THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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

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

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242(h) 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. 5245 (S.C. Ct. App. filed June 30, 2014) (Shearouse Adv. Sh. No. 26 at 118) {Appendix ("Appx.") 1146}. For the reasons set forth in the petition as well as this reply, this petition should be granted and this Court should grant Petitioners' motions for directed verdict/JNOV as to the claims for civil conspiracy, breach of contract, and breach of contract accompanied by a fraudulent act.

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

A. The civil conspiracy claim fails as to all Petitioners because Respondent failed to establish the required element of special damages, and this issue was adequately preserved under the circumstances.

All three Petitioners assert that directed verdict and JNOV should have been granted in their favor on the civil conspiracy claim because Respondent failed to offer any evidence of "special" damages. Specifically, Respondent's damages evidence was the same for all eleven causes of action – its alleged losses from the loss of its current and prospective clients - and, as such, Respondent failed to establish "special" damages which "go ***beyond*** the damages alleged in other causes of action" as required under the elements of a civil conspiracy claim. Pye v. Estate of Fox, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (emphasis added). In its return, Respondent admits that the damages for the civil conspiracy claim "were the same damages proven and awarded under the other causes of action." See Respondent's Return at p. 4. Respondent then asserts that this

issue has not been preserved for appellate review, or, alternatively, that this Court should overrule the longstanding "special damages" element of a civil conspiracy claim.

It is uncontested that Petitioners specifically raised the issue of a lack of any evidence of special damages at the first directed verdict motion in the underlying trial. {Appx. 347}. The preservation issue exists solely because Petitioners' counsel was prevented for reasserting this argument during the directed verdict motion made at the close of all evidence. The trial transcript reveals that at the second directed verdict motion, after initially arguing that the civil conspiracy fails as to Petitioner Corbin due to a lack of any evidence of any intent on his part to harm Allegro, the trial court specifically ***ordered*** Petitioners' counsel to stop presenting any argument on the civil conspiracy claim 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.**

(Appx. p. 414) (emphasis added). Viewed in this context, it is clear that the trial court was precluding any additional argument on the civil conspiracy claim and that Petitioners' counsel was specifically directed to move onto a different cause of action.

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), SCRCP; 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.

In its Return, Respondent asserts that Mains is not applicable because Petitioners' counsel did not insist on stating grounds for the record. See Respondent's Return at p. 3. However, while the Mains Court noted that it was incumbent for an attorney to be assertive in stating the grounds for the record, this failure of the attorney in the Mains case did not prevent the Mains Court from considering the merits of the issue on appeal given the unusual circumstances that led to this failure. The circumstances in the present case provide a greater justification than was present in the Mains case. Specifically, in Mains, the trial court dispensed with the second direct verdict motion altogether. Here, while Petitioners' counsel was in the process of stating the various grounds for directed verdict as to civil conspiracy, she was deliberately cut off by the trial court and directed

to ***move onto a different cause of action***. In addition to the example supplied by the Mains case, 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. Commonwealth v. Dickson, 918 A.2d 95, 99-100 (Pa. 2007) (refusing to hold that an issue was not preserved where counsel was "cut off" by the court before raising a specific point because the court "will not punish counsel for declining to resist the trial court's unequivocal effort to cut off conversation on this point"); Lai v. Sagle, 818 A.2d 237, 242-43 (Md. 2003).

Furthermore, all of the damages evidence of the Respondent was presented in the Respondent's case at trial. Hence, no other possible "special damages" evidence was presented at trial after Petitioners' trial counsel pointed out in her directed verdict motion at the close of Respondent's case that such evidence was lacking. When the full context of what occurred here is considered, the Court should consider Petitioners' argument regarding the lack of special damages. One of the Petitioners, Mr. Corbin, would be spared a new trial if this argument is considered by this Court, as it should be. Hence, 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 that has been previously ordered in this case to proceed without the civil conspiracy claim and without Mr. Corbin as a party.

As an alternative argument, Respondent requests that this Court overrule the element of civil conspiracy requiring the existence of special damages separate and apart for those claimed in other causes of action. See Respondent's Return at pp. 4-5. Specifically, Respondent would have this Court effectively remove the element of

"special damages" from the cause of action, and allow the process of election of remedies to remove any duplication of damages. However, civil conspiracy's requirement of "special damages" does not exist for the purpose of avoiding duplicative recoveries. Rather, it is a central element of the claim. In Pye v. Estate of Fox, this Court went so far as to state that "[b]ecause ***the quiddity of a civil conspiracy claim*** is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in the other causes of action." 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (emphasis added). Respondent's inability to establish special damages in this case (because none exist) provides no justification for a wholesale departure from longstanding South Carolina law on the cause of action of civil conspiracy.

