

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

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

RECEIVED

Jan 16 2024

SC Court of Appeals

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

Respondent,

v.

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

Defendants,

Of which Atlas Turner, Inc. is the

Appellant.

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INTRODUCTION

This appeal presents a straightforward question: Can a South Carolina circuit court establish a receivership over an active Canadian corporation that exists in the province of Quebec? Appellant, Atlas Turner, Inc. (“Atlas Turner”), is a Canadian corporation that previously manufactured products containing asbestos in Canada. (R. pp. 358-410, 461-500.) It stopped doing so in the mid-1980s. (R. pp. 358-410, 461-500.) Atlas Turner remains an active Canadian corporation. (R. pp. 358-410, 461-500.) It neither owns property nor does business in South Carolina. (R. pp. 687-689.) It has no judgments against it in South Carolina. It is not a debtor in South Carolina. In fact, none of the requirements for appointing a receiver under South Carolina’s receivership statute, S.C. Code Ann. § 15-65-10, are satisfied; therefore, the circuit court erred in appointing one. This is especially true considering that Atlas Turner has no assets in South Carolina—its assets are in Canada. Our circuit court has no authority to tell a Canadian corporation with no assets in this state that it must abide an American receiver’s commands. An American court would not accept the dictates of a Canadian receiver in relation to an American corporation with no assets in or judgments against it in Canada. The purported appointment of a receiver is erroneous and must be reversed, as should the circuit court’s abuse of discretion in holding Atlas Turner in contempt and striking its pleadings.

STATEMENT OF ISSUES ON APPEAL

- I. **Did the circuit court err in appointing a receiver?**
 - A. **Does the circuit court lack jurisdiction over property outside of South Carolina?**
 - B. **Is South Carolina’s receivership statute inapplicable to Atlas Turner?**
 - 1. **Is S.C. Code Ann. § 15-65-10(5) inapplicable to Atlas Turner?**
 - 2. **Is S.C. Code Ann. § 15-65-10(4) inapplicable to Atlas Turner?**

- II. **Did the circuit court err in holding Atlas Turner in contempt and striking its pleadings?¹**
 - A. **Did the circuit court abuse its discretion because it did not properly consider all the required factors?**
 - B. **Did the circuit court abuse its discretion because the sanction is unreasonable and too severe?**

STATEMENT OF THE CASE

Atlas Turner is an active Canadian corporation headquartered in the province of Quebec. It has no connection or nexus to South Carolina.² (R. pp. 358-410, 461-500; R. pp. 687-689.) Respondent, Donna Welch, individually and as Personal Representative of the Estate of Melvin C. Welch, deceased (“Welch”), sued Atlas Turner and many other defendants for alleged exposure to asbestos. (R. pp. 27-357, 411-460.) On April 20, 2023, Welch served Atlas Turner with a first amended notice of a Rule 30(b)(6), SCRCPP, deposition that contained more than 100 detailed topics. Because Atlas Turner ceased its asbestos business in the mid-1980s, it has no employees

¹ To be clear, this issue and the corresponding argument below includes the threshold question of whether it was proper for the circuit court to find Atlas Turner in willful contempt in the first place, which, Atlas Turner maintains, it was not.

² This includes having no certificate (in place or rescinded) to do business in the state and no ownership of property or assets in this state.

who can testify on the deposition topics or who could be “taught” such a wide array of materials covering roughly half of a century. It also lacks the requested documents.

The 30(b)(6) topics are further complicated by the limitations and restrictions of the Quebec Business Concerns Records Act, CQLR c D-12 (the “QBCRA”).³ The QBCRA provides the following:

[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.

