In The

Supreme Court of Virginia

RECORD NO.: 091172

ADNAN SYED; SHERIZA OUSMAN; ZEROWIRE TECHNOLOGIES, INC.,

Appellants,

v.

ZH TECHNOLOGIES, INC.; ABULALA K. NASER,

Appellees.

BRIEF OF APPELLANTS

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To the Honorable Chief Justice and Justices of the Supreme Court of Virginia:

Adnan I. Syed (hereinafter "Mr. Syed"), Sheriza Ousman, Mr. Syed's wife (hereinafter "Mrs. Ousman"), and Zerowire Technologies, Inc., Mr. Syed's company (hereinafter "Zerowire"), respectfully and jointly, by counsel, submit this Opening Brief of Appellants for consideration by this Honorable Court.

STATEMENT OF NATURE OF CASE AND MATERIAL PROCEEDINGS IN TRIAL COURT

On March 25, 2005, ZH Technologies, Inc. ("ZH Technologies") and Abulala K. Naser ("Naser") filed a verified Bill of Complaint with the Fairfax County Circuit Court against Mr. Syed, Mrs. Ousman, and Zerowire. (J.A. 1-16)[1]. In their verified Bill of Complaint Naser and ZH Technologies pleaded the following causes of action: breach of fiduciary duty against Mr. Syed ("Count I"); conversion against Mr. Syed ("Count II"); unjust enrichment against Mr. Syed and Mrs. Ousman ("Count III"); fraud against Mr. Syed ("Count IV"); violation of the Virginia business conspiracy statute against Mr. Syed, Mrs. Ousman, and Zerowire ("Count V");[2] tortious interference with contracts against Mr. Syed and Zerowire ("Count VI"); and

[1] "J.A." refers to the Joint Appendix.
[2] Va. Code § 18.2-500.

constructive trust against Mr. Syed and Mrs. Ousman ("Count VII"). (J.A. 1-16).

All of the claims in the Bill of Complaint were premised upon the unsubstantiated allegation that Mr. Syed was an employee of ZH Technologies. (J.A. 1-16, 526). Thus, In Count I alleged that Mr. Syed breached his fiduciary duty as an *employee* of ZH Technologies. (J.A. 9, 526). Furthermore, Count II as to conversion, Count III as to unjust enrichment, Count IV as to fraud, and Count VII as to constructive trust were also premised on the allegation that Mr. Syed, as an employee of ZH Technologies, did not have a right to the funds in the dedicated account especially created for his wireless internet business. (J.A. 9-14).

Count V of the Bill of Complaint dealing with the claim of business conspiracy specifically alleged an intra-corporate conspiracy between Mr. Syed, Mrs. Ousman, and Zerowire for the purpose of injuring ZH Technologies in its business. (J.A. 12, 528). No other co-conspirators were either named or implied in the Bill of Complaint. (J.A. 12).

In defending themselves from these allegations, Mr. Syed, Mrs. Ousman, and Zerowire concentrated all of their efforts and spent most of their time proving: (1) that Mr. Syed was not an employee of ZH Technologies and (2) that an intra-corporate conspiracy alleged in the Bill

of Complaint is not legally possible in Virginia. (J.A. 284-302, 455-483, 526). As no evidence was presented or existed to support the elements of any of the claims advanced in the Bill of Complaint, Mr. Syed, Mrs. Ousman, and Zerowire made a motion to strike, which they subsequently renewed several times during and after the trial. (J.A. 284-302, 455-483, 530, 1156-80). Mr. Syed, Mrs. Ousman and Zerowire also motioned the trial court to grant them summary judgment against ZH Technologies and Naser based on the fact that ZH Technologies had no legal standing or capacity to sue as its corporate existence was effectively terminated during all relevant to this litigation times[3]. (J.A. 66-74).

Recognizing that no evidence existed to support their claim that Mr. Syed was an employee of ZH Technologies and realizing that they needed an outside person to complete their claim for business conspiracy, Naser and ZH Technologies finally moved to amend their Bill of Complaint after both parties presented their evidence to: (1) include a new claim that Mr. Syed owed and breached a partnership fiduciary duty to ZH Technologies

[3] The trial court "resolved" this issue by giving the following instruction: "In determining whether Defendant breached a fiduciary duty to Plaintiff, you may consider and weigh whether and to what extent the Defendant was aware of the fact that the corporate status of the Plaintiff had been terminated." (J.A. 987; 588-607). This instruction fell short of informing the jury as to the state of the law with regard to this issue.

and (2) add additional co-conspirator in the face of Trevor Warner (hereinafter "Mr. Warner"). (J.A. 525-529).

