

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED

JUL 15 2014

SC Court of Appeals

M2872

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2004-CP-40-1915

Allegro, Inc., ..... Respondent,

v.

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

**APPELLANTS' PETITION FOR REHEARING**

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellants Emmett J. Scully ("Scully"), Yvonne Yarborough ("Yarborough"), and George Corbin ("Corbin") (collectively "Appellants") hereby file this petition for rehearing. Appellants agree that in Opinion No. 5245, filed June 30, 2014, this Court correctly reversed the Trial Court's denial of Appellant Scully's motions for directed verdict and JNOV as to the fraud and negligent misrepresentation claims.<sup>1</sup> However, in Opinion 5245, a Panel of this Court also affirmed the Trial Court's denial of Appellants' directed verdict and

<sup>1</sup> Appellants also note that in Opinion No. 4997, filed July 11, 2012, this Court previously ordered that a new trial be held in this matter based on the Trial Court's error in allowing a temporary injunction order to be introduced into evidence. Respondent's petition for rehearing to this Court on that issue was denied, and its petition to the Supreme Court for a writ of certiorari as to that ruling was ultimately denied on May 28, 2014 in Opinion No. 27391. This Court's Opinion 5245 repeats, without substantive changes, the portions of Opinion No. 4997 that related to the grant of a new trial. The grant of a new trial became final upon the denial of Respondents' petition for certiorari.

JNOV motions as to the claims for civil conspiracy, breach of contract, and breach of contract accompanied by a fraudulent act. Appellants respectfully submit that rehearing and/or issuance of a new opinion reversing the Trial Court's decision as to the claims for civil conspiracy, breach of contract and breach of contract accompanied by a fraudulent act is warranted. The grounds for this petition are that the Panel's opinion in this matter overlooked or misapprehended several matters of fact and law as to those claims.

### **INTRODUCTION**

In Opinion No. 5245, filed June 30, 2014, a Panel of this Court affirmed the Trial Court's denial of directed verdict and JNOV as to all of the Appellants on the civil conspiracy claim, and as to Appellant Scully on the breach of contract and breach of contract accompanied by a fraudulent act claims ("the contract based claims"). As to these rulings, the Panel overlooked or misapprehended several matters of law and fact in rendering this opinion.

First, as to the civil conspiracy claim, Appellant Corbin asserted that he was entitled to directed verdict and/or JNOV because Respondent failed to establish that he had the requisite intent to harm Respondent. The Panel held that sufficient evidence existed to allow the jury to consider whether Corbin possessed the required intent to harm. {Opinion No. 5245 at p. 14}. In affirming the Trial Court on this issue, the Panel misapprehended the facts surrounding Corbin's limited involvement in this matter and misapplied the law regarding uncontradicted evidence.

Second, also as to the civil conspiracy claim, all of the Appellants asserted that they were entitled to directed verdict and/or JNOV because Respondent failed to establish the existence of any special damages. The Panel held that this argument was not

preserved for review because, while it was raised in the directed verdict motion made at the close of Respondent's case, it was not specifically reasserted during the directed verdict motion at the close of all evidence. {Opinion No. 5245 at pp. 13-14}. In holding that this issue was not preserved, the Panel overlooked or misapprehended the factual circumstances surrounding the second directed verdict motion and existing authority from South Carolina and other jurisdictions supporting consideration of this issue where the Trial Court's actions specifically limited Appellants' counsel's ability to assert all grounds at the second directed verdict motion.

Lastly, on the contract based claims, Appellant Scully asserted that he was entitled to directed verdict and/or JNOV because Respondent failed to establish the existence of a contract, which was illustrated by Respondents' failure to show what the terms of the alleged contract were. The Panel's opinion separated this into two arguments: (1) the existence of a contract; and (2) whether the terms of the contract had been established. {Opinion No. 5245 at p. 15-16}. The Panel then held that the issue of whether a contract existed was preserved for appeal, but that there was evidence in the record that allowed the jury to weigh whether an oral employment contract was created. {Id. at 16}. The Panel further held that the issue of the terms of the contract was not preserved. In separating the establishment of the terms from the existence of the contract, the Panel misapprehended the nature of this argument and the applicable law. Additionally, in holding that evidence existed that could allow a jury to find that a contract existed, the Panel overlooked or misapprehended the facts established at trial. Therefore, this Court should grant rehearing and/or issue a new opinion which addresses and resolves these additional issues in favor of the Petitioners.

