

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Opinion No. 4997 (S.C. Ct. App. filed July 11, 2012)

Allegro, Inc., Respondent-Petitioner,

v.

Emmett J. Scully, Synergetic, Inc.,
George C. Corbin, and Yvonne Yarborough, Petitioners-Respondents.

RESPONDENT-PETITIONER'S RETURN TO
PETITIONER-RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

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RETURN ARGUMENTS

- I. **Assuming the Court of Appeals erred in not reaching the Defendants' arguments regarding the denial of the Defendants' directed verdict and JNOV motions for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent representation, the Defendants' arguments are not preserved for appeal, are barred by the law of the case doctrine, and have no merit.**

The Defendants challenge the sufficiency of the evidence to support the jury's finding against them on several causes of action. Their arguments are not properly before this Court.

Any appellate challenge to the sufficiency of the evidence must first be presented to the trial court by the making of a directed verdict motion at the close of all the evidence, and the failure to do so precludes appellate review of the issue. *Hendrix v. Eastern Distrib., Inc.*, 446 S.E.2d 440, 442 (S.C. App. 1994) , *aff'd*, 464 S.E.2d 112 (S.C. 1995) (vacating opinion to extent it ruled on merits of issues not preserved for appeal). The directed verdict motion must be based on specifically stated grounds, and any appellate argument is limited to those specifically stated grounds. Rule 50(a), SCRCPP; *Hendrix*, 446 S.E.2d at 446 ("It was incumbent upon Eastern to argue specifically which element of breach of contract accompanied by a fraudulent act was not established to give the trial court the opportunity to rule on the point.") (emphasis added). If a directed verdict motion is made at the close of the plaintiff's case but not renewed at the close of all the evidence, the issues raised in the motion are not preserved for appeal. *Hendrix*, 440 S.E.2d at 442 (also stating: "The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all evidence is *a strict one*.") (emphasis added). A JNOV motion is limited to the grounds raised in a directed verdict motion at the close of the evidence, *i.e.*, a JNOV motion cannot be used to raise or preserve for appellate review any issue that was not raised specifically in a directed verdict motion at the close of all the evidence. *Id.* If the trial judge denies a directed verdict or JNOV motion, and if the appellant fails to

challenge all grounds for that ruling, the unchallenged ruling becomes the law of the case and, right or wrong, requires affirmance. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970). Any motion to reconsider, alter, or amend a trial court's prior rulings is limited to the grounds stated in the prior motion, and the motion to reconsider cannot be used to raise issues for the first time. *Ex parte Beard*, 597 S.E.2d 835, 840 (S.C. App. 2004).

As demonstrated below, the Defendants' arguments on the sufficiency of the evidence violate the rules set forth above and, therefore, these issues are not properly before this Court for appellate review. Moreover, the Defendants' arguments are without merit.¹

A. The Civil Conspiracy Claims

The Defendants' directed verdict motions at the close of all the evidence appear at Appx. 411-415. Importantly, the Defendants did not renew their directed motions made at the close of the plaintiff's case. (*Id.*, *passim*). Thus, any appeal on the sufficiency of the evidence is limited to the specific grounds raised at Appx. 411-415. As to civil conspiracy, the Defendants first argued there was "no evidence of any acting in concert among the three of them [*i.e.*, Corbin, Scully, and Yarborough]." (Appx. 411). The trial court denied the directed verdict motion. (Appx. 415-416). The Defendants did not challenge this ruling on appeal and, therefore, it is the law of this case that the Defendants acted in concert with each other vis-à-vis the civil conspiracy.

The Defendants argue there was no evidence of "special damages" as to any defendant. This argument is not properly before this Court. The Defendants never argued at the close of the evidence that there was no evidence of special damages as a ground for their directed verdict motion on the conspiracy claim. (Appx. 411-415, *passim*). Thus, this argument is not preserved for review.

¹ In a footnote, the Defendants argue that if this Court grants the Plaintiff's certiorari petition and reverses the new trial ordered by the Court of Appeals, then they summarily "argue" other grounds in support of the new trial order. (Pet-Resps. Cert. Pet. at 6 n.3). Assuming this is sufficient to raise these other "new trial" grounds, the Plaintiff incorporates herein its appellate arguments in opposition to those arguments, including the arguments that these issues are not preserved for appeal, are barred by the law of the case doctrine, and have no merit.

The Defendants made this argument by directed verdict motion at the close of the Plaintiff's case (Appx. 347), but their failure to renew it at the close of all the evidence precludes review of the issue. (Appx. 411-415). In denying the Defendants' JNOV motion on this ground, the trial judge ruled that the Defendants had not made this argument at the close of the evidence and, therefore, could not make it in their JNOV motion. (Appx. 20). The Defendants did not challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case. In denying the Defendants motion to alter or amend on this ground, the trial judge ruled that the Defendants had raised this ground at the close of the plaintiff's case but failed to renew it at the close of the evidence and, therefore, they could not raise the issue as a ground for JNOV. (Appx. 44). The Defendants did not challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case.

