

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas
The Honorable Jean H. Toal, Circuit Court Judge

Civil Action No. 2023-CP-40-01759
Appellate Case No. 2023-002007

John A. Tibbs and Margaret B. Tibbs.....**PLAINTIFFS,**

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,**

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 ArranCo US, LLC, Hawk Bidco US Inc., and Sparrows Offshore, LLC are the.....**APPELLANT.**

INITIAL BRIEF OF APPELLANTS ARRANCO US, LLC; HAWK BIDCO (US) INC.;
AND
SPARROWS OFFSHORE, LLC (INJUNCTION APPEAL)

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STATEMENT OF ISSUE ON APPEAL

- I. Whether it was error for the circuit court to fail to grant the Sparrows Appellants' Motion for Injunction and to proceed in violation of Rule 205 of the South Carolina Appellate Court Rules.

INTRODUCTION¹

This appeal stems from a related matter already on appeal before this Court. The issues in both appeals are inextricably linked. In the prior, pending appeal filed December 18, 2023, ArranCo US, LLC; Hawk Bidco (US) Inc.; and Sparrows Offshore, LLC² appealed the circuit court’s December 6, 2023 Order which continued and modified the Cape PLC receivership and created a new receivership over a separate entity named Cape Intermediate Holdings Limited (“CIHL”). That appeal presents to the Court the following three issues:

I. Whether the circuit court erred in continuing and modifying the Cape PLC receivership, and in creating a new receivership over a separate entity, when the appointing court had no authority to create a receivership and doing so was violative of applicable federal and state law and constitutional protections.

II. Whether the circuit court erred in continuing and modifying the Cape PLC receivership, and in creating a new receivership over a separate entity, in light of the numerous unremedied deficiencies in the underlying appointment.

III. Whether the circuit court erred in finding it could properly exercise personal jurisdiction over Appellants under traditional bases or theories of amalgamation, single business enterprise, or alter ego.

See Sparrows Appellants’ Initial Brief, Appellate Case No. 2023-002007 (Feb. 22, 2024) [hereinafter February 22 Initial Brief].

As a result of that appeal, the Sparrows Appellants have asserted before the lower court in several filings that Rule 205 of the South Carolina Appellate Court Rules—and a multitude of

¹ By prosecuting this appeal, Appellants do not intend to waive, and expressly preserve, all defenses to the underlying action, including the defense of lack of personal jurisdiction.

² Appellants ArranCo US, LLC (“ArranCo”); Hawk Bidco (US) Inc. (“Hawk Bidco”); and Sparrows Offshore, LLC (“Sparrows Offshore”)—which were collectively referred to as “Sparrows Defendants” before the circuit court—are referred to herein as the “Sparrows Appellants” as done in their prior filed appeal.

South Carolina appellate and secondary authorities—mandate a lower court shall not act on any matter affected by an appeal during the pendency of such an appeal. Seeking to vindicate the right to rely on a seemingly unambiguous court rule—which has been interpreted in only one way by any court dealing with its substance—the Sparrows Appellants sought injunctive relief before the circuit court, seeking to have Rule 205 be enforced. However, the circuit court did not grant the Sparrows Appellants’ motion, and instead, issued its March 12 Order granting the Motions to Compel sought by the Receiver for Cape PLC.

Contrary to the contentions of the circuit court and the Receiver, at no point has this Court ruled—in a case involving a receiver appointed in a manner such as this one—on why Rule 205, SCACR does not apply. Nor has this Court ruled that an unambiguous, self-contained, and self-executing rule would not apply in this case in the exact same way as courts have held it—and its predecessor rule—to apply for decades. The Sparrows Appellants now respectfully come before this Court seeking enforcement of the South Carolina Appellate Court Rules, including through their properly asserted Motion for Injunction.

STATEMENT OF THE CASE³

This case arises out of a Third-Party Complaint filed in the court below by Peter D. Protopapas (the “Receiver”), who was appointed Receiver over an entity named Cape PLC. The Receiver was appointed in a separate asbestos lawsuit entitled *Park v. Armstrong International, Inc., et al.*, 2021-CP-40-02727. On March 6, 2023, counsel for the Parks filed a lengthy motion seeking appointment of a Receiver over “Cape PLC and its subsidiaries, affiliates, successors, and assigns.” *See Park* First & Second Am. Compls. (respectively filed Nov. 17, 2021 and Dec. 23, 2021).

