In The Supreme Court of Pennsylvania

No. _____

JACQUELINE NIEVES CRUZ and OSCAR CRUZ,

Petitioners,

v.

PRINCETON INSURANCE COMPANY, ALAN S. GOLD, and GOLD, BUTKOVITZ AND ROBINS, PC.

PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania at Nos. 3191 & 3192 EDA 2004 filed May 30, 2007, Affirming the Judgment of the Court of Common Pleas of Philadelphia County, No. 415 March Term 2003 entered October 18, 2004

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Stephen A. Sheller, Esquire
Jamie L. Sheller, Esquire
Sheller, P.C.
1528 Walnut Street, 3rd Floor
Philadelphia, PA 19102
(215) 790-7300

Counsel for Petitioners

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I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The divided, precedential opinion that a nine–judge en banc Superior Court of Pennsylvania panel issued on May 30, 2007, affirming the trial court's grant of summary judgment on the abuse of process claim of plaintiffs/petitioners, is attached hereto as Exhibit A.

The Superior Court's order of May 23, 2006, granting reargument en banc in this case, is attached hereto as Exhibit B.

The divided, non–precedential opinion that a three–judge panel of the Superior Court of Pennsylvania issued on March 14, 2006, reversing the trial court's grant of summary judgment on the abuse of process claim and remanding this lawsuit for trial, is attached hereto as Exhibit C.

The trial court's opinion in support of its grant of summary judgment, issued pursuant to Pennsylvania Rule of Appellate Procedure 1925(a), is attached hereto as Exhibit D.

The trial court's orders entering summary judgment in favor of the defendants are attached hereto as Exhibits E and F.

II. THE ORDER IN QUESTION

On May 30, 2007, the majority on a divided nine–judge Superior Court of Pennsylvania en banc panel issued a precedential opinion that concludes: "Orders affirmed." *See* Exhibit A at 11.

III. QUESTION PRESENTED

As evidenced by the Superior Court of Pennsylvania's order granting reargument en banc, this case presents an extremely important question of first impression deserving of resolution from Pennsylvania's highest Court.

The question presented in this case is:

> Whether a judgment debtor or its insurance company, which initiates a proceeding to appoint a guardian ad litem for an injured minor judgment creditor to pressure the minor's parents to settle the litigation for less money, can be sued for abuse of process for having used the guardian ad litem procedure "primarily to accomplish a purpose for which the process was not designed."

IV. STATEMENT OF THE CASE

Plaintiffs/petitioners Jacqueline Nieves Cruz and Oscar Cruz are and at all earlier relevant times have been the parents and natural guardians of their son Adam. When Adam was born on August 14, 1992 at Northeastern Hospital, he sustained permanent debilitating injuries that will require extensive medical care and treatment for the remainder of his life.

In 1994, Adam's parents initiated suit against Northeastern Hospital and two physicians to recover damages on Adam's behalf for the injuries that he suffered at birth. In August 2000, a jury returned a verdict against Northeastern Hospital in the amount of $10,811,431.27. After the trial court molded the judgment to include delay damages, the judgment totaled in excess of $15 million.

Defendant/respondent Princeton Insurance Company insured Northeastern Hospital for this claim, and it retained attorney Alan S. Gold of the law firm of Gold, Butkovitz & Robins, P.C. to represent the hospital on appeal and in related settlement negotiations. While the hospital's appeal was pending before the Superior Court of Pennsylvania, the parties participated in a mediation proceeding before a retired Philadelphia Common Pleas judge, who suggested a settlement in the range of $8 million to $10 million.

