

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. 2024-000341
Circuit Court Case No. 2022-CP-40-02979

Ted Everett Mitchell, individually and as Executor of the Estate of
Patsy Ann Mitchell,

Plaintiff,

v.

3M Company; ABB Inc.; Advance Auto Parts, Inc.; Air & Liquid
Systems Corporation; Alfa Laval, Inc.; Amentum Environment &
Energy, Inc.; Ametek, Inc.; Anchor/Darling Valve Company;
A.O.Smith Corporation; Armstrong International, Inc.; Asbestos
Corporation Limited; Atlas Turner, Inc.; AWT Air Company, Inc.;
Bahnsen, Inc.; Beatty Investments, Inc.; Bechtel Investments, Inc.;
The Bonitz Company; BW/IP Inc.; Cameron International
Corporation; Cape PLC; Carrier Corporation; Carver Pump
Company; Champlain Cable Corporation; Cleaver-Brooks, Inc.;
Clyde Union Inc.; Covil Corporation; Crane Co.; Crane Instrument
& Sampling, Inc.; Daniel International Corporation; Davis
Mechanical Contractors, Inc.; Detroit Stoker Company, LLC;
Ellington Insulation Company, Inc.; Erico International
Corporation; Fisher Controls International, LLC; Flowserve US
Inc.; Fluor Constructors International; Fluor Constructors
International, Inc.; Flour Daniel Services Corporation; Fluor
Enterprises, Inc.; FMC Corporation; Ford Motor Company; Foster
Wheeler Energy Corporation; Gardner Denver, Inc.; General
Electric Company; General Parts, Inc.; Genuine Parts Company;
The Goodyear Tire & Rubber Company; The Gorman-Rupp
Company; Goulds Pumps, Incorporated; Graphic Packaging
International, LLC; Great Barrier Insulation Co.; Grinnell LLC;
Hercules LLC; Honeywell International, Inc.; IMO Industries Inc.;
Industrial Holdings Corporation; International Paper Company; ITT
LLC; J.&L. Insulation, Inc.; Metropolitan Life Insurance Company;
Morse Tec LLC; Moyno, Inc.; NIBCO Inc.; Paramount Global;
Pennsylvania Transformer Technology, Inc.; Presnell Insulation
Co., Inc.; Redco Corporation; Rust Engineering & Construction,
Inc.; Rust International Inc.; Saint-Gobain Abrasives, Inc.;

Schneider Electric Systems USA, Inc.; Sequoia Ventures Inc.; Service Products, Inc.; The Sherwin-Williams Company; Southern Insulation, Inc.; Spirax Sarco, Inc.; SPX Corporation; Standard Insulation Company of N.C., Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Sterling Fluid Systems (USA) LLC; Valves and Controls US, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company; Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC, Defendants,

of which

Asbestos Corporation Limited, by and through its duly appointed Receiver Peter D. Protopapas Third-Party Plaintiff/ Respondent,

v.

Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America; The Continental Insurance Company; Federal Insurance Company; Travelers Casualty and Surety Company f/k/a Aetna Life & Casualty Co., Third-Party Defendants,

of which

The Continental Insurance Company is the, Appellant.

MOTION TO ENFORCE EXCLUSIVE JURISDICTION

(Expedited Consideration and Ruling Requested)¹

NOW COMES The Continental Insurance Company (“Continental”), by and through its counsel, and on the grounds set forth below hereby moves this Honorable Court for an order enforcing its exclusive jurisdiction under Rule 205, SCACR, confirming that the circuit court does not have jurisdiction at this time, and enjoining the circuit court and the Receiver from any further

¹ Pursuant to 263(b) SCACR, Movants request an expedited ruling on this motion.

efforts to proceed with matters affected by the multiple pending appeals challenging the validity and continuation of the appointment of a receiver for Asbestos Corporation Limited (“ACL”).

As an initial matter, Continental is mindful of this Court’s November 21, 2023 Order in *Childers v. Davis Mechanical Contractors, Inc., et al.*, Appellate Case No. 2023-000727 (S.C. Ct. of App.). The *Childers* Order addressed a motion to enforce Rule 205 filed by appellants with respect to an order entered by the circuit court during the pendency of the appeal; the motion asserted that the circuit court lacked jurisdiction to issue the order. The *Childers* Order denied the motion to enforce, stating that the circuit court’s order in question was not before the Court on appeal and “[t]his court will take no action on any order which is not properly before it” (citing *Mears v. Mears*, 287 S.C. 168, 169 (1985)). Here, in contrast, Continental’s present motion involves orders by the circuit court that were appealed and are before this Court.² Travelers Casualty and Surety Company f/k/a Aetna Life & Casualty Co. filed a notice of appeal as to these orders on March 11, 2024 and Continental filed a notice on March 27, 2024.³

