THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2022-CP-40-03834

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Appellate Case No. 2023-001096

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

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 successors-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-by-merger to Borg-Warner Corporation, Occidental Chemical Corporation as successor to Durez Corporation, O'reilly Automotive Stores, Inc., Paramount Global f/k/a Viacombs 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, Petitioners,

of which

Atlas Turner, Inc. is the Appellant.

and

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

and

Peter D. Protopapas, Duly Appointed Receiver for Atlas Turner, Inc., are the Respondents.

BRIEF OF THE RECEIVER PETER D. PROTOPAPAS

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ATTORNEYS FOR THE RECEIVER

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I. Introduction

This appeal arises from Defendant-Appellant Atlas Turner, Inc.'s ("Atlas" or "Atlas Turner") decision not to participate in court-ordered discovery and its misrepresentations to Chief Justice Toal (ret.), presiding as Circuit Judge over the Richland County Court of Common Pleas (the "Circuit Court"), regarding insurance assets that may cover the asbestos-related injuries of the late Plaintiff-Appellee Melvin G. Welch ("Welch" or "Plaintiff").[1] After many months of declining to participate in routine discovery, Atlas Turner now challenges the Circuit Court's decision to strike Atlas Turner's answer as a sanction and for then, in light of Atlas Turner's being in default, appointing a receiver for the limited purpose of determining whether Atlas Turner has insurance assets potentially responsive to asbestos tort claims brought against it in South Carolina. The Circuit Court's decisions were appropriate responses to Atlas Turner's conduct, were soundly based in precedent acknowledging the Court's discretion, and now provide a path forward for this litigation specifically and the management of the Court's asbestos docket generally.

After being diagnosed with mesothelioma, Welch sued several entities that allegedly manufactured, sold, or distributed asbestos-containing products or raw asbestos materials for use in South Carolina—including Atlas Turner. As is routine in civil litigation, most defendants responded to Welch's discovery requests. Atlas Turner, on the other hand, declined to produce the documents and a corporate-representative deponent, as Welch requested. What's more, even after the Circuit Court ordered Atlas Turner to produce a deponent, Atlas Turner refused to participate in the discovery process.

In response to Atlas Turner's failure to participate in discovery and its contempt of court, the Circuit Court sanctioned Atlas Turner by striking its answer. Then, because the striking of its

[1] Welch initially filed suit himself. He is survived by his wife, who proceeds with the litigation on behalf of his estate.

answer left Atlas Turner in default, the Circuit Court appointed Peter D. Protopapas (the "Receiver") for the limited purpose of marshaling Atlas Turner's insurance assets and administering them consistent with future court orders.

From the outset of this litigation, Atlas Turner has insisted that it does not belong in this litigation because it allegedly has no property in South Carolina. *See* Opening Br. at 1. Yet, when the Circuit Court rejected this argument, Atlas Turner changed positions. If Atlas Turner's avoidance of discovery and recent misrepresentations to the Circuit Court had not already made it clear, its appeal of the Circuit Court's sanction and separate appointment of a receiver confirms that Atlas Turner is determined to avoid discovery regarding insurance assets potentially responsive to asbestos claimants across the United States.

This Court should reject Atlas Turner's arguments. The striking of Atlas Turner's answer was a valid sanction for its contempt of court, and the Circuit Court's appointment of a receiver for the limited purpose of collecting and administering any of Atlas Turner's insurance proceeds to a rightful claimant was a valid remedy to Atlas Turner's failure to comply with the discovery process and resulting default. Both are well within the discretion of a circuit court in this state, and the Circuit Court should be affirmed on both grounds.

II. Background

In his asbestos case, Welch sued several entities that allegedly "manufactured, sold, and/or distributed asbestos-containing products or raw asbestos materials for use in South Carolina," where he and his father had worked in the same factory. (R. pp. 413–414). Atlas Turner—which is alleged to have transported asbestos-containing products to the factory—was one such entity. (R. pp. 420–421).[2]

[2] Atlas Turner is sued as the "successor to" Atlas Asbestos Co.

