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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Bentley Price, Circuit Court Judge

Appellate Case No.
2021-000837

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

Hampton B. LuzakAppellant

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--

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

--and--

Hampton B. LuzakAppellant

vs.

Merrill U. BarringerRespondent

RESPONDENTS' PETITION FOR REHEARING AS TO SEPTEMBER 14, 2022 ORDER

Pursuant to Rule 221(a) 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”), hereby file this Petition for Rehearing as to this Court’s Order issued on September 14, 2022 (the “Revised Vacating Order”), which amended the Court’s prior Order issued on April 29, 2022 (the “Vacating Order”).¹

The Court erred in the Revised Vacating Order by holding that Luzak’s appeal of the Bifurcation Order operated to stay matters in the circuit court that were “affected by the appeal.” Luzak’s appeal of the Bifurcation Order did not stay any proceedings in the circuit court because, as this Court concluded in the First Appeal, the Bifurcation Order was not immediately appealable. Under well-settled South Carolina precedent, an interlocutory appeal of an order that is not immediately appealable does not stay any proceedings in the circuit court. Thus, unless the Court intended to implicitly overrule its long-standing precedent, the Court should not have vacated any circuit court orders.

Respondents respectfully submit that the Court should grant this Petition and rescind the Vacating Order and the Revised Vacating Order. Further, to avoid further delay in this more-than-

¹ Respondents set forth the factual and procedural history relating to this matter in their Petition for Rehearing of the Vacating Order filed on May 26, 2022, which is incorporated herein by reference, and will not repeat that background here. Capitalized terms used herein have the same meaning as in Respondents’ prior Petition for Rehearing.

six-year-old litigation, the Court should certify all remaining appeals in this case and consolidate those appeals² for a decision on the merits.³

In the alternative, if the Court declines to rescind the Vacating Order and the Revised Vacating Order, the Court nevertheless should grant this Petition to clarify several issues for the parties, the circuit court, the Court of Appeals, and the Bar. Without clarifying these issues, the resulting uncertainty will lead to further motions practice, additional interlocutory appeals, and significant delay in this litigation, which has already been pending for over six years, and in which one of the primary parties (Mrs. Barringer) is now 87 years old. The issues which will require clarifying if the Court declines to rescind the Vacating Order and the Revised Vacating Order include:

- (1) Is the *Arnold* line of cases overruled (in whole or in part)? If so, what is the new law that is taking the place of the law set forth in the *Arnold* line of cases?
- (2) What is the status of the Second Appeal? The Vacating Order dismissed the Second Appeal in its entirety, although it did not vacate all of the orders being appealed in the Second Appeal, whereas the Revised Vacating Order held that the Derivative Damages

² Respondents request that the Court consolidate all appeals in whatever form they exist after the Court rules on this Petition so that this Court can reach a decision on the merits as quickly as possible. Certification and consolidation will expedite resolution of this rapidly aging case. The history of this litigation indicates with near certainty that any decision by the Court of Appeals will be subject to yet another Petition for Writ of Certiorari to this Court.

³ As briefed elsewhere, Luzak should not be permitted to pursue an interlocutory appeal of the Bifurcation Order because it is not immediately appealable (as this Court has already held), because she should not be permitted to “bootstrap” it to another appeal, and because her attempt to appeal the Bifurcation Order in the Third Appeal was untimely. However, if the Court is not inclined to address the appealability of the Bifurcation Order in ruling on this petition for rehearing, the parties can address this issue in the briefing on the merits, as the Court of Appeals previously directed the parties to do. (*See* Court of Appeals Order of December 23, 2021, Case No. 2021-000159).

Order (which is one of the orders appealed in the Second Appeal) was *not* vacated. The Revised Vacating Order, however, did not address Luzak’s attempt to bootstrap an appeal of the Bifurcation Order in the Second Appeal, although it implicitly held that bootstrapping is not proper by finding that the Derivative Damages Order was not a matter “affected by the appeal” of the Bifurcation Order.

