

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

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S.C. Supreme Court

Allegro, Inc., ... Respondent,

v.

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

Of whom Emmett J. Scully, Synergetic, Inc., George
Corbin, and Yvonne Yarborough are Petitioners.

APPENDIX
VOLUME THREE

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v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

1. Appellants' challenges to the denials of their motions for directed verdict and JNOV are not preserved for appeal, are barred by the law of the case doctrine, and are without merit.
2. Appellants' challenges to the trial court's evidentiary rulings are not preserved for appeal, are barred by the law of the case doctrine, and are without merit.
3. The judgment entered by the trial court accurately reflects the verdict intended by the jury, and the trial court correctly denied Appellants' motion for election of remedies.

STATEMENT OF THE CASE

Appellants' Statement of the Case correctly recites the procedural history of this case. Respondent (Allegro) objects to their Statement to the extent it sets forth arguments on the issues presented in their brief.

ARGUMENTS

- I. **Appellants' challenges to the denials of their motions for directed verdict and JNOV are not preserved for appeal, are barred by the law of the case doctrine, and are without merit.**

The Appellants challenge the sufficiency of the evidence to support the jury's finding against them on several causes of action.

Any appellate challenge to the sufficiency of the evidence must first be presented to the trial court by the making of a directed verdict motion at the close of all the evidence, and the failure to do so precludes appellate review of the issue. *Hendrix v. Eastern Distrib., Inc.*, 446 S.E.2d 440, 442 (S.C. App. 1994) , *aff'd*, 464 S.E.2d 112 (S.C. 1995) (vacating opinion to extent it ruled on merits of issues not preserved for appeal). The directed verdict motion must be based on specifically stated grounds, and any appellate argument is limited to those specifically stated grounds. Rule 50(a), SCRPC; *Hendrix*, 446 S.E.2d at 446 ("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). If a directed verdict motion is made at the close of the plaintiff's case but not renewed at the close of all the evidence, the issues raised in the motion are not preserved for appeal. *Hendrix*, 440 S.E.2d at 442 (also stating: "The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all evidence is *a strict one*.") (emphasis

added). A JNOV motion is limited to the grounds raised in a directed verdict motion at the close of the evidence, *i.e.*, a JNOV motion cannot be used to raise or preserve for appellate review any issue that was not raised specifically in a directed verdict motion at the close of all the evidence. *Id.* If the trial judge denies a directed verdict or JNOV motion, and if the appellant fails to challenge all grounds for that ruling, the unchallenged ruling becomes the law of the case and, right or wrong, requires affirmance. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970). Any motion to reconsider, alter, or amend a trial court's prior rulings is limited to the grounds stated in the motion, and the motion cannot be used to raise issues for the first time. *Ex parte Beard*, 597 S.E.2d 835, 840 (S.C. App. 2004).

As demonstrated below, the Appellants' arguments on the sufficiency of the evidence violate the rules set forth above and, therefore, these issues are not properly before this Court for appellate review.

A. The Civil Conspiracy Claim

The Appellants argue there was no evidence of "special damages" as to any appellant and, as to Appellant Corbin, there was no evidence that he had an intent to harm Allegro. (Init. App. Br. 42-45). These arguments are not properly before this Court for appellate review.

Appellants' directed verdict motions at the close of all the evidence appear at R. 406-410. Importantly, Appellants did not renew their directed motions made at the close of the plaintiff's case. (*Id.*, *passim*). Thus, any appeal on the sufficiency of the evidence is limited to the specific grounds raised at R. 406-410.

As to civil conspiracy, the Appellants first argued there was “no evidence of any acting in concert among the three of them [*i.e.*, Corbin, Scully, and Yarborough].” (R. 406). The trial court denied the directed verdict motion. (R. 410-411). Appellants do not challenge this ruling on appeal and, therefore, it is the law of this case that the Appellants acted in concert with each other vis-à-vis the civil conspiracy.

1. The “special damages” argument.

Appellant never argued at the close of the evidence that there was no evidence of special damages as a ground for their directed verdict motion on the conspiracy claim. (R. 406-410, *passim*). Thus, their appellate argument is not preserved for appeal and cannot be considered by this Court. Appellants made this argument by directed verdict motion at the close of the plaintiff’s case (R. 342), but their failure to renew it at the close of all the evidence precludes appellate review of the issue. (R. 406-410). In denying Appellants’ JNOV motion on this ground, the trial judge noted that Appellants had not made this argument at the close of the evidence and, therefore, could not make it in their JNOV motion. (R. 15). Appellants do not challenge this ruling on appeal and, therefore, it is the law of this case. In denying Appellants’ motion to alter or amend on this ground, the trial judge noted that Appellants had raised this ground at the close of the plaintiff’s case but failed to renew it at the close of the evidence and, therefore, it could not be raised as a ground for JNOV. (R. 39). Appellants do not challenge this ruling on appeal and, therefore, it is the law of this case.

In short, Appellants’ “special damages” argument is not preserved for appeal, because it was not made or renewed at the close of the evidence. Moreover, Appellants do not challenge the trial court’s ruling that they did not make this argument at the close

of the evidence and that, therefore, they could not raise the issue after the jury's verdict. Thus, this ruling is the law of this case and, right or wrong, requires affirmance.

2. The issue of Corbin's "intent to harm".

It is the law of this case that Scully and Yarborough acted in concert with the intent to harm Allegro, because Appellants do not make any appellate arguments to the contrary. It is the law of this case that Corbin acted in concert with Scully and Yarborough, because there is no appellate challenge to the trial court's denial of this ground for directed verdict. 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). Thus, were it assumed that Corbin did not personally have any specific 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. (R. 330-331). 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. (R. 331-333). 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.*, R. 333-336; 391). 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. (R. 387; 389-390).

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. 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, 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. And it is the law of this case that Corbin acted in concert with Scully and Yarborough vis-à-vis the conspiracy. Accordingly, this Court should affirm the jury's conspiracy verdict against Corbin.

B. The Contract Claims

Scully was an employee of Allegro. He argues there was no evidence of any contract between him and Allegro to support the claims for breach of contract and breach of contract accompanied by a fraudulent act and, therefore, the trial court erred in denying his

directed verdict and JNOV motions on these claims. In denying Scully's directed verdict motion, the trial court ruled:

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 an employee and back and forth.

(R. 409) (emphasis added). In short, the trial court denied the directed verdict motion, because there was an oral employment contract between Allegro and Scully, and this resulted in contractual obligations owed by Scully to Allegro. Scully does not mention or challenge this ruling on appeal and, therefore, it is the law of this case and precludes appellate review of Scully's arguments.

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." (R. 14). Scully does not mention or challenge this ruling on appeal and, therefore, it is the law of this case. Importantly, on appeal, Scully makes the same arguments that he attempted to make in his JNOV motion. Since he has not challenged 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 on appeal.

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." (R. 37) (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).

(R. 38) (underlining added). Scully does not mention or challenge this ruling on appeal and, therefore, it is the law of this case and precludes appellate review of Scully’s argument. The trial judge ruled that Scully’s directed verdict motion was insufficient to present the issue that he attempted to argue below. Rather than appeal this ruling, Scully simply repeats the argument made to the trial court. The law of the case doctrine precludes this absent a challenge to the trial court’s ruling.

In any event, it is undisputed that Scully was an employee of Allegro; he was the President. (R. 209; 218-219). 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.

C. The Fraud and Negligent Misrepresentation Claims

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.*; see also *Jacobson v. Yaschik*, 155 S.E.2d 601 (S.C. 1967).

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 is the only issue raised on appeal.

II. Appellants' challenges to the trial court's evidentiary rulings are not preserved for appeal, are barred by the law of the case doctrine, and are without merit.

Appellants seek a new trial based on four evidentiary rulings by the trial court. It is axiomatic that new trial motions based on alleged errors during trial are limited to the grounds raised during trial. See, *e.g.*, *Swicegood v. Lott*, 665 S.E.2d 211, 216 (S.C. App. 2009) (new trial for erroneous jury charge not available because appellant did not object to the charge when given to the jury). Thus, Appellants' new trial arguments are limited to the grounds raised during trial.

A. The Preliminary Injunction Order

Appellants contend it was error to admit the injunction order into evidence, because there was a danger that the jury would give undue weight to the findings in that order and that the jury might view itself as bound by those findings. (Init. App. Br. 34-35). Appellants never made this argument to the trial judge during the trial, so it is not and cannot be the basis for a new trial motion. *Swicegood, supra*.

In denying the Appellants' new trial motion, the trial court ruled they did not object to the testimony about this order prior to its introduction into evidence and, therefore, they

could not seek a new trial based on the admission of the injunction order into evidence. (R. 16). Appellants do not challenge this ruling on appeal and, therefore, it is the law of this case and, right or wrong, requires affirmance. The trial judge also ruled that the injunction was properly admitted into evidence "to show what was in the record and that an injunction had been issued." (R. 16). Appellants do not challenge this ruling and, therefore, it too is the law of this case.¹ The trial judge also ruled that Appellants' grounds for a new trial had not been raised during the trial by way of objections to the evidence and, therefore, these grounds could not be the basis for a new trial. (R. 16). Appellants do not challenge this ruling and, therefore, it too is the law of this case.

Finally, in denying Appellants' motion to alter or amend, the trial court held that the objection made at trial (upon which Appellants now rely on appeal) failed to demonstrate any specific ground for the objection. (R. 33-34). Appellants do not challenge this ruling and, therefore, it too is the law of this case. And it is axiomatic that a general objection without specifically stated grounds is too vague to preserve any issue for appeal. *State v. Patterson*, 482 S.E.2d 760, 766 (S.C. 1997).²

B. The Expert Report

Appellants contend the admission of the expert report into evidence was error because: (1) it was cumulative of the expert's subsequent testimony; (2) it contained impermissible and highly prejudicial hearsay; and (3) it contained a second complete copy of the preliminary injunction order. (Init. App. Br. 35).

¹ It should also be noted that Appellants never requested a limiting instruction to the jury that it should decide the case without reference or deference to any findings made in the injunction order.

² On appeal, the only objection cited by Appellants is that appearing at R. 245-247. (Init. App. Br. at 33). This is the same objection that the trial court found was insufficient to present any issue. (*Compare* quote at R. 33 with R. 246). This objection alludes to some prior discussion of the issue, but it is not of record, and it is duty of the appellant to make a sufficient record for appellate review. *Benton v. Davis*, 150 S.E.2d 235, 239 (S.C. 1966) (issue not preserved for appeal if appellant fails to make adequate record for review).

As to the Report of Mr. McHenry (Ground 3), the *only objection at trial* was a *general hearsay objection*. I overruled this general objection, which was *insufficient as a matter of law to present any objection*, upon the ground *that experts are permitted to base their opinion on hearsay* if it is the type generally relied upon by experts. The *Defendants never objected that the hearsay, to the extent there was any, was not this permissible type of hearsay*. Their attempt to make this argument after trial (Ground 5) comes too late to present any proper ground for a new trial. Moreover, the Defendants' relevance and other arguments go to the weight of the evidence, not the admissibility of it.

(R. 16-17) (emphasis added). Appellants never challenge the trial court's ruling that hearsay was their only objection at trial and, they never challenge his ruling that their hearsay objection was too general "as a matter of law to present any objection." Thus, these rulings are the law of the this case and require affirmance.

In denying Appellants' motion to alter or amend on this issue, the trial judge rejected any argument that Appellants' general hearsay objection was sufficiently specific given the context of the discussion with the court during trial:

Defendants now contend the context of their objection made the ground clear: "However, Defendants' hearsay objection was sufficient and preserves this issue for post trial review. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001) (holding that specificity as to an objection is only required where ground is not apparent from the context of the discussion contained in the record)." (Motion to Amend at pp. 4-5, ¶ 4). Having been a participant in the "discussion contained in the record," it was not apparent to me that Defendants were pursuing at trial the grounds they pursued after trial, nor have the Defendants pointed to anything "contained in the record" that should have made it apparent. Thus, the exception relied upon by Defendants does not apply and, therefore, their motion is denied for this reason and for the reasons in my July 14 Order. See *State v. New*, 526 S.E.2d 237, 239 (S.C. App. 1999) (the objection should be sufficiently specific to bring into focus the precise nature of the alleged error *so it can be reasonably understood by the trial court*); see also *State v. Rice*, 652 S.E.2d 409, 419 (S.C. App. 2007) (same; also noting transcript must make the ground for the objection apparent).

(R. 34-35) (italics in original) (underlining added). Appellants do not challenge this ruling on appeal and, therefore, it is the law of this case and requires affirmance.

On appeal, Appellants note that the trial court overruled their hearsay objection on the ground that experts are permitted to base their opinion on hearsay, but they argue this does not make the underlying hearsay admissible. (Init. App. Br. 37). Appellants did not make this argument to the trial court during the trial and, therefore, it is not preserved for appeal. *Pye v. Estate of Fox*, 633 S.E.2d 505, 510 (S.C. 2006). Moreover, Appellants did not make this argument in their motion for new trial and, therefore, it is not preserved for appeal. *Id.* (R. 756, ¶ 3). In any event, since Appellants have not challenged the trial court's earlier noted rulings, no hearsay issue is preserved for appeal.

Appellants cite Rule 702, SCRE, Rule 703, SCRE, and *Engbresten v. Fairchild Aircraft Corp.*, 21 F.3d 721 (6th Cir. 1994) in support of their argument that an expert's report is not admissible in evidence. (Init. App. Br. 35-36). They did not make this argument at trial, in their post-trial motion, or in their motion to alter or amend. (See R. 756, ¶ 3 and R. 805-806, ¶ 4). Thus, this argument is not preserved for appeal.

Appellants argue that admission of the report called undue attention to the expert's testimony. (Init. App. Br. 36). They did not make this argument at trial, in their post-trial motion, or in their motion to alter or amend. (See R. 756, ¶ 3 and R. 805-806, ¶ 4). Thus, this argument is not preserved for appeal.

Appellants argue that admission of the report was error because it contained a self-serving chronology of events prepared by Allegro. (Init. App. Br. 36-37). They did not make this argument at trial and, therefore, it is not preserved for appeal.

Appellants make passing references to the report being cumulative of the expert's subsequent testimony but never truly argue this point. (Init. App. Br. 35, 36). Appellants did not make this argument during trial or in their new trial motion. (See R. 756, ¶ 3). Thus, it is

not preserved for appeal. Although Appellants' motion to alter or amend made a passing reference to this "cumulative" argument (R. 805-806, ¶ 4), a motion to alter or amend cannot be used to raise an issue for the first time *Ex parte Beard*, 597 S.E.2d 835, 840 (S.C. App. 2004). Thus, the issue is not preserved for appeal.

Appellants make passing references to another copy of the injunction order being included in the experts' report. (Init. App. Br. 35, 36). Appellants did not make this argument during trial, so it is not preserved for appeal.

C. The Qualification of the Expert

Appellants make numerous arguments on appeal, but they did not make any of these arguments to the trial judge during the trial. Thus, none of Appellants' arguments are preserved for appeal. *Swicegood, supra*.

In their new trial motion, Appellants argued only that the expert was not qualified to testify "as an expert on PEO valuation." (R. 756, ¶ 4).³ The trial court rejected this argument:

As to Ground 4 [qualification "as an expert on PEO valuation"], Mr. McHenry was *not offered or accepted as an expert on PEO valuation*. Rather, he was *offered and accepted as an expert on the analysis of the damages suffered by the Plaintiff as a result of the Defendants' misconduct, i.e., he evaluated the damages but did not value the company*. His damage testimony was not based on a before-and-after valuation of the Plaintiff that attributed any reduction in value to the intervening conduct of the Defendants. *The Defendants never objected at trial on the grounds they seek to interject now* and, therefore, there is no basis for a new trial. More importantly, *the Defendants do not seek a new trial on the ground that Mr. McHenry was not qualified to give the testimony he actually gave at trial, i.e., an analysis and evaluation of the damages flowing from the Defendants' misconduct*. Accordingly, there is no basis for a new trial based on this Court's decision to qualify Mr. McHenry as an expert.

³ Appellants asserted another ground in support of their new trial motion but they have abandoned it on appeal by not arguing it on appeal. *Compare* Init. App. Br. 35-37 *with* R. 757, ¶ 5.

On appeal, Appellants mix "PEO valuation" and damages caused by a loss of customers in an apparent attempt to avoid the trial court's rulings. This attempt fails, because Appellants have not challenged the trial court's rulings and, more importantly, never timely argued to the trial court what they attempt to argue now. Thus, none of their arguments are preserved for appeal or properly before this Court for review.

In any event, all of Appellants' arguments go to the weight of the testimony, not its admissibility. The thrust of their argument is that the expert had not done this before. Under this theory, only those persons who have testified in the past as an expert can testify in the future as an expert. In other words, there can be no "first time" expert, which would result in expert testimony becoming unavailable in South Carolina once the "current" experts die or retire. Moreover, Appellants never argue that the expert was wrong in his calculations or methodology and, Appellants do not argue on appeal that the damage award is unsupported by the evidence. Finally, the expert was qualified to give the testimony given at trial as demonstrated by his vitae, which reflects extensive experience with PEO's and extensive education in business and accounting. (R. 606-607; see also R. 255-259).

D. The Exclusion of Damages Evidence

Allegro sought damages for "lost customers" taken by Scully to his new company, Synergetic. Allegro limited this "lost customer" damage claim to the 32 that left immediately after Scully's departure and went with his new company. (See R. 687-688). Appellants attempted to introduce evidence of other lost customers, purportedly to show that Allegro had failed to mitigate its damages. Since Allegro had limited its "lost customer" claim to the immediately departing customers who went to Scully's new company, the trial court ruled evidence of other customers lost after Scully's departure was irrelevant, because

it did not relate to the only damage claim being made by Allegro. Notably, the trial court ruled that any of the customers included in Allegro's "lost customer" claim could testify about why and how they left, and Appellants presented testimony from some of those customers. On appeal, Appellants argue it was error to exclude evidence regarding the loss of customers not included in Allegro's "lost customer" claim. As demonstrated below, this argument is not preserved for appeal, is barred by the law of the case doctrine and, in any event, has no merit.

Appellants correctly note that the trial court limited their "lost customers" evidence to "clients that left Allegro in close proximity with Scully's departure." (Init. App. Br. 40).

Appellants contend this was error because the excluded evidence would have shown:

1. Allegro's alleged damages were caused by its own mismanagement and not by Appellants' actions;
2. Allegro failed to mitigate its damages by failing to adequately serve its existing and subsequent [post-Scully departure] customers; and
3. If Allegro had provided these customers proper service, then Allegro's damages "would have been significantly reduced, if not completely avoided."

(Init. App. Br. 40). The only example of such evidence cited by Appellants is for Capital Bus Lines, a company that left Allegro months after Scully and went to his new company but was not included in Allegro's "lost customer" damage claim. Appellants never address or challenge the basis of the trial court's ruling.

When Appellants sought to introduce their "other lost customers" evidence, the trial court excluded this evidence because Allegro had limited its claim for "lost customers" damages to those specified in Allegro's Exhibit 7. Thus, Appellants were free to present testimony from these customers but could not present evidence from any other "lost

customers,” because it would be irrelevant to the damage claim being made by Allegro. In other words, since Allegro was not seeking damages for these other lost customers, the reasons that they left were irrelevant to any issue in the case. (R. 182-185; 198-203; 347-351). Moreover, during the discussions with the court, Appellants agreed that the trial court’s rationale was correct and, therefore, Appellants cannot change their position on appeal. (R. 199; 200; 202). Appellants renewed their trial argument of “failure to mitigate damages” in support of a new trial motion, and they added an argument that the “other lost customers” evidence also went to causation of Allegro’s damages (an argument they also continue to make on appeal). (R. 757, ¶¶ 6-9). The trial court denied Appellants’ motion:

In Grounds 6-9 of their new trial motion, the Defendants challenge the exclusion of evidence related to the operations of the Plaintiff company after the Defendants’ departure. These grounds share a common theme and a common fault. At trial, the *Plaintiff limited its “lost customer” damage claims and evidence to the 30 customers that left immediately after the Defendants departed, i.e., the customers taken by the Defendants*. The Defendants sought to introduce evidence of customers that left much later, including customers that started and left after the Defendants’ departure, claiming this evidence to be relevant to their defenses of mis-management and mitigation. *This evidence was inadmissible, because it was not responsive to the Plaintiff’s damage theory*. This Court repeatedly gave the Defendants an opportunity to present any case law or other authority to support their position. None was forthcoming.

(R. 17) (emphasis added). On appeal, Appellants never mention or challenge the rationale of the trial court’s ruling, which was made during trial and in denying the new trial motion. Thus, it is the law of this case and requires affirmance. Moreover, the trial court was manifestly correct. Since Allegro did not seek damages for any “other lost customers,” the reason they were lost was irrelevant to the “lost customers” damage issues in the case. Any causation or mitigation defense, by definition, must relate to the damages actually being

claimed by the plaintiff. And as noted earlier, Appellant was free to present evidence on the "lost customers" asserted by Allegro as damages.

III. The judgment entered by the trial court accurately reflects the verdict intended by the jury, and the trial court correctly denied Appellants' motion for election of remedies.

The trial judge charged the jury that a plaintiff "can only recover damages one time." (R. 442). When the jury began its deliberations, it initially began filling out the verdict form to award \$1,760,000 (\$1.76m) in actual damages for each cause of action. (See R. 44-45; 21). The jury became concerned that doing so would violate the court's charge that a plaintiff could only recover damages one time. (R. 21). The jury then directed a question to the court:

Would we have to break down the total of each damage, total of damages per each question, two, four, six, etcetera or the amount within the general amount?

(See R. 449). The jury explained that its question was whether, in filling out the verdict form, were they to put "the total amount that [they] decided to award[?]" (R. 449-450). A discussion ensued between the court and jury using an "apple" analogy, *i.e.*, the total damage award is 10 apples and whether the jury should assign particular numbers of apples to each claim. (R. 450). The jury summed up the discussion: "So after you have totaled every one of the damages [apples] you would have the same amount," *i.e.*, the 10 apples that the jury intended to award as damages. (R. 450). The jury expressly agreed with Allegro's counsel when he said:

But they would ultimately get to a total at the end of the day if there are damages found. The jury would say we believe they're entitled to ten apples but the ten apples consist of one, three, one---

(R. 451). The jury responded: "Yes, that's what I meant." (R. 451).

The jury returned with a verdict after striking through the initial awards of \$1,760,000 in actual damages and dividing that number evenly between the various claims at \$160,000 each. (R. 44-49). Another colloquy ensued between the judge and jury, in which the jury made it clear that "the amount of the verdict [it] wanted to award [Allegro]" was \$2,010,000, comprised of \$1,760,000 in actual damages and \$250,000 in punitive damages. (R. 456-457). Appellants declined the opportunity to make any further inquiries of the jury on this matter. (R. 457-458). The trial judge dismissed the jury and immediately thereafter entered judgment for Allegro in the amount of \$1,760,000 in actual damages and \$250,000 in punitive damages. (R. 43).

On appeal, Appellants ignore several facts: (1) that the jury initially began to fill out the verdict form by awarding \$1,760,000 in actual damages for each cause of action; (2) that their question was caused by their concern over the trial court's instruction that Allegro could recover its damages only once; and (3) the jury's question that led to all of the discussion with the jury. Nothing in the record supports Appellants' assertion that the jury was "operating under the mistaken belief that [it] was first to determine the total amount of damages to award, instead of making independent damage determinations for each cause of action." (Init. App. Br. 12). Moreover, Appellants never made this argument to the trial judge and they never challenge the trial court's contrary findings, re: (1) that the jury initially began to fill out the verdict form by awarding \$1,760,000 in actual damages for each cause of action; and (2) that their question was caused by their concern over the trial court's instruction that Allegro could recover its damages only once. (R. 21). Finally, nothing in the record supports Appellants' argument that the jury found only \$160,000 in actual damages. There is no evidence in the record that, once liability is established, would

show that the only actual damage suffered was \$160,000. Appellants never introduced any evidence at trial nor made any trial argument that Allegro's only actual damage was \$160,000.⁴

In denying Appellants' post-trial motions, the trial court made it unmistakably clear that the actual damage judgment was for each cause of action, that the punitive damage judgment was for each of two causes of action, and that this was based on the intent of the jury in rendering its verdict. (R. 21-23). Appellants moved to reconsider, and the trial court ruled:

South Carolina has long recognized the power and duty of a trial court "to carry into effect what was clearly the jury's intentions." *Anderson v. Aetna Cas. & Sur. Co.*, 178 S.E. 819, 830 (S.C. 1935). To that end, a court may correct a jury's verdict under certain circumstances:

While a trial judge may have the right in certain instances in a civil case to make, or order made, a correction in the verdict of a jury, after discharge of the jury, *for the purpose of giving effect to what the jury unmistakably found*, that power is *limited strictly to cases where the jury has expressed their finding in an informal manner* but the Judge cannot, under the power of amending the verdict, invade the province of the jury or substitute his verdict for theirs.

Camden v. Hilton, 600 S.E.2d 88, 92 (S.C. App. 2004) (emphasis added), *citing Lorick & Lowrance, Inc. v. Julius H. Walker & Co.*, 150 S.E. 789, 792 (S.C. 1929). In addition, "[a]fter the amendment, the verdict must be not what the judge thinks it ought to have been, but *what the jury intended it to be*." *Camden*, 600 S.E.2d at 88 (emphasis added), *citing Vinson v. Hartley*, 477 S.E.2d 715, 724 (S.C. App. 1996).

⁴ Appellants argue that the Revised Transcripts of Judgment support their view of the verdict rendered by the jury. These "transcripts" were prepared and filed at the insistence of Appellants' counsel before the trial court issued its order denying Appellants' post-trial motions and expressly ruled that the verdict and judgment was for \$2,010,000 against each of the Appellants (except Synergetic). Moreover, the only purpose of a "transcript of judgment" is to give record notice and establish priority of the judgment lien. It does not and cannot alter the judgment actually entered by the court. Thus, a good faith subsequent creditor may be able to argue that Allegro's priority is limited to the amounts appearing in the "transcripts," assuming the court's subsequent orders did not preclude any reliance on any such limitation (which they did), but the "transcripts" have no bearing on what amount is owed by a defendant (Appellants) to a plaintiff (Allegro).

Here, I corrected the verdict form in precisely the manner and for the precise purpose noted above. Based on the verdict form itself and my colloquies with the jury, I entered judgment in accordance with "what the jury intended it to be." This was done after the jury had "expressed their finding in an informal manner" during my colloquies with it, as well as the verdict form itself. I remain convinced, as I have been throughout this matter, that the judgment accurately reflects the intent of the jury.

There remains the argument that I was required to grant Defendants the option of a new trial in correcting the jury's verdict. They contend this option must be given "[e]ven in the limited circumstances where a court can amend the verdict" I disagree.

The rationale of the cases cited by Defendants is that a new trial option must be granted to the opposing party when a court changes the verdict from what the jury intended to something the judge deems more appropriate. The classic example of this is when a court grants a new trial *nisi remittitur* or *additur*. In these situations, the court changes the jury's intended verdict by decreasing or increasing it. That is not what happened in the present case. I did not invade the province of the jury to substitute my judgment for theirs. [footnote 2]. Rather, I corrected the verdict form to conform the verdict to what the jury intended after consulting with the jury. Thus, there is no need or requirement to grant a new trial option to Defendants. [footnote 3].

[Footnote 2]: Contrary to Defendants' assertion, I did not effectively or otherwise grant Plaintiff's motion for a new trial *nisi additur*. I did not find that the jury's award was inadequate and thereafter require Defendants to suffer a higher award or take a new trial. Rather, I corrected the jury's verdict to conform it to what the jury intended. This rendered Plaintiff's *additur* motion moot, because that motion was defensively based on the assumption this court would alter the judgment under Defendants' post-trial motions.

[Footnote 3]: The cases cited by Defendants for the requirement of a new trial option are readily distinguished. Two cases involved the classic scenario of a trial court granting a new trial *nisi additur*. See *Waring v. Johnson*, 533 S.E.2d 906 (S.C. App. 2000) and *Graham v. Whitaker*, 321 S.E.2d 40 (S.C. App. 1984). That is not what happened here. The third case is a "zero verdict" case which, again, is not what happened here. *Stevens v. Allen*, 520 S.E.2d 625 (S.C. App. 1999). The fourth case involved the return of a defense verdict after the defendant had admitted her negligence in causing an auto accident which, again, is not what happened here. *Vinson v. Hartley*, 477 S.E.2d 715 (S.C. App. 1996). (See Defs. Motion to Amend at pp. 2-3). None of these cases involved a

correction of a verdict to reflect the jury's intent, with the correction having been made after and based upon discussions with the jury about its verdict.

(R. 31-32). This ruling disposes of Appellants' argument regarding the need for a new trial option. The trial court did not change the verdict, so there was no need for granting a new trial option to the judgment entered by the court. Appellants cite no case, and research reveals none, that a new trial option must be given when the trial court enters a judgment that reflects the intent of the jury. This ruling also disposes of Appellants' argument regarding Allegro's additur motion, which on its face was made defensively only and only if the trial court were to grant Appellants' post-trial motions (which it did not).

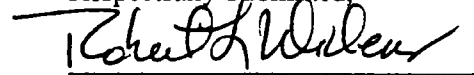
Appellants argue that the trial court should have resubmitted the case to the jury (and that Allegro should have requested this) if the verdict was inconsistent or ambiguous. Appellants further argue that since this was not done, the only relief available was a new trial. Appellants' arguments are based on the false premise that the trial court changed the jury's verdict. The cases cited by Appellants stand for the proposition that a court cannot construe or correct an ambiguous verdict. (Init. App. Br. 27). These cases, however, did not include the controlling facts here, to-wit: (1) that the jury initially began to fill out the verdict form by awarding \$1,760,000 in actual damages for each cause of action; (2) that their question was caused by their concern over the trial court's instruction that Allegro could recover its damages only once; (3) the jury's question that led to all of the discussion with the jury; and (4) the trial court's colloquies with the jury. Under these facts, the controlling law is that set forth by the trial court in the above-quoted order, which do not require resubmission to the jury or the granting of a new trial option.

