THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson Jr., Circuit Court Judge

Appellate Case No.: 2018-02025
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

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BRIEF OF PETITIONER

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ISSUE ON APPEAL

1. Should the Court reverse the special damages pleading requirement on civil conspiracy claims arising from Todd v. S.C. Farm Bureau Mut. Ins. Co.?

INTRODUCTION

The issue in this case is whether the "*Todd* Rule" which requires pleading special damages is good law? This Court ruled in *Todd v. S.C. Farm Bureau Mut. Ins. Co.* that separate or special damages and separate acts in furtherance of a conspiracy must be pled to establish an actionable civil conspiracy claim. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). That decision with respect to pleading special damages and acts in furtherance of a conspiracy was premised on authority from Corpus Juris Secundum that dealt with damages and not pleading. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981); *citing* 15A C.J.S. Conspiracy § 33, at 178. Interestingly, a December 2018 update to Corpus Juris Secundum appears to adopt the *Todd* rule on pleading. 15A C.J.S. Conspiracy § 33. However, closer inspection reveals that the C.J.S. provision adopting the *Todd* rule does not reflect a development of the entire body of civil conspiracy law nationwide; instead, the apparent incorporation of the *Todd* rule by Corpus Juris Secundum was based on *Todd's* progeny, *Hackworth v. Greywood at Hammett, LLC. See*, 15A C.J.S. Conspiracy § 33 (Dec. 2018); *citing*, *Hackworth*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009). Petitioner respectfully argues that *Todd* was error.

A three-year-old ruling by this Court tacitly supports Petitioner's argument. Justice Pleicones, dissenting and joined by Justice Beatty as to his reasoning, squarely disputed the propriety of the *Todd* rule in *Allegro, Inc. v. Scully*. *Allegro, Inc. v. Scully*, 418 S.C. 24, 37, 791 S.E.2d 140, 147 (2016), *reh'g denied* (Oct. 26, 2016). There, he reasoned: "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.* This Court's majority did not disagree with Justice Pleicones' reasoning, but concluded that *Scully*, a twelve-year-old case arising from a post-trial motion, was not an "appropriate vehicle" to reverse the *Todd* rule. *Scully*, 418 S.C. at 34 n. 3. This civil conspiracy case, unlike *Scully*, is relatively young and

arises from a decision on a Rule 12 motion; thus, this case is an "appropriate vehicle" to reverse the *Todd* rule and thereby the Court of Appeal's decision.

STATEMENT OF THE CASE

This is a civil conspiracy case arising out of Petitioner's termination from Charleston County School District and James Island Charter High School after approximately twenty years of teaching. Petitioner filed this case on September 17, 2015 alleging defamation against the entity Respondents Charleston County School District and James Island Charter High School and civil conspiracy against the individual Respondents Robert Bohnstengel and Stephanie Spann. (J.A. 16-27). The civil conspiracy claim was pled against Respondents Bohnstengel and Spann in their individual capacities. (*Id.*). Respondents filed a Rule 12(b)(6), SCRCP motion to dismiss and alternative motion for a more definite statement on November 30, 2015. That motion was fully briefed. (*See*, J.A. 73-100). The Circuit Court granted Respondents' motion to dismiss on April 15, 2016 and then denied a subsequent motion to reconsider. (J.A. 5-16). Petitioner next appealed. (J.A. 134-154).

The Court of Appeals affirmed the Circuit Court. (J.A. 197-205). Specifically, the Court of Appeals held that Petitioner/Appellant's defamation claim was foreclosed by discretionary immunity and her conspiracy claim failed because special damages were not sufficiently pled. (J.A. 198-202) (Defamation); (J.A. 202-204) (Civil Conspiracy). Petitioner next filed a petition for rehearing. (J.A. 206-217). Petitioner did not challenge the Court of Appeal's ruling on defamation which reached the same conclusion as the Circuit Court but employed a distinct South Carolina Tort Claims Act analysis. (J.A. 201-202) (*Compare*, J.A. 9-10). Petitioner's petition for rehearing did challenge the Court of Appeals civil conspiracy determination arguing: (1) that the *Todd* rule as applied to pleading special damages should be reversed; (2) other arguments regarding special damages; and (3) that Petitioner

should have been given leave to amend.[1] (J.A. 206-217). That petition for rehearing was ultimately denied. (J.A. 235-236).

