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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

Case No. 2023-CP-40-01759

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Appellate Case No. 2023-001461

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John A. Tibbs and Margaret B. Tibbs,

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

*of which*

Asbestos Corporation Limited, is the Appellant.

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**BRIEF OF COURT-APPOINTED RECEIVER PETER D. PROTOPAPAS**

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## **I. Statement of the Case**

This appeal arises from Defendant-Appellant Asbestos Corporation Limited's ("ACL") blatant refusal to participate in court-ordered discovery and its misrepresentations to Chief Justice Toal (ret.), presiding as Circuit Judge over the Richland County Court of Common Pleas (the "Circuit Court"), regarding the availability of responsive insurance assets that may cover the asbestos-related injuries of Plaintiffs-Appellees John A. Tibbs and Margaret B. Tibbs. ACL's opening brief represents just its latest attempt to hide its insurance assets—covering injuries ACL caused to the Tibbs plaintiffs and others in South Carolina—from the litigants and the court. The Circuit Court's orders should be affirmed as appropriate exercises of its discretion in response to ACL's intransigent and contemptuous behavior.

After the Circuit Court overruled its challenge to personal jurisdiction, ACL ignored Chief Justice Toal's order for the case to proceed. Indeed, ACL spent months refusing to participate in routine discovery, including defying the Circuit Court's specific directive for ACL to produce a corporate-representative deponent. The Court patiently provided ACL with multiple chances to participate in discovery (making clear that sanctions would result from ACL's continued refusal to comply with the South Carolina rules and the Court's orders). When ACL made clear it would *never* comply with the Court's orders, the Circuit Court held ACL in contempt and exercised its discretion to sanction ACL by striking its answer—a fitting sanction for a party who, despite answering the complaint, refused to participate in the proceedings.

Because ACL had not answered discovery and a default judgment was imminent, the Court appointed a receiver, Peter D. Protopapas (the "Receiver"), for the limited purpose of marshaling ACL's theretofore concealed insurance assets and rendering them appropriately responsive to qualifying asbestos tort claims brought against ACL. The Circuit Court's decisions are appropriate responses to ACL's conduct, are soundly based in precedent acknowledging the Court's discretion,

and provide a path forward for this litigation and the Court’s management of South Carolina’s asbestos docket. And both of ACL’s excuses for not providing any discovery—that the relevant events happened a long time ago and that the Quebec Business Records Concern Act somehow bars all discovery—have no legal support and were properly rejected.

ACL seeks to dissolve the receivership, arguing that it has no property in South Carolina. This argument is fatally flawed because it ignores three relevant opinions. First, well-settled South Carolina law holds that insurance contracts covering injuries caused to South Carolina residents in the state represent South Carolina property and assets. *Sangamo Weston, Inc. v. Nat’l Sur. Corp.*, 307 S.C. 143 (1992). Second, this Court’s recent opinion involving the *Covil* receivership acknowledged that *Covil*’s insurance policies were assets of the South Carolina receivership. *See Protopapas v. Wall Templeton & Haldrup, P.A.*, Appellate Case No. 2020-001437 (Ct. App. Nov. 22, 2023) (“Under the Appointment Order, the Receiver has authority and control over *Covil*’s assets, including available insurance coverage.”). Third, a similar holding by the United States Court of Appeals for the Fourth Circuit in litigation related to the Payne & Keller receivership found: “the state court has exclusive jurisdiction over the assets of the receivership.” *Protopapas v. Travelers Cas. & Sur. Co.*, 94 F.4th 351, 353 (4th Cir. 2024)

Moreover, in claiming that ACL has no insurance assets covering South Carolina residents, ACL simultaneously has represented both that (i) it has reviewed its records and it knows it has no such assets, R. p. \_\_; Aug. 21, 2023 Hearing Transcript, at 26 (“Hr’g Tr.”), and (ii) “it has no individuals with knowledge of” this issue who can be deposed. (App. Br. at 1). But a party may not refuse to participate in discovery and ask the Court to take it at its word. Here, evidence shows that ACL’s claims are false.

First, ACL’s chief financial officer, Mario Simard, reported to ACL’s excess insurers on February 15, 2023, “Asbestos Corporation Limited presently finances the cost of the asbestos litigation using the third and fourth excess layer coverage.” R. p. \_\_\_; Dec. 11, 2023 ACL Receiver’s Motion to Supplement the Record and for Sanctions for Fraud on the Court, at 12 (“Motion for Sanctions for Fraud”); *id.* Ex. B. This annual report is issued to insurers who wrote insurance protective of ACL in up to ten layers of excess insurance coverage in certain relevant years. *Id.* Ex. F. ACL has insurance assets directly responsive to the Tibbs action, and those insurance policies are presently responding to other asbestos claims.

