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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA**
**In the Supreme Court**

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Appeal from Charleston County
Court of Common Pleas
The Honorable Frank R. Addy, Jr. Circuit Court Judge

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Case No. 2014-CP-10-07038
Appellate Case No. 2019-000833

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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

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## RESPONDENTS' RETURN TO VERIFIED PETITION FOR A WRIT OF SUPERSEDEAS

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This case began over five years ago when Respondent Wendy C.H. Wellin ("Mrs. Wellin") petitioned for formal probate following the September 2014 passing of her husband. Appellants repeatedly have sought to delay the trial court proceedings. Their current Petition for a Writ of Supersedeas (the "Petition") is the next installment in this saga, and it seeks – for the third time this year and from as many courts – to delay the trial (tentatively set to occur in the

first quarter of 2020) because Appellants have prematurely tried to appeal an interlocutory order which established a bifurcated trial in two phases (the "Bifurcation Order"). Both the trial court and the Court of Appeals have determined the Bifurcation Order is not immediately appealable under S.C. Code § 14-3-330. Both the trial court and the Court of Appeals have exercised the authority Rule 241(a), SCACR, bestows upon ***each*** of them – as "lower court" and "appellate court," respectively – to lift any stay of the "matters decided in the order . . . on appeal" and to allow the phased trial of this matter to proceed. Both the trial court and the Court of Appeals have declined Appellants' invitation to transform the Bifurcation Order – which restricts no evidence from being presented, disposes of no claims nor parties, and prioritizes for the first phase of trial the will contest that gave rise to this probate case in the first place – into a *Morrow*-like, immediately appealable order which "severed a number of defendants . . . ostensibly under the label of 'bifurcation.'" *Morrow v. Fundamental Long-Term Care Holdings*, LLC, 412 S.C. 534, 535, 773 S.E.2d 144, 144 (2015). This case is not *Morrow*, and Appellants are not entitled – and have never been entitled – to a stay of the matters decided in the order on appeal.

The Petition should be denied for two reasons: (1) the two-part "fundamental question" Appellants insist their Petition must be granted to answer already ***has*** been answered by the plain language of the rules and existing case law; Appellants simply do not like the discretion the trial court has been given to decide whether a stay is warranted; and (2) the Petition is plagued by procedural deficiencies, both because it fails to comply with the requirements of Rule 241, SCACR, and because it raises issues not preserved in Appellants' petition for rehearing before the Court of Appeals.

## RELEVANT BACKGROUND

This Petition is Appellants' third successive request for a court to impose an automatic or discretionary stay under the authority of Rule 241, SCACR, and each one of those requests has been plagued by procedural deficiencies.

In the trial court and the Court of Appeals, Appellants improperly reversed Rule 241's procedure for how and to whom a supersedeas petition should be presented,[1] causing Respondents to scramble unnecessarily to address Appellants' stay requests on multiple fronts during a critical time of trial preparation. First, Appellants filed an "emergency" Petition for Writ of Supersedeas in the Court of Appeals (the "emergency supersedeas petition") that prematurely sought appellate intervention without ***first*** petitioning the trial judge and receiving an order "unjustifiably den[ying]" the relief sought, as required by Rules 241(d)(1) and 241(d)(4)(C), SCACR. Although Appellants' counsel, 48 hours before filing the emergency supersedeas petition, ***informally*** e-mailed the trial court to ask for a trial continuance, Appellants did not wait for the trial court to respond, nor did they make their request official by filing a proper motion for the trial court to consider, before filing in the Court of Appeals. Curiously, the emergency supersedeas petition never mentioned or attached that informal e-mail requesting a continuance – instead casually suggesting in a footnote that it would have been "impracticable" to ask the trial court for relief from the June 2019 trial setting. (Petition, pp. 3-4, n.4).[2]

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[1] Rule 241's procedure is clear: The Petition must contain "a showing that an application for this relief was made to the lower court . . . , and was unjustifiably denied or that the relief granted failed to afford the relief which the petitioner requested" or, "[i]f no application was made to the lower court . . . , then the petition shall state the extraordinary circumstances which made it impracticable to make such an application." Rule 241(d)(4)(C), SCACR.

[2] Of course, Appellants' own informal email request to the trial court belied their protestation that seeking relief from the trial court first was "impracticable."

After Appellants filed the emergency supersedeas petition, they again undermined their position that it was impracticable to ask the trial court for a stay ***by doing just that***: They filed a 153-page "Motion for a Continuance of Trial" asking the trial court to delay the June trial setting because of a wedding conflict and to continue the trial indefinitely due to an automatic stay they believed their appeal triggered.

Before trial commenced in June 2019, the trial court postponed trial until at least the first quarter of 2020. Almost simultaneously with that postponement, the Court of Appeals denied Appellants' emergency supersedeas petition and dismissed their interlocutory appeal because the Bifurcation Order was not immediately appealable. Appellants thereafter filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Court of Appeals raising some, but not all, of the arguments they now have presented in this Petition.