This matter involves a Third-Party Complaint filed against Continental and other insurers by Peter D. Protopapas. The complaint relies entirely on Mr. Protopapas’ authority to act as receiver for ACL – an active Canadian corporation – purportedly granted by an order entered by the circuit court in *Tibbs v. 3M Company, et al.*, No. 2023-CP-40-01759 (Cir. Ct. – Richland Cty., S.C.) on September 8, 2023. Five days later, on September 13, 2023, ACL filed a notice of appeal

² Continental notes that even if the November 21, 2023 Order suggested a procedural impediment applicable to the circumstances of the present motion (which it does not), the order would be accorded no precedential value under Rule 268(d)(2), SCACR.

³ Because Rule 205 is self-executing and does not identify the procedure to be followed when a circuit court proceeds in violation of this Court’s exclusive jurisdiction, Continental has followed the approach that appears to be suggested by the November 21, 2023 order, and filed a notice of appeal regarding the circuit court’s orders that are contrary to Rule 205.

of this order, along with the pre-receivership order on which it was predicated. This notice of appeal established the exclusive jurisdiction of the Court of Appeals and divested the circuit court of jurisdiction over matters affected by the appealed orders pursuant to Rules 205. The effect of the notice extends to the numerous asbestos lawsuits pending against ACL, as well as third-party actions purportedly filed against insurers in those actions. Here, because the Third-Party Complaint in this action was filed at a time when the circuit court was without jurisdiction and Mr. Protopapas was without authority, the Third-Party Complaint was void ab initio and should have been dismissed. Because the third-party action unquestionably will be affected by the pending appeals, it lies within the exclusive jurisdiction of the Court of Appeals and should not move forward at this time.

However, on February 26, 2024, the circuit court denied motions based on Rule 205 and other grounds filed by Continental and other insurers. The circuit court held that it had jurisdiction to proceed, that the ACL receivership appointment would continue, and that discovery would move forward immediately. Under these circumstances, Continental must now turn to this Court to enforce its exclusive jurisdiction. Doing so is necessary to resolve a situation that is patently inequitable, inefficient, and a waste of judicial and party resources – permitting the Receiver to pursue litigation against the insurers of an active foreign corporation before the threshold challenges to the receivership appointment have been decided.

BACKGROUND

This matter arises from an asbestos personal injury action, *Mitchell v. 3M Co., et al.*, No. 2022-CP-40-02979 (Richland Cnty., South Carolina). On May 17, 2023, Plaintiff filed an Amended Complaint in *Mitchell* that included ACL. The Amended Complaint alleges injury as a

result of exposure to asbestos and asserts that ACL “is liable for damages stemming from its own tortious conduct[.]” Amended Complaint, ¶13.

On September 8, 2023, the circuit court in another asbestos action (*Tibbs*) entered two orders regarding ACL. By its Order of September 8, 2023, the Court held ACL in contempt of court and struck its pleadings in the *Tibbs* action (the “Contempt Order”). Then, by a second Order also entered in the *Tibbs* action on September 8, 2023, the Court appointed Peter D. Protopapas as Receiver for ACL to “marshal all of the available insurance assets” for ACL and take other actions specified in the order (“Receivership Order”). The Receivership Order stated that the Receiver was granted the power and authority to, among other things, “assume control of the defense of asbestos claims made against ACL in the United States” and administer “any claims related to the actions or failure to act of ACL insurance carriers” Receivership Order, 6.

As the basis for the Receivership Order, the Court cited and relied upon its Contempt Order holding ACL in contempt of court and striking ACL’s answer. The Receivership Order stated that “where, as here, ACL’s answer has been struck, and thus only a ministerial action being left for ACL to be in judgment, a receiver to take possession of and, to the extent necessary, litigate ACL’s insurance assets as well as to assume control of the defense of asbestos claims made against ACL in the United States is exactly the type of historical circumstances, the Court’s of this state have found appropriate.” Receivership Order, p.3. The Court further found that “where there is active wrongdoing and illegal refusal to comply with this Court’s orders, the appointment of a receiver is appropriate.” *Id.*

On September 13, 2023, ACL filed a notice of appeal as to the Contempt Order on which the appointment of the Receiver was predicated, as well as the Receivership Order itself.

