

NOTICE
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2018 IL App (5th) 170396-U

NO. 5-17-0396

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

ROBERT WILSON and)	Appeal from the
ELIZABETH MOLLINGER-WILSON,)	Circuit Court of
)	Madison County.
Plaintiffs-Appellants,)	
)	
v.)	No. 12-L-1152
)	
THOMAS W. BURKART,)	Honorable
)	Clarence W. Harrison II,
Defendant-Appellee.)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* Because attorney failed to assert timely or sufficient claim to funds disbursed pursuant to void court orders, the first certified question on appeal is answered in the positive, in that retention of funds by attorney pursuant to void orders or equitable or other claims not yet asserted is precluded.

¶ 2 The defendant, Thomas W. Burkart, acted as legal counsel for the plaintiffs, Robert Wilson and Elizabeth Mollinger-Wilson (the Wilsons), in litigation stemming from the purchase of Illinois real estate. This appeal arises from questions certified by the circuit court pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016). We answer the first certified question in the positive, finding that Burkart’s retention of funds he has

in his possession pursuant to void court orders is precluded where Burkart has failed to assert a timely or other sufficient claim to the funds. We need not address the two remaining questions because answering them will not materially advance the ultimate termination of the litigation.

¶ 3

BACKGROUND

¶ 4 As noted previously (*Illinois State Bar Ass'n Mutual Insurance Co. v. Burkart*, 2015 IL App (4th) 140936-U, ¶ 5, “[t]he procedural history of this protracted litigation is convoluted,” and we therefore set forth only as much information as is relevant for purposes of this appeal.

¶ 5 In 2003, this court entered an order affirming in part and reversing in part a verdict reached by a jury on the Wilsons’ complaint regarding the real estate purchase. *Wilson v. Moore*, No. 5-01-0422 (2003) (*Wilson I*) (unpublished order under Supreme Court Rule 23). The circuit court had entered a \$30,000 judgment in favor of the Wilsons and against the original defendants, Paul R. Lauschke, Margi Moore, and Lauschke & Associates, on a jury’s verdict. On appeal, this court reversed that portion of the circuit court’s judgment in favor of the original defendants based on the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 1996)), and this court remanded the case for further proceedings. On remand, the circuit court entered judgment in favor of the original defendants on the Consumer Fraud and Deceptive Business Practices Act. Accordingly, on September 30, 2004, this court addressed a second appeal brought by the Wilsons, and we affirmed the circuit court’s finding that the original defendants did not

violate the Consumer Fraud and Deceptive Business Practices Act. *Wilson v. Lauschke*, No. 5-03-0469 (2004) (*Wilson II*) (unpublished order under Supreme Court Rule 23).

¶ 6 On March 9, 2005, this court issued the mandate based on the September 30, 2004, decision in *Wilson II*. Over two months later, on May 20, 2005, Burkart filed a motion to enforce and adjudicate attorney's lien, pursuant to the Attorneys Lien Act. 770 ILCS 5/1 *et seq.* (West 2004). In this motion, Burkart also requested the court to adjudicate in his favor an equitable lien on the underlying case's judgment proceeds. He sought \$35,806.85 in attorney fees. Burkart alleged in the motion that he had received a check from the defendants in the amount of the judgment plus interest, totaling \$41,613.70. The defendants' check was made payable to Burkart's law firm and the Wilsons. Burkart further alleged in the motion that the Wilsons had rejected his proposed distribution of the proceeds and refused to endorse the check. The Wilsons responded to Burkart's lien motion by filing a counterclaim alleging Burkart committed negligence and legal malpractice and retained an excessive amount of attorney fees from the judgment proceeds. The Wilsons' counterclaim requested a judgment against Burkart in an amount in excess of \$50,000. The circuit court acknowledged that the judgment against the original defendants had been fully satisfied and ordered that the judgment proceeds be deposited into an escrow account with the Bank of Edwardsville.

