ORIGINAL

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.

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 APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Plaintiff filed this suit as a class action in an Amended Complaint of November 5, 2012 alleging, as to the State Defendants (Office of the Governor, South Carolina Department of Revenue, and South Carolina Division of State Information Technology), causes of action for violation of S.C. Code Ann. §1-11-490, Gross Negligence, Gross Negligence *per se*, and Civil Conspiracy. As to Trustwave Holdings, Inc., Plaintiff alleged causes of action for violation of S.C. Code Ann. §39-1-90, negligence *per se*, negligence, and civil conspiracy.

In *lieu* of answering the Amended Complaint, all Defendants filed motions to dismiss under Rule 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure, for lack of standing, for lack of damages, and for mootness. A hearing was held before the Honorable G. Thomas Cooper in Richland County on February 7, 2013.

Plaintiff filed an Affidavit of Default as to Trustwave on December 18, 2012, and the Court quashed the default or "in the alternative" set it aside by a February 27, 2012 Order that was not appealed by Plaintiff. The Parties consented to the dismissal of Defendant Trustwave Corporation, which Counsel for Trustwave represented as not being a currently existing legal entity. The Court also dismissed Nimrata "Nikki" Haley and James F. Etter personally by another unappealed Order.

In separately filed Orders, Judge Cooper dismissed all claims brought in the suit. In the first Order, he dismissed the Department of Revenue and the Office of the Governor pursuant to Rules 12(b)(1) and 12(b)(6). Judge Cooper specifically found that Plaintiff lacked constitutional standing, as well as statutory standing. In addition, he found that the claims brought against the Department of Revenue and Office of the

Governor were moot. He also found that S.C. Code Ann. §1-11-490 was a mere "notice" statute. He found specifically that Plaintiff's allegations of damages were insufficient because they constituted only an "increased risk of future harm" (Record on Appeal Vol. 1, pp. 319 – 339) Finally, he dismissed the Civil Conspiracy claim and found that a class action against the Department of Revenue was impermissible under S.C. Code Ann. §12-60-80 (C).

In the second Order, Judge Cooper dismissed Trustwave. He specifically dismissed the Civil Conspiracy claim and dismissed Plaintiff's claim for breach of South Carolina Code Ann. § 39-1-90 on the basis that Trustwave did not either "own or license computer data" or "maintain computerized data." He found that Plaintiff's negligence *per se* claim was not established because Plaintiff did not prove that Trustwave violated S.C. Code Ann. § 39-1-90. Finally, he determined that Trustwave owed no duty to Plaintiff because S.C. Code Ann. § 39-1-90 did not create a duty as to Trustwave. He also found that Plaintiff did not suffer a legally cognizable injury. Finally, he found that the Economic Loss Rule barred recovery.

In the third Order, the circuit court dismissed the suit against the South Carolina Division of State Information Technology ("DSIT") because Plaintiff lacked standing by failure to establish that he had suffered an injury-in-fact, because S.C. Code Ann. § 1-11-490 did not confer standing, and because DSIT had complied with its duties under S.C. Code Ann. § 1-11-490. The Court specifically found that DSIT did not "own or license" the personal identifying information at issue. Finally, the court determined that Plaintiff's gross negligence claim failed as a matter of law because DSIT owed no duties to Plaintiff. Plaintiff filed a Motion For Reconsideration on March 13, 2013 and an

amended Motion For Reconsideration on March 13, 2013. Plaintiff specifically requested that the Order be amended to be without prejudice, as well as taking exception to the Orders' other grounds for dismissing the suit.

STATEMENT OF THE FACTS

In the fall of 2012, hackers illegally accessed South Carolina taxpayers' information stored in Department of Revenue databases housed in the Division of State Information Technology. The exfiltrated information contained personal identifying information. Approximately 3.6 Social Security numbers (including those of minor children who had never filed tax returns), approximately 387,000 credit and/or debit card numbers, and an unknown number of tax returns and other documents were obtained. The facts of this case gained national attention. Despite the notoriety of this case, the specific roles played by each of the Defendants in this suit remain largely unknown, and no discovery was conducted prior to this suit's being dismissed.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY DETERMINING THAT TRUSTWAVE'S MOTION TO DISMISS WAS A 12(B)(6) MOTION AND ERRED IN GRANTING THE MOTIONS TO DISMISS WITH PREJUDICE PRIOR TO GIVING THE PARTIES AN OPPORTUNITY TO ENGAGE IN DISCOVERY

When a party moves to dismiss under Rule 12(b)(6), "[t]he motion cannot be sustained if facts alleged in the complaint *and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case*." Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697, (1984) (emphasis added) (citations omitted). In addition, "[i]n

determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid South Management Co., Inc., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009).

