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. 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; and Trustwave Holdings, Inc., ... Respondents.

FINAL BRIEF OF RESPONDENT TRUSTWAVE HOLDINGS, INC.

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STATEMENT OF ISSUES ON APPEAL

I. DOES THE APPELLANT'S FAILURE TO ARGUE OR FULLY BRIEF EVERY BASIS FOR THE CIRCUIT COURT'S DISMISSAL OF THE ACTION REQUIRE THIS COURT TO UPHOLD THE DECISION ON APPEAL BASED ON THE TWO ISSUE RULE?

II. DID THE CIRCUIT COURT PROPERLY CONSIDER ONLY THE AMENDED COMPLAINT IN DISMISSING THE CASE AGAINST TRUSTWAVE AND WAS DISMISSAL WITH PREJUDICE PRIOR TO DISCOVERY PROPER?

III. DID THE CIRCUIT COURT PROPERLY HOLD IN THE ALTERNATIVE THAT THE APPELLANT FAILED TO ALLEGE COGNIZABLE INJURY AND THEREFORE LACKED STANDING TO INITIATE THE LAWSUIT?

IV. DID THE CIRCUIT COURT MAKE A FINDING IN THE ORDER DISMISSING TRUSTWAVE THAT THE STATUTE IN ISSUE WAS A "NOTICE" STATUTE?

STATEMENT OF THE CASE

The Plaintiff/Appellant filed an Amended Complaint on November 5, 2012, asserting claims purportedly arising out of the "data breach" that occurred earlier that year affecting taxpayer information in the possession of the South Carolina Department of Revenue. The Appellant sued Nimrata "Nikki" Haley, the Governor of South Carolina (both personally and in her official capacity); the South Carolina Department of Revenue ("SCDOR") and its former director, Mr. Etter; the South Carolina Division of State Information Technology ("DSIT"); this Respondent Trustwave Holdings, Inc., and Trustwave Corporation. Pursuant to unappealed Orders, Gov. Haley and Mr. Etter were dismissed as parties to the lawsuit. Trustwave Corporation was dismissed by stipulation. Respondent Trustwave Holdings, Inc. ("Trustwave") is the only non-South Carolina agency defendant remaining in this appeal.

By Order dated February 27, 2013, the Honorable G. Thomas Cooper, Jr., granted Trustwave's Motion to Dismiss for failure to state a claim under Rule 12(b)(6), SCRCP. (R. pp. 363-369; Order (Feb. 27, 2013)). Judge Cooper's Order found that the Plaintiff failed to state facts sufficient to constitute a cause of action against Trustwave for civil conspiracy, violation of South Carolina Code Section 39-1-90, negligence *per se*, or negligence. (R. pp. 364-368, ¶¶ 2-8). By way of two alternative holdings, the circuit court Order found that the economic loss rule barred the Plaintiff from any recovery and that the Plaintiff lacked standing given the lack of a legally cognizable injury. (R. p. 368, ¶¶ 9-10).

In addition to the court's Order dismissing Trustwave pursuant to Rule 12(b)(6), the court dismissed by separate Order the South Carolina Department of Revenue and the Office of the Governor and, by separate Order, DSIT. In his brief, the Appellant

acknowledges that he is only appealing the Orders dismissing Trustwave, the South Carolina Department of Revenue and the Office of the Governor, and DSIT.

The Appellant filed one Motion to Reconsider seeking to have the Orders of dismissal to be without prejudice, so the Appellant could amend his Complaint a second time. Judge Cooper denied the Appellant's Motion to Reconsider. (R. p. 388; Order (Apr. 16, 2013)).

On appeal, the Appellant filed a notice of appeal and only attached the Order denying the motion to reconsider. (R. pp. 390-395). In his Initial Brief, the Appellant raises four issues on appeal. Only the first and second issues on appeal implicate Trustwave. Issues three and four apply exclusively to the State Defendants.

STATEMENT OF FACTS

Respondent Trustwave is a leading provider of products and services for data security and compliance with certain payment card industry requirements. For over 15 years, Trustwave has sold various database security and compliance products to hundreds of thousands of organizations, including Fortune 500 businesses and large governmental institutions. Trustwave has provided, and continues to provide, SCDOR certain products and services that SCDOR has implemented to augment the security of its network.

The Appellant's lawsuit against Trustwave was filed less than one month after DSIT allegedly informed SCDOR of the data breach, and just ten days after the notification to affected taxpayers. (R. pp. 12, 16; Am. Compl.). The lone factual allegation regarding Trustwave within the Amended Complaint states: "Upon information and belief, Defendants Trustwave and Trustwave Holdings were charged with the duty of securing personal identifying information." (R. p. 16, ¶ 21). Trustwave

was sued because, according to the allegations in the Amended Complaint, the Trustwave Defendants "were charged with the duty of securing the personal identifying information." (*Id.*) The Appellant's allegation was made upon information belief and was not supported by any other allegation of fact regarding Trustwave's role in the underlying factual circumstances. (R. p. 16, ¶¶ 20-24). The Appellant asserted four causes of action against Trustwave in the Amended Complaint: civil conspiracy, violation of S.C. Code Ann. § 39-1-90, negligence *per se*, and negligence.

