

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 /Petitioners,
v.	
Emmett J. Scully, Synergetic, Inc., George Corbin, and Yvonne Yarborough	Defendants,
Of Whom Emmett J. Scully, George Corbin, and Yvonne Yarborough are	Petitioners/Respondent.

PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioners Emmett J. Scully (“Scully”), George Corbin (“Corbin”) and Yvonne Yarborough (“Yarborough”) (Scully, Corbin and Yarborough are collectively referred to as “Petitioners”) hereby petition this Court for 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}. Petitioners agree the Court of Appeals correctly held that the Trial Court erred by admitting a temporary injunction order into evidence and that this error required a new trial. However, Petitioners petition this Court for a writ of certiorari so that this Court may review the Court of Appeals’ refusal to address Petitioner’ directed verdict and JNOV arguments, which were not resolved by the grant of a new trial. Resolution of these unresolved issues would then allow the new trial in this matter to proceed only as to the remaining parties and claims.

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a petition for rehearing was made and finally ruled upon by the Court of Appeals on October 29, 2012. {App. p. 1063}.

QUESTIONS PRESENTED FOR REVIEW

- I. Does the Court of Appeals’ Opinion misinterpret and misapply the rule set forth in Futch v. McAllister Towing of Georgetown, Inc., that an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal, where the Court of Appeals’ correct ruling that a new trial was warranted did not dispose of Petitioners’ directed verdict and JNOV arguments?
- II. Did the Trial Court and the Court of Appeals err by failing to grant the Petitioners’ motions for directed verdict and JNOV as to the claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation?

- A. Did the Trial Court and the Court of Appeals err in failing to grant Petitioner Corbin directed verdict and/or JNOV as to the civil conspiracy claim where there was no evidence at trial that Corbin possessed any intent to harm Allegro?
- B. Did the Trial Court and the Court of Appeals err in failing to grant all of the Petitioners directed verdict and/or JNOV as to the civil conspiracy claim where there was no evidence at trial that Allegro suffered “special damages” which went beyond the damages alleged as to the other causes of action?
- C. Did the Trial Court and the Court of Appeals err in failing to grant Petitioner Scully directed verdict and/or JNOV as to the claims for breach of contract and breach of contract accompanied by a fraudulent act where there was no evidence at trial establishing the existence of a contract between Scully and Allegro or how any such contract was breached by Scully?
- D. Did the Trial Court and the Court of Appeals err in failing to grant Petitioner Scully directed verdict and/or JNOV as to the claims for fraud and negligent misrepresentation where there was no evidence at trial of a false representation by Scully?

STATEMENT OF THE CASE

This case stems from a dispute between the two shareholders of Allegro, Inc. which ultimately resulted in the two shareholders parting ways, the formation of a competing company, and litigation. The Respondent, Allegro, Inc. (“Allegro”), is a Professional Employer Organization (“PEO”) that was formed in the late 1990s by its initial owner Mary Etta McCarthy (“McCarthy”) {App. 76; 117-118}. A PEO provides Human Resources services for companies that wish to out-source that function. {App. 118}. The Petitioners are Emmett J. Scully (“Scully”), Yvonne Yarborough (“Yarborough”), and George Corbin (“Corbin”). Scully joined Allegro in August of 1998 when he became its president and a member of its board of directors. {App. 123}. Yarborough was an employee of Allegro from 2000 until 2004. {App. 126, 317-318}.

Corbin is the Chief Financial Officer of Merritt Veterinary Supplies, Inc. (“Merritt”), which was a client of Allegro. {App.145, 336}. In 2004, after leaving Allegro, Scully formed a competing PEO named Synergetic, Inc.

