

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

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, ..... Petitioners,

v.

Fundamental Long-Term Care Holdings, LLC; ..... Respondents.

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,

---

APPENDIX

Volume II

---

Gary W. Poliakoff  
Raymond P. Mullman, Jr.  
Poliakoff & Associates, P.A.  
215 Magnolia Street  
Post Office Box 1571  
Spartanburg, South Carolina 29304  
864-582-5472  
864-582-7280 (facsimile)

M. Chad Trammell  
The Trammell Law Firm, P.L.L.C.  
418 N. State Line Avenue  
Texarkana, Arkansas 71854  
870-779-1860  
870-779-1861 (facsimile)  
Attorneys for Petitioners

D. Jay Davis, Jr.  
William L. Howard, Sr.  
Russell G. Hines

Young Clement Rivers, L.L.P.  
 Post Office Box 993  
 Charleston, South Carolina 29402  
 864-577-4000

Lori D. Proctor  
 Serpe, Jones, Andrews, Callender & Bell,  
 P.L.L.C.  
 America Tower  
 2929 Allen Parkway, Suite 1600  
 Houston, Texas 77019  
 713-425-4400  
 Attorneys for Respondents

INDEX

Motion to Bifurcate .....	2
Memorandum in Support of Defendants' Motion to Bifurcate .....	13
Plaintiffs' Memorandum in Opposition to Bifurcate .....	23
With Exhibits 4, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 20, 21, 22, 23, 24, 25, 27, and 28	
Order Granting Motion to Bifurcate and Motion to Stay Discovery .....	304
Motion to Reconsider the Court's Order on Bifurcation, or, in the Alternative, for Clarification .....	320
With Exhibit 4	
Defendants' Response to Plaintiffs' Motion to Reconsider the Court's Order on Bifurcation .....	353
Order Denying Plaintiffs' Motion to Reconsider the Court's Order on Bifurcation	358
Appellants/Respondents' Memorandum of Law on Appealability of "Bifurcation" Order .....	359
Respondents/Appellants' Memorandum Addressing Appealability .....	384
Order (Court of Appeals) .....	408
Petition for Rehearing or Rehearing <i>En Banc</i> .....	410
With Exhibits 1, 6, 7, 9, 11, 14, 16, 17, 18, 20, 24, and 25	
Respondents/Appellants' Return to Appellants/Respondents' Petition for Rehearing or Rehearing <i>En Banc</i> .....	551
Order (Court of Appeals) .....	567

[The remaining portion of the Appendix is composed of a copy of  
 the documents listed in the Index.]

## AFFIDAVIT

My name is Kim Copeland. - KC

I was a Dietary Worker at Magnolia Place of Spartanburg from 1999-2008.

I worked all the shifts. - KC

I worked in the kitchen but also was out on all the halls so I saw what was going on all over the place. - KC

I quit because I got my CNA license and want to work at another place. - KC

I saw Mr. Morrow in his wheelchair out on the halls sometimes but I don't remember going into his room. - KC

Magnolia Place was a bad nursing home and the residents didn't get good care there. - KC

They were short-handed all the time and the CNAs were always complaining about not having enough help. - KC

On 2<sup>nd</sup> shift each CNA had about 13 residents each. There was no way a CNA could give good care to 13 people. - KC

At least three days a week I saw residents soaking wet with urine and with brown rings on their sheets. - KC

It was apparent to me that they hadn't been changed in a long time.

I helped in the dining room with feeding residents. -KC

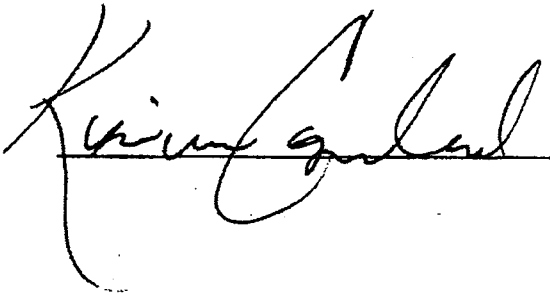
I saw aibs pick up trays from residents even though they weren't done eating. -KC

They did this because they were in a hurry from being so short-handed. -KC

The food wasn't very good and the residents complained about the quality. -KC

Many residents complained about not getting good care. -KC

This statement is true to the best of my knowledge and no promises or threats have been made to me.



## AFFIDAVIT

My name is Jamica Mayes -  
I was a CNA at Magnolia Place of  
Spartanburg from 2004 - Sept 2007. - am  
I worked 2<sup>nd</sup> shift on Unit 2. - am  
I quit to go to school. - am

We were short-handed at least 6-7  
times a month. - am

When we were short on the 2<sup>nd</sup>  
shift we had three aids instead of  
the four we needed. - am

When we were short we had about  
4x residents to take of. - am

We couldn't make a structured round  
when we were short. It seemed like  
we just going all over all the time. - am

The aids complained all the time  
about not having enough help but we  
never got any of the help we asked  
for. - am

We had lots of help was there  
and the office help came out onto the  
halls. When DAEC left all the extra  
help disappeared and the office workers  
went back to their offices. - am

I saw residents soaked with urine  
and with brown vives on their sheets. - JM

I saw gaps and holes in the Aids.  
The management made us fill in the  
blanks later even though we couldn't  
remember that far back or even if we  
had given the care. I did that  
because I didn't want to get written  
or fined. - JM

We ran out of pads or wipes or  
other things like that. - JM

This statement is true to the best of my knowledge and no promises or threats have been made to me.

Jennica Mearns

## AFFIDAVIT

My name is Kim (Wright) Gracos - KW (K.Hamm)

I was a CNA at Magnolia Place of Spartanburg from around 200~~6~~ or 200~~7~~ to 200~~6~~ or 200~~7~~. KW

I worked all the halls and all the shifts. -KW

I was terminated because I signed a letter for another CNA about her working full-time at Magnolia Place. KW

Before there I had never been in trouble and had never had any problems. KW

We were short-handed at Magnolia Place all the time. -KW!!!

We usually had only two aides for 44 residents on each unit. We usually had only one nurse each unit. KW

I did the best job I could but I couldn't get everything done that needed to be done for the residents. KW

I felt bad about that and it bothered me a lot. -KW

Many of us aides complained all the time about not having enough help but it never did any good. We still stayed

Kim (Wright)  
Gaines

short-handed all the time. KW

We had a large turnover of staff. It seemed like every time I turned around there were new people there. KW

I never saw the Administrator or the Don out on the halls unless DHEC was there. When DHEC was there they put on a big show but when DHEC left they went back to their offices and took smoke breaks all the time. KW!!!!

The only time we had enough help was when DHEC was there. When DHEC left the extra help disappeared and we went back to being short-handed. KW

It was impossible to give good care when we were short-handed. KW

Every day I found residents urine-soaked and with brown rings on their sheets. KW

Residents did not get turned and repositioned every two hours because we didn't have enough time or enough help. KW

I worked many double-shifts because we were so short. KW

I saw blanks and gaps in the ADLs. KW

(2)

Kim Gailos.

Some aids filled in the blanks  
2-3 days later. KW

Sometimes we ran out of gloves.  
When that happened we had to work  
without them. ~~We~~ We fixed in rooms if ~~they~~  
there was some left

---

This statement is true to the best of my knowledge and no promises or threats have been made to me.

*Ken Wright Gaines*

## AFFIDAVIT

My name is Margie Markuson. - m.m

I was a CNA at Magnolia Place of Spartanburg from 1992-2005 and from April 2007 - August 2009. - m.m

I worked 3<sup>rd</sup> shift on all the halls. -

I was terminated because of supposed insubordination. That happened when a traveling nurse told me to empty trash that the 2<sup>nd</sup> shift had left us. I didn't do it because they weren't supposed to leave trash for us and I wanted the day shift to see it for themselves. - m.m

We were short-handed all the time of the 3<sup>rd</sup> shift. We usually had only two aides for 44 residents. - m.m

When we were short-handed it was impossible to properly care for the residents. - m.m

The aides complained all the time about not having enough help but it never did any good. The Administrator and DON told us that that was all DHEC allowed so

that was what we had to work with. - m.m

Magnolia Place had a lot of extra help when DHEC was there. All the office

people came out onto the halls and pretended to do their jobs. when DITEC left things went back to normal. -mm

I constantly found residents soaked with urine and with brown rivings on their sheets. I could tell they had been like that for longer than they should have been. -mm

Residents did not get turned on schedule as they should have. -mm

There wasn't just enough time to get everything done. -mm

I saw blanks and skips in the Aids. Don Margaret Keller tried to make me just fill in the blanks later but I refused to do that. -mm

I know other aids just filled in the blanks even though they didn't know if the care they had charted had really be given. -mm

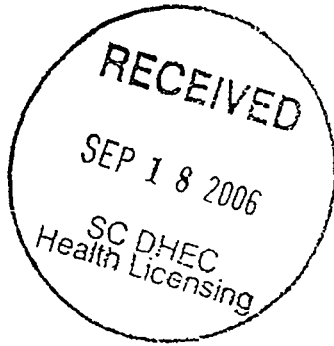
There was a CNA that used to come to work every weekend while drunk. Some days they sent her home and some days they let her work. Nothing was ever done at her doing this but I think she finally got Terminator in 2010 or this year. -mm

We sometimes ran out of supplies and

had to get them from Argentina Manor.  
we ran out of pads and gloves. — m.m.  
Nurses wouldn't help the aides, even  
when we were behind in our work. — m.m.  
They wouldn't even answer call lights. — m.m.  
I saw call lights moved where residents  
couldn't get to them. — m.m.

This statement is true to the best of my knowledge and no promises or threats have been made to me.

Margaret Malupson



September 14, 2006

VENNID 1102

Q 9/19  
RC 7/19  
NM 9/19  
Pam \_\_\_\_\_

change for each name of mgt.

