THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2023-002006
Circuit Court Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs,..... Plaintiffs,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Hesterton 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.; Lowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services; Orporation 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, Incl; 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; and Zurn Industries, LLC, ... Defendants,

of which

Asbestos Corporation Limited is the..... 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.; DeBeers PLC; DeBeers Centenary AG; DeBeers Consolidated Mines Ltd.; DeBeers S.A.; DeBeers UK Ltd.; DeBeers Jewelers US, Inc.; Angle 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 (USA) Jewelry Inc.; Forevermark US Inc.; Anglo American Crop Nutrients (USA), 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 SAS; Sparrows Offshore Group Ltd.; Hawk Bidco US Inc.; Arranco US, LLC; Sparrows Offshore, LLC; The Sparrows Group, LLC, ... Third-Party Defendants,

of which

Mohed Altrad and Altrad Investment Authority SAS are the..... Appellants.

INITIAL BRIEF OF THE ALTRAD DEFENDANTS (INJUNCTION APPEAL)

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March 19, 2024

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STATEMENT OF ISSUE ON APPEAL

Rule 205 of the South Carolina Appellate Court Rules vests the appellate court with "exclusive jurisdiction" over all issues that could be affected by an appeal. Despite having no jurisdiction to proceed, the circuit court entered an order allowing a court-appointed receiver to conduct virtually boundless discovery while the propriety of the receiver's appointment and the receiver's authority to undertake any activity at all is already pending on appeal. Did the circuit court err by exercising jurisdiction it no longer has and by failing to enjoin the receiver's conduct pending appeal?

STATEMENT OF THE CASE

With great respect for the circuit court, this subsequent appeal arises out of that court's failure to enforce the unambiguous restriction on its own jurisdiction when an appeal is pending. The circuit court's error in refusing the enjoin all activity by the putative Cape PLC Receiver has resulted in a court-appointed receiver attempting to function without any authority to do so during an appeal. The details of that receivership appointment are chronicled in the Appellants' Opening Brief in the initial appeal in this matter, and they are summarized below:

I. The Initial Receivership Appointment: Cape PLC

This receivership began in *Park v. Armstrong International, Inc.*, Case No. 2021-CP-40-02727. Nine months after the *Park* plaintiff reported to the circuit court that the case was "fully resolved," and with absolutely nothing substantive remaining in that case, Mr. Park filed a motion to have a receiver appointed over "Cape PLC and its subsidiaries, affiliates, successors, and assigns," none of which are defined or identified in the motion. (R. p. ___; Mot. to Appoint Receiver at 1 (filed Mar. 6, 2023, in *Park*).)

Cape PLC is an active foreign company incorporated in the Bailiwick of Jersey in 2011. (R. p. ___; Jersey Financial Services Commission Registry for Cape PLC.) It has no assets in South Carolina, no involvement in any of the historical asbestos-related activities that form the basis of the *Park* lawsuit in which the receivership originated (or in the present *Tibbs* case, for that matter), and no contacts with this state sufficient to establish personal jurisdiction in South Carolina. There never was and never has been a motion for entry of default or default judgment entered against Cape PLC in *Park*. And there is also no proof that the *Park* plaintiffs ever served anything at all on Cape PLC. It is fully a stranger to this state and to all of this litigation.

Yet, on March 17, 2023, without a hearing, and without an actual case remaining before it, the circuit court granted Mr. Park's motion, explaining:

> This Court finds that the application [to appoint Mr. Protopapas as receiver] is meritorious under the applicable statute because Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) ("Cape Asbestos") and its subsidiaries and global affiliates (collectively, "Cape" or the "Company') have dissolved and Cape, a foreign corporation, has forfeited its charter and has further failed to answer this case and therefore, Plaintiffs request for an expedited ruling on this motion is appropriate and also granted.

(R. p. ___; Order Appointing Cape PLC Receiver at 1 (filed Mar. 17, 2023, in *Park*).)

