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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. 2021-CP-40-03484

Appellate Case No. 2023-000727

Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers,
Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories, Inc.; General Boiler Casing Company, Inc.; HEFCO, Inc.; J.R. Dean Company, Inc.; Payne & Keller Company; SFB, Incorporated; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of Rome, Inc.; and Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co., Defendants.

Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; and Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, Third-Party Plaintiffs,

v.

Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland All American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler; Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company; Hartford Accident and Indemnity Company; Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc.; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance

Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

Of which, Payne & Keller Company, By and Through its Duly Appointed Receiver, Peter D. Protopapas, is the Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company, are Appellants.

**RESPONDENT'S
MEMORANDUM ON APPEALABILITY**

Respondent Payne & Keller Company (“Payne & Keller”), by and through its duly appointed receiver, Peter D. Protopapas (“the Receiver”), respectfully submits the following memorandum on the issue of appealability as requested by the Court in its May 5, 2023 letter. Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Receiver respectfully requests that the Court dismiss the appeal brought by Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company (“Travelers”), as well as the appeal brought by: AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance

Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (collectively, “the Joining Insurers”) because the trial court’s order denying their motions for dismissal and protection from discovery is not immediately appealable, and Appellants are not aggrieved parties.

BACKGROUND

Payne & Keller, a Texas corporation, dissolved in 1986. While active, its operations included the installation, repair, replacement, removal, and/or disturbance of thermal insulation and other building materials, which allegedly exposed individuals to asbestos. As a result of these alleged exposures, Payne & Keller is a defendant in asbestos-related bodily injury lawsuits in South Carolina state court. After it failed to answer complaints filed against it, and because it is a dissolved corporation, the circuit court appointed Peter D. Protopapas as Payne & Keller’s receiver on August 27, 2021, with the authority and obligation to (among other things) marshal Payne & Keller’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 filed a third-party complaint in the underlying bodily injury lawsuit, *Childers v. Davis Mechanical Contractors, Inc. et al.*, C.A. No. 2021-CP-40-03484, bringing declaratory judgment claims against Payne & Keller’s known insurers and several related entities concerning the terms of Payne & Keller’s insurance coverage and the relationships and obligations of the other third-party defendants. On August 24, 2022, Travelers moved to dismiss Payne & Keller’s claims against it and dissolve the Payne & Keller receivership, and on September 19, 2022, the Joining Insurers filed a joinder to Travelers’ motion. On November 16, 2022, Travelers filed an additional motion, seeking protection from discovery requests propounded by the Receiver and again asking the circuit court to dissolve the

Payne & Keller receivership and dismiss Travelers from the action. The circuit court held a hearing on Appellants' motions on January 27, 2023, during which it orally denied them. Following the oral rulings, Travelers requested a written order, which the court entered on March 31, 2023 ("the Order").

In the Order, the circuit court ruled (1) the Receiver has standing to bring his claims against Appellants because Payne & Keller has property within South Carolina and its 1986 dissolution does not preclude the current receivership under Texas law, (2) Appellants are subject to the personal jurisdiction of South Carolina courts, (3) the Receiver's third-party claims were properly brought under Rule 14(a), SCRCP, and (4) Rule 12(b)(8), SCRCP, does not prohibit the Receiver from asserting his third-party claims in the underlying action. Because Travelers' motion for protection from discovery relied on the standing arguments raised in its motion to dismiss, the Order also denied that motion.

On April 28, 2023, Travelers and the Joining Insurers separately appealed the Order, and this Court subsequently consolidated the appeals.

DISCUSSION

I. The Order is not immediately appealable.

"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.*

Here, the Order—which denied (1) Travelers’ motion to dismiss, (2) the Joining Insurers’ joinder to Travelers motion to dismiss, and (3) Travelers’ motion for protection from discovery—is neither final¹ nor an interlocutory order from which appeal may now be taken under section 14-3-330. As a result, the Order is not appealable. The Receiver respectfully requests that this appeal be immediately dismissed.

Section 14-3-330 allows immediate appellate review of only the following classes of interlocutory orders:

1. Those “involving the merits,” § 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,” § 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,” § 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).

Additionally, “[t]he provisions of section 14-3-330 are narrowly construed and serve the underlying policy favoring judicial economy by avoiding ‘piecemeal appeals.’” *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019) (quoting *Hagood v. Sommerville*, 362

¹ 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.”); *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (“[A] discovery order is not a final order because it leaves some further act to be done by the court before the rights of the parties . . . are determined.”).

S.C. 191, 196, 607 S.E.2d 707, 709 (2005)); *see also Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017) (“To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly . . .”).

Because the Order does not fall under any of these categories when properly construed, Appellants’ appeals should be dismissed.

1. The Order is not appealable under section 14-3-330(1), (2), or (3).

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)); *Hamm v. S.C. Pub. Serv. Comm’n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) (“Discovery orders . . . are interlocutory and are not immediately appealable.”).

