THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2023-000727
Circuit Court Case No. 2021-CP-40-03484

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 Their Duly Appointed Receiver, Peter D. Protopapas, is the ..... Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company;

and

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

REPLY IN SUPPORT OF MOTION FOR CERTIFICATION BY THE SUPREME COURT

Appellants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (collectively "Appellants") hereby submit this reply in support of their motion to this Court under Rule 204(b), SCACR, to certify this case for review.

INTRODUCTION AND SUMMARY

The Receiver concedes that certification here "could aid the interest of judicial economy and conserve the parties' time and resources by expediting appellate review." (Return at 11.) Appellants agree. Certifying this appeal will allow this Court to expedite review of the Circuit Court's March 31, 2023 Order (the "March 31 Order"), which continued a receivership over Payne & Keller, a Texas corporation that dissolved in 1986 and, under Texas's statute of repose, could not sue or be sued as of 1989.

As Appellants explained in their motion, the Circuit Court's March 31 Order erred on two grounds that present important questions of public interest. First, it allowed a receivership based solely on Payne & Keller's out-of-state insurance policies, even though South Carolina law requires "property within South Carolina" for a receivership. Appx. 3 (March 31 Order at 3); *see* S.C. Code § 15-65-10(4) (limiting receiverships over foreign entities to "property within this State"); *Howard v. Allen*, 254 S.C. 455, 459, 176 S.E.2d 127, 128 (1970) (out-of-state policies are not property in this state and cannot be the basis for attachment in in rem proceedings). Second, the Circuit Court ruled that the Receiver was allowed to continue his receivership based on his unpleaded assertions that Payne & Keller fraudulently dissolved, such that Payne & Keller's dissolution could be revoked and previously-barred claims against it revived under a new Texas

statute enacted many years after that dissolution. Appx. 0004-0006 (March 31 Order at 4-6). This ruling infringed Texas's authority over its own corporations. *See Mitchell v. Hancock*, 196 S.W. 694, 698 (Tex. App. 1917) ("'[t]he power to create a corporation is an attribute of sovereignty, and it is therefore, as to its corporate existence, amenable to and controllable in this respect by the sovereignty which created it and by none other.'") (citation omitted). It also violated Texas's constitution and Texas's established law against the retroactive application of statutes to revive barred claims. *Baker Hughes, Inc. v. Keco R.&D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999) ("a statute extending the limitations period of a claim already barred by limitations violations the Texas Constitution's prohibition against retroactive laws").

Because these rulings are indefensible, the Receiver does not address them on their merits. Instead, he devotes most of his Return to *ad hominem* attacks against Appellants and the entire insurance industry. Emblematic of this approach is the chart on pages 12-16 of the Receiver's Return, listing 28 appellate rulings or actions involving requests for appellate review of the Circuit Court's orders. Appellants were not party to any of those rulings or actions.

Nor is the Receiver correct that Appellants are asking this Court to weigh in on "hypothetical questions," or for an "advisory opinion … on the asbestos docket as a whole." (Return at 3-4). The March 31 Order—the matter for which Appellants seek Rule 204 certification—is now on appeal to the South Carolina Court of Appeals. That Order indisputably addressed—and depended on—holdings on the two important questions that are fundamental to this motion for certification.[1] Review of that order is appropriate and, indeed, necessary.

[1] Although the Receiver attempts to suggest that the dissolution issue is not properly before this Court (Return at 4), he later concedes that the March 31 Order ruled on "dissolution issues … now part of this appeal" (Return at 6).

Moreover, the March 31 Order exemplifies an ongoing pattern in the asbestos docket, giving added weight to the important questions of public significance that this case raises. At the behest of asbestos plaintiffs who consistently seek the appointment of the same receiver—Peter Protopapas—the Circuit Court has repeatedly ruled that insurance policies issued to out-of-state defendants by out-of-state insurance companies are property within the state sufficient to justify a receivership. This case presents an even more acute concern as to a breakdown in the adversary process. The Receiver, after being appointed at the behest of the asbestos plaintiff, is aiding the plaintiff by arguing against Payne & Keller's absolute defense to liability, thereby opening Payne & Keller to potential tort liability to the plaintiff. He has asserted that he controls the defense of Payne & Keller, and he has then exercised that control to strip Payne & Keller of a repose defense.

I. THE RECEIVER'S RETURN ACCENTUATES THE BREAKDOWN IN THE ADVERSARY PROCESS THAT APPELLANTS DESCRIBED IN THEIR MOTION.

In their motion to certify, Appellants did not just show that the Circuit Court committed significant legal errors when it allowed the receivership to continue. They also described how the Receiver has undermined Payne & Keller's defense to underlying tort claims. (Motion 15-16). In his Return, the Receiver acknowledges the steps he has taken to eliminate Payne & Keller's absolute defense to liability.