The Complaint in this matter was filed on April 15, 2004, and an Amended Complaint was filed on May 18, 2005. {App. 55, 76}. The Amended Complaint asserted a total of twelve causes of action against the various defendants, with nine causes of action asserted only against Scully, one cause of action asserted only against Yarborough, one cause of action asserted against both Scully and Yarborough, and one cause of action asserted jointly against all of the defendants. {App. 76}.¹

The trial of this matter was held before the Honorable Casey L. Manning from May 1, 2006 through May 5, 2006. At the close of the trial, eleven of the twelve claims in the Amended Complaint were submitted to the jury.² {App. 49}. While the civil conspiracy claim originally included Synergetic as a defendant, the verdict form as to that claim limited it to only Scully, Yarborough and Corbin, and Allegro has acknowledged that “no claims against Synergetic, Inc. were submitted to the jury.” {App. 49, 774}. Thus, prior to the end of the trial, Respondent abandoned any claim against Synergetic.

¹ Specifically, the following claims were asserted against **only Scully**: breach of the duty of loyalty, violation of S.C. Code Ann. § 33-8-420(a), breach of fiduciary duty, breach of contract accompanied by a fraudulent act, breach of contract, fraud, negligence, negligent misrepresentation, and violation of S.C. Code Ann. § 33-8-310. The following claim was asserted against **only Yarborough**: breach of the duty of loyalty. The following claim was asserted against **both Scully and Yarborough**: violation of S.C. Code Ann. § 41-10-10. Finally, the following claim was asserted jointly against **Scully, Yarborough, and Corbin**: civil conspiracy. {App. 76}.

² The claim for violation of S.C. Code Ann. § 41-10-10 was not included on the Verdict Form submitted by Allegro and approved by the Trial Court. {App. 449} and has been abandoned.

On May 5, 2006, the jury returned verdicts in favor of Allegro as to each of the eleven claims submitted to it. {App. 49}. Following the jury's verdict, both sides filed post-trial motions, all of which were denied. {App. 13, 32, 481, 526, 756, 759, 814}. Petitioners filed timely Notices of Appeal on August 12, 2008 and April 9, 2010. {App. 835}. On December 15, 2011 The Court of Appeals heard oral argument and on July 11, 2012 issued Opinion No. 4997 reversing the judgment in this matter and remanding it for a new trial based solely upon the Trial Court's error in admitting a temporary injunction order into evidence. {App. 1004}. Because it reversed the judgment and ordered a new trial, the Court of Appeals refrained from addressing Petitioners' arguments relating to the denial of their motions for directed verdict and JNOV as to several of the claims as well as other arguments supporting the grant of a new trial. Petitioners now file this petition for a writ of certiorari.

SUMMARY OF GROUNDS FOR CERTIORARI

Rule 242 of the South Carolina Appellate Court Rules provides the considerations used in deciding whether a writ of certiorari is appropriate. In this matter, review is appropriate because the decision of the Court of Appeals to decline to consider the directed verdict and JNOV arguments is in conflict with the prior decisions of this Court. See Rule 242(b)(3), SCACR. Here, the Court of Appeals correctly held that it was error for the Trial Court to allow a temporary injunction order to be admitted into evidence, and that this error requires that a new trial be held. Additionally, the Court of Appeals also correctly refrained from addressing the other grounds asserted by Petitioners as

requiring *a new trial*.³ See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling that an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). However, in declining to address Petitioner’s directed verdict and JNOV arguments, the Court of Appeals’ Opinion misapprehended and misapplied the rule set forth in Futch regarding restraint on the appellate review of additional issues where the determination of a prior issue is sufficient to *completely* resolve the appeal or a portion thereof. Specifically, while the Court of Appeals correctly held that a new trial was required due to the erroneous admission of the temporary injunction order, this ruling was dispositive *as to only the new trial issues* raised in Petitioners’ appeal, and the Court of Appeals’ Opinion should have addressed the directed verdict and JNOV issues raised by Petitioners. Those issues were unaffected by the decision to remand for a new trial and the resolution of the directed verdict and JNOV issues would serve the interests of judicial economy by limiting the new trial to only the surviving claims and parties. Thus, this Court should grant a writ of certiorari, reverse the Trial Court’s denial of directed verdict and JNOV on the disputed claims, and direct that the new trial of this matter proceed as to only the remaining claims and parties.

