

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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

S.C. Supreme Court

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

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. 5245 (S.C. Ct. App. filed June 30, 2014) (Shearouse Adv. Sh. No. 26 at 118) {Appendix (“App.”) 1146}. Petitioners agree the Court of Appeals correctly held that the trial court erred by failing to grant Petitioner Scully’s motions for directed verdict and JNOV on the claims for fraud and negligent misrepresentation.¹ However, in Opinion No. 5245, the Court of Appeals affirmed the trial court’s denial of Petitioners directed verdict and JNOV motions as to the claims for civil conspiracy, breach of contract and breach of contract accompanied by a fraudulent act. Petitioners now seek a writ of certiorari so that this Court may review the Court of Appeals’ Opinion as to those 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 September 4, 2014. {App. 1192}.

¹ Petitioners also note that previously in Opinion No. 4997, filed July 11, 2012, the Court of Appeals 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. {App. 1004}. Respondent petitioned this Court for a writ of certiorari as to that ruling which this Court denied on May 28, 2014 in Opinion No. 27391. {App. 1132}. In that Opinion, this Court remanded this case back to the Court of Appeals directing that court address the Petitioners’ directed verdict and JNOV arguments. Thus, the grant of a new trial of this matter became final with the filing of Opinion No. 27391, and the only remaining issues are whether Petitioners’ motions for directed verdict and JNOV should have been granted.

QUESTIONS PRESENTED FOR REVIEW

- I. Did the trial court and the Court of Appeals err by failing to grant the Petitioners' motions for directed verdict and/or JNOV as to the claim for civil conspiracy.**

 - 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?**
- II. Did the trial court and the Court of Appeals err in failing to grant Petitioner Scully's motions for 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?**

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") {R. 72, 112-113; App. 77, 117-118}. A PEO provides Human Resources services for companies that wish to out-source that function. {R. 113; 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. {R. R, 72, 118; App. 77, 118}. Yarborough was an employee of Allegro from 2000 until 2004. {R. 121, 312-313; App. 126, 317-318}. Corbin is the Chief Financial Officer of

Merritt Veterinary Supplies, Inc. (“Merritt”), which was a client of Allegro. {R. 140, 331; 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. {R. 55-67, 71-89; App. 60-72, 76-94}. 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. {R. 71-89; App. 76-94}.²

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.³ {R. 44-49; App. 49-54}. 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.” {R.

² 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. {R. 71-89; App. 76-94}.

³ 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. {R. 444; App. 449} and has been abandoned.

44-49, 762; App. 49-54, 774}. Thus, prior to the end of the trial, Respondent abandoned any claim against Synergetic.

On May 5, 2006, the jury returned verdicts in favor of Allegro as to each of the eleven claims submitted to it. {R. 44-49; App. 49-54}. Following the jury's verdict, both sides filed post-trial motions, all of which were denied. {R. 13-25, 27-42, 469-504, 514-573, 744-746, 747-760, 802-809; App. 18-30, 32-47, 481-516, 526-585, 756-758, 759-772, 814-821}. Petitioners filed timely Notices of Appeal on August 12, 2008 and April 9, 2010. {R. 823-846, App. 835-858}. 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}. In Opinion No. 4997, the Court of Appeals refrained from addressing any of Petitioners' directed verdict/JNOV arguments. {App. 1004}.

Both Petitioners and Respondent sought writs of certiorari from this Court regarding Opinion No. 4997. {App. 1065, 1086}. Petitioners sought review of the Court of Appeals' refusal to address the directed verdict/JNOV arguments. {App. 1066}. Respondent sought review of the grant of a new trial. {App. 1088}. On May 28, 2014, in Opinion No. 23791, this Court denied Respondent's petition, granted Petitioners' petition, and remanded this case to the Court of Appeals directing that Court to address Petitioners' directed verdict/JNOV arguments. {App. 1132}. Thus, the grant of a new trial of this matter became final with the filing of Opinion No. 27391, and the only issues remaining were whether Petitioners' motions for directed verdict/JNOV should have been granted.

On June 30, 2014, the Court of Appeals filed Opinion No. 5245, which addressed Petitioners' directed verdict/JNOV arguments. {App. 1146}. As to the claims of fraud and negligent misrepresentation, the Court of Appeals reversed the trial court and held that Petitioner Scully was entitled to directed verdict/JNOV as to these claims because Respondent failed to establish any evidence of a false representation. {App. 1163}. However, the Court of Appeals affirmed the trial court's denial of directed verdict/JNOV on the civil conspiracy, breach of contract, and breach of contract accompanied by a fraudulent act claims. {App. 1158-1162}. Specifically, on the civil conspiracy claim, the Court of Appeals held that Petitioners' argument that there was no evidence of special damages supporting the claim had not been preserved {App. 1158}, and that sufficient evidence existed as to Petitioner Corbin's intent to harm for the issue to go to the jury. {App. 1159}. On the contract claims, the Court of Appeals held that there was sufficient evidence of the existence of a contract between Petitioner Scully and Allegro for the matter to go to the jury and that Petitioner Scully had not preserved the issue of whether the terms of the contract had been established. {App. 1160-62}.

