THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2007-CP-42-4601

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

vs.

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

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NOTICE OF APPEAL

Lawrence E. Morrow and Evelyn M. Morrow, hereby appeal the order [judgment] of the Honorable J. Derham Cole, dated October 24, 2011. Appellants received written notice of entry of this order [judgment] on November 14, 2011.

Nov. 21, 2011

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of Record, William L. Howard, Sr., Esq., Post Office Box 993, Charleston, South Carolina 29402

Nov. 21, 2011

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November 21, 2011

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

RE: Lawrence E. Morrow and Evelyn M. Morrow, Appellants v. Fundamental Long-Term Care Holdings, LLC; Fundamental Clinical Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of Baltimore Management, LLC; THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg, Respondents, Case No. 2007-CP-42-4601

Dear Ms. Gee:

Enclosed for filing please find our Notice of Appeal in the above case. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents.
2. A copy of the Order and Judgments which are to be challenged on appeal.
3. Our check in the amount of $100.00 for filing.

Thank you for your assistance.

With best regards, I am

Yours very truly,

Gary W. Poliakoff
POLIAKOFF & ASSOCIATES, P.A.
Attorneys for Appellants

GWP/tjd

Enclosures

cc: William L. Howard, Sr., Esq., Attorney for Respondents

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

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

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

HISTORY OF THE CASE/ISSUES

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

SCRCP 42(b) states the following:

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

(Emphasis added.)

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The Rule sets three criteria by which this court may evaluate the need for 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, I conclude analysis of all three criteria favors bifurcation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs also assert an indirect basis for liability under a corporate successor analysis. "[I]n the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless there was an agreement to assume such debts, the circumstances surrounding the transaction warrants a finding of consolidation or merger of the two corporations, the successor company was a mere continuation of the predecessor, or the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213 (2005)(Citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)). "To meet the fraud exception to successor liability, the general rule is that a successor must knowingly participate in a fraudulent asset transfer." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67 (Ct. App. 2008). Consideration of this theory will require analysis of these complex legal concepts in the context of any evidence the parties proffer regarding merger, acquisition, or consolidation of the defendant corporations, as well as any legitimate purposes for the action, motives and knowledge possessed by the alleged actors.

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Plaintiffs also allege a "de facto merger" between FLTCH and THI Holdings, LLC as a basis for assigning liability for Nursing Home's torts. "Most courts traditionally have applied the mere continuation exception (also known as a de facto merger) contained in the general rule on successor liability only when there is commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors, or shareholders, and the business continues largely unchanged." *Simmons*, 366 S.C. at 317, 622 S.E.2d at 217 (J. Burnett, dissenting). "Where there is an absorption of the business and assets--in other words, a merger de facto . . . the extent of the liability is necessarily determined by the value of the property received." *Huggins v. Commercial & Sav. Bank*, 141 S.C. 480, 521 (S.C. 1927)(Citing 15 A. L. R., 1150.) The key element of a de facto merger is, however, a continuity of ownership between the selling and purchasing corporations. *Taylor v. Atlas Safety Equipment Co.*, 808 F. Supp. 1246, 1251 (E.D. Va. 1992) (citing *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977)) ("Absent a transfer of stock, the nature and consequences of a transaction are not those of a merger."); *Crawford Harbor Assocs. v. Blake Constr. Co.*, 661 F. Supp. 880, 883 (E.D. Va. 1987) (Applying Virginia law: "The essential characteristic of a de facto merger is the succession of the selling corporation's stockholders to stockholder status in the purchasing corporation.").

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ATTORNEY AT LAW

Finally, Plaintiffs allege the defendant corporate entities operated as a joint venture. South Carolina Courts equate joint venture with joint enterprise:

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 MAR -4 PM 4:26
M. HOPE BLACKLEY

NOW THEREFORE, IT IS

ORDERED that:

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

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

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

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

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

IT IS SO ORDERED.

Hon. J. Derham Cole
Circuit Court, Seventh Circuit

Spartanburg, South Carolina
Dated: March 3, 2011

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 MAR -7 PM 4:25
M. HOPE BLACKLEY

A CERTIFIED COPY
M. Hope Blackley
CLERK OF COURT
SPARTANBURG COUNTY
BY _____ D.C.
DATED 3/7/11

Case No. 2007-CP-42-4601

I, Russell G. Hines, do hereby certify that a copy of the Respondents'/Appellants' **Notice of Appeal** was sent to counsel for the Appellants/Respondents (i.e., counsel for all respondents/adverse parties to the Respondents'/Appellants' appeal) via United States Mail, postage pre-paid on December 1, 2011 addressed as follows:

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

and

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

I further certify that a copy of said **Notice of Appeal** was sent to the Clerk of the Spartanburg County Court of Commons Pleas via United States Mail, postage pre-paid on December 1, 2011 addressed as follows:

Spartanburg County Clerk of Court
The Honorable M. Hope Blackley
P. O. Box 3483
Spartanburg, SC 29304-3483

<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, SC 29402
Telephone: (843) 577-4000
and
JOHNSON, TRENT, WEST & TAYLOR, LLP
Lori D. Proctor
919 Miliam Street, Suite 1700
Houston, Texas 77002
Telephone: (713) 977-7070
Attorneys for the Respondents/Appellants

Charleston, South Carolina

Dated: 12/1/11

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

Lawrence E. **MORROW**, et al.,

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. **2007-CP-42-4601**

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

DEFENDANT(S)

CHECK ONE:

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

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

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

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

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

This matter came before this court on **defendants' motion** pursuant to Rule 42, *SCRCP*, to **bifurcate** the trial in this case as it relates to certain claims and to **stay discovery** as to certain claims made by the plaintiffs against the defendants in this case.

After consideration of the record, memoranda submitted, and the argument of counsel this court finds that the defendants' **motion** should be and **is** therefore **granted**.

J. Derham Cole, **Presiding Judge**

This judgment was entered on the 3rd day of **March**, **2011**, and a copy mailed first-class this 3rd day of **March**, **2011** to attorneys of record or to parties (when appearing pro se) as follows:

Gary W. Poliakoff, *Esq.*
Post Office Box 1571
Spartanburg, South Carolina 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

William L. Howard, Sr., *Esq.*
Post Office Box 993
Charleston, South Carolina 29402

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley, Clerk of Court

M. HOPE BLACKLEY
2011 MAR -4 PM 4:27
SPARTANBURG COUNTY
CLERK OF COURT
FILED

SCRCP FORM 4 (Revised 5/00)

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

Lawrence E. **MORROW**, et al.,

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. **2007-CP-42-4601**

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

DEFENDANT(S)

RECEIVED
SC Court of Appeals
NOV 28 2011

CHECK ONE:

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

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

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

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

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

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

FILED
OCT 24 2011
CLERK OF COURT
SPARTANBURG

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

J. Derham Cole, **Presiding Judge**

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

Gary W. Poliakoff, *Esq.*
Post Office Box 1571
Spartanburg, South Carolina 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

William L. Howard, Sr., *Esq.*
Post Office Box 993
Charleston, South Carolina 29402

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley/A. Sears
M. Hope Blackley, Clerk of Court

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2007-CP-42-4601

Lawrence E. Morrow and Evelyn M. Morrow,

Appellants/Respondents,

v.

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

Defendants,

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

Respondents/Appellants.

NOTICE OF APPEAL

RECEIVED
DEC 05 2011
SC Court of Appeals

Case No. 2007-CP-42-4601

Respondents/Appellants, 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, hereby appeal the order (judgment) of The Honorable J. Derham Cole dated October 24, 2011, a copy of which is attached hereto.[1] This is a cross-appeal, Respondents/Appellants having received the Appellants'/Respondents' Notice of Appeal on November 23, 2011.

<SIGNED ON THE FOLLOWING PAGE>

[1] On motion of the Appellants/Respondents, by order entered October 12, 2011, the above-captioned defendant THI of Baltimore Management, LLC was dismissed from this action.

Respectfully submitted,

YOUNG CLEMENT RIVERS LLP

By: _____

D. Jay Davis, Jr.
William L. Howard, Sr.
Russell G. Hines
P.O. Box 993
Charleston, SC 29402
Telephone: (843) 577-4000
and
JOHNSON, TRENT, WEST & TAYLOR, LLP
Lori D. Proctor
919 Miliam Street, Suite 1700
Houston, Texas 77002
Telephone: (713) 977-7070
Attorneys for the Respondents/Appellants

Charleston, South Carolina

Dated: 12/1/11

Other counsel of record:

POLIAKOFF & ASSOCIATES, P.A.
Gary W. Poliakoff, Esquire
Raymond P. Mullman, Esquire
P.O. Box 1571
Spartanburg, SC 29304
Telephone: (864) 582-5472
Attorneys for Appellants/Respondents

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

Lawrence E. **MORROW**, et al.,

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. **2007-CP-42-4601**

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

DEFENDANT(S)

CHECK ONE:

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

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

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

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

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

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

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

FILED
OCT 24 2011
SPARTANBURG COUNTY
CLERK OF COURT

J. Derham Cole, Presiding Judge

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

Gary W. Poliakoff, *Esq.*
Post Office Box 1571
Spartanburg, South Carolina 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

William L. Howard, Sr., *Esq.*
Post Office Box 993
Charleston, South Carolina 29402

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley, Clerk of Court

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2007-CP-42-4601

Lawrence E. Morrow and Evelyn M. Morrow,

Appellants/Respondents,

v.

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

Defendants,

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

Respondents/Appellants.

PROOF OF SERVICE

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DEC 05 2011
SC Court of Appeals

Gary W. Poliakoff
atty@gpoliakoff.com

Raymond P. Mullman, Jr.
rmullmanjr@aol.com

POLIAKOFF
& ASSOCIATES

Benard B. Poliakoff
(1916-1955)

J. Manning Poliakoff
(1923-1969)

Matthew Poliakoff
(1919-1979)

October 17, 2011

Linda D. Moffitt, CVR
800 Belcher Road
Spartanburg, SC 29316

RE: Lawrence E. Morrow and Evelyn M. Morrow v. THI Holdings, LLC; 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,
C.A.#: 07-CP-42-4601

Dear Ms. Moffitt:

We represent the Plaintiff in the above-captioned case. We would like to request a copy of the transcript from the hearing that took place on October 11, 2011.

If you require payment in advance, please contact us and we will immediately mail a check to you.

Thank you in advance for your assistance.

With best regards, I am,

Yours very truly,

Angela S. Lizer
Paralegal
POLIAKOFF & ASSOCIATES, P.A.

/tba
cc: D. Jay Davis, Jr., Esq. (Attorney for the Defendants)

Courthouse Square
215 Magnolia Street, Spartanburg, South Carolina 29306
Mailing Address: P.O. Box 1571, Spartanburg, South Carolina 29304
Telephone: 864-582-5472, 864-582-8101 • Facsimile: 864-582-7280
www.gpoliakoff.com

YCRLAW
Young Clement Rivers, LLP

Elizabeth R. O'Neil
Paralegal

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

December 1, 2011

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

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

Dear Ms. Gee:

Enclosed for filing in the above matter please find the following:

- The original and two (2) copies of a Notice of Appeal;
- The original and two (2) copies of a Proof of Service regarding same;
- Three (3) copies of the Orders being appealed; and
- Our firm's check in the amount of $100.00 to cover the cost of filing the Notice of Appeal.

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

Thank you, in advance, for your assistance.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Elizabeth R. O'Neil
Paralegal

RECEIVED
DEC 05 2011
SC Court of Appeals

ERO/ero
Enclosures
cc: Gary W. Poliakoff, Esquire
Raymond P. Mullman, Jr., Esquire
The Honorable M. Hope Blackley

YCRLAW
Young Clement Rivers, LLP

Russell G. Hines
Associate

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

December 6, 2011

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

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

Dear Ms. Gee:

Please be advised that the Respondents/Appellants have received the transcript(s) relevant to the above-referenced matter. Because, as I understand it, the Appellants/Respondents will be deemed the primary appellants in this cross-appeal, it is my understanding that, pursuant to Rule 206, SCACR, upon receipt of notification that the Appellants/Respondents received the subject transcript(s), a briefing schedule will be established by the Court. Accordingly, I do not understand any briefing deadline for the Respondents/Appellants to have been set at this time. If I am mistaken, or if you have any questions or concerns, please contact me.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines
Associate

RECEIVED
DEC 08 2011
SC Court of Appeals

RGH/jla
cc: SC Court Administration
Gary W. Poliakoff, Esquire, Poliakoff and Associates, P.A.
Raymond P. Mullman, Jr., Esquire, Poliakoff & Associates, PA

The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

December 12, 2011

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

Re: Morrow, Lawrence v. Fundamental
Case Tracking #: 2011204166

Dear Counsel:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. Failure to file in the proper court may result in the dismissal of your appeal. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the bar number and firm name of any counsel shown must be included in his or her address.

I further wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

Tanya A. Gee
CLERK

TAG/ec
cc: William L. Howard, Sr., Esquire
The Honorable Richard A. Shirley

Gary W. Poliakoff
atty@gpoliakoff.com

Raymond P. Mullman, Jr.
rmullmanjr@aol.com

POLIAKOFF & ASSOCIATES

Benard B. Poliakoff
(1916-1955)

J. Manning Poliakoff
(1923-1969)

Matthew Poliakoff
(1919-1979)

December 8, 2011

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

RE: Lawrence E. Morrow and Evelyn M. Morrow, Appellants v. Fundamental Long-Term Care Holdings, LLC; Fundamental Clinical Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of Baltimore Management, LLC; THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg, Respondents, Case No. 2007-CP-42-4601

Dear Ms. Gee:

Please be advised that Appellants received the transcript of record on December 2, 2011.

Thank you for your assistance.

With best regards, I am

Yours very truly,

Raymond P. Mullman, Jr.
POLIAKOFF & ASSOCIATES, P.A.
Attorneys for Appellants

RPM/snh

cc: SC Court Administration
William L. Howard, Sr., Esq., Attorney for Respondents

RECEIVED
DEC 12 2011
SC Court of Appeals

Courthouse Square
215 Magnolia Street, Spartanburg, South Carolina 29306
Mailing Address: P.O. Box 1571, Spartanburg, South Carolina 29304
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www.gpoliakoff.com

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
DEC 20 2011
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Please

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

Respondents/Appellants.

MOTION OF APPELLANTS FOR EXTENSION OF TIME

Gary W. Poliakoff
Raymond P. Mullman, Jr.
Poliakoff & Associates, P.A.
215 Magnolia Street
Spartanburg, SC 29306
(864) 582-5472
(864) 582-7280 (facsimile)
and

1-9-12
2-3-12

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

Other Counsel of Record:
Young Clement Rivers, LLP
D. Jay Davis, Jr.
William L. Howard, Sr.
Russell G. Hines
P.O. Box 993
Charleston, SC 29402
(864)577-4000
and
Lori D. Proctor,Esquire
919 Miliam Street, Suite 1700
Houston, Texas 77002
(713)977-7070
Attorneys for Respondents/Appellants

The undersigned, as attorney for Appellants, hereby moves pursuant to Rule 240 of the South Carolina Appellate Court Rules, for an Order allowing an extension of time to file Appellants' Initial Brief and Designation of Matter. Upon information and belief, the deadline is January 3, 2012. No prior requests for extensions have been made.

Appellants respectfully request the extension for the following reasons: (a) a particularly heavy schedule with upcoming depositions and hearings, and preparation therefor, and existing requirements for memoranda and preparation of documents in other pending matters; and (b) the upcoming holiday season and related family commitments.

Appellants respectfully request an extension of time of thirty days, to February 2, 2012, for filing and service of the Initial Brief and Designation of Matter.

Respectfully Submitted,

Gary W. Poliakoff, SC Bar Number 4488
Raymond P. Mullman, Jr., SC Bar Number 8662
Poliakoff & Associates, P. A.
215 Magnolia Street
P. O. Box 1571
Spartanburg, SC 29304
(864) 582-5472
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418 N. State Line Avenue
Texarkana, AR 71854
(870) 779-1860
(870) 779-1861 (facsimile)
Attorneys for Appellants/Respondents

December 19, 2011
Spartanburg, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Please

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

Respondents/Appellants.

PROOF OF SERVICE

I certify that I have served the **APPELLANTS' MOTION FOR EXTENSION OF TIME, AND A COPY OF APPELLANTS' LETTER TO SOUTH CAROLINA COURT OF APPEALS CLERK TANYA A. GEE DATED DECEMBER 19, 2011** on the above-captioned Defendants, by depositing a copy of it in the United States Mail, postage prepaid, on December 19, 2011, addressed to their attorneys of record: William L. Howard, Sr., Esq., and D. Jay Davis, Jr., Esq., and Russell G. Hines, Esq. of Young Clement Rivers, LLP, P.O. Box 993 Charleston, SC 29402 and Lori D. Proctor, Esq., Attorney for Respondents/Appellants at 919 Miliam Street, Suite 1700; Houston, Texas 77002

SIGNATURE BLOCK ON NEXT PAGE

December 19, 2011

Gary W. Poliakoff, SC Bar Number 4488
Raymond P. Mullman, Jr., SC Bar Number 8662
Poliakoff & Associates, P. A.
215 Magnolia Street
P. O. Box 1571
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(864) 582-5472
(864) 582-7280 (facsimile)

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

Gary W. Poliakoff
atty@gpoliakoff.com

Raymond P. Mullman, Jr.
rmullmanjr@aol.com

POLIAKOFF & ASSOCIATES

Benard B. Poliakoff
(1916-1955)

J. Manning Poliakoff
(1923-1969)

Matthew Poliakoff
(1919-1979)

December 19, 2011

RECEIVED
DEC 2 0 2011
SC Court of Appeals

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

RE: Lawrence E. Morrow and Evelyn M. Morrow, Appellants v. Fundamental Long-Term Care Holdings, LLC; Fundamental Clinical Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of Baltimore Management, LLC; THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg, Respondents, Case No. 2007-CP-42-4601

Dear Ms. Gee:

Enclosed for filing, regarding the above matter, please find the original and six (6) copies of documents as follow:

1. Motion of Appellants for Extension of Time;
2. Original and one (1) copy of Proof of Service for same.

Also enclosed is our check in the amount of $25.00 for the filing fee.

With best regards, I am

Yours very truly,

Raymond P. Mullman, Jr.
POLIAKOFF & ASSOCIATES, P.A.
Attorneys for Appellants

RPM, JR/asl
Enclosures
cc: William L. Howard, Sr., Esq., Attorney for Respondents/Appellants
D. Jay Davis, Jr., Esq., Attorney for Respondents/Appellants
Russell G. Hines, Esq. Attorney for Respondents/Appellants
Lori D. Proctor, Esq., Attorney for Respondents/Appellants
M. Chad Trammell, Esq., Attorney for Appellants/Respondents

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

RECEIVED
JAN 0 3 2012
SC Court of Appeals

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.

MOTION FOR EXTENSION OF TIME TO FILE AND SERVE RESPONDENTS/APPELLANTS' INITIAL APPELLANTS' BRIEF

R/A
1-9-12
2-3-12

Case No. 2007-CP-42-4601

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

COME NOW the Respondents/Appellants above captioned, by and through their undersigned counsel, pursuant to Rule 263(b), SCACR, and move this Honorable Court for a 30-day extension of time to file and serve their Initial Appellants' Brief and Designation of Matters to be included in the Record on Appeal.

This is a cross-appeal. Pursuant to Rule 206, SCACR, the Respondents/Appellants realize that the Court may wish to establish a briefing schedule. A briefing scheduling having not yet been established, however, and the Respondents/Appellants having received the transcript(s) relevant to this matter, the last of which having been received on December 5, 2011, to the extent that the Respondents/Appellants' Initial Appellants' Brief and corresponding Designation of Matters are, in accordance with Rule 208(a)(1), SCACR, due to be filed and served 30 days from December 5, 2011 (i.e., on or before January 4, 2012), the Respondents/Appellants respectfully request an extension of 30 days' time. Such extension is requested in light of other work-related time commitments as well as the recent holidays. The Respondents/Appellants do not believe that such extension will work any undue prejudice upon any other party to this matter.

WHEREFORE, the Respondents/Appellants submit that good cause exists for this Court to allow them until February 3, 2012 to file and serve their Initial Appellants' Brief and corresponding Designation of Matters to be included in the Record on Appeal.

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
Telephone: (843) 577-4000
and
JOHNSON, TRENT, WEST & TAYLOR, LLP
Lori D. Proctor (S.C. Bar No. 80117)
919 Miliam Street, Suite 1700
Houston, Texas 77002
Telephone: (713) 977-7070
Attorneys for the Respondents/Appellants

Charleston, South Carolina

Dated: 12/30/11

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.

PROOF OF SERVICE

Case No. 2007-CP-42-4601

I, Russell G. Hines, do hereby certify that a copy of the Respondents/Appellants' **Motion for Extension of Time to File and Serve Respondents/Appellants' Initial Appellants' Brief** was sent to counsel for the Appellants/Respondents (i.e., counsel for all respondents/adverse parties to the Respondents/Appellants' appeal) via United States Mail, postage pre-paid on December 30, 2011 addressed as follows:

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

and

M. Chad Trammell, Esquire
The Trammell Law Firm, P.L.L.C.
418 N. State Line Avenue
Texarkana, AR 71854

<SIGNED ON THE FOLLOWING PAGE>

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
Telephone: (843) 577-4000

and

JOHNSON, TRENT, WEST & TAYLOR, LLP
Lori D. Proctor (S.C. Bar No. 80117)
919 Miliam Street, Suite 1700
Houston, Texas 77002
Telephone: (713) 977-7070
Attorneys for the Respondents/Appellants

Charleston, South Carolina

Dated: 12/30/11

YCRLAW
Young Clement Rivers, LLP

Aimee M. Justman
Legal Assistant

Direct Dial: (843) 720-5460
Direct Fax: (843) 579-1385
E-mail: Ajustman@ycrlaw.com

December 30, 2011

RECEIVED
JAN 0 3 2012
SC Court of Appeals

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

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

Dear Ms. Gee:

Enclosed for filing in the above referenced matter, please find the original and seven (7) copies of a Motion for Extension of Time to File and Serve Respondents/Appellants' Initial Appellants' Brief. Also enclosed is the original and one (1) copy of the Proof of Service regarding the same, and a check in the amount of $25.00 to cover the costs associated with this request.

Please return one (1) court stamped copy of each document to me using the pre-stamped envelope provided. With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Aimee M. Justman
Legal Assistant

/amj
Enclosures
cc: M. Chad Trammell, The Trammell Law Firm, PLLC
Gary W. Poliakoff, Esquire, Poliakoff & Associates, P.A.
Raymond P. Mullman, Jr., Esquire, Poliakoff & Associates, PA
Lori D. Proctor, Esquire, Johnson, Trent, West & Taylor, LLP

The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 12, 2012

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

Lori D. Proctor, Esquire
Johnson Trent West
& Taylor,LLP
919 Milliam St/Ste 1700
Houston, TX 77002

Re: Morrow, Lawrence v. Fundamental
Case Tracking #: 2011204166

Dear Counsel:

Please be advised that a preliminary review of the order you are appealing shows it might not be appealable.

Accordingly, it is requested that each of you submit a memorandum to the court addressing the issue of appealability within ten (10) days of the date of this letter. Upon receipt of the memoranda, the matter will be taken under consideration and you will be notified as soon as action has been taken.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec
cc: William L. Howard, Sr., Esquire
D. Jay Davis, Jr., Esquire
Russell G. Hines, Esquire

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.

The Honorable J. Derham Cole
Spartanburg County
Trial Court Case No. 2007-CP-42-04601

ORDER

For good cause having been shown, the time for serving and filing the Appellants' Initial Brief and Designation of Matter of the Appellants/Respondents in the above entitled matter is hereby extended until February 3, 2012.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: Gary W. Poliakoff, Esquire
Raymond P. Mullman, Esquire
Lori D. Proctor, Esquire
William L. Howard, Sr., Esquire
D. Jay Davis, Jr., Esquire
Russell G. Hines, Esquire

FILED
JC 1/12/12

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.

The Honorable J. Derham Cole
Spartanburg County
Trial Court Case No. 2007-CP-42-04601

ORDER

For good cause having been shown, the time for serving and filing the Appellants' Initial Brief and Designation of Matter of the Respondents/Appellants in the above entitled matter is hereby extended until February 3, 2012.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: Gary W. Poliakoff, Esquire
Raymond P. Mullman, Esquire
Lori D. Proctor, Esquire
William L. Howard, Sr., Esquire
D. Jay Davis, Jr., Esquire
Russell G. Hines, Esquire

FILED
1/12/12

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2007-CP-42-4601

Lawrence E. Morrow and Evelyn M. Morrow,

Appellants/Respondents,

v.

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

Defendants,

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

Respondents/Appellants.

RESPONDENTS/APPELLANTS' MEMORANDUM ADDRESSING APPEALABILITY

RECEIVED
JAN 25 2012
SC Court of Appeals

Case No. 2007-CP-42-4601

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

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

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

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

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

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

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

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

S.E.2d 395 (1993); *Patterson v. Spector Broadcasting Corp.*, 287 S.C. 249, 335 S.E.2d 803 (1985)(discovery orders are not directly appealable). Appealability of the issues encompassed within the Respondents/Appellants' cross-appeal are premised solely upon a discretionary appeal allowed by this Court if it concludes Appellants/Respondents' appeal of the order granting bifurcation and staying discovery is immediately appealable. Should that be the case, the authority for allowing appeal of this interlocutory ruling is *QZO, Inc. v. Mover*, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004)(ruling that the denial of a motion to dismiss for lack of personal jurisdiction can be considered if another appealable issue is before the appellate court), and as to the discovery issue, *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) ("This Court reviews interlocutory orders when they contain other appealable issues."). Consequently, if this Honorable Court concludes Appellants/Respondents' appeal should be dismissed without prejudice because it is interlocutory and not immediately appealable, then Respondents/Appellants submit their cross-appeal should also be dismissed without prejudice for the same reason.

APPEALABILITY OF ORDER GRANTING BIFURCATION AND STAYING DISCOVERY OF NONCLINICAL ISSUES

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted,

YOUNG CLEMENT RIVERS LLP

By: _____

D. Jay Davis, Jr.
William L. Howard, Sr.
Russell G. Hines
P.O. Box 993
Charleston, SC 29402
Telephone: (843) 577-4000
and
JOHNSON, TRENT, WEST & TAYLOR, LLP
Lori D. Proctor
919 Miliam Street, Suite 1700
Houston, Texas 77002
Telephone: (713) 977-7070
Attorneys for the Respondents/Appellants

Charleston, South Carolina

Dated: January 23, 2012

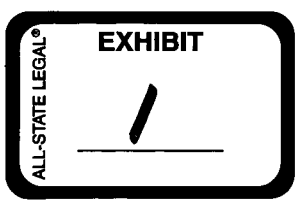
[1] Respondents/Appellants request an opportunity to file a memorandum in response to any unanticipated arguments raised by Appellants/Respondents in their Memorandum regarding appealability, which memo is due contemporaneously with this memorandum.

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

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 MAR -4 PM 4:26
M. HOPE BLACKLEY

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





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

HISTORY OF THE CASE/ISSUES

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

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

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 MAR -4 PM 4:26
M. HOPE BLACKLEY

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

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

FILED
CLERK OF COURT
BARTOW COUNTY
2011 MAR -4 PM 4:26
M. HOPE BLACKLEY

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

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

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

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

DISCUSSION

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

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

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

SCRCP 42(b) states the following:

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

(Emphasis added.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs also assert an indirect basis for liability under a corporate successor analysis. "[I]n the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless there was an agreement to assume such debts, the circumstances surrounding the transaction warrants a finding of consolidation or merger of the two corporations, the successor company was a mere continuation of the predecessor, or the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213 (2005)(Citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)). "To meet the fraud exception to successor liability, the general rule is that a successor must knowingly participate in a fraudulent asset transfer." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67 (Ct. App. 2008). Consideration of this theory will require analysis of these complex legal concepts in the context of any evidence the parties proffer regarding merger, acquisition, or consolidation of the defendant corporations, as well as any legitimate purposes for the action, motives and knowledge possessed by the alleged actors.

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Plaintiffs also allege a "de facto merger" between FLTCH and THI Holdings, LLC as a basis for assigning liability for Nursing Home's torts. "Most courts traditionally have applied the mere continuation exception (also known as a de facto merger) contained in the general rule on successor liability only when there is commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors, or shareholders, and the business continues largely unchanged." *Simmons*, 366 S.C. at 317, 622 S.E.2d at 217 (J. Burnett, dissenting). "Where there is an absorption of the business and assets--in other words, a merger de facto . . . the extent of the liability is necessarily determined by the value of the property received." *Huggins v. Commercial & Sav. Bank*, 141 S.C. 480, 521 (S.C. 1927)(Citing 15 A. L. R., 1150.) The key element of a de facto merger is, however, a continuity of ownership between the selling and purchasing corporations. *Taylor v. Atlas Safety Equipment Co.*, 808 F. Supp. 1246, 1251 (E.D. Va. 1992) (citing *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977)) ("Absent a transfer of stock, the nature and consequences of a transaction are not those of a merger."); *Crawford Harbor Assocs. v. Blake Constr. Co.*, 661 F. Supp. 880, 883 (E.D. Va. 1987) (Applying Virginia law: "The essential characteristic of a de facto merger is the succession of the selling corporation's stockholders to stockholder status in the purchasing corporation.").

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Finally, Plaintiffs allege the defendant corporate entities operated as a joint venture. South Carolina Courts equate joint venture with joint enterprise:

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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NOW THEREFORE, IT IS

ORDERED that:

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

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

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

IT IS SO ORDERED.

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Hon. J. Derham Cole
Circuit Court, Seventh Circuit

Spartanburg, South Carolina
Dated: March 3, 2011

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

Lawrence E. **MORROW**, et al.,

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. **2007-CP-42-4601**

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

DEFENDANT(S)

CHECK ONE:

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

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

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

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

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

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

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

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COUNTY OF SPARTANBURG

J. Derham Cole, Presiding Judge

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

Gary W. Poliakoff, *Esq.*
Post Office Box 1571
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ATTORNEY(S) FOR THE PLAINTIFF(S)

William L. Howard, Sr., *Esq.*
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Charleston, South Carolina 29402

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley, Clerk of Court

ALL-STATE LEGAL®
EXHIBIT
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SCRCP FORM 4 (Revised 5/00)

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.

PROOF OF SERVICE

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JAN 25 2012
SC Court of Appeals

Case No. 2007-CP-42-4601

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

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

and

Raymond P. Mullman, Esquire
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<SIGNED ON THE FOLLOWING PAGE>

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JAN 25 2012
SC Court of Appeals

Respectfully submitted,

YOUNG CLEMENT RIVERS LLP

By: _____

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Charleston, South Carolina

Dated: 1/23/12

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SC Court of Appeals

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January 23, 2012

VIA FACSIMILE and U.S. MAIL
The Honorable Tanya A. Gee
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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

Dear Ms. Gee:

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

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

Thank you, in advance, for your assistance.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Elizabeth R. O'Neil
Paralegal

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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2007-CP-42-4601

Lawrence E. Morrow and Evelyn M. Morrow,

Appellants/Respondents,

v.

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

Respondents/Appellants.

MEMORANDUM OF LAW ON APPEALABILITY OF "BIFURCATION" ORDER

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SC Court of Appeals

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I. INTRODUCTION

A. Issue and Brief Answer

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

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

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

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

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

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

B. *Standard of Review*

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

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

II. STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

III. FUNDAMENTAL FAMILY OF COMPANIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Fundamental Network offers substantial benefits:

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

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

- A company-wide commitment to continuous quality improvement.

- Case management and outcomes management including scheduled status report.

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

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

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

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

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

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

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

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

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

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

into their system;

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

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

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

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

FAS has employees and contracts to provide services within "the Fundamental family of companies" which is "part of a nationwide network of patient care centers."[3] FAS provides services such as payroll, professional liability, accounting, legal, and computer network and support as well as complaint hotline services, vendor services, and medical record review services. FAS also creates the budgets for all facilities within the "Fundamental family of companies."

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

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

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

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

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

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

IV. LEGAL ARGUMENTS

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

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

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

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

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

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

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

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

B. The Trial Court's Ruling is Immediately Appealable

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

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

pleading in any action." Section 14-3-330(2). Tatnall v. Gardner, 350 S.C. 135, 564 S.E.2d 377 (Ct. App. 2002). The Court's Order in effect grants summary judgment on causes of action for corporate negligence, direct participant liability, negligent management and administration, joint enterprise, agency, and governing body liability.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Several Courts have held that the **Seventh Amendment** right to the trial by jury includes the right to have a single issue decided one time by a single jury. See Gasoline Products Co. v. Champlin, 283 US 494 (1931), regarding the Seventh Amendment and the use of separate juries, particularly when one jury re-examines a fact decided by the first jury. The 7th Amendment provides in pertinent part that "the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States..." The issue in the Champlin case dealt with a partial remand of a contract dispute. The First Circuit left in tact the liability phase and remanded for a second jury to determine the amount of damages. The U. S. Supreme Court reversed

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

Plaintiffs' case is a case of direct corporate negligence, that is, the acts and omissions of the Fundamental entities caused Plaintiffs' injuries. The interrelated nature of the Defendants' joint venture described above demonstrates why Plaintiffs' substantial rights are affected by the Trial Court's ruling, which makes it subject to this Court's review. The Court, by granting bifurcation of the negligence causes of action against the facility and the parent corporation into two separate trials with two separate juries, has effectively granted summary judgement to the Fundamental entities; has effectively deprived Plaintiffs of a fair and fully informed fact finder; and has created more questions than answers with this "piecemeal litigation" which should be avoided. Plaintiffs should be allowed to go to trial with all Defendants in one trial with one jury - so that the whole story may

be told and justice served. All the evidence and issues overlap and are not "separate and distinct." Typical bifurcation, when granted, simply separates liability and damages, or liability and punitive damages, with separated presentations, but is still one trial before one jury. Here, Plaintiffs are deprived of presenting their case of negligence by the Fundamental entities.

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

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

Respectfully Submitted,

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January 23, 2012
Spartanburg, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2007-CP-42-4601

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

vs.

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

---

PROOF OF SERVICE

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

January 23, 2012

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January 23, 2012

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

RE: Lawrence E. Morrow and Evelyn M. Morrow, Appellants v. Fundamental Long-Term Care Holdings, LLC; Fundamental Clinical Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg
C.A. No. 2007-CP-42-4601

Dear Ms. Gee:

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

With best regards, I am,

Yours very truly,

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

RPM, JR/snh

Enclosures
cc: William L. Howard, Sr., Esq., Attorney for Respondents/Appellants
D. Jay Davis, Jr., Esq., Attorney for Respondents/Appellants
Russell G. Hines, Esq. Attorney for Respondents/Appellants
Lori D. Proctor, Esq., Attorney for Respondents/Appellants
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The South Carolina Court of Appeals

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February 2, 2012

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William L. Howard, Sr., Esquire
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Re: Morrow, Lawrence v. Fundamental
Case Tracking #: 2011204166

Dear Counsel:

This letter is to confirm, pursuant to a telephone conversation between Mr. Hines and a member of my staff today, that the filing deadlines for this matter will be held in abeyance pending the Court's decision on appealability.

Very truly yours,

CLERK

TAG/ec

cc: Lori D. Proctor, Esquire

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.

The Honorable J. Derham Cole
Spartanburg County
Trial Court Case No. 2007-CP-42-04601

ORDER

Appellants appeal from a trial court's order granting bifurcation of the litigation. Respondents filed a motion to dismiss, arguing the order was not immediately appealable. Appellants filed a return, arguing the order was an appealable final order that deprived the Appellants of a mode of trial to which they are entitled to as a matter of law. After careful consideration, the appeal is dismissed because the order granting bifurcation is not immediately appealable. See Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 73, 533 S.E.2d 331, 333 (2000) (finding an order granting bifurcation of issues was not immediately appealable because "trial of all issues in the case in a single proceeding [was] not a mode of trial to which the parties

[were] entitled as a matter of right"); see also Senter v. Piggly Wiggly Carolina Co., Inc., 341 S.C. 74, 78-79, 533 S.E.2d 575, 577-78 (2000) (finding an order denying bifurcation of the issues of liability and damages in a personal injury case was not immediately appealable because it did not deprive the party of a mode of trial to which it was entitled as a matter of right). Accordingly, Appellants' appeal and Respondents' cross-appeal are dismissed.

IT IS SO ORDERED.

Columbia, South Carolina

cc: Gary W. Poliakoff, Esquire
Raymond P. Mullman, Esquire
Lori D. Proctor, Esquire
William L. Howard, Sr., Esquire
D. Jay Davis, Jr., Esquire
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FILED
3/5/13

The South Carolina Court of Appeals

TANYA A. GEE
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Re: Morrow, Lawrence v. Fundamental
Case Tracking #: 2011204166

Dear Counsel:

Enclosed is a copy of an Order of the Court regarding the above case.

All parties are advised the remittitur will be sent in accordance with the South Carolina Appellate Court Rules.

Very truly yours,

Tanya A. Gee

CLERK

TAG/ec

cc: Lori D. Proctor, Esquire
The Honorable M. Hope Blackey

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2007-CP-42-4601

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

v.

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

PETITION FOR REHEARING OR REHEARING *EN BANC*

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SC Court of Appeals

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STATEMENT OF GROUNDS FOR REHEARING OR REHEARING *EN BANC*

1. The subject Opinion overlooked or misapprehended the prejudice that will result by two separate trials when the issues are not separate and distinct and substantial evidence will overlap between trials.

2. The subject Opinion overlooked or misapprehended the substantial evidence of excluded Defendants' significant and direct involvement in the operation of the facility and the opinions of Petitioner's experts' seasoned, and well-respected experts in forensic accounting, and nursing home administration.

3. The subject Opinion overlooked or misapprehended the atypical nature of the "bifurcation" Order in this case which allows necessary and indispensable parties to be excluded from the trial of this case.

4. The subject Opinion overlooked or misapprehended that Plaintiffs pled and significant evidence exists to show: an agency relationship among the facility and the excluded Defendants; a joint enterprise among all Defendants; an amalgamation of interests among all Defendants; and negligent management and administration.

5. The subject Opinion overlooked or misapprehended that statutory and regulatory law related to nursing homes requires the participation of the excluded Defendants.

STATEMENT OF THE CASE

The underlying negligence action arises from injuries and damages suffered by Lawrence E. Morrow while a resident in Defendants' nursing home, Magnolia Place at Spartanburg. Lawrence E. Morrow and his wife Evelyn M. Morrow (hereinafter "Plaintiffs" or "Appellants") commenced this action on December 27, 2007 and filed an amended complaint on January 20, 2009. (Exhibit 1). Since that time, two Defendants were dismissed.[1]

Plaintiffs' Complaint alleged that, while in the care of Defendants from January, 12, 2007 to February 2, 2007, Mr. Morrow suffered from infections, malnourishment, dehydration, and pressure ulcers. (Exhibit 1). Plaintiffs further alleged that as a result of Defendants' failure to turn and reposition Mr. Morrow every two hours, his pressure ulcers worsened and were unable to heal. According to Plaintiffs, he was also left by Defendants to languish in his urine and feces, resulting in further skin breakdown and worsening wound conditions. Plaintiffs' Complaint also states that Mr. Morrow suffered a preventable fall that caused permanent injury to his genitals while being assisted in the shower by Defendants' staff[2], requiring surgery to remove a penile implant from Mr. Morrow. (Exhibit 2, pp. 87-90; Exhibit 3). It is alleged that Plaintiffs' injuries and damages, including conscious pain and suffering, mental distress, medical bills and disability, and loss of consortium, were the direct and proximate cause of the negligent acts and omissions of each of the named Defendants. (Exhibit 1).

Defendants at issue include: the licensee of the facility, THI of South Carolina at Magnolia

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[1] Defendants, THI of Baltimore Management, LLC and THI Holdings, LLC were dismissed from this action.

[2] The staff involved were aides and not licensed health care professionals.

Place at Spartanburg, LLC (d/b/a Magnolia Place at Spartanburg) (hereinafter "THI of SC at Magnolia Place"), and the entities that Plaintiffs contend together control the overall operations and management of the facility, Fundamental Long Term Care Holdings, LLC (hereinafter "FLTCH"), THI of Baltimore, Inc. (hereinafter "THI of Baltimore"), Fundamental Clinical Consulting (hereinafter "FCC"), Fundamental Administrative Services, LLC (hereinafter "FAS"), and THI of South Carolina, LLC (hereinafter "THI of SC") (hereinafter collectively the "Fundamental Defendants").

Plaintiffs have pled a negligence cause of action against THI of SC at Spartanburg. (Exhibit 1). With respect to the Fundamental Defendants, Plaintiffs' Complaint includes allegations of direct negligence, corporate negligence, direct participant liability, alter ego, joint venture, negligent management and administration, and governing body liability. Each Defendant filed an Answer, generally denying the substance of Plaintiffs' claims, excluding FLTCH, which is contesting personal jurisdiction. All of the Defendants asserted the following affirmative defenses: unconstitutionality of punitive damages; failure to state facts sufficient to plead cause of action; limitation by South Carolina of non-economic damages to the amounts provided in S.C. Code § 15-32-200, et seq.; failure to mitigate damages; comparative negligence; contributory negligence; and failure to comply with S.C. Code § 15-79-125.

On October 25, 2010, Defendants filed a "Motion to Bifurcate", requesting that the Court separate Plaintiffs' negligence action into two separate trials–the first trial solely against THI of SC at Spartanburg to address issues Defendants label "clinical" and the second, "**only if necessary**" against the remaining "corporate" Defendants. Plaintiffs filed a Memorandum in Opposition on November 17, 2010. The parties argued their respective positions at a hearing on November 24,

2010. The Honorable Judge Cole granted Defendants' Motion to Bifurcate on March 4, 2011, which is the Order in question on appeal. (Exhibit 4).

Prior to appealing to this Court, Plaintiffs requested that the Trial Court reconsider its ruling based on further evidence that the "bifurcated" issues were not separate and distinct in a motion filed on March 14, 2011. Plaintiffs' Motion for Reconsideration was heard on October 11, 2011. The Trial Court ultimately denied the Motion for Reconsideration on November 17, 2011. (Exhibit 5).

On November 21, 2011, Plaintiffs filed their Notice of Appeal. Upon request from this Court, Plaintiffs filed a Memorandum of Law regarding the appealability of the Trial Court's Bifurcation Order on January 23, 2011. On March 5, 2012, the Court of Appeals denied Plaintiffs' Appeal without oral argument and without the benefit or an initial brief.

While the Order in question is labeled "Bifurcation," Plaintiffs will show that the effect of such ruling in the case at hand is to actually exclude necessary parties and crucial issues of corporate control, which caused the damages to Plaintiffs.

FACTS

A. Mr. Morrow's Residency at Magnolia Place at Spartanburg

Mr. Morrow entered Magnolia Place for short term physical therapy after being treated at the hospital for pneumonia. His goals, as well as the goals of his healthcare providers, were for him to regain his strength, begin walking again, and then return home. Upon discharge from the hospital, Mr. Morrow was too weak to go home immediately so his doctors recommended an admission to a skilled nursing facility, where Mr. Morrow could receive around the clock care until he regained his strength to handle basic life activities on his own. Mr. Morrow sought services at Magnolia Place of Spartanburg.

Unlike relying on a medical professional for a procedure or operation, Mr. Morrow relied on Defendants each and every day for his most basic needs, such as food, water, mobility, hygiene, wound care, toileting, and bathing. This unique reliance between a nursing home resident and the operators of a skilled nursing facility is a critical factor that distinguishes this action from standard medical malpractice actions. Unfortunately, Defendants did not provide Mr. Morrow with the care or services he needed. (Exhibit 6). As a result of Defendants' negligence, Mr. Morrow's condition declined so severely that he was unable to meet his goals during his residency at the Defendants' facility. Failure to provide professional nursing care is not the only issue here and thus, this is not solely a medical malpractice action. Instead, this case involves simple negligence–the breach of a duty owed to a frail elderly resident completely reliant on the facility operators for his well-being; the failure to use reasonable care.

During his deposition, Mr. Morrow testified that the staff seldom turned and repositioned him and that the staff would not respond to call bells within a reasonable amount of time. (Exhibit 2, pp. 121-122). He has also testified that on several occasions it would take staff over an hour to respond to call bells. (Exhibit 2, pp. 121-122). Additionally, Plaintiff suffered custodial neglect on January 19, 2007, when Mr. Morrow was improperly transferred in the shower room by two employees who were not licensed health care providers. (Exhibit 2, pp. 87-90). While the staff was transferring Mr. Morrow from his wheelchair to the shower chair, without a gait belt, Mr. Morrow suffered an injury to his scrotum. (Exhibit 2, pp. 87-90). Mr. Morrow has testified that he suffered excruciating pain and swelling to his penis, scrotum and the surrounding area as a result of that negligent transfer. (Exhibit 2 pp. 87-90, 96, 125; Exhibit 3). That injury to Mr. Morrow's genitals caused his penile implant to protrude from his penis and surgery was required to remove the implant.

(Exhibit 7, p. 53). The scar tissue caused by the trauma, and the infection caused by negligent wound care, meant Mr. Morrow was not a surgical candidate for a new penile implant. (Exhibit 2 pp. 120-121; Exhibit 7 pp. 52-53). He was no longer able to have sexual relations with his then 49 year-old wife. (Exhibit 2 p. 108; Exhibit 8 pp. 106-107, 112; Exhibit 7, p. 51).

Defendants' neglect and lack of care caused his pressure wounds to deteriorate during his residency at Magnolia Place at Spartanburg. (Exhibit 6). For example, the facility did not follow physician's orders related to wound care. The neglect was so bad, in fact, that Dr. Ernest Camp, who treated Mr. Morrow as an outpatient at Mary Black Wound Center during Mr. Morrow's stay at Defendant's facility noted, "we are having difficulty with compliance with the nursing home treating this patient. We will continue to try to do the best we can." (Exhibit 9). Dr. Camp continued by stating he would have to release Mr. Morrow as a client if the staff at [Magnolia Place at Spartanburg] could not follow his orders because he didn't want to be responsible for Mr. Morrow's outcome in that situation.

What Mr. Morrow did not know was that Magnolia Place was operated by a group of entities that routinely placed their own profits at a higher priority than resident care. (Exhibit 10). Ample evidence demonstrates that all of the named Defendants operate as a single enterprise, and that the enterprise was created for the primary purpose of deriving profits from operating nursing home facilities nationwide while shielding the main corporate entities and assets from any responsibility or liability when deaths and injuries result from deficient care. (Exhibit 10; Exhibit 11 pp. 71-72, 80-83, 86, 91, 93-95). Plaintiffs aver that the corporate Defendants knowingly, and with reckless disregard for the health and well-being of the facility residents, grossly understaffed and under-funded the facility; failed to appropriately train the staff; and knowingly permitted Mr. Morrow to

be neglected. Plaintiffs contend that injuries were caused by the poor treatment that was received at the facility and by the acts and omissions of the corporate owners.

B. The Fundamental Family of Companies

A general understanding of how the Fundamental Defendants operate as a single or joint enterprise in the operations of their healthcare facilities across the country, including Magnolia Place at Spartanburg, is required to understand the issues presented by the Trial Court's "Bifurcation" Order. Correspondingly, knowledge of the interrelated function of the various entities is crucial to understanding how the Plaintiffs' negligence allegations necessarily include the acts and omissions of the Fundamental Defendants, and therefore cannot logically or lawfully be "bifurcated." Despite repeated refusals of Defendants to produce relevant discovery in the instant matter, Plaintiffs have gathered a substantial amount of evidence from witnesses and various other public record sources to establish the amalgamated nature of the entities and to present genuine issues of disputed fact that would preclude entry of summary judgment or directed verdict on Plaintiffs' claims against the Fundamental Defendants.

Defendants are attempting to exclude evidence of the parent corporation and its agents' FCC and FAS' substantial involvement and control of the operation of Magnolia Place at Spartanburg. However, FLTCH's control and liability is inextricably woven and cannot be separated without presenting the jury with a false picture of what happened to Mr. Morrow, and removing the opportunity to render a just verdict based on the merits of this case.

All of the named Defendants are amalgamated entities with the same owners and managers who operate a chain of nursing homes as a joint enterprise. Defendants are owned by the same individuals, Murray Forman and Leonard Grunstein. Plaintiffs' forensic accounting expert Bruce

Engstrom issued a detailed report regarding the structure and interplay between the corporate entities. (Exhibit 12). FLTCH currently owns and controls Magnolia Place at Spartanburg 100% and owns and controls the other entities named herein 100%. (Exhibit 13). FLTCH is the sole shareholder of Defendant THI of Baltimore, Inc. FLTCH is likewise a member of FCC and FAS, which are the Defendants that provide management and operating services to THI of SC at Magnolia Place (d/b/a the facility name, Magnolia Place at Spartanburg). THI of Baltimore is in turn the Governing Body of THI of SC at Magnolia Place.

Plaintiffs allege and substantial evidence proves that these Defendants operated and managed the nursing home, Magnolia Place at Spartanburg, in a grossly negligent manner and caused injuries to Mr. Morrow. All Defendants together were grossly negligent by consciously deciding to provide insufficient staffing, training, and supplies at Magnolia Place at Spartanburg. Defendants knew or should have known that by doing so their nurse aids and nurses could not provide care to residents, including Mr. Morrow. (Exhibit 14, statements of former employees: K. Copeland; J. Mayes; K. Wright Gaines; M. Makupson).

In September 2006, FLTCH created FCC and FAS to replace the previous management company, which had provided operational and management services to all the facilities, including Magnolia Place (Exhibits 15 and 16). At the time of Mr. Morrow's residency in 2007, FCC and FAS were providing management and administrative services to Magnolia Place pursuant to contracts. (Exhibits 17 and 18). Plaintiffs' contend that FLTCH controls the operation and management of Magnolia Place through its agents FCC and FAS. Additionally, FCC and FAS conduct the operational and administrative services and training to all the facilities owned by FLTCH in South Carolina and nationwide.

FCC is designated as the management company of the facility on its application for licensure filed with the state. (Exhibit 13). The contract setting forth its duties as the management company provides that FCC is authorized to perform services "in whatever manner it deems reasonably appropriate to meet the day-to-day requirements of the operations" of the facility. (Exhibit 17). In fact, FCC provides the operational policies and procedures that must be followed by the facility pursuant to state and federal regulations. (Exhibit 19 p. 87; Exhibit 20 p. 119; S.C. Regulations 61-17 § 501). The contract for services acknowledges FCC's critical role in running the facility and states that its services are "required in connection with the management of the Facility." (Exhibit 17).

According to the corporate representative of the Fundamental Defendants, FAS has employees and contracts to provide services within "the Fundamental family of companies" which is "part of a nationwide network of patient care centers."[3] (Exhibit 20 pp. 18-19; Exhibit 19 pp. 18-19). FAS provides services such as payroll, professional liability, accounting, legal, and computer network and support as well as complaint hotline services, vendor services, and medical record review services. FAS also creates the budgets for all facilities within the "Fundamental family of companies." (Exhibit 21 pp. 3-4; Exhibit 19 p. 54; Exhibit 22 pp. 12-14, 19, 33-34; Exhibit 23 pp. 20-21, 76-77). The budgets determine the facilities' ability to sufficiently staff, including levels of staff and training, and furnishing of supplies, all of which directly results in care of residents or lack thereof.

The nursing home industry is subject to regulations, and standards establishing duties for governing bodies and management entities for nursing facilities, above and beyond other corporate businesses.

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

On the facility's Application for License, THI of Baltimore is listed as the Governing Body, which is extremely significant. (Exhibit 13). Section 483.75(d) of the Federal Nursing Home Reform Act (FHA) mandates that the governing body "is legally responsible for establishing and implementing policies regarding the management and operation of the facility." 42 CFR 483.75(d). However, Plaintiffs have discovered that THI of Baltimore, Inc. is a shell company that FLTCH uses to enter into contracts such as insurance and services provided by vendors. THI of Baltimore has never had any employees, does not conduct any business, and has no Operating Agreement or business purpose. It is a sham corporation. Plaintiffs contend and substantial evidence exists to prove that the governing body is FLTCH as the owner/operator of THI of Baltimore. Dr. Patterson, the Medical Director or Magnolia Place, testified that Fundamental is a "national company" that "oversee and monitor," and meets with "Fundamental people at a National level on their Medical Advisory Board" to keep costs down. (Exhibit 24 pp. 31-32, 151-152).

FLTCH has delegated the duties of the governing body to its agents' FCC and FAS as evidenced by the cost reports which state the "Home Office" for Magnolia Place is FCC and FAS. Cost Reports are documents required by Federal Regulation for nursing homes. These cost reports show substantial revenue going to FCC and FAS from Magnolia Place. It is significant that FCC and FAS file Home Office cost reports. The Home Office Cost Report General Instructions state:

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

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

As entities responsible for the day to day operations of the facility, FAS and FCC receive substantial portions of the funds paid by the residents for care at the facility. The Administrative Support Agreement between Magnolia Place at Spartanburg and FAS provides that the facility is contracted to pay 4% of net operating revenue monthly to FAS for services "required in connection with the management of the facility." (Exhibits 17 and 18). In the Clinical Support Agreement between THI of SC at Magnolia Place and FCC, the facility is contracted to pay 1% of net operating revenue monthly to Fundamental Clinical Services also for services "required in connection with the management of the facility." (Exhibit 17). This disproves Defendants' contention that there were no entities other than THI of SC at Magnolia Place performing any services for Mr. Morrow; 5% of monthly net operating revenue is not paid to related entities for doing nothing.

Plaintiffs retained expert forensic CPA Bruce Engstrom who arrived at the following conclusions that remain undisputed by Defendants:

(1) FLTCH's centralized cash management system stripped Magnolia Place from any right or control of revenues which were then commingled with monies from subsidiaries, and controlled exclusively at the corporate level;

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

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

(Exhibits 10 and 12).

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

(1) FLTCH's Operating Agreement which states "The Company is in the business of managing and operating long-term care facilities." (Exhibit 25 p. 1).

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

care." (Exhibit 26 pp. 1-2).

(3) FLTCH's application to the U.S. Patent and Trademark Office for the registration of the trademark "Fundamental" and the servicemark "Quality Care is Fundamental." (Exhibit 27).

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

a) If the resident/patients choices made are not cost effective, tactfully suggest alternate ideas to them.

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

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

d) Supplements are notoriously over prescribed. Supplement orders will frequently accompany a resident/patient upon transfer from a hospital or other institution. The resident should be evaluated to determine if the supplement is truly necessary. If it is determined that the supplement is not necessary, the attending physician should be notified and an order should be requested to discontinue the supplement. Facilities should strive to keep the percent of residents on supplements to less than 25%. (Exhibit 28).

Fundamental's website describes its "business":

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

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

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

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

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

- We continually evaluate our practices to ensure consistent delivery of superior care. At Fundamental we utilize a committee of health care professionals to continually review our patient care standards and advises the staff on the health care practices and policies that are most beneficial to our residents. (Exhibit 29).

In a case involving the same Defendants, Prendergast v. FLTCH et al, the Untied States District Court New Mexico provided a detailed factual basis for denying FLTCH's summary judgment motion. (Exhibit 30). The Court found the following undisputed facts:

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

(2) When FLTCH acquired THI Baltimore in March 2006, it created Defendants FCC and FAS to do the work that THI Baltimore Management, LLC, which is now defunct, had been doing. The FAS and FCC contracts are materially the same for every one of approximately 100 care facilities. The FAS management fee is 4% of net operating revenue and the FCC fee is 1%. FAS and FCC provided all the services listed in Exhibit A of the contract with Valle Norte and there is no consequence if the fee does not cover the operating expenses; the lack of payment is recorded as a "receivable" on FAS's books and a payable on the facility's books, and the balance just grows if the facility does not perform better; Valle Norte's revenues go to a "lock box, " along with the revenues for every "Fundamental" facility and the funds in the "lock box" are applied to a line of credit that FAS has.

(3) Christine Zack, an in-house attorney, holds the position of Senior Vice President for

FAS, and though she has no direct supervisor, she presumes her employment is controlled by FLTCH shareholder Murray Forman. Ms. Zack testified as the corporate representative for each defendant and she provides updates regarding operations and legal matters at the facility-level to FLTCH shareholder Mr. Forman several times a month; there is one Directors' and Officers' insurance policy, held in the name of FLTCH, that covers all the facilities and named Defendants[5]

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

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

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

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

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

The undisputed testimony and evidentiary documentation proves that Fundamental created the subsidiaries' policies and procedures, controls the budget, and represents to consumers that Fundamental operates and manages its nursing facilities. Although the Trial Court in the instant

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

matter stated that Plaintiffs were underestimating that the trial would take approximately two weeks, the Plaintiff in Prendergast was able to educate a court on the above mentioned prior to ruling on summary judgment motions. Even more importantly, Plaintiff presented its case regarding the interrelated nature of the Fundamental Defendants in a one week trial–ending with a jury verdict finding that Defendants FLTCH, FAS, FCC, THI of Baltimore, THI of New Mexico, and THI of New Mexico at Valle Norte, LLC were a part of an **integrated enterprise**. (Exhibit 31, p.1).

As in Prendergast, Plaintiffs have set forth evidence of the overlap of personnel with respect to the operations of Magnolia Place at Spartanburg. Kenneth Tabler is the Vice President of Finance for FAS, while he is also on the Board of Directors for the governing body of the facility, THI of Baltimore. Mr. Tabler even signed the lease for the nursing home property on behalf of THI of SC at Magnolia Place. Robert Crooks, the Regional Director of Operations that oversees several Fundamental nursing facilities including Magnolia Place at Spartanburg, was the President and sole officer of THI of SC and VP of Operations for FCC. Mark Fulchino was the Chief Financial Officer of FAS and a member of the Board of THI of Baltimore. Similarly, Bradley Bennett was the Chief Executive Officer of FCC and FAS and is also on the Board of THI of Baltimore. Mr. Bennett also held himself out as the President and Chief Executive Officer of the licensee, THI of SC at Magnolia Place. Christine Zack has appeared as the corporate representative (as designated per Rule 30(b)(6)) for all Defendants and is legal counsel for all Defendants. (Exhibit 20 pp. 18, 24-25).

Defendants, THI of Baltimore, THI of SC, and FLTCH, have no employees, but operate through their various subsidiaries and instrumentalities. Moreover, THI of Baltimore, THI of SC, and FLTCH share the same location, the same insurance policy, the same in house counsel, the same registered agents and the same headquarters. All of the nursing home facilities under the

Fundamental Defendants' control share identical contracts for services with FCC and FAS.

Undisputed testimony shows that no one on the facility-level, such as the Administrator, has the ability to change or cancel this contract. Instead, this important operational aspect is controlled by the corporate decision makers.

Additionally, FLTCH tax returns filed with the United States Internal Revenue Service from 2006 to 2008 reflect that FLTCH business activity is Nursing and Personal Care, and that its product and service is also Nursing and Personal Services. (Exhibit 26,p p. 1-2). Furthermore, according to FLTCH Vice President of Finance, Magnolia Place as well as similar FLTCH entities are treated as "disregarded entities" for federal tax purposes; consequently the financial performance (tax liability included) of Magnolia Place at Spartanburg (as well as similar entities) would be reported on the tax return of FLTCH co-owners (Murray Forman and Leonard Grunstein). (Exhibit 32 pp. 59-61, 86-87). FLTCH files a single tax return which includes all income and expenses of all of its subsidiaries and affiliate entities, including all of the entities named in this case. (Exhibit 26 pp. 1-2).

Testimony from witnesses who provide hands-on care at Magnolia Place of Spartanburg states that corporate decision making dictates how the facility is run. For instance, both Administrator Harris and Director of Nursing Keller agree that "corporate" or "Fundamental" make the final decision on crucial operational issues as budget, personnel, staffing, and services provided by outside vendors, such as food, laundry, housekeeping, registered dietician, physical therapy, speech therapy, and occupational therapy. Administrator Harris' employment contract is not between the facility-level entity, but is between her and the Fundamental Defendants' direct successor, Trans Health. Mrs. Harris explained that she received an extensive manual called the New Management

Resource Manual at orientation in March 2006 at corporate headquarters in Sparks, Maryland. (Exhibit 21 p. 1-2). That manual details corporate oversight, involvement, and supervision into every aspect of the operation and management of Magnolia Place at Spartanburg. Correspondingly, Plaintiffs' Nursing Administration expert testified to the significance of control of these types of operational and management issues. (Exhibit 33).

SUMMARY OF THE ARGUMENT

This nursing home abuse and neglect case concerns the responsibilities and duties of those who provide care to the elderly and disabled, and the legal consequences that should be imposed upon those who disregard their obligations. These responsibilities are not only attributed to the staff members of nursing homes that provide care, but also to the corporate entities that operate them. Despite Defendants' contentions and the Trial Court's ruling that Defendants cannot be directly liable for their corporate decision making, the law establishes otherwise. The Court of Appeals overlooked or misapprehended Plaintiffs' theories of liability against the excluded Defendants.

While the factual background in this case is somewhat complicated, the legal issues of liability in this case are relatively straightforward. Corporate negligence is a theory of liability that has a long-standing history of wide applicability in our Courts. Without question, nursing homes and healthcare management companies can be directly liable for their own wrongdoing under this theory. Since corporate negligence is a critical aspect of Plaintiffs' allegations, the Trial Court cannot lawfully "bifurcate" Plaintiffs' negligence action against related Defendants into two separate jury trials, requiring Plaintiffs' to try the "clinical issues" before one jury, and set forth the proof of the "corporate issues" and the Fundamental Defendants' liability before a second jury.

Plaintiffs set forth ample evidence to establish that the Fundamental Defendants' egregious

corporate decision making regarding under-staffing and under-budgeting resulted in institutional neglect to Mr. Morrow, causing him substantial injuries and damages. Notwithstanding, the Trial Court's "Bifurcation" Order disregarded these direct liability claims and ruled that Plaintiffs could only pursue the Fundamental Defendants' liability if the first jury found their co-Defendant, THI of SC at Magnolia Place liable.

The Court has deprived Plaintiffs of their right to a fair trial, a fair and fully informed fact finder, and has created more questions than answers with this "piecemeal litigation," which should be avoided. Plaintiffs should be allowed to go to trial with all Defendants in one trial with one jury - so that the whole story may be told and justice served. Under the Court's current ruling, several negligent acts complained of in this case will not be tried until after a jury determines liability and damages, if at all. Further, it is conceivable that a jury could find the nursing facility not liable, but find the corporate Defendants liable for failing to properly provide funding, staffing, care and supplies to the nursing facility.

Moreover, South Carolina law forbids bifurcation where the issues sought to be severed are not separate and distinct. Accordingly, the Trial Court abused its discretion by "bifurcating" Plaintiffs' negligence action from its alleged cause–the Fundamental Defendants' corporate negligence, resulting in substantial prejudice to Plaintiffs.

ARGUMENT

A typical "bifurcation" decision is ordinarily given considerable deference by an appellate court, requiring an abuse of discretion to justify a reversal. See, e.g., Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998). The Order at issue here, however, is not a typical bifurcation order that merely separates distinct issues into two phases of a trial, and

should not be treated as such. **Although labeled a "bifurcation", the Order forces Plaintiffs to pursue their negligence claim against one of several related Defendants, while effectively granting Summary Judgment on Plaintiffs' negligence claims against the remaining Defendants without any factual or legal basis whatsoever.** South Carolina jurisprudence has never allowed a court to sever a negligence action into two separate jury trials excluding necessary and indispensable parties from the negligence trial altogether, even though the plaintiff alleges direct liability, agency, and joint enterprise on behalf of the excluded defendants. As such, this is a novel issue and one of first impression in South Carolina. "In a case raising novel question of law, the appellate court is free to decide the question with no particular deference to the lower court." Ex Parte Capital U-Drive-It, Inc., 630 S.E.2d 464 (S.C., 2006). In other words, this Court has jurisdiction to correct errors of law in the lower court, without the confines of the abuse of discretion standard. See S.C. Code Ann. § 14-8-200 (Supp. 1999).

Nonetheless, Appellant also contends that the each of the Trial Court's errors and resulting prejudices detailed below constitute abuses of discretion. As defined by the South Carolina Supreme Court, "[a]n abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the error is based on factual conclusions that are without evidentiary support." BB&T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006). More specifically, "the trial court's exercise of discretionary power...is subject to appellate review; and that the term 'abuse of discretion' as used in such cases has no opprobrious implication and means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of the appellant, and therefore, in the circumstances, amounted to error of law." Bridges v. Wyandotte Worsted Co., 239 S.C. 37, 121 S.E.2d 300 (1961).

I. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THE PREJUDICE THAT WILL RESULT BY TWO SEPARATE TRIALS WHEN THE ISSUES ARE NOT SEPARATE AND DISTINCT AND SUBSTANTIAL EVIDENCE WILL OVERLAP BETWEEN THE TRIALS.

The Trial Court abused its discretion on the facts of this case, by severing one negligence action against related co-Defendants into two separate jury trials, without reasonable factual support to do so, resulting in substantial prejudice to the rights of Plaintiffs. Before relating the specific facts of this case in detail, we set forth the applicable law, which makes clear that while a trial court does have discretion to "bifurcate", that discretion is by no means unlimited. The applicable provision is **Rule 42(b)**, South Carolina Rules of Civil Procedure, which states:

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

Although Congress revised the Federal Rules of Civil Procedure in December 2007, South Carolina's bifurcation rule remains substantively similar to Federal Rule of Civil Procedure 42(b). As a result, South Carolina courts rely on federal caselaw into addition to state jurisprudence when examining and analyzing the state rule.

A. Restrictions on the Trial Court's Discretion to "Bifurcate"

Bifurcation is, and should be, the exception not the rule: "In exercising that discretion, [a] Court begins its analysis with the Advisory Committee's admonition that "separation of issues for trial is not to be routinely ordered." Advis. Comm. Notes, 1996 Amend., Fed.R.Civ.P. 42(b). Ordinarily, a jury is entitled to hear all of the evidence and deliberate over all of the issues in the case at one time. See e.g., Miller v. Am. Bonding Co., 257 U.S. 304, 307, 42 S.Ct 98, 66 L. Ed. 250

(1921) ("[T]he general practice is to try all the issues in a case at one time."); Monaghanv. SZS 33 Assoc, 827 F.Supp. 233, 245 (S.D.N.Y. 1993)." Svee v. Mercedes-Benz Credit Corp., 329 F.Supp.2d 283, 284 (S.D.N.Y. 2004). The highest Court in this state specifically declined to adopt a rule "which would require **South Carolina's trial courts to resolve in two separate actions what they now ably determine in one.**" Drury Dev Corp. v Foundation Ins. Co., 668 S.E.2d 798 (S.C., 2008).

Particularly, when issues in a case are so intertwined (i.e., the acts and omissions of interrelated co-Defendants as in our case), such that an attempt to divide them will only bring about confusion for the jury without any increase in judicial efficiency, and thereby create a risk of undue prejudice to a party, courts should not bifurcate. L-3 Communications Corp. v. OSI Systems, Inc., 418 F.Supp.2d 380, 382 (S.D.N.Y. 2005). See also, Trading Technologies Intern., Inc. v. eSpeed, Inc., 431 F.Supp.2d 834, 841 (N.D.I11. 2006) ("[I]t is true that where issues to be presented in the two trials sufficiently overlap, bifurcation should be denied."); Temp-Resisto Corp. v. Glatt, 18 F.R.D. 148, 152 (D.N.J. 1955) ("The language of Rule 42(b) would seem to indicate that individual issues in a litigation ought not to be plucked out for separate trial unless it is necessary to prevent undue delay or avoid prejudice.")

South Carolina law is abundantly clear–bifurcation is only appropriate under SCRCP 42(b) if the legal and factual issues of both trials are **completely distinct and do not overlap**. See Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (1998) (citing Fortune v. Gibson, 403 S.E.2d 674, 675 (S.C. App. 1991); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 73 n.8, 533 S.E.2d 331, 333 n.8 (2000). This requirement is quite stringent: "Where evidence relevant to the issues [that are separated] overlap, bifurcation is inappropriate." Creighton, 334 S.C. at 108, 512 S.E.2d at 516. "A trial should be bifurcated only if the issues are so distinct

that trial of each alone would not result in injustice." Id.

"Indeed, it has been expressly recognized that the "distinct issues" requirement 'is dictated for the issues involving overlapping legal and factual questions the verdicts rendered by each could be inconsistent.'" Fortune, 403 S.E.2d at 675. In Senter v. Piggy Wiggly, 533 S.E.2d 575 (2000), our Supreme Court affirmed the trial court and Court of Appeals denying bifurcation. In Senter, the trial court made the following observations and ruling:

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

In Autrey v. 22 Texas Services, Inc., 79 F.Supp. 2d 735 (S.D. Tx. 2000), the Court denied Defendants' Motion for Separate Trials in a nursing home case eerily similar to the case at bar. The court held:

> While Rule 42(b) of the Federal Rules of Civil Procedure provides that a court may order separae trials, the Court in this instance declines to exercise its authority. **Plaintiffs' entire case presents an ubiquitously complex set of facts affecting the liability of all Defendants. Consequently, to separate the parties would be to promote redundant adjudication.**

An appellate court should reverse a trial court's decision to bifurcate a trial when separate trial of related issues would tend to create confusion and uncertainty, notwithstanding the abuse of discretion latitude. Miller v. Fairchild Industries, Inc., 885 F.2d 498, 512 (9th Cir. 1988). In our case, Plaintiffs were denied a fair trial because whether and to what extent Plaintiffs were entitled

to any recovery from Magnolia Place is so inextricably interwoven with whether they are entitled to recovery from the Fundamental Defendants, the two cannot be separated without prejudice. See, e.g, United Airlines v. Wiener, 286 F.2d 302, 306 (9th Cir. 1961) ("The question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial.").

Even if a court determines that there might be some justification for overcoming South Carolina's preference for unitary trials of all issues, under no circumstances can issues be separated in a manner that violates the guarantees of the Seventh Amendment of the United States Constitution, which mandates that:

> In suits at common law, where the value of the amount in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. U.S.C.A. Const. Amend. 7.

Two essential guarantees provided by this constitutional provision are (1) that the parties are entitled to a fair trial by jury and (2) that once the facts are tried by a jury, they will not be reexamined by another jury (often referred to as the "reexamination clause"). The South Carolina Supreme Court recognized the danger of impeding on a litigant's right to a fair trial when it adopted SCRCP 42(b), which cautions courts to "always preserv[e] inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State." Indeed, Courts have consistently found that when a court orders a separate trial of an issue that is not entirely separate and distinct from the remaining issues, it necessarily violates *both* the right to a fair trial and the reexamination clause. See, e.g., Gasoline Products Co. v. Champlin, 283 U.S. 494 (1931). Because the Trial Court in this case erroneously bifurcated the question of THI of SC at Magnolia Place's negligence for the

first trial, separate and apart from the remaining interwoven components of the Fundamental Defendants' liability for negligence, negligent management and administration, and governing body liability, the Court's Order violated the U.S. Constitution and is fundamentally flawed.

The Champlin case involved a partial remand of a contract dispute. On appeal, the First Circuit left in tact the liability phase and remanded for a second jury to determine the amount of damages. The U. S. Supreme Court reversed the First Circuit and found that nothing in the record would tell the jury when the contract came into existence, what the terms were, or when it was breached. Thus,

> **"the question of damages [was] so interwoven with that of liability that the former [could not] be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to the denial of a fair trial." The Supreme Court found that the partial remand did violate the Seventh Amendment because the issue to be tried separately was not sufficiently "distinct and separable from the others [such] that a trial of it alone may not be had without injustice."** (Cite).

In In re Rhone-Poulenc Rorer, Inc., the Court of Appeals for the Seventh Circuit found that the district judge had exceeded his authority under Rule 42(b) of the Federal Rules because his trial plan proposed a separate trial of the negligence of the defendants, reserving comparative negligence, proximate causation and other issues of liability to later trials and other juries. The Court noted that courts are authorized to conduct separate trials under Rule 42(b) of the Federal Rules of Civil Procedure, but noted that "as we have been at pains to stress recently, the district judge must carve at the joint. Of particular relevance here, the judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries." In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (emphasis added). Under the Trial Court's ruling in the instant

matter, the second jury will be forced to reexamine the "clinical issues" decided by the first jury, such as Mr. Morrow's injuries and the respective causes, when deciphering the liability of the Fundamental Defendants. The prejudice to Plaintiffs here amounts to the denial of their rights to a fair trial.

B. Undisputed Evidence Demonstrates that the Liability of Magnolia Place and the Fundamental Defendants Are Not Separate and Distinct

This is a simple negligence case regarding operating a nursing home in a grossly negligent manner against common Defendants with the same owners, all of whom are accused of doing the same thing. Despite undisputed evidence of the interrelated nature of the Defendants presented by the Plaintiffs, the Trial Court came to the mistaken conclusion that the liability of the joint tortfeasors can somehow be disentangled and presented to two separate juries. The Trial Court separated the "clinical issues" from the so-called "corporate issues" of the Plaintiffs' case and ordered an isolated negligence trial against Defendant THI of SC at Magnolia Place while dismissing the Fundamental Defendants who own, operate and manage the facility.[6] Plaintiffs rigorously objected to the "bifurcation" of liability of the Fundamental Defendants' from that of their co-Defendant because the liability of THI of SC at Magnolia Place and the Fundamental Defendants is so inextricably intertwined as to be inseparable.

Importantly, the issues are not separate and distinct because the **"corporate" Defendants were the cause of the "clinical issues."** FLTCH ***supervised*** the actions of Fundamental facilities and made the ***decisions*** to under staff and under-fund supplies. FLTCH ***instructed*** facility

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[6] The Trial Court's error of prohibiting Plaintiff from pursuing its direct liability claims against the Fundamental Defendants is discussed below in Section IV.

employees to meet budget goals or face the consequences. FLTCH told facilities how many staff to hire, how many supplies to use, and how much to spend for the budget. It did so knowing that these decisions were critical to resident health and safety. It is impossible for Plaintiffs to present and prove their full negligence case against one co-Defendant without reference to its counterparts. Forcing Plaintiffs to try the case without evidence of the wrongdoing of the ultimately responsible Fundamental Defendants gutted their case and was a clear abuse of discretion.

Similarly, the duty owed by the Fundamental Defendants to Mr. Morrow as a resident in their nursing facility must be determined in relation to the potential or actual injuries that were or could be suffered. The Court's "bifurcation" Order erroneously requires the "clinical issues" and the "corporate issues" [which caused the clinical issues] to be determined in a vacuum. This is impractical, as evidence vital to the proof of THI of SC at Magnolia Place's negligence is required to prove the negligent acts of the Fundamental Defendants, in direct contravention of South Carolina's no overlap requirement.

Evidence of the Defendants' corporate structure and financial status is relevant to both the Plaintiffs' case in chief and their claim for punitive damages. Where evidence relevant to the issues of liability, damages, causation, and punitives overlap, bifurcation is inappropriate. All notions of judicial economy require that this case proceed in one trial. Plaintiffs have appropriately pled punitive damages against all Defendants, and bifurcation would not allow such remedy.

