THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2013-1096
Circuit Court Case No. 2012-CP-40-7331

Phillip Morgan, individually and on behalf of all similarly situated plaintiffs, ... Appellant,

v.

South Carolina Department of Revenue; South Carolina Division of State Information Technology; the Office of the Governor of the State of South Carolina; Trustwave Corporation; and Trustwave Holdings, Inc., ... Respondents.

BRIEF OF RESPONDENTS SOUTH CAROLINA DEPARTMENT OF REVENUE AND THE OFFICE OF THE GOVERNOR OF THE STATE OF SOUTH CAROLINA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

STATEMENT OF ISSUES ON APPEAL

With respect to Respondents the South Carolina Department of Revenue and the Office of the Governor, this case presents a series of appellate procedural issues, including:

1. Law of the Case: The Appellant did not appeal several grounds on which the circuit court dismissed his case. Does the law-of-the-case doctrine require affirmance of the circuit court's decision on those grounds?

2. Issue Preservation: Did the Appellant properly preserve issues for this Court's review if he did not raise them to the circuit court prior to entry of the order dismissing his case?

Assuming *arguendo* this appeal overcomes these procedural defects, substantive issues for this Court's consideration include:

3. Lack of Standing: Does the Appellant have standing to bring any of the claims that he alleges arise from the breach of the State's taxpayer data?

4. Lack of Damages: Is the absence of actual damages resulting from the data breach fatal to the Appellant's claims for relief?

5. Class Action Against Department of Revenue Prohibited: Did the circuit court rightly apply the statutory prohibition against class actions adverse to the Department of Revenue when dismissing class allegations against the agency?

STATEMENT OF THE CASE

This case arises out of computer hackers' unauthorized access of South Carolina's taxpayer data, which has received considerable attention from the citizenry, public officials, and the media. Federal law enforcement notified the State of South Carolina about that illegal breach in the Fall of 2012, and the United States Secret Service and the South Carolina Law Enforcement Division jointly notified the public about the breach through a press conference on October 26, 2012. (R. p. ___, Am. Compl. ¶ 23.) During that press conference, officials explained that they briefly delayed this announcement in order to allow law enforcement to fully investigate the breach. (*See* R. p. ___, Mem. in Supp. of Governor Haley and the Department of Revenue's Motion to Dismiss at 10 (transcribing remarks of Mark Keel, Chief of the South Carolina Law Enforcement Division, and Mike Williams, Special Agent with the United States Secret Service, that were incorporated by reference into the Amended Complaint).)

Following discovery of the breach, the State of South Carolina took steps to mitigate potential issues associated with the breach, including purchasing credit monitoring services and fraud counseling services for affected taxpayers. Nevertheless, the Appellant, on behalf of a class, filed suit against several public defendants on October 31, 2012, alleging a host of claims that he attributed to the breach. (R. p. ___, Compl. *passim*) He amended the complaint to add Trustwave Corporation and Trustwave Holdings as defendants on November 5, 2012. (R. p. ___, Am. Compl. *passim.*)

The Appellant asserted four claims against the public defendants: (1) an alleged violation of South Carolina Code § 1-11-490, (2) gross negligence, (3) gross negligence *per se*, and (4) civil conspiracy. (R. pp. ___–___, Am. Compl. ¶¶ 25–45.)

On December 6, 2012, Governor Haley, the Department of Revenue, and the Department's former director, James Etter, moved to dismiss the amended complaint. (R. p. ___, Motion to Dismiss or Stay Case.) On February 7, 2013, the circuit court held a hearing on this motion, as well as procedural and dispositive motions filed by the other respondents.

At the February 7th hearing, the circuit court orally dismissed Governor Haley and Mr. Etter as individual defendants, but it also substituted in the Office of the Governor as a defendant. (R. p. ___, Hr'g Tr. 26:9–16.) That ruling was memorialized in a Form 4 order filed on February 11, 2013. (R. p. ___, Form 4 Order (Feb. 11, 2013).)

The circuit court subsequently granted the motion to dismiss all claims against the Department of Revenue and the Office of the Governor through a written order dated February 27, 2013. (R. p. ___, Order Granting Motion to Dismiss the Department of Revenue and the Office of the Governor (Feb. 27, 2013).) It resolved the dispositive motions filed by the other respondents via separate orders.

On March 8, 2013, the Appellant filed a Motion for Reconsideration. (R. p. ___, Motion for Recons.) On March 11, 2013, he filed an Amended Motion for Reconsideration. (R. p. ___, Am. Motion for Recons.) The circuit court denied reconsideration by written order dated April 16, 2013. (R. p. ___, Order Den. Pl.'s Motion to Reconsider (Apr. 16, 2013).)

