeseeable and outrageous tort exception and denying ISCO's Motion to Compel Arbitration?

II. Did the Circuit Court err in ruling that Davis's negligence claim did not arise out of or relate to the employment relationship?

STATEMENT OF THE CASE

Respondents concur with the procedural history outlined in Appellant's Statement of the Case.

STATEMENT OF FACTS

Daniel Lee Davis (hereinafter "Respondent") worked for Appellant as a mechanic and fusion technician from March 2007 until he departed the company in March 2015 (R. p. 51, lines 9-10, 14). When he was hired by Appellant, he was required to provide personal identifying information (hereinafter "PII"), including, but not limited to, his Social Security number. (*Id.* at 51). Additionally, Respondent signed an Arbitration Agreement at the outset of his employment. (R. pp. 94-114). The Arbitration Agreement states that it applies to "any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO INDUSTRIES, LLC." (*Id.* at 94).

In March 2016, Appellant's employees gave PII regarding Respondent and others to identity thieves. (R. p. 51, line 18-p. 52, line 8). A third party, posing as an ISCO senior executive, sent an email to Respondent's human resources department requesting Respondent's IRS Form W-2 data. (*Id.* at 51). Respondent's employee gathered the requested data and transmitted the information to the hacker by email. (*Id.*). The compromised information included the Social Security numbers, addresses, and compensation and tax withholding information of current and former ISCO employees. (R. p. 52, lines 1-2, 7-8). Although Respondent purchased some passive coverage for those affected by the data breach, it did not stop identity thieves from attempting to take out loans, obtaining credit cards, and causing other damages. (R. pp. 52-53).

Respondent brought the putative class action at issue on behalf of himself and others (hereinafter collectively referred to as "Respondents") impacted by Appellant's negligence, gross negligence, and recklessness. (R. pp. 53-55).

ARGUMENTS

I. Standard of Review.

"The determination of whether a claim is subject to arbitration is subject to *de novo* review." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005) (citing *Vestry Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 206, 588 S.E.2d 136, 138 (Ct. App. 2003)). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) (citing *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)).

II. The Circuit Court correctly applied the outrageous tort exception and appropriately denied Appellant's Motion to Compel Arbitration.

In its Brief, Appellant contends that the Circuit Court erred in applying the unforeseeable and outrageous tort exception and denying its Motion to Compel Arbitration. For the reasons detailed below, many of Appellant's arguments are not preserved for appellate review. Notwithstanding Appellant's failure to preserve these issues, the Circuit Court's ruling was appropriate and this Court should affirm.

A. The Arbitration Agreement in this case in invalid.

As an initial matter, the Circuit Court's ruling should be upheld because the Arbitration Agreement is void as unconscionable.

It may be true that, in some cases, both state and federal policy favor arbitration of disputes. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118–19 (2001). However, regardless of the law applicable to this case,[1] arbitration is a matter of contract and a

[1] Appellant argues that the Federal Arbitration Act ("FAA") applies to this case. Respondents accept that, for purposes of this appeal and without the benefit of discovery, the FAA applies to

party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Id.* at 596, 553 S.E.2d at 118; *see also Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007).

Furthermore, "[w]hen the parties dispute whether a valid arbitration agreement exists, any ambiguities must be resolved against the drafter—which, in the labor context, will always be against the employer and in favor of the employee." *Weckesser v. Knight Enters. S.E., LLC*, 228 F. Supp. 3d 561, 565 (D.S.C. 2017) (citing *Kristian v. Comcast Corp.*, 446 F.3d 25, 35 (1st Cir. 2006)). "While there is a presumption in favor of arbitration, this presumption disappears when the parties dispute the existence of a valid arbitration agreement." *Id.* In fact, although unpreserved, Appellant's reliance on *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), supports this argument. *See id.* at 339 (noting that arbitration agreements must be placed on "equal footing" with other contracts).

Here, no valid arbitration agreement exists because the Arbitration Agreement is unconscionable. "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007).

First, the Arbitration Agreement specifically shortens the statute of limitations window to six months after employment. This is in direct contravention to South Carolina law, which prohibits contractual shortening of statutes of limitation. *See* S.C. Code Ann. § 15–3–140. This is substantively oppressive and thus unconscionable. *See Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. At

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this case. However, the cases relied on by the circuit court and in this brief were either decided under the FAA or are within the contours permitted by the FAA.

the hearing of this matter, Appellant appeared to concede the unconscionability of this language, but wrongly claims that this language may be severed. (R. p. 125). Here, unlike those cases where contractual language is "separate and distinct" from the agreement to arbitrate, the offending provision is part and parcel of the Arbitration Agreement and not a distinct contractual provision. Thus, the language should invalidate the entire Arbitration Agreement.

