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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS
APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2021-001022

EX PARTE:

Hampton B. Luzak, Petitioner,

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

Hampton B. Luzak, Petitioner,

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--

Hampton B. Luzak, Petitioner,

v.

Merrill U. Barringer, Respondent.

**REPLY TO RETURN TO PETITION FOR CERTIORARI
AND RESPONSE TO MOTION TO DISMISS**

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The Petitioner seeks a Writ of Certiorari to review a decision of the Court of Appeals which dismissed Appellate Case No. 2021-000159 on the basis that the appeal was interlocutory. Respondents assert that intervening events in the trial court have made this Petition moot. That is certainly not the case. In fact, intervening events at the trial court level have made the need for this Court to review the order that is the subject of this Petition even more urgent. The effect on the outcome of the entire case¹ of the order for bifurcation that is the subject of this Petition for Writ will not be known until the Court of Appeals concludes a pending appeal in this same case, currently pending as Appellate Case No. 2021-000837.

Petitioner Hampton Luzak (hereafter “Ms. Luzak”) renews her request for a writ of certiorari to the Court of Appeals. Due to the unique circumstances of the multiplicity of these consolidated (and then partially bifurcated) cases, Ms. Luzak requests that this Court deal with the issues raised in her petition in one of three ways:

- (1) The Petition for a Writ of Certiorari be held in abeyance pending the outcome of an appeal currently pending at the Court of Appeals.²
- (2) In the alternative, Ms. Luzak requests that this Court grant the writ and hold the proceedings in abeyance pending the outcome of the pending appeal.
- (3) By way of second alternative, Ms. Luzak requests that this Court grant the writ and remand this matter to the Court of Appeals to be consolidated with Appellate Case No. 2021-000837.

¹ At present, proceedings at the trial court level in Cases No. 2016-CP-07-1919, 2019-CP-07-1253 and 2019-CP-071294 are held in abeyance due to an appeal currently pending at the Court of Appeals which bears Appellate Case no. 2021-000837. The Court of Appeals matter is currently in the initial briefing phase.

² There is a significant likelihood that one or more of the parties to the pending appeal at the Court of Appeals will be seeking a review, in whole or in part, from this Court on Petition for Writ of Certiorari as to one or more issues to be decided by the Court of Appeals in Appellate Case No. 2021-000837.

ORDER SUBJECT TO PETITION FOR A WRIT OF CERTIORARI

Ms. Luzak filed her initial case in the Beaufort County Probate Court on August 26, 2016 and has been litigating the same claims ever since. In the case of *Luzak v. Merrill B. Light, et al.*, 2016-CP-07-1919, Ms. Luzak alleges multiple *legal* causes of action against the individual Respondents Merrill Light and others for undue influence, lack of capacity, mistake, fraud, intentional interference with inheritance, civil conspiracy, breach of fiduciary duty, and the like, along with associated equitable relief. A jury trial was requested.

In the other consolidated case of *Luzak v. Merrill U. Barringer*, 2019-CP-07-1253 and -1294, Ms. Luzak asserts similar legal causes of action against the widow of the Decedent for her participation in and/or aiding in the manipulation of Decedent Paul Barringer to amend his estate planning documents exclusively in favor of their other daughter, Merrill Light. In these 2019 cases against Mrs. Barringer, Ms. Luzak asserts causes of action for intentional interference with inheritance and gifts, constructive trust and injunction, enforcement of contract not to revoke (and injunction), attorney's fees, and civil conspiracy. She likewise requested a jury trial in those cases against Mrs. Barringer.

After the cases were designated complex, the trial judge issued two orders consolidating the four (4) litigation matters, one in 2017 and one in 2019. The parties and the Court agreed the parties were the same, the disputes arose out the same set of facts, the witnesses were the same, the exhibits were the same, and consolidation was in the best interests of the parties and promoted judicial economy. *See* Order For Consolidation of Actions by Consent filed May 19, 2017 and Consent Order on Plaintiff's Motion for Consolidation of Actions filed December 3, 2019. The cases contain both legal and equitable causes of action and seek both legal and equitable relief, but the legal causes of action by far predominate the cases and are the primary

causes of action for the cases.