While Appellants' petition for rehearing was pending in the Court of Appeals, Appellants also filed a Motion to Reconsider in the trial court, acknowledging that the trial court had postponed the trial as they requested but asking, in part, for a ruling on their request for an automatic stay of the trial on the basis of pendency of their interlocutory appeal. (*See* 7/10/10 Motion to Reconsider, pp. 2-3, attached hereto as **Exhibit A**). That motion remains pending and is scheduled to be heard on December 17, 2019.

On September 19, 2019, the Court of Appeals declined Appellants' request for rehearing, and this Petition followed.

## DISCUSSION OF MERITS OF APPEAL

Although this Petition seeks only a stay (automatic or otherwise) of the trial court proceedings, as Appellants' simultaneously-filed Petition for a Writ of Certiorari serves as the

primary vehicle to address the (im)propriety of this interlocutory appeal,[3] a brief summary of why this appeal fails on the merits provides an important foundation to understanding why this Petition must be denied. Appellants primarily invoke one case – *Morrow, supra* – to justify their decision to immediately appeal an interlocutory order addressing bifurcation. For this immediate appeal to be justified, this Court essentially must find the Bifurcation Order to be indistinguishable from the order in *Morrow* that "severed a number of defendants . . . ostensibly under the label of 'bifurcation.'" 412 S.C. at 535, 773 S.E.2d at 144.

Such a conclusion would require this Court to inject the plain language of the Bifurcation Order with a nefarious, ulterior motive to deprive Appellants of their constitutional right to trial by jury as there is nothing about the plain language of the Bifurcation Order that causes this result or renders it immediately appealable like the order in *Morrow*. The Bifurcation Order ruled on the Motion to Bifurcate or for Separate Trial that was filed by the Estate of Keith S. Wellin and sought bifurcation of all validity issues associated with Mr. Wellin's June 27, 2014 Will and the amended and restated Keith S. Wellin Florida Revocable Living Trust executed June 27, 2014 ("2014 Revocable Trust"), to include (1) whether Mr. Wellin possessed sufficient mental capacity to execute both documents; and (2) whether Mr. Wellin's execution of the June 27, 2014 Will or the 2014 Revocable Trust was the result of undue influence, fraud, duress, or mistake (hereinafter collectively, the "Validity Issues"). Appellants' claims in the state court case are two-fold: (1) in response to Mrs. Wellin's initiation of formal probate, Appellants initially brought a will contest in 2014 seeking to invalidate their father's most recent estate planning documents (which reduced their inheritance), on the grounds those documents were procured by Mrs. Wellin's undue influence, fraud, duress, or mistake and/or executed when their

[3] Respondents intend to file a Return to the Petition for Writ of Certiorari, but the deadline for filing this Return runs first.

father lacked capacity; and (2) four years later in 2018, they added tort-based claims against Mrs. Wellin individually, alleging generally that by defamation and otherwise she interfered to prevent them from receiving their rightful inheritance. The former, encompassing the Validity Issues to be tried in the first phase of trial, requires the adjudication of probate issues that can only be resolved by the state court because it has exclusive jurisdiction to probate Mr. Wellin's will. The latter, comprised primarily of *in personam* claims against Mrs. Wellin, individually, to be tried in the second phase of trial, are identical to claims the Wellin Children are simultaneously pursuing in federal court.

Although Appellants claim the Bifurcation Order effectively grants judgment on or disposes of certain claims excluded from what Appellants have termed to be a "truncated trial," the order contains no language stating or suggesting the first phase of the state court trial will be dispositive of the second phase of the state court trial. What the Bifurcation Order ***actually*** states is that "resolution of these [Validity] issues will likely result in resolution of much of the ***federal litigation***." (Bifurcation Order, p. 4)(emphasis added).[4]

Although Appellants accuse the trial court of effectively striking a portion of their pleading, namely their counterclaims, to prevent a jury from ever considering them, not one single word in the Bifurcation Order pretermits, or has the effect of pretermitting, the second phase of trial from proceeding in state court after the Validity Issues have been resolved (rather

[4] Appellants have asserted - in one federal case - duplicates of their tort-based counterclaims against Mrs. Wellin in this case, but that is only one piece of the larger federal litigation which is comprised of numerous cases pending in the District of South Carolina before the Honorable David C. Norton. Many of the Validity Issues the trial court has decided to try first are also at issue in the comprehensive federal litigation, yet as the Bifurcation Order observes, "these issues can only be decided in state court" within its exclusive probate jurisdiction. It is not at all unusual for the trial court to surmise that much of the federal litigation will be resolved once the Validity Issues are tried in this case. Of course, how much of the federal litigation is resolved will be ultimately a decision for Judge Norton, not the state court, and there is no immediately appealable issue for this Court to consider.

the question is ***when*** the parties' counterclaims would be tried). Indeed, that is exactly what ***bifurcation*** of the issues means, and it is not an immediately appealable decision.