On July 15, 2014, Petitioners filed a petition for rehearing. {App. 1165}. That petition was denied on September 4, 2014. {App. 1192}. Petitioners now file this petition for a writ of certiorari.

SUMMARY OF GROUNDS FOR CERTIORARI

Rule 242 of the South Carolina Appellate Court Rules outlines some of the considerations used in deciding whether a writ of certiorari is appropriate. Two of those considerations are present in this action and weigh in favor of this Court issuing a writ of certiorari to review and reverse the Court of Appeals' opinion as to the civil conspiracy

and contract claims. Specifically, the Court of Appeals' Opinion raises a novel question of law on the subject of issue preservation, and conflicts with prior decisions of this Court as to the existence of sufficient evidence to withstand motions for directed verdict and/or JNOV. See Rule 242(b)(1) & (3), SCACR.

On the subject of issue preservation, a novel question of law exists with regard to whether an issue is preserved if it is initially raised at the first directed verdict motion, but the party is not permitted to reassert it at the second directed verdict motion because the trial court expressly directs counsel to refrain from any additional argument on that claim. The Court of Appeals' Opinion in this matter adversely impacts Petitioners for failing to reassert the lack of special damages supporting civil conspiracy where that failure was directly caused by the trial court ordering counsel to end her argument as to that claim. Certiorari should thus be granted.

Review is also appropriate in this matter because the Court of Appeals' decision on the civil conspiracy and contract claims is in conflict with the prior decisions of this Court. Specifically, as to the civil conspiracy claim, the Court of Appeals' Opinion conflicts with the rule set forth in Pye v. Estate of Fox, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511-12 (2006), requiring that the combination be for the purpose of injuring the plaintiff, and the rule set forth in Hoard v. Roper Hospital, Inc., 587 S.C. 539, 549, 694 S.E.2d 1, 6 (2010), that a party may not avoid a dispositive motion by asserting that the jury may disbelieve *uncontradicted* evidence. Therefore, "special and important reasons" exist supporting the issuance of a writ of certiorari in this matter, and this Court should grant certiorari and reverse the denial of directed verdict/JNOV as to the civil conspiracy

and contract claims so that the new trial previously order in this case can proceed as to only the remaining claims and parties.

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 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.

I. 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. {R. 341-342, 401-411; App. 346-47, 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. {R. 341-342, 401-411; App. 346-47, 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 Petitioner Corbin, and no evidence establishing the third element of special damages as to *any* of the Petitioners.

A. Petitioner 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.

Petitioner 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 trial court erred in both its analysis and its conclusion on this issue. While considering the motion for directed verdict on this point, the trial court incorrectly interpreted the second element of this claim. {R. 406-409; 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." {R. 407; App. 412}. Thus, the trial court removed the key element of intent from its analysis of this claim. 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).

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; App. 388}. Corbin also wrote Scully a letter outlining three possible methods for valuing Allegro and reviewed a valuation as well as Scully's offer letter to determine if it was a "fair" offer. {R. 217-218, 370, 385; 578; App. 222-23, 375, 390, 590}. These actions evidence nothing more than friendly advice. Moreover, there was no evidence suggesting that, in providing this advice, Corbin possessed any intent to harm Allegro. Rather, to the contrary, the only evidence offered as to Corbin's intent was that he wanted to help Allegro. {R. 384, 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 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; App. 590} (emphasis added). Corbin's concern was what was best for Allegro. It was not what was best for Scully. There was no evidence at trial refuting this, and, thus, no evidence at trial supporting any intent by Corbin to harm Allegro.

In its Opinion, the Court of Appeals concluded that sufficient evidence existed to allow a jury to determine that Corbin intended to harm Allegro. {Opinion 5245 at p. 14, App. 1159}. However, the evidence cited, even when viewed in a light most favorable to Allegro, does not support this conclusion. First, the Court of Appeals 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 Court of Appeals 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; App. 388}. The suggestion of any of these possible options does not constitute evidence of 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 only evidence of Corbin’s intent came from Corbin’s written statements, such as the letter cited above, and Corbin’s testimony at trial. The Court of Appeals held 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; App. 1159}. Thus, the Court of Appeals concluded that, despite the lack of any other evidence as to Corbin’s intent,

the jury could disregard Corbin's uncontradicted testimony. This conclusion 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 Allegro's burden to affirmatively prove that Corbin's purpose was to injure Allegro. Aside from Corbin's letter and his testimony, the jury was left with nothing but mere speculation. However, 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's motions for directed verdict/JNOV as to the civil conspiracy claim. As this is the only claim asserted against Corbin, the new trial previously ordered by the Court of Appeals on the remaining claims would no longer need to involve him.

