THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas
L. Casey Manning, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2014-002055
Case No. 2004-CP-40-1915

Allegro, Inc., ...Respondent,

v.

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

Of Whom Emmett J. Scully, George Corbin, and
Yvonne Yarborough are.. Petitioners.

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ARGUMENT

I. The Court of Appeals correctly ruled on Petitioners' motion for directed verdict on the claim for civil conspiracy.

A. The Court of Appeals correctly ruled that Petitioners' "special damages" argument is not preserved for appeal.

Petitioners do not deny that their "special damages" issue is not preserved for appeal under the general rule requiring that all grounds for a directed verdict must be raised at the close of the evidence. Rather, they seek to excuse their failure to do so, because the trial judge said he had heard enough about conspiracy and told them to move to the next cause of action. They contend that they are therefore entitled to raise the "special damages" issue on appeal. In support of this argument, they rely on *Mains v. K Mart Corp.*, 375 S.E.2d 311 (S.C. App. 1988). Their reliance is misplaced because it is there stated:

> [I]t was incumbent upon its attorneys to either insist on stating the grounds for the record or handing motions in writing to opposing counsel and the trial judge for his decision. A trial lawyer must, with all deference to the court, preserve his client's position in order to lay a foundation for appeal; to this extent an attorney is required to be assertive.

375 S.E.2d at 313 (emphasis added). Here, trial counsel did not insist on stating any grounds for the record, and trial counsel was not assertive in preserving any issue for the record. Thus, the "special damages" issue is not preserved for appeal. Moreover, it is clear from the record that the trial judge had "heard enough" about the intent to harm issue. At the very least, therefore, it was incumbent upon trial counsel to request leave to make a record on other conspiracy issues, including the "special damages" issue. Having failed to do so, the "special damage" issue is not preserved for appeal.

B. Assuming the Petitioners' "special damages" argument is preserved for appeal, it has no merit as to Petitioner Corbin, because the only claim made against Corbin was civil conspiracy and, therefore all claimed damages are "special damages" as to him.

In *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 278 S.E.2d 607, 611 (S.C. 1981), this Court announced the rule that a claim for civil conspiracy fails to state a cause of action if it seeks an award of the same damages for the same acts against the same defendant that is sought in other causes of action pled in the complaint. Here, the damages proven and awarded against Scully and Yarborough were the same damages proven and awarded under other causes of action. As to Corbin, however, civil conspiracy was the only claim made against him and, therefore, the rule in *Todd* does not apply to Corbin. Thus, all damages proven and awarded against Corbin are "special damages" and, therefore, he is not entitled to a directed verdict under the rule in *Todd.* He may have a right to contribution from his fellow conspirators or an offset for any damages collected from them, but he is subject to a claim and award for civil conspiracy. Thus, there is no "special damage" error in denying his directed verdict motion on the claim for civil conspiracy.

C. Assuming the Petitioners' "special damages" argument is preserved for appeal, this Court should overrule *Todd, supra* and hold that the "special damages" rule pertains to the election of remedies rather than the existence of a cause of action for civil conspiracy.

Respondent respectfully submits that this Court should revisit and overrule the rule announced in *Todd, supra.* This Court relied on 15A C.J.S. Conspiracy, § 33, at 718 to announce this rule. *Todd,* 278 S.E.2d at 611. That C.J.S. authority, however, addresses the well-established rule against double recovery and the resulting need for an election of remedies when a claim for civil conspiracy is for the same acts and same damages sought against the same defendant as another claim made in the case. Accordingly, Respondent submits that the rule announced in *Todd* should be overruled and modified to comport with the purpose of the C.J.S. rule cited in *Todd.*

Thusly viewed, the rule should be the following: (1) if a civil conspiracy claim seeks the same damages for the same acts against the same party as another claim, it states a cause of action but there can be only one recovery for those acts and damages, so upon any award of damages, the plaintiff must elect its remedy; and (2) to the extent the civil conspiracy claim rests in whole or in part on different conduct or different resulting damages, then there is no double recovery as to those different damages (*i.e.*, "special damages) and, therefore, there is no need to elect between remedies for those special damages.

D. The Court of Appeals correctly ruled that Corbin was not entitled to a directed verdict on the "intent to harm" issue.

At the close of the evidence, Corbin, Scully, and Yarborough moved for a directed verdict on the conspiracy claim, arguing there was no evidence that they acted in concert with one another. (Appx. 411). The trial court denied this motion (Appx. 415-416), and none of the petitioners, including Corbin, challenged this ruling on appeal, and Corbin does not challenge it his certiorari petition before this Court. Therefore, it is the law of this case that Corbin acted in concert with Scully and Yarborough. It is also the law of this case that Scully and Yarborough acted with intent to harm Allegro, because they do not challenge and have never challenged the trial court's denial of the directed verdict motion on this issue.

