THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case 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 APPELLANT

October 12, 2018

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN APPLYING THE UNFORESEEABLE AND OUTRAGEOUS TORT EXCEPTION AND DENYING ISCO'S MOTION TO COMPEL ARBITRATION?

2. 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

Respondent Daniel Lee Davis (hereinafter "Davis") filed this action on September 13, 2017, alleging claims for breach of contract and negligence against Appellant ISCO Industries, Inc. (hereinafter "ISCO"). (R. pp. 7-17.) ISCO filed a Motion to Dismiss and Compel Arbitration on October 16, 2017. (R. pp. 18-49.) Davis filed an Amended Complaint on November 15, 2017, and removed his cause of action for breach of contract. (R. pp. 50-60.) ISCO renewed its Motion to Dismiss and Compel Arbitration on November 30, 2017. (R. pp. 61-96.) On February 21, 2018, Davis filed a Memorandum in Opposition to ISCO's Motion to Dismiss and Compel Arbitration. (R. pp. 97-114.) On February 23, 2018, Circuit Court Judge R. Keith Kelly held oral arguments on ISCO's Motion to Dismiss and Compel Arbitration. (R. pp. 115-140.) On April 6, 2018, Judge Kelly issued an order denying ISCO's Motion. (R. pp. 1-4.) ISCO filed a Notice of Appeal on May 3, 2018.

STANDARD OF REVIEW

Circuit court determinations of arbitrability are reviewed *de novo* on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009).

FACTS

ISCO is a Kentucky Corporation with its principal place of business in Kentucky. (R. p. 82.) Davis is a citizen and resident of South Carolina. (R. p. 50, ¶ 1.) ISCO is a global customized piping solutions provider. It maintains employees, manufacturing facilities and distribution sites in over 35 states. (R. p. 82.)

ISCO hired Davis to work at its South Carolina facility on May 30, 2007. At the initiation of employment, Davis signed an Arbitration Agreement with ISCO. (R. p. 82, ¶ 4.) Davis worked for ISCO in South Carolina. His employment records were maintained at the Company's corporate office in Kentucky. (R. p. 82, ¶ 5.)

Davis worked for ISCO as a mechanic and a field technician. As a field technician, Davis assisted on work-related calls with individuals outside of South Carolina. (R. p. 82, ¶ 6.) During his employment with ISCO, Davis attended annual sales meetings and safety meetings outside of South Carolina. (R. p. 82, ¶ 7.)

The data breach that is the subject of Davis's Amended Complaint occurred on March 2, 2016. (R. p. 82, ¶ 8; R. p. 51, ¶ 13.) It affected 449 current and former

employees throughout 35 states. (R. p. 82, ¶ 8.) Specifically, on March 2, 2016, an employee in ISCO's human resources department received an e-mail from someone posing as a senior executive at ISCO asking for employee 2015 IRS Form W-2 data. (R. p. 88; R. p. 51, ¶¶ 13-14.) Because the e-mail appeared to come from within ISCO, the employee gathered the requested W-2 data in electronic format and transmitted the information by return e-mail. (*Id.*)

Two days after the data breach, on March 4, 2016, ISCO sent the affected employees a letter providing notice of the data breach. (R. p. 83, ¶ 9; R. p. 52, ¶ 18.) ISCO provided these employees with free identity theft protection services through LifeLock. (R. pp. 83, ¶ 9.) On March 29, 2017, ISCO informed these employees that it had again retained LifeLock for an additional year of free identity theft monitoring. (R. pp. 83, ¶ 10; R. pp. 92-93.) Following the data breach, the affected employees have currently been provided with two years of free identity theft protection services through LifeLock. (*Id.*) ISCO again recently renewed this coverage for an additional year so that these employees remain covered with free identity theft monitoring through May 18, 2019.

Davis alleges that he has been damaged as a result of the data breach that included his personal identifying information ("PII"). Davis's Amended Complaint alleges that ISCO was negligent in failing to prevent this data breach.

The Arbitration Agreement signed by Davis at the initiation of his employment with ISCO contains a mandatory arbitration clause for "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. (R. p. 85, ¶1.)

