STATEMENT OF THE CASE

This appeal arises out of a declaratory judgment action brought by Petitioner Cole Vision Corporation ("Cole") and Sears Roebuck and Co. ("Sears") seeking a declaration that Respondent Steven C. Hobbs, O.D. ("Hobbs"), an optometrist, was obligated to defend and now is obligated to indemnify them pursuant to a lease agreement between Hobbs and Cole and Sears. (App. p.16) Cole and Sears further sought a declaration that Defendant NCMIC Insurance Company (who is not a party to this appeal) is obligated to indemnify Cole and Sears for claims made against them due to the alleged negligence of Hobbs based on its policy of insurance issued to Hobbs because they qualified as additional insureds. (App. p.18) Finally, Cole and Sears sought a judgment against both Hobbs and NCMIC for defense costs incurred in defending the claims made against them and for the amount of the settlement of the claims asserted in the underlying action brought by Mary and John Lewis (hereinafter "the Lewis case"), which are discussed below. (App. pp.17-18)

Hobbs was the sublessee of space leased by Cole from Sears where he practiced optometry. (App.pp. 8, 19a.) The sublease agreement between Cole and Hobbs provides that Hobbs shall indemnify Cole and Sears for any liability they may incur on account of his negligence and that Hobbs would procure insurance for their benefit. (App.pp.8-9, 20) As such, Cole and Sears contend that they are entitled to insurance coverage under the NCMIC policy issued to Hobbs providing both general liability and professional liability coverage. (App.pp. 15, 18)

Cole and Sears, along with Hobbs, were sued by Mary and John Lewis on account of Hobbs' alleged negligence in failing to properly diagnose and treat Mrs. Lewis. Mrs.

Lewis suffers from glaucoma and contended that the disease went unnoticed due to Hobbs' negligent treatment. She was rendered partially blind, allegedly because of the undiagnosed glaucoma. (App.pp. 10-11, 20) The case brought by the Lewises has now been settled. The amount of the settlement exceeds the liability limits of the NCMIC policy. Pursuant to the sublease's indemnification provision, both Sears and Cole tendered the defense of the litigation brought by the Lewises to Hobbs and NCMIC, Hobbs' insurance carrier. (App.pp. 14, 20a) Because NCMIC and Hobbs refused to defend and indemnify them, Cole then brought this action.

In response to the Complaint, Hobbs asserted a counterclaim for the alleged spoliation of evidence in the Lewis case, specifically a one page "patient profile sheet"[1] that may have been completed by Mrs. Lewis before she was treated by Hobbs. (App.p. 21) Although Hobbs asserts that Mrs. Lewis completed a patient profile sheet, he has been unable to locate it. Hobbs contends that Cole lost or destroyed the profile sheet. (App.p. 22) As a remedy, Hobbs seeks relief from the indemnification obligation he would otherwise have under the lease agreement. (App.p. 22)

Cole moved to dismiss Hobbs' counterclaim pursuant to SCRCP 12(b)(6) on the ground that South Carolina does not recognize a cause of action for spoliation of evidence. The motion was heard before the Honorable Clifton Newman on July 12, 2007, and Judge Newman granted the motion to dismiss by Order dated August 9, 2007. Thereafter, Hobbs appealed Judge Newman's Order to the Court of Appeals, which reversed and held that Hobbs pled facts sufficient to constitute a general negligence cause

[1] The patient profile sheet is a one page form that was allegedly completed by Mary Lewis, not Hobbs. The patient profile sheet was not a record of treatment rendered by Hobbs. It is the only item that Hobbs alleges was missing from Lewis' optometric file.

of action based on alleged spoliation of evidence, rather than a cause of action for spoliation of evidence in his answer and counterclaim. Cole Vision Corp. v. Hobbs, 384 S.C. 283, 680 S.E.2d 923 (Ct. App. 2009). Following the Court of Appeals' denial of the Petition for Rehearing, this Court granted Cole's Petition for Writ of Certiorari on September 2, 2010.

ARGUMENT

The Court of Appeals erred first in even considering Hobbs' claim that he asserted a valid claim for negligent spoliation of evidence because the issue was not preserved for appeal. Nevertheless, even if the issue is properly before the court, the Court of Appeals erred in recognizing a cause of action for negligent spoliation because such a claim was previously rejected by this Court in Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 659 S.E.2d 122 (2008), and South Carolina law does not recognize a tort of negligent spoliation. Moreover, such a cause of action conflicts with sound public policy. Lastly, if this Court were to create a negligent spoliation cause of action, it should not be applied in this case because Hobbs failed to plead an essential element of the claim – i.e. notice of the Lewis action – and because it is a new cause of action that should not be retroactively applied.