As such, Atlas Turner was unable to produce a 30(b)(6) deponent. Such action was not deliberate or an attempt to defy the circuit court. Simply put, you cannot produce what you do not have.⁴

On May 4, 2023, the circuit court held a status conference with Atlas Turner and Welch. Following the conference, the circuit court found Atlas Turner in contempt by order filed May 11, 2023, and invited Welch to identify “the requested sanction this Court should impose on Atlas and for [sic] any other relief requested.” (R. p. 2.)⁵ On June 20, 2023, the circuit court entered an

³ Atlas Turner has always been careful to raise the QBCRA to avoid any noncompliance or waiver arguments.

⁴ Atlas Turner is far from the first company unable to produce a 30(b)(6) witness based upon the passage of time and the overbreadth of the topics set forth in a 30(b)(6) notice. Whether the others who have found themselves caught between such a rock and a hard place have had their answers struck or have been left no choice but to settle for inflated value to avoid what Atlas Turner is now facing (a purported receivership), South Carolina has recently been recognized for its hostility to defendants in asbestos cases. *See Judicial Hellholes*, <https://www.judicialhellholes.org/hellhole/2022-2023/south-carolina-asbestos-litigation/> (last visited Oct. 4, 2023).

⁵ Previously, Atlas Turner had responded to this suit with a motion to dismiss for lack of personal jurisdiction, which the circuit court denied. Atlas Turner expressly reserves and does not waive its jurisdictional challenge, and nothing herein is intended to waive or otherwise undermine its denial of personal jurisdiction.

“Order Striking Atlas Turner’s Answer.”⁶ (R. pp. 7-10.) Such severe sanctions not being quite enough, the circuit court also granted Welch’s motion to appoint a receiver by order filed June 21, 2023. (R. p. 12.)

The circuit court reasoned that it had the authority to appoint a receiver over Atlas Turner’s “insurance assets” under S.C. Code Ann. § 38-61-10 because that statute states that “[a]ll contracts of insurance on property, lives, or interests in South Carolina are considered to be made in the [s]tate and . . . subject to the laws of this [s]tate.” (R. pp. 14.) The circuit court also concluded that because there was an entry of default (not a default judgment) against Atlas Turner, obtaining a default judgment would just be a ministerial process.⁷ (R. pp. 11-18.) At Welch’s request, the circuit court appointed local South Carolina attorney Peter Protopapas to act as a receiver for around the twentieth time in an asbestos case. (R. pp. 11-18.)

By notice served and filed July 6, 2023, this appeal timely follows the circuit court’s denial of Atlas Turner’s timely motions for reconsideration. (R. pp. 4-6; R. pp. 19-24; R. pp. 1932-1938.)

STANDARD OF REVIEW

“[T]he appointment of a receiver is within the discretion of the circuit [court].” *Richland Cnty. v. S.C. Dep’t of Revenue*, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018) (first alteration in original) (quoting *Midlands Util., Inc. v. S.C. Dep’t of Health & Env’tl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989)). However, “[t]he appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution.” *Id.* (quoting *Midlands Util., Inc.*, 301 S.C.

⁶ Later in the order it states it is striking “Atlas’ pleadings.” (R. p. 9.)

⁷ This belief and finding is an error of law. An entry of a default judgment is *not* a ministerial act. *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). Atlas Turner filed motions to reconsider, all of which the circuit court denied. (R. pp. 1746-1762; 1775-1784; R. pp. 4-6; 19-24).

at 228, 391 S.E.2d at 538). “[A] receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined.” *Id.* (quoting *Pelzer v. Hughes*, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887)).

