IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2010-CP-10-0523

Christopher T. Landers, Respondent,

v.

Atlantic Bank and Trust, Atlantic Banc Holdings, Inc., and Neal Arnold, Appellants.

BRIEF OF RESPONDENT CHRISTOPHER T. LANDERS

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STATEMENT OF THE CASE

On January 21, 2010, Respondent Christopher T. Landers filed a complaint against Appellants Atlantic Bank and Trust (the "Bank"), Atlantic Banc Holdings, Inc., and Neal Arnold (collectively "Appellants") alleging causes of action for breach of contract/constructive termination; slander and slander per se; and intentional infliction of emotional distress. **(R. pp.6-15).** On January 22, 2010, Appellants moved to compel arbitration, dismiss, or stay the claims asserted in Landers's complaint based on an arbitration provision contained within the employment agreement between Landers and the Bank. **(R. pp.162-173).**

On March 1, 2010, Landers filed an amended complaint, adding an additional claim against Appellants for illegal proxy solicitation pursuant to section 33-7-220(i) of the South Carolina Code. **(R. pp.82-93).** Appellants responded by moving to strike the amended

complaint,[1] to compel arbitration, and to dismiss or stay all proceedings, including discovery. **(R. pp.175-187).**

On June 11, 2010, Landers filed a second amended complaint, adding a fifth cause of action for his wrongful expulsion as a director of the Bank. **(R. pp.95-107).** The circuit court held a hearing on Appellants' motion to compel arbitration on June 25, 2010. **(R. p.1).** After this hearing, on July 16, 2010, Appellants filed an answer to the second amended complaint. **(R. pp.108-121).**

On September 8, 2010, the circuit court entered an order finding that only Landers's first cause of action, for breach of contract/constructive termination, was covered by the arbitration provision in the employment agreement. **(R. p.2, ¶6).** The circuit court held that Landers's remaining four causes of action were unrelated to the employment agreement and, alternatively, that these remaining four causes of action alleged conduct which was not within the contemplation of the parties at the time Landers and the Bank entered into the employment agreement. **(R. p.3, ¶¶7-8).** As a result, the circuit court denied Appellants' motion to compel arbitration and their motion to stay these causes of action. **(R. p.3, ¶10).** On September 23, 2010, Appellants appealed the circuit court's order. **(R. pp.210-212).**

FACTS

This appeal involves the issue of whether an arbitration clause in an employment agreement between Landers and the Bank compels arbitration of the following four causes of action: (1) Landers's allegations that Appellant Neal Arnold, in his capacity as the Bank's Chief Executive Officer ("CEO"), slandered him; (2) Landers's allegations that Arnold, as the Bank's

[1] The caption to Appellants' motion incorrectly refers to the striking of an amended answer; however, the substance of the motion clarifies that the intent was to strike Landers's amended complaint, as no answer had been filed. **(R. pp.175-187).**

CEO, threatened to "cut off [Landers's] dick one layer at a time" and committed other, similar acts calculated to inflict severe emotional distress on Landers; (3) Landers's allegations relating to the illegal solicitation of his proxy as a common shareholder of the Bank's holding company; and (4) Landers's allegations that he was wrongfully expelled as a director of the Bank. **(R. pp.95-107).**

In 2005, Landers and two other individuals founded the Bank, a federally-chartered savings bank with offices in Charleston, South Carolina; Myrtle Beach, South Carolina; and Savannah, Georgia. **(R. pp.95-96, ¶¶1-2, 5).** Appellant Atlantic Banc Holdings, Inc. (the "Holding Company") is the holding company for the Bank. **(R. p.95, ¶2).** In addition to being a founder of the Bank, Landers is a shareholder of the Holding Company and sat on the Board of Directors of the Bank until he was effectively ousted as a director in 2010. **(R. pp.95-96, ¶¶1, 5).** Finally, Landers was employed by the Bank pursuant to an employment agreement (the "Employment Agreement") from February 20, 2007 until he was constructively terminated on December 18, 2009. **(R. pp.96, 99-100, ¶¶7, 22).**

In his second amended complaint, the pleading the circuit court relied upon in his final order, Landers asserts five separate causes of action against Appellants based on certain conduct of Arnold from the time Arnold was hired as the Bank's CEO in May 2009 and based on certain acts which occurred *after* Landers's termination of his employment with the Bank on December 18, 2009, relating solely to Landers's status as a shareholder of the Holding Company or as a director of the Bank. **(R. p.1, ¶¶1-2; R. pp.95-107).** On appeal, Appellants contend, as they did before the circuit court, that, because Landers was previously an employee of the Bank, *all* acts the Appellants committed against Landers are subject to arbitration under the Employment Agreement, regardless of what the parties intended at the time they entered into the contract.

(Apps.' Initial Br.).