But the court relied on "facts" that were simply not true. Cape PLC has not dissolved. Cape PLC has not forfeited its charter. And Cape PLC had never been served with anything in the *Park* case, so of course it did not respond to an unserved complaint in South Carolina, a jurisdiction with which it has no contact at all.

Nevertheless, the order was sweeping and not limited to marshaling Cape PLC's assets in South Carolina (which do not exist). Instead, the circuit court granted the Receiver "the power and authority to fully administer all assets of Cape, accept service on behalf of Cape, engage counsel on behalf of Cape and take any and all steps necessary to protect the interests of Cape whatever they may be." (*Id.*)

This was an incredible overreach because South Carolina law does not give the circuit court such power. Despite there never being any proof that Cape PLC was ever served with anything at all in *Park*, the circuit court essentially appointed a custodian over that European company to run its daily affairs, and it did so without a live case before it and without even holding a hearing. South Carolina law does not even allow such a sweeping appointment over a foreign company. *See* S.C. Code Ann. §§ 33-14-320(a) & (c)(2) (authorizing the circuit court to appoint a custodian to "exercise all of the powers" only of domestic corporations).

Three months later, the Receiver filed a third-party complaint in *Tibbs*, in which the Receiver purports to be a crusader against dozens of companies—plus Mr. Altrad, an individual French citizen—that the Receiver contends have shielded Cape PLC from liability, claiming that the third-party complaint "begins their reckoning." (R. p. ___; Third-Party Compl. at "Introductory Statement" (June 30, 2023).)

This is completely unprecedented behavior. To be clear: Nine months after Mr. Park's case was "fully resolved" by his counsel's own admission, a South Carolina asbestos plaintiff requested that a South Carolina circuit court appoint a South Carolina attorney to serve as a receiver of a European company that was never served with a single scrap of paper, that has no judgment entered against it, and that has nothing to do with the State of South Carolina. Not only did the circuit court grant that motion, it did so without a hearing, it based its ruling on demonstrably untrue information, and it gave the so-called receiver the omnipotent powers of a custodian that are nowhere authorized by law. The Receiver then filed a third-party complaint in a different asbestos case against dozens of other companies (and a foreign individual), all with the goal of creating liability for Cape PLC—again, a European company that has nothing to do with this state—and then trying to impute that liability to those other companies (and that foreign individual).

Never before has such a situation arisen, in South Carolina or anywhere else. The Altrad Defendants did precisely what every other litigant did in response to such extraordinary circumstances: They sought refuge in the law. This receivership cannot exist as a matter of federal constitutional law and as a matter of South Carolina substantive and procedural law. It is fraught with legal errors that are detailed at length in the Altrad Defendants' brief in this appeal, as well as in the Appellants' opening briefs in the various other appeals arising from this same situation.

II. The Modified Receivership Appointment: Cape Intermediate Holdings Limited

When the Altrad Defendants and other third-party defendants pointed out the numerous legal problems with this receivership, the Receiver pivoted and argued in *Tibbs* that the appointment in *Park* was actually as a receiver over an entirely different, active foreign company—Cape Intermediate Holdings Limited ("CIHL"), which was incorporated in the United Kingdom in 1893, has no assets in South Carolina, has no judgment entered against it in South Carolina, and is not subject to personal jurisdiction in South Carolina. The Receiver made this argument despite the fact that Mr. Park never referenced CIHL in his motion to appoint a receiver, nor did the circuit court reference CIHL in its order creating this receivership.

Even though the Receiver's argument bore no connection to anything in the record, the circuit court accepted it, denied the Altrad Defendants' motion to dissolve the receivership, held that the Altrad Defendants are subject to personal jurisdiction in South Carolina despite having zero contacts with the state, and modified the original receivership appointment to seemingly include CIHL despite the absence of any notice to that foreign company of the Receiver's arguments or the potential appointment of a receiver over its assets (of which there are none in South Carolina). (R. p. ___; Order (Dec. 6, 2023).)