This result is supported by the applicable law. As the South Carolina Supreme Court explained in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007):

> [L]egislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result." S.C.Code Ann. § 36–2–302(1) (2003).
>
> At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 84–85 (D.C. Cir. 2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

Id. at 34, 644 S.E.2d at 673–74. Here, Appellant chose to include its offending provision within the Arbitration Agreement rather than include it in within an employment contract. And, in that Arbitration Agreement, Appellant chose to completely disregard express South Carolina law. *See id.* (refusing to apply severability where offending provision contravened consumer protection law). Moreover, adopting Appellant's severability argument would have the impact of rewriting the applicable arbitration provision at issue. Instead, the Arbitration Agreement is inapplicable to this case.

Second, the Arbitration Agreement suffers from mutuality of remedy for this type of breach. In *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), *aff'd*, 417 S.C. 42, 790 S.E.2d 1 (2016), the arbitration agreement at issue subjected the weaker party to liability for monetary damages while disclaiming liability for those same damages for the dominant party. *Id.* at 15, 742 S.E.2d at 40. The Court of Appeals found this arbitration agreement unconscionable "particularly in light of the lack of mutuality of remedy." *Id.* The Court in *Smith* also concluded the arbitration clause at issue "should not be severed from the numerous unconscionable provisions" in the agreement. *Id.* at 16, 742 S.E.2d at 41.

The relevant facts of this case demand a similar result. In the Arbitration Agreement, Appellant specifically excludes itself from arbitration of claims involving an employee violating confidentiality and non-pirating provisions. (R. p. 39, lines 1-5). Yet, under Appellant's reading of the Arbitration Agreement, should Appellant violate an employee's confidentiality, then that claim would nonetheless be subject to arbitration. Thus, Appellant has created a plain lack of mutuality whereby under its reading it may sue its employee should that employee breach the company's confidentiality or pirate company data; yet, an employee may not sue the company should the company breach the employee's confidentiality.

Either of the above provisions render the Arbitration Agreement unconscionable, and thus, unenforceable. When read together, these offending provisions make the Arbitration Agreement "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions." *Smith*, 403 S.C. at 15, 742 S.E.2d at 40.

B. Appellant's arguments that the unforeseeable and outrageous tort exception is contrary to controlling decisions of the U.S. Supreme Court and that the exception only applies in the consumer context are unpreserved for appellate review.

Appellant contends that this Court should reverse the Circuit Court's order and compel this case to arbitration because application of the "unforeseeable and outrageous tort exception" of *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007), is contrary to decisions of the United States Supreme Court and the exception only applies in the consumer context. (App. Brief at 6–8). These arguments are unpreserved for appellate review.

"'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate courts] with a platform for meaningful appellate review.' At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is 'axiomatic that an issue cannot be raised for the first time on appeal.' Imposing such a requirement on the appellant 'is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citations omitted). "Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal." *Id.* Although "a party is not required to use the exact name of a legal doctrine in order to preserve the issue," the South Carolina Supreme Court has explained that "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Id.* at 466, 719 S.E.2d at 642.

In the Motion to Compel Arbitration, Appellant argued: (1) the Federal Arbitration Act applies "because the relationship between [Appellant] and [Respondents] involved interstate commerce"; (2) the FAA and case law interpreting the FAA "strongly favor the enforcement of agreements to arbitrate"; (3) "agreements to arbitrate claims in the employment context are valid and enforceable"; and (4) [Respondent] must be compelled to arbitrate his claim in this case because it arises out of and relates to his employment relationship with Appellant and there are no legal constraints

