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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  
Circuit Court Case No. 2021-CP-40-03484

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 Their 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, formerly known as 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 the .....

Appellants.

**RETURN IN OPPOSITION TO THE RECEIVER'S MOTION TO STRIKE**

Appellants 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 (hereinafter, “Appellants”), submit 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”).

### **ARGUMENT**

In one filing, the Receiver seeks relief pursuant to Rule 240, but in the next filing he asks this Court to deny Appellants the procedural protections set forth in that very rule. He cannot have it both ways. By invoking Rule 240 and asking this Court to dismiss the appeal, the Receiver has no basis to seek to strike Appellants’ return, which is expressly permitted by Rule 240. The Receiver’s Motion to Strike should be denied.

The Receiver began his May 15, 2023 filing by seeking dismissal pursuant to Rule 240: “Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Receiver respectfully requests that the Court dismiss the appeal brought by [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.” (May 15, 2023, Memorandum of Receiver). These are the Receiver’s own words.

The motion to dismiss pursuant to Rule 240 is not a mere passing reference in the Receiver’s memorandum. It is the second sentence. Moreover, the Receiver goes on to reiterate the request to dismiss the appeal throughout his memorandum. (May 15, 2023, Memorandum of Receiver, pp. 5, 6, 15, 20, 21). Read in conjunction with the opening sentences of his memorandum, the Receiver plainly moves to dismiss the appeal pursuant to Rule 240.

In response, Appellants filed a return, which is specifically authorized by Rule 240: “Any party opposing a motion or petition shall have ten (10) days from the date of service thereof to file . . . his return . . .” Rule 240(e), SCACR. In other words, Appellants merely followed the plain language of Rule 240.

The consequences of failing to file a return to the Receiver’s motion to dismiss the appeal could be dire: “Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition.” Rule 240(e), SCACR. Thus, when the Receiver sought dismissal pursuant to Rule 240, Appellants were not only permitted to file a return, but they were required to file one. If not, they risked an argument from the Receiver that Appellants consented to dismissal.

The return was further necessitated by the Receiver’s unfounded argument that Appellants are somehow not aggrieved parties, even though Appellants are named defendants, sued by the Receiver, and whose motions to dismiss and to dissolve the Receivership were denied. This new – and incorrect – argument was not within the reasonable scope of a request for briefing on appealability when the basis for appeal identified in the Notices of Appeal was South Carolina Code § 14-3-330. As Rule 240, SCACR anticipates, the return gave Appellants the opportunity to respond to this new, unfounded argument. Therefore, the Receiver’s Motion to Strike should be denied.

Likewise, the Receiver’s request to stay the deadline to file a reply should be denied. The Receiver had an opportunity to timely file a reply, but instead he chose to move to strike a proper return. The Court did not enter an order extending the deadline 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”).

**CONCLUSION**

The Receiver's Motion should be denied, and this appeal should proceed on the merits.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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PROOF OF SERVICE

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I, the undersigned of the law offices of Murphy & Grantland PA, attorneys for Appellants, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them to the addresses below:

Pleading(s): Appellants' Return to Respondent's Motion to Dismiss

Parties Served:

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