

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

S.C. SUPREME COURT

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

Wendy C.H. Wellin,

Respondent,

v.

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

Appellants/Petitioners,

v.

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

Respondents.

In the Matter of: Keith S. Wellin

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## INTRODUCTION

The Petition for Writ of Certiorari in this matter should be denied. None of the factors in Rule 242(b), SCACR exist to justify the issuance of the writ. There is no Court of Appeals dissent, no constitutional issue, no federal question, no novel question of law, and no other “special and important” reason that warrants certiorari. Further, the Court of Appeals’ opinion does not conflict with precedent. The Court of Appeals correctly refused to transform a 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/Petitioners Peter Wellin, Cynthia W. Plum and Marjorie W. King (hereinafter collectively the “Wellin Children”) must await final judgment before seeking appellate review.

The need for circuit court finality before appeal is all the more apparent here, where the Wellin Children’s campaign for premature review of an interlocutory decision has been – and continues to be – plagued by mootness and ripeness deficiencies. Even as the Wellin Children were staunchly proclaiming to the Court of Appeals that the “automatic appellate stay” prohibited the circuit court from taking any further action, *see* Verified Petition for Writ of Supersedeas (June 7, 2019) (App. 177-78), the Wellin Children were requesting and obtaining from the circuit court a trial continuance in their favor, *see* Motion for Continuance (June 10,

2019)(App. 244-53) *and* Email from Judge Addy continuing trial (June 13, 2019)(App. 407).<sup>1</sup>

By reversing the procedure outlined in Rule 241, SCACR, which requires that a stay be requested and ruled upon by the circuit court first, the Wellin Children unnecessarily involved the Court of Appeals and mooted their own “emergency” petition for writ of supersedeas.

The Wellin Children continue their improperly-simultaneous pursuit of circuit court rulings and appellate review to this day, as they have asked this Court to grant certiorari to review issues **they admit the circuit court has yet to rule upon**, including whether the circuit court:

- “[will] continue the trial for the additional reason that the Court should not determine the length of trial without first considering the anticipated number of witnesses, their anticipated length of testimony, and other factors affecting the expected length of trial”;
- “[will] continue the trial on the basis that the Wellin Children's appeal of this Court's Order entered on May 15, 2019, automatically stayed any trial in this action—and deprived this Court of jurisdiction to hold a trial in this action unless and until the Court of Appeals or South Carolina Supreme Court remits this matter to this Court, which has not yet occurred”; and/or
- “[will] continue[ this matter] until after the South Carolina Court of Appeals and, if necessary, the South Carolina Supreme Court, rules on the Wellin Children's Petition for a Writ of Supersedeas.”

*See* Wellin Children’s Motion to Reconsider (July 10, 2019)(App. 476-78)(admitting that the circuit court “did not rule upon” the aforementioned issues when it “continue[d] the matter

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<sup>1</sup> The Wellin Children sought a stay from the Court of Appeals in their Verified Petition for a Writ of Supersedeas (App. 177-86), and three days later sought a stay from the circuit court in their Motion for Continuance (App. 244-53).

beyond the term of Court in June 2019”).<sup>2</sup> The Wellin Children’s Motion to Reconsider remains pending, and the circuit court is not scheduled to hear oral argument thereon until December 17, 2019.

This appeal not only seeks impermissible interlocutory review, but it seeks impermissible interlocutory review of issues that the circuit court has yet to even rule upon (or, in the case of the request for continuance, has decided in the Wellin Children’s favor). These procedural deficiencies further bolster the Court of Appeals’ decision to dismiss this interlocutory appeal and to deny the Wellin Children’s “emergency” supersedeas petition. Certiorari is not warranted.