Through its refusal to comply with the discovery process, Atlas Turner has made it clear from the outset that it will not litigate Welch's claims—just as it has done for decades in asbestos cases across the country. *See infra* at pp. 4, 6–7. Even after filing an answer nine months after Welch filed suit, (R. pp. 358–410), Atlas Turner declined to provide any substantive responses to Plaintiff's discovery requests.

During a hearing held on April 19, 2023, the Circuit Court "ordered Atlas to appear for a deposition so that this matter could be prepared for trial." (R. p. 1; R. p. 520, line 19–p. 521, line 2; R. p. 522, line 11–p. 523, line 10). Atlas Turner "failed to produce a witness as ordered by the Court … refused to identify a witness or a date on which it w[ould] produce a witness … [and] wholly failed to produce any documents as requested by the 30(b)(6) notice properly served on it." (R. p. 1). On May 4, 2023, the Circuit Court held a status conference "in an attempt to resolve Atlas' intransigence." (R. p. 1). The Circuit Court concluded, "[a]fter a comprehensive discussion," that Atlas Turner "does not intend to participate in this matter and that th[e] Court's orders on discovery will continue to be ignored." (R. p. 1; R. pp. 504–525, 535–537). Two days later, the Circuit Court granted Welch's motion to hold Atlas Turner in contempt of court and ordered Welch to submit briefing "identifying the requested sanction this Court should impose on Atlas and for any other relief requested." (R. p. 2).

On May 11, 2023, Welch asked the Circuit Court to strike Atlas Turner's pleading "as a sanction for failure to cooperate in discovery." (R. p. 1477) (quoting *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 651 (S.C. Ct. App. 2003)). Then, "[a]ssuming that th[e] Court determine[d] that the appropriate sanction for Atlas' contempt is the striking of Atlas' answer," Welch also asked the Circuit Court to issue an "order appointing a receiver over Atlas" so discovery could proceed. (R. p. 1477). Welch pointed out that Atlas Turner's contempt in this case was typical of

its conduct in other asbestos suits filed in the United States, and he argued that "appointment of a receiver to marshal Atlas' insurance assets and satisfy claims is therefore the appropriate remedy." (R. pp. 1477–1478).

The Circuit Court agreed. In one order, the Circuit Court struck Atlas Turner's answer as a sanction for failure to participate in the discovery process. (R. pp. 7–10). And in a separate, subsequent order, the Circuit Court appointed Peter D. Protopapas as the Receiver for Atlas Turner's insurance assets. (R. pp. 11–18). Importantly, however, the Circuit Court did not give the Receiver unlimited authority—its order specified that "the powers afforded to the receiver here are all related to the insurance assets of Atlas." (R. p. 16).

The Receiver promptly began searching for evidence of Atlas Turner's insurance policies. Within weeks of his appointment, the Receiver uncovered evidence of "millions of dollars' worth of insurance assets that are potentially available and responsive to the asbestos Plaintiffs' underlying claims against Atlas," despite that Atlas and its counsel would not assist with the Receiver's investigation. (R. p. 1788; R. pp. 1801–04). When Atlas Turner continued to oppose the activities of the Receiver through its prior counsel, (R. p. 1789), the Receiver sued Atlas Turner's prior counsel—seeking a declaration requiring prior counsel to produce their files and answer the Receiver's questions regarding their representation of Atlas Turner. *See* Compl., *Atlas Turner, Inc. v. Goldfein & Joseph, P.C.*, 2023-CP-40-03540 (S.C. Ct. Common Pleas July 10, 2023).

In accordance with the order appointing him, the Receiver also "tendered claims to various insurance carriers for a defense of Atlas in the underlying asbestos suits." (R. p. 1788). In July of 2023, Resolute Management, Inc. ("Resolute"), a third-party claims administrator for several of Atlas Turner's insurers, responded to the Receiver's tender of asbestos suits to those insurers.

Resolute sent one letter to Atlas Turner, which recounted that Atlas had advised the insurance companies "that Atlas continued to control its defense of the Asbestos Lawsuits even after the entry of the Receivership Order" and will continue to control its own defenses because "[the Receiver] is not objecting to Atlas's control of its own defense." (R. pp. 1788, 1806–07).

