

The Petitioner, Cole Vision Corporation, submits this brief in response to the brief submitted by Respondent Steven C. Hobbs.

I. *Austin v. Beaufort County Sheriff's Office* is controlling in light of the facts of this case

Despite Respondent's efforts to distinguish Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 659 S.E. 2d 122 (2008), from the case before the Court, Austin dictates a reversal of Court of Appeals' decision. Respondent attempts to characterize this case as distinguishable because Austin deals with "third-party" spoliation of evidence while, presumably, this case does not. (Br. of Resp't, p. 4.) However, regardless of whether or not the Court considers the instant case to be against a "third party," Austin and this case are similar in all material respects.

Austin dealt with a claim in which the Beaufort County Sheriff's Department [the "third party"] was alleged to have a duty to preserve evidence in its possession for the benefit of Austin [presumably the "first party"] as it related to her desire to bring a lawsuit against another unnamed potential defendant [the "second party"]. Austin alleged that the Sheriff's Department had prematurely disposed of evidence that would have inculpated an unknown second party against whom Austin intended to pursue a wrongful death claim. In this case, Hobbs [the "second party"] alleges that Cole [the "third party"] had a duty arising out of the alleged requirement that Cole, and not Hobbs himself, maintain the Patient Profile Sheet (Br. of Resp't, pp. 2, 5.) that would have exculpated him in the optometric malpractice claim brought by the Lewises [the "first party"]. Just as the evidence in the possession of the Beaufort County Sheriff's Office was alleged to be beneficial to Austin in prosecuting a wrongful death action, Dr. Hobbs alleges that the Patient Profile Sheet would have been helpful in defending himself

against Lewis's claims.¹ Thus, Austin's precedent militates in favor of reversing the Court of Appeals.

The instant case cannot properly be characterized as a "first party" spoliation case wherein one party has lost or disposed of evidence necessary to prosecute or defend the case brought by another party. Assuming that it ever existed, the Profile² was relevant only to Lewis's claim against Hobbs and not to Hobbs' obligations to Cole. Further, as the Court noted in Austin, the Supreme Court of Appeals for West Virginia "refused to recognize first party spoliation of evidence" in Hannah v. Heeter, 584 S.E.2d 560 (W.V. 2003). Austin, 377 S.C. at 34, 659 S.E.2d at 124 n. 3. Rather, remedies already exist for spoliation that is alleged to occur in the first party context.

Further, whether the Court construes Hobbs' spoliation claim as a "first party claim," a "third party claim," or something else entirely, it does not change the fact that the Court has never recognized such an independent cause of action in any context. Rather, this Court has declined to recognize a cause of action for negligent spoliation of evidence against an entity that allegedly failed to maintain that evidence for someone else for use in litigation, the very

¹ Dr. Hobbs contends in his brief that he has continued exposure to the Lewises. (Br. of Resp't, p. 2.) While the Lewis case was pending at the time this lawsuit was filed, the Lewises settled their claims against Hobbs and Cole in November 2007. Dr. Hobbs was released from further liability by the Lewises and the Lewis litigation was dismissed with prejudice at that time.

² Dr. Hobbs characterizes the Patient Profile Sheet as "patient records of Mrs. Lewis." (Br. of Resp't, p. 1.) While Cole does not agree that the Patient Profile Sheet would constitute a "medical record," it should be noted that if the Profile is indeed a "medical record," then, under South Carolina law, the *optometrist* is responsible to maintain the record. See S.C. Reg. 95-6 (requiring optometrists to comply with the South Carolina Physicians' Patient Records Act) and S.C. Code Ann. §§ 44-115-10 to 120 (West Rev. 2002) (Physician Patient Records Act setting forth rights and duties with regard to maintain patient records). If the Patient Profile Sheet is a "medical record" then it should have been maintained by Dr. Hobbs for a period of 10 years. See S.C. Code Ann § 44-115-120 (West Rev. 2002).

allegation that Hobbs makes here. Accordingly, this Court's decision in Austin controls the situation before the Court.