Finally, there is no danger of double recovery in this case, the prevention of which is the sole purpose of the election of remedies doctrine. Appellants' real purpose from the outset has been to require Allegro to play Russian Roulette, *i.e.*, choose a cause of action and then hope it survives an appeal. Once this appeal is resolved and a truly final judgment is rendered, Allegro will elect its remedy to the extent the affirmed causes of action and damage awards reflect double recovery.

CONCLUSION

For all of the foregoing reasons, the judgment and both post-trial orders should be affirmed.

Respectfully Submitted,



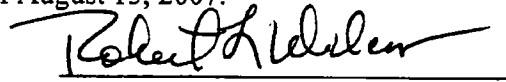
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Respondent's Brief complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.



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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. 2004-CP-40-1915

RECEIVED

DEC 01 2010

SC Court of Appeals

Allegro, Inc., ... Respondent,

v.

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

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ARGUMENT

I. 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 initial brief, Respondent repeatedly and incorrectly contends that the 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 Appellants' 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 Appellants have taken all necessary steps to preserve the issues raised in this appeal. The verdict in this case was rendered on May 5, 2006, and a Form 4 Order attaching the Verdict Form

was entered on that same day. (Verdict Form; R. 44; Form 4 Order dated 5/6/06; R. 43). On May 15, 2006, Appellants timely filed post-trial motions for election of remedies, JNOV, new trial, and new trial *nisi remitter*. (Appellants Post-Trial Motions; R. 744). These post-trial motions raised all of the issues contained in the present appeal. A hearing was held as to the post-trial motions on August 22, 2006, and at that hearing the issues contained in this appeal were argued by Appellants' counsel to the Trial Court. (Transcript of 8/22/06 Hearing; R. 469). On July 14, 2008, the Trial Court denied Appellants' post-trial motions. ("2008 Order")(Order denying Post-Trial Motions filed 7/14/08; R. 13). In this Order, the Trial Court made numerous, and frankly, unusual findings regarding issue preservation.¹ In order to challenge these rulings, as well as other errors in the 2008 Order, and to preserve the issues for appeal, on July 23, 2008, Appellants filed a second post-trial motion pursuant to Rules 50, 59 & 60 requesting that the Trial Court address and correct these issues. (Motion to Alter or Amend the Order Denying Defendants' Post-Trial Motions; R. 802). On August 13, 2008, while the second post-trial motion was pending, Appellants filed their Notice of Appeal appealing the verdict, the judgment entered thereon, and the 2008 Order.² A second post-trial hearing was held on November 26, 2008 as to the Appellants' second post-trial motion. (Transcript of 11/26/08; R. 514). 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 Appellants' second post-trial motion.³ ("2010

¹ The 2008 Order was submitted by Respondent's counsel and was signed unchanged by the Trial Court.

² On September 29, 2008, this Court granted Appellants' Motion for a Limited Remand so that the second motion could be considered by the Trial Court.

³ As with the 2008 Order, the 2010 Order was submitted by Respondent's counsel and signed unchanged by the Trial Court.

Order”) (Order Denying the Motion to Alter or Amend the order Denying Defendants’ Post-Trial Motions, filed 4/5/10; R. 27). Appellants then appealed the 2010 Order, and this appeal was then consolidated with the earlier appeal by this Court.

The 2008 Order and the 2010 Order have been appealed in their entirety. 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 brief, 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 Appellants’ brief. However, Appellants have consistently and repeatedly challenged the Trial Court’s 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), the Supreme 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 South Carolina Appellate Court Rules.

As is illustrated in Appellants’ Initial Brief, 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. Rather than address the appealed issues on the merits, Respondent instead seeks to preclude review of these issues through a hyper-technical and overbroad application of the law of the case doctrine which would improperly have the Trial Court determine whether appellate issues had been properly preserved. The rulings of the Trial Court challenged in this appeal have all been properly preserved, and the post-trial orders drafted by Respondent and signed unchanged by the Trial Court containing purported determinations as to preservation are encompassed in the appeal of the actual issues.

II. The Verdict Form is the only clear evidence of the jury's intent as to the verdict and there is no evidence of any "clear" intent by the jury to dramatically increase the actual and punitive damages rendered on its Verdict Form.

The Statement of the Facts and Section I of Appellants' Initial Brief set forth at length the factual background regarding the jury's questions to the Trial Court prior to rendering its verdict, the actual final Verdict Form, and the Trial Court's post-verdict questioning of the foreperson regarding the verdict. The Verdict Form in this case contained eleven separate findings by the jury as to eleven separate causes of action. (Verdict Form; R. 44). Specifically, the jury made eleven separate actual damages awards of \$160,000, and two separate and distinct punitive damages awards in the different amounts of \$75,000 and \$175,000. (Id.) Significantly, the eleven causes of action were against different individual Appellants or different groupings of the Appellants. Thus, while the total of all eleven awards, before election of remedies is made, may have been \$2,010,000 comprised of \$1,760,000 in actual damages and \$250,000 in punitive damages, these "total" amounts do not actually apply to any one of the Appellants. The Verdict is clear on its face, was never changed by the jury, and could not be changed by the Trial Court without simultaneously granting Appellants the option of a new trial.

Respondent contends that the jury's question regarding whether the damages awarded on the Verdict Form were to be the total of the damages or the damages specific to each cause of action, was prompted by their "concern" regarding the Trial Court's charge that the plaintiff could only recover damages one time. See Respondent's Initial Brief at p. 19. This is pure speculation on the part of Respondent

as there is nothing in the record indicating any such concern. Rather, the record shows that the jury was confused as to whether it was required to make separate damages determinations as to each cause of action. The Trial Court correctly instructed the jury that it was not to worry about the total of its damages awards, but instead was to determine the damages specifically and independently for each separate cause of action. (Tr. pp. 586-87; R. 450-451). This is exactly what the jury did, making eleven separate actual damages awards and two entirely different punitive damages awards. (Verdict Form; R. 44).

Respondent next asserts that "the jury made it clear that the amount of the verdict [it] wanted to award [Allegro] was \$2,010,000, comprised of \$1,760,000 in actual damages and \$250,000 in punitive damages." See Respondent's Initial Brief at p. 20. Respondent points to the fact that the jury initially wrote \$1,760,000 in the actual damages line for the first cause of action (which applied to Appellant Scully alone) as support for the claim that the jury's intent was "clear." This amount was then crossed out and replaced with \$160,000. (Verdict Form at p. 1; R. 44). Again, there is nothing in the record supporting the contention that any such intention by the jury in this way is "clear." The Verdict Form as filled out in fact contradicts this claim by containing separate and different punitive damages awards against different defendants. Put simply, the jury was never asked, and never stated, that it intended to award \$1,760,000 in actual damages for each cause of action and against each of the individual Appellants. Additionally, the jury was never asked, and never stated, that it intended to award \$250,000 in punitive damages on any of the causes of action and

against each of the individual Appellants. Any conclusion that the jury intended such a result is pure speculation.

At the close of the trial, the Trial Court made no mention whatsoever that it was changing the Verdict Form or the jury's verdicts. To the contrary, the Form 4 entered by the Trial Court merely listed totals of the damages without indicating that the totals applied to each individual Appellant, and attached the unchanged Verdict Form which clearly indicated varying damages totals for each defendant based on the jury's eleven independent verdicts. (Form 4 Order dated 5/5/06; R. 43; Verdict Form; R. 44). The Form 4 Order also specifically contemplated that post-trial motions as to the verdict would be forthcoming. (Form 4 Order dated 5/5/06; R. 43). It was not until more than two years later, in the 2008 Order, that the Trial Court made any indication that it had reformed the verdict, and it was not until the 2010 Order that the Trial Court actually stated its claim that it had "reformed" the jury's verdict. (2008 Order, at p. 10; R. 22; 2010 Order, at p. 2; R. 28).

Respondent now contends on appeal that the Trial Court "did not change the verdict," but rather that it entered a judgment that "reflects the intent of the jury." See Respondent's Initial Brief at p. 23. This new verdict would dramatically increase the actual damages for all of the causes of action and impose increased punitive damages against two of the Appellants. The fact that the jury stated its agreement as to the mathematical totals of the eleven verdicts it rendered does nothing to evidence its intent to award those totals as verdicts against each Appellant. Again, such is contradicted by

the verdicts themselves with their differing amounts awarded against different Appellants. (Tr. p. 592; R. 456).⁴

The case of Pniewski v. Kunda, 352 A.2d 462 (Pa. Super. Ct. 1975), provides some assistance on this issue. Pniewski involved a claim for wrongful death and a survival action. Id. at 464. The jury returned a verdict for \$110,336 on the form for the wrongful death action, but crossed out its verdict on the form for the survival action. Id. The foreperson stated that the jury thought that both actions were covered by the wrongful death form. The court convened a conference with counsel to discuss how to address the fact that the jury "blended" the verdicts, and the jury was sent back into deliberations. Id. The jury then returned with a verdict of \$41,333 on the survival action form. However, while the jury had taken both forms back into the deliberations, they did not change the wrongful death form to reduce the \$110,336 in damages previously awarded for both claims. Id. The result was that there were now two verdicts (\$110,336 for wrongful death and \$41,333 for the survival action) despite the jury's apparent intent for the verdicts to total \$110,336. Id. The trial court then granted a motion to "mold" the verdict by subtracting the survival action verdict from the wrongful death verdict. Id. On appeal, the Pniewski Court noted that while "a court has the power to mold a jury's verdict to conform with the clear intent of the jury . . . this rule does not apply where the jury's intention is less than clear." Id. at 464-65. The Pniewski Court concluded that the jury's intent in this case was "impossible to

⁴ If election of remedies were not an issue, the actual "totals" from the Verdict Form as to each individual Appellant were: (1) Scully - \$1,775,000 (ten \$160,000 actual damages verdicts and one \$175,000 punitive damages verdict); (2) Yarborough - \$570,000 (two \$160,000 actual damages verdicts and two separate punitive damages verdicts of \$75,000 and \$175,000); and (3) Corbin - \$335,000 (one \$160,000 actual damages verdict and one \$175,000 punitive damages verdict). (Verdict Form; R. 44). Thus, the overall \$2,010,000 "total" of the verdicts did not apply to any of the Appellants.

deduce” and that the lower court judge was “only speculating as to what the jury was trying to do and as to what the jurors must have thought.” Id. at 465.

Under South Carolina law, “[a]lthough the court may amend a verdict, the amendment *must be accompanied with an option of a new trial nisi to the party against whom the amendment militates.*” Vinson v. Hartley, 324 S.C. 389, 407, 477 S.E.2d 715, 724 (Ct. App. 1996). (emphasis added). Here, as in the trial of Pniewski, Respondent and the Trial Court contend that the verdict could be changed to give effect to what the jury “unmistakably” found. (2010 Order, at p. 5; R. 31). However, just as it was impossible to deduce the jury’s intent in Pniewski, it is equally impossible to deduce the jury’s intent in this case (assuming one wishes to ignore the facial verdicts themselves as the sole evidence of the intent, as Appellants urge). All that was asked of the jury, and all that was stated, was whether they intended to grant a “total” of those damages amounts. (Tr. pp. 592-93; R. 456-457). The jury’s response can just as easily be interpreted, as it is by the Appellants, to mean that they “intended” to make eleven separate actual damages awards of \$160,000 and two separate and different punitive damages awards of \$75,000 and \$175,000, all of which totaled \$2,010,000. Thus, the only “unmistakable finding” by the jury is what was clearly written on the Verdict Form – eleven separate and specific verdicts.

This Court has but two proper choices for addressing this issue. First, it can accept the unchanged Verdict Form as the only clear evidence of the intent of the jury. Under this view, as is illustrated in Section I.D. of Appellants’ Initial Brief, Respondent must make an election of remedies to avoid an impermissible double or multiple recovery of the same damages. See Inman v. Imperial Chrysler-Plymouth,

303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990). Second, if this Court instead concludes that the unchanged Verdict Form does not reflect the jury's intended verdict, it is impossible to divine the actual intent of the jury, so a new trial must be ordered, or a reformation of the verdict may occur *if* coupled with an option to the Appellants for a new trial (which option Appellants would select). Camden v. Hilton, 360 S.C. 164, 173, 600 S.E.2d 88, 93 (Ct. App. 2004) (holding that the trial court's authority to correct, modify, amend, or interfere with the jury's verdict is embraced in and limited to the power to grant new trials).

III. Directed Verdict and JNOV should have been granted as to the claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation.

A. Respondent's civil conspiracy claim fails as to all of the Appellants because there was no evidence of any special damages, and fails as to Appellant Corbin because there was no evidence of any intent or purpose on his part to harm Allegro.

1. The civil conspiracy claim fails because there was no evidence of special damages and this issue was adequately preserved.

Appellants have asserted that directed verdict and JNOV should have been granted as to all Appellants 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 – the alleged losses to Allegro 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." Pye v. Estate of Fox, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (emphasis added). In its brief, Respondent makes no attempt whatsoever to show that there was

any evidence establishing the necessary element of special damages. Rather, Respondent asserts only that this issue has not been preserved for appellate review.

Respondent admits that this precise issue was raised by Appellants in their initial directed verdict motion at the close of Respondent's case. See Respondent's Brief at p. 4. (Tr. p. 378; R. 342). Respondent then contends that, because this issue was not raised again in Appellants' second directed verdict motion at the close of all evidence, it has not been preserved. However, 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.

(Tr. p. 510; R. 409) (emphasis added). Viewed in this context, it is clear that the Trial Court did not wish to hear a reiteration of the special damages argument asserted in the prior directed verdict motion and that Appellants' counsel was specifically directed not to continue with any 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), 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 squarely 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.

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 taken into view, Appellants' counsel was not permitted the opportunity to renew the argument as to the complete lack of special damages. 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.

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

Appellants assert that there was no evidence at trial that Appellant Corbin had any intent to harm Respondent, and that, therefore, JNOV should have been granted as to Corbin on the civil conspiracy claim. This position has been consistently asserted at trial and in the post-trial motions, and has been presented in this appeal. (Tr. pp. 378, 507-510; R. 342, 406-409; Appellants' Post-Trial Motions; R. 744; Motion to Alter or Amend the Order Denying Defendants' Post-Trial Motions; R.802). Respondent now seeks 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 Appellants 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 is unnecessary to be liable for civil conspiracy. (Respondent’s Initial Brief at p. 5). 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,” that maxim presupposes and requires that the joint actors all share the same intent and are therefore responsible for each others actions. The intent of one, however, 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, Appellant 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 Respondent. 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. (Tr. pp. 239-

40, 457, 474-76; Letter from Corbin to Scully dated 3/27/03; R. 217-218, 370, 383-385; 578). Respondent has lost sight of a key fact in this case. The Plaintiff in this action 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. Respondent relies on testimony from Corbin wherein he stated that he did not talk with Ms. McCarthy about Scully's interest in buying Allegro as evidence of Corbin's intent to harm. (Tr. pp. 370-71; R. 334-335). This testimony provides no evidence of any intent by Corbin to harm anyone. Moreover, it only goes to Ms. McCarthy, not Allegro.

Respondent next contends that the jury was free to reject Corbin's testimony that he did not intend to harm Allegro. While a jury is not required to accept uncontradicted witness testimony, one 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). Respondent continued to have the burden of affirmatively proving 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). Respondent failed to establish this element of civil conspiracy as to Corbin, and Corbin should have been granted directed verdict and civil conspiracy.

B. 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.

In response to Appellant Scully's argument that there was no evidence of the existence of a contract, 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 has not been challenged in this appeal. At trial, 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.” (Tr. pp. 510, 570; R. 409, 434). Additionally, Appellants’ Initial Brief 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.” See Appellants Initial Brief at p. 46 (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. (Tr. pp. 377-78, 510; Motion to Alter or Amend the Order Denying Defendants’ Post-Trial Motions at p. 6; R. 341-342, 409; 802). 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 was entitled to directed verdict and JNOV as to those claims.

C. The evidence establishes that there was no misrepresentation by Scully, whether affirmatively or through a failure to speak, sufficient to support the claims for fraud and negligent misrepresentation.

Respondent now claims that the basis of the negligent misrepresentation and fraud claims against Appellant Scully is Scully's "silence" regarding the fact that he was planning to leave Allegro and take certain employees and customers with him. See Respondent's Initial Brief at pp. 8-9. This argument is wholly without merit. The record in this case clearly establishes that Scully affirmatively told Ms. McCarthy (the other owner of Allegro) of his plans to set up a competing business including taking Allegro's employees and customers with him. Ms. 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. (Tr. pp. 101-02; R. 129-130). In addition to affirmatively telling McCarthy of this plan, Scully also informed Allegro's third director, Frank Brown, that if he was unsuccessful in purchasing McCarthy's interest in Allegro, he intended to set up a competing company. (Tr. pp. 233-34; R. 211-212). Thus, there is no basis whatsoever for the contention that Scully was "silent" on these points. Therefore, in the absence of any evidence of a false representation made by Scully, the Trial Court should have granted Scully directed verdict and JNOV as to the claims for fraud and negligent misrepresentation.

IV. Appellants adequately preserved the numerous evidentiary errors that occurred at trial and which warrant a new trial.

A. Appellants made a timely objection to the admission of the Preliminary Injunction Order and it was manifestly obvious that such an Order could not be properly admitted at trial for any purpose.

Again, rather than address the merits of this issue, Respondent contends that the erroneous admission of a Preliminary Injunction Order containing twenty-five separate factual findings has not been preserved for review by this Court. Appellants' counsel objected to the admission of this document. (Tr. p. 268; R. 246). In response, the Trial Court overruled the objection and stated "I think subject to your earlier objection, is that fair enough, that I've already ruled upon?" (*Id.*) Thus, the Trial Court indicated it was aware of the basis for the objection. South Carolina law is clear that "[a] temporary injunction is made without prejudice to the rights of either party pending a hearing on the merits, and when other issues are brought to trial, they are determined without reference to the temporary injunction." *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (emphasis added); see also *Alston v. Limehouse*, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901). Therefore, the objectionable nature of a Preliminary Injunction Order at a subsequent trial on the merits is manifestly obvious, and Appellants' objection was sufficient to preserve the issue for review despite the fact that the specific grounds were not detailed. See *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993) (holding that, where reference was made to insurance in voir dire but the objecting party failed to state grounds for the objection, no waiver occurred because "the grounds for the objection were patent. The law forbids it.") (emphasis added).

Additionally, the Trial Court's rulings that the preliminary injunction order was properly admitted "to show what was in the record" and that the prior reference to the injunction in testimony made it proper to admit the order itself are not "the law of the case" as Respondent contends. Rather, these ruling are part and parcel of Appellants' challenge to the admission of the Order into evidence despite the longstanding rule that the merits at trial are to be determined "without reference to" the injunction order. Alston, 60 S.C. at 568. 39 S.E. at 191. It was clear error for the Preliminary Injunction Order to be admitted, and this error allowed the jury to view, consider, and give weight to an Order which contained twenty-five detailed findings of fact, all addressing issues that were before the jury for it to deliberate. The result is that the jury likely viewed these findings of fact, contained in a court order, as already determined and binding upon them. Therefore, under the holdings in Helsel and Alston, Appellants are entitled to a new trial absolute.

B. The admission of the McHenry Expert Report constituted reversible error and Appellants have adequately preserved this issue for appeal.

Respondent contends that Appellants' objection to the Admission of the McHenry Report has not been preserved because there is nothing in the record indicating the grounds for the objection. See Respondent's Initial Brief at p. 11. The Trial Transcript indicates that Appellants' grounds for objecting to the McHenry Report were discussed with the Trial Court in camera. (Tr. p. 294; R. 266) (stating that the objection was "based on the matters we discussed in camera"). While this portion of the record does not show the grounds for the motion, the Trial Court's 2008 Order denying Appellants' initial post-trial motions explained that the basis for the objection

was hearsay. (2008 Order at p. 4; R. 16). Thus, when the entire record, including the Trial Court's 2008 Order, is viewed, the basis for the objection is clear, and the issue has been adequately preserved.

In the 2008 Order, the Trial Court stated that it overruled this objection because "experts are permitted to base their opinions on hearsay." (2008 Order at p. 4; R. 16). This ruling was erroneous and is central to Appellants' appeal on this issue. While an expert may base his or her opinion on inadmissible hearsay, this does not mean that the hearsay itself becomes admissible. Jones v. Doe, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006) (holding that, while Rule 703 permits an expert giving an opinion to rely on inadmissible evidence, "[t]he rule, however, does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion."). This is the precise mistake made by the Trial Court. This clear error of law requires a new trial.

C. It was error for Daniel McHenry to be qualified as an expert witness and this error has been properly preserved by Appellants.

Respondent also contends that Appellants have not preserved the issue of whether it was error for the Trial Court to qualify Daniel McHenry as an expert on the valuation of PEOs. Again, Respondent cites passages from the Trial Court's Post Trial Orders and claims that Appellants have not challenged the Trial Court's ruling. As with Respondent's other similar claims, this is incorrect. Appellants objected to the qualification of Mr. McHenry as an expert at trial, and have repeated that challenge in two post-trial motions and this appeal. (Tr. pp. 287-93; R. 259-265; Appellants' Post-

Trial Motions; R. 744; Motion to Alter or Amend the Order Denying Defendants' Post-Trial Motions; R. 802). The issue has been repeatedly and properly preserved.

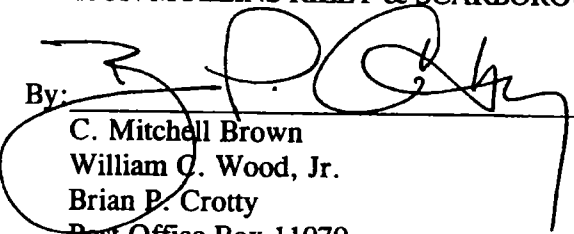
Respondent cites to the Trial Court's ruling that Mr. McHenry was offered as a "damages expert" as opposed to an expert at valuing PEOs. This, however, is a distinction without a difference. Respondent's "damages" was its loss in value. Thus, in order to qualify as a "damages expert," Mr. McHenry would have to be an expert in valuing PEOs – to be able to determine any loss in Respondent's value. As illustrated in Section II.C. of Appellants' Initial Brief, the Trial Court failed to exercise its duty as the gatekeeper of expert testimony to conduct threshold determinations of whether the potential expert witness is qualified and whether the subject matter is reliable. Jamison v. Morris, 385 S.C. 215, 228, 684 S.E.2d 168, 175 (2009) ("All expert testimony must meet a reliability threshold under Rule 702, SCRE, which imposes an affirmative and meaningful gatekeeper function on the trial judge"). Mr. McHenry lacked experience and expertise in the valuation of PEOs such that his qualification as an expert over Appellants' objection constituted reversible error warranting a new trial.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment entered below and enter judgment in favor of all Appellants on the civil conspiracy claim and in favor of Appellant Scully on the breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation claims. Additionally, this Court should order a new trial as to the remaining claims, or, alternatively, remand the matter to the Trial Court with instructions that the Trial Court require an election of remedies, based on the unreformed verdict on its face. Finally, because no judgment was sought

or obtained as to Appellant Synergetic, this Court should order the entry of judgment in favor of Synergetic.

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December 1, 2010

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. 2004-CP-40-1915

Allegro, Inc., ... Respondent,

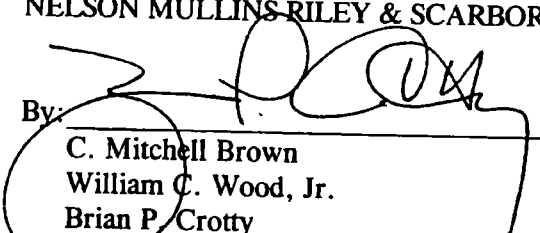
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
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L. Casey Manning, Circuit Court Judge

Case No. 04-CP-40-1915

Allegro, Inc., ... Respondent,

v.

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

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):

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December 1, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Allegro, Inc.,

Respondent,

v.

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

Appellants.

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 4997
Heard December 15, 2011 – Filed July 11, 2012

REVERSED AND REMANDED

Amy L. Gaffney, C. Mitchell Brown, William C.
Wood, Jr., Brian P. Crotty, and A. Mattison Bogan,
all of Columbia, for Appellants.

Robert L. Widener and Richard J. Morgan, both of
Columbia, for Respondent.

LOCKEMY, J.: In this civil action, Emmett Scully, Synergetic, Inc. (Synergetic), George Corbin, and Yvonne Yarborough (collectively, Appellants) contend the trial court erred in (1) reforming the jury's damages verdicts without providing the option of a new trial; (2) failing to require an election of remedies; (3) admitting into evidence the order granting a temporary injunction; (4) admitting into evidence Allegro, Inc.'s (Allegro) expert report; (5) certifying Daniel McHenry as an expert; (6) excluding evidence relating to the issue of Allegro's damages; and (7) failing to grant motions for directed verdict and judgment notwithstanding the verdict (JNOV) as to the claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation. We reverse and remand.

FACTS

Allegro is a professional employer organization ("PEO") that was formed in the late 1990s by its initial owner, Mary Etta McCarthy. A PEO provides human resource services for companies wanting to outsource that function. Scully joined Allegro in August of 1998 as president and a member of its board of directors. He was also given thirty percent of Allegro's stock. The remaining directors consisted of Allegro's majority owner, McCarthy, and one of Allegro's clients, Frank Brown. Between 1998 and 2001, Scully's ownership interest in Allegro increased to forty-nine percent, with McCarthy owning the remaining fifty-one percent.

There was no written employment contract or non-compete agreement between Allegro and Scully. Furthermore, Allegro did not have an employee handbook that was issued to or utilized by Allegro's employees. However, there was a Partnership/Buy-Sell Agreement negotiated by Scully and McCarthy at the time Scully joined Allegro which governed the percentage and change in ownership of Allegro.¹

McCarthy was actively involved in Allegro's management until Scully joined and took over the day-to-day operations. Scully testified that as president, he was entrusted with managing the operations in the best interest

¹ Brown was not a party to this agreement.

of Allegro along with financial oversight of the company. Beginning in late 2002 or early 2003, Scully expressed his frustration about the business to his friend, Corbin, who was also a certified public accountant (CPA). In addition to being Scully's personal friend, Corbin's company, Merritt, was a client of Allegro. Corbin advised Scully of three ways to deal with the situation: (1) Scully could buy out McCarthy; (2) McCarthy could buy out Scully; or (3) Scully could start his own business. Scully then consulted with Corbin about how to make an offer to purchase McCarthy's interest in Allegro. In March of 2003, Corbin issued a letter to Scully outlining three approaches for determining a fair purchase price for McCarthy's shares in Allegro. In closing, Corbin stated:

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 the business. The business 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.

In the spring of 2003, Scully informed McCarthy that he wanted to purchase her ownership interest in Allegro. Scully also discussed his proposal with Allegro's third director, Brown. During his conversation with Brown, Scully informed Brown that if he could not purchase McCarthy's shares, he would set up his own PEO business. Over the course of a series of discussions with McCarthy in 2003, Scully told her that if they could not agree upon a price at which she would sell her ownership interest in Allegro, he would leave the company and form a competing company, taking employees and clients with him. In response to these conversations, McCarthy suggested they have Allegro valued to determine the price of her interest. After McCarthy hired the Geneva Corporation (Geneva) to conduct a valuation study, Corbin reviewed the study and provided feedback to Scully at Scully's request.

On December 24, 2003, McCarthy received a letter from Scully offering to purchase her shares, setting forth two options as to the purchase

price, and asking for her response by January 23, 2004. Prior to sending McCarthy the offer, Scully had asked Corbin to review it and Corbin advised that it was a fair offer. McCarthy received a subsequent letter from Scully on January 23, 2004, restating his offer. On January 29, 2004, McCarthy responded with a written counteroffer. Scully replied in a February 2, 2004 letter, stating, "if we are unable to come to terms the result is a lose, lose, lose for everyone involved. If I leave Allegro and start a new PEO we will be in competition for the same customers and employees."

Having failed to reach an agreement regarding the purchase of Allegro, Scully gave his letter of resignation to McCarthy on February 16, 2004. McCarthy then told Scully she would accept his last offer to purchase her ownership interest in Allegro. They agreed her lawyers would draw up the necessary paperwork by the end of that week. After that conversation, Scully left town on a business trip for Allegro. While Scully was out of town, McCarthy decided she did not want to sell her ownership interest after all and focused her efforts on retaining Allegro. During Scully's absence, McCarthy met with Jim Everly, whom she hired to replace Scully as Allegro's president. McCarthy met with Scully on February 23, 2004, and presented Scully with a letter accepting his resignation. Immediately following Scully's departure from the company, McCarthy and Everly held a meeting with all Allegro employees during which time they were told they must sign non-compete contracts. Yarborough was an employee of Allegro from 2000 until 2004. At the meeting with McCarthy and Everly, Yarborough and another employee, Lisa Milliken, refused to sign the non-compete contracts.

McCarthy and Everly contacted all of Allegro's clients to inform them Scully was no longer employed by Allegro and made arrangements to meet with each client. They first met with Corbin of Merritt, who told them that due to his personal friendship with Scully, Merritt's business would likely go to Scully's new company, Synergetic. Pursuant to Merritt's contract with Allegro, Corbin sent a thirty day notice in the form of a letter on February 27, 2004, announcing its termination of their contract as of March 31, 2004. Letters from other clients terminating their contracts with Allegro shortly followed.

After his departure from Allegro, Scully formed his new company, Synergetic. On March 1, 2004, Yarborough resigned as an employee of Allegro and began working for Synergetic on March 2, 2004. Millikin also resigned from her position with Allegro on March 1, 2004, and subsequently became an employee of Synergetic.

On April 15, 2004, Allegro initiated this action by filing a complaint against Scully, Yarborough, Corbin, and Synergetic. On that same date, Allegro filed a motion for a temporary injunction, seeking to enjoin Scully, Yarborough, and Synergetic from soliciting business from Allegro's clients. That motion was granted in an eleven page order after a hearing on October 14, 2004.