The Amended Complaint is devoid of any other factual allegations to support any cause of action against Trustwave. Relying solely on the allegations of the Amended Complaint and using the appropriate standard of review, the circuit court granted Trustwave's Motion to Dismiss under Rule 12(b)(6), SCRCP. The alternate holdings of the circuit court relied upon the economic loss rule and lack of standing as bases to dismiss the Amended Complaint against Trustwave.

STANDARD OF REVIEW

"A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed 'to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." *Williams v. Condon*, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct. App. 2001) (citing Rule 12(b)(6), SCRCP). Where the facts alleged in the complaint do not support relief under any theory of the law, the dismissal must be sustained. *See O'Laughlin v. Windham*, 330 S.C. 379, 382, 498 S.E.2d 689, 691 (Ct. App. 1998). The question is whether, in the light most favorable to the Plaintiff, do the pleadings articulate a valid claim for relief. "Upon review, the appellate tribunal

applies the same standard of review that was implemented by the trial court." *Williams*, 347 S.C. at 233, 553 S.E.2d at 500.

ARGUMENTS

I. THE APPELLANT'S FAILURE TO CHALLENGE EACH BASIS FOR THE CIRCUIT COURT'S DISMISSAL OF THE ACTION REQUIRES THIS COURT TO AFFIRM THE DECISION BELOW BASED ON THE TWO ISSUE RULE.

As a critical threshold matter, the Appellant has not appealed all of the grounds established by the circuit court to dismiss the Amended Complaint against Trustwave. As a result, the Order below must be affirmed. It is well settled that "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." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). "Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (internal citation omitted). Therefore, the Appellant bears the burden of appealing every ruling in the Order on which the circuit court based its dismissal of Trustwave. Appellant has failed to do so and this Court should affirm the Order of Dismissal under the two issue rule.

A. <u>The Failure to Brief the Alternate Holding that the Economic Loss Rule Bars the Appellant's Claims is Sufficient to Affirm the Order on Appeal.</u>

The circuit court Order held that the economic loss rule bars the Appellant's recovery in this action. The holding is clearly set forth as an independent basis for dismissal in the Order dismissing Trustwave. (R. p. 368; Order (Feb. 27, 2013)). The

Appellant candidly states in his Conclusion that he has elected not to brief the circuit court's alternative holding that the economic loss rule bars his recovery in this action. (Appellant's Br. 24). The Appellant made this election despite his recognition in his brief that the circuit court found that the economic loss rule barred recovery. (Appellant's Br. 6).

Thus, the Appellant's failure to fully brief and argue his position on the economic loss rule is fatal to his appeal. The Appellant's only reference to the rule is when he states in his Conclusion paragraph that the economic loss rule applies only to products liability actions. (Appellant's Br. 24). The Appellant's Statement of Issues on Appeal makes no reference to the ruling with regard to the economic loss rule. "Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal." Rule 208(b)(1)(B), SCACR.

Moreover, nowhere in *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009), referenced by the Appellant in his Conclusion, does the South Carolina Supreme Court limit the economic loss rule to products liability actions only. The rule is discussed in the context of tort law versus contract law, and not a smaller subset of tort actions. In fact, the *Sapp* Court explains:

> The purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract. Contract law seeks to protect the expectancy interests of the parties. *Tort law, on the other hand, seeks to protect safety interests and is rooted in the concept of protecting society as a whole from physical harm to person or property.*

Id. at 147, 687 S.E.2d at 49. The Appellant offers no legal support for why the economic loss rule would apply narrowly to product liability cases.

The Appellant makes no specific argument as to why the economic loss rule should not apply to this type of data breach case. Many other jurisdictions facing similar

