

**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; THI of Baltimore
Management, LLC; THI of South Carolina at Magnolia
Place at Spartanburg, LLC d/b/a Magnolia Place at
Spartanburg,

Defendants,

Of whom 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 are,

Respondents/Appellants.

RESPONDENTS/APPELLANTS' MEMORANDUM ADDRESSING APPEALABILITY

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SC Court of Appeals

This Honorable Court has requested that the parties address the appealability of the Order (judgment) of The Honorable J. Derham Cole dated October 24, 2011, which Order in part denied the Motion of Appellants/Respondents, Lawrence E. Morrow and Evelyn M. Morrow, to alter or amend Judge Cole's March 3, 2011 Order Granting Motion To Bifurcate and Motion to Stay Discovery. This Memorandum is submitted in accordance with the Court's request.

The Appellants/Respondents brought this action seeking damages for personal injuries allegedly sustained by Mr. Morrow as a result of the care he received as a resident of a nursing home facility known as Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place (facility). Ultimately, the Amended Complaint alleged causes of action against six entities in addition to the facility. As to the non-facility defendants, Plaintiffs assert multiple causes of action for what they term "corporate, direct, control liability and/or piercing the corporate veil" (the "non-clinical issues").

Respondents/Appellants moved the trial court for an order bifurcating the proceeding. On March 3, 2011, Circuit Court Judge J. Derham Cole granted the motion, bifurcating the trial so as to try liability and damage issues as to the facility first, encompassing the clinical issues; then trying the issues, if any, as to the non-facility entities, and staying the discovery as to the non-clinical liability issues pertaining to the non-facility entities pending the further order of the court. (See Order Granting Motion to Bifurcate and Motion to Stay Discovery, attached hereto as Ex. 1).

During this same time period, the Respondent/Appellant Fundamental Long-Term Care Holdings, LLC (FLTCH) moved to dismiss the case against it on the grounds that the court did

not have a basis for asserting personal jurisdiction over it. Additionally, all Respondents/Appellants moved the court for a protective order in response to Appellants/Respondents' notice of taking the deposition of a person named Ken Tabler.

Appellants/Respondents moved the trial court, pursuant to Rule 59(e), SCRCF, to alter or amend the order granting bifurcation and staying discovery of non-clinical issues and also to exclude allegedly cumulative defense experts, to compel a Rule 30(b)(6), SCRCF, deposition, and to compel the deposition of Ken Tabler. On November 15, 2011, Judge Cole entered a Form 4 Order dated October 24, 2011 denying Appellants/Respondents' Rule 59 Motion to Alter or Amend and also denying their motion to exclude cumulative defense experts. (See Form 4 Order dated October 24, 2011, attached hereto as Ex. 2). The Court's order granted the Appellants/Respondents' motion to compel a Rule 30(b)(6) deposition and to compel Tabler's deposition. The Court's order also denied the Respondent/Appellant FLTCH's Motion to Dismiss for lack of personal jurisdiction and the Respondents/Appellants' motions for a protective order regarding the Tabler deposition.

On November 21, 2011, Appellants/Respondents filed their Notice of Appeal of Judge Cole's Order denying the motion to alter or amend the order granting bifurcation and staying discovery of the non-clinical issues. On December 1, Respondents/Appellants timely filed their cross-appeal.

The Respondents/Appellants' cross-appeal pertains only to the decisions of Judge Cole to deny FLTCH's motion to dismiss for lack of personal jurisdiction, to grant the Appellants/Respondents' motion to compel a Rule 30(b)(6) deposition, and to deny a protective order regarding the Tabler deposition. All of these rulings are clearly interlocutory, and not ordinarily appealable. *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426

S.E.2d 395 (1993); *Patterson v. Spector Broadcasting Corp.*, 287 S.C. 249, 335 S.E.2d 803 (1985)(discovery orders are not directly appealable). Appealability of the issues encompassed within the Respondents/Appellants' cross-appeal are premised solely upon a discretionary appeal allowed by this Court if it concludes Appellants/Respondents' appeal of the order granting bifurcation and staying discovery is immediately appealable. Should that be the case, the authority for allowing appeal of this interlocutory ruling is *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), and as to the discovery issue, *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."). Consequently, if this Honorable Court concludes Appellants/Respondents' appeal should be dismissed without prejudice because it is interlocutory and not immediately appealable, then Respondents/Appellants submit their cross-appeal should also be dismissed without prejudice for the same reason.

**APPEALABILITY OF ORDER GRANTING BIFURCATION AND STAYING
DISCOVERY OF NONCLINICAL ISSUES**

Respondents/Appellants submit neither the order of Judge Cole denying Appellants/Respondents' Rule 59 motion to alter or amend nor the order granting bifurcation and staying discovery are immediately appealable. *Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000).