Finally, the Bifurcation Order did not, as Appellants claim, attempt to "strong-arm" them into voluntarily relinquishing their right to a meaningful and substantive jury trial. The plain language of the Bifurcation Order specifically contemplates that the first phase of trial concerning the Validity Issues will be "limited to two weeks" of jury trial, but the Bifurcation Order expresses no opinion about the length of the second phase of trial. The Bifurcation Order also does not restrict the evidence Appellants are entitled to present in the first phase of trial. To the contrary, the Bifurcation Order specifically contemplates that Appellants "will be entitled to present all evidence concerning the prior estate plan, the circumstances surrounding its formulation and execution . . . ." (Bifurcation Order, p. 4).

As previewed above and explained more fully in Respondents' forthcoming Return to the Petition for Writ of Certiorari, there is no merit to Appellants' efforts to transform an interlocutory, bifurcation order into an immediately appealable issue. And, as explained below, there is no reason to grant Appellants' Petition for a Writ of Supersedeas either.

## ARGUMENT

### I. The Two-Part "Fundamental Question" Appellants Ask This Court To Decide In The Petition Has Already Been Answered; They Simply Do Not Like The Result.

There is no merit to Appellants' suggestion that this Court must grant their Petition in order to answer a two-part "fundamental question" about whether the trial court can proceed with "matters decided in the order on appeal," when the appeal itself is improper and exclusive appellate jurisdiction never vested. (Petition, pp. 1-2). This is not a novel inquiry requiring

clarification by this Court, as the answers to both parts of Appellants' question are found in the South Carolina Appellate Court Rules and existing case law, *to wit*:

> (A) The trial court does have discretion to lift an automatic stay of the matters decided in the order on appeal, to the extent one ever existed; and
>
> (B) Appeal of an interlocutory order, found to be premature under § 14-3-330, does not force a stay of the matters decided in the order.

(Petition, pp. 1-2).

Before delving into an analysis of the rules and case law that provide the answers above, a threshold issue merits discussion: Appellants have cited interchangeably to two different rules as authority for their Petition – Rule 241 and Rule 205, SCACR – when only the former establishes what they seek, which is an "automatic stay ***of the matters decided in the order on appeal.***" (Petition, p. 1)(emphasis added); *see* Rule 241(a)("As a general rule, the service of a notice of appeal in a civil matter acts to automatically ***stay matters decided in the order . . . on appeal.***")(emphasis added). Justice Few authored an instructive opinion during his tenure as Chief Judge on the Court of Appeals that explains the important distinction between the stay contemplated by Rule 241 and the stay contemplated by Rule 205:

> When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241 . . . This is the purpose of a stay under Rule 241—to determine whether the appealed *order* may be carried out or enforced—not to determine whether the *action* may proceed in the lower court while the appeal is pending . . . . The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR. The rule provides: "Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . . ."

*Tillman v. Oakes*, 398 S.C. 245, 255-56, 728 S.E.2d 45, 50 (Ct. App. 2012).

The Petition, which uses the generic term "automatic appellate stay" while interchangeably referring to Rule 241 and Rule 205, SCACR, (*see, e.g.*, Petition, p. 2), fails to take into account the distinction then-Chief Judge Few recognized in *Tillman*. Indeed, the Petition effectively defines the scope of Rule 241's stay (of the matters decided in the order on appeal) and the scope of Rule 205's stay (of any matters affected by the appeal) ***as one and the same*** with respect to the question of whether the trial court can enforce the Bifurcation Order and proceed with trial in this case prior to remittitur. They are not, in fact, one and the same: Appellants' request for an order "preventing the circuit court from holding a trial until this appeal is resolved," (Petition, p. 12), is by definition a Rule 241(a) request to stay the ***order on appeal*** that bifurcated the trial and ordered the first phase of trial to begin imminently.

Nevertheless, because Appellants have cited to both Rule 241 and Rule 205 in their Petition, Respondents too have addressed both rules herein. As outlined below, ***neither*** rule requires the trial court to delay trial any longer in this case; the trial court can lift the automatic stay contemplated by Rule 241(a) in its discretion, and the automatic stay contemplated by Rule 205 never attached to Appellants' premature appeal because the trial court never lost jurisdiction. Against that backdrop, the rules and case law reveal the following definitive answers to the two-part "fundamental question" that Appellants insist this Court must resolve: The trial court does have discretion to lift an automatic stay of the matters decided in the order on appeal, to the extent one ever existed, and appeal of an interlocutory order, found to be premature under S.C. Code § 14-3-330, does not force a stay of the matters decided in the order.

### A. Rule 241 gives the trial court discretion to lift an automatic stay of the matters decided in the order on appeal, to the extent one ever existed in this case.

