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**THE STATE OF SOUTH CAROLINA Dec 21 2023  
IN THE COURT OF APPEALS**

**SC Court of Appeals**

Appeal from Richland County  
Court of Common Pleas  
Jean Hoefer Toal, Circuit Court Judge

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

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; ACL, 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

Appellant.

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**APPELLANT'S MEMORANDUM IN OPPOSITION TO MOTION TO SUPPLEMENT  
THE RECORD AND FOR SANCTIONS FOR FRAUD ON THE COURT**

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Appellant Asbestos Corporation Ltd. (“ACL”) files this return to Peter D. Protopapas’ motion to supplement the record and for sanctions for “fraud on the court.” ACL respectfully asserts good cause has not been provided for any supplementation of the record, especially at this stage of a pending appeal, which is primarily centered on the issue of whether a receiver can be appointed for an existing foreign corporation which owns no property in South Carolina. More importantly, there has been no fraud on any court by ACL or its counsel, a claim that is most serious and should not be lightly made. Rather, this is a red herring designed to take the focus off the fact that Peter D. Protopapas is attempting to take over a major portion of ACL, is doing all he can to obviate the attorney-client privilege between ACL and his client. He is suing private attorneys. He is doing so where his very power and authority to be appointed receiver for a company with ongoing operations is on appeal to this Court of Appeals. Rule 205, SCACR, should prohibit such action as all of these actions are matters “affected by the appeal”.

This Court should ultimately decide this appeal when it comes before it on the merits. The hearing at issue on which Peter D. Protopapas bases his claims involved various motions against ACL which was then intertwined with a motion filed by Respondent against Atlas Turner (“Atlas”) in a different case (but the same hearing essentially) in an effort to lift the automatic stay.<sup>1</sup> While the Circuit Court cautioned the parties to identify themselves and keep the existence of the various parties separate, that effort was not successful. (Tr. p. 7). Rather, a confusing exchange went back and forth between the Circuit Court and all counsel regarding ACL and Atlas as if they were interchangeable companies (and they are not). Counsel for ACL was aware that with regard to Atlas, there was no insurance to which it could tender. As the motions were argued, the Circuit Court, counsel for the

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<sup>1</sup> The hearing took place on Monday, August 21, 2023.

Respondent and counsel for both Atlas and ACL (the undersigned) engaged in exchanges, many of which went back and forth between the companies in both the questions asked and answers provided.

An example of the back-and-forth utilized in the hearing between ACL and Atlas can be shown by looking at the transcript as a whole. Respondents' counsel stated:

– Judge, I want to introduce you to Asbestos Corporation Ltd., that you have a lot of this background already because they are related to Atlas Turner.

– In short, Your Honor, just like Atlas Turner, ACL is refusing to comply with your order but this time they are trying not to be quite as defiant.

– Just for in full disclosure, Mr. Brown – – and this is the third law firm to represent Atlas Turner and ACL. They were previously represented by Nelson Mullins and Murphy Grantland and now Clement Rivers.<sup>2</sup>

– Because what's happening is ACL and Atlas Turner is (sic) not tendering these cases to the insurance carriers.

– We also know, based upon the receiver's filing of Atlas Turner, that the liquidation of the insurance assets is a real concern. – – –

– Your Honor we know that they know how to do that because the receiver filed, and I'll hand it up, an Agreement of Transaction Settlement and Release between Asbestos Corporation Limited and the Maryland Casualty Company. And this is from 1989. (emphasis added)

– I don't understand why they're not tendering these cases to their insurance carrier who would have policies who would cover Mr. Tibbs and other South Carolinians.

(Tr. pp. 7, 8, 11, 14, 15, 16)

In responding to these issues, counsel for ACL misspoke. A simple mistake occurred as opposed to a “fraud on the court.” Peter D. Protopapas and Respondent introduced two letters from

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<sup>2</sup> Prior counsel moved to be dismissed due to a conflict of interest. They both did so by motions and with the consent of counsel and the Circuit Court.

Resolute that led to further confusion. The letters related to Atlas, not ACL.<sup>3</sup> In reviewing the letters the following exchange occurred:

Circuit Court: And this is correspondence dated just last month **indicating active coverage which Atlas, a corporation of ACL**, is choosing to manage itself and called the shots on the defense itself...  
Ms. McVey: **What that means to me is there's insurance here.**  
The Court: Exactly.  
(Tr. pp. 69-70) (emphasis added).

