

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

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Appellate Case No. 2022-1327

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

Hampton B. 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 Trust ..... Respondents

--and--

Hampton B. Luzak .....Appellant

vs.

Merrill U. Barringer .....Respondent

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**RESPONDENTS' RETURN TO APPELLANT'S  
PETITION FOR WRIT OF CERTIORARI**

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**RECEIVED**

**Oct 24 2022**

**S.C. SUPREME COURT**

Pursuant to Rule 242(f) 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 for Writ of Certiorari, filed by Appellant Hampton B. Luzak (“Luzak”) on September 22, 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. The Court of Appeals assigned the Supplemental Appeal a separate case number (Case No. 2022-000784) and, on June 9, 2020, the Court of Appeals 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.” After the Court of Appeals denied Luzak’s Petition for Rehearing, she filed the instant Petition in this Court.

The Court should deny the Petition for two reasons. First, the Court of Appeals correctly concluded that the Supplemental Appeal was untimely. Second, 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.

## **BACKGROUND**<sup>1</sup>

On October 23, 2020, Respondents filed a Joint Motion to Bifurcate Trial, pursuant to Rule 42, SCRCP, in which Respondents requested that the circuit court first conduct a narrow trial on 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”). The Motion requested a second trial to determine Luzak’s remaining causes of action. The circuit court granted the motion in the Bifurcation Order issued 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”). The Court of Appeals 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 this 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 two subsequent orders issued by the circuit court. (Appellate Case No. 2021-000837, the “Second Appeal”). On June 7, 2021, while the First Appeal was pending, the circuit court granted a motion

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<sup>1</sup> A detailed discussion of the factual and procedural history of these consolidated cases is set forth in Respondents’ Brief in Appellate Case No. 2021-000837, which is incorporated herein by reference. Respondents include here only a brief summary of the appellate history relevant to Luzak’s instant Petition.

by Coastal Forest Resources Company (“CFRC”) for intervention and for protective relief and dismissed some of Luzak’s tort-based claims on the basis that those claims were shareholder derivative claims, which belonged solely to CFRC (the “Derivative Damages Order”). 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 (the “July 2021 Summary Judgment Order”). 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 or mistake.

Luzak attempted to appeal the Bifurcation Order for a third time in Appellate Case No. 2021-001337 (the “Third Appeal”). In 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 include not only the Contract-Based Claims Order and the Order denying her motion for reconsideration, but also a third appeal of the Bifurcation Order. On June 9, 2020, the Court of Appeals dismissed the Supplemental Appeal as untimely. Luzak filed a Petition for Rehearing, which the Court of Appeals denied on August 24, 2022.

On April 29, 2022, the same day that this Court denied Luzak’s Petition for Writ of Certiorari in the First Appeal, the 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”)<sup>2</sup>. Respondents and Luzak filed petitions for rehearing of the Vacating Order.

On September 14, 2022, the Court issued an Order (the “Revised Vacating Order”) that granted the petitions for rehearing, in part, to clarify that the Vacating Order vacated the July 2021 Summary Judgment Order (at issue in the Second Appeal) and the Contract-Based Claims Order (at issue in the Third Appeal) but not the Derivative Damages Order (Second Appeal). The Court concluded that the July 2021 Summary Judgment Order and the Contract-Based Claims Order were “affected by the appeal of the [Bifurcation Order],” but that the Derivative Damages Order was not. On October 6, 2022, Respondents filed a Petition for Rehearing of the Revised Vacating Order, which remains pending, in which Respondents requested *inter alia* that the Court rescind the Revised Vacating Order, certify the Second and Third Appeals, and decide these appeals on the merits.

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<sup>2</sup> The Vacating Order was unclear regarding which circuit court order the Court intended to vacate and created confusion regarding the status of the appeals. The Vacating Order, which was entered in the Second Appeal, stated that it vacated an order granting *Merrill Barringer’s* summary judgment motion. Although three Orders were at issue in the Second Appeal—the Derivative Damages Order, the July 2021 Summary Judgment Order, and the Bifurcation Order—none of them granted summary judgment to Merrill Barringer. The only order on appeal that granted summary judgment to Merrill Barringer was the Contract-Based Claims Order at issue in the Third Appeal, which the Court did not certify and which remained pending in the Court of Appeals when the Vacating Order was issued.

