

RECEIVED

MAY 22 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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

Allegro, Inc. Respondent,

v.

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

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

Brief of Petitioners

C. Mitchell Brown
William C. Wood, Jr.
Brian P. Crotty
NELSON MULLINS RILEY & SCARBOROUGH LLP
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Amy L. Gaffney
GAFFNEY LEWIS & EDWARDS, LLC
3710 Landmark Drive, Ste. 304
Columbia, SC 29204
(803) 790-8838

Attorneys for Petitioners

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues	1
Statement of the Case.....	2
Standard of Review.....	8
Argument	8
I. Petitioners are entitled to a directed verdict and/or JNOV as to the civil conspiracy claim	8
A. 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	9
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	15
II. Scully is entitled to directed verdict/JNOV on the contract claims because Allegro failed to establish the existence and terms of any contract.....	18
Conclusion	22

TABLE OF AUTHORITIES

Page(s)

Cases

Commonwealth v. Dickson,
918 A.2d 95 (Pa. 2007) 17

Corontzes v. Trapalis,
259 S.C. 244, 191 S.E.2d 523 (1972) 20

Cowburn v. Leventis,
366 S.C. 20, 619 S.E.2d 437 (Ct. App. 2005)..... 12

Dukes v. Smoak,
181 S.C. 182, 186 S.E. 780 (1936) 20

Evans v. Wabash Life Ins. Co.,
247 S.C. 464, 148 S.E.2d 153 (1966) 16

First Union Nat’l Bank of South Carolina v. Soden,
333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998)..... 12, 14

Fuller v. Eastern Fire & Cas. Ins. Co.,
240 S.C. 75, 124 S.E.2d 602 (1962) 19

Gadson v. ECO Servs. of S.C., Inc.,
374 S.C. 171, 648 S.E.2d 585 (2007) 8

Harper v. Ethridge,
290 S.C. 112, 348 S.E.2d 374 (1986) 19

Hoard v. Roper Hospital, Inc.,
387 S.C. 539, 694 S.E.2d 1 (2010) 14

Inheritance Funding Co. v. Chatman,
C/A No. 3:12-cv-1308-JFA, 2013 U.S. Dist. Lexis 106996 (D.S.C. July
31, 2013) 12

Lai v. Sagle,
818 A.2d 237 (Md. 2003) 17

LaMotte v. Punchline of Columbia, Inc.,
296 S.C. 66, 370 S.E.2d 711 (1988) 8

Landbank Fund VII, LLC v. Dickerson,
2006 S.C. App. Lexis 154 (Ct. App. 2006)..... 20

<u>Mains v. K Mart Corp.</u> , 297 S.C. 142, 375 S.E.2d 311 (1988)	16, 17, 18
<u>Mendelsohn v. Whitfield</u> , 312 S.C. 17, 430 S.E.2d 524 (Ct. App. 1993) <i>aff'd</i> 312 S.C. 226, 439 S.E.2d 845 (1994)	12
<u>Player v. Chandler</u> , 299 S.C. 101, 382 S.E.2d 891 (1989)	20
<u>Pye v. Estate of Fox</u> , 369 S.C. 555, 633 S.E.2d 505 (2006)	11, 12, 15
<u>Robertson v. First Union Nat'l Bank</u> , 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002).....	12
<u>State v. Vuley</u> , 70 A.3d 940 (Vt. 2013).....	18
<u>United States v. Caper</u> , 571 Fed. Appx. 456 (6th Cir. 2014).....	18
<u>Vaught v. Waites</u> , 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989).....	15
Statutes	
S.C. Code Ann. § 33-8-310.....	5
S.C. Code Ann. § 33-8-420(a)	5
S.C. Code Ann. § 41-10-10.....	5, 6
Rules	
Rule 50(b), SCRCPP	16

Statement of Issues

- I. Did the trial court and the Court of Appeals err in 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 Respondent Allegro, Inc. (“Allegro”) which ultimately resulted in the two shareholders parting ways, the formation of a competing company, and litigation. Allegro is a Professional Employer Organization (“PEO”) that was formed in the late 1990s by its initial owner Mary Etta McCarthy (“McCarthy”) {App. 77, 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”). In 1998, Scully was given thirty percent (30%) ownership when he joined Allegro as its president and a member of its board of directors. {App. 77, 118, 121, 223}. By 2001 Scully’s ownership interest in Allegro increased to forty-nine percent (49%). {Id.} 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. 336}.

