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May 18 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No: 2016-CP-07-01919
Appellate Case No. 2021-000159

EX PARTE:

Hampton B. Luzak.....PETITIONER

IN THE MATTER OF:

Estate of Paul Brandon Barringer, II

Hampton B. Luzak,..... APPELLANT,

v.

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 Trust,..... RESPONDENTS.

And

Case Nos. 2019-CP-07-01253 and 2019-CP-07-01294
Appellate Case No. 2021-000159

Hampton Barringer Luzak,APPELLANT,

v.

Merrill U. Barringer,..... RESPONDENT.

APPELLANT’S PETITION AND MEMORANDUM FOR REHEARING

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Hampton B. Luzak**

The Appellant/Petitioner (Appellant herein) files this Petition for Rehearing with respect to this Court's Order filed May 4, 2021 dismissing the appeal filed by the Appellant in this matter filed on February 12, 2021.

PROCEDURAL BACKGROUND

The Trial Court in the underlying consolidated actions issued its Order (Bifurcation Order) bifurcating the trial of two (2) causes of actions. The Bifurcation Order was filed on December 30, 2020, and on January 14, 2021 the Trial Court denied the Appellant's Motion for Reconsideration. The Appellant then filed and served her Notice of Appeal of those Orders on February 12, 2021.

On February 22, 2021 the Court of Appeals asked the parties to submit memoranda addressing the immediate appealability of the Bifurcation Order. Those memoranda were submitted, and the Court of Appeals filed its Order on May 4, 2021 dismissing the appeal on the stated grounds that the "underlying orders are not immediately appealable under section 14-3-330 of the South Carolina Code (2017)."

This Petition seeks a rehearing on that Order dismissing the appeal.

ARGUMENT AND CITATION OF AUTHORITIES

This Court's Order dismissing the appeal on May 4, 2021 is a summary order that dismisses the appeal on the stated basis that *S.C. Code Ann.* §14-3-330 does not allow for immediate appeal. That Order does not address the grounds raised by the Appellant in her Appellant's Memorandum In Support Of Immediate Appealability Of Order Granting Motion To Bifurcate filed with this Court, and the Appellant raises again these issues and arguments submitted in her Memorandum. The Memorandum and the arguments and authorities cited therein are reiterated herein and that Memorandum is incorporated herein by reference for that purpose.

Without diminishing or abandoning the arguments set forth therein, the following are the salient issues which the Court of Appeals failed to address or properly consider when it dismissed the Appellant's appeal on May 4, 2021.

1. **The Court of Appeals failed to appreciate the substance of the Trial Court's Bifurcation Order in implicating the mode of trial and sequencing of the trial of the various causes of action:**

At initial blush, the Bifurcation Order may appear not to be immediately appealable, and the Appellant appreciates that any Order labelled "Order Granting Defendants' Motion To Bifurcate" prompts such an initial reaction. Typically, orders to bifurcate are not immediately appealable, but the label of that Order is misleading because the substance of the Bifurcation Order extends far beyond merely having two trials and directly implicates the mode of trial, which is, in fact, immediately appealable, for the reasons cited by the Appellant in her Memorandum. Everyone's reaction to the Bifurcation Order, including the Court of Appeals', would have been completely different if the Bifurcation Order had instead been labelled "Order for Mode of Trial and Sequencing The Trial of Causes of Action." *That* label would have been more reflective of the Trial Court's Order. In short, the Court of Appeals failed to appreciate the substance of the Bifurcation Order and the substantive and procedural effect of that order and to analyze the appealability of that Order when it dismissed the appeal.

2. **The Order dismissing the appeal failed to recognize that the Bifurcation Order excised two equitable causes of action from the consolidated cases and ordered that they be tried first to the prejudice of the Appellant's right to a jury trial on other causes of action, thereby either eliminating the Appellant's right to a jury trial of her legal causes of action or severely impairing that right.**

The Trial Court's Bifurcation Order carved out two equitable causes of action for trial first, leaving the legal causes of action to be tried later. Those two equitable causes of action are for a mandatory injunction and for the imposition of a constructive trust. The remaining causes of action are essentially for undue influence, lack of capacity, mistake, as well as torts of fraud, conversion, breach of fiduciary duty, tortious interference with inheritance, and conspiracy. Those latter causes of action are legal, and the Appellant is entitled to a jury trial on them, but the Bifurcation Order relegates them to a later clean-up trial with findings on the equitable causes of action prejudicing the Appellant's right to a jury determination. A common factual thread of undue influence and manipulation of the patriarch of the family, Paul Barringer (Decedent), by his daughter, Merrill Light and others while he suffered from dementia, weaves all of the causes of action together, and isolating two equitable causes of action for the initial trial deprives the Appellant of the right to a jury trial or dramatically prejudices her rights to a jury determination of the facts. Therefore, the substance of the Bifurcation Order implicates mode of trial and is immediately appealable.

