

RECEIVED
NOV 04 2019
S.C. SUPREME COURT

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
Appellate Case No. 2019-001752

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, 2009Appellants/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.

**REPLY IN SUPPORT OF PETITIONERS’
PETITION FOR A WRIT OF SUPERSEDEAS**

Petitioners (collectively “the Wellin Children”) asked this Court to stay an impending trial in this suit while the Court considers their Petition for a Writ of Certiorari arising from an order that precipitously scheduled a truncated trial on cherry-picked claims that the trial court incorrectly believed might also dispose of the remaining, untried claims. Respondents’ Return in opposition to the stay does nothing to blunt the force of the Wellin Children’s arguments. As summarized briefly here, and explained more fully below, each of Respondents’ assertions falls short:

- Respondents’ argument that the trial court and Court of Appeals permissibly “lifted” the appellate stay is demonstrably false. Neither court purported to do so, and Respondents never even attempt to initiate the procedural steps to lift the appellate stay.
- Respondents’ assertion that the automatic appellate stay was not triggered by the appeal is premised on a premature and incorrect assumption about the outcome of an issue on appeal,

namely the immediate appealability of the trial court's order. This assumption is particularly dubious when (as here) the order's appealability finds precedential support in a closely analogous case in which this Court reversed the Court of Appeals and held such orders *are* immediately appealable.

- Respondents' reliance on distinguishable, pre-SCACR cases is further undercut by their tacit admission that this Court has never held prospectively—*i.e.*, in advance of trial or in advance of its own determination of appealability—that the automatic stay was not triggered simply because a trial court judge believed the order was not immediately appealable.
- Respondents' argument that this Court may consider the question of supersedeas only if postured as an "appeal" rather than as a "petition" finds no support in the Rules and is, in fact, contradicted by the relevant Rules and statutes, which contemplate the filing of petitions seeking writs directly with this Court.
- Respondents' reliance on the novel requirement of "argument preservation" is found in neither the Rules nor case law, which require merely the preservation of *issues*.

Respondents' failure to advance plausible counter-arguments ultimately *reinforces* the Wellin Children's arguments for enforcement of the automatic appellate stay until this Court issues a remittitur. Alternatively, even without deciding if a stay was *automatically* triggered by the Wellin Children's appeal, this Court may—and should—grant the relief sought in the Petition by imposing a discretionary stay on the impending trial in light of the specific facts and issues presented by the appeal and to preserve the status quo while this Court contemplates the Wellin Children's Petition for a Writ of Certiorari and any subsequent briefing and arguments on the merits.

CLARIFICATIONS OF THE FACTS AND LAW

As an initial matter, before responding to the substantive arguments asserted in Respondents' Return, the Wellin Children reply briefly to five notable misapprehensions of the facts and the law. *First*, Respondents have repeatedly mischaracterized the Wellin Children's motivation in seeking a stay of the impending, truncated trial. *See, e.g.*, Return at 1, 4, 17–19 (accusing the Wellin Children nearly a dozen times of seeking a stay solely for the purposes of an unjustified delay). This scurrilous allegation is baseless speculation (since Respondents cannot read the Wellin Children's minds); it conveniently overlooks the fact that Respondents were themselves responsible for or amenable to a number of events that have elongated the course of this litigation; and, perhaps most importantly, it is false. The Wellin Children have

repeatedly explained to the trial court, the Court of Appeals, and this Court their good-faith, justifiable reasons for protesting the upcoming trial. They too seek a resolution of the litigation, but not at the cost of abandoning their right to a fair trial.

Second, Respondents present only a caricature-like summary of this Court's holding in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015), 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 deprived plaintiffs of the substantive right to be the architects of their case. The Return, however, repeatedly and erroneously implies the order in *Morrow* was immediately appealable only because it "severed a number of defendants." See Return at 2, 5 (quoting *Morrow*, 412 S.C. at 535, 773 S.E.2d at 144). This is incorrect. A more fulsome explanation of *Morrow's* holding and its parallels to the instant proceeding may be found in the Wellin Children's Petition for Supersedeas and their Petition for Certiorari, and will not be repeated herein. In short, *Morrow* was concerned not with the severance of *parties*, but with the severance of *claims* against parties. That is replicated here, because Judge Addy's Order effectively "severed" the claims against Wendy Wellin (decedent's fourth wife and one of the Respondents) in her individual capacity in the same way the claims against the corporate defendants were "severed" in *Morrow*.

