RECEIVED
OCT 12 2018
SC Court of Appeals

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
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 REPLY BRIEF OF APPELLANT

October 12, 2018

Jeffrey A. Lehrer (SC Bar No. 16687)
FORD & HARRISON LLP
100 Dunbar Street, Suite 300
Spartanburg, SC 29306
Telephone: (864) 699-1100
Facsimile: (864) 699-1101
jlehrer@fordharrison.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

ARGUMENTS IN REPLY

1. The Arbitration Agreement is not unconscionable based on the shortened statute of limitations contained in a separate paragraph of the Agreement.

The parties' agreement to arbitrate is not unconscionable based on the Agreement containing a separate provision shortening the statute of limitations. Davis argues that the shortened statute of limitations in Paragraph 2 of the Agreement is not reasonable or enforceable and invalidates the agreement to arbitrate. (Brief of Respondents p. 5-6.) While this issue was argued to the circuit court, the court did not rule on this issue. Courts have the discretion to sever these types of provisions from the agreement and enforce the arbitration provision without the shortened statute of limitation. Severing this provision is well supported by *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 874 (Ct. App. 2013). In *Carlson*, this Court severed a shortened statute of limitation and enforced an arbitration clause. This Court ruled that the reduction of the statute of limitations was in a separate and distinct paragraph from the agreement to arbitrate and was not relevant to a determination of whether the arbitration clause was unconscionable. *Id.* South Carolina law clearly provides that "arbitration clauses are severable from the contracts in which they are embedded." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 125, 713 S.E.2d 799, 804, (Ct. App 2011) *citing S.C.*

Pub. Serv. Auth. v. Great W. Coal, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993); *The Hous. Auth. of City of Columbia v. Cornerstone Housing, L.L.C.*, 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003).

Here, the Agreement contains clearly severable paragraphs. The agreement to arbitrate is contained in Paragraph 1 of the Agreement. (R. p. 95.) The shortened statute of limitations is solely contained in Paragraph 2 of the Agreement and is separate from the agreement to arbitrate. (*Id.*) Furthermore, Paragraph 4 of the Agreement states,

> The provisions of this Agreement shall be severable. If any portion of this Agreement is held to be invalid or unenforceable, it shall not be affect (sic) the remaining portions of this Agreement. This Agreement may be modified by a court or an arbitrator to render it enforceable.

(R. p. 96.)

The FAA's savings clause requires that arbitration agreements be treated the same or placed on "equal footing" as any other contract. 9 U.S.C. § 2; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018); *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). Davis argues that the statute of limitation provision is not severable because it is contained in an Arbitration Agreement rather than in an employment contract as it was *Carlson*. (Brief of Respondents p. 6.) This argument is contrary to the requirements of the

FAA. Because a reduced statute of limitations provision is severable from an employment contract (i.e. *Carlson*) it must also be severable from an Arbitration Agreement.

The South Carolina Supreme Court has acknowledged that severability in arbitration agreements is proper. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34-36, 644 S.E.2d 663, 674 (2007). While the Court in *Simpson* ultimately severed the entire arbitration clause from the contract, this was based on the conclusion that the arbitration provision contained a "number of oppressive and one-sided provisions" and that the Court would ultimately be "rewriting" rather than severing the unenforceable provisions. *Id.* The Court acknowledged that this issue must be addressed on a case by case basis. *Id.*

Davis has only alleged that two separate paragraphs of the Arbitration Agreement are unconscionable. As discussed in Section 2 below, the exclusion of restrictive covenants claims is clearly reasonable and enforceable. Thus, in this case there is ultimately only one alleged unenforceable provision in the Agreement, the shortened statute of limitations. Based on the reasoning of *Simpson* and *Carlson*, and the savings clause of the FAA, this provision must be severed and the arbitration provision must be enforced. For these reasons, Davis's argument related to the shortened statute of limitations should be rejected as a bar to arbitration in this case.

2. The Arbitration Agreement is not unconscionable based on an exclusion of claims related to restrictive covenants designed to protect employer confidential information and customer good will.

Davis argues that the exclusion of certain claims from arbitration causes the agreement to be unconscionable and unenforceable. (Brief of Respondents pp. 6-7.) Davis cites the theory of mutuality of remedy to support this argument. However, under South Carolina contract law, "a lack of mutuality of remedy does not invalidate a contract." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541-42, 542 S.E. 2d 360, 365 (2001) *citing Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 400-01, 498 S.E.2d 898, 905 (Ct. App. 1998).

