THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2007-CP-42-4601

Lawrence E. Morrow and Evelyn M. Morrow,

Appellants/Respondents,

v.

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

Respondents/Appellants.

MEMORANDUM OF LAW ON APPEALABILITY OF "BIFURCATION" ORDER

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I. INTRODUCTION

A. Issue and Brief Answer

Whether the Trial Court's Order "bifurcating" the negligence action—i.e., ordering two separate trials with different juries against related Defendants—and excluding evidence of direct liability against Defendants Fundamental Long Term Care, LLC (hereinafter FLTCH); Fundamental Clinical Consulting, LLC (hereinafter FCC); Fundamental Administrative Services, LLC (hereinafter FAS); and THI of Baltimore, Inc. (hereinafter collectively the Fundamental Defendants[1]) is immediately appealable.

Yes the Order at issue is appealable, as the Order rules on the merits and renders a final judgment on several causes of action properly pled by Plaintiffs against various Defendants, including corporate negligence, direct participant liability, negligent management and administration, and governing body liability pursuant to 42 CFR 483.75(d). Moreover, the Order ignores Plaintiffs' well pled theories of agency and joint enterprise, which are applicable to all of the Defendants.

Prior to trial Defendants filed a Motion which they mischaracterized as a motion for "Bifurcation." Such characterization is erroneous because Defendants actually sought an Order requiring Plaintiffs to proceed to jury trial against only one entity, despite Plaintiffs' claims, with supporting evidence, of direct liability and direct control by the other named Defendants. The Court granted Defendants' Motion, again erroneously characterizing the decision as a "bifurcation."

Plaintiffs will show that in reality, the lower Court's Order is not a "bifurcation" as such term has been typically utilized and ruled upon in South Carolina, but instead is an Order requiring

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[1] None of the Fundamental Defendants are licensed health care providers in South Carolina but rather entities responsible for managing, supervising, and governing the nursing home.

Plaintiffs to proceed to trial against only one entity, despite claims and evidence of direct liability and direct control by the other named Defendants. Plaintiffs' filed an appeal of the Order in question. This Court has instructed the parties to issue Memoranda regarding immediate appealability. For the reasons discussed below, this Order is immediately appealable. South Carolina Law provides the right to an immediate appeal to orders, such as the one at issue here, that involve the merits of the case and affect substantial rights of parties involved.

B. *Standard of Review*

The central issue on appeal is whether the Court can separate joint Defendants in a simple negligence action into two separate liability trials with separate juries. This is a novel issue and one of first impression in South Carolina. "In a case raising novel question of law, the appellate court is free to decide the question with no particular difference to the lower court." Ex Parte Capital U-Drive-It, Inc., 630 S.E.2d 464 (S.C., 2006).

Plaintiffs/Appellants acknowledge that typical orders to bifurcate one trial into separate phases - liability and damages - are not immediately appealable as interlocutory. However, the Trial Court's Order is not a typical bifurcation order where one action is separated into separate phases. South Carolina jurisprudence has never allowed a court to bifurcate a negligence action into two separate jury trials excluding necessary and indispensable parties from the first trial where Plaintiffs allege direct liability, agency, and joint enterprise from the excluded Defendants. This Order is an aberration that creates manifest injustice.

II. STATEMENT OF THE CASE

This is a simple negligence case against common Defendants who operated a nursing home in a grossly negligent manner, all of whom are accused of doing the same thing. The interrelated

Defendants are common Defendants with the same owners and managers who operate a chain of nursing homes as a joint enterprise. Defendants all have the same policies and procedures; same in-house counsel (Christine Zack); same national counsel (Lori Proctor); and same local counsel (Jay Davis and Bill Howard); same headquarters in Sparks, Maryland; and same registered agents. Plaintiffs allege these Defendants operated the nursing home, Magnolia Place at Spartanburg, in a grossly negligent manner and caused injuries to Mr. Morrow. All Defendants together were grossly negligent by consciously deciding to provide insufficient staffing, training, and supplies at Magnolia Place at Spartanburg. Defendants knew that by doing so their nurse aids and nurses could not provide care to residents, including Mr. Morrow. As a result of the Defendants' negligence, Mr. Morrow did not receive basic custodial care such as being turned and re-positioned every two hours; did not receive timely incontinence care and as a result his flesh rotted away until a massive and painful pressure sore ate into his bottom. The Fundamental Defendants set the staffing numbers, budget, and policies and procedures for Magnolia Place, which in turn caused the injuries to Mr. Morrow.

