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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

Jean Hoefer Toal, Chief Justice (Ret.) and Acting Circuit Court Judge

Case No. 2021-CP-40-03484

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.; and 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 its 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.

**RESPONDENT'S REPLY TO APPELLANTS' RETURNS TO
MOTION FOR SANCTIONS PURSUANT TO RULE 269**

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent Payne & Keller Company, By and Through its Duly Appointed Receiver, Peter D. Protopapas ("the Receiver") hereby submits this Reply to Appellants' Returns in Opposition to the Receiver's Motion for Sanctions.¹

¹ Appellants are 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 (collectively, "AIG Insurers"); and Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company ("Travelers").

Appellants attempt to misdirect this Court from evaluating their continued improper and dilatory activity by arguing they are simply litigants who are seeking routine appellate review. Appellants would have this Court believe that they are operating within the confines of South Carolina rules and law—business as usual. They further deflect addressing their devious behavior by claiming they are not alone in filing these appeals, pointing to other insurance carriers in receivership matters that have filed similar interlocutory requests for appellate relief.

They are correct—there is a coordinated effort by carriers to avoid the discovery of applicable insurance coverage which the Receiver has been tasked to identify and marshal in connection with his appointments. In recent years, our appellate courts have seen an unprecedented number of interlocutory appeals and appellate motions practice filed in receivership actions by Appellants and other insurers in a coordinated attempt to frustrate the purpose of the receiverships and delay the disposition of these cases in the circuit court. Distancing themselves from others’ bad acts does not excuse Appellants’ behavior before this Court. It is axiomatic that being in bad company does not relieve another wrongdoer of its own bad acts. In fact, this illustrates the escalating widespread efforts by insurers, including Appellants, to burden the appellate courts and halt progress in the circuit court. Here, Travelers does not even bother to address its and its attorneys’ many failed attempts to improperly pursue interlocutory appeals and extraordinary writs.² These efforts and tactics are not, and should not, be business as usual as

² Travelers’ affiliate United States Fidelity & Guaranty Company (“USF&G”), represented by the same counsel as Travelers here, was recently admonished by this Court for its refusal to directly answer questions posed by this Court. The Court noted USF&G’s filing was “largely unresponsive” to the very specific questions the Court ordered USF&G to answer. *See Protopapas v. Wall, Templeton & Haldrup, P.A.*, ___ S.C. ___, ___ S.E.2d ___, 2023 WL 8102870, at *3 (S.C. Ct. App. Nov. 22, 2023). The Court also noted USF&G’s “systematic destruction of historical insurance coverage documentation in the hope that policyholders would be unable to produce the policy records necessary to establish coverage.” *Id.* at *2.

Appellants would have this Court believe. These efforts are an abuse of the system.

The emergency motion filed by Appellants was another such improper effort. What is particularly alarming in the instant appeal is the coordinated effort to delay proceedings in South Carolina while Appellants forum shop for a favorable judgment in Texas.³ This behavior should be stopped, or it will, as history has shown, continue. This Court has broad discretion pursuant to Rule 269, SCACR, to sanction parties and discourage this conduct.

Despite this Court ruling on two occasions in this particular appeal, Appellants continue to refuse to accept this Court's ruling that the receivership may continue during the pendency of this appeal and the Receiver may carry out his court-appointed duties. Travelers renews its "belief" that this Court's reasoning in the September 8 Order was wrong and, in fact, is proceeding in Texas on that belief through its efforts to appoint a different receiver. (Travelers Ret. p. 3.) Still, Appellants assert this Court has not considered their oft repeated arguments and argue this Court does not mean what it says.

If this alone were not enough to justify sanctions, Travelers and its attorneys and Appellant National Union Fire Insurance Company of Pittsburgh, PA ("National Union") are presently seeking to usurp these proceedings in Texas in search of a different outcome. Additionally, in

³ In their Returns, Appellants contend that they want a speedy resolution of this appeal and have failed to file their initial briefs because the South Carolina Appellate Case Management System ("C-Track") labels the appeal as "Held in Abeyance" due to the pending motion by Zurich American Insurance Company ("Zurich") to be added as a party. (See *AIG Insurers Ret.* p. 9; *Travelers Ret.* p. 12.) However, Rule 240(b), SCACR, explicitly provides that only two classes of motion stay the time limits for perfecting an appeal: (1) motions to dismiss, and (2) motions to relieve counsel. Zurich's motion is neither of these. Rule 240(b) further provides, "Unless otherwise provided by these Rules, or ordered by the appellate court, the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition." As the Appellate Court Rules do not otherwise provide for a stay under these circumstances, and this Court has not ordered that Appellants' initial briefing deadline has been stayed, the Receiver believes Appellants' initial briefs are currently past due, regardless of what the C-Track website may indicate, and respectfully requests that this Court order Appellants to immediately serve and file their initial briefs.

violation of this Court's order, they continue to take the position that the Receiver and Receivership Court are powerless to act during the appeal. This is not only contrary to this Court's direct order but also to South Carolina law. *See* September 8 Order; S.C. Code Ann. § 14-3-450 ("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."); *cf. Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 589, 694 S.E.2d 15, 18 (2010) ("[U]nless ordered by the trial court, an appeal from a preliminary injunction order does not prevent the case moving forward on the merits."); *id.* (relying on section 14-3-450). These actions are an affront to South Carolina jurisprudence.