Next, the Order does not affect any of Appellants’ substantial rights 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.” § 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 Appellants, it also does not fall within section 14-3-330(3). The Order was also not entered in a “special proceeding” or “after judgment.” § 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, SCRCPC (“A civil action is commenced when the summons and complaint are filed with the clerk of court . . .”).

2. The Order is not appealable under section 14-3-330(4).

The Order also falls outside the scope of section 14-3-330(4) because it does not “grant[], continu[e], modify[], or refus[e] an injunction or grant[], continu[e], modify[], or refus[e] the appointment of a receiver.” § 14-3-330(4). No injunctions have been sought or entered here, and although the third-party claims in the underlying action are brought by Payne & Keller’s Receiver, the Order did not alter or affect the Receiver’s appointment in any way.

Based on the notices of appeal filed with this Court, Respondent expects that Appellants will argue the Order is appealable under section 14-3-330(4) because it “continues” and “modifies” Payne & Keller’s receivership.² However, Appellants are incorrect, and their attempts to manufacture appealability where none exists and frustrate the Receiver’s court-ordered efforts to marshal Payne & Keller’s assets—its insurance policies covering asbestos-related personal injury claims—should not be allowed.

a. Section 14-3-330(4) is concerned with “appointments,” not “receiverships.”

As an initial matter, the appealability statute only provides for immediate appellate review of orders affecting “the *appointment of a receiver.*” § 14-3-330(4) (emphasis added). Critically, the statute does not allow the interlocutory appeal of an order affecting “a receivership.” *See Aiken v. S.C. Dep’t of Revenue*, 429 S.C. 414, 420, 839 S.E.2d 96, 99 (2020) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous” (quoting *State v. Smith (In re Decker)*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))); *Hartford Accident & Indem. Co. v. Lindsay*, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979) (“Full effect must be given to each section of a statute, giving words their plain meaning, and, in the absence of ambiguity, words must not be added or taken away.”).

Although, upon first glance, the distinction between orders affecting the appointment of a receiver and a receivership *per se* may appear illusory, upon closer examination, the distinction is real, reflected in the language of the appealability statute, and has been acknowledged as legally significant by South Carolina courts, which have recognized that the creation of a

² Both Travelers’ and the Joining Insurers’ notices of appeal assert the Order “is immediately appealable pursuant to South Carolina Code § 14-3-330(4) because it specifically continues a receivership despite a motion to dissolve the receivership, and it modifies the scope of the receivership by authorizing the Receiver to investigate whether the Payne & Keller Company was properly dissolved in Texas in 1986.”

receivership and the appointment of a receiver are separate acts. *See, e.g., In re Citizens' Exch. Bank*, 140 S.C. 471, 493, 139 S.E. 135, 143 (1927) (“The power of the Circuit Judge to designate a receiver is, clearly, a matter of discretion; perhaps even of more enlarged discretion than that of deciding in the first instance whether or not there should be a receivership.”); *S. Tr. Co. v. Cudd*, 166 S.C. 108, 113-14, 164 S.E. 428, 429-30 (1932) (“That the power to appoint a receiver is inherent in a Court of equity is fully realized and approved. Also that the matter of ordering a receivership is very much within the discretion of the Circuit Judge, is likewise well realized.” (citations omitted)).

A receiver acts on behalf of, as an officer of, the appointing court. *See Ex parte Cusaac*, 244 S.C. 572, 580, 137 S.E.2d 764, 768 (1964) (“A receiver represents the Court appointing him; he is an officer of the Court and is the agency through which the Court acts.”). Thus, the appealability statute rightly focuses on, and allows immediate appellate review of, orders conferring the authority of the court on an individual. *See Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 479, 602 S.E.2d 83, 87 (Ct. App. 2004) (“The refusal of a trial court to appoint a receiver should be immediately appealable because of the potential harm in not having an unbiased party to protect a corporation’s assets.”). Admittedly, orders concerning receiverships often will affect both the receivership itself and the appointment of a receiver simultaneously—for example, when a receivership is created and a receiver appointed, or when a receivership is dissolved and a receiver relieved of the appointment. However, such is not the case here. In the circuit court, Appellants argued Payne & Keller’s receivership itself was improper and sought the dissolution of the entire receivership. None of Appellants arguments related to the appointment of the Receiver as such; thus, the Order, which rejected those

arguments, does not fall within the ambit of section 14-3-330(4) when carefully read and properly interpreted.

b. Even if section 14-3-330(4) applies to “receiverships,” the Order did not “modify” or “continue” anything.

Even assuming section 14-3-330(4) applies to “receiverships” *per se*, the Order is nonetheless not immediately appealable because it did not “modify” or “continue” anything—either the Receiver’s appointment or Payne & Keller’s receivership as a whole.

i. The Order did not “modify” anything.

First, the Order did not “modify[] . . . the appointment of [Payne & Keller’s] receiver,” § 14-3-330(4), or Payne & Keller’s receivership generally. Appellants may contend that the Order expanded the scope of the receivership by authorizing the Receiver to investigate Payne & Keller’s 1986 dissolution; however, the Receiver was already authorized to conduct such an investigation when the Order was entered. *Cf. In re Fifty-Four First Mortg. Bonds*, 15 S.C. 304, 314 (1881) (“The authority of a receiver rests . . . in the orders of the court by which he is appointed.”).

