THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable Michael Nettles, Circuit Court Judge

Appellate Case No. 2019-000949 (S.C. Ct. App. Dismissed July 31, 2019)
(Rehearing denied November 14, 2019)

April Jones..... .....Appellant

v.

Tim Ringer, Individually and as employee/agent of WAL-MART STORES, INC. d/b/a WAL-MART STORE # 630; WAL-MART STORES, INC.; and WAL-MART STORES EAST, L.P..... .....Respondents

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PETITION FOR WRIT OF CERTIORARI

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Charleston, SC 29403

Attorney for Petitioner

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CERTIFICATE OF COUNSEL

Counsel for the petitioners certifies that his Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on November 14, 2019. (**Appx. 92**)

QUESTION PRESENTED

I. Did the Court of Appeals err in dismissing Appellant's appeal as interlocutory where the order appealed from denied Appellant her substantial right to have the trial attorneys of her choosing?

STATEMENT OF THE CASE

This case presents a novel issue affecting a party's substantial right to choose her own counsel. It also presents an issue in which the decision of the Court of Appeals to be in conflict with prior decisions of the Supreme Court. Specifically, the issue is this: when a party's chosen team of trial attorneys is called to appear for trial in her case at the same time they are called to appears for trial in another county in another case, may the two trial judges deprive that party of her substantial right to choose her own team of trial attorneys by ordering that the trial team be broken up – i.e. that some of the chosen attorneys must try one case and some of the chosen attorneys must try the other? The answer to this question is of great importance to every client that engages a trial attorney who practices in more than one county in our state.

Here, the trial judges ordered that the party's chosen trial attorney team be broken up so that both trials could proceed at the same time, thus depriving Appellant of some of her chosen trial attorneys. The issue was raised by appeal to the Court of Appeals. The Court of Appeals dismissed the appeal as interlocutory. However, this dismissal appears to be in direct conflict with the Supreme Court's holding in EnerSys Delaware, Inc. v. Hopkins (and elsewhere) that an order affecting "the substantial right of the party to have an attorney of one's choosing [is immediately] appealable pursuant to section 14–3–330(2)." EnerSys Delaware, Inc. v. Hopkins, 401 S.C. 615, 618, 738 S.E.2d 478, 479–80 (2013).

Petitioner respectfully suggests that conflicts between matters with the same Rule 601 priority should be resolved by giving priority to the matter which has higher position on the

roster, and if two matters have the same roster position, then giving priority to the matter which was filed first (i.e. is the oldest). Whatever the resolution is, it cannot be that the Court gets to unilaterally decide which client (if any) gets to have her chosen attorneys and which does not. Instead, a bright-line rule is needed to safeguard the right of civil litigants to choose their own counsel.

STATEMENT OF FACTS

Appellant's right leg was amputated above the knee as the result of an infection she contracted by stepping on a nail. Plaintiff engaged attorneys Eric Poulin, Roy Willey, and Sean Tropea of the Anastopoulo Law Firm to represent her.

On May 22, 2017 Plaintiff filed a lawsuit in Florence County alleging, among other things, that she stepped on the pallet nail as a result of Wal-Mart's negligence in causing or allowing the nail to remain on the sales floor. Wal-Mart denied the bulk of Plaintiff's allegations. Over the course of the next two years the parties conducted discovery and participated in mediation. On January 15, 2019, attorney Kenneth David appeared as counsel in the case. Mr. David's role was purely administrative. At the time he appeared, Mr. David had been a licensed attorney for just eight months, and he had never tried a case – not even in Magistrate Court, and not even as second chair in Circuit Court. Also during that time, attorney Sean Tropea ceased representing Appellant when he left the Anastopoulo Law Firm.[1] Mr. Tropea was replaced by attorney Lane Jefferies – thus making Appellant's trial team the trio of Mr. Poulin, Mr. Willey, and Mr. Jefferies.

[1] Mr. Tropea left the firm and ceased representing Appellant on or about December 17, 2017. Although opposing counsel was contemporaneously notified of the change, Mr. Tropea did not file a Notice with the Court until August 14, 2019.

