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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, 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.

REPLY IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI[1]

Petitioners (collectively "the Wellin Children") asked this Court to grant a writ of certiorari to review the Court of Appeals' rulings that dismissed their appeal, denied their Petition for a Writ of Supersedeas, and denied their Petition for Rehearing and Suggestion for Rehearing *En Banc*. Respondents' Returns in opposition to the Petition fail to rebut the Wellin Children's arguments. As summarized briefly here, and explained more fully below, each of Respondents' arguments falls short:

- Respondents fail to rebut the Wellin Children's argument that the trial court's "bifurcation" order erroneously grants potential judgment on untried claims and is thus both immediately

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[1] Respondents filed three separate and largely duplicative Returns. The Wellin Children submit this unitary Reply in support of their Petition for a Writ of Certiorari.

appealable and reversible. Respondents' labored explanations to justify the order are inconsistent with both the language of the order and with their own past statements. Further, Respondents' arguments are unpersuasive because they rest on what Respondents assert was a typographical error in this Court's *Morrow* opinion or on distinctions that make no difference.

- Respondents fail to rebut the Wellin Children's argument that the trial court's "bifurcation" order deprives them of the right to be the architects of their case. Respondents' arguments to the contrary are, again, inconsistent with their past positions, rely on extra-Record evidence, and fail to grapple with (much less rebut) the prejudicial effects of Judge Addy's order.

- Respondents fail to rebut the Wellin Children's argument that the trial court's "bifurcation" order infringes on their right to a meaningful jury trial. Neither Respondents' formalistic view of the mode-of-trial doctrine nor their assertion that trial courts have great discretion to manage their dockets can excuse the undisputed fact that the trial court here, in hopes of forcing a settlement and without any informed basis upon which to determine an appropriate length of trial, imposed an arbitrary time limit on the trial, the effect of which is to deny the Wellin Children their right to a meaningful and effective jury trial.

- Respondents fail to rebut the Wellin Children's argument that the trial court's "bifurcation" order effectively struck a portion of their pleading. Confusingly, Respondents argue that Judge Addy's order does *not* neglect, fail to mention, or leave undone a "second phase" of trial. That is, of course, exactly what Judge Addy's order does, by failing to discuss, promise, or even acknowledge a second phase of trial.

- Finally, Respondents fail to rebut the Wellin Children's argument that the Court of Appeals erred by permitting the trial court to proceed with trial prior to the issuance of a remittitur. The issue is not moot because the trial court still intends to hold a trial in February 2020 regardless of whether the appeal is still pending. Both the trial court's plan and the Court of Appeals permitting it are erroneous and warrant review and reversal.

CLARIFICATIONS OF THE FACTS AND LAW

As an initial matter, before responding to the substantive arguments in Respondents' Returns, the Wellin Children reply briefly to eight procedural improprieties, omissions, or misapprehensions of fact and law found in the Returns.

First, none of the Returns responds to the Wellin Children's argument that the "bifurcation" at issue is indefensible because the trial court either intends for the truncated "first phase" of trial to be dispositive of other claims (in which case it is analogous to *Morrow*) or does not intend for the truncated trial to be dispositive of other claims, in which case it does not promote efficiency at all, and instead will require the parties to have multiple lengthy trials in which the same evidence is introduced. Because the trial court's order expressly states that it is

designed to promote efficiency—in addition to stating that the first phase of trial will likely resolve "much of" the federal court litigation—the order is analogous to the order in *Morrow*. Respondents' silence is a tacit concession of this critical point.

Second, Wendy seems to argue that bifurcation is appropriate in this case because the state court has exclusive jurisdiction to probate Keith Wellin's will. But this is a *non sequitur*. The state court's exclusive jurisdiction over probating wills in no way supports bifurcating certain claims cherry-picked by Respondents (including the claim seeking probate of Keith's will) from the remaining claims pending in the state court action.[2] As explained in the Wellin Children's Petition and ignored by Respondents, 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 (successfully) to turn this law on its head, arguing that the trial 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"). The impropriety of bifurcation under controlling case law could not be clearer.