When Payne & Keller’s receivership was created, the Receivership Court³ conferred very broad authority on the Receiver to act in Payne & Keller’s interest, giving him:

the power and authority [to] fully administer all assets of Payne & Keller, accept service on behalf of Payne & Keller, engage counsel on behalf of Payne & Keller and take *any and all steps necessary to protect the interests of Payne & Keller whatever they may be*. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Payne & Keller as well as any

³ The Supreme Court has ordered “that the Honorable Jean Hoefler Toal, retired Chief Justice of the Supreme Court, is hereby appointed to serve as the Chief Judge for Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system.” S.C. Sup. Ct. Order dated May 28, 2019. Incidental to this appointment, Justice Toal has established several receiverships over now-defunct companies whose operations are alleged to have caused bodily injury to individuals through asbestos exposure.

claims related to the actions or failure to act of Payne & Keller’s insurance carriers.

(Aug. 27, 2021 Order Appointing Receiver at 1, attached as Exhibit A (emphasis added).)

Investigating Payne & Keller’s history, including its dissolution in 1986, is clearly encompassed by the powers the Receivership Court conferred upon the Receiver when he was initially appointed in August of 2021. Accordingly, the Order did not grant him such authority, nor did it “modify” the scope of Payne & Keller’s receivership in any other way.

ii. The Order did not “continue” anything.

Similarly, the Order did not “continu[e] . . . the appointment of [Payne & Keller’s] receiver,” § 14-3-330(4), or Payne & Keller’s receivership generally. In arguing the Order “continued” Payne & Keller’s receivership, Appellants rely on an overly broad interpretation of section 14-3-330 that is contrary to precedent and would ultimately lead to numerous improper appeals out of the asbestos Receivership Court and from unrelated actions involving receiverships. *See Tillman*, 420 S.C. at 250, 801 S.E.2d at 760 (“To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly . . .”).

The language of section 14-3-330(4) was first enacted into South Carolina law in 1901 (through Act 358) as section 11(4) of the Code of Civil Procedure.⁴ At the time, South Carolina

⁴ *See* 1901 S.C. Acts 623 (“*Be it enacted* by the General Assembly of the State of South Carolina: That section 11 of the Code of Civil Procedure of this State relating to the jurisdiction of the Supreme Court, be and the same is hereby amended by the addition thereto of the following subdivision to be numbered ‘4.’”); *id.* (“4. An interlocutory order or decree in the Court of Common Pleas, granting or continuing or modifying or refusing an injunction, or else granting or continuing or modifying or refusing the appointment of a Receiver hereafter granted in any action”); *see also Williams v. Jones*, 62 S.C. 472, 481, 40 S.E. 881, 884 (1902) (ruling an order “was appealable before the act of 1901, 23 Stat., 623--for it involved the merits; and secondly, it was appealable under said act just quoted, for that act provides that the Supreme Court may review ‘An interlocutory order or decree in the Court of Common Pleas, granting or continuing or modifying or refusing an injunction, or else granting or continuing or modifying or refusing the appointment of a receiver hereafter granted in any action’”). Although it has been

courts commonly appointed receivers on a temporary basis,⁵ and it was likewise common for such temporary receiverships to be extended or made permanent—or “continued.”⁶ This practice of “continuing” temporary receiverships still takes place in South Carolina. *See, e.g., Wilmington Trust Nat’l Assoc. v. Piedmont Center Owner, LLC et al.*, 2019 S.C. C.P. LEXIS 513, *1 (S.C. Ct. Comm. Pl., Greenville Cnty., Mar. 8, 2019) (“At the hearing held on March 8, 2019, Plaintiff submitted evidence and testimony from the interim Receiver in support of the **continued**

recodified several times, the relevant language of section 14-3-330(4) has remained a part of South Carolina’s statutory scheme from 1901 to the present day.

⁵ *See, e.g., Montgomery & Crawford, Inc. v. Arcadia Mills*, 173 S.C. 464, 483, 176 S.E. 589, 596 (1934) (“Judge Stoll signed the order making H. A. Ligon temporary receiver”); *Moore v. S. Mut. B. & L. Ass’n*, 50 S.C. 89, 93, 27 S.E. 543, 545 (1897) (“[O]n the 12th of February, 1897, a temporary receiver of the defendant association was appointed”); *Hughes v. Edisto Cypress Shingle Co.*, 51 S.C. 1, 21, 28 S.E. 2, 9 (1897) (“C. B. Free was, under the order of Judge Witherspoon, appointed as temporary receiver”); *Tillinghast v. Bos. & Port Royal Lumber Co.*, 39 S.C. 484, 486, 18 S.E. 120, 121 (1893) (noting a party “applied for and obtained an order for the appointment of a temporary receiver”); *see also Hand v. Savannah & C. R. Co.*, 17 S.C. 219, 274 (1882) (“It can hardly be necessary to say, what has been so often held, that the objects for the appointment of a receiver are temporary in their character.”); *see also* 1930 S.C. Civil Code § 5564 (“If it appears to the Court that the corporation is insolvent or in imminent danger of insolvency the Court may appoint a temporary receiver of the corporation pending dissolution.”); *Tardy’s Smith on Receivers* 2d, § 3 (1920) (distinguishing temporary and permanent receivers).

