THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2012-CP-40-07331
Appellate Case No. 2013-001096

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.

INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA DIVISION OF STATE INFORMATION TECHNOLOGY

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STATEMENT OF THE ISSUES

I. Did the trial court correctly conclude that Appellant lacked standing to sue when the only injury alleged by Appellant is a risk of harm resulting from identity theft and Appellant failed to allege or establish a concrete, particularized injury or damages?

II. Did the trial court correctly conclude that Section 1-11-490 of the South Carolina Code (Supp. 2012) did not provide Appellant with standing to sue when, the statute only creates a right for private persons who have been injured to sue, and when Appellant failed to allege a judicially cognizable injury?

III. Did the trial court correctly conclude that Section 1-11-490 is a notice statute and that by Appellant's own admission, DSIT complied with any obligation it may have had under the statute?

IV. Did the trial court properly conclude that State agencies are immune from liability pursuant to Section 15-78-60(5) of the South Carolina Tort Claims Act when, as a matter of law, State agencies are not liable in tort for their alleged failure to enforce a statute?

V. Did the trial court properly dismiss the Amended Complaint with prejudice when no amount of discovery would alter the fact that Appellant has not suffered a concrete, particularized injury or damages and thus lacks standing to sue?

Statement of the Case

On October 31, 2012, Appellant Phillip Morgan ("Morgan") commenced this action with the filing of a Summons and Complaint. Morgan filed an Amended Complaint naming Respondent South Carolina Division of State Information Technology ("DSIT") as a Defendant on November 5, 2012. According to the Amended Complaint, in August and September of 2012, third parties infiltrated the database of the South Carolina Department of Revenue ("SCDOR") and acquired approximately 3.6 million Social Security numbers, approximately 387,000 credit and/or debit card numbers, and an unknown number of tax returns and other documents containing personal identifying information. (Am. Compl. ¶ 20.) In his Amended Complaint, Morgan contends that Defendants Trustwave and Trustwave Holdings are the entities charged with the duty of securing the personal identifying information. (*Id.* ¶ 21.) Morgan further alleges that on October 10, 2012, DSIT informed SCDOR and Respondent Nimrata "Nikki" Haley, Governor of South Carolina, of the database breach. (*Id.* ¶ 22.) Morgan also alleges that "the persons whose data had been compromised were not notified by [Respondents] until October 26, 2012." (*Id.* ¶ 23.)

The Amended Complaint contained seven causes of action, four of which are directed at DSIT. In his first cause of action, Morgan sought a declaration that DSIT "knowingly and willfully breached" section 1-11-490 of the South Carolina Code (Supp. 2012). (*Id.* ¶¶ 29, 30.) In his second cause of action, Morgan alleged that DSIT "willfully, wantonly, recklessly, and with gross negligence violated and failed to comply with the duties imposed upon [it] to encrypt data and to expeditiously disclose the breach of security in accordance with S.C. Code Ann. § 1-11-490 and [is], therefore grossly,

negligent *per se*." (*Id.* ¶ 34.) In his third cause of action, Morgan alleged that DSIT "formed a civil conspiracy" with the other Defendants "for the purpose of harming Plaintiff." (*Id.* ¶ 38.) Finally, in his fourth cause of action, Morgan contended that DSIT owed him "a duty to provide a reasonable standard of care under the circumstances by protecting Plaintiff's personal identifying information" but that DSIT "failed to exercise slight care and [has] willfully, wantonly, recklessly, and with gross negligence breached the standard of care owed to Plaintiff . . . ." (*Id.* ¶¶ 42, 43.)[1]

On December 4, 2012, DSIT moved to dismiss the Amended Complaint on various grounds. (Mot. to Dismiss.) Following a hearing on February 7, 2013, the Honorable G. Thomas Cooper, Jr. granted DSIT's Motion to Dismiss because (1) Morgan lacked standing to sue; (2) DSIT complied with its duty under § 1-11-490; and (3) Morgan's common law claims for negligence *per se*, civil conspiracy, and gross negligence failed as a matter of law. (Order filed Feb. 27, 2013). On March 8, 2013, Morgan moved for reconsideration of the trial court's orders granting the Defendants' motions to dismiss, (Mot. for Reconsideration), and on April 16, 2013, the trial court entered an order denying Morgan's motion. (Order dated Apr. 16, 2013.) On May 3,

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[1] On appeal Appellant has abandoned all issues relating to negligence *per se*, civil conspiracy, and gross negligence. "'Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue.'" *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (quoting *Forest Dunes Assocs. v. Club Carib, Inc.*, 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990)). Nowhere are those issues addressed in Appellant's brief; nor are they raised in Appellant's Statement of Issues on Appeal. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (finding issue abandoned where issue was not addressed in brief); *Jones*, 387 S.C. at 346, 692 S.E.2d at 903 ("'Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.'")

