

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**RECEIVED**

**May 26 2022**

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas  
Bentley Price, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No.  
2021-000837

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

Hampton B. Luzak..... Appellant

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  
..... Respondents

--and--

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

--and--

Hampton B. Luzak..... Appellant

vs.

Merrill U. Barringer..... Respondent

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**RESPONDENTS' PETITION FOR REHEARING**

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Pursuant to Rule 221(a) of the South Carolina Rules of Appellate Procedure, Merrill Barringer, individually and as personal representative of the Estate of Paul Brandon Barringer, II and 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 (collectively, “Respondents”), hereby file this Petition for Rehearing. Respondents respectfully request that rehearing be granted as to this Court’s Order issued on April 29, 2022, which vacated a circuit court order granting summary judgment and dismissed this appeal (the “Vacating Order”). Respondents further request that the Court rescind the Vacating Order, and in the interest of judicial economy, certify all pending appeals for this Court to consolidate and decide.<sup>1</sup>

### **INTRODUCTION**

Respondents respectfully submit this Petition pursuant to Rule 221(a), SCACR, because the Court overlooked or misapprehended points of law and fact in the Vacating Order. Respondents submit in this Petition the points overlooked or misapprehended “to aid the court in deciding correctly a case heard by it.” *Arnold v. Carolina Power & Light, Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933). The Court should rehear the Vacating Order for two compelling reasons.

*First*, the Court erroneously found that the circuit court lacked authority to grant a motion for summary judgment while the appeal of the circuit court’s Order granting Defendants’ Joint Motion to Bifurcate Trial on December 29, 2020 (the “Bifurcation Order”) was pending. The Court vacated the Order because it found “the circuit court did not have authority to grant [the] motion for summary judgment while [the] appeal of [the Bifurcation Order] was still pending.” The Court relied solely upon Rule 241(a), SCACR for this conclusion, noting in a parenthetical that the

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<sup>1</sup> In the alternative, Respondents request that this Court not certify any of the pending appeals in these cases, and that the Court allow the Court of Appeals to decide these appeals on the merits.

pending appeal acted to stay the proceedings. On the same day, and in a separate Order, the Court dismissed the appeal of the Bifurcation Order because the Order was “not immediately appealable.” Under well-settled South Carolina precedent, however, an appeal from of an interlocutory order that is not immediately appealable does *not* act to stay any proceedings in the circuit court. *See, e.g., S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 536 (1986); *State v. Dingle*, 279 S.C. 278, 282, 306 S.E.2d 223, 225 (1983), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990). The Vacating Order—finding that the appeal of the interlocutory Bifurcation Order acted to stay proceedings in the circuit court—cannot be reconciled with this well-settled authority, and so this appears to be an instance where the Court overlooked or misapprehended the applicable law.

*Second*, the Vacating Order did not correctly identify the Order that the Court intended to vacate. The Vacating Order, which was entered in Appellate Case No. 2021-000837 (“Appeal No. 837” and identified below as “the Second Appeal”), stated that it intended to vacate the Order granting *Merrill Barringer’s* summary judgment motion. Although three Orders are at issue in Appeal No. 837, none of them granted summary judgment to Merrill Barringer, and hence the parties and the circuit court cannot determine which Order the Court intended to vacate. The Court also dismissed the entire appeal without referencing any of the Orders that were challenged in Appeal No. 837. Accordingly, the parties cannot comply with the Vacating Order without clarification of what Order, if any, is vacated. Of course, if the Court, upon rehearing, concludes the appeal of the Bifurcation Order did not give rise to an automatic stay because that Order was not immediately appealable, none of the Orders entered by the circuit court should be vacated.

For these reasons, Respondents seek a rehearing of the Vacating Order and, in the interest of judicial economy, request that all pending appeals in these cases be consolidated pursuant to

Rule 214, SCACR, and certified to the Supreme Court for a decision on the issues presented therein.

## **BACKGROUND**

### **I. The Appeals**

An overview of the factual and procedural history of Barringer I and Barringer II is set forth in Respondents' Motion to Dismiss the Petition for Certiorari as Moot and Return, and will not be repeated in full here, but a summary of all pending appeals in those consolidated cases is set forth below.