While Jones v. Wal-Mart was pending in Florence County, Mr. Poulin, Mr. Willey, and Mr. Jefferies also comprised the trial team for another big case which was pending in Colleton County – Katina Troutman v. South Carolina Department of Parks Recreation & Tourism. **Appx. 75-87.** Like Jones, Troutman also involved very serious injuries.[2] **Appx. 75-87.** Also as in Jones, Mr. David appeared as counsel only in an administrative role – not as a trial attorney – and Mr. Tropea had been replaced by Mr. Jefferies. The other attorney of record, Catherine Juhas, had referred the case to the Anastopoulo Law Firm specifically because of their trial expertise. Accordingly, Ms. Juhas, like Mr. David, was not participating as a trial attorney. As a result, Troutman had the exact same trial team as Jones – the trio of Mr. Poulin, Mr. Willey, and Mr. Jefferies.

In early May of 2019 Appellant received notice that ***both*** Troutman and Jones were on trial rosters for the week on May 28, 2019. **Appx. 75-87.** On May 8, 2019 Appellant received notice via email that Troutman had been placed on the May 28, 2019 Jury Trial Roster for Colleton County in the number two position (Troutman later moved up to the #1 position). **Appx. 75-87.** Five days later, on May 13, 2019, the Florence Court entered an order holding that Jones "is subject to being called for trial during the May 28, 2019 term of court." **Appx. 1** ("May 13 Scheduling Order"). **Appx. 75-87.** On the same day, Appellant received notice via email that Jones had indeed been placed on the May 28, 2019 Jury Trial Roster for Florence County in the number six position (Jones later moved up to the #4 position). **Appx. 75-87**

Appellant attempted to resolve the conflict by attempting to settle Troutman. **Appx. 75-87.** The attempt was unsuccessful. Accordingly, Appellant's attorneys advised the Florence trial court of the conflict. **Appx. 75-87.** The Colleton County case was both older (2016 vs. 2017)

[2] In Troutman, the plaintiff's arm was degloved.

and had higher priority on the roster (#1 vs. #4). **Appx 75**. Appellant's attorneys suggested that the Colleton case should have gone forward with the Florence case to follow on the next term of court. **Appx. 75-79**. Alternatively, the Florence case (although younger, and with a lower priority on the roster) could have gone to trial while the Colleton case waited for the next term.

Appellant's attorneys were initially advised by the Florence court that the Colleton county trial judge – despite having the older case with the higher roster priority – would eliminate the conflict by "deferring" to the Florence court. **Appx. 75-87**. However, that is not what a subsequent email from the Colleton court said. **Appx. 75-87**. Rather, the Colleton court emailed Plaintiff's attorneys at 10:15 a.m. on May 23, 2019, as follows:

> "Judge Buckner wants the Plaintiffs to designate one attorney for the trial of this matter. That attorney will be protected from other matters in other counties, the remaining attorneys are not protected from other hearings in other counties."
>
> **Appx. 75-87**

The result of the two judges each insisting that the case in their county go forward at the same time is that ***neither*** the plaintiff in Jones (i.e. the Appellant) nor the plaintiff in Troutman could have her case tried by her chosen attorneys – the trial team of Poulin, Willey, and Jefferies.

On or about May 23, 2019, Appellant timely and properly filed and served a Notice of Appeal as to the May 13 Scheduling Order. **Appx. 1.**

On June 7, 2019, Respondents moved to dismiss the appeal on multiple grounds, including that the May 13 Scheduling Order was not appealable. **Appx. 10.**

On June 17, Appellant filed her Return to Respondents' motion to dismiss. **Appx. 41.**

On July 31, 2019, the Court of Appeals granted Respondents' motion to dismiss on the basis that the "underlying order on appeal is not immediately appealable. *See* S.C. Code Ann. § 14-3-330(2014)." **Appx. 65.**

On August 19, 2019, Appellant filed a Petition for Rehearing and/or Reinstatement (**Appx. 69**), which was denied by the Court of Appeals on November 14, 2019. **Appx. 92.**

This Petition for Writ Certiorari to the Court of Appeals timely followed.

ARGUMENT

I. The Court of Appeals erred in dismissing the appeal as interlocutory because the Order appealed from affects the substantial right of choosing one's own counsel and is therefore immediately appealable.

An order that affects the substantial right of a party to have an attorney of her choosing is appealable pursuant to S.C. Code Ann. § 14–3–330(2). EnerSys Delaware, 401 S.C. at 618, 738 S.E.2d at 479–80 ("In *Hagood,* we considered as an issue of first impression whether an order granting a motion to disqualify counsel in a civil trial was immediately appealable. We held that it is, finding ***such an order affected the substantial right of the party to have an attorney of one's choosing and was therefore appealable*** pursuant to section 14–3–330(2)") (emphasis added).