Thereafter, the circuit court granted the Motion to Appoint pursuant to subsections 15-65-10(4) and (5) of the South Carolina Code (2005). *See* Ex. E to Sparrows Appellants’ Motion to Dissolve [hereinafter *Park* Appointment Order]. After incorrectly noting “Cape, a foreign corporation, has forfeited its charter and has further failed to answer this case,” the order appointing the Receiver over “Cape PLC” and “its subsidiaries and global affiliates” set forth the following expansive rights and duties, including:

Therefore, this Court hereby appoints Peter Protopapas be and hereby is appointed Receiver in this case pursuant to the South Carolina Law with the power and authority 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. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Cape as well as any claims related to the actions or failure to act of Cape’s insurance carriers.

³ The facts relevant to this appeal stem from the proceedings which gave rise to Sparrows Appellants appeal filed December 18, 2023. The Sparrows Appellants’ February 22 Initial Brief in that matter contains a more exhaustive recitation of the factual background to that matter. *See* Feb. 22 Initial Brief, Appellate Case No. 2023-002007. All arguments, factual statements, relevant authority, and other materials from the Sparrows Appellants’ February 22, 2024 Initial Brief are incorporated herein by reference.

Id.

The Receiver filed a Third-Party Complaint in *Tibbs v. 3M Company et al.*, 2023-CP-40-01759.⁴ The Receiver’s Third-Party Complaint alleges the named Third-Party Defendants—aggregated into three “groups” of entities, denoted as the “Altrad Third-Party Defendants” (inclusive of the Sparrows Appellants⁵), the “Oppenheimer Third-Party Defendants,” and the “Charter Third-Party Defendants”—“are responsible for the sale and use of asbestos or asbestos-containing products throughout the United States, including in South Carolina”; “created sham transactions to feign exits of the asbestos industry in the United States, leaving shells and an absence of insurance coverage to account for their massive liability exposure”; and “amused themselves with the supposed ingenuity of their scheme to avoid any responsibility.” *Tibbs* Third-Party Compl. The Receiver’s pleading alleged each grouping was in some way involved in the mining, importation, sale, or distribution of asbestos into the United States on behalf of Cape PLC. *See generally id.* That is even though each of the Sparrows Appellants was **formed in Delaware** in the 2000s and then **later acquired** in mid-2022 by an entity distantly, and only recently related, via multiple tiers of corporate hierarchy, to the Cape PLC entity over which the Receiver was appointed and even more distantly to the separate CIHL entity over which the circuit court has now deemed this receivership to exist. The Third-Party Complaint filed by the Receiver now seeks “a day of reckoning” for conduct that occurred decades prior in an industry in which the Sparrows

⁴ The *Tibbs* Plaintiffs’ active pleading, filed on May 3, 2023, names Cape PLC (and not CIHL).

⁵ The Third-Party Complaint in *Tibbs* also named Sparrows Offshore Group, Ltd. and The Sparrows Group, LLC. These are separate and unrelated entities with no affiliation to the Sparrows Appellants and are, therefore, not included, in any respect, to the defined terms “Sparrows Defendants” (as referenced in the proceedings below) or “Sparrows Appellants.” The Sparrows Appellants detailed the basis for this distinction in their December 4, 2023 proposed order on their motions to dismiss for lack of personal jurisdiction, at 6–9, as well as their accompanying Objections to the Receiver’s proposed order filed the same day, at 19–20. *See* Feb. 22 Initial Brief.

Appellants have never participated, to which they have no relation, and for which they have received no benefit.

The following timeline sets forth the particular events relevant to this appeal⁶:

TIMELINE RELEVANT TO THIS APPEAL

Date	Event
March 17, 2023	Cape PLC Receivership created in <i>Park</i>
June 30, 2023	Third-Party Complaint in <i>Tibbs</i> filed
August 21, 2023	Dispositive motions filed by the Sparrows Appellants
September 5, 2023	Motion for Protective Order and Motion to Dissolve filed by the Sparrows Appellants
October 25, 2023	Circuit court hearing on Motion to Dissolve and Motion to Dismiss for Lack of Personal Jurisdiction
December 6, 2023	Circuit court issues Order denying Motions to Dismiss for Lack of Personal Jurisdiction and Motions to Dissolve, which is the Order on appeal in Appellate Case No. 2023-002007
December 15, 2023	Remaining dispositive motions denied by Form 4 Order
December 18, 2023	Notice of Appeal (Initial Appeal) filed by the Sparrows Appellants relative to December 6 Order on Appeal (Appellate Case No. 2023-002007)
January 2, 2024	The Sparrows Appellants file a protective Answer subject to their previously filed Motions to Dismiss, the pending appeal, and the position that Third-Party Defendants have no obligation to participate in post-appeal trial court proceedings and the circuit court and the Receiver have no authority to act, including pursuant to Rule 205, SCACR
January 5, 2024	The Sparrows Appellants serve protective written discovery responses and, in pertinent part, explain that discovery is a