At the close of Allegro's case, as well as at the close of all evidence, both sides moved for directed verdicts. These motions were denied. The trial court then submitted to the jury eleven of the claims asserted by Allegro.² Nine of the claims applied to Scully alone,³ one claim applied to Yarborough alone,⁴ and one claim applied jointly to Scully, Yarborough, and Corbin.⁵ The jury's special verdict form listed each of the eleven causes of action and asked two questions for each charge: (1) whether the plaintiff had proven that claim; and (2) if the claim had been proven, the amount of actual damages and punitive damages (where appropriate) the jury awarded as to each claim.

During deliberations, the jury sent a question to the trial court asking whether they should list the damages specific to each cause of action

² Allegro acknowledges no claims against Synergetic, Inc. were submitted to the jury; Synergetic joins this appeal because the issue was not addressed in the trial court's orders denying the Appellants' post-trial motions.

³ Scully was the sole defendant on charges of breach of contract, breach of contract with fraudulent intent, fraud, negligent misrepresentation, breach of fiduciary duty, breach of duty of loyalty, gross negligence, violation of section 33-8-310 of the South Carolina Code, and violation of section 33-8-420(a) of the South Carolina Code.

⁴ Yarborough was the sole defendant on one breach of loyalty charge.

⁵ Scully, Yarborough, and Corbin were jointly charged with civil conspiracy.

individually, or place the overall total amount the jury decided to award. In discussing the verdict with the foreperson, using apples as the hypothetical award, the trial court stated, "You give a certain number of apples for each cause of action. And that's all you are worried about. And there are some law related matters that I will take care of as a Judge" The foreperson stated she understood the concept, and the trial court continued:

So, for each cause of action depends on the breach of duty or [contract or] whatever you may find give a number, assign a value that you have been -- if the [p]laintiff's have [proven] to you by the greater weight of preponderance of evidence they are entitled to two apples on this one or three on that one or four on that one, that's the way you do it and don't worry about the total.⁶

The jury returned a verdict for Allegro on all eleven causes of action. The jury awarded actual damages in the amount of \$160,000 for each of the causes of action. Furthermore, the jury awarded \$75,000 in punitive damages on the breach of loyalty claim against Yarborough, and \$175,000 in punitive damages on the civil conspiracy claim against Scully, Yarborough, and Corbin jointly. The jury's verdict form shows that an award of \$1,760,000 had initially been entered in the designated space for actual damages for the first cause of action, but it was struck through and replaced with \$160,000.

Once the jury verdict was announced, the foreperson was questioned as to the total number of "apples" they intended to award Allegro, and their response was \$1,760,000. The court then asked "What about punitive damages in terms of the total number of apples you wanted to give to [Allegro]?" The foreperson said the jury wanted to give \$250,000 total to Allegro. The court finally stated, "We can add it up but your mathematician says it was the intent of this jury to award [Allegro] \$2,010,000," to which

⁶ It is unclear whether the trial court addressed the issue of the jury's verdict solely with the foreperson, or in the presence of the entire jury. This court strongly warns the trial bench of the danger of interacting with only the foreperson on substantive matters.

the foreperson agreed. As a final review, the trial court said, "Actual damage 1.7 million and the remainder of that sum is punitive damages totaling in the amount of \$2,010,000." Subsequently, no change was made to the verdict form by either the jury or the judge and no change was requested by Allegro.

The trial court completed a Form 4 order, which stated the total amount of actual and punitive damages and their grand total of \$2,010,000. The Form 4 order did not state that these amounts applied to all, or any, of the individual Appellants, but the special verdict form was attached showing the specific damages awards. Further, the Form 4 order gave no indication that the jury's verdict, as stated on the special verdict form, had been changed, altered, or modified in any way.

In their post-trial motions, Appellants moved for an election of remedies and asserted grounds for JNOV and a new trial. On July 14, 2008, the trial court denied all of Appellants' post-trial motions.⁷ In denying the motion for an election of remedies, the trial court stated:

Based upon the verdict form and the conversations with the jury before and after its verdict, I am convinced the jury intended to award \$1.76 Million Dollars in actual damages for each cause of action, and that it intended to award \$250,000 in punitive damages on the two causes of action. I am further convinced that the jury's apportionment of the verdict amongst the various causes of action does not reflect a finding that the Plaintiff suffered only \$160,000.00 in actual damages. Thus, entering judgment for the Plaintiff in the total amount of \$1.76 Million Dollars in actual damages and \$250,000.00 in punitive damages does not give rise to a double recovery.

On July 23, 2008, Appellants filed a motion to amend and/or set aside the July 14, 2008 order. This motion was also denied in an order by the trial

⁷ Prior to this order, Appellants submitted their objections to the proposed order.

court on April 5, 2010.⁸ The trial court stated that in its May 5, 2006 Form 4 order, it reformed the jury's verdict, changing it from eleven separate actual damages awards of \$160,000 and two punitive damages awards of \$75,000 and \$175,000, which resulted in different totals against different defendants, to one total verdict of \$2,010,000 against all the defendants. The trial court further stated any issue regarding this "reformation" of the jury's verdict not being coupled with the option of a new trial was waived because the issue "was not raised in Defendants' post-trial motions."

ISSUES ON APPEAL

1. Did the trial court err in admitting the order granting a preliminary injunction to Allegro into evidence?
2. Did the trial court err in admitting McHenry's report into evidence?
3. Did the trial court err in qualifying McHenry as an expert in the field of "damages"?
4. Did the trial court err in excluding evidence that Appellants allege was relevant to the issue of Allegro's damages as well as Allegro's failure to mitigate those damages?
5. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to civil conspiracy?
6. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to the contract claims?
7. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to the fraud and negligent misrepresentation claims?
8. Did the trial court err in reforming the jury verdict?
9. Did the trial court err in not requiring an election of remedies?

⁸ The Appellants objected to the 2010 order prior to its entry as well.

LAW/ANALYSIS

I. Evidentiary Errors

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 57-58 (2011) (quoting State v. Williams, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id. at 444, 710 S.E.2d at 58 (quoting State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). A finding of abuse of discretion does not end the analysis, however, "because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." Id.

a. Preliminary Injunction Order

Appellants argue the trial court erred in admitting the temporary injunction order into evidence. We agree.

First, we will address the threshold issue of preservation. For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented. State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). Further, it must be made with sufficient specificity "to inform the trial court of the point being urged by the objector." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). However, when the evidence is inherently prejudicial, the grounds for the objection are patent, and the issue will be found preserved. Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 43-47, 426 S.E.2d 756, 757-58 (1993) (holding a request that a voir dire question regarding insurance coverage "not be charged" was sufficient to preserve the issue, because even though specific grounds were not stated, the grounds were patent because the voir dire question was so inherently prejudicial).

We will examine whether a preliminary injunction order is inherently prejudicial, thus making the grounds of the objection to its admittance patent. An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. Cnty. of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). One of the elements the applicant must establish is that he has a likelihood of success on the merits. Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); see Transcontinental Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969) ("It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits."). A temporary injunction is granted without prejudice to the rights of either party pending a hearing on the merits, and "when other issues are brought to trial, they are determined without reference to the temporary injunction." Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (citing Alston v. Limehouse, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901) (stating "no fact decided upon such motion [for a temporary injunction] is concluded thereby, and when the other issues are brought to trial they are to be determined without reference to said orders"))). The purpose of a temporary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. Powell v. Immanuel Baptist Church, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

In the case at bar, the order included approximately four and a half pages of "Findings of Fact" by the trial court, as well as this statement by the trial court:

The Court carefully considered the pleadings, documents, and argument of counsel at a hearing . . . and finds that despite Defendants' denials of wrongdoing, there is sufficient evidence to indicate

that the Defendants were engaged in the activities alleged by the Plaintiff.

After Appellants' objection to the admission of the preliminary injunction order, the trial court stated, "I think subject to your earlier objection, is that fair enough, that I've already ruled upon?" The Appellants concurred with the trial court, and the trial court continued, stating, "Very well. We might go into a little more detail later but it is over your objection."

It is hard for this court to determine an instance where admission of a preliminary injunction order into the trial record would not be highly prejudicial. While Appellants did not state specific grounds for their objection, we find the introduction of the order for temporary injunction was inherently prejudicial, and thus, the grounds for the objection were patent. See Dunn, 311 S.C. at 43-47, 426 S.E.2d at 757-58. We believe admitting this order had a high possibility of influencing the jury due to its numerous findings of fact and statements concluding defendants' liability for the charges. The trial court abused its discretion in admitting the order into evidence. Thus, we reverse and remand in accordance with this decision.

b. McHenry's Expert Report

Appellants argue McHenry's written report and its attachments were cumulative of his subsequent testimony and contained impermissible and highly prejudicial hearsay, making its admission into evidence reversible error. We agree to the extent that the written report included the preliminary injunction order, but find the remainder of the testimony did not prejudice Appellants.

"Rule 703, SCRE, allows an expert giving an opinion to rely on facts or data that are not admitted in evidence or even admissible into evidence." Wright v. Hiester Const. Co., 389 S.C. 504, 523, 698 S.E.2d 822, 832 (Ct. App. 2010) (citing Jones v. Doe, 372 S.C. 53, 62, 640 S.E.2d 514, 519 (Ct. App. 2006)). However, Rule 703 does not allow the admission of hearsay evidence simply because an expert used it in forming his opinion; the rule only provides the expert can give an opinion based on facts or data that were not admitted into evidence. Jones, 372 S.C. at 62-63, 640 S.E.2d at 519.

As stated previously, for an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented. State v. Simpson, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Further, it must be made with sufficient specificity "to inform the trial court of the point being urged by the objector." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

At trial, Appellants objected to McHenry's report after Allegro moved to put it into evidence. The Appellants stated, "Same objection," purportedly in reference to a previous objection on the record that was based on matters discussed in camera. While the in camera discussion was either not placed on the record or not given to us in the record on appeal, the trial court's 2008 order states,

I overruled this general objection which was insufficient as a matter of law to present any objection, upon the ground that experts are permitted to base their opinion on hearsay if it is the type generally relied upon by experts. The Defendants never objected that the hearsay, to the extent there was any, was not this permissible type of hearsay.

In light of the trial court's 2008 order, it is apparent the objection was a general hearsay objection. In their 2006 post-trial motion, the Appellants objected again to the admission of McHenry's report "because this report was cumulative of his testimony, contained impermissible hearsay, and contained matters that were irrelevant and which served only to unfairly prejudice Defendants, confuse the issues, and mislead the jury." They further stated the report contained a document that gave "a purported timeline replete with multiple layers of impermissible hearsay, self-serving statements, conclusions of fact and law, Plaintiff's own opinions, and references to impermissible damages such as Plaintiff's litigation costs and attorneys' fees in this action."

We believe the specific issue of impermissible hearsay in the expert's report is preserved for appellate review, as the issue was raised with sufficient specificity, and ruled upon by the trial court. See S.C. Dep't of

Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (holding that to be preserved for appellate review, an issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity). There is nothing in the record on appeal that indicates the trial objection included arguments that the report was cumulative and contained matters that were irrelevant; thus, we find those issues are not preserved for our review. See McCall v. IKON, 380 S.C. 649, 663, 670 S.E.2d 695, 703 (Ct. App. 2008) (holding that the appellant has the burden of providing a record sufficient for appellate review).

Here, McHenry was allowed to rely on hearsay in his report when giving his expert opinion. However, the admission of the report itself simply because McHenry used it in forming his expert opinion was in error. The report contained many instances of hearsay, including numerous statements by Scully. However, "the admission in evidence of inadmissible hearsay affords no basis for reversal where the out-of-court declarant later testifies at trial and is available for cross-examination." Clark v. Ross, 284 S.C. 543, 551, 328 S.E.2d 91, 97 (Ct. App. 1985), abrogated by Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986). Further, we do not find any of the remaining impermissible hearsay to be reversible error.

We address the fact that a copy of the temporary injunction order was attached to the report, which we find highly prejudicial to the Appellants. We found admission of the temporary injunction order was improper, and it was error to admit it with the expert's report as well. We find that portion of the expert's report to be highly prejudicial; thus, we reverse the decision of the trial court to the extent it allowed the temporary injunction order into the record.

c. Exclusion of Damages Evidence and McHenry's Qualification

Because we reverse and remand based upon the above evidentiary issues, we need not reach Appellants' remaining evidentiary arguments regarding the trial court's exclusion of damages evidence and McHenry's qualification as an expert. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court

need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

II. Remaining Arguments

Appellants contend the trial court should have granted their motions for directed verdict and JNOV on their civil conspiracy claim, their contract claims, and their misrepresentation claims. Further, they contend the trial court erred in reforming the jury's verdict when the trial court should have either required an election of remedies based upon the jury's verdict or granted a new trial nisi additur.⁹ Again, because we reverse the trial court on the issues noted above, we need not review this argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Based on the foregoing reasons, the trial court's decision is

REVERSED AND REMANDED.

HUFF and PIEPER, JJ., concur.

⁹ We reiterate that we do not approve the practice of asking a question or responding only to the foreperson regarding a substantive issue about the law or the verdict. When a question arises regarding the law or the verdict form, the better practice is to confer with counsel outside the presence of the jury to discuss the proper response, and then instruct the entire jury in court or in writing and return them to the jury room to act in accordance with the court's instructions. See Keeter v. Alpine Towers Int'l, Inc., Op. No. 4995 (S.C. Ct. App. filed June 27, 2012) (Shearouse Adv. Sh. No. 22 at 73, 90-91) (Thomas, J., concurring) (providing the best practice to ensure a valid verdict is for the court to address any questions that arise in front of the entire jury). If a jury verdict form is ambiguous or unclear, the jury should be returned to the jury room in order to clarify or conform the verdict to its intent before the jury is excused. Id.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

AUG 20 2012

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

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"), George Corbin ("Corbin"), and Synergetic, Inc. ("Synergetic") (collectively "Appellants") hereby file this petition for rehearing. Appellants agree that in Opinion No. 4997, filed July 11, 2012, this Court correctly held that the Trial Court erred by admitting a temporary injunction order into evidence and that this error required a new trial. However, Appellants respectfully request a rehearing on this matter and/or the issuance of a new opinion so that this Court can address Appellants' directed verdict and JNOV arguments, which were not resolved by the grant of a new trial. This would allow the new trial in this matter to proceed only as to the remaining parties and claims.

INTRODUCTION

In Opinion No. 4997, filed July 11, 2012, a Panel of this Court correctly held that it was error for the Trial Court to allow a temporary injunction order to be admitted into evidence during the trial of this matter, and that this error requires that a new trial be held. This Court then correctly refrained from addressing the other grounds asserted by Appellants as requiring *a new trial*. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling that an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). However, Appellants respectfully submit that rehearing and/or the issuance of a new opinion is warranted because the Panel's Opinion misapprehended and misapplied the rule set forth in Futch regarding restraint on the appellate review of additional issues where the determination of a prior issue is sufficient to completely resolve the appeal or a portion thereof.

Specifically, while this Court correctly held that a new trial was required due to the erroneous admission of the temporary injunction order, this ruling was dispositive *as to only the new trial issues* raised in Appellants' appeal, and the Panel's Opinion should have addressed the directed verdict and JNOV issues raised by Appellants because those issues are unaffected by the decision to remand for a new trial and the resolution of the directed verdict and JNOV issues would serve the interests of judicial economy by limiting the new trial to only the surviving claims and parties. Additionally, the Panel's Opinion, while noting that Respondent has acknowledged that no claim against Appellant Synergetic was ever submitted to the jury, does not note that the new trial is limited to the claims as they were submitted to the jury. It is Appellants' understanding that any claim

as to Synergetic has been abandoned by Respondent and that Synergetic is *not* a party to the new trial. If this understanding is not correct, Appellants ask that this Court also clarify its ruling as to Synergetic. Therefore, this Court should grant rehearing and/or issue a new opinion which addresses and resolves these additional issues.

STATEMENT OF THE CASE AND THE FACTS

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

ARGUMENT

- I. The Panel's Opinion misapprehended and misapplied the rule that an appellate court should refrain from addressing additional issues where its determination of a prior issue is dispositive of the appeal because Appellants' directed verdict/JNOV issues were not disposed of through the grant of a new trial.

After correctly holding that the erroneous admission of the temporary injunction order required a new trial, the Panel's Opinion refrained from addressing either Appellants' other new trial arguments or Appellants' directed verdict and JNOV arguments. In refraining from addressing these issues, the Panel's Opinion cited Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) for the rule that appellate courts need not address remaining issues when its determination of a prior issue is dispositive of the appeal. Op. No. 4997 at p. 14. This restraint was proper as to Appellants' other new trial arguments because a new trial had already been ordered. However, the granting of a new trial was not dispositive of Appellants' directed verdict and JNOV arguments. Rather, the directed verdict and JNOV argument were ripe for resolution as rulings on these issues would serve only to

facilitate a new trial by limiting the new trial to only those claims which properly survived directed verdict or JNOV at the first trial.

Unlike other cases where South Carolina's Appellate Courts have refrained from ruling on additional grounds where the determination of a prior issue effectively resolved the appeal, in this case there are two separate categories of issues: (1) new trial issues; and (2) directed verdict/JNOV issues. The resolution of the former category does not also resolve the latter. For example, in the Futch case, a new trial was not at issue. Rather, the Supreme Court reversed the Court of Appeals' ruling of a directed verdict issue as well as a rule adopted by the Court of Appeals regarding forfeiture of compensation in breach of duty of loyalty cases. Futch, 335 S.C. at 613, 518 S.E.2d at 598. Other recent applications of the Futch rule are also limited to situations where the appellate court's ruling is dispositive of *the entire appeal*. See Platt v. CSX Transportation, Inc., 388 S.C. 441, 697 S.E.2d 575 (2010) (affirming the Court of Appeals' ruling that petitioner's claim was barred under the public duty rule, and then vacating the remainder of the Court of Appeals opinion addressing whether petitioner's claims were preempted and whether petitioner established proximate cause); Widdiecombe v. Tucker-Cales, 375 S.C. 427, 653 S.E.2d 276 (2007) (vacating the Court of Appeals' ruling that the doctrine of unclean hands provided an additional basis for the family court's exercise of jurisdiction, but affirming the remainder of the opinion which found that jurisdiction was otherwise proper); Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 596 S.E.2d 42 (2004) (determining that the violation of the applicable standard of care was not established at trial and vacating the Court of Appeals opinion as to the additional issues of duty and proximate cause).

It is entirely appropriate for this Court to resolve JNOV issues simultaneously with its decision to remand for a new trial based on evidentiary errors. The case of Whaley v. CSX Transportation, Inc., 362 S.C. 456, 609 S.E.2d 286 (2005) illustrates the propriety of such review. In Whaley, the plaintiff sued the railroad and asserted claims for violating the Federal Employer's Liability Act (FELA) and the Locomotive Inspection Act (LIA). Id. at 467, 609 S.E.2d at 291. The South Carolina Supreme Court ordered a new trial be held based on errors in the admission of similar accidents, transactions, or happenings evidence. Id. at 482-83, 609 S.E.2d at 300. Despite the fact that a new trial was ordered based on this evidentiary error, the Court also held that the railroad should have been granted JNOV on the LIA claim due to the fact that the plaintiff failed to present sufficient evidence as to that claim at the original trial. Id. at 480-81, 609 S.E.2d at 398-99. Thus, the re-trial of the Whaley case was limited to only the FELA claim. Id. at 484, 609 S.E.2d at 301; see also Wachovia Bank, N.A. v. Beane, 397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012) (granting a new trial based upon an excessive verdict while also holding that JNOV should have been granted to Wachovia to limit the defendant's setoff counterclaim, thus limiting the nature of the new trial). This is precisely the situation facing this Court. As in Whaley, despite the clear need for a new trial based on the evidentiary error, this Court should address the directed verdict/JNOV issues, and in doing so limit the new trial to only the viable claims.

While it was unnecessary for the Panel's Opinion to address Appellants' numerous other grounds for a new trial once it had decided that the admission of the

temporary restraining order warranted a new trial¹, and unnecessary for the Panel to address the election of remedies argument, the Panel's ruling *was not dispositive* as to the directed verdict/JNOV issues. Rather than being an unnecessary exercise of judicial power, resolution of the directed verdict/JNOV issues would actually serve the interests of justice by limiting the new trial to only those issues and claims which properly survived JNOV at the first trial. Therefore, this Court should grant rehearing and/or issue a new opinion which addresses the directed verdict/JNOV issues.

II. Respondent has abandoned any claim it asserted against Synergetic and Synergetic is not a party to the new trial ordered by this Court.

In its Opinion, the Panel specifically noted that "Allegro acknowledges no claims against Synergetic, Inc. were submitted to the jury." Op. No. 4997 at p. 5 n.2. This fact is established by the Verdict Form itself as well as Respondent's express acknowledgment in its return to Appellants' post trial motions. (Verdict Form; Allegro's Return to Motion for Election of Remedies, JNOV, New Trial and New Trial Nisi Remittitur p. 2; R. 44; 762). Thus, Respondent abandoned any claim it had against Synergetic at the original trial.² It is Appellants' understanding that the new trial ordered by this Court is limited to

¹ Appellants note that the Panel's Opinion also addressed the admission of Respondent's "expert" report, holding that its admission was in error based on the inclusion of the temporary injunction order in the report. Op. No. 4997 at p. 13. The Opinion, however, also finds that the inclusion of impermissible hearsay in the report did not constitute reversible error. *Id.* To the extent this Court is inclined to grant rehearing of this matter, Appellants request reconsideration of this conclusion and refers the Court to their prior briefing on this issue.

² Respondent's abandonment of any claim against Synergetic is also evidenced by its actions with regard to the Transcripts of Judgment it caused to be filed with the Clerk of Court. Specifically, on May 31, 2006, a Transcript of Judgment was filed which erroneously stated that a judgment in the amount of \$2,010,000 had been entered as to each of the Appellants, including Synergetic. (Transcript of Judgment dated 5/31/06; R. 461). After this error was brought to their attention, on June 26, 2008, Respondents caused a Revised Transcript of Judgment to be entered which corrected the amount of the

the claims Respondent pursued at trial, and that because the claim against Synergetic was abandoned, Synergetic is not a party to the new trial. See Westbrook v. Hutchison, 195 S.C. 101, 104, 10 S.E.2d 145, 146 (1940) (noting that where claim for punitive damages was abandoned, a subsequent new trial of the case was as to actual damages only). If Appellants' understanding is incorrect, Petitioners ask that this Court grant rehearing to address and clarify this issue.

III. The Panel's Opinion should be revised to find that Appellants are entitled to directed verdict and/or JNOV as to the claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation.

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.

A. 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. (Tr. pp. 377-78, 507-12; 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. (Tr. pp. 377-78, 507-12; R. 341-342, 401-411). To establish a claim for civil

judgment *and which specifically withdrew any reference to Synergetic*. (Revised Transcript of Judgment filed 6/26/08; R. 505).

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.

1. Appellant Corbin was entitled to directed verdict and JNOV on the civil conspiracy claim because there was no evidence whatsoever 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. The second element of civil conspiracy requires proof that the defendant acted "for the purpose of injuring the plaintiff." LaMotte, at 69, 370 S.E.2d at 713. While considering Appellants' motion for directed verdict on this point, the Trial Court incorrectly interpreted the second element of this claim. (Tr. pp. 507-10; 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." (Tr. p. 508; R. 407). The Trial Court reiterated this incorrect view saying: "it is not what you intend, it is what actually results." (Tr. p. 510; R. 409). 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) (holding that the "essential consideration" in a civil conspiracy claim is whether the primary purpose or object of the combination is to injure

the plaintiff, and upholding summary judgment as to civil conspiracy because there was no evidence of any “wrongful intent” on the part of the defendants); 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).

Corbin was entitled to a directed verdict and JNOV because there was no evidence that he acted with any intent to harm Allegro. 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. (Tr. p. 474; 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. (Tr. pp. 239-40, 457, 476; Letter from Corbin to Scully dated 3/27/03; 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. (Tr. p. 475; 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.

(Letter from Corbin to Scully dated 3/27/03; R. 578) (emphasis added). Corbin’s concern was what was best for Allegro. There was no evidence at trial refuting this. Therefore, because there was no evidence of any intent by Corbin to harm Allegro, the Trial Court erred by failing to grant him a directed verdict or JNOV as to civil conspiracy.

In its appellate brief, Respondent attempts to redefine the elements of civil conspiracy to remove the key element of individual intent. Specifically, while Respondent accurately asserts there has been no appeal on this ground as to Appellants 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 is unnecessary to be liable for civil conspiracy. (Respondent’s Final Brief at p. 5). 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,” that maxim presupposes and requires that the joint actors all share the same intent and are therefore responsible for each others actions: The intent of one, however, is not the intent of all, and intent must be specifically established as to each individual defendant.

“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 in order for Corbin to be liable for civil conspiracy. 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); 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 Respondent. 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. (Tr. pp. 239-40, 457, 474-76; Letter from Corbin to Scully dated 3/27/03; R. 217-218, 370, 383-385; 578). Respondent has lost sight of a key fact in this case. The Plaintiff in this action 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. Respondent relies on testimony from Corbin wherein he stated that he did not talk with Ms. McCarthy about Scully’s interest in buying Allegro as evidence of Corbin’s intent to harm. (Tr. pp. 370-71; R. 334-335). This testimony provides no evidence of any intent by Corbin to harm anyone. Moreover, it only goes to Ms. McCarthy, not Allegro.

Respondent has also asserted that the jury was free to reject Corbin's testimony that he did not intend to harm Allegro. Again, this is incorrect. While a jury is not required to accept uncontradicted witness testimony, one 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.

2. 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 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. (Tr. pp. 295-99; 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.³ 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 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.

B. Appellant Scully is entitled to directed verdict/JNOV on the contract claims because Respondent failed to establish the existence of any contract or how such contract was breached.

Respondent’s claims for breach of contract and breach of contract accompanied by a fraudulent act were asserted only against Appellant Scully. In order to establish a claim for breach of contract, the plaintiff must prove: (1) a binding contract entered into by the parties; (2) breach or unjustified failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962). Additionally, the existence of a contract, and of a breach thereof, are essential elements of a claim for breach of contract accompanied by a fraudulent act. Harper v. Ethridge, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (1986). Here, there was no evidence of any contract between Allegro and Scully. Thus, there was also no evidence establishing the terms of this alleged contract, and no evidence of a breach of the contract. Therefore, the Trial Court erred by failing to grant

³ Additionally, the damages awarded by the jury were exactly the same for each cause of action. (Verdict Form; R. 44).

Appellant Scully directed verdict and JNOV as to these claims. (Tr. pp. 377-78, 507-12; R. 341-342, 406-411).

The evidence at trial established that there was no employment contract between Allegro and Scully and that Allegro did not have an employee handbook that applied to Allegro employees. (Tr. pp. 158, 441-42; R. 169, 361-362). Additionally, the testimony at trial established that there was not a non-compete agreement between Allegro and Scully. (Tr. pp. 158, 441-42; R. 169, 361-262). The only “contract” ever mentioned at the trial involving Scully was a Partnership/Buy-Sell Agreement. (Tr. pp. 88, 441-42; R. 116, 361-362) Allegro, however, was not a party to this partnership agreement – it was between only McCarthy and Scully. (Tr. p. 441; R. 361).⁴

Respondent has asserted that the Trial Court determined there was an “oral contract” and incorrectly contends that this ruling has not been challenged in this appeal. At trial, 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.” (Tr. pp. 510, 570; R. 409, 434). Additionally, Appellants’ Brief 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.” See Appellants’ Final Brief at p. 46 (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-

⁴ Additionally, there was no evidence at trial that Scully breached the Partnership/Buy-Sell Agreement.

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. (Tr. pp. 377-78, 510; Motion to Alter or Amend the Order Denying Defendants' Post-Trial Motions at p. 6; R. 341-342, 409; 802). 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.

Therefore, Respondent failed to establish the existence of a contract, and, through this failure, also failed to establish any breach of a contract. These failures were fatal for 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.

C. Appellant Scully is entitled to directed verdict/JNOV on the fraud and negligent misrepresentation claims because there was no evidence of any false representation by Scully.

Respondent's claims for fraud and negligent misrepresentation were also asserted only against Appellant Scully. The first and second elements of fraud are: (1) a representation; and (2) its falsity. Kahn Construction Co. v. S.C. Nat. Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980). The first element of negligent misrepresentation is: (1) a false representation made by the defendant to the plaintiff. Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997). Respondent failed to offer evidence of any false representation made by Scully. Therefore, the Trial Court erred by failing to grant Scully

directed verdict and JNOV as to these claims. (Tr. pp. 377-78, 507-12; R. 341-342, 406-411).

McCarthy 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. (Tr. pp. 101-02; R. 129-130). Simply put, according to McCarthy's own testimony, Scully never lied to 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. (Tr. pp. 233-34; 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 PEO. (Tr. pp. 233-34; R. 211-212). Therefore, Respondent failed to offer any evidence as to the key element of a false representation made by Scully.

Respondent contends that the basis of the negligent misrepresentation and fraud claims against Appellant Scully is Scully's "silence" regarding the fact that 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. 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. (Tr. pp. 101-02; R. 129-130). Thus, there is no basis whatsoever for the contention that Scully was "silent" on these points.

Because Respondent failed to establish any false representation by Scully, the claims for fraud and negligent misrepresentation both fail, and Scully should have been granted directed verdict and JNOV on these issues. Therefore, this Court should grant rehearing or issue a new opinion correcting this error allowing the new trial of this matter to proceed without these baseless claims.

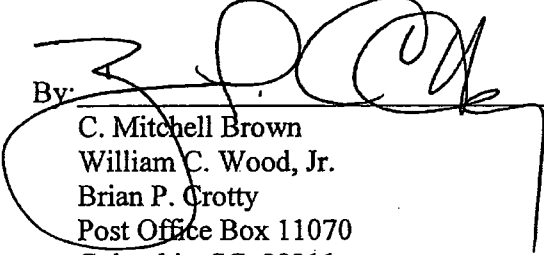
CONCLUSION

For the foregoing reasons, while this Court was correct in ordering a new trial based on the erroneous admission of the temporary restraining order, and correct in refraining from addressing the other *new trial* grounds asserted by Appellants and the election of remedies argument, this Court should grant a rehearing in this case and/or issue a new opinion addressing the directed verdict/JNOV issues which were not disposed of through the grant of a new trial, and resolve such issues as set forth herein.