When the Receiver was appointed, the Circuit Court directed him to "take any and all steps necessary to protect the interests of Payne & Keller whatever they may be." (Return at 9). Yet he has done precisely the opposite. His effort to salvage his receivership so that he can pursue claims against Appellants has triumphed over Payne & Keller's interest in successfully defending against underlying tort litigation.

At every turn, the Receiver has sought to prevent Appellants from establishing that Payne & Keller cannot sue or be sued and has a defense to underlying tort liability. Directly contrary to

his actions, the Receiver has a duty to assure that Payne & Keller can litigate all defenses available to it that are properly asserted for judicial resolution.[2] But when Appellants first argued that Payne & Keller's dissolution precluded claims by or against it, such that the receivership should be dissolved, the Receiver attacked his charge, asserting that Payne & Keller fraudulently dissolved almost forty years ago such that it could be resuscitated and subject to suit.[3] Then, even though Texas's constitutional bar on retroactively applying later-passed statutes prohibited the Circuit Court from reviving claims against Payne & Keller, the Receiver ignored that constitutional prohibition so that he could ask the Circuit Court to find a prima facie case that Payne & Keller had fraudulently dissolved, and thus save his receivership. In the March 31 Order, the Circuit Court accepted his arguments, allowing the receivership—and thus claims by or against Payne & Keller—to continue.

Payne & Keller's own defense lawyers have not been immune from the Receiver's campaign to eliminate its dissolution defense. The Receiver has expressly waived Payne & Keller's attorney-client privilege and opinion work product protection by publicly filing emails from Payne & Keller's South Carolina defense counsel in which they discuss the dissolution

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[2] The Receiver states that in taking these actions he "represents" and is acting on behalf of Payne & Keller. (Return at 10). As an insured, Payne & Keller has a duty to cooperate with its insurers in defending against underlying tort claims, rather than undermining its own defense. *See Vaught v. Nationwide Mut. Ins. Co.*, 250 S.C. 65, 71, 156 S.E.2d 627, 630 (1967). Also, the Receiver makes no effort to explain how revocation of Payne & Keller's 1986 dissolution protects Payne & Keller's interests. His only justification is that he is "seeking to recover [Payne & Keller's] insurance proceeds from its historical insurers" (Return at 10), but Payne & Keller has no need to pursue insurance proceeds if all suits against it are barred due to its dissolution and the statute of repose.

[3] The Receiver's so-called "evidence" of "fraud" was that asbestos claims were being brought against other companies in the early 1980s; that Payne & Keller faced a potential for three (or at most, twelve) dioxin claims that it might have to indemnify; and that Payne & Keller was sued in a single asbestos matter prior to the company's 1986 dissolution, which was dismissed without prejudice. *See* March 31 Order at 5 (referring to the Receiver's briefing and citation to *In re Charter Co.*, 63 B.R. 568 (M.D. Fla. 1986)).

defense. (Return App. 0651-0660). He misrepresents the opinions of the South Carolina lawyer as expressed in those now-public emails, arguing to this Court that the lawyer did not believe the dissolution defense to be "legitimate" "under the Texas dissolution statute."[4] (Return at 10). In fact, that lawyer stated that the Texas dissolution statute "limit[ed] the dissolved/terminated corporation[']s liability for claims," and he would "certainly like to apply the Texas dissolution statute in these South Carolina actions," but he did not believe the defense would be successful for reasons wholly unrelated to the fraudulent dissolution claim first asserted by the Receiver over a year later. (Return App. 0651). The lawyer's email also never discusses Texas's bar on the retroactive application of statutes to revive claims. Even after the March 31 Order, the same South Carolina law firm later pleaded a defense on Payne & Keller's behalf that "Payne & Keller Company is a dissolved entity and therefore lacks the capacity to be sued." (Payne & Keller Ans. to 2d Am. Complaint ¶ 252). When Payne & Keller's Texas lawyer asserted that same defense to a Texas action, however, the Receiver sued him in South Carolina. (Return at 7 n.7).

The Receiver defends all this conduct by arguing that he is not obligated to "raise meritless arguments and defenses to the detriment of the company in receivership." (Return at 10). The dissolution defense is not to the detriment of Payne & Keller, nor is it frivolous or asserted in bad faith. The fact of Payne & Keller's dissolution is undisputed. So is the Texas statute of repose stating that Payne & Keller could not sue or be sued after 1989. Nor is there any dispute that in 1986, when Payne & Keller dissolved, and in 1989, when all claims by or against it were barred, Texas law did not include any provision permitting a court to revoke a corporate dissolution based on fraud. It is also beyond contest that the Texas Supreme Court has repeatedly applied the Texas

[4] By commenting on the contents of these now-public emails, the Insurers are not expressly or impliedly waiving any privilege.