In denying their untimely motion to amend as to the allegation of employment relationship, the trial court stated as follows:

> They spent a lot of time putting on evidence he (Mr. Syed) was not an employee. … [I]t does not strike me as fair to them having to put on notice as to what the complaint is. They have devoted it seems to me significant effort in this trial to demonstrate to this jury he (Mr. Syed) was not an employee but something else. … Your motion is denied. *This is fundamentally unfair to do this at this point*.

(J.A. 526-27) (emphasis added).

With regard to Naser's and ZH Technologies' request to amend their Bill of Complaint in order to add Mr. Warner as a co-conspirator, the trial court said as follows:

> Now, I think again, this is fundamentally unfair. It is just in my opinion to be *fundamentally unfair after they rest, after they put on their case to permit you to amend your complaint*.

(J.A. 529) (emphasis added).

Unfortunately, disregarding its own previous ruling and Mr. Syed's, Mrs. Ousman's, and Zerowire's objections, the trial court then proceeded to instruct the jury that it could return a verdict in favor of both ZH Technologies and Naser: (1) on the claim of breach of fiduciary duty if it

found that Mr. Syed breached a partnership fiduciary duty[4] and (2) on the claim of conspiracy if it found that Mr. Syed, Mrs. Ousman, and Zerowire conspired with at least one other person. (J.A. 577-85, 535-40, 652-59, 687-88, 980-85, 988-89). Notwithstanding Mr. Syed's objections, the trial court further allowed Naser and ZH Technologies to argue to the jury that Mr. Syed conspired with Mr. Warner and also breached a partnership duty to Naser.[5] (J.A. 672-74).

After a six-day trial on the merits, the jury returned a verdict, the pertinent portions of which are summarized by the following chart:

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[4] The trial court also rejected Mr. Syed's request for a jury instruction giving the standards for formation of a partnership, the absence of which gave the jury the impression that a partnership existed. (J.A. 587-88)

[5] The fact that the jury later considered Mr. Warner in its deliberations is evident from its questions to the court. (J.A. 675-80, 921, 923-26). It's instructive to list some of these questions here:

- "Do not understand the status of Mr. Warner in this case. Mr. Wood has stated he is a co-conspirator. He is not represented in this case. Is he to be considered in decisions? Is there a separate case?" (J.A. 924).
- "If Warner was involved in getting ZH clients to change to Zerowire why wasn't Warner included in the suite as co-conspirator?" (J.A. 925).
- "Can we find against Warner in this suite?" (J.A. 926).
- "Who is co-conspirator referred to?" (J.A. 921).

	II (Conv.)	V (Consp.)	VI (TI)	I (BFD)	III (UE)	IV (Fraud)
Liability						
Syed	For Δ	For Π	For Π	For Π	For Π	For Π
Ousman	-------	For Δ	-------	-------	For Π	-------
Zerowire	-------	For Π	For Π	-------	-------	-------
Compensatory Damages						
Syed	$0	$0	$0	$22,500	$9,000	$22,500
Ousman	-----	$0	-------	-------	$13,500	-------
Zerowire	-----	$0	$0	-------	-------	-------

Punitive Damages

Syed	Re Counts II, V & VI: $375,000
Ousman	Re Counts II, V & VI: $0
Zerowire	Re Counts II, V & VI: $375,000

Despite the fact that the jury was clearly instructed that in order to award punitive damages it must first award compensatory damages, punitive damages were awarded against Mr. Syed and Zerowire on two counts on which no compensatory damages were awarded. (J.A. 669-71, 1016, 1019, 1138-55). Disregarding Mr. Syed's motion to set aside the punitive damages award as improper under the Virginia law, the trial court, in its letter opinion dated December 14, 2007, confirmed the jury's verdict as to the issue of liability and ordered a new trial on both compensatory and punitive damages only. (J.A. 1403-05, 1582-89).

Following a six-day trial on damages, the jury returned the following verdict:

	Syed	Ousman	Zerowire
Compensatory Damages			
V (Consp.)			
Naser	$36, 146.27	--------	$7,748.63
ZH	$0	--------	$0
I (BFD)			
Naser	$0	--------	--------
ZH	$36,146.27	--------	--------
III (UE)			
Naser	$36,146.27	$0	--------
ZH	$0	$0	--------
IV (Fraud)			
Naser	$0	--------	--------
ZH	$36,146.27	--------	--------
VI (TI)			
Naser	$0	--------	$0
ZH	$36,146.27	--------	$7,748.63
Punitive Damages			
V (Consp.)			
Naser	--------	--------	--------
ZH	--------	--------	--------
I (BFD)			
Naser	$0	--------	--------
ZH	$36,146.27	--------	--------
III (UE)			
Naser	$18,073.13	--------	--------
ZH	$0	--------	--------
IV (Fraud)			
Naser	$0	--------	--------
ZH	$18,073.13	--------	--------
VI (TI)			
Naser	$0	--------	$0
ZH	$18,073.13	--------	$3,874.31

