THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Daniel B. Dorn, in his capacity as the Parent and Natural Guardian of E.D., R.D. and Y.D, Appellant.

v.

Paul S. Cohen and Susan Cohen, Individually and in their capacity as the Co-Conservators of the person of Abbie Ilene Dorn, a protected person and ward, and in their capacity as Co-Trustees of the Abbie Dorn Special Needs Trust, Respondents.

Paul S. Cohen, M.D and Susan Cohen, Respondents,

v.

E.D., R.D., and Y.D., The Living Issue of Abbie Ilene Dorn, and the South Carolina Department of Health and Human Services, Respondents below,

Of whom E.D., R.D., and Y.D., The Living Issue of Abbie Ilene Dorn are the Appellants,

and

the South Carolina Department of Health and Human Services is a Respondent.

In Re: The Abbie Dorn Special Needs Trust.

Appellate Case No. 2015-000659

The Honorable Deadra L. Jefferson
Horry County
Trial Court Case No. 2013CP2608152, 2013CP2608139,
2014CP2601691, 2014CP2601744

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err when it dismissed the appeal from the Probate Court as interlocutory because it affects a substantial right?

2. Did the Order adding Mrs. Dorn as a named Defendant to the Appellant's Petition, at conclusion of testimony, unduly prejudice Appellant's substantial right of the Appellant to name his own Defendants and to control the presentation of evidence during trial within the parameters of the South Carolina Rules of Civil Procedure?

STATEMENT OF THE CASE

This appeal arises from a Petition filed in the Probate Court for Horry County by the Appellant, Mr. Daniel Dorn, (hereinafter "Mr. Dorn") which sought to remove the Respondents, Paul and Susan Cohen (hereinafter "Mr. Cohen" and "Ms. Cohen" or "the Cohens") as the Co-Conservators and Co-Trustees of the Abbie Dorn Special Needs Trust.

A trial was commenced in Probate Court in March 2013. While the trial was in recess, on or about December 5, 2013, the Court issued an Order joining Mrs. Dorn as a party in both cases. (R. Vol. I, p. 38-39). Appellants, both Mr. Dorn and Attorney Kachmarsky for the children, filed Notices of Appeal to the Horry County Court of Common Pleas in early 2014. The appeals were consolidated in the circuit court, and Respondents filed a Motion to Stay the appeal based on the recusal by the Probate Judge just prior to her losing her reelection bid in June 2014 (R. Vol. I, p. 358-390), and pending Motion for Mistrial filed by the Respondents in the Probate Court based on the judge not being reelected. (R. Vol. I, p. 346-357). The circuit court held a hearing on the Respondents' Motion to Stay the appeal on February 9, 2015. The circuit court judge did

not rule on the Motion to Stay, but instead held that the appeal was interlocutory and dismissed the appeal. (R. Vol. II, p. 554). This appeal follows.

FACTS

Mr. Dorn and Mrs. Abbie Ilene Dorn (hereinafter "Mrs. Dorn") were married in the State of California in 2002. In or around June 2006, Abbie Ilene Dorn gave birth to three (3) children, R.D, E.D., and Y.D. (hereinafter "the Dorn children"). Tragically, during childbirth, Mrs. Dorn suffered catastrophic injuries. The first two babies were delivered normally at Cedars-Sinai Medical Center, then, while attempting to reposition the third child for delivery, the doctor accidentally cut Mrs. Dorn's uterus causing massive blood loss, shock, and ultimately cardiac arrest. As a result of this accident, Mrs. Dorn was left paralyzed, unable to speak totally unable to function. To date, Mrs. Dorn remains totally and permanently disabled—stuck in a persistent vegetative state. She lacks any mental faculties or the ability to communicate, perceive, or be aware of the world around her.

A medical malpractice claim was filed in the State of California on behalf of Mrs. Dorn, which ultimately resulted in settlement. Pursuant to the terms of the settlement agreement, a sum of just under One Million ($1,000,000) Dollars was placed into the Abbie Dorn Special Needs Trust (hereinafter "the Trust") with additional future contributions to be made to same. Mrs. Dorn is currently a ward of the Court, and she also is under the Guardianship of her parents, the Cohens. (R. Vol. I, p. 3-27; R. Vol. III, p. 1144-1157).

