

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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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INDEX

Court of Appeals Opinion	App 1
Petition for Rehearing En Banc	App 15
Order Denying Petition for Rehearing.....	App 22
Appellant's Final Brief	App 24
Final Brief of Respondents	App 52
Final Brief of Guardian Ad Litem and Attorney for Abbie Ilene Dorn.....	App 78

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.

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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

Appeal From Horry County
Deadra L. Jefferson, Circuit Court Judge

AFFIRMED

John A. Massalon and Christy Ford Allen, both of Wills Massalon & Allen LLC, of Charleston, for Appellants Daniel B. Dorn, E.D., R.D., and Y.D.

Daniel Scott Slotchiver, of Slotchiver & Slotchiver, LLP, of Charleston, for Appellant Daniel B. Dorn.

John Kachmarsky, of Law Office of John Kachmarsky, of Charleston, as Court Appointed Attorney and Guardian ad Litem for Appellants E.D., R.D., and Y.D.

Reese Rodman Boyd, III and Bret Harlan Davis, of Davis & Boyd, LLC, of Myrtle Beach, for Respondents Paul S. Cohen and Susan Cohen.

Lynette Rogers Hedgepath, of the Hedgepath Law Firm, PA, of Conway, as Court Appointed Attorney for Abbie Ilene Dorn.

Virginia Lee Moore, of Moore Johnson & Saraniti Law Firm, PA, of Surfside Beach, as Court Appointed Guardian ad Litem for Abbie Ilene Dorn.

Shealy Boland Reibold, of the South Carolina Department of Health and Human Services, of Columbia, for Respondent South Carolina Department of Health and Human Services.

KONDUROS, J.: Daniel Bernard Dorn and E.D., R.D., and Y.D. (collectively, Appellants) appeal the circuit court's order dismissing as not immediately appealable their appeal of the probate court's order adding a party after the conclusion of Dorn's case-in-chief. Appellants contend the probate court's order,

which added Abbie Ilene Dorn (Abbie) as a party to Dorn's petition to remove Abbie's parents, Paul S. Cohen, M.D. and Susan Cohen (collectively, the Cohens), as the coconservators and cotrustees of the Abbie Dorn Special Needs Trust (the Trust), was immediately appealable because it affected Dorn's substantial right to name his own defendant and to control the presentation of evidence at trial. We affirm the circuit court's order.

FACTS/PROCEDURAL HISTORY

Dorn and Abbie began trying to conceive a child after marrying in 2002. Despite difficulty, Abbie conceived triplets and delivered E.D., R.D., and Y.D. (collectively, Children) at Cedars-Sinai Medical Center (Cedars-Sinai) in Los Angeles, California on June 21, 2006. During delivery, Abbie suffered catastrophic injuries that left her incapacitated.

Abbie, through Dorn and her guardian ad litem, brought and settled a medical malpractice claim against Cedars-Sinai for \$6,730,000. The settlement funded the Trust through a one-time contribution of \$910,275.20. The balance of the settlement funded the purchase of a \$4,333,105 annuity, which was to provide periodic payments of \$31,000 per month to the Trust over the remainder of Abbie's life. The amount of the annuity payments to the Trust was set to increase annually at a rate of 3.5%.

The Trust named Abbie as its sole primary beneficiary and Children as remainder beneficiaries after Abbie's death.¹ The Trust named the Cohens as cotrustees.² The Trust empowered the Cohens to employ professionals, including attorneys, for estate administration purposes and to represent Abbie in legal matters. The Trust made compensation of the attorneys hired on Abbie's behalf contingent on court approval.

¹ Children's interest as remainder beneficiaries of the Trust was subject to the Trust's repayment of the South Carolina Department of Health and Human Services (DHHS) for expenditures made by South Carolina on Abbie's behalf.

² The Trust was established to provide a discretionary, spendthrift trust to supplement public resources and benefits, at the Cohens' discretion, when public resources and benefits were unavailable or insufficient to provide for Abbie's health, safety, and welfare.

The Cohens moved to California to care for Abbie so she could remain close to Children; however, after learning Abbie was unlikely to secure daily visitation with Children, the Cohens returned with Abbie to their home in Horry County. On April 1, 2008, the Horry County Probate Court transferred jurisdiction over the Trust from Kern County, California to Horry County.

Dorn informed the Cohens he wanted a divorce, and they brought a marital dissolution action on Abbie's behalf in California in 2008. The California family court bifurcated the action and entered an order dissolving Dorn and Abbie's marriage on September 11, 2008. The California family court decided the custody, visitation, and child support portions of Dorn and Abbie's divorce nearly three years later in April 2011.

In November 2010, Dorn filed an emergency petition on Children's behalf to remove the Cohens as the Trust's cotrustees and sought a temporary restraining order (TRO) to prevent the Cohens from spending Trust money on anything other than Abbie's medical needs. Dorn alleged the Cohens abused their fiduciary responsibilities, violated the Trust's terms, and spent a substantial portion of the Trust's corpus on litigating the visitation portion of Dorn and Abbie's divorce. Dorn also sought repayment of all Trust funds associated with litigating the California visitation action.

Two days later, the Cohens filed a petition to affirm \$495,326.75 in legal fees paid by the Trust and to reform the Trust's terms. The Cohens alleged the Trust's terms created a logistical impracticability by requiring them to obtain court approval before paying attorney's fees. The Cohens maintained the Trust empowered them to incur and pay legal fees on Abbie's behalf; further, the Cohens sought permission to pay future legal fees with Trust funds.

The probate court held a TRO hearing on December 15, 2010, and denied Dorn's request for a TRO. The probate court believed there was some question as to whether the Cohens were authorized to pay legal fees with Trust funds and thought Dorn and the Cohens' petitions should be heard together in a single trial. Dorn stated he had no objection to the cases being heard together, and he believed the questions of fact were common to both petitions.

The probate court found Dorn should be served with the Cohens' petition and it should be amended to name both Children and DHHS as parties. The probate court recognized a potential conflict of interest existed if Dorn were to represent Children with respect to the Cohens' petition because of the ongoing visitation

dispute between Dorn and the Cohens. To resolve any conflict of interest, the probate court announced it would appoint a guardian ad litem to independently represent Children. The probate court appointed John Kachmarsky (Children's GAL) as attorney and guardian ad litem for Children on February 21, 2011. Contemporaneously, the probate court appointed Virginia Lee Moore as guardian ad litem (Abbie's GAL) and Lynette Rodgers Hedgepath (Appointed Attorney) as the appointed attorney for Abbie.

The Cohens amended their petition and named DHHS and Children as parties. Abbie and Children filed separate answers to the amended petition. Children asserted a counterclaim for breach of fiduciary duty against the Cohens, alleging the Cohens failed to exercise prudence or discretion in their pursuit of visitation with Children and dissipated the Trust's corpus without court approval. The Cohens answered Children's counterclaim and denied breaching their duties as cotrustees; further, the Cohens maintained Children failed to state a claim on which relief could be granted.

Trial commenced before the probate court on February 25, 2013. Dorn sought clarification regarding whether the probate court intended to hear three separate claims in a single trial, including Dorn's petition, the Cohens' petition, and Children's counterclaim. The Cohens believed trying multiple cases simultaneously was impractical and suggested Dorn's petition be heard and rebutted first, followed by the Cohens' petition. The Cohens argued any duplicative testimony from the first trial could be incorporated into the second trial as needed. Children preferred the petitions be heard simultaneously. Neither Abbie's GAL nor Appointed Attorney expressed a preference as to how the case should proceed.

The probate court believed the petitions were intertwined and trying the petitions together would be most effective. The probate court indicated if the petitions were heard separately, it was extremely unlikely the probate court would issue a decision at the end of the trial on Dorn's petition. The probate court explained Dorn would present his case first and the Cohens, Children, Appointed Attorney, and Abbie's GAL would be given an opportunity to cross-examine Dorn's witnesses. The probate court provided the parties would need to take that opportunity to question witnesses with respect to their own cases. The probate court stated the parties could recall witnesses later and call rebuttal witnesses to Dorn's case when presenting their own cases.

Appointed Attorney requested Dorn provide the parties with the order in which Dorn intended to call his witnesses. Dorn explained he would do whatever the probate court asked of him but noted the Cohens, Appointed Attorney, and Abbie's GAL had not requested Dorn's witness list during discovery. Dorn believed asking him to provide a witness list at that point circumvented the discovery process and sought information he was not required to provide. The probate court required only that Dorn inform the parties of the witnesses he intended to call before each day of trial. Finally, the probate court clarified Appointed Attorney was appointed to represent Abbie and not to represent Abbie's GAL.

Dorn, the Cohens, Children, and Appointed Attorney all presented opening statements. Dorn objected during Appointed Attorney's opening statement to statements regarding the potential repayment of legal fees to the Trust. The probate court told Dorn it would consider his objections to Appointed Attorney's anticipated evidence when Appointed Attorney presented that evidence during trial. Dorn called six witnesses in support of his petition. Appointed Attorney and Abbie's GAL cross-examined five and six of Dorn's witnesses, respectively. On the last day of trial, Dorn sought to clarify Abbie's status regarding the two petitions before the probate court. Dorn acknowledged the probate court appointed Abbie's GAL and Appointed Attorney but maintained Abbie was not a named party to his petition. The probate court interjected:

She may not be named as a party, but let's be clear, in my opinion, she is a party in your action to remove the trustees of her trust. I didn't go back to look at the order, and I'm happy to, but my position is I appointed [Appointed Attorney] and [Abbie's GAL] to represent Abbie in the action you brought and in the action the Cohens brought.

Dorn argued Abbie was not a party because she was not listed on the pleadings. Dorn acknowledged Appointed Attorney and Abbie's GAL could cross-examine witnesses but argued they could not call their own witnesses during trial on Dorn's petition. The probate court responded Abbie was an indispensable party and if Dorn took the position Abbie was not a party earlier in the proceedings, it would have directed him to amend his pleadings. Dorn maintained he was unaware of any point in the proceedings when the probate court announced Abbie was a party to the petitions. Dorn contended Abbie was not a true party. Dorn argued Abbie did not answer the pleadings, serve or accept service of discovery, or file a petition seeking to be named a party to the petitions. Dorn argued he was never advised he

needed to serve Abbie and Abbie never requested service. Children agreed with Dorn and argued Abbie was not a named party, whereas Children and DHHS were.

The Cohens argued Dorn's objections to Abbie's party status were untimely. They averred the probate court specifically stated all parties would be given an opportunity to cross-examine witnesses but whether Appointed Attorney and Abbie's GAL would not be allowed to call their own witnesses was not discussed. Abbie's GAL argued guardians ad litem in family court routinely called their own witnesses. Abbie's GAL also contended Abbie was a necessary party and Abbie's GAL and Appointed Attorney should be able to present any witnesses deemed necessary to protect Abbie's interests. Dorn argued his objection to Abbie's party status was not waived because he was not required to raise it until Abbie acted as a party, which had not occurred until that point in the case.