Contempt is also a matter within the discretion of the circuit court. *Spartanburg County Dep’t of Soc. Servs. v. Padgett*, 296 S.C. 79, 83, 370 S.E.2d 872, 875 (1988). Contempt is a consequence of the willful disobedience of a court order. *See Henderson v. Henderson*, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989). Civil contempt must be proved by clear and convincing evidence. *Durlach v. Durlach*, 359 S.C. 64, 71, 596 S.E.2d 908, 912 (2004) (citation omitted). A willful act is one “done voluntarily and intentionally with the specific intent . . . to fail to do something the law requires to be done” *Padgett*, 296 S.C. at 82–83, 370 S.E.2d at 874 (quoting Black’s Law Dictionary 1434 (5th ed.1979)). “Where a contemnor is unable, without fault on his part, to obey an order of the court, he is not to be held in contempt.” *Smith-Cooper v. Cooper*, 344 S.C. 289, 301, 543 S.E.2d 271, 277 (Ct. App. 2001) (citations omitted). A finding of contempt, therefore, must be reflected in a record that is “clear and specific as to the acts or conduct upon which such finding is based.” *Curlee v. Howle*, 277 S.C. 377, 382, 287 S.E.2d 915, 918 (1982).

Matters within the circuit court’s discretion are subject to reversal for abuse of discretion, and abuse of discretion occurs when the circuit court’s decision is controlled by an error of law or lacks evidentiary support. *Burke v. Republic Parking System, Inc.*, 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017).

ARGUMENT

I. The circuit court erred in appointing a receiver.

A. The circuit court lacks jurisdiction over property outside of South Carolina.

“The power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him.” *Pollock v. Carolina Interstate B. & L. Assn.*, 48 S.C. 65, 25 S.E. 977, 980 (1896) (quoting Gluck & B. Rec. p. 3). “[C]ourts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers.” *Id.* (quoting 20 Am. & Eng. Enc. Law, 65, 66).

“[T]he jurisdiction of a state is restricted to its own territorial limits.” *Ex parte First Pennsylvania Banking & Tr. Co.*, 247 S.C. 506, 508, 148 S.E.2d 373, 374 (1966). “[T]he general rule is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction. A statute which purports to have such operation is invalid.” *Id.* “South Carolina rules of construction provide that statutes must not be read to operate outside the state’s borders.” *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489 (4th Cir. 2007). “The South Carolina Supreme Court has written repeatedly that South Carolina statutes have no extraterritorial effect because the general rule is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction.” *Id.* (cleaned up).

In *Pollock*, the South Carolina Supreme Court had to determine whether the North Carolina state court’s appointment of a temporary receiver for the defendant association rendered service in this state invalid. Our Supreme Court made an extensive review of the territorial power of receivers. It noted that the United States Supreme Court ruled that a receiver has “no extraterritorial power of official action; none 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;

none which can give him, upon the principle of comity, a privilege to sue in a foreign court, or another jurisdiction.” *Pollock*, 48 S.C. 65, 25 S.E. at 980 (quoting *Booth v. Clark*, 58 U.S. 322, 338 (1854)) (emphasis added). Our Supreme Court also noted that in *Dial v. Gary*, “our court held that an administrator appointed by the courts of Massachusetts had no legal capacity to sue in this state, and that his assignment of the bond and mortgage to a citizen of this state did not give the latter capacity to sue.” *Id.* (citing *Dial*, 14 S. C. 573 (1881)). It concluded that “[t]his is supported by reason, and the jurisdiction and the power exercised by courts.” *Id.*⁸ Our Supreme Court elaborated that a “court deriving its power from the laws of North Carolina cannot confer any greater power than it is given. Having the right to appoint a receiver in their territory alone, such appointee is a creature of the appointing power, and cannot have greater power than his creator.” *Id.* “The stream cannot rise higher than its source.” *Id.*

Indeed, our receivership statute references these jurisdictional limits. It provides that the circuit court may appoint a receiver “[i]n such other cases as are provided by law or may be in accordance with the existing practice, *except as otherwise provided in this Code.*” § 15-65-10(5) (emphasis added). It limits a South Carolina receivership “in like cases[] of the property within the state of foreign corporations.” § 15-65-10(4). The reference to “like cases” regarding foreign corporations is a clear limitation on a receiver’s power. Therefore, our receivership statute only allows a South Carolina court to appoint a receiver over the assets of a foreign corporation that are found “within this state.”⁹

⁸ There appears to be a dearth of case law regarding receivers and their powers. The few cases located are not from this country. *See, e.g., In re Whittaker, Clark & Daniels*, 23-13575 MBK (B.C.D.N.J. 2023).