The circuit court rejected Appellants' arguments, recognizing that four of the five causes of action alleged by Landers arose from acts outside the Employment Agreement. **(R. p.3, ¶7).** These four causes of action—for slander/slander per se, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion of a director—have no relationship to Landers' employment *contract*, much less a significant one. In fact, the latter two claims arise solely out of Landers' status as a shareholder of the Holding Company and as a director of the Bank, respectively. **(R. p.3, ¶7; R. pp.104-107, ¶¶48-63).** Additionally, the two tort claims, which are based on the allegations, among many others, that Arnold threatened Landers, physically intimidated Landers, and threw papers at Landers in front of co-workers and banking executives, the circuit court correctly determined the parties could not have contemplated such egregious conduct, much less intended to submit such conduct to arbitration, at the time they entered into the Employment Agreement. **(R. p.3, ¶8; R. pp.102-104, ¶¶36-46).** Consequently, the circuit court's order should be affirmed.

I. Landers as founder, director, shareholder, *and* employee

Landers and two other individuals founded the Bank in 2005. **(R. pp.95-96, ¶¶1-2, 5).** Until the time of Landers's constructive termination, through the diligent efforts of the founders, including Landers, the Bank grew and became a highly successful local bank with a very strong balance sheet. **(R. p.96, ¶6).**

In addition to being a founder of the Bank, Landers is also a shareholder of the Holding Company. **(R. p.96, ¶5).** Landers owns 50,000 shares of the Holding Company and holds an option to purchase an additional 60,000 shares. **(R. p.96, ¶5).** Until he was frozen out in 2010, Landers also served on the Board of Directors of the Bank. **(R. p.95, ¶1).**

Landers became the Bank's Executive Vice President and Chief Mortgage Officer pursuant to the Employment Agreement, executed on February 20, 2007. **(R. p.96, ¶7).** It is this Employment Agreement which the Appellants rely upon in seeking arbitration of all of Landers's causes of action. Section 15 of the Employment Agreement provides, in pertinent part:

> Except for matters contemplated [in specified sections of the Employment Agreement], any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by binding arbitration . . . .

(R. pp.28-29, ¶15). In October 2008, Landers became the Bank's CEO. **(R. p.96, ¶7).**

II. Arnold effectively strips Landers of his authority and engages in a pattern of intimidation culminating in Landers's constructive termination

In May 2009, the Bank's Board of Directors hired Arnold to become the Bank's CEO. **(R. p.96, ¶8).** As a result, Landers volunteered to change positions from CEO to President of the Bank. **(R. p.96, ¶8).** Soon after, Arnold and others with the Bank began a campaign to discredit, belittle, and demean Landers to run him off. **(R. p.96, ¶11).** These actions are the subject of Landers' first cause of action for breach of contract and constructive termination. **(R. p.102, ¶32-34).**

Immediately after becoming CEO in May 2009, Arnold began courting new investors to recapitalize the Bank. **(R. p.96, ¶9).** It subsequently became apparent to Landers that this recapitalization would essentially be a corporate takeover that would transfer control of the Bank to an outside group who would appoint a new board of directors and replace the Bank's existing officers and management personnel. **(R. p.96, ¶9).** As a result, Landers approached Arnold, who repeatedly assured him that his job was safe and that Landers would be protected during the takeover. **(R. p.96, ¶10).** These reassurances were false.

Despite these reassurances, Arnold began tearing Landers down. When Landers defended a junior loan officer whom Arnold labeled as "retarded" and a "stupid southern girl from Georgia that could not speak English" at a committee meeting, Arnold threatened Landers in a highly aggressive and volatile manner. **(R. p.97, ¶13).** Arnold repeatedly criticized Landers and routinely called him a "pussy" in front of upper level management, members of the Bank, and co-workers. **(R. p.97, ¶14).** Arnold routinely engaged in outrageous verbal abuse and frequently demeaned and discredited Landers in front of others in an effort to run him off. **(R. p.97, ¶14).**

Beginning in September 2009, Arnold forced Landers to sign in and out every time Landers left his office. **(R. pp.97-98, ¶15).** Arnold also insisted Landers have another member of management involved whenever Landers communicated with certain clients because Arnold accused Landers of being incapable of handling these discussions alone. **(R. pp.97-98, ¶15).** Arnold made this unfounded accusation and imposed these limitations even though Landers founded the Bank and rolled his very successful and lucrative mortgage business into the Bank for no consideration. **(R. pp.97-98, ¶15).** In Fall 2009, Arnold insisted that Landers attend meetings to discuss documents which he was not permitted to review beforehand. **(R. p.99, ¶20).** Other documents later procured by Landers relating to the takeover revealed that Arnold never intended to retain Landers. **(R. p. 98, ¶18).** They also revealed that Arnold intended to bring in a different management team. **(R. p.98, ¶18).**

