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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.) and Acting Circuit Court Judge

Case No. 2020-CP-40-04385

Appellate Case No. 2023-001243

Southern Insulation, Inc., through its Receiver, Peter D. Protopapas,.....Respondent,

vs.

OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America); OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC); R.V. Chandler & Associates, Inc.; Chandler Rental Properties, Inc.; Thomas S. Chandler; Jean B. Ownbey, as Trustee of the Thomas S. Chandler, Sr. Living Trust u/d 4/06/06; Gene N. Norville; the South Carolina Property and Casualty Insurance Guaranty Association; Trebuchet US Holdings, Inc.; Trebuchet Investments Limited; Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited); Brad S. Huntington, individually; and John C. Williams, individually, Defendants,

Of which OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America); OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC); Trebuchet US Holdings, Inc.; Trebuchet Investments Limited; Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited); Brad S. Huntington, individually; and John C. Williams, individually, are the..... Petitioners.

RESPONDENT'S RETURN TO PETITIONERS' JOINT PETITION FOR A WRIT OF CERTIORARI

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RESTATED QUESTION PRESENTED

Did the Court of Appeals properly dismiss Petitioners' notices of appeal because the circuit court's order denying Petitioners' motions to dismiss is not immediately appealable under section 14-3-330(4) of the South Carolina Code or this Court's holding in *Williams v. Northwestern Security Life Insurance Co.*, 307 S.C. 462, 415 S.E.2d 809 (1992)?

INTRODUCTION

Petitioners' Joint Petition for a Writ of Certiorari tries to fit a square peg into a round hole by recharacterizing the circuit court's denial of a motion to dismiss as an order purportedly refusing an injunction. Petitioners did not request the circuit court to issue an injunction, and the circuit court's order does not refuse any injunction in Bedivere Insurance Company's liquidation order. Because this appeal falls squarely within the case law mandating dismissal, this Court should deny certiorari.

COUNTER-STATEMENT OF THE FACTS

Southern Insulation, Inc. ("Southern") was incorporated in 1967 and administratively dissolved in 1991. Southern is alleged during its operation to have exposed employees, customers, and third parties to asbestos. As a result, Southern has been sued in a number of asbestos-related personal injury actions. Because it is a dissolved corporation, the circuit court appointed Peter D. Protopapas ("the Receiver") as Southern's receiver on May 8, 2019, with the authority and obligation to (among other things) marshal Southern's assets, including all insurance policies and benefits that may provide coverage and defense for the asbestos suits.

To fulfill this obligation, the Receiver sued a known insurer of Southern and a related insurance agency. After uncovering more information about Southern's historical insurance program, the Receiver filed an amended complaint, adding several other insurers that issued policies with coverage for Southern, including the company now known as Bedivere Insurance

Company ("Bedivere").[1]

After various transactions, Petitioners, as the parent companies and predecessor parent companies of Bedivere, put Bedivere into liquidation in its home state of Pennsylvania. As a result, the Receiver voluntarily dismissed Bedivere from this action. This dismissal of Bedivere complied with the Pennsylvania Commonwealth Court's Order of Liquidation ("the Liquidation Order"), which among other things enjoins actions against Bedivere or its liquidator.

Soon thereafter, the Receiver filed a Second Amended Complaint ("the Complaint"), adding as defendants Petitioners (and others) who are not subject to protection under the Liquidation Order. Among other claims, the Receiver alleges Petitioners are directly liable to Southern for losses caused in South Carolina by wrongful conduct Petitioners engaged in as Bedivere's owners and operators. After the Complaint was filed, this action was improperly removed to federal court by Petitioners and then remanded to the circuit court.

Following remand, Petitioners moved to dismiss the claims, and the Receiver filed a Joint Response in Opposition to the motions. The circuit court held a hearing on Petitioners' motions to dismiss on January 27, 2023, during which the court orally denied the motions. Petitioners insisted that the court file a Form 4 order denying the motions ("the Order"), which was filed on February 7, 2023.

