THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Frank Addy, Circuit Court Judge

Case No. 2014-CP-10-07038
Court of Appeals Case No. 2019-000833

Wendy C.H. Wellin, ... Respondent,

v.

Peter Wellin, Cynthia W. Plum, and Marjorie W. King, Individually and as Co-Trustees and Beneficiaries of the Wellin Family 2009 Irrevocable Trust, u/a/b November 2, 2009 ..... Appellants/Petitioners,

v.

Wendy C.H. Wellin, Individually and as Trustee of the Keith S. Wellin Florida Revocable Living Trust u/a/d December 11, 2001, Hamilton College, Keith S. Wellin Florida Revocable Living Trust, Campbell Hart, and Heather Lane ..... Respondents,

In the Matter of: Keith S. Wellin.

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 242, SCACR, Appellants/Petitioners Peter Wellin, Cynthia W. Plum, and Marjory W. King (collectively the "Wellin Children") petition this Court to issue a writ of certiorari to review the Court of Appeals' panel rulings dismissing their appeal and denying their Petition for a Writ of Supersedeas (*see* Appendix ["App."] 416–18) and denying their Petition for Rehearing and Suggestion for Rehearing En Banc (App. 607–10). As explained more fully below, certiorari is warranted because the Court of Appeals' ruling conflicts with this Court's precedent regarding the immediate appealability of an order that, under the guise of "bifurcation," permits select claims to be tried based on the incorrect belief that the trial of those severed claims may be dispositive of other claims and issues, when, in fact, those other claims and issues are *not* derivative of or dependent on the claims to be tried. Certiorari is further warranted to correct the Court of Appeals' refusal to stay the trial below while the appellate courts consider and resolve with finality the questions of whether the ruling below is immediately appealable and, if so, whether the court below erred. The Court of Appeals should have prevented the circuit court from proceeding with trial until those matters are conclusively resolved with finality on appeal and the case is remitted to the lower court.

CERTIFICATION BY COUNSEL

The Court of Appeals ruled on the Wellin Children's Petition for Rehearing and Suggestion for Rehearing *En Banc* on September 19, 2019. (*See* App. 607–10.)

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err and diverge from this Court's precedent by dismissing the Wellin Children's appeal from a circuit court order that was immediately appealable (and was reversible) for multiple independent reasons including the following:

    a. It deprived them of a substantial right by effectively granting potential judgment on untried claims, especially when the circuit court's ruling was based on an erroneous understanding of the relationship between the issues to be tried and the untried claims on which judgment might be granted;

    b. It deprived them of a substantial right by denying them the ability to be the architects of their case;

c. It violated their due process rights and deprived them of a mode of trial to which they were entitled by effectively denying them a meaningful and substantive jury trial—a deprivation the Court of Appeals' order of dismissal failed even to acknowledge or analyze; and

d. It effectively struck out a portion of their pleadings—an effect the Court of Appeals' order of dismissal failed even to acknowledge or analyze.

2. Did the Court of Appeals err by refusing to enforce the stay of trial during the pendency of the appeal and, instead, tacitly encouraging the circuit court to proceed with trial during the appeal and without waiting for a final appellate resolution of the question of appealability and the substantive legal issues on appeal?

STATEMENT OF THE CASE AND FACTS[1]

This Petition arises from a nearly six-year-old dispute over a multi-hundred million dollar estate left by the decedent Keith S. Wellin ("Keith"). Petitioners—the Wellin Children—are Keith's three adult children of his first wife. Respondents include Wendy C.H. Wellin ("Wendy"), who was Keith's fourth wife and who is the Special Administrator of the Estate; her two daughters; and Hamilton College.

I. Keith Wellin's drastic revisions to his estate plan in his waning days led to litigation following his death.

Keith amassed substantial wealth during his lifetime and made extensive arrangements—including a prenuptial agreement and complex asset transfers—to convey the bulk of his estate to his lineal descendants, with whom he had always had a close and loving relationship. In the summer of 2013, however, Keith, who was then in very poor health, became convinced that his children had "stolen" millions of dollars from him. Subsequently, Keith sued his children multiple times in various venues and largely disinherited them. With various lawsuits still ongoing in federal court, Keith died on September 14, 2014. The next day, Wendy submitted his final will (dated June 27, 2014) for probate in the Probate Court for Charleston County. On October 20, 2014, the Wellin

[1] A recitation of the facts is also set forth in *Wellin et al. v. Wellin*, 427 S.C. 15, 828 S.E.2d 767 (Ct. App. 2019), which is a recently-decided appeal in a related matter arising from a related dispute between the same parties.

Children removed the probate action to the circuit court and counter-petitioned the circuit court to probate the 2011 version of Keith's will because the subsequent versions were executed at times when Keith lacked capacity and was subject to Wendy's undue influence. At the same time, the Wellin Children sued Wendy in federal court for various tort and breach of contract claims seeking damages arising from, among other things, Keith's decisions in the final year and a half of his life to sue and disinherit his children, to transfer nearly $30 million dollars of assets *inter vivos* to Wendy, and to attempt to undo much of his prior transfers of wealth to his lineal descendants.[2]

The Wellin Children's challenges to the validity of Keith's estate planning documents on the grounds of incapacity and undue influence are based on virtually the same evidence as the Wellin Children's tort and breach of contract claims against Wendy. In short, the Wellin Children are challenging the validity of Keith's estate planning documents on the grounds that Wendy convinced Keith—when his capacity was diminished—that his children betrayed him and stole from him, and the Wellin Children assert various tort and breach of contract claims against Wendy based on essentially this same theory, but with damages arising not from the will—which passed nothing—but from *inter vivos* transfers Keith made, revisions to his non-probate revocable trust, and other actions Keith took to harm the financial well-being of his children and other lineal descendants.

II. The state court suit was initially stayed, but later, at the urging of Wendy and other Respondents, resumed progress toward trial on certain cherry-picked claims.