**Arent Fox**  
ATTORNEYS AT LAW

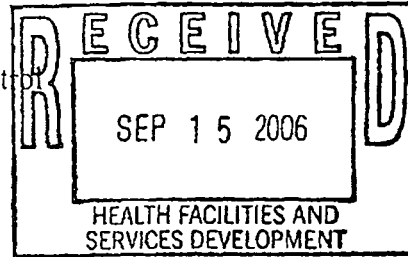
*Margolin  
Street  
Spunenberg*

**Lauren Tabak**  
212.492.3288 DIRECT  
212.484.3990 FAX  
tabak.lauren@arentfox.com

Reference Number  
026644-00022

**VIA FEDEX**

Bureau of Health Facilities and Services Development  
South Carolina Department of Health and Environmental Control  
2600 Bull Street  
Columbia, SC 29201-1708



Re: Management Changes

To Whom It May Concern:

We are writing to notify you of certain changes involving THI of Baltimore Management, LLC ("THIBM"), the current manager of the licensed skilled nursing facilities (the "Facilities") set forth on Schedule I attached hereto.

I. Corporate Restructuring and Name Change of THIBM

Prior to October 1, 2006, THIBM will change its name to Fundamental Clinical Consulting, LLC. For purposes of this letter, we will continue to refer to Fundamental Clinical Consulting, LLC as "THIBM."

Currently, THIBM is a wholly-owned subsidiary of THI of Baltimore, Inc., which is a wholly-owned subsidiary of Fundamental Long Term Care Holdings, LLC ("Fundamental"). Also prior to October 1, 2006, THIBM will become a wholly-owned subsidiary of Fundamental.

II. Services Provided

Pursuant to the terms of the current agreements with the Facilities, THIBM provides both administrative and clinical support services to the Facilities. Effective October 1, 2006, all responsibilities relating to administrative support services will be transferred to Fundamental Administrative Services, LLC, which is also a wholly-owned subsidiary of Fundamental. THIBM will continue to provide clinical support services to the Facilities.

Please be advised that there is no change in the licensed operators of the Facilities. Please accept this letter as official notice of the above-noted changes. It is our understanding

NYC/295162.1

Arent Fox PLLC  
1675 Broadway

New York, NY 10019-5820

212.484.3900 PHN

NEW YORK  
212.484.3990 FAX

WASHINGTON  
www.arentfox.com



Bureau of Health Facilities and Services Development  
September 14, 2006  
Page 2

that no further action is needed with your office in regard to these changes. If you have any questions, please do not hesitate to contact us.

Sincerely,

*Lauren Tabak*

Lauren Tabak

cc: Melissa Warlow

NYC/295162.1

Schedule I

Facility Name	Facility Address	Licensee	Tax Identification Number
Camp Care	59 Blackstock Road Inman, SC 29349	THI of South Carolina at Camp Care, LLC	20-0041552
Driftwood Rehabilitation & Nursing Center	2375 Baker Hospital Blvd. Charleston, SC 29405	THI of South Carolina at Charleston, LLC	20-0041439
Golden Age - Inman	51 North Main Street Inman, SC 29348	THI of South Carolina at Golden Age at Inman, LLC	20-0041714
Inman Healthcare	82 North Main Street Inman, SC 29349	THI of South Carolina at Inman, LLC	20-0041639
Magnolia Manor - Columbia	1007 North King Street Columbia, SC 29223	THI of South Carolina at Columbia, LLC	20-0041831
Magnolia Manor - Greenville	411 Ansel Street Greenville, SC 29601	THI of South Carolina at Greenville, LLC	20-0041852
Magnolia Manor - Greenwood, Inc.	1415 Parkway Drive Greenwood, SC 29848	THI of South Carolina at Greenwood, LLC	20-0041618
Magnolia Manor - Inman	63 Blackstock Road Inman, SC 29349	THI of South Carolina at Magnolia Manor- Inman, LLC	20-0041689
Magnolia Manor - Moncks Corner	505 S. Live Oak Road P.O. Box 1487 Moncks Corner, SC 29461	THI of South Carolina at Moncks Corner, LLC	20-0041817
Magnolia Manor - Rock Hill	127 Murrah Drive Rock Hill, SC 29732	THI of South Carolina at Rock Hill, LLC	20-0041729
Magnolia Manor of Spartanburg	375 Serpentine Drive Spartanburg, SC 29303	THI of South Carolina at Spartanburg, LLC	20-0041754

Bureau of Health Facilities and Services Development

September 14, 2006

Page 4

Magnolia Place - Greenville	35 Southpointe Drive Greenville, SC 29607	THI of South Carolina at Magnolia Place at Greenville, LLC	20-0041869
Magnolia Place at Spartanburg	8020 White Avenue Spartanburg, SC 29203	THI of South Carolina at Magnolia Place at Greenville, LLC	20-0041794

CLINICAL SUPPORT AGREEMENT

DATED AS OF Sept 11, 2006

by and between

Fundamental Clinical Consulting, LLC  
(CONTRACTOR)

and

THH of South Carolina at Magnolia Place at Spartanburg, LLC  
(OPERATOR)

8020 White Avenue  
Spartanburg, SC 29303



EXHIBIT A

Services

- (a) Assist Facility in complying with Facility's clinical policies, procedures and guidelines, and federal and state law.
- (b) Assist with survey matters.
- (c) Coordinate and maintain facility operations improvement data.
- (d) Maintain comprehensive survey result database.
- (e) Provide such other services as shall be mutually agreed upon by Contractor and Operator.

ADMINISTRATIVE SUPPORT AGREEMENT

DATED AS OF 1st Oct 2006

by and between

Fundamental Administrative Services, LLC  
(CONTRACTOR)

and

THI of South Carolina at Magnolia Place at Spartanburg, LLC  
(OPERATOR)

8020 White Avenue  
Spartanburg, SC 29303

EXHIBIT A

Services

(a) Provide the following payroll and personnel services to the Operator: administration of Employee payroll matters; administration and design of Employee benefits programs; management of a human resources program relating to Employee recruiting and retention; training of Employees; advice on Employee relations and related issues; management and design of the Employee incentive and bonus plans and other compensation programs; and establishment and management of retirement plans.

(b) Provide or secure from third party contractors all necessary telephones, computers, faxes, communications, intranet, internet, computer services, software systems, and other central network services and systems.

(c) Provide bookkeeping, accounting and related administrative support, budgeting, forecasting, financial analysis and reporting and maintain separate books, records and accounts for the Operator reflecting its own revenues and expenses.

(d) Assist in securing insurance.

(e) Assist in connection with regulatory reporting and preparation of cost reports.

(f) Provide billing and collection services.

(g) Provide in-house legal counsel and related support, and assist in securing outside counsel as needed.

(h) Assist in obtaining and maintaining licensure and certification.

(i) Provide accounts payable services.

(j) Provide access to national contracts and other purchasing services.

(k) Provide advice regarding the Health Insurance Portability and Accountability Act.

(l) Assist in the preparation and filing of tax returns.

Provide such other services as shall be mutually agreed upon by the Operator and Contractor.



1 A. YEAH, I MEAN, GENERALLY SPEAKING, TO MANAGE  
2 PROFESSIONAL LIABILITY AND GENERAL LIABILITY CLAIMS  
3 ACROSS THE COUNTRY.

4 Q. FOR?

5 A. FOR -- I AM EMPLOYED BY FUNDAMENTAL ADMINISTRATIVE  
6 SERVICES, LLC. HOWEVER, THERE ARE CONTRACTS WITH  
7 EACH INDIVIDUAL FACILITY WITHIN THE FUNDAMENTAL  
8 FAMILY THAT I PROVIDE SERVICES FOR PURSUANT TO THE  
9 ADMINISTRATIVE SERVICES CONTRACT.

10 Q. HOW MANY FACILITIES WOULD THAT BE?

11 A. THE PRESENT TIME, I'M JUST GOING TO GUESS AROUND  
12 100, BUT I CAN DOUBLE CHECK ON THAT NUMBER AND GET  
13 YOU SOMETHING MORE DEFINITE.

14 Q. SO, ALL OF THOSE FACILITIES, APPROXIMATELY 100  
15 FACILITIES COME UNDERNEATH THE FUNDAMENTAL GROUP OF  
16 FACILITIES. IS THAT CORRECT?

17 A. NOT NECESSARILY. NOT UNDER FUNDAMENTAL  
18 ADMINISTRATIVE SERVICES, LLC, UNDER T.H.I. OF  
19 BALTIMORE, WHICH YOU REMEMBER -- T.H.I. OF  
20 BALTIMORE, INC., WHICH AS YOU RECALL, STARTED OFF AS  
21 PRIMARILY IF NOT ENTIRELY OLD I.H.S. OPERATIONS.

22 Q. WHAT'S THE DIFFERENCE BETWEEN FUNDAMENTAL  
23 ADMINISTRATIVE SERVICES, LLC, AND FUNDAMENTAL LONG-  
24 TERM CARE ---

25 A. HOLDINGS, LLC.

- 1 Q. HOLDINGS, LLC, RIGHT, THAT'S WHERE I WAS GETTING. I  
2 WAS MAKING SURE I SAID THAT RIGHT.
- 3 A. FUNDAMENTAL LONG-TERM CARE HOLDINGS, LLC, DOESN'T DO  
4 ANYTHING. IT'S A HOLDING COMPANY. IT WAS THE  
5 ACQUISITION COMPANY. IT DOESN'T HAVE ANY EMPLOYEES.  
6 FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, HAS  
7 EMPLOYEES AND HAS CONTRACTS TO PROVIDE VARIOUS  
8 SERVICES WITHIN THE FUNDAMENTAL FAMILY AND I BELIEVE  
9 OUTSIDE THE FUNDAMENTAL FAMILY, AS WELL.
- 10 Q. WHAT SORTS OF SERVICES?
- 11 A. LEGAL SERVICES, PROFESSIONAL LIABILITY SERVICES,  
12 ACCOUNTING SERVICES. THOSE ARE THE PRIMARY SERVICES  
13 THAT ARE PROVIDED.
- 14 Q. WHO DOES YOUR PAYCHECK COME FROM?
- 15 A. FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC.
- 16 Q. OKAY. WHO DID YOU TALK TO TO PREPARE FOR TODAY'S  
17 DEPOSITION?
- 18 A. JUST COUNSEL.
- 19 Q. OKAY. DID YOU READ ANY DEPOSITIONS?
- 20 A. NOT IN PREPARATION FOR TODAY. HAVE I IN THE PAST?  
21 I'M SURE. I'M SURE THAT I HAVE.
- 22 Q. OKAY.
- 23 A. THIS CASE IS PART OF MY JOB.
- 24 Q. OKAY. SO, HAVE YOU READ ANY DEPOSITIONS THAT  
25 PERTAIN TO THIS CASE DIRECTLY?

