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' REPLY IN SUPPORT OF EMERGENCY MOTION TO CLARIFY AND ENFORCE RULE 205

INTRODUCTION

The Receiver's opposition memorandum ignores the dispositive issue—he presents absolutely no explanation of how the circuit court can issue rulings that directly interfere with matters that are already pending before this Court. Instead, he tries to bully and intimidate the Appellants from defending themselves against improper rulings issued below. The Receiver's opposition masks the futility of his legal position with bluster, finger-pointing, and generalized attacks against everyone who opposes his conduct. And, as is his norm, he requests sanctions.

This Court should not be misled about the dispositive legal point in the narrow motion presented: The law takes jurisdiction away from trial courts as to all issues on appeal and prohibits them from entering orders that affect issues pending before an appellate court, as appellate courts have exclusive jurisdiction to correct mistakes below before the circuit court goes any further.

The Appellants made this straightforward argument in their motion, even citing the dispositive rule by number in the caption of their "Emergency Motion to Clarify and Enforce Rule 205." That rule expressly prevents the circuit court from issuing orders that affect matters on appeal to this Court:

> Upon the service of the notice of appeal, the appellate court shall have ***exclusive jurisdiction*** over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with ***matters not affected by the appeal***.

Rule 205, SCACR (emphasis added).

The Supreme Court has consistently enforced this rule. *See, e.g.*, *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (reiterating that "Rule 205 divests the lower court or administrative tribunal of jurisdiction over '***matters affected by the appeal***'") (emphasis supplied by the Supreme Court).

And so has this Court. *See, e.g.*, *Tillman v. Oakes*, 398 S.C. 245, 255 & n.3, 728 S.E.2d 45, 51 & n.3 (Ct. App. 2012) (confirming that "[u]nder Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal," and reenforcing that the rule "deprives the lower court of the power to address a particular issue, or 'matter,' during the pendency of the appeal").

Even the trial judge here agrees. *See* Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 121 (3d ed. 2016) (confirming that "[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal").

Accordingly, an order issued by a trial court that impacts an issue on appeal is void for lack of jurisdiction. *See, e.g.*, *Arnal v. Fraser*, 371 S.C. 512, 518–19, 521–22, 641 S.E.2d 419, 422, 423–24 (2007) (holding various parts of a trial court order issued after an appeal was taken were "void *ab initio*" because the trial court "did not have jurisdiction to ***modify*** matters in the final divorce order that were on appeal," as Rule 205 prohibits the trial court from "issu[ing] orders that affect an issue on appeal") (emphasis supplied by the Supreme Court); *Wingate v. Wingate*, 289 S.C. 574, 575, 347 S.E.2d 878, 878 (1985) (holding that a family court's order reducing alimony payments "is void" because "alimony was an issue on appeal from the divorce decree" and "this Court had exclusive jurisdiction over the alimony issue"); *Wilson v. Walker*, 340 S.C. 531, 540, 532 S.E.2d 19, 23 (Ct. App. 2000) (vacating a contempt order "for lack of jurisdiction because the trial court issued it while an earlier order on which the contempt order was based was on appeal).

Despite this unbroken line of unambiguous authority, the Receiver's opposition ***never engages on the issue***. Instead, he implies that this Court's prior order regarding a "stay" answers the question and that the Appellants should be sanctioned for even raising the obvious distinction between the lack of a stay and the lack of jurisdiction. He then devotes several pages to defending

his conduct as a receiver, an issue that has nothing to do with the circuit court's lack of jurisdiction. The Receiver's silence on the dispositive jurisdictional point, though, is all this Court needs to hear.

ARGUMENT

I. By failing to even address the issue, the Receiver has conceded that Rule 205 prohibits the circuit court from entering orders that affect matters that are before this Court.

This is not the first time the Appellants have pointed out that Rule 205 eliminates the trial court's jurisdiction to enter orders that can impact issues presently on appeal, but this is the first time the Appellants have filed a motion specifically crystalizing the issue for the Court's consideration.

Each time before, the Appellants have raised the issue in a defensive posture in response to overreach by the Receiver or the underlying plaintiffs, before both the circuit court (App. 263–267, Hr'g Tr. 20:19–24:22 (July 10, 2023; App. 341, Hr'g Tr. 55:5–56:4 (Aug. 21, 2023)), and this Court (Appellants' Ret. to Respondent's Expedited Mot. to Clarify the Court's Order on Appealability, at 10–13 (Sept. 5, 2023); Travelers's Resp. in Opp'n to the Receiver's "Motion to Clarify," at 4–6 (Sept. 5, 2023)).

