RECEIVED
Nov 01 2021
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Court of Appeals Case No. 2018-000857
Circuit Court Case No. 2017-CP-42-03283

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

v.

ISCO Industries, Inc., ... Appellant.

PETITION FOR WRIT OF CERTIORARI

November 1, 2021

Jeffrey A. Lehrer (SC Bar No. 16687)
FORDHARRISON 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 ..... **iii**

I. Certification of Counsel **1**

II. Questions Presented **1**

III. Statement of the Case **2**

Facts **2**

Arguments

1. THE COURT OF APPEALS' DECISION ESSENTIALLY CREATED A FORESEEABILITY STANDARD, WHICH IS CONTRARY TO PUBLIC POLICY OF FAVORING ARBITRATION, AND IS CONTRARY TO THE UNITED STATES SUPREME COURT DECISIONS IN *AT&T MOBILITY, L.L.C. v. CONCEPCION* AND *EPIC SYS. CORP. V. LEWIS* **4**

2. THE COURT OF APPEALS' DECISION FAILED TO PROPERLY APPLY THIS COURT'S DECISION IN *LANDERS v. FED. DEPOSIT INS. CO.* **6**

3. THE COURT OF APPEALS' DECISION FAILED TO PROPERLY RESOLVE ANY DOUBT IN FAVOR OF ARBITRATION, MAKING THE DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT. **7**

4. THE COURT OF APPEALS' DECISION FAILED TO RECOGNIZE THE NEXUS BETWEEN DAVIS'S EMPLOYMENT AND THE ALLEGED NEGLIGENT CONDUCT. **9**

5. THE COURT OF APPEALS' DECISION FAILED TO RECOGNIZE THE FORESEEABILITY OF CYBERCRIMES IN THE EMPLOYMENT CONTEXT. **11**

6. INCORPORATION OF ISCO'S REMAINING ARGUMENTS **12**

A. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE BASED ON THE SHORTENED STATUTE OF LIMITATIONS CONTAINED IN A SEPARATE PARAGRAPH OF THE AGREEMENT 12

B. ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE BASED ON AN EXCLUSION OF CLAIMS RELATED TO RESTRICTIVE COVENANTS DESIGNED TO PROTECT EMPLOYER CONFIDENTIAL INFORMATION AND CONSUMER GOOD WILL 14

C. ALL OF ISCO'S ARGUMENTS REGARDING THE INAPPLICABILITY OF *AIKEN V. WORLD FINANCE* ARE PRESERVED FOR APPELLATE REVIEW 17

D. THE UNFORESEEABLE AND OUTRAGEOUS TORT EXCEPTION ONLY APPLIES IN THE CONSUMER CONTEXT, NOT IN THE EMPLOYER CONTEXT 21

E. THE UNFORESEEABLE AND OUTRAGEOUS TORT EXCEPTION DOES NOT APPLY IN THIS CASE BECAUSE THE ALLEGED CONDUCT WAS FORESEEABLE 22

F. THE UNFORESEEABLE AND OUTRAGEOUS TORT EXCEPTION DOES NOT APPLY IN THIS CASE BECAUSE THE ALLEGED CONDUCT DOES NOT INVOLVE AN OUTRAGEOUS TORT.....24

IV. Conclusion 25

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Aiken v. World Finance Corp. of South Carolina,
373 S.C. 144, 644 S.E.2d 705 (2007) 4, 5, 16, 17, 20, 21, 22, 24, 25

Atlantic Coast Builders & Contractors, LLC v. Lewis,
398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012) 20

Atlantic Textiles v. Avondale Inc.,
505 F.3d 274, 287, (4th Cir. 2007) 12

AT&T Mobility, L.L.C. v. Concepcion,
563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) 4, 13, 17, 18, 19, 20, 22

Bradley v. Brentwood Homes, Inc.,
398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012) 17

Carlson v. S.C. State Plastering, LLC,
404 S.C. 250, 260, 743 S.E.2d 868, 874 (Ct. App. 2013) 12, 13, 14

Chassereau v. Glob.-Sun Pools, Inc.,
373 S.C. 168, 644 S.E.2d 718 (2007) 22

Columbia v. Cornerstone Housing, L.L.C.,
356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003). 22