On May 3, 2013, the Appellant filed a Notice of Appeal of only the order "denying Plaintiff's Amended Motion for Reconsideration." (R. p. ___, Notice of Appeal.) He attached only a copy of the circuit court's April 16th Order to the Notice. (*Id.*)

STANDARD OF REVIEW

I. Motion to Reconsider

The Appellant has only noticed an appeal of the circuit court's order denying his motion to reconsider the dismissal of this case. Motions to alter or amend a judgment under Rule 59, SCRCP, are committed to the circuit court's sound discretion. *See Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) ("The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.").

II. Subject Matter Jurisdiction

Whether subject matter jurisdiction exists in the circuit court is a question of law, which is reviewed *de novo* on appeal. *Linda Mc Co. v. Shore*, 390 S.C. 543, 551, 703 S.E.2d 499, 503 (2010).

III. Dismissal Under Rule 12(b)(6)

Rule 12(b)(6), SCRCP, tests the legal sufficiency of a complaint. Under this rule, the Court should dismiss a claim if it fails "to state facts sufficient to constitute a cause of action." *Id.* When evaluating a motion under this rule, the Court is not to read unalleged facts into the pleadings, *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005), nor need it credit the claimant's legal conclusions or predicate act labels, *Builder Mart of Am., Inc. v. First Union Corp.*, 349 S.C. 500, 512, 563 S.E.2d 352, 358 (Ct. App. 2002). An appellate court applies the same standard as the circuit court when reviewing dismissal. *Disabato v. S.C. Ass'n of Sch. Adm'rs*, ___ S.C. ___, ___, 746 S.E.2d 329, 333 (2013).

ARGUMENTS AND AUTHORITIES

The circuit court's decision to dismiss all claims against the Department of Revenue and the Office of the Governor is consistent with virtually every court in the United States that has reviewed claims arising out of databases that were unlawfully breached. Some have dismissed claims due to a lack of standing, while others have dismissed claims due to a lack of recoverable damages. Regardless of the path, though, the destination is the same, and the circuit court's dismissal order is fully aligned with this robust body of case law.

In addition to these substantive legal issues, this appeal is fatally flawed because the Appellant has not followed the proper procedure for preserving and presenting issues for this Court's review. Familiar principles—such as the law-of-the-case doctrine and the requirement that a party must raise an issue below and in its opening appellate brief in order to preserve the point—should doom this appeal at the outset, as explained below.

I. The circuit court's decision should be affirmed because the Appellant has not properly preserved issues or otherwise followed appellate procedure in a way that would enable this Court to reverse dismissal.

This appeal presents a case study in how the failure to properly preserve issues and follow appellate procedure can be fatal to a case. For one, several grounds on which the circuit court dismissed the Department of Revenue and the Office of the Governor were not appealed to this Court and, therefore, have become the law of the case and direct affirmance of the circuit court's decision. Similarly, numerous other issues presented in the Appellant's opening brief were never raised to or ruled on by the circuit court, leaving them unpreserved for this Court's review. These procedural defects are discussed below in turn.

A. The Appellant failed to appeal issues on which the circuit court dismissed claims against the Department of Revenue and the Office of the Governor.

It is fundamental that a party who wishes to overturn a lower court's ruling must appeal that decision, including each issue on which an adverse ruling is based, to this Court. Otherwise, an unappealed issue is deemed abandoned, and the circuit court's decision on that point becomes the law of the case. *See, e.g.*, *Mibbs, Inc. v. S.C. DOR*, 337 S.C. 601, 605, 524 S.E.2d 626, 628 (1999) ("Failure to appeal an alternative ground of the judgment will result in affirmance."); *Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) ("Because [the appellant] has not appealed on all grounds, the trial court's decision is affirmed."); *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) ("Failure to argue is an abandonment of the issue and precludes consideration on appeal.").

In this same vein, an appellant must fully discuss an adverse issue in his opening brief in order to avoid abandoning the point. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."). These law-of-the-case principles apply even when an unappealed issue relates to subject matter jurisdiction. *See Judy v. Martin*, 381 S.C. 455, 459, 674 S.E.2d 151, 153 (2009) (applying the law-of-the-case doctrine to a trial court's "unchallenged disposition on the magistrate's subject matter jurisdiction").

