

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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

**RECEIVED**  
SEP 23 2016  
S.C. SUPREME COURT

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

**Return to Petition for Rehearing**

Pursuant to Rules 221(a) and 240(e), SCACR, Petitioners Emmett J. Scully, George Corbin, and Yvonne Yarborough (collectively “Petitioners”), hereby submit their Return to Allegro, Inc.’s (“Allegro”) Petition for Rehearing. In *Allegro, Inc. v. Scully, et al.*, Op. No. 27662 (filed August 24, 2016) (Shearouse Adv. Sh. No. 23 at pp. 57-69) (“Op. No. 27662”), this Court correctly reversed the Court of Appeals and the trial court and held that Petitioners should have been granted JNOV as to the claims for civil conspiracy, breach of contract, and breach of contract accompanied by a fraudulent act. (Op. No. 27662 at p. 65). Specifically, this Court held that because Allegro’s damages evidence at trial consisted solely of “general damages” applicable to all of the claims without any “indication of special damages emanating solely from the conspiracy,” Allegro failed to establish civil conspiracy’s necessary element of special damages. (*Id.* at p. 63). With regard to the contract claims, this Court held that there was “no

contract on which Allegro can predicate” those claims. (*Id.* at p. 65). Allegro now seeks rehearing on the limited issues of whether special damages were established as to Mr. Corbin, whether the element of special damages should be entirely removed from civil conspiracy, and whether there was evidence of an oral contract between Mr. Scully and Allegro.<sup>1</sup> Allegro’s petition should be denied because this Court fully considered and correctly rejected Allegro’s arguments.

### Standard of Review

A petition for rehearing must “state with particularity the points supposed to have been overlooked or misapprehended by the court.” Rule 221(a), SCACR. In order to prevail on a petition for rehearing, the petitioner must demonstrate the Court overlooked or misapprehended their argument. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

### Argument

**I. This Court correctly held that Petitioners’ motion for JNOV as to civil conspiracy should have been granted.**

**A. This Court correctly held that Allegro failed to establish the necessary element of special damages and the fact that the civil conspiracy claim was the only claim asserted against Mr. Corbin does not convert the general damages that were identical as to all claims into “special damages” as to Mr. Corbin alone.**

In its petition for rehearing, Allegro asserts that this Court overlooked its argument regarding special damages and George Corbin. This is incorrect. Allegro’s argument was that, because the only claim against Mr. Corbin was civil conspiracy, this somehow results in “all damages proven and awarded against Corbin” being “special damages.” (Respondent’s Brief. at

---

<sup>1</sup> Petitioners note that Allegro has not sought rehearing as to this Court’s other rulings, including the rulings that Petitioners’ arguments on civil conspiracy and the contract claims were adequately preserved.

p. 27-28; Petition for Rehearing at p. 2). This Court considered and properly rejected this argument.

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. As this Court stated two years after the inception of this dispute, “[b]ecause *the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.*” *Pye v. Estate of Fox*, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (emphasis added).

Whether damages constitute “special damages” is determined by the nature of the damages to the plaintiff, not by looking at against whom the cause of action is asserted, or at whether there are multiple causes of action or just conspiracy asserted. “General damages are inferred by the law itself, as they are the immediate, direct, and proximate result of the act complained of. Special damages, on the other hand, are not implied at law because they do not necessarily result from the wrong.” *Hackworth v. Greywood At Hammett, LLC*, 385 S.C. 110, 116-17, 682 S.E.2d 871, 875 (Ct. App. 2009) (internal citation omitted). Rather, “[s]pecial damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct.” *Id.*

The fact that the only claim against Mr. Corbin is civil conspiracy has no bearing on whether the damages claimed to be caused by him are “special damages.” In the case of *Vaught v. Waits*, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989), the plaintiff asserted claims against the members of the West Columbia City Council and the city administrator related to the termination of his employment. *Id.* at 203, 387 S.E.2d 92. The specific claims asserted were breach of contract, fraud, outrage, and civil conspiracy. *Id.* at 204, 387 S.E.2d 92. Significantly, while all

of these claims were asserted against the councilmembers, the only claim asserted against the city administrator was civil conspiracy. *Id.* The *Vaught* Court held that the civil conspiracy claim was barred due to a lack of special damages because “[t]he damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action.” *Id.* at 209, 387 S.E.2d at 95. Thus, despite the fact that civil conspiracy was the only claim asserted against the city administrator, this fact did not render the damages “special” as to the city administrator.

As this Court noted, “Allegro neither pled nor argued special damages.” (Op. No. 27662 at p. 63). This Court further noted that the only damages offered at trial were the general damages discussed by Daniel McHenry. (*Id.*) Thus, the only damages established at trial were damages that were “the natural and proximate result of the injury.” Having only established general damages at trial, such damages cannot be considered “special” as to one defendant but not as to another. They remain the exact same damages.<sup>2</sup> Therefore, this Court correctly held that JNOV should have been granted as to the claim of civil conspiracy, and Allegro’s petition should be denied.<sup>3</sup>

---

<sup>2</sup> Allegro has admitted that its 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.

<sup>3</sup> Petitioners note that, because this Court found that the civil conspiracy claim failed due to Allegro’s failure to establish any special damages, the Court did not need to address the argument specific to Mr. Corbin that Allegro failed to establish the necessary element that he acted with any purpose or intent to harm Allegro. This argument is set forth in Section I.A. of Petitioners’ Brief (pp. 9-14) and Section I of Petitioners’ Reply Brief (pp. 1-5). Petitioners reassert that argument herein. **Thus, in the event this Court determines that the special damages requirement was met as to Mr. Corbin alone, he is still entitled to JNOV on this claim due to the complete lack of any evidence that he acted with the primary purpose of harming Allegro.**

**B. This Court correctly refused to remove the element of special damages from civil conspiracy.**

In deciding the merits of the civil conspiracy issue, this Court held that “Allegro neither pled nor argued special damages” and that Allegro’s damages evidence consisted only of “general damages” “with no indication of special damages emanating solely from the conspiracy.” (Op. No. 27662 at p. 63). This court further refrained from removing civil conspiracy’s requirement of special damages, holding that “it would be unfair to the parties to change the pleading and proof requirements at this late stage in the litigation.” (*Id.* at n.3). In its petition, Allegro contends that this Court’s refusal to remove the element of special damages was based entirely “on the length of time this case has been pending.” (Petition for Rehearing at p. 2). Allegro further argues that “the delay in the case has been beyond the control of the parties.” Allegro’s arguments should be rejected.