⁹ This is especially true when a South Carolina receiver attempts to take control over an active Canadian corporation like Atlas Turner. This differentiates this case from the other receivership cases decided by the circuit court that involved long defunct corporations which arguably met the requirements of § 15-65-10.

The circuit court's rulings ignore the concept of interstate and intrastate commerce reserved to the federal government, not the states. The circuit court has no authority or jurisdiction outside of South Carolina. Atlas Turner has no property in South Carolina. All assets which the purported receiver seeks are in Canada, not South Carolina. The circuit court and the receiver cannot take charge over any property outside of the state, let alone outside of the United States. Thus, the circuit court erred in appointing a receiver.

B. South Carolina's receivership statute is inapplicable to Atlas Turner.

It is unclear which specific statute the circuit court relied on in its order appointing a receiver. The circuit court specifically cited § 15-65-10(5) but also generically noted that "other elements of the receivership statute are satisfied." (R. p. 12; *id.* at n.3.) In reviewing the receivership statute, none of the conditions are met.

1. Section 15-65-10(5) is inapplicable to Atlas Turner.

Section 15-65-10(5) provides that the circuit court may appoint a receiver "[i]n such other cases as are provided by law or may be *in accordance with the existing practice*, except as otherwise provided in this Code." § 15-65-10(5) (emphasis added). There are no published cases in South Carolina in which the circuit court appointed a receiver for a foreign corporation's assets that were never in the state. On the other hand, there are cases in which appellate courts reversed such an appointment of a receiver. *See, e.g., Boynton v. Consol. Indem. & Ins. Co.*, 180 S.C. 279, 185 S.E. 731, 737 (1936) (reversing the appointment of a receiver over a foreign corporation because "there [wa]s a total failure of any proof that it ha[d] property in this state").

The circuit court erred in applying § 15-65-10(5) because it is not in accordance with existing practice to appoint a receiver over a foreign corporation's assets that are not in South

Carolina. The lack of authority speaks for itself: It is not in accordance with existing practice to appoint a receiver for a foreign corporation's assets that are not in South Carolina.¹⁰

As discussed above, a receiver appointed in another jurisdiction has “no extraterritorial power of official action; none 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; none which can give him, upon the principle of comity, a privilege to sue in a foreign court, or another jurisdiction.” *Pollock*, 48 S.C. 65, 25 S.E. at 980 (quoting *Booth*, 58 U.S. at 338). “Receivers appointed before jurisdiction are not entitled, as of right, to recognition in other jurisdictions, and courts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers.” *Id.* (quoting 20 Am. & Eng. Enc. Law, 65, 66). “The power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him.” *Id.* (quoting Gluck & B. Rec. p. 3). Accordingly, the circuit court erred in applying § 15-65-10(5).

2. Section 15-65-10(4) is inapplicable to Atlas Turner.

Section 15-65-10(4) provides that the circuit court may appoint a receiver “[w]hen 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.*” § 15-65-10(4) (emphasis added). The circuit court stated that the statute's reference to “property within this state” is not a limitation on the Receiver's authority in this case.” (R. p. 14.) The circuit court reasoned that Atlas Turner's “insuring assets are subject to the laws of South Carolina, including the duly appointed Receiver” under § 38-61-10, which provides the following:

¹⁰ The circuit court cites *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384, 1 S.E.2d 797, 800 (1939), and *Virginia-Carolina Chemical v. Hunter*, 84 S.C. 214, 66 S.E. 177, 177 (1909), for examples of existing practice. (R. p. 13.) Those cases are not applicable here, because they involved real property in South Carolina. See *First Carolinas*, 191 S.C. at 1, S.E.2d at 800; *Virginia-Carolina*, 84 S.C. at 66 S.E. at 177.