Respondent also proposes as an alternative argument that, because the only claim asserted against Corbin is civil conspiracy, this somehow results in "all damages proven and awarded against Corbin" being "special damages." See Respondent's Return at p. 4. Respondent is incorrect. Whether damages constitute "special damages" is determined by the nature of the damages themselves, not by the cause of action asserted. The fact that the only claim against Corbin is civil conspiracy has no bearing on whether the damages claimed against him are "special damages." This Court has defined special damages as being "[d]amages for losses that are the natural and proximate, but not the necessary, result of the injury." Sheek v. Lee, 289 S.C. 327, 328, 345 S.E.2d 496, 497 (1986). Here, Respondent made no attempt whatsoever to establish that ***any*** of its damages were "special damages." Additionally, because Respondent's damages evidence was precisely the same for all causes of action, Respondent made no showing that any of the damages relating to the civil conspiracy claim were different from the

damages sought under its numerous other claims. In fact, Respondent now admits, at least as to Scully and Yarborough, that Respondents' civil conspiracy damages "were the same damages proven and awarded under the other causes of action." See Respondent's Return at p. 4. Thus, this Court should grant certiorari and grant Petitioners' motions for directed verdict and JNOV as to the civil conspiracy claim.

B. Respondent must establish each element of civil conspiracy against each Petitioner, and there is no evidence that Corbin acted with the intent or purpose of injuring Respondent.

Petitioner Corbin asserts that there was no evidence at trial that he had any intent to harm Respondent entitling him to a directed verdict and/or JNOV on the civil conspiracy claim. This position has been consistently asserted at trial and has been presented in this appeal. (Appx. pp. 347, 411-414, 937-939, 991-994). Respondent now attempts to remove the key element of *individual* intent from the requirements of civil conspiracy. 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 on the part of Corbin is unnecessary for him to be liable for civil conspiracy. See Respondent's Return at pp. 5-6. 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," is a familiar maxim, the ***intent*** of one, is ***not*** the intent of all, and intent must be specifically established as to each individual defendant. At trial, in the post-trial motions, and in this appeal, Corbin has consistently asserted that there was no evidence of any purpose or intent on his part to harm Respondent.

There are three separate and distinct elements necessary to establish a claim for civil conspiracy: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; and (3) which causes special damages. LaMotte v. Punchline of Columbia, Inc., 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988). "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. 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); 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);

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 failed to offer any such evidence of an intent or purpose by Corbin to harm Allegro. To the contrary, the evidence at trial established the opposite – that Corbin's limited involvement with this matter was for the purpose of helping Allegro and doing what he thought was in the best interests of Allegro. (Appx. pp. 222-223, 375, 388-390). Respondent repeatedly refers to the fact that Corbin's company was the first Allegro client to take its business to Scully's new company, in an attempt to convert Corbin's decision to lawfully terminate his company's contract with Allegro as evidence of intent to harm. The evidence, however, shows that Corbin believed that without Scully, Allegro would not be able to provide the level of service he required and that Corbin acted completely within the requirements of the contract by providing the required notice for termination. (Appx. pp. 397-398). The fact that Corbin was the first of many customers to reach that conclusion and take that permissible action does not constitute evidence of an intent to harm Allegro. Rather, it evidences Corbin's desire that his company continue to receive the level of service it received from Scully. Respondent failed to establish this element of civil conspiracy as to Corbin, and Corbin should have been granted directed verdict. As this is the only claim asserted against Corbin, this Court should grant the petition for writ of certiorari, review this issue, and grant Corbin

directed verdict/JNOV as to this claim, removing him as a party from the new trial of this case.

II. Respondent failed to offer evidence of any contract, whether oral or written, failed to present any evidence as to how the alleged contract was breached, and this issue has been adequately preserved.

With regard to the contract claims asserted against only Petitioner Scully, Respondent asserts that, because Scully was an employee of Allegro, "as a matter of law ... there was an employment contract between Scully and Allegro." See Respondent's Return at p. 8. However, contrary to this assertion, the existence of an employment relationship does not presuppose the existence of a contract. Additionally, Respondent has never set forth the terms of the alleged contract or how such terms were breached.

Respondent asserts that the trial court determined there was an "oral contract" and incorrectly contends that this ruling was not challenged before the Court of Appeals. This is incorrect. At trial, Petitioner 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." (Appx. pp. 414). Additionally, Petitioners' Brief before the Court of Appeals 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." (Appx. pp. 939-940) (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. (Appx. pp. 346-347, 414). 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. Absent evidence of the alleged contract, both the breach of contract claim and the claim for breach of contract accompanied by a fraudulent act fail and Scully's motions for directed verdict and JNOV should have been granted as to both claims. The writ of certiorari should thus be granted, Scully should be granted JNOV as to the contract claims, and the new trial of this case should proceed without either of these claims.

III. The issues raised in this appeal have been properly preserved and Respondent's repeated claims that the appealed issues are barred by the "law of the case" doctrine are unfounded.