Notably, Allegro did not raise any argument to overrule *Todd* the first time this case came before the Court. When Petitioners initially sought certiorari regarding the first Court of Appeals decision, Petitioners made the full argument to this Court that they should prevail as a matter of law as to civil conspiracy because, *inter alia*, civil conspiracy required the proof of special damages and none were shown. *See* Petition for Writ of Certiorari filed December 27, 2012, at p. 15 (attached as Exhibit 1 hereto). In response, Allegro not only failed to argue *Todd* should be overruled, it in fact cited to the case of *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 600, 358 S.E.2d 150, 152 (Ct. App. 1987), in which the Court of Appeals held that “[t]he elements of a civil conspiracy are (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) and which causes the plaintiff special damage.” *See* Return to Petition for Writ of Certiorari dated May 28, 2013, at p. 4 (attached as Exhibit 2 hereto). It would be particularly unfair in this matter, therefore, for this Court to suddenly change the law of civil conspiracy

when the parties tried the case under the current law, and the first time Allegro had the opportunity to ask this Court to consider changing that law, it failed to do so and instead relied on the current law in its Return. Thus, Allegro's efforts to blame the trial judge and the appellate courts for delays in raising whether *Todd* should be overruled should fail.

Moreover, this Court's refusal to remove the special damages element from civil conspiracy was entirely proper because the long-standing inclusion of special damages as an element of civil conspiracy is not a plain mistake in the law requiring reversal and the doctrine of *stare decisis* warrants respect for the long-established elements that have defined this claim. Additionally, this Court correctly reasoned that changing the pleading and proof requirements after twelve years of litigation would be manifestly unfair to the parties.

The requirement of special damages has repeatedly been held to be an integral element of the cause of action of civil conspiracy. As this Court has held, special damages are the linchpin and essence of the civil conspiracy cause of action – “[b]ecause *the quiddity of a civil conspiracy claim* is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in the other causes of action.” *Pye*, 369 S.C. at 568, 633 S.E.2d at 511 (emphasis added)<sup>4</sup>.

---

<sup>4</sup> This case is essentially a commercial tort case – a claim that Messrs. Scully and Corbin and Ms. Yarborough acted to take away Allegro's clients. It is not unusual for special damages to be required in commercial tort cases. See *Homeland Housewares, LLC v. Euro-Pro Operating, LLC*, 2014 U.S. Dist. Lexis 156675 (C.D. Cal. 2014) (California law requiring special damages as an element of trade libel); *Eversharp, Inc. v. Pal Blade Co.*, 182 F.2d 779 (2<sup>nd</sup> Cir. 1950) (New York law requiring special damages for trade libel); *Fowler v. Curtis Publishing Co.*, 182 F.2d 277 (Ct. App. DC 1950) (federal law requiring special damages for disparagement claim); *Erik Bowman Remedy Co. v. Jensen Salesbery Labs, Inc.*, 17 F.2d 255 (8th Cir. 1926) (special damages required for liable and slander of a corporation where statement is not libelous *per se*); *Testing Sys. v. Magnaflux Corp.*, 251 F. Supp. 286 (D.C.Pa. 1966)(special damages required in disparagement of property claim). The inclusion of special damages as an element in civil conspiracy should remain part of our established jurisprudence.

**1. The doctrine of *stare decisis* militates against changing a long-standing fundamental element of civil conspiracy.**

The doctrine of “[s]tare decisis exists to ‘insure a quality of justice which results from certainty and stability.’” *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (quoting *McCall v. Batson*, 285 S.C. 243, 256, 329 S.E.2d 741, 747 (1985) (Chandler, J., concurring)). As this Court had long noted, “we must remember how important is the doctrine of *stare decisis* in the administration of justice, and how ruinous also is uncertainty and vacillation. And unless in such review the error is apparent, manifest, and dangerous in its tendencies, it is better to yield than to overrule.” *Chamblee v. Tribble*, 23 S.C. 70, 79, 1885 S.C. Lexis 79, \*18 (1885) (emphasis added); see also *State ex rel. George v. City Council of Aiken*, 42 S.C. 222, 229, 20 S.E. 221, 223 (1894) (acknowledging the wisdom of the maxim of *stare decisis* and stating that it is rarely prudent to overrule a former decision except where it conflicts with other decisions, or has proceeded upon a plain mistake in the law.)

"A decision which is to overrule all former precedents and to establish a principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside." *Coleman v. Page's Estate*, 202 S.C. 486, 491, 25 S.E.2d 559, 560 (1943). For example, in the recent case of *Proctor v. Whitlark & Whitlark, Inc.*, 414 S.C. 318, 331-32, 778 S.E.2d 888, 895 (2015), this Court held that a departure from *stare decisis* was necessitated by clear intent from the Legislature and for public policy reasons. Here, there is no “plain mistake in the law” nor is there an apparent error “manifest and dangerous in its tendencies.” Additionally, there is no clear intent from the Legislature nor are there any identified public policy considerations warranting change. The requirement of special damages for certain torts is not an unusual one. In South Carolina claims

of defamation and slander of title include special damages as a requirement. *Parker v. Evening Post Publishing Co.*, 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994) (holding that special damages are an element of defamation where damages are not legally presumed); *Huff v. Jennings*, 319 S.C. 142, 459 S.E.2d 886 (Ct. App. 1995) (holding that special damages are an element of slander of title).

