SC LAWYER

THE MAGAZINE OF THE SOUTH CAROLINA BAR // JANUARY 2022

Pitfalls in Using Joint Ownership in Probate


SPECIAL
DAMAGES

What's Left Post-*Paradis*?

Civil Conspiracy Claims After the Demise of Special Damages

By Andrew M. Connor

In *Paradis v. Charleston County School District*,[1] the Supreme Court of South Carolina reexamined, revised, and reiterated the elements of civil conspiracy claims in this state. Before *Paradis*, civil conspiracy required "(1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages."[2] Special damages were required to be separate and distinct from the damages alleged in other causes of action.[3]

In deciding *Paradis*, however, the Supreme Court overruled 40 years of precedent and abolished the requirement of special damages. As a result, the *Paradis* decision represents a sea-change in the pleading requirements for this cause of action in South Carolina and, for many practitioners, removes an insuperable obstacle to properly alleging a civil conspiracy claim.

Now that special damages are no longer required, the question becomes, "What's left?" Indeed, in the wake of the *Paradis* decision, sorting through the remnants of overruled court opinions to decipher what remains of our state's civil conspiracy jurisprudence seems no easy task. Nevertheless, this article attempts to lighten the practitioner's load in answering the question, "What's left?" The answer, of course, is, "*Almost* everything else."

The *Paradis* decision restated the elements of civil conspiracy as "(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."[4] While this seems a complete reformulation of the claim, the Supreme Court noted that its opinion overruled previous cases only "to the extent they impose or appear to impose a requirement of pleading (and proving) special damages."[5] Taken at face value, *Paradis*'s holding is much narrower than it seems at first glance and leaves prior case law mostly intact. Upon closer examination, however, the restated elements also appear to result in a conflict that implicitly overrules previous cases on another issue.

Civil conspiracy likely continues to require evidence of agreement.

In the formulation of civil conspiracy set out in *Paradis*, the first element requires "a combination or agreement of two or more persons."[6] This first element is substantially the same as the first element set out in pre-*Paradis* opinions

PHOTO BY GEORGE FULTON

requiring "a combination of two or more persons."[7] This requirement remains unchanged along with the evidentiary requirement of showing some agreement.

In order to prove such a combination or agreement, pre-*Paradis* decisions required direct or circumstantial evidence "from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise."[8] Recognizing the "covert and clandestine" nature of civil conspiracy, these cases allowed an agreement to "be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances."[9] Where the evidence pointed only to acts done independently, courts found plaintiffs had failed to meet their burden.[10] These pre-*Paradis* principles likely survive and should inform practitioners pursuing and defending civil conspiracy claims post-*Paradis*.

Paradis implicitly overruled prior case law allowing claims based on lawful conduct.

A number of cases decided prior to *Paradis* did not require plaintiffs to plead and prove an unlawful act or unlawful means in accomplishing a civil conspiracy. Indeed, many decisions allowed civil conspiracy claims to proceed even though defendants had "committed no unlawful act and no unlawful means were used."[11] These holdings directly conflict with the second element of the conspiracy cause of action set out in *Paradis* which requires a plaintiff to prove an agreement "to commit an unlawful act or a lawful act done by unlawful means."[12] As recognized in Justice Kittredge's concurring opinion, the conflict is such that *Paradis* likely implicitly overruled these prior decisions.[13] The Supreme Court's majority opinion deferred any express ruling on this conflict.[14]

It seems most likely that the Court will interpret the second element of civil conspiracy to disallow claims to proceed in the absence of an unlawful act or unlawful means. The expression of this requirement excludes the approval of its absence. As aptly stated in Justice Few's concurring opinion in language that may yet be included in a future majority opinion, "[T]he law should never permit a court or a jury to impose civil liability for lawful, non-tortious conduct."[15] It seems the *Paradis* reformulation of civil conspiracy implicitly adopts this maxim and overrules prior cases on this issue.

Intra-corporate conspiracy doctrine likely remains post-*Paradis*.

Prior to *Paradis*, our Supreme Court adopted the intra-corporate conspiracy doctrine which holds that "a civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities."[16] Under this doctrine, so long as they are acting within the scope of their relationship, a principal cannot conspire with an agent, and agents of a common principal cannot conspire among themselves because they constitute a single entity and not "two or more persons" required for a civil conspiracy claim.

This doctrine strikes at the heart of the first element of civil conspiracy under *Paradis*. Under the doctrine, there can be no evidence of an agreement because the principal-agent relationship constitutes a single entity. Thus, where the intra-corporate conspiracy doctrine applies, the first element of the claim—pre-*Paradis* or post-*Paradis*—fails. Paradis did not explicitly or implicitly alter the application of this doctrine. Practitioners should, therefore, keep the intra-corporate conspiracy doctrine in mind when handling civil conspiracy claims.

