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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Durham Cole, Circuit Court Judge

Appellate Case No. 2012-212871
Trial Court No. 2007-CP-42–4601
Order (S.C. Ct. App. filed Aug. 3, 2012)

Lawrence E. Morrow and Evelyn M. Morrow, ... Petitioners,

v.

Fundamental Long-Term Care Holdings, LLC, Fundamental Clinical Consulting, LLC, Fundamental Administrative Services, LLC, THI of Baltimore, Inc., THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, ... Respondents.

BRIEF OF PETITIONERS

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STATEMENT OF QUESTIONS FOR REVIEW

This Court granted the petition without limitation based upon the following statement of the questions for review:

1. Whether the Court of Appeals committed reversible error based upon a material misstatement of fact.

2. Whether the Court of Appeals erred when it failed to consider Petitioners' argument that the Trial Court's Order is effectively a *final order* and therefore immediately appealable.

3. Whether the Court of Appeals erred when it failed to consider Petitioners' argument that the Trial Court's Order is an Order "*involving the merits*" and therefore immediately appealable.

4. Whether the Court of Appeals erred when it failed to recognize that the Trial Court's Order is an interlocutory order that "*affects a substantial right.*"

5. Whether this Court should issue a writ of certiorari based on the novel issue of law concerning matters of public importance involved in the present case.

6. Whether this Court should issue a writ of certiorari based on the constitutional issues that are directly involved in the present case.

STATEMENT OF THE CASE

On December 27, 2007, the Morrows filed an action against THI of South Carolina at Magnolia Place at Spartanburg, LLC, the licensee of a nursing home. The Morrows alleged Mr. Morrow suffered personal injuries while a resident at the facility. The Morrows also sued the entities the Morrows contend together control the overall operations and management of the facility: Fundamental Long-Term Care Holdings, LLC ("FLTCH"), Fundamental Clinical Consulting, LLC ("FCC"), Fundamental Administrative Services, LLC ("FAS"), THI of Baltimore, Inc. ("THI of Baltimore"), and THI of South Carolina, LLC ("THI of SC"), and THI Holdings, LLC (collectively the "Fundamental Defendants"). (App. pp. 468-470). The Morrows filed an amended complaint on March 20, 2009. (App. p. 468). THI of Baltimore and THI Holdings were later dismissed from the case.

In the complaint, the Morrows asserted that on January 20, 2007, Mr. Morrow was admitted to Magnolia Place at Spartanburg for care and treatment and that during his residency at the facility Mr. Morrow suffered injuries. (App. p. 473, ¶¶ 30, 32-35 ; p. 475, ¶ 49). The Morrows asserted that the corporate defendants are "vicariously liable for the acts and delicts of their employees, agents, and servants." (App. p. 474, ¶ 41). The Morrows also asserted that the Defendants held the Spartanburg facility out as being able to provide skilled care to its residents. (App. p. 474, ¶ 42, 43). The Morrows contended the Defendants were under a contractual duty to provide appropriate and adequate care pursuant to state and federal laws, rules, regulations and guidelines and existing industry standards. (App. p. 474, ¶ 44). The Complaint asserted that "the Defendants, their

officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to" Mr. Morrow. (App. p. 475, ¶ 48). The Complaint stated claims for (1) Negligence, Recklessness and Gross Negligence (App. pp. 475-477, ¶¶ 52-57); (2) Negligence per se (App. p. 478, ¶¶ 59-61); and (3) Loss of Consortium (App. p. 478, ¶ 63).

Each defendant except FLTCH answered the case, generally denying the substance of the claims; FLTCH contested personal jurisdiction. Each defendant asserted affirmative defenses for unconstitutionality of punitive damages, failure to state facts sufficient to plead a cause of action, the South Carolina limitation on non-economic damages pursuant to Section 15-32-200, et seq., of the Code; failure to mitigate damages, comparative negligence, contributory negligence, and failure to comply with Section 15-79-125 of the Code.

On October 25, 2010, the Defendants filed motion styled as a "Motion to Bifurcate." (App. pp. 2-22). The motion sought

> an Order bifurcating the trial on the alleged nursing negligence claims from the remaining claims in the case and stay all discovery on causes of action unrelated to nursing home negligence and/or related to allegations of liability based on "control, successor, direct or piercing the corporate veil" as to all defendants but the licensed operator of the facility that provided care to Mr. Morrow from January 12, 2007-February 2, 2007.

