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. 2023-001461

John A. Tibbs and Margaret B. Tibbs, ... Respondents,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiw-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden 3 North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount

Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC ..... Defendants,

of which

Asbestos Corporation Limited, is the ..... Appellant.

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

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INTRODUCTION[1]

The Receiver's third-party complaint and continued prosecution of its action against the Chubb Insurers directly conflicts with Rule 205 and this Court's exclusive jurisdiction. The Receiver does not even attempt to dispute the obvious fact that his third-party action is a "matter affected by" ACL's appeal. Instead, the Receiver tries to obfuscate the issue before this Court by citing to a different action involving orders from this Court about stays under Rule 241 and procedural defects with circuit court orders challenged under Rule 205. Whether another party properly raised Rule 205 in another action has no bearing on Rule 205's affect on this dispute. Whatever happened in the Payne & Keller Action, the fact remains: the Receiver's actions are in direct conflict with this Court's exclusive jurisdiction.

Rule 205 divested the circuit court of jurisdiction over the Receiver and his actions before he filed his complaint against the Chubb Insurers and served discovery. On September 13, 2023, the active Canadian corporation and Chubb Insurers' insured, ACL, appealed the trial court's Order appointing a receivership over it. Because ACL appealed the very order granting the Receiver authority over ACL's "Insurance Assets," Rule 205, SCACR, divested the circuit court of jurisdiction and granted this Court exclusive jurisdiction over any matters affected by the validity of the receivership and the Receiver's authority. Nonetheless, in direct conflict with this Court's exclusive jurisdiction and Rule 205, the Receiver went ahead and filed a third-party complaint against certain of ACL's insurers on September 19, 2023—*after* ACL's appeal. Further, the Receiver has burdened the Chubb insurers with extensive, far-reaching discovery requests relating to ACL.

[1] All capitalized terms have the same meaning as defined in the Chubb Insurers' Motion to Clarify and Enforce Rule 205. Unless otherwise noted, this brief omits internal quotation marks and original alterations and adds any emphasis reflected in quoted passages.

Thus, the Chubb Insurers respectfully move for an order from this Court that enforces Rule 205, SCACR, and enjoins the circuit court and the Receiver from any efforts to proceed with matters affected by this appeal.

ARGUMENT

The Receiver Filed his Third-Party Complaint After ACL's Appeal, Violating Rule 205 and this Court's Exclusive Jurisdiction

Rule 205, SCACR, is black letter law. There is no room for interpretation. Upon service of the notice of appeal, the appellate court is granted "*exclusive jurisdiction* over the appeal" except that the circuit court may "proceed[] with matters not affected by the appeal." Rule 205, SCACR; *see Tillman v. Oakes*, 398 S.C. 245, 255 & n. 3, 728 S.E.2d 45, 51 & n.3 (Ct. App. 2012) (reiterating that "[u]nder Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal," and explaining that this rule "deprives the lower court of the power to address a particular issue, or 'matter,' during the pendency of the appeal").

The Supreme Court of South Carolina has repeatedly enforced Rule 205. *See, e.g., Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (explaining that "Rule 205 divests the lower court or administrative tribunal of jurisdiction over '*matters affected by the appeal*'") (emphasis provided by the Supreme Court); *Lancaster v. Ga.-Pac. Corp.*, 403 S.C. 136, 137, 742 S.E.2d 867, 868 (2013) ("Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate Court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court.").

Here, ACL's appeal clearly affects the matters raised in the Receiver's complaint. Rule 205 deprived the circuit court of jurisdiction over any matter affected by ACL's appeal of the receivership order on September 13, 2023. *See, e.g.*, Jean H. Toal, et al., *Appellate Practice in*

South Carolina 121 (3d ed. 2016) ("[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal"). This includes its ability to act through the Receiver whose validity is on appeal. *See Jeffcoat v. Morris*, 300 S.C. 526, 528, 389 S.E.2d 159, 160 (Ct. App. 1989), *overruled on other grounds by United Carolina Bank v. Caroprop, Ltd*., 316 S.C. 1, 446 S.E.2d 415 (1994) ("A receiver . . . is an officer of the court and is the agency through which the court acts[]" and "takes possession of [assets] as the arm of the court . . . ."). Nonetheless, *after* receiving notice of ACL's appeal, the Receiver went ahead and filed his third-party complaint on September 19, 2023, in a court devoid of jurisdiction over the matter. The Receiver's action against ACL's insurers is predicated upon his appointment to receive ACL's "Insurance Assets." If this Court finds the receivership order is invalid, then the Receiver has no basis for bringing his claims purportedly on behalf of ACL or pursuing discovery from the Chubb Insurers. The circuit court thus lacks jurisdiction over the Receiver's third-party action because it is based on an order currently on appeal before this Court. *See 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). This Court's exclusive jurisdiction must be enforced now; the circuit court and the Receiver must be enjoined from proceeding with the third-party action against the Chubb Insurers, which is affected in its entirety by whether the receivership is valid.

The Receiver's only response to the indisputable conclusion that his third-party action is a "matter affected by" ACL's appeal is to mischaracterize this Court's orders in the Payne & Keller Action and argue that this Court should simply arrive at the same result—to let the Receiver continue to act during the pendency of this appeal. At the time of the Chubb Insurers' opening brief and the Receiver's Return, this Court had only addressed whether a receivership action was

stayed pending an insurer's appeal of a motion to dissolve a defunct company's receivership in the Payne & Keller Action. On November 21, 2023, this Court denied an insurer's motion to enforce Rule 205 because the circuit court order allegedly violating Rule 205 was not properly up on appeal. (Ex. A, Order dated Nov. 21, 2023.)[2] The purported procedural defects in the Payne & Keller Action proceedings have no bearing on whether Rule 205 prevents the Receiver from pursuing his claims against the Chubb Insurers in this action.

