

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. 2024-000337
Circuit Court Case No. 2022-CP-40-03834

Donna B. Welch, individually and as Personal Representative of
the Estate of Melvin G. Welch, deceased, Plaintiffs,

v.

Advance Auto Parts, Inc.; American Honda Motor Co., Inc.; Atlas
Asbestos Co.; Atlas Turner, Inc., as successor to Atlas Asbestos Co.,
a foreign company; Bahnson, Inc.; Covil Corporation; Daniel
International Corporation; Ellington Insulation Company, Inc.;
Fluor Constructors International; Fluor Constructors International,
Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.;
General Parts, Inc., individually and as successor in interest to
Carquest Corporation; Goodrich Corporation, b/k/a The B.F.
Goodrich Company; The Goodyear Tire & Rubber Company;
Graybar Electric Company, Inc.; Honeywell International, Inc.,
individually and as successor in interest to Allied Signal, Inc., as
successor to Bendix Corporation; Morse Tec LLC, f/k/a Borgwarner
Morse Tec LLC, and successor by merger to Borg-Warner
Corporation; Occidental Chemical Corporation, as successor to
Durez Corporation; O'Reilly Automotive Stores, Inc.; Paramount
Global, f/k/a ViacomCBS Inc., f/k/a CBS Corporation, a Delaware
corporation f/k/a Viacom, Inc., successor by merger to CBS
Corporation, a Pennsylvania corporation, f/k/a Westinghouse
Electric Corporation; Pneumo Abex LLC, successor in interest to
Abex Corporation; Redco Corporation f/k/a Crane Co.; Reinz
Wisconsin Gasket LLC f/k/a and/or successor to Reinz Wisconsin
Gasket Co. and Wisconsin Gasket Manufacturing Co., a wholly
owned subsidiary of DCO LLC; Rust Engineering & Construction,
Inc.; Rust International Inc.; Southern Insulation, Inc.; Spirax Sarco,
Inc.; Union Carbide Corporation; Westrock MWV, LLC,
individually and as successor in interest to Westvaco; and ZFActive
Safety US Inc., f/k/a Kelsey-Hayes Company, Defendants,

Atlas Turner, Inc., f/k/a Atlas Asbestos Company, Ltd., by and through its duly appointed Receiver Peter D. Protopapas

Third-Party
Plaintiff/
Respondent,

v.

Zurich American Insurance Co., individually and as successor by merger to Maryland Casualty Company; Enstar (U.S.), Inc.; Federal Insurance Company; Continental Insurance Company; Insurance Company of North America; Aetna Life & Casualty Co., n/k/a Travelers Casualty & Surety Co.; Certain Underwriters at Lloyd’s, London, and Certain London Market Companies; Canadian General Insurance Company, n/k/a Aviva Insurance Co. of Canada; Marsh & McLennan Companies, Inc.,

Third-Party
Defendants,

of which

The Continental Insurance Company and Certain Underwriters at Lloyd’s, London, and Certain London Market Companies are the,

Appellants.

MOTION TO ENFORCE EXCLUSIVE JURISDICTION

(Expedited Consideration and Ruling Requested)¹

NOW COMES The Continental Insurance Company (“Continental”) and Certain Underwriters at Lloyd’s, London, meaning those Syndicates which severally subscribed, each for itself and not for any other, and World Auxiliary Insurance Corporation Ltd.² (“Certain London Market Insurers”) (collectively, “Movants”), by and through their counsel, and on the grounds set forth below hereby move 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,

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

² The Ocean Marine Insurance Company Limited has succeeded to the relevant liabilities of World Auxiliary Insurance Corporation Ltd.

and enjoining the circuit court and the Receiver from any further efforts to proceed with matters affected by the multiple pending appeals challenging the validity and continuation of the appointment of a receiver for Atlas Turner, Inc., f/k/a Atlas Asbestos Company, Ltd. (“Atlas”).

As an initial matter, Movants are 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, Movants’ present motion involves orders by the circuit court that were appealed and are before this Court.³ Travelers Casualty and Surety Company f/k/a Aetna Life & Casualty Co. (“Travelers”) filed a notice of appeal as to these orders on March 11, 2024 and Movants filed their respective notices of appeal on March 27, 2024.⁴

This matter involves a Third-Party Complaint filed against Movants and other insurers by Peter D. Protopapas. The complaint relies entirely on Mr. Protopapas’ authority to act as receiver for Atlas – an active Canadian corporation – purportedly granted by an order entered by the circuit court in *Welch v. 3M Company, et al.*, No. 2022-CP-40-03834 (Cir. Ct. – Richland Cty., S.C.) on

³ Movants note 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.

⁴ 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, Movants have 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.

June 21, 2023. On July 6, 2023, Atlas Turner filed a notice of appeal as to the orders on which the appointment of the Receiver was predicated, as well as the Receivership Order itself.⁵ 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 Rule 205. The effect of the notice extends to the numerous asbestos lawsuits pending against Atlas, as well as third-party actions purportedly filed against insurers in those actions. 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 Movants and other insurers. The circuit court held that it had jurisdiction to proceed, that the Atlas receivership appointment would continue, and that discovery would move forward immediately. Under these circumstances, Movants 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, *Welch v. 3M Co., et al.*, No. 2022-CP-40-03834 (Richland Cnty., South Carolina). On July 25, 2022, Plaintiff filed a

⁵ The orders identified in the Notice of Appeal are: Order Holding Atlas Turner, Inc. in Contempt (May 11, 2023); Form 4 Order denying Atlas Turner, Inc.’s Motion to Reconsider and Vacate Contempt Order (June 16, 2023); Order Striking Atlas Turner’s Answer (June 20, 2023); Order on Plaintiff’s Motion to Appoint a Receiver (June 21, 2023); Form 4 Order denying Atlas Turner Inc.’s Motion to Reconsider Order Striking Atlas Turner’s Answer (June 28, 2023); and Form 4 Order denying Atlas Turner Inc.’s Motion to Reconsider Order on Plaintiff’s Motion to Appoint a Receiver (June 28, 2023).