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN APPLYING THE UNFORESEEABLE AND OUTRAGEOUS TORT EXCEPTION AND DENYING ISCO'S MOTION TO COMPEL ARBITRATION.

The circuit court denied ISCO's Motion to Compel Arbitration based solely on the reasoning in *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007). (R. pp. 1-2.) In *Aiken*, the Court created an "unforeseeable and outrageous torts exception" to enforcing arbitration agreements. The Court ruled that that it would "refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." 373 S.C. at 151, 644 S.E.2d 709. *Aiken* involved an arbitration agreement in a commercial contract and a theft and improper use of the plaintiff's information by the defendant's employees. *Id.* The South Carolina Supreme Court held that the arbitration agreement in this commercial contract did not apply because the alleged conduct by the defendant in intentionally stealing the borrower's personal information was not foreseeable and involved an outrageous

tort. *Id.* This exception created in *Aiken* is not applicable to the instant case because it is contrary to the United States Supreme Court's ruling in *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). Further, the ruling in *Aiken* is limited to the consumer context and does not apply to employment. In addition, the exception in *Aiken* is limited to claims that are both unforeseeable and allege outrageous torts committed by the defendant, neither of which apply in this case.

A. THE FEDERAL ARBITRATION ACT APPLIES TO THE ENFORCEMENT OF ISCO'S ARBITRATION AGREEMENT.

In its Motion to Compel Arbitration, ISCO argued that the Federal Arbitration Act ("FAA") applied in this case. (R. pp. 70-72.) Davis did not challenge the applicability of the FAA. (R. pp. 97-114.) The FAA applies in this case because the relationship between ISCO and Davis involved interstate commerce. For example,

1. ISCO is a Kentucky corporation with its principle place of business in Louisville, Kentucky;
2. ISCO's human resources department and personnel files are kept in Kentucky;
3. Davis is a South Carolina resident;
4. Davis worked for ISCO in South Carolina;

5. Davis worked for ISCO in areas outside of South Carolina. Davis worked for ISCO as a mechanic and a field technician. As a field technician, Davis assisted on work-related calls with individuals outside of South Carolina.
6. During his employment with ISCO, Davis attended annual sales meetings and safety meetings outside of South Carolina.

(R. pp. 82-83.)

The FAA and well-established case law interpreting the FAA strongly favor the enforcement of agreements to arbitrate. Section 2 of the FAA provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2013).

The United States Supreme Court repeatedly has stated that the FAA represents '"a liberal federal policy favoring arbitration agreements.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). As the Fourth Circuit has explained, "Pursuant to that liberal policy, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'" *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273-274 (4th Cir. 1997). Moreover, the strong federal policy favoring

arbitration applies with equal force to claims created by contract or by statute. *Id.* at 274.

It is well settled that agreements to arbitrate claims in the employment context are valid and enforceable. *See, e.g. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (stating, "We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context . . . . Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.") (Internal citations omitted). "The (FAA) leaves no place for the exercise of discretion by a district court, but instead mandates that the district court *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original).

South Carolina courts, the Fourth Circuit, and other state courts routinely and consistently enforce agreements to arbitrate employment disputes. *See Towles v. United HealthCare Corp.,* 338 S.C. 29, 41, 524 S.E.2d 839, 846 (1999) (holding that the arbitration agreement covered a former employee's claims and noting that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *O'Neil,* 115 F.3d at 276. "It is the policy of [South Carolina] and

federal law to favor arbitration[,] and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir.1996)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC,* 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

As outlined below, the circuit court erred in failing to apply these principles in favor of arbitration.

B. THE UNFORESEEABLE AND OUTRAGEOUS TORT EXCEPTION IS CONTRARY TO THE UNITED STATES SUPREME COURT'S RULING IN *AT&T MOBILITY V. CONCEPCION.*

In *AT&T Mobility, L.L.C. v. Concepcion*, the United States Supreme Court reiterated its position that arbitration agreements must be placed on "equal footing" with other contracts and enforced according to their terms. 563 U.S. at 339. In *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 9, 791 S.E.2d 128, 132 (2016), South Carolina Supreme Court Justices Pleicones writing the majority opinion recommended overruling *Aiken's* unforeseeable and outrageous tort exception "[b]ecause the outrageous torts exception is not a general contract principle, but instead one that has been applied only to arbitration clauses .