I. The Court of Appeals erred in impliedly recognizing a cause of action for negligent spoliation when this Court has expressly rejected such a claim.

Before the Court of Appeals published its opinion in this case in 2009, this Court expressly declined to recognize a negligent spoliation cause of action. In Austin, this Court affirmed summary judgment on a negligent spoliation claim, declining to create a new tort where the plaintiff had pled elements similar to those pled here. The Austin

decision controls this case, however, the Court of Appeals, in reversing the trial court's dismissal of the counterclaim, did not consider the Austin decision.[2]

Like the instant case, the Austin plaintiff alleged that spoliation of evidence by a third party impaired her ability to litigate another lawsuit. Although the Austin decision was brought to the attention of the Court of Appeals pursuant to Rule 208(b)(7), SCACR, the Court did not address the decision and therefore did not analyze the instant case in light of controlling case law.

Instead of applying Austin, the Court of Appeals held that Hobbs had sufficiently pled a cause of action for *negligence* based on allegations of spoliated evidence. The so-called "negligence" cause of action in the instant case is exactly like the "negligent spoliation" claim rejected in Austin. The elements of "negligent spoliation by a third party" outlined in Austin are the same as those alleged by Hobbs (with the exception of Hobbs' failure to allege Cole's actual knowledge of the pending or potential civil action when the patient profile was allegedly lost) but there are additional elements to negligent spoliation vis-à-vis a simple negligence action. In Austin, without adopting the cause of action for negligent spoliation, this Court recognized other courts had adopted the following elements for negligent spoliation:

(1) the existence of a pending or potential civil action;

(2) the alleged spoliator had actual knowledge of the pending or potential civil action;

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[2] The Austin decision was issued during the pendency of this appeal after the parties had submitted final briefs but before consideration of the case and issuance of a decision by the Court of Appeals on July 1, 2009. By letter dated March 14, 2008, counsel for Cole informed the Court of Appeals of the Austin decision's direct impact on the case. Counsel also fully argued the applicability of the Austin decision in its Petition for Rehearing to the Court of Appeals.

(3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances;

(4) spoliation of the evidence;

(5) the spoliated evidence was vital to a party's ability to prevail in a pending or potential civil action; and

(6) damages.

Austin, 377 S.C. at 34-35, 695 S.E.2d at 124 (emphasis added).

Hobbs has attempted to make the same claim that was rejected by this Court in Austin. Hobbs cannot circumvent the fact that his claim for negligent spoliation is not recognized in this State by alleging that the claim is only for negligence and that the negligence complained of is simply "spoliating evidence." No matter how the cause of action is denominated, the gravamen is *negligent spoliation*, a claim not recognized under South Carolina law. South Carolina courts have long held that it is the *substance* of the facts alleged and the relief sought that determines what the cause of action is against a defendant, not the form or label placed on the claim by the plaintiff. See, e.g., Richland County v. Kaiser, 351 S.C.89, 567 S.E.2d 260 (Ct. App. 2002) ("It is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'"). *Cf.* State Farm Fire and Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000) (rejecting a claim that "Barrett's complaint asserts causes of action for both intentional torts and negligence…because, 'in the context of a cause of action alleging an intentional tort, which by definition cannot be committed in a negligent manner, the allegation of negligence is surplusage.'").

Hobbs' cause of action – even when interpreted in the light most favorable to him[3] – is for negligent spoliation, which is claim that has not been recognized by this Court. Therefore, the trial court's dismissal of Hobbs' counterclaim was proper and the Court of Appeals erred in reversing the dismissal.

II. Public policy considerations do not support the adoption of a new tort of negligent spoliation.[4]

A variety of public policy considerations weigh against the adoption of a new tort of negligent spoliation. Other jurisdictions have considered the issue and found that policies favoring (1) employing existing non-tort remedies operate against the adoption of a tort not before recognized in this state, (2) avoiding speculative claims for damages, and (3) avoiding duplicative and potentially inconsistent litigation support the rejection of a tort remedy for negligent spoliation. See e.g. Coprich v. Superior Court, 80 Cal. App. 4th 1081 (Ct. App. 2000) and Trevino v. Ortega, 969 S.W. 2d 950 (Tex. 1998).

a. Existing non-tort remedies weigh against the recognition of the tort of negligent spoliation of evidence.

