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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
CARMEN T MULLEN, CIRCUIT COURT JUDGE

Appellate Case No. 2021-000159

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, ... Defendant/Respondents,

-and-

Hampton Barringer Luzak, ...Appellant,

v.

Merrill U. Barringer, ...Defendant/Respondent.

REPLY TO RESPONDENTS' RETURN TO PETITION FOR REHEARING

Appellant Hampton B. Luzak ("Luzak") replies to the Return submitted by Defendant/Respondents on August 9, 2021. On July 28, 2021, this Court requested a Return to

Luzak's Petition for Rehearing dated May 18, 2021,[1] and that Return was filed on August 9, 2021. Defendant/Respondents' Return fails to address or respond to the inquiry before this Court or to understand the scope of rehearing pursuant to Rule 221(a), SCACR. Instead, Defendant/Respondents attempt to simplify an incredibly complex situation of their own making and ask this Court to ignore the procedural status and focus solely on the merits of the case as Defendants/Respondents have wished them to be.

These consolidated cases, designated as complex in 2017, individually deal with the same basic facts and legal issues: the Decedent Paul Barringer executed testamentary documents in 1998, and the validity of those documents is unchallenged. Decedent's subsequent estate planning documents,[2] executed in February 2012, July 2012, June 2014, and February 2015, are invalid because of one or more of the following — undue influence, mistake, fraud, tortious interference, civil conspiracy, and/or lack of capacity. Each of those documents, if valid, revoked all earlier documents, so the last valid document is the operative document, whatever that is determined to be. These facts are common to all causes of action. As a necessary predicate for determining the bifurcated causes of action dealing with whether a power of appointment exists and, if so, may be exercised, the document creating such a power, if any, must be determined.[3] It is a fallacy to suggest that the bifurcated causes of action deal only with the 1998 documents and parol matters occurring after them; quite the opposite is true.

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[1] Pursuant to Rule 221(a), Respondents were prohibited from filing a Response to the Petition for Rehearing absent a specific request from this Court, which request was made by letter dated July 28, 2021.

[2] All of Decedent's subsequent estate planning documents were executed after he had been diagnosed with and began treatment for dementia in 2011.

[3] Defendant Barringer asserts that it does not matter which documents are valid as to the power of appointment issue, but how can one determine whether there is a power of appointment without determining which document, if any, creates one?

Luzak contends that the last valid estate planning documents were executed in December 1998. She contends that all subsequent documents are invalid. Defendant/Respondents contest that, asserting instead that all subsequent estate planning documents through 2015 are valid, despite Mr. Barringer's continuing rapid deterioration from dementia after 2011.

This dispute runs through all causes of action. In the second and third causes of action in two of the cases, 2019-CP-07-01253 and 2019-CP-07-01294, Luzak seeks a determination that Defendant Merrill Barringer does not have a power to appoint stock in the Decedent's legacy company ("the power of appointment causes of action") and seeks equitable relief from the court associated with that determination.[4] That determination necessarily involves a determination of which one of the five (5) sets of testamentary documents is valid.

The present appeal appeals the order of the trial court to bifurcate the trials of the causes of action because it implicates the Appellant's right to trial by a single jury on all of causes of actions and because the trial court improperly set the equitable causes of action for trial before the legal causes of action, an improper sequencing under South Carolina law. That is discussed below.

The problem is compounded because the first phase of the bifurcated trial is against only the Decedent's widow, Merrill Barringer, without the remaining Defendant/Respondents. That means that certain equitable causes of action have been cherry-picked by Defendant/Respondents to be tried against a cherry-picked Defendant before any legal causes of action are tried when common issues of fact and law permeate all causes action against all Defendant/Respondents. That implicates the mode of trial because it deprives Luzak of her right to a jury trial. That "affects a

[4] In addition to these two causes of action, the consolidated cases contain 22 other causes of action, although one of the causes of action, for civil conspiracy, was dismissed by summary judgment. See Order of Judge Price filed June 7, 2021. The June 7, 2021 order dismissing the conspiracy cause of action is a part of Luzak's appeal in Appellate Case No. 2021-000837, for which she has separately sought an emergency declaration from this Court that an automatic stay is in effect.

substantial right" within *S.C. Code Ann.* §14-3-330, and that is why the order for bifurcation is immediately appealable. The procedural by-product of the order of bifurcation is the fallacy that the bifurcated trial can be limited to the 1998 documents, leaving the subsequent documents for a later jury trial. *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997).