CompuCredit Corp. v. Greenwood,
132 S. Ct. 665 (2012) 8, 19

Davis v. KB Home of S.C., Inc.,
394 S.C. 116, 125, 713 S.E.2d 799, 804, (Ct. App 2011) 13

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213, 218 (1985) 8

Epic Sys. Corp. v. Lewis,
138 S.Ct. 1612, 200 L.Ed.2d (2018).....4, 5, 13, 17, 22

Fuqua v. SVOX AG,
2014 IL App (1st) 131429, ¶ 30, 382 Ill. Dec. 655, 665, 13 N.E.3d 68, 78 (Ill. App. 2014) .16

Gissel v. Hart,
382 S.C. 235, 676 S.E.2d 320 (2009) 17

IntegraMed America, Inc. v. Patton,
2013 WL 1768694 at *4 (D.S.C. April 24, 2013) 19

Kindred Nursing Centers L. P. v. Clark,
137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017) 5

Lackey v. Green Tree Fin. Corp.,
330 S.C. 388, 400-01, 498 S.E.2d 898, 905 (Ct. App. 1998) 14, 15

Landers v. Fed. Deposit Ins. Corp.,
402 S.C. 100, 739 S.E.2d 209 (2013) 6, 8, 21, 24

Marzulli v. Tenet S.C., Inc.,
No. 2018-UP-132, 2018 S.C. App. Unpub. LEXIS 134 (Ct. App. Mar. 28, 2018) 6

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley,
756 F.2d 1048, 1053-54 (4th Cir. 1985) 15

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614, 626 (1985) 19

Munoz v. Green Tree Fin. Corp.,
343 S.C. 531, 541-42, 542 S.E. 2d 360, 365 (2001) 14, 15

Nordin v. Nutri/System, Inc.,
897 F.2d 339, 344 (8th Cir. 1990) 16

O'Neil v. Hilton Head Hosp.,
115 F.3d 272 (4th Cir. 1997) 8, 19

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) 16

Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.,
418 S.C. 1, 791 S.E.2d 128 (2016) 5, 9

Partain v. Upstate Auto. Grp.,
386 S.C. 488, 689 S.E.2d 602 (2010) 22, 23

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) 16

S.C. Pub. Serv. Auth. v. Great W. Coal,
312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993) 13

Sillins v. Ness,
164 N.C. App. 755, 756, 596 S.E.2d 874, 875 (2004) 16

Simpson v. MSA of Myrtle Beach, Inc.,
373 S.C. 14, 34-36, 644 S.E.2d 663, 674 (2007) 14

Smith v. D.R. Horton, Inc.,
403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013) 15, 16

Staubes v. City of Folly Beach,
339 S.C. 406, 412-15, 529 S.E.2d 543, 546-47 (2000) 21

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) 13

Timmons v. Starkey,
389 S.C. 375, 698 S.E.2d 809 (2010) 25

Towles v. United HealthCare Corp.,
338 S.C. 29, 524 S.E.2d 839 (1999) 8

UBS PaineWebber, Inc. v. Aiken,
197 F. Supp. 2d 436, 441 (W.D.N.C. 2002) 16

Wilson v. Willis,
416 S.C. 395, 786 S.E.2d 571 (Ct. App. 2016) 22, 23, 24

Zabinski v. Bright Acres Assocs.,
346 S.C. 580, 553 S.E.2d 110 (2001) 9

STATUTES

9 U.S.C. § 2 (2013) 6

OTHER AUTHORITIES

https://www.latimes.com/business/technology/la-fi-tn-snapchat-phishing-attack-20160228-story.html. 11

https://www.pennlive.com/politics/2018/03/data_breach_put_360000_pa_teac.html.....11

https://www.opm.gov/cybersecurity/cybersecurity-incidents/ 11

https://breachlevelindex.com/assets/Breach-Level-Index-Report-2017-Gemalto.pdf

.....23

https://www.calyptix.com/top-threats/biggest-cyber-attacks-2017-happened/

.....23

https://trustedidpremier.com/eligibility/eligibility.html

.....23

https://www.infoworld.com/article/2615754/cyber-crime/south-carolina-reveals-massive-data-breach-of-social-security-numbers—credit-cards.html

.....23

I. CERTIFICATION OF COUNSEL

The Court of Appeals issued its opinion in this case on August 4, 2021. *Davis v. ISCO Indus*., Op. No. 5840 (S.C. Ct. App. dated Aug. 4, 2021). Appellant filed a Motion for Extension of Time to File Petition for Rehearing on August 12, 2021, requesting that the deadline be extended through September 3, 2021. On September 3, 2021, Appellant timely filed and served the Petition for Rehearing. The Court of Appeals denied Appellant's Petition for Rehearing by Order dated October 1, 2021. *Davis v. ISCO Indus*., Case No. 2018-000857, (S.C. Ct. App. dated Oct. 1, 2021). This Petition for a Writ of Certiorari is timely filed and served.