Third, Respondents seek to twist the Wellin Children's permissible and cautious approach in a truly remarkable procedural situation and turn it against them. Specifically, Wendy Wellin faults the Wellin Children for seeking relief from the appellate courts while also asking the trial court itself to voluntarily relent from its rushed and prejudicial plan. *See* Return of Wendy C.H. Wellin Individually at 3. Her criticisms are not justified. The Wellin Children appealed from a

[2] The version of the will that is probated is of little practical significance because all of the wills at issue are "pour-over" wills that convey any assets remaining in Keith Wellin's estate to his revocable trust. Moreover, the Estate has conceded that the Estate (as distinct from the revocable trust) has little or no assets in it. In any event, Wendy's argument about the state court's exclusive jurisdiction over the probate of wills is irrelevant to the issues before the Court.

supposed "bifurcation" order that gravely prejudiced their rights.[3] The trial court still intends to hold the "bifurcated" trial. Therefore, contrary to Wendy's assertion, that issue is ripe and is not moot. In addition, while the appeal was pending, the trial court abruptly announced its intention to begin trial in a matter of days. The Wellin Children immediately sought a writ of supersedeas from the Court of Appeals. This was permissible both because the situation was not one to which the normal procedure in Rule 241(d), SCACR applies and,[4] even if it were, it falls within the "extraordinary circumstances" exception to that rule. Nevertheless, in light of the exigency of the situation and out of an abundance of caution, the Wellin Children also asked the trial court to continue or stay the trial. This "belt and suspenders" approach did not moot the appeal, as is made evident by the fact that the trial court temporarily delayed the trial but still intends to hold it regardless of the pendency of the appeal. The issue and the need for enforcement or imposition of a stay is still very much alive.

Fourth, Respondents' Returns impermissibly attempt to introduce and rely on documents that were not before the Court of Appeals and are not contained in the Appendix. *See, e.g.*, Return of Wendy C.H. Wellin Individually at 10, 13, and Ex. A (attaching and relying on an exhibit containing excerpts from a 2011 trial court ruling in another suit); Return of Hamilton College at 2 and Ex. 1 (attaching and relying on select excerpts from one of Keith Wellin's Revocable Living Trusts—materials never presented to the Court of Appeals in the instant proceeding). The relevance, if any, of these exhibits is dubious; nevertheless they should be stricken or disregarded, as should Respondents' arguments that rely on them. The purpose of a writ of certiorari—"to review a final decision of the Court of Appeals," Rule 242(a), SCACR—is frustrated by the

[3] The Wellin Children also appealed from several prior orders that, on their own, would not have been immediately appealable, but when joined with an appealable issue may be considered by the appellate courts at the same time to promote efficiency.

[4] Rule 241 contemplates the use of writs of supersedeas to stay matters that are *not* automatically stayed by an appeal. *See* Rule 241(c)(1). In the instant proceeding, as the Wellin Children have repeatedly stated to the Court of Appeals and this Court, the automatic appellate stay *should* have stayed the trial, and the Wellin Children's Petition for a Writ of Supersedeas is, in some ways, more akin to a Petition for a Writ of Mandamus or Prohibition.

introduction of new evidence and arguments that were not presented to the Court of Appeals, and it is axiomatic that this Court's review of a lower court's ruling is confined to examining the arguments and evidence actually presented to that court. *See* Rule 210(h), SCACR (stating appellate court review is limited to evidence contained in the Record); *State v. Johnson*, 334 S.C. 78, 86 n.1, 512 S.E.2d 795, 799 n.1 (1999) (noting in an opinion reviewing a ruling of the Court of Appeals that the *Respondent* could not rely on unpreserved arguments); 14 C.J.S. Certiorari § 103 ("Except where otherwise prescribed by a statute or authorized by local practice, . . . review on certiorari is limited to the examination of the record . . . . Generally, it is not permissible to hear extraneous evidence.") (citations omitted).[5] This limitation applies even to additional sustaining grounds, which "must appear in the record on appeal." *See I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). Respondents' extra-Record evidence and their arguments arising from that evidence should be stricken or disregarded.