Appellants appear to have filed the Petition, at least in part, because they believe only the appellate courts can determine whether the trial court can proceed with matters decided by the order on appeal. (*See, e.g.,* Petition, pp. 8-9). The plain language of Rule 241(a) addresses this issue directly – whether the trial court can "[p]roceed with trial while an order governing the trial is being challenged on appeal." (Petition, p. 2). The rule provides that even if an automatic stay applies to the matters decided in the order on appeal, "[t]his automatic stay continues in effect for the duration of the appeal ***unless lifted by order of the lower court*** . . . ." Rule 241(a), SCACR (emphasis added). Not only ***can*** the trial court determine whether it should proceed with matters decided by the order on appeal, but the trial court ***must*** be the first court to make that determination under Rule 241 unless exceptional circumstances render it impracticable. Rule 241(d)(1), SCACR. Contrary to Appellants' protestation, when the trial court in this case decided it could proceed with enforcement of the order on appeal, it was not "***ignor[ing] these rules.***" (Petition, p. 2)(emphasis in original). Rather, the trial court was exercising the discretion Rule 241 requires,[5] as the Court of Appeals has now confirmed with its dismissal of the appeal, denial of the Petition for Writ of Supersedeas (that Appellants filed in that court), and denial of Appellants' Petition for Rehearing and Suggestion for Rehearing *En Banc*.

It is for good reason that both the trial court and Court of Appeals have declined to impose a stay or supersedeas over the order being challenged on appeal. When an interlocutory order is not directly appealable under § 14-3-330, as is the case here, it falls within an exception to the "automatic stay" contemplated by Rule 241(a), and the automatic stay does not attach in

[5] As outlined *supra*, it was Appellants who failed to follow the procedure outlined by Rule 241 and seek a stay from the trial court before asking the appellate courts to intervene.

the first instance. The Petition summarily – and erroneously – concludes that "[t]he automatic appellate stay is subject to 11 enumerated exceptions, *see* Rule 241(b), SCACR, none of which is implicated here." (Petition, p. 7 n.11). The list of enumerated exceptions found in Rule 241(b) comprise only "some, but not all, of the exceptions to the general rule [of an automatic stay]," and additional "exceptions to the general rule are found in statutes, court rules, and case law." Rule 241(b), SCACR.

This Court has previously recognized that the determination of whether an order is directly appealable under § 14-3-330 dictates whether "the appeal acts as an automatic stay of further proceedings upon the order" or whether the order falls within an exception and the automatic stay is not triggered. *Lebovitz v. Mudd*, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986)(finding under a predecessor to Rule 241 that the order on appeal *was* directly appealable, triggering the automatic stay and warranting denial of an unnecessary petition for a writ of supersedeas); *see Terry v. Terry*, 400 S.C. 453, 456-57, 734 S.E.2d 646, 648 (2012)(finding that "[a] notice of appeal from a temporary order does not, standing alone, operate to stay the effect or enforcement of the order" because "[s]uch orders . . . neither decide any issue with finality nor affect a substantial right within the meaning of S.C. Code Ann. Section 14-3-330(2) (Supp. 2011)"). In this case, the Court of Appeals correctly determined that the order being appealed does not rise to the level of an immediately appealable, interlocutory order under § 14-3-330 – such that the automatic stay was never triggered in the first instance.

Appellants also claim "'when there is a dispute as to whether an automatic stay exists,' the authority to resolve that dispute is vested in the appellate courts," and they cite *State v. Cooper (In re Cooper)*, 342 S.C. 389, 536 S.E.2d 870 (2000), as support for their claim. (Petition, p. 8)(quoting *Cooper* in part). Appellants' characterization of *Cooper* is misleading.

Although *Cooper* did hold, under Rule 241's predecessor (Rule 225), that "the Court of Appeals has authority to decide whether an exception to the automatic stay contained in Rule 225, SCACR is applicable," it did so only to clarify the impact of the General Assembly's June 1999 expansion of appellate jurisdiction – which gave the Court of Appeals the power "to issue writs of supersedeas" for the first time. *Cooper*, 342 S.C. at 398, 536 S.E.2d at 875-76 (noting that *Kearney v. Allen*, 287 S.C. 324, 338 S.E.2d 335 (1985), previously vested authority to rule upon issues arising under the SCACR only with the Supreme Court because appeals could not be directly filed in the Court of Appeals, and modifying *Kearney*, post-June 1999 expansion, to recognize that the Court of Appeals now "has the power and the authority to rule upon issues arising under SCACR, including those arising under Rule 225."). The 2000 holding in *Cooper* was necessary to address the 1999 statutory expansion of appellate jurisdiction that gave the Court of Appeals new supersedeas power. Reading *Cooper* as having given *only* appellate courts the power to issue writs of supersedeas and lift the automatic stay would conflict with the plain language of Rule 241(a), which gives that same supersedeas power to the trial court to lift the automatic stay.

For all of these reasons, there can be no dispute that the trial court in this case acted within the discretion given to it by Rule 241(a) to make determinations about whether the order on appeal should be stayed or whether the automatic stay applies in the first instance. This answer to part one of Appellants' "fundamental question" is well-established and requires no further clarification from this Court.