⁶ As noted above, a detailed recitation of all facts relevant to the Sparrows Appellants’ earlier filed appeal is included in their February 22 Initial Brief and is incorporated herein by reference. For more specific background facts, the Sparrows Appellants refer the Court to that February 22 Initial Brief.

	matter affected by the pending appeal per Rule 205, SCACR, as applied to this case
January 12, 2024	Receiver files Motions to Compel
February 16, 2024	The Sparrows Appellants respond to Motions to Compel, including on the basis of Rule 205, SCACR, and, as included therein and inextricably linked thereto, file a Cross-Motion for Injunction
February 27, 2024	The Sparrows Appellants' file an Objection to the circuit court ruling on pending Motions for Protective Order or Receiver's Motions to Compel, including on the basis of Rule 205, SCACR, and reiterating, in pertinent part, that a grant of the Motions to Compel would equate to a denial of the Sparrows Appellants' Cross-Motion for Injunction
March 12, 2024	Circuit court issues Order granting Motions to Compel and, in effect, denying Cross-Motion for Injunction and violating Rule 205, SCACR
March 19, 2024	Notice of Appeal filed by the Sparrows Appellants as to the circuit court's March 12, 2024 Order

STANDARD OF REVIEW

The result and consequence of the circuit court’s March 12 Order was the refusal of the Sparrows Appellants’ Cross-Motion for an Injunction, which renders the circuit court’s March 12 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). Labels included on a circuit court’s order do not control when the effect of the order is to the contrary.⁷

This Court reviews the refusal of an injunction under the abuse of discretion standard, 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). As occurred here, “[a] failure to exercise discretion amounts to an abuse of that discretion” because “[w]hen a trial judge is vested with discretion but [her] ruling reveals no discretion was in fact

⁷ “The label given to the order is not determinative of its immediate appealability.” *Spalt v. S.C. Dep’t of Motor Vehicles*, 423 S.C. 576, 584, 816 S.E.2d 579, 583 (2018). Accordingly, appellate courts look to the effect of an order to determine what that order does. *See, e.g., id.* (noting appealability depends on “the substance of the order”); *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (“[A]n appellate court should look to the effect of an interlocutory order to determine its appealability”); *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”). In making this inquiry, appellate courts are “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.” *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 540, 773 S.E.2d 144, 147 (2015); *see also generally 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 and permitting a defendant to re-seek to compel a matter to arbitration after the close of discovery was immediately appealable because “[t]he circuit court’s order favored litigation over arbitration”).

exercised, an error of law has occurred.” *CEL Prod., LLC v. Rozelle*, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004). Insofar as any questions of law were implicit in the circuit court’s actions as was the case here, those questions are to be reviewed de novo without deference to the lower court. *See Seels v. Smalls*, 437 S.C. 167, 172, 877 S.E.2d 351, 354 (2022); *S.C. Laws. Wkly. By & Through Dolan Publ’g Co. v. Wilson*, 423 S.C. 144, 148, 813 S.E.2d 527, 529 (Ct. App. 2018).

