

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Spartanburg County
Court of Common Pleas

S.C. Supreme Court

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2012-212871
Circuit Court Case No. 2007-CP-42-4601
(S.C. Ct. App. Order filed March 5, 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,
LLC; THI of Baltimore Management, LLC; THI of South
Carolina at Magnolia Place at Spartanburg, LLC d/b/a
Magnolia Place at Spartanburg,

Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
RESPONDENTS’ STATEMENT OF THE CASE.....	1
ARGUMENT.....	4
I. The Court of Appeals correctly dismissed Petitioners’ appeal, because the bifurcation order is not immediately appealable.	4
A. The bifurcation order is not immediately appealable.	5
B. Petitioners’ specific arguments are unavailing.	8
1. (a) The Court of Appeals did not base its dismissal of Petitioners’ appeal upon a material misstatement of fact, and	8
(b) the bifurcation order is not “effectively a final order,”	8
(c) nor is it an order “involving the merits,”	8
(d) nor is it an order affecting a “substantial right.”	8
2. Neither novel issues of law nor matters of public importance favor reversal of the Court of Appeals’ dismissal of Petitioners’ appeal... ..	18
3. Constitutional concerns do not support reversal of the Court of Appeals’ dismissal of Petitioners’ appeal.....	24
CONCLUSION	26

TABLE OF AUTHORITIES

Page

Cases

Ashenfelder v. City of Georgetown, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010).. 16

Carolina Renewal, Inc. v. S.C. Dep’t of Transp., 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009)..... 12

City of Wood River v. Geer-Melkus Constr. Co., Inc., 233 Neb. 179, 444 N.W.2d 305 (Neb. 1989)..... 17

Collins v. Sigmon, 299 S.C. 464, 385 S.E.2d 835 (1989)..... 16

Dawkins, Inc. v. Huff, 836 So.2d 1062 (Fla. 5th Dist. Ct. App. 2003) 17

Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558 S.E.2d 94 (2002).... 3, 27

Flagstar Corp. v. Royal Surplus Lines, 332 S.C. 182, 503 S.E.2d 497 (Ct. App. 1998), *rev’d*, 341 S.C. 68, 533 S.E.2d 331 5, 6, 7, 10, 16, 19, 21, 23, 24, 25, 27

Fortune v. Gibson, 304 S.C. 279, 403 S.E. 2d 674 (Ct. App. 1991)..... 6, 25

Fulmer v. Cain, 380 S.C. 466, 670 S.E.2d 652 (2008)..... 14

Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931) 26

Helping Others Maintain Env’t’l Standards v. Bos, 406 Ill. App.3d 669, 941 N.E.2d 347 (2010)..... 17

Houseman v. U.S. Aviation Underwriters, 171 F.3d. 1117 (7th Cir. 1999)..... 26

In Re Plywood Antitrust Litigation, 655 F2d. 627 (5th Cir. 1981)..... 6, 25

In Re: Breast Implant Prod. Liab. Litig., 331 S.C. 540, 503 S.E.2d 445 (1998) . 18, 19, 21

Link v. Wabash R.R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)..... 16

Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.1995)..... 26

<u>Mid-State Distribs., Inc. v. Century Imps., Inc.</u> , 310 S.C. 330, 426 S.E.2d 395 (1993).	3
<u>PaineWebber, Jackson & Curtis v. Merrill Lynch, Pierce, Fenner & Smith</u> , 587 F.Supp. 1112 (D. Del. 1984).....	26
<u>Patterson v. Spector Broad. Corp.</u> , 287 S.C. 249, 335 S.E.2d 803 (1985)	3, 5
<u>PPG Indus., Inc. v. Orangeburg Paint & Decorating Center, Inc.</u> , 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)	16
<u>QZO, Inc. v. Mover</u> , 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004)	3, 27
<u>Rush v. Blanchard</u> , 310 S.C. 375, 426 S.E.2d 802 (1993).....	11
<u>Sentry v. Piggly Wiggly Co., Inc.</u> , 341 S.C. 74, 533 S.E.2d 575 (2000).....	5
<u>Tady v. Warta</u> , 111 Neb. 521, 196 N.W. 901 (1924)	17
Statutes	
S.C. Code Ann. §14-3-330(2) (1976)	5
S.C. Code Ann. § 15-32-220.....	23
S.C. Code Ann. § 15-38-10 to 70	21
Section 15-38-15(a) of the Contribution Act.....	22
Restatement (Second) of Judgments § 59 cmt. E (1982).....	12
Rules	
Rule 42, SCRPC	6, 14, 15, 25