1 BEEN DEPOSED AS A 30(B)(6)?

2 A. PROBABLY NOT. I'VE PROBABLY GIVEN DEPOSITIONS THAT  
3 ARE NOT 30(B)(6), BUT OFF THE TOP OF MY HEAD, I  
4 DON'T REMEMBER.

5 Q. BUT YOU'VE BEEN DESIGNATED AS A 30(B)(6) BEFORE?

6 A. I HAVE.

7 Q. AND CAN YOU TELL ME WHAT COMPANIES YOU WERE  
8 DESIGNATED, YOU'VE BEEN DESIGNATED AS A 30(B)(6)?

9 A. I WOULD SAY VARIOUS SUBSIDIARIES, INDIRECT  
10 SUBSIDIARIES OF T.H.I. OF BALTIMORE, INC., AND  
11 VARIOUS FORMER LONG-TERM CARE SUBSIDIARIES OF  
12 INTEGRATED HEALTH SERVICES, INC.

13 Q. OKAY.

14 A. MAYBE -- I BELIEVE I.H.S. LONG-TERM CARE, INC., AND  
15 I THINK THAT'S IT. I MEAN, THAT'S KIND OF A BROAD  
16 SPECTRUM.

17 Q. AND WHEN YOU SAY VARIOUS SUBSIDIARIES, DOES THAT  
18 INCLUDE FACILITIES THEMSELVES?

19 A. YES, THAT'S WHAT I WAS REFERRING TO WHEN I SAID  
20 INDIRECT SUBSIDIARIES OF T.H.I. OF BALTIMORE, INC.  
21 I'M REFERRING TO FACILITY LEVEL ENTITIES.

22 Q. OKAY. DO YOU KNOW WHAT THE PRIMARY ISSUES ARE IN  
23 THIS CASE?

24 A. I BELIEVE THAT I DO.

25 Q. WHAT DO YOU UNDERSTAND THEM TO BE?

1 A. I UNDERSTAND THAT THERE ARE ALLEGATIONS OF WOUNDS  
2 THAT DEVELOPED AND ALSO ALLEGATIONS THAT THE  
3 FACILITY FAILED TO TIMELY TRANSFER MS. BROWN TO A  
4 MORE ACUTE CARE SETTING.

5 Q. AND TODAY, WHO ARE YOU HERE TO TESTIFY ON BEHALF OF?

6 A. COULD I SEE A COPY OF THE DEPOSITION NOTICE?

7 Q. I WAS GOING TO ASK YOU IF THAT WOULD HELP. I'VE GOT  
8 ENOUGH COPIES FOR THE WHOLE TABLE, PROBABLY.

9 **BY MS. HARRILL:**

10 AND I'M GOING TO GO AHEAD AND MARK THIS, NIKKI,  
11 AS EXHIBIT ONE.

12 (COURT REPORTER MARKS PLAINTIFF'S EXHIBIT NUMBER ONE,  
13 NOTICE OF DEPOSITION, ATTACHED.)

14 **BY THE WITNESS:**

15 THIS IS PARTICULARLY THE DEPOSITION NOTICE FOR  
16 T.H.I. OF BALTIMORE, INC.

17 **EXAMINATION RESUMED BY MS. HARRILL:**

18 Q. AND ARE YOU DESIGNATED TO TESTIFY ON BEHALF OF ALL  
19 OF THOSE ENTITIES?

20 A. I THINK THAT'S FAIR TO SAY, WITH THE EXCEPTION OF  
21 T.H.I. OF BALTIMORE, LLC, WHICH WE KNOW DOESN'T  
22 EXIST.

23 Q. OKAY. AND I'M GOING TO JUST GET RID OF THEM,  
24 BECAUSE I HAVE A STACK OF THEM, AS WELL. AND ALL OF  
25 THESE DEPOSITIONS, JUST SO WE'RE CLEAR, I CAN GIVE

1 GUIDELINES CHANGED. SO, THE I.H.S. POLICIES AND  
2 PROCEDURES WOULD HAVE BEEN UPDATED DURING THAT TIME  
3 PERIOD.

4 Q. AS JUST A MATTER OF COURSE?

5 A. AS A MATTER OF COURSE.

6 Q. OKAY.

7 A. AND THEN, AT SOME POINT IN 2006 OR EARLY 2007, SO IT  
8 COULD HAVE BEEN DURING MS. BROWN'S RESIDENCY OR  
9 PERHAPS NOT, NEW GUIDELINES WERE PURCHASED FROM A  
10 THIRD PARTY COMPANY.

11 Q. OKAY.

12 A. THAT WERE TOTALLY SEPARATE AND DISTINCT FROM THE OLD  
13 I.H.S. POLICY AND PROCEDURES THAT WERE UPDATED.

14 Q. OKAY. SO, THE POLICIES ARE NOT DRAFTED BY --  
15 THEY'RE TOTAL THIRD PARTY DRAFTING POLICIES, ALL THE  
16 POLICIES THAT THE FACILITY USES ARE DRAFTED BY A  
17 THIRD PARTY THAT IS NOT A T.H.I. ENTITY, A  
18 FUNDAMENTAL ENTITY. IS THAT CORRECT?

19 A. THAT -- THAT'S CORRECT. THEY'RE PURCHASING IT FROM  
20 A TOTAL THIRD PARTY.

21 Q. AND WHO DOES THAT PURCHASING? I MEAN, WHO DECIDES  
22 WHAT POLICIES ARE PURCHASED?

23 A. I BELIEVE THAT PART OF THE CONTRACTED FOR SERVICES  
24 WITH FUNDAMENTAL CLINICAL CONSULTING PROVIDES THAT  
25 F.C.C. WOULD INITIATE THE PURCHASING IN ORDER TO GET

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

**C O P Y**

Jimmy Tisdale, )  
Individually and as )  
Personal Representative )  
of the Estate of Pearl )  
Tisdale, )

Plaintiff, )

vs. )

Lake Marion Nursing )  
Center and Clarendon )  
Health System, )

Defendants. )

Civil Action Numbers  
2008-CP-14-664 & 655

**DEPOSITION OF CHRISTOPHER J. PATTERSON, M.D.**

PURSUANT to Notice and/or Agreement, the deposition of CHRISTOPHER J. PATTERSON, M.D. was taken commencing at the hour of 10:10 A.M., on Wednesday, October 13, 2010, at the offices of Poliakoff & Associates, P.A., 215 Magnolia Street, Spartanburg, South Carolina.

ELAINE C. HAMBY, REPORTER

---

**ELAINE C. HAMBY**  
**Deposition & Court Reporter**  
**103 Hamby Drive**  
**Piedmont, South Carolina 29673**  
**(864) 295-4697**

1 a contract.

2 Q. Does Fundamental have any oversight capabilities?

3 A. Yes.

4 Q. In what way?

5 A. Well, they have corporate level people that aren't  
6 affiliated with one particular nursing home that are  
7 coming in the buildings and oversee and monitor the  
8 buildings from a corporate standpoint. They're a  
9 national company.

10 Q. When you say they're monitored from a corporate  
11 standpoint, what does that mean?

12 A. Well, they have many different activities. For  
13 instance they have nurse consultants that will come in  
14 and perform audits on the nursing homes, and look at  
15 their charts, and try to make sure that they're  
16 complying with the regulations. They also have more of  
17 administrative-type people that are involved that come  
18 in and look at things from an administrative  
19 standpoint.

20 Q. What entities would, what would be the specific name of  
21 those entities that you're referring to that would be  
22 coming in? I mean, is it Fundamental Health that's  
23 actually--

24 A. Fundamental Health employees, these people, and so they  
25 employ nurses; they employ pharmacists; they employ or

**Deposition of Christopher J. Patterson, M.D.**

1 contract with pharmacists; they also employ  
2 administrators that, you know, or say regional  
3 administrators that are over the buildings in their  
4 region.

5 Q. And they're all employees of Fundamental Health or do  
6 you know?

7 A. Either they're employee of Fundamental Health or  
8 they're contracted with Fundamental Health. I think  
9 that the pharmacy group has their own entity that is  
10 contracted by Fundamental Health. I think they're  
11 called Fundamental Consulting or something along those  
12 lines.

13 Q. Do you know if the owners of Fundamental have had any  
14 difficulties with the federal government?

15 A. Not that I've heard of.

16 Q. You haven't heard of them having to pay civil penalties  
17 for illegal kickbacks of anything like that.

18 A. I haven't heard of anything like that.

19 Q. How often do you go to Briarwood?

20 A. I go to Briarwood typically on a monthly basis.

21 Q. And you're still the medical director there, at Summit  
22 Place and Briarwood.

23 A. Yes.

24 Q. What other facilities do you go to on a monthly basis?

25 A. That'd be Easley Living Center, and The Cascades, and

1 . staff or anything else?

2 A. The only thing I do in that regard is when I meet with  
3 the Fundamental people at a national level on their  
4 medical director advisory board. They will show me  
5 some cost data on, for instance, the amount of money  
6 per day per resident they are spending on Medicare A  
7 patients so that's really the only data that I see, and  
8 I have nothing to do with the preparation of that data.  
9 I just see when they give me the presentation to show  
10 what is going on.

11 Q. You have no opinions about, I mean, whether or not what  
12 they are showing you is appropriate or inappropriate,  
13 that sort of thing, correct?

14 A. I think that when they are showing it to me, I think  
15 it's appropriate for them to show it to the board of  
16 medical directors for discussion purposes.