After consenting to the consolidation on two occasions, Defendant/Respondents decided, and Judge Mullen agreed, to pluck two equitable causes of actions out to try "first and prior" to the trial of the predominant legal causes of action under the mistaken belief the bifurcated causes of action present no overlapping issues with the other causes of action. In doing so, they manufactured the "first and prior" trial to be against one Defendant/Respondent, Merrill Barringer only. The other Defendants/Respondents get to sit in the dugout and watch the outcome of the "first and prior" bifurcated trial before deciding on their next move.[5]

This procedural mess results from the Defendants/Respondents seeking piecemeal adjudication of certain discrete pieces of this consolidated case, which has profound effects on Luzak's trial of the case, forcing her to appeal at this interim stage to protect her procedural rights or otherwise lose them.[6] If the appeal of the order for bifurcation is not heard and until that order

[5] The remaining Defendant/Respondents may sit back and decide whether they like the outcome of the bifurcated trial, and if so, attempt to use this jury's findings offensively against Luzak because it is necessary in both trials to determine which estate planning documents are valid. If not, they get a second chance to convince a jury that didn't buy Mrs. Barringer's story the first time around after giving her the first chance to win or lose without assuming any risk for themselves. *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct.App. 1984). *See also Roberts v. Recovery Bureau Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct.App. 1994). In effect, Mrs. Barringer is the trial balloon or Guinea pig for the remaining Defendant/Respondents. Mrs. Barringer may lose the "first and prior" bifurcated trial, but the remaining Defendant/Respondents can try again on the remaining portion of the consolidated cases.

[6] For example, under the bifurcation order and later order setting trial for the first phase, the second and third causes of action against Merrill Barringer, the widow, alone are to be tried starting on August 30, 2021. The trial court, however, granted partial summary judgment on July 6, 2021 to the *other* Defendants/Respondents establishing the validity of the February 2012 Will and Trust (albeit subject to Luzak's second appeal, not addressed here) under the other consolidated case, throwing a procedural monkey wrench into the first trial. That is an example of the morass in which this case finds itself. Luzak will further discuss the multiplication of confusion caused by summary judgment orders issued during the pendency of this appeal in her Reply to the Return to Emergency Motion for Declaration of Stay, to be filed tomorrow.

is reversed, this case will inevitably bind itself into a Gordian[7] Knot, the result of which will mean that ultimately the trials of the consolidated cases will have to be redone and tried all over again in full and before a single, but different jury, who will be asked to decide the same factual issues the "first and prior" jury will have already been asked.

Luzak set out her position in her earlier Memorandum in support of appealability and her motion to reconsider.[8] The essence of the argument is that the trial court's order for bifurcation implicated the mode of trial and also the sequencing of the trials of the causes of action implicated the mode of trial because the order ordered that equitable claims be tried before legal claims, thereby inevitably prejudicing Luzak's right to have her legal causes of action tried before a jury before the equitable causes of action, even if the equitable causes of action were tried before a jury. The only way the causes of action can be tried is with a single trial on all causes of action before a single jury and the trial court ordering whatever equitable remedy may be appropriate after the jury determination. There are many common facts and issues between the bifurcated causes of action, and the remaining causes of action because all require a determination of the validity of each of the estate planning documents.

Luzak stated in her Memorandum on the immediate appealability: "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*,

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[7] Phrygian Gordium, 333 B.C. https://www.history.com/news/what-was-the-gordian-knot

[8] Luzak's Memorandum in Support of Immediate Appealability of Order Granting Motion to Bifurcate filed on March 4, 2021 is already of record before this Court. Similarly, her petition for rehearing the dismissal of the appeal dated May 18, 2021 is already of record.

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)."

That problem still exists. It is not cured or moot just because the trial court has decided to empanel a jury to try the equitable causes of action separately,[9] albeit first, leaving a different jury down the road to hear the remaining causes of action that are still predominantly legal in nature. There are many common issues of fact and law among all of the causes of action, and the current posture of the trial is that the equitable causes of actions are to be tried first against a single Defendant, while the remaining causes of action (predominantly legal) against other Defendants are tried down the road at some point, but with that first trial having prejudicial effect on the Appellant's right to trial by jury on her legal causes of action and, worst, possibly having a binding effect. That is why the *Johnson* court stated that the legal claims must be tried first, absent the "most imperative circumstances." *Id.* That "affects a substantial right" of the Appellant set forth in *S.C. Code Ann.* §14-3-330.