Petitioner subsequently filed a writ of certiorari on November 15, 2018 challenging the *Todd* rule and the Court of Appeals' conclusion that Petitioner did not adequately plead special damages. That writ was fully briefed. This Court granted certiorari on June 7, 2019 as to the first question presented by Petitioner: "Should the Court reverse the special damages pleading requirement on civil conspiracy claims arising from Todd v. S.C. Farm Bureau Mut. Ins. Co.?" Petitioner respectfully argues that the question before the Court should be answered in the affirmative.

STATEMENT OF THE PLEADINGS

Petitioner, an English teacher for nearly twenty years, was terminated by James Island Charter School and Charleston County School District at the end of the 2014-2015 school year. (J.A. 20-21, 24 ¶¶ 1, 7, 22). Respondents Bohnstengel and Spann were the principal and assistant principal at James Island Charter School. (J.A. 21 ¶ 4-5). Petitioner successfully met her Goals-Based Evaluation ("GBE") for the 2012-2013 school year, and she received successful performance evaluations in preceding years. (J.A. 21 ¶ 7). Petitioner was verbally assaulted during that school year by a student who had an established disciplinary record. (J.A. 21 ¶ 8). Petitioner immediately reported the assault to Respondents Bohnstengel and Spann and informed them that she felt it was necessary to file a police report based on the assault. (J.A. 21 ¶ 9). Respondent Bohnstengel vehemently discouraged Petitioner from filing the report on the basis that the report might negatively impact the Respondent Charter School's South Carolina Department of Education (SCDOE) report card. (J.A. 21 ¶ 9).

[1] This case, on the issue of leave to amend, has already been abrogated by this Court based on the Court of Appeals' application of an abuse of discretion standard on granting leave to amend. *See, Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 192 n. 9, 826 S.E.2d 585, 594 n. 9 (2019) (Citing to *Paradis* as an example of "refusing to remand for precisely the wrong reason[.]"); *citing, Paradis v. Charleston Cty. Sch. Dist.*, 424 S.C. 603, 616 n.3, 819 S.E.2d 147, 154 n.3 (Ct. App. 2018). Petitioner, however, did not seek certiorari regarding the denial of leave to amend.

Right after Petitioner received a successful GBE evaluation for the 2012-2013 school year, Respondents Bohnstengel and Spann placed her on a formal, rigorous evaluation plan for struggling teachers known as a SAFE-T plan for the 2013-2014 school year. (J.A. 22 ¶ 12). The SAFE-T plan had disciplinary implications and could result in termination. (*Id.*). Respondent Bohnstengel cited a prior meeting with Petitioner as his basis for placing her on the SAFE-T plan. (*Id.*). That meeting never occurred. (J.A. 22 ¶ 13). The SAFE-T plan required Petitioner to undergo periodic evaluations by three individuals and complete other difficult assignments throughout the 2013-2014 school year. (J.A. 22 ¶ 12). Consistent with her opposition to Petitioner filing a necessary police report, Petitioner later learned that Respondent Spann recommended to Respondent Bohnstengel that she be placed on a SAFE-T plan due to disciplinary referrals that she had made. (J.A. 22 fn. 1).

Petitioner, pursuant to the SAFE-T plan, was to be evaluated throughout the 2013-2014 school year by three individuals: Respondents Bohnstengel, Respondent Spann, and another employee. (J.A. 22 ¶ 14). None of Petitioner's evaluators had experience in her field. (*Id.*). Respondent Bohnstengel was terminated prior to the completion of Petitioner's 2013-2014 SAFE-T evaluation, and another evaluator was appointed in his stead (who also had no experience teaching English). (J.A. 23 ¶¶ 15-16). The three evaluators observed Petitioner less than 5% of her total teaching time during the 2013-2014 school year; nevertheless, she received a failing score at the end of the year. (J.A. 23 ¶ 17). Petitioner was next forced to undergo the SAFE-T plan for a second year (the 2014-2015 school year) in order to avert termination. (*Id.*). Additionally, Petitioner, who was previously part-time, was required to accept a full-time position. (*Id.*).

