

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

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

RECEIVED

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S.C. Supreme Court

Allegro, Inc., Respondent,

v.

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

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

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

1. Defendant Corbin's "intent to harm" arguments on the denial of his directed verdict motion for civil conspiracy are not properly before this Court and have no merit.
2. As an additional sustaining ground, Defendant Corbin's "intent to harm" arguments are barred by the law of the case doctrine.
3. As an additional sustaining ground, most of Corbin's "intent to harm" arguments are not properly before this Court, because those arguments are not presented in the Statement of Issues as required by Rule 208(b)(1)(B), SCACR.
4. Defendant Corbin's "intent to harm" arguments are not properly preserved or presented for appellate review and/or have no merit.
5. Defendant Corbin's argument that there was no evidence that he had an "intent to harm" Plaintiff has no merit.
6. Defendant Corbin's argument that the trial court misunderstood and misapplied the law on the "intent to harm" element of conspiracy has no merit and any presumed error was harmless.
7. Defendant Corbin's argument that the Court of Appeals did not address his argument that the trial court misunderstood and misapplied the law on "intent to harm" is not properly before this Court, has no merit, and any presumed error was harmless.
8. Defendant Corbin's argument that the Court of Appeals erred in its analysis of the evidence and the inferences to be drawn from the evidence has no merit, and any presumed error was harmless.
9. Defendant Corbin's argument that a jury cannot disregard uncontradicted testimony is without merit, is not properly before this Court and, in any event, any presumed error was harmless.
10. Defendants' arguments on the "special damages" element of civil conspiracy are not properly before this Court and/or have no merit.
11. Defendants' argument that the trial court improperly "cut-off" argument on their directed verdict motion for civil conspiracy is not properly before this Court, because Defendants did not timely raise it to the trial court or the Court of Appeals.
12. Defendants' argument that the trial court improperly "cut-off" argument on their directed verdict motion for civil conspiracy has no merit.

13. Assuming Defendants' "special damages" arguments are properly before this Court and have merit, they do not apply to Defendant Corbin, because civil conspiracy was the only claim made against him.
14. Assuming Defendants' arguments on the "special damages" element of civil conspiracy are properly before this Court and have merit, this Court should overrule *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 278 S.E.2d 607, 611 (S.C. 1981).
15. Defendant Scully's arguments that he was entitled to a directed verdict on the contract claims are frivolous and not properly before this Court.
16. Defendant Scully's argument that there was no evidence of a contract between him and Allegro is frivolous.
17. Defendant Scully's argument that there was no evidence of a contract between him and Allegro is not properly before this Court.
18. The Court of Appeals correctly found that Defendant Scully's "terms of contract" argument was not preserved for appeal, and any presumed error was harmless.

STATEMENT OF THE CASE¹

The Respondent (Plaintiff or Allegro) commenced this action against the Petitioners (Defendants) in April 2004 with a later-amended complaint alleging numerous causes of action. (A-1 at 55-75; 76-94).² On May 5, 2006, the jury returned a verdict for Plaintiff. (A-1 at 49-54). The trial court entered judgment in Plaintiff's favor on the same day for \$1,760,000.00 in actual damages and \$250,000.00 in punitive damages. (A-1 at 48).³

Defendants timely moved for JNOV and other post-trial relief on May 15, 2006. (A-2 at 759-772). The trial court held a post-trial motions hearing on August 22, 2006. (A-2 at 481-516). The trial court denied all post-trial motions by Defendants in an order dated July 9, 2008, and entered July 14, 2008. (A-1 at 18-30). Defendants timely moved to alter or amend the order denying their post-trial motions on July 23, 2008. (A-2 at 814-834).

On August 12, 2008, while their motion to alter or amend was pending before the trial court, Defendants appealed to the South Carolina Court of Appeals. (A-2 at 835-836). On August 18, 2008, Defendants moved in the Court of Appeals for a limited remand for the purpose of allowing the trial court to rule on their motion to alter or amend. (A-2 at 859-861). The Court of Appeals granted this motion. The trial court heard Defendants' motion to alter or amend in November 2008 and denied it in an April 2010 order. (A-2 at 526-585; 32-47). Defendants timely appealed from this order.

¹ Pursuant to Rule 242(i), SCACR, the briefs filed after this Court grants certiorari must comply with Rule 208(b), SCACR. Pursuant to Rule 208(b)(1)(C), SCACR, a party's Statement of the Case "shall not contain contested matters." Here, Defendants' Statement of the Case is replete with contested matters in clear violation of Rule 208(b)(1)(C). Their "Statement" is in fact a combination of a Statement of the Case and a Statement of Facts.

² The Appendix is comprised of three volumes. This brief cites the Appendix as A-1, A-2, and A-3 so that this Court will know which volume is being cited.

³ No judgment was entered against defendant Synergetic, Inc., and Synergetic is not a petitioner in this case.

The Court of Appeals reversed and remanded for a new trial, finding that the trial court had erred in admitting a temporary injunction order into evidence. (A-3 at 1004-1017). The Court of Appeals acknowledged that Defendants had not stated any specific grounds for their objection to the temporary injunction order, which is generally required to preserve an objection for appellate review, but found that general objections to evidence are sufficient when the evidence is “inherently prejudicial, and thus, the grounds for the objection [are] patent.” (A-3 at 1014; see generally A-3 at 1012-1017). The Court of Appeals did not reach Defendants’ other appellate arguments, including its arguments that the trial court erred in denying several of their directed verdict motions, because it was reversing on the “injunction order” issue. (A-3 at 1017).