[9] At the time of bifurcation, Judge Mullen did not specify whether the bifurcated trial would be jury or nonjury. Subsequent orders by the Chief Administrative Judge which set the trial for August 30, 2021 were similarly silent on the issue. Just recently, the online docket changed to reflect a jury was being empaneled for the August 30, 2021 term. Counsel were left guessing until the terms of court published on the judicial branch website changed a few weeks ago to reflect a jury being called in, presumably for this case, although no one has actually said so. Luzak is still not sure who, why or how it was decided that the August 30, 2021 trial would be a jury trial.

Further, Defendant/Respondents argue that Luzak is bound by some "consent" pursuant to SCRCP Rule 39(e) that the equitable claims be tried by jury. Luzak has strenuously opposed the bifurcation and its sequencing. Luzak reserved her rights under this appeal and requested a jury trial on the first phase of the bifurcated trial only in a last gasp effort to salvage something resembling her jury trial rights despite the order to proceed to trial on the first phase of the bifurcated trial. *See* Plaintiff's Motion to Reconsider and Amend Orders on Motions Entered June 7, 2021, ¶. 13, filed June 17, 2021 @4:56 p.m.

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STRUCTURE OF APPELLATE REVIEW

The General Assembly provides for appeals of final judgments as well as certain intermediate orders, including those which preclude a judgment from which an appeal can be taken and those which affect a substantial right in accordance with S.C. Code Ann. §14-3-330.[10] Thus, in determining whether an order that is not final can and must be appealed at an interim stage of the proceedings, the provisions of §14-3-330 control. Section 14-3-330(d) allows an appeal of an intermediate order that "affects a substantial right" or "must prevent a judgment from which an appeal may be taken. *Rutledge v. Tunno,* 63 S.C. 205, 41 S.E. 308 (1902); *DuPont v. DuBos*, 33 S.C. 389, 11 S.E. 1073 (1890).

Similarly, "an order that effectively forecloses a party from contesting the case on the merits affects a substantial right and is immediately appealable." Toal, Appellate Practice in South Carolina (3d.Ed. 2016) pp. 94-95, citing *McLaughlin v. Strickland,* 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1918). *See also Ayer v. Chassereau,* 18 SC. 597 (1882) (an order refusing leave to file an answer involves a substantial right and may be immediately appealed although final judgment has not been entered.).

Here, the order on appeal requires the second and third causes of action to be to be tried and equitable remedies applied, while leaving additional legal issues to be determined in a later trial with a later jury deciding the same factual issues. "[S]ome minimal inquiry will always be necessary on the part of an appellate court considering the appealability of an order which is alleged to have deprived a party of a mode of trial." *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). "In a well-established exception to the general rule, we repeatedly

[10] The South Carolina Constitution provides that the jurisdiction of appellate courts is that as spelled out by the General Assembly. S.C. Constitution Article V, § 5. The applicable section, S.C. Code Ann. §14-3-330 applies equally to law cases and equity cases. *Charleston County Department of Social Services v. Father*, 317 S.C. 283, 454 S.E.2d 307 (1995); *Gowens v. Gowens*, 294 S.C. 500, 366 S.E.2d 29 (Ct. App. 1988).

have held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14–3–330(2). *See Flagstar Corp. v. Royal Surplus Lines,* 341 S.C. 68, 72, 533 S.E.2d 331, 333 (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.") (listing cases); *Creed v. Stokes,* 285 S.C. 542, 331 S.E.2d 351 (1985) (order referring case to master in equity affects the mode of trial, a substantial right, and party waived his objection to the reference and his right to jury trial by failing to immediately appeal the order); *Bateman v. Rouse,* 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App.2004) (purpose of immediate appeal on right to particular mode of trial is to preserve party's constitutional right to trial by jury which would otherwise be lost.)" *Hagood v. Sommerville*, 362 S.C. 191, 196–97, 607 S.E.2d 707, 709 (2005).

CHANGES IN THE STATUS OF THE TRIAL COURT PROCEEDINGS

Since Luzak filed her petition for rehearing for this appeal, the trial court has issued separate summary judgment orders that impact this appeal and the status of the trial court proceedings. Luzak's second appeal was filed on August 5, 2021 (Appellate case No. 2021-000837). The landscape at the trial court now is dramatically different than it was at the time Luzak filed her first appeal in February 2021.

During the pendency of the instant appeal, the Chief Administrative Judge granted summary judgment in favor of Defendant/Respondents on discrete issues, finding that the estate planning documents executed by Mr. Barringer in February 2012 are valid.[11] He also dismissed

[11] Rule 56, SCRCP, permits summary judgment to be sought on "all or any part" of a pending claim. When summary judgment is granted under circumstances as to require an immediate appeal, the trial court proceedings are stayed, if the order on appeal necessarily affects the judgment which remains to be litigated at the trial court. Rule 241(a), Rule 205, SCACR. Respondents obviously seek to delay the final resolution of this case as long as possible, since they have sought and obtained multiple orders which require immediate appeals and stay the trial court proceedings.