⁶ *See, e.g., Carroll v. Cash Mills*, 125 S.C. 332, 336, 118 S.E. 290, 291 (1923) (“On February 21, 1921, the temporary receivership was made permanent, by order of the Circuit Judge.”); *Wylie v. Commercial & Farmers’ Bank*, 63 S.C. 406, 408, 41 S.E. 504, 505 (1902) (“After answers were in, an application was made to have the temporary receiver made permanent receiver. This was ordered in June, 1899.”); *White v. Commercial & Farmers’ Bank*, 60 S.C. 122, 123, 38 S.E. 453, 454 (1901) (noting “a temporary receiver was appointed on the 3d day of February, 1900 (afterwards made permanent)”); *State v. Port Royal & Augusta R.R. Co.*, 45 S.C. 470, 477, 23 S.E. 383, 384 (1895) (“On the same day such temporary receiver was made permanent receiver.”); *see also* 75 C.J.S. *Receivers* § 79 (“According to the showing made, the court may make, or refuse to make, an order **continuing** a temporary receiver previously appointed.” (emphasis added)); *Stair v. Meissel*, 207 Ind. 280, 283, 192 N.E. 453, 454 (1934) (“It is, therefore, ordered by the court that the receivership herein be and the same is hereby **continued** and made permanent pending the determination of the main cause of action in this cause.” (emphasis added)); *Singer v. Goff*, 334 Mich. 163, 167, 54 N.W.2d 290, 292 (1952) (“Equity courts have inherent power to appoint a receiver, and it is a matter of discretion whether a receivership shall be **continued** or discontinued. The record in the instant case shows that, after the expiration of the 1-year period, the court issued various orders which necessarily imply a **continuance** of the Singer receivership.” (emphasis added) (citations omitted)).

Receivership, and requested that the Court extend the Receiver Order until subsequent order of this Court, in accordance with the terms of the Receiver Order, which are incorporated herein.” (emphasis added)). Accordingly, the language in section 14-3-330(4) allowing for the immediate appeal of orders “continuing . . . the appointment of a receiver” was not intended to apply to the current circumstance, in which a court simply rejects a third party’s attempt to challenge and dissolve a receivership. Instead, it was intended to apply to instances where a temporary receivership was explicitly extended in duration, whether made permanent or remaining as a temporary receivership with a later termination date.

For section 14-3-330(4) to allow the instant appeals of the Order—which did not “continue” Payne & Keller’s receivership, and at most,⁷ simply declined to dissolve it—the statute would need to contain appropriate alternative language, as other jurisdictions have done. *See, e.g.*, Okla. Stat. tit. 12, § 993(4) (allowing the immediate appeal of an order that “refuses to vacate the appointment of a receiver”); Mo. Rev. Stat. § 512.020(2) (allowing the immediate appeal of an order “refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers”); Kan. Stat. Ann. § 60-2102(a)(3) (allowing the immediate appeal of “[a]n order that . . . refuses to wind up a receivership”); 4 V.I.C. § 33(b) (“The Supreme Court of the Virgin Islands has jurisdiction of appeals from . . . (2) Interlocutory orders . . . refusing orders to wind up receiverships . . .”).

⁷ “[A]n appellate court should look to the effect of an interlocutory order to determine its appealability . . .” *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). Here, the Order had *no* effect on Payne & Keller’s receivership, whether to its duration, scope, the identity of the Receiver, or otherwise. Consequently, the Order does not warrant review by this Court. *See, e.g., Cobb v. Maccaro*, 310 S.C. 303, 306, 423 S.E.2d 156, 157 (Ct. App. 1992) (ruling the refusal to dissolve a mechanic’s lien was not immediately appealable).

Underlying and reinforcing Respondent’s interpretation of section 14-3-330(4) is an important consideration: that receivers, once appointed, should be able to carry out their court-ordered duties without other entities interfering by filing unnecessary, improper, and time-consuming appeals. If Appellants’ view of section 14-3-330(4) is accepted, insurers in the asbestos Receivership Court,⁸ and debtors to entities in receivership elsewhere, could invent any number of reasons why a receivership or a receiver’s appointment is improper, regardless of merit, move for dissolution of the receivership on that basis, and appeal the denial of such motions as orders “continuing” the receivership. In fact, under such a broad interpretation as Appellants would have this Court adopt, ordinary motions to dismiss and motions for summary judgment against a receiver’s claims containing a perfunctory argument that, upon dismissal or adjudication of the claims, the receivership should be dissolved, would be immediately appealable. This would upend foundational appealability law in South Carolina. *See Silverman v. Campbell*, 326 S.C. 208, 211, 486 S.E.2d 1, 2 (1997) (recognizing “it is well-settled that the