Additionally, this is not a situation where there is only one case stating the rule in question or where there are conflicting decisions. While Allegro characterizes its request as merely overruling the single *Todd* case, in actuality, this Court would be overruling decades of precedent. Looking solely to this Court's opinions, special damages have been held to be a key requirement for civil conspiracy in multiple cases over the past thirty years. *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988) ("A civil conspiracy is a combination of two or more persons joining for the purpose of injuring the plaintiff and causing special damage to the plaintiff."); *see also City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 546, 677 S.E.2d 574, 580 (2009) (holding that "[t]he gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff..." and that "[b]ecause the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action."); *Pye v. Estate of Fox*, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) (holding that "[b]ecause the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action."); *Angus v. Burroughs & Chapin, Co.*, 368 S.C. 167; 628 S.E.2d 261 (2006) (identifying special damages as an element of civil conspiracy); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559; 626 S.E.2d 884 (2006) (same); *Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Planning Corp.*, 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004) (same); *Peoples*

*Fed. S&L Ass'n v. Res. Planning Corp.*, 358 S.C. 460; 596 S.E.2d 51 (2004) (same); *Lawson v. S.C. Dep't of Corrections*, 340 S.C. 346; 532 S.E.2d 259 (2000) (same); *Future Group v. Nationsbank*, 324 S.C. 89; 478 S.E.2d 45 (1996) (same); *Hammond v. Butler, Means, Evins & Brown*, 300 S.C. 458; 388 S.E.2d 796 (1990) (same). Thus, in addition to the absence of an explanation as to how the special damages element is a “plan mistake in the law” that is “dangerous in its tendencies,” this long-standing body of law should not be lightly overturned. *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 203 (2012) (noting that the doctrine of stare decisis “is far more a respect for a body of decisions as opposed to a single case standing alone.”)

**2. It would be fundamentally unfair and a violation of due process to alter the elements of civil conspiracy in this matter.**

Allegro requests that this Court reverse the body of law cited above and fundamentally change an integral element of civil conspiracy by removing the long-standing element of special damages. For decades, South Carolina law has required a plaintiff to establish special damages to maintain a civil conspiracy claim. As a result, potential defendants were on notice that actions that otherwise met the elements of this claim could subject them to a civil penalty if they resulted in special damages to another party. Such potential defendants, however, have never been put on notice that they could be subjected to this penalty even where no special damages resulted. It is for this reason that such changes in the law are prospective rather than retrospective. Otherwise, the result would infringe upon the Due Process Clauses of the state and federal constitutions and notions of fundamental fairness.

The tort of civil conspiracy is part of the common law of South Carolina. *Jackson v. Bi-Lo Stores*, 313 S.C. 272, 274, 437 S.E.2d 168, 169 (Ct. App. 1993) (describing civil conspiracy as a common law tort). Here, the parties tried the case understanding that the special damages

element was required. If this Court wishes to look at the law of civil conspiracy and consider changes, it should not do so in this old case, where a new trial has been ordered after twelve years of litigation. The Court should instead look at the issues by use of a different vehicle, and consider, among other things, whether the more appropriate action would be to do away with civil conspiracy as an independent claim altogether. Several other jurisdictions have refused to recognize an independent claim of civil conspiracy.<sup>5</sup> Were this Court to not only maintain the claim, but embrace a new, liberal form of civil conspiracy without the requirement of special damages, such would represent a marked shift in public policy that would permit more lawsuits, cause uncertainty in the law, and adversely affect South Carolinians (both businesses and individuals) in a number of respects.

Failing all of the above, Petitioners assert that in the event this Court decides to change the long-established elements of civil conspiracy to completely remove the element of special damages (which it should not do), such a change should be applied only prospectively and not

---

<sup>5</sup> *Richard B. LeVine, Inc. v. Higashi*, 113 Cal App. 4th 566, 574 (Cal. App. 2005) (holding that in California there is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom); *Perry v. Perry*, 2015 Conn. Super. Lexis 2373, \*15 (Conn. Super. Ct. Sept. 15, 2015) (holding that Connecticut does not recognize an independent tort of civil conspiracy. Rather, a cause of action may be asserted for damages caused by acts committed pursuant to a conspiracy to commit a substantive tort); *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1211 (Del Ch. 2010) (noting that Delaware does not recognize civil conspiracy to commit a tort as an independent cause of action); *K.M.K. v. A.K.*, 908 N.E. 658, 663 (Ind. Ct. App. 2009) (noting that in Indiana there is no separate cause of action for civil conspiracy, but there is a civil cause of action for damages resulting from a conspiracy); *Dhaliwal v. Dhaliwal*, 184 So. 3d 773 (La. Ct. App. 2016) (holding that Louisiana does not recognize an independent cause of action for civil conspiracy); *Pappas v. Passias*, 271 A.D.2d 420 (N.Y. App. Div. 2000) (holding that New York does not recognize civil conspiracy to commit a tort as an independent cause of action); *Fox v. Wilson*, 354 S.E.2d 737, 743 (N.C. App. 1987) (North Carolina - noting that North Carolina does not recognize a claim for civil conspiracy and instead provides an action for damages caused by the acts committed pursuant to a formed conspiracy); *Bender v. Logan*, 2016 Ohio App. Lexis 3194, \*48 (Ohio App. Aug. 1, 2016) (Ohio – holding that Ohio law does not recognize civil conspiracy as an independent cause of action).

retrospectively to the Petitioners based on alleged conduct that took place more than twelve years ago. As this Court noted in its Opinion, “it would be unfair to parties to change the pleading and proof requirements at this late stage in the litigation.” (Op. No. 27662 at p. 63 n.3). This is in accord with South Carolina law which provides that “[c]hanges in the law are usually prospective, not retroactive.” *Pinckney v. Warren*, 344 S.C. 382, 391, 544 S.E.2d 620, 625 (2001).

"[T]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." *McCaskey v. Shaw*, 295 S.C. 372, 368 S.E.2d 672, 673 (Ct. App. 1988) citing *Bartlett v. Nationwide Mutual Fire Ins. Co.*, 290 S.C. 154, 157, 348 S.E.2d 530, 532 (Ct. App. 1986). "**Prospective application is required when liability is created where formerly none existed.**" *Hupman v. Erskine College*, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984) (emphasis added); see also *Marcum v. Bowden*, 372 S.C. 452, 458 n.5 643 S.E.2d 85, 88 n.5 (2006) (holding that “[i]t would offend notions of fairness ... to retroactively impose tort liability where previously there had been none...”)