In its order dated March 10, 2009, the trial court denied Mr. Syed's Motion to Set Aside the Jury's Verdict and ordered treble damages in accordance with Virginia Code § 18.2-500(a), in the amount of $108,438.81 against Mr. Syed and in favor of Naser, and in the amount of $23,245.89 against Zerowire and in favor of Naser. (J.A. 1739-40). The trial court also granted to Naser an attorney fee award in the amount of $644,447.35 and expenses of $31,943.30, to be paid by Mr. Syed and Zerowire, jointly and severally. (J.A. 1739-40). On March 31, 2009, the trial court issued a final order in this case. (J.A. 1741-46). This appeal followed.

STATEMENT OF FACTS

In 2002, Mr. Syed, Naser, and two other people decided to start a business for the purpose of going after government contracts. (J.A. 87-90, 351-57). In this regard, the four of them, including Mr. Syed and Naser, signed a letter of intent. (J.A. 91, 875, 357-58). At the insistence of Naser the new business venture was to operate under the umbrella of ZH Technologies in order to show previous business activity. (J.A. 88-9). The agreement between the four partners was that while they were trying to obtain government contracts, they will continue to be engaged in their separate businesses and to retain all profits from these endeavors. (J.A. 89, 160-61). During this time, Naser through ZH Technologies worked as a

contractor for the IRS and Mr. Syed worked as an independent contractor for Trinocor Technologies, Inc. ("Trinicor"), where he provided high speed internet access to hotels and motels. (J.A. 89, 361-64).

After Mr. Syed's left Trinocor, Naser offered him to continue in the same line of business under the umbrella of ZH Technologies. (J.A. 378-79). According to Naser, this would have allowed ZH Technologies to expend its corporate resume even further in order to look more attractive for their government bids. (J.A. 378-79, 383-84). To enable Mr. Syed to independently run his wireless internet business under the umbrella of ZH Technologies, Naser, as ZH Technologies' president, opened a dedicated bank account for Mr. Syed's business and made him a signatory. (J.A. 191, 389). During this arrangement, Ms. Syed was getting paid the difference between the expenses and revenues of his wireless internet business. (J.A. 142-43, 180, 192, 387-89).

When finally in August of 2003, the government business between the four partners fell apart, Mr. Syed and Naser entered into an oral agreement whereby the two of them agreed to continue their efforts in obtaining government contracts and to split any revenues from that side of the business 50/50. (J.A. 876, 176-77, 359-60, 380). In the mean time,

they also agreed to continue working in their separate endeavors to stay afloat financially. (J.A. 385).

After several years, Mr. Syed's hard work and perseverance finally paid off and his wireless internet business started to bring some revenues. (J.A. 416). Although Naser never really participated in Mr. Syed's wireless internet business and never demanded any funds from Mr. Syed's dedicated wireless internet business account, he emailed to Mr. Syed on February 13, 2005 asking him to sign a memorandum of understanding, which would have provided Naser with 50 percent of Mr. Syed's wireless internet business. (J.A. 138, 186-92, 400-405, 412-413). After Mr. Syed understandably refused by notifying Naser on February 28, 2005 about leaving ZH Technologies, he then received a Cease and Desist letter from Naser's attorney followed by Naser's personal threat that he will take Mr. Syed down. (J.A. 405-410).

Unwilling to be entangled in a protracted court action, Mr. Syed provided Naser's attorney with all of the information regarding its wireless internet business and client base. (J.A. 410). Instead of using this information to contact the wireless internet business clients and to take over the business, Naser and his attorney used that information to sue Mr. Syed on March 25, 2005. (J.A. 1-16).

During the trial, ZH Technologies' accountant, Adeel Zafar ("Mr. Zafar"), testified that although Mr. Syed was receiving 1099s as an independent contractor and never received any salary, Naser requested in 2005 that Mr. Syed be issued a W-2 retroactively, which Mr. Zafar refused to do.[6] (J.A. 266-67, 312-13, 317-18). Mr. Zafar further testified that at the beginning of 2005, at the request of Mr. Syed who was trying to obtain a loan to buy a house, he checked the status of ZH Technologies and discovered that it had been terminated as of August, 2004. (J.A. 306-7, 395-99).