In light of the pending federal court action between the Wellin Children and Wendy, the circuit court issued an order on July 6, 2015 granting the Wellin Children's motion to stay the state court action, ruling: "In the absence of a stay, the parties would be forced to litigate the overlapping

[2] These claims include defamation, intentional interference with inheritance, intentional interference with prospective economic relations, breach of fiduciary duty, breaches of the prenuptial agreement, breach of contract accompanied by a fraudulent act, barratry, and negligence per se. It is important to note that the claims against Wendy seek damages for actions that are unrelated to Keith's will which is being probated. The will passed no assets, and the estate has little or no assets.

issues in this action and in the Federal Action, which would create the risk of inconsistent judgments and waste the resources of this Court and the parties." *See* Order at 2–3 (App. 108–09). While the state court action was stayed, the federal suit moved steadily toward trial. In the federal action, the parties have taken more than 120 depositions, disclosed more than two dozen expert witnesses, and had dozens of hearings and status conferences before Judge Norton and the Special Master to assist with the extensive motions practice. More than 2,000 ECF entries have been entered in the federal litigation.

On June 30, 2017, Wendy as Special Administrator ("the Estate") filed a motion to lift the stay in the state circuit court action. The circuit court subsequently granted the motion over the Wellin Children's objections. The Wellin Children, concerned about potential preclusive effect on their claims against Wendy should the state court proceed to trial first, subsequently sought and obtained an order allowing them to amend their pleading in the state circuit court action to assert counterclaims against Wendy that mirror the claims they are asserting against her in federal court. Since the stay was lifted, the Estate, Wendy, and Hamilton College have aggressively pursued a strategy to procure a partial trial in the state circuit court focused solely on the issues of whether Keith lacked capacity and was under undue influence when he executed his final will and trust on June 27, 2014—that is, the issues with the most difficult burden for the Wellin Children—with the express intention of using the outcome in the partial trial to preclude the Wellin Children from pursuing their tort and breach of contract claims against Wendy—that is, the claims with the most favorable burden for the Wellin Children—in the state and federal court actions.

On May 2, 2018, the Wellin Children again moved to stay the state court action pending the outcome of the federal litigation, on the grounds that, among other things, Judge Norton had capably handled the federal litigation for five years and was intimately familiar with the issues in this litigation, whereas no state court judge had any familiarity with this litigation. On August 22,

2018, Judge Addy, who was serving as a visiting judge hearing motions in the Ninth Circuit Court of Common Pleas, heard and denied the Wellin Children's motion to stay. His ruling was based primarily on the age of the case. Although the length and mode of trial was not before him, Judge Addy stated at the hearing on the motion to stay that he would recommend to Judge Young, the Chief Administrative Judge, that the trial of this action be limited to two weeks. As Judge Addy acknowledged, however, his recommendation was not based on the anticipated number of witnesses, the anticipated length of their testimony, or any other facts bearing on the expected length of trial—indeed, Judge Addy did not have any of this information—but rather was based on his belief that limiting the trial to two weeks would drive the parties to settle. *See* Hearing Tr. at 31:9 to 32:6 (Aug. 22, 2018) (App. 113–14). Judge Addy also stated that, while federal judges might be willing to try the case for eight weeks, no state court judge would be willing to try the case for this long. *Id.* at 12:14–19 (App. 112). The next day, Judge Addy signed a Form 4 Order denying the Wellin Children's motion to stay, and he added the following handwritten note in the margin of the Order: "No further delays in this case. Chief Admin judge should set for trial (2 weeks max) as soon as practicable." Order (App. 116).

III. The state circuit court precipitously scheduled a truncated trial only on the claims with the most difficult burden for the Wellin Children.

On December 4, 2018, the Chief Justice assigned Judge Addy to the state court Wellin case. On February 12, 2019, Judge Addy held a hearing on a number of pending motions, including (i) the Wellin Children's motion for a status conference and scheduling order, which requested Judge Addy hold a hearing regarding the appropriate length of trial based on the facts of this case, and (ii) the Estate's "Motion to Bifurcate or for Separate Trial of Validity Issues."

In its memorandum in support of its motion to "bifurcate" trial, the Estate (*i.e.*, Wendy) asked the Court to hold a trial only on the claims that present the Wellin Children with the most onerous burden of proof—namely, the claims relating to whether Keith's will and revocable trust

are invalid by virtue of incapacity or undue influence. *See* Memorandum in Support of Motion to Bifurcate (App. 118–27). The truncated trial of severed claims the Estate requested would not include the Wellin Children's tort and breach of contract counterclaims against Wendy which, though based on the same evidence, have a lower standard of proof. The Estate argued that severing the claims in this way would "streamline" the remainder of the case and that the first trial (with the more onerous standard for the Wellin Children) "could be dispositive of the entire case." *Id.* at 7 (App. 0124). Further, the Estate argued in its memorandum that the severed trial with the more onerous burden for the Wellin Children could be dispositive of "the Wellin Children's individual tort claims against Mrs. Wellin relating to her alleged involvement with or influence over Keith and his estate planning." *Id.* at 8 (App. 125). Likewise, Wendy's counsel argued at the hearing on the motion that, if Wendy and the Estate are successful during the severed trial, "it eviscerates the lawsuit" as to "virtually every cause of action that" the Wellin Children have against Wendy. *See* Hearing Tr. at 27:25 to 28:1 (Feb. 11, 2019) (App. 134–35). Finally, although South Carolina law provides that "[a] trial should be bifurcated only if the issues are *so distinct* that trial of each alone would not result in injustice," *Creighton v. Coligny Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (emphasis added), the Estate attempted to turn this law on its head, arguing that the Court should bifurcate because the issues to be bifurcated are *not distinct from*—but, instead, permeate—the remaining claims. *See* Hearing Tr. at 8:17–19 (Feb. 11, 2019) (App. 130) (arguing the Court should bifurcate because "Keith Wellin's capacity and issues surrounding the same permeate the claims between the parties in both this action in state court and also the federal court litigation").