**B. Appeal of an interlocutory order, found to be premature under S.C. Code § 14-3-330, does not force a stay of the matters decided in the order, because the exclusive jurisdiction of the appellate court never vested.**

Appellants also contend that ***any*** appeal of an interlocutory order forces a stay of the matters decided in the order until the last rung of appellate review has been exhausted – even if the appeal was improvident and exclusive jurisdiction never vested with the appellate courts. As outlined below, this argument finds its demise in both the limited scope of appellate jurisdiction and the practical abuses such a rule would invite. Although it is not clear whether Appellants rely on Rule 205 or Rule 241 for their position on this issue, it does not matter: No automatic stay is triggered under either rule when a litigant appeals an interlocutory order that is not immediately appealable. This is because there is a "recognized exception" for improvident, interlocutory appeals like the one in this case such that they fall outside of the "general rule" that "the filing of the notice of intent to appeal vest[s the appellate courts] . . . with exclusive jurisdiction." *S.C. Pub. Serv. Auth. v. Arnold*, 340 S.E.2d 535, 536 (S.C. 1986); *see also Tillman*, 398 S.C. at 256 n.3, 728 S.E.2d at 51 n.3 (Ct. App. 2012) (explaining "[t]he reference in Rule[] 205[, SCACR,] . . . to the 'jurisdiction' of the [trial] court[] does not refer to subject matter jurisdiction. Rather, the rule[] govern[s] the circumstances under which the exclusive appellate jurisdiction Rule 205 grants to the appellate court deprives the [trial] court of the power to address a particular issue, or 'matter,' during the pendency of the appeal."). This Court has pronounced repeatedly and unequivocally, "[w]here an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay further proceedings in the lower court." *Arnold*, 340 S.E.2d at 536 (citing *State v. Dingle*, 279 S.C. 278, 306 S.E.2d 223 (1983), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990), and *Crout v. S.C. Nat. Bank,* 278 S.C. 120, 293 S.E.2d 422

(1982)).[6] The trial court's decision to proceed with trial in this case, which is the subject matter of the order on appeal, comports with the exception to the automatic stay this Court recognized in the aforementioned case law (hereinafter the "*Arnold/Dingle/Crout* exception").

**i. The scope of an appellate court's exclusive jurisdiction over the appeal is limited to a proper appeal, and the trial court retains jurisdiction to proceed when an improvident, interlocutory appeal has been filed.**

The Petition presents no argument that defeats application of the *Arnold/Dingle/Crout* exception in this case or requires an indefinite stay of the trial court proceedings. First, Appellants' effort to distinguish *Arnold* based on its "procedural posture" falls flat. When the trial court in *Arnold* proceeded with the underlying trial, there did not exist – as Appellants have represented – a "final determination and ruling" by this Court regarding the improvidence of the appeal. (Petition, pp. 8-9). The Petition gives the impression that issuance of the remittur was a mere formality in *Arnold* and the trial court had the finality it needed to proceed, (*id.*), but this Court's recitation of the procedural history in *Arnold* tells a different story.

When the trial court called the *Arnold* case to trial, this Court's decision was not final at all: It was still considering a "petition for rehearing and reconsideration" and had stayed the remittitur "pending consideration of the petition." *Arnold*, 340 S.E.2d at 536. The trial court in

[6] As Appellants note, *Arnold, Crout,* and *Dingle* were decided before the adoption of the SCACR, under a predecessor rule Supreme Court Rule 41 § (1)(A). When compared to the language of the current rules, the language of Rule 41 § (1)(A) seems even more definitive about the automatic stay: "[E]very appeal taken to the Supreme Court from a judgment, decision, or decree shall automatically operate as . . . a stay of further proceedings in the court below upon the judgment appealed from during the pendency of the appeal." S.Ct. Rule 41. *See also Crout*, 278 S.C. at 124; 293 S.E.2d at 424 (noting that "Supreme Court rule 41 § 1(A) states that subject to certain exceptions, every appeal taken to the Supreme Court from a judgment, decision, or decree shall automatically operate as a supersedeas and as a stay of further proceedings in the lower court" and recognizing exceptions outlined in S.C. Code Ann. § 14-3-330 (1976)). Even so, this Court still recognized that the automatic stay does not apply to interlocutory orders that are not immediately appealable.