As a result of the Defendants' negligence, Mr. Morrow did not receive basic custodial care such as being turned and re-positioned every two hours; did not receive timely incontinence care and as a result his flesh rotted away until a massive and painful pressure sore ate into his bottom. The Fundamental Defendants set the staffing numbers, budget, and policies and procedures for Magnolia

Place, which in turn caused the injuries to Mr. Morrow.

The liability of the Fundamental Defendants is not separate and distinct from the "clinical" issues. Plaintiffs will be substantially prejudiced if forced to proceed to two separate jury trials because neither jury will be permitted to hear the full cause of Plaintiffs' injuries and damages. The first jury will be misled to believe that the only acts Plaintiffs contend caused Mr. Morrow's injuries were the acts and omissions of THI of SC at Magnolia Place. Worse, under the Trial Court's ruling, Plaintiffs may only pursue their claims against the Fundamental Defendants if and only if the first jury finds that co-Defendant Magnolia Place was negligent and, after the appeal, the judgment is not paid.

Plaintiffs set forth a large number of witnesses that would be required to testify in both stages of this so-called bifurcation. The overlap of this evidence was largely ignored by the Trial Court. The Administrator and Director of Nursing's testimony is required to discuss the facts of Mr. Morrow's case, but also to explain the extensive direction and management they receive from "corporate." Their testimony reveals that Administrator Pat Harris and DON Margaret Keller do not make major care-related decisions regarding policies and procedures, staffing levels, or budget levels, because those decisions are made by the Fundamental Defendants.

Specifically, Margaret Keller is supervised by FCC employee Marsha Denner who signs her evaluation sheets (Exhibit 34 pp.7-10). Mrs. Keller testified that Defendant FAS gets involved with facility level decisions regarding whether a copy of a patient's medical chart may be given to a requesting patient. She explained that if a resident requested a copy of their chart, it is first sent to the legal department at FAS (Exhibit 23, p 9-10). She also testified that Practice Guidelines (Exhibit 35) mandate that any revisions have to be sent to the corporate clinical services but she doesn't know

who corporate clinical services is. (Exhibit 34 pp. 182-183).

Another example is Lynn Henderson, the Business Office Manager at Magnolia Place who trained in Sparks, Maryland. (Exhibit 36 p.19). She routinely attends meetings that include other Business Office Managers from other facilities when "Fundamental creates a new program or policy (Exhibit 36 p.18). Her performance is evaluated by Fundamental using a "scorecard" (Exhibit 36 p. 20).

C. The Order Renders Unworkable Statutes on Contribution and Noneconomic Damages

S.C. Code § 15-38-15(B) requires that one jury apportion the percentages of fault among defendants as specified in Subsection (C). Subsection (C)(3) states where there is a verdict for damages against two or more defendants for the same indivisible injury, the jury is to specify in a separate verdict the percentage of liability that proximately caused the indivisible injury so that the total of the percentages is one hundred percent. 15-38-15(C)(3)(a) states that the Court may determine that two or more persons are to be treated as a single party. "Such treatment 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 an additional defendant. 15-38-20 discusses the right of contribution among the defendants. 15-38-15(D) states a defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any party. 15-38-20(B) states where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgement has not been recovered against all or any of them. The court's order

to bifurcate or dismiss the Fundamental entities grants an unfair advantage to Defendant THI of SC at Magnolia Place since the facility could assert that the Fundamental entities are at fault AND seek contribution from them after the verdict.

S.C. Code § 15-32-220 limits the jury's award against a licensed health care provider for Noneconomic Damages. This statute does not apply to Fundamental Defendants since they are not licensed health care providers. The Court's Order complicates the application of this limitation. At the first trial against the facility, if the jury awards more than the statutory limitation, does the Trial Court automatically reduce the award or does the Order allow us to collect that amount from the Fundamental Defendants?

D. The Reasons Cited by the Trial Court for the "Bifurcation" Cannot Withstand Scrutiny

1. *Factual Justifications*

The Trial Court's Order is based on broad, unsupported statements and incorrect conclusions of law. Primarily, the Court's Order relies on promoting judicial economy as the basis for bifurcating the related issues into two separate trials. Contrarily, judicial economy mandates trying the related issues in a single trial. The facts in the "bifurcated" proceedings ordered by the Trial Court are the same, both concerning the injuries sustained by Mr. Morrow at the Magnolia Place facility.

The Trial Court requires Plaintiffs to try the same case twice, notwithstanding the fact that the majority of the evidence would be the same in each trial. Plaintiff will indeed suffer prejudice because the cost of the proposed separate trials and the delay towards resolution would be great. Under the current ruling, witnesses, including experts, will testify at each of the separate trials, which

may be heard years apart. Plaintiffs' recovery against Defendants could potentially be delayed for years. The threat of prejudice to the Plaintiff's case under the ordered "bifurcated" proceedings is real and severe, weighing heavily in favor of a single trial. Defendants, on the other hand, have presented no evidence that they will suffer prejudice by having a single trial involving the same operative facts. Worse, presentation of the basis for punitive damages would be duplicated, and the jury or juries may well determine that the Fundamental entities should pay punitive damages differently from the nursing facility. For example, see Hundley v. Rite Aid, 339 S.C. 285, 529 S.E.2d 45 (S.C. App., 2000) wherein punitive damages were assessed against the corporation but not against the individual who committed the error.

The Trial Court's Order proclaimed: "[t]he length of the trial alone, is sufficient to justify bifurcation" and rejected Plaintiffs' contentions that based on their experience, these trials take one to two weeks. (Exhibit 4 p.12) The Trial Courts' finding is based on speculation not fact. The same "corporate" issues we heard (and resolved in favor of Plaintiffs) in the Prendergast v. Fundamental case in New Mexico. In that case, the trial lasted less than a week, and the jury was able to understand the issues. The issues are not complex. It is simple negligence and agency law.

By granting the Defendants' Motion to Bifurcate, the Trial Court ignored the obvious and serious obstacles presented by allowing one negligence action to be needlessly severed into two actions. Should this Order stand and become the law of South Carolina, all negligence cases with common Defendants will now be tried in multiple trials that span several years. Among civil defendants who cause injury to others, this new strategy of needless delay, additional cost, waste of judicial resources, and confusion is sure to be commended.

In an attempt to comply with the "no overlap requirement," the Trial Court arbitrarily rejected

Plaintiffs' well-founded contention that evidence and witnesses will necessarily overlap between the two trials. The Court stated, "Plaintiffs identified four experts and argues bifurcation will prejudice them by requiring testimony by them at two separate trials. I disagree with this assessment." (Exhibit 4 p.12). The Trial Court did not provide sound reasoning for its disagreement. Plaintiff's experts cannot discuss ***how*** the "**clinical issues**" occurred without addressing the "**corporate" causes**.

Former employees such as Nurse Denise Collins who was employed at Magnolia Place as an LPN from 2006 to 2011, will undoubtably be required to testify regarding both the "clinical" and "corporate" issues. Specifically, Ms. Collins will testify regarding recurring staffing issues at the facility, which affect the quality of clinical care, but which is a result of the corporate decision making. Although Ms. Collins will testify as to the standard of care of a nurse, she will also testify to her experience regarding corporate representatives' involvement in the management of the facility, such as the investigation of clinical incidents. Nursing Assistant Venise Sims will likewise provide testimony regarding her experience on how the facility was managed and the chronic short-staffing (both corporate causes), which resulted in poor quality of care provided to residents at Magnolia Place of Spartanburg.

Although on its face the Trial Court's Order acknowledges that "Plaintiffs argue multiple theories of direct liability as well", the Court's discussion of corporate liability reveals that it completely disregarded Plaintiffs' allegations regarding direct liability. (Exhibit 4 pp.8-9). Instead, the Court gave a detailed discussion of indirect (or vicarious liability), including agency, alter ego, or instrumentality. Id. The Court's ruling itself affirms that it ignored Plaintiffs' well pled direct liability claims by only permitting Plaintiffs to proceed to the second trial against the Fundamental Defendants **if** their co-defendant subsidiary is liable.

2. *Case Law Relied on by the Trial Court*

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

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

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

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

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

The critical distinction between the cases cited above and the instant matter, two separate juries with two separate trials involving the same issues with interrelated defendants, is precisely what causes the substantial injustice to the Plaintiffs. The Court also quoted a Federal District Court case from Delaware as the one example that was found that allowed two separate juries in two separate actions in the same case. U.S. Ciena Corp v. Corvis Corp, 210 F.R.D.519 (D. Del 2002). However, Ciena was a patent case and the Court expressly limited the discussion "in the content of patent cases" where bifurcation is typically used to simplify complex issues in "overly complex

patent trials". The Court in Ciena admitted that "[T]ypically, courts bifurcate patent cases into liability and damage trials".

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

II. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THE SUBSTANTIAL EVIDENCE OF EXCLUDED DEFENDANTS' SIGNIFICANT AND DIRECT INVOLVEMENT IN THE OPERATION OF THE FACILITY AND THE OPINIONS OF THE PETITIONER'S EXPERTS' SEASONED, AND WELL-RESPECTED EXPERTS IN FORENSIC ACCOUNTING, AND NURSING HOME ADMINISTRATION.

Although labeled a bifurcation, bifurcating or severing the Plaintiffs' claims was only a part of the Trial Court's Order at issue. The effect of the Court's ruling was to grant Summary Judgment in favor of the Fundamental Defendants on Plaintiffs' direct negligence claims. The Trial Court seemingly ignored Plaintiffs' direct liability, corporate negligence, and direct participant liability claims. Plaintiffs' Complaint sets forth well pled facts which state that all of the Defendants, including the Fundamental Defendants, had a duty to Mr. Morrow, breached that duty and were the cause of Mr. Morrow's injuries. The Trial Court's Order erroneously severed the negligence cause of action against THI of South Carolina at Magnolia Place into a trial of its own, prohibiting the Plaintiffs from pursuing their direct liability claim against the Fundamental Defendants. Plaintiffs request that the Court of Appeals overturn the Court's Order to "Bifurcate," which prevents the jury from hearing relevant evidence proving Defendants' reckless, willful, callous, and conscious

disregard of the well-being of their residents.

The Trial Court's Order erroneously states that the only way the Fundamental Defendants' will be liable is if the first jury finds that their co-Defendant THI of SC at Magnolia Place is liable for negligence. (Bifurcation Order, p. 15). This is blatant error. As set forth in the Complaint, Plaintiffs' contend that the Fundamental Defendants, through their short staffing and budgeting decisions, were the direct and proximate cause of Mr. Morrow's injuries. Plaintiffs' alternatively-pled vicarious liability claims are completely independent of Plaintiffs' direct liability claims.

A. Liability of Corporate Managers and Owners of Nursing Homes

Corporate managers and owners of nursing home facilities can be held ***both* directly** liable for their own actions in operating the facility ***and*** vicariously liable through agency, piercing the corporate veil, and amalgamation of interests for the acts of their subsidiaries. The determination of liability in each instance often depends on the degree of control the parent exerts over the facility. Depending on the facts of a case, direct and indirect theories may be pled alternatively, as done by Plaintiffs in the instant matter.

1. *Direct Liability*

Imposition of direct liability upon corporate managers and owners of nursing homes, when supported by facts, is strongly supported by the widely-accepted premise of tort law -- that everyone must accept responsibility for his or her conduct. For the average nursing home resident who suffers an injury as a result of negligence, neglect and/or abuse, public policy militates in favor of compensation and restitution. Any assumption that a corporate entity will act appropriately under the circumstances without the threat of tort liability is an illusion.

The notion that a corporation may be held liable for its independent acts of negligence "is a

general rule of substantive law, so frequently applied that it is unnecessary to cite cases in support..." Pryor v. Chambersburg Oil and Gas Co, 376 Pa. 521, 528,103 A.2d 425, 428 (1954). Thus, "where the case is founded on the proposition that the master [corporation] was independently negligent, and no attempt is made to restrict the alleged negligent acts to its servants alone, recovery can be had against the master, irrespective of the servant's liability." Skalos v. Higgins, 303 Pa. Super. 107, 113, 449 A.2d 601, 603-604 (1982).[7] Direct liability is an important basis of liability in nursing home litigation because the abuse and neglect of nursing home patients are often the result of systematic problems throughout the subsidiary corporations, directly linked to conscious corporate decision making.

The U.S. Supreme Court in U.S. v. Bestfoods, explained that "a parent corporation is itself responsible for the wrongs committed by its agents in the course of its business." 524 U.S. 51, 64-65 (1998). The parent is directly liable for the subsidiary's actions where it has "forced the subsidiary to take the complained-of action, in disregard of the subsidiary's distinct legal personality," or "interfered with the subsidiary's operations in a way that surpasses the control exercised by a parent as an incident of ownership." Pearson v. Component Technology Corp., 247 F.3d 471, 487 (3d. Cir. Pa. 2001) (discussing the U.S. v. Bestfoods Court's reliance on Justice Douglas for the proposition that parent corporations may be directly liable for their subsidiaries' actions when the "alleged wrong

[7] Generally speaking, corporate negligence can be proven by adding together multiple breaches of the standard of care by the corporate entities agents, with the theory being that such collective breaches put the entity on notice that it was failing to adopt and/or enforce adequate policies and procedures. It can also be proven by failures in the collective decision-making process of the corporate entity. Corporate decisions are often made collectively by a number of persons. Different individuals might have differing levels of awareness and participation in the decisions. When a collective decision leads to blameworthy conduct, some participants might have acted innocently, others less so. Assessing individual blame might be difficult, in contrast to simply placing blame on the corporation, on whose behalf the individuals acted. In some cases, corporate wrongdoing cannot always be reduced to an individual actor. For these reasons, imposing liability on the corporate whole rather than each individual who participated in the corporate decision makes sense, and is allowed in most cases.

can seemingly be traced to the parent through the conduit of its own personnel and management."). Direct liability functions essentially as a kind of "transaction-specific" alter ego theory. That is, direct liability will be imposed when the parent "manages, directs, or conducts operations specifically related to the violation" that caused the harm to the nursing home resident.[8] Thus, for example, if the parent corporation of a nursing home controls the staffing levels in the facility and the harm done to the plaintiff is a result of understaffing, the parent can be found directly liable for that harm. Multiple breaches of state and national standards owed to the plaintiff will often be attributable to the defendant's failure to provide sufficient staff to meet the care needs of its residents, which, in turn, may be attributable to a deficient budget or inadequate guidelines for determining the appropriate number of staff. When a parent controls the budget of its facility, setting forth guidelines and policies, the parent is responsible for the understaffing, and, consequently, directly responsible for all violations of the standard of care related thereto. The parent corporation can also be held directly liable where it controls the budget when a nursing home resident's harm is related to budgetary decisions other than staffing, for example, pressure sores caused by lack of adequate and proper supplies, such as diapers, wipes, and mattresses; or injuries resulting from inadequate or poorly maintained equipment, such as Hoyer lifts. See, e.g., Forsythe v. Clark USA, Inc., 864 N.E.2d 227 (Ill. 2007) (recognizing direct liability when corporate cutbacks in staffing, training, and supplies

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See *U.S. v. Days Inn*, 151 F.2d at 826, citing *Bestfoods*:

Although relating to a different federal statute, the Supreme Court's opinion in *Bestfoods* provides this court with helpful direction. In *Bestfoods*, the Supreme Court opined that in order for a parent corporation to be liable for a violation of CERCLA, the parent corporation "must manage, direct, or conduct operations specifically related to the violation or compliance with CERCLA. In the present case, to give effect to the plan language of section 303, as well as deference to the DOJ's interpretation of the statute, we conclude that to bear responsibility for an inaccessible facility under section 303, a party must possess a significant degree of control over the final design and construction of a facility.

lead to harm); Smartt v. NHC, 2009 WL 482 475, (Tenn.Ct.App. 2009) (same); French v. Stratford House, 333 S.W.3d 546 (Tenn., 2010) (same); and Scampone v. Grane Healthcare Co., 11 A.3d 967 (Pa.Super.Ct., 2010) (same). Other examples of parental control of a facility, creating direct liability are the training of staff and employment of qualified staff. See also Advocat v. Sauer 111 S.W.3d 346 (Ark.2003) *cert denied*, 540 U.S. 1012 (2003) (held corporate defendant liable for "felonious corporate custodial neglect" because the corporation knew there were staffing problems in the facility, and committed negligence against residents of the facility "because it was short-staffed due to cut backs.")

On the other hand, if the parent has not managed, directed, or conducted operations related to the violation that caused harm to the plaintiff, the parent would not be directly liable for such negligence, though it could be held indirectly liable if, in general, the parent so manipulates the subsidiary for its own advantage that the subsidiary is merely an agent or instrumentality of the parent. The same facts may create liability in one case under an indirect theory, while in another case, serve as a basis of direct liability.

In Canavan v. National Healthcare Corp., the court imposed direct liability on the sole shareholder for ignoring problems of understaffing in the nursing home while cutting the staffing budget. 889 S.2d 825, 827 (Fla. Ct. App. 2004). The court specifically stated, "This was not a case in which the plaintiffs were required to pierce the corporate veil in order to find individual liability." Id; compare to Despain v. Avante Group, Inc., 900 So. 2d 637 (Fla. Ct. App. 2005). In this matter, Plaintiffs have substantial evidence that CNA staffing was cut when Fundamental took over the operation in December 2005. Both Harris and Keller testified that they staff at "minimum levels" and do not increase staffing based on the acuity of the residents. (Exhibit 37 pp. 16, 80-81; Exhibit

22 pp. 17, 50; Exhibit 23 p. 15-17, 20-21; Exhibit 34 pp. 37, 38, 39, 98, 99, 164-167).

In Forsythe v. Clark USA, Inc., the court found that a parent company can be held liable under a theory of direct participant liability for controlling its subsidiary's budget in a way that led to harm. 864 N.E.2d 227, 224 Ill.2d 274 (Ill., 2007). Plaintiffs' allegations of liability centered around defendants' overall budgetary strategy. Id. at 278. Plaintiffs alleged that defendant breached a duty to use reasonable care in imposing its business strategy on the subsidiary by (1) requiring subsidiary to minimize operating costs including costs for training, maintenance, supervision and safety, (2) requiring subsidiary to limit capital investments to those which would generate cash for the business thereby preventing subsidiary from adequately preventing the harm, and (3) failing to adequately evaluate the safety and training procedures in place at the facility. Similar to the case at bar, plaintiffs alleged that defendant's strategy of capital cutbacks forced the subsidiary to have unqualified employees. Id.

The Forsythe court found that "budgetary mismanagement, accompanied by the parent's negligent direction or authorization of the manner in which the subsidiary accomplishes that budget, can lead to a valid cause of action under the direct participant theory of liability." Id. at 290. That court provided the following rationale:

> Where there is evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy *and* carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary, that parent company could face liability. The key elements to the application of direct participant liability, then, are a parent's specific direction or authorization of the manner in which an activity is undertaken and foreseeability. If a parent company specifically directs an activity, where injury is foreseeable, that parent could be held liable. Similarly, if a parent company mandates an overall course of action and then authorizes the

manner in which specific activities contributing to that course of action are undertaken, it can be liable for foreseeable injuries. Id.

The "amalgamation of interests" theory, also referred to as "blurred identity" theory, is also a basis for interrelated corporations to be held liable for negligence. Corporate entities are amalgamated if, "the legal distinction[s] between the entities are blurred, . . . they are in effect one and the same as far as their representation and operation and that the actions of one should apply to the others . . . because they are in effect one and the same . . ." See Pope v. Heritage Cmtys, Inc., 395 S.C. 404, 717 S.E. 2d 765, 772 (S.C. App., 2011), *reh'g denied* (Dec. 12, 2011).

In Kincaid v. Landing Development Corp., Plaintiff brought suit for negligent construction and breach of warranty against three related entities (a development corporation, a management company and a construction corporation). 289 S.C. 89, 91, 344 S.E.2d 869, 871 (Ct. App. 1986). The management company argued that the court should have directed a verdict in its favor because it was merely the marketing and sales company. Id. at 96, 344 S.E.2d at 874. This court affirmed the trial court's finding that the evidence presented by Plaintiff revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities". Id. (quoting the trial court). The evidence presented in Kincaid included: the three companies shared owners, as well as a location; the management company was the entity called to remedy problems; and the company's letterhead stated that the management company was "A Development, Construction, Sales, and Property Management Company."

The Trial Court in the instant case failed to recognize the amalgamated interests of THI of SC at Magnolia Place and the Fundamental Defendants.[9] As set forth in detail herein, the record is

replete with evidence showing that the Fundamental Defendants' interests are amalgamated with those of the licensee.

2. *Vicarious Liability*

Before commencing the below discussion of vicarious liability, Plaintiffs again emphasize that the primary issue at present is that of direct liability and direct control by all Defendants. Vicarious or indirect liability follows the general principles of veil-piercing law, which require the plaintiff to analyze the parent subsidiary relationship to determine whether the parent controls the subsidiary to such a degree that the subsidiary is not a separate entity but merely an agent, instrumentality or alter ego of the parent. Although the tests employed to determine when circumstances justifying "veil-piercing" exist are variously referred to as the "alter ego," "instrumentality," or "identity" doctrines, the formulations are generally similar, and courts rarely distinguish them. The Third Circuit in Pearson v. Component Technology Corp., 247 F.3d 471, 482 (3d. Cir 2001) provides an overview of the law of piercing the corporate veil, with examples of bases for such.

In Despain v. Avante Group, Inc.,[18] the court held that inadequate staffing, linked to inadequate care, served as the basis for indirect (vicarious) liability for punitive damages:

> As to the vicarious liability of the corporate entities, the record evidence and proffer shows that the facility was not adequately staffed, which contributed to the inability to provide the decedent with proper care, and that the numerous records regarding the decedent's care were incomplete, missing, or had been fabricated, which made assessment, treatment, and referrals of the decedent much more difficult. We believe that this showing established a reasonable basis to conclude that the corporate entities were negligent. Accordingly, Despain established a reasonable basis to plead a claim for punitive damages based on the theory of vicarious liability. 900 So. 2d at 645.

Defendants' also argue that Plaintiffs' theory of piercing the corporate veil is premature in this case. The South Carolina Supreme Court rejected this argument in 2008 in the case of Drury Dev. Corp. v. Foundation Insurance Co., 380 S.C. 97, 101 668 S.E.2d 798, 801 (S.C. 2008). The Court stated that "[w]hile it is undoubtedly true that the corporate veil is often pierced post judgment, it is also true that South Carolina courts frequently consider these issues in one bifurcated action." Id. The Court went on to say that "a trial court need not dismiss an alleged alter ego defendant from a case on the grounds that the issue of corporate liability has not yet been resolved." Id. The court held that so long as the plaintiff has pled facts sufficient to survive a motion to dismiss as to the corporate liability claims and the alter ego claim, the trial court should move forward to determination of both matters. Again, the vicarious liability is an issue entirely separate from Plaintiffs' case of direct corporate liability and control.

B. Nursing Home Regulations and Statutory Framework

The nursing home industry is subject to regulations regarding requirements for entities which manage and control nursing facilities, and regarding liability of governing bodies of nursing facilities. Such regulations are applicable to the nursing home industry and not other industries. See Section 483.75 (d) of the Federal Nursing Home Reform Act (FHA) regarding legal responsibility of the facility's governing body. 42 C.F.R. 483.75(d). Further, identification of the entities responsible for management of a nursing home facility are required in the Application for License in South Carolina.

If case law alone were not enough, statutes and regulations governing the care to be provided by nursing home operators further establish liability. In order to prevent the type of abuse and neglect suffered by residents like Mr. Morrow, the operation of skilled nursing facilities is governed

by a comprehensive set of highly detailed and specific Medicare regulations. *See generally* 42 C.F.R. Part 483 (2001). These regulations are meant to provide nursing home residents "a dignified existence, self determination, and communication with and access to persons and services inside and outside the facility." 42 C.F.R. § 483.10.

Federal Regulations govern staffing levels, nutrition and hydration, turning and repositioning of residents to prevent pressure sores, and a plethora of other issues in order to guarantee that nursing home residents are provided with quality care. Sometimes referred to as the "Nursing Home Reform Act," the OBRA '87 federal regulations include provisions on all aspects of nursing home care and services provided. See 42 C.F.R. §§ 483.30, 483.75(1) (2001) (requiring a skilled nursing facility to "have sufficient nursing staff to provide nursing and related services to attain ... the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by [the resident's] ... individual plan of care" and maintain accurate and complete medical records for each resident "in accordance with accepted professional standards and practices.").

The existing statutory scheme also recognizes the importance of determining a nursing home's true owners and financially interested parties. The Nursing Home Transparency and Improvement Act was passed as a part of the Patient Protection and Affordable Care Act in March of 2010. Prior to its enactment, information on the ownership structure and financial "chain of command" was historically confidential and mostly unavailable to the public through complicated, multi-level structures. Acknowledging that the licensee is not the only entity with responsibility for the operation of nursing facilities, the Act now requires nursing homes to clearly identify owners, managers, and the organizational structure of the facility.

C. Direct and Indirect Liability of the Fundamental Defendants

Plaintiffs allege that Mr. Morrow's injuries were a result of chronic staffing and supply shortages dictated by the Fundamental Defendants. When nurse aids and nurses could not provide care because they didn't have time to do their jobs, Mr. Morrow wasn't turned and re-positioned every two hours, and he did not receive timely incontinence care. (Exhibit 2 pp. 72, 76, 121-122).

As a result of those shortages his flesh rotted away until a massive painful pressure sore ate into his bottom. In addition to setting the staffing numbers, the Fundamental Defendants set the operational budget at Magnolia Place. (Exhibit 21 pp. 3-4). The Fundamental Defendants were aware of the deficiencies in care at Magnolia Place at Spartanburg, but ignored such warnings and maintained a staffing budget that was inadequate to meet the needs of Mr. Morrow and the other residents in the facility. The result for an enfeebled and elderly South Carolina gentleman like Mr. Morrow was horrific agony, pain, and humiliation.

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

The negligence of FLTCH, FAS, FCC, and THI of Baltimore, Inc- which includes failure to budget properly, failure to sufficiently staff and train, failure to follow federal and state regulations including Board of Nursing Advisory Opinions and Best Practices, failure to monitor compliance with policies and procedures, failure to operate and manage the resources and revenue of the facility- ***causes*** the clinical failures and injuries sustained by Plaintiffs. The failure to comply with 42 CFR 483.75, and other regulations related to use of resources/revenue (42 CFR 483.17 and 42 CFR 413.20) informs the jury of why the facility has systemic problems in providing patient care, and is necessary for just adjudication of this case.

III. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THE ATYPICAL NATURE OF THE "BIFURCATION" ORDER IN THIS CASE WHICH ALLOWS NECESSARY AND INDISPENSABLE PARTIES TO BE EXCLUDED FROM THE TRIAL OF THIS CASE.

The Trial Court's Order violates S.C.R.C.P. Rule 19 because complete relief cannot be accorded without all Defendants, including the real party in interest FLTCH. Pursuant to S.C.R.C.P. Rule 19, "a person ...**shall** be joined as a party in the action if in his absence complete relief cannot be accorded among those already parties." There are four indispensable and necessary defendants in this case: 1. **THI of SC at Magnolia Place**: the licensee of the nursing home; 2. **FLTCH**: the defacto governing body that was negligent in governing Magnolia Place; and **FCC** and **FAS**: agents that were negligent in managing and operating Magnolia Place. Plaintiffs contend that these entities control, operate, and manage Magnolia Place, and their own negligence caused injury. This is not new or novel. It is a simple negligence case involving a joint enterprise.

The Court ignored the Application for Licensure of the Facility, governed by federal and state regulations, that provided critical information regarding these indispensable parties involvement.

Section 9(G) of Magnolia Place's Application for License asks whether "**any person or other legal entity claim liabilities of the licensee or of the facility or service for which the license is requested?**" Defendants marked: "**Yes. See Exhibit A.**" Exhibit A states the following:

> **THI of South Carolina at Magnolia Place at Spartanburg, LLC is wholly owned by THI of South Carolina, LLC which is wholly owned by THI of Baltimore, Inc which is wholly owned by Fundamental Long Term Care Holdings, LLC which is wholly owned 50% by Murray Foreman and 50% by Leonard Grunstein.** (Exhibit 38).

It was a fundamental error of law for the Trial Court to dismiss these valid claims without an evidentiary hearing. As set forth herein, Plaintiffs laid out a prima facie showing (despite denial of responsible discovery thus far) of the Fundamental Defendants' liability in this action, which remains undisputed by Defendants. Since the Court's ruling is without reasonable factual support and results in prejudice to the rights of Plaintiffs, the dismissal of necessary and indispensable parties amounted to an abuse of discretion. In addition to ignoring the undisputed evidence, the Court did not allow Plaintiffs to discover all evidence likely to lead to admissible evidence, despite numerous requests. Defendants' Motion for Bifurcation was filed in an attempt to prevent Plaintiffs from discovering material and relevant information related to Defendants' involvement in the operation and management of the facility. The Court's Order was in effect an entry of summary judgment and was premature without the necessary discovery. Defendants refused to answer simple questions at the 30(b)(6) deposition on June 10, 2009 [10] related to the business structure, relationships, and compensation between and among the related entities.

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[10] Christine Zack was the designee and is the in-house lawyer for all Defendants and an employee of FAS. Defendants filed a Motion for Protective Order after the deposition but the Motion was never ruled upon. (Motion for Protective Order).

Defendants have also refused to produce any discovery from FLTCH including the Stock Purchase Agreement; correspondence and emails from Murray Forman to other Defendants; FLTCH's Operating Agreement, Director & Officer Insurance Policy, prior depositions, or contracts and agreements between and among the Defendants such as the Amended and Restated Revolving Credit and Security Agreement, Lease/Sublease; and Cost reports.[11] Plaintiff's Expert Bruce Engstrom's affidavit provides: "The Revolving Credit and Security Agreement also revealed that the parent company had significant control over the budget of each individual facility. The agreement requires the Borrower to furnish to lender consolidated monthly projected operational budgets, with financial covenants including but not limited to, (I) aggregate combined census levels at the facilities shall be no less than 85% of total available beds; and (ii) at no time shall borrower (on a consolidated basis) permit its EBITDA (a profibility index) to be less than $12,500,000 per year". (Exhibit10 p.7).

Further, Plaintiffs have been unable to compel production of information required and known to exist including but not limited to staffing, budget, correspondence and emails among the Defendants, audits, mock surveys, intercompany transfers, monthly profit and loss reports, and a host of other documents described in Defendants own operational, administrative, and clinical manuals. This failure to maintain or produce these documents are in violation of federal regulations which govern nursing homes such as 42 CFR 483.30(e) and CMS 15-1§ 2135.

Defendants have refused to produce these documents which would prove FLTCH, FCC and FAS substantial involvement in the operation and management of Magnolia Place. Defendants' contend that the Court's Order of December 30, 2008, precludes them from producing any of this

[11] Fortunately, some of these relevant documents are publicly available through PACER, judicial websites, prior litigation, CMS, DHHS, and DHEC. However, Defendants refuse to admit the authenticity and genuineness of these documents. (FLTCH Motion for a Protective Order).

information. Plaintiffs moved to reconsider the Order on August 20, 2010 based on new evidence, but Defendants filed the Motion for Bifurcation in response, and the Motion to Reconsider was never ruled upon.

IV. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THAT PLAINTIFFS PLED AND SIGNIFICANT EVIDENCE EXISTS TO SHOW: AN AGENCY RELATIONSHIP AMONG THE FACILITY AND THE EXCLUDED DEFENDANTS; A JOINT ENTERPRISE AMONG ALL DEFENDANTS; AN AMALGAMATION OF INTERESTS AMONG ALL DEFENDANTS; AND NEGLIGENT MANAGEMENT AND ADMINISTRATION.

Plaintiffs contend that FLTCH, through its agents FCC and FAS, controls the staffing levels in the facility and the harm done to the Plaintiff is a direct result of under-staffing, therefore the parent can be found directly liable for that harm. Since have recognized that claims relating to the negligent administration and management of health care facilities are governed by ordinary negligence principles, it was error for the Court to remove this question from the jury.

As expressed by the court in Spilman, a corporation cannot evade responsibility for the abuse and neglect of nursing home residents by disclaiming knowledge of, or immediate involvement in the neglect, especially where the neglect is not an isolated occurrence, but a systemic problem in the facility:

> [The corporation], Eastbrooke, says that its managing officers did nothing to inflict the abuses, did not know of them, and were not negligent in any manner. Therefore, it argues that it cannot be held responsible under either theory of corporate liability for punitive damages. **But Eastbrooke cannot escape responsibility by managing its facility with managers who close their eyes, refuse to hear, and dull their sense of smell.** Certainly, Eastbrooke's managing agents should not be charged with knowing every isolated event that occurs, but the events surrounding Walter Spilman were not isolated . . . . Its is difficult to imagine that an employee with managerial responsibilities either knew of Walter Spilman's plight

and failed to take any action to assist this totally dependent human being or so totally ignored the operation of the nursing facility that Walter Spilman's plight went unnoticed. **Either situation exhibits a reckless disregard of human life or of the safety of persons. exposed to its dangerous effects, or reckless indifference to the rights of Walter Spilman for whom the nursing home was being compensated for every detail of sustaining his life in the most dignified and comfortable way possible.**

A federal district court in Pennsylvania examined "corporate negligence" with respect to nursing home corporations in Young Estate of Middlekauff v. Manor Care Health Svcs, Inc., CIV.A 03-6864, 2004 WL 953869 at *1 (E.D. Pa. Apr. 20, 2004). The complaint charged Manor Care Health Services, Inc. and the related corporations with placing a desire to maximize profits over the responsibility to care for the needs of elderly and vulnerable residents. Id. The court explained that the doctrine of corporate negligence is based on the corporation's "role in the total health care of its patients: which justifie[s] the imposition of a non-delegable duty of care that the [nursing home] owes directly to its patients." Id.

The Supreme Court recognized that "the term "**nondelegable duty**" is somewhat misleading." Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000)(citations omitted). The Court went on to explain that "[a] person may delegate a duty to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, the delegating person remains *liable* for that breach. **It actually is the liability, not the duty, that is not delegable. The party which owes the nondelegable duty is vicariously liable for negligent acts of the independent contractor**." Id.

V. THE SUBJECT OPINION OVERLOOKED OR MISAPPREHENDED THAT STATUTORY AND REGULATORY LAW RELATED TO NURSING HOMES REQUIRES THE PARTICIPATION OF THE EXCLUDED DEFENDANTS.

The Trial Court's Order granted a stay on "all discovery on causes of action unrelated to the primary claim of nursing home negligence." However, the Trial Court misses the point. The negligence and failures of the governing body as required by 483.75 are directly related to the claim against Magnolia Place, and there is no additional cause of action against the "up-stream entities". One cause of action for negligence applies to all Defendants, particularly the named governing body, THI of Baltimore, and the defacto governing body, FLTCH.

Expert witness Mr. Arbeit states in his affidavit that "It is a fundamental axiom in the nursing home industry that a facility must have a governing body (see federal OBRA certification code 483.75(d).) This governing body appoints the administrator, establishes the terms of the administrator's employment, retains the privilege of removing the administrator and/or limiting the administrator's ability to actually control the facility's operations pursuant to a job description or corporate directive. Further, well established evidence demonstrates whoever approves and ultimately controls fiscal spending (with or without an established budget) will directly impact day-to-day facility operations and resident care outcomes. (Arbeit Affidavit). See Canavan v. National Healthcare Corp., 889 So.2d 825 (Fla. Ct. App. 2004).

The facility is required to have a governing body that is legally liable pursuant to 42 CFR 483.75. THI of Baltimore, Inc. is listed as the designated governing body on Magnolia Place's Application for License. FLTCH, however, claims liabilities of the facility, and that the governing body is legally responsible for establishing and implementing policies regarding the management and operation of the facility pursuant to 42 CFR 483.75(d). How can negligence be determined without the governing body that is legally responsible for the operation of the nursing home as a party at trial? Notably, the facility's Director of Nursing and Administrator testified that neither have

the power to change the policies and procedures–only the governing body has that power. (Exhibit 34 pp. 9-11; Exhibit 23 pp. 11-13; Exhibit 22 pp. 33-34).

The Court erroneously dismissed valid claims despite genuine issues of material fact regarding the governing body that should have been submitted to a jury. Defendants contend that FCC employee and Regional Director Officer Robert Crooks, Administrator Pat Harris, and Director of Nursing Margaret Keller were members of the governing body in 2007. This is a false contention. Both Pat Harris and Margaret Keller in sworn testimony denied any knowledge or participation in the governing body. (Exhibit 39 p. 21; Exhibit 34 pp. 208-209; Exhibit 22 pp. 9-10, 26-27). These factual inconsistencies and the credibility of the witnesses should be decided by the jury.

CONCLUSION

The central issue on appeal is whether the Court can separate joint Defendants in a simple negligence action into two separate liability trials with separate juries. This is a novel issue and one of first impression in South Carolina. The Court's decision misapprehends that the Trial Court's Order "bifurcating" the negligence action—i.e., ordering two separate trials with different juries against related Defendants—and excluding evidence of direct liability against Fundamental Defendants rules on the merits and renders a final judgment on several causes of action properly pled by Plaintiffs that are jury questions including agency, joint and several liability, joint enterprise, corporate negligence, direct participant liability, negligent management and administration, and governing body liability pursuant to 42 CFR 483.75(d).

South Carolina jurisprudence has never allowed a court to bifurcate a negligence action into two separate jury trials excluding necessary and indispensable parties from the first trial where Plaintiffs allege direct liability, agency, and joint enterprise from the excluded Defendants. The

Court's Order denies Plaintiffs the ability to try the negligence case against the severed parties, the Fundamental Defendants, resulting in a summary judgment or directed verdict. The Court's Order grants final judgment in favor of Defendants FLTCH, FAS, FCC, and THI of Baltimore, Inc. as to Plaintiffs' allegations of direct liability for egregious corporate negligence, negligent management and administration, and liability as the governing body pursuant to 42 CFR 483.75(d). This Order is an aberration that creates manifest injustice. Should this Order stand and become the law of South Carolina, all negligence cases with common Defendants will now be tried in multiple trials that span several years. Among civil defendants who cause injury to others, this new strategy of needless delay, additional cost, waste of judicial resources, and confusion is sure to be commended. Should this Order stand, the Court dockets of South Carolina will be clogged with multiple trials involving the same Parties and same issues that should be adjudicated in one trial.

Appellants respectfully request that this Court resolve this novel issue of South Carolina law by allowing the Appeal to go forward. It is an error of law to sever a single negligence action into two separate jury trials, effectively granting summary judgment in favor of necessary and dispensable parties without a lawful basis to do so.

Respectfully Submitted,

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March 19, 2012
Spartanburg, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

Lawrence E. Morrow and
Evelyn M. Morrow,

Plaintiffs,

-vs-

THI Holdings, LLC;
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.

AMENDED COMPLAINT
(Personal Injury)

C.A.#: 07-CP-42-4601

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The Plaintiffs, Lawrence E. Morrow and Evelyn M. Morrow, do hereby respectfully allege as follows:

PARTIES & JURISDICTION

1. That the Plaintiffs, Lawrence E. Morrow and Evelyn M. Morrow, are citizens and residents of the County of Spartanburg and each is a separate Claimant under S.C. Code § 15-32-200 et seq.

2. That upon information and belief, Fundamental Long Term Care holdings, LLC (hereinafter, "FundLTC") is a Maryland limited liability corporation operating and doing business within the state of South Carolina, but has no registered agent in the state of South Carolina.

3. That the Defendants in this case represented to the State of South Carolina that an entity which they alleged was named THI of Baltimore, LLC, (hereinafter "THI, LLC"), allegedly participated in ownership, management, and/or control of the facility

PLAINTIFF'S EXHIBIT 1

in question in this case; however, though discovery in similar cases, Defendants have admitted that no such entity ever existed. Upon information and belief, THI of Baltimore, LLC never formed and never existed despite Defendants' representations to the contrary.

4. That upon information and belief, Fundamental Clinical Consulting, LLC (hereinafter "FCC") and Fundamental Administrative Services, LLC (hereinafter "FAS") are Delaware limited liability companies operating and doing business within the state of South Carolina, but with no registered agents in this state.

5. That upon information and belief, FCC and FAS are successor companies to THI of Baltimore, Management, LLC and as such, have successor corporate liability for the acts and delicts of said predecessors.

6. That upon information and belief, THI of Baltimore, Inc. (hereinafter "THI, Inc.") is a Delaware limited liability corporation operating within the state of South Carolina, but has no registered agent in the state of South Carolina.

7. That upon information and belief, THI of South Carolina, LLC, (hereinafter, "THI of SC"), is a Delaware limited liability corporation operating within the state of South Carolina, with a registered agent in South Carolina.

8. That upon information and belief, THI of Baltimore Management, LLC, (hereinafter, "THI Management"), is a Delaware limited liability corporation operating within the state of South Carolina, with a registered agent in South Carolina.

9. That upon information and belief, THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg (hereinafter "Magnolia Place"), is a for-profit entity incorporated under the laws of the State of Delaware and is licensed and doing business in the County of Spartanburg, State of South Carolina. That Plaintiff Lawrence E. Morrow was a resident at Magnolia Place at Spartanburg at relevant times hereto, in Spartanburg County, South Carolina.

10. That upon information and belief, Defendants "Magnolia Place", "THI Management" and "THI of SC" are limited liability corporations, authorized and existing under the laws of the State of South Carolina; further, "THI Inc." is a corporation authorized and existing under the laws of the State of South Carolina. At times relevant to this case, all of said LLC's and said corporation have operated and have done business in the state of South Carolina, and more specifically, have owned, operated and/or managed the "Magnolia Place at Spartanburg" nursing home facility in Spartanburg County , South Carolina.

10. That upon information and belief, Defendant THI Holdings LLC (hereinafter "THI Holdings") is a Delaware limited liability corporation, operating and doing business

in the State of South Carolina, with a registered agent in South Carolina, and at times relevant hereto, directly controlled and operated the Magnolia Place facility in Spartanburg County, South Carolina.

11. That upon information and belief, Defendants "THI Holdings," "FundLTC," "FCC," "FAS," "THI, Inc."; "THI Management" and "THI of SC" have at times relevant hereto owned, operated, managed, and controlled Magnolia Place at Spartanburg, the facility in Spartanburg county, South Carolina at which Mr. Morrow resided.

12. That upon information and belief, Defendants FCC, FAS, THI, Inc., THI Management, THI of SC, and Magnolia Place are subsidiaries of Fund LTC, and are wholly owned, operated, managed and controlled by Fund LTC.

13. That upon information and belief, Fund LTC owns and operates the nursing home facility in question, and exerts management control and operational control over the other Defendant subsidiaries, specifically including the acts and delicts by said corporate subsidiaries relating to the Defendant nursing home. Upon information and belief, all or most of the following factors exist between Fund LTC and all subsidiaries named herein:

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a. Common ownership;
b. Common directors or officers;
c. Financing of the subsidiary by the parent;
d. Gross inadequacy of capital for the subsidiaries;
e. Incorporation and/or organization of the subsidiaries by the parent;
f. Payment by the parent of the salaries and other expenses or losses of the subsidiaries;
g. Lack of business dealings by the subsidiary except with the parent and lack of assets except those conveyed to it by parent;
h. Lack of independent action by the executives of the subsidiaries, who instead take their orders from the parent corporate in the latter's interest.

14. That upon information and belief, Magnolia Place delivers nursing home care for a fee and had authority, express or implied, to control the means and agencies employed to execute the delivery of nursing home care to Lawrence Morrow during her residency at Magnolia Place.

15. That upon information and belief, Magnolia Place was involved in the ownership, operation, and/or management of nursing homes for profit including the facility where Mr. Morrow resided.

16. That upon information and belief, all Defendants named herein are or have been involved in budget, staffing, training, supervision, development and implementation

of policies and procedures for Magnolia Place, and have directly controlled the operations at said nursing home facility.

17. That Defendant Fund LTC at all times relevant hereto totally dominated said subservient companies. Said subservient companies were so organized and controlled, and their business conducted in such a manner that they were merely an agency, instrumentality, adjunct, and/or alter ego of Fund LTC who is therefore liable and responsible for the acts and delicts of all Defendants regarding said Defendant nursing facility.

18. That all Defendants have engaged in substantial business activities in South Carolina, including the management, operation, control and/or ownership of the Defendant nursing home facility at various times.

19. That all Defendants named herein have promulgated and established the policies, procedures, protocols, staffing decisions, and budgetary decisions at the Magnolia Place nursing facility, and all Defendants named herein have directly controlled said facility at various times.

20. That the acts and delicts of the staff at the Magnolia Place nursing home facility in Spartanburg County, South Carolina were authorized, approved and ratified by all Defendants named herein.

21. That Fundamental Long-Term Care Holdings, LLC is a successor corporate entity to THI Holdings, LLC, which is no longer actively conducting business. Fund LTC has successor corporate liability for the acts and delicts of THI Holdings, LLC, which at times relevant hereto, had the right to control operations, and exerted management control and exerted operational control over the corporate subsidiaries named herein.

22. That at times relevant hereto, the Defendant entities hereto were totally dominated and subservient to THI Holdings LLC and/or Fundamental Long Term Care Holdings, LLC. Said subservient corporations were so organized and controlled, and their business conducted in such a manner, that they were merely an agency, instrumentality, adjunct, and/or alter ego of THI Holdings LLC and/or Fundamental Long Term Care Holdings, LLC. THI Holdings and Fund LTC are liable and responsible for the acts and delicts of the other Defendants named herein.

23. That upon information and belief, Defendant Fund LTC acquired substantially all of the assets of THI Holdings LLC (including ownership and control of the other Defendant entities herein). Said acquisition amounted to a de facto merger, in that (1) there was a continuation of the enterprise of the former corporation, with continuity of management, personnel, physical locations, assets and general business operations; (2) a continuity of shareholders; (3) the former entity ceased (or is in the process of ceasing) its own ordinary business operation, and merged into said

successor; and (4) the successor assumed those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller. Further, a substantial continuity occurred between seller and successor, in that there occurred (1) retention of employees; (2) retention of supervisory personnel; (3) retention of most of the same facilities and locations; (4) providing of the same services; (5) retention of same or similar names of subsidiaries; (6) continuity of assets; (7) continuity of general business operation; and (8) said successor held itself out as a continuation of the same operator of nursing facilities and related nursing industry entities.

24. That the sublease for the premises of the Magnolia Place nursing facility (wherein decedent resided), at 8020 White Avenue, Spartanburg, South Carolina, in Section 9.1 provides the following:

> Landlord and Tenant agree that any transactions whereby Tenant is no longer **100% directly or indirectly owned and controlled** by THI Holdings LLC shall be deemed a prohibited transfer under this Section 9.1. For purposes of this Article 9, the terms "control" or "controls" shall mean possession, direct or indirect, of the power to direct or to cause the direction of, the management and policies of any person or entity, whether through the ownership of voting securities, or partnership interest, by contract or otherwise. Any attempted transfer in violation of the terms and covenants of this Section 9.1 shall be void. Notwithstanding the foregoing, the consent of Landlord shall not be required to any transfer to any other direct or indirect subsidiary or parent of Tenant, so long as the transferee is 100% directly or indirectly owned and controlled by THI Holdings LLC . . .

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25. That at present, Fundamental Long Term Care Holdings, LLC 100% owns and controls Magnolia Place, wherein decedent resided, and 100% own and control the other entities named herein. That prior to FundLTC, these entities were 100% owned and controlled by THI Holdings.

26. That upon information and belief, Defendants FAS and FCC provided management, operational control, and management control, and exerted direct control over, the Defendant facility Magnolia Place, at times when decedent resided therein and received negligent and deficient care; further, Defendants FAS and FCC are the successor corporate entities to Defendant "THI Management" and as such, are liable and responsible for the acts and delicts of said predecessor entities.

27. That the Court has jurisdiction over the parties and subject matter.

28. That the acts and delicts referred to herein occurred at Defendants' facility in the County of Spartanburg, State of South Carolina.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

29. That on January 20, 2007, Lawrence E. Morrow was admitted to Magnolia Place at Spartanburg with the understanding that he would be provided with the care that his medical conditions reasonably required.

30. That while residing at Defendants' facility, the Mr. Morrow was damaged and injured as a result of abuse, neglect, negligence and violations of nursing care.

31. That Mr. Morrow was a resident of Defendants' facility from his admission until his discharge on February 2, 2007.

32. That Mr. Morrow suffered an injury to his genitals while being assisted in the shower by Defendants' staff on January 19, 2007 as a result of Defendants' negligence.

33. That as a result of the aforementioned injury, surgery was required to remove a penile implant from Mr. Morrow.

34. That the facility failed to properly monitor and control Mr. Morrow's diabetes.

35. That the facility did not properly care for Mr. Morrow's pressure wounds, allowing the wounds to worsen.

36. That at all times relevant hereto, Defendants were required to exercise due care in the supervision and care of its residents to prevent the occurrence of new adverse health conditions and to prevent currently existing adverse health conditions from deteriorating.

37. That during Mr. Morrow's residency at Magnolia Place, the acts and delicts of Defendants caused, and were the proximate causes of Plaintiffs' conscious pain and suffering, mental distress, medical bills and disability and loss of consortium.

38. That the Plaintiffs institute this action in order to recover for Plaintiffs' injuries. Said injuries and damages were the proximate result of the acts and delicts of Defendants.

39. That the provisions of the Omnibus Reconciliation Act of 1987 ("OBRA") were applicable with regard to Lawrence E. Morrow. Defendants were under an obligation to follow all rules and regulations of OBRA as well as all applicable state and federal laws, rules, regulations, and guidelines including S.C. Regulations 61-17 and the South Carolina Nurse Practice Act, S.C. Code § 40-33-5 et. seq.

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40. That the Defendants were liable and responsible for the acts and delicts of its employees, agents, and servants under the principle of respondeat superior.

41. That Defendants THI Holdings, FundLTC, FAS, FCC, THI, Inc., THI of SC and THI Management are vicariously liable for the acts and delicts of their employees, agents, and servants.

42. That the Defendants held Magnolia Place out to the State of South Carolina, the South Carolina Department of Health and Environmental Control, the public at large, and to Lawrence Morrow and his family specifically, as being:

(a) skilled in the performance of nursing, rehabilitative, and other medical support services;
(b) properly staffed, supervised and equipped to meet the total needs of its residents;
(c) able to specifically meet the total nursing, personal care, medical, physical therapy, and
(d) licensed by the South Carolina Department of Health Environmental Control and complying on a continual basis with all state and federal rules, regulations, and standards established for nursing homes in South Carolina.

43. That the Defendants held Magnolia Place out to the United States of America, the Centers for Medicare and Medicaid Services, the public at large, and Lawrence Morrow and his family specifically, as being a skilled nursing facility and as a nursing facility meeting the requirements of 42 CFR Part 483.

44. That the Defendants were under a contractual duty to provide reasonable, appropriate and adequate care to Lawrence E. Morrow pursuant to state and federal laws, rules, regulations, guidelines and existing industry standards.

45. That the Defendants owed certain non-delegable duties to Lawrence Morrow, including, but not limited to the duties set forth in the foregoing and ensuing paragraphs of this complaint. Defendant THI Management also had additional duties accepted by it under the terms of its management agreements(s) with the other facility defendants.

46. That at all times pertinent hereto, Lawrence E. Morrow resided at the above-named facility pursuant to the terms of the admissions agreement, and as such was under the exclusive control and care of Defendants and their employees, agents, officers, and servants while a resident.

47. That at all times pertinent hereto, THI of South Carolina at Magnolia Place at Spartanburg, as licensee was ultimately responsible for maintaining approved standards for the facility.

48. That the Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Lawrence E. Morrow.

49. That upon information and belief, Lawrence E. Morrow's health conditions were aggravated and exacerbated by the Defendants' repeated failure to properly supervise him or monitor his medical conditions and keep him safe from harm in that he suffered an injury to his genitals, his diabetes was not properly controlled and his pressure wounds were not properly treated. These deviations from the standard of care were the proximate causes of conscious pain and suffering, mental distress, medical bills and disability.

50. That the facility defendants, directly or indirectly, received federal and state funds as reimbursement of the care of residents including Lawrence Morrow.

FIRST CAUSE OF ACTION
(Negligence, Recklessness and Gross Negligence)

51. Relevant and consistent allegations contained in paragraphs 1-50 are incorporated by reference as if written verbatim herein.

52. That Defendants had a duty of due care to their patients and residents to discover, warn and/or prevent risks; to take reasonable safety precautions; to eliminate unreasonable risks; and to provide proper protection from harm.

53. The Defendants by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Lawrence E. Morrow. More particularly the Defendants were negligent in the following particulars:

a. failing to properly supervise as required, and promised to the family upon admission;

b. failing to provide the care, supervision and monitoring of patients, residents, and in particular Mr. Morrow, which was required by law, in accordance with the standards of practice among members of the nursing home community, and which was necessary for his health and safety;

c. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Lawrence Morrow;

d. failing to provide sufficient numbers of qualified personnel including nurses,

nurses assistants, medication aides, and/or orderlies to meet the total needs of its residents, including Mr. Morrow;

e. failing to abide by applicable federal and state laws governing long term care facilities and nursing care;

f. failing to hire a sufficient number of trained and competent staff;

g. failing to follow the licensing and regulatory rules of the State of South Carolina;

h. failing to properly train and supervise employees to deal with residents who were unable to care for themselves;

I. failing to follow physicians' orders;

j. failing to prevent decubitus ulcers from worsening and/or in failing to provide necessary and proper treatment of the ulcers;

k. failing to appropriately diagnose Mr. Morrow's condition;

l. failing to turn and reposition Mr. Morrow to prevent pressure ulcers from worsening and to promote healing;

m. failing to ensure that Mr. Morrow and his wounds were kept clean and dry;

n. failing to provide adequate nutrition and hydration;

o. failing to conduct weekly body audits to discover pressure ulcers;

p. failing to monitor and assess Mr. Morrow adequately for pain and discomfort;

q. failing to treat Mr. Morrow with dignity and respect;

r. failing to follow licensing and regulatory rules of the Federal Government;

s. failing to appropriately update and implement the Plan of Care;

t. failing to provide adequate funding to ensure proper safety, training, and supervision;

u. filing to create and foster a work environment for the staff that would be conducive to providing appropriate care to all residents of the facility;

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MARC KITCHENS

v. failure to ensure proper charting;

w. failing to provide Mr. Morrow with appropriate medications, treatments and nutritional interventions which would promote healing and resolve infection to the wound areas;

x. failing to train staff to appropriately transfer residents who are unable to transfer independently;

y. Failing to notify the physician and the family of injuries sustained as a result of the improper transfer;

z. failing to exercise due care; and

aa. by other negligent acts and/or omissions yet to be determined or defined.

54. That as a result, Mr. Morrow experienced prolonged conscious pain and suffering, mental anguish and incurred substantial medical bills and disability and were the sole and proximate cause for the damage and injuries sustained by his wife, Evelyn Morrow.

55. That the aforesaid acts and delicts were the sole and proximate cause of Lawrence E. Morrow's injuries, and were the sole and proximate cause of the damage and injuries sustained by his wife, Evelyn Morrow.

56. That the wrongful conduct of Defendants set forth in the negligence and negligence per se counts of this complaint was undertaken without regard to the health and safety consequences of Lawrence Morrow who was entrusted to Defendants' care, and rises to the level of gross negligence in that Defendants' conduct was wilful, wanton, reckless, and shows a conscious disregard for the health and safety of Lawrence Morrow.

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57. That the Defendants independently and through their managers, officers and others yet unknown demonstrated conscious and intentional disregard of and indifference to the rights and safety of Lawrence Morrow and other patients at Magnolia Place as demonstrated by:

(A) Their business practice of attempting to care for residents with an inadequate number of under-trained staff, which their officers and managers knew or should have known were reasonably likely to result in injury to Lawrence Morrow and their other patients;

(B) Their business practice of failing to supervise and train their staff in order to ensure that their policies and procedures were known to and adhered to by

licensed staff, and that licensed staff practiced within their scopes of practice

SECOND CAUSE OF ACTION
(Negligence Per Se)

58. Relevant and consistent allegations contained in paragraphs 1-57 are incorporated by reference as if written verbatim herein.

59. That in addition to the above, Plaintiff alleges that Defendants have been negligent per se in their violations of sections of OBRA (Omnibus Budget Reconciliation Act of 1987), S.C. Regulations 61-17, and The Nurse Practice Act.

60. That each and/or all of the foregoing state and federal laws, rules and regulations prescribe certain actions or defines the standard of conduct. Lawrence E. Morrow was and remains in the class of persons sought to be protected by each regulation and/or statute. Moreover, Mr. Morrow's injuries were the type of harm that each of these regulations was intended to prevent according to the extent that the Defendants' conduct violated these regulations. Such conduct amounts to negligence per se as that term is defined and is known and understood at law. Each act or omission constituting negligence per se was the proximate cause of Mr. Morrow's injuries and damages, and was the proximate cause of the damages and injuries suffered by Evelyn Morrow.

61. That as a direct and proximate result of the Defendants' acts and delicts, Lawrence E. Morrow endured extreme conscious pain and suffering, mental distress, medical bills and disability. As a further direct consequence of said acts and delicts, the Evelyn Brown suffered loss of consortium.

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THIRD CAUSE OF ACTION
(Loss of Consortium)

62. Relevant and consistent allegations contained in paragraphs 1-60 are incorporated by reference as if written verbatim herein.

63. That as a further result of Defendants' acts and delicts, Plaintiff Evelyn Morrow, individually, was damaged and injured indefinitely from the time of Mr. Morrow's injury on January 19, 2007, as follows:

a. In suffering loss of enjoyment of life;

b. In experiencing mental anguish;

c. In suffering loss of consortium, loss of society, and loss of companionship of Plaintiff's husband, Lawrence E. Morrow.

WHEREFORE, Plaintiff prays for judgment against the Defendants for actual and punitive damages in the sums deemed appropriate by the jury, for the costs of the action, and for such other and further relief as this Court may deem just and proper.

GARY W. POLIAKOFF
RAYMOND P. MULLMAN, JR.
LARA PETTISS HARRILL
Poliakoff & Associates, P.A.
215 Magnolia Street
P. O. Box 1571
Spartanburg, SC 29304
(864) 582-5472
Attorneys for the Plaintiff

Date: 3/20/09
Spartanburg, S. C.

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MARC KITCHENS
CLERK OF COURT

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG C.A.# 2007-CP-42-4601

****
LAWRENCE E. MORROW AND *
EVELYN M. MORROW, *
*
PLAINTIFFS, *
*
VERSUS *
*
THI OF BALTIMORE, 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. *
****

DEPOSITION OF LAWRENCE EDWARD MORROW

PURSUANT TO NOTICE AND/OR AGREEMENT, THE DEPOSITION OF **LAWRENCE EDWARD MORROW** WAS CALLED BY THE DEFENDANTS ON THE 6TH DAY OF MAY, 2008, COMMENCING AT THE HOUR OF 10:02 A.M., AT THE LAW OFFICES OF POLIAKOFF AND ASSOCIATES, 215 MAGNOLIA STREET, SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS FOLLOWS:

C. NICOLE SIMPSON
VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.
836 SHORESBROOK DRIVE
SPARTANBURG, S.C. 29301-6515
864-574-1313



BATHROOM. I WAS IN THE SHAPE TO WHERE I COULDN'T CLEAN MYSELF. I HAD TO DEPEND ON SOMEBODY TO CLEAN ME. IT WAS EMBARRASSING, BUT ANYWAY, I WOULD RING THE BELL. SOMETIMES I WOULD GET ASSISTANCE RIGHT AWAY, BUT THEY WAS MANY, MANY TIMES THAT I WOULD SIT IN THERE AND I HAVE HAD TO HOLLER AND SCREAM FOR SOMEBODY TO COME HELP ME GET OFF OF THAT COMMODE, THAT I ABSOLUTELY COULDN'T DO IT, COULDN'T GET UP. THERE'S A RAIL THERE. I COULD PULL MYSELF UP, BUT I COULDN'T GO NOWHERE. IT WAS WORSE AT NIGHT. AT NIGHT, I THINK THEY WERE WAY UNDERSTAFFED BECAUSE SOMETIMES IT WOULD BE -- THERE'S TIMES IT WOULD BE 30, MAYBE 40 MINUTES. IF IT WAS IN BETWEEN SHIFT CHANGE, FORGET IT. IF SOMEBODY IN THERE WAS CHOKING TO DEATH OR HAVING A BREATHING PROBLEM, THEY WOULD ABSOLUTELY DIE BEFORE THEY WOULD GET SOMEBODY TO THEM DURING SHIFT CHANGE BECAUSE FOR ONE SOLID HOUR, YOU CAN'T GET NOBODY IN THERE. THIRTY MINUTES BEFORE AND 30 MINUTES AFTER, YOU ABSOLUTELY WON'T GET NOBODY IN A ROOM DOWN THERE FOR NO REASON. THERE'S A LOT OF THEM THAT HELPED ME. THEY TRIED TO. THERAPY, THEY HELPED ME MORE IN THERAPY THAN ANYTHING. I HAD FALLINGS OUT WITH NURSES, SUPPOSED TO GIVE ME -- CHANGE MY DRESSINGS. THEY WERE SUPPOSED TO CHANGE MY DRESSING AT LEAST TWICE A DAY.

THE AFTERNOON AND NIGHTTIME, IT WAS JUST LIKE, MAYBE, I DON'T BELIEVE IT WAS OVER THREE PEOPLE IN THE WHOLE THING, THREE, MIGHT HAVE BEEN FOUR PEOPLE. I DON'T KNOW. THE WAY I HEARD SOME OF THEM TALK, THAT THEY WERE JUST SO STRETCHED OUT THAT THEY COULDN'T ---

Q. DID YOU EVER -- DID EITHER YOU OR YOUR WIFE EVER MAKE ANY COMPLAINTS TO ANYBODY IN MANAGEMENT AT THE NURSING HOME ABOUT THE CARE YOU WERE RECEIVING?

A. YEAH, MY WIFE DID.

Q. WERE YOU THERE WHEN SHE MADE THE COMPLAINTS?

A. I WAS IN THE BED. I COULDN'T GET TO THEM. WELL, LIKE I SAID, I HAD A FALLING OUT, I HAD A COMPLAINT WITH A NURSE DOWN THERE THAT WAS GOING TO COME, SAID SHE WAS GOING TO COME CHANGE MY BANDAGE, AND I -- THE ONE THAT I JUST TOLD YOU, AND I HAD BEEN WAITING ON HER FOR ABOUT THREE HOURS. IT WAS SUPPOSED TO BE EARLIER. AND SHE WAS STANDING DOWN THERE TALKING, AND THAT'S WHEN I BLESSED HER OUT.

Q. BUT YOU WERE NEVER PRESENT WHEN ANY COMPLAINTS WERE MADE TO ADMINISTRATION AT THE NURSING HOME?

A. NO. MM-MM (NEGATIVE RESPONSE). I WASN'T.

Q. YOUR WIFE WOULD HAVE MADE THE COMPLAINTS?

A. YEAH, BUT I KNOW SHE WENT DOWN. EVERY TIME I WENT BACK TO THE WOUND CENTER FOR THEM TO CHECK ME AND

THE WOUND CENTER AND I HAD DR. CAMP TO LOOK AT ME. I TOLD HIM WHAT HAD HAPPENED AND HE LOOKED AT ME AND HE SAID, "WELL, YOU NEED TO LET DR. WARREN LOOK AT YOU." HE SAID THERE'S A LOT OF SWELLING. HE SAID YOU DON'T WANT IT TO GET INFECTED, AND I SAID WELL, I'M TRYING TO SEE HIM, BUT I HAVEN'T SEEN HIM YET. BUT ANYWAY, WHEN I WENT BACK THE NEXT DAY OR THREE OR FOUR DAYS IS WHEN I SEEN DR. WARREN, IT WAS 12 DAYS FROM THE TIME I WENT TO THE NURSING HOME UNTIL I COULD SEE DR. WARREN.

Q. SO, YOU BELIEVE YOU TOLD DR. CAMP WHAT HAD HAPPENED TO YOUR PENIS ---

A. OH, YEAH. I TOLD HIM AND HE LOOKED AT ME AND IT WAS ALL SWELLED UP.

Q. WHAT DID HE SAY?

A. HE SAID I NEED TO LET DR. WARREN LOOK AT ME. HE SAID YOU NEED TO LET HIM LOOK AT YOU AND KEEP AN EYE ON IT, HE SAID, BECAUSE YOU DON'T WANT IT TO GET INFECTED.

Q. OKAY. AND DESCRIBE FOR ME IN YOUR OWN WORDS HOW THIS INCIDENT HAPPENED.

A. THEY WERE GOING TO GIVE ME A SHOWER WHICH I DON'T THINK THEY WERE SUPPOSED TO GIVE ME A SHOWER. THEY WERE SUPPOSED TO WASH ME AND ALL, BUT I DON'T THINK THEY WAS ACTUALLY SUPPOSED TO WET ALL THE BANDAGES I

HAD ON ME BACK THERE. BUT ANYWAY, THEY CARRIED ME UP THERE IN A WHEELCHAIR AND THEY GOT ME IN THERE IN THE SHOWER. WELL, WHAT IT IS, THEY ROLL -- THEY'VE GOT SHOWER CHAIRS. THEY'VE GOT TWO DIFFERENT KINDS. THEY MADE WHAT LOOKED LIKE P.V.C. PIPE AND ONE OF THEM IS MADE LIKE STRAIGHT ACROSS JUST LIKE THIS FOR A WOMAN. AND THE OTHER HAS GOT A STOOL LIKE IT'S SPLIT AND IT'S OPEN. WELL, THEY HAD ONE THAT'S A SOLID CHAIR AND IT'S ON WHEELS. THEY PUT YOU ON THIS AND THEY ROLL YOU IN THE SHOWER, AND THAT'S WHERE THEY GIVE YOU THE SHOWER, WASH YOU. WELL, THEY WERE -- THERE WAS ONE PERSON TRYING TO GET ME OUT OF THE WHEELCHAIR, AND THIS LITTLE NURSE, SHE'S A NURSES' AIDE. SHE WAS IN TRAINING. SHE HAD THE CHAIR FOR ME TO SIT ON. DIDN'T HAVE NO BAND OR NOTHING ON ME. THERE WAS ONE NURSE OR AIDE, WHATEVER IT WAS, HAD ME BY THE ARM AND I WAS GETTING UP. WELL, THIS GIRL, SHE HAD THE CHAIR, AND I TURNED AROUND AND I PUT MY ARM ON IT AND WAS TRYING TO GET UP ON IT. WHEN SHE DID, SHE ROLLED IT UNDER THERE AND SHE CAUGHT MY SCROTUM ON IT. AND THAT'S WHEN IT JUST PUSHED ME RIGHT DOWN ON IT. AND I HOLLERED, SCREAMED. SHE SAID I'M SORRY. BUT ANYWAY, IT STARTED HURTING, STARTED HURTING, STARTED SWELLING, AND WHEN I DID SEE DR. WARREN, I TOLD HIM

AND HE LOOKED AT ME AND HE SAID, YOU'RE GOING TO BE -- SAID YOU'LL BE ALL RIGHT.

Q. BEFORE WE GET TO DR. WARREN, LET ME GO BACK AND MAKE SURE I UNDERSTAND EXACTLY HOW THIS HAPPENED. YOU SAID THERE WAS SOME PORTION OF THE CHAIR THAT YOU GOT YOUR SCROTUM CAUGHT ON. WHAT PORTION OF THE CHAIR ---

A. IT WAS THE TOP PART WHERE YOU SIT, LIKE I SAY. THERE'S -- I CAN DRAW YOU A LITTLE DIAGRAM OF IT IF YOU'D LIKE.

Q. WHATEVER IS EASIEST FOR YOU.

A. ALL RIGHT. IF YOU CAN LEAN OVER HERE A MINUTE, THE TOP OF THOSE CHAIRS IS MADE LIKE THIS, SOME OF THEM, NOT ALL OF THEM. THEY'VE GOT SOME THAT'S MADE JUST LIKE THIS.

Q. ABOUT THE TOP, ARE YOU TALKING ABOUT THE SEAT?

A. THAT'S THE TOP SEAT, BUT THIS IS ON P.V.C., LIKE P.V.C. PIPE. IT'S GOT WHEELS ON IT AND GOT HANDLES ON IT.

Q. RIGHT.

A. BUT ANYWAY, THE SEAT'S MADE LIKE THIS ON SOME OF THEM. ON SOME OF THEM, IT COMES ALL THE WAY AROUND, JUST LIKE THAT. THEY USED THIS TYPE RIGHT HERE. THEY HAD ONE OF THESE SETTING THERE, OVER THERE. I DON'T KNOW WHY THEY DIDN'T USE IT, BUT THEY USED ONE

LIKE THIS, AND WHEN THEY SHOVED THAT THING ON ME AND ME SITTING DOWN, THEY CAUGHT MY SCROTUM. AND I SCREAMED, CAUGHT IT RIGHT IN THERE.

Q. ON THE EDGE OF THE SEAT?

A. ON THE EDGE OF THE SEAT WHEN THEY STARTED ---

Q. OKAY. SO, LET'S MARK THIS.

(COURT REPORTER MARKS DEFENDANT'S EXHIBIT NUMBER FIVE, SKETCH, ATTACHED.)

BY THE WITNESS:

IN OTHER WORDS, THEY JUST PUSHED THIS RIGHT HERE. IF THEY HAD USED ONE LIKE THIS, IT WOULD HAVE BEEN NO PROBLEM, BUT WHEN I STARTED TO SIT ON THE CHAIRS, THEY -- SAY THIS IS THE CHAIR RIGHT HERE AND LIKE THAT. WHEN THEY SHOVED THAT UNDER ME, THEY CAUGHT MY SCROTUM RIGHT IN THERE.

EXAMINATION RESUMED BY MR. BOULIER:

Q. SO, YOUR SCROTUM GOT CAUGHT ON THAT FRONT EDGE OF THE SEAT?

A. RIGHT.

Q. AND WHY DON'T YOU, JUST SO WE CAN IDENTIFY THIS ON THE RECORD, JUST PUT AN ---

A. IF THEY HAD USED THIS ---

Q. HANG ON, HANG ON. BEAR WITH ME JUST A MINUTE. PUT AN ARROW BY THE SEAT THAT YOU SAY THEY ACTUALLY USED WITH YOU. JUST DRAW AN ARROW TO THAT. OKAY. AND

A. NO. I KNOW THE ONLY THING THAT I KNOW THEY CONTINUED, WENT AHEAD AND FINISHED GIVING ME A SHOWER AND WHEN THEY TOOK -- THEY GOT A -- IT'S LIKE A HOSE WITH A SPRAYER AND WHEN THEY SPRAYED ME BACK IN THERE, I KNOW IT HURT.

Q. DID IT HURT WHEN THEY SPRAYED THE WOUNDS OR ---

A. YEAH, BACK IN MY WOUNDS, BUT THEN WHEN THEY TOOK ME BACK TO THE ROOM, I JUST KEPT HURTING IN FRONT. I HURT MORE THEN, IN FACT, WHEN -- THE NEXT DAY WHEN I WENT TO THERAPY, I TOLD THEM THAT I WAS HURTING WORSE IN FRONT THEN THAN I WAS BEHIND. AND I TOLD THEM WHAT HAD HAPPENED.

Q. ALL RIGHT. AND DID YOU TELL ANYBODY ELSE ABOUT THIS INCIDENT WITH THE SHOWER CHAIR OTHER THAN THE PEOPLE IN THERAPY, DR. CAMP AND DR. WARREN?

A. DID ANYBODY ELSE?

Q. YES, SIR.

A. YEAH, I TOLD -- WHAT HIS NAME? CADILLAC AND ALL, FLEETWOOD, I TOLD HIM THAT THEY HAD HURT ME AND I ALSO TOLD THE ONE THAT THEY CALLED -- SHE SAID CALL HER ALLSTATE. I TOLD HER THEY HAD HURT ME. IN FACT, I TOLD ALL THEM NURSES UP THERE ABOUT IT. THE BLACK, IT WAS THE BLACK LADY, BIG HEAVYSET LADY. SHE WAS A NURSE, REAL NICE. I TOLD HER, BUT I TOLD EVERYBODY IN THERAPY ABOUT IT, ABOUT ME HURTING SO.

ME SO BAD, I WOULD HOLLER AT THEM. I HAVE SAT IN THE BATHROOM IN THERE FOR AN HOUR RINGING THE BELL AND HOLLERING FOR SOMEBODY TO COME HELP ME GET OUT OF THERE.

Q. MR. MORROW, ARE YOU MAKING ANY CLAIM IN THIS CASE THAT THE INJURY FROM THE SHOWER CHAIR HAS AFFECTED YOUR RELATIONSHIP WITH YOUR WIFE?

A. IT SURE HAS.

Q. PRIOR TO YOUR ILLNESS AND BEING HOSPITALIZED AT MARY BLACK AND THEN GOING TO MAGNOLIA PLACE, WHEN IS THE LAST TIME YOU AND YOUR WIFE HAD BEEN ABLE TO HAVE INTERCOURSE?

A. ON THE FRIDAY BEFORE I WAS ADMITTED TO THE HOSPITAL ON MONDAY MORNING.

Q. SO, YOU DON'T RECALL, IF I REPRESENTED TO YOU THERE WAS SOMETHING IN THE MEDICAL RECORDS FROM THAT PERIOD INDICATING IT HAD BEEN A YEAR, YOU DON'T RECALL EVER MAKING THAT STATEMENT TO A DOCTOR?

A. I'M NOT UNDERSTANDING WHAT YOU SAID.

Q. IF I REPRESENTED TO YOU THAT THERE WAS A REFERENCE IN ONE OF THE MEDICAL RECORDS DURING THAT PERIOD OF TIME THAT IT HAD BEEN A YEAR, YOU DON'T RECALL EVER MAKING THAT STATEMENT TO ONE OF YOUR DOCTORS?

A. I'M STILL NOT UNDERSTANDING WHAT YOU'RE WANTING ---

Q. YOU TOLD ME THAT YOU AND YOUR WIFE ---

A. NO, MM-MM (NEGATIVE RESPONSE).
Q. AND THEY DIDN'T USE A GAIT BELT TO ASSIST YOU?
A. NO, THEY DIDN'T.
Q. AND THERE WAS ONE FEMALE C.N.A. HOLDING YOU UP?
A. MM-HMM (AFFIRMATIVE RESPONSE). THAT'S RIGHT.
Q. AND YOU WEIGHED ABOUT 200 POUNDS AT THE TIME?
A. 199 POUNDS.
Q. OKAY. DO YOU KNOW HOW OFTEN THEY WEIGHED YOU AT THE FACILITY?
A. I THINK THEY WEIGHED ME TWICE WHILE I WAS OUT THERE. I KNOW -- YEAH, IT WAS TWICE THAT THEY WEIGHED ME WHEN THEY ROLLED ME UP ON THE SCALES.
Q. WHEN THEY WERE GETTING YOU OUT OF THE WHEELCHAIR THE DAY OF THE INCIDENT, WERE THE WHEELS OF THE WHEELCHAIR LOCKED?
A. I DON'T KNOW. I DON'T KNOW.
Q. DO THE WHEELS ON THE SHOWER CHAIR HAVE LOCKS ON THEM?
A. I DON'T KNOW THAT.
Q. DID DR. KINARD TELL YOU WHY THEY COULD NOT REPLACE THE PENILE IMPLANT?
A. THEY SAID THAT THERE WAS TOO MUCH SCAR DAMAGE DOWN THERE AND THERE WAS TOO MUCH DAMAGE IN THERE.
Q. DID ---
A. THE SCAR TISSUE.