Second, no party is entitled to avoid discovery by blanketly asserting it has no knowledge of insurance policies it owns or related agreements it entered. Rather, the Circuit Court appropriately appointed the Receiver to determine whether and to what extent ACL has insurance assets—which efforts have already led to the discovery of the substantial responsive insurance assets discussed herein. ACL’s litigation conduct, including its shifting positions and absolute refusal to produce documents, information, and a Rule 30(b)(6) deponent as ordered by the Court, make clear it is determined to avoid discovery regarding its insurance assets at all costs.

This Court should reject ACL’s arguments on appeal. The striking of ACL’s answer was a valid sanction for its contempt of court, and the appointment of a receiver for the purpose of collecting and administering ACL’s insurance assets was a valid remedy to ACL’s failure to comply with the discovery process and resulting default. Both decisions were well within the discretion of the Circuit Court, and both should be affirmed.

## **II. Issues on Appeal**

1. Whether the Circuit Court abused its discretion in holding ACL in contempt and sanctioning it by striking its answer in response to ACL’s repeated refusal to engage in discovery in this case.

2. Whether the Circuit Court erred in appointing a Receiver to find, collect, and administer ACL's insurance assets after its answer was struck and given clear evidence that ACL has insurance assets covering liabilities in South Carolina that it has attempted to hide from the parties and the Court.

### **III. Statement of the Facts**

Since filing its Answer to the Tibbs' Complaint, which alleged damage caused by asbestos ACL sent into South Carolina, ACL has refused to participate in any meaningful discovery, violating multiple court orders in doing so. Each of the reasons why ACL refuses to participate in discovery are meritless and further support the validity of the Circuit Court's orders ACL now challenges on appeal.

#### **A. ACL raised a motion to dismiss it knew it would lose.**

Although the records reflected sales of ACL asbestos to South Carolina, ACL raised a specious motion to dismiss for lack of personal jurisdiction, which has been rejected in many U.S. courts over the course of decades. *See Buttitta v. Allied Signal, Inc.*, 2010 WL 1427273, at \*20 (N.J. Super. Ct. App. Div. Apr. 5, 2010) (noting ACL's "defense had been rejected in nine other cases filed in federal court," not to mention state courts); *see also* R. p. \_\_; July 19, 2023 Order Denying Motion to Dismiss (July 19, 2023).

On July 10, 2023, the Circuit Court heard argument on ACL's motion to dismiss for lack of personal jurisdiction and denied the motion. It then "ordered ACL to fully answer discovery and appear for a deposition so that this matter could be prepared for trial." R. p. \_\_; Sept. 8, 2023 Order Holding ACL in Contempt, at 1 ("Contempt Order").

On July 19, 2023, the Circuit Court issued a written order memorializing its ruling denying ACL's motion to dismiss for lack of personal jurisdiction. *See* Order Denying Motion to Dismiss. The Circuit Court expressly rejected ACL's argument that the Court lacked specific jurisdiction

including because “Plaintiffs submitted evidence of ACL’s sales of its asbestos product directly into South Carolina.” *Id.* The Circuit Court also observed that ACL “refused to participate in any jurisdictional discovery” and, given that conduct and the Court’s denial of the motion to dismiss, directly ordered ACL “to answer discovery and to produce a 30(b)(6) witness by July 24, 2023.” *Id.* The Court specifically warned that failure to do so “shall result in ACL being held in contempt.” *Id.*; *see* R. p. \_\_; Sept. 8, 2023 Order Appointing Receiver, at 2 (“Receiver Order”).

**B. After the Court’s initial warning, ACL continued its refusal to participate in discovery.**

Despite these warnings and order, “ACL failed to produce a witness as ordered by the Court” and “refused to identify a witness or a date on which it will produce a witness.” Contempt Order at 1. Instead, ACL’s attorney sent Plaintiffs’ counsel an email on July 24, 2023 stating that it was “unable to produce a 30(b)(6) witnesses based upon the gap in time,” and after including some irrelevant depositions from prior cases stating unequivocally that “no additional documents will be provided” and “there will be no live witness for this deposition.” R. p. \_\_; July 24, 2023 Stephen Brown Letter. Thus, ACL failed to “fully answer discovery and provide documents ordered to be produced.” Contempt Order at 1. Not only did ACL refuse to comply with the “Court’s orders to produce documents, a witness or otherwise participate in discovery,” Receiver Order at 2, but it “made it clear that it does not intend to participate in this matter” and will continue to “ignore[]” the Court’s orders. Contempt Order at 1.

**C. When ACL continued its pattern of defiance, the Circuit Court held ACL in contempt of court, struck its answer, and appointed a receiver.**

Subsequently, Plaintiffs filed a motion to strike ACL’s answer and to appoint a receiver, which the Circuit Court considered in a August 21, 2023 hearing. At the hearing, ACL’s attorney confirmed that ACL would not comply with the Court’s discovery orders. *See* Hr’g Tr. at 22-27.

