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Jan 11 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Joan H. Toal
Acting Circuit Court Judge

Appellate Case No. 2023-000727

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

v.

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

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

v.

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

Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd’s of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman’s Fund Insurance Company,

Third-Party Defendants,

of which

Payne & Keller Company, by and through its Receiver Peter D. Protopapas, is the

Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company f/k/a Stonewall Insurance Company, individually and as successor in interest to Stonewall Surplus Lines Insurance Company; Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company are the.....

Appellants.

TRAVELERS’ JOINDER TO MOTION FOR CERTIFICATION BY THE SUPREME COURT

Travelers Casualty and Surety Company respectfully joins the Motion for Certification by the Supreme Court filed by its co-Appellants. This appeal involves numerous issues of significant public interest and legal principles of major importance, and it is worthy of this Court’s immediate attention. Granting the Motion for Certification would ensure that this appeal is resolved efficiently

and expeditiously, and it would provide much-needed guidance to the Bench and Bar regarding legal errors that are pervasive within the Asbestos Docket.¹

As explained in the Motion for Certification, this case involves a South Carolina asbestos personal-injury plaintiff's attempt to resurrect Payne & Keller—which is a Texas company that dissolved in Texas in 1986, and which has ceased to exist and has been immune from suit as a matter of Texas law since 1989—for purposes of suing it. Without a hearing, and without taking any evidence, the South Carolina circuit court appointed a South Carolina lawyer as a receiver over that long-dissolved, non-existent Texas company. The circuit court, at the request of the plaintiff and with the support of the Receiver, subsequently issued an order, currently on appeal, that purports to bring Payne & Keller back to life so that it can be sued in South Carolina.

This has spawned a series of matters that are pending before the Fourth Circuit, the Texas Court of Appeals, and the South Carolina Court of Appeals. But the propriety of the out-of-jurisdiction appointment—a South Carolina circuit court creating a national receivership over a Texas company—is one of the core issues of this appeal, and a successful appeal by the Appellants here will put an end to this unlawful receivership and unnecessary, wasteful litigation.

Unfortunately, as discussed in the Motion for Certification, the Payne & Keller situation is an example of what has become a common pattern in the Asbestos Docket. This Court has repeatedly warned that appointing a receiver “is a drastic remedy, and should be granted only with reluctance and caution.” *Richland Cty. v. S.C. DOR*, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018). It has also warned that the “refusal of revocation [of a receivership], under changed

¹ This joinder should in no way be misconstrued as a slight to the Court of Appeals. Travelers' only desire here is efficient resolution of the issues presented in this appeal, and taking the case to the State's highest court serves that goal. If the motion is not granted, Travelers looks forward to having the Court of Appeals resolve the issues that are currently before it after full merits briefing, which has not yet begun.

circumstances, is also drastic.” *Vasiliades v. Vasiliades*, 231 S.C. 366, 376, 98 S.E.2d 810, 815 (1957). Despite these unambiguous warnings that are black-letter South Carolina law, the asbestos circuit court has appointed the same South Carolina lawyer as a receiver **two dozen times**—always at the request of the same plaintiffs’ counsel, and always without a hearing. A list of those appointments is attached as Table 1.

Nor has the asbestos court heeded its jurisdictional boundaries. The South Carolina Code recognizes the territorial restriction on a state court’s authority: “A receiver may be appointed by a judge of the circuit court, either in or out of court, when a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, **of the property within this State of foreign corporations.**” S.C. Code Ann. § 15-65-10(4) (cleaned up and emphasis added); *see also id.* § 1-1-10 (providing that the “jurisdiction of this State extends to all places within its bounds”).

This jurisdictional limitation is not only a function of the South Carolina Code; it is a command of the United States Constitution. *See, e.g., Carolina Trucks & Equip., Inc. v. Volvo Trucks of N.A., Inc.*, 492 F.3d 484, 489–90 (4th Cir. 2007) (“The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude. One state may not ‘project its legislation’ into another, as the Commerce Clause ‘precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.’” (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935), and *Healy v. Beer Inst.*, 491 U.S. 324, 335 (1989))).