Q. DID DR. KINARD TELL YOU IT WAS A RESULT OF THE RECENT TRAUMA OR YOUR PREVIOUS DISEASE? THE SCAR TISSUE, DID HE TELL YOU IT WAS AS A RESULT OF THE RECENT TRAUMA IN THE SHOWER OR WAS IT A RESULT OF THE ---

A. HE DIDN'T -- HE DIDN'T SAY WHICH ONE. HE DIDN'T GO INTO NO DETAIL.

Q. DID ANYBODY AT MAGNOLIA PLACE EVER INFORM YOU THAT YOU HAD A VIRUS, LIKE MERSA?

A. NO.

Q. DID YOU EVER SEE ANY OF THE STAFF NOT WASH THEIR HANDS AFTER TAKING CARE OF ANOTHER PATIENT BEFORE TAKING CARE OF YOU?

A. OH, YEAH.

Q. DID THEY, THE STAFF AT MAGNOLIA PLACE TURN AND REPOSITION YOU EVERY TWO HOURS?

A. NO, THEY DIDN'T.

Q. ALL RIGHT. AND WE TALKED A LITTLE BIT ABOUT, OR YOU TALKED A LITTLE BIT ABOUT THE CALL BELLS. WHAT WAS THE TYPICAL RESPONSE TIME WHEN YOU HIT THE CALL BELL?

A. WELL, SOMETIMES IT WOULD BE OVER AN HOUR. I HAVE SAT IN THERE ON THE COMMODE SOMETIMES FOR AN HOUR BEFORE I COULD GET ANYBODY, AND I MASHED THE BUTTON, THE BELL, OR THE RED LIGHT AND I'D EVEN HOLLER FOR

THEM. JUST -- GO AHEAD. THIS DON'T PERTAIN TO WHAT YOU ASKED ME ABOUT.

Q. OKAY. DID YOU HEAR PEOPLE AT NIGHT ASKING FOR HELP?

A. OH, YES.

Q. AND EXPLAIN THAT A LITTLE TO ME.

A. WELL, LIKE I SAID, IT'S GOING INTO A DIFFERENT WORLD AT NIGHT DOWN THERE BECAUSE YOU CAN HEAR PEOPLE HOLLERING ALL NIGHT LONG. THIS ONE GUY THAT WAS IN THE ROOM WITH ME, ONE NIGHT, HE SAT AND HOLLERED AND HE HAD HIS LEGS UP TO HIS KNEES AMPUTATED. I DON'T KNOW WHETHER IT WAS BOTH OF THEM, BUT I KNOW HE HAD ONE OF THEM UP BECAUSE HE HAD SOMETHING OVER IT. BUT I KNEW ONE OF HIS LEGS WAS OFF. AND IT WAS AN OLD BLACK GUY, AND HE SAT THERE AND HE WOULD HOLLER AND SCREAM FOR THEM TO COME HELP HIM. AND SOMETIMES, SOMETIMES THEY WOULD COME GET HIM, BUT MOST OF THE TIME, HE WOULD DO THAT FOR ALL TWO OR THREE HOURS BEFORE ANYBODY WOULD COME IN THERE AND HE WOULD MESS ALL OVER HIMSELF AND BE IN THAT. YEAH, I SEEN THEM COME IN AND TREAT HIM AND THEY'D GO WORK ON HIM AND THEN THEY WOULD COME AROUND THERE TO ME, AND NO, THEY DIDN'T GO AND WASH THEIR HANDS.

Q. DID, AT ONE POINT, THEY PUT YOU ON ADULT DIAPERS, CORRECT?

A. I HAD -- YEAH.

WAS ON YOUR BUTTOCKS ---

A. RIGHT THERE ON THE CHEEKS.

Q. AND THEN THE ONE THAT FORMED AT MAGNOLIA PLACE IS ON YOUR SACRUM, CORRECT?

A. RIGHT.

BY MR. BOULIER:

OBJECT TO THE FORM OF THE QUESTION.

EXAMINATION RESUMED BY MR. MULLMAN:

Q. DID THE STAFF HAVE NAME TAGS?

A. I DON'T RECALL THEM HAVING THEM.

Q. WAS THERE ONE SPECIFIC NURSE THAT WAS RESPONSIBLE FOR WOUND CARE AND TREATMENT?

A. NOT TO MY KNOWLEDGE.

Q. AND I THINK YOU TESTIFIED PREVIOUSLY THAT AFTER DR. WARREN SAW YOU AFTER THE SHOWER INCIDENT, HE INCREASED YOUR PAIN MEDICATION.

A. HE WHAT?

Q. HE INCREASED YOUR PAIN MEDICATION? DID HE INCREASE YOUR PAIN MEDICATION AFTER SEEING YOU AFTER THE SHOWER INCIDENT, DR. WARREN?

A. ISSUE ME WHAT?

Q. DID HE INCREASE YOUR PAIN MEDICATION?

A. YES, HE DID I'M SORRY.

Q. NO PROBLEM. BESIDES PHYSICAL THERAPY OR OCCUPATIONAL THERAPY, DID THE STAFF AT THE NURSING

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Lawrence E. Morrow and Evelyn M. Morrow, Plaintiffs, -vs- Fundamental Long-Term Care Holdings, LLC; Fundamental Clinical Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of Baltimore Management, LLC; THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg, Defendants.	)	IN THE COURT OF COMMON PLEAS **AFFIDAVIT OF LAWRENCE E. MORROW** C.A. #: 07-CP-42-4601

Personally appeared before me Lawrence E. Morrow, who having duly sworn, deposes and states:

Immediately following the incident in the shower room on January 19, 2007, I developed swelling and bruising in my groin area, including the penis and scrotum. The bruising to my groin area was bluish in color. The area was still bruised when I was discharged from the nursing home on February 2, 2007. The entire area remained swollen until after the implant was removed in March of 2007.

Immediately following the incident I began experiencing discharge from my penis. It began as a clear liquid but developed into a thicker, yellowish



discharge. The discharge was constant and worsened the night before the implant began to come out. That night it was thicker and had a more yellowish color than before.

After the incident happened I experienced constant pain from my groin area, penis, and scrotum. Sitting and lying flat were both painful and it was almost impossible for me to stand due to the pain.

Sworn and subscribed before me
this AUG day of 31st, 2009

Cynthia M. Bell

Notary Public for South Carolina
My commission expires: 12/11/2011

Lawrence E. Morrow

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

Lawrence E. **MORROW**, et al.,

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. **2007-CP-42-4601**

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

DEFENDANT(S)

CHECK ONE:

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

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

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

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

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

This matter came before this court on **defendants' motion** pursuant to Rule 42, *SCRCP*, to **bifurcate** the trial in this case as it relates to certain claims and to **stay discovery** as to certain claims made by the plaintiffs against the defendants in this case.

After consideration of the record, memoranda submitted, and the argument of counsel this court finds that the defendants' **motion** should be and **is** therefore **granted**.

J. Derham Cole, Presiding Judge

This judgment was entered on the **3rd** day of **March, 2011**, and a copy mailed first-class this **3rd** day of **March, 2011** to attorneys of record or to parties (when appearing pro se) as follows:

Gary W. Poliakoff, *Esq.*
Post Office Box 1571
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ATTORNEY(S) FOR THE PLAINTIFF(S)

William L. Howard, Sr., *Esq.*
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ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley, Clerk of Court

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PLAINTIFF'S EXHIBIT 4
Blumberg No. 6113

SCRCP FORM 4 (Revised 6/00)

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	SEVENTH JUDICIAL CIRCUIT
LAWRENCE E. MORROW AND EVELYN M. MORROW, PLAINTIFFS, vs. FUNDAMENTAL LONG-TERM CARE HOLDINGS, LLC; FUNDAMENTAL CLINICAL COUNSULTING, 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.	CASE NO. 2007-CP-42-4601 **ORDER GRANTING MOTION TO BIFURCATE AND MOTION TO STAY DISCOVERY**

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

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

HISTORY OF THE CASE/ISSUES

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

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

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

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

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

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

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

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

DISCUSSION

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

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

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

SCRCP 42(b) states the following:

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

(Emphasis added.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiffs also assert an indirect basis for liability under a corporate successor analysis. "[I]n the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless there was an agreement to assume such debts, the circumstances surrounding the transaction warrants a finding of consolidation or merger of the two corporations, the successor company was a mere continuation of the predecessor, or the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213 (2005)(Citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)). "To meet the fraud exception to successor liability, the general rule is that a successor must knowingly participate in a fraudulent asset transfer." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67 (Ct. App. 2008). Consideration of this theory will require analysis of these complex legal concepts in the context of any evidence the parties proffer regarding merger, acquisition, or consolidation of the defendant corporations, as well as any legitimate purposes for the action, motives and knowledge possessed by the alleged actors.

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Plaintiffs also allege a "de facto merger" between FLTCH and THI Holdings, LLC as a basis for assigning liability for Nursing Home's torts. "Most courts traditionally have applied the mere continuation exception (also known as a de facto merger) contained in the general rule on successor liability only when there is commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors, or shareholders, and the business continues largely unchanged." *Simmons*, 366 S.C. at 317, 622 S.E.2d at 217 (J. Burnett, dissenting). "Where there is an absorption of the business and assets--in other words, a merger de facto . . . the extent of the liability is necessarily determined by the value of the property received." *Huggins v. Commercial & Sav. Bank*, 141 S.C. 480, 521 (S.C. 1927)(Citing 15 A. L. R., 1150.) The key element of a de facto merger is, however, a continuity of ownership between the selling and purchasing corporations. *Taylor v. Atlas Safety Equipment Co.*, 808 F. Supp. 1246, 1251 (E.D. Va. 1992) (citing *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977)) ("Absent a transfer of stock, the nature and consequences of a transaction are not those of a merger."); *Crawford Harbor Assocs. v. Blake Constr. Co.*, 661 F. Supp. 880, 883 (E.D. Va. 1987) (Applying Virginia law: "The essential characteristic of a de facto merger is the succession of the selling corporation's stockholders to stockholder status in the purchasing corporation.").

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Finally, Plaintiffs allege the defendant corporate entities operated as a joint venture. South Carolina Courts equate joint venture with joint enterprise:

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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NOW THEREFORE, IT IS

ORDERED that:

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

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

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

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

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

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IT IS SO ORDERED.

Hon. J. Derham Cole
Circuit Court, Seventh Circuit

Spartanburg, South Carolina
Dated: March 3, 2011

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M. Hope Blackley
CLERK OF COURT
SPARTANBURG COUNTY
BY: [illegible] D.C.
DATED 3/7/11

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

Lawrence E. **MORROW**, et al.,

PLAINTIFF(S)

JUDGMENT IN A CIVIL CASE

CASE NO. **2007-CP-42-4601**

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

DEFENDANT(S)

CHECK ONE:

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

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

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

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

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

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

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

FILED
Oct 24 2011
Spartanburg County
Clerk of Court

J. Derham Cole, Presiding Judge

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

Gary W. Poliakoff, *Esq.*
Post Office Box 1571
Spartanburg, South Carolina 29304

ATTORNEY(S) FOR THE PLAINTIFF(S)

William L. Howard, Sr., *Esq.*
Post Office Box 993
Charleston, South Carolina 29402

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley, C.A.

M. Hope Blackley, Clerk of Court

PLAINTIFF'S EXHIBIT 5

SCRCP FORM 4 (Revised 5/00)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

Lawrence E. Morrow)
Plaintiffs,)

Vs.)

Magnolia Place at Spartanburg)

Defendant)

IN THE COURT OF COMMON PLEAS
(Jury Trial Requested)

Affidavit of MARY T. BRUNO

C.A.#: 06-CP-09-5

2007 JUL 30 PM 3:02
MARC KITCHENS
CLERK OF COURT
SPARTANBURG COUNTY

Personally appeared before me Mary T. Bruno, who having been duly sworn, deposes, and states"

1) That I am over the age of 18 years and am qualified and competent to issue this Affidavit.

2) That I qualify as an "expert", as defined in S.C.Code § 15-36-100 (A).

3) That my professional qualifications are accurately set forth in my curriculum vitae, which is attached hereto.

4) That I have reviewed various records pertaining to Lawrence Morrow, deceased, and the care and treatment rendered. The medical records I have received were from:

1. Mary Black Memorial Hospital (December 18, 2006 to January 11, 2007)
2. Magnolia Place at Spartanburg (January 12, 2007 to February 2, 2007)
3. Evelyn Morrow (spouse) personal journal of daily events (January 12, 2007 to February 2, 2007)
4. Mary Black Memorial Hospital, the Wound Center (dates of service: January 9, 16, 23, 30, 2007; February 1, 7, 14, 28, 2007; March 14, 21, 28, 2007; & April 4, 11, 2007)
5. Mary Black Memorial Hospital (March 5, 2007 to March 13, 2007)

5) That, pursuant to S.C. Code § 15-36-100 (B), after reviewing all records received it is my expert opinion that Magnolia Place at Spartanburg fell below the minimum Standards of Care provided to Lawrence Morrow. Magnolia Place failed to institute a timely Nursing Care Plan in regards to pressure ulcers.

PLAINTIFF'S EXHIBIT
6

6) That the factual basis for the above opinion is the following:

1.

i. Low air loss mattress "when available" ordered January 12, 2007.
ii. Skin risk analysis & interventions (Braden score 13 - 18) January 12, 2007, states apply pressure reducing support surface to bed.
iii. Minimum Data Set stated pressure reduction bed
iv. Evelyn Morrow (spouse) journal states "they ordered air mattress & placed today" January 15, 2007
v. Evelyn Morrow (spouse) journal states his preference to disposable briefs over use of underwear. (Disposable briefs are contraindicated while using a low air loss mattress as the plastic blocks the flow of air to the patient)

2.

i. Skin risk analysis & interventions (Braden score 15 - 18), January 12, 2007 states use pressure relieving device for seating surfaces.
ii. Minimum Data Set stated pressure reduction surface seat.
iii. Evelyn Morrow (spouse) journal states Physical Therapy ordered a gel cushion for Lawrence's wheelchair that is working out good, January 24, 2007
iv. Weekly skin assessment did not indicate the use of a wheelchair cushion, January 19 & 25, 2007

3.

i. Skin risk analysis & interventions (Braden score 15 - 18), January 12, 2007 state reposition at least every 2 hours.
ii. Minimum Data Set did not indicate that a turning & repositioning program was initiated.
iii. Evelyn Morrow (spouse) journal states "spending too much time on his back", January 13, 2007
iv. Physical therapy progress note states "have notified nursing to obtain "foam wedge" to keep patient off sacrum when lying supine", January 15, 2007
v. Nursing notes show inconsistent turning & repositioning throughout entire stay. Several entries state repositioned on patient's request. (Mr. Morrow exhibited assistance needed for turning & repositioning by a bed mobility on the MDS stating 2/2 = hands on assistance required)
vi. Wound clinic note on January 30, 2007 "we are having difficulty with compliance with the nursing home treating this patient".
vii. Wound deterioration:
    a. January 26, 2007 right buttock 3 x 2.6; left buttock 3.2 x 2.2
    b. February 1, 2007 right buttock 4.5 x 2.8 x .2; sacrum / left buttock 9.6 x 3.1

7) I reserve the right to amend my findings should any new facts / documentation be presented to me.

The Affiant further sayeth naught.

Bruce Engrstom, CPA/ABV, CVA, CFF

North Little Rock, Arkansas
Date: 11-15-10

STATE OF ARKANSAS)
COUNTY OF PULASKI)

Sworn to and subscribed before me this the
15th day of November, 2010.

Notary Public for Arkansas
My Commission Expires: 9-9-19

LESLEY HARRIS
PULASKI COUNTY
NOTARY PUBLIC - ARKANSAS
My Commission Expires September 09, 2019
Commission No. 12373023

COPY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF
COMMON PLEAS

LAWRENCE E. MORROW and
EVELYN M. MORROW

Plaintiffs

vs.

Case No.:
2007-CP-42-4601

FUNDAMENTAL LONG-TERM CARE HOLDINGS, LLC; FUNDAMENTAL CLINICAL CONSULTING, LLC; FUNDAMENTAL ADMINISTRATION SERVICES, LLC; THI OF BALTIMORE MANAGEMENT, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT SPARTANBURG, LLC, d/b/a MAGNOLIA PLACE AT SPARTANBURG

Defendants

_____/

The Telephonic deposition of JAY S. COPELAND, M.D. was held on Monday, February 28, 2011, commencing at 6:04 p.m., at the Offices of Gore Brothers Reporting & Videoconferencing, 2275 Research Boulevard, Suite 500, Rockville, Maryland 20850, before Kenneth Norris, Notary Public.

REPORTED BY: Kenneth Norris

PLAINTIFF'S EXHIBIT 7
Blumberg No. 5113

Q. Okay.

And understanding you've been consulting as an expert on cases for 20 years?

A. Over 25 years.

Q. Okay.

Are there any other opinions that you currently hold that we've not discussed during your deposition today?

A. I mean, I think the only thing that was just kind of alluded to, or brushed by, was his problems subsequent to the removal of the implant. I mean, he, as I said, he's not able to have intercourse. He's not able to get an erection. And I'd say just kind of importantly, I believe that to be a permanent condition.

Q. And, obviously, that's the condition he was in prior to getting the implant?

A. In a different way, but, yes, he still had -- still was not able to have intercourse properly because of curvature and because of erections that were brief.

Q. Okay.

And, so, the only way that he could alleviate that problem now would be to have another implant?

A. I would say that would be the likely next step, except it may be technically impossible to place another implant.

Q. And why would it be technically impossible?

A. Because once an implant is removed, I mean, if an implant is removed and replaced because it's improperly sized or it breaks, you can always put one in. But once it's become infected and removed, those spaces scar down and those channels or chambers where you place the prosthesis may scar down to a degree that it's technically impossible to get anything back in there. Certainly, there's great question whether you can. So if you operate, it may be for no purpose, and the complication rate goes way up with any kind of surgery there. But in my experience, more often than not, it's not technically possible.

Q. Is there a way to evaluate whether it's technically possible before you get into the surgical procedure?

A. No.

Q. You said something along the lines of it may be technically impossible. You're saying that's because there's no way for us to know, but it does happen after removal?

A. Correct.

Q. Okay.

And other than inability to get an erection, are there any other medical conditions caused by the removal of the implant?

A. No. I mean, not at this point in time, no.

MS. PROCTOR: Doctor, I think that that is all the questions I have for you this evening. I appreciate your time and cooperation.

EXAMINATION BY MR. POLIAKOFF:

Q. I just have a very few.

Dr. Copeland, you were asked some questions about indications of bruising or discoloration.

Do you have the photographs handy there with you?

A. Yes.

Q. And can you generally describe what the photographs tell us?

A. Well, I mean, most of the photographs I have are of the decubitus ulcers on his buttocks and back. So it doesn't tell me anything about this area. I have the one photograph of March 7th, 2007, showing the distal portion of the penis with an eroded prosthesis coming out from the distal penis.

It does look swollen. It's hard to tell about any discoloration at that point in time. There

COPY

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)
C.A. # 07-CP-42-4601

LAWRENCE E. MORROW AND EVELYN M. MORROW,

PLAINTIFFS,

VERSUS

THI HOLDINGS, LLC; 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.



****

DEPOSITION OF

EVELYN STEWART MORROW

****

PURSUANT TO NOTICE OF DEPOSITION AND/OR AGREEMENT IN THE ABOVE-ENTITLED CASE, THE DEPOSITION OF EVELYN STEWART MORROW WAS TAKEN ON **THE 9TH DAY OF NOVEMBER, 2009**, COMMENCING AT THE HOUR OF 4:02 P.M., IN THE LAW OFFICES OF POLLAKOFF & ASSOCIATES, SPARTANBURG, SOUTH CAROLINA:

REPORTED BY: MARCIE L. SMITH, VERBATIM REPORTER.

FREELANCE REPORTING SERVICES
Certified Verbatim Reporters
Post Office Box 17007
Spartanburg, South Carolina 29301
(864) 587-7080 OR (864) 706-1341
FreelanceRpt@charter.net



A. THE DOOR WAS LOCKED.

Q. SO THEY WEREN'T LETTING PEOPLE IN?

A. NO.

Q. DID YOU HAVE ANY PROBLEMS WITH THAT?

A. I WAS CONCERNED FOR HIM WITH HIS IMMUNE SYSTEM BEING DOWN FROM BEING IN THE HOSPITAL FOR SO LONG AND IN INTENSIVE CARE. AND WITH HAVING THE COPD AND RESPIRATORY TROUBLES.

Q. DID HE CATCH WHATEVER IT WAS GOING AROUND?

A. NO, HE DID NOT. THEY KEPT HIM -- THEY KEPT THEM IN THEIR ROOMS. WHEN HE WOULD GO TO THERAPY THEY'D PUT THE MASK ON AND...

Q. SO THEY WERE SUCCESSFUL IN NOT ALLOWING HIM TO GET SICK?

A. YES.

Q. ALL RIGHT, LET ME TALK A LITTLE BIT ABOUT THE CLAIM THAT YOU'VE MADE IN THIS CASE, WHICH IS YOUR LOSS OF CONSORTIUM CLAIM. DO YOU GENERALLY UNDERSTAND WHAT THAT IS?

A. YES.

Q. ALL RIGHT, TELL ME WHAT MAKES UP YOUR LOSS OF CONSORTIUM CLAIM.

A. WE WERE VERY ACTIVE SEXUALLY. AND BY ACTIVE, I WOULD SAY A COUPLE TIMES A WEEK. HAD BEEN SINCE WE FIRST MET IN '96. WITH -- I GUESS WITH HAVING THIS -- NOT THAT

WE'VE GROWN DISTANT BY ANY MEANS. WE'RE PROBABLY CLOSER. BUT IT'S STILL THE FACT THAT WE -- EVEN THOUGH IT HADN'T BEEN LEGALLY DONE UNTIL FEBRUARY OF '07, WE WERE CONSIDERED HUSBAND AND WIFE. WE CAN'T CARRY ON THAT -- THE INTIMACY ROLE OF IT. AS FAR AS SEXUAL.

Q. YOU MAY HAVE SAID THIS EARLIER, BUT TELL ME AGAIN THE DATE OF YOUR MARRIAGE.

A. FEBRUARY 21ST OF 2007. WE HAD PLANNED ON GETTING MARRIED NEW YEAR'S EVE. AND WE MESSED THINGS UP.

Q. YOU MEAN BY BEING IN MARY BLACK?

A. BY BEING IN MARY BLACK. AND, YOU KNOW, HE WAS UNCONSCIOUS, SO...

(OFF THE RECORD DISCUSSION)

WITNESS ANSWERS:

A. AND WHEN I WENT TO GET THE MARRIAGE LICENSE, I HAD TO PUSH HIM IN THE WHEELCHAIR. NOW HOW DID THAT LOOK?

EXAMINATION RESUMED BY MR. WHITE:

Q. SO YOU'VE TOLD ME ABOUT YOUR SEXUAL RELATIONSHIP. HAS YOUR RELATIONSHIP CHANGED IN ANY OTHER WAY, OTHER THAN SEXUALLY, AS A RESULT OF ANYTHING CLAIMED IN THIS CASE?

A. I DON'T QUITE UNDERSTAND WHAT YOU'RE ---

Q. WELL, JUST IN GENERAL. YOU MENTIONED THAT YOU FEEL YOU MIGHT HAVE EVEN GROWN CLOSER BECAUSE OF THIS.

A. MM-HMM (AFFIRMATIVE RESPONSE).

Q. ARE YOU SAYING JUST EMOTIONAL ATTACHMENT, YOU ALL HAVE

Q. WHAT DO YOU MEAN NOW LEGALLY?

A. MY DAUGHTER CALLS HIM POP.

Q. OKAY.

A. YEAH. NO FORMAL PAPERWORK.

Q. I SEE. YOU DESCRIBED THE CHANGE IN YOUR SEXUAL RELATIONSHIP AND YOU DESCRIBED SOME CHANGES IN HIS ABILITY TO DO THINGS, WORK OR AROUND THE HOUSE. HAS YOUR RELATIONSHIP CHANGED IN ANY OTHER WAY OTHER THAN THAT? AND OTHER THAN BECOMING CLOSER EMOTIONALLY AS YOU DESCRIBED.

A. NO.

Q. ALL RIGHT, NOW IS MR. MORROW'S DIABETES NOW? IS IT UNDER CONTROL?

A. HE STILL GETS INSULIN AT NIGHT. IT'S BEING MONITORED BY DR. TESSENEER.

Q. AND THE PRESSURE ULCERS, IF I RECALL CORRECTLY, I THERE WERE WAS A NOTE FROM JULY OF 2004, FROM DR. CARP SAYING HIS PRESSURE ULCERS HAD COMPLETELY HEALED.

A. YES, THEY HAD.

Q. IS THAT ACCURATE?

A. YES.

Q. DOES HE SUFFER ANY PROBLEMS AS A RESULT OF THOSE PRESSURE ULCERS ----

A. JUST TENDERNESS.

Q. TENDERNESS?

Patient Record

MARY BLACK MEMORIAL HOSPITAL
Spartanburg, South Carolina

Patient Name	ACCT#	SS#	A/D	NSCL	D/D
MORROW, LAWRENCE	1742937	250349208	1/16/2007	WC	

HISTORY & PHYSICAL:

WOUND CLINIC NOTE

DATE OF VISIT: 01/30/2007

HISTORY OF PRESENT ILLNESS: The patient is seen with deep stage 3 and stage 2 sacral decubitus ulcer.

REVIEW OF SYSTEMS: He says he has less pain. He has had no fever or chills.

SOCIAL HISTORY: Unchanged.

FAMILY HISTORY: Unchanged.

WOUND EXAM: The patient and his family member are hear today. They say that the bandages have not been changed at the nursing home twice a day. He actually went over 24 hours without a dressing change one day last week. He has been started on the methicillin-resistant Staphylococcus aureus protocol but apparently has not been getting the Hibiclens bath. We are having difficulty with compliance with the nursing home treating this patient. We will continue to try to do the best we can.

Examination today shows the stage 2 portion of the decubitus to be healing nicely. There is skin irritation and erythema over a large area of the buttocks which we think may be secondary to tape. They are to use a minimum of tape. The deep portion of the wound is 2.5 by 2.5 centimeters and 2 centimeters deep but not down to bone at this time. This will require a wound vacuum-assisted closure. Any resistance with this treatment plan will lead to the unfortunate discharge of this patient from the wound center since our orders have to be complied with. He is a very nice gentleman, we hope we can get this healed but he will need the methicillin-resistant Staphylococcus aureus protocol enacted to the letter. He will need twice a day dressing changes and he will need a wound vacuum-assisted closure. He does have an air mattress. He will return in the near future for wound vacuum-assisted closure application.

DD: 01/30/07/1515
DT: 01/30/07/1515
BY: mr

SIGNATURE: _____
Ernest Camp, III, M.D. (13)

cc: Wound Center
(Coded 2)

Printed: 01/30/2007 16:31:42

PLAINTIFF'S EXHIBIT 9
Blumberg No. 5113

Patient Record

MARY BLACK MEMORIAL HOSPITAL
Spartanburg, South Carolina

Patient Name	ACCT#	SS#	Date	NSCL	D/D
MORROW, LAWRENCE	1742937	250349208	1/16/2007	WC	

HISTORY & PHYSICAL:

WOUND CENTER PROGRESS NOTE:

HISTORY OF PRESENT ILLNESS: The patient seen with stage III sacral decubitus ulcer.

PAST HISTORY:

MEDICATIONS:

ALLERGIES:

SOCIAL HISTORY: Unchanged.

FAMILY HISTORY: Unchanged.

REVIEW OF SYSTEMS: Moderate discomfort. No fever or chills.

WOUND EXAM: The bulk of the wound, particularly the part on each buttock, looks good. The part over the sacrum has one deep stage III portion that was sharply debrided with scissors. The fact that this is down in his gluteal cleft means that it is probably not getting full direct pressure in the air mattress, so I do not think we need a stage III bed at this time. The depth of this is of some concern. The family says that they are not putting gauze down into the gluteal cleft where the worst part of the wound is. He also says that he is barely getting once a day dressing changes. We want to change the wound twice a day using Accuzyme in and on the wound, and then use Kerlix impregnated with Solocyte down in and on the wound. He also has cultured methicillin-resistant Staphylococcus aureus. He is started on Bactrim with nasal Bactroban and Hibiclens baths. The family says that the nursing home doctor, Dr. Warren, has encouraged him not to come to the Mary Black Hospital Wound Center and to let them take care of it there. For now, the family wants him to come here as does the patient; however, if we cannot get assurances that our orders are being carried out we will allow the nursing home to do total care of these wounds.

DD: 01/23/07/1458
DT: 01/23/07/1549
BY: ab

SIGNATURE: _____
Ernest Camp, III, M.D. (13)

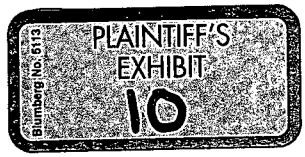
Printed: 01/23/2007 23:49:55

MORROW, THI
408-0035

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Lawrence E. Morrow and Evelyn M. Morrow, Plaintiff, v. THI Holdings, LLC; 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, LLC d/b/a Magnolia Place at Spartanburg, Defendants,	)	IN THE COURT OF COMMON PLEAS C.A. No.: 07-CP-42-4601 **AFFIDAVIT OF BRUCE ENGSTROM, CPA/ABV CVA, CFF**

PERSONALLY APPEARED before me, Bruce R. Engstrom, who, being sworn, deposes and says the following:

1. My name is Bruce R. Engstrom. I am employed by EGP, PLLC as a Certified Public Accountant. I make the following statements of my own personal knowledge and/or professional experience. My curriculum vitae is attached as Exhibit A.
2. I have been accepted as a forensic accounting expert in courts around the country in a variety of cases, and in particular have testified as an expert regarding similar issues in nursing home neglect and abuse cases such as the above-captioned case in various states.



3. I am currently under contract with the United States Department of Justice to consult on various issues concerning Health Care providers. I have also served under contract with the Arkansas Attorney General's office and the Arkansas Judicial Discipline Committee on various matters.
4. My work involves following the trail of money associated with a particular nursing home, demonstrating the profitability of the various segments of related party operations, the presence or absence of arms' length transactions between related parties, evidence of transfer of profit by related parties from the licensee of the nursing home and determining the net worth of various defendants. I also look for evidence of exertion of control by related parties through analysis of contractual agreements, budgets, and various financial documents.
5. The evidence made available to me for my review, prior to the making of this Affidavit, includes information provided and the following documentation:
    a. Medicaid Licensure files
    b. Sublease agreement dated August 29, 2003
    c. Medicaid Cost reports 2005 to 2008
    d. Home Office Cost Reports 2005 to 2008
    e. Medicare Cost Reports 2005 to 2008, CMS data from FACTS database
    f. Amended and Restated Revolving Credit and Security Agreement dated March 28, 2006
    g. By-Laws of THI of Baltimore, Inc.
    h. Deposition of Robert Crooks
    i. Deposition of Christine Zacks
    j. Deposition of Ken Tabler, Prendergast v. Fundamental
    k. Spartanburg County Real Estate documents
    l. Fundamental Long Term care Holdings, LLC tax Returns 2006 to 2008

6. I have reviewed the evidence submitted to me, and based on evidence contained in the documentation, reports, attachments, and disclosures, the following facts emerged:

   a. According to the licensure application renewal filed with and received by South Carolina Department of Health and Environmental Control (DHEC) on June 9, 2006 for the License to operate the facility located at Spartanburg, South Carolina that is known to the public as Magnolia Place at Spartanburg from September 1, 2006 through August 31, 2007, Magnolia Place at Spartanburg was directly owned and/or operated by THI of South Carolina at Spartanburg, LLC;

   b. Paragraph 9 of the license application reflects THI of Baltimore, Inc as the licensee's governing body, and W. Bradley Bennett as the presiding officer of the governing body.

   c. According to paragraph G and Exhibit A of the licensure application, "person or other legal entity" that claims liabilities of the licensee of the facility or services for which the license is requested are:

      i. THI of South Carolina, LLC,

      ii. THI of Baltimore, Inc.,

      iii. Fundamental Long Term Care Holdings, LLC,

      iv. Murray Forman,

      v. Leonard Grunstein

   d. Exhibit A attached to the license application reflects that the facility is wholly owned by THI of South Carolina, LLC, which is wholly owned by THI of Baltimore, Inc., which is wholly owned by Fundamental Long Term Care Holdings, LLC.(FLTCH), which is owned 50% by Murray Forman and 50% by Leonard Grunstein. We would like to mention here that according to deposition of Defendants counsel Christine Zack, THI of South

Carolina, LLC, THI of Baltimore, Inc., and FLTCH are all entities with no employees.

e. According to Paragraph H and Exhibit B of the license application, the following individuals are listed as officers of the licensee:

   i. W. Bradley Bennett (President; Chief Executive Officer)

   ii. Mark Fulchino (Executive Vice President; Chief Financial Officer)

   iii. Toni-Jean Lisa (Executive Vice President; General Counsel; Secretary)

   iv. Sean Nolan (Senior Vice President – Finance; Chief Accounting Officer

   v. Matthew Box (Senior Vice President)

   vi. Kimberly McCarty (Vice President; Treasurer)

   vii. Melissa Warlow (Vice President; Assistant Secretary)

f. The license application also reflects that the land and building of the facility is owned by H. Thomas Taylor. According to lease related documents and publicly available real estate documents:

   i. Prior to June 1, 2006, the tenant of the facility land and building was Magnolia Place, Inc., an Entity owned by ABE Briarwood Corporation.

   ii. Prior to June 1, 2006, the Subtenant of the facility's land and building was THI of South Carolina at Magnolia Place at Spartanburg, LLC

However, contrary to the above, the Amended and Restated Revolving Security Agreement among FLTCH, THI of Baltimore, Inc., THI of Nevada II, Inc., and certain subsidiaries (including Magnolia Place at Spartanburg) as "Borrower"(s) and Capital Source Finance, LLC, "Lender" reflects on schedule 6.4(i) that CAM-Magnolia Place, LLC, is the

Sublessor, and also that the facility has an unfavorable lease due to SWC-ABE Briarwood.

On June 1, 2006 the sublease which reflects ABE Briarwood Corporation as owner of the facility Certificate of Need was terminated, and the lease right assigned to an unknown party. Updated lease documents will be necessary to uncover the current owner of the Certificate of Need as well as the terms of the lease assignment and the terms governing the new lease and/or sublease agreement.

g. According to the Centers for Medicare Services (CMS), Magnolia Place at Spartanburg is classified as a "Multi-nursing home (chain) ownership." According to CMS; "Multi-nursing home chain has two or more homes under one ownership or operation". Filings with South Carolina DHEC reflect that 13 facilities (including Magnolia Place at Spartanburg) in South Carolina alone are under one ownership or operation, with the ultimate parent being FLTCH.

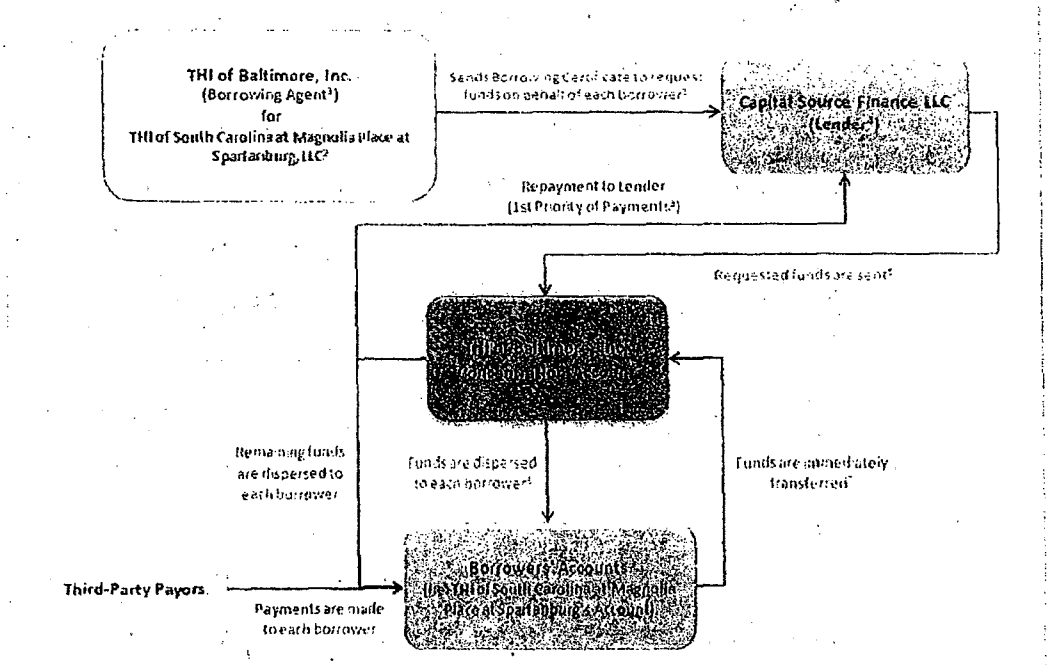
h. The illustration of chain operations can be seen on the Home Office Cost reports where the cost from entities or facilities are all pooled together and then allocated to each facility or entity. For instance from January to December 2007, allocation of pooled costs between Health Care facilities and other chain components amounted to $723,543,411, representing 144 entities' pooled costs. Consequently, the costs or the financial results of operations of all those entities, including Magnolia Place at Spartanburg are interrelated.

i. Other illustrations of common operation and joint liability are evidenced by the Amended and Restated Revolving Credit and Security Agreement among FLTCH, THI of Baltimore, Inc., THI of Nevada II, Inc., and certain subsidiaries (including Magnolia Place at Spartanburg) as "Borrower(s)"

and Capital Source Finance, LLC, "Lender" (Revolving Credit and Security Agreement). The purpose of the agreement is to make available to Borrower(s) a revolving credit facility in a maximum principal amount at anytime outstanding of up to $50,000,000. As Collateral, the Borrower(s) pledged all its accounts, including receivables from Medicare, Medicaid, and Private Pay. The agreement entered on March 28, 2006 and ending on February 2, 2009 was signed for the Borrower(s) by Mark Fulchino (Executive Vice President; Chief Financial Officer of FLTCH) and Murray Forman (President of FLTCH); with THI of Baltimore Inc. as the Borrowing Agent.

j. The Revolving Credit and Security Agreement imposed a central cash management system as described on the chart below:

Revolving Credit and Security Agreement: CENTRAL CASH MANAGEMENT SYSTEM



[1] Section 2.15(a) [2] Exhibit A, page v [3] Section 2.4(a) [4] Page 1 [5] Section 2.4(a) and Schedule 2.4
[6] Section 2.4(a) and (b) [7] Section 2.5 [8] Section 2.5

The above cash management system stripped Magnolia Place at Spartanburg from any right it may have had on its revenues, which by the means of the central cash management system was commingled with monies from others subsidiaries of FLTCH, and controlled exclusively at the corporate level. The above activities clearly indicate that the facility was under the direct control of the parent company or owner, due to the extensive cash management activities. By centralizing all the cash, the parent can redeploy the assets to other subsidiaries or to shareholders, enabling higher rates of return on the total asset base. While this management practice allows for higher shareholder returns, it also requires that the company manage all cash from a central location so that it can be deployed in the most effective manner. Such level of efficiency cannot be achieved or maintained in an organizational structure such that each legal entity is operated as a separate entity distinct from the other entities of the organization. As a result, this transfers a substantial amount of control from the facility to the parent organization FLTHC.

k. The Revolving Credit and Security Agreement also revealed that the parent company had significant control over the budget of each individual facility. The agreement requires the Borrower to furnish to lender consolidated monthly projected operational budgets, with financial covenants including but not limited to:

   i. Aggregate combined census levels at the facilities shall be no less than 85% of total available beds.

   ii. At no time shall borrower (on a consolidated basis) permit its EBITDA (a profitability index) to be less than $12,500,000 per year.

l. In order to fulfill the requirements of the financial covenants included in the Revolving Credit and Security Agreement, the ability to maintain costs below a specific threshold become crucial for leveraged firms. In case of nursing homes, some of the main expense categories are staffing and dietary. As seen below, on a Per Patient Days (PPD) basis, FLTCH spending metrics in South Carolina are below state average, and the deficiency became wider in 2006, when FLTCH took control of the operations, and entered into the Revolving Credit and Security Agreement discussed earlier :

Staffing

		Hours PPD			
		Chain	State	Variance PPD	Variance Hours
Chain	**Direct Care**				
THI	FYE 2005	3.61	4.09	(0.48)	(222,197.27)
THI & FLTCH	FYE 2006	3.51	4.39	(0.88)	(408,791.25)
FLTCH	FYE 2007	3.54	4.39	(0.85)	(392,168.00)

Dietary Spending (Excluding Salaries)

Chain		Chain	State	Variance PPD	Total $ Variance
THI	FYE 2005	5.13	9.86	$ (4.73)	$ (2,204,379)
THI & FLTCH	FYE 2006	5.25	10.98	$ (5.73)	$ (2,653,310)
FLTCH	FYE 2007	5.78	12.12	$ (6.34)	$ (2,936,765)

Given the centralized operations and management, the above trend can also be observed on the facility level at Magnolia Place at Spartanburg.

m. Other examples of control and centralized management and operations include:

   i. "Each borrower irrevocably authorizes Lender to disburse the proceeds of the Revolving Loan to the Borrowing Agent [THI of Baltimore, Inc.]."(Revolving Credit and Security Agreement, pg. 4);

ii. "Each borrower acknowledges that it is jointly and severally liable for all of the Obligations under the Loan Documents. Each borrower expressly understands, agrees and acknowledges that (i) Borrowers are all Affiliated entities by common ownership, (ii) each borrower desires to have availability of common credit facility instead of separate credit facilities" (Revolving Credit and Security Agreement, pg. 15);

The document defines the term "Affiliate" as " any Person, any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with such Person"; it also states that "Affiliate" shall include any Subsidiary.

n. FLTCH tax returns filed with the United States Internal Revenue Service from 2006 to 2008 reflect that FLTCH business activity is Nursing and Personal Care, and that its product and service is also Nursing and Personal Services.

o. Furthermore, according to FLTCH Vice President of Finance, Magnolia Place at Spartanburg as well as similar FLTCH entities are treated as "disregarded entities" for federal tax purposes; consequently the financial performance (tax liability included) of the Magnolia Place at Spartanburg (as well as similar entities) would be reported on the tax return of Fundamental Long Term Care Holdings, LLC co-owners (Murray Foreman and Leonard Grunstein).

7. Based upon my experience and professional experience as outlined above, I have formed the following opinions:

a. The Center for Medicare Services Publication 15-1, chapter 10, paragraph 1002.3 states "Control exists where an individual or an organization has the power, directly or indirectly, significantly to influence the actions or

policies of an organization or institution." With this definition in mind (a similar definition can be found in the Revolving Credit Agreement), I find that:

i. With respect to the events alleged in Plaintiff's Complaint, based on the foregoing facts as outlined above and the series of transactions referred to in the preceding paragraphs of this Affidavit, the following corporations and individuals had substantial ties to the facility known as Magnolia Place at Spartanburg, and through those ties, exerted significant direction and control over the management and operations with direct and/or indirect implication to overall patient care:

(a) Fundamental Long-Term Care Holdings, LLC;
(b) Fundamental Clinical Consulting, LLC;
(c) Fundamental Administrative Services, LLC;
(d) THI of Baltimore, Inc.;
(e) THI of South Carolina, LLC;
(f) Murray Forman;
(g) Leonard Grunstein;
(h) Mark Fulchino;
(i) Bradley Bennett
(j) Robert Lee Crooks, Jr.

ii. Furthermore, as demonstrated through the numerous contracts and agreements pertaining to the transactions, oversight agency applications, and the other publicly available documentation, it is clear that the corporations and individuals named under paragraph 7.i.(a)-(j) had, at the times relevant to the events alleged in Plaintiff's Complaint, substantial ties to the State of South Carolina, and, while they may not have held physical offices or business locations within the state, they most certainly transacted and conducted business on a regular and continuing basis and that said contacts either directly or indirectly allowed them to earn substantial revenue and income;

8. The factual basis for my opinion is based upon available evidences, my education, experience, training, and careful review of the evidence and Court filings to date as described above.
9. I specifically reserve the right to add to, amend or subtract from this Affidavit as new evidence comes into view or as new opinions are formulated.

State of Florida

County of Citrus

Signed and sworn to (or affirmed) before me on the 7th of June, 2007

By Mary T. Bruno, RN, CWS, CFCN, CLNC, FCCWS, DAPWCA

Signature of Notary Public

NOTARY PUBLIC-STATE OF FLORIDA
Albert M. Carosella
Commission # DD438271
Expires: JUNE 07, 2009
Bonded Thru Atlantic Bonding Co., Inc.

My Commission expires: JUNE 7, 2009

Stamp / seal

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

SEVENTH JUDICIAL COURT

LAWRENCE E. MORROW AND
EVELYN M. MORROW — PLAINTIFFS

vs. CASE NO.: #2007-CP-42-4601

THI HOLDINGS, LLC,
FUNDAMENTAL LONG-TERM CARE
HOLDINGS, LLC, ET AL — DEFENDANTS

ORAL DEPOSITION

OF

BRUCE ENGSTROM

(Taken February 24, 2011, at 2:58 p.m.)



Carolina at Magnolia Place at Spartanburg, your research indicated that the facility itself --

THE WITNESS: The revolving agreement, please.

MR. ABDUL: (Complies.)

A I'll show you their cash management structure.

BY MS. PROCTOR:

Q Well, that's what I'm looking at -- your evaluation of their central cash management system in which you indicate third-party payors, Medicaid, Medicare, and private, each go into THI of South Carolina at Magnolia Place at Spartanburg's account?

A Yeah. But I don't think it's located there. I think it's still the home office, but it just has that title on it. The more definitive picture of what happens to the money is contained in the "Amended and Restated Revolving Credit and Security Agreement" dated in '06.

Q Well, we'll talk in a minute how they spend it, but right now, I'm just talking about how they get it.

A But this does it, too. This deals with that. If I can lay my hands on it. But my memory is that even though it is listed as a THI of South Carolina at Magnolia Place at Spartanburg account, I think

it's really the parent -- here it is -- the parent controls all of that. And the reason is is in this revolving loan agreement, the lender wanted all of the cash to be centralized and work in a very specific way. And so they didn't want the money sitting out there in Spartanburg or sitting over in one of these accounts. They want it concentrated in one spot, so that they can reach in and make the payments to themselves. And all of their cash is described in Zuckerman F.030646. That's the way that money comes, and that's way the money goes. So even though they say that it's a Spartanburg account, it's controlled by the parent, which is really it is controlled by the creditor of the parent.

MS. PROCTOR: All right. I'm going to object a non-responsive.

Q What's the purpose of a provider number?

A A provider number is to register. It's like having a Social Security number with the IRS. It's to identify who you are because they would much rather keep track of you by a number than to keep track of you by alpha-numbers -- I mean, alpha-letters. You can have two Smiths out there, but you can't have two similar or the same provider

A Can you point me to the page?
Q Uh-huh.
A Oh, is it on my 11, the bottom of it?
Q No.
A Or the top of 12?
Q Yes, mid-12.
A Yes.
Q Isn't it typical, if you know -- well, let me ask it this way. For example, I have a line of credit with a bank. They require that my draw-down be only so much of a percentage of my receivables.
A Right.
Q And if that gets wonky, then I have to pay them immediately the difference.
A Right.
Q And they require that of me.
A Right.
Q Did they control me?
A To a certain extent, but that's not the situation here. What you described would be if Spartanburg itself negotiated their own contract with the deals, and it had to do with just their receivables, and that's not what happened here. And the best way to understand this is that that even though these lawyers went through a lot of trouble

to set up all these entities, and they constantly tinkered with it, in reality, it's just one company, and it's been excessively fragmented by these lawyers. But in order to actually operate, they couldn't operate with any efficiency whatsoever if they operated as the individual companies of each nursing home. So they operate as one company, and when they do that, then they lump all of the receivables together, they lump everybody's cash together, and then they work out one deal with the lender, and the lender exerts control over the terms, okay? But how much of the money, how much of the assets of Spartanburg are being pledged against the liabilities of another nursing home get blurred in this pool that goes on, okay? And so the fact that somebody told or made Spartanburg to allow its assets to become collateral for potentially somebody else's loan is evidence of control being exerted by controlling structure from the top.

Q Who told Spartanburg to do that?

A I believe it came out of administrative services. And if you'll -- it was part of the structure that's been designed and implemented by Forman and Grunstein. I mean, you don't go around allowing your home to become collateral for your

neighbor's mortgage.

Q There might be situations in which I would.

A Oh, really?

Q Sure.

A We need to talk after this deposition, then

Q Well -- so Magnolia Place at Spartanburg, there was no quid pro quo. They did not get anything out of this agreement?

A No. They collectively do, okay? And that's the key factor. If you are all members of the same family, you collectively benefit from the mortgage on the family home. But if you're an unrelated neighbor down the street, you don't, okay? And so the fact that would motivate Spartanburg to do this is the fact that they're part of one enterprise, and collectively, they operate as one, and so, therefore, they benefit to whatever degree, you know, they can. And what happens is is there's -- some homes are more profitable than others. Some of them have more receivables than others, but, collectively, they pool -- they risk it all because they're related because they're all one. You won't do that for people that you don't -- aren't related to or aren't part of, and so that's evidence of control. To organize something like that and to run

something like that requires control from the top or it falls apart.

Q So if I'm reading your report correctly and hearing you today correctly, we know that there was control from the top because this can't work unless there's control from the top?

A Right. That's in addition to the fact that they possessed the right to control. This is evidence of exertion of it.

Q Is there any evidence, any evaluation, in your report of how -- or what happens to the money after the lender is paid?

A Well, the lender hasn't been paid.

Q So the --

A But I've seen that there is money being used for purposes other than the lender. For example, they paid out to themselves, having never put any money in this company, they paid out to themselves over $15,000,000.

Q You're, again, referring to the transaction that happened a year after Mr. Morrow's residency?

A No. Now I'm speaking of the whole history from the initial purchase all the way through the '09 tax return -- or the '08 return.

Q And what $15,000,000 are you talking about?

those places and they pay the lender. The lender has first right to the cash.

Q Now, your chart indicates that there is a concentration account all of the money goes into and then all of that money either goes to TransHealthcare Inc. or Capital Source Financing, LLC, the lender.

A And it goes back down to Borrowers' bank account which pays the expenses.

Q I thought you said the expenses were paid out of the concentration account?

A This (indicating), Borrowers' bank account, remember, is not at the location of Spartanburg. It's at the same location that THI bank account is, and it's the same people operating those bank accounts, okay? So what they do when they pay this expenses is it's wired into that account, and immediately funds all the checks that these same people made out to pay the expenses at Spartanburg. I mean, it's just one office with people paying all of the bills of all the nursing homes out of the money that came from all of the nursing homes just like you see in a single-operating business. It's just that the lawyers drew it up kind of funky, but it still runs like a regular business. And it has

through three specific mechanisms. One, central cash planning and treasury activities." And we've already discussed that, correct?

A Yes.

Q "Two, the corporate strategies implemented at the facility level," please tell me what you mean by that?

A Well, that would be both from an economic monetary form, you know, controlling all of the money, but also from some of the policies and procedures. We've seen the policies and procedures in other THI holdings and these, and they're the same. They're identical.

Q And why are those corporate strategies?

A Because to implement consistent policies across the numerous nursing homes, it has to come from the top, not from the bottom. You can't have every nursing home running it however they wish. And that's why you centralize administrative services, and they say they suggest, but if every nursing home administrator had the power to set their own policies, then you would see different policies. We're not seeing different policies in the different nursing homes.

Q And what nursing homes have you compared?

Q So the corporate strategies are being implemented by Len and Murray?

A Yes. Because they are the ones that make sure the Fundamental Administrative Service and Clinical Consulting are staffed and running it the way they want to which dictates down the policies and procedures and cash management and all that stuff. This whole structured deal was designed by Forman and Grunstein and quote, brought to the nursing home world by them.

Q And what evidence do you have of that?

A It's stated so in there (indicating).

Q In a verified complaint?

A Yes.

Q And you took the information contained in this --

A It's representations made by the attorneys for Forman and Leonard Grunstein in the complaint in a lawsuit against Mr. Schron in New York.

Q MICH II Holdings, LLC et al. versus Rubin Schron, et al.?

A Right. That statement is in there.

Q And what evidence do you have that Murray Forman and Leonard Grunstein are implementing these strategies at a facility level?

A Well, like I said before and I hate to be repetitive, that they put in place the people over in administrative services who put in place the policies and procedures and the cash management and the treasury activities. They are the ones who negotiated and implemented the initial structure, financial structure, of the whole organization. They are the ones who implemented and set up this complicated fragmentation of this business. All of that is coming from Murray Forman and Leonard Grunstein because of the statement that's made in this complaint that says, "Grunstein and Forman brought creative ideas to the structuring and financing of the skilled nursing and healthcare facility business. Grunstein has banking and real estate, financial, legal expertise and Forman has investment bank expertise." That tells me that they designed a way to set these things up and run them. They bought these things, these nursing homes, put them into the structure they designed and are operating them the way they designed. Pretty simple.

Q All right. And "management involvement at all levels of the company," what evidence do you have of that? Well, what do you mean by that, first of all?

A Well, let me get back to that page. What page were we on?

Q That's the last page, the last line.

A Well, again, all you've got to do is look and see where the employees are, the corporate employees. The ones that are making decisions, okay? Let's go back to that chain. At the bottom, I'm on page -- is that a 6 upside down, yeah, 6 on my chart. You've got the people that are at the nursing home, the facility level, topped off by an administrator, okay? There are no employees in this company, this company, or this company (indicating). So, all of a sudden, on that chain of command right there, there's nothing between Forman and Grunstein and the actual facility. Instead they stick over here in a company that's owned 100 percent by a company that they own a 100 percent of, you've got administrative services. And so they are applying the corporate strategies down into the nursing homes.

Q And what evidence do you have of that?

A By the way it's structured and by the way -- the fact that these people here (indicating) hire and fire the person who runs that. And if you can hire and fire somebody, then you control them.

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG
C.A.#: 07-CP-42-4601

Lawrence E. Morrow and
Evelyn M. Morrow,

Plaintiffs,

-vs-

THI Holdings, LLC;
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.

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M. HOPE BLACKWELL

Report

February 23, 2011

I have been asked to give my opinion on this matter based on the documents that I have reviewed and in my possession today. If further documents are supplied by the defendants, my opinion may be supplemented due to new information.

Bruce Engstrom



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A. HOPE BLANCHLEY

I. INTRODUCTION AND BACKGROUND

Lawrence E. Morrow was a resident at the nursing home known as Magnolia Place at Spartanburg, located in Spartanburg County at 820 White Avenue, Spartanburg, South Carolina 29303, from January 12, 2007 until his discharge on February 2, 2007.

While in the care of Defendants, it has been alleged in the complaint that Mr. Morrow suffered an injury to his genitals while being assisted in the shower by Defendants' staff on January 19, 2007. As a result of the aforementioned injury, surgery was required to remove a penile implant from Mr. Morrow. Also, during Mr. Morrow's residency at Magnolia Place, the acts and delicts of Defendants caused, and were the proximate causes of Plaintiffs': [1]

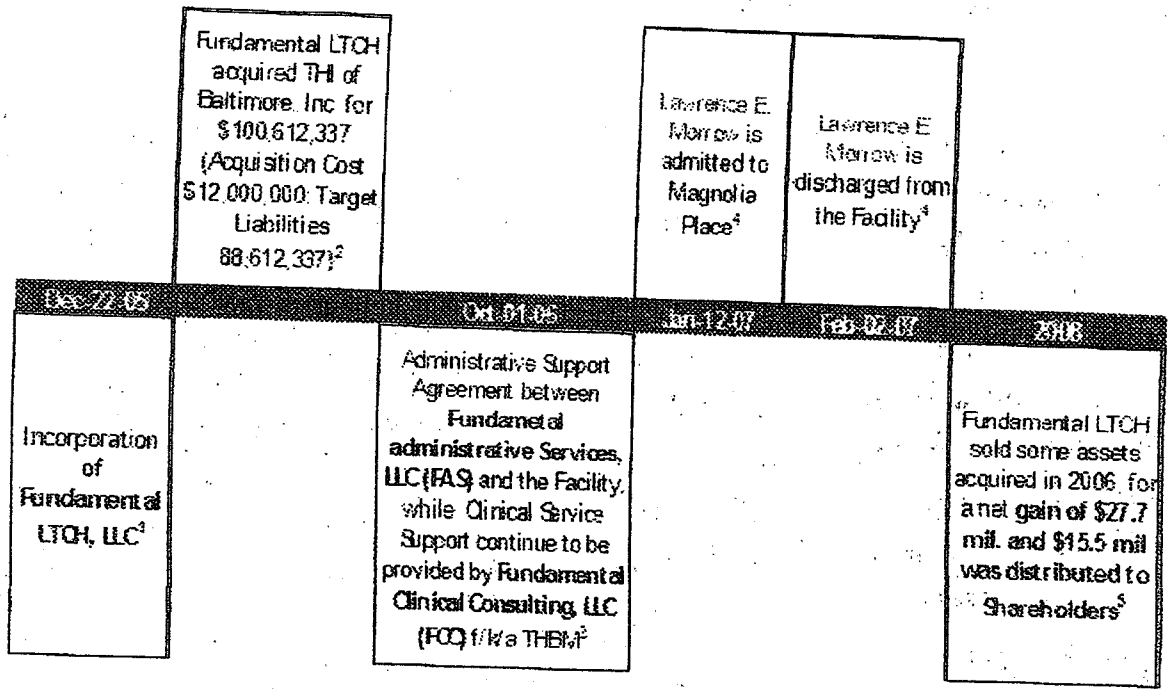
- Conscious pain and suffering,
- Mental distress,
- Medical bills and disability
- Loss of consortium.

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During Lawrence E. Morrow's entire residency, Magnolia Place at Spartanburg was a nursing home facility with the Medicare provider number 42-5175, and was operated by THI of South Carolina at Magnolia Place at Spartanburg, LLC, a wholly owned subsidiary of Fundamental Long Term Care Holdings, LLC, an entity for which "Nursing and Personal Care" is the principal business activity.[2] The timeline below is a summary of the sequence of major events and transactions:

[1] Amended Complaint

[2] FLTCH tax returns 2006 to 2008, bates stamps Zukerman F.015491, F.015520 and F.015563



Source

1. FLTCH 2006 Tax returns Bates stamps Zuckerman F.015490
2. FLTCH 2006 Tax returns Bates stamps Zuckerman F.015499
3. "Management Changes" letter to SC DHEC Sept 14, 2006
4. Amended Complaint
5. FLTCH 2006 Tax returns Bates stamps Zuckerman F.015564 and F.015585

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This report reflects that Magnolia Place at Spartanburg was not operated as an independent facility, but rather as a unit of the parent company, Fundamental Long Term Care Holdings, LLC; which directly or indirectly exerted ownership

and control over the facility during the period of Lawrence Morrow's stay at the facility.

Several pieces of direct evidence indicate this pattern of control and ownership. The remainder of this document details the aspects of operational and financial control exerted over Magnolia Place at Spartanburg, including corporate structure, facility operational management and financial activities.

I. CORPORATE STRUCTURE

The Center for Medicare Services (CMS) website, lists Magnolia Place at Spartanburg as part of a Multi-nursing Home Chain Ownership. According to CMS, Multi-nursing home chains have two or more homes under one ownership or operation.[3] In this case, in South Carolina alone, during Mr. Morrow's residency, 13 Skilled Nursing Facilities listed below were under one ownership and operation - Fundamental Long Term Care Holdings, LLC[4]:

Name	CMS Provider
MAGNOLIA MANOR OF COLUMBIA	425287
MAGNOLIA MANOR OF GREENVILLE	425090
MAGNOLIA MANOR OF GREENWOOD	425172
MAGNOLIA MANOR OF INMAN	425032
MAGNOLIA MANOR OF ROCK HILL	425165
MAGNOLIA MANOR OF SPARTANBURG	425091
MAGNOLIA MANOR-MONCKS CORNER	425140
MAGNOLIA PLACE OF GREENVILLE	425361
INMAN HEALTHCARE INC.	425122
GOLDEN AGE-INMAN	425316
DRIFTWOOD REHAB & NURSING CTR	425082
CAMP CARE	425303
MAGNOLIA PLACE OF SPARTANBURG	425175

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[3] CMS Nursing Home Compare Website
[4] "Management Changes" letter to S.C. DHEC Sept.14, 2006.

Like many corporations that own and operate skilled nursing and rehabilitation facilities, there is a complicated system of subsidiary companies used to manage the assets of the parent, Fundamental Long Term Care Holdings, LLC (FLTCH). Magnolia Place at Spartanburg was set up as a unit of its parent company and operates within a web of multiple subsidiaries and related parties all owned and controlled directly or indirectly by FLTCH as discussed below.

A. OPERATIONAL STRUCTURE

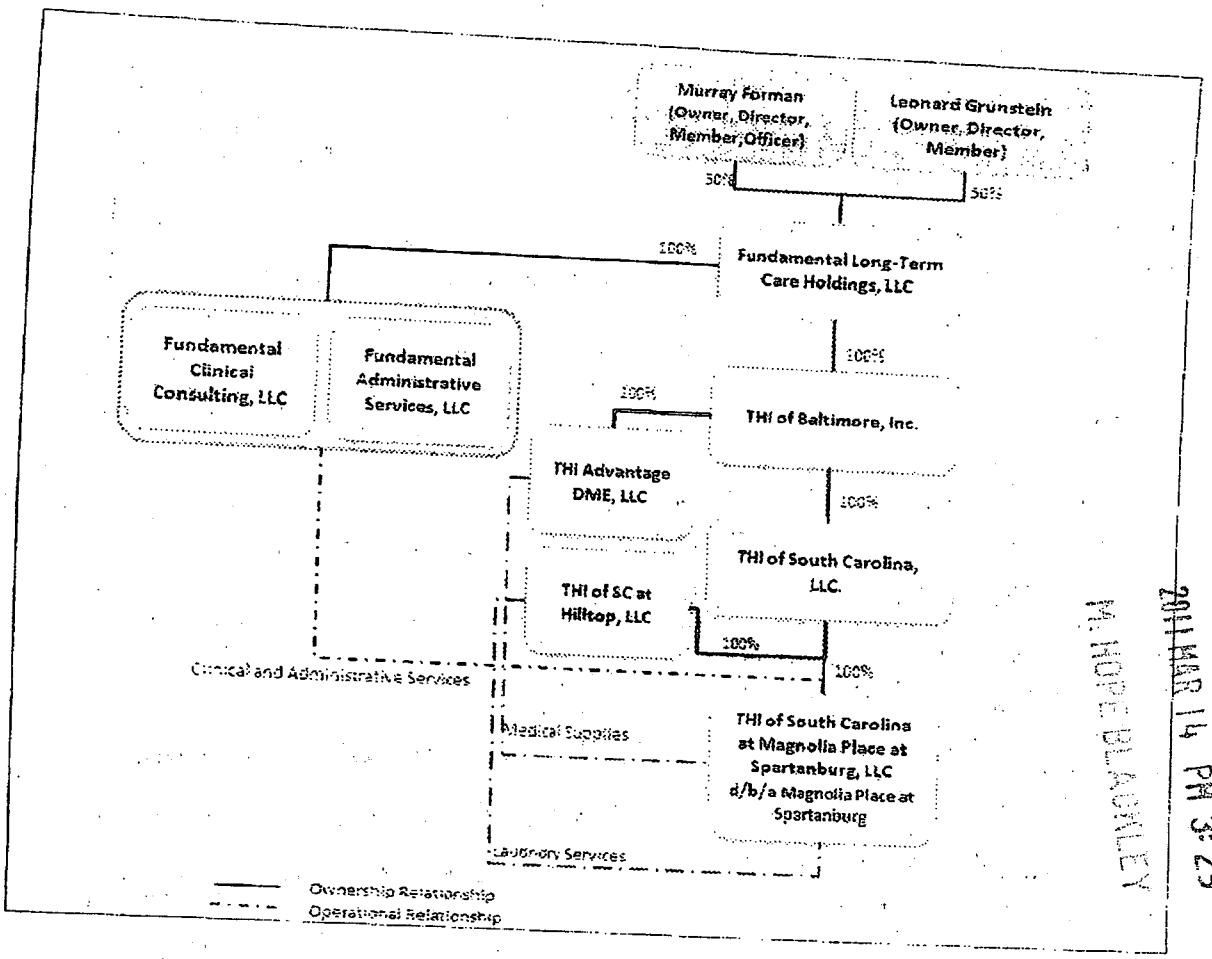
During Lawrence E. Morrow's residency at Magnolia Place at Spartanburg, the Facility was directly owned and operated by THI of South Carolina at Magnolia Place at Spartanburg, LLC, which is a wholly owned subsidiary of THI of South Carolina, LLC and is ultimately owned by Fundamental Long Term Care Holdings, LLC owners Murray Forman and Leonard Grunstein. Also, many of the services needed at the Facility from Laundry services to administrative services are provided by the following entities directly or indirectly owned by FLTCH:[5]

- Fundamental Administrative Services, LLC (FAS)
- Fundamental Clinical Consulting, LLC (FCC)
- THI Advantage DME, LLC
- THI of South Carolina at Hilltop, LLC

Consequently, by funneling those services to the above entities and through interrelated parties' transactions, Magnolia Place at Spartanburg provides a stream of revenues to other entities directly or indirectly owned and/or controlled by FLTCH. The following chart is illustrative of the ownership and operational structure of Magnolia Place at Spartanburg during Mr. Morrow's residency[6]:

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[5] Medicaid and Medicare Cost Reports – Related Parties Schedule
[6] Letters to SC Department of Health dated 9-14-2006, 4-7-2006, 12-30-2005, Credit Revolving Documents schedule 6.3, Medicare Cost Reports Schedule A-8-1, Exhibit A Medicaid License Application



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Typically, the above structure should not be suspected to be unique for Magnolia Place at Spartanburg, but also for all the other facilities under Fundamental Long Term Care Holdings, LLC's chain operation or ownership. We would like to mention here that according to the deposition of Defendants counsel Christine Zack, THI of South Carolina, LLC, THI of Baltimore, Inc., and FLTCH are all entities with no employees.[7]

A. CERTIFICATE OF NEED AND REAL ESTATE STRUCTURE

The license application for Nursing Home License reflects that during Mr. Morrow's residency, the land and building of the facility is owned by H. Thomas Taylor. Prior to June 1, 2006 H. Thomas Taylor leased the facility to Magnolia Place, Inc. which in turn subleased the facility to THI of South Carolina at

[7] Zack's deposition Page 14 lines 18-20 and Page 79 lines 22 to 25 to Page 80 line 1

Magnolia Place, LLC,.[8] According to the Sublease Agreement, Magnolia Place, Inc., an entity owned by ABE Briarwood Corporation following its purchase of Integrated Health Services in 2003[9], is the owner of the Facility's Certificate Of Need[10].

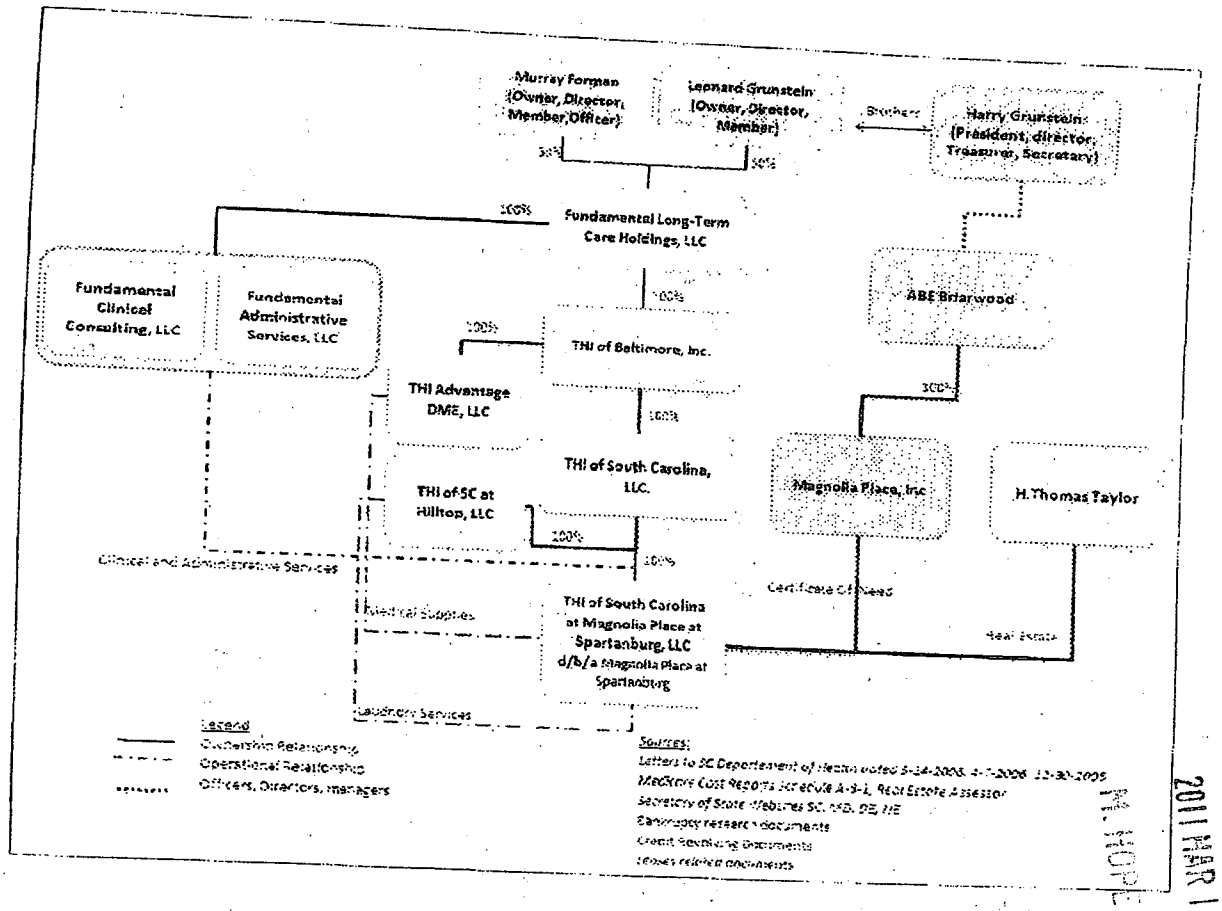
On or post June 1, 2006 the Sublease agreement was terminated and the lease rights assigned to an unknown party.[11] Consequently, from June 1st 2006 to July 23rd 2008 parties to Magnolia Place lease and/or sublease remained unclear. The table below is a summary of the multiple transactions that affected the leases[12]:

Lease related transactions
Lease agreement between H. Thomas Taylor and Magnolia Place, Dated April 1, 1993
Amended and Restated Lease agreement between H. Thomas Taylor and Magnolia Place, Dated November 12, 1998
Amendment # 1 : Amended and Restated Lease agreement between H. Thomas Taylor and Magnolia Place, Dated August 29, 2003
Sublease agreement between Magnolia Place, Inc. and THI of South Carolina - Spartanburg. Dated August 8/29/2003 Effective 8/30/2003 Expiration 7/31/2018
Amendment # 2 : Amended and Restated Lease agreement between HT Taylor's Nursing Homes, LLC and Magnolia Place, Inc. & THI of SC at Magnolia Place at Sprtg Dated July 1, 2006 *Lease rights assigned and Sublease terminated*
Amendment # 3 : Amended and Restated Lease agreement between Taylor NH Hilltop-Spartanburg, LLC & THI of SC at Magnolia Place at Spartanburg Dated July 23, 2008
Amendment # 4 : Amended and Restated Lease agreement between Taylor NH Hilltop-Spartanburg, LLC & THI of SC at Magnolia Place at Spartanburg Dated July 23, 2008
Amending all together with the lease and all the amendments, with lease commencing April 1, 1993 and Terminating March 31, 2013

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SPARTANBURG COUNTY

According to section 9.12 and Section 9.13 of the Sublease Agreement in our possession, the above transactions would not have affected the ownership of the Facility's Certificate Of Need. Therefore the complete ownership structure of Magnolia Place at Spartanburg, both from the operational as well as the Certificate of Need and Real Estate standpoint is depicted below:

[8] Sublease Agreement exhibit C and Revolving Credit Agreement Exhibit 6.4 (Zukerman F.030574) identifying Magnolia Place, Inc as CAM Magnolia, LLC
[9] U.S. Bankruptcy Court fillings – Stock purchase agreement and Exhibit C Sublease Agreement.
[10] Sublease Agreement page 34 section 9.12(a)
[11] Short Form Lease July 23, 2008
[12] Short Form Lease July 23, 2008, Sublease Agreement and Exhibits



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The above structure was implemented and designed by Grunstein and Forman who "brought creative ideas to the structuring and financing of the skilled nursing and healthcare facility business."[13] It is important to mention here that, Fundamental LTCH, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical Consulting, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, THI of South Carolina at Hilltop, LLC, THI Advantage DME, LLC, THI of South Carolina at Magnolia Place at Spartanburg, LLC, and ABE Briarwood Corporation ALL share the same location/address at 930 Ridgebrook Road, Sparks, MD 21152.[14]

[13] MICH II Holdings, LLC; Grunstein; Forman vs. Shron complaint– page 9
[14] FLTCH Tax returns and Nevada SoS, Magnolia Place License Application pg4, FAS and FCC consulting Agreements, Revolving Credit Agreement schedule 4.3

I. OPERATIONAL MANAGEMENT AND CONTROL

"Control exists where an individual or an organization has the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization or institution".[15]

Through Corporate Structure, Contracts and Central Cash Management, Fundamental Long Term Care Holdings, LLC and/or its owners, exerted control over the operations and management of Magnolia Place at Spartanburg.