Both parties timely petitioned for rehearing. (A-3 at 1018-1035; 1036-1041). The Court of Appeals denied both rehearing petitions. (A-3 at 1059-1064).

Both parties timely petitioned this Court for a writ of certiorari. (A-3 at 1065-1085; 1086-1093). Defendants’ principal argument was that the Court of Appeals erred in not reaching their directed verdict arguments; and Plaintiff’s principal argument was that the Court of Appeals had erred in finding an objection without specifically stated grounds was sufficient to preserve an issue for appeal. (*Id.*). This Court denied Plaintiff’s petition, granted Defendants’ petition in substantial part, and remanded to the Court of Appeals for a decision on Defendants’ directed verdict arguments. (A-3 at 1132-1134).

Plaintiff moved to clarify this Court’s remand order, the question being whether this Court intended its denial of Plaintiff’s certiorari petition to be final or whether Plaintiff could re-petition after the Court of Appeals issued its opinion on remand from this Court. (A-3 at 1135-1137). The controlling question was whether 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” in holding that no specifically stated grounds are necessary for evidentiary objections if the evidence is inherently prejudicial and therefore the grounds for the objection are patent. (A-3 at 1144). This Court denied Plaintiff’s motion to clarify, thereby approving the Court of Appeals’ ruling. (A-3 at 1145).

The Court of Appeals issued a new opinion after remand from this Court. (A-3 at 1146-1164). The Court ruled as follows on Defendants’ directed verdict issues:

- a. Defendants’ “special damages” argument on the conspiracy claim was not preserved for review (A-3 at 1158-1159);
- b. Defendant Corbin’s “intent to harm” argument on conspiracy was preserved for review but properly denied by the trial court (A-3 at 1159);
- c. Defendant Scully’s “no evidence of the existence of a contract” argument was preserved for review but properly denied by the trial court, and his “no evidence of the terms of the contract” was not preserved for review (A-3 at 1160-1162); and
- d. the trial court erred in denying Defendant Scully’s motion for a directed verdict on fraud and negligent misrepresentation. (A-3 at 1162-1163).

Both parties timely petitioned for rehearing – the Court of Appeals denied both petitions. (A-3 at 1165-1178; 1180-1183; 1190-1193). Defendants timely petitioned for a writ of certiorari – Plaintiff did not seek certiorari. This Court granted Defendants’ petition.

STANDARD OF REVIEW

In reviewing a trial court’s denial of a directed verdict motion, an appellate court views the evidence and inferences therefrom in the light most favorable to the non-moving party. *Gadson v. ECO Servs. of S.C., Inc.*, 648 S.E.2d 585, 588 (S.C. 2007). The denial of a directed verdict motion must be affirmed “when either the evidence yields more than one inference or if its inference is in doubt.” *Id.*

ARGUMENT

Defendants argue generally that one or more of them were entitled to a directed verdict on the civil conspiracy and contract claims, because the evidence against them was insufficient as a matter of law. Any appellate challenge to the sufficiency of the evidence must first be presented to the trial court with a directed verdict motion at the close of the evidence, and the failure to do so precludes appellate review of the appellate challenge. *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 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 the evidence, the issues raised in the motion are not preserved for appeal. *Hendrix*, 446 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, alter, or amend 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 later, Defendants' appellate arguments violate the rules set forth above and other error preservation/presentation rules. Thus, Defendants' appellate arguments are not properly before this Court for appellate review. In any event, Defendants' appellate arguments have no merit. Therefore, it is respectfully submitted that this Court should affirm the Court of Appeals or dismiss the writ of certiorari as improvidently granted. See, e.g., *Team IA, Inc. v. Lucas*, 750 S.E.2d 91 (S.C. 2013) (dismissing writ as improvidently granted after reviewing Appendix and briefs).

I. Defendant Corbin's "intent to harm" arguments on the denial of his directed verdict motion for civil conspiracy are not properly before this Court and have no merit.

A claim for civil conspiracy has three elements: "(1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages." *City of Hartsville v. South Carolina Mun. Ins. & Risk Fin. Fund*, 677 S.E.2d 574, 579 (S.C. 2009). In Argument heading I(A), Defendant Corbin asserts he was "entitled to a directed verdict and JNOV on the civil conspiracy claim because there was no evidence that he possessed any intent to harm [Plaintiff]." (Pet. Br. at 9). Corbin makes at least five separate arguments under this single argument heading, in which he uses "intent to harm" to express the "purpose of injuring" element of civil conspiracy:

1. at pages 9-11, Corbin argues there was no evidence that he intended to harm Plaintiff, and that the only evidence is that he intended to help Plaintiff;

2. at pages 11-13, Corbin argues the trial court misunderstood and misapplied the law on the “intent to harm” element of conspiracy;⁴
3. at page 13, Corbin asserts the Court of Appeals did not address his argument that the trial court misunderstood and misapplied the law on “intent to harm”;⁵
4. at pages 13-14, Corbin argues that the Court of Appeals erred in its factual analysis on the meaning of the evidence and the inferences to be drawn from the evidence;⁶ and
5. at page 14, Corbin argues that the Court of Appeals ignored the law on the efficacy of uncontradicted testimony and the jury’s right to disregard such testimony.⁷

As demonstrated later, Corbin’s arguments are not properly before this Court and/or have no merit.

