

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2014-002055

Case No. 2004-CP-40-1915

RECEIVED
OCT 05 2016
S.C. SUPREME COURT

Allegro, Inc., Respondent,

v.

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

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

REPLY TO RETURN TO
PETITION FOR REHEARING

Respondent respectfully submits this Reply to Petitioners' Return to Respondent's Petition for Rehearing. As shown below, Petitioners have failed to demonstrate why this Court should not grant rehearing on the grounds set forth in the Rehearing Petition.

I. This Court overlooked the fact that the only claim made against Petitioner Corbin was for civil conspiracy and, therefore, the *Todd* rule on special damages does not apply to the conspiracy claim against Corbin.

In *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 278 S.E.2d 607, 611 (S.C. 1981), this Court held that there is no cause of action of civil conspiracy if the complaint seeks the same damages for conspiracy that are also sought under another claim. Here, the majority applied the *Todd* rule to hold that Allegro has no civil conspiracy claim against any of the Petitioners. Respectfully, this was error because the only claim made against Petitioner Corbin was for civil conspiracy. Thus, the *Todd* does not and cannot apply to the conspiracy claim against Corbin. (See Resp. Br. 27-28).

Petitioners contend that the foregoing argument should be rejected based on the Court of Appeals' decision in *Vaught v. Waits*, 387 S.E.2d 91 (S.C. App. 1991), where the court applied the *Todd* rule in an employment termination case. Specifically, Petitioners argue that the only claim made against the city administrator was for conspiracy but the Court of Appeals nevertheless applied the *Todd* rule to that claim. While it *appears* that conspiracy was the only claim against the administrator, nothing in the *Vaught* opinion indicates that the court was presented with, considered, or rejected any argument that the *Todd* rule does not apply when conspiracy is the only claim made against a particular defendant. Thus, *Vaught* does not and cannot stand for the proposition advocated by Petitioners here and, in any event, *Vaught* is not binding on this Court.

At times in their Return, Petitioners seem to argue against conspiracy based on some "special damages" argument that goes beyond *Todd*. (Return at 2-4). Any such argument is not properly before this Court, because Petitioner's only argument to this Court on "special damages" was based solely on the *Todd* rule as applied in *Vaught, supra* and *Pye v. Estate of Fox*, 633 S.E.2d 505 (S.C. 2006). (See App. Br. at 15). Indeed, this was the only argument upon which Petitioners

sought certiorari regarding “special damages” and, therefore, it was and can only be the only argument upon which this Court granted certiorari to review the “special damages” issue. (See Exh. A at 12-13). Petitioners cannot now raise an entirely new argument (if they are in fact attempting to do so).¹

Finally, and perhaps most notably, Petitioners do not respond to Respondent’s argument that applying the *Todd* rule here, or in other similar cases, allows a conspiracy tortfeasor to escape liability whenever other claims for the same damages are made against others but not the tortfeasor.

II. This Court should overrule *Todd*.

The majority rejected Allegro’s argument for overruling *Todd*. This rejection was not based on the merits of the argument. Rather, it was based on the length of time this case has been pending. Respectfully, the issue should be decided on the merits of the argument. Moreover, as shown in Respondent’s Petition for Rehearing, much of the delay in the case has been beyond the control of the parties. Petitioners do not dispute this – rather, they argue *inter alia* that Respondent did not raise its *Todd* argument in response to Petitioners’ first certiorari petition and should therefore not be heard “to blame the trial judge and the appellate courts for delays in raising whether *Todd* should be overruled” (Return at 6). This argument is nonsensical for several reasons.

First, Respondent is not attempting to “blame” anyone for anything. Rather, it simply noted that the delay upon which this Court relied to not reach the issue was largely not the fault of anyone, including the parties and, therefore, the delay should not be used by this Court to not reach the

¹ Petitioners also make reference to their “intent to harm” argument in the event that this Court agrees with Respondent on the scope of the *Todd* rule. (Return at 4, n.3). Petitioners incorporate by reference the arguments made in their briefs before this Court. (*Id.*). Assuming this is sufficient to raise this issue, Respondent incorporates the responsive arguments made in its Brief of Respondent, including the fact that Petitioners’ argument was not properly preserved or presented for review. (See Resp. Br. at 12-23).

Todd issue. Notably, Petitioners do not dispute Respondent’s explanation of the delay. Second, whatever did or did not happen during the first certiorari proceedings before this Court are irrelevant to the issues raised in the second certiorari proceedings before this Court, and Respondent argued in those proceedings that *Todd* should be overruled. (See Exh. B at 4-5).