*Arnold* had a non-final order from this Court dismissing the appeal as premature, ***and no more certainty about whether the underlying order was immediately appealable than the trial court does in this case***. In fact, the trial court's refusal in this case to impose an indefinite, automatic stay is backed not only by the Court of Appeals' dismissal of the appeal as premature, but also by the Court of Appeals' denial of the Petition for Writ of Supersedeas and the Court of Appeals' denial of the Petition for Rehearing and Suggestion for Rehearing *En Banc*. There is no reason why the holding of *Arnold* does not apply to the situation in this case and permit the trial court to proceed because "the notice of intent to appeal d[id] not transfer jurisdiction to this Court, nor d[id] it stay further proceedings in the lower court." *Id.*

Second, even if Appellants successfully distinguish *Arnold* (which they have not), they have not even tried to distinguish *Crout* or *Dingle,* both of which reached the same conclusion as *Arnold* about whether the "automatic appellate stay" applies. *Crout* and *Dingle* actually present far more compelling circumstances to impose a bright-line, automatic stay regardless of whether the appeal is premature, yet this Court ***still*** upheld the trial court's refusal to recognize such a rule in each case. In *Crout*, after the appellant noticed his appeal of an order denying his request for a trial continuance, the trial court made its own determination that no automatic stay was triggered because the order was not immediately appealable. *Crout*, 278 S.C. at 122-124, 293 S.E.2d at 423-424. The trial court not only proceeded with the trial based solely on its own discretionary determination, but when appellant's counsel advised the court that he was not ready to proceed on the morning of trial, the trial court ***dismissed appellant's case with prejudice***. *Id.* The trial court's refusal to impose an automatic stay had harsh consequences for the appellant in *Crout*, but this Court ***still*** found that no automatic stay was required because the appellate court (as is the case here) never assumed jurisdiction over the appeal under § 14-3-330. *Crout*, 278

S.C. at 124, 293 S.E.2d at 424 ("The administrative judge's order refusing appellant's motion for a continuance or a voluntary dismissal was not appealable because it was an intermediate order not involving the merits. Therefore, the notice of appeal from that order did not transfer jurisdiction to this Court or stay further proceedings in the trial court.").

Likewise in *Dingle,* after the trial court refused to impose an automatic appellate stay for the accused defendant's appeal of a pretrial order committing him to the custody of the South Carolina Department of Mental Health, the trial court proceeded to verdict in the accused defendant/appellant's murder trial even while his appeal was pending. *Dingle*, 279 S.C. at 282, 306 S.E.2d at 225. Although the trial court's refusal to recognize an automatic stay in *Dingle* again led to harsh consequences for the appellant, this Court still approved of the trial court's actions, finding that the trial court retained continuing jurisdiction over the subject matter of the case to proceed with the murder trial despite the appeal, because the order at issue was interlocutory in nature and thus not appealable. *Id.*

These unequivocal holdings of *Arnold, Crout,* and *Dingle* simply cannot be reconciled with Appellants' threat that denial of the Petition would be an unprecedented, "prospective[]" holding that no automatic stay was triggered "because the trial court judge determined, in his or her own discretion, that the order was not immediately appealable." (Petition, p. 9). Affirming the trial court's discretionary determination that an order was not immediately appealable and the automatic stay did not apply is *exactly* what this Court did in *Arnold, Crout,* and *Dingle*. And in this case, the trial court's assessment of appealability does not stand alone, as the Court of

Appeals now has affirmed the trial court's approach. The trial court in this case has ample reason to proceed without further delay because this interlocutory appeal is improvident.[7]

**ii. From a practical standpoint, requiring the trial court to impose a bright-line automatic stay regardless of whether the appeal is improvident invites unfettered abuse by litigants who seek to delay trial.**

It would be judicially inefficient, manifestly unfair, and invite unfettered abuse to allow a litigant to deprive a trial court of jurisdiction by filing an improvident appeal of an interlocutory order. Other courts have recognized the danger of imposing a bright-line, automatic stay over all trial court proceedings regardless of the propriety of the appeal:

> While filing a notice of appeal generally deprives the district court of jurisdiction, where the notice is manifestly deficient, *e.g.* by reason of reference to a nonappealable order, the district court may disregard it and proceed with the case. *Ruby v. Secretary of the United States Navy*, 365 F.2d 385, 389 (9th Cir. 1966), cert. denied, 386 U.S. 1011, 18 L. Ed. 2d 442, 87 S. Ct. 1358 (1967); *Manuel San Juan Co. v. American International Underwriters Corp.*, 331 F. Supp. 1050, 1054 (D.P.R. 1971); 9 Moore's Federal Practice (2d ed.) § 203.11, at 736-39. ***Otherwise, a litigant could temporarily deprive a court of jurisdiction at any and every critical juncture.***

*Hodgson v. Mahoney*, 460 F.2d 326, 328 (1st Cir. 1972)(emphasis added). If trial courts are stripped of any discretion to determine whether the exclusive jurisdiction contemplated by Rule 205, SCACR, has attached to an interlocutory appeal, trial court proceedings will grind to a halt because every litigant will appeal any and all orders – interlocutory or not – to tie the case up for