The Court of Appeals held that Defendant Corbin’s “intent to harm” argument was preserved for appeal, because Corbin renewed the directed verdict motion that he made at the close of Plaintiff’s evidence. (A-3 at 1159). The Court of Appeals affirmed the trial court’s denial of Corbin’s directed verdict motion, finding that the evidence and inferences created a question of fact for the jury. (*Id.*).

A. Corbin’s “intent to harm” arguments are barred by the law of the case doctrine.

It is the law of this case that Defendants Scully and Yarborough acted in concert with an intent to harm Plaintiff, because no one has ever argued to the contrary on appeal. It is also the law of this case that Defendant Corbin acted in concert with Scully and Yarborough, because there is no appellate challenge to the trial court’s denial of this ground

⁴ This argument begins with the first full paragraph on page 11 of Petitioners’ Brief and ends at the top of page 13.

⁵ This assertion is made in the first sentence of the first full paragraph on page 13 of Petitioners’ Brief.

⁶ This argument begins in the first full paragraph on page 11 of Petitioners’ Brief and ends at top of page 14.

⁷ This argument is made in the first and only full paragraph on page 14 of Petitioners’ Brief.

for directed verdict. It is the law of civil conspiracy that the hand of one is the hand of all and, therefore, Defendant Corbin is responsible for the acts undertaken by Defendants Scully and Yarborough, as well as 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 Plaintiff, it is irrelevant because he knowingly acted in concert with other conspirators who intended to harm Plaintiff.

B. Corbin’s “intent to harm” arguments are not properly preserved or presented for appellate review and/or have no merit.

As noted earlier, Defendant Corbin presents at least five different issues in support of his “intent to harm” appellate arguments. All of these issues are presented under a single statement of issue, which states in full:

Did the trial court and the Court of Appeals err in failing to grant [Defendant] Corbin directed verdict and/or JNOV as to the civil conspiracy claim where there was no evidence that Corbin possessed any intent to harm [Plaintiff]?

(Pet. Br. 1). Under Rule 208(b)(1)(B), SCACR, an appellant’s statement of issues must set forth “each of the issues presented for review [and] shall be concise and direct as to each issue.” The rule further provides that “[b]road general statements may be disregarded by the appellate court [and ordinarily], no point will be considered which is not set forth in the statement of the issues on appeal.”

Defendants’ statement of issue on “intent to harm” issue sets forth only one issue: “there was no evidence that Corbin possessed any intent to harm [Plaintiff].” (Pet. Br. 1). This statement presents Defendants’ principal “intent to harm” argument, which focuses on the sufficiency of the evidence but has no merit. (Pet. Br. 9-11; see Arg. I(B)(1), *infra*). This statement of issue, however, does not encompass Defendants’ other “intent to harm”

arguments. (Pet. Br. 11-14; see Args. I(B)(2)-(5), *infra*). Thus, as an additional sustaining ground for the Court of Appeals' ruling, these issues are not properly before this Court for appellate review. *Narruhn v. Alea London, Ltd.*, 745 S.E.2d 90, 92 (S.C. 2013); *State v. Langford*, 735 S.E.2d 471, 477 (S.C. 2012). In any event, as shown later, these issues are otherwise not properly before this Court and/or have no merit. (See Args. I(B)(2)-(5), *infra*).

1. Corbin's argument that there was no evidence that he had an "intent to harm" Plaintiff has no merit.

When reviewing the sufficiency of the evidence in an action at law tried by a jury, the evidence and inferences therefrom must be viewed in the light most favorable to the non-moving party, and the evidence is sufficient "when either the evidence yields more than one inference or if its inference is in doubt." *Gadson v. ECO Servs. of S.C., Inc.*, 648 S.E.2d 585, 588 (S.C. 2007). Here, in a well-written *jury argument*, Defendants set forth their view of the evidence and the inferences to be drawn from that evidence, concluding that the evidence shows that Corbin was only "trying to help [Plaintiff]" and only provided "friendly advice" to Defendant Scully. (Pet. Br. 9-11). Defendants' view of the evidence and inferences, however, is not the relevant inquiry. Rather, the question is whether the evidence and inferences, *viewed in Plaintiff's favor*, created a question of fact for the jury on whether Defendant Corbin had any intent or purpose to harm Plaintiff while knowingly acting in concert with Defendants Scully and Yarborough who undisputedly intended to harm Plaintiff. As demonstrated below, the evidence was sufficient to create a jury question. Thus, the trial court did not err in denying Defendant Corbin's directed verdict motion and, therefore, the Court of Appeals did not err in affirming the trial court.

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.* (emphasis added).

Corbin provided a range of CPA services to Plaintiff from 1999 to 2003. (A-1 at 336-338, 382. As a result, he became familiar with Plaintiff’s clients (A-1 at 338) and “knew the finances of [Plaintiff] *intimately*” – and Scully enlisted Corbin’s aid for this very reason while Corbin was still providing CPA services to Plaintiff. (A-1 at 375, emphasis added; see also *id.* at 219, 221; 258; 590-591). Corbin stopped providing formal CPA services to Plaintiff after his company became a client of Plaintiff (A-1 at 127), but he continued to provide informal services. (A-1 at 337-338). As a result of his CPA services to Plaintiff, Corbin also knew how many clients Scully’s new business would need to reach the break-even point. (A-1 at 340-341).