. ." Justices Pleicones opined that this exception was inconsistent with *Concepcion* and its supporting federal jurisprudence and recommending overruling *Aiken*. *Id.* ("Accordingly, to the extent South Carolina cases apply the outrageous torts exception, I would now overrule those cases and find the trial court erred by determining the exception precluded enforcement of the arbitration clause.")

The United States Supreme Court recently confirmed the reasoning in *Concepcion* in *Epic Sys. Corp. v. Lewis*, Nos. 16-285, 16-300, 16-307, 2018 U.S. LEXIS 3086 (May 21, 2018). In *Lewis*, the Court analyzed the savings clause of the FAA and ruled that "the savings clause recognizes only defenses that apply to 'any' contract. In this way the clause establishes a sort of 'equal treatment' rule for arbitration contracts." *Id.* at *15 citing *Kindred Nursing Centers L. P. v. Clark*, 137 S. Ct. 1421, 197 L. Ed. 2d 806, 812 (2017). In *Lewis*, the employees argued that the enforcement of a class waiver in an arbitration clause is contrary to the National Labor Relations Act and was thus "illegal" as a matter of federal statutory law. *Lewis*, at *18-19. The Court ruled that this was not sufficient to challenge the arbitration agreement because this defense was not "unconscionable" as a matter of state common law. *Id.*

The "unforeseeable and outrageous tort exception" is a concept that applies solely to arbitration agreements. It is not an "unconscionable" defense as a matter of state common law. Therefore, it is contrary to the interpretation of the FAA in

Concepcion and *Lewis*. For these reasons and the reasons outlined by Justices Pleicones in *Parsons*, the circuit court erred in applying the "unforeseeable and outrageous tort exception" to deny arbitration in this case.

C. THE UNFORESEEABLE AND OUTRAGEOUS TORT EXCEPTION ONLY APPLIES IN THE CONSUMER CONTEXT, NOT IN THE EMPLOYMENT CONTEXT.

In *Aiken*, the Court limited the "unforeseeable and outrageous tort exception" to consumers in normal business dealings. Specifically, it ruled that "[b]ecause even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Aiken,* 373 S.C. at 151, 644 S.E.2d at 709. The South Carolina Supreme Court has not applied this exception in the employment context. Rather, all of its application has been in the consumer context. *See Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 689 S.E.2d 602 (2010); *Chassereau v. Glob.-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007).

Davis signed an arbitration agreement at the initiation of employment that applies to any claims that arise out of or relate to employment. He did not have a consumer relationship with ISCO. He was not a consumer protected under the "unforeseeable and outrageous torts exception." Therefore, the circuit court erred in denying ISCO's Motion to Compel Arbitration.

D. THE UNFORESEEABLE AND OUTRAGEOUS TORT EXCEPTION DOES NOT APPLY IN THIS CASE BECAUSE THE ALLEGED CONDUCT WAS FORESEEABLE.

Even assuming the "unforeseeable and outrageous tort exception" remains viable after *Concepcion* and *Lewis* and applies in the employment context, it still requires a finding that the alleged conduct was both unforeseeable and involved an outrageous tort. The circuit court erred in ruling that the alleged negligent conduct of ISCO was not foreseeable. In *Aiken*, the Court ruled that it was not foreseeable that the defendant would obtain the plaintiff's information through a commercial contract and then steal that information to use for a criminal purpose. A significant difference between *Aiken* and the instant case is that in *Aiken* the defendant engaged in the outrageous conduct. Here, Davis only alleges that ISCO was negligent in failing to protect his information from outside cyber-criminals.