Petitioners also make an extended argument, for the very first time in this case, that notions of *stare decisis* and due process preclude this Court from overruling *Todd*. (Return at 7-13). This argument is nonsensical because, if accepted, the law could never change. Petitioners also argue that any overruling of *Todd* should be prospective only. Here again, the argument is nonsensical because, if a party obtaining a change in the law cannot take advantage of that change, then no party will expend the time and resources to make such arguments, and the law will never change. Moreover, nothing in this case indicates any of the Petitioners conducted themselves based on some notion that they could not be held liable for conspiracy under the *Todd* rule.

III. This Court overlooked the evidence of an oral contract.

This Court held that there was no contract upon which to base Allegro’s contract claims, because “no material terms [were] provided or alleged.” Respectfully, this Court overlooked the evidence presented at trial on the existence of an oral contract, all of which was presented without objection or contradiction. (See Resp. Br. at 29-30 & n.10). Thus, the material terms of the contract were “provided” at trial and therefore, it is respectfully submitted that this Court erred in finding otherwise. In addition, this Court ruled that the implied covenant of good faith and fair dealing could not be applied to an employment at-will situation. The Petitioners never made this argument to this Court and, therefore, it cannot be the basis for reversal under axiomatic principles of law.

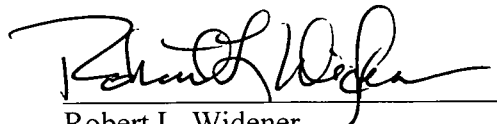
Petitioners respond that they made this argument in their Reply Brief, but it is axiomatic that arguments cannot be raised for the first time in a reply brief. *E.g., Simmons v. SC STRONG*,

739 S.E.2d 631, 634 n.2 (S.C. App. 2013). In any event, the cases cited by this Court sought damages for wrongful termination of an at-will employment contract, and the plaintiff sought to apply the implied covenant of good faith and fair dealing to the employer's decision to terminate the plaintiff. See *Williams v. Riedman*, 529 S.E.2d 28 (S.C. App. 2000) and *Keiger v. Citgo*, 482 S.E.2d 792 (S.C. App. 1997). These holdings dovetail precisely with the rule that the implied covenant cannot be used to limit the exercise of a contractual right, and any party to an at-will employment contract has the right to terminate the contract without notice, at any time, and for any reason. See *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 780 S.E.2d 263, 273 (S.C. App. 2015) (implied covenant does not apply when defendant has done something that the contract gave it the right to do). Here, the issue is not the right or decision to terminate. Rather, the question is one of conduct during the employment while at the same accepting wages from the employer. The law should not insulate an at-will employee from an "implied covenant" claim for bad faith and unfair dealing that occurred during the employment and before any termination of the employment.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant rehearing and issue an amended opinion that affirms the Court of Appeals.

Respectfully Submitted,



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In the Supreme Court

APPEAL FROM RICHLAND COUNTY
In The Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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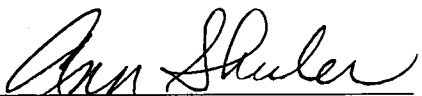
Of Whom Emmett J. Scully, George Corbin, and
Yvonne Yarborough are Petitioners.

CERTIFICATE OF SERVICE

I certify that I have served a copy of Respondent Allegro, Inc.'s Reply to Return to Petition for Rehearing by depositing a copy of same in the United States Mail, sufficient postage prepaid, on October 3, 2016 addressed to the attorneys for the Petitioners, as follows and via email at the email addresses shown below:

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ARGUMENT

I. The Court of Appeals correctly ruled on Petitioners' motion for directed verdict on the claim for civil conspiracy.

A. The Court of Appeals correctly ruled that Petitioners' "special damages" argument is not preserved for appeal.

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

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

375 S.E.2d at 313 (emphasis added). Here, trial counsel did not insist on stating any grounds for the record, and trial counsel was not assertive in preserving any issue for the record. Thus, the "special damages" issue is not preserved for appeal. Moreover, it is clear from the record that the trial judge had "heard enough" about the intent to harm issue. At the very least, therefore, it was incumbent upon trial counsel to request leave to make a record on other conspiracy issues, including the "special damages" issue. Having failed to do so, the "special damage" issue is not preserved for appeal.

- B. Assuming the Petitioners' "special damages" argument is preserved for appeal, it has no merit as to Petitioner Corbin, because the only claim made against Corbin was civil conspiracy and, therefore all claimed damages are "special damages" as to him.

In *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 278 S.E.2d 607, 611 (S.C. 1981), this Court announced the rule that a claim for civil conspiracy fails to state a cause of action if it seeks an award of the same damages for the same acts against the same defendant that is sought in other causes of action pled in the complaint. Here, the damages proven and awarded against Scully and Yarborough were the same damages proven and awarded under other causes of action. As to Corbin, however, civil conspiracy was the only claim made against him and, therefore, the rule in *Todd* does not apply to Corbin. Thus, all damages proven and awarded against Corbin are "special damages" and, therefore, he is not entitled to a directed verdict under the rule in *Todd*. He may have a right to contribution from his fellow conspirators or an offset for any damages collected from them, but he is subject to a claim and award for civil conspiracy. Thus, there is no "special damage" error in denying his directed verdict motion on the claim for civil conspiracy.