The Altrad Defendants, as well as numerous other third-party defendants, appealed that order, as it both continued a receivership over objections that it was void *ab initio* as a matter of federal and state law, and it modified the original order to place into receivership a different foreign entity than that which was at issue in the initial appointment. There are presently ***six*** appeals pending involving that order: this one, and Appellate Case Numbers 2023-002007, 2023-002008, 2023-002009, 2023-002010, and 2023-002011.

III. Subsequent Activity that Directly Involves Matters Already Pending on Appeal

Following the appeal, the Receiver has insisted on pressing forward with discovery despite the pending appeal to the validity of the receivership. Whether the receivership can exist, and what are the limitations on its scope if it is even allowed to continue, are core questions that are squarely presented in the Altrad Defendants' initial appeal.

Yet, despite the fact that the receivership's very existence is in grave doubt before this Court, the Receiver has demanded to proceed with an astonishingly broad scope of discovery, through which he—again, purporting to act on behalf of an active foreign company that has never had anything to do with the State of South Carolina—seeks to investigate "events commencing many decades ago and continuing for decades" that occurred in "Apartheid-era South Africa." (R. p. ___; Third-Party Compl. ¶¶ 40–41 (June 30, 2023).)

Like other third-party defendants, the Altrad Defendants moved for a protective order from the Receiver's oppressive and unlawful discovery efforts at the same time they sought to dissolve the receivership and dismiss the case. (R. p. ___; Altrad Defs.' Mot. for Protective Order and to Dissolve the Receivership (Sept. 30, 2023).) But the circuit court did not rule on that motion prior to the Altrad Defendants' appeal of the order continuing and modifying the receivership, and the motion for protective order remained pending after the Altrad Defendants filed and served their notice of appeal. Accordingly, the circuit court lacked jurisdiction to even consider that motion during the pendency of the appeal. Rule 205, SCACR.

Undeterred by the pending appeal and absence of jurisdiction below, the Receiver pressed forward and demanded voluminous discovery. The Altrad Defendants—like the other third-party defendants—objected, noting that their pre-appeal motion for a protective order relieved them of any obligation to respond to discovery pursuant to *Baughman v. AT&T Co.*, 306 S.C. 101, 109,

410 S.E.2d 537, 542 (1991); and explaining that the appeal stripped the circuit court of any jurisdiction to proceed with the receivership pursuant to Rule 205, SCACR, and every case that has construed the rule. (R. p. ___; Altrad Defs.' Objections to Written Discovery (Jan. 5, 2024).)

The Receiver then moved to compel responses. In that motion, the Receiver described the Altrad Defendants' citations to Rule 205, SCACR, and the numerous cases enforcing that rule as "frivolous and flatly contrary to law." (R. p. ___; Receiver's Mot. to Compel at 3 (Jan. 12, 2024).)

Despite this inflammatory rhetoric, the Receiver cited exactly zero authority addressing the circuit court's lack of jurisdiction to adjudicate matters that are affected by an appeal. And that's because there is no such authority. It is black-letter law that the circuit court has no jurisdiction to proceed with any matter that is affected by a pending appeal. Rule 205, SCACR.

Accordingly, the Altrad Defendants opposed the Receiver's motion by citing Rule 205 and cross-moving the circuit court to enjoin the Receiver from proceeding with any activity at all—discovery, filing new pleadings, anything—"unless or until the appellate process is fully and finally adjudicated." (R. p. ___; Altrad Defs.' Cross-Mot. to Enjoin All Activity by the Putative Cape PLC Receiver at 16 (Feb. 16, 2024).) They also explained that taking any action on the Receiver's motion would "equate to a denial of the requested injunction." (R. pp. ___–___; Altrad Defs.' Objection to Court Ruling on Motions at 17–18 (Feb. 27, 2024).)

On March 12, 2024, the circuit court rejected the Altrad Defendants' arguments, granted the Receiver's motion, and authorized the Receiver to proceed without restriction despite the pendency of the appeal. (R. p. ___; Order Granting the Receiver's Motions to Compel Discovery Responses (Mar. 12, 2024).) This subsequent appeal follows.