The Brown Court stated:

> Rule 12(b)(6) of the South Carolina Rules of Civil Procedure provides in pertinent part that: "[I]f on a motion asserting the defense numbered (6) to dismiss for failure to state facts sufficient to constitute a cause of action, *matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*" [Emphasis in original].

> [. . .] It is our view the language of the Rule is clear, and it states plainly that the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside of the pleadings *if* the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. Brown, 291 S.C. at 366-67, 698, 673 S.E.2d at698.

Hence, if a party asks the court to consider materials other than the Complaint to make its determination, the party purportedly seeking a 12(b)(6) dismissal of the action, in fact, converts its 12(b)(6) motion into a motion for summary judgment, regardless of its appellation. The Supreme Court of South Carolina has held:

> Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." [. . .] ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.

Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). (Internal Citations Omitted). In Baughman, the Court reversed the trial

court's granting of partial summary judgment because of the Plaintiffs "acted with due diligence" in acquiring an expert and propounding discovery to the Defendants. The Court concluded that the Defendants could renew their motions "once Plaintiffs have been afforded an adequate opportunity to complete discovery [. . .]" Id. at 114, 545.

By supplementing its Motion with affidavits, Trustwave made a motion for summary judgment, which cannot be granted, in accordance with the above analysis, until the parties have had the opportunity to engage in discovery. Accordingly, Trustwave's Motion should have been denied.

Furthermore, Plaintiff requested leave to amend his complaint *in lieu* of dismissal. South Carolina precedent is clear on the liberality with which motions to amend must be granted:

> When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded [. . .] If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006) Citing Foman v. Davis 371 U.S. 17 (2006). In the case at bar, the circuit court, quite simply, gave *literally no*

explanation as to why the dismissal was with prejudice in its two-paragraph order. (Record on Appeal Vol. 1 pp. 387-388)

Plaintiff's causes of action against Trustwave were dismissed, in large part, because "[t]he only allegation made as to the Trustwave Defendants is that '[u]pon information and belief, Defendants Trustwave and Trustwave Holdings were charged with the duty of securing the personal identifying information" instead of the Complaints stating, literally, "Trustwave Defendants own, license or maintain the personally identifying information at issue." (Record on Appeal Vol. 1 pp. 363-369). At the hearing for this matter, counsel for Plaintiff argued that the issue of what constitutes ownership and maintenance of the data was a question of fact to be determined through discovery. Similarly, the Order dismissing DSIT finds that DSIT did not own, maintain, or license the data (in spite of counsel for DSIT's concession that DSIT was the "landlord" for said data). 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 both S.C. Code Ann. § 1-11-490 and S.C. Code Ann. § 39-1-90 when requesting relief. The 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 be easily amended since "[i]t is the substance of the requested relief that matters regardless of the form in which the request for relief was framed." Cole Vision Corp. v. Hobbs, 394 S.C. 144, 714 S.E.2d 537 (2011).

The Court also erred by considering improper matters—matters outside the four corners of the Complaint, in its Orders dismissing this action, and by elaborating on the underlying factual basis upon which this suit was brought when the parties had engaged

in no discovery, and Plaintiff had not stipulated to any matter of fact as alleged at the hearing for this matter by Defendants. Under South Carolina law, "where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record." Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589, FN 2 (Ct. App. 1997).

With respect to Trustwave, the Court made a finding of fact "that SCDSIT 'houses' the data" and found that "[i]f the Trustwave Defendants do not own, license, or maintain the data, the statute does not apply to them" when Plaintiff made no concession that Trustwave did not maintain or own the data, and such a determination concerning Trustwave could not have been made apart from the Court's relying on the bare assertions to that effect by counsel for Trustwave.

