

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

L. Casey Manning, Circuit Court Judge

Case No. 2004-CP-40-1915

Allegro, Inc.,..... Respondent/Petitioner,

v.

Emmett J. Scully, Synergetic, Inc., George Corbin,
and Yvonne Yarborough Defendants,

Of Whom Emmett J. Scully, George Corbin, and
Yvonne Yarborough are Petitioners/Respondents.

**PETITIONERS'/RESPONDENTS' REPLY
IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

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Pursuant to Rule 242(h) of the South Carolina Appellate Court Rules, Petitioners/Respondents Emmett J. Scully (“Scully”), George Corbin (“Corbin”) and Yvonne Yarborough (“Yarborough”) (Scully, Corbin and Yarborough are collectively referred to as “Petitioners/Respondents”) hereby submit this reply in support of their petition requesting this Court issue a writ of certiorari to review the opinion of the Court of Appeals captioned *Allegro, Inc. v. Emmett J. Scully, Synergetic, Inc., George Corbin and Yvonne Yarborough*, Op. No. 4997 (S.C. Ct. App. filed July 11, 2012) (Shearouse Adv. Sh. No. 23 at 76) {Appendix (“App.”) p. 1004}.¹ For the reasons set forth in the petition as well as this reply, Petitioners’/Respondents’ petition should be granted and this Court should address their directed verdict and JNOV arguments because the resolution of those unresolved issues will allow the new trial of this matter to proceed only as to the remaining parties and claims.

I. Allegro does not dispute Petitioners’/Respondents’ argument that the Court of Appeals should have addressed the directed verdict and JNOV arguments.

As an initial matter, Petitioners/Respondents note that Allegro’s return to the petition for writ of certiorari does not address or attempt to refute Petitioners’/Respondents’ initial argument that the Court of Appeals’ opinion should have ruled upon Petitioners’/Respondents’ directed verdict and JNOV arguments. The Court of Appeals refrained from ruling on the directed verdict and JNOV arguments based upon the rule set forth in *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), that appellate courts need not address remaining issues when

¹ Petitioners/Respondents agree with the Court of Appeals’ Opinion to the extent it correctly held that the Trial Court erred by admitting a temporary injunction order into evidence and that this error required a new trial. Petitioners’/Respondents’ petition requests that this Court review the Court of Appeals’ failure to address Petitioners’/Respondents’ directed verdict and JNOV arguments.

the determination of a prior issue is dispositive of the appeal. (Op. No. 4997 at p. 14) {App. 1017}. As discussed in Section I of Petitioners'/Respondents' petition, while the Court of Appeals correctly ordered a new trial based on the erroneous admission of the temporary injunction order, this ruling was not dispositive as to the directed verdict/JNOV issues, and the resolution of those issues would serve the interests of justice by limiting the new trial to only those claims and parties which properly survived directed verdict/JNOV at the first trial. Allegro makes no attempt to dispute this argument, and instead argues the merits of the directed verdict/JNOV issues or asserts they were not preserved. As is explained below, Petitioners'/Respondents' directed verdict/JNOV arguments were properly preserved and certiorari should be granted to resolve these issues.

II. Petitioners/Respondents are entitled to a directed verdict and/or JNOV as to the civil conspiracy claim.

A. The civil conspiracy claim fails because there was no evidence of special damages and this issue was adequately preserved.

Petitioners/Respondents assert that directed verdict and JNOV should have been granted as to Scully, Yarborough and Corbin on the civil conspiracy claim because Allegro failed to offer any evidence of "special" damages. Specifically, Allegro's damages evidence was the same for all eleven causes of action – the alleged losses to Allegro from the loss of its current and prospective clients - and, as such, Allegro failed to establish "special" damages which "go beyond the damages alleged in other causes of action." Pye v. Estate of Fox, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (emphasis added). In its return, Allegro makes no attempt whatsoever to show that there was any

evidence establishing the necessary element of special damages. Rather, Allegro asserts only that this issue has not been preserved for appellate review.

Allegro admits that this precise issue was raised by Appellants in their initial directed verdict motion at the close of Respondent's case. See Allegro's Return at p. 3. Allegro then contends that, because this issue was not raised again in Petitioners'/Respondents' second directed verdict motion at the close of all evidence, it has not been preserved. However, the trial transcript reveals that at the second directed verdict motion, after initially arguing that the civil conspiracy fails as to Corbin due to a lack of any evidence of any intent on his part to harm Allegro, the Trial Court specifically **ordered** Petitioners'/Respondents' counsel to stop presenting any argument on civil conspiracy and to move onto the next cause of action:

MS. GAFFNEY: Correct, and there is no evidence in the record before the Court that Corbin had any purpose or design to injure Allegro.

