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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No.: 2022-001332

Common Pleas Case No.: 2017-CP-39-00709

Andrew Pampu.....Appellant/Respondent,

v.

Erin Wingo, David Wingo, and Colin J. Gahagan.....Respondents/Appellants,

BRIEF OF RESPONDENT/APPELLANT COLIN J. GAHAGAN'S
RESPONSE TO APPELLANT/RESPONDENT'S BRIEF

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ISSUE ON APPEAL

DID THE TRIAL COURT PROPERLY GRANT A DIRECTED VERDICT ON THE ACTION FOR CIVIL CONSPIRACY IN LIGHT OF THE ABSENCE OF SUFFICIENT EVIDENCE ESTABLISHING THE ELEMENTS OF CIVIL CONSPIRACY?

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I. **BECAUSE ANDREW PAMPU FAILED TO PRESENT SUFFICIENT EVIDENCE ESTABLISHING ALL THE ELEMENTS OF CIVIL CONSPIRACY, THE TRIAL COURT PROPERLY DIRECTED A VERDICT ON THAT CAUSE OF ACTION FOR C.J. GAHAGAN (ISSUES 1 and 2)**

Andrew Pampu asserts in his appeal that the lower court erred in granting post-trial motions to set aside the verdicts on the action for civil conspiracy. (R. pp. 5 - 7). He asserts that there existed sufficient proof of each of the elements necessary to establish the existence of a civil conspiracy and that the trial judge improperly invaded the province of the jury by reversing its determination.

The essential elements of civil conspiracy are:

- 1) a combination or agreement of two or more persons,
- 2) to commit an unlawful act or a lawful act by unlawful means,
- 3) together with the commission of an overt act in furtherance of the agreement, and
- 4) damages proximately resulting to the plaintiff.

Paradis v. Charleston County School District, 433 SC 562, 861 SE2d 774 (2021). Appellant-Respondent's apparent theory to establish civil conspiracy rests upon testimony and evidence which establishes a relationship between C.J. Gahagan and Erin Wingo, their communications regarding their desire for some action to be taken against Andrew Pampu for his actions, Andrew Pampu subsequently being suspended from Clemson after a Title IX hearing and the

assertion that Andrew Pampu was unable to get into dental school due to the Title IX findings. Please note that evidence regarding testimony during the Title IX hearing or the results of that hearing was also excluded by the trial court.

The testimony at trial clearly established a relationship between C.J. Gahagan and Erin Wingo. (R. p. 1430, lines 13 – 25; R. p. 1630. lines 15 – 17; R. p. 1755. lines 10 - 12). As noted previously, the two had dated before the sexual interaction between Erin Wingo and Andrew Pampu on the evening of October 24, 2015 occurred. *Id.* When C.J. Gahagan learned of the sexual interaction, he undertook an informal investigation which revealed that Andrew Pampu bragged about his sexual conquest (R. p. 1530, lines 5 – 22; R. p. 1612, lines 18 – 21; R. p. 3248; R. p. 1807, lines 8 - 25) and that Erin Wingo was extremely drunk at the time of the incident, to the point she lacked a clear memory of what had occurred. (R. p. 1669, lines 21 – 25; R. p. 1829, lines 9 - 14). The matter was subsequently investigated by the Clemson Office of Community and Ethical Standards. Please note that this agency's investigation was not initiated by either Erin Wingo or C.J. Gahagan. (Tr. p. 235, ll. 12-16). Moreover, during the Title IX hearing that followed, C.J. Gahagan was, at most one of several witnesses who testified. Ultimately, the Clemson Office of Community and Ethical Standards determined that Andrew Pampu had engaged in non-consensual sex with Erin Wingo and directed that he be suspended from Clemson. (R. pp. 3255 to 3257).

The above summary does not establish the existence of a civil conspiracy by Erin Wingo and C.J. Gahagan. There is evidence that they discussed their desire that he be suspended or expelled from school. (R. p. 1796, line 10 to p. 1797, line 1; R. p. 1798, lines 16 - 18). However, this only establishes conversations but no action on their part, the latter being the required element of proof of an overt act. In other words, there must be some act by one of the conspirators in furtherance of the alleged agreement which will advance the mere conversation between the conspirators to action. Moreover, the conversations undertaken must establish an agreed-upon unlawful act which would lead to damages to the plaintiff or an agreement to undertake a lawful act by unlawful means. Neither were proven in this case. The conversations and communications between C.J. Gahagan and Erin Wingo only establish their dislike of Andrew Pampu after he had taken sexual advantage of her and their desire that he be expelled from Clemson because of his actions. These conversations and communications do not establish a strategy to bring about his expulsion or suspension.