For reasons that were not explained, Judge Mullen issued an order on December 30, 2020 (Bifurcation Order) that picked out two equitable causes of action from the 2019 complaints against Mrs. Barringer and bifurcated those to be tried “first and prior” to all the rest of the cases. Those causes of action are for the imposition of a constructive trust and a mandatory injunction. Those two causes of action are equitable, and no legal causes of action are to be tried in conjunction with the equitable causes of action. Simply, the first phase of the bifurcation is *entirely* equitable.

Ms. Luzak appealed the Bifurcation Order as well as the order denying reconsideration on February 12, 2021, and she has appealed those orders since they implicate mode of trial, especially by piecemealing the fact finding of a set of common facts by improperly sequencing the trial of equitable causes of action before legal causes of action, thereby prejudicing her right to a jury trial on her legal causes of action. That Bifurcation Order was the subject of Appellate Case 2021-000157, which the Court of Appeals dismissed as interlocutory and is the subject of this Petition for a Writ of Certiorari.

Selecting two (2) equitable causes of action out of 24 causes of action (the vast majority of which are legal causes of action) and ordering the trial of the equitable causes of action first would operate to the prejudice of Ms. Luzak. All causes of action arise from a common core of facts that are universally applicable to all causes of actions. “A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice. *Fortune v. Gibson*, 304 S.C. 279, 403 S.E.2d 674 (Ct.App.1991). Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate. *Id.*” *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998).

The two (2) causes of action that were bifurcated to be tried “first and prior” to the remaining causes of action were the subject of a subsequent summary judgment which was granted by order dated August 20, 2021 (a copy of the order is attached to Respondents’ Response). Ms. Luzak has appealed that order to the Court of Appeals, Appellate Case No. 2021-000837. She has also appealed the Bifurcation Order, which was the subject of Appellate Case No. 2021-000157, which was dismissed by the Court of Appeals as interlocutory. That Bifurcation Order is the subject of this Petition.

The Respondents seek dismissal of the Petition on the grounds that the trial court subsequently granted a jury trial on the equitable causes of action and because the trial court then granted summary judgment on those causes of action.

Granting a jury trial on the equitable causes of action and then bringing in another jury for trial of the legal causes of action is error since there are material facts common to all causes of action, legal and equitable. The *Creighton* court said that bifurcation is appropriate only if the issues are so distinct trial of each alone will not result in injustice and that bifurcation is inappropriate when the evidence of both phases overlap. *Id.* Also, Ms. Luzak has fought tenaciously to protect her right to trial by jury. She has never consented to or acquiesced in any bifurcation, and her request for a jury trial of the first phase of the bifurcation was nothing more than an attempt to salvage a hint of her right to a trial by jury in the face of the erroneous bifurcation.

The fact that the trial court subsequently granted summary judgment on those two (2) equitable causes of actions does not remove the issue nor render it moot. Ms. Luzak has appealed that order granting that summary judgment. In that case, the present issue of bifurcation persists and must be resolved. Stated differently, the issue of bifurcation will persist until those two (2)

equitable causes of action are finally adjudicated...or the Bifurcation Order is reversed.

That the Bifurcation Order dated December 30, 2020 is now incorporated with appeals of other orders in Appellate Case No. 2021-000837 does not moot the issue raised in this Petition. This Petition addresses the single issue upon which the Court of Appeals dismissed Appellate Case No. 2021-000157: whether the Bifurcation Order affected a substantial right and was immediately appealable under S. C. Code § 14-3-330.