### ARGUMENT

The South Carolina Appellate Court Rules provide that a “writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR; *see also State v. Lyles*, 381S.C. 442, 443, 673 S.E.2d 811, 812 (2009) (“The Court has held it will grant certiorari to the Court of Appeals only where special reasons justify the exercise of that power.”) (citations omitted). Typically, the granting of certiorari is limited to cases where: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision by the Court of Appeals is in conflict with a prior decision of this Court; (4) substantial constitutional issues are directly involved; or (5) a federal question is included, and the decision by the Court of Appeals conflicts with a decision of the Supreme Court of the United States. *See* Rule 242(b), SCACR; *see also Lyles*, 381 S.C. at 444 n.2, 673 S.E.2d at 812 n.2. As explained below, the Court of Appeals’

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<sup>2</sup> The Wellin Children’s July 10, 2019 Motion to Reconsider is included in the Appendix only because Respondents attached it to their Return to the Wellin Children’s Petition for Rehearing and Rehearing *En Banc*. The Wellin Children did not include the Motion to Reconsider as an independent document in their Appendix, nor do they mention it in their Statement of the Case.

ruling presents none of these factors, is consistent with longstanding precedent regarding immediately appealable orders, and the Wellin Children have not pointed to any other “special and important” reason that would warrant a review of the Court of Appeals’ decision.

**I. The Court Of Appeals’ Dismissal Order Is Consistent With Well-Settled Law Regarding What Constitutes An Immediately Appealable Order Under Section 14-3-330 Of The South Carolina Code.**

The Court of Appeals’ opinion narrowly construing S.C. Code § 14-3-330’s grant of immediate appealability presents no basis upon which to grant certiorari. It presents no novel issue, no dissenting opinion, no conflict with prior law, no constitutional or federal question, and no other “special and important” reason that warrants certiorari. Rather, it simply reiterates the well-established rule of this Court that bifurcation orders are not immediately appealable and finds *Morrow* distinguishable.

Before addressing what the Wellin Children couch as “multiple independent reasons” why the “Court of Appeals err[ed] and diverge[d] from this Court’s precedent,” *see* Petition, p. 1 (Questions Presented for Review, No. 1(a)-(d)), it is important to debunk their claim that the brevity of the Court of Appeals’ opinion indicates a “fail[ure] even to acknowledge or analyze” two of the Wellin Children’s arguments. *See* Petition, p. 2 (Questions Presented for Review, Nos. 1(c), (d)). Through every stage of this appeal, the Wellin Children have made it consistently and abundantly clear that *Morrow* is their sole justification for immediately appealing this interlocutory order. *See, e.g.*, Notice of Appeal, p. 2, n.2 (May 16, 2019)(App. 2)(citing *Morrow*<sup>3</sup>); Petition for Rehearing and Suggestion for Rehearing En Banc, p. 2 (June 28, 2019)(App. 420)(“The Panel’s dismissal of this appeal overlooked or misapprehended the facts,

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<sup>3</sup> The Notice cited *Morrow* as its only supporting case law with the accompanying parenthetical “holding order granting motion to bifurcate was immediately appealable because it affected a substantial right of appellant.” (*Id.* (also citing generally to S.C. Code Ann. § 14-3-330)).

issues, and relevant procedural posture of this case and the way in which this case parallels the situation presented in *Morrow*.”). Although the Petition now has fractured their challenge to the Bifurcation Order into four subparts – that it “effectively grant[ed] potential judgment on untried claims,” “den[ied] them the ability to be the architects of their case,” “den[ied] them a meaningful and substantive jury trial,” and “struck out a portion of their pleadings,” Petition pp. 1-2 – these are just different ways of saying the same thing: the Wellin Children believe the Bifurcation Order pretermits a jury trial on their tort-based claims against Respondent Wendy C. H. Wellin (“Mrs. Wellin”) and therefore is immediately appealable under the authority of *Morrow*. The Court of Appeals’ opinion unequivocally (and properly) rejected this argument:

This case is distinguishable from *Morrow* as the underlying bifurcation order in this case does not state or even suggest that the first phase of the bifurcated trial will be dispositive of any claim tried in the second phase of trial, and the order contains no language restricting the evidence Appellants are entitled to present in either phase.

*See* Dismissal Order, p. 2 (June 13, 2019)(App. 417).

The Court of Appeals properly rejected the Wellin Children’s invitation 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. The Wellin Children’s continued reliance on the voluminous exhibits attached to their appellate filings – from which they have plucked arguments and phrases out of context to create the illusion they are being deprived of the right to a jury trial on their tort claims, *see, e.g.*, Petition, pp. 15-16, 19 – reveals the extent to which they have distorted the plain language of the Bifurcation Order.