Corbin knew in 2002 that Scully had “major frustrations” with McCarthy. (A-1 at 388). Thereafter, Corbin met with Scully on “multiple” occasions and became “intimately involved” with Scully’s plan to either buy out McCarthy or set up a competing business, providing frequent advice on how to do so. (A-1 at 258 375, 380; A-2 at 590-591). Despite being “intimately involved in all of these discussions,” Corbin never disclosed his involvement to McCarthy or Plaintiff’s Board of Directors. (A-1 at 340; 396). Corbin’s

company was the first client to leave Allegro and engage the services of Scully's competing business.

In short, Corbin knew there was a fight between Scully and McCarthy over control of Allegro, but to Corbin, Scully was Allegro. (A-1 at 393). Thus, when Corbin "advised" Scully on taking over Allegro or leaving it to set up a competing company, without disclosing this to McCarthy or the Board of Directors, the jury was free to conclude that Corbin picked a side in the fight rather than believe his protestation that he was acting in the best interest of and to protect Allegro or simply giving "friendly advice" to the other owner of Allegro. The circumstantial evidence gave rise to an inference that Corbin knew of and assisted Scully and Yarborough in their plan to take clients from Allegro. Corbin was the first client to leave Allegro for Scully's new business – hardly the act of someone concerned with the best interest of Allegro – and Corbin had frequently advised Scully on how to best set up a competing business. These facts were sufficient circumstantial evidence for the jury to find Corbin was a conspirator who intended to harm Allegro and knowingly assisted others who intended to harm Allegro, rather than being someone concerned with the best interest of Allegro.

All of this is particularly true given that Corbin was a defendant with a personal financial interest in the outcome of the trial. Thus arose the inherently-jury questions of Corbin's demeanor, veracity, and credibility, all of which precludes granting a directed verdict under the notion that Corbin's testimony was "uncontradicted." *Black v. Hodge*, 410 S.E.2d 595, 596 (S.C. App. 1991), *approved in Hoard v. Roper*, 694 S.E.2d 1, 6 (S.C. 2010).⁸

⁸ For a fuller discussion of *Black* and *Hoard*, see pp. 20-22, *infra*.

2. Corbin's argument that the trial court misunderstood and misapplied the law on the "intent to harm" element of conspiracy has no merit and any presumed error was harmless.

Defendant Corbin bases his argument on heavily redacted quotations from the Record on Appeal. (Pet. Br. at 11). When one reads the entire colloquy between the trial court and Corbin's counsel, it is clear that the trial court was saying that a conspiracy existed even if the specific harm caused by the conspiracy was not the harm specifically intended by the defendant. (A-1 at 411-414). In any event, and assuming the trial court erred, it nevertheless reached the right result because, as shown earlier, there was sufficient evidence to create a question for the jury. It is axiomatic that a trial court will be affirmed if it reaches the right result, albeit for the wrong reason. *Moorhead v. First Piedmont Bank & Trust Co.*, 256 S.E.2d 414, 416 (S.C. 1979); *Russell v. Hines*, 103 S.E. 545, 546 (S.C. 1920). Moreover, any presumed error is also harmless error because, as demonstrated earlier: (1) all of Defendant Corbin's "intent to harm" arguments are barred by the law of the case doctrine; and (2) this issue is not properly before this Court, because it is not set forth in Defendants' Statement of Issues.

3. Corbin's argument that the Court of Appeals did not address his argument that the trial court misunderstood and misapplied the law on "intent to harm" is not properly before this Court, has no merit, and any presumed error was harmless.

Defendant Corbin makes this argument in a single sentence: "In its Opinion, the Court of Appeals did not address the trial court's misinterpretation and misapplication of civil conspiracy's second element [intent to harm]." (Pet. Br. 13). A single-sentence argument is too conclusory to present any issue for review. *Bean v. South Carolina Cent. R.R. Co.*, 709 S.E.2d 99, 113 (S.C. App. 2011). In any event, it was unnecessary for the Court of Appeals to address this issue because, as shown earlier, the evidence created a

jury question on whether Corbin intended to harm Plaintiff. Thus, there was no error and any error in not addressing this issue was harmless error. Any presumed error is also harmless because, as demonstrated earlier: (1) all of Defendant Corbin's "intent to harm" arguments are barred by the law of the case doctrine; and (2) this issue is not properly before this Court, because it is not set forth in Defendants' Statement of Issues.

4. Corbin's argument that the Court of Appeals erred in its analysis of the evidence and the inferences to be drawn from the evidence has no merit, and any presumed error was harmless.

In this argument, Defendant Corbin attacks the Court of Appeals' analysis of the evidence and whether it created a jury question on whether Corbin intended to harm Plaintiff. (Pet. Br. 13-14). As shown earlier, the evidence created a question for the jury. As shown below, Defendant Corbin's specific attacks on the Court of Appeals' analysis have no merit.

Corbin first argues that his knowledge about Plaintiff's clients "has no bearing on the issue of intent to harm." (Pet. Br. 13). To the contrary, this knowledge gave Corbin the ability to assist Defendants Scully and Yarborough in their undisputed plan to harm Plaintiff.