Through argument and pleadings, the Defendants misled the Trial Court by moving to "bifurcate" (effectively sever) the negligence cause of action against the facility from the alleged "corporate" defendants who own, operate, and manage the facility. This is entirely inappropriate because Plaintiffs contend that these Defendants are responsible for the negligence. Defendants improperly suggest that one jury should determine whether there was negligence prior to any determination regarding the Fundamental defendants.

The Court's Order denies Plaintiffs the ability to try the negligence case against the severed parties, the Fundamental Defendants, resulting in a summary judgment or directed verdict. The

Court's Order grants final judgment in favor of Defendants FLTCH, FAS, FCC, and THI of Baltimore, Inc. as to Plaintiffs' allegations of direct liability for egregious corporate negligence, negligent management and administration, and liability as the governing body pursuant to 42 CFR 483.75(d). Rather than calling it what it is, Defendants have cleverly mislabeled the end-result a "bifurcation." The inexact label of bifurcation intentionally disguises the extraordinary nature of Defendants' request.

By granting Defendants Motion, the Trial Court requires Plaintiffs to first try a case against only one of the common Defendants. This minor co-Defendant, THI of South Carolina at Magnolia Place at Spartanburg, LLC (hereinafter Magnolia Place), is a special purpose entity created by the common owners in an attempt to distance themselves from their control and operation of the facility and liability. Undisputed evidence shows that Magnolia Place did not and could operate the nursing home independent of the Fundamental Defendants. Indeed, Magnolia Place did not make staffing or budget decisions and is not subject to liability for such egregious corporate negligence.

The Trial Court's Order is inherently prejudicial to the Plaintiffs. Plaintiffs will be improperly prejudiced and prohibited from submitting their evidence to the jury regarding the corporate decision to ignore the dangers to residents and provide inadequate staffing. Instead, Plaintiffs will have to wait several years to present any evidence against the co-Defendants and must in fact submit such evidence to an entirely different jury. This will necessitate the re-introduction of the evidence from the first trial against the co-Defendant via the same witnesses and the same documents. The end result is that Plaintiffs will try a partial and incomplete case against one co-Defendant and then try the rest of the case against the other co-Defendants several years later. The lunacy of this scenario is apparent when one is reminded that all of these Defendants are related entities with common

ownership; all of whom are **accused of jointly doing the same thing**—negligently causing Mr. Morrow's injuries. This nightmarish judicial quagmire is not "bifurcation."

Defendants ignore the Plaintiffs' theory of direct negligence against the Fundamental Defendants, suggesting that the only way these Defendants will be liable is through piercing the corporate veil, if the first jury finds that their co-Defendant Magnolia Place is liable for negligence. This is blatantly false. As set forth in the Complaint, Plaintiffs' contend that the Fundamental Defendants, through their short staffing and budgeting decisions, were the direct and proximate cause of Mr. Morrow's injuries.

III. FUNDAMENTAL FAMILY OF COMPANIES

The Court's Order grants final judgment on behalf of Defendants FLTCH, FAS, FCC, and THI of Baltimore, Inc. as to Plaintiffs' allegations of direct liability for corporate negligence, negligent management and administration, and liability as the governing body pursuant to 42 CFR 483.75(d). FLTCH is the company at the top of the current corporate structure and is 50% owned by both Murray Forman and Leonard Grunstein. It is the sole shareholder of THI of Baltimore, Inc. FLTCH, as the parent company, is also a member of FAS and FCC, which are currently providing management and operating services to THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg. These entities function as a joint venture to operate and manage the Fundamental nursing facilities including Magnolia Place at Spartanburg.

FLTCH currently owns and controls Magnolia Place at Spartanburg 100% and owns and controls the other entities named herein 100%. Plaintiffs retained expert forensic CPA Bruce Engstrom who has opined that:

1) FLTCH's centralized cash management system stripped Magnolia Place from any

right or control of revenues which were then commingled with monies from subsidiaries, and controlled exclusively at the corporate level;

2) FLTCH's activities through its agents FCC and FAS clearly indicate that the facility was under direct control of FLTCH;

3) Such control cannot be achieved or maintained in an organizational structure such that each legal entity is operated as a separate entity distinct from the other entities of the organization;

4) The Revolving Credit and Security Agreement also revealed that the parent company had significant control over the budget of each individual facility. The agreement requires the Borrower to furnish to lender consolidated monthly projected operational budgets, with financial covenants including but not limited to: (i) "aggregate combined census levels at the facilities shall be no less than 85% of total available beds; and (ii) at no time shall borrower (on a consolidated basis) permit its EBITDA (a profitability index) to be less than $12,500,000 per year." The Agreement requires each facility to maintain certain mandates such as: census levels shall be no less than 85% of total available beds requiring the facility to accept residents that they are not capable or staffed adequately to provide all reasonable and necessary services.