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

In *Sangamo Weston, Inc. v. Nat'l Sur. Corp.*, the defendant operated a facility located in South Carolina and allegedly discharged a hazardous substance into the surrounding area. 307 S.C. 143, 146, 414 S.E.2d 127, 129 (1992). The South Carolina Supreme Court interpreted § 38-61-10 and determined that “South Carolina substantive law govern[ed] the dispute” even though the insurance contracts were executed outside of South Carolina and between parties that were not citizens of South Carolina. *Id.* at 149, 414 S.E.2d at 130. There, however, the dispute revolved around whether South Carolina or another jurisdiction’s law would apply. Indeed, our Supreme Court ruled that when § 38-61-10 applies “it governs as South Carolina’s *rule of conflicts*.” *Id.* at 147, 414 S.E.2d at 130 (emphasis added).

Additionally, courts have refused to apply § 38-61-10 in the conflicts of law context unless a sufficient nexus to South Carolina existed. *See, e.g., Russell v. McGrath*, 135 F. Supp. 3d 427, 431 (D.S.C. 2015) (“[Section] 38-61-10 does not automatically supplant the traditional doctrine of *lex loci contractus* in every case. Indeed, courts have often held that § 38-61-10 is inapplicable, noting ‘a lack of connection, interest or nexus to South Carolina,’ such that it could not be said that the ‘property, lives, or interests’ insured were located in South Carolina.”) (internal citation omitted); *Unisun Ins. Co. v. Hertz Rental Corp.*, 312 S.C. 549, 552 n.1, 436 S.E.2d 182, 184 n.1 (Ct. App. 1993) (noting that application of § 38-61-10 would also result in the application of New York law because “at the time the contract was made, the property and interests insured were in the State of New York”).

To the extent the circuit court applied § 15-65-10(4), it erred because Atlas Turner is an active Canadian corporation that has not been dissolved. There is zero evidence of insolvency or of any imminent danger thereof. Atlas Turner has not forfeited any corporate rights. More importantly, Atlas Turner is a foreign corporation that has no property in South Carolina. Unlike the corporation in *Sangamo*, Atlas Turner has never had any assets in South Carolina.

The circuit court also erred in concluding that Atlas Turner has property in South Carolina under § 38-61-10. This statute is merely a choice of law provision; it is not a hook that the circuit court can use to apply the South Carolina receivership statute to foreign corporations that do not have assets in the state—it is not a jurisdictional statute. *See Sangamo*, 307 S.C. at 147, 414 S.E.2d at 130 (“Where this statute applies it governs as South Carolina’s *rule of conflicts*.”) (emphasis added).

Here, the issue is not whether South Carolina or another jurisdiction’s law applies; it is whether South Carolina courts have the authority to appoint a receiver for a foreign corporation’s assets that are not in the state. Section 38-61-10 has been applied solely in the context of conflicts of law cases; there is no case in which § 38-61-10 has been applied along with the receivership statute to grant a receivership over a foreign corporation’s assets that are not located in South Carolina. Neither the circuit court nor Welch cites any such case law. Nothing in § 38-61-10 converts a Canadian asset into property located in South Carolina. To accept such a broad and unrestrained view with respect to contracts of insurance would pit state against state and country against country and ignore the Commerce Clause of the United States Constitution and the implications thereof. *See Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 103–04, 705 S.E.2d 28, 36 (2011) (“The Commerce Clause of the United States Constitution provides that Congress has the power to regulate commerce among the several states. However, the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. Even in the

absence of Congressional regulation, the negative implications of the Commerce Clause, often referred to as the Dormant Commerce Clause, prohibit state action that unduly burdens interstate commerce.”) (internal citations and quotation marks omitted).