(App. p. 2). The motion was made purportedly pursuant to Rule 42(b), SCRCP. (App. p. 3). Thus, the Defendants requested that the court order the Morrows to proceed to trial on their negligence claims solely against THI of SC at Magnolia Place, and then order a second trial "only if necessary" against the remaining defendants. That is, they asked the

court to strike the complaint against five named defendants and prevent any pursuit of those claims unless the Morrows obtained a favorable jury verdict in the first trial.

The Morrows objected to the motion, asserting that the corporate defendants, including Fundamental Long-Term Care Holdings, LLC (FLTCH), were "attempting to exclude the parent corporation's substantial involvement in the operation of Magnolia Place." (App. p. 23). The Morrows asserted that "FLTCH's control and liability is inextricably woven and cannot be separated without presenting the jury with a false picture of what happened to Mr. Morrow, and removing the opportunity to render a verdict that will prevent neglect to future residents." (App. p. 23). The Morrows noted their claims against FLTCH were based on direct liability and not a "derivative claim." (App. pp. 23-24). The Morrows contended the "issue in this case is whether Mr. Morrow's injuries and loss of dignity were the foreseeable result of profit-driven management and operational practices that were consistently at odds with residents' needs as controlled by a joint venture involving all Defendants." (App. p. 24).

The Morrows denied the case was "simply a 'malpractice' case." (App. p. 24). Rather, the Morrows asserted the corporate defendants had direct liability. (App. pp. 27-30). This included an assertion of "corporate negligence" (App. pp. 30-42). The Morrows contended there was a lack of separate and distinct issues (App. pp. 42-50) and they would suffer inherent prejudice. (App. pp. 50-54). The Morrows asserted that a grant of bifurcation would essentially be "granting summary judgment for Defendants on Plaintiffs' cause of action of corporate negligence." (App. p. 54).

Following a hearing, the trial court entered an order granting Defendants' motion.

The trial court concluded:

> The consideration of the corporate liability issues will require this court to charge, and a jury to consider, complex issues separate and distinct from the clinical issues. Though separate and distinct, they are dependent upon a jury first determining that Nursing Home was negligent as a proximate cause of injury to Plaintiffs. The corporate liability claims in no way alter that requirement of the case; without proving professional negligence, Plaintiffs simply cannot recover. Consequently, I conclude the issues to be tried and the evidence presented in the negligence action against Nursing Home are wholly separate and distinct from what Plaintiff must prove to establish corporate liability against the remaining defendants.

(App. p. 309). The court noted the Morrows stated claims based on piercing the corporate veil; instrumentality, alter ego and corporate control; corporate successor liability; agency; adjunct; de facto merger; and joint venture. (App. p. 310).

The court acknowledged that some of these theories assert direct liability. (App. pp. 311-315). The court held that unless the first jury found for the Morrows as against the nursing home, the remaining claims against the rest of the defendants would be rendered "moot" and could not proceed. (App. Br. pp. 317-318). The court ordered "separate trials" – the first against THI of SC at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, and then:

> In a separate trial by a different jury empanelled at a subsequent date, and only if necessary, Plaintiffs['] claims for punitive damages against the remaining Defendants for their alleged conduct and liability for the actual and punitive damages awarded in the first trial against THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg (reserving for non-jury adjudication in the same proceeding any equitable claims not properly tried to a jury), and subject to any set-offs allowed by law....

(App. p. 319, ¶ 2(b)).

The Morrows sought reconsideration of the order. (App. pp. 320-332). The Morrows asserted the order:

> has effectively granted summary judgment to the Fundamental entities; has effectively deprived Plaintiffs of a fair and fully informed fact finder; and has created more questions than answers with this "piecemeal litigation" which should be avoided. Plaintiffs should be allowed to go to trial with all Defendants in one trial with one jury. All the evidence and issues overlap and are not "separate and distinct." Typical bifurcation, when granted, simply separates liability and damages, or liability and punitive damages, with separated presentations, but is still one trial before one jury. But in the Court's Order, Plaintiffs are deprived of presenting their case of negligence by the Fundamental entities. The result of the first trial will no doubt be taken up on appeal. The appellate courts will render separate decisions that will impact the other case, and eventually the cases will most likely be re-tried together at some point years down the road. The two trials of the same case will actually cause this matter to go on for many more years.

(App. p. 321). The Morrows pointed out that the description of there being "massive discovery" was deceptive, since the number appeared high because they had to seek the same information from each defendant. (App. p. 327). They also pointed out that the corporate defendants Magnolia Place, FLTCH, and the management companies FCC and FAS are necessary and indispensable parties to the litigation. (App. pp. 328-329). The Morrows pointed out the court misapplied cases it believed permitted it to order two separate trials with separate juries. (App. pp. 330-331). Lastly, the Morrows outlined a proposal for streamlining the remaining discovery. (App. p. 331). Defendants filed a memorandum in opposition to reconsideration. (App. pp. 353-357).