2013, Morgan filed his Notice of Appeal, appealing Judge Cooper's February 27, 2013 Order granting DSIT's Motion to Dismiss. (Order filed Feb. 27, 2013.)

Statement of Facts

On October 26, 2012, the SCDOR announced that in August and September of 2012, a cyber attack by unknown persons exposed approximately 3.6 million social security numbers and 387,000 credit and debit card numbers belonging to residents of the State of South Carolina. (Am. Compl. ¶ 20.) On October 10, 2012, DSIT informed the SCDOR and Governor Haley of the breach. (*Id.* ¶ 22.)

With respect to the causes of action brought against DSIT in this matter, it is important to note that the Amended Complaint fails to allege any facts that would support Morgan's incorrect assertion that DSIT, at the time the DOR data was stolen, was responsible for maintaining or securing the data that was stolen from DOR's server-based systems. The Amended Complaint also fails to set forth facts to support the notion that DSIT even had access to this data. Likewise, there are no allegations in the Amended Complaint that DSIT, at the time of the cyber attack, had agreed to provide data security services for the protection of data stored on DOR's server-based systems. Indeed, as to the stolen DOR data that is the subject of this appeal, DSIT merely provided DOR with floor space at DSIT's data center facility where DOR was allowed to place its own systems. Moreover, the Amended Complaint fails to assert any specific injury or damages suffered by Morgan that were caused by the alleged actions or inaction of DSIT.

Standard of Review

"The appellate court applies the same standard of review as the trial court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP." *Cole Vision Corp. v. Hobbs*, 348 S.C. 283, 287, 680 S.E.2d 923, 925 (Ct. App. 2009) (citing *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citing *Doe*, 373 S.C. at 395, 645 S.E.2d at 247). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Capital City Ins. Co.*, 382 S.C. at 99, 674 S.E.2d at 528 (citing *Plyer v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007)). This Court will sustain a trial court's grant of a motion to dismiss "only if the facts alleged in the complaint do not support relief under any theory of law." *Capital City Ins. Co.*, 382 S.C. at 99, 674 S.E.2d at 528 (citing *Ashley River Props. I, L.L.C. v. Ashley River Props. II, L.L.C.*, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007)).

The facts alleged in Morgan's Amended Complaint, even if true, do not support relief against DSIT under any theory of law. Thus, it is clear that this Court should affirm the trial court's order granting DSIT's Motion to Dismiss the Amended Complaint with prejudice.

Argument

I. The Trial Court Correctly Concluded That Appellant Lacks Standing to Sue.

The trial court correctly found and concluded that Morgan lacks standing to sue because while he has alleged that his personal identifying information was stolen, he did not allege a present, particularized injury. The only injury alleged by Morgan is that of "being placed in a material risk of harm for identity theft." (Am. Compl. ¶ 35.) Morgan's allegations amount to hypothetical claims of harm that do not amount to a cognizable injury-in-fact. Because Morgan failed to allege any actual harm suffered, and because Morgan failed to allege or establish any legally cognizable damages, the trial court properly dismissed all causes of action set forth in Morgan's Amended Complaint. This Court should affirm the decision of the trial court.

A. The trial court correctly concluded that Appellant has not suffered an injury-in-fact.

A fundamental prerequisite to a legal action is standing. *Sloan v. Sch. Dist. of Greenville County*, 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000) (citing *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985)). Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. *Michael P. v. Greenville Cnty. Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009) (citing *Powell ex rel. Kelley v. Bank of Am.*, 397 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008)). To have standing, a party must therefore have a personal stake in the subject matter of a lawsuit. *Sloan*, 342 S.C. at 518, 537 S.E.2d at 301 (citing *Newman v. Richland County Hist. Preserv. Com'n*, 325 S.C. 79, 82, 480 S.E.2d 72, 74 (1997)); *Sea Pines Ass'n for the Protection of Wildlife v. S.C. Dep't. of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "[S]uch imminent

prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public." *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992).

