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Aug 17 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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. 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--

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

--and--

Hampton B. Luzak,Appellant,

v.

Merrill U. Barringer,Respondent.

REPLY TO RETURN:
EMERGENCY PETITION FOR
DECLARATION OF AUTOMATIC STAY PURSUANT
TO RULE 241(a), SCACR

Appellant Hampton B. Luzak (hereafter “Luzak”) filed an appeal to this Court from four (4) orders on August 5, 2021. This Reply addresses only Appellate Case No. 2021-000837, in which Luzak asked that this Court declare there is a stay of trial court proceedings in effect.

In December 2020, the trial court entered an order for bifurcation, and that order is presently subject to appeal in Appellate Case No. 2021-000159. The current procedural posture of that appeal is that the Court of Appeals initially dismissed the appeal on May 4, 2012 as being interlocutory in nature and not immediately appealable, but after review of the Appellant’s Petition for Rehearing, the Court instructed the Respondents to file a Return to the Petition. The Appellant filed her Reply to that Return yesterday, August 16, 2021, and that Petition for Rehearing is before the Court of Appeals.

After this Court dismissed Appellate Case No. 2021-000159 on May 4, 2021 (and after Luzak filed her petition for rehearing on May 18, 2021), proceedings continued in the trial court, with Defendant/Respondents continuing to cherry-pick discrete issues on which to move for summary judgment, with all such motions being granted. Two of the orders issued during that time required immediate appeal, with the application of Rule 241(a) necessarily staying the trial court proceedings. The instant Petition was filed because the trial court has continued to schedule matters in preparation for the August 30, 2021 trial, and the clerk of court has issued jury summons for approximately 500 potential jurors for the bifurcated trial.¹

The orders on appeal in this appeal are:

¹ There is no public reference of which Luzak is aware which confirms the issuance of jury summons for the August 30, 2021 trial. However, on August 12, 2021, counsel for Luzak obtained the list of 425 potential jurors who have been summoned for the August 30, 2021 term. The clerk’s jury list reflects communications from a number of potential jurors, invoking their right to claim exemption for jury service because they are beyond the age of 65 years, so it is clear the jury assembly process is proceeding. *See* S.C. Code Ann. §14-7-200 (setting forth timetable for summoning of petit jurors).

1. Order entered July 6, 2021 granting summary judgment to Defendant/Respondent Merrill Light as to the validity and enforceability of estate planning documents executed February 28, 2012 (Merrill Light's Motion for Summary Judgment filed May 14, 2021).
2. Order entered June 7, 2021 allowing intervention of nonparty intervenor Coastal Forest Resources Company (CFRC) and dismissing Luzak's claim for civil conspiracy and striking the majority of her claims for damages.² Intervenor CFRC's involvement in the case then ended.
3. Order entered June 7, 2021 which affirmed the earlier order of bifurcation issued by Judge Mullen and set the trial on the bifurcated trial for August 30, 2021,³ without stating whether or not Luzak would be granted the jury trial she had demanded.⁴
4. Order of Judge Mullen dated December 30, 2020 bifurcating two causes of action from the 2019 actions and requiring them to be tried "first and prior to any other causes of action." This order was already on appeal in Appellate Case No. 2021-000159 but is being examined by this Court to determine whether, standing alone, it was immediately appealable. The present appeal of that order for bifurcation is appropriate although perhaps redundant with the pending appeal of that order under Appellate Case No. 2021-000159 that is mentioned above. The present appeal of that order is viable, and the earlier appeal of that order also remains viable. By joining the December 30, 2020 order with

² Since CFRC was not a party to this action, one might question why CFRC had standing to move for summary judgment on a cause of action which sought no relief against it and to strike damages which were not sought against it. Hopefully, this Court can answer those questions and others in this appeal.

³ Ordinarily, an appeal from this order would be interlocutory but it has been joined with appeals from final orders and is therefore reviewable pursuant to Section 14-3-330(1) and Rule 54(a), SCRCP.

⁴ The order on appeal (issued by the Chief Administrative Judge) also required the trial be completed in one week, which is, of course, an abuse of discretion. *Spartanburg County DSS v. Padgett*, 296 S.C. 79, 370 S.E.2d 872 (1988). The current trial judge has verbally overruled the Chief Administrative Judge and has advised he has two weeks available for jury trial and may be able to structure a third week if necessary through Court Administration by seeking a reassignment from Lexington County.

the appeal from the two final orders identified in paragraphs 1 and 2 above, this Court may need not determine whether the order of bifurcation (Appellate Case No. 2021-000159) is interlocutory.

Section 14-3-330(1) expressly permits appeal of what would otherwise be an interlocutory order to be included in an appeal from final orders, as here. *See also*, Rule 54(a), SCRCP (preliminary orders may be revised “at any time” before “entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”); Toal Appellate Practice in South Carolina, (3d 2016), p. 162, citing *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 1976 (1990), cited with approval in *Thornton v. S.C.E.&G.*, 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011), discussed *infra*.