Corbin next argues that his failure to inform McCarthy of his "conversations" with and "advice" to Scully "has no bearing on whether Corbin intended to harm Allegro in providing that advice," because McCarthy "is not the plaintiff." (Pet. Br. 13) (all emphasis in original). To the contrary, Corbin's failure to discuss the matter with McCarthy (or with Plaintiff's Board of Directors) belies his professed intent of helping Allegro. McCarthy was the principal and only other owner of Allegro. If Corbin's intent was to help Allegro, he naturally would have discussed the ongoing dispute with her (or the Board) in

attempting to resolve the dispute for the benefit of Allegro. At the very least, his failure to discuss the matter with McCarthy or the Board permitted the jury to conclude that Corbin's real intent was to help Scully and Yarborough, not Allegro, and that he had chosen Scully's side in the fight between Scully and McCarthy over ownership of Allegro and its business, including its clients.

Corbin next argues that the Court of Appeals erred in focusing on Scully's option (identified by Corbin) to form a competing business, because it was "merely an option not a recommendation." (Pet. Br. 13) (all emphasis in original). The jury, however, was free to conclude that Corbin's presentation of this "option" belied his claimed intent of only trying to help Allegro. Having the President and key employees leave Allegro to set up a competing business could never be in the best interest of Allegro. Again, this evidence permitted the jury to conclude that Corbin had chosen Scully's side in the fight between Scully and McCarthy to the detriment of Allegro.

In any event, any error is harmless error because, as demonstrated earlier: (1) all of Defendant Corbin's "intent to harm" arguments are barred by the law of the case doctrine; (2) there was sufficient evidence to create a question for the jury; and (3) this issue is not properly before this Court, because it is not set forth in Defendants' Statement of Issues.

5. Corbin's argument that a jury cannot disregard uncontradicted testimony is without merit, is not properly before this Court and, in any event, any presumed error was harmless.

Citing this Court's opinion in *Hoard v. Roper*, 694 S.E.2d 1 (S.C. 2010), which was an appeal from an order granting summary judgment, Defendant Corbin argues that one cannot avoid a directed verdict by asserting a jury may disbelieve uncontradicted testimony. This argument fails for several reasons.

First, and foremost, Corbin has misread this Court's opinion in *Hoard* and grossly overstated its holding. There, this Court made it clear that the "uncontradicted testimony" rule is limited to summary judgment motions and does not apply to jury trials: "A jury's prerogative to disregard uncontradicted testimony is a *sound principle of law*, but it has no application in a summary judgment setting." 694 S.E.2d at 6 (emphasis added). This appeal arises from a jury trial, not an order granting summary judgment. Thus, the ruling in *Hoard* does not apply here.

Second, in reversing the Court of Appeals in *Hoard*, this Court specifically noted and approved the Court of Appeals' opinions in *Black v. Hodge*, 410 S.E.2d 595 (S.C. App. 1991) and *Ross v. Paddy*, 532 S.E.2d 612 (S.C. App. 2000). *Hoard*, 694 S.E.2d at 6. In both of these opinions, the Court of Appeals rejected arguments that the appellant was entitled to a directed verdict based on the uncontradicted testimony of a witness. In *Hoard*, this Court specifically approved these rejections:

In *Black*, the court of appeals affirmed a jury verdict for Respondent Hodge despite Black's contention on appeal that the jury was required to accept her uncontradicted testimony. There, the court of appeals' decision correctly stated that a jury is not required to accept uncontradicted witness testimony, as credibility is a question for the jury. Likewise, in *Ross*, on appeal from a jury verdict, the court of appeals found issues concerning witness credibility were properly resolved by the jury. The principle enunciated in *Black* and *Ross* is sound.

Hoard, 694 S.E.2d at 6 (citations omitted)(emphasis added). The Court of Appeals' opinion in *Black* is particularly instructive. There, the plaintiff's testimony that she was injured in the accident was uncontradicted, and she argued the jury was therefore required to accept her testimony. *Black*, 410 S.E.2d at 596. The Court of Appeals rejected this argument, because there remained the question of the plaintiff's credibility, including her interest in the outcome of the litigation. *Id.* The same is true here – Corbin is a defendant

and therefore has an obvious interest in the outcome of this litigation, which implicitly raises the question of his credibility. Such matters are quintessential jury questions.

Third, “intent” is a state of mind that generally can only be known to that person. Thus, if one accepts Corbin’s “uncontradicted testimony” argument on his intent/state of mind, a plaintiff can never recover for conspiracy if the defendant denies any intent to harm in the absence of a prior inconsistent statement. And, with the possible exception of a defendant’s co-conspirators, it is highly unlikely that a defendant would ever admit to any one that he or she was acting with an intent to harm the plaintiff. And it is highly unlikely that any co-conspirator would divulge any such statement.

Finally, as shown earlier, the evidence and inferences permit a conclusion that Corbin was not acting in the best interest of Allegro as he claimed to be. In any event, Defendant Corbin’s argument is not properly before this Court.

It is axiomatic that an issue cannot be raised for the first time on appeal. *Johnson v. Sonoco Prods. Co.*, 672 S.E.2d 567, 570 (S.C. 2009). Defendants never argued to the trial court that Corbin’s “uncontradicted” testimony entitled Corbin to judgment as a matter of law, because it could not be dis-believed by the jury.⁹ Thus, Defendants’ argument is not properly before this Court.