These expert opinions are consistent with several documents Plaintiffs discovered from outside sources and filed with the Court:

1) FLTCH's Operating Agreement which states "The Company is in the business of managing and operating long-term care facilities."

2) FLTCH's tax returns that state FLTCH's business is "nursing and personal care."

3) FLTCH's application to the U.S. Patent and Trademark Office for the registration of the trademark "Fundamental" and the servicemark "Quality Care is Fundamental."

4) Defendants' Nutrition Manual requires that the cost of food be $3.40 (or less) per patient per day. The Nutrition Manual also states the following:

- if the resident/patients choices made are not cost effective, tactfully suggest alternate ideas to them.

- yield adjusted recipes be used for ALL menu items. The food cost analysis is based on the recipe provided. If you find that you have a better recipe for a particular item, submit it to the National Director of Nutrition for consideration on future menus. An alternate of comparable cost and nutrition is determined by the Nutritional Director. The alternates should not involve high cost, labor-intensive items.

- Ice cream, sherbert, or fruit are not to be used as a last minute substitute for a menu due to higher cost

- Supplements are notoriously over prescribed. Supplement orders will frequently accompany a resident/patient upon transfer from a hospital or other institution. The resident should be evaluated to determine if the supplement is truly necessary. If it is determined that the supplement is not necessary, the attending physician should be notified and an order should be requested to discontinue the supplement. Facilities should strive to keep the percent of residents on supplements to less than 25%.

5) Fundamental's website describes its "business":

- The Fundamental Long Term Care companies are dedicated to providing each patient with the finest quality healthcare services in the most compassionate manner possible. It's that simple.

- This package was created to help familiarize potential patients, residents, and their families with the services and benefits available from Fundamental.

- With this core philosophy, we at Fundamental seek to help patients and their families through what can be a very emotional decision-making process. We naturally provide guidance and consultation on everything from how to properly choose the facility that's right for you to providing resources that help you cope with the nature of the decision itself.

- At Fundamental we offer advanced nursing, medical and rehabilitation services, combining the best of medical practice and technology with compassionate care and home-like comforts.

- Ensuring quality in everything we do. We do not only meet community and state standards of care, but strive to exceed them through a program of performance improvement that monitors overall care according to our more demanding criteria.

- We continually evaluate our practices to ensure consistent delivery of superior care. At Fundamental we utilize a committee of health care professionals to continually review our patient care standards and advises the staff on the health care practices and policies that are most beneficial to our residents.

The Fundamental Network offers substantial benefits:

- Consistency and continuous clinical excellence, eliminating duplication of effort in placement and care decisions.

- Standardized plans of care with clinical protocols and competency-based testing for staff ensuring high levels of patient care.

- A company-wide commitment to continuous quality improvement.

- Case management and outcomes management including scheduled status report.

- As a leading provider in the business of caring for people, we recognize that this philosophy must also extend beyond our patients to include our staff.

6) The Court in Prendergast v. FLTCH, a case in New Mexico, provided a detailed factual basis for denying FLTCH's summary judgment motion. The Court found the following undisputed facts:

- The Regional Director of Operations advised these facilities about how to increase profits, in addition to being responsible for ensuring that his facilities "met and exceeded" their budget expectations, as his bonuses were tied to the financial performance of these facilities.

- When FLTCH acquired THI Baltimore in March 2006, it created Defendants FCC and FAS to do the work that THI Baltimore Management, LLC, which

is now defunct, had been doing. The FAS and FCC contracts are materially the same for every one of approximately 100 care facilities. The FAS management fee is 4% of net operating revenue and the FCC fee is 1%. FAS and FCC provided all the services listed in Exhibit A of the contract with Valle Norte and there is no consequence if the fee does not cover the operating expenses; the lack of payment is recorded as a "receivable" on FAS's books and a payable on the facility's books, and the balance just grows if the facility does not perform better; Valle Norte's revenues go to a "lock box," along with the revenues for every "Fundamental" facility and the funds in the "lock box" are applied to a line of credit that FAS has.

