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Oct 20 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No.: 2021-001022

Hampton B. Luzak Petitioner

-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, and Merrill Barringer individually Respondents

and

Hampton B. Luzak Petitioner

-vs.-

Merrill U. Barringer Respondent

**RESPONDENTS' MOTION TO DISMISS THE
PETITION FOR CERTIORARI AS MOOT AND RETURN**

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TABLE OF CONTENTS

Counter-Statement of Questions Presented for Review	1
Counter-Statement of the Case	1
Argument	7
I. The Court should dismiss the Petition because intervening events in the circuit court have rendered the Petition moot	7
II. The Petition should be denied because the Court of Appeals correctly determined that the Bifurcation Order is not immediately appealable	7
Conclusion	10

Pursuant to Rule 240, SCACR, Respondents 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, and Merrill Barringer, individually (“Mrs. Barringer”) and as personal representative of the Estate of Paul Brandon Barringer, II (collectively, “Respondents”), hereby move to dismiss Hampton B. Luzak’s (“Luzak”) Petition for Certiorari. The Court should dismiss the Petition because intervening events have rendered it moot.

In addition, pursuant to Rule 242(f), SCACR, Respondents submit this Return to the Petition. If the Court does not dismiss the Petition as moot, the Petition should be denied because the Court of Appeals properly concluded that the circuit court’s order bifurcating this case for trial was not immediately appealable.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. Did events following commencement of this appeal render the Petition moot?
- II. Did the Court of Appeals properly dismiss this appeal because the Bifurcation Order was not immediately appealable?

COUNTER-STATEMENT OF THE CASE

This is a dispute between family members over an estate. Paul Brandon Barringer, II died on May 30, 2016. In August of 2016, his daughter Hampton Luzak filed the first of four civil lawsuits in Beaufort County. The two 2016 actions are against Paul Barringer’s widow, and Luzak’s 89-year-old mother, Mrs. Barringer, as personal representative of Mr. Barringer’s estate, and Luzak’s sister, Merrill Light, individually and as trustee of the Barringers’ revocable trusts. These cases have civil action numbers 2016-CP-07-1919 and 2016-CP-07-1961 and are referred to here as “Barringer I.” The two 2019 actions, which name Mrs. Barringer individually as the

sole defendant, have civil action numbers 2019-CP-07-01253 and 2019-CP-07-01294 and are referred to here as “Barringer II.”

A. Barringer I

In Barringer I, Luzak alleges 19 causes of action against her sister Merrill Light.¹ (App. 909-978.) Luzak claims that, beginning in 2012, Paul Barringer lacked the mental capacity to execute various wills, trust amendments and transfers, and his family members and others unduly influenced him for their own financial gain. (App. 959.) Specifically, Luzak challenges Mr. Barringer’s 2012, 2014, and 2015 estate planning documents, and a 2012 transfer of stock to Merrill Light, on incapacity, undue influence, and mistake grounds (the “Incapacity/Undue Influence Claims”). (App. 959-966.) Luzak also asserts tort claims against Merrill Light, including intentional interference with inheritance, civil conspiracy, breach of fiduciary duty, fraud, and conversion, as well as equitable claims for unjust enrichment (the “Tort-Based Claims”). (App. 966-979.) These claims seek to invalidate Mr. Barringer’s 2012-2015 estate planning documents, as well as the 2012 transfer of stock to Merrill Light, and to recover money damages from Respondents.

In Barringer I, Luzak identified at least 22 potential fact witnesses, and Respondents identified over 27 fact witnesses. (App. 112-116.) These witnesses include friends, family, family doctors, neurologists, accountants, lawyers, nurses, housekeepers, hunting partners, secretaries, business colleagues, and numerous others. Luzak also identified four experts who will testify at trial—a neurologist, a trust fiduciary expert, a forensic accountant, and an economist, and Respondents identified four experts of their own.

¹ Mrs. Barringer is named in Barringer I only in her capacity as Personal Representative of the Estate, and no direct relief is sought against Mrs. Barringer in Barringer I.

B. Barringer II

In Barringer II, Luzak sued only her mother, Mrs. Barringer. (App. 753.) Barringer II's first cause of action ("Intentional Interference with Inheritance") and fifth cause of action ("Civil Conspiracy") add Mrs. Barringer as an individual defendant and co-conspirator to the Barringer I Tort-Based Claims. (App. 803-806, 809-810.) These two Barringer II claims raise the same factual allegations and legal claims as Barringer I.