A. OPERATIONAL MANAGEMENT AND CONTROL THROUGH CORPORATE STRUCTURE

During Morrow's stay at Magnolia Place at Spartanburg, the license application reflects THI of Baltimore, Inc. as the licensee's governing body, and W. Bradley Bennett as the presiding officer of Magnolia Place at Spartanburg's governing body. The governing body appoints the Administrator, and is legally responsible for establishing and implementing policies regarding the management and operation of the Facility.[16] Also, "person or other legal entity" that claims liabilities of the licensee of the facility or services for which the license is requested are: [17]

i. THI of South Carolina, LLC,
ii. THI of Baltimore, Inc.,
iii. Fundamental Long Term Care Holdings, LLC,
iv. Murray Forman,
v. Leonard Grunstein

Furthermore, the following individuals are listed as officers of the licensee:

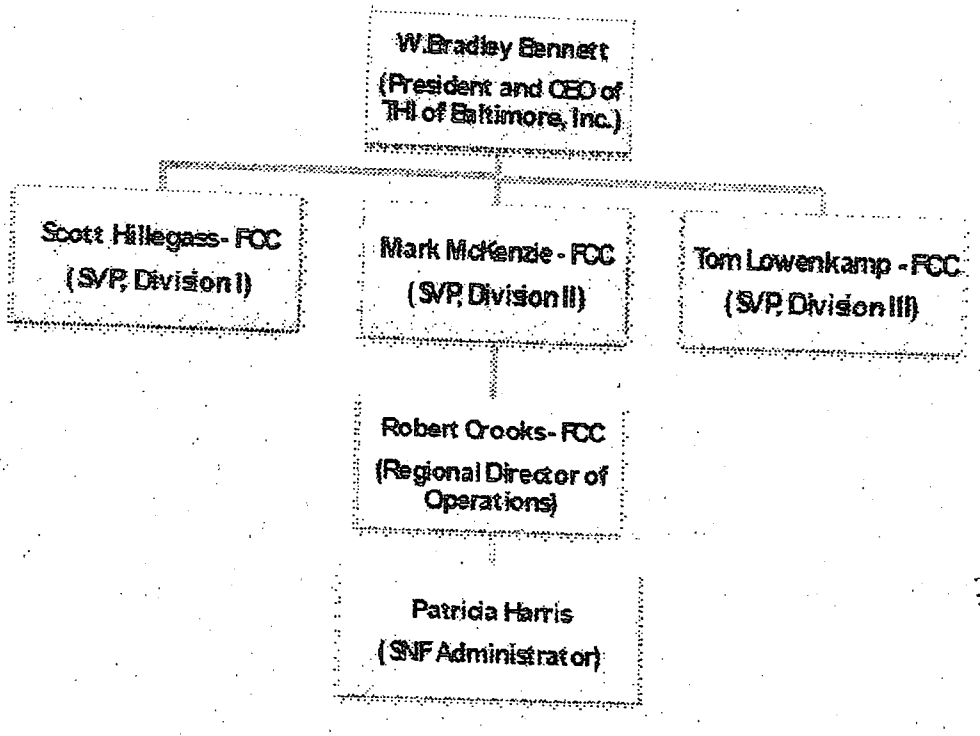
i. W. Bradley Bennett (President; Chief Executive Officer)
ii. Mark Fulchino (Executive Vice President; Chief Financial Officer)
iii. Toni-Jean Lisa (Executive Vice President; General Counsel; Secretary)
iv. Sean Nolan (Senior Vice President – Finance; Chief Accounting Officer)
v. Matthew Box (Senior Vice President)
vi. Kimberly McCarty (Vice President; Treasurer)
vii. Melissa Warlow (Vice President; Assistant Secretary)

As seen above, during Morrow's residency, the Facility's management and control is held by upper corporate executives, and not by Patricia A. Harris, the administrator. The latter, who is at the bottom of the corporate hierarchy as seen below, is hired by Fundamental Clinical Consulting, LLC's Regional Director of

[15] CMS Pub. 15-1 chapter 10, paragraph 1002.3
[16] OBRA, 42CFR8483.75
[17] License application for license expiring August 7, 2007 page 4

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Operations (Robert E. Crooks) who is not listed as an officer of Magnolia Place at Spartanburg:[18]



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The Resource Manual which reflects part of the hierarchy chart above was provided to Patricia Harris a few weeks before the acquisition of THI of Baltimore, Inc. by Fundamental. Despite the transaction, the day-to-day operations of the Facility remained the same, and other than one officer, existing officers and directors of the licensee remained the same.[19] Consequently, unless proven otherwise and consistent with the license application for Nursing Home license expiring on August 31, 2007, the above hierarchy was in place during Morrow's stay at Magnolia Place at Spartanburg. For the relevant time frame, we would like to note here that Robert Crooks is an employee of Fundamental Clinical Consulting, LLC[20] while Bradley Bennett is the President and CEO of THI of Baltimore, Inc.[21] Also, Magnolia Place at Spartanburg's license application was signed, among others, by Mark Fulchino who is Executive Vice President of THI

[18] Resource Manual For New Management provided to Patricia Harris, Defendants' R-RFP 1474, and deposition of Robert Crooks pg.24 lines 22 to 24
[19] Letter to SC DHEC December 30, 2005
[20] Robert Crooks deposition page 8 and 9
[21] Revolving Credit Agreement Zukerman F. 030542

of Baltimore, Inc. and also FLTCH's Executive Vice President and Chief Financial Officer[22].

In light of the above discussion, it appears that Magnolia Place at Spartanburg is a unit of its parent company and that its management and control go beyond the scope of its administrator and includes the highest rank of the corporate ladder. This reality is also illustrated through contracts and central cash management as discussed below.

A. Operational Management and Control Through Contracts

THI/Fundamental nursing facilities, at least those in South Carolina have agreements for administrative and consulting services with entities that are wholly owned by FLTCH, respectively Fundamental Administrative Services, LLC and Fundamental Clinical Services, LLC.[23] Also, all THI/Fundamental Health Care Facilities are parties to a service agreement with THI Advantage DME, LLC, which is another entity ultimately owned by FLTCH. This is an indication that all those entities, including Magnolia Place at Spartanburg are part of a single entity that appears to be fragmented in multiple units. Moreover, by stripping the facility from its ability to choose a non-related entity to provide those services, FLTCH through those contracts has the ability to direct the management of Magnolia Place at Spartanburg. Furthermore, those agreements were not entered at arm's length. "Transactions involving family members, and parent companies and subsidiaries, are deemed arm-in-arm dealings. To qualify as an arm's length transaction, neither of the involved parties may have any interest in the transaction's consequences to the other party"[24]. In this case, those agreements were entered into by entities all ultimately owned conjointly by Murray Foreman and Leonard Grunstein. The illustration of chain operations can also be seen on the Home Office Cost reports where the cost from entities or facilities are all pooled together and then allocated to each facility or entity. For instance from January to December 2007, allocation of pooled costs between Health Care facilities and other chain components amounted to $723,543,411, representing 144 entities' pooled costs.[25] Consequently, the costs or the financial results of operations of all those entities, including Magnolia Place at Spartanburg are interrelated.

Another contract through which FLTCH exerted significant control over Magnolia Place at Spartanburg is the Amended and Restated Revolving Credit and Security Agreement among FLTCH, THI of Baltimore, Inc., THI of Nevada II, Inc., and

[22] Revolving Credit Agreement Zukerman F. 030542
[23] Letter to SC DHEC September 14, 2006
[24] Business Dictionary
[25] Home Office Cost Report FYE 2008 Schedule G

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certain subsidiaries (including Magnolia Place at Spartanburg) as "Borrower(s)" and Capital Source Finance, LLC, "Lender". The purpose of the agreement is to make available to Borrower(s) a revolving credit facility in a maximum principal amount at anytime outstanding of up to $50,000,000.[26] As Collateral, the Borrower(s) pledged all its accounts, including receivables from Medicare, Medicaid, and Private Pay.[27] The agreement entered on March 28, 2006 and ending on February 2, 2009 was signed for the Borrower(s) by Mark Fulchino (Executive Vice President and Chief Financial Officer of FLTCH who is also Executive Vice President of THI of Baltimore, Inc.) and Murray Forman (Owner and President of FLTCH), with THI of Baltimore Inc. as the Borrowing Agent.[28] The Amended and Restated Revolving Credit and Security Agreement is illustrative of common operation and joint liability as evidenced by the following statement: "Each borrower acknowledges that it is jointly and severally liable for all of the obligations under the Loan Documents. Each borrower expressly understands, agrees and acknowledges that (i) Borrowers are all affiliated entities by common ownership, (ii) each borrower desires to have availability of common credit facility instead of separate credit facilities".[29]The document defines the term "Affiliate" as " any Person, any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with such Person"; it also states that "Affiliate" shall include any Subsidiary.[30]In this case, Magnolia Place at Spartanburg is directly and/or indirectly controlled by FLTCH.

The Revolving Credit and Security Agreement also revealed that the parent company had significant control over the budget of each individual facility. The agreement requires the Borrower to furnish to lender consolidated monthly projected operational budgets, with financial covenants including but not limited to:

- Aggregate combined census levels at the facilities shall be no less than 85% of total available beds.
- At no time shall borrower (on a consolidated basis) permit its EBITDA (a profitability index) to be less than $12,500,000 per year.

In order to meet the above requirements on a consolidated basis, each facility's budget should follow certain guidelines.

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[26] Revolving Credit Agreement Zukerman F. 030422
[27] Revolving Credit Agreement Zukerman F. 030436 to F.030437
[28] Revolving Credit Agreement Zukerman F. 030458, F.030497,F.030498, F.030506
[29] Revolving Credit Agreement Zukerman F. 030436
[30] Revolving Credit Agreement Zukerman F. 030505

The increase in leverage at the corporate level can easily be observed at the facility level as well. The table below show how Magnolia Place at Spartanburg's long term debt account was impacted over time: [31]

Magnolia Place at Spratanburg - Per Book Balance Sheet Account								
	THI		THI & FLTCH			FLTCH		
	10/1/2004 - 9/30/2005		10/1/2005 - 9/30/2006		10/1/2006 - 9/30/2007		10/1/2007 - 9/30/2008	
LTD Mortgage Payable	$	31,129	$	24,242	$	-	$	-
LTD Intercompany Account	$	96,151	$	511,188	$	558,565	$	1,574,559
Total LTD	$	127,280	$	535,430	$	558,565	$	1,574,559

The significant increase in the Facility's long term debt, specifically at it relates to Intercompany account is another evidence of commingling of funds and the fact that the parent company orchestrated and centralized the movement of cash as further discussed below.

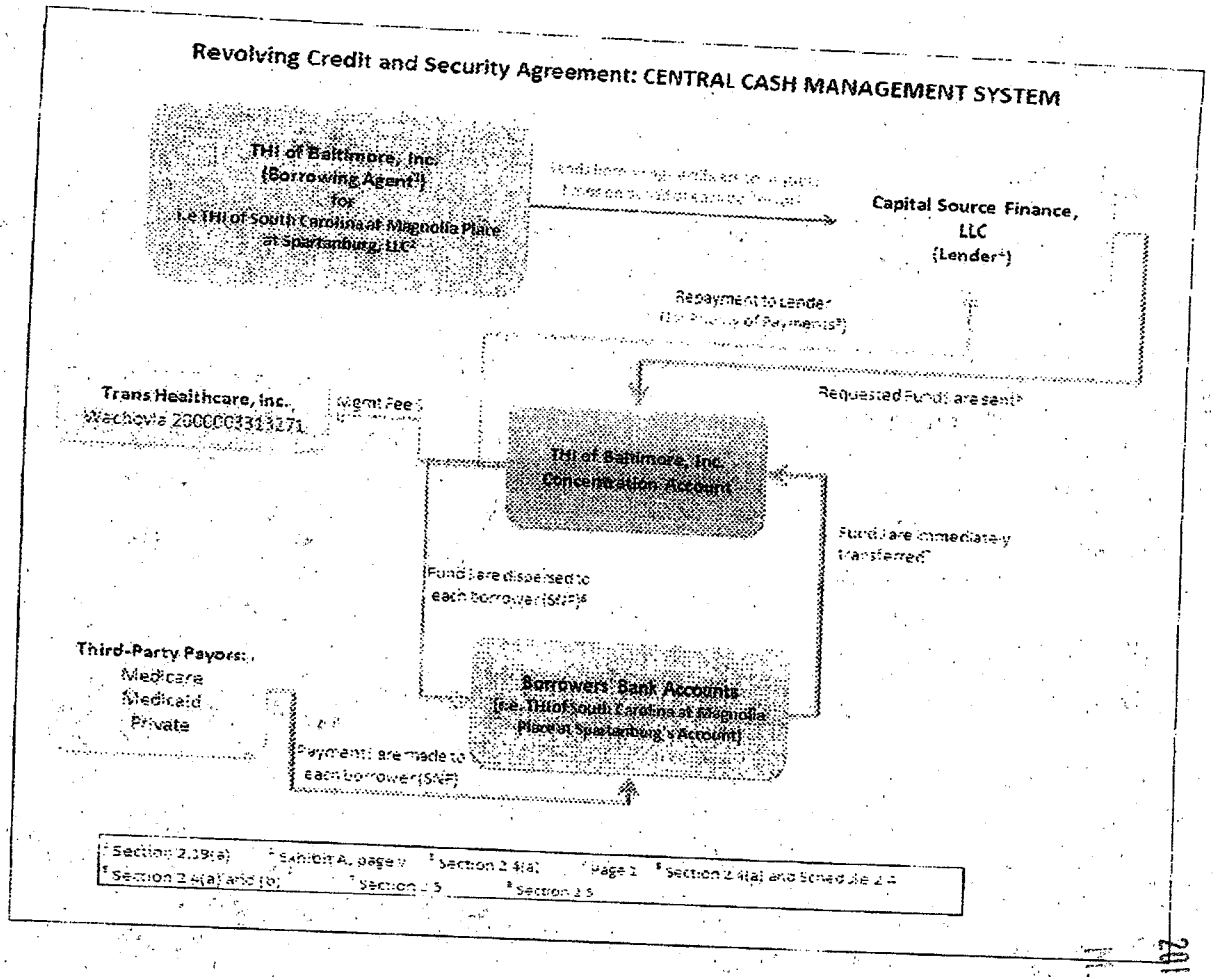
A. OPERATIONAL MANAGEMENT AND CONTROL THROUGH CENTRAL CASH PLANNING

According to the Revolving Credit and Security Agreement, "Each borrower irrevocably authorizes Lender to disburse the proceeds of the Revolving Loan to the Borrowing Agent [THI of Baltimore, Inc.]."[32] The Revolving Credit and Security Agreement required a central cash management system, with THI of Baltimore, Inc. playing a central role as described on the chart below:

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[31] Magnolia Place Medicaid Cost Reports FYE 2005 to FYE 2008

[32] Revolving Credit Agreement Zukerman F. 030425



The above cash management system stripped Magnolia Place at Spartanburg from any right it may have had on its revenues, which by the means of the central cash management system were commingled with monies from others subsidiaries of FLTCH and controlled exclusively at the corporate level. The above activities clearly indicate that the facility was under the direct control of the parent company or owner, due to the extensive cash management activities. By centralizing all the cash, the parent can redeploy the assets to other subsidiaries or to shareholders, enabling higher rates of return on the total asset base. While this management practice allows for higher shareholder returns, it also requires that the company manage all cash from a central location so that it can be deployed in the most effective manner. Such level of efficiency cannot be achieved or maintained in an organizational structure such that each legal entity

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is operated as a separate entity distinct from the other entities of the organization. As a result, this transfers a substantial amount of control from the facility to the parent organization FLTCH.

Also, in order to fulfill the requirements of the financial covenants included in the Revolving Credit and Security Agreement, the ability to maintain costs below a specific threshold become crucial for leveraged firms, as further discussed below.

I. FINANCIAL ACTIVITIES

During the year of Morrow's residency at Magnolia Place at Spartanburg, the Facility was profitable. As shown below, there is an exponential growth in profitability after the transfer of ownership to FLTCH[33]:

Revenue PPD	THI	THI & FLTCH		FLTCH
FYE	10/1/2004 - 9/30/2005	10/1/2005 - 9/30/2006	10/1/2006 - 9/30/2007	10/1/2007 - 9/30/2008
SNF	$ 180.41	$ 190.72	$ 215.41	$ 236.09
%Growth compared base year FYE 9/2005		6%	19%	31%

Net Income PPD	THI	THI & FLTCH		FLTCH
FYE	10/1/2004 - 9/30/2005	10/1/2005 - 9/30/2006	10/1/2006 - 9/30/2007	10/1/2007 - 9/30/2008
SNF	$ 11.54	$ 25.77	$ 27.91	$ 34.82
%Growth compared base year FYE 9/2005		123%	142%	202%

As seen above, the year in which FLTCH took ownership of the facility recorded 123% of growth in profitability, in contrast with only 6% growth in revenue PPD. The exponential profitability growth compared to base year FYE 9/2005 continued for the following years as well.

Meanwhile, the deficiency variance of some of the Facility's key expense items widens after FLTCH's ownership acquisition as seen below[34]:

- Dietary spending PPD (excluding salaries): The facility spent only 41% of the state average dietary spending from FYE 2006 to FYE 2008 as detailed below:

[33] CMS FACTS Database -- Medicare Cost Report Data
[34] CMS FACTS Database – Medicare Cost Report Data

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Dietary Spending (Excluding Salaries)

		SNF	State minus THI	Variance PPD	Total $ Variance
THI	10/1/2004 - 9/30/2005	4.61	9.86	$ (5.26)	$ (153,340)
THI & FLTCH	10/1/2005 - 9/30/2006	4.46	10.98	$ (6.52)	$ (202,164)
FLTCH	10/1/2006 - 9/30/2007	4.72	12.12	$ (7.41)	$ (226,374)
FLTCH	10/1/2007 - 9/30/2008	5.65	13.22	$ (7.58)	$ (229,829)

- **Direct Care Hours PPD: The facility consistently worked fewer direct care hours PPD, compared to the state average and has seen a wider deficiency variance compared to base year FYE 2005 as detailed below:**

		Hours PPD			
		SNF	State minus THI	Variance	Variance Hours
THI	10/1/2004 - 9/30/2005	3.77	4.09	(0.32)	(9,984.74)
THI & FLTCH	10/1/2005 - 9/30/2006	3.78	4.39	(0.61)	(18,989.75)
FLTCH	10/1/2006 - 9/30/2007	3.91	4.39	(0.48)	(14,754.65)
FLTCH	10/1/2007 - 9/30/2008	3.83	4.60	(0.77)	(23,411.27)

- **Hourly Rates: The facility paid lower wages for direct care compared to the state average for FYE 2006 to FYE 2008 as detailed below:**

		Average Hourly Rates		
		SNF	State	Variance
THI	10/1/2004 - 9/30/2005	$ 13.69	$ 13.57	$ 0.12
THI & FLTCH	10/1/2005 - 9/30/2006	$ 13.80	$ 14.21	$ (0.41)
FLTCH	10/1/2006 - 9/30/2007	$ 14.09	$ 15.08	$ (0.99)
FLTCH	10/1/2007 - 9/30/2008	$ 15.26	$ 16.10	$ (0.84)

Given the centralization of operations and control, we are not surprised by the fact that the above spending (or under-spending) patterns are not unique to Magnolia Place at Spartanburg, but rather can be observed for all

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THI/Fundamental entities in South Carolina, on a chain-wide systematic basis as seen below[35]:

Dietary Spending (Excluding Salaries)

Chain		Chain	State	Variance PPD	Total $ Variance
THI	FYE 2005	5.13	9.86	$ (4.73)	$ (2,204,379)
THI & FLTCH	FYE 2006	5.25	10.98	$ (5.73)	$ (2,653,310)
FLTCH	FYE 2007	5.78	12.12	$ (6.34)	$ (2,936,765)
FLTCH	FYE 2008	6.16	13.22	$ (7.06)	$ (2,957,835)

Direct Care Staffing

Direct Care

Chain		Hours PPD				Average Hourly Rates		
		Chain	State	Variance PPD	Variance Hours	Chain	State	Variance PPD
THI	FYE 2005	3.61	4.09	(0.48)	(222,197.27)	13.63	13.57	$ 0.06
THI & FLTCH	FYE 2006	3.51	4.39	(0.88)	(406,791.25)	14.14	14.21	$ (0.07)
FLTCH	FYE 2007	3.54	4.39	(0.85)	(392,158.00)	14.68	15.08	$ (0.39)
FLTCH	FYE 2008	3.54	4.60	(1.06)	(444,533.15)	15.52	16.10	$ (0.58)

The financial results of the nursing facilities part of FLTCH's chain operation flow all the way to FLTCH's owners. According to FLTCH's Vice President of Finance, Magnolia Place at Spartanburg as well as similar FLTCH entities are treated as "disregarded entities" for federal tax purposes; consequently the financial performance (tax liability included) of Magnolia Place at Spartanburg (as well as similar entities) would be reported on the tax return of Fundamental Long Term Care Holdings, LLC's co-owners (Murray Foreman and Leonard Grunstein).[36] Also, FLTCH's tax returns filed with the United States Internal Revenue Service from 2006 to 2008 reflect that FLTCH's business activity is Nursing and Personal Care, and that its product and service is also Nursing and Personal Services[37].

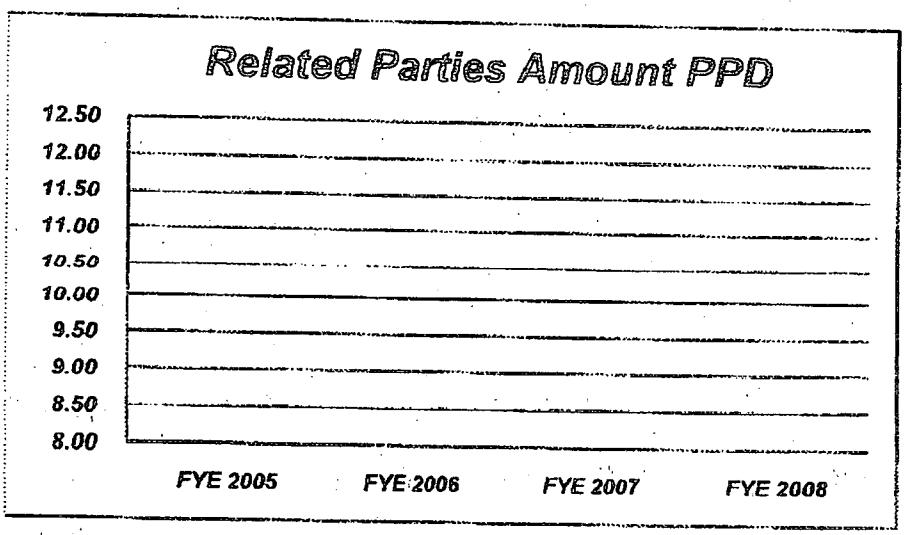
The financial results of Magnolia Place at Spartanburg as well as other THI/Fundamental nursing facilities are just the first layer of FLTCH beneficial ownership. FLTCH and its owners also benefit from the fact that an increase in the facility's profitability increases the revenue of some of the related parties

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[35] CMS FACTS Database – Medicare Cost Report Data
[36] Tabler Deposition, page 60 to 69
[37] FLTCH tax returns 2006 to 2008, bates stamps Zukerman F.015491, F.015520 and F.015563

owned by FLTCH. For instance the consulting fees paid by Magnolia Place at Spartanburg or other THI/Fundamental nursing facilities to entities owned by FLTCH are based on a percentage of net operating revenue,[38] therefore an increase in net operating revenue will also increase the related party revenue. Below is the illustration of the increase in Magnolia Place at Spartanburg related parties PPD, thus an increase in revenue received by FLTCH subsidiaries resulting in part from the increase in profitability Magnolia Place at Spartanburg[39]:

	THI	THI & FLTHC		FLTCH
	10/1/2004 - 9/30/2005	10/1/2005 - 9/30/2006	10/1/2006 - 9/30/2007	10/1/2007 - 9/30/2008
Amount	281,387	303,464	330,284	358,947
Amount PPD	9.05	9.79	10.81	11.84
% Growth base year FYE 2005		8.1%	19.3%	30.8%



The above figures are only for Magnolia Place at Spartanburg, thus the implied multiplier effect on a chain-wide basis.

During the fiscal year corresponding to Morrow's residency timeframe, the parent company (Fundamental LTCH) at the corporate level, realized $4,149,587 in business income for 2007[40], as well as a gain in sales of property of $27,705,986 the following year, of which $15,500,974[41] were siphoned to its shareholders

[38] FAS Consulting Agreement
[39] CMS FACTS Database – Medicare Cost Report Data
[40] 2007 tax returns
[41] 2008 tax returns

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Murray Forman and Leonard Grunstein. In perspective, those distributions to Forman and Grunstein in one year are equivalent to 1,047,034 hours of care or 2.5 times higher than the average yearly costs of additional hours of care needed to get all South Carolina THI/Fundamental facilities to the state average level in terms of Hours PPD as detailed below[42]:

	Hours PPD				Average Hourly Rates			
	Chain	State	Variance PPD	Variance Hours	Chain	State		Cost to get to State Level
FYE 2006	3.51	4.39	(0.88)	(406,791)	14.14	14.21	$	5,781,892
FYE 2007	3.54	4.39	(0.85)	(392,169)	14.68	15.08	$	5,758,900
FYE 2008	3.54	4.60	(1.06)	(444,533)	15.52	16.10	$	6,898,290
	Total FYE 06-08			(1,245,492)			$	18,439,081

	SCTH Chain
Total Hours of Care Needed to Get to State Average FYE 06-08	1,245,492
Total Cost for Hours of Care Needed to Get to State Average FYE 06-08	$18,439,081
Average Yearly Cost of Hours of Care Needed to Get to State Average	$ 6,146,360
Distribution to Owners	$ 15,490,974
Equivalence in Hours of Care	1,047,034 Hours
Equivalence to Average Yearly Cost	2.5

I. CONCLUSION

As a result of the strategies put in place and operated by Fundamental Long Term Care Holdings, LLC and/or its owners, Magnolia Place at Spartanburg was not operating as a freestanding facility, but rather as an integral unit of Fundamental Long Term Care Holdings, LLC and part of a single, but yet excessively fragmented organization . Fundamental LTCH and/or shareholders, through corporate structure, ownership interest and interrelated entities contracts, exerted control over the management and operation of Magnolia Place at Spartanburg, with direct and/or indirect implication to overall patient care. Magnolia Place at Spartanburg's financial results are the direct result of control applied at the facility level by Fundamental Long Term Care Holdings, LLC and/or its owners. This control was exercised through three specific mechanisms: central cash planning and treasury activities, the corporate strategies implemented at the facility level, and management involvement at all levels of the company.

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[42] CMS FACTS Database and FLTCH 2008 Tax returns

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D H E C

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. 200 Cobb Avenue
(Street address or location)

Spartanburg Spartanburg SC 29303 864-542-5515
(City) (County) (Zip code) (Telephone #)

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 # ucf 512 which expires August 31, 2006

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 _____.

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SC DHEC
Health Licensing

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.

Blumberg No. 6113 PLAINTIFF'S EXHIBIT 13

9. Licensee (The legal entityor 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. THC of South Carolina at Regency Place at Spartanburg, L.L.C.
(Name)

B. 930 Ridgebrook Rd | Sparks | MD | 21152
(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 Corporation ☐ None in these categories apply

D. THC of Baltimore, Inc.
(Complete title of the licensee's governing body)

E. W. Bradley Bennett, President
(Name and title of presiding officer of governing body)

930 Ridgebrook Road
(Mailing address of presiding officer)

Sparks | MD | 21152 | 410-773-1000
(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.

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. See Exhibit A

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 Exhibit 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. THF at Baltimore Management, 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 Maryland

County of Baltimore

I, Melissa Warlow and Mark Kirkner 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.

(Signature)* VP (Title)

(Signature)* EVP (Title)

An application must be signed by the owner if an individual; or in the case of a limited liability corporation, the head of the limited liability corporation; 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 8th day of June (Month), 2006 (Year)

NOTARY PUBLIC Robin Goodman

My commission expires 4/1/2009 NOTARY SEAL

ROBIN GOODMAN
Notary Public, State of Maryland
County of Baltimore
My Commission Expires April 1, 2009

14. Katie Hoodman Licensure Asst (Name and title of person preparing this application) 717-775-[illegible] (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.

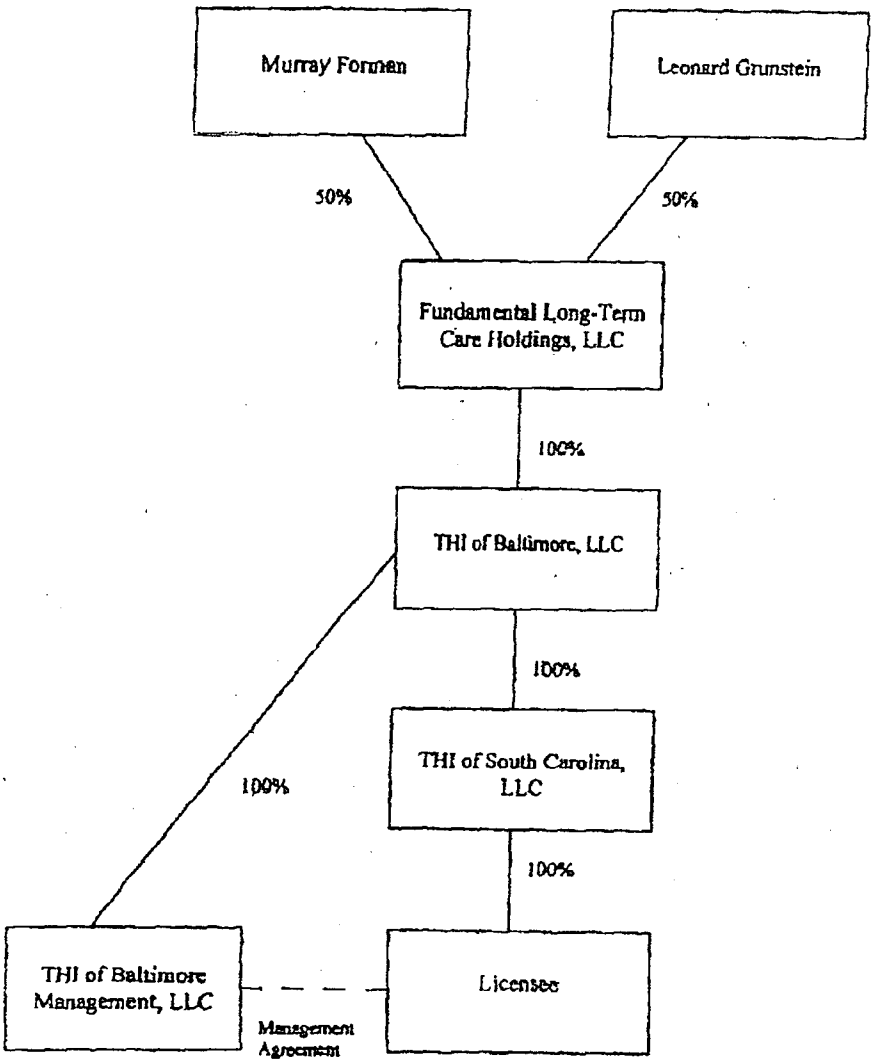
EXHIBIT A B

930 Ridgebrook Road
Sparks, MD 21152
410-773-1000

Directors
W. Bradley Bennett
Mark Fulchino
Toni-Jean Lisa

Officers	Office
W. Bradley Bennett	President; Chief Executive Officer
Mark Fulchino	Executive Vice President; Chief Financial Officer
Toni-Jean Lisa	Executive Vice President; General Counsel; Secretary
Sean Nolan	Senior Vice President - Finance; Chief Accounting Officer
Matthew Box	Senior Vice President
Kimberly McCarty	Vice President; Treasurer
Melissa Warlow	Vice President; Assistant Secretary

Ownership Structure of Licensee
Following the Transaction



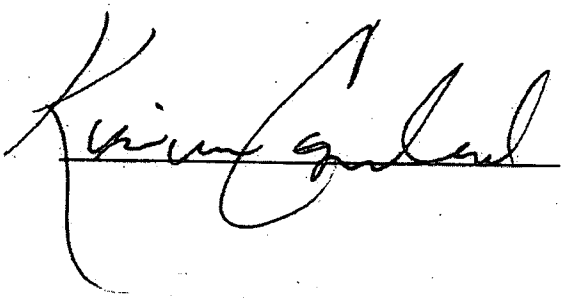
AFFIDAVIT

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 2nd 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

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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 aides 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 Noyes. — JN
I was a CNA at Magnolia Place of Spartanburg from 2004 - Sept 2007. — JN
I worked 2nd shift on Unit 2. — JN
I quit to go to school. — JN
We were short-handed at least 6-7 times a month. — JN
When we were short on the 2nd shift we had three aides instead of the four we needed. — JN
When we were short we had about 44 residents to take of. — JN
We couldn't make a structured round when we were short. It seemed like we just going all over all the time. — JN
The aides complained all the time about not having enough help but we never got any of the help we asked for. — JN
We had lots of help was there and the office help came out into the halls. When DHEC left all the extra help disappeared and the office workers went back to their offices. — JN

I saw residents soaked with urine and with brown rings on their sheets. – JM

I saw gaps and holes in the AGDs. 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 fired. – 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.

Jamica Mann

AFFIDAVIT

My name is Kim (Wright) Gaines – KW (K Hams)
I was a CNA at Magnolia Place of Spartanburg from around 200[redacted] or 200[redacted] to 200[redacted] or 200[redacted]. 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 worried many double-shifts because we were so short. KW

I saw blanks and gaps in the ADLs. KW

Kim Gailos.

Some aides filled in the blanks 2-3 days later. KG

Sometimes we ran out of groups. When that happened we had to work without them. KG or filled in rooms if ~~there~~ was some left

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

Kim Wright Gaines

AFFIDAVIT

My name is Margie Markupson. — M.M
I was a CNA at Magnolia Place of Spartanburg from 1992-2005 and from April 2007 - August 2009. — M.M
I worked 3rd 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 2nd 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 3rd 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 DHEC left things went back to normal. - m m

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

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

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

I saw blanks and skips in the ADLs. DON Margaret Keller tried to make me just fill in the blanks later but I refused to do that. - m m

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

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 terminated in 2010 or this year. - m m

We sometimes ran out of supplies and

had to get them from Magnolia 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.

Marjorie Makupson

MANAGEMENT SERVICES AGREEMENT

BETWEEN

THI of Baltimore Management, LLC

AND

THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT SPARTANBURG, LLC

DATED AS OF August 30, 2003

PLAINTIFF'S EXHIBIT 15

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MANAGEMENT SERVICES AGREEMENT

THIS MANAGEMENT SERVICES AGREEMENT (this "Agreement") is made and entered into as of August 30, 2003, between THI of Baltimore Management, LLC, a Delaware limited liability company ("Manager") and THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT SPARTANBURG, LLC ("Lessee").

Introductory Statement

Lessee is the operator of the Magnolia Place, Inc. at Spartanburg health care facility, located at 8020 White Avenue, Spartanburg, SC 29303 (the "Facility").

Lessee and Manager are entering into this Agreement to set forth the general terms by which the Facility will be managed by Manager.

NOW, THEREFORE, in consideration of the promises and covenants herein contained and intending to be legally bound hereby, the parties agree as follows:

ARTICLE I

RETENTION OF MANAGER

1.1 Retention. For and during the Term (as defined in Article II hereof) of this Agreement, Lessee hereby grants to Manager the sole and exclusive right, and employs Manager to supervise, manage, and operate the Facility in the name and for the account of Lessee, upon the terms and conditions herein set forth; provided, however, that throughout the Term of this Agreement, Lessee or its authorized representative(s) may exercise any duties or responsibilities delegated to Manager in the event Lessee deems such action to be reasonably desirable or necessary.

1.2 Acceptance. Manager accepts such appointment and agrees that it will (a) perform its duties and responsibilities hereunder in accordance with this Agreement, (b) use commercially reasonable efforts to supervise and direct the management and operation of the Facility in an efficient and cost effective manner and comply, in all material respects, with all applicable statutes, ordinances, rules and regulations established by any governmental authority having jurisdiction over the Facility; and (c) consult with Lessee and keep Lessee advised of all major policy matters relating to the Facility. Subject to the foregoing and to the other provisions of this Agreement, including Section 1.1 hereof, Manager, without the approval of Lessee (unless such approval is herein specifically required as to policies and manner of operation), shall have the unrestricted control and sole discretion with regard to the operation and management of the Facility for all customary purposes (including the exercise of its rights and performance of its duties provided for in Article III hereof), and the right to

determine all policies affecting the appearance, maintenance, standards of operation, quality of service, and any other matter affecting the Facility or the operation thereof.

1.3 Agency Relationship. It is expressly agreed by Lessee and Manager that Manager is at all times acting and performing under this Agreement as an agent of Lessee, and that no act, commission or omission by either Lessee or Manager shall be construed to make or constitute the other its partner, member, joint venture or associate, except to the extent specified herein.

1.4 Interest. Lessee shall be the owner and/or holder of the respective licenses, permits and contracts pertaining to the Facility (subject to Section 3.7 hereof), and shall be the "provider" within the meaning of all third-party contracts for the Facility. Specifically, and without limitation, Lessee shall own (a) the Medicare provider numbers, (b) the Medicare provider agreements with the Centers for Medicare and Medicaid Services (CMS) and (c) the Medicare certifications.

ARTICLE II

TERM

The term (the "Term") of this Agreement begins on the date hereof (the "Commencement Date") and shall continue until the fifth anniversary of the date hereof (the "Termination Date"), provided that the initial Termination Date and each subsequent Termination Date shall automatically be extended for a five-year period if neither party hereto has delivered to the other party a written notice of termination no later than 90 days prior to the then-applicable Termination Date; provided further that the Termination Date shall be such earlier date as provided for in Article VI hereof.

ARTICLE III

RIGHTS AND DUTIES OF MANAGER

During the Term of this Agreement, and in the course of its management and operation of the Facility:

3.1 Employees. Manager shall hire, promote, discharge, and supervise the work of the Facility's Administrator, Assistant Administrator, Department Heads, and all operating and service employees performing services in and about the Facility. All of such employees shall be employees of Lessee and the aggregate compensation, including fringe benefits, with respect to such employees shall be charged to Lessee as an expense of the operation of the Facility. The term "fringe benefits" as used herein shall include, but not be limited to, the employer's contribution of FICA, unemployment compensation, and other employment taxes, retirement plan

contributions, workman's compensation, group life, accident, and health insurance premium, profit sharing contributions, disability, and other similar benefits paid or payable by Manager for the employees of the Facility. All such employees shall be covered by appropriate malpractice and/or errors and omissions insurance as approved by Manager and Lessee. The cost of same shall be charged to Lessee as an expense of the operation of the Facility. Manager shall be responsible, also, for coordinating health insurance coverages (including COBRA matters) for the employees of the Facility.

Notwithstanding anything to the contrary hereinabove, while Manager has the right to remove or discharge any of the employees of the Facility, including the Facility's Administrator, Assistant Administrator and Department Heads, Manager may not transfer any Administrator, Assistant Administrator or Department Heads to any other facility without the prior written consent of Lessee, which consent may not be unreasonably withheld.

3.2 Labor Contracts. Manager, if requested by Lessee, will negotiate on Lessee's behalf and at Lessee's expense, with any labor union lawfully entitled to represent the employees at the Facility, but any collective bargaining agreement or labor contract resulting therefrom must first be approved by Lessee who shall be the only person(s) authorized to execute the same. Lessee agrees that all fees and costs of outside professionals in conducting and concluding such negotiations shall be paid by Lessee out of Facility Funds (as defined in Section 3.10 below).

3.3 Concessionaires, Etc. Manager shall negotiate and consummate in the name at the expense of Lessee, contracts or arrangements with concessionaires, licensees, tenants, and other intended users of the Facility. Any fees and expenses incurred in connection therewith shall be charged to Lessee as an expense of the operation of the Facility.

3.4 Ancillary Services, Utilities, Etc. Manager shall enter into such contracts in the name of and at the expense of Lessee as may be deemed necessary or advisable for the furnishing of all ancillary services, utilities, concessions, supplies and other services as may be needed from time to time for the maintenance and operation of the Facility.

3.5 Purchases. Manager shall supervise the purchasing by Facility staff of food, beverages, operating supplies, and other materials and supplies, in the name of and for the account and at the expense of Lessee, as may be needed from time to time for the maintenance and operation of the Facility.

3.6 Repairs. Manager shall make or install or cause to be installed at Lessee's expense and in the name of Lessee any repairs, replacements, additions, and

improvements in and to the Facility and the furnishings and equipment in order to keep and maintain the same in good repair, working order and condition, and outfitted and equipped for the proper operation thereof in accordance with (a) industry standards comparable to those prevailing in other similar facilities, and (b) all applicable state or local rules, regulations, or ordinances.

3.7 Licenses and Permits. Manager shall apply for and use commercially reasonable efforts to obtain and maintain in the name and at the expense of Lessee, all licenses and permits required in connection with the management and operation of the Facility. Lessee agrees to cooperate with Manager in applying for, obtaining, and maintaining such licenses and permits.

3.8 Governmental Regulation.

(a) Manager shall take such action as shall be reasonably necessary to insure that the Facility and the management thereof by Manager comply with all federal, state and local laws, regulations and ordinances applicable to the Facility or the management thereof by Manager, including the particular laws and regulations applicable to health care facilities.

(b) Manager shall promptly provide to Lessee as and when received by Manager, all notices, reports or correspondence from governmental agencies that assert deficiencies or charges against the Facility or that otherwise relate to the suspension, revocation, or any other action adverse to any approval, authorization, certificate, determination, license or permit required or necessary to own or operate the Facility. Subject to Lessee's prior written approval, Manager may appeal any action taken by any governmental agency against the Facility; provided, however, that Lessee shall adequately secure and protect Manager from loss, cost, damage or expense by bond or other means reasonably satisfactory to Manager in order to contest by proper legal proceedings the validity of any such statute, ordinance law, regulation or order, provided that such contest shall not result in the suspension of operations of the Facility; and, provided, further, that Lessee shall have no obligation to secure and protect Manager from any loss, cost, damage or expense that arises directly out of Manager's breach of any of its covenants, duties or obligations under this Agreement.

3.9 Taxes. Manager shall cause all taxes, assessments, and charges of every kind imposed upon the Facility by any governmental authority, including interest and penalties thereon (collectively, "Taxes"), to be paid when due from Facility Funds, subject to the terms of the applicable Facility lease. Manager shall not cause such Taxes to be paid if (a) such Taxes are in good faith being contested by Lessee at its sole expense and without cost to Manager, (b) enforcement for non-payment of such Taxes is stayed, and (c) Lessee shall have given Manager written notice of such contest and stay and authorized the non-payment thereof, not less than ten (10) days prior to the

date on which such Taxes are due and payable. Interest or penalty payments shall be reimbursed by Manager to Lessee if imposed upon Lessee by reason of the gross negligence on the part of Manager in making the payment for Taxes if funds are available therefor. Manager shall notify Lessee of all Taxes assessed against the Facility to Manager's knowledge, other than in the normal course of business.

3.10 Deposit and Disbursement of Funds. Manager shall deposit in a banking institution which is a member of the FDIC in accounts in Lessee's name, all monies arising from the operation of the Facility or otherwise received by Manager for and on behalf of Lessee (collectively, the "Facility Funds"), and shall disburse and pay the same from said accounts on behalf and in the name of Lessee in the following order of priority, as and when required to be made in connection with:

(a) Payment of all costs and expenses arising out of the administration, maintenance and operation of the Facility, including, without limitation, the administrative and operating costs of Lessee, Taxes and the reimbursable expenses of Manager, including all accrued and unpaid interest on any unpaid balances thereon, as set forth in Section 3.16 hereof;

(b) Payment of the lease rent applicable to the Facility or, if directed by Lessee, the debt service on any mortgage on the Facility;

(c) Payment of interest due on the working capital line of credit for the Facility;

(d) Payment of Manager's Management Fee provided for in Article V hereof (including any accrued and unpaid Management Fees for prior periods);

(e) The balance of such funds shall be distributed to Lessee, at Lessee's request, subject to the retention of an appropriate operating reserve, as mutually agreed upon by Manager and Lessee.

Nothing herein shall be deemed to preclude Lessee from having full and complete access to any accounts contemplated herein and the representative of Lessee shall be an additional signatory on all such accounts.

3.11 Insurance. Manager shall apply for, obtain and maintain on behalf of Lessee, all insurance (a) necessary or required for the operation of the Facility and (b) consistent with Lessee's obligations under any agreements with holders of secured debt on the Facility. The cost of such insurance shall be charged to Lessee as an expense of the operation of the Facility and shall be paid by Lessee out of Facility Funds. Manager shall provide Lessee with Certificates of Insurance evidencing such insurance. All insurance obtained by Manager shall be effected by policies issued by insurance

companies of good reputation and of sound and adequate financial responsibility. All liability insurance policies shall be carried in the name of Lessee and Manager and any losses payable under such policies shall payable to Lessee and Manager as their respective interests shall appear. The record owner of the Facility and any lender of secured debt on the Facility shall be named as mortgagee and, along with Lessee and Manager, additional insured (as appropriate) on the property insurance and the comprehensive general liability insurance policies. Manager shall not be liable to Lessee or any other person if it fails to obtain and/or maintain any such insurance policies if the failure is not due to Manager's negligence (e.g., it is a result of Lessee's failure to make monies available to Manager to pay the premiums on any such insurance policies).

Unless otherwise set forth herein to the contrary, Lessee and Manager each hereby waive any right of recovery against the other party for any claims that may be brought for any loss which is covered by fire and extended coverage insurance upon or relating to the Facility and the furnishings and equipment thereon. This waiver of subrogation shall be valid and binding only in the event it is recognized and accepted by the fire and hazard insurance companies issuing policies required hereunder. Each party further agrees that its sole source of reimbursement of loss or damage shall be the insurance proceeds of the policies to be provided hereunder and that the other party shall not be liable for any damage or loss in excess of such insurance coverage. Nothing contained herein shall be deemed by either party to be a release, relinquishment and/or forfeiture of subrogation rights, if any, exercisable by any insurance carriers under the terms and conditions of insurance policies applicable to the matters contained in this paragraph.

Subject to the provisions of this Section 3.11, Manager shall secure certificates of such insurance for the Facility, shall maintain the original of all such policies at the office of the Manager, if requested, shall deliver copies of such original policies to Lessee. Manager shall provide prompt written notice to Lessee of any modification, termination or cancellation of any insurance policy for the Facility.

Any insurance of the character described in the foregoing provisions of this Section 3.11 may be effected by Manager through policies of blanket insurance or through self-insurance programs which may cover other properties or locations of Manager and its subsidiaries or affiliates, the premium or other cost for which will be prorated among the various properties, including the Facility covered by said policies and such allocated portion of said premium cost shall be borne by Lessee.

3.12 Legal Actions. Manager shall promptly notify Lessee of all threatened or pending legal actions to which Manager has knowledge. Subject to Lessee's prior written approval, Manager shall institute, in Lessee's name and at Lessee's expense, any and all legal actions or proceedings to collect charges, rent, or other sums due the

Facility or to lawfully oust or dispossess tenants or other persons in possession under, or lawfully cancel, modify, or terminate any lease, license, or concession agreement for the breach thereof or default thereunder by the tenant, licensee, or concessionaire. Additionally, subject to Lessee's prior written approval (not to be unreasonably withheld), Manager may take, at Lessee's expense, appropriate steps to protect and/or litigate to final judgment in any appropriate court any violation or order affecting the Facility.

3.13 Management Services. Without limitation, Manager shall provide the Facility with all of the customary management services and techniques which it employs in operating other healthcare facilities which its manages and consistent with industry practices which may be applicable to and beneficial to the Facility.

3.14 Statements. Manager shall prepare or cause to be prepared the following statements:

(a) A monthly balance sheet, income statement and statement of cash flows for the operations of the Facility, in a form reasonably acceptable to Lessee, to be delivered to Lessee not later than thirty (30) days after the end of each month.

(b) Annual audited financial statements for the Facility prepared by a firm of independent public accountants reasonably acceptable to Lessee, to be delivered to Lessee not later than one hundred twenty (120) days after the end of the fiscal year for the Facility.

(c) Manager shall select accountants reasonably acceptable to Lessee for the preparation of all federal and state tax returns for the Facility if and to the extent the same may be required to be filed during the Term of this Agreement, and the costs of preparation of all such returns shall be charged to Lessee as an expense of the operation of the Facility and shall be paid by Lessee out of Facility Funds. If reasonably requested by Lessee, Manager shall prepare any reports that may be required to be made during the Term of this Agreement, or otherwise relating to Manager's operation of the Facility pursuant to this Agreement, under Medicaid or Medicare or by the state in which the Facility is located, with any necessary and reasonable expenses for assistance from outside data processing, tax and cost report consultants being charged to Lessee as an expense of the operation of the Facility and shall be paid by Lessee out of Facility Funds.

(d) Manager shall deliver to Lessee on a monthly basis within thirty (30) days after the end of each month of the following reports:

(i) a detailed statement of income and expenses which include the average daily census and patient mix of the Facility;

(ii) aged accounts receivable report for the Facility subdivided into thirty (30), sixty (60) and ninety (90) day periods and by payor source;

(iii) a written calculation of the Base Management Fee for such month; and

(iv) any other reports customarily prepared by Manager in connection with the operation of its health care facility.

(e) Any statements or reports reasonably requested by Lessee that in turn are requested by landlords to the Facility or the holders of secured debt on the Facility.

(f) Manager shall deliver to Lessee written within ten (10) days of filing thereof a copy of each Medicaid or Medicare cost report, amended costs report and all supplemental materials filed with a governmental agency in respect of the Facility.

(g) Manager shall promptly deliver to Lessee written notice of any material action, proposal or investigation by any agency or entity, or complaint to such agency or entity, known to Manager, the result of which would reasonably be expected to (i) create a material adverse effect on Lessee and/or the Facility, or (ii) modify in a way materially adverse to Manager or Lessee or revoke or suspend or terminate, or fail to renew or fully continue in effect, any Medicare and/or Medicaid certification, license or certificate or operating authority pursuant to which Manager or Lessee operates the Facility, or (iii) suspend, terminate, materially adversely modify, or fail to renew or fully continue in effect any cost reimbursement or cost sharing program by any state or federal governmental agency, including, but not limited to, Medicaid or Medicare or any successor or substitute therefor, or seek return of or reimbursement for any funds previously advanced or paid pursuant to any such program, or (iv) impose any bed hold, limitation on resident admission, denial of payment for new admissions or similar restriction on the Facility, or (v) prosecute any party with respect to the operation of any activity on the Facility or enjoin any party or seek any civil or criminal penalty in respect thereof.

(h) Within thirty (30) days after the Commencement Date for the current fiscal year of the Facility and not later than thirty (30) days prior to the beginning of every subsequent fiscal year of the Facility, Manager shall prepare and deliver to Lessee an itemized budget for the Facility for the fiscal year, which budget shall be subject to the written approval of Lessee, which consent shall not be unreasonably withheld. The itemized budget shall cover all projected revenues and expenses of the Facility for the fiscal year. Once Lessee has approved the proposed

budget in writing (the "Approved Budget"), then Manager shall be entitled to incur all expenses and liabilities described in this Agreement in substantial compliance with the Approved Budget. Except under exigent circumstances, Manager shall not, without the prior written consent of Lessee, incur any expenses or liability on behalf of Manager, the Facility or Lessee in material deviation from the Approved Budget. Manager shall be available to meet with Lessee at Manager's offices on a quarterly basis to review the Approved Budget relative to actual results of operations of the Facility.

3.15 Books and Records. Manager on behalf of Lessee shall supervise and direct the keeping of full and accurate books of account and such other records reflecting the results of operation of the Facility as required by law. All such books and records shall be the property of Lessee.

3.16 Payment of Expenses. All expenditures of every kind required or permitted by Manager under this Agreement are for Lessee's account ("Lessee Expenditures"), except for Manager's Staff Services (described below). Manager is authorized by Lessee to pay all Lessee Expenditures from Facility Funds. Lessee shall pay directly (or reimburse Manager promptly if Manager advances funds for) any Lessee Expenditures not paid from Facility Funds. Manager's "Staff Services", which are not reimbursable by Lessee, means only the salaries and benefits of Manager's officers and home office staff, as well as Manager's home office overhead that is not specifically allocable to the Facility.

3.17 Data Processing. Manager shall, directly or through an affiliate, provide the data processing required to maintain the financial, payroll, and accounting records of the Facility.

3.18 Cooperation and Transition to a New Manager. In respect of the termination or expiration of this Agreement and upon notification from Lessee that a new manager ("New Manager") to manage the Facility has been chosen, Manager agrees to use commercially reasonable efforts and take such actions as shall be reasonably necessary to insure that the management and operation of the Facility is transitioned to New Manager in an efficient and complete manner. Manager agrees to fully cooperate and comply with all reasonable requests by Lessee and New Manager for information and assistance on the Facility and its operations, including, but not limited to, employee matters, payables information, accounts receivable information, insurance matters, status of litigation involving the Facility, licensure matters, reimbursement contracts and the books and records of the Facility. Manager's obligations under this Section 3.18 shall survive the termination or expiration of this Agreement. For any activities of Manager requested under this Section 3.18 after the Termination Date that do not involve obligations of Manager already required under this Agreement but not as yet completed prior to the Termination Date, including, but not limited to, the delivery of any financial statements or information under Section 3.14

hereof, Manager will be reimbursed by Lessee for any of Manager's actual and documented out of pocket expenses incurred and will be reasonably compensated by Lessee for any material efforts made at the request of Lessee.

ARTICLE IV

RIGHTS AND DUTIES OF LESSEE

During the Term of this Agreement and subject to Lessee's rights set forth in Section 1.1 hereof:

4.1 Right of Inspection. Lessee shall have the right to enter upon any part of the Facility upon reasonable advance notice to Manager for the purpose of examining or inspecting same or examining or making extracts of books and records of the Facility, but the same shall be done with as little disruption to the business of the Facility as possible. However, the books and records of the Facility shall not be removed from the Facility without the express written consent of Manager. Lessee acknowledges that some books and records will be maintained at Manager's principal place of business and Lessee shall have access thereto as if such books and records were maintained at the Facility.

Lessee shall direct all inquiries regarding operations, procedures, policies, employee relations, patient care, and all other matters concerning the Facility to the President and CEO of Manager.

4.2 Cooperation with Manager. Lessee will cooperate in all reasonable respects with Manager in operating and supervising the operations of the Facility.

4.3 Operating Capital. Lessee shall provide Manager with such amount of working capital as may be reasonably required from time to time for the operation of the Facility on a sound financial basis (including the payment of management fees and reimbursable expenses owed to Manager). If additional working capital is required, Manager shall notify Lessee thereof in writing and Lessee shall provide Manager with such increase in working capital within fifteen (15) days thereafter.

4.4 Capital Improvements. Lessee shall provide Manager with such amount of funds as may be required from time to time to make all necessary capital improvements to the Facility in order to maintain and continue standards of operation of the Facility as a healthcare facility. If additional capital improvement funds are required, Manager shall notify Lessee thereof in writing and Lessee shall provide Manager with such additional capital improvement funds within fifteen (15) days thereafter.

4.5 Management Start-Up Costs to be Funded by Lessee. Lessee shall fund an amount not to exceed Three Hundred Thousand Dollars ($300,000), in the aggregate, for the costs and expenses of converting operational responsibility for the Facility to Manager (collectively, the "Start-Up Funds"), which costs shall be used for, without limitation, the acquisition or implementation of systems hardware, software, communication connectivity and related materials and services at the Facility. Manager shall submit to Lessee a written spending plan describing the proposed use of the Start-Up Funds. Once Lessee has approved the plan (which approval shall not be unreasonably withheld), then Manager shall be entitled to implement the plan and incur the expenses out of Facility Funds. All of the tangible assets purchased with the Start-Up Funds under this Section 4.5 shall immediately become a part of the Facility and shall belong to Lessee subject to the terms and conditions of the applicable leases on the Facility.

ARTICLE V

COMPENSATION AND DISTRIBUTIONS

5.1 Management Fees. As full and exclusive compensation for all of the services to be rendered by Manager during the Term of this Agreement, Lessee shall pay to Manager on the first day of each calendar month, beginning on the date hereof, or, if the date hereof is not the first day of a month, then beginning on the first day of the month following the date hereof, at its principal office, or at such other place as Manager may from time to time designate in writing:

(a) A monthly fee (the "Base Management Fee") equal to five percent (5%) of Gross Revenues of the Facility derived for each calendar month of the Term. The Base Management Fee shall be calculated based upon the Gross Revenues of the Facility during the preceding month as set forth in the monthly statements delivered by Manager to Lessee under Section 3.14 hereof. The Base Management Fee shall be adjusted quarterly based upon actual revenues received by Manager on behalf of Lessee for the operations of the Facility.

For the purposes of determining the Base Management Fee, "Gross Revenues" means, for any period, all revenues and income of any kind actually received directly and indirectly by Lessee during such period, including rental or other payment from concessionaires, licensees, tenants, and other users of the Facility managed by Manager pursuant to this Agreement, and from the sale of products and/or the furnishing of services, but excluding therefrom all bequests, gifts, or similar donations, as determined on an accrued basis in accordance with standard accounting procedures consistently applied, less any overpayments or repayments and further excluding:

(i) federal, state, and municipal excise, sales and use taxes collected directly from patients as a part of the sales prices of any goods or services;

(ii) proceeds of any life insurance policies;

(iii) gains or losses arising from the sale or other disposition of capital assets;

(iv) any reversal or accrual of any contingency or tax reserve;

(v) any discounts granted;

(vi) advances or other borrowed funds;

(vii) interest earned on sinking fund, special security accounts, bonds funds, etc. originally and specifically formed as a requirement of any bond issue (if any) utilized to finance the Facility; and

(viii) bad debt expense.

(b) An annual fee (the "Incentive Management Fee", together with the Base Management Fee, collectively, the "Management Fee") equal to twenty-five (25%) of the increase in EBITDARM for the Facility for each Fiscal Year (beginning with the Fiscal Year ending December 31, 2002) during the Term of this Agreement over the Base Year EBITDARM. The Incentive Management Fee shall be: (i) calculated and earned on an annual basis and (ii) paid to Manager on the first day of the calendar month following the date the annual audited financial statements for such Fiscal Year have been delivered to Lessee under Section 3.14 hereof. Notwithstanding the foregoing, in no event shall the total Incentive Management Fee paid to Manager for any particular Fiscal Year during the Term of this Agreement exceed an amount representing two percent (2%) of Gross Revenues of the Facility derived for such Fiscal Year. For any partial Fiscal Year that Manager manages the Facility during the Term, the Incentive Management Fee shall be calculated on a pro rata basis relative to the number of months that Manager managed the Facility during such Fiscal Year. For purposes of determining the Incentive Management Fee during any Fiscal Year where the Medicare reimbursement rates applicable to the Facility are less than the Medicare reimbursement rates utilized for the calculation of the Base Year EBITDARM, then the calculation of EBITDARM for the Facility for such Fiscal Year will utilize the higher Medicare reimbursement rates utilized for calculating the Base Year EBITDARM.

For purposes of determining the Incentive Management Fee, the following definitions shall apply:

"Base Year EBITDARM" means the EBITDARM for the Facility for the Fiscal year ending December 31, 2001.

"EBITDARM" means, for any period, the sum (determined on a consolidated basis for the Facility) of (i) net income (or net loss), (ii) interest expenses, (iii) income tax expenses, (iv) depreciation expenses, (v) amortization expenses, (vi) rent expenses and (vii) Management Fees.

"Fiscal Year" means the period from January 1 to December 31.

5.2 Carryover of Unpaid Management Fees. Notwithstanding the foregoing, the Management Fees (including any amount carried over pursuant to the succeeding sentence hereof) shall be payable only to the extent that the Facility Funds shall be sufficient as of the applicable date for payment. In the event that any portion of the Management Fees are not paid when due, interest shall accrue on such unpaid amount at a rate per annum equal to the prime rate of Citibank, N.A. then in effect, plus two percent (2%), and such total amount shall be carried over and be payable on the immediately succeeding Payment Date. When past due Management Fees are paid, the fees shall be paid in the order in which they were earned. Any and all accrued and unpaid Management Fees shall become immediately and fully payable by Lessee upon the expiration or any termination of this Agreement, regardless of the availability of Facility Funds.

ARTICLE VI

TERMINATION RIGHTS

6.1 Termination by Lessee. If at any time or from time to time during the Term any of the following events shall occur and, if applicable, not be remedied within the applicable period of time herein specified, namely:

(a) Manager shall apply for or consent to the appointment of a receiver, trustee, or liquidator of Manager of all or a substantial part of its assets, file a voluntary petition in bankruptcy, make a general assignment for the benefit of creditors, file a petition or an answer seeking reorganization or arrangement with creditors or take advantage of any insolvency law, or if an order, judgment or decree shall be entered by any court of competent jurisdiction, on the application of a creditor, adjudicating Manager as bankrupt or insolvent or approving a petition seeking reorganization of Manager or appointing a receiver, trustee or liquidator of Manager or of all or substantial part of its assets, and such order, judgment or decree shall continue unstayed and in effect for any period of sixty (60) consecutive days;

(b) Manager shall fail to keep, observe, or perform any material covenant, agreement, term or provision of this Agreement to be kept, observed, or performed by Manager, and such default shall continue for a period of thirty (30) days after written notice thereof by Lessee to Manager; or

(c) Manager shall, in the performance of its services hereunder, engage in self-dealing activities that involve terms and conditions that are not arms-length, commit fraud, or engage in any act (or any failure to act) that constitutes willful misconduct or gross negligence;

then in case of any such event and upon the expiration of the period of grace (if any) applicable thereto, this Agreement shall terminate at Lessee's option and upon five (5) days written notice to Manager. Notwithstanding the foregoing, Lessee may terminate this Agreement without cause and for no reason upon one hundred eighty (180) days prior written notice to Manager, which notice cannot be given sooner than one hundred eighty-five (185) days after the Commencement Date.

6.2 Termination by Manager. If at any time from time to time during the Term any of the following events shall occur and not be remedied within the applicable period of time herein specified, namely:

(a) Lessee shall fail to keep, observe, or perform any material covenant, agreement, term or provision of this Agreement to be kept, observed, or performed by Lessee (except for a payment default described in Section 6.2(b) below) and such default shall continue for a period of thirty (30) days after written notice thereof by Manager to Lessee;

(b) Lessee shall fail to make any payment required hereunder and such default shall continue for a period of thirty (30) days after written notice from Manager to Lessee;

(c) The Facility or any portion thereof shall be damaged or destroyed by fire or other casualty and (i) Lessee shall fail to undertake to repair, restore, rebuild, or replace any such damage or destruction with in forty-five (45) days after such fire or other casualty, or shall fail to complete such work diligently, and (ii) Lessee shall fail to permit Manager to undertake to repair, restore, rebuild, or replace, at Lessee's expense, any such damage or destruction within forty-five (45) days after such fire or other casualty;

(d) Lessee shall apply for or consent to the appointment of a receiver, trustee, or liquidator of Lessee or of all or a substantial part of its assets, file a voluntary petition in bankruptcy or admit in writing its inability to pay its debts as they become due, make a general assignment for the benefit of creditors, file a petition or any answer

seeking reorganization or arrangement with creditors or take advantage of any insolvency law, or if an order, judgment or decree shall be entered by a court of competent jurisdiction, on the application of a creditor, adjudicating Lessee bankrupt or appointing a receiver, trustee, or liquidator of Lessee with respect to all or substantial part of the assets of Lessee, and such order, judgment or decree shall continue unstayed and in effect for any period of sixty (60) consecutive days;

(e) All or any portion of any Management Fee which is earned (including interest accrued thereon) remains unpaid to Manager after the date that is ninety (90) days after the last day of the month to which such Management Fee relates; or

(f) The Facility is no longer covered by professional liability and general liability insurance policies;

then in case of any such event and upon the expiration of the period of grace (if any) applicable thereto, this Agreement shall terminate at Manager's option and upon five (5) days written notice to Lessee. Notwithstanding the foregoing, Manager may terminate this Agreement without cause and for no reason upon one hundred eighty (180) days prior written notice to Lessee, which notice cannot be given sooner than one hundred eighty-five (185) days after the Commencement Date.

6.3 Surviving Rights Upon Termination. If either party exercises its option to terminate pursuant to this Article VI, each party shall account for and pay to the other all sums due and owing pursuant to the terms of this Agreement within thirty (30) days after the effective date of termination. Without limiting the generality of the foregoing, within thirty (30) days after the effective date of termination of this Agreement, Lessee shall be obligated to pay to Manager all accrued and unpaid Base Management Fees, a pro rata portion of the Incentive Management Fees, and the reimbursable expenses of Manager, together with all accrued and unpaid interest thereon, notwithstanding the available Facility Funds may not be sufficient for such purposes. All other rights and obligations of the parties under this Agreement shall terminate (except as set forth in Article VII, Article VIII, Section 3.18, Section 6.3 and Section 6.4 hereof).

6.4 Cooperation After Termination. Upon the expiration or earlier termination of this Agreement, Manager shall cooperate fully with Lessee in effecting an orderly transition to avoid any interruption in the rendering of the above-described services to the Facility and, in such event, shall promptly surrender to Lessee or New Manager all keys, contracts, other documents and records maintained by Manager in connection with the operations of each Facility as soon as practical but in no event later than three (3) days from the Termination Date. In addition, upon the expiration or earlier termination of this Agreement, Manager shall return to Lessee or New Manager all original documents and all copies thereof, except for one copy which Manager may

maintain for record purposes only, which relate in any way to the performance of services hereunder, and the operation and maintenance of the Facility, including, without limitation, personnel records, resident records, purchase orders, material receiving reports, checks, vouchers, and all bills of accounts however maintained, whether in written form or magnetic media, in the possession, custody or control of Manager. Further, Manager shall cooperate fully with Lessee and Lessee's accountants and other representatives in respect of the preparation of annual financial statements or other reports that may be required for the Facility relating to Manager's operation of the Facility during the period covered by the Term of this Agreement; provided, however, that any requests of Manager made after the Termination Date that do not involve obligations of Manager already required under this Agreement but not as yet completed prior to the Termination Date, including, but not limited to, the delivery of any financial statements or information under Section 3.14 hereof, Manager will be reimbursed by Lessee for any of Manager's accrual and documented out of pocket expenses incurred and will be reasonably compensated by Lessee for any material efforts made at the request of Lessee.

6.5 No Personal Liability. The parties hereto agree that the liability of Lessee and Manager under the terms of this Agreement shall be limited solely to the assets of Lessee and Manager, it being intended that no officers, manager(s), director(s) or equityholder(s) of Lessee or officers, equityholders or directors of Manager shall be deemed personally liable for any judgment, costs or damages incurred by Manager or Lessee hereunder.

ARTICLE VII

INDEMNIFICATION; EXPENDITURE LIMITATION

7.1 Indemnification of Lessee by Manager. Manager shall indemnify and hold Lessee and Lessee's officers, directors, equityholders, members, managers, employees and affiliates harmless from any and all claims, losses, judgments, damages, expenses and liabilities whatsoever (including reasonable attorneys' fees) incurred by any of them in connection with, by reason of, or arising out of: (a) the breach or failure of any representation, warranty, covenant or obligation of Manager that is contained in this Agreement or (b) any third party claims which are caused by Manager in whole or in part through any negligent act, willful omission, fraud or self-dealing activities that involve terms and conditions that are not arms-length in connection with the performance of Manager's duties or obligations under this Agreement. Manager's obligations under this Section 7.1 shall survive termination of this Agreement.

7.2 Indemnification of Manager by Lessee. Lessee shall indemnify and hold Manager and Manager's officers, directors, equityholders, employees and affiliates harmless from any and all claims, losses, judgments, damages, expenses and liabilities

Defendants' R-RFP 0284

whatsoever (including reasonable attorneys' fees) incurred by any of them in connection with, by reason of, or arising out of: (a) Manager's performance of services or undertaking of responsibilities in compliance with the terms and conditions of this Agreement; (b) the breach or failure of any representation, warranty, covenant or obligation of Lessee that is contained in this Agreement; or (c) any damage to property, or injury or death to persons, occurring in or with respect to the Facility; excluding, however, for clauses (a), (b) and (c) any matters covered by Manager's indemnity under Section 7.1 hereof. Lessee's obligations under this Section 7.2 shall survive termination of this Agreement.

7.3 Control of Defense of Indemnifiable Claims. The indemnified party shall promptly notify the indemnifying party of any such claim and shall provide the indemnifying party with all available evidence to enable the indemnifying party to defend such claim. The indemnifying party shall have the sole and exclusive right to select counsel and shall pay all expenses of the defense, including, without limitation, attorneys' fees and court costs. If necessary, the indemnified party shall join as a party to the suit, but shall be under no obligation to participate except to the extent that such participation is required as a result of being a named party to the suit. The indemnified party shall offer reasonable assistance to the indemnifying party in connection therewith at no charge to the indemnifying party except for reimbursement of reasonable out-of-pocket expenses incurred by the indemnified party in rendering such assistance. The indemnified party shall have the right to participate and be represented in any such suit by its own counsel at its own expense. The indemnifying party shall not settle any such suit if such settlement would have an adverse effect on the rights of the indemnified party without obtaining the prior written consent of the indemnified party, which consent shall not be unreasonably withheld. It is the intention of the parties that, in the event that the indemnifying party wrongfully denies its indemnification obligations hereunder, and the indemnified party is required to enforce the indemnifying party's obligation hereunder, then the indemnified party shall be entitled to recover its reasonable attorneys' fees and costs incurred therein.

7.4 Limitation of Expenditure Obligation. Notwithstanding anything to the contrary in this Agreement, Manager shall have no obligation whatsoever to make any advance to or for the account of Lessee, or to pay any amount contemplated for, or required of, Manager under this Agreement, or to incur any expenditure obligation – whether ordinary or capital – except to the extent that funds are available for such purpose (in Manager's reasonable judgment) either from working capital or capital funds provided by Lessee or otherwise from the Facility Funds. Moreover, if Manager so requests, from time to time, Lessee shall sign, as principal, any contract or agreement which Manager is authorized or required to execute pursuant to this Agreement to evidence that Manager is acting solely as Lessee's agent and not as principal.

ARTICLE VIII

CONFIDENTIALITY; NON-SOLICITATION

8.1 Non-Disclosure of Confidential Information. Lessee acknowledges that Manager's business involves the development and use of Confidential Information (defined below) and that Manager will make available such Confidential Information to Lessee and to the Facility in connection with Manager's duties under this Agreement. Manager acknowledges that Lessee and the Facility business involves the development and use of Confidential Information and that Lessee and the Facility will make available such Confidential Information to Manager in connection with Manager's duties under this Agreement. Except as Lessee and Manager may disclose to landlords to the Facility or the holders of secured debt on the Facility or to its respective lenders, investors or advisors or in fulfillment of their duties and responsibilities under this Agreement or as may be required to be disclosed by Lessee, the Facility and Manager by law, the parties and their respective officers, directors, employees or agents shall not, at any time during or after the term of this Agreement, divulge, furnish or make accessible Confidential Information to any person or entity for any purpose whatsoever. "Confidential Information" means any confidential or proprietary information, including, without limitation, manuals, forms, policies and procedures, computer programs, system documentation and related software, patient records and patient information and any other information of any kind with respect to the finances, business plans or business operations of the parties, provided, however that Confidential Information does not include information which (a) is generally available to the public other than as a result of disclosure by the receiving party, (b) was available to the receiving party on a non-confidential basis prior to its disclosure to the receiving party by the disclosing party, or (c) becomes available to the receiving party on a non-confidential basis from a source other than the disclosing party.

8.2 Non-use and Return of Materials. Effective upon a termination of this Agreement for any reason whatsoever, the parties and their respective officers, directors, managers, employees and agents shall not use any Confidential Information of the other party for any purpose whatsoever, including, but not limited to, use in connection with the operation and management of the Facility.

8.3 Non-Solicitation. Lessee and Manager agree that for the entire Term of this Agreement and for twelve (12) months after the date that this Agreement is terminated, (a) Lessee shall not entice, induce, directly or indirectly, any employee to leave the employ of Manager to work with or for Lessee, or to work with any persons or entity with whom Lessee become affiliated, and (b) Manager shall not entice or induce, directly or indirectly, any employee to leave the employ of Lessee to work with or for Manager, or to work with any other person or entity with whom Manager is or becomes affiliated.

8.4 Remedies. The parties agree that an aggrieved party who is the beneficiary of any restriction contained herein may not be adequately compensated for damages for a breach of the covenants contained in this Article VIII, and such aggrieved party shall be entitled to injunctive relief and specific performance in addition to all other remedies. If a court of competent jurisdiction shall finally determine that the restraints provided for in this Article VIII, are too broad as to the activity, geographic area or time covered, said activity, geographic area or time covered will be reduced to whatever extent the court deems necessary, and such covenant shall be enforced as to such reduced activity, geographic area or time period.

ARTICLE IX

REPRESENTATIONS AND WARRANTIES

9.1 Organization and Standing of Lessee. Lessee represents and warrants to Manager that it is duly incorporated or organized, validly existing and in good standing under the laws of the state of its incorporation or organization. Lessee has the limited liability company power and authority to own the property and assets now owned by it and to conduct the business presently being conducted by it.

9.2 Absence of Conflicting Agreements. Lessee represents and warrants to Manager that neither the execution or delivery of this Agreement or any of the other instruments and documents required or contemplated hereby (collectively, the "Transaction Documents"), nor the performance by it of the transactions contemplated hereby and thereby, conflicts with, or constitutes a breach of or a default or requires the consent of any third party (except consents already obtained) under (a) the Articles of Incorporation, Bylaws, Partnership Agreement or Limited Liability Company Agreement of it; or (b) to the best of its knowledge, any applicable law, rule, judgment, order, writ, injunction, or decree of any court, currently in effect; or (c) to the best of its knowledge, any applicable rule or regulation of any administrative agency or other governmental authority currently in effect; or (d) any agreement, indenture, contract or instruments to which it is now a party or by which it assets are bound.

9.3 Organizing and Standing of Manager. Manager represents and warrants to Lessee that Manager is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware. Manager has the limited liability company power and authority to own the property and assets now owned by it and to conduct the business presently being conducted by it.

9.4 Absence of Conflicting Agreements. Manager represents and warrants to Lessee that neither the execution or delivery of this Agreement or any of the Transaction Documents by Manager, nor the performance by Manager of the

transactions contemplated hereby and thereby, conflicts with, or constitutes a breach of or a default or requires the consent of any third party (except consents already obtained) under (a) the Certificate of Formation or Limited Liability Company Agreement of Manager; or (b) to the best of its knowledge, any applicable law, rule, judgment, order, writ, injunction, or decree of any court, currently in effect; or (c) to the best of its knowledge, any applicable rule or regulation of any administrative agency or other governmental authority currently in effect; or (d) any agreement, indenture, contract or instrument of which Manager is now a party or by which the assets of Manager are bound.

ARTICLE X

SUCCESSORS AND ASSIGNS

10.1 Assignments by Manager. Manager, without the consent of Lessee, shall have the right to assign this Agreement to a wholly or majority owned subsidiary of Manager; provided, however, that Manager shall not thereby be released from its obligations hereunder. In the event that all or substantially all the assets of Manager or its equity securities shall during the term of this Agreement be acquired by another corporation or other entity (hereinafter referred to as the "Acquiring Corporation") as a result of a merger, consolidation, reorganization, or other transaction, and the Acquiring Corporation assumes all of the obligations of Manager then accrued hereunder, if any, then Manager shall be relieved of all such obligations (and such Acquiring Corporation shall be relieved of liability hereunder if it subsequently is involved in such acquisition). Except as otherwise permitted herein, Manager shall have no right to assign this Agreement.