STANDARD OF REVIEW

Although the circuit court styled its order as one "granting the Receiver's motion to compel discovery responses," this Court and the Supreme Court have been clear that the effect of an order, not its nomenclature, govern its appealability. *See, e.g.*, *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539–40, 773 S.E.2d 144, 147 (2015) ("Our review of trial court orders is not constrained by how the order is styled. . . . We are therefore free to evaluate the trial court's order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable."); *Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461, 464 n.4 (2013) (explaining that whether an order is immediately appealable is a function of "substance rather than nomenclature"); *Thornton v. SCE&G*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (holding that "an appellate court should look to the effect of an interlocutory order to determine its appealability"); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842–43 (Ct. App. 1999) (holding that an order requiring discovery but permitting a defendant to re-seek to compel a matter to arbitration after engaging in discovery was immediately appealable because "[t]he circuit court's order favored litigation over arbitration").

Here, the Altrad Defendants sought to enjoin all activity by the Receiver while this appeal is pending, as such a restraint is required by Rule 205, SCACR, and the circuit court's lack of jurisdiction. The circuit court rejected that argument, held that the receivership is not "stayed," and allowed the Receiver to proceed uninhibited, rendering the order immediately appealable. *See* S.C. Code Ann. § 14-3-330(4) (authorizing immediate appeals of interlocutory orders "refusing an injunction"); *Hazel v. Blitz USA, Inc.*, 433 S.C. 120, 124, 857 S.E.2d 4, 6 (2021) (addressing on immediate appeal the propriety of an order that allowed a case to proceed and refused to "permanently enjoin" the claims against a defendant based on a bankruptcy court order).

An order refusing an injunction is reviewed for an abuse of discretion, which occurs when the decision is "unsupported by the evidence or controlled by an error of law." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). In turn, questions of law involving jurisdiction and interpretation of statutes and rules "are reviewed *de novo*, without deference to the lower courts." *Seels v. Smalls*, 437 S.C. 167, 172, 877 S.E.2d 351, 354 (2022).

ARGUMENT

I. Because the propriety of the receivership is pending before this Court, every possible issue associated with the receivership is affected by the current appeal and therefore within this Court's "exclusive jurisdiction."

This appeal is controlled by Rule 205, SCACR, which provides as follows:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

The rule is clear on its face: Any issue that is involved with an appeal is within the "exclusive jurisdiction" of the appellate court, which necessarily renders all such issues beyond the reach of the circuit court's jurisdiction. *See Morris v. Morris*, 295 S.C. 37, 40, 367 S.E.2d 24, 26 (1988) ("This Court has exclusive jurisdiction over an appeal upon the service of a Notice of Intent to Appeal."); *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 112, 576 S.E.2d 191, 197 (Ct. App. 2003) ("Circuit courts generally lose subject matter jurisdiction of a case when a notice of appeal is filed and served."); *Binkley v. Burry*, 352 S.C. 286, 294, 573 S.E.2d 838, 843 (Ct. App. 2002) ("Once an appeal is filed, the appellate court has exclusive jurisdiction over the matter."); Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 121 (3d ed. 2016) (confirming that "[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal").

A jurisdictional prohibition renders the circuit court without power to act. *See, e.g.*, *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) ("Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause." (quoting 32A Am. Jur. 2d *Federal Courts* § 581 (2007))).

And that is exactly how courts have enforced Rule 205 when a circuit court does anything that touches on an issue that is already pending on appeal. The South Carolina Supreme Court has repeatedly warned circuit courts to stand down when a matter is on appeal. *See, e.g.*, *Lancaster v. Ga.-Pac. Corp.*, 403 S.C. 136, 137–38, 742 S.E.2d 867, 868 (2013) ("Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate Court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court. . . . [W]e hereby remind the bench and bar that action on a settlement may not be taken by the lower court, except with regard to matters not affected by the appeal, while the matter is pending before this Court."); *Grosshuesch v. Cramer*, 377 S.C. 12, 31 n.7, 659 S.E.2d 112, 122 n.7 (2008) ("We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal.").