17 Q. You are not making a decision about whether or not what  
18 they are doing is appropriate or not?

19 A. Correct.

20 Q. When they show you those types of things, Fundamental,  
21 are they asking for input on how to reduce costs or  
22 what is the purpose of-

23 A. Either that or they are showing us what changes we made  
24 have done, you know, to see what we did made a  
25 difference.

1 Q. You mean as far as overhead?

2 A. As far as managing pharmaceutical costs because the  
3 physicians are significant drivers there. They are the  
4 ones writing for the medications.

5 Q. So there is a push, I guess, to some extent by folks  
6 like Fundamentals or whoever to try to keep those costs  
7 low?

8 A. Correct.

9 Q. Keep the overhead low?

10 A. Yes. And they look to us to help decide, for instance,  
11 you know, what medications should we be looking at,  
12 managing more aggressively, what are the opportunities  
13 for approval versus and drug persons that are  
14 commonly being used that shouldn't be being used. They  
15 look to physicians to help guide them on that.

16 Q. Do they have an annual conference for that?

17 A. I meet with the Medical Director Advisory Board three  
18 times a year.

19 Q. Is that here in South Carolina?

20 A. No. It's either at wherever the AMDA Conference is  
21 every year. It moves from city to city so they have  
22 one where the national AMDA Conference is, and then  
23 they have two in Las Vegas each year.

24 Q. AMDA does?

25 A. No, no. Fundamental does.

**OPERATING AGREEMENT  
OF  
FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC  
(a Delaware Limited Liability Company)**

OPERATING AGREEMENT, dated as of December 22, 2005, is made and entered into by and among FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC, a Delaware limited liability company (the "Company"), and each of the Members now or hereafter executing the signatory page hereof and admitted as Members of the Company (collectively referred to as the "Members").

**ARTICLE 1  
DEFINED TERMS; RULES OF CONSTRUCTION**

Unless otherwise indicated, capitalized words and phrases in this Agreement shall have the meanings set forth in the Glossary of Terms annexed hereto as Exhibit A. Unless the context of this Agreement requires otherwise, the plural includes the singular, the singular includes the plural, the part includes the whole and "including" has the inclusive meaning of "including without limitation." The words "hereof," "herein," "hereby," "thereunder" and other similar terms in this Agreement refer to this Agreement as a whole and not exclusively to any particular provision of this Agreement. All pronouns and any variations thereof shall be deemed to refer to masculine, feminine, or neuter, singular or plural, as the identity of the Person or Persons may require.

**ARTICLE 2  
ORGANIZATIONAL MATTERS**

2.1 Formation; Name; Purposes and Powers.

(a) Formation. The Company was formed under the name FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC as a Delaware limited liability company pursuant to the Delaware Limited Liability Company Act (the "Act"), upon the filing of the Certificate of Formation with the Secretary of State of Delaware on December 22, 2005.

(b) Name. The name of the Company is FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC and all business of the Company shall be conducted in such name or in any subsidiary or nominee entities formed from time to time upon approval of the Board of Managers of the Company.

(c) Purposes and Powers. The Company was formed for the following purposes and shall have the following powers:

(i) Business Purpose. The Company is in the business of managing and operating long-term care facilities, including skilled nursing facilities, long-term care hospitals and assisted living facilities.

(ii) General Powers. Subject to the limitations set forth in clause (i) above, the Company shall possess and may exercise all of the powers and privileges granted by

NEWYORK01 1090239v3 356634-000001 01/06/2006



the Act or by this Agreement, together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business purposes or activities of the Company.

2.2 **Principal Place of Business.** The principal office of the Company shall be located at c/o Troutman Sanders LLP, 405 Lexington Avenue, New York, New York 10174, Attn: Leonard Grunstein, Esq. or at such place or places as the Board of Managers (as such term is defined in **Section 4.1(a)** below) may designate from time to time.

2.3 **Term.** The term of the Company commenced on the date its Certificate of Formation was filed in the office of the Secretary of State of the State of Delaware (the "**Certificate of Formation**"), and shall continue until the winding up and liquidation of the Company and its business is completed as provided in **Article VIII** hereof.

2.4 **Filing of the Certificate of Formation.** The Board of Managers shall, from time to time, designate one or more "authorized persons," within the meaning of the Act, to execute, deliver and file any amendments, restatements, corrections or cancellation of the Company's Certificate of Formation, all in accordance with the provisions of this Agreement.

2.5 **Liability to Third Parties.** The debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the Company; and no Member or Manager (as such term is defined in the Act) shall be obligated personally for any such debt, obligation or liability of the Company solely by reason of being a Member or Manager of the Company.

**ARTICLE 3**  
**INTERESTS IN THE COMPANY;**  
**AUTHORIZATION AND ISSUANCE OF INTERESTS**

3.1 **Interests.**

(a) Authorization of Interests. A total of 1,000 units of equity membership interests in the Company (hereinafter referred to as "**Interests**") are hereby authorized for issuance, of which 1,000 are being issued contemporaneously herewith to the Members in the amounts set forth opposite each Member's name on **Schedule A** hereto.

(b) Capital Contributions. Each of the Members, in consideration of the issuance of its Interests, shall make, or has prior hereto made, capital contributions in the amount set forth opposite such Member's name on **Schedule A** hereto. A Capital Account shall be established for each Member on the books of the Company, which shall be maintained in accordance with the definition of Capital Account set forth in **Exhibit A**.

(c) Economic Identity of Interests. All Interests shall have identical economic rights, priorities and privileges.

(d) Voting. The holders of Interests shall each be entitled to one vote per Interest on all matters submitted to a vote or consent of Members.

a capital contribution to the Company in respect of such issuance in an amount equal to at least the fair market value per Interest so issued, determined at the end of the Fiscal Quarter immediately preceding the date on which such issuance occurs in accordance with generally accepted accounting principles consistently applied, multiplied by the number of Interests, as the case may be, to be issued to such Member.

3.4 **Loans and Advances by Members.** If any Member (or any affiliate thereof) shall, with the consent of the Board of Managers, loan or advance any funds to the Company (other than the capital contributions), including, without limitation, by way of funding a personal guaranty, letter of credit, surety or performance bond or other financial accommodation to the Company, such loan or advance shall not be deemed a contribution to the capital of the Company and shall not in any respect increase such Member's Interests in the Company. Such loan or advance shall constitute an obligation and liability of the Company and shall bear interest at a rate and be repayable on terms and conditions to be agreed to by the Members and the Board of Managers. Any reference in this Agreement to the payment of debts, obligations or liabilities of the Company shall be deemed to include any such loans from Members (or their affiliates), and, to the extent that law and agreements to which the Company is a party or is subject permit, and to the extent that the terms of such loans may require, such loans from Members (or their affiliates) shall be paid ahead of other general debts, obligations and liabilities of the Company and before any other Distributions of Cash Flow are made to any Members.

3.5 **Business Combinations.** It is intended that the Board of Managers of the Company shall have the maximum authority to cause the Company to enter into transactions involving the sale, merger, consolidation, or other business combination or related transaction, or sale of the membership interests of the Company or other disposition of any or all of its assets and properties by whatever method is utilized (collectively, a "Business Combination"), *provided that*, if under applicable law it is necessary for the Members of the Company to approve any such Business Combination, then if such Business Combination is approved by the Board of Managers, then each and every other Member of the Company shall have the right and obligation to approve such Business Combination and to participate in such Business Combination on the closing thereof, pro-rata in accordance with his Percentage Interest in the Company and each and every Member shall (1) execute and deliver such votes, proxies, written consents or other documents and instruments approving such Business Combination, and (2) execute and deliver such instruments of transfer, including assignments of membership interests and stock powers, as are necessary to sell, transfer, convey and assign their membership interests in the Company in connection with such Business Combination.

#### ARTICLE 4 MANAGEMENT

##### 4.1 Management of the Company.

(a) **Management by the Managers.** All management powers over the business and affairs of the Company shall be vested in the managers, who shall be designated by the Member(s) of the Company. The initial Managers shall be Murray Forman and Leonard Grunstein, and together the Managers shall be referred to as the "Board of Managers" of the

Company or the "Managers." The Manager(s) (or in their capacity as the Board of Managers) may appoint, remove and replace officers of the Company who shall have such authority as specified by the Managers or, if not specified, as is customary for the titles to which such officers are given. At each meeting of the Board of Managers the presence of a majority of the Managers then in office shall be necessary and sufficient to constitute a quorum for the transaction of business. In the absence of a quorum, a majority of those present at the time and place of any meeting may adjourn the meeting from time to time until a quorum shall be present and the meeting may be held as adjourned without further notice or waiver. Any one or more members of the Board of Managers may participate in a meeting of the Board of Managers by means of a telephone conference or other electronic communication allowing all persons participating in the meeting to hear each other. Except as otherwise expressly provided by the Certificate of Formation, this Agreement or applicable Law, each Manager shall be entitled to one vote, and all questions brought before the Board of Managers shall be determined by a majority of the votes cast at any meeting at which a quorum is present. Any action required or permitted to be taken by the Board of Managers may be taken without a meeting, notice or vote through a written consent to the action signed by the Managers having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all managers entitled to vote thereon were present and voted. Murray Forman will also be the President and Secretary of the Company with such authority as is customary for such respective positions.

(b) Powers of the Managers. The Managers shall have such powers as are granted to Managers of a limited liability company under the Act and all other powers granted under any other provision of this Agreement, and shall have full power and authority to carry out and perform all legal acts on such terms as the Managers shall, in their discretion, deem necessary or appropriate to conduct, or cause to be conducted, the business and affairs of the Company, including, without limitation:

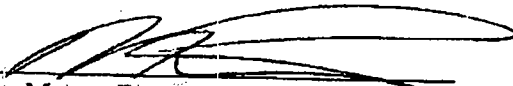
(i) authorizing, executing and delivering and performing services relating to the business of managing and operating long-term care facilities, including skilled nursing facilities, long-term care hospitals and assisted living facilities;


(ii) selling, exchanging, transferring or otherwise disposing of all or any portion of the assets and properties of the Company, including without limitation, real property, leasehold interests, shares of capital stock, partnership interests, membership interests, promissory notes, loans receivable and other instruments and securities;

(iii) incurring and refinancing debt of the Company, which may be secured or unsecured, recourse or non-recourse, including without limitation, lines of credit, working capital lines, letters of credit, accounts receivable financing and other asset based loans, and subjecting all or any portion of the Company's assets, including the membership interests of any subsidiaries and the promissory notes, loans receivable and collateral securing such debt, to liens and encumbrances securing such debt, and executing and delivering documentation thereof including revolving credit agreements, loan agreements, promissory notes and security and pledge agreements;

IN WITNESS WHEREOF, the parties have entered into this Agreement as of the day first above set forth.

**FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC**

By:   
Name: Murray Forman  
Title: Manager

By:   
Name: Leonard Grunstein  
Title: Manager

**Members:**

  
Murray Forman, as Member

  
Leonard Grunstein, as Member



# Application For License to Operate an Inpatient Care Facility

## Division of Health Licensing

In accordance with §44-7-260 and §44-71-10, of the South Carolina Code Ann. (Suppl. 2001) and Regulations 61-13, 61-16, 61-17, 61-78, 61-90, 61-93 and 61-103, licensees and prospective licensees must file an application under oath prior to operating a health care facility, and annually thereafter. Licenses are effective for a 12-month period following the date of issue.

1. A. Magnolia Place at Spartanburg  
(Name of facility to be licensed)

B. 8020 White Ave.  
(Street address or location)

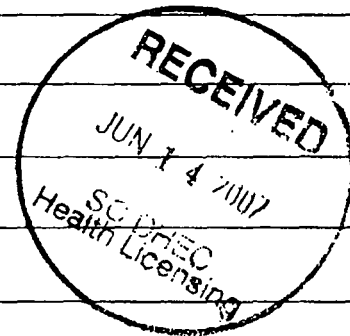
Spartanburg Spartanburg S.C. 29303 864  
(City) (County) (Zip code) (Telephone #) 542  
8515

C. \_\_\_\_\_  
(Mailing address if different) (City) (State) (Zip code)

D. \_\_\_\_\_  
(E-mail Address)

2. Reason for application (check one or more):

- A.  New activity or service (Initial License)
- B.  Renewal of license # NCF861 which expires August 31, 2007
- C.  Change of: (Attach copy of Certificate of Need (CON) letter of approval/exemption, if applicable.)
  - (1) licensee from \_\_\_\_\_  
to \_\_\_\_\_
  - (2) name of activity from \_\_\_\_\_  
to \_\_\_\_\_
  - (3) address of activity from \_\_\_\_\_  
to \_\_\_\_\_
  - (4) number of licensed units from \_\_\_\_\_ to \_\_\_\_\_



**NOTICE:** Your license must be renewed prior to the expiration date. The current licensee is responsible for renewal of the license prior to the expiration date regardless of any changes or pending approvals (i.e. ownership changes or bed increases/decreases) from the Department that are in progress at the time the license is due for renewal. To avoid a lapse in your license, please submit an application to renew the current license and a second application to effect the changes.

3. **Administrative Officer (Facility Contact):** Prefix: Mr.  Mrs.  Ms.  Dr.  Other: \_\_\_\_\_  
First Name: Patricia MI: A Last Name: Harris  
Generation: Sr.  Jr.  III  Other: \_\_\_\_\_ Suffix: MD  Ph.D.  RN  Other:   
Title: NHA

(Nursing Homes Only) Administrator's License Number: 632099 Expires: 6-30-07 As issued by the SC Board of Long Term Care Administrators, Department of Labor Licensing and Regulation)

4. Type of facility for which application is made: (Check only one category per application)

A.  **Intermediate Care Facility for the Mentally Retarded (Regulation 61-13)**

Number of Beds: \_\_\_\_\_

B.  **Hospital or Institutional General Infirmiry (Regulation 61-16)**

General Hospital     Institutional General Hospital     Institutional General Infirmiry  
 Specialized Hospital (Specialty): \_\_\_\_\_

Certified to perform abortions?  Yes;  No (Request to Health Licensing must be on file.)

Number of beds to be licensed: General \_\_\_\_\_; Psychiatric \_\_\_\_\_; Rehabilitation \_\_\_\_\_;  
Substance abuse \_\_\_\_\_; **Total Number of Beds:** \_\_\_\_\_

Do you operate a swing bed unit?  Yes;  No. Number of Beds: \_\_\_\_\_

Does your hospital provide perinatal (obstetrics and newborn) services?  Yes;  No.

If yes, indicate the appropriate level:  I;  II;  III;  III Regional Center.

If licensed at Level II or III, how many NICU and Neonatal Special Care (Intermediate and Continuing Care) neonates are you capable of caring for? NICU \_\_\_\_\_ Neonatal Special Care \_\_\_\_\_

Are you JCAHO accredited?  Yes;  No. Date of Last JCAHO Inspection: \_\_\_\_\_

C.  **Nursing Home (Regulation 61-17)**

(1)  Nursing Home    Number of Beds: 88

(2)  Institutional Nursing Home    Number of Beds: \_\_\_\_\_

Total Number of Beds: 88

D.  **Residential Treatment Facility for Children & Adolescents (Regulation 61-103)**

Number of Beds: \_\_\_\_\_

E.  **Chiropractic Facility (Regulation 61-90)**    Number of Beds: \_\_\_\_\_

F.  **Treatment Facility for Psychoactive Substance Abuse or Dependence (Regulation 61-93)**

\_\_\_\_\_ Number of Medical Detoxification Beds (Requires CON Approval)

\_\_\_\_\_ Number of Social Detoxification Beds

\_\_\_\_\_ Number of Residential Treatment Program Beds

\_\_\_\_\_ Total Number of Beds to be Licensed

G.  **Hospice Facility (Regulation 61-78)**    Number of Beds: \_\_\_\_\_

5. If you checked 4.C:
- A. Does your facility provide or offer to provide Alzheimer's special care services?  Yes  No
  - B. If yes, does your facility have a designated area specifically designed to care for Alzheimer patients?  
 Yes  No Name of Designated Area: \_\_\_\_\_
  - C. If you answered yes to 5.A or 5.B, how many Alzheimer patients are you able to accommodate? \_\_\_\_\_

6. In how many buildings are patient/resident rooms located? 1

A. Name of building	No. of beds
<u>Magnolia Place at Spartanburg</u>	<u>88</u>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

B. If any facility services or functions are located in buildings other than those named above, attach a description of the functions and name of building(s) (and location if at an address other than that of the hospital).  
N/A

7. Attach a brief description of any construction or renovations in progress; identify location, percent of completion, expected completion date, and if applicable Certificate of Need.  
N/A

8. A. Chief of Medical Staff/Medical Director/Physician on Call:  
Dr Brad Whitney MD 12758  
(Name and License Number)

B. Director of Nursing: Margaret Keller  
00061098 4-30-08  
(Certificate Number) (Renewal Number)

9. Licensee (The legal entity or its governing body that has the ultimate responsibility and authority for the conduct of the facility or service; the owner of the business with which rests the ultimate responsibility for maintaining approved applicable licensing standards for the facility: If applicable, the licensee must be the entity to which the Certificate of Need has been issued or that has been exempted from Certificate of Need review.)

A. THE OF South Carolina at Magnolia Place at Spartanburg, LLC  
(Name)

B. 8020 White Ave Spartanburg SC 29303  
(Mailing address) (City) (State) (Zip Code)

C. Check one of following characteristics in each of the three categories that applies to the licensee:

- (1)  Profit  Not for Profit (Non Profit)
- (2)  State Government  County Government  District Government  
 Religious  Commercial  None in these categories apply
- (3)  Sole proprietorship  Partnership  Limited Partnership  Corporation  
 Limited Liability Company  None in these categories apply

D. THE OF South Carolina, LLC  
(Complete title of the licensee's governing body)

E. Robert Crooks  
(Name and title of presiding officer of governing body)

316 E Glenwood Drive  
(Mailing address of presiding officer)

Birmingham AL 35209  
(City) (State) (Zip Code) (Telephone #)

F. (1) If a publicly held entity or corporation, does any person or other legal entity own 5 percent or more of the ownership interest or owners' equity of the licensee?  Yes;  No. If yes, then attach a list identifying the name, address, percent and type of ownership claim. N/A

(2) If not a publicly held entity, attach a list identifying the name, address, percent and type of ownership claim of all others. See exhibit A

G. Does any person or other legal entity claim liabilities of the licensee or of the facility or service for which this license is requested?  Yes;  No. If yes, then attach a list identifying the name, address, percent, and type of claim.

H. If the licensee is a corporation or partnership, you must attach a list identifying all officers with your initial application and annually thereafter with each license renewal application.  
See exhibit B

10. Real property ownership. Is the land and/or building on/in which the facility or service is conducted owned by the licensee?  Yes;  No. If no, attach a list providing information similar to that required in Line 9. above.  
See attached C

11. Management. Has the licensee engaged an entity other than an employee of the licensee to manage or operate the facility?  Yes;  No. If yes, attach a list providing information similar to that required in Line 9, above. Fundamental Clinical Consulting, LLC

12. Is there any agreement, contract, option, understanding, intent or other arrangement that will effect a change in any of the information requested and/or provided in Lines 9, 10, or 11 above?  Yes;  No. If yes, attach a complete description of this, including the type of information required in Line 9, above.

13. VERIFICATION

State of South Carolina

County of Spartanburg

I, Patricia Harris and Lynne Henderson being duly sworn on my oath, depose and say that I have read the foregoing application (and attachments) and know the contents thereof; that the statements contained are correct and true to the best of my knowledge and belief. Furthermore, I understand that I must comply with standards set forth in South Carolina Regulation 61-13, 61-16, 61-17, 61-78, 61-93, or 61-103 (as applicable to the license applied for herein) and that non compliance with these standards may result in the Department pursuing enforcement actions as provided in the applicable regulation 61-13, 61-16, 61-17, 61-78, 61-93, or 61-103.