In opposing the Estate's motion, the Wellin Children argued the Court should not sever the issues of capacity and undue influence because the Wellin Children's tort and breach of contract claims against Wendy are based on the same evidence as the Wellin Children's challenges to

Keith's estate planning documents on incapacity and undue influence grounds.[3] *See* Memorandum in Opposition (App. 141–51); *see also Stone v. Thompson*, 426 S.C. 291, 296, 826 S.E.2d 868, 871 (2019) (Beatty, J., concurring) ("In my view, bifurcation in a domestic relations case should be rare if ever at all."). Further, the Wellin Children argued that severing the trial in the way proposed by the Estate could only have two potential outcomes in the event the Estate is successful during the first trial: (1) in the second trial, all the same evidence from the first trial is introduced again, resulting in a colossal waste of resources, or (2) in the second trial, the Wellin Children are precluded from pursuing their claims against Wendy or from introducing the evidence relevant to those claims. Thus, the Wellin Children argued, the Estate's proposed mode of trial is either (1) massively inefficient or (2) massively prejudicial to the Wellin Children's right to pursue their claims against Wendy.

Judge Addy took the Estate's motion under advisement. At the hearing, however, he made clear that he would not sever the issue of undue influence from the Wellin Children's claims

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[3] The South Carolina District Court, applying Federal Rule of Civil Procedure 42 on bifurcation, which is substantially identical to South Carolina Rule of Civil Procedure 42, has held that separability of the issues "constitutes a threshold inquiry" on a motion to bifurcate, and "the issues must be truly separable before separate trials can be ordered without the risk of untoward consequences." *Dodgeland of Columbia, Inc. v. Federated Mut. Ins. Co.*, No. CV 3:09-1190-JFA, 2009 WL 10710815, at *2 (D.S.C. July 15, 2009). Further, "bifurcation is 'improper where the issues are so closely interwoven that plaintiff would have to present the same evidence twice in separate trials. In such circumstances, judicial economy is fostered by a single trial.'" *Id.* (quoting 8 Moore's Federal Practice 3d § 42.20[7][c]). Bifurcation should be used only sparingly:

> The court is permitted considerable discretion in exercising its powers under [Rule 42]. [] Notwithstanding the broad discretion conferred by Rule 42(b), the bifurcation of issues and the separate trial of them is not the usual course of events. *See* 9 Charles Alan Wright, et al., Federal Practice and Procedure § 2381, 2387-92, at 474 (1990). Nothing else appearing, a single trial will be more expedient and efficient. []
>
> The party requesting separate trials bears the burden of convincing the court that such an exercise of its discretion will promote greater convenience to the parties, witnesses, jurors, and the court, be conducive to expedition and economy, and not result in undue prejudice to any party. [] Merely presenting some proof which supports bifurcation is not enough.

Id. at *1 (citations omitted).

against Wendy because of the extent to which the issue of undue influence is overlapping with the Wellin Children's claims against Wendy. *See* Hearing Tr. at 41:16–17 (Feb. 11, 2019) (App. 137) ("I wouldn't be bifurcating undue influence because that's the crux of your case."); *id.* at 41:25 to 42:2 (App. 137–38) (stating to the Wellin Children's counsel: "So if you're talking or worried about undue influence, hey, we're not going to have any evidence of undue influence [in the bifurcated trial]"). Indeed, Judge Addy recognized how devastating to the Wellin Children it would be if he severed undue influence from their claims against Wendy:

> But if I were to do that – you know, if I were to bifurcate, I wouldn't lift [undue influence from the remainder of the case] because that means they'll do it in one step and it has an effect. ***That's your entire case.***

Id. at 42:23 to 43:1 (App. 138–39) (emphasis added).[4]

Notwithstanding Judge Addy's assurance at the hearing that he would not bifurcate the issue of undue influence from the Wellin Children's claims against Wendy, Judge Addy issued an Order on May 15, 2019, doing just that. In its Order, the circuit court stated:

> This Court will try the issues of undue influence and testamentary capacity for all changes to Keith Wellin's estate plan from 2013-2014 in state court. Put another way, the trial will decide the issues of undue influence and testamentary capacity for the relevant period of time. Of course, the Wellin children will be entitled to present all evidence concerning the prior estate plan, the circumstances surrounding its formation and execution, plan and the jury will ultimately decide which estate plan and/or revocable trust controls.

Order at 4 (App. 164). Moreover, in the Order, the circuit court declined to hold a hearing to determine the length of trial that would be needed to permit the parties to adequately present their evidence and pursue their claims. Instead, the court imposed an arbitrary two-week cap on the length of trial and stated it would begin at an unspecified date in June 2019. Stated differently, the

[4] The circuit court also stated that, if the parties did not waive their right to a jury trial, "we're not going to bifurcate." Hearing Tr. at 25:25 to 26:1 (Feb. 11, 2019) (App. 132–33). He then said that this was only his "initial default setting" and that "perhaps . . . we would" bifurcate a jury trial. *Id.* at 26:3–4 (App. 133). The parties have not waived their right to a jury trial.

Order sets a trial in which the parties may submit however much evidence they can squeeze into their portion of a two-week trial, but the jury will be permitted to decide *only* the two issues strategically cherry-picked by the Estate from all of the pleadings in the case. Although the same evidence would be relevant to the tort and contract claims asserted by the Wellin Children against Wendy, the jury will not be allowed to decide those issues alongside undue influence and capacity.

Even worse, the circuit court stated this severed, truncated trial will likely dispose of at least some of the Wellin Children's claims, which would not be presented to the jury in the initial phase. *See id.* at 4 (App. 164) (stating this phasing of trial is intended to "promote convenience, efficiency, and economy" and that the "resolution of these issues will likely result in resolution of much of the federal litigation").[5] Of course, severing the issues in this manner will promote efficiency and economy *only* if the first phase of trial has a preclusive effect on the remaining claims. That is, if the circuit court intended to permit the Wellin Children to pursue fully their claims against Wendy during the second phase of trial regardless of the outcome of the first phase of trial, then the circuit court could not possibly have found that the bifurcation will "promote convenience, efficiency, and economy." This is a critical point that Respondents, the circuit court, and the Court of Appeals have steadfastly refused to address.