ASSIGNMENTS OF ERROR

II. The trial court erred in instructing the jury on breach of partnership duty theory and on the jury's responsibility to return a verdict against Mr. Syed if the jury found Mr. Syed breached a partnership fiduciary duty to Naser despite the fact that such theory was never pled in the Bill of Complaint.

[6] During the trial, Naser admitted that Mr. Syed was never issued a W-2 form; that ZH Technologies never did any withholding from Mr. Syed; that the only form Mr. Syed ever received from ZH Technologies was 1099. (J.A. 182-83). Naser further testified that he never controlled the hours worked by Mr. Syed; never supervised Mr. Syed while he was working; never inspected Mr. Syed's work; and never told Mr. Syed how to do his work. (J.A. 217-18).

IV. The trial court erred in allowing Naser and ZH Technologies to argue to the jury that the jury may find a civil conspiracy if Mr. Syed conspired with Trevor Warner ("Mr. Warner") despite the fact that the Bill of Complaint neither listed Mr. Warner as a defendant nor as a co-conspirator under its civil conspiracy count.

VIII. The trial court erred in confirming the jury's verdict as to the issue of liability and ordering a new trial on damages despite the fact that the jury in the first trial awarded "0" damages to the prevailing party on the count of civil conspiracy and one cannot be found guilty of civil conspiracy until and unless it can first be proven that damages have been sustained.

IX. The trial court erred in ordering a new trial on damages after the jury came back with a $0 verdict on civil conspiracy and tortious interference counts because claims cannot be retried when punitive damages are awarded, but no compensatory damages are awarded as a predicate.

X. The trial court erred in refusing to strike all of plaintiffs' evidence despite the fact that ZH Technologies' corporate existence was terminated during the time of the alleged wrong.

XII. The trial court erred in awarding attorneys' fees to Naser and ZH Technologies because they failed to segregate them from attorneys' fees expended on other claims.

QUESTIONS PRESENTED

(1) Did the trial court err in allowing Naser and ZH Technologies argue and present to the jury new theories and facts not pled in their Bill of Complaint? (Assignments of Error Nos. II and IV).

(2) Did the trial court err in confirming the jury's verdict as to the issue of liability and ordering a new trial on damages despite the fact that one cannot be found guilty of civil conspiracy until and unless it can first be proven that damages have been sustained? (Assignment of Error No. VIII).

(3) Did the trial court err in ordering a new trial on damages despite the fact that the jury awarded "0" compensatory damages on conspiracy and tortious interference counts? (Assignment of Error No. IX).

(4) Did the trial court err in refusing to strike all of Naser's and ZH Technologies' evidence despite the fact that ZH Technologies' corporate existence was terminated during the time of the alleged wrong? (Assignment of Error No. X).

(5) Did the trial court err in awarding attorneys' fees to Naser and ZH Technologies for the count of civil conspiracy despite the fact that they

failed to segregate them from attorneys' fees expended on their other claims? (Assignment of Error No. XII).

ARGUMENTS

I. Standard of Review.

In reviewing the decision of a trial court on appeal, the Supreme Court of Virginia is "not bound by the trial court's view of the law." *Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 65-66, 481 S.E.2d 460, *cert. denied*, 522 U.S. 813 (1997). In *Omni Homes, Inc.*, the Court held that the trial court's error in its interpretation of the relevant legal standards warranted a *de novo* standard of review. *See id*.

In this appeal, the Court is presented solely with questions of law. As such, it is proper for the Court to apply a *de novo* standard of review. *Janvier v. Armino*, 272 Va. 353, 363, 634 S.E.2d 754, 759 (2006), *citing Wilby v. Gostel*, 265 Va. 437, 440, 578 S.E.2d 796, 798 (2003).

II. The trial court erred in allowing Naser and ZH Technologies to argue and present to the jury new theories and facts not pled in their Bill of Complaint.

Rule 1:4(d) of the Rules of the Supreme Court of Virginia requires each pleading to state enough facts to "*clearly inform* the opposite party of the true nature of the claim" asserted against him or her. (Emphasis added). This Court in *Hensley v. Dreyer* specifically mandated that "every

litigant is entitled to be told in plain and explicit language the adversary's ground of complaint." 247 Va. 25, 30, 439 S.E.2d 372 (1994). Furthermore, "a court may not base a judgment or decree upon facts not alleged or upon a right, however meritorious, that has not been pleaded and claimed." *Id.* In addition, "the rule that the proofs must correspond with the allegation is fully recognized" because "[i]ts purpose is to prevent surprise." *Caputo v. Holt*, 217 Va. 302, 306, 228 S.E.2d 134 (1976), *quoting Kennedy v. Mullins*, 155 Va. 166, 180, 154 S.E. 568 (1930); *see also Marabda v. Albanese & Assoc., P.C.*, 41 Va. Cir. 186 at 6-7, Not Reported in S.E.2d, 1996 WL 1065652 (Fairfax Cir. Ct. 1996), *citing Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.* 221 Va. 1139, 1141, 277 S.E.2d 228 (1981) ("[A]llegations not included in the motion for judgment cannot form the basis for a recovery.").

