THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-002025
Published Opinion No. 28030 (S.C. Sup. Ct. Filed May 19, 2021)

Leisel Paradis, ...Petitioner

vs.

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

Of whom Robert Bohnstengel and Stephanie Spann are the.....Respondents.

RESPONDENTS' PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Rule 221, SCACR, Respondents Robert Bohnstengel and Stephanie Spann ("Respondents") submit this Petition for Rehearing as to this Court's Opinion filed May 19, 2021 ("Opinion"). In the Opinion, the Court concludes "South Carolina's requirement of pleading special damages should be abolished" in respect to civil conspiracy claims. In doing so, the Court addresses the sole, narrow question the Court chose to consider in granting Petitioner's Petition for Certiorari.

In the Opinion, the Court discusses and analyzes the general history of civil conspiracy claims in South Carolina, including the history of the elements required to plead and prove a civil conspiracy claim. In doing so, and accounting for the Court abolishing the requirement to plead and prove special damages, the Court states the following in respect to a civil conspiracy claims: "In light of our decision today, we are returning to our long-standing precedent pre-*Todd* and for clarification specifically state a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff."

However, the Court's noted statement and "clarification" regarding the current requirements for pleading and proving a civil conspiracy claim is not consistent with the Court's past, historical requirement, including pre-Todd, that a party also plead and prove intent to harm/purposeful injury. In fashioning the Opinion, the Court omits intent to harm/purposeful injury as a long-standing, well-recognized element of a civil conspiracy claim in South Carolina. Because the Court makes no mention of intent to harm/purposeful injury as a necessary element of a civil conspiracy claim, it is unclear whether the Court, in addition to abolishing the

requirement to plead and prove special damages, also abolishes the requirement to prove intent to harm/purposeful injury.

Respondents petition the Court to rehear and reconsider the Opinion for the following reasons:

1. South Carolina historically requires intent to harm/purposeful injury as a necessary element of a civil conspiracy claim and the Opinion, whether intentionally or by oversight, fails to include intent to harm/purposeful injury as a necessary element; and,
2. Removing intent to harm/purposeful injury as a necessary element of a civil conspiracy claim creates a new substantive right as to civil conspiracy and, therefore, should only be applied prospectively.

ARGUMENT

I. The Opinion Fails to Address Intent to Harm as a Necessary Element of Civil Conspiracy.

On March 13, 2019, less than four months prior to the Court granting Petitioner's Petition for Writ of Certiorari on June 7, 2019, the Court issued its opinion in Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019). In Skydive, the Court recognized and stated the following: "To prove civil conspiracy, a plaintiff must prove the defendant acted 'for the purpose of injuring [intended to harm] the plaintiff.'" Skydive at 185, 826 S.E.2d at 590 (quoting City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 546, 677 S.E.2d 574, 579 (2009)). Skydive recognized and enunciated that intent to harm/purposeful injury is a necessary, required element of a civil conspiracy claim.

The Court's statement, recognition and requirement articulated in Skydive and City of Hartsville is consistent with the Court's long-standing requirement that intent to harm/purposeful

injury must be pleaded and proven in an actionable claim for civil conspiracy . LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988) ("'object'" of civil conspiracy must be to "'ruin or damage the business of another'") (quoting Charles v. Texas, 199 S.C. 156, 170, 18 S.E.2d 719, 724 (1942) (a pre-Todd decision); Future Group II v. NationsBank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996) ("civil conspiracy is a combination of two or more parties *joined for the purpose of* injuring the plaintiff") (emphasis added); McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006) ("civil conspiracy is a combination of two or more persons joining *for the purpose of injuring*"); Lawson v. S.C. Dep't of Corr., 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000) (same); Pye v. Estate of Fox, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006) ("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.") (emphasis added); Allegro, Inc. v. Scully, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016) ("'A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff.'") (quoting McMillan).[1] However, the Opinion fails to recognize, mention, or restate intent to harm/purposeful is a necessary element of a civil conspiracy claim. More particularly, the Court's statement intended to clarify the elements of civil conspiracy omits intent to harm/purposeful injury as a necessary element.