- (3) If the Second Appeal remains pending, does it remain certified to the Supreme Court, or is it remanded to the Court of Appeals? If the Second Appeal remains pending before the Supreme Court, is further briefing required, and on what schedule?
- (4) If the Second Appeal remains pending, and if the *Arnold* line of cases are overruled, what matters (if any) are stayed at the circuit court by virtue of the Second Appeal?
- (5) What is the status of the Third Appeal? The Revised Vacating Order stated that the summary judgment order appealed in the Third Appeal (the Contract-Based Claims Order) is vacated, but this Court never certified the Third Appeal. Also, the Revised Vacating Order did not address Luzak’s attempt to appeal the Bifurcation Order (for a third time) in the Third Appeal.

Again, Respondents respectfully submit that South Carolina precedent is clear and that this Court should simply rescind its Vacating Order and Revised Vacating Order based on the *Arnold* line of cases and certify the remaining appeals for a decision on the merits. However, if the Court declines to do so, Respondents respectfully request that the Court provide clarification as to the above issues.

I. The Court should grant the Petition for Rehearing to apply well-settled precedent holding that an appeal of an interlocutory order that is not immediately appealable does not stay proceedings in the circuit court.

The Court erred in the Vacating Order and the Revised Vacating Order by holding that Luzak’s appeal of the Bifurcation Order operated to stay matters in the circuit court that were “affected by the appeal.” Luzak’s appeal of the Bifurcation Order did not stay any proceedings in the circuit court because, as this Court concluded in the First Appeal, the Bifurcation Order was not immediately appealable. *See* 4/29/2022 Order in Case No. 2021-001022 (holding that “the court of appeals correctly held that the circuit court’s bifurcation order was not immediately appealable”). Under well-settled South Carolina precedent, because the Bifurcation Order was not immediately appealable, the automatic stay contemplated by Rule 241(a) did not stay any proceedings in the circuit court. *S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 536 (1986) (“Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay further proceedings in the lower court.”) (collectively, with the cases cited in footnote 3, “the *Arnold* line of cases”).⁴ The Court should therefore grant this Petition for Rehearing, rescind the Vacating Order and the Revised

⁴ *See also State v. Dingle*, 279 S.C. 278, 282, 306 S.E.2d 223, 225 (1983), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990) (“We hold that the order [committing criminal defendant to mental health agency pending trial] is interlocutory in nature and thus not appealable. Since the order is not appealable until final judgment is rendered, the trial court had continuing jurisdiction over the subject matter of the case.”); *Crout v. South Carolina Nat’l Bank*, 278 S. C. 120, 124, 293 S. E. 2d 422, 424 (1982) (“The administrative judge’s order refusing appellant’s motion for a continuance or a voluntary dismissal was not appealable because it was an intermediate order not involving the merits. Therefore, the notice of appeal from that order did not transfer jurisdiction to this Court or stay further proceedings in the trial court.”); Jean Hoefler Toal, *et al.*, *Appellate Practice in South Carolina*, 3d Ed. (2017) at p. 339 (“[W]hen an order is interlocutory and not immediately appealable, the service and filing of a notice of intent to appeal does not transfer jurisdiction to the appellate courts, nor does it stay further proceedings in the lower court.”).

Vacating Order, and certify all remaining appeals to the Supreme Court for consolidated review on the merits, or remand those appeals to the Court of Appeals.

The Court failed to address the *Arnold* line of cases in the Vacating Order and the Revised Vacating Order, despite Respondents' extensive discussion of these cases in their Petition for Rehearing of the Vacating Order, and even though these decisions compel a conclusion that no stay arose by the appeal of the Bifurcation Order here. If the Court simply overlooked this discussion, then the Court should grant Respondent's Petition to correct the error. If the Court intended to overrule or distinguish *Arnold*, and to hold for the first time that an appeal of an interlocutory order that is not immediately appealable nonetheless stays further proceedings in the circuit court, the Court should still grant Respondent's Petition to clarify the basis and scope of this significant change in the law for the benefit of the parties, the lower courts, and the Bar. As it stands, the reasons why the Court found a stay here—a case in which no party advocated for a change in precedent, and in which the Court did not have the benefit of briefing on this point—are unknown, and therefore, provide no guidance for future proceedings, either in this case or others.