To have standing, "[a] plaintiff must allege an actual controversy in which he has a personal stake." *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). Moreover, a party must demonstrate standing for each form of relief sought. *Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 185 (2000); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the United States Supreme Court articulated the "irreducible constitutional minimum" that standing requires:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (citations and internal quotation marks omitted) (alterations in original).[2] The party seeking to establish standing "carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 600, 550 S.E.2d at 290.

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[2] The standard articulated by the United States Supreme Court in *Lujan* has been adopted by and applies with equal force to cases arising under state law. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

In the present case, the trial court correctly found that Morgan lacked standing because he failed to plead an injury-in-fact. Injury-in-fact means that the injury must be "certainly pending". *Lujan*, 504 U.S. at 563, n.2. In other words, an injury-in-fact "must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is 'distinct and palpable' as distinguished from merely 'abstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal citations omitted). Allegations of possible future injury are not enough to survive a motion to dismiss.

> Allegations of 'possible future injury' are not sufficient to satisfy Article III. Instead, '[a] threatened injury must be certainly impending,' and 'proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all[.]' A plaintiff therefore lacks standing if his 'injury' stems from an indefinite risk of future harms inflicted by unknown third parties.

Reilly v. Ceridian Corp., 664 F.3d 38, 42 (3d Cir. 2011) (internal citations omitted).

The Amended Complaint fails to meet this threshold test. According to the Amended Complaint, Morgan "has suffered actual damages and is in imminent danger of suffering further material injury and loss." (Am. Compl. ¶ 44.) But Morgan fails to identify the actual damage he allegedly has suffered as a result of the breach of SCDOR's database. At most, Morgan implies that he has "a cognizable legal claim for the cost of credit monitoring services." (Br. of Appellant 14.) However, as the trial court correctly found, South Carolina law imposes no liability "merely for the creation of risk when there are no actual damages" because to do so would "drastically change[] the fundamental elements of a tort action" and "make[] any amount of damages entirely speculative." *Sapp v. Ford Motor Co.*, 386 S.C. 143, 149, 687 S.E.2d 47, 50 (2009). In

other words, a claim cannot survive dismissal when damages are speculative. *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."). Moreover, the cost of credit monitoring services is not sufficient to confer standing. *See Giordano v. Wachovia Sec., LLC*, No. 06-476 (JBS), 2006 WL 2177036, *4 (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.").

Morgan's assertion that "[t]he likelihood that [the persons who allegedly obtained Morgan's personal identifying information] will *not* use the information . . . lies somewhere between slim and nonexistent . . ." (Br. of Appellant 14 (emphasis in original)) is no more than sheer speculation. "The requirement of an actual or imminent injury ensures that the harm has either happened or is sufficiently threatening; it is not enough that the harm might occur at some future time." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) (citing *Lujan*, 504 U.S. at 560, n.1). "In the identity theft context, courts have embraced the general rule that an alleged increase in risk of future injury is not an 'actual or imminent' injury." *Key v. DSW, Inc.*, 454 F. Supp. 2d 684, 689 (S.D. Ohio 2006). "Consequentially, courts have held that plaintiffs do not have standing, or have granted summary judgment for failure to establish damages in cases involving identity theft or claims of negligence and breach of confidentiality brought in response to a third party theft or unlawful access to financial information . . . ." *Id.* (citing cases).

Morgan suggests that a "jurisdictional split" exists regarding whether similarly situated plaintiffs have suffered cognizable damages. (Br. of Appellant 13.) No such