Based on the foregoing, Landers recognized his constructive termination by the Bank by letter dated December 18, 2009. **(R. pp.99-100, ¶22).** Arnold confirmed this termination by return letter dated December 21, 2009. **(R. p.100, ¶23).**

III. Arnold slanders and humiliates Landers

In the meantime, Arnold and others began slandering and harassing Landers. More particularly, Arnold and other executives hired by Arnold humiliated Landers in the presence of Landers and numerous co-workers by telling everyone that "Landers had ADD and was incompetent to perform his job," and Landers "was incapable of effectively communicating with anyone in performing his job." **(R. pp.96-97, ¶12).** Arnold's comments and harassment of Landers did not stop there, as Neal demeaned Landers by, among other things, physically threatening him. **(R. pp.96-97, ¶12).**

IV. Appellants illegally solicit Landers's proxy and freeze him out as a director of the Bank

Appellants also refused to afford Landers his minimum rights as a shareholder of the Holding Company or a director of the Bank. For instance, Landers repeatedly asked to see the documentation associated with the takeover, concerned about, among other things, the tremendous dilution the re-capitalization would have on the company's common stock. **(R. p.98, ¶17).** Arnold refused to provide Landers with these materials. **(R. p.98, ¶17).**

On or about January 4, 2010, the Holding Company and the Bank sent a Notice of Special Meeting and Proxy to the shareholders. **(R. p.100, ¶24).** This notice disclosed that the potential new investors would have full control and ownership of the Holding Company and the Bank. **(R. p.100, ¶24).** The proposed amendments to the Articles of Incorporation enclosed with the notice purported to relieve the directors of most of their fiduciary duties and to allow them to determine the dividends for preferred shares to be owned by the new investors. **(R. p.100, ¶24).** Further, significant stock awards would be provided to Arnold without reasonable basis or justification. **(R. p.100, ¶25).**

The notice and enclosed proxy statement also contains incomplete, insufficient and misleading information related to the effect on the common stock after the takeover. **(R. p.100,**

¶26). The proposed amendments would permit the entity, through the newly appointed directors, to pay dividends on its preferred stock but not the common stock, and to take other actions detrimental to the common shareholders, effectively forcing their share values to zero. **(R. p.100, ¶26).** In addition, the Compensation Committee for the Bank, at Arnold's behest, authorized 115,000 stock options for itself. **(R. p.101, ¶28).** The reason or explanation for these options was never forthcoming. **(R. p.101, ¶28).**

Also in January 2010, Appellants began a concerted effort to freeze Landers out as a director. **(R. p.106, ¶61).** The most telling evidence of this freeze-out occurred on May 26, 2010, when Landers attempted to appear at a special board meeting by phoning into the meeting as he had done previously. **(R. p.101, ¶29).** He was told he could only attend such meetings in person. **(R. p.101, ¶29).** When Landers then attempted to attend in person, Arnold ejected him because Landers refused to recuse himself. **(R. p.101, ¶29).** Since that time, Appellants have failed and refused to provide Landers with the information necessary for him to serve as a director. **(R. p.101, ¶30).**

V. The circuit court denies Appellants' motion to compel arbitration with respect to Landers's causes of action for slander/slander per se; intentional infliction of emotional distress; illegal proxy solicitation; and wrongful expulsion of a director

Based on the foregoing, Landers filed the present action against Appellants, who moved to compel arbitration of the dispute. **(R. pp.95-107; R. pp.191-209).** By order filed on September 8, 2010, the circuit court held that Landers's first cause of action for breach of contract/constructive termination arose from the Employment Agreement and, therefore, would be subject to arbitration. **(R. p.2, ¶6).** With respect to Landers's remaining causes of action, the circuit court denied Appellants' motion to compel arbitration on alternate bases, holding that (1) there was no significant relationship between these claims and the Employment Agreement; and

(2) the parties could not have contemplated the facts giving rise to these causes of action at the time they entered into the Employment Agreement. **(R. p.3, ¶¶7-8).** The circuit court held the remaining claims should proceed in the Court of Common Pleas. **(R. p.3, ¶10).**

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id.

ARGUMENT

I. The circuit court correctly found that Landers's causes of action for slander/slander per se, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion of a director had no significant relationship to the Employment Agreement because none of these causes of action require reference to or construction of the Employment Agreement.

In its first ground for denying Appellants' motion to compel arbitration, the circuit court held, in pertinent part: "I find that there is not a significant relationship between these claims [for slander/slander per se; intentional infliction of emotional distress; illegal proxy solicitation; and wrongful expulsion of a director] and the contract containing the arbitration provision, therefore, they are not subject to arbitration." **(R. p.3, ¶7).** The circuit court correctly concluded that the enumerated causes of action were not significantly related to the Employment Agreement because none of these causes of action require reference to or construction of the Employment Agreement.