Appointed Attorney argued she and Abbie's GAL actively participated in the proceedings after they were appointed to represent Abbie on both petitions. Appointed Attorney argued she and Abbie's GAL attended depositions, participated in motions hearings and trials, and presented the probate court with fee affidavits. Appointed Attorney acknowledged she did not answer Dorn's petition but stated she would have answered if Abbie had been served. Appointed Attorney argued Dorn was on notice of Abbie's party status at the time the probate court appointed Appointed Attorney and Abbie's GAL. Appointed Attorney contended it was incumbent on Dorn to formally serve Abbie at that time.

Dorn argued Appointed Attorney and Abbie's GAL's involvement in the case rendered Abbie a participant, not a party. Dorn believed Abbie, as a participant, could cross-examine witnesses and submit fee petitions; however, Dorn argued a distinction arose because Abbie could not be served with discovery or call witnesses.

The probate court denied Dorn's motion to exclude Appointed Attorney and Abbie's GAL from calling witnesses based on Dorn's argument that Abbie was not a party. The probate court reiterated Dorn's underlying petition sought to remove the trustees of Abbie's trust, which made her an interested party. The probate court stated it must consider Abbie's best interests and was unaware of any rule preventing a court appointed guardian ad litem from calling his or her own witnesses in an action involving a protected person.

The parties did not complete the trial within the time allotted by the probate court. At the conclusion of the time scheduled for trial, the probate court requested

Appointed Attorney and Abbie's GAL provide it with a list of potential witnesses. The probate court also requested the parties submit briefs on any outstanding motions, including adding Abbie as a party.

The parties submitted briefs at the end of March. In her brief, Abbie requested an amendment to the pleadings to allow her to present evidence and testimony regarding the Cohens' reliance on experts in performing their fiduciary duties. Abbie argued Dorn had ample opportunity to conduct discovery and would suffer no prejudice by amending the pleadings. The Cohens argued they should be allowed to amend the pleadings to conform to the evidence they presented at trial to assert the defense of advice of counsel. The Cohens argued Dorn had the opportunity to refute any evidence presented showing the Cohens relied on counsel's advice. Dorn argued it would be unduly prejudicial to allow the Cohens and Abbie to amend the pleadings to conform to the evidence and allow the Cohens to assert an affirmative defense two weeks into trial because Dorn would be required to submit additional discovery, conduct further depositions, and potentially recall every witness who previously testified.

The probate court held a telephone status conference with the parties on November 25, 2013. Thereafter, on December 3, 2013, the probate court issued an order continuing the incomplete trial and another order adding Abbie as a party to both petitions pursuant to Rule 19, SCRCF.

Appellants appealed to the circuit court the probate court's order adding Abbie as a party. On March 10, 2014, the probate court issued an order granting Abbie and the Cohens' motions to amend the pleadings to conform to the evidence and found Dorn would not suffer any prejudice and would be afforded a full opportunity to address the issues raised in the amended pleadings.

On June 26, 2014, the Cohens moved before the probate court for a mistrial on the basis the probate court judge who heard the first part of the trial on Dorn's and the Cohens' petitions was not reelected and would not likely be able to resume the proceedings before leaving office. The probate court judge recused herself from the matter on September 3, 2014. On October 14, 2014, the Cohens moved to stay the appeals filed by Appellants until a new judge was appointed and the proceedings were tried to conclusion or until a mistrial was declared.

The circuit court held a hearing on the Cohens' motion to stay on February 9, 2015. At the hearing, the circuit court stated it was unlikely a mistrial would be granted. The circuit court found Appellants' appeals were not immediately appealable

because no final decision had been rendered in the case. The circuit court dismissed the appeals as not immediately appealable and did not rule on the Cohens' motion to stay the appeal at that time.³ This appeal followed.

LAW/ANALYSIS

Appellants argue the probate court's order adding Abbie as a party to Dorn's petition to remove the Cohens as cotrustees of the Trust is immediately appealable because it affects Dorn's substantial right to name his own defendants and control the presentation of evidence at trial. Appellants contend the probate court's order affected Dorn's substantial right because he could have received complete relief without Abbie's addition as a party. Appellants also argue allowing Appointed Attorney and Abbie's GAL to call undisclosed witnesses for whom Dorn had not prepared prevented Dorn from being able to identify, depose, or receive discovery from those witnesses, which left Dorn unable to effectively litigate the case, needlessly delayed proceedings, and burdened the Trust with extra costs. We disagree.

"The determination of whether a trial court's order is immediately appealable is governed by statute." *Morrow v. Fundamental Long-Term Care Holdings, LLC*,

³ The Form 4 orders contained in the record appear to state that the circuit court had already ruled Appellants' appeals were not immediately appealable and because of that the circuit court found the Cohens' motion for a stay moot. Specifically, the orders stated,

This case came before the Court during the February 9, 2015 common pleas non-jury term for a hearing on Defendant Paul S. Cohen's Motion to Stay, filed October 15, 2014. Because this Court denied Plaintiff Daniel B. Dorn's [p]robate [a]ppeal, filed December 23, 2013 as interlocutory, Defendant Paul S. Cohen's Motion to Stay, filed October 15, 2014 is resolved as moot.

The Form 4 orders were sufficient for this court to consider whether the probate court's order was immediately appealable. *See Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) ("As both court rule and this Court's precedent provide, a judgment is effective only when reduced to writing and entered into the record.").

412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015). Section 14-3-330 of the South Carolina Code (1977 & Supp. 2015) states,

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (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.

Our supreme court has held 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, making the order immediately appealable. *See Morrow*, 412 S.C. at 539, 773 S.E.2d at 146 ("The effect of this order is to prevent the [plaintiffs] from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing."); *Neeltec Enters.*,

Inc. v. Long, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) ("The right of the plaintiff to choose [his] defendant is a substantial right within the meaning of this subsection.").

However, 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. Rather, "the question of whether an order is immediately appealable is determined on a case-by-case basis." *See Morrow*, 412 S.C. at 538, 773 S.E.2d at 146. To determine whether an order is immediately appealable, we look to the probate court's order's effect on the proceedings. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c).").

In *Neeltec*, our supreme court held an order requiring a plaintiff to substitute two corporations as defendants in lieu of the individual the plaintiff originally named in the complaint was immediately appealable. 397 S.C. at 564, 725 S.E.2d at 927. In that case, the plaintiff originally filed an action against Willard Long, in his individual capacity, for blocking the plaintiff's advertisements for a fireworks store off Interstate 95 with advertisements for Long's own store, Fireworks Superstore. *Id.* at 565, 725 S.E.2d at 927. In defending the action, Long filed a "Motion for Summary Judgment or, in the Alternative, for Substitution of Parties," alleging Long did not own Fireworks Superstore but that it was owned by Hobo Joes, Inc. and subsequently, by Foxy's Fireworks Superstore, Inc. *Id.* at 565, 725 S.E.2d at 927-28. The special referee granted Long's motion, finding Long was not the proper defendant and ordered the plaintiff to substitute the two corporations as defendants. *Id.* In finding the order immediately appealable, our supreme court stated the order "effectively discontinue[d] [the plaintiff's] suit against Long, thus bringing the order under 2(a)." *Id.* at 566, 725 S.E.2d at 928.

Similarly, in *Morrow*, our supreme court held an order bifurcating proceedings that had the effect of depriving the plaintiffs of their substantial right to bring a case against the defendant of their choosing was immediately appealable. 412 S.C. at 539, 773 S.E.2d at 146. In that case, the plaintiffs filed a negligence action against a nursing home for injuries sustained by a resident who was assisted in the shower by a nursing home employee. *Id.* at 535-36, 773 S.E.2d at 144-45. In addition, the plaintiffs filed suit against the nursing home's corporate parents, alleging they were vicariously liable for the nursing home's negligence and directly liable for underfunding the nursing home, which led to staffing and training deficiencies. *Id.* at 536, 773 S.E.2d at 145. The nursing home's corporate parents filed a motion to

bifurcate the trial, arguing the issues of the nursing home's negligence and corporate negligence were distinct. *Id.* Thereafter, the trial court issued an order stating the action against the nursing home could go forward but only if the plaintiffs were successful would the second action on corporate negligence proceed before a jury at trial. *Id.* In finding the circuit court's order immediately appealable, our supreme court stated the effect of the trial court's order was to grant the nursing home's corporate parents potential summary judgment on the issue of direct corporate liability because the plaintiffs would not be able to litigate that claim against the corporate parents if they were unsuccessful in their direct action against the nursing home. *Id.* at 539, 773 S.E.2d at 146. Our supreme court further determined the effect of the circuit court's order "deprive[d] [the plaintiffs] of bringing their case against the defendant of their own choosing." *Id.*

We find the probate court's order in this case did not affect Dorn's substantial right to choose his own defendant. 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. Rather, the probate court's order had the effect of an order granting a motion to intervene because it allowed for Abbie's full participation as a party in the action seeking to remove the trustees of the trust created for her benefit. *See Duncan v. Gov't Emps. Ins. Co.*, 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994) (holding an appeal from an order of the circuit court granting a guardian ad litem's motion to intervene was interlocutory, did not affect a substantial right, and was therefore not immediately appealable).

Appellants' contention that Dorn could have received complete relief without Abbie's addition as a party in unavailing. Appellants' argument overlooks Abbie's interest as the primary beneficiary of the Trust. *See* S.C. Code Ann. § 62-7-103(2)(A) (Supp. 2015) (stating a beneficiary is "a person [who] . . . has a present or future beneficial interest in a trust, vested or contingent"). "[A]ccording to the former decisions of this court, it is indispensable that the beneficiaries be made parties to any proceeding brought for the purpose of adjudicating their interest." *Hood v. Cannon*, 178 S.C. 94, 99-100, 182 S.E.2d 306, 308 (1935). In this case, determination of the issues before the probate court had serious consequences for Abbie, whose welfare and care depended directly on the prudent use of the Trust's funds. Therefore, the probate court's joinder of Abbie under Rule 19, SCRCP, was proper and enabled Abbie, through Appointed Attorney and Abbie's GAL, to protect her interests as the Trust's primary beneficiary. *See* Rule 19(a), SCRCP ("A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall* be joined as a

party in the action if . . . he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest" (emphasis added)).

To the extent Appellants argue Abbie's interests were adequately represented by the Cohens, we disagree. This argument fails to recognize the distinction between guardians and guardians ad litem, as well as the position in which Dorn's petition placed the Cohens by forcing them to defend their expenditures from the Trust. "The terms 'guardian' and 'guardian ad litem' have separate and distinct legal meanings; thus, persons appointed to serve in those capacities are charged with separate and distinct duties and obligations." *Wilson v. Ball*, 337 S.C. 493, 496, 523 S.E.2d 804, 806 (Ct. App. 1999).