Here, the circuit court dismissed all four claims against the Department of Revenue and the Office of the Governor on a host of legal grounds. With respect to each claim, the Appellant has failed to appeal at least one basis for dismissal:

All Claims

Mootness: The circuit court dismissed all of the Appellant's claims against the Department of Revenue and the Office of the Governor on grounds that they were moot, as the State of South Carolina has already voluntarily provided remedies to taxpayers impacted by the breach. (R. pp. ___–___, Order Granting Motion to Dismiss the Department of Revenue and the Office of Governor at 8–10 (Feb. 27, 2013).) The Appellant did not appeal the circuit court's ruling on mootness.

Statutory Claim

Data Not Owned by Governor's Office: The circuit court held that South Carolina Code § 1-11-490 was inapplicable to the Office of the Governor because there were no allegations that the Governor's Office "own[s] or license[s]" the database that was breached. (R. p. ___, Order Granting Motion to Dismiss the Department of Revenue and the Office of Governor at 12 (Feb. 27, 2013).) The Appellant did not appeal the circuit court's ruling on this issue.

Law Enforcement Exception: The circuit court also dismissed the statutory claim against both the Department of Revenue and the Office of the Governor because South Carolina Code §§ 1-11-490(A) and 1-11-490(C) authorize public officials to delay providing notice of a data breach when necessary to advance a criminal investigation, which was indisputably the case here. (R. pp. ___–___, Order Granting Motion to Dismiss the Department of Revenue and the Office of Governor at 12–14 (Feb. 27, 2013).) The Appellant did not appeal the circuit court's application of this statutory exemption to liability.

Negligence Claims

No Duty Owed by Governor's Office: The circuit court dismissed the Appellant's negligence claims against the Office of the Governor due to a lack of a duty owed. (R. pp. ___–___, Order Granting Motion to Dismiss the Department of Revenue and the Office of Governor at 15–16 (Feb. 27, 2013).) The Appellant did not challenge this ruling on appeal.

Immunity Pursuant to South Carolina Code § 15-78-60(4): The circuit court also held that both the Department of Revenue and the Office of the Governor were immune from the Appellant's negligence claims pursuant to South Carolina Code § 15-78-60(4). (R. p. ___, Order Granting Motion to Dismiss the Department of Revenue and the Office of Governor at 14 (Feb. 27, 2013).) The Appellant did not appeal this basis for dismissal.

Civil Conspiracy Claim

No Elements of Claim: The circuit court dismissed the Appellant's civil conspiracy claim against both the Department of Revenue and the Office of the Governor on grounds that the Amended Complaint did not contain allegations sufficient to support the elements of this cause of action. (R. pp. ___–___, Order Granting Motion to Dismiss the Department of Revenue and the Office of Governor at 18–19 (Feb. 27, 2013).) The Appellant did not challenge this ruling on appeal.

* * * * *

Because the Appellant has not appealed any of these grounds for dismissing the claims against the Department of Revenue and the Office of the Governor, the circuit court's ruling should be affirmed, and each claim against these public defendants should remain dismissed with prejudice.

B. The Appellant failed to preserve for appellate review several of the remaining issues argued in his opening brief.

In addition to failing to appeal numerous dispositive issues, the Appellant has also violated this Court's prerequisites for preserving issues for appellate review. Failing to properly preserve an issue prevents an appellate court from considering the point. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (reiterating that the issue-preservation rules are designed to "prevent[] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card").

An issue is properly preserved for appellate review only if it is presented to and ruled upon by the trial court. *See Elam v. S.C. DOT*, 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). Likewise, a party is required to raise an issue prior to the circuit court entering judgment and may not use a motion for reconsideration as a vehicle for presenting an issue for the first time. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.").

In his appeal, the Appellant has briefed a number of issues that he argues warrant reversal. Several of these issues, however, were never presented to or ruled on by the circuit court. These unpreserved issues include:

"Public Importance" Standing: The circuit court dismissed this case in part because the Appellant lacked standing to bring suit. On appeal, the Appellant argues for the first time that he has standing to present his claims pursuant to South Carolina's

"'public importance' exception to the traditional constitutional analysis of standing." (Initial Br. of Appellant at 15.) This basis for standing was never presented to the circuit court and, therefore, is not preserved for review.

"Special Duty" Rule: The Appellant argues on appeal that "a plaintiff can successfully maintain a tort suit for damages based upon a statute that creates a special duty." (Initial Br. of Appellant at 20.) The circuit court made no rulings with respect to any "special duty" issue. Accordingly, this issue is not preserved for review.

Logrolling: The circuit court dismissed all class allegations against the Department of Revenue because, by statute, the agency "may not be named or made a defendant in any other class action brought in this State." S.C. Code Ann. § 12-60-80(C). The Appellant now argues that this statutory prohibition against suing the Department on behalf of a class "violates the one subject rule" of the South Carolina Constitution. (Initial Br. of Appellant at 22.) This objection is too late and not preserved for review by this Court, as even constitutional issues cannot be raised for the first time on appeal. *See, e.g.*, *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal.").