This appeal followed on February 21, 2023. Two days later, the Receiver moved to dismiss because the Order is not immediately appealable. The Court of Appeals agreed and dismissed the appeal on April 13, 2023. The Court of Appeals followed established law in concluding an appeal

[1] Bedivere was previously owned by the OneBeacon Defendants (OneBeacon Insurance Group, Ltd. and OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC)), and later sold to the Trebuchet Defendants (Trebuchet US Holdings, Inc.; Trebuchet Investments Limited; Trebuchet Group Holdings Limited; Brad S. Huntington; and John C. Williams). Bedivere was formerly known as Potomac Insurance Company, which insured Southern for asbestos claims.

from "the denial of a motion to dismiss is interlocutory and not immediately appealable." *Southern Insulation, Inc. v. OneBeacon Insurance Group, Ltd. et al.*, S.C. Ct. App. Order dated April 13, 2023. The Court of Appeals rejected Petitioners' contention that the Order qualified under the limited statutory exception permitting an interlocutory appeal from an order refusing an injunction. The Court correctly reasoned that Petitioners could not avail themselves of this limited exception permitting an appeal because Bedivere, the entity in liquidation, is not a party to this litigation; the Petitioners are not Bedivere (or within the definition of Bedivere in the Liquidation Order); and the Receiver's causes of action against Petitioners allege wrongdoing by Petitioners only.

On June 30, 2023, following the Court of Appeals' dismissal, the liquidator responsible for administering Bedivere's liquidation estate in Pennsylvania ("the Liquidator") sought a Pennsylvania court order requiring the Receiver to show why this litigation should not be stayed until the Pennsylvania court determined whether the Liquidation Order barred the Receiver's claims. The Liquidator's petition, in the form of an application for a rule to show cause, was summarily denied without the Pennsylvania court even requesting a response from the Receiver.[2] As a result, multiple courts from different jurisdictions have now effectively reached the same conclusion—Petitioners are not protected by the Liquidation Order.

In yet another attempt to delay discovery and seek relief from a fourth court, Petitioners ask this Court to view the Order as one that refuses an injunction. This effort is futile. This Court need not delve into the merits to conclude that the Liquidation Order does not shield Petitioners from the Receiver's claims against them for their own tortious conduct, wrongdoing that harmed South Carolina citizens and for which Southern seeks recovery by the Receiver appointed by a

[2] *In re Bedivere Ins. Co.*, 1 BIC 2021, (Pa Commw. Ct. Aug. 21, 2023).

South Carolina trial court with special jurisdiction by order of this Court. Because the Order is not an order refusing an injunction, Petitioners' petition should be denied.

ARGUMENT

I. The Court of Appeals correctly dismissed this appeal because the Order is neither final nor an interlocutory order from which an appeal may be taken.

It is undisputed that the Order is not a final order and is therefore interlocutory. *See Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017) ("An order reserving an issue, or leaving open the possibility of further action by the trial court before the rights of the parties are resolved, is interlocutory."). Despite the Receiver commencing this litigation nearly three years ago, and over a year and a half since adding Petitioners, this lawsuit remains at the earliest stages of discovery, far from a final judgment.

It is also clear that the Order simply denies Petitioners' motions to dismiss. It is well-established that the denial of a motion to dismiss is not appealable. *See, e.g.*, *Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) ("Since the order denying the Rule 12(b)(6) motion does not finally decide any issue, it is not directly appealable."). Neither the general appealability statute of section 14-3-330 nor case law interpreting that provision changes this bedrock principle.

Since the default rule is that an order denying a motion to dismiss is not appealable, Petitioners must satisfy an explicit statutory exception to that rule. *See Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004) ("An interlocutory order is appealable if it falls into one of a few, limited categories of appealable judgments or orders."). This is so because the right to appeal is a creature of statute. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006) ("The right of appeal arises from and is controlled by statutory law."). Unless an interlocutory order explicitly qualifies as one of the "few, limited categories," the order is not immediately appealable. *Howe*, 362 S.C. at 216, 607 S.E.2d at 356.

In their Petition, Petitioners assert that the Order is appealable under section 14-3-330(4). They do not contend that the Order is appealable under any of the other subparts of section 14-3-330. Section 14-3-330(4) permits an appeal of "[a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver." In this litigation, no injunction has been entered and the circuit court has not denied any motion for an injunction. Simply because the circuit court rightfully rejected Petitioners' contention that this case should be dismissed does not mean that the court's decision morphed into an order refusing an injunction.