The Chubb Insurers Can Intervene as of Right to Protect Their Interests in the* Mitchell *Action

The Receiver argues that the Chubb Insurers cannot intervene as of right because they have "the same objective as ACL," which is to "invalidate the circuit court's appointment of the Receiver and avoid investigation and marshaling of ACL's insurance assets." Return at 6. But the Chubb Insurers have not sought to intervene in this action to argue the merits of ACL's appeal of its receivership. The Chubb Insurers have sought to intervene only because they are currently subject to conflicting instructions from the Receiver and ACL, a solvent Canadian corporation to whom the Chubb Insurers still owe the duties imposed by insurance contract to their insured. The Chubb Insurers should not be subjected to extensive discovery from a South Carolina receiver until the Court of Appeals rules on whether the appointment was appropriate in the first place.[3] The fact that ACL is appealing its receivership is not sufficient to protect the Chubb Insurers from the

[2] This Court did not endorse the Receiver's argument, also raised in the Payne & Keller Action, that its September 8, 2023 order addressed whether Rule 205 applied to divest the circuit court of jurisdiction during the pendency of the appeal.

[3] The Receiver attached 105-134 document requests and 13 interrogatories to Federal and Century respectively when he served his complaint, and then proceeded to serve notices to take corporate designee depositions of both Century and Federal on 13 separate topics, further demonstrating the undue burden on the Chubb Insurers should this Court decide that the Receiver was improperly appointed after the Chubb Insurers were already required to respond to the excessive discovery requests.

Receiver's improper actions in the Mitchell Action. Without this Court's intervention to enforce Rule 205, the Receiver will continue to improperly prosecute his third party action against the Chubb Insurers. The Chubb Insurers' intervention in this action is necessary to protect their interests in the Mitchell Action that are separate and distinct from ACL's interests in not having a receiver appointed.

The fact that ACL has now asked this Court to enforce Rule 205 does not change this analysis. On November 22, 2023, ACL filed a motion on various grounds to get a ruling that "Mr. Protopapas cannot act as purported receiver for ACL during the pendency of this appeal," including by application of Rule 205. (Ex. B, ACL's Motion dated November 22, 2023 in the Payne & Keller Action, at 1.) But ACL specifically seeks to prevent the Receiver from taking actions that directly affect ACL's defense in the underlying actions. (*id.* at 16 (arguing the Receiver is harming ACL by firing the defense counsel ACL hired to protect its interests in the underlying lawsuits).) ACL does not purport to seek to protect its insurers from the Receiver's improper actions in the various third-party actions, including the Mitchell Action.

The Court Should Allow the Chubb Insurers to Permissively Intervene Because ACL's Appeal and the Chubb Insurers' Motion Share a Common Core Issue

In any event, the Court should permit the Chubb Insurers to intervene because the interests they seek to protect share a common core issue with ACL's appeal. The Receiver does not even attempt to explain how ACL's appeal and the Chubb Insurers' motion to enforce Rule 205 do not share a common core issue. *See* Return at 6-7. The existence of the Receiver's complaint against the Chubb Insurers depends on the Order at issue in this appeal. The third-party complaint is specifically brought by "[ACL] by and through its duly appointed Receiver." (App. Vol. I 29, Third-Party Compl. dated Sep. 19, 2023, in the Mitchell Action.) The subject of this appeal is whether the Receiver is "duly appointed" over ACL. This Court should thus allow the Chubb

Insurers to intervene and protect their interests in the third party action that are directly affected by this appeal.

CONCLUSION

If the Receiver's efforts to prosecute his third-party action and control the "Insurance Assets" of ACL are allowed to continue, it would materially add to and change the issues in this appeal. As a result, the Chubb Insurers respectfully request that the Court issue an order enforcing its exclusive jurisdiction under Rule 205, SCACR, enjoining the circuit court and the Receiver from any further efforts to proceed with matters affected by this appeal.

Respectfully submitted,

/s/ Kevin K. Bell
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November 29, 2023

EXHIBIT A

The South Carolina Court of Appeals

Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers, Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories, Inc.; General Boiler Casing Company, Inc.; HEFCO, Inc.; J.R. Deans Company, Inc.; Payne & Keller Company; SFB, Incorporated; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; Defendants.

Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; and Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, Third-Party Plaintiffs,

v.

Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland All American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler; Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental

Insurance Company, Individually and as Successor in interest to Harbor Insurance Company; Hartford Accident and Indemnity Company; Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc.; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

Of which, Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, is the Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company, are Appellants.

Appellate Case No. 2023-000727

ORDER

After careful consideration of Appellants' motion to "clarify and enforce Rule 205," SCACR, the motion is denied. Appellants' motion was prompted by an order issued by the circuit court on October 5, 2023, which Appellants contend the circuit court lacked jurisdiction to issue. Appellants request that this court "enforce" its exclusive jurisdiction over the matters on appeal, confirm that the circuit court acted outside its jurisdiction in issuing the October 5 order, and "enjoin[]" the circuit court from proceeding further with regard to matters affected by this appeal. The order that was properly appealed to this court is the circuit court's March 31, 2023 order denying Appellants' motion to dissolve the receivership and motion to dismiss. This court will take no action on any order which is not properly before it. *See Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) ("Service of the notice of intent to appeal is a jurisdictional requirement . . . ."). Moreover, further "motions to clarify" filed by any party may not be considered by this court. *See* Rule 221(c), SCACR ("The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal.").

Debbie H. Verdin
FOR THE COURT

Columbia, South Carolina

FILED
Nov 21 2023

cc:
Wesley Brian Sawyer, Esquire
Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
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EXHIBIT B

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. 2023-CP-40-01759
Appellate Case No. 2023-001461

John A. Tibbs and Margaret B. Tibbs,

Respondents,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiw-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; ACL Asbestos Co; ACL Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric

Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC,

Defendants,

Of which Asbestos Corporation Limited is the

Appellant.

