

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Keith Kelly, Circuit Court Judge
C.A. No. 2017-CP-42-03283

Appellate Case No. 2021-001256
Opinion No. 5840 (S.C. Ct. App. filed Aug. 4, 2021)

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

v.

ISCO Industries, Inc., Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Whether special and important reasons exist to review the Court of Appeals' decision affirming the trial court's conclusion that Davis's negligence claim did not arise out of or relate to the employment relationship.
- II. Whether the Court of Appeals applied the appropriate standard by analyzing the specific arbitration provision to determine whether a significant relationship existed between the negligence claims and the arbitration language.
- III. Whether the Court of Appeals correctly concluded that no significant relationship existed between Respondent's negligence claim and the employment-related arbitration agreement.
- IV. Whether the Court of Appeals correctly applied this Court's decision in *Landers v. Federal Deposit Insurance Corp.*, where the Court noted that Landers's allegations pled claims directly relating to performance of duties under an employment contract, while the claims in the instant matter involve a human resources employee disclosing information to hackers, which does not relate to the employment relationship.
- VI. Whether the arbitration agreement in this case is unconscionable and invalid.
- VII. Whether Petitioner preserved for review arguments that the unforeseeable and outrageous tort exception is contrary to controlling decisions of the United States Supreme Court and that the exception only applies in the consumer context.
- VIII. Whether there exists any compelling reason for this Court to address the issue of whether the lower court correctly applied the outrageous tort exception where the Court of Appeals expressly declined to address the issue.
- IX. Whether the Court of Appeals correctly applied the rule requiring that arbitration be predicated on an agreement to arbitrate.

COUNTER-STATEMENT OF THE CASE

STATEMENT OF FACTS

Daniel Lee Davis (hereinafter “Respondent”) worked for Petitioner as a mechanic and fusion technician from March 2007 until he departed the company in March 2015. (R. p. 51). When he was hired by Petitioner, he was required to provide personal identifying information (hereinafter “PII”) including, but not limited to, his Social Security number. (R. p. 51). Additionally, Respondent signed an Arbitration Agreement at the outset of his employment. (R. pp. 95-96). The Arbitration Agreement states that it applies to “*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 INDUSTRIES, LLC.*” (R. p. 95).

A year after Respondent left the company, in March 2016, Petitioner’s employee gave PII for Respondent and others to identity thieves. (R. pp. 51-52). A third party, posing as an ISCO senior executive, sent an email to Petitioner’s human resources department requesting Respondent’s IRS Form W-2 data. (R. p. 51). Petitioner’s employee gathered the requested data and transmitted the information to the hacker by email. (R. p. 51). The compromised information included the Social Security numbers, addresses, and compensation and tax withholding information of current and former ISCO employees. (R. p. 52). Although Petitioner purchased some passive coverage for those affected by the data breach, it did not stop identity thieves from attempting to take out loans, obtaining credit cards, and causing other damages. (R. pp. 52-53).

Respondent brought the putative class action at issue on behalf of himself and others (hereinafter collectively referred to as “Respondent”) impacted by Petitioner’s negligence, gross negligence, and recklessness. (R. pp. 53-55). Petitioner filed a Motion to Dismiss and Compel Arbitration on October 16, 2017, and renewed its motion on November 30, 2017. (R. pp. 18-49;

R. pp. 61-96). Following oral argument, the Honorable R. Keith Kelly denied Petitioner’s motion, finding that (1) the allegations did not bear a relationship to the arbitration agreement and (2) the claims were “for unanticipated and unforeseeable tortious conduct” constituting an exception to arbitration enforcement pursuant to *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007) (R. pp. 1-4).

By opinion dated August 4, 2021, the Court of Appeals affirmed Judge Kelly, holding the arbitration agreement inapplicable because “[t]here was not a significant relationship between Davis’s employment relationship and the conduct in this case.” Finding this issue determinative, the Court of Appeals expressly declined to address the circuit court’s denial of the motion to compel based upon the unforeseeable and outrageous tort exception.

STANDARD OF REVIEW

I. Considerations Governing Review on Petition for Writ of Certiorari.

Pursuant to Rule 242, SCACR, a writ of certiorari to review a final decision of the Court of Appeals rests in the “sound judicial discretion” of the Supreme Court and “will be granted only where there are special and important reasons.”

II. Standard of Review Applied by Court of Appeals.

“The determination of whether a claim is subject to arbitration is subject to *de novo* review.” *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005) (citing *Vestry Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 206, 588 S.E.2d 136, 138 (Ct. App. 2003)). “Nevertheless, a circuit court’s factual findings will not be reversed on appeal if any evidence reasonably supports the findings.” *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) (citing *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)).