Constitution's bar on retroactive statutes to hold that a subsequently-enacted statute cannot revive already-barred claims. Far from meritless, these facts and law are established and the Receiver does not even dispute them in his Return. Indeed, a defense lawyer who did not pursue a dissolution defense on behalf of Payne & Keller would have been committing malpractice.

The Receiver does not explain how it could threaten Payne & Keller to raise this obvious defense under Texas law. And he does not explain how his attacks on Payne & Keller, opening the company to potential liability, are possibly in the company's "best interest." Nor can he. The Receiver's unprecedented and unusual conduct demands this Court's intervention.

II. THE RECEIVER'S LAUNDRY LIST OF GRIEVANCES DOES NOT ELIMINATE THE SIGNIFICANT QUESTIONS PRESENTED.

Most of the Receiver's return is devoted to grievances against other insurers who are not even party to this appeal, yet the Receiver still includes Appellants in his blunderbuss aspersions. These grievances do not affect the merits of the motion to certify, and the Court may disregard them entirely. Rather than leaving them uncontested, however, Appellants address them briefly.

For example, the Receiver falsely asserts that "the insurers" (apparently including Appellants) will "pursue any and all methods to avoid their contractual obligations to defend and indemnify their insureds from which they received premiums for decades." (Return at 8.) To the contrary, Appellant National Union has defended every lawsuit against Payne & Keller tendered by the Receiver.[5] And it has also defended other named insureds under the policies at issue for over 35 years. Indeed, in his third-party complaint against Appellants, the Receiver does not even allege a breach of the duty to defend or duty to indemnify. Rather, he alleges two claims: a claim

[5] National Union is the only primary insurer among Appellants, which is why it has been the entity defending these claims.

that he is entitled to payment of his own fees, and a claim that he is entitled to possession of Payne & Keller's policies. (2d Am. Third-Party Complaint, ¶¶ 176-185).

The Receiver also chastises Appellants for mentioning the Circuit Court's October 5 Order revoking Payne & Keller's dissolution (Return at 4). Then, he changes course and relies heavily on events that postdated the March 31 Order. For example, he makes much of the Court of Appeals' November 21, 2023 Order denying Appellants' motion asking that Court to enforce its exclusive jurisdiction under Rule 205, SCACR, and vacate the Circuit Court's October 5 Order, which addressed the same issues as the March 31 Order now on appeal. The Court of Appeals declined to do so not because Appellants' position on Rule 205 lacked merit, but because the October 5 order was not before it. (Return App. 3-6). This does not mean, however, that Appellants cannot seek review of the earlier March 31 Order in this Court.

The Receiver also accuses Appellants of "duplicitous filings across multiple jurisdictions" (specifically, Texas) "seeking to achieve more favorable results." (Return at 5). This accusation ignores the facts of the two Texas proceedings described by the Receiver. Both arose after the March 31 Order, and neither was initiated by Appellants.

In the first Texas proceeding, an asbestos plaintiff sued Payne & Keller. (*See* Return at 6.) The Receiver accepted service and tendered the suit to Payne & Keller's insurers, and National Union accepted the tender and engaged counsel to defend the Texas case. The defense lawyer filed pleadings asserting the dissolution defense on behalf of Payne & Keller—the same defense that Payne & Keller's defense attorneys assert in answers filed in South Carolina. The plaintiff in the Texas suit nonsuited his case shortly thereafter. Astoundingly, the Receiver admits that he "did not, and would not authorize" the assertion of this defense (Return at 7), even though it was plainly

in Payne & Keller's best interest to do so. As the Receiver also admits (Return at 7 n.4), he even sued the defense lawyer in South Carolina for asserting the defense.

As to the second Texas proceeding, the Receiver initiated that proceeding, not Appellants. On October 12, the Receiver took the Circuit Court's October 5 Order to Texas and "domesticated" it, without notifying to Appellants, who had opposed entry of that order. He raced to Texas and initiated that action even though the 10-day period for a motion to reconsider had not yet expired and the dissolution issues were also part of this pending appeal. That same day, the Receiver then used the "domesticated" order to obtain a clerical "Certificate of Revocation of Dissolution" from the Texas Secretary of State. No one ordered the Receiver to take those steps before this appeal was completed. He did so of his own volition. Because of these actions, Appellants were left with no choice but to seek to vacate the "domesticated" order in Texas, as well as litigating these issues in South Carolina.