On October 24, 2011, the trial court entered a Form 4 order denying the motion. (App. p. 358). The Morrows appealed.

On January 23,2012, upon request from the Court of Appeals, the Morrows filed a

Memorandum of Law regarding the appealability of the Trial Court's Bifurcation Order. (App. pp. 359-383). Respondents filed a memorandum addressing appealability, asserting the order was not appealable. (App. pp.384-390).

On March 5, 2012, a single Judge signed an order dismissing the appeal without prejudice. (App. p. 408-409). The Morrows petitioned the Court for rehearing *en banc*. (App. pp. 410-552). Respondents filed a return to the petition. (App. p.553-568). On August 3, 2012, a three-judge panel denied the petition for rehearing. (App. p. 569-570).

On September 4, 2012, the Morrows petitioned this Court to issue a writ of certiorari to review the Court of Appeals' order. On May 23, 2014, the Court granted the petition and issued the writ of certiorari. The sole issue before this Court is the appealability of the trial court's order that two separate trials take place among these parties.

FACTS

Although the merits of the Morrows' direct negligence claims against the Fundamental Defendants are not before the Court at this time, the Court should consider the underlying matter in ruling on the issue of appealability. *Cf. Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73 n. 7, 533 S.E.2d 331, 333 n. 7 (2000) (Court pointed out that "some minimal inquiry will always be necessary on the part of the appellate court considering the appealability of an order which is alleged to have deprived a party of a mode of trial").

At the time of Mr. Morrow's residency in 2007, FCC and FAS provided operational and administrative services to Magnolia Place. This included conducting training to all of the facilities FLTCH owned. The application for licensure of the facility designates FCC as the management company for Magnolia Place. (App. p. 544). As the management company, FCC is authorized to perform services in whatever manner it deems reasonably appropriate to meet the day-to-day requirements of the operation of the facility. (App. pp. 520-521). FCC is the entity responsible for the facility's compliance with state and federal regulations. (App. p. 164, ll. 22-25).

According to their corporate representatives, FAS has employees and contracts to provide services within "the Fundamental family of companies" which is "part of a nationwide network of patient care centers." (App. pp. 152-154, 524-526). Above all, FAS creates the budget for Magnolia Place – the budget determines the facility's ability to sufficiently staff, including levels of staff and training, and the furnishing of supplies, all of which directly affects a resident's care or lack thereof. FAS's other hands-on

responsibilities are varied, including complaint hotline services, vendor services, and medical record review services. (App. pp. 157, 235-237, 239-240, 248, 249, 260-261).

THI of Baltimore is listed as the governing body on the facility's license application. (App. p. 213). Federal law mandates that the "governing body" "is legally responsible for establishing and implementing policies regarding the management and operation of the facility...." 42 C.F.R. 483.75(d). Evidence reveals, however, that THI of Baltimore is a shell company that FLTCH uses to enter into contracts such as insurance and vendor services – it has no employees, no operating agreement and no business purpose, and does not conduct any business. Evidence also reveals that FLTCH is the de facto governing body as the controlling owner/operator of THI of Baltimore. (App. pp. 342-352). For example, the Medical Director of Magnolia Place testified that Fundamental is a "national company" that "oversee[s] and monitor," and meets with "Fundamental people at a National level on their Medical Advisory Board" to keep costs down. (App. pp. 530-534).

The Morrows point to the following authorities supporting their claims of direct negligence against the Corporate Defendants: *U.S. Bestfoods*, 524 U.S. 51, 64-65 (1998) (Court noted the rule that a "parent corporation is [itself] responsible for the wrongs committed by its agents in the course of its business" and this is a rule of direct liability for the parent's own actions)(brackets in original); *U.S. v. Days Inn*, 151 F.3d 822, 826 (8th Cir. 1998), *cert denied* 526 U.S. 1016 (1999) (parent corporation has direct liability for violation of statute where parent manages, directs, or conducts operations specifically related to the violation or compliance with the statute); *Forsythe v. Clark USA, Inc.*, 864