In fact there is nothing about the plain language of the Bifurcation Order that renders it immediately appealable like the order in *Morrow*. The Bifurcation Order ruled on a motion filed by the Estate of Keith S. Wellin seeking 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").

The nature of the Wellin Children's claims in state court provides context for why it is judicially efficient for the circuit court to try the Validity Issues in a first phase of trial. Their claims are two-fold: (1) in 2014, in response to Mrs. Wellin's initiation of formal probate, the Wellin Children initially brought a will contest 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 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 one of the cases pending in federal court. Given that this case originated as a probate proceeding following the death of Keith Wellin (the Wellin Children's father and Mrs. Wellin's husband), it should come as no surprise that the circuit court sitting in probate would want to bifurcate trial to prioritize determinations of matters the federal court

cannot resolve, which are included in the Validity Issues. Against that backdrop, the Wellin Children's fractured argument fails no matter how parsed or phrased.

**a. The Bifurcation Order did not grant "potential summary judgment."**

The Court of Appeals correctly observed that the Bifurcation 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. Dismissal Order, p. 2 (App. 417). Although the Wellin Children claim otherwise, they have distorted and omitted critical language in the Bifurcation Order to accomplish this goal. Once their tenuous scaffolding of support is exposed, the Wellin Children's argument crumbles.

First, the Wellin Children distort the plain language of the Bifurcation Order to claim that it "**expressly contemplates and intends that the outcome of a jury trial [in the first phase] . . . may be dispositive of the Wellin Children's claims against Wendy.**" Petition, p. 13 (emphasis added). The only thing the Bifurcation Order expressly states is that "resolution of these [Validity] issues will likely result in resolution of much of the **federal litigation.**" Bifurcation Order, p. 4 (App. 10)(emphasis added).<sup>4</sup> This is a critical distinction. The "federal litigation" is comprised of numerous cases pending in the District of South Carolina before the Honorable David C. Norton, and only one of those federal cases includes duplicates of their tort-based counterclaims pending against Mrs. Wellin in this case.<sup>5</sup> The Bifurcation Order expressly states

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<sup>4</sup> In another portion of the Petition, the Wellin Children accuse the circuit court of "stat[ing] this severed, truncated trial will likely dispose of at least some of the Wellin Children's claims," even as they cite to the "federal litigation" language of the Bifurcation Order that contradicts their very characterization. Petition, p. 9 (citing Order, p. 4 (App. 164)(emphasis added)).

<sup>5</sup> The closest the Wellin Children come to acknowledging this distinction is their footnote observation that "there are numerous other issues in the federal litigation which are not also in the state case." Petition, p. 14, n.9. There is no truth to their conspiracy theory that "resolving the federal litigation" is just "a synonym for deciding the remaining claims against Wendy." *Id.*

that “[t]his jurist recently consulted with Judge Norton . . . [and b]oth courts agree that the actions pending in state court should be tried prior to the federal action in order to promote judicial economy.” Bifurcation Order, p. 3 (App. 9). Although the Wellin Children may disagree with the priority for trial as determined by the state and federal judges presiding over their claims, this does not transform the Bifurcation Order into “expressly” preventing the Wellin Children from ever trying their tort-based claims in state court, as they represent it does.

This agreed-upon trial priority is well-founded given that the state circuit court must fulfill the exclusive jurisdiction granted to it by the General Assembly to decide competing petitions for formal testacy – matters which could not ever be resolved in the comprehensive federal action even though the Wellin Children are pursuing the same tort claims in that forum. In fact, the Bifurcation Order specifically points to the state court’s exclusive jurisdiction as the very reason why trial of the Validity Issues may resolve some of the federal litigation: “This Court finds that bifurcation of the issues will promote convenience, efficiency, and economy **in that these issues can only be decided in state court** and resolution of these issues will likely result in resolution of much of the federal litigation.” Bifurcation Order, p. 4 (App 10)(emphasis added).