In *Flagstar*, the South Carolina Supreme Court explained that "[a]n order granting bifurcation of issues for trial simply does not strike to the heart of this Court's traditional analysis of claims of denial of a mode of trial." The Court ruled:

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).

Flagstar Corporation v. Royal Surplus Lines, 341 S.C. at 73, 533 S.E.2d at 333-334.

Both the reasoning and the holding in *Flagstar* apply to a personal injury tort case as well. *See Sentry v. Piggly Wiggly Company, Inc.*, 341 S.C. 74, 533 S.E.2d 575 (2000)(ruling an order denying bifurcation of liability and damages in a tort case is not immediately appealable). Furthermore, as noted by the *Flagstar* Court in the above quote, an order bifurcating discovery is also not immediately appealable. *Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. at 73, 533 S.E.2d at 333-334.

Anticipating Appellants/Respondents may argue that they have been denied a mode of trial because the bifurcation order contemplates two separate juries to determine the clinical and the non-clinical “up-stream” corporate liability issues, Respondents/Appellants would draw the Court’s attention to its ruling on this same issue in *Fortune v. Gibson*, 304 S.C. 279, 403 S.E. 2d 674 (Ct. App. 1991). In that case, this Court stated:

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, 304 S.C. at 281-282, 403 S.E. 2d 675.

In *Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000), the Supreme Court reversed the Court of Appeals, which had ruled the bifurcation order was immediately appealable, and based upon its conclusion that the issues were not distinct, had reversed the trial court's order granting bifurcation. See *Flagstar v. Royal Surplus Lines*, 332 S.C. 182, 503 S.E.2d 497 (Ct App. 1998), *rev'd*, *Flagstar v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). As noted previously, the basis for the Supreme Court's ruling was that the trial court's decision to bifurcate the proceedings did not deny the Appellant a mode of trial, and any abuse of discretion by the trial court in granting bifurcation could be reviewed after the trial and after full development of the evidence. The Court did not analyze or base its decision on the Court of Appeal's conclusion that bifurcation should not have been ordered because the issues to be bifurcated were not distinct. Therefore, it is clear from the Supreme Court's opinion in *Flagstar* that any abuse of discretion on the part of the trial court in deciding whether the issues are so distinct that a trial of each issue alone would not result in prejudice, as a necessary foundation for its decision to grant bifurcation, does not affect the conclusion that the bifurcation order is not subject to interlocutory appellate review. Consequently, the bifurcation of issues to be tried before separate juries is not immediately appealable.

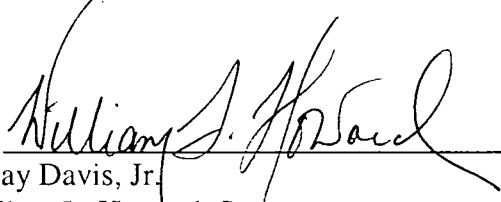
CONCLUSION

For the foregoing reasons, Respondents/Appellants request that the appeal of the Appellants/Respondents be dismissed without prejudice on the grounds that the order appealed from is not immediately appealable. Should the Court so rule, Respondents/Appellants respectfully assert that the Respondents/Appellants' cross-appeal will also be premature, and the Court should dismiss Respondents/ Appellants' cross-appeal without prejudice and remand this case to the trial court for further proceedings in conformity with the Court's ruling. Should the

Court determine Appellants/Respondents' appeal is proper, then Respondents/Appellants request that this Court exercise its discretion to entertain their cross-appeal under the authority of *QZO, Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004) and *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002).¹

Respectfully submitted,

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Dated: January 23, 2012

¹ Respondents/Appellants request an opportunity to file a memorandum in response to any unanticipated arguments raised by Appellants/Respondents in their Memorandum regarding appealability, which memo is due contemporaneously with this memorandum.

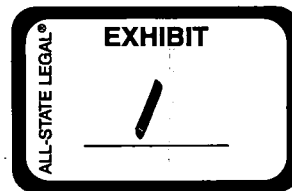
STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SPARTANBURG)	SEVENTH JUDICIAL CIRCUIT
)	
LAWRENCE E. MORROW AND)	CASE NO. 2007-CP-42-4601
EVELYN M. MORROW,)	
)	
PLAINTIFFS,)	
)	
vs.)	
)	
FUNDAMENTAL LONG-TERM CARE)	
HOLDINGS, LLC; FUNDAMENTAL)	
CLINICAL CONSULTING, LLC;)	
FUNDAMENTAL 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,)	
)	
DEFENDANTS.)	