- C. Assuming the Petitioners' "special damages" argument is preserved for appeal, this Court should overrule *Todd, supra* and hold that the "special damages" rule pertains to the election of remedies rather than the existence of a cause of action for civil conspiracy.

Respondent respectfully submits that this Court should revisit and overrule the rule announced in *Todd, supra*. This Court relied on 15A C.J.S. Conspiracy, § 33, at 718 to announce this rule. *Todd*, 278 S.E.2d at 611. That C.J.S. authority, however, addresses the well-established rule against double recovery and the resulting need for an election of remedies when a claim for civil conspiracy is for the same acts and same damages sought against the same defendant as another claim made in the case. Accordingly, Respondent submits that the rule announced in *Todd* should be overruled and modified to comport with the purpose of the C.J.S. rule cited in *Todd*.

Thusly viewed, the rule should be the following: (1) if a civil conspiracy claim seeks the same damages for the same acts against the same party as another claim, it states a cause of action but there can be only one recovery for those acts and damages, so upon any award of damages, the plaintiff must elect its remedy; and (2) to the extent the civil conspiracy claim rests in whole or in part on different conduct or different resulting damages, then there is no double recovery as to those different damages (*i.e.*, “special damages) and, therefore, there is no need to elect between remedies for those special damages.

- D. The Court of Appeals correctly ruled that Corbin was not entitled to a directed verdict on the “intent to harm” issue.

At the close of the evidence, Corbin, Scully, and Yarborough moved for a directed verdict on the conspiracy claim, arguing there was no evidence that they acted in concert with one another. (Appx. 411). The trial court denied this motion (Appx. 415-416), and none of the petitioners, including Corbin, challenged this ruling on appeal, and Corbin does not challenge it his certiorari petition before this Court. Therefore, it is the law of this case that Corbin acted in concert with Scully and Yarborough. It is also the law of this case that Scully and Yarborough acted with intent to harm Allegro, because they do not challenge and have never challenged the trial court’s denial of the directed verdict motion on this issue.

It is the law of civil conspiracy that the hand 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). This is so because he does not challenge the denial of his directed verdict motion that he acted in concert with Scully and Yarborough. 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. The circumstantial evidence gave rise to an inference that Corbin knew of and assisted Scully and Yarborough in their plan to take clients from Allegro. Corbin was the first client to leave Allegro for Scully’s new business – hardly the act of someone concerned with the best interest of

Allegro – and Corbin had frequently advised Scully on how to best set up a competing business. These facts were sufficient circumstantial evidence for the jury to find Corbin was a conspirator who intended to harm Allegro or knowingly assisted others who intended to harm Allegro. And it is the law of this case that Corbin acted in concert with Scully and Yarborough vis-à-vis the conspiracy. Accordingly, the trial court did not err in denying Corbin’s directed verdict motion.

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.

II. The Court of Appeals correctly ruled on Scully’s motion for directed verdict on the contract claims.

A. Scully’s argument has no merit.

The implied covenant of good faith and fair dealing is implied by law into every contract. *Adams v. G.J. Creel and Sons, Inc.*, 465 S.E.2d 84, 85 (S.C. 1995). The thrust of Allegro’s breach

of contract claims was that Scully violated this covenant. (See Cmplnt. at Appx. 59, ¶¶ 27-30; 61-62, ¶¶ 41-47). Thus, if there was a contract between Scully and Allegro, there was a jury issue on whether Scully breached the contract.

Scully's only argument is that there was no evidence of a contract between him and Allegro. This is errant nonsense. It is undisputed that Scully was an employee of Allegro, that he was the President of Allegro, that he managed the day-to-day operations of Allegro, and that he received a salary from Allegro. The undisputed facts demonstrate, as a matter of law, that there was an employment contract between Scully and Allegro. At the very least, these undisputed facts create a jury question as to whether there was a contract between Scully and Allegro. Therefore, the trial court did not err in denying Scully's directed verdict motion. Indeed, it would have been reversible error to grant the motion.