external to the arbitration agreement that would foreclose arbitration. (R. pp. 68-80). In Respondents' Response in Opposition, Respondents argued that there was no relationship between the Arbitration Agreement and Respondents' claim, expressly relying on the South Carolina Supreme Court's holding in *Aiken v. World Finance Corp. of South Carolina* that the plaintiff's claims for "unanticipated and unforeseeable tortious conduct" were not within the scope of the arbitration agreement. (R. pp. 97-114). At the hearing, Appellant argued that Respondents' claim is subject to arbitration because it arises out of his employment relationship and the arbitration agreement is enforceable, notwithstanding a provision in the agreement shortening the statute of limitation, because that provision is severable so that the remainder of the agreement is enforceable. (R. pp. 121-123). With respect to *Aiken*, Appellant argued that the case was factually distinguishable from the facts of this case because, in *Aiken*, the company's employee engaged in the identity theft. (R. pp. 121-122). Notably, despite being on notice that Respondents relied on *Aiken* to preclude arbitration, Appellant did not argue that *Aiken*'s outrageous tort exception was contrary to the Supreme Court's decision in *AT&T Mobility LLC v. Conception.* Appellant likewise did not argue that the outrageous tort exception was limited only to the consumer context.

The trial court's Order Denying Appellant's Motion to Compel Arbitration and Motion to Dismiss Respondents' Amended Complaint relied on *Aiken* to hold that "[Respondents'] claims in this case are 'for unanticipated and unforeseeable tortious conduct' and are, therefore, not within the scope of the arbitration agreement." (R. pp. 1-3). The trial court did not consider Appellant's arguments that the outrageous tort exception is contrary to U.S. Supreme Court precedent and is only applicable in the consumer context, and Appellant did not file a Rule 59 motion to raise those arguments and give the trial court the opportunity to consider them.

In *Simpson v. World Finance Corp. of South Carolina*, 367 S.C. 184, 623 S.E.2d 877 (Ct. App. 2007), the Court of Appeals held that, in an appeal of the denial of a motion to compel arbitration, lenders failed to preserve a claim for appellate review where the lenders did not raise the argument in their motion to compel arbitration or during the hearing before the Circuit Court and the Circuit Court did not address the issue in its order and the lenders failed to file a Rule 59 motion. *Id.* at 187–88, 623 S.E.2d at 879. Because the argument was not raised to and ruled on by the Circuit Court, it was not properly before the Court of Appeals. *Id.* And, in *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011), the South Carolina Supreme Court held that the issue of whether the FAA preempted South Carolina law, which the appellant had raised to the U.S. Supreme Court, had not been sufficiently preserved for appellate review in the state court proceedings, even though the appellant had referenced state and federal policies favoring arbitration of disputes in its filings. *Id.* at 465, 719 S.E.2d at 643. After reexamining the record, the Supreme Court observed that "[i]n all of the submissions, memoranda, and hearings before the trial court, not once was there a single mention of federal preemption as it relates to the issue before us." *Id.* at 468, 719 S.E.2d at 644. General references to policy favoring arbitration were not sufficient; "a general acknowledgment of a policy favoring arbitration is a far cry from a specifically articulated preemption argument." *Id.*

Here too, Appellant failed to raise the specific arguments regarding the outrageous tort exception to the trial court that it now makes on appeal, despite having had the opportunity to do so. Appellant never argued that the holding of *Aiken* is inconsistent with U.S. Supreme Court precedent or is limited to the consumer context in its briefing, at the hearing, or in a Rule 59 motion, so the trial court was never able to consider and rule on these issues. Even though the U.S. Supreme Court decided *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (May 21, 2018), after the date of the

trial court's order denying arbitration, that case simply confirmed the reasoning in *AT&T Mobility* and does not represent a departure from prior analysis of arbitration agreements under the FAA. (*See* App. Brief 7). *See generally S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("[I]t is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error."); *In the Interest of Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("[T]he trial court must be given an opportunity to resolve the issue before it is presented to the appellate court."). Even if these arguments were preserved for appellate review, for the reasons discussed below, they are without merit.

C. The Circuit Court did not err in relying on *Aiken v. Word Finance*, including its outrageous tort exception, in refusing to compel arbitration.

As the Circuit Court correctly noted, the South Carolina Supreme Court has specifically held that identity theft is an outrageous act. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149–50, 644 S.E.2d 705, 708 (2007). And, despite Appellant's statements to the contrary, *Aiken* has never been overruled and remains binding law in South Carolina.