Mr. Dorn now has custody of the Dorn children, who are now eight (8) years of age. However, this arrangement only developed after years of litigation brought by the Cohens

in the California Superior Court against Mr. Dorn. The Cohens sought visitation of the Dorn children by their daughter, who was at the time, and still remains in a persistent vegetative state. The litigation was costly, and unfortunately, the Cohens allowed the Trust to bear the burden of their legal pursuits, depleting almost One Million ($1,000,000) Dollars from the Trust in legal fees alone.

As a result, Mr. Dorn first filed this action against the Cohens, both individually and as Co-Conservators and Co-Trustees of Mrs. Dorn and the Trust. (R. Vol. I, p. 50-94). The Petition filed by Mr. Dorn sought removal of the Cohens as "trustees" and requested monetary reimbursement to the Trust for the legal expenses incurred by the Cohens in the failed California litigation. Mr. Dorn alleged various causes of action including breach of several fiduciary duties and willful violations by the Cohens of the terms of the Trust while acting as Conservators and Trustees. In a strange turn of events, one day after Mr. Dorn filed his petition, the Cohens filed a separate Petition against Mr. Dorn and the Dorn Children seeking to amend the terms of the Trust to allow the Cohens to incur legal fees without advance approval from the Court—the very same conduct for which Mr. Dorn filed the initial Petition. (R. Vol. I, p. 95-189).

The Probate Judge appointed Attorney V. Lee Moore as the Guardian ad Litem (hereinafter "GAL") for Mrs. Dorn. (R. Vol. I, p. 28). The Probate Judge also appointed Attorney Lynette R. Hedgepath to serve as the attorney for Mrs. Dorn, individually. The Court did not appoint any attorney to represent the GAL. (R. Vol. I, p. 29).

Given the number of common issues arising in both matters, the Court consolidated the two matters for discovery and trial purposes only. In the Order consolidating the

matters, the Court indicated that separate final Orders would be issued in each matter. (R. Vol. I, p. 409-494). Although Mr. Dorn filed his Petition on behalf of the Dorn Children, the Cohens then objected to Counsel for Mr. Dorn serving as Counsel for the Dorn Children in the Petition filed by the Cohens, wherein the Dorn children were named as Respondents. Accordingly, the Court appointed Attorney John Kachmarsky as Attorney and GAL to the Dorn Children, as beneficiaries of the Trust. (R. Vol. I, p. 30).

Once the Court resolved the issues concerning consolidation and Court appointments, litigation commenced. Over the course of the next several years, formal written discovery, depositions, and pretrial hearings were conducted in the consolidated cases. In the Petition filed by Mr. Dorn, Mrs. Dorn was not listed as a party in his action. Accordingly, Mr. Dorn did not serve the Petition upon Mrs. Dorn, her GAL, nor her Court appointed Attorney as they were not identified parties to the Petition. Further, no discovery was served upon Mrs. Dorn, the GAL, nor the Court appointed Attorney for Mrs. Dorn. During the course of discovery, only Counsel for Mr. Dorn, Counsel for the Respondents, and the Court appointed GAL and Attorney for the Dorn children ever participated in the exchange of formal discovery. The original Cohen Petition only listed "In re the Abbie Dorn Special Needs Trust" in the caption, with no persons listed as Respondent. (R. Vol. I, p. 95-189). The Summons to the Cohen Petition, however, was served on "Abbie Ilene Dorn and Her Guardians and Conservators and the Trustee of the Abbie Dorn Special Needs Trust, Paul S. Cohen, MD and Susan Cohen." (R. Vol. I, p. 95-189). In March 2011, the Cohens amended their Petition and added E.D., R.D., and Y.D, the Living Issue of Abbie Ilene Dorn and the SC Department of Health and Human

Services as Respondents. (R. Vol. I, p. 202-260).