Fifth, Respondents mischaracterize the Wellin Children's motivation in pursuing their appellate remedies. *See, e.g.*, Return of Wendy C.H. Wellin as Special Administrator at 2, 7, 10–11 (accusing the Wellin Children of seeking appellate redress solely for the purposes of an unjustified delay, and of seeking a unitary trial on all claims simply so they can "muddle up their claims and prevail" unjustly); Return of Wendy C.H. Wellin Individually at 11 (claiming the Wellin Children's goal is a trial that allows them to confuse the jury). These scurrilous allegations are baseless speculation (since Respondents cannot read the Wellin Children's minds); they conveniently overlook 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, they are

[5] A Petition for Certiorari and a Return thereto are, in this respect, different from other types of motions or petitions that seek immediate relief directly from this Court and which may, in appropriate circumstances, include supporting documents. *Compare* Rule 242, SCACR (noting that the arguments made to this Court in the context of a cert petition must contain "specific reference to pertinent portions of the Record on Appeal") *with* Rule 240, SCACR (discussing motions and petitions more generally and noting that while some motions may include "supporting documents," "[w]here Rules 241 through 246 provide different or additional requirements or procedures, those requirements or procedures shall apply").

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 prompt resolution of the litigation, but not at the cost of abandoning their right to a full and fair jury trial.

Sixth, Respondents present 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. Respondents, however, erroneously imply the order in *Morrow* was immediately appealable only because it "'severed a number of defendants.'" *See* Return of Wendy C.H. Wellin Individually at 2 (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 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 in her individual capacity in the same way the claims against the corporate defendants were "severed" in *Morrow*.

Seventh, Respondents incorrectly state that the Wellin Children's argument about immediate appealability requires this Court "to inject the Bifurcation Order with a nefarious, ulterior motive which is nowhere to be found in its plain language or in its practical application." *See id.* at 6; *see also* Return of Hamilton College at 3 ("The Wellin Children have derogated and disparaged the Bifurcation Order. They imply Judge Addy had ulterior motives which are nowhere to be found in the Order."). But the Wellin Children do not argue or imply Judge Addy issued the order based on any ulterior motives, nor is there any need for the Court to speculate about his motives or to "inject" anything into his order. The order's express language 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 at 4 (App. 164) (stating the truncated trial on hand-picked claims will "likely" result in resolution of "much of the federal litigation"); *see also* the Wellin Children's Petition 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 every cause of action'" the Wellin Children have against her).[6]

Eighth, Respondents argue that because the trial court has expressed its intent to commence a trial in the first quarter of 2020, certain of the Wellin Children's arguments are "moot." *See* Return of Wendy C.H. Wellin as Special Trustee at 11. The need for this Court's intervention (and the error of the Court of Appeals' failure to do so), however, has not been mooted by the delay of trial because the trial court plainly intends to proceed with trial regardless of whether the Wellin Children's appeal is still pending. Accordingly, the issue that Respondents claim is moot is, in fact, very much alive. Further, the first quarter of 2020 is (as of the date of this filing) but five weeks away—three of which are holiday weeks—and even assuming the trial begins a month after that,[7] 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 Certiorari, this Court should issue a writ because the Court of Appeals' ruling conflicts with this Court's precedent; deprived the Wellin Children of the substantive right to be the architects of their case; affirmed an arbitrary

[6] As explained more fully below, the new position Respondents take in their Returns—namely, that the "first phase" of trial will have preclusive effect *only* on any validity questions raised in other proceedings and *not* on the Wellin Children's tort counterclaims—is a marked departure from their past statements. *See* Argument I, *infra* (quoting Respondents' past articulations of a very different position).

[7] Trial is planned to be held the first two weeks of February 2020.

infringement on the Wellin Children's right to a meaningful jury trial; declined to review an order effectively striking a portion of a pleading; and tacitly encouraged the trial court to proceed with trial notwithstanding the pendency of an appeal that, if *Morrow* is any guide, is a meritorious one. None of the Respondents' arguments to the contrary show otherwise. Each is rebutted below.