## STATEMENT OF THE CASE AND THE FACTS

Petitioners believe the Court's Opinion correctly and clearly sets out the facts in this matter.

### ARGUMENT

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 this 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.

**I. Appellants 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, Appellants moved the Trial Court for directed verdict as to the claim for civil conspiracy. (R. 341-342, 401-411). The specific grounds for these motions were that, as to Appellant Corbin, there was no evidence that he acted with the purpose of harming Allegro, and as to *all* Appellants, there was no evidence that Respondent suffered special damages. (R. 341-342, 401-411). 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 Appellants.

**A. Appellant Corbin was entitled to directed verdict and JNOV on the civil conspiracy claim because there was no evidence 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. While considering Appellants' motion for directed verdict on this point, the Trial Court incorrectly interpreted the second element of this claim. (R. 406-409). 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." (R. 407). 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) .

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. (R. 383). Corbin also wrote Scully a letter outlining three methods for valuing Allegro and reviewed the Geneva valuation as well as Scully's offer letter to determine if it was a "fair" offer. (R. 217-218, 370, 385; 578). All of this was done, not with any intent to harm Allegro, but, to the contrary, because Corbin wanted to help Allegro. (R. 384). 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 Mary Etta 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.

(R. 578) (emphasis added). Corbin's concern was what was best for Allegro. There was no evidence at trial refuting this.

In its Opinion, the Panel concluded that sufficient evidence existed to allow a jury to determine that Corbin intended to harm Allegro. {Opinion 5245 at p. 14}. However, the evidence cited by the Panel, even when viewed in a light most favorable to Allegro, does not support this conclusion. First, the Panel noted that Corbin admitted he had a general knowledge about Allegro's clients based on accounting work he did for the company in the past. {Id.}. This fact, however, has no bearing on the issue of intent to harm. The Panel next noted that, in advising Scully, Corbin did not inform McCarthy of the conversations, and included in his advice "the option of setting up a competitive company." {Id.}. In focusing on Corbin's failure to inform McCarthy, the Panel overlooked the fact that the plaintiff in this case 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, and any failure by Corbin to inform McCarthy of friendly advice he provided to Scully has no bearing on whether Corbin intended to harm Allegro in providing that advice. In focusing on the fact that one of the options Corbin identified as existing was for Scully to set up his own business, the Panel overlooked that fact that this option was only one of several and was merely an option, not a recommendation. The record clearly establishes that Corbin identified three possible options: (1) Scully could sell his interest in Allegro to McCarthy; (2) McCarthy could sell her interest to Scully; or (3) Scully could leave Allegro and start his own business. (R. 383). The suggestions of any of these possible options does not constitute evidence of an intent to harm Allegro. To the contrary, they

show nothing but Corbin's concern for Allegro's future, whether it be under Scully or McCarthy. The inclusion of an option that Scully start his own business does not amount to evidence of intent to harm Allegro. Rather, it was merely one of several options, and Corbin did not recommend it over the others.

The Panel concluded that "the credibility of statements evidencing Corbin only had the intent to help and not injure Allegro are for the jury to decide." {Opinion 5245 at p. 14}. In reaching this conclusion, the Panel misapprehended the law in South Carolina regarding uncontradicted testimony and dispositive motions. A party 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. This Court should grant rehearing or issue a new opinion to correct this error. As this is the only claim asserted against Appellant Corbin, the new trial on the remaining claims would no longer need to involve him.

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

The Panel held that Appellants' argument that the civil conspiracy claim failed due to a lack of any evidence of special damages was not preserved because, while it was raised at the first directed verdict motion, it was not specifically reasserted at the directed

verdict motion at the close of all evidence. {Opinion No. 5245 at pp. 13-14}. This conclusion overlooks the facts surrounding the second directed verdict motion which fall within an exception to the general rule that directed verdict arguments must be reasserted at the close of evidence to be preserved.