A "guardian" is one given the power and charged with the duty of taking care of a person who is considered incapable of administering his or her own affairs and of managing his or her property rights. A "guardian ad litem," on the other hand, is one authorized to prosecute on behalf of or defend an incapacitated person in any suit to which the incapacitated person may be a party and to protect his or her interests in the particular litigation.

Id. at 496-97, 523 S.E.2d at 806 (footnote omitted). Further, "[a] guardian ad litem is a representative of the court[,] appointed to assist it in properly protecting the interests of an incompetent person." *Shainwald v. Shainwald*, 302 S.C. 453, 457, 395 S.E.2d 441, 444 (Ct. App. 1990).

The record makes abundantly clear the Cohens are excellent caregivers and provide Abbie with outstanding care. However, given that Dorn's petition places the Cohens in the unenviable position of defending their expenditures from the Trust, a potential conflict of interest exists between whether Trust funds were used to satisfy Abbie's special needs versus the Cohens' perception of Abbie's needs. Thus, while Appellants are correct the Cohens are Abbie's guardians and can protect her interests under many circumstances, the independent representation the probate court afforded Abbie by appointing Abbie's GAL and Appointed Attorney was needed here.

Further, despite Appellants' arguments to the contrary, Dorn suffered no undue prejudice as a result of the probate court's order adding Abbie as a party to the

proceedings. Appellants argue the probate court's order left Dorn unable to effectively litigate his case; however, 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. The 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 allow the parties to recall witnesses and call rebuttal witnesses if necessary. Appellants never objected to this procedural arrangement; instead, both Dorn and Children were early proponents of trying the petitions simultaneously.

The record demonstrates Abbie, through Appointed Attorney and Abbie's GAL, fully participated in the proceedings through depositions, presented an opening statement, and participated in cross-examination of the other parties' witnesses before she was officially named a party to the petitions. The probate court's comments demonstrated it intended to allow Appointed Attorney and Abbie's GAL to fully participate at trial. Further, Appointed Attorney's willingness to answer Dorn's petition if Abbie had been served with Dorn's petition demonstrated a common understanding amongst the parties Abbie was to be afforded the rights of a full party to both petitions from the beginning of trial. Therefore, we find Appellants were not unduly prejudiced by Abbie's addition as a party in this case and the circuit court properly determined the probate court's order was not immediately appealable because Abbie's addition as a party did not affect Dorn's substantial right to choose his own defendant.

CONCLUSION

We find the circuit court did not err in dismissing as not immediately appealable Appellants' appeals of the probate court's order adding Abbie as a party. Consequently, the circuit court's order is

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

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.

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AUG 17 2016

SC Court of Appeals

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

v.

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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

TABLE OF CONTENTS

Table of Authorities	2
Statement of Issues on Appeal.....	2
Argument	2
Conclusion	5

TABLE OF AUTHORITIES

<u>Morrow v. Fundamental Long Term Care Holdings, L.L.C.</u> , 412 S.C. 534, 773 S.E.2d 144 (2015).....	3
<u>Neeltec Enters. v. Long</u> , 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2013)	3, 4
S.C. Code Ann. § 14-3-330 (2)(a)	3

STATEMENT OF ISSUES

- 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

- 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 findings¹, 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 waiver 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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THE STATE OF SOUTH CAROLINA
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2014CP2601691, 2014CP2601744

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AUG 17 2016

SC Court of Appeals

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August 16, 2016

The South Carolina Court of Appeals

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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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

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Luff J.
U. K. Luff J.
John D. Tate J.

Columbia, South Carolina

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FILED

10-27-16

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APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues on Appeal	1
Statement of the Case	1
Facts	2
Arguments.....	9
A. THE ORDER IS IMMEDIATELY APPEALABLE BECAUSE IT AFFECTS A SUBSTANTIAL RIGHT	9
B. THE STANDARD OF REVIEW	12
C. THE PROBATE COURT’S ORDER ADDING MRS DORN, THE WARD OF THE COURT, AS A SEPARATE PARTY TO THE CASE AFTER THE TRIAL WAS NEARLY COMPLETE SHOULD BE VACATED BECAUSE SHE WAS NOT A NECESSARY PARTY UNDER RULE 19 AND BECAUSE THE ORDER UNDULY PREJUDICED THE APPELLANT.....	12
1. Adding Mrs. Dorn as a party under Rule 19 was error because Appellant could have received complete relief on this claim without the addition of Mrs. Dorn as a separate party	13
2. The amendment adding Mrs. Dorn, mid-trial and at the conclusion of Appellant’s case, caused undue prejudice to Appellant	15
Conclusion	19

TABLE OF AUTHORITIES

State Court Opinions

<u>Ball v. Canadian Am. Express Co.</u> , 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1993)	16
<u>Bensch v. Davidson</u> , 354 S.C. 173, 580 S.E.2d 128 (2003)	17
<u>Berkeley Elec. Coop. v. Mt. Pleasant</u> , 302 S.C. 186, 394 S.E.2d 712 (1990)	12
<u>Briggs v. Richardson</u> , 288 S.C. 537, 343 S.E.2d 653 (Ct. App. 1986)	18
<u>Collins Entm't, Inc. v. White</u> , 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2004)	16
<u>Forrester v. Smith & Steele Builders, Inc.</u> , 295 S.C. 504, 369 S.E.2d 156 (Ct. App. 1988)	15
<u>Gaddy v. Douglass</u> , 359 S.C. 329 (Ct. App. 2004)	14
<u>Hunnicut v. Rickenbacker</u> , 268 S.C. 511, 234 S.E.2d 887 (1977)	12
<u>Jeter v. S.C. DOT</u> , 369 S.C. 433, 633 S.E.2d 143 (2006)	12
<u>Neeltec Enters. v. Long</u> , 402 S.C. 524, 741 S.E.2d 767 (Ct. App. 2012)	11, 12
<u>Parker v. Spartanburg Sanitary Sewer Dist.</u> , 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2004)	16
<u>Reed v. Clark</u> , 277 S.C. 310, 286 S.E.2d 384 (1982)	17
<u>Rosenthal v. Allstate Ins. Co.</u> , 670 N.Y.S.2d 862 (2d Dep't 1998)	15
<u>Rutland v. S.C.</u> , 400 S.C. 209, 744 S.E.2d 142 (2012)	11
<u>S.C. State Highway Dep't v. Booker</u> , 260 S.C. 245, 195 S.E.2d 615 (1973)	17
<u>Shah v. Richland Mem'l Hosp.</u> , 350 S.C. 139, 564 S.E.2d 681 (Ct. App. 2002)	13
<u>Stanley v. Kirkpatrick</u> , 357 S.C. 169, 592 S.E.2d 296 (2003)	16
<u>Morrow v. Fundamental Long Term Care Holdings, L.L.C.</u> , ____ S.C. ____, 773 S.E.2d 144 (2015)	10, 11

State Statutes

S.C. Code Ann. § 14-3-330 (1976 & Supp. 2015)	10
S.C. Code Ann. § 14-3-330(2)(a) (1976 & Supp. 2015)	10

Other

S.C. R. Civ. P. 19	13
S.C. R. Civ. P. 17 (c)	14
1B West McKinney's Forms Civil Practice Law and Rules § 4.304	15

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. SLOCHIVER: 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

*

*

*

1 to the action that we have brought -- and I'll let
2 Mr. Kachmarsky speak to his action, but with
3 reference to the action that I brought on behalf
4 of Daniel Dorn in his capacity as guardian for the
5 minor children against the Cohens in their
6 capacity as trustees and conservators, the
7 guardians have every -- the guardian and the
8 guardian attorney, or the attorney for Abbie, have
9 every right to cross-examine anybody that I call
10 as a witness or anybody that the Cohens call as a
11 witness, but they do not have the right in my
12 action, the one that we filed, to call their
13 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;
- (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 Hunnicut 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

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 Trust³ assets, as opposed to using their own funds, in

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), SCRPC ("... 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), SCRPC, *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
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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

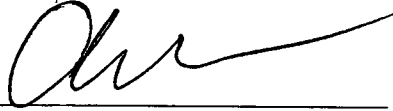
The Honorable Deadra L. Jefferson
Horry County
Trial Court Case No. 2013CP2608152, 2013CP2608139,
2014CP2601691, 2014CP2601744

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CERTIFICATE OF COUNSEL

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

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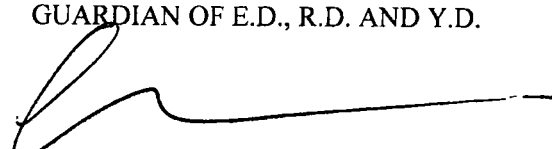
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November 30, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals
Appellant,

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

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 Heath 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 Heath 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. 2013-CP-26-2968, 2013-CP-26-8139,
2014-CP-26-1691, 2014-CP-26-1744

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Standard of Review	2
Statement of the Case	3
Argument:	
I. Did the Circuit Court err when it dismissed the appeal from the Probate Court when it found that the Court Order at issue is interlocutory in nature, and not immediately appealable?	11
II. Did the Order of the Probate Court clarifying the standing of Abbie Dorn as a party sufficiently impact a substantial right of the Appellants, such that they should be entitled to an immediate appeal of the ruling?	14
Conclusion	16

TABLE OF AUTHORITIES

Cases:

<u>Matter of Howard</u> , 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993)	2
<u>Morrow v. Fundamental Long Term Care Holdings, LLC</u> , 773 S.E.2d 144 (2015).....	2, 12, 13
<u>Hagood v. Sommerville</u> , 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005)	12, 13
<u>Berkeley Elec. Coop v. Mt. Pleasant</u> , 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990)	13
<u>Hunnicutt v. Rickenbacker</u> , 268 S.C. 511, 517, 234 S.E.2d 887, 890 (1977)	13
<u>Ieter v. S.C. DOT</u> , 369 S.C. 433, 633 S.E.2d 143, 146 (2006)	13
<u>Macauley v. Wachovia Bank of S.C., N.A.</u> , 333 S.C. 201, 508 S.E.2d 46 (Ct. App. 1988)	15
<u>Hanson, et al. v. Denckla, et al.</u> , 357 U.S. 235	15

Statutes:

South Carolina Code Ann. §62-1-308 (1976 & Supp. 2015).....	2
South Carolina Code Ann. §62-1-308(d) (1976 & Supp. 2015).....	2
South Carolina Code Ann. §14-3-330 (1976 & Supp. 2015).....	2, 12, 13

Rules:

South Carolina Rules of Civil Procedure, Rule 19.....	13, 14
South Carolina Rules of Civil Procedure, Rule 19(a)	15
South Carolina Rules of Civil Procedure, Rule 24.....	13

STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err when it dismissed the appeal from the Probate Court when it found that the court order at issue is interlocutory in nature, and not immediately appealable?**
- II. Did the Order of the Probate Court clarifying the standing of Abbie Dorn as a party sufficiently impact a substantial right of the Appellants, such that they should be entitled to an immediate appeal of the ruling?**

STANDARD OF REVIEW

Appeals from the probate court are governed by the provisions of the probate code. Matter of Howard, 315 S.C. 356, 360, 434 S.E.2d 254, 256 (1993). South Carolina Code § 62-1-308 provides that a final order or decree of the probate court may be appealed to the circuit court, and that the circuit court "must hear and determine the appeal according to the rules of law." S.C. Code Ann. § 62-1-308(d) (1976 & Supp. 2015). "[A]ccording to the rules of law' means according to the rules governing appeals." Matter of Howard, 315 S.C. at 360, 434 S.E.2d at 257. However, in this case, there is no final order of the probate court from which the appeal is taken. As such, this Court must look to the nature of the specific order appealed from in order to determine whether such order is in fact appealable, and if so, the appropriate standard of review to be applied. See S.C. Code Ann. § 14-3-330 (1976 & Supp. 2015), and Morrow v. Fundamental Long Term Care Holdings, LLC, 773 S.E.2d 144 (2015).