Prior to the commencement of trial, neither Mrs. Dorn, nor her Attorney or GAL ever served an Answer to Mr. Dorn's Petition. No person, other than the Cohens, acting on behalf of Abbie Dorn provided a witness list or exhibit list in advance of trial. Over objection by Appellant, the Court allowed both Mrs. Dorn's GAL and Mrs. Dorn's Attorney to make opening and closing statements and to cross-examine witnesses. (R. Vol. II, p. 749). The Court stated that "Ms. Hedgepath does not represent Ms. Moore as guardian ad litem. She represents, as attorney, Abbie Dorn." (R. Vol. II, p. 749). Mrs. Dorn's GAL confirmed that neither she nor Mrs. Dorn's Attorney ever received any written discovery from either the Appellants or the Respondents. Mrs. Dorn's GAL noted on the record that she thought the lack of discovery was "strange", and that she was "concerned that certain witnesses were not listed." (R. Vol. II, p. 768). Mrs. Dorn's GAL stated that she decided not to disclose the witnesses she felt were relevant, but she "felt like it was not a benefit to [Mrs. Dorn] for [Appellant's counsel] to know who our witnesses would be." (R. Vol. II, p. 768).

At trial, Mr. Dorn presented evidence and testimony of several witnesses, including Mr. Dorn and the Cohens. Following the conclusion of witness testimony by both Mr. Dorn and the Cohens, Mr. Dorn rested his case. (R. Vol. III, p. 1068). It was at this time that the GAL and the Attorney for Mrs. Dorn sought to call additional witnesses. Counsel for Mr. Dorn objected, stating that while witnesses may be permitted in the Petition filed by the Cohens, wherein Mrs. Dorn was a named party, said witness testimony could not and should not be permitted in the Petition filed by Mr. Dorn as all parties had concluded the

calling of their witnesses. It was at this point, for the very first time, that the trial Judge stated that Mrs. Dorn was, in fact, a Party to both of the actions. (R. Vol. III, p. 1031).

The line of questioning, related objections, and discussion amongst all Counsel and the Court led to the ultimate question as to whether Mrs. Dorn was an actual party to both actions: the implications being whether or not her Court-appointed Attorney would be able to call her own witnesses. Mr. Dorn objected on the basis that Mrs. Dorn was neither a party, and to the extent that she was, had never previously listed or identified that she intended to call any witnesses in defense of an action to which she was not even a named party

The Court indicated that it intended to allow Mrs. Dorn's GAL and Attorney to call the previously undisclosed witnesses. However, the Court's schedule did not allow for the extensive time necessary to complete the trial. On the morning of the sixth day of trial, the last available day on the docket for same, Mr. Dorn informed the court he would be finished with his case by the end of that day. (R. Vol. III, p. 1024). Counsel for Mr. Dorn repeated his objections to the calling of witnesses by Mrs. Dorn's Court appointed Attorney and GAL:

> 21 Mr. SLOTCHIVER: As nonparties, Your Honor, we would
> 22 not have the right to serve discovery on
> 23 nonparties, and nonparties, while they have the
> 24 right to examine witnesses, do not have the right
> 25 to call witnesses, and therefore, with reference
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> to the action that we have brought -- and I'll let Mr. Kachmarsky speak to his action, but with reference to the action that I brought on behalf of Daniel Dorn in his capacity as guardian for the minor children against the Cohens in their capacity as trustees and conservators, the guardians have every -- the guardian and the guardian attorney, or the attorney for Abbie, have every right to cross-examine anybody that I call as a witness or anybody that the Cohens call as a witness, but they do not have the right in my action, the one that we filed, to call their witnesses.

(R. Vol. III, p. 1025)

At this time, the Court attempted to clarify previous statements, and issued a verbal ruling that Mrs. Dorn should have been named as a party.

> [Mrs. Dorn] may not be named as a party, but let's be clear, in my opinion, she is a party to your action to remove the Trustees of her trust . . . so my position is [Mrs. Dorn] is a party to {Mr. Dorn's] action.