As a result, the Circuit Court held in one order that ACL was in contempt of Court and struck its answer as a sanction under the governing test discussed in *Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co., Inc.*, 334 S.C. 193, 198 (S.C. Ct. App. 1999). *See* Contempt Order at 2-3. And in a subsequent order, the Circuit Court appointed Peter D. Protopapas as the Receiver for ACL’s insurance assets. Receivership Order at 2-5.

The Circuit Court did not give the Receiver unlimited authority—its order specified that “the powers afforded to the receiver here are all related to the insurance assets of Atlas.” *Id.* at 6-7 (granting Receiver “the power and authority [to] fully administer all insurance assets of Asbestos Corporation, Ltd. and any subsidiaries, accept service on behalf of ACL, engage counsel on behalf of ACL, to assume control of the defense of asbestos claims made against ACL in the United States, and take any and all steps necessary to protect the interests of ACL whatever they may be”). The Court instructed, among other things, that the Receiver “investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to ACL,” *id.* at 7, and tender “current and future claims from Plaintiffs suffering from asbestos diseases brought against ACL to which those policies are responsive.” *Id.* at 1-2.

**D. The Receiver immediately uncovered insurance information ACL previously had hidden from the Court and other litigants in discovery.**

The Receiver promptly began searching for evidence of ACL’s insurance policies and has uncovered evidence of insurance policies providing coverage to ACL for asbestos disease claims, including policies issued by the Insurers. *See* R. p. \_\_\_; Sept. 19, 2023 Receiver/ACL’s Third-Party Complaint. The Receiver separately has filed a Third-Party Complaint seeking declaratory relief regarding these Insurers’ coverage obligations and a declaration regarding the meaning and application of these policies to asbestos lawsuits brought against ACL. *See id.*

After being appointed receiver of ACL’s affiliate company Atlas Turner, the Receiver uncovered information that both ACL and Atlas Turner had misled the Circuit Court regarding the existence and status of insurance assets. On August 18, 2023, the Receiver filed a notice regarding these misrepresentations, alerting the Court to “documents that evidence potential past liquidations of Insurance Assets”—including an agreement in which these companies may have released certain insurance rights in the 1980s. R. p. \_\_; Aug. 18, 2023 Notice of Misrepresentations, at 1-2 (citing Agreement Between ACL and the Maryland Casualty Company (July 18, 1989) (“Maryland Agreement”); Memorandum of Agreement Between Bell Asbestos Mines, LTD, Royal Insurance Company of Canada, and Atlas (Dec. 18, 1986) (“Royal Agreement”)).<sup>1</sup>

The Receiver also has uncovered evidence that ACL has substantial insurance covering its asbestos liability, and that ACL has represented to its excess insurers as recently as 2023 that *it finances its other asbestos litigation costs with that insurance*. See Motion for Sanctions for Fraud at 12-13. These facts directly contradict ACL’s prior representations to the Court. *Id.* at 5-10.

#### **IV. Argument**

##### **A. The Circuit Court had authority to sanction ACL for its refusal to engage in the discovery process.**

The Circuit Court’s sanction striking ACL’s answer was well justified. South Carolina’s rules and case law provide trial courts broad discretion to sanction parties for failing to cooperate

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<sup>1</sup> These agreements demonstrate that ACL and its insurers took actions to liquidate insurance policies that cover U.S. asbestos liabilities, while simultaneously agreeing to hide their existence from claimants or other third parties with potential interests in the proceeds of such policies. For example, in the Maryland Agreement, ACL “agrees that it will cease and forego all efforts to locate or develop any evidence or other information that may directly or indirectly assist any Claimant in developing, asserting or litigating any Third-Party action against Maryland, and ACL further agrees that it shall refrain from assisting others in locating or developing any such evidence or information.” Maryland Agreement. And in the Royal Agreement, ACL affiliate Atlas Turner “expressly represent[ed] and guarantee[d] that ... [it] will not submit, voluntarily, copies of the policies to any third party and especially to anyone who would be likely to make use of them in a court of law.” Royal Agreement. At the same time, these agreements create trust accounts for the express purpose of paying judgments or settlements of U.S. asbestos claims. Neither ACL nor its insurers have provided any information on the status of the insurance proceeds paid into those trust accounts—which may still be assets applicable to U.S. asbestos claims.

in discovery—including by striking pleadings. ACL not only disobeyed several Court orders to produce a witness and turn over information regarding its insurance, but its counsel represented to the Circuit Court that it would continue to refuse compliance.