SIGNATURE PAGE ATTACHED

Respectfully submitted,

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Columbia, South Carolina

August 20, 2012

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

Allegro, Inc., ...Respondent,

v.

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

PETITION FOR REHEARING

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Pursuant to Rules 221 and 224, SCACR, Respondent respectfully submits this Petition for Rehearing. For the reasons set forth below, Respondent submits this Court should grant rehearing and issue an amended opinion that affirms the appealed orders and judgment.

ARGUMENTS FOR REHEARING

This Court reversed the appealed orders and judgment based upon its conclusion that “the trial court erred in admitting the temporary injunction order into evidence.” (Slip Op. at 9). It is uncontested that the appellants’ objection did not have any specifically stated grounds and, in particular, that the appellants did not raise the grounds relied upon by this Court to reverse. “A general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for review.” *State v. Nelson*, 501 S.E.2d 716, 724 n.1 (S.C. 1998). Moreover, it is axiomatic that South Carolina does not have a plain error rule – “a party must have a contemporaneous *and specific* objection to preserve an issue for appellate review.” *State v. Sheppard*, 706 S.E.2d 16, 19 (S.C. 2011) (emphasis added); *accord Elam v. South Carolina Dep’t of Transp.*, 602 S.E.2d 772, 780 (S.C. 2004). This Court, however, held that the general objection in this case was sufficient because: “when the evidence is inherently prejudicial, the grounds for the objection are patent, and the issue will be found preserved.” (Slip. Op. at 9). In so ruling, this Court relied upon the Supreme Court’s opinion in *Dunn v. Charleston Coca-Cola Bottling Co.*, 426 S.E.2d 756 (S.C. 1993).¹

For the reasons set forth below, it is respectfully submitted that this Court has misread and misapplied the Supreme Court’s ruling in *Dunn*, and that ruling does not apply here. In any

¹ In two footnotes, this Court commented on the propriety of a trial judge addressing issues with the foreperson only rather than the entire jury. (Slip Op. at nn. 6&9). It does not appear this Court based its opinion on this matter. Assuming it did, and assuming there was any error by the trial court, this issue is not preserved for appeal. The appellants never raised this issue to the trial court – the trial court did not rule on this issue – the appellants did not seek a ruling by reconsideration. More importantly, the appellants never raised this issue to this Court, so it cannot be the basis for a reversal. “[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” *Herron v. Century BMW*, 719 S.E.2d 640, 644 (S.C. 2011)

event, it is further submitted that the law of the case doctrine precludes this Court's ruling, even if the Supreme Court's ruling in *Dunn* might otherwise be applicable here. Accordingly, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that affirms the appealed orders and judgment.²

I. The Supreme Court's ruling in *Dunn* does not apply here and does not remove this case from the rule that a general objection preserves no issue for appeal.

In *Dunn*, the trial court granted the plaintiff's request for a *voir dire* inquiry of the jury panel that mentioned the possible existence of liability insurance in an automobile wreck case. 426 S.E.2d at 757. The defendant requested that the *voir dire* question not be asked. The Supreme Court found this request was a sufficient objection to preserve the issue for appeal under the following analysis:

1. First, the requested *voir dire* was "contrary to a *legion of opinions* issued by the Supreme Court of South Carolina." *Id.* at 757 (emphasis added).
2. Second, as to the defendant's failure to object on specifically stated grounds, the Supreme Court held: "The grounds of the objection were patent. The law forbids it." *Id.* at 758. The grounds were patent, because a "legion of opinions" forbid it.
3. Third, the *voir dire* question "*itself* gave jurors reason to believe that a verdict in this case would be paid by an insurance carrier," in violation of the "basic principle of law" set forth in a legion of Supreme Court cases that the existence of liability insurance "shall not be made known to the jury." *Id.* at 758, 757 (emphasis added).

² The arguments made herein also apply to the issue of the injunction order being in the later admitted expert report. (See Slip Op. at 11-13). Any objection to the admission of the injunction order as part of the expert report fails for the same reasons noted herein. In addition, since the injunction order was already admitted into evidence, its inclusion in the subsequently admitted expert's is not a basis for reversal. "It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." *State v. McFarlane*, 306 S.E.2d 611, 613 (S.C. 1983).

In relying on *Dunn*, this Court held that the unspoken grounds for an objection are patent (and therefore need not be stated) “when the evidence is inherently prejudicial.” (Slip Op. at 9). This was not the holding or reasoning of the Supreme Court in *Dunn*. Rather, the grounds were “patent” because of the “legion of opinions” from the Supreme Court on the matter. There is no such “legion” here.

Moreover, the grounds for the objection in *Dunn* were “patent,” because the mere mention of liability insurance was prohibited by the “legion of opinions.” Here, the mere mention of the injunction order would not give rise to reversible error. The error and ground is not “patent” because, as noted by this Court, the prejudice if any derived from the reading of the injunction order. In other words, any error (and any ground for objection) was “latent,” because it required a reading of the injunction order. It was thus incumbent upon the appellants to specifically raise the latent danger of prejudice arising from a reading of the injunction order.

In addition, any reversible error in the admission of evidence is, by definition, the admission of evidence that is “inherently prejudicial.” Under this Court’s analysis, any evidence that is “inherently prejudicial” need only be challenged by a general objection without any specifically stated grounds to preserve the issue for appeal. Thus, this Court has created a sweeping “plain error” rule for objecting to the admission of evidence that is contrary to the Supreme Court’s long standing precedents that South Carolina does not have a “plain error” rule and that general objections preserve no issue for appeal.

Finally, and perhaps most importantly, research reveals no case extending *Dunn* beyond its particular facts. Nothing in the *Dunn* opinion indicated that the Supreme Court intended the rule in *Dunn* to extend beyond the axiomatic rule against permitting the jury to know of or consider the existence of liability insurance. After *Dunn*, the Supreme Court has steadfastly

applied the rules on error preservation and refused to adopt a “plain error” rule in South Carolina. If the rationale in *Dunn* is to extend beyond the particular facts of that case, that extension must come from the Supreme Court. Until then, this Court is constitutionally bound to follow the Supreme Court’s precedent that South Carolina does not have a “plain error” rule and that general objections preserve no issue for appeal. S.C. Const. art. V, § 9 (“The decisions of the Supreme Court shall bind the Court of Appeals as precedents.”).

II. Assuming the Supreme Court’s ruling in *Dunn* might otherwise be applicable here, reversal is precluded by the law of the case doctrine.

It is axiomatic that an unchallenged ruling by a trial court, “right or wrong, is the law of this case and *requires affirmance*.” *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970) (emphasis added), *accord*, *Erickson v. Jones Street Publishers, L.L.C.*, 629 S.E.2d 653, 670 (S.C. 2006). (“unappealed ruling, right or wrong, is the law of the case and requires affirmance”) (citations omitted). Here, the trial court made the following separate and independent rulings:

1. The appellants’ objection at trial did not set forth any specific ground and, therefore, there was no ground for a new trial based on admitting the order into evidence. (R. 16; 33-34).
2. The injunction was properly admitted into evidence “to show what was in the record and that an injunction had been issued.” (R. 16; 33-34).
3. The appellants did not object to testimony about injunction order prior to its introduction into evidence and, therefore, they could not seek a new trial based on the admission of that order into evidence. (R. 16; 33-34).

On appeal, the appellants did not challenge any of these rulings. (App. Br., *passim*). Thus, each of these rulings, “right or wrong, is the law of this case and *requires affirmance*.” *Buckner, supra*

(emphasis added). The appellants attempted to argue against these rulings in their reply brief, but this came too late to present any issue for appellate review: "It is axiomatic that an issue cannot be raised for the first time in a reply brief." *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011), *aff'g* 671 S.E.2d 87 (S.C. App. 2008). Thus, were it to be assumed that the Supreme Court's ruling in *Dunn* is applicable here, this Court must nevertheless affirm under the law of the case doctrine. Nothing in *Dunn* indicates the Supreme Court intended to obviate the need for an appellant to challenge all grounds for a trial court's rulings.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that affirms the appealed orders and judgment.

Respectfully Submitted,



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August 20, 2012
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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

SEP 20 2012

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, Yvonne Yarborough, and Synergetic, Inc. (collectively "Appellants") hereby submit this Return to Allegro's Petition for Rehearing of Opinion No. 4997 issued July 11, 2012. As set forth fully below, the Panel should deny the petition for rehearing for two primary reasons. First, the Panel correctly applied the rules of issue preservation to this case. Second, Allegro improperly uses the petition for rehearing to re-argue the same grounds previously considered and rejected by the Panel.

I. The Panel correctly applied the rules of issue preservation to this case.

In this petition for rehearing, Allegro contends the Panel misapplied Dunn Charleston Coca-Cola Bottling Co., 311 S.C. 43, 43-47, 426 S.E.2d 756, 757-58 (1993), to address the admission of the preliminary injunction order. This argument is

without merit. The Panel merely applies settled principles related to issue preservation in this matter. Thus, the petition should be denied.

First, Allegro claims Dunn is inapplicable because the Dunn rule applies only because a “legion” of opinions has recognized that a jury cannot consider insurance coverage. {Petition p. 4}. Specifically, Allegro alleges that no “legion” exists in this matter that would allow the grounds for perseveration to be considered patent as in Dunn. The Dunn case does not turn on exactly how many cases exist stating the admission of certain evidence is error. A single opinion from this Court or from the Supreme Court clearly stating that an admission of certain evidence is error is no less the law than several opinions stating likewise. Allegro’s claim ignores the settled rule that preliminary injunctions are inherently prejudicial for a jury to consider because the order is made prior to any determination of the merits of the claim. The Supreme Court has made clear that “[a] temporary injunction is made without prejudice to the rights of either party pending a hearing on the merits, and when other issues are brought to trial, they are determined without reference to the temporary injunction.” Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (emphasis added); see also Alston v. Limehouse, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901). Therefore, the inherent prejudice resulting from admission of a preliminary injunction order has been recognized by our courts. Just as in Dunn, the objectionable nature of a Preliminary Injunction Order at a subsequent trial on the merits was patently obvious. Accordingly, the Panel properly applied long-standing precedent to find that Appellants’ general objection was sufficient to preserve the issue for review. The Panel should deny the petition.

Second, Allegro claims that the prejudice from the admission of the preliminary injunction order could not be patent because the jury had to read the order. {Petition p. 4}.¹ This argument is nonsensical and manifestly without merit. Allegro advocates for a rule that an appellate court should assume a jury does not read, review, or consider the evidence presented at trial during its deliberations. This is not, and should not be, the law of this State. The trial court admitted the preliminary injunction order into evidence and allowed the jury to consider the order during deliberations. Appellants objected to the preliminary injunction order being allowed into evidence. The trial court permitted it nonetheless, despite clear law to the contrary. That error was patent and prejudiced Appellants. The Panel should reject this argument and deny the petition for rehearing.

Third, Allegro alleges Dunn is limited to the facts of that case, arguing nothing in the opinion indicated the Supreme Court intended for Dunn to apply to other matters. {Petition p. 4-5}. In essence, Allegro contends that all Supreme Court opinions are limited to the facts of that case unless the court affirmatively states otherwise. This argument misapprehends the effect of Supreme Court precedent. Supreme Court precedent is not limited to the specific facts of the case unless the opinion says otherwise. Rather, Supreme Court opinions are limited to the facts of that case only when the Supreme Court specifically states the opinion is so limited. See, e.g., Johnson v. Rent-A-Center, Inc., ___ S.C. ___, 730 S.E.2d 857 (2012) (“We stress our

¹ Additionally, Allegro claims “the mere mention of the injunction order would not give rise to reversible error.” {Petition p. 4 (emphasis added)}. This misconstrues the facts of this matter. The trial court did not merely “mention” the order to the jury. Rather, the trial court admitted the order into evidence and allowed the jury to consider it during deliberations. Such error is patently and inherently prejudicial to Appellants.

opinion is a narrow one, limited to the facts of this case”); Michau v. Georgetown County ex rel. S.C. Counties Workers Compensation Trust, 396 S.C. 589, 723 S.E.2d 805 (2012) (“We stress, however, that our opinion is a narrow one limited to . . . the facts of this case”); Nationwide Mut. Ins. Co. v. Bair, 257 S.C. 551, 186 S.E.2d 410 (1972) (“We . . . limit our holding to the terms of the contract now before us and the facts of this case”). The Supreme Court did not limit Dunn in this manner. Thus, the Panel correctly applied the controlling Supreme Court precedent of Dunn. Allegro’s argument is without merit. This Panel should deny the petition for rehearing.

Lastly, Allegro claims the Panel adopted the “plain error rule” by applying Dunn to this matter. That is simply not the case. The Panel did not adopt any new preservation rules in the opinion. Nor did the Panel alter any existing preservation rules. Instead, the Panel merely applied a well-settled and controlling rule created by our Supreme Court.² Contrary to Allegro’s assertions, the Panel operated within its constitutional confines and applied the existing Supreme Court precedent in Dunn to this matter. The Panel should deny the petition for rehearing and allow its opinion to stand as written.

II. The Panel previously considered and rejected Allegro’s “law of the case” argument.

Allegro’s second ground for rehearing is improper and does not support a grant of rehearing. In the petition for rehearing, Allegro merely repeats the same three “law of the case” arguments previously presented in its Respondent’s Brief. Compare

² Further, Rule 103(a)(1), SCRE, states that a specific grounds for an objection to the admission of evidence need not be set forth where the grounds are “apparent from the context.” Such is true here. The submission of the preliminary injunction order with all of its findings is erroneous and prejudicial, and such is plain and apparent.

Petition for Rehearing p. 5 and Respondent's Brief p. 9-10 (setting forth the same three law of case arguments presented to the Panel in briefing). The Panel already reviewed, weighed the merits of, and rejected this argument in the opinion. Accordingly, this ground cannot constitute a basis for rehearing because it was previously presented to this Court. The Supreme Court has held that a petition for rehearing cannot be used to present previously made appellate arguments. See Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (holding it is not "the purpose of a petition for rehearing to have the case tried in the appellate court a second time"). The Panel should, therefore, deny the petition.

Even if this argument were properly in a petition for rehearing, the Panel should still deny it on the merits. Appellants properly preserved their arguments related to the admissibility of the preliminary injunction order. In the petition, Allegro again contends that the issues raised by Appellants were barred by the "law of the case" doctrine. Specifically, Allegro uses isolated statements from the trial court's order denying Appellants' post trial motions in a hyper-technical fashion to claim these statements are now the "law of the case." However, Allegro again misconstrues the "law of the case" doctrine and fails to recognize the fact that all of the issues raised in this appeal were properly raised before the trial court at trial as well as in the two post-trial motions. Thus, the issue was 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 Appellants took all necessary steps to preserve the issues raised in this appeal and the preliminary injunction order. The verdict in this case was rendered on May 5, 2006, and a Form 4 Order was entered on that same day. Appellants then timely filed post-trial motions for election of remedies, JNOV, new trial, and new trial nisi remittitur. These post-trial motions raised all of the issues contained in this appeal.

Further, Appellants argued the issues contained in this appeal at the hearing on the post-trial motions. In the order denying Appellants’ post-trial motions, the trial court ruled on these issues by making specific findings regarding issue preservation. In order to challenge these preservation rulings, Appellants filed a second post-trial motion requesting that the trial court address and correct those rulings.³ The trial court held a second post-trial hearing to further address these issues. Just as before, the issues that are the subject of this appeal were raised and argued to the trial court. Again, the trial court issued an order ruling on these issues and denying Appellants’ second post-trial motion.

The initial order ruling on the preliminary injunction order and the orders denying the post-trial motions have been appealed in their entirety. The preservation

³ While the second post-trial motion was pending, Appellants filed their Notice of Appeal appealing the verdict, the judgment entered thereon, and the 2008 Order. On September 29, 2008, this Court granted Appellants’ Motion for a Limited Remand so that the second motion could be considered by the trial court.

issues raised by the trial court are not the law of the case. Rather, those issues are the subject matter of this appeal. 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. 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).

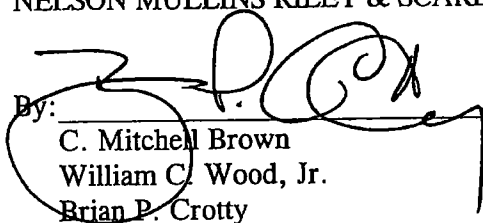
In the petition, Allegro claims that three statements from the trial court's orders are the law of the case because the specific sentence is not expressly challenged by name in Appellants' brief. Issue preservation does not require that each phrase or sentence used in the order be specifically mentioned. Rather, the 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). Appellants consistently and repeatedly challenged the trial court's rulings at issue in this appeal—the issues in this appeal were raised at trial, were raised during the extended post-trial phase of this matter, were ruled upon by the trial court, and became the subject of this appeal. Thus, this issue was properly preserved for review. The Panel should deny the petition for rehearing.

Conclusion

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

SIGNATURE PAGE ATTACHED

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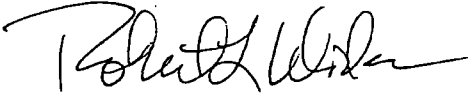
Re: Allegro, Inc. v. Emmett J. Scully, et al.
Opinion No. 4997
Case No. 04-CP-40-1915
Case Tracking No. 200899926

Dear Madam Clerk:

Upon review of the Appellant's Rehearing Petition, and pursuant to Rule 240(e), SCACR, Respondent will not be filing a Return unless requested by this Court.

Respectfully yours,

McNAIR LAW FIRM, P.A.



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RLW/as
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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

Allegro, Inc., ...Respondent,

v.

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

REPLY TO RETURN TO PETITION FOR REHEARING

I. The Supreme Court's ruling in *Dunn* does not apply here and does not remove this case from the rule that a general objection preserves no issue for appeal.

As set forth in the Petition for Rehearing, the Respondent respectfully submits that this Court has misread and misapplied the Supreme Court's ruling in *Dunn v. Charleston Coca-Cola Bottling Co.*, 426 S.E.2d 756 (S.C. 1993), and that ruling does not apply here. The Appellants respond with five arguments – none have merit.

First, the Appellants dismiss the Supreme Court's reliance on a "legion" of cases in *Dunn*, contending that a single opinion from either appellate court is sufficient to trigger the "inherent prejudice" exception created by this Court in this case to excuse the failure to present specific grounds in support of an objection. This argument highlights the error in this Court's ruling – according to the Appellants, an objecting party need not state any grounds for an

objection if there is a single case stating that the challenged evidence is improper. In other words, the only time an objecting party must state specific grounds is when there is no case law on the admissibility of the evidence. This is not and cannot be the law unless the Supreme Court announces an abandonment of the long standing error preservation rules in this state. The Supreme Court has not done so and, therefore, it is respectfully submitted that this Court must apply those rules to this case rather than create an exception that has no basis in the law.¹

Second, the Appellants mis-state the Respondent's argument on the issue of "latent v. patent" errors, contending the Respondent has argued that "the admission of the preliminary injunction could not be patent because the jury had to read the order." (Return at 3). The Respondent has never made this argument. Rather, since any prejudice from the injunction order necessarily became apparent only upon a reading of the injunction order, it was incumbent upon the Appellants to point this out to the trial judge, *i.e.*, the question of whether an error was latent or patent is viewed from the perspective of the trial judge. Here, the Appellants never argued to the trial judge that there was danger the jury would give undue weight to the factual findings in the injunction order – indeed, the Appellants never told the trial judge that the injunction order contained factual findings. Thus, when the Appellants made their admittedly general objection with no specifically stated grounds, in violation of the longstanding rules of law, nothing in that objection or the very nature of the challenged evidence itself alerted the trial court to any "patent" ground for the objection or any "inherent" prejudice.

¹ The Appellants complain that the Respondent advocates a rule that general objections are insufficient unless there is a certain number of existing cases making the evidence inadmissible. The Respondent, however, simply and only relies upon and quotes the exact language used by the Supreme Court in *Dunn*, *i.e.*, that the general objection was sufficient because there was a "legion" of cases of making it clear that any mention of liability insurance was reversible error. It was this "legion" of cases that make the grounds for the objection in *Dunn* patent to the trial judge and, therefore, there was no need to state specific grounds. There is no such "legion" of cases on the issue presented here and, therefore, nothing made the grounds of the objection to the trial judge in this case. Thus, the Appellants were required to state specific grounds in support of their objection, which they manifestly and admittedly failed to do in this case.

Third, the Appellants argue that *Dunn* rule is not limited to any particular circumstance, because the Supreme Court did not expressly limit it to the admission of evidence regarding the existence of liability insurance. The Appellants, however, make no response to the Respondent's arguments that, since the ruling in *Dunn*, the Supreme Court has continued to apply the general rules on the sufficiency of objections and steadfastly refused to adopt a "plain error" rule in South Carolina. If the Appellants' reading of *Dunn* is correct, then the Supreme Court would have allowed general objections to preserve issues for appeal if there was a single case holding that the evidence was inadmissible. The Supreme Court has done the exact opposite.

Fourth, the Appellants contend that this Court simply applied *Dunn* here. As set forth above and in the Respondent's Petition for Rehearing, it is respectfully submitted that this Court has gone beyond *Dunn* and created a sweeping exception that swallows the rule requiring specific grounds in support of an objection. To be reversible error, the error must be inherently prejudicial. Thus, under this Court's ruling, if the admission of any evidence is prejudicial and reversible, a general objection is sufficient and the trial court will be reversed on appeal based on appellate arguments that were never made to the trial court. In other words, this Court has created a "plain error" rule for objections to evidence.

Finally, in a footnote, the Appellants cite Rule 103(a)(1), SCRE, for the proposition that objections to evidence need not be state specific grounds if the grounds are "apparent from the context," and they contend the admission of the injunction order meets this rule because the error and prejudice in admitting the injunction order into evidence is "plain and apparent." (Return at 4, n.2). The Appellants, however, never made this argument to the trial court or to this Court. Moreover, the Appellants have mis-stated the rule. Under Rule 103(a)(1), SCRE, the admission of evidence is not error unless there is an objection "stating the specific grounds of objection."

The rule creates an exception to this requirement and provides there need not be any specifically stated grounds if the grounds are “apparent from the context.” Here, there is no “context” to support a failure to state specific grounds, *e.g.*, there was no discussion of the injunction order or its contents – there was no discussion of any danger that the jury would rule based on the factual findings in the injunction order rather than the jury’s view of the evidence in the case – indeed, there was no discussion of anything. Thus, there was no “context” as envisioned by Rule 103(a)(1), SCRE.

II. Assuming the Supreme Court’s ruling in *Dunn* might otherwise be applicable here, reversal is precluded by the law of the case doctrine.

As set forth in the Petition for Rehearing, the Respondent respectfully submits that any assumed error in admitting the injunction order into evidence is not a basis for reversal due to the law of the case doctrine, even if this Court’s “inherently prejudicial” exception to the error preservation rules correctly states South Carolina law. The Appellants respond with several arguments – none have merit.

First, the Appellants contend these grounds are not proper rehearing grounds, because they merely repeat the arguments made in the Respondent’s brief. This argument has no merit. A petition for rehearing is limited to grounds previously raised to the court, because “[i]t is *axiomatic* that an issue cannot be raised for the first time on rehearing.” *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011) (emphasis added), *aff’d* 671 S.E.2d 87 (S.C. App. 2008); *accord Herron v. Century BMW*, 719 S.E.2d 640, 644 (S.C. 2011) (“... a party may not raise an issue for the first time in a petition for rehearing.”). Thus, contrary to the Appellants’ argument, a previously presented argument is the only proper ground for rehearing. Moreover, the SCACR requires any party intending to seek certiorari to first raise the issue to this Court in the initial proceedings, *i.e.*, the briefs, and then raise the issue again in a petition for rehearing. See Rule

242(d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”) (emphasis added). Thus, the Appellants’ argument is foreclosed by the specific provisions of the SCACR and axiomatic principles of appellate practice and procedure. Finally, to support their deviation from the SCACR and axiomatic principles of appellate law, the Appellants cite the Supreme Court’s decision in *Kennedy v. South Carolina Retirement Sys.*, 564 S.E.2d 322 (S.C. 2001). The Appellants simply misread *Kennedy* and quote it completely out of context.

In *Kennedy*, the Supreme Court denied a petition for rehearing because the asserted ground had not been previously presented to the Court and was presented for the first time in the rehearing petition. 564 S.E.2d at 322. Ignoring this holding, the Appellants here quote *Kennedy* out of context: “it is not ‘the purpose of a petition for rehearing to have the case tried in the appellate court a second time.’” (Return at 5). In *Kennedy*, the Supreme Court refused to consider arguments and evidence presented for the first time upon rehearing and held:

“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” Appellants had the opportunity to present their arguments and evidence when this case was originally heard by the trial court. Therefore, contrary to the dissent’s argument, this Court should not consider appellants’ previously unrepresented evidence when deciding whether to grant the petition for rehearing.

564 S.E.2d at 322 (emphasis added) (citations omitted). The underlined portion of the quote above is the part quoted by the Appellants here, but a cursory reading of the opinion demonstrates that the Supreme Court was refusing to retry the case on rehearing based on arguments and evidence that had not been presented previously. In short, the *Kennedy* opinion does not stand for the proposition advanced by the Appellants.

In their next argument, the Appellants argue extensively that they properly preserved their arguments in the trial court – they miss the point here. They did not challenge the trial court’s alternative rulings in their Brief of Appellant – they do not cite any portion of their Appellants’ Brief as having challenged the trial court’s alternative rulings. Therefore, those unchallenged rulings are the law of the case.

The Appellants also argue as follows: “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 [sic] at the outset of its analysis.” (Return at 7). The trial court, however, was not ruling the issues were not preserved for appellate review. Rather, the trial court correctly held that it could not grant a new trial based on the erroneous admission of evidence, when the new trial motion was based on grounds that were not timely raised during the trial. (R. 16; 33-34). This is a fundamental and axiomatic rule of law in South Carolina. *E.g., State v. Robinson*, 119 S.E.2d 671, 676 (S.C. 1961) (new trial not available for erroneous admission of evidence absent timely and proper objection to the evidence at trial), *overruled in part on other grounds, State v. Torrence*, 406 S.E.2d 315 (S.C. 1991). The Appellants apparently believe the trial court had to consider their new trial motion and grant it, despite the absence of an objection at trial, even though doing so would have been reversed on appeal under axiomatic principles of law. The Appellants cite no authority for this position, and none exists.

The Appellants also argue they were not required to expressly challenge the trial court’s alternative rulings in their Appellants’ Brief, because error preservation does not require them to specifically mention each phrase or sentence used in the order. (Return at 7). To support their astounding argument that they need not challenge a trial court’s rulings, they cite *Spence v. Wingate*, 674 S.E.2d 169 (S.C. 2009), but this opinion provides no support for their argument.

In *Spence*, the plaintiff sued for legal malpractice. The defendants contended that they owed no duty to the plaintiff, because there was no attorney-client relationship between the plaintiff and defendants. The plaintiff contended there was an ongoing duty owed by the defendants based on there having been a past attorney-client relationship between the plaintiff and defendants. The trial court agreed with the defendants and granted summary judgment to them, holding the defendants “owed no duty or obligation” to the plaintiff. At issue was whether the plaintiff’s argument was preserved for appeal despite not having made a 59(e) motion. The Supreme Court held there was no need to make a 59(e) motion, because “the order explicitly address[ed] [plaintiff’s] argument by ruling [the defendants] “owed no duty or obligation” to [the plaintiff].” 674 S.E.2d at 170. Thus, the issue was preserved for appeal. Nowhere in *Spence*, however, did the Supreme Court hold that an appellant need not challenge each alternative ruling by a trial court. Indeed, the *Spence* opinion has nothing to do with the law of the case doctrine.

The Appellants’ mistaken reliance on *Spence* is illustrative of a fundamental flaw in their analysis. Throughout their Return, they argue about error preservation. The law of the case doctrine, however, is a question of error presentation, not error preservation. An error can be fully preserved for appellate review, but if the appellant fails to make any arguments on appeal, the unchallenged (albeit preserved for appeal) issue and ruling is the law of the case and requires affirmance. Here, the Appellants never challenged the trial court’s rulings in their Brief of Appellant and, therefore, those unchallenged rulings are the law of this case and, right or wrong, require affirmance. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970); accord, *Erickson v. Jones Street Publishers, L.L.C.*, 629 S.E.2d 653, 670 (S.C. 2006).

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Petition for Rehearing, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that affirms the appealed orders and judgment.

Respectfully Submitted,



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October 10, 2012
Columbia, South Carolina



The South Carolina Court of Appeals

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October 29, 2012

Mr. Brian Patrick Crotty
PO Box 11070
Columbia SC 29211

Re: Allegro, Inc. v. Scully, Emmett
Appellate Case No. 2008-099926

Dear Counsel:

Enclosed is a copy of the order denying the Petition for Rehearing in the above case.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Charles Mitchell Brown
Amy Lohr Gaffney
Richard J. Morgan
Allen Mattison Bogan
Robert L. Widener
William C. Wood, Jr.

The South Carolina Court of Appeals

Allegro, Inc., Respondent,

v.

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

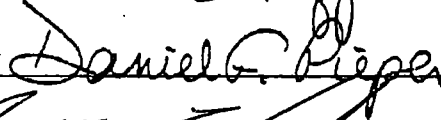
Appellate Case No. 2008-099926

ORDER

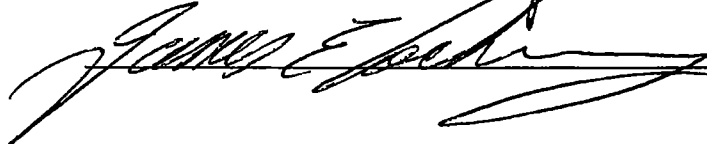
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Charles Mitchell Brown

Amy Lohr Gaffney

Brian Patrick Crotty

Richard J. Morgan

Allen Mattison Bogan

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William C. Wood, Jr.

FILED
29 Oct 2012



The South Carolina Court of Appeals

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The South Carolina Court of Appeals

Allegro, Inc., Respondent,

v.

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

Appellate Case No. 2008-099926

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Yaff

J.

Daniel G. Pieper

J.

James E. Leckey

J.