B. Scully's argument is barred by the law of the case and Rule 242(c)(4), SCACR.

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

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. See Rule 242(c)(4), SCACR ("Only those questions raised in the Court of Appeals . . . shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

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

In denying Scully's motion to alter or amend on this issue, the trial court rejected Scully's argument that the "handbook, etc." language used in his directed verdict motion was by way of example only and that "[i]mplicit in the argument that no contract has been established is the claim that the terms of the contract or the breach of the contract have not been established." (Appx. 42) (emphasis in Order). The trial judge held:

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

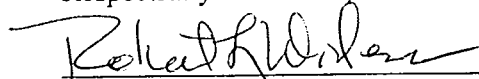
(Appx. 43) (underlining added). Scully did not mention or challenge this ruling on appeal to the Court of Appeals and, therefore, it is the law of this case and precludes Scully's certiorari argument. See Rule 242(c)(4), SCACR ("Only those questions raised in the Court of Appeals . . . shall be included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

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.

CONCLUSION

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

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioners Emmett J. Scully (“Scully”), George Corbin (“Corbin”) and Yvonne Yarborough (“Yarborough”) (Scully, Corbin and Yarborough are collectively referred to as “Petitioners”) hereby petition this Court for a writ of certiorari to review the opinion of the Court of Appeals captioned *Allegro, Inc. v. Emmett J. Scully, Synergetic, Inc., George Corbin and Yvonne Yarborough*, Op. No. 5245 (S.C. Ct. App. filed June 30, 2014) (Shearouse Adv. Sh. No. 26 at 118) {Appendix (“App.”) 1146}. Petitioners agree the Court of Appeals correctly held that the trial court erred by failing to grant Petitioner Scully’s motions for directed verdict and JNOV on the claims for fraud and negligent misrepresentation.¹ However, in Opinion No. 5245, the Court of Appeals affirmed the trial court’s denial of Petitioners directed verdict and JNOV motions as to the claims for civil conspiracy, breach of contract and breach of contract accompanied by a fraudulent act. Petitioners now seek a writ of certiorari so that this Court may review the Court of Appeals’ Opinion as to those claims.

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a petition for rehearing was made and finally ruled upon by the Court of Appeals on September 4, 2014. {App. 1192}.

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

QUESTIONS PRESENTED FOR REVIEW

- I. Did the trial court and the Court of Appeals err by failing to grant the Petitioners' motions for directed verdict and/or JNOV as to the claim for civil conspiracy.**
- A. Did the trial court and the Court of Appeals err in failing to grant Petitioner Corbin directed verdict and/or JNOV as to the civil conspiracy claim where there was no evidence at trial that Corbin possessed any intent to harm Allegro?**
- B. Did the trial court and the Court of Appeals err in failing to grant all of the Petitioners directed verdict and/or JNOV as to the civil conspiracy claim where there was no evidence at trial that Allegro suffered "special damages" which went beyond the damages alleged as to the other causes of action?**
- II. Did the trial court and the Court of Appeals err in failing to grant Petitioner Scully's motions for directed verdict and/or JNOV as to the claims for breach of contract and breach of contract accompanied by a fraudulent act where there was no evidence at trial establishing the existence of a contract between Scully and Allegro?**

STATEMENT OF THE CASE

This case stems from a dispute between the two shareholders of Allegro, Inc. which ultimately resulted in the two shareholders parting ways, the formation of a competing company, and litigation. The Respondent, Allegro, Inc. ("Allegro"), is a Professional Employer Organization ("PEO") that was formed in the late 1990s by its initial owner Mary Etta McCarthy ("McCarthy") {R. 72, 112-113; App. 77, 117-118}. A PEO provides Human Resources services for companies that wish to out-source that function. {R. 113; App. 118}. The Petitioners are Emmett J. Scully ("Scully"), Yvonne Yarborough ("Yarborough"), and George Corbin ("Corbin"). Scully joined Allegro in August of 1998 when he became its president and a member of its board of directors. {R. R, 72, 118; App. 77, 118}. Yarborough was an employee of Allegro from 2000 until 2004. {R. 121, 312-313; App. 126, 317-318}. Corbin is the Chief Financial Officer of

Merritt Veterinary Supplies, Inc. (“Merritt”), which was a client of Allegro. {R. 140, 331; App. 145, 336}. In 2004, after leaving Allegro, Scully formed a competing PEO named Synergetic, Inc.

The Complaint in this matter was filed on April 15, 2004, and an Amended Complaint was filed on May 18, 2005. {R. 55-67, 71-89; App. 60-72, 76-94}. The Amended Complaint asserted a total of twelve causes of action against the various defendants, with nine causes of action asserted only against Scully, one cause of action asserted only against Yarborough, one cause of action asserted against both Scully and Yarborough, and one cause of action asserted jointly against all of the defendants. {R. 71-89; App. 76-94}.²

The trial of this matter was held before the Honorable Casey L. Manning from May 1, 2006 through May 5, 2006. At the close of the trial, eleven of the twelve claims in the Amended Complaint were submitted to the jury.³ {R. 44-49; App. 49-54}. While the civil conspiracy claim originally included Synergetic as a defendant, the verdict form as to that claim limited it to only Scully, Yarborough and Corbin, and Allegro has acknowledged that “no claims against Synergetic, Inc. were submitted to the jury.” {R.