data breach cases have applied the economic loss rule to plaintiffs' claims for negligence. *See, e.g.*, *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 498-99 (1st Cir. 2009) (rendering payment card information worthless was not the result of physical destruction of property); *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 175-77, 180 (3d Cir 2008) (emphasizing that the magnetic strip data on the stolen credit cards was copied, not destroyed); *Bell v. Blizzard Entm't, Inc.*, No. 12-cv-09475-BRO-PJW, Dkt. No. 54, at *14 (C.D. Cal. July 11, 2013) (holding that Economic Loss Doctrine barred customers' negligence claim because no duty to safeguard information arose in tort, and because customers suffered mere diminution in value of their video games); *In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, 903 F.Supp.2d 942, 962 (S.D. Cal. 2012) (dismissing negligence claim because of absence of special relationship between parties); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 528-31 (N.D. Ill. 2011) (dismissing negligence claims because plaintiff did not suffer personal injury or property damage); *Pa. State Emps. Credit Union v. Fifth Third Bank*, 398 F. Supp. 2d 317, 326-30 (M.D. Pa. 2005) (granting motion to dismiss negligence claim against retailer in connection with theft of personal information from retailer's computer system because requested damages amounted to pure economic loss); *Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc.*, 918 N.E.2d 36, 47-48 (Mass. 2009) (holding that the Doctrine barred credit unions from pursuing negligence claim against retailer that had improperly stored data from individual credit cards). Given our Supreme Court's explanation that tort law exists to protect persons "from physical harm to person or property," it is appropriate for the logic underlying the economic loss rule to apply to the Appellant's claims of speculative future harm tied to the alleged loss of his personal data.

In addition, the Appellant did not preserve his challenge to the circuit court's ruling with regard to the economic loss rule in the court below and, therefore, the issue is not preserved for this Court's review. The Appellant's Motion for Reconsideration under Rule 59(e), SCRCP, as well as his Amended Motion, did not identify, much less challenge, the circuit court's reliance on the economic loss rule as an independent basis for dismissal. (R. pp. 372-377, 380-384). The Appellant failed to give the circuit court the opportunity to determine whether the economic loss doctrine was inapplicable to his claims.

> The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *First Union Nat'l Bank of S.C.* at 566, 511 S.E.2d at 378. As a result, the Appellant's failure to preserve this issue accompanied by his failure to brief the issue on appeal leaves this Court with little choice but to affirm the circuit court's finding that the Appellant's case is barred by the economic loss rule.

B. The Appellant's Failure to Challenge the Ruling Below that the Amended Complaint Fails to Set Forth Facts to Support Causes of Action Against Trustwave for Civil Conspiracy and Negligence Require this Court to Affirm the Dismissal of Those Causes of Action.

The primary holding of the circuit court in the Order dismissing Trustwave is that the Amended Complaint fails to allege facts sufficient to constitute a cause of action against Trustwave. The Order very specifically details the elements of the causes of action, and finds that the Amended Complaint's bare and conclusory allegations are

insufficient to allow the action to proceed. The Appellant again fails to set forth any facts to support his claims and provides this Court with nothing in his appeal to challenge this ruling of the circuit court. As shown herein, the causes of action for civil conspiracy and negligence fail and dismissal must be affirmed under the two issue rule.

As to civil conspiracy, the fatal defects of the Amended Complaint are not addressed on appeal. In fact, the Appellant's brief does not discuss the civil conspiracy claim at all. Therefore, just as with the economic loss rule, the Appellant has abandoned his objection to the circuit court's dismissal of the cause of action for civil conspiracy and dismissal of that cause of action must be affirmed.

Even if this Court chose to disregard the two issue rule, the circuit court's decision to dismiss the cause of action for civil conspiracy under Rule 12(b)(6) must be affirmed. Civil conspiracy requires that the Appellant allege facts sufficient to infer "(1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage." *Benedict College v. Natl. Credit Sys. Inc.*, 400 S.C. 538, 545, 735 S.E.2d 518, 521 (Ct. App. 2012). "To be actionable, . . . a conspiracy's primary purpose or object must be to injure the plaintiff." *Id.* at 545, 735 S.E.2d at 522 (internal citation omitted). The Amended Complaint lacks any allegation of intent to harm between the numerous co-defendants. Moreover, the Amended Complaint lacks any factual allegations supporting special damages that are separate and distinct from the general damages alleged. *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) (requiring dismissal of the action where the plaintiff merely repeats damages arising from other claims). "A 'plaintiff's obligation to provide the grounds of his entitle[ment] to relief require more

than labels and conclusion, and a formulaic recitation of the elements of a cause of action will not do.'" (R. pp. 364-365; Order Feb. 27, 2013)) (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007)). The Appellant alleges no facts to support his cause of action; choosing merely to recite the elements of the cause of action in the Amended Complaint and offering nothing further on appeal. As a result, the circuit court's holding dismissing the cause of action for civil conspiracy is correct.

As with the claim for civil conspiracy, the Appellant does not challenge the dismissal of the claim for negligence and in particular, the circuit court's finding that the Amended Complaint fails to "allege facts demonstrating the occurrence of three distinct elements: a duty of care owed by the defendant; a breach of that duty by negligent act or omission; and damage proximately caused thereby." (R. p. 367; Order (Feb. 27, 2013)). The only duty alleged in the Amended Complaint purportedly arises from South Carolina Code section 39-1-90, which is the basis for the Appellant's claim for negligence *per se.* Importantly, the Appellant does not challenge the circuit court's specific finding that, other than section 39-1-90, the Appellant has not pled any actionable duty owed by Trustwave to the Appellant. (R. pp. 367-368; Order (Feb. 27, 2013)). Without any duty, the dismissal of the cause of action for negligence must be affirmed.