There was no employment contract between Allegro and Scully, and Scully never entered into a non-compete agreement with Allegro. {App. 366-367}. Additionally, Allegro did not have an employee handbook that was issued to or utilized by Allegro’s employees. {App. 366}. Rather, the only agreement or contract in existence is a Partnership/Buy-Sell Agreement between Scully and McCarthy which governed the percentage and change in ownership of Allegro negotiated by Scully and McCarthy at the time that Scully joined Allegro. {App. 121, 366-367}. Allegro was not a party to this

agreement. {App. 366-367}. Even though McCarthy owns fifty-one percent (51%) of Allegro¹, she was not a party to this litigation and is not a party in this appeal.

In late 2002/early 2003, Scully began feeling frustrated with the business arrangement with McCarthy. Scully mentioned this to his friend, George Corbin. {App. 387-388}. In addition to being Scully's friend, Corbin's company, Merritt, was also a client² of Allegro. {App. 337-338}. Corbin provided advice to his friend, telling Scully that he had three options 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. {App. 388}.

By early 2003, Scully wanted to become the sole owner of Allegro, and he consulted with his friend Corbin regarding how to go about making an offer to McCarthy to purchase her interest in Allegro. {App. 219-221, 395-396}. In late March 2003, Corbin provided Scully with a letter outlining three possible approaches for determining a fair purchase price for McCarthy's shares in Allegro. {App. 222-223, 590-591}. In his March 27, 2003 letter, Corbin expressed his concern for Allegro's welfare, as well as his desire that Allegro's two owners come to some amicable resolution. Specifically, a closing paragraph of this letter states:

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.

¹ Scully continues to own forty-nine percent (49%) of Allegro.

² During the 1999 – 2002 timeframe, Corbin, in his capacity as a Certified Public Accountant, also did some consulting and independent auditing work for Allegro. {App. 127, 337}. In January of 2003, Merritt became a client of Allegro and Corbin stopped doing any auditing work for Allegro. {App. 127, 258, 337}.

{App. 590-591}. As he testified at trial, in preparing this letter, Corbin had “absolutely” no intent to harm McCarthy, and “in fact, [his] concern was for the business.” {App. 389}.

In response to Scully informing her that he wanted to purchase her shares, McCarthy suggested that they have Allegro valued to determine a price for her fifty-one percent (51%) interest. {App. 131, 374}. At Scully’s request, Corbin reviewed the valuation and provided feedback to Scully regarding it. {App. 390}.

On December 24, 2003, Scully made an offer to McCarthy to purchase her Allegro shares setting forth two options as to the purchase price and asking for her response by January 23, 2004. {App. 136-137, 712-713}. Prior to sending McCarthy this offer, Scully asked Corbin to review it and Corbin responded that he thought it was a fair offer. {App. 375, 390}.

Scully and McCarthy failed to reach an agreement regarding his purchase of Allegro, and on February 16, 2004, Scully tendered his letter of resignation to McCarthy. {App. 141-143, 710}. McCarthy responded to the resignation by telling Scully that she would accept his last offer to purchase her interest in Allegro, and they agreed that her lawyers would draw up the necessary paperwork by the end of that week. {App. 143, 377}.

While Scully was out of town handling Allegro’s business, McCarthy decided that she would not sell, and focused her efforts on retaining control of Allegro. {App. 143-147}. During Scully’s absence that week, McCarthy hired Jim Everly (“Everly”) to replace Scully as Allegro’s president, and McCarthy and Everly began setting up meetings with Allegro’s clients to discuss Scully’s replacement. {App. 148, 151-152}.