RESPONDENTS' STATEMENT OF THE CASE

Petitioners Lawrence and Evelyn Morrow brought this action seeking damages on account of personal injuries they alleged Mr. Morrow sustained from improper care and treatment by nursing-home staff during his three-week stay as a resident of a facility licensed to Respondent THI of South Carolina at Magnolia Place, LLC d/b/a Magnolia Place at Spartanburg (the "Facility"). (App. pp. 468-79.)¹ For example, Petitioners alleged that Mr. Morrow was improperly positioned in a shower chair, resulting in injury to his genitals that required removal of his penile implant several weeks after he left the Facility, and they alleged that Mr. Morrow was not turned in his bed or provided appropriate nutrition, resulting in decubitous ulcers, which they blame on staff inaction as well as insufficient staffing to meet his needs. Each and every injury to Mr. Morrow alleged by Petitioners is, in the first instance, based on the care and treatment he received at the Facility by Facility employees. (App. pp. 468-79.)

In addition to suing the Facility, Petitioners named additional entities as Defendants, asserting liability as to them based on their alleged control of the Facility and also on theories of respondeat-superior, corporate-veil-

¹ Mr. Morrow resided at the Facility from January 12 to February 2, 2007. At that time, he was 76 years old. Upon information and belief, Mr. Morrow died of natural causes—unrelated to this case—in November of 2011.

piercing, joint-enterprise, and amalgamation-of-interest. To be clear, all of the bases of liability Petitioners alleged against these non-Facility Defendants are indirect, in the sense that none of these Defendants were actually at the Facility providing hands-on care or treatment to Mr. Morrow. The direct liability claimed against these Defendants is thus premised upon their alleged control of the Facility, which, according to Petitioners, is causally related to the alleged inadequate care and treatment of Mr. Morrow. For example, Petitioners claim one or more of these non-Facility Defendants controlled funding for the Facility and that the Facility was underfunded and insufficiently staffed; they contend the Facility's nutritional budget was too small, resulting in Mr. Morrow's ulcers, because he was not served food sufficient to meet his nutritional needs; and they charge that the Facility's staff was not properly trained and one or more of these entities was responsible for training. (App. pp. 468-79.)

On Respondents' motion,² by order filed March 4, 2011, the circuit court (The Honorable J. Derham Cole presiding) bifurcated the trial of the case, directing that liability and damage issues first be tried as to the Facility (encompassing the clinical issues), and, then, if that proceeding resulted in a

² Respondent Fundamental Long-Term Care Holdings, LLC ("FLTCH") contests personal jurisdiction in this matter and moved for dismissal on this basis during the proceedings before the circuit court leading up to Petitioners' appeal. FLTCH's cross-appeal from the circuit court's denial of its motion to dismiss as addressed in another footnote, *infra*.

determination that Petitioners suffered damages proximately caused by the Facility, the remaining issues would be tried as to the non-Facility Defendants. The bifurcation order stayed discovery of the non-clinical liability issues pertaining to the non-Facility Defendants pending further order of the court. (App. pp. 2-22, 304-19.)

Petitioners' appeal followed the circuit court's denial of their motion to reconsider the bifurcation order. (App. p. 358.)^{3 4}

After requesting briefing from the parties on appealability, the Court of Appeals determined that the bifurcation order was not immediately

³ The circuit court's order denying reconsideration of the bifurcation order also ruled upon a number of other motions made by the parties. It denied Petitioners' motion to exclude certain allegedly cumulative defense experts; it granted Petitioners' motion to compel a certain Rule 30(b)(6) deposition as well as Petitioners' motion to compel the deposition of an individual named Ken Tabler, denying Respondents' competing motion for a protective order as to Mr. Tabler; and denied FLTCH's motion to dismiss for lack of personal jurisdiction.

⁴ All Respondents timely cross-appealed the circuit court's rulings compelling the 30(b)(6) and Tabler depositions, and FLTCH timely cross-appealed the denial of its motion to dismiss. All of these rulings are clearly interlocutory and, ordinarily, not immediately appealable. Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 426 S.E.2d 395 (1993); Patterson v. Spector Broad. Corp., 287 S.C. 249, 335 S.E.2d 803 (1985) (discovery orders are not directly appealable). Appealability of the issues raised via cross-appeal is premised solely upon the Court's discretionary allowance of their immediate appeal if it determines Petitioners' immediate appeal of the bifurcation order is proper. See QZO, Inc. v. Mover, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004) (ruling that the denial of a motion to dismiss for lack of personal jurisdiction can be considered if another appealable issue is before the appellate court); Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) ("This Court reviews interlocutory orders when they contain other appealable issues."). Accordingly, if this Court determines that Petitioners' appeal should be dismissed without prejudice, then Respondents concede that their cross-appeals were correctly dismissed without prejudice by the Court of Appeals. But, out of an abundance of caution, and while making clear their position that Petitioners' appeal was correctly dismissed, if this Court reverses the Court of Appeals' dismissal and allows Petitioners' appeal to go forward, Respondents ask that their cross-appeals proceed as well.

appealable and dismissed all appeals, and then denied Petitioners' petition for rehearing. (App. pp. 408-09, 569-70.)