Time after time, when circuit courts ignore that warning, both the Supreme Court and this Court have deemed circuit court orders void *ab initio*. *See, e.g.*, *Arnal v. Fraser*, 371 S.C. 512, 517–23, 641 S.E.2d 419, 421–24 (2007) (conducting matter-by-matter analysis of lower court rulings; voiding *ab initio*, "for lack of jurisdiction," those rulings that were affected by the matter on appeal; and noting that, per Rule 205, "the lower court may not act or issue orders that affect an issue on appeal"); *Wingate v. Wingate*, 289 S.C. 574, 575, 347 S.E.2d 878, 878 (1985) (holding that a family court's order reducing alimony payments "is void" because "alimony was an issue

on appeal from the divorce decree" and "this Court had exclusive jurisdiction over the alimony issue"); *Wilson v. Walker*, 340 S.C. 531, 540, 532 S.E.2d 19, 23 (Ct. App. 2000) (vacating a contempt order "for lack of jurisdiction" because the trial court issued it while an earlier order on which the contempt order was based was on appeal).

And the Supreme Court has reiterated that Rule 205's scope is broad and removes circuit court jurisdiction over anything that might affect an issue on appeal. Consider *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016).

There, the Supreme Court was asked to reverse its prior ruling in *Epstein v. Brown*, 363 S.C. 372, 382–83, 610 S.E.2d 816, 821 (2005), where a 3–2 court held the statute of limitations for a legal malpractice claim begins the moment a client knows or should know she has a claim against her counsel, regardless of the pendency of an appeal. In *Stokes-Craven*, the Court initially reversed *Epstein*, and it did so based on its view of a 1994 opinion from the Oklahoma Court of Appeals. *Stokes-Craven Holding Corp. v. Robinson*, 2015 S.C. LEXIS 328, at *21–25 (S.C. Sup.Ct. Sept. 9, 2015), *withdrawn and substitute opinion issued at* 416 S.C. 517, 787 S.E.2d 485 (2016). But that ruling resulted in another 3–2 split among the justices, with then-Chief Justice Toal and Justice Kittredge finding that *Epstein* was more consistent with South Carolina's discovery rule for potential tort claims. *Id.* at *32 (Toal, C.J., dissenting, joined by Kittredge, J.).

The *Stokes-Craven* Court then reconsidered its initial opinion and issued what became the controlling opinion of the Court. Upon reconsideration, a 4–1 majority again overruled *Epstein*, but it scuttled any reliance on out-of-jurisdiction case law. Instead, the Court held that its ruling "is strictly based on existing appellate court rules"; specifically, Rule 205. 416 S.C. at 532, 787 S.E.2d at 493. The new *Stokes-Craven* majority—which now included then-Acting Justice Toal and Justice Kittredge—held the statute of limitations for a malpractice claim could not run during

the pendency of an appeal as a matter of law because Rule 205 deprived the circuit court of jurisdiction to consider anything that may in any way touch on the appeal:

> Furthermore, Rule 205 divests the lower court or administrative tribunal of jurisdiction over "***matters affected by the appeal***," which necessarily would include a legal malpractice cause of action that is based on the outcome of the appealed verdict, judgment, or ruling. *See Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012) ("[T]he lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter affected by the appeal' under Rules 205 and 241(a)."); *Black's Law Dictionary* 68 (10th ed. 2014) (defining "affect" as "to produce an effect on; to influence in some way").
>
> Consequently, until the appeal is resolved against the client, there is no legally cognizable cause of action for an attorney's alleged malpractice. Upon resolution of the appeal, a cause of action for legal malpractice accrues triggering the statute of limitations.

Id. at 534, 787 S.E.2d at 494 (emphasis supplied by the Supreme Court).