In denying the Sparrows Appellants’ Cross-Motion, the circuit court relied not on Rule 205 but instead on this Court’s interpretations of Rule 241 of the South Carolina Appellate Court Rules in unrelated matters and found it, and the Receiver, could continue acting despite the fact the Sparrows Appellants’ prior appeal was pending. This decision and its logical and legal underpinnings—as a decision interpreting and applying this state’s rules—is to be reviewed de novo. *Allen v. S.C. Pub. Emp. Ben. Auth.*, 411 S.C. 611, 622, 769 S.E.2d 666, 672 (2015) (noting “same rules of construction are used to interpret rules as are used to interpret statutes”). “In interpreting the language of a court rule, [courts] apply the same rules of construction used in interpreting statutes. *Green By & Through Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). Accordingly, words in court rules must be “given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule. *Id.* And, in treating court rules as statutes, the interpretation of one is a question of law—reviewed de novo. *Ex parte Travelers Home & Marine Ins. Co. v. Stringfellow*, 427 S.C. 238, 241, 830 S.E.2d 718, 720 (Ct. App. 2019) (“Interpretation of a rule is a question of law we review de novo. Our role in interpreting a statute or court rule is to determine what the legislature intended to accomplish.”); *S.C. Laws. Wkly. By & Through Dolan Publ’g Co.*, 423 S.C. 144, 148, 813 S.E.2d 527, 529 (Ct. App. 2018) (“Determining the proper interpretation of a statute is a question of law,

and this [c]ourt reviews questions of law de novo.” (citing *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014))).

ARGUMENT

As detailed by the Sparrows Appellants in their February 22 Initial Brief regarding the December 6 Order on appeal, the underlying receivership cannot exist as a matter of federal constitutional law and as a matter of South Carolina substantive and procedural law. Since the filing of that appeal, the Sparrows Appellants have put before the circuit court on numerous occasions the argument that Rule 205 of the South Carolina Appellate Court Rules prohibits action by the circuit court on any matter affected by the currently pending appeal of the continuation, modification, and propriety of the Cape PLC Receivership and the creation and grant of a new receivership over CIHL. Because the propriety and fundamental nature of the underlying receivership are pending before this Court, all issues associated with such receivership are affected by the pending appeal and, therefore, the lower court and the Receiver are deprived of the power to proceed thereon. By nevertheless granting the Receiver's Motions to Compel and refusing the Sparrows Appellants' Cross-Motion for Injunction, the lower court has acted outside of its jurisdiction and power to proceed. *See Sparrows Appellants Objection to Court Ruling on Motions for Protective Order or Receiver's Motions to Compel at 19–20 (filed Feb. 27, 2024) (noting “any ruling allowing discovery would equate to a denial of the requested injunction and the Sparrows Defendants' underlying motion seeking such relief”)*.

Recently, this Court has made clear that parties before it are not to file “motions to clarify” and that the court will not take “action on any order which is not properly before it.” *See Order in Appellate Case No. 2023-000727 (filed Nov. 21, 2023)*.⁸ Accordingly, rather than seek

⁸ The circuit court referenced both the November 21 Order in Appellate Case No. 2023-000727 as well as the September 8 Order in the same case. Neither point addresses head-on the issue as to Rule 205. One discusses only a stay, which, as discussed below, has no bearing on the question posed by a Rule 205 analysis. The other, as noted above, never reached the Rule 205 question because of the manner in which it was placed before the Court.

clarification by interlocutory motion, the Sparrows Appellants have filed a proper Notice of Appeal and this Initial Brief to seek enforcement of Rule 205, and in the interim, seek an injunction to preserve their rights. The circuit court’s March 12 Order—constituting action taken in violation of the precepts and limitations of Rule 205—is now properly before this Court for enforcement.

I. Rule 205, SCACR, leaves no room for action by the circuit court or its appointed Receiver in this case.

Rule 205 reads, in its entirety:

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.

Rule 205, SCACR.

As is clear by its terms, service of a notice of appeal has two direct results. The first is that the appellate court has exclusive jurisdiction over the appeal. *See id.*; *see also 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.”); *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) (explaining that “[t]he appellate court obtains exclusive jurisdiction over the appeal upon the service of the notice of appeal”). The second is that the lower court may proceed in *only two* scenarios, neither of which apply here; the lower court may proceed with (i) petitions for writs of supersedeas under Rule 241, SCACR, and (ii) “matters *not affected by the appeal.*” Rule 205, SCACR (emphasis added). There are *no* exceptions to Rule 205. *See id.*

The required analysis under Rule 241, SCACR, for **stays and supersedeas** petitions is separate and wholly distinct from the **jurisdictional** inquiry mandated by Rule 205, SCACR. A decision on one does not, and cannot, affect or dictate the other. As explained in *Tillman v. Oakes*, 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012), these separate rules, with separate accompanying analyses, cannot be conflated:

When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241

The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR

398 S.C. at 254–55, 728 S.E.2d at 50–51; *see also Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 533–34, 787 S.E.2d 485, 493–94 (2016) (analyzing both Rules 205 and 241, SCACR).