split exists, however. The overwhelming weight of authority holds that a plaintiff in the position of Morgan lacks a particularized injury and thus lacks standing. *See Reilly*, 664 F.3d at 42 (concluding that "[u]nless and until [appellants'] conjectures come true, Appellants have not suffered any injury; there has been no misuse of the information, and thus, no harm"); *Hammond v. The Bank of New York Mellon Corp.*, No. 08-civ-6060 (RMB) (RLE), 2010 WL 2643307, *7 (S.D.N.Y. June 25, 2010) (concluding, in a suit for damages for loss of personal identification information, that "Plaintiffs lack standing because their claims are future-oriented, hypothetical, and conjectural"); *Amburgy v. Express Scripts, Inc.*, 671 F. Supp. 2d 1046, 1052-53 (E.D. Mo. 2009); *Hinton v. Heartland Sys., Inc.*, No. 09-594 (MLC), 2009 WL 704139 (D.N.J. Mar. 16, 2009) (dismissing plaintiff's complaint because, among other things, plaintiff's allegations of injuries "amounts to nothing more than speculation"); *Pinero v. Jackson Hewett Tax Serv., Inc.*, 594 F. Supp. 2d 710, 714-16 (E.D. La. 2009) (concluding that the possibility that personal information was put at an increased risk did not constitute actual injury); *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 7-8 (D.D.C. 2007) (concluding that plaintiffs have failed to allege an injury-in-fact and thus lack standing since plaintiffs' allegations "amount to mere speculation that at some unspecified point in the indefinite future they will be the victims of identity theft"); *Kahle v. Litton Loan Servicing, LP*, 486 F. Supp. 2d 705 (S.D. Ohio 2007) ("A complaint alleging the mere potential for an injury does not satisfy Plaintiff's burden to prove standing.").

Morgan relies on *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151 (1st Cir. 2011) for the proposition that "some jurisdictions have regarded the cost of insurance against identity theft as damages by way of 'mitigation,' in particular when it is reasonably

certain that other persons whose information was disclosed from the same breach has been used." (Br. of Appellant 13.) Morgan's reliance on *Anderson* is misguided. In *Anderson*, a third party breached defendant's electronic payment processing system, resulting in 1,800 unauthorized charges to defendant's customer accounts. The First Circuit, applying Maine law, found that the stolen data "was used to run up thousands of improper charges across the globe to the customers' accounts. The card owners were not merely exposed to a hypothetical risk, but to a real risk of misuse[,]" 659 F.3d at 164, and therefore plaintiffs "had a reasonable basis for purchasing identity theft insurance to avoid further damage." *Id.* at 166. Thus, in *Anderson*, the damages were particularized and concrete, not hypothetical or prospective.

Unlike the plaintiffs in *Anderson*, Morgan does not allege that his personal identifying information has been used by a third party as a result of the alleged breach. Nor has Morgan alleged that he has purchased or incurred identity theft insurance costs. Contrary to Morgan's assertion, the overwhelming trend in recent years has been to find that plaintiffs in identity theft cases do not have standing. The principal factor in cases that have found that a plaintiff has standing is the existence of "persons involved in [the] breach [that] have acted on the ill-gotten information." *Katz*, 672 F.3d at 80. Indeed, the analysis of the court in *Katz*, another First Circuit case decided a year after *Anderson*, is directly on point for the present case:

> In this case, the plaintiff purchased identity theft insurance and credit monitoring services to guard against a possibility, remote at best, that her nonpublic personal information might someday be pilfered. Such a purely theoretical possibility simply does not rise to the level of a reasonably impending threat.

> [Plaintiff's] cause of action rests entirely on the hypothesis that at some point an unauthorized, as-yet unidentified, third party might access her data and then attempt to purloin her identity. The conjectural nature of this hypothesis renders the plaintiff's case readily distinguishable from cases in which confidential data actually has been accessed through a security breach and persons involved in that breach have acted on the ill-gotten information. *Cf. Anderson v. Hannaford Bros.*, 659 F.3d 151, 164-65 (1st Cir. 2011) (holding purchase of identity theft insurance in such circumstances reasonable in negligence context). Given the multiple strands of speculation and surmise from which the plaintiff's hypothesis is woven, finding standing in this case would stretch the injury requirement past its breaking point.

Id. at 80-81.

Here, the trial court thus correctly concluded that the failure of Morgan to allege an actual misuse of his personal identifying information was fatal to this case. (Order 9.) *See Worix v. MedAssets, Inc.*, 857 F. Supp. 2d 699, 705 (D. Ill. 2012) (granting defendant's motion to dismiss because plaintiff "does not allege that his data has been misused. Thus *Anderson* does not help his case"). As the trial court found, Morgan has not suffered any actual damage. Morgan's allegations of possible future loss is mere speculation and does not amount to an actual or imminent harm. Without an actual or imminent harm, Morgan lacks standing to bring this action. This Court should therefore affirm the order of the trial court.