¶ 7 On March 12, 2008, the circuit court entered summary judgment in favor of Burkart on the Wilsons' malpractice, breach of contract, and breach of fiduciary duty claims. On April 9, 2008, the circuit court entered an order holding, *inter alia*, that Burkart's attempted lien notice was ineffective to acquire a statutory attorney's lien

because the lien notice involved proceeds the defendants no longer had in their possession and was served after Burkart and the Wilsons had severed their attorney-client relationship. The court concluded, therefore, that Burkart's attempt to assert a statutory attorney's lien against the proceeds of the jury verdict had failed. Despite this conclusion, the circuit court held that an equitable lien was created equal to 50% of the gross amount of the recovery and entered judgment in Burkart's favor.

¶ 8 On March 11, 2010, this court addressed the parties' third appeal. *Wilson v. Burkart*, No. 5-08-0180 (2010) (*Wilson III*) (unpublished order under Supreme Court Rule 23). Both the Wilsons and Burkart contested the court order denying the enforcement of a statutory lien but finding an equitable lien in favor of the defendant. This court affirmed the circuit court's April 9, 2008, order denying the enforcement of a statutory lien but finding an equitable lien in favor of Burkart. *Id.* In *Wilson III*, this court found, *inter alia*, that Burkart was entitled to an equitable lien protecting reasonable compensation for his services. *Id.* On September 29, 2010, the Illinois Supreme Court denied the Wilsons' petition for leave to appeal. 237 Ill. 2d 593 (2010) (table). The Illinois Supreme Court issued its mandate to the Fifth District Appellate Court on November 3, 2010. On November 10, 2010, this court's mandate was filed in the circuit court.

¶ 9 On October 4, 2010, Burkart filed a motion to release the funds that had been deposited with the Bank of Edwardsville. On November 4, 2010, before this court issued its mandate affirming the judgment on appeal, the circuit court entered an order directing the Bank of Edwardsville to distribute the funds held in escrow, giving \$20,806.85 to

Burkart and the remaining funds to the Wilsons, and to close the account. On the same day, Burkart took the order to the Bank of Edwardsville, which distributed \$20,806.85 to Burkart, distributed the remaining funds to the Wilsons, and closed the account. On January 14, 2011, the circuit court denied the Wilsons' motion to reconsider its November 4, 2010, order. On February 11, 2011, the Wilsons filed a notice of appeal. *Wilson v. Lauschke*, 2012 IL App (5th) 110059-U (*Wilson IV*).

¶ 10 On February 21, 2012, this court vacated the circuit court's April 9, 2008, order, which awarded an equitable lien in favor of Burkart. *Id.* This court held in *Wilson IV* that a void order can be attacked at any time and that the circuit court had lacked the authority to hear Burkart's equitable lien request, which was filed more than 30 days after final judgment in the underlying case. *Id.*

¶ 11 On May 29, 2012, the Wilsons filed a motion for relief from the vacated orders, seeking return of the \$20,806.85. On June 26, 2012, the circuit court entered an order, noting the appellate mandate, noting Burkart's failure to appear, and granting the Wilsons "leave to file further petition."

¶ 12 Thereafter, the Wilsons filed a complaint seeking to recover the funds Burkart withdrew pursuant to the November 4, 2010, court order. On November 30, 2015, the Wilsons filed a fifth amended complaint alleging abuse of process, conversion, malicious prosecution, and miscellaneous remedy. On April 19, 2016, the circuit court entered an order for partial summary judgment on conversion, granting summary judgment in Burkart's favor as to the November 4, 2010, withdrawal of the funds, but denying summary judgment in his favor with regard to holding the funds after the appellate

court's order vacating its prior orders. On June 10, 2016, the circuit court granted Burkart's motion to dismiss with regard to the counts involving abuse of process and malicious prosecution "on 2-619 grounds as precluded by law upon the facts alleged" and denied Burkart's motion to dismiss regarding equitable relief, finding the measure of damages remained a factual dispute. On July 21, 2016, the court denied the Wilsons' motion for reconsideration.