- Christine Zack, an in-house attorney, holds the position of Senior Vice President for FAS, and though she has no direct supervisor, she presumes her employment is controlled by FLTCH shareholder Murray Forman. Ms. Zack testified as the corporate representative for each defendant and she provides updates regarding operations and legal matters at the facility-level to FLTCH shareholder Mr. Forman several times a month; there is one Directors' and Officers' insurance policy, held in the name of FLTCH, that covers all the facilities and named Defendants[2]

- All facilities have the same handbook, the same policies, the same employee benefits, and the same 401(k) plan. They have the same internet provider and protocol for conducting background checks on employees. There is one benefits coordinator for FAS who works with the HR payroll employee at each facility regarding employee benefits. There is an electronic purchasing hub for all facilities that they can log on to purchase their food and equipment; all facilities, including Valle Norte, have the same policies and procedures regarding the way residents are handled;

- FLTCH's address is 930 Ridgebrook Road, Sparks, Maryland, the same address as THI Baltimore; for federal tax purposes, FLTCH has elected to treat Valle Norte (and its similar facilities) as a "disregarded entity" and the owners of FLTCH pay taxes for the profits received by Valle Norte, which are reported on the tax return that FLTCH files (there are filing that are made at the shareholder level to reflect those results); the FAS tax department prepares the tax filings for FLTCH;

- Teresa Crocker, who was employed in the human resource department at Valle Norte, was told by "Fundamental" what company name to use, what letterhead to use for new hires, and how to input employment information

[2] Despite the Court's finding, Defendants refuse to produce or acknowledge any insurance coverage for FLTCH, FCC, or FAS.

into their system;

- FAS provides a website and recruiting and marketing services to facilities and the site simply says "Fundamental" because different entities recruit for jobs on the web page;

- Mr. Roby, with FCC, evaluated Plaintiff's job performance and prepared a performance evaluation (the only one in Plaintiff's file); when Mr. Roby received a raise, he was informed about it by Ms. Miller with FAS; each geographic region has a budget, prepared by Mr. Hillegass, the RDOs, and FAS accountant.

The undisputed testimony and evidentiary documentation proves that Fundamental created the subsidiary's policies and procedures, controls the budget, and represents to consumers that Fundamental operates and manages the facility.

FCC is currently listed as the management company for THI of South Carolina at Magnolia Place at Spartanburg d/b/a Magnolia Place at Spartanburg. The contract for these services states that these services are "required in connection with the management of the Facility." FCC also provides the operational policies and procedures that must be followed by the facility pursuant to state and federal regulations.

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."[3] FAS provides services such as payroll, professional liability, accounting, legal, and computer network and support as well as complaint hotline services, vendor services, and medical record review services. FAS also creates the budgets for all facilities within the "Fundamental family of companies."

On the facility's Application for License, THI of Baltimore, Inc. is listed as the Governing

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[3] These terms were used by Defendants' 30(b)(6) designee, and in Defendants' Manuals.

Body and FCC is listed under "Management" as the entity engaged to manage or operate the facility. This is significant in nursing home litigation. The Federal Nursing Home Reform Act (FHA) includes 42 CFR 483.75(d) which states that the governing body "is legally responsible for establishing and implementing policies regarding the management and operation of the facility." However, Plaintiffs have discovered that THI of Baltimore, Inc. is a shell company that FLTCH uses to enter into contracts such as insurance and services provided by vendors. THI of Baltimore has never had any employees, does not conduct any business, and has no Operating Agreement or business purpose. It is a sham corporation. Plaintiffs contend that the governing body is FLTCH as the owner of THI of Baltimore. FLTCH has delegated the duties of the governing body to its agents' FCC and FAS as evidenced by the cost reports which state the "Home Office" for Magnolia Place is FCC and FAS. Cost Reports are documents required by Federal Regulation for nursing homes. These cost reports show substantial revenue going to FCC and FAS from Magnolia Place. It is significant that FCC and FAS file Home Office cost reports. The Home Office Cost Report General Instructions state:

> The Home Office Cost Report is a supplementary document to the provider cost report. It supports and explains the appropriateness and amounts of cost incurred by the Home Office on behalf of the chain components. This cost report form should be prepared for any organization... which provides products and/or services for two or more entities one or more of which is a related party provider,[4] such that costs of the organization must be allocated to the related party provider.
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> The chain organization is a special type of multiple facility group, which consists of

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[4] As defined by the instructions, "related to the provider means that the provider to a significant extent is associated or affiliated with, or has control of, or is controlled by, the organization furnishing the services, facilities, or supplies."

entities bound together through common ownership or control.[5] In the Centers for Medicare and Medicaid Services manual (CMS-15, Section 2150) a chain is described as follows: **A chain organization consists of a group of two or more health care facilities which are owned, leased, or through any other device, controlled by one organization.**

IV. LEGAL ARGUMENTS

A. The Fundamental Defendants Were Improperly Severed From Plaintiffs' Negligence Cause of Action

Plaintiffs' complaint sets forth well pled facts which state that all of the Defendants, including the Fundamental Defendants, had a duty to Mr. Morrow, breached that duty and were the cause of Mr. Morrow's injuries. The Trial Court's Order erroneously severed the negligence cause of action against THI of South Carolina at Magnolia Place into a trial of its own, prohibiting the Plaintiffs from pursuing its direct liability claim against the Fundamental Defendants.