The other two causes of action in Barringer II, Luzak's third cause of action ("Enforcement of Contract Not to Revoke and Injunction") and second cause of action ("Constructive Trust and Injunction") (collectively the "Contract-Based Claims"), are different and factually distinct from all other causes of action in the cases. Luzak's Contract-Based Claims are not based on any alleged incapacity of, or any alleged undue influence exerted on, Paul Barringer. Rather, Luzak's Contract-Based Claims are based on the theory that—in or before 1998, long *before* Mr. Barringer allegedly became mentally incapacitated and subject to undue influence in 2012—Mr. Barringer purportedly entered into a contract with Mrs. Barringer in which Mrs. Barringer promised never to exercise a power of appointment that she holds over Mr. Barringer's remaining estate in a manner that would treat their children unequally. (App. 806-808.)

These Contract-Based Claims present a discrete, threshold issue in these cases. Mr. Barringer's December 4, 1998 trust (which Luzak does not challenge) as well as subsequent trusts executed on February 28, 2012, July 20, 2012, June 12, 2014, and February 5, 2015 (all of which Luzak does challenge), all granted Mrs. Barringer a power of appointment, under which she can direct, in her own will, how any remaining portion of Mr. Barringer's estate will be

distributed among the Barringer children.² Thus, even if Luzak were successful in setting aside any, or all, of the wills, trusts, and transfers Mr. Barringer executed between 2012 and 2015, Mr. Barringer's estate planning documents still grant Mrs. Barringer the power to distribute the assets in her discretion at her death. With her Contract-Based Claims, Luzak seeks to prevent Mrs. Barringer from executing a new will and exercising her power of appointment to Luzak's detriment based on the allegation that Mrs. Barringer secretly contracted with or promised her husband never to change her will or exercise the power of appointment, regardless of changed circumstances in the future. Luzak alleges that this contract/promise was made no later than December 4, 1998. (App. 197.) The relief Luzak requests in the Contract-Based Claims is an injunction prohibiting Mrs. Barringer from executing a new will and exercising her power of appointment, and a constructive trust for the benefit of Luzak in accordance with the terms of the alleged contract. (App. 806-807.)³

C. The Bifurcation Order

On October 23, 2020, Respondents filed a Joint Motion to Bifurcate Trial, pursuant to Rule 42, SCRCF, in which they requested that the Court first conduct a narrow trial on Luzak's factually and legally distinct Contract-Based Claims, and subsequently try the remaining causes of action in the consolidated actions. (App. 563.) Respondents argued that Luzak's Contract-Based Claims present a narrow, threshold issue of whether Merrill Barringer made an enforceable contract or promise never to change her will and exercise her power of appointment

² A power of appointment is a common feature of estate planning instruments that "is created when one person, the donor, grants another person, the donee, the authority to designate the beneficiaries of the donor's property. Thus, when a donor grants a donee power of appointment over certain specified property, the donee gains the right to specify who will receive that property." AmJur. 2nd PowerAppt. § 2 (2021).

³ After filing Barringer II in May of 2019, Luzak moved to consolidate Barringer I and Barringer II. To save time and resources, and without any determination being made by the Court, all parties consented to consolidation at that time, and on December 3, 2019, the Court entered a Consent Order on Plaintiff's Motion for Consolidation of Actions.

in a manner. Respondents argued that the evidence and legal issues to be decided in this initial trial would be distinct from those relating to the transactions between 2012 and Mr. Barringer's death in 2016, and that the proof required to determine the Contract-Based Claims is relatively simple compared to the complex proof required for the remaining claims.

The circuit court agreed with Respondents and entered the Bifurcation Order on December 29, 2020. The Bifurcation Order states, “[i]n accordance with SCRCP Rule 42(b), this Court has determined that a separate trial of the Second and Third Causes of Action set forth in [Barringer II], shall proceed first and prior to any separate and subsequent trial(s) of the remaining causes of action alleged in [Barringer I and Barringer II].” (App. 6-8.)

After the circuit court denied Luzak's motion for reconsideration of the Bifurcation Order, this appeal followed. Luzak's sole ground for appeal was that, by requiring that the Contract-Based Claims, which are equitable causes of action, be tried before her legal claims, the Bifurcation Order “may” deprive Luzak of her right to a jury trial on unspecified factual issues Luzak alleges are common to the Contract-Based Claims and the remaining claims. (App. 551-562.) After requesting and receiving briefing on whether the Bifurcation Order was immediately appealable, the Court of Appeals dismissed the appeal on May 4, 2021. (App. 4-5.)