During the two years leading up to the trial, Mr. Syed, Mrs. Ousman, and Zerowire spent most of their time and efforts conducting careful discovery and preparing to defend themselves against the allegations contained in Naser's and ZH Technologies' verified complaint that Mr. Syed

breached his employee fiduciary duty to ZH Technologies[7] and also conspired to injure ZH Technologies in its business with Mrs. Ousman and Zerowire. However, when during the trial it became apparent that Naser and ZH Technologies will not be able to prove or sustain their initial theories of breach of employee's fiduciary duty and narrow conspiracy between Mr. Syed, Mrs. Ousman, and Zerowire, they confronted Mr. Syed at the end of the trial with new theories of breach of a partnership fiduciary duty to Naser personally and Mr. Syed's conspiracy with Mr. Warner, which were never pled in the Bill of Complaint.

Although the trial court properly denied Naser's and ZH Technologies' motion to amend their Bill of Complaint at the end of the trial as untimely and fundamentally unfair to Mr. Syed, it nevertheless allowed Naser and ZH Technologies to argue their novel theories to the jury in their closing statements and to include them in the jury instructions. Consequently, Naser and ZH Technologies' proofs did not correspond with their initial allegations in their Bill of Complaint and, therefore, resulted in unfair surprise to Mr. Syed.

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[7] Count I's *ad damnum* seeks relief for breach of employee fiduciary duty for ZH Technologies only. Naser's and ZH Technologies closing argument and jury instructions sought damages for breach of fiduciary duty to Naser personally as Mr. Syed's partner.

Although Section 8.01-377 of the Virginia Code seems to authorize the trial court to bypass the amendment of the pleadings by directing the jury to find the facts, such move is only allowed in a limited case where the trial court considers the variance between the evidence and allegations to be "such as could not have prejudiced the opposing party." This Court interpreted this statute in *Hensley v. Dreyer* as follows:

> In case of variance, Code § 8.01-377 gives a trial court the discretion to apply the foregoing rule reasonably either by permitting amendment of the pleadings (and possibly postponing the trial) or, lieu of amendment , by having the facts determined and rendering judgment, *but only on the condition that no prejudice results.* While the statute is remedial in purpose and should be liberally construed, *it should not be interpreted in manner inconsistent with its plain language*.

247 Va. 25, 439 S.E.2d 372 (1994) (emphasis added).[8]

In the present case, the trial court in denying Naser's and ZH Technologies' motion to amend their Bill of Complaint at the end of the trial, clearly stated and repeated several times that to do so would be "fundamentally unfair" to Mr. Syed, Mrs. Ousman, and Zerowire who "devoted it seems to me significant effort in this trial to demonstrate to this jury [Mr. Syed] was not an employee but something else." (J.A. 526-29).

[8] In *Hensley*, the Court held that "the trial court abused its discretion by concluding, in a manner inconsistent with the statutory language, that the variance 'could not have prejudiced" the sellers." 247 Va. 25, 30, 439 S.E.2d 372, 375 (1994).

The trial court, therefore, clearly admitted that to allow Naser and ZH Technologies to amend their Bill of Complaint after both parties rested, would result in prejudice to Mr. Syed, Mrs. Ousman, and Zerowire. The fact that the trial court later disregarded its own ruling and allowed Naser and ZH Technologies to argue to the jury that Mr. Syed conspired with Mr. Warner and breached a partnership duty to Naser personally, indicates that the trial court misinterpreted the meaning of Section 8.01-377 of the Virginia Code in applying it to the issue of variance between the evidence and the allegations. (J.A. 575-85).

For these reasons, the trial court erred in allowing Naser and ZH Technologies to argue and present to the jury new theories and facts not pled in their Bill of Complaint.

III. The trial court erred in confirming the jury's verdict as to the issue of liability and ordering a new trial on damages despite the fact that one cannot be found guilty of civil conspiracy until and unless it can first be proven that damages have been sustained.