II. THE COURT ERRED BY DISMISSING THE CLAIMS PURSUANT TO RULE 12(B)(1), PURSUANT TO A FINDING THAT PLAINTIFF HAD NOT DEMONSTRATED LEGALLY COGNIZABLE DAMAGES/STANDING, AND PURSUANT TO THE FINDING THAT S.C. CODE ANN §1-11-490 AND §39-1-90 ARE MERELY "NOTICE" STATUTES

The Circuit Court dismissed the claims brought in this suit on four basic grounds: first, on the ground that the Court lacked subject matter jurisdiction (dismissal under SCRCP 12(b)(1)); second, on the related ground that the Plaintiff had failed to establish legally cognizable damages or failed to have standing; third, on the ground that S.C. Code Ann 1-11-490 and 39-1-90 were merely notice statutes; and fourth, on the ground that Plaintiff's claims against the State entities are barred by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et. seq.*

A. The Circuit Court Erred by dismissing pursuant to Rule 12(b)(1).

The only issue regarding which the circuit court arguably does not have jurisdiction arises from S.C. Code Ann § 1-11-490 (H), which reads, in its entirety, "An agency that knowingly and willfully violates this section is subject to an administrative fine up to one thousand dollars for each resident whose information was accessible by reason of the breach, the amount to be decided by the Department of Consumer Affairs." It is a well-settled principle of South Carolina law that "[w]here the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language [. . .] Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction." Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 24-25 579 S.E.2d 334, 337 (2003) (citations omitted). The plain meaning of §1-11-490 provides only that the "*amount*" of the "*administrative fine*" is "to be decided by the Department of Consumer Affairs" in the event of an agency being found to have "knowingly and willfully" in violation of the statute.

More importantly, the statute expressly provides, "a resident of the state who is injured by a violation of the section, in addition to and cumulae of all other rights and remedies available at law, may: (1) Institute a *civil action* to recover damages". Hence, the statute expressly allows for a "civil action" in order to determine liability and provides only that "the amount [of the fine for a knowing violation is] to be decided by the Department of Consumer Affairs." Finally, as a matter of law, the Administrative Law Court "has no authority to decide civil matters or to award monetary damages in

cases." South Carolina Dept. of Consumer Affairs v. Foreclosure Specialists, Inc. 390 S.C. 182, 187, 700 S.E.2d 468, 470 (2010). (*quoting* Randolf R. Lowell, South Carolina Administrative Practice and Procedure, 152 (2d ed. 2008). Therefore, the statute, on its face and by its plain meaning, requires that the breach of this statute be decided, as a matter of fact, by the circuit court in the "civil action" for which the statute provides, and, only if the breach is determined to be knowing and willful, the amount of the compulsory fine that results from that violation is to be determined by the Department of Consumer Affairs. The circuit court still retains exclusive control over determining the fact of the breach, as well as the legal *damages* resulting from the breach. The *amount* of the *fine* alone, an entirely separate issue, and the only one within the scope of its jurisdiction conferred by the statute, is to be determined by the Department of Consumer Affairs. Accordingly, subject matter jurisdiction is conferred upon the circuit court by statute.

B. The Circuit Court Erred by Dismissing the Action for Lack of Common Law Damages

Assuming, *arguendo*, the absence of the statutory bases upon which Plaintiff brought this suit (outlined in detail in subsection C, below), Plaintiff concedes that a jurisdictional split over whether a plaintiff has asserted cognizable damages (and, by extension standing) exists under *similar* (not identical) circumstances. Nevertheless, 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. In Anderson v. Hannaford Bros. Co., 659 F.3d 151 (1st Cir. 2011), the First Circuit Court of Appeals found

> It was foreseeable [. . .] that a customer, knowing that her credit or debit card data had been compromised and that thousands of fraudulent charges had resulted from the same security breach, would replace the card to mitigate against misuse of the card data. *It is true that the only plaintiffs to allege having to pay a replacement card fee [. . .] do not allege that they experienced any unauthorized charges to their account, but the test for mitigation is not hindsight.* Similarly, it was foreseeable that a customer who had experienced unauthorized charges to her account [. . .] would reasonably purchase insurance to protect against the consequences of data misuse.