B. 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 plaintiff 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; 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).

The Court of Appeals held that Petitioners’ argument regarding special damages was not preserved. {Opinion No. 5245 at pp. 13-14; App. 1158-1159}. Specifically, while the special damages argument was raised at the first directed verdict motion⁵, it was not specifically reasserted at the directed verdict motion at the close of all evidence. {Id.; App. 1158-1159}. 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 Petitioner Corbin due to a lack of any evidence of any intent on his part to harm Respondent, the trial court specifically **ordered** Petitioners’ counsel to stop presenting any argument on civil conspiracy and to move onto the next cause of action:

⁴ Additionally, the damages awarded by the jury were exactly the same for each cause of action. {R. 44-49; App. 49-54}.

⁵ It is uncontested that Petitioners specifically raised the issue of a lack of any evidence of special damages at the first directed verdict motion. {R. 342; App. 347}.

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; App. 414) (emphasis added). The trial court specifically directed Petitioners' 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. This 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. Significantly, the issue of special damages would be dispositive on this claim, as Respondent has never attempted to establish the existence of any special damages supporting the claim. Rather, Respondent rests solely on preservation to defeat this argument.

Other jurisdictions faced with a preservation issue caused by the trial court refusing to allow argument to be presented have also 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, Petitioners’ 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 Petitioners’ 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 Petitioners as to the civil conspiracy cause of action. As the existence of special damages is an essential element of a civil conspiracy claim, and because the record is devoid of any evidence supporting this key element, this Court should grant certiorari, and correct this error by granting Petitioners’ motions for directed verdict/JNOV as to this claim. The new trial previously ordered in this matter could then proceed without this claim.

II. Petitioner Scully is entitled to directed verdict/JNOV on the contract claims because Respondent failed to establish the existence and terms of any contract.

Respondent’s claims for breach of contract and breach of contract accompanied by a fraudulent act were asserted only against Petitioner Scully. Petitioner 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 Court of Appeals 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. 15-16; App. 1160-1161}. Additionally, the Court of Appeals concluded that there could have been an “oral contract, or a contract created by conduct.” {Id. at 16; App. 1161}. Both of these ruling were in error.

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. {R. 341-342, 406-411; 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. {R. 169, 361-362; App. 174, 366-367}. Additionally, the testimony at trial established that that there was not a non-compete agreement between Allegro and Scully. {Id.: 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. {R. 115-116, 361-362; App. 120-121, 366-367}.

On the issue of preservation, the Court of Appeals misconstrued the law regarding the requirements for establishing the existence of a contract. Specifically, the Court of Appeals’ 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; App. 1160}. The Court of Appeals then treated Scully’s argument regarding the nonexistence of any evidence as to the supposed terms of the alleged contract as a wholly separate argument which they 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”).

Petitioner 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 Court of Appeals’ Opinion concludes that there was sufficient evidence to “suggest an oral contract, or a contract created by conduct.” {Opinion No. 5245 at p. 16; App. 1161}. The 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. This illustrates the lack of any evidence of a contract.

The Court of Appeals' Opinion also appears to rely on the Partnership/Buy-Sell Agreement {R. 116, 361-362; App. 121, 367-368} between Scully and McCarthy as a basis for the contract claims. {Id.; App. 121, 367-368}. This reliance is misplaced because Allegro was not a party to this partnership agreement – it was between only McCarthy and Scully.⁶ 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, Petitioner 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. The writ of certiorari should thus be granted, Petitioner Scully should be granted directed verdict and/or JNOV as to the contract claims, and the new trial of this case should proceed without either of these claims.

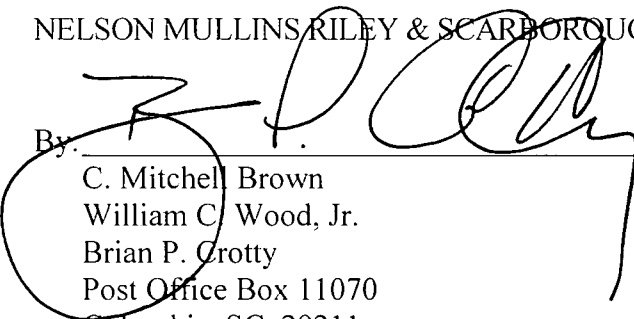
⁶ Additionally, there was no evidence at trial that Scully breached the Partnership/Buy-Sell Agreement. To this day he remains the 49% owner of Allegro.

CONCLUSION

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

Respectfully submitted,

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October 16, 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
Appellate Case No. 2014-002055

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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, George Corbin, and
Yvonne Yarborough are

Petitioners.

PROOF OF SERVICE

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

Pleadings: **Petition for Writ of Certiorari**

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October 16, 2014