Furthermore, the doctrine of mutuality of remedy does not apply in this case because Davis is not deprived of a remedy for his own confidentiality claim or any other claim. "An agreement providing for arbitration does not determine the remedy for a breach of contract but only the forum in which the remedy for the breach is determined." *Munoz,* 343 S.C. at 541-42, 542 S.E. 2d at 365. In *Munoz*, the Court held that an arbitration agreement that allowed the lender to seek foreclosure while requiring the consumer to arbitrate any counterclaim was not unconscionable for lack of mutuality of remedy. *Id.*; *see also Lackey,* 330 S.C. at 498 S.E.2d at 905.

Davis's reliance on *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) to support his argument is

misplaced. In *Smith*, the agreement actually limited "liability" against one party. *Id.* at 15. The South Carolina Supreme Court ruled,

> D.R. Horton's attempts to disclaim implied warranty claims and prohibit *any* monetary damages are clearly one-sided and oppressive. Under the terms of paragraph 14, the only remedy provided for a defect in the home is repair or replacement—options left entirely in the discretion of D.R. Horton. This is no remedy at all because it leaves the relief to the whim of D.R. Horton while simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate.

Smith, 417 S.C. at 50, 790 S.E.2d at 5 (2016).

In the instant case, Paragraph 3 of the Arbitration Agreement simply allows ISCO to exclude restrictive covenant issues from arbitration. (R. p. 96. ¶ 3.) It does not limit Davis's rights to bring any claims in arbitration or to seek any specific remedy. In fact, Davis has the right to seek injunctive relief in court despite the arbitration clause. "Where a dispute is subject to mandatory arbitration under the Federal Arbitration Act, a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a 'hollow formality." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1053-54 (4th Cir. 1985).). Davis has failed to demonstrate how he is unable to get the same relief in arbitration which is available in a judicial setting. *Lackey*, 330 S.C. at 400-01, 498 S.E.2d at 905. Thus, there is no lack of mutuality of remedy in this case.

Even assuming that a restrictive covenant exclusion is unenforceable, which it is not, it is severable as discussed in Section 1 above. Significantly, in *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016), this Court distinguished *Smith v. D.R. Horton, Inc.*, based on the inclusion of a severability clause. *Id.* ("Moreover, unlike the arbitration agreement in *D.R. Horton*, the legal remedies paragraph contains a severability clause."). In *One Belle Hall Prop. Owners Ass'n,* the contract limited the defendant's liability but contained a severability clause. This Court ruled the alleged oppressive provisions were separate from the agreement to arbitrate, that the agreement contained a severability clause and that arbitration was proper. *Id.*

Finally, provisions excluding restrictive covenants from arbitration are very reasonable and common based on the need for employers to obtain immediate and permanent injunctive relief to stop a breach and protect against unfair competition. *See UBS PaineWebber, Inc. v. Aiken*, 197 F. Supp. 2d 436, 441 (W.D.N.C. 2002) ("Under the terms of the PEA, however, PaineWebber reserved the right to seek preliminary injunctive relief from a court of competent jurisdiction."); *Sillins v. Ness*, 164 N.C. App. 755, 756, 596 S.E.2d 874, 875 (2004)(ruling that an arbitration agreement that excluded the employer's right to enforce the restrictive covenant and seek remedies in court was enforceable if the FAA applied.); *Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 344 (8th Cir. 1990); *Fuqua v. SVOX AG*, 2014 IL App (1st)

131429, ¶ 30, 382 Ill. Dec. 655, 665, 13 N.E.3d 68, 78 (Ill. App. 2014) (enforcing arbitration where agreement contained exclusion based on compliance with a restrictive covenant.); *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 136, 538 N.Y.S.2d 513, 515, 535 N.E.2d 643, 645 (1989) (enforcing an exclusion of disputes involving whether the employee violated a restrictive covenant from arbitration.); *Green v. Faurecia Auto. Seating, Inc.*, No. 2:11CV173, 2012 U.S. Dist. LEXIS 86044, at *2 (N.D. Miss. June 21, 2012) (enforcing arbitration despite an exception of workers' compensation, unemployment compensation, unfair competition/trade secret claims, breach of confidentiality, and any restrictive covenant claims); *Henry v. New Orleans La. Saints L.L.C.*, No. 15-5971, 2016 U.S. Dist. LEXIS 65535, at *19-20 (E.D. La. May 18, 2016)("The Agreement does not lack mutuality because the Saints reserved the right to seek an injunction."); *Craddick Partners, Ltd. v. EnerSciences Holdings, LLC*, No. 11-15-00014-CV, 2016 Tex. App. LEXIS 7515, at *2 (App. July 14, 2016)(Enforcing arbitration clause that excluded claims seeking injunctive, declarative or preliminary relief.)