**ORDER GRANTING
MOTION TO BIFURCATE
AND MOTION TO STAY DISCOVERY**

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Defendants moved this Court to Bifurcate the trial and stay discovery of the corporate liability claims in the above captioned matter. The Motion to Bifurcate and to Stay Discovery came to be heard before me on November 24, 2010. Gary W. Poliakoff and Raymond P. Mullman of Poliakoff & Associates appeared for the Plaintiffs. William L. Howard and D. Jay Davis, Jr. of Young Clement Rivers LLP, along with Lori D. Proctor of Johnson, West, Trent & Taylor, LLP, appeared for the named Defendants, with the exception of Fundamental Long-Term Care Holdings, LLC, which has not made a general appearance and is contesting personal jurisdiction. Having reviewed the Motion and memoranda submitted in favor and in opposition to the Motion, and having considered the arguments advanced by

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counsel, I conclude bifurcation and a stay regarding the corporate liability discovery is appropriate in this case for the following reasons.

HISTORY OF THE CASE/ISSUES

For purposes of this Motion, the following facts are undisputed. Plaintiff Lawrence E. Morrow entered the Defendant nursing home, THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg (the "Nursing Home"), following hospitalization at Mary Black Hospital. He resided at the Nursing Home from January 12, 2007, to February 2, 2007, and he alleges personal injury resulting from negligent nursing home care during his stay. During his residency, Plaintiffs allege Mr. Morrow suffered from infections, malnourishment, dehydration, and pressure sores. Plaintiffs also allege he was injured as a result of negligent handling while attempting to shower, necessitating subsequent surgery to remove a penile implant. Plaintiffs contend the Nursing Home was negligent in various ways including failure to have proper equipment, such as an appropriate mattress and a proper chair for showering; failure to have sufficient staff on hand; failure of the staff to manage Mr. Morrow's care, including turning in the bed and proper assistance in positioning in an appropriate shower chair; failure to train and supervise the staff; and failure to provide proper nourishment. Plaintiffs allege causes of action for negligence, recklessness, gross negligence, negligence per se and loss of consortium. These negligence claims have been labeled by the parties as the "clinical issues," involving the alleged direct action or inaction by the Nursing Home and its staff in the care and treatment of Mr. Morrow during his residency. For purposes of this Order, the Court will also refer to these issues as the "clinical issues."

On January 20, 2009, Plaintiffs filed an Amended Complaint adding Defendants Fundamental Long Term Care Holdings, LLC, Fundamental Administrative Services, LLC, and

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Fundamental Clinical Consulting, LLC. The Plaintiffs allege all other Defendants are corporate entities related to the Nursing Home. Essentially, Plaintiffs assert that these remaining Defendants, all limited liability companies, are inter-related entities that control "all facets" of the Nursing Home's operations. They claim these companies are sham entities, designed to shield the individual owners of the corporations from liability and to siphon off the assets and revenues generated by the Nursing Home and other nursing homes. According to Plaintiffs, these Defendant companies have entered upon a scheme to defraud the government and the nursing home patients by setting up an elaborate system of funneling money from one entity to another in such a complicated fashion that "it is difficult to discover all of the responsible entities."

In an attempt to attach liability to these non-facility entities, Plaintiffs assert various theories by which one or more of these entities are alleged to be either directly liable Plaintiffs, or indirectly liable for the obligations of Nursing Home through a veil piercing analysis, alter ego analysis, or successor liability analysis.

With regard to Plaintiffs' claims of direct liability, Plaintiffs argue the evidence will establish that these interrelated "upstream" corporations have maintained total control over Nursing Home operations, including its budget and its staff size, credentials, training, and supervision. Thus, as Plaintiffs phrase their argument, the Plaintiffs were injured because there was insufficient properly trained staff and/or equipment to assist, and that is directly caused by the upstream corporate entity(ies)' failure to adequately fund the Nursing Home. Plaintiffs make the same assertion with regard to the cause of malnourishment, and the failure to have the correct mattress or shower equipment.¹ For purposes of this order, these claims separate and apart from

¹ In their Memorandum in Opposition to the Motion to Bifurcate, Plaintiffs argue "[s]imply put, [corporate decision makers] fail to provide the individual caregivers with the necessary tools to provide care, all to increase profits. In

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the direct clinical care received by the Nursing Home resident will be referred to as the "corporate liability claims."

Defendants filed this Motion to Bifurcate the trial of the nursing home negligence claims (the clinical issues) from the remaining claims through which Plaintiffs seek to attach liability to other non-facility entities. Defendants ask this Court to stay all discovery on causes of action unrelated to the primary claim of nursing home negligence against Nursing Home, to include the allegations of liability as to all other named defendants based upon "control, successor, direct and/or piercing the corporate veil." Defendants' motion for bifurcation is made pursuant to Rule 42(b) of the South Carolina Rules of Civil Procedure.