**Not once** in the Petition’s 24 pages – although it cites the Bifurcation Order over 30 times – do the Wellin Children acknowledge, quote, or discuss the portion of the Bifurcation Order that emphasizes many of “these issues can only be decided in state court” within its exclusive probate jurisdiction. This is more than just a convenient omission from the Wellin Children’s Petition, because this exclusive jurisdiction factor was a driving force in the circuit court’s decision to bifurcate to “promote[s] convenience, efficiency, and economy” in both the

federal and state litigation by ensuring that the state court's exclusive jurisdiction determinations are made in the first phase of trial.<sup>6</sup>

To understand the Bifurcation Order, it must be understood that this is a case in which the state court can **and must** exercise its exclusive jurisdiction to determine matters of probate at some point in this litigation. The state court has in its discretion decided those determinations should be prioritized in a first-phase trial of the Validity Issues. This cannot be compared to *Morrow*'s determination that the corporate liability claims "are dependent upon a jury first determining that Nursing Home was negligent" such that "without proving professional negligence, Plaintiffs simply cannot recover [against the corporate defendants]." See Order Granting Motion to Bifurcate and Motion to Stay Discovery, p. 6 (also designated p. 309 of the *Morrow* Appendix)(March 4, 2011), *Morrow v. Fundamental Long-Term Care Holdings, LLC*, Case No. 2007-CP-42-4601, pertinent pages attached hereto as **Exhibit A**.<sup>7</sup>

Nor is it a punishment inflicted on the Wellin Children or a deprivation of substantial right if the first trial phase of the Validity Issues ultimately "defines" or "narrows" the issues for

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<sup>6</sup> Of course, how much of the federal litigation is resolved after that exercise of exclusive jurisdiction is ultimately a decision for Judge Norton, not the state court. It is important to bear all of this in mind when reading the arguments of counsel quoted in the Petition, because there is no merit to the Wellin Children's suggestion that these statements are proof that the circuit court is surreptitiously planning to never hold a second phase of trial on the tort claims. See Petition, p. 15-16. There is an inevitable need for the jury first to decide which documents control. Whether the jury hears these matters separately, or lumped together in one trial with various standards of proof, is a procedural matter for the circuit court to decide; it is not an immediately appealable abridgment of a litigant's right to a trial by jury.

<sup>7</sup> Although the Wellin Children's Appendix included snippets from the oral argument in *Morrow*, (App. 165-68), it failed to include the underlying order in *Morrow*. This omission is perhaps not surprising given that the *Morrow* order uses definitive language found nowhere in the Bifurcation Order. Given the 25-page limit applicable to this Return, only pertinent pages from the *Morrow* order are attached hereto. The full order can be accessed online via the C-Track Case Management System, as it was filed in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, Supreme Court Case Number 2012-212871, as pages 304-319 of the Appendix.

the jury to consider in the second phase of trial. Regardless of whether the trial is bifurcated or not, narrowing **will occur** due to the two-fold nature of the claims the Wellin Children have brought. This is because whether in two phases or in one, the jury **must determine first** which estate planning documents govern, fixing the amount the Wellin Children stand to inherit from their father's estate, before the Wellin Children can even attempt to define for the jury the amount of inheritance they allegedly lost as a result of the tortious actions of which they complain. This is not the same as preventing claims from being tried at all. The Estate moved to bifurcate not because it would pretermite the Wellin Children's tort-based claims against Mrs. Wellin individually from being heard by a jury, but because the Validity Issues undergird and define many – if not most – of the major allegations in this litigation. The Wellin Children may disfavor bifurcation of the Validity Issues from their tort-based claims because it prevents them from confusing a jury with similar arguments that relate to completely different causes of action with different standards of proof,<sup>8</sup> but this does not transform the Bifurcation Order into an immediately appealable ruling.