APPELLANT'S MOTION TO CONFIRM AUTOMATIC STAY AND/OR PURPORTED RECEIVER'S LACK OF JURISDICTION OR, ALTERNATIVELY, VERIFIED PETITION FOR SUPERSEDEAS

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Attorneys for Appellant

NOW COMES Appellant, Asbestos Corporation Limited ("ACL"), by and through its undersigned counsel, and, on the grounds set forth below, hereby moves this Honorable Court for the following relief:

(A) To confirm that the appealed orders in this matter are subject to the automatic stay under Rule 241(a), SCACR, such that the purported receiver for ACL appointed by the circuit court, South Carolina attorney Peter Protopapas ("Mr. Protopapas"), cannot act as purported receiver for ACL during the pendency of this appeal, and/or confirm that, pursuant to Rule 205, SCACR, Mr. Protopapas lacks jurisdiction to act as purported receiver for ACL during the pendency of this appeal or, alternatively,

(B) Assuming, *arguendo*, that the appealed orders are not subject to the automatic stay and Mr. Protopapas's jurisdiction is not lacking, to impose a supersedeas of the matters decided in the appealed orders pursuant to subsections (c) and (d) of Rule 241, such that Mr. Protopapas cannot act as purported receiver for ACL during the pendency of this appeal.

BACKGROUND

ACL is a corporation organized and existing under the laws of Canada, with its principal place of business in the Province of Quebec. (**Exhibit 1** [Richard Dufour Affidavit dated May 11, 2023] ¶ 2.) Prior to 1986, ACL engaged in the mining and milling of raw chrysotile asbestos fiber. (**Ex. 1** ¶ 10.) ACL did so solely in Canada; all its sales of asbestos were made F.O.B. Thetford Mines, Quebec, Canada; and all its obligations relating to such sales were performed in Canada. (**Ex. 1** ¶ 10.) ACL has never transacted any business in South Carolina, or even been registered to do so. (**Ex. 1** ¶¶ 3, 5, 7–8.) Nor has ACL ever owned or leased any real property in South

Carolina, maintained any bank accounts in South Carolina, received mail in South Carolina, appointed or authorized any agent to accept process for it in South Carolina, or commenced any litigation in South Carolina. (**Ex. 1** ¶¶ 4–9.) Most importantly, *ACL does not now have and never has had any judgments against it, nor any other indebtedness, in South Carolina*.

Respondents, John A. Tibbs ("Mr. Tibbs") and Margaret B. Tibbs ("Mrs. Tibbs") (collectively, "Plaintiffs"), filed this action in the Richland County Court of Common Pleas on April 5, 2023, alleging ACL and numerous other defendants exposed Mr. Tibbs to asbestos. (**Exhibit 2.1** [Original Complaint (omitting the contemporaneously filed Cytology Report and letter of Steven E. Haber, M.D.)].) Shortly thereafter, Plaintiffs filed the operative complaint, which is their First Amended Complaint, filed May 3, 2023. (**Exhibit 2.2** [First Amended Complaint (again omitting the contemporaneously filed Cytology Report and letter of Steven E. Haber, M.D.)].)

ACL was served in the Province of Quebec and timely responded to the suit on May 17, 2023, with a motion to dismiss for lack of personal jurisdiction. (**Exhibit 3** [ACL's Motion to Dismiss for Lack of Personal Jurisdiction].)

By order filed July 19, 2023, the circuit court, the Honorable Jean Hoefer Toal presiding, denied ACL's motion to dismiss,[1] whereupon ACL timely answered the operative complaint on August 2, 2023. (**Exhibit 5** [ACL's Answer to the First Amended Complaint].)[2]

[1] (**Exhibit 4** [Order Denying ACL's Motion to Dismiss for Lack of Personal Jurisdiction].)

[2] To be clear, in answering the operative complaint, ACL expressly raised and did not waive its jurisdictional objection/defense. (**Ex. 5** ¶ 249.) ACL continues to expressly reserve and not waive its jurisdictional challenge, and nothing herein is intended to waive or otherwise undermine its denial of personal jurisdiction.

The circuit court's order denying ACL's motion to dismiss for lack of personal jurisdiction ordered ACL "to answer discovery and to produce a [Rule] 30(b)(6)[, SCRCP,] witness by July 24, 2023." (**Ex. 4**.) ACL answered certain discovery and advised Plaintiffs' counsel prior to the scheduled deposition date that, due to the age of the claim and the death or unknown whereabouts of former employees, as well as applicable Quebec law, specifically, the Quebec Business Concerns Records Act ("QBCRA"), it could not produce a Rule 30(b)(6) witness to address the multitude of topics Plaintiffs identified for examination. ACL did, however, produce numerous transcripts of depositions and trial testimony by former employees in an effort to provide information to Plaintiffs. Neither Plaintiffs' counsel nor the circuit court paid any attention to ACL's attempt to provide testimony and documents that did not violate the QBCRA. ACL has not attached these materials because they are voluminous, but they were all electronically filed in the circuit court on August 9, 2023, and as such, they are available on the Richland County Public Index via sccourts.org, and of course, should the Court wish for ACL to provide them directly, it will gladly do as instructed.

On July 26, 2023, Plaintiffs moved to hold ACL in contempt and strike its answer to the operative complaint for its alleged willful failure to comply with the circuit court's order requiring it to comply with Plaintiffs' operative notice of ACL's Rule 30(b)(6) deposition and accompanying subpoena duces tecum (the "operative deposition notice and subpoena"). (**Exhibit 6** [Plaintiffs' Motion to Hold ACL in Contempt and Strike its Answer].)[3] Then, anticipating the success of their motion to hold ACL in contempt and strike its answer, Plaintiffs filed another motion on July 28,

[3] Specifically, the operative deposition notice and subpoena was Plaintiffs' second amended notice/subpoena, served July 11, 2023, which noticed ACL's Rule 30(b)(6) deposition (and set the deadline for the corresponding document production) for July 24, 2023. (**Exhibit 7** [Plaintiffs' Second Amended Rule 30(b)(6) Deposition and Subpoena Duces Tecum to ACL].).