When Scully returned from his business travel, McCarthy informed him that she was accepting his resignation. {App. 149-150, 711}. After McCarthy informed him that she was accepting his resignation, Scully formed a competing PEO named Synergetic, Inc. (“Synergetic”). {App. 379}.

McCarthy’s and Everly’s first Allegro client meeting was with George Corbin of Merritt Veterinary Supplies. {App. 152, 392}. Corbin told McCarthy that, in his opinion, “Mr. Scully was Allegro,” and that he would likely continue doing business with Scully. {App. 151, 392-393}. Under its Service Agreement with Allegro, Merritt could terminate its contract with Allegro by providing thirty days notice. {App. 154, 397}. On February 27, 2004, Corbin, on behalf of Merritt, sent Allegro a letter stating that Merritt was terminating its Service Agreement with Allegro as of March 31, 2004. {App. 152, 393, 743}.

Allegro initiated this action with the filing of its Complaint on April 15, 2004. Allegro’s operative 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. 76-94}.³

³ 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. 76-94}.

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 Allegro's case, as well as at the close of all evidence, both sides moved for directed verdict. {App. 344-347, 400-416}. These motions were denied. {App. 347, 416}. At the close of the trial, eleven of the twelve claims in the Amended Complaint were submitted to the jury.⁴ {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." {App. 49-54, 774}.

On May 5, 2006, the jury returned verdicts in favor of Allegro as to each of the eleven claims submitted to it. {App. 49-54}. Following the jury's verdict, both sides filed post-trial motions, all of which were denied. {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. {App. 835-858}. On July 11, 2012, the Court of Appeals 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}.

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 their directed verdict/JNOV arguments. {App. 1066}. Allegro sought review of the grant of a new trial. {App. 1088}. On May 28, 2014, in

⁴ 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.

Opinion No. 23791, this Court denied Allegro'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}.

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 Allegro 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}.

Petitioners filed a timely petition for rehearing which was denied on September 4, 2014. {App. 1165, 1192}. This Court granted Petitioners' petition for a writ of certiorari on April 22, 2015.

Standard of Review

In reviewing the denial of a motion for directed verdict or 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 therefrom 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.

Argument

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

At the close of Allegro'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. 346-47, 406-416}. To establish its civil conspiracy claim, Allegro 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). Allegro failed to meet this burden as to Corbin specifically, and all Petitioners collectively. Specifically, even when the evidence is viewed in a light most favorable to Allegro, there was no evidence that Corbin acted with the purpose or intent of harming Allegro. To the contrary, the only evidence on the issue of Corbin's purpose or intent was that he provided advice to a friend regarding what Corbin believed to be in the best interests of Allegro. Additionally, as to all Petitioners, Allegro failed to establish that it had suffered any special damages. To the contrary, Allegro's damages evidence was identical as to all of its causes of action.

A. 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 purpose or 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 possible methods for valuing Allegro and reviewed a valuation as well as Scully's offer letter to determine if it was a "fair" offer. {App. 222-23, 375, 390, 590-591}. These actions evidence nothing more than friendly advice.

As to Corbin's advice to Scully regarding Scully's options, such advice does not evidence any intent to harm Allegro or otherwise support a civil conspiracy claim. Corbin advised Scully that, in Corbin's opinion, Scully had three options in going forward: (a) Scully could purchase McCarthy's fifty-one percent (51%) interest in Allegro and become its sole owner; (b) Scully could sell his forty-nine percent (49%) interest in Allegro to McCarthy leaving her its sole owner; and/or (c) Scully could leave Allegro and form his own company. {App. 388}. None of the options outlined in Corbin's advice to his friend evidences that Corbin was acting with the purpose of injuring Allegro. Rather, Corbin merely stated the obvious fact that if Allegro's two owners could not continue to work together, one should sell out to the other and move on to other endeavors. The fact that one of the options suggested was that Scully could start a new business does not evidence an intent to injure Allegro. Scully, who was not subject

to a non-compete agreement, as with any employee of any business, was free to earn a living and compete in his chosen field. Corbin's advice was evidence of nothing more than concern for his friend as well as for Allegro.