² Specifically, the following claims were asserted against **only Scully**: breach of the duty of loyalty, violation of S.C. Code Ann. § 33-8-420(a), breach of fiduciary duty, breach of contract accompanied by a fraudulent act, breach of contract, fraud, negligence, negligent misrepresentation, and violation of S.C. Code Ann. § 33-8-310. The following claim was asserted against **only Yarborough**: breach of the duty of loyalty. The following claim was asserted against **both Scully and Yarborough**: violation of S.C. Code Ann. § 41-10-10. Finally, the following claim was asserted jointly against **Scully, Yarborough, and Corbin**: civil conspiracy. {R. 71-89; App. 76-94}.

³ The claim for violation of S.C. Code Ann. § 41-10-10 was not included on the Verdict Form submitted by Allegro and approved by the Trial Court. {R. 444; App. 449} and has been abandoned.

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

On May 5, 2006, the jury returned verdicts in favor of Allegro as to each of the eleven claims submitted to it. {R. 44-49; App. 49-54}. Following the jury's verdict, both sides filed post-trial motions, all of which were denied. {R. 13-25, 27-42, 469-504, 514-573, 744-746, 747-760, 802-809; App. 18-30, 32-47, 481-516, 526-585, 756-758, 759-772, 814-821}. Petitioners filed timely Notices of Appeal on August 12, 2008 and April 9, 2010. {R. 823-846, App. 835-858}. On December 15, 2011 The Court of Appeals heard oral argument and on July 11, 2012, issued Opinion No. 4997 reversing the judgment in this matter and remanding it for a new trial based solely upon the trial court's error in admitting a temporary injunction order into evidence. {App. 1004}. In Opinion No. 4997, the Court of Appeals refrained from addressing any of Petitioners' directed verdict/JNOV arguments. {App. 1004}.

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

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

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

SUMMARY OF GROUNDS FOR CERTIORARI

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

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

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

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

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

ARGUMENT

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

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

At the close of Respondent's case, and again at the end of the trial, Petitioners moved the Trial Court for directed verdict as to the claim for civil conspiracy. {R. 341-342, 401-411; App. 346-47, 406-416}. The specific grounds for these motions were that, as to Petitioner Corbin, there was no evidence that he acted with the purpose of harming Allegro, and as to *all* Petitioners, there was no evidence that Respondent suffered special damages. {R. 341-342, 401-411; App. 346-47, 406-416}. To establish a claim for civil conspiracy, Respondent was required to prove: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes special damages. LaMotte v. Punchline of Columbia, Inc., 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988). Even when the evidence is viewed in a light most favorable to Respondent, there was no evidence

establishing the second element as to Petitioner Corbin, and no evidence establishing the third element of special damages as to *any* of the Petitioners.

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

Petitioner Corbin's motions for directed verdict and JNOV as to civil conspiracy (the only claim asserted against him) should have been granted based on the lack of any evidence that he acted with any intent to harm Allegro. The trial court erred in both its analysis and its conclusion on this issue. While considering the motion for directed verdict on this point, the trial court incorrectly interpreted the second element of this claim. {R. 406-409; App. 411-414}. Specifically, the Trial Court stated that "intent to harm has nothing to do with conspiracy," but rather that "what actually happened as a result" was the "true measure of whether or not there was a conspiracy." {R. 407; App. 412}. Thus, the trial court removed the key element of intent from its analysis of this claim. This was error. The second element of civil conspiracy does not focus on the result. Rather, it *requires that the combination be for the purpose of injuring the plaintiff*. Pye v. Estate of Fox, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511-12 (2006) (holding that the "essential consideration" in a civil conspiracy claim is whether the primary purpose or object of the combination is to injure the plaintiff, and upholding summary judgment as to civil conspiracy because there was no evidence of any "wrongful intent" on the part of the defendants); Mendelsohn v. Whitfield, 312 S.C. 17, 430 S.E.2d 524 (Ct. App. 1993) *aff'd* 312 S.C. 226, 439 S.E.2d 845 (1994) (upholding directed verdict as to civil conspiracy where there was no evidence defendant acted "willfully to injure" the plaintiff).

The evidence at trial showed that Corbin provided advice to his friend Scully regarding his options of buying out McCarthy's interest in Allegro, selling out his interest to McCarthy, or leaving Allegro to start his own business. {R. 383; App. 388}. Corbin also wrote Scully a letter outlining three possible methods for valuing Allegro and reviewed a valuation as well as Scully's offer letter to determine if it was a "fair" offer. {R. 217-218, 370, 385; 578; App. 222-23, 375, 390, 590}. These actions evidence nothing more than friendly advice. Moreover, there was no evidence suggesting that, in providing this advice, Corbin possessed any intent to harm Allegro. Rather, to the contrary, the only evidence offered as to Corbin's intent was that he wanted to help Allegro. {R. 384, App. 389}. As Corbin explained in his March 27, 2003 letter to Scully:

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

{R. 578; App. 590} (emphasis added). Corbin's concern was what was best for Allegro. It was not what was best for Scully. There was no evidence at trial refuting this, and, thus, no evidence at trial supporting any intent by Corbin to harm Allegro.