Id. at 164-65 (Emphasis added). Hence, even though they had not *yet* experienced unauthorized charges, the Anderson Plaintiffs had asserted legally cognizable damages. Counsel for Plaintiff is unaware of any South Carolina jurisprudence directly addressing the issue.

Under South Carolina Law, however:

> As a general rule, the evidence should be such as to enable the court or jury to determine the amount of damages with reasonable certainty or accuracy; and it is sufficient if they are so established. Proof of the amount of loss with absolute or mathematical certainty is not required, and *it does not matter that the determination of damages depends to some extent on the consideration of contingent events.* So, it had been held sufficient if a reasonable basis of computation is afforded, even though the result may be only approximate, or to adduce evidence which is the best the case is susceptible of under the circumstances and which will permit a reasonably close estimate of the loss.

Proctor v. Dept. of Health and Environ. Control, 368 S.C. 279, 317, 628 S.E.2d 496, 516-17 (Ct. App. 2006) (emphasis added) (internal citations and quotations omitted). Hence, under South Carolina's damages analysis, in which damages may be awarded based, to some degree, on "contingent events." South Carolina law should allow a cognizable legal claim for the cost of credit monitoring services. The person or persons who obtained the information in this breach, by the fact that the actions undertaken to acquire that information were criminal, are known to be cyber criminals. The likelihood that they will

not use the information they obtained (or sell it to persons who will) lies somewhere between slim and nonexistent, and the single year of credit monitoring the State has offered to its residents is clearly insufficient to adequately protect South Carolina Residents (Record on Appeal Vol. 1 pp. 181- 193)

Even if South Carolina law did not allow for damages predicated upon the need for credit monitoring, Plaintiff's Complaint could be amended and restructured to provide for classes of individuals in tiers based on the identifiable material loss they have suffered by having their personal identifying information stolen, e.g., those with consequentially depleted bank accounts, those with false charges in determinable amounts, etc. See, e.g. Resnick v. AvMed, Inc., 693 F.3d 1317 (11th Cir. 2013).

Furthermore, South Carolina law has long been clear that standing can be conferred by statute irrespective of any alleged constitutional deficiency: "The traditional concepts of constitutional standing are *inapplicable* when standing is conferred by statute." Freemantle v. Preston, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012) (Emphasis Added). The Freemantle Court determined that the Freedom of Information Act had a "standing provision," which stated, "Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases [. . .]" Id. Both S.C. Code Ann. § 39-1-90 and §1-11-490 allow any "resident of this State who is injured by a violation of this section" to "institute a civil action [. . .]." Significantly, as outlined below, the definition of injury provided in these statutes differs from the definition provided by South Carolina common law.

Finally, South Carolina law recognizes a "public importance" exception to the

traditional constitutional analysis of standing. As the Freemantle Court articulated:

> This Court has often recognized the "public importance" exception to the general standing requirements. Standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. In cases falling within the ambit of important public interest, standing is conferred without requiring the plaintiff to show he has an interest greater than other potential plaintiffs. However, a matter is deemed to be of public importance only where a resolution is needed for future guidance [. . .] Thus, for a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.

Freemantle, 398 S.C. at 194, 728 S.E.2d at 44 (internal citations omitted). The fact that the State of South Carolina itself has spent, to date, in excess of $12,000,000 as a result of this data breach establishes the magnitude of the public importance of this issue.

C. The Circuit Court Erred by Finding that S.C. Code Ann. §1-11-490 and §39-1-90 are Merely "Notice" Statutes

Because the South Carolina Legislature has enacted S.C. Code Ann. § 1-11-490 and § 39-1-90, it has created a novel (and innovative) definition of what constitutes an "injury" and "damages" when a South Carolina resident's personal identifying information not "rendered unusable" through "encryption" or "redaction" has been breached. In S.C. Code Ann. § 1-11-490(D)(2), "Breach of the security system" is defined to have occurred "when 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 consumer.***" (in essence, the very definition of damages the First Circuit adopted in a similar context in Anderson) (emphasis added). By this statute, South Carolina creates a right of action, consistent with the Tort Claims Act, for an injury ("illegal use of the information has occurred or is reasonably likely to occur") causing damages ("material

risk of harm to the consumer") that could arguably otherwise not be compensable in an ordinary tort analysis. In effect, therefore, S.C. Code Ann. §1-11-490 and 39-1-90 create the mechanism through which South Carolina residents may bring claims against State agencies and private individuals responsible for maintaining the integrity and security of the personal identifying information of South Carolina residents.