Respondent Spann continued as one of Petitioner's 2014-2015 SAFE-T evaluators even though evaluators were customarily replaced between evaluation years. (J.A. 23 ¶ 18). Petitioner worried that Respondent Spann would not be objective because Spann failed her the prior year and was involved in Petitioner's initial placement on the SAFE-T plan. (J.A. 22-23 ¶ 18; *see also*, ¶ 12; *and*,

fn. 1). Respondent Spann changed the plan's evaluation requirements multiple times throughout the 2014-2015 school year leaving Petitioner perpetually confused about what she had to do in order to succeed. (J.A. 23-24 ¶ 19). Petitioner regularly sought clarification on her assignments and requirements due to Spann's changes. (*Id.*).

Petitioner's appointed mentor Charity Scruggs met with Petitioner almost daily and observed that Petitioner was suffering from severe work-related stress caused by the requirements of the SAFE-T program. (*Id.*). Scruggs also noted that Petitioner was working hard to meet her plan's shifting requirements by employing various teaching strategies, asking for assistance, and utilizing suggestions offered to her. (J.A. 20-21 ¶ 23-24). Respondent Spann, and her fellow evaluators, gave Petitioner a failing grade for her 2014-2015 SAFE-T evaluation. (J.A. 21 ¶ 20). Oddly enough, Petitioner received higher scores on the plan at the beginning of the 2014-2015 school year in comparison to later in the year when she was implementing the strategies recommended to her. (*Id.*). Petitioner was next terminated on the stated basis that she failed the 2014-2015 SAFE-T evaluation. (J.A. 21 ¶ 22). Petitioner, regarding her conspiracy claim, alleges that Respondents Bohnstengel and Spann caused her to be placed on a rigorous evaluation plan and set her up for termination based on personal dislike of her and due to a shared motivation to punish her for appropriate disciplinary referrals because those referrals negatively affected their school's overall report card score. (J.A. 26-27 ¶¶ 34-36).

ARGUMENT

Special damages, in the civil conspiracy context, should be a matter of election of remedies not pleading. This Court's ruling in *Scully,* a comprehensive review of the analysis employed by the *Todd* Court, and the progression of civil conspiracy law in South Carolina support Petitioner's contention. Furthermore, a survey of comparative conspiracy law indicates that South Carolina is the only state which mandates that special damages be pled in support of a civil conspiracy claim.

Petitioner, as set forth below, respectfully argues that the Court should reverse the special damages pleading requirement on civil conspiracy claims arising from *Todd v. S.C. Farm Bureau Mut. Ins. Co.*

1. THE *TODD* RULE ON SPECIAL DAMAGES SHOULD BE REVERSED.

Right now, "[t]he elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages." *Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006); *citing, LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct.App.2005); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004); *see also Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp.*, 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004). The third of the above enumerated elements was a creation of this Court's decision in *Todd v. S.C. Farm Bureau Mut. Ins. Co.* which applied a provision from Corpus Juris Secundum about duplicative damages to require pleading "additional damages" (from those damages sought in other causes of action) to state a viable civil conspiracy claim. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). "[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) (Pleicones Dissenting).

