THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson Jr., Circuit Court Judge

Case No. 2016-001337
Appellate Case No.: 2016-001337

Leisel Paradis ..... Appellant

v.

Charleston County School District, James Island Charter High School, Robert Bohnstengel, and Stephanie Spann, in their individual capacities,..... Respondents

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APPELLANT'S PETITION FOR REHEARING

J. Lewis Cromer, Esquire (# 1470)
J. Paul Porter, Esquire (# 100723)
Cromer Babb Porter & Hicks, LLC
1418 Laurel Street, Suite A
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Facsimile 803-799-9533

Attorneys for Appellant

Appellant, Leisel Paradis, submits this Petition for Rehearing of this Court's opinion filed on August 1, 2018 pursuant to Rule 221(a), SCACR. This Court held: (1) that Paradis' defamation claim was foreclosed because she failed to plead any defamatory statements or acts outside of the Respondents explicit statutory authority; (2) that Paradis' civil conspiracy claim should be dismissed for want of special damages; and (3) that Paradis should not be given leave to amend. *Paradis v. Charleston Cty. Sch. Dist.*, Op. No. 5583 No. 2016-001337, 2018 WL 3636581, at *5 (S.C. Ct. App. Aug. 1, 2018) (Shearouse Adv. Sh. No. 31 at 43-51). Paradis does not petition this Court to rehear her defamation claim against Charleston County School District and James Island Charter High School.[1] Paradis does petition this Court to rehear and reconsider its determination on her conspiracy claim and its denial of leave to amend. Paradis makes the following arguments in support of this petition:

1. Special damages are not or should not be required to plead a conspiracy claim.
2. Now, having conceded her sole other claim, Paradis' conspiracy damages are sufficient.
3. Paradis' damages were special damages because they were the only damages sought against the Individual Respondents.
4. This Court's finding that Paradis did not plead special damages misapplied the standard of review.
5. Paradis should have been given leave to amend.

Here, in light of the Court's dissent and the majority's response to the Court's dissent in *Allegro, Inc. v. Scully*, there is sufficient persuasive authority that special damages are not or should not be a pleading requirement. Further, if pleading special damages is required, Respondents Bohnstengel and Spann

[1]The Lower Court held that the Respondents were protected by sovereign immunity, without citing to a specific exception to the South Carolina Tort Claims Act's waiver of immunity, based on law that pre-dated the Tort Claims Act. (R. pp. 6-7). This Court, on the other hand, did base its ruling on an expectation to the Tort Claims Acts waiver of immunity, discretionary immunity. *Paradis*, 2018 WL 3636851 at 3 (Shearouse Adv. Sh. No. 31 at 44-49; *citing*, (S.C. Code Ann. § 15-78-60(5). Thus, Paradis maintains that the Trial Court's ruling on this issue was reversible, but she does not challenge this Court's legally distinct ruling on that same issue.

are solely named in the conspiracy claim and conspiracy is the sole remaining claim; so, special damages are not required. Last, with respect to conspiracy, this Court's determination that Paradis' conspiracy damages were synonymous with her defamation damages misapplied the standard of review. Finally, Paradis did present, albeit during oral argument, background for why her conspiracy damages of ostracism and blacklisting were different from her defamation damages and, to the extent those damages need further factual support, the added context was ample basis to support leave to amend.

1. CIVIL CONSPIRACY DOES NOT REQUIRE PLEADING SPECIAL DAMAGES.

The Petitioner's claim for civil conspiracy should have survived dismissal because it does not require special damages to be pled.

The Court's special damages requirement for a civil conspiracy claim is to prevent double recovery. The Court held in *Todd* that a plaintiff must plead and prove "special damages" to state a cause of action for civil conspiracy. *Todd v. S.C. Farm Bureau Mut. Ins.* Co., 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981); *citing* 15A C.J.S. Conspiracy § 33, at 178. Following *Todd*, special damages were treated as a pleading requirement on conspiracy claims. *See, e.g., Vaught v. Waites*, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) ("Because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred under *Todd*.).

The Court relied on 15A C.J.S. Conspiracy § 33 to require that special damages be pled and proven. *Todd*, 278 S.E.2d at 611. However, that C.J.S. authority addressed the well-established rule against double recovery and the resulting need for an election of remedies when a claim for civil conspiracy is for the same acts and same damages sought against the same defendant as another claim. That C.J.S. section provides:

> Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.

15A C.J.S. *Conspiracy* § 33. The *Todd* rule is more appropriately suited to allow multiple claims to allege the same damages with the caveat that double recovery is expressly prohibited, and it should not be applied to the determination of whether a complaint is sufficiently pled.