B. The trial court correctly found that Section 1-11-490 does not confer standing.

According to Morgan, "subject matter jurisdiction is conferred upon the circuit court by" section 1-11-490 of the South Carolina Code (Supp. 2012). (Br. of Appellant 12-13.) But as the trial court correctly concluded, while section 1-11-490 creates a right

to sue, it does not create standing to sue. This Court should therefore affirm the order of the trial court.

Standing can be created by statute. *E.g., Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012) (observing that the FOIA "contains a specific standing provision allowing any citizen of South Carolina to seek a declaratory judgment or injunctive relief to enforce the Act's requirements"). Section 1-11-490(G) provides that "[a] resident of this State *who is injured* by a violation of this section, in addition to and cumulative of all other rights and remedies available at law, may: (1) institute a civil action to recover damages . . . ." (Emphasis added). Thus, the trial court correctly found that while section 1-11-490(A) provides a right to sue, a necessary prerequisite to exercising that right is that the party instituting such an action must be "a resident of this State who is injured by a violation of this section . . . ." As demonstrated above, Morgan failed to allege a judicially cognizable present injury. Accordingly, this Court should affirm the trial court's conclusion that Morgan does not have standing under section 1-11-490.

Because Morgan failed to allege any concrete, particularized damages, he lacks standing. This Court should affirm the trial court's granting of DSIT's Motion to Dismiss Plaintiff's Amended Complaint with prejudice and in its entirety.[3]

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[3] Although not addressed in the Order Granting DSIT's Motion to Dismiss, DSIT notes that the trial court granted the Trustwave Defendants' Motion to Dismiss on the ground that, among other things, Morgan "has not alleged any physical harm or damage to property and therefore the economic loss rule bars his recovery." (Order Granting Trustwave Defendants' Motion to Dismiss ¶ 9.) "'Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.'" *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903

C. **The trial court correctly concluded that Section 1-11-490 is a notice statute.**

The trial court found that Section 1-11-490 is a notification statute. For the reasons set forth below, this Court should affirm.

Section 1-11-490 of the South Carolina Code of Laws (Supp. 2012) provides, in relevant part, as follows:

> (A) An agency[4] of this State ***owning or licensing computerized data*** or other data that includes personal identifying information ***shall disclose a breach of the security of the system*** following the discovery or notification of the breach in the security of the data to a resident of this State whose unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person when the illegal use of the information has occurred or is reasonably likely to occur or use of the information creates a material risk of harm to the resident. ***The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement***, as provided in subsection (C), or with measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.
>
> (B) An agency ***maintaining computerized data*** or other data that includes personal identifying information that the agency does not own ***shall notify the owner or licensee of the information of a breach of the security of the data immediately following discovery***, if the personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person.

(2010)). In the present case, the trial court ruled that the economic loss rule prevents recovery of the purely economic losses alleged in the Amended Complaint. This ruling applies to all Defendants with equal force. Morgan failed to appeal the trial court's conclusion with respect to this issue, and the trial court's ruling on the economic loss rule is the law of the case that provides an independent basis for this Court to affirm dismissal of the Amended Complaint in its entirety with prejudice.

[4] "Agency" is defined as "any agency, department, board, commission, committee, or institution of higher learning of the State or a political subdivision of it." S.C. Code Ann. § 1-11-490 (D)(1).

(Emphasis added.)

The trial court correctly found that section 1-11-490 is a notification statute. An agency that maintains the computerized data must "notify the owner or licensee" of a breach immediately following discovery, S.C. Code Ann. § 1-11-490(B), while an agency owning or licensing the computerized data must notify residents of the State affected by the breach. S.C. Code Ann. § 1-11-490(A). The statute imposes no duty to encrypt data.

Morgan does not allege that DSIT owned, licensed, or maintained the computerized data, and DSIT does not concede that it fits within the statutory categories. Indeed, at the hearing, SCDOR averred that it owned and licensed the data. (Tr. p. 57, l. 17—p. 58, l. 7; p. 61, l. 19—p. 62, l. 3.) Moreover, Morgan's own allegations support the fact that SCDOR, not DSIT, owns, licenses, and maintains the data. In his Amended Complaint, Morgan alleges that "[u]pon information and belief, on or about August 27, 2012, third persons infiltrated ***the database of the South Carolina Department of Revenue*** . . . ." (Am. Compl. ¶ 20 (emphasis added).) Because DSIT does not own or license computerized data or other data that includes personal identifying information, section 1-11-490 imposes no duty on DSIT.