2023, asking the circuit court, "[s]hould [it] strike ACL's pleadings," to appoint a receiver for ACL. (**Exhibit 8** [Plaintiffs' Motion to Appoint a Receiver for ACL (omitting exhibits)].) In fact, they specifically requested that Mr. Protopapas be appointed receiver. (**Ex. 8** p. 4.)

In opposition to Plaintiffs' motions to hold it in contempt, strike its answer, and appoint a receiver for it, ACL argued to the circuit court that it had not willfully failed to comply with the court's directive that it comply with the operative deposition notice and subpoena. (**Exhibit 9** [ACL's Memo in Opposition to Plaintiffs' Motion to Hold it in Contempt, Strike its Answer, and Appoint a Receiver (omitting exhibits)].) Rather, as ACL explained, because it had been nearly 40 years since it had ceased its asbestos operations, it does not have the personnel (i.e., current, or even former, employees or other individuals with the requisite personal knowledge) to address the topics Plaintiffs identified for examination or the records necessary to meaningfully "educate" someone to do so, and the QBCRA applies to ACL and subjects it to criminal penalties in Quebec if it produces information and documents Plaintiffs sought. (**Ex. 9**.)[4] ACL further explained that, notwithstanding the challenging circumstances, it had still attempted to comply with circuit court's order insofar as it was able to do so, having duly answered the court ordered interrogatories on July 24, 2023; called Plaintiffs' counsel in advance of the appointed time for ACL's Rule 30(b)(6) deposition to advise that ACL was unable to produce a designee(s) to address the topics Plaintiffs

[4] ACL has always been careful to raise the QBCRA to avoid any noncompliance or waiver arguments. Among other things, the QBCRA provides as follows:

> [N]o person shall, pursuant to any requirement issued by any . . . judicial . . . authority outside of Quebec, remove or cause to be removed, or send or cause to be sent, from any place in Quebec to any place outside Quebec, any document or resumé or digest of any document relating to any concern.

(**Exhibit 10** [QBCRA] § 2.)

identified for examination; and produced to Plaintiffs copies of more than a dozen transcripts of sworn testimony by ACL witnesses in earlier litigation, when these now-deceased witnesses were still alive. (**Ex. 9**.)

By order filed September 8, 2023, the circuit court granted Plaintiffs' motion to hold ACL in contempt and strike its answer, rendering it in default. (**Exhibit 11** [Order Holding ACL in Contempt and Striking its Answer].) No default *judgment* was or has been rendered against ACL. By separate order filed the same day, the circuit court also appointed Mr. Protopapas as receiver for ACL. (**Exhibit 12** [Order Appointing a Receiver].)

Although "'[t]he appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution,'"[5] and, indeed, "'a receiver will not be appointed during the progress of a cause, unless . . . there is danger that the property will be materially injured before the case can be determined,'"[6] the circuit court both incautiously relied on erroneous legal reasoning that is unsupported by our state's existing appellate jurisprudence and inappropriately appointed a receiver for ACL during the progress of this action in the absence of the requisite evidence of any immediate threat of danger to any property that is the subject of this action while at the same time granting Mr. Protopapas the purported power to control all of ACL's asbestos litigation in the United States. This is especially troublesome here, given the "special vigilance" that American

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[5] *Richland County v. S.C. Dep't of Revenue*, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018) (quoting *Midlands Util., Inc. v. S.C. Dep't of Health & Envtl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989)).

[6] *Id.* (quoting *Pelzer v. Hughes*, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887) (internal quotation marks and citation omitted)); *see also id.* at 312–13, 811 S.E.2d at 769 ("South Carolina Code section 15-65-10 sets forth the circumstances under which the appointment of a receiver is appropriate. Before judgment is rendered, 'A receiver may be appointed by a judge of the circuit court . . . on the application of either party when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired . . . .'").

courts are required to exercise "to protect foreign litigants," such as ACL, "from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 546 (1987) ("American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. . . . Objections to 'abusive' discovery that foreign litigants advance should therefore receive the most careful consideration. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.") (internal citations omitted).[7]

Nonetheless, according to the circuit court, it had the authority to appoint a receiver with respect to ACL's so-called "insurance assets" in South Carolina, which, in turn, authorized it to grant the receiver control over all of ACL's asbestos litigation nationwide. There being no precedent in our case law for such a receivership, the circuit court attempts to justify the receivership by pointing to S.C. Code Ann. § 38-61-10, which provides that "[a]ll contracts of insurance on property, lives, or interests in South Carolina are considered to be made in the State and . . . subject to the laws of this State," and simply concluding "that 'South Carolina substantive law governs [the insuring assets of ACL]'" and, "[t]hus, the appointment of a receiver over those assets is appropriate." (**Ex. 12** p. 5.) The circuit court also concluded that, because, by virtue of

[7] In reality, the receivership here is not a conventional receivership in any way, but rather an improper discovery sanction, stemming solely from ACL's inability (for the reasons explained above) to produce the demanded Rule 30(b)(6) witness and records.

its answer having been stricken, ACL was in default, even though there was no default judgment against ACL, obtaining one would just be a ministerial process. (**Ex. 12** p. 2 n.2.)[8]

To be clear, it is not the case that Plaintiffs simply moved for the appointment of "a receiver" and the circuit court selected Mr. Protopapas solely of its own accord. Rather, Plaintiffs expressly asked the circuit court to appoint Mr. Protopapas, in particular, as receiver for ACL,[9] and the circuit court obliged. (**Ex. 12**.) On information and belief, this is approximately the 20th time that Mr. Protopapas has been appointed as a receiver in an asbestos case, and his appointment has primarily come at the urging of the particular law firms representing Plaintiffs in this case. No one knows what the receiver or the attorneys that he hires when not using his own firm are making off of their actions as the circuit court seals *all* records related to fees.