**1. The Circuit Court’s order striking ACL’s answer was appropriate.**

South Carolina trial courts indisputably may “completely strike [a party’s] pleadings in [a] matter as a sanction for failure to cooperate in discovery.” *Scott*, 353 S.C. at 651 (citing S.C. R. Civ. P. 37(b)(2)(C)); *see, e.g., Griffin*, 334 S.C. at 198 (“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.”). The power of a court to punish for contempt “is essential to the preservation of order in judicial proceedings and to the enforcements of the judgments, orders and writs of the courts.” *Miller v. Miller*, 375 S.C. 443 (Ct. App. 2007).

On this well-supported basis, the Circuit Court sanctioned ACL, stating:

ACL has violated this Court’s orders. Moreover, ***ACL has indicated that it does not intend to comply with those orders in the future.*** In light of ACL’s position, this Court has no choice but to find ACL in contempt of court. ACL has failed to produce a witness[,] ... refused to participate in meaningful discovery[,] ... [and] refused to produce documents. Given this intentional and willful refusal to participate in discovery, the Court hereby strikes ACL’s pleadings.

Contempt Order at 3 (emphasis added).

ACL does not deny the Circuit Court’s authority to strike its pleading as a sanction for failure to participate in discovery. (*See* App. Br. at 12). Nor does it deny that parties to litigation—like Plaintiffs—are entitled to discovery to be prepared for trial, or that a party may not ignore or refuse to follow a court’s discovery orders. *See Downey v. Dixon*, 294 S.C. 42, 46 (Ct. App. 1987); *Griffin*, 334 S.C. at 198 (court may strike pleadings for failure to “obey an order to provide or permit discovery”). Instead, it argues that the Circuit Court (i) did not adequately consider the

factors relevant to ordering sanctions before issuing its order, App. Br. at 13–14, and (ii) erred in finding ACL’s conduct to be willful, *id.* at 15-17. ACL is wrong on both points.

*First*, the Circuit Court analyzed the four factors relevant to discovery sanctions and all are plainly satisfied by ACL’s misconduct. *See Griffin*, 334 S.C. at 198 (nature of the discovery, discovery posture, willfulness, and prejudice). ACL’s assertion that the Circuit Court “clearly considered just the willfulness factor” is wrong. (App Br. at 13–14).

At the August 21, 2023 hearing in which the Circuit Court imposed the sanction of striking the answer, the Court extensively considered all four factors. *See, e.g.*, Hr’g Tr. at 5-11 (Tibbs’ counsel and Court discussing the nature and posture of discovery); *id.* at 22-27, 29, 31-32, 35, 43 (ACL’s counsel and Court discussing discovery orders and lack of compliance with discovery to date, and Plaintiffs’ need for discovery); *id.* at 46-47 (Court noting “this corporation is deliberately refusing to comply with discovery rules of South Carolina” and “has made it clear that they are not going to cooperate ... in doing anything that leads to the discovery of business records” or a 30(b)(6) deponent); *id.* at 47 (describing the need for “a much more detailed examination by discovery of the records and information from ACL as to its insurance program”); *id.* at 50 (explaining that discovering and tendering insurance coverage would help, not hurt, ACL—an ongoing corporation that would otherwise be on the hook for judgments against it).

Again, in its written order, the Circuit Court quoted all four relevant factors. Contempt Order at 2 (quoting *Griffin*, 334 S.C. at 198). The Circuit Court went on to expressly evaluate the nature of the discovery, the discovery stage of the case, and ACL’s willfulness. *See* Contempt Order at 1 (describing all the discovery ACL refused to participate in); *id.* at 3 (discussing ACL’s refusal to comply with the Court’s orders and refusal to participate in any “meaningful discovery,” which given the Court’s warnings, was “intentional and willful”). And implicit in the Court’s order

is a finding that any prejudice is warranted given ACL's repeated, blatant, and willful misconduct. *See id.* at 2-3. Moreover, the Circuit Court appointed the Receiver to perform the obligations ACL refused to perform with respect to its insurance assets—minimizing any potential. *See generally* Receivership Order; *see also* Hr'g Tr. at 50.

The Circuit Court plainly considered all relevant factors—on multiple occasions and in multiple ways. ACL's assertion otherwise is contrary to the record.

Nor does ACL cite any case stating a Circuit Court must individually discuss every factor or in which this Court or the South Carolina Supreme Court reversed a Circuit Court's decision to strike a pleading. Instead, it cites only cases like this one—where the trial courts considered the factors and properly struck the parties' pleadings as sanctions for failure to participate in discovery. (*See* App. Br. at 13–14 (discussing *Griffin*, 334 S.C. 193; *McNair v. Fairfield County*, 379 S.C. 462 (S.C. Ct. App. 2008))).

