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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2022-000784

In Re: IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton Barringer Luzak.....Appellant

vs.

Merrill B. Light, Merrill U. Barringer as Personal Representative of the Estate of Paul Brandon Barringer II, Merrill B. Light as trustee of the Paul B. Barringer II Revocable Trust dated December 4, 1998, and Merrill B. Light as Trustee of the Merrill Barringer Light Revocable TrustRespondents

--and--

Hampton B. LuzakAppellant

vs.

Merrill U. BarringerRespondent

**RESPONDENTS' RETURN TO APPELLANT'S
PETITION TO REINSTATE APPEAL**

Pursuant to Rule 240(e) of the South Carolina Rules of Appellate Procedure, Merrill Barringer, individually and as personal representative of the Estate of Paul Brandon Barringer, II, and Merrill B. Light, individually and as trustee of the Paul B. Barringer, II Revocable Trust dated December 4, 1998, and as trustee of the Merrill Barringer Light Revocable Trust (collectively, “Respondents”), submit this Return to the Petition to Reinstate Appeal, filed by Appellant Hampton B. Luzak (“Luzak”) on May 26, 2022 (the “Petition”).

On June 1, 2022, Luzak filed a Notice of Supplemental Appeal (the “Supplemental Appeal”), in which Luzak sought to supplement her Notice of Appeal filed on November 8, 2021 in Appellate Case No. 2021-001337. This Court assigned the Supplemental Appeal a separate case number (Case No. 2022-000784) and, on June 9, 2020, the Court issued an order dismissing the Supplemental Appeal “[b]ecause the appellant has failed to provide proof of timely service upon the respondents as required by Rule 203(b)(1) of the South Carolina Appellate Court Rules.” On June 10, 2022, Luzak filed the Petition, in which she argued that she timely served the Supplemental Appeal.

The Court should deny the Petition for two reasons. First, as this Court has already held, the Bifurcation Order that Luzak asks this Court to review in her Supplemental Appeal is not appealable until final judgment. Second, the Court correctly concluded that the Supplemental Appeal was untimely.

BACKGROUND¹

On October 23, 2020, Respondents filed a Joint Motion to Bifurcate Trial, pursuant to Rule 42, SCRCF, in which Respondents requested that the circuit court first conduct a narrow trial on

¹ A detailed discussion of the factual and procedural history of these consolidated cases is set forth in Respondents’ Brief, which is incorporated herein by reference. Respondents include here only a brief summary of the appellate history relevant to Luzak’s Petition.

two claims in which Luzak seeks to enforce a secret contract or promise that Mrs. Barringer allegedly made with Mr. Barringer never to exercise her power of appointment (the “Contract-Based Claims”), and subsequently try Luzak’s remaining causes of action. The circuit court granted the motion and entered the Bifurcation Order on December 30, 2020, and denied Luzak’s motion for reconsideration of the Bifurcation Order on January 14, 2021.

Luzak has attempted to appeal the Bifurcation Order in three separate appeals. Luzak commenced her first appeal of the Bifurcation Order on February 12, 2021. (Court of Appeals Case No. 2021-000159; Supreme Court Case No. 2021-001022, the “First Appeal”). This Court dismissed the First Appeal on May 4, 2021, because the Bifurcation Order was “not immediately appealable,” and subsequently denied Luzak’s petition for rehearing. (COA Case No. 2021-00159, 5/4/2021 Order.) Luzak filed a Petition for Writ of Certiorari, and the Supreme Court issued an Order on April 29, 2022, denying the petition because “the court of appeals correctly held that the circuit court’s bifurcation Order was not immediately appealable.” (SCSC Case No. 2021-001022, 4/29/2022 Order.)

Next, Luzak attempted to bootstrap an appeal of the Bifurcation Order to her appeal of subsequent orders issued by the circuit court.² (Appellate Case No. 2021-000837, the “Second

²On June 7, 2021, while the First Appeal was pending, the circuit court granted a motion by Coastal Forest Resources Company (“CFRC”) for intervention and for protective relief and dismissed some of Luzak’s tort-based claims, including her claim for civil conspiracy, that constituted shareholder derivative claims that would belong solely to CFRC, and not to Luzak, or to any individual shareholder of CFRC. In a separate Order dated July 6, 2021, the circuit court granted Defendant Merrill Light’s Motion for Summary Judgment as to the validity of the Will and First Amendment to the Paul B. Barringer, II, Revocable Trust, dated December 4, 1998, executed by Paul B. Barringer, II, on February 28, 2012. In that Order, the circuit court concluded that Luzak failed to establish a genuine issue of material fact as to her claims that Paul Barringer lacked testamentary capacity when he executed his February 28, 2012, testamentary documents, and as to her claims that these documents were the product of undue influence over Mr. Barringer and/or mistake.