This Court has repeatedly reinforced this jurisdictional limitation on receiverships. *See, e.g., Frink v. Nat’l Mut. Fire Ins. Co.*, 90 S.C. 544, 549, 74 S.E. 33, 35 (1912) (“That a receiver has no extra territorial authority is too well settled to require the citation of authority.”); *Pollock v.*

B.&L. Ass'n, 48 S.C. 65, 74, 25 S.E. 977, 980 (1896) (reciting that “a receiver has no extra territorial power of official action, none of which the Court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor’s property,” that “[r]eceivers appointed by one jurisdiction are not entitled as of right to recognition in other jurisdictions, and courts of equity cannot acquire extra territorial jurisdiction over property by appointing receivers,” and “[t]he power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him”) (cleaned up).

Despite this long line of controlling authority, the order appointing Mr. Protopapas as Payne & Keller’s Receiver purports to give him unfettered power over all assets and property of Payne & Keller located anywhere in the country.

Again, Payne & Keller is not alone in this regard. A list of additional out-of-jurisdiction receivership appointments from the Asbestos Docket is attached as Table 2.

And a third issue appears in this case that is pervasive within the Asbestos Docket: this appeal arises from a third-party complaint that the Receiver has wrongfully bolted onto an underlying asbestos personal injury case despite not asserting any claims for derivative liability.

This is an improper use of Rule 14, as third-party practice is only available to assert derivative liability against a third-party defendant. *See, e.g.*, Rule 14(a), SCRCF (authorizing third-party practice only when “a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him”); *CNH Indus. Cap. Am. LLC v. Able Const., Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. Feb. 7, 2017) (explaining that Rule 14 “does not allow the defendant to assert a separate and independent claim,” and reiterating that “[i]t is not sufficient that the third-party claim is a related claim; the claim must be derivatively based on the original plaintiff’s claim”).

It is especially improper to use Rule 14 to join insurance carriers into a tort lawsuit, as this Court has declared that coverage issues should be resolved in separate litigation. *See, e.g., Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93, 100, 110–11, 847 S.E.2d 87, 91, 96 (2020) (confirming that insurers have no right to intervene in underlying litigation and reiterating coverage disputes should be resolved “in a subsequent declaratory judgment action”). Yet, this misuse of Rule 14 has happened repeatedly in the Asbestos Docket and has spawned a series of unwieldy, highly litigious cases-within-cases that are procedurally improper.

* * * * *

This Court is uniquely vested with authority to address important legal issues that permeate multiple cases. That authority is typically exercised through a writ of certiorari, but the result would be the same here if the Court grants the Motion for Certification, as the standards for certiorari review and Rule 204 certification are similar. *See, e.g., Oncology & Hematology Assocs. of S.C., LLC v. S.C. DHEC*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010) (issuing a writ of certiorari to review a discovery order so that it could “speak to trial courts generally” about the Court’s “concern[] that ‘discovery practice’ has become a cottage industry and the merits of a claim are being relegated to a secondary status”); *Binney v. State*, 384 S.C. 539, 541 n.1, 683 S.E.2d 478, 479 n.1 (2009) (issuing a writ of certiorari to review an interlocutory question regarding a potential waiver of the attorney-client privilege for criminal defendants because the issue was “capable of arising in every PCR proceeding”); *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471–72, 674 S.E.2d 154, 160 (2009) (issuing a writ of certiorari to examine on an interlocutory basis “the appropriate standard for the discovery of trade secret information in a product liability action” because it was an issue that was “the subject of numerous claims in state and federal courts,” and addressing the issue through an extraordinary writ “best serves the

interests of judicial economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest”); *In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 543 & n.2, 503 S.E.2d 445, 447 & n.2 (1998) (resolving through a writ of certiorari questions of law that had arisen in a coordinated docket to deal with all cases involving defective breast implants, as such a decision would apply across “numerous state and federal actions” and “would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues”).