(R. Vol. III, p, 1025)

With respect to the case brought by the Cohens, the GAL and Attorney for the Dorn Children joined in the position of Counsel for Mr. Dorn, highlighting the following to the Court:

> The amended Petition [filed by the Cohens] names the three children, [and] the Department of Health and Human Services, and does ***not*** name Abbie Dorn, so for the record, I'd like to put on the record that I take the same position as [Counsel for Mr. Dorn.]

(R. Vol. III, p. 1026) (***emphasis added***)

At the conclusion of the last scheduled day for trial, March 7, 2013, the Court

recessed the trial, and agreed to entertain a formal written Motion by Mrs. Dorn's Attorney to have Mrs. Dorn added as a Party to the case. Other parties were allowed to brief the Court on the issue in response to Mrs. Dorn's Motion. (R. Vol. III, p. 1142).

On or about March 13, 2013, Mrs. Dorn's Attorney mailed a witness list to the trial Judge in a sealed envelope marked "For Judge's Eyes Only". (R. Vol. III, p. 1158-1159). By the end of April 2013, while the trial was still in recess, the motion to add Abbie Dorn as a party and to allow her Attorney and GAL to call witnesses on her behalf was fully briefed. (R. Vol. I, p. 303-312; R. Vol. I, p. 313-320; R. Vol. I, p. 321-345).

At the conclusion of testimony on March 7, 2013, it was the position of the Appellant that his case, with respect to the Petition filed by Mr. Dorn—was concluded given that both Mr. Dorn and the Cohens had put up all of their witnesses. Therefore, if Mrs. Dorn's Attorney and GAL were not allowed to call any additional witnesses then Mr. Dorn's Petition would be ripe for decision. It is not disputed by any party or person related to this case that the Attorney for the Dorn children intended to call a couple of witnesses. However, it was only the presentation of that testimony which remained in order to complete trial. The Court did not immediately reschedule the trial.

Rather, upon reviewing the briefs and replies submitted by all Counsel, on or about December 5, 2013, the Court issued an Order joining Mrs. Dorn as a party in both cases. (R. Vol. I, p. 38-39). The Court also issued an Order, over Appellant's vigorous objection, allowing Mrs. Dorn's Attorney to assert the work-product privilege to prevent Appellant's Counsel from questioning her regarding communications she had with Counsel for the Cohens. (R. Vol. I, p. 31-35). Finally, also over Appellant's vigorous

objection to same, the Court entered an Order allowing the Cohens to Amend the Pleadings to Conform with the Evidence. (R. Vol. I, p. 40-42). Shortly thereafter, despite the fact that trial had almost completed, Mrs. Dorn was allowed to file an Answer to Appellant's Petition.

Appellants, both Mr. Dorn and Attorney Kachmarsky for the children, filed Notices of Appeal to the Horry County Court of Common Pleas in early 2014. The appeals were consolidated in the circuit court. Respondents filed a Motion to Stay the appeal based on the recusal by the Probate Judge just prior to her losing her reelection bid in June 2014, and pending Motion for Mistrial filed by the Respondents in the Probate Court based on the judge not being reelected. (R. Vol. I, p. 358-390). The circuit court held a hearing on the Respondents' Motion to Stay the appeal on February 9, 2015. The circuit court judge, however, did not rule on the Motion to Stay, but instead concluded that the appeal was interlocutory and dismissed the appeal. (R. Vol. II, p. 554; R. Vol. I, p. 43-49).

ARGUMENT

A. THE ORDER AT ISSUE IS IMMEDIATELY APPEALABLE

Despite there being no motion to dismiss the appeal filed in the circuit court from the probate court and despite the appellate briefing had not been completed, the circuit court dismissed the appeal as interlocutory at a hearing on the Respondents Motion to Stay on February 9, 2015. The undersigned submits this was error.

The Probate Order being appealed from added a party defendant to the case, mid – trial, after the Appellant had completed his case. This Order affected the substantial right

of a Plaintiff to choose his Defendant, and therefore should not have been dismissed by the circuit court as interlocutory. The question of whether a lower court's order is immediately appealable is governed by statute. S.C. Code Ann. § 14-3-330 (1976 & Supp. 2015). Pursuant to section 14-3-330, appellate courts have jurisdiction to immediately review:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
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> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code. Ann.§ 14-3-330. The question of whether an order is immediately appealable is also determined on a case-by-case basis. Morrow v. Fundamental Long Term Care Holdings, L.L.C., ___ S.C. ___, 773 S.E.2d 144 (2015).