The removal of the element of special damages from civil conspiracy is not the mere creation of a new remedy. Special damages are an element of the claim and, therefore, are an essential prerequisite to there being any liability for this claim. Such a change would create a new substantive right – a cause of action for civil conspiracy based on general damages. Moreover, if the requirement of special damages is removed from the elements of civil conspiracy, it would result in potential liability being created as to Petitioners for this claim where none previously existed at the time of the initiation of this action. As noted by this Court, “Allegro neither pled nor argued special damages” in this case, nor did Allegro offer evidence of

anything other than “general damages” applicable to the other claims. (Op. No. 27662 at p. 63). Thus, Petitioners should have been granted a directed verdict at the close of Allegro’s case. Absent a change of a key element of the cause of action, no liability previously existed. A retroactive application of such a change, however, would violate fundamental due process and fairness.

South Carolina’s Constitution, like that of the United States, provides that no person shall be deprived of property without due process of law. See U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. These constitutional guarantees of due process are “violated when a party is denied fundamental fairness.” *Hipp v. S.C. Dept. of Motor Vehicles*, 381 S.C. 323, 325, 673 S.E.2d 416, 417 (2009); *see also JRS Builders, Inc. v. Neunsinger*, 364 S.C. 596, 602, 614 S.E.2d 629, 633 (2005)

The constitutional guarantees of due process require that judicial rulemaking be prospective in nature. The United States Supreme Court has acknowledged that limitations on the retroactive application of a judicial decision “are inherent in the notion of due process.” *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001); *see also Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (holding that retroactive application of unforeseeable judicial enlargement of criminal statute violated due process). Similarly, this Court has recognized that judicial decisions applied retroactively can violate the Due Process Clause. *State v. Collins*, 329 S.C. 23, 28 n.4, 495 S.E.2d 202, 205 n.4 (1998); *Muldrow v. Caldwell*, 173 S.C. 243, 175 S.E. 501, 504 (1934); *see also* 628 Am. Jur. 2d Constitutional Law § 693

Drawing from this principle, due process requires that the person to be punished have been under fair notice of the type or severity of penalty that could be imposed on him for his conduct. *See Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009)

(“The Supreme Court expounded upon *Haslip*’s due process standard in *Gore*, where it held that ‘[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose.’”) (quoting *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996)); see also *Atkinson v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 164-65, 604 S.E.2d 385, 389 (2004) (same).

This is not a situation in which the law has been silent; to the contrary, since the *Todd* decision, and during the course of this very appeal, this Court has repeatedly held that special damages are an essential element necessary to establish a cause of action for civil conspiracy. See *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 546, 677 S.E.2d 574, 580 (2009); *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, the damages alleged must go beyond the damages alleged in other causes of action.”). In the absence of notice that “civil conspiracy” could be supported merely by general damages rather than requiring the establishment of special damages that went beyond the damages claimed for other causes of action, the Due Process Clauses of the state and federal Constitutions forbids retrospective relief. Therefore, this Court correctly refrained from making a fundamental change to the elements of civil conspiracy, and Allegro’s petition for rehearing should be denied.

II. **This Court correctly held that Allegro failed to establish a contact that supported the claims for breach of contract and breach of contract accompanied by a fraudulent act.**

This Court held that there was nothing to suggest that Mr. Scully’s employment with Allegro “was anything other than an at-will relationship.” (Op. No. 27662 at p. 64) This Court further noted that, being unable to point to any explicit contractual terms, Allegro claimed Scully

breached the implied covenant of good faith and fair dealing. (*Id.*) However, this Court then held that there was no contract that could support this implied duty because the covenant of good faith and fair dealing does not apply to at-will employment relationships. (*Id.* at 65). Therefore, this Court concluded that “[w]ith no material terms provided or alleged, we find no contract on which Allegro can predicate its claims....” (*Id.*).

Allegro now asserts that this Court overlooked evidence of an “oral contract” between Mr. Scully and Allegro. (Petition for Rehearing at p. 3). Allegro claims that, based on the alleged evidence of an oral contract, “the material terms of the contract were ‘provided’ at trial.” (*Id.*). This Court overlooked nothing. This Court has reviewed the record in this matter on more than one occasion and correctly noted the absence of proof therein of a contract. The “oral contract” Allegro claims existed was described as “Scully agreed to come to work, to do the work, and to get paid for the work.” (Respondent’s Brief at p. 29). As this Court correctly noted, this is nothing other than an at-will relationship. *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.”). Contrary to Allegro’s assertions, an at-will employment relationship is not an “oral contract.” Additionally, because there was no evidence of anything other than an at-will employment relationship, there is no breach of contract claim and the covenant of good faith and fair dealing is inapplicable. *William v. Reidman*, 339 S.C. 251, 274, 529 S.E.2d 28, 40 (Ct. App. 2000).

Allegro asserts that this Court’s ruling that the implied covenant of good faith and fair dealing does not apply to an employment at-will situation was improper, claiming that this argument was not made to this Court. (Petition for Rehearing at p. 3). This assertion is incorrect. Petitioners’ argued that Allegro failed to establish the existence and terms of any contract.

(Petitioners' Brief at pp. 18-21). Allegro then responded with the assertion that the contract claims were supported by the implied covenant of good faith and fair dealing within an "employment contract." (*Id.* at p. 29). In their reply brief, Petitioners then asserted that Allegro's argument "contradicts the settled South Carolina law on employment contracts – that South Carolina is an "at-will" employment state and that an employment contract is not presumed in the absence of an actual contract. (Petitioners' Reply Brief at p. 10). This Court held that "there is nothing to suggest this was anything other than an at-will relationship." (Op. No. 27662 at p. 64) . This Court then correctly rejected Allegro's argument because there was no contract to which the Court could imply the duty of good faith. By raising the issue that no employment contract existed in an at-will employment situation, Petitioners raised the issue on which this Court based its ruling. As this Court correctly held that there was no contract that could support Allegro's contract claims, Allegro's petition for rehearing should be denied.

