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

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Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Unpublished Order in Appellate Case No. 2011-204166
(S.C. Ct. App. filed March 5, 2012)

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Lawrence E. Morrow and Evelyn M. Morrow,

Petitioners,

v.

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

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.

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# RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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YOUNG CLEMENT RIVERS, LLP
D. Jay Davis, Jr.
William L. Howard, Sr.
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
(843) 577-4000
*-and-*
SERPE, JONES, ANDRES, CALLENDER
& BELL, PLLC
Lori D. Proctor
America Tower
2929 Allen Parkway, Suite 1600
Houston, Texas 77019
(713) 452-4400
***Attorneys for the Respondents***

## INDEX

## QUESTION PRESENTED

I. **Did the Court of Appeals correctly dismiss this appeal because the order granting bifurcation is not immediately appealable?**

## INTRODUCTION AND STATEMENT OF THE CASE

The Petitioners, Lawrence E. Morrow and Evelyn M. Morrow, brought this action seeking damages on account of 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). Mr. Morrow was 76 years of age at the time of his admission in 2007.[1]

Ultimately, the Petitioners filed an Amended Complaint alleging that Mr. Morrow sustained personal injury as a result of the treatment and care he received at the facility by the facility employees. For example, they alleged he was positioned improperly in a shower chair, as a result of which he suffered an injury to his genitals, requiring removal of his penile implant several weeks after he left the facility. They alleged he was not turned in his bed or provided appropriate nutrition, as a result of which he suffered decubitous ulcers. They claimed this was a result of staff inaction, as well as insufficient staff to properly meet his needs. Each and every injury the Petitioners allege is based, in the first instance, on the care and treatment Mr. Morrow received at the facility by the facility staff and employees.

In addition to suing the facility, the Petitioners chose to include additional entities, alleging liability on their part by virtue of their alleged control of the facility, as well as liability by virtue of respondeat-superior theories, corporate-veil-piercing theories, joint-

[1] Respondents are informed and believe that Mr. Morrow died of natural causes unrelated to this case in November of 2011.

enterprise theories, and amalgamation-of-interest theories. However, each of the theories of liability against these other entities is indirect, in the sense that they were not at the facility providing the hands-on care to Mr. Morrow. Thus, the direct liability of these entities is premised upon their participation in controlling the facility, such that the facility staff care and treatment were inadequate. For example, the Petitioners claim one or more of these related entities controlled the funding, as a result of which the staff was underfunded and insufficient. They argue the nutritional budget was too small, as a result of which the food served to Mr. Morrow was insufficient to meet his nutritional needs; thus, causing his ulcers. They assert the staff was not properly trained, and one or more of these entities was in charge of providing the training.[2]

The Respondents moved the trial court for an order bifurcating the proceeding and, on March 3, 2011, The Honorable J. Derham Cole granted the motion. Judge Cole bifurcated the trial so as to try liability and damage issues as to the facility first, encompassing the clinical issues; then, assuming the jury determined there was an injury to the Petitioners proximately caused by the facility, trying the remaining issues as to the non-facility entities. The order granting bifurcation stayed the discovery as to the non-clinical liability issues pertaining to the non-facility entities pending the further order of the court. (App. pp. 304-19.) Contrary to the Petitioners' characterization, the order granting bifurcation did not dismiss any party or grant judgment for or against any party. The order contemplates that the case against the facility will be tried to conclusion and, if the verdict results in an award to the Petitioners, it will establish the amount of actual

[2] This is consistent with the Petitioners' arguments. (*See* Petition for Writ of Certiorari, p. 16) (wherein, the Petitioners argue, "[t]he 'corporate' issues caused the clinical issues.")

damage as well as any punitive damages against the facility. In a subsequent trial, the court would direct the jury as to the verdict against the facility, including the actual damage amount, and the second jury would determine the liability of the remaining entities for the actual damages, as well as assessing the liability for and amount of any punitive damages. Thus, any punitive damage award would be based upon the Petitioners' theories, including alleged "direct" liability and "indirect" liability theories. Furthermore, any such award would be based upon the actor's conduct as established at trial.