³ In the event that this Court should grant any petition for a writ of certiorari submitted by Respondent with regard to the grant of a new trial, Petitioners assert, as additional sustaining grounds, their other arguments supporting the grant of a new trial. Specifically, a new trial was also warranted based upon: (a) The Trial Court erroneously “reforming” the jury’s verdict failing to require an election of remedies; (b) the Trial Court erring in qualifying Daniel McHenry as an expert witness; (c) the Trial Court erroneously admitting Mr. McHenry’s report into evidence; and (d) the Trial Court erroneously excluding relevant damages evidence.

ARGUMENT

I. **The Court of Appeals' Opinion misapprehended and misapplied the rule that an appellate court should refrain from addressing additional issues where its determination of a prior issue is dispositive of the appeal because Petitioners' directed verdict/JNOV issues were not disposed of through the grant of a new trial.**

After correctly holding that the erroneous admission of the temporary injunction order required a new trial, the Court of Appeals' Opinion refrained from addressing either Petitioners' other new trial arguments or Petitioners' directed verdict and JNOV arguments. In refraining from addressing these issues, the Court of Appeals cited Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) for the rule that appellate courts need not address remaining issues when its determination of a prior issue is dispositive of the appeal. (Op. No. 4997 at p. 14) {App. 1017}. This restraint was proper as to Petitioners' other *new trial* arguments because a new trial had already been ordered. However, the granting of a new trial was not dispositive of Petitioners' directed verdict and JNOV arguments. Rather, the directed verdict and JNOV argument were ripe for resolution as rulings on these issues would serve only to facilitate a new trial by limiting the new trial to only those claims which properly survived directed verdict or JNOV at the first trial.

Unlike other cases where South Carolina's Appellate Courts have refrained from ruling on additional grounds where the determination of a prior issue effectively resolved the appeal, in this case there are two separate categories of issues: (1) new trial issues; and (2) directed verdict/JNOV issues. The resolution of the former category does not also resolve the latter. For example, in Futch, a new trial was not at issue. Rather, the Supreme Court reversed the Court of Appeals' ruling on a directed verdict issue as well

as a rule adopted by the Court of Appeals regarding forfeiture of compensation in breach of duty of loyalty cases. Futch, 335 S.C. at 613, 518 S.E.2d at 598. Other recent applications of the Futch rule are also limited to situations where the appellate court's ruling is dispositive of *the entire appeal*. See Platt v. CSX Transportation, Inc., 388 S.C. 441, 697 S.E.2d 575 (2010) (affirming the Court of Appeals' ruling that petitioner's claim was barred under the public duty rule, and then vacating the remainder of the Court of Appeals opinion addressing whether petitioner's claims were preempted and whether petitioner established proximate cause); Widdiecombe v. Tucker-Cales, 375 S.C. 427, 653 S.E.2d 276 (2007) (vacating the Court of Appeals' ruling that the doctrine of unclean hands provided an additional basis for the family court's exercise of jurisdiction, but affirming the remainder of the opinion which found that jurisdiction was otherwise proper); Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 596 S.E.2d 42 (2004) (determining that the violation of the applicable standard of care was not established at trial and vacating the Court of Appeals opinion as to the additional issues of duty and proximate cause).

It is entirely appropriate for an appellate court to resolve directed verdict/JNOV issues simultaneously with a decision to remand for a new trial based on evidentiary errors. The case of Whaley v. CSX Transportation, Inc., 362 S.C. 456, 609 S.E.2d 286 (2005) illustrates the propriety of such review. In Whaley, the plaintiff sued the railroad and asserted claims for violating the Federal Employer's Liability Act (FELA) and the Locomotive Inspection Act (LIA). Id. at 467, 609 S.E.2d at 291. This Court ordered a new trial be held based on errors in the admission of similar accidents, transactions, or happenings evidence. Id. at 482-83, 609 S.E.2d at 300. Despite the fact that a new trial