I. The "bifurcation" order granted potential judgment and is immediately appealable.

The Wellin Children's Petition explained how the so-called bifurcation order in the instant proceeding granted potential judgment on untried claims and thus paralleled the analogous order this Court found immediately appealable in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). Respondents, however, seek to distinguish *Morrow*, arguing Judge Addy's order in the instant proceeding did *not* grant potential judgment on any untried claims because (1) the only preclusive effect contemplated by Judge Addy's "bifurcation" order is for the first phase of trial to resolve only the claims pending in the federal court litigation to the extent those claims are actually tried in the first phase of trial, and (2) neither Judge Addy nor the Respondents intend or expect that the upcoming truncated trial will have any preclusive effect on the Wellin Children's untried counterclaims against Wendy. *See* Return of Wendy C.H. Wellin Individually at 6–13; *see also* Return of Hamilton College at 5–8. As explained below, both arguments are incorrect.

First, Respondents argue the "bifurcation" order intends for the first phase of trial to resolve only the claims pending in the federal court litigation to the extent those claims are actually tried in the first phase of trial. But this argument is contradicted by the text of the "bifurcation" order, which expressly states that the truncated trial will likely "result in resolution of *much* of the federal litigation." *See* Order at 4 (App. 164) (emphasis added). The federal litigation involves dozens of claims, and only *one* claim—the Wellin Children's declaratory judgment claim against Wendy Wellin in civil action number 2:14-cv-4067—challenges the validity of Keith's purported amendments to his revocable trust on testamentary capacity, undue influence, and related grounds. If Judge Addy only intended for the first phase of trial to resolve this single claim

pending in the federal court litigation (or a portion of this single claim), he certainly would not have predicted that the first phase of trial will resolve "much of the federal litigation."

Second, Respondents argue that no one intends for the outcome of the truncated trial to have any preclusive effect on the Wellin Children's untried counterclaims. In fact, Wendy argues in her Return that a loss by the Wellin Children in the first phase of trial may *benefit* the Wellin Children in pursuing their tort claims against Wendy in the second phase of trial. *See* Return of Wendy C.H. Wellin Individually at 13. This is a remarkable mid-litigation shift by the Respondents, who have previously argued that if the Wellin Children lose the first phase of trial on the validity issues, it 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").[8]

Respondent Hamilton College asserts a third argument seeking to distinguish *Morrow*. *See* Return of Hamilton College at 5. The thrust of the argument is not entirely clear and, in any event, is unpersuasive because it rests on Hamilton College's admitted modification of *Morrow's* actual text. *See id.* (quoting a modified version of the *Morrow* opinion); *id.* at 5 n.5 (explaining the supposed error in *Morrow* necessitating the textual modifications).[9] And regardless of Hamilton's speculation about what a footnote in the *Morrow* opinion *really* meant, the actual holding of

[8] Respondents fail to acknowledge their about face, much less provide an explanation of which position they have asserted is the correct one. Moreover, Wendy's newfound position is not only inconsistent with her own past positions; it also seems to be inconsistent with the position still taken by another Respondent whose Return argues that "the outcome of the first phase of any bifurcated trial necessarily has preclusive effect on the remaining issues in the case." *See* Return of Hamilton College at 5.

[9] The thrust of the argument is further disguised by the fact that the argument itself misquotes portions of *Morrow*—apparently inadvertently—without using brackets or otherwise indicating the alteration. *Compare id.* at 5 (quoting a portion of the *Morrow* opinion discussing a hypothetical scenario in which certain of the plaintiffs' claims were "unsuccessful") *with id.* at 5 n.5 (quoting the same sentence of *Morrow* but altering it so it appears to be discussing a scenario in which certain of the plaintiffs' claims were "successful"). In any event, whatever it is that Hamilton College means to argue, the argument is unpersuasive for the reasons explained above.

Morrow and its applicability here is clear: when (as here) a so-called bifurcation order contemplates and intends that a trial on certain claims may be dispositive of other, untried claims that are not, in fact, dependent on or derivative of the tried claims, that order effectively grants judgment and is immediately appealable.