Similarly, Corbin's March 27, 2003 letter to Scully outlining methods Scully might use for valuing Allegro provides no evidence that Corbin's purpose was to injure Allegro. {App. 590-591}. In this letter Corbin discussed three different approaches that Scully might use to set a fair value for Allegro. Providing advice as to how to set a fair and accurate value for Allegro cannot reasonably be considered to be evidence that Corbin's purpose was to injure Allegro. The same is true for Corbin's review of the independent valuation of Allegro and his review of Scully's offer letter. All that Corbin was trying to do was provide his friend with practical advice as to what Corbin thought was fair.

Whether these actions are viewed independently, or collectively, they provide no evidence whatsoever that Corbin's purpose was to injure Allegro. The only evidence of Corbin's intent or purpose offered at trial establishes the opposite. Corbin testified that, in providing his advice to Scully, "[his] concern was for the business." {App. 389-390}. Corbin's actual purpose of trying to help Allegro was further evidenced by his closing sentiments in his March 27, 2003 letter to Scully, wherein 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 [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. 590-591} (emphasis added). In Corbin's view, what needed to happen was for one to sell out to the other. There was no evidence at trial refuting this, and, thus, no evidence at trial supporting any intent by Corbin to harm Allegro.

When considering and denying Corbin's motion for a directed verdict, the trial court erred in both its analysis and its conclusion on this issue. {App. 411-414}. When Corbin's counsel raised the issue of the lack of evidence that Corbin had any intent to harm Allegro, the trial court *twice* responded by misstating the meaning of civil conspiracy's second element. First, at the beginning of the argument on this point, the trial court stated:

THE COURT: Well, **intent has nothing to do with conspiracy.** It is not necessarily intent as a result that you get. Is it not so?

...

THE COURT: ... It is the result, it is **the end result** of that combination that is the gravel man [sic] or true test as to whether or not there was a conspiracy. Looking at hindsight.

{App. 412} (emphasis added). The trial court then restated this view before cutting off any further argument on civil conspiracy:

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.

{App. 414} (emphasis added). The trial court's view was that a party's intent or purpose had no bearing in a civil conspiracy analysis, and that it is the result of a party's actions that controls the analysis. The trial court's misinterpretation of the second element of civil conspiracy was clearly erroneous.

Contrary to the view expressed by the trial court, civil conspiracy's second element 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). By focusing on the result rather than the intent, the trial court completely removed the second element from consideration. This shows a fundamental misconception regarding civil conspiracy. In Pye, this Court stated that the “essential consideration” in a civil conspiracy claim is “whether the primary purpose or object of the combination is to injure the plaintiff.” Id. at 567, 633 S.E.2d at 511. “This calculus necessarily includes an element of intent.” Inheritance Funding Co. v. Chatman, C/A No. 3:12-cv-1308-JFA, 2013 U.S. Dist. Lexis 106996 *13 (D.S.C. July 31, 2013). The rule stated in Pye directly contradicts the interpretation and analysis of the trial court in this case.

Even if a party combines with another in a manner that results in injury to a third person, there is no civil conspiracy unless that party’s primary purpose or intent was to cause that injury. In the Pye case, this Court upheld the grant of summary judgment as to the civil conspiracy claim because there was no evidence of any “wrongful intent” on the part of the defendants. Pye at 568, 633 S.E.2d at 512. Similarly, in Mendelsohn v. Whitfield, 312 S.C. 17, 25, 430 S.E.2d 524, 529 (Ct. App. 1993) *aff’d* 312 S.C. 226, 439 S.E.2d 845 (1994), the grant of directed verdict as to civil conspiracy was upheld where there was no evidence the defendant acted “willfully to injure” the plaintiff, despite the fact that injury resulted. See also Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005) (affirming summary judgment on civil conspiracy because there was no evidence the defendants “joined together for the purpose of injuring [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).