II. In the alternative, the Court should grant the Petition for Rehearing to provide clarification on several issues.

If the Court declines to rescind the Vacating Order and the Revised Vacating Order based on the *Arnold* line of cases, the Court nevertheless should grant the Petition for rehearing to provide clarification on several issues for the benefit of the parties, the lower courts, and the Bar.

A. The Court should grant the Petition for Rehearing to clarify the status of the Second Appeal.

If the Court does not apply the *Arnold* line of cases and rescind the Vacating Order and the Revised Vacating Order, the Court should nevertheless grant Respondents' Petition to address the status of the Second Appeal, which status is unclear after the Revised Vacating Order. In the

Vacating Order, the Court dismissed the Second Appeal in its entirety, although the Order vacated only one of the three circuit court orders at issue in that appeal (and did not correctly identify the circuit court order that the Court intended to vacate).⁵ The Vacating Order said nothing about the appellate status of the two circuit court orders in the Second Appeal that were not vacated by the Vacating Order. In the Revised Vacating Order, the Court did not expressly rescind its prior dismissal of the Second Appeal. Presumably, because the Court in the Revised Vacating Order held that the Derivative Damages Order is not vacated, the Court intended for the Second Appeal to continue as to the Derivative Damages Order. But the Second Appeal also included Luzak's attempt to bootstrap a second appeal of the Bifurcation Order to the two summary judgment orders that were also challenged in that appeal, and the Court has not addressed the current status of the Bifurcation Order appeal in light of its decision to vacate the July 2021 Summary Judgment Order.

This Court has already held the Bifurcation Order is not immediately appealable on its own, but the Court should take this opportunity to find that the Bifurcation Order is also not reviewable with the appeal of the Derivative Damages Order because the Bifurcation Order is not sufficiently related to the Derivative Damages Order. (*See* Respondents' Initial Br. filed 4/1/2022 pp. 32-35.) This Court's ruling in the Revised Vacating Order that the Derivative Damages Order was not affected by the appeal of the Bifurcation Order compels the conclusion that those two orders are *not* sufficiently related to permit Luzak to bootstrap an appeal of the Bifurcation Order to her appeal of the Derivative Damages Order.

Accordingly, Respondents respectfully request clarification as to: (1) whether the Second Appeal remains pending despite its prior dismissal in its entirety; (2) if the Second Appeal remains

⁵ The three orders at issue in the Second Appeal were the Derivative Damages Order, the July 2021 Summary Judgment Order, and the Bifurcation Order, which Luzak attempted to appeal for a second time in the Second Appeal.

pending, whether the Bifurcation Order should be dismissed because it lacks a sufficient nexus to the appeal of the Derivative Damages Order; (3) if the Second Appeal remains pending, whether it remains certified to the Supreme Court or is remanded to the Court of Appeals; and (4) if the Second Appeal remains pending before the Supreme Court, whether further briefing is required and, if so, on what schedule.

B. The Court should grant the Petition for Rehearing to clarify the scope of any continuing stay in the circuit court.

In addition, after clarifying which orders remain in the Second Appeal, the Court should also define the scope of any stay now in effect in the circuit court as a result of the Second Appeal. This litigation is already more than six years old, and Respondent Merrill Barringer is 87 years old. Respondents respectfully urge the Court to provide a path for prompt and efficient resolution of this dispute, rather than requiring Respondents to wait perhaps several years for Luzak's parade of interlocutory appeals to reach an end.