In its Opinion, the Court of Appeals concluded that sufficient evidence existed to allow a jury to determine that Corbin intended to harm Allegro. {Opinion 5245 at p. 14, App. 1159}. However, the evidence cited, even when viewed in a light most favorable to Allegro, does not support this conclusion. First, the Court of Appeals noted that Corbin admitted he had a general knowledge about Allegro's clients based on accounting work he did for the company in the past. {Id.}. This fact, however, has no bearing on the issue of intent to harm. The Court of Appeals next noted that, in advising Scully, Corbin did

not inform McCarthy of the conversations, and included in his advice “the option of setting up a competitive company.” *{Id.}*. In focusing on Corbin’s failure to inform McCarthy, the Panel overlooked the fact that the plaintiff in this case is Allegro, Inc., which is comprised of two shareholders, Ms. McCarthy with fifty-one percent (51%) ownership and Emmett Scully with forty-nine percent (49%) ownership. Ms. McCarthy is not the plaintiff, and any failure by Corbin to inform McCarthy of friendly advice he provided to Scully has no bearing on whether Corbin intended to harm Allegro in providing that advice. In focusing on the fact that one of the options Corbin identified as existing was for Scully to set up his own business, the Panel overlooked that fact that this option was only one of several and was merely an option, not a recommendation. The record clearly establishes that Corbin identified three possible options: (1) Scully could sell his interest in Allegro to McCarthy; (2) McCarthy could sell her interest to Scully; or (3) Scully could leave Allegro and start his own business. {R. 383; App. 388}. The suggestion of any of these possible options does not constitute evidence of intent to harm Allegro. To the contrary, they show nothing but Corbin’s concern for Allegro’s future, whether it be under Scully or McCarthy. The inclusion of an option that Scully start his own business does not amount to evidence of intent to harm Allegro. Rather, it was merely one of several options, and Corbin did not recommend it over the others.

The only evidence of Corbin’s intent came from Corbin’s written statements, such as the letter cited above, and Corbin’s testimony at trial. The Court of Appeals held that “the credibility of statements evidencing Corbin only had the intent to help and not injure Allegro are for the jury to decide.” {Opinion 5245 at p. 14; App. 1159}. Thus, the Court of Appeals concluded that, despite the lack of any other evidence as to Corbin’s intent,

the jury could disregard Corbin's uncontradicted testimony. This conclusion misapprehended the law in South Carolina regarding uncontradicted testimony and dispositive motions. A party may not avoid a dispositive motion by asserting that a jury may disbelieve uncontradicted evidence. Hoard v. Roper Hospital, Inc., 587 S.C. 539, 549, 694 S.E.2d 1, 6 (2010). It was still Allegro's burden to affirmatively prove that Corbin's purpose was to injure Allegro. Aside from Corbin's letter and his testimony, the jury was left with nothing but mere speculation. However, mere speculation about a party's motives does not amount to proof of a conspiracy. First Union Nat'l Bank of South Carolina v. Soden, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998). Thus, because Respondent failed to establish this key element of civil conspiracy as to Corbin, his motions for directed verdict and JNOV should have been granted. Therefore, the grant of certiorari is warranted and this Court should grant Corbin's motions for directed verdict/JNOV as to the civil conspiracy claim. As this is the only claim asserted against Corbin, the new trial previously ordered by the Court of Appeals on the remaining claims would no longer need to involve him.

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

The third element of a civil conspiracy claim requires that the plaintiff establish that it has suffered "special damages." "Special" damages are damages which "go beyond the damages alleged in other causes of action." Pye, 369 S.C. at 568, 633 S.E.2d at 511 (emphasis added). Respondent failed to offer any evidence of "special" damages. To the contrary, Respondent's damages evidence was exactly the same for all eleven causes of action – the alleged losses to Allegro from the loss of its current and prospective

clients. {R. 267-271; App. 272-276}. There was no distinction in the damages evidence establishing any form of damages specific only to the civil conspiracy claim which went beyond the damages claimed for the other claims.⁴ Absent such evidence of “special” damages specifically related to the civil conspiracy claim, the Trial Court should have granted all of the Petitioners directed verdict or JNOV as to this claim. Vaught v. Waites, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (holding that civil conspiracy claim was barred where the damages sought under that claim were the same as those sought in a breach of contract claim).