Direct liability is an important basis of liability in nursing home litigation. Often abuse and neglect of nursing home patients is the result of systematic problems that begin at the top of the corporate structure and trickle down through the subsidiary corporations to the facilities and, finally, to the residents. The conscious decisions by those at the top to place more importance on profits result in neglect and dangerous situations at the facility level. Budgets are cut, staffing reduced, lower quality of supplies substituted, and profits siphoned away from the vulnerable residents who need care. These problems are an integral element of Plaintiffs' case against Defendants who undercapitalized the facility for their own individual profits. Evidence of the Defendants' corporate

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[5] "Common Control exists where an individual or an organization has the power, directly, or indirectly, to significantly influence or direct the actions or policies of an organization or institution. The term "control" includes any kind of control, whether or not it is legally enforceable and however it is exercisable or exercised. It is the reality of the control which is decisive, not its form or the mode of its exercise."

structure and financial status is relevant to both the Plaintiffs' case in chief and their claim for punitive damages. Where evidence relevant to the issues of liability, damages, causation, and punitives overlap, bifurcation is inappropriate. All motions of judicial economy require that this case proceed in one trial. Plaintiffs have appropriately pled punitive damages against all Defendants, and bifurcation would not allow such remedy. Courts have allowed direct liability when corporate cutbacks in staffing, training, and supplies lead to harm. See Forsythe v. Clark USA, Inc., 864 N.E.2d 227 (Ill. 2007); Smartt v. NHC, 2009 WL 482 475, (Tenn.Ct.App. 2009); French v. House, 333 S.W.3d 546 (Tenn., 2010); and Scampone v. Grane HealthcareCo., 11A.3d 967 (Pa.Super.Ct., 2010) Courts have held that the person or entity responsible for approving the budget of the nursing home can be held liable in cases such as this. See Canavan v. NHC, 889 So.2d 825 (Fla.App. 2004). Courts have also upheld liability against a corporate defendant for "felonious corporate custodial neglect." Advocat, Inc. v. Sauer, 111 S.W.3d 346 (Ark.2003) *cert denied*, 540 U.S. 1012 (2003) (The corporation knew there were staffing problems in the facility, and committed negligence against residents of the facility "because it was short-staffed due to cut backs.").

Examining the "cause" prong of the negligence cause of action illustrates the Trial Court's error of effectively granting summary judgment in favor of the Fundamental Defendants. With respect to the injuries suffered by Mr. Morrow at Magnolia Place, it is the Plaintiffs' duty to prove that the Defendants caused Mr. Morrow's damages. The jury (as the fact finder) should then have the exclusive opportunity to decide whether the Defendants caused his injuries, which can be based on the Plaintiffs' well pled theories. For instance, the jury should consider whether the Fundamental Defendants' failure to provide sufficient resources or failure to provide sufficient staffing was the cause of Mr. Morrow's injuries. Under the Trial Court's ruling, the Plaintiffs are forced into a sterile

trial environment and prohibited from proving the direct cause of Mr. Morrow's injuries—short staffing and under budgeting by the Fundamental Defendants, as well as the overall corporate culture of neglect.

The standard of care for the owners and operators of nursing homes, somewhat like those of a private hospital, are under a duty to exercise reasonable care to avoid injury to patrons, and the reasonableness of such care is to be assessed in the light of the patron's physical and mental condition. Stogsdill v. Manor Convalescent Home, Inc., 35 Ill.App.3d 634, 343 N.E.2d 589 (2d Dist. 1976).

B. The Trial Court's Ruling is Immediately Appealable

The Trial Court's Order is appealable to this Court for two distinct reasons: 1) it involves the merits of the case at issue and is in effect a final judgment, and 2) it violates S.C.R.C.P. Rule 19 by forcing the negligence cause of action to proceed without indispensable parties.

By in effect granting summary judgment on causes of action for corporate negligence, direct participant liability, negligent management and administration, joint enterprise, agency, and governing body liability, the Court's "Bifurcation" Order involves the merits of the underlying case. "Intermediate orders **involving the merits** may be immediately appealed pursuant to §14-3-330(l). An order which involves the merits is one that must **finally determine some substantial matter forming the whole or a part of some cause of action** or defense." Ex Parte Wilson, 625 S.E.2d 205 (S.C., 2005) *citing* Mid-State Distribution, Inc. 310 S.C. 330, 426 S.E.2d 777 (S.C., 1993). Indeed, "[a]n order affects a substantial right and is immediately appealable when it: a) in effect determines the action and prevents 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). Tatnall v. Gardner, 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002). The Court's Order in effect grants summary judgment on causes of action for corporate negligence, direct participant liability, negligent management and administration, joint enterprise, agency, and governing body liability.