Indeed, for example, ACL knows for certain that the same law firms representing Plaintiffs in the instant case have succeeded in having Mr. Protopapas appointed as receiver for Atlas Turner, Inc., f/k/a Atlas Asbestos Co. ("Atlas"), in an asbestos case styled *Welch v. Advance Auto Parts, Inc., et al.*, Richland County Case No. 2022-CP-40-03834 ("*Welch*");[10] that, based on his purported appointment as receiver for Atlas in *Welch*, Mr. Protopapas has purported to act on Atlas's behalf with respect to another asbestos case Plaintiffs' counsel are pursuing styled *Perry et al. v.*

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[8] This conclusion is clearly erroneous as a matter of law. While the act of noting an *entry* of default in the clerk's file book may be a ministerial act, the process of actually entering a default *judgment* (especially in a case of unliquidated damages like this) certainly is not. *See Beckham v. Durant*, 300 S.C. 329, 387 S.E.2d 701 (Ct. App. 1989); *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1987) (party requesting default judgment not entitled to one as a matter of right); *see also* Rule 55(b)(2), SCRCP (regarding the procedure for obtaining a default judgment in all cases other than cases involving liquidated damages or sum certain amounts).

[9] (**Ex. 8** p. 4.)

[10] The undersigned counsel for ACL also represents Atlas in *Welch*, and Atlas's appeal of the circuit court's order appointing Mr. Protopapas as receiver in *Welch* (and other related orders) is currently pending before this Court as Appellate Case No. 2023-001096.

American International Industries et al., Richland County Case No. 2023-CP-40-04072 ("*Perry*"); and that, according to the *Perry* Plaintiffs' motion for default judgment against Atlas, Mr. Protopapas has purported to accept service for Atlas in *Perry* and based on this purported acceptance of service, the *Perry* Plaintiffs contend that Atlas is in default, Mr. Protopapas having failed to see that an answer (or other acceptable form of response to the *Perry* Plaintiffs' complaint) was made on behalf of Atlas. (**Exhibit 13** [Affidavit of Default and Motion for Default Judgment Against ACL in *Perry*].)

Moreover, in the instant case, on September 8, 2023, the same day the circuit court's order appointing him as receiver for ACL was filed, based on his purported authority as receiver for ACL, Mr. Protopapas emailed a letter purporting to fire ACL's chosen counsel (the undersigned), stating:

> Dear Mr. Brown:
>
> Pursuant to the attached Order of Appointment, I have authority to hire and fire defense counsel for [ACL]. Please accept this letter as terminating your services for defending ACL. Please provide your entire ACL file to me.
>
> . . .
>
> Sincerely,
>
> *Peter D Protopapas*

(**Exhibit 14** [Mr. Protopapas's Letter Purporting to Terminate ACL's Counsel].)

By notice of appeal served and filed September 13, 2023, ACL timely appealed the circuit court's orders holding ACL in contempt and striking its answer and appointing Mr. Protopapas as receiver for ACL, both of which orders were filed September 8, 2023. (**Exhibit 15** [Notice of Appeal (omitting copies of the appealed orders, all of which are already otherwise attached as exhibits) and Proof of Service].)

This motion/petition asks the Court (A) to confirm that the appealed orders in this matter are subject to the automatic stay under Rule 241(a), such that Mr. Protopapas cannot act as purported receiver for ACL during the pendency of this appeal, and/or confirm that, pursuant to Rule 205, Mr. Protopapas lacks jurisdiction to act as purported receiver for ACL during the pendency of this appeal or, alternatively, (B) assuming, *arguendo*, that the appealed orders are not subject to the automatic stay and Mr. Protopapas's jurisdiction is not lacking, to impose a supersedeas of the matters decided in the appealed orders pursuant to subsections (c) and (d) of Rule 241, such that Mr. Protopapas cannot act as purported receiver for ACL during the pendency of this appeal.

ARGUMENT

I. The Court should confirm that the appealed orders are subject to the automatic stay under Rule 241(a) and/or that Mr. Protopapas lacks jurisdiction to act as purported receiver for ACL during the pendency of this appeal.

Because there is a dispute about whether the automatic stay applies here, ACL must turn to this Court, not the circuit court, to resolve the dispute. *See Kearney v. Allen*, 287 S.C. 324, 327–28, 338 S.E.2d 335, 337–38 (1985) (interpreting former Supreme Court Rule 41 and holding that, when no procedure is specified, authority to resolve disputes over whether the automatic stay applies is vested in the Supreme Court, not the circuit court); *State v. Cooper*, 342 S.C. 389, 398, 536 S.E.2d 870, 875–76 (2000) (modifying *Kearney* to hold that the Court of Appeals has the power and authority to rule upon issues arising under the South Carolina Appellate Court Rules, including those arising under Rule 241). As explained below, the Court should confirm that the

automatic stay applies—as, indeed, by their motion to *lift* the automatic stay in the substantially similar case of *Welch*, even Plaintiffs' counsel themselves once admitted.[11]

Subsection (a) of Rule 241 establishes the following general rule that the service of a notice of appeal acts to automatically stay the appealed order(s):

> **(a) General Rule.** As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Subsection (b) of Rule 241, quoted as follows, recognizes the existence of (and lists some, but not all, of the) certain discrete exceptions to the general rule in subsection (a) that "are found in statutes, court rules, and case law":

> **(b) Exceptions.** The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be

[11] Again, the undersigned counsel for ACL also represents Atlas in *Welch*, which is another asbestos case being pursued by the same attorneys who represent Plaintiffs in the instant case, and Atlas's appeal of the circuit court's order appointing Mr. Protopapas as receiver in *Welch* (and other related orders) is currently pending before this Court as Appellate Case No. 2023-001096. After Atlas noticed its appeal in *Welch*, Plaintiffs' counsel filed a motion asking the circuit court "to lift the automatic stay in this matter as to the appointment of a receiver for [Atas]." (**Exhibit 16** [Motion to Lift Automatic Stayin *Welch*].) Logic dictates that to *lift* a stay requires that there must first *be* a stay to lift. Although Plaintiffs' counsel would go on to withdraw the motion after the circuit court denied it, the very fact that they moved to lift the automatic stay (and, for that matter, the plain language of the motion itself) proves that even Plaintiffs' counsel themselves had good reason to believe that there was in fact a stay to lift. (**Ex. 16** p. 1 (asking the circuit court "to lift the automatic stay in this matter as to the appointment of a receiver for [Atlas]."); *see also id.* at p. 3 (referring to "the automatic stay imposed by Atlas' filing of its Notice of Appeal"), p. 5 ("Given that the appointed receiver is, during the pendency of this appeal, prohibited from acting . . . ."), p. 5 (requesting "that [the circuit court] lift the automatic stay imposed by Atlas' filing of its notice of appeal").)