The Court of Appeals held that Petitioners’ argument regarding special damages was not preserved. {Opinion No. 5245 at pp. 13-14; App. 1158-1159}. Specifically, while the special damages argument was raised at the first directed verdict motion⁵, it was not specifically reasserted at the directed verdict motion at the close of all evidence. {Id.; App. 1158-1159}. This conclusion overlooks the facts surrounding the second directed verdict motion which fall within an exception to the general rule that directed verdict arguments must be reasserted at the close of evidence to be preserved.

The trial transcript reveals that at the second directed verdict motion, after initially arguing that the civil conspiracy fails as to Petitioner Corbin due to a lack of any evidence of any intent on his part to harm Respondent, the trial court specifically **ordered** Petitioners’ counsel to stop presenting any argument on civil conspiracy and to move onto the next cause of action:

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

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

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

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

(R. 409; App. 414) (emphasis added). The trial court specifically directed Petitioners' counsel not to continue with any further argument regarding civil conspiracy.

Generally, in order to preserve an issue raised in a directed verdict motion, the motion must be made at the close of all evidence. Rule 50(b), SCRCP; Evans v. Wabash Life Ins. Co., 247 S.C. 464, 148 S.E.2d 153 (1966). This rule is wholly proper where the fault for failing to make or renew the motion lies with the appealing party. However, where the actions of the Trial Court, as opposed to the party, prevented the motion from being made or renewed, this rule has not been, and should not be, strictly enforced. This Court faced a similar situation in the case of Mains v. K Mart Corp., 297 S.C. 142, 375 S.E.2d 311 (1988). In Mains, the defendant made a motion for directed verdict on specific grounds at the close of plaintiff's case. Id. at 145, 375 S.E.2d at 312-13. At the close of all evidence the trial court stated on the record: "[n]ote the usual motions and mark them heard. Y'all go ahead and get to arguments before lunch. To [sic] ahead," and no directed verdict motions by the parties were noted in the record. Id. at 145, 375 S.E.2d at 313. While the Mains Court noted that it was incumbent for K Mart to make its motion for directed verdict on the record in order to preserve the issue, it stated that **"[w]e will however, address the issue presented by the motion for a directed verdict at the close of the plaintiff's case."** Id. (emphasis added). Thus, because the failure to preserve the issue resulted from the action of the trial court, and because the issue was raised in the initial directed verdict motion, the Supreme Court considered the merits of the issue on

appeal. As with Mains, the facts of this case warrant this Court giving consideration to the special damages argument. Significantly, the issue of special damages would be dispositive on this claim, as Respondent has never attempted to establish the existence of any special damages supporting the claim. Rather, Respondent rests solely on preservation to defeat this argument.

Other jurisdictions faced with a preservation issue caused by the trial court refusing to allow argument to be presented have also allowed the underlying issue to be considered on the merits on appeal. In Commonwealth v. Dickson, 918 A.2d 95, 99-100 (Pa. 2007), the court refused to hold that an issue was not preserved where counsel was “cut off” by the court before raising a specific point and instead held that the court “will not punish counsel for declining to resist the trial court’s unequivocal effort to cut off conversation on this point.” Further, in Lai v. Sagle, 818 A.2d 237, 242-43 (Md. 2003) the court held that an objection to remarks made in opening statements was preserved despite the party’s failure to renew the objection and motion for mistrial at the close of all evidence because, by objecting until he was “cut-off by the trial judge, signaling the end of discussion on that issue,” petitioner had done all that was required to preserve the issue.

When the full context of what occurred at the directed verdict stage following the close of all evidence is considered, Petitioners’ counsel was not permitted the opportunity to complete her arguments as to civil conspiracy or to renew the prior arguments made as to that claim. As in Mains, because this issue was clearly raised and ruled upon at the first directed verdict stage, and because the failure to raise it at the second directed verdict stage was the result of the trial court specifically directing Petitioners’ counsel to

cease argument on that civil conspiracy cause of action, this Court should consider the merits of the “special damages” argument and grant JNOV as to all Petitioners as to the civil conspiracy cause of action. As the existence of special damages is an essential element of a civil conspiracy claim, and because the record is devoid of any evidence supporting this key element, this Court should grant certiorari, and correct this error by granting Petitioners’ motions for directed verdict/JNOV as to this claim. The new trial previously ordered in this matter could then proceed without this claim.

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

Respondent’s claims for breach of contract and breach of contract accompanied by a fraudulent act were asserted only against Petitioner Scully. Petitioner Scully asserts that both of the contract claims against him fail because Respondent failed to establish the existence and terms of any such contract. The Court of Appeals held that the issue of the existence of a contract was preserved but that the issue of the terms of that contract was not preserved. {Opinion No. 5245 at pp. 15-16; App. 1160-1161}. Additionally, the Court of Appeals concluded that there could have been an “oral contract, or a contract created by conduct.” {Id. at 16; App. 1161}. Both of these ruling were in error.

