

# 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

December 27, 2018

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DEC 27 2018

S.C. SUPREME COURT

Via Hand Delivery

Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29201

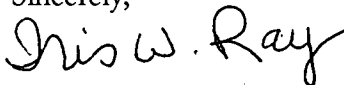
Re: **Leisel Paradis v. Charleston County School District, et al.**  
**Court of Appeals Appellate Case No. 2016-001337**

Dear Mr. Shearouse:

Enclosed please find the original and seven (7) copies of Appellants' Reply to Respondents' Return to Petition for Writ of Certiorari in connection with the above referenced matter. Please file and return a clocked-copy to our courier.

By copy of this letter to counsel of record, we are serving them a copy of the same. Should there be any questions or concerns, please do not hesitate to contact our office.

With kind regards, I am

Sincerely,  
  
Iris W. Ray  
*Litigation Paralegal*

/iwr  
*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

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

J.C. Nicholson Jr., Circuit Court Judge

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DEC 27 2018

S.C. SUPREME COURT

Appellate Case No.: 2016-001337  
Published Opinion No. 5583 (S.C. Ct. App. Filed Aug. 1, 2018)

Leisel Paradis ..... Petitioner

v.

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

**REPLY TO RESPONDENTS' RETURN  
TO PETITION FOR WRIT OF CERTIORARI**

J. Lewis Cromer (# 1470)  
J. Paul Porter (# 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 Petitioner

Other Counsel of Record:

Bob J. Conley  
Emanuel Joseph Ferguson  
CLEVELAND & CONLEY, LLC  
171 Church Street, Suite 310  
Charleston, South Carolina 29401  
(843) 577-9626  
Attorneys for Respondents James Island Charter  
High School and Robert Bohnstengel

Rene Stuhr Dukes  
ROSEN ROSEN & HAGOOD, LLC  
151 Meeting Street, Suite 400  
Charleston, South Carolina 29401  
(843) 577-6726  
Attorney for Respondents Charleston County  
School District and Stephanie Spann

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## INTRODUCTION

The principal question in this case is whether the Court should reverse the *Todd* rule which requires that special damages be pled to state a civil conspiracy claim. *See, Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). A two Justice minority of this Court reached the following conclusion in 2016 in *Allegro, Inc. v. Scully*: “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.” *Allegro, Inc. v. Scully*, 418 S.C. 24, 37, 791 S.E.2d 140, 147 (2016) (C.J. Pleicones *dissenting*), *reb'g denied* (Oct. 26, 2016); *and, Id.* 418 S.C. at 36 (“I agree with the dissent's position advocating for this Court to overrule *Todd* and its progeny.”) (J. Beatty *concurring*). The majority did not challenge this point, but determined that *Scully*, a twelve-year-old case arising from post-trial motions, was not “an appropriate vehicle” to reverse *Todd* based on the *Scully* “case’s age and procedural posture.” *Id.* 418 S.C. at 34, Fn. 3. This, a relatively young case arising from a Rule 12 motion, is the appropriate vehicle to reverse *Todd*. Nevertheless, even if the Court were to preserve the *Todd* rule, a side-by-side comparison of the damages Petitioner seeks on her civil conspiracy claim versus the damages she sought on her defamation claim, which was brought against different parties, illustrates reversible error by the Court of Appeals in affirming the Circuit Court’s grant of a motion to dismiss her conspiracy claim for want of special damages.

Respondents challenge Petitioner on both points and argue that Petitioner failed to preserve her *Todd* argument for appeal. Petitioner has preserved her arguments for appeal and respectfully requests that this Court grant Certiorari and ultimately reverse the Court of Appeals.

## ARGUMENT

Special damages, in the civil conspiracy context, should be a matter of election of remedies not pleading. Moreover, even if a matter of pleading, Petitioner pled special damages. Petitioner replies

to Respondents' issue preservation and substantive arguments in the order presented by Respondents on Return.

I. PETITIONER SUFFICIENTLY PRESERVED HER CHALLENGE TO *TODD*.

Respondents broadly argue that Petitioner did not preserve her argument against *Todd* before the lower court. Respondents, though painting with a broad brush, rely on a narrower issue preservation holding by the Court of Appeals concerning the applicability of the *Todd* rule to cases where conspiracy defendants are only sued for conspiracy such that any damages alleged against them must innately be special or separate damages regardless of a party's other claims against other defendants. The Court of appeals found that this argument was not preserved. *Paradis v. Charleston Cty. Scb. Dist.*, 424 S.C. 603, 616, 819 S.E.2d 147, 154 (Ct. App. 2018), *reb'g denied* (Oct. 18, 2018) ("We note Paradis has on appeal alleged the damages she claims for civil conspiracy and defamation are for different parties and are thus different damages. We decline to address this issue as it was never raised to the circuit court."). The Court of Appeals committed error on this point because the issue was in fact explicitly preserved on brief before the Circuit Court:

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.