In *Todd*, the Court was confronted with a civil conspiracy claim that simply incorporated prior allegations in support of four separate causes of action and alleged "that the acts were done in furtherance of a conspiracy among the defendants." *Todd.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981). The *Todd* Court first cited to this Court's 1939 decision in *Charles v. Texas Company* and a subsequent federal court decision to define the tort of civil conspiracy in South Carolina as: "the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a

lawful act in an unlawful way to the detriment of another."[2] *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981); *citing, Charles v. Texas Company*, 192 S.C. 82, 5 S.E.2d 464 (1939); *Sams v. Brotherhood of Railway and Steamship Clerks, Sumter Lodge* No. 6193, 166 F.Supp. 49 (E.D.S.C.), *affirmed*, 233 F.2d 263 (4th Cir. 1956). Thereafter, the *Todd* Court, after opining about the duplicative nature of the plaintiff/respondent's pleadings, cited to 15A C.J.S. Conspiracy § 33 at 718 as a "rule applicable to [conspiracy] pleadings." *Todd*, 278 S.E. 2d at 611. That provision of secondary authority stated verbatim:

> 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.

Id., *quoting*, 15A C.J.S. Conspiracy § 33 at 718. The *Todd* Court, after applying the above as a pleading rule, concluded: "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. The actual language cited by *Todd* to create what the *Todd* Court called a "rule applicable to [] pleadings" was focused on preventing the recovery of duplicative damages at trial and was not intended to espouse initial pleading requirements. Therefore, *Todd* expanded the application of secondary authority to create a pleading rule where a pleading rule did not exist either within the secondary authority cited by *Todd* or prior inclinations of statutory law.

Nevertheless, "[f]rom th[e] holding in *Todd* evolved the requirement that the civil conspiracy plaintiff must both plead and prove 'special damages' in order to recover." *Scully*, 791 S.E.2d 140 at 147; *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

[2] "This definition derives from Lord Dehman's statement in *King v. Jones*, 110 Eng. Rep. 485, 487 (K.B. 1832)." *Scully*, 418 S.C. 24 n. 4, 37, 791 S.E.2d 140, 147 n. 4.

under *Todd*."). Tail wagging the dog, Corpus Juris Secundum first miscited by *Todd* was later updated to incorporate the *Todd* rule. 15A C.J.S. Conspiracy § 33 (June 2019) ("Since the essence of a civil-conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action. If a plaintiff merely repeats in its civil-conspiracy claim the damages from another claim instead of specifically listing special damages as part of the civil conspiracy claim, its conspiracy claim should be dismissed."). On the surface this appears troubling for Petitioner's cause; however, closer examination reveals that the update to Corpus Juris Secundum, stating that special damages must be pled, was not the result of a nationwide development in conspiracy law, but rather was the result of *Todd* itself. The case cited by the C.J.S. update that requires pleading special damages, *Hackworth v. Greywood at Hammett, LLC*, is a South Carolina case that resulted from *Todd*.[3] 15A C.J.S. Conspiracy § 33; *Hackworth, LLC*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009). Within this context, the instant updates to Corpus Juris Secundum are not persuasive; put simply, the progeny of *Todd* cannot be genuinely employed to protect the *Todd* rule.

The *Todd* rule, at bottom, is more appropriately suited to allow multiple claims to allege the same damages with the caveat that a double recovery is expressly prohibited. The *Todd* rule should not be applied to the determination of whether a complaint is sufficiently pled. Then Chief Justice Pleicones recognized the necessity to roll back *Todd* in *Scully* concluding: "I would overrule *Todd* and

[3] The *Hackworth* case did involve a distinct, yet similar, challenge to *Todd* that was rejected by the Court of Appeals. *Hackworth*, 682 S.E.2d at 876. ("Greywood first argues the C.J.S. excerpt relied on by the South Carolina Supreme Court in *Todd* was misconstrued. We disagree."). There, a counterclaiming defendant/appellant argued that *Todd* should be overturned because it forecloses the right to plead alternative theories of recovery. *Id.* The Court disagreed finding that *Todd* did not preclude pleading alternative theories of recovery, but simply required additional allegations of special damages and acts in furtherance of a conspiracy. *Id.* The approach to *Todd* in *Hackworth* focused on a symptom rather than the disease. Put another way, this argument is distinct from the argument raised in *Hackworth* (and therefore not foreclosed by that argument) because the Petitioner rightly focuses on the mistaken creation of a pleading rule by *Todd* rather than effects of that pleading rule.