10.2 Sale, Assignment or Sublease by Lessee: Related Matters. Any sale, sublease, or assignment with respect to any Facility, other than to Manager, shall be expressly subject to the terms and provisions of this Agreement and shall not relieve Lessee of their liability or obligations hereunder, and Lessee shall cause any purchaser, assignee, or sublessee to deliver to Manager written acknowledgment of its agreement to perform hereunder including the payment of the Management Fees described herein.

10.3 Binding Effect. This Agreement shall be binding upon the respective successors, assigns and legal representatives of the parties hereto and shall inure to the benefit of and be enforceable by the parties hereto and their respective successors, assigns and legal representatives.

ARTICLE XI

MISCELLANEOUS PROVISIONS

11.1 Notices. Any notice or communication by any party to the other shall be in writing and shall be given and be deemed to have been duly given, upon the date delivered if delivered personally (including by commercial express service or by facsimile transmission (with a copy sent by regular mail)) or upon the date received if mailed postage pre-paid, registered express, or certified mail, addressed as follows:

To Manager:

THI of Baltimore Management, LLC
4660 Trindle Road, Suite 103
Camp Hill, Pennsylvania 17011
Attention: Anthony F. Misitano
Facsimile Number: 717-730-8722

To Lessee:

THI of South Carolina at Magnolia Place at Spartanburg, LLC
c/o THI of Baltimore, Inc.
4660 Trindle Road, Suite 103
Camp Hill, Pennsylvania 17011
Attention: President
Facsimile Number: 717-730-8722

or to such other address, and to the attention of such other person or officer as any party may designate in writing by notice.

11.2 No Partnership or Joint Venture. Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between Lessee, its successors, or assigns on the one part and Manager, its successors, or assigns on the other part. Notwithstanding the foregoing, the parties hereby agree that they shall each have a duty to act in good faith and to deal fairly with the other party hereto.

11.3 Modifications and Changes. This Agreement cannot be changed or modified except by another agreement in writing signed by Lessee and Manager.

11.4 Understanding and Agreements. This Agreement constitutes the entire understanding and agreement of whatsoever nature or kind existing between the parties with respect to Manager's management of the Facility and all prior negotiation and agreements (if any) pertaining to the subject matter hereof are merged into this Agreement.

Defendants' R-RFP 0289

11.5 Headings, Etc. The article and paragraph headings contained herein are for convenience of reference only and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.

11.6 Approval of Consent. Whenever under any provisions of this Agreement, the approval or consent of each party is required, the decision thereon shall be promptly given and such approval or consent shall not be unreasonably withheld, unless this Agreement expressly provides that a decision shall be made in a party's sole discretion. It is further understood and agreed that whenever under any provisions of this Agreement the approval or consent or Lessee is required, such approval or consent shall be given by Lessee. For all purposes under this Agreement, Manager shall determine solely from the latest such notification received by it the person or persons authorized to give such approval or consent. Manager shall rely exclusively and conclusively on the designation set forth in such notification, notwithstanding any notice of knowledge to the contrary.

11.7 Governing Law. THIS AGREEMENT SHALL BE DEEMED TO HAVE BEEN MADE AND SHALL BE CONSTRUED AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, WITHOUT REGARD TO ITS LAWS REGARDING CONFLICTS OF LAW. THE PARTIES HERETO AGREE THAT ANY SUIT, ACTION OR OTHER LEGAL PROCEEDING IN CONNECTION WITH THIS AGREEMENT SHALL BE BROUGHT IN THE COURTS OF CUMBERLAND COUNTY, COMMONWEALTH OF PENNSYLVANIA OR IN THE COURTS OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA. THE PARTIES HERETO WAIVE ANY OBJECTION TO SUCH JURISDICTION AND VENUE IN ANY OF SUCH COURTS.

11.8 Enforceability. Should any provision of this Agreement be unenforceable as among the parties, such unenforceability shall not affect the enforceability of the other provisions of this Agreement.

11.9 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

11.10 No Personal Liability. The parties hereto agree that the liability of Lessee and Manager under the terms of this Agreement shall be limited solely to assets of Lessee and Manager, it being intended that no officers, directors or equityholders of Lessee or officers, equityholders or directors of Manager shall be deemed personally liable for any judgment, costs or damages incurred by Manager or Lessee hereunder.

* * * * *

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Management Services Agreement as of the date first above written.

MANAGER:

THI of Baltimore Management, LLC

By: _____
Name: JEFFREY A. BARNHILL
Title: VICE PRESIDENT, TREASURER & ASSISTANT SECRETARY

LESSEE:

THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT SPARTANBURG, LLC

By: _____
Name: JEFFREY A. BARNHILL
Title: VICE PRESIDENT, TREASURER & ASSISTANT SECRETARY

RECEIVED
SEP 18 2006
SC DHEC
Health Licensing

QQ 9/19
RC 9/19
NM 9/19
Pam ____
change for each name of mgt.

Arent Fox
ATTORNEYS AT LAW

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

Reference Number
026644-00022

September 14, 2006

VIA FEDEX

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

RECEIVED
SEP 15 2006
HEALTH FACILITIES AND
SERVICES DEVELOPMENT

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

PLAINTIFF'S EXHIBIT 16
Blumberg No. 5113

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

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

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 _____, 2006

by and between

Fundamental Clinical Consulting, LLC
(CONTRACTOR)

and

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

8020 White Avenue
Spartanburg, SC 29303

PLAINTIFF'S EXHIBIT 17

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 data base.

(e) Provide such other services as shall be mutually agreed upon by Contractor and Operator.

CONFIDENTIAL
MORROW/THI D- 1616

ADMINISTRATIVE SUPPORT AGREEMENT

DATED AS OF [illegible], 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

MOR

PLAINTIFF'S EXHIBIT 18

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.

CONFIDENTIAL
MORROW/THI D- 1599

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG 2007-CP-42-606

ASHLEY BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILHELMINA BROWN, DECEASED, AND AS REPRESENTATIVE OF STATUTORY BENEFICIARIES,

PLAINTIFF,

VERSUS

THI OF BALTIMORE, 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.

DEPOSITION OF ROBERT LEE CROOKS, JR.

PURSUANT TO NOTICE AND/OR AGREEMENT, THE DEPOSITION OF ROBERT LEE CROOKS, JR. WAS CALLED BY THE PLAINTIFF ON THE 13TH DAY OF NOVEMBER, 2008, COMMENCING AT THE HOUR OF 11:20 A.M., AT THE LAW OFFICES OF HOLCOMBE BOMAR, 200 DUNBAR STREET, SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS FOLLOWS:

DIXY MOORE TURNER

CERTIFIED VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.

836 SHORESBROOK DRIVE

SPARTANBURG, S.C. 29301-6515

864-574-1313

Blumberg No. 5113
PLAINTIFF'S EXHIBIT 19

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GOING TO BE ON IT FOR A WHILE. SO THAT'S WHERE THIS IS FROM. AND THIS -- LET ME JUST REPRESENT TO YOU THAT THIS MANUAL WAS PROVIDED TO ME BY THE DEFENDANTS, AND ONE OF THE THINGS THAT WAS INCLUDED IN THIS IS A LETTER TO PAT HARRIS SAYING, HEY, YOU KNOW, WELCOME TO THE FACILITY IN 2006.
A. RIGHT.
Q. SO MY ASSUMPTION IS THAT THIS IS THE MANUAL THAT WAS PROVIDED TO HER. IT HAD SOME NOTES OF HERS, SOME HIGHLIGHTS OF HERS, AND THAT SORT OF THING. SO ON THIS PARTICULAR IT SEEMS TO BE A LETTER FROM BRADLEY BENNETT, AND IT SAYS PRESIDENT AND CHIEF EXECUTIVE OFFICER. DO YOU KNOW THE PRESIDENT AND CHIEF EXECUTIVE OFFICER OF WHAT?
A. FUNDAMENTAL CONSULTING.
Q. OKAY. SO HE'S THE PRESIDENT OF FUNDAMENTAL CONSULTING? CLINICAL CONSULTING?
A. I'M NOT SURE, TO BE HONEST.
Q. OKAY. BUT HE'S SOMEHOW INVOLVED WITH FUNDAMENTAL? IS THAT YOUR UNDERSTANDING?
A. YES.
Q. OKAY. AND AT THE TOP OF THIS LETTER IT SAYS, "YOU WILL BE A PART OF A NATIONWIDE NETWORK OF PATIENT CARE CENTERS INCLUDING SKILLED NURSING FACILITIES." WOULD YOU AGREE THAT MAGNOLIA PLACE IS PART OF A

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NATIONWIDE NETWORK OF PATIENT CARE CENTERS?
A. IT IS. YOU KNOW, A FACILITY THAT HAS SISTER FACILITIES WITH IT, YES, IN VARIOUS STATES.
Q. MOST OF WHICH ARE SKILLED NURSING FACILITIES? WOULD YOU AGREE WITH THAT?
A. THE MAJORITY, YES.
Q. HAVE YOU EVER HEARD OF THE TRANSHEALTH QUICK START PROGRAM?
A. NO. ON THE NET THERE FROM FUNDAMENTAL THERE ARE QUICK STARTS FOR NURSES. LET'S SEE. I BELIEVE THERE'S ONE -- I'M NOT SURE. THERE'S SEVERAL OTHER ---
(MARKED PLAINTIFF'S EXHIBIT NUMBER FOUR - EXCERPT FROM RESOURCE MANUAL - ATTACHED)
EXAMINATION RESUMED BY MS. HARRILL:
Q. LOOK AT EXHIBIT FOUR FOR ME REAL QUICK.
A. UH-HUH (AFFIRMATIVE RESPONSE.)
Q. DOES THAT LOOK FAMILIAR TO YOU? AND I'M SAYING THAT SAYS "TRANSHEALTH QUICK START PROGRAM" AND IT LOOKS LIKE IT'S -- THIS WAS CONTAINED IN THAT MANUAL FOR PAT HARRIS. AND IT LOOKS TO ME LIKE SORT OF AN ADMINISTRATOR QUICK START PROGRAM. DO YOU ALL USE THIS?
A. I DO NOT.
Q. OKAY. SO YOU'VE NOT SEEN THIS BEFORE?

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A. NO, MA'AM.
(MARKED PLAINTIFF'S EXHIBIT NUMBER FIVE - EXCERPT FROM RESOURCE MANUAL - ATTACHED)
EXAMINATION RESUMED BY MS. HARRILL:
Q. MR. CROOKS, IF YOU WOULD LOOK AT PLAINTIFF'S EXHIBIT FIVE FOR ME FROM THE SAME MANUAL. AND AGAIN, I APOLOGIZE FOR THE QUALITY IF THIS COPY. BUT THIS CAME FROM A SECTION TITLED -- IN THAT MANUAL TITLED COMPANY OVERVIEW.
A. UH-HUH (AFFIRMATIVE RESPONSE.)
Q. HAVE YOU SEEN THIS? I GUESS WE'LL START WITH THIS PAGE. HAVE YOU SEEN THIS PAGE BEFORE? DOES IT LOOK FAMILIAR TO YOU? BECAUSE THERE'S A WHOLE SECTION IN HERE. ACTUALLY IT'S SEVERAL DIFFERENT SECTIONS.
A. I HAVE SEEN BITS AND PIECES, ESPECIALLY WHEN WE DID TRAININGS ON REPORTS AND THESE.
Q. OKAY. SO YOU MIGHT HAVE SEEN ---
A. IT LOOKS LIKE A ...
Q. A POWERPOINT?
A. YEAH.
Q. THAT'S WHAT IT LOOKED LIKE TO ME, TOO. PART OF A POWERPOINT. THE WAY I'VE BEEN DOING THIS, AND IT'S THE ONLY WAY I KNOW TO DO IT, IS TO SAY THAT -- SINCE THIS IS LIKE A POWERPOINT PRESENTATION, TO SAY THIS IS SLIDE ONE, TWO, THREE, FOUR, FIVE AND SIX.

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A. UH-HUH (AFFIRMATIVE RESPONSE.)
Q. OKAY. SO IF YOU LOOK AT SLIDE NUMBER FIVE, IT SAYS THI KEY EXECUTIVES FIELD OPERATIONS.
A. UH-HUH (AFFIRMATIVE RESPONSE.)
Q. DOES THAT LOOK ACCURATE TO YOU FOR 2005 AND 2006, AS BEST YOU CAN RECALL?
A. YES, MA'AM.
Q. AND AS BEST YOU CAN READ IT, SINCE IT'S TEENY TINY.
A. YEAH, I CAN SEE. MY ARM CAN REACH SO FAR.
Q. IF YOU LOOK ON PAGE THREE. AND THESE ARE BATES NUMBERED, BUT I'M JUST GOING TO GO BY THE PAGE NUMBER.
A. THAT'S FINE.
Q. PAGE THREE WOULD BE THE THIRD SLIDE. IT TALKS ABOUT COST CONTROL.
A. YES.
Q. TALK TO ME ABOUT -- IT SAYS CONTROL PER PATIENT PER DAY COSTS BY DAILY ADJUSTING BUDGETS TO CENSUS FLUCTUATIONS. CAN YOU EXPLAIN HOW THAT WORKS?
A. THAT'S ONLY PER PATIENT DAY. YOU KNOW, THAT'S BASED ON THEIR BUDGETS PREPARED BY THE FACILITIES THAT THEY INTEND TO OPERATE BY.
Q. OKAY. AND SO, AS THEIR CENSUS FLUCTUATES, THEN DO THEY ADJUST THE BUDGET NUMBERS?
A. NO. BUDGET -- PPD STAYS THE SAME, AS FAR AS X-

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YOU KNOW.
Q. BUT WHO ESTABLISHES THE POLICIES AND PROCEDURES THAT SAY, YOU KNOW, HOW ONE CAN BE HIRED, OR WHO CAN BE HIRED, OR WHO COULD NOT BE HIRED? ARE THERE POLICIES AND PROCEDURES IN PLACE FOR THAT?
A. WELL, OBVIOUSLY BY REGULATION, YOU KNOW. YOU'VE GOT TO CHECK SLED CHECKS. YOU'VE GOT TO CHECK LICENSES. SO THOSE KINDS OF THINGS WOULD VOID OUT ANYBODY. IN THE APPLICATION YOU'RE CHECKING ALL THOSE ISSUES BEFORE YOU CAN HIRE, AND THAT'S STATED BY LAW.
Q. AND WHO SETS THE POLICIES ON FIRING?
A. THE ADMINISTRATOR. I MEAN, IF THERE ARE ISSUES THAT SOMEONE VIOLATES. AND AGAIN, IT DEPENDS ON SEVERITY.
Q. IF YOU HAVE AN EMPLOYEE THAT'S FIRED FROM ONE OF YOUR FACILITIES - - SAY YOU HAVE AN EMPLOYEE THAT'S FIRED FROM MAGNOLIA PLACE - - -
A. UH-HUH (AFFIRMATIVE RESPONSE.)
Q. - - - COULD THEY THEN GO AND WORK AT MAGNOLIA MANOR DOMAN?
A. SHOULDN'T. I MEAN, BECAUSE YOU'RE - - YOU KNOW, YOU CAN'T REVEAL THAT. ALL YOU CAN SAY IS THEY WERE LAST EMPLOYED. IF THEY DON'T PUT IT ON THE STATEMENT, WE DON'T KNOW - - OR APPLICATION. EXCUSE ME.

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Q. IF YOU HAD A QUESTION ABOUT THE OPERATION OF A FACILITY, WHO WOULD YOU GO TO TO ANSWER THAT QUESTION?
BY MR. BOULIER:
OBJECT TO THE FORM OF THE QUESTION.
WITNESS ANSWERS:
A. I'D START WITH THE ADMINISTRATOR IF - - -
Q. AND IF THEY DIDN'T KNOW THEN WHERE WOULD YOU GO?
A. DEPENDING ON THE QUESTION I HAD TOO. WOULD IT BE NURSING, OR IF IT'S DIETARY, OR WHAT.
Q. IF IT WERE A NURSING QUESTION WHO WOULD YOU GO TO?
A. DIRECTOR OF NURSES, I GUESS.
Q. WHAT IF THE DIRECTOR OF NURSING DIDN'T KNOW?
A. WE WOULD INVESTIGATE TO FIND OUT. I'D HAVE MARSHA GO IN.
Q. OKAY. DO ALL OF THE FACILITIES THAT YOU WERE RESPONSIBLE FOR, THEY HAVE THE SAME POLICIES AND PROCEDURES?
A. YES.
Q. AND I THINK WE TALKED ABOUT THIS A MINUTE AGO. YOU DON'T HAVE ONE I.T. PERSON THAT YOU CONTACT, IS THAT CORRECT?
A. CORRECT.
Q. IT'S JUST I.T. IN MARYLAND THAT YOU WOULD CONTACT?
A. CORRECT.

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Q. HAS THAT CHANGED ANY SINCE 2005?
A. NOT TO MY KNOWLEDGE.
Q. I MEAN, IT'S ALWAYS BEEN THE SAME PEOPLE YOU'VE CALLED; IS THAT CORRECT?
A. YES. SAME NUMBER. THEY MAY HAVE DIFFERENT PEOPLE HANDLING DIFFERENT THINGS.
Q. DO YOU HAVE ANY IDEA WHERE MAGNOLIA PLACE BUYS FOOD?
A. CISCO.
Q. WHAT ABOUT LINEN SUPPLIES, DO YOU KNOW?
A. IT COULD BE VARIOUS VENDORS.
Q. YOU DON'T KNOW SPECIFICALLY?
A. NOT TO MY KNOWLEDGE.
Q. WHAT ABOUT LIKE MATTRESSES?
A. THERE ARE VARIOUS VENDORS ON THE DSSI PORTAL THAT THEY CAN BUY FROM.
Q. ARE YOU IN ANY WAY INVOLVED IN RESOLVING GRIEVANCES?
BY MR. BOULIER:
OBJECT TO THE FORM OF THE QUESTION.
WITNESS ANSWERS:
A. NO. THAT'S DONE IN THE FACILITY.
Q. IS THAT THE SAME AS COMPLAINTS?
A. RIGHT.
Q. DO YOU EVER MEET WITH RESIDENTS OR THEIR FAMILIES?
A. I DON'T - - I MEAN, INFORMALLY I SEE THEM AND TALK TO THEM WHEN I'M IN BUILDINGS. I DON'T HAVE PLANNED

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MEETINGS WITH THEM, UNLESS THEY ASK ME TO.
Q. IF SOMEBODY HAS A COMPLAINT ABOUT THE ADMINISTRATOR, WOULD THEY BRING THAT TO YOU?
A. WELL, IF THEY KNEW TO, YES. BUT USUALLY THAT WOULD GO THROUGH PROBABLY THE HOTLINE. THEY HAVE THAT ACCESSIBILITY.
Q. ARE YOU AWARE OF ANY COMPLAINTS AGAINST THE ADMINISTRATOR SINCE 2003?
BY MR. BOULIER:
OBJECT TO THE FORM OF THE QUESTION.
WITNESS ANSWERS:
A. NO.
Q. DO YOU MAKE SURE THAT ALL THE STAFF ARE EVALUATED EVERY YEAR? DO YOU MAKE SURE THAT ALL OF THE STAFF ARE EVALUATED EVERY YEAR? IS THAT YOUR RESPONSIBILITY?
BY MR. BOULIER:
OBJECT TO THE FORM OF THE QUESTION.
WITNESS ANSWERS:
A. THAT WOULD BE AN HR FUNCTION.
Q. DID YOU TELL ME WHO WAS HEAD OF HR IN THAT FACILITY? DO YOU KNOW?
A. I DON'T KNOW. SOMEONE WOULD BE ASSIGNED TO THAT. I HAVE AN HR REGIONAL PERSON.
Q. WHO IS THE HR REGIONAL PERSON?

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A. (NODS HEAD.)
BY MR. BOULIER:
YOU NEED TO ANSWER OUT LOUD.
EXAMINATION RESUMED BY MS. HARRILL:
Q. AND ARE YOU RESPONSIBLE FOR REVIEWING AND APPROVING THE FACILITY'S ANNUAL BUDGET?
A. YES.
Q. AND ARE YOU RESPONSIBLE FOR REVIEWING AND APPROVING THE CAPITAL EXPENDITURE PLAN?
A. I'M PART OF THAT PROCESS, YES.
Q. WHO ELSE IS PART OF THAT PROCESS?
A. WELL, THAT WOULD - - I DO APPROVE IT, AND IT GOES TO THE REGIONAL GUY TO - - THAT CONTROLS THE CASH. IN OTHER WORDS, HOW WE WOULD SET UP WHATEVER CONTRACTORS, AND THERE ARE TIMES THAT WE MAY NOT BE ABLE TO DO IT, YOU KNOW. THESE ARE PLANS THAT WE - WOULD LIKE TO DO.
Q. RIGHT. WHEN YOU SAY THE REGIONAL GUY WHO CONTROLS THE CASH, WHO IS THAT?
A. WELL, I HAVE A MAINTENANCE FELLOW THAT - - CONSTRUCTION. SO WE WOULD BE LOOKING AT IT TOGETHER FOR FEASIBILITIES AND GUESSTIMATES BASICALLY, BECAUSE YOU KIND OF GET IDEAS OF WHAT SOMETHING MAY COST YOU, BUT YOU DON'T KNOW UNTIL YOU GET BIDS.
Q. SO THIS IS PRIMARILY GOING TO BE RELATED TO UPGRADES

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OR UPKEEP OF THE BUILDING?
A. YES, MA'AM.
Q. AND IT SAYS HERE THAT YOU WOULD OBTAIN GOVERNING BODY APPROVAL. SINCE YOU ARE A MEMBER OF THE GOVERNING BODY - - -
A. THAT'S ME.
Q. YEAH. SO YOU DON'T HAVE TO GO TO ANYBODY FOR THAT APPROVAL BECAUSE IT'S YOU, IS THAT CORRECT?
A. ONLY THOSE THAT HOLD THE MONEY SO I CAN MAKE SURE WE GOT IT.
Q. AND WHO WOULD THAT BE? I MEAN, WHO WOULD YOU HAVE TO GO TO FOR MONEY?
A. WELL AGAIN, THERE ARE, YOU KNOW, FUNDS SET ASIDE EACH YEAR, YOU TRY TO ON CERTAIN DOLLARS PER BED, TO DO JUST GENERAL IMPROVEMENTS: PAINT, POWDER, AND REALLY I DON'T HAVE TO GO IN ANYWAY, BUT THERE ARE ACCOUNTS WHERE WE - - OBVIOUSLY WE WOULD PROCESS THROUGH AS YOU WOULD CALL AP, AND SUBMIT THOSE TO BE PAID. SO, YOU KNOW, IT'S BASICALLY - - IF THE MONEY IS - - THAT THE FACILITY HAS, CAN WE DO THESE THINGS WITH THEIR INCOME OR BORROW IT. SO...
Q. WHEN YOU TALK ABOUT THE MONEY THAT THE FACILITY HAS, IS THAT IN A BANK ACCOUNT WITH MAGNOLIA PLACE'S NAME ON IT, OR - - -
A. I COULDN'T - - IT'S DEPOSITED.

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Q. OKAY. I WANT TO TALK A LITTLE BIT ABOUT SORT OF THE STRUCTURE OF DIVISIONS AND REGIONS AND THAT SORT OF THING.
A. UH-HUH (AFFIRMATIVE RESPONSE.)
Q. AND I DON'T - - I MEAN, IT MAY NOT HELP YOU, IT MAY HELP YOU. I ACTUALLY STARTED ON PAGE 18 - - LET'S SEE. I THINK IT'S 1805. IT'S NOT. IT'S 1806. THERE'S A TRANSHEALTH FACILITY LISTING. IT STARTS ON PAGE 1806. AND ON 1807 IT TALKS ABOUT DIVISION TWO. AND YOU'RE INCLUDED IN DIVISION TWO - - -
A. YES.
Q. - - - AS THE RDO.
A. RIGHT.
Q. SO DIVISION TWO SAYS IT'S 53 FACILITIES. DOES THAT SOUND RIGHT TO YOU? IS THAT STILL CORRECT?
A. I ONLY KNOW MINE. MARK MCKENZIE COULD TELL YOU THE REST.
Q. OKAY. AND HE'S THE VICE-PRESIDENT OF OPERATIONS; IS THAT CORRECT? MARK MCKENZIE?
A. RIGHT. AND THAT'S WHO I'D BE SENDING REQUESTS TO AS FAR AS MAJOR CAPITAL.
Q. OKAY. NOW, WHEN YOU LOOK AT WHERE YOUR NAME IS AND IT LISTS ALL THOSE FACILITIES, IT ALSO INCLUDES HILLTOP LAUNDRY. WHAT IS SOUTH CAROLINA HILLTOP LAUNDRY? IS THAT JUST YOU ALL'S LAUNDRY FACILITY OR

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- - -
A. IT'S - - YEAH. RIGHT THERE NEXT TO THE FACILITY THAT WE'RE DISCUSSING. IT ONLY OPERATES THE BED LINENS FOR SPARTANBURG AND DUNCAN FACILITIES WHERE WE DO THE WASHING. PERSONAL ITEMS ARE DONE AT THE FACILITY.
Q. OKAY. SO THEY JUST DO TOWELS, AND SHEETS, AND THAT SORT OF THING?
A. YES, MA'AM.
Q. AND JUST FOR THE UPSTATE FACILITIES OR - - -
A. CORRECT.
Q. OKAY. AND ARE ALL THESE FACILITIES INCLUDED IN YOUR REGION STILL?
A. WELL, LET'S SEE. NO.
Q. WHO IS NO LONGER - - -
A. INTERMEDIATE HEALTHCARE STAFFING.
Q. OKAY. WHICH WAS - - AND WE CAN AGREE THAT WASN'T A FACILITY ACTUALLY?
A. NO, AND NEITHER - - IT'S LIKE LAUNDRY. IT HELPED - - WELL, IT REALLY DIDN'T HELP. IT WAS ACTUALLY A STAFFING AGENCY FOR THE FACILITIES.
Q. SO IF - - -
A. I DON'T OPERATE IT ANYMORE. WE CLOSED IT. AND THEN - - LET'S SEE. DO I HAVE EVERYBODY? THAT'S IT.
Q. SO NOBODY ADDITIONAL ON THAT LIST?

Q. OKAY, AND WHAT WOULD INFLUENCE ACUITY LEVEL OF A RESIDENT?

A. LIKE IF THEY HAD A G-TUBE OR THEY WERE ON OXYGEN AND IF THEY NEEDED, YOU KNOW, HELP ALL THE TIME, ASSISTANCE, OR IF THEY WERE TOTALLY DEPENDENT.

Q. HAVE YOU EVER TRIED TO DETERMINE THE ACUITY LEVEL OF THE RESIDENTS IN YOUR FACILITY?

BY MR. McDONALD:

OBJECT TO THE FORM; GO AHEAD.

WITNESS ANSWERS:

A. NO. CAN I GO BACK TO THAT?

EXAMINATION RESUMED BY MS. HARRILL:

Q. OF COURSE, YOU CAN.

A. I HAVE TRIED ON A -- LIKE A GROUP, A SMALL GROUP, AND SAY, YOU KNOW, WE NEED TO CHANGE ONE TO ANOTHER GROUP BECAUSE THEIR ACUITY LEVEL IS HIGH ON THIS GROUP.

Q. OKAY. WHAT'S THE PROCESS YOU WOULD GO THROUGH TO DETERMINE THAT?

A. WELL, I'D LOOK AND SEE HOW MANY PEOPLE WERE TOTAL CARE.

Q. OKAY, LIKE ON A GIVEN UNIT?

A. YES, MA'AM, IN A GIVEN GROUP.

Q. IN A GROUP, LIKE A CNA GROUP?

A. LIKE A CNA GROUP, AND HOW LONG IT TOOK TO TAKE CARE

A. FIVE DAYS A WEEK.
Q. SO, YOU HAVE A LONG MEETING ON MONDAY?
A. YEAH.
Q. DO YOU AGREE THAT DOCUMENTATION IN A RESIDENT'S CHART IS IMPORTANT?
A. YES, MA'AM.
Q. WHAT'S THE PURPOSE OF DOCUMENTATION?
A. THE PURPOSE OF DOCUMENTATION IS TO PROVE THAT -- THAT IT HAPPENED, AND THE DOCTOR NEEDS IT TO KNOW HOW TO TREAT THE RESIDENT. HE CAN, AFTER HE NEEDS IT, TO KNOW HOW TO TREAT THE RESIDENT. PLUS THE MDS COORDINATOR NEEDS IT TO -- TO MAKE THEIR CARE PLAN.
Q. WHO WAS THE MDS COORDINATOR?
A. AT THAT TIME?
Q. YES.
A. I BELIEVE IT WAS TRACEY WALL.
Q. DO YOU AGREE THAT DOCUMENTATION MUST BE TIMELY, ACCURATE, AND COMPLETE?
A. YES, MA'AM.
Q. DO YOU AGREE THAT DOCUMENTATION MUST BE LEGIBLE?
A. YES, MA'AM.
Q. ARE YOU INVOLVED WITH BUDGETING IN YOUR FACILITY?
A. NO, MA'AM. I TELL MY ADMINISTRATOR IF I NEED ANOTHER NURSE WHEN SHE GETS READY TO DO THE BUDGET, OR WHAT I NEED, AND THEN SHE PUTS IN FOR IT.

Q. HAVE YOU EVER REQUESTED ANOTHER NURSE AND NOT GOTTEN HER?

A. YES, MA'AM.

Q. DO YOU KNOW IF CENSUS AND ACUITY DATA IS USED FOR DEVELOPING A BUDGET?

BY MR. McDONALD:

OBJECT TO THE FORM.

WITNESS ANSWERS:

A. I DON'T KNOW, BUT I'M SURE IT IS.

EXAMINATION RESUMED BY MS. HARRILL:

Q. WE TALKED A MINUTE AGO ABOUT ONE OF THE REPORTS, A CLINICAL MATRIX MONTHLY.

A. MM-HMM. (AFFIRMATIVE RESPONSE).

Q. DOES THAT PROVIDE LIKE A SUMMARY INFORMATION ON A DAILY CENSUS, AND DOES IT INCLUDE ACUITY? IS THAT CENSUS AND ACUITY INCLUDED?

A. NO.

Q. ON THE MATRIX IT'S NOT?

A. NO. THAT'S A WHOLE MONTH, A MONTH'S MATRIX.

Q. DO YOU HAVE ANY DOCUMENTS THAT SHOW LIKE DAILY WHAT YOUR CENSUS AND ACUITY IS?

A. I DON'T, BUT THE ADMISSION COORDINATOR DOES.

Q. WHO IS THE ADMISSION COORDINATOR; LATONYA?

A. LATONYA.

Q. AND YOU SAID EARLIER THAT POLICIES AND PROCEDURES

Q. WHAT ABOUT NURSES?
A. NURSES MAY HAVE TO HAVE CEUs.
Q. WHAT IS THAT?
A. CONTINUING EDUCATION UNITS.
Q. OKAY. HOW MANY?
A. THEY HAVE TO HAVE 30 IN TWO YEARS. THEY HAVE JUST STARTED THIS.
Q. CAN YOU GET ANY OF THAT FROM YOUR CORPORATE, OR DO YOU HAVE TO GO OUTSIDE? I KNOW YOU SAID YOU JUST RECENTLY HAD DONE ONE.
A. I HAVE TO GO OUTSIDE, BUT, NOW, THE LPNs, THEY CAN GO THROUGH CORPORATE, AND THEN WE SIGN, YOU KNOW, THAT THEY'RE COMPETENT.
Q. OKAY. SO YOU DO COMPETENCIES IN-HOUSE?
A. YEAH.
Q. DO YOU ALL HAVE PERFORMANCE BONUSES OF ANY SORT IN YOUR FACILITY?
A. WE HAVE A YEARLY EVAL.
Q. DOES THAT HAVE ANY BONUS TIED TO IT?
A. NO, YOU JUST GET THE YEARLY RAISE. NOW, WE DO PAY A BONUS WHEN WE HAVE TO ASK THEM TO WORK OVER BUT NOT ON PERFORMANCE.
Q. OKAY. HAVE YOU EVER KNOWN THE FACILITY TO BE UNDER BUDGET?
A. NOT LATELY. THEY HOLLER AT US. OH, HE, BACK UP,

UNDER BUDGET NOT OVER BUDGET.

Q. WELL, I GUESS I'M THINKING MORE ALONG THE LINES OF SURVEYS AND STUFF -- NOT SURVEYS, I'M SORRY, BONUSES. IF YOU WERE TO STAY UNDER BUDGET, DO YOU GET BONUSES FOR BEING UNDER BUDGET? DO YOU GET BONUSES IF YOU HAVE A SURVEY WITH NO DEFICIENCIES ON IT, ANYTHING LIKE THAT?

A. NO, BUT WE HAVE TO STAY UNDER BUDGET.

Q. READ THAT NAME TO ME.

A. NICKI STANTON.

Q. AND WHO IS SHE?

A. SHE IS MY SDC NOW.

Q. OH, SHE'S YOUR CURRENT SDC?

A. RIGHT.

Q. BECAUSE AUDREY HUSTON IS THE ADON?

A. RIGHT.

Q. WHAT'S HER NAME, NAME?

A. I CALL HER NICKI STANTON. I DON'T KNOW HOW TO PRONOUNCE THAT.

Q. THAT'S WHAT I WAS LOOKING AT. I WAS LIKE THAT DOESN'T LOOK LIKE NICKI. OKAY, LIKE NAKENYA OR -- OKAY, THAT'S ALL RIGHT. I JUST WANTED TO KNOW WHO THAT WAS. DO YOU GET SPEND-DOWN REPORTS FROM ANY DEPARTMENT, SUCH AS DIETARY OR THERAPY?

A. NO, MA'AM.

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG 2007-CP-42-606

****

ASHLEY BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILHELMINA BROWN, DECEASED, AND AS REPRESENTATIVE OF STATUTORY BENEFICIARIES,
PLAINTIFF,

VERSUS

THI OF BALTIMORE, 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.

****

VIDEO DEPOSITION OF CHRISTINE ZACK

PURSUANT TO NOTICE AND/OR AGREEMENT, THE VIDEO DEPOSITION OF **CHRISTINE ZACK** WAS CALLED BY THE PLAINTIFF ON THE 7TH DAY OF OCTOBER, 2008, COMMENCING AT THE HOUR OF 2:06 P.M., AT THE LAW OFFICES OF HOLCOMBE BOMAR, 200 DUNBAR STREET, SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS FOLLOWS:

C. NICOLE SIMPSON
VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.
836 SHORESBROOK DRIVE
SPARTANBURG, S.C. 29301-6515
864-574-1313

Blumberg No. 6113
PLAINTIFF'S EXHIBIT 20

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

Q. FOR?

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

Q. HOW MANY FACILITIES WOULD THAT BE?

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

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

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

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

A. HOLDINGS, LLC.

Q. HOLDINGS, LLC, RIGHT, THAT'S WHERE I WAS GETTING. I WAS MAKING SURE I SAID THAT RIGHT.

A. FUNDAMENTAL LONG-TERM CARE HOLDINGS, LLC, DOESN'T DO ANYTHING. IT'S A HOLDING COMPANY. IT WAS THE ACQUISITION COMPANY. IT DOESN'T HAVE ANY EMPLOYEES. FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, HAS EMPLOYEES AND HAS CONTRACTS TO PROVIDE VARIOUS SERVICES WITHIN THE FUNDAMENTAL FAMILY AND I BELIEVE OUTSIDE THE FUNDAMENTAL FAMILY, AS WELL.

Q. WHAT SORTS OF SERVICES?

A. LEGAL SERVICES, PROFESSIONAL LIABILITY SERVICES, ACCOUNTING SERVICES. THOSE ARE THE PRIMARY SERVICES THAT ARE PROVIDED.

Q. WHO DOES YOUR PAYCHECK COME FROM?

A. FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC.

Q. OKAY. WHO DID YOU TALK TO TO PREPARE FOR TODAY'S DEPOSITION?

A. JUST COUNSEL.

Q. OKAY. DID YOU READ ANY DEPOSITIONS?

A. NOT IN PREPARATION FOR TODAY. HAVE I IN THE PAST? I'M SURE. I'M SURE THAT I HAVE.

Q. OKAY.

A. THIS CASE IS PART OF MY JOB.

Q. OKAY. SO, HAVE YOU READ ANY DEPOSITIONS THAT PERTAIN TO THIS CASE DIRECTLY?

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

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

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

A. I HAVE.

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

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

Q. OKAY.

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

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

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

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

A. I BELIEVE THAT I DO.

Q. WHAT DO YOU UNDERSTAND THEM TO BE?

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

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

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

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

BY MS. HARRILL:

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

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

BY THE WITNESS:

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

EXAMINATION RESUMED BY MS. HARRILL:

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

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

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

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

Q. AS JUST A MATTER OF COURSE?

A. AS A MATTER OF COURSE.

Q. OKAY.

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

Q. OKAY.

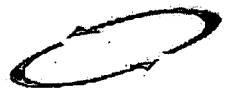
A. THAT WERE TOTALLY SEPARATE AND DISTINCT FROM THE OLD I.H.S. POLICY AND PROCEDURES THAT WERE UPDATED.

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

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

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

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



Trans Health

Resource Manual

For

New Management

An Introduction to the
Trans Healthcare Organization,
Support, Systems, Key Management Reports
and Other Resources

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Printed: July 2005



Trans Health

March 2, 2006

Patricia Harris
Magnolia Place of Spartanburg
8020 White Avenue
Spartanburg, SC 29303

Dear Patricia,

Welcome and congratulations on your new position as Administrator of Magnolia Place of Spartanburg. On behalf of the Trans Health Administrator's Advisory Board, we would like to welcome you.

You have joined a team dedicated to providing you the resources and support necessary to be successful as the "CEO" of your facility.

Your:

Facility number	90542
Division	II
Divisional SVP	Mark McKenzie
Regional Director of Operations	Robert Crooks
Clinical Services Director	Marsha Denner
Regional Controller	Brent Shearer
Human Resource Director	Phillip Deming (interim)

The next Administrator's Orientation is scheduled for April 18 - 20, 2006 in Sparks, Maryland, which is our corporate headquarters.

The Administrator Advisory Board, a group of twelve of your peers, has created a mentoring program to assist you over the next several months and in the future. Your mentor will be Edith Goforth of Magnolia Manor of Greenwood. She can be reached at 864-227-9500 and by e-mail L-SC-0537-ADMIN-Magnolia-Manor-Greenwood@thcare.com. You will find an outline of this program attached. The Administrator's Advisory Board group e-mail address is AdminAdBoard@thcare.com.

We hope you enjoy receiving your *Welcome Package* and find it helpful. In it you will find a resource manual, a directory of the advisory board members, and some other items just for fun.

As an Administrator at Trans Health, you have a unique opportunity to make a very real difference touching one life at a time. We are pleased you have chosen a career with Trans Health and we look forward to working closely with you.

Sincerely,

TRANS HEALTH ADMINISTRATOR ADVISORY BOARD

Enclosures

- Provide consulting to Business Office staff on the resolution of problematic patient accounts.
- Provide a resource for the location and filing of Probate claims.
- Provide research and auditing of outstanding balances to enforce contractual obligations.
- Coordinate the Corporate resources for the resolution of accounts involving medical review.
- Coordinate the utilization of legal resources on collection issues.

Facility Financial Services (FFS)

The Facility Financial Services Department performs all accounting, budgeting, reimbursement, and financial reporting functions for all facilities, provides financial management support, coordinates all financial issues and ensure accuracy and relevancy of data distributed to the users, and serves as the primary contact for Regional Directors of Operations and certain Owner issues.

Key Functions

- Responsible for the accounting, budgeting, reimbursement, and financial reporting functions for a group of facilities in accordance with external and company guidelines, regulations, and standards.
- Coordinate and communicate with regional staff, treasury department, and facilities on cash flow needs.
- Develop and analyze facility operating, capital, and cash budgets.
- Review and ensure accuracy, completeness, timeliness, and relevancy on all financial data produced, including monthly financial statements and special requests for financial analyses.
- Coordinate reimbursement functions between the facility and Corporate Reimbursement.
- Coordinate and prepare schedules for outside independent financial auditors related to fiscal year end, Medicare, Medicaid, debt covenants and A/R financing.
- Responsible for coordinating monthly balance sheet analysis in appropriate format to meet the needs of corporate accounting and/or external auditors.

HRIS/Payroll

The corporate payroll department is responsible for timely and accurate biweekly reporting and processing of payroll. They are also responsible for the accurate and timely reporting of all federal and state payroll taxes.

Regional Director of Operations (RDO)

The Regional Director of Operations (RDO) is responsible for overseeing the operations of assigned long-term care facilities and/or specialty hospitals. It is the responsibility of this position to assure the highest practical medical and psycho-social well being of the residents and families it serves, as well as, the needs of the employees and the community in which it operates. The Regional Director of Operations directs the overall operation of the assigned facilities to include the service provision, financial, human resources, licensure compliance and census development while ensuring the assigned facilities comply with corporate policies, federal/state and JCAHO regulations.

Key Functions

- Establishes a facility management system through:
  - Clinical reviews in collaboration with the Regional Clinical Services Director
  - P&L reviews in collaboration with the Regional Controller
  - Accounts Receivable reviews in discussion with the Regional Accounts Manager.
  - Compliance reviews to assure all business office policies and procedures are maintained.
- Regularly reviews marketing plans with Administrator and regional marketing staff to assure that services meet the needs of the local community and both the census and payer mix targets are achieved as budgeted.
- Assures each facility maintains substantial compliance with all local, state and federal regulations to assure licensure, Medicare/Medicaid certification and /or JCAHO or CARF accreditation as applicable to attain the highest external recognition for care and services rendered in the facility. Support each facility in obtaining AHCA Annual Quality Award.
- Reviews and approves each facility's annual operating budget and capital expenditure plan as required by corporate policy and obtains governing body approval. Provides direction and support to the facility Administrator in achieving contribution margin at or above budget and capital expenditures at or below budget.

Business & Census Development

Led by the Division Vice President of Business Development, the various team members and types of support are described below. In addition to providing direct support to the facilities in their respective division and regions, staff offer assistance in program development, physician relations, managed care contracting, marketing and community outreach expertise.

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG 2006-CP-42-3453
****
ASHLEY BROWN, AS PERSONAL *
REPRESENTATIVE OF THE ESTATE*
OF WILHELMINA BROWN, *
DECEASED, AND AS *
REPRESENTATIVE OF STATUTORY *
BENEFICIARIES, *
*
PLAINTIFF, *
*
VERSUS *
*
THI OF BALTIMORE, 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. *
****

DEPOSITION OF PATRICIA ANN HARRIS

PURSUANT TO NOTICE AND/OR AGREEMENT, THE DEPOSITION OF PATRICIA ANN HARRIS WAS CALLED BY THE PLAINTIFF ON THE 29TH DAY OF AUGUST, 2007, COMMENCING AT THE HOUR OF 1:16 P.M., AT THE LAW OFFICES OF POLIAKOFF AND ASSOCIATES, 215 MAGNOLIA STREET, SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS FOLLOWS:

DIXY MOORE TURNER, CVR
CERTIFIED VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.

836 SHORESBROOK DRIVE

SPARTANBURG, S.C. 29301-6515

864-574-1313



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29316.
Q. OKAY. AND WHO ARE YOU EMPLOYED BY?
A. MAGNOLIA PLACE OF SPARTANBURG.
Q. AND HOW LONG HAVE YOU BEEN THERE?
A. IT WILL BE TWO YEARS IN DECEMBER.
Q. OKAY. AND HAVE YOU BEEN THE ADMINISTRATOR SINCE YOU STARTED?
A. YES.
Q. SO YOU'VE BEEN THE ADMINISTRATOR FOR TWO YEARS. CAN YOU GIVE ME A LITTLE INFORMATION ABOUT YOUR EDUCATION, PLEASE.
A. I HAVE A AD IN RN. I WAS AN LPN.
Q. ADN? WHAT'S AN ADN?
A. RN. ASSOCIATE DEGREE.
Q. THANK YOU. AN AD IN RN?
A. YES.
Q. OKAY. GO AHEAD. SORRY.
A. ASSOCIATE DEGREE. I WAS AN LPN PRIOR TO THAT, AND THEN I GOT MY ADMINISTRATOR'S LICENSE IN '99.
Q. OKAY. AND WHAT IS YOUR ROLE AS THE ADMINISTRATOR AT MAGNOLIA PLACE?
A. TO OVERSEE EVERYTHING ABOUT THE BUILDING. ALL THE RESIDENTS AND STAFF.
Q. OKAY. WHAT DOCUMENTS HAVE YOU REVIEWED TO PREPARE FOR TODAY'S DEPOSITION?

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A. I'VE JUST LOOKED THROUGH THE CHART, AND THAT'S REALLY ALL. NOTHING IN-DEPTH.
Q. WOULD YOU AGREE THAT YOUR ROLE IS TO INTERPRET FACILITY POLICY AND INSURE THAT IT'S CARRIED OUT?
A. YES.
Q. WHAT MAKES UP THE STANDARD OF CARE IN YOUR FACILITY?
BY MR. MCDONALD:
OBJECT TO THE FORM. GO AHEAD.
EXAMINATION RESUMED BY MS. HARRILL:
Q. LET ME REPHRASE THAT. WHAT MAKES UP THE RULES THAT YOU FOLLOW IN YOUR FACILITY? WOULD IT BE THE POLICIES AND PROCEDURES? IS THAT PART OF THE RULES THAT YOU FOLLOW IN THE FACILITY?
A. YES, ALONG WITH CORPORATE RULES. FEDERAL RULES. GOVERNMENT RULES. I HAVE A LOT OF PEOPLE TELLING ME WHAT TO DO. TAKE YOUR PICK.
Q. OKAY. SO WHEN YOU SAY FEDERAL RULES, DO YOU MEAN OBRA?
A. YES.
Q. OKAY. DID YOU ASSIST IN RESPONDING TO OUR DISCOVERY REQUESTS IN THIS CASE?
A. SAY AGAIN. TALK ENGLISH.
Q. YEAH. WHEN WE FILED THIS LAWSUIT WE SENT WHAT WE CALL DISCOVERY REQUESTS, WHICH WOULD BE REQUESTS FOR DOCUMENTS OR THIS -- YOU KNOW, REQUEST FOR

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INFORMATION FROM THE FACILITY. LIKE WE REQUESTED WILHELMINA BROWN'S FILE, WE REQUESTED -- I THINK WE REQUESTED INCIDENT REPORTS, BUT I KNOW WE AGREED NOT TO GET THOSE. AND I'M WONDERING IF YOU WERE ONE OF THE PEOPLE THAT COORDINATED GETTING ALL OF THOSE DOCUMENTS TO US.
A. I'M SURE. I'M SURE I DID. ONE TIME OR ANOTHER.
Q. OKAY. WHO IS YOUR DIRECT SUPERVISOR?
A. ROBERT CROOKS.
Q. AND WHAT IS HIS TITLE?
A. REGIONAL DIRECTOR OF OPERATIONS.
Q. FOR WHAT COMPANY?
A. FUNDAMENTAL.
Q. AND WHERE IS HE BASED OUT OF?
A. HE LIVES IN ALABAMA. THAT'S ALL I KNOW.
Q. DOES HE COME INTO THE FACILITY OFTEN?
A. DEPENDS ON WHAT YOU CALL OFTEN. HIS OFFICE IS RIGHT NEXT DOOR TO MINE. MY BUILDING.
Q. OKAY. SO HE'S FROM ALABAMA BUT HE WORKS HERE IN SPARTANBURG?
A. HIS OFFICE IS IN SPARTANBURG. BUT HE USUALLY GOES FROM FACILITY TO FACILITY.
Q. BECAUSE HE'S VICE-PRESIDENT ---
A. YES.
Q. --- OR DIRECTOR OF OPERATIONS?

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A. YES.
Q. OKAY. SO THIS IS NOT HIS ONLY FACILITY?
A. NO.
Q. DO YOU KNOW WHO IS ON THE BOARD OF DIRECTORS FOR MAGNOLIA PLACE?
A. GOOD LORD, NO.
Q. DO YOU KNOW WHO IS ON THE GOVERNING BOARD?
A. NO.
Q. SO YOU'RE NOT ON EITHER ONE OF THOSE BOARDS?
A. NO.
Q. DO YOU HAVE ANY CORPORATE CONSULTANTS THAT COME INTO YOUR FACILITY BESIDES ROBERT CROOKS?
A. YES. MARSHA DENNER, THE CLINICAL SERVICE DIRECTOR. DON'T ASK ME THESE NAMES. WE HAVE SOMEONE THAT COMES IN, LORETTA, THAT'S THE BUSINESS OFFICE -- BUSINESS OFFICE SOMETHING OR ANOTHER. I HAVE AN ACTIVITY PERSON, STEPHANIE, THAT COMES IN. I DON'T -- OFF THE TOP OF MY HEAD THAT'S ALL I CAN THINK OF.
Q. WHAT ABOUT THE DIETARY?
A. THE DIETARY. NO, WAIT A MINUTE. SHE'S NOT A CORPORATE PERSON.
Q. OKAY. WHO IS THAT?
A. SHE'S A CONSULTANT. AND RIGHT NOW IT'S WENDY SOMETHING OR ANOTHER, BECAUSE WE JUST CHANGED.
Q. WHO WAS IT IN -- BETWEEN JULY 2005 AND AUGUST OF

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2006?
A. DON'T KNOW.
Q. BUT THAT PERSON DOES NOT WORK FOR THE FACILITY?
A. I DON'T HAVE A POSITIVE NO. OH, NO. THEY ARE A CONSULTING FIRM AND SHE DOES NOT WORK ---
Q. DOES NOT WORK FOR THE FACILITY.
A. YEAH.
Q. CAN YOU TELL ME WHO THE OTHER CONSULTANTS WORK FOR? DO THEY WORK FOR MAGNOLIA PLACE OR DO THEY WORK FOR CORPORATE?
A. CORPORATE.
Q. AND WHEN YOU SAY CORPORATE DO YOU MEAN FUNDAMENTAL THI?
A. DON'T ASK ME THAT EITHER. I'M ASSUMING FUNDAMENTAL, BUT I -- WHEN YOU GET PAST ME, THEY'RE JUST TITLES.
Q. OKAY. HOW LONG HAS IT BEEN SINCE THEY STARTED USING FUNDAMENTAL? I KNOW FUNDAMENTAL IS A NEW -- A NEW COMPANY. DO YOU REMEMBER WHEN THAT CHANGED OVER?
A. SINCE I'VE BEEN THERE.
Q. IT'S BEEN SINCE YOU'VE BEEN THERE? WERE THERE ANY CHANGES AS FAR AS YOU WERE CONCERNED ---
A. NO.
Q. --- ON THE FACILITY LEVEL WHEN THEY CHANGED?
A. NO.
Q. HOW OFTEN DO YOU COMMUNICATE WITH THE CONSULTANTS?

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AND THAT WOULD BE ANY OF THE CONSULTANTS INCLUDING --
A. ANY TIME THEY COME INTO THE BUILDING.
Q. HOW OFTEN DO THEY COME INTO THE BUILDING?
A. AT LEAST ONCE A MONTH.
Q. OKAY. NOW, THEY COME IN FOR REGULARLY SCHEDULED VISITS ONCE A MONTH?
A. YES.
Q. DO THEY COME IN ANY OTHER TIME?
A. THE CLINICAL SERVICE DIRECTOR COMES WHEN SHE WANTS TO.
Q. BUT EVERYBODY ELSE IS PRETTY MUCH SCHEDULED?
A. YES.
Q. DO THEY PROVIDE YOU WITH ANY REPORTS OR ANYTHING LIKE THAT ABOUT WHAT THEY'VE DONE WHILE THEY WERE THERE?
A. THE BUSINESS OFFICE MANAGER IS JUST VERBAL. THE ACTIVITY PERSON, STEPHANIE, WILL USUALLY GIVE ME SOMETHING. SHE'S NEW, NOW. SHE HASN'T BEEN THERE LONG. IN THIS POSITION LONG. AND DIETARY GIVES ME A REPORT.
Q. A WRITTEN REPORT?
A. A WRITTEN REPORT. I HAVE A SOCIAL SERVICE CONSULTANT. SHE DOESN'T COME ON A MONTHLY BASIS. I'M NOT REAL SURE -- QUARTERLY MAYBE. SHE COMES

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QUARTERLY, AND SHE GIVES ME A WRITTEN REPORT.
Q. OKAY. DO YOU KEEP THOSE?
A. DIETARY, NO.
Q. DO YOU KEEP THE OTHER REPORTS THAT YOU GET?
A. I MIGHT HAVE SOME OF THEM. USUALLY THE DEPARTMENT KEEPS IT. I JUST REVIEW IT.
Q. OKAY. DO YOU HAVE ANY ROLE IN DEVELOPING THE BUDGET FOR THIS FACILITY?
A. YES.
Q. WHAT IS YOUR ROLE ---
A. ABOUT THIS MUCH (INDICATING). I GO IN THERE AND TELL THEM WHAT I WANT AND THEN THEY TELL ME WHAT I CAN HAVE.
Q. OKAY. AND WHEN YOU SAY I TOLD THEM AND THEY TELL ME, WHO IS THEM AND THEY?
A. WE HAVE A FINANCIAL PERSON FROM -- I THINK HE'S FROM SPARKS OR WHATEVER. HE COMES DOWN AND WE SIT THERE AND TELL HIM WHAT WE WANT AND WHAT WE NEED.
Q. DO YOU KNOW WHAT THAT PERSON'S NAME IS?
A. I BELIEVE -- WELL, NO. IT WAS A WOMAN THE LAST TIME. BUT I DON'T REMEMBER -- BRENT SHEARS IS THE -- I THINK IS OVER THAT KIND OF STUFF.
Q. AND WHEN YOU MEET WITH CORPORATE ABOUT THE BUDGET AND YOU TELL THEM WHAT YOU WANT, HOW IS IT THAT YOU DETERMINE WHAT IT IS THAT YOU WANT?

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A. USUALLY -- A LOT OF IT IS FROM HISTORY.
Q. OKAY. ANY INPUT FROM THE DEPARTMENT HEADS?
A. YES. I'LL ASK THEM IS -- YOU KNOW, IS THERE SOMETHING IN PARTICULAR THAT THEY WANT OR NEED.
Q. AND HOW ACCURATELY IS YOUR INPUT FOLLOWED?
A. PRETTY CLOSE. PRETTY CLOSE. NOW, I WILL SAY -- AND I'LL ADD THIS. WHEN IT COMES TO HOW MANY MEDICARE DAYS AND MEDICAID DAYS AND THAT KIND OF MONEY ---
Q. RIGHT.
A. --- FORGET IT. THAT'S ALL THEM. I DON'T DEAL WITH THAT PART.
Q. I UNDERSTAND. WHAT ABOUT -- SO THE DEPARTMENT HEADS DON'T HAVE ANY ROLE AT ALL IN BUDGET OTHER THAN TO TELL YOU, HEY, I NEED THIS, OR HEY, I NEED THAT?
A. YES.
Q. ARE YOU REQUIRED TO MEET A CERTAIN PROFIT MARGIN AS A PERCENTAGE OR A TOTAL OF THE BUDGET?
A. THERE'S SOMETHING ABOUT EBITDA, EBITDAR, EBI SOMETHING THAT I'M SUPPOSED TO MEET, YEAH.
Q. DO YOU KNOW WHAT THAT MEANS? WHAT THAT STANDS FOR?
A. NO. I'VE BEEN TOLD WHAT IT'S BEEN, BUT ---
Q. BUT YOU DON'T REMEMBER?
A. NO, I DON'T.
Q. DO YOU KNOW ANY IDEA WHAT YOUR TOTAL OPERATING BUDGET WAS IN 2005?

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A. NO.
Q. 2006?
A. NO.
Q. HAVE YOU HEARD OF THE ADMINISTRATOR PERFORMANCE INCENTIVE PROGRAM?
A. YES.
Q. CAN YOU TELL ME WHAT THAT IS?
A. IT'S -- YOU HAVE TO -- IN ORDER -- YOU HAVE TO -- IT'S LIKE A FIVE, SIX REQUIREMENTS THAT YOU HAVE TO FULFILL IN ORDER TO GET A BONUS.
Q. WHAT SORT OF REQUIREMENTS?
A. SOMETHING LIKE CENSUS, CASH, CLINICAL. I DON'T REMEMBER.
Q. EXPLAIN THAT TO ME. LIKE KEEPING YOUR CENSUS AT A CERTAIN LEVEL?
A. UH-HUH (AFFIRMATIVE RESPONSE.)
Q. WHAT WOULD CASH BE?
A. HOW MUCH YOU COLLECT.
Q. OKAY. WHAT ABOUT THE LAST ONE YOU SAID? I'M SORRY.
A. CLINICAL.
Q. CLINICAL.
A. CLINICAL IS -- DETERMINES ON OUR -- USUALLY OUR SURVEYS.
Q. OKAY. ARE THERE ANY OTHER BONUS PROGRAMS IN YOUR FACILITY THAT YOU'RE AWARE OF THAT ARE MAYBE NOT

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RELATED TO YOU?
A. YES.
Q. LIKE DOES YOUR DON HAVE A BONUS PROGRAM?
A. YES. SHE DID LAST YEAR FOR HER FIRST YEAR.
Q. AND HOW DOES THAT WORK?
A. SAME AS MINE.
Q. HAVE YOU EVER BEEN DIRECTED TO FREEZE HIRING?
A. NO.
Q. TO LIMIT HIRING?
A. NO.
Q. TO INCREASE YOUR PROFIT MARGIN?
A. NO.
Q. TO LIMIT SCHEDULING OF EMPLOYEES?
A. NO. WE DO SCHEDULE ON A CENSUS BASIS. WE DO DO THAT.
Q. OKAY. DO YOU KNOW WHAT YOUR CURRENT TURNOVER RATE OF RNs IS?
A. NO.
Q. LPNs?
A. NO.
Q. CNAs?
A. NO.
Q. DO YOU EVER USE TEMPORARY AGENCY OR AGENCY STAFFING?
A. YES.
Q. WHEN IS THE LAST TIME YOU DID THAT?

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A. LAST WEEK.
Q. WHAT TEMPORARY AGENCY DO YOU USUALLY USE?
A. I HAVE NO IDEA.
Q. WHO WOULD KNOW THAT?
A. MARGARET -- OR MARGIE MAYBE.
Q. WHO IS MARGIE?
A. SHE'S A STAFFING COORDINATOR.
Q. WHO DOES THE HIRING IN YOUR BUILDING FOR NURSES?
A. MARGARET, BUT IT'S NOT -- IT'S NOT A ONE PERSON THING. MARGARET INTERVIEWS THEM, MARGIE TALKS TO THEM, MY STAFF DEVELOPMENT TALKS TO THEM, AND THEN I MAY BE BROUGHT IN, DEPENDING ON THE SALARY.
Q. WHO DOES REFERENCE CHECKS FOR YOUR NEW HIRES?
A. MARGIE AND NIKKI, MY STAFF DEVELOPMENT PERSON.
Q. NIKKI IS STAFF DEVELOPMENT TOO?
A. STAFF -- WAIT A MINUTE. NIKKI IS THE STAFF DEVELOPMENT COORDINATOR. MARGIE IS THE STAFFING COORDINATOR.
Q. OKAY. WHAT'S THE DIFFERENCE IN THEIR ROLES?
A. NIKKI NOT ONLY EDUCATES -- SHE'S THE EDUCATION PERSON. MARGIE JUST DOES THE ---
Q. SHE DOES THE DAY TO DAY SCHEDULING OF THE EMPLOYEES?
A. MARGIE DOES.
Q. MARGIE DOES. OKAY. DO YOU KNOW NIKKI'S LAST NAME?
A. STANTON.

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Q. MARGIE'S?
A. CALBERT.
Q. DO YOU AGREE THAT MAGNOLIA PLACE HAS TO PROVIDE SUFFICIENT STAFFING, AND WHEN I SAY STAFFING I MEAN NURSING STAFF, AS DETERMINED BY RESIDENT ASSESSMENTS AND CARE PLANS?
A. REPHRASE IT.
Q. DOES MAGNOLIA PLACE HAVE TO HAVE SUFFICIENT STAFFING AS DETERMINED BY ACUITY LEVELS IN YOUR BUILDING?
BY MR. MCDONALD:
OBJECT TO THE FORM.
BY THE WITNESS:
I DON'T KNOW WHAT YOU SAID.
BY MR. MCDONALD:
I'M SORRY. YOU CAN GO AHEAD AND ANSWER.
WITNESS ANSWERS:
A. WE OVERSTAFF. WE DON'T REALLY DO BY ACUITY. WE OVERSTAFF.
Q. OKAY. CAN YOU TELL ME WHAT YOUR STAFFING LEVELS ARE THEN?
A. WE DO ONE -- WE DO TWO CNAs PER -- 7:00 TO 3:00, AND 3:00 TO 11:00, MORE THAN THE REGULATIONS REQUIRE US, PLUS WE HAVE TWO RESTORATIVE AIDS ON 7:00 TO 3:00. SO THAT'S FOUR EXTRA PEOPLE ON DAY SHIFT AND TWO ON 3:00 TO 11:00.

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Q. WHAT DO THE RESTORATIVE AIDS DO?
A. EXERCISES, RETRAINING, MAINTAINING.
Q. DO THEY DO ANY CNA -- YOU KNOW, LIKE CNA WORK ON THE FLOOR BESIDES THAT?
A. NO. WELL, I MEAN, IF A BELL RINGS AND A PATIENT WANTS TO GO TO THE BATHROOM THEY'LL TAKE THEM, BUT OTHERWISE ARE THEY ASSIGNED ANYTHING? NO.
Q. OKAY. SO DO YOU DETERMINE SUFFICIENT STAFFING BY THE REGULATIONS? BY THE STATE REGULATIONS?
A. NO. THAT'S JUST MINIMUM STAFFING.
Q. OKAY. DO YOU HAVE ANY -- ARE THERE ANY COMPLAINTS ABOUT STAFFING IN YOUR BUILDING?
A. NO MORE THAN ANY OTHER BUILDING.
Q. OKAY. FROM OTHER STAFF? DO THEY COMPLAIN ABOUT NOT HAVING ENOUGH TIME TO GET THEIR WORK DONE OR ---
A. NO.
Q. AND I THINK I HAVE THE ANSWER TO THIS. DID YOU TELL ME THAT MARGIE IS RESPONSIBLE FOR THE STAFFING ITSELF IN YOUR FACILITY?
A. YES. SCHEDULING.
Q. SCHEDULING. WHAT SORT OF REPORTS DO YOU PREPARE REGULARLY?
A. I DON'T KNOW OF ANY. I CAN'T THINK OF ANY OFF THE TOP OF MY HEAD.
Q. ARE THERE ANY REPORTS THAT YOU REVIEW REGULARLY?

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A. REVIEW, YES. I REVIEW MY P&L -- ANYTHING THAT CORPORATE SENDS DOWN TO ME I REVIEW.
Q. OKAY. TELL ME WHAT ALL, OFF THE TOP OF YOUR HEAD, CORPORATE SENDS DOWN TO YOU TO REVIEW ON A REGULAR BASIS?
A. ON A REGULAR BASIS. WE DO THE BUDGET -- OR I REVIEW THE BUDGET ON A MONTHLY BASIS. OUR QUALITY INDICATORS, THEY'RE GIVEN TO ME. USUALLY ON A QUARTERLY BASIS ON THAT. I CAN'T THINK OF ANYTHING.
Q. WHO SENDS YOU -- AND WHEN I SAY WHO, WHO AT CORPORATE SENDS YOU LIKE THE P&Ls AND THE BUDGET?
A. NO ONE SENDS THEM. THEY'RE ONLINE.
Q. THEY'RE ONLINE. WHO PREPARES THEM?
A. SOMEBODY IN CORPORATE.
Q. DON'T KNOW WHO?
A. NO.
Q. DO THEY DO THE QUALITY INDICATOR?
A. NO. THERE'S ANOTHER GROUP THAT DOES QUALITY INDICATOR. WE HAVE -- WE HAVE PEOPLE IN CORPORATE THAT HAVE TITLES THAT SEND US ALL THIS STUFF.
Q. HAVE YOU HEARD OF THE CLINICAL MATRIX MONTHLY?
A. CLINICAL MATRIX MONTHLY. YOU'RE TALKING ABOUT THE MDS -- THAT MY MDS PEOPLE GIVE ME? YES, I -- BUT THAT'S NOT A CORPORATE FORM.
Q. NO. BUT I'M JUST ASKING ABOUT ANY REPORTS, WHETHER

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THEY CAME FROM CORPORATE OR NOT.
A. THE CLINICAL MATRIX, YES. WE REVIEW THAT ON A WEEKLY BASIS, BUT NOT A MONTHLY BASIS.
Q. AND THAT HAS SOMETHING TO DO WITH MDSs?
A. YES.
Q. WHAT EXACTLY DOES THAT HAVE TO DO WITH MDSs?
A. TELLS YOU HOW MANY PATIENTS FELL -- IT'S GOT A WHOLE LINE OF LIKE 25 TO 30 THINGS TELLING YOU WHAT CATEGORIES THESE PATIENTS WERE UNDER THAT THE MDS TOTAL.
Q. LIKE RUBs CATEGORIES?
A. NO.
Q. SO IT'S NOT LIKE MEDICARE CATEGORIES?
A. NO.
Q. WHAT KIND OF CATEGORIES ARE YOU TALKING ABOUT THEN?
A. HOW MANY PEOPLE HAD A FALL SINCE -- ON THEIR LAST ASSESSMENT. HOW MANY PEOPLE HAD FOLEY CATHETERS, HOW MANY PEOPLE DECUBITUS, HOW MANY PEOPLE -- THAT KIND OF THING.
Q. SO DOES SOMEBODY PREPARE THAT OR DOES IT COME OFF OF THE COMPUTER SYSTEM THAT THE MDS IS GIVING TO YOU?
A. IT COMES OFF THE COMPUTER SYSTEM FROM STATE. THAT'S A STATE FORM.
Q. DO YOU EXPECT YOUR EMPLOYEES TO BE FAMILIAR WITH THE POLICIES AND PROCEDURES IN YOUR FACILITY?

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A. YES.
Q. DO YOU EXPECT THEM TO FOLLOW THEM?
A. YES.
Q. IF THEY FAIL TO FOLLOW THE POLICIES AND PROCEDURES IS THAT A VIOLATION OF THE RULES?
A. YES.
Q. IS IT A VIOLATION OF THE STANDARD OF CARE?
BY MR. MCDONALD:
OBJECT TO THE FORM.
BY MR. HARRILL:
YOU CAN ANSWER.
BY MR. MCDONALD:
I'M SORRY. YOU CAN ALWAYS ANSWER UNLESS I TELL YOU OTHERWISE. WE'RE JUST DOING THAT LEGAL STUFF THAT LAWYERS DO.
WITNESS ANSWERS:
A. OKAY. SAY IT AGAIN.
Q. IF AN EMPLOYEE FAILS TO FOLLOW THE POLICIES AND PROCEDURES IS THAT A VIOLATION OF THE STANDARD OF CARE?
A. YES.
BY MR. MCDONALD:
SAME OBJECTION.
EXAMINATION RESUMED BY MS. HARRIS:
Q. DO YOU HAVE ANY AUTHORITY TO SIGN CONTRACTS FOR

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Q. --- NOVEMBER 17TH, '05?
A. YES.
Q. IT SAYS THE BASIC FUNCTION OF THE ADMINISTRATOR IS RESPONSIBLE FOR DIRECTING OVERALL OPERATION OF THE FACILITY'S ACTIVITIES IN ACCORDANCE WITH THE CURRENT APPLICABLE FEDERAL, STATE AND LOCAL STANDARDS, GUIDELINES AND REGULATIONS AS DIRECTED BY THE GOVERNING BOARD, AND FOR INSURING THAT THE HIGHEST DEGREE OF QUALITY PATIENT RESIDENT CARE IS MAINTAINED AT ALL TIMES. DO YOU AGREE WITH THAT?
A. YES.
Q. DO YOU HAVE ANY CONTACT WITH ANYBODY ON THE GOVERNING BOARD?
A. NO.
Q. NUMBER EIGHT SAYS REVIEW AND INTERPRET MONTHLY FINANCIAL STATEMENTS AND PROVIDE SUCH INFORMATION TO THE GOVERNING BOARD. I THINK YOU TESTIFIED ALREADY THAT YOU DO REVIEW MONTHLY FINANCIAL STATEMENTS AND THAT THOSE COME FROM CORPORATE, IS THAT CORRECT?
A. YES.
Q. OKAY. BUT YOU DON'T PROVIDE THAT INFORMATION TO THE GOVERNING BOARD?
A. I DON'T, NO. THEY DO.
Q. THEY BEING SOMEBODY IN CORPORATE?
A. SOMEBODY IN CORPORATE.

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Q. NUMBER 13 SAYS REPRESENT THE FACILITY AT AND PARTICIPATE IN TOP LEVEL MEETINGS. DO YOU DO THAT?
A. DESCRIBE TOP LEVEL MEETINGS.
Q. I WAS GOING TO ASK YOU TO DESCRIBE TOP LEVEL MEETINGS.
A. TOP LEVEL MEETINGS. TOP LEVEL MEETINGS MEANS GOING OVER TO THE CBO WHERE WE HAVE OUR P&T MEETINGS, OUR ADMINISTRATIVE MEETINGS. AS A MATTER OF FACT, WE'RE HAVING THE MEDICAL DIRECTOR AND ADMINISTRATOR'S MEETING TONIGHT. THAT'S OUR TOP LEVEL MEETINGS.
Q. AND P&T, WHAT DOES THAT MEAN?
A. HECK IF I KNOW. IT HAS SOMETHING TO DO WITH PHARMACY.
Q. OKAY. SO IT'S A PHARMACY SORT OF MEETING?
A. YES.
Q. I UNDERSTAND WHAT YOU'RE SAYING. AND I THINK IT'S SAFE TO SAY, NUMBER 17, THAT YOU DO NOT MAKE WRITTEN OR ORAL REPORTS TO THE GOVERNING BOARD?
A. NO. IF I DO, I DON'T KNOW ABOUT IT.
Q. IT SAYS ON PAGE THREE, ADMINISTRATOR RECEIVES DIRECTION FROM THE REGIONAL DIRECTOR. IS THAT ROBERT CROOKS?
A. YES.
(MARKED PLAINTIFF'S EXHIBIT NUMBER TWO - CMS 671 FORMS - ATTACHED)

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EXAMINATION RESUMED BY MS. HARRILL:
Q. THIS WOULD BE EXHIBIT TWO, CMS 671 FORMS. DO YOU PREPARE THESE?
A. YES.
Q. CAN YOU TELL ME WHAT THE PURPOSE OF THEM IS?
A. BECAUSE THE GOVERNMENT SAYS THAT I HAVE TO.
Q. AND WHO ARE THEY GIVEN TO?
A. CERTIFICATION.
Q. SO IS THAT LIKE WHEN SURVEY COMES INTO THE BUILDING?
A. YES.
Q. IS IT JUST LICENSURE CERTIFICATION?
A. NO. IT'S A CERTIFICATION. IT'S NOT LICENSING.
Q. OKAY. JUST DHEC?
A. CERTIFICATION.
Q. DHEC CERTIFICATION ONLY?
A. YES.
Q. NOT THE SAME AS -- AND I UNDERSTAND THE MEANING DIFFERENT FROM LICENSURE.
A. IT'S NOT LICENSURE.
Q. OKAY. TELL ME WHERE YOU GET THE INFORMATION FOR WHAT IS ON -- I GUESS IT WOULD BE THE THIRD PAGE OF THIS FORM.
A. THE HOURS?
Q. YES.
A. I HAVE MY -- ON A LOT OF THEM I HAVE MY PAYROLL

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PERSON TO PULL UP THE HOURS FROM WHAT'S BEEN WORKED.
Q. AND WHEN IT SAYS -- AND I'M JUST LOOKING AT RN DIRECTOR OF NURSES. UNDER NURSING SERVICES IT SAYS FULL-TIME STAFF HOURS 80.
A. UH-HUH (AFFIRMATIVE RESPONSE.)
Q. EIGHTY PER WEEK?
A. PER PAY PERIOD.
Q. PER PAY PERIOD.
A. THIS IS A TWO PERIOD -- THIS IS A TWO WEEK PERIOD.
Q. OKAY. AND DO YOU KNOW WHAT THE PURPOSE THIS FORM SERVES FOR DHEC?
A. THE ONLY THING I CAN THINK OF IS SO THEY'LL KNOW JUST TO -- IT'S TO MAKE SURE THAT WE ARE WITHIN THE REGULATORY HOURS. BUT ALSO ON THEIR -- ON THEIR INTERNET THING THEY TELL HOW MANY NURSING HOURS THAT WE DO, AND THEY HAVE TO GET THAT FROM THIS THING.
Q. OKAY. SO WHEN YOU GO TO THE INTERNET AND YOU LOOK UP THE NURSING HOME AND IT HAS EVERYBODY'S HOURS, YOU KNOW, HOW MANY UNITS YOU HAVE, HOW MANY BEDS YOU HAVE ---
A. YES.
Q. --- HOW MANY NURSES. OKAY.
A. I'M ASSUMING THEY GET THAT FROM HERE, BECAUSE I DON'T KNOW ANYWHERE ELSE THEY COULD GET IT FROM BESIDES THIS FORM.

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Q. NOW, LET ME ASK YOU THIS. DO YOU KNOW WHEN THEY'RE COMING IN THE BUILDING?
A. NO.
Q. SO WHEN THEY WALK IN THE BUILDING YOU ALL ANNOUNCE DR. BLACK IS IN THE BUILDING, OR HOWEVER IT IS YOU ALL USED TO DO IT ---
A. YES.
Q. I USED TO WORK IN A NURSING HOME, SO. AND THEN YOU GO AND START FILLING THIS OUT FOR SURVEY, IS THAT CORRECT?
A. I HAVE 48 HOURS TO -- I DON'T USUALLY DO THIS IMMEDIATELY. I USUALLY DO IT THE NEXT DAY.
Q. OKAY. DO YOU KEEP THESE IN YOUR OFFICE?
A. YES.
(MARKED PLAINTIFF'S EXHIBIT NUMBER THREE - CENSUS - ATTACHED)
EXAMINATION RESUMED BY MS. HARRILL:
Q. THIS IS EXHIBIT THREE. CAN YOU TELL ME WHAT THIS IS?
A. HOW MANY DAYS I'VE HAD THESE PEOPLE.
Q. BUT WHAT WOULD YOU CALL THIS DOCUMENT?
A. MY CENSUS.
Q. OKAY. AND HOW OFTEN DO YOU GENERATE THIS DOCUMENT?
A. I DON'T.
Q. WHO DOES?