The instant appeal operates to automatically stay proceedings in the trial court. Rule 241(a). The first two (2) orders listed are appeals from final judgments, as to which there is no question immediate appeals must be taken. These orders are directly appealable pursuant to S.C. Code Ann. § 14-3-330(1). Rule 241(a) provides that the trial court proceedings are stayed while the appellate court decides the issues on appeal, since they will affect the final judgment that is eventually rendered.

If the circuit court errs in striking out any material allegations of a good cause of action. . . it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleadings, and on appeal from the final judgment, this court could not say there was error of law in confining the evidence and charge to the pleadings.

Thornton v. SCE&G, 391 S.C. 297, 303, 705 S.E.2d 475, 479 (Ct. App. 2011).

The *Thornton* case further held:

Generally, orders granting partial summary judgment may be immediately appealable under either the “involving the merits” or “substantial right” categories of section 14-3-330(1) and (2)(c). *See Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 178-79 (1990) (holding an order granting partial summary judgment may be appealable under either category). To decide whether a particular summary judgment order fits into

either subsection, however, the court must examine the order to determine if it meets the subsection's criteria for appealability.

...

An order “involves the merits” when it finally determines a substantial matter forming the whole or a part of some cause of action or defense.

Id. at 306, 705 S.E.2d at 480 (Ct. App. 2011)

As it currently stands, the final order entered July 6, 2021, which granted summary judgment in favor of Merrill Light, establishes that Paul Barringer’s February 2012 estate planning documents are valid as a matter of law. That is a final order, subject to immediate appeal.⁵ An order granting summary judgment is immediately appealable because it finally adjudicates that legal claim. *Osborne v. Allstate Insurance Co.*, 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995). Similarly, the order dismissing the civil conspiracy cause of action is a final order, subject to immediate appeal.

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. The bifurcated trial issues are clearly affected by the summary judgment orders, and the bifurcated trial is thus stayed until the resolution of the appeals.

These consolidated cases⁶ each deal with the same basic facts and issues: the Decedent Paul Barringer executed testamentary documents in 1998, and the validity of those documents is

⁵ Defendant/Respondents attempt to carve out the bifurcated issues using a meaningless analysis of “contractual” and “non contractual” claims in an attempt to show that the trial of the remaining causes of action can proceed despite whatever final judgments are entered as a result of the August 30, 2021 trial. As pointed out in the Reply to Return to Motion to Reconsider filed yesterday in Appellate Case No. 2021-000159, and below, both the bifurcated trial and the trial of the remaining causes of action include many common questions of law and fact, so that the bifurcated causes of action are clearly affected by the summary judgment orders.

⁶ These consolidated cases have been designated as complex litigation.

unchallenged. Decedent's subsequent estate planning documents,⁷ 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.⁸

If the February 2012 documents are valid, as determined by the summary judgment order being appealed in the instant appeal, then the 1998 estate planning documents that all parties concede were valid at the time they were created have been revoked by the February 2012 documents.⁹ The summary judgment order did not address the validity of any documents subsequent to February 2012. Thus, the bifurcated trial, which must determine which one set of estate planning documents is valid, is thrown into a state of confusion by the summary judgment as to the February 2012 documents.¹⁰

Luzak must be allowed to first complete the appellate process for the summary judgment as to the February 2012 documents before trying the bifurcated cause of action.

⁷ All of Decedent's subsequent estate planning documents were executed after he had been diagnosed with and began treatment for dementia in 2011.

⁸ 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?

⁹ Luzak asserts error in this finding for a number of reasons; however, this Court will not have adjudicated the final decision of that appeal prior to the August 30, 2021 bifurcated trial.

¹⁰ Just this morning, opposing counsel filed a motion *in limine* to exclude all medical evidence from the trial to be held on August 30, 2021. See reference to status conference on August 2, 2021, *supra* at footnote 4. Opposing counsel keeps changing the rules, or at least trying to.

Similarly, one of the tools Luzak had available to attack the validity of the post-1998 estate planning documents was her cause of action for civil conspiracy, which was taken away by summary judgment. Luzak must be allowed to first complete the appellate process for the summary judgment as to the civil conspiracy cause of action before trying the bifurcated cause of action.

The appeals of these two summary judgment orders clearly affect the causes of action in the bifurcated trial, which therefore must be stayed.

“An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial.” *Thornton v SCE&G*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). Orders granting summary judgment as to only a part of a case “may be immediately appealable under either the ‘involving the merits’ or ‘substantial right’ categories of [Section 14-3-330].” *Id.*, referencing *Link v. School District of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 178-79 (1990).