⁸ Regrettably, the non-meritorious appeal of unappealable orders has become common practice in South Carolina asbestos receivership litigation. *See, e.g., Ex Parte: Zurich Am. Ins. Co.*, Appellate Case No. 2019-001651 (appealing discovery orders directly to Supreme Court; appeal dismissed Oct. 16, 2019 upon initial review of appealed orders); *Ex parte: Hartford Accident & Indem. Co.*, Appellate Case No. 2019-001764 (appealing discovery order; dismissed Nov. 1, 2019 following motion to dismiss and subsequent withdrawal of appeal); *Ex Parte: U.S. Fid. & Guar. Co.*, Appellate Case No. 2020-000845 (appealing orders in case where appellant was not a party; dismissed July 30, 2020 upon motion); *Finch v. U.S. Fid. & Guar. Co.*, Appellate Case No. 2020-001663 (appealing bifurcation order; appeal dismissed Jan. 6, 2021 upon motion; certiorari denied July 6, 2021 in Appellate Case No. 2021-000462); *Covil Corp. v. Penn. Nat’l Mut. Cas. Ins. Co.*, Appellate Case No. 2022-000761 (appealing discovery orders; appeal dismissed Aug. 9, 2022 upon motion; certiorari denied Jan. 12, 2023 in Appellate Case No. 2022-001764); *Covil Corp. v. Penn. Nat’l Mut. Cas. Ins. Co.*, Appellate Case No. 2022-000785 (appealing same discovery orders directly to Supreme Court; certiorari denied Aug. 23, 2022); *Covil Corp. v. Penn. Nat’l Mut. Cas. Ins. Co.*, Appellate Case No. 2022-001722 (appealing order confirming non-jury trial; appeal dismissed Feb. 8, 2023 upon motion; petition for rehearing pending); *S. Insulation, Inc. v. OneBeacon Ins. Grp., Ltd.*, Appellate Case No. 2023-000252 (appealing order denying dismissal; appeal dismissed Apr. 13, 2023 upon motion; petition for rehearing pending).

denial of summary judgment is not directly appealable”); *McLendon*, 313 S.C. at 526 n.2, 443 S.E.2d at 540 n.2 (observing “the denial of a motion to dismiss is not directly appealable”).

Allowing such appeals would also stymie actions involving receiverships in the circuit court, as each appellant would argue that the receivership’s propriety affects the viability of the entire action. This is not what the legislature intended with respect to receiverships in enacting section 14-3-330(4), nor would it be consonant with the general rule that section 14-3-330 should be narrowly construed. *See Stone*, 426 S.C. at 295, 826 S.E.2d at 870; *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. The appropriate time to challenge the propriety of a receivership is at its outset—which section 14-3-330(4) explicitly allows by providing for the immediate appeal of orders “granting . . . the appointment of a receiver”—not now, years after the receivership has been established and the Receiver appointed.

In sum, section 14-3-330(4) does not afford Appellants any basis to appeal the Order, and their appeals should be immediately dismissed.

II. Appellants have no right to appeal the Order because they are not aggrieved parties.

Even assuming *arguendo* that the Order is appealable under section 14-3-330(4), Appellants are unable to seek appellate review because they are not aggrieved by the Receivership Court’s refusal to dissolve Payne & Keller’s receivership. *See* Rule 201(b), SCACR (“Only a party aggrieved by an order, judgment, sentence or decision may appeal.”); *State v. Looper*, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017) (“Whether based on statute or case law, the overarching point remains—absent the presence of an exception to the final judgment rule, appealability is determined by a final judgment and an aggrieved party.”).

Although appellants undoubtedly would like Payne & Keller’s receivership to be dissolved and the underlying action against them dismissed, this desire does not give rise to a

right to appeal.⁹ Payne & Keller’s receivership, in and of itself, does not operate on Appellants’ rights of property or bear directly upon their interests. The creation of the receivership and the Receiver’s appointment merely put the Receiver in the place of Payne & Keller vis-à-vis Payne & Keller’s property.¹⁰ However, this affected only Payne & Keller’s property—it did not affect the property or any other right held by Appellants. The fact that Payne & Keller’s assets are its insurance policies, contracts to which Appellants are also parties, does not change this fact. The Receiver only possesses Payne & Keller’s rights and obligations under the policies, and the separate but corresponding rights and obligations of the Appellant insurers were unaffected by the creation of the receivership and the Receiver’s appointment.¹¹

⁹ See *State v. Cox*, 328 S.C. 371, 373, 492 S.E.2d 399, 400 (Ct. App. 1997) (“[A]ppellate review is limited to parties aggrieved by a judgment, order, or sentence below, and an aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property.” (citations omitted)); *Ralph v. McLaughlin*, 432 S.C. 640, 649, 856 S.E.2d 154, 158 (2021) (“[A]n aggrieved party is one who is injured in a legal sense; one who has suffered an injury to person or property. . . . [A]n aggrieved party with[in the meaning of the] statute relating to appeals is a person who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly upon his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation.” (quoting *Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970))).

