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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

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.

APPELLANTS CERTAIN INSURERS' REPLY IN SUPPORT OF EMERGENCY MOTION TO ENFORCE RULE 205

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Defendants AIG Property Casualty
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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*

INTRODUCTION

The Receiver's return fails to address the key point of Appellants Certain Insurers¹ and Travelers' Emergency Motion: Rule 205, SCACR, precludes the circuit court from taking any action on matters affected by this appeal, yet that is precisely what the circuit court has done and may continue to do if the Emergency Motion is not granted.

Instead, the Receiver seeks to circumvent this issue entirely by arguing that the Court has already decided that Rule 205 does not apply to this appeal. Not so. This Court's one-page September 8, 2023 order only stated that the March 31, 2023 order currently on appeal, and the "receivership action," is "not stayed." (Sept. 8, 2023 Order). The order did *not* relinquish this Court's exclusive jurisdiction under Rule 205 over "matters affected by the appeal." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016). Indeed, the order said nothing about Rule 205. And the Receiver offers no response to Appellants' showing that by issuing its October 5, 2023 order, the circuit court acted on the same matters that are affected by this appeal, including the central question of whether the 1986 dissolution of Payne & Keller, a Texas corporation, precludes any claims by or against it. (*See* Oct. 23, 2023, Emergency Mot. at 6-7).

The rest of the Receiver's return is devoted to attacks on Appellants and defenses of the Receiver's conduct, none of which relate to the application of Rule 205. The Court should grant the Emergency Motion, rule that the circuit court did not have jurisdiction to issue its October 5, 2023 order, and enjoin the circuit court and the Receiver from engaging in further efforts to proceed with matters affected by this appeal.²

¹ Certain Insurers include AIG Property Casualty Company, formerly known as Birmingham Fire 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.

² There are numerous other reasons that the October 5 Order is indefensible. Certain Insurers expressly reserve all rights.

ARGUMENT

I. The October 5 Order indisputably addresses matters affected by the appeal.

“Upon the service of the notice of appeal, the appellate court *shall have exclusive jurisdiction* over the appeal Nothing in these Rules shall prohibit the lower court . . . from proceeding with matters *not affected by the appeal.*” Rule 205, SCACR (emphasis added). “[T]he 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’. . . .” *Tillman*, 398 S.C. at 256, 728 S.E.2d at 51 (citing Rules 205 and 241, SCACR).

The Supreme Court has gone out of its way in recent years to reiterate to the bench and bar the importance of Rule 205:

- “[W]e hereby remind the bench and bar that action on a settlement may not be taken by the lower court, except with regard to matters not affected by the appeal, while the matter is pending before this Court” *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013);
- “We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal.” *Grosshuesch v. Cramer*, 377 S.C. 12, 31 n. 7, 659 S.E.2d 112, 122 n.7 (2008)

The October 5 Order directly addresses matters affected by the appeal, and the Receiver makes no argument otherwise. He does not dispute that the circuit court’s October 5 Order addresses the same issues that are pending before this Court on appeal. Nor could he: the October 5 Order specifically references and relies on the same facts and legal arguments raised in the January 13, 2023 motion and resulting March 31, 2023 order that is the subject of this appeal:

The Receiver has conducted substantial research regarding Payne & Keller, including the reasons for Payne & Keller’s purported dissolution and the underlying reasons for that dissolution. *Much of that history is set forth in the Receiver’s Response to Third Party Defendant Travelers Casualty & Surety Company’s Motion to Dismiss Third Party Claims and Dissolve the Payne & Keller Receivership filed January 13, 2023 and subsequently repeated in*

the instant motion. Large portions of those undisputed facts and the applicable law are reiterated here in whole or in part.

(October 5, 2023 Order, p. 2) (Appx. p. 2) (emphasis added). Thus, the October 5 Order addressed and resolved the very same issue that is the subject of this appeal, and it even goes so far as to rely on the submissions and “applicable law” from the briefing that led to the order on appeal. Because the October 5 Order further decided legal and factual issues that are currently before this Court, it rules on “matters affected by the appeal” and the circuit court lacked jurisdiction to enter the order.

Unfortunately, the October 5 Order has already had consequences: on October 12, the Receiver took the order to Texas, attempted to domesticate it, and had the Secretary of State issue a “Certificate of Revocation of Dissolution” based on it, even though the order should never have issued in the first place.

II. This Court did not previously address Rule 205 because the Receiver’s prior motion only asked for clarification as to a stay under Rule 241.

Lacking any argument that Rule 205 does not apply, the Receiver resorts to arguing that this Court’s one-page September 8, 2023 order on the Receiver’s motion regarding a stay under Rule 241 removed this Court’s exclusive jurisdiction under Rule 205. This argument makes no sense. First, this Court cannot concede away – especially by silence – its exclusive jurisdiction under Rule 205. Second, whether a stay exists under Rule 241 is a separate and distinct issue from this Court’s exclusive jurisdiction.

A. Rule 205 does not authorize this Court to give up its exclusive jurisdiction.

The language of Rule 205 is mandatory, stating that the appellate court “shall” have exclusive jurisdiction upon service of the notice of appeal. This Court’s September 8 Order does not purport to relinquish this Court’s exclusive jurisdiction, nor could it. The Appellate Court Rules do not contain a provision for relinquishing jurisdiction over matters affected by the appeal.

B. Even when an appeal does not result in a Rule 241 stay, the circuit court still lacks jurisdiction under Rule 205 to rule on matters affected by the appeal.