#### **A. The First Appeal: Bifurcation Order (Supreme Court Case No. 2021-001022, Court of Appeals Case No. 2021-000159)**

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 Appellant Hampton Luzak's ("Luzak") factually and legally distinct Contract-Based Claims, and subsequently try the remaining causes of action, if necessary. The circuit court granted the motion and entered the Bifurcation Order. The Bifurcation Order states, "[i]n accordance with SCRCF 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]." (Appendix Vol. 1 in Supreme Court Case No. 2021-001022, C-Track September 20, 2021, Appendix 000006-000008.)

Luzak then moved for reconsideration of the Bifurcation Order. After the circuit court denied Luzak's motion for reconsideration of the Bifurcation Order, Luzak filed her first appeal of the Bifurcation Order, which was designated as Court of Appeals Case No. 2021-000159 (the "First Appeal"). The Court of Appeals dismissed the First Appeal on May 4, 2021, on the ground that the Order was not immediately appealable, and Luzak then filed a Petition for Writ of

Certiorari seeking further review of the First Appeal by this Court.<sup>2</sup> On April 29, 2022, this Court issued an Order denying Luzak’s Petition for Writ of Certiorari in the First Appeal (“4/29/2022 Order”). This Court’s Order dismissing the appeal stated that “the court of appeals correctly held that the circuit court’s bifurcation Order was not immediately appealable.” (4/29/2022 Order).

**B. The Second Appeal: Summary judgment on the February 2012 estate planning documents, CFRC intervention, derivative damages, civil conspiracy (Appellate Case No. 2021-000837)**

On June 7, 2021, while the First Appeal was pending, the circuit court granted a motion by Coastal Forest Resources Company (“CFRC”) for intervention and for protective relief (the “Derivative Damages Order”). Some of Luzak’s tort-based claims, including her claim for civil conspiracy, relate to alleged conduct by Merrill Light as a member of the CFRC board of directors that purportedly injured CFRC, with Luzak injured only in her capacity as a CFRC shareholder in proportion to the number of shares she owned. CFRC argued that these allegations constituted shareholder derivative claims that would belong solely to CFRC, and not to Luzak, or to any individual shareholder of CFRC. The circuit court agreed and dismissed the civil conspiracy claim, as well as other damages deemed to be derivative, and which Luzak lacks standing to pursue.

In a separate Order dated July 6, 2021, the circuit court granted Defendant Merrill Light’s Motion for Summary Judgment as to the validity of the Will and First Amendment to the Paul B. Barringer, II, Revocable Trust, dated December 4, 1998, executed by Paul B. Barringer, II, on February 28, 2012 (the “July 2021 Summary Judgment Order”). In that Order, the circuit court concluded that Luzak failed to establish a genuine issue of material fact as to her claims that Paul

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<sup>2</sup> Subsequently, in an Order entered on June 7, 2021, the circuit court scheduled a trial only on the Contract-Based Claims to begin August 30, 2021. The circuit court subsequently vacated the trial date after granting Mrs. Barringer summary judgment on the Contract-Based Claims.

Barringer lacked testamentary capacity when he executed his February 28, 2012, testamentary documents, and as to her claims that these documents were the product of undue influence over Mr. Barringer and mistake.

On August 5, 2021, Luzak commenced the instant appeal of the Derivative Damages Order, the July 2021 Summary Judgment Order, and for a second time, the Bifurcation Order (Court of Appeals Case No. 2021-000837, the “Second Appeal”). The next day, Luzak filed an Emergency Petition for Declaration of Automatic Stay Pursuant to Rule 241(a), SCACR (“Emergency Petition”), in which she asked the Court of Appeals to declare that the automatic stay precluded the circuit court from proceeding with the August 30 trial on the Contract-Based Claims. On August 19, 2021, the Court of Appeals issued an Order denying the Emergency Petition and permitting the trial on the Contract-Based Claims to proceed. Because the Court of Appeals declined to stay the impending bifurcated trial, even though the Second Appeal remained pending before that Court, the Court of Appeals necessarily concluded that the trial was “not affected by” the Second Appeal. If the imminent trial had been a matter “affected by the appeal,” then a stay would have been proper under Rule 241(a), and the Court of Appeals presumably would have held accordingly. Luzak did not file a petition for rehearing or seek further review of the Court of Appeals’ Order denying the Emergency Petition.