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The Court: How in the world do you explain the letters from Resolute to Mr. Protopapas not two days or not a month ago where they say there is coverage?  
Mr. Brown: They do not [say there is coverage].  
(Tr. pp. 78)

Counsel attempted repeatedly to clear up the misconception regarding these letters, which applied only to Atlas and did not establish coverage:

Mr. Brown: I apologize, but if you read those letters carefully, they don't say what Your Honor is saying nor what Ms. McVey presented to this Court. [N]either one of those letters say there is coverage and so and so has decided that they don't want it. It's just not there.  
Circuit Court: All right, sir.  
(Tr. pp. 79)(emphasis added).

A review of the full transcript, which contains both the caption of the *Tibbs* case (ACL) and the *Welch* case (Atlas), shows the Circuit Court took no action, issued no orders, judgments, or rulings against the Receiver or the Respondents based upon any statement made by counsel for ACL.<sup>4</sup> Rather, the Circuit Court gave counsel for the Respondents (Tibbs) everything they requested. Specifically, the Circuit Court found ACL in contempt for failing to produce a Rule 30(b)6, SCRCF witness, struck its answer, and named Peter D. Protopapas as the purported

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<sup>3</sup> Copies of the Resolute letters are attached as **Exhibit A**.

<sup>4</sup> A copy of the complete transcript is attached as **Exhibit B**.

receiver for ACL. These facts do not support a claim for fraud on the court.<sup>5</sup>

Fraud upon the court is a narrow and invidious species of fraud that subverts the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. *Chewning v. Ford Motor Co.* 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003). Like all other types of fraud, proving fraud upon the court requires a showing that the perpetrator acted with the intent to defraud. *Id.* at 79, 579 S.E.2d at 608 (quoting *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir.2002)). There is no such thing as accidental fraud. “‘Fraud on the court,’ whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court.” *Id.* (quoting *Buck*, 281 F.3d at 1342).

Fraud on the court typically involves a case where a judgment, order, or other action is rendered by a court which has been purposefully and intentionally misled. *See, e.g., Cloniger v. Cloniger*, 261 S.C. 603, 193 S.E.2d 647 (1973). Here, the Circuit Court took no action in favor of ACL. As such, the primary requirement for fraud on the court is not met. Furthermore, the judicial machinery in this case performed in its usual manner.<sup>6</sup> The Circuit Court granted the Respondents every drop of relief they sought and supposedly provided the purported receiver with all authority necessary to move forward with performing its function. Under the facts set forth above, counsel was in no way attempting to commit a fraud upon the court. If it had done so, the Circuit Court was certainly aware of the steps it could take if such a claim manifested itself. It did not do so, nor

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<sup>5</sup> Peter D. Protopapas was appointed Receiver. In this appeal, he moved to be named and aligned with the Respondents. He argues as if he were a Respondent and supports their positions on a consistent basis. As an allegedly neutral court appointed receiver, he should not ask to be aligned with the Respondents on an appeal.

<sup>6</sup> Respondent seeks various costs and sanctions in this case; however, it has done nothing more than the Circuit Court required it to do. As such, no additional costs were incurred. None are substantiated in the motion as well.

did it suggest any of the parties do so. There is no support for this Court of Appeals to allow for a supplementation of the record below and then, even when the Circuit Court took no action based upon the alleged “fraud on the court,” for this Court of Appeals somehow make such a finding and award sanctions.

The procedural background provided by Peter D. Protopapas does not relate to the issues before this Court. ACL has never sought to shut down any investigation of insurance while its appeal is pending. The record (including the proposed supplemental materials which are not appropriate) shows no such actions by ACL of encouraging any other party to take any action. Peter D. Protopapas makes a generic statement to this alleged action by ACL without a single reference to the record or any evidence. If insurance companies, purported receivers, or other entities move to intervene in an appeal, that is an issue for this Court of Appeals to determine in applying the *South Carolina Appellate Court Rules*. Former Chief Justice Toal (sitting as a circuit judge in this case) acknowledged the various parties “**had the right to appeal**” her decisions to the [Court of Appeals] and ultimately to the Supreme Court. The motions and appeals filed in this case by ACL as well as insurance carriers or other entities are rights they possess. This appeal is of great significance. The appeal and motions are part of this incredibly important appeal. None have been filed for any improper delay.<sup>7</sup> To try and infer such actions to ACL and then cite them as supporting a fraud on the court has no support in the evidence, rules, or law. Mere speculation

