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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.) and Acting Circuit Court Judge

Case No. 2020-CP-40-04385

Appellate Case No. 2023-000252

Southern Insulation, Inc., through its Receiver, Peter D. Protopapas,Respondent,

vs.

OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America); OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC); R.V. Chandler & Associates, Inc.; Chandler Rental Properties, Inc.; Thomas S. Chandler; Jean B. Ownbey, as Trustee of the Thomas S. Chandler, Sr. Living Trust u/d 4/06/06; Gene N. Norville; the South Carolina Property and Casualty Insurance Guaranty Association; Trebuchet US Holdings, Inc.; Trebuchet Investments Limited; Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited); Brad S. Huntington, individually; and John C. Williams, individually, Defendants,

Of which OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America); OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC); Trebuchet US Holdings, Inc.; Trebuchet Investments Limited; Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited); Brad S. Huntington, individually; and John C. Williams, individually, are the Appellants.

**RESPONDENT’S
MOTION TO DISMISS
APPEAL**

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent Peter D. Protopapas, as the Receiver for Southern Insulation, Inc. (“Southern”) respectfully moves this

Honorable Court to dismiss this consolidated appeal as soon as possible because the trial court's order denying motions to dismiss is not appealable.¹

FACTUAL AND PROCEDURAL BACKGROUND

Southern was incorporated in 1967 and administratively dissolved in 1991. During its operation, Southern is alleged to have exposed employees, clients, and third parties to asbestos. Consequently, Southern has been sued in a number of asbestos-related personal injury actions. Because it is a dissolved corporation, the circuit court appointed Peter D. Protopapas ("the Receiver") as Southern's receiver on May 8, 2019, with the authority and obligation to (among other things) marshal Southern's assets, including all insurance policies and benefits that may provide coverage and defense for the asbestos suits.

In order to fulfill this obligation, the Receiver sued a known insurer of Southern and a related insurance agency. After uncovering more information about Southern's historical insurance program, the Receiver filed an amended complaint, adding several other insurers that issued policies with coverage for Southern, including the company now known as Bedivere Insurance Company² ("Bedivere"). Following settlements with several defendants, Bedivere entered liquidation proceedings in its home state of Pennsylvania. The Receiver then filed a Second Amended Complaint ("the Complaint"), removing Bedivere as a defendant and adding Appellants (and others) as defendants. Among other things, the Receiver alleges Appellants were

¹ The OneBeacon and Trebuchet Defendants each filed their own appeals of the Order, and their appeals have been consolidated. References to the "Appeal" or the "consolidated Appeal" are to both of the appeals of the Order.

² Bedivere was previously owned by the OneBeacon Defendants (OneBeacon Insurance Group, Ltd. and OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC)), and later sold to the Trebuchet Defendants (Trebuchet US Holdings, Inc., Trebuchet Investments Limited, Trebuchet Group Holdings Limited, Brad S. Huntington, and John C. Williams). Bedivere was formerly known as Potomac Insurance Company, which insured Southern for asbestos suits.

directly liable to Southern for losses caused in South Carolina by wrongful conduct Appellants engaged in as Bedivere's owners and operators. This action was improperly removed by Appellants and remanded to state circuit court.

Following remand, Appellants filed motions to dismiss the claims against them, and the Receiver filed a Joint Response in Opposition to the motions. The circuit court held a hearing on Appellants' motions to dismiss on January 27, 2023, during which the Court orally denied the motions. Appellants requested a Form 4 order denying the motions ("the Order"), which was filed on February 7, 2023. This appeal followed on February 21, 2023.

DISCUSSION

"The right of appeal arises from and is controlled by statutory law." *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Id.* "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by [section] 14-3-330 [of the South Carolina Code]." *Id.* "Absent a specialized statute, an order must fall into one of several categories set forth in [s]ection 14-3-330 in order to be immediately appealable." *Id.* The provisions of Section 14-3-330 . . . have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005).

Here, the Order is neither final³ nor an interlocutory order from which appeal may be taken under section 14-3-330. As a result, the Order is not appealable. The Receiver respectfully

³ See *Levi v. N. Anderson Cnty. EMS*, 409 S.C. 374, 385, 762 S.E.2d 44, 50 (Ct. App. 2014) ("The denial of a motion to dismiss has been consistently held not to be a final decision.").

requests that this appeal be immediately dismissed.

For interlocutory orders, Code section 14-3-330 allows immediate appellate review of only the following classes of interlocutory orders:

1. Those “involving the merits,” Code section 14-3-330(1);
2. Those “affecting a substantial right” when the order also “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action,” “grants or refuses a new trial,” or “strikes out an answer or any part thereof or any pleading,” Code section 14-3-330(2);
3. Those “affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment,” Code section 14-3-330(3);
and
4. Those “granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver,” § 14-3-330(4).