Hamilton College's next argument fares no better. Specifically, Hamilton argues that Judge Addy's "bifurcation" order did not *actually* grant judgment, and only a "subsequent ruling by the state or federal court" would grant judgment on any of the untried claims. *See* Return of Hamilton College at 7. But that fact is no different than the posture of *Morrow*, a case in which the absence of formal entry of judgment did not prevent this Court from holding the order to be immediately appealable. *See Morrow*, 412 S.C. at 539, 773 S.E.2d at 146 (noting that the critical factor giving rise to immediate appealability was that the trial court's so-called bifurcation order "*effectively* grants the Fundamental Entities *potential* summary judgment" on untried claims) (emphasis added). Respondents have failed to distinguish the order in the instant proceeding from the one held to be immediately appealable in *Morrow*. The Court of Appeals erred by ruling otherwise, and certiorari is warranted to correct the deviation from this Court's precedent.

II. The "bifurcation" order deprives the Wellin Children of the right to be the architects of their case and is thus immediately appealable.

The Wellin Children's Petition explained how the so-called bifurcation order in the instant proceeding deprived them of the substantive right to be the architects of their case and is therefore immediately appealable. Respondents' arguments to the contrary fail to prove otherwise.

For example, Wendy, in her individual capacity, merely repeats her newfound and inconsistent position that the outcome of the truncated trial on the validity issues will have no effect on the Wellin Children's untried claims against Wendy, except potentially to bolster the Wellin Children's claims in the event they lose the first phase of trial. *See* Return of Wendy C.H. Wellin Individually at 12–13. As explained above, however, her argument is belied by the text of the trial court's "bifurcation" order and by her own past arguments. The remainder of her argument relies on extra-Record evidence, *id.* at 13, that, as also explained above, should be disregarded and which, in any event, is

unpersuasive. Specifically, she argues that the trial court's order in *Morrow* explicitly limited the evidence to be admitted in the first phase of trial, while the trial court's order in the instant proceeding does not explicitly exclude evidence. But this Court did not find the order in *Morrow* to be immediately appealable because it excluded certain evidence from the first phase of trial. Thus, this supposed distinction between the order in *Morrow* and the order in the instant proceeding is irrelevant.

Wendy's arguments in her capacity as Special Administrator of the Estate fare no better. She argues first that the analogous cases upon which the Wellin Children rely are merely analogous, rather than identical to the situation presented here. *See* Return of Wendy C.H. Wellin as Special Administrator at 8. Her argument misses the point. No one disputes that *Hagood* and *Neeltec* are not precisely identical to the case at bar. The point is that Judge Addy's wholesale and arbitrary exclusion of claims—exclusions that likely will have subsequent preclusive effects—are as bad or worse than the rulings in *Hagood* and *Neeltec* found to be immediately appealable.

Hamilton College hints at an additional argument in the "Introduction" section of its return, but fails to expound on it in the subsequent "Argument" section. Specifically, Hamilton argues that because it is a beneficiary but is uninterested in the tort and contract claims between the Wellin Children and Wendy, it will be more convenient for Hamilton and other beneficiaries to try the validity issues separately from the tort and contract counterclaims. *See* Return of Hamilton College at 2. But even if the "bifurcation" of trial will be more convenient for Hamilton, that fact is irrelevant to the legal analysis of whether the Wellin Children have been deprived of a substantial right such that the bifurcation order is both immediately appealable and reversible. Accordingly, Hamilton's argument—which, in any event, is never fully articulated and lacks any supporting authority—should be disregarded.

III. The "bifurcation" order infringes on the Wellin Children's right to a meaningful jury trial.

The Wellin Children's Petition explained how the so-called bifurcation order in the instant proceeding infringed on their right to the mode of trial they are entitled to by preventing them

from conducting a meaningful and substantive jury trial and/or by pressuring them into "voluntarily" relinquishing that right. Respondents' arguments to the contrary fail to rebut the Wellin Children's argument.