On May 23, 2014, this Court issued a writ of certiorari to review the decision of the Court of Appeals.

ARGUMENT

I. The Court of Appeals correctly dismissed Petitioners' appeal, because the bifurcation order is not immediately appealable.

Contrary to Petitioners' characterization, the bifurcation order did not dismiss or grant judgment for or against any Defendant. Under the order, Petitioners' case against the Facility will be tried to conclusion. If Petitioners prevail, the result of that trial would establish their actual damages and any punitive damages against the Facility. If Petitioners do not prevail, the case would be over. Then, if needed, in a second trial, the jury would be instructed about the prior judgment against the Facility, including the actual damages award, and it would then determine the liability, if any, of the non-Facility Defendants for Petitioners' actual damages as well as any punitive damages to be awarded against those Defendants. Any punitive award against one or more of the non-Facility Defendants would therefore be based upon Petitioners' theories of both indirect and direct liability in view of their conduct as established at trial.

A. The bifurcation order is not immediately appealable.

The Court of Appeals correctly ruled that neither the bifurcation order nor the order denying reconsideration of it are immediately appealable and correctly dismissed Petitioners' appeal.

In Flagstar Corporation v. Royal Surplus Lines, this Court explained that “[a]n order granting bifurcation of issues for trial simply does not strike to the heart of [its] traditional analysis of claims of denial of a mode of trial.” 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000).

In short, trial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right. Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence. We therefore hold that an order granting separate trials of issues in a contract case is not immediately appealable, either permissibly or mandatorily, pursuant to S.C. Code Ann. §14-3-330(2) (1976). This ruling also disposes of the second issue of whether the portion of the order bifurcating discovery is immediately appealable. *See also Patterson v. Spector Broadcasting Corp.*, 287 S.C. 249, 335 S.E.2d 803 (1985) (discovery orders are not directly appealable).

Id. at 73, 533 S.E.2d at 333-334. The reasoning and holding in Flagstar are not less applicable to the present personal-injury tort case. *See Sentry v. Piggly Wiggly Co., Inc.*, 341 S.C. 74, 533 S.E.2d 575 (2000) (ruling that an order denying bifurcation of liability and damages in a tort case is not

immediately appealable). And, as expressly stated by the Flagstar Court in the above quotation, this goes for an order bifurcating discovery as well. 341 S.C. at 73, 533 S.E.2d at 333-34.

Petitioners argue they have been denied a mode of trial, because the bifurcation order calls for two separate juries to determine the clinical and non-clinical/up-stream corporate liability issues. As our State's jurisprudence already instructs, however, the use of two juries is not a problem:

We hold there is no per se rule that the same jury must decide both issues. To hold otherwise would be to ignore a fundamental principle underlying bifurcation: a trial may be bifurcated only if the issues are so distinct that a trial of each alone would not result in prejudice. *See In Re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981). The very purpose of this principle is to cover cases in which separate juries decide separate issues. If South Carolina Rule of Civil Procedure 42(b) contemplated bifurcation before the same jury only, there would be no need for the requirement that the issues be distinct. . . .

Fortune v. Gibson, 304 S.C. 279, 281-82, 403 S.E. 2d 674, 675 (Ct. App. 1991). The right to trial by jury is therefore protected by the overarching requirement that the issues to be tried separately are distinct; however, as Flagstar instructs, the question of whether or not the circuit court correctly determined the issues to be distinct is simply not subject to immediate

appellate review.

In Flagstar, this Court reversed the Court of Appeals, which had ruled the subject bifurcation order was immediately appealable. The Court of Appeals based its decision on its conclusion that the bifurcated issues were not distinct. See Flagstar Corp. v. Royal Surplus Lines, 332 S.C. 182, 503 S.E.2d 497 (Ct. App. 1998), *rev'd*, 341 S.C. 68, 533 S.E.2d 331. Without analyzing or otherwise basing its decision on the Court of Appeals' conclusion that the bifurcated issues were not distinct, this Court ruled that the lower court's decision to bifurcate the proceedings did not deny the appellant a mode of trial, and any abuse of discretion by the lower court in granting bifurcation could be reviewed after the trial and after full development of the evidence. Id. at 341 S.C. at 73, 533 S.E.2d at 333-34 ("Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence.").