C. <u>The Appellant Cannot Raise These Issues in Reply.</u>

Finally, as is shown herein, it is well settled that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal. *See First Union Nat'l Bank of S.C.* at 566, 511 S.E.2d at 378. Likewise, issues raised only in reply and not contained in the initial brief will not present issues for this Court's consideration. *See Glasscock, Inc. v. U.S. Fidelity and Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (explaining that arguments conclusory in nature are deemed abandoned

on appeal and cannot be revived in reply). As a result, the Appellant is precluded from briefing the economic loss rule, civil conspiracy, and negligence in reply. Any attempt to do so should be ignored by the Court.

II. THE CIRCUIT COURT PROPERLY CONSIDERED ONLY THE AMENDED COMPLAINT IN DISMISSING THE CASE AGAINST TRUSTWAVE AND DISMISSAL WITH PREJUDICE PRIOR TO DISCOVERY WAS NOT ERROR.

The Appellant initially contends that the circuit court's dismissal of the Amended Complaint against Trustwave was based on facts outside the pleadings (which allegedly had the effect of turning the Motion to Dismiss into one for summary judgment), and that as a result, the dismissal was premature because the Appellant had not conducted any discovery. (Appellant's Br. 8-10). Neither contention is supported by the language of the Order.

A. The Circuit Court's Dismissal Under Rule 12(b)(6), SCRCP, was Confined to the Four Corners of the Amended Complaint and Relevant Case Law.

In support of his first contention – that the court below improperly considered facts outside the pleadings – the Appellant points first to affidavits that Trustwave attached to its Motion to Dismiss on other grounds. Trustwave's Motion to Dismiss sought dismissal of Trustwave Corporation as a party (to which Appellant stipulated); dismissal for improper service (which was denied and not appealed);[1] and dismissal for failure to state a claim under Rule 12(b)(6), SCRCP. (R. pp. 40-46; Mot. to Dismiss). A review of the Motion clearly identifies the Rule 12(b)(6) grounds for dismissal separately identified in Paragraph 14(a)-(j) of the Motion. (R. p. 43-44; Mot. to Dismiss). The

[1] The Appellant acknowledges in his Statement of the Case that the circuit court's setting aside of default against Trustwave Holdings was not appealed and that the parties consented to the dismissal of Trustwave Corporation as a party. (Appellant's Br. 5).

affidavits attached as Exhibit A and B to the Motion do not relate to the Rule 12(b)(6) dismissal grounds, and only address improper service and dismissal of Trustwave Corporation – two issues not appealed by Appellant. (R. pp. 40-43; Mot. to Dismiss). The Memorandum in Support of the Motion to Dismiss argues improper service and dismissal of Trustwave Corporation as separately stated arguments from the Rule 12(b)(6) dismissal grounds, and the affidavits only address service and the defunct Trustwave Corporation. (R. pp. 72-86; Memo. in Supp. of Mot. to Dismiss).

The transcript of the hearing on the various dismissal motions reflects references to the affidavits only during Trustwave's arguments as to improper service. (R. pp. 253-266; Hr'g Tr. 7-20). The Order granting the motion to dismiss Trustwave pursuant to Rule 12(b)(6) *never* refers to or relies upon any affidavit filed by Trustwave. Clearly, Trustwave did not submit nor did the circuit court consider affidavits when ruling upon the Motion to Dismiss on the Rule 12(b)(6) grounds. It is apparent in light of the Record and the Order, the circuit court did not convert the motion to dismiss to one for summary judgment, and would have had no basis, or need, to do so. *Contra Gilbert v. Miller*, 356 S.C. 25, 27-28, 586 S.E.2d 861, 862-63 (Ct. App. 2003) (trial correctly converted a motion to dismiss to a motion for summary judgment when the trial court considered photographs, affidavits and a lease filed in response to a motion to dismiss).

The Appellant's second argument as to why the circuit court considered evidence outside the four corners of the Amended Complaint is likewise without merit. The Appellant contends that "the issue of what constitutes ownership and maintenance of the data in question is a question of fact to be determined through discovery." (Appellant's Br. 10). Initially, the only fact asserted against Trustwave in the Amended Complaint is

the following: "Upon information and belief, Defendants Trustwave and Trustwave Holdings were charged with the duty of securing personal identifying information." (R. p. 16, ¶ 21). It is important to note that Trustwave is sued under South Carolina Code section 39-1-90 (which applies to persons conducting business in this state), while SCDOR, the Office of the Governor, and DSIT are sued under section 1-11-490 (which applies to state agencies). Each statute applies to persons or agencies that own, license, or maintain computerized data that has been compromised. S.C. Code Ann. § 39-1-90 (a)-(b). The Appellant never alleged which party owns, licenses or maintains the data at issue. At the motion hearing, without objection, counsel for SCDOR stated that DOR owned the data. (R. pp. 301, line 7; 304, lines 3-7; 307, lines 21-22; Hr'g Tr.).