Furthermore, the Trial Court's Order violates S.C.R.C.P. Rule 19 because complete relief cannot be accorded without all Defendants, including the real party in interest FLTCH. Pursuant to S.C.R.C.P. Rule 19, "a person ...**shall** be joined as a party in the action if in his absence complete relief cannot be accorded among those already parties." There are four indispensable and necessary defendants in this case:

1. ***Magnolia Place***: the nursing home;
2. **FLTCH:** the governing body that was negligent in governing Magnolia Place; and
3. **FCC** and **FAS**: agents that were negligent in operating Magnolia Place.

FLTCH, FCC, and FAS are necessary and indispensable parties to this litigation. Plaintiffs contend that these entities control, operate, and manage Magnolia Place, and their own negligence caused injury. This is not new or novel. It is a simple negligence case involving a joint enterprise.

The undisputed testimony and evidentiary documentation provides that FLTCH created the subsidiary's policies and procedures, controls the budget, and represents to consumers that Fundamental operates and manages the facility. The Supreme Court of South Carolina has repeatedly held that "the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)." [Cite omitted]("Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial court's order deprives a party

of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.") Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (S.C., 2005).

None of the South Carolina cases cited by the Trial Court allow the Trial Court to separate joint Defendants in a negligence action into two separate trials with separate juries. Rather, each case dealt with bifurcating one trial into separate phases such as liability and damages or liability and punitive damages:

A. Flagstar Corp. v. Royal Surplus Lines, 533 S.E.2nd 331 (S.C., 2000) Flagstar was a class action racial discrimination case involving an issue regarding insurance coverage. Those issues are clearly separate and distinct.

B. Durham v. Vinson 602 S.E.2d 760 (S.C., 2004): Durham was a medical malpractice case where the trial was bifurcated into liability and punitive damages with the same injury. There was only one jury involved in this case.

C. Drury Dev Corp. v Foundation Ins. Co., 668 S.E.2d 798 (S.C., 2008): Drury involved a bifurcation where plaintiff attempted to pierce the corporate veil at the same trial as the liability phase. The Drury case only relates to a cause of action against the shareholder to pierce the corporate veil, not for direct liability. In the present case, Plaintiffs allege compensatory damages as a result of parent corporation direct liability for their own negligence. As the Drury Court held:

> "We therefore decline to adopt a rule [bifurcation] which would require South Carolina's trial courts to resolve in two separate actions what they now ably determine in one."

D. Wright v. Hiester Construction Co. 698 S.E. 2d 822 (Ct. App. 2010): Defendants attempted to bifurcate liability and damages in a bad faith insurance case and were denied. The Court of Appeals found no abuse of discretion.

The critical distinction between the cases cited above and the instant matter, two separate juries with two separate trials involving the same issues with interrelated defendants, is precisely what causes the substantial injustice to the Plaintiffs.

The Court also quoted a Federal District Court case from Delaware as the one example that was found that allowed two separate juries in two separate actions in the same case. U.S. Ciena Corp v. Corvis Corp, 210 F.R.D.519 (D. Del 2002). However, Ciena was a patent case and the Court expressly limited the discussion "in the content of patent cases" where bifurcation is typically used to simplify complex issues in "overly complex patent trials." The Court in Ciena admitted that "[T]ypically, courts bifurcate patent cases into liability and damage trials."

Accordingly, none of these cases provide basis for the Court to bifurcate one negligence case into two separate trials with two separate juries. Typically, bifurcation separates the trial into separate phases with the same Defendants. In this case, the Court has, in effect granted Summary Judgment for Defendants. Further, Plaintiffs cannot find one personal injury negligence case that allows what the Court has proposed to do in this case.

Several Courts have held that the **Seventh Amendment** right to the trial by jury includes the right to have a single issue decided one time by a single jury. See Gasoline Products Co. v. Champlin, 283 US 494 (1931), regarding the Seventh Amendment and the use of separate juries, particularly when one jury re-examines a fact decided by the first jury. The 7th Amendment provides in pertinent part that "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..." The issue in the Champlin case dealt with a partial remand of a contract dispute. The First Circuit left in tact the liability phase and remanded for a second jury to determine the amount of damages. The U. S. Supreme Court reversed

the First Circuit and found that nothing in the record would tell the jury when the contract came into existence, what the terms were, or when it was breached. Thus, **"the question of damages [was] so interwoven with that of liability that the former [could not] be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to the denial of a fair trial." Th U.S. Supreme Court found that the partial remand did violate the Seventh Amendment because the issue to be tried separately was not sufficiently "distinct and separable from the others [such] that a trial of it alone may not be had without injustice."**