Certiorari lies only for those issues that were first raised to the Court of Appeals. Rule 242(d)(2), SCACR. Here, Defendants did not make their “uncontradicted testimony” argument to the Court of Appeals in their Brief of Appellants. (A-2 at 887-943). Thus, the issue is not properly before this Court. Defendants first made this argument in their Reply

⁹ Defendants did not raise this issue in their motions for a directed verdict at the close of Plaintiff’s case or the close of the evidence. (A-1 at 344-347; 400-416). Defendants also did not raise this issue in their motion for JNOV or new trial (A-2 at 759-772) or in their motion to alter or amend. (A-2 at 814-821).

Brief (A-3 at 994), but it is axiomatic that an argument cannot be made for the first time in a reply brief. *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011).

In any event, any error is harmless error because, as demonstrated earlier: (1) all of Defendant Corbin's "intent to harm" arguments are barred by the law of the case doctrine; (2) there was sufficient evidence to create a question for the jury; and (3) this issue is not properly before this Court, because it is not set forth in Defendants' Statement of Issues.

II. Defendants' arguments on the "special damages" element of civil conspiracy are not properly before this Court and/or have no merit.

It is undisputed that Defendants did not make a directed verdict motion at the close of the evidence that preserves their appellate argument on "special damages." Thus, their appellate arguments are not preserved for appeal under axiomatic principles of law. Defendants argue, however, that they are entitled to a JNOV based on their "special damages" argument, because the trial court prevented them from making a directed verdict motion at the close of the evidence and prevented them from renewing the motion that they made at the close of Plaintiff's evidence. (Pet. Br. at 15-18). This "cut-off" argument is not properly before this Court and has no merit.

A. Defendants' "cut-off" argument is not properly before this Court, because Defendants did not timely raise it to the trial court or the Court of Appeals.

It is axiomatic that, to preserve an issue for appellate review, an appellant must present the issue to the trial court at the first opportunity. *James v. Anne's, Inc.*, 701 S.E.2d 730, 732-733 (S.C. 2010); *State v. Aldret*, 509 S.E.2d 811, 813 (S.C. 1999). When circumstances prevent an appellant from raising an issue to the trial court at the very first opportunity, he or she must raise the issue at the first opportunity thereafter to preserve the issue for appeal. *State v. Liberte*, 521 S.E.2d 744, 746 n.1 (S.C. App. 1999). Here, even if

one accepts Defendants' "cut-off" argument at face value, it is nevertheless not properly before this Court for review for several reasons.

After the alleged "cut-off" during the directed verdict motion at the close of the evidence, Defendants could have but failed to raise the "cut-off" issue in their post-trial motion for JNOV and a new trial, but they failed to do so. (A-2 at 766-767, ¶ 15; see also *id.* at 756-772, *passim*). In its return to Defendants' post-trial motions, Plaintiff specifically argued that Defendants' "special damages" argument was not properly before the court, because Defendants had not made a directed verdict motion on this ground. (A-2 at 770, ¶ 15). The trial court held a hearing on Defendants' post-trial motions, but Defendants never raised their "cut-off" argument to the trial court. (A-2 at 481-504, *passim*).

The trial court denied Defendants' post-trial motions in a written order. (A-1 at 18-30). The trial court specifically held that Defendants had not made a "special damages" argument at the directed verdict stage and, therefore, they could not make that argument in seeking JNOV. (A-1 at 20-21). Defendants filed a motion to alter or amend. (A-2 at 814-821). Therein, and for the *first* time, Defendants hinted at their current cut-off argument by noting the trial court's ruling, recapping their "special damages" directed verdict motion at the close of Plaintiff's case, and then making the following assertion:

At the close of all evidence, Defendants *renewed their motion* for directed verdict as to the civil conspiracy claim and after a brief discussion were informed that the Court has "heard enough about civil [conspiracy]" and were directed to move onto the next cause of action.

(A-2 at 820, ¶ 8) (emphasis added). Defendants never renewed the motion made at the close of Plaintiff's case. (See A-1 at 400-416, *passim*). Defendants did not argue that it was error to "cut-off" their directed verdict motion or that, had the trial court not done so,

then Defendants would have made a “special damages” argument or renewed their prior motion. (See Motion to Alter or Amend, A-2 at 814-821, *passim*).

It is axiomatic that an appellant cannot raise an issue the first time in a motion to alter or amend. *Johnson v. Sonoco Prods. Co.*, 672 S.E.2d 567, 570 (S.C. 2009). Here, Defendants could have and should have raised their “cut-off” argument in their JNOV/new trial motion, particularly given that Plaintiff’s opposition to that motion included the argument that Defendants had failed to make a direct verdict motion on “special damages” at the close of the evidence. Having failed to do so, they could not raise this issue in their motion to alter or amend and, therefore, Defendants cannot make any “cut-off” argument on appeal.

On appeal to the Court of Appeals, Defendants did not make any “cut-off” argument in their Brief of Appellants. (A-2 at 936-937). Rather, they incorrectly implied that they had made their “special damages” argument in their directed verdict motion at the close of the evidence. (*Id.* at 936). Plaintiff responded that Defendants’ “special damages” argument was not preserved for appeal, because Defendants had not made this argument in their directed verdict motion at the close of the evidence. (Resp. Br., A-3 at 953-955). In reply, Defendants made their present “cut-off” argument for the first time in their Reply Brief. (A-3 at 989-991).