The arbitration provision in this case provides, in pertinent part:

> Except for matters contemplated [in specified sections of the Employment Agreement], any controversy or claim arising out of

> or relating to this contract, or the breach thereof, shall be settled by binding arbitration . . . .

(R. pp.28-29, ¶15). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Aiken v. World Fin. Corp., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007). "Courts typically characterize arbitration agreements purporting to govern disputes 'arising out of or related to' the underlying contract between the parties as 'broad' arbitration clauses encompassing a wide range of issues." Id. at 153 note 2, 644 S.E.2d at 710 note 2. "Accordingly, courts generally hold broadly-worded arbitration agreements apply to disputes in which a "significant relationship" exists between the asserted claims and the contract containing the agreement to arbitrate. Hatcher v. Edward D. Jones & Co., L.P., 379 S.C. 549, 552, 666 S.E.2d 294, 296 (Ct. App. 2008); see also Long v. Silver, 248 F.3d 309, 316 (4th Cir. 2001) ("[A] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained.").

"The term 'arising out of,' within an arbitration clause referring to disputes or controversies arising out of the agreement, does not cover matters or claims independent of, or collateral to, the contract, and *arbitration of a collateral matter will be ordered only if the claim implicates either the interpretation of the contract or the parties' rights and obligations under it.*" 6 C.J.S. Arbitration § 48 (emphasis added). "For a tort claim to be considered as arising out of or relating to a contract, *it must raise some issue that requires reference to or the construction of some portion of the contract*, and under one view, the contract must create some duty of care independent of general tort law, although the required relationship between the dispute and the contract does not exist simply because the dispute would not have arisen absent the existence of the contract." Id. (emphasis added); see also Lovey v. Regence BlueShield of Idaho, 72 P.3d

877, 887 (Id. 2003) ("For a tort claim to be considered as 'arising out of or relating to' a contract, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself.").

South Carolina case law is in accord. In Aiken, the Supreme Court of South Carolina explained, in interpreting an arbitration clause with "arising out of or relating to" language:

> Applying what amounts to a "but-for" causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable.

Id. at 150, 644 S.E.2d at 708 (citing Seifert v. U.S. Home Corp., 750 So.2d 633, 638 (Fla. 1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement.")).[2]

Appellants apparently concede that the so-called "corporate claims"—the causes of action for illegal proxy solicitation and wrongful expulsion of a director—are not significantly related to the Employment Agreement or even the general employment relationship between the Bank and Landers. **(Apps.' Br. p.17)** ("Even if there remains some question about the corporate claims, at least Respondent's workplace-related tort claims arose in the workplace, and relate purely to his employment as President of the Bank.").

Regardless, with respect Landers's causes of action for slander/slander per se and intentional infliction of emotional distress, Appellants argue these claims bear a significant relationship to the Employment Agreement because they are alleged to have occurred in the

[2] The referenced propositions from Corpus Juris Secondum, supra, cite to the Idaho Supreme Court's decision in Lovey, which, in turn, cites to the Florida Supreme Court's decision in Seifert. In Aiken, the Supreme Court of South Carolina also favorably cited this language in Seifert. Aiken, 373 S.C. at 150, 644 S.E.2d at 708.

workplace while Landers was an employee of the Bank. Such a "but for" test has been roundly rejected. See, e.g., Aiken, 373 S.C.at 150, 644 S.E.2d at 708 (recognizing such a "but for" test is insufficient to show the dispute arises from the underlying contract). Moreover, none of the causes of action asserted by Landers (save his claim for breach of contract/constructive termination) require "reference to or the construction of some portion of the contract." See 6 C.J.S. Arbitration §48 (explaining disputes arising from a contract must require reference to or construction of some portion of the contract).

In Simpson v. World Fin. Corp., 367 S.C. 184, 186-87, 623 S.E.2d 877, 878-79 (Ct. App. 2005) aff'd, 373 S.C. 178, 644 S.E.2d 723 (2007), Tawanda Simpson entered into several loan transactions with the defendant (a financial institution), and each such transaction contained an arbitration provision. The defendant's employees subsequently used Simpson's personal financial information to procure illegal loans and embezzle the proceeds from those loans. Id. Based on this conduct, Simpson filed suit against the defendant for, among other things, intentional infliction of emotional distress. Id. Defendant moved to compel arbitration pursuant to the loan agreements, and the circuit court denied the motion. Id.