* * * * *

Because these issues were not raised and ruled on below, they are not preserved for appellate review. And because the Appellant relies almost exclusively on these unpreserved issues as the grounds for his appeal, the circuit court's ruling should be affirmed for this additional procedural reason.

II. The circuit court's decision to dismiss all claims against the Department of Revenue and the Governor's Office was correct on the merits.

Assuming *arguendo* that the Appellant can overcome each of the dispositive procedural hurdles discussed above, the circuit court's decision should still be affirmed because it was correct on the merits. The circuit court applied the plain language of the statutes at issue—both the "breach notification" statute and the prohibition against suing the Department of Revenue in a class-action capacity—as well as the uniform body of case law resolving data-breach litigation when dismissing the claims against the Department of Revenue and the Office of the Governor. Nothing in the Appellant's opening brief undercuts or legitimately rebuts the trial court's decision.

A. The Appellant's claims are legally defective because he has not alleged any cognizable damages.

This is not the first time litigation has arisen from a breach of a database containing sensitive information, and case law analyzing such litigation is well-developed. In resolving such claims, courts around the country agree that a plaintiff must allege that he has suffered actual losses that are attributable to a breach before a case can proceed. As explained below, some courts have framed this issue in terms of the injury-in-fact element of standing, while some have framed it in terms of the damages element of any legal claim. The circuit court dismissed the claims against the Department of Revenue and the Office of the Governor under both frameworks, and its decision is correct on both counts.

1. The Appellant has not alleged an injury sufficient to provide constitutional or statutory standing.

Before a court can exercise jurisdiction over a matter, the plaintiff must have standing to bring suit. *Anders v. S.C. Parole & Cmty. Corr. Bd.*, 279 S.C. 206, 211, 305

S.E.2d 229, 231 (1983). Like the federal courts, South Carolina requires a party to satisfy a three-part test in order for standing to attach. First, the plaintiff must have suffered an injury-in-fact that is not merely hypothetical and speculative, but that is "concrete and particularized." Second, the injury must be fairly traced to the defendant's alleged conduct. Third and finally, the court must be able to redress the injury. *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195–96, 669 S.E.2d 337, 339 (2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

In this case, the Appellant has not alleged that he has suffered any actual losses resulting from the breach of the taxpayer database. He has not alleged that anyone has stolen his identity. He has not alleged that anyone has fraudulently opened a bank account or credit card in his name. Instead, he alleged only that he has been "placed in a material risk of harm for identity theft." (R. p. ___, Am. Compl. ¶ 35.) He reiterated this speculation in his opening brief, opining that the likelihood that he will not suffer an actual harm at some point in the future "lies somewhere between slim and nonexistent." (Initial Br. of Appellant at 14.)

This empty prediction of an injury that may never occur is not enough to trigger standing. Courts around the country have dismissed similar cases due to the absence of a concrete, definite injury attributable to the breach of a database. *See, e.g.*, *Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) (affirming dismissal and holding that "***if*** the hacker attempts to use the information, and ***if*** he does so successfully, only then will Appellants have suffered an injury") (emphasis supplied by the *Reilly* court); *Hammond v. Bank of N.Y. Mellon Corp.*, Case No. 08 Civ. 6060 (RMB) (RLE), 2010 U.S. Dist. LEXIS 71996, at *6–7 (S.D.N.Y. June 25, 2010) ("[T]his Court concludes that plaintiffs

here do not have Article III standing (*i.e.*, there is no 'case or controversy') because they claim to have suffered little more than an increased risk of future harm from the loss (whether by accident or theft) of their personal information."); *Key v. DSW Inc.*, 454 F. Supp. 2d 684, 690 (S.D. Ohio 2006) (dismissing claims arising from the breach of a database that contained credit card, debit card, and checking account information of 1.5 million customers due to a lack of standing because "Plaintiff's claims are based on nothing more than a speculation that she will be a victim of wrongdoing at some unidentified point in the indefinite future"). The circuit court's determination is fully aligned with these decisions, and it should be affirmed accordingly.

In order to avoid this conclusion, the Appellant argues that some courts have found standing "under *similar* (not identical) circumstances." (Initial Br. of Appellant at 13 (emphasis and parenthesis supplied by Appellant).) The Appellant identifies two cases that he claims support this position. Both, however, are readily distinguishable from the instant case.