ARGUMENT

I. No Special and Important Reasons Exist to Review the Court of Appeals' Decision Affirming the Circuit Court Determination that Respondent's Claim did not Arise out of or Relate to the Employment Relationship.

Rule 242, SCACR, provides five illustrative grounds for this Court's review of a Court of Appeals decision, none of which exist in the instant petition:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR.

None of these scenarios are present in the instant case. This case involves the Court of Appeals' correct application of the law governing arbitrability of disputes in South Carolina. Petitioner has identified no errors or points of fact or law overlooked or misapplied by the Court of Appeals that would support granting its Petition. Accordingly, and for all the reasons set forth in the record below, the Petition should be denied.

A. The Court of Appeals Properly Applied the Appropriate Standard in Assessing Whether the Arbitration Provision Applied to Respondent's Negligence Claim.

The gravamen of Petitioner's petition rests on its contention that the Court of Appeals applied an improper standard in assessing whether arbitration was required. This contention is nothing more than a proverbial red herring that seeks to direct this Court's attention to an unpreserved argument that the "unforeseeable and outrageous" exception articulated in *Aiken v. World Finance Corp.* is contrary to existing decisions of the United States Supreme Court.

However, even a cursory reading of the Court of Appeals' opinion reveals that the court explicitly declined to address this issue or ground its decision to affirm the circuit court's ruling

on the exception. *See* Op. at 9 n.3 (“Based on our determination of [the significant relationship] 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.”). Accordingly, Petitioner’s arguments concerning the unforeseeable and outrageous tort exception and challenge to *Aiken* are immaterial to this Court’s consideration of the instant Petition.

In its petition, Petitioner conflates two related, but separate, legal concepts - foreseeability in the context of the outrageous tort exception on one hand, and the scope of an arbitration provision, properly delineated under standard rules of contract interpretation, on the other hand - in an attempt to have this Court reach a substantive review of the circuit court’s arbitration ruling. However, this Court should not allow Petitioner to distort the Court of Appeals’ well-reasoned ruling in such a manner.

The Court of Appeals’ opinion unequivocally articulates that the examination of the scope of an arbitration provision is a matter of contract law, noting that “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” Op. at 5. (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000)). The court recognized that arbitration will not be compelled where the parties have not contractually agreed to arbitrate; thus, an arbitration clause must be examined pursuant to general rules of contract interpretation to determine the intention of the parties based on the specific language at issue. *Id.* The Court correctly noted that “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,” noting that a party may be compelled to arbitration only when a “significant relationship” exists between the asserted claims

and the governing contract in which the arbitration clause is contained. Op. at 5–6 (quoting *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999)).

Under this framework, the Court of Appeals found there was no significant relationship between the arbitration provision at issue and the claim brought in this action, and therefore the claim was not within the scope of the provision. Importantly, however, the Court of Appeals’ reasoning was not based upon the foreseeability of Petitioner’s conduct or whether such conduct amounted to an outrageous tort. Consequently, this Court should restrict its review to the ruling the *actually made* by the Court of Appeals, and not the distorted presentation of the ruling that appears in Petitioner’s Petition.

B. The Court of Appeals Correctly Held that No Significant Relationship Existed Between Respondent’s Negligence Claim and his Contractual Employment Arbitration Agreement.

Applying appropriate contractual principles, the Court of Appeals concluded that “[t]here was not a significant relationship between Davis’s employment relationship and the conduct in this case.” Op. at 9. In so holding, the Court of Appeals concurred with the Circuit Court’s conclusion that “there is no relationship between the subject matter of [Davis’s] claims in this case and the arbitration agreement, which relates to employment.” R. 2. The Circuit Court and Court of Appeals each thoroughly reviewed the specific language in the arbitration agreement as applying only 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,” which language does not encompass the conduct out of which Respondent’s claim arose.

Thus, even if the Arbitration Agreement was valid, which Respondent disputes, there is no “significant relationship” between the asserted claims and the Arbitration Agreement. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); (R. p. 51) (alleging that

the “claim at bar does not bear a substantial relationship to the employment agreement or arbitration clause”).¹

Courts hold that even the most broadly-worded arbitration agreements apply only to disputes in which a “significant relationship” exists between the asserted claims and the contract containing the arbitration clause. *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119 (quoting *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001), *overruled on other grounds by Hertz Corp. v. Friend*, 559 U.S. 77 (2010)). As it attempts to do in the instant Petition, Petitioner’s argument in the Court of Appeals centered on its contention that the Circuit Court relied “solely” on an outrageous tort exception. However, a plain reading of the trial judge’s decision reflects that the Circuit Court squarely held otherwise, (R. p. 2) (“The Court finds that there is no relationship between the subject matter of Plaintiff’s claims in this case and the arbitration agreement, which relates to employment”), and the Court of Appeals correctly affirmed this decision.

