

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 04-CP-40-1915
Appellate Case No. 2008-099926
S.C. Ct. App. Opinion No. 5245 (filed June 30, 2014)

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JUL 28 2014
SC Court of Appeals

Allegro, Inc., Respondent,

v.

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

RESPONDENT’S PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Respondent respectfully submits this Petition for Rehearing regarding this Court’s Opinion Number 5245, in which this Court held that Appellant Emmett J. Scully was entitled to a directed verdict on Respondent’s claims for fraud and misrepresentation. This Court held that “the element of a ‘false misrepresentation’ cannot be premised upon an omission or silence of a party,” because the failure to speak when there is a duty to speak (“fraud by silence”) is limited to claims for fraudulent concealment. Respondent respectfully submits this was error for several reasons.

First, this Court has reversed the trial court on a ground never argued to the trial court or this Court. Second, this Court has overlooked controlling Supreme Court precedent to the contrary. Third, there is no logical or jurisprudential basis for limiting evidence of “fraud by silence” to claims

for fraudulent concealment. Fourth, any such limitation should be prospective only, and Respondent should be granted leave to amend its complaint on remand.

ARGUMENT

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

As President of Allegro, Scully manifestly had a duty to speak when he knew that key employees were planning to leave without notice, that employees were compiling company documents to take when they left, and that employees were using company time and company resources for their own purposes and to the detriment of Allegro. There is evidence that Scully knew all of these things and more, but he never disclosed it to Allegro. (See, *e.g.*, R. 283-311; 313-328; 577; 584-599). Thus, there is evidence of a misrepresentation, which was the only issue raised on appeal by Appellant Scully as to the claims for fraud and misrepresentation.

I. This Court has reversed the trial court on a ground never raised to the trial court or this Court.

Subject to a few exceptions not applicable here (*e.g.* lack of subject matter jurisdiction), it is axiomatic that the appellate courts cannot and will not reverse on a ground never raised to the trial court or the appellate court. *Georgetown County League of Women Voters v. South Land Co., Inc.*, 713 S.E.2d 287, 289 n.2 (S.C. 2011); *Watson v. Underwood*, 756 S.E.2d 155, 160 n.9 (S.C. App. 2014). Here, Scully never argued to the trial court or this Court that evidence of “fraud by silence” was limited to claims for fraudulent concealment. Accordingly, it is respectfully submitted that this Court erred in reaching and reversing upon this issue.

II. This Court has overlooked controlling Supreme Court precedent to the contrary.

The Supreme Court's precedent is binding on this Court. S.C. Const. Art. V, § 9. In *Lawson v. Citizens & Southern Nat'l Bank of S.C.*, 193 S.E.2d 124, 128 (S.C. 1972), the Supreme Court held that evidence of a failure to disclose when under a duty to do so ("fraud by silence") in an action for fraud and deceit "makes out a case of actionable fraud sufficient to carry the case to the jury," *i.e.*, the evidence was sufficient to withstand a motion for directed verdict. Importantly, in so ruling, the Supreme Court relied upon and cited a "fraudulent concealment" case in discussing the requirements of "fraud by silence," and then applied those requirements to an action for fraud and deceit. *Id.* at 126-127. It is thus clear that the Supreme Court does not view "fraud by silence" as being limited to claims for fraudulent concealment. Accordingly, it is respectfully submitted that this Court erred in limiting evidence of "fraud by silence" to claims for fraudulent concealment.

III. The law should not limit evidence of "fraud by silence" to claims for fraudulent concealment.

All fraud, by definition, is the concealment of the truth by act or omission. There is no logical or jurisprudential basis for limiting "fraud by silence," *i.e.*, the concealment of the truth by omission, to claims for fraudulent concealment. Accordingly, if this Court does not grant rehearing on Grounds I and II, *supra*, Respondent respectfully submits that this Court should reconsider its ruling and issue an amended opinion that affirms the trial court's denial of Appellant's directed verdict motions on the claims for fraud and misrepresentation.

IV. Any rule that "fraud by silence" should be prospective only, and Respondent should be permitted to amend its complaint on remand.

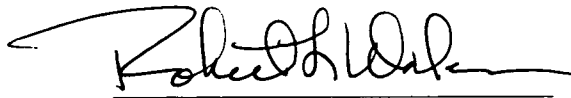
Research reveals no case other than this Court's opinion in the present case as limiting evidence of "fraud by silence" to claims for fraudulent concealment. Thus, this Court's opinion represents a new rule of law. If this Court does not grant rehearing on Grounds I-III, *supra*,

Respondent respectfully submits that this Court should issue an amended opinion that makes the new rule of law prospective only. See *Marcum v. Bowden*, 642 S.E.2d 85, 86-87 (S.C. 2007). Respondent further respectfully submits that it should be permitted to amend its complaint on remand to comport with this Court's pronouncement of a new rule of law.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion as requested above.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert L. Widener", written over a horizontal line.

Robert L. Widener
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Attorneys for Respondent

July 29, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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Allegro, Inc., Respondent,

v.

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

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Respondent's Petition for Rehearing by depositing a copy of same in the United States Mail, sufficient postage prepaid, on July 28, 2014 addressed to the attorneys for the Appellants, as follows:

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SC Court of Appeals


Ann Shuler

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July 28, 2014

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Via Courier

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
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SC Court of Appeals

Re: Allegro, Inc. -v- Emmett J. Scully, Synergetic, Inc., George C. Corbin,
and Yvonne Yarborough
Case No. 04-CP-40-1915
Appellate Case No. 2008-099926
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Dear Madam Clerk:

Enclosed for filing, please find the original and seven copies of Respondent Allegro, Inc.'s Petition for Rehearing, along with the original and one copy of the Certificate of Service. Our check in the amount of \$25.00 is enclosed. Please file the Petition in your office and return the file stamped extra copy to me via our courier.

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

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

RLW/as
Enclosures

cc: C. Mitchell Brown, Esq.
Amy L. Gaffney, Esq.
Brian P. Crotty, Esq.
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