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<sup>8</sup> The Wellin Children's appellate filings continue to emphasize that the evidence relevant to their tort-based claims against Mrs. Wellin may overlap in some instances with evidence relevant to the Validity Issues. Petition pp. 17-18. The **issues**, however, remain distinct, such that bifurcation "helps clarify and simply" them. *Durham v. Vinson*, 360 S.C. 639, 645, 602 S.E.2d 760, 763 (2004). This distinction exists not only in the standards of proof for the tort-based claims and the Validity Issues (a distinction the Wellin Children now admit, *see* Petition at 14), but also in the causation standards and even as to the defendants from whom recovery is sought. For example, if the Wellin Children are unable to prevail in the Validity Issues trial, yet they prevail in the trial of their tort-based claims, they may recover from Mrs. Wellin individually but could not recover from the Estate. Likewise, if they prevail as to the Validity Issues but lose on their tort-based claims, they could recover from the Estate but cannot recover from Mrs. Wellin individually. In *Morrow*, the same claim was made against different parties, and the circuit court found that failure to prevail against one party pretermits proceeding with the same claim against the other party. In this case, the Wellin Children have made completely different claims against different defendants and the circuit court decided (1) to bifurcate the tort-based claims from the

The Wellin Children's omission of the Bifurcation Order's exclusive jurisdiction factor and distortion of the "federal litigation" language used by the circuit court wholly undermine their crusade to equate the Bifurcation Order with the order in *Morrow*.

**b. The Bifurcation Order did not deprive the Wellin Children of being architects of their case.**

The Wellin Children remain architects of their claims even in a bifurcated trial. The nature of the bifurcation in this case, which permits the jury to decide which estate planning documents are the operative documents before proceeding with any tort claims concerning those documents, could not be more different than the scenario present in *Morrow*. Because the order in *Morrow* clearly stated that plaintiff could not proceed with the second phase of trial if it failed to prevail in the first, it is not at all surprising that counsel for defendants in that case refused to "stipulate that even with the plaintiff losing in the, quote, first trial-, you would stipulate they have an absolute right then to pursue the claims against the corporate defendants?" Oral Arg. Tr., at 19:25-20:6 (January 13, 2015)(App. 167:25-168:6)(question posed by Kittredge, J). The order in *Morrow* spoke to this stipulation directly by finding the corporate claims were dependent on a successful first phase.

In this case, a stipulation similar to that sought in *Morrow* would make no sense even though the Wellin Children condemn Respondents and accuse them of "refus[ing to so] stipulate." Petition, p. 15. This is because there is no direct correlation between the outcome of the first Validity Issues phase and the success of the second tort claims phase as there was in *Morrow*. Here, if the Wellin Children lose the first phase of Validity Issues trial, i.e., fail to convince a jury to invalidate their father's most recent estate planning documents, then it is

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Validity Issues; and (2) to try the latter first because the Validity Issues will resolve those matters over which the probate court has exclusive jurisdiction.

conceivable they will receive a less-favorable inheritance and actually use that **to bolster** their tort claims in the second phase of trial (most notably, to increase the lost inheritance damages claimed from Mrs. Wellin). Unlike *Morrow*, there is no predetermined outcome if the Wellin Children lose the first phase of trial in this case; in fact, a loss in phase one may inure to their benefit in phase two.

Moreover, it is quite significant that the Bifurcation Order does not – as the *Morrow* order did – predetermine that certain evidence should be excluded from the first phase of trial. The circuit court in *Morrow* not only restricted the scope of admissible evidence by determining “the evidence presented in the negligence action . . . [is] wholly separate and distinct from what Plaintiff must prove to establish corporate liability against the remaining defendants,” **Ex. A, *Morrow* Order**, p. 6 (also designated p. 309 of the *Morrow* Appendix), it prevented altogether any additional discovery concerning corporate liability unless the plaintiff prevailed in the first phase of trial. **Ex. A, *Morrow* Order**, p. 16 (also designated p. 319 of the *Morrow* Appendix). The Bifurcation Order has the opposite effect: “[T]he Wellin children will be entitled to present all evidence concerning the prior estate plan, the circumstances surrounding its formulation and execution, plan, and the jury will ultimately decide which estate plan and/or revocable trust controls.” Bifurcation Order, p. 4 (App. 10). The Wellin Children do not acknowledge that the Bifurcation Order diverges from *Morrow* on this important issue of scope of admissible evidence. Rather, they appear to claim that the Bifurcation Order’s lack of predetermined evidentiary exclusions is somehow **to their detriment** – forcing them to make a “Hobson’s Choice” concerning what evidence to introduce. Petition, pp. 17-18. The Wellin Children cite no authority for their suggestion that they can immediately appeal an order simply because it

provides “pervasive” choices about whether to seek admission “as to each piece of evidence,” Petition p. 17, nor can they find any support for this argument in *Morrow*.