IV. The Wellin Children appealed; the circuit court judge opined, *ex parte*, to the Court of Appeals regarding the appeal; and Respondents moved to dismiss the appeal.

Upon receiving the Court's May 15, 2019 Order, the Wellin Children immediately appealed lest their ability to appeal be lost forever.[6] *See* Notice of Appeal (May 16, 2019) (App.

[5] The claims the Wellin Children are pursuing against Wendy in the federal litigation are precisely the same claims the Wellin Children are pursuing against Wendy in the state litigation.

[6] *See Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (stating a party that fails to appeal an order affecting a substantial right waives the right to appeal it later); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (holding the failure to immediately appeal a ruling affecting the mode of trial and a substantial right meant the appeal was waived); *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) (purpose of immediate appeal on right to a mode of trial is to preserve party's constitutional right which would otherwise be lost).

1). The next day—though unbeknownst to the Wellin Children until later—Judge Addy wrote to the Chief Judge of the Court of Appeals stating, among other things, that "I do believe this appeal may be little more [than] an effort to delay this matter further," and that "I just wanted the Court to be aware of my concerns and the procedural posture of this case in the hopes that we would be able to forward and resolve this matter in June." *See* Letter (May 17, 2019) (App. 190). Judge Addy did not copy the Wellin Children on the letter, and they discovered a copy of the letter only after it was uploaded to the Court of Appeals online docket, C-Track.[7]

The Court of Appeals received Judge Addy's letter on May 20, *see id.*, and a few days later asked the parties to submit memoranda regarding the appealability of the orders on appeal. *See* Letter (May 23, 2019) (App. 16–18). Wendy and the other Respondents subsequently moved to dismiss the appeal, arguing the orders from which the Wellin Children appealed were not immediately appealable. *See* Mot. to Dismiss of Wendy, her daughters, and Hamilton College (May 24, 2019) (App. 19–30); Mot. to Dismiss of Wendy Wellin as Special Administrator (May 29, 2019) (App. 33–41). The Wellin Children filed their Response to the motions on June 7, 2019.

V. Despite the pending appeal, the trial judge informed the parties of his intent to proceed with the trial, prompting the Wellin Children to seek a Writ of Supersedeas.

Notwithstanding the pendency of that appeal, Judge Addy informed the parties' counsel via email on the evening of June 4, 2019, that he intended to proceed with the trial on June 17, 2019, under the same limitations and conditions being challenged on appeal. (App. 214.) In response, the Wellin Children filed a Petition for a Writ of Supersedeas with the Court of Appeals seeking to stay the trial below unless and until the matter was remitted to the circuit court. *See* Petition for Writ (June 7, 2019) (App. 177–217). In light of the exigency of the circumstances, the Wellin Children simultaneously filed a Motion for Expedited Consideration of the petition. *See* Mot. for Expedited Consideration (June 7, 2019) (App. 218–19).

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[7] That C-Track entry has since been changed, and Judge Addy's letter has been removed from the PDF of the correspondence received by the Court of Appeals.

Out of an abundance of caution, and even though the Wellin Children believed the circuit court lacked authority to proceed with the trial, they nevertheless filed a Motion for Continuance with the circuit court seeking to reschedule the trial, the date of which had been set for the first time only a week previously, and which was set to commence in a matter of days. *See* Mot. for Continuance (June 10, 2019) (App. 243–53).

VI. The circuit court continued the trial until February 2020, and the Court of Appeals dismissed the Wellin Children's appeal, denied their Petition for a Writ of Supersedeas, and declined to rehear the matter.

On the afternoon of Thursday, June 13, 2019, Judge Addy emailed the parties' counsel to inform them the trial would not be commencing the following week, citing logistical difficulties relating to courtroom availability and conceding the circuit court's May 15 Order was inconsistent with the circuit court's comments at the February 11 hearing with respect to whether the issue of undue influence would be tried in the truncated trial. *See* Email from Judge Addy to counsel (June 13, 2019) (App. 407). A few moments later, the Court of Appeals emailed the parties' counsel to inform them the Court was dismissing the appeal and denying the Petition for a Writ of Supersedeas. *See* Order (June 13, 2019) (App. 416–18). The Court of Appeals' Order failed to address many of the arguments in the Wellin Children's briefing.

The Wellin Children subsequently filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. *See* Petition (June 28, 2019) (App. 419–45). The Court of Appeals requested and received Returns to the Petition from Respondents. *See* Letter to counsel (July 17, 2019) (App. 446–47); Return of Wendy Wellin as Special Administrator (July 29, 2019) (App. 501–07); Return of Wendy, her daughters, and Hamilton College (July 26, 2019) (App. 448–63). The Court of Appeals denied the Wellin Children's Petition for Rehearing and Suggestion for Rehearing *En Banc* on September 19, 2019. *See* Order (Sept. 19, 2019) (App. 607–10). This Petition for Certiorari followed.

ARGUMENT

The appealability of an interlocutory order is governed primarily by S.C. Code Ann. § 14-3-330, which permits the immediate appeal of certain interlocutory orders, including those involving the merits, affecting a substantial right, or effectively striking out a portion of a pleading. This Court has explained that subsection 14-3-330(2) permits the immediate appeal of orders affecting the "mode of trial," including orders that deny or limit a party's jury trial right or limit a party's ability to be the master and architect of its own case. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (collecting cases); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015). As explained more fully below, the circuit court's Order dated May 15, 2019 is such an order,[8] and the Court of Appeals erred by dismissing it and by failing to stay the trial during the pending appeal.

I. The Court of Appeals erred and diverged from this Court's precedent by dismissing the Wellin Children's appeal of an order that, under the guise of bifurcation, effectively and erroneously granted potential judgment on their claims.