Patricia Harris

(Signature)\*

President Administrator

(Title)

Lynne Henderson

(Signature)\*

VP, Treasurer, Secretary Business Affairs

(Title)

An application must be signed by the owner if an individual; or in the case of a limited liability company, the head of the limited liability company; or two of the owners if a partnership; or, in the case of a corporation, by two of its officers; or, in the case of a governmental unit, by the head of the governmental department having jurisdiction over the facility.

Subscribed and sworn to before me this 9<sup>th</sup> day of May, 2007.  
(Month) (Year)

NOTARY PUBLIC Margaret A. Keller

My commission expires 8/24/2015 NOTARY SEAL

14. R. Goodman 410-773-1175  
(Name and title of person preparing this application) (Telephone Number) (Date Prepared)

## **EXHIBIT A**

**THI of South Carolina at Magnolia Place at Spartanburg,  
LLC**

**(20-0041794) is: wholly owned by THI of South Carolina, LLC  
(20-0042099) which is wholly owned by THI of Baltimore, Inc.  
(45-0510853) which is wholly owned by Fundamental Long  
Term Care Holdings, LLC (20-4005037) which is owned 50%  
by Murray Forman and 50% by Leonard Grunstein.**

Exhibit B

**Officer List**  
**THI of South Carolina at Magnolia Place at Spartanburg, LLC**

<b>Name</b>	<b>Title</b>
Patricia Harris	President
Lynne Henderson	Vice President, Treasurer, Secretary

# FUNDAMENTAL

Exhibit C

Fundamental Administrative Services, LLC  
930 Ridgebrook Road, Sparks, MD 21152

VIA OVERNIGHT MAIL

March 30, 2007

Nancy Maertens  
South Carolina DHEC  
2600 Bull Street  
Columbia, SC 29201-1708

RE: Transfer of Real Property at Magnolia Place at Spartanburg

Dear Ms. Maertens:

THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg currently leases the real property from H.T. Taylor Nursing Homes, LLC which is wholly owned by H. Thomas Taylor. H. Thomas Taylor intends to transfer the real property from H.T. Taylor Nursing Homes, LLC to Taylor NH Hilltop-Spartanburg, LLC on April 15, 2007.

The current lease will be assigned from H.T. Taylor Nursing Homes, LLC to Taylor NH Hilltop-Spartanburg, LLC. A draft of the amendment incorporating this assignment is attached. The CON exemption letter for this transaction is also attached.

Please be advised that the licensee is not changing. It is only a change of the real property owner.

If you have any questions or need any further information, please do not hesitate to contact me at 410-773-1176.

Very truly yours,



Melissa Warlow  
Vice President

# FUNDAMENTAL™

June 13, 2007

SCDHEC  
Division of Health Licensing  
2600 Bull Street  
Columbia, SC 29201



Dear Sir or Madam:

## LICENSURE RENEWAL APPLICATIONS

Enclosed please find licensure renewal applications for the following facilities:

*Magnolia Manor-Moncks Corner*

*Magnolia Manor-Spartanburg*

*Magnolia Place at Spartanburg*

The required fees and attachments are also enclosed.

If you have any questions, please call me at 410-773-1175.

Sincerely,

A handwritten signature in cursive script that reads "Robin Goodman".

Robin Goodman  
Licensing Coordinator



**DIVISION OF HEALTH LICENSING**  
 2600 Bull Street  
 Columbia, South Carolina 29201

**Statement of Fees Due**

May 1, 2007

Region 1

Administrator  
 Magnolia Place at Spartanburg  
 8020 White Avenue  
 Spartanburg, SC 29303

*Tom Chappell*  
 6-15-07

**License Type:** Nursing Home  
**Ownership Type:** Ltd. Liability  
**License Number:** NCF-861  
**Number of Units:** 88

Expires : 08/31/2007



Invoice #	Amount
RB07895-6	\$69.50
RA07895-6	\$810.50

**Total Due \$880.00** If Paid Before 08/01/2007 \$1,100.00 If Paid After 09/01/2007

In accordance with State Budget Proviso 9.18, failure to submit a license renewal application or fee to the Department by the license expiration date shall result in a late fee of \$75 or 25% of the licensing fee amount.

**THIS CHECK IS VOID IF GREEN PANTOGRAPH AND MICROPRINTING ARE ABSENT**

THI Of Baltimore  
 930 Ridgbrook Road  
 Sparks, MD 21152

Wachovia  
 30 North Third Street  
 Harrisburg, PA 17101

3-50 /310

0000220961

PAY DATE 05-23-2007 PAY AMOUNT \*\*\*\*\*\$880.00

CHECK NOT VALID AFTER 180 DAYS

PAY EXACTLY Eight Hundred Eighty And NO/100 Dollars

PAY TO SOUTH CAROLINA STATE OF  
 DEPT OF HEALTH ENVIRONMENTAL CTRL  
 DIVISION OF HEALTH LICENSING  
 2600 BULL STREET  
 COLUMBIA SC 29201

RECEIVED  
 JUN 14 2007  
 HEALTH LIC

*W B B*

-12/11

# FUNDAMENTAL™

---

Fundamental Administrative Services, LLC  
930 Ridgebrook Road, Sparks, MD 21152

---

VIA OVERNIGHT MAIL

March 30, 2007

Nancy Maertens  
South Carolina DHEC  
2600 Bull Street  
Columbia, SC 29201-1708



RE: Transfer of Real Property at Magnolia Place at Spartanburg

Dear Ms. Maertens:

THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg currently leases the real property from H.T. Taylor Nursing Homes, LLC which is wholly owned by H. Thomas Taylor. H. Thomas Taylor intends to transfer the real property from H.T. Taylor Nursing Homes, LLC to Taylor NH Hilltop-Spartanburg, LLC on April 15, 2007.

The current lease will be assigned from H.T. Taylor Nursing Homes, LLC to Taylor NH Hilltop-Spartanburg, LLC. A draft of the amendment incorporating this assignment is attached. The CON exemption letter for this transaction is also attached.

Please be advised that the licensee is not changing. It is only a change of the real property owner.

If you have any questions or need any further information, please do not hesitate to contact me at 410-773-1176.

Very truly yours,

A handwritten signature in black ink, appearing to read "Melissa Warlow".

Melissa Warlow  
Vice President

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

CASE NOS. 05 CP-42-3348

\*\*\*\*\*  
UNDERA JETER, AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF  
KATHLEEN CHAMBERS, DECEASED, AND  
AS REPRESENTATIVE OF STATUTORY  
BENEFICIARIES.

PLAINTIFF,

-VS-

COPY

MAGNOLIA PLACE, INC. d/b/a AS  
MAGNOLIA PLACE AT SPARTANBURG, INC.,  
AND TRANS HEALTHCARE, INC. d/b/a,

DEFENDANTS.  
\*\*\*\*\*

---

DEPOSITION  
OF  
MARGARET KELLER

---

PURSUANT TO NOTICE OF DEPOSITION AND/OR AGREEMENTS IN  
THE ABOVE-ENTITLED CASE, THE DEPOSITION OF MARGARET KELLER  
WAS TAKEN BY THE BELOW NAMED NOTARY PUBLIC FOR SOUTH  
CAROLINA AND CERTIFIED VERBATIM REPORTED AT FOLLIAROFF AND  
ASSOCIATES, 215 MARIONETA SQUARE, SPARTANBURG, SOUTH  
CAROLINA, ON THE 12TH DAY OF APRIL, 2006, COMMENCING AT  
10:11 A.M.

DEPOSITION REPORTED BY: REGINA A. TAGUE, CVR

CONFIDENTIAL

FOR ATTORNEY EYES ONLY

---

REGINA A. TAGUE, CVR  
CERTIFIED COURT REPORTER  
POST OFFICE BOX 2412  
SPARTANBURG, SOUTH CAROLINA 29504  
(864) 587-8159 MOBIL 764-0744

Plaintiff No. 510  
PLAINTIFF'S  
EXHIBIT  
39

1 Q. DO YOU AGREE THAT THE FACILITY MUST ENSURE THAT  
2 EACH RESIDENT RECEIVES ADEQUATE SUPERVISION AND  
3 ASSISTIVE DEVICES TO PREVENT ACCIDENTS

4 A. YES, MA'AM.

5 Q. DO YOU AGREE THAT A PATIENT WHO'S KNOWN TO BE  
6 AT RISK FOR FALLS HAS TO BE MONITORED  
7 APPROPRIATELY TO MINIMIZE THAT RISK OF FALLING?

8 A. YES, MA'AM.

9 Q. WHO IS THE ADMINISTRATOR AT MAGNOLIA PLACE?

10 A. PAT HARRIS. SHE JUST STARTED AT THE FIRST OF  
11 THE YEAR.

12 Q. AND WHO WAS THE ADMINISTRATOR PRIOR TO THAT?

13 A. ALEX STEVENSON.

14 Q. AND HE NO LONGER WORKS THERE?

15 A. NO, MA'AM.

16 Q. DO YOU KNOW WHY HE LEFT?

17 A. HE MOVED TO UTAH.

18 Q. DO YOU KNOW WHO IS ON THE GOVERNING BOARD FOR  
19 MAGNOLIA PLACE?

20 A. NO, MA'AM.

21 Q. DO YOU ALL HAVE CORPORATE CONSULTANTS THAT COME  
22 IN TO THE FACILITY?

23 A. YES, THE CSD.

24 Q. AND YOU TOLD ME WHO THAT WAS.

25 A. MARCIA DENNER.

**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' RETURN TO APPELLANTS/RESPONDENTS'  
PETITION FOR REHEARING OR REHEARING *EN BANC***

---

---

Case No. 2007-CP-42-4601

---

YOUNG CLEMENT RIVERS, LLP  
D. Jay Davis, Jr. (S.C. Bar No. 6723)  
William L. Howard, Sr. (S.C. Bar No. 1967)  
Russell G. Hines (S.C. Bar No. 72100)  
P.O. Box 993  
Charleston, SC 29402  
(843) 577-4000

*and*

SERPE, JONES, ANDREWS, CALLENDER &  
BELL, PLLC  
Lori D. Proctor (S.C. Bar No. 80117)  
333 Clay Street, Suite 3485  
Houston, Texas 77002  
(713) 977-7070  
*Attorneys for the Respondents/Appellants*

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS

By and through their undersigned counsel, the Respondents/Appellants submit this return to the Appellants/Respondents' Petition for Rehearing or Rehearing *En Banc*.

