

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

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.

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## Argument

### **I. Corbin should have been granted directed verdict or JNOV because Allegro failed to introduce any evidence that Corbin acted with the intent or purpose of injuring Allegro.**

Throughout this case and this appeal, Corbin has asserted that there is no evidence that he ever intended to harm Allegro, and that, to the contrary, the evidence established that he believed he was acting in Allegro's best interests in advising his friend Scully on the potential purchase or sale of Allegro, and the methods for valuing Allegro. In its brief, Allegro mischaracterizes this argument, asserting that Corbin seeks to have this Court disregard the jury's finding and weigh the evidence submitted to the jury on whether Corbin intended to harm Allegro. *See* Resp. Br. p. 15.<sup>1</sup> Allegro misapprehends Corbin's argument to this Court. Corbin does not ask this Court to weigh any evidence. Rather, Corbin has consistently maintained that there was *no*

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<sup>1</sup> Allegro also asserts that Corbin failed to preserve this issue for appellate review, claiming Corbin only set forth one argument in the Statement of Issue for this argument rather than state five separate issues in the Statement of Issues. *See* Resp. Br. p. 12-14. Allegro attempts to take isolated phrases and statements from Corbin's brief to this Court used to support his argument that the trial court should have granted JNOV on the civil conspiracy claim and improperly convince this Court that such supporting rationale constitutes stand alone issues that should have been set forth in the Statement of Issues. *Id.* This argument lacks merit and distorts our rules of appellate practice in an attempt to distract from the issues before this Court.

First, as noted above, Corbin has consistently raised this argument with supporting rationale throughout the trial, the post-trial motions, and this appeal. Second, the issue framed in the Statement of Issues properly encompasses and covers the rationale used to support the argument. Rule 208(b)(1)(B), SCACR, does not require that each phrase, sentence, or supporting rationale used to support an argument be specifically set forth in the Statement of Issues. Rather, an *issue* is properly set forth for consideration by the appellate court when it adequately apprises the court of the issue challenged on appeal. *See, e.g., Eubank v. Eubank*, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001) (holding that an issue read in conjunction with the argument section for that issue adequately raised the issue for appellate review). Under Allegro's improper reading of Rule 208, SCACR, the party would have to convert the Statement of Issues into a full argument section in order to avoid being procedurally barred from advancing sub-issues, sentences, phrases, or supporting rationale to the appellate court. The Court should not be driven to treat the Statement of Issues like the old "exceptions" under the former Supreme Court Rules, where there was constant bickering between parties regarding whether the "exceptions" were specific enough, etc. This Court should reject Allegro's argument.

evidence for the jury to weigh because Allegro introduced *no* evidence of Corbin's intent to harm. (Appx. p. 347, 411-414, 759, 814, 937-939, 991-994). Therefore, the trial court erred in submitting the civil conspiracy claim against Corbin to the jury.<sup>2</sup> This Court should reverse the Court of Appeals' finding to the contrary.

In order to prove a claim for civil conspiracy, our law requires a plaintiff to establish three separate and distinct elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; and (3) which causes special damages. *LaMotte v. Punchline of Columbia, Inc.*, 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988). "In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005) (emphasis added). In order for there to be "joint assent" to harm a plaintiff, each alleged conspirator must individually intend for such harm to occur. *Id.*

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<sup>2</sup> Allegro further claims that the law of the case doctrine bars Corbin's argument. See Resp. Br. p. 13-14. Allegro claims that because Scully and Yarborough did not appeal the verdict that they acted in concert with each other and with individual intent to harm Allegro, then somehow that verdict binds Corbin on appeal. *Id.* Essentially, Allegro asserts that the individual intent of Scully and Yarborough is somehow imputed onto Corbin. This argument lacks merit and should be rejected because Corbin is not bound by a ruling related to Scully and Yarborough. The intent of Corbin is wholly separate from the intent of Scully and Yarborough. Allegro was required to specifically establish intent as to each individual defendant. *Mendelsohn v. Whitfield*, 312 S.C. 17, 430 S.E.2d 524 (Ct. App. 1993) *aff'd* 312 S.C. 226, 439 S.E.2d 845 (1994) (upholding directed verdict as to civil conspiracy where there was no evidence defendant acted "willfully to injure" the plaintiff); *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002) (rejecting civil conspiracy claim where there was no evidence of a concerted effort to harm the plaintiff); *First Union Nat'l Bank of South Carolina v. Soden*, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998) (holding there was insufficient evidence regarding the defendant's intent to support a civil conspiracy charge). At trial, in the post-trial motions, and in this appeal, Corbin has consistently asserted that there was no evidence of any purpose or intent on his part to harm Allegro. (Appx. pp. 347, 411-414, 937-939, 991-994). Because Corbin has continuously appealed from the failure of the trial court to grant directed verdict and JNOV on the issue of his intent, the law of the case doctrine is inapplicable.