The trial transcript reveals that at the second directed verdict motion, after initially arguing that the civil conspiracy fails as to Appellant Corbin due to a lack of any evidence of any intent on his part to harm Respondent, the Trial Court specifically **ordered** Appellants' 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.**

(R. 409) (emphasis added). The Trial Court specifically directed Appellants' counsel not to continue with any further 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), SCRCPP; 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. As with Mains, the facts of this case warrant this court giving consideration to the special damages argument.

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 considered, Appellants' counsel was not permitted the opportunity to complete her arguments as to civil conspiracy or to renew the prior arguments made as to that claim. 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 Appellants' counsel to cease argument on that civil conspiracy cause of action, this Court should consider the merits of the "special damages" argument and grant JNOV as to all Appellants as to the civil conspiracy cause of action.

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. (R. 267-271). 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.<sup>2</sup> Absent such evidence of "special" damages specifically related to the civil conspiracy claim, the Trial Court should have granted all of the Appellants 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

---

<sup>2</sup> Additionally, the damages awarded by the jury were exactly the same for each cause of action. (R. 44).

breach of contract claim). Thus, this Court should grant rehearing or issue a new opinion correcting this error so that the new trial may proceed without the civil conspiracy claim.

**II. Appellant Scully is entitled to directed verdict/JNOV on the contract claims because Respondent failed to establish the existence and terms of any contract.**

Appellant Scully asserts that both of the contract claims against him fail because Respondent failed to establish the existence and terms of any such contract. The Panel held that the issue of the existence of a contract was preserved but that the issue of the terms of that contract was not preserved. {Opinion No. 5245 at pp. 15016}. Additionally, the Panel concluded that there could have been an “oral contract, or a contract created by conduct.” {Id. at 16}. Both of these ruling were in error.

On the issue of preservation, the Panel misconstrued the law regarding the requirements for establishing the existence of a contract. Specifically, the Panel’s Opinion notes that Scully’s motions for directed verdict specifically argued that there was no oral or written contract between Allegro and Scully. {Id. at 15}. The Panel’s Opinion then treats Scully’s JNOV argument regarding the nonexistence of any evidence as to the supposed terms of the alleged contract as a wholly separate argument which the Panel concluded had not been preserved. However, the requirement that the terms of a contract be established is a necessary part of establishing the existence of the contract, and was therefore preserved by Scully’s directed verdict motions.

In order to establish the existence of a contract, it was necessary for Respondent to establish the terms of that contract and that the parties agreed upon those terms. “South Carolina common law requires that in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all*

essential and material terms of the agreement.” Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original); Corontzes v. Trapalis, 259 S.C. 244, 249, 191 S.E.2d 523, 525 (1972) (holding that “[t]he burden of establishing the existence of the alleged contract and its terms rested upon the respondent.”); Dukes v. Smoak, 181 S.C. 182, 184, 186 S.E. 780, 781 (1936) (holding that the burden was upon plaintiff to prove the existence and terms of the contract she alleged, and its breach.”). Where the alleged contract is an *oral* contract, as is the case here, the necessity of establishing the terms and the parties’ agreement to those terms is even more essential to the claim Landbank Fund VII, LLC v. Dickerson, 2006 S.C. App. Lexis 154 \*11-12 (Ct. App. 2006) (holding “[i]n order to establish the existence of an oral [contract] Dickerson must prove by a preponderance of the evidence that there was a meeting of the minds as to all of the essential and material terms of the alleged agreement”).

Appellant Scully did not separately argue: (1) no contract existed; and (2) the terms of the alleged contract were not established. ***Rather, he argued that no contract existed and the lack of any contract is evidenced by the fact that its alleged terms have never been established, or even attempted to be established.***

The Panel’s Opinion concludes that there was sufficient evidence to “suggest an oral contract, or a contract created by conduct.” {Opinion No. 5245 at p. 16}. The Panel’s Opinion, however, makes no attempt to outline what the specific terms of the suggested contract were or to establish that the parties had a “meeting of the minds” as to those terms. This is because the record is devoid of any evidence of such terms or Scully’s agreement thereto.