¶ 13 On September 21, 2017, the circuit court entered an order certifying the following questions for appeal (see Illinois Supreme Court Rule 308):

- “1. Whether [the Wilsons'] (fifth) amended complaint precludes any equitable offset (in favor of [Burkart]) based upon [Burkart's] contractual right to an attorney's fee, where no contractual action has been filed by [Burkart], no attorney's lien was perfected, and the statute of limitations for a contractual action has expired, but where the funds have been previously distributed to the attorney pursuant to prior court order?
2. Whether the Court's granting of defendant's motion to dismiss (on Counts I [abuse of process] and III [malicious prosecution] pursuant to section 2-619) was in error, where [Burkart's] motion to dismiss did not differentiate between sections 2-615 & 2-619 (a limitation on parties or the Court), did not support the section 2-619 motion with an affidavit, and [Burkart] did not answer Counts I and III?

As to the April 19, 2016 order:

3. Whether the Trial Court erred in granting [Burkart] summary judgment (in part) as to Count II ([c]onversion), with regard to the withdrawal of funds (pursuant to the trial court’s November 4, 2010 order) between when the Appellate Court’s Day 1 opinion was published but prior to the Day 1 mandate being received, but also prior to the Day 2 opinion?”

¶ 14 On November 15, 2017, this court granted the Wilsons’ application for leave to appeal pursuant to Illinois Supreme Court Rule 308.

¶ 15 ANALYSIS

¶ 16 Illinois Supreme Court Rule 308 provides an exception to the normal appeal process. Illinois Supreme Court Rule 308 provides in relevant part:

“When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court’s own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.” Ill. S. Ct. R. 308(a) (eff. Jan. 1, 2016).

¶ 17 “Our review of the appellate court’s ruling on certified questions is governed by Rule 308.” *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 550 (2009). “We limit our review to the certified questions, which, as questions of law, we review *de novo*.” *Id.* However, once we have answered a certified question, in the interests of judicial economy and the

need to reach an equitable result, we may consider the propriety of the circuit court order that gave rise to the proceedings. *Id.*

¶ 18 On appeal, with regard to the first certified question, the Wilsons argue that there is no legal basis to create an equitable offset in Burkart's favor. They argue that neither Burkart nor the circuit court cites authority to support an equitable offset for attorney fees and that Burkart has failed to timely or successfully assert any claim to the funds. We agree.

¶ 19 The circuit court's first certified question involves Burkart's retention of funds pursuant to void court orders. On November 4, 2010, before the appellate court issued its mandate affirming judgment on appeal, the circuit court entered an order distributing funds to Burkart. "Where there has been an appeal from a circuit court judgment, the judgment of the appellate court becomes final when entered, and the mandate of a court of review is the transmittal of the judgment of that court to the circuit court and reverts it with jurisdiction." *Hickey v. Riera*, 332 Ill. App. 3d 532, 542-43 (2001). "It is the filing of the mandate from the appellate court in the circuit court that reinvests jurisdiction in the circuit court." *Id.* at 543. Prior to the filing of the appellate court mandate, the circuit court has no jurisdiction. *Wheatley v. International Harvester Co.*, 166 Ill. App. 3d 775, 777 (1988); see also *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 305 (1981). Any action taken by a circuit court when it has no jurisdiction is null and void. *Id.*

¶ 20 Here, before this court issued its mandate in *Wilson III*, that is, prior to the time that the case was reinstated in the circuit court and while the appellate court still retained jurisdiction over the case, the circuit court entered an order directing the Bank of

Edwardsville to distribute the funds held in escrow, giving \$20,806.85 to Burkart and the remaining funds to the Wilsons. Because the circuit court entered its order authorizing the distribution of funds to Burkart prior to the filing of this court's mandate pursuant to *Wilson III*, the circuit court's November 4, 2010, order, entered when the court had no jurisdiction over the case, had no effect and is null and void. See *People v. Chapman*, 2018 IL App (1st) 163045, ¶ 4 ("After the filing of a notice of appeal and prior to the filing of the appellate court's mandate, the circuit court lacks jurisdiction to enter any order of substance in the cause.").