DISCUSSION

The Defendants argue bifurcation of the trial will facilitate convenience, avoid prejudice and will provide the most expeditious and economical method of resolving the issues. Defendants point out that the clinical issues involve complex matters involving medical science requiring expert medical and nursing testimony to aid the jury in its resolution of the issues of nursing home negligence and/or recklessness, as well as proximate cause and damages. The Plaintiff, Mr. Morrow, was seventy-six years of age at the time of his three week residency at the Nursing Home. According to Defendants, the medical records reflect that Mr. Morrow had a medical history of chronic obstructive pulmonary disease, diabetes, paroxysmal atrial tachycardia (for which he was taking coumadin), hypertension, hyperlipidemia, reflux disease, benign prostatic hypertrophy, and a history of smoking until 2 years before admission, with an immediate past history of intensive care hospitalization for pneumonia, where he was tube fed and bedridden. Defendants assert the medical records reveal a diagnosis and treatment for a

this environment, caregivers are often victims themselves, faced daily with the inability to perform their assigned tasks, and watching those they are attempting to care for fall ever so irreparably into a state of basic neglect."

34

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decubitus ulcer during his hospitalization, immediately prior to his entry into Nursing Home. Consequently, Defendants argue the Plaintiff's pre-existing condition raises substantial issues of medical causation in addition to the contested issues regarding nursing home care, such as staffing and staffing requirements, training, supervision within the nursing home, availability of proper equipment, and the care rendered to the patient. Defendants assert these issues will require substantial expert testimony, and are in the nature of a complex medical malpractice case. Defendants further argue the corporate liability issues are totally separate from the clinical issues and that the corporate liability issues will require substantial expert testimony and document review.

SCRCP 42(b) states the following:

(b) Separate Trials. The court, in *furtherance of convenience* or to avoid *prejudice*, or when separate trials will be *conducive to expedition and economy*, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

(Emphasis added.)

The Rule sets three criteria by which this court may evaluate the need for bifurcation: i) avoiding convenience; ii) avoiding prejudice; or iii) expedition and economy. If any one of these standards is met, a trial may be bifurcated so long as "the issues are so distinct that trial of each alone would not result in injustice." *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 516, 698 S.E.2d 822, 828 (Ct. App. 2010). In this case, I conclude analysis of all three criteria favors bifurcation.

Trial judges are given discretion as to whether to bifurcate a trial, "tak[ing] care to analyze whether or not issues are overlapping or not distinct." *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73, 533, S.E.2d 331, 333 (2000); see also *Durham v. Vinson*, 360 S.C. 639,

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645, 602 S.E.2d 760, 763 (2004). The Supreme Court of South Carolina has gone so far as to “encourage” bifurcation of trials in complex medical malpractice actions and where bifurcation “helps clarify and simplify the issues.” *Durham*, 360 S.C. at 645, 602 S.E.2d at 763.

To further inform its exercise of discretion, this Court also considers “whether bifurcation would avoid prejudice, promote efficiency, conserve judicial resources, and avoid juror confusion, keeping in mind that the underlying goal is a just and expeditious final disposition of the matter.” *Deutscher Tennis Bund v. ATP Tour, Inc.*, 2008 U.S. Dist. LEXIS 47779 (D. Del. 2008), citing 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2388 (3d ed. 2008); See also *Ciena Corp. v. Corvis Corp.*, 210 F.R.D. 519, 521 (D. Del. 2002).

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

As enumerated in Defendant’s Motion to Bifurcate, Plaintiffs’ discovery requests regarding the corporate liability claims have been massive and overwhelming. As a result of the breadth and scope of these discovery requests, this Court has entertained multiple lengthy hearings on Motions to Compel regarding issues unrelated to Plaintiffs’ negligence claim against Nursing Home. This is exemplified by the discovery chart attached to Defendants’

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106

memorandum, reflecting over one thousand interrogatory requests and over four hundred requests to produce documents including subparts in the numbered requests.

To appreciate the potential impact of the added non-clinical issues on the just and efficient adjudication of the case, as well as the potential impact of bifurcating the proceedings, it is necessary to review and understand the scope of the additional legal principles and evidentiary issues raised by these claims. Plaintiffs allege the following enumerated bases for liability of the non-facility entities: piercing the corporate veil; instrumentality, alter ego and corporate control; corporate successor liability; agency; adjunct; de facto merger; and joint venture.