At the same time, Resolute also sent a letter to the Receiver, reporting that the insurance companies had been "advised by Atlas that Atlas is controlling and defending its own interests," that "[the Receiver is] not objecting to Atlas's control of its own defense," that "Atlas is not tendering the Asbestos Lawsuits [to the insurance companies] for defense and indemnity," and therefore, "given that Atlas is not tendering the Asbestos Lawsuits, there is no defense or indemnity being requested." (R. pp. 1788–1789, 1812). Based on Atlas Turner's and Resolute's misconduct and misrepresentations, the Receiver asked that the Circuit Court to clarify that he is "authoriz[ed] … to assume control of the defense of the asbestos litigation pending against Atlas in the United States"—so that Atlas Turner and its insurers could not continue to assert that the Receiver lacked authority to pursue coverage under Atlas Turner's policies. (R. p. 1789). This motion remains pending.

The Receiver's investigation also revealed that Atlas Turner had been misleading the Circuit Court regarding the existence and status of its insurance assets. On August 18, 2023, the Receiver filed a notice alerting the Circuit Court to two misrepresentations by Atlas Turner: (1) that there was no evidence of Atlas Turner's potentially liquid insurance assets; and (2) that the Receiver violated an automatic stay. (R. pp. 1823–1853). First, the Receiver noted that "Atlas's representation that liquidation of Insurance Assets is speculative and unsupported is misleading, as the Receiver is aware of documents that evidence potential past liquidations of Insurance Assets of Atlas"—including two agreements in which Atlas Turner may have released certain insurance

rights in the 1980s. (R pp. 1823–1824) (citing Memorandum of Agreement Between Bell Asbestos Mines, LTD, Royal Insurance Company of Canada, and Atlas (Dec. 18, 1986) ("Royal Agreement") (R. pp. 1826–1833); Agreement Between Asbestos Corporation Ltd. ("ACL") and the Maryland Casualty Company (July 18, 1989) ("Maryland Agreement") (R. pp. 1834–1851)).[3] Second, the Receiver highlighted that Atlas Turner incorrectly stated that the Receiver violated an "automatic stay" by tendering lawsuits against insurance companies *after* Atlas Turner filed its notice of appeal. (R. p. 1824). In fact, Atlas Turner knew that the Receiver tendered these lawsuits more than two weeks *before* Atlas Turner filed its notice of appeal, and thus did not violate any automatic stay, even if one had applied. (R. p. 1824).[4]

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[3] These agreements evidence that Atlas Turner and its insurers took actions to liquidate insurance policies that cover U.S. asbestos liabilities, while simultaneously agreeing to hide their existence from claimants or other third parties with potential interests in the proceeds of such policies. For example, in its agreement liquidating the Royal liability policies, Atlas Turner "expressly represent[ed] and guarantee[d] that … [it] will not submit, voluntarily, copies of the policies to any third party and especially to anyone who would be likely to make use of them in a court of law." Royal Agreement (R. p. 1829). Likewise, in the agreement liquidating the Maryland Casualty policies (which includes a release of potential rights by Atlas), Atlas affiliate ACL "agrees that it will cease and forego all efforts to locate or develop any evidence or other information that may directly or indirectly assist any Claimant in developing, asserting or litigating any Third-Party action against Maryland, and ACL further agrees that it shall refrain from assisting others in locating or developing any such evidence or information." Maryland Agreement (R. p. 1845). At the same time, these agreements create trust accounts for the express purpose of paying judgments or settlements of U.S. asbestos claims. Neither Atlas nor its insurers have provided any information on the status of the insurance proceeds paid into those trust accounts—which may still be a repository of Atlas's insurance assets applicable to U.S. asbestos claims.

[4] In fact, this Court has since confirmed that an appeal of an order appointing a receiver does not result in an automatic stay under South Carolina Rule of Civil Procedure 62(a) and Section 14-3-450 of the South Carolina Code. *See Childers v. Davis Mech. Contractors, Inc.*, 2023-000727 (S.C. Ct. App. Sept. 8, 2023). Nevertheless, the Atlas Turner entities and their insurers continue to assert the stay. *See, e.g.*, 2023-CP-40-02979 (Oct. 23, 2023) (arguing the circuit court lacks jurisdiction due to Rules 205 and 241 of the South Carolina Appellate Court Rules in the Asbestos Corporation Limited receivership); 2023-CP-40-02979 (Oct. 23, 2023) (arguing the circuit court lacks jurisdiction due to Rule 205 in the Asbestos Corporation Limited receivership); 2023-CP-40-02979 (Oct. 23, 2023) (same); 2023-CP-40-02979 (Oct. 23, 2023) (seeking protective order in the Asbestos Corporation Limited receivership).