It is axiomatic that an argument cannot be made for the first time in a reply brief. *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011). Thus, Defendants’ “cut-off” argument was never properly before the Court of Appeals and, therefore, the Court of Appeals did not err in rejecting it. Indeed, since Defendants did not timely raise their “cut-off” argument to the trial court or the Court of Appeals, it would have been reversible error

for the Court of Appeals to reach this issue. See, e.g., *Johnson v. Lloyd*, 757 S.E.2d 705 (S.C. 2014) (reversing Court of Appeals for reaching an issue that was not preserved for appeal).

Certiorari lies only for those issues that were first raised to the Court of Appeals. Rule 242(d)(2), SCACR. Here, Defendants' "cut-off" argument was never properly before the Court of Appeals, because it was not timely raised to the trial court or the Court of Appeals. Accordingly, Defendant's "cut-off" argument is not properly before this Court. In any event, their argument has no merit.

B. Defendants' "cut-off" argument has no merit.

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

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

375 S.E.2d at 313 (emphasis added). Here, trial counsel did not insist on stating any grounds for the record, and trial counsel was not assertive in preserving any issue for the record. Thus, the "special damages" issue is not preserved for appeal. Moreover, it is clear

from the record that the trial judge had “heard enough” about the intent to harm issue. At the very least, therefore, it was incumbent upon trial counsel to request leave to make a record on other conspiracy issues, including the “special damages” issue.

Moreover, the “special damages” issue could have been raised in one of two other ways. First, in response to the trial court’s statement, Defendants could have replied: “Yes, your Honor, we would therefore simply renew the arguments made at the close of the plaintiff’s case.” Second, at any other time during the directed verdict proceedings, including when the trial court specifically asked Defendants whether they had “[a]nything further” (A-1 at 415), Defendants could have renewed all motions and arguments made at the close of Plaintiff’s evidence. They did neither.

Having failed to do anything to comply with the duty imposed by this Court in *Mains*, Defendants’ argument under *Mains* has no merit. Accordingly, Defendants’ “special damage” argument is not preserved for appeal and therefore not properly before this Court.

III. Assuming Defendants’ “special damages” arguments are properly before this Court and have merit, they do not apply to Defendant Corbin, because civil conspiracy was the only claim made against him.

In *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 278 S.E.2d 607, 611 (S.C. 1981), this Court announced the rule that a claim for civil conspiracy fails to state a cause of action if it seeks an award of the same damages for the same acts against the same defendant that is sought in other causes of action pled against the same defendant in the complaint. Here, civil conspiracy was the only claim made against Defendant Corbin and, therefore, he is not entitled to a directed verdict under the rule in *Todd*. He may have a right to contribution from the other defendants or an offset for any damages collected from

them, but he is subject to a claim and award for civil conspiracy. Thus, there was no “special damage” error in denying his directed verdict motion on the claim for civil conspiracy.

IV. Assuming Defendants’ arguments on the “special damages” element of civil conspiracy are properly before this Court and have merit, this Court should overrule *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 278 S.E.2d 607, 611 (S.C. 1981).

Plaintiff respectfully submits that this Court should revisit and overrule the rule announced in *Todd, supra*. This Court relied on 15A C.J.S. Conspiracy, § 33 to announce this rule. *Todd*, 278 S.E.2d at 611. That C.J.S. authority, however, addressed the well-established rule against double recovery and the resulting need for an election of remedies when a claim for civil conspiracy is for the same acts and same damages sought against the same defendant as another claim made in the case. Accordingly, Respondent submits that the rule announced in *Todd* should be overruled and modified to comport with the purpose of the C.J.S. rule cited in *Todd*. Thusly viewed, the rule should be the following: (1) if a civil conspiracy claim seeks the same damages for the same acts against the same party as another claim, it states a cause of action but there can be only one recovery for those acts and damages, so upon any award of damages, the plaintiff must elect its remedy; and (2) to the extent the civil conspiracy claim rests in whole or in part on different conduct or different resulting damages, then there is no double recovery as to those different damages (*i.e.*, “special damages) and, therefore, there is no need to elect between remedies for those special damages.

V. Defendant Scully's arguments that he was entitled to a directed verdict on the contract claims are frivolous and not properly before this Court.

Defendant Scully argues there was no evidence of any contract between him and Plaintiff and, therefore, he was entitled to a directed verdict on Plaintiff's breach of contract claims. This is a frivolous argument.

A. Defendant Scully's "no contract" argument is frivolous.

The implied covenant of good faith and fair dealing is implied by law into every contract. *Adams v. G.J. Creel and Sons, Inc.*, 465 S.E.2d 84, 85 (S.C. 1995). The thrust of Plaintiff's breach of contract claims was that Scully violated this covenant. (See Cmplnt., A-1 at 59, ¶¶ 27-30; 61-62, ¶¶ 41-47). Thus, if there was a contract between Scully and Plaintiff, there was a jury issue on whether Scully breached the contract. Defendants do not contend otherwise.