Section 18.2-500 of the Virginia Code dealing with civil conspiracy states as follows:

> Any person who *shall be injured* in his reputation, trade, business or profession by reason of a violation of § 18.2-499, may sue therefor and *recover three-fold the damages by him sustained*, and the costs of suit, including a reasonable fee to plaintiff's counsel, and without limiting the generality of the term, "damages" shall include loss of profits.

(Emphasis added); *see also* Jury Instruction 34 (presenting to the jury the language of this statute) (J.A. 992).[9]

According to this Court's opinion in *Gallop v. Sharp* interpreting this statute, "the gist of the civil action of conspiracy is the *damage caused by the acts committed* in pursuance of the formed conspiracy and not the mere combination of two or more persons to accomplish an unlawful purpose or use unlawful means." 179 Va. 335, 338, 19 S.E.2d 84, 87 (1942) (emphasis added); *see also Ulloa v. QSP, Inc*., 271 Va. 72, 78, 624 S.E.2d 43, 47 (2006) (stating that proof of injury and proof that the injured party suffered damages was a necessary predicate to a verdict on a business conspiracy).

In *Ulloa v. QSP, Inc.*, as in the present case, the jury received instructions consistent with Section 18.2-500 of the Virginia Code, which required them to find proof of injury and that the injured party suffered damages as a predicate to a verdict on a business conspiracy claim. *See id.* at 78. Similarly to the present case, the jury awarded "0" damages to the prevailing party. *See id.* In upholding the trial court's decision to set aside the business conspiracy verdict, this Court stated that the jury's

[9] Jury Instruction number 29, which was prepared by Naser and ZH Technologies, specifically requires the jury to determine that Naser and ZH Technologies actually "suffered damages as a result of defendant's acts" in order to find Mr. Syed liable for civil conspiracy. (J.A. 990).

finding of "a conspiracy without damages in each instance was contrary to jury instructions" and therefore "[u]nder *Rome v. Kelly Springfield Tire Co.*, 217 Va. 943, 948, 234 S.E.2d 277, 281 (1977), the *verdicts were invalid as a matter of law*." *Id.* (emphasis added).

In the instant case, despite the fact that the jury found Mr. Syed and Zerowire to be liable on the claim of business conspiracy, it awarded "0" damages to Naser and ZH Technologies on this Count. Consequently, the jury's verdict not finding any compensatory damages notwithstanding liability was invalid as a matter of law and should have been set aside by the trial court. To put this in other words, it was contrary to the law for the trial court to allow Naser and ZH Technology to prove their damages during the second trial despite the fact that the liability issue had already been determined in their favor.

For these reasons, the trial court erred in confirming the jury's verdict as to the issue of liability and ordering a new trial on damages only despite the fact that one cannot be found guilty of civil conspiracy until and unless it can first be proven that damages have been sustained.

IV. The trial court erred in ordering a new trial on damages despite the fact that the jury awarded "0" compensatory damages on conspiracy and tortious interference counts.

"[A]n award of compensatory damages … is an indispensable predicate for an award of damages" under Virginia law. *Gasque v. Mooers Motor Car Co.*, 227 Va. 154, 159, 313 S.E.2d 384 (1984). Where "the jury awarded no compensatory damages …, there could be no award of punitive damages" and the claim "*will not be relitigated* in any subsequent trial." *O'Connell v. Bean*, 263 Va. 176, 180, 556 S.E.2d 741 (2002) (emphasis added); *see also Murray v. Hadid*, 238 Va. 722, 732, 385 S.E.2d 898 (1989) ("[A]n award of punitive damages must be predicated upon an award of compensatory damages.").

In this case, although the jury in the first trial awarded Naser and ZH Technologies punitive damages for their claims of civil conspiracy and tortious interference, it at the same time did not award them any compensatory damages for these claims. By applying the rule in *O'Connell v. Bean*, it follows that the entire verdict as to these claims should have been set aside as invalid.

Although both parties and the trial court have agreed that this Court's precedent directs that a verdict which awards punitive damages, but fails to award compensatory damages cannot be maintained, the trial court

nevertheless confirmed the jury's verdict as to liability and ordered a new trial on damages. (J.A. 1583-89). In making this decision, the trial court mistakenly relied on its interpretation of this Court's rule in *Zedd v. Jenkins*, 194 Va. 704, 74 S.E.2d 791 (1953).

In *Zedd*, this Court held that "the action of the trial court in changing the verdict was reversible error and entitled defendant to a new trial." *Id.* at 707. The Court further noted that:

> Both litigants were entitled to have a fair and impartial jury pass upon the merits of the case, with a full understanding of the principles of law applicable, *uninfluenced by the judge*, or anyone else. Neither party has had his claim so passed upon. In order to give the parties such a trial, this Court ordinary would reverse the judgment, *set aside the verdict* and remand the case.