The most that Princeton Insurance Company had offered to settle the case while it was on appeal to the Superior Court of Pennsylvania was $7 million, an offer that the Cruzes had rejected as of February 2002. In response to that rejection, on February 27, 2002, attorney Gold filed a petition on behalf of Princeton

Insurance Company in the Court of Common Pleas of Philadelphia County asking that court to appoint a guardian ad litem to represent Adam's interest in the litigation. The petition asserted, in relevant part:

> 6. Princeton and the Cruzes have engaged in excessive [sic] settlement negotiations with the aid of Abraham Gafni, former judge of the Court of Common Pleas of Philadelphia County as a mediator. The parties have reached an impasse in those negotiations. Princeton Insurance Co. has offered $7,000,000 to the Cruzes. This constitutes sufficient money to support [Adam] for the rest of his life. This money has been turned down.
>
> 7. Princeton Insurance Co. believes that a substantial possibility exists that Northeastern Hospital will prevail on the appeal and that the Cruzes may receive no money for [Adam].
>
> 8. [Adam's] medical expenses would then become a burden on the taxpayers of this Commonwealth.
>
> 9. [Adam] would not have the opportunity to have the full services that he would if his parents accepted the $7,000,000.
>
> 10. Princeton Insurance Co. respectfully requests that this Court appoint a guardian ad litem to evaluate the settlement demand and to represent the interest of [Adam] in this litigation.
>
> 11. Princeton believes that the parents have had a substantial disagreement among themselves concerning how to handle this litigation and whether to accept the settlement offer of Princeton Insurance Co. made on behalf of Northeastern Hospital.
>
> 12. Further, a potential conflict of interest exists between plaintiffs' counsel and the interests of her minor client, [Adam], particularly in light of disagreement among his parents with respect to the settlement offer.
>
> 13. The appointment of a guardian ad litem will insure that the interest of the child will be protected. The guardian ad litem would pursue the litigation on behalf of [Adam] and evaluate settlement offers.

Exhibit A at 2–3.

This case is an appeal from the entry of summary judgment against the Cruzes on their claim for abuse of process against defendants Princeton Insurance Company, attorney Gold, and attorney Gold's law firm. The representative of Princeton Insurance Company who directed Gold to file the petition for appointment of a guardian ad litem testified under oath at his deposition that Princeton's primary purpose in filing the petition for appointment of a guardian ad litem was to cause the Cruzes to accept Princeton's $7 million settlement offer. *See* Exhibit A at 7–9.

On March 7, 2002, the trial court denied Princeton Insurance Company's petition for appointment of a guardian ad litem. Before the time for appeal from that order had expired, the Cruzes communicated their acceptance of Princeton Insurance Company's $7.1 million settlement offer in the underlying case. Thereafter, on April 17, 2002, the Superior Court of Pennsylvania affirmed in full the judgment of more than $15 million against Northeastern Hospital in the underlying case. Next, on September 5, 2002, the Philadelphia Court of Common Pleas approved the $7.1 million settlement of the underlying action.

On May 22, 2003, the Cruzes filed suit in the Philadelphia Court of Common Pleas against defendants/respondents Princeton Insurance Company, attorney Gold, and attorney Gold's law firm alleging that defendants were liable for abuse of process for having filed the guardian ad litem action. The suit alleged that the use of the guardian ad litem action to pressure the Cruzes to accept the $7 million settlement offer constituted an improper purpose and that the Cruzes suffered

injury in the form of emotional distress stemming from the anxiety that the guardian ad litem action caused them.

After discovery had concluded, the defendants moved for summary judgment in the trial court. The trial court granted defendants' motions for summary judgment, holding both that the Cruzes lacked standing to assert a claim for abuse of process, because the guardian ad litem proceeding had not been initiated against them, and that the guardian ad litem proceeding did not constitute an action used "primarily to accomplish a purpose for which the process was not designed."

The Cruzes then filed a timely appeal to the Superior Court of Pennsylvania. On March 14, 2006, a divided three–judge Superior Court panel issued a Memorandum Opinion reversing the entry of summary judgment and remanding this case for trial. The panel, consisting of Judges Mussmano, McCaffery, and Kelly, was unanimous in holding that the Cruzes had standing to assert an abuse of process claim. The panel was also unanimous in holding that the testimony from a representative of Princeton Insurance Company that the guardian ad litem proceeding was intended to pressure the Cruzes to accept the insurance company's settlement offer would allow a reasonable jury to conclude that the guardian ad litem proceeding constituted a process used "primarily to accomplish a purpose for which the process was not designed." Finally, Judges Mussmano and McCaffery held that the Cruzes had adequately alleged damages in the form of emotional distress, while Judge Kelly in dissent would have affirmed based on his view that there was an absence of compensable injury.