- 3. The Order dismissing the appeal failed to recognize that the Bifurcation Order not only excised two equitable causes of action to the detriment of the Appellant's right to a jury trial but also further aggravated the problem by ordering the equitable causes of action to be tried before the legal causes of action.**

The Order dismissing the appeal also failed to appreciate that the substance of the Bifurcation Order compounded the error in failing to follow well-established sequencing rules regarding the order in which bifurcated trials under these

circumstances must proceed. That implicates the mode of trial which, in turn, implicates a substantial right, triggering the well-established rule that such orders must be immediately appealed, or be forever waived. *See Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389-390 (Ct. App. 2004) (“Orders of the trial judge denying a request for a jury trial involve the mode of trial, affect substantial rights, ... and are immediately appealable. The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues.”). Sequencing rules mandate that when a case contains both legal and equitable causes of action and there exists disputed common factual issues relevant to both equitable and legal claims, *the legal claims must be tried first*, with the court in the trial of the equitable claims being bound by the findings of fact made by the jury. *See Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *Johnson v. S.C. Nat’l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987); *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013); *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004). The South Carolina Supreme Court has stated: “If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the ‘most imperative circumstances,’ the ‘at law’ claim must be tried first.” *Johnson*, 292 S.C. at 56, 354 S.E.2d at 897 (internal citations and quotations omitted). The purpose of the sequencing rules is to “assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full jury trial of legal issues.” *Id.* at 55, 354 S.E.2d 897. Only by applying the sequencing rules adopted by the appellate courts of this State can a trial court comply with constitutional, statutory, and case

law mandates to preserve a party's right to trial by jury inviolate. Again, common factual issues of undue influence and manipulation weave all of the causes of action together, and cherry-picking equitable causes of action to be tried before legal causes of actions implicates mode of trial and is immediately appealable.

4. The Court of Appeals erred in concluding that the Bifurcation Order was not immediately appealable.

By statute, a party has the right of immediate appeal where a substantial right is implicated. *S.C. Code Ann.* § 14-3-330(2). It is well established that a trial court order “affecting the mode of trial affect[s] a substantial right as defined in Section 14-3-330(2) of the *South Carolina Code* (1976), ... ‘must, therefore, be appealed immediately’.” *Frampton v. S.C. Dept. Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 274 (Ct. App. 2013) (quoting *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997)); *see also Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72–73, 533 S.E.2d 331, 333–34 (2000) (“Pursuant to § 14–3–330(2), this Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.”) (internal citations and footnotes omitted); *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013) (reversing the trial court's order which mandated that the parties' equitable claims be tried first by the court.) “Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” *Frampton*, 406 S.C. at 386, 752 S.E.2d at 274.

CONCLUSION

For these reasons, the Appellant petitions for rehearing and reconsideration of this Court's order dismissing the Appellant's appeal. These issues of mode of trial and sequencing will not go away through the course of this litigation. For this Court not to hear the appeal of these issues at this time will result in the parties going through bifurcated trials that ultimately will end up being a nullity. Bifurcation of trial typically lies within the discretion of the Trial Judge, but not when the mode of trial and sequencing of trial are implicated. The mode of trial and sequencing of trials is not discretionary.

The Appellant petitions for rehearing and reconsideration of this Court's Order of May 4, 2021 dismissing her appeal and that the appeal be allowed to proceed so that all of these issues may be fully briefed and then decided rather than being summarily dismissed.

Respectfully submitted,

s/Thomas W. Traxler

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Date: May 18, 2021

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APPEAL FROM BEAUFORT COUNTY
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Appellate Case No. 2021-000159

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Case Nos. 2019-CP-07-01253 and 2019-CP-07-01294
Appellate Case No. 2021-000159

Hampton Barringer Luzak,APPELLANT,

v.

Merrill U. Barringer,..... RESPONDENT.

PROOF OF SERVICE

I certify that I have served Appellant’s Petition and Memorandum for Rehearing on May 18, 2021 on Respondents, 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; Merrill B. Light as Trustee of the Merrill Barringer Light Revocable Trust, and Merrill U. Barringer by and through their counsel of record, Alice F. Paylor, Bijan Ghom, Charles B. Molster, III, J. Ashley Twombly, Kevin Johnson, Lee Anne Walters, Harley D. Ruff, and Denise Collins, by first class United States mail with proper postage attached and electronic mail at their following AIS e-mail addresses in accordance with the Supreme Court Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020):

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March 18, 2021

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From: Kimberly Hutchins
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Cc: Tom Traxler
Subject: Hampton Luzak v. Merrill B. Light, et al. - Appellate Case No.: 2021-000159
Attachments: Appellant's Petition and Memorandum for Rehearing.pdf; Proof of Service for Petition and Memorandum for Rehearing.pdf; 2021.05.18 Letr to Clerk w Filing Petition for Rehearing.pdf

Dear Counsel:

Attached please find for service upon you the Appellant's Petition and Memorandum for Rehearing, along with a letter of transmittal to the Court of Appeals and the Proof of Service.

Thank You,

Kimberly Hutchins, ACP

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May 18, 2021

VIA Email: ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
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Columbia, SC 29201

RECEIVED
May 18 2021
SC Court of Appeals

Re: In the Matter of the Estate of Paul Brandon Barringer, II
Appellate Case No.: 2021-000159

Dear Ms. Kitchings:

Attached and being emailed herewith for filing is the Appellant's Petition and Memorandum for Rehearing dated May 18, 2021, along with the Proof of Service on counsel in this matter.

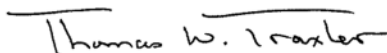
I do hereby certify that on this date I have placed in United States mail a check made payable to the Court of Appeals in the amount of \$50.00 for the filing fee for the Appellant's Petition and Memorandum for Rehearing.

If you need anything further in order for this Petition and Memorandum for Rehearing to be properly filed, please do not hesitate to let me know.

Also, I would appreciate it if the Appellate records would note my representation of the Appellant in this matter and also the representation of Alan Medlin. The information is shown on the signature block of the enclosed Petition. I do not believe that we received notices earlier from the Court, and it would appear that we may not be noted as counsel of record for the Appellant in this matter.

Yours very truly,

CARTER, SMITH, MERRIAM,
ROGERS & TRAXLER, P.A.



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TWT/kh

Enclosures

Cc: James R. Gilreath (*via email*)
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