In short, the Defendants' "special damages" argument is not preserved for appeal, because it was not made or renewed at the close of the evidence. Moreover, the Defendants do not challenge the trial court's ruling that they did not make this argument at the close of the evidence and that, therefore, they could not raise the issue after the jury's verdict. Thus, this ruling is the law of this case and, right or wrong, requires affirmance.

Defendant Corbin argues separately that there was no evidence that he intended to harm Allegro and, therefore, he was entitled to a directed verdict on the civil conspiracy claim against him.²

It is the law of this case that Scully and Yarborough acted in concert with the intent to harm Allegro, because they did not make any appellate arguments to the contrary. It is the law of this case that Corbin acted in concert with Scully and Yarborough, because no defendant challenged the trial court's denial of this ground for directed verdict. It is the law of civil conspiracy that the hand

² The other defendants (Scully and Yarborough) do not make this argument.

of one is the hand of all and, therefore, Corbin is responsible for the acts undertaken by Scully and Yarborough and the damages resulting therefrom. *Charles v. Texaco Co.*, 18 S.E.2d 719, 726 (S.C. 1942); 16 AM. JUR. 2D *Conspiracy* § 16 (2009). Thus, were it assumed that Corbin did not personally have any intent to harm Allegro, it is irrelevant because he knowingly acted in concert with other conspirators who (as a matter of law in this case) intended to harm Allegro.

In any event, there is sufficient evidence in the record to create a jury question on whether Corbin intended to harm Allegro.

Corbin is a CPA with extensive experience as chief financial officer of major businesses. (Appx. 335-336). He provided accounting services to Allegro and thereby became familiar with its business operations and its client base – his company later became a client of Allegro and he therefore discontinued his formal CPA relationship with Allegro. (Appx. 336-338). Corbin knew of Scully’s plans to either buy out McCarthy’s interest in Allegro or start a competing business that would seek to serve the same clients, and he assisted Scully in planning these alternatives. (*E.g.*, Appx. 338-341; 396). Three days after Scully departed from Allegro, Corbin moved his company’s business from Allegro to Scully’s new company – he was the first Allegro client taken by Scully. (Appx. 392; 394-395).

Civil conspiracy, by its very nature, is a covert and clandestine act that is usually not susceptible of proof by direct evidence. *Island Car Wash, Inc. v. Norris*, 358 S.E.2d 150, 153 (S.C. App. 1987). Thus, civil conspiracy is typically proven by circumstantial evidence. *Id.* A conspiracy “may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances.” *Id.* In deciding whether a conspiracy has been proven, the jury may consider any evidence that tends to connect “those *advising, encouraging* [or] *aiding*” the other conspirators. *Id.*

Here, Corbin's principal argument is that he intended to help Allegro rather than harm it. The jury was free to reject this protestation by Corbin on his intent, an issue peculiarly within the province of the jury.³ The circumstantial evidence gave rise to an inference that Corbin knew of and assisted Scully and Yarborough in their plan to take clients from Allegro. Corbin was the first client to leave Allegro for Scully's new business – hardly the act of someone concerned with the best interest of Allegro – and Corbin had frequently advised Scully on how to best set up a competing business. These facts were sufficient circumstantial evidence for the jury to find Corbin was a conspirator. And it is the law of this case that Corbin acted in concert with Scully and Yarborough vis-à-vis the conspiracy. Accordingly, this Court should affirm the jury's conspiracy verdict against Corbin.

B. The Contract Claims

Defendant Scully argues there was no evidence of any contract between him and Allegro. This is simply false. It is undisputed that Scully was an employee of Allegro, served as its President, and received a salary from Allegro for his services. It is thus obvious that there was a contract between Scully and Allegro. Scully's entire argument for certiorari hinges upon there being no evidence of a contract. The undisputed evidence created a question of fact on the existence of a contract between Allegro and Scully. Thus, the trial judge did not err in denying

³ Citing this Court's opinion in *Hoard v. Roper*, 694 S.E.2d 1 (S.C. 2010), Corbin argues that one cannot avoid a dispositive issue by asserting a jury may disbelieve uncontradicted evidence. This argument fails for three reasons. First, and foremost, Corbin has misread the opinion in *Hoard*. There, this Court stated: "a jury is not required to accept uncontradicted witness testimony, as credibility is a question for the jury." *Id.* at 6 (emphasis added). Thus, were it assumed that Corbin's testimony was uncontradicted (and it was not), the jury was not required to accept it and was free to make its own credibility determination. Second, Corbin has overstated the rule set forth in *Hoard*. There, this Court stated: "A jury's prerogative to disregard uncontradicted testimony is a sound principle of law, but it has no application in a summary judgment setting." *Id.* at 6 (emphasis added). This appeal arises from a jury trial, not an order granting summary judgment. Third, Corbin's own actions contradicted his claim that he had the best interest of Allegro at heart – he was the first Allegro client to leave and go to Scully's new competing business, which is not the act of someone with the best interest of Allegro at heart, nor was the act of helping Scully form a competing business.