And each time before, the Receiver has ignored or sidestepped the issue and failed to address the absence of jurisdiction below. Instead, the Receiver has solely argued that the existence or nonexistence of a "stay" is what matters. Even when the Appellants explained this jurisdictional bar in prior motions practice before this Court, the Receiver refused to even acknowledge this threshold issue. (Receiver's Reply to Appellants' Returns to Expedited Motion to Clarify *passim* (Sept. 6, 2023).)

This time is no different. The Appellants have proactively and affirmatively framed the issue in this motion as the circuit court acting without jurisdiction because of Rule 205's

reservation of exclusive jurisdiction over issues on appeal to the appellate courts. In response, the Receiver still refuses to address the absence of jurisdiction below, instead pretending that this Court's earlier order stating that a stay is not in place somehow resolves the issue. (Receiver's Resp. at 3–7.)

But it is basic law that a stay has nothing to do with the exercise or absence of jurisdiction. Whether a stay is in place only affects the enforceability of an order on appeal; regardless of the presence of a stay, the trial court has no jurisdiction to make new rulings that affect an issue on appeal.

This is not a novel point—the Supreme Court says so. *See Arnal*, 371 S.C. at 519, 641 S.E.2d at 422 ("Because Father's payment of child support and medical expenses as required by the final divorce order were not stayed by the appeal, the family court retained jurisdiction to enforce those payments. However, the family court did not have jurisdiction to ***modify*** matters in the final divorce order that were on appeal." (citing Rule 205, SCACR)) (emphasis supplied by the Supreme Court).

And this Court says so. *See Tillman*, 398 S.C. at 255, 728 S.E.2d at 51 ("Thus, the existence or nonexistence of a stay under Rule 241 does not control the family court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter affected by the appeal' under Rules 205 and 241(a).") (cleaned up).

And even the circuit court judge has said so. *See* Toal, *Appellate Practice in South Carolina*, at 121 ("Note that the existence or nonexistence of a stay under Rule 241 does not control the [lower] court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated

in the lower court during the appeal is a matter affected by the appeal under Rules 205 and 241(a).").

The Receiver's sustained silence in response to the sole argument raised by this motion amounts to a concession of the point. *See, e.g.*, *Anderson v. J.A. Piper Roofing Co.*, No. 6:21-cv-02901-DCC-JDA, 2022 WL 19404456, at *4 (D.S.C. Dec. 29, 2022) (holding "courts have recognized that a party's failure to address an issue in its opposition brief concedes the issue" and collecting cases on the point), *report and recommendation adopted at* 2023 WL 2300039 (D.S.C. Mar. 1, 2023); *First Union Nat'l Bank v. FVCS Commc'ns*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) ("We note initially First Union's failure to respond to this argument in its brief could amount to a concession that the trial court ruled incorrectly." (citing 5 Am. Jur. 2d *Appellate Review* § 555, at 254)), *rev'd on other grounds* 328 S.C. 290, 494 S.E.2d 429 (1997).

But even without an official concession from the Receiver, the law on this issue is settled and clear. A jurisdictional bar trumps ***everything***. A court cannot act if it lacks jurisdiction. *See generally Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (explaining that "[j]urisdiction is generally defined as 'the authority to decide a given case one way or the other" and confirming that "[w]ithout jurisdiction, a court cannot proceed at all in any cause" (quoting 32A Am. Jur. 2d *Federal Courts* § 581 (2007))).

Rule 205 "deprives the lower court of the power to address a particular issue, or 'matter,' during the pendency of the appeal." *Tillman*, 398 S.C. at 255 n.3, 728 S.E.2d at 51 n.3.

And an order issued without jurisdiction—including a trial court attempting to act without jurisdiction because of Rule 205—is void. *Arnal*, 371 S.C. at 518–19, 521–22, 641 S.E.2d at 422, 423–24; *Wingate*, 289 S.C. at 575, 347 S.E.2d at 878; *Wilson*, 340 S.C. at 540, 532 S.E.2d at 23.