Following the Superior Court's initial ruling in this case, defendants timely petitioned for reargument en banc. The Superior Court granted reargument en banc, and this case was thereafter reargued before an en banc panel of nine Superior Court judges.

On May 30, 2007, a divided en banc Superior Court issued a decision affirming the trial court's entry of judgment on the Cruzes abuse of process claim. A total of six judges joined in the majority opinion, which Judge Bender wrote. The majority opinion concludes as a matter of law that the use of a guardian ad litem action to pressure the parents of an injured minor to accept a settlement does not constitute a process used "primarily to accomplish a purpose for which the process was not designed." *See* Exhibit A at 10–11.

Three of the nine judges on the en banc panel disagreed with that conclusion. One of those three judges would have affirmed on the basis that the Cruzes had supposedly failed to point to adequate proof of emotional injury. The other two Superior Court Judges dissented and voted to reverse the trial court's entry summary judgment. In the view of the two dissenting judges, Judge Todd and Judge Stevens, a jury could reasonably conclude both that defendants had used the guardian ad litem procedure "primarily to accomplish a purpose for which the process was not designed" and that plaintiffs sustained compensable emotional distress as a result.

This timely petition for allowance of appeal from the Superior Court's divided en banc decision followed.

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

This Case Presents An Important Question Of First Impression That Has Not Been, But Should Be, Resolved By This Court

This case presents an important question of first impression that cries out for resolution by this Court: Whether a judgment debtor or its insurance company, which initiates a proceeding to appoint a guardian ad litem for an injured minor judgment creditor to pressure the minor's parents to settle the litigation for less money, can be sued for abuse of process for having used the guardian ad litem procedure "primarily to accomplish a purpose for which the process was not designed."

Even in our aggressively litigious culture, the actions of Princeton Insurance Company and its lawyer that give rise to this abuse of process lawsuit represent a remarkable new low. They initiated a guardian ad litem proceeding against the admittedly loving and competent parents of a severely injured child in order to pressure those parents to accept what the parents had perceived to be a low–ball settlement offer, consisting of less than half of the $15 million medical malpractice judgment that the injured child had received in his lawsuit against the hospital responsible for causing the seriously debilitating injuries that will plague him for the remainder of his days on earth.

The Superior Court's en banc majority opinion authorizes judgment debtors and their insurance carriers to pursue this very sort of extortion by judicial process, holding that defendants did not use the guardian ad litem procedure "primarily to

accomplish a purpose for which the process was not designed" when defendants sought to have the injured minor's parents replaced by some unknown third–party who would then have the authority to accept or reject a settlement offer from the insurance company that the parents perceived as too low. Due to the en banc Superior Court's ruling, the parents will be unable to recover on account of the emotional distress that they sustained as a result of having correctly understood that Princeton Insurance Company was trying to remove them from making what unquestionably was one of the most consequential decisions affecting their young child's life: whether and how much to settle his $15 million personal injury judgment against the hospital that caused their son to suffer permanent, debilitating injuries that will render him incapacitated for the rest of his life.

The question presented herein is an important but straightforward question of law: Where a judgment debtor or its insurer institutes a guardian ad litem proceeding to pressure the parents of an injured minor to settle for an amount that the parents originally viewed as insufficient, has the judgment debtor/insurer instituted the guardian ad litem proceeding "primarily to accomplish a purpose for which the process was not designed"?