Finally, even if South Carolina law governs, § 15-65-10 still needs to be satisfied before the circuit court can appoint a receiver. As has been addressed at length above, there is no evidence under South Carolina law which would justify the circuit court placing Atlas Turner under a receivership. Accordingly, even if Atlas Turner has insurance contracts that are considered made in South Carolina and subject to its laws, that does not establish that it *owns* property in South Carolina. Therefore, the circuit court erred in applying § 15-65-10(4).

II. The circuit court erred in holding Atlas Turner in contempt and striking its pleadings.

“If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (citing Rule 37(b)(2)(C), SCRCF). However, “[w]hen the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly.” *Id.* at 198, 511 S.E.2d at 718; *see also 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).

A. The circuit court abused its discretion because it did not properly consider all the required factors.

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

In *Griffin*, the court determined that the circuit court did not abuse its discretion in striking the pleadings. 334 S.C. at 199, 511 S.E.2d at 719. The court noted that the circuit court “clearly considered the appropriate factors” and provided a detailed account of the discovery requests and responses. *Id.* The court also observed that the circuit court imposed a lesser sanction and gave a “clear and explicit warning of the consequences” of failing to comply with earlier orders. *Id.* Additionally, the court recognized that the circuit court considered the greatly prejudicial nature of the sanction while reasoning that the sanctioned party’s willful disobedience to four previous orders warranted the harsh sanction. *Id.*

Similarly, the court in *McNair v. Fairfield County* also determined that the circuit court did not abuse its discretion in striking the pleadings. 379 S.C. 462, 476, 665 S.E.2d 830, 832 (Ct. App. 2008). Again, the court noted that the circuit court “considered the appropriate factors” and recited the circuit court’s explicit findings regarding the failure to produce documents. *Id.* at 467, 665 S.E.2d at 832–33. The court also observed that the circuit court warned that it was inclined to strike the pleading. *Id.* at 467, 665 S.E.2d at 832. Additionally, the court acknowledged that the

circuit court determined that the sanctioned party's willful disobedience to previous orders warranted the severe sanction. *Id.* at 467, 665 S.E.2d at 833.

Here, unlike the circuit courts in *Griffin* and *McNair*, the circuit court abused its discretion because it clearly did not consider all four required factors to determine the appropriate discovery sanction. Unlike the orders in *Griffin* and *McNair*, the circuit court merely found that Atlas Turner willfully failed to produce a witness in its order striking Atlas Turner's answer. The circuit court did not consider the nature of discovery sought, the discovery stage of the case, or the degree of prejudice Atlas Turner would suffer, unlike the circuit courts in *Griffin* and *McNair*.

Moreover, the circuit court erred in finding that Atlas Turner acted willfully. Atlas Turner cannot produce the requested discovery because it has no employees who are able to testify on the deposition issues. Atlas Turner also does not maintain or possess records necessary to educate a witness to testify regarding the matters contained in the Rule 30(b)(6) notice. Even if Atlas Turner did have those records, it would be subject to criminal and/or civil penalties under the QBCRA for producing them.¹¹

¹¹ Section 2 of the QBCRA provides the following:

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

The term "document" is defined as "any account, balance sheet, statement of receipts and expenditure, profit and loss statement, statement of assets and liabilities, inventory, report and any other writing or material forming part of the records or archives of a business concern." QBCRA § 1(a). The term "concern" is defined as "any business concern in Quebec." QBCRA § 1(b). The term "requirement" is defined as "any demand, direction, order, subpoena or summons." QBCRA § 1(c). Any person who infringes the provisions of Section 2 **shall** be guilty of contempt of court. QBCRA § 5 (emphasis added). Quebec courts have made clear that other Quebec "concerns" like Atlas Turner are subject to criminal and/or civil penalties if they produce, in United States litigation, information or documents from their files in Quebec.

An inability to produce a requested discovery is not a willful refusal to comply with a discovery order. Indeed, the circuit court’s finding that Atlas Turner acted willfully emphasizes that it did not consider the nature of discovery sought. Thus, the circuit court erred because it did not consider all the required factors.