In one breath, Travelers argues it has at all times acted in accordance with this Court's September 8, 2023 Order, and in another it once again argues the circuit court does not have jurisdiction because the question of whether the receivership can continue to exist or function is a matter solely before this Court. Appellants have shown that they will continue to ignore rulings of this Court that do not fit their own narrative. The September 8 Order conclusively established that the receivership can continue during the pendency of this appeal. In no uncertain terms, this Court stated: "the receivership action and the receiver's ability to carry out his duties are not stayed." Appellants wish this Court to believe they are in compliance with its directives and are merely seeking to preserve the status quo for appellate review. However, at the same time it argues the status quo should be preserved, Travelers and its counsel have sought to vacate the circuit court's orders in a Texas court and have sought the appointment of a new receiver in Texas. National Union has joined Travelers in seeking to invalidate a South Carolina circuit court order.

As Travelers has done on many occasions over the years, it engages duplicative positions that cannot be reconciled. Travelers argues this Court has exclusive jurisdiction over the

appointment of the present Receiver while at the same time seeking to have a different Receiver appointed in Texas in blatant disregard of the South Carolina judiciary and its proceedings. In further defiance of this Court and the trial court, Travelers has engaged the same lawyers who are complicit in these actions.

Even now, Appellants fail to accurately report the facts to this Court. Having domesticated the Order revoking Payne & Keller's dissolution, the Receiver gave notice of the domestication to Appellants on October 23, 2024. Appellants take issue with the timeframe in which the Receiver provided notice; however, Appellants have moved to intervene in Texas and have even initiated declaratory judgment actions in Texas to request affirmative relief from the Texas court.

Travelers' argument that "its litigation decision[s in Texas are] in no way inconsistent with Travelers' arguments to this Court" is mindboggling. (Travelers' Ret. pp. 9–10.) Contrary to Travelers' representations to this Court, it is not simply seeking to intervene in the Receiver's domestication in Texas. Travelers has filed for affirmative declaratory relief in Texas, requesting that the Texas court appoint "a proper receiver for Payne & Keller to administer its Texas assets, if any, and to take any other steps necessary to protect Payne & Keller and reject the unauthorized acts of the South Carolina Receiver." (*See* Exhibit B submitted with the Receiver's Motion for Sanctions p. 12.) Travelers' filings in Texas impugn the integrity of South Carolina courts. While Travelers represents that it is within the exclusive jurisdiction of this Court to determine whether the receivership is proper, it espouses the opposite in Texas, asking the Texas court to make affirmative declarations that the South Carolina court improperly appointed the Receiver, did not have the power to issue its orders, and did not have adequate evidence to support its orders. (*Id.* pp. 11–12.)

Travelers also continues to assert that Payne & Keller is a Texas corporation with no South Carolina connection or assets. Travelers characterizes its Texas pleadings as merely asking “a Texas trial court to construe Texas law involving a Texas company,” arguing its pursuit of legal action against the Receiver in Texas “has nothing to do with whether a South Carolina circuit court can proceed on an issue when the same issue is pending before the South Carolina Court of Appeals.” (Travelers Ret. p. 10.) However, this is not true. Travelers raised the same arguments to the circuit court that it should not appoint a receiver over Payne & Keller because Payne & Keller is a Texas company. As stated by Travelers in its Texas pleadings, one of the issues it believes is on appeal in South Carolina is “whether the circuit court erred by . . . appointing a Receiver over Payne & Keller, a dissolved Texas corporation that does not have any property in South Carolina.” (Exhibit B submitted with the Receiver’s Motion for Sanctions pp. 6–7.) Despite its arguments that this Court has exclusive jurisdiction to determine whether a South Carolina court can appoint a receiver over a Texas corporation, it is also seeking a ruling on this issue in Texas. Travelers continues to assert that Payne & Keller is a Texas company with no property in South Carolina, ignoring this Court’s and the circuit court’s previous rulings that insurance assets are property of a company within this state, and making contrary representations in Texas. *See Protopapas v. Wall, Templeton & Haldrup, P.A.*, ___ S.C. ___, ___ S.E.2d ___, 2023 WL 8102870, at *3 (S.C. Ct. App. Nov. 22, 2023) (noting it is necessary for a receiver, who was appointed over all assets of a company, including insurance assets, to know whether a company was subject to future claims in order to fulfill the requirements of the appointment order).

In order to deter Appellants from continuing to interpose appellate filings to delay the disposition of this case while they seek resolution of the appellate issues in another jurisdiction, the Receiver respectfully requests the Court use the wide discretion provided for in Rule 269 to

impose sanctions against Appellants. In light of Travelers' and its attorneys' long history of non-meritorious appeals, filings interposed for the purposes of delay, disregard of orders of courts in this state, lack of candor to tribunals, and castigation of a South Carolina tribunal in pleadings in Texas, the Receiver further respectfully requests this Court impose additional sanctions against this appellant and its attorneys.

Respectfully submitted,

s/Jonathan M. Robinson

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December 28, 2023.

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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,

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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,

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and

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

PROOF OF SERVICE

I certify that a true copy of Respondent's Reply to Appellants' Returns to Motion for Sanctions Pursuant to Rule 269 in this case has been served on the following, this 28th day of December, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262(a)(1), SCACR, and *RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022)*, S.C. Sup. Ct. Order dated May 6, 2022.

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December 28, 2023.

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Date: Thursday, December 28, 2023 3:51:00 PM
Attachments: [Reply ISO Mtn Sanctions_2.pdf](#)

On behalf of Jon Robinson, please find attached for service the Respondent's Reply to Appellants' Returns to Motion for Sanctions in the above matter.

Thank you,

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