Unlike here, the plaintiffs in each of the cases on which the Appellant bases his standing argument alleged that they were victims of actual identity theft and that they suffered identifiable losses stemming from that theft. *See Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1322 (11th Cir. 2012) ("Bank of America accounts were opened in Curry's name, credit cards were activated, and the cards were used to make unauthorized purchases. Curry's home address was also changed with the U.S. Postal Service. . . . [A]n account was opened in Moore's name with E*Trade Financial, and in April 2011, Moore was notified that the account had been overdrawn."); *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 164 (1st Cir. 2011) ("Here, there was actual misuse [of lost

data], and it was apparently global in reach. . . . The data was used to run up thousands of improper charges across the globe to the customers' accounts."). The alleged injury in this case, which is nothing beyond a concern about the potential for future misconduct, is a far cry from the injuries that were actually suffered in the cases on which the Appellant anchors his appeal. The Court, like the circuit court, should reject the Appellant's misplaced reliance on cases that are fundamentally distinguishable.

The Appellant also attempts to bypass the absence of constitutional standing by relying on statutory standing, which he claims is triggered by South Carolina Code § 1-11-490(G). (Initial Br. of Appellant at 14–15.) There are two core problems with this argument. First, any standing conferred by Section 1-11-490 is only applicable to a claim brought under the statute itself; it cannot confer standing for the Appellant's common law claims of gross negligence, gross negligence *per se*, and civil conspiracy.

Second, this statute does not vest *carte blanche* standing to every citizen, regardless of his or her circumstances, if a database "own[ed] or licens[ed]" by an agency is breached. Instead, by its very terms, the statute only vests standing in a resident who has been "injured by a violation of this section." S.C. Code Ann. § 1-11-490(G). The only way an agency can violate this law is by not providing timely notice to impacted citizens that a database has been breached. *Id.* § 1-11-490(A).[1] Not only does Section 1-11-490(G) contain the same "injury" requirement for standing as the constitutional-

[1] As noted above in Section I.A, the General Assembly has exempted agencies from liability if they delay notifying the public about a breach in order to advance a criminal investigation. S.C. Code Ann. §§ 1-11-490(A) & -490(C). The circuit court dismissed the Appellant's statutory claim against the Department of Revenue and the Governor's Office in part because of this exception. (R. pp. ___–___, Order Granting Motion to Dismiss the Department of Revenue and the Office of Governor at 12–14 (Feb. 27, 2013).) The Appellant has not challenged that dispositive ruling on appeal.

standing analysis, it only vests standing in a citizen who alleges that he was harmed by an agency's delay in notifying the public about a breached database.[2] Because the Appellant has not alleged any such harm here, the circuit court's rejection of his statutory standing argument should be affirmed.

2. The Appellant has not alleged any damages that are recoverable under South Carolina law.

Even if the Appellant's speculation is sufficient to confer standing, his claims remain fatally defective because he cannot recover any damages for his alleged injury. The circuit court dismissed the Appellant's claims for lack of recoverable damages, and courts around the country have uniformly agreed with that analysis and conclusion.

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[2] The Appellant devotes over five pages of his opening brief to arguing that South Carolina Code § 1-11-490 is not a "mere notice" statute and that the circuit court's holding that the law only requires agencies to provide notice of a breach is an "absurd interpretation." (Initial Br. of Appellant at 15–20.) The statute could not be clearer in its terms and requirements, and the Appellant is simply wrong.

Section 1-11-490(A) identifies circumstances under which an agency "shall disclose a breach of the security system." Section 1-11-490(B) identifies additional circumstances under which an agency "shall notify" an affected party about a breach. Section 1-11-490(C) explains that notice can be delayed when necessary for law enforcement to continue an investigation. Section 1-11-490(D) provides definitions. Section 1-11-490(E) identifies the various ways an agency may provide notice about a breach. Section 1-11-490(F) authorizes agencies to formulate their own notification policies. Finally, Sections 1-11-490(G) through -490(I) identify potential remedies for violating the notice provisions.

Nor is South Carolina's "notice" statute unique, as it tracks other states' laws with respect to obligations and remedies following a breach. *See, e.g.*, *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 637 (7th Cir. 2007) ("The provisions of the [Indiana] statute applicable to private entities storing personal information require only that a database owner ***disclose*** a security breach to potentially affected consumers; they do not require the database owner to take any other affirmative act in the wake of a breach. If the database owner fails to comply with the only affirmative duty imposed by the statute—the duty to disclose—the statute provides for enforcement ***only*** by the Attorney General of Indiana.") (emphasis supplied by the *Pisciotta* court). The Court should reject the Appellant's misinterpretation of South Carolina Code § 1-11-490 accordingly.