The circuit court held that S.C. Code Ann. § 1-11-490 and § 39-1-90 were mere "notice" statutes. It is a well-settled principle of South Carolina law that "[w]here the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language [. . .] Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction." Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 24-25 579 S.E.2d 334, 337 (2003) (citations omitted). Nevertheless,

> All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Kiriakides v. United Artist Communications, Inc., 312 S.C. 271, 275 440 S.E.2d 364, 366 (1994) (internal citations omitted). Finally, and most importantly with regard to the statute at issue in this case, "[w]hile provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit liability, we also must presume in construing a statute that the Legislature did not intend

to perform a futile thing. We are constrained to avoid a construction that would read a provision out of a statute, and must reconcile conflicts if possible." Proctor v. Dept. of Health and Environ. Control, 368 S.C. 279, 311, 628 S.E.2d 496, 513-14 (Ct. App. 2006).

The statute that Plaintiff alleges applies to the State Defendants is "§ 1-11-490. Breach of security of state agency data; notification; rights and remedies of injured parties; penalties; notification of Consumer Protection Division." By 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. The first class of agencies to whom the statute gives a disclosure duty, under (A), are those "owning or licensing" the data, who are required to notify South Carolina residents when use of the residents' personal indentifying information is "reasonably likely to occur or use of the information creates a material risk of harm to the resident." The second class of state agencies, under (B), are those agencies "maintaining" data that includes personal identifying information, who are required to timely notify the agencies in (A) who own or license the information. Curiously, the circuit court found that DSIT did not "own, license, or maintain" the data despite the fact that DSIT admitted that the data was housed on DSIT's premises. The court also found that, to the extent that DSIT could have been responsible for the data, it had fulfilled its obligation under the statute when it "provided the requisite notice" of the breach to the Office of the Governor because "section 1-11-490" is only a notification statute." (Record on Appeal Vol. 1 pp. 340-361) In the Order dismissing the Office of the Governor and Department of Revenue, the court dismissed the Office of the Governor for not "owning or licensing" the data. Finally, the court dismissed the Department of Revenue without making any factual finding regarding the

Department's relationship to the data. Interestingly, the court did not make any prerequisite findings regarding who owned, maintained, or licensed the data and did not even determine what those terms signified in the present context. The Orders as to the Office of the Governor and DSIT also found, as a matter of fact, that neither Defendant owed a statutory duty because it did not own, license, or maintain the data when no such fact exists apart from the parties' counsels' bare assertions of fact made at the hearing for this matter. In short, Plaintiff brought claims against every legal entity that possibly could have owned, maintained, or licensed the data, and the court found that no entity owned, maintained, or licensed the data—hence finding, as a matter of law, that no entity could ever "own, maintain, or license" data under S.C. Code Ann § 1-11-490 nor S.C. Code Ann. §39-1-90.

Of all the Defendants involved in this suit, one or more of them must have, to some degree, "owned," "licensed," or "maintained" the data. That is, since the data has existed, and has been breached, one or more of the Defendants must have controlled it when it was breached. Defendants rely on these terms of the statute to absolve themselves of liability, but if none of these Defendants is governed by the statute, then residents of this state have no remedy against any agency when their personal identifying information is breached. The court cannot "unwrite" the statute and *must* presume that "the Legislature did not intend to perform a futile thing." Proctor, *supra*. Exactly who owns, licenses, and maintains the data are questions of fact to be determined through discovery. If none of the Defendants owned, licensed, or maintained the data, and if the only purpose of the statute is for agencies to provide notice, the statute's conferring the right of State residents to initiate suit is a futile thing. For example, if the Defendants