was ordered based on this evidentiary error, the Court also held that the railroad should have been granted JNOV on the LIA claim due to the fact that the plaintiff failed to present sufficient evidence as to that claim at the original trial. Id. at 480-81, 609 S.E.2d at 398-99. Thus, the re-trial of the Whaley case was limited to only the FELA claim. Id. at 484, 609 S.E.2d at 301; see also Wachovia Bank, N.A. v. Beane, 397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012) (granting a new trial based upon an excessive verdict while also holding that JNOV should have been granted to Wachovia to limit the defendant's setoff counterclaim, thus limiting the nature of the new trial). This is precisely the situation in this case. As in Whaley, despite the clear need for a new trial based on the evidentiary error, this Court should address the directed verdict/JNOV issues, and in doing so limit the new trial to only the viable claims.

While it was unnecessary for the Court of Appeals' Opinion to address Petitioners' numerous other grounds for a new trial once it had decided that the admission of the temporary restraining order warranted a new trial, the Court of Appeals' ruling *was not dispositive* as to the directed verdict/JNOV issues. Rather than being an unnecessary exercise of judicial power, resolution of the directed verdict/JNOV issues would actually 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. Therefore, this Court should grant a writ of certiorari in order to review and address the directed verdict/JNOV issues.

II. The Court of Appeals' Opinion should have granted Petitioners directed verdict and/or JNOV as to the claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation.

In reviewing the denial of a motion for directed verdict of JNOV, an appellate court applies the same standard as the trial court. Gadson v. ECO Servs. of S.C., Inc., 374 S.C. 171, 175, 648 S.E.2d 585, 588 (2007). While an appellate court is required to view the evidence and inferences reasonably drawn therefore in a light most favorable to the non-moving party, the trial court should be reversed when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Id. at 176, 648 S.E.2d at 588.

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

At the close of Respondent's case, and again at the end of the trial, Petitioners moved the Trial Court for directed verdict as to the claim for civil conspiracy. {App. 346-347, 406-416}. The specific grounds for these motions were that, as to Petitioner Corbin, there was no evidence that he acted with the purpose of harming Allegro, and as to *all* Petitioners, there was no evidence that Respondent suffered special damages. {App. 346-347, 406-416}. To establish a claim for civil conspiracy, Respondent was required to prove: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes special damages. LaMotte v. Punchline of Columbia, Inc., 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988). Even when the evidence is viewed in a light most favorable to Respondent, there was no evidence establishing the second element as to Corbin, and no evidence establishing the third element of special damages as to *any* of the Petitioners.

1. Corbin was entitled to directed verdict and JNOV on the civil conspiracy claim because there was no evidence whatsoever that he possessed any intent to harm Allegro.

Corbin's motions for directed verdict and JNOV as to civil conspiracy (the only claim asserted against him) should have been granted based on the lack of any evidence that he acted with any intent to harm Allegro. The second element of civil conspiracy requires proof that the defendant acted "for the purpose of injuring the plaintiff." LaMotte, at 69, 370 S.E.2d at 713. While considering Petitioners' motion for directed verdict on this point, the Trial Court incorrectly interpreted the second element of this claim. {App. 411-414}. Specifically, the Trial Court stated that "intent to harm has nothing to do with conspiracy," but rather that "what actually happened as a result" was the "true measure of whether or not there was a conspiracy." {App. 412}. The Trial Court reiterated this incorrect view saying: "it is not what you intend, it is what actually results." {App. 414}. This was error. The second element of civil conspiracy does not focus on the result. Rather, it requires that the combination be for the purpose of injuring the plaintiff. Pye v. Estate of Fox, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511-12 (2006) (holding that the "essential consideration" in a civil conspiracy claim is whether the primary purpose or object of the combination is to injure the plaintiff, and upholding summary judgment as to civil conspiracy because there was no evidence of any "wrongful intent" on the part of the defendants); 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).