In *Aiken*, in order to apply for a loan, a plaintiff was required to provide PII to a lender. *Id.* at 147, 644 S.E.2d at 706. In exchange for the loan, the plaintiff entered into an arbitration agreement covering any claims related to the loan. *Id.* Various employees of the lender used the plaintiff's personal information, and the plaintiff brought a complaint in South Carolina court against the lender. *Id.* The South Carolina Supreme Court squarely held that identity theft is outrageous conduct not subject to an arbitration agreement:

> In this case, we find the theft of Aiken's personal information by World Finance employees to be outrageous conduct that Aiken could not possibly have foreseen when he agreed to do business with World Finance.

Id. at 151, 644 S.E.2d at 709. Similarly, here, neither Respondent nor any other current or former employees of Appellant could have foreseen that Appellant's employees would give away their

information to identity thieves. Contrary to Appellant's argument, while the facts in *Aiken* dealt with a consumer issue, the Supreme Court did not limit its holding to the consumer context. *See id.* at 149–52, 644 S.E.2d at 708–10. In fact, the Court made clear that, generally speaking, the theft of PII constitutes "outrageous conduct that [a party] could not possibly have foreseen." *Id.* at 151, 644 S.E.2d at 709.

Appellant further argues that *Aiken* is inapplicable because identity theft is foreseeable. In fact, Appellant goes on to say that "it is reasonable for every person to expect that at some point there will be an attack on their PII." (Initial Brief of Appellant, at 10). Even assuming that this might be true, it wholly mischaracterizes what occurred in this case. This was not a "typical" cyber-attack. Here, an ISCO employee affirmatively and willfully gave PII to an identity thief. Appellant is asking the Court to find that if a person is required to give PII to their employer, it is foreseeable that the employer would act in contravention of any and all authentication policies and affirmatively hand over sensitive data to any unverified entity who requested it. And this conduct, as noted in the Amended Complaint, was willful and thus outrageous. (R. p. 14, lines 21-23, p. 56, lines 5-9). [2]

III. The Circuit Court correctly ruled that Respondents' claim did not arise out of his employment relationship with Appellant.

Even if the Arbitration Agreement were otherwise valid, there is no "significant relationship" between the asserted claims and the Arbitration Agreement. *See Zabinski v. Bright Acres Assocs.*,

[2] Appellant wrongly attempts to analogize this case to *Wilson v. Willis*, 416 S.C. 395, 419, 786 S.E.2d 571, 583 (Ct. App. 2016). In that case, the gravamen of the torts at issue did not involve identity theft, but rather a failure to train and supervise. *Id.* Further, as discussed more fully herein, *Wilson* relied on the fact that the arbitration claims were encompassed by the arbitration provision while the claims here fall well outside the scope of the arbitration provision.

346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); R. p. 51, lines 15-17 (alleging that the "claim at bar does not bear a substantial relationship to the employment agreement or arbitration clause")).

Courts hold that even the most broadly-worded arbitration agreements apply only to disputes in which a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119 (quoting *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001), *overruled on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010)). In fact, despite Appellant's argument that the Circuit Court relied "solely" on an outrageous tort exception, the Circuit Court squarely held otherwise: "The Court finds that there is no relationship between the subject matter of Plaintiff's claims in this case and the arbitration agreement, which relates to employment." (R. pp. 1-3).

The Circuit Court was correct, and there was ample evidence to support this ruling. The Arbitration Agreement here states that it governs claims "arising out of or relating to . . . employment." (R. pp. 48-49) The crux of the claim at issue is that Appellant recklessly, and with gross negligence, gave identify thieves the PII of Respondent and several others. (R. p. 52, lines 3-6). Although Appellant collected Respondents' PII upon employment, and thus had a duty to protect it as the information's custodian, it is a stretch to say that Appellant wrongfully handing over personal information "arises out of or relates to" Respondents' employment. Certainly, such action could not have been anticipated as stemming from the employer/employee relationship.

As noted by the Court in *Aiken*:

> [I]n signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct. Accordingly, we hold that Aiken's claims . . . are not within the scope of the arbitration agreement with World Finance.

373 S.C. at 151, 644 S.E.2d at 709 (footnote omitted). In fact, it strains credulity for Appellant to argue that such a data breach would arise out of the employment relationship when a data breach

by the employee would presumably not arise out of the employment relationship as evidenced by Appellant's own Arbitration Agreement. (R. pp. 38-39).

Appellant's reliance on *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013), is misplaced. In *Landers*, the conduct at issue involved a CEO's "defamatory statements . . . directly related to [the plaintiff's] ability to perform his duties [as an employee]." *Id.* at 111, 739 S.E.2d at 214–15. A CEO making statements about an employee's work-based performance is plainly within the scope of employment, and is a far cry from a company representative giving out an employee's PII to an unauthorized third party in contravention of company policy.