To remove any doubt about the wide breadth of Rule 205's reach, Chief Justice Pleicones observed that the *Stokes-Craven* majority broadly applies Rule 205 to eliminate the circuit court's jurisdiction to consider even "inchoate and speculative collateral lawsuits" during an appeal that raises similar or related issues. *Id.* at 538, 787 S.E.2d at 496 (Pleicones, C.J., concurring in judgment).

* * * * *

The upshot of this unbroken line of authority is obvious: Because this Court is currently considering an appeal involving *inter alia* (1) whether the Receiver was unlawfully appointed as a matter of both federal and South Carolina law (either as a receivership over Jersey-based Cape PLC, as initially appointed, or as a receivership over U.K.-based CIHL, as subsequently modified); (2) if the appointment was somehow valid, the scope of the Receiver's authority; and (3) whether the circuit court has jurisdiction over the Altrad Defendants in the first place, every issue related to the receivership is presently within this Court's "exclusive jurisdiction" pursuant to Rule 205

and beyond the reach of the circuit court's jurisdiction. The circuit court committed an error of law in exercising jurisdiction that it no longer had. *See, e.g.*, *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) (dismissing motions filed after a remittitur was issued because "[w]hen the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard [in the appellate court] thereafter").

II. The circuit court erred by not enjoining the Receiver from undertaking any additional activities while this matter is pending before the appellate court's "exclusive jurisdiction.'

Rule 205 is designed to be self-executing and to apply automatically; the absence of jurisdiction renders the circuit court without power to act, as explained in the preceding section. Yet, the Receiver's insistence upon advancing the litigation below while the validity of his very appointment is pending on appeal forced the Altrad Defendants to seek an injunction against the Receiver to enforce Rule 205. Accordingly, the Altrad Defendants' opposition to the Receiver's motion to compel discovery included a cross-motion to enjoin all activity by the Receiver—both in litigation, and outside of litigation—based on the exact same legal predicate: that Rule 205 prevents the circuit court and the Receiver from engaging in any additional activity unless and until the appellate process is fully and finally adjudicated. (R. p. ___; Altrad Defs.' Cross-Mot. to Enjoin All Activity by the Putative Cape PLC Receiver at 16 (Feb. 16, 2024).)

By authorizing the Receiver to continue his activities, the circuit court necessarily refused to enter the injunction sought by the Altrad Defendants. *See, e.g.*, *Towles*, 338 S.C. at 35, 524 S.E.2d at 842–43 (holding that delaying the grant of a motion to compel arbitration until after discovery rendered the order compelling discovery immediately appealable, as the circuit court had "favored litigation over arbitration" despite not finally resolving the question of arbitrability). That refusal to enjoin the Receiver was an error of law.

The Receiver purports to be "the officer of the Court" or "the arm of the Court." *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 217, 118 S.E. 303, 304 (1923). But the absence of jurisdiction renders the court without power to act. *See Limehoue*, 404 S.C. at 104, 744 S.E.2d at 572 (holding that "[w]ithout jurisdiction, a court cannot proceed at all in any cause"). Because the circuit court unambiguously lacks jurisdiction to proceed, the Receiver himself also lacks authority to conduct any activity, as he cannot possibly have any greater power to function than does the circuit court that appointed him.

Accordingly, the absence of jurisdiction by the circuit court also requires the Receiver to be enjoined from further activity unless and until the circuit court re-gains jurisdiction. Again, with great respect for the circuit court, this is not a matter of discretion; the Altrad Defendants sought an injunction as a matter of law based on the circuit court's lack of jurisdiction and black-letter South Carolina law enforcing that lack of jurisdiction. The circuit court's order permitting the Receiver to continue conducting litigation activities without the power to do so is therefore void *ab initio* and should be vacated accordingly. *Arnal*, 371 S.C. at 517–23, 641 S.E.2d at 421–24; *Wingate*, 289 S.C. at 575, 347 S.E.2d at 878; *Wilson*, 340 S.C. at 540, 532 S.E.2d at 23.