Corbin was entitled to a directed verdict and JNOV because there was no evidence that he acted with any intent to harm Allegro. The evidence at trial showed that Corbin provided advice to his friend Scully regarding his options of buying out McCarthy's interest in Allegro, selling out his interest to McCarthy, or leaving Allegro to start his own business. {App. 388}. Corbin also wrote Scully a letter outlining three methods for valuing Allegro, reviewed a valuation of Allegro, and reviewed Scully's offer letter to McCarthy to determine if it was a "fair" offer. {App. 222-223, 375, 390, 590}. All of this was done, not with any intent to harm Allegro, but, to the contrary, because Corbin wanted to help Allegro. {App. 389}. As Corbin explained in his March 27, 2003 letter to Scully:

The overall issue here is that something needs to happen. The ongoing tension between you and [McCarthy] is obvious. That has to be tiring for both of you. It is also probably obvious to employees. *Either way, it is not healthy for [Allegro]. [Allegro] has a better chance of success without that tension.* If one of you has to sell out to relieve it, then that is what needs to happen.

{App. 590}(emphasis added). Corbin's concern was what was best for Allegro. There was no evidence at trial refuting this. Therefore, because there was no evidence of any intent by Corbin to harm Allegro, the Trial Court erred by failing to grant him a directed verdict or JNOV as to civil conspiracy.

In its appellate brief, Respondent attempted to redefine the elements of civil conspiracy to remove the key element of individual intent. Specifically, while Respondent accurately asserts there has been no appeal on this ground as to Petitioners Scully and Yarborough, Respondent incorrectly contends that "it is the law of the case" that Corbin acted in concert with Scully and Yarborough and that individual intent is unnecessary to be liable for civil conspiracy. (Respondent's Final Brief at p. 5){App.

955}. Essentially, Respondent 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 with respect to a conspiracy claim.

“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, Respondent must still establish that Corbin assented to the purpose or intent of harming Allegro in order for Corbin to be liable for civil conspiracy. 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); 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).

Respondent has also 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. Respondent 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. {App. 339-340}. This testimony provides no evidence of any intent by Corbin to harm anyone. Moreover, it only goes to Ms. McCarthy, not Allegro.

Respondent has also asserted that the jury was free to reject Corbin's testimony that he did not intend to harm Allegro. Again, this is incorrect. While a jury is not required to accept uncontradicted witness testimony, one may not avoid a dispositive motion by asserting that a jury may disbelieve uncontradicted evidence. Hoard v. Roper Hospital, Inc., 587 S.C. 539, 549, 694 S.E.2d 1, 6 (2010). It was still Respondent's burden to affirmatively prove that Corbin's purpose was to injure Allegro. Mere speculation about a party's motives does not amount to proof of a conspiracy. First Union Nat'l Bank of South Carolina v. Soden, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998). Thus, because Respondent failed to establish this key element of civil conspiracy as to Corbin, his motions for directed verdict and JNOV should have been granted. Therefore, the grant of certiorari is warranted and this Court should grant

Corbin JNOV as to the civil conspiracy claim. As this is the only claim asserted against Corbin, the new trial properly ordered by the Court of Appeals on the remaining claims would no longer need to involve him.

2. All of the Petitioners are entitled to directed verdict/JNOV on the civil conspiracy claim because there was no evidence of the required special damages.

The third element of a civil conspiracy claim requires that the defendant establish that it has suffered “special damages.” “Special” damages are damages which “go *beyond* the damages alleged in other causes of action.” Pye, 369 S.C. at 568, 633 S.E.2d at 511 (emphasis added). Respondent failed to offer any evidence of “special” damages. To the contrary, Respondent’s damages evidence was exactly the same for all eleven causes of action – the alleged losses to Allegro from the loss of its current and prospective clients. {App. 272-276}. There was no distinction in the damages evidence establishing any form of damages specific only to the civil conspiracy claim which went beyond the damages claimed for the other claims.⁴ Absent such evidence of “special” damages specifically related to the civil conspiracy claim, the Trial Court should have granted all of the Petitioners directed verdict or JNOV as to this claim. Vaught v. Waites, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (holding that civil conspiracy claim was barred where the damages sought under that claim were the same as those sought in a breach of contract claim). Thus, 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.