Luzak's cause of action for conspiracy (which was not one of the causes of action carved out for trial but would be presented by Luzak to help the trier of fact determine which set of estate planning documents is valid.)

Judge Price also *sua sponte* set a discovery cut-off and ordered the bifurcated trial to begin on August 30, 2021. Luzak asserts that the first appeal stayed the trial court proceedings, which would have prevented the interim orders by Judge Price that changed the landscape of the trial court proceedings. Luzak also asserts that the second appeal filed on August 5, 2021 (Appellate Case No. 2012-000837) operated to stay the trial court proceedings.[12]

The August 30, 2021 trial will require a determination of whether Defendant Merrill Barringer has a power to appoint stock in the decedent's legacy company. The jury will need to consider the same voluminous evidence for the bifurcated issues as it would for the rest of the case: To make a determination in the bifurcated trial, the jury will have to consider five sets of estate planning documents to see which set, if any, is valid. Several of the recent summary judgment orders of June 7, 2021 — the subject of the separate appeal — compound the trial problems and necessarily affect the power of appointment trial. Relevant to the appeals, these summary judgment orders determined that the February 2012 Will and Trust[13] are valid and dismissed the civil conspiracy cause of action. Thus, Luzak asserts that the bifurcated power of appointment trial is stayed, for the reasons stated below.

[12] After the second appeal (Appellate Case No. 2021-000837) was filed, Judge Bonds ruled that there was no stay in effect and trial would go forward on August 30, 2021. This Court is currently considering Luzak's Emergency Motion to Declare there is an automatic stay in effect, which she filed on August 9, 2021. This Court is expediting its consideration of Luzak's emergency motion, with Luzak's reply due tomorrow. Luzak argued prior to the motion hearings on August 10, 2021 that the trial court proceedings were stayed, but Judge Bonds disagreed and said neither appeal stayed the trial court proceedings. He then heard several pending motions. No rulings have yet been issued on the motions argued on August 10, 2021. Judge Bonds has requested proposed orders by August 20, 2021.

[13] The February 2012 Will and Trust documents differ from the subsequent documents because the February Will and Trust documents' dispositive provisions treat the decedent's children equally, as do the 1998 documents.

The effect of the second appeal will be discussed in more detail in reply to the response filed to Luzak's Emergency Motion to Declare Stay, which is due tomorrow. However, it is sufficient to point out that an order granting summary judgment of any cause of action is immediately appealable because it finally determines some part of the action. *Osborne v. Allstate Insurance Company*, 319 S.C. 479, 462 S.E.2d 291 (Ct.App. 1995). Therefore, the orders now on appeal granting summary judgment on the 2012 estate planning documents and Luzak's claim for civil conspiracy are clearly and indisputably directly appealable under S.C. Code Ann. § 14-3-330.

CONCLUSION

The order for bifurcation and its sequencing of the trials deprives the Appellant of her right to trial by a single jury of all of her causes of action with the trial order ordering such equitable relief after that jury has spoken. Otherwise, the bifurcation prejudices the Appellant's rights to a jury trial on her legal causes of action.

BALLARD & WATSON

s/ Desa Ballard
Desa Ballard (S.C. Bar No. 498)
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com

James R. Gilreath (S.C. Bar No. 02133)
William M. Hogan (S.C. Bar No. 65272)
THE GILREATH LAW FIRM, PA
110 Lavinia Avenue (zip 29601)
P.O. Box 2147
Greenville, South Carolina 29602
Telephone: 864.242.4727
Facsimile: 864.232.4395
jim@gilreathlaw.com
bhogan@gilreathlaw.com

S. Alan Medlin (S.C. Bar No. 3924)
1713 Phelps Street
Columbia, South Carolina 29205
Telephone: 803.777.7465
Facsimile: 803.777.7465
amedlin@sc.rr.com

Charles B. Macloskie (S.C. Bar No. 3514)
MACLOSKIE LAW FIRM
P.O. Box 280
Beaufort, South Carolina 29901
Telephone: 843.524.0909
Fax: 843.521.1379
macloskielawfirm@hargray.com

Thomas W. Traxler (S.C. Bar No. 5624)
CARTER, SMITH, MERRIAM ROGERS & TRAXLER, PA
900 East North Street (29601)
P.O. Box 10828 (29603)
Greenville, South Carolina
Telephone: 864.242.3566
Facsimile: 864.232.1558
tom.traxler@carterlawpa.com

Attorneys for Appellant Hampton B. Luzak

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STATE OF SOUTH CAROLINA
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APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
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Appellate Case No. 2021-000159

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, ... Defendant/Respondents,

-and-

Hampton Barringer Luzak, ... Appellant,

v.