Furthermore, as explained in Part III below and contrary to Petitioners' contentions, this litigation is not barred by any injunction in the Liquidation Order. The Liquidation Order's stay of litigation only precludes suit against specific entities, none of which are involved in this litigation. And the Receiver's suit is not encompassed within the types of actions enjoined by the Liquidation Order. Because Petitioners fail to show that the Order effectively refused any injunction contained in the Liquidation Order, this Court should deny certiorari.[3]

II. Petitioners' reliance on *Williams v. Northwestern Security Life Insurance Company* is misguided. Petitioners are not entities protected from suit by Bedivere's Liquidation Order.

Petitioners' arguments depend on an expansive and erroneous interpretation of a single decision from this Court: *Williams v. Northwestern Security Life Insurance Co.*, 307 S.C. 462, 415 S.E.2d 809 (1992). The Court of Appeals rejected Petitioners' misreading of *Williams*, and this Court should too.

[3] Petitioners cite to *Childers v. Davis Mechanical Contractors, Inc*., Appellate Case No. 2023-000727 (S.C. Ct. App.), but that case does not affect the analysis here. The appealability question in *Childers* relates to the language in section 14-3-330(4) concerning receiverships, not injunctions, and unlike in *Childers*, the court of appeals here did not see a need to postpone its decision on appealability until after a full briefing of all the issues on appeal.

In *Williams*, Michael Williams sued Northwestern Security Life Insurance Company, Toyota Credit Corporation, and World Omni Financial Corporation, contending those entities conspired to repossess Williams' car. *Id.* at 463, 415 S.E.2d at 809. Four months before Williams filed suit, a North Carolina court entered an order of liquidation for Northwestern as well as a corresponding injunction. *Id.* Northwestern moved to dismiss Williams' complaint based on the North Carolina injunction, but the trial court denied its motion. On appeal, this Court agreed that Northwestern's motion was immediately appealable "under these facts." *Id.* at 464, 415 S.E.2d at 810.

Petitioners overlook the narrow holding in *Williams* and completely discount the material difference between that case and the instant case. In *Williams*, Northwestern was the entity in liquidation, and the liquidation order enjoined suits against Northwestern. Because the plaintiff in *Williams* sued the liquidated insurer, which the liquidation order prohibited, this Court found that the trial court's denial of the insurer's motion to dismiss had "refused" the North Carolina injunction. *Id.* at 464, 415 S.E.2d at 809. Additionally, the *Williams* court limited the scope of its ruling to the particular facts of that case. *See id.* ("Under these facts, we agree."). The decision was fact-based and limited.

Here, Bedivere is the equivalent of Northwestern. Unlike Northwestern, however, Bedivere is *not* a defendant here. Moreover, as explained in Part III below, the Bedivere Liquidation Order does not enjoin this litigation.

Williams simply does not govern, and this Court should reject Petitioners' invitation to expand that single decision against the backdrop of established case law prohibiting an interlocutory appeal from an order denying a motion to dismiss. *See, e.g.*, *Huntley*, 319 S.C. at 560, 462 S.E.2d at 861; *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526,

443 S.E.2d 539, 540 (1994) (finding the denial of a motion to dismiss is not immediately appealable). Not only does case law already answer the question of appealability in favor of the Receiver, but expanding *Williams* would also conflict with this state's jurisprudence cautioning against piecemeal appeals and narrowly construing the statutory exceptions permitting an interlocutory appeal. *See, e.g.*, *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 42, 21 S.E.2d 209, 213 (1942) ("The rule in restriction of piecemeal appellate procedure, dating back to the common law, is based upon sound reason and practical utility. If it were otherwise, endless delays would be encountered—delays which are unnecessary in cases similar to the one now before us, which can be decided upon an appeal from such final judgment as may later be entered by the trial Court."); *see also Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537-38, 773 S.E.2d 144, 146 (2015) ("The provisions of section 14-3-330 have been construed by this Court to serve the underlying policy favoring judicial economy by avoiding 'piecemeal appeals.'"); *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760 ("To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly . . . ."); *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) ("The provisions of [s]ection 14-3-330 . . . have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed."); *Howe*, 362 S.C. at 216, 607 S.E.2d at 356 ("The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment. In light of the policy underpinnings of the final judgment rule, exceptions should be recognized cautiously.").[4] Accordingly, the Court of Appeals' interpretation of *Williams*

[4] Importantly, the denial of a motion to dismiss does not "preclude a party from raising the issue at a later point or points in the case." *Huntley*, 319 S.C. at 560, 462 S.E.2d at 861. Nothing prevents Petitioners from raising their arguments following a final judgment.

is correct because it honors the policies of narrowly construing the statutory exceptions that permit an interlocutory appeal and avoiding piecemeal appeals.