### INTRODUCTION

As a preliminary matter, the Respondents/Appellants respectfully submit that there is no cause for *en banc* review. The question presented at this juncture of the appellate process is whether or not this Court properly dismissed the appeal without prejudice because it is interlocutory and not immediately appealable. The Court did so based upon well-established and unequivocal precedent from our Supreme Court in *Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). The Court's decision does not create any division of authority in the appellate case law of this jurisdiction, nor is there a significant public issue or matter of exceptional importance decided by this opinion. The well-reasoned decision of this Court of Appeals is premised upon substantial South Carolina precedent. Therefore, rehearing is rightfully denied, and there is no basis for *en banc* review.

The Appellants/Respondents do not argue that this Court misstated the facts or misapprehended the issue of appealability. The operative facts are well established by the orders on appeal and are correctly analyzed by the Court's decision.

The Appellants/Respondents do not present any basis for asserting that this Court overlooked or misapprehended the facts or the applicable law. The Appellants/Respondents do nothing more than amplify their previous arguments advancing the merits of their position on the underlying issue of bifurcation. They completely ignore the issue before the Court, which is the appealability of the order of bifurcation.

Contrary to the Appellants/Respondents' argument, this Court provided both sides with its preliminary view that the orders were not appealable, and then received and considered memoranda from both sides on the issue before making its well-reasoned decision to dismiss the appeals. Therefore, the Petition for Rehearing should be denied, because the Appellants/Respondents do not raise any matter that this Court overlooked or misapprehended in the facts or the law.

Essentially, the Appellants/Respondents argue that the Court erred by:

- 1) Overlooking or misapprehending the prejudice resulting from bifurcation because the issues are not separate and distinct;
- 2) Overlooking or misapprehending that the Respondents/Appellants' had significant and direct involvement in the running of the nursing home;
- 3) Overlooking or misapprehending that the bifurcation order is "atypical" because it allows necessary and indispensable parties to be excluded from the trial of the case;
- 4) Overlooking and misapprehending that the Appellants/Respondents pled and provided significant evidence to establish that the "excluded" Respondents/Appellants had an agency relationship with the nursing home facility, were involved in a joint enterprise, and had an "amalgamation of interests" among them, and also to show negligent management and administration; and
- 5) Overlooking and misapprehending that statutory and nursing home regulatory law requires the participation of the excluded Respondents/Appellants.

Each of these contentions will be addressed below.

### **FACTUAL/PROCEDURAL BACKGROUND**

The Appellants/Respondents brought this action seeking damages for personal injuries allegedly sustained by Lawrence E. 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 (the

“facility”).<sup>1</sup> Ultimately, the Amended Complaint alleged causes of action against six entities in addition to the facility. As to the non-facility Respondents/Appellants, the Appellants/Respondents assert multiple causes of action for what they term “corporate, direct, control liability and/or piercing the corporate veil” (the “non-clinical issues”).

The 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, a copy of which is attached hereto as Exhibit 1, which is incorporated herein by reference.)

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 of the Respondents/Appellants moved the court for a protective order in response to the Appellants/Respondents’ notice of taking the deposition of a person named Ken Tabler.

The Appellants/Respondents moved the trial court, pursuant to Rule 59(e), SCRCP, 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), SCRCP,

---

<sup>1</sup> The Respondents/Appellants are informed and believe that Mr. Morrow died in November of 2011, although the Appellants/Respondents have not amended the caption to reflect this event. Appellant/Respondent Evelyn Morrow was not married to the deceased at the time of his residence at Magnolia Place at Spartanburg, the parties having married several weeks after Mr. Morrow left the nursing home.

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 the 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, a copy of which is attached hereto as Exhibit 2, which is incorporated herein by reference.) 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 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, the 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, the Respondents/Appellants timely filed their cross-appeal.<sup>2</sup>

---

<sup>2</sup> 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 ruled that the Appellants/Respondents' appeal of the order granting bifurcation and staying discovery was immediately appealable. Had that been 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 were to conclude that the Appellants/Respondents' Petition for Rehearing should be granted and that the order dismissing the appeal should be withdrawn, then the Respondents/Appellants submit that their cross-appeal

In their Original Complaint, filed December 27<sup>th</sup> 2007, the Appellants/Respondents, Lawrence E. Morrow and Evelyn M. Morrow, alleged that Mr. Morrow was admitted to the facility commonly known as Magnolia Place at Spartanburg on January 20<sup>th</sup> 2007<sup>3</sup> and that he resided at the facility until his discharge approximately three weeks later on February 2, 2007. Mr. Morrow alleged that he suffered an injury to his genitals while being assisted in the shower by facility staff on January 19, 2007 and that, as a result of the aforementioned injury, surgery was required to remove his penile implant. Mr. Morrow's implant was removed on March 7<sup>th</sup> 2007, approximately five weeks after his discharge from Magnolia Place at Spartanburg.

According to the medical records, at the time of admission, Mr. Morrow was 76 years old, and had been in intensive care at a local hospital, suffering from pneumonia. He had a medical history of 1) chronic obstructive pulmonary disease; 2) diabetes type mellitus; 3) paroxysmal atrial tachycardia (for which he was taking coumadin); 4) hypertension; 5) hyperlipidemia; 6) reflux disease; 7) benign prostatic hypertrophy, and a history of smoking until 2 years before. According to the hospital chart, he had to be tube fed, and had developed pressure ulcers which were not resolved at the time he was transferred to the nursing home facility.

The Appellants/Respondents alleged causes of action for negligence, recklessness, gross negligence, negligence per se and loss of consortium. In addition to Magnolia Place at Spartanburg, the Appellants/Respondents sued in their Original Complaint four other Respondents/Appellants, even though none of these other entities was the licensed operator of the facility during Mr. Morrow's residency, or at any other time.

---

should also be allowed to proceed under the authority of *QZO, Inc.*, 358 S.C. 246, 594 S.E.2d 541.

<sup>3</sup> Mr. Morrow was actually admitted January 12, 2007.

On January 20<sup>th</sup> 2009, the Appellants/Respondents filed an Amended Complaint adding Respondents/Appellants Fundamental Long Term Care Holdings, LLC, Fundamental Administrative Services, LLC, and Fundamental Clinical Consulting, LLC.

In addition to the negligence causes of action, the Appellants/Respondents asserted multiple causes of action for what they termed “corporate, direct, control liability and/or piercing the corporate veil” (the “Corporate Liability Claims”). In reality, the Appellants/Respondents continually sought to dramatically complicate this personal injury action by asserting liability against multiple corporate entities, none of which were licensed to operate the facility wherein Mr. Morrow resided or were involved in the care provided to Mr. Morrow.

### **LEGAL BACKGROUND**

Rule 42(b), SCRPC, 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.

(bold in original) (italics added for emphasis).

The Rule sets three standards which the trial court may use to justify bifurcation: i) 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, analysis of all three criteria favored 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, 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, the trial court should also consider “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).

## ARGUMENT

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

This Court properly ruled 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*, our 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.

**A. THIS COURT DID NOT OVERLOOK OR MISAPPREHEND THE PREJUDICE RESULTING FROM BIFURCATION BECAUSE THE ISSUES ARE NOT SEPARATE AND DISTINCT.**

The Appellants/Respondents first assert that this Court overlooked or misapprehended the prejudice resulting from bifurcation because the issues are not separate and distinct. Under the authority of *Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000), this argument is clearly without merit. In *Flagstar*, the Court of Appeals held that the trial court's bifurcation of complex insurance coverage issues was immediately appealable and reversed the order of bifurcation because the issues were not separate and distinct. On writ of *certiorari* to the Court of Appeals, the Supreme Court reversed the Court of Appeals, stating:

Royal successfully argued in the Court of Appeals that the order granting bifurcation was immediately appealable. The Court of Appeals then held that the trial court had erroneously granted bifurcation **in that the complexity of the issues involved in this insurance contract litigation were overlapping, and could not meet the "separate issue" requirement of Rule 42(b).** Because

the Court of Appeals erred in deciding the threshold question of appealability, we do not reach the issue of whether or not the trial court's order granting bifurcation was correct. . . .

An 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. That analysis proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case. In this case, no party is denied the right to a trial by jury. Moreover, after trial, Royal will be free to advance on appeal that the trial judge abused his discretion in ordering bifurcation and that it has thereby been effectively deprived of a fair and/or fully informed fact finder. An abuse of discretion, if any, by the trial court in its ruling can be corrected at that time. (Citation Omitted).

*Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. 68, 72-72, 533 S.E.2d 331, 332-333 (2000). As in *Flagstar*, the Appellants/Respondents will be free to advance on appeal that the trial judge abused his discretion in ordering bifurcation and that they have thereby been effectively deprived of a fair and/or fully informed fact finder. An abuse of discretion, if any, by the trial court in its ruling can be corrected at that time.

**B. THE COURT DID NOT OVERLOOK OR MISAPPREHEND THAT THE RESPONDENTS/APPELLANTS' HAD SIGNIFICANT AND DIRECT INVOLVEMENT IN THE RUNNING OF THE NURSING HOME.**

The Appellants/Respondents next argue that this Court overlooked or misapprehended the fact that they had pled and provided evidence to substantiate that the Respondents/Appellants non-facility corporations had significant involvement in the daily running of the nursing home, such that they proximately caused and were directly liable for the Appellants/Respondents' injuries and damages. Again, this argument begs the question of whether or not the order bifurcating the trial of these issues is appealable.

The nature and extent of the allegations and evidence regarding the relationship between the Respondents/Appellants and their connection to the care provided to Appellant/Respondent

Lawrence Morrow at the facility are only pertinent on the question of whether the trial court abused its discretion in concluding this evidence addressed separate and distinct issues which were proper for bifurcation pursuant to Rule 42. See *Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. 68, 72-72; 533 S.E.2d 331, 332-333 (2000) and discussion in previous subsection. As such, the Appellants/Respondents' assertions do not address appealability, but instead, focus solely on the underlying merits of the argument regarding the propriety of bifurcating the case.