**Second**, the Circuit Court correctly found that ACL willfully disobeyed its discovery orders. While ACL suggests the Circuit Court sanctioned it without warning after it ignored “a single order,” App. Br. at 15, this is yet another misrepresentation. ACL was aware that the Circuit Court viewed its conduct as willful and was considering striking its pleading as a sanction. The Court ordered ACL to participate in discovery at the July 10, 2023 hearing on its motion to dismiss, Contempt Order at 1, and in its July 19, 2023 order denying that motion, Order Denying MTD. In response, ACL emailed Plaintiffs' counsel claiming it would not send any “additional documents” and would present “no live witness for this deposition.” Stephen Brown Letter. And, at the August 21, 2023 hearing on whether to hold ACL in contempt and strike its answer, ACL's attorney—in response to the Tibbs' attorney stating that ACL refused to produce a 30(b)(6) witness or any other discovery, Hr'g Tr. 6—told the Court that ACL would not produce any discovery or any witness

requested by the 30(b)(6) notice. *Id.* at 22. The Circuit Court appropriately responded to ACL “deliberately refusing to comply with discovery rules” and its orders by holding ACL “in contempt of this court” and sanctioning ACL “by striking [its] answer.” *Id.* at 48.

ACL’s accusation that “the circuit court afforded ACL significantly less time before striking its pleadings than the circuit courts” in other cases thus makes little sense. (App. Br. at 16). A Court need not wait longer after a party not only has ignored its orders multiple times but also has made clear it will *never* comply with those orders. Striking an answer at that point—without wasting more of the parties’ and court’s time and resources—is not an abuse of discretion.

This State’s procedural rules and precedent are clear that a trial court is within its right to strike a pleading for this sort of discovery-related misconduct. *See, e.g.,* S.C. R. Civ. P. 37(b)(2)(C); *Scott*, 353 S.C. at 651; *Griffin*, 334 S.C. at 198; *see also Buttitta*, 2010 WL 1427273, at \*27 (different state’s appellate court affirming trial court’s striking of ACL’s “answers and defenses for failure to comply with the discovery orders” to produce documents and a 30(b)(6) witness; “[i]n order to prevent ACL from benefiting from its wrongful conduct [of ignoring “legitimate discovery requests”], some sanction was required,” and “[w]e are satisfied that the judge’s choice of a sanction was entirely appropriate and fell well within the bounds of the judge’s discretion”).

**2. ACL’s excuses for why its refusal to participate in discovery was not willful are plainly deficient and not supported by law.**

This Court should place no stock in the two excuses ACL offered to the Circuit Court and recycles on appeal for its refusal to comply with the Court’s orders or engage in any meaningful discovery. Neither has any legal support and they do not undermine the finding that ACL’s conduct was willful.

*First*, ACL’s excuse that its asbestos activities happened a long time ago and all witnesses with knowledge of asbestos operations and insurance agreements are “dead,” so no documents or 30(b)(6) deponent can be produced, is absurd. (*See* Hr’g Tr. 22; App. Br. at 16). If that excuse worked, no one would ever produce a corporate representative in an asbestos case, which invariably implicates several-decades-old facts and records. As the Circuit Court explained, situations frequently arise where, even though the relevant first-hand witnesses are no longer alive, the company appoints a 30(b)(6) representative, who need not “have ever operated within the company,” but instead “is the repository of business records and . . . insurance records that can be found that pertain to the claims being made.” (Hr’g Tr. 22). That events happened long ago does not prevent still-existing companies “from appointing a very competent 30(b)(6) representative to marshal their records and speak to matters with regard to claims against them.” (*Id.* at 22–23).

And if there truly are no records responsive to the discovery requests, then the company must produce a 30(b)(6) *witness* to testify to that fact under oath. ACL has no support for its position that it can avoid all discovery simply by having its *attorney* assert that it has no responsive documents. That is not a good-faith “attempt[] to comply with the discovery order.” (App. Br. at 16). It is willful refusal.

Moreover, ACL’s argument that it has no relevant records at all cannot be squared with several representations made by ACL’s counsel about its historic activities, including that it has been a functioning company without asbestos operations since the 1980s, that it entered an agreement with Maryland Casualty Company in 1989 to cover insurance policies covering U.S. citizens from 1976 to 1971, Hr’g Tr. at 20–21, or that representatives of ACL “have gone through and [sic] we can find and we know of and there is no coverage for us to tender against.” (*Id.* at 26). If ACL’s counsel knows about ACL’s operations in the 1980s and ACL has representatives that

went through ACL’s insurance records, then surely ACL can present a 30(b)(6) witness to testify regarding those operations and records. *See id.* (Plaintiffs are “entitled to depose the people that you had go through those records and ask them what they looked at and so forth. It’s not acceptable to say, ‘We’re not going to tender anybody because it’s too old and everybody is dead.’ You have got people now ... who looked at old records[.]”). ACL’s refusal to do so was plainly willful and warranted sanctions.<sup>2</sup>