Nevertheless, on September 19, 2023, Mr. Protopapas filed a Third-Party Complaint in the *Mitchell* action that relied entirely upon his appointment as receiver under the Receivership Order in *Tibbs*. The Third-Party Complaint asserts three causes of action against four insurers alleged to have issued policies insuring ACL that are “responsive to this lawsuit.” TPC, ¶¶9, 15, 21, 27. It seeks declarations requiring the third-party defendants to compensate him “for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants’ policies and to further declare that this obligation is unlimited.” *Id.* ¶48. It also seeks, among other things an array of abstract, hypothetical, and contingent declarations that do not present a specific, concrete matter for judicial resolution. *Id.* ¶¶39-40 & Prayer for Relief.

Continental and other third-party defendants in the *Mitchell* action responded with motions raising Rule 205 and asserting that the Third-Party Complaint was void because it was filed at a time when the circuit court was divested of jurisdiction by the *Tibbs* notice of appeal, and seeking the dismissal or stay of the third-party action on multiple grounds. Travelers’ motion further requested that the ACL receivership be dissolved. In addition, Continental and the other third-party defendants filed motions for protective order to stay discovery pending resolution of their motions based on Rule 205 and other grounds. On February 26, 2024, the circuit court entered orders that denied all of the third-party defendants’ motions in their entirety.⁴

⁴ Mr. Protopapas has further asserted that his authority under the *Tibbs* Receivership Order extends to numerous other asbestos lawsuits against ACL, including *Link v. 4520 Corp., Inc., et al.*, 2022-CP-40-05543 (Richland Cnty., South Carolina) and *Donaghy v. 4520 Corp., Inc., et al.*, 2023-CP-40-03108 (Richland Cnty., South Carolina). On February 23, 2024, the circuit court entered an “Order on Receiver’s Motion to Enforce A Court Order Against Clement Rivers, LLP” (February 23, 2024) in the *Link* and *Donaghy* actions, holding *inter alia* that: (i) the defense counsel retained by ACL was directed to produce its complete file to the Receiver upon request and to view the Receiver “as the client for . . . ACL in the defense of asbestos litigation matters and the management of any insurance or insurance-related assets;” (ii) in the event of a disagreement

ARGUMENT

Rule 205 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.

Rule 205, SCACR. Pursuant to this Rule, “the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal.” *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 532 (2016); *accord Tillman v. Oakes*, 398 S.C. 245, 255 (2012). “Affected” as used in the rule has been defined as “to produce an effect on; to influence in some way.” *Stokes-Craven*, 416 S.C. at 534, quoting *Black’s Law Dictionary* 68 (10th ed. 2014).

Here, Mr. Protopapas is using the jurisdiction of the circuit court to prosecute a third-party action and use the discovery tools attendant to that judicial proceeding. He is doing so even though the third-party action against the third-party defendants seeks to exercise authority that depends wholly upon his appointment by the Receivership Order predicated upon the Contempt Order. The third-party action was expressly brought by Mr. Protopapas as “duly appointed receiver” for ACL. TPC, p.1. This appointment, as discussed above, was based upon the Contempt Order holding ACL in contempt and striking its answer. Under these circumstances, this third-party action unquestionably will be “affected” by the appeal of the Contempt Order and the Receivership Order in *Tibbs*, as well as the other appeals challenging the ACL receivership. The circuit court therefore

between Stephen Brown of Clement Rivers and the Receiver related to the defense of asbestos matters or the management of insurance assets, “the Receiver’s directives shall prevail” and “Mr. Brown is hereby ORDERED to comply with the Receiver’s directives in these situations;” and (iii) the Receiver “shall be viewed as the named insured and the representative of . . . ACL in the defense of asbestos litigation matters and the management of any insurance or insurance-related assets.” ACL filed a separate appeal of this order on March 4, 2024.

lacks jurisdiction to proceed with the third-party action and discovery therein, and the Receiver cannot proceed with such litigation activity during the pendency of the appeal.⁵

Thus, as of September 13, 2023, the circuit court was divested of jurisdiction and Mr. Protopapas lacked authority to take action as Receiver. Under these circumstances, the Third-Party Complaint filed in this action on February 21, 2024, was void ab initio and should have not moved forward.

It should be noted that, under the circumstances of the present matter, the application of Rule 205 is not altered by Rule 62(a), SCRCP. Rule 62 is entitled “Stay of Proceedings to Enforce a Judgment” and subsection (a) is entitled “Automatic Stay: Exceptions – Injunctions, Receivership, and Accountings.” Rule 62(a) provides that “no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry.” This rule has an exception stating that “an interlocutory or final judgment . . . in a receivership action . . . shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal.” Rule 62(a), SCRCP.