No one involved in this proceeding disputes the general rule that garden-variety bifurcation orders typically are not immediately appealable. The circuit court's "bifurcation" in this suit, however, is no ordinary bifurcation order. Indeed, the Order in this case is not even a bifurcation order at all because it does not define a second phase, only a single truncated trial on severed claims. Rather, as explained more fully below, it is analogous to the order in *Morrow*, in which this Court held a "bifurcation" order was immediately appealable because it effectively granted "potential" summary judgment on certain issues not included in the truncated trial and because it deprived plaintiffs of their substantive right to be the architects of their case. *See Morrow*, 412 S.C. at 539, 773 S.E.2d at 146.

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[8] The Wellin Children acknowledge, as they have previously, that the other two orders from which they appeal would not, if standing alone, be immediately appealable. They are, however, appropriately appealed when (as here) there is another appealable order before the court and doing so would serve the interest of equity and judicial economy. *See Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014).

In *Morrow*, the plaintiffs sued a nursing home and its parent companies for injuries sustained by Mr. Morrow. Plaintiffs alleged the parent companies were vicariously liable for the nursing home's alleged negligence *and* were directly liable for their own alleged wrongdoing in underfunding the nursing home. The circuit court ordered a "bifurcated" trial with a first phase in which only "trial on the nursing home negligence claims could go forward, and only if the Morrows were successful, a new jury could hear the corporate negligence claims in a later proceeding." *Morrow*, 412 S.C. at 536, 773 S.E.2d at 145.

The Morrows appealed, and the Supreme Court ruled the circuit court's order—though it was styled as one for bifurcation—was immediately appealable because it "affects a substantial right." *Id.* at 538, 773 S.E.2d at 146. Specifically, the Supreme Court focused on the circuit court's express intent and erroneous belief that the first phase of trial could and should resolve other claims that were not asserted in that trial or considered by that jury and which were not derivative of the claims that actually were pursued and resolved by the jury:

> By considering the Morrow's claims against the [parent companies] as dependent upon their claim against Magnolia Place, the trial court's order effectively grants the [parent companies] potential summary judgment on the issues of direct corporate liability.
>
> Accordingly, we find the trial court's order fits neatly within the statutory provision allowing immediate appeals where a substantial right is implicated. S.C. Code Ann. § 14-3-330(2)(a). The effect of this order is to prevent the Morrows from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing.

Id. at 539, 773 S.E.2d at 146 (footnotes and citation omitted). Stated differently, the immediately appealable error in *Morrow* was that the trial court intended for one trial before one jury on one set of claims against one party to be potentially dispositive of a different set of claims against different parties implicating potentially different standards and burdens of proof.

The trial court's Order here commits the same error. The Order expressly contemplates and intends that the outcome of a jury trial where no claims against Wendy are tried or decided by the jury may be dispositive of the Wellin Children's claims against Wendy. Stated differently, the jury

will decide the issues of capacity and undue influence—issues that involve a more difficult burden of proof—and the jury's decisions on those issues will *also* decide "potential summary judgment" as to the Wellin Children's tort claims against Wendy—claims that are based on different and more easily-satisfied elements. *See* Order at 3–4 (App. 9–10) (stating the circuit court's expectation and intent that the resolution of the two hand-picked issues in the "phase 1" trial "will likely result in resolution of much of the federal litigation"). Thus, the circuit court's order provides Wendy, who will have no claims tried against her, with "potential summary judgment" without ever facing a jury trial, just as the circuit court's order in *Morrow* provided the corporate parents, who would have had no claims tried against them in the first phase of trial, with "potential summary judgment" without ever facing a jury trial. Indeed, if the circuit court's Order promotes "convenience, efficiency, and economy," as it claims to do, *see* Order at 4 (App. 10), then the Order *must* intend for the severed trial to determine some or all of the Wellin Children's claims against Wendy. The only alternative would be for the severed trial not to decide any of the Wellin Children's claims against Wendy, in which case the Order would require the parties to have essentially the same trials with the same evidence two or more times but with different claims and different juries. This cannot possibly be what the circuit court intended, particularly where the circuit court specifically stated that the order would result in "convenience, efficiency, and economy," and specifically stated that the first phase of trial "will likely result in resolution of much of the federal litigation." *Id.* at 4.[9] In their briefing, Respondents have consistently refused to respond to this latter point—that the bifurcation Order must either grant "potential" summary judgment (and therefore be immediately appealable) because, otherwise, it would achieve none of the efficiency goals that the circuit court held are the very reason for the bifurcation.

[9] The Wellin Children's claims against Wendy are the same in state and federal court, so resolving the federal litigation appears to be a synonym for deciding the remaining claims against Wendy. While there are numerous other issues in the federal litigation which are not also in the state case, it would make no sense for those more tangentially related issues to be decided if the core tort claims against Wendy are not.

Notably, during the oral argument in *Morrow*, the South Carolina Supreme Court asked counsel for the parent corporations—*i.e.*, the parties who had obtained the "bifurcation" order and who were arguing that it was not immediately appealable—whether he would stipulate that the plaintiffs would have the right to pursue their claims against the corporate defendants regardless of the outcome of the first phase of trial. *See* Oral Argument Tr., at 19:25 to 20:6 (January 13, 2015) (App. 167–68). Respondent's counsel would not so stipulate. *See id.* at 20:5 (App. 168). Here, Wendy not only refuses to stipulate that the Wellin Children will be permitted to pursue all their claims against her even if the Wellin Children lose the first phase of trial, Wendy argues that such an outcome would "eviscerate[] the lawsuit" as to "virtually every cause of action that" the Wellin Children have against Wendy. *See* Hearing Tr. at 27:25 to 28:1 (Feb. 11, 2019) (App. 134–35); *see also* Memorandum in Support of Motion to Bifurcate at 7 (App. 124) (Wendy as Special Administrator arguing that the trial "could be dispositive of the entire case").