Civil conspiracy claims continue to require an overt act in furtherance of conspiracy.

South Carolina has long recognized the requirement of an "overt acts" which cause damage to the plaintiff for a conspiracy to become civilly actionable.[17] Indeed, courts have recognized the obvious that "[a]n unexecuted civil conspiracy is not actionable."[18]

Perhaps ironically, as noted in *Paradis*, this requirement of "overt acts" (along with discussion of an election of remedies issue) led to the evolution of the special damages requirement that *Paradis* overturned.[19] Nevertheless, the overt act requirement has been explicitly incorporated into the new formulation of civil conspiracy iterated in *Paradis*. In its opinion, the Supreme Court included the requirement in the third element of the claim requiring "the commission of an overt act in furtherance of the agreement."[20] As a result, unlike some of the other issues discussed herein, there is no question—some overt act is required for a civil conspiracy claim under *Paradis*.

Intent to harm remains an integral part of a civil conspiracy claim.

Under the pre-*Paradis* formulation of the claim, the second element required that the purpose of the conspiracy be to injure the plaintiff.[21] Courts went on to explain that the "essential consideration" for a civil conspiracy claim was "whether the primary purpose or object of the combination is to injure the plaintiff."[22]

Practitioners will note that the *Paradis* opinion did not include language concerning the purpose of the conspiracy in the formal elements of the claim. The intent of the conspiracy, however, remains relevant under the *Paradis* analysis. In footnote nine of the *Paradis* decision, the Supreme Court explicitly recognized civil conspiracy as an "intentional tort" for which "an intent to harm . . . remains an inherent part of the analysis."[23]

***

As with any material change in the case law, it may take years (or decades) for subsequent cases in ever-varying fact patterns to backfill our jurisprudence with nuanced analysis. While much is yet to be decided on this front, the *Paradis* opinion seems to have left a significant portion of civil conspiracy

jurisprudence intact. Thankfully, the body of undisturbed case law should aid the practitioner in both formulating and defending civil conspiracy claims post-*Paradis*.

Andrew M. Connor is a partner in the Charleston office of Nelson Mullins Riley & Scarborough LLP where he primarily practices in the areas of products liability and complex litigation.

Endnotes

[1] 433 S.C. 562, 861 S.E.2d 774 (2021)
[2] *Pye v. Estate of Fox*, 369 S.C. 555, 566–67, 633 S.E.2d 505, 511 (2006).
[3] *Id.* at 568, 633 S.E.2d at 511.
[4] *Paradis*, 433 S.C. at 574, 861 S.E.2d at 780.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 569, 861 S.E.2d at 777 (quoting *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 10, 344 S.E.2d 379, 382 (Ct. App. 1986)).
[8] *Pye* at 567, 633 S.E.2d at 511.
[9] *Id.*
[10] *Id.* at 568, 633 S.E.2d at 512 (plaintiff failed to show agreement where only evidence showed alleged conspirator "took [action] on his own").
[11] *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988) ("An action for civil conspiracy may exist even though respondents committed no unlawful act and no unlawful means were used."); *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 11, 344 S.E.2d 379, 382 (Ct. App. 1986) ("However, an unlawful act is not a necessary element of the tort. An action for conspiracy may lie even though no unlawful means are used and no independently unlawful acts are committed.").
[12] *Paradis* at 574, 861 S.E.2d at 780.
[13] *Id.* at 578, 861 S.E.2d at 782 ("It is the second element—to commit an *unlawful act* or a lawful act by *unlawful means*—that restores an objective legal standard to this cause of action. When the appellate courts of this state approved of an analytical framework that allowed one's personal sense of fairness and right and wrong to be sufficient for a civil conspiracy claim, we created a rudderless cause of action.").
[14] *Id.* at 576, 861 S.E.2d at 781 ("Any further arguments potentially affecting the viability of Petitioner's claim, whether they arise from this Court's decision or otherwise, are properly raised upon remand to the circuit court, in the first instance[.]").
[15] *Id.* at 582, 861 S.E.2d at 785 (Few, J., concurring).
[16] *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886–87 (2006).
[17] *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981).
[18] *Id.* (citing *Charles v. Texas Company*, 199 S.C. 156, 18 S.E.2d 719 (1942)).
[19] *Paradis* at 571-73, 861 S.E.2d at 779-80.
[20] *Id.* at 574, 861 S.E.2d at 780.
[21] *Pye* at 567, 633 S.E.2d at 511.
[22] *Id.*
[23] *Paradis* at 574, 861 S.E.2d at 780 n.9.