Wendy argues that because the trial court's "bifurcation" ruling contemplates holding a railroaded jury trial, the order did not abridge the Wellin Children's right to a jury trial. *See* Return of Wendy C.H. Wellin Individually at 14. Her formalistic and mechanical argument, however, fails to explain away the *effect* of the trial court's ruling, which is to impose an arbitrarily-selected time limit that even *the Estate's* counsel has estimated to be grossly inadequate to allow for a full, fair, and meaningful jury trial. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011) (noting that "an appellate court should look to the *effect* of an interlocutory order to determine its appealability") (emphasis added); Hearing Tr. at 4:13 to 5:7 (July 20, 2016) (App. 171–72) (the Estate's counsel 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").

Wendy next argues that the Wellin Children's mode-of-trial argument is not ripe because the trial court has not yet ruled on a Motion for Reconsideration in which the two-week time limit was mentioned. *See* Return of Wendy C.H. Wellin Individually at 15. But Judge Addy's various rulings and course of conduct make plain that he has denied the Wellin Children's repeated requests to hold a hearing to determine an adequate length of trial. For example, before postponing the June 2019 trial mere days before it was set to begin, Judge Addy had declined to consider what length the trial actually needed to be. Further, he has expressly declared he will not be conducting any trial in excess of two weeks. *See* Hearing Tr. at 12:14–19 and 31:9 to 32:6 (Aug. 22, 2018) (App. 112–14). Indeed, subsequent to the Wellin Children's filing of their Motion for Reconsideration, Judge Addy informed the parties he still intends to limit the trial to two weeks in February 2020. The trial court's repeated statements and rulings render the issue ripe for this Court's review. The Wellin Children, who filed their Motion for Reconsideration out of an

abundance of caution, should not now be held hostage by the fact that the trial court has chosen to delay more than five months before considering the motion.[10]

Finally, Wendy defends the trial court's imposition of a two-week limit on the trial as an exercise of discretion to which this Court should extend deference. *See* Return of Wendy C.H. Wellin Individually at 16; Return of Wendy C.H. Wellin as Special Administrator at 10. Yet again, her argument misses the point. No one disputes that trial management and docket management are a matter generally vested in the trial court's discretion. The point, however, is that the imposition of an arbitrary time limit, chosen without basis and over the objections of a party for the express purpose of attempting to force a settlement, is an abuse of that discretion that effects a deprivation of the substantial right to a meaningful jury trial, meaning the ruling is both immediately appealable and is not entitled to deference from the appellate court. This Court would not (as Wendy claims) be required to itself determine how much time is needed for the trial in this suit, nor would it be required to rule that every litigant is entitled to as much time as he wants. *See* Return of Wendy C.H. Wellin Individually at 16. Rather, this Court need only make the unremarkable pronouncement that before a trial court schedules a trial, it must have some actual knowledge of the volume of evidence and of the time frame the parties anticipate or request, and must have some informed and reasonable basis upon which to exercise its discretion to set or limit the duration of the trial.

IV. The "bifurcation" order effectively struck a portion of a pleading.

The Wellin Children's Petition explained how the effect of the so-called bifurcation order in the instant proceeding was to strike a portion of their pleading. Only one Respondent even attempts to counter this argument. *See* Return of Wendy C.H. Wellin Individually at 17. Her short and conclusory argument, however, is unpersuasive. Specifically, she argues that "[n]ot one single word in the Bifurcation Order pretermits, or has the effect of pretermitting, the second phase of

[10] The Motion was filed on July 10, 2019 (*see* App. 476) and will not be heard until December 17, 2019 (*see* Return of Wendy C.H. Wellin Individually at 4), meaning the Motion will be ruled upon—at the earliest—a mere six weeks before trial is set to commence.

trial from proceeding in state court after the Validity Issues have been resolved . . . ." *Id.* But that is *exactly* what the "bifurcation" order does by failing even to mention a second phase of trial and, instead, ignoring, overlooking, and leaving it undone.[11] Further, both the order and the past statements of Respondents' counsel indicate this omission was likely a calculated one, since both the trial court and Respondents believe the truncated trial on severed issues will be dispositive of at least some untried claims between the parties. By potentially preventing a fact finder from ever considering the Wellin Children's counterclaims and thus potentially preventing those claims from ever being litigated on the merits, the trial court's "bifurcation" order effectively struck a portion of the Wellin Children's pleading.