made a joint public announcement on January 1, 2015 that they were creating a web site, which would launch on February 1, 2015, called "Learn About South Carolina" on which they would place the Social Security numbers, tax returns, and medical test results of all South Carolina residents, free of charge, and invited criminals to use the information for fun and profit, under the interpretation of the statute determined by the circuit court, because the notice came before the willful breach, no resident of this State would have been harmed by violation of this "notice" statute, and any suit a resident brought would have to be dismissed as a matter of law. By this interpretation, the purpose of the statute is to protect state agencies and companies doing business in this State, not to protect the residents of this State who are harmed by the breach. S.C. Code Ann. § 1-11-490 and §39-1-90 give South Carolina residents the right to institute a civil action when their unencrypted personal identifying information has been disclosed as the result of a security breach. The circuit court's interpretation of this statute contorts it into a shield to protect potential defendants by making a civil action against them impossible if the defendant provides notice of a security breach. Clearly, such an absurd interpretation of the statute would invert the Legislative intent and render what has been enacted as a tool for injured residents into an impediment to those same residents' seeking redress.

The statute is a "notice" statute only insofar as notice is a prerequisite to State Residents learning of the breach so that they can protect themselves and timely invoke their right to institute a civil action. If the Defendants had not divulged the existence of this breach, residents would have had no way to learn of it. Perhaps time would have demonstrated an anomalously high percentage of South Carolina residents becoming victims of tax fraud and identity theft in proportion to residents of other states, but the

residents would have had no way to know that they were being victimized as a result of acts and omissions of the Defendants in this suit and that it was against these Defendants that they had (or should have had) recourse. Accordingly, since the statute is clearly more than a "notice" statute, it is necessary to determine whether the statute provides a waiver of sovereign immunity as to the State Defendants.

III. THE CIRUCIT COURT ERRED IN FINDING THAT THE TORT CLAIMS ACT BARRED THE CLAIMS AGAINST THE STATE DEFENDANTS

The circuit court found that S.C. Code Ann. § 1-11-490 did not create a special duty to create liability as to the State Defendants. The analysis necessarily hinges on the statute by which Plaintiff requests relief. Under South Carolina law, a plaintiff can successfully maintain a tort suit for damages based upon a statute that creates a special duty. As the Arthurs Court stated,

> A plaintiff may prevail against a public duty defense if the statute not only concerns the duties of a public office, but also has the essential purpose of protecting identifiable individuals from a particular kind of harm. In such cases, the statute creates a special duty which may give rise to a negligence suit against an officer for failure to perform his duties properly.

Arthurs v. Aiken, 338 S.C. 253, 265, 525 S.E.2d 542, 548 (1999). (citations omitted).

In Rayfield v. South Carolina Dep't of Corrections, 297 S.C. 95, 374 S.E.2d 910 (Ct.App.1988), the Court of Appeals articulated a six-part test for determining whether a statute creates a special duty to an individual member of the public. A special duty is created if:

> (1) an essential purpose of the statute is to protect against a particular kind of harm;
>
> (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm;

(3) the class of persons the statute intends to protect is identifiable before the fact;

(4) the plaintiff is a person within the protected class;

(5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and

(6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

The purpose of the statute at issue is to (1) to protect against breach of "personal identifying information." The statute (2) imposes a duty on state agencies "owning or licensing computerized data or other data that includes personal identifying information." The (3) class of identifiable individuals protected by S.C. Code Ann. § 1-11-490 consists of every "resident of this State whose unencrypted and unredacted personal identifying information was, or is reasonably believed to have been, acquired by an unauthorized person." As a South Carolina resident and taxpayer, Plaintiff (as well as the proposed class) (4) fall within the protected class. Clearly, the Defendants knew that criminals possessing personal identifying information could cause (5) harm to members of the class, and the State Defendants (6) had the authority to act (or not act) with regard to preserving the security of the data.

The circuit court also found that discretionary immunity barred Plaintiff's claims Nevertheless, 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. Faile v. South Carolina Dept. of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 345 (2002). *See also Jackson v. South Carolina Dep't of Corr.* 301 S.C.