The Circuit Court and Court of Appeals are correct, and there is ample evidence to support these rulings. The Arbitration Agreement here states that it governs claims “*arising out of or relating to . . . employment.*” (R. p. 38). The crux of the claim at issue is that Petitioner recklessly, and with gross negligence, gave identity thieves the PII of Respondent and several others. (R. p. 12). Although Petitioner collected Respondent’s PII when he began his employment, and thus had a duty to protect it as the information’s custodian, Petitioner’s human resources employee wrongfully handing over personal information cannot be said to “arise out of or relate[] to” Respondent’s employment. To hold otherwise would amount to applying a “but for” causation standard that this Court has rejected when determining the scope of an arbitration clause. *See Aiken*, 373 S.C. at 150, 644 S.E.2d at 708 (“Applying what amounts to a ‘but-for’ causation

¹ See Return at pp. 15-19 (argument supporting unconscionability of provision *in toto*).

standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable.”)

As was noted by the Court in *Aiken*:

[I]n signing the agreement to arbitrate, Aiken could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct. Accordingly, we hold that Aiken's claims . . . are not within the scope of the arbitration agreement with World Finance.

Id. at 151, 644 S.E.2d at 709 (footnote omitted).

C. The Court of Appeals Correctly Applied and Thoroughly Analyzed this Court's Decision in *Landers v. Federal Deposit Insurance Corp.*, Particularly Noting that the Employee's Allegations There Pled Claims Directly Relating to The Performance of his Duties Under an Employment Contract (In Contrast to the Claims Presented in the Instant Case).

Petitioner asserts that the Court of Appeals improperly applied this Court's decision in *Landers v. Federal Deposit Insurance Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013). However, the Court of Appeals meticulously analyzed *Landers* in rejecting Petitioner's arguments. Importantly, the Court of Appeals quoted extensively from this Court's decision and expressly noted this Court concluded that “*Landers* . . . essentially pled himself into a corner with respect to each of his claims,” and that his Complaint “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.” (Op. 8–9).

In fact, the Court of Appeals performed the precise analysis applied by this Court in *Landers*. It applied the proper standard, it analyzed the applicable contractual language, and it reviewed the factual allegations, properly concluding that the allegations did not significantly relate to the arbitration agreement.

Thus, Petitioner’s reliance on *Landers* is totally misplaced, as is evidenced by the Court of Appeals’ opinion noting these distinguishing facts. In *Landers*, the conduct at issue involved a CEO’s “defamatory statements . . . *directly related* to [the plaintiff’s] ability to perform his duties [as an employee].” *Id.* at 111, 739 S.E.2d at 214–15 (emphasis added). A CEO making statements about an employee’s work-based performance is plainly within the scope of employment and is a far cry from a company representative voluntarily giving out an employee’s PII to an unauthorized third party; thus, there is no inconsistency between the *Landers* decision and the Court of Appeals’ opinion in this case.

In fact, in reaching its conclusion, the *Landers* court distinguished *McMahon v. RMS Electronics, Inc.*, 618 F. Supp. 189 (S.D.N.Y. 1985). *See id.* at 110–11, 739 S.E.2d at 214–15. In *McMahon*, as interpreted by *Landers*, an arbitration agreement was correctly found to be outside the scope of the employment agreement where the employee’s claim did not require reference to the underlying contract and did not require an interpretation of the contractual agreement between the two parties. *Id.* at 110–11, 739 S.E.2d at 214 (citing *McMahon*, 618 F. Supp. at 193). The district court in *McMahon* noted a claim “is not arbitrable simply because the statements were made during the term of . . . employment.” *Id.* (quoting *McMahon*, 618 F. Supp. at 193). Here, Respondent’s claim requires no reference to the underlying agreement (which, as noted previously, is solely an arbitration agreement), nor does it require interpretation of that agreement or the employment relationship (which had ended for Respondent when Petitioner’s tortious conduct occurred). In fact, the only relationship Respondent’s claim has to his prior employment is that the PII released was provided to the employer at the onset of his employment.

Like *McMahon*, cases from similar jurisdictions examining analogous situations have reached identical conclusions. For example, in *Smith v. Captain D’s, LLC*, 963 So. 2d 1116 (Miss.

2007), the Supreme Court of Mississippi denied arbitration using similar reasoning. In that case, an employee sued her employer for negligently hiring a manager who subsequently assaulted her. *Id.* at 1118. The court rejected the employer’s argument that the claim at issue fell within the parties’ arbitration agreement for claims “arising out of or relating to” the plaintiff’s employment.