The Receiver also asserts that the Texas Secretary of State has found these issues to be unimportant, so this Court should also ignore them (Return at 8), but that is a mischaracterization of the Secretary of State's position. The Secretary of State merely sought to be dismissed from the litigation in Texas for lack of subject matter jurisdiction, and Appellants acceded to that request. The Secretary of State expressly *did not* "opine on … whether the domesticated decision was rendered by a court acting within the limits of its authority and subject matter jurisdiction," or "on the Order's apparent domestication in Texas through Texas Civil Practice & Remedies Code Chapter 35 or on the limits, if any, to said Order's effectiveness in Texas." (Return App. 0638.) She also did not "make any comment, either in support or in opposition, concerning the findings of fact and law that underlie the October 5, 2023 South Carolina Order." (*Id.*) Thus, the Secretary

of State's comments do not refute Appellants' showing that the Circuit Court exceeded its proper jurisdiction and violated Texas's constitution and governing precedent.

Next, the Receiver blames Appellants for the "tortured procedural history of this appeal" and the fact that opening briefs have not yet been filed. (Return at 12). Of course, by seeking certification here, Appellants are pursuing an expedited appellate resolution, rather than stringing out the process. The Receiver also glosses over the fact that briefing was delayed because he challenged the immediate appealability of the March 31 Order, necessitating a decision on the appealability issue. Moreover, the Court of Appeals has continued to hold this case in abeyance, even after deciding that the appeal would proceed, because of other motions practice, some of which was initiated by the Receiver. When Appellants are directed to file their opening briefs, they will promptly do so. Actions speak louder than words. Appellants' motion to this Court to certify this appeal shows they have no desire for delay. To the contrary, Appellants seek a prompt resolution of this appeal on the merits.

Even now, the Receiver is asking this Court to defer a ruling on the March 31 Order, arguing that the order was interlocutory and not "immediately appealable." (Return at 17). His position should be rejected, as it was when the Court of Appeals ruled that the "appeal shall proceed." (Return App. 0364). South Carolina Code § 14-3-330(4) states that this Court "shall have appellate jurisdiction" and "shall review upon appeal" an "interlocutory order . . . granting, continuing, modifying, or refusing the appointment of a receiver." That is precisely what the March 31 Order did—it denied a request to dissolve the receivership and dismiss the Receiver's claims against Appellants, thereby "continuing" the receivership over Payne & Keller. It also "modif[ied]" the receivership. After the Circuit Court initially ordered the Receiver to "protect[] the interests of Payne & Keller" (Return at 9), its March 31 Order permitted the Receiver to pursue

undoing the corporate dissolution of Payne & Keller, which would turn Payne & Keller from a dissolved entity immune from suit into a live company and potentially viable tort defendant. Although interlocutory, the March 31 Order is plainly appealable now.

Finally, the Receiver paints all "insurers" with the same brush, castigating them for pursuing appeals in receivership cases. (Return at 11). He even goes so far as to suggest that if this Court certifies this appeal, it should do so to prohibit "insurers and other parties" from "requesting certification" in "receivership appeals." (*Id.*). The Receiver's laundry list of 28 different "rulings" or actions in other appeals is irrelevant to the merits of this motion. Some of them are not "rulings" at all, as his table at pages 12-16 suggests: they include items like voluntary withdrawals of appeals, withdrawn petitions, and consented dismissals. And none of the 28 items in the Receiver's table even involved Appellants.

To be sure, the receivership activities in the asbestos docket have led to many appellate proceedings not involving Appellants. But those proceedings illustrate the scope and unprecedented nature of the Receiver's activities, not a campaign by insurers to "abuse the appellate process." Indeed, in one order cited by the Receiver denying his request for sanctions, this Court recognized the "complexity of the issues" in receivership litigation. (Return App. 0001-0002). It also acknowledged that parties have the right to protect and further their interests "within the bounds of applicable rules and case law." (*Id.*). Appellants are acting consistently with that standard. Moreover, Appellants' interests are aligned with the interest of Payne & Keller in avoiding liability. The Receiver's abandonment of and attacks on his charge are inconsistent with that interest and should be remedied now.

CONCLUSION

The Court should grant Appellants' motion and certify the March 31 Order for review.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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February 2, 2024

PROOF OF SERVICE

I, the undersigned of the law offices of Murphy & Grantland PA, attorneys for Appellants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburg, PA, Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company, and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them to the addresses below:

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February 2, 2024