¹⁰ See *Nat’l Cash Register Co. v. Burns*, 217 S.C. 310, 313, 60 S.E.2d 615, 617 (1950) (“A primary concept of the law of receivers is that a receiver stands in the shoes of the debtor with respect to the property of the latter”); *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 217-18, 118 S.E. 303, 304 (1923) (“The Receiver of an insolvent corporation represents, not only the corporation, but also its stockholders and creditors, and it is his duty to assert and protect the rights of each of these several classes of persons; he is regarded as a Trustee for them. . . . The property becomes a trust fund for the payment of debts, and the Receiver simply holds it for the benefit of those ultimately entitled, in law or equity, to it.”); *Bates v. S.C. Nat’l Bank*, 280 S.C. 599, 601, 313 S.E.2d 361, 362 (Ct. App. 1984) (“The property in the hands of the receiver is *in custodia legis*; the possession of the property by the receiver is the possession of the court which appointed him.”).

¹¹ See *Carwile v. Metro. Life Ins. Co.*, 136 S.C. 179, 195, 134 S.E. 285, 290 (1926) (“A receiver can acquire no other, greater, or better interest than the debtor had in the property.” (quoting *In re Am. Slicing Mach. Co.*, 125 S.C. at 218, 118 S.E. at 304)); *Nat’l Cash Register Co.*, 217 S.C. at 313, 60 S.E.2d at 617 (providing that property in a receiver’s possession “is subject to valid liens and other contractual obligations”); *id.* at 313-14, 60 S.E.2d at 617 (“The general rule is that the appointment of a receiver will not change any existing contractual relation or create any

That third parties are not injured in a legal sense by the establishment of a receivership is also reflected in the statutes governing receiverships. For example, before a receivership is created, notice of the application for the receivership must be given to the entity being placed into receivership and others claiming an interest in that entity's property. *See* S.C. Code Ann. § 15-65-20 (“No receiver of the property of any person or corporation shall be appointed by any court or judge, either in term time or at chambers, without notice of the application for such appointment to the party to the action whose property is sought to be put in the hands of a receiver and to any party to the action in possession of such property claiming an interest therein under any contract, lease or conveyance thereof from the alleged owner.”). These are the parties that may be aggrieved by an order such as the one currently on appeal; however, notice need not be given to third parties like Appellants because they would not be similarly aggrieved.

And although the Receiver has brought claims against Appellants, that does not render the receivership *per se* as legally injurious to Appellants. *See Looper*, 421 S.C. at 389, 807 S.E.2d at 205 (“We, of course, take no exception to the notion that Petitioner was adversely impacted by the circuit court’s order remanding the case for trial, but he was not aggrieved in a legal sense. *Cf. 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.’).”). Consequently, the circuit court’s refusal to dissolve Payne & Keller’s receivership does not, standing alone, aggrieve Appellants.¹²

new contractual relation or right of action thereon, and a receiver can do nothing to impair a contract as between the parties thereto.”); *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 343, 745 S.E.2d 90, 93 (2013) (holding an “[i]nsurer still retains all of its defenses and rights under [an] insurance contract” when an insured’s rights under the contract, including claims against the insurer, are assigned to a third party).

¹² *See, e.g., Wildflower Nursery, Inc. v. Beasley*, No. 2016-UP-082, 2016 S.C. App. Unpub. LEXIS 98, at *3 (Ct. App. Feb. 24, 2016) (“As to the denial of Beasley’s motion for the

In addition to the above South Carolina cases supporting Respondent’s position, other jurisdictions have consistently held that a third party is not aggrieved by the imposition of a receivership.¹³ An opinion by the North Carolina Court of Appeals is particularly instructive. In *Haarhuis v. Cheek*, 820 S.E.2d 844 (2018), the defendant hit and killed a pedestrian with her

appointment of a receiver, we find Wildflower was not aggrieved by the circuit court’s denial of that motion.”); *cf. Powell v. Bank of Am.*, 379 S.C. 437, 448, 665 S.E.2d 237, 243 (Ct. App. 2008) (“Because the Bank has no interest in the escrowed funds, the Bank is not aggrieved by the trial court’s apportionment of the funds between Cody and Elizabeth. We dismiss the Bank’s appeal.”); *Burns v. Gardner*, 328 S.C. 608, 617, 493 S.E.2d 356, 361 (Ct. App. 1997) (“The assessment of sanctions in this case does not affect any property right of the appellants, nor does it impose any burden or obligation on the appellants. Thus, we cannot say that the appellants are aggrieved by the imposition of sanctions against their attorney.”); *Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 120-21, 754 S.E.2d 486, 490-91 (2014) (holding parties could not appeal the circuit court’s approval of a settlement because they were not “aggrieved in any way by the settlement agreement”).