The Supreme Court of Mississippi recently reaffirmed and expounded on the logic behind this holding. In *Doe v. Hallmark Partners, LP*, 227 So. 3d 1052, 1056 (Miss. 2017), *reh’g denied* (Aug. 10, 2017), a tenant sued her landlord for negligent security practices after she was assaulted at her apartment complex. The court rejected the landlord’s argument that the claim at issue fell within the parties’ arbitration agreement, reasoning:

Notably, Jane’s complaint does not allege lease-based or contract-based claims. In other words, Jane does not suggest her claims “arise out of” her “occupancy and leasing of [her apartment].” Rather, she seeks recovery based on her status as an invitee of the apartment complex and the common-law duties Hallmark and SEI owed to lessees and non-lessees alike.

Id. at 1056. Thus, while Jane Doe may have been in the position to be attacked as a result of signing a lease with her landlord, the allegations against the landlord stemmed from the landlord’s failure to protect those on the property. Here, while Respondent may have been in the position to have his information stolen as a result of having given that information to his employer, the allegations stem from the duty Petitioner would owe to anyone for whom it possesses PII, regardless of an employment relationship. Additionally, like the situation in *Hallmark Partners*, Respondent does not suggest the claims arise out of his employment. Instead, the Complaint here specifically notes that the “claim at bar does not bear a substantial relationship to the employment agreement or arbitration clause.” (R. p. 51).

Thus, the Court of Appeals correctly affirmed the Circuit Court denial of the motion to compel arbitration as a contractual matter because to “interpret an arbitration agreement to apply

to actions completely outside the expectations of the parties would be inconsistent with” the goal of arbitration. *Aiken*, 373 S.C. at 152, 644 S.E.2d at 710. The Circuit Court’s factual findings were supported by reasonable evidence, *see Thornton*, 357 S.C. at 94, 592 S.E.2d at 51, and the Court of Appeals’ review and ruling should not be disturbed.

II. Petitioner’s Arguments that the Unforeseeable and Outrageous Tort Exception is Contrary to Controlling Decisions of the U.S. Supreme Court and that the Exception Only Applies in the Consumer Context are Unpreserved for Appellate Review.

Petitioner utterly failed to preserve for appellate review its argument that the “unforeseeable and outrageous tort exception” adopted in *Aiken* is contrary to decisions of the United States Supreme Court.²

Respondent is fully aware of this Court’s position that “in most cases, the preparation of the . . . return [to a petition] will involve no more than taking the arguments already made in the briefs before the Court of Appeals, putting in the additional case history information, and updating and checking the citations.” *See Re: Extensions in Cases Seeking a Petition for a Writ of Certiorari to Review a Decision of the South Carolina Court of Appeals* (S.C. Sup. Ct. filed July 16, 2014). However, because Petitioner contends that the Court of Appeals created a foreseeability standard that is contrary to the public policy favoring arbitration and contrary to a United States Supreme Court decision, Respondent respectfully submits that additional argument on this issue is necessary. Petitioner has tacitly acknowledged that it failed to preserve these arguments for appellate review – as evidenced by its concession that “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” because “[t]he circuit court is bound by the precedential rulings of the South Carolina

² Even in the event the Court were to find this argument preserved, Respondent submits it is without merit and contrary to a plain and ordinary reading of the opinion.

Supreme Court and could not have overruled *Aiken*.” Pet. at 20. By refusing to allow the argument to die, so to speak, Petitioner instead elects to mischaracterize the clear language of the Court of Appeals’ analysis in an attempt to reach an issue that it failed to preserve in the trial court.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate courts] with a platform for meaningful appellate review.” At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is “axiomatic that an issue cannot be raised for the first time on appeal.” Imposing such a requirement on the Petitioner “is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.”

Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citations omitted).

“Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal.” *Id.* Although “a party is not required to use the exact name of a legal doctrine in order to preserve the issue,” the South Carolina Supreme Court has explained that “the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.” *Id.* at 466, 719 S.E.2d at 642.

In its Motion to Compel Arbitration, Petitioner argued: (1) the Federal Arbitration Act applies “because the relationship between [Petitioner] and [Respondents] involved interstate commerce”; (2) the FAA and case law interpreting the FAA “strongly favor the enforcement of agreements to arbitrate”; (3) “agreements to arbitrate claims in the employment context are valid and enforceable”; and (4) Respondent must be compelled to arbitrate his claim in this case because it arises out of and relates to his employment relationship with Petitioner and there are no legal constraints external to the arbitration agreement that would foreclose arbitration. (R. pp. 61-96). In his Response in Opposition, Respondent argued that there was no relationship between the Arbitration Agreement and his claim, relying upon the South Carolina Supreme Court’s holding

in *Aiken* that the plaintiff's claims for "unanticipated and unforeseeable tortious conduct" were not within the scope of the arbitration agreement. (R. pp. 97-114).