STATEMENT OF THE CASE

This appeal arises from two closely related Petitions filed in the Probate Court for Horry County in November 2010, both involving the Abbie Dorn Special Needs Trust. One Petition, brought by Respondents Paul and Susan Cohen, sought confirmation of certain payments made by Paul and Susan Cohen (hereinafter "Mr. Cohen" and "Ms. Cohen" or "the Cohens"), as Co-Conservators of Abbie Dorn, and Co-Trustees of the Abbie Dorn Special Needs Trust, while the other Petition, brought by the Appellant, Mr. Daniel Dorn, (hereinafter "Mr. Dorn") sought to remove the Cohens as Co-Conservators and Co-Trustees of the Abbie Dorn Special Needs Trust (the "Trust"), for acts related to the same payments from the Trust which the Cohens sought to affirm.

A trial was commenced in Probate Court in February of 2013. While the trial was in recess, on or about December 5, 2013, the Court issued an Order naming Abbie Ilene Dorn as a party in both cases (R. pp. 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. pp. 358-390). The circuit court held a hearing on the Respondents' Motion to Stay the appeal on February 9, 2015, but did not rule on the Respondents' Motion to Stay, and instead held that the appeal was interlocutory and dismissed the appeal. (R. pp. 554-568). This appeal to the Court of Appeals followed.

FACTS

Daniel Dorn and Abbie Ilene Dorn (hereinafter, "Ms. Dorn" or "Abbie") were married in the State of California in 2002. In or around June 2006, Abbie gave birth to three (3) children, R.D., E.D., and Y.D. (hereinafter "the Dorn children"). Tragically, during childbirth, Ms. 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, Ms. Dorn was left paralyzed, and unable to speak or to function. To date, Ms. Dorn remains tragically disabled.

A medical malpractice claim was filed in the State of California on behalf of Ms. Dorn, which ultimately resulted in settlement. Pursuant to the terms of the settlement agreement, a portion of the settlement was used to purchase an annuity on the life of Abbie Ilene Dorn, and a portion of the settlement, just under One Million (\$1,000,000), was paid as a lump sum into the Abbie Dorn Special Needs Trust. The annuity purchased with the settlement provides monthly income to the Trust, currently in excess of \$36,000 monthly, for the life of Abbie Dorn, which income will continue to increase over the life of Abbie Dorn. Ms. Dorn is currently a ward of the Court, and she also is under Guardianship of her parents, the Cohens. (R. pp. 3-27).

At the request of Mr. Dorn, the Cohens instituted a marital dissolution proceeding in California. The Cohens did not object to Daniel Dorn retaining custody

of the Dorn children, who are now nine (9) years of age, but did seek visitation of the Dorn children on behalf of Abbie Dorn. Mr. Dorn, in turn, sought child support payments from the Abbie Dorn Special Needs Trust, payments which the Cohens were advised and believe are inconsistent with the purpose of the Abbie Dorn Special Needs Trust, a special needs trust established pursuant to 42 U.S.C. § 1396p(d)(4)(A). The resulting litigation between Mr. Dorn and the Cohens in the California Superior Court persisted for years, was unfortunate, and was costly. The Cohens paid the legal fees incurred in connection with the California marital dissolution litigation, which amounted to nearly One Million Dollars (\$1,000,000), from the Abbie Dorn Special Needs Trust.

Following the California litigation, Mr. Dorn commenced litigation against the Cohens in South Carolina, filing an action against the Cohens both individually and as Co-Conservators and Co-Trustees of Abbie Dorn and the Trust (the "Dorn Petition"). One day later, and before they were aware the Dorn Petition had been filed, but anticipating further litigation from Dan Dorn, the Cohens filed a separate petition (the "Cohen Petition"), seeking to confirm the same payments from the Trust associated with the California marital dissolution action which Mr. Dorn complained of in the Dorn Petition. The Dorn Petition sought the removal of the Cohens as Co-Trustees of the Trust and as Co-Conservators of their daughter, and requested monetary reimbursement to the Trust for the legal expenses incurred by the Trust in the 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 the Cohen Petition, the Cohens alleged that they had previously been authorized to retain attorneys for the protected person, Abbie Dorn, by the Superior Court of California, Kern County, Metropolitan Division, and by the Order of Transfer of Jurisdiction to Horry County, but that in prudence they were seeking additional specific affirmation of that same authority by the Horry County Probate Court.

The Probate Judge appointed Attorney V. Lee Moore as the Guardian ad Litem (hereinafter "GAL") for Ms. Dorn. (R. p. 28). The Probate Judge also appointed Attorney Lynette R. Hedgepath to serve as the attorney for Ms. Dorn, individually. The Court did not appoint any attorney to represent the GAL. (R. p. 29). These appointments applied to both the Dorn Petition and the Cohen Petition, while the Court's appointment of John Kachmarsky as Attorney and GAL to represent the Dorn children applied only to the Cohen Petition action.

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. pp. 472-473).

The original Cohen Petition only listed "In re the Abbie Dorn Special Needs Trust" in the caption, with no persons listed as Respondent. (R. p. 96). 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. p. 122). 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. pp. 123-125)

Prior to the commencement of trial, Mr. Dorn did not serve the Dorn Petition on Ms. Dorn, and neither her Attorney nor the GAL ever served an Answer to the Dorn Petition. The Cohens did serve a copy of the Cohen Petition on Abbie's Attorney, and Ms. Dorn answered the Cohen Petition. (R. pp. 283-287). Over objection by Appellant, the Court allowed both Ms. Dorn's GAL and Ms. Dorn's Attorney to make opening and closing statements and to cross-examine witnesses. (R. pp. 749-750).

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. It was at this time that the GAL and the Attorney for Ms. 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 Ms. 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 Ms. Dorn was, in fact, a Party to both of the actions. (R. pp. 1025-1031).

The ensuing colloquy amongst the Court, and all Counsel present in the courtroom evidences substantial confusion over whether or not Abbie Dorn was a party to either the Dorn Petition, the Cohen Petition, or both petitions. In response to the

discussion in the courtroom, and numerous lengthy objections, the Court indicated that it intended to allow Ms. Dorn's GAL and Attorney to call witnesses:

20 THE COURT: She may not be named as a
21 party, but let's be clear, in my opinion, she is a
22 party in your action to remove the trustees of her
23 trust. I didn't go back to look at the order, and
24 I'm happy to, but my position is I appointed
25 Ms. Hedgepath and Ms. Moore to represent Abbie in
1815:1 the action you brought and in the action that the
2 Cohens brought.

(R. p. 1025). Following ongoing discussion of the issue before the Court, the Court continued to clarify that it had considered Abbie Dorn to be a party to both the Dorn and the Cohen Petitions. (R. pp. 1025-1031). Counsel for the Cohens noted that, while neither the Dorn Petition or the Cohen Petition appeared to directly name Abbie Dorn as a party, certain documents, such as the Orders appointing John Kachmarsky, Lynette Hedgepath, and Lee Moore to their respective court-appointed roles referenced *only* Abbie Dorn as a party:

25 MR. BOYD: Before you rule, let me
1830
1 just add one point. The order appointing the
2 guardian and the attorneys for the protected
3 person, the caption the court used in the order,
4 which, again, you've signed the order the 2nd day
5 of February 2011 -- and I've got a hard copy in
6 the file, I can hand it up -- the caption that the
7 court utilized in the order, it doesn't mention
8 Dan Dorn. It doesn't mention the Cohens. It's a
9 two-line caption, Your Honor. The first line is:
10 The matter of Abbie Dorn, a protected person.
11 Nobody else is mentioned in the caption. The
12 second line is: Matter of Abbie Dorn Special
13 Needs Trust. So to sit here and contend that
14 Abbie Dorn is --
15 THE COURT: And what does the order

16 actually say, Mr. Boyd?
17 MR. BOYD: And it contains -- so the
18 caption of Your Honor's order is: Matter of Abbie
19 Dorn, a protected person, matter of the Abbie Dorn
20 Special Needs Trust, contains both the case
21 numbers, 2008-GC -- actually, I think that's an
22 error, Your Honor. It's 2010. 2010-GC-26-25 and
23 GC-26-50, which are the two cases, and then the
24 order is: Order appointing guardian ad litem upon
25 review of the incoming pleadings filed in the
1831

1 above-referenced matters, plural, referring to
2 both, this court finds that the appointment of a
3 guardian ad litem is appropriate, necessary,
4 and/or desirable for the protected person, Abbie
5 Dorn, referring to her as the protected person.

6 MR. DAN SLOTCHIVER: We agree with
7 that completely. We're not disputing that.

8 THE COURT: And was that the order
9 that appointed both Ms. Hedgepath and Ms. Moore?

10 MR. BOYD: There's an order for
11 Ms. Moore, Your Honor, and there's the equivalent
12 order for Mr. Kachmarsky, referring only to
13 2010-GC-26-50 and an equivalent order for
14 Ms. Hedgepath referring to both actions.

* * *

21 THE COURT: Thank you.

22 Mr. Slotchiver, I'm not aware of any
23 rule that prevents a court-appointed guardian ad
24 litem on behalf of either a minor, an alleged
25 incapacitated person, a protected person, a ward
1832

1 from calling their own witnesses in any action
2 that involves that person.

