No. 16-1150

In The
Supreme Court of the United States

ELSA HALL, As personal representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust,

Petitioner,

v.

SAMUEL H. HALL, JR. and HALL & GRIFFITH, P.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Third Circuit Court of Appeals determined that the case before it is not separately appealable absent certification under Federal Rule of Civil Procedure 54(b) because it had been consolidated for trial and pre-trial administration with a related case. The question presented by the petition is:

> Should the Court grant certiorari to consider, absent certification pursuant to Federal Rule of Civil Procedure 54(b), whether cases scheduled and tried together should be appealable separately?

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held corporation owning 10% or more of the stock of Respondent, Hall & Griffith, P.C. which is a professional corporation

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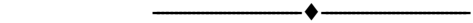
INTRODUCTION

Petitioner raises a question about the right of a party to appeal one of two separate but related cases in a consolidated case that has been consolidated for all purposes, including trial. Even if the question Petitioner raises were properly presented, there is no important conflict among the circuit courts of appeals. Further, even if there were, Rule 54(b) provides an adequate remedy.



STATEMENT OF THE CASE

In April 2011, Samuel H. Hall, Jr. ("Samuel") along with his niece, Yassin Hall ("Yassin"), sought the appointment of a guardian for his mentally and physically declining 94-year-old mother ("Mrs. Hall"). In avoidance of this, his sister, Elsa Hall ("Elsa") took his mother from the Virgin Islands to an undisclosed location in Florida to live, all without Samuel's and Yassin's knowledge. Elsa also procured a lawyer to file suit against her brother as she sought to exploit her mother's retirement income and assets. On May 9, 2011, the lawyer Elsa procured filed suit on behalf of Mrs. Hall against her son, Samuel and his law firm, Hall and Griffith, P.C. (collectively "Respondents"), for breach of fiduciary duty, conversion, malpractice, and fraud. The focus of the lawsuit was to hold Respondents liable for an amount equal to the gifts Mrs.

Hall memorialized in writing that she had given between 2003 to 2007 to Samuel and his sister Phyllis and Mrs. Hall's granddaughter, Yassin, but not to Elsa, in order to assist them with the construction of homes on property Mrs. Hall gifted to them in 2002.

While Samuel and Yassin prosecuted the guardianship action in the Virgin Islands Superior Court over the opposition of Elsa, Mrs. Hall died. Elsa was appointed the administrator of Mrs. Hall's estate and became the sole trustee of her trust. As such, Elsa amended the complaint filed in Civil No. 11-54 ("11-54") and Respondents answered the amended complaint. Samuel also asserted a counterclaim against Elsa in both her individual and representative capacities. He also sued Elsa in a separate action in her individual capacity in (Case No. 3:13-cv-95) ("13-95"). That lawsuit made essentially the same allegations against Elsa in her individual capacity that Samuel made against her in both her representative and individual capacities in the counterclaim in 11-54. Samuel then moved, in both actions, to consolidate the two cases.

On February 14, 2014, the district court consolidated both actions for all purposes. The consolidation orders did not limit consolidation to pre-trial administration. The two cases were then tried together despite a motion to sever the cases filed on the eve of trial by Petitioner. Throughout the litigation, including the trial, separate counsel represented Elsa in her two separate capacities.

Prior to the start of the consolidated trial, and during the trial, the district court rejected substantial portions of Petitioner's claims and substantial portions of Samuel's claims. The jury returned a verdict in favor of Respondents, finding no liability on their part, and against Elsa in her representative capacity. The jury also returned a verdict in favor of Samuel and against Elsa in her individual capacity, awarding Samuel $500,000 in compensatory damages and $1.5 million in punitive damages.

On February 4, 2015, the district court clerk entered separate judgments in each separate case. However, on March 4, 2015, Elsa filed a motion for a new trial in the case against her in 13-95. Also, on March 5, 2015, Elsa in her representative capacities filed an appeal in the Third Circuit in Civil No. 11-54 even though the district court did not enter an order separating 11-54 from the consolidated case and Petitioner did not seek Federal Rule of Civil Procedure 54(b) ("Rule 54(b)") certification and a determination that there was no just cause for delay.

Respondents moved to dismiss the appeal, asserting that the judgment entered in 11-54 was not final because there was not yet a final ruling in 13-95. On March 30, 2016, the district court granted the motion for new trial in 13-95 and vacated the verdict against Elsa individually.