N.E.2d 227 (Ill. 2007) (recognizing "direct participant liability" when of parent company when corporate cutbacks in staffing, safety, maintenance, and training leads to injury to others); *Smartt v. NHC Healthcare*, 2009 WL 482475 (Tenn. Ct. App. 2009), *rev. denied* March 10, 2011 (parent corporation may be directly liable for acts of subsidiary under numerous theories, including control theory, instrumentality rule, or respondeat superior; a duty of care can be imposed upon a parent corporation through the instrumentality rule by proving the parent's sufficient control over the subsidiary); *Scampone v. Grane Healthcare Co.*, 11 A.3d 967, 987 (Pa. Super. Ct. 2010) (describing the elements of a cause of action for "corporate negligence" which arises from the policies, actions or inactions of the institution itself rather than the specific acts of employees; "under this theory, a corporation is held directly liable, as opposed to vicariously liable, for its own negligent acts"), *affirmed* 57 S.3d 582 (Pa. 2012); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 354 (Ark. 2003) *cert denied* 540 U.S. 1012 (2003) (Court held corporate defendant liable for "custodial negligence" because the corporation knew it had staffing problems and committed negligence as to residents of the facility "because it was short-staffed due to cutbacks").

The Morrows requested that the trial court reconsider its ruling because overwhelming evidence demonstrated the issues the trial court ordered to be tried separately were not separate and distinct. Instead, the Fundamental Defendants are not just "upstream corporate" entities, but are the controlling decision-makers that dictated the operations of Magnolia Place. (App. pp. 320-332). Although the order is labeled a "bifurcation," the court's ruling actually dismissed co-defendants from the actions and

strikes out causes of action pending against them. The trial court denied the motion so the Morrows appealed. The Court of Appeals dismissed the appeal before the parties could brief the issues.

ARGUMENTS

THE ORDER IN THIS CASE IS AN IMMEDIATELY APPEALABLE ORDER

The sole issue before the Court is whether the trial court's order here is one that is immediately appealable. The Court of Appeals dismissed the order as not appealable. This Court should reverse and remand to that Court to permit briefing of the merits of the appeal and then to address those merits.

The right of appeal arises from and is controlled by statutory law. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). An appeal ordinarily may be pursued only after a party has obtained a final judgment. *Id.*, *citing* S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCP; Rule 201(a), SCACR. The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330 (1976 & Supp.2003). *Hagood.* An interlocutory order generally must fall into one of several categories set forth in that statute in order to be immediately appealable. *Hagood.*

Section 14-3-330 provides:

> 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.

Therefore, an appeal of an interlocutory order is permitted in limited circumstances as set forth in the statute.

The Court of Appeals held the order was an order granting bifurcation and as such was not immediately appealable under *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000) and *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000). For the following reasons this Court should reverse that order and either remand the case for briefing and arguments on the merits, or permit the parties to brief the merits before this Court of whether the trial court's order should be reversed.

A. WHETHER THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BASED UPON A MATERIAL MISSTATEMENT OF FACT

The Court of Appeals wrongly characterized the trial court's order as merely a "bifurcation order" in ruling that order was not immediately appealable. The Court failed to recognize that the order striking the Morrows' direct liability claims against the Fundamental Defendants is *not* a bifurcation order as such, but instead is an order involving the merits of the case and affecting a substantial right. (Appx. pp. 304-319;

408-409). The effect of the trial court's order was to dismiss the Fundamental Defendants in this matter on the Morrows' direct liability claims, including direct liability for negligence, corporate negligence, and direct participant liability. (Appx. pp. 304-319).

This is not true bifurcation as contemplated by Rule 42(b), SCRCP. Instead, it is a severance of the case into two cases against joint tortfeasors, depriving the Morrows of the right to bring their action against any and all defendants whom they choose so long as they can assert colorable claims against them. The trial court's order removes certain defendants from the case under the guise of "bifurcation," and the Court of Appeals dismissed the appeal based on that label.

This Court should look to the substance of the trial court's ruling rather than the label, and should find the order is not a "bifurcation" in the normal sense of that term. The Court should hold that the order in this case is, in fact, appealable because of its dispositive nature with regard to the corporate defendants. *Thornton v. SCE&G Corp.*, 391 S.C. 297, 303, 705 S.E.2d 475, 478 (Ct. App. 2011) (construction of Section 14-3-330(2)(c) requires appellate court to "focus on the effect of the order, not the label given to the motion or to the order granting it."). Whether an order striking a portion of a pleading is immediately appealable under Section 14-3-330(2)(c) depends on the effect of the individual order under the facts and circumstances of the case. *Thornton*. As the Court stated in *Thornton*:

> [A]n appellate court should look to the effect of an interlocutory order to determine its appealability under section 14–3–330(2)(c). An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct

any errors in the order during or after trial.