The same day, the Receiver filed a report on his investigation as of august 18, 2023. (R. pp. 1854–1925). In addition to reiterating that "[t]he Receiver's investigation to date into Atlas's potential Insurance Assets has already uncovered evidence that Atlas had (and likely still has) insurance responsive to U.S. asbestos claims," the Receiver elaborated on Atlas Turner's "strategic 'posture' of minimal engagement" in asbestos litigation across the country. (R. p. 1854). The strategy—which Atlas Turner first adopted in 1985—was to withdraw its defense to asbestos claims and allow a trial court to enter default judgments against it, presuming that the underlying plaintiffs would not be able to collect on those default judgments. (R. pp. 1855–1858). In many of those cases, Atlas Turner's insurance companies did the same.[5] (R. pp. 1856–1857). That is exactly what happened here. The Receiver explained: "After the Receiver initiated this third-party action against Atlas's insurers, individuals purporting to act on Atlas's behalf advised Atlas's insurers that Atlas was not tendering the asbestos claims pending before this Court and that no defense or indemnity should be provided by Atlas's insurers." (R. p. 1858). In this case, the Receiver noted, the "arranged declinations of coverages appear to be designed to thwart the Receiver's investigation and marshaling of Atlas's Insurance Assets to respond to the asbestos claims before this Court." (R. p. 1858).

The Circuit court heard argument on these and other issues on August 21, 2023. In its oral ruling, the Circuit Court opined that it was "clear from Resolute's letters that Atlas knows that there is coverage … [and] [h]as instructed … Resolute … that it is controlling its own defense." (R. p. 667, lines 14–20). The Circuit Court was troubled by "information that Atlas has liquidated

[5] Indeed, this was key part of Atlas and its affiliates' two historical insurance release agreements, discussed above. The insurers' agreements to liquidate insurance policies included express requirements that Atlas and its affiliates agree not to disclose the existence of insurance assets and to frustrate potential claimants' pursuit of insurance proceeds that would otherwise be available under the released policies.

some of [its insurance] policies, information that [the Receiver] has brought to the Court." (R. p. 669, lines 12–15). Because, in the Circuit Court's view, the information "raise[d] a serious-enough issue … about the honesty of Atlas to the Court as well as the ability to preserve assets that may be available to respond to the Welch lawsuit," the Circuit Court "ask[ed] that the parties convey" the issue to "the Court of Appeals in connection with any filings that are made with regard to a stay, a lifting of a stay, or anything else that would affect the ability to go forward with this receivership." (R. p. 669, line 16–p. 670, line 1). Given the exigency, the Circuit Court stated it "would strongly urge the Court to take this matter up at its earliest possible convenience." (R. p. 670, lines 3–5) The Circuit Court clarified that, in the meantime, it would issue an order directing Atlas Turner not to liquidate any additional insurance assets. (R. p. 670, line 9–p. 671, line 10).

The Circuit did just that on September 8, 2023, ordering "Atlas and its affiliates to refrain from liquidating or divesting any of its insurance assets, under the current protection of the Receiver, until further classification of the legal issues pending before the Court of Appeals is made." (R. p. 25). The Circuit Court also "order[ed] Atlas to identify and set forth all applicable insurance policies and assets applicable to this case." (R. p. 25). Atlas Turner remains bound by those orders. Yet Atlas Turner still has not produced any insurance policies or assets, and it has provided no acknowledgment or assurance to the Circuit Court that it will refrain from liquidating or divesting its insurance assets.

III. Argument

A. The Circuit Court had authority to sanction Atlas Turner for its refusal to engage in the discovery process.

The Circuit Court's sanction striking Atlas Turner's answer was well-justified. South Carolina's rules and corresponding judicial precedent provide trial courts broad discretion to sanction parties for failing to cooperate in discovery—including by striking the party's pleading—

and the Receivership Court acted well within its authority. Atlas Turner not only disobeyed several Court orders to produce a witness and turn over information regarding its insurance, but its counsel represented to the Circuit Court that it would continue to refuse compliance. Atlas Turner certainly has not shown an abuse of discretion in the Circuit Court's sanction of striking the answer.