> strictly complied with. A list of some, but not all, of the exceptions to the general rule is:
>
> **(1)** Money judgments as provided in S.C. Code Ann. § 18-9-130.
>
> **(2)** Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150.
>
> **(3)** Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. § 18-9-160.
>
> **(4)** Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170.
>
> **(5)** Judgments directing the sale of perishable property as provided in S.C. Code Ann. § 18-9-220.
>
> **(6)** Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. § 63-3-630.
>
> **(7)** Worker's compensation awards as provided in S.C. Code Ann. § 42-17-60.
>
> **(8)** An appeal from an order granting an injunction or temporary restraining order.
>
> **(9)** Family court orders awarding temporary suit costs or attorney's fees as provided in S.C. Code Ann. § 63-3-530(A)(2).
>
> **(10)** Ejectment orders as provided in S.C. Code Ann. § 27-37-130 and S.C. Code Ann. § 27-40-800.
>
> **(11)** Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600 (G)(5).

Clearly, the appealed orders here do not fall within any of the exceptions listed in Rule 241(b). Nor is there any question otherwise as to whether the instant appeal has the effect of automatically staying the operation of the order appointing Mr. Protopapas as receiver for ACL.

Mr. Protopapas's appointment as receiver for ACL is based on the circuit court's order holding ACL in contempt and striking its answer. (**Ex. 12** p. 3 ("But where, as here, ACL's answer

has been struck, and thus only a ministerial action being left for ACL to be in judgment, a receiver to take possession of and, to the extent necessary, litigate ACL's insurance assets as well as to assume control of the defense of asbestos claims made against ACL in the United States is exactly the type of historical circumstances, the Court's [sic] of this state have found appropriate.").). In striking ACL's answer, the power that the circuit court purported to exercise was not the "traditional contempt power[]," but rather the power to sanction discovery violations under Rule 37, SCRCP. *See In re Anonymous Member of the S.C. Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001) (citing Rule 37 for the proposition that "*[i]n addition to their traditional contempt powers*, judges may issue orders as a sanction for improper deposition conduct . . . [including] striking out pleadings or parts thereof . . . .") (emphasis added); (*see also* **Ex. 12** pp. 2–3 (citing only cases having to do with discovery violations punishable under Rule 37).) An order striking an answer is immediately appealable under S.C. Code Ann. § 14-3-330(2)(c) (authorizing an immediate appeal of or an order "strik[ing] out an answer or any part thereof or any pleading in any action"). Accordingly, ACL's proper appeal of the circuit court's order striking its answer triggers the "general rule" under Rule 241(a) that "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order . . . on appeal, and to automatically stay the relief ordered in the appealed order . . . ." In the absence of any exception to this general rule with respect to orders striking a party's pleading (of which ACL is unaware), the circuit court's order striking ACL's answer is stayed pursuant to Rule 241(a), and in turn, its order appointing Mr. Protopapas as receiver for ACL is effectively stayed because that order is based on the circuit court's order striking of ACL's answer.

To be clear, ACL recognizes that, pursuant to Rule 62(a), SCRCP, "an interlocutory or final judgment . . . in a *receivership action* . . . shall not be stayed . . . during the pendency of an

appeal" (emphasis added), and ACL also recognizes that S.C. Code Ann. § 14-3-450 provides, "In case of an appeal under item (4) of Section 14-3-330[12] the proceedings in other respects in the court below shall not be stayed during the pendency of such appeal unless otherwise ordered by the court below." But Rule 62(a) and § 14-3-450 are of no consequence here. The order appointing Mr. Protopapas as receiver for ACL was not issued in a vacuum. Again, by its own terms, it is founded on the circuit court's order holding ACL in contempt and striking its answer, which, as explained above, is automatically stayed under Rule 241(a). The stay of this underlying order—which is substantively and procedurally upstream of and essential to the order appointing Mr. Protopapas as receiver for ACL, and on which neither Rule 62(a) nor § 14-3-450 has any bearing—effectively stays the order appointing Mr. Protopapas as receiver for ACL, too.

Assuming, *arguendo*, Rule 62(a) and/or § 14-3-450 were relevant here, neither of them upsets the automatic stay under Rule 241(a). The instant lawsuit alleges personal injury and seeks money damages. It is not an action by any appointed receiver. The term "receivership action" refers to a type of action that is different from the instant personal injury lawsuit. *See, e.g., U.S. v. S. Growth Indus., Inc.*, 251 S.C. 404, 406, 162 S.E.2d 849, 850 (1968) ("This litigation arises because the United States of America filed a petition within the *receivership action* against the receiver and against John H. Mauldin.") (emphasis added); *Lindsay v. Main Ins. Co.*, 281 S.C. 331, 332, 315 S.E.2d 166, 167 (Ct. App. 1984) ("At the time of this hearing, a *receivership action* had been instituted in Illinois.") (emphasis added). Rule 62(a) applies to "receivership actions," and as the instant lawsuit is not a "receivership action," Rule 62(a) is not applicable here.

[12] Section 14-3-330(4) authorizes an immediate 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."

As for § 14-3-450, the critical phrase is "in other respects." Section 14-3-450 provides, "In case of an appeal under item (4) of Section 14-3-330 the proceedings *in other respects* in the court below shall not be stayed during the pendency of such appeal unless otherwise ordered by the court below" (emphasis added). Logically, for the legislature to declare that the lower court proceedings shall not be stayed in *other* respects is also for it to declare that they shall indeed be stayed in at least *some* respect. By its plain language, § 14-3-450 provides that, with respect to an appeal under § 14-3-330(4) of "[a]n interlocutory order . . . granting . . . the appointment of a receiver," the proceedings in the lower court "in other respects," i.e., in respects *other than* the appointment of the receiver (the particular subject of the appeal), are not stayed by the appeal, which means that in respect *of* the appointment of the receiver, there is a stay.