In *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 668 S.E.2d 798 (2008), our Supreme Court answered the question of whether or not it was permissible to maintain an alter ego claim without first obtaining a judgment against the corporation. Answering that it was, the Court stated:

While it is undoubtedly true that the corporate veil is often pierced post-judgment, it is also true that South Carolina courts frequently consider these issues in one **bifurcated** action. See, e.g., *Carolina Marine Handling v. Lasch et al.*, 363 S.C. 169, 176, 609 S.E.2d 548, 553 n.6 (recognizing that "an attempt to pierce the corporate veil often occurs post-judgment . . ."); see also *Mid-South Mgmt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007) (in which the trial court allowed claims against a corporation and its parent companies to proceed to a **bifurcated** trial on issues of corporate liability and veil-piercing theories); *Hunting v. Elders*, 359 S.C. 217, 597 S.E.2d 803 (Ct. App. 2004) (in which the trial court allowed claims against a corporation and its shareholder to proceed to a **bifurcated** trial on issues of corporate liability and veil-piercing).

Thus, even though our Court has ruled an action to pierce the corporate veil can be maintained in the same proceeding as the suit to establish liability, the Court has been careful to stress that the proceedings should be bifurcated.

Traditionally, our courts have been careful to maintain the identity of separate corporations as distinct legal entities, employing the alter-ego or instrumentality analysis to



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disregard this distinction "only with mature consideration and caution." *Baker v. Cedarwood Associates*, 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980). To pierce the corporate veil, the court applies an analysis of factors identified in *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984). Piercing the corporate veil is an equitable theory for determining liability, and, as previously noted, our Supreme Court has allowed this to proceed "in one *bifurcated* action" without first obtaining a judgment against the subsidiary corporation. See *Sturkie* 280 S.C. at 456-457, 313 S.E.2d at 318; *Drury*, 380 S.C. at 102, 668 S.E.2d at 801. Thus, bifurcation of this theory of liability is clearly suggested, if not mandated, for the trial of this issue.

Plaintiffs argue multiple theories of direct liability, as well. Our courts recognize that a corporation may be held liable for the actions of a related corporation under theories of agency, alter ego or where one operates as the instrumentality of the other. To establish a basis for liability under an alter-ego or instrumentality analysis, the Plaintiff must show total domination and control of one entity by another and inequitable consequences caused thereby. *Colleton County Taxpayers Association v. The School District of Colleton County*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006). Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity. Id. Nevertheless, "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability. The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility." *United States v. Bestfoods*, 524 U.S. 51, 72, 118 S. Ct. 1876, 1889 (1998).

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Even if the requisite degree of control is established, control, in and of itself, is not sufficient. It is necessary to show that the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy. *Colleton County Taxpayers Association*, 371 S.C. 224, 237, 638 S.E.2d 685, 692, citing *Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 367-368, 271 S.E.2d 596, 600 (1980).

Plaintiffs contend the evidence will show all other named defendants are "adjuncts" of Fundamental Long Term Care Holdings, LLC ("FLTCH") and therefore FLTCH is liable for all their acts. See *Environmental Waste Control v. Browning-Ferris Indus.*, 711 So. 2d 912, 914 (Ala. 1997)("[A] parent corporation which owns all the stock of a subsidiary corporation is not liable for acts of its subsidiary corporation, unless the parent corporation so controls the operation of the subsidiary corporation as to make it a mere adjunct, instrumentality, or alter ego of the parent corporation." (Emphasis added). "To justify piercing the corporate veil on an alter ego theory in order to hold a parent corporation liable for the acts or omissions of its subsidiary a plaintiff must show that there is such a unity of interest and ownership between the two corporations that their separate personalities no longer exist, and that an inequitable result would follow if the parent were not held liable. To put it in other terms, the plaintiff must show 'specific manipulative conduct' by the parent toward the subsidiary which 'relegate[s] the latter to the status of merely an instrumentality, agency, conduit or adjunct of the former . . ." *Laird v. Capital Cities/Abc*, 68 Cal. App. 4th 727, 742 (Cal. App. 3d Dist. 1998). "[T]he notion of separate corporate existence of parent and subsidiary or affiliated corporations will not be recognized where one corporation is so organized and controlled and its business conducted in such a manner as to make it merely an agency, instrumentality, adjunct, or alter ego of another corporation." *Triple "C" Recreation Asso. v. Cash*, 124 Ga. App. 754, 756 (Ga. Ct. App. 1971),

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179

citing *Exchange Bank of Macon v. Macon Constr. Co.*, 97 Ga. 1 (25 SE 326, 33 LRA 800) and 18 AmJur2d 559, § 14; 564, § 17.

Plaintiffs argue the business actions, policies, communications, budgetary processes, expenditures, structures and histories will provide a basis for establishing total control to engage in a fraudulent scheme to plunder approximately two hundred nursing home facilities, resulting in injustice to residents and nursing home staff, as well as violations of public policy. The Court concludes this theory, if allowed, would greatly expand the scope of the evidence, presenting a complexity of interwoven financial and business dealings for analysis.