Thus, even if Corbin “combined” in some fashion with Scully, Yarborough, or both (i.e., their acts all concurrently led to a result), Allegro was required to establish that Corbin intended to harm Allegro, independent from the actions or intent of Scully and Yarborough. Allegro failed to do so here. Allegro’s post-trial mischaracterizations and re-characterizations of the relationship between Corbin and Scully cannot and do not constitute evidence sufficient to withstand directed verdict.

In its brief, Allegro relies on the fact (1) that Corbin previously performed accountant services for Allegro, (2) that Corbin had some knowledge of Allegro’s clients, (3) that Corbin was aware of Scully’s option of forming his own company, and (4) that Corbin’s company was the first Allegro client to take its business to Scully’s new company as “proof” of Corbin’s intent to harm Allegro. *See* Resp. Br. p. 16-17. None of these facts evidence any ill motive by Corbin. The fact that Corbin, prior to becoming a client of Allegro, performed accountant work has no bearing whatsoever on his intent when subsequently providing advice to his friend Scully regarding his options and methods of valuation. Additionally, any knowledge Corbin had of Allegro’s client was surpassed by the knowledge of Scully and Yarborough, and there is no evidence that Corbin provided any such information. Finally, Corbin’s decision to take his business to Scully’s new company after giving Allegro the required notice does not evidence any intent to harm Allegro. As with any consumer, Corbin was free to move his business in accordance with his own wishes and the terms of his contract. Allegro fails to provide any fact presented to the trial court that would link such facts to the requisite intent to harm Allegro. To the contrary, the evidence at trial established the opposite—that Corbin’s limited involvement with this matter was for the purpose of

helping Allegro and doing what he thought was in the best interests of Allegro. (Appx. pp. 222-223, 375, 388-390).

Allegro also claims that Corbin had a duty to disclose to Allegro or McCarthy that Scully was leaving to start a competing business, and his failure to do so was proof of his intent to harm Allegro. *See* Resp. Br. p. 17. This argument is without merit. First, McCarthy was well aware of Scully's intention to start a competing business. As the Court of Appeals found, Scully told her that he would start a competing business taking Allegro employees and clients with him. (Appx. p. 1163). Additionally, Corbin owed neither Allegro nor McCarthy any duty to further inform them of Scully intention to compete with Allegro if McCarthy would not sell him her stake in the company. Thus, Allegro's argument fails as a matter of law.

In short, Allegro had the burden of proving Corbin's intent to injure Allegro. Allegro failed to introduce any such evidence. Allegro's unsupported speculation and conjecture to this Court regarding the testimony at trial is insufficient to support the denial of the directed verdict or JNOV. *See, e.g., 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 that mere speculation about a party's motives does not amount to proof of a conspiracy); *Hoard v. Roper Hospital, Inc.*, 587 S.C. 539, 549, 694 S.E.2d 1, 6 (2010) (holding that one may not avoid a dispositive motion by asserting that a jury may disbelieve uncontradicted evidence).<sup>3</sup> As a result, this Court should grant Corbin

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<sup>3</sup> Allegro claims this Court should ignore the *Hoard* rule because that case addressed "an appeal from an order granting summary judgment" not directed verdict. This argument is manifestly without merit. Both summary judgment and directed verdict are granted when a claim fails as a matter of law. Thus, the rationale applies to both situations.