In order to establish a claim for breach of contract, the plaintiff must prove: (1) a binding contract entered into by the parties; (2) breach or unjustified failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962). Additionally, the existence of a contract, and of a breach thereof, are essential elements of a claim for breach of contract accompanied by a fraudulent act. Harper v. Ethridge,

290 S.C. 112, 119, 348 S.E.2d 374, 378 (1986). Here, there was no evidence of any contract between Allegro and Scully. Thus, there was also no evidence establishing the terms of this alleged contract, and no evidence of a breach of the contract. Therefore, the Trial Court erred by failing to grant Petitioner Scully directed verdict and JNOV as to these claims. {R. 341-342, 406-411; App. 346-347, 411-416}.

The evidence at trial established that there was no employment contract between Allegro and Scully and that Allegro did not have an employee handbook that applied to Allegro employees. {R. 169, 361-362; App. 174, 366-367}. Additionally, the testimony at trial established that there was not a non-compete agreement between Allegro and Scully. {Id.: App. 174, 366-367}. The only “contract” ever mentioned at the trial involving Scully was a Partnership/Buy-Sell Agreement relating to Scully’s ownership interest in Allegro. {R. 115-116, 361-362; App. 120-121, 366-367}.

On the issue of preservation, the Court of Appeals misconstrued the law regarding the requirements for establishing the existence of a contract. Specifically, the Court of Appeals’ Opinion notes that Scully’s motions for directed verdict specifically argued that there was no oral or written contract between Allegro and Scully. {Id. at 15; App. 1160}. The Court of Appeals then treated Scully’s argument regarding the nonexistence of any evidence as to the supposed terms of the alleged contract as a wholly separate argument which they concluded had not been preserved. However, the requirement that the terms of a contract be established is a necessary part of establishing the existence of the contract, and was therefore preserved by Scully’s directed verdict motions.

In order to establish the existence of a contract, it was necessary for Respondent to establish the terms of that contract and that the parties agreed upon those terms.

“South Carolina common law requires that in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.” Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original); Corontzes v. Trapalis, 259 S.C. 244, 249, 191 S.E.2d 523, 525 (1972) (holding that “[t]he burden of establishing the existence of the alleged contract and its terms rested upon the respondent.”); Dukes v. Smoak, 181 S.C. 182, 184, 186 S.E. 780, 781 (1936) (holding that the burden was upon plaintiff to prove the existence and terms of the contract she alleged, and its breach.”). Where the alleged contract is an *oral* contract, as is the case here, the necessity of establishing the terms and the parties’ agreement to those terms is even more essential to the claim Landbank Fund VII, LLC v. Dickerson, 2006 S.C. App. Lexis 154 *11-12 (Ct. App. 2006) (holding “[i]n order to establish the existence of an oral [contract] Dickerson must prove by a preponderance of the evidence that there was a meeting of the minds as to all of the essential and material terms of the alleged agreement”).

Petitioner Scully did not *separately* argue: (1) no contract existed; and (2) the terms of the alleged contract were not established. *Rather, he argued that no contract existed and the lack of any contract is evidenced by the fact that its alleged terms have never been established, or even attempted to be established.*

The Court of Appeals’ Opinion concludes that there was sufficient evidence to “suggest an oral contract, or a contract created by conduct.” {Opinion No. 5245 at p. 16; App. 1161}. The Opinion, however, makes no attempt to outline what the specific terms of the suggested contract were or to establish that the parties had a “meeting of the minds” as to those terms. This is because the record is devoid of any evidence of such

terms or Scully's agreement thereto. This illustrates the lack of any evidence of a contract.

The Court of Appeals' Opinion also appears to rely on the Partnership/Buy-Sell Agreement {R. 116, 361-362; App. 121, 367-368} between Scully and McCarthy as a basis for the contract claims. {Id.; App. 121, 367-368}. This reliance is misplaced because Allegro was not a party to this partnership agreement – it was between only McCarthy and Scully.⁶ Additionally, the partnership agreement provides no information as to the supposed terms of the alleged oral contract between Allegro and Scully.

Therefore, Respondent failed to establish the existence and terms of the contract, and this failure is fatal to the both of the contract claims. Thus, Petitioner Scully's motions for directed verdict and JNOV should have been granted as to both the breach of contract claim and the claim for breach of contract accompanied by a fraudulent act. The writ of certiorari should thus be granted, Petitioner Scully should be granted directed verdict and/or JNOV as to the contract claims, and the new trial of this case should proceed without either of these claims.

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

CONCLUSION

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

Respectfully submitted,

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October 16, 2014