V. The Court of Appeals' failure to enforce or impose a stay warrants review and correction.

The Wellin Children's Petition explained how 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. Respondents' arguments to the contrary are unavailing.

As an initial matter, Wendy's arguments (both in her individual capacity and her capacity as Special Administrator of the Estate) contain a number of misapprehensions and inaccurate representations. *See generally* note 4, *supra*, and accompanying text. In addition, she criticizes the Wellin Children for filing an emergency petition when there was no "emergency at the time the Court of Appeals' opinion was issued because trial had been continued." Return of Wendy C.H. Wellin Individually at 17. Her argument is too clever by half. As explained in the Wellin Children's cert petition, at the time the Wellin Children sought an emergency stay from the Court of Appeals, the trial date had been abruptly announced and was set to begin in a matter of days. The circumstances at that time were quite exigent. The trial court's subsequent announcement that

[11] *See* Black's Law Dictionary (11th ed. 2019) (defining "pretermit" as "1. To ignore or disregard purposely" or "2. To neglect, overlook, or omit accidentally; esp., to fail to include through inadvertence"); *see also* The Merriam-Webster.com Dictionary, available at https://www.merriam-webster.com/dictionary/pretermit (defining "pretermit" as "(1) to leave undone," "(2) to let pass without mention or notice," or "(3) to suspend indefinitely").

the trial would be continued was made by an email made mere minutes before the Court of Appeals emailed counsel to announce its ruling denying the Petition for a Writ of Supersedeas.

Wendy further argues that the issue of a stay "should be moot since the Wellin Children successfully pushed the trial date out by at least six months." Return of Wendy C.H. Wellin as Special Administrator at 11.[12] Her argument misses the point and misapplies the doctrine of mootness. As to the former, the delay of trial is inconsequential to the question of whether the Court of Appeals erred by permitting the trial court to proceed with trial before the issuance of a remittitur. Regardless of whether the trial is held in June 2019 or February 2020, no trial should occur while an appeal is pending. As to Wendy's argument that the issue is moot, the trial court still intends to hold the truncated trial regardless of whether the Wellin Children's appeal is still pending. The issue is very much alive.

The remainder of Respondents' arguments mirror and incorporate those found in their Return to the Wellin Children's Petition for a Writ of Supersedeas. Because the Wellin Children have already responded to those arguments, they will not repeat them here, but rather incorporate by reference the arguments found in their Petition for a Writ of Supersedeas (filed October 17, 2019) and their Reply in support of the same (filed November 4, 2019).

CONCLUSION

For the foregoing reasons as well as those asserted in their Petition for a Writ of Certiorari, Petitioners respectfully request this Court grant the Petition and review the Court of Appeals' rulings.

[*SIGNATURE PAGE ATTACHED*]

[12] To be clear, the trial date was moved six months from when it was originally scheduled—*i.e.*, from June 2019 to February 2020—not six months from the date of Respondents' Returns.

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November 25, 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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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/b 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):

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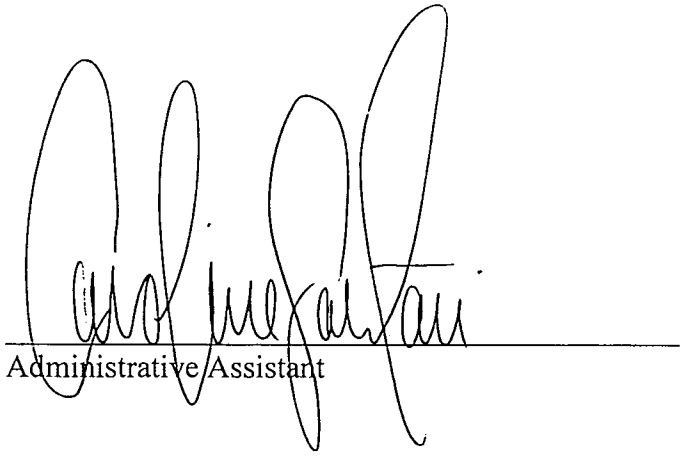

Administrative Assistant

November 25, 2019