This Court has repeatedly recognized that trial courts in this State have the "option to completely strike [a party's] pleadings in [a] matter as a sanction for failure to cooperate in discovery." *Scott*, 353 S.C. at 651 (citing S.C. R. Civ. P. 37(b)(2)(C)); *see, e.g.*, *Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co., Inc.*, 334 S.C. 193, 198 (S.C. Ct. App. 1999) ("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."). On this well-supported basis, the Circuit Court sanctioned Atlas Turner, stating:

> Atlas has failed to produce a witness. Indeed, it has articulated its intent not to over and over again. Atlas has refused to participate in meaningful discovery. It has refused to produce documents. Given this intentional and willful refusal to participate in discovery, the court hereby strikes Atlas' pleading.

(R. p. 9).

Atlas Turner does not deny the Circuit Court's authority to strike its pleading as a sanction for failure to participate in discovery. *See* Opening Br. at 12. Instead, it argues that the Circuit Court erred in finding it willful and that the Circuit Court did not adequately consider the factors before issuing its sanction. Atlas Turner is wrong on both points.

First, the Circuit Court correctly found that Atlas Turner willfully disobeyed the discovery order. While Atlas Turner suggests that the Circuit Court sanctioned it without warning, this is yet another misrepresentation. Atlas Turner was well aware that the Circuit Court viewed its conduct as willful, and well aware that the Circuit Court was considering striking its pleading as a sanction.

Atlas Turner's failure to comply with the discovery process was brought to the Circuit Court's attention during a hearing on April 19, 2023. Welch's counsel informed the Circuit Court that "Atlas has refused to engage in any discovery, either jurisdictional discovery or anything else," (R. p. 510, lines 6–8), and expressed concern that Atlas Turner would not show up for its deposition scheduled for April 20, (R. p. 520, line 5–p. 521, line 5). When the Circuit Court "direct[ed] that the 30(b)(6) witness be prepared sufficient to respond … to the records that [Welch] ha[d] been able to, by other means, gather" and asked whether Atlas Turner would comply, Atlas Turner's counsel stated, "Your Honor, my client will not have a witness available tomorrow ***or ever***." (R. p. 520, line 19–p. 521, line 9) (emphasis added). The Court maintained its order that Atlas Turner must produce a witness for trial or risk consequences. (R. p. 523, lines 2–14, p. 524, lines 13–24).

Atlas Turner did not produce a witness, did not identify a date by which it would produce a witness, and did not produce any documents requested by the 30(b)(6) notice. (R. p. 1). During a May 4, 2023 status conference, Welch's counsel asked the Circuit Court to hold Atlas Turner in contempt of court for its continued failure to submit to discovery, suggesting "striking an answer" as a sanction. (R. p. 544, line 17–p. 545, line 17). The Circuit Court declared that Atlas Turner "is in contempt of [its] order … to provide its corporate representative for deposition," (R. p. 557, lines 6–10), and agreed that a proper sanction could "include things such as striking the answer," (R. p. 551, lines 5–16).

To the extent Atlas Turner asserts that its conduct was not willful and that it could not have known that its answer could be stricken, these arguments are falsifiable. As of April 14, 2023, at the latest, Atlas Turner knew that the Circuit Court had ordered it to produce a witness—something it committed not to do. Atlas Turner could have produced a deponent at any time—but it did not do so, and it has maintained it will not do so. This State's procedural rules and precedent are clear

that a trial court is within its right to strike a pleading for this sort of discovery-related misconduct. *See, e.g.,* S.C. R. Civ. P. 37(b)(2)(C); *Scott*, 353 S.C. at 651; *Griffin*, 334 S.C. at 198.

Second, the order striking Atlas Turner's pleading, and the hearing transcript that preceded the order, make clear that the Circuit Court analyzed all relevant considerations before issuing its sanction.

