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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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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

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Appellate Case No. 2023-000727

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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.; 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 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 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.

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**EXPEDITED MOTION TO CLARIFY  
THE COURT'S ORDER ON APPEALABILITY**

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Respondent Payne & Keller Company, by and through its appointed Receiver, Peter D. Protopapas, respectfully requests that this Court clarify its recent order indicating that this appeal may proceed. Specifically, Respondent asks this Court to clarify that the pendency of this appeal does not stay the underlying receivership action.

**BACKGROUND**

This Court issued an order August 9, 2023, indicating that the current matter could proceed on appeal. *See Exhibit A.* At hearings before the circuit court on July 10, 2023, and August 21, 2023, Appellants contended that this appeal imposes a stay on the underlying receivership action

and the Receiver's ability to carry out his court-assigned duties. As a result, Respondent seeks this Court's urgent clarification.

### DISCUSSION

**THIS COURT SHOULD CLARIFY ITS ORDER ON APPEALABILITY TO NOTIFY THE CIRCUIT COURT AND THE LITIGANTS THAT THE RECEIVERSHIP ACTION AND THE RECEIVER'S ABILITY TO CARRY OUT HIS DUTIES ARE NOT STAYED.**

South Carolina's rules and procedures for receiverships are meant to ensure that receivers are able to carry out their duties while an appeal is pending. Respondent respectfully asks this Court to clarify that the Receivership action and the Receiver's ability to carry out his duties are not stayed as a result of the instant appeal. During the August 21, 2023 hearing, the circuit court instructed the parties in this matter to obtain clarity on this issue from this Court.

Although the Receiver maintains the order on appeal is not immediately appealable, the insurers assert the order is appealable pursuant to section 14-3-330(4) of the South Carolina Code as an order "continuing" or "modifying . . . the appointment of a receiver." Even if section 14-3-330(4) applies to appeal, section 14-3-450 of the South Carolina Code provides that there is no stay for such appeals. *See* S.C. Code Ann. § 14-3-450 ("In case of an appeal under item (4) of Section 14-3-330 the proceedings in other respects in the court below shall not be stayed during the pendency of such appeal unless otherwise ordered by the court below."); *cf. Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 589, 694 S.E.2d 15, 18 (2010) ("[U]nless ordered by the trial court, an appeal from a preliminary injunction order does not prevent the case moving forward on the merits."); *id.* (relying on section 14-3-450).

The South Carolina Rules of Civil Procedure further provide:

Unless otherwise ordered by the court, *an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting, shall not be stayed*

during the period after its entry and until an appeal is taken or *during the pendency of an appeal.*

Rule 62(a), SCRCP (emphases added). Because this is a receivership action, no stay is applicable pursuant to Rule 62(a).

Generally, stays for matters on appeal are imposed and governed by Rule 241 of the South Carolina Appellate Court Rules. The Receiver does not dispute that most appeals result in an automatic stay of the affected order. *See* Rule 241(a) (“As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.”). Rule 241(b) lists exceptions to the automatic stay and makes clear that the list includes “some, but not all, of the exceptions to the general rule.” Rule 241(b), SCACR. As noted above, section 14-3-450 and Rule 62(a) clearly provide that receivership actions are not stayed during the pendency of appeals.

Our state’s policy regarding receiverships underscores why the duties of the receiver should not be stayed while an appeal proceeds. Section 14-3-450 and Rule 62(a) are the vehicle that allows the courts of this state to protect the assets of a corporation under receivership, even during the pendency of an appeal. Allowing receiverships to be stayed while an appeal is pending would simply raise the “potential harm in not having an unbiased party to protect a corporation’s assets.” *Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 479, 602 S.E.2d 83, 87 (Ct. App. 2004). A finding to the contrary would allow any corporation wanting to defy a receivership to moot the litigation by liquidating or wasting the company’s assets while the appellate courts consider the appeal. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (“A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the]

reviewing Court to grant effectual relief.” (alterations in original) (quoting *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973))).

### **CONCLUSION**

Based on the foregoing, Respondent respectfully asks this Court to clarify that the pendency of this appeal does not stay the underlying Receivership action and the Receiver may continue carrying out his court-appointed duties while this appeal is pending.

Respectfully submitted,

s/Jonathan M. Robinson

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August 23, 2023.

# EXHIBIT A

# The South Carolina Court of Appeals

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. Deans 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.; 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 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 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.

Appellate Case No. 2023-000727

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ORDER

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After careful consideration of the parties' memoranda on appealability, this appeal shall proceed. However, nothing in this order prevents the parties from raising the issues of appealability and standing in their briefs.

Respondent's motion to strike Appellants' May 25, 2023 filings is granted. The May 25, 2023 filings which were designated by Appellants as returns to Respondent's "motion to dismiss," are hereby stricken.

*Robert H. Verdin*

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FOR THE COURT

Columbia, South Carolina

cc:

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**FILED**  
**Aug 09 2023**

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