In the present case the issues are not sufficiently distinct and separable to be tried separately without resulting in substantial injustice to the Plaintiffs. Various states have held that severance orders are immediately appealable, particularly if the specific circumstances result in injustice. The New York Supreme Court held that an order severing claims into different trials was reviewable. Todd v. Gull Contracting Co., 22 A.D.2d 904, 255 N.Y.S.2d 452 (1964). See also Landers v. E. Tex. Salt Water Disposal Co., 151 Tex. 251, 255, 248 S.W.2d 731, 733 (1952) (Texas Supreme Court held severability order was reviewable).

The undisputed testimony and evidentiary documentation proves that Fundamental created the subsidiary's policies and procedures, controls the budget, and represents to consumers that Fundamental operates and manages the facility.

C. Judicial Economy Requires Reversal of the Trial Court's Order

The facts in the "bifurcated" proceedings ordered by the Trial court are the same, both concerning the injuries sustained by Mr. Morrow at the Magnolia Place facility. Based upon experience, the length of the trial is expected to be one to two weeks. Yet, Defendants propose to try the same case twice, notwithstanding the fact that the majority of the evidence would be the same

in each trial. Plaintiffs will indeed suffer prejudice because the cost of the proposed separate trials and the delay toward resolution would be great. Under Defendants' plan, Plaintiffs would be forced to try the same case twice. Plaintiffs would have to call the same witnesses, including experts, to each of the separate trials, which may be heard years apart. Plaintiffs' recovery against Defendants could potentially be delayed for years. The threat of prejudice to the Plaintiffs' case under the ordered "bifurcated" proceedings is real and severe, weighing heavily in favor of a single trial. Defendants, on the other hand, have presented no evidence that they will suffer prejudice by having a single trial involving the same operative facts.

Should this Order stand and become the law of South Carolina, all negligence cases with common Defendants will now be tried in multiple trials that span several years. Among civil defendants who cause injury to others, this new strategy of needless delay, additional cost, waste of judicial resources, and confusion is sure to be commended. Should this Order stand, the Court dockets of South Carolina will be clogged with multiple trials involving the same Parties and same issues that should be adjudicated in one trial. Take for example the simple negligence case involving a trucking accident. Should this Order become the law, when a truck driver for a national trucking company is negligent by driving when he is sleepy and kills a family on a South Carolina highway, Plaintiff will no longer be allowed to pursue a case against the Trucking Company. Plaintiff may have evidence that warrant an award of damages against the trucking company, such as forcing its drivers to drive too many hours in a short period of time resulting in sleepy and inattentive drivers. But South Carolina Plaintiffs will no longer be allowed to pursue the trucking company. Instead, Plaintiffs will be required to first pursue an action against the truck driver. Should Plaintiffs prevail in that trial and be awarded damages, Plaintiffs will have to wait for a final judgment, which could

take years. Several years after that, Plaintiffs will then finally be allowed to pursue their case against the Trucking Company and for the first time present the evidence of gross corporate malfeasance to an entirely different jury. Importantly, since the jury will need to know what actually happened in the accident and will need to know the injuries of the Plaintiffs' in order to assess damages, all of the evidence presented several years prior will need to be presented again to a different jury. A Plaintiff would hope that those witnesses would be available to testify a second time.

Of course all of the above is not simply absurd, it's entirely avoidable. Simple negligence cases against commonly owned Defendants should be tried in one trial, not in multiple trials that span years and possibly decades. This Order is not one of "bifurcation" because it does not "bifurcate" the trial; instead it creates multiple trials concerning identical issues that will take years to complete. Additionally, due to the exceptional circumstances, which includes South Carolina jurisprudence in negligence cases, and the fact that Defendants have filed the same Motion in every pending case[6], Plaintiffs request to argue against general "bifurcation" precedent and asks this Court to accept review of the Trial Court's aberrant Order. See Salmonsen v. Cgd, Inc., 377 S.C. 442, 661 S.E.2d 81 (S.C., 2008); Binney v. State, 384 S.C. 539, 683 S.E.2d 478 (S.C., 2009).