As the Circuit Court recognized when sanctioning Atlas Turner, "[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." (R. p. 8) (quoting *Griffin*, 334 S.C. at 198). All four factors were discussed at the May 4, 2023, hearing. *See, e.g.,* (R. p. 543, line 16–p. 544, line 25) (Welch's counsel describing the nature and posture of discovery); (R. p. 548, line 8–p. 552, line 18) (Circuit Court describing nature of discovery, posture of discovery, and willfulness); (R. p. 551, lines 5–16) (discussing the appointment of a receiver over Atlas Turner, which had repeatedly articulated its intent not to comply). The Circuit Court also addressed the discovery and willfulness factors in its sanctions order. (R. p. 9) (discussing Atlas's specific "intentional and willful" acts of disobedience). And the Circuit Court appointed the Receiver to perform the obligations Atlas Turner refused to perform with respect to its insurance assets—negating any potential prejudice to Atlas Turner. (R. p. 11–18).

Atlas Turner does not say, but appears to suggest, that the Circuit Court was required to discuss the factors individually in its sanctions order. But Atlas does not cite any case stating that a trial court must discuss the factors at all. Nor does Atlas Turner state any case in which this Court or the South Carolina Supreme Court reversed a trial court's decision to strike a pleading. Instead, it cites only cases like this one—where the trial courts considered the factors and properly struck the parties' pleadings as sanctions for failure to participate in discovery. *See* Opening Br. at 13–

14 (discussing *Griffin*, 334 S.C. 193, and *McNair v. Fairfield County*, 379 S.C. 462 (S.C. Ct. App. 2008)). Based on this Court's opinions in *Griffin* and *McNair*, the Court should likewise uphold the Circuit Court's sanction here.

Finally, Atlas Turner's dismay at having its answer stricken is puzzling. Atlas Turner has repeatedly indicated that it does not intend to participate in this suit: It has failed to produce a witness or any policy documents. And it has failed to submit to the Circuit Court's jurisdiction despite repeated orders to do so. In fact, Atlas Turner has consistently represented that it not only will not, but cannot, participate. That is precisely why the Circuit Court struck the answer and appointed a limited Receiver—to represent Atlas Turner, a company claiming to be unwilling or unable to participate in the discovery process in United States courts, insofar as its insurance policies cover Welch's asbestos-related personal-injury claims in South Carolina. Given the Receiver will now take the actions Atlas Turner says it cannot and will not take, this Court's striking of Atlas Turner's pleading causes no prejudice and should be affirmed.[6]

B. The Receivership Court had authority to appoint a receiver to administer Atlas Turner's insurance assets.

1. Appointment of the Receiver accords with existing practice.

Under South Carolina law, "'[a] receiver may be appointed by a judge of the circuit court' in a variety of situations." *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 697 n.2 (S.C. Ct. App. 2022) (quoting S.C. Code Ann. § 15-65-10). In addition to the four specific scenarios in which Section 15-65-10 authorizes receiverships, the statute broadly provides that a court may

[6] The Circuit Court's sanction striking Atlas Turner's answer was itself another valid basis for the appointment of a receiver. For, as the Circuit Court explained, "the practical result of" striking the answer is that Atlas Turner will be subject to a default judgment, and another ground for appointing a receiver is "to carry a judgment into effect." (R. p. 12 n.3); *see* S.C. Code Ann. § 15-65-10(2) ("A receiver may be appointed by a judge of the circuit court … [a]fter judgment, to carry the judgment into effect[.]").

appoint a receiver "[i]n such other cases as are provided by law or may be in accordance with the existing practice…." *Id.* § 15-65-10(5). As the Circuit Court recognized, appointment of the Receiver in this case accords with the longstanding historical practice, as well as the Circuit Court's past practice in certain situations in asbestos cases. (R. pp. 12–15).