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<sup>7</sup> The delay in perfecting this appeal resulted from Respondents’ Return to ACL’s request to withdraw its petition for supersedeas and their objection to request for a second extension on Appellant’s initial brief (which is customarily allowed by this Court of Appeals). Respondents’ own actions, not Appellant, are responsible for the delays in perfecting this appeal and it being held in abeyance. Respondents ask that ACL’s initial brief be filed by January 2, 2024. ACL has no objection to this deadline. ACL does object to Respondents’ request that rather than allow it to withdraw its motion for supersedeas it should be treated as if it were heard and denied. No authority is cited in support of this proposition.

does not support Peter D. Protopapas' claims for fraud or sanctions. His claiming it does not make it so.

In addition, Peter D. Protopapas references a motion for supersedeas filed in *Welch* (an Atlas case) which was denied by this court because it believed it should have been filed with the Circuit Court first. While Atlas and ACL disagree with this Court of Appeal's ruling, both have the right and will file such petitions with the Circuit Court as this Court has deemed appropriate. He cites no authority to the contrary. Even counsel for the Respondent acknowledges that Atlas and ACL have the right to appeal any and all orders and rulings which are appealable. (Tr. pp. 61-62). That is exactly what ACL has done in this case.

The supposed appointment of Peter D. Protopapas as a purported receiver is a matter of considerable contest on appeal. His appointment does not in any fashion empower him to say what he wants when he wants or give him license to make unsupported allegations of this magnitude. The purported receiver makes serious allegations of fraud on the court, improper delays, and of ACL encouraging others to appeal rulings which are undeniably appealable. Such allegations are extremely serious and should not be taken lightly. Exercising one's appellate rights and engaging in proper motion practice is neither a delaying tactic nor in any way improper. They are part of the ways all orderly and fair systems of justice work.

Even the Circuit Court recognized this issue of an automatic stay will ultimately go on appeal to Columbia "because you are going to appeal whatever I do here and sooner or later the Supreme Court is going to have to weigh in on it." (Tr. pp. 77-78). This is not a simple receivership over property located in South Carolina. Rather, the Circuit Court has, as to ACL, appointed what it believes to be a receiver with control over "all of its asbestos litigation throughout the United States." South Carolina's statutory provisions regarding receiverships recognize our courts' jurisdiction does

not stretch to this limit. The Circuit Court simply refuses to recognize that there are limits on its jurisdiction. This is such a case. The Circuit Court may only take control and appoint a receiver (assuming other statutory provisions are satisfied) over a foreign corporation's property within this state. *See* S.C. Code Ann. § 15-65-10 (of the property "within this state of foreign corporations"). Simply put, the appeal in this case and the *Welch* appeal go to the heart of the power of the Circuit Court and Peter D. Protopapas to take control over litigation and assets of foreign corporations which are outside of this state.

If this were so easily accomplished, other states could assert similar arguments and take control through their own receiverships over litigation and assets in South Carolina. This would not sit well with the courts of this state. As the Circuit Court noted "they are appealing the legitimacy of the receivership." (Tr. P. 71.) Peter D. Protopapas is doing all in his power to avoid this central issue on appeal.

ACL made clear at its arguments to the Circuit Court it did not believe there was authority under the Circuit Court's theory of combining S.C. Code Ann. § 38-61-10, S.C. Code Ann. § 15-65-10 and *Sangamo Weston, Inc. v. National Sur. Corp.*, 307 S.C. 143 (1992) so as to give it the ability to appoint a receiver over an out-of-state state and out of country active corporation in existence whose assets are not in this state. The Circuit Court acknowledged the argument but disagreed. That is the purpose for this appeal in part, as well as the legitimacy of the receivership.

The Circuit Court did not indicate that its ruling was in any way impacted by any statements made by counsel concerning potential insurance. As noted, counsel for ACL was also counsel for Atlas in the motions being heard. Counsel was aware that Atlas had no insurance to which the tender could be made. Counsel had no knowledge as to ACL's status regarding insurance and should have made that very clear and been especially careful to keep the two separated. While counsel for Peter

D. Protopapas would like to turn it into more than a simple mistake, the Circuit Court took no actions based upon the statements made by counsel for ACL. As such, this motion for fraud on the court and sanctions should be denied.

*(Signature page for Appellant's Memorandum in Opposition to Motion to Supplement the Record and for Sanctions for Fraud on the Court, Appellate Case No. 2023-001461)*

Respectfully submitted,  
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