Just as ACL “had no problem with setting up a qualified settlement fund to take care of asbestos claims back in the ’80s” covering ’70s policies, ACL should “have no problem bringing that forward today”—especially given no evidence or representation that business records were in fact lost or destroyed. (H’rg Tr. 24–25). Indeed, ACL’s counsel did not dispute that ACL turned over to Maryland Casualty Company “all kinds of records” involving “the internal workings of ACL” despite the Quebec Records Act. (*Id.* at 31). If ACL’s intransigence and refusal to participate in any discovery is not willful in this case, it is hard to imagine what is.

2. After Chief Justice Toal rejected ACL’s argument that the discovery sought was too old to produce, ACL’s attorney pivoted to relying on the Quebec Business Records Concern Act (“QBRCA”), but the Court rightly held that Act does not prevent the discovery sought here and is not self-enforcing in any event. (*See* Hr’g Tr. 9). On appeal, ACL never argues that the Act actually would prevent the discovery sought and ordered in this case. Thus, any “argument” based on the QBRCA is forfeited.

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<sup>2</sup> ACL’s stalwart refusal to produce any deponent is made even more egregious by the fact that the Receiver has uncovered proof that it does have insurance—including up to ten layers of insurance—potentially responsive to Plaintiffs’ claims. (*See* Motion for Sanctions for Fraud, Ex. F). Indeed, ACL’s own chief financial officer represented that this excess insurance is being used to pay asbestos liabilities. (*See* Motion for Sanctions for Fraud at 12–13).

Moreover, the QBRCA applies only to the “removal” of original corporate documents from Quebec and only when “the provincial Attorney-General” applies “for a court order precluding removal” of certain documents relating to the Canadian concern. *Lyons v. Bell Asbestos Mines, Ltd.*, 119 F.R.D. 384, 386–87 (D.S.C. 1988)—independent reasons the Act is not implicated here.

The QBRCA (which focuses on *originals of documents*) is not violated if a company makes copies and sends those copies out of province, answers interrogatories, or *produces a 30(b)(6) deponent*. Hr’g Tr. 43; *Lyons*, 119 F.R.D. at 387; *see also Ney v. Owens-Illinois, Inc.*, 2016 WL 7116015, at \*5 & n.3 (E.D. Pa. Dec. 6, 2016) (ordering ACL to “produce copies of all documents concerning the sale and supply of asbestos fibers by ACL” to certain companies for certain years, and noting the QBCRA does not prevent photocopies of documents being produced or documents being inspected in Quebec).

And the QBRCA applies only where there is evidence that “a restraining order under section 4 of the QBRCA is pending.” *Lyons*, 119 F.R.D. at 387; *see Young Women’s Christian Ass’n of Nat. Cap. Area, Inc. v. Allstate Ins. Co. of Canada*, 1994 WL 661523, at \*2 (D.D.C. Nov. 22, 1994) (noting Quebec’s law is “not self-enforcing but require[s] a petition by the Attorney-General to a district judge of the provincial court for an order precluding the removal of business information,” and that Quebec’s law contains a provision whereby “a foreign country before which any civil or commercial case is pending” can order a Canadian company to produce a “witness to appear for examination” and/or “any writing or document”). Here, ACL’s attorney admitted there is no such petition pending:

THE COURT: Has the Attorney General applied for enforcement of this Records Act?

MR. BROWN: Not to my knowledge at this point.

Hr’g Tr. 29. ACL has not met “its evidentiary burden in establishing that the provisions of the QBCRA would apply to the discovery sought by plaintiffs” in this case. *Lyons*, 119 F.R.D. at 387.

And, even if the QBCRA applied to these discovery requests and even if the Attorney-General had taken the required steps, a “United States court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign’s views to the contrary,” and “[i]t is not *ipso facto* a defense to a discovery request that the law of the foreign country may prohibit production or disclosure.” *Id.* at 389 (citations omitted); *see also Connex R.R. LLC v. AXA Corp. Sols. Assurance*, 2017 WL 3433542, at \*5 (C.D. Cal. Feb. 22, 2017) (“The mere existence of a blocking statute does not preclude an American court from ordering discovery from a foreign litigant.”) (citing *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987)).