The Panel's Opinion also appears to rely on the Partnership/Buy-Sell Agreement (R. 116, 361-362) between Scully and McCarthy as a basis for the contract claims. {Id.}. This reliance is misplaced because Allegro was not a party to this partnership agreement – it was between only McCarthy and Scully.<sup>3</sup> Additionally, the partnership agreement provides no information as to the supposed terms of the alleged oral contract between Allegro and Scully.

Therefore, Respondent failed to establish the existence and terms of the contract, and this failure is fatal to the both of the contract claims. Thus, Appellant Scully's motions for directed verdict and 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. This Court should grant rehearing or issue a new opinion correcting this error, and the new trial of this case should proceed without either of these claims.

### CONCLUSION

For the foregoing reasons, while this Court was correct in ordering that the new trial based previously ordered as to this matter should proceed without the fraud and negligent misrepresentation claims, this Court should grant a rehearing in this case and/or issue a new opinion holding that the civil conspiracy claim fails as to Appellant Corbin because of a lack of any evidence he intended to harm Allegro, holding that the civil conspiracy claim fails as to all Appellants due to the lack of any evidence of special damages, and holding that the contract claims asserted against Appellant Scully fail because there is no evidence establishing the existence and material terms of any contract between Allegro and Scully.

---

<sup>3</sup> Additionally, there was no evidence at trial that Scully breached the Partnership/Buy-Sell Agreement.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown  
William C. Wood, Jr.  
Brian P. Crotty  
Post Office Box 11070  
Columbia, SC 29211  
(803) 799-2000

Amy L. Gaffney  
GAFFNEY LEWIS & EDWARDS, LLC  
3710 Landmark Dr., Ste. 304  
Columbia, SC 29204  
(803) 790-8838

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

Columbia, South Carolina

July 15, 2014

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

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.

---

PROOF OF SERVICE

---

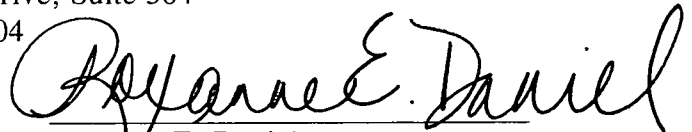
I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail,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

Pleadings:           **Appellants' Petition for Rehearing**

Counsel Served:

Robert L. Widener, Esquire  
Richard J. Morgan, Esquire  
McNair Law Firm, PA  
Post Office Box 11390  
Columbia, SC 29211

Amy L. Gaffney, Esquire  
Gaffney Lewis & Edwards LLC  
3710 Landmark Drive, Suite 304  
Columbia SC 29204



Roxanne E. Daniel  
Administrative Assistant

July 15, 2014

# Nelson Mullins

Nelson Mullins Riley & Scarborough LLP  
Attorneys and Counselors at Law  
1320 Main Street / 17th Floor / Columbia, SC 29201  
Tel: 803.799.2000 Fax: 803.255.9040  
[www.nelsonmullins.com](http://www.nelsonmullins.com)

Brian P. Crotty  
(Admitted in PA & SC)  
Tel: 803.255.9422  
Fax: 803.255.9040  
[brian.crotty@nelsonmullins.com](mailto:brian.crotty@nelsonmullins.com)

July 15, 2014

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
SC Court of Appeals  
1015 Sumter Street - 5th Floor  
Columbia, SC 29201

RECEIVED  
JUL 15 2014  
SC Court of Appeals

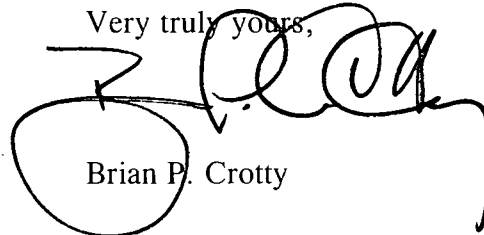
RE: Allegro, Inc. v. Emmett J. Scully, Synergetic, Inc., George Corbin, and  
Yvonne Yarborough  
Civil Action No. 04-CP-40-1915  
SC Court of Appeals Tracking No. 200899926  
Our File No. 28221/01500

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellants' Petition for Rehearing in the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is our Firm check in the amount of \$25.00 as the required filing fee.

By copy of this letter to counsel of record, we are serving them with a copy of this Petition.

Very truly yours,



Brian P. Crotty

BPC:rd

Enclosures

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