Complaint in *Welch* that included Atlas. The Complaint alleges injury as a result of exposure to asbestos and asserts that Atlas “is liable for damages stemming from its own tortious conduct[.]” Complaint, ¶14.

On May 11, 2023, the circuit court in *Welch* entered an order that held Atlas in contempt of court (the “Contempt Order”). Then, by a second Order on June 20, 2023, the circuit court struck Atlas’s answer. The next day, on June 21, 2023 the Court appointed Peter D. Protopapas as Receiver for Atlas to “administer all insurance assets” of Atlas 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 actions, “administer any insurance or indemnification assets of Atlas as well as any claims related to the actions or failure to act of Atlas insurance carriers” Receivership Order, 6.

As the basis for the Receivership Order, the Court cited and relied upon its prior Order of May 11, 2023 holding Atlas in contempt of court and its Order of June 20, 2023 striking Atlas’s answer. The Receivership Order stated that “where, as here, Atlas’ [answer] has been struck, and thus only a ministerial action being left for Atlas to be in judgment, a receiver to take possession of and, to the extent necessary, litigate Atlas’ insurance assets is exactly the type of historical circumstances, the Court’s of this state have found appropriate.” Receivership Order, 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 July 6, 2023, Atlas filed a notice of appeal as to six different orders in this action, including the orders on which the appointment of the Receiver was predicated, as well as the Receivership Order itself.

On June 21, 2023, Mr. Protopapas filed a Third-Party Complaint in the *Welch* action, and an Amended Third-Party Complaint on June 26, 2023, that relied entirely upon his appointment as receiver under the Receivership Order. The Amended Third-Party Complaint asserts three causes of action against seven insurers alleged to have issued policies insuring Atlas that are “responsive to this lawsuit.” Amended TPC, ¶¶13, 16, 22, 28, 34, 40, 46. 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.* ¶68. 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.* ¶¶59-60 & Prayer for Relief.

Movants and other third-party defendants in the *Welch* action responded with motions raising Rule 205 and seeking the dismissal or stay of the third-party action on multiple grounds. Travelers’ motion further requested that the Atlas receivership be dissolved. In addition, Movants and the other third-party defendants filed motions for protective orders 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.⁶

⁶ Mr. Protopapas has further asserted that his authority under the *Welch* Receivership Order extends to numerous other asbestos lawsuits against Atlas, 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 Atlas was directed to produce its complete file to the Receiver upon request and to view the Receiver “as the client for . . . Atlas . . . in the defense of asbestos litigation matters and the management of any insurance or insurance-related assets;” (ii) in the event of a disagreement 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”

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 and the Order of June 20, 2023 striking Atlas’s answer. The third-party action was expressly brought by Mr. Protopapas as “duly appointed Receiver” for Atlas. Amended TPC, ¶1. This appointment, as discussed above, was based upon the Contempt Order and the Order striking Atlas’s answer. Under these circumstances, this third-party action unquestionably will be “affected” by the appeal of the Contempt Order, the order striking Atlas’s answer, and the Receivership Order in *Welch*, as well as the other appeals challenging the Atlas receivership. The circuit court therefore lacks

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 . . . Atlas . . . in the defense of asbestos litigation matters and the management of any insurance or insurance-related assets.” Atlas filed a separate appeal of this order on March 4, 2024.

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.⁷

Thus, as of July 6, 2023, the circuit court was divested of jurisdiction and Mr. Protopapas lacked authority to take action as Receiver. Under these circumstances, the Amended Third-Party Complaint in this action should have not moved forward.

It should be noted that, under the circumstances of the present matter, the application of Rules 205 is not altered by Rule 62(a), SCRCF. 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), SCRCF.

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 (stating that “the existence or non-existence of a stay under Rule 241 does not control the [lower]

⁷ 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.

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.⁸

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 in the Contempt Order and the order striking Atlas's answer. These orders were entered prior to the appointment of a Receiver and made no reference whatsoever to a receivership. These orders were plainly not a judgment "in a receivership action." As such, the orders unquestionably are not subject to the Rule 62(a) exception. Because non-receivership orders have been appealed, all "matters decided" in the Contempt Order and the order striking Atlas's answer 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 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

⁸ 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.

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. Once Atlas's notice of appeal was filed and served, the circuit court should have affirmed that it no longer had jurisdiction and the Receiver was without authority to act, including his prosecution of claims and discovery against third-party defendants 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

Movants 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 Movants' motions and continuing the appointment of the Atlas receivership, and enjoining the Receiver from any further efforts to proceed with matters affected by the pending appeals.

April 1, 2024

Respectfully submitted,

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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 Certain Underwriters at Lloyd's, London, and Certain London Market Companies' Motion to Enforce Exclusive Jurisdiction

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Dated: April 1, 2024

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