As discussed in Section I above, the Court did not explain whether it was overruling or distinguishing the *Arnold* line of cases, leaving uncertain the application to this case of this Court's precedents regarding the automatic stay. Moreover, because the Court did not explain in the Revised Vacating Order why it found that the July 2021 Summary Judgment Order and the Contract-Based Claims Order are "affected by the appeal of the bifurcation order," but that the Derivative Damages Order is not, the parties (and very likely the circuit court) cannot determine which summary judgment motions the circuit court now has authority to decide. Like the Contract-Based Claims Order and the July 2021 Summary Judgment Order, the Derivative Damages Order dismissed a subset of the claims that the circuit court had previously bifurcated for separate trials in the Bifurcation Order. However, this Court concluded that, unlike the Contract-Based Claims

Order and the July 2021 Summary Judgment Order, the Derivative Damages Order was *not* affected by Luzak’s appeal of the Bifurcation Order. Because this Court treated the Derivative Damages Order differently, the parties may logically infer that the appeal of the Derivative Damages Order does *not* deprive the circuit court of the power to re-hear the summary judgment motions that this Court vacated, but the scope of the circuit court’s authority to act while the appeals are pending remains unclear.

As a result, the circuit court may refuse to hear any further motions until all appeals are resolved, or, if the circuit court does agree to rehear motions related to the orders vacated by this Court, the parties could expend significant time and resources on motions practice only to find out on appeal that the circuit court still lacked jurisdiction to decide the motions. Rather than having the circuit court speculate as to whether it is precluded from rehearing the vacated summary judgment motions (and from hearing other potential motions for summary judgment or otherwise), this Court should clarify the scope of any continuing stay. Failure to do so will result in confusion, uncertainty, and unnecessary delay. Respondents respectfully submit that this Court should end this inevitable cycle of delay by clearly defining the scope of the stay, if any, that remains in place.

Specifically, if the Court declines to rescind the Vacating Order and the Revised Vacating Order based on the *Arnold* line of cases, the Court should find the circuit court is not deprived of jurisdiction to hear further summary judgment or other motions – including rehearing the Contract Claims Summary Judgment Motion and the July 2021 Summary Judgment Motion. Assuming only the Derivative Damages Order remains in the Second Appeal, and the Bifurcation Order is dismissed from that appeal for the reasons articulated above, the Court should hold the appeal of the Derivative Damages Order does not affect the issues raised in these summary judgment motions that the circuit court previously decided. The Contract Claims summary judgment motion

relates solely to whether Mr. and Mrs. Barringer in 1998 entered into a secret contract or agreement that neither would exercise a testamentary power of appointment which was included in their estate planning documents. This is an issue entirely distinct from the derivative claims and damages, as well as from the civil conspiracy cause of action, which are the issues addressed in the Derivative Damages Order. No decision on the appeal of the Derivative Damages Order would affect a determination of the very simple factual issue addressed in the Contract-Claims Summary Judgment. Likewise, by deciding the Contract-Claims Summary Judgment, the circuit court would not affect the appeal of the Derivative Damages Order.

The July 2021 Summary Judgment Motion is also unrelated to the Derivative Damages Order. It addresses the discrete factual question of whether any genuine issue of material fact is in dispute with respect to Luzak's claims that her father was not competent and was under undue influence when he executed certain estate planning documents in February 2012. No decision on this summary judgment motion would affect any issue in the appeal of the Derivative Damages Order and vice versa.

And last, if the Court refuses to rescind the Revised Vacating Order, this Court will have already determined that the Derivative Damages Order is distinct from both the Contract-Claims Order and the July 2021 Order by choosing to vacate both of them, while allowing the appeal of the Derivative Damages Order to continue. If the Derivative Damages Appeal was sufficiently tied to the other two summary judgment orders, then they would have risen or fallen together when this Court was deciding the scope of a stay arising from the appeal of the Bifurcation Order. Accordingly, the circuit court should be allowed to retain jurisdiction to hear the motions relating to the vacated orders, while the appellate courts continue to consider the appeal of the Derivative Damages Order.