Columbia, South Carolina

cc:

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Amy Lohr Gaffney
Brian Patrick Crotty
Richard J. Morgan
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FILED

29 Oct, 2012

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DEC 27 2012

S.C. Supreme Court

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

PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242 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. 4997 (S.C. Ct. App. filed July 11, 2012) (Shearouse Adv. Sh. No. 23 at 76) {Appendix ("App.") p. 1004}. Petitioners agree the Court of Appeals correctly held that the Trial Court erred by admitting a temporary injunction order into evidence and that this error required a new trial. However, Petitioners petition this Court for a writ of certiorari so that this Court may review the Court of Appeals' refusal to address Petitioner' directed verdict and JNOV arguments, which were not resolved by the grant of a new trial. Resolution of these unresolved issues would then allow the new trial in this matter to proceed only as to the remaining parties and claims.

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a petition for rehearing was made and finally ruled upon by the Court of Appeals on October 29, 2012. {App. p. 1063}.

QUESTIONS PRESENTED FOR REVIEW

- I. Does the Court of Appeals' Opinion misinterpret and misapply the rule set forth in Futch v. McAllister Towing of Georgetown, Inc., that an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal, where the Court of Appeals' correct ruling that a new trial was warranted did not dispose of Petitioners' directed verdict and JNOV arguments?
- II. Did the Trial Court and the Court of Appeals err by failing to grant the Petitioners' motions for directed verdict and JNOV as to the claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation?

- A. Did the Trial Court and the Court of Appeals err in failing to grant Petitioner Corbin directed verdict and/or JNOV as to the civil conspiracy claim where there was no evidence at trial that Corbin possessed any intent to harm Allegro?
- B. Did the Trial Court and the Court of Appeals err in failing to grant all of the Petitioners directed verdict and/or JNOV as to the civil conspiracy claim where there was no evidence at trial that Allegro suffered "special damages" which went beyond the damages alleged as to the other causes of action?
- C. Did the Trial Court and the Court of Appeals err in failing to grant Petitioner Scully directed verdict and/or JNOV as to the claims for breach of contract and breach of contract accompanied by a fraudulent act where there was no evidence at trial establishing the existence of a contract between Scully and Allegro or how any such contract was breached by Scully?
- D. Did the Trial Court and the Court of Appeals err in failing to grant Petitioner Scully directed verdict and/or JNOV as to the claims for fraud and negligent misrepresentation where there was no evidence at trial of a false representation by Scully?

STATEMENT OF THE CASE

This case stems from a dispute between the two shareholders of Allegro, Inc. which ultimately resulted in the two shareholders parting ways, the formation of a competing company, and litigation. The Respondent, Allegro, Inc. ("Allegro"), is a Professional Employer Organization ("PEO") that was formed in the late 1990s by its initial owner Mary Etta McCarthy ("McCarthy") {App. 76; 117-118}. A PEO provides Human Resources services for companies that wish to out-source that function. {App. 118}. The Petitioners are Emmett J. Scully ("Scully"), Yvonne Yarborough ("Yarborough"), and George Corbin ("Corbin"). Scully joined Allegro in August of 1998 when he became its president and a member of its board of directors. {App. 123}. Yarborough was an employee of Allegro from 2000 until 2004. {App. 126, 317-318}.

Corbin is the Chief Financial Officer of Merritt Veterinary Supplies, Inc. ("Merritt"), which was a client of Allegro. {App.145, 336}. In 2004, after leaving Allegro, Scully formed a competing PEO named Synergetic, Inc.

The Complaint in this matter was filed on April 15, 2004, and an Amended Complaint was filed on May 18, 2005. {App. 55, 76}. The Amended Complaint asserted a total of twelve causes of action against the various defendants, with nine causes of action asserted only against Scully, one cause of action asserted only against Yarborough, one cause of action asserted against both Scully and Yarborough, and one cause of action asserted jointly against all of the defendants. {App. 76}.¹

The trial of this matter was held before the Honorable Casey L. Manning from May 1, 2006 through May 5, 2006. At the close of the trial, eleven of the twelve claims in the Amended Complaint were submitted to the jury.² {App. 49}. While the civil conspiracy claim originally included Synergetic as a defendant, the verdict form as to that claim limited it to only Scully, Yarborough and Corbin, and Allegro has acknowledged that "no claims against Synergetic, Inc. were submitted to the jury." {App. 49, 774}. Thus, prior to the end of the trial, Respondent abandoned any claim against Synergetic.

¹ Specifically, the following claims were asserted against only Scully: breach of the duty of loyalty, violation of S.C. Code Ann. § 33-8-420(a), breach of fiduciary duty, breach of contract accompanied by a fraudulent act, breach of contract, fraud, negligence, negligent misrepresentation, and violation of S.C. Code Ann. § 33-8-310. The following claim was asserted against only Yarborough: breach of the duty of loyalty. The following claim was asserted against both Scully and Yarborough: violation of S.C. Code Ann. § 41-10-10. Finally, the following claim was asserted jointly against Scully, Yarborough, and Corbin: civil conspiracy. {App. 76}.

² The claim for violation of S.C. Code Ann. § 41-10-10 was not included on the Verdict Form submitted by Allegro and approved by the Trial Court. {App. 449} and has been abandoned.

On May 5, 2006, the jury returned verdicts in favor of Allegro as to each of the eleven claims submitted to it. {App. 49}. Following the jury's verdict, both sides filed post-trial motions, all of which were denied. {App. 13, 32, 481, 526, 756, 759, 814}. Petitioners filed timely Notices of Appeal on August 12, 2008 and April 9, 2010. {App. 835}. On December 15, 2011 The Court of Appeals heard oral argument and on July 11, 2012 issued Opinion No. 4997 reversing the judgment in this matter and remanding it for a new trial based solely upon the Trial Court's error in admitting a temporary injunction order into evidence. {App. 1004}. Because it reversed the judgment and ordered a new trial, the Court of Appeals refrained from addressing Petitioners' arguments relating to the denial of their motions for directed verdict and JNOV as to several of the claims as well as other arguments supporting the grant of a new trial. Petitioners now file this petition for a writ of certiorari.

SUMMARY OF GROUNDS FOR CERTIORARI

Rule 242 of the South Carolina Appellate Court Rules provides the considerations used in deciding whether a writ of certiorari is appropriate. In this matter, review is appropriate because the decision of the Court of Appeals to decline to consider the directed verdict and JNOV arguments is in conflict with the prior decisions of this Court. See Rule 242(b)(3), SCACR. Here, the Court of Appeals correctly held that it was error for the Trial Court to allow a temporary injunction order to be admitted into evidence, and that this error requires that a new trial be held. Additionally, the Court of Appeals also correctly refrained from addressing the other grounds asserted by Petitioners as

requiring *a new trial*.³ See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling that an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). However, in declining to address Petitioner's directed verdict and JNOV arguments, the Court of Appeals' Opinion misapprehended and misapplied the rule set forth in Futch regarding restraint on the appellate review of additional issues where the determination of a prior issue is sufficient to *completely* resolve the appeal or a portion thereof. Specifically, while the Court of Appeals correctly held that a new trial was required due to the erroneous admission of the temporary injunction order, this ruling was dispositive *as to only the new trial issues* raised in Petitioners' appeal, and the Court of Appeals' Opinion should have addressed the directed verdict and JNOV issues raised by Petitioners. Those issues were unaffected by the decision to remand for a new trial and the resolution of the directed verdict and JNOV issues would serve the interests of judicial economy by limiting the new trial to only the surviving claims and parties. Thus, this Court should grant a writ of certiorari, reverse the Trial Court's denial of directed verdict and JNOV on the disputed claims, and direct that the new trial of this matter proceed as to only the remaining claims and parties.

³ In the event that this Court should grant any petition for a writ of certiorari submitted by Respondent with regard to the grant of a new trial, Petitioners assert, as additional sustaining grounds, their other arguments supporting the grant of a new trial. Specifically, a new trial was also warranted based upon: (a) The Trial Court erroneously "reforming" the jury's verdict failing to require an election of remedies; (b) the Trial Court erring in qualifying Daniel McHenry as an expert witness; (c) the Trial Court erroneously admitting Mr. McHenry's report into evidence; and (d) the Trial Court erroneously excluding relevant damages evidence.

ARGUMENT

- I. The Court of Appeals' Opinion misapprehended and misapplied the rule that an appellate court should refrain from addressing additional issues where its determination of a prior issue is dispositive of the appeal because Petitioners' directed verdict/JNOV issues were not disposed of through the grant of a new trial.

After correctly holding that the erroneous admission of the temporary injunction order required a new trial, the Court of Appeals' Opinion refrained from addressing either Petitioners' other new trial arguments or Petitioners' directed verdict and JNOV arguments. In refraining from addressing these issues, the Court of Appeals cited Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) for the rule that appellate courts need not address remaining issues when its determination of a prior issue is dispositive of the appeal. (Op. No. 4997 at p. 14) {App. 1017}. This restraint was proper as to Petitioners' other *new trial* arguments because a new trial had already been ordered. However, the granting of a new trial was not dispositive of Petitioners' directed verdict and JNOV arguments. Rather, the directed verdict and JNOV argument were ripe for resolution as rulings on these issues would serve only to facilitate a new trial by limiting the new trial to only those claims which properly survived directed verdict or JNOV at the first trial.

Unlike other cases where South Carolina's Appellate Courts have refrained from ruling on additional grounds where the determination of a prior issue effectively resolved the appeal, in this case there are two separate categories of issues: (1) new trial issues; and (2) directed verdict/JNOV issues. The resolution of the former category does not also resolve the latter. For example, in Futch, a new trial was not at issue. Rather, the Supreme Court reversed the Court of Appeals' ruling on a directed verdict issue as well

as a rule adopted by the Court of Appeals regarding forfeiture of compensation in breach of duty of loyalty cases. Futch, 335 S.C. at 613, 518 S.E.2d at 598. Other recent applications of the Futch rule are also limited to situations where the appellate court's ruling is dispositive of *the entire appeal*. See Platt v. CSX Transportation, Inc., 388 S.C. 441, 697 S.E.2d 575 (2010) (affirming the Court of Appeals' ruling that petitioner's claim was barred under the public duty rule, and then vacating the remainder of the Court of Appeals opinion addressing whether petitioner's claims were preempted and whether petitioner established proximate cause); Widdiecombe v. Tucker-Cales, 375 S.C. 427, 653 S.E.2d 276 (2007) (vacating the Court of Appeals' ruling that the doctrine of unclean hands provided an additional basis for the family court's exercise of jurisdiction, but affirming the remainder of the opinion which found that jurisdiction was otherwise proper); Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 596 S.E.2d 42 (2004) (determining that the violation of the applicable standard of care was not established at trial and vacating the Court of Appeals opinion as to the additional issues of duty and proximate cause).

It is entirely appropriate for an appellate court to resolve directed verdict/JNOV issues simultaneously with a decision to remand for a new trial based on evidentiary errors. The case of Whaley v. CSX Transportation, Inc., 362 S.C. 456, 609 S.E.2d 286 (2005) illustrates the propriety of such review. In Whaley, the plaintiff sued the railroad and asserted claims for violating the Federal Employer's Liability Act (FELA) and the Locomotive Inspection Act (LIA). Id. at 467, 609 S.E.2d at 291. This Court ordered a new trial be held based on errors in the admission of similar accidents, transactions, or happenings evidence. Id. at 482-83, 609 S.E.2d at 300. Despite the fact that a new trial

was ordered based on this evidentiary error, the Court also held that the railroad should have been granted JNOV on the LIA claim due to the fact that the plaintiff failed to present sufficient evidence as to that claim at the original trial. Id. at 480-81, 609 S.E.2d at 398-99. Thus, the re-trial of the Whaley case was limited to only the FELA claim. Id. at 484, 609 S.E.2d at 301; see also Wachovia Bank, N.A. v. Beane, 397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012) (granting a new trial based upon an excessive verdict while also holding that JNOV should have been granted to Wachovia to limit the defendant's setoff counterclaim, thus limiting the nature of the new trial). This is precisely the situation in this case. As in Whaley, despite the clear need for a new trial based on the evidentiary error, this Court should address the directed verdict/JNOV issues, and in doing so limit the new trial to only the viable claims.

While it was unnecessary for the Court of Appeals' Opinion to address Petitioners' numerous other grounds for a new trial once it had decided that the admission of the temporary restraining order warranted a new trial, the Court of Appeals' ruling *was not dispositive* as to the directed verdict/JNOV issues. Rather than being an unnecessary exercise of judicial power, resolution of the directed verdict/JNOV issues would actually serve the interests of justice by limiting the new trial to only those claims and parties which properly survived directed verdict/JNOV at the first trial. Therefore, this Court should grant a writ of certiorari in order to review and address the directed verdict/JNOV issues.

II. The Court of Appeals' Opinion should have granted Petitioners directed verdict and/or JNOV as to the claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation.

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 an appellate 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.

A. Petitioners 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, Petitioners moved the Trial Court for directed verdict as to the claim for civil conspiracy. {App. 346-347, 406-416}. The specific grounds for these motions were that, as to Petitioner Corbin, there was no evidence that he acted with the purpose of harming Allegro, and as to *all* Petitioners, there was no evidence that Respondent suffered special damages. {App. 346-347, 406-416}. 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 Petitioners.

1. Corbin was entitled to directed verdict and JNOV on the civil conspiracy claim because there was no evidence whatsoever 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. The second element of civil conspiracy requires proof that the defendant acted "for the purpose of injuring the plaintiff." LaMotte, at 69, 370 S.E.2d at 713. While considering Petitioners' motion for directed verdict on this point, the Trial Court incorrectly interpreted the second element of this claim. {App. 411-414}. 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." {App. 412}. The Trial Court reiterated this incorrect view saying: "it is not what you intend, it is what actually results." {App. 414}. 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) (holding that the "essential consideration" in a civil conspiracy claim is whether the primary purpose or object of the combination is to injure the plaintiff, and upholding summary judgment as to civil conspiracy because there was no evidence of any "wrongful intent" on the part of the defendants); 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).

Corbin was entitled to a directed verdict and JNOV because there was no evidence that he acted with any intent to harm Allegro. 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. {App. 388}. Corbin also wrote Scully a letter outlining three methods for valuing Allegro, reviewed a valuation of Allegro, and reviewed Scully's offer letter to McCarthy to determine if it was a "fair" offer. {App. 222-223, 375, 390, 590}. All of this was done, not with any intent to harm Allegro, but, to the contrary, because Corbin wanted to help Allegro. {App. 389}. 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 [McCarthy] 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.

{App. 590}(emphasis added). Corbin's concern was what was best for Allegro. There was no evidence at trial refuting this. Therefore, because there was no evidence of any intent by Corbin to harm Allegro, the Trial Court erred by failing to grant him a directed verdict or JNOV as to civil conspiracy.

In its appellate brief, Respondent attempted to redefine the elements of civil conspiracy to remove the key element of individual intent. 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 is unnecessary to be liable for civil conspiracy. (Respondent's Final Brief at p. 5){App.

955}. 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,” that maxim presupposes and requires that the joint actors all share the same intent and are therefore responsible for each others actions. The intent of one, however, is not the intent of all, and intent must be specifically established as to each individual defendant with respect to a conspiracy claim.

“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 in order for Corbin to be liable for civil conspiracy. 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); 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 has also lost sight of a key fact in this case. The Plaintiff in this action 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. Respondent relies on testimony from Corbin wherein he stated that he did not talk with Ms. McCarthy about Scully's interest in buying Allegro as evidence of Corbin's intent to harm. {App. 339-340}. This testimony provides no evidence of any intent by Corbin to harm anyone. Moreover, it only goes to Ms. McCarthy, not Allegro.

Respondent has also asserted that the jury was free to reject Corbin's testimony that he did not intend to harm Allegro. Again, this is incorrect. While a jury is not required to accept uncontradicted witness testimony, one 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. Therefore, the grant of certiorari is warranted and this Court should grant

Corbin JNOV as to the civil conspiracy claim. As this is the only claim asserted against Corbin, the new trial properly ordered by the Court of Appeals on the remaining claims would no longer need to involve him.

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

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. {App. 272-276}. 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.⁴ Absent such evidence of “special” damages specifically related to the civil conspiracy claim, the Trial Court should have granted all of the Petitioners 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 breach of contract claim). Thus, 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 to proceed without the civil conspiracy claim.

⁴ Additionally, the damages awarded by the jury were exactly the same for each cause of action. {App. 49}.

B. Petitioner Scully is entitled to directed verdict/JNOV on the contract claims because Respondent failed to establish the existence of any contract or how such contract was breached.

Respondent's claims for breach of contract and breach of contract accompanied by a fraudulent act were asserted only against Petitioner Scully. In order to establish a claim for breach of contract, the plaintiff must prove: (1) a binding contract entered into by the parties; (2) breach or unjustified failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962). Additionally, the existence of a contract, and of a breach thereof, are essential elements of a claim for breach of contract accompanied by a fraudulent act. Harper v. Ethridge, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (1986). Here, there was no evidence of any contract between Allegro and Scully. Thus, there was also no evidence establishing the terms of this alleged contract, and no evidence of a breach of the contract. Therefore, the Trial Court erred by failing to grant Petitioner Scully directed verdict and JNOV as to these claims. {App. 346-347, 411-416}.

The evidence at trial established that there was no employment contract between Allegro and Scully and that Allegro did not have an employee handbook that applied to Allegro employees. {App. 174, 366-367}. Additionally, the testimony at trial established that there was not a non-compete agreement between Allegro and Scully. {App. 174, 366-367}. The only "contract" ever mentioned at the trial involving Scully was a Partnership/Buy-Sell Agreement relating to Scully's ownership interest in Allegro. {App.

121, 366-367} Allegro, however, was not a party to this partnership agreement – it was between only McCarthy and Scully. {App. 366}.⁵

Respondent has asserted that the Trial Court determined there was an “oral contract” and incorrectly contends that this ruling has not been challenged in this appeal. At trial, 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.” {App. 414, 439}. Additionally, Petitioners’ Brief 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.” See Appellants’ Final Brief at p. 46 {App. 939}(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. {App. 346-347, 414; 814}. 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.

Therefore, Respondent failed to establish the existence of a contract, and, through this failure, also failed to establish any breach of a contract. These failures were fatal for both of the contract claims. Thus, Petitioner Scully’s motions for directed verdict and

⁵ Additionally, there was no evidence at trial that Scully breached the Partnership/Buy-Sell Agreement.

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. The writ of certiorari should thus be granted, Petitioner Scully should be granted JNOV as to the contract claims, and the new trial of this case should proceed without either of these claims.

C. Petitioner Scully is entitled to directed verdict/JNOV on the fraud and negligent misrepresentation claims because there was no evidence of any false representation by Scully.

Respondent's claims for fraud and negligent misrepresentation were also asserted only against Petitioner Scully. The first and second elements of fraud are: (1) a representation; and (2) its falsity. Kahn Construction Co. v. S.C. Nat. Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980). The first element of negligent misrepresentation is: (1) a false representation made by the defendant to the plaintiff. Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997). Respondent failed to offer evidence of any false representation made by Scully. Therefore, the Trial Court erred by failing to grant Scully directed verdict and JNOV as to these claims. {App. 346-342, 411-416}.

McCarthy 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. {App. 134-135}. Simply put, according to McCarthy's own testimony, Scully never lied to 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. {App. 216-217}. 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 PEO. {App. 216-217}. Therefore, Respondent failed to offer any evidence as to the key element of a false representation made by Scully.

Respondent contends that the basis of the negligent misrepresentation and fraud claims against Petitioner Scully is Scully's "silence" regarding the fact that he was planning to leave Allegro and take certain employees and customers with him. See Respondent's Final Brief at pp. 8-9 {App. 958-959}. This argument is wholly without merit. 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. {App. 134-135}. Thus, there is no basis whatsoever for the contention that Scully was "silent" on these points.

Because Respondent failed to establish any false representation by Scully, the claims for fraud and negligent misrepresentation both fail, and Scully should have been granted directed verdict and JNOV on these issues. Therefore, this Court should grant a writ of certiorari to correct this error, allowing the new trial of this matter to proceed without these baseless claims.

CONCLUSION

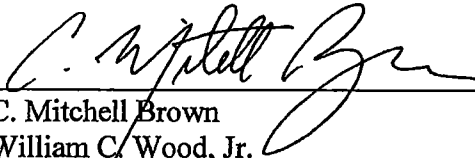
For the foregoing reasons, while the Court of Appeals was correct in ordering a new trial based on the erroneous admission of the temporary restraining order, and

correct in refraining from addressing the other *new trial* grounds asserted by Petitioners, it was error for the Court of Appeals to refrain from addressing the directed verdict/JNOV issues in its Opinion because those issues were unaffected by the Court of Appeals' Opinion. This Court should grant a writ of certiorari to review and address the directed verdict/JNOV issues and grant JNOV as to the civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation claims. This would allow the new trial that was properly ordered by the Court of Appeals to proceed as to only the viable claims and the remaining parties.

SIGNATURE PAGE ATTACHED

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December 27th, 2012

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

RECEIVED

DEC 27 2012

Opinion No. 4997 (S.C. Ct. App. filed July 11, 2012) **S.C. Supreme Court**

Allegro, Inc., ... Respondent-Petitioners,

v.

Emmett J. Scully, Synergetic, Inc.,
George C. Corbin, and Yvonne Yarborough, ... Petitioners-Respondent.

RESPONDENT-PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Respondent-Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 29, 2012. (Appx. 1067).

QUESTIONS PRESENTED

1. The Court of Appeals erred in reversing and remanding for a new trial based on the admission of the temporary injunction order into evidence, because the issue was not preserved for appeal.
2. The Court of Appeals erred in reversing and remanding for a new trial based on the admission of the temporary injunction order into evidence, because the Petitioners-Respondents failed to challenge the trial court's alternative rulings, thereby making those rulings the law of the case that, right or wrong, required affirmance.

STATEMENT OF THE CASE

This business litigation case was tried before a jury, and the trial court entered judgment in favor of the Respondent-Petitioner (Allegro) and against the Petitioners-Respondents (Defendants).¹ The Defendants made post-trial motions – the trial court denied the motions – the Defendants made a motion to alter or amend – the trial court denied the motion.

The Defendants timely appealed. The Court of Appeals reversed and remanded upon the sole ground that the trial court had erred in admitting a temporary injunction order into evidence. Thus, the Court of Appeals did not reach numerous other issues raised by the Defendants on appeal. Both parties petitioned for rehearing – the Court of Appeals denied both petitions.

Allegro now seeks a writ of certiorari from this Court to the Court of Appeals.

¹ No judgment was entered against Defendant Synergetic, Inc.

² This is the same objection that the trial court was insufficient to present any issue. (*Compare* Appx. 38 with Appx. 251). This objection alludes to some prior discussion of the issue, but it is not of record, and it is an appellant's duty to make a sufficient record for appellate review. *Benton v. Davis*, 150 S.E.2d 235, 239 (S.C. 1966) (issue not preserved for appeal if appellant fails to make adequate record for review). Moreover, the Defendants have never contended that they raised any specific ground to the trial court and, most importantly, they have never contended

ARGUMENTS

I. The issue of admitting the temporary injunction order into evidence was not preserved for appeal.

The Court of Appeals Court reversed and remanded for a new trial, because “the trial court erred in admitting the temporary injunction order into evidence.” (Appx. at 1012). It is uncontested that the Defendants’ objection did not have any specifically stated grounds and, in particular, that the Defendants did not raise the grounds relied upon by the Court of Appeals. (See, e.g., objection at Appx. 250-252).² “A general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for review.” *State v. Nelson*, 501 S.E.2d 716, 724 n.1 (S.C. 1998). Moreover, it is axiomatic that South Carolina does not have a plain error rule – “a party must have a contemporaneous *and specific* objection to preserve an issue for appellate review.” *State v. Sheppard*, 706 S.E.2d 16, 19 (S.C. 2011) (emphasis added); *accord Elam v. South Carolina Dep’t of Transp.*, 602 S.E.2d 772, 780 (S.C. 2004). The Court of Appeals, however, held that the general objection in this case was sufficient because: “when the evidence is inherently prejudicial, the grounds for the objection are patent, and the issue will be found preserved.” (Appx. at 1012). In so ruling, the Court of Appeals relied upon this Court’s opinion in *Dunn v. Charleston Coca-Cola Bottling Co.*, 426 S.E.2d 756 (S.C. 1993).³ For the

² This is the same objection that the trial court was insufficient to present any issue. (Compare Appx. 38 with Appx. 251). This objection alludes to some prior discussion of the issue, but it is not of record, and it is an appellant’s duty to make a sufficient record for appellate review. *Benton v. Davis*, 150 S.E.2d 235, 239 (S.C. 1966) (issue not preserved for appeal if appellant fails to make adequate record for review). Moreover, the Defendants have never contended that they raised any specific ground to the trial court and, most importantly, they have never contended that they raised the ground relied upon by the Court of Appeals.

³ In two footnotes, the Court of Appeals commented on the propriety of a trial judge addressing issues with the foreperson only rather than the entire jury. (Appx. 1009 and 1017, nn.6&9). It does not appear the Court based its opinion on this matter. Assuming it did, and assuming any error by the trial court, this issue is not preserved for appeal. The Defendants never raised this issue to the trial court – the trial court did not rule on it – the Defendants did not move to alter or amend. Most importantly, the Defendants never raised this issue to the Court of Appeals. “[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” *Herron v. Century BMW*, 719 S.E.2d 640, 644 (S.C. 2011).

reasons set forth below, it is respectfully submitted that the Court of Appeals misread and misapplied this Court's ruling in *Dunn*, and that ruling does not apply here.⁴

In *Dunn*, the trial court granted the plaintiff's request for a *voir dire* inquiry of the jury panel that mentioned the possible existence of liability insurance in an automobile wreck case. 426 S.E.2d at 757. The defendant requested that the *voir dire* question not be asked. This Court found this request was a sufficient objection under the following analysis:

1. First, the requested *voir dire* was "contrary to a *legion of opinions* issued by the Supreme Court of South Carolina." *Id.* at 757 (emphasis added).
2. Second, as to the defendant's failure to object on specifically stated grounds, this Court held: "The grounds of the objection were patent. The law forbids it." *Id.* at 758. The grounds were patent, because a "legion of opinions" forbid it.
3. Third, the *voir dire* question "*itself* gave jurors reason to believe that a verdict in this case would be paid by an insurance carrier," in violation of the "basic principle of law" set forth in a legion of this Court's cases that the existence of liability insurance "shall not be made known to the jury." *Id.* at 758, 757 (emphasis added).

In relying on *Dunn*, the Court of Appeals held that the unspoken grounds for an objection are patent (and therefore need not be stated) "when the evidence is inherently prejudicial." (Appx. at 1012). This was not the holding or reasoning of this Court in *Dunn*. Rather, the grounds in *Dunn* were "patent" because of the "legion of opinions" from this Court on the issue of mentioning liability insurance in a jury trial. There is no such "legion" here.

⁴ The arguments made herein also apply to the issue of the injunction order being in the later admitted expert report. (See Appx. at 1014-1015). Any objection to the admission of the injunction order as part of the expert report fails for the same reasons noted herein. In addition, since the injunction order was already admitted into evidence, its inclusion in the subsequently admitted expert's is not a basis for reversal. "It is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." *State v. McFarlane*, 306 S.E.2d 611, 613 (S.C. 1983).

Moreover, the grounds for the objection in *Dunn* were “patent,” because the mere mention of liability insurance was prohibited by the “legion of opinions.” Here, the mere mention of the injunction order would not give rise to reversible error. The error and ground is not “patent” because, as noted by the Court of Appeals, the prejudice if any derived from the reading of the injunction order. In other words, any error (and any ground for objection) was “latent,” because it required a reading of the injunction order. It was thus incumbent upon the Defendants to specifically raise the latent danger of prejudice arising from a reading of the injunction order. The Defendants, however, never argued to the trial judge that there was a danger the jury would give undue weight to the factual findings in the injunction order – indeed, the Defendants never told the trial judge that the injunction order contained factual findings. Thus, when the Defendants made their admittedly general objection with no specifically stated grounds, in violation of the longstanding rules of law, nothing in that objection or the very nature of the challenged evidence itself alerted the trial court to any “patent” ground for the objection or any “inherent” prejudice.

In addition, any reversible error in the admission of evidence is, by definition, the admission of evidence that is “inherently prejudicial.” Under the Court of Appeals’ analysis, any evidence that is “inherently prejudicial” need only be challenged by a general objection without any specifically stated grounds to preserve the issue for appeal. Thus, the Court of Appeals has created a sweeping “plain error” rule for objecting to the admission of evidence that is contrary to this Court’s long standing precedents that South Carolina does not have a “plain error” rule and that general objections preserve no issue for appeal.

Finally, research reveals no case extending *Dunn* beyond its particular facts. Nothing in the *Dunn* opinion indicated that this Court intended the rule in *Dunn* to extend beyond the

axiomatic rule against permitting the jury to know of or consider the existence of liability insurance. After *Dunn*, this Court has steadfastly applied the rules on error preservation and refused to adopt a "plain error" rule in South Carolina. In short, the Court of Appeals ignored long standing precedent from this Court and violated its constitutional duty to adhere to this Court's precedent. S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

II. Assuming this Court's ruling in *Dunn* might otherwise be applicable here, reversal is precluded by the law of the case doctrine.

It is axiomatic that an unchallenged ruling by a trial court, "right or wrong, is the law of this case and *requires affirmance*." *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970) (emphasis added), *accord*, *Erickson v. Jones Street Publishers, L.L.C.*, 629 S.E.2d 653, 670 (S.C. 2006). ("unappealed ruling, right or wrong, is the law of the case and requires affirmance") (citations omitted). Here, the trial court made the following separate and independent rulings regarding the temporary injunction order:

1. The appellants' objection at trial did not set forth any specific ground and, therefore, there was no ground for a new trial based on admitting the order into evidence. (Appx. 21; 38-39).
2. The injunction was properly admitted into evidence "to show what was in the record and that an injunction had been issued." (Appx. 21; 38-39).
3. The appellants did not object to testimony about the injunction order prior to its introduction into evidence and, therefore, they could not seek a new trial based on the admission of that order into evidence. (Appx. 21; 38-39).

