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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

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 REHEARING

September 3, 2021

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NOW COMES Appellant ISCO Industries, Inc. ("ISCO"), by and through its undersigned counsel, hereby petitioning this Honorable Court for rehearing of this matter. This Court decided this appeal by published opinion dated August 4, 2021 ("Subject Decision"), affirming the circuit court's denial of ISCO's motion to compel arbitration.[1]

MATERIAL POINTS OVERLOOKED OR MISAPPREHENDED

ISCO respectfully submits the following material points overlooked or misapprehended by the Court.

I. THE COURT OVERLOOKED AND MISAPPREHENDED THE RELEVANCE OF FORESEEABILITY OF CLAIMS AS IT RELATES TO ARBITRATION AGREEMENTS.

In the Subject Decision, this Court 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." (*See* Exhibit A, pp. 8-9). 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

[1] By Order dated August 13, 2021, this Court extended the time to file and serve the Petition for Rehearing until September 3, 2021. For ease of reference, a copy of the Subject Decision (with page numbers added for citation purposes) is attached hereto as Exhibit A.

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 Subject 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 Subject Decision's 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 Subject Decision improperly relied on a broader foreseeable standard in affirming the circuit court.

II. THE SUBJECT DECISION OVERLOOKED AND MISAPPREHENDED THE ACTUAL FORESEEABILITY OF CYBERCRIMES.

Even assuming *arguendo* that foreseeability was a proper consideration in analyzing whether to compel arbitration, 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, (*See* Appellant's Final Br., p. 13), 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, including a data breach compromising PII of over 360,000 Pennsylvania teachers, https://www.pennlive.com/politics/2018/03/data_breach_put_360000_pa_teac.html, a cyberattack 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 compromising PII of 3,700 employees, https://www.opm.gov/cybersecurity/cybersecurity-incidents/. 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 Subject Decision incorrectly ruled that Davis could not have foreseen that his employment related PII would be stolen by cyber criminals.

III. THE SUBJECT DECISION OVERLOOKED AND MISAPPREHENDED THE ADMITTED NEXUS BETWEEN DAVIS'S EMPLOYMENT AND THE ALLEGED NEGLIGENT CONDUCT.

The Subject Decision concluded that there was no nexus between Davis's employment and the theft of his PII. This conclusion overlooks the overwhelming evidence to the contrary. First, 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.) Thus, Davis has admitted the nexus between his employment and his disclosure of PII.

Second, the nexus between Davis's employment and the claims in this case are significant. As admitted by Davis, 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. Davis alleges that the alleged duty to protect the information arises out of employment. The alleged negligent conduct in this case has an undeniable significant relationship to Davis's employment relationship with ISCO.

The Subject Decision's 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.

IV. THE SUBJECT DECISION FAILED TO PROPERLY APPLY THE REASONING OF *LANDERS V. FED. DEPOSIT INS. CO.*

The Subject Opinion 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 above, this conclusion is contrary to the evidence and admissions in this case. Furthermore, there are substantial similarities between this case and *Landers* and the instant case. 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 creates inconsistent outcomes for motions to compel arbitration. ISCO respectfully submits that the Subject 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 properly determine

that the circuit court erred in finding no significant relationship or nexus existed between Davis's allegations and the arbitration agreement.

V. THE SUBJECT DECISION FAILED TO PROPERLY RESOLVE ANY DOUBT IN FAVOR OF ARBITRATION.

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 Subject 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. ISCO delineated the extensive interstate nature of the relationship between Davis and ISCO in its brief. (*See* Appellant's Final Br., p. 5-6.) The 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).

The South Carolina Supreme 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).

The Subject Decision is contrary to these strong public policy considerations favoring arbitration. The connections between the claims in this case and the employment relationship are significant, undeniable, and actually admitted by Davis's own initial pleading. The Subject Decision failed to properly address these issues. Accordingly, this Court should grant ISCO's Petition for Rehearing, and

substitute the Subject Decision with an opinion reversing the circuit court's denial of ISCO's motion to compel arbitration.

VI. INCORPORATION OF ISCO'S REMAINING ARGUMENTS.

This Court 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. (*See* Exhibit A, p. 9.) Should this Court reverse its 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 fully incorporates its other arguments from the Brief of Appellant and Reply Brief of Appellant herein. ISCO briefly restates 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. (*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.) These exclusions do not make the agreement to arbitrate unconscionable or unenforceable because they do not deprive Davis of any remedy and only limit the forum to seek such remedy. (*See* Appellant's Final Reply Br., pp. 4-5). Furthermore, such a provision is subject to severability. (*See* Appellant's Final Reply Br., pp. 1-4, 6).

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* Appellant's Final Reply Brief, pp. 6-7); *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). For these reasons, Davis's argument related to the alleged lack of mutuality of remedy should not act as a bar to compelling arbitration in this case.