On April 29, 2022, the same day on which this Court denied Luzak’s Petition for Writ of Certiorari, which followed the Court of Appeals’ dismissal of the First Appeal, this Court certified Appeal No. 837—the Second Appeal—pursuant to Rule 204(b), SCACR, and issued the Vacating Order. The Vacating Order, citing the automatic stay language in Rule 241(a), SCACR, held that “the circuit court did not have the authority” to grant a summary judgment motion while the First Appeal remained pending, and therefore the Court vacated the referenced Order and declared the

appeal to be moot.<sup>3</sup> The Vacating Order made no specific reference to the two summary judgment Orders that Luzak was appealing in the Second Appeal, nor did the Court refer to Luzak’s second attempt to appeal the Bifurcation Order in the Second Appeal. Also on April 29, 2022, the Court of Appeals issued a Remittitur of the First Appeal, referencing Lower Case No. 2016-CP0701919 and Appellate Case No. 2021-000159.

**C. The Third Appeal: Summary Judgment on the Contract-Based Claims (Appellate Case No. 2021-001337)**

On August 20, 2021, shortly before the Contract-Based Claims were scheduled to be tried, the circuit court granted Mrs. Barringer’s motion for summary judgment as to the Contract-Based Claims (the “Contract-Based Claims Order”). This Order eliminated the need for the first phase of the bifurcated trial. On November 8, 2021, Luzak filed a Notice of Appeal of the Contract-Based Claims Order (“Third Appeal”). The Third Appeal remains pending in the Court of Appeals, and the Vacating Order made no reference to the Third Appeal.<sup>4</sup>

**ARGUMENT**

**I. The First Appeal did not stay further proceedings in the circuit court because the Bifurcation Order was not immediately appealable.**

Luzak’s appeal of the Bifurcation Order did not stay further proceedings in the circuit court because, as this Court concluded in the First Appeal, the Bifurcation Order was not immediately appealable. *See* 4/29/2022 Order (holding that “the court of appeals correctly held that the circuit

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<sup>3</sup> As set forth in more detail below, the Order stated “the circuit court did not have the authority to grant Respondent Merrill U. Barringer’s motion for summary judgment” while the First Appeal was pending. An order granting summary judgment to Merrill U. Barringer was not appealed in Appellate Case No. 837.

<sup>4</sup> Respondents request that this Court certify the Third Appeal pursuant to Rule 204(b), SCACR, as well and decide the merits of the Third Appeal along with the merits of the Second Appeal, in the interest of judicial economy. Respondents have filed a motion to certify the Third Appeal contemporaneously with this Petition.

court's bifurcation order was not immediately appealable"). Under well-settled South Carolina precedent, because the Bifurcation Order was not immediately appealable, the automatic stay contemplated by Rule 241(a) did not act to stay any proceedings in the circuit court. *Arnold*, 287 S.C. at 586, 340 S.E.2d at 536 ("Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay further proceedings in the lower court."); *Dingle*, 279 S.C. at 282, 306 S.E.2d at 225 ("We hold that the order [committing criminal defendant to mental health agency pending trial] is interlocutory in nature and thus not appealable. Since the order is not appealable until final judgment is rendered, the trial court had continuing jurisdiction over the subject matter of the case."); *Crout*, 278 S. C. at 124, 293 S. E. 2d at 424 (1982) ("The administrative judge's order refusing appellant's motion for a continuance or a voluntary dismissal was not appealable because it was an intermediate order not involving the merits. Therefore, the notice of appeal from that Order did not transfer jurisdiction to this Court or stay further proceedings in the trial court."); Jean Hoefler Toal, *et al.*, *Appellate Practice in South Carolina*, 3d Ed. (2017) at p. 339 ("[W]hen an order is interlocutory and not immediately appealable, the service and filing of a notice of intent to appeal does not transfer jurisdiction to the appellate courts, nor does it stay further proceedings in the lower court.").<sup>5</sup>

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<sup>5</sup> Notably, the Vacating Order is only three short paragraphs, and it does not mention *Arnold*, *Dingle*, or *Crout*, indicating that the Court simply overlooked those bedrock decisions. Also, because neither party argued that these decisions should be overruled, the Court did not state that it intended to overrule them, and the 4/29/22 Order is unpublished, it appears unlikely that the Court intended to overrule this entire line of cases. Litigants routinely rely on *Arnold*, *Dingle*, and *Crout* as settled law in South Carolina, and if the Court intended to overrule this precedent, it likely would have done so in a more detailed, reasoned, and published decision.