McCarthy, the founder and principal owner of Plaintiff, testified without contradiction that Defendant Scully agreed to become the President of Plaintiff and run its day to day operations in exchange for a salary from Plaintiff. (A-1 at 120-123). McCarthy also testified that at the relevant times in this case, Defendant Scully was "employed by Allegro," that he received "a paycheck from Allegro," that he received "benefits from Allegro," and that he, like McCarthy, "was an employee of Allegro." (A-1 at 165, 171). Indeed, Defendant Scully twice admitted that, during the relevant times in this case, he was "employed at Allegro" and "employed with Allegro." (A-1 at 226, 236-237). In other words, the uncontradicted evidence showed that Scully agreed to come to work, to do the work, and to get paid for the work. This is the quintessential employment contract.¹⁰ At

¹⁰ There was never an issue in this case as to whether Scully was employed by Plaintiff. In Plaintiff's original complaint, Plaintiff alleged that Scully was an employee of Plaintiff at all relevant times. (A-1 at 56, ¶ 12). In its amended complaint, Plaintiff again alleged that Scully was an employee of Plaintiff at all relevant

the very least, the foregoing evidence created a question of fact for the jury as to whether there was an employment contract between Scully and Plaintiff. Thus, the trial court did not err in denying Defendant Scully's directed verdict motion. In any event, as shown below, Defendant Scully's "contract" argument is not properly before this Court.

B. Defendant Scully's "no contract" argument is not properly before this Court.

At the close of Plaintiff's evidence, Scully moved for a direct verdict on the contract claims upon the following ground: "There's been absolutely no evidence . . . that there is any sort of contract that binds Mr. Scully and Ms. McCarthy." (A-1 at 346). At the close of the evidence, Scully moved for a directed verdict upon the following ground:

In terms of breach of contract, Your Honor, there is a complete absence of any evidence in the records before the Court that there was any kind of contract There's no contract here. There is no hand book, there's no employment agreement, no non-compete that was breached, so it is the Defendant's position that the breach of contract and then the derivative breach of contract with fraudulent intent should fail. The Plaintiff has offered nothing on a contract.

(A-1 at 414). As shown earlier, the undisputed evidence that Defendant Scully came to work, did the work, and got paid for the work is evidence of an employment contract between Scully and Plaintiff. In any event, Scully's arguments are not properly before this Court.

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

times. (A-1 at 77, ¶ 12). Scully answered the original complaint individually, and admitted the employment allegation. (Scully Answ., page 2, ¶ 12). Defendants filed a joint answer to the amended complaint and again admitted the employment allegations. (Def. Answ. to Amd. Cmplnt., p. 1, ¶ 4). The answers were not included in the record on appeal, but this Court may inspect and consider any part of the trial court records. Rule 212(a), SCACR.

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 Plaintiff and Scully, and this resulted in contractual obligations owed by Scully to Plaintiff. Scully did not mention or challenge this ruling on appeal to the Court of Appeals (A-2 at 887-943). Thus, it is the law of this case and precludes Scully's current arguments for certiorari. See Rule 242(c)(4), SCACR ("Only those questions raised in the Court of Appeals . . . shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

In denying Scully's JNOV motion on this issue, the trial court ruled that Scully's directed verdict motion "was limited to the argument that there was no employee handbook, no employment agreement, and no non-compete agreement [and thus] the arguments based on a failure to prove terms of the contract or a breach thereof cannot be the basis of a JNOV motion." (Appx. 19). Again, Scully did not mention or challenge this ruling on appeal to the Court of Appeals (A-2 at 887-943) and, therefore, it is the law of this case. Importantly, Scully now 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, he cannot make those arguments in seeking certiorari. See Rule 242(c)(4), SCACR ("Only those questions raised in the Court of Appeals . . . shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

In denying Scully's motion to alter or amend on this issue, the trial court rejected Scully's argument that the "handbook, etc." language used in his directed verdict motion was by way of example only and that "[i]mplicit in the argument that no contract has been

established is the claim that the terms of the contract or the breach of the contract have not been established.” (Appx. 42) (emphasis in Order). The trial judge held:

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

(Appx. 43) (underlining added). Scully did not mention or challenge this ruling on appeal to the Court of Appeals (A-2 at 887-943) and, therefore, it is the law of this case and precludes Scully’s certiorari argument. See Rule 242(c)(4), SCACR (“Only those questions raised in the Court of Appeals . . . shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”).

C. The Court of Appeals correctly found that Defendant Scully’s “terms of contract” argument was not preserved for appeal, and any presumed error was harmless.


The Court of Appeals held that Defendant Scully failed to make a directed verdict motion on the question of whether Plaintiff failed to prove the terms of the contract between Plaintiff and Scully. (A-3 at 1160-1161). Defendant Scully never argued anything about the terms of the contract to the trial court (A-1 at 344-347; 400-416) and, therefore, the Court of Appeals ruled correctly. In any event, any presumed error was harmless. As shown earlier, the evidence showed the following employment contract terms: (1) Scully agreed to become President of Plaintiff and manage its day-to-day operations; and (2)

Plaintiff agreed to pay Scully a salary for these services. These are the quintessential terms of an employment contract.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the Court of Appeals or dismiss the writ of certiorari as improvidently granted.

Respectfully Submitted,



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July 6, 2015
Columbia, South Carolina

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

Appellate Case No. 2014-002055
Case No. 04-CP-40-1915

RECEIVED
JUL 06 2015
S.C. Supreme Court

Allegro, Inc., Respondent,

v.

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

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

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Brief of Respondent and by depositing a copy of same in the United States Mail, sufficient postage prepaid, on July 6, 2015, addressed to the attorneys for the Petitioners, as follows:

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