## ARGUMENT

### **I. The Petition should be denied because the Court of Appeals correctly concluded that the Supplemental Appeal was 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), SCRCR, 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. The Court of Appeals correctly held that it lacked jurisdiction to hear Luzak's untimely Supplemental Appeal. *Clegg*, 377 S.C. at 651, 661 S.E.2d at 795.

Nor did the Vacating Order somehow render Luzak's Supplemental Appeal timely. 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, somehow triggered a new 30-day window in which to appeal the Bifurcation Order. The Court of Appeals therefore properly dismissed the appeal as untimely.

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

In addition to being untimely, the Supplemental Appeal must be dismissed because, as this Court has already held, the Bifurcation Order is not immediately appealable. Luzak nevertheless argues that the Bifurcation Order is reviewable with the Contract-Based Claims Order in the Third Appeal. If this Court declines Respondents' pending request to rescind the Revised Vacating Order, however, the Court should deny Luzak's Petition for Certiorari because the vacatur of the Contract-Based Claims Order leaves no jurisdictional basis to review the Bifurcation Order as part of the Third Appeal. 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 that the Bifurcation Order standing alone is not immediately appealable.

If the Court does rescind the Revised Vacating Order, the Bifurcation Order still is not reviewable as part of the Third Appeal. Luzak’s reliance on S.C. Code Ann. § 14-3-330(1),<sup>3</sup> for the position that the Bifurcation Order is reviewable with her appeal of the Contract-Based Claims Order, is misplaced. 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,” but this Court has already held that the Bifurcation Order does not “involve the merits” and therefore “is not immediately appealable under section 14-3-330 of the South Carolina Code.” (COA Case No. 2021-00159, 5/4/2021 Order.)

Nor is the Contract-Based Claims Order a “final judgment,” such that the Court would have jurisdiction under § 14-3-330(1) to review with the Contract-Based Claims Order “any intermediate order or decree necessarily affecting the judgment not before appealed from.” A final judgment is an order that “dispose[s] of the cause, . . . reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined.” *Kriti Ripley, LLC v. Emerald Investments, LLC*, 404 S.C. 367, 379, 746 S.E.2d 26, 33 (2013) (quoting *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41–42, 21 S.E.2d

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<sup>3</sup> Section 14-3-330(1) provides as follows:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.

209, 212 (1942)). The Contract-Based Claims Order granted summary judgment on only two causes of action, not on all of Luzak's claims. Accordingly, although the Contract-Based Claims order was immediately appealable as an order "affecting the merits," it was a not a final judgment. *Stone v. Thompson*, 418 S.C. 599, 795 S.E.2d 49 (Ct. App. 2016), *reversed on other grounds by*, 426 S.C. 291, 826 S.E.2d 868 (holding that a ruling by the family court in a bifurcated divorce action that a common law marriage existed was not a "final judgment"); *see also* Rule 54(b), SCRCF (providing that an order disposing of fewer than all claims may be treated as a "final judgment" only upon certification by the circuit court that "there is no just reason for delay[ing]" entry of final judgment and appeal). Thus, the appellate courts lack jurisdiction to review the Bifurcation Order as part of the Third Appeal under § 14-3-330(1).

Moreover, although the appellate courts have occasionally exercised discretion to review an order that is not immediately appealable in conjunction with a closely related intermediate 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., 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 order because of an insufficient nexus between the orders); *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"). 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.<sup>4</sup>

### **CONCLUSION**

For the foregoing reasons, Respondents respectfully request that this Court deny Luzak's Petition for Certiorari.<sup>5</sup>

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<sup>4</sup> As Respondents have argued elsewhere, the Bifurcation Order also is not reviewable as part of the Second Appeal because the Bifurcation Order is not sufficiently related to the Derivative Damages Order or the July 2021 Summary Judgment Order, the latter of which this Court vacated in the Revised Vacating Order. (*See* Appellate Case No. 2021-000837, Respondents' Initial Br. filed 4/1/2022 pp. 32-35.)

<sup>5</sup> Luzak's Petition also requests that the Court certify the Third Appeal. Luzak notes that the Revised Vacating Order purported to vacate the Contract-Based Claims Order without first certifying the Third Appeal from the Court of Appeals, and she asks the Court to address this procedural defect by certifying the Third Appeal now. Although Respondents have petitioned the Court to rescind the Revised Vacating Order, Respondents agree that the Court should certify the Third Appeal for the reasons stated in Respondents' Petition for Rehearing of the Revised Vacating Order.