Third, Respondents incorrectly state the Wellin Children's argument about immediate appealability requires 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." See Return at 5; see also *id.* at 7. But there is no need for the Court to speculate or "inject" anything into the analysis or into Judge Addy's order. The trial court's own statements and Respondents' own arguments unambiguously reveal the intended effect of the truncated trial, namely to grant potential judgment on untried claims that are neither dependent on nor derivative of the few claims to be tried. See, e.g., Judge Addy's "bifurcation" order (attached to the Wellin Children's Pet. for a Writ of Supersedeas as Ex. A) (stating the truncated trial on hand-picked claims will "likely" be dispositive of unspecified portions of "the federal litigation"); see also the Wellin

Children’s Pet. for a Writ of Certiorari at 5 (quoting Respondents’ assertions that trial of the cherry-picked claims “could be dispositive of the entire case” including “the Wellin Children’s individual tort claims against Mrs. Wellin” and could “eviscerate[] the lawsuit’ as to ‘virtually ever cause of action” the Wellin Children have against her). The Court need not “inject” ulterior motives into the planned “bifurcation”; they are plainly evident.

Fourth, Respondents fault the Wellin Children for relying on both Rule 205 and Rule 241, SCACR. *See* Return at 8–9. The thrust of Respondents’ argument—which is not entirely clear—seems to be that Rule 241 stays matters decided in the appealed *order*, while Rule 205 stays the *action* in the lower court. Thus (according to Respondents) the Wellin Children should have relied solely on the former and not on the latter. *See id.* at 8. This is a distinction without a difference. In the instant proceeding, the *order* being appealed sets a trial, and the lower court intends to proceed in this *action* by holding that trial. The Wellin Children seek to stay the matters decided in the *order* and they seek to stay the trial in this *action* because the trial court lacks jurisdiction until the matter is remitted. Both the stay discussed in Rule 241 and the related jurisdictional provision in Rule 205 are pertinent here.

Fifth, the Return acknowledges that the trial court has expressed its intent to commence a trial sometime in the first quarter of 2020, but proceeds to argue the trial is not “imminent.” *See* Return at 18–19. The first quarter of 2020, of course, is but eight weeks away (three of which are holiday weeks), and even assuming the trial is still several months away,¹ it hardly seems advisable for the Wellin Children to sit on their hands and wait till the eve of trial to seek relief from this Court.

ARGUMENTS

As explained in the Wellin Children’s Petition for a Writ of Supersedeas, this Court should issue a writ of supersedeas for any of several independent and alternative reasons, including to enforce the automatic appellate stay imposed by the Rules, to protect this Court’s jurisdiction, to maintain the status quo pending resolution of the appeal, to preserve judicial

¹ Trial is planned to be held the first two weeks of February 2020.

economy, or to avoid rendering the matters on appeal moot.² None of the Respondents' arguments to the contrary show otherwise, and each is rebutted below.

I. Neither the trial court nor the Court of Appeals “lifted” the stay imposed by the Rules.

Respondents' first argument in opposition to the Petition for Supersedeas is a remarkable one: that the trial court and the Court of Appeals supposedly affirmatively lifted the appellate stay. *See* Return at 2 (“Both the trial court and the Court of Appeals have exercised the authority Rule 241(a), SCACR, bestows upon each of them . . . to lift any stay”); *id.* at 8–10 (arguing the trial court lifted the automatic appellate stay). The argument suffers from two flaws discussed below.

First, the lower courts may lift a stay pursuant to Rule 241 only when there is a stay in place to be lifted. What stay might that be? It is the automatic appellate stay the Wellin Children have argued was triggered by their appeal. *See* Rule 241(a), SCACR (“This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court”); Rule 241(c), SCACR (titled “Supersedeas or Lifting of Automatic Stay”); Rule 241(d)(1) (discussing the procedure for “lifting the automatic stay”). If, as Respondents have argued, the trial court and Court of Appeals had any ability to “lift” a stay in this proceeding, it was only because the automatic appellate stay was triggered by the appeal. The Wellin Children agree it was, and ask this Court to enforce it.