For these reasons, Davis's argument related to the alleged lack of mutuality of remedy should be rejected as a bar to arbitration in this case.

3. All of ISCO's arguments regarding the inapplicability of *Aiken v. World Finance* are preserved for appellate review.

Arbitrability determination are subject to *de novo* review. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). Davis argues that ISCO failed to preserve two arguments for appeal regarding the applicability of *Aiken v. World Finance Corp. of South Carolina,* 373 S.C. 144, 644 S.E.2d 705 (2007). (Brief of Respondents pp. 7-11.)

First, Davis alleges that ISCO's argument in Section I.B. of its Brief of Appellant (that South Carolina's outrageous tort exception is contrary to United States Supreme Court precedent) was not preserved for appeal. Davis argues that ISCO failed to argue the application of *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336, 131 S. Ct. 1740, 1744 (2011) to the circuit court. Davis's argument takes an unreasonably narrow view of issue preservation and fails to consider the underlying basis for the United States Supreme Court's rulings in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336, 131 S. Ct. 1740, 1744 (2011). The decisions in *Epic* and *Concepcion*, which ISCO cited in its Brief of Appellant, are based on the FAA's savings clause. This savings clause is located in Section 2 of the FAA and 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) (emphasis added).

The FAA's savings clause is the basis for the holding *Epic*. Specifically, the Court ruled, "the saving clause recognizes only defenses that apply to 'any' contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts." *Epic,* 138 S. Ct. at 1622. The FAA's savings clause was also the basis for the ruling in *Concepcion.* 563 U.S. at 336, 131 S. Ct. at 1744. Specifically, the Court in *Concepcion* ruled

> Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate "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. We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

Id. The *Concepcion* Court further analyzed the savings clause as follows:

> The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

Id., 563 U.S. at 339, 131 S. Ct. at 1746.

The FAA's savings clause was clearly the underlying basis of the rulings in *Epic* and *Concepcion*. The FAA savings clause is also the basis of ISCO's argument in Section I.B. of its Brief of Appellant. Contrary to Davis's argument, the FAA's savings clause was also one of the reasons ISCO cited to the circuit court as requiring arbitration in this case.[1] Specifically, ISCO's Memorandum in Support of its Motion to Compel Arbitration cited the savings clause as follow:

> 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).

(R. p. 72)(emphasis added).

> "Under the FAA, the party seeking arbitration must first show a written agreement for arbitration; then, the court must assess whether there are "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.; *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 606 (D.S.C. 1998), *aff'd and remanded,* 173 F.3d 933 (4th Cir. 1999).

(R. p. 75)(emphasis added).

---

[1] It is ironic that Davis argues that ISCO cannot rely on *Epic*, despite the fact that it was issued after the circuit court's order in this case, because it "simply confirmed the earlier reasoning in *AT&T Mobility*." (Brief of Respondents, p. 10.) Davis ignores the fact that both of these cases "simply confirmed the reasoning in" the FAA savings clause, which was clearly argued and cited to the circuit court. Davis's preservation argument is an overzealous attempt to avoid the ultimate issue of whether the outrageous tort exception is contrary to the FAA's savings clause.

Furthermore, the rulings in *Epic* and *Concepcion* heavily relied upon the purpose of the FAA and the strong policy favoring arbitration. *Epic* 138 S. Ct. at 1621-22 (citing Congress' direction to courts to abandon their hostility and instead treat arbitration agreements as "valid, irrevocable, and enforceable" and the "liberal federal policy favoring arbitration agreements"); *Concepcion*, 563 U.S. at 339, 131 S. Ct. at 1745 (citing the "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract.") Similarly, ISCO raised the FAA's overriding policy in its Memorandum in Support of Motion to Compel. Specifically, ISCO argued the following:

> The 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, 273-74 (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.

(R. p. 72.)