That's the sum total of this motion. The circuit court's order on appeal in this case held that the receivership was proper and could continue despite the Texas statute of repose blocking all claims for and against Payne & Keller—a dissolved Texas company—since 1989. The circuit court held that the Receiver could actively attempt to generate liability against Payne & Keller, despite the order appointing him requiring him to protect Payne & Keller's interests. It held that the Receiver's speculation about Payne & Keller's dissolution in Texas in 1986 amounted to a *prima facie* case of constructive fraud. It held that a South Carolina circuit court had authority to address these matters even though they exclusively involve a Texas business. And the circuit court even went so far as to apply a revocation statute to potentially retroactively reopen an expired limitations period despite the Texas Constitution's prohibition against doing so. (App. Vol. I 198–207.)

All of those holdings were in error, and all are now on appeal to this Court. Yet, the circuit court issued an order on October 5, 2023, that purports to undo Payne & Keller's corporate dissolution from 1986—completely taking away the very statute of repose that blocks the receivership in the first place, the propriety of which is one of the primary appellate issues pending before this Court. The new order purports to take the "constructive fraud" issue a step further and conclusively hold as a matter of fact that Payne & Keller was fraudulently dissolved in 1986 in Texas. And it again held that a South Carolina circuit court had authority to disrupt the internal affairs of a Texas business in violation of the Texas Constitution. (App. Vol. I 363–371.)

The circuit court's October 5, 2023 order violates Rule 205 and every case construing it, including *Stokes-Craven*, *Arnal*, *Wingate*, *Tillman*, and *Wilson*. If this new order is left unchecked, the Appellants will be in the impossible position of having to argue to this Court why the Texas statute of repose blocks this receivership from proceeding, while at the same time the circuit court

has now doubled-down on the order on appeal by issuing a new order purporting to completely eliminate the statute-of-repose defense.

Indeed, the underlying plaintiffs and the Receiver have taken the October 5, 2023 order to Texas and have gotten a local court to unwittingly unwind Payne & Keller's 1986 dissolution without any notice at all to the Appellants, to the trial court, or to this Court, and without any explanation of the *ultra vires* nature of the circuit court's action or the fact that the same issues are on appeal to this Court. (App. Vol. IV 63–97.)[1]

Rule 205 is designed to prevent this exact scenario from happening. An appellate court is supposed to review a lower court's rulings against a static record; it is not supposed to hit a moving target or constantly refresh its analysis to account for circumstances that the trial court keeps changing.

In deference to the circuit court judge, she appears to have misunderstood the scope of this Court's prior order indicating that a stay is not in place, as she explained to the parties during a conference on October 25th:

> The Court: I mean, frankly, when I got Judge Verdin's order, it indicated to me pretty clearly that I can go right ahead with this matter. It says: The receiver's ability to carry out his duties aren't stayed, and my order of March the 31st is not stayed.
>
> So I think I could do whatever I felt the justice of the case indicated I should do. The question is whether they've had a fair opportunity to argue the merits of the contention that the revocation should be terminated because the revocation was obtained through constructive fraud.
>
> * * * * *

[1] Upon learning of that friendly lawsuit in Texas between the plaintiffs who got the Receiver appointed and the Receiver himself, Travelers moved to intervene on October 27, 2023, and will seek to vacate the Texas court's order. (App. Vol. IV 98–111.) Travelers will keep this Court informed of the additional proceedings that take place in that court.

The Court: What does Judge Verdin's order mean, in your judgment, when she says: We further clarify that the order you just referred to is not stayed during the pendency of this appeal? She says that. And then she says: The receivership action and the receiver's ability to carry out his duties are not stayed. What does that mean?

Mr. Sawyer: Your Honor, I think what it means is, it is a full reflective of what was asked of her in the motion to clarify. The motion to clarify from the receiver to Judge Verdin only asked about Rule 241 and the—the—

The Court: I don't care whether it asked about 241 or what it asked about, Mr. Sawyer.

Mr. Sawyer: Well—

The Court: The—what does—I'm asking you what Judge Verdin—she doesn't refer to any particular rule one way or another, other than the civil procedure rule that says that interlocutory orders are not stayed by an appeal, which this is one. And that's all she says about that.

And then she further said—refers to the provisions in the receivership statute that state proceedings in all respects are not stayed. What—what does she mean by that?

Mr. Sawyer: She means that there's not a stay. 241 talks about a stay.

The Court: Well, if there's not a stay, then what prevents me from issuing the order I issued in October?

Mr. Sawyer: Rule 205, which says that matters affected by the appeal are within the exclusive jurisdiction of the appellate court. That's the distinction.