Ms. Luzak acknowledges that, in Appellate Case No. 2021-000837, the Court of Appeals is now considering the merits of the Bifurcation Order, as well as an order granting summary judgment in favor of Merrill Light on the causes of action that were bifurcated to be tried among the remaining causes of action but which Ms. Luzak would produce as evidence in the “first and prior” trial. Also included in Appellate Case No. 2021-000837 are appeals from an order which granted a non-party the right to intervene for the sole purpose of having a certain cause of action (civil conspiracy) and categories of damages sought by Ms. Luzak stricken (although the damages were not sought against the Intervenor).

The question posed by this Petition for Writ of Certiorari that needs to be answered cannot be determined until the Court of Appeals issues its final order in Appellate Case No. 2021-000837. Depending on the ruling of the Court of Appeals on the multiple issues before it in that appeal, the question of whether the Bifurcation Order continues to affect Ms. Luzak’ rights may be squarely back before this Court if the Court of Appeals affirms the Bifurcation Order but reverses the grant of summary judgment to Merrill Light. The trial court and the parties will then be faced again with the conundrum of how to try two causes of action from one of the 2019 lawsuits before the remaining causes of action, both legal and equitable, can be addressed. The original orders of consolidation would have prevented this ping pong match

among the courts and decided all issues at one time with one jury. The Bifurcation Order which is the subject of this petition exploded the issues into separate pieces that may well be litigated (if they remain bifurcated) for years if not decades to come.

Ms. Luzak requests that this Petition be held in abeyance pending the final outcome of the Court of Appeals' proceedings in Appellate Case No. 2021-000837. If the Court of Appeals reverses the Bifurcation Order, this Petition becomes moot. If the Court of Appeals affirms the Bifurcation Order yet reverses any of the other orders on appeal, Ms. Luzak still has a right to directly appeal the order. Her failure to pursue the issue in these proceedings may well be considered an abandonment of this issue, and would prevent her from seeking to appeal the bifurcation separately, as she has attempted to do here. A "law of the case" argument looms.

There is not anything about this Petition that is moot. Depending on the ruling of the Court of Appeals in Appellate Case No. 2021-000837, Ms. Luzak may well be required to seek review by this Court of the order of bifurcation. She cannot do so if she has not pursued all appellate review available to her from her original appeal, Appellate Case No. 2021-000137. Otherwise, the determination by the Court of Appeals that the bifurcation order is interlocutory and not directly appealable will become the law of the case. *Simmons v. Simmons*, 392 S.C. 412, 709 S.E.2d 666 (2011). Ms. Luzak's rights regarding bifurcation will have been adjudicated and become the law of the case without this Court ever considering the questions raised in this petition.

Logically, while holding a Petition for Writ of Certiorari in abeyance may initially seem burdensome, there is no other way to protect Ms. Luzak's ability to preserve her position that she is entitled to appeal the bifurcation order as an order affecting a substantial right and denying her a mode of trial to which she is entitled. *Parker v. Shecut*, 340 S.C. 460, 492-93, 531 S.E.2d 546,

563-64 (Ct.App. 2000) (rev'd on other grounds 349 S.C. 226, 562 S.E.2d 620 (2002) (holding appeal in abeyance because of high likelihood of future appeal).

For the reasons set forth above, Ms. Luzak respectfully seeks an order of this Court holding the Petition for Writ in Abeyance pending the final decision of the Court of Appeals in Appellate Case No. 2021-000837. Alternatively, the Petition could be granted, the parties can brief the issues and the final consideration by this Court can be delayed until issues being appealed in the current Court of Appeals proceeding in Appellate Case No. 2021-000837 are finally decided. Lastly, the Court could grant the writ and remand the issue to the Court of Appeals to be consolidated with the pending appeal in Appellate Case No. 2021-000837.

CONCLUSION

This Petition for Writ of Certiorari is sought to protect Ms. Luzak's rights at some later point during these proceedings. The only alternative to this Court granting the Writ under one of the circumstances suggested would be for this Court to deny the petition and also declare that there is no final order that is the law of the case as far as the bifurcation order is concerned. In no other way can Ms. Luzak's rights be protected.

Respectfully submitted,

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