[1] In Allegro, then Chief Justice Pleicones stated the special damages element of civil conspiracy should be abolished. Allegro at 36, 791 S.E.2d at 146 (Pleicones, C. J., dissenting). Correspondingly, Chief Justice Beatty agreed with Justice Pleicones. Id. (Beatty, J., concurring in part and dissenting in part). Justice Hearn, writing for the majority, acknowledged then Chief Justice Pleicones' and Chief Justice Beatty's dissents, but concluded Allegro did not present the right case to consider abolishing special damages as an element of civil conspiracy. Id. at 34, 791 S.E.2d at 145, fn. 3. Notably, neither then Chief Justice Pleicones, Justice Hearn nor Chief Justice Beatty expressed a similar desire to abolish intent to harm/purposeful injury as an element of civil conspiracy.

By failing to recognize, mention, or restate intent to harm/purposeful injury is a necessary element of a civil conspiracy claim, the Opinion creates an unnecessary and unfortunate void that the bench, bar, and public will find difficult, if not impossible, to understand and apply. Therefore, the Court should clarify for the bench, bar and public whether intent to harm/purposeful injury remains a necessary element of civil conspiracy.

II. If Intent to Harm Is Removed as an Element of Civil Conspiracy, the Opinion Should Apply Prospectively Only.

If the Court intentionally and purposely removed intent to harm/purposeful injury as a necessary element that Petitioner, and others, must prove to support a civil conspiracy claim, the Court went beyond the sole, narrow issue it granted certiorari to review - whether special damages should remain an element of civil conspiracy. If so, and the Opinion stands, the Opinion removes two previously necessary elements of civil conspiracy – special damages and intent to harm/purposeful injury. Removing intent to harm/purposeful injury as a necessary element substantively reshapes the contours of civil conspiracy claims.

For decades, South Carolina law required a plaintiff to plead and prove intent to harm/purposeful injury to maintain a civil conspiracy claim. Consequently, individuals, such as Respondents, were on notice that actions otherwise meeting the elements of civil conspiracy could subject them to liability if their actions were done with the purpose (i.e. intent) to injure another person or entity. However, individuals, including Respondents, were never on notice they could be subject to liability for actions that were not done with the purpose or intent to injure an individual or entity. It is for this reason such a significant change in the law, if intended by the Court, should be instituted and applied prospectively not retrospectively. Any other result infringes upon the Due Process Clauses of the state and federal constitutions, as well as upon notions of fundamental fairness. Indeed, any other result subjects Respondents to liability that did not exist

when the actions and events giving rise to this case occurred.

"[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." McCaskey v. Shaw, 295 S.C. 372, 368 S.E.2d 672, 673 (Ct. App. 1988) (citing Bartlett v. Nationwide Mutual Fire Ins. Co., 290 S.C. 154, 157, 348 S.E.2d 530, 532 (Ct. App. 1986)) (emphasis added). "Prospective application is required when *liability is created where formerly none existed.*" Hupman v. Erskine College, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984) (emphasis added); *see also* Marcum v. Bowden, 372 S.C. 452, 458, 643 S.E.2d 85, 88 n.5 (2006) (holding "[i]t would offend notions of fairness ... to retroactively impose tort liability where previously there had been none... ").

The removal of the element of intent to harm/purposeful injury from civil conspiracy is not the mere creation of a new remedy. Intent to harm, not mere negligence, or something of lesser consequence, is an element of civil conspiracy and, therefore, an essential prerequisite to there being liability for a civil conspiracy claim. The removal of intent to harm/purposeful injury as a necessary element of civil conspiracy creates a new *substantive right* - a cause of action for civil conspiracy based on action(s) that an individual or entity did not intend to harm or purposely injure another.

Moreover, if intent to harm/purposeful injury is no longer required to maintain an action for civil conspiracy, Respondents will be subject to liability where none previously existed, including when Respondents allegedly engaged in the conspiracy and when Petitioner initiated this action. A retroactive application of a change in the law as to civil conspiracy in respect to the intent to harm/purposeful injury requirement violates fundamental due process and fairness as to Respondents and all others who may be subjected to liability where none existed at the time the

alleged unlawful actions occurred.