At the hearing, Petitioner argued that Respondent's claim is subject to arbitration because it "arises out of" his employment relationship and is therefore enforceable, notwithstanding the provision in the agreement which impermissibly shortens the statute of limitation.³ (R. pp. 121-126). With respect to *Aiken*, Petitioner argued that the case was factually distinguishable from the facts of this case because, in *Aiken*, the company's employee actually engaged in the identity theft. (R. pp. 121-122). Notably, despite being on notice that Respondent relied on *Aiken* to preclude arbitration, Petitioner did not argue that *Aiken*'s outrageous tort exception was contrary to the Supreme Court's decision in *AT&T Mobility LLC v. Conception*. Petitioner likewise did not argue that the outrageous tort exception was limited only to the consumer context. (R. pp. 118-126; R. pp. 133-137).

The trial court's Order Denying Petitioner's Motion to Compel Arbitration and Motion to Dismiss Respondents' Amended Complaint relied on *Aiken* to hold that "[Respondent's] claims in this case are 'for unanticipated and unforeseeable tortious conduct' and are, therefore, not within the scope of the arbitration agreement." (R. p. 2). Again, the trial court never considered Petitioner's new arguments that the outrageous tort exception is contrary to U.S. Supreme Court precedent and is only applicable in the consumer context, and Petitioner did not file a Rule 59(e), SCRCF, motion to raise those arguments and give the trial court the opportunity to consider them. Accordingly, the issue is not preserved for appellate review and this Court should decline Petitioner's invitation to consider it. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731,

³ As addressed later in this briefing, Petitioner's contention that the statute of limitations provision is severable - and therefore the remainder of the agreement is enforceable - directly conflicts with South Carolina law. *See Return* at pp. 16-18.

733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”).

In *Simpson v. World Finance Corp. of South Carolina*, 367 S.C. 184, 623 S.E.2d 877 (Ct. App. 2007), the Court of Appeals held that, in an appeal of the denial of a motion to compel arbitration, lenders failed to preserve a claim for appellate review where they did not raise the argument in their motion to compel arbitration or during the hearing before the Circuit Court, the Circuit Court did not address the issue in its order, and the lenders failed to file a Rule 59(e) motion. *Id.* at 187–88, 623 S.E.2d at 879. Because the argument was not raised to and ruled on by the Circuit Court, it was not properly before the Court of Appeals. *Id.* And, in *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011), the South Carolina Supreme Court held that the issue of whether the FAA preempted South Carolina law, which the Petitioner had raised to the U.S. Supreme Court, had not been sufficiently preserved for appellate review in the state court proceedings even though the Petitioner had referenced state and federal policies favoring arbitration of disputes in its filings. *Id.* at 465, 719 S.E.2d at 643. After reexamining the record, the Supreme Court observed that “[i]n all of the submissions, memoranda, and hearings before the trial court, not once was there a single mention of federal preemption as it relates to the issue before us.” *Id.* at 468, 719 S.E.2d at 644. General references to policy favoring arbitration were not sufficient; “a general acknowledgment of a policy favoring arbitration is a far cry from a specifically articulated preemption argument.” *Id.*

Here too, Petitioner failed to raise the specific arguments regarding the outrageous tort exception to the trial court that it now makes on appeal, despite having had the opportunity to do so. Petitioner never argued that the holding of *Aiken* is inconsistent with U.S. Supreme Court precedent or is limited to the consumer context in either its briefing, at the hearing, or in a Rule

59(e) motion, so the trial court was never able to consider and rule on these issues. Even though the U.S. Supreme Court decided *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (May 21, 2018), after the date of the trial court’s order denying arbitration, that case simply confirmed the reasoning in *AT&T Mobility* and does not represent a departure from prior analysis of arbitration agreements under the FAA. (See App. Brief 7). See generally *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (“[I]t is a litigant’s duty to bring to the court’s attention any perceived error, and the failure to do so amounts to a waiver of the alleged error.”); *In the Interest of Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (“[T]he trial court must be given an opportunity to resolve the issue before it is presented to the appellate court.”). Moreover, even if these arguments were preserved for appellate review, they are immaterial to this Court’s consideration of Petitioner’s Petition.

Petitioner’s attempt to read in a foreseeability standard into the opinion is misdirection, plain and simple. The Court of Appeals correctly applied the “significant relationship” standard and rejected what is essentially the “but for” causation standard that the Petitioner urges this Court to adopt. A plain reading of the opinion reflects that any mention of “foreseeability” solely reflects the characterization by the court of the Plaintiff’s pleadings, and language as to whether Davis “anticipated” that his employer would reveal his personal information to hackers was merely descriptive. Op. at 2, 8.