The Supreme Court has recently affirmed and recognized that a Plaintiff's right to name or choose his own defendant is a substantial right from which immediate appeal

rights arise under section 14-3-330 (2)(a). Id. In Morrow, the Supreme Court ruled that the trial court's order, which substituted corporate defendants for an individual employee on issues of direct corporate liability, effectively prevented the Morrows "from being the architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing. Id. (citing Neeltec Enters. v. Long, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2013)). The Court found that what the trial court called its ruling – in Morrow, the court termed its order one for bifurcation – made no difference as the Court is not constrained by how the order was styled. Furthermore, the Court commented that just because part of the prejudice stemming from the order may be cured at a later date does not remove it from purview of S.C. Code Ann. § 14-3-330(2)(a). Id. Fn. 1. Also Justice Pleicones, in his dissent in Rutland v. S.C., 400 S.C. 209, 744 S.E.2d 142 (2012), characterized the rule that a plaintiff may choose her defendant as a "settled rule."

In this matter, the probate court's order adding a party defendant, mid --trial, which in turn altered the presentation of evidence to the extent that Appellant was presented with new previously unnamed witnesses after the conclusion of his case in effect determines the action and prevents a judgment from which an appeal might be taken. If the Order adding Abbie Dorn, ward of the court, as party had not been issued, the presentation of the evidence (with the exception of a witness of Appellant Kachmarsky) would have been completed and the case would have been ready for decision. The underlying Probate Court Order on appeal was issued in December 2013 (some ten months after the recess of the trial), (R. Vol. I, p. 38-39) and the status of the probate court case remains uncertain.[1]

1 As of the date of this brief, the probate court has yet to schedule the conclusion of the

B. STANDARD OF REVIEW

The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP, or intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court. See Berkeley Elec. Coop. v. Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990); and Hunnicutt v. Rickenbacker, 268 S.C. 511, 517, 234 S.E.2d 887, 890 (1977). "This Court will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party." Jeter v. S.C. DOT, 369 S.C. 433, 633 S.E.2d 143, 146 (2006).

The order allowing the amendment to add Abbie Dorn as a party defendant, two weeks into the trial, was an abuse of discretion and deprived Appellant of his "substantial right to name its [his] defendant." See Neeltec Enters. v. Long, 402 S.C. 524, 741 S.E.2d 767 (Ct. App. 2012) (holding substitution of corporate party for individual in unfair trade practices act case interfered with plaintiff's substantial right to name its defendant, and was therefore immediately appealable). The order finding the appeal interlocutory, and therefore not immediately appealable should be reversed.

C. THE COURT'S ORDER DESIGNATING MRS. DORN, THE WARD OF THE

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trial. After the December 2013 orders which are the subject of this appeal, the probate judge lost her reelection bid in June 2014. Prior to leaving office, she also recused herself from the case because she had been in discussions about possibly joining the law firm of Attorney Lee Moore, court appointed counsel for Mrs. Dorn. (R. Vol. III, p. 1166). Respondents Mr. and Mrs. Cohen filed a Motion for Mistrial based on the judge not being reelected. The Probate Court has not set the motion for mistrial for hearing, nor has it indicated how it intends to address completing the trial, which has now been in recess for over two (2) years.

COURT, A SEPARATE PARTY TO THE CASES AFTER THE TRIAL HAD ALMOST COMPLETED SHOULD BE VACATED AS SHE WAS NOT A NECESSARY PARTY UNDER RULE 19, SCRCP AND BECAUSE THE ORDER UNDULY PREJUDICED THE APPELLANT.