In fact, in reaching its conclusion, the *Landers* Court distinguished *McMahon v. RMS Electronics, Inc.*, 618 F. Supp. 189 (S.D.N.Y. 1985). *See Landers*, 402 S.C. at 110–11, 739 S.E.2d at 214–15. In *McMahon*, as interpreted by *Landers*, an arbitration agreement was correctly found to be outside the scope of the employment agreement where the employee's claim did not require reference to the underlying contract and did not require an interpretation of the contractual agreement between the two parties. *Landers*, 402 S.C. at 110–11, 739 S.E.2d at 214 (citing *McMahon*, 618 F. Supp. at 193). The district court in *McMahon* noted a claim "is not arbitrable simply because the statements were made during the term of . . . employment." *Landers*, 402 S.C. at 110–11, 739 S.E.2d at 214 (quoting *McMahon*, 618 F. Supp. at 193). Here, Respondents' claim requires no reference to the underlying agreement (which, as noted previously, is solely an arbitration agreement), nor does it require interpretation of that agreement or the employment relationship (which had ended for Respondent). In fact, the only relation Respondents' claim has to employment is that the data which was released was tendered to the employer at the onset of employment.

Like *McMahon*, cases from similar jurisdiction examining analogous situations have reached identical conclusions. In *Smith v. Captain D's, LLC*, 963 So. 2d 1116 (Miss. 2007), the Supreme

Court of Mississippi denied arbitration using similar reasoning. In that case, an employee sued her employer for negligently hiring a manager who subsequently assaulted her. *Id.* at 1118. The court rejected the employer's argument that the claim at issue fell within the parties' arbitration agreement for claims "arising out of or relating to" the plaintiff's employment.

The Supreme Court of Mississippi recently reaffirmed and expounded on the logic behind this holding. In *Doe v. Hallmark Partners, LP*, 227 So. 3d 1052, 1056 (Miss. 2017), *reh'g denied* (Aug. 10, 2017), a tenant sued her landlord for negligent security practices after she was assaulted at her apartment complex. The court rejected the landlord's argument that the claim at issue fell within the parties' arbitration agreement:

> Notably, Jane's complaint does not allege lease-based or contract-based claims. In other words, Jane does not suggest her claims "arise out of" her "occupancy and leasing of [her apartment]." Rather, she seeks recovery based on her status as an invitee of the apartment complex and the common-law duties Hallmark and SEI owed to lessees and non-lessees alike.

Id. at 1056. Thus, while Jane Doe may have been in the position to be attacked as a result of signing a lease with her landlord, the allegations against the landlord stemmed from the landlord's failure to protect those on their property. Here, while Respondent may have been in the position to have his information stolen as a result of having given that information to his employer, the allegations stem from the duty Appellant would owe to anyone for whom it possesses PII. Additionally, like the situation in *Hallmark Partners,* Respondent does not suggest the claims arise out of employment. Instead, the Complaint here specifically notes that the "claim at bar does not bear a substantial relationship to the employment agreement or arbitration clause." (R. p. 51, lines 15-17).

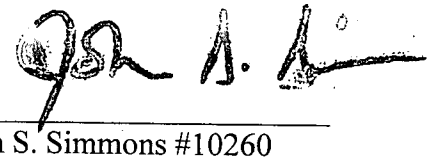
Thus, the Circuit Court correctly denied the motion to compel arbitration as to "interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would

be inconsistent with" the goal of arbitration. *Aiken*, 373 S.C. at 152, 644 S.E.2d at 710. Certainly, the Circuit Court's factual findings are supported by some reasonable evidence. *See Thornton*, 357 S.C. at 94, 592 S.E.2d at 51.

CONCLUSION

Based on the foregoing reasons, this Court should affirm the judgment of the Circuit Court.

Respectfully submitted,



October 2, 2018

John S. Simmons #10260
Derek A. Shoemake #78398
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201
Tel: (803) 779-4600

John B. White, Jr. # 5996
Marghretta H. Shisko # 100106
Ryan F. McCarty # 74198
HARRISON | WHITE, P.C.
178 West Main Street
Spartanburg, SC 29306
Tel: (864) 585-5100

Attorneys for Respondents