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. There, 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. This Court's majority did not disagree; but instead, it declined to overrule the *Todd* rule based on characteristics specific to *Scully* based on the *Scully* 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, n. 3. Unlike *Scully*, Petitioner appeals a Rule 12 Order in a three-year-old case where discovery has not yet begun. This is an appropriate vehicle to reverse the *Todd* rule or modify it to only apply to a double recovery and the election of remedies.[4]

2. CIVIL CONSPIRACY WAS RECOGNIZED IN SOUTH CAROLINA PRIOR TO *TODD* AND PLEADING SPECIAL DAMAGES WAS NOT REQUIRED.

There are not many published decisions discussing civil conspiracy in South Carolina prior to *Todd*, and some of the pre-*Todd* authority is less explanative than desired. *See*, *Lyon v. Sinclair Ref. Co.*, 189 S.C. 136, 200 S.E. 78, 81 (1938) ("The action for conspiracy being bottomed upon an alleged lease, there being a failure to prove an enforceable lease, obviates the necessity of going into the elements of conspiracy[.]"). Nevertheless, the limited pre-*Todd* authority available indicates the existence of actionable conspiracy claims in South Carolina without the requirement of pleading or

[4] Petitioner will appropriately file a Motion to Argue Against Precedent, regarding *Todd*. 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[.]").

proving special damages. This Court, in *Charles v. Texas Company*, stated the law of conspiracy as follows: "conspiring together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another." *Charles*, 192 S.C. 82, 5 S.E.2d 464, 472 (1939). Years later, the South Carolina District Court, citing *Charles*, reiterated: "it is well settled in South Carolina that a conspiracy is the conspiring together of persons to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another." *Sams v. Bhd. of Ry. & S. S. Clerks, Sumter Lodge No. 6193*, 166 F. Supp. 49, 54 (E.D.S.C. 1956); *See also, Hosp. Care Corp. v. Commercial Cas. Ins. Co.,* 194 S.C. 370, 9 S.E.2d 796, 803–04 (1940) ("[N]or does the second cause of action allege the required elements of a conspiracy to accomplish an unlawful purpose or a lawful purpose unlawfully.").

Early civil conspiracy holdings indicate that the Court's primary concern in assessing the legal sufficiency of conspiracy claims was the existence of concerted action not whether the damages sought for a civil conspiracy overlapped with the damages sought for other alleged claims. Such was the case in *Westbrook v. Hutchinson*, where this Court affirmed a verdict on a claim of civil conspiracy to commit false imprisonment seeking nonspecific damages based on "testimony [that] afforded a reasonable inference that the defendants were acting in concert." *Westbrook v. Hutchison*, 195 S.C. 101, 10 S.E.2d 145, 150 (1940); *See also, Anderson v. S. Ry. Co.*, 224 S.C. 65, 69, 77 S.E.2d 350, 351 (1953) ("There was no cause of action for conspiracy[;] the company could not conspire with itself."). Before *Todd*, this Court acknowledged the actionability of civil conspiracy based on concerted action to harm another. *Howle v. Mountain Ice Co.*, 167 S.C. 41, 165 S.E. 724, 729 (1932) (Rejecting a conspiracy claim based on the "insufficiency of the evidence to show an agreement between the defendants for the purpose of injuring the plaintiff-the gravamen of the charge[,]" but counseling that South Carolina does not take the view that unlawful action is required to show a conspiracy.).

Even post-*Todd*, concerted action (not special damages) remains paramount to the viability of conspiracy claims. *Pye v. Estate of Fox*, 369 S.C. 555, 567–68, 633 S.E.2d 505, 511 (2006) ("The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se."). Recognition of the misapplication of a damage rule to pleading in *Todd* in conjunction with a review of pre-*Todd* statements of conspiracy law, provides a framework for how the elements of civil conspiracy ought to be stated. Correcting *Todd* does not require dramatic change; indeed, the post-*Todd* statement of civil conspiracy elements in *Pye v. Estate of Fox* (and elsewhere) would only require the following slight modification:

> The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes ~~special~~ damages.