B. The circuit court abused its discretion because the sanction is unreasonable and too severe.

“[T]he sanction imposed should be reasonable, and the [c]ourt should not go beyond the necessities of the situation to foreclose a decision on the merits of a case.” *Rickerson v. Karl*, 412 S.C. 215, 221, 770 S.E.2d 767, 770 (Ct. App. 2015) (alterations in original) (quoting *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990)). “Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction.” *Griffin*, 432 S.C. at 198-99, 511 S.E.2d at 719. “A willful act is . . . one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.” *Hook v. S.C. Dep’t of Health & Envtl. Control*, 439 S.C. 52, 76, 885 S.E.2d 442, 455 (Ct. App. 2023), *reh’g denied* (Apr. 20, 2023) (quoting *Cheap-O’s Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 607–08, 567 S.E.2d 514, 520 (Ct. App. 2002)). “A sanction of dismissal is too severe if there is no evidence of any intentional misconduct.” *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996).

In *Griffin*, the circuit court struck the sanctioned party’s pleadings after the case had been pending for nearly two years. 334 S.C. at 195–96, 665 S.E.2d at 832. The sanctioned party in *Griffin* also ignored multiple discovery orders. *Id.* In *McNair*, the circuit court struck the

sanctioned party's pleadings after the sanctioned party did not respond to the court's order to compel discovery for seven-and-a-half months. 379 S.C. at 464–65, 665 S.E.2d at 831.

Here, the circuit court abused its discretion because the sanction is unreasonable. Unlike the sanctioned party in *Griffin*, Atlas Turner has not ignored multiple discovery orders. Moreover, the circuit courts in *Griffin* and *McNair* afforded the sanctioned parties significantly more time before striking their pleadings than the circuit court afforded Atlas Turner. Unlike the circuit courts in *Griffin* and *McNair*, the circuit court found Atlas Turner in contempt less than a month after it issued the discovery order. After just one additional month, the circuit court struck Atlas Turner's answer.

Additionally, unlike the circuit courts in *Griffin* and *McNair*, the circuit court did not give an explicit warning that it would consider striking the pleadings. During the hearing on May 4, 2023, the circuit court mentioned that Welch could submit proposed orders that included striking the pleadings. The circuit court also stated that it had granted that relief in the past, but it never explicitly stated that it would consider striking the pleadings either at the hearing or in its contempt order. The circuit court's decision to strike Atlas Turner's pleadings so quickly without clear and explicit warning was unreasonable; therefore, the circuit court abused its discretion.

Further, as discussed above, the circuit court erred in finding that Atlas Turner willfully disobeyed the discovery order. The circuit court went so far as to state that Atlas Turner did not want to participate in the court process at all during the hearing on August 21, 2023. Clearly that is not true because Atlas Turner filed an answer that the circuit court struck.

Atlas Turner's inability to produce the requested discovery is not a showing of bad faith, willful disobedience, or gross indifference to the moving party's rights. Atlas Turner simply cannot produce the requested discovery because it does not exist. Even if Atlas Turner had the

requested discovery, the QBCRA prohibits Atlas Turner from producing it. There was no showing of intentional misconduct; therefore, the circuit court's sanction was too severe. Accordingly, the circuit court abused its discretion and erred in striking Atlas Turner's pleadings.

CONCLUSION

Simply put, the circuit court has no right or authority to appoint a South Carolina receiver under these facts. The circuit court's decisions to place Atlas Turner in contempt, strike Atlas Turner's pleadings, and appoint a receiver should all be reversed. Having said that, the one conspicuous error is the appointment of a South Carolina receiver over an active Canadian corporation. To allow this would cause chaos from state to state and country to country because of the overzealous application of inapplicable receivership law by states or countries lacking any jurisdiction to do so.

Respectfully submitted,
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