In *Tillman*,⁹ then-Chief Judge Few of the South Carolina Court of Appeals further explained the function of Rule 205, SCACR:

Under Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal, but is specifically allowed to proceed with matters not affected by the appeal. . . . Thus, the existence or

⁹ The 2012 *Tillman* decision has been cited favorably by the South Carolina Supreme Court on two occasions: (1) *Stokes-Craven Holding Corp.*, 416 S.C. at 534, 787 S.E.2d at 494 (citing *Tillman* for its analysis of Rule 205, SCACR) and (2) *Greenville Bistro, LLC v. Greenville Cnty.*, 435 S.C. 146, 171, 866 S.E.2d 562, 575 (2021) (citing both *Tillman* and *Stokes-Craven* after stating that “Rule 205, SCACR, explains the effect an appeal has on a lower court’s jurisdiction”). Additionally, *Tillman* was cited favorably by the lower court itself. *See Toal, supra*, at 121, 345–55 (“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 Rule 205. (citing *Tillman*, 398 S.C. at 254–55, 728 S.E.2d at 50–51)).

nonexistence of a stay . . . 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”

398 S.C. at 255 & n.3, 728 S.E.2d at 51 & n.3 (citations omitted) (further clarifying that “[t]he reference in Rule 205 to the ‘jurisdiction’ of the lower courts does not refer to subject matter jurisdiction,” but, instead, “govern[s] the circumstances under which the exclusive appellate jurisdiction Rule 205 grants to the appellate court deprives the lower court of the power to address a particular issue, or ‘matter,’ during the pendency of the appeal”); *see also Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 532, 787 S.E.2d 485, 493 (2016) (“[T]he service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal”)¹⁰; *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.”); *Ditech Fin., LLC v. Snyder*, No. 2019-000575, 2022 WL 2826359, at *9 (S.C. Ct. App. July 20, 2022) (holding that Rule 205, SCACR, divested the lower court of jurisdiction over deciding whether to proceed with a foreclosure because there was a pending appeal of an order that, if reversed, would have had the

¹⁰ Exemplifying the wide breadth of Rule 205’s reach, then-Chief Justice Pleicones observed that the *Stokes-Craven* majority opinion 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).

effect of preventing the foreclosure in the first place); *Rudd v. Pepper Hill Nursing & Rehab Center, LLC*, No. 2019-CP-02-02840, 2021 WL 8153809, at *1 (S.C. Com. Pl. Mar. 16, 2021) (finding that motion to amend complaint to add defendants on veil-piercing theory “involved matters affected by the pending appeal” and could not proceed in the lower court because appealed order denying motion to compel arbitration would result in dismissal of existing defendants and any basis for veil piercing if reversed).

In *In re Estate of Connor v. Slotchiver*, No. 2009-UP-502, 2009 WL 9530097 (S.C. Ct. App. Oct. 29, 2009) (per curiam), this Court addressed whether a special administrator of an estate could proceed and take further action in the probate court while the validity of his underlying appointment was on appeal. 2009 WL 9530097, at *2 (interpreting and applying, in pertinent part, Rule 205, SCACR). There, the Court found that because the validity and legitimacy of the appointment was an issue on appeal, the lower court erred by refusing to dismiss the special administrator’s petition to sell real estate and by finding that such petition was unaffected by the appeal. *Id.* In so finding, this Court explained the special administrator’s “authority to pursue a petition to sell estate assets derived from and depended entirely upon his position as special administrator of [the] estate.” *Id.*

Here, the Sparrows Appellants filed their Initial Notice of Appeal as to the circuit court’s December 6 Order on December 18, 2023. From *that very moment*, Rule 205, SCACR, automatically applied, and continues to apply, while the Sparrows Appellants’ appeal remains pending. *See* Rule 205, SCACR. As noted in *Tillman*, the question now posed by Rule 205 is “whether the issue sought to be litigated in the lower court during the appeal is a ‘matter[] affected by the appeal.’” *Tillman*, 398 S.C. at 255, 728 S.E.2d at 51; *see also, cf. 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 . . . jurisdiction of a case when a notice of appeal is filed and served.”).

a. Matters affected by the pending appeal

As set forth in the Sparrows Appellants’ February 22 Initial Brief as to the December 6 Order, a number of issues are on appeal. However, all relate to the fact the December 6 Order ruled, among other things, on the propriety and empowerment of the Cape PLC receivership and granted, continued, and modified the appointment of the Receiver.