III. The Arbitration Agreement in this Case is Unconscionable and Invalid.

In affirming the Circuit Court’s ruling that Respondent’s negligence claim did not arise out of or relate to his employment relationship with ISCO, the Court of Appeals correctly held that no significant relationship existed between Davis’s claims in this case and his employment with

ISCO. However, in addition, the arbitration agreement in the instant matter is void as unconscionable.

It may be true that, in some cases, both state and federal policy favor the arbitration of disputes. *See Zabinski*, 346 S.C. at 596–97, 553 S.E.2d at 118–19. However, regardless of the law applicable to this case,⁴ arbitration is a matter of contract and a party cannot be required to arbitrate any dispute he has not agreed to submit. *Id.* at 596, 553 S.E.2d at 118; *see also Aiken*, 373 S.C. at 149, 644 S.E.2d at 708.

Furthermore, “[w]hen the parties dispute whether a valid arbitration agreement exists, any ambiguities must be resolved against the drafter—which, in the labor context, will always be against the employer and in favor of the employee.” *Weckesser v. Knight Enters. S.E., LLC*, 228 F. Supp. 3d 561, 565 (D.S.C. 2017) (citing *Kristian v. Comcast Corp.*, 446 F.3d 25, 35 (1st Cir. 2006)). “While there is a presumption in favor of arbitration, this presumption disappears when the parties dispute the existence of a valid arbitration agreement.” *Id.* In fact, although unpreserved, Petitioner’s reliance on *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), supports this argument. *See id.* at 339 (noting that arbitration agreements must be placed on “equal footing” with other contracts).

Here, no valid arbitration agreement exists because the Arbitration Agreement is unconscionable. “In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would

⁴ Petitioner argues that the Federal Arbitration Act (“FAA”) applies to this case. Respondent accepts that, for purposes of this appeal and without the benefit of discovery, the FAA applies to this case. However, the cases relied on by the circuit court and in this brief were either decided under the FAA or are within the contours permitted by the FAA.

accept them.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007).

First, the Arbitration Agreement specifically shortens the statute of limitations window to six months after employment. This is in direct contravention of South Carolina law, which prohibits contractual shortening of statutes of limitation. See S.C. Code Ann. § 15-3-140. This is substantively oppressive and thus unconscionable. See *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. At the hearing of this matter, Petitioner appeared to concede the unconscionability of this language, but wrongly claimed that this language may be “severed.” (R. p. 125). Here, unlike those cases where contractual language is “separate and distinct” from the agreement to arbitrate, the offending provision is part and parcel of the Arbitration Agreement and not a distinct contractual provision. Thus, the language should invalidate the entire Arbitration Agreement.

This result is supported by the applicable law. As the South Carolina Supreme Court explained in *Simpson v. MSA of Myrtle Beach, Inc.*:

[L]egislation permits this Court to “refuse to enforce” any unconscionable clause in a contract or to “limit its application so as to avoid an unconscionable result.”

At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, “a critical consideration in assessing severability is giving effect to the intent of the contracting parties,” the D.C. Circuit recently cautioned, “If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.” Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties.

373 S.C. 14, 34, 644 S.E.2d 663, 673–74 (2007) (citations omitted) (quoting S.C. Code Ann. § 36-2-302(1) (2003); *Booker v. Robert Half Int’l Inc.*, 413 F.3d 77, 84–85 (D.C. Cir. 2005)) (citing *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002)). Here, Petitioner chose to include its offending provision within the Arbitration Agreement rather than its

employment contract, thereby choosing to completely disregard express South Carolina law. *See id.* (refusing to apply severability where offending provision contravened consumer protection law). Moreover, adopting Petitioner’s severability argument would amount to rewriting the applicable arbitration provision at issue. Instead, the Arbitration Agreement is void and inapplicable to this case.

Second, the Arbitration Agreement suffers from a lack of mutuality of remedy for this type of breach. In *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), the arbitration agreement at issue subjected the weaker party to liability for monetary damages while disclaiming liability for those same damages for the dominant party. *Id.* at 15, 742 S.E.2d at 40. The Court of Appeals found this arbitration agreement unconscionable, “particularly in light of the lack of mutuality of remedy.” *Id.* The Court in *Smith* also concluded that the arbitration clause at issue “should not be severed from the numerous unconscionable provisions” in the agreement. *Id.* at 16, 742 S.E.2d at 41.

The relevant facts of this case demand a similar result. In the Arbitration Agreement, Petitioner specifically excludes itself from arbitrating claims involving an employee violating confidentiality and non-pirating provisions. (R. p. 49). Yet, under Petitioner’s reading of the Arbitration Agreement, should Petitioner violate an employee’s confidentiality, then that claim would nonetheless be subject to arbitration. Thus, Petitioner has created a plain lack of mutuality whereby it may sue its employee should the employee breach the company’s confidentiality or pirate company data, but an employee may not sue the company should the company breach the employee’s confidentiality.