Indeed, other courts have rejected ACL’s argument that the QBCRA protects it from discovery for exactly these reasons. *See, e.g., Ney*, 2016 WL 7116015, at \*5 & n.3; *Buttitta v. Allied Signal, Inc.*, 2010 WL 1427273, at \*21–22 (N.J. Super. Ct. App. Div. Apr. 5, 2010) (affirming trial court’s orders “compelling discovery and, later, striking ACL’s answer and limiting its ability to participate at trial,” and ultimate judgment against ACL).<sup>3</sup>

**B. The Court had authority to appoint the Receiver to find, collect, and administer ACL’s insurance assets.**

**1. Appointment of the Receiver accords with existing practice.**

Under South Carolina law, “[a] receiver may be appointed by a judge of the circuit court’ in a variety of situations.” *Palmetto Wildlife Extractors, LLC v. Ludy*, S.C. 690, 697 n.2 (S.C. Ct.

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<sup>3</sup> Lacking any support in South Carolina case law, ACL resorts to mudslinging. Rather than legal support, ACL turns to the blogosphere, citing a website entitled “Judicial Hellholes” to claim that South Carolina’s asbestos litigation docket is such a “hellhole.” (App. Br. at 16 n.12 (citing a website that attacks Chief Justice Toal by name and slams South Carolina Supreme Court decisions)).

App. 2022) (quoting S.C. Code Ann. § 15-65-10). In addition to the four specific scenarios in which Section 15-65-10 authorizes receiverships, the statute provides that a court may appoint a receiver “[i]n such other cases as are provided by law or may be in accordance with the existing practice....” *Id.* § 15-65-10(5). As the Circuit Court recognized, appointment of the Receiver in this case accords with the longstanding historical practice, as well as the Circuit Court’s current practice in other asbestos cases. (*See* Receivership Order at 2–5).

As the South Carolina Supreme Court has recognized, “[t]he right to have a receiver appointed is an ancient one” historically employed by courts sitting in equity. *Pelzer v. Hughes*, 3 S.E. 781, 785 (S.C. 1887); *accord First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 1 S.E.2d 797, 805–06 (S.C. 1939) (receivers are historically appointed by courts sitting in equity to ensure a fair result). Although “the power of appointment of a receiver should be resorted to only in exceptional circumstances,” *Knotts*, 1 S.E.2d at 805, the circumstances of this case are the exact circumstances in which courts have found receiverships appropriate. When, as here, a defendant “is trying to defeat his creditors by an act or course of conduct which indicates moral fraud—a conscious intent to defeat, delay or hinder creditors in the collection of debts—then a court will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud,” including appointment of a receiver. *Va. Carolina Chem. v. Hunter*, 66 S.E. 177, 179 (S.C. 1909); *accord Weis v. Goetter*, 72 Ala. 259, 261 (Ala. 1882) (“In cases where an estate is held by a party, under a title obtained by fraud, actual or constructive, a receiver will be appointed.” (quoting STORY’S EQ. JUR. § 834)); *see, e.g., Philips Med. Sys. Int’l, B.V. v. Bruetman*, 982 F.2d 211, 212 (7th Cir. 1992) (affirming the district court’s default judgment and appointment of receiver given the defendant’s “utter disregard for such procedural niceties as showing up for depositions and obeying court orders to remain in the country”); *Clark v. Walter T. Bradley Coal*,

*Lime & Cement Co.*, 6 App. D.C. 437, 443–49 (Ct. App. D.C. 1895) (similar). The Circuit Court employed this historical practice here, appointing the Receiver and granting him “powers ... related to the insurance assets of ACL.” (Receivership Order at 6).

ACL argues that it has not engaged in “moral fraud” because it is relying on its “jurisdictional defense.” (App. Br. at 10). But ACL’s jurisdictional defense was rejected by the Circuit Court, relying on “decades of opinions dismissing those very assertions.” At that point, ACL’s continued refusal to participate in the litigation became morally fraudulent. Receiver Order at 3. Flouting unambiguous court orders to stand on defenses rejected by this court—and a dozen other U.S. courts—is indeed moral fraud.

ACL also misrepresented to the Circuit Court the availability of insurance to cover injuries it caused in the United States. The Receiver has uncovered clear evidence of insurance—and agreements with insurers to liquidate that insurance into trusts for victims. *See supra* pp. 6–7.

The appointment of a receiver here is “in accordance with the existing practice” of appointing receivers in appropriate situations in asbestos suits. § 15-65-10(5). Courts in other jurisdictions have also recognized Protopapas as a trusted receiver in insurance matters. For example, the Delaware Court of Chancery recently appointed Protopapas to serve as a receiver in a matter before that court. *See In re Reinz Wis. Gasket, LLC*, 2022-0859 (Del. Ch. Aug. 3, 2023) (appointing Peter D. Protopapas as receiver). Thus, the Receiver’s appointment in this case accords with both historical practice and presently existing practice in the Circuit Court to deal with its asbestos docket, which involves many defunct or recalcitrant defendants. That appointment should be affirmed under South Carolina Code § 15-65-10(5).<sup>4</sup>

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<sup>4</sup> The Circuit Court’s sanction striking ACL’s answer was itself another valid basis for the appointment of a receiver. As the Circuit Court explained, “the practical result of” striking the answer is that ACL will be subject to a default judgment, and another ground for appointing a

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

ACL's only argument for why Section 15-65-10(5) does not apply is its assertion that this case involves the appointment of "a receiver over a foreign corporation's assets that were never in the state." (App. Br. at 11). A party who has refused to participate in discovery is in no position to assert that its assets "were never in the state." *Id.* Determining which of ACL's policies are or were in South Carolina is one of the Receiver's primary tasks.