II. QUESTIONS PRESENTED

1. Whether the Court of Appeals' decision incorrectly created a foreseeability standard, contrary to the public policy favoring arbitration and contrary to the U.S. Supreme Court's decisions in *AT&T Mobility, L.L.C. v. Concepcion and Epic Sys. Corp. v. Lewis*.

2. Whether the Court of Appeals' decision failed to properly apply this Court's decision in *Landers v. Fed. Deposit Ins. Co.*

3. Whether the Court of Appeals' decision failed to properly resolve any doubt in favor of arbitration, making the decision in conflict with decisions of this court and the United States Supreme Court.

4. Whether the Court of Appeals' decision failed to recognize the nexus between Davis's employment and the alleged negligent conduct.

5. Whether the Court of Appeals' decision failed to recognize the foreseeability of cybercrimes in the employment context.

6. Incorporation of ISCO's remaining arguments not directly addressed by the Court of Appeals' decision.

A. Whether the arbitration agreement is unconscionable based on the shortened statute of limitations contained in a separate paragraph of the agreement.

B. Whether the arbitration agreement is unconscionable based on an exclusion of claims related to restrictive covenants designed to protect employer confidential information and customer good will.

C. Whether all of ISCO's arguments regarding the inapplicability of *Aiken v. World Finance* are preserved for appellate review.

D. Whether the Unforeseeable and Outrageous Tort Exception only applies in the consumer context, not in the employment context.

E. Whether the Unforeseeable and Outrageous Tort Exception applies in this case where the alleged conduct was foreseeable.

F. Whether the Unforeseeable and Outrageous Tort Exception applies in this case where the alleged conduct by ISCO does not involve an outrageous tort.

III. STATEMENT OF THE CASE

A. 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 were provided with two years of free identity theft protection services through LifeLock. (*Id*.) ISCO again renewed this coverage for an additional year so that those employees remained 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.)

B. Procedural History

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. The Court of Appeals issued its opinion in this case on August 4, 2021. The Court of Appeals denied Defendant's Petition for Rehearing by Order dated October 1, 2021.

1. The Court of Appeals' Decision Essentially Created a Foreseeability Standard, Which is Contrary to the Public Policy of Favoring Arbitration, and is Contrary to the United States Supreme Court Decisions in *AT&T Mobility, L.L.C. v. Concepcion and Epic Sys. Corp. v. Lewis.*

The Court of Appeals' opinion is directly contrary to the United States' Supreme Court opinions in *AT&T Mobility, L.L.C. v. Concepcion and Epic Sys. Corp. v. Lewis*. In its Opinion, the Court of Appeals incorrectly determined the alleged conduct did not "truly relate" to Davis's employment relationship with ISCO because Davis "would not have been expected to anticipate [ISCO] would reveal that information to hackers." *Davis v. ISCO Indus.*, Op. No. 5840, 11 (S.C. Ct. App. dated Aug. 4, 2021). This is essentially adopting a foreseeability standard which is contrary to the public policy favoring arbitration. This creates a standard even broader than the South Carolina Supreme Court's ruling in *Aiken v. World Finance Corp. of South Carolina*, which has also been challenged by this appeal. In *Aiken*, the Court recognized an exception to arbitration where the conduct was outrageous and unforeseeable. *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007). The Court of Appeals' decision creates an even broader exception where the alleged negligent conduct was not foreseeable. This ruling, like *Aiken*, is contrary to the requirements of the Federal Arbitration Act.