Even if DSIT were subject to the statute, it would have no duty other than notification. "An agency maintaining computerized data or other data that includes personal identifying information that the agency does not own,"[5] owes *only* the duty to "notify the owner or licensee of the information of a breach of the security of the data immediately following discovery, if the personal identifying information was, or is

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[5] DSIT does not meet this description with respect to the SCDOR data that is the subject of this action because DSIT was not responsible for maintaining this data.

reasonably believed to have been, acquired by an unauthorized person." S.C. Code Ann. § 1-11-490(B). The statute does not impose upon any party any obligation to "render data unusable" as alleged in the Amended Complaint. As already noted, to the extent that DSIT even had a duty of notification, by Morgan's own admission DSIT fully complied with that obligation when it notified SCDOR of the breach on October 10, 2012. (Am. Compl. ¶ 22.) The trial court therefore correctly concluded that "any duty DSIT theoretically could have under the statute was, by Morgan's own admission, performed by DSIT." (Order 6.) Accordingly, on the face of the Amended Complaint, the trial court correctly concluded that DSIT is not liable for breaching a duty under this statute.[6]

Because Morgan failed to allege or establish that DSIT owns, licenses, or maintains the data, the trial court correctly concluded that his claim for violation of section 1-11-490 (and, as a consequence, negligence *per se*) fails. This Court should therefore affirm the decision of the trial court.[7]

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[6] According to Morgan, "[b]y its very title, the statute is primarily concerned with 'Breach of security,' not 'notice,' which is the necessary prerequisite to the 'civil action' for which Subsection (G)(1) provides." (Br. of Appellant 16.) But while it may be "proper to consider the title or caption of an act in aid of construction to show the intent of the legislature," *Joytime Distrib. & Amusement v. State*, 338 S.C. 634, 649, 528 S.E.2d 647, 655 (1999), this rule "applies only in cases where the legislative meaning is left in doubt by a failure to clearly express it in the law." 73 Am. Jur. 2d *Statutes* § 99 (2013) (footnote omitted). Section 1-11-490 does not contain an ambiguity; nor does Morgan allege the statute is ambiguous.

[7] Morgan contends that "[o]f all the Defendants involved in this suit, one or more of them must have, to some degree, 'owned,' 'licensed,' or 'maintained' the data. . . . Exactly who owns, licenses, and maintains the data are questions of fact to be determined through discovery." (Br. of Appellant 18.) But again, this is of no consequence since Morgan has not suffered a particularized injury.

II. The Trial Court Correctly Concluded That the Tort Claims Act Bars Plaintiff's Claims.

Although not addressed in the order granting DSIT's Motion to Dismiss, the trial court found and concluded in a separate order that "[t]o the extent the Plaintiff alleges that the State agencies failed to properly exercise their discretion when protecting data, [State] agencies are immune pursuant to Section 15-78-60(5)" of the South Carolina Tort Claims Act, and therefore Plaintiff's common law claims fail as a matter of law. (Order Granting Mot. to Dismiss Dep't of Revenue & Office of the Governor 14.) This Court should affirm the dismissal of the claims against DSIT on this basis as well.[8]

The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* (2005),[9] "'governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees.'" *Smith v. Reg'l Med. Ctr.*, 394 S.C. 110, 114, 713 S.E.2d 656, 658 (Ct. App. 2011) (quoting *Flateau v. Harrelson*, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003)). The Act, which completely restores sovereign immunity, *see* S.C. Code Ann. § 15-78-20(b), sets forth specific waivers and limitations on actions against government entities. *Id.* Thus, "the

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[8] DSIT initially made this argument in its Memorandum in Support of Motion to Dismiss, but the trial court did not rule specifically on the Tort Claims Act with respect to DSIT. However, "[a] respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.'" *Jones v. Lott*, 378 S.C. 339, 347, 692 S.E.2d 900, 904 (2010) (quoting *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)). "'The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.'" *Id.* Here, it is proper and fair for this Court to rely on the Tort Claims Act in affirming dismissal in favor of DSIT because like the Department of Revenue and the Office of the Governor, DSIT is an agency of the State and thus immune from liability under the Tort Claims Act.

[9] The Tort Claims Act only applies to Plaintiff's tort claims, but not the statutory cause of action set forth in the Amended Complaint.