NELSON MULLINS RILEY & SCARBOROUGH LLP

*s/ C. Mitchell Brown*

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C. Mitchell Brown  
SC Bar No. 012872  
E-Mail: mitch.brown@nelsonmullins.com  
1320 Main Street, 17<sup>th</sup> Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

Robert H. Brunson  
SC Bar No. 11987  
E-Mail: robert.brunson@nelsonmullins.com  
Merritt G. Abney  
SC Bar No. 071893  
E-Mail: merritt.abney@nelsonmullins.com  
151 Meeting Street / Sixth Floor  
Post Office Box 1806 (29402-1806)  
Columbia, SC 29201  
(843) 853-5200

*Attorneys for Defendant/Respondent Merrill Light*

Alice F. Paylor, Esquire  
Bijan K. Ghom, Esquire  
Saxton & Stump, LLC  
151 Meeting Street, Suite 350  
Charleston, SC 29401  
afp@saxtonstump.com  
bkg@saxtonstump.com

*Attorneys for Respondent Merrill B. Light individually, as  
Trustee of the Paul B. Barringer, II Revocable Trust dated  
December 4, 1998, and as Trustee of the Merrill Barringer  
Light Revocable Trust*

Charles B. Molster, III, Esquire  
cmolster@molsterlaw.com  
THE LAW OFFICES OF CHARLES B. MOLSTER, III  
PLLC  
2141 Wisconsin Avenue, N.W., Suite M  
Washington, D.C. 20007  
(703) 346-1505

*Attorney admitted pro hac vice for Respondents, Merrill B. Light, 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 Trust*

J. Ashley Twombly, Esquire  
twombly@twlawfirm.com  
Kevin Johnson, Esquire  
kjohnson@twlawfirm.com  
Lee Anne Walters, Esquire  
lwalters@rosenhagood.com  
TWENGE + TWOMBLY LAW FIRM  
311 Carteret Street  
Beaufort, SC 29902

*Attorney for Respondent Merrill U. Barringer, individually and Respondent Merrill U. Barringer, as Personal Representative of the Estate of Paul Brandon Barringer, II*

Harley D. Ruff, Esquire  
hruff@ruffllc.com  
Denise Collins, Esquire  
dcollins@ruffllc.com;  
RUFF & RUFF, LLC  
17 Professional Village Circle  
Beaufort, SC 29907

*Attorneys for Respondent Merrill U. Barringer, as Personal Representative of the Estate of Paul Barringer, II*

October 24, 2022

OTHER COUNSEL OF RECORD:

BALLARD & WATSON

Desa Ballard  
226 State Street  
West Columbia, South Carolina 29169  
803.796.9299  
desab@deasballard.com

*Attorneys for Appellant Hampton B. Luzak*

THE GILREATH LAW FIRM, P.A.  
James R. Gilreath (S.C. Bar #02133)  
William M. Hogan (S.C. Bar #65272)  
110 Lavinia Avenue (zip 29601)  
P.O. Box 2147  
Greenville, SC 29602  
Telephone: (864) 242-4727  
Fax: (864) 232-4395  
jim@gilreathlaw.com  
bhogan@gilreathlaw.com

*Attorneys for Appellant Hampton B. Luzak*

S. Alan Medlin (S.C. Bar No. 3924)  
amedlin@sc.rr.com  
1713 Phelps Street  
Columbia, SC 29205  
Telephone: (803) 777-7465  
Fax: (803) 777-7465

*Attorney for Appellant Hampton B. Luzak*

Charles B. Macloskie (S.C. Bar No. 3514)  
macloskielawfirm@hargray.com  
Macloskie Law Firm  
P.O. Box 280  
1506 Prince Street  
Beaufort, SC 29901  
Telephone: (843) 524-0909  
Fax: (843) 521-1379

*Attorney for Appellant Hampton B. Luzak*

Thomas W. Traxler (S.C. Bar No. 5624)  
tom.traxler@carterlawpa.com  
CARTER, SMITH, MERRIAM, ROGERS & TRAXLER, P.A.  
900 East North Street (29601)  
P.O. Box 10828 (29603)  
Greenville, South Carolina  
Phone: (864) 242-3566  
Fax: (864) 232-1558

*Attorney for Appellant Hampton B. Luzak*