1. **Adding Abbie Dorn as a party under Rule 19 was not proper because Mr. Dorn could have received complete relief on his claim without the addition of Abbie Dorn as a separate party.**

The probate court relied on S.C. R. Civ. P. 19 as the basis on which to name Mrs. Dorn as a separate party defendant. Rule 19(a)(1), SCRCP, provides, in part, that a person subject to process shall be joined as a party in the action if "in his absence complete relief cannot be accorded among those already parties." The rule allows the court the authority under Rule 19 to add Mrs. Dorn, ward of the court, as a party if the same was necessary to afford complete relief to Appellant. See Shah v. Richland Mem'l Hosp., 350 S.C. 139, 564 S.E.2d 681 (Ct. App. 2002).

The addition of Mrs. Dorn as a separate party was not necessary because Mrs. Dorn was already represented by the presence of the Cohens as defendants in the action, and adding her in some separate capacity played no substantive role in the relief Mr. Dorn was seeking in his case -- that to remove the Cohens from their duties as co-trustees of the Abbie Dorn Special Needs Trust.[2] Specifically, Mr. Dorn was challenging the Cohens' use of the Abbie Dorn Special Needs Trust[3] assets, as opposed to using their own funds, in

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2 It is important to point out that Mrs. Dorn is an adult in a persistent vegetative state, and unquestionably incompetent within the meaning of "incompetent" in the rules of civil procedure.

3 The stated purpose of the Abbie Dorn Special Needs Trust is to . . . provide a discretionary spendthrift trust, to supplement public resources and benefits when such resources and benefits are unavailable or insufficient to provide for the Special Needs of the Beneficiary. It is not a trust for the support of the Beneficiary. (R. Vol. III, p. 1144-1157).

the amount of some $200,000 to $300,000 to undertake all sorts of litigation strategies against Mr. Dorn in California, which previously had been determined in Mr. Dorn's favor. The actual figure was later determined to be closer to approximately One Million ($1,000,000.00) Dollars. The Cohens utilized these Trust assets to undertake a myriad of litigation strategies against Mr. Dorn in the California Divorce case. Despite these efforts, the case ultimately was determined in Mr. Dorn's favor when all parties, including the Cohens, signed a consent Order which held (amongst other things) that Mrs. Dorn received no benefit from visitation with the children. In this case, it is undisputed that the Cohens served as Abbie Dorn's Co-Guardians, Co-Conservators, and Co-Trustees of Abbie Dorn Special Needs Trust. As such, the Cohens were the appropriate parties to serve as representatives of Abbie Dorn, and they did exactly that in the trial of these cases.

S.C. R. Civ. P. 17 (c) provides the following persons may sue or defend on behalf of an incompetent person: a general guardian; a committee; a conservator; or a like fiduciary. The court may appoint a "guardian ad litem" for an incompetent person not otherwise represented. In Gaddy v. Douglass, 359 S.C. 329, 597 S.E.d 12 (Ct. App. 2004), an action brought by one attorney-in-fact for Ms. M, an elderly person with severe dementia, against another alleged attorney-in-fact, the court held that the incompetent person [Ms. M] was not a necessary party to the case because Ms. M was adequately represented by her attorney-in-fact serving in a representative capacity for her.

The Cohens, in defending themselves as co-conservators and co-trustees of the Abbie Dorn Special Needs Trust, participated in the formal pleadings, participated in formal discovery with the opposing counsel, identified witnesses, and should be deemed

adequate representatives of Abbie Dorn for the purposes of this case. No further representatives or legal counsel were required. The case by Mr. Dorn against the Cohens contained all parties necessary to the relief being sought by Mr. Dorn, and the court should vacate the probate court order adding Abbie Dorn as a separate party, two weeks into the trial.

2. The amendment adding Mrs. Dorn, two weeks in to the trial and at the conclusion of Mr. Dorn's case, caused undue prejudice to Appellant Mr. Dorn.

"The test of whether an amendment should be allowed is whether the amendment will prejudice or work an injustice to the adverse party." Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 509, 369 S.E.2d 156, 159 (Ct. App. 1988). Not surprisingly, the undersigned has been unable to locate any South Carolina cases commenting on the appropriateness, or lack thereof, of a court allowing the addition of a *party* in the middle of a trial. However, the general considerations when reviewing extent of prejudice in amendments would be applicable in this instance.