⁴ Additionally, the damages awarded by the jury were exactly the same for each cause of action. {App. 49}.

B. Petitioner Scully is entitled to directed verdict/JNOV on the contract claims because Respondent failed to establish the existence of any contract or how such contract was breached.

Respondent's claims for breach of contract and breach of contract accompanied by a fraudulent act were asserted only against Petitioner Scully. In order to establish a claim for breach of contract, the plaintiff must prove: (1) a binding contract entered into by the parties; (2) breach or unjustified failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962). Additionally, the existence of a contract, and of a breach thereof, are essential elements of a claim for breach of contract accompanied by a fraudulent act. Harper v. Ethridge, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (1986). Here, there was no evidence of any contract between Allegro and Scully. Thus, there was also no evidence establishing the terms of this alleged contract, and no evidence of a breach of the contract. Therefore, the Trial Court erred by failing to grant Petitioner Scully directed verdict and JNOV as to these claims. {App. 346-347, 411-416}.

The evidence at trial established that there was no employment contract between Allegro and Scully and that Allegro did not have an employee handbook that applied to Allegro employees. {App. 174, 366-367}. Additionally, the testimony at trial established that there was not a non-compete agreement between Allegro and Scully. {App. 174, 366-367}. The only "contract" ever mentioned at the trial involving Scully was a Partnership/Buy-Sell Agreement relating to Scully's ownership interest in Allegro. {App.

121, 366-367} Allegro, however, was not a party to this partnership agreement – it was between only McCarthy and Scully. {App. 366}.⁵

Respondent has asserted 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.” {App. 414, 439}. Additionally, Petitioners’ Brief 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.” See Appellants’ Final Brief at p. 46 {App. 939}(emphasis in original). “Any” contract obviously includes both oral and written contracts.

Respondent 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. {App. 346-347, 414; 814}. 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.

Therefore, Respondent failed to establish the existence of a contract, and, through this failure, also failed to establish any breach of a contract. These failures were fatal for both of the contract claims. Thus, Petitioner Scully’s motions for directed verdict and

⁵ Additionally, there was no evidence at trial that Scully breached the Partnership/Buy-Sell Agreement.

JNOV should have been granted as to both the breach of contract claim and the claim for breach of contract accompanied by a fraudulent act. The writ of certiorari should thus be granted, Petitioner Scully should be granted JNOV as to the contract claims, and the new trial of this case should proceed without either of these claims.

C. Petitioner Scully is entitled to directed verdict/JNOV on the fraud and negligent misrepresentation claims because there was no evidence of any false representation by Scully.

Respondent's claims for fraud and negligent misrepresentation were also asserted only against Petitioner Scully. The first and second elements of fraud are: (1) a representation; and (2) its falsity. Kahn Construction Co. v. S.C. Nat. Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980). The first element of negligent misrepresentation is: (1) a false representation made by the defendant to the plaintiff. Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997). Respondent failed to offer evidence of any false representation made by Scully. Therefore, the Trial Court erred by failing to grant Scully directed verdict and JNOV as to these claims. {App. 346-342, 411-416}.

McCarthy 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. {App. 134-135}. Simply put, according to McCarthy's own testimony, Scully never lied to her. To the contrary, he explicitly told her what he would do if she didn't sell. The uncontested testimony at trial also established that Scully was completely straightforward about his plans when talking with Allegro's third director, Frank Brown. {App. 216-217}. Specifically, in 2003, while Scully was attempting to purchase McCarthy's interest in Allegro, he informed Brown that if he was unsuccessful,

he intended to set up a competing PEO. {App. 216-217}. Therefore, Respondent failed to offer any evidence as to the key element of a false representation made by Scully.