This truncated trial of severed claims could wrongly result in disposition of many of the Wellin Children's claims and counterclaims arising from at least a dozen challenged transactions which the Wellin Children claim were the result of Wendy's tortious misconduct, which overlaps largely with her undue influence of Keith in his estate planning. For example, the Wellin Children's claims against Wendy—none of which would be tried in the truncated and severed trial—include defamation, breach of prenuptial of agreement, and intentional interference with inheritance. These claims are all based, at least in part, on improper conduct by Wendy that caused Keith to disinherit the Wellin Children and thereby caused the Wellin Children damages in the form of lost inheritance. It is possible the jury in the severed trial could conclude that the evidence of undue influence relating to Keith's estate planning transactions in 2013–14 is insufficient to meet the standards of undue influence and incapacity under South Carolina law, but could still—if given the chance—conclude the evidence *was* sufficient to establish the Wellin Children's tort claims against Wendy. Wendy, however, clearly intends that the jury will never have that chance, since she intends to use any determination of "fact" in the first phase of trial—*i.e.*, a determination

that there was no undue influence over Keith's estate planning—to preclude a trial on the Wellin Children's tort claims involving different elements, a different standard, and potentially different or additional evidence.

Thus, under the circuit court's phasing of the trial, the Wellin Children's tort claims could be effectively disposed of without actually being tried. This is as bad or worse than the deprivation of a substantial right that was held to be immediately appealable in *Morrow*, namely a threatened disposition of untried claims based on the erroneous belief that the untried claims are dependent on or derivative of other claims to be tried. Put differently, here the circuit court erroneously believes that many, if not all of the Wellin Children's claims against Wendy are derivative of their claims that the estate planning documents are void for Wendy's undue influence and Keith's lack of capacity.

The Court of Appeals did not address these similarities to *Morrow*, but stated merely that "[t]his case is distinguishable from *Morrow* as the underlying bifurcation order in this case does not state or even suggest that the first phase of the bifurcated trial will be dispositive of any claim tried in the second phase of the trial." Order of Dismissal at 2 (App. 417). The failure of the circuit court's order to discuss a second phase of trial, however, actually *supports* the immediate appealability of that order. Neither the circuit court's order nor any other pronouncement from the circuit court has discussed whether there will be a second phase of trial *because the circuit court and the opposing parties believe the truncated trial on the severed issues may be dispositive of the entire case* and any subsequent trial on the untried claims may be unnecessary. *See, e.g.*, Order at 3–4 (May 15, 2019) (App. 9–10) (anticipating the trial of the severed claims could be dispositive of other claims between the parties); Estate's Mem. in Supp. of the Mot. to Bifurcate at 7–8 (App. 124–25); Hearing Tr. at 27:25 to 28:1 (Feb. 11, 2019) (App. 134–35); *id.* at 42:23 to 43:1 (App. 138–39). Indeed, the circuit court's order would have no rationale at all if it did envision a second phase of trial on all claims not tried during the first phase, because the second phase would require presentation of the same evidence as in the first phase, but to a different jury hearing different

claims. Thus, as noted above, if the phasing of trial is intended to "promote convenience, efficiency, and economy," as the circuit court specifically held, then the circuit court *must* intend for the first phase of trial to be dispositive of certain remaining claims. The Court of Appeals' order dismissing the instant appeal failed even to acknowledge this argument. The Court of Appeals thus failed to distinguish this case from *Morrow*, and the Court of Appeals' dismissal of this appeal conflicts with this Court's ruling in *Morrow*.

II. The Court of Appeals erred and diverged from this Court's precedent by dismissing the Wellin Children's appeal of an order that deprived them of the substantive right to be the architects of their case.

The Court of Appeals further erred and broke with this Court's precedent by dismissing the Wellin Children's appeal from an order that, like the immediately appealable order in *Morrow*, "prevent[s] [the Wellin Children] from being architects of their own complaint, and deprives them of bringing their case against the defendant of their choosing." *Morrow*, 412 S.C. at 539, 773 S.E.2d at 146. Wendy, the person the Wellin Children are suing and from whom the Wellin Children are seeking to recover, will have no claims asserted against her during the truncated and severed trial. Further, the circuit court's Order forces the Wellin Children into a Hobson's choice of either (i) choosing to introduce evidence, arguments, and witnesses to support their position on the issues of undue influence and incapacity, knowing that if the jury rules against them they might be precluded from "relitigating" those facts in a subsequent trial of their tort claims against Wendy, or (ii) choosing instead to reserve those arguments, evidence, and facts for a possible future tort and breach of contract trial, and thus hamstringing their prosecution of the issues of incapacity and undue influence, which are based on the same evidence as the Wellin Children's tort and breach of contract claims. The Hobson's Choice effect of the Order is particularly important because these choices will be pervasive throughout the trial. Counsel for the Wellin Children will have to choose as to each piece of evidence whether to present it to maximize the chance of prevailing in the present or holding it back to mitigate the risk of a possible future finding that a fact was "actually litigated" for purposes of collateral estoppel in a future trial. Preservation of a record as to these

choices for a meaningful appeal would pose potentially unsurmountable challenges. It would be similar to disqualification of counsel, which the Supreme Court has found is immediately appealable because it is "one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken." *Hagood v. Sommerville*, 362 S.C. 191, 197–98, 607 S.E.2d 707, 710 (2005).

Also, in *Morrow*, the South Carolina Supreme Court held that, "[t]o prevent the Morrows from appealing the order immediately would encourage piecemeal litigation and limit their appellate remedies after the first trial on nursing home negligence and its subsequent appeal." *Morrow*, 412 S.C. at 539, 773 S.E.2d at 146–47. Likewise, here, preventing the Wellin Children from appealing the order immediately would encourage piecemeal litigation and limit their appellate remedies after the first trial on the issues of undue influence and capacity and its subsequent appeal. Piecemeal litigation would be guaranteed because, after this truncated trial, the losing party would be forced to appeal or waive their rights to do so. *See Stone v. Thompson*, 426 S.C. 291, 826 S.E.2d 868, 870 (2019) (upholding appeal "following a bifurcated hearing [in which] a claim or defense has been finally determined."). Appellate rights would be affected as explained above because of the extent to which the Hobson's Choice would permeate the truncated trial, but would be virtually impossible to preserve in the record.