### **Conclusion**

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

***Signature Page Attached***

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

September 23, 2016

# **Exhibit 1**

RECEIVED

DEC 27 2012

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

Case No. 2004-CP-40-1915

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

**PETITION FOR A WRIT OF CERTIORARI**

C. Mitchell Brown  
 William C. Wood  
 Brian P. Crotty  
 NELSON MULLINS RILEY & SCARBOROUGH, LLP  
 Post Office Box 11070  
 Columbia, SC 29211  
 (803) 790-2000

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

Attorneys for Petitioners

Other Counsel of Record:  
 Robert L. Widener  
 Richard J. Morgan  
 MCNAIR LAW FIRM, P.A.  
 Post Office Box 11390  
 Columbia, SC 29211  
 (803) 799-9800

Attorneys for Respondent

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioners Emmett J. Scully (“Scully”), George Corbin (“Corbin”) and Yvonne Yarborough (“Yarborough”) (Scully, Corbin and Yarborough are collectively referred to as “Petitioners”) hereby petition this Court for a writ of certiorari to review the opinion of the Court of Appeals captioned *Allegro, Inc. v. Emmett J. Scully, Synergetic, Inc., George Corbin and Yvonne Yarborough*, Op. No. 4997 (S.C. Ct. App. filed July 11, 2012) (Shearouse Adv. Sh. No. 23 at 76) {Appendix (“App.”) p. 1004}. Petitioners agree the Court of Appeals correctly held that the Trial Court erred by admitting a temporary injunction order into evidence and that this error required a new trial. However, Petitioners petition this Court for a writ of certiorari so that this Court may review the Court of Appeals’ refusal to address Petitioner’ directed verdict and JNOV arguments, which were not resolved by the grant of a new trial. Resolution of these unresolved issues would then allow the new trial in this matter to proceed only as to the remaining parties and claims.

#### **CERTIFICATION OF COUNSEL**

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

#### **QUESTIONS PRESENTED FOR REVIEW**

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

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

#### STATEMENT OF THE CASE

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

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

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

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

---

<sup>1</sup> 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}.

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

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

#### **SUMMARY OF GROUNDS FOR CERTIORARI**

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

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

---

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

## ARGUMENT

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

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

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

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

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

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

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

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

In reviewing the denial of a motion for directed verdict of JNOV, an appellate court applies the same standard as the trial court. Gadson v. ECO Servs. of S.C., Inc., 374 S.C. 171, 175, 648 S.E.2d 585, 588 (2007). While an appellate court is required to view the evidence and inferences reasonably drawn therefore in a light most favorable to the non-moving party, the trial court should be reversed when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Id. at 176, 648 S.E.2d at 588.

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

At the close of Respondent's case, and again at the end of the trial, Petitioners moved the Trial Court for directed verdict as to the claim for civil conspiracy. {App. 346-347, 406-416}. The specific grounds for these motions were that, as to Petitioner Corbin, there was no evidence that he acted with the purpose of harming Allegro, and as to *all* Petitioners, there was no evidence that Respondent suffered special damages. {App. 346-347, 406-416}. To establish a claim for civil conspiracy, Respondent was required to prove: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes special damages. LaMotte v. Punchline of Columbia, Inc., 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988). Even when the evidence is viewed in a light most favorable to Respondent, there was no evidence establishing the second element as to Corbin, and no evidence establishing the third element of special damages as to *any* of the Petitioners.

**1. Corbin was entitled to directed verdict and JNOV on the civil conspiracy claim because there was no evidence whatsoever that he possessed any intent to harm Allegro.**

Corbin's motions for directed verdict and JNOV as to civil conspiracy (the only claim asserted against him) should have been granted based on the lack of any evidence that he acted with any intent to harm Allegro. The second element of civil conspiracy requires proof that the defendant acted "for the purpose of injuring the plaintiff." LaMotte, at 69, 370 S.E.2d at 713. While considering Petitioners' motion for directed verdict on this point, the Trial Court incorrectly interpreted the second element of this claim. {App. 411-414}. Specifically, the Trial Court stated that "intent to harm has nothing to do with conspiracy," but rather that "what actually happened as a result" was the "true measure of whether or not there was a conspiracy." {App. 412}. The Trial Court reiterated this incorrect view saying: "it is not what you intend, it is what actually results." {App. 414}. This was error. The second element of civil conspiracy does not focus on the result. Rather, it requires that the combination be for the purpose of injuring the plaintiff. Pye v. Estate of Fox, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511-12 (2006) (holding that the "essential consideration" in a civil conspiracy claim is whether the primary purpose or object of the combination is to injure the plaintiff, and upholding summary judgment as to civil conspiracy because there was no evidence of any "wrongful intent" on the part of the defendants); Mendelsohn v. Whitfield, 312 S.C. 17, 430 S.E.2d 524 (Ct. App. 1993) *aff'd* 312 S.C. 226, 439 S.E.2d 845 (1994) (upholding directed verdict as to civil conspiracy where there was no evidence defendant acted "willfully to injure" the plaintiff).

Corbin was entitled to a directed verdict and JNOV because there was no evidence that he acted with any intent to harm Allegro. The evidence at trial showed that Corbin provided advice to his friend Scully regarding his options of buying out McCarthy's interest in Allegro, selling out his interest to McCarthy, or leaving Allegro to start his own business. {App. 388}. Corbin also wrote Scully a letter outlining three methods for valuing Allegro, reviewed a valuation of Allegro, and reviewed Scully's offer letter to McCarthy to determine if it was a "fair" offer. {App. 222-223, 375, 390, 590}. All of this was done, not with any intent to harm Allegro, but, to the contrary, because Corbin wanted to help Allegro. {App. 389}. As Corbin explained in his March 27, 2003 letter to Scully:

The overall issue here is that something needs to happen. The ongoing tension between you and [McCarthy] is obvious. That has to be tiring for both of you. It is also probably obvious to employees. Either way, it is not healthy for [Allegro]. [Allegro] has a better chance of success without that tension. If one of you has to sell out to relieve it, then that is what needs to happen.