The second element of civil conspiracy also requires proof of an agreement to commit an unlawful act or a lawful act by unlawful means to harm a Plaintiff. The expulsion of Andrew Pampu from Clemson was not an unlawful act since Clemson's Anti-Harassment and Non-Discrimination Policy provides for that remedy when certain acts are proven. (See R. p. 3152). Nor are the conversations and communications between C.J. Gahagan and Erin

Wingo sufficient to establish a lawful act (expulsion or suspension) obtained by an unlawful act. According to Appellant-Respondent's theory, he was expelled by the actions of C.J. Gahagan and Erin Wingo testifying against him during the Title IX hearing. The acts of testifying during that hearing by C.J. Gahagan and Erin Wingo were not unlawful acts but simply the acts of witnesses testifying during a hearing.

Appellant-Respondent may assert that the testimony given was untruthful and a lie, relying upon C.J. Gahagan's reaction to his hearing that Erin Wingo had cheated on him and come to a party when he specifically asked her not to. (R. p. 1787, lines 2 – 4; R. p. 1787, line 22 to p. 1789, line 2). However, upon closer examination, the statements made by C.J. Gahagan only indicate that he lied during the hearing, but not about what. In fact, C.J. Gahagan would have had no first-hand knowledge of what occurred on that evening. It would constitute pure speculation to assert that any testimony given by either Erin Wingo or C.J. Gahagan caused the Clemson Office of Community and Ethical Standards to rule as it did, particularly in light of the trial court ruling excluding all evidence of what occurred during the Title IX hearing. However, according to a letter dated February 19, 2016, from the Clemson Community and Ethical Standards hearing board to Andrew Pampu, which was excluded from evidence, it was determined that Erin Wingo was unable to consent to engage in sexual relations based upon the information presented. (R. pp. 3255 to p. 3257). C.J. Gahagan was only one of several

witnesses to testify before that board. He would have only been able to testify as to what he knew which did not include what occurred between Erin Wingo and Andrew Pampu since he was not present. Accordingly, if he lied, C.J. Gahagan would not have lied about whether the sex was consensual or not, which was the essential issue before the board. Without this testimony, there would be no overt act by C.J. Gahagan to cause Andrew Pampu to be suspended or expelled.

Moreover, it should be noted that Andrew Pampu's argument attempts to accomplish indirectly what he could not accomplish directly. Under South Carolina law, intrinsic fraud may not be used as a basis for reversing a decision or judgment. Rycraft v. Tanguay, 279 SC 76, 302 SE2d 327 (1985). Intrinsic fraud includes perjury and forged documents. With intrinsic fraud, unlike extrinsic fraud, which involves acts preventing a party from presenting all of his or her case, the party has the opportunity to protect himself through the presentation of evidence or cross-examination. In this case, Andrew Pampu is relying upon alleged intrinsic fraud by C.J. Gahagan through his testimony at the Title IX hearing. Similar to the situation in which a party seeks to overturn a judgment based upon intrinsic fraud, he argues that a decision should not have been returned against him and he was damaged as a result of that decision. In both instances the party seeks to utilize the alleged intrinsic fraud to argue that the result would otherwise have been different. Using this approach would have the unwanted result of opening all decisions to further

scrutiny to determine whether the questioned testimony would have had the effect of modifying the result or not. For this reason, courts look to the parties to protect their interests through the presentation of testimony and cross-examination. The same is not true with “extrinsic fraud” which serves to prevent such testimony or cross-examination.

Additionally, the asserted intrinsic fraud in this case, that C.J. Gahagan lied during the Title IX hearing, is insufficient to establish that the alleged fraud would have led to a different result. After all, C.J. Gahagan was not present when the sexual activities between Erin Wingo and Andrew Pampu occurred and therefore could not state from personal knowledge what occurred. Any testimony he may have given would be with regard to observations made after the event (for example, Erin Wingo’s state of intoxication) or possibly before the event occurred. The fact that the Clemson board may have relied upon other evidence or testimony in reaching its decision further lessens the likelihood that any alleged perjury would have modified its decision.