391 S.C. at 304, 705 S.E.2d at 479.

As noted, the trial court's order removes the central issue of the Fundamental Defendants' direct liability from the trial, preventing their direct liability from being litigated on the merits in this case. (App. pp. 304-319). The order also has the effect of preventing the liability of the remaining defendant (Magnolia Place) from being determined on the merits since the trial court ordered a discovery stay on what it arbitrarily determined to be "non-clinical." Under the trial court's ruling, the jury will not hear the cause of the clinical issues that comprised Mr. Morrow's injuries and damages.

Under the trial court's ruling, several negligent acts the Morrows complain about will not be tried until after a jury determines liability and damages, if at all, against Magnolia Place. For example, the jury will never hear the evidence that shows the Fundamental Defendants' practice of siphoning funds paid to the nursing home for resident care for their own profits. A jury could conceivably find Magnolia Place not liable but find against the Fundamental Defendants for failing to properly provide funding, staffing, care and supplies to the nursing home facility.

The trial court's order deprives the Morrows of their right to a fair trial before a fair and fully informed fact-finder, and creates more questions than answers with this "piecemeal litigation." The Morrows should be allowed to go to trial with all of the defendants in one trial with one jury so that the whole story may be told and justice served. The very purpose for disallowing direct appeal of certain orders is to "advance the salutary consideration of avoiding 'piecemeal litigation' which would occur if immediate

review of such pretrial motions were either mandated or permitted." *Senter v. Piggly Wiggly Carolina Co., Inc.*, 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000). The trial court's order, however, attains the precisely opposite result, mandating "piecemeal litigation."

The trial court's order further prejudices the Morrows by granting a stay on "all discovery on causes of action unrelated to the primary claim of nursing home negligence." (App. p. 319). This portion of the order misses the point of this litigation. The negligence and failures of the governing body, THI of Baltimore, are directly related to the negligence claims against the licensee, THI of SC at Magnolia Place. There is no additional cause of action against what the trial court referred to as "upstream entities." (App. pp. 306, 468-470). This is one cause of action for negligence that applies as to all defendants – it is a fundamental error for the trial court to dismiss the joint tortfeasors, particularly the named governing body, THI of Baltimore, and the de facto governing body, FLTCH.

As this Court has stated, interlocutory rulings regarding mode of trial or *limitations on relief* must be immediately appealed, and the failure to do so effects a waiver of appeal rights. *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 431 S.E.2d 587 (1993). The Court of Appeals failed to recognize that the trial court's order placed a limitation on the relief the Morrows sought by forcing them to trial against only some, but not all, of the parties who they claim are responsible for their damages. That order must be reviewed now and the prejudice of the order may not be remedied later.

This Court should reverse the Court of Appeals' dismissal of this appeal and should remand the matter for that Court to permit briefing and argument on the merits.

B. WHETHER THE COURT OF APPEALS ERRED WHEN IT FAILED TO CONSIDER PETITIONERS' ARGUMENT THAT THE TRIAL COURT'S ORDER IS EFFECTIVELY A *FINAL ORDER* AND THEREFORE IMMEDIATELY APPEALABLE

The trial court's order effectively renders a final judgment on several causes of action the Morrows have properly pled against the Fundamental Defendants. These include agency, joint and several liability, joint enterprise, corporate negligence, direct participant liability, negligent management and administration, and governing body liability pursuant to 42 C.F.R. 483.75(d). The order does not allow these claims to go to the jury. (App. pp. 304-319). Indeed, the order effectively grants final judgment in favor of FLTCH, FAS, FCC and THI of Baltimore, Inc., by ruling that the Morrows may only pursue these real parties in interest in a separate trial years down the road, but only *if* a first jury (which will not be presented all of the facts) finds Magnolia Place liable. (App. p. 318).

Moreover, the denial of access to the subject matter of the case itself, – discovery from named defendants regarding their negligent acts resulting in harm to Mr. Morrow – deprives the Morrows of the ability to fully present evidence establishing their case. The order deprives the Morrows of the ability to fully present the elements of the negligence claim. This prejudices the Morrows by striking their claim and depriving them of any meaningful opportunity to be heard. That error cannot be vindicated on appeal after trial.

The trial court's order also prejudices the Morrows by depriving them of the ability to rely on the blurred identity theory of liability based on the amalgamation of interests of the Fundamental Defendants. (App. p. 454). Since the ruling foreclosed the

Morrows' opportunity to try interrelated corporations together, the Morrows will not be able to show the jury that the Fundamental Defendants are amalgamated, i.e., that the legal distinctions between the entities are blurred and they are in effect one and the same as far as their representation and operation and that the actions of one should apply to the others. *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011); *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App.1986).

