THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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, ... Petitioner

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 CERTIORARI

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PETITIONERS HEREBY CERTIFIES THAT THEY TIMELY FILED A PETITION FOR REHEARING WHICH WAS DENIED BY ORDER DATED OCTOBER 27, 2016

STATEMENT OF ISSUE

1. *This Court should grant* certiorari *because the conclusion that the underlying probate court appeal is not immediately appealable is in conflict with this Court's decision in Morrow v. Fundamental Long Term Care Holdings, LLC, which addressed the appealability of orders which prejudice a party's right to name his own defendant, and thus control the presentation of evidence at trial, both of which are matters of exceptional importance.*

This appeal arises from a probate court petition brought by Petitioner Daniel Dorn, (hereinafter "Mr. Dorn") seeking to remove 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. After the testimony of all of Mr. Dorn and the Cohens' witnesses, yet while the trial was in recess, on or about December 5, 2013 – some nine (9) months after the trial testimony was given, the probate court issued an Order joining Abbie Dorn, both the ward and beneficiary of the special needs trust, as a party in both cases. (R. Vol. I, p. 38-39). Petitioners, both Mr. Dorn and Attorney Kachmarsky (appointed to represent the children in the Cohen filed case), appealed to the Horry County Court of Common Pleas. The appeals were consolidated, and thereafter, the circuit court held that the appeal was interlocutory and dismissed the appeal. (R. Vol. II, p. 554). This appeal followed. On August 3, 2016, the Court of Appeals affirmed the decision of the circuit court that the appeal from the order adding Abbie Dorn a party was interlocutory. Dorn v. Cohen et al., 2016 WL 4123949 (S.C. Ct. App. Aug. 3,

2016). On October 27, 2016, the Court of Appeals denied the Petitioners' Motion for Rehearing.

BRIEF STATEMENT OF FACTS

Mr. Dorn and Mrs. Abbie Dorn (hereinafter "Mrs. Dorn") were married, and on or around June 2006, Abbie Ilene Dorn gave birth triplets, R.D, E.D., and Y.D. (hereinafter "the Dorn children"). Tragically, during childbirth, Abbie Dorn suffered catastrophic injuries. The first two babies were delivered normally, then, while attempting to reposition the third child for delivery, the doctor accidentally cut Abbie Dorn's uterus causing massive blood loss, shock, and ultimately cardiac arrest. As a result of this accident, Abbie Dorn was left paralyzed, unable to speak and totally unable to function. To date, Abbie Dorn remains totally and permanently disabled— 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 California on behalf of Abbie 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. Abbie 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 has custody of the children, who are now ten (10) years of age. However, after the birth of the children and tragedy with Abbie Dorn, Mr. Dorn and his

in-laws were engaged in lengthy litigation brought by the Cohens in the California Superior Court against Mr. Dorn. The Cohens sought visitation of the Dorn children for Abbie Dorn, who was at the time, and still remains in a persistent vegetative state. The litigation was costly, and unfortunately, the Cohens caused the Trust monies to fund their legal pursuits against Mr. Dorn, depleting almost One Million ($1,000,000) Dollars from the trust in legal fees alone.

In 2013, as a result of the Cohen's use and resulting substantial reduction in the trust assets, Mr. Dorn filed an action against the Cohens, (R. Vol. I, p. 50-94), which sought to remove the Cohens as "trustees" and requested monetary reimbursement to the trust for the legal expenses incurred by the Cohens in the failed out of state litigation. Mr. Dorn alleged various causes of action including breach of fiduciary duties and willful violations by the Cohens of the terms of the trust while acting as Conservators and Trustees. In an odd turn of events, one (1) day after Mr. Dorn filed his probate petition, the Cohens filed a separate petition against Mr. Dorn and the Dorn Children which sought 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 Abbie 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 probate court

consolidated the two (2) matters for discovery and trial purposes, only. In its consolidation Order, 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 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).

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, Abbie Dorn was never named as a party in his action. Accordingly, Mr. Dorn did not serve the Petition upon Abbie Dorn, her GAL, nor her court-appointed Attorney. Further, no discovery was served upon Abbie Dorn, the GAL, nor the court-appointed Attorney for Abbie Dorn. During the course of discovery, only Counsel for Mr. Dorn, Counsel for the Cohens, and the Court appointed GAL and Attorney for the Dorn children participated in the exchange of formal discovery.

Prior to the commencement of trial, neither Abbie Dorn, nor her Attorney or GAL 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. At trial and over objection by Petitioner, the court allowed both Abbie Dorn's GAL and 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). Abbie Dorn's GAL

confirmed that neither she nor Abbie Dorn's Attorney ever received any written discovery from any party. Abbie 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). Abbie 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 [Abbie 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, the Cohens, and an expert retained by Mr. Dorn. 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 Abbie *first* 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 Abbie Dorn had been named party, said witness testimony could not and should not be permitted in the Petition filed by Mr. Dorn as all parties to that case had concluded the calling of their witnesses. It was at this point, for the very first time, that the probate judge stated that Abbie 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 probate court led to the ultimate question as to whether Abbie 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 at trial. The Court indicated that it intended to allow Abbie Dorn's GAL and Attorney call the previously undisclosed witnesses. However, the Court's schedule did not allow for the 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), and repeated his objections to the calling of witnesses by Abbie Dorn's court-appointed Attorney and GAL. At this time, the court attempted to clarify previous statements made during the trial, and issued a verbal ruling that Abbie Dorn should have been named as a party. (R. Vol. III, p, 1025). With respect to the case brought by the Cohens, the GAL and Attorney for the Dorn Children, Attorney John Kachmarsky, joined Mr. Dorn's objection. (R. Vol. III, p. 1026).

