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SC Court of Appeals

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. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs,

Respondents,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiw-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking

Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC,

Defendants,

Of which Asbestos Corporation Limited, is

Appellant,

and

Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas,

Third-Party Plaintiff, Respondent

v.

Anglo American PLC, individually and as successor in interest to Anglo American Corporation of South Africa LTD., De Beers PLC, individually and as successor in interest to De Beers S.A., De Beers Centenary AG, De Beers Consolidated Mines Ltd., n/k/a De Beers Consolidated Mines Proprietary Ltd., De Beers UK Ltd., De Beers Jewellers LTD., De Beers Jewellers US, Inc., Anglo American US Holdings Inc., Element Six US Corp., Element Six Technologies US Corp., Element Six Technologies (OR) Corp., First Mode Holdings, Inc., Platinum Guild International (U.S.A.) Jewelry Inc., Lightbox Jewelry Inc., Forevermark US Inc., Anglo American Crop Nutrients (U.S.A.) LLC, Charter Consolidated Ltd., ESAB Corporation, Central Mining & Investment Corporation Ltd., Cape Holdco Ltd., The Law Debenture Corporation PLC, Cape Industrial Services Group Ltd., Mohed Altrad, Altrad UK Ltd., Cape UK Holdings Newco Ltd., Altrad Services, Ltd., f/k/a Cape Industrial Services Ltd., Altrad Investment Authority S.A.S., Sparrows Offshore Group Ltd., Hawk Bidco US Inc., ArranCo US, LLC, Sparrows Offshore, LLC, and The Sparrows Group, LLC,

Third-Party Defendants,

Of which Mohed Altrad, Altrad Investment Authority S.A.S., ArranCo US, LLC, Hawk Bidco US Inc., Sparrows Offshore, LLC, Anglo American PLC, De Beers, PLC, De Beers Centenary AG, De Beers Consolidated Mines Proprietary Ltd., De Beers UK Ltd., ESAB Corporation, Charter Consolidated Ltd., and Central Mining & Investment Corporation Ltd., are

Appellants.

INITIAL BRIEF OF APPELLANT ASBESTOS CORPORATION LIMITED

CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
James D. Gandy, III (SC Bar No. 11925)
Graydon V. Olive, IV (SC Bar No. 105319)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
(843) 720-5488
Attorneys for Appellant Asbestos Corporation Limited

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INTRODUCTION

This appeal presents a straightforward question: can the circuit court appoint a receiver over a foreign company's assets and property that have never been in South Carolina? Appellant, Asbestos Corporation Limited ("ACL"), is a Canadian company that previously mined and sold asbestos exclusively in Canada. (Answer.) ACL ceased its asbestos-related business in the mid-1980s but remains an active Canadian company. (Answer.)

ACL does not do business in South Carolina. (Richard Dufour Affidavit.) It also does not have any assets or property in South Carolina. (Richard Dufour Affidavit.) Therefore, the circuit court had no authority to appoint a receiver over ACL's assets or property.

Recognizing that it did not have jurisdiction over out-of-state property, the circuit court applied a conflicts/choice of law statute[1] to construe ACL's property as "in" South Carolina. (Receiver Order p. 4). The circuit court then determined that it would be in accordance with existing practice to appoint a receiver pursuant to section 15-65-10(5) of the South Carolina Code because ACL's personal jurisdiction defense was "moral fraud" and "active wrongdoing."[2] (Receiver Order p. 3.) The circuit court erred in applying both statutes and appointing the purported receiver.

Additionally, the circuit court erred in holding ACL in contempt and striking its pleadings. The circuit court found that ACL willfully disobeyed its discovery order because it did not produce a witness requested pursuant to Rule 30(b)(6), South Carolina Rules of Civil Procedure. (Contempt Order). ACL attempted to comply with the discovery order, but it has no individuals with knowledge of the requested issues. (August 21, 2023 Hearing transcript). It also does not

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1 S.C. Code Ann. § 38-61-10.