The trial court's order is thus appealable as a "final order" as set forth in Section 14-3-330(1). *See also* S.C. Const. art. V, § 5 (permitting this Court to issue writs or review and to correct errors of law); Rule 201(a), SCACR ("appeal may be taken, as provided by law, from any final judgment or appealable order."). Further, the Morrows' rights cannot be vindicated on appeal after trial of the first case against Magnolia Place. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000) (immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case). They have the right to try their case against all of the defendants who are responsible for their harms at the same time.

Statutes and rules of court should be construed liberally in favor of the right of appeal. *Stroup v. Duke Power Co.*, 216 S.C. 79, 84, 56 S.E.2d 745, 747 (1949); *Haughton v. Order of United Commercial Travelers of Am.*, 108 S.C. 73, 74–75, 93 S.E. 393, 394 (1917); *O'Rourke v. Atl. Paint Co.*, 91 S.C. 399, 403, 74 S.E. 930, 931 (1912).

This Court should construe Section 14-3-330 in favor of the Morrows' right to appeal and should reverse the Court of Appeals' decision dismissing the appeal in this case.

C. WHETHER THE COURT OF APPEALS ERRED WHEN IT FAILED TO CONSIDER PETITIONERS' ARGUMENT THAT THE TRIAL COURT'S ORDER IS AN ORDER "*INVOLVING THE MERITS*" AND THEREFORE IMMEDIATELY APPEALABLE

The trial court's order is also appealable under Section 14-3-330 (1) because the order is one "involving the merits" of the case. The Court of Appeals failed to recognize this basis for immediate appeal.

An order involving the merits "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Mid–State Distrib., Inc. v. Century Imp., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). The decision to dismiss the Fundamental Defendants and to strike the Morrows' properly pled direct liability claims against them finally determines those issues at this time in this case. (App. pp. 304-319, 468-479).

The Morrows contend that the Fundamental Defendants' corporate scheme was crafted to conceal the reality that these self-named "corporate" defendants were the parties dictating every aspect of the nursing home's operations, resulting in Mr. Morrow's injuries and damages. (App. pp. 333-352). Despite the somewhat complicated corporate structure, the issues of liability in this case are relatively straightforward. Corporate negligence is a theory of liability that has a long-standing history of wide applicability in our courts. Without question, nursing home and healthcare management companies can be directly liable for their own wrongdoing under this theory. (See discussion above in the "Facts"). Since corporate negligence is a critical aspect of the Morrows' allegations, the trial court cannot "bifurcate" their negligence action against related defendants into

two separate jury trials, requiring the Morrows to try the "clinical issues" before one jury, and set forth the proof of the "corporate issues" and the Fundamental Defendants before a second jury. The order thus involves the merits of the Morrows' claims.

The order also "involves the merits" of the remaining negligence claims against THI of SC because it excludes evidence of the parent corporation and the substantial involvement and control of the facility's operations by its agents, FCC and FAS. (App. pp. 342-352). Since FLTCH's control and liability is inextricably woven and cannot be separated without presenting the jury with a false picture of what happened to Mr. Morrow, the order denies the jury the opportunity to render a just verdict based on the merits of this case.

The portion of the order that denies the Morrows the right to discovery from named defendants concerning their negligent acts (the subject matter of the claim itself) also involves the merits. *See City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996) (reviewing an order in that case precluding discovery where the subject of the discovery was the subject matter of the case itself).

The order of the Court of Appeals improperly dismissed the appeal without considering that the trial court's order was appealable since it involved the merits of the case.

D. WHETHER THE COURT OF APPEALS ERRED WHEN IT FAILED TO RECOGNIZE THAT THE TRIAL COURT'S ORDER IS AN INTERLOCUTORY ORDER THAT "*AFFECTS A SUBSTANTIAL RIGHT*"

The order in this case also affects a substantial right and is thus immediately appealable. The Court of Appeals failed to recognize this fact when it dismissed the appeal.

An order affects a substantial right and is immediately appealable when it "(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[.]" Section 14-3-330(2). *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

The order in this case affects the Morrows' substantial right to proceed to trial against the defendant of their choice. It matters not that the order severs the Fundamental Defendants for a second trial *only if* the Morrows obtain a verdict against Magnolia Place, for that order dictates who they must proceed against just as if it had required a substitution of parties. It is therefore immediately appealable. *See Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012) (holding an order affecting a plaintiff's substantial right to name its defendant was immediately appealable under Section 14-3-330(2)(1)).