The Petitioners moved the trial court, pursuant to Rule 59(e), SCRCP, to alter or amend the order granting bifurcation and also to exclude allegedly cumulative defense experts; to compel a Rule 30(b)(6), SCRCP, deposition; and to compel the deposition of a person named Ken Tabler. On November 15, 2011, Judge Cole entered a Form 4 Order (dated October 24, 2011) denying the Petitioners' Rule 59 motion and denying their motion to exclude allegedly cumulative defense experts. The order granted the Petitioners' motion to compel a Rule 30(b)(6) deposition and to compel Tabler's deposition. (App. p. 358.)[3] On November 21, 2011, the Petitioners noticed their appeal of Judge Cole's order denying their motion to alter or amend the order granting bifurcation.[4]

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[3]During this same time period, Respondent Fundamental Long-Term Care Holdings, LLC (FLTCH) moved to dismiss the case against it on the grounds that the trial court did not have a basis for asserting personal jurisdiction over it. Additionally, all of the Respondents moved the court for a protective order in response to the Petitioners' notice of taking the deposition of Ken Tabler. The trial court's November 15, 2011 order also denied FLTCH's motion to dismiss for lack of personal jurisdiction and the Respondents' motions for a protective order regarding the Tabler deposition.

[4] On December 1, 2011, the Respondents timely noticed their cross-appeal. The Respondents' cross-appeal pertains only to the decisions of Judge Cole to deny FLTCH's

The Court of Appeals concluded the order granting bifurcation was not immediately appealable, and dismissed the appeal. (App. pp. 408-09.) Thereafter, the Court of Appeals denied the Petitioners' petition for rehearing. (App. pp. 569-70.) The instant petition for a writ of certiorari to the Court of Appeals followed.

## ARGUMENT

### I. The Court of Appeals correctly dismissed this appeal because the order granting bifurcation is not immediately appealable.

#### A. The order granting bifurcation is not immediately appealable.

The Respondents submit that—as the Court of Appeals correctly ruled—neither the order of Judge Cole denying the Petitioners' Rule 59 motion to alter or amend nor the order granting bifurcation are immediately appealable. *Flagstar Corporation v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). For this reason, the Petitioners'

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motion to dismiss for lack of personal jurisdiction, to grant the Petitioners' 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, ordinarily, not immediately 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' cross-appeal are premised solely upon a discretionary appeal allowed by this Court if it concludes that the Petitioners' appeal relating to the order granting bifurcation is immediately appealable. Should that be the case, the authority for allowing the cross-appeal regarding the denial of FLTCH's motion to dismiss 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 issues, *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 agrees with the Court of Appeals and concludes that the Petitioners' appeal should be dismissed without prejudice because it is interlocutory and not immediately appealable, then Respondents concede that their cross-appeal was correctly dismissed without prejudice. But, and while making clear the Respondents' position that the Petitioners' appeal was correctly dismissed, out of an abundance of caution, to the extent that the Court reverses the Court of Appeals' dismissal and allows the Petitioners' appeal to go forward, the Respondents ask that their

request for the issuance of a writ of certiorari by this Court should be denied, because the appeal was rightly dismissed.

In *Flagstar*, this 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." 341 S.C. at 72, 533 S.E.2d at 333. 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).

*Id.* 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 this Court in the above quote in *Flagstar*, an order bifurcating discovery is also not immediately appealable. 341 S.C. at 73, 533 S.E.2d at 333-334.

The Petitioners 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. However, as the Court of Appeals held in

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cross-appeal be allowed to proceed as well.

*Fortune v. Gibson*, 304 S.C. 279, 281-82, 403 S.E. 2d 674, 675 (Ct. App. 1991), the use of two juries is not a problem:

> We hold there is no per se rule that the same jury must decide both issues. To hold otherwise would be to ignore a fundamental principle underlying bifurcation: a trial may be bifurcated only if the issues are so distinct that a trial of each alone would not result in prejudice. *See In Re Plywood Antitrust Litigation*, 655 F2d. 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. . . .

Consequently, the Seventh Amendment right to trial by jury is protected by the requirement that the issues to be tried separately are distinct. The question of whether or not the issues are distinct, in turn, is clearly not reviewable at this stage under this Court's precedent in *Flagstar*, 341 S.C. 68, 533 S.E.2d 331.