Finally, if the Court is now persuaded to recognize such a claim, then the Court should nevertheless reverse the Court of Appeals because Hobbs has not pled Austin's elements here. In Austin, the Court found that the plaintiff could not establish a duty to preserve the evidence that was in the possession of the Beaufort County Sheriff. Id. at 35. Here, Hobbs' Complaint did not allege any "knowledge of the spoliator [Cole] of the pending or potential civil action [of the Lewises]." See id. at 35. This would be perhaps be the most fundamental and critical element of the tort of negligent spoliation, should it now be recognized. Because Hobbs failed to allege a critical element of a "newly created" tort, if it even exists, his claim should not be allowed to survive. In short, if the Court is persuaded that such a claim should exist, this is not the proper case to create it.

II. The assertion of declaratory judgment claim does not save Hobbs' counterclaim

Hobbs contends that the fact that he also sought a declaratory judgment at the trial court level should also weigh in favor of upholding the Court of Appeals' reversal of the dismissal of his counterclaim. Although Hobbs correctly states the law of South Carolina as it relates to declaratory judgment actions, this reasoning is unpersuasive here.

First, like the argument that Hobbs' counterclaim asserts a cause of action for negligence rather than negligent spoliation, Hobbs also failed to preserve this issue for appeal. In the Brief of Respondent, Hobbs asserts for the first time that the inclusion of a declaratory judgment cause of action is somehow different than his substantive, legal cause of action for negligent spoliation of evidence. This issue is not preserved for appeal because it was not addressed in Judge Newman's order dismissing the counterclaim nor was it addressed before the Court of Appeals.

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

Secondly, and more substantively, Hobbs’ declaratory judgment claim is nothing more than a rehashing of his legal claims. In paragraphs 43 and 44 of the Answer and Counterclaim Hobbs asserts:

43. As a result of Cole’s negligence, Defendant is impaired with regard to his ability to defend the claim of Mary Lewis and has incurred attorneys [sic] fees and costs and continues to incur attorneys [sic] fees and costs in his own defense as a result of Cole’s spoliation of evidence and continued exposure as a result of the claim of Mary Lewis.

44. Defendant requests that the Court declare the rights and liabilities of the parties pursuant to §15-62-10 [sic] et seq. Code of Laws of South Carolina. Specifically, Defendant is entitled to a declaration by the Court that Cole is liable for any liability of the Defendant to the Lewises and to Sears as a result of this spoliation of evidence, that Defendant has no duty to Cole, and that Cole is obligated to reimburse Defendant for attorney’s fees and costs with he may incur in defending the Sumter County action and the declaratory judgment action.

(App p. 22.)

By these two paragraphs Hobbs has requested both damages in form of attorney’s fees and costs and his individual exposure in the Mary Lewis litigation and a declaration that Cole should pay damages in the same form. In other words, his declaratory judgment cause of action seeks nothing different from or extra than his legal claim.

Hobbs argues that a declaratory judgment action is not improper merely because there is another form of relief available to him. However, there is no relief available at law for the negligent spoliation claims Hobbs is asserting and he cannot circumvent the lack of a cognizable claim merely by also couching it as seeking declaratory relief. As the Court of Appeals recognized in Felts v. Richland County, 299 S.C.214, 383 S.E.2d 261 (Ct. App. 1989), “The

Uniform Declaratory Judgments Act which has been adopted by most state jurisdictions is remedial and procedural in nature and does not create substantive rights or duties... A particular declaratory judgment action draws its equitable or legal substance from the nature of the underlying controversy.” Id. at 216 (citations omitted).

In this case there is no “underlying substance” from which Hobbs can draw. There is no recognized cause of action in South Carolina for negligent spoliation of evidence. Accordingly, no declaratory judgment action will lie when it is based on the same factual predicate and the same claims of relief.

CONCLUSION

Regardless of the manner in which the Court denominates the parties, this Court has never recognized a cause of action for spoliation of evidence. The Austin decision was made based upon a factual scenario that is so legally similar that it should be controlling of the facts before the Court. Finally, though Hobbs sought a declaratory judgment in the trial court, there is no legal predicate creating a substantive right to relief for allegations of negligent spoliation. Therefore, for these reasons and for the reasons set forth in Petitioner’s Brief, the Court of Appeals’ should be reversed.

Respectfully Submitted,

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