III. Petitioners mischaracterize the Bedivere Liquidation Order to support their argument that the circuit court's Order effectively refused an injunction.

The Liquidation Order bars only actions against certain entities, and none of those protected entities includes Petitioners. Paragraph 13 of the Liquidation Order provides:

> Unless the Liquidator consents thereto in writing, no action at law or in equity, including, but not limited to, an arbitration or mediation, the filing of any judgment, attachment, garnishment, lien or levy of execution process against Bedivere or its assets, shall be brought **against Bedivere or the Liquidator or against any of their employees, officers or liquidation officers** for acts or omissions in their capacity as employees, officers or liquidation officers of Bedivere or the Liquidator, whether in this Commonwealth or elsewhere, nor shall any such existing action be maintained or further prosecuted after the effective date of this Order.

Exhibit 1, at 6 (emphasis added).[5]

This action does not include as defendants "Bedivere or the Liquidator or . . . any of their employees, officers or liquidation officers." They are not parties here. The injunction that Petitioners contend was "refused" is, by its own terms, not implicated or violated because Petitioners are defendants here, and Bedivere is not.

Petitioners are defendants for their bad acts that the Receiver alleges drove Bedivere into liquidation and caused direct harm to Southern. Those same defendants now seek to use the Liquidation Order as a shield against being sued for those acts. This fact was part of the circuit court's rationale in denying Petitioners' motions to dismiss:

> THE COURT (to Petitioners): [O]n the one hand, Bedivere does nothing. The Liquidator does nothing. And you get to hide behind that to say nobody can pursue . . . my bad acts because they got to wait till the Liquidator does . . . . This is an attempt to go after you all [the Petitioners] directly. And you are hiding behind that liquidation to say, oh, we get the protection of the liquidator and Bedivere so that

[5] A copy of the Liquidation Order is attached as Exhibit 1 to the Receiver's March 13, 2023 Reply to the Motion to Dismiss filed in the Court of Appeals.

> we can continue to enjoy the fruits of undercutting and destroying Bedivere. That's just not a very appealing argument to me.

Southern Insulation, Inc. v. State Auto, et al., C.A. No. 2020-CP-40-04385, Jan. 27, 2023, Motion to Dismiss Transcript of Record ("Transcript"), at 30:22–25; 31:17–22.[6]

Petitioners seek to broaden the stay in the Liquidation Order beyond its express terms to try to protect themselves from accountability. The only South Carolina case (other than *Williams*) cited by Petitioners in support of their position is an unpublished trial court decision that, in fact, supports the Receiver's position: *Antinopoulos v. DS Contractors, Inc. et al.* In that case, a defendant insured of The Home Insurance Company, a liquidating insurer, moved to stay the action against it in accordance with a New Hampshire liquidation order, which provided in relevant part:

> To the full extent of the jurisdiction of the Court and the comity to which the orders of the court are entitled, **all actions or proceedings <u>against an insured</u>** of the Home in which The Home has an obligation to defend the insured **are stayed for a period of six months** from the date of the Order and such additional time as the Court may determine . . . .

Antinopoulos v. DS Contractors, Inc. et al., C.A. No. 2001-CP-10-00632, Order Granting Motion of Defendant Parex, Inc. for Stay, at 3 (Charleston Cnty. Ct. Comm. Pl. Oct 8, 2003) (emphasis added).[7] The trial court in *Antinopoulos* granted the defendant insured's motion under section 38-27-430 of the South Carolina Code (discussed below) because, in that case, the stay explicitly protected the defendant insured. That is, the express language of the injunction in that case precluded litigation against a party in the case. In contrast, Petitioners seek to preclude litigation against them because of an injunction precluding actions against separate entities.