Id. at 708 (emphasis added).

Although *Zedd* specifically addresses the parties' entitlement in certain cases to a new trial on both issues of liability and damages, the trial court refused to go that far and ordered a new trial on the issue of damages only. (J.A. 1583-89). In making this decision, the trial court erroneously reasoned that "[s]ince none of the issues now before the court impact upon liability, that portion of the jury's verdict is confirmed." (J.A. 1589). As has been shown in Argument III of this Brief, such reasoning was inherently faulty as no liability can possibly exist with regard to the claim of civil

conspiracy unless and until it can first be established that the injured party has suffered actual damages.

For these reasons, the trial court erred in ordering a new trial on damages despite the fact that the jury awarded "0" compensatory damages on conspiracy and tortious interference counts.

V. The trial court erred in refusing to strike all of Naser's and ZH Technologies' evidence despite the fact that ZH Technologies' corporate existence was terminated during the time of the alleged wrong.

It is an axiom of Virginia jurisprudence that "a legal wrong is the violation of a legal right, for which the law provides a remedy; a wrong not within the scope of the law … cannot be regarded as a wrong." *Michie's Jurisprudence of Va. & W. Va.*, Actions, ¶ 5 (2004). No one, as a matter of law, can be an employee of a non-existent corporation. *See McLean Bank v. Nelson*, 232 Va. 420, 423, 350 S.E.2d 651, 656 (1986) ("a dissolved corporation is no corporation at all"). Furthermore, a corporation cannot assert claims arising while the corporation's existence was terminated because "*its capacity to sue* or to be sued is terminated, irrespective of when the cause of action arose." *Harris v. T.I., Inc.*, 243 Va. 63, 65, 413 S.E.2d 605, 608 (1992) (emphasis added).

Naser and ZH Technologies were required to demonstrate a legal right that was violated at the time of the alleged wrong in order for them to

claim a potential remedy. The corporate existence of ZH Technologies, which is the only party seeking relief in the Bill of Complaint's *ad damnum*, was terminated from August 2, 2004 to March 30, 2005; and then again from July 31, 2006 to January 25, 2007. (J.A. 912). Hence, ZH Technologies' claims against Mr. Syed never existed because they could only have arisen during the time when ZH Technologies' corporate existence was terminated. Consequently, Mr. Syed owed ZH Technologies no duty and violated no right of ZH Technologies at the time when the alleged actions occurred.

Notwithstanding this fact, Naser and ZH Technologies argued that pursuant to Section 13.1-754 of the Virginia Code, once a corporation has been reinstated, the corporate existence is deemed to have continued from the date of termination of corporate existence. (J.A. 588-607). From this, they argue, necessarily follows that the corporation reacquires its ability to sue for violations which occurred against it during the time when its existence was terminated. (J.A. 588-607).

Section 13.1-754 of the Virginia Code in pertinent part provides as follows:

> Upon entry by the Commission of an order of reinstatement, the corporate existence shall be deemed to have continued from the date of termination of corporate existence, and *any liability* incurred by the corporation or a director, officer, or other agent

> after termination of corporate existence and before the reinstatement *shall be determined as if the termination of corporate existence had never occurred*.

Va. Code § 13.1-754 (emphasis added). A careful reading of this statute, Virginia case law, and legislative history shows that only claims *against* a suspended corporation are revived when the corporation's existence is reinstated. Thus, after *McLean* and *Harris* revealed the inequity of absolving a corporation from liability for actions while dissolved, the Virginia Legislature enacted in 2004 an amendment to Virginia Code § 13.1-754 to impose liability for claims that accrued *against* a terminated corporation.[10]

Disregarding the plain language of § 13.1-754, the trial court erroneously interpreted it as requiring an extra element of knowledge. Following this logic, the trial court not only refused to strike the evidence based on the fact that ZH Technologies did not exist during the times of alleged wrong, but instead requested that the jury be given the following instruction: "In determining whether the Defendant breached a fiduciary duty to the Plaintiff, you may consider and weigh whether and to what

[10] The 2004 amendment to § 13.1-754 of the Virginia Code changed "except that reinstatement shall have no effect on any question of personal liability of the directors, officers or agents in respect to the period between termination of corporate existence and reinstatement" to ", and any liability incurred by the corporation or a director, officer, or other agent after termination of corporate existence and before reinstatement shall be determined as if the termination of corporate existence had never occurred."

extent the Defendant was aware of the fact that the corporate status of the Plaintiff had been terminated." (J.A. 607, 1089).