It is the law of civil conspiracy that the hand of one is the hand of all and, therefore, Corbin is responsible for the acts undertaken by Scully and Yarborough and the damages resulting therefrom. *Charles v. Texaco Co.*, 18 S.E.2d 719, 726 (S.C. 1942); 16 AM. JUR. 2D *Conspiracy* § 16 (2009). This is so because he does not challenge the denial of his directed verdict motion that he acted in concert with Scully and Yarborough. Thus, were it assumed that Corbin did not personally have any intent to harm Allegro, it is irrelevant because he knowingly acted in concert with other conspirators who

(as a matter of law in this case) intended to harm Allegro. In any event, there is sufficient evidence in the record to create a jury question on whether Corbin intended to harm Allegro.

Corbin is a CPA with extensive experience as chief financial officer of major businesses. (Appx. 335-336). He provided accounting services to Allegro and thereby became familiar with its business operations and its client base – his company later became a client of Allegro and he therefore discontinued his formal CPA relationship with Allegro. (Appx. 336-338). Corbin knew of Scully's plans to either buy out McCarthy's interest in Allegro or start a competing business that would seek to serve the same clients, and he assisted Scully in planning these alternatives. (*E.g.*, Appx. 338-341; 396). Three days after Scully departed from Allegro, Corbin moved his company's business from Allegro to Scully's new company – he was the first Allegro client taken by Scully. (Appx. 392; 394-395).

Civil conspiracy, by its very nature, is a covert and clandestine act that is usually not susceptible of proof by direct evidence. *Island Car Wash, Inc. v. Norris*, 358 S.E.2d 150, 153 (S.C. App. 1987). Thus, civil conspiracy is typically proven by circumstantial evidence. *Id.* A conspiracy "may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances." *Id.*. In deciding whether a conspiracy has been proven, the jury may consider any evidence that tends to connect "those *advising*, *encouraging* [or] aiding" the other conspirators. *Id.*

Here, Corbin's principal argument is that he intended to help Allegro rather than harm it. The jury was free to reject this protestation by Corbin on his intent, an issue peculiarly within the province of the jury. The circumstantial evidence gave rise to an inference that Corbin knew of and assisted Scully and Yarborough in their plan to take clients from Allegro. Corbin was the first client to leave Allegro for Scully's new business – hardly the act of someone concerned with the best interest of

Allegro – and Corbin had frequently advised Scully on how to best set up a competing business. These facts were sufficient circumstantial evidence for the jury to find Corbin was a conspirator who intended to harm Allegro or knowingly assisted others who intended to harm Allegro. And it is the law of this case that Corbin acted in concert with Scully and Yarborough vis-à-vis the conspiracy. Accordingly, the trial court did not err in denying Corbin's directed verdict motion.

Citing this Court's opinion in *Hoard v. Roper*, 694 S.E.2d 1 (S.C. 2010), Corbin argues that one cannot avoid a dispositive issue by asserting a jury may disbelieve uncontradicted evidence. This argument fails for three reasons. First, and foremost, Corbin has misread the opinion in *Hoard*. There, this Court stated: "a jury is <u>not</u> required to accept <u>uncontradicted</u> witness testimony, as credibility is a question for the jury." *Id.* at 6 (emphasis added). Thus, were it assumed that Corbin's testimony was uncontradicted (and it was not), the jury was not required to accept it and was free to make its own credibility determination. Second, Corbin has overstated the rule set forth in *Hoard*. There, this Court stated: "A jury's prerogative to disregard uncontradicted testimony is a sound principle of law, but it has <u>no application in a summary judgment setting</u>." *Id.* at 6 (emphasis added). This appeal arises from a jury trial, not an order granting summary judgment. Third, Corbin's own actions contradicted his claim that he had the best interest of Allegro at heart – he was the first Allegro client to leave and go to Scully's new competing business, which is not the act of someone with the best interest of Allegro at heart, nor was the act of helping Scully form a competing business.

II. The Court of Appeals correctly ruled on Scully's motion for directed verdict on the contract claims.

A. <u>Scully's argument has no merit</u>.

The implied covenant of good faith and fair dealing is implied by law into every contract. *Adams v. G.J. Creel and Sons, Inc.*, 465 S.E.2d 84, 85 (S.C. 1995). The thrust of Allegro's breach

of contract claims was that Scully violated this covenant. (See Cmplnt. at Appx. 59, ¶¶ 27-30; 61-62, ¶¶ 41-47). Thus, if there was a contract between Scully and Allegro, there was a jury issue on whether Scully breached the contract.