Moreover, besides the issue of a stay under Rule 241(a), there is also the issue of jurisdiction under Rule 205, which provides that, "[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal" and limits the lower court's jurisdiction to "matters not affected by the appeal." Accordingly, upon the service of the notice of appeal, Rule 205 "divests the [lower] court of jurisdiction over all matters affected by the appeal." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 532, 787 S.E.2d 485, 493 (2016).

"A receiver *represents the court* appointing him. He is an officer of the court and is *the agency through which the court acts*[]" and "takes possession of [assets] as *the arm of the court* . . ." *Jeffcoat v. Morris*, 300 S.C. 526, 528, 389 S.E.2d 159, 160 (Ct. App. 1989) (emphasis added), *overruled on other grounds by United Carolina Bank v. Caroprop, Ltd.*, 316 S.C. 1, 446 S.E.2d 415 (1994) (citing *Kirven v. Lawrence*, 244 S.C. 572, 137 S.E.2d 764 (1964), and *Carwile v. Metropolitan Life Ins. Co.*, 136 S.C. 179, 134 S.E. 285 (1926)).

Obviously, Mr. Protopapas's receivership is at issue in this appeal, and in turn, all acts taken by Mr. Protopapas as purported receiver for ACL while this appeal is pending are matters affected by the appeal. As the arm of the court appointing him and the agency through which that court acts, Mr. Protopapas's power to act is necessarily dependent on the circuit court's power to act itself, such that where, as here, the circuit court is divested of its power to act, i.e., its jurisdiction, so, too, must be Mr. Protopapas.

Accordingly, for the foregoing reasons, the Court should confirm that the appealed orders in this matter are subject to the automatic stay under Rule 241(a), such that Mr. Protopapas cannot act as purported receiver for ACL during the pendency of this appeal, and/or confirm that, pursuant to Rule 205, Mr. Protopapas lacks jurisdiction to act as purported receiver for ACL during the pendency of this appeal.

II. Even assuming, *arguendo*, the automatic stay under Rule 241 does not apply to the appealed orders and Mr. Protopapas's jurisdiction is not lacking, the Court should impose a supersedeas.[13]

In determining whether to grant a supersedeas, the Court "should consider whether [it] is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." It is hard to imagine a better illustration of the need for a supersedeas than that provided by Mr. Protopapas's purported acceptance of service and default on behalf of Atlas in the substantially similar case of *Perry*. (**Ex. 13**.) Like the order in the instant case appointing Mr.

[13] ACL recognizes that Rule 241(d)(1) provides that, "[e]xcept where extraordinary circumstances make it impracticable, an application . . . for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal," but submits that, under the circumstances, because of the combination of this alternative request for supersedeas with ACL's primary request for confirmation of the automatic stay (which request, as explained, is not properly addressed to the lower court, but only to this Court), it is impracticable to first pursue supersedeas in the lower court and/or there is otherwise good cause for this Court to consider the within petition for supersedeas in the interests of justice and judicial economy.

Protopapas as receiver for ACL, which directs Mr. Protopapas to "take any all steps necessary to *protect the interests of ACL* whatever they may be,"[14] the order in *Welch* appointing Mr. Protopapas as receiver for Atlas expressly directs him to "take any all steps necessary to *protect the interests of Atlas* whatever they may be." (**Exhibit 17** [Order Appointing Receiver in *Welch*] p. 6 (emphasis added).) Yet, without any notice to Atlas itself, and despite knowing full well that Atlas denies and disputes the existence of personal jurisdiction and wishes to preserve this defense, Mr. Protopapas has not protected the interests of Atlas, but rather has used his purported authority under the order in *Welch* appointing him as receiver for Atlas to purportedly accept service on Atlas's behalf in *Perry*, only for the *Perry* Plaintiffs to now claim that Atlas is in default (and, thus, deemed to have admitted the allegations of the *Perry* Plaintiffs' complaint and to have waived all affirmative defenses thereto[15]) based on Mr. Protopapas's purported acceptance of service and failure thereafter to see that any response to the *Perry* complaint was timely made on Atlas's behalf.

On September 8, 2023, the very day the circuit court's order appointing him as receiver for ACL was filed, Mr. Protopapas's first act as purported receiver for ACL was to purport to fire the counsel that ACL itself has chosen to protect its interests. To turn Mr. Protopapas loose to exercise

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[14] (**Ex. 12** p. 6 (emphasis added).)

[15] *See Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the [opposing party's] allegations and to have conceded liability."); *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002) ("The failure to plead an affirmative defense is deemed a waiver of the right to assert it."); *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978) ("By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint.") (internal quotation marks and citation omitted); *Ammons v. Hood*, 288 S.C. 278, 282, 341 S.E.2d 816, 818 (Ct. App. 1986) ("Hood . . . argues the trial court erred in not dismissing the action at the conclusion of the damages hearing since workers' compensation is Ammons' exclusive remedy . . . . A defendant who wishes to raise the exclusivity of workers' compensation as a defense must do so affirmatively. Since Hood did not answer, the trial court correctly denied the motion.") (internal citation omitted).

the powers purportedly conferred upon him by the circuit court would allow him to go ahead and do all the things that the instant appeal challenges before ACL even has a chance to be heard in this Court. In other words, it would not prevent a contested issue from becoming moot, but rather guarantee it does. Simply put, if Mr. Protopapas is allowed to act as purported receiver for ACL during the pendency of this appeal, ACL's right to a meaningful appeal of his appointment (and the orders related thereto) is eviscerated. Meanwhile, there is no risk to Plaintiffs if Mr. Protopapas is prohibited from acting as purported receiver for ACL during the pendency of this appeal.