Proof of damages is an essential element to each of the Appellant's claims against the Department of Revenue and the Office of the Governor. *See* S.C. Code Ann. § 1-11-490(G)(1) (identifying damages as an element of the Appellant's claimed statutory violation); *Pye v. Estate of Fox*, 369 S.C. 555, 568, 633 S.E.2d 505, 512 (2006) ("Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action."); *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000) (listing recoverable damages as an element of any negligence claim).

As discussed above, the Appellant's only alleged damages are associated with an increased "material risk of harm for identity theft." (R. p. ___, Am. Compl. ¶ 35.) South Carolina law, though, does not impose liability "merely for the creation of risk when there are no actual damages." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). To do otherwise would "drastically change[] the fundamental elements of a tort action" and would allow recovery even when damages are "entirely speculative." *Id.*; *see also Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) ("Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." (quoting *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570–71, 183 S.E.2d 438, 444 (1971))).

Citing this universal prohibition on recovering purely speculative damages, numerous courts have followed the circuit court's same logic in dismissing claims arising out of breached databases. *See, e.g.*, *Krottner v. Starbucks Corp.*, 406 F. App'x 129, 131 (9th Cir. 2010) (affirming dismissal of negligence claim under Washington law because the plaintiff's allegations about a risk of future harm associated with the theft of

unencrypted data did "not establish[] a cognizable injury"); *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 639–40 (7th Cir. 2007) (affirming dismissal of claims brought under Indiana law arising from a "sophisticated, intentional and malicious" hack of a database because "[w]ithout more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy"); *Holmes v. Countrywide Fin. Corp.*, Case No. 5:08-cv-00205-R, 2012 U.S. Dist. LEXIS 96587, at *17 (W.D. Ky. July 12, 2012) ("The unfavorable legal precedent from Kentucky, New Jersey, and other states prompts the Court to reject a naked claim of increased risk of identity theft. Plaintiffs must offer additional damages for a cognizable injury under either state's law."); *Hammond*, 2010 U.S. Dist. LEXIS 71996, at *34–35 (dismissing a negligence claim arising out of stolen unencrypted data because, as a matter of New York law, "a heightened fear of having th[e plaintiffs'] identities stolen in the future" does not amount to a cognizable injury).

Faced with this wealth of adverse rulings, the Appellant suggests that this Court should rewrite South Carolina law to "allow a cognizable legal claim for the cost of credit monitoring services." (Initial Br. of Appellant at 14.) He does not cite any support for this novel position, which has been squarely rejected time after time by courts around the country. Simply put, a party cannot claim as damages monies it voluntarily spends to avoid a future problem that may never occur. *See, e.g.*, *Reilly*, 664 F.3d at 46 ("That a plaintiff has willingly incurred costs to protect against an alleged increased risk of identity theft is not enough to demonstrate a 'concrete and particularized' or 'actual or imminent' injury."); *Pisciotta v. Old Nat'l Bancorp*, Case No. 1:05-cv-668-LJM-WTL, 2012 U.S. Dist. LEXIS 160878, at *4 (S.D. Ind. Sept. 19, 2012) ("Further, recent case

law from across the country has rejected the cost of credit monitoring as an alternative award for what would otherwise be speculative and unrecoverable damages."); *Giordano v. Wachovia Secs., LLC*, Case No. 06-476 (JBS), 2006 U.S. Dist. LEXIS 52266, at *12 (D.N.J. July 31, 2006) ("Plaintiff's allegations that, as a result of Wachovia's actions, she will incur costs associated with obtaining credit monitoring services in order to prevent identity theft simply does not rise to the level of creating a concrete and particularized injury. Plaintiff's claims, at best, are speculative and hypothetical future injuries."); *Hendricks v. DSW Shoe Warehouse Inc.*, 444 F. Supp. 2d 775, 780 (W.D. Mich. 2006) ("She is, according to her theory, entitled to damages to buy peace of mind, or to help her determine when and if a claim accrues through actual loss. But Michigan law does not accept such a theory of recovery on the claims asserted by plaintiff."). This logic is particularly sound here because the State of South Carolina has already provided free credit monitoring services for impacted taxpayers, as the circuit court acknowledged.

At bottom, the circuit court's decision to dismiss the Appellant's claims for lack of recoverable damages is unassailable. Its ruling is consistent with courts throughout the country that have analyzed, and dismissed, similar claims. Accordingly, the circuit court's dismissal should be affirmed.

B. The circuit court properly dismissed the class allegations against the Department of Revenue because the General Assembly has prohibited class litigation against the agency.

