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**Jun 18 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas  
R. Kirk Griffin, Circuit Court Judge

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Case No. 2022-CP-43-01006  
Case No. 2023-CP-36-00276  
Case No. 2023-CP-36-00300  
Appellate Case No. 2024-000742

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Jerry Cozby, Plaintiff,

vs.

Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Ouellette, and Quality Haulers, Inc., Defendants,

of which Kent Huntley Oliver and Thompson Construction Group, Inc., are Respondents.

AND

Dean Alan Arender and Tamala Arender, Appellants,

vs.

Kent Huntley Oliver, Thompson Construction Group, Inc., Curtis Kent Ouellette, and DMX Transportation Services, Inc., Defendants,

of which Kent Huntley Oliver and Thompson Construction Group, Inc. are Respondents.

AND

Kent Huntley Oliver, Respondent,

vs.

Curtis Kent Ouellette, Quality Haulers, Inc., Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc., Defendants,

of which Dean Alan Arender, US XPRESS Leasing, Inc., and US XPRESS, Inc., are Appellants.

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**REPLY TO RETURNS TO MOTION TO DISMISS**

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Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondents Kent Huntley Oliver and Thompson Construction Group, Inc., by and through the undersigned counsel, hereby submit this Reply to the arguments raised by Appellants Dean Alan Arender, Tamala Arender, US XPRESS, Inc., and US XPRESS Leasing, Inc. in their Returns to Respondents' Motion to Dismiss.

## ARGUMENT

### **I. The Order on Appeal does not Affect a Substantial Right.**

In each Return, the driving argument for immediate review is that the circuit court's order affects the Arender Plaintiffs' substantial right to choose their defendants. According to Appellants, the order is immediately appealable because, by joining the Cozby Action, the Arender Action, and the Oliver Action, it adds additional defendants to the previously separate cases. Appellants contend the order is therefore appealable under *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012), and *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015).

The circuit court's order does not affect any such substantial right. Unlike the underlying orders in *Neeltec* and *Morrow*, the circuit court's order does not deprive Arender (or any other Plaintiff) of the ability to maintain an action against the defendants he chose to sue. The fact that the order resulted in additional defendants being added to the once-separate cases does not mean it is immediately reviewable. See *Dorn v. Cohen*, 418 S.C. 126, 137-39, 791 S.E.2d 313, 319-20 (Ct. App. 2016) (holding an order adding a defendant was not immediately appealable because it did not "affect [the plaintiff's] substantial right to choose his own defendant"), *aff'd as modified*, 421 S.C. 517, 809 S.E.2d 53 (2017). As Respondents argued in their Motion to Dismiss, the Court should recognize the order has the same effect as an order granting intervention and hold it is not

immediately appealable. Motion at 7 n.2; *Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994).

**A. The cases cited by Appellants do not control.**

Again, Appellants rely primarily on *Neeltec* and *Morrow* for the proposition that the circuit court's order is immediately appealable because it impacts their right of election. However, those cases are distinguishable because they involved orders that *deprived* the plaintiffs of the ability to pursue claims against their chosen defendants.

In *Neeltec*, the South Carolina Supreme Court held an order substituting an individual defendant for two corporate defendants was immediately appealable. 397 S.C. at 566-67, 725 S.E.2d at 928-29. There, the plaintiff filed suit against an individual, alleging he interfered with the plaintiff's business in violation of the South Carolina Unfair Trade Practices Act. *Id.* at 565, 725 S.E.2d at 927. The individual defendant filed a "Motion for Summary Judgment or, in the Alternative, for Substitution of Parties," alleging two corporations were the proper defendants. *Id.* The special referee granted the defendant's motion and ordered that the two corporations be substituted as defendants. *Id.* at 565, 725 S.E.2d at 928.