(App. Vol. IV 23:17–24:5, 38:2–39:17.)

Respectfully, the circuit court judge's assessment of this Court's prior order did not account for the fundamental differences between a stay under Rule 241 and the absence of jurisdiction under Rule 205. Because the October 5, 2023 order was issued without jurisdiction, it is void *ab initio*, and the Court should vacate it accordingly.

II. The remainder of the Receiver's return filing is nothing more than *ad hominem* attacks on opposing litigants and self-serving statements about receiverships that are irrelevant to this motion.

Pages 1 through 6 of the Receiver's opposition memorandum argue that the absence of a stay must mean the trial court can continue entering orders that impact matters that are on appeal. Rule 205 and its supporting case law make clear that is incorrect, as discussed above.

Pages 7 through 17 of the Receiver's opposition are then devoted to criticizing every litigant who has ever opposed the receiverships that have spawned from the Asbestos Docket. The Court should not credit such generalized, *ad hominem* attacks.

Indeed, the parties to this appeal are strangers to and have no awareness of most of the matters listed on Pages 7 through 10—Section B—of the Receiver's memorandum. Of the handful of those filings to which Travelers was a party, Travelers is delighted to discuss those filings with this Court if it so desires, as each and every one was made in good faith and designed to preserve issues for eventual appellate review.

This Court is fully aware of how detailed and precise South Carolina law is regarding issue preservation. *See generally* Toal, *Appellate Practice in South Carolina*, at 458 ("Routinely, attorneys present unpreserved issues in the appellate courts. In fact, it is rare to find an Advance Sheet that does not contain several cases that are disposed of on preservation grounds. Thus, lack of preservation is a fertile field for the respondent."). The high stakes of being adverse to the Asbestos Docket receiverships forces litigants to be as inclusive and comprehensive as possible in their filings so as not to inadvertently waive an issue or potential appeal. Seeking appellate review when necessary is hardly sanctionable, as the Receiver implies—it is essential to avoid waiving issues or arguments. Travelers would welcome a discussion with this Court about issues from the Asbestos Docket and the receiverships being reviewed by appellate courts.

Nor is this motion designed to delay anything. The Appellants specifically called it an "emergency" motion to help expedite its review with this Court. The Receiver's repeated suggestion that the Appellants filed an "emergency" motion for purposes of delay is simply incorrect and inconsistent with the very name of the motion.

Finally, the Receiver devotes Sections C, D, and E of his return memorandum to defending his conduct with respect to attempting to create liability for Payne & Keller. That discussion is irrelevant to the motion pending, but the Receiver misstates what's happening here.

The Receiver casts himself as a crusader trying to take down "legacy insurers." As he puts it: "the insurers have rested comfortably for decades believing that the contracts they entered into with Payne & Keller would never be honored." (Receiver's Mem. at 15.) This makes no sense. No one—not even the Receiver—has ever suggested that any insurance carrier has failed to "honor" any policy it entered with Payne & Keller.

To the contrary, Texas law has barred every claim against Payne & Keller since the Texas statute of repose for dissolved Texas companies expired in 1989. Until the underlying plaintiffs in this case had a receiver appointed over Payne & Keller, and then the Receiver and underlying plaintiffs both began working to revoke Payne & Keller's Texas termination, Payne & Keller had no potential exposure to any liabilities for more than three decades. This was certain as a matter of Texas law, and there isn't a credible suggestion anywhere in the record that the Appellants or any other insurer have been trying to sidestep any contractual obligation to Payne & Keller.

Again, the discussions in Sections B, C, D, and E of the Receiver's return memorandum are wholly irrelevant to the motion pending. To the extent the Court believes they bear on this motion in any way, Travelers rejects all of the arguments, insinuations, and mischaracterizations contained therein, and it welcomes a discussion with the Court regarding any of those issues.

CONCLUSION

Rule 205 takes jurisdiction from the trial court and prohibits it from issuing new orders that could affect any matter on appeal. This is black-letter South Carolina law, and the Receiver has no response to this argument.

Accordingly, Travelers respectfully requests that the Court grant this motion and vacate the October 5, 2023 order, which was issued without jurisdiction and is void *ab initio*.

Respectfully submitted,

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November 3, 2023

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Travelers Casualty and Surety Company, 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' Reply in Support of Emergency Motion to Clarify and Enforce Rule 205

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November 3, 2023