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

**II. This Court should reverse the trial court and grant JNOV on the civil conspiracy cause of action because Allegro failed to establish the required element of special damages.**

The trial court erred in failing to grant all Petitioners directed verdict or JNOV because Allegro failed to offer any evidence of special damages. As Allegro has admitted, the damages evidence was the same for all eleven causes of action. Therefore, Allegro failed to establish “special damages” that go beyond the damages alleged in other causes of action as required under the elements of a civil conspiracy claim. This Court should reverse.

**A. Preservation**

Allegro claims that Petitioners failed to preserve their special damages argument for appellate review. *See* Resp. Br. p. 23-26. Allegro’s argument distorts and misapplies our rules of error preservation in an attempt to distract from the fact that Allegro admittedly failed to prove the existence of any special damages. Petitioners properly preserved their arguments for review by this Court.

Petitioners first raised the issue of a lack of any evidence of special damages in their directed verdict motion at the close of Allegro’s case. (Appx. p. 347). The trial court denied the motion. At the close of all the evidence, Petitioners sought to renew their motion for directed verdict. (Appx. p. 414). However, the trial court prevented Petitioners from reasserting this argument during the directed verdict motion made at the close of all evidence. The colloquy with the trial judge shows any further argument would have been futile.

After initially arguing that the civil conspiracy claim failed as to Corbin due to the lack of any evidence of intent on his part to harm Allegro, the trial court specifically ordered Petitioners' counsel to stop presenting any argument on the civil conspiracy claim and to move onto the next cause of action:

MS. GAFFNEY: Correct, and there is no evidence in the record before the Court that Corbin had any purpose or design to injure Allegro.

THE COURT: It is not what you intend. It's what actually results. Anyway go to the next, go to the next civil. **I have heard enough about civil – go to the next cause of action.**

(Appx. p. 414) (emphasis added). Thus, the trial court precluded any additional argument on the civil conspiracy claim, including the special damages grounds, and Petitioners' counsel was specifically directed to move onto a different cause of action.

Generally, in order to preserve an issue raised in a directed verdict motion, the motion must be made at the close of all evidence. Rule 50(b), SCRCPP; *Evans v. Wabash Life Ins. Co.*, 247 S.C. 464, 148 S.E.2d 153 (1966). However, where the actions of the trial court prevented the motion from being made or renewed, this rule has not been, and should not be, strictly enforced based on a futility analysis. *See, e.g., Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 546-47 (2000) (holding that a party need not engage in a futile act in order to preserve an issue for appellate review); *State v Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (excusing the failure to raise an issue where the tone and tenor of the judge's comments are such that any objection or argument would be futile).

Furthermore, all of the damages evidence introduced in trial was presented in the Allegro's case in chief. None of the evidence was introduced during Petitioner's case in chief. Hence, no other possible "special damages" evidence was presented at trial after Petitioners' trial counsel pointed out in her directed verdict motion at the close of Allegro's case that such evidence was lacking. When the full context of what occurred here is considered, the Court should consider Petitioners' argument regarding the lack of special damages. This Court should reverse the trial court and grant JNOV as to the civil conspiracy claim in its entirety, thus allowing the new trial that has been previously ordered in this case to proceed without the civil conspiracy claim.

Lastly, Allegro argues that the issue is not preserved for review because Petitioners did not raise their preservation argument to the trial court. *See* Resp. Br. p. 24 ("Defendants could have but failed to raise the [futility] issue in their post-trial motion for JNOV and a new trial, but they failed to do so" . . . . "Defendants never raised their [futility] argument to the trial court"). Such a claim has no support in our law. Error preservation is a rule of *appellate* practice, not trial practice. *Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 478, 602 S.E.2d 83, 86 (Ct. App. 2004) (noting that the initial determination in appellate review is the determination of whether an issue has been preserved and that such determination is for the appellate court); Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina*, 55 (2nd Ed. 2002) ("Preserving issues for appellate review is a fundamental component of *appellate practice*." (emphasis added)). Petitioners

were not required to raise the preservation issue to the trial court. Thus, Petitioners properly preserved the issue for appellate review.<sup>4</sup>

**B. This Court should reverse because Allegro failed to introduce any evidence of special damages as to Corbin.**

Allegro alleges that because the only claim asserted against Corbin was civil conspiracy, then this somehow results in “all damages proven and awarded against Corbin” being “special damages.” *See* Resp. Br. p. 27-28. This Court should reject Allegro’s unsupported argument.

