

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

REPLY BRIEF OF PETITIONER

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S.C. SUPREME COURT

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INTRODUCTION

The question before the Court is whether the Court should reverse the “*Todd* rule”. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) (Requiring that special damages be **pled** and proven to state a valid civil conspiracy claim). Petitioner, via her initial brief filed on June 1, 2019, has presented authority supporting her position that the *Todd* rule is a South Carolina-specific enigma created by this Court in 1981 when it applied a rule on duplicative damages to pleadings and thereby added a new and nebulous element to the previously recognized tort of civil conspiracy. Respondents, in their brief, spend little analysis directly addressing this issue and instead seek to avoid a change to the *Todd* rule based on issue preservation and *stare decisis* grounds.¹ (Respondent’s Brief pp. 5-10). Respondent’s also argue that any change to the *Todd* rule should not be applied to them and appear to argue that this Court should do away with civil conspiracy altogether. Respondent’s deliberate use of only two pages of their brief to directly defend the *Todd* rule on the merits is indicative that the *Todd* rule is legally infirm. Petitioner addresses each of the Respondents’ arguments in turn.

ARGUMENT

Respondents make five discreet arguments: (1) arguing that the issue on certiorari before the Court was not preserved; (2) making a brief defense of the *Todd* rule on its merits; (3) making a defense of the *Todd* rule based on *Stare Decisis*; (4) arguing in favor of a prospective application of the reversal of the *Todd* rule; and (5) arguing, or at least appearing to argue, that the tort of civil conspiracy should be eliminated altogether.

¹ Respondents’ brief was filed by mail on August 22, 2019, received by this Court on Friday August 23, 2019, and mail-served on Petitioner on Monday August 26, 2019. This reply brief is filed within 10 days of service to the petitioner pursuant to Rule 242(i), SCACR.

1. THE PROPRIETY OF THE TODD RULE IS SUFFICIENTLY PRESERVED IN THE RECORD.

“[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). The Court’s decision in *Allegro, Inc. v. Scully*, which shed light on the impropriety of the *Todd* rule, was published on August 24, 2016 after this matter was decided by the Circuit Court. *Allegro, Inc. v. Scully*, 418 S.C. 24, 37, 791 S.E.2d 140, 147 (2016) (C.J. Pleicones *dissenting*), *reh'g denied* (Oct. 26, 2016). Nevertheless, Petitioner did, at least implicitly, challenge the application of the *Todd* rule to this case below by pointing out that the sole claim alleged against the Individual Respondents was civil conspiracy such that the element of special damages, if required, was innately satisfied by her claim:

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 Defendants District and JICHS not the Individual Defendants.

(J.A. pp. 85-86). Here, Petitioner’s pre-*Scully* argument that the *Todd* rule should not be used to dismiss her claim can be fairly read broadly to preserve the question of the applicability and propriety of the *Todd* rule.

Furthermore, “an exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances.” *State v. Bonner*, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012); *see also, Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 441, 633 S.E.2d 143, 147 (2006) (“Regardless of any preservation problems we address this issue in the interest of judicial economy.”). Here, given that *Allegro, Inc. v.*

Scully arose after the Circuit Court decision in this case and given that the majority of this Court did not answer the question presented in this case in *Scully* because of the age and circumstances in *Scully*, judicial economy supports this Court deciding this question now, regardless of issue preservation. *Scully*, 418 S.C. at 34 n. 3 (determining that *Scully* was not the appropriate vehicle to address the *Todd* Rule based on its age and procedural posture); *See also, Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332, 730 S.E.2d 282, 287 (2012) (“In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice.”) (C. J. Toal, *concurring*).

In this case, the Petitioner’s pre-*Scully* arguments on *Todd* should either be read broadly enough to have preserved the issue before the Court or, alternatively, this Court should still address the propriety of the *Todd* rule in the interest of fairness and judicial economy.

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

Respondent’s briefly argue that “The *Todd* court correctly applied [15A C.J.S. Conspiracy § 33] to the allegations” in *Todd*. Respondents, to bolster their position, then cite to the amendment of the relevant C.J.S. provision. (Respondent Brief pp. 6-8). Respondents overlook that *Todd*, at its core, applied a damages rule to pleadings and that the C.J.S. update they rely on to bolster their argument is a product of *Todd*. In this regard, Respondents’ argument in favor of the *Todd* rule is unpersuasive.