Either of the above provisions alone render the Arbitration Agreement unconscionable and thus unenforceable. When read together, these offending provisions make the Arbitration

Agreement “wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions.” *Smith*, 403 S.C. at 15, 742 S.E.2d at 40.

IV. Given that the Court of Appeals Declined to Address the Denial of Arbitration On the Basis of the Unforeseeable and Outrageous Tort Exception, There Exists No Reason for this Court to Do So.

Since the Court of Appeals declined to address the denial of arbitration on the grounds of the unforeseeable and outrageous tort exception, Respondent respectfully submits that there exists no good reason for this Court to consider the issue. However, in an effort to fully and completely respond to the entirety of the Petition, Respondent submits that the Circuit Court’s additional ground was appropriate and in accordance with existing South Carolina law.

As the Circuit Court correctly noted, this Court has specifically held that identity theft is an outrageous act. *Aiken*, 373 S.C. at 149–50, 644 S.E.2d at 708. And, despite Petitioner’s statements to the contrary, *Aiken* has never been overruled and remains binding law in South Carolina. In *Aiken*, to apply for a loan, a plaintiff was required to provide PII to a lender. *Id.* at 147, 644 S.E.2d at 706. In exchange for the loan, the plaintiff entered into an arbitration agreement covering any claims related to the loan. *Id.* Various employees of the lender tortiously used the plaintiff’s personal information, and the plaintiff brought a complaint in South Carolina court against the lender. *Id.* The South Carolina Supreme Court squarely held that identity theft is outrageous conduct not subject to an arbitration agreement:

In this case, we find the theft of Aiken’s personal information by World Finance employees to be outrageous conduct that Aiken could not possibly have foreseen when he agreed to do business with World Finance.

Id. at 151, 644 S.E.2d at 709. Similarly, here, neither Respondent nor any other current or former employees of Petitioner could have foreseen that Petitioner’s employees would give away their information to identity thieves. Contrary to Petitioner’s argument, while the facts in *Aiken* dealt

with a consumer issue, the Supreme Court did not limit its holding to the consumer context. *See id.* at 149–52, 644 S.E.2d at 708–10. In fact, the Court made clear that, generally speaking, the theft of PII constitutes “outrageous conduct that [a party] could not possibly have foreseen.” *Id.* at 151, 644 S.E.2d at 709.

Petitioner further argues that *Aiken* is inapplicable because, in its view, identity theft is foreseeable. In fact, Petitioner goes on to say that “it is reasonable for every person to expect that at some point there will be an attack on their PII.” (Initial Brief of Petitioner, at 10). However, the mere possibility that an event may happen, or is likely to happen in the aggregate over the course of one’s life, does not render that event foreseeable under the law in a particular circumstance. *See Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 521, 389 S.E.2d 155, 156 (Ct. App. 1989) (“The test of for[e]seeability is whether some injury to another is the natural and probable consequence of the complained of act.”). For Petitioner to be correct that Respondent’s identity theft was foreseeable, it must be true that it is probable—or more likely than not—that giving an employer PII will result in identity theft. Such is clearly not the case.

And even assuming that this might be true, Petitioner wholly mischaracterizes what occurred in this case. This was not a “typical” cyber-attack. Here, an ISCO employee affirmatively and willfully gave PII to an identity thief. Petitioner is asking the Court to find that if a person is required to give PII to their employer, it is foreseeable that the employer would act in contravention of any and all authentication policies and affirmatively hand over sensitive data to any unverified entity who requested it. And this conduct, as noted in the Amended Complaint, was willful and thus outrageous. (R. p. 51, p. 56).⁵

⁵ Petitioner wrongly attempts to analogize this case to *Wilson v. Willis*, 416 S.C. 395, 419, 786 S.E.2d 571, 583 (Ct. App. 2016), *rev’d*, 426 S.C. 326, 827 S.E.2d 167 (2019), asserting that

V. ISCO’s Argument That Any Doubt Must Be Resolved in Favor of Arbitration Would Essentially Swallow the Rule Requiring that Arbitration Be Predicated on an Agreement to Arbitrate.

Seeking to rely upon the United States Supreme Court’s decision in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), ISCO asks this Court to adopt a rule whereby any “reasonable doubt” as to the existence of an arbitration agreement overtakes the requirement that there exist intent by the parties to arbitrate—i.e., some significant relationship between the claim at issue and the parties’ contract. (Pet. 7–8). However, ISCO declines to address the facts of the *Dean Witter* case, which differ greatly from those presented in the instant case.