Again, the Court of Appeals' order dismissing the instant appeal failed even to acknowledge this argument, much less to distinguish this denial of a substantial right from the one held to be immediately appealable in *Morrow*. The Court of Appeals' dismissal of this appeal thus erred and conflicts with this Court's precedent, including *Morrow*.

III. The Court of Appeals erred and diverged from this Court's precedent by dismissing the Wellin Children's appeal of an order that affected a mode of trial.

The Court of Appeals erred and broke from binding precedent in yet another way, namely by dismissing an appeal from an order that deprived the Wellin Children of their substantial right to the mode of trial to which they are entitled by preventing them from conducting a meaningful and substantive jury trial and/or by attempting to strong-arm them into "voluntarily" relinquishing

that right. As explained more fully below, the two-week limit for the truncated trial set by the circuit court was arbitrarily chosen, grossly insufficient, and a thinly veiled incentive to encourage the Wellin Children to abandon a jury trial altogether.

First, the circuit court did not seek, analyze, or articulate, or have any meaningful basis upon which to determine the length needed for a trial of the party's claims. Indeed, the court denied the Wellin Children's request that the circuit court simply hold a hearing where the parties could present such information. *See* Order (App. 164). The circuit court did not know, and declined to hold a hearing where the parties disclose to it, the number of witnesses the parties anticipate calling, the expected length of testimony, what evidence will be presented, or any other facts bearing on the expected length of trial.

Rather, Judge Addy candidly admitted his motivation for seeking to impose a two-week limit on the trial was to force a settlement or to pressure the parties to "elect" a nonjury trial. *See* Hearing Tr. at 31:9 to 32:6 (Aug. 22, 2018) (App. 113–14) ("I am firmly convinced and I have the strongest suspicion that when the trial court . . . directs that this case will last no more than two weeks . . . I am very confident that this case will resolve . . . ."). Additional comments made by the circuit court during the pendency of this appeal further confirm this view. *See* Hearing Tr. at 7:18–23 (June 12, 2019) (App. 518) (Judge Addy: "I really think it would behoove everybody . . . to give serious consideration to doing this nonjury because that will prevent us from being limited to the two weeks that I am going to permit in this particular case."); *id.* at 9:8–11 (App. 520) (Judge Addy: "If you all want to do this as a bench trial, we can forget about next week and forget about the week after that, and I can find some other time to do that."); *id.* at 17:10–12 (App. 528) (Judge Addy: "Again, if it was nonjury, I would do it all. I would do it all and give you guys all the time in the world.").

The arbitrarily chosen two-week limitation is grossly inadequate. The parties have taken more than 120 depositions in the related federal litigation, most of which have related to issues of capacity or undue influence. The Estate has identified 132 witnesses in its interrogatory responses

in this action and has listed *48 of them* as witnesses they intend to call in any trial of the issues of incapacity and undue influence. On the issues of capacity and undue influence, Wendy and the Estate have disclosed eight retained testifying experts and have identified dozens of treating physicians and fact witnesses. Likewise, the Wellin Children have identified six retained expert witnesses on these subjects along with numerous fact witnesses. Indeed, although the Estate's counsel has consistently pushed for a truncated trial, even he has admitted that litigating the issues of capacity and undue influence would require significantly more than two weeks. *See* Hearing Tr. at 4:13 to 5:7 (July 20, 2016) (App. 171–72) (estimating trial of "the issue of capacity and competence" would require "three to four weeks of testimony," and predicting calling "upwards of 50 witnesses specifically related to the issue of capacity, validity issues, undue influence, et cetera"). Indeed, even if pretrial motions, jury selection, opening statements, directed verdict motions, and closing statements take only two days, and even if the Wellin Children received half of the remaining trial time (while Wendy, the Estate, and Hamilton shared the remaining half), the Wellin Children would have only four days to present their case. Keith amended his trust more than a dozen times in his life and amended his trust five different times during 2013 and 2014. This is not the type of case where the Wellin Children can present their case in four days. Thus, the practical effect of limiting the trial to two weeks is to exclude the vast majority of the Wellin Children's relevant evidence from trial, thereby denying the Wellin Children a full and fair opportunity to try their case and violating their due process rights.

This sort of high stakes brinkmanship—significantly limiting a party's jury trial in hopes of forcing a settlement, and offering the parties the right to fully try their case only if they waive their constitutional right to a jury trial—has the effect of depriving the Wellin Children of a mode of trial and therefore should be immediately appealable. *See Hagood*, 362 S.C. at 198, 607 S.E.2d at 710 (holding that even the disqualification of a party's attorney in a civil case was "closely related to the right to a particular mode of trial" and thus was immediately appealable); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389–90 (Ct. App. 2004) ("Orders of the trial judge

denying a request for a jury trial involve the mode of trial, affect substantial rights under section 14-3-330(2) of the South Carolina Code, and are immediately appealable."); *see also Ingram v. Ingram*, 125 P.3d 694, 698 (Ok. Civ. App. 2005) (reversing ruling below in light of time-limited trial and noting that "parties in litigation are entitled to a meaningful and full opportunity to be heard, so rigid time limits are disfavored," and where time limits are imposed, "[t]he court should thoroughly familiarize itself with the case through pretrial proceedings before imposing limitations, should require litigants to estimate length of their cases and, if necessary, amount of time for each witness").

In the instant litigation, the circuit court's Order establishing the mode of trial wrongly threatens to deprive the Wellin Children of a jury trial on their claims in which all the applicable evidence is presented and the jury is instructed on the applicable standards for the Wellin Children's claims against Wendy. This deprivation involves a substantial right and is immediately appealable, regardless of whether the ruling is characterized by the circuit court as a bifurcation order. *See Morrow*, 412 S.C at 539, 773 S.E.2d at 146. Interlocutory rulings such as this one regarding the mode of trial or limitations on relief may be, and must be, immediately appealed. *See Foggie v. CSX Transp., Inc.* 313 S.C. 98, 431 S.E.2d 587 (1993). The Court of Appeals thus erred by dismissing the appeal, particularly where it did so without acknowledging or analyzing the effect the circuit court's order had on the mode of trial.