In *Flagstar*, this Court reversed the Court of Appeals, which had ruled the bifurcation order was immediately appealable. The Court of Appeals based its decision on its conclusion that the issues were not distinct, and reversed the trial court's order granting bifurcation. *See Flagstar Corp. v. Royal Surplus Lines*, 332 S.C. 182, 503 S.E.2d 497 (Ct App. 1998), *rev'd*, 341 S.C. 68, 533 S.E.2d 331. Reversing the Court of Appeals, this Court ruled 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. Importantly, 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 this Court's opinion in *Flagstar*

that any abuse of discretion on the part of the trial court in deciding that 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, is only reviewable after full development of the evidence at trial, and is not subject to interlocutory appellate review. Consequently, the bifurcation of issues to be tried before separate juries is not immediately appealable.

### B. The Petitioners' specific arguments are unavailing.

#### 1. The Court of Appeals did not base its decision upon a material misstatement of fact, and the order granting bifurcation is not "effectively a final order," or an order "involving the merits," or an order affecting a "substantial right."[5]

The Petitioners repeatedly argue that the substance of the ruling they appeal is not bifurcation but, instead, it strikes their direct liability claims against the non-facility defendants, in effect granting those non-facility defendants summary judgment. The Petitioners assert the order granting bifurcation involves the merits of the case and affects a substantial right of the Petitioners'. They further argue the order presents a novel issue of first impression, and a writ of certiorari should be issued for this reason. The Petitioners' description of the order granting bifurcation is misleading.

It should first be noted that these arguments are based on the Petitioners' analysis of the connection between the issues bifurcated under the trial court's order. This is nothing more than an argument that the issues bifurcated by the order are not separate

[5] This section of the Respondents' return addresses the Petitioners' arguments I, II, III, and IV. That said, though separately set forth, the analysis/argument presented in this return necessarily contains some overlap amongst the issue(s) before the Court. To the extent that the argument/analysis contained in any particular part of this return is relevant to any other part, the same is hereby incorporated therein by reference.

and distinct. As discussed previously, this argument is premature, and under *Flagstar*, is not immediately appealable.

Furthermore, contrary to the Petitioners' description of the order granting bifurcation, it clearly does not dismiss any claims or parties, does not grant any party judgment on any claim or matter, does not involve the merits, and does not affect a substantial right of any party.[6]

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[6] The Order grants the following relief:

1) Defendants' Motion to Bifurcate is **GRANTED**;

2) The Court will conduct separate jury trials on the issues of this case in the following sequence:

   a. Plaintiffs claims of actual and punitive damages against the Defendant, THI of South Carolina at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg, to include all post trial motions;

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

3) Discovery is stayed pending the further order of this Court regarding all non-clinical issues, including but not limited to, all discovery requests that are irrelevant to or not likely to lead to admissible evidence directly related the clinical issues involving negligence/recklessness/proximate cause and damages asserted by Plaintiffs against THI of South Carolina at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg, its agents, servants and employees, or any defense raised by THI of South Carolina at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg to such claims. Discovery is hereby stayed pending the further order of this Court as to all issues of liability by non-facility defendants including, but not limited to, discovery regarding corporate finances, structure, history, supply contracts, inter-corporate contracts, and non-entity corporate affairs.

Although *Flagstar* teaches that an analysis of the interrelationship between the claims and issues is not proper at this stage of the litigation, the Petitioners persist in arguing that the bifurcated issues are not separate and distinct as the only basis for their assertions. However, their arguments are unavailing even if their analysis was a proper subject of inquiry.

Mr. Morrow was first admitted into the intensive care unit of the local hospital prior to his arrival at the nursing home facility with a diagnosis of pneumonia. His medical history included: Chronic Obstructive Pulmonary Disease (COPD); diabetes type mellitus; paroxysmal atrial tachycardia, for which he was taking Coumadin; hypertension; hyperlipedemia; reflux disease; benign prostatic hypertrophy; and a history of smoking. Mr. Morrow also had a penile implant that was approximately twelve years old.

He remained in the hospital intensive care unit for three weeks, where he was tube fed and required ventilator support. During his hospital stay, he developed a "stage 2 decubitus ulcer." According to the hospital records, this developed into a complex wound requiring debridement by the time of his discharge. Mr. Morrow entered the nursing home facility immediately upon discharge from the hospital, where he remained for only two weeks. According to his discovery responses, his total claimed medical bills from his alleged injuries were Eleven Thousand Dollars ($11,000.00). With regard to Mrs. Morrow's claim of loss of consortium, it is undisputed that Mr. Morrow did not marry Mrs. Morrow until several weeks after he left the facility.