The Amended Complaint is, even viewed in the light most favorable to the Appellant, inconsistent and vague on that issue. In the Order, the circuit court clearly focused on the inadequacies of the bare allegations in the Appellant's Amended Complaint and the lack of any factual basis to support a cause of action against Trustwave under section 39-1-90. (R. pp. 365-367; Order (Feb. 27, 2013)) (recognizing that "[t]he Amended Complaint appears to acknowledge that the Department of Revenue owned the data," and citing the Amended Complaint which states "third parties infiltrated the database of the South Carolina Department of Revenue"). Nowhere in the Amended Complaint, the Motion to Reconsider, the Amended Motion to Reconsider, or the Initial Brief has the Appellant set forth any factual basis to support a cause of action against Trustwave under section 39-1-90, nor has the Appellant attempted to rebut or disagree with SCDOR's contention that it owned the data in question. To the contrary, Appellant repeats in his Statement of the Facts one of the facts that he claims to have erroneously

supported the dismissal Order because it went outside the pleadings – that DSIT 'houses' the data stored by DOR. (Appellant's Br. 7). Certainly, the Appellant does not contend that Trustwave owned the tax filings for South Carolina taxpayers or that Trustwave maintained taxpayer data contained on servers owned by the SCDOR.

B. The Substance of the Appellant's Amended Complaint Fails to Allege any Facts Setting Forth a Cause of Action Against Trustwave for Violating Section 39-1-90.

As to violation of South Carolina Code section 39-1-90, the Appellant failed to allege facts sufficient to show application of the statute to Trustwave. In addition, the Appellant similarly failed to allege facts necessary to show a breach of the statutory provisions by Trustwave or how any breach proximately caused damage to the Appellant. "In order to rest liability on the violation of a statute, the violation must be the proximate cause of the injury. . . . . An act is deemed to be the proximate cause of an injury when, without such an act, the injury would not have occurred." *Unisun Ins. v. Hawkins*, 342 S.C. 537, 544, 537 S.E.2d 559, 563 (Ct. App. 2000) (internal citations omitted). The Appellant alleges no connection between an alleged failure to notify him of a data breach and any damage suffered by him, especially since his only alleged injury is at best a hypothetical risk of future harm. Clearly, no basis exists to continue the case against Trustwave for violation of South Carolina Code section 39-1-90.

The Appellant contends that the circuit court should have allowed the cause of action under 39-1-90 to proceed relying on *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 714 S.E.2d 537 (2011), particularly the statement that "[i]t is the substance of the requested relief that matters regardless of the form in which the request for relief was framed." (Appellant's Br. 10) (citing *Cole Vision Corp.* at 153-54, 714 S.E.2d at 542). A review of *Cole Vision* shows that the case supports the circuit court's decision. In *Cole*

Vision, the Plaintiff Hobbs asserted a cause of action for spoliation of evidence, which the circuit court dismissed under Rule 12(b)(6), because South Carolina does not recognize such a cause of action. The Court of Appeals reversed, interpreting the claim as "sounding in general negligence." *Cole Vision Corp.*, at 148, 714 S.E.2d at 539. The Supreme Court reversed the Court of Appeals, holding that "simply a semantic change in the description of the appealing party's claim does not render the request for relief any more viable. It is the substance of the requested relief that matters." *Id.* at 153-54, 714 S.C.2d at 542. The same is the case before this Court: the Appellant's desire to amend his already amended complaint solely to revise his word choice would no more bring Trustwave within the statutory ambit required for relief than the version already dismissed below. The Appellant has filed an Amended Complaint, a Brief in Opposition to Motions to Dismiss, a Motion to Reconsider and an Amended Motion to Reconsider, and an Initial Brief on appeal. Despite these multiple opportunities to set forth the factual basis supporting his requests for relief, the Appellant has never made a factual allegation that would support a cause of action against Trustwave based on violation of South Carolina Code section 39-1-90.

The claim for negligence *per se* suffers from the same defects underpinning the claim for violation of Code section 39-1-90. Not only does the Amended Complaint fail to state facts sufficient to allege or infer the application of the statute to Trustwave or that Trustwave breached the statute, it fails to allege any injury suffered as proximate result of the breach. "The violation of a statute, while negligence *per se*, will not support a recovery for damages unless such violation proximately caused or contributed to the injury complained of." *Seals by Causey v. Winburn*, 314 S.C. 416, 418, 445 S.E.2d 94,

96 (Ct. App. 1994). Without breach or proximately caused injury, the Appellant's claim for negligence *per se* fails.