In the present case, the Court of Appeals correctly followed the lead of the Flagstar Court in finding that the bifurcation order is not immediately appealable and dismissing Petitioners' appeal. Any abuse of discretion on the part of the circuit court in deciding that the issues are so distinct that a trial of each issue alone would not result in prejudice—the necessary

foundation for its decision to grant bifurcation—is only reviewable after full development of the evidence at trial, and is not subject to interlocutory appellate review. Consequently, dismissal of Petitioners’ appeal should be affirmed.

B. Petitioners’ specific arguments are unavailing.

1. (a) **The Court of Appeals did not base its dismissal of Petitioners’ appeal upon a material misstatement of fact, and**
 - (b) **the bifurcation order is not “effectively a final order,”**
 - (c) **nor is it an order “involving the merits,”**
 - (d) **nor is it an order affecting a “substantial right.”**⁵

Petitioners argue that, in effect, the bifurcation order strikes and summarily disposes of their direct-liability claims against the non-Facility Defendants; thus, they claim the order involves the merits of the case and affects a substantial right and is, effectively, a final order.

As an initial matter, Petitioners mischaracterize the bifurcation order. Simply consulting the following plain language of the order shows that it does **not** strike or dismiss any claims or parties, grant any party judgment (in

⁵ This section of Respondents’ brief addresses Petitioners’ arguments A, B, C, and D. That said, though separately set forth, the analysis/argument presented in this brief necessarily contains some overlap amongst the issues before the Court. To the extent that the argument/analysis contained in any particular part of this brief is relevant to any other part, the same is hereby incorporated therein by reference.

whole or in part), involve the merits, finally dispose of the case, or affect a substantial right:

NOW THEREFORE, IT IS ORDERED that:

- 1) Defendants' Motion to Bifurcate is **GRANTED**;
- 2) The Court will conduct separate jury trials on the issues of this case in the following sequence:
 - a. Plaintiffs claims of actual and punitive damages against the Defendant, THI of South Carolina at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg, to include all post trial motions;
 - b. In a separate jury 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;
- 3) Discovery is stayed pending the further order of this Court regarding all non-clinical issues, including but not limited to, all discovery requests that are irrelevant to or not likely to lead to admissible evidence directly related the clinical issues involving negligence/recklessness/proximate cause and damages asserted by Plaintiffs against THI of South Carolina at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg, its agents, servants and employees, or any defense raised by THI of South Carolina at Spartanburg, LLC

d/b/a/ Magnolia Place at Spartanburg to such claims. Discovery is hereby stayed pending the further order of this Court as to all issues of liability by non-facility defendants including, but not limited to, discovery regarding corporate finances, structure, history, supply contracts, inter-corporate contracts, and non-entity corporate affairs.

(App. pp. 318-19 (emphasis in original).)

Moreover, Petitioners' argument is based on their analysis of the connection (i.e., supposed lack of distinction) between the issues bifurcated by the circuit court. As explained above, such argument is premature and improper under Flagstar, 341 S.C. 68, 533 S.E.2d 331. Nonetheless, even were it not misplaced, Petitioners' argument is unavailing.

Prior to his stay at the Facility, Mr. Morrow had been admitted to the intensive-care unit of a local hospital with a diagnosis of pneumonia. His medical history included: Chronic Obstructive Pulmonary Disease (COPD); diabetes type mellitus; paroxysmal atrial tachycardia, for which he was taking Coumadin; hypertension; hyperlipidemia; reflux disease; benign prostatic hypertrophy; and that he was a smoker. Also, Mr. Morrow had a penile implant that was approximately 12 years old.

He remained in the hospital ICU for three weeks, where he was tube fed and required ventilator support. During his hospital stay, he developed a "stage 2 decubitus ulcer." According to the hospital records, this developed

into a complex wound requiring debridement by the time of his discharge.

Mr. Morrow entered the Facility immediately upon discharge from the hospital, where he remained for only three weeks. According to his discovery responses, his total claimed medical bills from his alleged injuries were \$11,000. With regard to Mrs. Morrow's loss-of-consortium claim, it is undisputed that Mr. Morrow did not marry Mrs. Morrow until several weeks after he left the Facility.

As alleged in Petitioners' complaint, the Facility and its staff employees were the only actors that cared for and treated Mr. Morrow, and the Facility had the responsibility to provide appropriate care for its residents. There is no defense asserted by the Facility that any failure to meet the residents' needs was caused by the actions of other non-Facility Defendants. Therefore, in order for any liability to attach to the other non-Facility Defendants, it must first be determined that Petitioners were injured, and that those injuries were proximately caused by some negligent act or delict of the Facility acting through its staff.