The facility and its staff constitute the only actors who treated and cared for Mr. Morrow under the allegations in the Amended Complaint, and the facility had the

responsibility to provide appropriate care for its residents. There is no defense asserted by the facility that any failure to meet the resident's needs was caused by the actions of other named defendants. Therefore, in order for any liability to attach to the other named non-facility entities, the fact-finders must first conclude that the Petitioners were injured, and that those injuries were proximately caused by some negligent act or delict of the facility acting through its agents, servants, and employees.

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

Both factually and as alleged by Petitioners in the Amended Complaint, proving that the acts or delicts of the facility caused injury to the Petitioners is a necessary link in the causal chain. Under the order granting bifurcation, the first trial would decide that issue, and that decision would be binding on the remaining defendants under any of the Petitioners' theories of recovery based upon principles of issue preclusion. *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009) ("Collateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. "); *Id.* ("[A]s these decisions make clear, the identity of the parties, and their relationships to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel."); *see Restatement (Second) of Judgments § 59 cmt. E (1982)* (because the interests of closely-held corporations and their owners generally fully coincide, there is no good reason to

regard them as legally distinct for purposes of collateral estoppel); *see also Id.* at § 59(3)(b) (espousing the general rule that collateral estoppel bars a closely-held corporation from relitigating issues previously decided in an action where the owner of the corporation was a party). If this causation issue is decided against the facility in the first trial, and if the Petitioners prove their allegations of negligence against the remaining non-facility defendants under any of their theories in the second trial, the decision in the first trial would preclude re-litigation of that link in the causal chain in the second trial.

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

Consequently, as the case exists today, the remaining defendants would be precluded from re-litigating the issue of what, if any, actual damages were proximately caused by the actions of the facility, and the Petitioners' successful assertion of liability under any of the theories framed by the pleadings would subject the tortfeasor to the actual damage award. Furthermore, bifurcation under the trial court's order preserves to each party the right to a trial by jury of all legally viable issues. Consequently, it does not affect the mode of trial.

Conversely, if the first jury were to determine that the Petitioners suffered no injury, or that any injury was not proximately caused by the facility's negligence, then litigation of the alleged control and management of the facility by the other named

entities would be unnecessary because their actions could not be a proximate cause of injury to the Petitioners. The trial court concluded that the parties are more likely to receive a fair trial through the bifurcation, because there is less chance a jury will be confused by trying to understand and resolve complex inter-corporate liability issues, encompassing alternative theories of liability based upon joint enterprise, veil piercing, alter ego, amalgamation of interest, direct control, and vicarious liability, while at the same time analyzing difficult medical and/or nursing malpractice issues. This decision furthers convenience and avoids the possibility of prejudice to both parties, both of which are considerations identified in Rule 42 (b), SCRCP.

The trial court also concluded that, if the jury did not return a verdict for the Petitioners in the first trial against the facility, bifurcation avoids the time and expense to the court, prospective jurors, and the litigants of an unnecessary trial of multiple causes of action involving complex legal theories and multiple parties. This, in turn, is conducive to expedition and economy, also a proper consideration under Rule 42.

The trial court held an extensive hearing before deciding the issue, and obviously concluded the scope of discovery and trial issues was vastly expanded by the Petitioners' claims that interrelated national companies are "sham" entities, that they "siphon" facility funding, that they are joint venturers, exercise control over the daily management of the facility, or have an "amalgamation of interests" with the facility such as to make them responsible for its acts and delicts. Certainly any veil-piercing analysis is steeped in accounting issues that are complex and totally distinct from the medical issues that frame the front line questions to be resolved in deciding whether there is any liability to the Petitioners. The cost and time involved in pre-trial matters and devoted to resolving

discovery disputes, as well as the increased risk of jury confusion caused by superimposing complex theories of corporate liability on already difficult medical and nursing malpractice claims, commends the discretionary decision of the trial judge to bifurcate this proceeding into two trials.

Furthermore, the trial judge maintains the authority to modify the decision to bifurcate as the case develops.[7] As discussed previously, in *Flagstar*, 341 S.C. at 73, 533 S.E.2d at 333-334, this Court ruled an order granting bifurcation is not immediately appealable. It is interlocutory, and is a discretionary call on the part of the trial judge, who is responsible for managing the trial proceedings.