The Court recently supplied persuasive authority to this premise in *Allegro, Inc. v. Scully*. Former Chief Justice Pleicones, dissenting, reasoned: "that the *Todd* Court misread and misapplied [15A C.J.S. Conspiracy] § 33, which merely states a prohibition on double recovery, not a rule of pleading or proof[.]" *Allegro, Inc. v. Scully*, 418 S.C. 24, 37, 791 S.E.2d 140, 147 (2016), *reh'g denied* (Oct. 26, 2016). Chief Justice Pleicones continued: "I would overrule *Todd* and its progeny to the extent they create a 'special damages' pleading and/or proof requirement for a civil conspiracy cause of action." *Id.* 791 S.E. 2d at 147. Chief Justice Beatty concurred with the majority opinion in part, but also dissented in part to agree with Chief Justice Pleicones: "advocating for this Court to overrule *Todd* and its progeny." *Id.* at 146. The majority, importantly, declined to overrule the *Todd* rule on specific procedural grounds because of the *Allegro* case's age and procedural posture. The majority reasoned:

> While Chief Justice Pleicones and Justice Beatty would overrule *Todd*, we disagree this is an appropriate vehicle in which to do so given this case's age and procedural posture. This lawsuit was filed over twelve years ago and has already been through a lengthy trial. Given the pending retrial arising out of the remaining causes of action, we believe it would be unfair to the parties to change the pleading and proof requirements at this late stage in the litigation.

Id. at 145, Fn 3.

Paradis appeals a Rule 12 Order in a case where discovery has not begun; whereas, *Allegro* was twelve years old and was an appeal from the denial of a directed verdict or JNOV. This is an

appropriate case to reverse the *Todd* rule or modify it to only apply to a double recover and the election of remedies.[2]

2. HAVING DISMISSED THE DEFAMAITON CLAIM, WHICH IS NOT APPEALED, THE CONSPIRACY DAMAGES ARE SPECIAL DAMAGES.

Regardless of this Court's willingness to disagree with the post-decision application of *Todd*, Paradis does not appeal or petition to rehear this Court's holding on her defamation claim; thus, the problem of duplicative damages is erased. The *Todd* Court was explicit that the problem with the plaintiff's special damages were that they were the same damages sought on his other claims:

> Todd seeks damages in his first four causes of action for the same acts incorporated by the fifth cause. He is therefore precluded from seeking damages for the same acts yet again.

Todd, 278 S.E.2d at 611 (1981). This Court echoed that holding in *Hackworth v. Greywood at Hammett, LLC*

> In this case, Greywood has repeated verbatim the same damages in its civil conspiracy claim as are alleged in its claim for breach of contract accompanied by a fraudulent act. Nothing in the claim informs the Hackworths what special damages are alleged as part of Greywood's civil conspiracy claim. Accordingly, we believe under the case law cited above, Greywood failed to properly plead its civil conspiracy cause of action, and therefore, the trial court did not error in dismissing the claim.

Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 117, 682 S.E.2d 871, 875–76 (Ct. App. 2009). Paradis' conspiracy damages, though she contends they were distinct from her defamation damages, are now the only damages she seeks. Thus, when this Court affirmed the dismissal of Paradis' defamation claim, it removed the special damages problem and rendered its dismissal of her conspiracy claim unwarranted.

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[2] "Permission of the appellate court shall not be required to argue against precedent in the brief." Rule 217, SCACR.

3. PARADIS' ONLY CLAIM AGAINST RESPONDENTS BOHNSTENGAL AND SPANN WAS HER CONSPIRACY CLAIM, SO SHE PLED SPECIAL DAMAGES.

Again, regardless of this Court's willingness to disagree with the post-decision application of *Todd*, Paradis only sought damages from Respondents Bohnstengel and Spann on her conspiracy claim; thus, the *Todd* rule does not apply. Chief Justice Pleicones noted this dichotomy (from cases of multiple claims with the same damages) in his *Allegro* dissent:

> Even if the Court were to preserve the *Todd* rule, the sole claim asserted against petitioner Corbin was civil conspiracy, and thus as to him the "special damages" rule created by *Todd* does not apply.

Allegro, Inc., 791 S.E.2d at 147. The portions cited in § 2 above from *Todd* and *Hackworth* dismissing conspiracy claims where the same damages were sought against the same defendants in all relevant claims highlight this distinction. Here, there can be no problem of special damages where the conspiracy damages are the only damages sought against the conspiracy Respondents.

This Court declined to rule on this argument finding that it was not preserved. *Paradis*, 2018 WL 3636581 at 5 (Shearouse Adv. Sh. No. 31 at 50). ("We decline to address this issue as it was never raised to the circuit court."). "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018), *reh'g denied* (Apr. 18, 2018); *quoting, Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012). Moreover,

> When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.