IV. The Court of Appeals erred by dismissing the Wellin Children's appeal of an order that effectively struck a portion of a pleading.

As noted above, Code section 14-3-330 permits the immediate appeal of an interlocutory order that "strikes out an answer or any part thereof or any pleading in any action." S.C. Code Ann. § 14-3-330(2)(c). The circuit court's May 15, 2019 order does so. Although the order is characterized as a "bifurcation," the *effect* of it, as explained above, is potentially to prevent the Wellin Children from ever bringing their claims before a jury—that is, it effectively strikes out a portion of their pleading, namely their counterclaims. When analyzing subsection 14-3-330(c)(2), a court should look to the effect, not the label, of the order on appeal:

> [A]n appellate court should look to the effect of an interlocutory order to determine its appealability under section 14–3–330(2)(c). An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial.

Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011). In the instant litigation, the effect of the circuit court's "bifurcation" order is potentially to prevent a fact finder from ever considering the Wellin Children's counterclaims and thus to prevent those claims from ever being litigated on the merits. The Court of Appeals' order dismissing this appeal failed to acknowledge or analyze this argument, and the Court of Appeals erred by dismissing the appeal despite the presence of this basis for immediate appealability.

V. The Court of Appeals erred by refusing to stay any trial while the appeal was pending and, instead, tacitly encouraging the circuit court to proceed to trial during the appeal.

As explained in the Statement of the Case and the Facts, *supra*, several weeks after the Wellin Children filed their Notice of Appeal in the instant appeal, and while the briefing on the question of immediate appealability was still ongoing, the circuit court informed the parties that, despite the pendency of the appeal, it intended to proceed with trial commencing in a matter of days. In response, the Wellin Children filed an emergency Petition for Writ of Supersedeas requesting the Court of Appeals to instruct the circuit court to stay the trial pending resolution of the appeal. In its subsequent order of dismissal, the Court of Appeals denied that Petition without providing any reasoning or explanation. *See* Order of Dismissal at 1 (App. 416).[10] As explained below, the Court of Appeals' denial of the writ was error.

First, a stay was warranted here to enforce the automatic stay required by the rules. The appellate court rules expressly state the filing of a Notice of Appeal divests the circuit court of

[10] Although the truncated trial has been postponed, Judge Addy has indicated he still intends to proceed with it in early 2020 despite the pending appeal. Accordingly, the Wellin Children have filed a Petition for a Writ of Supersedeas at the same time as they filed this Petition for a Writ of Certiorari. *That* Petition explains at greater length and in greater detail why a stay is warranted. *This* Petition summarizes those reasons more succinctly for purposes of demonstrating how the Court of Appeals diverged from the Rules and this Court's precedent and why certiorari is thus warranted.

jurisdiction over all matters decided in and affected by the Order being appealed. *See* Rules 205 & 241(a), SCACR. The fact that the appealability of the lower court's order is disputed or thought to be a "close call" should not alter this analysis. The Rules establishing the automatic appellate stay make no exception for situations (like in *Morrow* or this case) where the immediately appealability of an order is perceived to be a "close call." Rather, when (as here) a party has a plausible (and, indeed, correct) basis upon which to appeal immediately, the language of the Rules is plain that the order is automatically stayed unless and until there is a remittitur. The Court of Appeals' refusal to stay the trial pending resolution of this appeal is effectively a ruling that the filing of a notice of appeal only triggers a stay if the circuit court agrees that the interlocutory order is immediately appealable. That is, the Court of Appeals effectively ruled that there is no "automatic" stay, even though Rules 205 and 241(a) clearly provide for one. Thus, the Court of Appeals refusal to enforce the automatic stay was error.

Second, and separately, a stay was warranted here by considerations of fairness, efficiency, and the sound and orderly administration of justice.[11] *See Matter of Decker*, 322 S.C. 212, 214, 471 S.E.2d 459 (1995) (stating that even if the automatic appellate stay does not apply, the Court "must determine if we should exercise our discretion to issue a writ of supersedeas," and issuing such a writ in the interests of fairness and to preserve the status quo pending the Court's resolution of a novel question). In contrast, the rule espoused by the circuit court and the Court of Appeals in the instant litigation invites trial judges to roll the dice, speculating that the appeal will eventually be dismissed with finality and that the trial held in the meantime will be valid, but taking the risk that—if the order being appealed is, in fact, held to be immediately appealable—the trial will have been a sizeable waste of the parties' and the court's resources. This sort of gamble is not (and should not be) the law. Again, reference to *Morrow* is instructive. In *Morrow*, a single Judge of

[11] The Wellin Children argued, and continue to believe, that the automatic appellate stay divested the lower court of jurisdiction in this instance. In addition, there was a separate and narrower basis upon which the Court of Appeals should have granted the Petition, namely the prudential interests of judicial economy, efficiency, and the equitable administration of justice as presented by the specific facts of this case.

the Court of Appeals initially dismissed the appeal as interlocutory. A panel of the Court of Appeals subsequently affirmed. If the circuit court in *Morrow* had at that point proceeded to try the case without waiting for the Morrows to petition for rehearing, then petition for certiorari, then brief the merits, then argue the case to the Supreme Court, and finally obtain an opinion from the Supreme Court reversing the Court of Appeals, that trial would have been a nullity. So too here. The Court of Appeals should have granted the Petition for a Writ of Supersedeas and made clear that the lower court lacked jurisdiction to proceed with trial unless and until a remittitur is issued. The Court of Appeals failure to stay the proceeding below warrants certiorari.

CONCLUSION

For the foregoing reasons, the rulings of the Court of Appeals erred and conflicted with this Court's precedent, and the Wellin Children respectfully request this Court grant a Writ of Certiorari to review and correct the errors.

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