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[7] Appellants attempt to minimize the impact of *Arnold, Crout,* and *Dingle* by presenting it as an outdated "statement in a 1986 opinion that the appeal of an interlocutory ruling does not deprive the lower court of jurisdiction" that has rarely been "reiterated or relied on" post-SCACR. (Petition, p. 8 and n.12). As recently as 2018, the Court of Appeals cited the *Arnold/Crout/Dingle* exception to the automatic stay with approval in an unpublished opinion, and its premise remains intact and viable today. *See State v. Reece*, No. 2018-UP-022, 2018 S.C. App. Unpub. LEXIS 16, at *3-4 (Ct. App. Jan. 10, 2018) ("Reece contends the trial judge lacked jurisdiction to convict her because the remittitur was not issued until after her trial. We find the pretrial order was not immediately appealable . . . . [and t]hus Reece's filing of the notice of appeal from the order did not divest the trial judge of jurisdiction.").

years in appellate review and trigger a delay over which the trial court has no control. This practice would run afoul of the appellate court's limited authority to review interlocutory orders, as granted by S.C. Code § 14-3-330 and which the Court of Appeals has already determined does not exist in this case. A mandatory, automatic stay every time a notice of appeal is filed would also ignore the discretion that Rule 241, SCACR, affords to trial courts to determine when an automatic stay should be lifted so the trial court can enforce the matters decided by the order on appeal.

This case – which began as a simple request for formal probate – is entering its sixth year of litigation,[8] in large part because of delays Appellants have obtained that have prevented the trial court from deciding this case on its merits. Although the case finally was set for trial in June 2019, Appellants presented a barrage of reasons why trial should not proceed on those dates (including the pendency of this appeal, a family wedding during the second week of trial, and alleged surprise at the June setting and at what subject matter would be tried in the first phase), in part prompting the trial court to postpone trial until the first quarter of 2020. *See* Petition, Exhibits F, G, H. Because no trial has occurred and no trial will occur until the first quarter of 2020, Appellants are not facing an imminent, harsh consequence that requires a writ of supersedeas "to preserve the status quo" and "avoid rendering the matters on appeal moot."

[8] This is a complex estate dispute in which significant attorneys' fees already have been expended to litigate this matter contemporaneously in multiple courts. This isolated piece of the comprehensive litigation between the parties – which is the only portion of the litigation that can proceed with probating Mr. Wellin's Last Will and Testament because of the exclusive jurisdiction afforded to South Carolina courts to do so – has been pending since 2014 and is long-overdue for trial.

(Petition, p. 10).[9] Appellants even seem to acknowledge this when they admit "[t]he circuit court's postponement of the trial relieved the exigency of the situation." (Petition, p. 6).

With three or four months before trial could occur in this case, Appellants could have just as easily moved for expedited review of their Petition for Writ of Certiorari in lieu of seeking – for the third time and from as many courts – a writ of supersedeas. *See* Rule 263(b), SCACR (providing that with one inapplicable exception, "[t]he time prescribed by these Rules for performing any act . . . may be . . . shortened by the appellate court, or by any judge or justice thereof").[10] This Court, in other cases that may result in dismissal of an interlocutory appeal, has "expedited th[e] matter so that it could be decided without an excessive delay of the trial." *State v. Isaac*, 405 S.C. 177, 180, 747 S.E.2d 677, 678 (2013)(dismissing interlocutory appeal after finding order was not immediately appealable); *see also Willis v. Wukela*, 379 S.C. 126, 128, 665 S.E.2d 171, 172 (2008)(ordering an expedited briefing schedule when dismissal of the appeal was at stake). Here, Appellants have chosen to seek another trial delay and stay in lieu of simply moving for expedited consideration so as not to further delay the trial, tentatively set to occur in the first quarter of 2020.

## II. The Petition must be denied because it is plagued by procedural deficiencies, both because it fails to comply with the requirements of Rule 241, SCACR, and because it raises issues not preserved in Appellants' petition for rehearing before the Court of Appeals.

Rule 241 does not entitle litigants – as Appellants have done in this case – to file individual Petitions for Writ of Supersedeas in each successive court, from the trial court, to the

[9] As discussed *infra* in Section II, this mootness argument is not even properly before the Court because Appellants failed to preserve it in their Petition for Rehearing filed in the Court of Appeals.

[10] Although the instant Petition suggests that Appellants "request expedited consideration *and* issuance of a writ staying the trial," (Petition, p. 7), no motion or official request for expedited review has been filed in this Court.

Court of Appeals, to this Court, raising new or unpreserved grounds for why supersedeas should be imposed. Rule 241(d) establishes an orderly procedure for how and when each request must be presented – requiring an initial request for supersedeas to be made to the trial court "[e]xcept where extraordinary circumstances make it impracticable," Rule 241(d)(2), SCACR, and providing a right to "petition the appellate court . . . for review" if that initial request is denied. Rule 241(d)(2), SCACR; *see also* Rule 241(d)(7)("Any party aggrieved by the decision. . . of a lower court . . . may petition under this Rule for a review of that decision"). This procedure of review, which requires that a litigant seek review of a prior supersedeas opinion instead of filing a new petition altogether, ensures consistency, prevents overlap, and preserves the integrity of appellate review.