Antinopoulos does not support Petitioners' argument that the Liquidation Order has been

[6] A copy of the transcript from the hearing on Petitioners' motions to dismiss is attached as Exhibit 2 to the Receiver's March 13, 2023 Reply to the Motion to Dismiss filed in the Court of Appeals.
[7] A copy of the order in *Antinopoulos* is attached as Exhibit 3 to the Receiver's Reply to the Motion to Dismiss filed in the Court of Appeals.

"refused" or is not being honored because the circuit court has allowed the Receiver's claims against them to proceed. If anything, *Antinopoulos* demonstrates that the plain language of a litigation stay must be taken literally and given proper effect in determining whether it applies. Here, the Liquidation Order's stay does not protect Petitioners from being named defendants in this action.

For the same reason, section 38-27-430, which Petitioners argue required the circuit court to enforce the Liquidation Order, is not implicated here. That statute provides, in relevant part:

> The courts of this State **shall give full faith and credit to injunctions against the liquidator or the company** or the continuation of existing actions **against the liquidator or the company**, when the injunctions are included in an order to liquidate an insurer issued pursuant to corresponding provisions in other states.

S.C. Code Ann. § 38-27-430(a) (emphasis added). Under the statute, the Court must give "full faith and credit" to the Liquidation Order's injunction barring actions "against the liquidator or" Bedivere, and that injunction, unlike in *Williams* and *Antinopoulos*, has been respected here because neither Bedivere nor its liquidator is a party.

During the hearing on Petitioners' motions to dismiss, the circuit court observed that it could give full faith and credit to the Liquidation Order while still allowing the Receiver to proceed with its action—the two were not mutually exclusive:

> THE COURT: Well, there's nothing that ousts South Carolina of jurisdiction simply by that liquidation. There's nothing in their act that does that . . . . [W]e can give full faith and credit to the liquidation and still allow -- this is something that is very ancillary to the liquidation. This is an attempt to go after you all [the Petitioners] directly.

Exhibit 2, at 31:8–18. The circuit court did not refuse to give full faith and credit to the Liquidation Order by allowing this action to proceed because the Liquidation Order does not preclude litigation against Petitioners.

1. The Receiver has not brought claims that were "assets" of Bedivere's liquidation estate or that could have been asserted by the Liquidator on behalf of Bedivere.

The Liquidation Order vests in the Liquidator those "rights of action" Bedivere could have asserted.[8] Petitioners argue that the Receiver's claims against them infringe on the Liquidator's authority to bring claims on Bedivere's behalf and interfere with the Liquidator's marshalling of Bedivere assets. Neither is true.[9] Regardless of the Liquidator's powers, as one "standing in the shoes" of the insolvent Bedivere the Liquidator has rights only to those assets and claims belonging to Bedivere. Respondent's claims against Petitioners for Petitioners' wrongs do not belong to, and are therefore not "assets" of, Bedivere's liquidation estate.

a. Bedivere could not bring claims based on alter ego because only third parties can bring such claims; similarly, the Liquidator could not bring such claims.

The Receiver has alleged that Petitioners, initially the OneBeacon Defendants and later the Trebuchet Defendants, were controlling persons that dominated Bedivere and conspired with Bedivere's agents to commit the bad acts on which the Receiver's claims here are based. The Receiver has alleged Petitioners' tort and alter ego liability, caused by Petitioners' undercapitalization, siphoning of assets and funds, influence as dominant shareholders, and use of

[8] *See* Exhibit 1, at 2 ("The Liquidator is vested with title to all property, assets, contracts and rights of action (assets) of Bedivere of whatever nature and wherever located, whether held directly or indirectly, as of the date of filing of the Petition for Liquidation.").

[9] In addition, contrary to Petitioners' suggestion, Paragraph 14 of the Liquidation Order (cited in Footnote 14 below) is not implicated by this litigation. Paragraph 14 enjoins secured creditors and creditors claiming secured, priority, or preferred interests in any assets of Bedivere from taking certain actions or pursuing claims against Bedivere's assets. Southern is an unsecured creditor of Bedivere and does not claim any secured, priority, or preferred interest in any particular assets of Bedivere. Thus, by its terms the injunction contained in Paragraph 14 does not apply to Southern, and correspondingly the circuit court's Order denying Petitioners' motion to dismiss did not refuse the injunction contained in that part of the Liquidation Order. Moreover, as described in Footnote 12 below, the Receiver is not seeking to recover for itself any asset belonging to Bedivere through this litigation.