Thus, the First Appeal, which challenged only the unappealable interlocutory Bifurcation Order, did not give rise to an automatic stay, did not transfer jurisdiction from the circuit court, and did not divest the circuit court of authority to proceed with the case.<sup>6</sup> Accordingly, the Vacating Order was in error and Respondents respectfully submit that the Court should rescind it.

**II. The Court should grant rehearing because the Vacating Order is unclear as to which order it intends to vacate.**

The Vacating Order states:

Because the circuit court did not have authority to grant Respondent Merrill U. Barringer’s motion for summary judgment while

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<sup>6</sup> Courts in other jurisdictions concur that appeals of interlocutory orders do not create a stay. *See Reaves v. Tucker*, 800 S.E.2d 188, 193 (Va. Ct. App. 2017) (providing citations to numerous decisions in other states concurring with this view). The court in *Reaves* explained that the trial court retains the conditional discretion to decide whether to proceed after an interlocutory appeal:

As a practical matter, when a notice of appeal of an interlocutory order is filed, the trial court proceeds at its own risk. As with any appeal, if this Court reverses the trial court's decision and remands the case back to the trial court, then any decision by the trial court subsequent to the order being appealed that is in conflict with the resolution of the appeal by this Court will have no force and effect. If the trial court has doubt whether the appellate court will reverse its interlocutory order, “it may decline to act further until the purported appellee obtains dismissal of the appeal in the court of appeals.” In such a situation, a stay may promote judicial efficiency in the administration of the litigation. In contrast, “[w]here the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a nonappealable order, is clear to the [trial] court, it may [exercise its discretion] ... and proceed with the case, knowing that it has not been deprived of jurisdiction.”

*Id.*, 800 S.E.2d at 193–94 (citations omitted). The court in *Reaves* recounted the reason for this rule: “To conclude otherwise would ‘deliver into the hands of each litigant the ability to freeze matters in the [trial] court simply by filing a notice of appeal, no matter how frivolous.’” *Id. Accord Phoenix NPL, LLC v. Shah*, 2021 IL App. (2d) 191130-U, ¶ 21 (“If the appeal from an unappealable order were to divest the trial court of jurisdiction while the appellate court sorted it out, and only upon the issuance of the appellate mandate would jurisdiction be restored to the trial court, then a bad-faith litigant could file a notice of appeal on any order, halt the proceedings in the trial court until the appellate mandate, and repeat the process over and over so as to prolong the action in the trial court indefinitely and drain the resources of the other litigant or litigants.”) (quoting *In re Marriage of Levites*, 185 N.E.3d 263, 281-82).

Appellant Hampton Barringer Luzak's appeal of the circuit court's bifurcation order was still pending, the circuit court's motion granting summary judgment is vacated.

But no order granting Merrill Barringer summary judgment is at issue in the Second Appeal, which is the only appeal referenced in the Vacating Order. In the Second Appeal, Luzak appealed the July 21, 2021 Summary Judgment Order which *Merrill Light* and *not Merrill U. Barringer* filed. In the Second Appeal, Luzak also sought to challenge the Derivative Damages Order and, for a second time, the Bifurcation Order. Thus, the Vacating Order dismissed the entire appeal, which included three different orders, without specifically referring to any of the orders.

The only circuit court order granting summary judgment to Merrill Barringer that is on appeal is the Contract-Based Claims Order, which Luzak appealed only in the Third Appeal (Court of Appeals Case No. 2021-001337). This Court did not certify the Third Appeal pursuant to Rule 204(b), SCACR, and the Third Appeal remains pending before the Court of Appeals. If this Court intended to vacate the Contract-Based Claims Order—which, for the reasons discussed above, it should not do—it would need to certify the Third Appeal before doing so.

Thus, this Court should also grant this Petition because, without clarification from the Court, the parties, the circuit court, and the Court of Appeals will not be able to determine what order, if any, this Court intended to vacate and which orders, if any, remain pending on appeal.

### CONCLUSION

For the above reasons, Respondents respectfully submit that the Petition for Rehearing should be granted, and this Court should rescind the Order and decide this appeal on the merits. Petitioners also seek certification of all pending appeals to this Court for consolidation and determination of the issues presented in those appeals.

Respectfully submitted,

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May 26, 2022

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