This is so, of course, because proof of proximate cause requires proof of both causation-in-fact and legal cause. Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 804 (1993). Causation-in-fact is proved by establishing that the claimed damage would not have occurred "but for" the

defendant's negligence. Id.

Proving that the acts or delicts of the Facility caused Petitioners damage is a necessary link in the causal chain that must be established under all of Petitioners' theories of liability. Indeed, under the bifurcation order, the first trial would finally determine this issue, binding the non-Facility Defendants under any of Petitioners' theories of recovery based upon principles of issue preclusion. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009) ("Collateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. "); Id. ("[A]s these decisions make clear, the identity of the parties, and their relationships to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel."); *see* Restatement (Second) of Judgments § 59 cmt. E (1982) (because the interests of closely-held corporations and their owners generally fully coincide, there is no good reason to regard them as legally distinct for purposes of collateral estoppel); *see also id.* at § 59(3)(b) (espousing the general rule that collateral estoppel bars a closely-held corporation from relitigating issues previously decided in an action where the owner of the corporation was a party). If this causation

issue is decided against the Facility in the first trial, and Petitioners prove their allegations of negligence against the non-Facility Defendants under any of their theories in the second trial, the decision in the first trial would preclude re-litigation of that link in the causal chain in the second trial.

Likewise, under Petitioners' existing allegations, the only injury and damage to Petitioners flows from the treatment and care provided at the Facility. There can be only one valuation of that actual damage, regardless of how many named parties are at fault, and that would be provided by the first trial. Because there is no allegation that any of the non-Facility Defendants caused a different injury, there is no basis for a jury to award different actual damages against them.

Consequently, as the case exists today, the non-Facility Defendants would be precluded from re-litigating the issue of what, if any, actual damages were proximately caused by the actions of the Facility, and Petitioners' successful assertion of liability under any of the theories framed by the pleadings would subject the tortfeasor to the actual damage award. Furthermore, bifurcation under the circuit court's order preserves to each party the right to a trial by jury of all legally-viable issues. It does not affect the mode of trial. Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (observing that the mode of trial exception is "confined to orders

which abridge a party's constitutional right to trial by jury.”) (citation omitted).

Conversely, if the first jury were to determine that Petitioners suffered no injury, or that any injury was not proximately caused by the Facility's negligence, then litigation of the alleged control and management of the Facility by the other Defendants would be unnecessary, because their actions could not be a proximate cause of injury to Petitioners. The circuit court concluded that the parties are more likely to receive a fair trial through the bifurcation, because there is less chance a jury will be confused by trying to understand and resolve complex inter-corporate liability issues, encompassing alternative theories of liability based upon joint enterprise, veil-piercing, alter-ego, amalgamation-of-interest, direct control, and vicarious liability, while at the same time analyzing difficult medical and/or nursing malpractice issues. This decision furthers convenience and avoids the possibility of prejudice to both parties, both of which are considerations identified in Rule 42 (b), SCRCF.

The circuit court also concluded that, if the jury did not return a verdict for Petitioners in the first trial against the Facility, bifurcation avoids the time and expense to the court, prospective jurors, and the litigants of an unnecessary trial of multiple causes of action involving complex legal

theories and multiple parties. This, in turn, is conducive to expedition and economy, also a proper consideration under Rule 42.

The circuit court held an extensive hearing before deciding this issue, and obviously concluded that the scope of discovery and trial issues was vastly expanded by Petitioners' claims that interrelated national companies are "sham" entities, that they "siphon" Facility funding, that they are joint venturers, exercise control over the daily management of the Facility, or have an "amalgamation of interests" with the Facility such as to make them responsible for its acts and delicts. Certainly any veil-piercing analysis is steeped in accounting issues that are complex and totally distinct from the medical issues that frame the frontline questions to be resolved in deciding whether there is any liability to Petitioners. The cost and time involved in pre-trial matters and devoted to resolving discovery disputes, as well as the increased risk of jury confusion caused by superimposing complex theories of corporate liability on already difficult medical and nursing malpractice claims, commends the discretionary decision of the circuit court to bifurcate this proceeding into two trials.

Further still, the circuit court maintains the authority to modify the

decision to bifurcate as the case develops.⁶ As discussed previously, in Flagstar, 341 S.C. at 73, 533 S.E.2d at 333-34, this Court ruled that an order granting bifurcation is not immediately appealable. It is interlocutory, and is accordingly a discretionary call on the part of the circuit judge, who is responsible for managing the trial proceedings. *Cf.* Collins v. Sigmon, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989) (“The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an ‘inherent power,’ governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630-31, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962)).