Appellant's attorneys were ordered to be in two places at once. Obviously, that is not possible. Specifically, Appellant's attorneys were ordered to appear for trial of Appellant's case in Florence County at the same time they were ordered to appear for trial of another client's case in Colleton County. Both cases were major actions involving serious personal injury – the Colleton County case involved degloving of an arm, and the Florence County case involved amputation of a leg. Accordingly, each client had chosen a trial team consisting of the firm's senior-most attorneys – Eric Poulin, Roy Willey, and Lane Jefferies – and indeed those attorneys were of record in each case. **Appx. 75-87.** Clearly, the entire trial team of Poulin, Willey, and Jefferies could not appear for both trials at the same time.

Appellant's attorneys advised the Florence trial court of the conflict. **Appx. 75-87**. The Colleton County case was both older (2016 vs. 2017) and had higher priority on the roster (#1 vs. #4). **Appx. 75-87**. Logically, the Colleton case should have gone forward, with the Florence case to follow on the next term of court. This is what Appellant's attorneys suggested. **Appx. 75-87.** Alternatively, the Florence case (although younger, and with a lower priority on the roster) could have gone to trial while the Colleton case waited for the next term. Nonetheless, what could not happen was for the trial team of Poulin, Willey, and Jefferies to try both cases simultaneously.

Unfortunately, the impossible task of trying both cases at the same time is exactly what the trial judge in this case ordered. **Appx. 75-87.** Appellant's attorneys were initially advised by the Florence court that the Colleton county trial judge – despite having the older case with the higher roster priority – would eliminate the conflict by "deferring" to the Florence court. **Appx. 75-87**. However, that is not what a subsequent email from the Colleton court said. **Appx. 75-87**. Rather, the Colleton court emailed Plaintiff's attorneys at 10:15 a.m. on May 23, 2019, as follows:

> "Judge Buckner wants the Plaintiffs to designate one attorney for the trial of this matter. That attorney will be protected from other matters in other counties, the remaining attorneys are not protected from other hearings in other counties."
>
> **Appx. 75-87**

The result of the two judges each insisting that the case in their county go forward at the same time is that ***neither*** Plaintiff could have her case tried by her chosen attorneys – the trial team of Poulin, Willey, and Jefferies. **Appx. 75-87.** It is as if each client had hired Crosby, Stills, and Nash to play her wedding, but the trial Judges decreed that the band had to split up – two would play one wedding and the third would play the other.

However, unlike having the wedding band of one's choosing, having the ***attorneys*** of one's choosing is a substantial right. EnerSys Delaware, Inc. v. Hopkins, 401 S.C. 615, 618, 738 S.E.2d 478, 479–80 (2013); Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d at 707, 708 (2005). An order that affects the substantial right of a party to have an attorney of her choosing is immediately appealable pursuant to S.C. Code Ann. § 14–3–330(2). EnerSys Delaware, 401 S.C. at 618, 738 S.E.2d at 479–80 ("In *Hagood,* we considered as an issue of first impression whether an order granting a motion to disqualify counsel in a civil trial was immediately appealable. We held that it is, finding ***such an order affected the substantial right of the party to have an attorney of one's choosing and was therefore appealable*** pursuant to section 14–3–330(2)") (emphasis added). The EnerSys Delaware court went on to say:

> "In concluding the right to retain counsel of one's choosing is a substantial right for the purposes of appealability, [the Hagood Court] noted:
>
> (1) the importance of the party's right to counsel of his choice in an adversarial system;
> (2) the importance of the attorney- client relationship, which demands a confidential, trusting relationship that often develops over time;
> (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and
> (4) an appeal after final judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney."
>
> EnerSys Delaware, Inc. v. Hopkins, 401 S.C. 615, 618, 738 S.E.2d 478, 479–80 (2013).

In the same vein, the Hagood court observed that an order, affecting the

> "right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case. Moreover, the right to be represented by ones preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right.

> Deprivation of the right to one's preferred attorney would affect the attorney-client relationship, which is extremely important in our adversarial system. Furthermore, an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification."
>
> Hagood, 362 S.C. at 197–98, 607 S.E.2d at 710.

