

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
Court of Common Pleas

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

Case No. 2013-001096

Phillip Morgan, Individually and on Behalf of All Similarly Situated
Plaintiffs,.....Appellant,

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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ARGUMENT

1) Must The Circuit Court Order Be Affirmed Based on Law of the Case or Issue Preservation Grounds?

a) Mootness

The only Order referencing mootness applied only to the Office of the Governor and the Department of Revenue; accordingly, the doctrine would apply only to them under any circumstance. The Office of the Governor and Department of Revenue allege that the law of the case doctrine requires affirmance on the mootness ground. Even if Appellant did not raise mootness as to Plaintiff Philip Morgan, the case may still be properly adjudicated, and other Plaintiffs may bring suit. As the South Carolina Supreme Court has stated:

First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001). Even in the event that this Court finds that mootness applies, it would only apply to the Office of the Governor and the Department of Revenue, and appellate review of the issues presented would fall into any of the three mootness exceptions.

b) Does the Law of the Case Doctrine Require Affirmance of Appellant's Statutory Claims?

i) Parties That "Owned" or "Maintained" the Breached Data

The Office of the Governor and Department of Revenue argue that Appellant did not appeal the issue of who owned or maintained the data at issue. In his Amended Motion for

Reconsideration, Appellant took exception to the court's dismissal of the suit for finding that the Defendants did not "own" or "maintain" the data when he stated, "the fact that Plaintiff's Complaint stated that the Defendants in this suit 'secured' or controlled the data clearly articulates the role Plaintiff alleges the Defendants had, and Plaintiff clearly invoked S.C. Code Ann. Section Symbol 39-1-90 when requesting relief [. . .]." (Amended Motion for Reconsideration at 4) In fact, the bulk of Plaintiff's Amended Motion for Reconsideration is devoted to arguing that the court's findings regarding what entity owned or maintained the data. A large portion of Section I of Appellant's appellate brief is devoted to an analysis of the manner in which the circuit court erred by making this finding (See p. 9 of Appellant's Brief).

ii) "Law Enforcement Exception"

The Office of the Governor and Department of Revenue contend that Appellant did not appeal the finding of a purported "law enforcement exception" to Section 1-11-490. The circuit court explicitly found that "South Carolina Code Section 1-11-490 is strictly a notice statute." (Governor order at 7). The circuit court's absolving the State Defendants of liability was predicated on its finding that the statute was a "notice statute" and that the delay in providing notice could be justified when it was done at the behest of law enforcement. The alleged "law enforcement exception" is a term that exists nowhere outside of the Office of the Governor's and Department of Revenue's Initial Brief. It is merely an *ad hoc* term culled from 1-11-490 and a duplicative way of stating that the statute at issue was merely a "notice statute," a finding that was admittedly appealed.

c) Negligence Claims/ Section 15-78-60(4)

The Office of the Governor and Department of Revenue argue that Appellant did not appeal the finding that Defendants owed no duty to Appellant. Appellant expressly appealed the finding that no duty was owed in his Amended Motion for Reconsideration and briefed the issue in his initial brief (See Appellant's Brief at 17). Appealing the absence of any duty encompasses the specific, duty-related finding that South Carolina Code Section 15-78-60(4) required dismissal of the suit.

d) Economic Loss Rule

Trustwave Holdings argues that Appellant's "failure to fully brief and argue his position" regarding the economic loss rule requires affirming the holding on the alternative, economic loss rule, ground (Trustwave's Initial Brief at 6). Plaintiff did take exception with the circuit court's order and explained his basis as to why the circuit court was in error in his brief, as is conceded by Trustwave (See Appellant's Initial Brief at 24). Accordingly, the issue was preserved for appellate review.

2) Substantive Law, Sections 39-1-90 and 1-11-490

The two statutes at issue distinguish this case from any other case in any other jurisdiction. They create a unique definition of injury and damages that precludes application of the general principles relied upon by other jurisdictions applying either common law principles or their own statutory laws.

As was articulated in Appellant's Initial Brief, these statutes reframe the discussion being presented to this Court. The statutes at issue create a situationally specific definition of both injury and damages and provide a civil remedy for persons who are "injured" and sustain

“damages” within the meaning of those terms as defined within the statutes. The basic question presented to this Court is whether these statutes exist to effect the purpose of providing the remedy they expressly purport to create or whether they exist for no purpose.

3) Dismissal With Prejudice

The only substantive reason upon which Defendants seem to rely to state that the circuit court did not abuse its discretion by dismissing the Complaint with prejudice is that “Appellant already amended his complaint one time as a matter of right.” (Initial Br. Of Office of the Governor and Department of Revenue at 23). Plaintiff did amend the original complaint, but only to add Trustwave as a defendant because Trustwave’s identity had not been disclosed at the time the original complaint was filed. The law regarding dismissal of complaints with prejudice is clear, and no legally sufficient rationale for dismissal with prejudice was stated in any Order or by any Appellee. Appellant requests only that he be allowed to engage in discovery so that his complaint can be conformed to the evidence that becomes available.

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PROOF OF SERVICE

I CERTIFY THAT I HAVE SERVED THE Initial Reply Brief of Appellant on
Respondents, Office of the Governor, South Carolina Department of Revenue, South Carolina
Division of State Information Technology, and Trustwave Holdings, by depositing a copy of the
same in the United States Mail, postage prepaid, on November 21, 2013, to their attorneys of
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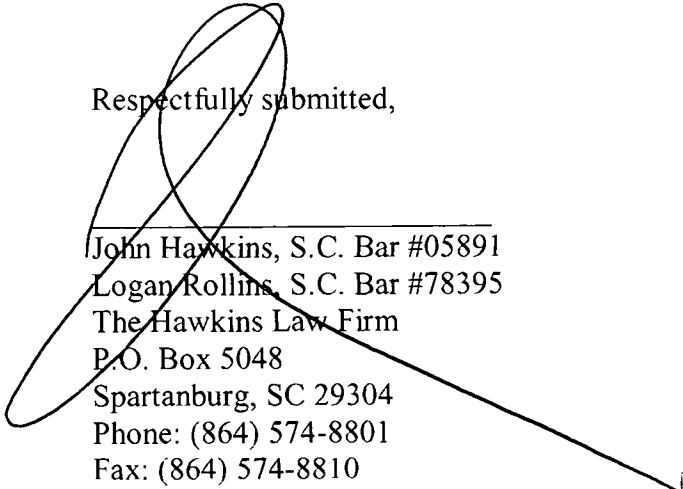
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Respectfully submitted,



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