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

All of ISCO's arguments regarding the inapplicability of *Aiken* are preserved for appellate review. Arbitrability determinations 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.) All of these arguments were properly preserved for appeal. (*See* Appellant's Final Reply Br., pp. 8-15).

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

The circuit court denied ISCO's Motion to Compel Arbitration based solely on the reasoning in *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007). (R. pp. 1-2.) In *Aiken*, the Court limited the "unforeseeable and outrageous tort exception" to consumers in normal business dealings. Thus, this doctrine does not apply in this case. (*See* Appellant's Final Br., pp. 4-5, 10).

E. The Unforeseeable and Outrageous Tort Exception does not apply in this case because the alleged conduct by ISCO does not involve an outrageous tort.

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. (*See* Appellant's Final Br., pp. 14-15).

VII. CONCLUSION

For the foregoing reasons, this Court should grant ISCO's Petition for Rehearing, and substitute the Subject Decision with an opinion reversing the circuit court's denial of ISCO's motion to compel arbitration.

Respectfully submitted this 3rd day of September, 2021.

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EXHIBIT A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

ISCO Industries, Inc., Appellant.

Appellate Case No. 2018-000857

Appeal From Spartanburg County
R. Keith Kelly, Circuit Court Judge

Opinion No. 5840
Heard December 8, 2020 – Filed August 4, 2021

AFFIRMED

Jeffrey Andrew Lehrer, of Ford & Harrison, LLP, of Spartanburg, for Appellant.

John S. Simmons, of Simmons Law Firm, LLC, of Columbia; John Belton White, Jr., Ryan Frederick McCarty, and Marghretta Hagood Shisko, all of Harrison White P.C., of Spartanburg, for Respondent.

KONDUROS, J.: ISCO Industries, Inc. appeals the circuit court's denial of its motion to compel arbitration in a suit its former employee, Daniel Lee Davis, brought against it following a data breach. ISCO contends the circuit court erred in determining an arbitration agreement did not apply due to the unforeseeable and outrageous tort exception and because Davis's negligence claim did not arise out of or relate to his employment relationship with ISCO. We affirm.

FACTS/PROCEDURAL HISTORY

ISCO is a Kentucky based corporation, which provides global customized piping solutions. It has locations and employees in over thirty-five states. Davis worked for ISCO as a mechanic and fusion technician in South Carolina from March 2007 until March 2015. At the start of his employment, ISCO required Davis to provide personal identifying information including his Social Security number. He also signed an arbitration agreement. In the arbitration agreement, he agreed to exclusively settle by arbitration "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."

On March 2, 2016, an employee in ISCO's human resources department received an e-mail requesting employees' "2015 IRS Form W-2 data" purportedly from a senior executive at ISCO. The employee gathered and e-mailed the requested data. The information included the Social Security numbers, addresses, and compensation and tax withholding information of current and former ISCO employees. Shortly thereafter, an employee at ISCO realized the e-mail was actually from an outside third party who had fraudulently disguised his e-mail address. On March 4, 2016, ISCO notified the affected employees of the data breach. ISCO provided these employees with free identity theft protection services through LifeLock, which it later renewed. The data breach affected 449 current and former employees throughout thirty-five states.

Davis filed an action against ISCO on September 13, 2017, alleging claims for breach of implied contract and negligence. Davis filed the action on behalf of all current and former ISCO employees whose personal identifying information was released as a result of the data breach. He alleged ISCO had a duty to exercise reasonable care in holding, securing, and protecting that personal identifying information; it was foreseeable Davis and the others would suffer substantial harm if ISCO employed inadequate safety practices for securing personal identifying information; and as a result of ISCO's negligence, Davis and others suffered and will continue to suffer damages and injury, including out-of-pocket expenses and the loss of productivity and enjoyment as a result of spending time monitoring and correcting consequences of the data breach.

ISCO filed a motion to dismiss and compel arbitration. Davis filed an amended complaint removing his cause of action for breach of contract. ISCO filed a motion to dismiss Davis's complaint in the event the court did not compel

arbitration, asserting Davis lacked standing and failed to state facts sufficient to establish a negligence claim or to support an award of punitive damages or attorney's fees. Davis filed a response in opposition to ISCO's motions.

The circuit court held a hearing on both of ISCO's motions on February 23, 2018. The court determined the arbitration agreement was not applicable to Davis's cause of action.[1] The court found:

> The arbitration agreement that [Davis] signed applied to claims "arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO," but [Davis's] claims in this case arise out of [ISCO's] release of the personal identifying information of [Davis] and others to cyber-criminals. The [c]ourt finds that there is no relationship between the subject matter of [Davis's] claims in this case and the arbitration agreement, which relates to employment. Like the [c]ourt in *Aiken*,[2] this [c]ourt holds that [Davis's] claims in this case are "for unanticipated and unforeseeable tortious conduct" and are, therefore, not within the scope of the arbitration agreement.