(J.A. pp. 86-87). Thus, the Court of Appeals failed to observe that the instant issue, upon which Respondents rely to broadly claim Petitioner cannot challenge *Todd*, was explicitly preserved before 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).

Furthermore, the *Scully* decision where Chief Justice Pleicones provided persuasive authority to challenge *Todd* was not published until August 24, 2016 after this matter was heard and ruled upon by the Circuit Court. (J.A. pp. 4-16, 29). Paradis based her appellate challenge to *Todd* on the *Allegro* decision. (J.A. pp. 151-152). Thus, issue preservation is not a reasonable basis to bar Petitioner's challenge to *Todd* when the persuasive authority for that challenge had not entirely materialized when this matter was decided by the Circuit Court. Here, Paradis raised her *Todd* challenge below with enough specificity to preserve it for the Court. As such, this Court can and should reverse the Court of Appeals' decision on Petitioner's conspiracy claim because the *Todd* rule should be reversed and because the only damages alleged against the Respondents are the conspiracy damages; such that, the *Todd* rule does not apply anyway.

## II. THE TODD RULE ON SPECIAL DAMAGES SHOULD BE REVERSED.

The *Todd* Court was confronted with a plaintiff who sought generalized conspiracy damages based on allegations that were reincorporated verbatim from four preceding claims into a plaintiff's civil conspiracy claim. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981). ("The fifth cause of action simply takes all the prior allegations and alleges that the acts were done in furtherance of a conspiracy among the defendants. Damages are then sought for injury resulting from the conspiracy."). The *Todd* Court determined that the conspiracy claim violated a "rule applicable to [conspiracy] pleadings [] stated at 15A C.J.S. Conspiracy s 33, at 718." *Todd*, 276 S.C. at 293. That secondary authority provided:

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.

See, *Todd*, 276 S.C. at 293; quoting, 15A C.J.S. Conspiracy s 33, at 718.

“[T]he *Todd* Court misread and misapplied § 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) (Pleicones *Dissenting*). Instead, 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.<sup>1</sup> Furthermore, as discussed expansively on Petition, the overwhelming majority of states do not require special damages to be pled to state a legally viable conspiracy claim. See, Petition for Writ of Certiorari pp. 7-9. A plain reading of the secondary authority relied upon by *Todd*, the persuasive authority arising from *Scully*, and the law of sister jurisdictions all counsel in favor of reversing the *Todd* rule.

Respondents cite to the December 2018 update to 15A C.J.S. Conspiracy § 33 in response claiming that it adopted pleading requirements that “originated” in *Todd*. (Return p. 6). This appears persuasive on the surface until the footnotes to that secondary authority are analyzed. The authority relied on by the relevant C.J.S. provision is *Todd’s* progeny *Hackworth v. Greywood at Hammett, LLC*. 15A C.J.S. Conspiracy § 33 (Dec. 2018); citing, *Hackworth*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009). *Hackworth* was premised on *Todd*. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) (“If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.”); citing, *Vaught v. Waites*, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (“The damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action.

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<sup>1</sup> Petitioner will appropriately file a Motion to Argue Against Precedent, regarding *Todd*, should this Writ of Certiorari be granted. Rule 217, SCACR. (“Permission of the appellate court shall not be required to argue against precedent in the brief. Oral argument against precedent shall not be permitted except upon leave of the appellate court[.]”).

Because no special damages are alleged aside from the breach of contract damages, we hold the conspiracy action is barred under *Todd*.”<sup>2</sup> Thus, Respondents’ reliance on the most recent inclination of 15A C.J.S. Conspiracy § 33 which they claim memorialized the special damages pleading rule that “originated” in *Todd* is overstated. Indeed, the *Todd* Court misapplied secondary authority barring a double recovery to create a pleading rule; next, our Courts have repeated the *Todd* holding in decisions spanning the last 40 years; now, an update to that secondary authority relying on *Todd*’s progeny (*Hackworth*) has now adopted the mistake in *Todd* because of *Todd*. Thus, the updated C.J.S. provision relied on by the Respondents should be disregarded and is undermined by flawed circular logic.

The Court’s dissent in *Scully*, the majority’s determination that *Scully* was not an appropriate vehicle to reverse *Todd* based on extrinsic factors not present in this case, a review of *Todd*, and a persuasive assessment of comparative law all counsel in favor of reversing the *Todd* rule on special damages. The updated secondary authority cited by Respondents in opposition is unavailing because it is ultimately premised on *Todd* itself. Petitioner, therefore, respectfully requests that the Court take this opportunity to overturn the *Todd* rule.