THE COURT: It is not what you intend. It's what actually results. Anyway go to the next, go to the next civil. **I have heard enough about civil – go to the next cause of action.**

(Appx. p. 414) (emphasis added). Viewed in this context, it is clear that the Trial Court did not wish to hear a reiteration of the special damages argument asserted in the prior directed verdict motion and that Petitioners'/Respondents' counsel was specifically directed not to continue with any argument regarding civil conspiracy.

Generally, in order to preserve an issue raised in a directed verdict motion, the motion must be made at the close of all evidence. Rule 50(b), SCRCF; Evans v. Wabash Life Ins. Co., 247 S.C. 464, 148 S.E.2d 153 (1966). This rule is wholly proper where the fault for failing to make or renew the motion lies with the appealing party. However, where the actions of the Trial Court, as opposed to the party, prevented the motion from

being made or renewed, this rule has not been, and should not be, strictly enforced. The South Carolina Supreme Court faced a similar situation in the case of Mains v. K Mart Corp., 297 S.C. 142, 375 S.E.2d 311 (1988). In Mains, the defendant made a motion for directed verdict on specific grounds at the close of plaintiff's case. Id. at 145, 375 S.E.2d at 312-13. At the close of all evidence the trial court stated on the record: "[n]ote the usual motions and mark them heard. Y'all go ahead and get to arguments before lunch. To [sic] ahead," and no directed verdict motions by the parties were noted in the record. Id. at 145, 375 S.E.2d at 313. While the Mains Court noted that it was incumbent for K Mart to make its motion for directed verdict on the record in order to preserve the issue, it stated that **"[w]e will however, address the issue presented by the motion for a directed verdict at the close of the plaintiff's case."** Id. (emphasis added). Thus, because the failure to preserve the issue resulted from the action of the trial court, and because the issue was raised in the initial directed verdict motion, the Supreme Court considered the merits of the issue on appeal.

Similarly, other jurisdictions faced with a preservation issue caused by the trial court refusing to allow argument to be presented have allowed the underlying issue to be considered on the merits on appeal. In Commonwealth v. Dickson, 918 A.2d 95, 99-100 (Pa. 2007), the court refused to hold that an issue was not preserved where counsel was "cut off" by the court before raising a specific point and instead held that the court "will not punish counsel for declining to resist the trial court's unequivocal effort to cut off conversation on this point." Further, in Lai v. Sagle, 818 A.2d 237, 242-43 (Md. 2003) the court held that an objection to remarks made in opening statements was preserved despite the party's failure to renew the objection and motion for mistrial at the close of all

evidence because, by objecting until he was “cut-off by the trial judge, signaling the end of discussion on that issue,” petitioner had done all that was required to preserve the issue.

When the full context of what occurred at the directed verdict stage following the close of all evidence is taken into view, Petitioners’/Respondents’ counsel was not permitted the opportunity to renew the argument as to the complete lack of special damages. As in Mains, because this issue was clearly raised and ruled upon at the first directed verdict stage, and because the failure to raise it at the second directed verdict stage was the result of the Trial Court specifically directing Petitioners’/Respondents’ counsel to cease argument on that civil conspiracy cause of action, this Court should grant certiorari, correct this error by granting JNOV as to the civil conspiracy claim in its entirety, thus allowing the new trial to proceed without the civil conspiracy claim.

B. Allegro must establish each element of civil conspiracy against each defendant, and there is no evidence that Corbin acted with the intent or purpose of injuring Allegro.

Petitioners/Respondents assert that there was no evidence at trial that Corbin had any intent to harm Allegro, and that, therefore, JNOV should have been granted as to Corbin on the civil conspiracy claim. This position has been consistently asserted at trial and has been presented in this appeal. (Appx. pp. 347, 411-414, 937-939, 991-994). Allegro now seeks to remove the key element of individual intent from the requirements of civil conspiracy. Specifically, while Allegro accurately asserts there has been no appeal on this ground as to Scully and Yarborough, it incorrectly contends that “it is the law of the case” that Corbin acted in concert with Scully and Yarborough and that individual intent on the part of Corbin is unnecessary to be liable for civil conspiracy.