Whether damages constitute “special damages” is determined by the nature of the damages themselves, not by the cause of action asserted. Special damages caused by the defendant are the very essence of a civil conspiracy claim, and the claim fails as a matter of law without evidence of such damage. *See Pye v. Estate of Fox*, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (holding that “[b]ecause *the quiddity of a civil conspiracy claim* is the damage resulting to the plaintiff” such damages are essential to a civil conspiracy claim against the defendant) (emphasis added). Moreover, the special damages required for a civil conspiracy claim are defined as “[d]amages for losses that are the natural and proximate, but not the necessary, result of the injury” caused by the defendant. *Sheek v. Lee*, 289 S.C. 327, 328, 345 S.E.2d 496, 497 (1986).

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<sup>4</sup> Allegro also claims that the issue is not preserved for review because Petitioners did not raise a non-issue (whether Petitioners preserved the issue for appellate review) in their opening brief to the Court of Appeals. *See* Resp. Br. p. 25 (“On appeal to the Court of Appeals, Defendants did not make any [futility] argument in their Brief of Appellant.”). Our rules of appellate practice do not require an appellant in its opening brief to set forth all the reasons why the arguments it asserts are preserved for appeal. The practice instead is for appellant to present an argument to the appellate court; the respondent can then assert that the issue is not preserved for appellate review; and the appellant then presents the basis for how the issue is preserved in the reply brief. *See* Resp. Br. p. 25 (acknowledging that Petitioners responded to Allegro’s preservation argument in the Reply Brief to the Court of Appeals).

Based on the foregoing, the fact that the only claim against Corbin is civil conspiracy has no bearing on whether the damages claimed to be caused by him are “special damages.” Allegro made no attempt to establish that any of its damages were “special damages” as defined by this Court. Instead, Allegro offered precisely the same damages evidence for all causes of action. Allegro’s attempts to claim otherwise to this Court are unavailing.<sup>5</sup> This Court should reverse the trial court and grant directed verdict or JNOV as to the civil conspiracy claim.

**C. Allegro’s request to remove the special damages element from civil conspiracy lacks merit and should be rejected by this Court.**

Allegro further argues that this Court overrule well-established precedent and remove the element requiring the existence of special damages separate and apart for those claimed in other causes of action in a civil conspiracy cause of action. *See* Resp. Br. p. 28. Specifically, Allegro claims that this requirement is no longer needed because election of remedies would prevent “double recovery.” *Id.* Allegro’s characterization as to why special damages are required is misplaced and does not support overruling current law.

Contrary to Allegro’s unsupported claim, the requirement for “special damages” in a civil conspiracy cause of action does not exist for the purpose of avoiding duplicative recoveries. Instead, special damages constitute an integral element of the cause of action as a whole, and without special damages, the claim would not exist. In fact, this Court has held that special damages are the linchpin of the civil conspiracy cause of action. This Court held that “[b]ecause *the quiddity of a civil conspiracy*

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<sup>5</sup> In fact, Allegro admits, at least as to Scully and Yarborough, that Allegro’s civil conspiracy damages “were the same damages proven and awarded under the other causes of action.” *See* Resp. Return to Pet. for Cert. p. 4.

*claim* is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in the other causes of action.” *Pye v. Estate of Fox*, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (emphasis added). Allegro’s inability to establish special damages in this case (because none exist) does not provide justification for a wholesale departure from longstanding South Carolina law on the cause of action of civil conspiracy.

**III. The trial court erred in failing to grant Scully’s motion for directed verdict or JNOV on the contract claims because Allegro failed to establish the existence of any contract.**

Allegro’s claims for breach of contract and breach of contract accompanied by a fraudulent act were asserted only against Scully. The trial court erred in failing to grant DV/JNOV on these claims because Allegro failed to establish the existence and terms of any such contract. In its brief, Allegro alleges that Scully’s “no contract” argument fails because “Scully agreed to come to work, to do the work, and to get paid for the work. This is the quintessential employment contract.” *See* Resp. Br. p. 29. This argument contradicts settled South Carolina law on employment contracts. South Carolina is an “at-will” employment state, and an employment contract will not be presumed absent “the creation of a specific contract of employment.” *See, e.g., Mathis v. Brown & Brown of S. C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) (holding that “[i]n South Carolina, employment at-will is presumed absent the creation of a specific contract of employment.”). Thus, absent a specific employment contract the employer-employee relationship is non-contractual. As a result, Allegro’s argument lacks merit and should be rejected by this Court.