This appeal must stay the trial court proceedings as provided in Rule 241(a). Until this Court determines, *inter alia*, whether summary judgment was properly granted to Merrill Light as to the February 2012 estate planning documents as well as the civil conspiracy cause of action (and the other issues on appeal), any trial at this time regarding the validity of the 1998 documents and family agreements through 2010 to enforce them is a colossal waste of judicial and clerical resources.

The doctrine of an automatic stay of trial court proceedings during the pendency of an appeal¹¹ exists precisely to prevent the trial court's waste of judicial resources to litigate an issue that will be rendered moot by the appeal.

The purpose of a stay of "proceedings in the trial court [is] to preserve the *status quo* pending the determination of the appeal... and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (citations omitted). If the trial set for August 30, 2021 goes forward, its result will be meaningless, at least until the issues raised in the instant appeal are finally determined.

Luzak is required to file immediate appeals from the orders on appeal in the instant appeal. Otherwise, "the fruits of a meritorious appeal" from the order on appeal would otherwise be lost. *Graham, supra*. It is for that very reason the automatic stay comes into effect.

Motion hearings were held on August 10, 2021 at the trial Court after this Emergency Petition to Declare Automatic Stay was filed. The trial judge heard arguments on the effect of the instant (second) appeal and whether the trial court proceedings were stayed by the appeal. Despite the Rules and the law, the trial judge ruled verbally that judicial economy required that the trial go forward despite the pendency of the appeals because one of the Defendant/Respondents "is 89 years old" and "weighing judicial economy, [the question] does not come close."

The issue is whether the appeal of the judgments stays the trial of remaining causes of action because the orders appealed from "affect" the remaining issues. In this case, the remaining issues are clearly affected by the appeal of the summary judgments. The age of any party is

¹¹ There are certain exemptions to the automatic stay provision of Rule 241(a), those exceptions being set forth in Rule 241(b), none of which are relevant here.

irrelevant to the question of whether an appeal affects remaining causes of action; the Rules do not create an exception for age. Luzak recognizes the jurisdiction of the trial court to proceed “with matters not affected by the appeal” under Rule 205, but clearly the matters set forth herein affect all of the remaining proceedings before the trial court. The law is clear that there is a mandate of an automatic stay as a result of the grant of summary judgment in favor of Defendant/Respondents on two causes of action. However, this Court should also consider the maelstrom that would be created by moving forward with the August 30, 2021 trial on the bifurcated causes of action. Preliminarily, the trial judge will be required to determine:¹²

1. What, if anything, the jury must be told at the August 30, 2021 trial as to whether the February 2012 estate planning documents have been held to be valid by the summary judgment order on appeal? It would seem an important question, since one of the questions that have been bifurcated for the “first and prior” trial will examine which of multiple estate planning documents are the effective documents. Luzak’s ability to argue the bifurcated issues is seriously compromised if the jury is told that the 2012 documents have already been determined to be valid.¹³ If the jury is told that the February 2012 estate planning documents have already been determined to be valid, Luzak loses her opportunity to challenge those documents because, if the trial is held as scheduled, she will not have had the ability to complete her pursuit of the appeal.

¹² If these issues are not decided and addressed pre-trial, the risk of many more years of litigation leers, with appellate courts determining the preclusive effect of various rulings and findings from the “first and prior” trial.

¹³ Query whether such an instruction to the jury would be an improper comment by the trial judge on the facts, or would constitute a legal instruction. *See* South Carolina Constitution Article V, Section 21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”) Is the grant of summary judgment to Merrill Light as to the February 2012 documents a point of fact, which the trial judge cannot disclose, or is it a matter of law that must be charged?

2. Since Merrill Barringer is the only Defendant/Respondent defending the August 30, 2021 trial, will counsel for the other Defendant/Respondents, some of who will testify at trial, be permitted to participate at trial even though their clients are not litigants in the action?¹⁴
3. What will the effect be, if any, of factual findings of the jury to be seated on August 30, 2021 on the same factual issues that will be a part of the subsequent trials on the remaining causes of action?¹⁵
4. If only Merrill Barringer is a Defendant/Respondent in the August 30, 2021 trial, will the remaining Defendant/Respondents be able to rely upon (assuming Mrs. Barringer wins) or use offensively (if Mrs. Barringer is unsuccessful) factual and/or legal rulings from the bifurcated trial? If Luzak prevails, will the factual and/or legal rulings from the bifurcated trial be binding for the remaining causes of action?
5. Will the jury be told there are additional, unresolved issues that will be decided sometime in the future and their factual findings may be considered binding in causes of action this jury will not be hearing?