(Allegro's Return at pp. 3-4). Essentially, Allegro asserts that the individual intent of Scully and Yarborough is somehow imputed onto Corbin. While the "hand of one" may be "the hand of all," that maxim presupposes and requires that the joint actors all share the same intent and are therefore responsible for each others actions. The intent of one, however, is not the intent of all, and intent must be specifically established as to each individual defendant. At trial, in the post-trial motions, and in this appeal, Corbin has consistently asserted that there was no evidence of any purpose or intent on his part to harm Allegro.

There are three separate and distinct elements necessary to establish a claim for civil conspiracy: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; and (3) which causes special damages. LaMotte v. Punchline of Columbia, Inc., 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988). "In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005) (emphasis added). In order for there to be "joint assent" to harm a plaintiff, each alleged conspirator must individually intend for such harm to occur.

Thus, even if Corbin "combined" in some fashion with Scully, Yarborough or both, Allegro must still establish that Corbin assented to the purpose or intent of harming Allegro. South Carolina's courts have consistently rejected civil conspiracy claims where there is no evidence that the defendant possessed the requisite intent to harm the plaintiff. Cowburn, 366 S.C. at 49, 619 S.E.2d at 453 (affirming summary judgment on civil

conspiracy claim because there was no evidence the defendants “joined together for the purpose of injuring [the plaintiff]”); Pye, 369 S.C. at 567-68, 633 S.E.2d at 511-22 (affirming summary judgment on civil conspiracy claim where there was no evidence of “wrongful intent” because the “essential consideration” in a civil conspiracy claim is whether the primary purpose or object of the combination is to injure the plaintiff); Mendelsohn v. Whitfield, 312 S.C. 17, 430 S.E.2d 524 (Ct. App. 1993) *aff’d* 312 S.C. 226, 439 S.E.2d 845 (1994) (upholding directed verdict as to civil conspiracy where there was no evidence defendant acted “willfully to injure” the plaintiff); Robertson v. First Union Nat’l Bank, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002) (rejecting civil conspiracy claim where there was no evidence of a concerted effort to harm the plaintiff); First Union Nat’l Bank of South Carolina v. Soden, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998) (holding there was insufficient evidence regarding the defendant’s intent to support a civil conspiracy charge).

Allegro failed to offer any such evidence of an intent or purpose by Corbin to harm Allegro. To the contrary, the evidence at trial established the opposite – that Corbin’s limited involvement with this matter was for the purpose of helping Allegro and doing what he thought was in the best interests of Allegro. (Appx. pp. 222-223, 375, 388-390). Allegro has lost sight of a key fact in this case. The Plaintiff in this action is Allegro, Inc., which is comprised of two shareholders, Ms. McCarthy with fifty-one percent (51%) ownership and Emmett Scully with forty-nine percent (49%) ownership. Ms. McCarthy is not the plaintiff. Allegro relies on testimony from Corbin wherein he stated that he did not talk with Ms. McCarthy about Scully’s interest in buying Allegro as evidence of Corbin’s intent to harm. (Appx. pp. 339-340). This testimony provides no

evidence of any intent by Corbin to harm anyone. Moreover, it only goes to Ms. McCarthy, not Allegro. Additionally, Allegro attempts to convert Corbin's decision to lawfully terminate his company's contract with Allegro as evidence of intent to harm. The evidence, however, shows that Corbin believed that without Scully, Allegro would not be able to provide the level of service he required and that Corbin acted completely within the requirements of the contract by providing the required notice for termination. (Appx. pp. 397-398). The fact that Corbin was the first of many customers to reach that conclusion and take that permissible action does not constitute evidence of an intent to harm Allegro. Rather, it evidences Corbin's desire that his company continue to receive the level of service it received from Scully. Allegro failed to establish this element of civil conspiracy as to Corbin, and Corbin should have been granted directed verdict and civil conspiracy. As this is the only claim asserted against Corbin, this Court should grant the petition for writ of certiorari, review this issue, and grant Corbin directed verdict/JNOV as to this claim, removing him as a party from the new trial of this case.

III. Allegro failed to offer evidence of any contract, whether oral or written, failed to present any evidence as to how the alleged contract was breached, and this issue has been adequately preserved.

With regard to the contract claims asserted against only Scully, Allegro asserts that, because Scully was an employee of Allegro, "[i]t is thus obvious that there was a contract between Scully and Allegro." (Allegro's Return p. 5). However, contrary to this assertion, the existence of an employment relationship does not presuppose the existence of a contract. Additionally, Allegro has never set forth the terms of the alleged contract or how such terms were breached.

