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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 REPLY IN SUPPORT OF ITS
MOTION TO STRIKE APPELLANTS' MAY 25, 2023 FILINGS
AND STAY THE DEADLINE FOR FILING ANY REPLY**

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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 Reply in Support of its 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 (collectively the “Joining Insurers”).

As Respondent noted in its Motion to Strike, Appellants’ argument that the passing reference to Rule 240, SCACR, in Respondent’s appealability memorandum converted the memorandum into a standalone motion to dismiss is grossly overstated. This Court has observed, “It is a well-recognized legal concept in South Carolina that motions should be treated based on substance and effect as opposed to how they are styled by the moving party. The court must examine the relief sought to understand the true nature of the pleading.” *Rowe v. Advance Am.*, No. 2006-UP-047, 2006 S.C. App. Unpub. LEXIS 49, at *2 (Ct. App. Jan. 20, 2006) (citation omitted); *see also id.* (quoting *Standard Federal Savings & Loan Association v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991), for the proposition that “it is the substance of the relief sought that matters ‘regardless of the form in which the request for relief was framed’”). As it does when examining motions, so too should this Court look to the effect of Respondent’s appealability memorandum and view it as just that—a memorandum submitted pursuant to the Court’s request—and not as an entirely separate motion for dismissal, as Appellants argue it is. Here, the relief Respondent requested—dismissal—is the same relief any Respondent would

seek in an appealability memorandum when the order on appeal is not immediately appealable. This is true regardless of whether Rule 240 is cited, and Respondent’s single reference to the rule in its appealability memorandum did nothing to change the relief sought therein, this Court’s review of the memorandum, or the action this Court would take after having reviewed all parties’ memoranda. The simple fact remains that, regardless of whether Respondent specifically requested dismissal in its memorandum, this Court would dismiss Appellants’ appeals if it agreed with Respondent’s arguments.

Appellants next assert Respondent’s argument that they are not aggrieved parties under Rule 201, SCACR, was outside the scope of this Court’s request for appealability memoranda and somehow gave them the right to file a response to the argument. *See, e.g.*, *Joining Insurers Ret.* at 4 (asserting the aggrieved party argument “was not within the reasonable scope of a request for briefing on appealability”). However, this is not the case. In its May 5, 2023 letter, this Court requested that the parties submit “memoranda addressing the issue of appealability.” The Court did not limit its request to a strict analysis of section 14-3-330 of the South Carolina Code, and as Respondent noted in its memorandum, South Carolina law is clear that a party’s status as aggrieved (or not) under Rule 201 is a critical component of an appealability analysis. *See 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.”). Accordingly, Respondent’s argument was well within the scope of this Court’s request for “memoranda addressing the issue of appealability.” Appellants complain that they did not have the opportunity to be heard on this issue, but in fact they had the same opportunity as Respondent to address the issue in their memoranda—they simply chose not to take it. As would be the case

if Appellants failed to argue an issue in their appellate briefs, their failure to address Rule 201 in their memoranda should act as a waiver of the argument, and Respondent's inclusion of the issue in its memorandum as part of a complete appealability analysis should not be manipulated into a ground for giving Appellants a second bite at the apple. *Cf. Connor v. Slotchiver (In re Estate of Connor)*, No. 2009-UP-501, 2009 S.C. App. Unpub. LEXIS 523, at *12 (Ct. App. Oct. 29, 2009) ("An issue is deemed waived on appeal if it is not argued in the appellant's brief.").

Finally, Appellants' argument that this Court should deny Respondent's request for a stay of any deadline to reply to their May 25 filings is ironic, given the procedural maneuvering Appellants have engaged in; nonsensical; and not mandated by the South Carolina Appellate Court Rules as they suggest. First, Appellants' attempts to hold Respondent to a strict five-day deadline for responding to their May 25 filings puts the cart before the horse, as whether their filings are proper returns to a motion is an open question that has yet to be answered by this Court. Appellants want to force Respondent into an untenable and inconsistent position: arguing that their filings are not proper returns while at the same time filing a reply to them, which would acknowledge their propriety as returns. Additionally, Appellants' reliance on the fact that no extension was granted by June 9, the purported deadline for Respondent to file its reply, is misplaced. Under Appellants' view of the current procedural posture, the Receiver had five days in which to respond to their returns. Respondent moved for a stay of the purported deadline prior to its expiration, and as this Court is well aware, routine appellate motions such as Respondent's are not decided in five days; thus, Respondent had no way to obtain a stay within that short window. Again, Appellants want to force Respondent into an impossible "catch-22" situation: requesting a stay of the deadline while also submitting its reply prior to the deadline's expiration. Respectfully, the Court should not acquiesce to such gamesmanship. Moreover, as this Court is

also well aware, should it deny Respondent's motion to strike and accept Appellants' May 25 filings as returns to a motion to dismiss, it has the authority to extend the deadline for Respondent to file its reply. *See* Rule 263(b), SCACR ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof."). Respondent respectfully submits that, if Appellants are allowed to file returns to Respondent's appealability memorandum, fairness dictates that Respondent be allowed to file a reply.

Based on the foregoing arguments and those in its Motion, Respondent respectfully requests that this Court strike Appellants' May 25 filings from the appellate record. Alternatively, should the Court deny the Motion to Strike, Respondent respectfully requests that it be allowed to file a reply to the May 25 filings after this Court has ruled on this Motion.

Respectfully submitted,

/s/ Christopher R. Jones

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Attorneys for Respondent

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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,

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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 Reply to its 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 19th 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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June 19, 2023

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Subject: Appellate Case No. 2023-000727 - Respondent's Reply to Motion to Strike
Attachments: 2023-000727 Resp. Reply to Mtn. to Strike.pdf

Dear counsel,

Attached for service upon you please find Respondent's Reply to its 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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