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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

PETITION FOR REHEARING EN BANC

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STATEMENT OF ISSUES

1. *Rehearing en banc is warranted to secure or maintain uniformity of its decisions in that the appeal should have been allowed based on Supreme Court precedent, and because a party's right to name his own defendant and control the presentation of evidence at trial is a question of exceptional importance to the application of the South Carolina Rules of Civil Procedure*

ARGUMENT

1. *Rehearing en banc is warranted to secure or maintain uniformity of its decisions in that the appeal should have been allowed based on Supreme Court precedent, and because a party's right to name his own defendant and control the presentation of evidence at trial is a question of exceptional importance to*

the application of the South Carolina Rules of Civil Procedure

The Supreme Court holdings in Morrow v. Fundamental Long Term Care Holdings, L.L.C., 412 S.C. 534, 773 S.E.2d 144 (2015) and Neeltec Enters. v. Long, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2013) recognize 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. Here, the effect of the order adding Abbie Dorn as a party – after the conclusion of the trial (both Petitioner's case and the Cohens had concluded all disclosed witnesses) – deprived Mr. Dorn of bringing his case against the defendant of his own choosing.

The Court's opinion failed to acknowledge the extremely prejudicial impact this ruling had based on the Attorney and GAL for Abbie Dorn's assertion of their right to call un-named, not previously disclosed, "secret witnesses." The court's opinion contains several of what one could construe as factual findings[1], but omits reference to the facts that no person, other than the Cohens, acting on behalf of Abbie Dorn, provided a witness list or exhibit list in advance of trial. 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 [Petitioner's counsel] to know who our witnesses would be." (R. Vol. II, p. 768). Then, days after the trial was recessed, but while the probate court was considering the motion to

1 Petitioner is concerned that that appellate court opinion's lengthy factual recitation and certain conclusions of fact unnecessarily venture into the province of the probate court, and requests modification of the order to remove or reduce such content.

amend and add Abbie Dorn as a party, 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). Said witnesses have yet to be disclosed to date.

Nearly nine months later, on or about December 5, 2013, the Court issued an Order joining Abbie 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 Abbie 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). If, as set forth by the court in its opinion, Abbie Dorn's interest so conflicted with that of the Cohens that Abbie Dorn needed to be an involuntary party with appointed GAL and Attorney, said conflict should not permit counsel for Abbie Dorn to claim some attorney-client privilege with the attorneys for the Cohens.[2] This ruling has significant impacts on the ability of Mr. Dorn to bring his case against the defendant of his choosing, and effectively deprived him of that right such that it determined or discontinued the action.

As stated by the Court in Neeltec, just because part of the prejudice stemming from the order may be cured at a later date does not remove it from the purview of the statute. 397 S.C. at 566, FN1, 725 S.E.2d at 928. The court's opinion determined that part of the prejudice *could* be cured, but reliance on speculation about what the probate court will do upon conclusion of the trial fails to recognize the holding in Neeltec that such does not

2 When two lawyers who represent co-parties seek to protect communications between those lawyers under the attorney client privilege, such is known as the joint defense exception to the wavier of attorney client privilege and requires, among other things, that the parties not have conflicting interests. See Tobaccoville v. McMaster, 387 S.C. 287, 692 S.E.2d 526 (S.C. 2010)

prevent appeal.

The Probate Court's order adding a party to this action at the conclusion of the testimony of all disclosed witnesses impinged on Petitioner's substantial right and had the effect of determining or discontinuing the action.

CONCLUSION

For the reasons discussed herein, Appellant respectfully requests that the Court rehear this matter *en banc*.

August 16, 2016

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GUARDIAN OF E.D., R.D., AND Y.D.

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CERTIFICATE OF SERVICE

I certify that I have served the Petition for Rehearing En Banc by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 2016 addressed to:

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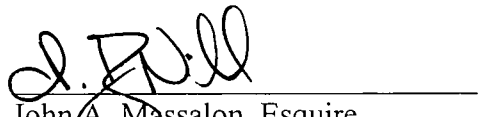

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VIA FEDERAL EXPRESS
OVERNIGHT DELIVERY

The Honorable Jenny A. Kitchings
Clerk of Court, South Carolina Court of Appeals
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RE: Daniel B. Dorn, in his Capacity as the Parent and Natural Guardian of E.D., R.D. and Y.D., Appellant
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In re: The Abbie Dorn Special Needs Trust
Appellate Case No.: 2015-00659
Our File No.: 939-1

Dear Ms. Kitchings:

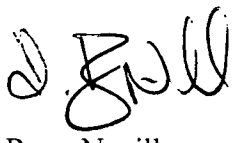
Enclosed please find the original and seven (7) copies of the Petition for Rehearing En Banc and Certificate of Service in regard to the above-referenced matter. In addition, please find Wills Massalon & Allen LLC's check #8168 in the amount of $25.00 representing the filing fee. Please return one (1) file-stamped copy to me in the self-addressed, stamped envelope provided.

By copy of this correspondence, I am serving the same upon all counsel of record. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC



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