As presently postured, in these consolidated actions, the trial court will be forced to try multiple trials in the next few years, with different juries, different results, convoluted by determinations of what effect the first bifurcated trial had on the subsequent trials, all of which is

¹⁴ Rule 20, SCRCP has been applied to prohibit persons who are not parties to the action from full participation in a trial and appeal, since the non-parties had the option of seeking to intervene and did not do so. *Valentine v. Davis*, 319 SC. 169, 460 S.E.2d 218 (Ct. App. 1995). Similarly, will the trial judge be forced to determine whether the non-parties are necessary parties such that litigation of the bifurcated action in the absence of the non-parties as full parties require a decision based on “equity and good conscience” that the case not proceed until the alignment of parties can be determined? Rule 19, SCRCP. *See also Stearns Bank National Association v. Glenwood Falls L.P.*, Ct. App. 2007 (“... a defendant may come into the court with trumpets, or quietly by the back door.”)

¹⁵ “Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based on a different claim.” *Carrigg v. Cannon*, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001) (citations omitted).

likely meaningless because the stay rendered by the instant appeal makes all those proceedings going forward void and of no effect.

It bears remembering that Judge Mullen’s first order of consolidation, dated May 19, 2017, which was a consent order, stated that “[c]ounsel for all parties have agreed that in order to simplify and expedite these matters, the . . . cases should be consolidated for purposes of discovery and trial.” *Id.* (emphasis added).

After consenting to “simplify and expedite” these matters, counsel for Defendant/Respondents have changed course, since they now approach the consolidated causes of action incrementally, moving for summary judgment on small, discrete parts of causes of action. 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, causing the trial court proceedings to screech to a halt.

If Defendant/Respondents would stop incrementally chipping away at the issues in dispute in this litigation, perhaps it can someday come to an end. Not today, however, because Defendant/Respondents asked first for bifurcation (after agreeing to consolidate to simplify and expedite the matter), then repeatedly moved for summary judgment, and they got what they asked for. As a result, Defendant/Respondents have (perhaps unwittingly) halted what appeared to be progress in a case that was initiated in 2016 and continues today.

CONCLUSION

Charles Dickens’ novel Bleak House revolves upon the fictional case of Jarndyce v. Jarndyce, which evolves over many years of litigation and destroys the happiness and lives of most members of the family as they become obsessed with pursuing their claims and waiting for the long-expected judgment, in the end, the costs of which have consumed the whole property.

This scarecrow of a suit has, in the course of time, become so complicated that no man alive knows what it means . . . Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why . . . but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.

Howard B. Miller, California Bar Journal, July 2010, citing Dickens and discussing the expected breadth and length of the BP Oil spill litigation to come.

Opposing counsel constantly cries that Luzak is the one who is dragging this case out. A quick look at the docket makes it clear who has, and has not, been trying to move the case forward. Defendant/Respondents have built a mountain of files through their unrelenting and unwavering litigation of the case piece-by-piece, which they are welcome to do. Of course, Luzak is equally able to appeal to protect her rights, which she unfortunately has had to do once again.

Luzak respectfully prays for an order of this Court declaring that the automatic stay is in effect, such that Luzak can protect her rights without having an August 30, 2021 trial shoved down her throat in an effort to stifle her pursuit of her rights. The appeals of the summary judgment orders clearly affect the bifurcated trial issue and effect a stay thereof, as well as the remaining causes of action, and Luzak asks the Court of Appeals to declare and confirm this.

Respectfully submitted,

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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. 2021-000837

In re: 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
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--and--

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

--and--

Hampton B. Luzak,Appellant,

v.

Merrill U. Barringer,Respondent.

PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, do hereby certify that on August 17, 2021, I served a copy of the **Reply to Respondents' Return to Petition for Declaration of Automatic Stay**, 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:

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Beth Cogan, Paralegal

August 17, 2021

Beth Cogan

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Subject: (Luzak v. Light et al. 2021-000837) Reply to Respondents' Return to Petition for Declaration of automatic Stay
Attachments: 2021 08 17 Ltr to COA encl Reply to Return (Stay).pdf; 2021 08 17 Reply to Return to Emergency Motion to Declare Stay.pdf; 2021 08 17 POS Reply to Return (Stay).pdf

Good afternoon,

Please see the attached Reply to Respondents' Return to Petition for Declaration of Automatic Stay for the above-referenced matter that is being filed today with the COA.

Kindest Regards,
-Beth

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August 17, 2021

Via Email (ctappfilings@sccourts.org)
The Honorable Jenny Abbot Kitchings
Court of Appeals Clerk of Court
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Aug 17 2021
SC Court of Appeals

Re: *Hampton Luzak v. Merrill B. Light, et al.*
Appellate Case No.: 2021-000837

Dear Ms. Kitchings:

Enclosed for filing please find the Reply to Respondents' Return to Petition for Declaration of Automatic Stay 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
desab@desaballard.com

Enclosures

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

The Honorable Jenny Abbot Kitchings
In Re: Luzak v. Light, et al. (2021-000837)
August 17, 2021

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