Plaintiffs also assert an indirect basis for liability under a corporate successor analysis. “[I]n the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless there was an agreement to assume such debts, the circumstances surrounding the transaction warrants a finding of consolidation or merger of the two corporations, the successor company was a mere continuation of the predecessor, or the transaction was entered into fraudulently for the purpose of defeating creditors' claims. *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312 S.E.2d 213 (2005)(Citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924))” To meet the fraud exception to successor liability, the general rule is that a successor must knowingly participate in a fraudulent asset transfer.” *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67 (Ct. App. 2008). Consideration of this theory will require analysis of these complex legal concepts in the context of any evidence the parties proffer regarding merger, acquisition, or consolidation of the defendant corporations, as well as any legitimate purposes for the action, motives and knowledge possessed by the alleged actors.

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Plaintiffs also allege a "de facto merger" between FLTCH and THI Holdings, LLC as a basis for assigning liability for Nursing Home's torts. "Most courts traditionally have applied the mere continuation exception (also known as a de facto merger) contained in the general rule on successor liability only when there is commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors, or shareholders, and the business continues largely unchanged." *Simmons*, 366 S.C. at 317, 622 S.E.2d at 217 (J. Burnett, dissenting). "Where there is an absorption of the business and assets--in other words, a merger de facto . . . the extent of the liability is necessarily determined by the value of the property received." *Huggins v. Commercial & Sav. Bank*, 141 S.C. 480, 521 (S.C. 1927)(Citing 15 A. L. R., 1150.) The key element of a de facto merger is, however, a continuity of ownership between the selling and purchasing corporations. *Taylor v. Atlas Safety Equipment Co.*, 808 F. Supp. 1246, 1251 (E.D. Va. 1992) (citing *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977)) ("Absent a transfer of stock, the nature and consequences of a transaction are not those of a merger."); *Crawford Harbor Assocs. v. Blake Constr. Co.*, 661 F. Supp. 880, 888 (E.D. Va. 1987) (Applying Virginia law: "The essential characteristic of a de facto merger is the succession of the selling corporation's stockholders to stockholder status in the purchasing corporation.")

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Finally, Plaintiffs allege the defendant corporate entities operated as a joint venture.

South Carolina Courts equate joint venture with joint enterprise:

A joint enterprise exists where there are two or more persons united in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose. Further, in order to constitute a joint enterprise, there must be a common purpose and community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto.

11

Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 147, 425 S.E.2d 764, 774 (Ct. App. 1992). Unlike the previous theories advanced by Plaintiffs, to establish this basis for joint liability, Plaintiffs would be required to establish that the various corporate entities operate for a common, shared purpose and have an equal right to direct and control the conduct of each other with respect to that common purpose. The subtle differences in this theory render the overall analysis of the various theories of liability even more complex for a jury of laymen to decipher.

Although the Plaintiff asserts these issues can be tried in one week, I conclude otherwise. Based upon the arguments presented, I conclude the clinical issues can be tried within one week, but the number and complexity of the remaining issues as outlined above leads this court to conclude the trial of those issues is likely to be a prolonged, document intensive, undertaking. The length of a trial, alone, is not a sufficient reason to bifurcate. However, the introduction of the complex corporate liability issues in the same proceeding with the underlying clinical negligence claim involving complex medical issues and requiring review of large hospitalization records from both Mary Black Hospital and Nursing Home, is likely to have an adverse effect on jury comprehension. Bifurcation of these issues will enhance the ability of the jury to reach a fair and just decision by presenting the evidence in a manner that is easier for jurors to understand and by limiting the number of legal issues the jury must address at any particular time. In reaching this conclusion, I find the corporate liability claims are complex, and require a different inquiry than the clinical issues. They are separate and distinct.

Plaintiff has identified four experts, and argues bifurcation will prejudice them by requiring the testimony of these experts at two separate trials. I disagree with this assessment. Plaintiffs' first named expert is Mary Bruno, a registered nurse. Plaintiffs state she will testify as

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to negligent wound care and nursing care, as well as governmental standards and regulations governing the same. This is pertinent to the clinical issues. Plaintiffs' second named expert is Jay S. Copeland, M.D. According to Plaintiffs, he will testify as to causation for the removal of Lawrence Morrow's penile implant. This, again, is pertinent to the clinical issues. Plaintiffs' third named expert is Bruce Engstrom, CPA. Plaintiffs state he will testify as to the parent corporation's control over Nursing Home. This is clearly directed to the non-clinical, corporate liability issues. Likewise, Plaintiffs' fourth named expert, Byron Arbeit, is a former nursing home administrator, who Plaintiffs state will testify as to effects the non-facility entities have on the facility's operation, including the analysis of corporate structure and control by non-facility entities of the nursing home facility. Again, this is directed to the non-clinical issues of upstream corporate liability, distinct from the clinical issues.