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 Abbie Dorn's Attorney to have Abbie Dorn added as a Party to the case. (R. Vol. III, p. 1142). On or about March 13, 2013, Abbie 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).

At the conclusion of testimony on March 7, 2013, it was the position of the Petitioner that his case was concluded given that both Mr. Dorn and the Cohens had put up all of their witnesses. Therefore, if Abbie 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 that the Attorney/GAL for the Dorn children intended to call a couple of witnesses in the case brought by the Cohens. However, it was only the presentation of that testimony which remained in order to complete trial. The court did not immediately reschedule the trial (and has not done so to date).

Rather, 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 questioning of her regarding communications she had with Counsel for the Cohens. (R. Vol. I, p. 31-35).

Petitioners, both Mr. Dorn and Attorney Kachmarsky for the children, appealed the probate court order. The circuit court concluded that the appeal was interlocutory and dismissed the appeal. (R. Vol. II, p. 554; R. Vol. I, p. 43-49).

ARGUMENT

The Probate Order being appealed from added a party defendant to the case, when the trial was nearly completed and after the Petitioner Mr. Dorn had called all of his witnesses. This Order affected the substantial right of a Plaintiff to choose his Defendant, and therefore was immediately appealable. 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;
>
> (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.,412 S.C. 534, 773 S.E.2d 144 (2015).

The Supreme Court 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."

The Court of Appeals in this case, however, distinguished the application of 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), and

held that the court's order adding Abbie Dorn as a party near the conclusion of the trial was not sufficiently prejudicial to have the "effect of" depriving Petitioner the right to bring his case against the defendant of his choosing. (App., p. 12). It appears that the Court of Appeals reached this decision, in large part, on speculation that "the record gives no indication Dorn *would not be given sufficient time* to prepare to cross-examine any witnesses Appointed Attorney and Abbie's GAL *may call* to testify at trial," and that "he probate court indicated from the outset that because both petitions were based on the same questions of fact, it *would be flexible with the parties'* presentation of their cases and allowing the parties to recall witnesses and call rebuttal witnesses if necessary." (App., p. 14).

Reliance by the Court of Appeals on what it believes the probate court "*might*" do to alleviate the prejudice suffered by Petitioner is not a proper basis on which to rely in determining the effect that the order issued in December 2013 had on the trial wherein Petitioner had already presented all of his evidence. 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 prevent appeal.

While the Court of Appeals attempted to compare this order to an order granting a motion of a party to intervene into an action, there is no indication that Duncan v. Gov't Emps. Ins. Co., 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994) considered intervention at

the close of the evidence in the trial. The unusual facts of this case and the late timing of this Order do permit comparison to pre-trial orders allowing intervention.

Here, the effect of the order adding Abbie Dorn as a party – after the conclusion of Petitioner's case and after the Respondent Cohens had concluded with examination of all witnesses disclosed prior to trial – deprived Mr. Dorn of bringing his case against the defendant of his own choosing. The Court of Appeals' opinion fails to acknowledge the extremely prejudicial impact this ruling had, particularly in light of the near end of the trial, based on the Attorney and GAL for Abbie Dorn's eleventh hour assertion of their right to call un-named and not previously disclosed, "secret witnesses."

The events at the close of the testimony were so unusual that Abbie Dorn's GAL even admitted 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). Abbie Dorn's GAL stated that she decided not to disclose the witnesses which she felt were relevant (and presumably intended to call), because she "felt like it was not a benefit to [Abbie 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 amend and add Abbie Dorn as a party, Abbie 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.*

The Supreme Court should grant certiorari to review the Order of the Court of Appeals in light of its potential to conflict directly with the holdings of 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) recognizing the important right for a plaintiff choose his own defendant, particularly when an order adding a party is made, not in discovery or even pre-trial, but after the conclusion of the plaintiff's case-in-chief.

CONCLUSION

For the reasons discussed herein, Petitioner respectfully requests that the Supreme Court grant certiorari review of the Court of Appeals' decision.

November 23, 2016.

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PROOF OF SERVICE

I certify that I have served a copy of the Petition for Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on November 28, 2016, addressed to:

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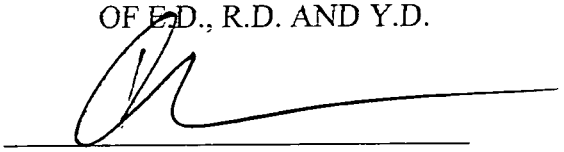

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