The South Carolina Court of Appeals affirmed. This Court applied the analytical framework articulated by the South Carolina Supreme Court in Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001), to determine whether Simpson's claims against the defendant had a "significant relationship" to the loan agreements between Simpson and defendant. Id. at 189, 623 S.E.2d at 880. The Court of Appeals explained, in pertinent part:

> With respect to tort claims, the supreme court noted the test from other jurisdictions stating, "the focus should be on the factual allegations contained in the petition rather than on the legal causes of actions asserted." Zabinski, 346 S.C. at 597 n. 4, 553 S.E.2d at 119 n. 4. The court elaborated:

> The test is based on a determination of whether the particular tort claim is so interwoven with the contract that *it could not stand alone*. If the tort and contract claims are so interwoven, both are arbitrable. On the other hand, if the tort claim is completely independent of the contract and could be maintained *without reference to the contract*, the tort claim is not arbitrable.

Id. (emphasis added). The Court of Appeals reasoned as follows:

> Applying the foregoing principles to the specific facts of this case, we agree with the circuit court's conclusion that Simpson's claims were not subject to arbitration. Initially, we reject Appellants' contention that the claims arose out of the loan agreement simply because Appellants' employees would not have had access to Simpson's personal financial information but for the loan agreement. Although Appellants' assertion is factually accurate, it disregards the analytical framework for determining whether claims are arbitrable. Simpson's tort claims are independent of the loan agreement and *require no reference to the contract*.

Id. at 190-91, 623 S.E.2d at 881 (emphasis added).

This case is no different. Nothing in Landers's claims for slander/slander per se or intentional infliction of emotional distress requires reference to, much less construction of, the Employment Agreement. **(R. pp.95-107).** As Appellants apparently concede, this conclusion is even more compelling in addressing Landers's claims for illegal proxy solicitation and wrongful expulsion of a director. These claims fail to meet even the "but for" test rejected by South Carolina appellate courts because they are completely independent of the Employment Agreement and pertain only to Landers's status as a shareholder of the Holding Company and as a director of the Bank, respectively. See, e.g., Zabinski, 346 S.C. at 603 note 4, 553 S.E.2d at 122 note 4 ("[I]f the tort claim is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable.").

On appeal, Appellants overlook whether Landers's claims are significantly related to the

Employment Agreement in favor of the much broader—but inapplicable—test of whether any of Landers's claims relate to his employment *relationship* with the Bank. In fact, while Appellants focus on the relationship between Landers's claims for slander/slander per se and intentional infliction of emotional distress, on the one hand, and Landers's employment with the Bank, on the other, Appellants fail to point out *any relationship* between these claims and the *Employment Agreement*. In this respect, Appellants' reliance on Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002), is inapposite.

Comparing the arbitration provision in Stokes to the arbitration provision in this case is like comparing apples to oranges. The arbitration provision in Stokes defined the scope of arbitrable claims based on whether the dispute arose out of the relationship between the parties, not any particular contract relevant to that relationship: "I agree to arbitrate any dispute, claim or controversy that may arise *between me and my firm, or a customer, or any other person,* that is required to be arbitrated under the rules, constitutions, or by-laws [of the National Association of Securities Dealers ("NASD")] . . . ." Id. at 608, 571 S.E.2d at 712 (emphasis added). In fact, the Court of Appeals in Stokes addressed a line of federal cases dealing with whether claims arose out of the employment *relationship*. See Zandford v. Prudential-Bache Sec., Inc., 112 F.3d 723, 728 (4th Cir. 1997) ("Though this court has not before addressed the specific interpretive issue . . . the courts of appeals that have done so in interpreting Rule 347's 'arising out of employment' language have followed the Eighth Circuit in construing the phrase to include claims that 'involve significant aspects of the employment relationship, including but not limited to explicit contractual terms.'" (citations omitted)). Accordingly, in Stokes, the Court of Appeals addressed "whether the source of the dispute arises from the employment or termination of employment." Id. at 612, 571 S.E.2d at 714; cf. McMahon v. RMS Electronics, Inc., 618 F. Supp. 189, 192

(S.D.N.Y. 1985) ("Here the [arbitration] clause governs only those disputes arising in connection with the employment contract, whereas in Coudert [v. Paine Webber Jackson & Curtis, 705 F.2d 78 (2d Cir.1983)] the clause extended to any disputes arising from the employment itself or its termination.").

In addition to these important distinctions, the Supreme Court of South Carolina in Aiken abrogated Stokes to the extent it may have used a "but for" test in determining whether Stokes's claims arose out of his employment with Met Life:

> Stokes alleges Drake, acting as an agent of Met Life, broke into his personal rented office and took files and other personal property. Stokes used this office "to perform his responsibilities as a Met Life account representative." *Absent his employment with Met Life, Stokes would not have had this office.*

Id. at 611, 571 S.E.2d at 714 (emphasis added). In this respect, the Court of Appeals rejected a "significant aspects" test adopted by the Fourth Circuit Court of Appeals in Zandford, 112 F.3d at 728. Id.