Plaintiffs further argue bifurcation will serve to delay resolution, to the detriment of the Plaintiffs. However, bifurcation will facilitate an earlier trial in which the Plaintiffs' claims against Nursing Home can be adjudicated. As it presently stands, this case is more than three years old, and trial is slated to be scheduled in the spring of 2011. However, the multitude of discovery requests and discovery disputes to date regarding the corporate liability claims lead the court to conclude there would be a substantial delay in the trial of the Nursing Home case if these issues are not bifurcated. For example, this Court has previously ruled that Plaintiffs could not discover corporate financial information. This is an issue that requires the Court to balance the right of the Plaintiffs to fully investigate the facts surrounding their claim against the defendants' rights to be protected against overly burdensome and unreasonable requests in pursuit of a "fishing expedition." However, should this Court at some time modify its earlier ruling so as to allow some discovery of this issue, it is likely to consume substantial pre-trial

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13

preparation time, delaying the trial of these corporate liability claims. Thus, contrary to Plaintiffs' assertion, bifurcation will serve the purpose of providing Plaintiffs an early adjudication of their personal injury claims against Nursing Home, as well as any punitive damage claim against Nursing Home. Any delay in trying the non-clinical issues caused by the discovery process and pre-trial preparation is not increased by bifurcation. Nor does bifurcation jeopardize Plaintiffs' ability to impose Nursing Home's liability upon the remaining defendants or seek punitive damages against the remaining defendants based upon direct liability theories.

I also conclude bifurcation will serve to diminish the chance of prejudice to defendants. Many of the Plaintiffs theories for attaching liability to the non-nursing home defendants require a showing of fraud and misuse of control. These are elements that have the capability of inflaming a jury, which would be an improper external force in determining actual damages. The award of actual damages is based upon the amount of damage proven at trial, and should not be influenced by the degree of reprehensibility. Such external forces are only proper in the consideration of punitive damages. Bifurcation will reduce the possibility of this improper influence without reducing the Plaintiffs' ability to receive full recovery for any corporate reprehensibility through the assertion of punitive damages in the second jury trial proceeding. The potential to inflame the emotions, passions and prejudice of the jury and confuse the jury would be reduced substantially by bifurcating the trials.

With regard to the Plaintiffs' claims of secondary corporate liability based upon piercing the corporate veil, this Court has been assigned this case under a complex litigation status, and will retain jurisdiction over all aspects of the bifurcated proceedings through the trial stage. Thus, this Court can oversee the expeditious completion of discovery and scheduling of trial on all non-clinical issues in a timely fashion, to avoid prejudice to either party. In doing so, the

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Court will be able to direct the second jury as to all issues decided in the trial of the clinical issues, in the same fashion the Court would charge a jury in any case in which a verdict is directed on the issues of liability and actual damages. Conversely, should the jury deny relief to Plaintiffs against Nursing Home, the remaining issues are rendered moot, thereby saving the parties the time and expense of preparing and trying the non-clinical corporate liability issues.

The potential benefit of bifurcation to the Court, the judicial system and the parties' resources will be substantial, while the likelihood of reaching a final disposition in a more efficient and expeditious manner will be greatly increased.

CONCLUSION

Based on the foregoing analysis, this Court concludes bifurcation of the trial of the clinical issues involving the alleged negligence and recklessness against Nursing Home and the trial of the remaining issues involving the theories of liability against the non-facility defendants should be bifurcated, and all discovery related to the non-clinical issues should be stayed pending the trial of the clinical issues against the defendant Nursing Home.

NOW THEREFORE, IT IS

ORDERED that:

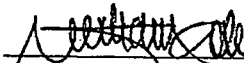
- 1) Defendants' Motion to Bifurcate is **GRANTED**;
- 2) The Court will conduct separate jury trials on the issues of this case in the following sequence:
 - a. Plaintiffs claims of actual and punitive damages against the Defendant, THI of South Carolina at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg, to include all post trial motions;

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- 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 hereby stayed pending the further order of this Court as to all issues of liability non-facility defendants including, but not limited to, discovery regarding corporate finances, structure, history, supply contracts, inter-corporate contracts, and non-entity corporate affairs.

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IT IS SO ORDERED.