As an additional basis for dismissing the claims against the Department of Revenue, the circuit court cited the statutory prohibition against suing the agency in a class-action capacity. (R. pp. ___-___, Order Granting Motion to Dismiss the

Department of Revenue and the Office of Governor at 19–21 (Feb. 27, 2013).) That provision provides as follows:

> Notwithstanding subsections (A) and (B), a claim or action for the refund of taxes may not be brought as a class action in the Administrative Law Judge Division or any court of law in this State, and ***the department***, political subdivisions, or their instrumentalities ***may not be named or made a defendant in any other class action brought in this State***.

S.C. Code Ann. § 12-60-80(C) (emphasis added).

By its plain language, the statute bars litigants from suing the Department of Revenue in class actions "for the refund of taxes" or "in any other class action brought in this state." *Id.* The Court, of course, must enforce statutes as they are written. *See Rainey v. Haley*, ___ S.C. ___, ___, 745 S.E.2d 81, 82 (2013) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000))).[3]

So clear is this statutory prohibition that the Supreme Court has previously enforced it in the exact manner held by the circuit court here. In *Drummond v. State*, 378 S.C. 362, 365–69, 662 S.E.2d 587, 589–90 (2008), the plaintiff sued the Department of Revenue to recover sales taxes that were allegedly collected in error, and for a declaration that an agency regulation was invalid. The Court affirmed the circuit court's dismissal of

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[3] The Legislature is free to restrict or prohibit the use of the class-action procedural device as it sees fit, which it has done in several other contexts. *See, e.g.*, S.C. Code Ann. § 9-21-40 ("A claim [for recovery under the Retirement Systems Code] may not be prosecuted on behalf of a class."); *id.* § 37-23-50(A) ("No borrower may bring a class action for a violation of this article [of the Consumer Protection Code]."); *id.* § 39-5-140(a) (providing that a claim for actual damages under the Unfair Trade Practices Act may not be brought "in a representative capacity"); *id.* § 40-39-160(1) (granting pledgors certain rights against pawnbrokers, but authorizing suit for recovery "in an action other than a class action").

the claims for a tax refund, as the plaintiff had not exhausted available administrative remedies. *Id.* at 368–69, 662 S.E.2d at 590. It did, however, permit the request for declaratory relief to proceed. *Id.* at 369–70, 662 S.E.2d at 590–91. Although the portion of the case that remained after appeal no longer involved a tax refund, the Court specifically held that the plaintiff could not prosecute his claim for declaratory relief on behalf of a class. Citing South Carolina Code § 12-60-80(C), the Court concluded that "this action may not be certified as a class action." *Id.* at 370 n.5, 662 S.E.2d at 591 n.5.

Despite the statute's plain language and the *Drummond* Court's unambiguous ruling, the Appellant argues—for the first time on appeal, which is procedurally barred—that the statutory prohibition against suing the Department of Revenue in a class action "violates the one subject rule" of the South Carolina Constitution. (Initial Br. of Appellant at 22–23.) The Appellant's argument, however, demonstrates a fundamental misunderstanding of this constitutional provision.

The South Carolina Constitution provides that "[e]very Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." S.C. Const. art. III, § 17. This procedural check on the legislative process is designed to prevent logrolling multiple unrelated topics into a single bill in order to increase their likelihood of passage, as well as to inform the citizenry about the Legislature's work. *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 101, 691 S.E.2d 158, 161 (2010).

The one-subject rule does not prohibit the General Assembly from addressing multiple facets of a general subject in a single bill. *Keyserling v. Beasley*, 322 S.C. 83, 86, 470 S.E.2d 100, 102 (1996). Instead, the matters addressed within a bill must only be

"kindred in nature" and have a "natural association" with one another. *Westvaco Corp. v. S.C. DOR*, 321 S.C. 59, 64, 467 S.E.2d 739, 742 (1995). As long as an act's title "states the general subject of the legislation and the provisions of the act are germane to that subject," a bill will pass constitutional muster. *State ex rel. Medlock v. S.C. State Family Farm Dev. Auth.*, 279 S.C. 316, 318, 306 S.E.2d 605, 607 (1983). Importantly, "Article III, section 17 is to be liberally construed so as to uphold an act if practicable, and doubtful or close cases are to be resolved in favor of upholding the act's validity." *Sea Cove Development*, 387 S.C. at 101, 691 S.E.2d at 161.

In challenging the circuit court's application of Section 12-60-80(C), the Appellant argues that anything within the entire codified Revenue Procedures Act that relates to a topic other than the resolution of a tax dispute is constitutionally infirm. In his view, because Section 12-60-80(C) prohibits class actions against the Department of Revenue in ***all*** contexts, it "must be stricken from the Code" because it is a non-tax issue codified with tax-related statutes. (Initial Br. of Appellant at 23.) This position mischaracterizes the one-subject rule.