Notably, in Aiken, our Supreme Court favorably cited to McMahon v. RMS Electronics, Inc., 618 F.Supp. 189 (S.D.N.Y.1985), which is instructive in the present appeal. Id. at 152, 644 S.E.2d at 709. In McMahon, 618 F. Supp. at 190-91, RMS and McMahon "entered into a valid employment agreement (the 'Agreement') which defined the terms and conditions of McMahon's employment as the director of one of RMS' operating divisions." "[T]he Agreement included an arbitration clause requiring that '[a]ll disputes and claims arising in connection with this Agreement" shall be settled in arbitration.'" Id.

After he was terminated by RMS, McMahon brought a lawsuit against RMS alleging eight causes of action, which included a defamation claim involving "a statement made one week before McMahon's termination by the president of RMS to another employee that McMahon

was the 'company drunk' and was interfering with the president's operation of the company." Id. The district court ultimately denied RMS's motion to compel arbitration of this claim, explaining:

> McMahon's final claim alleges that RMS' president stated to another employee, one week before McMahon's termination, that McMahon was the 'company drunk' and that he was interfering with the president's operation of the company. This defamation claim, unlike the previous two claims, is not encompassed by the arbitration clause in the Agreement. Although the statements regarding McMahon's drinking habits may be relevant to his claim of wrongful termination, *the resolution of the defamation claim does not require reference to the underlying contract.* Unlike the previous two claims, the issues underlying this final defamation claim *do not require an interpretation of the contractual agreement between the two parties.* Furthermore, *the defamation claim is not arbitrable simply because the statements were made during the term of McMahon's employment.*

Id. at 192 (emphasis added).

The McMahon decision is indistinguishable from the present case. The arbitration provision in McMahon, like the arbitration provision here, references disputes arising from an employment contract, not an employment relationship. Similarly, the allegations supportive of Landers's causes of action for slander/slander per se and intentional infliction of emotional distress, like the allegations in McMahon, include statements and actions made by Arnold in the workplace, but require no reference to or construction of the Employment Agreement. To paraphrase the district court in McMahon, Landers's claims for slander/slander per se and intentional infliction of emotional distress are not arbitrable simply because the statements were made during the term of Landers's employment.[3]

Based on the foregoing, the district court correctly recognized the absence of any

[3] Landers's claims for illegal proxy solicitation and wrongful expulsion of a director are not even alleged to have occurred in the workplace or during the term of his employment.

significant relationship between Landers's causes of action for slander/slander per se, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion of a director, on the one hand, and the Employment Agreement, on the other. Consequently, his decision should be affirmed on this ground alone.

II. Landers's causes of action for slander/slander per se, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion of a director do not "touch matters" covered by the Employment Agreement, and Appellants failed to preserve this issue for appellate review.

Appellants contend that Landers's so-called "corporate claims" for illegal proxy solicitation and wrongful expulsion of a director are arbitrable because they "touch matters" covered by the Employment Agreement.

In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 666 note 13 (1985), the United States Supreme Court included a footnote explaining that it need not review the decision of the First Circuit Court of Appeals regarding whether an arbitration clause covered the appellant's federal statutory claims against the respondent. Nevertheless, the Court concluded the footnote by finding: "[I]nsofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability." Id.

While Appellants contend on appeal that this "touch matters" standard "appears to be broader than the 'significant relationship' standard heretofore applied by the Supreme Court in determining arbitrability of particular claims," Appellants fail to cite any authority for this proposition or explain how the standards differ. **(Apps.' Initial Br. p.19).** Further, Appellants point to no cases in South Carolina or the Fourth Circuit Court of Appeals which actually apply

this standard. Under these circumstances, the argument should be deemed abandoned. See Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

Further, the cases cited by Appellants in support of their position that the "touch matters" standard should govern over a "significant relationship" test suggest that the terms are synonymous. See, e.g. 3M Co. v. Amtex Sec., Inc., 542 F.3d 1193, 1199 (8th Cir. 2008) (citing to the "touch matters" test and the "significant relationship" test in analyzing whether claims were within scope of broad arbitration clause). Accordingly, regardless of whether a "significant relationship" or a "touch matters" analysis is utilized, Landers's "corporate claims," as well as his other claims for slander/slander per se and intentional infliction of emotional distress, require no reference to or construction of the Employment Agreement. Consequently, the circuit court properly denied Appellants' motion to compel arbitration as to these claims.

In addition, the circuit court did not rule upon whether the so-called "corporate claims" or any of Landers's other claims "touch matters" covered by the Employment Agreement, so the issue is not preserved. See Aiken v. World Fin. Corp., 373 S.C. 144, 148, 644 S.E.2d 705, 708 (2007) ("In order to be preserved for appellate review, an issue must have been raised to and ruled upon by the trial court.").