¹³ See *MW Capital Funding, Inc. v. Magnum Health & Rehab of Monroe LLC*, No. 16-14459, 2019 U.S. Dist. LEXIS 127463, at *10 (E.D. Mich. July 31, 2019) (“The court is doubtful that a non-party creditor like MDHHS has standing to challenge the imposition of a receivership. MDHHS was not directly harmed by the imposition of the receivership, which affected *Defendants’* assets.” (footnote omitted)); *Luckenbach v. Laer*, 212 P. 918, 920 (Cal. 1923) (“The appellants were in exactly the same position after the appointment of the receiver and the granting of permission to sue [appellants] as they were before. They were, or were not, liable to the Krempel-Preston Company and to its creditors, as the facts exist. The receiver is merely the minister of the corporation, acting under the direction of the court, in attempting to enforce such liability. In any action brought thereon by him, the appellants may interpose every defense they would have against the corporation. If they have a meritorious defense, they will, we may assume, defeat any recovery.”); *Exch. Tr. Co. v. Okla. State Bank*, 259 P. 589, 593 (Okla. 1927) (“The Bank is not a party aggrieved. It is not, and was not, the owner or in possession of the mortgaged premises or crops raised thereon. It is not, under the order of appointment of the receiver, chargeable with any expense in connection with the receivership.”); *Med. Device All., Inc. v. Ahr*, 988 P.2d 308, 310 (Nev. 1999) (“Where a receiver is appointed to oversee the operations of a corporation, the corporation is the aggrieved party and has a right to appeal from that order.”); *Brenda Sue Steuer Revocable Tr. v. Strauss*, 2022-Ohio-3484, ¶ 13 (Ct. App. 2022) (“Strauss has asserted no interest in the property of Fairport Real Estate subject to the receivership. Accordingly, he cannot claim to be aggrieved by the imposition of the receivership.”); *Needle v. Perfection Const. Co.*, 154 A. 878, 879 (N.J. 1931) (“It is to be observed that the corporation defendant has not appealed and is not complaining of the order appointing a statutory receiver. Just how the appellant as mortgagee is aggrieved by that order has not been made to appear. The order appointing a receiver had the legal effect of transferring property of the corporation to the receiver and it is not apparent that any injury will result to her by this change of position and title.”).

vehicle while driving intoxicated. Plaintiff, the pedestrian's husband and administrator of her estate, received and accepted an offer by the defendant's insurer to release his claims against the defendant in exchange for payment within ten days of \$50,000, the defendant's insurance policy limits. However, soon after receiving the plaintiff's acceptance of the settlement offer, the insurer retained counsel to represent the defendant. The settlement payment was not timely made, and the plaintiff filed suit against the defendant. At trial, the jury entered a verdict against the defendant for \$4.25 million in compensatory damages and \$45,000 in punitive damages. When the judgment went unsatisfied, the plaintiff filed a motion to appoint a receiver for the defendant, who "possessed property in the form of unliquidated legal claims against [the insurer] and [counsel] for their actions in causing [the] defendant to be encumbered with a judgment of nearly \$4.3 million." *Id.* at 847. At a hearing on the motion, the trial court allowed, over the objections of the plaintiff, the insurer and counsel to argue against appointing a receiver. The trial court denied the request for a receiver, and on appeal, the North Carolina Court of Appeals considered whether the insurer and counsel had standing to challenge the appointment of a receiver. The *Haarhuis* court observed, "It is well settled that the debtor of a judgment-debtor lacks standing to object to the appointment of a receiver, as the debtor is not the 'party aggrieved' in the underlying action." *Id.* at 848. The court noted that the interests of the insurer and counsel were "entirely antagonistic" to those of the defendant because they were her potential debtors, and it added that they were not "legally aggrieved in the instant case by the appointment of a receiver." *Id.* at 849. Here, as in *Haarhuis*, the entity in receivership (Payne & Keller) possesses rights of action against its insurers, who oppose the receivership. And, as in *Haarhuis*, Appellants are not aggrieved by the mere existence of Payne & Keller's receivership.

Furthermore, assuming Appellants are aggrieved by the Order's denial of their requests for dismissal and protection from discovery, those rulings are clearly not appealable at this time. Therefore, those rulings in the Order do not render Appellants aggrieved parties with respect to the dissolution of Payne & Keller's receivership. *See Burns v. Gardner*, 328 S.C. 608, 617-18, 493 S.E.2d 356, 361 (Ct. App. 1997) ("Because the appellants are not aggrieved by the assessment of sanctions, they cannot pursue *the issue* on appeal. . . . Accordingly, *that portion* of the appellants' appeal relating to the sanctions assessed against their attorney is hereby dismissed." (emphasis added)); *Dunson v. Dunson*, 278 S.C. 210, 212, 294 S.E.2d 39, 40 (1982) ("The failure to sustain the wife's allegation of desertion has not prejudiced any of her rights. The award of the divorce on the ground of separation for one (1) year has not denied to her any personal or property right, nor has it imposed on her any burden or obligation. She has been properly declared entitled to alimony, from which there is no appeal. She is simply not an aggrieved party *in so far as this issue is concerned*." (emphasis added)).