Courts have taken the following factors into consideration: the lapse of time since the service of the original pleading; how long the amending party was aware of the facts upon which the motion is predicated; the reasonableness of the explanation of the delay; the extent that pretrial preparation has already occurred; the duplication of effort required if the amendment is permitted; and the impact of the trial date if the amendment is permitted. 1B WEST MCKINNEY'S FORMS CIVIL PRACTICE LAW AND RULES § 4.304; see also Rosenthal v. Allstate Ins. Co., 670 N.Y.S.2d 862 (2d Dep't 1998) (the later a motion to amend is made, the less chance it will be granted).

The prejudice envisioned by the S.C. Rule Civ. Pro. 15 leave to amend a pleading more than 30 days from service of responsive pleading is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it. Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296 298 (S.C. 2004); Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2004) (citing Tanner v. Florence Cnty. Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999)). Furthermore, the South Carolina Court of Appeals has held that prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action. Ball v. Canadian Am. Express Co., 314 S.C. 272, 274, 442 S.E.2d 620, 622 (S.C. Ct. App. 1994).

In Collins Entm't, Inc. v. White, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (S.C. Ct. App. 2005), the court of appeals further defined this prejudicial effect when it explained that it would be prejudicial to allow the defendant to raise a defense during trial when the opposing party did not have time to prepare a case against that defense prior to trial. The court held that the opposing party was prejudiced simply by the fact that they had prepared their case around the defendant's pleadings and were not afforded the ability to prepare their case against any affirmative defense absent from the pleadings. Id. Notably, the court denied leave to amend the pleadings even though the defendant claimed that statements made during trial, in support of the defenses they plead, established evidence of the defense they were seeking to incorporate into their amended pleading. Id. Additionally, the Supreme Court of

South Carolina has held that reliance of counsel serves as an affirmative defense. See Mason v. Williams, 194 S.C. 290, 9 S.E.2d 537 (1940); see generally, Rule 8(c), SCRCP (". . . and any other matter constituting and avoidance."). A privileged matter in South Carolina is matter that is not intended to be introduced into evidence and/or testified to in Court. S.C. State Highway Dep't v. Booker, 260 S.C 245, 254,195 S.E.2d 615, 620 (1973).

Appellant, in this case, has, at great expense, deposed and produced witnesses, addressed thousands of documents in discovery and trial, and formulated trial strategies based upon same. As such, it would be unduly prejudicial to allow the court appointed attorney for the ward, Mrs. Dorn, to amend the pleadings to conform to add Mrs. Dorn as a separate party which appears be a *nunc pro tunc* method to allow Attorneys Hedgepath and Moore to call admittedly undisclosed witnesses on the issue of reasonable reliance by Mrs. Cohen on legal advice, an affirmative defense Mrs. Cohen had full opportunity to assert and to which Appellants would have been entitled to discovery.

Moreover, Petitioner believes this needless delay in the proceedings would only burden the Abbie Dorn Special Needs Trust with unnecessary costs. None of this would have been necessitated had the issue been raised in a timely manner – prior to the commencement of the trial. Disclosure of information before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing. Bensch v. Davidson, 354 S.C. 173 at 182, 580 S.E.2d 128 at 132-33 (2003) (citing Reed v. Clark, 277 S.C. 310, 286 S.E.2d 384 (1982). Rule 33(b), SCRCP, *inter alia,* requires

disclosure to opposing counsel of the names and addresses of known witnesses as to the facts of the case. Furthermore, the court of appeals has held that this is a continuing duty. Briggs v. Richardson, 288 S.C. 537, 539, 343 S.E.2d 653, 655 (Ct. App. 1986).

In this case, there was no real explanation of the delay in alerting the other parties or the court to this issue – other than counsel Hedgepath and Moore's desire to surprise counsel for Appellant with undisclosed (and unnamed by the other parties) witnesses. This intent to surprise is even illustrated during the trial by the refusal of Attorney Hedgepath, even after this issue was being fully debated, to identify who she intended to call the following day. (R. Vol. II, p. 889; R. Vol. III, p. 1158-1159).