**C. THIS COURT DID NOT OVERLOOK OR MISAPPREHEND THAT THE BIFURCATION ORDER IS "ATYPICAL" BECAUSE IT ALLOWS NECESSARY AND INDISPENSABLE PARTIES TO BE EXCLUDED FROM THE TRIAL OF THE CASE.**

Next, the Appellants/Respondents argue this Court somehow overlooked or misapprehended that the bifurcation order was "atypical" because it allowed necessary and indispensable parties to be excluded from the trial of the case. Nothing could be further from the truth.

First of all, this is not a proper subject for reconsideration, because the trial court's order of bifurcation did not dismiss any party from the suit. The trial court merely ordered that the issues be tried in two separate jury proceedings. No Respondent/Appellant was in any way finally determined to be with or without fault, or in any way relieved from potential liability to the Appellants/Respondents.

Furthermore, the Respondents/Appellants are not necessary parties. In *Government Employees Ins. Co., Ex Parte*, 373 S.C. 132, 644 S.E.2d 699 (2007), our Supreme Court explained that "[t]his Court has interpreted Rule 19, SCRCF to require that a party be a 'necessary party' to be joined in an action pursuant to the rule. See *Slatton v. Slatton*, 289 S.C. 128, 130, 345 S.E.2d 248, 249 (1986). 'A necessary party is one whose rights must be

ascertained and settled before the rights of the parties to the action can be determined.’ *Id.*” However, the Court has refused to consider joint tortfeasors as necessary parties, ruling instead that when two or more parties are joint tortfeasors, the plaintiff has the right to sue either or both, and a defendant tortfeasor has no right to join another alleged tortfeasor as a necessary party because each tortfeasor is jointly and severally liable to the plaintiff. *Little v. Robert G. Lassiter & Co.*, 156 S.C. 286, 153 S.E. 128 (1930); *Bridges v. Wyandotte Worsted Company*, 239 S.C. 37, 121 S.E.2d 300 (1961); *Simon v. Strock*, 209 S.C. 134, 39 S.E.2d 209 (1946); *Doctor v. Robert Lee, Inc.*, 215 S.C.332, 55 S.E.2d 68 (1949).

The Appellants/Respondents further confuse the issues by asserting that the trial court granted summary judgment to the non-facility parties. This is blatantly false. The trial court did not grant summary judgment to any party. Consequently, this argument is wholly without merit.

Finally, the Appellants/Respondents’ argument on this point ultimately boils down to an assertion that the trial judge incorrectly ruled that the issues were separate and distinct. As set forth previously, this argument is premature, and this Court correctly determined the trial court’s order is interlocutory and not immediately appealable. See *Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. 68, 72-72; 533 S.E.2d 331, 332-333 (2000) and discussion in subsection A.

**D. THIS COURT DID NOT OVERLOOK OR MISAPPREHEND THAT THE APPELLANTS/RESPONDENTS PLED AND PROVIDED SIGNIFICANT EVIDENCE TO ESTABLISH THAT THE “EXCLUDED” RESPONDENTS/APPELLANTS HAD AN AGENCY RELATIONSHIP WITH THE NURSING HOME FACILITY, WERE INVOLVED IN A JOINT ENTERPRISE, HAD AN “AMALGAMATION OF INTERESTS” AMONG THEM, AND TO SHOW NEGLIGENT MANAGEMENT AND ADMINISTRATION.**

As articulated in Subsection B, the nature and extent of the allegations and evidence regarding the relationship between the Respondents/Appellants and their connection to the care

provided to Appellant/Respondent Lawrence Morrow at the facility are only pertinent on the question of whether the trial court abused its discretion in concluding the issues were separate and distinct, such that bifurcation was proper pursuant to Rule 42. *See Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. 68, 72-72, 533 S.E.2d 331, 332-333 (2000) and discussion in previous subsection. As such, the Appellants/Respondents' assertions do not address appealability, but instead, focus solely on the underlying merits of the argument regarding the propriety of bifurcating the case.

The Appellants/Respondents also argue the trial court was "premature" because it ruled without permitting appropriate discovery. However, an order bifurcating discovery is also not immediately appealable. *Id.* Therefore, this Court properly decided the order was not immediately appealable under the authority of *Flagstar*. *Id.*

**E. THE COURT DID NOT OVERLOOK OR MISAPPREHEND THAT STATUTORY AND NURSING HOME REGULATORY LAW REQUIRES THE PARTICIPATION OF THE EXCLUDED RESPONDENTS/APPELLANTS.**

Finally, the Appellants/Respondents return to the same basic argument, asserting that the nursing home statutes provide for certain obligations that would apply to all Respondent/Appellants, and provide a basis for establishing negligent and reckless conduct as to all. Again, however, this is nothing more than an argument that the issues were not separate and distinct enough to meet the requirements of Rule 42, which under *Flagstar* is not immediately appealable.

Nothing in the order of bifurcation prevents the Appellants/Respondents from establishing a violation of the nursing home regulations and statutes as a premise for claiming negligence. However, to the extent that the violations involved alleged corporate control over policies and procedures, staffing issues, or funding, they can only be a basis for recovery if it is

established that they were a proximate cause of injury. Thus, if there was, in the first instance, no breach of the standard of care by the facility proximately causing injury to Mr. Morrow, it matters not how negligent the facility or non-facility parties may have been in handling their statutory or regulatory duties, assuming any are applicable to them.

### CONCLUSION

The Appellants/Respondents have not been denied a mode of trial. The bifurcation order contemplates two separate juries to determine the clinical and the non-clinical “up-stream” corporate liability issues. In *Fortune v. Gibson*, 304 S.C. 279, 403 S.E. 2d 674 (Ct. App. 1991), 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 F2d. 627. (5<sup>th</sup> 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.

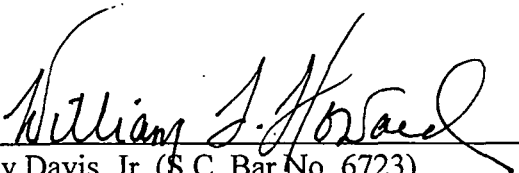
As noted previously, the basis for the Supreme Court’s ruling in *Flagstar Corporation v. Royal Surplus Lines*, 341-S.C. 68, 533 S.E.2d 331 (2000) was that the trial court’s decision to bifurcate the proceedings did not deny the appellant a mode of trial, and any abuse of discretion by the trial court 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.

For the foregoing reasons, the Respondents/Appellants request that the Petition for Rehearing or Rehearing *En Banc* be denied, and this case be remanded to the trial court for further proceedings. 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).

Respectfully submitted,

YOUNG CLEMENT RIVERS LLP

By: 

D. Jay Davis, Jr. (S.C. Bar No. 6723)

William L. Howard, Sr. (S.C. Bar No. 1967)

Russell G. Hines (S.C. Bar No. 72100)

P.O. Box 993

Charleston, SC 29402

(843) 577-4000

*and*

SERPE, JONES, ANDREWS, CALLENDER &  
BELL, PLLC

Lori D. Proctor (S.C. Bar No. 80117)

333 Clay Street, Suite 3485

Houston, Texas 77002

(713) 977-7070

*Attorneys for the Respondents/Appellants*

Charleston, South Carolina

Dated: April 23, 2012

# The South Carolina Court of Appeals

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, Respondents/Appellants.

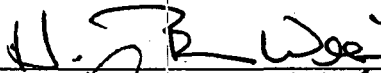
Appellate Case No. 2011-204166

---

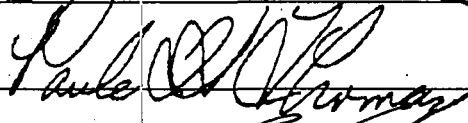
## ORDER

---

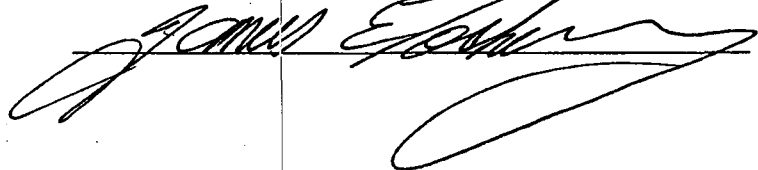
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

  
\_\_\_\_\_

J.

  
\_\_\_\_\_

J.

  
\_\_\_\_\_

J.

Columbia, South Carolina

**FILED**

Arthur 8/3/12

cc:

William L. Howard, Sr.

Gary W. Poliakoff

Lori Diane Proctor

Russell Grainger Hines

Raymond Paul Mullman, Jr.

Donald Jay Davis, Jr.

HP

11/11/11 10:11 AM

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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, ..... Petitioners,

v.

Fundamental Long-Term Care Holdings, LLC; ..... Respondents.

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,

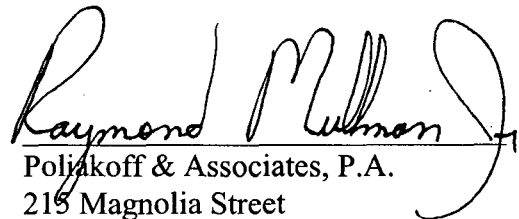
**RECEIVED**

SEP 06 2012

**S.C. Supreme Court**

PROOF OF SERVICE

I certify that I have served the Appendix of Petition for a Writ of Certiorari on the Defendants by depositing a copy of it in the United States Mail, postage prepaid, on 9/4, 2012, addressed to their attorneys of record, D. Jay Davis, Jr., William L. Howard, Sr., and Russell G. Hines of Young Clement Rivers, LLP, Post Office Box 993, Charleston, SC 29402; and Lori D. Proctor of Serpe, Jones, Andrews, Callender & Bell, PLLC, America Tower, 2929 Allen Parkway, Suite 1600, Houston, Texas, 77019.



Poliakoff & Associates, P.A.  
215 Magnolia Street  
Post Office Box 1571  
Spartanburg, SC 29304  
Attorney for Petitioners