The Third Circuit asked the parties to brief the issue of jurisdiction in their appellate briefs. The issue was briefed and after oral argument on December 12,

2016, the Third Circuit issued an opinion determining it lacked jurisdiction over 11-54. On February 10, 2017, the Third Circuit dismissed Petitioner's appeal for lack of appellate jurisdiction. Thereafter, on April 4, 2017, Civil No. 13-95 was retried in the lower court. On April 6, 2017, the jury returned a verdict in favor of Samuel and against Elsa in the amount of $3,384,000 in compensatory damages and $6,618,000 in punitive damages.

A motion for a directed verdict and for a mistrial are pending in the case.

REASONS FOR DENYING THE WRIT

The Third Circuit Court of Appeals determined that Civil No. 11-54 is not separately appealable absent certification under Rule 54(b) because it had been consolidated for trial and pre-trial administration with a related case. There does not appear to be an important split among the federal circuit courts regarding whether cases scheduled and tried together may be appealed separately. None of the cases cited by Petitioner indicate an important split among the circuits within S. Ct. Rule 10. Second, Petitioner seeks to occupy this Court with an issue that is addressable consistently in all circuits by the application of Rule 54(b). There does not appear to be any split among the circuits regarding the effect of such a certification where there is no just cause for delay.

I. There Is Unanimity Among The Circuits Regarding The Lack Of Jurisdiction Over A Separate Appeal Of A Case Consolidated, Scheduled And Tried Together With Another

This case involves the narrow situation where two related cases were consolidated for all purposes, that is, for case management and for trial, and Petitioner sought a separate appeal of one of the individual cases. While Petitioner has cited to precedent in various circuits seeking review by this Court, the cases cited by Petitioner do not indicate a split among the circuits regarding the jurisdictional prerequisite of an appeal of an individual case that was part of a consolidated case where the individual cases that were consolidated were scheduled and tried together.

First and Sixth Circuits

The First and Sixth Circuit cases cited by Petitioner, *FDIC v. Caledonia Inv. Corp.*, 862 F.2d 378 (1st Cir. 1988) and *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994) do not address the issue of the appealability of an individual case that was consolidated and then scheduled and tried together before a single jury to final judgment with another case. Rather, those cases involve consolidated cases where an appeal was allowed of an individual case where summary judgment has been granted in one of them. That is not this case. Thus, there is no indication in the First

and Sixth Circuit cases cited by Petitioner that the instant case would have been decided differently in those circuits than it was by the Third Circuit.[1]

Federal, Ninth, and Tenth Circuits

Petitioner concedes that the Federal, Ninth, and Tenth Circuits would rule on appeal the same way in connection with the instant case as the Third Circuit did and hold that "the dismissal of one of several consolidated cases is not immediately appealable as of right." *Petitioner's Brief at 7.* As Petitioner concedes those circuits would refuse to accept jurisdiction:

> *See Spraytex*, 96 F.3d at 1381 (ruling that "there may be no appeal of a judgment disposing of fewer than all aspects of a consolidated case"); *Trinity*, 827 F.2d at 675 (adopting "the rule that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final, appealable judgment under 28 U.S.C. § 1291"); *Huene*, 743 F.2d at 705 (holding that "the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions"). *Petitioner's Brief at 7.*

Thus, there is no split among those circuits and the Third Circuit.

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[1] The two circuits alternatively could have deemed consolidated cases involving summary judgment of one of the separate cases as Rule 54(b) compliant and achieved the same result. In essence the two circuits treat a final judgment by summary judgment as akin to Rule 54(b) certification.

Second Circuit

Petitioner also acknowledges that "The Second Circuit would also decline jurisdiction over Petitioner's appeal" *Petitioner's Brief at 7.* Petitioner just does not like the way the Second Circuit expresses its decision. However, the fact that the Second Circuit reaches the same result as other circuits via a different rationale does not constitute or create a split among the circuits. Circuits are not split where they have different verbal formulations of the same underlying legal rule.

Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits

The Third Circuit held in the instant case, citing *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991) that it lacked jurisdiction to decide on appeal Petitioner's individual case because the "dispositive" factor is "whether the cases were consolidated for trial or simply for pretrial administration." The instant case was consolidated for both. Petitioner virtually concedes that the Petitioner's appeal "would have suffered a similar fate in the D.C., Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits" as it did in the Third Circuit. *Petitioner's Brief at 8.* Thus, in no instance has the Petitioner identified a case in which an appeal was allowed of an individual case, absent Rule 54(b) certification, where it had been consolidated with another case for all purposes. The conclusion is inescapable that there is no split among the circuits concerning whether they have

jurisdiction over the appeal of an individual case that was consolidated for all purposes with another.

II. There Is Unanimity Among All Circuit Courts That Rule 54(b) Certification Satisfies The Jurisdictional Prerequisite For Appeal

Petitioner seeks to occupy this Court with an issue that is addressable consistently and tolerably in all circuits by the application of Rule 54(b). National uniformity among the circuits concerning the appeal of an individual case constituting part of a consolidated case is not essential where Rule 54(b) provides a national remedy that addresses the issue about which Petitioner complains.

After the jury verdict in the instant consolidated case, Petitioner never sought Rule 54(b) certification of Petitioner's individual action despite the eventual passage of two years since the jury verdict was rendered and judgment entered thereon. Rule 54(b) is interpreted in all circuit courts of appeals as allowing for an appeal of an individual case where there was no just reason for delay. See, e.g., *Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 229 (3d Cir. 2012). Not only was Rule 54(b) certification not sought by Petitioner at the outset of this case, no supplemental order that otherwise satisfies this jurisdictional prerequisite was ever obtained. Had 54(b) certification been obtained, an appeal would have been allowed in all of the circuit courts of appeals. As far as Respondent is able to determine, there is no split among the circuits in interpreting

whether they have jurisdiction over a case that has been certified for appeal by a lower court.

Petitioner's failure to invoke 54(b) was noted pointedly by the Third Circuit in determining it had no jurisdiction to hear the appeal of Petitioner. Its ruling was also consistent with Third Circuit precedent that, absent 54(b) certification, cases scheduled and tried together remain consolidated on appeal. Said the Third Circuit in *Hall v. Wilkerson*, 926 F.2d at 314:

> Among the criteria we considered in deciding whether the orders in *Bergman* and *Bogosian* were appealable were whether the cases were in the same forum with the same judge; whether the complaints and defendants were identical; whether plaintiffs had the same counsel in both actions; and, as noted, whether the cases were consolidated for trial or simply for pre-trial administration. Both *Bogosian* and *Bergman* found the latter consideration dispositive. In *Bogosian*, we emphasized that the two cases had not been consolidated for trial, whereas in *Bergman*, they were. Moreover, in *Bergman* both the complaints were "substantially similar" in the two actions.

Similarly, in connection with the instant case, the Third Circuit noted:

> Both parties' claims have already been heard together. Our cases allowing for separate appeals have typically involved claims that either were not consolidated for trial, *Hall*, 926 F.2d at 314; *Bogosian v. Gulf Oil Corp.*, 561

> F.2d 434, 441 (3d Cir. 1977), or had been consolidated for trial but had not yet been tried. *Bergman*, 860 F.2d at 566; *$8,221,877.16 in U.S. Currency*, 330 F.3d at 146. By contrast, here, all of the claims were in fact scheduled together and tried before a single jury. That counsels in favor of keeping the claims together on appeal.

Hall v. Hall, Case No. 15-1564, Slip Op. at 8 (3d Cir. Feb. 10, 2017).

Petitioner laments the fact that "After a two-year delay, briefing on the merits, and oral argument, the Third Circuit refused to accept jurisdiction over Petitioner's appeal." *Petitioner's Brief at 8*. But after the jury verdict and final judgment, Petitioner never sought an order severing the cases, nor sought Rule 54(b) certification and a determination that there was no just reason for delay. *Elliott v. Archdiocese of N.Y.*, 682 F.3d 213, 229 (3d Cir. 2012). The fault then lies not in the circuits but with Petitioner. Whether Petitioner will continue to wait on a final order in 13-95 or decide to seek Rule 54(b) certification of an individual case remains to be seen.

CONCLUSION

Petitioner has presented no evidence of conflict among the circuits concerning appellate jurisdiction over cases consolidated for all purposes including trial before a single jury. Nor is there evidence of any conflict among the circuits regarding the opportunity for

appellate jurisdiction where there is Rule 54(b) certification. The petition for certiorari should be denied.

DATED: June 14, 2017

Respectfully submitted,

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