Pye, 633 S.E.2d at 511. (Strikethrough intentional). The above alteration to correct *Todd* and conform with pre-*Todd* statements of civil conspiracy law in South Carolina would not erode a conspiracy defendant's ability to avoid being taxed a double recovery; it would simply relegate that sort of a dispute to its proper procedural posture, post-trial rather than pleading. Considering pre-*Todd* authority, it becomes even more apparent that the *Todd* rule was an aberration that this Court can, and should correct.

3. PERSUASIVE AUTHORITY FROM OTHER JURISDICTIONS SUPPORTS OVERTURNING THE *TODD* RULE.

This Court has considered the law of other jurisdictions as persuasive authority where there is no contemporary governing law on point or a new rule is being considered. *Gardner v. Campbell*, 257 S.C. 209, 211, 184 S.E.2d 700, 701 (1971) ("As our Rule 44 is new, it is, of course, appropriate to look to persuasive authority from other jurisdictions having essentially the same rule, as to the proper interpretation and application of our rule."); *Williams v. Morris*, 320 S.C. 196, 200, 464 S.E.2d 97, 99

(1995) ("There are no opinions by this Court addressing the precise issue raised in this lawsuit. Nevertheless, there is persuasive authority from the state of Maine[.]"). Here, where Petitioner requests a reversal of the *Todd* rule, considering the treatment of civil conspiracy by other jurisdictions would be appropriate. Petitioner has performed a nation-wide survey of civil conspiracy law. It appears that while all states and the District of Columbia recognize conspiracy as a tort, no state other than South Carolina requires that special damages be pled.

The elements of a civil conspiracy claim in Alabama, and several similar jurisdictions, require concerted action by two or more persons to achieve an unlawful purpose or a lawful purpose by unlawful means. *Ex parte Alamo Title Co.*, 128 So.3d 700, 713 (Ala. 2013) ("The elements of civil conspiracy in Alabama are: (1) concerted action by two or more persons (2) to achieve an unlawful purpose or a lawful purpose by unlawful means.").[5] Justice Pleicones referenced this statement of the

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[5] A majority of other jurisdictions, though at times requiring special damages in an election of remedies context, set forth the same or similar elements as Alabama. *See, Davis v. King Craig Trust*, 2017 WL 2209879, at *3 (Alaska, 2017) (citing *Morasch v. Hood*, 222 P.3d 1125, 1131–32, 232 Or. App. 392, 402 (Or. App. 2009)). *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 36, 201 Ariz. 474, 498 (Ariz. 2002) (Same); *Stauffer v. Stegemann*, 165 P.3d 713 (Colo. App. 2006) (Same); *Charter Oak Lending Group, LLC v. August*, 14 A.3d 449, 460–61, 127 Conn.App. 428, 446 (Conn. App. 2011); *AeroGlobal Capital Management, LLC v. Cirrus Industries*, Inc., 871 A.2d 428 (Del.Supr. 2005) *Griva v. Davison*, 637 A.2d 830 (D.C. 1994); *Walters v. Blankenship*, 931 So.2d 137, 140 (Fla.App. 5 Dist.,2006); *Miyashiro v. Roehrig, Roehrig, Wilson & Hara*, 228 P.3d 341, 362, 122 Hawai'i 461, 482 (Hawaii App. 2010); *Taylor v. McNichols*, 243 P.3d 642, 660, 149 Idaho 826, 844 (Idaho,2010); *Redelmann v. Claire Sprayway, Inc.*, 375 Ill.App.3d 912 (Ill. App. 1 Dist. 2007); *Birge v. Town of Linden*, 57 N.E.3d 839, 845 (Ind.App. 2016); *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220 (Iowa 1977); *State ex rel. Mays v. Ridenhour*, 811 P.2d 1220, 1224, 248 Kan. 919, 923 (Kan. 1991). *Smith v. Coyne*, 2004 WL 1433638, at *4 (Me.Super. 2004); *Mackey v. Compass Marketing, Inc.*, 892 A.2d 479, 485, 391 Md. 117, 128 (Md. 2006); Mays v. Three Rivers Rubber Corp., 352 N.W.2d 339, 341, 135 Mich.App. 42, 48 (Mich. App. 1984); *Robert Allen Taylor Co. v. United Credit Recovery, LLC*, 2016 WL 5640670, at *11 (Minn. App. 2016); *Gallagher Bassett Services, Inc. v. Jeffcoat*, 887 So.2d 777, 786 (Miss. 2004); *Higgins v. Ferrari*, 474 S.W.3d 630, 642 (Mo. App. W.D. 2015); *Schumacker v. Meridian Oil Co.*, 956 P.2d 1370, 1373, 288 Mont. 217, 221, 1998 MT 79, ¶ 18 (Mont. 1998); *In re Appeal of Armaganian*, 784 A.2d 1185, 1189, 147 N.H. 158, 163 (N.H. 2001); *Banco Popular North America v. Gandi*, 876 A.2d 253, 263, 184 N.J. 161, 177 (N.J. 2005); *Mace v. Pyatt*, 203 N.C.App. 245 (N.C. App. 2010); *Hurt v. Freeland*, 589 N.W.2d 551 (N.D. 1999); *Edwards v. Urice*, 220 P.3d 1145, 1152, 2009 OK CIV APP 20, ¶ 20 (Okla. Civ .App. Div. 1 2008); *Morasch v. Hood*, 222 P.3d 1125, 1131–32, 232 Or. App. 392, 402 (Or. App. 2009); *Skipworth by Williams v. Lead Industries Ass'n, Inc.*, 690 A.2d 169, 174, 547 Pa. 224, 235 (Pa. 1997);

