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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 MOTION TO STRIKE APPELLANTS' MAY 25, 2023 FILINGS AND STAY THE DEADLINE FOR FILING ANY REPLY

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Attorneys for Respondent Payne & Keller Company, By and Through its Duly Appointed Receiver, Peter D. Protopapas

Respondent Payne & Keller Company ("Payne & Keller"), by and through its duly appointed receiver, Peter D. Protopapas ("the Receiver"), respectfully submits this Motion to Strike the May 25, 2023 filings in this appeal by Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company 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, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company.

Appellants' purported "returns" to Respondent's "motion to dismiss" are procedurally improper and should be struck from the appellate record. In a May 5, 2023 letter to the parties, this Court recognized that the appealability of the order on appeal ("the Order") was dubious and requested memoranda from the parties addressing the issue of appealability. On May 15, 2023, the parties filed the requested memoranda. In its memorandum, Respondent requested that the Court dismiss the appeals "[p]ursuant to Rule 240 of the South Carolina Appellate Court Rules." However, the one-time inclusion of this phrase did not convert Respondent's appealability memorandum into a motion to dismiss or otherwise alter the procedural posture of the case. Appellants rely entirely on these few words to justify filing their "returns," but such reliance drastically overstates the significance and effect of the words. As the Court is aware, if it agrees with Respondent's appealability memorandum, dismissal of Appellants' appeals would follow regardless of whether Respondent specifically requested it in the memorandum. Additionally, Rule 240, SCACR, allows a party to file a return to a motion in order for that party to be heard on an issue before the Court takes action on a motion. But Appellants have already been heard on the appealability of the Order—in their appealability memoranda, filed May 15. Respectfully,

this Court should disregard and strike Appellants' improper attempts to inject further argument on this issue.

Respondent further requests that, if the Court denies the motion to strike Appellants' filings, it also stay the deadline for responding to the filings and allow Respondent to submit its response after the Court has entered an order disposing of this Motion.

Respectfully submitted,

_/s/ Christopher R. Jones___
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Attorneys for Respondent

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v.

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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.

PROOF OF SERVICE

I certify that a true copy of Respondent's Motion to Strike Appellants' May 25 Filings and Stay the Deadline for Filing Any Reply in this case has been served on the following, this 1st day of June, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262(a)(1), SCACR, and *RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022)*, S.C. Sup. Ct. Order dated May 6, 2022.

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Respectfully submitted,

_/s/ Christopher R. Jones___

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June 1, 2023

Chris Jones

From: Chris Jones
Sent: Thursday, June 1, 2023 3:12 PM
To: wsawyer@murphygrantland.com; todd.carroll@wbd-us.com; elizabeth.oneill@wbd-us.com; hlee@steptoe.com; Brian Barnwell; John B. White, Jr.; Marghretta Shisko; Edwards, Brady; scott.schutte@morganlewis.com
Subject: Appellate Case No. 2023-000727 - Respondent's Motion to Strike
Attachments: 2023-000727 Resp. Mtn. to Strike.pdf

Dear counsel,

Attached for service upon you please find Respondent's Motion to Strike Appellants' May 25 Filings and Stay the Deadline for Filing Any Reply, which we are filing with the Court of Appeals today.

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