South Carolina courts have never recognized a distinct cause of action against a party for spoliation, whether negligent or even intentional. Our state's appellate courts have, however, approved of levying sanctions or charging adverse jury instructions as a remedy against a party found to have lost or destroyed relevant evidence, but those

[3] As discussed below, Judge Newman ruled in this 12(b)(6) order of dismissal that Hobbs' claim was for spoliation of evidence – a cause of action not recognized in South Carolina. Hobbs did not seek reconsideration of that order by filing a Rule 59 motion. Accordingly, he failed to preserve the issue of whether South Carolina recognizes a cause of action for "negligent spoliation" or "negligence" arising from spoliated evidence for appeal.

[4] Because the Court of Appeals ruled that Hobbs could assert a claim for negligent spoliation, that is the cause of action addressed herein. However, by making this argument Cole does not waive any argument concerning the fact that this is not the cause of action pled in the counterclaim or that the issue was not properly before the Court.

remedies are available in the case where the evidence was to be presented, not in a subsequent lawsuit. No published opinion of any South Carolina appellate court recognizes any remedy for spoliation of evidence other than sanctions or adverse jury instructions imposed in the case in which the evidence was relevant. Stokes v. Spartanburg Reg'l Med. Ctr., 368 S.C. 515, 521, 629 S.E.2d 675, 678 (Ct. App. 2006) (ordering a new trial for failure to give a jury instruction on the adverse inference of the import of evidence lost or destroyed by the defendant).

Moreover, even in circumstances where the Court found that a party or an attorney intentionally destroyed evidence or refused to produce it to the opposing party -- an allegation not made by Hobbs in this case -- the courts of South Carolina have allowed no more than a sanction *in the case where the evidence was to be presented*. In most of those cases the trial court provided only a jury charge outlining the presumption that such evidence, if presented, would have been adverse to the party withholding it. See e.g., Welsh v. Gibbons, 211 S.C. 516, 46 S.E.2d 147 (1948) (and the decisions cited therein). However, even the most severe sanction levied was only imposed *in the context of the case pending in which the destroyed evidence was to be presented*. QZO, Inc. v. Moyer, 358 S.C. 246, 252, 594 S.E.2d 541, 545 (Ct. App. 2004) (upholding the trial court striking the defendant's pleadings due to his "intentional defiance of [the trial court's] order . . . and his willful destruction of evidence"); Kershaw County Bd. of Educ. v. United States Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (Ct. App. 1990) (holding that a sanction more severe than the adverse jury instruction was too severe when there was no evidence that the spoliated evidence was intentionally lost or destroyed).

Of course, as recently as 2008, this Court refused to recognize a separate cause of action for either negligent or intentional spoliation of evidence. See Austin, supra.

Other states, with even fewer protections available than what South Carolina has recognized, have still refused to adopt the tort of negligent spoliation. The California Court of Appeals refused to adopt such a tort in the case of Coprich v. Superior Court, 80 Cal. App. 4th 1081 (Ct. App. 2000). In that case, the plaintiffs in a personal injury action arising from an automobile accident sought recovery from an insurance carrier for failing to preserve a vehicle involved in the accident. In holding that California would not recognize a cause of action for negligent spoliation, the court noted that under the law of California the potential alternative remedies for spoliation would not be available in the case of *negligent* spoliation. Id. at 1089 n. 4. Nevertheless, the California court refused to allow the claim to proceed as a new cause of action. Id. See also Trevino v. Ortega, 969 S.W.2d at 958 (noting "[t]rial courts have broad power to police litigants and protect against evidence spoliation.")

As the above-referenced cases demonstrate, South Carolina law allows for a variety of remedies when a party can show that evidence was spoliated, either negligently or intentionally. However, those remedies are available in the case where the evidence was to be presented to the factfinder, not in any subsequent litigation. In light of the fact that Hobbs potentially had remedies available to him in the Mary Lewis litigation, i.e. sanctions or adverse jury charges,[5] he should not be allowed to bring a separate cause of action for negligent spoliation of evidence as a collateral claim in this suit.

[5] Hobbs sought no relief in the Mary Lewis litigation for the alleged spoliation.

b. The nature of the remedy in a negligent spoliation claim is so highly speculative that the claim should not be recognized.

To begin with, it is important to note that Hobbs does not seek an award of damages in connection with his claim for negligent spoliation. To the contrary, he simply requests that the court relieve him of his contractual obligation to indemnify Cole. Nevertheless, the damages calculation, if such a cause of action were allowed, is too speculative. "The risk of meritless claims for negligent spoliation is particularly troublesome in light of the uncertainty concerning the nature of the missing evidence and its potential effect in the underlying litigation…." Coprich, 80 Cal. App. 4th at 1089. "Even those courts that have recognized an evidence spoliation tort note that the damages are speculative. The reason that the damages inquiry is difficult is because evidence spoliation tips the balance in a lawsuit; it does not create damages amenable to monetary compensation." Trevino, 969 S.W.2d at 952-53 (citations omitted).