III. The circuit court's reliance on a prior order involving a "stay" is wrong as a matter of law.

When incorrectly allowing the Receiver to continue activities during an appeal that directly challenges the lawfulness of that appointment, the circuit court explained that it was allowed to proceed—and, concurrently, the Receiver was allowed to continue functioning—because this case is not "automatically stayed following the appeal of an order denying a motion to dissolve the receivership." (R. p. ___; Order at 12 (Mar. 12, 2024).) In support of its ruling, the circuit court cited two unpublished single-judge orders in *Childers v. Davis Mechanical Contractors, Inc.*,

Appellate Case No. 2023-000727. There are at least two problems with the circuit court's reasoning.

First, the Appellate Court Rules expressly forbid reliance on such orders. *See* Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.").

Second, and more fundamentally, a "stay" is irrelevant to the existence or absence of jurisdiction below. This Court has been clear that one has nothing to do with the other:

> However, the absence of a stay does not mean the [lower] court may proceed with the case while one of its orders is on appeal. . . . Under rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal. The rule states: "Nothing in these Rules shall prohibit the lower court . . . from proceeding with matter not affected by the appeal." Thus, ***the existence or nonexistence of a stay under Rule 241 does not control the [lower] court's power to proceed with the action*** and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a "matter[] affected by the appeal."

Tillman v. Oakes, 398 S.C. 245, 255, 728 S.E.2d 45, 50–51 (Ct. App. 2012) (emphasis added).

The *Tillman* Court explained that when proceeding below, the trial court "addressed the wrong question—whether the order was stayed during appeal. The question the court should have addressed is whether the issue raised in the petition was a matter affected by the appeal." *Id.* at 256, 728 S.E.2d at 51.

The clear distinction *Tillman* draws between a stay, which is discretionary, and the absence of jurisdiction, which is not discretionary and has no exceptions, is hornbook law:

> Note that the existence or nonexistence of a stay under Rule 241 does not control the [lower] court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a matter affected by the appeal under Rules 205 and 2041(a).

Toal, *Appellate Practice in South Carolina*, at 121 (citing *Tillman*).

Here, the circuit court "addressed the wrong question" and committed an error of law by relying on two non-precedential orders that speak only to a stay and that are entirely silent on the dispositive point about the circuit court lacking jurisdiction when a matter is on appeal. Neither of those unpublished single-judge orders addresses the dispositive issue of the circuit court's lack of jurisdiction over a matter that is the subject of an appeal. One only discusses a "stay," which is irrelevant, as discussed above. The other does not engage on the jurisdictional point because the underlying order that violated Rule 205 had not yet been appealed; in fact, that underlying order still remains un-appealed due to a Rule 59 motion that the circuit court has not ruled on and, instead, has held in abeyance since October 24, 2023.

The analysis required by Rule 205 asks whether the issue pending before the circuit court overlaps in any way with an issue on appeal; here, it indisputably does, as the Receiver's authority to even exist is squarely pending before this Court. Accordingly, the circuit court lacks jurisdiction, and it should have enjoined the Receiver from undertaking any further actions during the pendency of this appeal.

CONCLUSION

In this case, Rule 205 serves an essential purpose of protecting this Court's appellate jurisdiction. The Appellate Court Rules are designed to prevent exactly what is happening below so that the appellate courts can review a static record and a static set of issues on appeal, rather than forcing both the parties and this Court to hit a moving target. *See, e.g.*, Rule 205, SCACR ("Upon service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241."); *id.* Rule 210(c) ("The Record shall not,

however, include matter which was not presented to the lower court or tribunal."); *id.* Rule 210(h) ("Except provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.").

By exceeding its own jurisdictional boundaries and refusing to enjoin the Receiver from attempting to engage in litigation activities while the propriety of the receivership is on appeal, the circuit court has committed an error of law. Because its order permitting the Receiver to continue its activities, including taking voluminous discovery of the Altrad Defendants and others, was issued without jurisdiction, that order is void *ab initio* as a matter of settled South Carolina law and should be vacated accordingly.

Respectfully submitted,

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March 19, 2024

PROOF OF SERVICE

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

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