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Jun 12 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Joan H. Toal
Acting Circuit Court Judge

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.; 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.,
Payne & Keller Company, and PBI QSF, LLC, 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
American General Insurance Company, and Maryland Casualty
Company); Allstate Insurance Company; John Tighe; Sean
Anthony 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, Birmingham Fire 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, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman’s Fund Insurance Company,

Third-Party
Defendants,

of which

Payne & Keller Company, by and through its 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 f/k/a Stonewall Insurance Company, individually and as successor in interest to Stonewall Surplus Lines Insurance Company; Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company are the

Appellants.

TRAVELERS’S RETURN IN OPPOSITION TO THE RECEIVER’S MOTION TO STRIKE

Appellant Travelers Casualty and Surety Company (improperly named as Travelers Casualty & Surety Company) (“Travelers”) respectfully submits this return in opposition to the June 1, 2023 motion to strike filed by Respondent Payne & Keller Company, by and through its receiver, Peter D. Protopapas (the “Receiver”).

In his motion, the Receiver asks this Court to strike Travelers’ May 25, 2023 response to the motion to dismiss embedded in his May 15 “memorandum on appealability.” The Receiver suggests that Travelers’ brief is “procedurally improper and should be struck from the appellate record,” because, in his view, he did not actually move to dismiss the appeal. (Receiver’s June 1, 2023 Mot. Strike at 3.) The Receiver is mistaken.

The second sentence of his “memorandum on appealability” states: “Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Receiver respectfully requests that the Court dismiss the appeal brought by [Travelers and its co-Appellants] 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.” (Receiver’s May 15, 2023 Mem. at 2–3.) And he repeats his dismissal request throughout his brief. (*Id.* at 6, 15, 20, 21.) Travelers exercised its right to respond to the Receiver’s motion under Rule 240, SCACR—the same Rule on which the Receiver relied in asking this Court to dismiss the appeal.

While the Receiver acknowledges that “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,” he says that Travelers has “already been heard on the appealability of the Order” by way of the appealability brief Travelers filed on May 15, 2023. (Receiver’s June 1, 2023 Mot. Strike at 3.) But Travelers had no opportunity to be heard on the Receiver’s argument that this appeal should be dismissed because Travelers is somehow not an “aggrieved” party—a new, baseless argument that went well beyond his argument that the order on appeal is not immediately appealable under Section 14-3-330. Travelers was well within its rights to respond to the Receiver’s motion to dismiss arguments. And, in fact, had Travelers not responded, its silence could have been misunderstood to be a waiver or a concession of the propriety of the Receiver’s arguments, which

have no basis in law or fact. The Receiver's distractions should stop so the parties can move forward with the merits of this important appeal.

The Receiver's motion to strike should be denied.¹

Respectfully submitted,

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June 12, 2023

¹ In addition, his request to stay the deadline to file a reply should be denied, and he should not be permitted to belatedly file a reply, as he did not timely file a reply and the Court did not enter an order extending the deadline for him to do so before the deadline passed. *See* Rule 240(f), SCACR ("The moving party shall have five (5) days from the date of service of a return to file an original and six (6) copies of a reply"); *id.* Rule 240(g) ("Failure of the moving party to perform any act required by this Rule may be deemed an abandonment of the motion or petition.").

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PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Travelers's Return in Opposition to the Receiver's Motion to Strike

Parties Served:

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/s/ M. Todd Carroll
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Travelers Casualty and Surety Company*

June 12, 2023