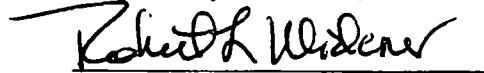
On appeal, the Defendants did not challenge any of these rulings. (App. Br., *passim*). Thus, each of these rulings, "right or wrong, is the law of this case and *requires affirmance*." *Buckner, supra*

(emphasis added). The Defendants attempted to argue against these rulings in their reply brief, but this came too late to present any issue for appellate review: "It is axiomatic that an issue cannot be raised for the first time in a reply brief." *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011), *aff'g* 671 S.E.2d 87 (S.C. App. 2008). Thus, were it to be assumed that this Court's ruling in *Dunn* is applicable here, the Court of Appeals was nevertheless barred from reaching the issue by the law of the case doctrine. Nothing in *Dunn* indicates this Court intended to obviate the need for an appellant to challenge all grounds for a trial court's rulings.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant certiorari, reverse the Court of Appeals, and reinstate the appealed judgment.

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December 27, 2012
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

RECEIVED

FEB 22 2013

S.C. Supreme Court

Opinion Number 4997
Heard December 15, 2011 – Filed July 11, 2012
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.

**PETITIONERS-RESPONDENTS' RETURN IN OPPOSITION TO
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INTRODUCTION

In Opinion No. 4997, the South Carolina Court of Appeals reversed the judgment of the Trial Court and remanded this matter for a new trial. Opinion No. 4997 (S.C. Ct. App. filed July 11, 2012) (Shearouse Adv. Sh. No. 23 at 76) {Joint Appendix (“Jt. App.”) pp. 1004-1017}. Specifically, the Court of Appeals held that the admission of a preliminary injunction order (with its findings of fact and conclusions by the hearing judge) into evidence constituted reversible error. {Jt. App. p. 1012-1014}. The Court of Appeals further held that Petitioners-Respondents’ contemporaneous objection to this evidence properly preserved this issue because the temporary injunction order was inherently prejudicial and the grounds for the objection were patent. {Jt. App. p. 1014}. Additionally, the Court of Appeals held that reversal was warranted because the temporary injunction order was admitted a second time, over Petitioners-Respondents’ objection, as part of Respondent-Petitioner Allegro Inc.’s (“Allegro”) expert’s report. {Jt. App. p. 1014}.

Allegro now petitions this Court for certiorari. As shown herein, Allegro has failed to offer this Court any grounds that warrant certiorari as provided by Rule 242 of the South Carolina Appellate Court Rules. Instead, Allegro seeks for this Court to simply revisit the same arguments that were properly rejected by the Court of Appeals, without identifying any significant issues or actual inconsistency with prior decisions of this Court. Allegro’s petition for certiorari should be denied.¹

¹ Petitioners-Respondents have petitioned this Court for certiorari based upon the Court of Appeals’ failure to address their directed verdict/JNOV arguments. While the Court of Appeals correctly held that a new trial was required due to the erroneous admission of the temporary injunction order, this ruling was dispositive *as to only the new trial issues*

I. The Court of Appeals correctly ruled that the preliminary injunction order was inherently prejudicial and that the grounds for Petitioners-Respondents' contemporaneous objection to its admission were patent.

In its petition, Allegro contends the Court of Appeals misread and misapplied this Court's ruling in Dunn Charleston Coca-Cola Bottling Co., 311 S.C. 43, 43-47, 426 S.E.2d 756, 757-58 (1993), in reaching its decision that the admission of the preliminary injunction order constituted reversible error. This argument is without merit. The Court of Appeals correctly applied settled principles and rules related to issue preservation in this matter. Thus, Allegro's petition for certiorari should be denied.

Allegro complains about the Court of Appeals' citation to Dunn as supportive of its decision with respect to the temporary injunction order. First, Allegro claims Dunn is inapplicable because the Dunn rule applies only because a "legion" of opinions have recognized that a jury cannot consider insurance coverage. {Allegro's Petition p. 4}. Specifically, Allegro alleges that no "legion" of analogous case authority exists in this matter that would allow the grounds for perseveration to be considered patent, as was the case with the issue of insurance coverage in Dunn. However, the Dunn case does not turn on how many cases exist stating the admission of certain evidence is error. A single opinion from this Court clearly stating that an admission of certain evidence is error is no less the law than several opinions stating likewise. Allegro's claim ignores the settled rule that preliminary injunction orders are inherently prejudicial for a jury to consider

raised in Petitioners-Respondents' appeal, and the Court of Appeals' Opinion should have addressed the directed verdict and JNOV issues raised by Petitioners-Respondents. The directed verdict and JNOV issues were unaffected by the decision to remand for a new trial and the resolution of those issues would serve the interests of judicial economy by limiting the new trial to only the surviving claims and parties. Petitioner-Respondents' Petition for a Writ of Certiorari should be granted and Allegro's should be denied.

because the order is made prior to any determination of the merits of the claim. This Court has made clear that “[a] temporary injunction is made without prejudice to the rights of either party pending a hearing on the merits, and when other issues are brought to trial, they are determined without reference to the temporary injunction.” Helsel v. City of N. Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (emphasis added); see also Alston v. Limehouse, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901). Therefore, the inherent prejudice resulting from the admission of a preliminary injunction order has been settled South Carolina law for more than a century. Just as in Dunn, the objectionable nature of a preliminary injunction order at a subsequent trial on the merits was patently obvious. Accordingly, the Court of Appeals properly applied long-standing precedent to find that Petitioners-Respondents’ objection to the admission of the preliminary injunction order was sufficient to preserve the issue for review. Thus, Allegro’s petition for certiorari should be denied.

Second, Allegro claims that the prejudice from the admission of the preliminary injunction order could not be patent because the jury *may* not have read the order despite its being sent back to the jury room during deliberations. {Allegro’s Petition p. 4}.² This argument is without merit and was not even raised by Allegro before the Court of Appeals until its petition for rehearing. Allegro advocates for a rule that an appellate court should assume a jury does not read, review, or consider the evidence presented at trial during its deliberations. This is not, and should not be, the law of this State. The

² Additionally, Allegro claims “the mere mention of the injunction order would not give rise to reversible error.” {Allegro’s Petition p. 4 (emphasis added)}. This misconstrues the facts of this matter. The Trial Court did not merely “mention” the order to the jury. Rather, the trial court admitted the order into evidence and allowed the jury to consider it during deliberations. Such error is patently and inherently prejudicial to Petitioners-Respondents.

Trial Court admitted the preliminary injunction order into evidence and allowed the jury to consider the order during deliberations. Petitioners-Respondents objected to the preliminary injunction order being allowed into evidence. The Trial Court permitted it nonetheless, despite the obvious prejudicial nature of the order and longstanding South Carolina precedent to the contrary. That error was patent and prejudiced Petitioners-Respondents. This Court should reject this argument and deny Allegro certiorari.

Third, Allegro alleges Dunn is limited to the facts of that case, arguing that nothing in the Dunn opinion indicated an intent that it apply to other matters. {Allegro's Petition p. 4-5}. In essence, Allegro contends that all Supreme Court opinions are limited to their facts unless this Court affirmatively states otherwise. This argument misapprehends the effect of Supreme Court precedent. Supreme Court precedent is not limited to the specific facts of the case unless the opinion says otherwise. Rather, Supreme Court opinions are limited to the facts of that case only when the Supreme Court specifically states the opinion is so limited. See, e.g., Johnson v. Rent-A-Center, Inc., 398 S.C. 595, 602, 730 S.E.2d 857, 860 (2012) ("We stress our opinion is a narrow one, limited to the facts of this case"); Michau v. Georgetown County ex rel. S.C. Counties Workers Compensation Trust, 396 S.C. 589, 596, 723 S.E.2d 805, 808 (2012) ("We stress, however, that our opinion is a narrow one limited to . . . the facts of this case"); Nationwide Mut. Ins. Co. v. Bair, 257 S.C. 551, 557, 186 S.E.2d 410, 413 (1972) ("We . . . limit our holding to the terms of the contract now before us and the facts of this case"). The Supreme Court did not limit Dunn in this manner. Thus, the Court of Appeals correctly applied the Supreme Court precedent of Dunn. Allegro's argument is without merit, and this Court should deny Allegro certiorari.

Lastly, Allegro claims the Court of Appeals adopted the "plain error rule" by applying Dunn to this matter. That is simply not the case. There was in fact an objection made. The Court of Appeals did not adopt any new preservation rules in the opinion. Rule 103(a)(1), SCRE, states that a specific grounds for an objection to the admission of evidence need not be set forth where the grounds are "apparent from the context." Such is true here. The submission of the preliminary injunction order with all of its findings is erroneous and prejudicial, and such is plain and apparent. Therefore, this Court should deny Allegro's petition for a writ of certiorari.

II. The Court of Appeals properly rejected Allegro's erroneous "law of the case" argument.

Allegro also asserts that certain statements made by the Trial Court were not appealed, and now constitute the "law of case," barring the Court of Appeals' ruling on the improper admission of the preliminary injunction order. The three statements at issue are: (1) that no specific ground for the objection was set forth; (2) that the injunction was admitted into evidence "to show what was in the record"; and (3) that there was no objection to prior testimony elicited as to the injunction. {Allegro's Petition p. 5}. Allegro contends that the failure to specifically appeal these statements bars the Court of Appeals from addressing the improper admission of the preliminary injunction order into evidence. Allegro is incorrect and its argument ignores the actual and ultimate issue appealed and ruled upon by the Court of Appeals regarding whether the admitting the preliminary injunction order into evidence was in error.

As to the first statement—that a specific ground for the objection was not stated—Allegro's argument ignores the actual issue raised by Petitioners-Respondents' appeal. Petitioners-Respondents do not contend that they specifically stated the basis for the

objection made at trial as to the admission of the preliminary injunction order. Rather, Petitioners-Respondents asserted, and the Court of Appeals agreed, that the grounds for this objection were patent due to the inherently prejudicial nature of the preliminary injunction order and South Carolina's longstanding precedent requiring that the merits of a dispute be determined without reference to the preliminary injunction.³ Thus, the fact that the Trial Court concluded that specific grounds for the objection were not stated is irrelevant as to this appeal and as to the Court of Appeals' correct conclusion that specific grounds did not need to be stated in this circumstance. The Court of Appeals' opinion specifically acknowledges this point stating: "[w]hile Appellants did not state specific grounds for their objection, we find the introduction of the order for temporary injunction was inherently prejudicial, and thus, the grounds for the objection were patent." {Jt. App. p. 1014}. Therefore, the Trial Court's statement regarding the lack of specificity of the grounds for the objection did nothing to bar the Court of Appeals from its correct conclusion that the admission of the preliminary injunction order was in error.

As to the second statement—that the injunction order was admitted into evidence “to show what was in the record”—this statement is similarly irrelevant to the issue appealed. The Trial Court stated that it admitted the preliminary injunction order into evidence “to show what was in the record and that an injunction had been issued.” {Jt. App. pp. 21, 38}. This was simply a relevance determination by the Trial Court. However, Petitioners-Respondent's appeal on this issue is not based on relevance. Rather, it is based on the inherently prejudicial nature of the injunction order, and the

³ Petitioners-Respondent's appellate brief asserted that the admission of the preliminary injunction order was “over Appellants' objection” and that its admission was “clear error.” {Jt. App. pp. 926- 928}.

impropriety of its admission into evidence despite any relevance the Trial Court may have determined it had. Therefore, this statement also does nothing to bar Petitioners-Respondents' appeal or the Court of Appeals from deciding the actual issue in dispute.

Finally, the third statement—that there was no objection to prior testimony elicited as to the injunction—is also irrelevant to the issue actually appealed. Petitioners-Respondents do not dispute that, when Allegro's counsel mentioned the existence of an injunction order during the questioning of a witness, no objection to that question was made. However, the issue in this appeal is not the mere mentioning of the existence of an injunction order. Rather, the issue in this appeal is the actual admission into evidence of the written injunction order containing twenty-five detailed findings of facts addressing the very issues that were then before the jury for their determination. Any failure to object to the prior *mere mentioning* of the injunction order has no bearing on the objection to the order's subsequent *admission into evidence*. Therefore, as with the other statements cited by Allegro, the Trial Court's statement regarding the prior testimony also did nothing bar the Court of Appeals from correctly concluding that the grounds for Petitioners-Respondents' objection to the admission of the order and its findings were patent and that the admission of the injunction order into evidence constituted reversible error requiring a new trial⁴.

Allegro is attempting to use these isolated statements from the Trial Court in a hyper-technical fashion to create multiple issues to appeal where there actually is only

⁴ Petitioners-Respondents also objected to the admission of the expert report, which included as an attachment a copy of the same preliminary injunction order. In addition to reversing the Trial Court based upon the initial admission of the injunction order into evidence, the Court of Appeals also found its separate admission as part of the expert report also required reversal and a new trial. {Jt. App. pp. 1014, 1016}.

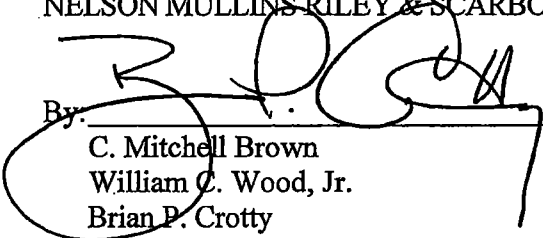
one issue – whether the Trial Court’s admission of the preliminary injunction order into evidence was reversible error. As is illustrated above, these statements do not relate to the actual dispute in this appeal. Just as this attempt to cloud the clearly appealed issue was rejected by the Court of Appeals, this Court should similarly deny Allegro’s petition for certiorari.

CONCLUSION

Based on the foregoing, Allegro’s petition for a writ of certiorari should be denied and Petitioners-Respondents’ petition should be granted for the reasons set forth in their Petition for a Writ of Certiorari.

Respectfully submitted,

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February 22, 2013

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

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

Opinion No. 4997 (S.C. Ct. App. filed July 11, 2012)

Allegro, Inc., ... Respondent-Petitioner,

v.

Emmett J. Scully, Synergetic, Inc.,
George C. Corbin, and Yvonne Yarborough, ... Petitioners-Respondents.

RESPONDENT-PETITIONER'S REPLY TO PETITIONER-RESPONDENT'S RETURN TO
RESPONDENT-PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENTS

I. The issue of admitting the temporary injunction order into evidence was not preserved for appeal.

The Defendants argue that a single opinion from this Court (or the Court of Appeals) declaring a type of evidence is inadmissible triggers the rule in *Dunn v. Charleston Coca-Cola Bottling Co.*, 426 S.E.2d 756 (S.C. 1993) and allows a general objection to preserve the issue for appeal. (Pet-Resp. Cert. Ret. at 3). This argument highlights the error in the Court of Appeals' ruling – according to the Defendants, an objecting party need not state any grounds for an objection if there is a single case stating that the challenged evidence is improper. In other words, the only time an objecting party must state specific grounds is when there is no case law on the admissibility of the evidence. Nothing in *Dunn* indicates this Court intended any such sweeping exception to the error preservation rules.¹

The Defendants mis-state the Plaintiff's argument on the issue of "latent v. patent" errors, contending the Plaintiff has argued that "the admission of the preliminary injunction order could not be patent because the jury *may* not have read the order " (Pet-Resp. Cert. Ret. at 4, 4-5) (emphasis in original). The Plaintiff has never made this argument. Rather, since any prejudice from the injunction order necessarily became apparent only upon a reading of the injunction order, it was incumbent upon the Defendants to point this out to the trial judge, *i.e.*, the question of whether an error was latent or patent is viewed from the perspective of the trial judge. Here, the Defendants never argued to the trial judge that there was any danger the jury would give

¹ The Defendants complain that the Plaintiff advocates a rule that general objections are insufficient unless there is a certain number of existing cases making the evidence inadmissible. The Plaintiff, however, simply and only relies upon and quotes the exact language used by this Court in *Dunn*, *i.e.*, that the general objection was sufficient because there was a "legion" of cases of making it clear that any mention of liability insurance was reversible error. It was this "legion" of cases that made the grounds for the objection in *Dunn* patent to the trial judge and, therefore, there was no need to state specific grounds. There is no such "legion" of cases on the issue presented here and, therefore, nothing made the grounds of the objection to the trial judge in this case. Thus, the Defendants were required to state specific grounds in support of their objection, which they manifestly and admittedly failed to do in this case.

undue weight to the factual findings in the injunction order – indeed, the Defendants never told the trial judge that the injunction order contained factual findings. Thus, when the Defendants made their admittedly general objection with no specifically stated grounds, in violation of the longstanding rules of law, nothing in that objection or the very nature of the challenged evidence itself alerted the trial court to any “patent” ground for the objection or any “inherent” prejudice.

The Defendants argue that *Dunn* rule is not limited to any particular circumstance, because this Court did not expressly limit it to the admission of evidence regarding the existence of liability insurance. The Defendants, however, make no response to the Plaintiff’s arguments that, after the ruling in *Dunn*, this Court has continued to apply the general rules on the sufficiency of objections and steadfastly refused to adopt a “plain error” rule in South Carolina. If the Appellants’ reading of *Dunn* is correct, then this Court would have allowed general objections to preserve issues for appeal if there was a single case holding that the evidence was inadmissible. This Court has done the exact opposite. Moreover, if this Court had intended *Dunn* to announce a sweeping exception to the error preservation rules, which is how the Court of Appeals has applied it, this Court undoubtedly would have said so in *Dunn*.

The Defendants argue that the Court of Appeals did not adopt a “plain error” rule, because there was an objection. A general objection simply is not an objection. Moreover, as this Court most recently noted in rejecting the notion of adopting a “plain error” rule in South Carolina, “a party must have a contemporaneous *and specific* objection to preserve an issue for appellate review.” *State v. Sheppard*, 706 S.E.2d 16, 19 (S.C. 2011) (emphasis added).

Finally, the Defendants cite Rule 103(a)(1), SCRE, for the proposition that objections to evidence need not be state specific grounds if the grounds are “apparent from the context,” and they contend the admission of the injunction order meets this rule because the error and prejudice

in admitting the injunction order into evidence was “plain and apparent.” (Pet-Resp. Cert. Ret. at 6). The Defendants, however, never made this argument to the trial court or the Court of Appeals until their petition for rehearing. Thus, the argument comes too late to reverse the trial court. Moreover, the Defendants have misread the rule. Under Rule 103(a)(1), SCRE, the admission of evidence is not error unless there is an objection “stating the specific grounds of objection.” The rule creates an exception to this requirement and provides there need not be any specifically stated grounds if the grounds are “apparent from the context.” Here, there is no “context” to support a failure to state specific grounds, *e.g.*, there was no discussion of the injunction order or its contents – there was no discussion of any danger that the jury would rule based on the factual findings in the injunction order rather than the jury’s view of the evidence in the case – indeed, there was no discussion about the contents of the injunction or anything else. Thus, there was no “context” as envisioned by Rule 103(a)(1), SCRE.

II. Assuming the Defendants’ general objection was sufficient to preserve the issue of admitting the temporary injunction order into evidence, the Defendants’ appeal is nevertheless barred by the law of the case doctrine.

As demonstrated in the Plaintiff’s certiorari petition, the trial court held the injunction order was admissible based on three separate rulings, which the Defendants did not challenge on appeal, thereby making each of those rulings the law of this case that requires affirmance. (Resp-Pet. Cert. Pet. at 5-6).

First, the trial court ruled that the preliminary injunction was admissible “to show what was in the record.” The Defendants dismiss this ruling as simply being a statement of relevancy that does not impact the question of admissibility. The Defendants have misread the trial court’s order, which stated that the injunction order “was properly admitted to show what was in the record and that an injunction had been issued.” (Appx. 16) (emphasis added). Thus, the trial

court's ruling was on admissibility, not simply relevance and, therefore, the Defendants' argument fails. This is their only argument against this ruling being the law of the case and, it is factually (and legally) incorrect. Thus, the trial court's ruling remains the law of this case and, right or wrong, requires affirmance. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970).

Second, the trial court ruled that the Defendants failed to object to prior testimony regarding the injunction order and, therefore, they could not challenge the later admission of that evidence. The Defendants concede they did not object to this testimony but argue that their failure to do so did not prevent them from later challenging the admission of the temporary injunction into evidence. Assuming this argument has any merit, and it does not, the Defendants did not make this argument to the Court of Appeals in their Brief of Appellant. Thus, the trial court's ruling is the law of the case and requires affirmance.

Third, the trial court ruled that the Defendants failed to state a specific ground for their objection and, therefore, the issue was not properly before the court. The Defendants argue that since no specific grounds were needed in their objection, the trial court's ruling is not the law of the case. The Defendants misunderstand the law of the case doctrine. It was incumbent upon them to argue on appeal that the trial court erred in this ruling, because no specific objection was necessary. They never made this argument to the trial judge, and they never made it to the Court of Appeals in their Brief of Appellant. Thus, the trial court's ruling is the law of the case and, right or wrong, requires affirmance.

Finally, the Defendants complain that the Plaintiff is being "hyper-technical" and attempting to rely on "statements" (*i.e.*, the trial court's rulings) that do not relate to the issue of admitting the preliminary injunction order into evidence. The Defendants are simply wrong.

The trial court's rulings relate directly to the admission of the preliminary injunction order. It was incumbent upon the Defendants to challenge these rulings in their Brief of Appellant. They did not and, therefore, each of these rulings is the law of this case and, right or wrong, each ruling requires affirmance.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Plaintiff's Certiorari Petition, it is respectfully submitted that this Court should grant certiorari, reverse the Court of Appeals, and reinstate the appealed judgment.

Respectfully Submitted,



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May 21, 2013
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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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RETURN ARGUMENTS

- I. Assuming the Court of Appeals erred in not reaching the Defendants' arguments regarding the denial of the Defendants' directed verdict and JNOV motions for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent representation, the Defendants' arguments are not preserved for appeal, are barred by the law of the case doctrine, and have no merit.

The Defendants challenge the sufficiency of the evidence to support the jury's finding against them on several causes of action. Their arguments are not properly before this Court.

Any appellate challenge to the sufficiency of the evidence must first be presented to the trial court by the making of a directed verdict motion at the close of all the evidence, and the failure to do so precludes appellate review of the issue. *Hendrix v. Eastern Distrib., Inc.*, 446 S.E.2d 440, 442 (S.C. App. 1994) , *aff'd*, 464 S.E.2d 112 (S.C. 1995) (vacating opinion to extent it ruled on merits of issues not preserved for appeal). The directed verdict motion must be based on specifically stated grounds, and any appellate argument is limited to those specifically stated grounds. Rule 50(a), SCRPC; *Hendrix*, 446 S.E.2d at 446 ("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). If a directed verdict motion is made at the close of the plaintiff's case but not renewed at the close of all the evidence, the issues raised in the motion are not preserved for appeal. *Hendrix*, 440 S.E.2d at 442 (also stating: "The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all evidence is *a strict one*.") (emphasis added). A JNOV motion is limited to the grounds raised in a directed verdict motion at the close of the evidence, *i.e.*, a JNOV motion cannot be used to raise or preserve for appellate review any issue that was not raised specifically in a directed verdict motion at the close of all the evidence. *Id.* If the trial judge denies a directed verdict or JNOV motion, and if the appellant fails to

challenge all grounds for that ruling, the unchallenged ruling becomes the law of the case and, right or wrong, requires affirmance. *Buckner v. Preferred Mut. Ins. Co.*, 177 S.E.2d 544, 544 (S.C. 1970). Any motion to reconsider, alter, or amend a trial court's prior rulings is limited to the grounds stated in the prior motion, and the motion to reconsider cannot be used to raise issues for the first time. *Ex parte Beard*, 597 S.E.2d 835, 840 (S.C. App. 2004).

As demonstrated below, the Defendants' arguments on the sufficiency of the evidence violate the rules set forth above and, therefore, these issues are not properly before this Court for appellate review. Moreover, the Defendants' arguments are without merit.¹

A. The Civil Conspiracy Claims

The Defendants' directed verdict motions at the close of all the evidence appear at Appx. 411-415. Importantly, the Defendants did not renew their directed motions made at the close of the plaintiff's case. (*Id.*, *passim*). Thus, any appeal on the sufficiency of the evidence is limited to the specific grounds raised at Appx. 411-415. As to civil conspiracy, the Defendants first argued there was "no evidence of any acting in concert among the three of them [*i.e.*, Corbin, Scully, and Yarborough]." (Appx. 411). The trial court denied the directed verdict motion. (Appx. 415-416). The Defendants did not challenge this ruling on appeal and, therefore, it is the law of this case that the Defendants acted in concert with each other vis-à-vis the civil conspiracy.

The Defendants argue there was no evidence of "special damages" as to any defendant. This argument is not properly before this Court. The Defendants never argued at the close of the evidence that there was no evidence of special damages as a ground for their directed verdict motion on the conspiracy claim. (Appx. 411-415, *passim*). Thus, this argument is not preserved for review.

¹ In a footnote, the Defendants argue that if this Court grants the Plaintiff's certiorari petition and reverses the new trial ordered by the Court of Appeals, then they summarily "argue" other grounds in support of the new trial order. (Pet-Resps. Cert. Pet. at 6 n.3). Assuming this is sufficient to raise these other "new trial" grounds, the Plaintiff incorporates herein its appellate arguments in opposition to those arguments, including the arguments that these issues are not preserved for appeal, are barred by the law of the case doctrine, and have no merit.

The Defendants made this argument by directed verdict motion at the close of the Plaintiff's case (Appx. 347), but their failure to renew it at the close of all the evidence precludes review of the issue. (Appx. 411-415). In denying the Defendants' JNOV motion on this ground, the trial judge ruled that the Defendants had not made this argument at the close of the evidence and, therefore, could not make it in their JNOV motion. (Appx. 20). The Defendants did not challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case. In denying the Defendants motion to alter or amend on this ground, the trial judge ruled that the Defendants had raised this ground at the close of the plaintiff's case but failed to renew it at the close of the evidence and, therefore, they could not raise the issue as a ground for JNOV. (Appx. 44). The Defendants did not challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case.

In short, the Defendants' "special damages" argument is not preserved for appeal, because it was not made or renewed at the close of the evidence. Moreover, the Defendants do not challenge the trial court's ruling that they did not make this argument at the close of the evidence and that, therefore, they could not raise the issue after the jury's verdict. Thus, this ruling is the law of this case and, right or wrong, requires affirmance.

Defendant Corbin argues separately that there was no evidence that he intended to harm Allegro and, therefore, he was entitled to a directed verdict on the civil conspiracy claim against him.²

It is the law of this case that Scully and Yarborough acted in concert with the intent to harm Allegro, because they did not make any appellate arguments to the contrary. It is the law of this case that Corbin acted in concert with Scully and Yarborough, because no defendant challenged the trial court's denial of this ground for directed verdict. It is the law of civil conspiracy that the hand

² The other defendants (Scully and Yarborough) do not make this argument.

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). 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.³ 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. And it is the law of this case that Corbin acted in concert with Scully and Yarborough vis-à-vis the conspiracy. Accordingly, this Court should affirm the jury's conspiracy verdict against Corbin.

B. The Contract Claims

Defendant Scully argues there was no evidence of any contract between him and Allegro. This is simply false. It is undisputed that Scully was an employee of Allegro, served as its President, and received a salary from Allegro for his services. It is thus obvious that there was a contract between Scully and Allegro. Scully's entire argument for certiorari hinges upon there being no evidence of a contract. The undisputed evidence created a question of fact on the existence of a contract between Allegro and Scully. Thus, the trial judge did not err in denying

³ 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 not required to accept uncontradicted 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 no application in a summary judgment setting." *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.

Scully's directed verdict motion. Moreover, Scully's arguments to the contrary are barred by the law of the case doctrine.

In denying Scully's directed verdict motion, the trial court ruled:

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.

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.

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. The trial judge ruled that Scully’s directed verdict motion was insufficient to present the issue that he attempted to argue below. Rather than appeal this ruling, Scully simply repeats the argument made to the trial court. The law of the case doctrine precludes this absent a challenge to the trial court’s ruling.

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.

C. The Fraud and Negligent Misrepresentation Claims

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

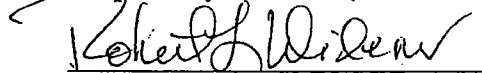
and, therefore, any silence when he had a duty to speak would be a misrepresentation and fraud. *Id.*; see also *Jacobson v. Yaschik*, 155 S.E.2d 601 (S.C. 1967).

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.*, Appx. 288-316; 318-333; 582; 589-604).⁴ Thus, there is evidence of a misrepresentation, which is the only issue raised on certiorari.

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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May 28, 2013
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⁴ Scully argues he told Allegro (McCarthy) that he was taking employees with him. He said this, but he never disclosed that they had agreed to leave without notice. More importantly, there is no evidence (and no argument) that he told Allegro that employees were compiling Allegro documents to take with them (steal) when they left Allegro or that employees were using company time and resources for their own purposes (and those of Scully in forming the new business) and to the detriment of Allegro.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUN - 7 2013

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

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.

**PETITIONERS'/RESPONDENTS' 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/Respondents Emmett J. Scully ("Scully"), George Corbin ("Corbin") and Yvonne Yarborough ("Yarborough") (Scully, Corbin and Yarborough are collectively referred to as "Petitioners/Respondents") hereby submit this reply in support of their petition requesting this Court issue 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. 4997 (S.C. Ct. App. filed July 11, 2012) (Shearouse Adv. Sh. No. 23 at 76) {Appendix ("App.") p. 1004}.¹ For the reasons set forth in the petition as well as this reply, Petitioners'/Respondents' petition should be granted and this Court should address their directed verdict and JNOV arguments because the resolution of those unresolved issues will allow the new trial of this matter to proceed only as to the remaining parties and claims.

I. Allegro does not dispute Petitioners'/Respondents' argument that the Court of Appeals should have addressed the directed verdict and JNOV arguments.