Even in South Carolina, the nature and weight of evidence that has been subject to a spoliation claim is exceedingly varied. The appellate courts of this state have decided spoliation claims related to, among others:

> (a) the reformatting of and destruction of data on a computer hard drive in a dispute between business partners, Moyer, 358 S.C. 246 at 251, 594 S.E.2d 541 at 544;
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> (b) the materials removed during the abatement of asbestos from a school building, United States Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 370;
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> (c) the destruction of drug paraphernalia in a potential wrongful death action, Austin, 377 S.C. 31, 33, 659 S.E.2d 122, 123;
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> (d) the destruction of a chair that collapsed and allegedly caused injury to the plaintiff, Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 675 S.E.2d 783 (Ct. App. 2009);

(e) the loss of a specific medical record and a blood sample in a medical malpractice action, Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006); and

(f) the refusal to produce a Coca-Cola bottle allegedly containing poisonous substances, Welsh, 211 S.C. 516, 46 S.E.2d 147.

The wide variety of cases in which a spoliation claim can be brought and the unending kinds of evidence that can be lost or destroyed leads to the nearly inescapable conclusion that a jury would have no choice but to speculate as to the value of any one piece of evidence to any of the countless issues that could arise in any given litigation.

In this case, the damages are even more speculative because the Lewis case was settled rather than tried. There are no jurors to testify about the effect of the lack of the patient profile sheet on their award. Nor is there any way for Hobbs to quantify the amount the Lewises might have accepted in settlement of the claim had there been a copy of the patient profile sheet available. "As a general rule, the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy. 'Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.'" Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008) (citations omitted). The damages evidence that would have to be presented to succeed on a cause of action for negligent spoliation, cannot be reasonably certain or accurate. That is particularly true when the underlying case is resolved via settlement. Therefore, the cause of action should not be recognized in South Carolina.

In this case, Hobbs alleged no damages in his complaint arising from the alleged spoliation of the one page Patient Profile Sheet. Rather he sought relief from his contractual indemnity obligation. The potential damages that could be asserted by Hobbs

are so speculative that this subsequent litigation should not be the forum for Hobbs to make a claim arising from the spoliation.

c. Negligent spoliation will clog the court system with duplicative litigation.

The litigation of a negligent spoliation claim will require the re-litigation of the prior lawsuit where the alleged spoliation occurred. This is true for two reasons. First, under existing spoliation law, the aggrieved party should have presented the claim and either received its remedy or had the claim rejected. Second, if damages are to be determined (a process of doubtful accuracy) the underlying action must be re-tried (or tried in the first instance where resolved by settlement) in the spoliation suit.

Because remedies are available in the underlying litigation, the allegedly aggrieved party should be required to seek its remedy there. Under the current state of the law, the trial court has the authority to sanction the spoliator or give an adverse jury charge if warranted. If those remedies are not requested, then the aggrieved party should not be allowed to bring a subsequent tort action seeking even more speculative relief. If those remedies are sought and awarded then the aggrieved party has received its remedy and should not be allowed a second bite at the same apple by asserting a subsequent claim for damages (or other relief as requested by Hobbs). Finally, if the aggrieved party seeks sanctions or an adverse jury charge in the underlying action but is denied, there has been a determination on the merits that the complaining party was not damaged or prejudiced by the alleged spoliation. Accordingly, in either circumstance, the spoliation issue has been resolved on the merits at that time.

No further litigation of the spoliation claim should thereafter be allowed because the subsequent claim could result in an inconsistent outcome. In addition, if the

complaining party is allowed to pursue a subsequent remedy for spoliation, the original case in which the spoliation alleged occurred will have to be retried in order to determine the damages incurred by the victim of the spoliation.

> The spoliation claim would require a retrial within a trial in which all of the evidence presented in the underlying action would be presented again for the trier of fact to determine what effect the spoliated evidence might have had in light of the other evidence. The trier of fact would have to speculate as to the nature of the missing evidence and the effect that it might have had in the underlying action, rendering the fact of harm and causation irreducibly uncertain and creating the potential for arbitrary and inconsistent results.