C. Dismissal with Prejudice of the Amended Complaint was Correct.

As a related matter, the Appellant also contends that because the circuit court allegedly converted the Motion to Dismiss to one for summary judgment, summary judgment may not be granted prior to discovery. Trustwave has already shown that the circuit court did not convert the motion to one for summary judgment by relying on documents outside the Amended Complaint. Nevertheless, the Appellant does contend that dismissal was premature and that a dismissal with prejudice was improper. When challenging dismissal of the action because only limited discovery had occurred, the Appellant bears the burden to show that additional discovery would have aided his cause. In challenging the Rule 12(b)(6) Motion, the Appellant as "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a fishing expedition.'" *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (finding summary judgment not premature and plaintiffs could not rest on unsupported conclusory factual allegations of complaint). Moreover, where further discovery is unlikely to lead to genuine issues of material fact, dismissal is appropriate. *See id.* at 71, 580 S.E.2d at 440; *see also Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835 (Ct. App. 2012) (affirming dismissal with prejudice of amended complaint and denial of additional discovery where reconsideration motion and appellate brief lack any new factual allegations to support claims). As shown herein, despite many opportunities to do so, the Appellant has not and cannot identify any discovery that would allow his causes of action to continue.

The Appellant cites to *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006), for the proposition that the circuit court should have dismissed the case without prejudice, thereby allowing the Appellant to file a new complaint. The *Spence* decision clearly supports the circuit court's decision that the dismissal in this case should be with prejudice. First, it is worth noting that the Complaint dismissed and the subject of this appeal, was in fact an *amended* complaint. Thus, the Appellant had already undertaken one attempt to properly plead his factual allegations. Second, in *Spence,* the Supreme Court makes clear that where "the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted," this Court may affirm the dismissal with prejudice. *Id.* at 131, 628 S.E.2d at 882. The Appellant makes no new or additional allegations with regard to Trustwave, and merely regurgitates on appeal the exact same arguments presented to the circuit court below, both in opposition to the dismissal motions and in seeking reconsideration of the dismissal Order. As the United States Supreme Court explained in the case of *Foman v. Davis*, 371 U.S. 178 (1962), cited by the *Spence* Court and the Appellant, outright refusal to allow the opportunity to amend may be outside a trial court's discretion where there is no "justifying reason appearing for the denial . . . ." *Foman* at 182. In this case, however, the Appellant had already amended his complaint once, and offered no additional factual allegations in support of his request to amend yet again or any different theory of recovery. Thus, the circuit court's decision to refuse yet another amendment to the complaint was justified and correct.

III. THE CIRCUIT COURT'S HOLDING IN THE ALTERNATIVE THAT THE APPELLANT FAILED TO ALLEGE COGNIZABLE INJURY AND THEREFORE LACKED STANDING TO INITIATE THE LAWSUIT WAS CORRECT.

The Appellant's second argument on appeal as it relates to Trustwave, appears to challenge the lower court's ruling in the alternative that the Appellant failed to allege a cognizable injury and therefore lacked standing. (R. p. 368; Order (Feb. 27, 2013)). The Appellant concedes in his brief that he has failed to allege a cognizable injury, although he claims that some jurisdictions would support his request for relief. The law cited by the Appellant in support of his position, however, is markedly different that the facts of this case. Thus, lack of a cognizable injury remains a fatal flaw to the Appellant's claims.

A. The Appellant has Not Suffered Any Cognizable Damages and Therefore Lacks Standing to Bring this Action.

In *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151 (1st Cir. 2011), cited by the Appellant as favorable law in support of his appeal, the court rejects as actionable the very claim that the Appellant has sought to pursue in this case. The facts of *Anderson* involved the theft of over 4 million customer banking cards and nearly 2,000 cases of fraudulent charges on the stolen cards. *See id.* at 154. The *Anderson* Court points out that the facts of its case do *not* involve "lost data which has not been accessed or used by third parties." *Id.* at 164. Rather, "[t]he 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." *Id.* The *Anderson* Court contrasted as factually distinguishable circumstances where "'there [was] no evidence that the thieves or other unauthorized individuals were able to access that information or if accessed that it [was] used for unlawful purposes[,] . . . any injuries of Plaintiff[s] [was]