As an initial matter, Petitioners/Respondents note that Allegro's return to the petition for writ of certiorari does not address or attempt to refute Petitioners'/Respondents' initial argument that the Court of Appeals' opinion should have ruled upon Petitioners'/Respondents' directed verdict and JNOV arguments. The Court of Appeals refrained from ruling on the directed verdict and JNOV arguments based upon the rule set forth in Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), that appellate courts need not address remaining issues when

¹ Petitioners/Respondents agree with the Court of Appeals' Opinion to the extent it correctly held that the Trial Court erred by admitting a temporary injunction order into evidence and that this error required a new trial. Petitioners'/Respondents' petition requests that this Court review the Court of Appeals' failure to address Petitioners'/Respondents' directed verdict and JNOV arguments.

the determination of a prior issue is dispositive of the appeal. (Op. No. 4997 at p. 14) {App. 1017}. As discussed in Section I of Petitioners'/Respondents' petition, while the Court of Appeals correctly ordered a new trial based on the erroneous admission of the temporary injunction order, this ruling was not dispositive as to the directed verdict/JNOV issues, and the resolution of those issues would serve the interests of justice by limiting the new trial to only those claims and parties which properly survived directed verdict/JNOV at the first trial. Allegro makes no attempt to dispute this argument, and instead argues the merits of the directed verdict/JNOV issues or asserts they were not preserved. As is explained below, Petitioners'/Respondents' directed verdict/JNOV arguments were properly preserved and certiorari should be granted to resolve these issues.

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

A. The civil conspiracy claim fails because there was no evidence of special damages and this issue was adequately preserved.

Petitioners/Respondents assert that directed verdict and JNOV should have been granted as to Scully, Yarborough and Corbin on the civil conspiracy claim because Allegro failed to offer any evidence of "special" damages. Specifically, Allegro's damages evidence was the same for all eleven causes of action – the alleged losses to Allegro from the loss of its current and prospective clients - and, as such, Allegro failed to establish "special" damages which "go beyond the damages alleged in other causes of action." Pye v. Estate of Fox, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (emphasis added). In its return, Allegro makes no attempt whatsoever to show that there was any

evidence establishing the necessary element of special damages. Rather, Allegro asserts only that this issue has not been preserved for appellate review.

Allegro admits that this precise issue was raised by Appellants in their initial directed verdict motion at the close of Respondent's case. See Allegro's Return at p. 3. Allegro then contends that, because this issue was not raised again in Petitioners'/Respondents' second directed verdict motion at the close of all evidence, it has not been preserved. However, the trial transcript reveals that at the second directed verdict motion, after initially arguing that the civil conspiracy fails as to Corbin due to a lack of any evidence of any intent on his part to harm Allegro, the Trial Court specifically ordered Petitioners'/Respondents' 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.**

(Appx. p. 414) (emphasis added). Viewed in this context, it is clear that the Trial Court did not wish to hear a reiteration of the special damages argument asserted in the prior directed verdict motion and that Petitioners'/Respondents' counsel was specifically directed not to continue with any 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), 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.

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 taken into view, Petitioners’/Respondents’ counsel was not permitted the opportunity to renew the argument as to the complete lack of special damages. 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 Petitioners’/Respondents’ counsel to cease argument on that civil conspiracy cause of action, 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 to proceed without the civil conspiracy claim.

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

Petitioners/Respondents assert that there was no evidence at trial that Corbin had any intent to harm Allegro, and that, therefore, JNOV should have been granted as to Corbin 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). Allegro now seeks to remove the key element of individual intent from the requirements of civil conspiracy. Specifically, while Allegro accurately asserts there has been no appeal on this ground as to Scully and Yarborough, it 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 to be liable for civil conspiracy.

(Allegro's Return at pp. 3-4). Essentially, Allegro 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," that maxim presupposes and requires that the joint actors all share the same intent and are therefore responsible for each others actions. The intent of one, however, 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 Allegro.

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, Allegro 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).

Allegro 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). Allegro has lost sight of a key fact in this case. The Plaintiff in this action 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. Allegro relies on testimony from Corbin wherein he stated that he did not talk with Ms. McCarthy about Scully’s interest in buying Allegro as evidence of Corbin’s intent to harm. (Appx. pp. 339-340). This testimony provides no

evidence of any intent by Corbin to harm anyone. Moreover, it only goes to Ms. McCarthy, not Allegro. Additionally, Allegro attempts 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. Allegro failed to establish this element of civil conspiracy as to Corbin, and Corbin should have been granted directed verdict and civil conspiracy. 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.

III. Allegro 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 Scully, Allegro asserts that, because Scully was an employee of Allegro, "[i]t is thus obvious that there was a contract between Scully and Allegro." (Allegro's Return p. 5). However, contrary to this assertion, the existence of an employment relationship does not presuppose the existence of a contract. Additionally, Allegro has never set forth the terms of the alleged contract or how such terms were breached.

Allegro asserts that the Trial Court determined there was an “oral contract” and incorrectly contends that this ruling has not been challenged in this appeal. At trial, 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, 439). Additionally, Petitioners’/Respondents’ Initial 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.

Allegro 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.

IV. The evidence establishes that there was no misrepresentation by Scully, whether affirmatively or through a failure to speak, sufficient to support the claims for fraud and negligent misrepresentation.

Allegro now claims that the basis of the negligent misrepresentation and fraud claims against Scully is Scully's "silence" regarding the fact that he was planning to leave Allegro and take certain employees and customers with him. See Allegro's Return at pp. 7-8. This argument is without merit. The record in this case clearly establishes that Scully affirmatively told Ms. McCarthy (the other owner of Allegro) of his plans to set up a competing business including taking Allegro's employees and customers with him. Ms. 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. (Appx. pp. 134-135). In addition to affirmatively telling McCarthy of this plan, Scully also informed Allegro's third director, Frank Brown, that if he was unsuccessful in purchasing McCarthy's interest in Allegro, he intended to set up a competing company. (Appx. pp. 216-217). Thus, there is no basis whatsoever for the contention that Scully was "silent" on these points.

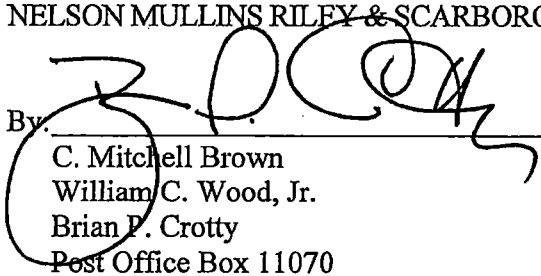
Because Allegro failed to establish any false representation by Scully, the claims for fraud and negligent misrepresentation both fail, and Scully should have been granted directed verdict and JNOV on these issues. Therefore, this Court should grant a writ of certiorari to correct this error, allowing the new trial of this matter to proceed without these baseless claims.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, while the Court of Appeals was correct in ordering a new trial based on the erroneous admission of the temporary restraining order, it was error for the Court of Appeals to refrain from addressing the directed verdict/JNOV issues in its Opinion because those issues were unaffected by the Court of Appeals' Opinion. This Court should grant a writ of certiorari to review and address the directed verdict/JNOV issues and grant JNOV as to the civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation claims. This would allow the new trial that was properly ordered by the Court of Appeals to proceed as to only the viable claims and the remaining parties.

Respectfully submitted,

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Columbia, South Carolina

June 7, 2013

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Allegro, Inc., Respondent-Petitioner,

v.

Emmett J. Scully, Synergetic, Inc., George C. Corbin,
and Yvonne Yarborough, Petitioners-Respondents.

Appellate Case No. 2012-213386

Lower Court Case No. 2004-CP-40-1915

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
The Honorable L. Casey Manning, Circuit Court Judge

Opinion No. 27391
Submitted May 20, 2014 – Filed May 28, 2014

REMANDED

Robert L. Widener and Richard J. Morgan, both of
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Petitioner.

Amy L. Gaffney, of Gaffney Lewis & Edwards, LLC, C.
Mitchell Brown, William C. Wood, and Brian P. Crotty,
all of Nelson Mullins Riley & Scarborough, LLP, of
Columbia, for Petitioners-Respondents.

PER CURIAM: Petitioner-respondent (Defendants) and respondent-petitioner (Allegro) each seek a writ of certiorari to review the Court of Appeals' decision in *Allegro, Inc. v. Scully*, 400 S.C. 33, 733 S.E.2d 114 (Ct. App. 2012). We deny Allegro's petition, grant Defendants' petition, dispense with further briefing, and remand to the Court of Appeals for consideration in accordance with this opinion.

Defendants argue the Court of Appeals erred in failing to address their claims that the trial judge erred in denying their motions for directed verdict and JNOV. We agree.

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. An appellate court need not address remaining issues when disposition of a prior issue is dispositive. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010); *see also Futch v. McAllister Towing of Georgetown, Inc.* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

The Court of Appeals' decision reversed and remanded this case for a new trial based on the trial judge's decision to admit a temporary injunction order into evidence. However, relying on *Futch, supra*, the Court of Appeals declined to address Defendants' claims that the trial judge erred in denying their motions for directed verdict and JNOV. Defendants argue the Court of Appeals' disposition of the new trial issue was not dispositive of their directed verdict and JNOV arguments, and therefore, the Court of Appeals should have addressed the arguments before remanding for a new trial.

We find the Court of Appeals should have addressed whether the trial judge erred in denying Defendants' directed verdict and JNOV motions. The Court of Appeals' decision to reverse and remand for a new trial based on the admission of the temporary injunction order did not dispose of any parties or causes of action that could have been eliminated by a decision on the trial judge's denial of Defendants' motions. Therefore, *Futch, supra*, did not apply because the Court of Appeals' disposition of the new trial issues did not dispose of the directed verdict and JNOV issues.

Accordingly, this matter is hereby

REMANDED.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**

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

Opinion No. 27391
Submitted May 20, 2014 - Filed May 28, 2014

Allegro, Inc., ...Respondent-Petitioner,

v.

Emmett J. Scully, Synergetic, Inc.,
George C. Corbin, and Yvonne Yarborough, ...Petitioners-Respondents.

MOTION TO CLARIFY

Respondent-Petitioner (Plaintiff) respectfully seeks clarification of this Court's intent in denying Plaintiff's petition for a writ of certiorari in the context of remanding other issues to the Court of Appeals. Plaintiff is not seeking a rehearing of that denial, as such is prohibited by Rule 221(a), SCACR. Plaintiff only seeks clarification as set forth below.

The Plaintiff obtained judgments against the Petitioners-Respondents (Defendants) and filed those judgments. The Court of Appeals granted Defendants a new trial based on the admission of an injunction order into evidence. The Court of Appeals refused to rule on Defendants' directed verdict issues, finding that its new trial ruling was dispositive of those issues. Plaintiff petitioned this Court for certiorari, arguing *inter alia* that the issue of admitting

the injunction order into evidence was not preserved for appeal because Defendants' objection stated no grounds, and it was barred by the law of the case doctrine because Defendants had not challenged the trial court's alternative ruling. Defendants also petitioned this Court for certiorari, arguing *inter alia* that the Court of Appeals should have ruled on their directed verdict issues, because the new trial ruling was not dispositive of those issues. This Court granted Defendants' petition, dispensed with further briefing, agreed with the Defendants on the directed verdict issues, and remanded the case to the Court of Appeals for a ruling on the directed verdict issues. In so ruling, this Court also denied Plaintiff's certiorari petition without further comment.

After receiving this Court's opinion, the Defendants demanded that Plaintiff cancel the judgments against the Defendants, *i.e.*, Defendants have demanded that Plaintiff relinquish the judgment liens so that Defendants may deal freely with their assets during the pendency of the litigation. They make this demand under the following reading of this Court's opinion:

1. This Court's denial of Plaintiff's certiorari petition was final and absolute, such that the Defendants are at least entitled to a new trial regardless of the outcome in the Court of Appeals on remand.
2. Thus, regardless of the outcome in the Court of Appeals on remand, Plaintiffs cannot again raise any issue regarding the Court of Appeals' first opinion granting a new trial. For example, if the Court of Appeals denies Defendants' "directed verdict" appeal and therefore reinstates or continues the grant of a new trial, Plaintiffs cannot thereafter petition this Court for certiorari on the new trial ruling.

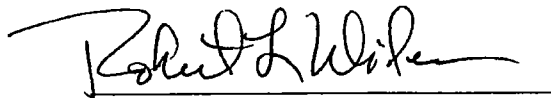
Plaintiff submits that, because this Court was remanding other issues to the Court of Appeals, it denied Plaintiff's certiorari petition for the present but not as an absolute final ruling on the propriety of the new trial ruling. In other words, this Court's analysis and intent was as follows:

1. The Court of Appeals erred in not reaching the directed verdict issues and, therefore, this case must be remanded to the Court of Appeals for a ruling on those issues.

2. Since the case must be remanded to the Court of Appeals, and since this may impact the outcome of the case, judicial economy is best promoted by denying Plaintiff's certiorari petition at this time.
3. After the Court of Appeals issues its ruling on remand, any party would then be free to petition for certiorari regarding any result on remand. For example, if the Court of Appeals rejects Defendants' directed verdict arguments on remand and therefore reinstates or continues the prior grant of a new trial, Plaintiff could then petition this Court for certiorari on the new trial ruling.
4. The foregoing approach best serves judicial economy by allowing this Court to address the merits of all potential certiorari issues in a single opinion after the Court of Appeals has ruled upon all issues that required a ruling.

The requested clarification of this Court's intent in denying Plaintiff's certiorari petition will allow the parties to make informed decisions regarding the status of the filed judgments and whether any action regarding those judgments is needed at this time. For this reason, and for the reasons set forth above, Plaintiff respectfully requests clarification of this Court's opinion and an amended opinion stating that Plaintiff may seek certiorari of the new trial ruling if appropriate after the Court of Appeals issues its opinion on remand.

Respectfully Submitted,



Robert L. Widener
Richard J. Morgan
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Post Office Box 11390
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803-799-9800
Attorneys for Respondent-Petitioner

May 30, 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

RECEIVED

MAY 30 2014

S.C. Supreme Court

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.

PETITIONERS'/RESPONDENTS' RETURN TO MOTION TO CLARIFY

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Petitioners/Respondents Emmett J. Scully, George Corbin and Yvonne Yarborough ("Petitioners/Respondents") hereby submit their Return in opposition to Allegro, Inc.'s ("Allegro") Motion to Clarify.

Contrary to Allegro's assertion in its motion, this Court's Opinion No. 27391 was absolutely clear in its rulings. In an attempt to create a lack of clarity, Allegro re-characterized the Opinion by reordering its rulings. Specifically, Allegro's motion focuses first upon the disposition of Petitioners/Respondents' petition stating that this Court granted the petition, dispensed with further briefing, and remanded the case to the Court of Appeals for it to address the directed verdict and JNOV issues. Allegro then suggests that the denial of its own petition on the separate issue of the grant of a new trial

was merely a technical result of the other certiorari ruling and not a final disposition of that issue. *See* Motion to Clarify at p. 2 (“In so ruling, this Court also denied Plaintiff’s certiorari petition without further comment.”). Allegro is mistaken.

This Court’s concise Opinion resolved Allegro’s petition at its outset. The first matter decided in the Opinion was the denial of Allegro’s petition. Opinion No. 27391 (“We deny Allegro’s petition, ...”). Only after Allegro’s petition was denied does the Court address Petitioners’/Respondents’ petition.

Despite the fact that this Court directly and definitively ruled on Allegro’s petition at the outset of its Opinion, Allegro’s motion suggests that this Court was actually engaging in a four-point analysis that did not intend to rule on Allegro’s petition at this time, but rather reserved a dispositive ruling for some subsequent appeal. Allegro’s suggestion ignores the realities of this appeal and this Court’s Opinion.

The “new trial” issue that was the subject of Allegro’s petition was wholly separate from the “directed verdict/JNOV issues” that were the subject of Petitioners’/Respondents’ petition. The Court of Appeals properly reversed the judgment in this matter and ordered a new trial based solely on the “new trial” issue of the improper admission over objection of the temporary injunction. Allegro’s petition for rehearing was denied, and its petition for certiorari, which was denied by this Court, focused on this issue.

In contrast, Petitioners’/Respondents’ petition did not involve the “new trial issue” and instead only sought rulings on the directed verdict/JNOV issues that were not addressed by the Court of Appeals. This Court’s remand to the Court of Appeals on the directed verdict/JNOV issues serves only to potentially limit the new trial to the proper

claims and parties that survived. Put simply, the new trial issue was ripe for final determination, and this Court's denial of certiorari on that issue properly and finally decided the issue. Contrary to Allegro's assertion, "judicial economy" is not served by delaying final disposition of the new trial issue as it is wholly independent of the matters remanded to the Court of Appeals.

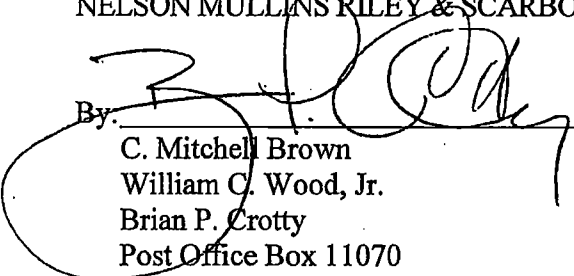
Because this Court's Order initially and specifically denied Allegro's petition, Petitioners/Respondents requested that Allegro's counsel take the necessary steps to withdrawal or cancel the Transcripts of Judgment they had filed with various counties' clerks of court. *See* Letter 5/29/14 Letter from Crotty to Morgan and Widener, attached as Exhibit A. These Transcripts of Judgment have been on file for over eight years encumbering Petitioners/Respondents' property to their detriment. Now that the Court of Appeals has reversed that judgment and ordered a new trial, and now that this Court has denied Allegro's certiorari petition as to that reversal, the removal of the judgments from the clerks of court's judgment roles is entirely necessary and proper at this time.

Therefore, because the Opinion in this matter clearly denies Allegro's petition for a writ of certiorari on the new trial issue, Petitioners/Respondents respectfully request that this Court deny Allegro's motion to clarify.

SIGNATURE PAGE ATTACHED

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Columbia, South Carolina

May 30, 2014

Exhibit A

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May 29, 2014

Via E-Mail (rmorgan@mcnair.net & rwidener@mcnair.net) & U.S. Mail

Richard J. Morgan, Esquire
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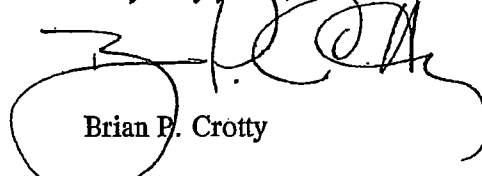
RE: Allegro, Inc. v. Emmett J. Scully, Synergetic, Inc., George Corbin, and
Yvonne Yarborough
Civil Action No. 04-CP-40-1915
SC Court of Appeals Tracking No. 200899926
SC Supreme Court Case No. 2012-213386
Our File No. 28221/01500

Dear Rick & Robert:

Yesterday the South Carolina Supreme Court issued its opinion denying your client's petition for a writ of certiorari. That denial finalized the Court of Appeals' reversal of the judgment and grant of a new trial. As the original trial court judgment no longer exists, we hereby ask you to take whatever steps are necessary to withdraw or cancel the Revised Transcript of Judgment you submitted to the Richland County Clerk of Court, including any other counties where the Transcript of Judgment has also been filed or entered. We further ask that you let us know as soon as possible when this has been accomplished.

Thank you for your attention to this matter.

Very truly yours,



Brian P. Crotty

cc: Amy L. Gaffney, Esq. (via e-mail agaffney@glelawfirm.com)

With offices in the District of Columbia, Florida, Georgia, Massachusetts, North Carolina, South Carolina, Tennessee and West Virginia

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

Opinion No. 27391
Submitted May 20, 2014 - Filed May 28, 2014

Allegro, Inc., ...Respondent-Petitioner,

v.

Emmett J. Scully, Synergetic, Inc.,
George C. Corbin, and Yvonne Yarborough, ...Petitioners-Respondents.

**RESPONDENT-PETITIONER'S REPLY TO PETITIONERS-RESPONDENTS'
RETURN TO MOTION TO CLARIFY**

The question presented by the motion to clarify is one of this Court's intent. If this Court intended to approve the Court of Appeals' deviation from this Court's precedent and creation of an exception to this Court's error preservation jurisprudence, then the Petitioners-Respondents have correctly read this Court's opinion. If this Court intended to postpone a final decision on this issue, then the Respondent-Petitioner has correctly read this Court's opinion.

Respectfully Submitted,



Robert L. Widener
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Attorneys for Respondent

June 2, 2014

COLUMBIA 1162574v1

28221/01300
mid 6/26/14

The Supreme Court of South Carolina

Allegro, Inc., Respondent/Petitioner,

v.

Emmett J. Scully, Synergetic, Inc., George C. Corbin and
Yvonne Yarborough, Petitioners/Respondents.

Appellate Case No. 2012-213386
Lower Court Case No. 2004-CP-40-1915

ORDER

Allegro, Inc. moves for this Court to clarify its opinion in *Allegro, Inc. v. Scully*, Op. No. 27391 (S.C. Sup. Ct. filed May 28, 2014) (Shearouse Adv. Sh. No. 21). The motion is denied.

 C.J.
FOR THE COURT

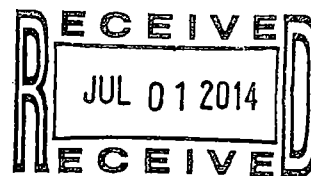
Columbia, South Carolina

June 25, 2014

cc:

C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Brian Patrick Crotty, Esquire
Amy Lohr Gaffney, Esquire
Robert L. Widener, Esquire
Richard J. Morgan, Esquire
Jeanette W. McBride
The Honorable Jenny Kitchings

THE STATE OF SOUTH CAROLINA
In The Court of Appeals



Allegro, Inc., Respondent,

v.

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

Appellate Case No. 2008-099926

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 5245
Submitted May 28, 2014 – Filed June 30, 2014

REVERSED AND REMANDED

Amy Lohr Gaffney, of Gaffney Lewis & Edwards, LLC,
and Charles Mitchell Brown, William C. Wood, Jr.,
Brian Patrick Crotty, and Allen Mattison Bogan, all of
Nelson Mullins Riley & Scarborough, of Columbia, for
Appellants.

Robert L. Widener and Richard J. Morgan, both of
McNair Law Firm, PA, of Columbia, for Respondent.

LOCKEMY, J.: In this civil action, Emmett Scully, Synergetic, Inc. (Synergetic), George Corbin, and Yvonne Yarborough (collectively, Appellants) contend the trial court erred in (1) admitting into evidence the order granting a temporary injunction; (2) admitting into evidence Allegro, Inc.'s (Allegro) expert report; (3) certifying Daniel McHenry as an expert; (4) excluding evidence relating to the

issue of Allegro's damages; (5) failing to grant motions for directed verdict and judgment notwithstanding the verdict (JNOV) as to the claims for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent misrepresentation; (6) reforming the jury's damages verdicts without providing the option of a new trial; and (7) failing to require an election of remedies. We reverse and remand.¹

FACTS

Allegro is a professional employer organization (PEO) that was formed in the late 1990s by its initial owner, Mary Etta McCarthy. A PEO provides human resource services for companies wanting to outsource that function. Scully joined Allegro in August of 1998 as president and a member of its board of directors. He was also given thirty percent of Allegro's stock. The remaining directors consisted of McCarthy, who was the majority owner, and one of Allegro's clients, Frank Brown. Between 1998 and 2001, Scully's ownership interest in Allegro increased to forty-nine percent and McCarthy held the remaining fifty-one percent interest.

Allegro and Scully never executed an employment contract or non-compete agreement. Furthermore, Allegro did not have an employee handbook that was issued to or utilized by its employees. However, when Scully joined Allegro, Scully and McCarthy negotiated a Partnership/Buy-Sell Agreement that governed the percentage and change in ownership of Allegro.²

McCarthy was actively involved in Allegro's management until Scully joined and took over the day-to-day operations. Scully testified that as president, he was entrusted with managing the operations in the best interest of Allegro along with financial oversight of the company. Beginning in late 2002 or early 2003, Scully expressed frustrations about the business to his friend, Corbin, who was also a certified public accountant (CPA). Additionally, Corbin's company, Merritt, was a client of Allegro. Corbin advised Scully regarding three possible options: (1) Scully could buy out McCarthy; (2) McCarthy could buy out Scully; or (3) Scully could start his own business. Scully then consulted with Corbin about how to make an offer to purchase McCarthy's interest in Allegro. In March of 2003,

¹ This case was previously decided by this court; our supreme court remanded it for a decision on the issues involving the directed verdict and JNOV motions. *Allegro, Inc. v. Scully*, 400 S.C. 33, 733 S.E.2d 114 (2012) *remanded by* Op. 27391 (S.C. Sup.Ct. filed May 28, 2014) (Shearouse Adv. Sh. No. 21 at 29).

² Brown was not a party to this agreement.

Corbin issued a letter to Scully outlining three approaches for determining a fair purchase price for McCarthy's shares in Allegro. In concluding the letter, Corbin stated:

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 the business. The business 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.

In the spring of 2003, Scully informed McCarthy that he wanted to purchase her ownership interest in Allegro. Scully also discussed his proposal with Allegro's third director, Brown. During his conversation with Brown, Scully stated that if he could not purchase McCarthy's shares, he would set up his own PEO business. Over the course of a series of discussions with McCarthy in 2003, Scully told her that if they could not agree upon a price at which she would sell her ownership interest in Allegro, he would leave the company and form a competing company, taking employees and clients with him. In response to these conversations, McCarthy suggested having Allegro valued to determine the price of her interest. After McCarthy hired the Geneva Corporation (Geneva) to conduct a valuation study, Corbin reviewed the study and provided feedback to Scully at Scully's request.

On December 24, 2003, McCarthy received a letter from Scully offering to purchase her shares, setting forth two options as to the purchase price, and asking for her response by January 23, 2004. Prior to sending McCarthy the offer, Scully had asked Corbin to review it and Corbin advised that it was a fair offer. McCarthy received a subsequent letter from Scully on January 23, 2004, restating his offer. On January 29, 2004, McCarthy responded with a written counteroffer. Scully replied in a February 2, 2004 letter, stating, "if we are unable to come to terms the result is a lose, lose, lose for everyone involved. If I leave Allegro and start a new PEO we will be in competition for the same customers and employees."

Having failed to reach an agreement regarding the purchase of Allegro, Scully gave his letter of resignation to McCarthy on February 16, 2004. McCarthy then told Scully she would accept his last offer to purchase her ownership interest in Allegro. They agreed her lawyers would draw up the necessary paperwork by the end of that week. After that conversation, Scully left town on a business trip for

Allegro. While Scully was out of town, McCarthy decided she did not want to sell her ownership interest after all and focused her efforts on retaining Allegro. During Scully's absence, McCarthy met with Jim Everly, whom she hired to replace Scully as Allegro's president. McCarthy met with Scully on February 23, 2004, and presented Scully with a letter accepting his resignation. Immediately following Scully's departure from the company, McCarthy and Everly held a meeting with all Allegro employees and informed the employees that they must sign non-compete contracts. Yarborough was an employee of Allegro from 2000 until 2004. At the meeting with McCarthy and Everly, Yarborough and another employee, Lisa Milliken, refused to sign the non-compete contracts.

McCarthy and Everly contacted all of Allegro's clients to inform them Scully was no longer employed by Allegro and made arrangements to meet with each client. They first met with Corbin of Merritt, who told them that due to his personal friendship with Scully, Merritt's business would likely move to Scully's new company, Synergetic. Pursuant to Merritt's contract with Allegro, Corbin sent a thirty day notice in the form of a letter on February 27, 2004, announcing its termination of their contract as of March 31, 2004. Letters from other clients terminating their contracts with Allegro shortly followed.

After his departure from Allegro, Scully formed his new company, Synergetic. On March 1, 2004, Yarborough resigned as an employee of Allegro and began working for Synergetic on March 2, 2004. Millikin also resigned from her position with Allegro on March 1, 2004, and subsequently became an employee of Synergetic.

On April 15, 2004, Allegro initiated this action by filing a complaint against Scully, Yarborough, Corbin, and Synergetic. On that same date, Allegro filed a motion for a temporary injunction, seeking to enjoin Scully, Yarborough, and Synergetic from soliciting business from Allegro's clients. That motion was granted in an eleven page order after a hearing on October 14, 2004.

At the close of Allegro's case, as well as at the close of all evidence, both sides moved for directed verdicts. These motions were denied. The trial court then submitted to the jury eleven of the claims asserted by Allegro.³ Nine of the claims

³ Allegro acknowledges no claims against Synergetic were submitted to the jury; Synergetic joins this appeal because the issue was not addressed in the trial court's orders denying the Appellants' post-trial motions.

applied to Scully alone,⁴ one claim applied to Yarborough alone,⁵ and one claim applied jointly to Scully, Yarborough, and Corbin.⁶ The jury's special verdict form listed each of the eleven causes of action and asked two questions for each charge: (1) whether the plaintiff had proven that claim; and (2) if the claim had been proven, the amount of actual damages and punitive damages (where appropriate) the jury awarded as to each claim.

During deliberations, the jury sent a question to the trial court asking whether they should list the damages specific to each cause of action individually, or place the overall total amount the jury decided to award. In discussing the verdict with the foreperson, using apples as the hypothetical award, the trial court stated, "You give a certain number of apples for each cause of action. And that's all you are worried about. And there are some law related matters that I will take care of as a Judge" The foreperson stated she understood the concept, and the trial court continued:

So, for each cause of action depends on the breach of duty or [contract or] whatever you may find give a number, assign a value that you have been -- if the [p]laintiff's have [proven] to you by the greater weight of preponderance of evidence they are entitled to two apples on this one or three on that one or four on that one, that's the way you do it and don't worry about the total.⁷

The jury returned a verdict for Allegro on all eleven causes of action. The jury awarded actual damages in the amount of \$160,000 for each of the causes of action. Furthermore, the jury awarded \$75,000 in punitive damages on the breach of loyalty claim against Yarborough, and \$175,000 in punitive damages on the

⁴ Scully was the sole defendant on charges of breach of contract, breach of contract with fraudulent intent, fraud, negligent misrepresentation, breach of fiduciary duty, breach of duty of loyalty, gross negligence, violation of section 33-8-310 of the South Carolina Code, and violation of section 33-8-420(a) of the South Carolina Code.