Scully's directed verdict motion. Moreover, Scully's arguments to the contrary are barred by the law of the case doctrine.

In denying Scully's directed verdict motion, the trial court ruled:

Whether there's *no written contract*, there *is an oral contract*, there's certain duties that flow that *results in certain contractual obligations* from an employer to and employee and back and forth.

(Appx. 414) (emphasis added). In short, the trial court denied the directed verdict motion, because there was at least an oral employment contract between Allegro and Scully, and this resulted in contractual obligations owed by Scully to Allegro. Scully did not mention or challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case and precludes Scully's current arguments for certiorari.

In denying Scully's JNOV motion on this issue, the trial court ruled that Scully's directed verdict motion "was limited to the argument that there was no employee handbook, no employment agreement, and no non-compete agreement [and thus] the arguments based on a failure to prove terms of the contract or a breach thereof cannot be the basis of a JNOV motion." (Appx. 19). Again, Scully did not mention or challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case. Importantly, on appeal and here, Scully makes the same arguments that he attempted to make in his JNOV motion. Since he did not challenge the trial court's ruling that those arguments were not made at trial and therefore could not be the basis for a JNOV motion, he cannot make those arguments in seeking certiorari.

In denying Scully's motion to alter or amend on this issue, the trial court rejected Scully's argument that the "handbook, etc." language used in his directed verdict motion was by way of example only and that "[i]mplicit in the argument that no contract has been established is the claim

that the terms of the contract or the breach of the contract have not been established.” (Appx. 42) (emphasis in Order). The trial judge held:

A directed verdict motion “shall state the *specific grounds therefor*.” Rule 50(a), SCRPC (emphasis added). Implicit arguments do not satisfy the “specific grounds” requirement of Rule 50(a). Moreover, in seeking a directed verdict, the moving party must argue which element(s) of a cause of action are not supported by the evidence, something Defendants did not do here with any specificity. *Hendrix v. Eastern Distrib., Inc.*, 446 S.E.2d 440, 446 (S.C. App. 1994)(“It was incumbent upon Eastern to argue specifically which element of breach of contract accompanied by a fraudulent act was not established to give the trial court the opportunity to rule on the point.”) (emphasis added), *aff’d*, 464 S.E.2d 112 (S.C. 1995) (vacating opinion to extent it ruled on merits of issues not preserved for appeal).

(Appx. 43) (underlining added). Scully did not mention or challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case and precludes Scully’s certiorari argument. The trial judge ruled that Scully’s directed verdict motion was insufficient to present the issue that he attempted to argue below. Rather than appeal this ruling, Scully simply repeats the argument made to the trial court. The law of the case doctrine precludes this absent a challenge to the trial court’s ruling.

In any event, as noted earlier, it is undisputed that Scully was an employee of Allegro; he was the President. (Appx. 214; 223-224). Accordingly, there manifestly was a contract between Scully and Allegro. Since the only argument by Scully is the non-existence of any contract, and since there manifestly was some contract between Scully and Allegro, Scully’s argument is without merit were it assumed the argument was properly before this Court.

C. The Fraud and Negligent Misrepresentation Claims

Misrepresentation and fraud arises upon silence when there is a duty to speak. *Ellie, Inc. v. Miccichi*, 594 S.E.2d 485, 497 (S.C. App. 2004). A duty to speak arises from a preexisting and definite fiduciary relationship. *Id.* As president of Allegro, Scully owed a fiduciary duty to Allegro

and, therefore, any silence when he had a duty to speak would be a misrepresentation and fraud. *Id.*; see also *Jacobson v. Yaschik*, 155 S.E.2d 601 (S.C. 1967).

As President of Allegro, Scully manifestly had a duty to speak when he knew that key employees were planning to leave without notice, that employees were compiling company documents to take when they left, and that employees were using company time and company resources for their own purposes and to the detriment of Allegro. There is evidence that Scully knew all of these things and more, but he never disclosed it to Allegro. (See, e.g., Appx. 288-316; 318-333; 582; 589-604).⁴ Thus, there is evidence of a misrepresentation, which is the only issue raised on certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Defendants' certiorari petition.

Respectfully Submitted,



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⁴ Scully argues he told Allegro (McCarthy) that he was taking employees with him. He said this, but he never disclosed that they had agreed to leave without notice. More importantly, there is no evidence (and no argument) that he told Allegro that employees were compiling Allegro documents to take with them (steal) when they left Allegro or that employees were using company time and resources for their own purposes (and those of Scully in forming the new business) and to the detriment of Allegro.

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the Respondent-Petitioner's Return Petitioner-Respondent's Petition for Writ of Certiorari by depositing a copy of same in the United States Mail, sufficient postage prepaid, on May 28, 2013 addressed to the attorneys for the Petitioners-Respondents, as follows:

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