Atl. Coast Builders & Contractors, LLC, 730 S.E.2d at 287 (2012). Therefore, it is necessary to note that Respondents Bohnstengel and Spann do not appear to have argued on brief or at oral argument, to the undersigned's recollection, that the issue of whether *Todd* rule applied to them was not preserved. (Respondent Brief pp. 13-17). Perhaps that is because this is, in essence, an issue within an issue.

Meaning, there is no doubt that Paradis argued to the circuit court that she had sufficiently pled special damages below, there is no doubt that the conspiracy claim is the only claim alleged against Bohnstengel and Spann, and there is no doubt Paradis raised this argument here; rather, the sole doubt before this Court is that Paradis made this specific sub-argument below. (R. pp. 17-24, 47-52) (Appellant Brief pp. 13-14).

Candidly, the oral argument below does not contain an explicit reference to this argument; however, Paradis' legal memorandum below does:

> The third element, special damages must be satisfied to prevent a double recovery.
>
> . . .
>
> Plaintiff pled special damages that are separate and distinct from those damages pled in her other claim because the damages pled in the defamation claim are exclusively set forth against Individual not the Individual Defendants.

(R pp. 82-83). Further, the Circuit Court, though it did not specifically address this issue, incorporated the issue into its order: "Based on the Complaint, the legal memoranda, and arguments of Counsel, the Court makes the following findings of fact and conclusions of law. (R. p. 3). Here, where this issue was directly raised by Paradis on brief below and that argument was generally rejected by the Court, "any doubt should be resolved in favor of preservation." *Johnson*, 812 S.E.2d at 210.

Furthermore, the *Allegro* decision where Chief Justice Pleicones provided persuasive authority to this argument in dissent was not published until August 24, 2016; whereas, this matter was heard on March 30, 2016, the order dismissing this case was granted on April 15, 2016, and the motion to reconsider was denied on May 19, 2016. (R. pp. 1-13, 25). Paradis based her appellate argument on the *Allegro* decision. (Appellant Brief pp. 13-14). Thus, with respect to issue preservation and in so much as this issue was centered on the *Allegro* decision, a party should not be expected to fully argue an issue at the Circuit Court prior to the arrival of the persuasive legal authority that supports that argument. Here, Paradis raised this issue below in her legal memorandum and that memorandum was

rejected by the Circuit Court; so, this issue is sufficiently preserved. Once treated as preserved, this Court can and should reverse the Circuit Court's decision on Paradis' conspiracy claim because the only damages alleged against the Individual Respondents are the conspiracy damages; so, the *Todd* rule does not apply.

4. PARADIS DAMAGES WERE SPECIAL WHEN ASSESSED AGAINST THE APPROPRIATE STANDARD OF REVIEW.

"[T]he appellate court [on Rule 12(b)(6)] applies the same standard of review implemented by the trial court." *Ashley River Properties I, LLC v. Ashley River Properties II, LLC*, 374 S.C. 271, 279, 648 S.E.2d 295, 298 (Ct. App. 2007) *citing*, *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). "The [Trial Court's Order] will not be sustained if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Williams*, 553 S.E.2d at 499; *citing*, *Brown v. Leverette,* 291 S.C. 364, 353 S.E.2d 697 (1987); *McCormick v. England,* 328 S.C. 627, 494 S.E.2d 431 (Ct.App.1997). "The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." *Williams*, 553 S.E.2d at 499-500; *citing*, *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987); *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct.App.1999).

Paradis alleged the following damages for her defamation claim:

> 32. That such statements and actions were false, known to be false, and given with reckless disregard for the truth, were maliciously made, and have proximately caused Plaintiff's severe and continuing damages including the loss of her job, loss of income, loss of earning capacity, and future income and benefits associated therewith. Further, Plaintiff has sustained embarrassment, humiliation, damage to her reputation, emotional distress, and pain and suffering, which will continue into the foreseeable future. As a result of these actions, Plaintiff lost a considerable amount of sleep and her self-confidence.

(R. p. 23). Paradis next alleged the following damages for her civil conspiracy claim:

36. Such actions taken by the Defendants and others amount to an unlawful civil conspiracy and approximately cause special damages to the Plaintiff for being blacklisted and ostracized from the profession of education.

37. Plaintiff is further entitled to an award of punitive damages from the Individual Defendants for their intentional, malicious, and evil actions.

(R. p. 24). This Court concluded that Paradis' damages for ostracism and blacklisting were "precisely the damages one would expect from defamatory statements." Paradis respectfully contends that the Court's conclusion on this point denied her the benefit of the governing standard of review. When Paradis' conspiracy claim is assessed against the appropriate review framework, giving her the benefit of all reasonable inferences and in the light most favorable to her, her conspiracy damages were sufficiently distinct in both word and form from her defamation damages.

5. PARADIS SHOULD BE GIVEN LEAVE TO AMEND THE COMPLAINT.

This Court ruled that Paradis should not be given leave to amend because she "did not present the Circuit Court or this Court with any proposed changes she would make to the complaint to cure the deficiencies identified." *Paradis*, 2018 WL 3636581 at 5 (Shearouse Adv. Sh. No. 31 at 54, Fn. 3).