The quoted language represents the second of three elements that a plaintiff must prove to establish a valid claim for abuse of process. *McNeil* v. *Jordan*, 586 Pa. 413, 437–38, 894 A.2d 1260, 1275 (2006) (citing *Werner* v. *Plater–Zyberk*, 799 A.2d 776, 785 (Pa. Super. Ct. 2002)); *see also McGee* v. *Feege*, 517 Pa. 247, 256, 535 A.2d 1020, 1024 (Pa. 1987) (citing Restatement (Second) of Torts § 682). Here, a majority

of the en banc Superior Court panel held as a matter of law that plaintiffs had failed to satisfy this second prong. The en banc majority's opinion states: "While Appellees might have had motives other than the appointment of a guardian ad litem to protect Adam's interest, the petition did seek the appointment of a guardian and under the instant factual situation, such action was not inappropriate. The petition sought the appointment of a guardian ad litem to evaluate the settlement. While Appellees might have hoped this would help resolve the case, the petition was not used to accomplish a purpose for which the process was not designed." Exhibit A at 10–11.

Yet three of the nine judges on the en banc panel disagreed. Judge Orie Melvin, in her opinion concurring in the judgment, wrote: "Unlike the majority, I would find that the Appellants, by pointing to the deposition testimony of Peter Leone, have raised a genuine issue of material fact with regard to the second element of their abuse of process claim — whether the process was used primarily to accomplish a purpose for which it was not designed." Exhibit A at 12 n.4. And the two dissenters, in an opinion by Judge Todd in which Judge Stevens joined, explained:

> I find that a jury could, reasonably, come to a different conclusion — namely, that Appellees were seeking a guardian ad litem not for the primary benefit of Adam, a guardianship's undeniable aim, but for the primary benefit of orchestrating a settlement. Such use of the guardianship process would not be, in my view, a "legitimate object" of the process. Rather, I conclude that a jury could reasonably conclude that Appellees' actions were a "perversion of legal process to benefit someone in achieving a purpose which is not an authorized goal of the procedure in question" — that is, settlement of the malpractice case.

Exhibit A at 18.

This Court has never considered whether a judgment debtor's pursuit of a guardian ad litem proceeding against the parents of an injured minor in order to extort a more advantageous settlement from the judgment debtor's perspective constitutes a "perversion of legal process to benefit someone in achieving a purpose which is not an authorized goal of the procedure in question." That this is a question of great importance is unambiguously demonstrated by the fact that the Superior Court of Pennsylvania granted rehearing en banc to decide the question and yet divided 6–3 on the issue. Moreover, if the votes of the other two Superior Court judges who served on the original three–judge panel are counted, the division within the Superior Court of Pennsylvania on the question presented in this Petition for Allowance of Appeal is 6–5.[1]

It is impossible to know how often in the past the highly objectionable institution of a guardian ad litem proceeding under the circumstances presented here has occurred. But now that the en banc Superior Court has affirmatively blessed the procedure and insulated it from challenge by means of abuse of process suits, one can be certain that judgment debtors and their insurers, seeking to pressure the parents of injured minors to accept what appears to be a low–ball

[1] Judge McCaffery joined in the three–judge panel's majority opinion, which reversed the trial court's grant of summary judgment against the Cruzes and in favor of the insurance company, its lawyer, and his law firm. Judge Kelly, in dissent, would have affirmed on the basis of lack of sufficient proof of compensable damages, but he expressly agreed that the insurance company's institution of a guardian ad litem proceeding to extort a more favorable settlement constituted use of that proceeding "primarily to accomplish a purpose for which the process was not designed."

settlement, will be able to initiate baseless guardian ad litem proceedings with impunity, as well as take other, possibly more egregious actions until their conduct is reined in.

To be sure, the Court of Common Pleas of Philadelphia County properly rejected the guardian ad litem action that Princeton Insurance Company brought against the Cruzes. But, as this Court is well aware, trial courts do not always reach the correct result, and the Superior Court's ruling affording free rein to judgment debtors and their insurance companies to attempt to pressure parents into settlements via satellite guardian ad litem proceedings is bound to produce instances where trial courts issue erroneous rulings that grant the appointment of a guardian and thereby deprive the parents of their fundamental substantive due process right to determine what is in the best interests of their own children. *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000) ("we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Hiller* v. *Fausey*, 588 Pa. 342, 358, 904 A.2d 875, 885 (2006) ("the right to make decisions concerning the care, custody, and control of one's children is one of the oldest fundamental rights protected by the Due Process Clause").