(citation omitted).

This appeal followed.

STANDARD OF REVIEW

Unless the parties otherwise provide, "[t]he question of the arbitrability of a claim is an issue for judicial determination." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

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[1] The circuit court also denied ISCO's motion to dismiss, but ISCO did not appeal that ruling.

[2] *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007) (providing an outrageous torts exception to arbitration enforcement in South Carolina).

LAW/ANALYSIS

ISCO asserts the circuit court erred by denying its motion to compel arbitration by ruling Davis's negligence claim did not arise out of or relate to his employment relationship with ISCO. It argues there was a significant relationship between Davis's employment relationship and the conduct in this case. We disagree.

> [S]tate law determines questions "concerning the validity, revocability, or enforceability of contracts generally," *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987), but the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)[, *superseded by statute on other grounds as stated in Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th. Cir. 1997)].

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417 n.4 (4th Cir. 2000) (citations omitted). "These statutes constitute 'a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

"We must address questions of arbitrability with a healthy regard for the federal policy favoring arbitration." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). "Therefore, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including "'the construction of the contract language itself.'" *Id.* (quoting *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273-74 (4th Cir. 1997)). "Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." *Id.* at 41-42, 524 S.E.2d at 846. However, our supreme court recently noted that "statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration." *Palmetto*

Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), *reh'g denied*, S.C. Sup. Ct. Order dated Apr. 20, 2021.

"Generally, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Int'l Paper Co.*, 206 F.3d at 416 (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). "Arbitration is available only when the parties involved contractually agree to arbitrate." *Berry v. Spang*, 433 S.C. 1, 11-12, 855 S.E.2d 309, 315 (Ct. App. 2021) (quoting *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44), *reh'g denied*, S.C. Ct. App. Order dated Mar. 26, 2021, *petition for cert. filed*. "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118 (2001). "Determining whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract." *Towles*, 338 S.C. at 41, 524 S.E.2d at 846. "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." *Id.* "The construction of a clear and unambiguous contract is a question of law for the court to determine." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) (emphasis omitted). "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (quoting *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)).

"When a party invokes an arbitration clause after the contractual relationship between the parties has ended, the parties' intent governs whether the clause's authority extends beyond the termination of the contract." *Towles*, 338 S.C. at 41, 524 S.E.2d at 846. "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." *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. "To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Id.* at 597, 553 S.E.2d at 118.

> [T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying

> contract does not alone imply that the clause should apply to every dispute between the parties. For example, a clause compelling arbitration for any claim "arising out of or relating to this agreement" may cover disputes outside the agreement, but only if those disputes relate to the subject matter of that agreement. On the other hand, if the clause contains language compelling arbitration of any dispute arising out of the relationship of the parties, it does not matter whether the particular claim relates to the contract containing the clause; it matters only that the claim concerns the relationship of the parties. Under *Zabinski*, such a clause would have the broadest scope because it could be interpreted to apply to every dispute between the parties.

Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., 356 S.C. 202, 209-10, 588 S.E.2d 136, 140 (Ct. App. 2003) (citations omitted).

"Whether a particular claim is subject to arbitration has been examined in many cases . . . ." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629 n.7, 667 S.E.2d 1, 5 n.7 (Ct. App. 2008). In *Zabinski*, the supreme court found "any claim pursuant to the partnership agreement is arbitrable" because the arbitration agreement provided "'any controversy or claim arising out of the partnership agreement' should be settled by arbitration." 346 S.C. at 597, 553 S.E.2d at 119. The court determined "any tort claims between the partners that relate to the partnership agreement are arbitrable." *Id.* Further, the court held "the winding up of the partnership is covered by the arbitration agreement because it concerns issues that are the direct result of the partnership agreement." *Id.* at 597-98, 553 S.E.2d at 119. However, the court also determined "[d]espite South Carolina's presumption in favor o[f] arbitration, . . . the remaining . . . claims are not subject to arbitration because a significant relationship does not exist between the . . . claims and the partnership agreement." *Id.* at 598, 553 S.E.2d at 119. Those remaining claims included "the action between [two of the partners] involv[ing] a dispute over the purchase agreement, which is completely unrelated to the partnership agreement. . . . The facts involved in this controversy are completely independent of any dispute arising out of the partnership agreement and are not arbitrable." *Id.*