⁵ Yarborough was the sole defendant on one breach of loyalty charge.

⁶ Scully, Yarborough, and Corbin were jointly charged with civil conspiracy.

⁷ It is unclear whether the trial court addressed the issue of the jury's verdict solely with the foreperson, or in the presence of the entire jury. This court strongly warns the trial bench of the danger of interacting with only the foreperson on substantive matters.

civil conspiracy claim against Scully, Yarborough, and Corbin jointly. The jury's verdict form shows that an award of \$1,760,000 had initially been entered in the designated space for actual damages for the first cause of action, but it was struck through and replaced with \$160,000.

Once the jury verdict was announced, the foreperson was questioned as to the total number of "apples" they intended to award Allegro, and their response was \$1,760,000. The court then asked "What about punitive damages in terms of the total number of apples you wanted to give to [Allegro]?" The foreperson said the jury wanted to give \$250,000 total to Allegro. The court finally stated, "We can add it up but your mathematician says it was the intent of this jury to award [Allegro] \$2,010,000," to which the foreperson agreed. As a final review, the trial court said, "Actual damage 1.7 million and the remainder of that sum is punitive damages totaling in the amount of \$2,010,000." Subsequently, no change was made to the verdict form by either the jury or the judge and no change was requested by Allegro.

The trial court completed a Form 4 order, which stated the total amount of actual and punitive damages and their grand total of \$2,010,000. The Form 4 order did not state that these amounts applied to all, or any, of the individual Appellants, but the special verdict form was attached showing the specific damages awards. Further, the Form 4 order gave no indication that the jury's verdict, as stated on the special verdict form, had been changed, altered, or modified in any way.

In their post-trial motions, Appellants moved for an election of remedies and asserted grounds for JNOV and a new trial. On July 14, 2008, the trial court denied all of Appellants' post-trial motions.⁸ In denying the motion for an election of remedies, the trial court stated:

Based upon the verdict form and the conversations with the jury before and after its verdict, I am convinced the jury intended to award \$1.76 Million Dollars in actual damages for each cause of action, and that it intended to award \$250,000 in punitive damages on the two causes of action. I am further convinced that the jury's apportionment of the verdict amongst the various causes of action does not reflect a finding that the Plaintiff suffered only \$160,000.00 in actual damages. Thus,

⁸ Prior to this order, Appellants submitted their objections to the proposed order.

entering judgment for the Plaintiff in the total amount of \$1.76 Million Dollars in actual damages and \$250,000.00 in punitive damages does not give rise to a double recovery.

On July 23, 2008, Appellants filed a motion to amend and/or set aside the July 14, 2008 order. This motion was also denied in an order by the trial court on April 5, 2010.⁹ The trial court stated that in its May 5, 2006 Form 4 order, it reformed the jury's verdict, changing it from eleven separate actual damages awards of \$160,000 and two punitive damages awards of \$75,000 and \$175,000, which resulted in different totals against different defendants, to one total verdict of \$2,010,000 against all the defendants. The trial court further stated any issue regarding this "reformation" of the jury's verdict not being coupled with the option of a new trial was waived because the issue "was not raised in Defendants' post-trial motions." This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in admitting the order granting a preliminary injunction to Allegro into evidence?
2. Did the trial court err in admitting McHenry's report into evidence?
3. Did the trial court err in qualifying McHenry as an expert in the field of "damages"?
4. Did the trial court err in excluding evidence that Appellants maintain was relevant to the issue of Allegro's damages as well as Allegro's failure to mitigate those damages?
5. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to civil conspiracy?
6. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to the contract claims?
7. Did the trial court err in denying Appellants' directed verdict and JNOV motions in regards to the fraud and negligent misrepresentation claims?

⁹ The Appellants objected to the 2010 order prior to its entry as well.

8. Did the trial court err in reforming the jury verdict?

9. Did the trial court err in not requiring an election of remedies?

LAW/ANALYSIS

I. Evidentiary Errors

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57-58 (2011) (quoting *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* at 444, 710 S.E.2d at 58 (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)). A finding of abuse of discretion does not end the analysis, however, "because to warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.*

1. Preliminary Injunction Order

Appellants argue the trial court erred in admitting the temporary injunction order into evidence. We agree.

First, we will address the threshold issue of preservation. For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented. *State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005). Further, it must be made with sufficient specificity "to inform the trial court of the point being urged by the objector." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). However, when the evidence is inherently prejudicial, the grounds for the objection are patent, and the issue will be found preserved. *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 43-47, 426 S.E.2d 756, 757-58 (1993) (holding a request that a voir dire question regarding insurance coverage "not be charged" was sufficient to preserve the issue, because even though specific grounds were not stated, the grounds were patent because the voir dire question was so inherently prejudicial).

We will examine whether the introduction of a preliminary injunction order into evidence is inherently prejudicial, thus making the grounds of the objection to its admittance patent. An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *Cnty. of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). One of the elements the applicant must establish is that he has a likelihood of success on the merits. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); see *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969) ("It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits."). A temporary injunction is granted without prejudice to the rights of either party pending a hearing on the merits, and "when other issues are brought to trial, they are determined without reference to the temporary injunction." *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (citing *Alston v. Limehouse*, 60 S.C. 559, 569, 39 S.E. 188, 191 (1901) (stating "no fact decided upon such motion [for a temporary injunction] is concluded thereby, and when the other issues are brought to trial they are to be determined without reference to said orders")). The purpose of a temporary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973).

In the case at bar, the order included approximately four and a half pages of "Findings of Fact" by the trial court, as well as this statement by the trial court:

The Court carefully considered the pleadings, documents, and argument of counsel at a hearing . . . and finds that despite Defendants' denials of wrongdoing, there is sufficient evidence to indicate that the Defendants were engaged in the activities alleged by the Plaintiff.

After Appellants' objection to the admission of the preliminary injunction order, the trial court stated, "I think subject to your earlier objection, is that fair enough, that I've already ruled upon?" The Appellants concurred with the trial court, and the trial court continued, stating, "Very well. We might go into a little more detail later but it is over your objection."

It is hard for this court to determine an instance where admission of a preliminary injunction order into the trial record would not be highly prejudicial. While Appellants did not state specific grounds for their objection, we find the introduction of the order for temporary injunction into evidence was inherently prejudicial, and thus, the grounds for the objection were patent. *See Dunn*, 311 S.C. at 43-47, 426 S.E.2d at 757-58. We believe admitting this order had a high possibility of influencing the jury due to its numerous findings of fact and statements concluding defendants' liability for the alleged charges. The trial court abused its discretion in admitting the order into evidence. Thus, we reverse and remand in accordance with this decision.

2. McHenry's Expert Report

Appellants argue McHenry's written report and its attachments were cumulative of his subsequent testimony and contained impermissible and highly prejudicial hearsay, making its admission into evidence reversible error. We agree to the extent that the written report included the preliminary injunction order, but find the remainder of the testimony did not prejudice Appellants.

"Rule 703, SCRE, allows an expert giving an opinion to rely on facts or data that are not admitted in evidence or even admissible into evidence." *Wright v. Hiestor Constr. Co.*, 389 S.C. 504, 523, 698 S.E.2d 822, 832 (Ct. App. 2010) (citing *Jones v. Doe*, 372 S.C. 53, 62, 640 S.E.2d 514, 519 (Ct. App. 2006)). However, Rule 703 does not allow the admission of hearsay evidence simply because an expert used it in forming his opinion; the rule only provides the expert can give an opinion based on facts or data that were not admitted into evidence. *Jones*, 372 S.C. at 62-63, 640 S.E.2d at 519.

As stated previously, for an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented. *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). Further, it must be made with sufficient specificity "to inform the trial court of the point being urged by the objector." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

At trial, Appellants objected to McHenry's report after Allegro moved to put it into evidence. The Appellants stated, "Same objection," purportedly in reference to a previous objection on the record that was based on matters discussed in camera. While the in camera discussion was either not placed on the record or not given to us in the record on appeal, the trial court's 2008 order states,

I overruled this general objection which was insufficient as a matter of law to present any objection, upon the ground that experts are permitted to base their opinion on hearsay if it is the type generally relied upon by experts. The Defendants never objected that the hearsay, to the extent there was any, was not this permissible type of hearsay.

In light of the trial court's 2008 order, it is apparent the objection was a general hearsay objection. In their 2006 post-trial motion, the Appellants objected again to the admission of McHenry's report "because this report was cumulative of his testimony, contained impermissible hearsay, and contained matters that were irrelevant and which served only to unfairly prejudice Defendants, confuse the issues, and mislead the jury." They further stated the report contained a document that gave "a purported timeline replete with multiple layers of impermissible hearsay, self-serving statements, conclusions of fact and law, Plaintiff's own opinions, and references to impermissible damages such as Plaintiff's litigation costs and attorneys' fees in this action."

We believe the specific issue of impermissible hearsay in the expert's report is preserved for appellate review, as the issue was raised with sufficient specificity, and ruled upon by the trial court. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (holding that to be preserved for appellate review, an issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity). There is nothing in the record on appeal that indicates the trial objection included arguments that the report was cumulative and contained matters that were irrelevant; thus, we find those issues are not preserved for our review. *See McCall v. IKON*, 380 S.C. 649, 663, 670 S.E.2d 695, 703 (Ct. App. 2008) (holding that the appellant has the burden of providing a record sufficient for appellate review).

Here, McHenry was allowed to rely on hearsay in his report when giving his expert opinion. However, the admission of the report itself simply because McHenry used it in forming his expert opinion was in error. The report contained many instances of hearsay, including numerous statements by Scully. However, "the admission in evidence of inadmissible hearsay affords no basis for reversal where the out-of-court declarant later testifies at trial and is available for cross-examination." *Clark v. Ross*, 284 S.C. 543, 551, 328 S.E.2d 91, 97 (Ct. App.

1985), *abrogated by Sherer v. James*, 290 S.C. 404, 351 S.E.2d 148 (1986). Further, we do not find any of the remaining impermissible hearsay to be reversible error.

We address the fact that a copy of the temporary injunction order was attached to the report, which we find highly prejudicial to the Appellants. We found admission of the temporary injunction order was improper, and it was error to admit it with the expert's report as well. We find that portion of the expert's report to be highly prejudicial; thus, we reverse the decision of the trial court to the extent it allowed the temporary injunction order into the record.

3. Exclusion of Damages Evidence and McHenry's Qualification

Because we reverse and remand based upon the above evidentiary issues, we need not reach Appellants' remaining evidentiary arguments regarding the trial court's exclusion of damages evidence and McHenry's qualification as an expert. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

II. Denial of Directed Verdict and JNOV

"In ruling on motions for directed verdict or [JNOV], the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Steinke v. S.C. Dep't of Labor, Licensing & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). "In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002) (quoting *Sims v. Giles*, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct. App. 2001)). "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* This court will reverse the trial court's ruling on a directed verdict or JNOV motion only where there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Clark v. S.C. Dep't of Public Safety*, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005); *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003)).

For preservation purposes, when a defendant moves for a directed verdict under Rule 50, SCRPC at the close of the plaintiff's case, he must renew that motion at

the close of all evidence. *Wright v. Craft*, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006) (citing *Hendrix v. E. Distribution, Inc.*, 316 S.C. 34, 37, 446 S.E.2d 440, 442 (Ct. App. 1994), *aff'd in result*, 320 S.C. 218, 464 S.E.2d 112 (1995)).

"[If] a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." *Id.* A motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion and cannot raise grounds beyond those raised in the directed verdict. *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 88, 610 S.E.2d 852, 856 (Ct. App. 2005).

1. Civil Conspiracy

Appellants contend the trial court should have granted their directed verdict and JNOV motions on the civil conspiracy claim because there were no special damages, and, as to appellant Corbin, because there was no evidence of an intent to harm Allegro. We find part of this argument was not preserved for our review, and we disagree with the remainder of Appellants' argument.

a. Special Damages

First, we review Appellants' argument that there was no evidence of special damages and, thus, the trial court erred in denying their directed verdict and JNOV motions. At the close of Allegro's evidence, Appellants moved for their directed verdict and stated:

With regard to the civil conspiracy cause of action against Ms. Yarborough and Mr. Corbin, as Your Honor's well aware, you have to show a combination of two or more people for the purpose of harming, in this case Allegro, and that there has to be some special damages, not just, the normal damages that are incident to other claims but special damages unique to that conspiracy and the Plaintiff has offered no evidence of any special damages other than the general damages that their expert testified to yesterday. So because of that absence we would submit the civil conspiracy claim should be dismissed.

In Appellants' directed verdict motion at the close of all evidence, they failed to renew their previous directed verdict motion and also failed to argue that there was

a lack of evidence as to special damages. Thus, we find Appellants did not preserve this portion of their argument. *See Wright*, 372 S.C. at 19, 640 S.E.2d at 496.

b. Intent to Harm

In contrast to their argument discussed above, Appellants did specifically renew their contention that Corbin did not have the requisite intent to harm, which is a requirement to be found liable for civil conspiracy. We determine that this portion of the argument is preserved for our review.

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010) (quoting *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006)); *see also Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage."). "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) (quoting *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998)). The gravamen of the tort of civil conspiracy is "the damage resulting to [the] plaintiff from an overt act done pursuant to a common design." *Vaught*, 300 S.C. at 208, 387 S.E.2d at 95.

Here, Corbin admitted he had a general knowledge about Allegro's clients because he previously did accounting work for the company. Corbin also admitted he spoke in an advisory capacity with Scully about Scully's interest in Allegro without informing McCarthy of the conversations. In this advisory capacity, Corbin stated he outlined the option of setting up a competitive company and explained there was a letter that outlined that option along with other options. Specifically, Corbin agreed he was "intimately" involved in all conversation regarding Scully's interest in buying Allegro or setting up his own competing business. The credibility of statements evidencing Corbin only had the intent to help and not injure Allegro are for a jury to decide. Viewing the evidence in the light most favorable to the non-moving party, Allegro, we find evidence exists to go before a jury to weigh. For the foregoing reasons, we affirm the trial court's denial of Appellants' directed verdict on this ground.

2. Contract Claims

Scully argues the trial court erred by failing to grant his directed verdict and JNOV as to the claims for breach of contract and breach of contract accompanied by a fraudulent act. Specifically, Scully contends there was no evidence of any contract between Allegro and Scully, no evidence of any terms of the alleged contract, and no evidence of a breach of the alleged contract. We find a portion of Scully's argument was not preserved for our review, and we disagree with the remaining argument.

a. Breach of Contract

We find Scully preserved the issue of the existence of a contract for our review. However, we do not think he preserved the argument that the terms of the contract were not proven. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 60, 691 S.E.2d 135, 155 (2010) (holding when an issue is not raised as a ground for a directed verdict, raising the issue in a JNOV motion will not preserve it for appellate review); *see also In re McCracken*, 346 S.C. 87, 92-93, 551 S.E.2d 235, 238 (2001) (stating only issues raised at directed verdict can properly be raised in a JNOV).

At the close of Allegro's case, Scully made the motion for a directed verdict on the claims of breach of contract and breach of contract with fraudulent intent and argued there was no contract between Scully and Allegro, oral or written. Specifically, Scully argued:

The Court: You don't think there was an oral understanding between these two parties in this litigation, between Ms. McCarthy and Mr. Scully?

[Scully's Counsel]: There's been no evidence that there's been any oral understanding between.

The Court: So, are you saying there is no written contract? There is no oral contract?

[Scully's Counsel]: Exactly

At the close of all the evidence, Scully made a motion for a directed verdict, arguing again that there is no evidence of any contract, oral or written, and so the claims for breach of contract and breach of contract with fraudulent intent could

not stand. In his post-trial JNOV motion, Scully stated, "[Allegro] failed to prove the existence of a contract between Scully and [Allegro], the terms of any such contract between Scully and Plaintiff, and the breach of any such contract by Scully."

We hold Scully preserved the issue of the existence of a contract, but he did not preserve the issue of defining the terms of the alleged contract. *See Stokes-Craven*, 387 S.C. at 60, 691 S.E.2d at 155.

"Under the common law, a trial court should submit to the jury the issue of existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference." *Small v. Springs Indus., Inc.*, 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1987); *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 101 S.E. 838 (1920); *Benya v. Gamble*, 282 S.C. 624, 627-29, 321 S.E.2d 57, 59-61 (Ct. App. 1984). General contract law provides that a "contract exists when there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." *Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (quoting *Benya*, 282 S.C. at 628, 321 S.E.2d at 60). A contract may arise from oral or written words or by conduct. *Rushing v. McKinney*, 370 S.C. 280, 290, 633 S.E.2d 917, 922 (Ct. App. 2006).

We find there is evidence in the record for the jury to weigh the issue of the existence of a contract. While there may not have been a written contract, there is evidence on the record to suggest an oral contract, or a contract created by conduct. Scully was hired as President of Allegro, and he stated his general responsibilities as president of Allegro were "[t]he daily operations of the business." Scully also admitted he had financial duties as well as the responsibility to act in a good faith manner for the benefit of the company. In addition to those admissions, the record reflects there was testimony regarding a written partnership buy/sell agreement, which included terms about changing ownership and percentage of ownership. Viewing the facts in the light most favorable to Allegro, there is evidence in the record for a jury to weigh whether an offer was communicated to Scully that he accepted, thus creating an employment contract. Therefore, we affirm the trial court on this issue.

b. Breach of Contract with Fraudulent Intent

Scully's only argument on appeal regarding this issue is that the trial court erred in denying his motion for a directed verdict and JNOV because there was no evidence of the existence of a contract. We disagree.

Because we find there was evidence for a jury to weigh in determining the existence of a contract, we affirm the trial court on this issue.

3. Fraud and Negligent Misrepresentation

Scully argues the trial court erred in failing to grant his directed verdict and JNOV as to the claims for fraud and negligent representation. We agree.

"Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003). "To prevail on a cause of action for fraud, a [p]laintiff must prove by clear, cogent and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Moseley v. All Things Possible, Inc.*, 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010) (citing *Regions Bank*, 354 S.C. at 672, 582 S.E.2d at 444-45).

To prove a claim for the common law tort of negligent misrepresentation, a plaintiff is required to establish the following elements: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. *West v. Gladney*, 341 S.C. 127, 133-34, 533 S.E.2d 334, 337 (Ct. App. 2000). "There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (quoting *AMA Mgt. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). "Evidence of a mere broken promise is not sufficient to prove negligent misrepresentation."

Turner v. Milliman, 392 S.C. 116, 123, 708 S.E.2d 766 at 769-70 (2011) (quoting *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003)).

"The failure to prove any element of fraud or misrepresentation is fatal to the claim." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010) (quoting *Schnellmann v. Roettger*, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (2007)).

Allegro argues silence when there is a duty to speak can constitute fraud. *See Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) (stating "parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud"). However, while our court recognizes "[n]ondisclosure is fraudulent when there is a duty to speak," this discussion relates to the separate and distinct claim of fraudulent concealment, not a claim of fraud. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 334, 574 S.E.2d 502, 509 (Ct. App. 2002) (quoting *Ardis v. Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993)). Therefore, the element of "false misrepresentation" cannot be premised upon an omission or silence of a party. *See id.*

Here, McCarthy, on behalf of Allegro, testified Scully told her of his plans. Specifically, she stated:

[H]e told me one day and he told me this three or four times if you do not take the money I'm offering you, I'm leaving Allegro. I am taking Yvonne and Lisa. I am taking 50 percent of the clients. I already know which ones I want and it will be 50 percent of your business and I am going to tear Allegro apart.

Allegro offers no other evidence of false representations made by Scully. McCarthy, on behalf of Allegro, admitted she knew of Scully's desire to purchase Allegro and his intent to start his own business with the possibility of damaging Allegro's business should he not be able to purchase Allegro. Thus, we reverse the trial court on this issue, as there was no evidence to support a showing of a false representation by Scully, and a failure to prove any element of fraud or misrepresentation is fatal to the claim.

III. Remaining Arguments

Appellants contend the trial court erred in reforming the jury's verdict when the trial court should have either required an election of remedies based upon the jury's verdict or granted a new trial nisi additur.¹⁰ Because we reverse the trial court on the issues noted above, we need not review this argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Based on the foregoing reasons, the trial court's decision is

REVERSED AND REMANDED.

HUFF and PIEPER, JJ., concur.

¹⁰ We reiterate that we do not approve the practice of asking a question or responding only to the foreperson regarding a substantive issue about the law or the verdict. When a question arises regarding the law or the verdict form, the better practice is to confer with counsel outside the presence of the jury to discuss the proper response, and then instruct the entire jury in court or in writing and return them to the jury room to act in accordance with the court's instructions. *See Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. 179, 203-04, 730 S.E.2d 890, 902-03 (Ct. App. 2012) (Thomas, J., concurring) (providing the best practice to ensure a valid verdict is for the court to address any questions that arise in front of the entire jury). If a jury verdict form is ambiguous or unclear, the jury should be returned to the jury room in order to clarify or conform the verdict to its intent before the jury is excused. *Id.*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUL 15 2014

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

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.¹ However, in Opinion 5245, a Panel of this Court also affirmed the Trial Court's denial of Appellants' directed verdict and

¹ 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), 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. 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.² 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

² 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.³ 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.

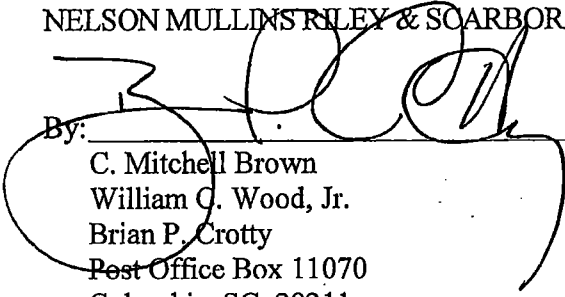
CONCLUSION

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.

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

Respectfully submitted,

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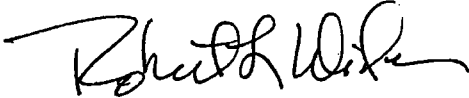
Re: Allegro, Inc. v. Emmett J. Scully, et al.
Case Tracking No. 200899926
Civil Action No. 2004-CP-40-1915

Dear Ms. Kitchings:

This Court's opinion properly resolved all issues that were properly before the Court. The Appellant's Petition for Rehearing under Rule 221, SCACR, fails to raise any proper issue warranting rehearing. Accordingly, pursuant to Rule 240(e), SCACR, the Respondent will not be filing a Return to the Petition for Rehearing unless requested by this Court. ("a return to a petition or motion for rehearing under Rule 221 need not be filed unless requested by the court. ").

Respectfully yours,

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RLW/as

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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)

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.

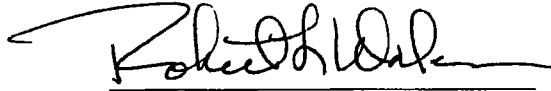
Research reveals no case other than this Court's opinion in the present case as limiting evidence of "fraud by silence" to claims for fraudulent concealment. Thus, this Court's opinion represents a new rule of law. If this Court does not grant rehearing on Grounds I-III, *supra*,

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,



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July 29, 2014
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

L. Casey Manning, Circuit Court Judge

Case No. 04-CP-40-1915

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.¹

¹ 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

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.

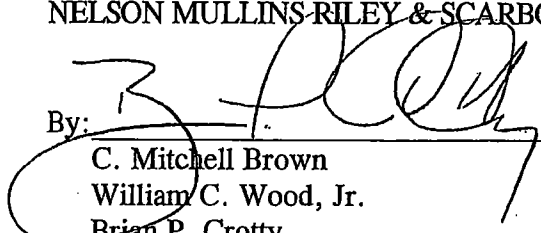
Because Allegro failed to establish any false representation by Scully, and because the record refutes any claim that Scully was "silent" as to his announced intent to start a competing company and take key employees and clients, the claims for fraud

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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August 7, 2014

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)

Allegro, Inc., ...Respondent,

v.

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

RESPONDENT'S REPLY TO RETURN TO PETITION FOR REHEARING

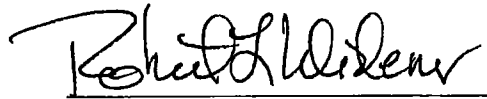
Appellant's return to Respondent's Petition for Rehearing ignores the arguments made in the Petition. As noted in the Petition, Appellant Scully manifestly had a duty to speak when he knew that employees were compiling company documents to take when they left, and that employees were using company time 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, and there is no evidence that he 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 as to the claims for fraud and misrepresentation. Appellants never respond to this. (Return, *passim*).¹

As also set forth in Respondent's Rehearing Petition, this Court's ruling that "fraud by silence" was limited to claims for fraudulent concealment was erroneous for four reasons: (1) this Court reversed the trial court on a ground never argued to the trial court or this Court; (2) this Court overlooked controlling Supreme Court precedent to the contrary; (3) there is no logical or jurisprudential basis for limiting evidence of "fraud by silence" to claims for fraudulent concealment; and (4) any such limitation should be prospective only, and Respondent should be granted leave to amend its complaint on remand. Appellants never respond to any of these arguments.

For all of the foregoing reasons, and for all of the reasons set forth in Respondent's Petition for Rehearing, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion as requested in Respondent's Petition for Rehearing.

Respectfully Submitted,



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¹ In their footnote 1, Appellants argue that Respondent's letter regarding the filing of a Return to Appellants' Petition for Rehearing waived any challenge by Respondent to this Court's ruling. This is a silly argument. The letter clearly related to Appellants' Petition only. Moreover, the letter expressly stated this Court had properly decided the issues that were properly before it. As set forth in Respondent's Rehearing Petition, the issue of whether "fraud by silence" is limited to claims for fraudulent concealment was not properly before this Court. Thus, the letter has no bearing on the issues raised in Respondent's Rehearing Petition.

The South Carolina Court of Appeals

Allegro, Inc., Respondent,

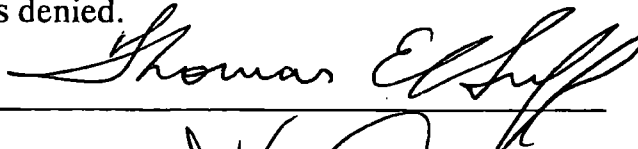
v.

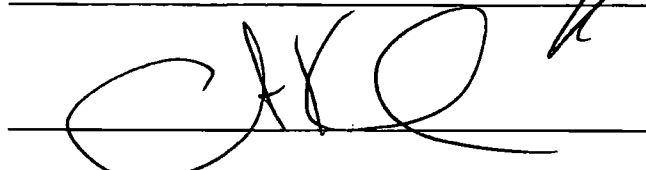
Emmett J. Scully, Synergetic, Inc., George C. Corbin and
Yvonne Yarborough, Appellants.

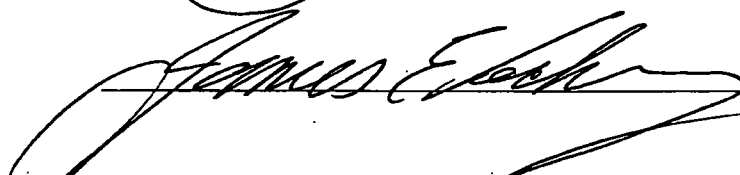
Appellate Case No. 2008-099926

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, Allegro Inc.'s petition for rehearing is denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc:

Charles Mitchell Brown, Esquire

Amy Lohr Gaffney, Esquire

Brian Patrick Crotty, Esquire

Richard J. Morgan, Esquire

FILED

August 26, 2014

Allen Mattison Bogan, Esquire
Robert L. Widener, Esquire
William C. Wood, Jr., Esquire
The Honorable L. Casey Manning

The South Carolina Court of Appeals

Allegro, Inc., Respondent,

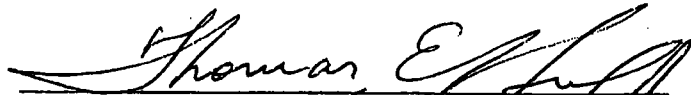
v.

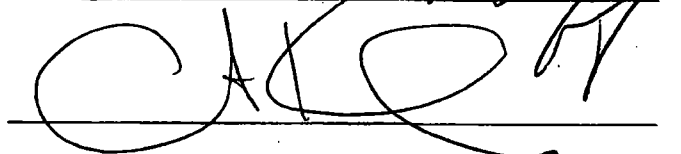
Emmett J. Scully, Synergetic, Inc., George C. Corbin and
Yvonne Yarborough, Appellants.

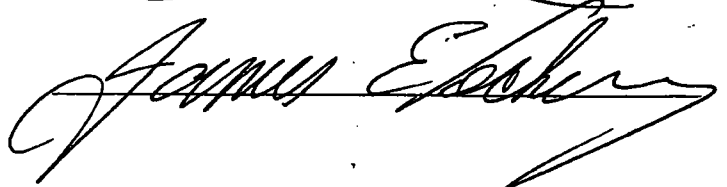
Appellate Case No. 2008-099926

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, Emmett J. Scully, Yvonne Yarborough, and George Corbin's petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

cc:

Charles Mitchell Brown, Esquire

Amy Lohr Gaffney, Esquire

Brian Patrick Crotty, Esquire

Richard J. Morgan, Esquire
Allen Mattison Bogan, Esquire
Robert L. Widener, Esquire
William C. Wood, Jr., Esquire

FILED

September 4, 2014

MCNAIR
ATTORNEYS

October 6, 2014

Robert L. Widener
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Via Courier

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

OCT - 6 2014

S.C. Supreme Court

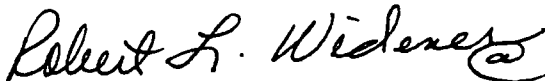
Re: Allegro, Inc. -v- Emmett J. Scully, Synergetic, Inc., George C. Corbin,
and Yvonne Yarborough
Case No. 04-CP-40-1915
Appellate Case No. 2008-099926
S.C. Ct. App. Opinion No. 5245 (filed June 30, 2014)

Dear Mr. Shearouse:

Respondent Allegro, Inc. will not be filing a Petition for Writ of Certiorari in
the above referenced case.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

RLW/as
Enclosures

cc: Honorable Jenny Abbott Kitchings
C. Mitchell Brown, Esq.
Amy L. Gaffney, Esq.
Brian P. Crotty, Esq.
Richard J. Morgan, Esq.

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