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). The third enumerated element was judicially created by 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” in order 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). Specifically, 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. However, 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. Comparing *Todd* to the C.J.S. provision it cited plainly demonstrates that the *Todd* court applied a damages rule to pleadings.

Complicating the initial error, *Corpus Juris Secundum*, first miscited by *Todd*, was later updated to incorporate the *Todd* rule. 15A C.J.S. Conspiracy § 33 (June 2019) 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*. 15A C.J.S. Conspiracy § 33; citing, *Hackworth, LLC*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009). Within this context, the updates to *Corpus Juris Secundum* cited by Respondents are not persuasive. Put simply, the progeny of *Todd* cannot be reasonably used as an independent basis to preserve the *Todd* rule.

The *Todd* rule, at bottom, is more appropriately applied 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. This Court’s majority did not answer this specific question when it was presented compellingly in *Scully* because of the age of

that case and that case's procedural posture. *Scully*, 791 S.E.2d at 145, n. 3. This case does not share the *Scully* case's age or procedural posture. and it is an appropriate vehicle to reverse *Todd*. The Respondents' arguments to preserve *Todd* misapprehend the original C.J.S. provision cited in *Todd* and overstate the importance of an updated C.J.S. provision resulting from *Todd*. Those arguments, in full context, do not justify preserving the *Todd* rule.

3. STARE DECISIS DOES NOT JUSTIFY PRESERVING THE *TODD* RULE.

Following a cursory defense of *Todd* on the merits, Respondents pivot to *stare decisis*. (Respondent Brief pp. 8-10). "However, stare decisis is not an inexorable command: 'There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right.... There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment.'" *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012); quoting, *Smith v. Daniel Const. Co.*, 253 S.C. 248, 255-56, 169 S.E.2d 767, 771 (1969) (Bussey, J., dissenting) (quoting *Sidney Spitzer & Co. v. Comm'rs of Franklin County*, 188 N.C. 30, 123 S.E. 636, 638 (1924)). "Stare decisis should be used to foster stability and certainty in the law, but, not to perpetuate error and injustice." *Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n*, 277 S.C. 1, 4, 282 S.E.2d 230, 231 (1981); superseded by statute on other grounds, S.C. Code Ann. § 33-55-200 *et seq.* (2006). Here, where *Todd* presents a demonstrable and hardly debatable mistake of law, *stare decisis* is not enough to justify the further perpetuation of legal error. *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 451, 790 S.E.2d 763, 770 (2016) ("While adherence to precedent under the rubric of *stare decisis* is commendable and provides certainty and consistency within our judicial system, adherence to precedent that is wrong serves no such laudable purpose."). That is, the *Todd* rule was premised on discernable legal error and *stare decisis* is not a compelling basis to continue that error.

4. PROSPECTIVE APPLICATION IS NOT REQUIRED BY ROLLING BACK THE *TODD* RULE.

This Court, by rolling back the *Todd rule*, will not be creating a new substantive right. Instead, it will be correcting an error of law on a preexisting right of action; as such, Respondents' argument for prospective application is unwarranted. As noted by Petitioner in her opening brief, South Carolina historically recognized civil conspiracy claims prior to *Todd* without a pleading requirement for special damages. (Petitioner Brief pp. 10-12); *citing*, *Lyon v. Sinclair Ref. Co.*, 189 S.C. 136, 200 S.E. 78, 81 (1938); *Charles v. Texas Company*, 192 S.C. 82, 5 S.E.2d 464, 472 (1939); *Hosp. Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 9 S.E.2d 796, 803-04 (1940); *and*, *Westbrook v. Hutchison*, 195 S.C. 101, 10 S.E.2d 145, 150 (1940); *et al.* Because this case does not concern the creation of a new right of action or the abrogation of some established immunity, the cases Respondents rely on are not applicable, and a retrospective application of the reversal of the *Todd* rule would be appropriate.

“[T]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively.” *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989); *citing*, *McCaskey v. Shaw*, 295 S.C. 372, 368 S.E.2d 672, 673 (Ct.App.1988). “Prospective application is required when liability is created where formerly none existed.” *Toth*, 377 S.E.2d at 285; *quoting*, *Hupman v. Erskine College*, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984). The Court applies prospective application where a new tort is created or where an established immunity is dissolved. *See Toth*, 298 S.C. 6, 9, 377 S.E.2d 584, 586 (1989) (assembling and describing cases and situations where prospective immunity has been applied). This Court, in rolling back the *Todd* rule, would not create a “new right or cause of action” nor would it erode an established immunity. *Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 434, 706 S.E.2d 501, 503 (2011). Therefore, there is no legal basis to warrant prospective application.

Indeed, by correcting the error of law arising from *Todd*, this Court would be “vindicating [an] existing right;” therefore, justifying retrospective, not prospective, application. *Toth*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989); *quoting, McCaskey v. Shaw*, 295 S.C. 372, 368 S.E.2d 672, 673 (Ct.App.1988) (“decisions creating new remedies to vindicate existing rights are applied retrospectively.”). Respondents’ argument on prospective application then (founded entirely on inapplicable law concerning: the creation of new torts, erosion of established immunities, criminal prosecutions, and the due process considerations on punitive damages) has no impact here where the Court is not asked to create new law, but instead, is only asked only to correct a discernable error of law arising after South Carolina initially recognized the viability of civil conspiracy claims. Here where the Court is “vindicating [an] existing right,” retrospective application is warranted.

5. THERE IS NO BASIS FOR ELIMINATING THE TORT OF CIVIL CONSPIRACY.

Respondents, who previously argued that Petitioner did not preserve its *Todd* rule argument, close by arguing for the first time that the if this Court eliminates the *Todd* rule, it should also eliminate the tort of civil conspiracy altogether. Respondents’ suggestion to “call the whole thing off” is premised on a misreading of comparative conspiracy law in other jurisdictions. (Respondent Brief pp. 13-18). Respondents first assert that other jurisdictions “refuse to recognize an independent claim of civil conspiracy” and then urge this Court to “eliminate civil conspiracy as an independent cause of action in South Carolina” all together on that asserted basis. Respondents overstate the second element in *Pre-Todd* conspiracy law in South Carolina and in the conspiracy law in other jurisdictions to reach their conclusion.

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). That statement of the

law is consistent with how other jurisdictions state the law of civil conspiracy. (Petitioner Brief at pp. 13-14 N. 5-6). The “unlawful act” or “lawful act in an unlawful way” statement from *Charles* and other jurisdictions has not been read in South Carolina, both before and after *Todd*, to require illegal conduct by conspirators in order to state a viable 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.”). Respondents over-extend “unlawful act/way” type statements of law from other jurisdictions to over-complicate the requirement that conspiracies be predicated on combined action to harm.

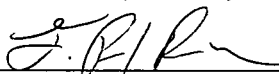
The holdings relied on by Respondents from other jurisdictions are overstated and by no means justify the wholesale elimination of conspiracy as a tort. Indeed, all that is required by this appeal is the elimination of special damages as a pleading requirement. That simple act would bring South Carolina’s usage of civil conspiracy in-line with her sister jurisdictions. 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.”); *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.”). Respondents’ final argument dreams up a dispute that does not exist. That argument, and Respondents’ preceding arguments, do not justify the preservation of the *Todd* rule. Therefore, Petitioner respectfully asks this Court to overrule *Todd* on special damages and remand this case to proceed through discovery.

CONCLUSION

This Court should reverse *Todd* on issue of special damages. The determination of special damages on conspiracy claims is intended to foreclose a duplicative recovery at the end of an action; rather than to foreclose alternative pleading at the beginning of an action. *Pre-Todd* South Carolina precedent did not require special damages to be pled; consequently, this Court is not being asked to create a new right or abrogate any established immunity. Indeed, reversing the *Todd* rule, would bring South Carolina conspiracy law in-line with both its own *pre-Todd* iterations and in-line with how civil conspiracy is treated, on this issue, by other jurisdictions. Petitioner, therefore, asks this Court to reverse the Court of Appeals on this issue, reverse *Todd* with respect to special damages, and remand this case so that Petitioner can engage in discovery.

Respectfully Submitted,

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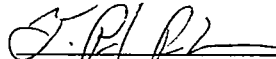
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I certify that I, the undersigned employee of Cromer Babb Porter & Hicks, LLC, caused to have served **Reply Brief of Petitioner** by depositing a copy of it in the United States Mail, postage prepaid and electronic mail, on September 3, 2019, to attorney 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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