As the Court of Appeals recognized, "a trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of facts and conclusions of law before entry of judgment or decree." *PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988); *see also Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010); *City of Wood River v. Geer-Melkus Construction Company, Inc.*, 233 Neb. 179, 183, 444 N.W.2d 305 (Neb. 1989) ("No court is required to persist in error, and, if [the judge] concludes that a former ruling was wrong, [the judge] may correct it at any time while the case is still in his control.") (quoting *Tady v. Warta*, 111 Neb. 521, 526, 196 N.W. 901,903 (1924); *Dawkins, Inc. v. Huff*, 836 So.2d 1062 (Fla. 5th Dist. Ct. App. 2003) (trial court has jurisdiction during progress of case to set aside or modify an interlocutory order before final judgment as interlocutory judgments are not within the restrictions provided by civil rule governing

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

relief from judgment, decrees, or orders; rather, such orders remain within the inherent power of the court to control the progress of the case prior to final judgment); *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App.3d 669, 941 N.E.2d 347 (2010) ("A trial judge possesses the inherent authority to review, modify or vacate an interlocutory order at any time until it enters a final judgment."). As the Supreme Court of Nebraska noted in *City of Wood River*, this ruling is "consistent with the inherent power of the court to control its own proceedings and the policy of favoring appeal only at the end of all lower court proceedings." *City of Wood River*, 233 Neb. at 183, 444 N.W.2d at 308.

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

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

### 2. Issuance of an extraordinary writ is not warranted because this case does not involve a novel question of law concerning matters of public importance.[8]

Next, the Petitioners argue this case involves novel questions of law because the bifurcation order "severs" parties, granting separate liability trials for severed parties, excluding necessary and indispensable parties from the first trial, despite their well-pled allegations of direct liability against the severed parties as joint tortfeasors. Premised upon this argument, the Petitioners ask this Court to grant a writ of certiorari under the authority of *In Re: Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998). Although granting a writ of certiorari in that case, the Court reiterated the high threshold for considering such extraordinary action:

> Although we will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal, a writ of certiorari may be issued when exceptional circumstances exist. This matter presents such a case. Novel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions are involved in this matter. A decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues.
>
> We reiterate that this Court will not issue a writ of certiorari merely to relieve a circuit court's burden of deciding difficult issues in high profile cases. However, as Judge Floyd very appropriately notes, this is not only an exceptional case of great public interest, but is also one presenting novel questions of law, which, to best serve the interests of judicial economy, should be answered at this time.

*Id.* at 543, 503 S.E.2d at 447, n. 2. The Petitioners' arguments fail to meet this threshold inquiry for several reasons.

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[8] This section of the Respondents' return addresses the Petitioners' argument V.

First, there is no novel issue of law presented. As previously articulated, this Court's decision in *Flagstar* forecloses this line of inquiry and definitively rules that questions of this nature can be properly addressed after full development of the evidence at trial. 341 S.C. at 73, 533 S.E.2d at 333-34 ("Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence."). This is so because the order granting bifurcation separates issues into two trials, each of which is conducted in front of a jury. As in their prior arguments, the Petitioners essentially argue the interrelation of the issues makes them inseparable, and has the effect of severing parties into separate proceedings. This requires an analysis of the question of whether the issues bifurcated by the trial court's order are separate and distinct, such that the trial of each alone will not cause prejudice.

Second, there is no exceptional circumstance presented. The Petitioners have asserted individual personal injury claims against a nursing home facility and have claimed companies with whom it is alleged to be affiliated or in some other way owned and/or controlled are also responsible for their injury and damage by virtue of the relationships these companies have with the facility. In the first instance, their claims are fact-specific, involving the individual care and treatment Mr. Morrow received at the facility. This is not a case involving a potentially large number of claimants based upon a common fact, such as an alleged product defect. The issues the Petitioners are attempting to raise in this interlocutory appeal, while certainly important to the litigants, are not matters of "significant public interest," nor are they "contained in numerous state and federal actions." Consequently, there is no basis for asserting the facts of this case provide an exception to the rule established in *Flagstar*, and there is no factual

underpinning for any claim that a ruling by this Court at this time would serve the interests of judicial economy by eliminating numerous inevitable appeals. *See In Re: Breast Implant product Liability Litigation*, 331 S.C. at 543, 503 S.E.2d at 447, n. 2.