2 The circuit court did not support these statements with any evidence.

have any documents that are capable of familiarizing anyone with knowledge of the requested issues. (August 21, 2023 Hearing transcript). Therefore, the circuit court erred in finding that ACL acted willfully. Moreover, the circuit court did not consider all the required factors in deciding to strike ACL's pleadings; it struck ACL's pleadings based solely on its erroneous determination that ACL acted willfully. Accordingly, the circuit court's decisions are based upon errors of law and should be reversed.

STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in appointing a receiver for ACL?

> **A. Can the circuit court assert jurisdiction over assets and property outside of South Carolina?**
>
> **B. Did the circuit court err in applying S.C. Code Ann. § 15-65-10(5) because it is not "in accordance with existing practice" to appoint receivers over assets and property outside of South Carolina?**

II. Did the circuit court err in striking ACL's pleadings?

> **A. Did the circuit court abuse its discretion because it did not consider all the required factors?**
>
> **B. Did the circuit court abuse its discretion because the sanction is unreasonable and too severe?**

III. Did the circuit court err in holding ACL in contempt because ACL did not act willfully?

STATEMENT OF THE CASE

ACL is an active Canadian company headquartered in the province of Quebec. Prior to 1986, ACL engaged in the mining and milling of raw chrysotile asbestos fiber. (Richard Dufour Affidavit.)

ACL's mining and subsequent sales were wholly performed in Canada. (Richard Dufour Affidavit.) ACL has no connection or nexus to South Carolina.[3] (Answer; Richard Dufour Affidavit.)

Respondents, John A. Tibbs and Margaret B. Tibbs (collectively, "the Tibbses"), sued ACL and many other defendants for alleged exposure to asbestos. (Summons and Complaint; First Amended Summons and Complaint.) The Tibbses served ACL with a notice of a Rule 30(b)(6), SCRCP, deposition regarding ACL's asbestos business. (Depo notice; 1st Amended Depo Notice; 2nd Amended Depo Notice.) ACL responded that it was not able to produce a witness capable of responding to the proposed issues due to the lengthy amount of time that had passed since ACL ceased its asbestos business in the mid-1980s. ACL conveyed that all individuals involved in the asbestos business had passed away, and it did not possess any documents capable of preparing a witness to respond to the proposed issues. ACL also communicated that the limitations and restrictions of the Quebec Business Concerns Records Act, CQLR c D-12 (the "QBCRA"), prevented it from producing documents it possessed.[4] (July 24, 2023 Letter.)

At a hearing on July 10, 2023, the circuit court orally ordered ACL to fully answer discovery and appear for the requested 30(b)(6) deposition within fourteen days. (Contempt Order p.1.) On July 19, 2023, the circuit court issued an order that denied ACL's motion to dismiss for lack of personal jurisdiction and reiterated its order for ACL to produce a 30(b)(6) witness by July

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[3] This includes not having a certificate, either in place or rescinded, to do business in South Carolina. Additionally, ACL does not own any assets or property in South Carolina.

[4] 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.

24, 2023. (Order on Personal Jurisdiction.) ACL answered the court ordered discovery and called the Tibbses' counsel in advance to advise her that ACL could not produce the requested 30(b)(6) witness. In a good faith effort to show its attempt to comply with the circuit court's order, ACL produced copies of depositions and transcripts that were not subject to the QBCRA from previous witnesses that were now deceased.[5]

On September 8, 2023, the circuit court entered an order holding ACL in contempt and striking its pleadings as a sanction ("Contempt Order"). (Contempt Order.) In a separate contemporaneous order, the circuit court granted the Tibbses' motion to appoint a receiver ("Receiver Order"). (Receiver Order p. 1.)

In the Receiver Order, the circuit court found that it had jurisdiction over ACL's out-of-state assets because they were "in" South Carolina pursuant to S.C. Code Ann. § 38-61-10.[6] (Receiver Order.) The circuit court also concluded that obtaining a default judgment would merely be a ministerial process because ACL was in default.[7] (Receiver Order.) At the Tibbses' request, the circuit court appointed attorney Peter Protopapas to act as a receiver for approximately the twentieth time in an asbestos case in which the law firm Dean Omar represented the plaintiff. (Receiver Order.) By notice served and filed September 13, 2023, ACL appealed the Contempt Order and Receiver Order. (Contempt Order; Receiver Order; Notice of Appeal.)