“[A] trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of facts and conclusions of law before entry of judgment or decree.” PPG Indus., Inc. v. Orangeburg Paint & Decorating Center, Inc., 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988); *see also* Ashenfelder v. City of Georgetown, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010); City of Wood River v. Geer-Melkus Constr. Co., Inc., 233 Neb. 179, 183, 444 N.W.2d 305 (Neb. 1989) (“No court is required to persist in error,

⁶ Due to the complex nature of this litigation, this case has been assigned to Judge Cole.

and, if [the judge] concludes that a former ruling was wrong, [the judge] may correct it at any time while the case is still in his control.”) (quoting Tady v. Warta, 111 Neb. 521, 526, 196 N.W. 901,903 (1924); Dawkins, Inc. v. Huff, 836 So.2d 1062 (Fla. 5th Dist. Ct. App. 2003) (trial court has jurisdiction during progress of case to set aside or modify an interlocutory order before final judgment as interlocutory judgments are not within the restrictions provided by civil rule governing relief from judgment, decrees, or orders; rather, such orders remain within the inherent power of the court to control the progress of the case prior to final judgment); Helping Others Maintain Env’tl Standards v. Bos, 406 Ill. App.3d 669, 941 N.E.2d 347 (2010) (“A trial judge possesses the inherent authority to review, modify or vacate an interlocutory order at any time until it enters a final judgment.”). As the Supreme Court of Nebraska noted in City of Wood River, this ruling is “consistent with the inherent power of the court to control its own proceedings and the policy of favoring appeal only at the end of all lower court proceedings.” 233 Neb. at 183, 444 N.W.2d at 308.

Consequently, the circuit court has the inherent authority to modify the current order of bifurcation if the circumstances change, such as in the event Petitioners provide evidence that could establish a basis for non-Facility corporate liability (i.e., actionable negligence or recklessness)

independent of the acts and delicts of the Facility.

Lastly, the bifurcation order provides a general procedure for handling the trial of the issues, but it does not inhibit the circuit court's ability to require discovery prior to completion of the first phase of the trial regarding non-clinical issues if Petitioners can explain how the information sought could lead to the discovery of admissible evidence or is relevant on the clinical issues involving the facility. In other words, the circuit court has not issued any final ruling, and maintains the ability to modify any procedural ruling that might prejudice a party, should one arise.

2. Neither novel issues of law nor matters of public importance favor reversal of the Court of Appeals' dismissal of Petitioners' appeal.⁷

Petitioners argue this case involves novel questions of law, because the bifurcation order "severs" parties, granting separate liability trials for severed parties, excluding necessary and indispensable parties from the first trial, despite their well-pleaded allegations of direct liability against the severed parties as joint tortfeasors. Upon this premise, Petitioners asked this Court to grant a writ of certiorari under the authority of In Re: Breast Implant Prod. Liab. Litig., 331 S.C. 540, 503 S.E.2d 445 (1998). Although granting a writ of certiorari in that case, this Court reiterated the high

⁷ This section of Respondents' brief addresses Petitioners' argument E.

threshold for considering such extraordinary action:

Although we will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal, a writ of certiorari may be issued when exceptional circumstances exist. This matter presents such a case. Novel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions are involved in this matter. A decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues.

We reiterate that this Court will not issue a writ of certiorari merely to relieve a circuit court's burden of deciding difficult issues in high profile cases. However, as Judge Floyd very appropriately notes, this is not only an exceptional case of great public interest, but is also one presenting novel questions of law, which, to best serve the interests of judicial economy, should be answered at this time.

Id. at 543, 503 S.E.2d at 447, n. 2. Even though the Court has now granted Petitioners' request for issuance of a writ of certiorari to review the Court of Appeals' dismissal, there is no cause to reverse the Court of Appeals.

First, there is no novel issue of law presented. Again, this Court's decision in Flagstar forecloses this line of inquiry and definitively rules that questions of this nature are not properly addressed immediately; rather, they should be addressed after full development of the evidence at trial. 341 S.C. at 73, 533 S.E.2d at 333-34 ("Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full

development of the evidence.”). This is so because the bifurcation order separates issues into two trials, each of which is conducted in front of a jury. As in their prior arguments, Petitioners essentially argue the interrelation of the issues makes them inseparable, and has the effect of severing parties into separate proceedings. This requires an analysis of the question of whether the issues bifurcated by the circuit court are separate and distinct, such that the trial of each alone will not cause prejudice.