125, 390 S.E.2d 467 (Ct.App.1989) *aff'd,* 302 S.C. 519, 397 S.E.2d 377 (1990). Therefore, since the issue is whether the Defendants have been grossly negligent, the question is one that should be decided by a jury: "In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury." Faile, 350 S.C. at 332, 566 S.E.2d at 345.

IV. THE CIRUCIT COURT ERRED IN FINDING THAT A CLASS ACTION AGAINST THE DEPARTMENT OF REVENUE IS IMPERMISSIBLE

The circuit court found that S.C. Code Ann. 12-60-80(C) applies so as to prohibit all class actions against the Department of Revenue, regardless of whether or not they relate to tax issues. By definition, the *Revenue Procedures* Act applies only to tax disputes.

By finding that the statute applied to any suit, including this suit for damages from a data breach, the circuit court interpreted the statute in a manner that violates the one subject rule of Article 3, §17 of the South Carolina Constitution, which provides that "[e]very Act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." The Supreme Court has explained that the purpose of Article III is "(1) to apprise the members of the General Assembly of the contents of an act by reading the title; (2) to prevent legislative 'log-rolling'; and (3) to inform the people of the State of the matters with which the General Assembly concerns itself." American Petroleum Institute and BP Products North America v. South Carolina Department of Revenue et al., 382 S.C. 572, 677 S.E.2d 16 (2009). Log rolling is a "legislative practice of including several propositions in one measure [. . .] so that the legislature [. . .] will pass all of them, even though these propositions might not have

passed if they had been submitted separately." [. . .] To prevent this practice, our constitution requires that an act relate to only one subject." Id. (Internal quotations omitted). When the title was amended, the portion dealing with §12-60-80 stated: "TO AMEND ARTICLE 1, CHAPTER 60 OF TITLE 12, RELATING TO SOUTH CAROLINA REVENUE PROCEDURES ACT, SO AS TO REVISE THE MANNER IN WHICH AND CONDITIONS UNDER WHICH DISPUTES OR CLAIMS WITH THE DEPARTMENT OF REVENUE ARE DETERMINED AND RESOLVED."

Section 12-60-80 was amended in 2003 to add:

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

Section 12-60-80 (A) and (B) both deal exclusively with taxes. Subsection (C) then purports to treat of "any other class action." The purpose of the Revenue Procedures Act is stated in the Act itself: "It is the intent of the General Assembly to provide the people of this State with a straightforward procedure to determine a dispute with the Department of Revenue and a dispute concerning *property taxes*. The South Carolina Revenue Procedures Act *must be interpreted and construed in accordance with, and in furtherance of, **that intent***." S.C. Code Ann. §12-60-20 (Emphasis added). By interpreting the Act to apply so as to bar a class action arising from a data breach, the circuit court created an interpretation that violated the one subject rule of the South Carolina Constitution. The application of §12-60-80 to any non-tax issue violates the one subject rule of the South Carolina Constitution, and accordingly this section of the Revenue Procedures Act must be stricken from the Code.

CONCLUSION

The circuit court dismissed Plaintiff's Complaint prior to his having the opportunity to engage in fact finding to determine what entity or entities owned, maintained, or licensed the data in question. Apart from that determination being made, any dismissal is, at the very least, premature. Although the Trustwave Order also dismissed pursuant to the economic loss rule, Counsel for the Plaintiff has not briefed the issue because this case is not related to products liability, the situation in which the rule would have merit: "The economic loss rule is a creation of the modern law of products liability. Under the rule, there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself." Sapp v. Ford Motor Company, 386 S.C. 143, 147 687 S.E.2d 47, 49 (2009). At any rate, the entire proposed Plaintiff class doubtless has suffered from non-economic losses, including the anxiety that their personal identifying information could at any time be used by unknown criminals.

For the foregoing reasons, as well as others to be made at oral argument for this case, the circuit court Orders dismissing this suit should be reversed.

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January 16, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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.

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 certified that this Final Brief complies with Rule 211(b), SCACR.

January 16, 2014.

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PROOF OF SERVICE

I CERTIFY THAT I HAVE SERVED THE Appellant's Reply Brief to be Included in the Record on Appeal 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 January 15, 2014, to their attorneys of record as follows:

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