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[5] The Tibbses' counsel responded, "What do you expect me to do with these?" She did not review the documents to see if they were helpful; instead, she pursued the nuclear option of having the circuit court hold ACL in contempt and strike ACL's answer, resulting in ACL's default.

[6] That statute provides 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." § 38-61-10 (emphasis added). The statute never states that the contracts are to be considered assets *located in* South Carolina.

[7] The circuit court's conclusion was error. 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). To date, there is no default judgment against ACL in this case.

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 & Envtl. 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. 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)). Moreover, a court may not appoint a receiver absent jurisdiction to do so. *See Ex Parte First Pennsylvania Banking & Tr.Co.,* 247 S.C. 506, 148 S.E.2d 373 (1966) ("[T]he jurisdiction of a state is restricted to its own territorial limits."). Without such jurisdiction, the actions of the court and the purported receiver are mere nullities.

Additionally, contempt is 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, 874 (1988). "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). "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). 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 for ACL.

A. The circuit court cannot assert jurisdiction over assets and property outside of South Carolina.

"[T]he jurisdiction of a state is restricted to its own territorial limits."[8] *Ex parte First Pennsylvania Banking & Tr. Co.*, 247 S.C. 506, 508, 148 S.E.2d 373, 374 (1966). Consequently, "[t]he 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).

Moreover, "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." *Ex parte First Pennsylvania Banking*, 247 S.C. at 508, 148 S.E.2d at 374. Accordingly, "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

[8] The circuit court oddly refused to recognize this basic premise of law. (August 21, 2023 hearing transcript).

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 extensively reviewed the territorial power of receivers. Our Supreme Court noted a United States Supreme Court ruling 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 (emphasis added) (quoting *Booth v. Clark*, 58 U.S. 322, 338 (1854)). Our Supreme Court also noted that it previously "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 v. Gary*, 14 S. C. 573 (1881)). It concluded that "[t]his is supported by reason, and the jurisdiction and the power exercised by courts." *Id.* 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.* The same holds true in this case.

Indeed, our receivership statute references these jurisdictional limits, specifically limiting receiverships over foreign companies to "property within the state." S.C. Code Ann. § 15-65-10(4). Nevertheless, the circuit court ruled that the statute's reference to "'property within this state' [wa]s not a limitation on the Receiver's authority in this case." (Receiver Order p. 4.) The circuit court reasoned that ACL's "insuring assets are subject to the laws of South Carolina, including the duly appointed Receiver" under § 38-61-10.

Section 38-61-10 in its entirety provides the following:

> 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.

S.C. Code Ann § 38-61-10 (emphases added). To support its interpretation of § 38-61-10, the circuit court cited *Sangamo Weston, Inc. v. Nat'l Sur. Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992). In *Sangamo*, the defendant operated a facility located in South Carolina that allegedly discharged a hazardous substance into the surrounding area. *Id.* at 146, 414 S.E.2d at 129. 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. However, that 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).

The circuit court erred in applying § 38-61-10 to construe that ACL has property in South Carolina. Section 38-61-10 is merely a choice of law provision. Contrary to the circuit court's ruling, § 38-61-10 does not allow courts to unilaterally declare insurance assets as property located in South Carolina; it merely replaces the common law rule of *lex loci contractus* for insurance contracts in the conflict of laws context. *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)); *Hartsock v. Am. Auto. Ins. Co.*, 788 F. Supp. 2d 447, 450 (D.S.C. 2011) ("Historically, in insurance coverage disputes, South Carolina courts have followed the doctrine of *lex loci contractus*, and applied the law of the state where the contract was formed. However, this rule was modified by a statute enacted in 1947 and now codified

at South Carolina Code section 38-61-10." (internal citation omitted) (citing *Sangamo*, 307 S.C. 143, 414 S.E.2d 127)); *Okatie Hotel Grp., LLC v. Amerisure Ins. Co.*, No. CIV.A. 2:04-2212-23, 2006 WL 91577, at *3 (D.S.C. Jan. 13, 2006) ("South Carolina choice of law encompasses both the traditional *lex loci contractus* doctrine and S.C. Code Ann. § 38-61-10. Historically, South Carolina courts followed the rule of *lex loci contractus* and applied the law of the state where the insurance contract was formed. However, a statute enacted in South Carolina in 1947, S.C. Code Ann. § 38-61-10, modified the traditional rule of *lex loci contractus*." (internal citations omitted)).