elements in *Scully*. 418 S.C. at 36; *citing*, *King v. Jones*, 110 Eng. Rep. 485, 487 (K.B. 1832). This majority view is consistent with pre-*Todd* conspiracy law in South Carolina. However, it should be noted that the concept of "lawful"/"unlawful" is not so narrow as to apply strictly to what is or is not criminally lawful; precedent indicates that both criminal and tortious conduct can amount to a conspiracy. Indeed, this Court held both before and after *Todd* that a criminally unlawful act or process was not necessary to establish a civil conspiracy claim. *Pye v. Estate of Fox*, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006) ("[A]n unlawful act is not a necessary element of the tort."); *quoting*, *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 11, 344 S.E.2d 379, 382 (Ct.App.1986); *Howle v. Mountain Ice Co.*, 167 S.C. 41, 165 S.E. 724, 729 (1932) ("Although this rule [referring to immunity from civil conspiracy liability where the conspiracy alleged is criminally lawful] prevails in some jurisdictions, such is not the majority view or that of this court."). On this point, our pre-*Todd* conspiracy law is also consistent with Arkansas and a large minority of other jurisdictions which expound on the significance of the "lawful"/"unlawful" short hand in the majority statement of the elements. *See*, *Chambers v. Stern*, 64 S.W.3d 737, 743, 347 Ark. 395, 404 (Ark. 2002). ("[I]n order to prove a civil conspiracy, [one] must show a combination of two or more persons to accomplish a purpose that is unlawful or oppressive or to accomplish some purpose, not in itself unlawful, oppressive or immoral, by unlawful, oppressive or immoral means, to the injury of another.").[6]

Kirlin v. Halverson, 758 N.W.2d 436, 455, 2008 S.D. 107, ¶ 59 (S.D. 2008); *PNC Multifamily Capital Institutional Fund XXVI Ltd. Partnership v. Bluff City Community Development Corp.*, 387 S.W.3d 525 (Tenn. Ct. App. 2012); *MVS International Corporation v. International Advertising Solutions, LLC*, 545 S.W.3d 180 (Tex. App. El Paso 2017); *Harvey v. Ute Indian Tribe of Uintah and Ouray Reservation*, 416 P.3d 401 (Utah 2017); *Commercial Business Systems, Inc. v. Bellsouth Services, Inc.*, 453 S.E.2d 261, 267, 249 Va. 39, 48 (Va. 1995); *Woody v. Stapp*, 146 Wash.App. 16 (Wash. App. Div. 3 2008); *Dunn v. Rockwell*, 689 S.E.2d 255, 268, 225 W.Va. 43, 56 (W.Va. 2009); *White v. Shane Edeburn Const., LLC*, 285 P.3d 949, 958, 2012 WY 118, ¶ 29 (Wyo. 2012).