Subsequently, via order entered on June 7, 2021, the circuit court scheduled a trial on the Contract-Based Claims only. Respondents subsequently consented to a jury trial on these Contract-Based Claims.⁴ (6/07/2021 Order, Exhibit A.) Prior to the scheduled trial, the circuit court granted summary judgment on the Contract-Based Claims to Merrill Barringer. (8/20/2021

⁴ Equitable claims may be tried to a jury with the parties' consent. Rule 39(c), SCRCP (“In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury *or the court, with the consent of both parties may order a trial by jury whose verdict has the same effect as if trial had been a matter of right.*”) (emphasis added); *Horne v. Davis Constructors, Inc.*, 302 S.C. 484, 487, 395 S.E.2d 724, 725-26 (Ct. App. 1990), *aff'd as modified* 307 S.C. 559, 416 S.E.2d 634 (1992) (holding Rule 39(c) permits parties to try equitable claims to a jury by consent).

Order Granting Summary Judgment, Exhibit B.) On August 30, 2021, Luzak filed a motion to reconsider the order granting summary judgment, which the circuit court denied on October 8, 2021 (10/8/2021 Order Denying Motion for Reconsideration, Exhibit C.)

The Court of Appeals denied Luzak's Petition for Rehearing in the instant appeal on August 19, 2021. (App. 2-3.)

CONSIDERATIONS FOR GRANTING A WRIT

A writ of certiorari will be granted only where there are "special and important reasons." Rule 242(b), SCACR; *see also S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C. at 236, 844 S.E.2d 373. In considering whether to grant a writ of certiorari, the Court considers the following reasons, which are "neither controlling nor fully measuring" of the Court's discretion or power to grant review in general: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR.

No such special and important reasons are present in this case, nor does any other reason warrant this Court's review. This appeal presents no novel question of law, federal question or constitutional issue, the decision of the Court of Appeals was unanimous, and it correctly applied this Court's precedent in dismissing the appeal. Consequently, this Court should deny Luzak's Petition.

ARGUMENT

I. The Court should dismiss the Petition because intervening events in the circuit court have rendered the Petition moot.

“Generally, this Court only considers cases presenting a justiciable controversy.” *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006). “An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.” *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). “A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.” *Sloan*, 369 S.C. at 26, 630 S.E.2d at 477.

Here, subsequent events rendered the Petition moot. First, the circuit court scheduled a *jury* trial for the Contract-Based Claims, and Respondents consented to a jury trial on those claims. Because Respondents consented to a jury trial, bifurcation of the claims would not have deprived Luzak of her right to jury trial on any issue.⁵ In addition, prior to the scheduled date for a trial on the Contract-Based Claims, the circuit court granted Merrill Barringer’s motions for summary judgment on the Contract-Based Claims and subsequently denied Luzak’s motion to reconsider that decision. As such the Petition is moot and should be dismissed on that basis.

II. The Petition should be denied because the Court of Appeals correctly determined that the Bifurcation Order is not immediately appealable.

The Court of Appeals properly dismissed this appeal because bifurcation orders are not appealable prior to entry of final judgment. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68,

⁵ Moreover, Luzak has no right to have the *same* jury for both trials. *Fortune v. Gibson*, 304 S.C. 279, 281, 403 S.E.2d 674, 675 (Ct. App. 1991) (“We hold there is no per se rule that the same jury must decide both issues. To hold otherwise would be to ignore a fundamental principle underlying bifurcation: a trial may be bifurcated only if the issues are so distinct that a trial of each alone would not result in injustice.”) Accordingly, no rule prevents one jury deciding the narrow factual issues underlying Luzak’s Contract-Based Claims and a different jury deciding the separate and distinct issues related to her remaining claims. *See id.*

72, 533 S.E.2d 331, 333 (2000) (order bifurcating the issue of exclusion under an insurance policy from the issue of occurrence was not immediately appealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 77–78, 533 S.E.2d 575, 577 (2000) (order denying bifurcation of trial on issues of liability and damages in personal injury case is not immediately appealable as affecting a substantial right).

In *Flagstar Corp.*, the Supreme Court held that an order merely bifurcating issues for a separate trial does not “affect a substantial right” under S.C. Code § 14-3-330(2). The court reasoned that “trial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right. Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence.” *Id.* at 72-73, 533 S.E.2d 331, 333. Any such error can be corrected, the court concluded, by ordering a new trial. *Id.* (citing *Breland v. Love Chevrolet*, 339 S.C. 89, 529 S.E.2d 11 (2000) (immediate appeals under § 14-3-330(2) are permitted only where the alleged error cannot be corrected by a new trial)); *see also Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (holding the “mode of trial” exception in S.C. Code § 14-3-330(2) to the general rule that only final orders are appealable is confined to orders which abridge a party’s right to trial by jury.)