As the South Carolina Supreme Court has recognized, "[t]he right to have a receiver appointed is an ancient one" historically employed by courts sitting in equity. *Pelzer v. Hughes,* 3 S.E. 781, 785 (S.C. 1887); *accord First Carolinas Joint Stock Land Bank of Columbia v. Knotts,* 1 S.E.2d 797, 805–06 (S.C. 1939). Although "the power of appointment of a receiver should be resorted to only in exceptional circumstances," *Knotts,* 1 S.E.2d at 805, the circumstances of this case are the exact circumstances in which courts have found receiverships appropriate. When, as here, a defendant "is trying to defeat his creditors by an act or course of conduct which indicates moral fraud—a conscious intent to defeat, delay or hinder creditors in the collection of debts—then a court will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud," including appointment of a receiver. *Va. Carolina Chem. v. Hunter,* 66 S.E. 177, 179 (S.C. 1909); *accord Weis v. Goetter*, 72 Ala. 259, 261 (Ala. 1882) ("In cases where an estate is held by a party, under a title obtained by fraud, actual or constructive, a receiver will be appointed." (quoting STORY'S EQ. JUR. § 834)); *see, e.g., Clark v. Walter T. Bradley Coal, Lime & Cement Co.*, 6 App. D.C. 437, 443–49 (Ct. App. D.C. 1895) ("Fraud and imminent danger are shown here. It is alleged, and by the plea and demurrer admitted, that the Clarks are insolvent; that they have sought by fraudulent conveyances to put their property beyond the reach of their creditors; that they have no property subject to execution at law, and that, under cloak of the company which they have organized to cover their fraud, they are wasting and making away with their assets.").

The Circuit Court employed this historical practice here—appointing Peter D. Protopapas to serve as the Receiver and granting him "powers … related to the insurance assets of Atlas." (R. p. 16). The Circuit Court's appointment of Protopapas "to act as a receiver for around the twentieth time in an asbestos case," Opening Br. at 4, this fact only reinforces that appointment of a receiver here is "in accordance with the existing practice" of appointing receivers in appropriate situations in asbestos suits—often where a company is defunct. § 15-65-10(5).

Courts in other jurisdictions have also recognized Protopapas as a trusted receiver in insurance matters. For example, the Delaware Court of Chancery recently appointed Protopapas to serve as a receiver in a matter before that court. *See In re Reinz Wis. Gasket, LLC*, 2022-0859-MTZ (Del. Ch. Aug. 3, 2023) (appointing Peter D. Protopapas as receiver). [7]

The Receiver's appointment therefore accords with the historical practice the Circuit Court, at times, appropriately invokes, and it should be affirmed on that basis under South Carolina Code § 15-65-10(5).

Atlas Turner's only argument for why section 15-65-10(5) does not apply is its assertion that this case involves the appointment of "a receiver for a foreign corporation's assets that were

[7] When appointing Protopapas to serve as a court-appointed receiver, Chief Justice Toal has also repeatedly emphasized Protopapas's professionalism—including in this case. *See, e.g.*, (R. p. 583, line 13–p. 584, line 1) ("I appointed Mr. Protopapas as the receiver in the first Covil case, not by anybody's recommendation, but because of my knowledge of Mr. Protopapas. And he has now operated in a good many receiverships. And I will assure you, he is a vigorous defender in the receiverships in which a qualified settlement fund has been established. He does not settle cases casually. He protects the fund just as any defense lawyer would do. The attorneys he … hires to handle the defense are well-recognized defense lawyers to the nth degree in this state and vigorously represent the defense point of view."); Order at 14, *Falls v. CBS Corp.*, No. 2015-CP-46-02155 (S.C. Ct. Common Pleas May 7, 2020) ("This Court manages the South Carolina docket, and has observed Covil's behavior in numerous asbestos cases since Mr. Protopapas was appointed. From this Court's perspective, Mr. Protopapas has managed Covil's defense in those cases appropriately and professionally, while consistently meeting his obligations to Covil's insurers.").

never in the state." Opening Br. at 8. But, as discussed above, the Receiver has presented evidence in the Circuit Court showing that it had (and likely has) insurance policies covering the injuries Atlas Turner caused to claimants in this State. Moreover, as discussed in the next section, these insurance policies are indeed "assets … in the state," *id.*, under South Carolina law. *See infra* p. 15. So, Atlas Turner's argument falls under multiple premises.