None of the Appellants' three requests for a stay has complied with the review procedure Rule 241 requires. As previously outlined, Appellants filed their emergency supersedeas petition in the Court of Appeals prematurely, having failed to first petition the trial judge and receive an order "unjustifiably den[ying]" the relief sought, as required by Rules 241(d)(1) and 241(d)(4)(C), SCACR. Appellants suggested that it would have been impracticable to request relief from the trial court first, but then they did request the same relief from the trial court just a few days after filing their emergency supersedeas petition – undermining any claim they could not have done so in the first instance and mooting their request to the Court of Appeals. In fact, they are still seeking a favorable ruling from the trial court on this issue as evidenced by the filing of their Motion to Reconsider which remains pending for the trial court's decision. (*See* Ex. A). This procedural deficiency was never remedied by Appellants, and the emergency supersedeas petition was denied. For this reason this Petition too should be denied; Rule 241

contemplates that it will be in the scope of an "appellate review," and Appellants failed to follow the procedure Rule 241 requires.

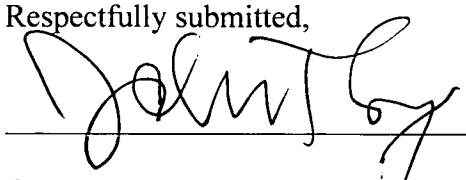
The Petition before this Court also is deficient, independently, because it raises arguments that were not preserved for this Court's review. After the Court of Appeals denied Appellants' emergency supersedeas petition, they sought Rehearing and Rehearing *En Banc* as to the denial of their request for supersedeas, arguing that a writ of supersedeas was required to enforce the automatic stay and ensure the trial court did not try the case when it lacked jurisdiction to do so. (Petition for Rehearing and Rehearing *En Banc*, pp. 10-11). At least two of the arguments presented in the instant Petition were not raised in the Petition for Rehearing and therefore are not preserved for this Court's review, specifically the mootness argument that occupies the second enumerated justification in the Petition, and the "alternative [argument that] even if the automatic appellate stay does not apply, a discretionary or prudential stay is warranted" found in the Petition's third enumerated justification. (Petition, pp. 10-12). Mootness was never raised in the Petition for Rehearing, and the only type of stay discussed was the application of an automatic, not discretionary, stay.

The law is well-settled that issues not raised "in [the] petition for rehearing before the Court of Appeals . . . [are] unpreserved for our review." *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 235, 797 S.E.2d 387, 393 (2016). Such is the case here with the Petition's aforementioned arguments, and the Petition should be denied for this reason as well.

## CONCLUSION

Respondents respectfully request that this Court deny the Petition, expedite consideration of the Appellants' pending Petition for Writ of Certiorari, and return this matter to the trial court for resolution.

Respectfully submitted,



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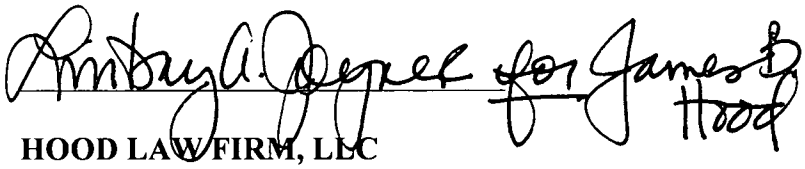

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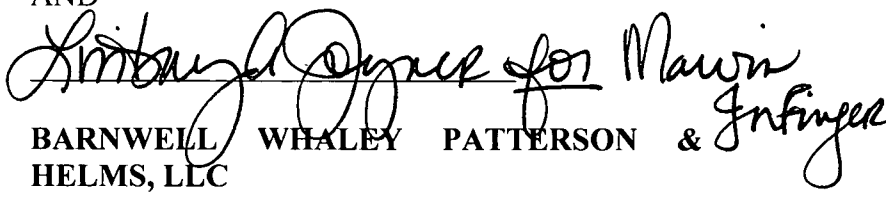

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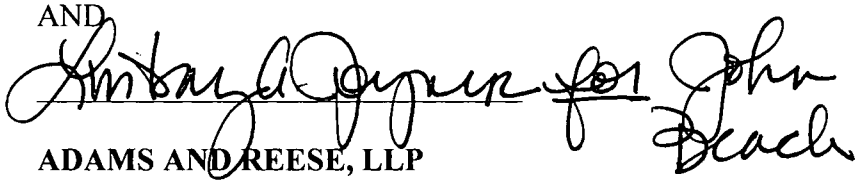

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## CERTIFICATE OF SERVICE

I, the undersigned Paralegal of the law offices of Gallivan, White & Boyd, P.A., attorneys for Wendy C. H. Wellin, individually, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

**RESPONDENTS' RETURN TO**
**VERIFIED PETITION FOR A WRIT OF SUPERSEDEAS**

Counsel Served:

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October 28, 2019

Melissa Le Urch