> When adjudicating a motion to compel arbitration under the FAA, courts engage in a two-step inquiry. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). First, the Court must determine whether the parties agreed to arbitrate the dispute. *Id.* Second, the

> Court must decide whether "any legal constraints external to the parties' agreement foreclose arbitration." *Id.* In making these determinations, the Court must keep in mind the strong presumption in favor of arbitration. *E.g., IntegraMed America, Inc. v. Patton,* 2013 WL 1768694 at *4 (D.S.C. April 24, 2013) (granting defendant's motion to compel arbitration in a lawsuit pending for two months and noting, "South Carolina favors arbitration") (*citing Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc.,* 344 S.C. 553, 556 (Ct. App. 2001) (compelling arbitration in a lawsuit pending for approximately eight months and stating that "it is the policy of this state to favor arbitration of disputes")).

(R. p. 73.)

These cited principles of the FAA are the basis of the Supreme Court's ruling in *Epic* and *Concepcion*. These FAA policies, principles and arguments were raised to the circuit court and, despite these arguments, the circuit court denied arbitration. Therefore, the arguments raised by ISCO in Section I. B. of its Brief of Appellant are preserved for appellate review.

Issue preservation does not limit a party's ability to further explain or differentiate the applicability of a case or legal principle on appeal. It does not limit the party's ability to cite additional cases in further support of the arguments it made to the circuit court. Indeed, Chief Justice Toal has cautioned against "denigrat[ing] the primary purpose of the judiciary" by the "over-zealous application of appellate preservation rules:"

> In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice. . . . I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a "gotcha" game with attorneys by showcasing their alleged mistakes, at the expense of their clients. This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests. In light of my view, I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.

Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting).

Furthermore, it was futile to argue to the circuit court that the South Carolina Supreme Court's ruling in *Aiken* is contrary to U.S. Supreme Court precedent. The circuit court is bound by the precedential rulings of the South Carolina Supreme Court and could not have overruled *Aiken*. Thus, even assuming arguendo this issue was not fully argued to the circuit court, which it was, this argument was futile and does not bar appellate review. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412-15, 529 S.E.2d 543, 546-47 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review.").

Ultimately, *Aiken's* outrageous tort exception is contrary to the guiding principles, policy and savings clause of the FAA. ISCO specifically raised these

FAA guiding principles, policies and the savings clause to the circuit court and the circuit court denied arbitration. Thus, this argument is properly preserved for appellate review.

Second, Davis argues that ISCO's argument in Section I.C of its Brief of Appellant was not preserved for appeal. (Brief of Respondents p. 10-11.) ISCO's argument is that the outrageous tort exception has only been applied in the consumer context, not the employment context. Again, Davis takes an overzealous view of issue preservation. ISCO specifically raised this issue to the circuit court. At the hearing on its Motion to Compel Arbitration, ISCO specifically explained how the reasoning in *Aiken* was applied in 2007 to a loan agreement in the consumer context, and how the law developed over the years and was not applied in 2013 to alleged outrageous conduct in the employment context in *Landers v. Fed Deposit Ins. Co.*, 402 S.C. 100, 739 S.E. 2d 209 (2013). (R. pp. 121-125.) Clearly, ISCO differentiated the consumer context in *Aiken* from the employment context in *Landers*. Thus, this argument is properly preserved for appellate review.

ISCO respectfully submits that the merit of the remaining issues of its appeal are adequately demonstrated in its principal brief. Regardless of whether the outrageous tort exception remains a valid exception to arbitration, it is not applicable here because Davis has not alleged that ISCO engaged in <u>any</u> outrageous conduct.

The Brief of Respondents does not argue otherwise. It is not disputed that Davis's sole claim in this case is negligence.

CONCLUSION

For the foregoing reasons, along with those set forth in its principal brief, ISCO asks this Honorable Court to reverse the circuit court and dismiss/stay this lawsuit in favor of arbitration, or remand the case to the circuit court with instructions for it to do so.

Respectfully submitted,

October 12, 2018

Jeffrey A. Lehrer (SC Bar No. 16687)
FORD & HARRISON LLP
100 Dunbar Street, Suite 300
Spartanburg, South Carolina 29306
Telephone: (864) 699-1100
Facsimile: (864) 699-1101
jlehrer@fordharrison.com
Attorney for Appellant

WSACTIVELLP:9958034.2

THE STATE OF SOUTH CAROLINA
In The 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.

CERTIFICATE OF COUNSEL

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

October 12, 2018

Jeffrey A. Lehrer (SC Bar No. 16687)
FORD & HARRISON LLP
100 Dunbar Street, Suite 300
Spartanburg, South Carolina 29306
Telephone: (864) 699-1100
Facsimile: (864) 699-1101
jlehrer@fordharrison.com
Attorney for Appellant