Luzak argues that the Court failed to recognize that the Bifurcation Order in this case is no ordinary bifurcation order. She argues the Bifurcation Order is extraordinary because it inappropriately carved out equitable claims for an initial trial. But Luzak has no right under S.C. Code § 14-3-330(2) to have legal and equitable claims tried together. *Flagstar Corp.*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (“In short, trial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right.”). Moreover, the circuit court

did not bifurcate all of Luzak's equitable claims from her legal claims. Although the Contract-Based Claims are equitable claims, Luzak's remaining claims also include equitable claims and contain requests for equitable relief as well. The circuit court made no attempt to separate claims on that basis. Rather, the court severed the Contract-Based Claims because they involve narrow, discrete issues factually and legally distinct from the remaining claims, and the court concluded that Respondents satisfied the requirements for bifurcation under Rule 42, SCRPC. Any appellate review of that decision must await a final judgment. *Flagstar Corp.*, 341 S.C. 68, 72, 533 S.E.2d 331, 333.

Luzak also argues the Court failed to follow sequencing rules that require legal claims to be tried before equitable claims. But these rules apply only where the equitable claims and legal claims are based on common facts. *See Johnson v. South Carolina National Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987) (“Moreover, ***when issues common to both legal and equitable claims are to be tried in a single proceeding***, legal issues are to be determined first, and the findings of the jury are binding on the sitting judge, as trier of the equitable claims.”) (emphasis added). That is not the case here. The bifurcated trials would not determine a single common question of fact. Luzak's Contract-Based Claims present a discrete, threshold issue of whether Merrill Barringer made an enforceable contract/promise never to change her 1998 will and Revocable Trust. Luzak alleges that the promise was made by Mrs. Barringer “no later than December 4, 1998.” (App. 197.) The circuit court's decision to bifurcate was proper because the evidence and legal issues to be decided in this initial trial are distinct from those relating to Luzak's remaining claims, which relate to Mr. Barringer's alleged lack of mental capacity due to Alzheimer's disease between 2012 and Mr. Barringer's death in 2016. In her petition for certiorari, Luzak vaguely asserts that “[a]ll of the claims in each (sic) arise from a common

factual thread that weaves all of the causes of action together.” (Petition at 5.) But Luzak never even attempts to demonstrate that the limited issue to be decided in the first phase (whether a contract/promise was made by “no later than December 4, 1998”) overlaps with any issue to be decided in the subsequent trial (whether Mr. Barringer lacked mental capacity or was unduly influenced between 2012 and 2016). Thus, the sequencing rules set forth in *Johnson* do not apply here.⁶

CONCLUSION

The Court should dismiss the Petition because Respondents’ consent to a jury trial on the Contract-Based Claims, and the circuit court’s order granting Respondents summary judgment on the Contract-Based Claims, rendered the appeal moot. Moreover, under Rule 242(b), SCACR, certiorari is not appropriate in this case. The Court of Appeals’ decision raises no special and important issues that warrant this Court’s review. The Court of Appeals properly dismissed the appeal because the Bifurcation Order was not immediately appealable. This Court should deny the Petition.

⁶ This Court recently denied review in a similar case in which the Court of Appeals rejected the same argument Luzak makes here. *Finch v. U.S. Fidelity and Guaranty Company*, Appellate Case No. 2021-000462. In *Finch*, the circuit court ordered bifurcation to try plaintiff’s equitable claims before her legal claims. Plaintiff’s equitable claims sought a declaratory judgment that two insurance companies were the alter egos of a company which lost a \$32 million verdict. If the insurers were determined to be the alter egos of the judgment defendant, then a second trial would resolve plaintiff’s legal claims for breach of fiduciary duty against the insurance company defendants. Plaintiff took an immediate appeal, arguing that the bifurcation order deprived plaintiff of her right to a jury trial by requiring a trial of the equitable claims before the legal claims. The Court of Appeals dismissed the appeal on the ground that the bifurcation order was not immediately appealable and, in the order denying plaintiff’s petition for rehearing, stated, “[f]rom the filings provided by the parties, we cannot determine what factual issues (if any) necessarily overlap between the legal and equitable claims.” (App. 210-211.) This Court subsequently denied plaintiff’s petition for certiorari. (App. 212-213.) Like the plaintiff in *Finch*, Luzak failed to demonstrate factual overlap between the Contract-Based Claims and her remaining claims that would implicate the sequencing rules. This Court should adhere to the persuasive reasoning of the rulings in *Finch* to deny Luzak’s petition here.

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-vs.-

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CERTIFICATE OF SERVICE

The undersigned, J. Ashley Twombly of TWENGE + TWOMBLY LAW FIRM, Attorneys for Respondent, Merrill U. Barringer, hereby avers that on the 20th day of October 2021 a true and accurate copy of Respondents' Motion to Dismiss the Petition for Certiorari as Moot and Return was served via electronic mail using their email addresses listed in the Attorney Information System, addressed as follows:

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