Accordingly, Travelers joins its co-Appellants’ Motion for Certification and respectfully submits that this case should be certified for review pursuant to Rule 204, SCACR, to efficiently and expeditiously resolve numerous issues of considerable public importance.

Respectfully submitted,

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Appendix of Tables Referenced in
Travelers' Joinder

Table 1: Receivership Appointments from the Asbestos Docket

<u>Company Put in Receivership</u>	<u>Moving Counsel</u>	<u>Who is Appointed</u>	<u>Case in Which Appointment is Made</u>
Covil Corp.	Kassel McVey/Dean Omar Branham Shirley	Peter Protopapas	2018-CP-40-04940
Starr Davis Company, Inc.	Kassel McVey/DOBS	Peter Protopapas	2019-CP-40-00076
Starr Davis Company of S.C., Inc.	Kassel McVey/DOBS	Peter Protopapas	2019-CP-40-00076
Southern Insulation, Inc.	Kassel McVey/DOBS	Peter Protopapas	2019-CP-40-00076
Great Barrier Insulation Co.	Kassel McVey/DOBS	Peter Protopapas	2020-CP-40-02692
J&L Insulation, Inc.	Kassel McVey/DOBS	Peter Protopapas	2020-CP-40-01952
Pipe & Boiler Insulation, Inc.	Kassel McVey/DOBS	Peter Protopapas	2020-CP-40-01952
Piedmont Insulation Inc.	Kassel McVey/DOBS	Peter Protopapas	2020-CP-40-004475
Presnell Insulation Co., Inc.	Kassel McVey/DOBS	Peter Protopapas	2020-CP-40-01364
Flame Refractories, Inc.	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-03484
General Boiler Casing Co.	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-03484
Payne & Keller Co.	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-03484
United Construction Co. of Rome	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-03484
Standard Insulation Co.	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-03484
Stafford Insulation Co.	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-03484
J.R. Deans Co., Inc.	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-03484
HEFCO, Inc.	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-03484
Davis Mechanical Contractors, Inc.	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-03484
Heat & Frost Insulation Co.	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-06190
Whittaker Clark & Daniel, Inc.	Kassel McVey/DOBS	Peter Protopapas	2022-CP-40-01265
Beaty Investments, Inc.	Kassel McVey/DOBS	Peter Protopapas	2022-CP-40-01241
Cape PLC	Kassel McVey/DOBS	Peter Protopapas	2021-CP-40-02727
Atlas Turner Co., Ltd.	Kassel McVey/DOBS	Peter Protopapas	2022-CP-40-03834
Asbestos Co., Ltd.	Kassel McVey/DOBS	Peter Protopapas	2022-CP-40-03834

Table 2: Foreign Companies Placed in Receivership in the Asbestos Docket

<u>Company in Receivership</u>	<u>Where Located</u>	<u>Active/Dissolved</u>
Starr Davis Company, Inc.	North Carolina	Dissolved
Great Barrier Insulation Co.	Florida	Dissolved
J&L Insulation, Inc.	North Carolina	Dissolved
Piedmont Insulation Inc.	North Carolina	Dissolved
Presnell Insulation Co., Inc.	North Carolina	Dissolved
Flame Refractories, Inc.	Florida	Dissolved
General Boiler Casing Co.	North Carolina	Dissolved
Payne & Keller Co.	Texas	Dissolved (an improper circuit court order attempts to undo this dissolution)
United Construction Co. of Rome	North Carolina	Dissolved/merged with Flame Refractories
Standard Insulation Co.	North Carolina	Dissolved
Heat & Frost Insulation Co.	North Carolina	Dissolved
Whittaker Clark & Daniel, Inc.	New Jersey	Active—Bankruptcy Pending
Beaty Investments, Inc.	North Carolina	Dissolved
Cape PLC	International: Jersey	Active
Atlas Turner Co., Ltd.	International: Canada	Active
Asbestos Co., Ltd.	International: Canada	Active

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PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Travelers Casualty and Surety Company, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Travelers' Joinder to Motion for Certification by the Supreme Court

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January 11, 2024