Second, Respondents' argument that the lower courts “lifted” the automatic stay is counterfactual. For one thing, Respondents never undertook the steps required to seek to lift the stay. *See* Rules 241(c)(1) and 241(d)(1) (stating the lifting of the automatic stay begins when a party moves or applies to lift the stay). Respondents never moved or applied to lift the stay, and they do not allege otherwise. Further, neither the trial court nor the Court of Appeals ever made *any* ruling or statement purporting to “lift” the appellate stay. The Court of Appeals merely

² These bases are independent, and the Court need not determine whether the automatic appellate stay applies if it concludes instead that a stay should be imposed as a matter of prudence under the specific and unusual facts, posture, and issues implicated in this appeal.

denied the Wellin Children’s Petition in a ruling lacking the analysis and explanation required by Rule 241(c)(2), SCACR. Neither court lifted the stay, and this Court should enforce it.

II. Respondents cannot avoid the automatic stay by repeatedly insisting it does not apply.

The Wellin Children explained in their Petition why the automatic appellate stay applies and they distinguished the three pre-SCACR cases on which Respondents rely. In their Return, Respondents fail to identify any additional authority in support of their position,³ and thus tacitly concede the Wellin Children’s argument that no South Carolina appellate court has ever prospectively held the automatic stay was not triggered simply because a trial court judge believed the order was not immediately appealable.⁴ Respondents’ repeated assertion that the Wellin Children’s appeal did not trigger the automatic stay because Judge Addy’s “bifurcation” order is not immediately appealable begs the question by assuming the outcome of one of the issues on appeal—an unwarranted assumption when the most closely analogous case concluded the order *was* immediately appealable. Until the question of the immediate appealability of the order is resolved, the automatic stay applies. The Rules establishing the automatic appellate stay make no exception for cases where appealability is a “close call,” and the orderly administration of justice counsels in favor of interpreting and applying the Rules in a way that preserves the status quo, does not read into the text an exception where none exists, and avoids a costly trial that may later be determined a nullity.

III. A stay in this proceeding will not open the proverbial floodgates of litigation.

Unable to find plausible legal arguments to oppose the stay, Respondents deploy a bogey man. Specifically, they argue the imposition of a stay in this suit would open the proverbial

³ The sole additional case Respondents cite in support of this argument is an unpublished Court of Appeals ruling, *see* Return at 17 n.7, which citation violates the appellate court rules and should be ignored or stricken from the Return. *See* Rule 268(d)(2), SCACR (“Memorandum opinions and unpublished orders have no precedential value and should not be cited . . .”).

⁴ Respondents’ assertion to the contrary, *see* Return at 16, seems to misapprehend what is meant by a *prospective* holding, *i.e.*, an appellate court’s holding *in advance* of the trial being challenged and in advance of this Court’s consideration and determination of whether the order on appeal is immediately appealable. The three cases on which Respondents rely all involve *retrospective* holdings, *i.e.*, ones in which the challenged trial had *already* taken place and in which this Court had *already* concluded the challenged order was not immediately appealable.

floodgates of litigation, leading to “unfettered abuse by litigants” and causing the courts to “grind to a halt because *every* litigant will appeal *any* and *all* orders.” *See* Return at 17–18 (emphasis added). But like a specter that vanishes at dawn, so too Respondents’ bogey man vanishes under the light of closer inspection. The Wellin Children’s appeal mirrors that in *Morrow*, and if *Morrow* did not open the floodgates of interlocutory appeals (which it did not), neither will this Court’s preservation of the status quo while considering the pending petition for certiorari in this suit. Further, even if this Court enforces or imposes a stay in the instant proceeding, the apocryphal floodgates of abusive filings will remain firmly shut by Rule 11, SCRCP and Rule 269, SCACR, which respectively require attorneys, by their signature, to verify their filing is supported by good grounds and is not interposed for delay, and which forbid on pain of penalty frivolous filings and appeals, petitions, or motions taken solely for the purpose of delay.

IV. The Wellin Children’s Petition complies with the requirements actually found in the Rules.

Respondents’ final argument in opposition to the Wellin Children’s request for a stay is that the request is procedurally defective for three reasons: (1) Rule 241, SCACR supposedly does not permit the Wellin Children to file a Petition for a Writ of Supersedeas directly with this court, but, rather, requires the question to be presented as an appeal from the lower court’s ruling; (2) the Wellin Children’s Petition raises arguments supposedly not asserted in their Petition for Rehearing and Suggestion for Rehearing *En Banc*; and (3) the Wellin Children’s Motion for Reconsideration of some of the trial court’s rulings is still pending before the trial court. *See* Return at 4, 19–21. As explained below, none of these arguments provide a viable basis to deny the requested writ.