After the Court of Appeals dismissed the plaintiff's appeal as interlocutory, the Supreme Court reversed, concluding the order was appealable under section 14-3-330(2)(a). Crucially, the Supreme Court found the order "effectively discontinues [plaintiff's] suit against [the individual defendant.]" *Id.* at 566, 725 S.E.2d at 928. Accordingly, the Court found the order affected the plaintiff's substantial right to choose her defendant. *Id.*

*Morrow* also involved an order that deprived a plaintiff the ability to pursue claims against his chosen defendant. In that case, the plaintiff filed suit against a nursing home and various entities related to the nursing home (the "Fundamental Entities") after he was injured while being

assisted in the shower. 412 S.C. at 536, 773 S.E.2d at 145. The plaintiff alleged direct negligence against the nursing home, and he alleged vicarious liability and corporate negligence against the Fundamental Entities. *Id.* The Fundamental Entities filed a motion to bifurcate, arguing the issues of direct negligence and corporate negligence were distinct, such that the plaintiff could only recover against the Fundamental Entities if he was first successful against the nursing home. *Id.* The trial court granted the motion, finding the plaintiff had to prove negligence against the nursing home before the corporate negligence claim could proceed. *Id.*

In holding the order of bifurcation was immediately appealable, the Supreme Court ruled the corporate negligence claim did not depend upon the success of the direct negligence claim. *Id.* at 538-39, 773 S.E.2d at 146. Accordingly, the Supreme Court found “the trial court’s order effectively grants the Fundamental Entities potential summary judgment on the issues of direct corporate liability.” *Id.* at 539, 773 S.E.2d at 146. Because the order therefore “deprives [the plaintiffs] of bringing their case against the defendant of their own choosing,” the Supreme Court held the order was immediately appealable. *Id.*

To summarize, both *Neeltec* and *Morrow* involved orders that prohibited plaintiffs from pursuing the claims they asserted against particular defendants. In that limited situation, the Supreme Court recognized the plaintiffs were entitled to immediate review. The situation here is far different. The order on appeal does not prohibit any plaintiff from pursuing claims against the defendants of his choosing. Unlike *Neeltec* and *Morrow*, this is not a situation where certain defendants have effectively been granted summary judgment.<sup>1</sup> Rather than extinguishing any

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<sup>1</sup> Appellants’ reliance on *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), is also misplaced. Although the *Smith* Court affirmed plaintiffs’ right to choose their defendants, *see id.* at 562-63, 799 S.E.2d at 487, that “right” was not the basis for appellate review. Instead, *Smith* arose from a grant of summary judgment, which is immediately appealable. *Id.* at 552, 799 S.E.2d at 481.

claims, the order simply requires the joinder of additional defendants. The Court should recognize Appellants' "substantial right" arguments are unavailing.

**B. The Court should dismiss following the reasoning in *Dorn*.**

Tellingly, neither Return mentions this Court's decision in *Dorn v. Cohen*. There, the Court rejected the precise argument Appellants advance here, holding an order adding a defendant does **not** impact a plaintiff's "substantial right to choose his own defendant." 418 S.C. at 142, 791 S.E.2d at 321. Although the South Carolina Supreme Court affirmed on different grounds, 421 S.C. 517, 809 S.E.2d 53, this Court's analysis remains sound, and the Court should follow it again here.

*Dorn* arose from a probate court action to remove the Cohens as cotrustees of a trust. 418 S.C. at 130, 791 S.E.2d at 315. At trial, after the conclusion of Dorn's case-in-chief, the probate court issued an order adding Abbie, Dorn's former wife, as a party to the action. *Id.* at 135, 791 S.E.2d at 318. Dorn immediately appealed the order, contending it affected his "substantial right to name his own defendants and control the presentation of evidence at trial." *Id.* at 136, 791 S.E.2d at 318.