Davis's claims against ISCO are more comparable to the claims in *Wilson v. Willis*, 416 S.C. 395, 419-420, 786 S.E.2d 571, 583-584 (Ct. App. 2016). In *Wilson*, the plaintiff alleged that the insurer failed to sufficiently investigate, train, supervise, and audit its agent. *Id.* The Court of Appeals ruled that "such tort claims are rather commonplace" and that it could not say that these claims were "clearly not within the contemplation of the parties" to the arbitration agreement. *Id.* citing *Partain*, 689 S.E.2d at 605. Thus, the Court reversed the circuit court and compelled arbitration. *Wilson*, 786 S.E. 2d 583-584.

The alleged negligent conduct in the instant case is rather commonplace and was reasonably foreseeable. Davis argues that it was not reasonably foreseeable when he was required to disclose PII throughout his employment relationship with ISCO that cyber-criminals would attempt to steal this information and that ISCO's employees would act negligently in failing to protect this information. However, in this age of technology and cybercrimes it is reasonably foreseeable that cybercriminals are constantly attempting to steal PII. A corporation's failure to completely protect from cyber-attacks is commonplace. It is likely impossible to provide complete protection. The number of data information breaches is overwhelming and this only includes the breaches that are actually reported. According to 2017 information, data records were lost or stolen 82 times every second. *https://breachlevelindex.com/assets/Breach-Level-Index-Report-2017-Gemalto.pdf.* The news media frequently reports on significant data breaches that have impacted a vast majority of Americans. In 2017, Equifax reported a breach that impacted 145.5 million U.S. consumers. *https://www.calyptix.com/top-threats/biggest-cyber-attacks-2017-happened/.* ISCO has confirmed that Davis's information was stolen as a result of the Equifax breach. *https://trustedidpremier.com/eligibility/eligibility.html.* In 2017, Uber suffered a data breach that resulted in hackers accessing PII of more than 57 million Uber drivers and riders. *https://www.calyptix.com/top-threats/biggest-cyber-attacks-*

2017-happened/. In 2017, Verizon purchased Yahoo and learned that a 2013 breach actually impacted 3 billion accounts. *Id.* In each of these examples, some of the most technologically advanced companies in the United States failed to prevent the data breach. In addition, governmental agencies have been targets of cybercrimes. In fact, in 2012, the South Carolina Department of Revenue suffered a data breach that exposed 3.6 million Social Security numbers and 387,000 taxpayers' credit and debit card numbers when a database server was hacked. *https://www.infoworld.com/article/2615754/cyber-crime/south-carolina-reveals-massive-data-breach-of-social-security-numbers--credit-cards.html.*

Therefore, it is reasonable for every person to expect that at some point there will be an attack on their PII. Most South Carolina residents have had their PII exposed or stolen. It is reasonable for an employee who must provide PII to his employer to expect that there will be outside attacks on this information. It is reasonable to foresee that an individual or company will be unable to prevent all data breaches. This is much more foreseeable than an employee foreseeing that his employer will tortiously defame him. *See Landers*, 402 S.C. at 110, 739 S.E.2d at 214 (enforcing an employment related arbitration agreement where the employer allegedly committed tortious acts of slander and outrage). It is not logical to find that an employer can be granted arbitration when it engaged in tortious conduct by providing information that defames an employee, but is denied arbitration when

employee information is subject to very common cyber-attacks. Such an expansive view of foreseeability will lead to inconsistent results and require all arbitration agreements to include an extensive and exhaustive list of the potential claims that are covered by arbitration. As outlined in Section A above, this is contrary to the broad applicability of the FAA. The circuit court erred in ruling that ISCO's alleged negligent conduct was not foreseeable. Therefore, the circuit court erred in denying ISCO's Motion to Compel Arbitration.

E. THE UNFORESEEABLE AND OUTRAGEOUS TORT EXCEPTION DOES NOT APPLY IN THIS CASE BECAUSE THE ALLEGED CONDUCT BY ISCO DOES NOT INVOLVE AN OUTRAGEOUS TORT.