The Receiver's August 23, 2023 motion to clarify did not ask this Court whether the circuit court could rule on matters affected by the appeal. Rather, the Receiver asked this Court to hold that the appeal did not result in an automatic stay of the entire underlying case. (Aug. 23, 2023 Motion, pp. 2-3). He sought the following clarification from the Court: "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.**" (Aug. 23, 2023 Motion, p. 4) (emphasis added). The Receiver never mentioned Rule 205, nor did the Receiver mention the Motion to Revoke the Dissolution of Payne & Keller that led to the circuit court's October 5 Order. Moreover, the Motion never asked this Court to hold that the circuit court could proceed with addressing issues that are affected by the appeal despite the mandate of Rule 205.

In response, this Court entered a one-page order that tracked the Receiver's requested relief. This Court first clarified that the appeal "shall proceed." Then, this Court held: "[W]e further clarify that the March 31, 2023 order is not stayed during pendency of this appeal. . . . Accordingly, the receivership action and the receiver's ability to carry out his duties are not stayed." (Sept. 8, 2023 Order). The September 8 Order only cites Rule 62, SCRPC and South Carolina Code § 14-3-450, both of which relate to whether there is a stay pending the appeal. Thus, this Court ruled specifically and only on the relief sought by the Receiver – the case was not stayed. However, this Court never discussed Rule 205 or jurisdiction. To be sure, Appellants raised that issue in their return, but the Court did not mention it or address it in its September 8 Order, choosing instead to solely address the stay question that the Receiver had presented. The Court left the Rule 205 issue for another day.

The Rule 205 exclusive jurisdiction over matters “affected by the appeal” still applies even when a case is not stayed under Rule 241. For example, the appeal in *Tillman* was not subject to a stay because the order on appeal was a “family court order[] regarding a child.” 398 S.C. at 254 (citing Rule 241(b)(6), SCACR). However, despite the lack of a stay, then-Chief Judge Few recognized that Rule 205 would still preclude the family court from issuing orders on matters affected by the appeal. *Id.*

Then-Chief Judge Few explained the clear distinction between the question of a stay, on the one hand, and the question of exclusive jurisdiction on the other. The question of a stay under Rule 241 addresses “what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of the relief ordered.” *Id.* at 254-55, 728 S.E.2d at 50. On the other hand, Rule 205 addresses the question of “what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending.” *Id.* “Thus, 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 . . .’” *Id.* (emphasis added).

This Court’s September 8 Order only answered the first question – is there a stay? The Receiver’s August 23, 2023 Motion to Clarify did not ask this Court to permit the circuit court to rule on matters affected by this appeal. Therefore, this Court chose not to address the issue at that time. Now that the circuit court has issued rulings specifically involving matters “affected by the appeal,” it is time to address the Rule 205 question. The circuit court’s October 5 Order rules on the very issues that are pending on appeal before this Court. Therefore, the October 5 Order should

be vacated and the circuit court and the Receiver should be enjoined from taking further action on the issues pending before this Court on appeal.

III. The Receiver’s ad hominem attacks and attempts to distract this Court from the present motion are just that – an improper distraction.

The Receiver spends his entire 17-page Return talking about matters other than Rule 205 and case law applying the rule. He devotes five pages of the Return to a list of appeals made by other carriers in other cases on other issues. Those cases and appeals have nothing to do with this appeal. This Court has already held—*twice*—that this appeal will go forward, meaning that the appeal is anything but meritless. Moreover, Certain Insurers are not parties to any of the appeals listed in the Receiver’s chart. The Receiver’s attack on other insurers for taking appeals in other cases is nothing but a red herring that distracts from the only issue: Rule 205 and its obvious application to the circuit court’s October 5 order.

The Receiver also contends that Certain Insurers somehow misunderstand his role, and that he acted to “protect the interests of Payne & Keller” by seeking to revoke its dissolution, open it up for liability, and prevent its lawyers from asserting obviously-applicable statutory defenses on its behalf. (Receiver’s Return p. 11-17). Certain Insurers disagree that this conduct could be construed as protecting the interests of Payne & Keller.

The Receiver also falsely accuses the insurers of having failed to honor their insurance contracts with Payne & Keller. (Receiver’s Return, p. 15). He fails to identify a single instance where the insurers have failed to honor such contracts.

To be clear, Certain Insurers dispute the allegations and statements set forth in the Receiver’s Return. The Receiver’s unsupported ad hominem attacks and invective are not only incorrect; they are also wholly irrelevant to the Rule 205 Motion pending before this Court. Therefore, Certain Insurers will not address each false assertion in the Receiver’s Return but

reserve all rights to do so at the appropriate time. The sole issue presented here is whether Rule 205 applies to the circuit court's October 5, 2023 order and similar actions, and it plainly does.

CONCLUSION

For the above-stated reasons, the Court should enforce its exclusive jurisdiction pursuant to Rule 205, SCACR. The circuit court's October 5 Order specifically references the facts and arguments from the prior motion that is now on appeal before this Court. Thus, the October 5 Order indisputably rules on matters "affected by the appeal." The October 5 Order should be vacated, and the circuit court and the Receiver should be enjoined from taking further action on matters affected by the appeal. Those issues are within the "exclusive jurisdiction" of the appellate court.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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PROOF OF SERVICE

I, the undersigned of the law offices of Murphy & Grantland attorneys for Appellants AIG Property Casualty Company, formerly known as Birmingham Fire 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, 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): APPELLANTS CERTAIN INSURERS' REPLY IN SUPPORT OF
EMERGENCY MOTION TO ENFORCE RULE 205

Parties Served:

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November 3, 2023