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

In its appellate brief, Respondent attempted to redefine the elements of civil conspiracy to remove the key element of individual intent. Specifically, while Respondent accurately asserts there has been no appeal on this ground as to Petitioners Scully and Yarborough, Respondent incorrectly contends that "it is the law of the case" that Corbin acted in concert with Scully and Yarborough and that individual intent is unnecessary to be liable for civil conspiracy. (Respondent's Final Brief at p. 5){App.

955}. Essentially, Respondent asserts that the individual intent of Scully and Yarborough is somehow imputed onto Corbin. While the “hand of one” may be “the hand of all,” that maxim presupposes and requires that the joint actors all share the same intent and are therefore responsible for each others actions. The intent of one, however, is not the intent of all, and intent must be specifically established as to each individual defendant with respect to a conspiracy claim.

“In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise.” Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005) (emphasis added). In order for there to be “joint assent” to harm a plaintiff, each alleged conspirator must individually intend for such harm to occur. Thus, even if Corbin “combined” in some fashion with Scully, Yarborough or both, Respondent must still establish that Corbin assented to the purpose or intent of harming Allegro in order for Corbin to be liable for civil conspiracy. South Carolina’s courts have consistently rejected civil conspiracy claims where there is no evidence that the defendant possessed the requisite intent to harm the plaintiff. Cowburn, 366 S.C. at 49, 619 S.E.2d at 453 (affirming summary judgment on civil conspiracy claim because there was no evidence the defendants “joined together for the purpose of injuring [the plaintiff]”); Pye, 369 S.C. at 567-68, 633 S.E.2d at 511-22 (affirming summary judgment on civil conspiracy claim where there was no evidence of “wrongful intent” because the “essential consideration” in a civil conspiracy claim is whether the primary purpose or object of the combination is to injure the plaintiff); Robertson v. First Union Nat’l Bank, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002) (rejecting civil

conspiracy claim where there was no evidence of a concerted effort to harm the plaintiff); First Union Nat'l Bank of South Carolina v. Soden, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998) (holding there was insufficient evidence regarding the defendant's intent to support a civil conspiracy charge).

Respondent has also lost sight of a key fact in this case. The Plaintiff in this action is Allegro, Inc., which is comprised of two shareholders, Ms. McCarthy with fifty-one percent (51%) ownership and Emmett Scully with forty-nine percent (49%) ownership. Ms. McCarthy is not the plaintiff. Respondent relies on testimony from Corbin wherein he stated that he did not talk with Ms. McCarthy about Scully's interest in buying Allegro as evidence of Corbin's intent to harm. {App. 339-340}. This testimony provides no evidence of any intent by Corbin to harm anyone. Moreover, it only goes to Ms. McCarthy, not Allegro.

Respondent has also asserted that the jury was free to reject Corbin's testimony that he did not intend to harm Allegro. Again, this is incorrect. While a jury is not required to accept uncontradicted witness testimony, one may not avoid a dispositive motion by asserting that a jury may disbelieve uncontradicted evidence. Hoard v. Roper Hospital, Inc., 587 S.C. 539, 549, 694 S.E.2d 1, 6 (2010). It was still Respondent's burden to affirmatively prove that Corbin's purpose was to injure Allegro. Mere speculation about a party's motives does not amount to proof of a conspiracy. First Union Nat'l Bank of South Carolina v. Soden, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998). Thus, because Respondent failed to establish this key element of civil conspiracy as to Corbin, his motions for directed verdict and JNOV should have been granted. Therefore, the grant of certiorari is warranted and this Court should grant

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

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

The third element of a civil conspiracy claim requires that the defendant establish that it has suffered “special damages.” “Special” damages are damages which “go *beyond* the damages alleged in other causes of action.” Pye, 369 S.C. at 568, 633 S.E.2d at 511 (emphasis added). Respondent failed to offer any evidence of “special” damages. To the contrary, Respondent’s damages evidence was exactly the same for all eleven causes of action – the alleged losses to Allegro from the loss of its current and prospective clients. {App. 272-276}. There was no distinction in the damages evidence establishing any form of damages specific only to the civil conspiracy claim which went beyond the damages claimed for the other claims.<sup>4</sup> Absent such evidence of “special” damages specifically related to the civil conspiracy claim, the Trial Court should have granted all of the Petitioners directed verdict or JNOV as to this claim. Vaught v. Waites, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (holding that civil conspiracy claim was barred where the damages sought under that claim were the same as those sought in a breach of contract claim). Thus, this Court should grant certiorari, correct this error by granting JNOV as to the civil conspiracy claim in its entirety, thus allowing the new trial to proceed without the civil conspiracy claim.

---

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

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

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

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

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

Respondent has asserted that the Trial Court determined there was an “oral contract” and incorrectly contends that this ruling has not been challenged in this appeal. At trial, Scully’s counsel specifically argued that there was “no contract here” and there was “a complete absence of any evidence in the record before the court that there was any kind of contract.” {App. 414, 439}. Additionally, Petitioners’ Brief directly addressed this issue – specifically arguing that “there was no evidence of any contract between Allegro and Scully, no evidence of the terms of this alleged contract, and no evidence of a breach of the contract.” See Appellants’ Final Brief at p. 46 {App. 939}(emphasis in original). “Any” contract obviously includes both oral and written contracts.

Respondent also incorrectly contends that Scully has not challenged the Trial Court’s ruling that his directed verdict motion on this issue was limited to the non-existence of an employee handbook, employment agreement, or a non-compete agreement. The nonexistence of these forms of contracts were merely used as examples of how there was no evidence of any contract. {App. 346-347, 414; 814}. The fact remains that there was no evidence of any contract, and no evidence of how the nonexistent contract was supposedly breached by Scully. This issue has been repeatedly raised by Scully and has been adequately preserved in this appeal.

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

---

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

JNOV should have been granted as to both the breach of contract claim and the claim for breach of contract accompanied by a fraudulent act. The writ of certiorari should thus be granted, Petitioner Scully should be granted JNOV as to the contract claims, and the new trial of this case should proceed without either of these claims.