¶ 21 Moreover, on February 21, 2012, the *Wilson IV* court addressed the Wilsons' fourth appeal and vacated the circuit court's April 9, 2008, order, which had entered the equitable lien in Burkart's favor. This court held that the circuit court lacked the authority to hear Burkart's equitable lien request, which was filed more than 30 days after final judgment in the underlying case. *Wilson IV*, 2012 IL App (5th) 110059-U; see also *Leavell v. Department of Natural Resources*, 397 Ill. App. 3d 937, 950 (2010) (trial court loses jurisdiction over matter when 30 days have passed following entry of final order). Thus, in *Wilson IV*, this court determined that the circuit court's April 9, 2008, order was also void. See *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002) (it is well settled that a judgment entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void and may be attacked at any time or in any court, either directly or collaterally); *Schak v. Blom*, 334 Ill. App. 3d 129, 134-35 (2002) ("A void order is a

complete nullity from its inception and has no legal effect and may be attacked, either directly or collaterally, at any time or in any court.”).

¶ 22 Because the order releasing the funds to Burkart was void, as was the order granting his request for an equitable lien, it is unclear from the record before us why the circuit court did not order Burkart to return the funds pursuant to the Wilsons’ May 29, 2012, motion attacking the void judgments. See *Sarkissian*, 201 Ill. 2d at 104 (discussing motions attacking void judgments); *Schak*, 334 Ill. App. 3d at 134-35 (because turnover order was void, court properly ordered the return of the funds that had been turned over pursuant to the void order). Instead, it certified the following question for appeal:

“1. Whether [the Wilsons’] (fifth) amended complaint precludes any equitable offset (in favor of [Burkart]) based upon [Burkart’s] contractual right to an attorney’s fee, where no contractual action has been filed by [Burkart], no attorney’s lien was perfected, and the statute of limitations for a contractual action has expired, but where the funds have been previously distributed to the attorney pursuant to prior court order?”

¶ 23 In question one, while noting that Burkart has failed to make a timely or sufficient claim to the funds, the circuit court asks whether the Wilsons’ complaint precludes his retention of the funds. The complaint does not preclude Burkart’s retention of the funds: his failure to make a timely or sufficient claim to funds distributed pursuant to void court orders precludes him from retaining them. While inartfully worded, the first certified question on appeal essentially asks if Burkart has an equitable claim to the funds even though he has failed to sufficiently assert one. Thus, we modify the certified question and

answer the question in the affirmative, thereby holding that Burkart is precluded from retaining funds disbursed pursuant to void court orders because he has failed to assert a timely or sufficient claim to the funds. See *De Bouse*, 235 Ill. 2d at 552 (supreme court modified certified question to bring it within ambit of proper question of law).

¶ 24 The record before us does not reveal that the circuit court has ordered Burkart to return the funds. See *Sarkissian*, 201 Ill. 2d at 104; *Cook v. Burnette*, 341 Ill. App. 3d 652, 660 (2003) (“section 2-1401(f) motions to vacate void orders are no longer amenable to the due diligence, meritorious defense, or two-year time requirement”); *Schak*, 334 Ill. App. 3d at 134-35 (because turnover order was void, court properly ordered the return of the funds that had been turned over pursuant to the void order). Until the circuit court orders Burkart to return the funds, we find that answering questions two and three will not materially advance the litigation. See Ill. S. Ct. R. 308(a) (eff. Jan. 1, 2016); *Voss v. Lincoln Mall Management Co.*, 166 Ill. App. 3d 442, 443 (1988) (vacating order allowing leave to appeal as having been improvidently entered because addressing certified question would not actually materially advance the ultimate termination of the litigation); *Kincaid v. Smith*, 252 Ill. App. 3d 618, 622 (1993) (after reviewing the parties’ briefs, appellate court dismissed the appeal as improvidently granted because resolution of the certified question alone would not materially advance the litigation).

¶ 25

CONCLUSION

¶ 26 For the foregoing reasons, the first certified question is answered in the affirmative, in that Burkart is precluded from retaining funds in his possession pursuant to void orders where he has asserted no timely or sufficient claim to them.

¶ 27 The first certified question is modified and answered, and the cause is remanded with directions that the circuit court order Burkart to return \$20,806.85, which was disbursed pursuant to void court orders.

¶ 28 Certified question modified and answered; cause remanded with directions.