To that end, the Receiver has already uncovered and presented evidence in the Circuit Court showing that ACL has entered insurance policies covering the injuries it caused to South Carolina residents. Under South Carolina law, insurance policies covering injuries in South Carolina to South Carolina residence are indeed "assets ... in the state." *Id.* South Carolina Code 38-61-10 states: "All contracts of insurance on property, lives, or interests in this state are considered to be made in the State and all contracts of insurance the applications for which are taken within this State are considered to have been made within this State and are subject to the laws of this State." Insurance policies covering property, lives, or interests in South Carolina are plainly subject to the Circuit Court's jurisdiction. *See id.*

This State's Supreme Court has interpreted that statutory provision as establishing that it is "immaterial where [an insurance] contract was entered into" or whether "the policyholders or insurers [are] citizens of South Carolina." *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 149 (1992). What matters for the Court's exercise of jurisdiction is whether the insurance policies cover "property, lives, or interests" in the state. *Id.* Thus, under this provision, "South Carolina substantive law governs" ACL's insuring assets covering South Carolina property and victims—

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receiver under the statute is "to carry a judgment into effect." Receivership Order at 2 n.3; *see* S.C. Code Ann. § 15-65-10(2) ("A receiver may be appointed by a judge of the circuit court ... [a]fter judgment, to carry the judgment into effect[.]").

including South Carolina law involving the appointment of a receiver over those assets. (Receiver Order at 5 (quoting *Sangamo*, 307 S.C. at 149)).

ACL disagrees with Chief Justice Toal’s holding that *Sangamo*’s discussion of Section 38-61-10 applies here, attempting to explain it away on its facts. (*See* App. Br. at 8). ACL’s argument ignores its legal reasoning that “[w]hat is solely relevant is where the property, lives, or interests insured are located.” 307 S.C. at 149.

Instead, ACL cites cases about the Commerce Clause in the United States Constitution. *See, e.g., Travelscape, LLC v. S.C. Dep’t of Rev.*, 391 S.C. 89, 103–04 (2011). These cases—which do not involve insurance contracts entered to cover property in South Carolina—are inapplicable. ACL also cites *Russell v. McGrath*, 135 F. Supp. 3d 427, 431 (D.S.C. 2015), which makes clear that insurance to cover injuries to people who are “longtime permanent resident[s] of South Carolina” is governed by Section 38-61-10. 135 F. Supp. 3d at 432. ACL ignores that it purposefully marketed and sold asbestos into South Carolina for many years, *see* Order Denying MTD, and purchased insurance to cover itself for liabilities arising from that very action, *see* Maryland Agreement. Its insurance policies are property within the state and are assets “subject to the laws of South Carolina, including the duly appointed receiver.” (Receiver Order at 4.)

ACL also cites one case it says reversed “the appointment of a receiver over a foreign corporation because ‘there [wa]s a total failure of any proof that it ha[d] property in this state.’” *Id.* (citing *Boynton v. Consol. Indem. & Ins. Co.*, 185 S.E. 731, 737 (1936)). This description is misleading. In *Boynton*, a receiver was appointed to oversee a bond given by Guardian Casualty Company, which indisputably was “not the property of the Consolidated Company for which the receiver was appointed.” 185 S.E. at 737. Here, the Receiver was appointed to marshal ACL’s

applicable insurance assets, and ACL itself—and not some other entity—is the company for which the Receiver was appointed.

Moreover, the Circuit Court relied on evidence that “ACL sold its products throughout the United States well knowing that it would end up in the workplaces of working men and women throughout the nation, including sales, specifically to South Carolina.” (Receiver Order at 5). To the extent the Receiver finds insurance agreements covering injuries caused in the state by ACL’s asbestos sent into the state, ACL’s regular invocation of “extraterritoriality” is without any merit.

## **V. Conclusion**

Based on ACL’s refusal to participate in the discovery process, the Circuit Court properly exercised its authority to hold ACL in contempt and sanction it by striking its pleading, and to address the resulting default by appointing the Receiver to marshal and administer ACL’s insurance assets. This Court should affirm the challenged orders in full.

Respectfully submitted,

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