Andrew Pampu’s action for civil conspiracy was properly dismissed by judgment notwithstanding the verdict for another reason. In order to recover under the theory of civil conspiracy, there must be proof of damages proximately caused by the alleged conspiracy. Paradis v. Charleston County School District, supra. Andrew Pampu primarily relies upon the testimony of Steven Shedlin, an expert in vocational counseling, who, among other matters, attempted to render an expert opinion of Andrew Pampu’s earning capacity (R.

p. 1949, lines 4 - 11). Mr. Shedlin testified that but for his suspension from Clemson, Andrew Pampu would have been accepted at a dental school and thereafter become an orthodontist. He then attempted to opine on the approximate future lost income he would earn over his work-life expectancy. This testimony was objected to and excluded by the trial judge since Mr. Shedlin did not have an expertise as an economist and could not utilize the methodology that an economist would use in calculation of the future lost income. (R. p. 1949, line 4 to p. 1958, line 17). Andrew Pampu attempts to avoid this ruling by asserting it is a matter for the jury determination and that proof of damages to a mathematical certainty is not required, citing Whisenant v. James Island Corp., 277 S.C. 10, 281 SE2d 794 (1981). However, that same case provides that in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. What constitutes "reasonable certainty and accuracy" often depends upon the type of damage being considered. For example, "noneconomic damages" such as pain and suffering, inconvenience, disfigurement, bodily injury and loss of companionship have no standard by which to measure a loss and are often left to the discretion of a court or jury. See, Section 15-32-210(9), S.C. Code (1976). By comparison, "economic damages" such as medical expenses, education costs, lost earnings, loss of earning capacity, cost of repairs and property losses often have a standard or formula which can be utilized to more clearly determine the extent of a loss.

See, Section 15-32-210(3), S.C. Code (1976). With regard to these “economic damages”, expert witnesses are often utilized to assist the jury in determining the extent of a particular loss. This is true with regard to a claim for future lost income. In the case or Brooks v. United States, 273 F. Supp. 619 (DSC 1967), the court held that the controlling consideration in determining pecuniary loss were prospective earnings and work life expectancy reduced to present value which are to be established through facts and data sufficient to furnish a basis from which a court or jury may approximate the proper amount with reasonable certainty. (Brooks concerned a wrongful death action. However, the calculation for future lost income is essentially the same). In this case, there was no testimony concerning how much the Andrew Pampu might earn as an orthodontist, what his work-life expectancy might be, how to reduce the net amount lost to present value, what the appropriate discount rate might be, among other factors and evidence necessary to approximate the future lost income with reasonable certainty. Instead, without the expert testimony of an economist, the jury would be left to flail about with no method or standard to guide them as to how to properly calculate damages associated with the alleged civil conspiracy. While mathematical certainly is not required, speculation is also not permissible. The reasonable certainty standard is easily met through the testimony of an economist. Because the Andrew Pampu failed to present this type of expert testimony, there was an absence of testimony or evidence which would establish the pecuniary loss with reasonable certainty.

Based upon the above, it is clear that the trial court properly ruled there was an absence of testimony regarding a plan or scheme created by Erin Wingo and C.J. Gahagan to harm Andrew Pampu, there was no evidence of acts by either Erin Wingo or C.J. Gahagan to put any such scheme into action, and there was a lack of evidence or testimony regarding damages incurred by Andrew Pampu as a result of this alleged conspiracy. Notwithstanding this proper reversal of the jury verdict on the civil conspiracy cause of action, Andrew Pampu has argued that the trial court interfered with a jury function after it had previously denied a motion for directed verdict. This argument, like those discussed above, lacks merit. *Rule 50(b)* of the South Carolina Rules of Civil Procedure specifically provides as follows:

Whenever a motion for a directed verdict made at the close of all evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. (Emphasis added).

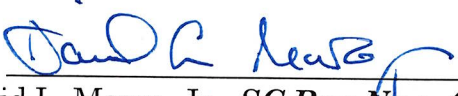
By issuing its post-trial Order overturning the verdicts on the action of civil conspiracy, the trial court was following this rule and based upon its findings and determinations properly ruled that Andrew Pampu failed to establish all of the necessary elements for civil conspiracy.

CONCLUSION

Because Andrew Pampu failed to submit sufficient evidence regarding the existence of a plan or scheme by C.J. Gahagan and Erin Wingo to have Andrew Pampu expelled from Clemson, the commission of overt acts to put that plan or scheme into operation or reasonably certain evidence of damages caused by the alleged civil conspiracy, the trial court was correct in directing a verdict on this cause of action. That ruling should be affirmed.

Respectfully submitted,

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Pursuant to Appellate Rule 210, the undersigned hereby certifies that the Brief of Colin J. Gahagan complies with Rule 210(b).

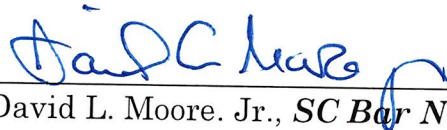
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CERTIFICATE OF MAILING

I do hereby certify that I have served the Respondent/Appellant Colin J. Gahagan's Response to Appellant/Respondent's Brief to all counsel of record on September 14, 2023, by *electronic mail only*, as follows:

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