

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2022-CP-40-03834
Appellate Case No. 2023-001096

Donna B. Welch, individually and as Personal Representative of the Estate of
Melvin G. Welch, deceased,

Respondent,

v.

Advance Auto Parts, Inc., American Honda Motor Co., Inc., Atlas Asbestos Co,
Atlas Turner, Inc. as successor to Atlas Asbestos Co, a foreign company,
Bahnsen, Inc., Covil Corporation, Daniel International Corporation, Davis
Mechanical Contractors, Inc., Ellington Insulation Company, Inc., Fluor
Constructors International f/k/a Fluor Corporation, Fluor Constructors
International, Inc., Fluor Daniel Services Corporation, Fluor Enterprises, Inc.,
General Parts, Inc. individually and as successor-in-interest to Carquest
Corporation, Goodrich Corporation f/k/a The B. F. Goodrich Company, The
Goodyear Tire & Rubber Company, Graybar Electric Company, Inc., Honeywell
International, Inc. individually and as successor-in-interest to Allied Signal, Inc.,
as successor to Bendix Corporation, Morse Tec LLC f/k/a Borgwarner Morse Tec
LLC, and successor-by-merger to Borg-Warner Corporation, Occidental
Chemical Corporation as successor to Durez Corporation, O'reilly Automotive
Stores, Inc., Paramount Global f/k/a Viacomcbs Inc., f/k/a CBS Corporation, a
Delaware corporation f/k/a Viacom, Inc., successor-by-merger to CBS
Corporation, a Pennsylvania corporation, f/k/a Westinghouse Electric
Corporation, Pneumo Abex LLC successor-in-interest to Abex Corporation,
Redco Corporation f/k/a Crane Co., Reinz Wisconsin Gasket LLC f/k/a and/or
successor to Reinz Wisconsin Gasket Co. and Wisconsin Gasket Manufacturing
Co., a wholly owned subsidiary of Dco LLC, Rust Engineering & Construction,
Inc., Rust International Inc., Southern Insulation, Inc., Spirax Sarco, Inc., Union
Carbide Corporation, Westrock MWV, LLC individually and as successor-in-
interest to Westvaco, ZF Active Safety US Inc. f/k/a Kelsey-Hayes Company,

Defendants,

Of which Atlas Turner, Inc. is the

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The circuit court abused its discretion in striking Atlas Turner’s pleadings because it did not consider all the required factors.

As explained in Atlas Turner’s principal brief, there are four factors a court must consider when determining the appropriate discovery sanction: “the nature of discovery sought, the discovery stage of the case, willfulness, and the degree of prejudice.” *Richardson on Behalf of 15th Cir. Drug Enf’t Unit v. Twenty-One Thousand & no/100 Dollars (\$21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 600, 846 S.E.2d 14, 17 (Ct. App. 2020). “If the court does not consider these factors, an abuse of discretion occurs.” *Id.*

The circuit court abused its discretion because it clearly did not consider all four required factors. The circuit court decided to strike Atlas Turner’s pleadings based solely on its determination that Atlas Turner willfully failed to produce a witness. Indeed, it is clear from the circuit court’s order and the hearing transcripts that the circuit court did not consider the nature of the discovery sought, the discovery stage of the case, or the degree of prejudice Atlas Turner would suffer because those factors are not mentioned at all. Our courts have made it clear that “[i]f the court does not consider these factors, an abuse of discretion occurs.” *Id.*

II. The circuit court erred in appointing a receiver because Atlas Turner has no property in South Carolina.

The circuit court cannot appoint a receiver over a foreign corporation’s property and assets that are not in South Carolina. This is common sense, straightforward, black letter law.¹

¹ Indeed, Atlas Turner’s principal brief provided ample authority supporting this basic rule of law. *See Pollock v. Carolina Interstate B. & L. Assn.*, 48 S.C. 65, 25 S.E. 977, 980 (1896) (“The power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him.” (quoting *Gluck & B. Rec.* p. 3)); *Id.* (“[C]ourts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers.” (quoting *20 Am. & Eng. Enc. Law*, 65, 66)); *Ex parte First Pennsylvania Banking & Tr. Co.*, 247 S.C. 506, 508, 148 S.E.2d 373, 374 (1966) (“[T]he jurisdiction of a state is restricted to its own territorial limits.”); *Id.*

To avoid this problem, the circuit court used section 38-61-10 of the South Carolina Code to construe that Atlas Turner has property in South Carolina. The circuit court erred in doing so.

Section 38-61-10 is merely a conflicts/choice of law provision. Neither Respondent nor the circuit court cited any authority in which this statute was used outside of a conflicts of law context; Appellant has also failed to find such authority. The lack of authority supporting the circuit court's ruling and Respondent's argument makes sense because section 38-61-10 in its entirety provides the following:

All contracts of insurance on property, lives, or interests in this State *are considered to be made in the State* and all contracts of insurance the applications for which are taken within the State *are considered to have been made within this State* and are subject to the laws of this State.

§ 38-61-10 (emphases added). Contrary to the circuit court's ruling and Respondent's argument, this statute does not allow courts to construe insurance assets as *property in* South Carolina; it merely replaces the common law rule of *lex loci contractus* for insurance contracts in the conflict of laws context.²

("[T]he general rule is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction. A statute which purports to have such operation is invalid."); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489 (4th Cir. 2007) ("South Carolina rules of construction provide that statutes must not be read to operate outside the state's borders."); *Id.* ("The South Carolina Supreme Court has written repeatedly that South Carolina statutes have no extraterritorial effect because the general rule is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction." (cleaned up)).