Allegro asserts that the Trial Court determined there was an “oral contract” and incorrectly contends that this ruling has not been challenged in this appeal. At trial, Scully’s counsel specifically argued that there was “no contract here” and there was “a complete absence of any evidence in the record before the court that there was any kind of contract.” (Appx. pp. 414, 439). Additionally, Petitioners’/Respondents’ Initial Brief before the Court of Appeals directly addressed this issue – specifically arguing that “there was no evidence of any contract between Allegro and Scully, no evidence of the terms of this alleged contract, and no evidence of a breach of the contract.” (Appx. pp. 939-940) (emphasis in original). “Any” contract obviously includes both oral and written contracts.

Allegro also incorrectly contends that Scully has not challenged the Trial Court’s ruling that his directed verdict motion on this issue was limited to the non-existence of an employee handbook, employment agreement, or a non-compete agreement. The nonexistence of these forms of contracts were merely used as examples of how there was no evidence of any contract. (Appx. pp. 346-347, 414). The fact remains that there was no evidence of any contract, and no evidence of how the nonexistent contract was supposedly breached by Scully. This issue has been repeatedly raised by Scully and has been adequately preserved in this appeal. Absent evidence of the alleged contract, both the breach of contract claim and the claim for breach of contract accompanied by a fraudulent act fail and Scully’s motions for directed verdict and JNOV should have been granted as to both claims. The writ of certiorari should thus be granted, Scully should be granted JNOV as to the contract claims, and the new trial of this case should proceed without either of these claims.

IV. The evidence establishes that there was no misrepresentation by Scully, whether affirmatively or through a failure to speak, sufficient to support the claims for fraud and negligent misrepresentation.

Allegro now claims that the basis of the negligent misrepresentation and fraud claims against Scully is Scully's "silence" regarding the fact that he was planning to leave Allegro and take certain employees and customers with him. See Allegro's Return at pp. 7-8. This argument is without merit. The record in this case clearly establishes that Scully affirmatively told Ms. McCarthy (the other owner of Allegro) of his plans to set up a competing business including taking Allegro's employees and customers with him. Ms. McCarthy specifically testified that, during the course of 2003, on several occasions, Scully expressly told her that, if they could not agree upon terms for her to sell him her interest in Allegro, he would leave, open a competing company, and take Allegro's clients and employees with him. (Appx. pp. 134-135). In addition to affirmatively telling McCarthy of this plan, Scully also informed Allegro's third director, Frank Brown, that if he was unsuccessful in purchasing McCarthy's interest in Allegro, he intended to set up a competing company. (Appx. pp. 216-217). Thus, there is no basis whatsoever for the contention that Scully was "silent" on these points.

Because Allegro failed to establish any false representation by Scully, the claims for fraud and negligent misrepresentation both fail, and Scully should have been granted directed verdict and JNOV on these issues. Therefore, this Court should grant a writ of certiorari to correct this error, allowing the new trial of this matter to proceed without these baseless claims.

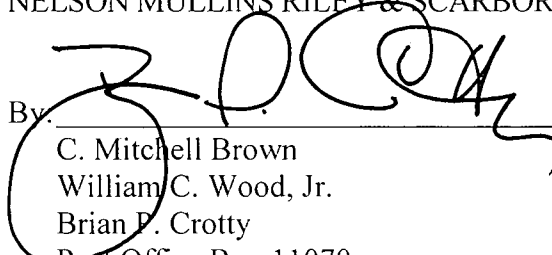
CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, while the Court of Appeals was correct in ordering a new trial based on the erroneous admission of the temporary restraining order, it was error for the Court of Appeals to refrain from addressing the directed verdict/JNOV issues in its Opinion because those issues were unaffected by the Court of Appeals' Opinion. This Court should grant a writ of certiorari to review and address the directed verdict/JNOV issues and grant JNOV as to the civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation claims. This would allow the new trial that was properly ordered by the Court of Appeals to proceed as to only the viable claims and the remaining parties.

Respectfully submitted,

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PROOF OF SERVICE

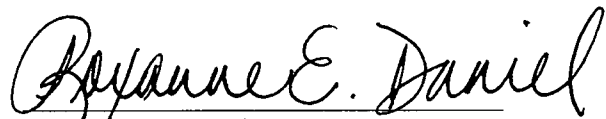
I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **Petitioners'/Respondents' Reply in Support of Petition for a Writ of Certiorari**

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