Torts Claims Act is a limited waiver of governmental immunity." *Murphy v. Richland Mem'l Hosp.*, 317 S.C. 560, 563, 455 S.E.2d 688, 690 (1995). Although "[t]he burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense," *Steinke v. S.C. Dep't of Labor Licensing & Regulation*, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999) (citing *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994)), "[p]rovisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed in favor of limiting liability." *Id.* (citing S.C. Code Ann. § 15-78-20(f) (Supp. 1998) and *Baker v. Sanders*, 301 S.C. 170, 391 S.E.2d 229 (1990)).

The General Assembly granted "the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit *for any tort* except as waived by [the Act]." S.C. Code Ann. § 15-78-20 (b) (emphasis added). Under the Act, a governmental entity is not liable for a loss resulting from, among other things,

> (4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;
>
> * * * *

S.C. Code Ann. § 15-78-60(4).

Subsection (4) of the Act "makes clear that the government is not liable in tort for its failure to enforce a statute" as a matter of law. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, ____, 743 S.E.2d 778, 783 (2013). According to the Amended Complaint, DSIT "knowingly and willfully breached" section 1-11-490. (Am. Compl. ¶

30.) Therefore, the trial court correctly concluded that state agencies are immune from liability under section 15-78-60(4) and this Court should affirm.[10]

III. The Trial Court Properly Dismissed This Action With Prejudice.

Morgan argues that "[t]he mere fact that Plaintiff did not use the words 'maintain' or 'own' does not warrant dismissal of the action with prejudice when such a semantic distinction can easily be amended . . . ." (Br. of Appellant 10.) But this argument misses the point. Even assuming that Morgan expressly alleged that DSIT "maintained" or "owned" the personal identifying information (which is denied), the fact remains that Morgan's alleged damages are hypothetical and speculative, not concrete and particular. Alleging that DSIT "maintained" or "owned" the personal identifying information would not preclude the trial court's conclusion that Morgan lacks standing to bring this action. This Court should therefore affirm the order of the trial court.

Second, Morgan complains that the trial court "gave literally no explanation as to why the dismissal was with prejudice in its two-paragraph order." (Br. of Appellant 9.) But it is apparent from the Amended Complaint that there has been no misuse of Morgan's personal identifying information. (*See* Am. Compl. ¶ 35.) The trial court did not dismiss Morgan's Amended Complaint with prejudice based on the absence of factual issues. Instead, the trial court's dismissal was based on a legal pleading issue, namely, Morgan's failure to allege and establish concrete, present-day particularized damages.

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[10] According to Appellant, "the longstanding rule in South Carolina has been that 'the performance of discretionary duties does not give rise to immunity if the public official acted in a grossly negligent manner.'" (Br. of Appellant 21.) However, other than in this one sentence, Appellant failed to raise the issue of gross negligence (or any of his other common law claims) in his Statement of Issues on Appeal or fully address the issue of gross negligence in his brief. *See* note 1, *infra*. Because that issue is not before this Court, this Court should affirm the decision of the trial court.

The admitted non-existence of damages cannot be remedied by amending the pleading. Therefore, the trial court properly dismissed the Amended Complaint with prejudice. This Court should affirm.

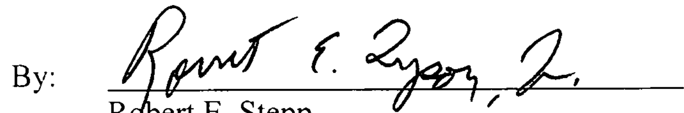
Finally, Morgan contends that the trial court "also erred by considering improper matters—matters outside the four corners of the Complaint . . . and by elaborating on the underlying factual basis upon which this suit is brought when the parties had engaged in no discovery . . . ." (Br. of Appellant 10.) But Morgan fails to identify the purported "improper matters" considered by the trial court that, if they had not been considered, would have saved Morgan's claim from being dismissed for lack of standing. In fact, no amount of discovery would help Morgan withstand DSIT's Motion to Dismiss, and Morgan fails to establish otherwise. Stated differently, no amount of discovery would or could ever change the unassailable fact that Morgan has not suffered any harm. Morgan therefore cannot recover under any theory of the case and this Court should therefore affirm the order of the trial court.

Conclusion

For the reasons stated above, this Court should affirm the trial court's order dismissing Plaintiff's Amended Complaint with prejudice.

[Signature page follows]

SOWELL GRAY STEPP & LAFFITTE LLC

By: 

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