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A. I DON'T KNOW WHERE YOU GOT IT FROM.
Q. DO YOU GET IT?
A. THIS IS ON MY P&L, BUT ---
Q. YOUR PROFIT AND LOSS?
A. BUT I DON'T DO JUST THIS. I DON'T GENERATE THIS FORM.
Q. DO YOU HAVE ANY IDEA WHO GENERATES THIS FORM?
A. NO. LIKE I SAID, IT'S ON MY P&L, SO I DON'T DO AN EXTRA FORM FOR IT.
Q. WHERE DO THE P&Ls COME FROM?
A. CORPORATE.
Q. HOW DOES CORPORATE GET INFORMATION FROM YOU OR FROM YOUR FACILITY?
A. THROUGH THE COMPUTER.
Q. WHO IS PUTTING CENSUS INFORMATION INTO THE COMPUTER?
A. I'M NEARLY SURE THIS COMES FROM MY BUSINESS OFFICE MANAGER. MY ADMISSION PERSON PUTS IN OUR CENSUS ON A DAILY BASIS. BUT THIS UNDOUBTEDLY COMES FROM PAYROLL. I MEAN, THIS HAS TO DO WITH THE BUDGET, SO SHE HAS TO PUT IN HOW MANY PEOPLE ARE PRIVATE, HOW MANY PEOPLE ARE INSURANCE, HOW MANY PEOPLE ARE MEDICARE AND MEDICAID.
Q. OKAY. AND ADMISSIONS WOULD BE LATONYA, CORRECT?
A. YES.
Q. LATONYA IS DOING DAILY CENSUS, AND THAT GOES INTO

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THE COMPUTER WHICH GOES TO CORPORATE, IS THAT CORRECT?
A. YES.
Q. SO THEY HAVE A DAILY REPORT OF WHAT YOUR CENSUS IN YOUR BUILDING IS?
A. YES.
Q. DO YOU HAVE ANY DOCUMENTS LIKE THIS THAT SHOW ACUITY LEVELS IN YOUR FACILITY?
A. NO.
Q. SO THERE'S -- NOBODY PREPARES ANYTHING ON ACUITY LEVELS IN THE BUILDING?
A. NO.
Q. DO YOU NEGOTIATE THE LEASE FOR THE FACILITY?
A. NO.
Q. DO YOU ENTER INTO CONTRACTS WITH VENDORS FOR SUPPLIES?
A. YES.
Q. THAT'S YOUR RESPONSIBILITY. WHAT'S THE MOST MONEY YOU CAN SPEND AT ONE TIME?
A. I HAVE NO IDEA.
Q. NOBODY HAS EVER GIVEN YOU A LIMIT OF HOW MUCH MONEY YOU CAN SPEND FOR THE FACILITY?
A. NOT -- I DON'T KNOW WHAT YOU'RE TALKING ABOUT.
Q. IF YOU HAVE THE AUTHORITY TO -- DO YOU HAVE THE AUTHORITY TO SPEND THE FACILITY'S MONEY?

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A. YES.
Q. DO YOU HAVE ANY LIMIT ON HOW MUCH THAT CAN BE AT ONE TIME? HAS ANYBODY EVER SAID IF YOU WANT TO SPEND MORE THAN $500 CALL THE REGIONAL DIRECTOR OF OPERATIONS?
A. DEPENDS ON WHAT IT IS. IF IT'S CAPITAL EXPENDITURE THEN I WOULD HAVE TO GO THROUGH CAPITAL IN ORDER TO GET IT.
Q. AND WHO WOULD THAT BE?
A. I SEND IT TO MY RDO.
Q. REGIONAL DIRECTOR OF OPERATIONS?
A. YES.
Q. OKAY. AND EXPLAIN TO ME CAPITAL EXPENDITURES SO I KNOW WE'RE ON THE SAME PAGE.
A. IT HAS SOMETHING TO DO WITH THE -- WHETHER IT'S LIKE A BUILDING PERMIT, SOMETHING PERMANENT ABOUT THE BUILDING LIKE A ROOF. SOMETHING THAT'S GOING TO STAY IN THE BUILDING, IF IT'S OVER $500 THEN I HAVE TO GO THROUGH THEM.
Q. OKAY. CAN YOU IMPLEMENT YOUR OWN POLICIES AND PROCEDURES WITHIN YOUR BUILDING?
A. CAN I IMPLEMENT MY OWN POLICIES AND PROCEDURES? I GUESS I COULD IF I WANTED TO.
Q. CAN YOU CHANGE THE POLICIES AND PROCEDURES THAT ARE HANDED TO YOU BY CORPORATE?

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A. NO. THAT WOULD HAVE TO GO THROUGH CORPORATE.
Q. WHO HAS FINAL APPROVAL OF THE BUDGET IN YOUR BUILDING?
A. I DON'T HAVE ANY IDEA.
Q. BUT CAN YOU CREATE YOUR OWN BUDGET?
A. NO.
Q. DOES MAGNOLIA PLACE HAVE A MANAGEMENT COMPANY?
A. I DON'T KNOW. I JUST TAKE CARE OF MY PATIENTS. I DON'T WORRY ABOUT THE MONEY PART.
Q. OKAY. DO YOU SIGN PLANS OF CORRECTION ---
A. YES.
Q. --- AFTER SURVEY?
A. YES.
Q. WHO HIRED YOU?
A. ROBERT CROOKS.
Q. AND IS HE THE ONE WITH THE AUTHORITY TO FIRE YOU?
A. YES.
Q. WHO APPROVES AND PAYS FOR ADS FOR JOB OPENINGS?
A. I DO.
Q. DOES MAGNOLIA PLACE DO ANY LIKE CONSUMER SATISFACTION SURVEYS?
A. YES.
Q. WHO DOES THOSE?
A. SOMEBODY CALLED AN INTERVIEW OR SOME -- IT'S DONE THROUGH CORPORATE.

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Q. OKAY. DO YOU GET THE RESULTS OF THOSE?
A. YES. I CAN GO ONLINE AND GET THEM.
Q. OKAY. WHO PROVIDES THE FORMS FOR THE FACILITY THAT ARE RELATED TO PATIENT CARE LIKE MARs AND TREATMENT RECORDS AND ---
A. BRIGGS.
Q. BRIGGS DOES?
A. UH-HUH (AFFIRMATIVE RESPONSE.)
Q. WHO HIRES THE MEDICAL DIRECTOR?
A. I THINK IN THIS -- I DON'T KNOW WHO ORIGINALLY HIRED THE MEDICAL DIRECTOR. USUALLY THE ADMINISTRATOR HAS THE DISCRETION TO HIRE.
Q. WHO PAYS THE MEDICAL DIRECTOR'S SALARY?
A. I DO.
Q. YOU DO?
A. YES.
Q. IF THERE WERE PROBLEMS WITH PATIENT CARE WOULD CORPORATE CONSULTANTS KNOW ABOUT THAT?
A. YES.
Q. HOW WOULD THEY FIND OUT?
A. WE NOTIFY THEM.
Q. DO YOU CALL ON THE PHONE, SEND THEM AN EMAIL?
A. USUALLY CALL THEM.
Q. AND IF YOU CALL THEM DO THEY THEN COME IN?
A. YES.

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Q. AND THEY GIVE YOU A REPORT AFTER THEY'RE THERE?
A. YES.
Q. OKAY. DO YOU REVIEW INCIDENT REPORTS?
A. YES.
Q. DO YOU SEND THEM OUTSIDE OF THE FACILITY?
A. NO.
Q. DO YOU KNOW WHAT THE NAME OF THE LICENSEE FOR THIS FACILITY IS? WHEN YOU HAVE -- LIKE YOUR DHEC LICENSE THAT'S POSTED IN YOUR BUILDING. DO YOU KNOW THE NAME OF THE LICENSEE?
A. ARE YOU TALKING ABOUT MAGNOLIA PLACE OF SPARTANBURG, OR ITS ---
Q. OR MAYBE A THI OF SOUTH CAROLINA OR SOMETHING LIKE THAT.
BY MR. MCDONALD:
OBJECT TO THE FORM. GO AHEAD AND ANSWER.
WITNESS ANSWERS:
A. I DON'T -- I THINK ON SOME OF THEM IT SAYS THI. NO, I DON'T KNOW THE EXACT WORDAGE OF IT, NO. I THINK IT JUST SAYS MAGNOLIA PLACE OF SPARTANBURG, BUT I'M NOT SURE THAT'S WHAT IT SAYS.
Q. DO YOU KNOW WHO OWNS THE BUILDING?
A. IT MAY BE TOM TAYLOR, BUT THAT'S GUESSING.
Q. WHO PAYS THE RENT?
A. I DO.

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Q. DO YOU HAVE THE AUTHORITY TO NEGOTIATE THE TERMS OF THE LEASE?
A. NO.
Q. WHO DOES?
A. CORPORATE.
Q. OKAY. SO YOU DON'T HAVE THE AUTHORITY TO SELL THE BUILDING?
A. NO.
Q. MORTGAGE THE BUILDING?
A. NO. I WISH I DID.
Q. DO YOU HAVE ANY OWNERSHIP INTEREST IN THE NURSING HOME OR THE ENTITY THAT OWNS IT?
A. NO.
Q. DID YOU RECEIVE ANY TRAINING WHEN YOU WERE FIRST HIRED?
A. YES.
Q. FROM MAGNOLIA PLACE?
A. YES.
Q. WHO PROVIDED THAT TRAINING?
A. SPARKS, MARYLAND.
Q. AND WHEN YOU SAY SPARKS, MARYLAND, IS THAT THI?
A. YES.
Q. WOULD IT HAVE BEEN THI OF BALTIMORE MANAGEMENT?
A. YES. WHATEVER SPARKS IS NAMED.
Q. WELL, THERE'S ABOUT FIVE OF THEM. THAT'S WHAT I'M

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A. YES.
Q. HAVE YOU EVER TRIED TO DETERMINE THE ACUITY LEVEL OF EACH RESIDENT IN YOUR FACILITY?
A. NO.
Q. HAS ANYONE IN YOUR BUILDING DONE THAT?
A. NO.
Q. DO YOU AGREE THAT DOCUMENTATION IS IMPORTANT?
A. YES.
Q. IS IT THE POLICY OF YOUR FACILITY THAT IF IT'S NOT DOCUMENTED, IT'S NOT DONE?
BY MR. MCDONALD:
OBJECT TO THE FORM. GO AHEAD.
WITNESS ANSWERS:
A. NO.
Q. EXPLAIN TO ME WHY NOT.
A. NOT MINE. IT'S NOT MY OPINION, NO.
Q. OKAY. WHAT IS YOUR OPINION?
A. JUST BECAUSE IT WASN'T DOCUMENTED DOESN'T MEAN IT WASN'T DONE.
Q. OKAY. AND IF, SAY, I CAME IN TO WORK AT YOUR FACILITY, HOW WOULD I KNOW WHAT CARE HAD BEEN PROVIDED TO A RESIDENT IF IT WERE NOT DOCUMENTED?
A. WORD OF MOUTH.
Q. OKAY. IF I REPLACED SOMEBODY IN YOUR FACILITY -- IF I CAME IN ON FIRST SHIFT TOMORROW MORNING AND

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WHOEVER WAS AT FIRST SHIFT THIS MORNING NO LONGER WORKED THERE, HOW WOULD I PROVE -- AND SHE HAD NOT DOCUMENTED, HOW WOULD I PROVE WHAT CARE SHE HAD PROVIDED?
A. WHAT YOU'RE ASKING ME IS A SUBJECTIVE THING IN A LOT OF WAYS, BECAUSE ALL YOU HAVE TO DO IS LOOK AT THE PATIENT AND TELL WHETHER THE PATIENT WAS TAKEN CARE OF OR NOT.
Q. BUT HOW DO YOU PROVE TO THE GOVERNMENT THAT DOCTOR'S ORDERS WERE FOLLOWED FOR THAT PATIENT?
A. THAT WASN'T YOUR FIRST QUESTION.
Q. WELL, THAT'S A NEW QUESTION.
A. OKAY. THERE IS NO WAY TO PROVE IT.
Q. OKAY. DO YOU HAVE ANY CLINICAL EXPERIENCE?
A. YES.
Q. AS A NURSE?
A. YES.
Q. HOW MANY YEARS WERE YOU A NURSE?
A. I GOT MY LPN IN 1977.
Q. OKAY. AND WHAT OTHER FACILITIES HAVE YOU WORKED AT?
A. HOW MANY YEARS DO YOU WANT ME TO GO BACK?
Q. JUST LIST FOR ME FACILITIES.
A. ST. GEORGE, EDISTO CONVALESCENT CENTER, JOLLY ACRES. I'VE WORKED FOR SENECA, I'VE WORKED FOR BROOKVIEW, WOODRUFF, IN SOUTH CAROLINA. I THINK THAT'S ALL IN

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SOUTH CAROLINA. NO, BEAUFORT. MULTIPLE.
Q. WHAT OTHER STATES HAVE YOU WORKED IN?
A. ALABAMA. THAT'S WHERE I GOT MY RN. AND TEXAS.
Q. DO YOU STILL HAVE RN -- DO YOU STILL HAVE A CURRENT RN LICENSE?
A. YES.
Q. IN SOUTH CAROLINA?
A. YES.
Q. IN ALABAMA?
A. NO. YOU CAN ONLY HAVE -- NO. MY LICENSE -- IN SOUTH CAROLINA IT'S NOW A MULTI-STATE.
Q. HAVE YOU EVER BEEN DISCIPLINED BY THE BOARD -- BY THE -- I GUESS IT WOULD BE THE BOARD THAT LICENSES NURSING HOMES ---
A. NURSING BOARD, YES.
Q. --- ADMINISTRATORS?
A. NOT ADMINISTRATOR. NURSING BOARD.
Q. TELL ME ABOUT THAT.
A. IN VERY PLAIN TERMS, I PISSED OFF THE WRONG PERSON, AND IN ORDER -- AND THAT WAS THE EASIEST WAY TO GET BACK AT ME.
Q. OKAY. WHAT FACILITY WERE YOU WORKING FOR THEN?
A. WOODRUFF.
Q. OKAY. CAN YOU EXPLAIN THAT TO ME, WHAT HAPPENED?
A. THEY CLAIM THAT I DOCUMENTED ON A PHYSICIAN'S ORDER

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AFTER HE SIGNED THE ORDER. I DOCUMENTED ON IT PRIOR TO HIM SIGNING IT. EVEN IN MY DISCIPLINARY ACTIONS I DID NOT AGREE OR DISAGREE WITH IT.
Q. OKAY. AND YOU WENT BEFORE THE NURSING BOARD FOR THAT?
A. WELL, IT WAS TAKEN BEFORE THE NURSING BOARD. I DIDN'T GO FOR IT.
Q. HOW LONG DID YOU WORK AT WOODRUFF?
A. EIGHT MONTHS, NINE MONTHS.
Q. DO YOU RECALL WILHELMINA BROWN?
A. YES.
Q. WHAT DO YOU RECALL ABOUT HER?
A. SHE WAS A BED PATIENT WITH TUBE FEEDING. I CAN JUST SEE HER, BUT THAT'S ALL I RECALL ABOUT HER.
Q. DID YOU EVER TALK WITH HER FAMILY?
A. NOT THAT TO MY KNOWLEDGE, NO.
Q. DO YOU HAVE ANYTHING TO DO WITH COST REPORTS IN YOUR FACILITY?
A. DO I MAKE THEM? NO.
Q. DO YOU SIGN THEM?
A. I DON'T REMEMBER SIGNING THEM.
(MARKED PLAINTIFF'S EXHIBIT NUMBER FOUR - MEDICAID COST REPORT - ATTACHED)
BY MR. MCDONALD:
WHAT NUMBER ARE WE ON, DO YOU KNOW?

STATE OF SOUTH CAROLINA — IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG — CASE NO. 06-CP-42-3453

ASHLEY BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILHELMINA BROWN, DECEASED, AND AS REPRESENTATIVE OF STATUTORY BENEFICIARIES,
PLAINTIFF,

VERSUS

THI OF BALTIMORE, LLC, THI OF BALTIMORE, INC., THI OF BALTIMORE MANAGEMENT, LLC, THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT SPARTANBURG, LLC D/B/A MAGNOLIA PLACE AT SPARTANBURG,
DEFENDANTS.

DEPOSITION OF MARGARET W. KELLER

PURSUANT TO NOTICE AND/OR AGREEMENT, THE DEPOSITION OF MARGARET W. KELLER WAS CALLED BY THE PLAINTIFF ON THE 28TH DAY OF AUGUST, 2007, COMMENCING AT THE HOUR OF 10:36 A.M. AT THE LAW OFFICES OF POLIAKOFF AND ASSOCIATES, 215 MAGNOLIA STREET, SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS FOLLOWS:

DIXY MOORE TURNER
CERTIFIED VERBATIM REPORTER

Blumberg No. 6119
PLAINTIFF'S EXHIBIT 23

A. WELL, I'M GETTING THERE.
Q. OKAY. DON'T LET ME INTERRUPT YOU. I'M SORRY.
A. MY ROLE IS TO PLAN AND IMPLEMENT IN THE NURSING DEPARTMENT THE REGS AS SET FORTH BY FEDERAL AND STATE AND PLUS CORPORATE.
Q. OKAY, SO YOU HELP TO DEVELOP POLICIES AND PROCEDURES; DO YOU DO THAT?
A. NO, I DON'T DEVELOP THEM.
Q. OKAY, BUT YOU HELP TO IMPLEMENT THEM ---
A. RIGHT.
Q. --- WITHIN THE NURSING DEPARTMENT?
A. YES, MA'AM.
Q. --- AND COORDINATE WITH OTHER DEPARTMENTS AS WELL?
A. YES, MA'AM.
Q. ARE YOU IN CONSTANT CONTACT WITH THE ADMINISTRATOR?
A. YES, MA'AM.
Q. WHAT DOCUMENTS DID YOU REVIEW TO PREPARE FOR TODAY'S DEPOSITION?
A. I THUMBED THROUGH THE CHART, NOT REAL GOOD, AND I KIND OF THUMBED THROUGH MY DEPOSITION.
Q. OKAY, AND THAT'S ALL?
A. MM-HMM. (AFFIRMATIVE RESPONSE)
Q. DO YOU AGREE THAT A RESIDENT OR THEIR LEGAL REPRESENTATIVE HAS THE RIGHT UPON REQUEST TO ACCESS RECORDS WITHIN 24 HOURS?

A. THEY HAVE THE RIGHT, BUT IT DON'T ALWAYS HAPPEN.

Q. EXPLAIN WHAT YOU MEAN.

A. WELL, WHEN WE GET A REQUISITION FOR A CHART WE HAVE TO SEND IT TO OUR LEGAL DEPARTMENT.

Q. WHERE IS YOUR LEGAL DEPARTMENT? IS THAT HERE IN SPARTANBURG, OR IS THAT IN MARYLAND?

A. I THINK IT'S IN MARYLAND.

Q. SO, THAT'S AT THI?

A. RIGHT.

Q. AND IS THAT A CORPORATE POLICY?

A. YES, MA'AM.

Q. IS THERE ANY DOCUMENT THAT INDICATES THAT THAT'S THE POLICY OF THE CORPORATE OFFICE?

BY MR. McDONALD:

OBJECT TO THE FORM; GO AHEAD.

WITNESS ANSWERS:

A. I'M SURE THERE IS. THAT WOULD BE IN MEDICAL RECORDS.

EXAMINATION RESUMED BY MS. HARRILL:

Q. SO, WHO REVIEWS THOSE RECORDS? IS IT LAWYERS IN MARYLAND?

A. I'M NOT SURE.

Q. DO YOU KNOW WHY THEY DO THAT?

A. NO, MA'AM.

Q. DO YOU AGREE THAT A FACILITY MUST IMMEDIATELY INFORM

THE RESIDENT, CONSULT WITH THE PHYSICIAN, NOTIFY A FAMILY MEMBER WHEN WHERE IS A SIGNIFICANT CHANGE IN THE RESIDENT'S CONDITION?

A. YES, MA'AM.

Q. IS THAT A FACILITY POLICY?

A. YES, MA'AM.

Q. CAN YOU TELL ME WHAT MAKES UP THE STANDARD OF CARE IN YOUR FACILITY.

BY MR. McDONALD:

OBJECT TO THE FORM, BUT GO AHEAD.

EXAMINATION RESUMED BY MS. HARRILL:

Q. OKAY, LET ME REPHRASE THAT. CAN YOU TELL ME WHAT MAKES UP THE RULES FOR YOUR FACILITY, THE RULES THAT YOU NEED TO FOLLOW.

A. WE HAVE TO FOLLOW THE STATE AND FEDERAL GUIDELINES.

Q. OKAY, AND WHAT ABOUT THE POLICIES AND PROCEDURES OF THE FACILITY?

A. WELL, YEAH; THAT, TOO.

Q. OKAY, AND WHAT ABOUT CUSTOMARY PRACTICE WITHIN THIS AREA FOR OTHER NURSING HOMES; DO YOU FOLLOW THAT AS WELL?

A. WE FOLLOW CORPORATE POLICIES AND PROCEDURES.

Q. OKAY. SO, DOES CORPORATE CREATE THE POLICIES FOR YOUR FACILITY?

A. YES, MA'AM.

Q. AND IF THERE ARE NEW POLICIES IMPLEMENTED, HOW DO YOU GET THOSE; WHO DO YOU GET THOSE FROM?

A. THEY USUALLY E-MAIL THEM TO US, OR ELSE, YOU KNOW, IF THERE'S A LOT OF THEM TO CHANGE IN THE POLICY BOOK, THEY WILL SEND US A PACKET OF THEM, AND WE HAVE TO CHANGE THEM OUT.

Q. WHEN YOU SAY "THEY," IS THERE LIKE A SPECIFIC PERSON, OR IS IT JUST SOMEONE OUT THERE IN CORPORATE?

A. NO, IT WOULD COME FROM OUR - WHEREVER THEY ORDER THEIR MANUALS FROM.

Q. OKAY, SO IT'S ANOTHER COMPANY THAT SENDS THEM TO YOU?

A. YES, MA'AM.

Q. OKAY. DO YOU HAVE ANY INPUT IN DEVELOPMENT OF POLICIES AND PROCEDURES?

A. NO, MA'AM.

Q. CAN YOU TELL ME WHO ISSUES YOUR PAYCHECK. DOES IT COME FROM MAGNOLIA PLACE, OR WHAT DOES IT SAY ON YOUR PAYCHECK? DO YOU KNOW OFF THE TOP OF YOUR HEAD?

A. IT COMES FROM FUNDAMENTALS, I BELIEVE.

Q. WHO IS YOUR SUPERVISOR?

A. MY SUPERVISOR, MY ADMINISTRATOR IS PAT HARRIS. MY CSD IS MARSHA DENNER.

Q. CSD, CLINICAL SERVICE COORDINATOR?
A. RIGHT; DIRECTOR.
Q. AND WHO DOES SHE WORK FOR?
A. SHE WORKS FOR FUNDAMENTALS.
Q. IS SHE THE ONLY PERSON YOU HAVE CONTACT WITH AT CORPORATE?
A. YOU KNOW, I GET THE E-MAILS FROM THEM.
Q. WHO ELSE DO YOU GET E-MAILS FROM?
A. WELL, WE GET E-MAILS FROM ANY OF THE DIFFERENT DEPARTMENTS UP THERE IF THEY, YOU KNOW, MIGHT NEED A REPORT OR SOMETHING.
Q. WHAT KIND OF REPORT MIGHT THEY ASK YOU FOR?
A. WELL, I HAVE TO TURN IN A CRITICAL MATRIX MONTHLY.
Q. WHAT IS THAT?
A. IT'S JUST TELLING -- IT'S JUST TELLING THEM WHAT OUR CENSUS IS AND HOW MANY DECUBES WE HAVE AND AND FILES AND HOW MANY IS IN THE HOSPITAL. IT'S JUST AN OVERVIEW OF THE FACILITY.
Q. WHAT OTHER REPORTS DO YOU GENERATE ON A REGULAR BASIS?
A. THAT'S ALL THAT I SEND TO CORPORATE.
Q. WHAT OTHER ONES DO YOU CREATE? ARE THERE ANY OTHER REPORTS THAT YOU CREATE REGULARLY THAT MAY OR MAY NOT GO TO CORPORATE?
A. NOT ME, I DON'T. WE HAVE OTHERS, BUT I DON'T.

OBJECT TO THE FORM.

WITNESS ANSWERS:

A. NO, NOT THE RATE.

EXAMINATION RESUMED BY MS. HARRILL:

Q. OKAY. WOULD YOU AGREE THAT THE FACILITY IS REQUIRED TO HAVE SUFFICIENT NURSING STAFF TO PROVIDE SERVICES TO ATTAIN OR MAINTAIN THE HIGHEST PRACTICAL PHYSICAL, MENTAL, AND SOCIAL WELL-BEING OF EACH RESIDENT?

A. YES, MA'AM.

Q. HAVE YOU EVER BEEN AWARE OF YOUR FACILITY NOT HAVING SUFFICIENT NURSING STAFF TO DO SO?

A. NO, MA'AM.

Q. HOW DO YOU DETERMINE SUFFICIENT NURSING STAFF IN YOUR FACILITY?

A. ON SEVEN TO THREE, THE STATE SAYS THAT WE HAVE TO HAVE ONE CNA PER NINE RESIDENTS.

Q. OKAY, ON SEVEN TO THREE?

A. ON SEVEN TO THREE. WE TRY -- WHICH MEANS THAT WOULD BE TEN CNAs FOR 88 RESIDENTS. WE USUALLY HAVE 12. THEY SAY THAT -- DO YOU WANT ME TO GO COMPLETELY THROUGH THE CNAs AND THEN COME BACK TO THE NURSES?

Q. THAT WOULD BE WONDERFUL IF YOU COULD DO THAT.

A. ON 3 TO 11, WE ARE REQUIRED TO HAVE ONE CNA TO 13 RESIDENTS, AND THAT WOULD MEAN SEVEN CNAs TO 88, AND

WE USUALLY HAVE EIGHT. ON 11 TO 7 WE ARE REQUIRED TO HAVE TWO -- I'M SORRY, ONE CNA TO 22, AND WE HAVE FOUR.

Q. TO 88?

A. TO 88. ON YOUR NURSES, WE ARE REQUIRED ONE NURSE TO 44 RESIDENTS, WHICH WE HAVE TWO NURSES.

Q. NOW, WHEN YOU SAY "NURSES," YOU MEAN LPNs, RIGHT, OR RNs?

A. LPNs OR RNs, EITHER ONE.

Q. OKAY, AND WHAT DO YOU NORMALLY HAVE; LPNs OR RNs?

A. NORMALLY LPNs.

Q. OKAY. GO AHEAD; I DIDN'T MEAN TO INTERRUPT. GO AHEAD.

A. WE HAVE FOUR NURSES ON FIRST SHIFT PER 88, AND WE HAVE FOUR NURSES ON SECOND SHIFT TO 88. AND WE HAVE TWO ON NIGHT SHIFT TO 88.

Q. DO YOU KNOW WHAT THE FEDERAL REGULATIONS SAY ABOUT STAFFING REQUIREMENTS AS OPPOSED TO THE STATE REGULATIONS?

A. THEY ARE THE SAME.

Q. DO YOU KNOW WHAT THE PHRASE "ACUITY LEVEL" MEANS?

A. ACUITY LEVEL? YEAH.

Q. CAN YOU TELL ME WHAT THAT MEANS.

A. IT MEANS THE ACUITY OF THE RESIDENTS, HOW MUCH MORE STAFF IS REQUIRED TO TAKE CARE OF THAT RESIDENT.

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



a contract.

Q. Does Fundamental have any oversight capabilities?

A. Yes.

Q. In what way?

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

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

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

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

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

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

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

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

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

A. Not that I've heard of.

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

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

Q. How often do you go to Briarwood?

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

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

A. Yes.

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

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

staff or anything else?

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

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

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

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

A. Correct.

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

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

Q. You mean as far as overhead?

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

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

A. Correct.

Q. Keep the overhead low?

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

Q. Do they have an annual conference for that?

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

Q. Is that here in South Carolina?

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

Q. AMDA does?

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



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.

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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

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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 Mangers 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:

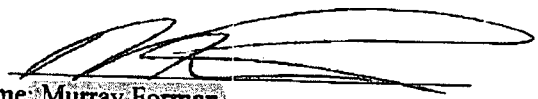
(i) authorizing, executing and delivering and performing services relating to the business of managing and operating long-term care facilities, including skilled nursing facilities, long-term care hospitals and assisted living facilities;

(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

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Form **8453-S**

Department of the Treasury
Internal Revenue Service

U.S. S Corporation Income Tax Declaration for an IRS *e-file* Return

File electronically with the corporation's tax return. Do not file paper copies.

For calendar year 2007, or tax year beginning 01/01/2007 and ending 12/31/2007

OMB No. 1545-1867

2007

Name of Corporation

FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC

Employer identification number

20-4005037

Part I Tax Return Information (Whole dollars only)

1	Gross receipts or sales less returns and allowances (Form 1120S, line 1c)	1	737,874,851.
2	Gross profit (Form 1120S, line 3)	2	737,874,851.
3	Ordinary business income (loss) (Form 1120S, line 21)	3	4,149,587.
4	Net rental real estate income (loss) (Form 1120S, Schedule K, line 2)	4	
5	Income (loss) reconciliation (Form 1120S, Schedule K, line 18)	5	4,366,108.

Part II Declaration of Officer (see instructions) Be sure to keep a copy of the corporation's tax return.

6 a ☐ I consent that the corporation's refund be directly deposited as designated on the Form 8050, Direct Deposit of Corporate Tax Refund, that will be electronically transmitted with the corporation's 2007 federal income tax return.

b ☒ I do not want direct deposit of the corporation's refund or the corporation is not receiving a refund.

c ☐ I authorize the U.S. Treasury and its designated Financial Agent to initiate an electronic funds withdrawal (direct debit) entry to the financial institution account indicated in the tax preparation software for payment of the corporation's federal taxes owed on this return, and the financial institution to debit the entry to this account. To revoke a payment, I must contact the U.S. Treasury Financial Agent at 1-888-353-4537 no later than 2 business days prior to the payment (settlement) date. I also authorize the financial institutions involved in the processing of the electronic payment of taxes to receive confidential information necessary to answer inquiries and resolve issues related to the payment.

If the corporation is filing a balance due return, I understand that if the IRS does not receive full and timely payment of its tax liability, the corporation will remain liable for the tax liability and all applicable interest and penalties.

Under penalties of perjury, I declare that I am an officer of the above corporation and that the information I have given my electronic return originator (ERO), transmitter, and/or intermediate service provider (ISP) and the amounts in Part I above agree with the amounts on the corresponding lines of the corporation's 2007 federal income tax return. To the best of my knowledge and belief, the corporation's return is true, correct, and complete. I consent to my ERO, transmitter, and/or ISP sending the corporation's return, this declaration, and accompanying schedules and statements to the IRS. I also consent to the IRS sending my ERO, transmitter, and/or ISP an acknowledgement of receipt of transmission and an indication of whether or not the corporation's return is accepted, any indication of a refund offset, and, if rejected, the reason(s) for the rejection. If the processing of the corporation's return or refund is delayed, I authorize the IRS to disclose to my ERO, transmitter, and/or ISP the reason(s) for the delay, or when the refund was sent.

Sign Here ▶ Signature of officer _____ Date _____ ▶ PRESIDENT Title

Part III Declaration of Electronic Return Originator (ERO) and Paid Preparer (see instructions)

I declare that I have reviewed the above corporation's return and that the entries on Form 8453-S are complete and correct to the best of my knowledge. If I am only a collector, I am not responsible for reviewing the return and only declare that this form accurately reflects the data on the return. The corporate officer will have signed this form before I submit the return. I will give the officer a copy of all forms and information to be filed with the IRS, and have followed all other requirements in Pub. 3112, IRS *e-file* Application and Participation, and Pub. 4163, Modernized e-File (MeF) Information for Authorized IRS *e-file* Providers. If I am also the Paid Preparer, under penalties of perjury I declare that I have examined the above corporation's return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. This Paid Preparer declaration is based on all information of which I have any knowledge.

ERO's Use Only	ERO's signature ▶	Date	Check if also paid preparer ☐	Check if self-employed ☐	ERO's SSN or PTIN
	Firm's name (or yours if self-employed), address, and ZIP code ▶				EIN Phone no.

Under penalties of perjury, I declare that I have examined the above corporation's return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. This declaration is based on all information of which I have any knowledge.

Paid Preparer's Use Only	Preparer's signature ▶	Date	Check if self-employed ☐	Preparer's SSN or PTIN P00363773
	Firm's name (or yours if self-employed), address, and ZIP code ▶ KPMG LLP 1 EAST PRATT STREET BALTIMORE MD 21202			EIN 13-5565207 Phone no. 410-949-8500

For Privacy Act and Paperwork Reduction Act Notice, see instructions. Form 8453-S (2007)

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Form **1120S** — Department of the Treasury, Internal Revenue Service (77)

U.S. Income Tax Return for an S Corporation

▶ Do not file this form unless the corporation has filed or is attaching Form 2553 to elect to be an S corporation.
▶ See separate instructions.

OMB No. 1545-0130

2007

For calendar year 2007 or tax year beginning 01/01/2007, and ending 12/31/2007

A S election effective date: 01/01/2006	Use IRS label. Otherwise, print or type. Name: FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC	D Employer identification number: 20-4005037
B Business activity code number (see instructions): 623000	Number, street, and room or suite no. If a P.O. box, see instructions.: 930 RIDGEBROOK ROAD	E Date incorporated: 01/01/2006
C Check if Sch. M-3 attached: X	City or town, state, and ZIP code: SPARKS, MD 21152	F Total assets (see instructions): $ 231,206,488.

G Is the corporation electing to be an S corporation beginning with this tax year? ☐ Yes ☒ No. If "Yes," attach Form 2553 if not already filed.

H Check if: (1) ☐ Final return (2) ☐ Name change (3) ☐ Address change (4) ☐ Amended return (5) ☐ S election termination or revocation

I Enter the number of shareholders in the corporation at the end of the tax year ▶ 2

Caution. *Include only trade or business income and expenses on lines 1a through 21. See the instructions for more information.*

Income	1a	Gross receipts or sales: 737,874,851.	b Less returns and allowances:	c Bal ▶ 1c	737,874,851.
	2	Cost of goods sold (Schedule A, line 8)		2	
	3	Gross profit. Subtract line 2 from line 1c		3	737,874,851.
	4	Net gain (loss) from Form 4797, Part II, line 17 *(attach Form 4797)*		4	
	5	Other income (loss) *(see instructions - attach statement)* See Statement 1.		5	155,435.
	6	Total income (loss). Add lines 3 through 5 ▶		6	738,030,286.
Deductions (see instructions for limitations)	7	Compensation of officers		7	
	8	Salaries and wages (less employment credits)		8	354,540,829.
	9	Repairs and maintenance		9	2,363,094.
	10	Bad debts		10	11,080,943.
	11	Rents		11	63,785,790.
	12	Taxes and licenses See Statement 1.		12	50,490,831.
	13	Interest		13	4,687,451.
	14	Depreciation not claimed on Schedule A or elsewhere on return *(attach Form 4562)*		14	3,579,207.
	15	Depletion (Do not deduct oil and gas depletion.)		15	
	16	Advertising		16	1,044,396.
	17	Pension, profit-sharing, etc., plans		17	
	18	Employee benefit programs		18	41,774,071.
	19	Other deductions *(attach statement)* See Statement 1.		19	200,534,087.
	20	Total deductions. Add lines 7 through 19 ▶		20	733,880,699.
	21	Ordinary business income (loss). Subtract line 20 from line 6		21	4,149,587.
Tax and Payments	22a	Excess net passive income or LIFO recapture tax *(see instructions)*	22a		
	b	Tax from Schedule D (Form 1120S)	22b		
	c	Add lines 22a and 22b *(see instructions for additional taxes)*		22c	
	23a	2007 estimated tax payments and 2006 overpayment credited to 2007	23a 40,077.		
	b	Tax deposited with Form 7004	23b		
	c	Credit for federal tax paid on fuels *(attach Form 4136)*	23c		
	d	Add lines 23a through 23c		23d	40,077.
	24	Estimated tax penalty *(see instructions)*. Check if Form 2220 is attached ▶ ☐		24	
	25	Amount owed. If line 23d is smaller than the total of lines 22c and 24, enter amount owed		25	
	26	Overpayment. If line 23d is larger than the total of lines 22c and 24, enter amount overpaid		26	40,077.
	27	Enter amount from line 26 Credited to 2008 estimated tax ▶ Refunded ▶		27	40,077.

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Sign Here ▶ Signature of officer MURRAY FORMAN Date ▶ PRESIDENT Title

May the IRS discuss this return with the preparer shown below (see instructions)? ☐ Yes ☐ No

Paid Preparer's Use Only	Preparer's signature ▶	Date	Check if self-employed ☐	Preparer's SSN or PTIN: P00363773
	Firm's name (or yours if self-employed), address, and ZIP code ▶ KPMG LLP, 1 EAST PRATT STREET, BALTIMORE, MD 21202		EIN	13-5565207
			Phone no.	410-949-8500

For Privacy Act and Paperwork Reduction Act Notice, see separate instructions. Form **1120S** (2007)

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ZUCKERMAN, F. 015519

Schedule A Cost of Goods Sold (see instructions)

1	Inventory at beginning of year	1	
2	Purchases	2	
3	Cost of labor	3	
4	Additional section 263A costs *(attach statement)*	4	
5	Other costs *(attach statement)*	5	
6	**Total.** Add lines 1 through 5	6	
7	Inventory at end of year	7	
8	**Cost of goods sold.** Subtract line 7 from line 6. Enter here and on page 1, line 2	8	

9a Check all methods used for valuing closing inventory: (i) ☐ Cost as described in Regulations section 1.471-3
(ii) ☐ Lower of cost or market as described in Regulations section 1.471-4
(iii) ☐ Other (Specify method used and attach explanation.) ▶

b Check if there was a writedown of subnormal goods as described in Regulations section 1.471-2(c) ▶ ☐
c Check if the LIFO inventory method was adopted this tax year for any goods (if checked, attach Form 970) ▶ ☐
d If the LIFO inventory method was used for this tax year, enter percentage (or amounts) of closing inventory computed under LIFO 9d
e If property is produced or acquired for resale, do the rules of section 263A apply to the corporation? ☐ Yes ☐ No
f Was there any change in determining quantities, cost, or valuations between opening and closing inventory? If "Yes," attach explanation. ☐ Yes ☐ No

Schedule B Other Information (see instructions)

		Yes	No
1	Check accounting method: a ☐ Cash b ☒ Accrual c ☐ Other (specify) ▶		
2	See the instructions and enter the: a Business activity ▶ NURSING & PERS CARE b Product or service ▶ NURSING & PERS CARE		
3	At the end of the tax year, did the corporation own, directly or indirectly, 50% or more of the voting stock of a domestic corporation? (For rules of attribution, see section 267(c).) If "Yes," attach a statement showing: (a) name and employer identification number (EIN), (b) percentage owned, and (c) if 100% owned, was a QSub election made?		X
4	Has this corporation filed, or is it required to file, a return under section 6111 to provide information on any reportable transaction?		X
5	Check this box if the corporation issued publicly offered debt instruments with original issue discount ▶ ☐ If checked, the corporation may have to file Form 8281, Information Return for Publicly Offered Original Issue Discount Instruments.		
6	If the corporation: (a) was a C corporation before it elected to be an S corporation or the corporation acquired an asset with a basis determined by reference to its basis (or the basis of any other property) in the hands of a C corporation and (b) has net unrealized built-in gain (defined in section 1374(d)(1)) in excess of the net recognized built-in gain from prior years, enter the net unrealized built-in gain reduced by net recognized built-in gain from prior years ▶ $		
7	Enter the accumulated earnings and profits of the corporation at the end of the tax year. $		
8	Are the corporation's total receipts *(see instructions)* for the tax year and its total assets at the end of the tax year less than $250,000? If "Yes," the corporation is not required to complete Schedules L and M-1		X

Schedule K Shareholders' Pro Rata Share Items

			Total amount
Income (Loss)	1 Ordinary business income (loss) (page 1, line 21)	1	4,149,587.
	2 Net rental real estate income (loss) *(attach Form 8825)*	2	
	3a Other gross rental income (loss) 3a		
	b Expenses from other rental activities *(attach statement)* 3b		
	c Other net rental income (loss). Subtract line 3b from line 3a	3c	
	4 Interest income	4	362,220.
	5 Dividends: a Ordinary dividends	5a	
	b Qualified dividends 5b		
	6 Royalties	6	
	7 Net short-term capital gain (loss) *(attach Schedule D (Form 1120S))*	7	
	8a Net long-term capital gain (loss) *(attach Schedule D (Form 1120S))*	8a	
	b Collectibles (28%) gain (loss) 8b		
	c Unrecaptured section 1250 gain *(attach statement)* 8c		
	9 Net section 1231 gain (loss) *(attach Form 4797)*	9	-43,270.
	10 Other income (loss) *(see instructions)* Type ▶	10	

Form **8883**
(October 2002)
Department of the Treasury
Internal Revenue Service

Asset Allocation Statement
Under Section 338

▶ Attach to your income tax return. ▶ See separate instructions.

OMB No. 1545-1806.

Part I Filer's Identifying Information

1a Name as shown on return	1b Identifying number as shown on return
FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC	20-4005037

1c Check applicable box (see instructions): ☐ Old target ☒ New target

1d Was a valid and timely Form 8023 filed? ☒ Yes ☐ No
If yes, enter the date filed ▶ 12/07/2006

Part II Other Party's Identifying Information

2a Name of other party to the transaction	2b Other party's identifying number
THI OF BALTIMORE, INC. & SUBSIDIARIES	45-0510853

Address (number, street, and room or suite no.)

930 RIDGEBROOK ROAD

City or town, state, and ZIP code

SPARKS,MD 21152

Part III Target Corporation's Identifying Information

3a Name and address of target corporation	3b Employer identification number
	3c State or country of incorporation

Part IV General Information

4a Acquisition date	4b What percentage of target corporation stock was purchased:
03/28/2006	(i) During the 12-month acquisition period? %
	(ii) On the acquisition date? 100.00%

5a Stock price	5b Acquisition costs/Selling costs	5c Target liabilities	5d AGUB/ADSP
$	$ 12,000,000.	$ 88,612,337.	$ 102,290,237.

		Yes	No
6	Was the filer listed in Part I, above, a member of an affiliated group of corporations before the acquisition date?		X
7	Was the target corporation a member of an affiliated group before the acquisition date?		X
8	Is the target corporation or any target affiliate:		
a	A controlled foreign corporation? If "No," check here if it was a CFC at any time during the preceding 5 years ▶ ☐		X
b	A foreign corporation with income, gain, or less effectively connected with the conduct of a trade or business within the United States (including U.S. real property interests)?		X
c	A qualifying foreign target under Regulations section 1.338-2(e)(1)(iii)?		X
d	A corporation to which section 936 applies?		X
e	A corporation electing under section 1504(d) or section 953(d)?		X
f	A domestic international sales corporation (DISC)?		X
g	A passive foreign investment company (PFIC)?		
h	If the answer to item 8g is "Yes", is the PFIC a pedigreed qualified electing fund?		

For Paperwork Reduction Act Notice, see separate Instructions. Form **8883** (10-2002)

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AMENDED AND RESTATED
REVOLVING CREDIT AND SECURITY AGREEMENT

among

FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC,
THI OF BALTIMORE, INC., THI OF NEVADA II, INC.
and certain Subsidiaries as Borrowers

and

CAPITALSOURCE FINANCE LLC
as Lender

Dated as of
March 28, 2006

ZUCKERMAN, F. (
Bluemberg No. 5113
PLAINTIFF'S EXHIBIT 27

EXECUTION COPY

AMENDED AND RESTATED REVOLVING CREDIT AND SECURITY AGREEMENT

This AMENDED AND RESTATED REVOLVING CREDIT AND SECURITY AGREEMENT (the "Agreement") dated as of March 28, 2006, is entered into by and among FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC, a Delaware limited liability company, THI OF BALTIMORE, INC., a Delaware corporation, THI OF NEVADA II, INC., a Delaware corporation, and THE SUBSIDIARIES LISTED ON THE SIGNATURE PAGES HEREOF (each individually referred to herein as "Borrower" and collectively as "Borrowers"), and CAPITALSOURCE FINANCE LLC, a Delaware limited liability company (referred to herein as a "Lender").

RECITALS

WHEREAS, Borrower and Lender have entered into that certain Revolving Credit and Security Agreement, dated as of February 2, 2006, (as amended, the "Original Loan Agreement");

WHEREAS, Lender and Borrower desire to amend and restate the Original Loan Agreement to continue to make available to Borrower a revolving credit facility (the "Revolving Facility") in a maximum principal amount at any time outstanding of up to $50,000,000.00 (the "Facility Cap"), and within the Facility Cap, a sublimit of $10,000,000 to be used for the issuance of standby letters of credit (the "L/C Sublimit") the proceeds of which shall be used by Borrowers as providers of healthcare services to finance certain acquisition costs, for the purchase or generation of receivables and for payments to Lender hereunder and for any other lawful purpose authorized in this Agreement; and

WHEREAS, Lender is willing to make the Revolving Facility available to Borrowers upon the terms and subject to the conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and adequacy of which hereby are acknowledged, Borrowers, and Lender hereby agree as follows:

I. DEFINITIONS

1.1 General Terms

(a) For purposes of this Agreement, in addition to the definitions above and elsewhere in this Agreement, the terms listed in Appendix A and Annex I hereto shall have the meanings given such terms in Appendix A and Annex I, which are incorporated herein and made a part hereof. All capitalized terms used which are not specifically defined herein shall, unless the context indicates otherwise, have the meanings provided for by the UCC to the extent the same are used or defined therein; in the event that any term is defined differently in different Articles or Divisions of the UCC, the definition contained in Article or Division 9 shall control Unless otherwise specified herein or in Appendix A, any agreement, contract or instrument referred to herein or in Appendix A shall mean such agreement as modified, amended, restated or supplemented from time to time. Unless otherwise specified, as used in the Loan Documents or in any certificate, report, instrument or other document made or delivered pursuant to any of the Loan Documents, all accounting terms not defined in Appendix A, Annex I or elsewhere in this Agreement shall have the meanings given to such terms in and shall be interpreted in accordance with GAAP References herein to "Eastern time" shall mean eastern standard time or eastern daylight savings time as in effect on any date of determination in the eastern United States of America

2.16 Payments by Lender

Should any amount required to be paid under any Loan Document be unpaid such amount may be paid by Lender, which payment shall be deemed a request for a Revolving Loan as of the date such payment is due, and Borrowers irrevocably authorize disbursement of any such funds to Lender by way of direct payment of the relevant amount, interest or Obligations. No payment or prepayment of any amount by Lender or any other Person shall entitle any Person to be subrogated to the rights of Lender under any Loan Document unless and until the Obligations have been fully performed and paid irrevocably in cash and this Agreement has been terminated. Any sums expended by Lender as a result of any Borrower's or any Guarantor's failure to pay, perform or comply with any Loan Document or any of the Obligations may be charged to any Borrower's account as a Revolving Loan and added to the Obligations.

2.17 Intentionally Omitted

2.18 Monthly Statements

Lender will account to Borrowers monthly with a statement of Revolving Loans, and any charges and payments made pursuant to this Agreement, and in the absence of manifest error, such accounting rendered by Lender shall be deemed final, binding and conclusive unless Lender is notified by Borrowers in writing to the contrary within thirty (30) calendar days of Receipt of each accounting, which notice shall be deemed an objection only to items specifically objected to therein.

2.19 Borrowing Agent

(a) Each Borrower hereby irrevocably and unconditionally appoints THI of Baltimore, Inc. as Borrowing Agent hereunder and under the other Loan Documents to act as agent for each such Borrower for all purposes of the Loan Documents, including, as applicable, (A) requesting Loans, (B) delivering certificates (C) allocating (to the extent permitted in the Loan Documents) the proceeds of the Loans, (D) taking any other action or receiving any communication on behalf of such Borrower in connection with the Loan Documents, and (E) taking such other actions and having such other powers as are reasonably incidental thereto. Borrowing Agent agrees to act upon the express conditions contained in this Agreement and the other Loan Documents, as applicable. No fees shall be payable to Borrowing Agent for acting as Borrowing Agent. In performing its functions and duties under this Agreement and the other Loan Documents, Borrowing Agent shall act solely as an agent of Borrowers. Lender shall be entitled to rely upon, and shall not incur any liability for relying upon, any notice (including any Borrowing Certificate), request, certificate, consent, statement, instrument, document or other writing (including any electronic message, posting or other distribution) believed by it to be genuine and to have been signed, sent or otherwise authenticated by the Borrowing Agent. Lender also may rely upon any statement made to them orally or by telephone and believed by them to have been made by Borrowing Agent, and shall not incur any liability for relying thereon. Any oral or written statement, certificate, representation or commitment made, given or delivered by Borrowing Agent under this Agreement or the other Loan Documents shall be deemed to have been approved by, made, given and delivered on behalf of, and shall bind Borrowers, jointly and severally, as fully as if any Borrower had made, given or delivered such statement, certificate, representation or commitment. The provisions of this Section 2.19 are solely for the benefit of Borrowers, Lender, and no other Person shall have any rights as a third party beneficiary of any of such provisions.

ZUCKERMAN, F. 030429

first day of each successive calendar month (starting with the month in which the Closing Date occurs) and on the Revolving Facility Maturity Date

3.2 Computation of Fees; Lawful Limits

All fees hereunder shall be computed on the basis of a year of three hundred sixty (360) days and for the actual number of days elapsed in each calculation period, as applicable In no contingency or event whatsoever, whether by reason of acceleration or otherwise, shall the interest and other charges paid or agreed to be paid to Lender for the use, forbearance or detention of money hereunder exceed the maximum rate permissible under applicable law which a court of competent jurisdiction shall, in a final determination, deem applicable hereto. If, due to any circumstance whatsoever, fulfillment of any provision hereof, at the time performance of such provision shall be due, shall exceed any such limit, then, the obligation to be so fulfilled shall be reduced to such lawful limit, and, if Lender shall have received interest or any other charges of any kind which might be deemed to be interest under applicable law in excess of the maximum lawful rate, then such excess shall be applied first to any unpaid fees and charges hereunder, then to unpaid principal balance owed by Borrowers hereunder, and if the then remaining excess interest is greater than the previously unpaid principal balance, Lender shall promptly refund such excess amount to Borrowing Agent and the provisions hereof shall be deemed amended to provide for such permissible rate The terms and provisions of this Section 3.2 shall control to the extent any other provision of any Loan Document is inconsistent herewith.

3.3 Default Rate of Interest

Upon the occurrence and during the continuation of an Event of Default, the Applicable Rate of interest in effect at such time with respect to the Obligations shall be increased by 3% per annum (the "Default Rate")

3.4 Acknowledgement of Joint and Several Liability

Each Borrower acknowledges that it is jointly and severally liable for all of the Obligations under the Loan Documents. Each Borrower expressly understands, agrees and acknowledges that (i) Borrowers are all Affiliated entities by common ownership, (ii) each Borrower desires to have the availability of one common credit facility instead of separate credit facilities, (iii) each Borrower has requested that Lender extend such a common credit facility on the terms herein provided, (iv) Lender will be lending against, and relying on a Lien upon, all of Borrowers' assets even though the proceeds of any particular loan made hereunder may not be advanced directly to a particular Borrower, (v) each Borrower will nonetheless benefit by the making of all such loans by Lender and the availability of a single credit facility of a size greater than each could independently warrant, and (vi) all of the representations, warranties, covenants, obligations, conditions, agreements and other terms contained in the Loan Documents shall be applicable to and shall be binding upon each Borrower

IV. COLLATERAL

4.1 Grant of Security Interest

(a) To secure the prompt and complete payment, performance and observance of all of the Obligations, each Borrower, to the maximum extent permitted by law, hereby grants, assigns, conveys, mortgages, pledges, hypothecates and transfers to Lender, a Lien upon all of its right, title and interest in, to and under all personal property, Real Estate and other assets, whether now owned by or owing to, or hereafter acquired by or arising in favor of, such Borrower (including under any trade

ZUCKERMAN, F. 030436

names, styles or derivations thereof), and whether owned or consigned by or to, or leased from or to, such Borrower, and regardless of where located (all of which being hereinafter collectively referred to as the "Collateral"), including:

(i) all Accounts;

(ii) all Books;

(iii) all Chattel Paper

(iv) all Documents;

(v) all General Intangibles (including payment intangibles and Software);

(vi) all Goods (including Inventory, Equipment and Fixtures);

(vii) all Instruments;

(viii) all Investment Property;

(ix) all Deposit Accounts of any Borrower, including all Blocked Accounts, Concentration Accounts and all other bank accounts and all deposits therein;

(x) all money, cash or cash equivalents of any Borrower;

(xi) all Supporting Obligations and Letter-of-Credit Rights of any Borrower;

(xii) any and all commercial tort claims;

(xiii) to the extent not otherwise included, all Proceeds, tort claims, insurance claims and other rights to payments not otherwise included in the foregoing and products of the foregoing and all accessions to, substitutions and replacements for, and rents and profits of, each of the foregoing; and

In addition, to secure the prompt and complete payment, performance and observance of the Obligations and in order to induce Lender to execute, deliver and perform its obligations under the Loan Documents, each Borrower hereby grants to Lender, a right of setoff against the property of such Borrower held by any Lender, consisting of property described above now or hereafter in the possession or custody of or in transit to any Lender, for any purpose, including safekeeping, collection or pledge, for the account of such Borrower, or as to which such Borrower may have any right or power

Notwithstanding the foregoing, "Collateral" shall not include (i) any Equipment financed by a Borrower with purchase money indebtedness or Capital Leases permitted hereunder prior to the date hereof (provided that such exclusion shall only apply to the extent such Borrower is prohibited from granting a security interest under the terms of such Indebtedness or Capital Lease and only so long as such Indebtedness or Capital Lease remains outstanding), or (ii) any contract rights or General Intangibles which by their express terms prohibit the applicable Borrower from granting a security interest therein, but only to the extent that such prohibition would be enforceable notwithstanding the provisions of Sections 9-406, 9-407 or 9-408 of the UCC

ZUCKERMAN, F. 030437

any duty upon Lender or any Lender to exercise any such powers. Lender agrees that (a) except for the powers granted in clause (h) of the Power of Attorney, it shall not exercise any power or authority granted under the Power of Attorney unless an Event of Default has occurred and is continuing, and (b) Lender shall account for any moneys received by Lender in respect of any foreclosure on or disposition of Collateral pursuant to the Power of Attorney provided that Lender shall not have any duty as to any Collateral, and Lender shall be accountable only for amounts that they actually receive as a result of the exercise of such powers. NEITHER LENDER NOR ITS RESPECTIVE RELATED PARTIES SHALL BE RESPONSIBLE TO ANY LOAN PARTY FOR ANY ACT OR FAILURE TO ACT UNDER ANY POWER OF ATTORNEY OR OTHERWISE, EXCEPT IN RESPECT OF DAMAGES ATTRIBUTABLE SOLELY TO THEIR OWN GROSS NEGLIGENCE OR WILLFUL MISCONDUCT AS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION, NOR FOR ANY PUNITIVE, EXEMPLARY, INDIRECT OR CONSEQUENTIAL DAMAGES.

4.7 Subsidiaries

(a) In the event after the Closing Date that any Person becomes a wholly owned Domestic Subsidiary of any Loan Party, Loan Parties shall (a) promptly cause such Domestic Subsidiary to become a Borrower hereunder (including for the purposes of this Article IV) and (b) take all such actions and execute and deliver, or cause to be executed and delivered, all such documents, instruments, agreements, and certificates as are required. In the event that any Person becomes a Foreign Subsidiary of any Loan Party, and the ownership interests of such Foreign Subsidiary are owned by any Loan Party or by any wholly owned Domestic Subsidiary thereof, such Loan Party shall, or shall cause such Domestic Subsidiary to, take such actions and deliver all such documents, instruments, agreements, and certificates as are necessary (or as may otherwise be reasonably requested by Lender) to grant and to perfect a first priority Lien (subject to Permitted Liens) in favor of Lender, for its benefit, in such ownership interests, provided that in no event shall such Domestic Subsidiary be required to pledge ownership interests exceeding sixty-five percent (65%) of its total ownership interests in such Foreign Subsidiary. With respect to each such Subsidiary, Loan Parties shall promptly send to Lender written notice setting forth with respect to such Person (i) the date on which such Person became a Subsidiary of a Loan Party, and (ii) all of the data required to be set forth in this Agreement or any other Loan Document (including any schedule thereto) with respect to all Subsidiaries of Loan Parties; provided, such written notice shall be deemed to supplement any schedule required to be delivered pursuant to any Loan Document for all purposes hereof. In addition, upon each such event, Loan Parties shall provide to Lender a schedule setting forth a complete list of Guarantor Subsidiaries. Loan Parties shall executed and deliver, or cause to be executed and delivered, to Lender such further agreements, instruments, documents and legal or other opinions, and take such actions necessary or advisable to grant to Lender, for its benefit, a perfected security interest (subject only to Permitted Liens) in all Collateral with respect to such wholly-owned Subsidiary, or as may be reasonably requested by Lender.

4.8 Lender's' Rights: Limitations on Lender's Obligations

(a) It is expressly agreed by each Loan Party that, anything herein to the contrary notwithstanding, each Loan Party shall remain liable under each of its Contracts and each of its Licenses to observe and perform all the conditions and obligations to be observed and performed by it thereunder. Lender shall not have any obligation or liability under any Contract or License by reason of or arising out of this Security Agreement or the granting herein of a Lien thereon or the receipt by Lender of any payment relating to any Contract or License pursuant hereto. Lender shall not be required or obligated in any manner to perform or fulfill any of the obligations of any Loan Party under or pursuant to any Contract or License, or to make any payment, or to make any inquiry as to the nature or the sufficiency of any payment received by it or the sufficiency of any performance by any party under any Contract or License,

ZUCKERMAN, F. 030441

IN WITNESS WHEREOF, each of the parties has duly executed this Amended and Restated Revolving Credit and Security Agreement as of the date first written above

THI OF BALTIMORE, INC.
IHS Acquisition No. 111, Inc.
THI Advantage DME, LLC
THI American Respiratory Services, LLC
THI Immediate Healthcare Staffing,, LLC
THI Nurse Advocates, LLC
THI Nurse Practitioners, LLC
THI of Baltimore Management, LLC
THI of Florida at Osceola, LLC
THI of Florida, LLC
THI of Georgia at Shamrock, LLC
THI of Georgia, LLC
THI of Kansas at Brighton Place, LLC
THI of Kansas at Cherry Creek Village, LLC
THI of Kansas at Cherry Creek, LLC
THI of Kansas at Golden Plains, LLC
THI of Kansas at Highland Park, LLC
THI of Kansas at Indian Creek, LLC
THI of Kansas at Indian Meadows, LLC
THI of Kansas at Specialty Hospital, LLC
THI of Kansas at Wichita Specialty, LLC
THI of Kansas, LLC
THI of Maine at Integrated Rehab, LLC
THI of Maine, LLC
THI of Michigan at Clarkston, LLC
THI of Michigan at Detroit, LLC
THI of Michigan at Silverbrook Manor, LLC
THI of Michigan, LLC
THI of Missouri at Gravois, LLC
THI of Missouri, LLC
THI of Nevada at Carson, LLC
THI of Nevada at Cheyenne, LLC
THI of Nevada at Desert Valley Therapy, LLC
THI of Nevada at Hearthstone, LLC
THI of Nevada at Henderson Convalescent, LLC
THI of Nevada at Las Vegas I, LLC
THI of Nevada at Las Vegas/Sierra, LLC
THI of Nevada at Vegas Valley, LLC
THI of Nevada II at Boulder City, LLC
THI of Nevada II at Desert Lane, LLC
THI of Nevada II at North Las Vegas, LLC

By: _____
Name: MARC FUCHS
Title: EVP CFO

THI of South Carolina at Rock Hill, LLC
THI of South Carolina at Camp Care, LLC
THI of South Carolina at Charleston, LLC
THI of South Carolina at Columbia, LLC
THI of South Carolina at Greenville, LLC
THI of South Carolina at Greenwood, LLC
THI of South Carolina at Hilltop, LLC
THI of South Carolina at Inman, LLC
THI of South Carolina at Magnolia Manor-Inman, LLC
THI of South Carolina at Magnolia Place at Greenville, LLC
THI of South Carolina at Magnolia Place at Spartanburg, LLC
THI of South Carolina at Moncks Corner, LLC
THI of South Carolina at Spartanburg, LLC
THI of South Carolina Golden Age-Inman, LLC
THI of South Carolina Hospice, LLC
THI of South Carolina, LLC
THI of Texas at Arlington II, LLC
THI of Texas at Canton, LLC
THI of Texas at Canyon, LLC
THI of Texas at Dallas, LLC
THI of Texas at Forest Lane, I LC
THI of Texas at Fort Worth, LLC
THI of Texas at Grace Care Center, LLC
THI of Texas at Houston, LLC
THI of Texas at Longmeadow, LLC
THI of Texas at Lubbock I, LLC
THI of Texas at Lubbock II, LLC
THI of Texas at Mesquite, LLC
THI of Texas at Mimosa, LLC
THI of Texas at Mount Pleasant I, LLC
THI of Texas at Mount Pleasant II, LLC
THI of Texas at Plano, LLC

By: _____
Name: Mark Fuchs
Title: EVP, CFO

THI of Texas at Richardson, LLC
THI of Texas at Samaritan Hospice, LLC
THI of Texas at San Antonio I, LLC
THI of Texas at San Antonio II, LLC
THI of Texas at San Antonio III, LLC
THI of Texas at San Jacinto, LLC
THI of Texas at Sherman, LLC
THI of Texas at Swan Manor, LLC
THI of Texas at Wichita Falls, LLC
THI of Texas at Winterhaven, LLC
THI of Texas, LLC
THI of Wisconsin at Hartford, LLC
THI of Wisconsin, LLC

By: _____
Name:
Title:

Address for Notices:

_____
_____
Attention:
Telephone:
Fax:
Email:

Fundamental Long Term Care Holdings, LLC
Fundamental Long Term Care Interim Management, LLC

By: _____
Name: MURRAY ZUCKERMAN
Title: PRESIDENT

Address for Notices:

510 Ridgebrook Road
Sparks, MD 21152
Attention:
Telephone:
Fax:
Email:

OFFICER'S COMPLIANCE CERTIFICATE

FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC

The undersigned, Mark Fulchino, hereby certifies that he is Executive Vice President and Chief Financial Officer of FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC, a Delaware limited liability company (the "Company"), and that he makes this certificate on behalf of the Company in connection with and pursuant to Section 7.1 of the Amended and Restated Revolving Credit and Security Agreement, dated as of March __, 2006, (as amended, supplemented, modified and restated from time to time, collectively, the "Loan Agreement") between the Company (together with the subsidiaries and affiliates listed on the signature page to the Loan Agreement, "Borrower"), and CapitalSource Finance LLC, a Delaware limited liability company, and further certifies as follows:

a. The company-prepared financial statements for the month ended [DATE] which accompany this certificate are true and correct in all material respects and have been prepared in accordance with GAAP consistently applied with prior periods and present fairly the consolidated financial position of the Borrower as of [DATE] and the results of its operations for the month then ended subject to audit and normal year-end adjustments

b Since [DATE] [the date of the last similar certification, or, if none, the Closing Date] no Default or Event of Default has occurred under the Loan Agreement [except as set forth on Schedule __ hereto, which includes a description of such Default or Event of Default]

c. Delivered herewith are detailed calculations demonstrating compliance by the Borrower with the provisions of Section 8.1 of the Loan Agreement at the end of the period or periods referred to in Annex 1 of the Loan Agreement, unless otherwise indicated on Exhibit 1 hereto. The calculations have been prepared in accordance with GAAP consistently applied with prior periods subject to changes resulting from audit and normal year-end adjustments

d. Borrower has reviewed the relevant terms of the Loan Documents and the condition of the Borrower

IN WITNESS WHEREOF, the undersigned has caused this certificate to be executed as of this _____ day of _____, 200__.

THI OF BALTIMORE, INC.,
as Borrower Agent

By: _____
Name: Mark Fulchino
Title: Executive Vice President

And By: _____
Name: W Bradley Bennett
Title: President and CEO

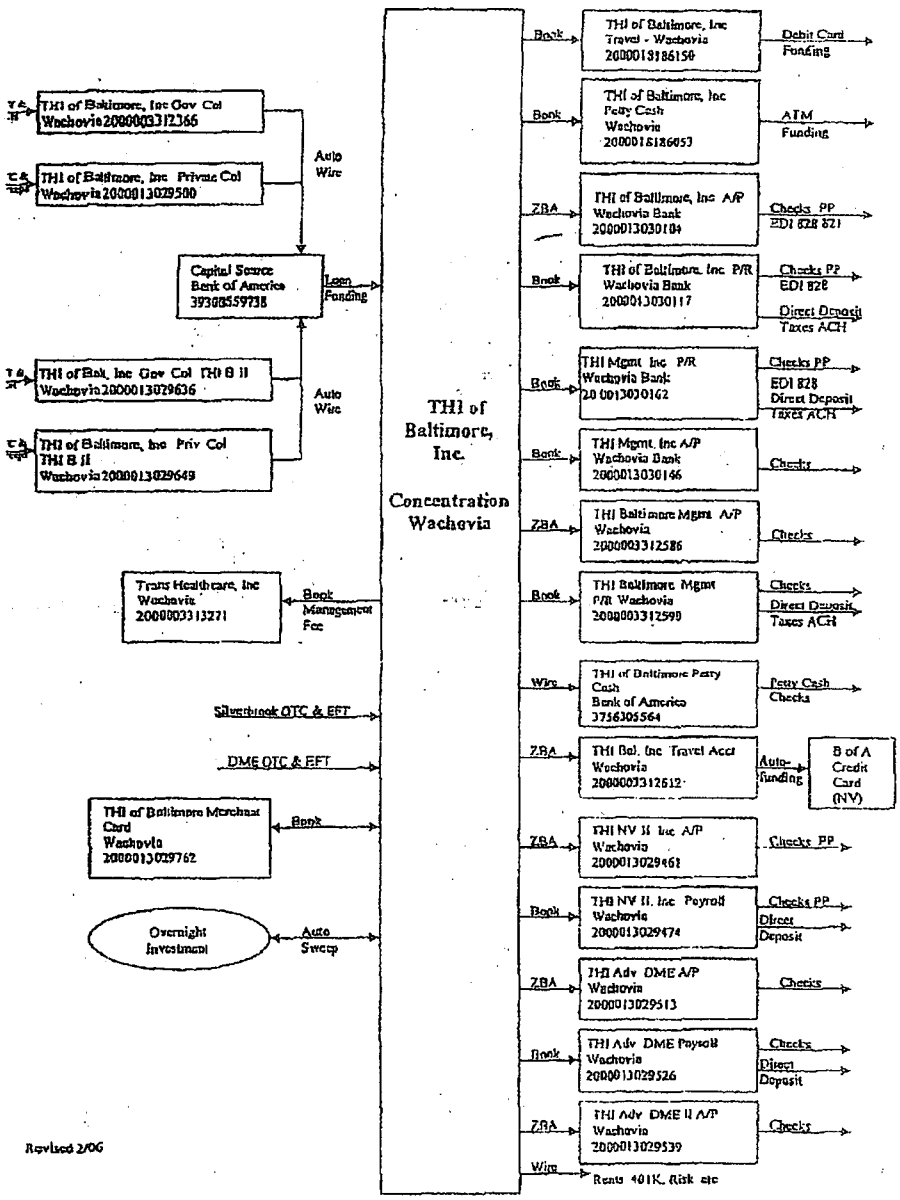
NYC/250795 2

THI of South Carolina at Magnolia Place at Greenville, LLC	Limited Liability Company	Delaware	3660188	930 Ridgebrook Road Sparks, MD 21152	35 Southpointe Dr Greenville, SC 29607
THI of South Carolina at Magnolia Place at Spartanburg, LLC	Limited Liability Company	Delaware	3660106	930 Ridgebrook Road Sparks, MD 21152	8020 White Avenue Spartanburg, SC 293
THI of South Carolina at Moncks Corner, LLC	Limited Liability Company	Delaware	3660108	930 Ridgebrook Road Sparks, MD 21152	505 S Live Oak Rd - Box 1487 Moncks Corner, SC 2
THI of South Carolina at Rock Hill, LLC	Limited Liability Company	Delaware	3660104	930 Ridgebrook Road Sparks, MD 21152	127 Murrah Drive Rock Hill, SC 29732
THI of South Carolina at Spartanburg, LLC	Limited Liability Company	Delaware	3660109	930 Ridgebrook Road Sparks, MD 21152	375 Serpentine Dr Spartanburg, SC 293
THI of South Carolina Golden Age - Inman, LLC	Limited Liability Company	Delaware	3666898	930 Ridgebrook Road Sparks, MD 21152	82 North Main St Inman, SC 29349
THI of South Carolina Hospice, LLC	Limited Liability Company	Delaware	4040582	930 Ridgebrook RoadSparks, MD 21152	500 Jefferson Davis I Spartanburg, SC 293
THI of South Carolina, LLC	Limited Liability Company	Delaware	3666335	930 Ridgebrook Road Sparks, MD 21152	
THI of Texas at Arlington II, LLC	Limited Liability Company	Delaware	3660221	930 Ridgebrook Road Sparks, MD 21152	1112 Gibbins Rd Arlington, TX 76011
THI of Texas at Canton, LLC	Limited Liability Company	Delaware	3660216	930 Ridgebrook Road Sparks, MD 21152	901 West College St Canton, TX 75103
THI of Texas at Canyon, LLC	Limited Liability Company	Delaware	3660219	930 Ridgebrook Road Sparks, MD 21152	15 Hospital Drive Canyon, TX 79015
THI of Texas at Dallas, LLC	Limited Liability Company	Delaware	3666809	930 Ridgebrook Road Sparks, MD 21152	7955 Harry Hines Boulevard Dallas, TX 75235
THI of Texas at Forest Lane, LLC	Limited Liability Company	Delaware	3660214	930 Ridgebrook Road Sparks, MD 21152	9009 Forest Lane Dallas, TX 75243
THI of Texas at Fort Worth, LLC	Limited Liability Company	Delaware	3666817	930 Ridgebrook Road Sparks, MD 21152	8001 Western Hills Bl Ft Worth, TX 76108
THI of Texas at Grace Care Center, LLC	Limited Liability Company	Delaware	3666811	930 Ridgebrook Road Sparks, MD 21152	1101 Grace St Wichita Falls, TX 763(
THI of Texas at Houston, LLC	Limited Liability Company	Delaware	3666825	930 RidgeBrook Road Sparks, MD 21152	6160 South Loop East Houston, TX 77087
THI of Texas at Longmeadow, LLC	Limited Liability Company	Delaware	3666808	930 Ridgebrook Road Sparks, MD 21152	120 Meadowview Driv Justin, TX 76247
THI of Texas at Lubbock I, LLC	Limited Liability Company	Delaware	3666805	930 Ridgebrook Road Sparks, MD 21152	1409 9th St Lubbock, TX 79401
THI of Texas at Lubbock II, LLC	Limited Liability Company	Delaware	3666798	930 Ridgebrook Road Sparks, MD 21152	1401 9th St Lubbock, TX 79401
THI of Texas at Mesquite, LLC	Limited Liability Company	Delaware	3660212	930 Ridgebrook Road Sparks, MD 21152	825 West Kearney Mesquite, TX 75149
THI of Texas at Mimosa, LLC	Limited Liability Company	Delaware	3660215	930 Ridgebrook Road Sparks, MD 21152	459 Keller Parkway Keller, TX 76248

SCHEDULE 6.11

On March 26, 2006, Fundamental Long Term Care Holdings, LLC, submitted applications to the United States Patent and Trademark Office for the registration of the trademark "Fundamental" and the servicemark "quality care is Fundamental."

SCHEDULE 6.30
Corporate Bank Structure

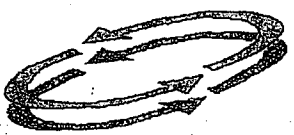


Revised 2/06

SCHEDULE 8.2 (Continued)

Unfavorable Lease
Balance 2/28/2006

Facility #	Facility Name	Amount	Due To	D
90113	Sunset Hills Health & Rehabilitation Center	(725,888)	SWC-ABE Briarwood Corp.	8/3
90131	Mountain View Specialty Care Center	(1,182,516)	SWC-ABE Briarwood Corp.	8/3
90137	Driftwood Rehabilitation and Nursing Center	(306,029)	SWC-ABE Briarwood Corp.	8/3
90532	Magnolia Manor of Camp Care	(107,237)	SWC-ABE Briarwood Corp.	8/3
90535	Magnolia Manor of Columbia	(623,800)	SWC-ABE Briarwood Corp.	8/3
90536	Magnolia Manor of Greenville	(48,916)	SWC-ABE Briarwood Corp.	8/3
90537	Magnolia Manor of Greenwood	77,877	SWC-ABE Briarwood Corp.	8/3
90538	Magnolia Manor of Inman	475,370	SWC-ABE Briarwood Corp.	8/3
90539	Magnolia Manor of Moncks Corner	51,337	SWC-ABE Briarwood Corp.	8/3
90540	Magnolia Manor of Rock Hill	41,224	SWC-ABE Briarwood Corp.	8/3
90541	Magnolia Manor of Spartanburg	36,945	SWC-ABE Briarwood Corp.	8/3
90542	Magnolia Place of Spartanburg	34,224	SWC-ABE Briarwood Corp.	8/3
90543	Magnolia Place of Greenville	(2,751,802)	SWC-ABE Briarwood Corp.	8/3
90606	Cherry Creek Village Nursing Center	(86,291)	SWC-ABE Briarwood Corp.	8/3
90607	Golden Plains Healthcare Center	344,245	SWC-ABE Briarwood Corp.	8/3
90658	Carson Convalescent Center	411,807	SWC-ABE Briarwood Corp.	8/3
90661	Hearthstone of Northern Nevada	(510,537)	SWC-ABE Briarwood Corp.	8/3
90688	Greenery Specialty Care Center of Canonsburg	(684,922)	SWC-ABE Briarwood Corp.	8/3
90740	Wichita Specialty Hospital	(592,809)	SWC-ABE Briarwood Corp.	8/3
90770	Cherry Creek Village Retirement Center	136,033	SWC-ABE Briarwood Corp.	8/3
		(6,011,685)		



Trans Health

The Highlands
910 Ridgebrook Rd
Sparks, MD 21152
(410) 773-1000

NUTRITION SERVICES STANDARDS OF PRACTICE

THI-5
4/04, 3/05, 11/05

PLAINTIFF'S EXHIBIT 28
Blumberg No. 5113

NUTRITION: PURCHASING TO PRODUCTION

Facility Menus

The National Director of Nutrition with input from the Nutrition Directors develops the menus. The menu cycle is four weeks in length and includes three (3) regional variations. There is one Spring/Summer and one Fall/Winter menu cycle each year. Each facility will reuse one of the menu cycles each year and will receive one new cycle each year.