 Hon. J. Derham Cole
 Circuit Court, Seventh Circuit

Spartanburg, South Carolina
 Dated: March 3, 2011

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2007-CP-42-4601

Lawrence E. MORROW, et al.,

FUNDAMENTAL LONG-TERM CARE HOLDINGS,
LLC, et al.,

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other

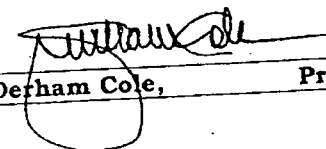
ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

This matter came before this court on **plaintiffs' motions**; to **reconsider** and **clarification** of order for **bifurcation**; to **exclude** cumulative defense **experts**; to **compel** a 30(b)(6) witness deposition; to **compel** deposition of **Ken Tabler**; and defendant FLTCH's **motion to dismiss** and defendants' **motion for protective order** (Tabler).

After consideration of the record, memoranda submitted, and the argument of counsel, this court finds plaintiffs' **motions to reconsider** and for clarification and to **exclude** experts should and are therefore **denied**. Plaintiff's **motion to compel** 30(b)(6) and Tabler's deposition should be and is therefore **granted**. Defendant FLTCH's **motion to dismiss** and defendants' **motion for protective order** should be and are therefore **denied**.

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J. Derham Cole, Presiding Judge

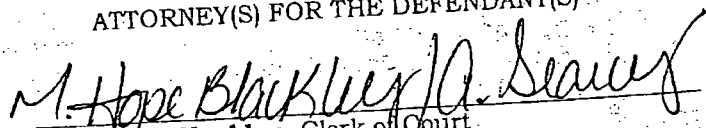
This judgment was entered on the 24th day of **October, 2011**, and a copy mailed first-class this 24th day of **October, 2011** to attorneys of record or to parties (*when appearing pro se*) as follows:

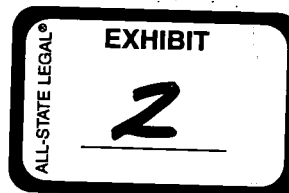
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


M. Hope Blackley, Clerk of Court



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; THI of Baltimore
Management, LLC; THI of South Carolina at Magnolia
Place at Spartanburg, LLC d/b/a Magnolia Place at
Spartanburg,

Defendants,

Of whom 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 are,

Respondents/Appellants.

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JAN 25 2012

SC Court of Appeals

Case No. 2007-CP-42-4601

I, Russell G. Hines, do hereby certify that a copy of the **Respondents/Appellants' Memorandum Addressing Appealability** was sent to counsel for the Appellants/Respondents (i.e., counsel for all respondents/adverse parties to the Respondents/Appellants' appeal) via United States Mail, postage pre-paid on January 23, 2012 addressed as follows:

Gary W. Poliakoff, Esquire
Poliakoff & Associates, P.A.
P.O. Box 1571
Spartanburg, SC 29304

and

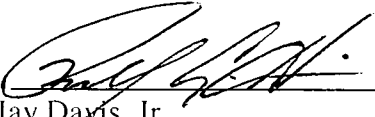
Raymond P. Mullman, Esquire
Poliakoff & Associates, P.A.
P.O. Box 1571
Spartanburg, SC 29304

<SIGNED ON THE FOLLOWING PAGE>

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SC Court of Appeals

Respectfully submitted,

YOUNG CLEMENT RIVERS LLP

By:  _____
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Charleston, SC 29402

Telephone: (843) 577-4000

and

JOHNSON, TRENT, WEST & TAYLOR, LLP

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Attorneys for the Respondents/Appellants

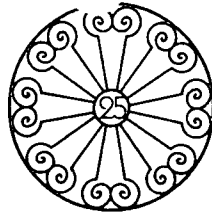
Charleston, South Carolina

Dated: 1/23/12

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YCR LAW
Young Clement Rivers, LLP

Elizabeth R. O'Neil
Paralegal

Direct Dial: (843) 724-6658
Direct Fax: (843) 579-2936
E-mail: eonil@ycrlaw.com

January 23, 2012

VIA FACSIMILE and U.S. MAIL

The Honorable Tanya A. Gee
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Lawrence E. Morrow and Evelyn M. Morrow vs. Fundamental Long-Term Care Holdings, LLC, et al.*
Case No.: 2007-CP-42-4601
Claim No.: AIG Claim# 027-089-388/ HBLM# 0723767
YCR File: 14347-20100252

Dear Ms. Gee:

Enclosed for filing in the above matter please find the original and seven (7) copies of Respondents/Appellants' Memorandum Addressing Appealability with exhibits. Also enclosed are the original and two (2) copies of a Proof of Service concerning same.

Kindly return one (1) clocked copy of each document to us in the self-addressed, stamped envelope provided.

Thank you, in advance, for your assistance.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Elizabeth R. O'Neil
Paralegal

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ERO/ero
Enclosures
cc: Gary W. Poliakoff, Esquire
Raymond P. Mullman, Jr., Esquire