purely speculative.'" *Id.* (citing *Kahle v. Litton Loan Services, LP*, 486 F.Supp.2d 405, 712-13 (S.D. Ohio 2007)). This factual distinction is what sets *Anderson* apart from this case – there is no allegation that the Appellant or any member of an alleged class has suffered actual, concrete damages as a result of the data breach. To be entitled to relief, the damages alleged must "constitute a legal injury, such as actual money lost, rather than time or effort expended." *Anderson* at 162. As the Anderson court and other courts have acknowledged, hypothetical risk is insufficient to sustain a data breach claim. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147-51 (2013) (holding that the speculative risk of future harm – particularly harm that is dependent on the independent acts of third-parties not before the court – cannot establish standing, and that plaintiff cannot manufacture standing by incurring costs to mitigate this speculative risk); *Katz v. Pershing, LLC*, 672 F.3d 64, 79-80 (1st Cir. 2012) (holding that plaintiff lacked standing due to the mere contention that she purchased identity-theft insurance and credit monitoring services to mitigate against increased risk of identity theft); *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (holding plaintiff not entitled to standing where alleged increased risk of future harm dependent on speculative future actions of an unknown third party); *In re Barnes & Noble Pin Pad Litigation*, No. 12-cv-8617, 2013 WL 4759588, at *4-5 (N.D. Ill. Sept. 3, 2013) (holding increased risk of future harm insufficient to establish standing); *cf. Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1020-21 (D. Minn. 2006) (holding that increased risk of future identity theft does not constitute cognizable harm under negligence); *Hendricks v. DSW Shoe Warehouse*, 444 F. Supp. 2d 775, 783 (W.D. Mich. 2006) (refusing to accept novel theory of damages assuming a risk of future injury at some indefinite future time).

Similarly, the Appellant's reliance on *Proctor v. S.C. Dept. of Health and Envtl. Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006), is misplaced. While *Proctor* sets forth the general principle that damages for lost profits need not be proved to an absolute certainty, in no way does it eliminate the requirement of suffering actual damages to be entitled to relief. In fact, the case cites the well settled principle supporting the lower court's finding that there was no legally cognizable injury here – for damages to be recoverable, the jury must be able to determine the amount of damages with reasonable certainty and "neither the existence, causation, nor amount of damages can be left to conjecture, guess or speculation." *Id.* at 316, 628 S.E.2d at 516. *See also Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) (affirming summary judgment where homeowner lacked any evidence of diminution in value of home outside of pure conjecture) (internal citation omitted). Clearly, for the Appellant to recover against the Respondents, he must have suffered some damage. In this case, the Appellant never alleged that he suffered any damages beyond speculation of potential future harm.

In the context of a class action lawsuit resulting from the theft of personal identifying information collected by a payroll processing firm stolen by an unknown hacker, the Third Circuit Court of Appeals affirmed dismissal when the complaint did not allege any actual harm to the persons whose information was stolen. *Reilly v. Ceridian Corp.,* 664 F.3d 38 (3rd Cir 2011). "Allegations of 'possible future injury' are not sufficient to satisfy Article III [standing]." *Id.* at 42. The *Reilly* Court further explained that even as to the individuals who had incurred costs associated with credit monitoring

or other security measures to guard against future theft (which has not been alleged by the Appellant in this action):

> We conclude that Appellants' alleged time and money expenditures to monitor their financial information do not establish standing, because costs incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more "actual" injuries than the alleged "increased risk of injury" which forms the basis for Appellant's claims.

Id. at 46. It is an inescapable conclusion that the Appellant's failure in this data breach case to assert any actual damages – as opposed to speculative, possible future damages - requires that this Court affirm dismissal under Rule 12(b)(6), SCRCP.

B. **The Statutory Standard for Standing Requires an Injury.**

The Appellant appears to also argue that the cognizable injury requirement to standing is somehow obviated where standing is conferred by statute or the "public importance" exception. (Appellant's Br. 14-15). As to standing conferred by statute, the statute that the Appellant asserts applies to Trustwave requires that the citizen bringing a private cause of action have been "injured." S.C. Code Ann. § 39-1-90 (G). In contrast, the statute at issue in *Fremantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012), cited as favorable law by the Appellant, "specifically conferred standing upon *any citizen* of South Carolina to bring a FOIA claim against a public body for declaratory or injunctive relief, or both." *Id.* at 195, 728 S.E.2d at 45 (emphasis added). The statute underlying the Appellant's claims against Trustwave still requires that the resident bringing suit have suffered an injury as a result of a willful or negligent violation of the statute in order to recover damages. S.C. Code Ann. § 39-1-90 (G)(1)-(2). It is worth noting that in *Fremantle*, only the FOIA claim for declaratory and injunctive relief was reversed on appeal; the Supreme Court upheld the dismissal of the claims for damages where the

plaintiff taxpayer lacked constitutional standing because his claimed injury was suffered "in some *indefinite* way in common with people *generally*." *Fremantle* at 192, 728 S.E.2d at 43 (emphasis in original, citation omitted). The Appellant's lack of any injury remains a bar to proceeding notwithstanding the Appellant's reliance on the statute at issue.