The base menus are planned to cost $ 3.40 (or less) ppd. This number assumes that every serving is used in every recipe; your raw food costs will run slightly higher. The therapeutic and consistency modified diets may be higher than the base menu cost. In the long-term care setting, effort must be made to liberalize restrictive diets whenever clinically possible. A sample memo on liberalizing diets is attached and may be modified and used for your facility, if desired. Materials on liberalizing diets are also available for review on the clinical website.

Menus are the basis for food cost control and provide the resident/patient with foods that are most familiar in a particular region. The menus must be used as they are designed with only minor changes made during the introductory stage. If there is a particular food that the majority of residents/ patients dislike, the menu may then be changed. A food with a similar nutrient value and cost should be used to replace the food removed from the menu. Each food group is substituted to ensure equal nutrition value. Be aware of ounces of protein and vitamin A foods. Replace with items that are comparable in cost.

Menus are non-selective. Menus must have planned alternates, not only to meet regulations, but for effective cost control. You must plan your own alternates. Every facility must have a disaster menu that follows State guidelines. (Refer to DP- F-5) check actual page number

When introducing a new menu, present it to your residents/ patients at a resident council or menu committee meeting. Present menus positively and explain the recipe when discussing a food that may be unfamiliar to them. Meet with the resident/patient who has many preferences on a periodic basis, as he/she may need an individualized diet or menu plan not addressed by the facility menu.

If menus have to be changed for your facility, the dietitian must approve those changes and verify that the items meet nutritional and cost criteria. When a change is made, check your order guide to make certain the new item is on the order guide and the item replaced on the menu is removed from the your purchase guide.

You will find one meal on your menu that is not planned. Use this to plan a meal of the month with the residents and activities department. If the resident/ patients choices made are not cost effective, tactfully suggest alternate ideas to them.

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Menus

1. Menus are planned to meet the federal and state requirements and resident/patient preferences.
2. Menus must be prepared and served as written, including items on the regular diet, therapeutic diets and portion sizes. Nutrition staff must inform the ND if they do not have a food on the menu.
3. The ND, not the cook, is authorized to make changes or substitutions.. If a substitution must be made when the ND is out, the cook must contact the ND and/or dietitian for approval.
4. Menus are planned 14 days in advance.
5. Menus are dated as to day served.
6. Substitutions for regular and therapeutic diet items must be written on the menu and on the Substitution Record. If this has not been done by the time the meal is started, the ND must note the change on the menu.
7. Disaster menus are developed and will be used as needed. All staff must know the disaster menu plan.

Meal of the Month/Holiday Menus/Theme Meals

1. Each month the residents plan at least one meal.
2. Meals will be planned for holidays with input from residents. The ND will finalize the holiday menus with assistance from the dietitian.

Recipes

1. Recipes are available for all menu items and must be followed.
2. It is mandated that yield adjusted recipes be used for ALL menu items. The food cost analysis is based on the recipe provided. If you find that you have a better recipe for a particular item, submit it to The National Director of Nutrition for consideration on future menus.

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Alternates

1. The Nutrition Director (ND) provides direction for alternate foods rather than leave this decision to the cook. Production sheets indicating the number of alternates to be prepared are produced via the *Menutracker ™* computerized program.

2. The alternates that are actually served are planned in writing prior to the start of the meal service to avoid repetition. The Alternate Menu Planner form is utilized.

   An alternate of comparable cost and nutrition is determined by the ND. The alternates should not involve high cost, labor-intensive items. Ice cream, sherbet, or fruit are not to be used as a last minute substitute for a menu item due to the generally higher cost.

3. One alternate is to be prepared for every regular diet food item on the menu. Alternates for non-regular diets (e.g., mechanical soft, puree, calorie diets, etc.) are to be prepared if written on the production sheet so they are available if requested. When the main entrée item is a hot food item, then a hot alternate is to be available so the residents do not receive cold sandwiches repetitively as an alternate. A third alternate, for residents disliking the main menu item and the chosen alternate, is available (such as cottage cheese, cheese, fruit, vegetable juice, and fruit juice.) Offer a fruit or juice as a vegetable substitute for residents with extensive vegetable dislikes.

4. f a resident/patient has an extensive list of food dislikes or preferences, this resident may be entered in the *Menutracker ™* program as a selective resident. The resident/patient may then be given a copy of the week-at-a-glance menus so that he/she can indicate the foods that are unacceptable and a reasonable substitution for these foods. If these preferences are noted in the computer the first time through the cycle, they will automatically be selected throughout the remainder of the cycle.

5. To avoid repetition, allow at least a day between when the item was on the menu and when it is used as an alternate. Utilize leftovers as alternates within two days after serving unless the item was stored in the freezer.

6. Designate an area in the storeroom marked "alternates". Stock items in that area that are not designated for use on the menu within the next seven days.

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SPECIFIC GUIDES FOR FOOD COST CONTROL (Continued)

- ❑ Check for excessive leftovers after meal service and adjust production. Cooks may be preparing extra because they are afraid they will run out.

- ❑ Utilize leftovers.
  - Leftovers can be used for substitutions.
  - Leftover cooked vegetables can be collected in a container in the freezer and used to make vegetable soup.
  - Leftover roast beef could be turned into bbq beef sandwiches for an alternate.

Eggs

- ❑ Check Portion size. One serving is a #8 dipper. Instruct cooks to spread the eggs with the dipper so they are not left in the shape of a "ball". At the discretion of the ND, extra eggs may be given to residents who request them or to those who need extra protein.

- ❑ Remember to watch for residents who don't like and never eat eggs. Enter this as a dislike and add the equivalent protein to their diet in another form. For example: Peanut butter toast, cheese toast, additional milk, cottage cheese, etc.

- ❑ Maintain a two-day supply of eggs at all times.

- ❑ Order extra fresh eggs/RTU (ready to use) for boiled eggs for salads, deviled eggs and desserts as indicated on the order guide. Crack fresh eggs in 12-x 20 x 2" pan and steam in steamer to avoid peeling when chopped hard cooked eggs are needed for salads and recipes.

Dairy



- ❑ Milk
  - Use powdered milk for all cooking.
  - Check to see that the correct size glasses are used for meal service.
  - Compare prices between half gallon and gallon containers.
  - Use of individual 8 oz. cartons is more costly per serving than pouring from gallon containers.
  - Train staff to use Menutracker production sheets and only bring indicated number of portions of milk and other beverages to tray line at meals.
  - Better control of milk usage can be obtained by pouring in the kitchen rather than sending gallon containers with food carts.
  - Post a written order for the milk vendor.

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Nourishments and Thickeners (Continued)

Interferes with Intake of Meals

Supplements are generally high in fat and have a powerful satiating effect. This commonly results in reduced appetites at meal times, and therefore, reduced intakes, which may lead to weight loss.

Require a Physician's Order

All supplements require a physician's order to be given to a resident. They also require a physician's order to be discontinued. Many times physicians are reluctant to discontinue a supplement and prefer to continue them as a prophylactic measure to prevent future weight loss.

Appropriate Use of Supplements

Supplements should be considered a last resort second only to tube feeding and TPN. Residents/patients should not be prescribed a supplement unless all other efforts (large portions, snacks, enhanced foods, etc.) have failed. Supplements should never be provided without a physician's order.

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

If a supplement is deemed necessary, acceptance must be documented and monitored. If a resident/patient routinely refuses a supplement, efforts should be made to obtain an order to discontinue the item.

The frequency of which a supplement is given should also be scrutinized. A supplement ordered three times a day (tid) or twice a day (bid) will often lead to taste fatigue and limit the effectiveness of supplementation. The times the supplement is delivered also needs to be considered. The time span between breakfast and lunch is often shorter than the span between lunch and supper. If this is the case, then a mid-morning supplement will likely interfere with the resident's noon meal intake. Supplements are not served with meals as they can interfere with the intake of that meal.

If a resident/patient requests a supplement when one is not medically necessary, the resident/patient should be charged for that supplement as the item can be considered a confectionery food.

Many times, residents/patients are put on supplements and become dependent on them. Their meal intakes dwindle to nothing as they eat less and less food. This will lead to their stomach becoming volume sensitive; that is to say the resident/patient will be able to tolerate only smaller and smaller volumes of food. This can be potentially disastrous if taste fatigue sets in, and the resident/patient is no longer able to tolerate the supplement. He will not be able to consume adequate amounts of food because of his volume sensitivity. This can lead to a severe weight loss.

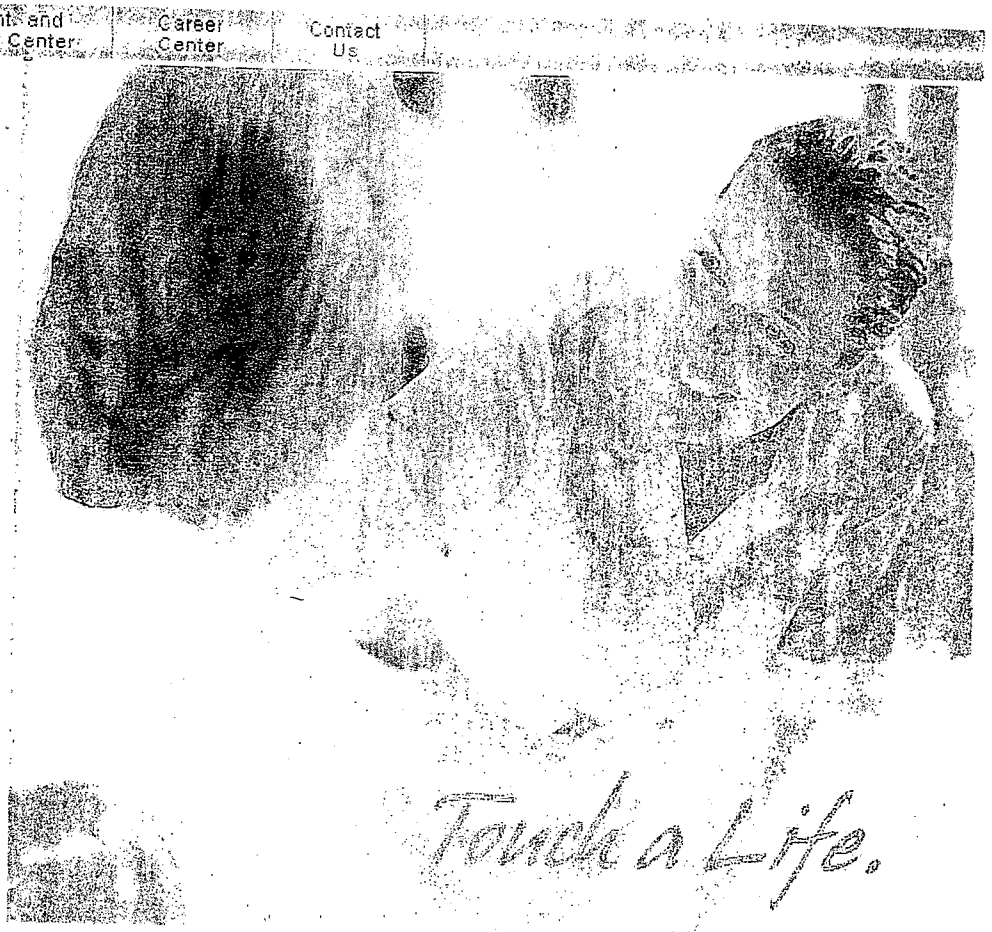
Facilities should strive to keep the percent of residents on supplements to less than 25%.

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FUNDAMENTAL

Fundamental believes in the simple, yet awe-inspiring power of one person caring for another. It is a phenomenon that begins where technology leaves off.

If we, as caregivers, are able to reach a person's heart and speak to who they are, then at the end of the day, the life that is changed most is often our own.



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PLAINTIFF'S EXHIBIT 29

FUNDAMENTAL

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Search Result For South Carolina (SC)

The facilities matching your search criteria are listed below.

- Click on a Facility Name to view detailed information.
- Click on the column titles to sort the table by those columns.

Facility	City
Camp Care	Inman
CAO Of South Carolina	Spartanburg
Driftwood Rehab and Nursing Center	Charleston
Golden Age-Inman	Inman
Immediate Healthcare Staffing	Spartanburg
InmanHealthcareInc	Inman
Magnolia Manor of Columbia	Columbia
Magnolia Manor of Greenville	Greenville
Magnolia Manor of Greenwood	Greenwood
Magnolia Manor of Inman	Inman
Magnolia Manor of Moncks Corner	Moncks Corner
Magnolia Manor of Rock Hill	Rock Hill
Magnolia Manor of Spartanburg	Spartanburg
Magnolia Place of Greenville	Greenville
Magnolia Place of Spartanburg	Spartanburg
Samaritan Care Hospice of South Carolina	Spartanburg
SC Hilltop Laundry	Spartanburg

Back to Search

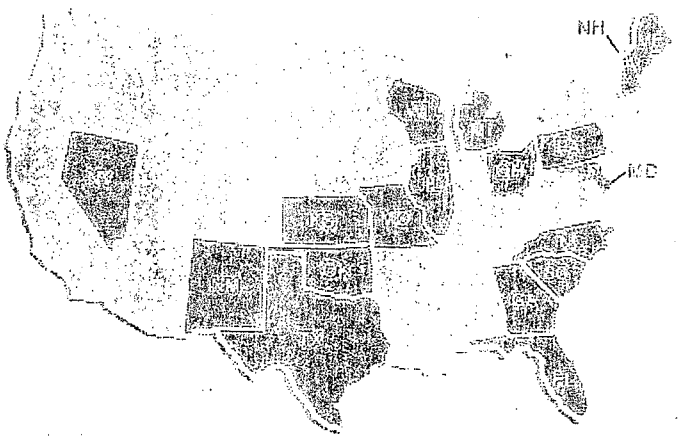
FUNDAMENTAL

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Healthcare Facility Locator

Start your search for a facility by clicking a state on the map below!



Florida

Hospice of Orange-Osceola
Hospice of Osceola (sold 3/31/08)

Georgia

Shamrock Nursing and Rehabilitation Center

Illinois

Brentwood Sub-Acute HCC

Kansas

Brighton Place West NF-MH
Cherry Creek Retirement Center
Golden Plains Healthcare Center
Indian Creek Healthcare Ctr
Indian Meadows Healthcare Ctr
Specialty Hospital of Mid America
Topeka Community HealthCare Center
Wichita Specialty Hospital

Maine

Maine Center Integrated Rehab at Brewer
ME Ctr-Integ. Reb at Fairfield (old Winslow)
ME Ctr-Integ. Reb at Rockland (old Rockport)

Maryland

Advantage DME
Fundamental Admin Services
Fundamental Admin Services
Fundamental Clinical Consulting
Fundamental Clinical Consulting

Pathway Health Management, Inc (inactive 4/19/2006

Samaritan Care Hospice Corp (sold 8/31/08)

Michigan

Clarkston Specialty Healthcare Center

Samaritan Care Hospice

Silverbrook Manor

Missouri

Sunset Hills Health and Rehab Center

Nevada

Carson Convalescent Center

Central Intake of Nevada

College Park Rehab Ctr

Desert Lane Care Center

Desert Valley Therapy - East Sahara

Desert Valley Therapy - North Tenaya

Desert Valley Therapy - South Rainbow

Desert Valley Therapy-South Ramono

Harmon Medical and Rehabilitation Hospital

Hearthstone of Northern Nevada

Henderson Healthcare Ctr

Horizon Spec Hospital-LasVegas

Las Vegas/Sierra jv

Mountain View Care Center @ Boulder City

N. Las Vegas Care Ctr

Nevada CBO (housed in Henderson)

NV Healthcare Training & Education

Southern Nevada Sleep Center

Swan Dialysis

Vegas Valley Rehabilitation Hospital

New Hampshire

Pleasant Valley Nursing Center

New Mexico

Albuquerque Care Center

Casa Arena Blanca Nsg. Ctr

Casa Maria Health Care Center

En Su Casa Personal Care

Hobbs Health Care Ctr

Las Cruces Nursing Ctr

New Mexico CBO (housed in Village of Alameda)

NM Healthcare Training & Ed (housed in Casa Maria)

Southwest Samaritan Care Hospice (sold 8/31/08)

Spec Hospital of Albuquerque

Sunset Villa Care Ctr

Valle Norte Caring Center

Vida Encantada NrsReb

Village at Alameda

Ohio

Boardmen Specialty Care and Rehabilitation Center
Horizon Village Nursing and Rehabilitation Center
Rosewood Manor
Whispering Pines

Oklahoma

Bryant Nursing Ctr
Edmond Specialty Hospital

Pennsylvania

Broomall Rehab and Nursing Ctr
Greenery SpCC-Canonsburg
Mountainview Spec Care Ctr
Samaritan Care Hospice of Pa (sold 8/31/08)

South Carolina

Camp Care
CAO Of South Carolina
Driftwood Rehab and Nursing Center
Golden Age-Inman
Immediate Healthcare Staffing
InmanHealthcareInc
Magnolia Manor of Columbia
Magnolia Manor of Greenville
Magnolia Manor of Greenwood
Magnolia Manor of Inman
Magnolia Manor of Rock Hill
Magnolia Manor of Spartanburg
Magnolia Place of Greenville
Magnolia Place of Spartanburg
Samaritan Care Hospice of SC (sold 8/31/08)
SC Hilltop Laundry

Texas

Alamo Heights Health and Rehabilitation Center
Bremond Nursing and Rehabilitation Center
Brownfield Rehabilitation and Care Center
Canyon Healthcare Ctr
Care Inn of Abilene
Care Inn of Edna
Care Inn of Llano
Care Inn of Sanger
Care Inn of Seguin
Cleburne Rehabilitation & Health Care Center
Courtyards at Fort Worth
Courtyards at Pasadena
Crestview Manor Nursing & Rehab Ctr
Crosbyton Nursing and Rehabilitation Center
Dallas Hospital CBO - Billing Office
Dallas SNF CBO - North Richland Hills Div Office
Dalworth Nursing & Rehabilitation Center
Floydada Rehabilitation and Care Center
Forest Lane Healthcare Ctr

Grace Care Center
Health Care & Rehab of Corsicana
Heritage Manor of Canton
Heritage Oaks
Heritage Place
Iowa Park Healthcare Center
Kirkland Court Health and Rehabilitation Center
Lakeside Rehabilitation and Care Center
Lockney Health and Rehabilitation Center
Longmeadow Healthcare Center
Lubbock Acute Care Center, LLC (Opening Sept 15)
Meadowbrook Care Center
Medical Ctr Nrs Fac-SanAntonio
Mimosa Manor
Mt. Pleasant Assisted Living
Mulberry Manor
Northwood Health Care Center
Plainview Healthcare Center
Pleasant Springs Hlthcare Ctr
Retama Manor Del Rio Nursing Center
Retama Manor Victoria South
Richland Hills Nursing & Rehabilitation Center
River Valley Health & Rehabilitation Center
Samaritan Care Hospice - Dallas (sold 8/31/08)
Samaritan Care Hospice - Houston (sold 8/31/08)
Samaritan Care Hospice of Fort Worth (sold 8/31/08
Samaritan Care-Asperion San Antonio (sold 8/31/08)
San Jacinto Manor
Southwest Regional Skilled Nursing Center
Southwest Regional Specialty Hospital
Stoneybrook Healthcare Center
Texas Specialty Hospital
Texas Specialty Hospital at Dallas
Texas Specialty Hospital-Wichita Falls
Texoma Healthcare Ctr
Texoma Specialty Care Center
The Park in Plano
The Village at Richardson
Tulia Health and Rehabilitation Center
Villa Haven Health and Rehabilitation Center
Winterhaven Healthcare Ctr
Woodlake Nursing Home

Wisconsin

THI of Wisconsin

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FUNDAMENTAL

Care With A Conscience

Skilled Nursing

Subacute Care

Long Term Basic Medical Care

Outpatient Rehabilitation

Alzheimer's & Related Disorders

Specialty Hospital

Assisted Living

Home

Care With A Conscience

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

This package was created to help familiarize potential patients, residents, and their families with the services and benefits available from Fundamental. We understand that choosing the right healthcare facility can be a new and sometimes confusing experience. We hope this information will assist you in finding the facility that's right for you, and help you prepare for the transition ahead.

At Fundamental, patients, residents and their family members are considered our guests. Fundamental healthcare centers provide 24-hour nursing care services to meet the medical and rehabilitative needs of patients, while offering family members the peace of mind that comes from knowing their loved one is being treated with the medical expertise, caring, and respect that he or she deserves.

Convenience

Our centers pride themselves on the accessibility of services. Fundamental accepts admissions 24 hours a day, 7 days a week. A patient, family member, or healthcare professional can start the admission process with a phone call; patients can be admitted within hours of calling.

Physician Involvement

A variety of physician specialists monitor the condition and progress of patients by conducting rounds based upon the needs of their patients. Additionally, physicians are available 24 hours a day. If a patient's personal physician is not on staff at the facility, we can arrange transportation to the physician's office or for a physician to cover while your loved one is a patient. The Facility Medical Director is also available to oversee care during the stay. In addition to the Medical Director, other physician specialists such as pulmonologists, orthopedists, neurologists, cardiologists, and urologists attend to patients as needed.

Qualified Staff

Each location receives medical direction from a qualified physician. Care and treatments are provided by a highly skilled staff including registered and licensed practical/vocational nurses, physical and occupational therapists, speech/language pathologists, nursing assistants, respiratory therapists, medical social workers, a registered dietician, and other clinical specialists.

Thorough Treatment Planning

To provide the most appropriate and effective services, Fundamental develops individualized plans of care that are tailored to each patient's personal needs. The plan of care outlines the specific treatments and services the patient will receive and is created based on thorough assessments completed prior to and upon arrival. In addition, high skilled staff monitor each patient's condition and progress throughout the stay with adjustments made to the plan of care as needed.

Quality of Life

While medical, nursing and rehab attention is certainly a focus, Fundamental centers also offer many homelike amenities and social events, which we've found contribute positively to our patients' emotional well-being. Recreational and therapeutic activities are offered seven days a w eek to all patients through the Activity Department. Beauty and barber services are available on the premises. Family members are encouraged to visit as frequently as they like, 24 hours per day, seven days a week. Patients and their families may use our meeting rooms for special events such as birthdays, anniversaries, etc...

Preparing for Admission

FUNDAMENTAL

Healthcare Services

Healthcare Professionals

Care Options

Finding The Right Facility

Managing A Tough Decision

Care With A Conscience

Medicare/Medicaid

Testimonials

Patient And Family Center

TLC for Patients and Families



At Fundamental, when one person cares for another, it's more than a profession. It's a relationship. One based on experience as well as empathy. It is a blending of high-tech with high-touch. It is a relationship nourished by understanding. We seek to understand each patient as the person he or she is; keeping in mind not only the individual's health needs, but moreover, the individual as a whole.

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

At the end of the day, our goal is to be here for you to provide as much or as little support as you desire or need. If we can help ease your burden or those of your loved ones, even a little, we will have performed our duties well.

FUNDAMENTAL

Facilities Overview

Setting Expectations

Staffing And Oversight Approach

Referral Resources

Formularies

Home

Healthcare Professionals



At Fundamental we offer advanced nursing, medical and rehabilitation services, combining the best of medical practice and technology with compassionate care and home-like comforts. Here, your patients will find an environment where the healing goes hand-in-hand with living life to the fullest. Ensuring quality in everything we do. We pride ourselves on working closely with you to deliver the most responsive, cost-effective care possible. We not only meet community and state standards of care, but strive to exceed them through a program of performance improvement that monitors overall care according to our more demanding criteria.

FUNDAMENTAL

Facilities Overview

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Staffing And Oversight Approach

We continually evaluate our practices to ensure consistent delivery of superior care. At Fundamental we utilize a committee of health care professionals to continually review our patient care standards and advises staff on the health care practices and policies that are most beneficial to our residents. Professionals are carefully selected for their ability to work with others to provide compassionate, superior care. Working together, the team thoroughly reviews each patient's treatment history and goals to create a customized care plan that follows the highest possible standards of care.

Our staff focuses on helping our residents to achieve and maintain their highest level of independence and dignity. Beyond our finest technical and medical capabilities we offer heartfelt compassion for those we serve.

The Fundamental Network offers substantial benefits:

- Consistency and continuous clinical excellence, eliminating duplication of effort in placement and care decisions
- Standardized plans of care with clinical protocols and competency-based testing for staff ensuring high levels of patient care
- A company-wide commitment to continuous quality improvement
- Case management and outcomes management including scheduled status reports
- Convenient locations

An experienced interdisciplinary team offering 24-hour nursing coverage, the latest technology, and medical supervision by physicians provide sub acute patient care. Fundamental care management coordinators keep you apprised of your patient's status.

FUNDAMENTAL Career Center

Job Search

Job Search By Recruiter

Create Job Application Account

Logon To Your Fundamental Account

Send Us A General Application

CLICK HERE FOR JOB SEARCH @ FUNDAMENTAL LONG TERM CARE COMPANIES

As a leading provider in the business of caring for people, we recognize that this philosophy must also extend beyond our patients to include our staff. The people who work tirelessly everyday to make our mission a reality are our most valuable asset. To that end, Fundamental strives to create a caring work environment that supports growth and encourages personal success.

Our commitment to our employees is evidenced by the multitude of support programs designed to enhance the experiences of both patients and employees. We understand that our caregivers can make a world of difference in the lives of our patients and their families. We want our team to be as skilled and motivated as possible in order to create a positive experience for each person associated with our healthcare centers.

As a result, we have invested heavily in programs that promote quality care by supporting staff. This means continuous educational opportunities and training, management tools, and career development programs. Some of these programs are highlighted below:

Acuity-Based Staffing (ABS):

An automated program that helps the healthcare center assign the appropriate number and mix of professional nursing staff and aides. Based on the MDS and RUGs, Acuity-Based Staffing looks at the acuity level of each patients and produces a corresponding staffing recommendation of RNs, LPNs, and CNAs for the unit.

TeamWorks:

A program designed to offer leadership training for Department Heads, assisting with supervisory skill building, teamwork development, and performance improvement.

Hospice of Fundamental relies on the combined knowledge of a highly experience, diverse, empathetic team of professionals, which include:

CareWorks:

A career development program for Certified Nursing Assistants to increase skill levels and provide opportunities for professional growth.

BRIDGE Mentoring:

A mentoring program designed to assist the newly hired CNA. This program identifies accomplished CNAs to act as preceptors to new staff, assisting with the period of adjustment to the facility.

QuickStart:

An orientation program developed for various facility employees including Directors of Nursing, Nurse Assessment Coordinators, Charge Nurses, Rehabilitation Staff, Dietary Professionals, Directors of Admissions, Staff Development and Infection Control Nurses. The goal of this program is to help new staff adjust to the expectations and routines of their position, and to ensure they are aware of all resources available to them.

In short, Fundamental owes its success to the over 30,000 people who work around the clock to provide care to our patients. These are individuals with a passion for caregiving, who understand that each moment offers an opportunity to make a positive difference in a patient's life. Family members often tell us that they are delighted with the level of connection between staff and patients, and are even more

surprised at how attached they themselves become!

Career opportunities abound at all levels. Our healthcare centers provide varying levels of patient care, offering ample opportunities for professional caregivers in nursing and rehabilitation, as well as openings in support areas such as Admissions, Business Office, Maintenance, Dietary, Activities, and Social Services.

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As a leading provider in the business of caring for people, we recognize that this philosophy must also extend beyond our patients to include our staff. The people who work tirelessly everyday to make our mission a reality are our most valuable asset. To that end, Fundamental strives to create a caring work environment that supports growth and encourages personal success.

Our commitment to our employees is evidenced by the multitude of support programs designed to enhance the experiences of both patients and employees. We understand that our caregivers can make a world of difference in the lives of our patients and their families. We want our team to be as skilled and motivated as possible in order to create a positive experience for each person associated with our healthcare centers.

As a result, we have invested heavily in programs that promote quality care by supporting staff. This means continuous educational opportunities and training, management tools, and career development programs. Some of these programs are highlighted below:

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Healthcare Services

Care With A Conscience

Skilled Nursing

Subacute Care

Long Term Basic Medical Care

Outpatient Rehabilitation

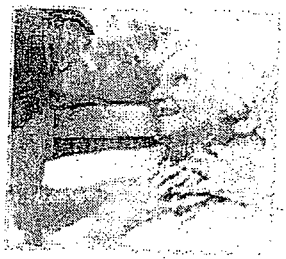
Alzheimer's & Related Disorders

Specialty Hospital

Assisted Living

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The Facilities within the Fundamental network strive to provide quality clinical practices, positive patient outcomes and innovative programming. Each healthcare center offers a broad range of programs and services to meet the diverse needs of the communities it serves.



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Skilled Nursing

Skilled Nursing care and services are designed for individuals who need 24-hour nursing care. Rehabilitation services are typically a part of the skilled nursing patient's treatment regimen. Physical and Occupational Therapy, as well as Speech Language Pathology, are provided through licensed therapists. Some centers offer Respiratory Therapy for patients with severe pulmonary conditions. Care and services are provided by skilled interdisciplinary team of professional caregivers who receive medical direction from a qualified physician.

Skilled nursing centers within the Fundamental network pride themselves on the accessibility of services. The facilities accept admissions 24 hours per day, seven days per week. A patient, family member, or healthcare professional can start the admission process with a phone call.

Skilled nursing programs provide nursing care and services to meet the medical and rehabilitative needs of patients, while offering family members the peace of mind that comes from knowing their loved one is being treated with the experience.

All skilled nursing patients receive an individual care plan tailored to meet their specific needs. The skilled nursing plan of care outlines the specific treatments and services the patient will receive and is created based on assessments completed during the admission process. In addition, staff monitor each skilled nursing patient's condition and progress throughout the stay and make adjustments to the care plan that reflect any change in status or patient needs.

While medical attention is certainly a focus, skilled nursing centers within the Fundamental network also offer many home-like amenities and social events, which we've found contribute positively to our patients' emotional well-being. We believe in providing holistic care and recognize the benefits of mental stimulation and personal comforts in the recovery process. To that end, recreational and therapeutic activities designed for varying skill levels are offered regularly by the Activity Department. Beauty and barber services are available on the premises through independent providers. Family members are considered an important part of the team caring for their loved ones and are encouraged to visit frequently. Patients and their families may use our meeting rooms for special events such as birthdays, anniversaries, etc.

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Many of the Fundamental healthcare centers have distinct units dedicated to the care of patients who are medically stable, but also need specialized nursing and/or rehabilitative care. Some examples include patients recovering from strokes, cardiac, orthopedic, or transplant surgery, patients with chronic or acute pulmonary conditions, brain injury, individuals with acute or chronic wounds, and more. All care and services are provided by a skilled interdisciplinary team of professional caregivers under the direction of a physician. Depending on the programs available at the healthcare center, specialist physicians are also available.

We are proud of our ability to meet the full range of our patient's personal and medical needs with care and compassion.

- Wound Management Services
- Surgical Recovery Services
- Pulmonary Services
- Nutritional Support Services
- Rehabilitation Services
- Infectious Disease Services
- Oncology Management Services
- Renal Services

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Long Term Basic Medical Care

Long Term Care residents live in our facilities because they can no longer care for themselves and require some degree of nursing care and observation. Care and services are designed to meet the needs of the residents who live there. Twenty-four hour nursing care, as well as regularly scheduled activities and dining, are part of the long term care experience. Religious services, as well as Beauty/Barber activities are offered along with many volunteer and visitor oriented events. All care and services are provided by an interdisciplinary team of professional caregivers under the direction of an independent physician.

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Alzheimer's & Related Disorders

Philosophy

Fundamental network facilities are committed to delivering quality medical care and rehabilitative services to individuals who suffer from Alzheimer's disease. Our comprehensive Alzheimer's services focus of our on the total needs of each patient and his/her family, while emphasizing dignity, self-esteem, compassion, understanding, and security. Many facilities feature a separate, specialized therapeutic residence that can more effectively meet the needs of patients with Alzheimer's.

Staff

Our team of skilled professionals includes nurses, aides, activities specialists, food service providers, housekeepers, and maintenance personnel. Each member of the Alzheimer's staff receives extensive training in recognizing the characteristics of Alzheimer's disease and using techniques that emphasize effective communication and behavior management approaches. The center's independent Medical Director is actively involved in care planning and delivery and is on call 24 hours a day.

Environment and Services

The environment of the Alzheimer's wing presents a soothing atmosphere, while reducing isolation caused by the disease. Cleanliness, safety, and simple decor promote orientation and independence. We strive to minimize any sense of loss, while maximizing each patient's potential and capabilities during a difficult time of life. Patients may receive the following services:

- Comprehensive evaluation of individual needs on admission reassessments throughout the stay
- Patient-specific plan of care specifying therapeutic goals for cognitive function and daily activities
- Activity-intense programming
- Coordinated interaction with family and friends
- Family support services

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Wound Management Services

Philosophy

Fundamental network facilities are committed to delivering quality wound care to patients with a variety of comprehensive medical needs. The loss of skin integrity can severely affect the physiological, psychological, social and financial well being of the individual suffering from acute or chronic debilitation. Pressure ulcers and delayed wound healing are major causes of morbidity in patients already compromised by an acute or chronic illness, accident or injury.

Treatment Categories

Wound management services may encompass the following treatment categories:

- Wound infection and IV therapy (including MRSA)
- Stage III and IV ulcers
- Complex stage II pressure ulcers
- Amputation site and prosthetic wounds
- Postoperative skin flaps
- Abdominal wounds
- Other chronic wounds

Services

- Nutritional analysis and control by staff-registered dietician
- Total Parenteral Nutrition (TPN), G-Tube, J-Tube
- Counseling program directed by Staff MSW
- Hemodialysis and peritoneal dialysis
- Intensive diebetic care
- Physical/occupational/speech therapies
- Antibiotic therapy
- Anticoagulant therapy
- Laboratory services available 24 hours a day
- Superficial debridement, electrical stimulation, and hydrotherapy
- Chemical debridement
- Mechanical debridement
- Electric modalities (including ultrasound)
- Consult by a Certified Enterostomal Therapy Nurse (CETN)
- Aggressive skin deficit assessment and intervention
- Aggressive therapeutic dressing management

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Surgical Recovery Services

Philosophy

Fundamental network facilities are committed to providing quality medical care and rehabilitative services to patients with a variety of post-surgical needs. Our comprehensive, interdisciplinary treatment approach maximizes continuity of care. An interdisciplinary team - including physicians, nurses, physical therapists, occupational therapists, speech/language pathologists, social workers, recreational therapists, and other clinical specialists, along with the patient and family - constructs a plan of care and meets regularly to monitor progress

Our surgical recovery services are designed for persons coping with the effects of trauma, chronic disease, or other disabling conditions. Patients and families are assisted in establishing and attaining realistic goals for achieving maximum independence. Treatment plans and length of stay are individualized according to each patient's specific needs and response to therapy. Throughout the day, depending on the patient's tolerance level, an intense therapy regimen is conducted on an individual basis and is augmented by structured group activities. The entire environment is supportive of patient growth and encourages safe risk-taking and attainment of goals. Education for the patient and family is individually structured, including a clear and thorough understanding of the parameters of rehabilitation and the effects of disability.

Treatment Categories

Specific treatment categories surrounding:

- Cardiovascular surgery
- Castro-intestinal surgery
- Abdominal surgery
- Neck and throat surgery
- CABG
- Thoracic surgery (Organ transplant, Amputations)
- Other surgeries

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Infectious Disease Services

Philosophy

Fundamental network facilities are committed to delivering quality infectious disease care and rehabilitative services to patients of all ages with complex but stable medical and nursing care needs. Comprehensive services focus on the total needs of each patient. The integration of superior clinical, education, and support services makes a significant difference in the care of individuals with an infectious disease. To promote optimal outcomes, a plan of care is established with the patient and family.

Treatment Categories

Infectious disease services cover a wide spectrum of diagnoses and treatment categories, which include:

- TB of all body systems (Note: patients with pulmonary TB may not be admitted in most locations until no longer contagious).
- MRSA/VRE and other antibiotic-resistant microorganisms
- New and recurrent urinary tract infections
- HIV/AIDS
- Blood stream infections
- Skin and soft tissue infections

Services

Infectious disease and IV therapy patients may receive the following services:

- Antibiotic therapy and other appropriate treatments
- Nutrition/TPN
- Anticoagulant therapy
- Laboratory services as appropriate
- Intravenous therapy
- Terminal care

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Facilities Overview

Finding first-rate, long-term care for your patients is one of the most serious and challenging issues for today's health care professionals. Unique and changing patient needs, quality of care, and cost concerns are all issues to consider. At Fundamental, we understand the challenge.... and we have the solution. In addition to Specialty Care services, Fundamental provides 24 hour nursing services to meet a variety of needs. These include short-term basic nursing treatments; rehabilitation after an accident, illness or injury; and long-term care. An interdisciplinary team of highly skilled professionals chosen for both their expertise, and dedication, cares for each resident. This team thoroughly reviews each individual's medical, nursing and rehab history and treatment goals, creating a plan that follows the highest possible standards of care.

We strive to deliver exceptional care in the most comfortable, progressive setting possible. Fundamental's success is founded upon optimal outcomes, cost containment, and accountability.

Starting with a thorough understanding of a person's history, our goal is to maximize independence and autonomy. This is followed by ongoing gentle and supportive care. Each person is a vital and respected member of our community.

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Setting Expectations

Setting expectations from the beginning with our patients and families is a cornerstone to our success. It is important that beginning prior to admission that each is aware of the real and subtle differences between Acute Care and Post Acute Care. Utilizing a process called "Quality Expectation Setting", each facility is charged to ensure the patients and their families are comfortable in the setting to which they have just been admitted. The real differences are notably with the primary caretaker at the bedside. While in the hospital, professional (RN) as well as LP/LV Nurses in all probability delivered the majority of the care. In the post acute setting the primary care giver with be the Certified Nursing Assistant, who is directly supervised by both RN's and LP/LV Nurses. Patients admitted to our setting are generally more stable than in acute care and require less of the "technology" that an acute care institution can provide, never the less, there will at all times be a licensed nurse available to direct the care.

As stated earlier, the Post Acute Setting is capable of handling many higher acuity patients. In addition we strive to include the latest technology to assist our nurses in obtaining required assessment data earlier. An exaqmple of this would be Point of Care Testing, utilizing new technology that provides beside results of PT INR and UA.

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Formularies

At Fundamental we strive to provide the best care rendered in the most expedient way possible. Formularies for pharmaceuticals and wound care are an example of such. With the assistance of our Medical Director Advisory Board, all Fundamental locations utilize a consistent Drug Formulary for all patients in the sub-acute or Medicare Stay.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MICHAEL PRENDERGAST,

Plaintiff,

vs.

CIV 07-1265 CG/LFG

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

Defendants.

MEMORANDUM OPINION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RE: SINGLE EMPLOYER STATUS

This matter comes before the Court upon "Defendants Fundamental Long Term Holdings, LLC, THI of Baltimore, Inc., THI of New Mexico, LLC, Fundamental Administrative Services, LLC, and Fundamental Clinical Consulting, LLC's Motion for Summary Judgment Re: Single Employer Status" and Memorandum Brief in support thereof (docket nos. 166, 167), filed May 8, 2009; "Plaintiff's Response to Defendants' Motion for Summary Judgment Regarding Single Employer Status" (docket no. 178), filed May 28, 2009; and "Defendants' Reply in Support of their Motion for Summary Judgment Re: Single Employer Status" (docket no. 183), filed June 15, 2009. For the reasons below, the Court finds Defendants' motion should be denied.

Procedural Background

On December 17, 2007, Michael Prendergast ("Mr. Prendergast" or "Plaintiff") filed his "Complaint for Damages for Violation of Fair Labor Standards Act, Retaliatory Discharge and Personal Injury." Docket no. 1 ("Plaintiff's Original Complaint"). Plaintiff's Original Complaint names as Defendants Valle Norte, Fundamental Long Term Care Holdings, LLC



d/b/a GTCR Fund VI, LP ("FLTCH"), THI of Baltimore, Inc. ("THI Baltimore"), THI of New Mexico, LLC ("THI New Mexico"), Fundamental Long Term Care Interim Management, LLC, and THI Holdings, LLC. Id. On February 20, 2009, Mr. Prendergast filed his "First Amended Complaint for Damages for Violation of Fair Labor Standards Act and Retaliatory Discharge."[1] Docket no. 132 ("Plaintiff's First Amended Complaint"). Plaintiff's First Amended Complaint does not name Fundamental Long Term Care Interim Management, LLC or THI Holdings, LLC as Defendants, but adds Fundamental Administrative Services, LLC ("FAS") and Fundamental Clinical Consulting, LLC ("FCC"). Id. Thus, the six named Defendants in Plaintiff's First Amended Complaint are: Valle Norte, FLTCH, THI Baltimore, THI New Mexico, FAS, and FCC. Id. All of the parties have consented to the undersigned pursuant to 28 U.S.C. § 636(c). See docket nos. 3, 9, 28 and 193.

Plaintiff's First Amended Complaint alleges the case arises under the Fair Labor Standards Act, 29 U.S.C. § 209, et seq. ("FLSA"), and New Mexico common law. See docket no. 132 at 1. Mr. Prendergast contends that "as a single employer," Defendants Valle Norte, FLTCH, THI Baltimore, THI New Mexico, FAS and FCC were Plaintiff's "'employers' within the meaning of the FLSA." Id. at 3. On March 9, 2009, Defendants Valle Norte, FLTCH, THI Baltimore, THI New Mexico, FAS, and FCC filed their Answer to Plaintiff's First Amended Complaint. See docket no. 137 ("Defendants' Answer"). Defendants' Answer essentially denies all of the substantive allegations in Plaintiff's First Amended Complaint. See id.

On May 8, 2009, Defendants FLTCH, THI Baltimore, THI New Mexico, FAS, and FCC

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[1] Mr. Prendergast filed a motion to amend his complaint on January 2, 2009, and the motion was granted on February 19, 2009, leading to the filing of the amended complaint on February 20, 2009. See docket nos. 84 and 127.

filed their "Motion for Summary Judgment Re: Single Employer Status," along with a Memorandum Brief in support thereof. See docket nos. 166 and 167. The memorandum argues that Valle Norte was Plaintiff's employer and that the other five named Defendants along with Valle Norte do not constitute a "single employer." Id. As such, according to Defendants, judgment in favor of FLTCH, THI Baltimore, THI New Mexico, FAS, and FCC should be granted. Id. On May 28, 2009, Plaintiff filed a response in opposition to Defendants' Motion for Summary Judgment, arguing that all named Defendants are properly sued as a "single employer" of Mr. Prendergast. See docket no. 178. On June 15, 2009, Defendants filed a reply. See docket no. 183.

Factual Background

The following facts, unless otherwise indicated, are undisputed. For purposes of the Motion for Summary Judgment filed by Defendants FLTCH, THI Baltimore, THI New Mexico, FAS, and FCC, all reasonable factual inferences are viewed in the light most favorable to Plaintiff. See Atlantic Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1148 (10th Cir. 2000).

On or about August 30, 2006, Mr. Prendergast was hired as maintenance director at the Valle Norte Caring Center in Albuquerque, New Mexico. See docket no. 169, exhibit 1. For the majority of Mr. Prendergast's employment, he was supervised by Facility Administrator Dona Felton ("Ms. Felton"). After Ms. Felton resigned, Plaintiff was supervised by Jaime Andujo ("Mr. Andujo"). See docket no. 177, exhibit A. During Plaintiff's employment, Mr. Andujo also acted as Regional Director of Operations ("RDO") for Valle Norte and approximately 11 other nursing facilities in New Mexico. See id., exhibit F. Among other duties, Mr. Andujo advised these facilities about how to increase profits, in addition to being responsible for

ensuring that his facilities "met and exceeded" their budget expectations, as his bonuses were tied to the financial performance of these facilities. See id.

Mr. Andujo also serves as THI New Mexico's sole officer. See id., exhibit C. FLTCH is the sole shareholder of THI Baltimore, THI Baltimore is the sole member of THI New Mexico, which, in turn, is the sole member of Valle Norte. See docket no. 167 at 2. The Directors of Valle Norte were W. Bradley Bennett ("Mr. Bennett") and Mark Fulchino ("Mr. Fulchino") from January to July 2006. See docket no. 178, exhibit A. Valle Norte's officers during the same period were Mr. Bennett, Mr. Fulchino, Toni-Jean Lisa ("Ms. Lisa"), Sean Nolan ("Mr. Nolan"), Kimberly McCarty ("Ms. McCarty"), and Melissa Warlow ("Ms. Warlow"). Id. Valle Norte is managed by a "governing body" consisting of the facility administrator, the Director of Nursing ("DON") and the RDO. Id., exhibit B. RDOs, such as Mr. Andujo, are employed by Defendant FCC. Id. The only officer of Defendant THI New Mexico, as stated above, is the current RDO for the state, Mr. Andujo. Id. Defendant THI Baltimore's officers and directors are Ken Tabler ("Mr. Tabler"), who is also Vice President of Finance for FAS, Mr. Bennett, and Mr. Fulchino. Prior to March 2006, THI Baltimore's officers included Ms. Lisa, Mr. Nolan, Ms. McCarty, and Ms. Warlow, who are all also FAS employees. Id. THI Baltimore's officers do not perform any duties for the entity. Id. THI Baltimore's address is 930 Ridgebrook Road, Sparks, Maryland, which is the same address as FLTCH. Id., exhibits C and D.

FLTCH is owned solely by Murray Foreman ("Mr. Foreman") and Leonard Grunstein ("Mr. Grunstein"), the only officers and directors in a company with no employees. Id., exhibit D. When FLTCH acquired THI Baltimore in March 2006, it created Defendants FCC and FAS to do the work that THI Baltimore Management, LLC, which is now defunct, had been doing. Id., exhibit B. Employees of THI Baltimore Management, LLC became employees of FAS or

FCC depending on their duties. Id. THI Baltimore Management, LLC's directors were Mr. Bennett and Mr. Fulchino, its officers were Mr. Bennett, Mr. Fulchino, Ms. Lisa, Mr. Nolan, Ms. McCarty, Ms. Warlow, and Mr. Tabler, and its address was 930 Ridgebrook Road, Sparks, Maryland. Id., exhibit E. These are the same directors, officers, and address that FAS has now. Id. FCC's address is in Texas and its officers and directors are Mr. Hillegass and Karen McDonald ("Ms. McDonald"). Id.

The FAS and FCC contracts are materially the same for every one of approximately 100 care facilities,[2] including Valle Norte. Id., exhibit D. The FAS management fee is 4% of net operating revenue and the FCC fee is 1%. Id. FAS calculates the fees that are owed for the facilities that it serves and pays the vendors, rent, and all operating expenses for the facilities. Id. Christine Zack ("Ms. Zack"), an in-house attorney, holds the position of Senior Vice President for FAS, and though she has no direct supervisor, she presumes her employment is controlled by FLTCH shareholder Mr. Foreman. Id., exhibit B. Mr. Tabler, an officer and director of THI Baltimore as well as Vice President of Finance for FAS, reports to Mark Fulchino, who is the CFO for FAS. Id.

THI New Mexico's apparently sole officer, Mr. Andujo, has testified that he did not know the purpose of THI New Mexico, whether it had any financial statements, or whether it had any other officers. Id., exhibit C. Further, Mr. Andujo, who was technically also an employee of FCC reports to Mr. Hillegass in Texas and oversaw 12 facilities covered by the

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[2] All facilities have the same handbook, the same policies, the same employee benefits, and the same 401(k) plan. See id., exhibits C, D, and G. They have the same internet provider and protocol for conducting background checks on employees. See id., exhibit G. There is one benefits coordinator for FAS who works with the HR/payroll employee at each facility regarding employee benefits. See id., exhibit B.

FAS and FCC contracts. Id., exhibit C. Mr. Andujo's physical office is in the Valle Norte facility. Id.

During Plaintiff's employment, Lanny Dosher ("Mr. Dosher") was the Divisional Construction Maintenance Director for 42 facilities, including Valle Norte. Id., exhibit G. Mr. Dosher, though also technically employed by FCC, was responsible for overseeing facility construction projects, for approving funds for facility capital expenditures, and for making final decisions as to cost effectiveness. Id. Mr. Dosher made clear to Ms. Felton, the facility Administrator and Mr. Prendergast's direct supervisor, that he disliked Plaintiff's numerous complaints about the physical state of the facility and his efforts to remedy the problems he encountered, referring to Mr. Prendergast as a "loose cannon." Id., exhibit E and K.

Ms. Felton resigned her position at Valle Norte in May 2007 due to her observations of upper management's lack of concern or attention to the safety and well-being of staff and residents. See id., exhibit K. She indicates that she "observed significant problems while at Valle Norte," but "was not allowed to sufficiently address these problems due to managements's apparent overriding concern with the 'bottom line.'" Id. With respect to Plaintiff, Ms. Felton has stated "[o]n a number of occasions, [Mr.] Prendergast would not clock in when he needed to perform work at Valle Norte after business hours due to emergency situations," a situation complicated by the fact that Plaintiff "had previously been verbally reprimanded and warned by [Mr.] Andujo about working extra overtime." Id. Mr. Andujo, THI New Mexico's sole officer who reported to Mr. Hillegass at FCC, supervised Plaintiff for the remainder of his employment at the Valle Norte facility. See id., exhibit A. Mr. Prendergast was terminated shortly after Ms. Felton's resignation, however, Mr. Andujo and Karen Miller (formerly Hood) ("Ms. Miller"), who was the Vice President of Human Resources and employed by FAS, have refused to

acknowledge that Plaintiff was actually terminated and instead assert that he resigned his position. See id., exhibits F and R.

Legal Standard

Summary judgment may be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Summary judgment is appropriate "only where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197, 1207 (10th Cir. 2006) (quoting Rule 56(c)). When applying this standard, the court examines the record and makes all reasonable inferences in the light most favorable to the non-moving party. See Muñoz v. St. Mary-Corwin Hosp., 221 F.3d 1160, 1164 (10th Cir. 2000).

The movant bears the initial burden of demonstrating the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. See Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 979 (10th Cir. 2002); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir. 1998). If this burden is met, the nonmovant cannot rest on the pleadings, but must set forth specific facts by reference to affidavits, deposition transcripts, or other exhibits to support the claim. See Serna v. Colo. Dep't of Corr., 455 F.3d 1146, 1151 (10th Cir. 2006) (citing Behrens v. Pelletier, 516 U.S. 299, 309 (1996)).

The nonmovant's burden is more than a simple showing of "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Evidence relied upon in opposition to summary judgment "may be insufficient to create a triable fact if it is non-specific or otherwise non-responsive, vague, conclusory, or self-

serving." Piercy v. Maketa, 480 F.3d 1192, 1197-98 (10th Cir. 2007). The nonmovant's "evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." Bones v. Honeywell Int'l, Inc., 366 F.3d 869, 875 (10th Cir. 2004).

Analysis

Plaintiff alleges that all Defendants function as a "single employer." Summary judgment is appropriate if Defendants FLTCH, THI Baltimore, THI New Mexico, FAS, and FCC demonstrate there is "no genuine issue as to any material fact" and they are "entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." Thom v. Bristol-Myers Squibb Co., 353 F.3d 848, 851 (10th Cir. 2003) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." Id. (citing Anderson, 477 U.S. at 248).

Under the single-employer test, a Plaintiff who is the employee of one entity may seek to hold another entity liable by arguing that the two entities effectively constitute a single employer. See Bristol v. Board of County Commr's of the County of Clear Creek, 312 F.3d 1213, 1218 (10th Cir. 2002). The single-employer test is sometimes confused with, but is distinct from, the joint-employer test. Id. Under the joint-employer test, a Plaintiff who is the employee of one entity may seek to hold another entity liable by claiming that the two entities are joint employers. Id. The joint-employer test acknowledges that the two entities are separate, but looks to whether they co-determine the essential terms and conditions of employment. Id. The single-employer test, however, asks whether two nominally separate entities should in fact be treated as an integrated enterprise in contrast with the joint-employer test, which assumes that

the alleged employers are separate entities. Id. Moreover, while the single-employer test "looks at the overall relationships of the . . . entities, not just the entities' relationship to a given employee or class of employees." Sandoval v. City of Boulder, Colorado, 388 F.3d 1312, 1324 (10th Cir. 2004).

The Tenth Circuit weighs four factors in considering "whether two nominally separate entities constitute an integrated enterprise or single employer: (1) interrelations of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership and financial control." Id. at 1322. While the Circuit has stated that it considers the third factor to be the most important, it has also stated that the "heart of the inquiry" concerning single-employer status "is whether there is an absence of an arm's length relationship among the companies." See id.; Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999). "The ultimate determination of single employer status depends upon all the circumstances of the case." NLRB v. Carson Cable TV, 795 F.2d 879, 882 (9th Cir. 1986).

A. FLTCH

Construing the facts in a light most favorable to Mr. Prendergast, the Court finds Plaintiff has produced evidence of the following:

(1) FLTCH is owned solely by Mr. Foreman and Mr. Grunstein and Mr. Foreman and Mr. Grunstein are the only officers and directors;

(2) FLTCH's address is 930 Ridgebrook Road, Sparks, Maryland, the same address as THI Baltimore;

(3) For federal tax purposes, FLTCH has elected to treat Valle Norte (and its similar facilities) as a "disregarded entity" and the owners of FLTCH pay the taxes for the profits received by Valle Norte, which are reported on the tax return that FLTCH files (there are filing that are made at the shareholder level to reflect those results);

(4) The FAS tax department prepares the tax filings for FLTCH;

(5) Christine Zack ("Ms. Zack") an in-house attorney, holds the position of Senior Vice President for FAS, and though she has no direct supervisor, she presumes her employment is controlled by FLTCH shareholder Mr. Foreman;

(6) Ms. Zack testified as the corporate representative for each defendant and she provides updates regarding operations and legal matters at the facility-level to FLTCH shareholder Mr. Foreman several times a month;

(7) There is one Directors' and Officers' ("D&O") insurance policy, held in the name of FLTCH, that covers all the facilities and named Defendants; and

(8) Teresa Crocker ("Ms. Crocker"), who was employed in the human resources department at Valle Norte, was told by "Fundamental" what company name to use, what letterhead to use for new hires, and how to input employment information into their system.

See docket no. 178, exhibits B, C, and D.

B. THI Baltimore

Construing the facts in a light most favorable to Mr. Prendergast, the Court finds Plaintiff has produced evidence of the following:

(1) THI Baltimore was acquired by FLTCH in March 2006 and after the acquisition, it created Defendants FAS and FCC to do the work that THI of Baltimore Management, LLC, (now defunct), had been doing;

(2) Employees of THI of Baltimore Management, LLC became employees of FAS or FCC depending upon their duties;

(3) The officers and directors THI Baltimore are Mr. Tabler, Mr. Bennett, and Mr. Fulchino, who were also the directors of Valle Norte from January to July 2006;

(4) THI Baltimore's address is 930 Ridgebrook Road, Sparks, Maryland, the same address as FLTCH;

(5) For federal tax purposes, THI Baltimore has elected to treat Valle Norte as a "disregarded entity;"

(6) Ms. Zack testified as the corporate representative for each defendant and she provides updates regarding operations and legal matters at the facility-level to FLTCH shareholder Mr. Foreman several times a month;

(7) There is one D&O insurance policy, held in the name of FLTCH, that covers all the facilities and named Defendants, including THI Baltimore;

(8) The professional and general liability ("PLGL") insurance policy that applies to the facilities is written in the name of FCC and THI Baltimore is also covered by the policy; and

(9) The FAS tax department prepares the tax filings for THI Baltimore.

See id., exhibits B, D, and E.

C. **THI New Mexico**

Construing the facts in a light most favorable to Mr. Prendergast, the Court finds Plaintiff has produced evidence of the following:

(1) Valle Norte is purportedly managed by a "governing body" consisting of the facility administrator, the Director of Nursing ("DON") and the Regional Director of Operations ("RDO") and the only officer of Defendant THI New Mexico is the current RDO, Mr. Andujo;

(2) Mr. Andujo did not know the purpose of THI New Mexico, whether it had any financial statements, or whether it had any officers;

(3) RDOs, including Mr. Andujo, are also employed by Defendant FCC;

(4) For federal tax purposes, THI New Mexico has elected to treat Valle Norte as a "disregarded entity;"

(5) The FAS tax department prepares the tax filings for THI New Mexico;

(6) There is one D&O insurance policy, held in the name of FLTCH, that covers all the facilities and named Defendants;

(7) Dona Felton, the Valle Norte administrator from October 2006 to May 2007, reported to the RDO of Valle Norte and sole officer of THI New Mexico, Mr. Andujo;

(8) Mr. Andujo also supervised some marketing employees, but did not know if they worked for FCC or FAS;

(9) All "Fundamental" nursing home facilities had the same handbook, the same policies, the same employee benefits, the same 401(k) plan, the same internet provider and the same protocol for conducting background checks on employees;

(10) Ms. Zack testified as the corporate representative for each defendant and she provides updates regarding operations and legal matters at the facility-level to FLTCH shareholder Mr. Foreman several times a month;

(11) THI New Mexico's sole officer, Mr. Andujo, reported to FCC officer and director Mr. Hillegass in Texas; and

(12) THI New Mexico's sole officer's physical office is located in the Valle Norte facility.

See id., exhibits A, B, C, D, E, G, and H.

D. FAS

Construing the facts in a light most favorable to Mr. Prendergast, the Court finds Plaintiff has produced evidence of the following:

(1) The directors of Valle Norte from January to July 2006 were Mr. Bradley, who is also the CEO of FAS, and Mr. Fulchino, who is the CFO of FAS, a former officer and director at Valle Norte, and a current officer and director with THI Baltimore;

(2) After FLTCH acquired THI Baltimore in March 2006, it created Defendants FAS and FCC to do the work of THI Management, LLC (now defunct);

(3) FAS has the same directors, officers, and address that THI Baltimore Management, LLC used to have;

(4) The FAS and FCC contracts are materially the same for every one of approximately 100 facilities, including Valle Norte;

(5) The FAS management fee is 4% of net operating revenue for Valle Norte and all other "Fundamental" facilities;

(6) FCC also has a contract for services with FAS;

(7) FAS and FCC provided all the services listed in Exhibit A of the contract with Valle Norte and there is no consequence if the fee does not cover the operating expenses;

(8) FAS has never cancelled a contract or stopped providing services because a facility was in the negative;

(9) The lack of payment is recorded as a "receivable" on FAS's books and a payable on the facility's books, and the balance just grows if the facility does not perform

better;

(10) Valle Norte's revenues go to a "lock box," along with the revenues for every "Fundamental" facility and the funds in the "lock box" are applied to a line of credit that FAS has;

(11) FAS pays the vendors, rent, and all operating expenses for the facilities, including Valle Norte;

(12) Ms. Zack holds the position of Senior Vice President for FAS, and though she has no direct supervisor, she presumes her employment is controlled by FLTCH shareholder, Mr. Foreman;

(13) Mr. Tabler, the Vice President of Finance for FAS, reports to Mr. Fulchino, who is the CFO for FAS, an officer and director with THI Baltimore, and a former director at Valle Norte;

(14) Ms. Miller, the Vice President of Human Resources employed by FAS, was the primary contact for Valle Norte, other facilities and FCC regarding human resources issues, such as handbook policies, employee complaints, employee discipline, and benefits;

(15) Ms. Miller verified the interrogatory answers for each of the Defendants in this case;

(16) Ms. Felton, whose signature is on the FAS and FCC contracts, had not heard of FAS or FCC and did not know the relationship between any of the Defendants and Valle Norte;

(17) Mr. Andujo advised facilities about how to be profitable and oversaw their budgets, but he did not know to whom the management fee was paid, how it was calculated, what is was based upon, or if a facility could do anything to reduce it;

(18) Employees are wrong "all the time" about who they are employed by and by whom their coworkers are employed;

(19) FAS employee Ms. Miller is a decision-maker on terminations at facilities, and Mr. Andujo confirmed that Ms. Miller would have authority to discipline director-level employees, such as Plaintiff;

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

(21) Positions at the facility level, including at Valle Norte, are posted on the website

of FAS, but FCC also uses the same website to look for applicants;

(22) FAS employee Ms. Miller visited Valle Norte to audit whether Ms. Crocker was "doing her work correctly," and audited things like employees' files, payroll issues like vacation, and whether people clocked in and out correctly;

(23) Ms. Crocker's only responsibility regarding processing employee terminations was to send a termination form to corporate and they took care of all the details, such as discontinuing benefits and 401(k) contributions;

(24) As the administrators' supervisor, THI New Mexico's only employee, Mr. Andujo did their performance evaluations, determined whether or not they should be hired or fired, determined their pay increases, oversaw their work performance, and set goals and objectives for them – Mr. Andujo is employed by FCC and his supervisor is FCC officer and director Mr. Hillegass;

(25) Mr. Andujo told Ms. Felton that only she and he had authority to terminate Mr. Prendergast's employment;

(26) Calls to the employee hotline from Valle Norte were received by the compliance department at FAS and employee complaints about a supervisor through the hotline were investigated by Mr. Andujo, who reviewed his findings with Ms. Miller from FAS and sometimes Mr. Hillegass from FCC; and

(27) Employees worked for both Valle Norte and Albuquerque Care Center at the same time as Mr. Andujo and Mr. Dosher pulled people, including maintenance, from different facilities to help in other locations if extra help was needed.

See id., exhibits B, C, D, E, F, G, H, and K.

E. FCC

Construing the facts in a light most favorable to Mr. Prendergast, the Court finds Plaintiff has produced evidence of the following:

(1) FCC's address is in Texas and its officers are Mr. Hillegass and Ms. McDonald;

(2) Mr. Andujo, THI New Mexico's sole officer, reports to Mr. Hillegass at FCC;

(3) The FCC contracts are materially the same for every one of approximately 100 facilities, including Valle Norte;

(4) The FCC management fee is 1% and FCC also has a contract for services with FAS;

(5) Mr. Dosher was employed by FCC as the Divisional Construction and Maintenance Director from September 2003 to 2008 and he was responsible for overseeing maintenance operations and maintenance directors at 42 facilities in eight states;

(6) Mr. Dosher had never heard of any Fundamental companies besides FCC;

(7) Mr. Andujo, THI New Mexico's sole officer, was not sure if he and Ms. Miller from FAS worked for the same company, but he knew she also worked for "Fundamental;"

(8) Mr. Roby, with FCC, believed he and Ms. Miller, with FAS, worked for the same company;

(9) Mr. Hillegass with FCC offered Ms. Felton her Facility Administrator job at Valle Norte;

(10) It was part of Mr. Dosher's job to inform the Facility Administrator and the RDO if a maintenance man was not performing appropriately;

(11) Mr. Roby, with FCC, evaluated Plaintiff's job performance and prepared a performance evaluation (the only one in Plaintiff's file);

(12) When Mr. Roby received a raise, he was informed about it by Ms. Miller with FAS;

(13) There is an electronic purchasing hub for all facilities that they can log on to purchase their food and equipment;

(14) All facilities, including Valle Norte, have the same policies and procedures regarding the way residents are handled;

(15) Each geographic region has a budget, prepared by Mr. Hillegass, the RDOs, and an FAS accountant;

(16) The money is maintained by FAS until it is needed;

(17) A capital expenditure is anything $500 or more with a lifetime of 12 months or longer and administrators could not make any capital expenditures without going through Mr. Andujo;

(18) Mr. Andujo had to forward expenditures to Mr. Dosher and Mr. Hillegass for approval and the money then had to be "released" by Lynn Weir with FAS;

(19) Mr. Dosher made decisions on facility repairs, wrote reports of his facility visits.

and provided training to new maintenance employees regarding policies and procedures, including the requirement that they call him if they wished to spend over $500;

(20) Mr. Andujo was eligible for a bonus which was based on the financial performance, turnover rates, and clinical outcomes of the accumulated performance of all of the facilities that he oversaw;

(21) Marketing for the facilities was handled by an employee at the division level who reported to Mr. Hillegass, a regional marketing employee, and a business development individual who reported to Mr. Andujo.

See id., exhibits B, C, D, E, F, G, H, I, and J.

F. Single Employer Status

In weighing the four factors the Court is to consider when evaluating whether the nominally separate entities in this case constitute an integrated enterprise or single employer, the Court finds that given the amount and weight of evidence submitted by Plaintiff with respect to the interrelations of operations, common management, centralized control of labor relations, and common ownership and financial control, there is a genuine issue of material fact as to the "single employer" status of Valle Norte, FLTCH, THI Baltimore, THI New Mexico, FAS, and FCC. See Fed. R. Civ. P. 56(c) (addressing the factors in Sandoval, 388 F.3d at 1322). Even a cursory review of the record and evidence in this case indicates interrelations between the operations and common management of the different entities, as FAS and FCC are involved with control of labor relations and have some degree of financial control over all the other entities, and Mr. Andujo, Mr. Dosher, Mr. Hillegass, Mr. Tabler, Mr. Bennett, Mr. Fulchino and Ms. Miller appear to work for the interests of multiple entities.

The Court acknowledges the arguments and evidence submitted by Defendants to suggest "single employer" status does not apply, but ultimately the Court finds there is a "genuine" issue because there is sufficient evidence on each side so that a rational trier of fact could resolve the

issue either way. See Thom, 353 F.3d at 851. There is one D&O policy covering all the facilities and named Defendants; Ms. Zack has testified as the corporate representative of all of the named Defendants and presumes she is supervised by Mr. Foreman with FLTCH; Ms. Miller verified interrogatory answers for all of the named Defendants; FLTCH and THI Baltimore share the same address; THI Baltimore, after being acquired by FLTCH, created FCC and FAS; and Mr. Andujo, whose office is physically at the Valle Norte facility, is currently the only officer of THI New Mexico and the current RDO for Valle Norte, but is an employee of FCC and reports to Mr. Hillegass in Texas.

Because the Court finds there is a genuine issue of material fact as to whether there is an absence of an arm's length relationship amongst the named Defendants, the undersigned will not address all of the other strong evidence presented by Plaintiff suggesting Valle Norte, FLTCH, THI Baltimore, THI New Mexico, FAS, and FCC operate as an integrated enterprise. See Knowlton, 189 F.3d at 1184. Defendants' Motion for Summary Judgment Regarding Single Employer Status will thus be denied.

WHEREFORE,

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment Re: Single Employer Status (docket no. 166) is **DENIED**.

SO ORDERED on this 13th day of August, 2009.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
09 SEP 18 PM 3:24
CLERK-ALBUQUERQUE

MICHAEL PRENDERGAST,

Plaintiff,

vs.

CIV 07-1265 CG/LFG

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

Defendants.

COURT'S SPECIAL VERDICT FORM

Question 1: Was Mr. Prendergast discharged because he made complaints about the physical condition of the facility, including making statements to the State Health Inspector?

Answer: Yes (Yes or No)

If your answer to Question 1 is No, proceed to Question 6. If your answer to Question 1 is Yes, proceed to Questions 2, 3, 4 and 5.

Question 2: If your answer to Question 1 is yes, did the discharge of Mr. Prendergast cause damage to him?

Answer: Yes (Yes or No)

If your answer to Question 2 is no, proceed to Question 4. If your answer to Question 2 is Yes, proceed to Questions 3 and 4.

Question 3: In accordance with the damage instructions given by the Court, we find the damages suffered by Mr. Prendergast on account of his discharge to be:

Lost Wages & Benefits $ 31,500

Emotional Distress $ 4,000

Question 4: Is Mr. Prendergast entitled to punitive damages?

Answer: Yes (Yes or No)

If your answer to Question 4 is no, proceed to Question 6. If your answer to Question 4 is Yes, proceed to Question 5.



Question 5: What is the amount of punitive damages?

$ 75,000 00

Answer Question 6 regardless of your Answers to Questions 1-5.

Question 6: Is Mr. Prendergast entitled to unpaid overtime compensation?

Answer: No (Yes or No)

If your answer to Question 6 is No, proceed to Question 8. If your answer to Question 6 is Yes, proceed to Question 7.

Question 7: What is the amount of overtime compensation that is due to Mr. Prendergast?

$ _____

Do not answer Question 8 unless you have answered Yes to Question 1 or Question 6.

Question 8: Are all or some of the Defendant companies an integrated enterprise?

Answer: Yes (Yes or No)

If your answer is Yes, place an X next to the entities that are part of the integrated enterprise:

X Fundamental Long Term Care Holdings, LLC
X Fundamental Administrative Services, LLC
X Fundamental Clinical Consulting, LLC
X THI of Baltimore, Inc.
X THI of New Mexico, LLC
X THI of New Mexico at Valle Norte, LLC

JURY CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

John J. Wilson
Foreperson

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MICHAEL PRENDERGAST, Plaintiff, vs. FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC, d/b/a GTCR FUND VI, LP, et al., Defendants.	Case No. CIV 07-1265 CEG/LFG

DEPOSITION OF KENNETH TABLER

Taken at the Law Offices of:

Littler Mendelson, P.C.
3960 Howard Hughes Parkway, Suite 300
Las Vegas, Nevada 89109

Thursday, January 29, 2009

1:40 p.m.

Reported by: Gale Galerno, RMR, CCR No. 562

Blumberg No. 9118
PLAINTIFF'S EXHIBIT 32

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documents?
Q. Yes.
A. Yes.
Q. It is required to?
A. It has tax obligations.
Q. And those tax documents are prepared by the tax departments of Fundamental Administrative Services; is that correct?
A. That's correct.
Q. What entity owns THI of Baltimore, Inc.?
MR. RICHTERS: Object to the form. Once again, the same objections. Standing objection.
BY MS. WARNER:
Q. Do you know?
A. Yes. Fundamental Long Term Care Holdings, LLC.
Q. Is Fundamental Long Term Care Holdings, LLC a 100 percent owner of THI Baltimore, Inc.?
MR. RICHTERS: Same objection.
THE WITNESS: Yes.
BY MS. WARNER:
Q. Does Fundamental Long Term Care Holdings, LLC have tax filing obligations?
A. Yes.
Q. Are those documents prepared by the tax

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department of Fundamental Administrative Services?
A. Yes.
Q. Does Valle Norte receive and pay for any services provided by THI of Baltimore, Inc.?
A. It does not receive any services or make any payments to THI Baltimore, Inc.
Q. Does THI of Baltimore, Inc. have any tax obligations related to its ownership of Valle Norte?
A. The group has tax filing obligations as a result of the structure that's in place.
Q. Is any of the money that Valle Norte has related to THI of Baltimore, Inc.'s tax obligations?
MR. RICHTERS: Object to the form.
THE WITNESS: I don't quite understand. Does any of the money that Valle Norte has relate to --
BY MS. WARNER:
Q. THI of Baltimore, Inc.'s tax obligations.
MR. RICHTERS: Same objection.
THE WITNESS: I guess when you say does it have any money, are you referring to the results of its operations?
Q. Yes.
A. Because of certain federal tax elections

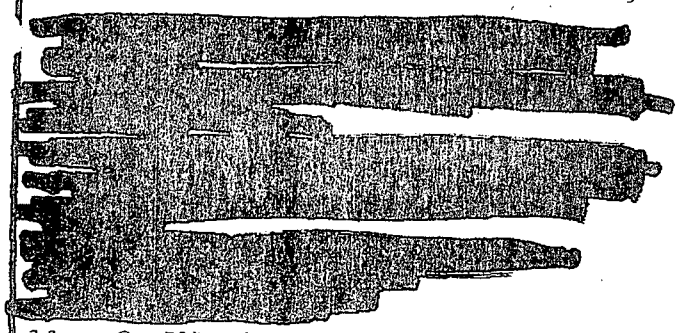
Page 60

available to LLC's, some of the entities for tax purposes are treated as disregarded entities, which, again, has very specific meaning under the, you know, federal tax code.
Q. Okay. Can you give me a short understanding of what the disregarded entity is?
A. What that has to do with is the manner that income and expenses are reflected on a tax return. And, again, there's certain elections that are available to determine which entities have certain filing obligations or not.
Q. What qualifies an entity as a disregarded entity?
A. It's an election that -- it's a tax election.
Q. Is Valle Norte a disregarded entity?
A. For federal tax purposes, that election has been made, yes.
Q. And when you say "for federal tax purposes," which entity's federal tax obligations are you referring to?
A. Well, I'll say the filing obligation of Fundamental Long Term Care Holdings, LLC.
Q. And for its filing obligation, federal, Fundamental Long Term Care Holdings, LLC treats

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Valle Norte as a disregarded entity; is that correct?
A. That's correct, only for federal income tax purposes, yes.
Q. Is the -- I'm probably going to use the wrong words. Did you say an election, is the election of the disregarded entity status true for entities other than Valle Norte?
MR. RICHTERS: Object to the form.
THE WITNESS: Yes. Those elections have been made for other entities.
BY MS. WARNER:
Q. Is it true that those elections have been made for all of the entities at the same level as Valle Norte?
A. Yes.
Q. And that applies to entities across the country; is that right?
MR. RICHTERS: Object to the form.
THE WITNESS: Yes.
BY MS. WARNER:
Q. Do any other entities elect to treat Valle Norte as a disregarded entity besides Fundamental Long Term Care Holdings, LLC?
MR. RICHTERS: When you say other entities,

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Q. If I understand your testimony previously, the entity that does recognize a monetary value and the entities at the facility level is Fundamental Long Term Care Holdings, LLC; is that correct?
MR. RICHTERS: Object to the form. And I think there's a mischaracterization, I believe.
THE WITNESS: I think I testified that the results of operations and the assets and liabilities of the facility are reflected at that entity that operates the facility at that lower level.
BY MS. WARNER:
Q. Correct. And please explain -- or correct me. I also thought that you testified that the Fundamental Long Term Care Holdings, LLC is the entity that is responsible for paying taxes on the

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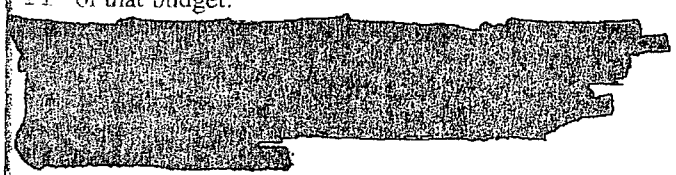
profit or loss of the facility level.
MR. RICHTERS: Object to the form. Asked and answered.
THE WITNESS: I don't believe that was my testimony. I think I testified that because of various federal tax elections, it's passed through to the owners on their individual returns.
BY MS. WARNER:
Q. Okay. So again, I'm just asking for clarification of your previous testimony. Please correct me if I don't have it right. The facility level, such as Valle Norte, its profit and loss are ultimately reflected in the individual tax returns of the individual shareholders of Fundamental Long Term Care Holdings, LLC?
MR. RICHTERS: Object to the form.
THE WITNESS: Yes. You're talking about tax elections, and the impact of filing those elections and returns. And that's a correct statement.
BY MS. WARNER:
Q. Does THI of Baltimore, Inc. have anything that's taxable?
A. It doesn't -- again, it joins in. It's made certain tax elections and joins in the filing

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of tax returns by the group, but it has no other activities besides its ownership interests in those various entities.
Q. Is there a joint tax return filed?
MR. RICHTERS: Object to the form. On behalf of?
BY MS. WARNER:
Q. Do any of these entities that you are designated to testify on behalf of today file joint tax returns with one or more of each other?
A. There's really no -- a joint tax return is terminology related to an individual. So it's not really terminology you would use in the corporate world. But there are elections that have been made so that the results of the operations are reported on one return.
Q. And that is the individual return of the shareholders; is that correct?
A. Well, the return is filed at the Fundamental Long Term Care Holdings, LLC level.
Q. And that includes the financial results of FAS and FCC as well, correct?
A. Yes.
Q. In your capacity as the representative for THI of Baltimore, Inc., can you explain the manner

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and methods by which that entity determines annual budgets for their affiliated entities?
MR. RICHTERS: Referring to number 17, is it?
MS. WARNER: Yes.
THE WITNESS: Again, the budgets are generally -- the administrator of the facility is responsible for the budget. There are certain services that are provided under the administrative support agreement to help them in that preparation of that budget.