III. The circuit court correctly found that Landers's causes of action for slander/slander per se, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion of a director allege conduct which was egregious and unforeseeable to Landers at the time he entered into the Employment Agreement.

While Appellants contend that the circuit court incorrectly applied a "foreseeability"

standard to the present dispute, a careful reading of the circuit court's order shows that he relied upon the standard regarding tortious acts which are egregious and unforeseen from the standpoint of the party opposing arbitration: "If those factual allegations [supporting Landers's claims for slander/slander per se and intentional infliction of emotional distress] are considered true for purposes of the motion, these two causes of action assert egregious acts that were not contemplated at the time the Employment Agreement was signed." **(Order p. 3, ¶8).**

In Aiken v. World Fin. Corp., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007), the Supreme Court of South Carolina explained as follows:

> [W]e pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because 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.

As a result, the Court held that the plaintiff's claims "for unanticipated and unforeseeable tortious conduct by World Finance's employees are not within the scope of the arbitration agreement with World Finance." Id.

Appellate courts in South Carolina have not hesitated to apply this rule in subsequent cases alleging intentional torts outside the contemplation of the parties at the time the parties entered into a contract with an arbitration clause. See, e.g. Partain v. Upstate Auto. Group, 386 S.C. 488, 494, 689 S.E.2d 602, 605 (2010) ("Partain cannot be held to have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had agreed to purchase. Moreover, Partain cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly

fraudulent conduct."); Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007) ("[W]e believe a reasonable person would not have foreseen and would not have expected (and ought not to expect) Global-Sun employees to commit acts historically associated with the common law tort of outrage in seeking to collect an overdue debt."); Hatcher v. Edward D. Jones & Co., L.P., 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) ("[W]e find that to interpret the arbitration provision contained in Hatcher's contract with Edward Jones to apply to alleged action completely outside the expectations of the parties at the time the contract was entered would be inconsistent with the goal favoring arbitration as an effective means for resolving disputes.").

In this case, Landers alleges, among other egregious acts, that Arnold slandered him, demeaned him, and physically threatened him. **(R. pp.95-107).** As the circuit court recognized, this conduct is not something Landers or any reasonable person would have anticipated at the time he entered into the Employment Agreement. **(R. p.3, ¶8).** See Chassereau, 373 S.C. at 172, 644 S.E.2d at 720 (refusing "to interpret an arbitration agreement . . . to apply to illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate").

Appellants now raise the novel issue of whether the standard enunciated in Aiken and utilized by subsequent appellate courts in South Carolina applies only to consumer transactions. This argument ignores the contractual principles underlying Aiken. "An arbitration clause is a contractual term, and general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute." Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); see also Zandford v. Prudential-Bache Sec., Inc., 112 F.3d 723, 727 (4th Cir. 1997) ("Arbitration clauses are contractual terms, and ordinary means of

contract interpretation must be applied to determine their applicability to particular disputes.").

In this context, it is axiomatic that matters which are not within the contemplation of the parties at the time of contracting are not governed by the contract. See, e.g., Stern & Stern Associates v. Timmons, 310 S.C. 250, 251-52, 423 S.E.2d 124, 125 (1992) (special damages are recoverable only if they are within the contemplation of the parties at the time they entered into the contract); Hatcher v. Edward D. Jones & Co., L.P., 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) ("[T]o interpret the arbitration provision contained in Hatcher's contract with Edward Jones to apply to alleged action completely outside the expectations of the parties at the time the contract was entered would be inconsistent with the goal favoring arbitration as an effective means for resolving disputes.").

In deciding Aiken, the Supreme Court of South Carolina confirmed that "[w]e only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties." Aiken, 373 S.C. at 152, 644 S.E.2d at 709. Notably, immediately after providing this explanation for its decision, the Supreme Court cited to McMahon v. RMS Electronics, Inc., 618 F.Supp. 189, 191 (S.D.N.Y.1985), which, as previously discussed, involved the issue of whether an arbitration clause in an employment contract covered allegations that the employer's president slandered the employee by referring to him as the "company drunk." Finally, in Chassereau, 373 S.C. at 172, 644 S.E.2d at 720, the Supreme Court confirmed that the rule in Aiken protected not just a reasonable consumer, but also a "reasonable person."

Based on the foregoing, the circuit court properly ruled that Landers's claims rested upon "egregious acts that were not contemplated at the time the Employment Agreement was signed." **(R. p.3, ¶8).**

IV. The circuit court did not abuse its discretion in denying Appellants' motion to stay, and Appellants failed to preserve the issue of whether the circuit court erred in denying their motion to stay on the ground that one of Landers's causes of action was arbitrable.