The order then requires the Morrows to try their entire case in chief twice – once against Magnolia Place and, if they prevail, a second time against the Fundamental Defendants. This is not a case of true bifurcation, where an issue of liability against all defendants is tried first, followed by a trial on damages. Instead, this is a severance of

interrelated cases that will require basically the same proof in two separate matters. Furthermore, the second trial would likely be delayed as Magnolia Place seeks appellate review of any verdict the Morrows attain.

The trial court's order denies the Morrows the mode of trial to which they are entitled. That is, the Morrows are denied the right to present their negligence claims against related defendants before a fully informed fact finder, as their entire case presents a complex set of facts affecting the liability of all of the defendants. Consequently, to separate the parties promotes redundant adjudication, piecemeal litigation, the potential for inconsistent verdict, and the tendency to create confusion and uncertainty. *See Autrey v. 22 Texas Services Inc.*, 79 F. Supp.2d 735 (S.D. Tex. 2000) (to order separate trials where plaintiffs' entire case presents an ubiquitous complex set of facts affecting the liability of all defendants would promote redundant adjudication); *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 511 (9th Cir. 1989) (finding bifurcation inappropriate where "[a]n attempt to separate the trial of the liability and damages issues in this case would therefore tend to create "'confusion and uncertainty.'").

Further, as an order which denies the Morrows a mode of trial to which they are entitled, they were required to immediately appeal or risk losing the ability to challenge the order after judgment in the first case. *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997); *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

The order also affects the Morrows' substantial rights because complete relief cannot be afforded without all of the defendants, including the real party in interest (FLTCH). Rule 19, SCRCP, provides "a person...shall be joined as a party in the action if

in his absence complete relief cannot be accorded among those already parties." The Fundamental Defendants are necessary and indispensable parties in this case.

The Court of Appeals' ruling erroneously failed to consider that the trial court's order affected substantial rights and thus was immediately appealable. This Court should reverse that order, remand the matter to permit briefing and argument, or order briefing and argument before this Court on the merits of the appeal.

E. THE COURT SHOULD CONSIDER THAT THE CASE NOVEL ISSUE OF LAW CONCERNING MATTERS OF PUBLIC IMPORTANCE INVOLVED IN THE PRESENT CASE

The Court should also consider that the order in this case concerns matters of public importance as set forth in the Petition for Writ of Certiorari. Those issues involve whether a trial court may lawfully separate joint defendants in a negligence action into two separate trials on liability and damages with separate juries, excluding necessary and indispensable parties from the first trial, and excluding critical evidence of negligence among the joint tortfeasors under well-pled theories against the excluded defendants. This is a novel question of law and one of first impression in South Carolina.

The case also involves the issue of how a plaintiff may receive a fair trial under South Carolina's current statutory scheme for contribution and noneconomic damages if that plaintiff is forced to try co-defendants who acted in concert in two separate trials before two separate juries. Section 15-38-15(B) of the Code requires that one jury apportion the percentages of fault among defendants as specified in subsection (C) of the statute. And where there is a verdict for damages against two or more defendants for the

same indivisible injury, the jury is to specify the percentage of liability that proximately caused the indivisible injury to that the total of the percentages is 100 percent. S.C. Code Ann. § 15-38-15(C)(3) (Supp. 2013). The statute also permits the court to treat two or more persons as a single party under certain circumstances. S.C. Code Ann. § 15-38-15(C)(3)(a).

Section 15-38-20 discusses the right of contribution among the defendants. Subsection (B) of that statute provides that where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them, even though judgment has not been recovered against all or any of them. Section 15-38-15(D) provides that a defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for all of the damages alleged by any party.

The trial court's order to "bifurcate" and exclude the Fundamental Defendants gives the remaining defendant, Magnolia Place, an unfair advantage. Magnolia Place could limit its liability during the first trial by asserting that the Fundamental Defendants are at fault and later seek contribution from them after the verdict. Justice would not be served when the fact finder is in the dark and an order creates loopholes like this for negligent defendants.

Also, Section 15-32-220 of the Code limits the jury's award for noneconomic damages against a licensed healthcare provider. The statute does not apply to the Fundamental Defendants since they are not licensed healthcare providers. The trial

court's order complicates the application of this limitation: If a jury in the first trial against Magnolia Place returns a verdict for more than the statutory limitation, would the trial court automatically reduce the award or would the trial court's order permit the Morrows to collect the entire amount from the Fundamental Defendants?