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

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

McCarthy testified that, during the course of 2003, on several occasions, Scully expressly told her that, if they could not agree upon terms for her to sell him her interest in Allegro, he would leave, open a competing company, and take Allegro's clients and employees with him. {App. 134-135}. Simply put, according to McCarthy's own testimony, Scully never lied to her. To the contrary, he explicitly told her what he would do if she didn't sell. The uncontested testimony at trial also established that Scully was completely straightforward about his plans when talking with Allegro's third director, Frank Brown. {App. 216-217}. Specifically, in 2003, while Scully was attempting to purchase McCarthy's interest in Allegro, he informed Brown that if he was unsuccessful,

he intended to set up a competing PEO. {App. 216-217}. Therefore, Respondent failed to offer any evidence as to the key element of a false representation made by Scully.

Respondent contends that the basis of the negligent misrepresentation and fraud claims against Petitioner Scully is Scully's "silence" regarding the fact that he was planning to leave Allegro and take certain employees and customers with him. See Respondent's Final Brief at pp. 8-9 {App. 958-959}. This argument is wholly without merit. As illustrated above, the record in this case clearly establishes that Scully affirmatively told McCarthy of his plans to set up a competing business including taking Allegro's employees and customers with him. McCarthy specifically testified that, during the course of 2003, *on several occasions*, Scully expressly told her that, if they could not agree upon terms for her to sell him her interest in Allegro, he would leave, open a competing company, and take Allegro's clients and employees with him. {App. 134-135}. Thus, there is no basis whatsoever for the contention that Scully was "silent" on these points.

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

### CONCLUSION

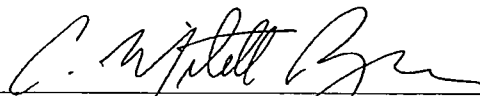
For the foregoing reasons, while the Court of Appeals was correct in ordering a new trial based on the erroneous admission of the temporary restraining order, and

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

***SIGNATURE PAGE ATTACHED***

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. 304  
Columbia, SC 29204  
(803) 790-8838

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

Columbia, South Carolina

December 27<sup>th</sup>, 2012

\_\_\_\_\_  
THE STATE OF SOUTH CAROLINA  
In The Supreme Court

\_\_\_\_\_  
APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

\_\_\_\_\_  
Opinion Number 4997  
Heard December 15, 2011 – Filed July 11, 2012  
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, Synergetic, Inc., George  
Corbin, and Yvonne Yarborough are ..... Petitioners.

\_\_\_\_\_  
PROOF OF SERVICE

\_\_\_\_\_  
I, the undersigned Paralegal, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioners Emmett J. Scully, George C. Corbin, and Yvonne Yarborough, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:                   Petition for Writ of Certiorari

Counsel Served:

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

Amy L. Gaffney, Esquire  
Gaffney Lewis & Edwards LLC  
3710 Landmark Drive, Suite 304  
Columbia SC 29204

Meredith S. Keane

Meredith S. Keane

Paralegal

December 27, 2012

# **Exhibit 2**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

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

---

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

---

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

v.

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

---

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

---

Robert L. Widener  
Richard J. Morgan  
McNAIR LAW FIRM, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800  
ATTORNEYS FOR RESPONDENT-PETITIONER

Other Counsel of Record

C. Mitchell Brown  
William C. Wood  
Brian P. Crotty  
NELSON MULLINS RILEY & SCARBOROUGH, LLP  
Post Office Box 11070  
Columbia, SC 29211  
(803) 790-2000

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

## INDEX

<b>Return Arguments .....</b>	<b>1</b>
I.    Assuming the Court of Appeals erred in not reaching the Defendants' arguments regarding the denial of the Defendants' directed verdict and JNOV motions for civil conspiracy, breach of contract, breach of contract accompanied by a fraudulent act, fraud, and negligent representation, the Defendants' arguments are not preserved for appeal, are barred by the law of the case doctrine, and/or have no merit .....	1
A. The Conspiracy Claims.....	2
B. The Contract Claims.....	5
C. The Fraud and Negligent Misrepresentation Claims.....	7
<b>Conclusion .....</b>	<b>8</b>

## RETURN ARGUMENTS

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

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

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

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

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

#### A. The Civil Conspiracy Claims

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

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

---

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

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

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

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

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

---

<sup>2</sup> The other defendants (Scully and Yarborough) do not make this argument.

of one is the hand of all and, therefore, Corbin is responsible for the acts undertaken by Scully and Yarborough and the damages resulting therefrom. *Charles v. Texaco Co.*, 18 S.E.2d 719, 726 (S.C. 1942); 16 AM. JUR. 2D *Conspiracy* § 16 (2009). Thus, were it assumed that Corbin did not personally have any intent to harm Allegro, it is irrelevant because he knowingly acted in concert with other conspirators who (as a matter of law in this case) intended to harm Allegro.

In any event, there is sufficient evidence in the record to create a jury question on whether Corbin intended to harm Allegro.

Corbin is a CPA with extensive experience as chief financial officer of major businesses. (Appx. 335-336). He provided accounting services to Allegro and thereby became familiar with its business operations and its client base – his company later became a client of Allegro and he therefore discontinued his formal CPA relationship with Allegro. (Appx. 336-338). Corbin knew of Scully's plans to either buy out McCarthy's interest in Allegro or start a competing business that would seek to serve the same clients, and he assisted Scully in planning these alternatives. (E.g., Appx. 338-341; 396). Three days after Scully departed from Allegro, Corbin moved his company's business from Allegro to Scully's new company – he was the first Allegro client taken by Scully. (Appx. 392; 394-395).