First, Respondents are incorrect that a litigant who filed a Petition for a Writ of Supersedeas at the Court of Appeals is prohibited from filing a subsequent Petition at this Court. The Rules do not prohibit, but, rather, permit the Wellin Children to “petition the appellate court where the appeal is pending” to review the trial court’s ruling. *See* Rule 241(d)(2); *see also* Rule 241(d)(7) (“Any party aggrieved by the decision of the lower court, the administrative tribunal, or an individual judge or justice may petition under this Rule for a review of that decision.”). The wisdom of the Rules’ accommodation of this procedure is illustrated in this proceeding. If, as

Respondents argue, the only way to raise the issue of supersedeas to this Court is by way of appellate review (*e.g.*, by petition for certiorari rather than a petition directly seeking a writ),⁵ then the trial might be over and done with before this Court rules on the petition for certiorari and subsequently considers and rules on the merits of the appeal. Furthermore, even assuming *arguendo* that a petitioner in the Wellin Children’s shoes cannot request a stay directly from this Court, the pending Petition is alternatively framed as one seeking a writ of prohibition or mandamus—writs that may unquestionably be brought directly to this Court. *See* Wellin Children’s Petition for a Writ of Supersedeas at 1 n.1; *see also* S.C. Const. art. V § 5 (“The Supreme Court shall have power to issue writs or orders of . . . mandamus [and] . . . prohibition.”); S.C. Code Ann. § 14-3-310 (same); Rule 245(b), SCACR.⁶ The Wellin Children’s request for relief directly from this Court is permitted.

The second supposed “procedural defect” with the Wellin Children’s Petition—that it raises arguments not asserted in the Petition for Rehearing—fares no better. Respondents’ argument misapprehends both the applicability and the requirements of the doctrine of issue preservation. Even assuming *arguendo* that the doctrine is applicable to the Petition in question,⁷ it requires merely that the *issue* or the *question* have been presented to the Court of Appeals and raised in the Petition for Rehearing, not that the Petition for Rehearing exhaustively set out the entire argument

⁵ Incidentally, the Wellin Children have also sought certiorari to review, among other things, the Court of Appeals’ denial of the Petition for a Writ of Supersedeas. *See* Wellin Children’s Petition for a Writ of Certiorari at 22–24 (filed October 17, 2019).

⁶ Indeed, the relief sought in the pending petition is arguably more akin to a writ of prohibition or mandamus than a writ of supersedeas described in Rule 241, SCACR. That Rule contemplates the issuance of writs of supersedeas in instances where the automatic appellate stay does *not* apply. Here, however, as explained in the Wellin Children’s Petition, the automatic appellate stay applies, and thus the relief sought is a writ compelling the lower court to yield to that stay and/or prohibiting the lower court from engaging in matters that are stayed.

⁷ Neither Rule 241 nor Rule 245 requires non-certiorari petitions filed with the Supreme Court to be limited to arguments previously raised in the Petition for Rehearing. When the Rules intend to impose such a requirement, they do so expressly. *See* Rule 242(d)(2) (imposing such a requirement on petitions for certiorari). The absence of such a requirement in the Rules pertaining to the instant Petition is telling.

in full. *See* Rule 242(d)(2) (“Only those *questions* raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari A question presented will be deemed to include *every subsidiary question fairly comprised therein.*”) (emphasis added); *Sloan v. Dept. of Transp.*, 365 S.C. 299, 308, 618 S.E.2d 876, 880 (2005) (noting the appellant “failed to include the *issue* in his petitions for rehearing and certiorari” and thus “this *issue* was not preserved for review”) (emphasis added); *see also Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (“We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner.”); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (noting the doctrine of issue preservation “is not a ‘gotcha’ game”).

Further, the arguments Respondents claim are unpreserved were, in fact, raised to the Court of Appeals. Though the Petition for Rehearing did not use the words “moot” or “mootness” in explaining the need for rehearing of the supersedeas petition, that argument was unquestionably before the Court of Appeals. *See* Wellin Children’s Petition for a Writ of Supersedeas at 7–9 (June 7, 2019); Wellin Children’s Petition for Rehearing and Suggestion for Rehearing *En Banc* at 11 (arguing a stay was warranted because a trial held while the appeal was pending would be a waste and a nullity, *i.e.*, would render it moot). So too with the Wellin Children’s alternative argument that a stay should be granted as a matter of discretion. *See* Wellin Children’s Petition for a Writ of Supersedeas at 7 (June 7, 2019) (explaining the reasons to grant a stay include enforcement of the automatic appellate stay *and* prudential reasons like judicial economy, efficiency, and preservation of the status quo); Wellin Children’s Petition for Rehearing and Suggestion for Rehearing *En Banc* at 2, 10–11 (noting the “sound policy reasons” and the “considerations of fairness and efficiency” that support a stay). The Wellin Children’s issues (and supporting arguments) are preserved.