3 MR. DAN SLOTCHIVER: Well, Your Honor,
4 I'll be happy to --

5 THE COURT: Regardless of whether they
6 were actually named as a party in a proceeding,
7 I'm not aware of any rule that prevents them -- I
8 understand you've cited the South Carolina Rules
9 of Civil Procedure, but I'm not aware of any rule
10 that limits a guardian ad litem's right to call

11 witnesses in an action where that person they were
12 appointed to represent -- maybe they're an
13 incarcerated person, out of state, in state, maybe
14 they're a minor, maybe they're already a protected
15 person, maybe they're already a ward, maybe
16 they're alleged to be incapacitated -- that would
17 prevent someone who's representing the best
18 interest of that person from calling witnesses in
19 an action to which they have an interest.

(R. p. 1029).

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 Ms. Dorn's Attorney to have Abbie Dorn added as a Party to the case. Other parties were allowed to brief the Court on the issue in response to Ms. Dorn's Motion. (R. p. 1142) On December 5, 2013, the Court issued an Order explicitly joining Ms. Dorn as a party in both cases. (Order Naming Abbie Ilene Dorn as Party to Actions).

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. pp. 358-364). 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. pp. 554-568).

ARGUMENT

I. THE ORDER AT ISSUE IS NOT IMMEDIATELY APPEALABLE, AND THE CIRCUIT COURT DID NOT ERR WHEN IT DISMISSED APPELLANT'S APPEAL.

Appellants correctly note in their Brief that, despite the fact that appellate briefing had not been completed, the Circuit Court dismissed the appeal below as interlocutory at a hearing on the Respondents' Motion to Stay the appellate proceedings, on February 9, 2015. (Appellants' Brief pp. 9-10). Appellants claim that because the Probate Order appealed from added a party defendant, mid-trial, it was immediately appealable. However, while on its face the Probate Order being appealed from added Abbie Dorn as a party defendant to the cases below in the Probate Court, these Respondents would argue that the Probate Order at issue merely clarified with certainty the role of Abbie Dorn in these proceedings. As Respondents have already observed, neither the Dorn Petition *nor* the Cohen Petition named Abbie Dorn as a specific party to their respective actions, while other documents in both proceedings, such as the Orders concerning court appointed counsel and GALs, referenced Abbie Dorn *exclusively*. (Supra, at p. 8).

To suggest that Abbie Dorn was truly "added as a new party-Defendant, mid-trial," as the Appellants do, is also to suggest that these actions could ever have been undertaken and litigated fairly, absent her full and unfettered participation in the proceedings. Such a rule would undermine the very purpose of appointed counsel for protected persons and guardians ad litem in the probate courts. Similarly, suggesting

that the Probate Order appealed from affected the substantial right of Daniel Dorn because it interfered with his right to “choose his Defendant,” is true only insofar as Daniel Dorn would have been free to litigate the Dorn Petition absent the full and active participation of Abbie Ilene Dorn, something which these Respondents would argue cannot be the rule, and which this Court cannot sanction.

The South Carolina Supreme Court recently addressed the question of what types of trial court orders are, and are not, immediately appealable in the case of Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 773 S.E.2d 144 (2015). In Morrow, the Court held that:

the determination of whether a trial court’s order is immediately appealable is governed by statute. Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005); *see* S.C. Code Ann. § 14-3-330 (1976 & Supp. 2014). 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 provisions of section 14-3-330 have been construed by this Court to serve the underlying policy favoring judicial economy by avoiding "piecemeal appeals." Hagood, 362 S.C. at 196, 607 S.E.2d at 709. By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis.

Morrow v. Fundamental Long Term Care Holdings, LLC, 412 S.C. 534, 537-38, 773 S.E.2d 144, 145-46 (2015) (emphasis added).

Appellants correctly observe that the Supreme Court in Morrow affirmed and recognized that a Plaintiff's right to name or choose his own defendant is a substantial right. However, in this case, significantly, the Probate Court order appealed from neither "determined the action," nor did it prevent "a judgment from which an appeal might be taken," nor did it "discontinue the action." As Appellants acknowledge in their brief, "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.**" (Appellant's Br. p. 12, *citing* 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)(emphasis added)), and this Court should not disturb a lower court's decision, unless "a manifest abuse of discretion is found resulting in an error of law." (Appellant's Br. p. 12, *citing* Jeter v. S.C. DOT, 369 S.C. 433, 633 S.E.2d 143, 146 (2006)). No such manifest abuse of discretion is found here. The Probate Order appealed from did not "determine the action." Indeed, the status and

outcome of these cases remains very much “uncertain,” as Appellants themselves acknowledge. (Id.) Nor did the Probate Court Order appealed from prevent a judgment from which an appeal might be taken, or discontinue the action. As such, the Probate Order appealed from does not fall within the ambit of S.C. Code § 14-3-330, and is therefore not immediately appealable.

II. THE PROBATE COURT DID NOT ERR IN CLARIFYING THE STATUS OF ABBIE DORN AS A DIRECT PARTY TO THE PROCEEDINGS BELOW, AND THE PROBATE COURT’S RULING DID NOT SUFFICIENTLY IMPACT A RIGHT OF THE APPELLANTS SUCH THAT THEY SHOULD BE ENTITLED TO AN IMMEDIATE APPEAL OF THAT RULING.

As Respondents note above, the trial transcript makes clear that while there were differing opinions in the courtroom when the issue of Abbie Dorn’s status arose on March 7, 2013, the transcript generally supports the conclusion that both the attorney and the GAL for Abbie Dorn, and the attorneys for the Cohen Respondents, as well as, significantly, the Probate Court judge herself, had commenced the underlying trial proceedings in the Probate Court, on both the Dorn and Cohen Petitions, with the expectation that Abbie Dorn would be able to fully and completely participate in all proceedings, on both the Dorn Petition and the Cohen Petition. (R. pp. 1024-1031).

Moreover, there can be little doubt that Abbie is unquestionably a necessary and indispensable party to these proceedings. South Carolina Rules of Civil Procedure, Rule 19, provides in pertinent part, that:

A person ... shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties,

or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. **If he has not been so joined, the court shall order that he be made a party.**

Rule 19(a), SCRCP (emphasis added). Here, where the Probate Court was asked to construe a special needs trust that exists, as it must pursuant to Medicaid requirements, *for the sole benefit* of Abbie Dorn, it is difficult to argue that Abbie Dorn is not a necessary party to those proceedings. See, e.g., Macaulay v. Wachovia Bank of S.C., N.A., 333 S.C. 201, 508 S.E.2d 46 (S.C. App. 1988) (citing Hanson, et al. v. Denckla, et al., 357 U.S. 235, for the general rule that a trustee is a necessary party to an action involving the validity of a trust).

While acknowledging that the Court has the authority to add Abbie Dorn as a party, if necessary, pursuant to Rule 19(a), SCRCP, Appellants assert that Abbie is not a necessary party to the proceedings in the Probate Court because she “was already represented by the presence of the Cohens as defendants in the action.” (Appellant’s Br. p. 13.) Yet, the Cohens are the same co-trustees whom Appellants seek to have removed as co-trustees for allegedly breaching their fiduciary responsibilities with respect to Abbie’s Special Needs Trust.

It is reasonable to conclude that the Probate Court proceedings in this matter, and the cases generally, have life-or-death implications for Abbie Ilene Dorn. To overlook the individual primarily impacted by these proceedings, Abbie Ilene Dorn, or to suggest that the proceedings below may proceed absent Abbie’s full and unfettered

participation, is to overlook both the true nature of the litigation, and the very purpose of the Abbie Dorn Special Needs Trust. The trial judge in the Probate Court, as is made clear in the Orders appointing Abbie's counsel and GAL, understood from the outset that Abbie's rights and interests in these proceedings were paramount and must be protected. (R. pp. 28, 29). The Probate Court Judge appointed Abbie's attorney and GAL for that purpose, and she was well within her discretion to do so.

Because Abbie Dorn is, and has been from the outset, a necessary party to both the Dorn Petition and the Cohen Petition, the Order of December 5, 2013, naming her as such and clarifying her status as a necessary party does not sufficiently impact the rights of the Appellants, such that they should be entitled to an immediate appeal of that Order.

CONCLUSION

Appellants would appear to suggest to this Court a rule by which vulnerable and protected persons such as Abbie Dorn may participate in litigation in the Probate Courts which directly affects them in fundamental ways, but without being afforded the same rights, privileges, or status of other litigants. Appellants have not been unduly prejudiced by the rulings of the trial court below. Respondents respectfully request that the ruling of the Circuit Court below be AFFIRMED, and that the Appellants' current appeal be DENIED.

For the reasons set forth herein, Respondents Paul and Susan Cohen respectfully request that this Court affirm the judgment of the Circuit Court below.

November 30, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Reese R. Boyd, III", written over a horizontal line.

Reese R. Boyd, III

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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

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.

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DEC 02 2015

SC Court of Appeals

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 certifies that the Respondents' Final Brief complies with Rule 211(b) pursuant to SCACR.

November 30, 2015

Respectfully submitted,

The image shows two handwritten signatures in black ink. The first signature on the left is for Reese R. Boyd, III, and the second signature on the right is for Bret H. Davis. Both signatures are written in a cursive, flowing style.

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as Co-Trustees of the Abbie Dorn
Special Needs Trust

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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TABLE OF CONTENTS

Table of Authorities	i
Statement of Issues on Appeal	1
Statement of the Case	1
Facts	2
Arguments	5
I. AS AN INTERESTED PARTY, ABBIE ILENE DORN WAS ENTITLED TO PARTICIPATE FULLY IN THE DISCOVERY AND TRIAL PROCESS, MAKING THE ORDER NAMING HER AS A PARTY TO THE ACTION UNNECESSARY..	5
II. THE OBJECTION TO ABBIE ILENE DORN PARTICIPATING AS A PARTY IN THE TRIAL WAS NOT TIMELY MADE, AND IS THEREFORE WAIVED.....	6
III. THE ORDER ADDING ABBIE ILENE DORN AS A NAMED PARTY IS INTERLOCUTORY AND IS, THEREFORE, NOT IMMEDIATELY APPEALABLE...	6
IV. THE ORDER ADDING ABBIE ILENE DORN AS A NAMED PARTY DID NOT UNDULY PREJUDICE APPELLANT'S SUBSTANTIAL RIGHT 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.....	10
Conclusion	18