The time to nip in the bud the Superior Court's fundamentally flawed ruling is now, before the decision is permitted to propagate into numerous guardian ad litem proceedings initiated by judgment debtors and their insurers seeking to pressure the parents of injured minors to accept what appear to be unfairly low settlement offers.

None of the reasons that the defendants/respondents could offer in opposing the grant of allowance of appeal in this case are meritorious or persuasive. All eleven Superior Court judges who have adjudicated this case via the three–judge panel decision and the nine–judge en banc decision that followed were unanimous in rejecting defendants' assertion that the Cruzes lacked standing to bring an abuse of process action against defendants because they were not formally parties to the guardian ad litem proceeding that Princeton Insurance Company instituted. As those eleven judges unanimously recognized, the guardian ad litem proceeding sought to directly deprive the Cruzes' ability to decide whether, and if so for what amount, to settle their son's personal injury claim against Northeastern Hospital. The guardian ad litem proceeding sought to deprive the Cruzes of their fundamental right to make decisions in the best interest of their child, and thus the Superior Court was unquestionably correct in holding, unanimously, that the Cruzes had standing to assert a claim for abuse of process against the defendants.

The defendants have also previously disputed the Cruzes' allegation of improper purpose. The defendants attempt to depict their purpose in instituting the guardian ad litem proceeding not as a greed–driven effort to prune more than $8 million from a judgment in excess of $15 million that the Superior Court was then on the verge of affirming in the underlying case; rather, the defendants claim that they acted for the charitable and unselfish purposes of assuring that the Cruzes did not walk away with nothing and force their child to become a ward of the state, when a $7 million settlement would supposedly have provided for his lifetime

needs for intensive medical care and medical supervision simply to remain alive. This, of course, presents a quintessential jury question. Moreover, the Rules of Professional Conduct do not assign to the lawyers for Princeton Insurance Company and Northeastern Hospital any obligation to be fair to their adversaries; rather, those lawyers are required to do what is in the best interest of their own clients. This Court can safely assume that the lawyers for the hospital and the insurance company believed that they were discharging their obligation to further the interests of their own clients in pursuing the misbegotten guardian ad litem proceeding.

To demonstrate improper purpose, the Cruzes in opposing summary judgment relied on the following deposition testimony of Peter Leone, vice president of claims at Princeton during the time the guardian ad litem proceeding was initiated:

> Q: So your sole purpose in this case was — I just want to make sure I'm clear — your sole purpose in having the petition filed on behalf of Princeton was to obtain an unbiased opinion as to the settlement offer?
>
> A: My purpose was to get the case settled.
>
> Q: Now, did you understand that a Petition to Appoint a Guardian Ad Litem — did you understand that one of it's [sic] purposes could be to get a case settled?
>
> A: I don't think it's [sic] purpose was to get a case settled. I thought it was, again, to give an unbiased opinion so that it would be another factor to be considered by the Plaintiffs and maybe by the Plaintiffs' attorney and the judge, whoever else is involved in the case to say that the number on the table was a fair number.
>
> Q: And to accept that number in such [sic] that the Plaintiff would accept the number that Princeton had offered?

A: Yes, or something close to it.

Q: Were you aware or did you have any understanding that there was any signs of mental incompetency on the part of the parents?

A: None whatsoever.

Q: Did you have an opinion that they were incompetent to act as parties?

A: No. I said before I thought they were lovely people, nice people.

Q: Did you have any indication that the parents had been physically abusive to Adam?

A: None at all.

Q: Any indication during the time of trial or afterwards that Adam had suffered from any type of physical or mental neglect?

A: None.