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. 333, 339, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011). 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 Justice 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 . . ." Justice Pleicones opined that this exception was inconsistent with *Concepcion* and its supporting federal jurisprudence and recommended 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 confirmed the reasoning in *Concepcion* in *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 200 L.Ed.2d (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. Similarly, the Court of Appeals' application of a broader foreseeable standard would apply solely to arbitration agreements. These are not "unconscionable" defenses as a matter of state common law. Therefore, the reliance on any foreseeability standard is contrary to

the interpretation of the FAA in *Concepcion* and *Lewis*. For these reasons, the circuit court erred in applying the "unforeseeable and outrageous tort exception" to deny arbitration in this case and the Court of Appeals' decision improperly relied on a broader foreseeable standard in affirming the circuit court.

2. The Court of Appeals' Decision Failed to Properly Apply this Court's Decision in *Landers v. Fed. Deposit Ins. Co.*

The Court of Appeals' decision ruled that this case is distinguishable from *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013), because there was no significant relationship between the alleged conduct and employment. As discussed below, this conclusion is contrary to the evidence and admissions in this case. Furthermore, there are substantial similarities between *Landers* and the instant case.

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*., s*ee 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.).

Both *Landers* and the instant case concern the same fundamental alleged conduct – the revelation of employee information. Both *Landers* and this case concern a broad arbitration agreement that applies to any claim that arises out of or relates to employment. Despite the fact that

the alleged conduct at issue in *Landers* was the affirmative and intentional disclosure of employee information, the Court still held that the arbitration agreement applied to the conduct. By compelling arbitration in a case regarding affirmative tortious conduct causing the disclosure of personal information, but not in an instance of mere alleged negligence causing the disclosure of personal information, the Court of Appeals creates inconsistent outcomes for motions to compel arbitration.

ISCO respectfully submits that the Court of Appeals' decision erroneously allows an employer to compel arbitration after intentionally disclosing employee information, but does not allow an employer to compel arbitration when it allegedly negligently causes personal information to be disclosed. Thus, the only way to avoid this contradiction is to reverse the Court of Appeals' decision and determine that the circuit court erred in finding no significant relationship or nexus existed between Davis's allegations and the arbitration agreement.

3. The Court of Appeals' Decision Failed to Properly Resolve Any Doubt In Favor of Arbitration, Making the Decision in Conflict with Decisions of this Court and the United States Supreme Court.

The Court of Appeals' decision failed to properly resolve any doubt in favor of arbitration, conflicting with the case law from this Court and the Supreme Court of the United States. While the admissions discussed above and indisputable facts prove that the arbitration agreement should apply to this case, they must at a minimum create reasonable doubt regarding whether the arbitration agreement applies to this dispute. Any such doubt must be resolved in favor of arbitration because of the applicability of the Federal Arbitration Act ("FAA") to this case. The Court of Appeals' decision failed to properly resolve any doubt in favor of arbitration.

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[1]. The

[1] 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)

FAA mandates "a liberal federal policy favoring arbitration agreements." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). The United States Court of Appeals for the Fourth Circuit has clearly 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) (emphasis added). "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).

This Court has adopted this strong public policy favoring arbitration and has also ruled that any doubts concerning the scope of the arbitration provision should be resolved in favor of arbitration. *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"); *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) ("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.'") (emphasis added). Thus, the Court of Appeals' decision is contrary to these strong public policy considerations and State and United States Supreme Court rulings favoring arbitration. As discussed below, the connections between the claims in this

---

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.)

case and the employment relationship are significant, undeniable, and actually admitted by Davis's own initial pleading. The Court of Appeals' decision failed to properly address these issues.

4. The Court of Appeals' Decision Failed to Recognize the Nexus Between Davis's Employment and the Alleged Negligent Conduct.

The Court of Appeals' Opinion concluded that there was no nexus between Davis's employment and the theft of his PII. 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. The Court of Appeals' conclusion overlooks the overwhelming evidence showing the significant nexus between Davis's employment and the alleged negligent conduct.

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. 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.

Importantly, Davis has admitted the significant relationship between his claims 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. (emphasis added) (R. p. 13, ¶ 44.) Davis admits that he was required to provide this PII information to ISCO as part of his "employment." (R. p. 51, ¶10.) Thus, Davis has admitted the nexus between his employment and his disclosure of PII. Thus, the Court of Appeals' decision finding that there was no nexus between Davis's employment and the underlying claim was in error and contrary to the substantial evidence and admissions in this case.