**c. The Bifurcation Order did not adversely affect a mode of trial to which the Wellin Children are entitled.**

The Bifurcation Order did not, as the Wellin Children claim, attempt to “strong-arm” them into “‘voluntarily’ relinquishing” their right to a meaningful and substantive jury trial. Petition, pp. 18-19. The plain language of the Bifurcation Order expressly orders a jury trial, which is the only factor relevant to the only question before the Court: Can the Wellin Children **immediately** appeal the Bifurcation Order? As the Court of Appeals’ opinion noted, the Wellin Children are free to appeal these issues after trial, *see* Dismissal Order, p. 2 n.2 (App. 2), but South Carolina law has limited the scope of immediately appealable “mode of trial” orders to those that abridge the appellants’ constitutional right to trial by jury. *Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008). “That analysis [of whether a constitutional right to a jury trial was abridged] proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case.” *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72-73, 533 S.E.2d 331, 333-34 (2000). Here, as in *Flagstar*, “no party is denied the right to a trial by jury” because the Bifurcation Order specifically orders a jury trial. *Id.*

Moreover, after trial, . . . [the Wellin Children] will be free to advance on appeal that the trial judge abused his discretion in ordering bifurcation and that [they] ha[ve] thereby been effectively deprived of a fair and/or fully informed fact finder. An abuse of discretion, if any, by the trial court in its ruling can be corrected at that time. *See Breland v. Love Chevrolet*, 339 S.C. 89, 529 S.E.2d 11, 2000 S.C. LEXIS 54 (S.C. Sup. Ct. 2000) (immediate appeals under § 14-3-330(2) are permitted only where the alleged error cannot be corrected by a new trial). To hold

otherwise would require this Court to, inter alia, predetermine the admissibility of evidence in advance of trial, to pass upon matters of pretrial discovery and to engage in “piecemeal litigation” . . . . In short, trial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right. Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence.

*Id.*

Despite having been afforded a jury trial by the plain language of the Bifurcation Order, the Wellin Children nevertheless sought immediate appeal because they believe “[t]he arbitrarily chosen two-week limitation [of trial] is grossly inadequate” and not based on “any meaningful basis upon which to determine the length needed for a trial of the party’s claims.” Petition, p. 19. This argument fails procedurally in the first instance because it is not ripe: The Wellin Children have admitted the circuit court has yet to rule upon it. As previously noted, after the Wellin Children filed their Petition for Rehearing in the Court of Appeals, they filed a Motion to Reconsider in the circuit court specifically requesting a ruling on an argument they claim the Court of Appeals overlooked or misapprehended – “that the Court should not determine the length of trial without first considering the anticipated number of witnesses, their anticipated length of testimony, and other factors affecting the expected length of trial.” *Compare* Reconsideration Motion, p. 3 (App. 478) *with* Rehearing Petition, p. 8 (App. 426). Quite significantly, the Wellin Children requested reconsideration on the two-week trial length because the circuit court previously “**did not rule upon**” this argument. Reconsideration Motion, p. 3 (App. 478) (emphasis added). Even if the two-week trial length was an immediately appealable issue (which it is not as outlined below), the Wellin Children tacitly admit this issue is not ripe for appellate consideration because the circuit court has yet to rule upon their argument.