C. **<u>The "Public Importance" Exception to Standing is Not Applicable.</u>**

The Appellant further asserts the "public importance" exception to traditional constitutional standing principles is applicable to this action. "The key to the public importance analysis is whether a resolution is needed for future guidance." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). The matter of public importance must "be inextricably connected to the public need for court resolution for future guidance." *Id.* at 199, 669 S.E.2d at 341. Nowhere does the Appellant explain how court resolution is needed for future guidance in the context of the data breach. In *Fremantle*, the Supreme Court rejected the claim that the plaintiff taxpayer met the public importance exception where the plaintiff taxpayer sought money damages for himself while purporting to represent the taxpayers of his county, holding that the claim for money damages "directly conflicts with the purpose and spirit of the public importance exception." *Fremantle* at 194, 728 S.E.2d at 44. Similarly in this matter, the Appellant only seeks money damages as a result of the alleged actions or inactions of Trustwave and, despite not having any actual economic damages to set forth, the Appellant does not seek any sort of injunctive or declaratory relief to aid the public. Clearly, the Appellant herein is much like the plaintiff taxpayer in *Fremantle*, for whom claims seeking money damages were properly dismissed on Rule 12(b)(6) grounds.

IV. THE CIRCUIT COURT ORDER DISMISSING TRUSTWAVE DID NOT FIND THAT SECTION 39-1-90 WAS A "NOTICE" STATUTE.

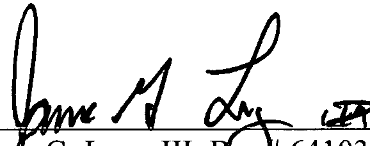
The Appellant argues that the circuit court improperly found section 39-1-90 of the South Carolina Code of Laws was a "notice" statute. (Appellant's Br. 15). A thorough review of the Order dismissing Trustwave shows that not a single reference or finding is made that section 39-1-90 is "merely a 'notice' statute." What the Order does clearly set forth, however, is that the Appellant failed to set forth factual allegations in his Amended Complaint sufficient to support that Trustwave owned, licensed or maintained computerized data and, therefore, was devoid of a factual foundation necessary to find that Trustwave was "subject to the provisions of S.C. Code Ann. § 39-1-90, much less that the same have been breached." (R. p. 366; Order (Feb. 27, 2013)). The Appellant's argument in this portion of his brief represents no more than an attempt to argue the doctrine of *res ipsa loquitur*. That is, because the data breach occurred, someone must be responsible, and that by suing everyone the Appellant could think of to be held responsible, the claims must be allowed to go forward. In South Carolina, it is insufficient for the Appellant to simply submit that the data breach occurred and that therefore one or more parties must be held accountable by the Court. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 452-53, 699 S.E.2d 169, 179 (2010) ("Respondents may not rely solely on the fact that an accident occurred to prove their products liability case under a negligence theory since South Carolina does not follow the doctrine of *res ipsa loquitur*."); *see also, Fletcher v. Med. Univ. of S.C.*, 390 S.C. 458, 463-64, 702 S.E.2d 372, 374 (Ct. App. 2010) ("[W]e are not permitted to speculate that misfortune was the result of negligence in the absence of any evidence as to how the physicians deviated from the standard of care.") The Appellant has an obligation in his pleadings to set forth

factual allegations sufficient to constitute a cause of action against Trustwave and to show his entitlement to relief. *See* Rule 8(a), SCRCP. Because of his failure to do so, even with having amended his complaint at the outset, dismissal of the lawsuit was proper.

CONCLUSION

For the foregoing reasons, Trustwave respectfully requests that the Court dismiss this appeal outright and affirm the decision of the circuit court dismissing this action as to Trustwave Holdings.

Respectfully submitted,



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January 6, 2014
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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. 2013-001096

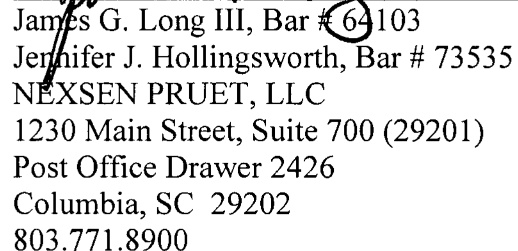
Phillip Morgan, individually and on behalf of all similarly situated Plaintiffs, ... Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the *Final Brief of Respondent Trustwave Holdings, Inc.* complies with Rule 211(b), SCAR.



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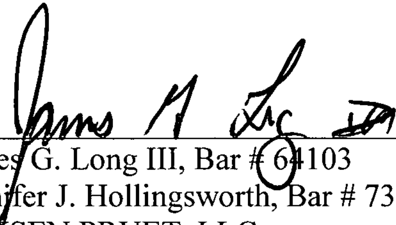

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