Bedivere's funds to pay for Petitioners' other lines of business, all of which are factors supporting Petitioners' alter ego liability directly to the Receiver.

"[C]ourts apply the alter ego theory and disregard a company's separate identity for the benefit of **third parties**, *e.g.*, creditors of the corporation, who would suffer an unjust loss or injury unless the . . . parent corporation were held liable for the subsidiary's debts." *Spartan Tube & Steel v. Himmelspach (In re RCS Engineered Prods. Co.)*, 102 F.3d 223, 225-26 (6th Cir. 1996) (emphasis added). The general rule is that the corporate veil is pierced only for *third parties*, like Southern, and never for the benefit of the debtor corporation. 18 Am. Jur. 2d *Corporations* § 46 (1985). The Liquidator could not bring claims on behalf of Bedivere that are based on alter ego liability because the doctrine is for the benefit of third parties (like Southern) and not for the subservient entity (which here is Bedivere). Moreover, contrary to Petitioners' implication, the alter ego doctrine does not cause a corporate parent to become the same corporate entity as its subsidiary. Rather, it simply provides a theory of procedural relief for an injured third party. *Jones v. Enter. Leasing Co. Southeast*, 383 S.C. 259, 267, 678 S.E.2d 819, 823 (Ct. App. 2009) ("Alter ego describes a theory of procedural relief.").

The purpose of the alter ego doctrine is to prevent badly behaving corporate parents from using the corporate form to shield themselves from direct liability while acting wrongly. "[O]ne must show that the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy." *Mid-S. Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 603, 649 S.E.2d 135, 143 (Ct. App. 2007). The Receiver has sued Petitioners not because they are the same entity as Bedivere, but because they misused their dominion and control over Bedivere to enrich themselves, and this caused harm to Southern. Petitioners are separate and distinct legal entities from Bedivere with their own assets from which they can satisfy a judgment,

if Southern secures one. The Receiver's assertion of an alter ego claim does not change these facts.[10]

b. In an action against Petitioners, Bedivere would be barred by *in pari delicto* from asserting Southern's claims; similarly, the Liquidator would be barred.

The Receiver, in opposing Petitioners' motions to dismiss in the circuit court, argued that if Bedivere had attempted to bring claims against Petitioners similar to those brought by the Receiver, Petitioners would have raised the defense of *in pari delicto*, since such claims would allege that Bedivere was complicit in the same bad acts on which those claims were based and thus Bedivere would be barred from bringing such claims. *In pari delicto* is an affirmative defense that prevents a plaintiff who participated in the same wrongdoing as the defendant from recovering damages from that wrongdoing. *Anderson v. Cordell (In re Infinity Bus. Grp., Inc.)*, 628 B.R. 213, 248, 2021 U.S. Dist. LEXIS 65185, at *73 (D.S.C. Mar. 31, 2021). The Liquidator, as successor to Bedivere, is subject to any legal or equitable defenses that could have been raised against Bedivere. *See Grayson Consulting, Inc. v. Wachovia Sec., LLC (In re Capital)*, 2008 Bankr. LEXIS 4109, at *6 (Bankr. D.S.C. June 10, 2008) (finding *in pari delicto* is an equitable defense that can be asserted against a plaintiff who shares fault with the defendant).

The Receiver argued to the circuit court that whether *in pari delicto* would apply is a question of fact that has yet to be determined. Given the very preliminary stage of the case against Petitioners (discovery has commenced but is in its early stages), the Receiver argued it should be

[10] Additionally, Bedivere's insolvency does not prevent the Receiver from maintaining its alter ego claims against Petitioners. *Cf. Alvarez v. Ward*, No. 1:11cv03, 2011 U.S. Dist. LEXIS 151873, at *10 (W.D.N.C. Oct. 17, 2011) ("A plaintiff . . . may allege a direct cause of action against the alter ego that is not subject to the bankruptcy stay.").

allowed to determine the facts. The circuit court agreed: "Discovery will elucidate a lot of [th]ings that are still out there about this matter."[11]

The Receiver has also alleged that, unlike Petitioners, Southern is an *innocent* third-party that suffered harm from the bad acts of *both* the badly behaving debtor (Bedivere, not a defendant here) and the third parties (Petitioners, who are defendants here), each of which were, at times, the ultimate controlling persons of Bedivere. Petitioners were all *in pari delicto* with Bedivere.