Second, there is no exceptional circumstance presented. Petitioners have asserted individual personal-injury claims against a nursing-home Facility and have claimed companies with whom it is alleged to be affiliated, or in some other way owned and/or controlled, are also responsible for their damages by virtue of the relationships these companies have with the Facility.

In this regard, their claims are fact-specific, involving the individual care and treatment Mr. Morrow received at the Facility. This is not a case involving a potentially large number of claimants based upon a common fact, such as an alleged product defect. The issues Petitioners are attempting to raise in this interlocutory appeal, while certainly important to the litigants, are not matters of “significant public interest,” nor are they “contained in numerous state and federal actions.” Consequently, there is no basis for

asserting the facts of this case provide an exception to the rule established in Flagstar, and there is no factual underpinning for any claim that a ruling by this Court at this time would serve the interests of judicial economy by eliminating numerous inevitable appeals. See In Re: Breast Implant, 331 S.C. at 543, 503 S.E.2d at 447, n. 2.

Petitioners also advance the argument that the bifurcation order granting presents a novel question of law because it implicates the apportionment of liability under the South Carolina Contribution Among Tortfeasors Act, S.C. Code Ann. § 15-38-10 to -70 (the “Contribution Act”). This argument is specious.

Petitioners’ amended complaint is convoluted, and provides insight into the complexity of the issues they raise and the basis for the circuit court’s conclusion that bifurcation would serve the ends of justice. As alleged, Petitioners’ basis for asserting liability against the non-Facility Defendants, is that each entity is interrelated and has exerted direct control over the Facility. They allege each entity is a subsidiary or successor by merger, and all are subsidiaries of FLTCH. They claim all of the interrelated entities are totally dominated by FLTCH, and all are involved in the budgeting, staffing, training, supervision, development, and implementation of policies and procedures for the Facility. Based upon these assertions,

they characterize their bases for liability under the rubric of “agency,” instrumentality,” “adjunct,” “and/or alter-ego.” Finally, as a basis for liability of each non-Facility entity, they assert that each is vicariously liable for the torts of the Facility.

Without question, each of Petitioners’ theories for non-Facility liability lies in the alleged interrelationship of the non-Facility entity to other non-Facility entities and to the nursing home itself. Section 15-38-15(a) of the Contribution Act does not provide for contribution where two persons are to be treated as a single party, and specifically states as follows: “Such treatment [as a single party] **must be used** where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously liable for the conduct of another defendant.” (emphasis added). Thus, under any of Petitioners’ theories of direct liability against the non-Facility Defendants, there is no apportionment of liability.

Petitioners also claim the bifurcation order somehow gives the Facility an unfair advantage. They hypothesize that the Facility could claim at trial that the other Respondents are to blame, and not the Facility or its staff. They opine that “[j]ustice [is] not served when the fact finder is in the dark and an order creates loopholes like this for negligent defendants.” (Pet.

Br. p. 24.) This argument is without merit.

There is no claim by the Facility that any injury or damage to Petitioners was in any way caused by a third party, including the other named Respondents. Furthermore, to arrive at the conclusion that there could be some hypothetical advantage to the Facility provided by bifurcation is to conclude that the issues are not separate and distinct, and the trial of one issue alone will (at least hypothetically) result in prejudice. As previously discussed, that analysis was resoundingly rejected as a basis for entertaining an interlocutory appeal of an order of bifurcation by this Court in Flagstar, 341 S.C. at 73, 533 S.E.2d at 333-34 (“Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence.”).

Next, Petitioners argue that the statutorily-imposed limitations on noneconomic damages found in S.C. Code Ann. § 15-32-220 are “complicated” by the bifurcation order. Of course, the fact that one aspect of the case may be more complicated as a result of bifurcation is not a basis for reversal, even if it were immediately appealable. Rather, such an alleged complication would be a matter for the circuit court to weigh in its discretionary decision to bifurcate. Furthermore, as with their other arguments, Petitioners’ assertions again attack the circuit court’s

determination that the issues are separate and distinct, which determination is not reviewable at this stage pursuant to Flagstar.

This argument is also flawed because the imposition of statutorily-imposed limitations on damages is not a proper question for the jury. It is superimposed upon a jury award by the trial judge upon proper motion. Thus, nothing prevents the trial court from dealing with any issues raised by statutorily-imposed limitations of the jury award in a post-verdict hearing. Petitioners do not advance any basis for arguing that bifurcation will in any way impede the trial court's ability to properly apply the statute.