Finally, Respondents argue the Wellin Children’s Petition is premature because there is a Motion for Reconsideration pending. This argument fails to provide a plausible rebuttal to the Petition. The fact that the Motion for Reconsideration is set for December 17, 2019—mere weeks before the first quarter of 2020 begins—illustrates both the impracticability of waiting for the trial

court's ruling and the need to seek intervention by this Court. *See* Rule 241(d)(1) (noting when it is impracticable to await the trial court's ruling, including when said ruling is subject to "an unnecessary delay," the petitioner may seek relief directly from the appellate court).⁸ The Wellin Children filed that motion out of an abundance of caution, but in light of Judge Addy's previous and repeated refusals to stay the trial to await the remittitur from the appellate courts, the ruling on the motion seems to be a foregone conclusion. And, as noted above, it seems inadvisable for the Wellin Children to sit idly by awaiting that ruling, which would likely be handed down mere weeks before the trial and which would prompt a furious, last-minute scramble to seek a stay from this Court. The instant Petition for a Writ of Supersedeas hopes to avoid that eleventh hour haste.

CONCLUSION

For the foregoing reasons as well as those asserted in Petitioners' Petition for a Writ of Supersedeas, Petitioners respectfully request this Court grant the Petition.

[SIGNATURE PAGE ATTACHED]

⁸ Previously in this suit, it was likewise impracticable first to seek a stay from the trial court and await its ruling when it announced a trial set to commence mere days later and had already stated that it had no intention of honoring the appellate stay. *See* email from Judge Addy on June 4, 2019 (attached to the Wellin Children's Petition as Exhibit D).

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Miles Coleman
Robert H. Brunson
SC Bar No. 11987
E-Mail: robert.brunson@nelsonmullins.com
Merritt G. Abney
SC Bar No. 71893
E-mail: merritt.abney@nelsonmullins.com
Patrick C. Wooten
SC Bar No. 77985
E-Mail: patrick.wooten@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Miles Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
2 West Washington Street / Suite 400
Greenville, SC 29601
(864) 373-2352

Attorneys for Appellants/Petitioners

Greenville, South Carolina
November 4, 2019

RECEIVED

NOV 04 2019

S.C. SUPREME COURT

RECEIVED

NOV 04 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

NOV 04

S.C. SUPREME COURT

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

Case No. 2014-CP-10-07038
Appellate Case No. 2019-001752

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.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Peter Wellin, Cynthia Wellin Plum, and Marjorie Wellin King Individually and as Co-Trustees and Beneficiaries of the Wellin Family 2009 Irrevocable Trust, u/a/d November 2, 2009, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

REPLY IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF SUPERSEDEAS

Counsel Served:

John T. Lay, Jr., Esq.
Gray T. Culbreath, Esq.
John D. Hudson, Jr., Esq.
Lindsay Anne Joyner, Esq.
Gallivan, White & Boyd, PA
PO Box 7368
Columbia, SC 29202
*Attorneys for Wendy C.H. Wellin,
individually*

John Fisher Beach, Esq.
Lyndey Bryant, Esq.
Adams and Reese LLP
PO Box 2285
Columbia, SC 29202
Attorneys for Hamilton College

F. Patricia Scarborough, Esq.
Edward G.R. Bennett, Esq.
Evans, Carter, Kunes & Bennett, P.A.
PO Box 369
Charleston, South Carolina 29402
Attorneys for the Estate

Robert H. Hood, Esq.
James B. Hood, Esq.
Molly H. Craig, Esq.
Hood Law Firm, LLC
172 Meeting Street
Charleston, SC 29401
*Attorneys for Wendy C.H. Wellin, as Special
Administrator and for the Keith S. Wellin
Florida Revocable Living Trust*

Marvin D. Infinger, Esq.
Barnwell Whaley Patterson & Helms, LLC
PO Drawer H
Charleston, SC 29402
*Attorney for Campbell Lane Hart and
Heather Lane*

M. Dawes Cook, Jr., Esq.
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402
*Attorneys for F. Patricia Scarborough, Esq.
and Edward G.R. Bennett, Esq.*



Administrative Assistant

November 4, 2019