Appeal”). On April 29, 2022, the same day on which the Supreme Court denied Luzak’s Petition for Writ of Certiorari in the First Appeal, the Supreme Court certified the Second Appeal pursuant to Rule 204(b), SCACR, and issued an Order that vacated a circuit court order granting summary judgment and dismissed the Second Appeal (the “Vacating Order”). On May 26, 2022, Respondents filed a petition for rehearing of the Vacating Order and Luzak filed a motion to alter or amend the Vacating Order, both of which remain pending.

Finally, in Appellate Case No. 2021-001337 (the “Third Appeal”), Luzak initially appealed only the circuit court Order dated August 20, 2021, granting Merrill Barringer summary judgment on the two Contract-Based Claims (the “Contract-Based Claims Order”) and the Order denying Luzak’s motion for reconsideration of the Contract-Based Claims Order issued on October 8, 2021. (11/8/2021 Notice of Appeal.) On May 31, 2022, however, Luzak filed a “Supplemental Notice of Appeal” in the Third Appeal in which she sought to supplement her Notice of Appeal filed on November 8, 2021, to state that she is appealing not only the Contract-Based Claims Order and the Order denying her motion for reconsideration, but also, for a third time, the Bifurcation Order. Luzak also filed a supplemental Initial Brief and Designation of Matter relating to her purported third appeal of the Bifurcation Order. On June 9, 2020, this Court dismissed the Supplemental Appeal as untimely.

ARGUMENT

I. The Petition should be denied because the Bifurcation Order is not appealable until final judgment.

This Court has already held that the Bifurcation Order is not immediately appealable, and the Supreme Court agreed. Luzak nevertheless argues that an appeal of the Bifurcation Order “can be heard as part this [Third Appeal] in accordance with S.C. Code Ann. § 14-3-330(a).” (5/31/2022

Supplemental Notice of Appeal, p. 2.) Section 14-3-330 contains no subsection (a). Presumably, Luzak means § 14-3-330(1), but that subsection does not support Luzak’s position either. Section 14-3-330(1) grants the appellate courts jurisdiction over “[a]ny intermediate judgment, order or decree in a law case involving the merits.” This Court has already held that the Bifurcation Order does not “involve the merits” and expressly stated that the Bifurcation Order “is not immediately appealable under section 14-3-330 of the South Carolina Code.” (COA Case No. 2021-00159, 5/4/2021 Order.) Thus, any appeal of the Bifurcation Order must await final judgment.³

Moreover, although the appellate courts have occasionally exercised discretion to review an order that is not immediately appealable in conjunction with a closely related order that is properly on appeal, the Supreme Court has held that appellate courts should exercise that discretion only where the former order is closely intertwined with the latter and where reviewing the former order will eliminate unnecessary litigation. *See, e.g., Morris v. Anderson Cnty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (holding that the Court “may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation”); *Brown v. County of Berkeley*, 366 S.C. 354, 362, 622 S.E.2d 533, 538 n.5 (2005) (refusing to accept appeal of interlocutory order denying motion to dismiss on the ground that it lacked sufficient nexus to or companionship with immediately appealable order denying plaintiff’s request for preliminary injunction); *Smith v. Tiffany*, 419 S.C. 548, 552, 799 S.E.2d 479, 481 n.1 (2017) (declining to review interlocutory discovery order along with appeal of properly appealable

³ Luzak argues that, unless the Supreme Court reverses its dismissal of the Second Appeal, this Third Appeal is Luzak’s “only opportunity” to obtain appellate review of the Bifurcation Order. (Supplemental Notice of Appeal, p. 2, n. 1.) But if the Third Appeal results in reversal of the circuit court’s order granting Mrs. Barringer summary judgment on the Contract-Based Claims, then Luzak can seek review of the Bifurcation Order after final judgment on all claims. If the appellate courts affirm summary judgment on the Contract-Based Claims, then the Bifurcation Order will become moot.

order because of an insufficient nexus between the orders). Here, the Bifurcation Order is not reviewable with the appeal of the Contract-Based Claims Order because the Bifurcation Order is not closely related to the Contract-Based Claims Order. The Bifurcation Order merely severed Luzak's causes of action for separate trials, while the Contract-Based Claims Order disposed of Luzak's Contract-Based Claims on the merits. Nor would review of the Bifurcation Order eliminate unnecessary litigation. Dismissal of the Contract-Based Claims presents no compelling reason for interlocutory review of the Bifurcation Order, which this Court already held is not appealable until final judgment.

II. The Petition should be denied because the Supplemental Appeal is untimely.

Rule 203(b)(1), SCACR, provides that a “notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.” A timely Rule 59(e), SCRCP, motion to alter or amend judgment stays the time for appeal until the appellant receives “written notice of entry of the order granting or denying such motion.” *Id.* The requirement of service of the notice of appeal within 30 days after receiving written notice of the entry of a final order or judgment is jurisdictional. *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008). “[I]f a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Id.* (quoting *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004)).