In the final analysis, S.C. Code § 14-3-330 does not authorize immediate appeal of an order limiting the duration of a first phase of trial when no evidence has been restricted, a jury has been afforded, and there is no limitation on the length of the second phase. The Wellin Children ask this Court to ignore the circuit court's discretion and responsibility "to secure the just, speedy, and inexpensive determination of every action," Rule 1, SCRPC and instead to find that an order allotting a two-week jury trial (for the singular purpose of determining the validity of certain documents) is tantamount to depriving the Wellin Children of their right to a jury trial. Expanding the reach of immediately appealable orders to include orders regarding the length of trial and other procedural matters soundly within the trial judge's discretion would grossly distort the scope of the "mode of trial" exception. First, it would require this Court to definitively conclude – even before the first piece of evidence has been admitted in the circuit court and without any record on appeal outlining the evidence necessary for proof – that: (1) a two-week trial would **never** be sufficient for the Wellin Children to present their relevant evidence and have the Validity Issues heard by the jury; and (2) as a general rule, when a litigant may not have time to present all of the evidence he desires at trial, it is tantamount to depriving the litigant of a jury trial altogether. Aside from the unsuitable predeterminations required to reach the conclusion advocated by the Wellin Children, allowing litigants to immediately appeal decisions regarding the duration of trial would irrevocably tie the hands of judges who are tasked with deciding how to stretch valuable judicial resources across overloaded case dockets. There is no deprivation of a substantial right here that warrants stripping circuit courts of the discretion needed to administer their dockets effectively.

**d. The Bifurcation Order did not strike a portion of a pleading.**

Finally, the Wellin Children perfunctorily accuse the circuit court of effectively striking a portion of their pleading, namely their counterclaims, to prevent a jury from ever considering them. *See* Petition pp. 21-22. Not one single word in the Bifurcation Order pretermits, or has the effect of pretermittng, the second phase of trial from proceeding in state court after the Validity Issues have been resolved (rather the question is **when** the parties' counterclaims would be tried). That is exactly what bifurcation of the issues means, and the Bifurcation Order did not need to describe the second phase of trial in detail for it to exist.

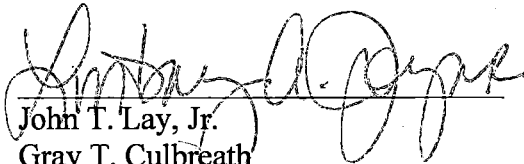
## **II. The Court of Appeals Did Not Err In Refusing To Grant The Procedurally-Deficient "Emergency" Petition For Writ of Supersedeas.**

The Wellin Children's final argument consists of their claim that the Court of Appeals should have granted their "emergency" Petition for Writ of Supersedeas – despite their failure to follow the supersedeas procedure outlined in Rule 241, SCACR, despite the Court of Appeals' agreement with the circuit court that the appeal was premature such that no automatic stay was triggered, and despite the lack of emergency at the time the Court of Appeals' opinion was issued because trial had been continued. Respondents' previously-filed Return to the Wellin Children's Petition for Writ of Supersedeas addresses in detail the Wellin Children's arguments in favor of a stay, and in the interest of judicial efficiency, those arguments are incorporated by reference as if fully set forth herein rather than repeated. As a general observation, the Wellin Children's duplicative requests for this Court not only to review the Court of Appeals' denial of supersedeas, **but also** to consider anew their third successive request for a stay in a separate Petition for Writ of Supersedeas, is yet another manipulation of the procedure required by Rule 241, SCACR. They cannot have it both ways, as Rule 241, SCACR provides for a process of review under these circumstances – not the right to file individual petitions in each successive court.

CONCLUSION

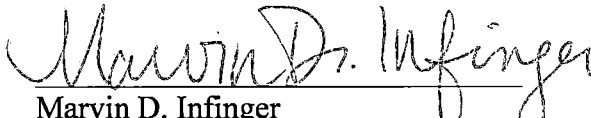
For the foregoing reasons, Respondents Wendy C.H. Wellin, Individually, Campbell Hart, and Heather Lane submit that the Court of Appeals' decision in this suit is consistent with precedent and presents none of the characteristics that justify a grant of certiorari.