The issues set forth in the February 22 Initial Brief—whether the Receivership is proper, whether the Receiver has been duly empowered, and whether the December 6 Order on appeal has granted, continued, and/or modified his appointment (collectively, the “Receivership Issues on Appeal”)—directly affect the Receiver’s ability to appear in any court, serve pleadings, pursue his derivative claims, file motions, seek discovery from the Sparrows Appellants, and take any action on behalf of Cape PLC and/or other entity with relation or affiliation to the Sparrows Appellants. *See, e.g., Estate of Connor*, 2009 WL 9530097, at *2 (finding that special administrator’s authority to take action “derived from and depended entirely upon his position” and, because an appeal as to the validity and legitimacy of the underlying appointment was pending, additional action taken in the probate court would be affected by the appeal).

Likewise, the February 22 Initial Brief put before this Court legitimate issues as to whether the circuit court could properly exercise personal jurisdiction over any of the Sparrows Appellants (collectively, the “Personal Jurisdiction Issues on Appeal”). As the Supreme Court of South Carolina has noted, “[t]he power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him.” *Pollock v. Carolina Interstate Bldg. & Loan Ass’n*, 48 S.C. 65, 25 S.E. 977, 980 (1896). This is because a court “cannot confer any greater power than

it is given” and “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. The stream cannot rise higher than its source.” *Id.* Thus, the Personal Jurisdiction Issues on Appeal are inextricably linked with the Receivership Issues on Appeal stated above, and all were ruled upon in the same December 6 Order. Accordingly, the pending appeal directly affects the Receiver’s ability to continue prosecuting the third-party action against the Sparrows Appellants below.

With these being the issues on which the pending appeal centers, reversal by this Court on any one ground will result in the pending third-party action being dismissed, moot, or leaving the Receiver with inadequate authority to continue litigating claims against the Sparrows Appellants on behalf of Cape PLC (or CIHL). Accordingly, the Sparrows Appellants’ pending appeal *necessarily* affects all aspects of the claims pending against them. In light of these facts and the circumstances presented, Rule 205, SCACR, leaves no room for disagreement and provides no exception—the court below could not proceed with or rule on the Receiver’s motions to compel (or the Sparrows Appellants’ pending motions for protective order filed prior thereto) during the pendency of the appeal, and it was error for the court below to do so, resulting in the March 12 Order being 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”); *see also 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.”); *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).

Moreover, because any receiver appointed in South Carolina is deemed to be an “officer” or “arm” of the Court, the Receiver here cannot possibly have more power to act than does the circuit court that appointed him. *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 217, 118 S.E. 303, 304 (1923). The circuit court’s March 12 Order permitting the Receiver to continue litigating without the power to do so is again 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.

b. A “stay” analysis is irrelevant and inapplicable

Moreover, the circuit court erred by basing its March 12 Order on its findings that the underlying proceedings were not “automatically stayed following the appeal of an order denying a motion to dissolve the receivership.” *See* Mar. 12 Order at p.12 (citing Sept. 8, 2023 & Nov. 21, 2023 procedural Orders from Appellate Case No. 2023-000727). Even if it were proper to rely on these procedural Orders—from an unrelated case to which the Sparrows Appellants are not parties and in which Rule 205 arguments and authorities applicable and relevant here were not addressed—which it is not, the Rule 241 “stay” issue and question is irrelevant and inapplicable here, as it is the “wrong question.” *See Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 50–51 (Ct. App. 2012) (“[T]he existence or nonexistence of a stay under Rule 241 *does not control* the [lower] court’s power to proceed with the action.” (emphasis added)).

In addition to being wholly inapplicable and irrelevant to a Rule 205, SCACR, jurisdiction analysis, the underlying authorities referenced for the inapplicable Rule 241 inquiry—S.C. Code Ann. § 14-3-450 and Rule 62, SCRCR—do not apply, by their express terms and under any analysis, to the Personal Jurisdiction Issues on Appeal. *See, e.g.*, S.C. Code Ann. §§ 14-3-330, -450 (limiting application—in the realm of stays under inapplicable Rule 241, SCACR—to “an appeal under item (4) of Section 14-3-330” of “[a]n interlocutory order . . . granting, continuing, modifying, or refusing the appointment of a receiver”); Rule 62, SCRCR (entitled “Automatic Stay; Exceptions—Injunctions, Receivership, and Accountings” and providing an exception for “an interlocutory or final judgment . . . in a receivership action,” which does not apply to the December 6 Order on appeal and is relevant only to the inapplicable Rule 241, SCACR, stay analysis); *Tillman v. Oakes*, 398 S.C. at 255, 728 S.E.2d at 50–51.