Q. Does THI of Baltimore, Inc. have any role whatsoever in determining the budgets for any of the affiliated entities?
MR. RICHTERS: Object to the form.
THE WITNESS: It has no role.
BY MS. WARNER:
Q. What role does Fundamental Administrative Services have in determining the annual budgets for the entities that it serves?

AFFIDAVIT

1. I am Byron S. Arbeit, MA, NFA, HFA and am a resident of Sarasota, Florida. I am licensed to administer nursing homes in Louisiana (1982-current) and in Indiana (1991-current); and, have passed a national board examination in nursing home administration. Further, this Writer has annually obtained continuing education hours approved by State licensure boards in excess of licensure renewal requirements. I was the licensed nursing home administrator of a New Orleans, Louisiana nursing home April 1982- June 1991 and served as an ex-officio member of that facility's board of directors; the licensed administrator of an Indianapolis, Indiana nursing home June 1991- December 1993 and served as an ex-officio member of its board of directors; and, the licensed nursing home administrator of another Indianapolis, Indiana nursing home June 1994- June 1997.

Prior to entering the field of nursing home administration, this Writer spent approximately eight years in the field of hospital administration and passed his national board examination, at the time given by the American College of Hospital Administrators. Within this eight year span of time, this Writer was a member of the board of a community mental health center; and, an ex-officio Board member of a community health center.

This Writer has served as a nursing home administration consultant to nursing homes' administrators and/or board of directors before and after 1997; and has current consulting relationships with long-term care facility operators. During the period December 1996-December 2002 and June 2005- current, this Writer has a consulting relationship with the U.S. Department of Justice, involving the evaluation of nursing home operations in selected public, non-profit and/or private, for-profit facilities. This Writer also had a confidential relationship with the State of Florida from late 1997-2003 involving confidential nursing home administration-related matters; and, has on one occasion consulted with the State of Indiana on a matter involving a nursing home administrator.

In addition, this Writer has taught nursing home administration at Tulane School of Public Health (graduate student level) and Tulane School of Medicine (first and fourth year medical students) from 1982-1991; has taught courses, given commencement speeches and/or lectures in the field of nursing home administration at the University of Central Florida on numerous occasions since 1998; taught a semester course in nursing home administration at International College in 2004; and, has lectured for several years to several professional trade groups (nursing home administrators, nurses, attorneys) whose attendees receive continuing education credit from their own State licensure boards for hearing these lectures. Other related endeavors have included publishing copyrighted papers or chapters of textbooks related to the field of nursing home administration; and, having experience mentoring several nursing home administrators-in- training with State licensure board credentials as a preceptor while in Louisiana.

Blumberg No. 5113 PLAINTIFF'S EXHIBIT 33

This Writer has on numerous occasions performed forensic work for plaintiff or defense bar (since 1987) on matters involving the nursing home, its administration, and its governance. This Writer has been qualified in numerous federal court trials and state court trials; and, has been qualified to testify at two State court trials and one federal court trial in South Carolina. To this Writer's knowledge, he has never been disqualified in the field of nursing home administration or long-term care facility administration.

2. In the matter of Morrow vs. Magnolia Place at Spartanburg, Plaintiff Counsel has requested that Affiant discuss some of the effects the following entities would have on the individual nursing home's operation who is a defendant in this case, namely: Fundamental Administrative Services, LLC; Fundamental Clinical Consulting, LLC; THI of Baltimore, Inc.; and, Fundamental Long Term Care Holdings, LLC. This Writer has had opportunity to read depositions of corporate personnel who have provided an informational pathway relative to the relationship each of the above named entities have with Magnolia Place at Spartanburg, as well as a July 1, 2009 analysis of corporate structure written 7/1/09 by CFO Network and some Plaintiff pleadings in matters involving the aforementioned entities at issue.

3. Nursing home administrators and their respective board of directors/ supervising management companies are charged with seeing that all governmental regulations, facility policies and nursing home operation community practice standards are complied with and provided by staff. Failure to do so could result in the nursing home administrator – as the only professional – being automatically reported to his or her State licensure board (especially for resident quality of care or quality of life or resident abuse/ neglect matters); and the facility licensure or certification status being subjected to governmental sanctions. Administrators are also regulatorily responsible for monitoring, coordinating and evaluating the quality of care given each resident. The administrator is responsible for interpreting his/ her corporate overseers' established policies and developing/ implementing the procedures for compliance with same; and, the corporate overseers are responsible for auditing of the administrator's performance in carrying out the corporate overseers' estabilished policies – for assuring the facility's administrator is provided adequate fiscal resources to do his job – and for intervening as needed to assure the facility provides services to nursing home residents in the spirit of compliance with governmental regulations and community practice standards.

It is a fundamental axiom in the nursing home industry that a facility must have a governing body (see federal OBRA certification code 483.75 (d).) This governing body appoints the administrator, establishes the terms of the administrator's employment, retains the privilege of removing the administrator and/or limiting the administrator's ability to actually control the facility's operations pursuant to a job description or corporate directive. Further, it is a clarification of the obvious that whoever approves and ultimately controls fiscal spending (with or without an established budget) will directly impact day-to-day facility operations and resident care outcomes. In Magnolia Place at Spartanburg, similar to the way most nursing homes operate, it is a higher corporate

authority that controls the administrator's application of available fiscal resources. In this case the Magnolia Place at Spartanburg administrator was significantly controlled collectively and individually by THI of Baltimore, Inc., Fundamental Administrative Services LLC, Fundamental Clinical Consulting LLC and Fundamental Long Term Care Holdings LLC. (hereinafter referred to as "Fundamental Entities").

4. The Fundamental Entities had a duty to assure that the facility be adequately staffed to meet the needs of each resident 24 hours a day, 7 days a week. This requirement typically requires that there has to be consideration of the acuity of resident needs. In Affiant's opinion, Fundamental Entities failed to provide adequate staffing to meet the needs of Mr. Morrow. The Fundamental Entities operated in such a manner that the corporate officials would be aware or should have been aware of negative resident care outcomes. Lack of adequate staffing (especially in the nursing department) in quantity and quality have been repeatedly linked in the nursing home industry and/or government studies literature as having foreseeable negative consequences with respect to accident prevention, skin care, nutritional care, hydrational care and neglect/abuse, notwithstanding the anticipated reduction of employee morale. Lack of sufficient staffing can also be linked to staff who have not been provided sufficient orientation and training to the duties to which they are assigned.

The Fundamental Entities had, as stated previously, a duty to audit the performance of the administrator and the nursing home, to develop a protocol for enhanced systemic communication of resident care problems as they would arise, and to assure an immediate and effective corporate response that would mitigate or eliminate probabilities of resident mistreatment. As a nature of this duty, it is this Writer's opinion that the Fundamental Entities represented the true governing body of Magnolia Place at Spartanburg, and not the combination of the administrator/ director of nursing and regional director as testified by some facility management representatives in depositions. Indeed, if that combination of personnel were to represent the governing body of Magnolia Place at Spartanburg, then the administrator and director of nursing could effectively remove the regional director from the board, could alter or void all management contracts and they could spend money as they wished. Same was certainly far from the realities of options the administrator had. The administrator of Magnolia Place at Spartanburg, the facility operations, and ultimately the resident population's care was orchestrated by the Fundamental Entities.

FURTHER AFFIANT SAYETH NAUGHT

Brent Adkins 11/12/10

ATTESTATION OF NOTARY:

Gail Neva Marks 11/12/10

NOTARY PUBLIC-STATE OF FLORIDA
Gail Neva Marks
Commission # DD747293
Expires: APR. 10, 2012
BONDED THRU ATLANTIC BONDING CO., INC.

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG 2007-CP-42-6601

LAWRENCE E. MORROW AND EVELYN M. MORROW,

PLAINTIFFS,

VERSUS

THI OF BALTIMORE, 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.

DEPOSITION OF MARGARET KELLER

PURSUANT TO NOTICE AND/OR AGREEMENT, THE DEPOSITION OF **MARGARET KELLER** WAS CALLED BY THE PLAINTIFFS ON THE 3RD DAY OF APRIL, 2009, COMMENCING AT THE HOUR OF 10:00 A.M., AT HOLCOMBE BOMAR, 100 DUNBAR STREET, SUITE 200, SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS FOLLOWS:

JILL S. BISHOP
VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.
836 SHORESBROOK DRIVE
SPARTANBURG, S.C. 29301-6515
864-574-1313

Blumberg No. 5113
PLAINTIFF'S EXHIBIT 34

RIGHT?
A. YES, SIR.
Q. OKAY. AND YOU UNDERSTAND WHAT A SWORN OATH IS, RIGHT?
A. YES, SIR.
Q. OKAY. WHEN WERE YOU FIRST NOTIFIED THAT YOU WERE ON THE GOVERNING BODY?
A. I GUESS I'VE ALWAYS BEEN ON THERE.
Q. WELL, WHEN DID YOU FIRST -- WERE NOTIFIED OF THAT?
A. SEVERAL MONTHS AGO.
Q. OKAY. DID YOU GET ANY KIND OF COMPENSATION FOR BEING ON THE GOVERNING BODY?
A. JUST MY PAYCHECK.
Q. OKAY. AND HOW DO YOU COMMUNICATE WITH THE GOVERNING BODY?
A. WE TALK AMONGST US.
Q. OKAY. IS THERE ANY KIND OF QUARTERLY, ANNUAL MEETING THAT YOU ALL GET TOGETHER OR IS IT WEEKLY, DAILY?
A. WE HAVE A WEEKLY CALL ON TUESDAYS, BUT I'M NOT ALWAYS IN THEM.
Q. OKAY. AND THAT CALL IS BETWEEN WHO?
A. THE ADMINISTRATOR AND THE R.D.O. AND MYSELF.
Q. AND THE R.D.O. IS ROBERT CROOKS?
A. RIGHT.

Q. HOW LONG HAS HE BEEN R.D.C.?
A. I GUESS ABOUT FOUR OR FIVE YEARS. I'M GUESSING AT THAT. I CAN'T TELL YOU.
Q. WAS THAT WHEN I.H.S. WENT BANKRUPT AND IT WAS UNDER NEW OWNERSHIP? IS THAT WHEN ROBERT CROOKS STARTED?
A. I DON'T KNOW.
Q. OKAY.
A. I'LL BE HONEST WITH YOU.
Q. THAT'S FINE. AND DO YOU KNOW IF ROBERT CROOKS WORKED FOR I.H.S.?
A. I DON'T KNOW WHO ROBERT CROOKS WORKS FOR.
Q. OKAY. DO YOU KNOW WHO HE WORKS FOR NOW?
A. I DO NOT.
Q. OKAY. AND YOUR SUPERVISOR IS THE ADMINISTRATOR, MARSHA DENNER?

BY MR. BOULIER:

OBJECT TO THE FORM OF THE QUESTION.

BY THE WITNESS:

MY ADMINISTRATOR ---

EXAMINATION RESUMED BY MR. MULLMAN:

Q. OKAY.
A. --- IS PAT HARRIS. MY CONSULTANT IS MARSHA DENNER.
Q. OKAY. HAVE YOU EVER TESTIFIED BEFORE THAT YOUR SUPERVISOR WAS MARSHA DENNER?
A. NO.

Q. OKAY. WHY DOES MARSHA DENNER ---
A. NOT TO MY KNOWLEDGE. I HAVEN'T.
Q. OKAY. WHY IS SHE INVOLVED IN YOUR ANNUAL EVALUATION?
A. SHE IS A CONSULTANT FOR MY FACILITY.
Q. AND I ASSUME AS A MEMBER OF THE GOVERNING BODY, YOU HIRED HER?
A. NO.
Q. OKAY. SO, WHO MADE THE DECISION TO HAVE MARSHA DENNER AS A CONSULTANT FOR THE FACILITY?
A. I DON'T KNOW.
Q. OKAY. HOW WOULD YOU FIND THAT OUT?
A. I HAVE NO IDEA.
Q. OKAY. WELL, DO YOU ANSWER TO HER?
A. NO, SHE ---
Q. WELL, IT'S INTERESTING THAT SHE SIGNS OFF ON YOUR EVALUATIONS IF YOU DON'T ANSWER TO HER. DO YOU SEE WHAT I'M SAYING? SO, WHY DO YOU HAVE HER SIGN OFF ON YOUR EVALUATION?
A. SHE COMES IN AND -- AND CHECKS THINGS OUT IN OUR FACILITY TO SEE THAT WE'RE DOING BY THE POLICY AND PROCEDURES. AND I GUESS THAT'S HOW SHE SIGNS OFF ON IT.
Q. OKAY. AND HOW DOES SHE KNOW WHAT THE POLICY AND PROCEDURES ARE IN YOUR FACILITY?

A. I GUESS SHE HAS THEM.
Q. OKAY. DO YOU GET POLICY AND PROCEDURE UPDATES FROM MARSHA DENNER?
A. NO, SIR.
Q. OKAY. WHO DO YOU GET UPDATES FOR THE POLICY AND PROCEDURES?
A. FROM MY ADMINISTRATOR.
Q. OKAY. DO YOU KNOW WHERE SHE GETS THEM?
A. I HAVE NO IDEA.
Q. DO YOU EVER DISAGREE WITH ANY OF THE POLICY AND PROCEDURES THAT YOUR ADMINISTRATOR GIVES YOU?
A. NO, SIR.
Q. OKAY. IF YOU DID, YOU COULD NOT FOLLOW THAT POLICY AND PROCEDURE AS HEAD OF THE NURSING DEPARTMENT?
A. WELL, YES, I COULD DISCUSS IT WITH PAT.
Q. OKAY. AND DO YOU ALSO DISCUSS IT WITH ROBERT CROOKS?
A. I HAVEN'T NEVER.
Q. OKAY. NOW, IN THIS FACILITY, YOU GUYS USED TO PHOTOGRAPH PRESSURE ULCERS, RIGHT?
A. YES, SIR.
Q. AND WHO MADE THE DECISION TO STOP PHOTOGRAPHING PRESSURE ULCERS?
A. I DO NOT KNOW.
Q. OKAY. DO YOU KNOW WHEN THAT STOPPED?

A. I SURE DON'T.

Q. AND I BELIEVE THAT IT WAS AFTER THE I.R.S. BANKRUPTCY. IS THAT YOUR UNDERSTANDING?

BY MR. BOULIER:

OBJECT TO THE FORM OF THE QUESTION.

BY THE WITNESS:

I DON'T KNOW.

EXAMINATION RESUMED BY MR. MULLMAN:

Q. AND YOUR -- THE PURPOSE OF YOUR COMPANY IS TO MAKE A PROFIT, CORRECT?

A. YES.

Q. IN OTHER WORDS, YOU'RE NOT A NON-PROFIT ORGANIZATION, RIGHT?

A. NO.

Q. AND THE ONLY FUNCTION YOU HAVE IS TO PROVIDE CARE, TREATMENT, SERVICES TO RESIDENTS?

A. RIGHT.

Q. YOU DON'T MAKE A PRODUCT OR ANYTHING LIKE THAT, RIGHT?

A. NO.

Q. DO YOU GUYS KEEP NOTES OF ANY OF THE GOVERNING BODY MEETINGS OR DISCUSSIONS?

A. I DON'T. PAT MAY.

Q. DO YOU KEEP COPIES OF ANY MOCK SURVEYS, AUDITS, CONSULTANT RECOMMENDATIONS OR REPORTS?

THROUGH THE CHARTS AS COMPARED TO DOING THE OTHER RESPONSIBILITIES?

A. I HAVE NO IDEA.

Q. OKAY. DO YOU KNOW HOW MANY CHARTS SHE CAN GO THROUGH PER MONTH?

A. I DON'T KNOW.

Q. DO YOU EVER INCREASE THE STAFF BECAUSE OF THE ACUITY OF THE RESIDENTS, OR DO YOU JUST RELY ON THE STATE MINIMAL STANDARDS?

A. WE RELY ON THE STATE MINIMAL, BUT WE HAVE -- ALWAYS HAVE ONE EXTRA ONE IN THE BUILDING.

Q. ONE EXTRA CNA?

A. RIGHT.

Q. OKAY. AND NOT RN OR LPN?

A. UH-UH.

Q. AND WHEN ALEX WAS THERE, YOU GUYS USED TO HAVE 12 CNAs ON FIRST SHIFT, RIGHT?

A. UH-HUH.

Q. BUT ACCORDING TO THE STAFFING RECORDS, NOW YOU ONLY HAVE TEN OR 11.

A. RIGHT.

Q. SO, PAT HARRIS, I GUESS, CUT ONE OF THE CNAs OR TWO OF THE CNAs?

A. I DON'T KNOW WHO DID IT.

Q. OKAY. YOU DIDN'T DO IT?

A. I DIDN'T DO IT.
Q. OKAY. SO, DO YOU KNOW WHY IT WAS DONE?
A. I DO NOT.
Q. HAVE YOU EVER ASKED WHY IT WAS DONE?
A. NO.
Q. OKAY. BUT THAT WOULD STILL MEET THE MINIMUM STANDARDS FOR SOUTH CAROLINA IF YOU HAD FIVE CNAs ON FIRST SHIFT? I MEAN, TEN, FIVE PER UNIT. EXCUSE ME.
A. YEAH, BUT MOST OF THE TIME, WE HAVE 11.
Q. OKAY. IS ONE UNIT WHERE YOU PUT THE TOTAL CARE OR TOTAL DEPENDENT PEOPLE? DO YOU TRY TO MAKE THEM EVEN ---
A. RIGHT.
Q. --- FOR ACUITY PURPOSES? HOW DO YOU DECIDE WHO GETS ---

BY MR. BOULIER:

MAKE SURE YOU ANSWER OUT LOUD.

BY MR. MULLMAN:

I'M SORRY.

BY THE WITNESS:

I'M SORRY. RIGHT.

EXAMINATION RESUMED BY MR. MULLMAN:

Q. I'M HARD OF HEARING. I THOUGHT YOU DID ANSWER, BUT WITH THE A.C., IT'S HARD TO HEAR. WHO -- WHICH UNIT GETS THAT EXTRA CNA IF THERE'S 11?

A. WE GO BY THE MEDICARE.
Q. WHICHEVER UNIT HAS MORE MEDICARE PEOPLE?
A. RIGHT.
Q. BUT YOU DON'T PUT ALL THE MEDICARE PEOPLE IN ONE UNIT?
A. NO.
Q. IS THERE A POLICY ABOUT DOCUMENTING THE OFFERING AND THE GIVING OF SUPPLEMENTS AND SNACKS TO RESIDENTS?
A. YES, SIR.
Q. OKAY. AND WHAT IS THAT POLICY?
A. IT IS ON THE -- YOU MEAN WHERE DO WE DOCUMENT IT?
Q. YEAH. YOU DO DOCUMSNT IT, RIGHT?
A. YEAH.
Q. AND I GUESS YOU'RE TRYING TO SAY THE ADLs, YOU WOULD DOCUMENT?
A. IT'S DOCUMENTED ON THE FOOD INTAKE SHEET, AND SOME OF IT IS DOCUMSNTED ON THE TREATMENT SHEET, AND SOME OF IT IS DOCUMENTED ON THE M.A.R.
Q. OKAY. WELL, YOU WOULDN'T DOCUMENT IT THREE DIFFERENT TIMES?
A. NO, IT'S DIFFERENT THINGS ON EACH ONE.
Q. OH, OKAY. I GOTCHA.
A. LIKE, THE SNACKS THE CNAs GIVE.
Q. OKAY. SO, THAT WOULD BE ON THE ADL?
A. RIGHT.

THAT THEY HAVE? IS THERE A D.O.N. ADVISORY BOARD?

A. NO. NO, UH-UH.

Q. BUT YOU PROBABLY KNOW THEM FROM IN-SERVICE TRAINING AND ---

A. OH, YEAH.

Q. DO YOU AGREE THE HIGHER THE ACUITY LEVEL, THE MORE STAFFING IS NEEDED?

A. IT ALL DEPENDS.

Q. IT ALL DEPENDS ON WHAT?

A. ON THE STAFF YOU HAVE WORKING.

Q. SO, IF YOU, LIKE YOU SAID BEFORE, YOU ALWAYS JUST USE THE SOUTH CAROLINA REGULATIONS ON MINIMUM STAFFING RATIOS, RIGHT?

A. RIGHT. BUT WE HAVE ONE OVER.

Q. YOU HAVE ONE OVER ON CNAs ---

A. UH-HUH.

Q. BUT NOT LPNs AND RNs?

A. YES, WE HAVE ONE OVER ON LPNs.

Q. OH, HOW MANY ---

A. I HAVE TWO LPNs PER UNIT AND SOMETIMES AN RN WILL BE WORKING AN LPN SLOT.

Q. OKAY. AND WHAT IS THE RATIO FOR LPNs?

A. ONE TO 44.

Q. ON WHICH SHIFT?

A. ON ALL THREE SHIFTS.

Q. ON ALL THREE SHIFTS?
A. UH-HUH.
Q. YOU JUST NEED ONE LPN FOR 44 PEOPLE?
A. THAT'S WHAT THEY SAY. OR ONE FOR 22 IS WHAT I HAVE.
Q. OKAY.
A. BUT IT'S ONE PER 44.
Q. ALL RIGHT. SO, GOING BACK TO THE HIGHER THE ACUITY, THE MORE STAFFING. YOU DON'T BASE STAFFING ON THE ACUITY OF THE RESIDENTS?
A. NO.
Q. OKAY. SO, IF YOU HAD 88 INDEPENDENT PEOPLE, YOU WOULD HAVE THE SAME STAFF AS IF YOU HAD 88 TOTAL DEPENDENT?
A. RIGHT.
Q. OKAY. HOW MUCH OF YOUR TIME IS SPENT IN THE OFFICE COMPARED TO PROVIDING DIRECT CARE OR BEING ON THE FLOOR?
A. I DON'T PROVIDE DIRECT CARE.
Q. OKAY. SO, BEING ON THE FLOOR, I GUESS?
A. BEING ON THE FLOOR?
Q. YEAH.
A. IT JUST VARIES.
Q. BUT THERE'S NO 50/50, 75/25? THERE'S NO KIND OF TYPICAL NUMBER?
A. NO, IT JUST ALL DEPENDS ON WHAT I'VE GOT TO DO THAT

STAFFING LEVELS IS THEY TALK ABOUT A STUDY FROM HARRINGTON AND CARRILLO IN 2000. AND HARRINGTON AND COVENER. HAVE YOU EVER READ THOSE?

A. NO.

Q. OKAY. IT SAYS, "THE STAFFING LEVELS ARE OF GREAT INTEREST, BECAUSE EVIDENCE SUGGESTS A RELATIONSHIP BETWEEN HIGHER STAFFING AND QUALITY OF CARE PROCESS AND OUTCOMES." WOULD YOU AGREE WITH THAT STATEMENT?

A. I CANNOT GIVE MY OPINION ON THAT, BECAUSE, YOU KNOW, I'VE NEVER SEEN THIS OR -- I JUST CAN'T GIVE MY OPINION ON IT.

Q. OKAY. RIGHT BELOW THAT, IT SAYS, "RECENTLY C.M.S., CENTERS FOR MEDICARE OR MEDICAID SERVICES, 2001, EXAMINED TOTAL NURSE STAFFING AND FOUND THAT LONG STAY RESIDENTS IN NURSING FACILITIES WITH LESS THAN 4.1 HOURS PER RESIDENT PER DAY WERE AT SERIOUS RISK FOR HARM AND JEOPARDY." HAVE YOU EVER SEEN THAT STUDY FROM THE C.M.S.?

A. NO, I HAVEN'T.

Q. HAVE YOU EVER HEARD THAT YOU NEED TO HAVE AT LEAST 4.1 HOURS PER DAY PER RESIDENT?

A. NO.

Q. AND AS YOU SIT HERE TODAY, YOU DON'T KNOW WHAT NUMBER THE FACILITY IS OR WHAT NUMBER YOU WOULD BE COMFORTABLE WITH AT THE FACILITY?

BY MR. BOULIER:

OBJECT TO THE FORM.

EXAMINATION RESUMED BY MR. MULLMAN:

Q. YOU DON'T HAVE A GOAL, IN OTHER WORDS?

A. I HAVE A GOAL OF HAVING TWO AND TWO, FOUR ON FIRST, FOUR ON SECOND, AND TWO ON THIRD.

Q. OKAY. SO, YOUR GOAL IS THE MINIMUM STANDARDS OF THE SOUTH CAROLINA REGULATION?

A. NO, I'M OVER THE STANDARDS.

Q. OKAY. AND YOU'RE -- WELL, YOU'RE OVER THE STANDARDS FOR THE CNA, RIGHT?

A. I'M ONE OVER ON THE CNA. I AM TWO OVER ON FIRST AND TWO OVER ON SECOND FOR THE NURSES.

Q. FOR THE LPNs?

A. YES.

Q. OKAY. SO, ON SECOND SHIFT, YOU HAVE FOUR LPNs?

A. YES, I DO.

Q. AND THE ONLY WAY WE WOULD BE ABLE TO CORROBORATE THAT IS IF WE HAD THE TIME SHEETS, THE STAFFING SHEETS, AND THE ASSIGNMENT SHEETS. IS THERE ANY OTHER DOCUMENT THAT WE WOULD NEED TO HAVE SO THAT WE COULD DO AN ANALYSIS OF THAT?

A. I DON'T KNOW.

Q. OKAY. DO YOU HAVE -- YOU HAVE 88 BEDS, AND I KNOW THEY'RE ALL MEDICARE CERTIFIED, BUT DO YOU TRY TO

KEEP X AMOUNT MEDICARE, X AMOUNT PRIVATE PAY, AND X MEDICAID?

A. WE TRY, BUT IT'S NOT ALWAYS THAT WAY.

Q. OKAY. BECAUSE IF YOU HAVE A BED OPEN AND THE HOSPITAL CALLS AND IT'S SOMEBODY ON MEDICAID, YOU HAVE TO TAKE HIM, RIGHT?

A. RIGHT.

Q. BUT YOU KNOW, I PUT THE WORD X IN THERE, BUT HOW MANY MEDICARE PEOPLE WOULD YOU WANT IF YOU COULD?

A. THIRTY.

Q. THIRTY?

A. IF I COULD.

Q. I MEAN, I ASSUME YOU WOULD WANT 88 PRIVATE PAY PEOPLE, IF YOU COULD?

A. YEAH.

Q. BUT 30 MEDICARE. HOW MANY MEDICAID, THAT YOU DON'T WANT TO GO OVER?

A. I DON'T KNOW. I DON'T REALLY KNOW WHAT OUR LIMITS ARE SUPPOSED TO BE.

Q. OKAY. IS THAT SOMEWHERE IN A POLICY THAT I COULD LOOK AT?

A. NO. I DON'T THINK.

Q. OKAY.

A. BUT WE HAVE TO HAVE SO MANY MEDICAID AND SO MANY MEDICARE AND SO MANY PRIVATES.

Q. OKAY. WHERE WOULD I GET THAT INFORMATION?
A. I DON'T KNOW.
Q. I MEAN, IS IT WRITTEN DOWN IN YOUR OFFICE OR IS IT SOMETHING SOMEBODY TOLD TO YOU?
A. IT'S SOMETHING SOMEBODY TOLD ME.
Q. OKAY. WHO TOLD YOU THAT?
A. PAT.
Q. OKAY. AND YOU DON'T KNOW WHERE SHE GOT IT FROM?
A. NO, I DON'T. IT HAS SOMETHING TO DO WITH THE CASE MIX.
Q. DO YOU KNOW HOW MANY PRIVATE PAY YOU HAVE ON A REGULAR BASIS?
A. NO, I DON'T. IT FLUCTUATES.
Q. HAVE YOU EVER DETERMINED THE AVERAGE AGE OF YOUR RESIDENTS?
A. THE AVERAGE AGE?
Q. UH-HUH.
A. NO.
Q. NUMBER 12, HAVE YOU EVER HEARD OF THE LONG-TERM CARE COMMUNITY COALITION?
A. NO.
Q. OKAY. I'LL GO TO PAGE SEVEN FIRST. AND UNDER THE NURSING HOME RESIDENTS CONTINUES TO SUFFER.
A. UH-HUH.
Q. UNDER THE PRESSURE ULCERS.

(COURT REPORTER MARKS PLAINTIFF'S EXHIBIT NUMBER 18, LEADERSHIP STANDARD OF PRACTICE, ATTACHED.)

EXAMINATION RESUMED BY MR. MULLMAN:

Q. NUMBER 18, LEADERSHIP STANDARD OF PRACTICE, SECTION ONE, LEADERSHIP FRAMEWORK, SUBJECT MANUALS, STANDARDS OF CARE, STANDARDS OF PRACTICE, PROGRAMS, AND RESOURCES. STANDARD ONE SAYS, "DESIGNATED MEMBERS OF THE GOVERNING ENTITY WILL DEVELOP THE STANDARDS OF PRACTICE MANUALS, PROGRAM MANUALS, AND RESOURCE MANUALS IN COLLABORATION WITH THE HEALTHCARE CENTERS."

A. YES.

Q. WHO IS THE GOVERNING ENTITY?

A. OF MAGNOLIA PLACE?

Q. YEAH.

A. THAT WOULD BE ME AND PAT AND -- BUT ALEX WAS THERE, THEN. IT WOULD BE ME AND PAT AND ROBERT NOW.

Q. AND THIS SAYS TRANS HEALTH MANAGEMENT ON THE BOTTOM AGAIN, BUT IT ALSO SAYS T.H.I. 9/2003. DO YOU KNOW WHAT T.H.I. MEANT?

A. TRANS HEALTH, INCORPORATED.

Q. OKAY. HAVE YOU EVER HEARD OF T.H.I. OF BALTIMORE, INC.?

A. I'VE HEARD OF IT.

Q. WERE THEY THE GOVERNING ENTITY?

A. I DO NOT KNOW.
Q. OKAY. UNDER PRACTICE GUIDELINES, NUMBER FOUR ---
A. YEAH.
Q. IT SAYS, "REVISION REQUEST SHALL BE SENT TO CORPORATE CLINICAL SERVICES FOR REVIEW." WHO IS CORPORATE CLINICAL SERVICES?
A. I DON'T KNOW.
Q. WELL, WHY WOULD YOU WANT TO SEND THAT TO THEM FOR A REVIEW?
A. IF WE WANTED ANY CHANGES MADE.
Q. BUT CAN'T YOU, AS THE GOVERNING BODY, MAKE THOSE CHANGES WITHOUT INPUT FROM THE CORPORATE CLINICAL SERVICES?
A. I DON'T KNOW WHO CORPORATE CLINICAL SERVICES THEY'RE TALKING ABOUT.
Q. OKAY. AND THEN, NUMBER SIX, IT SAYS, "T.H.I. MANUALS, STANDARDS OF PRACTICE, PROGRAMS, AND RESOURCE MANUALS ARE AVAILABLE FOR VIEWING ON THE T.H.I. INTRANET." DO YOU KNOW WHAT THAT MEANS?
A. YOU CAN GO ON THE INTERNET AND PULL IT UP. THE INTRANET.
Q. AND WHO HAS ACCESS TO THAT INTRANET?
A. IN MY BUILDING, ALL MY NURSING ADMINISTRATION DOES.
Q. OKAY. ARE YOU -- WHO IS -- ARE YOU THE ONE WHO ACTUALLY PUT THEM ON THE COMPUTER?

A. NO, I DIDN'T REALIZE.

Q. AND ONE OF THE OTHER DEFENDANTS WAS MAGNOLIA PLACE, INC., BUT WAS IT -- DID EITHER ONE OF THOSE ENTITIES HAVE ANYTHING TO DO WITH THE OPERATION OF MAGNOLIA PLACE?

A. I GUESS THIS MAGNOLIA PLACE, INC., DID.

Q. OKAY. SO, THAT ---

A. I'M NOT SURE.

Q. IT WASN'T T.H.I. OF SOUTH CAROLINA DOING BUSINESS AS MAGNOLIA PLACE BACK THEN?

A. I DON'T KNOW.

Q. OKAY.

A. I DON'T KNOW HOW THEY HANDLE ALL THAT.

Q. OKAY. OKAY. IN THIS -- ON PAGE 21, LINE 16 ---

BY MR. BOULIER:

HANG ON A SEC AND LET'S CATCH UP.

BY MR. MULLMAN:

YEAH, I'M SORRY.

EXAMINATION RESUMED BY MR. MULLMAN:

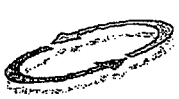
Q. LAURA ASKED YOU ON LINE 18, "DO YOU KNOW WHO IS ON THE GOVERNING BOARD FOR MAGNOLIA PLACE?" AND YOU SAID, "NO, MA'AM."

A. I DIDN'T AT THE TIME. I KNOW NOW.

Q. OKAY. AND WHO TOLD YOU THAT YOU WERE ON THE GOVERNING BODY?

A. I DON'T EVEN REMEMBER.
Q. OKAY. AND WHAT WAS YOUR REACTION WHEN THEY TOLD YOU YOU WERE ON THE GOVERNING BODY?
A. I SAID, "OH, REALLY?"
Q. DID THEY TELL YOU WHAT YOUR ROLE OR RESPONSIBILITY AS A MEMBER OF THE GOVERNING BODY WAS?
A. TO SEE THAT THE POLICY AND PROCEDURES ARE CARRIED OUT.
Q. AND TO HIRE THE ADMINISTRATOR?
A. AND TO HIRE THE ADMINISTRATOR? NO, I WASN'T TOLD I HAD TO HIRE THE ADMINISTRATOR.
Q. DID ANYONE TELL YOU THAT YOU OPENED YOURSELF TO LIABILITY AS A MEMBER OF THE GOVERNING BODY?
A. NO.
Q. IF YOU GO TO 57, LINE 11, LAURA ASKED YOU, "IS THERE A MANAGEMENT COMPANY FOR MAGNOLIA PLACE?" AND YOU ANSWERED, "T.H.I. IS THE MANAGEMENT COMPANY." WHAT DID YOU MEAN BY T.H.I.?
A. TRANS HEALTH, INCORPORATED.
Q. AND DO YOU KNOW WHERE THEY'RE LOCATED?
A. NO, I DON'T, BECAUSE THEY HAVE SEVERAL PLACES.
Q. SO, YOU ACTUALLY BELIEVE THAT THERE'S A CORPORATION CALLED TRANS HEALTH, INCORPORATED, SOMEWHERE?
A. I DON'T KNOW.
Q. OKAY. WELL, DO YOU KNOW WHO MUCH YOU PAID TRANS

Leadership Standards of Practice



Trans Health

Defe

Blumberg No. 5113
PLAINTIFF'S EXHIBIT 35



Trans Health

The Highlands
910 Ridgebrook Road
Sparks, MD 21152
(410) 773-1000

LEADERSHIP STANDARDS OF PRACTICE

Defendants' R-RFP 1816

THI

TRANS HEALTH INCORPORATED

IN ACCORDANCCE WITH THE RESIDENT POLICIES, THE FOLLOWING HAVE REVEIWED AND APPROVED THE POLICIES OF THIS FACILITY.

JANUARY, 2006
DATE

Pat Davis NHA ✓
ADMINISTRATOR

Margaret D Keller, DON
DIRECTOR OF NURSING

Gilbert Garner RN ADON
ASSISTANT DIRECTOR OF NURSING

MEDICAL DIRECTOR

Audrey Huston, RN
STAFF DEVELOPMENT

BUSINESS OFFICE MANAGER

Rebecca Wages, SSD
SOCIAL SERVICES

ADMISSION COORDINATOR

ACTIVITY DIRECTOR

Lucia P. Rangutes COM
FOOD SERVICE MANAGER

Edward Davis - Maintenance Dept
MAINTENCE DIRECTOR

HOUSEKEEPING SUPERVISOR

Crystal Watts
MEDICAL RECORDS DIRECTOR

Mary Calvert LPN
STAFFING COORDINATOR

Tracy Wall, LPN
MDS COORDINATOR

Marlena Graves, RPh
PHARMACY CONSULTANTS

HEALTH CARE CENTER
ADMINISTRATIVE REVIEW SHEET

The contents of this standards manual have been reviewed and have been accepted as practice guidelines in this health care center.

Pat Haas — 2/1/07
Administrator — Date

[signature] — 1/31/07
Medical Director — Date

Margaret Keller DON — 2/1/07
Director of Nursing — Date

Other — Date

THE MISSION

Our mission is to provide our communities with quality healthcare services that meet the individual needs of patients, delivering care in a manner and environment that promotes dignity, safety and quality of life.

THE VISION

We aspire to set the industry standard for excellence in providing quality healthcare services to our patients. We seek to achieve service excellence through client satisfaction surveys, performance improvement efforts and outcomes measurement.

THE QUALITY STATEMENT

Quality means meeting the needs and expectations of our patients/resident, physicians, payors, employees and the communities we serve through teamwork and commitment to a process of continuous improvement, systematic feedback, continuous improvement and innovation.

THE GOALS

Our goal is to be the premier healthcare provider in America and we understand that this happens by touching one life at a time. We are committed to:

- *Providing quality care that instills peace of mind in our patients and their families;*
- *Creating a positive, rewarding and supportive environment for our employees; and*
- *Offering high quality referral options to the medical community.*

CLINICAL SERVICES PURPOSE STATEMENT

The purpose of Clinical Services is to contribute to positive patient/resident/client outcomes in a cost-effective manner through the establishment of standards, the provision of support/resources to our customers and the enhancement of professional development.

THI MANUAL IN-HOUSE DISTRIBUTION LIST

Note: ***In Order to reduce the maintenance of manuals and paper use, the Administrator and Director of Nursing are encouraged to access manuals through the THI Intranet!***

Manuals and Codes		Responsible Staff/Location (at a minimum)	Completed
THI-1	Standards of Care – Also inside of THI-20 Leadership (Section 12)	Administrator and Director of Nursing (DON)	
THI-2	Activity SOP	Administrator and Activity Director	
THI-3	Business Office	Administrator and Business Manager	
THI-4	Surveillance, Prevention & Control of Infection SOP	Administrator, DON, Infection Control Nurse/designee, all nursing units & department heads	
THI-5	Nutrition Services SOP	Administrator, DON, Dietary Manager	
THI-5A	Nutrition Services Purchasing to Production SOP	Administrator, Dietary Manager	
THI-6	Nutrition Orientation SOP	Administrator, Dietary Manager	
~~THI-7~~	~~Driver Safety SOP~~ **Merged with THI-13 Risk Mgmt.**	Administrator, designee responsible for driver safety, H.R. designee	
THI-8	Drug Free Work Place SOP	Administrator, DON, designee responsible for H.R., department heads	
THI-9	Hazardous Communication/Right to Know	Adm., DON, designee responsible for MSDS records, dept. heads	
~~THI-10~~	~~Lock Out/Tag Out SOP~~ **Merged with THI-11 OSHA Recordkeeping .**	Administrator, Maintenance Manager	
THI-11	OSHA Recordkeeping/Lock Out – Tag Out SOP	Administrator, designee responsible for OSHA records	
THI-12	Physical Environment/Utilities Management	Administrator, Laundry/Housekeeping, Maintenance Managers	
THI-13	Risk Management/Driver Safety SOP	Administrator, designee responsible for Risk Management	
THI-14	Safety and Emergency Preparedness	Administrator, DON, designee responsible for Risk Mgmt, dept. heads, nursing units	
THI-15	Employee Handbook	Administrator, DON, department heads, designee responsible for H.R., nursing units	
THI-17	Human Resources SOP	Administrator, DON, designee responsible for H.R.	
~~THI-16~~	~~General Orientation SOP~~ **Merged with THI-24 Staff Education/ Orientation SOP**	Administrator, DON, designee responsible for Orientation	
THI-18	Health Information Management SOP	Administrator, DON, designee responsible for clinical records	
THI-20	Leadership SOP	Administrator, DON, Medical Director, department heads	
THI-21	Medical Device Reporting SOP	Administrator, DON, designee responsible for device reporting	
~~THI-22~~	~~Alzheimer/Dementia and Related Disorders~~ **Discontinued and Replaced by FRSU001 Secured Unit Program Guidelines (Resource)**	For facilities with Alzheimer's/Dementia specialty units: Administrator, DON, Specialty Unit Director and Specialty Unit	
THI-23	Nursing SOP	Administrator, DON, Medical Director, all nursing units	
THI-24	.Staff Education/Orientation SOP	Administrator, designee for Staff Development	
THI-25	Restorative Nursing SOP	Administrator, DON, designee for restorative nursing, all nursing units	
THI-26	Wound Care SOP	Administrator, DON, designee for wound care, all nursing units	
THI-27	Accounts Payable	Administrator, Business Office	
THI-28	Respiratory Standards of Care/Safety	Administrator, DON, Respiratory Dept., when applicable	
THI-29	Respiratory SOP (includes Respiratory/Nursing Training Module)	Administrator, DON, Respiratory Dept., when applicable, all nursing units	
THI-28A	Oxygen Safety Manual	Administrator, DON, Respiratory Services, nursing units when indicated	
THI-30	Social Services SOP	Administrator, Social Service	
THI-32	Rehabilitation SOP	Administrator, Rehabilitation Services	
THI-33	Employee Benefits SOP	Administrator, designee for benefits	
THI-35	Performance Improvement SOP (PI)	Administrator, DON, department heads, designee responsible for this process	
Perry and Potter: either 3rd, 4th or 5th edition		DON, all nursing units	

THI: 9/2003 – THI Revision – 4/04

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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG 2007-CP-42-4601

****

LAWRENCE E. MORROW AND *
EVELYN M. MORROW, *
*
PLAINTIFFS, *
*
VERSUS *
*
FUNDAMENTAL LONG-TERM CARE *
HOLDINGS, LLC, ET AL, *
*
DEFENDANT. *

****

DEPOSITION OF LYNN HENDERSON

PURSUANT TO NOTICE AND/OR AGREEMENT, THE DEPOSITION OF LYNN HENDERSON WAS CALLED BY THE PLAINTIFF ON THE 12TH DAY OF JANUARY, 2011, COMMENCING AT THE HOUR OF 1:47 P.M., AT THE MARRIOTT, OAK BOARDROOM, 299 NORTH CHURCH STREET, SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS FOLLOWS:

JILL BISHOP EDWARDS
VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.
836 SHORESBROOK DRIVE
SPARTANBURG, S.C. 29301-6515
864-574-1313

Draft Copy



A. OR THE EMPLOYEES, THE WAY I UNDERSTAND IS THE FAMILY MEMBERS OF THE EMPLOYEES THAT HAVE A HARDSHIP, THE EMPLOYEES CAN MAKE AN APPLICATION ON THEIR BEHALF.

Q. OKAY. AND DO YOU KNOW WHO OWNS THIS CHARITY?

A. I DO NOT.

Q. I MEAN, COULD SOMEBODY OUTSIDE THE COMPANY DONATE?

A. I DO NOT KNOW.

Q. I THINK I ASKED YOU THIS BEFORE. I APOLOGIZE IF I'M GETTING REDUNDANT, BUT YOU SAY YOU DO HAVE MEETINGS WITH OTHER BUSINESS OFFICE MANAGERS WHEN THERE IS A NEW POLICY OR ---

A. FOR TRAINING. NOT FOR NEW POLICY.

Q. OKAY. AND WHERE IS THAT TRAINING HELD?

A. IT'S HELD AT OUR EDUCATION DEPARTMENT, WHICH IS RIGHT NEXT DOOR TO MY FACILITY.

Q. WHICH BUILDING IS THAT?

A. IT'S CALLED THE MAGNOLIA GROUP.

Q. IS THAT WHERE ROBERT CROOKS' OFFICE IS?

A. IT IS.

Q. AND DO YOU MEET WITH ROBERT CROOKS WHEN HE VISITS?

A. I DO NOT.

Q. DO YOU KNOW HOW OFTEN HE VISITS?

A. I DO NOT.

Q. SO, THE ONLY PERSON YOU REPORT TO IS PAT HARRIS?

A. THAT'S CORRECT.

Desk Copy

Q. OKAY. DO YOU KNOW THE OTHER BUSINESS OFFICE MANAGERS OUTSIDE OF SOUTH CAROLINA?
A. I DON'T.
Q. HAVE YOU EVER BEEN TO SPARKS, MARYLAND?
A. I HAVE.
Q. FOR WHAT PURPOSE?
A. TRAINING FOR OUR NEW PAYROLL SOFTWARE.
Q. AND WHAT'S THE NAME OF THAT PAYROLL SOFTWARE? IS THAT ---
A. CHRONOS.
Q. --- PEOPLESOFT?
A. CHRONOS.
Q. CHRONOS?
A. AND PEOPLESOFT IS BUILT IN WITH IT.
Q. ARE YOU - DO YOU CREATE OR HAVE ANY INVOLVEMENT IN CONTRIBUTING TO THE DETAILED STATEMENT OF OPERATIONS?
A. I DON'T.
Q. OKAY. DO YOU KNOW WHERE YOUR PAYCHECK WAS ISSUED BY?
A. I DON'T, HONESTLY.
Q. DO YOU HAVE ANY INVOLVEMENT IN THE COST REPORTS?
A. I DON'T.
Q. DO YOU KNOW HOW TO READ A COST REPORT?
A. I DON'T.

Draft Copy

Q. AND WHAT'S YOUR LEVEL OF EDUCATION?
A. HIGH SCHOOL WITH SOME COLLEGE.
Q. WHERE DID YOU GO TO COLLEGE?
A. WAKE TECH. I TOOK A FEW SEMESTERS OF BUSINESS ADMINISTRATION.
Q. DO YOU GET EMAILS FROM THE ACCOUNTS MANAGER, THE REGIONAL ACCOUNTS MANAGER?
A. ON A PERSONAL LEVEL.
Q. ARE THERE PERFORMANCE REPORT CARDS FOR EACH FACILITY RELATED TO COLLECTIONS AND ACCOUNTS RECEIVABLE?
A. THERE IS A FORM CALLED THE SCORE CARD.
Q. AND WHEN YOU GET ON THE COMPUTER, DO YOU HIT - WELL, IS THERE INFORMATION ABOUT YOUR COLLECTION GOALS FOR EACH MONTH?
A. WITHIN - YES, I CAN GO TO THAT LINK, YES.
Q. DOES PAT HARRIS GET EVALUATED BASED ON THE SUCCESS OF THE COLLECTIONS?
A. I DO NOT KNOW.
Q. DO YOU KNOW WHAT THE HOME OFFICE COST REPORT IS?
A. NO, I DON'T.
Q. DO YOU KNOW WHO THE HOME OFFICE IS FOR MAGNOLIA PLACE?
A. I DON'T.
Q. WHEN - IF SOMEBODY'S ON MEDICAID OR MEDICARE, DOES THE MONEY ACTUALLY GO INTO AN ACCOUNT AT MAGNOLIA

DEPOSITION OF PATRICIA HARRIS
6/19/2009

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG 2007-CP-42-4601
****
LAWRENCE E. MORROW AND *
EVELYN M. MORROW, *
*
PLAINTIFFS, *
*
VERSUS *
*
THI HOLDINGS, LLC; *
FUNDAMENTAL LONG-TERM CARE *
HOLDINGS; LLC; FUNDAMENTAL *
CLINICAL CONSULTING, LLC; *
FUNDAMENTAL ADMINISTRATIVE *
SERVICES, LLC; THI OF *
BALTIMORE, INC.; THI OF *
SOUTH CAROLINA AT MAGNOLIA *
PLACE AT SPARTANBURG, LLC *
D/B/A MAGNOLIA PLACE AT *
SPARTANBURG, *
*
DEFENDANTS. *
****

30(B)(6) DEPOSITION OF PATRICIA ANN MORRISON HARRIS

PURSUANT TO NOTICE AND/OR AGREEMENT, THE DEPOSITION OF PATRICIA ANN MORRISON HARRIS WAS CALLED BY THE PLAINTIFF ON THE 19TH DAY OF JUNE, 2009, COMMENCING AT THE HOUR OF 10:19 A.M., AT THE LAW OFFICES OF HOLCOMBE BOMAR, 200 DUNBAR STREET, SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS FOLLOWS:

CHRISTIAN NICOLE SIMPSON

VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.

836 SHORESBROOK DRIVE

SPARTANBURG, S.C. 29301-6515

864-574-1313



STATE OF SOUTH CAROLINA — IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG — 2007-CP-42-4601

JAWRENCE E. MORROW AND EVELYN M. MORROW,

PLAINTIFFS,

VERSUS

THI OF BALTIMORE, 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.

DEPOSITION OF PAT HARRIS, VOLUME II

PURSUANT TO NOTICE AND/OR AGREEMENT, THE DEPOSITION OF **PAT HARRIS** WAS CONTINUED BY THE PLAINTIFFS ON THE 21ST DAY OF JULY, 2009, COMMENCING AT THE HOUR OF 10:05 A.M., AT HOLCOMBE BOMAR, 100 DUNBAR STREET, SUITE 200, SPARTANBURG, SOUTH CAROLINA, ATTENDED BY COUNSEL AS FOLLOWS:

JILL BISHOP EDWARDS
VERBATIM REPORTER

DIXY MOORE TURNER ASSOC., INC.
836 SHORESBROOK DRIVE
SPARTANBURG, S.C. 29301-6515
864-574-1313

Page 14

BY MR. WHITE:
AND SO, I WAS JUST SAYING WE'RE OBJECTING TO PRODUCING THEM.
BY MR. MULLMAN:
THAT'S FINE. LET ME MAKE THAT EXHIBIT ONE, AND LET'S JUST GO THROUGH THAT REAL QUICK.
(MARKED PLAINTIFF'S EXHIBIT NUMBER ONE - 30(B)(6) NOTICE - ATTACHED)
EXAMINATION BY MR. MULLMAN:
Q. MS. HARRIS, THIS IS RAY MULLMAN, AND WE'VE MET BEFORE. AND YOU'VE GIVEN A DEPOSITION BEFORE, SO YOU KNOW HOW THE RULES WORK. I'M GOING TO ASK YOU A SERIES OF QUESTIONS. ANSWER THEM AS BEST YOU CAN. YOU'RE HERE AS A REPRESENTATIVE OF THE FACILITY AND INDIVIDUALLY. WE'RE GOING TO TRY AND GO THROUGH THE 30(B)(6) ISSUES FIRST TO MAKE IT EASIER. IF YOU DON'T UNDERSTAND THE QUESTION, LET ME KNOW AND I'LL REPHRASE IT. IF YOU NEED TO LOOK AT A DOCUMENT, JUST ASK ME OR MACK AND WE'LL TRY TO GET IT FOR YOU. LET'S START WITH NUMBER ONE. THE EXISTENCE OF THE DOCUMENTS REQUESTED BELOW PURSUANT TO 34. SO IF YOU GO TO THE SCHEDULE OF DOCUMENTS A, AND THIS IS ON PAGE FOUR, DO YOU HAVE OR CREATE - - LET'S START WITH CREATE. DO YOU CREATE MONTHLY CENSUS REPORTS? "YOU" MEANING THE DEFENDANT. NOT YOU PERSONALLY.

Page 15

A. NO.
Q. DOES THE DEFENDANT CREATE CENSUS TREND REPORTS?
A. NO.
Q. DO YOU GUYS CREATE DAILY ACUITY REPORTS?
A. NO.
Q. DO YOU GUYS CREATE MONTHLY ACUITY REPORTS?
A. NO.
Q. DO YOU HAVE DOCUMENTS SHOWING THE ACUITY TRENDS?
A. NO.
Q. DO YOU HAVE DOCUMENTS LABELED DAILY CASE MIX?
A. NO.
Q. DO YOU HAVE MONTHLY CASE MIX?
A. NO.
Q. DO YOU HAVE PATIENT PER DAY REPORTS?
A. NO.
Q. AND QUALITY INDICATOR REPORTS?
A. WHAT DO YOU DESCRIBE AS QUALITY INDICATOR REPORTS? WHAT DO YOU DESCRIBE THEM AS?
Q. WELL, I THINK THEY'RE JUST CALLED QUALITY INDICATOR REPORTS. I THINK THAT'S ALL ABOUT ACUITY AND HOW MANY NUMBERS OF RESIDENTS HAVE A WEIGHT LOSS OR DEMENTIA OR PRESSURE ULCERS. THOSE KIND OF THINGS.
A. I DON'T - - I DON'T KEEP THEM, NO.
Q. BUT DO YOU CREATE THEM?
A. NO. I DON'T CREATE THEM.

Page 16

Q. AND "YOU" MEANING THE DEFENDANT.
A. NO.
Q. DID YOU USED TO CREATE THESE DOCUMENTS A THROUGH I? IS THIS SOMETHING THAT YOU USED TO DO BEFORE?
A. NO.
Q. SO NUMBER THREE, THE ACUITY LEVEL, WITHOUT THOSE DOCUMENTS HOW DO YOU FIGURE OUT THE ACUITY LEVEL OF RESIDENTS?
A. WHERE ARE YOU?
Q. ON PAGE TWO, NUMBER THREE.
A. ALL RIGHT. ACUITY LEVEL. NOW, ASK THE QUESTION AGAIN.
Q. YEAH. HOW DO YOU DETERMINE THE ACUITY LEVEL OF RESIDENTS AT MAGNOLIA PLACE?
A. I DON'T DETERMINE THE ACUITY LEVELS.
Q. SO YOU DON'T STAFF BY ACUITY?
A. NO.
Q. DO YOU JUST STAFF BY THE MINIMUM REGULATIONS OF 6117?
A. NO.
Q. HOW DO YOU DETERMINE STAFFING?
A. BY THE NEED.
Q. BUT ISN'T NEED BASED ON ACUITY?
A. NO.
Q. WHAT IS IT BASED ON?

Page 17

A. THE NEED OF THE PATIENTS. I OVERSTAFF FOR MINIMUM.
Q. WELL, YOU USED TO HAVE SIX CNAs ON FIRST SHIFT AND NOW YOU ONLY HAVE FIVE, RIGHT?
A. HUH?
Q. ON FIRST SHIFT YOU HAD SIX CNAs AND THEN YOU REDUCED IT TO FIVE.
A. NO.
Q. SO HOW MANY CNAs ON FIRST SHIFT DO YOU NORMALLY HAVE?
A. TWELVE TO 13.
Q. WHEN I SAID SIX, I MEANT PER UNIT.
A. I'M SORRY.
Q. YOU HAVE TWO DIFFERENT UNITS. YEAH. I SHOULD HAVE BEEN MORE CLEAR. I'M SORRY.
A. SIX TO SEVEN.
Q. SIX TO SEVEN. SO IF YOU HAD LESS, THEN WHAT WOULD THAT MEAN? THAT THE NEED WASN'T THERE?
A. NO.
Q. SO YOU WILL ALWAYS HAVE SIX TO SEVEN NO MATTER WHAT THE NEED IS?
A. NO. IT'S ACCORDING TO THE CENSUS ALSO.
Q. WELL, WHERE DO YOU KEEP THE INFORMATION ON THE CENSUS?
A. THROUGH KNOWLEDGE. COUNTING HEADS. WE DO A - - WE COUNT HEADS EVERYDAY.

A. BY ANYBODY.
Q. --- REPRESENT SOMETHING -- I WASN'T TRYING TO IMPLY THAT YOUR LAWYERS WERE GOING TO TELL YOU TO THROW AWAY ANYTHING. I'M SAYING, YOU KNOW, IF THEY SAID NO, YOU DON'T HAVE TO, YOU PROBABLY WOULDN'T. ALL RIGHT.
A. I DON'T KEEP PAPER WORK UNLESS I ABSOLUTELY HAVE TO KEEP IT BECAUSE IT'S -- THERE'S -- NURSING HOMES DO NOT HAVE STORAGE.
Q. YEAH.
A. SO. AND THAT'S THE REASON.
Q. WELL, SINCE -- I MEAN, THERE'S NOT A LOT OF COMPLAINTS, ACCORDING TO YOUR PRIOR TESTIMONY, SO THERE WOULDN'T BE A LOT OF PAPER WORK. IF THERE'S NOT A LOT OF GRIEVANCES, NOT A LOT OF INCIDENT REPORTS, THERE WOULDN'T BE A LOT OF PAPER WORK.
A. NO.
Q. RIGHT? ALL RIGHT. 2060, THE SUBJECT IS STAFFING. THE STANDARD IS "THE HEALTHCARE CENTER'S LEADERSHIP WILL PROVIDE A SUFFICIENT NUMBER OF STAFF TO SUCCESSFULLY IMPLEMENT PATIENT/RESIDENT FOCUSED FUNCTIONS." I THINK WE TALKED ABOUT THIS BEFORE. THE SOUTH CAROLINA REGULATIONS HAVE A MINIMUM STANDARD, RIGHT?
A. YES.

Q. BUT YOU DON'T STAFF BASED ON ACUITY?
A. NO.
Q. BUT UNDER NUMBER TWO HERE, PRACTICE GUIDELINES, IT SAYS, "THE ADEQUACY OF STAFF IS DEMONSTRATED BY MEETING PATIENTS/RESIDENTS' CARE NEEDS IN ACCORDANCE WITH THEIR CARE PLANS." AND OF COURSE, THEIR CARE PLANS ARE DEPENDENT ON THEIR ACUITY, RIGHT?
A. YES. IN SOME WAYS, BUT YOU HAVE TO UNDERSTAND, ACUITY LEVEL STAFFING CAN ALSO GO AS MUCH AGAINST YOU. IF WE USED IT, IT WOULD GO AGAINST ME IN MY FACILITY BECAUSE I HAVE REHAB PATIENTS. AND ACCORDING TO THE ACUITY, IT DEPENDS ON HOW MUCH CARE THEY REQUIRE.
Q. OKAY. WHAT DO YOU MEAN GO AGAINST YOU?
A. BECAUSE IF I DID WHAT YOU WANTED OR YOU'RE WANTING TO SAY, IT WOULD BE DIFFERENT. I DO -- I DON'T DO ACCORDING TO ACUITY THAT YOU'RE THINKING OF. I DO ACCORDING TO THE NEED OF THE PATIENT.
Q. UH-HUH. OKAY. BUT THE PATIENTS CHANGE ON ---
A. YES.
Q. --- ON A DAILY, WEEKLY, MONTHLY BASIS, RIGHT?
A. YES.
Q. DO YOU -- YOU DON'T HAVE ANY OR YOU HAVEN'T HAD ANY KIND OF R.N. VACANCY WHERE YOU WANTED TO HIRE SOMEBODY BECAUSE OF THIS ALLEGED NURSING SHORTAGE,

D H E C

PROMOTE PROTECT PROSPER

South Carolina Department of Health and Environmental Control

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 864 542 8515
(City) (County) (Zip code) (Telephone #)

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 _____.

RECEIVED
JUN 14 2007
SCDHEC
Health Licensing

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.*

Blumberg No. 6113

PLAINTIFF'S EXHIBIT 38

3. **Administrative Office** (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: 632.N99 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 Infirmary (Regulation 61-16)**

☐ General Hospital ☐ Institutional General Hospital ☐ Institutional General Infirmary
☐ 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

Name of building	No. of beds
Magnolia Place at Spartanburg	88

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

00061078
(Certificate Number)

4-30-08
(Renewal Number)

9. Licensee (The legal entityor 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. THI 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. THI 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 (,

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 Office Mgr (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 8th day of May (Month), 2007 (Year).

NOTARY PUBLIC Margaret A Keller

My commission expires 8/24/2015 NOTARY SEAL

14. R. Goodman (Name and title of person preparing this application) 410-723-1175 (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

Name	**Title**
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.

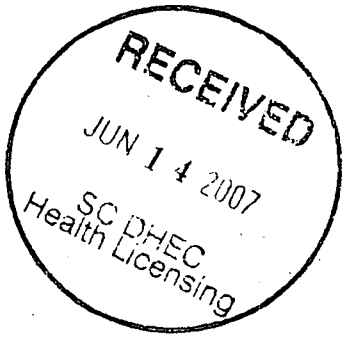
Please be advised that the licensee is not changing. It is only a change of the real property owner.

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 facilites:

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,

Robin Goodman

Robin Goodman
Licensing Coordinator

D H E C

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

RECEIVED
JUN 14 2007
SC DHEC
Health Licensing

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 Ridgebrook 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

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,

Melissa Warlow
Vice President

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

CASE NOS. 05-CP-42-3346

****

UNDREA 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.(TRI),

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 REPORTER AT POLIAKOFF AND ASSOCIATES, 215 MAGNOLIA STREET, SPARTANBURG, SOUTH CAROLINA, ON THE 18th 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 29304
(864) 587-6159 MOBILE 764-0244

PLAINTIFF'S EXHIBIT 39

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

A. YES, MA'AM.

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

A. YES, MA'AM.

Q. WHO IS THE ADMINISTRATOR AT MAGNOLIA PLACE?

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

Q. AND WHO WAS THE ADMINISTRATOR PRIOR TO THAT?

A. ALEX STEVENSON.

Q. AND HE NO LONGER WORKS THERE?

A. NO, MA'AM.

Q. DO YOU KNOW WHY HE LEFT?

A. HE MOVED TO UTAH.

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

A. NO, MA'AM.

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

A. YES, THE CSD.

Q. AND YOU TOLD ME WHO THAT WAS.

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, Plaintiffs/Appellants

vs.

RECEIVED
MAR 2 0 2012
SC Court of Appeals

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

---

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing or Rehearing *En Banc* on Respondents by email on March 19, 2012, addressed to their attorneys of record: William L. Howard, Sr., Esq., (Bhoward@ycrlaw.com); and D. Jay Davis, Jr., Esq., (jdavis@ycrlaw.com); and Russell G. Hines, Esq., (rhines@ycrlaw.com) of Young Clement Rivers, LLP, P.O. Box 993 Charleston, SC 29402 and Lori D. Proctor, Esq., (ldproctor@proctor-law.com); Attorney for Respondents/Appellants at 919 Miliam Street, Suite 1700; Houston, Texas 77002

March 19, 2012

Raymond Mullman Jr

Gary W. Poliakoff, Esq.
Raymond P. Mullman, Esq.
Poliakoff & Associates, P.A.
P.O. Box 1571
Spartanburg, S.C. 29304
Telephone: 864-582-5472
Fax: 864-582-7280
Attorney for Appellants

Gary W. Poliakoff
atty@gpoliakoff.com

Raymond P. Mullman, Jr.
rmullmanjr@aol.com

POLIAKOFF & ASSOCIATES

Benard B. Poliakoff
(1916-1955)

J. Manning Poliakoff
(1923-1969)

Matthew Poliakoff
(1919-1979)

March 19, 2012

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

RE: Lawrence E. Morrow and Evelyn M. Morrow, Appellants v. Fundamental Long-Term Care Holdings, LLC; Fundamental Clinical Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg
C.A. No. 2007-CP-42-4601

Dear Ms. Gee:

Enclosed for filing is an original and six copies of Appellants' Petition for Rehearing in the above matter along with our Proof of Service for Same.

With best regards, I am,

Yours very truly,

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

RPM, JR/snh

Enclosures

cc: William L. Howard, Sr., Esq., Attorney for Respondents/Appellants
D. Jay Davis, Jr., Esq., Attorney for Respondents/Appellants
Russell G. Hines, Esq. Attorney for Respondents/Appellants
Lori D. Proctor, Esq., Attorney for Respondents/Appellants
M. Chad Trammell, Esq., Attorney for Appellants/Respondents

RECEIVED
MAR 2 0 2012
SC Court of Appeals

Courthouse Square
215 Magnolia Street, Spartanburg, South Carolina 29306
Mailing Address: P.O. Box 1571, Spartanburg, South Carolina 29304
Telephone: 864-582-5472, 864-582-8101 • Facsimile: 864-582-7280
www.gpoliakoff.com

YCRLAW
Young Clement Rivers, LLP

Russell G. Hines
Associate

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

RECEIVED
MAR 30 2012
SC Court of Appeals

March 29, 2012

VIA US MAIL AND FACSIMILE
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Lawrence E. Morrow and Evelyn M. Morrow vs. Fundamental Long-Term Care Holdings, LLC; 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
Case No.: 2007-CP-42-4601
Claim No.: AIG Claim# 027-089-388/ HBLM# 0723767
YCR File: 14347-20100252
Case Tracking Number: 2011204166

Dear Ms. Kitchings:

We have received the Appellants/Respondents' Petition for Rehearing in the above-referenced matter, and understand that the present deadline for the Respondents/Appellants' return is today. Please accept this correspondence as our request to the Court for an extension of ten (10) days' time to file a return on behalf of the Respondents/Appellants. Our firm's check in the amount of $25 is enclosed to cover the cost of this request.

By my calculations, with the requested extension, the new deadline for any return on behalf of the Respondents/Appellants would be April 9, 2012. Further, I would ask that the Court hold the present deadline for the Respondents/Appellants' return in abeyance until it acts upon this request.

The Petition for Rehearing is approximately 50 substantive pages, with more than 400 pages of exhibits, and the allowance of additional time will be of benefit to the Respondents/Appellants in preparing an adequate return for the Court's consideration. Respectfully, I believe that the allowance of additional time is in the interests of justice and will not work any undue prejudice upon the Appellants/Respondents.

If the Court has any questions or concerns, or if a more formal motion is required to present this request to the Court, please let me know.

With best wishes and kindest regards, I am

1 SX

R/P HA - until 4/23/12

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines
Associate

RGH/jla
cc: (via US Mail and Facsimile)
M. Chad Trammell, The Trammell Law Firm, PLLC
Gary W. Poliakoff, Esquire, Poliakoff & Associates, P.A.
Raymond P. Mullman, Jr., Esquire, Poliakoff & Associates, PA

RECEIVED
MAR 3 0 2012
SC Court of Appeals

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.

MOTION FOR EXTENSION OF TIME TO FILE/SERVE RETURN TO PETITION FOR REHEARING

---

moot Ext. for Ord Return

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

COME NOW the Respondents/Appellants above captioned, by and through their undersigned counsel, pursuant to Rule 263(b), SCACR, and move this Honorable Court for a 10-day extension of time to file/serve their Return to the Appellants/Respondents' Petition for Rehearing.

Such extension is requested in light of other work-related time commitments as well as the recent Easter holiday. The Respondents/Appellants submit that the requested extension is consistent with the interests of justice and that it will not work any undue prejudice upon the Appellants/Respondents.

WHEREFORE, the Respondents/Appellants submit that good cause exists for this Court to allow them until April 19, 2012 to file/serve their Return to the Appellants/Respondents' Petition for Rehearing. Further, the Respondents/Appellants ask that the Court hold the time limit for their return in abeyance until it has acted upon the instant motion.

<SIGNED ON THE FOLLOWING PAGE>

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
Telephone: (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
Telephone: (713) 977-7070
Attorneys for the Respondents/Appellants

Charleston, South Carolina

Dated: 4/9/12

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

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2007-CP-42-4601

Lawrence E. Morrow and Evelyn M. Morrow,

Appellants/Respondents,

v.

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

Defendants,

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

Respondents/Appellants.

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RECEIVED
APR 10 2012
SC Court of Appeals

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

I, Russell G. Hines, do hereby certify that a copy of the **Motion for Extension of Time to File/Serve Return to Petition for Rehearing** was sent to counsel for the Appellants/Respondents (i.e., counsel for all respondents/adverse parties to the Respondents/Appellants' appeal) via United States Mail, postage pre-paid on April 9, 2012 addressed as follows:

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

and

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

and

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

<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, SC 29402
Telephone: (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
Telephone: (713) 977-7070
Attorneys for the Respondents/Appellants

Charleston, South Carolina

Dated: 4/9/12

YCRLAW
Young Clement Rivers, LLP

Elizabeth R. O'Neil
Paralegal

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

April 9, 2012

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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

Dear Ms. Kitchings:

Enclosed for filing in the above matter please find the original and seven (7) copies of a Motion for Extension, as well as our firm check in the amount of $25.00 to cover the cost of filing same. Also enclosed are the original and two (2) copies of a Proof of Service concerning same.

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

Thank you, in advance, for your assistance.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Elizabeth R. O'Neil
Paralegal

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

RECEIVED
APR 10 2012
SC Court of Appeals

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.

The Honorable J. Derham Cole
Spartanburg County
Trial Court Case No. 2007-CP-42-04601

ORDER

For good cause having been shown, the time for serving and filing a Return to the Petition for Rehearing or Rehearing En Banc in the above entitled matter is hereby extended until April 23, 2012.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

FILED
4/16/12

cc: Gary W. Poliakoff, Esquire
Raymond P. Mullman, Esquire
Lori D. Proctor, Esquire
William L. Howard, Sr., Esquire
D. Jay Davis, Jr., Esquire
Russell G. Hines, Esquire

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*

RECEIVED
APR 24 2012
SC Court of Appeals

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").[1] 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,

---

[1] 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.[2]

[2] 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 27th 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 20th 2007[3] 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 7th 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) hyperlypidemia; 6) reflux disease; 7) benign prostatic hypartrophy, 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.

[3] Mr. Morrow was actually admitted January 12, 2007.

On January 20th 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), SCRCP, 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, SCRCP 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 (5th Cir. 1981). The very purpose of this principle is to cover cases in which separate juries decide separate issues. If South Carolina Rule of Civil Procedure 42(b) contemplated bifurcation before the same jury only, there would be no need for the requirement that the issues be distinct. . . .

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

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: William L. Howard

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 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,

SC Court of Appeals
APR 2 4 2012
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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.

PROOF OF SERVICE

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)
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and
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333 Clay Street, Suite 3485
Houston, Texas 77002
(713) 977-7070
Attorneys for the Respondents/Appellants

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

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

and

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

<SIGNED ON THE FOLLOWING PAGE>

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)
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and

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Attorneys for the Respondents/Appellants

Charleston, South Carolina

Dated: 4/23/12

YCRLAW
Young Clement Rivers, LLP

Russell G. Hines
Associate

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

April 23, 2012

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Lawrence E. Morrow and Evelyn M. Morrow vs. Fundamental Long-Term Care Holdings, LLC, et al.*
Case No.: 2007-CP-42-4601
Claim No.: AIG Claim# 027-089-388/ HBLM# 0723767
Tracking No.: 2011204166
YCR File: 14347-20100252

Dear Ms. Kitchings:

Enclosed for filing in the above matter please find the original and seven (7) copies of the **Respondents/Appellants' Return to Appellants/Respondents' Petition for Rehearing or Rehearing *En Banc*** along with an original and two (2) copies of a **Proof of Service** concerning same. Kindly return one (1) file-stamped copy of each document to us in the envelope provided.

Thank you in advance for your assistance.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines
Associate

RGH/
Enclosures
cc: Gary W. Poliakoff, Esquire
Raymond P. Mullman, Jr., Esquire
M. Chad Trammel, Esquire

SC Court of Appeals
APR 24 2012
RECEIVED

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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August 03, 2012

Mr. Gary W. Poliakoff
PO Box 1571
Spartanburg SC 29304

Mr. Raymond Paul Mullman, Jr.
PO Box 1571
Spartanburg SC 29304

Re: Morrow, Lawrence v. Fundamental
Appellate Case No. 2011-204166

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: William L. Howard, Sr.
Lori Diane Proctor
Russell Grainger Hines
Donald Jay Davis, Jr.

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
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.

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
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TELEPHONE: (803) 734-1080

FAX: (803) 734-1499

www.sccourts.org

September 7, 2012

Mr. Raymond Paul Mullman, Jr.
PO Box 1571
Spartanburg SC 29304

Re: Lawrence Morrow v. Fundamental
Appellate Case No. 2012-212871

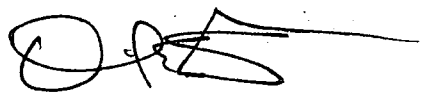
Dear Counsel:

This Court has received your Petition for Writ of Certiorari and Appendix, and the case has been assigned the appellate case number that appears above. **Please use this number on all future correspondence relating to this matter.**

All parties to this matter are advised that all filings must comply with the requirements of Rule 242 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at www.sccourts.org/courtreg. Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

The attention of the parties is directed to the order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. The order can be found at www.sccourts.org/courtOrders/HTMLFiles/2007-08-13-02.htm. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. **This office will *not* review filings for redaction or to determine if materials should be sealed.**

Very truly yours,



CLERK

cc:

Gary W. Poliakoff
William L. Howard, Sr.
Donald Jay Davis, Jr.
Lori Diane Proctor
Russell Grainger Hines
The Honorable Jenny Kitchings

The Supreme Court of South Carolina

RECEIVED
MAY 28 2014
SC Court of Appeals

Lawrence E. Morrow and Evelyn M. Morrow,
Petitioners,

v.

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

Appellate Case No. 2012-212871
Lower Court Case No. 2007-CP-4204601

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' order dismissing petitioner's appeal in *Morrow v. Fundamental Long-Term Care Holdings, L.L.C.*, S.C. Ct. App. Order dated Mar. 5, 2010. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

C.J.

J.

J.

J.

J.

Columbia, South Carolina

May 23, 2014

cc:
The Honorable Jenny Abbott Kitchings
Gary W. Poliakoff, Esquire
Raymond Paul Mullman, Jr., Esquire
William L. Howard, Sr., Esquire
Donald Jay Davis, Jr., Esquire
Lori Diane Proctor, Esquire
Russell Grainger Hines, Esquire
M. Hope Blackley

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

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September 7, 2012

Mr. Raymond Paul Mullman, Jr.
PO Box 1571
Spartanburg SC 29304

Re: Lawrence Morrow v. Fundamental
Appellate Case No. 2012-212871

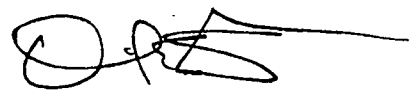
Dear Counsel:

This Court has received your Petition for Writ of Certiorari and Appendix, and the case has been assigned the appellate case number that appears above. **Please use this number on all future correspondence relating to this matter.**

All parties to this matter are advised that all filings must comply with the requirements of Rule 242 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at www.sccourts.org/courtreg. Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

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Very truly yours,



CLERK

cc:

Gary W. Poliakoff
William L. Howard, Sr.
Donald Jay Davis, Jr.
Lori Diane Proctor
Russell Grainger Hines
The Honorable Jenny Kitchings

The South Carolina Court of Appeals

Lawrence E. Morrow and Evelyn M. Morrow,
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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
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.

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
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August 03, 2012

Mr. Gary W. Poliakoff
PO Box 1571
Spartanburg SC 29304

Mr. Raymond Paul Mullman, Jr.
PO Box 1571
Spartanburg SC 29304

Re: Morrow, Lawrence v. Fundamental
Appellate Case No. 2011-204166

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: William L. Howard, Sr.
Lori Diane Proctor
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