The Court should be mindful of these facts when reviewing whether the order is immediately appealable.

F. THIS COURT SHOULD CONSIDER THE CONSTITUTIONAL ISSUES THAT ARE DIRECTLY INVOLVED IN THE PRESENT CASE

In considering this matter, the Court should consider that the trial court's ruling raises substantial constitutional issues. First, the order runs afoul of the Seventh Amendment of the United States Constitution by requiring two separate juries to examine the same facts. Second, the Order deprives the Morrows their constitutionally guaranteed right to a fair trial.

The Seventh Amendment, in pertinent part, provides:

> In suits at common law, where the value of the amount in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. 7. Two essential guarantees provided by this provision are (1) that the parties are entitled to a fair trial by jury and (2) that once the facts are tried by a jury, they will not be reexamined by another jury (often referred to as the "reexamination clause"). The Trial Court's Order violates both guarantees.

This Court recognized the danger of impeding on a litigant's right to a fair trial

when it adopted Rule 42(b). The language of the rule cautions courts to "always preserv[e] inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State." Rule 42(b), SCRCP. Indeed, when an order separates the trial of an issue that is not entirely separate and distinct from the remaining issues, it necessarily violates both the right to a fair trial and the reexamination clause. *Cf. Gasoline Products Co. v. Champlin*, 283 U.S. 494 (1931) (where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice). Because the trial court in this case erroneously bifurcated the question of Magnolia Place's negligence for the first trial, separate and apart from the remaining interwoven components of the Fundamental Defendants' liability for negligence, negligent management and administration, and governing body liability, the order violated the U.S. Constitution and is fundamentally flawed.

The Record demonstrates that the "bifurcated" issues are *not* separate and distinct. This is a negligence case involving operating a nursing home in a grossly negligent manner against common Defendants with the same owners, all of whom are accused of doing the same thing. Despite undisputed evidence of the interrelated nature of the Defendants presented by the Morrows, the trial court came to the mistaken conclusion that the liability of the joint tortfeasors can somehow be disentangled and presented to two separate juries. The trial court separated what Defendants have labeled the "clinical issues" from the so-called "corporate issues" of the Morrows' case. The trial court ordered an isolated negligence trial against Magnolia Place and erroneously dismissed the

Fundamental Defendants who own, operate and manage the facility. The Morrows rigorously objected to the "bifurcation" of liability of the Fundamental Defendants' from that of their co-defendant because the liability of Magnolia Place and the Fundamental Defendants is so inextricably intertwined as to be inseparable.

In short, the issues are not separate and distinct because the "corporate" Defendants were the cause of the "clinical issues." The Fundamental Defendants supervised the actions of the nursing facilities, including Magnolia Place, and made the decisions to under staff and under-fund supplies. The Fundamental Defendants instructed facility employees to meet budget goals or face the consequences. They told facilities how many staff to hire, how many supplies to use, and how much to spend for the budget. These Defendants did so knowing that these decisions were critical to resident health and safety. It is impossible for the Morrows to present and prove their full negligence case against one co-Defendant without reference to its counterparts. Forcing the Morrows to try the case without evidence of the wrongdoing of the ultimately responsible Fundamental Defendants guts their case and is a clear abuse of discretion.

Similarly, the duty owed by the Fundamental Defendants to Mr. Morrow as a resident in their nursing facility must be determined in relation to the potential or actual injuries that were or could be suffered. The trial court's "bifurcation" order erroneously requires the "clinical issues" and the "corporate issues" (which caused the clinical issues) to be determined in a vacuum. This is impractical, as evidence vital to the proof of Magnolia Place's negligence is required to prove the negligent acts of the Fundamental Defendants, in direct contravention of the Seventh Amendment and South Carolina's "no

overlap" requirement. The effect of the trial court's order is to deny the Morrows any meaningful opportunity to be heard.

The Morrows were denied a fair trial because whether and to what extent the Morrows are entitled to any recovery from Magnolia Place is so inextricably interwoven with whether they are entitled to recovery from the Fundamental Defendants, the two cannot be separated without prejudice. *See, e.g, United Airlines v. Wiener*, 286 F.2d 302, 306 (9th Cir. 1961) ("The question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial.").

Again, the Court should be mindful of these arguments as it considers whether to reverse the decision of the Court of Appeals.

CONCLUSION

For the reasons stated this Court should reverse the Court of Appeals' order dismissing this appeal and should remand the matter to that Court for it to consider the merits of the issues raised in this appeal.

Respectfully submitted,

July 24, 2014

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