TABLE OF AUTHORITIES

CASES

<u>Bass v. Isochem</u> , 365 S.C. 454, 617 S.E.2d 369 (2005)	10
<u>Bridges v. Dep't of Md. State Police</u> , 441 F.3d 197 (4th Cir. 2006)	10
<u>Cumbe v. Cumbe</u> , 245 S.C. 107, 139 S.E.2d 477 (1964)	16
<u>Davis v. La-Z-Boy Chair Co.</u> , 287 S.C. 121, 337 S.E.2d 238 (1985)	7
<u>Doe v. N. Greenville Hosp.</u> , 318 S.C. 459, 458 S.E.2d 439 (Ct. App. 1995)	15
<u>Elec. Mobility Corp. v. Bourns Sensors/Controls, Inc.</u> , 87 F. Supp. 2d 394 (D.N.J. 2000) ...	10
<u>Ex parte Foster</u> , 350 S.C. 238, 565 S.E.2d 290 (2002)	14
<u>Ex parte Gov't Employees Ins. Co.</u> , 373 S.C. 132, 644 S.E.2d 699 (2007)	11
<u>Ex Parte Wilson</u> , 367 S.C. 7, 625 S.E.2d 205 (2005)	7
<u>Fleming v. Asbill</u> , 326 S.C. 49, 483 S.E.2d 751 (1997)	16
<u>Foust v. Se. Pa. Transp. Auth.</u> , 756 A.2d 112 (Pa. Commw. Ct. 2000)	10
<u>Hasselman v. Barnes</u> , 700 S.E.2d 69 (N.C. Ct. App. 2010)	12
<u>Hebbard v. Colgrove</u> , 105 Cal. Rptr. 172 (Ct. App. 1972)	12
<u>In re James F.</u> , 174 P.3d 180 (Cal. 2008)	17
<u>In re Lugo's Guardianship</u> , 172 N.Y.S.2d 104 (Ct. Cl. 1958)	17
<u>K.D.H. v. T.L.H., III</u> , 3 So. 3d 894 (Ala. Civ. App. 2008) ...	17
<u>Melancon v. Texaco, Inc.</u> , 659 F.2d 551 (5th Cir. 1981)	10
<u>Morrow v. Fundamental Long-Term Care Holdings, LLC</u> , 412 S.C. 534, 773 S.E.2d 144 (2015)	8
<u>Owings v. Foote</u> , 818 A.2d 1149 (Md. Ct. Spec. App. 2002)	17

<u>State v. Byers</u> , 392 S.C. 438, 710 S.E.2d 55 (2011)	6
<u>State v. Davis</u> , 371 S.C. 170, 638 S.E.2d 57 (2006)	15
<u>Stevens v. Loomis</u> , 334 F.2d 775 (1st Cir. 1964)	12
<u>Sunbelt Envtl. Servs. V. Rieder’s Jiffy Mkt., Inc.</u> , 138 S.W.3d 130 (Mo. Ct. App. 2004)	12
<u>Weaver v. Lentz</u> , 348 S.C. 672, 561 S.E.2d 360 (Ct. App. 2002)	14
<u>Wilson v. Ball</u> , 337 S.C. 493, 523 S.E.2d 804 (Ct. App. 1999)	13

STATUTES

S.C. Code Ann. § 14-3-330(2)(a)	9
S.C. Code Ann. § 14-8-200(a)	7
S.C. Code Ann. § 62-7-103(22)	5
S.C. Code Ann. § 62-1-308(a)	7
S.C. Code Ann. § 62-5-405(a)	11

COURT RULES

Rule 17, SCRPC	13
Rule 19, SCRPC	11
Rule 103(a)(1), SCRE	6

OTHER AUTHORITIES

90A C.J.S. <u>Trusts</u> § 801	12
<u>Black’s Law Dictionary</u> , “undue prejudice” (10th ed. 2014)	14
57 C.J.S. <u>Mental Health</u> § 316	17

STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR WHEN IT DISMISSED THE APPEAL FROM THE PROBATE COURT AS INTERLOCUTORY BECAUSE IT AFFECTS A SUBSTANTIAL RIGHT?

II. DID THE ORDER ADDING MRS. DORN AS A NAMED DEFENDANT TO THE APPELLANT'S PETITION, AT THE CONCLUSION OF TESTIMONY, UNDULY PREJUDICE APPELLANT'S SUBSTANTIAL RIGHT 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 consolidated actions filed in the Horry County Probate Court regarding the Abbie Dorn Special Needs Trust (hereinafter, the "Trust"). The first Petition was brought by Appellant Daniel Dorn (hereinafter, "Mr. Dorn") requesting removal of the Co-Conservators and Co-Trustees of the Trust. (Dorn Summons and Petition, R. p. 50). The day after Mr. Dorn's petition was filed, Respondents Paul S. Cohen, M.D. and Susan Cohen (hereinafter, "Mr. Cohen" or "Mrs. Cohen" individually, or "the Cohens," collectively), who are Co-Conservators for Abbie Ilene Dorn (hereinafter, "Mrs. Dorn") and Co-Trustees of the Trust filed a petition requesting reformation of the Trust to allow them to expend funds from the Abbie Ilene Dorn Special Needs Trust in litigation. (Cohen Summons and Petition, R. p. 95). On February 21, 2011, the Probate Court issued orders under both cases which appointed V. Lee Moore as Guardian ad Litem for Abbie Ilene Dorn (Order Appointing V. Lee Moore, R. p. 28), appointed Lynette Rogers Hedgepath as attorney for Mrs. Dorn (Order

Appointing Attorney, R. p. 29), and appointed John Kachmarsky as attorney and Guardian ad Litem for the minor children (Order Appointing Attorney and Guardian ad Litem, R. p. 30).

A trial was commenced in Probate Court on February 25, 2013, and was recessed on March 7, 2013. During this recess and as a result of discussions that occurred at the trial, on December 5, 2013, the Probate Court issued an order sua sponte joining Abbie Ilene Dorn as a party to both cases. (Order Naming Abbie Ilene Dorn as Party to Action, R. p. 38). Mr. Dorn and Appellant Attorney Kachmarsky, as Guardian *ad Litem* for the minor children (hereinafter, “Appellant Children”) filed Notice of Appeal to the Horry County Court of Common Pleas (Notice of Appeal to Horry County Court of Common Pleas), with such appeals being consolidated by the Circuit Court. (Order Consolidating Appeals). The Cohens then filed a Motion to Stay the appeal based on the unavailability of the presiding judge due to the loss of her bid for reelection (Motion to Stay, R. p. 358), and a Motion for Mistrial based on the Probate Court judge not being reelected (Motion for Mistrial, R. p. 346). On February 9, 2015, a hearing was held on the Cohen’s Motion to Stay the appeal. At that hearing, the circuit judge dismissed the appeal as interlocutory (Order Dismissing Appeal, R. p. 43). Appellants appeal from that order.

FACTS

Mr. Dorn and Mrs. Dorn were married in 2002 in California. (Testimony of Susan Cohen, Tr. Transcript p. 467, l. 22, R. p. 686). After substantial difficulty in conceiving children, the couple found out in 2005 that they were expecting triplets. Testimony of Daniel Dorn, Tr. Transcript p. 1843, l. 9 – 1844, l. 4, R. p. 1032). During the birth of their triplets in 2006, Mrs. Dorn suffered catastrophic injuries which have left her permanently paralyzed and unable to speak. A medical malpractice claim was filed on Mrs. Dorn’s behalf, which

was ultimately settled, and the proceeds of that action funded the Abbie Dorn Special Needs Trust.

Mr. Dorn practices the Orthodox Jewish faith, which denies him the ability to institute an action for divorce. For this reason, after Mrs. Dorn's injuries, Mr. Dorn requested that the Cohens institute such action, which they did. (Testimony of Daniel Dorn, Tr. Transcript, p. 1901 l. 17 – 1902, l. 21, R. p. 1046-1047). Surprisingly, once initiated, Mr. Dorn contested the action, requesting the payment of child support from the Trust (which would have disqualified Mrs. Dorn from Medicaid eligibility) and that the Court deny visitation with the minor children to Mrs. Dorn. (Testimony of Susan Cohen, Tr. Transcript, p. 182, ll. 8-12, R. p. 615). The Cohens used funds from the Trust to defend this litigation, which was ultimately concluded with an Order allowing visitation between Mrs. Dorn and the minor children and denying child support. The litigation was protracted and costly, with both parties spending close to \$1,000,000.00 each on attorney's fees and costs.

In 2008, the Cohens, who are Mrs. Dorn's parents, moved her to Horry County, South Carolina, where she continues to live with them. She undergoes extensive therapy and is living far beyond what her doctors originally predicted. It is not clear to what extent she is cognizant of her surroundings, although there are indications that she is aware of what is going on around her, and she is able to communicate nonverbally through blinking her eyes.

In 2011, Mr. Dorn filed a petition in the Probate Court for Horry County, seeking to remove the Cohens as trustees of the Trust and requested monetary reimbursement to the Trust for the divorce-related legal expenses. (Dorn Summons and Petition, R. p. 50). The next day, the Cohens filed a separate petition against Mr. Dorn and the Appellant Children seeking to amend the terms of the Trust to allow the Cohens to incur legal fees without

advance court approval. (Cohen Summons and Petition, R. p. 95). While Mrs. Dorn was not named as a party in Mr. Dorn's action, she was named as a party in the Cohens' action.

Given the number of common issues, the Probate Court consolidated the two actions. Neither Mrs. Dorn nor her attorney or Guardian ad Litem have ever been served with the Petition filed by Appellant in this matter; however, counsel for Mrs. Dorn was served with the Cohen Petition, and filed an Answer related to same. (Answer of Abbie Ilene Dorn, R. p. 283). This Answer was served on all parties, including the Appellants (Certificate of Service filed May 5, 2011, R.p. 286-287). Additionally, no discovery requests were ever served on Mrs. Dorn's attorney or Guardian ad Litem. Prior to the trial, Mrs. Dorn's attorney and Guardian ad Litem participated in the numerous depositions that were taken, and during the trial, Mrs. Dorn's attorney and Guardian ad Litem participated fully in the presentation of evidence. The Probate Court allowed the attorney and Guardian ad Litem for Mrs. Dorn to make opening and closing statements and to cross examine witnesses. None of this participation was met with objection from the Appellant.

As the case progressed, there were delays in the presentation of evidence due to medical emergencies and illness of the attorneys. While the matter was scheduled for two weeks of trial, only six days of testimony were actually held. The Court indicated a belief that the action would not be resolved prior to the end of the scheduled time and that the hearing would have to be recessed and reconvened at a later time based on the court's schedule. On the morning of the sixth day of trial, which was the last day scheduled for the hearing on the court's docket, counsel for Appellant argued for the first time that the Attorney and Guardian ad Litem for Mrs. Dorn should not be allowed to call witnesses as Mrs. Dorn was not a named party in the action. In December of 2014, the Probate Court

issued an order sua sponte naming Abbie Ilene Dorn as a party. (Order Adding Abbie Ilene Dorn as a Named Party, R. p. 38). Mr. Dorn appealed that Order to the Circuit Court, where his appeal was dismissed as interlocutory. (Order Dismissing Appeal, R. p. 43-49). It is from this Order that he appeals.

Arguments

I. AS AN INTERESTED PARTY, ABBIE ILENE DORN WAS ENTITLED TO PARTICIPATE FULLY IN THE DISCOVERY AND TRIAL PROCESS, MAKING THE ORDER NAMING HER AS A PARTY TO THE ACTION UNNECESSARY.