[6] The following jurisdictions, in addition to Arkansas and similar to South Carolina law, explicitly do not appear to require conspiracy claims to be predicated on an unlawful act or process. *Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co. LLC*. 277 S.W.3d 255, 261 (Ky.App. 2008); Butz v. Lynch, 710 So.2d 1171 (La. App. 1 Cir. 1998); *DeNourie & Yost Homes, LLC v. Frost*, 854 N.W.2d 298, 316,

Regardless of nuanced distinctions in the statements of conspiracy elements by our several sister states, it is compelling that no state other than South Carolina considers special damages to be a pleading requirement for conspiracy.[7] Pre-*Todd* authority in South Carolina, persuasive authority in her sister states, and the discernable misapplication of the law within the four corners of *Todd* itself resoundingly counsel together in favor of reversing the *Todd* rule. Here, where a nearly 40-year-old pleading rule is at issue, a review of persuasive authority is warranted and sampling persuasive authority reveals, overwhelmingly, that the *Todd* rule should be reversed.

CONCLUSION

All things considered: 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 pre-*Todd* precedent, and a persuasive assessment of comparative law all support reversing the *Todd* rule on special damages. Therefore, Petitioner respectfully posits that special damages are not a suitable basis for Rule 12, SCRCP dismissal and that the Court of Appeals ruling against her on conspiracy should be reversed.

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289 Neb. 136, 156–57 (Neb. 2014); *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 971 P.2d 1251, 1256, 114 Nev. 1304, 1311 (Nev. 1998); *Cain v. Champion Window Co. of Albuquerque, LLC*, 164 P.3d 90, 98, 142 N.M. 209, 217, 2007 -NMCA- 085, ¶ 28 (N.M. App. 2007); *Great Lakes Motor Corp. v. Johnson*, 156 A.D.3d 1369 (N.Y.A.D. 4 Dept. 2017); *Mangelluzzi v. Morley*, 40 N.E.3d 588, 601, 2015 -Ohio- 3143, ¶ 54 (Ohio App. 8 Dist. 2015); *North Highland Inc. v. Jefferson Machine & Tool Inc.*, 377 Wis.2d 496 (Wis. 2017)

[7] Although not necessarily germane to the instant issue, Petitioner notes, for full context, that many states also require conspiracy to be predicated on the commission of another tort and that Massachusetts requires proof of coercion absent an underlying tort. *See i.e., Mustaqeem-Graydon v. SunTrust Bank*, 258 Ga.App. 200 (Ga. App. 2002); *Great Lakes Motor Corp. v. Johnson*, 156 A.D.3d 1369 (N.Y.A.D. 4 Dept. 2017); *Bainum v. Coventry Police Department*, 156 A.3d 418, 421 (R.I. 2017); *Davis v. Vile*, 2003 WL 25746021, at *3 (Vt. 2003); *and*, Kurker v. Hill, 689 N.E.2d 833, 836, 44 Mass.App.Ct. 184, 188 (Mass. App. Ct. 1998).

Petitioner Liesel Paradis respectfully asks this Honorable Court to reverse the special damages pleading requirement on civil conspiracy claims arising from *Todd v. S.C. Farm Bureau Mut. Ins. Co.* Thereby, Petitioner asks the Court to reverse the holding of the Court of Appeals and remand this case for the reasons discussed above.

Respectfully Submitted,

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July 1, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-02025
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

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PROOF OF SERVICE

I certify that I, the undersigned employee of Cromer Babb Porter & Hicks, LLC, caused to have served **Brief of Petitioner** by depositing a copy of it in the United States Mail, postage prepaid and electronic mail, on July 1, 2019, 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.

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