Throughout its Return, Respondent repeatedly and incorrectly contends that issues raised in this appeal are barred by the "law of the case" doctrine. Specifically, Respondent erroneously asserts that Appellants have not appealed isolated statements made by the trial court in its Orders denying Petitioners' post-trial motions, and that these statements are now "the law of the case." However, Respondent is misconstruing and misapplying the law of the case doctrine and is ignoring the fact that all of the issues raised in this appeal were raised before the trial court at trial as well as in the two post-trial motions, and have been properly preserved for appeal.

Under the "law of the case" doctrine, "[i]t is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." Lindsay v. Lindsay, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct.

App. 1997) *citing* Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993). Thus, under the "law of the case" doctrine, an unappealed order or ruling is ordinarily the law of the case. Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000). This doctrine is inapplicable where the lower court's ruling has been challenged and appealed.

The post-trial procedural history of this case illustrates how Petitioners have taken all necessary steps to preserve the issues raised in this appeal. Following the verdict in this case, Petitioners filed post-trial motions which raised all of the issues contained in this appeal. A hearing was held on those motions and Petitioners' counsel presented argument as to these issues to the trial court. On July 14, 2008, the trial court denied Petitioners' initial post-trial motions. {Order denying Post-Trial Motions filed 7/14/08; Appx. 18 ("the 2008 Order")}. The 2008 Order contained numerous, and frankly, unusual findings regarding issue preservation.[1] In order to challenge these rulings, as well as well as other errors in the 2008 Order, and to preserve the issues for appeal, Petitioners filed a second post-trial motion pursuant to Rules 50, 59 & 60 requesting that the trial court address and correct these issues. {Appx. 814}. A second hearing was held, and, again, the issues that are the subject of this appeal were raised and argued to the trial court. On April 5, 2010, the Trial Court issued an Order denying Petitioners' second post-trial motion.[2] {Order Denying the Motion to Alter or Amend the Order Denying Defendants' Post-Trial Motions, filed 4/5/10; Appx. 32 "the 2010 Order")}.

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[1] The 2008 Order was submitted by Respondent's counsel and was signed unchanged by the trial court.

[2] As with the 2008 Order, the 2010 Order was submitted by Respondent's counsel and signed unchanged by the trial court.

The 2008 and 2010 Orders have been appealed in their entirety. Contrary to Respondent's assertions, the preservation issues raised by the trial court in these Orders are not the law of the case. Rather, they are part of the very subject matter of this appeal. See Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc., 360 S.C. 473, 478, 602 S.E.2d 83, 86 (Ct. App. 2004) (noting that the initial determination in appellate review is the determination of whether an issue has been preserved). It is not the province of the trial court to rule on whether an issue has been preserved for appeal. Rather, such a determination is to be made by the Appellate Court at the outset of its analysis. Id.

In its Return, Respondent has picked sentences from the trial court's orders and asserts that the statements in those sentences are the law of the case because the specific sentence is not expressly challenged by name in Petitioners' appeal. However, Petitioners have consistently and repeatedly challenged the rulings at issue in this appeal. Issue preservation does not require that each phrase or sentence used by the trial court be specifically expressly mentioned. Rather, an *issue* is properly preserved for appeal when it has been raised and ruled upon by the trial court. Spence v. Wingate, 381 S.C. 487, 489-90, 674 S.E.2d 169, 169 (2009). Even under the former Supreme Court Rules, where issue preservation was accomplished through formal "assignments of error" or "exceptions," Respondent's hyper-technical view requiring numerous exceptions to preserve subparts of issues would not apply. In Simpson v. Cox, 95 S.C. 382, 79 S.E. 102, 103 (1913), this Court explained that "it is clear that it is rarely, if ever, necessary for [exceptions] to be long or involved," that they should "contain no repetition," and they should "properly contain the ground or reason upon which the assignment of error is

predicated, when it is not clearly shown or necessarily implied in the assignment itself." The Simpson Court went on to establish the standard for exceptions, stating that they should be "short, clear, and concise, specifying the errors complained of without circumlocution, argumentation, or repetition, and only one exception will be taken to raise the same point. Id. Under Respondents' view, despite the Simpson Court's statements, the "law of the case" doctrine would somehow apply anyway to procedurally bar a host of sub-issues or sentences from appellate review. Such was not the case under the former Supreme Court rules, nor is it the case under the modern South Carolina Appellate Court Rules.

Hence, the issues in this appeal were raised at trial as well as during the extended post-trial phase of this matter, were ruled upon by the trial court, and are now the subject of this appeal and petition and properly preserved.

CONCLUSION

Based on the arguments set forth above, this Court should issue a writ of certiorari to review and reverse the portion of the Court of Appeals' decision relating to the claims for civil conspiracy, breach of contract and breach of contract accompanied by a fraudulent act.

Signature Page Attached

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioners, 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: **Petitioners' Reply Brief in support of Petition for Writ of Certiorari**

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December 5, 2014

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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
SC Supreme Court Tracking No. 2012-213386
Our File No. 28221/01500

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of Petitioners' Reply in support of Petition for Writ of Certiorari 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 Petitioners' Reply Brief.

Very truly yours,

Brian P. Crotty

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