There was no evidence of any contract between Allegro and Scully, no evidence of the terms of this alleged contract, and no evidence of a breach of the contract. Absent evidence of the alleged contract, both the breach of contract claim and the claim for breach of contract accompanied by a fraudulent act fail and Scully's motions for directed verdict and JNOV should have been granted as to both claims. This Court should reverse.

Allegro next claims that Scully failed to preserve any argument regarding the trial court's finding of an oral contract. *See* Resp. Br. p. 30-31. This argument likewise lacks merit. At trial, Scully argued that there was "no contract here" and there was "a complete absence of any evidence in the record before the court that there was **any kind of contract.**" (Appx. pp. 414) (emphasis added). Such argument unequivocally raised the objection to the oral contract finding. Additionally, Scully argued to the Court of Appeals that "there was no evidence of any contract between Allegro and Scully, no evidence of the terms of this alleged contract, and no evidence of a breach of the contract." (Appx. pp. 939-940) (emphasis in original). "Any" contract includes both oral and written contracts. The issue is properly before the Court.<sup>6</sup>

In sum, the evidence at trial established that there was no employment contract between Allegro and Scully, and Allegro did not have an employee handbook that

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<sup>6</sup> Allegro also incorrectly contends that Scully limited his directed verdict motion on this issue to the non-existence of an employee handbook, employment agreement, or a non-compete agreement. *See* Resp. Br. p. 31-32. The nonexistence of these forms of contracts were merely used as examples of how there was no evidence of any employment contract. (Appx. pp. 346-347, 414). The examples were not used as stand-alone grounds for directed verdict; instead, the examples framed Allegro's wholesale failure to offer any proof of a "specific contract of employment." The fact remains that there was no evidence of any contract, and no evidence of how the nonexistent contract was supposedly breached by Scully. This issue has been repeatedly raised by Scully and has been adequately preserved in this appeal.

applied to Allegro employees. (Appx. p. 174, 366-367). Additionally, the testimony at trial established that there was not a non-compete contract between Allegro and Scully. (*Id.*)<sup>7</sup> Absent evidence of the alleged contract, both the breach of contract claim and the claim for breach of contract accompanied by a fraudulent act fail. The trial court erred in failing to grant Scully's motions for directed verdict and JNOV as to both claims. This Court should reverse, and the new trial of this case should proceed without either of these claims.

### 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.

*Signature Page Attached*

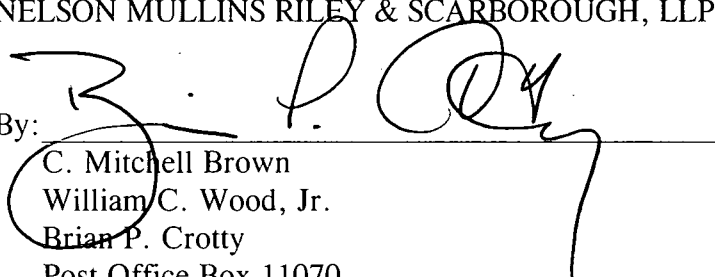
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<sup>7</sup> The only "contract" ever mentioned at the trial involving Scully was a Partnership/Buy-Sell Agreement between Scully and McCarthy relating to Scully's ownership interest in Allegro. (Appx. p. 120-121, 366-367). Allegro was not a party to that contract, and there was no evidence that it was breached in any way. Thus, the Partnership/Buy-Sell Agreement had no bearing on the issues in this case.

Respectfully submitted,

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PROOF OF SERVICE

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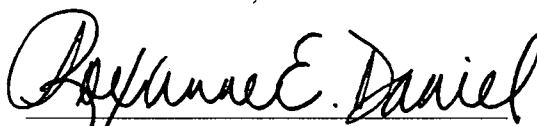
I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioners, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail,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

Pleadings:           **Reply Brief of Petitioners**

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