3. Constitutional concerns do not support reversal of the Court of Appeals' dismissal of Petitioners' appeal.⁸

Petitioners argue bifurcating the issues so as to require "two separate juries to examine the same facts" violates the Seventh Amendment to the United States Constitution. Again, as an initial matter, Petitioners misstate the content of the bifurcation order. The order does not allow two separate juries to "examine," much less decide, the same facts. The order specifically provides that the first jury will determine all of the issues regarding the Facility in the first trial, i.e., the issue of negligence, recklessness, and/or breach of contract by the Facility and its agents, servants, and employees as a proximate cause of injury to Petitioners. That is the only jury verdict to be

⁸ This section of Respondents' brief addresses Petitioners' argument F.

rendered as to those issues.

Assuming the jury rules in favor of Petitioners, the second jury would decide whether or not the other, non-Facility Respondents were also liable for the negligent acts and delicts of the Facility under any of Petitioners' theories of liability. If so, the jury would also determine whether any of the other Respondents were also liable for punitive damages. Consequently, the same issues are not tried to the two juries.

Once more, Petitioners' arguments are premature because they are premised upon the assertion that the issues to be bifurcated are not separate and distinct. Flagstar, 341 S.C. 68, 533 S.E.2d 331. Again, as our Court of Appeals stated in Fortune:

[T]here is no per se rule that the same jury must decide both issues. To hold otherwise would be to ignore a fundamental principle underlying bifurcation: a trial may be bifurcated only if the issues are so distinct that a trial of each alone would not result in prejudice. *See In Re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981). The very purpose of this principle is to cover cases in which separate juries decide separate issues. If South Carolina Rule of Civil Procedure 42(b) contemplated bifurcation before the same jury only, there would be no need for the requirement that the issues be distinct. . . .

304 S.C. at 281-282, 403 S.E. 2d 675; *see also* Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1126 (7th Cir. 1999) ("To avoid conflict with

this constitutional provision, questions in a single suit can only be tried by different juries if they are ‘so distinct and separable from the others that a trial of [them] alone may be had without injustice.’”) (citing Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 500, 51 S.Ct. 513, 75 L.Ed. 1188 (1931)); id. (“In other words, the district court ‘must not divide issues between separate trials in such a way that the same issue is reexamined by different juries.’”) (citing Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir.1995)); id. (“While both juries can examine overlapping evidence, they may not decide factual issues that are common to both trials and essential to the outcome.”) (citing PaineWebber, Jackson & Curtis v. Merrill Lynch, Pierce, Fenner & Smith, 587 F.Supp. 1112, 1117 (D. Del. 1984)).

CONCLUSION

Upon examination, the analysis of each of Petitioners’ arguments for interlocutory appeal of the order granting bifurcation is grounded in the question of whether the bifurcated issues are separate and distinct, such that each can be tried separately without causing prejudice. That question has been rejected as a basis for allowing an interlocutory appeal, because it “simply does not strike to the heart of this Court’s traditional analysis of claims of denial of a mode of trial.” Flagstar, 341 S.C. at 73, 533 S.E.2d at

333-34.

For the foregoing reasons, Respondents ask that the Court affirm the Court of Appeals' dismissal of Petitioners' appeal. Should the Court so rule, Respondents concede that their cross-appeals were properly dismissed without prejudice. Should the Court determine Petitioner's appeal is proper, however, then Respondents request that this Court exercise its discretion to entertain their cross-appeals (or remand the same to the Court of Appeals for consideration along with Petitioners' appeal) under the authority of QZO, 358 S.C. 246, 594 S.E.2d 541 and Ferguson, 349 S.C. 558, 564 S.E.2d 94.

<SIGNED ON THE FOLLOWING PAGE>

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Charleston, South Carolina

Dated: 9 | 4 | 14

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2012-212871
Circuit Court Case No. 2007-CP-42-4601
(S.C. Ct. App. Order 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,
LLC; THI of Baltimore Management, LLC; THI of South
Carolina at Magnolia Place at Spartanburg, LLC d/b/a
Magnolia Place at Spartanburg,

Respondents.

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S.C. Supreme Court

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I, Joanna B. Stroud, of Young Clement Rivers, LLP, counsel for Respondents, do hereby certify that a copy of the **BRIEF OF RESPONDENTS** was served upon counsel for Petitioners via United States Mail, properly posted, on September 4, 2014, addressed as follows:

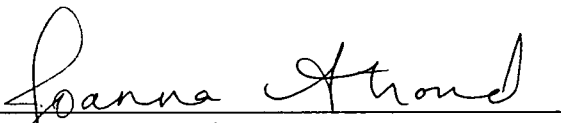
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