Even assuming that ISCO's conduct was not foreseeable, Davis cannot satisfy the second part of the "unforeseeable and outrageous tort exception." Davis has not alleged that ISCO or its agents or employees engaged in conduct that constitutes an outrageous tort. The circuit court erred in focusing on the conduct of the cyber-criminals rather than the conduct of ISCO, an innocent victim of the cyber-criminals fraudulent scam. (R. pp. 1-2.) In *Aiken*, the plaintiff asserted the tort claim of outrage against the defendant, not an unknown third party cybercriminal. This exception does not apply to simple claims of negligence, which is the only claim in this case. Unlike the defendant in *Aiken*, ISCO's employees did not steal Davis's information. The Amended Complaint clearly alleges that a third party criminal

deceived ISCO's employee into providing information under false pretenses. (R. p. 51, ¶¶ 13-14; R. p. 52, ¶¶ 15-16.)

As discussed above, Davis's claims against ISCO are more comparable to the claims in *Wilson*, 416 S.C. at 419-20, 786 S.E.2d at 583-84. In *Wilson*, the court ruled that the claims centered on the "Insurers' alleged failure to sufficiently investigate, train, supervise and audit Willis." *Id.* The court ruled that these claims against the defendant insurer "do not involve intentional or otherwise outrageous conduct." *Id.* Thus, the court ruled that the "unforeseeable and outrageous tort exception" did not apply to bar arbitration. *Id.* Similarly, in *Timmons v. Starkey*, 389 S.C. 375, 378, 698 S.E.2d 809, 811 (2010), the Court refused to apply the "unforeseeable and outrageous tort exception" where "there were no allegations susceptible of a construction that [the defendant] acted either illegally or outrageously."

Davis's claims are essentially that ISCO did not sufficiently train the human resources official who was deceived into sending W-2 information to the cyber-criminal, and that ISCO did not take sufficient steps to protect the information. This is clearly not the type of outrageous conduct contemplated by *Aiken*. Therefore, the circuit court erred in applying the "unforeseeable and outrageous tort exception" to the sole claim for negligence in this case.

II. THE CIRCUIT COURT ERRED IN RULING THAT DAVIS'S NEGLIGENCE CLAIM DID NOT ARISE OUT OF OR RELATE TO HIS EMPLOYMENT RELATIONSHIP WITH ISCO.

The negligence claim in this case is within the scope of ISCO's arbitration agreement. In examining the scope of arbitration agreements, the South Carolina Supreme Court has traditionally considered whether there is a "significant relationship" between the claims asserted and the contract in which the arbitration clause is contained. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001); *Parsons*, 791 S.E.2d at 135. There is a significant relationship between Davis's employment relationship with ISCO and the alleged negligent conduct in this case.

ISCO offered, and Davis accepted, the terms of the Arbitration Agreement at the initiation of employment. This arbitration clause in this case is broad, as Davis agreed to arbitrate "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 "exclusively by final and binding arbitration before a single, neutral Arbitrator." (R. p. 95, ¶ 1).

The allegations in this case arise out of and relate to employment. Davis worked for ISCO for approximately 8 years after signing the Arbitration Agreement. (R. p. 51, ¶¶ 9-11.) During this entire time of Davis's employment, ISCO was required under applicable tax and employment laws to maintain Davis's PII and

report his PII to governmental agencies. ISCO was required to maintain an updated and valid W-4 and to annually issue an IRS Form W-2. Davis admits that he was required to provide this PII information to ISCO as part of his "employment." (R. p. 51, ¶10.) Davis's Amended Complaint alleges that ISCO improperly disclosed PII to a third party who fraudulently disguised his e-mail address as that of a senior executive. (R. p. 52, ¶ 16.) Specifically, on March 2, 2016, an employee in ISCO's human resources department received an e-mail from someone posing as a senior executive at ISCO asking for ISCO's 2015 IRS Form W-2 data. (R. p. 88.) Because the e-mail appeared to come from within ISCO, the employee gathered the requested W-2 data in electronic format and transmitted the information by return e-mail. (*Id.*) Because Davis was employed by ISCO in 2015, his information was disclosed. The human resources employee who Davis alleges improperly disclosed PII was acting within the course and scope of her employment with ISCO in allegedly mishandling the PII. (R. p. 51, ¶¶ 12-14; R. p. 52, ¶¶ 15-16.) The fraudulent request was related to employment as the criminal claimed to need employee W-2 information.