Q: Did you take issue in any way with the Cruzes as parents for Adam?

* * *
[A:] I thought they were lovely parents and doing a great job.

* * *

Q: Now, your goal is to have a guardian appointed to provide an unbiased evaluation of the settlement offer [and] to accept the settlement offer?

* * *

[A:] My goal was to get the case settled.

Exhibit A at 7–9.

This testimony, which the en banc Superior Court's opinion quotes at length, sufficiently establishes that Princeton Insurance Company initiated the guardian ad litem proceeding for an improper purpose: to achieve the most financially advantageous settlement of the hospital malpractice lawsuit that it could attain.

Additionally, in opposing summary judgment, the Cruzes presented to the trial court the expert testimony of an attorney with relevant experience in abuse of process actions who was of the opinion that the guardian ad litem proceeding had been pursued "primarily to accomplish a purpose for which the process was not designed." Thus, more than sufficient evidence exists for a reasonable jury to find in plaintiffs' favor on this element of an abuse of process claim.

Defendants had argued previously that the Cruzes supposedly had failed to establish harm flowing from the guardian ad litem proceeding. Only six of the eleven Superior Court judges to have considered this case opined on that issue, but of those six judges the vote was 4–2 *in favor of the Cruzes* on the issue of compensable harm. The Cruzes have provided sworn deposition testimony establishing that they experienced emotional distress as a result of being threatened by Princeton Insurance Company, via the guardian ad litem proceeding, with loss of the ability to make one of the most important decisions affecting the life of their severely disabled son. As all six Superior Court judges that opined on this issue have recognized, under existing law the Cruzes are not required to produce expert testimony to establish compensable emotional distress. The defendants' spurious assertion of a lack of compensable harm is no reason to deny review here.

Finally, only the two dissenters from the en banc Superior Court's ruling addressed the argument that Gold and his law firm were advancing that "they cannot be held separately liable for abuse of process as they were only acting as counsel for Princeton . . . ." Exhibit A at 21 n.9. The dissenters correctly observe in

that footnote that Gold and his law firm waived the ability to obtain appellate review of this issue because they did not raise it in their summary judgment motion filed in the trial court. Accordingly, this issue likewise provides no impediment to review of the important question of first impression presented herein.

* * * * *

The right of competent and loving parents to decide whether or not to accept a settlement offer in litigation involving an injured child is one of the most important and consequential decisions parents may ever have to make. The en banc Superior Court's decision, unless reviewed and overturned by this Court, will permit judgment debtors and their insurers to threaten that fundamental right with impunity by filing baseless and unmeritorious judgment ad litem proceedings in order to coerce and pressure parents to settle. The question presented herein is a both a question of great importance and a question of first impression. This Court should therefore exercise its discretion to grant this Petition for Allowance of Appeal.

VI. CONCLUSION

For the foregoing reasons, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,

Dated: June 29, 2007

Stephen A. Sheller, Esquire
Jamie L. Sheller, Esquire
Sheller, P.C.
1528 Walnut Street, 3rd Floor
Philadelphia, PA 19102
(215) 790-7300

Howard J. Bashman
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the person and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

Service by first class mail addressed as follows:

Lawrence M. Silverman, Esquire
Jonathan A. Cass, Esquire
Silverman Bernheim & Vogel
Two Penn Center Plaza, Suite 910
Philadelphia, PA 19102
(215) 569–0000
Attorneys for Respondent Princeton Insurance Company

Jeffrey B. McCarron, Esquire
Kathleen M. Carson, Esquire
Swartz Campbell LLC.
Two Liberty Place
50 S. 16th Street, 28th Floor
Philadelphia, PA 19102
(215) 564-5190
Attorneys for Respondents Alan S. Gould and
Gould, Butkovitz & Robins, PC

Dated: June 29, 2007

Howard J. Bashman
I.D. No. 61029
2300 Computer Avenue
Suite G–22
Willow Grove, PA 19090
(215) 830–1458
Counsel for Petitioners