Moreover, regarding the closely analogous situation of an order actually disqualifying a party's preferred attorney, the Hagood court held that that not only is the order immediately appealable, it "***must be immediately appealed*** or any later objection in a subsequent appeal will be waived. Cf. Flagstar Corp., 341 S.C. at 72, 533 S.E.2d at 333 (party is required to immediately appeal if denied a mode of trial to which he is entitled as a matter of right, and failure to do so forever bars appellate review of the issue)." Hagood, 362 S.C. at 197–98, 607 S.E.2d at 710. The same applies here, because whether an attorney is actually disqualified (i.e. removed from the case) or constructively disqualified (e.g. prevented from appearing), the effect is the same – the client is deprived of her substantial right to choose her own counsel.

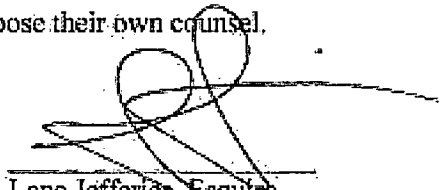
In light of the Supreme Court's opinion in both EnerSys Delaware, Inc. and Hagood, not only was Appellant permitted to bring her appeal immediately, she was ***required*** to do so. As a result, the Court of Appeals dismissal of the appeal as interlocutory was error.

CONCLUSION

Petitioner respectfully submits that this case is appropriate for review by the Supreme Court for several reasons. First, Court of Appeals' dismissal of the appeal as interlocutory is in direct conflict with binding authority from the Supreme Court. Second, the question presented deals directly with a party's substantial right to choose her own counsel. Third, how to resolve conflicts when an attorney is called to appear at the same time in two tribunals that have the same priority under Rule 601 is a novel issue. Fourth, it is a novel issue that is increasing in

importance as more and more South Carolina attorneys begin practicing in multiple counties now that e-filing has made doing so practical. Whatever the resolution is, it cannot be that the Court gets to unilaterally decide which client (if any) gets to have her chosen attorneys and which does not.

Petitioner respectfully suggests that conflicts between matters with the same Rule 601 priority be resolved by giving priority to the matter which has higher priority on the roster, and if two matters have the same roster position, then giving priority to the matter which was filed first (i.e. is the oldest). There may be other solutions, but whatever the solution, a bright-line rule is needed to safeguard the right of civil litigants to choose their own counsel.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable Michael Nettles, Circuit Court Judge

Case No. 2017-CP-21-1375

April Jones..... .....Appellant

v.

Tim Ringer, Individually and as employee/agent of WAL-MART STORES, INC. d/b/a WAL-MART STORE # 630; WAL-MART STORES, INC.; and WAL-MART STORES EAST, L.P..... .....Respondents

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PROOF OF SERVICE

I certify that I have served the PETITION FOR WRIT OF CERTIORARI and APPENDIX on Respondents by depositing a copy of them in the United States Mail, postage prepaid, on December 16, 2019, addressed to Respondents' attorneys of record, Nashiba Boyd and Lee Ellen Bagley, 3700 Forest Drive, Suite 400, Columbia, SC 29204.

I hereby certify that I filed the PETITION FOR WRIT OF CERTIORARI and APPENDIX with the Supreme Court by depositing the original and six (6) copies of the Petition along with two (2) copies of the Appendix, and a check in the amount of $250.00 for the filing fee, in the United States Mail, postage prepaid, on December 16, 2019 addressed to the Clerk of the Supreme Court.

I hereby certify that I filed the PETITION FOR WRIT OF CERTIORARI with the Court of Appeals by depositing it in the United States Mail, postage prepaid, on December 16, 2019 addressed to the Clerk of the Court of Appeals.

[SIGNATURE ON FOLLOWING PAGE]

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December 16, 2019

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RE: *April Jones v. Wal-Mart Stores, Inc., et al*
Case No.: 2017-CP-21-1375

Dear All:

Enclosed please find the PETITION FOR WRIT OF CERTIORARI and APPENDIX served on Respondents by depositing a copy of them in the United States Mail, postage prepaid, on December 16, 2019, addressed to Respondents' attorneys of record, Nashiba Boyd and Lee Ellen Bagley, 3700 Forest Drive, Suite 400, Columbia, SC 29204.

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Sincerely,

Ivey B. Franklin, Esq.

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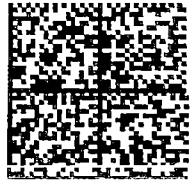

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