Thus, Davis provided PII because of his employment, ISCO was required to maintain and report the PII as his employer, the fraudulent request was related to alleged employment purposes, the human resources official who disclosed the PII only had access to Davis's information because she was an employee of ISCO, this human resources official was the records custodian for Davis's employment records,

and this human resources official was at all times acting within the scope of her employment duties as a human resources official for ISCO. The alleged negligent conduct has a significant relationship to Davis's employment relationship with ISCO.

Moreover, Davis has admitted the significant relationship between his allegations and his employment with ISCO. In the original Complaint, Davis alleged that ISCO breached an employment contract with him by allowing this theft of PII to occur. (R. p. 12, ¶¶ 41-42; R. p. 13, ¶¶ 41-46.) Davis alleged that providing PII was a condition precedent to employment. (R. p. 12, ¶ 42.) Davis alleged that in light of the sensitive nature of this PII, ISCO implicitly promised Davis that it would take adequate measures to safely store PII. (R. p. 13, ¶ 43.) Perhaps most significantly, Davis further alleged that this implied promise was material to Davis's decision to accept employment and that he would not have disclosed PII without implied assurances that it would be safeguarded. (R. p. 13, ¶ 44.) Davis's original contract claim and factual allegations were contrary to the argument that Davis's claims did not arise out of or relate to employment. In fact, these allegations confirmed such a substantial relationship. It was only after ISCO moved to compel arbitration that Davis moved to amend his complaint to remove this claim and these allegations. Thus, Davis's own prior statements confirm the applicability of the arbitration agreement.

Significantly, in *Landers*, the Court interpreted a broad arbitration agreement similar to ISCO's agreement that applies to any claim that arises out of or relates to employment. *Landers*, 402 S.C. at 112, 739 S.E.2d at, 214-15. In *Landers*, the plaintiff asserted claims for slander and intentional infliction of emotional distress (outrage). Despite the outrageous nature of the tort claims, the Court ruled that there was a significant relationship between the claims and employment. *Id.* The Court relied on the strong policy favoring arbitration and the heavy presumption in favor of arbitration. *Id.*, *see also Marzulli v. Tenet S.C., Inc.*, No. 2018-UP-132, 2018 S.C. App. Unpub. LEXIS 134, at *14 (Ct. App. Mar. 28, 2018) (applying *Landers* and the strong policy favoring arbitration and ruling that the plaintiff's defamation claim was significantly related to her employment as it involves an allegation the plaintiff inappropriately touched a patient while working at Hospital.).

The circuit court's ruling is contrary to the reasoning in *Landers*. Both *Landers* and the instant case involve the use of employee information. In *Landers*, the employer falsely reported employee information. In the instant case, the employer allegedly acted negligent in failing to protect employee information. In essence the circuit court's reasoning means that an employer can falsely report employee information and compel arbitration, but if it is negligent in handling that same information it cannot compel arbitration. Such a ruling is completely contrary to the intent and broad applicability of the FAA.

At a minimum, there is a legitimate question regarding the issue of scope in this case. This question must be resolved in favor of arbitration. "The heavy presumption in favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Parsons,* 418 S.C. at 7, 791 S.E.2d at 131 (internal citations omitted). "Further, unless the Court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Carolina Care Plan, Inc. v. United HealthCare Servs.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004).

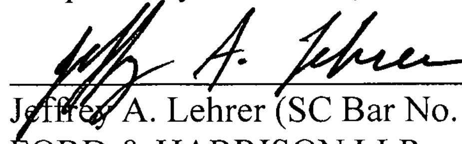
Therefore, the circuit court erred in failing to apply this heavy presumption and in ruling that there was no relationship between the subject matter of Davis's claims and the arbitration agreement.

CONCLUSION

For the reasons stated above, this Court should reverse the Order of the circuit court and compel this matter to arbitration.

October 12, 2018

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

RECEIVED
OCT 12 2018
SC Court of Appeals

R. Keith Kelly, Circuit Court Judge

Case No. 2017-CP-42-03283

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

v.

ISCO Industries, Inc., Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

October 12, 2018

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