Importantly, Rule 62(a) only addresses the application of a “stay.” It does not purport to abridge or alter the exclusive jurisdiction of the Court of Appeals. *See Tillman*, 398 S.C. at 255

⁵ While the Receiver may refer to orders by this Court in other cases involving particular circumstances, none of these orders provide authority to disregard the express mandate of Rule 205 in this case. *See e.g.*, Sept. 8, 2023 Order, No. 2023-000727 (order in Payne & Keller appeal addressing only the subject of a stay and not addressing jurisdiction under Rule 205); Nov. 21, 2023 Order, No. 2023-000727 (order in Payne & Keller appeal denying appellants’ “motion to clarify and enforce Rule 205” after concluding that the circuit court’s October 5, 2023 order declining to stay the Payne & Keller Receivership was not part of the appeal and therefore not properly before the Court of Appeals); Dec. 1, 2023 Order, No. 2023-001096 (order in Atlas Turner, Inc. appeal denying appellant’s motion on procedural basis that appellant had failed to petition the circuit court first); Feb. 5, 2024 Order, No. 2023-001461 (order in Tibbs appeal denying motion to intervene and declining to act upon motion to clarify and enforce Rule 205). Furthermore, as discussed above, these orders from other cases do not have precedential value in this matter. *See* Rule 268(d)(2), SCACR.

(stating that “the existence or non-existence of a stay under Rule 241 does not control the [lower] court’s power to proceed with the action . . .”). Rule 205 provides no exceptions other than for “matters not affected by the appeal.” Because this third-party action is undeniably “affected by the appeal,” Rule 205 is thus dispositive and sufficient in itself to require suspension of the Receiver’s attempt to litigate the third-party action in the circuit court.⁶

Furthermore, as pertinent here, the Receivership Order was not a stand-alone order concerning an insolvent entity. It involved a viable entity – and was expressly dependent upon findings and rulings set forth on the Contempt Order holding ACL in contempt of court and striking ACL’s answer. That order was entered prior to the appointment of a Receiver and made no reference whatsoever to a receivership. The Contempt Order plainly was not a judgment “in a receivership action.” As such, the Contempt Order unquestionably is not subject to the Rule 62(a) exception. Because this non-receivership order has been appealed, all “matters decided” in the Contempt Order and the Receivership Order predicated thereon were and are stayed, including the appointment of the Receiver and the Receiver’s actions purportedly based on his authority thereunder.

For the above reasons, no legitimate reason exists in this matter to disregard the exclusive jurisdiction of the Court of Appeals under Rule 205. To the contrary, it plainly would be inequitable, inefficient, and a waste of judicial resources to litigate insurance coverage issues

⁶ The limited scope of Rule 62(a) is further apparent from S.C. Code Section 14-3-450. This statute expressly provides that “[i]n case of an appeal under item (4) or Section 14-3-330 [which authorizes the appeal of orders or decrees “granting, continuing, modifying, or refusing the appointment of a receiver”], the proceedings **in other respects** in the court below shall not be **stayed** during the pendency of the appeal unless otherwise ordered by the court below” (emphasis added). Thus, if a case includes “other” aspects that do not involve the appointment of a receiver, the unaffected aspects may not be stayed, but Section 14-3-450 leaves no doubt that the stay applies to the receivership appointment when it is appealed.

raised by the Receiver before the threshold challenges to the orders relating to the receivership appointment have been resolved. Although the application of Rule 205 is automatic and does not require an order, the Receiver's insistence upon prosecuting this litigation made it necessary for Third-Party Defendant to raise the matter in the circuit court. As the Receiver filed the Third-Party Complaint after the service of the notice of appeal, the circuit court should have affirmed that it no longer had jurisdiction and the Receiver was without authority to act, including his filing and prosecution of claims and discovery against Third-Party Defendant in this third-party action. However, rather than affirming that the exclusive jurisdiction over this matter lies with the Court of Appeals, the circuit court held that it had jurisdiction and that the litigation would continue unabated.

CONCLUSION

Continental respectfully requests that the Court issue an order enforcing its exclusive jurisdiction under Rule 205, SCACR, confirming that the circuit court did not have jurisdiction to issue its February 26, 2024 orders denying Continental's motions and continuing the appointment of the ACL receivership, and enjoining the Receiver from any further efforts to proceed with matters affected by the pending appeals.

Respectfully submitted,

April 1, 2024

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SC Court of Appeals

PROOF OF SERVICE

I, the undersigned of the law offices of Gordon Rees Sculls Mansukhani LLP, attorneys for Appellant The Continental Insurance Company, 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:

Pleading(s): The Continental Insurance Company's Motion to Enforce Exclusive Jurisdiction

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