Appellant argues that the Order Naming Abbie Ilene Dorn as a party affected a substantial right resulting in undue prejudice because the trial in regards to his claims to remove the Co-Trustees of the Trust was completed. Initially, it is clear that even by Appellant's own admission in Appellant's brief, the case was not concluded because the Attorney and Guardian ad Litem for the minor children still had witnesses and evidence to present. (Appellants Brief, R. pp. 396, l. 26 – p. 397, l. 2). There is simply no evidence of a substantial right being affected causing undue prejudice to the Appellant. The result in this matter would be exactly the same regardless of whether the ward was specifically named as a party because she is already an interested party. See S.C.Code Ann § 62-7-103(22) (“‘Interested party’ means any person or party deemed to be a necessary or proper party under Rule 19 of the South Carolina Rules of Civil Procedure.”)

This case is analogous to the appointment of a Guardian ad Litem to protect the interest of minor children in a Family Court case. In these matters, the children are not named as parties in the action; however, the Guardian ad Litem has the right to call witnesses and present evidence to the Court in order to protect the interests of the children. Any rule

otherwise would result in the Guardians ad Litem serving solely at the whim of counsel for the parties, unable to call witnesses that were necessary to the presentation of the best interests of wards, protected persons, and children unless counsel for other parties determined their testimony helpful.

Appellant argues that there is no harm to Mrs. Dorn as an interested party in not being able to present witnesses and testimony as she is represented in this matter by the Cohens; however, this argument is illogical in the face of Appellant's argument that the Cohens be removed as Co-Trustees and Conservators for Mrs. Dorn because they do not adequately represent her interests. Additionally, Appellant gives no indication of why the Attorney/Guardian ad Litem for the minor children would be allowed to call witnesses and present evidence; however, the Attorney and Guardian ad Litem for Mrs. Dorn would not be able to do so.

II. THE OBJECTION TO ABBIE ILENE DORN PARTICIPATING AS A PARTY IN THE TRIAL WAS NOT TIMELY MADE, AND IS THEREFORE WAIVED.

Objections must be timely made in order to preserve the objection. See State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011); Rule 103(a)(1), SCRE (requiring a "timely objection"). Appellants objection to counsel and Guardian ad Litem for Mrs. Dorn being able to participate in the case in the same way as a party was not timely made. Attorneys Hedgepath and Moore attended and participated in depositions, participated fully in trial, and participated in the cross-examination of witnesses. To wait until the Petitioner's case was nearing conclusion to make such an objection was not timely, and such objection is therefore waived.

III. THE ORDER ADDING ABBIE ILENE DORN AS A NAMED PARTY IS INTERLOCUTORY AND IS, THEREFORE, NOT IMMEDIATELY APPEALABLE.

Despite the fact that the result would have been identical whether Mrs. Dorn was a named party or an unnamed but interested party, the Order adding Mrs. Dorn as a named party is interlocutory as it does not involve the merits of the action, and as such is not appealable. In relevant part, “a final order, sentence, or decree of a probate court may [be] appeal[ed] to the circuit court,” S.C.Code Ann. § 62-1-308(a), and the Court of Appeals “has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court,” *Id.* at § 14-8-200(a).

Notably, however, “[a]s a general rule, only final judgments are appealable. Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.” *Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (citations omitted); e.g., *Davis v. La-Z-Boy Chair Co.*, 287 S.C. 121, 121, 337 S.E.2d 238, 238 (1985) (“[A] Circuit Court order remanding a workers’ compensation case for the taking of additional testimony does not involve the merits of the action and is therefore interlocutory and not reviewable for lack of finality.”). The testimony has not concluded in this matter, thus leaving some further act to be done by the court before the rights of the parties could be determined.

While some limited interlocutory orders are appealable, this order does not qualify as an immediately appealable interlocutory order. The Supreme Court of South Carolina recently addressed the question of what constitutes an appealable interlocutory order.

The determination of whether a trial court’s order is immediately appealable is governed by statute. *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005); *see* S.C.Code Ann. § 14-3-330 (1976 &

Supp. 2014). 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 provisions of section 14-3-330 have been construed by this Court to serve the underlying policy favoring judicial economy by avoiding “piecemeal appeals.” Hagood, 362 S.C. at 196, 607 S.E.2d at 709. By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis.

Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 537-38, 773 S.E.2d 144, 145-46 (2015).

In Morrow, the circuit court granted the corporate defendants’ motion to bifurcate the plaintiff’s direct negligence claim from the vicarious negligence claim. See id. at 536, 773

S.E.2d at 145. The plaintiffs appealed and the defendants argued that the bifurcation order was not immediately appealable. See id. In relevant part, the Supreme Court held that

the trial court's order fits neatly within the statutory provision allowing immediate appeals where a substantial right is implicated. S.C. Code Ann. § 14-3-330(2)(a). The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing. *See Neeltec Enters., Inc., v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012) ("The right of the plaintiff to choose her defendant is a substantial right within the meaning of [section 14-3-330(2)(a)]").

Id.

In the instant case, Mr. Dorn seeks to analogize his case to that in Morrow so that his case likewise falls within the parameters of section 14-3-330(2)(a). (Appellant's Brief, p. 11). But as both Mr. Dorn and Morrow have noted, the question is extremely fact dependent and, thus, "determined on a case-by-case basis." Id. (citing *Morrow*, 412 S.C. 534, 773 S.E.2d 144). As such, Morrow is clearly distinguishable from the instant case.

Adding Mrs. Dorn as a party defendant in no way prejudices the Appellant because Mrs. Dorn was an unquestionably interested party to the litigation. Adding her as a named party does not terminate the action or prevent an appeal as required by section 14-3-330(2)(a). In his brief, Appellant asserts that had Mrs. Dorn not been added as a party, "the presentation of the evidence . . . would have been completed and the case would have been ready for decision." (Appellant's Brief pp. 11-12). However, he also admits that the "Attorney for the Dorn children intended to call a couple of witnesses [, but], it was only the presentation of that testimony which remained in order to complete trial." (Appellant's Brief pp. 8, 11). Even assuming that to be true, however, that scenario does not affirmatively have any effect on or truncate the litigation. Mrs. Dorn's interest as a beneficiary of the Trust at

issue in the litigation makes her a party necessary for the adjudication of the case. In fact, at the commencement of the trial, the court stated that it was unlikely that a ruling would be made after the presentation of Appellant's case. (See Trial Transcript, p.11, ll. 6-12, R. p. 572).

The question of whether an order adding parties to litigation is interlocutory for purposes of appeal has not been addressed by South Carolina courts. "When there is no case on point in South Carolina, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority." Bass v. Isochem, 365 S.C. 454, 478, 617 S.E.2d 369, 381 (2005).

Several other jurisdictions have directly addressed this issue and held that the ruling on a motion to add parties is interlocutory and, thus, not subject to immediate appeal. See Foust v. Se. Pa. Transp. Auth., 756 A.2d 112, 116 (Pa. Commw. Ct. 2000) (noting "that an order granting a motion to amend a pleading [to add new parties] is interlocutory and appealable only by permission"); Bridges v. Dep't of Md. State Police, 441 F.3d 197, 206 (4th Cir. 2006) ("A denial of a motion to amend a complaint [to add new parties] is not a final order, nor is it an appealable interlocutory or collateral order."); Melancon v. Texaco, Inc., 659 F.2d 551, 553 (5th Cir. 1981) ("Orders granting or denying motions to add new parties to a pending suit are interlocutory and non-appealable."); Elec. Mobility Corp. v. Bourns Sensors/Controls, Inc., 87 F. Supp. 2d 394, 398-99 (D.N.J. 2000) (trial court would not certify for interlocutory appellate review denial of request to amend complaint to add new plaintiff).

IV. THE ORDER ADDING ABBIE ILENE DORN AS A NAMED PARTY DID NOT UNDULY PREJUDICE APPELLANT'S SUBSTANTIAL RIGHT 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.

Mrs. Dorn, as beneficiary of the Trust is a necessary party under Rule 19, SCRCP. See also S.C. Code Ann. § 62-5-405(a) (Supp. 2014) (service of Summons and Petition for protective order must be served on the person to be protected). Any action relating to the Trust or removal of the Co-Conservators necessarily requires the determination of rights of interested parties, which is the reason for the appointment of an Attorney and Guardian ad Litem. If the Court were to hold that the Attorney and Guardian ad Litem had no right to participate in the trial of this matter, the Court would in effect stop the ability of any necessary party to present a case to protect their interest in litigation. The right of Appellant to choose his own Defendant simply cannot be a right so absolute as to operate to the exclusion of an interested party.

In relevant part, Rule 19, SCRCP, states as follows:

A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Rule 19(a), SCRCP.

“This Court has interpreted Rule 19, SCRPC to require that a party be a necessary party to be joined in an action pursuant to the rule. A necessary party is one whose rights must be ascertained and settled before the rights of the parties to the action can be determined.” Ex parte Gov’t Employee’s Ins. Co., 373 S.C. 132, 136, 644 S.E.2d 699, 701 (2007) (internal quotation marks omitted). With respect to a trust, “[a]nyone legally or beneficially interested in the subject matter of a suit to establish or enforce a trust, and whose interests would be affected by a decree regarding the trust, is a necessary party.” 90A C.J.S. Trusts § 801 (Westlaw database updated June 2015).¹

Undisputedly, Mrs. Dorn has an interest in the Trust at issue here; indeed, the Trust was set up solely because of her physical and mental incapacities. Therefore, it cannot be legitimately disputed that Mrs. Dorn is a necessary party to the instant litigation wherein Appellant seeks to remove and replace the trustees thereof and further seeks reimbursement to the Trust. See Hasselmann v. Barnes, 700 S.E.2d 69, 70 (N.C. Ct. App. 2010) (“When dealing with a trust, the general rule in suits, respecting the trust property, brought either by or against the trustees, the . . . beneficiaries as well as the trustees also, are necessary parties.” (internal quotation marks omitted)); Sunbelt Envtl. Servs. v. Rieder’s Jiffy Mkt., Inc., 138 S.W.3d 130, 134 (Mo. Ct. App. 2004) (“[I]f a suit is brought that involves the trust property, it is the general rule that all trustees and beneficiaries are considered necessary parties.”); Stevens v. Loomis, 334 F.2d 775, 778 (1st Cir. 1964) (other trust beneficiaries were necessary parties to a suit by one trust beneficiary seeking to charge the trustees to augment the trust corpus); see also Hebbard v. Colgrove, 105 Cal. Rptr. 172, 178 (Ct. App. 1972)

¹See Bass, 365 S.C. at 478, 617 S.E.2d at 381 (analogous cases from other jurisdictions can be persuasive in the South Carolina courts).