By addressing and basing its ruling on the “wrong question” (Rule 241) and inapplicable authorities and procedural Orders from this Court, the circuit court committed an error of law. There exists no applicable authority or appellate precedent or pronouncement—binding or otherwise—that permits the lower court to proceed when Rule 205, SCACR, bars further action by depriving and divesting the lower court of jurisdiction over all matters affected by the Sparrows Appellants’ pending appeal.

II. The circuit court should have granted the Sparrows Appellants’ request for injunctive relief and erred by refusing to do so.

Operating under the plain meaning of Rule 205, the Sparrows Appellants opposed the Receiver’s underlying discovery and resulting Motions to Compel on similar bases to the Rule 205 analysis set forth above, as well as the pendency of a Motion for Protective Order on which the lower court did not rule prior to the Sparrows Appellants’ filing their Notice of Appeal as to the December 6 Order now on appeal. However, because the circuit court appeared unpersuaded by

the argument that Rule 205 prevented action on any matters affected by the appeal—specifically including the Receiver’s ability to seek discovery, the lower court’s ability to grant a motion to compel and dispose of pending motions for protective order, and other related actions—the Sparrows Appellants included in their Opposition to Receiver’s Motions to Compel a Cross-Motion for injunctive relief whereby the circuit court—if it determined it had the power to do so—could afford the Sparrows Appellants the same outcome sought pursuant to Rule 205.

In so moving, the Sparrows Appellants offered the following legal bases on which the circuit court *should have* ruled as a matter of law. First, and most importantly, the injunction should have been based on the plain and clear text of Rule 205. Second, and because Rule 205 creates a jurisdictional bar to action by which a lower court is divested of authority to rule on all but a few matters, the circuit court cannot act any further. *See 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))). Third, as set forth above, the Receiver acts as an arm of the court. *See Pollock*, 48 S.C. 65, 25 S.E. at 980. Because the circuit court lacked jurisdiction to proceed, the Receiver himself also lacked authority to conduct any activity, as he cannot possibly have any greater authority to function than the circuit court itself. *Id.* This is not a matter of discretion.

On these bases, the Sparrows Appellants sought to have the circuit court enforce the basic and fundamental rules necessary to preserving the orderly review and determination of the issues pending on appeal. However, rather than rule on the Cross-Motion for injunctive relief, the circuit court indicated it would simply keep it under advisement. In practice and substance, this was a

refusal to enjoin and a resulting error of law as to the Sparrows Appellants’ simple and straightforward request: enforce Rule 205 and the results thereof.

CONCLUSION

For the reasons set forth herein, the Sparrows Appellants respectfully request this Court give effect to the plain unambiguous language of Rule 205, SCACR. Doing so requires that the lower court’s March 12 Order—issued without the power or jurisdiction to do so—be deemed void ab initio and vacated accordingly with instructions consistent with Rule 205 and the injunction sought and refused to further protect the Sparrows Appellants’ rights during the pendency of the appeal of the December 6 Order already on appeal.¹¹

Respectfully submitted,

s/ Steven J. Pugh

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SPARROWS OFFSHORE, LLC**

March 19, 2024

¹¹ Per Rule 208(b)(6), SCACR, the Sparrows Appellants incorporate herein, to the extent applicable, all additional arguments raised and authorities cited by similarly situated Appellants Mohed Altrad, Altrad Investment Authority S.A.S., ESAB Corporation, Charter Consolidated Ltd., and Central Mining & Investment Corporation Ltd.

CERTIFICATE OF SERVICE

I, Ashwin R. Sanzgiri, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellants ArranCo US, LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC, do hereby certify that I have this date served the foregoing **INITIAL BRIEF OF APPELLANTS ARRANCO US, LLC; HAWK BIDCO (US) INC.; AND SPARROWS OFFSHORE, LLC (INJUNCTION APPEAL)**, dated March 19, 2024, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on all counsel of record using the primary email addresses listed in the Attorney Information System (if applicable).

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