In *Landers v. Federal Deposit Insurance Corp.*, an employee, Landers, "claim[ed] he was constructively terminated from his employment as a result of [the CEO's]

tortious conduct towards him. [The employer and the CEO] moved to compel arbitration pursuant to the employment contract." 402 S.C. 100, 103, 739 S.E.2d 209, 210 (2013). "The trial court found that only Landers' breach of contract claim was subject to the arbitration provision, while his other four causes of action comprised of several tort and corporate claims were not within the scope of the arbitration clause." *Id.* Our supreme court "reverse[d] the trial court's order and h[e]ld that all of Landers' causes of action must be arbitrated," stating "Landers' pleadings provide a clear nexus between his claims and the employment contract sufficient to establish a significant relationship to the employment agreement." *Id.* The court determined "the claims are within the scope of the agreement's broad arbitration provision." *Id.*

The supreme court explained:

> Landers' tort claims bear a significant relationship to the Agreement. The Agreement contains not only monetary rights and obligations, but also articulates the duties and obligations of Landers and provides that Landers is subject to the direction of the employer, requiring him to diligently follow and implement all policies and decisions of the employer. Furthermore, the Agreement contemplates what constitutes cause for termination, including a "material diminution in [ ] powers, responsibilities, duties or compensation."
>
> Thus, in light of the breadth of the Agreement and the particular manner in which Landers has pled his underlying factual allegations, we find Landers' tort claims significantly relate to the Agreement. The perceived inability to perform one's *job* certainly relates to an *employment* contract. Even assuming the arbitrability of the claims was in doubt, which it is not, we cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that Landers' slander and intentional infliction of emotional distress claims are covered by the clause. Thus, we reverse the trial court's order denying Appellants' motion to compel the causes of action of slander and intentional infliction of emotional distress.

Id. at 111-12, 739 S.E.2d at 215 (alteration in original) (footnote omitted).

> We stress that our decision today is driven by the strong policy favoring arbitration, the nature of the Agreement, and Landers' underlying factual allegations. Certainly, we recognize that even the broadest of clauses have their limitations. However, Landers has essentially pled himself into a corner with respect to each of his claims. Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement. Thus, we reverse the trial court with respect to Landers' remaining four causes of action and hold that each is to be arbitrated. In doing so, we also reject the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable.

Id. at 115-16, 739 S.E.2d at 217 (footnote omitted).

In the present case, the court found "there is no relationship between the subject matter of [Davis's] claims in this case and the arbitration agreement, which relates to employment." The arbitration agreement stated it applied to "any and all claims, disputes or controversies arising out of or relating to [Davis's] candidacy for employment, employment and/or cessation of employment with ISCO." Even though ISCO had Davis's personal identifying information only due to his previous employment with it, the grounds for his negligence claim—the human resources employee disclosing his information to hackers—do not truly relate to his employment. At the time Davis supplied his employer with his information in starting his employment, he would not have been expected to anticipate employer would reveal that information to hackers.

Landers is distinguishable from the present case as the facts underlying Landers's causes of action are completely different than those here. *See id.* at 112, 739 S.E.2d at 215 ("[I]n light of the breadth of the Agreement and the particular manner in which Landers has pled his underlying factual allegations, we find Landers' tort claims significantly relate to the Agreement. The perceived inability to perform one's *job* certainly relates to an *employment* contract."); *id.* at 115, 739 S.E.2d at 217 ("Landers has essentially pled himself into a corner with respect to

each of his claims. Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement.").

There was not a significant relationship between Davis's employment relationship and the conduct in this case. Therefore, the circuit court did not err in finding the arbitration agreement did not apply here. Accordingly, we affirm the circuit court's decision.[3]

CONCLUSION

The circuit court's decision to deny the motion to compel arbitration is

AFFIRMED.

LOCKEMY, C.J., and MCDONALD, J., concur.

[3] Based on our determination of this issue, we need not address ISCO's remaining arguments on appeal, which concern the denial of its motion to compel arbitration on the basis of the unforeseeable and outrageous tort exception. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

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.

CERTIFICATE OF SERVICE
OF APPELLANT'S PETITION FOR REHEARING

This is to certify that on this date, a true and correct copy of Appellant's Petition for Rehearing has been served upon opposing counsel, pursuant to the Supreme Court's Order 'Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules,' (as of August 25, 2021), by e-mailing a copy to counsel at their AIS e-mail addresses, as reflected below:

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September 3, 2021

VIA: ONEDRIVE E-FILE
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Daniel Lee Davis v. ISCO Industries, Inc.
Appellate Case No. 2018-000857

Dear Ms. Kitchings:

Please find attached Appellant's Petition for Rehearing, Proof of Service, along with a copy of the service e-mail thereof. The filing fee in the amount of $50.00 will be delivered to the appellate court within five days of this filing, per the court's guidelines.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With highest regards, I remain

Very truly yours,

FORD & HARRISON LLP

JEFFREY A. LEHRER

JAL/hmr

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