Appellants finally contend that the circuit court should have stayed Landers's non-arbitrable claims while his claim for breach of contract/constructive termination is arbitrated. Pursuant to the Federal Arbitration Act:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C.A. § 3. The decision to grant or deny a stay rests within the discretion of the circuit court. See Edwards v. SunCom, 369 S.C. 91, 95 note 4, 631 S.E.2d 529, 531 note 4(2006) ("We note that, although we find no abuse of discretion in the grant of a stay in this case, Edwards is free to move the circuit court for a lift of the stay, or such other relief as may be necessary, if the matter pending before the FCC is unduly delayed.").

"When the case involves both arbitrable and nonarbitrable claims, the court generally will only stay the arbitrable claims." 1 Domke on Com. Arb. § 22:6; see also Allied-Bruce Terminix Companies, Inc. v. Dobson, 684 So. 2d 102, 111 (Ala. 1995) ("Litigation of non-arbitrable claims is not ordinarily due to be stayed pending arbitration of arbitrable claims."); Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 20 (1983) ("It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice

between the federal and state courts; it occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." (emphasis in original)).

Appellants point to no case or rule which compels the circuit court to stay non-arbitrable claims while arbitration proceeds on the remaining claims. In fact, courts addressing the issue have come to the opposite conclusion and held that the issue is within the circuit court's discretion. See, e.g., Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 97 (4th Cir. 1996) ("Enforcement of agreements to arbitrate under the Federal Arbitration Act may require piecemeal litigation . . . and the decision to stay the litigation of non-arbitrable claims or issues is a matter largely within the district court's discretion to control its docket."); Dobson, 684 So. at 111 (recognizing litigation of non-arbitrable claims is not generally stayed pending outcome of arbitration with respect to arbitrable claims).

In the sole case cited by Appellants in support of this argument, the South Carolina Court of Appeals reversed the circuit court's determination that the plaintiff's trespass and conversion claims were not subject to arbitration. See Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002). As a result, *all* of the plaintiff's causes of action were arbitrable, and the circuit court accordingly stayed plaintiff's suit pending the arbitration. See id. ("*As the FAA applies to all of Stokes' causes of action*, all related state court proceedings are stayed pending resolution of the arbitration." (emphasis added)).

Moreover, while the circuit court clearly denied Appellants' motion to stay the pending state court litigation, the circuit court never ruled on the precise issue of whether, when one claim is subject to arbitration and the others are not, the non-arbitrable claims should be stayed until a determination is rendered on the arbitrable claims. Further, Appellants did not move for

such a ruling pursuant to Rule 59(e), SCRCP. As such, the issue is not preserved for appellate review. See Aiken v. World Fin. Corp., 373 S.C. 144, 148, 644 S.E.2d 705, 708 (2007) ("In order to be preserved for appellate review, an issue must have been raised to and ruled upon by the trial court.").

In this case, unlike in Stokes, Landers filed four causes of action which are not subject to arbitration. As a result, even if the issue were preserved for appellate review, the circuit court properly denied Appellants' motion to stay.

CONCLUSION

The circuit court correctly held that Landers's claims for slander/slander per se and intentional infliction of emotional distress do not require reference to or construction of the Employment Agreement. As such, they have no "significant relationship" to such agreement and are not covered by its arbitration clause. Moreover, Landers's claims for illegal proxy solicitation and wrongful expulsion of a director fail even the expansive (but rejected) "but for" test; these claims relate, not to Landers's status as an employee, but to his independent status as a shareholder of the Holding Company and a director of the Bank.

In the alternative, the circuit court correctly held that the allegations in Landers's second amended complaint (with the exception of the breach of contract/constructive termination cause of action) were simply not within the contemplation of the parties at the time they entered into the Employment Agreement. Landers could not have expected that Arnold would humiliate and intimidate him in front of co-workers when Landers signed the Employment Agreement in February 2007.

Because the circuit court properly denied Appellants' motion to compel arbitration with respect to the above-referenced claims, the circuit court also properly denied Appellants' motion

to stay the circuit court proceedings relating to these claims. Based on the foregoing, the circuit court's decision should be affirmed in its entirety.

Respectfully Submitted,

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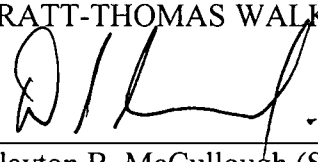

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May 25, 2011
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2010-CP-10-0523

Christopher T. Landers, Respondent,

v.

Atlantic Bank and Trust, Atlantic Banc Holdings, Inc., and Neal Arnold, Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I hereby certify that I served true and correct copies of Respondent's Motion for Extension of Deadline to File and Serve Final Brief and Respondent's Final Brief on this 25th day of May, 2011 via United States Mail, postage prepaid, upon the following counsel of record:

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