Because Appellants are not aggrieved by the refusal to dissolve Payne & Keller's receivership, and the circuit court's other rulings in the Order are clearly not appealable, their appeals should be immediately dismissed.¹⁴

¹⁴ *See Cisson v. McWhorter*, 255 S.C. 174, 177-78, 177 S.E.2d 603, 605 (1970) ("Our statutory provision limiting appellate review to those who have been aggrieved by the judgment below is, in our opinion, a wise and well reasoned requirement, as our court is concerned with correcting errors that have practically wronged the appealing party. It, therefore, follows that it is our duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court."); *First Union Nat'l Bank v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct. App. 1998) ("A party cannot appeal from a decision which does not affect his interest, however erroneous and prejudicial it may be to the rights and interests of some other person.").

III. If these appeals are not immediately dismissed, consideration of Appellants' other grounds for dismissal in the circuit court is unwarranted.

As stated above, the denial of a motion to dismiss and orders concerning discovery are not immediately appealable. However, Respondent recognizes that this Court can, in its discretion, decide to consider non-appealable issues alongside an issue or order properly appealed. See *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (“An order that is not directly appealable *may be* considered if there is an appealable issue before the court.” (emphasis added)). Notwithstanding this discretion, the South Carolina Supreme Court has explained that such non-appealable issues should have “a sufficient nexus or companionship [to the appealable issue(s)] to justify [the] exercise of immediate appellate review.” *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005). Here, there is no nexus between Appellants’ arguments concerning Payne & Keller’s receivership and their other arguments in pursuit of dismissal. Accordingly, if this Court decides to consider the receivership issue, it should decline to review Appellants’ remaining arguments ruled upon in the Order.

CONCLUSION

Because the Order is not appealable and did not aggrieve Appellants, Respondent respectfully requests that this Court immediately dismiss these appeals.

Respectfully submitted,

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May 15, 2023

EXHIBIT A

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS , Individually and as)	C/A NO. 2021-CP-40-03484
Personal Representatives of the Estate of)	
LEWIS C. CHILDERS ,)	<i>In Re:</i>
)	Asbestos Personal Injury Litigation
Plaintiff,)	Coordinated Docket
)	
v.)	
)	<u>ORDER</u>
DAVIS MECHANICAL)	
CONTRACTORS, INC. , et al.)	
)	
Defendants.)	

CAME ON _____, 2021, to be heard the Plaintiff’s Motion to Appoint a Receiver Over Payne & Keller Company, pursuant to S.C. Code §15-65-10(4). This Court finds that the application is meritorious under the applicable statute because Payne & Keller Company (“Payne & Keller”) dissolved and Payne & Keller, a Texas Corporation, has forfeited its charter and has further failed to answer this case and therefore, Plaintiff requests for an expedited ruling on this motion is appropriate and also granted.

Therefore, this Court hereby appoints Peter Protopapas be and hereby is appointed Receiver in this case pursuant to the South Carolina Law with the power and authority fully administer all assets of Payne & Keller, accept service on behalf of Payne & Keller, engage counsel on behalf of Payne & Keller and take any and all steps necessary to protect the interests of Payne & Keller whatever they may be. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Payne & Keller as well as any claims related to the actions or failure to act of Payne & Keller’s insurance carriers.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Respondent's property, to: 1) collect all accounts receivable of Respondent and all rents due to the Respondent from any tenant; 2) to change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the Respondent; redirect the delivery of any mail addressed to the Respondent or any business of the Respondent, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Respondent, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Respondents; 6) hire any person or company to move and store the property of Respondent; 7) to insure any property belonging to the Respondents (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendants; 9) obtain from any landlord, building owner or building manager where the Respondent or the Respondent's business is a tenant, copies of the Respondent's lease, lease application, credit application, payment history and copies of Respondent's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Respondent may be situated, and to review and obtain copies of all documents related to same.

Based on the Court's experience in other receivership matters, and in an effort to streamline these proceedings, the Court expects the Receiver to investigate the existence of all insurance coverages potentially available to the company in receivership. The Receiver will provide potential insurers with lists of work sites, contractors, and insurance brokers and agents to facilitate

the insurers' searches for coverage (specifically including coverage provided to any related or subsidiary companies of the company in receivership or any company for whom the company in receivership did work as an "additional insured" under coverage written to another entity). The Court expects all insurers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches.

The Court further orders that, as the Receiver Court, that the Receiver or Payne & Keller Insulation, Inc. may not be sued outside this Court without obtaining the Receiver's consent or an order of this Court prior to doing so.

AND IT SO ORDERED this ____ day of _____ 2021.

Jean Hofer Toal, Chief Justice of the Supreme Court of
South Carolina (Retired), acting as Circuit Court Judge



Richland Common Pleas

Case Caption: Lenora Childers , plaintiff, et al vs Davis Mechanical Contractors ,
defendant, et al
Case Number: 2021CP4003484
Type: Order/Appointment of Receiver

So Ordered

Jean H. Toal