Accordingly, for the foregoing reasons, even assuming, *arguendo*, the automatic stay under Rule 241 does not apply to the appealed orders and Mr. Protopapas's jurisdiction is not lacking, the Court should impose a supersedeas, such that Mr. Protopapas cannot act as purported receiver for ACL during the pendency of this appeal.

III. The facts of this case are unique from other alleged receiverships, and it is not guided or controlled by the order filed September 8, 2023, in *Childers v. Davis Mechanical Contractors, Inc.*, Appellate Case No. 2023-000727.

ACL anticipates that Plaintiffs and Mr. Protopapas will argue that this Court has addressed these very issues in *Childers*. It has not. The differences between these two cases are stark.

In *Childers*, the circuit court established a receivership with respect to a *dissolved* company, Payne & Keller, where all parties acknowledged that Payne & Keller was a former Texas corporation dissolved in 1986. It was argued, among other things, that the receivership should be stayed until the appeal of the denial of the motion to dissolve the receivership was decided. A single judge of this Court heard a motion on the matter and ruled that the appeal would proceed but there would be no stay during the pendency of the appeal. ACL takes no position on the propriety of this ruling as its underlying facts and supporting case law materially differ from the instant case.

First, the instant appeal is not only of the circuit court's order appointing Mr. Protopapas as receiver for ACL but also of the circuit court's underlying order holding ACL in contempt and striking its answer, and the stay of this underlying order effectively stays the order appointing Mr. Protopapas as receiver for ACL, too. Nothing like this was involved in *Childers*.

Additionally, the Court's order in *Childers* addressed only the issue of the *stay*, not the *jurisdictional* issue relating to the divestment of the circuit court's jurisdiction upon the service of the notice of appeal and the receiver's existence as the arm of that court and the agency through which it acts.

Moreover, upon information and belief, outside of the purported ACL and Atlas receiverships, none of the prior receiverships have been against "live" companies with boards of directors making decisions about corporate governance and operations. None involved a corporation established in a foreign country with no assets in South Carolina. In the prior cases where receiverships were established, most (if not all) involved essentially "dead" companies, for lack of a better expression, where no one fought the appointment of a receivership at that time. ACL and Atlas were the first to step forward and assert their rights as Canadian corporations not operating in South Carolina with no assets in South Carolina to argue that the circuit court could not take control via a receivership over any part of the company, such as its so-called "insurance assets."

In the other cases, no one with a legitimate interest received notice of the purported receiver's actions. As such, no one contested the various receiverships because the companies were long since dissolved. The ruling of the circuit court in this case moves the receiver into allegedly taking control of the so-called "insurance assets" of a live corporation that is still in existence and located in a foreign country with no assets in this state. It does so without any

citations to applicable or viable law of South Carolina. If the purported receiver settles cases on behalf of ACL and his appointment is later reversed, how will ACL be made whole? This is the very reason we have stays in certain appeals. This is a textbook example of why this Court should recognize that the automatic stay is in place, or in the alternative issue a writ of supersedeas, and place a hold on all proceedings pending the instant appeal.

If the purported receiver is allowed to act with no true restrictions, he will have the authority to decide which claims get settled and which claims get nothing. Since the circuit court seals all documents related to legal fees received by the receiver and his attorneys in every case, no one will ever know if justice was done.

CONCLUSION

WHEREFORE, ACL moves/petitions the Court (A) to confirm that the appealed orders in this matter are subject to the automatic stay under Rule 241(a), such that Mr. Protopapas cannot act as purported receiver for ACL during the pendency of this appeal, and/or confirm that, pursuant to Rule 205, Mr. Protopapas lacks jurisdiction to act as purported receiver for ACL during the pendency of this appeal or, alternatively, (B) assuming, *arguendo*, that the appealed orders are not subject to the automatic stay and Mr. Protopapas's jurisdiction is not lacking, to impose a supersedeas of the matters decided in the appealed orders pursuant to subsections (c) and (d) of Rule 241, such that Mr. Protopapas cannot act as purported receiver for ACL during the pendency of this appeal.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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November 22, 2023

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Nov 29 2023
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. 2023-001461

John A. Tibbs and Margaret B. Tibbs, ... Respondents,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiw-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden 3 North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA,

Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC ..... Defendants,

of which

Asbestos Corporation Limited, is the ..... Appellant.

PROOF OF SERVICE

Pursuant to Rule 262(c)(3), SCACR, I certify that I have caused the **CHUBB INSURERS' REPLY IN SUPPORT OF MOTION TO CLARIFY AND ENFORCE RULE 205** to be served on the following counsel of record by AIS email at the following addresses:

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Columbia, South Carolina
November 29, 2023

Toni Hawkins

From: Toni Hawkins
Sent: Wednesday, November 29, 2023 3:35 PM
To: 'sbrown@ycrlaw.com'; 'rhines@ycrlaw.com'; 'tgandy@ycrlaw.com'; 'TMcVey@kassellaw.com'; 'jrutkoski@kassellaw.com'; 'achapman@dobslegal.com'; 'dhumen@dobslegal.com'; 'Peter Protopapas'; 'jchandler@rplegalgroup.com'; 'bb@rplegalgroup.com'; murrell@smithrobinsonlaw.com; Jon Robinson; Shanon Peake
Cc: Kevin K. Bell; 'Danny Nieto'; 'lindsay@rplegalgroup.com'
Subject: 2023-001461 Tibbs v. Asbestos Corporation Limited appeal - Chubb Insurers Reply in Support of Motion to Clarify and Enforce Rule 205
Attachments: Chubb Insurers' Reply to Clarify and Enforce Rule 205.pdf

Please find attached for service a copy of Century Indemnity Company and Federal Insurance Company (Chubb Insurers') Reply in Support of Motion to Clarify and Enforce Rule 205 which is being filed with the Court of Appeals today.

Thank you.
Toni Hawkins

ROBINSON GRAY
Litigation + Business

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