Respondent contends that the basis of the negligent misrepresentation and fraud claims against Petitioner Scully is Scully's "silence" regarding the fact that he was planning to leave Allegro and take certain employees and customers with him. See Respondent's Final Brief at pp. 8-9 {App. 958-959}. This argument is wholly without merit. As illustrated above, the record in this case clearly establishes that Scully affirmatively told McCarthy of his plans to set up a competing business including taking Allegro's employees and customers with him. 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. {App. 134-135}. Thus, there is no basis whatsoever for the contention that Scully was "silent" on these points.

Because Respondent 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

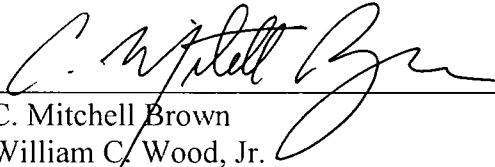
For the foregoing reasons, while the Court of Appeals was correct in ordering a new trial based on the erroneous admission of the temporary restraining order, and

correct in refraining from addressing the other *new trial* grounds asserted by Petitioners, 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.

SIGNATURE PAGE ATTACHED

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
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Attorneys for Petitioners Emmett J. Scully, George
Corbin, and Yvonne Yarborough

Columbia, South Carolina

December 27th, 2012

____ THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Opinion Number 4997
Heard December 15, 2011 - Filed July 11, 2012
Case No. 2004-CP-40-1915

Allegro, Inc., Respondent/~~Petitioners~~,
v.
Emmett J. Scully, Synergetic, Inc., George Corbin, and
Yvonne Yarborough, Defendants,
Of whom Emmett J. Scully, Synergetic, Inc., George
Corbin, and Yvonne Yarborough are Petitioners/Respondent

PROOF OF SERVICE

I, the undersigned Paralegal, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioners Emmett J. Scully, George C. Corbin, and Yvonne Yarborough, 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: Petition for Writ of Certiorari

Counsel Served:

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Meredith S. Keane
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December 27, 2012

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December 27, 2012

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: Allegro, Inc. v. Emmett J. Scully, Synergetic, Inc., George Corbin, and Yvonne
Yarborough
Civil Action No. 04-CP-40-1915 2012-213386
~~SC Court of Appeals Tracking No. 200899926~~
Our File No. 28221/01500

RECEIVED

DEC 27 2012

Dear Mr. Shearouse:

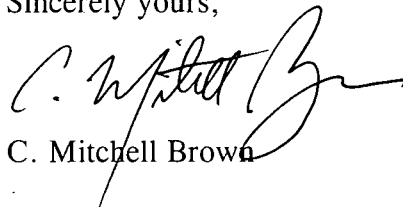
S.C. Supreme Court

Enclosed please find the original and seven copies of the Petitioners Emmett J. Scully, George Corbin and Yvonne Yarborough's Petition for Writ of Certiorari and three (3) copies of the Appendix in the above-referenced matter. We would ask that you file the original of the Petition and two copies of the Appendix and return clocked-in copies of each to us via our courier. Also enclosed is our filing fee check for \$100.00 as required.

By copy of this letter to South Carolina Court of Appeals and counsel of record, we are providing them with a copy of this Petition for Writ of Certiorari.

With kind regards, I remain

Sincerely yours,



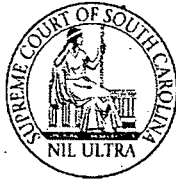
C. Mitchell Brown

CMB:mws
Enclosures

cc: Honorable Jenny Kitchings, Clerk SC Court of Appeals

The Honorable Daniel E. Shearouse
December 27, 2012
Page 2

Robert L. Widener, Esquire
Richard J. Morgan, Esquire
Amy L. Gaffney, Esquire



The Supreme Court of South Carolina

Nelson, Mullins, Riley & Scarborough

01/02/2013

RECEIPT #66756

Case No: 2012-213386
Case Short Title: Allegro, Inc. v. Emmett Scully
Event:
Fee Type: Case Initiation Fee
Amount: \$100.00
Payment Type: Check
Reference No: 715929
Check/Money Order Date: 12/27/2012
Comments: