THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Hon. R. Knox McMahon, Circuit Court Judge

Case No. 11-CP-21-941

Appellate Case No. 2013-001764

Scient Partners, LLC.....Appellant,

v.

Pinnacle Network Solutions, Inc., and Cliff Smith.....Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

On April 11, 2011, Scient Partners, LLC (hereinafter "HillSouth," which is its trade name), instituted this action against Pinnacle Network Solutions, Inc. ("Pinnacle"), and Cliff Smith ("Smith") alleging damages arising from the alleged misappropriation of protected trade secrets.[1] (R. pp. 10-13.) The complaint asserted causes of action for misappropriation of trade secrets, injunctive relief, civil conspiracy, unfair and deceptive trade practices, breach of employee loyalty (and aiding and abetting thereof), and conversion. (R. pp. 10-16.) HillSouth's complaint was amended on April 2, 2011, asserting identical causes of action. (*See* R. pp. 19-26.) Pinnacle and Smith filed an answer to the Amended Complaint on August 19, 2011, and raised several defenses, including that the Amended Complaint failed to state a claim upon which relief could be granted. (*See* R. pp. 29-33.)

Following discovery, on April 18, 2013, Pinnacle and Smith filed a motion to dismiss (citing Rule 12(c), SCRCP) asserting that the complaint failed to state a cause of

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[1] In its brief, HillSouth refers to Smith as "the thief" (Brief of Appellant p. 8) and proclaims that this matter involves "theft" (*id.* p. 3). Such name-calling is highly offensive, insulting, and completely inappropriate in an appellate brief, not to mention seemingly inconsistent with the Lawyer's Oath ("[t]o *opposing parties* and their counsel, I pledge fairness, integrity, *and civility*, not only in court, but also in all written and oral communications" (*emphasis added*)).

action for, among other things, civil conspiracy. (*See* R. pp. 37-39.) Prior to trial, HillSouth voluntarily withdrew all claims except for the causes of action for alleged violation of the South Carolina Trade Secrets Act, § S.C. Code Ann. § 39-8-10 *et seq.*, and civil conspiracy. The case was tried before a jury beginning April 22, 2013. At the conclusion of HillSouth's case-in-chief, the trial court directed a verdict in favor of Pinnacle and Smith as to the civil conspiracy cause of action. (R. p. 202, l.18 – p. 205, l.3.) Ultimately, the jury returned a verdict in favor of Pinnacle and Smith as to the Trade Secrets Act claim. (R. p. 223, l.12 – p. 224, l.13; R. pp. 41-44.)

Following the verdict, HillSouth moved for a new trial and for judgment notwithstanding the verdict. (*See* R. p. 224, ll.15-25; R. pp. 45-56.) The trial court denied those motions both from the bench at the conclusion of the trial (R. p. 224, ll.23-25) and by written order (R. pp. 1-6). HillSouth noticed this appeal on August 8, 2013. (R. pp. 59-60.)

STATEMENT OF FACTS

In the Fall of 2009, Chris Bailey, the head of information technology (IT) at South of the Border ("SOTB") (R. p. 63, l.17-19), contacted Smith, then an employee of HillSouth (R. p. 86, ll.1-9), about submitting a quote for an IT infrastructure project at SOTB. (R. p. 105, l.24 – p. 109, l.10; R. p. 111, ll. 10-11; R. p. 269.) Smith and Bailey were personal friends. (R. p. 108, ll.4-9; R. p. 213, ll.9-14; R. p. 214, ll.8-13.) Smith and others within HillSouth, along with other vendors such as BBCI and Cisco, began assembling a price and equipment list quote for the project, while BBCI was primarily charged with system design. (R. p. 105, l.24 – p. 109, l.10; R. p. 140, l.3 – p. 142, l.20; R. p. 252.) In connection with this, Bailey provided Smith with a quote for the project

that had been provided to SOTB by another IT company, POS Worldwide, prior to HillSouth's involvement. (R. p. 134, l.23 – p. 135, l.18; R. pp. 270-271.) At Bailey's instruction, Smith was to, and did, use the POS Worldwide quote to prepare HillSouth's quote. (R. p. 134, l.23 – p. 138, l.10.) Bailey and SOTB wanted a system based on the specifications they had been quoted previously. (R. p. 138, l.1 – p. 139, l.12.) Ultimately, HillSouth submitted an equipment sales and installation quote to SOTB for the project. (R. pp. 263-268; R. p. 109, ll.8-10.)

On July 23, 2010, Smith resigned his position at HillSouth. (R. p. 93, l.21 – p. 95, l.10; R. p. 251.) Smith subsequently began working for Pinnacle. (R. p. 129, ll.1-4.) Within a couple of days after his departure from HillSouth, Smith contacted Bailey about submitting a quote from Pinnacle for the SOTB project. (R. p. 127, ll.12-15.) Bailey was fully aware that Smith was now with Pinnacle, and let SOTB's president and CEO, Ryan Schafer, know of the move. (R. p. 210, l.23 – p. 212, l.10.) On July 27, 2010, Smith submitted a summary quote to Bailey from Pinnacle. (R. p. 128, ll.2-25; R. p. 129, l.15 – p. 130, l.24.) According to Bailey, it was Schafer's decision to go with Pinnacle (R. p. 210, l.16 – p. 211, l.3), and once that decision was made, Schafer e-mailed Bailey and told him to proceed and to contact Smith. (R. p. 214, l.14 – p. 216, l.1.)

On August 11, 2010, Bailey contacted Smith asking for a detailed contract. (R. p. 131, l.15 – p. 132, l.20; R. p. 261.) There were several revisions and change orders made to the project plans prior to execution of the contract between Pinnacle and SOTB. (R. p. 143, l.1 – p. 147, l.23.) The contract between SOTB and Pinnacle was signed on August 16, 2010 by Schafer, as SOTB's president, CEO and owner (R. p. 64, ll.10-12.), and by

Brent Tiller, as an officer and owner of Pinnacle (R. p. 79, ll.17-19). (R. pp. 253-258; R. p. 67, l.21 – p. 68, l.3; R. p. 147, ll.7-13.)

HillSouth then brought this action by complaint filed April 11, 2012, as amended on August 2, 2011. Included among the seven causes of action set forth in the Amended Complaint was a claim arising under the Trade Secrets Act. (R. pp. 19-22.) In that cause of action, HillSouth asserted that Pinnacle and Smith misappropriated confidential trade secrets, including prices and pricing practices, which Smith had obtained during his employment with HillSouth, and misused that information to ultimately obtain a contract for the SOTB project. (R. pp. 20-21.) HillSouth claimed that as a result, it sustained financial harm, including lost business and profits. (R. p. 22.)

HillSouth also asserted a claim for civil conspiracy. (R. pp. 23-24.) It was alleged that Pinnacle and Smith conspired to cause HillSouth financial harm "by among other things, misappropriating and misusing Plaintiff's Trade Secrets as alleged above, including Plaintiff's prices and pricing practices." (R. pp. 23-24.) HillSouth baldly claimed that as a result of that alleged conspiracy, it sustained "special damages" of an unspecified nature, and requested an award of actual and punitive damages as well as prejudgment interest. (R. p. 24.) In all of the other causes of action, save his claim for injunctive relief, HillSouth similarly requested actual damages, punitive damages, and/or prejudgment interest. (R. pp. 24-26.)

During trial HillSouth's owner, Robbie Hill, who was HillSouth's professed "damage witness" (R. p. 164, ll.9-10), testified in great detail about HillSouth's alleged damages. According to Hill, HillSouth's damages from Smith and Pinnacle's alleged conduct consisted of the loss of the SOTB contract and the associated lost profits that

would have flowed therefrom. (R. p. 176, l.1 – p. 182, l.8; R. p. 183, ll.13-16; R. p. 186, l.14 – p. 188, l.8; R. p. 189, l.22 – p. 192, l.13; R. p. 193, l.8 – p. 195, l.16; R. p. 196, ll.11-20.) Hill testified that he calculated HillSouth's lost profits to be $97,203.67. (R. p. 180, ll.1-16.). When asked about whether HillSouth had been damaged by the alleged conspiracy, Hill responded "absolutely," but never testified in what way HillSouth had been so damaged. (R. p. 195, ll.15-16.) At no point during his testimony did Hill testify that HillSouth had sustained any damage to its reputation, good will, or brand as a result of Smith's and Pinnacle's conduct, much less because of the alleged conspiracy.

Similarly, Andy Patel, HillSouth's Chief Technology Officer (R. p. 154, ll.16-17), who was not testifying as HillSouth's "damage witness" (R. p. 164, l.9), did testify about HillSouth's profit margins. (R. p. 162, l.8 – p. 163, l.8.) Like Hill, however, he also never once testified about any alleged damage to HillSouth's reputation, good will, or brand.

At the conclusion of HillSouth's case in chief, counsel for Smith and Pinnacle moved for a directed verdict as to the Trade Secrets Act and conspiracy claims, the only claims which were tried. (R. p. 197, ll.10-14.) As to the conspiracy claim, the motion for directed verdict was based on the fact that HillSouth had neither pled nor proved "special damages," and that HillSouth had not proven the existence of any agreement between the defendants. (R. p. 197, l.16 – p. 198, l.19.) The trial court denied the motion as to the Trade Secrets Act claim. The court, however, agreed that HillSouth had neither pled nor proven damages distinct and apart from the alleged lost profits and business which supported the Trade Secrets Act claim, and thus had not satisfied the "special damages"

element of a civil conspiracy claim. (R. p. 202, l.18 – p. 205, l.3.) The jury ultimately found for Smith and HillSouth on the Trade Secrets Act claim.

HillSouth thereafter moved for a new trial or JNOV on multiple grounds, all of which were denied. (*See* R. pp. 45-56; R. pp. 1-6.) As to the civil conspiracy claim, the court confirmed its prior finding that HillSouth had neither pled nor proven special damages. (R. pp. 5-6.)

ARGUMENT

Though HillSouth raised several grounds for new trial or JNOV to the trial court, the only issue raised in its brief on appeal before this Court is whether the trial court erred in failing to allow the civil conspiracy claim to be presented to the jury as an alternate theory of recovery. All other issues raised previously have, therefore, been abandoned. *See* Allen v. Pinnacle Healthcare Sys., 394 S.C. 268, 715 S.E.2d 362, 367 (Ct. App. 2011) (matters not raised in statement of issues on appeal are deemed abandoned) (*citing* Rule 208(b)(1)(B), SCACR).

I. HILLSOUTH FAILED TO PLEAD SPECIAL DAMAGES WITH SPECIFICITY; THEREFORE, ITS CLAIM FOR CIVIL CONSPIRACY WAS PROPERLY DISMISSED.

In order to maintain an action for civil conspiracy, a plaintiff must properly plead three elements "(1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage." Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 682 S.E.2d 871, 874 (Ct. App. 2009). A civil conspiracy claim "requires the tortious conduct in question to cause the plaintiff special damage." Benedict College v. Nat'l Credit Sys., Inc., 400 S.C. 538, 735 S.E.2d 518, 522 (Ct. App. 2012). As opposed to general damages which "are the immediate, direct, and proximate

result of the act complained of" and which "are inferred by the law itself," this Court has repeatedly defined special damages as "those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct" which "are not implied at law because they do not necessarily result from the wrong." Hackworth, 682 S.E.2d at 875; Benedict College, 735 S.E.2d at 522.

Special damages must "be *specifically alleged in the complaint* to avoid surprise to the other party." Hackworth, 682 S.E.2d at 875 (*emphasis added*); Benedict College, 735 S.E.2d at 523; Rule 9(g), SCRCP ("[w]hen items of special damages are claimed, they shall be specifically stated"). "Because the quiddity of a civil conspiracy is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505, 511 (2006); Hackworth, 682 S.E.2d at 875. A plaintiff may not simply "incorporate the prior allegations [of other causes of action] and then allege the existence of a conspiracy and pray for damages resulting from the conspiracy." Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 278 S.E.2d 607, 611 (1981). "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." Hackworth, 682 S.E.2d at 875 (*emphasis added*); Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91, 95 (Ct. App. 1989). This Court has held that Todd, *supra*, requires that:

> when a party wishes to assert multiple causes of action, including civil conspiracy, it must allege acts in furtherance of the conspiracy and special damages that are separate and independent of the other acts and damages that underlie the other causes of action within the same complaint.

Hackworth, 682 S.E.2d at 876. If special damages are not properly pled, a civil conspiracy claim must be dismissed. AJG Holdings, LLC v. Dunn, 392 S.C. 160, 168,

708 S.E.2d 218 (Ct. App 2011); *see also* Gordon v. Busbee, 397 S.C. 119, 723 S.E.2d 822, 831-32 (Ct. App. 2012) (holding that directed verdict was proper where plaintiff's "amended complaint fails to allege any special damages incurred as a result of any conspiracy" but simply "allege the same damages as they do under other causes of action").

In its Amended Complaint, HillSouth fails to plead special damages with specificity. Instead, HillSouth merely baldly asserts that it "suffered special damages" as a result of the alleged conspiracy, and that it is entitled to an award of "actual damages, prejudgment interest, and punitive damages." (R. p. 24.) There is, however, no specific listing of what those "special damages" consist. Moreover, even its generic request for the award of actual damages, punitive damages, and prejudgment interest mirrored its requests for identical damages in the other causes of action. (R. pp. 24-26.)

At trial HillSouth's counsel argued – for the first time at the directed verdict stage following the close of HillSouth's case-in-chief – that HillSouth suffered damage to its reputation and brand as a result of the conspiracy. (*See* R. p. 199, l.4 – p. 200, l.20.) Even assuming, *arguendo*, that such damages could constitute special, rather than general, damages and further assuming, *arguendo*, that those damages could somehow relate to the alleged conspiracy, those "items of special damage" were not "specifically stated" in the Amended Complaint as required by Rule 9(g) of the South Carolina Rules of Civil Procedure. Notwithstanding the fact that there was absolutely no testimony or other evidence that HillSouth suffered any such damage as argued by counsel at the directed verdict stage, there is no allegation anywhere in the Amended Complaint that HillSouth claimed injury to reputation or brand as special damages. In fact, at trial

HillSouth did not even bother to move to amend its pleadings to conform to the evidence, *see* Rule 15(b), SCRCP, which it could have done had it produced evidence of special damages in the form of injury to reputation or brand.

HillSouth's failure to properly plead special damages is fatal to its civil conspiracy cause as a matter of law. The trial court, therefore, properly granted Smith's and Pinnacle's motion for a directed verdict, and dismissed HillSouth's claim for civil conspiracy.

II. HILLSOUTH FAILED TO PROVE ANY SPECIAL DAMAGES AT TRIAL; THEREFORE, ITS CLAIM FOR CIVIL CONSPIRACY FAILED AS A MATTER OF LAW.

Alternatively, even assuming that the mere recitation of the words "special damages" is specific enough to survive dismissal, HillSouth was still required to prove all elements of a civil conspiracy in order to recover. *See* Pye, 633 S.E.2d at 511. "The essential consideration in civil conspiracy is...whether the primary purpose or object of the combination is to injure the plaintiff." *Id.*; Benedict College, 4735 S.E.2d at 522. A plaintiff may not simply "incorporate the prior allegations [of other causes of action] and then allege the existence of a conspiracy and pray for damages resulting from the conspiracy." Todd, 278 S.E.2d at 611. A plaintiff bears the burden of not only properly pleading, but also proving, special damages from the conspiracy which are "different from those constituting the alleged tortious act. Todd, 278 S.E.2d at 611.

Here, HillSouth produced absolutely no evidence that it sustained special damages in any form, much less injury to its brand or reputation as it now contends, resulting from an alleged conspiracy which was designed primarily to injure HillSouth. Not a single witness – not even Hill, HillSouth's owner and proclaimed "damage

witness" – even so much as mentioned, even in passing, that HillSouth sustained injury to reputation or brand as a result of the complained of acts. Instead, both Hill, and to a lesser extent, Patel, HillSouth's CTO, testified at great length about HillSouth's damages which consisted solely of the lost profits associated with failing to obtain the SOTB contract. The only person who even mentioned injury to reputation or brand at trial was HillSouth's counsel in opposition to the directed verdict motion -- and, of course, the arguments of counsel do not constitute evidence.

HillSouth argues that the testimony of Schafer somehow demonstrates that HillSouth sustained reputation or brand injury. At no point in time did Schafer testify that HillSouth's brand or reputation was in any way diminished as a result of anything that occurred. If his testimony that he thought he was contracting with HillSouth and not Pinnacle is to be believed, the only inference to be drawn is that, as even he admits, he signed a contract to spend several hundred thousands of dollars without reading it carefully enough to even know with whom he was contracting. (*See* R. p. 69, ll.16-18; R. pp. 253-259.) Additionally, as Schafer explains, the subsequent questions regarding the contract performance related to Pinnacle's, not HillSouth's, performance and charges for extra equipment which Pinnacle, not HillSouth, made. (R. p. 76.) Again, there is absolutely no mention by Schafer that HillSouth's reputation or brand was at all diminished in any way by anything Smith or Pinnacle did or failed to do.

In seeming recognition that it failed to plead or produce evidence of special damages, HillSouth argues primarily that it should have been permitted to "elect remedies" between the Trade Secrets Act claim and the civil conspiracy claim. (Brief of Appellant pp.12-17.) The essence of its argument is that since the jury rejected its claim

under the Trade Secrets Act, the damages which it otherwise claimed were attributable thereto could then be bootstrapped to the civil conspiracy claim. This argument completely misapprehends the nature and purpose of the doctrine of election of remedies, ignores the special damages element of a civil conspiracy claim, and seeks to overturn a long history of well-established precedent starting with Todd, *supra*.

The "election of remedies involves a choice between different forms of redress afforded by law *for the same injury*, or different forms of proceeding on the same cause of action." Jones v. Winn-Dixie Greenville, Inc., 318 S.C. 171, 456 S.E.2d 429, 431 (Ct. App. 1995) (*emphasis added*). It requires "a choice between two or more different coexisting modes of procedure and relief afforded by law *for the same injury*." Save Charleston Foundation v. Murray, 286 S.C. 170, 333 S.E.2d 60, 63 (Ct. App. 1985) (*emphasis added*). The doctrine of election of remedies "has no application where two separate causes of action, each based on different facts, exists." Jones, 456 S.E.2d at 432.

By definition, the doctrine of election of remedies is inapplicable to claims for civil conspiracy. In order to maintain a civil conspiracy claim, a plaintiff must plead and prove "that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint." AJG Holdings, LLC, *supra* (*citing* Todd, 278 S.E.2d at 611). Additionally, the plaintiff must have sustained "special damages" as a result of the alleged conspiracy, which special damages must be separate and distinct from the damages sustained as a result of the other tortious conduct alleged. *E.g.*, Hackworth, 682 S.E.2d at 876; Pye, 633 S.E.2d at 511. The very elements required to sustain the cause dictate that a civil conspiracy is not, and cannot be, based on the "same facts" or the "same injuries" as any other cause of action, including one under the Trade

Secret Act, but is instead a separate cause of action based on different facts; therefore, the doctrine of election of remedies is inapplicable.

Moreover, HillSouth's suggestion that since it failed to prove its claim under the Trade Secrets Act, the damages attributable thereto should have thereby been attributable to the civil conspiracy claim, thus becoming "special damages," flies directly in the face of Todd, *supra*, and its well-settled progeny that the damages supporting a civil conspiracy cause must be separate and distinct from any other cause alleged in the complaint.[2] If accepted, HillSouth's theory would allow a plaintiff to ignore the special damages pleading requirements of Rule 9(g), pursue only general damages on a civil conspiracy claim, and still prevail but only if he happens to lose on the underlying tort claim: it is only if the plaintiff loses on the underlying claim that the damages otherwise common to other causes of action would become "special" to the civil conspiracy claim.[3] That theory of relief is unsupportable under the well-established law of this State.

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[2] Completely ignoring Todd and the cases that follow which clearly govern this action, HillSouth suggests that this issue is one of first impression in this State and directs this Court's attention to Nucor Corp. v. Bell, 482 F. Supp. 2d 714 (D.S.C. 2007), for the proposition that it should have been permitted to submit the civil conspiracy cause to the jury under an election of remedies theory. (Brief of Appellant pp. 14-16.) Contrary to HillSouth's assertions, Bell in no way addresses the issue of election of remedies. *See id.* at 726. Nor does Bell address the failure of a plaintiff to plead or prove special damages in connection with a civil conspiracy claim, which is the issue in this appeal; in fact, there is no discussion of whether the pleadings in that case met the elements of a civil conspiracy claim. *See id.* Rather, Bell merely stands for, in pertinent part, the rather unremarkable proposition that the Trade Secrets Act does not necessarily preempt common law causes of action, including potential civil conspiracy claims, since they may provide relief not afforded under the Act. *Id.* at 726-27. Preemption was not argued as a defense in this case and was not addressed by the trial court. Bell is completely inapposite.

[3] Once again ignoring the governing precedent set forth in Todd, *supra*, Hackworth, *supra*, Pye, *supra*, and related cases, HillSouth suggests that Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986) (*citing* Sorrell's Case, A.C. 700, 712 (1925)), and Cricket Cove Ventures, LLC v. Gilland, 390

For these reasons, too, the trial court properly directed verdict for Smith and HillSouth on HillSouth's civil conspiracy claim.

CONCLUSION

For the foregoing reasons, the circuit court's orders directing a verdict for the Respondents and denying the Appellant's motions for new trial and JNOV should be affirmed.

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February 12, 2015

S.C. 312, 701 S.E.2d 39 (Ct. App. 2010), permit a civil conspiracy claim to be submitted to a jury under an alternate or election of remedies theory. (Brief of Appellant pp. 12-13.) In Lee the primary issue was whether it was necessary for a plaintiff to plead an unlawful act in connection with a civil conspiracy claim, or whether a lawful act could suffice; there was no discussion of special damages or election of remedies. *See* 344 S.E.2d at 382-83. In Cricket Cove it was held, specifically, that the plaintiff had stated a claim for civil conspiracy in that it properly pled special damages which were distinct from the damages sought in the other causes of action pled in the complaint; there was absolutely no discussion of election of remedies. *See* 701 S.E.2d at 46. These cases are also inapposite.

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CERTIFICATE OF COUNSEL

I, Robert T. King, attorney for Respondents, hereby certify that the Brief of Respondents complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Robert T. King

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CERTIFICATE OF SERVICE

I, the undersigned, of the law office of King, Love & Smith, LLC, as attorneys for Respondents, do hereby certify that I have served the IBRIEF OF RESPONDENTS this February 16, 2015, by depositing the same in a U.S. Postal Box in an envelope, sufficient postage prepaid, properly addressed to the following:

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