

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 04-CP-40-1915

RECEIVED

AUG 07 2014

SC Court of Appeals

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

v.

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

**Return to Allegro's Petition for Rehearing**

Appellants Emmett J. Scully, George C. Corbin, and Yvonne Yarborough (collectively "Appellants") hereby submit this return to Allegro's petition for rehearing. In Opinion No. 5245, issued June 30, 2014, this Court correctly held that Appellant Emmet Scully ("Scully") was entitled to a directed verdict and JNOV on the claims for fraud and negligent misrepresentation because there was no evidence of any false representation by Scully supporting such claims. Allegro's petition should be denied because, not only was there a complete lack of evidence of any false representation by Scully, the evidence at trial established that Scully specifically told Allegro of his plans to start a competing company.<sup>1</sup>

<sup>1</sup> Appellants note that on July 25, 2014, prior to Allegro filing its petition for rehearing, Allegro informed this Court that it was not filing a return to Appellants' petition. In this letter, Allegro stated that "[t]his Court's opinion properly resolved all issues that were properly before the Court." Thus, Allegro acknowledged that this Court's

Fraud and negligent misrepresentation share, as an essential element of either claim, that there must be a false representation. Kahn Construction Co. v. S.C. Nat. Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980) (stating that the elements for fraud include a representation and its falsity); Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997) (identifying a false representation as the first element of negligent misrepresentation). At the trial of this matter Allegro failed to establish this essential element. (R. 341-342, 406-411).

Specifically, McCarthy (Allegro's majority owner) testified that on several occasions during the course of 2003, 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. (R. 129-130). Simply put, according to McCarthy's own testimony, Scully never concealed his intentions or actions from 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 (Scully and McCarthy were Allegro's only other directors). (R. 211-212). 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 company. (R. 211-212). Therefore, Respondent failed to offer any evidence as to the key element of a false representation made by Scully.

Allegro has attempted to assert that the basis of the negligent misrepresentation and fraud claims against Appellant Scully was Scully's "silence" regarding the fact that

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decision on the fraud and negligent misrepresentation claims was "proper" and Allegro's petition may also be denied based on express waiver.

he was planning to leave Allegro and take certain employees and customers with him. See Respondent's Final Brief at pp. 8-9. This argument is wholly without merit and was properly rejected by this Court. 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. (R. 129-130). Thus, there is no basis whatsoever for the contention that Scully was "silent" on these points.

Allegro cites to the case of Lawson v. Citizens & Southern Nat'l Bank of S.C., 259 S.C. 477, 193 S.E.2d 124 (1972), in support of its "fraud by silence" theory. That case, however, is inapplicable to the facts of this case. In Lawson, the issue was whether a developer fraudulently concealed a filled area that was unsuitable to support construction from the purchasers. Id. at 480, 193 S.E.2d at 126. There was conflicting testimony on the issue of whether or not the purchasers were informed or aware of the existence and location of the filled area, making that an issue to be determined by the jury. Id. at 484, 193 S.E.2d at 127-28. There is no such conflicting testimony or evidence in this matter. There was no evidence that Scully hid his intentions and plans from Allegro. Rather, all evidence established the opposite.

Because Allegro failed to establish any false representation by Scully, and because the record refutes any claim that Scully was "silent" as to his announced intent to start a competing company and take key employees and clients, the claims for fraud

and negligent misrepresentation both fail, and this Court properly held that Scully is entitled to directed verdict and JNOV on these claims.

Conclusion

Based on the foregoing, the Panel should deny Allegro's petition for rehearing.

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Columbia, South Carolina

August 7, 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

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AUG 07 2014

**SC Court of Appeals**

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**

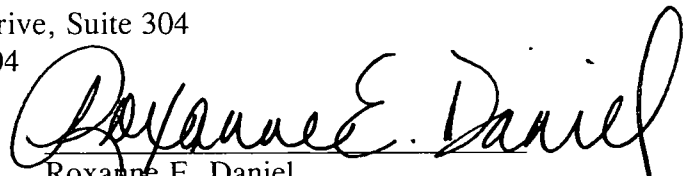
I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail,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

Pleadings: **RETURN TO ALLEGRO'S PETITION FOR REHEARING**

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August 7, 2014

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August 7, 2014

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AUG 07 2014

**SC Court of Appeals**

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

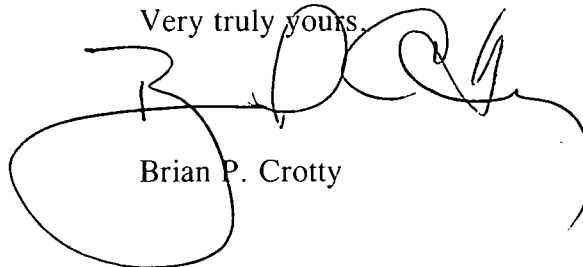
RE: Allegro, Inc. v. Emmett J. Scully, Synergetic, Inc., George Corbin, and  
Yvonne Yarborough  
Civil Action No. 04-CP-40-1915  
SC Court of Appeals Tracking No. 200899926  
Our File No. 28221/01500

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellants' Return to Allegro's 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.

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