Addressing the order's appealability, this Court noted the holdings in *Neeltec* and *Morrow* that "an order depriving a plaintiff of his or her ability to determine the defendant against whom he or she brings a cause of action can affect a substantial right[.]" *Id.* at 137, 791 S.E.2d at 319. Importantly, however, the Court also recognized "the fact that the probate court's order, on its face, added Abbie as a party to Dorn's petition is not inherently dispositive of whether the probate court's order was immediately appealable." *Id.* at 138, 791 S.E.2d at 319. The Court conducted a thorough analysis of *Neeltec* and *Morrow* and found those decisions did not support Dorn's "substantial right" argument: "Unlike the orders in *Neeltec* and *Morrow*, the probate court's order in this case

neither substituted Abbie for the Cohens nor deprived Dorn of the ability to maintain his petition to remove the Cohens as the Trust's cotrustees.” *Id.* at 139, 791 S.E.2d at 320. Instead, the Court found the order “had the effect of an order granting a motion to intervene” and was therefore not immediately appealable. *Id.* (citing *Duncan*, 331 S.C. at 485, 449 S.E.2d at 580).

Although the Supreme Court affirmed this Court’s holding as modified, it did so on an independent basis that is not applicable here. Specifically, the Supreme Court held the appealability issue should have been analyzed under the specialized statute governing appeals from the probate court. 421 S.C. at 520, 809 S.E.2d at 54; *see also Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (noting section 14-3-330 controls the appealability analysis “absent some specialized statute”).

Here, no specialized statute applies, and Appellants agree section 14-3-330 governs. Accordingly, this Court’s decision in *Dorn* is instructive, and the Court should reach the same result. Because the circuit court’s order does not deprive any plaintiff of the ability to pursue claims against any defendant, the substantial right of election is not implicated. Rather, as the *Dorn* Court held, the order effectively operates as one granting a motion to intervene. Indeed, if Appellants were correct that any order adding defendants to a plaintiff’s case impacted the substantial right of election, the number of interlocutory appeals before our appellate courts would increase substantially. Rather than allowing such piecemeal litigation, this Court should dismiss Appellants’ appeal.

## **II. Appellants’ Remaining Arguments Are Meritless.**

Rather than discussing appealability, Appellants devote most of their argument to chiding the circuit court. Those arguments are unsupported and irrelevant here. However, Appellants (US XPRESS, in particular) also contend the order is immediately appealable because it impacts their

“mode of trial.” Essentially, Appellants contend the order is subject to immediate review because it results in certain plaintiffs asserting claims against their employers in violation of the exclusivity provision of the Workers’ Compensation Act. *See* S.C. Code Ann. § 42-1-540.

There is a simple solution for Appellants’ hypothetical concerns. As the circuit court noted in its order, Rule 20(b), SCRPC, allows the court to make “such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.” The circuit court is certainly mindful of the exclusivity provision, and it can use the discretion provided by Rule 20(b) to avoid the hypothetical issues Appellants envision. Accordingly, Appellants’ arguments relating to the Workers’ Compensation Act are premature and provide no support for immediate appealability.

### **CONCLUSION**

For the foregoing reasons, as well as those set forth in Respondents’ Motion to Dismiss, the Court should dismiss this appeal.

*[Signature page to follow]*

Respectfully submitted,

**SMITH | ROBINSON**  
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**PROOF OF SERVICE**

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I, the undersigned employee of Smith Robinson Holler DuBose and Morgan, LLC, certify

that a true copy of Reply to Returns to Motion to Dismiss in this case has been served on the following, this 18<sup>th</sup> of June, 2024, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447).

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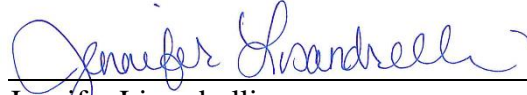
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June 18, 2024

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**Subject:** Arender v Oliver 2024-000742  
**Attachments:** [2024.06.18 Reply to Return to MTD, 1.pdf](#)  
[2024.06.18 POS Reply to Return MTD, 1.pdf](#)

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Attached for service is the Respondents' Reply to Returns to Motion to Dismiss. Thank you.