For these reasons, the trial court erred in refusing to strike all of Naser's and ZH Technologies' evidence despite the fact that ZH Technologies' corporate existence was terminated during the time of the alleged wrong.

VI. The trial court erred in awarding attorneys' fees to Naser and ZH Technologies for the count of civil conspiracy despite the fact that they failed to segregate them from attorneys' fees expended on their other claims.

The trial court awarded Naser and ZH Technologies attorneys' fees in the amount of $644,447.35 and expenses of $31,943.30 pursuant to their statutory claim of civil conspiracy. (J.A. 1739-40). The trial court specifically stated in its order dated March 10, 2009 that it considers this amount "reasonable" under Virginia Code § 18.2-500.

In deciding whether the amount of attorneys' fees and costs granted by the trial court was reasonable, this Court in *West Square, L.L.C. v. Comm. Tech., Inc.,* stated that the prevailing party has "the burden to specify attorneys' fees associated with *a particular claim for which an award of attorneys' fees is allowed*." 274 Va. 425, 435-36, 649 S.E.2d 698, 703 (2007). "Even though claims may be intertwined and have a common factual basis, … the party seeking an award of costs and expenses, [has]

'the burden to establish to a reasonable degree of specificity' those cost and expenses associated" with that particular claim." *See id.* (quoting *Ulloa v. QSP, Inc.*, 271 Va. 72, 83, 624 S.E.2d 43, 50 (2006)[11]).

In the present case, Naser and ZH Technologies likewise had several claims, but the trial court allowed attorneys' fees and costs only with regard to their statutory conspiracy claim under § 18.2-500 of the Virginia Code. (J.A. 1739-40). Naser and ZH Technologies did not make any attempt to establish to a reasonable degree of specificity those attorneys' fees associated with their business conspiracy claim as their time entries contain no delineation between that claim and the other claims they had asserted in this matter, including their unsuccessful claim of conversion. (J.A. 1622- 1705). Consequently, Naser and ZH Technology are not entitled to recover their requested attorneys' fees.

For these reasons, the trial court erred in awarding attorneys' fees to Naser and ZH Technologies for the count of civil conspiracy despite the fact that they failed to segregate them from attorneys' fees expended on their other claims.

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[11] In *Ulloa*, the Supreme Court of Virginia reversed the trial court's award of attorneys' fees totaling $691,099.05 due to the fact that the prevailing party failed to reasonably separate out its attorneys' fees associated with its breach of contract claim. *See Ulloa* at 83.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, your Appellants, Adnan I. Syed, Sheriza Ousman, and Zerowire Technologies, Inc., respectfully request that this Honorable Court grant them the following relief:

(1) Reverse the trial court's final judgment and award in its entirety due to the fact that ZH Technologies' corporate existence was terminated during the time of the alleged wrong and it, therefore, was prevented from asserting any claims against Mr. Syed, Mrs. Ousman, and Zerowire; or in the alternative.

(2) Reverse the trial court's judgment confirming the first jury's verdict as to liability and ordering a new trial on damages by: (a) setting aside the first jury's verdict in regard to the claims of civil conspiracy and tortious interference as contrary to the law and (b) setting aside the first jury's verdict with regard to the claims of civil conspiracy and breach of fiduciary duty based on the fact that the trial court erroneously allowed Naser and ZH Technologies to argue and present to the jury new theories and facts not pled in their Bill of Complaint.

(3) In addition, the Appellants respectfully request that this Honorable Court reverse the trial court's judgment in regard to its award of attorneys' fees for the reasons stated above and also due to the fact that

Naser and ZH Technologies failed to segregate the attorneys' fees associate with their claim of civil conspiracy from attorneys' fee associated with their other claims.

Respectfully submitted,
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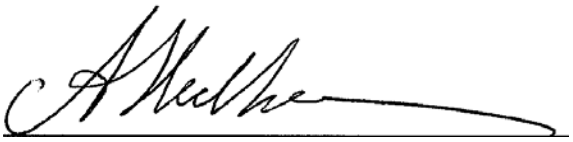
CERTIFICATE OF SERVICE

I do hereby certify that on this 14th day of December, 2009, I have complied with the provisions of Rule 5:26(d) of this Court by filing 15 copies of this Opening Brief of Appellants and an electronic copy of said brief with the Clerk of the Supreme Court of Virginia and by serving three (3) copies of this brief by first class mail, postage prepaid, to counsel for the Appellees: Robert E. Sevila, Esquire, William R. Fitzpatrick, Esquire, SEVILA, SAUNDERS, HUDDLESTON & WHITE, P.C., 30 North King Street, Leesburg, Virginia 20176.



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