However, Paradis provided this Court the context for her conspiracy damages of ostracism and blacklisting on oral argument. Specifically, she argued that, as a long-term public educator in a county where only one public school district existed, she was cut off from future employment in her field absent moving her family or accepting a considerable commute. Within this context, her damages are distinct from those of an ordinary employee who is terminated from an employer with limited other locations and with market competitors. Thus, the damages she suffered because of the actions she attributed to the Individual Respondents in her conspiracy claim were distinct from the more ordinary damages alleged in her workplace defamation claim.

"A motion to amend is addressed to the sound discretion of the trial judge." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716–17 (Ct. App. 2005); *citing, Stanley*

v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004); *City of North Myrtle Beach v. Lewis–Davis,* 360 S.C. 225, 599 S.E.2d 462 (Ct.App.2004). "Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party." *Id., citing, Crestwood Golf Club, Inc. v. Potter,* 328 S.C. 201, 493 S.E.2d 826 (1997); *Pruitt v. Bowers,* 330 S.C. 483, 499 S.E.2d 250 (Ct.App.1998). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Id. Tanner v. Florence County Treasurer,* 336 S.C. 552, 521 S.E.2d 153 (1999); *Lewis–Davis,* 360 S.C. at 232, 599 S.E.2d at 465. "The party opposing the amendment has the burden of establishing prejudice." *Id., citing, Foggie v. CSX Transp., Inc.,* 315 S.C. 17, 431 S.E.2d 587 (1993); *Pruitt,* 330 S.C. at 489, 499 S.E.2d at 253. "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Id., citing, Jarrell v. Seaboard Sys. R.R.,* 294 S.C. 183, 363 S.E.2d 398 (Ct.App.1987). Here, there has not been a showing of prejudice, and granting Paradis leave to amend would not have substantially changed the nature of the civil conspiracy claim against Respondents Bohnstengel and Spann.

Therefore, Paradis, to the extent her damages needed the additional context described above to survive dismissal, should have been given leave to amend.[3]

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court grant a rehearing in this matter or reconsider this matter and reverse the circuit court's decision.

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[3] Paradis also notes that she suffered considerable medical damages as well because of the Conspiracy Respondents' conduct. The undersigned did not raise this on argument, ironically in light of this Court's issue preservation determination, because he felt it was not sufficiently in the record.

CROMER BABB PORTER & HICKS, LLC

J. Lewis Cromer, Esquire (# 1470)
J. Paul Porter, Esquire (# 100723)
1418 Laurel Street, Suite A
Post Office Box 11675
Columbia, South Carolina 29211
Phone: 803-799-9530
Fax: 803-799-9533

Attorneys for Appellant

Columbia, South Carolina
August 16, 2018

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PROOF OF SERVICE

I certify that I, the undersigned employee of Cromer Babb Porter & Hicks, LLC, caused to have served Appellant's Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 2018, to attorney of record, Rene S. Dukes, Esq., ROSEN, ROSEN, HAGOOD, LLC, P.O. Box 893, Charleston, SC 29402, and Bob J. Conley, Esq., CLEVELAND AND CONLEY, LLC, 171 Church Street, Suite 310, Charleston, SC 29402.

CROMER BABB PORTER & HICKS, LLC

BY: _____

J. Lewis Cromer (# 1470)
J. Paul Porter (# 100723)
1418 Laurel Street, Suite A
Post Office Box 11675 (29211)
Columbia, South Carolina 29201
Phone 803-799-9530
Fax 803-799-9533
Attorney for Appellant

August 16, 2018
Columbia, South Carolina

C | B | P | H
CROMER BABB PORTER & HICKS, LLC
Attorneys and Counselors at Law

J. Lewis Cromer * Julius W. Babb, IV * J. Paul Porter * Ryan K. Hicks
Shannon M. Polvi * Samantha E. Albrecht * Elizabeth M. Bowen

August 16, 2018

VIA HAND-DELIVERY
Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Leisel Paradis v. Charleston County School District, et al.
Case No. 2016-001337

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of the Appellant's Petition for Rehearing in the above-referenced matter, along with the Proof of Service. Also enclosed is our check in the amount of $25.00 for the filing fee. Please file and return a filed copy to our runner.

Please feel free to contact me should you have any questions.

Sincerely,

Kate M. Ray
Litigation Paralegal

/kmr
Enclosures

cc: Rene S. Dukes, Esquire
Rosen, Rosen, & Hagood, LLC
P.O. Box 893
Charleston, SC 29402

Bob J. Conley, Esquire
Cleveland & Conley, LLC
171 Church Street, Suite 310
Charleston, SC 29401