Coprich, 80 Cal. App. 4th at 1088-89. In Trevino, the Texas Supreme Court held similarly, "recognizing a cause of action for evidence spoliation would create an impermissible layering of liability and would allow a [party] to collaterally attack an unfavorable judgment with a different factfinder at a later time, in direct opposition to the sound policy of ensuring the finality of judgments." 969 S.W.2d at 953.

The effect of allowing a new tort claim for spoliation of evidence creates the potential of either inconsistent litigation results or duplicative trials on the same issue. As such, this cause of action should not be recognized in South Carolina.

III. Even if this Court recognizes a cause of action for negligent spoliation, Hobbs failed to allege facts sufficient to support his claim.

Even if this Court were inclined to recognize a cause of action for negligent spoliation, Hobbs has failed to plead an essential element: that Cole had actual knowledge of the pending or potential civil action of Mary Lewis when it allegedly lost the profile sheet.

In his counterclaim Hobbs alleged:

(1) He was involved in an existing civil action;

(2) Cole had a duty to preserve Hobbs' patient profiles based on the requirement that Hobbs turn over such documents to Cole and assumption of control over them;

(3) Cole lost Lewis' patient profile;

(4) the lost profile impaired his ability to litigate the existing civil action; and

(5) as a result, Hobbs incurred costs and fees.

(App.pp.19a-22) Hobbs did not allege, nor could he,[6] that Cole had actual knowledge of the pending or potential action when the patient profile was allegedly lost. Thus, even if the Court now recognizes a tort for negligent spoliation, Hobbs has failed to state claim because there is no allegation Cole had knowledge of Mary Lewis' claims when it allegedly lost her profile sheet. Knowledge of the pending or potential action is a necessary element of the cause of action described (but rejected) in Austin. Thus, Hobbs' claim fails as pled and a dismissal pursuant to Rule 12(b)(6), SCRCP, was warranted.

IV. Hobbs' claim that the cause of action against Cole Vision is actually for Negligence is not preserved for appeal.

In his argument to the Court of Appeals, Hobbs characterized his claim against Cole Vision as one for negligence rather than as one for the unrecognized tort of spoliation of evidence. The Court of Appeals accepted this as the type of claim asserted by Dr. Hobbs and decided that he had properly pled such a claim.

However, as Cole argued to the Court of Appeals, this issue, i.e. whether there can be a negligence claim based on the loss or destruction of evidence, is not preserved for appeal because it was not addressed in Judge Newman's order dismissing the

[6] Service of the original Complaint in the underlying tort action was Hobbs' first notice of the suit. By that time, the patient profile could not be located. Cole was not named as a defendant in the original Complaint, but became a defendant when the Lewises later amended their Complaint.

counterclaim. "The trial court did not rule on this issue, and [appellant] did not raise it in a Rule 59, SCRCP, motion. Therefore, this issue is not preserved." Shealy v. Doe, 370 S.C. 194, 205, 634 S.E.2d 45, 51 (Ct. App. 2006).

Judge Newman did not address the issue of whether Hobbs stated a valid cause of action for negligence. Rather, his order was based only on the fact that South Carolina does not recognize any independent cause of action for spoliation. "No South Carolina appellate court has recognized a cause of action for spoliation of evidence." (App. p. 5.) However, Judge Newman did not rule upon the issue of whether Hobbs could recover under a negligence theory of liability. Thus, because the issue of "negligent spoliation" was not addressed in the Order granting the Motion to Dismiss and because no Rule 59 motion was filed by Dr. Hobbs, the issue of whether South Carolina would allow recovery for spoliation of evidence under a negligence theory was not properly before the Court of Appeals and is not properly before this Court.

CONCLUSION

Hobbs' arguments regarding the adoption of the tort of negligent spoliation are not preserved for appeal. Even if they were, South Carolina law does not recognize such a cause of action. This case is directly controlled by this Court's opinion in Austin. Even if South Carolina law recognized such a cause of action, Hobbs failed to plead a critical or essential element before the Circuit Court. For all of these reasons, the Court of Appeals erred in reversing the dismissal of Hobbs' counterclaim.

Finally, to the extent that the Court finds that negligent spoliation of evidence is a viable tort that will be recognized in South Carolina, such recognition should be prospective only because this is a reversal of the prior law of this state as expressed in

Austin and its predecessors. Acceptance of Hobbs' arguments means this Court is creating liability where formerly none existed. Toth v. Square D Co., 298 S.C. 6, 8, 377 S.E.2d 584 (1989).

For these reasons, Cole respectfully petitions this Court to reverse the decision of the Court of Appeals and affirm the dismissal of Hobbs' claim for spoliation of evidence.

Respectfully Submitted,

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