C. The Court should grant the Petition for Rehearing because the Court never certified the Third Appeal and therefore lacked jurisdiction to vacate the Contract-Based Claims Order.

The Revised Vacating Order explained that the Court previously vacated two summary judgment orders—the July 2021 Summary Judgment Order, which was at issue only in the Second Appeal, and the Contract-Based Claims Order, which was at issue only in the Third Appeal. But the Court has never certified the Third Appeal, and therefore, that appeal remains pending in the Court of Appeals, where it has been fully briefed and, according to the courts’ website, is “awaiting consideration.” Therefore, if this Court declines to rescind the Vacating Order and the Revised Vacating Order, the Court should grant the Petition for Rehearing to clarify that, presumably, the Court intended to certify the Third Appeal pursuant to Rule 204(b), SCACR, before vacating the Contract-Based Claims Order, which is only at issue in the Third Appeal.

Finally, if the Court does not reverse its decision to vacate the Contract-Based Claims Order, it should clarify whether the Third Appeal remains pending at all. The only summary judgment order addressed in the Third Appeal is the Contract-Based Claims Order. Luzak, however, has also sought to bootstrap the Bifurcation Order appeal yet again—this time, to the appeal of the Contract-Based Claims Order in the Third Appeal. She sought to add this third interlocutory appeal of the Bifurcation Order by filing a Supplemental Notice of Appeal in the Third Appeal, which had been pending for many months. The Court of Appeals, *sua sponte*, dismissed the Supplemental Notice of Appeal as untimely. (*See* 6/9/2022 Order of Dismissal, Appellate Case No. 2022-000784.) It also denied Luzak’s Motion to Reinstate the Supplemental Notice of Appeal, and Luzak has now filed a Petition for Writ of Certiorari seeking review of the dismissal of the Supplemental Notice of Appeal. If the Court declines to rescind the Revised Vacating Order, the Court should promptly deny that Petition because the vacatur of the Contract-Based Claims Order leaves no jurisdictional

basis for an immediate appeal of the Bifurcation Order. No appealable order remains in the Third Appeal to which the appeal of the Bifurcation Order could be bootstrapped, and this Court has previously ruled the Bifurcation Order standing alone is not immediately appealable.

Therefore, with respect to the Third Appeal, if the Court does not reverse its decision to vacate the Contract-Based Claims Order, the Court should grant this Petition for Rehearing to: (1) certify the Third Appeal to obtain jurisdiction to vacate the Contract-Based Claims Order, if that is the intention of the Court; and (2) deny as moot Luzak’s Petition for Writ of Certiorari filed on September 22, 2022 as to the dismissal of the Supplemental Notice of Appeal in the Third Appeal because the Contract-Based Claims Order was vacated and no independent basis exists for Luzak to challenge the Bifurcation Order—even if the Supplemental Notice of Appeal was timely, which it is not; (3) dismiss the Third Appeal in its entirety, as no appealable order would remain; (4) if the Court does not dismiss the Third Appeal as moot, it should indicate whether the Third Appeal is now pending before the Supreme Court or the Court of Appeals; and (5) if any aspect of the Third Appeal, including the pending Petition for Writ of Certiorari as to the Supplemental Notice of Appeal, remains pending, the Court should define the scope of any stay in the circuit court arising from such appeal.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Supreme Court should grant this Petition for Rehearing to rescind the Vacating Order and the Revised Vacating Order based upon the *Arnold* line of cases holding that an appeal of an interlocutory order that is not immediately appealable does not give rise to any stay in the circuit court. By correcting this error, the Court would need to proceed no further as to this Petition and it should then certify and consolidate all remaining appeals for a decision on the merits or remand all pending appeals to the

Court of Appeals. If, however, the Court does not rescind these Orders, it should provide the parties with the clarifications and guidance requested in this Petition.

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