("The basic purposes underlying the rule requiring joinder of beneficiaries as indispensable parties in an action against trustees are (1) to protect the trustees against a multiplicity of actions, and (2) to see that all beneficiaries are adequately represented.").

In his brief, Appellant argues that the addition of Mrs. Dom as a party defendant was not necessary, because she was already represented in the proceedings by the Cohens as her Co-Guardians and Co-Conservators as well as Co-Trustees of the Trust. (Appellant's Brief 13-14). Yet, as noted by the Court of Appeals of South Carolina, there is a significant and substantive distinction between guardians and conservators on the one hand and Guardians ad Litem on the other.

The terms "guardian" and "guardian ad litem" have separate and distinct legal meanings; thus, persons appointed to serve in those capacities are charged with separate and distinct duties and obligations. A "guardian" is one given the power and charged with the duty of taking care of a person who is considered incapable of administering his or her own affairs and of managing his or her property and rights. A "guardian ad litem," on the other hand, is one authorized to prosecute on behalf of or defend an incapacitated person in any suit to which the incapacitated person may be a party and to protect his or her interests in the particular litigation.

Wilson v. Ball, 337 S.C. 493, 496-97, 523 S.E.2d 804, 806 (Ct. App. 1999) (footnotes omitted).

Moreover, in relevant part, Rule 17, SCRCP, states as follows:

Whenever a minor or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative he may sue by his next friend or by guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the minor or incompetent person.

Rule 17(c), SCRCP (emphasis added).

Here, Mrs. Dorn is indeed represented by guardians and conservators, *as well as* a Guardian *ad Litem* and court-appointed independent counsel. The trial court in its discretion found that it was necessary in this case for Abbie to have separate representation from her guardians/conservators/trustees for purposes of the instant litigation. See Ex parte Foster, 350 S.C. 238, 243, 565 S.E.2d 290, 293 (2002) (“[T]he trial court is to exercise its discretion in making these appointment decisions.”).

Thus, the mere fact that the Cohens represent Mrs. Dorn’s interests as her Guardians, Conservators, and Co-Trustees does not automatically mean that they would be appropriate parties to represent her interests in litigations specifically alleging malfeasance on their parts. In this case, the trial court exercised its discretion to appoint separate legal counsel for Mrs. Dorn in this litigation. (Tr. Transcript p. 717, l. 3; p. 720, l. 16, R. pp. 749-750).

Undeniably, “[a]mendments are liberally allowed within the sound discretion of the trial judge, and the opposing party must show prejudice to warrant reversal.” Weaver v. Lentz, 348 S.C. 672, 677, 561 S.E.2d 360, 363 (Ct. App. 2002). In his brief, Mr. Dorn argues that allowing the amendment of the pleadings to add Mrs. Dorn as a party defendant in the action caused him “undue prejudice” warranting reversal. (Appellant’s Br. P. 15).

“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.” Weaver, 348 S.C. at 677, 561 S.E.2d at 363 (internal quotation marks omitted). Yet *undue prejudice* exists only when “[t]he harm resulting from a fact-trier’s being exposed to evidence that is persuasive but inadmissible . . . or that so arouses the emotions that calm and logical reasoning is abandoned.” Black’s Law Dictionary “undue prejudice” (10th ed. 2014). Here, Mr. Dorn alleges that he was unduly prejudiced because

the late amendment adding Mrs. Dorn as a party defendant permitted Mrs. Dorn to call undisclosed witnesses to testify at trial. (Appellant's Brief, p. 17). There is absolutely no prejudice in this case, because the trial court made clear that the Attorney and Guardian ad Litem for Mrs. Dorn were two distinct roles. (Tr. Transcript, p. 16, l. 14-24, R. p. 573); comments by counsel for Appellant indicate that he believed that the Attorney and Guardian ad Litem could participate in discovery despite his having never served them with discovery requests compelling the disclosure of witnesses they planned to call at trial (Tr. Transcript p. 793, l. 23 – p. 794, l. 14; p. 799, ll. 19 – 23, R. pp. 768, 769). Furthermore, Appellant did not object to counsel for Mrs. Dorn making an opening statement (Tr. Transcript, p. 43, l. 1 – p. 45, l. 15, R. p. 580) or the Guardian ad Litem being given the same opportunity. Tr. Transcript, p. 47, ll. 6-8, R. p. 581). Appellant's counsel made no objection to the Attorney and Guardian ad Litem for Mrs. Dorn participating in trial in regards to the entry of evidence (Tr. Transcript, p. 55, l. 25 – p. 56, l. 6; p. 405, ll. 12-16; p. 406 l. 5-13; p. 560, l. 14-15; p. 606, ll. 4-5, R. pp. 583, 671, 710, 721) or cross-examining witnesses (Tr. Transcript p. 636, l. 4 – 637, l. 18, R. p. 729), or entering exhibits designating them as the second respondent in the action (Tr. Transcript p. 658, l. 4 – 660, l. 9; p. 662, ll. 3-5; p. 739, ll. 4-20, R. p. 734-735, 754). In fact, it was not until the last day of testimony, two weeks after commencement of the trial, that Appellant indicated an objection to the Attorney and Guardian ad Litem for Mrs. Dorn calling witnesses to testify on their ward's behalf.

To the extent that the trial court erred by adding Mrs. Dorn as a party defendant in this case, any such error was harmless because the Guardian ad Litem and court-appointed attorney were free to advocate for Mrs. Dorn in these proceedings regardless of such amended pleading. See State v. Davis, 371 S.C. 170, 181-82, 638 S.E.2d 57, 63 (2006)

("Error is . . . harmless when it could not reasonably have affected the result of the trial." (internal quotation marks omitted)); e.g., Doe v. N. Greenville Hosp., 318 S.C. 459, 465, 458 S.E.2d 439, 442 (Ct. App. 1995) (any error committed by the trial court in allowing an amendment was harmless and therefore provides no basis for reversal).

As previously noted, "[t]he court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action *or shall make such order as it deems proper for the protection of the minor or incompetent person.*" Rule 17(c), SCRPC (emphasis added). In the instant case, even though Mrs. Dorn's interests were purportedly being represented by the Cohens as her guardians and conservators (and trustees of the Trust), the trial court nevertheless felt that the circumstances required that Mrs. Dorn's legal interests be separately represented by her own, independent counsel, i.e., the Guardian ad Litem and the court-appointed attorney. See Foster, 350 S.C. at 243, 565 S.E.2d at 293 ("[T]he trial court is to exercise its discretion in making these appointment decisions.").

Also as previously noted, the Guardian ad Litem's role is specifically to attend to the ward's best interests in a particular legal proceeding. See Wilson, 337 S.C. at 496-97, 523 S.E.2d at 806. As such, the Guardian ad Litem, in substance if not in name, has the authority to participate in the legal proceedings on behalf of the ward to the extent that the Guardian ad Litem deems necessary and appropriate to protect Mrs. Dorn's interests therein. See Fleming v. Asbill, 326 S.C. 49, 55, 483 S.E.2d 751, 754 (1997) ("[A] guardian ad litem in a private custody dispute functions as a representative of the court appointed to assist it in protecting the best interests of the ward. . . . by ascertaining the best interests of the ward *and advocating to the court the ward's best interest.*" (emphasis added)); Cumbe v. Cumbe, 245 S.C. 107, 112, 139 S.E.2d 477, 480 (1964) ("It is the duty of the court, *as well as that of the*

guardian ad litem and his attorney, to see that the rights of minors and incompetents are protected.” (emphasis added); specifically mentioning filing an answer in the litigation on the wards’ behalf).

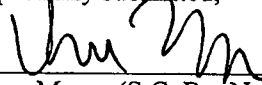
In addition to these South Carolina authorities, the Court may also find several cases from other jurisdictions helpful. See Bass, 365 S.C. at 478, 617 S.E.2d at 381 (analogous cases from other jurisdictions can be persuasive in the South Carolina courts); e.g., K.D.H. v. T.L.H. III, 3 So. 3d 894, 900 (Ala. Civ. App. 2008) (“A guardian ad litem is an attorney entitled to argue his or her client’s case to the court as is any other attorney[.]”); In re James E., 174 P.3d 180, 186 (Cal. 2008) (a parent who is mentally incompetent must appear through a guardian ad litem appointed by the court, the effect of which “is to transfer direction and control of the litigation from the parent to the guardian ad litem”); Owings v. Foote, 818 A.2d 1149, 1156 (Md. Ct. Spec. App. 2002) (“A court-appointed attorney in a guardianship proceeding must act in the client’s best interest and diligently advocate his or her position.”); In re Lugo’s Guardianship, 172 N.Y.S.2d 104, 109 (Ct. Cl. 1958) (“A guardian ad litem . . . serves on behalf of the alleged incompetent as the conductor of the case during the vicissitudes it may encounter in court.”), *rev’d on other grounds*, 187 N.Y.S.2d 59 (App. Div. 1959); *see also* 57 C.J.S. Mental Health § 316 (Westlaw database updated June 2015) (“[T]he guardian ad litem is best suited to determine what course of action to follow on behalf of the ward, and . . . [h]e or she fully represents the rights and interests of the ward in the particular case, and his or her rights and powers generally extend to all matters in the particular litigation affecting the interests of the ward. A guardian ad litem may make tactical and even fundamental decisions affecting the litigation, but always with the interest

of the ward in mind[, including but not limited to, entering into] binding contracts for the retention of counsel and expert witnesses[.]” (footnotes omitted)).

CONCLUSION

The Probate Court did not err in adding Mrs. Dorn as a named party as her interests were necessary to the adjudication of matters related to the Trust under which she is sole beneficiary; however, to the extent that such a ruling was error, it did not prejudice the Appellant because the court-appointed Attorney and Guardian ad Litem for Mrs. Dorn would have had the ability to present her case as an interest party, whether named or not.

Respectfully submitted,



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November 25, 2015

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

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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

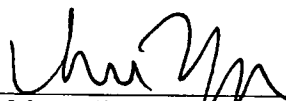
Appellate Case No.: 2015-000659

The Honorable Deadra L. Jefferson
Horry County

Trial Court Case Nos.: 2013CP2608152, 2013CP2608139,
2014CP2601691, 2014CP2601744

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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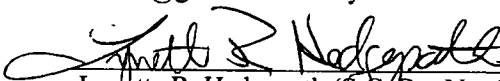
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PROOF OF SERVICE

I HEREBY CERTIFY that I have served the **FINAL BRIEF OF GUARDIAN
AD LITEM AND ATTORNEY FOR ABBIE ILENE DORN** and **CERTIFICATE
OF COUNSEL**, by depositing copies of it in the United States Mail, postage prepaid on
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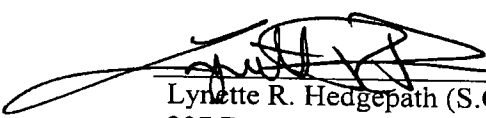
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November 30, 2015



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