The Order does not fall into any of these categories. Thus, the consolidated Appeal should be dismissed.

First, the Order does not “involve the merits” under section 14-3-330(1). “An order [that] involves the merits is one that ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’” *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) (quoting *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). Here, the Order does not finally determine *any* matter concerning *any* party’s causes of action or defenses—it merely allows this case to proceed to the discovery phase of the litigation. See *McLendon v. S.C. Dep’t of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443

S.E.2d 539, 540 n.2 (1994) (“Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue[s] raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable” (citation omitted)).

Next, the Order does not affect a substantial right of any Appellant and does not also “in effect determine[] the action and prevent[] a judgment from which an appeal might be taken or discontinue[] the action,” “grant[] or refuse[] a new trial,” or “strike[] out an answer or any part thereof or any pleading.” S.C. Code Ann. § 14-3-330(2). As a result, the Order is not immediately appealable under section 14-3-330(2). *See, e.g., Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) (“Avoidance of trial is not a ‘substantial right’ entitling a party to immediate appeal of an interlocutory order.”); *Du Pont v. Du Bos*, 33 S.C. 389, 394, 11 S.E. 1073, 1074-75 (1890) (“It is quite clear that the order here under review is not appealable . . . ; for even granting that it affects a substantial right, that is not sufficient, for it must also, in effect, determine the action and prevent a judgment from which an appeal might be taken, and this it certainly does not do.”).

Similarly, because the Order does not affect a substantial right of any Appellant, it also does not fall within section 14-3-330(3). The Order was also not entered in a “special proceeding” or “after judgment.” S.C. Code Ann. § 14-3-330(3). Instead, the Order was entered in a typical civil action before judgment, and so section 14-3-330(3) is inapplicable. *See Allen v. Partlow*, 3 S.C. 417, 418 (1872) (observing a special proceeding is “any remedy *other than an action or ordinary proceeding* in a Court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence” (emphasis added)); *see also Smith v. Saye*, 131 S.C. 378, 381, 127 S.E. 568,

569 (1925) (distinguishing between a “special proceeding” and a “civil action”); Rule 3, SCRCP (“A civil action is commenced when the summons and complaint are filed with the clerk of court . . .”).

Finally, the Order falls outside the scope of section 14-3-330(4) because it does not a “grant[], continu[e], modify[], or refus[e] an injunction or grant[], continu[e], modify[], or refus[e] the appointment of a receiver.” S.C. Code Ann. § 14-3-330(4). No injunctions have been sought or entered here. And although the action is being brought by Southern’s Receiver, the Order does not address any issues related to the Southern’s receivership or affect its appointment in any way. Accordingly, section 14-3-330(4) does not afford Appellants any basis to appeal a denial of their motions to dismiss.

CONCLUSION

Because the Order is not appealable, Respondent respectfully requests that this Court immediately dismiss this appeal of the denial of Appellants’ motions to dismiss.

Respectfully submitted,

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Of which OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America); OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC); Trebuchet US Holdings, Inc.; Trebuchet Investments Limited; Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited); Brad S. Huntington, individually; and John C. Williams, individually, are theAppellants.

PROOF OF SERVICE

The undersigned hereby certifies that, on this date, a copy of **Respondent’s Motion to Dismiss Appeal** has been served upon counsel listed below via email, as follows:

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Via E-Filing

The Honorable Jenny Abbott Kitchings
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RE: *Southern Insulation, Inc., through its Receiver, Peter D. Protopapas, vs. OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America); OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC); R.V. Chandler & Associates, Inc.; Chandler Rental Properties, Inc.; Thomas S. Chandler; Jean B. Ownbey, as Trustee of the Thomas S. Chandler, Sr. Living Trust u/d 4/06/06; Gene N. Norville; the South Carolina Property and Casualty Insurance Guaranty Association; Trebuchet US Holdings, Inc.; Trebuchet Investments Limited; Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited); Brad S. Huntington, individually; and John C. Williams, individually,*

Appellate Case No. 2023-000252

Dear Ms. Kitchings:

Enclosed for filing with your office, please find Respondent's Motion to Dismiss Appeals and Proof of Service. All counsel of record are being served with same via electronic mail.

The filing fee of \$50.00 for this Motion will be hand delivered to your office.

Sincerely,

s/Matthew T. Richardson
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Enclosure

CC via email: All Counsel of Record

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