Because Bedivere is in liquidation, Petitioners argue the Liquidator has the ultimate say over the Receiver's claims. This is a classic straw-man argument—and if it is honored, the wrongdoers, and no one else, will benefit. At the time of the circuit court's hearing on Petitioners' motions to dismiss, the Liquidator had made no move to sue any of the Petitioners or to intervene in this action. Since that hearing, the end of the time within which the Liquidator could have asserted any of Southern's causes of action (March 11, 2023, the second anniversary of Bedivere's Liquidation Order) passed. *See* 40 P.S. § 221.26(b). The circuit court recognized the practical effect of this state of affairs:

> THE COURT (to The Receiver): Well, what you're saying is that this crowd, these two, are just hiding behind the liquidator . . . .
>
> MR. RICHARDSON: Right. They created the very situation they're now waving as a shield in this courtroom to try and protect themselves from damages they –
>
> THE COURT: Now that they have a liquidator, you can't pursue the bad people who caused them to be in liquidation.

Exhibit 2, at 22:12–23.

Meanwhile, Southern itself is in receivership, and its Receiver is seeking to pursue its mandate to marshal and recover Southern's assets so it can respond to meritorious asbestos

[11] Exhibit 2, at 32:13–14. Although the uncorrected transcript states "feelings," the actual word was "things."

personal injury claims. The Receiver is the one party that did not participate in the bad acts that brought us here, and Southern has been injured as a result of those acts.

Consistent with equity principles—including that "[e]quity eschews mechanical rules; it depends on flexibility"— the Receiver argues that where two persons are tasked with recovering the assets of respective debtors, the one who is actively trying to recover for completely innocent asbestos victims, from solvent bad actors that would profit if recovery were mechanically denied, should be the one allowed to proceed. *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). The Receiver would never get its day in court against these bad actors otherwise. The circuit court agreed. *See* Exhibit 2, at 22:12–23.

2. The Receiver is bringing its own direct claims against Petitioners.

Petitioners characterize the Receiver's claims as "derivative" and properly asserted only by the Liquidator, but this is not the case. As explained above, Bedivere could not have brought Southern's claims, and the Liquidator cannot either. Moreover, even if Southern's injury were viewed as secondary to the injury suffered by Bedivere, the Receiver's action is not derivative. The Receiver is suing for direct harm to Southern and is seeking only those damages to which Southern personally is entitled.[12] *See In re Refco Sec. Litig*., 2011 U.S. Dist. LEXIS 103129, at **52-53 (S.D.N.Y. July 5, 2011) (finding claims of creditors suing for damages caused by third parties who aided and abetted the acts of the wrongdoing insiders were not "derivative" like those of shareholders suing for harm to their corporation, and "derivative" claims are those claims held

[12] Although Respondent's Second Amended Complaint requested alternative remedies in connection with its claims, the Receiver is not pursuing damages not directly suffered by Southern and is not seeking to attach or recover for itself any assets owned by Bedivere. *See* Exhibit 2, at 24:22–25:5. In order to conform the Complaint to the remedies sought by the Receiver, the Receiver has filed a motion in the circuit court to restate its Second Amended Complaint to eliminate unnecessary alternative remedies. As of this filing, the circuit court has not ruled on this motion.

by the debtor corporation, where the one suing on the corporation's behalf is the one stepping into its shoes).

In *Refco*, the creditors (like the Receiver here) were allowed to sue even though their injury was secondary to the party suffering the primary injury (the debtor). Their claims were not derivative. "The case law establishes that the plaintiffs who have been barred by *in pari delicto* [in other cases] are only those who are actually invoking a right to sue for the damages suffered by the [debtor] corporation." *Id.* at *63 (emphasis added). When *in pari delicto* applies, it "does not cover a plaintiff's claim for damages that, while indirect, are actually suffered by *both* the [debtor] corporation *and* the [creditor] plaintiff." *Id.* (emphasis added). Here, the Receiver asserts direct claims against Petitioners for the damages Southern has suffered because of Petitioners' bad acts.