5. The Court of Appeals' Decision Failed to Recognize the Foreseeability of Cybercrimes in the Employment Context.

Even assuming *arguendo* that foreseeability was a proper consideration in analyzing whether to compel arbitration[2], here the prevalence of cybercrimes and data breaches in employment make the underlying alleged conduct actually foreseeable. Given the prevalence of cybercrime and data breaches in both the general context and the employment context, an employee should reasonably know that his or her personal identifying information (PII) is vulnerable to hackers and may be compromised at any time. Not only is cybercrime a common occurrence in everyday life[3], cybercriminals are also routinely targeting employers for employee information. In fact, other employers have encountered cybercrime identical to the incident at issue here. A hacker posing as a social media company's CEO requested sensitive employee information from the company's payroll personnel. *https://www.latimes.com/business/technology/la-fi-tn-snapchat-phishing-attack-20160228-story.html*. The hacker successfully obtained PII of over 700 current and former employees of the company. There are countless other instances of data breaches and cybercrime concerning employee data[4]. Cyberattacks and data breaches are such commonplace that an employee should reasonably know at the time of the commencement of employment that his or her information may be compromised due to an employer's possession of the PII. Therefore, the Court of Appeals' decision incorrectly ruled that Davis could not have foreseen that his employment related PII would be stolen by cyber criminals.

---

[2] *See* section I(1), *supra*.
[3] *See* pages 28-29, *infra*.
[4] For example, a data breach in Pennsylvania occurred, compromising PII of over 360,000 teachers, https://www.pennlive.com/politics/2018/03/data_breach_put_360000_pa_teac.html, a cyberattack occurred causing PII of 4.2 million current and former Federal government employees to be compromised, https://www.opm.gov/cybersecurity/cybersecurity-incidents/, and another large-scale government breach occurred compromising PII of 3,700 employees, https://www.opm.gov/cybersecurity/cybersecurity-incidents/.

6. Incorporation of ISCO's remaining arguments

The Court of Appeals held that the arbitration agreement did not apply in this case because no significant relationship exists between the alleged conduct and the arbitration agreement, and accordingly, declined to address ISCO's remaining arguments. *Davis v. ISCO Indus*., Op. No. 5840, 11-12 (S.C. Ct. App. dated Aug. 4, 2021). Should this Court reverse the Court of Appeals' decision regarding the applicability of the arbitration agreement, such a finding could necessitate an analysis of some or all of ISCO's remaining arguments. Thus, ISCO discusses these remaining arguments below.

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

Contrary to Davis's argument in his brief, the parties' agreement to arbitrate is not unconscionable based on the Agreement containing a separate provision shortening the statute of limitations. While such a provision may not be enforceable under South Carolina law, it is enforceable in other states. For example, North Carolina does not have a similar statute refusing to enforce a shortened statute of limitations. *Atlantic Textiles v. Avondale Inc.*, 505 F.3d 274, 287, (4th Cir. 2007) ("But because North Carolina has no similar prohibition against contractual shortening of statutory limitation periods, we must still consider the enforceability of the one-year limitation period contained in the arbitration agreements.") ISCO is a multi-state employer. Davis's Complaint seeks a multi-state class action. It is reasonably likely that this limitation will apply to some ISCO employees located outside of South Carolina. Therefore, this provision is not unconscionable.

Regardless, this provision is severable from the agreement to arbitrate. 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*, the South Carolina Court of Appeals severed a shortened statute of limitation and enforced an arbitration clause. The 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.

This 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. (*See* Appellant's Final Reply Br., p. 1-3); *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 874 (Ct. App. 2013).

B. 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 has argued 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.). 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.

C. 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.[5] 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

[5] 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.

> "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).

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.

D. 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. It appears this 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.

E. 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), *rev'd on other grounds, Wilson v. Willis*, 426 S.C. 326, 827 (2019). 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*. There are countless examples of data breaches from everyday life.[6]

Therefore, it is reasonable for every person to expect that at some point there will be an attack on their PII. 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

[6] 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 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*.

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. 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.

F. 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 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.

IV. CONCLUSION

For the foregoing reasons, this Court should grant certiorari, and substitute the Subject Decision with an opinion reversing the Court of Appeals' decision denying of ISCO's motion to compel arbitration.

Respectfully submitted this 1st day of November, 2021.

s/ Jeffrey A. Lehrer
Jeffrey A. Lehrer (SC Bar No. 16687)
FORDHARRISON 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:12637935.1