Luzak served the Supplemental Notice of Appeal on May 31, 2022, which was more than 30 days after she received written notice of the circuit court orders at issue in the Third Appeal and her Supplemental Appeal. The Bifurcation Order was entered December 30, 2020, and the circuit court's order denying Luzak's motion for reconsideration of the Bifurcation Order was entered on

January 14, 2021. The Contract-Based Claims Order was entered on August 20, 2021, and the Order denying Luzak’s motion for reconsideration of the Contract-Based Claims Order was issued on October 8, 2021. Luzak received written notice of the entry of these orders via the electronic filing system on the dates they were entered. No appellate court rule or other authority permits Luzak to “supplement” her timely appeal of the Contract-Based Claims Order with her untimely appeal of the Bifurcation Order. This Court therefore lacks jurisdiction to hear Luzak’s untimely Supplemental Appeal. *Clegg*, 377 S.C. at 651, 661 S.E.2d at 795.

Nor did the Supreme Court’s ruling in the Second Appeal somehow render Luzak’s Supplemental Appeal timely. Luzak argues that “[t]he trigger for filing the current Supplemental Notice of Appeal was [the Supreme Court’s Vacating Order], which could have but did not address the merits of the [Bifurcation Order].” (Mot. to Reinstate Appeal, p. 2.) But the Vacating Order has no bearing upon the timeliness of the Supplemental Appeal. The “order or judgment” that triggers the 30-day deadline for service of the notice of appeal under Rule 203(b)(1) is the lower court’s order for which the appellant seeks review (including an order denying a timely motion to alter or amend, motion for judgment n.o.v., or motion for a new trial). Rule 203(b)(1), SCACR; *see also* Rule 203(e)(1)(C) (requiring the notice of appeal to contain the date of the “order, judgment, or sentence *from which the appeal is taken*”) (emphasis added). The Supplemental Appeal was filed more than 30 days after *all* of the lower court rulings for which Luzak has sought appellate review. No authority supports Luzak’s argument that the Vacating Order, which *dismissed* her Second Appeal (but which remains before the South Carolina Supreme Court pending motions to alter or

amend and for rehearing), somehow triggered a new 30-day window in which to appeal the Bifurcation Order.⁴ The Court therefore properly dismissed the appeal as untimely.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Luzak's Petition to Reinstate Appeal.

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⁴ Luzak points out that, although the Vacating Order dismissed the Second Appeal, no remittitur has issued from the Supreme Court because Respondents filed a timely petition for rehearing and Luzak filed a motion to alter or amend the Vacating Order. (Supp. Notice of Appeal, p. 2, n.1.) Luzak argues that, if the Supreme Court denies these motions, and affirms its dismissal of the Second Appeal, then “the order of bifurcation must be considered as part of [the Third Appeal] in accordance with S.C. Code Ann. § 14-3-330(a).” (*Id.*) But, again, Section 14-3-330 contains no subsection (a), and this Court has already held that the Bifurcation Order “is not immediately appealable under section 14-3-330 of the South Carolina Code.” No authority supports Luzak's position that this Court must accept her untimely effort to appeal the Bifurcation Order, for the third time, after the Supreme Court has twice dismissed her appeals and held that appellate review of the Bifurcation Order must await final judgment.

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June 27, 2022

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Hampton Barringer Luzak.....Appellant

vs.

Merrill B. Light, Merrill U. Barringer as Personal Representative of the Estate of Paul Brandon Barringer II, J. Randolph Light, Jr., Merrill B. Light as putative trustee of the Paul B. Barringer II Revocable Trust dated December 4, 1998, and Merrill B. Light as Trustee of the Merrill Barringer Light Revocable TrustRespondents

--and--

Coastal Forest Resources Company ("CFRC")Intervenor/Respondent

--and--

Hampton B. LuzakAppellant

vs.

Merrill U. BarringerRespondent

PROOF OF SERVICE

The undersigned, J. Ashley Twombly, of TWENGE + TWOMBLY LAW FIRM, Attorneys for Respondents, hereby avers that on the 27th day of June 2022, a true and accurate

copy of the attached **RESPONDENTS' RETURN TO APPELLANT'S PETITION TO REINSTATE APPEAL** was served via electronic mail to the following:

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June 27, 2022

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**RE: In the Matter of the Estate of Paul Brandon Barringer, II
Hampton Barringer Luzak v. Merrill B. Light, et al.
Hampton Barringer Luzak v. Merrill U. Barringer
Appellate Case No. 2022-000784**

Dear Ms. Kitchings:

Enclosed please find for filing Respondents' Return to Petition to Reinstate Appeal in the referenced matter. By copy of this letter and as evidenced by the Proof of Service, this filing has been served upon counsel for the Appellant.

Thank you for your consideration of this request. If you have any questions, please do not hesitate to contact me.

With kindest personal regards, I remain,

Cordially,



J. Ashley Twombly

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