Merrill U. Barringer, ... Defendant/Respondent.

PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, do hereby certify that on August 16, 2021, I served a copy of the **Reply to Respondents' Return to Petition for Rehearing,** in the above-captioned case on the following individuals by electronic mail using their email address

listed in the Attorney Information System, addressed as follows:

Bijan Khaladj-Ghom, Esquire
Rosen Hagood LLC
bghom@rosenhagood.com

Alice Paylor, Esquire
Rosen Hagood LLC
apaylor@rosenhagood.com

Charles Molster, Esquire
The Law Offices of Charles B. Molster, III, PLLC
cmolster@molsterlaw.com

J. Ashley Twombley, Esquire
Twenge & Twombley, LLC
twombley@twlawfirm.com

Lee Anne Walters, Esquire
Twenge & Twombley, LLC
lwalters@twlawfirm.com

Kevin Johnson, Esquire
Johnson & Johnson Attorneys at Law, LLC
kjohnson@johnsonlawyers.com
kjohnson@twlawfirm.com

Harley Ruff, Esquire
Ruff & Ruff, LLC
hruff@ruffllc.com

Denise Collins, Esquire
Ruff & Ruff, LLC
dcollins@ruffllc.com

Beth Cogan

Beth Cogan, Paralegal

August 16, 2021

Beth Cogan

From: Beth Cogan
Sent: Monday, August 16, 2021 4:46 PM
To: Alice Paylor; Bijan Ghom; Charles Molster; Ashley Twombley; Lee Walters; Kevin Johnson; kjohnson@johnsonlawyers.com; Harley D. Ruff; Denise Collins; Taylor Davis
Cc: Desa Ballard; Tom Traxler; Alan Medlin, Esquire; Bill Hogan; 'Macloskie Law Firm'; kathie@gilreathlaw.com; Debbie Dorn; Kimberly Hutchins
Subject: (Luzak v. Light et al. 2021-000159) Reply to Respondents' Return to Petition for Rehearing
Attachments: 2021 08 16 Ltr to COA encl Reply to Return (Petition for Rehearing).pdf; 2021 08 16 Reply to Return Petition for Rehearing.pdf; 2021 08 16 POS Reply to Return (Petition for Rehearing).pdf

Good afternoon,
Please see the attached Reply to Respondents' Return to Petition for Rehearing for the above-referenced matter that is being filed today with the COA.

Kindest Regards,
-Beth

Beth Cogan, Paralegal
Ballard & Watson, Attorneys at Law
226 State Street
West Columbia, South Carolina 29169
803.796.9299
803.796.1066 Facsimile
beth@desaballard.com
www.desaballard.com

Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169
ph 803.796.9299 | fx 803.796.1066 | desaballard.com

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Aug 16 2021
SC Court of Appeals

August 16, 2021

Via Email (ctappfilings@sccourts.org)
The Honorable Jenny Abbot Kitchings
Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Hampton Luzak v. Merrill B. Light, et al.*
Appellate Case No.: 2021-000159

Dear Ms. Kitchings:

Enclosed for filing please find the Reply to Respondents' Return to Petition for Rehearing and Proof of Service for the above-referenced matter.

By copy of this letter and as evidenced by the Proof of Service, these filing has been served upon counsel for the Respondents. Thank you for your time in this matter. If you have any questions, please do not hesitate to contact our office.

With warm personal regards, I am,

Sincerely yours,

Desa Ballard | ekc

Desa Ballard
desab@desaballard.com

Enclosures

cc: *Via Electronic Mail*
Alice Paylor, Esquire
Bijan Ghom, Esquire
Charles Molster, Esquire
J. Ashley Twombley, Esquire
Lee Anne Walters, Esquire
Kevin Johnson, Esquire

Harley D. Ruff, Esquire
Denise Collins, Esquire
Ryan Rich, Esquire
Eugene Parrs, Esquire
Edward Fuhr, Esquire
Jonathon Schronce, Esquire
Thomas W. Traxler, Esquire
S. Alan Medlin, Esquire
Charles Macloskie, Esquire
James R. Gilreath, Esquire
William Hogan, Esquire
Hampton Luzak