Scully's only argument is that there was no evidence of a contract between him and Allegro. This is errant nonsense. It is undisputed that Scully was an employee of Allegro, that he was the President of Allegro, that he managed the day-to-day operations of Allegro, and that he received a salary from Allegro. The undisputed facts demonstrate, as a matter of law, that there was an employment contract between Scully and Allegro. At the very least, these undisputed facts create a jury question as to whether there was a contract between Scully and Allegro. Therefore, the trial court did not err in denying Scully's directed verdict motion. Indeed, it would have been reversible error to grant the motion.

B. Scully's argument is barred by the law of the case and Rule 242(c)(4), SCACR.

In denying Scully's directed verdict motion at the close of the evidence, the trial ruled as follows:

> Whether there's *no written contract*, there *is an oral contract*, there's certain duties that flow that *results in certain contractual obligations* from an employer to and employee and back and forth.

(Appx. 414) (emphasis added). In short, the trial court denied the directed verdict motion, because there was at least an oral employment contract between Allegro and Scully, and this resulted in contractual obligations owed by Scully to Allegro. Scully did not mention or challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case and precludes Scully's current arguments for certiorari. See Rule 242(c)(4), SCACR ("Only those questions raised in the Court of Appeals . . . shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

In denying Scully's JNOV motion on this issue, the trial court ruled that Scully's directed verdict motion "was limited to the argument that there was no employee handbook, no employment agreement, and no non-compete agreement [and thus] the arguments based on a failure to prove terms of the contract or a breach thereof cannot be the basis of a JNOV motion." (Appx. 19). Again, Scully did not mention or challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case. Importantly, on appeal and here, Scully makes the same arguments that he attempted to make in his JNOV motion. Since he did not challenge the trial court's ruling that those arguments were not made at trial and therefore could not be the basis for a JNOV motion, he cannot make those arguments in seeking certiorari. See Rule 242(c)(4), SCACR ("Only those questions raised in the Court of Appeals . . . shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

In denying Scully's motion to alter or amend on this issue, the trial court rejected Scully's argument that the "handbook, etc." language used in his directed verdict motion was by way of example only and that "*[i]mplicit in the argument* that no contract has been established is the claim that the terms of the contract or the breach of the contract have not been established." (Appx. 42) (emphasis in Order). The trial judge held:

> A directed verdict motion "shall state the *specific grounds therefor.*" Rule 50(a), SCRCP (emphasis added). Implicit arguments do not satisfy the "specific grounds" requirement of Rule 50(a). Moreover, in seeking a directed verdict, the moving party must argue which element(s) of a cause of action are not supported by the evidence, something Defendants did not do here with any specificity. *Hendrix v. Eastern Distrib., Inc.*, 446 S.E.2d 440, 446 (S.C. App. 1994)("It was incumbent upon Eastern to argue specifically which element of breach of contract accompanied by a fraudulent act was not established to give the trial court the opportunity to rule on the point.") (emphasis added), *aff'd*, 464 S.E.2d 112 (S.C. 1995) (vacating opinion to extent it ruled on merits of issues not preserved for appeal).

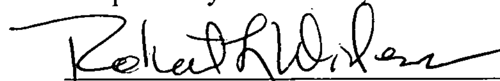
(Appx. 43) (underlining added). Scully did not mention or challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case and precludes Scully's certiorari argument. See Rule 242(c)(4), SCACR ("Only those questions raised in the Court of Appeals . . . shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

In any event, as noted earlier, it is undisputed that Scully was an employee of Allegro; he was the President. (Appx. 214; 223-224). Accordingly, there manifestly was a contract between Scully and Allegro. Since the only argument by Scully is the non-existence of any contract, and since there manifestly was some contract between Scully and Allegro, Scully's argument is without merit were it assumed the argument was properly before this Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Defendants' certiorari petition.

Respectfully Submitted,



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December 1, 2014
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Emmett J. Scully, Synergetic, Inc.,
George C. Corbin, and Yvonne Yarborough,. .... Defendants,

Of Whom Emmett J. Scully, George Corbin, and
Yvonne Yarborough are.. Petitioners.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Respondent's Return to Petitioners' Petition for Writ of Certiorari by depositing a copy of same in the United States Mail, sufficient postage prepaid, on December 1st, 2014 addressed to the attorneys for the Petitioners, as follows:

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Re: Allegro, Inc. -v- Emmett J. Scully, Synergetic, Inc., George C. Corbin, and Yvonne Yarborough
Case No. 04-CP-40-1915
Appellate Case No. 2014-002055

Dear Mr. Shearouse:

Enclosed for filing, please find the original and seven copies of Respondent's Return to Petitioners' Petition for Writ of Certiorari. Please file the Return in your office, and return the file stamped extra copy to me in the return envelope provided. By copy of this letter, we are serving counsel for the Petitioners with a copy of the Return.

Respectfully yours,

McNAIR LAW FIRM, P.A.

Robert L. Widener

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RLW/as
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