Respectfully submitted,



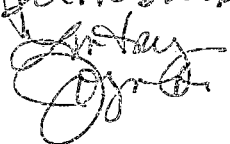
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*w/ express permission of Gray*



*Attorney for Heather Lane and Campbell Hart*

November 15, 2019

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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):

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Counsel Served:

<p><b><u>Attorneys for Appellants</u></b>  Robert H. Brunson, Esq.  Patrick Wooten, Esq.  Merritt G. Abney, Esq.  Nelson Mullins Riley &amp; Scarborough  P.O. Box 1806  Charleston, SC 29402</p>	<p><b><u>Attorneys for Wendy C.H. Wellin, as Special Administrator and Trustee for the Keith S. Wellin Florida Revocable Living Trust</u></b>  Robert H. Hood, Esq.  James B. Hood, Esq.  Molly H. Craig, Esq.  Virginia Rogers Floyd, Esq.  Hood Law Firm, LLC  172 Meeting Street  Charleston, SC 29402</p>
<p><b><u>Attorneys for F. Patricia Scarborough, Esq. and Edward G.R. Bennett, Esq.</u></b>  M. Dawes Cooke, Jr., Esq.  Barnwell Whaley Patterson &amp; Helms, LLC  PO Drawer H  Charleston, SC 29402</p>	<p><b><u>Attorneys for Hamilton College</u></b>  John Beach, Esq.  Lyndey Bryant, Esq.  Adams and Reese, LLP  1501 Main Street, 5<sup>th</sup> Floor  Columbia, SC 29201</p>
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November 15, 2019



# EXHIBIT A

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

SEVENTH JUDICIAL CIRCUIT

LAWRENCE E. MORROW AND  
EVELYN M. MORROW,

CASE NO. 2007-CP-42-4601

PLAINTIFFS,

vs.

FUNDAMENTAL LONG-TERM CARE  
HOLDINGS, LLC; FUNDAMENTAL  
CLINICAL CONSULTING, LLC;  
FUNDAMENTAL ADMINISTRATIVE  
SERVICES, LLC; THI OF BALTIMORE,  
INC.; THI OF SOUTH CAROLINA,  
LLC; THI OF BALTIMORE  
MANAGEMENT, LLC; THI OF SOUTH  
CAROLINA AT MAGNOLIA PLACE  
AT SPARTANBURG, LLC D/B/A  
MAGNOLIA PLACE AT  
SPARTANBURG,

DEFENDANTS.

## ORDER GRANTING MOTION TO BIFURCATE AND MOTION TO STAY DISCOVERY

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



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

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

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

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

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

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

### CONCLUSION

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

**NOW THEREFORE, IT IS**

**ORDERED** that:

- 1) Defendants' Motion to Bifurcate is **GRANTED**;
- 2) The Court will conduct separate jury trials on the issues of this case in the following

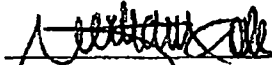
sequence:

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

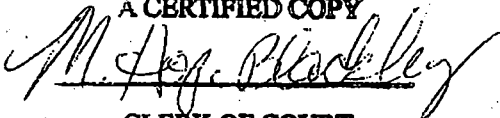
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- b. In a separate jury trial by a different jury empanelled at a subsequent date, and only if necessary, Plaintiffs claims for punitive damages against the remaining Defendants for their alleged conduct and liability for the actual and punitive damages awarded in the first trial against THI of South Carolina at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg (reserving for non-jury adjudication in the same proceeding any equitable claims not properly tried to a jury), and subject to any set-offs allowed by law;
- 3) Discovery is stayed pending the further order of this Court regarding all non-clinical issues, including but not limited to, all discovery requests that are irrelevant to or not likely to lead to admissible evidence directly related the clinical issues involving negligence/recklessness/proximate cause and damages asserted by Plaintiffs against THI of South Carolina at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg, its agents, servants and employees, or any defense raised by THI of South Carolina at Spartanburg, LLC d/b/a/ Magnolia Place at Spartanburg to such claims. Discovery hereby stayed pending the further order of this Court as to all issues of liability non-facility defendants including, but not limited to, discovery regarding corporate finances, structure, history, supply contracts, inter-corporate contracts, and non-entity corporate affairs.

**IT IS SO ORDERED.**

  
 Hon. J. Derham Cole  
 Circuit Court, Seventh Circuit

Spartanburg, South Carolina  
 Dated March 3, 2011

A CERTIFIED COPY  
  
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 BY [Signature] D.C.  
 DATED 3/7/11

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