Next, the Petitioners advance the argument that the order granting bifurcation presents a novel question of law because it implicates the apportionment of liability under the South Carolina Contribution Among Tortfeasors Act, S.C. Code Ann. §§ 15-38-10 to -70 (the "Contribution Act"). This argument is specious. The Petitioners' Amended Complaint is convoluted, and provides insight into the complexity of the issues they raise and the basis for the trial judge's conclusion that bifurcation would serve the ends of justice. The Petitioners' basis for asserting liability against the non-facility defendants, as alleged in their Amended Complaint, is that each entity is interrelated and has exerted direct control over the facility. They allege each entity is a subsidiary or successor by merger, and all are subsidiaries of FLTCH. They claim all of the interrelated entities are totally dominated by FLTCH, and all are involved in the budgeting, staffing, training, supervision, development and implementation of policies and procedures for the facility. Based upon these assertions, they characterize their bases for liability under the rubric of "agency," instrumentality," "adjunct," "and/or alter ego." Finally, as a basis for liability of each non-facility entity, they assert that each is vicariously liable for the torts of the facility.

It is readily apparent that each of the Petitioners' alleged theories for non-facility liability lies in the interrelationship of the non-facility entity to other non-facility entities and to the nursing home itself. Section 15-38-15(a) of the Contribution Act does not provide for contribution where two persons are to be treated as a single party, and

specifically states as follows: "Such treatment [as a single party] *must be used* where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously liable for the conduct of another defendant." (emphasis added). Thus, under any of the Petitioners' theories of direct liability, there is no apportionment of liability.

Next, the Petitioners claim the order granting bifurcation somehow gives the facility an unfair advantage. They hypothesize that the facility could claim at trial that the other Respondents are to blame, and not the facility or its staff. They opine that "justice is not served when the fact finder is in the dark and loopholes like this are created for negligent defendants." This argument is without merit.

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

Next, the Petitioners argue that the statutorily imposed limitations on noneconomic damages found in S.C. Code Ann. § 15-32-220 are "complicated" by the order granting bifurcation. Of course, the fact that one aspect of the case may be more

complicated as a result of bifurcation is not a basis for reversal, even if it were immediately appealable. Rather, such an alleged complication would be a matter for the trial court to weigh in its discretionary decision to bifurcate. Furthermore, as with the previous arguments, the Petitioners' assertions again attack the trial court's determination that the issues are separate and distinct, which determination is not reviewable at this stage pursuant to *Flagstar*.

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

### 3. Issuance of an extraordinary writ is not warranted on account of the purported constitutional issue claimed by the Petitioner.[9]

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

would decide whether or not the other Respondents were also liable for the negligent acts and delicts of the facility under any of the Petitioners' theories of liability. If so, the jury would also determine whether any of the other Respondents were also reckless as a proximate cause of the Petitioners' injuries, and award such punitive damages as the jury deems proper. Consequently, the same issues are not tried to the two juries.

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

> [T]here is no per se rule that the same jury must decide both issues. To hold otherwise would be to ignore a fundamental principle underlying bifurcation: a trial may be bifurcated only if the issues are so distinct that a trial of each alone would not result in prejudice. *See In Re Plywood Antitrust Litigation*, 655 F2d. 627 (5th Cir. 1981). The very purpose of this principle is to cover cases in which separate juries decide separate issues. If South Carolina Rule of Civil Procedure 42(b) contemplated bifurcation before the same jury only, there would be no need for the requirement that the issues be distinct. . . .

304 S.C. at 281-282, 403 S.E. 2d 675; *see also Houseman v. U.S. Aviation Underwriters*, 171 F.3d. 1117, 1126 (7th Cir. 1999) ("To avoid conflict with this constitutional provision, questions in a single suit can only be tried by different juries if they are 'so distinct and separable from the others that a trial of [them] alone may be had without injustice.'") (citing *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S.Ct. 513, 75 L.Ed. 1188 (1931)); *Id.* ("In other words, the district court 'must not divide issues between separate trials in such a way that the same issue is reexamined by different juries.'") (citing *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th

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[9] This section of the Respondents' return addresses the Petitioners' argument VI.

Cir.1995)); *Id.* ("While both juries can examine overlapping evidence, they may not decide factual issues that are common to both trials and essential to the outcome.") (citing *PaineWebber, Jackson & Curtis v. Merrill Lynch, Pierce, Fenner & Smith*, 587 F.Supp. 1112, 1117 (D.Del. 1984)).