Similar to the United States Constitution, South Carolina's Constitution requires no person be deprived of property without due process of law. *See* U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. As recognized by the Court, constitutional guarantees of due process are "violated when a party is denied fundamental fairness." Hipp v. SC Dept. of Motor Vehicles, 381 S.C. 323, 325, 673 S.E.2d 416, 417 (2009); *see also* JRS Builders, Inc. v. Neunsinger, 364 S.C. 596, 602, 614 S.E.2d 629, 633 (2005) ("Whether a statutory amendment applies retroactively is ordinarily a matter of statutory construction and interpretation, not of constitutional law.")

The constitutional guarantees of due process require judicial rulemaking be only prospective in application. Notably, the United States Supreme Court acknowledged limitations on the retroactive application of a judicial decision "are inherent in the notion of due process." Rogers v. Tennessee, 532 U.S. 451, 456 (2001); *see also* Bouie v. City of Columbia, 378 U.S. 347, 353 (1964) (retroactive application of unforeseeable judicial enlargement of criminal statute violates due process).

Consistent with the United States Supreme Court, the Court recognized judicial decisions applied retroactively can violate the Due Process Clause. State v. Collins, 329 S.C. 23, 28, 495 S.E.2d 202, 205 n.4 (1998) (discussing judicial decision applied retroactively can violate the Due Process Clause); Muldrow v. Caldwell, 173 S.C. 243, 175 S.E. 501, 504 (1934) (discussing the retroactive feature of legislation may "deprive any citizen of this State of his 'property without due process of law."). Applying this principle, due process requires the individual to be punished receive fair notice of the type or severity of penalty that could be imposed on him for his conduct. *See* Mitchell, Jr. v. Fortis Ins. Co., 385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009) ("The Supreme Court expounded upon *Haslip's* due process standard in *Gore,* where it held that '[e]lementary

notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose.'") (quoting BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996)); *see also* Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 164-65, 604 S.E.2d 385, 389 (2004) (same).

Since Todd, and pre-Todd after Charles in 1942, including at the time of Respondents' alleged conduct and during the course of this lawsuit, the Court and the Court of Appeals consistently held intent to harm/purposeful injury is an essential element necessary to establish a cause of action for civil conspiracy. Indeed, since Charles in 1942, a period of almost eight decades, a party was required to prove intent to harm/purposeful injury to prove civil conspiracy – anything less than intentional, purposeful injury was insufficient.

In the absence of notice to Respondents that a civil conspiracy could be supported by conduct which does not constitute intentional, purposeful injury, the Due Process Clauses of the state and federal Constitutions prohibits retrospective relief. Therefore, should the Court eliminate the intent to harm/purposeful injury element for an actionable claim for civil conspiracy, the Court should not apply the new legal definition retrospectively, including to the Respondents.

CONCLUSION

The Court's statement and "clarification" regarding the current requirements for pleading and proving a civil conspiracy claim is not consistent with the Court's past, historical requirement that a party also plead and prove intent to harm/purposeful injury. In fashioning the Opinion, the Court omits intent to harm/purposeful injury as a long-standing, well-recognized element of a civil conspiracy claim in South Carolina. Because the Court makes no mention of intent to harm/purposeful injury as a necessary element of a civil conspiracy claim in the Opinion, it is

unclear whether the Court, in addition to abolishing the requirement to plead and prove special damages, also abolishes the requirement to prove intent to harm/purposeful injury.

For these reasons, the Court should grant Respondents' Petition for Rehearing. In doing so, the Court should clarify whether intent to harm/purposeful injury remains a necessary element of civil conspiracy, in particular whether a party must prove the alleged conspirators intended to purposely cause injury. If intent to harm/purposeful injury is no longer an element of civil conspiracy, the Court should apply the substantive change prospectively only, not to Respondents.

Respectfully submitted,

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