Here, the issue is not whether South Carolina or another jurisdiction's law applies; rather, it is whether South Carolina courts have the authority to appoint a receiver for a foreign company's assets that are not in the state. South Carolina's receivership statute does not provide the circuit court with that power, and § 38-61-10 is not a hook that the circuit court can use to apply the receivership statute to foreign companies that do not have assets in the state. Section 38-61-10 is not a jurisdictional statute; indeed, § 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 appoint a receiver over a foreign company's assets that are not located in South Carolina.

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)).

In short, the circuit court has no authority or jurisdiction outside of South Carolina, ACL has no assets or property in South Carolina, and the circuit court cannot use a receiver to extend its reach beyond the borders of this state. Therefore, the circuit court erred in appointing a receiver, and the actions of the purported receiver are null and void.

B. The circuit court erred in applying § 15-65-10(5) because it is not "in accordance with existing practice" to appoint receivers over assets and property outside of South Carolina.

Section 15-65-10(5), which the circuit court exclusively cited in the Receiver Order, 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). In the Receiver Order, the circuit court cited *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*[9] and *Virginia-Carolina Chemical v. Hunter*[10] as examples of existing practice. (Receiver Order p. 3.) Those cases are not applicable here for several reasons.

First, the disputes in *First Carolinas* and *Virginia-Carolina* involved real property in South Carolina. *First Carolinas*, 191 S.C. at 1, S.E.2d at 800; *Virginia-Carolina*, 84 S.C. at 66 S.E. at 177. Conversely, ACL does not have any assets or property in South Carolina. Additionally, unlike the reallocation of assets and property in *First Carolinas* and *Virginia-Carolina*, ACL's jurisdictional defense is not "moral fraud"; it is a valid and proper defense. Finally, examples of an *existing* practice would be found in cases published much more recent than 1909 and 1939.

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[9] 191 S.C. 384, 1 S.E.2d 797, 800 (1939).

[10] 84 S.C. 214, 66 S.E. 177, 177 (1909).

The circuit court also erroneously relied on the following statement from the Supreme Court for support that ACL has property in South Carolina: "The whole property of the company within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it." *Porter v. Sabin*, 149 U.S. 473, 480 (1893). The circuit court made additions to the original text that fundamentally altered what the *Porter* court said to twist the statement into support for its ruling. The *Porter* court dealt with the issue of state and federal courts "exercising jurisdiction over the same territory," which was still a relatively novel system in 1893. *Id.* Unlike the property here, the property in *Porter* was within the state that appointed the receiver. Therefore, *Porter* is not applicable here because ACL is a foreign company that has never had property or assets in South Carolina.

Indeed, there has never been a published appellate case in South Carolina in which the circuit court appointed a receiver over a foreign company's assets that were never in the state. In fact, appellate courts have reversed circuit courts for appointing receivers over out-of-state property. *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 company because "there [wa]s a total failure of any proof that it ha[d] property in this state"). The lack of authority speaks for itself: it is not in accordance with existing practice to appoint a receiver over a foreign company's assets that are not in South Carolina.

The lack of authority makes sense because, as discussed above, 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*, 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.* (emphasis added) (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) because it is not "in accordance with existing practice" to appoint receivers over assets and property outside of South Carolina.

II. The circuit court erred in striking ACL's 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), SCRCP). 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 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.* Additionally, the court recognized that the circuit court considered the greatly prejudicial nature of the sanction in its 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. Additionally, the court also noted the circuit court's determination that the sanctioned party's willful disobedience to previous orders warranted the severe sanction. *Id.* at 467, 665 S.E.2d at 833.