In its Opinion, the Court of Appeals did not address the trial court's misinterpretation and misapplication of civil conspiracy's second element. Rather, 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 Court of Appeals 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.⁵ In focusing on the fact that one of the options Corbin identified as existing was for Scully to set up his own business, the Court of Appeals 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

⁵ Additionally, Corbin did not owe McCarthy any duty to disclose the fact that he was providing advice to his friend Scully.

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}. Under the Court of Appeals' view, anyone who provides counsel or assistance to an employee who wishes to start his or her own competing business could be subject to a civil conspiracy claim brought by the former employer.

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 ignored 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., 387 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 Allegro failed to establish this key element of civil conspiracy as to Corbin, his motions for directed verdict and JNOV should have been granted.

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). Allegro failed to offer any evidence of “special” damages. To the contrary, Allegro’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.⁶ 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 motion⁷, 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

⁶ Additionally, the damages awarded by the jury were exactly the same for each cause of action. {App. 49-54}.

⁷ It is uncontested that Petitioners specifically raised the issue of a lack of any evidence of special damages at the first directed verdict motion. {App. 347}.

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 Allegro, the trial court specifically **ordered** Petitioners' 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.**

(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 Allegro has never attempted to establish the existence of any special damages supporting the claim. Rather, Allegro rests solely on preservation in its attempt 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. See also United States v. Caper, 571 Fed. Appx. 456, 459-60 (6th Cir. 2014) (holding that an “‘opportunity’ to object is illusory when the district court cuts off defense counsel); State v. Vuley, 70 A.3d 940, 957 (Vt. 2013) (holding that an argument truncated by the trial court is normally sufficient to preserve unstated grounds for objection).

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 Petitioners’ directed verdict/JNOV as to this claim.

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

Allegro’s claims for breach of contract and breach of contract accompanied by a fraudulent act were asserted only against Scully. Scully asserts that both of the contract claims against him fail because Allegro 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 and the Court of Appeals erred by failing to grant 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 that there was not a non-compete agreement between Allegro and Scully. {Id.}. The only “contract” ever mentioned at the trial involving Scully was a Partnership/Buy-Sell Agreement between Scully and McCarthy relating to Scully’s ownership interest in Allegro. {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. {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 Allegro 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 "[t]he 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 alleged 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 {App. 121, 367-368} between Scully and McCarthy as a basis for the contract claims. {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.⁸ Additionally, the partnership agreement provides no information as to the supposed terms of the alleged oral contract between Allegro and Scully.

Therefore, Allegro 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 should be granted directed verdict and/or JNOV as to both the breach of contract claim and the claim for breach of contract accompanied by a fraudulent act.

⁸ 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

For the foregoing reasons, this Court should reverse the judgment entered below and enter judgment in favor of all Petitioners on the civil conspiracy claim and in favor of Petitioner Scully on the breach of contract and breach of contract accompanied by a fraudulent act claims.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown
William C. Wood, Jr.
Brian P. Crotty
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Amy L. Gaffney
GAFFNEY LEWIS & EDWARDS, LLC
3710 Landmark Dr., Ste. 109
Columbia, SC 29204
(803) 790-8838

Attorneys for Petitioners Emmett J. Scully, George Corbin, and Yvonne Yarborough

Columbia, South Carolina
May 22, 2015

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

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: **Brief of Petitioners**

Counsel Served:

Robert L. Widener, Esquire
Richard J. Morgan, Esquire
McNair Law Firm, PA
Post Office Box 11390
Columbia, SC 29211


Lisa P. Whitehurst
Administrative Assistant

May 22, 2015