"A large number of cases hold that if a corporation is barred from suing for harm to the corporation due to *in pari delicto*, those claims can then be brought by creditors of the wrongdoing corporation. The right of creditors to bring their own claims when the [Trustee] is barred is a function of the Wagoner Doctrine." *Id.* at *57; *see also id.* at *57 n.9 ("[T]he courts have consistently held that the Wagoner Doctrine and *in pari delicto* . . . are 'substantively identical.'"). As stated above, Bedivere is barred by *in pari delicto* from suing Petitioners for the Receiver's claims. The Receiver may therefore sue Petitioners for the injury they have caused to Southern.

In sum, because the Receiver's claims against Petitioners are not assets of Bedivere and do not seek to recover any assets of Bedivere,[13] the Liquidation Order[14] and litigation stay do not bar

[13] See Footnotes 9 and 12, above.

[14] *See* Exbibit 1, at 2 ("The Liquidator is vested with title to all property, assets, contracts and rights of action (assets) of Bedivere of whatever nature and wherever located, whether held directly or indirectly, as of the date of filing of the Petition for Liquidation."); *id.* at 6 ("All secured creditors or parties, pledges, lienholders, collateral holders or other persons, claiming secured, priority or preferred interests in any property or assets of Bedivere, are hereby enjoined from taking any steps whatsoever to transfer, sell, assign, encumber, attach, dispose of, or exercise, purported rights in or against any property or assets of Bedivere except as provided in Section 543 of Article V, 40 P.S. § 221.43.").

this action. Accordingly, the Petitioners' attempt to force the Liquidation Order to apply here is misplaced.

3. The Order does not foreclose Petitioners' ability to raise their issues later when the record is full—thus the appeal should be dismissed.

In ruling on Petitioners' motions to dismiss, the circuit court noted that if this action were not allowed to proceed, the Receiver, who may be the only innocent party here, might have no remedy for the bad acts of others:[15]

> Well, the one thing I -- that just stands out to me in this whole mélange of entities that were involved in this thing is that there's one entity that isn't bad and didn't do anything wrong. And it looks like everybody else is kind of hiding. But Southern is the one that didn't -- nobody, I think -- I mean, Potomac, all these other entities, Bedivere, all participated in a scheme that stripped out the long-tail assets available for use in these claims. Now, how does the one innocent party get to suffer this -- a calamity not of its making, but of the making of people who committed, arguably, fraud?

Exhibit 2, at 11:2–12.

The circuit court also noted that in considering a motion to dismiss, it must view the pleadings in the light most favorable to the nonmoving party. That, along with no discovery having occurred yet, solidified the Court's finding that Petitioners' motions to dismiss should be denied:

> On OneBeacon's motion to dismiss, denied. And that certainly at this stage and looking at the pleadings in the light most favorable to the nonmoving party, and in light of the arguments I've heard today, I'm even more convinced that this motion to dismiss should be denied at this time. Discovery will elucidate a lot of [th]ings that are still out there about this matter. And the same goes with Trebuchet and its motion to dismiss. It's denied, and again on the same basis.

Exhibit 2, at 32:8–16.

There should be great reluctance in reviewing issues that are not immediately appealable,

[15] Southern ought to be able to explore this possibility during discovery. *See* Exhibit 2, at 20:13-22; 21:18-25; 22:1-10.

since "[i]nterlocutory appellate tinkering tends to disrupt litigation's forward progress"—particularly where the case has been "stuck in appellate jousting rather than litigated on the merits . . . ." *Davis v. S.C. Dep't of Corrs.,* 2022 S.C. App. Unpub. LEXIS 100 (S.C. Ct. App. Feb. 23, 2022). The Receiver is not seeking to usurp any claims or other assets that belong to or could be asserted by the Liquidator. The Receiver is just requesting to be allowed to move forward with litigating the merits of this action, which is not aimed at, and does not bring claims belonging to, Bedivere or its Liquidator.

CONCLUSION

The Court of Appeals properly dismissed this appeal because an order denying a motion to dismiss is not appealable. Neither section 14-3-330(4) nor this Court's decision in *Williams* applies, and thus, this Court should decline to issue a writ of certiorari.

Respectfully submitted,

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September 5, 2023