Here, the circuit court abused its discretion because it did not consider all four factors required to determine the appropriate discovery sanction. Unlike the circuit courts in *Griffin* and

McNair, the circuit court clearly considered just the willfulness factor in deciding to strike ACL's answer. The circuit court did not consider at all the nature of discovery sought, the discovery stage of the case, or the degree of prejudice ACL would suffer under the unique facts of this case.

Indeed, the circuit court's erroneous finding that ACL acted willfully emphasizes that it did not consider the nature of discovery sought. ACL cannot produce the requested discovery because it has no employees who are able to testify regarding the matters contained in the Rule 30(b)(6) notice, and ACL does not maintain or possess records necessary to educate a witness to testify regarding those issues. Even if ACL did have those records, it would be subject to criminal and/or civil penalties under the QBCRA for producing them.[11] ACL's inability to produce the requested discovery is not a willful refusal to comply with a discovery order; rather, it is an example of a company facing two diametrically opposing laws.

The circuit court had to consider the nature of discovery sought, the discovery stage of the case, and the degree of prejudice ACL would suffer; it did not. Thus, the circuit court abused its

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[11] Again, 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 ACL are subject to criminal and/or civil penalties if they produce, in United States litigation, information or documents from their files in Quebec.

discretion and erred in striking ACL's pleadings because it did not consider all the required factors. This constituted an error of law mandating a reversal of the circuit court's ruling.

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 case had been pending for nearly two years before the circuit court struck the sanctioned party's pleadings. 334 S.C. at 195-96, 665 S.E.2d at 832. The sanctioned party in *Griffin* also ignored multiple discovery orders rather than a single order. *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*, ACL did not ignore multiple discovery orders. Moreover, the circuit court afforded ACL significantly less time before striking its pleadings than the circuit courts in *Griffin* and *McNair* afforded those sanctioned parties. Additionally, ACL attempted to comply with the discovery order by producing the documents it could, unlike the sanctioned parties in *Griffin* and *McNair*.

Moreover, the circuit court erred in finding that ACL willfully disobeyed the discovery order. As discussed in Section II.A., ACL's inability to produce the requested 30(b)(6) witness was not deliberate or an attempt to defy the circuit court. Simply put, you cannot produce what you do not have.[12] In a show of good faith, ACL provided the Tibbses with the documents it was able to produce in compliance with the QBCRA.

The circuit court's sanction was too severe because there is no evidence of any intentional misconduct. ACL'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. ACL simply cannot produce the requested 30(b)(6) witness because everyone that had knowledge of the requested issues has passed away, and ACL does not possess any documents that could prepare a witness on the requested issues. Accordingly, the circuit court abused its discretion and erred in striking ACL's pleadings because the sanction is unreasonable and too severe.

III. The circuit court erred in holding ACL in contempt because ACL did not willfully disobey the discovery order.

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[12] ACL 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 settlement values to avoid what ACL 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).

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). 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).

As discussed in Section II, ACL did not willfully disobey the circuit court's order to produce the Tibbses' requested 30(b)(6) witness. ACL simply does not have anyone with knowledge of the requested issues or any documents with the capability to familiarize anyone with the knowledge required to respond to the requested issues. Accordingly, the circuit court erred in holding ACL in contempt.

CONCLUSION

The circuit court erred in holding ACL in contempt, striking its pleadings, and appointing a receiver. The circuit court has no authority or jurisdiction outside of South Carolina, and ACL is a foreign company that has no assets or property in South Carolina; the circuit court cannot use a receiver to extend its reach beyond this state's borders. Additionally, the circuit court did not consider all the required factors in striking ACL's pleadings, and ACL did not willfully refuse to comply with the discovery order. For the foregoing reasons, the ruling of the circuit court and the actions of the purported receiver should be reversed.

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Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/*Stephen L. Brown*
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
James D. Gandy, III (SC Bar No. 11925)
Graydon V. Olive, IV (SC Bar No. 105319)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellant Asbestos Corporation Limited

Charleston, South Carolina

February 22, 2024