² See *Hartsock v. Am. Auto. Ins. Co.*, 788 F. Supp. 2d 447, 450 (D.S.C. 2011) ("Historically, in insurance coverage disputes, South Carolina courts have followed the doctrine of *lex loci contractus*, and applied the law of the state where the contract was formed. See *Sangamo Weston, Inc. v. Nat'l Surety Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992). However, this rule was modified by a statute enacted in 1947 and now codified at South Carolina Code section 38-61-10."); *Okatie Hotel Grp., LLC v. Amerisure Ins. Co.*, No. CIV.A. 2:04-2212-23, 2006 WL 91577, at *3 (D.S.C. Jan. 13, 2006) ("South Carolina choice of law encompasses both the traditional *lex loci contractus* doctrine and S.C. Code Ann. § 38-61-10. Historically, South Carolina courts followed the rule of *lex loci contractus* and applied the law of the state where the insurance

The circuit court and Respondents both erroneously rely on the following statement from the Supreme Court for support that Atlas Turner has property in South Carolina: “The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it.” *Porter v. Sabin*, 149 U.S. 473, 480 (1893). That case, however, dealt with the issue of state and federal courts “exercising jurisdiction over the same territory,” which was still a relatively novel system in 1893. *Id.* Unlike the property here, the property in *Porter* was within the state that appointed the receiver. Therefore, *Porter* is not applicable here because Atlas Turner is a foreign corporation that has never had property or assets in South Carolina.

III. The circuit court erred in appointing a receiver because South Carolina’s receivership statute is inapplicable to Atlas Turner.

A. S.C. Code Ann. § 15-65-10(5) is inapplicable because it is not a part of existing practice to appoint a receiver over a foreign corporation’s out-of-state assets.

Neither the circuit court nor Respondent cite a single case in which a state court appointed a receiver over a foreign corporation’s out-of-state property. They also fail to cite a single case in which § 38-61-20 was used to deem property within the state. As discussed above, the cases they cite merely used the statute to construe insurance contracts as *made* in South Carolina, not property *within* South Carolina. The circuit court appointing a receiver over a foreign corporation’s out-of-state assets cannot be part of an existing practice of law if there is no evidence that it has ever been done before.

B. S.C. Code Ann. § 15-65-10(1) is inapplicable because Atlas Turner has not committed any fraud and does not have any judgments against it.

contract was formed. However, a statute enacted in South Carolina in 1947, S.C. Code Ann. § 38-61-10, modified the traditional rule of *lex loci contractus*.” (internal citations omitted)).

Initially, Atlas Turner notes that Respondent did not raise this statute to the circuit court, and the circuit court did not mention this statute in its order. Regardless, Atlas Turner's inability to produce a requested witness is not a fraud on Respondent.

C. S.C. Code Ann. § 15-65-10(4) is inapplicable because Atlas Turner has not forfeited any corporate or property rights, and it has no property in South Carolina.

Section 15-65-10(4) clearly provides that it applies to foreign corporations' property in South Carolina. § 15-65-10(4) ("When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of *the property within this State of foreign corporations.*" (emphasis added)). As discussed in Section II, Atlas Turner has no property in South Carolina. Additionally, Atlas Turner has not forfeited any corporate or property rights, regardless of location.

IV. Atlas Turner's initial brief did not violate South Carolina's professional standards.

Respondent takes exception to the name of a website and misconstrues Atlas Turner's citation to that website as an affront to the judicial system. Atlas Turner did not intend to disparage the circuit court but wanted to note that others have taken exception to the rulings in issue. This point was clearly made in Atlas Turner's Reply to Respondent's Reply to Respondent's Opposition to Appellant's Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas, and Atlas Turner incorporates that into this Reply Brief. Respondent presents a mere red herring to avoid the complete lack of authority supporting her position that the circuit court may, under the facts of this case, appoint a receiver to control assets outside the jurisdiction of this state as well as this country.

V. Atlas Turner has not waived or abandoned its personal jurisdiction defense because a pretrial denial of a motion to dismiss for lack of personal jurisdiction is interlocutory and not directly appealable.

In *Mid-State Distributors, Inc. v. Century Importers, Inc.*, our supreme court explicitly held that “the denial of a motion to dismiss under Rule 12(b)(2), SCRCF, is interlocutory and not directly appealable.” 310 S.C. 330, 336, 426 S.E.2d 777, 781 (1993). Therefore, Atlas Turner’s has not waived or abandoned its personal jurisdiction defense. Contrary to Respondent’s claims otherwise, Atlas Turner’s personal jurisdiction defense is still viable and will be appealed at the appropriate time.

CONCLUSION

For the foregoing reasons, along with those set forth in its principal brief, Appellant asks this Court to reverse the circuit court’s decisions to place Atlas Turner in contempt, strike Atlas Turner’s pleadings, and appoint a purported receiver.

Respectfully submitted,
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November 28, 2023

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Jean Hoefer Toal, Circuit Court Judge

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Corporation, Goodrich Corporation f/k/a The B. F. Goodrich Company, The
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Corporation, a Pennsylvania corporation, f/k/a Westinghouse Electric
Corporation, Pneumo Abex LLC successor-in-interest to Abex Corporation,
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Of which Atlas Turner, Inc. is the

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November 28, 2023

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Subject: RE: Welch v. Atlas Turner, Inc.; Appellate Case No. 2023-001096 (CR 230593)
Attachments: Initial Reply Brief.pdf

Enclosed for service upon you in the above-referenced matter, please find Appellant's Initial Reply Brief.

Thank you,

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