Atlas Turner also cites one case it says reversed "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.'" *Id.* (citing *Boynton v. Consol. Indem. & Ins. Co.*, 185 S.E. 731, 737 (1936)). This description is misleading. In *Boynton*, a receiver was appointed to oversee a bond given by Guardian Casualty Company, which indisputably was "not the property of the Consolidated Company for which the receiver was appointed." 185 S.E. at 737. Here, the Receiver was appointed to marshal Atlas Turner's applicable insurance assets, and Atlas Turner itself—and not some other entity—is the company for which the Receiver was appointed.

Atlas Turner identifies no defect in that appointment. And its repeated challenge to "extraterritorial power," Opening Br. at 9, is a red herring, since the Receiver is pursuing coverage under insurance policies providing coverage for claims brought in South Carolina.

2. The Receiver was appointed to administer property within the State.

The relevant property at issue here—the insurance policies covering South Carolina plaintiffs—are considered by South Carolina to be property of the State. South Carolina Code 38-61-10 states: "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 this State are considered to have been made within this State and are subject to the laws of this State." *Id.* Insurance policies covering property, lives, or interests in South Carolina—which the

Receiver has every reason to believe exist[8]—are plainly subject to the Circuit Court's jurisdiction. *See also Sangamo Weston v. Nat'l Sur. Corp.*, 414 S.E.2d 127, 130 (1992) (noting it is "immaterial where the contract was entered into" or whether "the policyholders or insurers [are] citizens of South Carolina"). All that matters is the insurance policies cover property, lives, or interest in the state. *Id.*[9]

IV. CONCLUSION

Based on Atlas Turner's unwillingness to participate in the discovery process, the Circuit Court properly exercised its authority to sanction Atlas Turner by striking its pleading and to address the resulting default by appointing a receiver to marshal and administer Atlas Turner's insurance assets. This Court should affirm the Circuit Court in full.

(Signature page follows)

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[8] Both the Royal Agreement and Maryland Agreement, *see supra* p. 6 & n.3, support the Receiver's belief that Atlas Turner had, and likely still has, insurance assets covering property, interests or lives in South Carolina. The trust accounts created by these agreements exist for the express purpose of satisfying asbestos liabilities, including in the U.S.—evidence that Atlas Turner and its affiliates understood that the policies issued provided coverage for asbestos claims asserted across the U.S., including South Carolina. Accordingly, the insurance proceeds collected in such accounts, like the insurance policies themselves, evidence assets located in South Carolina.

[9] Ironically, Atlas Turner argues that *Sangamo*'s discussion of Section 38-61-10 is wholly inapplicable here, attempting to explain it away on its facts (not its legal reasoning), but may not recognize that Chief Justice Toal (presiding over the Circuit Court below) authored that Supreme Court decision. Instead, Atlas Turner cites wholly inapposite cases, which dealt with property in New York, *Unisun Ins. Co. v. Hertz Rental Corp.*, 436 S.E.2d 182, 184 n.1 (S.C. Ct. App. 1993), or that discuss the U.S. Commerce Clause generally, *Travelscape, LLC v. S.C. Dep't of Rev.*, 705 S.E.2d 28, 36 (S.C. 2011). These cases—which do not involve insurance contracts entered to cover property in South Carolina—are irrelevant. Atlas Turner also cites *Russell v. McGrath*, 135 F. Supp. 3d 427, 431 (D.S.C. 2015), which is a federal (not state) case and actually makes clear that insurance to cover injuries to people who are "longtime permanent resident[s] of South Carolina" is governed by Section 38-61-10. 135 F. Supp. 3d at 432. Moreover, Atlas Turner ignores that it purposefully marketed and sold asbestos into South Carolina for many years (and purchased insurance to cover itself for liabilities arising from that very action). Its insurance policies are property within the state.

Respectfully submitted,

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January 17, 2024

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Jan 17 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2022-CP-40-03834

_____

Appellate Case No. 2023-001096

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

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 successors-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-by-merger to Borg-Warner Corporation, Occidental Chemical Corporation as successor to Durez Corporation, O'reilly Automotive Stores, Inc., Paramount Global f/k/a Viacombs 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, Petitioners,

of which

Atlas Turner, Inc. is the Appellant.

and

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

and

Peter D. Protopapas, Duly Appointed Receiver for Atlas Turner, Inc., are the Respondents.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that this brief complies with the provisions of Rule 211(b), SCACR.

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January 17, 2024.