"Indeed, it has been expressly recognized that the "distinct issues" requirement 'is dictated for the issues involving overlapping legal and factual questions the verdicts rendered by each could be inconsistent.'" Fortune v. Gibson, 403 S.E.2d 674 (S.C. App. 1991). In Senter v. Piggy Wiggly, 533 S.E.2d 575 (2000), our Supreme Court affirmed the trial court and Court of Appeals denying bifurcation. In Senter, the trial court made the following observations and ruling:

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[6]Abrams v. FLTCH, et al C.A.#: 10-CP-42-6861; Brown v. FLTCH, et al C.A.#: 10-CP-42-6860; Campsen v. FLTCH, et al C.A.# 11-CP-42-0438; Harris v. FLTCH, et al C.A.#: 10-CP-42-6862; Hipp v. FLTCH, et al C. A.# 07-CP-42-1578;

> Over a period of hundreds of years we have developed a tort system which has as its basis trial by jury. We have evolved a system which works: we try issues of liability and damages together. We rely upon judges to charge the law and the evidence and not upon sympathy. Evolving along with the trial system is a Settlement System. Because of the doubts as to what a jury (or judge) will do, at some point, frequently just before trial because at that point both parties are forced to face their cases as they are, most cases settle. If they did not the system would break down.... I see this as a typical law suit with serious injuries and I see no reason to bifurcate the trial.

V. CONCLUSION

At the trial of this case, Plaintiffs intend to prove that all of the named Defendants are essentially the same entity, and that they were all created for the primary purpose of deriving profits from operating nursing home facilities nationwide while shielding the main corporate entities and assets from any responsibility or liability when deaths and injuries result from deficient care. Plaintiffs aver that the corporate Defendants knowingly, and with reckless disregard for the health and well-being of the facility residents, grossly understaffed and under-funded the facility; failed to appropriately train the staff; and knowingly permitted Mr. Morrow to be neglected. Plaintiffs contend that injuries were caused by the poor treatment.

Plaintiffs' case is a case of direct corporate negligence, that is, the acts and omissions of the Fundamental entities caused Plaintiffs' injuries. The interrelated nature of the Defendants' joint venture described above demonstrates why Plaintiffs' substantial rights are affected by the Trial Court's ruling, which makes it subject to this Court's review. The Court, by granting bifurcation of the negligence causes of action against the facility and the parent corporation into two separate trials with two separate juries, has effectively granted summary judgement 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 - so that the whole story may

be told and justice served. 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. Here, Plaintiffs are deprived of presenting their case of negligence by the Fundamental entities.

Under the Court's current ruling, several negligent acts complained of in this case will not be tried until after a jury determines liability and damages, if at all. This case is not about a mistake made in a complicated medical procedure or even allowing a resident to trip and fall. The negligent acts in this case are failures of the Fundamental Defendants to provide sufficient number of adequately trained staff and ample supplies to give residents of a nursing home the basic care they need. These corporate Defendants had a legal duty to do so, and they breached that duty for one reason and one reason only: money. The result was the damage suffered in the case. The case cannot be tried as currently ordered without allowing the jury to be informed of this critical part of the nursing home abuse and neglect from which Mr. Morrow suffered.

The Court's Order creates an unprecedented division of Defendants into two trials on identical issues, for which there is absolutely no legal authority and which will undoubtedly result in trial and appellate chaos that would go on for years.

Respectfully Submitted,

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January 23, 2012
Spartanburg, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2007-CP-42-4601

Lawrence E. Morrow and Evelyn M. Morrow, Plaintiffs/Appellants

vs.

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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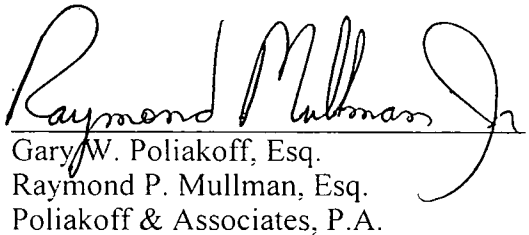
PROOF OF SERVICE

I certify that I have served the Memorandum of Law on Appealability on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on January 23, 2012, addressed to their attorneys of record: William L. Howard, Sr., Esq., and D. Jay Davis, Jr., Esq., and Russell G. Hines, Esq. of Young Clement Rivers, LLP, P.O. Box 993 Charleston, SC 29402 and Lori D. Proctor, Esq., Attorney for Respondents/Appellants at 919 Miliam Street, Suite 1700; Houston, Texas 77002

January 23, 2012



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January 23, 2012

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Lawrence E. Morrow and Evelyn M. Morrow, Appellants 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 South Carolina at Magnolia Place at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg
C.A. No. 2007-CP-42-4601

Dear Ms. Gee:

Enclosed for filing is the original and six copies of Appellants' Memorandum of Law Regarding Appealability in the above matter along with our Proof of Service for Same.

With best regards, I am,

Yours very truly,

Raymond P. Mullman, Jr.
POLIAKOFF & ASSOCIATES, PA

RPM, JR/snh

Enclosures
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