Civil conspiracy, by its very nature, is a covert and clandestine act that is usually not susceptible of proof by direct evidence. *Island Car Wash, Inc. v. Norris*, 358 S.E.2d 150, 153 (S.C. App. 1987). Thus, civil conspiracy is typically proven by circumstantial evidence. *Id.* A conspiracy “may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances.” *Id.* In deciding whether a conspiracy has been proven, the jury may consider any evidence that tends to connect “those *advising, encouraging* [or] *aiding*” the other conspirators. *Id.*

Here, Corbin's principal argument is that he intended to help Allegro rather than harm it. The jury was free to reject this protestation by Corbin on his intent, an issue peculiarly within the province of the jury.<sup>3</sup> The circumstantial evidence gave rise to an inference that Corbin knew of and assisted Scully and Yarborough in their plan to take clients from Allegro. Corbin was the first client to leave Allegro for Scully's new business – hardly the act of someone concerned with the best interest of Allegro – and Corbin had frequently advised Scully on how to best set up a competing business. These facts were sufficient circumstantial evidence for the jury to find Corbin was a conspirator. And it is the law of this case that Corbin acted in concert with Scully and Yarborough vis-à-vis the conspiracy. Accordingly, this Court should affirm the jury's conspiracy verdict against Corbin.

#### **B. The Contract Claims**

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

---

<sup>3</sup> Citing this Court's opinion in *Hoard v. Roper*, 694 S.E.2d 1 (S.C. 2010), Corbin argues that one cannot avoid a dispositive issue by asserting a jury may disbelieve uncontradicted evidence. This argument fails for three reasons. First, and foremost, Corbin has misread the opinion in *Hoard*. There, this Court stated: "a jury is not required to accept uncontradicted witness testimony, as credibility is a question for the jury." *Id.* at 6 (emphasis added). Thus, were it assumed that Corbin's testimony was uncontradicted (and it was not), the jury was not required to accept it and was free to make its own credibility determination. Second, Corbin has overstated the rule set forth in *Hoard*. There, this Court stated: "A jury's prerogative to disregard uncontradicted testimony is a sound principle of law, but it has no application in a summary judgment setting." *Id.* at 6 (emphasis added). This appeal arises from a jury trial, not an order granting summary judgment. Third, Corbin's own actions contradicted his claim that he had the best interest of Allegro at heart – he was the first Allegro client to leave and go to Scully's new competing business, which is not the act of someone with the best interest of Allegro at heart, nor was the act of helping Scully form a competing business.

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

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

Whether there's *no written contract*, there is an *oral contract*, there's certain duties that flow that *results in certain contractual obligations* from an employer to and employee and back and forth.

(Appx. 414) (emphasis added). In short, the trial court denied the directed verdict motion, because there was at least an oral employment contract between Allegro and Scully, and this resulted in contractual obligations owed by Scully to Allegro. Scully did not mention or challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case and precludes Scully's current arguments for certiorari.

In denying Scully's JNOV motion on this issue, the trial court ruled that Scully's directed verdict motion "was limited to the argument that there was no employee handbook, no employment agreement, and no non-compete agreement [and thus] the arguments based on a failure to prove terms of the contract or a breach thereof cannot be the basis of a JNOV motion." (Appx. 19). Again, Scully did not mention or challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case. Importantly, on appeal and here, Scully makes the same arguments that he attempted to make in his JNOV motion. Since he did not challenge the trial court's ruling that those arguments were not made at trial and therefore could not be the basis for a JNOV motion, he cannot make those arguments in seeking certiorari.

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

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

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

(Appx. 43) (underlining added). Scully did not mention or challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case and precludes Scully’s certiorari argument. The trial judge ruled that Scully’s directed verdict motion was insufficient to present the issue that he attempted to argue below. Rather than appeal this ruling, Scully simply repeats the argument made to the trial court. The law of the case doctrine precludes this absent a challenge to the trial court’s ruling.

In any event, as noted earlier, it is undisputed that Scully was an employee of Allegro; he was the President. (Appx. 214; 223-224). Accordingly, there manifestly was a contract between Scully and Allegro. Since the only argument by Scully is the non-existence of any contract, and since there manifestly was some contract between Scully and Allegro, Scully’s argument is without merit were it assumed the argument was properly before this Court.

### **C. The Fraud and Negligent Misrepresentation Claims**

Misrepresentation and fraud arises upon silence when there is a duty to speak. *Ellie, Inc. v. Miccichi*, 594 S.E.2d 485, 497 (S.C. App. 2004). A duty to speak arises from a preexisting and definite fiduciary relationship. *Id.* As president of Allegro, Scully owed a fiduciary duty to Allegro

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

As President of Allegro, Scully manifestly had a duty to speak when he knew that key employees were planning to leave without notice, that employees were compiling company documents to take when they left, and that employees were using company time and company resources for their own purposes and to the detriment of Allegro. There is evidence that Scully knew all of these things and more, but he never disclosed it to Allegro. (See, *e.g.*, Appx. 288-316; 318-333; 582; 589-604).<sup>4</sup> Thus, there is evidence of a misrepresentation, which is the only issue raised on certiorari.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Defendants' certiorari petition.

Respectfully Submitted,



Robert L. Widener  
Richard J. Morgan  
McNAIR LAW FIRM, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Attorneys for Respondent-Petitioner

May 28, 2013  
Columbia, South Carolina

---

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

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM RICHLAND COUNTY  
In The Court of Common Pleas

L. Casey Manning, Circuit Court Judge

---

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

---

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

v.

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

---


CERTIFICATE OF SERVICE

---

I certify that I have served a copy of the Respondent-Petitioner's Return Petitioner-Respondent's Petition for Writ of Certiorari by depositing a copy of same in the United States Mail, sufficient postage prepaid, on May 28, 2013 addressed to the attorneys for the Petitioners-Respondents, as follows:

Amy L. Gaffney, Esquire  
Gaffney, Edwards & Lewis  
3710 Landmark Drive, Suite 109  
Columbia, SC 29204

C. Mitchell Brown, Esquire  
Brian Crotty, Esquire  
Nelson Mullins Riley & Scarborough LLP  
P. O. Box 11070  
Columbia, SC 29211

  
Ann Shuler

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

RECEIVED

SEP 23 2016

S.C. SUPREME COURT

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

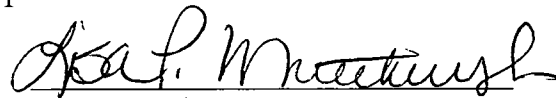
PROOF OF SERVICE

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

Pleadings: **Return to Petition for Rehearing**

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

September 23, 2016