Further, in allowing the additional affirmative defenses, based wholly upon the testimony of witnesses that the Appellant heretofore has been unable to depose, receive discovery on, or even determine the identity of same strikes at the fundamental fairness underlying these proceedings. An Order allowing such an amendment, and allowing the addition of Mrs. Dorn as a party as the means by which the opposing side may introduce new witnesses and new evidence causes grave and injurious has to Appellant's ability to be fairly heard before this tribunal. The undue prejudice implicated by such Orders is great.

The factors to consider when addressing prejudice, *infra*. p. 15, not surprisingly, appear to assume such amendments are made prior to the actual trial. In this case, all pretrial preparation had already occurred and Appellant had produced and examined all of his witnesses, including two (2) experts. The prejudiced here is enormous. If this amendment were to be allowed, duplicated effort and duplicated expense would be

great – Appellant would need to depose these new witnesses, assuming he is informed of their identity before they take the stand, possibly revise his plans with regard to his own experts and the scope of their work, recall those experts, do additional discovery, and basically retry his entire case at great personal expense. At this juncture, appellant may simply be unable to put on an effective litigation, and as such, will suffer the undue prejudice created by these Orders.

The timing of this amendment and its relationship to the efforts of these attorneys for the incompetent ward, Mrs. Dorn, to call undisclosed witnesses render this Order a deprivation of the legal rights (that to name one's own defendant) of Appellant, and should be vacated so that this case can be concluded and ruled upon.

CONCLUSION

The events of this case, and progress (or lack thereof) of this trial have been unusual. The actual and proper parties to the case of Dorn v. Cohen and Cohen v. Dorn et al. should be allowed have their case heard, yet heard and decided within the parameters of the rules of civil procedure and within the bounds of fundamental fairness. Allowing the addition of a party at this stage in the proceedings who is neither (1) necessary to accord complete relief amongst the parties, and (2) cause undue prejudice to the Appellant is an abuse of discretion by the trial judge, and as such, the Orders should be vacated. Such Orders have undermined the fairness of the proceedings and have adversely affected Mr. Dorn's substantial legal rights with respect to choose his own Defendants and prepare for his day in Court. Mr. Dorn has litigated his case, and is entitled to a judgement on the same without the addition of new parties, new

defenses, and new witnesses which, up until the signing of these Orders, were wholly unanticipated by the Appellant.

The undersigned respectfully requests that the Order dismissing the appeal as interlocutory and the Order adding Abbie Dorn as a separate party, and the resulting impact of that decision – allowing Attorneys Hedgepath and Moore to put up additional witnesses- should be reversed and vacated.

November 24, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Daniel B. Dorn, in his capacity as the Parent and Natural Guardian of E.D., R.D. and Y.D, Appellant.

v.

Paul S. Cohen and Susan Cohen, Individually and in their capacity as the Co-Conservators of the person of Abbie Ilene Dorn, a protected person and ward, and in their capacity as Co-Trustees of the Abbie Dorn Special Needs Trust, Respondents.

Paul S. Cohen, M.D and Susan Cohen, Respondents,

v.

E.D., R.D., and Y.D., The Living Issue of Abbie Ilene Dorn, and the South Carolina Department of Health and Human Services, Respondents below,

Of whom E.D., R.D., and Y.D., The Living Issue of Abbie Ilene Dorn are the Appellants,

and

the South Carolina Department of Health and Human Services is a Respondent.

In Re: The Abbie Dorn Special Needs Trust.

Appellate Case No. 2015-000659

The Honorable Deadra L. Jefferson
Horry County
Trial Court Case No. 2013CP2608152, 2013CP2608139,
2014CP2601691, 2014CP2601744

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with Rule 211 (b), SCACR.

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PROOF OF SERVICE

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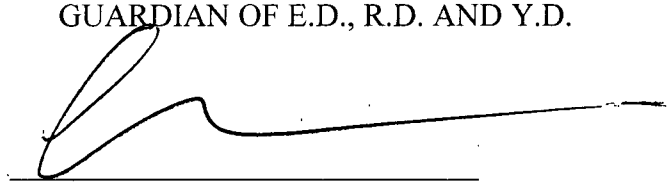

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