### III. PETITIONER’S CONSPIRACY DAMAGES ARE SPECIAL DAMAGES

Petitioner respectfully submits that, even if the Court preserves the *Todd* rule, the Court of Appeals’ holding that she did not allege special damages in support of her civil conspiracy was reversible error. Specifically, Petitioner’s civil conspiracy claim is legally viable, without regard to special damages, because: (1) conspiracy is Petitioner’s only remaining claim; (2) the only claim against the Individual Respondents was civil conspiracy, and (3) because her conspiracy damages were distinct in nature and form from her defamation damages.

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<sup>2</sup> Notably, *Todd* was challenged in *Hackworth* on the grounds that it foreclosed alternative pleading, but it was not challenged in *Hackworth* on the issue before the Court here: whether the *Todd* court improperly created a pleading requirement out of a prohibition on double recovery.

Respondents, citing no legal authority, only address the first sub-argument listed above. Respondents argue that because defamation was originally in the Complaint and case before the Court of Appeals, that conspiracy is now the only remaining claim is immaterial. Respondents posit that the Petitioner is asking the Court to rewrite her complaint to remove the defamation allegation to erase any problem of special damages. Respondents' argument is off base. Petitioner did not abandon her defamation claim to obtain a tactical advantage; instead, Petitioner abandoned that claim because the Court of Appeals made an irreversible holding on that claim that was distinct from the decision on that claim by the Circuit Court.

Respondents' overlook the difference between why Paradis challenged the Circuit Court's defamation decision but does not challenge this Court of Appeals ruling on that same claim. This dichotomy informs the present procedural posture of this case and supports Paradis' ability to argue that by not appealing the Court of Appeals' dismissal of her defamation claim there is no longer a concern of special damages. The proposed order signed by the Circuit Court relied on the demurrer standard of review, based its defamation ruling on inapplicable pre-tort claims act case law, and did not cite to a specific S.C. Code Ann. § 15-78-60 exception to the South Carolina Tort Claims Act's waiver of immunity in its determination that the entity respondents were immune from suit. On the other hand, the Court of Appeals' defamation decision was based on a specific tort claims act exception, was supported by governing case law, and did not incorporate the demurrer standard of review. Thus, the Court of Appeals essentially fixed the Lower Court's defamation ruling and rendered Paradis' earlier justifiable defamation arguments moot. Had the Court of Appeals "clearly and concisely upheld the decision of the circuit court" as Respondents suggest then Petitioner would have challenged that ruling. The Court of Appeals' ruling on defamation was correct while the Circuit Court's ruling on defamation was incorrect. Respondent's argument that Petitioner cannot now adapt to the procedural landscape created by the Court of Appeals decision in these circumstances is absent

any precedential support. Petitioner, in addition to her other conspiracy arguments which Respondent did not address, can appropriately argue that special damages is no concern here since conspiracy is the only remaining claim.

Last, Respondents, citing to Rule 242(b), SCACR, argue that this case is not appropriate for Supreme Court review. (Return p. 8). The Rule 242(b) list of considerations this Court applies when determining whether to grant certiorari is “neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general.” A two-justice minority of this Court found the *Todd* rule should be reversed two years ago in *Scully* and the majority of this Court only abstained on that issue because of the age and procedural posture of that case. Clarifying the Court’s position on conspiracy claims generally and stating the required pleading elements specifically is a necessary, special, and important reason for Supreme Court review.

#### CONCLUSION

Petitioner Liesel Paradis therefore respectfully asks this Honorable Court to grant her Writ of Certiorari and ultimately reverse the holding of the Court of Appeals and remand this case for the reasons discussed above.

*Respectfully Submitted,*

**CROMER, BABB, PORTER & HICKS, LLC**



J. Lewis Cromer, Esquire (# 1470)

J. Paul Porter, Esquire (# 100723)

1418 Laurel Street

Post Office Box 11675

Columbia, South Carolina 29211

Phone: (803) 799-9530

Fax: (803) 799-9533

Attorneys for Appellant

Columbia, South Carolina  
December 27, 2018

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
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S.C. SUPREME COURT

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001337

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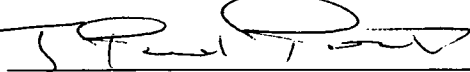
v.

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

**PROOF OF SERVICE**

I certify that I, the undersigned employee of Cromer Babb Porter & Hicks, LLC, caused to have served **Petitioner's Reply to Respondents' Return to Petition for Writ of Certiorari** by depositing a copy of it in the United States Mail, postage prepaid and electronic mail, on December 27, 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. and Emanuel Ferguson, 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 Petitioner*

December 27, 2018  
Columbia, South Carolina