## CONCLUSION

Upon examination, the analysis of each of the Petitioners' arguments for interlocutory appeal of the order granting bifurcation is grounded in the question of whether the bifurcated issues are separate and distinct, such that each can be tried separately without causing prejudice. That question has been rejected as a basis for allowing an interlocutory appeal because it "simply does not strike to the heart of this Court's traditional analysis of claims of denial of a mode of trial." *Flagstar*, 341 S.C. at 73, 533 S.E.2d at 333-34.

For the foregoing reasons, the Respondents request that the Petition for Writ of Certiorari be denied because, as the Court of Appeals correctly found, the Petitioners' appeal was from orders that are not immediately appealable. Should the Court so rule, the Respondents concede that their cross-appeal was properly dismissed without prejudice. Should the Court determine the Petitioner's appeal is proper, however, then Respondents request that this Court exercise its discretion to entertain their cross-appeal (or remand the same to the Court of Appeals for consideration along with the Petitioners' appeal) under the authority of *QZO*, 358 S.C. 246, 594 S.E.2d 541 and *Ferguson*, 349 S.C. 558, 564 S.E.2d 94.

**<SIGNED ON THE FOLLOWING PAGE>**

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: _____

D. Jay Davis, Jr.
William L. Howard, Sr.
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
(843) 577-4000
***-and-***
SERPE, JONES, ANDRES, CALLENDER
& BELL, PLLC
Lori D. Proctor
America Tower
2929 Allen Parkway, Suite 1600
Houston, Texas 77019
(713) 452-4400
***Attorneys for the Respondents***

Charleston, South Carolina

Dated: 11/19/12

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

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Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Unpublished Order in Appellate Case No. 2011-204166
(S.C. Ct. App. filed March 5, 2012)

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Lawrence E. Morrow and Evelyn M. Morrow,

Petitioners,

v.

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

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.

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**PROOF OF SERVICE**

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Unpublished Order in Appellate Case No. 2011-204166
(S.C. Ct. App. filed March 5, 2012)

YOUNG CLEMENT RIVERS, LLP
D. Jay Davis, Jr.
William L. Howard, Sr.
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
(843) 577-4000
*-and-*
SERPE, JONES, ANDRES, CALLENDER
& BELL, PLLC
Lori D. Proctor
America Tower
2929 Allen Parkway, Suite 1600
Houston, Texas 77019
(713) 452-4400
***Attorneys for the Respondents***

I, Russell G. Hines, of Young Clement Rivers, LLP, do hereby certify that a copy of the **Respondents' Return to Petition for Writ of Certiorari** was sent to counsel for the Petitioners via United States Mail, postage pre-paid on November 19, 2012 addressed as follows:

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

***-and-***

M. Chad Trammell, Esquire
The Trammell Law Firm, PLLC
418 North State Line Avenue
Texarkana, Arkansas 71854

***Attorneys for the Petitioners***

YOUNG CLEMENT RIVERS LLP

Russell G. Hines

Charleston, South Carolina

Dated: 11/19/12

YCRLAW
Young Clement Rivers, LLP

Russell G. Hines

Direct Dial: (843) 720-5488
Direct Fax: (843) 579-1327
E-mail: RHines@ycrlaw.com

November 19, 2012

**VIA U.S. MAIL**
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P. O. Box 11330
Columbia, SC 29211-1330



Re: *Morrow v. Fundamental Long-Term Care Holdings, LLC et al.*
Case No.: 2007-CP-42-4601
Appellate Case No.: 2011-204166
YCR File: 14347-20100252

Dear Mr. Shearouse:

Enclosed for filing in the above matter please find the original and seven (7) copies of the **Respondents' Return to Petition for Writ of Certiorari** along with the original and two (2) copies of a **Proof of Service** for the same. Kindly return one (1) stamped copy of each filed document to me in the envelope provided. Of course, if the Court has any questions or concerns, please just let me know.

With best wishes and kindest regards, I am

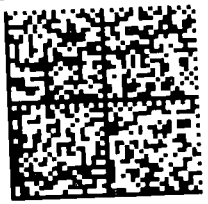
Sincerely,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines

RGH/ero
ce: Gary W. Poliakoff, Esquire
Raymond Mullman, Jr., Esquire
M. Chad Trammell, Esquire

FIRST CLASS MAIL



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YCRLAW

**25 Calhoun Street, Suite 400**
**P.O. Box 993**
**Charleston, SC 29402-0993**

JLA
14347-
20100252

Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330