Davis’s claims are “more comparable” to the claims in *Wilson* as outlined in the opinion issued by the Court of Appeals and later reversed. (Pet. 22–24). In *Wilson*, customers of an insurance agent brought suit against the broker, agency, and insurers, alleging that the agency and insurers failed to train and supervise their agent, resulting in theft of customer monies, forgery, and related malfeasance. The circuit court denied the motions to compel arbitration filed by the insurers, which sought to compel the customers to arbitration pursuant to certain agency agreements between the insurers and the agency (to which the customers were non-signatories). In concluding that defendants were not entitled to arbitration, the circuit court made the following findings, among others:

(1) there was no evidence of a valid contract requiring arbitration because the Agency Agreement was never signed by Southern Risk or, alternatively, the unsigned agreement was invalid because it violated the Statute of Frauds; (2) the arbitration clause was narrow in scope and inapplicable on its face to Petitioners’ claims because the claims had no relation to and were not “*in connection with the performance of the Agency Agreement,*” which, instead, controlled only the business relationship between Southern Risk and the Insurers, not the relationship between the Insureds and the Insurers

Id. at 333, 827 S.E.2d at 171 (emphasis added). The Court of Appeals reversed the trial court, and the Supreme Court subsequently reversed, finding the plaintiffs could not be compelled to arbitration as non-signatories, primarily analyzing the case under a direct benefits estoppel framework. However, the Supreme Court rejected any attempt to implicate estoppel “simply because a claim relates to or would not have arisen *but for* a contract’s existence,” and further noted that “[g]eneral principles of *South Carolina law* form the basis for most of Petitioners’ claims.” *Id.* at 342, 343, 827 S.E.2d at 176 (emphases added). Similarly, here ISCO seeks to circumvent trial on Respondent’s state law negligence claim which would not have arisen but for his employment at ISCO.

In *Dean Witter*, a client of Dean Witter Reynolds Inc., a securities broker-dealer,

[A]lleged that an agent of Dean Witter had traded in his account without his prior consent, that the number of transactions executed on behalf of the account was excessive, that misrepresentations were made by an agent of Dean Witter as to the status of the account, and that the agent acted with Dean Witter's knowledge, participation, and ratification.

When Byrd invested his funds with Dean Witter in 1981, he signed a Customer's Agreement providing that "[a]ny controversy between you and the undersigned arising out of or relating to this contract or the breach thereof, shall be settled by arbitration."

Id. at 214–15. Dean Witter subsequently moved to compel arbitration of all of the state law claims, leaving the federal securities claims contained in the pleading for trial in federal court. The District Court declined to compel arbitration of the pendent state law claims, citing the inefficiency of parallel actions and possible inconsistent results. The Court of Appeals for the Ninth Circuit affirmed the lower court; however, the Supreme Court reversed, noting that the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration *on issues as to which an arbitration agreement has been signed.*" *Id.* at 218 (second emphasis added).

Here, there exists no agreement to arbitrate the issues (or claims) contained in this lawsuit, which arise out of an entirely unanticipated, yet voluntary, disclosure of PII by an ISCO employee during her workday. To interpret the arbitration provision at issue here otherwise would be inconsistent with any pro-arbitration policy by contravening the parties' intent when entering into the arbitration agreement. *See, e.g., Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) (finding an arbitration provision in a financial services contract between investor and advisor did not cover negligence or consumer fraud claims because the prospect of an advisor converting his client's funds for personal use was "not within the parties' contemplation" when the contract was formed.)

As this Court noted in *Landers*, “even the broadest of arbitration clauses have their limitations.” 402 S.C. at 115, 739 S.E.2d at 217. Further, arbitration “is predicated on an agreement to arbitration because parties are waiving their fundamental right to access to the courts.” *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173; *see also Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007) (customer not required to arbitrate her claim that pool seller’s agent defamed her when she fell behind on her payments, notwithstanding the broadly worded arbitration provision contained in her purchase contract, given the lack of connection between the sales contract and the defamation claim).

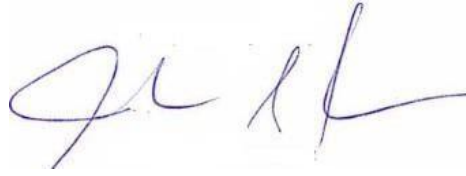
Here, the Court of Appeals correctly affirmed the trial court’s determination concerning the scope of the arbitration provision. To find otherwise would require this Court to disregard the intent of the parties and the clear contractual language to which the parties agreed.

CONCLUSION

The Court of Appeals’ decision below correctly found that Respondent is not required to arbitrate his claim against Petitioner. Accordingly, and based upon the foregoing reasons, this Court should deny Petitioner’s Petition for a Writ of Certiorari.

-Signature Page to Follow-

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'JS Simmons', is positioned above a horizontal line.

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