The one-subject rule directs how a bill must be presented to the Legislature for its consideration, not how the Code Commissioner drafts titles for new laws or places them in the Code of Laws post-passage. But the Appellant does not challenge the legislative process underlying Section 12-60-80(C) in any way. He does not argue that the provisions of Section 12-60-80(C) were unrelated to the remaining portions of the bill in which they were passed, nor does he argue that these provisions were unaccounted for in the bill's title. Accordingly, his argument fails to account for the only information relevant to a challenge under the one-subject rule, and it should be rejected.

Nor is it surprising that the Appellant has failed to account for the actual elements of a logrolling challenge, as the General Assembly followed the proper constitutional process when passing Section 12-60-80(C) ten years ago. This provision was contained in Act 69 of the 2003–2004 legislative session, and that decade-old bill was a comprehensive revision of virtually the entire Tax Code. There cannot be any legitimate dispute that a provision outlining procedures that must be followed when suing the State's Tax Collector is germane to a bill addressing nearly every facet of the Tax Code.

Moreover, the particular issues addressed in Section 12-60-80(C) are accounted for in the relevant excerpt from Act 69's title: "To amend Article I, Chapter 60 of Title 12, relating to South Carolina Revenue Procedures Act, so as to revise the manner in which and conditions under which disputes or claims with the Department of Revenue are determined and resolved." Act 69, Title, 115th Session of the General Assembly (2003–2004). The legislation meets the Constitution's one-subject requirement, and the Appellant's arguments to the contrary should be rejected.

In sum, the circuit court properly applied South Carolina Code § 12-60-80(C) when dismissing the Appellant's class-action allegations against the Department of Revenue. On appeal, the Appellant has not preserved this issue for review, nor has he challenged the actual legislation that placed Section 12-60-80(C) into South Carolina law. Accordingly, the circuit court's holding that the Department of Revenue cannot be sued by a class in any context should be affirmed.

III. The circuit court properly dismissed all claims with prejudice.

In his opening brief, the Appellant argues that the circuit court should not have dismissed his claims against the Trustwave entities with prejudice, but instead should

have given him leave to amend his complaint. (Initial Br. of Appellant at 7–11.) He appears to have limited this aspect of his appeal only to the Trustwave entities.

Nevertheless, in the event the Appellant intended for this portion of his appeal to apply to the Department of Revenue and the Office of the Governor as well, these Respondents respectfully submit that the circuit court's ruling was correct for two reasons. First, the Appellant already amended his complaint one time as a matter of right, but he never filed a separate motion to amend his complaint a second time, as required by Rules 7(b)(1) and 15(a) of the South Carolina Rules of Civil Procedure.

Second, whether to permit a party to amend his pleadings is within the circuit court's sound discretion and will not be reversed absent an abuse of discretion. *Duncan v. CRS Sirrine Eng'rs, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 118 (Ct. App. 1999). Here, the Appellant has not offered any reason why he should be permitted to amend his complaint once more other than a general plea for a chance to drag all of the respondents through an expensive discovery process, a position that hardly amounts an abuse of discretion by the circuit court. (Initial Br. of Appellant at 7.)

Moreover, the circuit court's ruling is consistent with the wealth of cases dismissing similar claims arising from data breaches when, as here, the plaintiff's claims are defective as a matter of law. *See, e.g.*, *Pisciotta*, Case No. 1:05-cv-668-LJM-WTL, 2012 U.S. Dist. LEXIS 160878, at *8 ("Plaintiffs' claims are dismissed with prejudice. Plaintiffs shall take nothing by way of their complaint."); *Hendricks*, 444 F. Supp. 2d at 783 ("The court concludes that because Michigan courts would not recognize the causes of action asserted in plaintiff's amended complaint, her pleading is subject to dismissal as a matter of law."). The Court should reject the Appellant's final argument as a result.

CONCLUSION

The breach of South Carolina's database was deplorable and criminal, but it did not give rise to any civil liability with respect to the State. Courts across the country have routinely dismissed claims precisely like those presented by the Appellant in this case, and the circuit court's determination on the merits of his claims is fully aligned with those decisions. Moreover, the Appellant has not appealed or preserved for appellate review numerous dispositive issues on which the circuit court based its ruling, an oversight that creates a host of fatal defects in this appeal. For these reasons, the circuit court's order dismissing all claims against the Department of Revenue and the Office of the Governor should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for the South Carolina Department of Revenue and the Office of the Governor of the State of South Carolina, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

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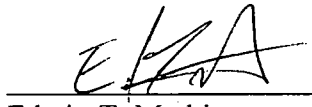

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October 25, 2013