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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

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

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.; Bahnson, Inc.; Beaty 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,

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 Travelers Casualty and Surety Company f/k/a Aetna Life & Casualty Co., and The Continental Insurance Company are the Appellants.

THE RECEIVER FOR ASBESTOS CORPORATION LIMITED'S RESPONSE REGARDING APPEALABILITY

Peter Protopapas, the court-appointed Receiver for the insurance assets of Asbestos Corporation Limited ("ACL" or the "Receiver"), submits this Response regarding whether two interlocutory orders entered by the circuit court—specifically its Order Denying Motions to Dismiss, Stay, Strike, and Dissolve the Receivership and its Order Denying Motions for Protection from Discovery (collectively, the "Orders")—are immediately appealable. Both Travelers Casualty and Surety Company ("Travelers") and the Continental Insurance Company ("Continental") have appealed these Orders, claiming they are immediately appealable.

This Court's resolution of this issue will be greatly facilitated because the South Carolina Supreme Court decided the issue when it took the rare step of granting a Motion to Certify Appeal (also joined by Travelers and its counsel), vacating an order denying sanctions, and dismissing the appeal. *See Childers v. Davis Mechanical Contractors*, No. 2024-000005 (March 27, 2024) ("*Childers*"). Despite the South Carolina Supreme Court rejecting the attempts by the Appellants

to insist that certain interlocutory orders are immediately appealable, Travelers, and now Continental, has been undeterred in pursuing this inappropriate appeal of the Orders.[1]

INTRODUCTION

Inappropriate appeals, like this case, have become an unfortunate pattern in the asbestos receivership litigation in South Carolina. Like the numerous other appeals of orders regarding receiverships filed by insurers in the last six weeks,[2] Travelers and Continental appeal two non-appealable interlocutory orders—one denying motions to dismiss or strike a third-party complaint and to dissolve the Receivership and the other an order on discovery in the face of controlling precedent holding that this appeal is improper. On Wednesday, March 27, 2024, all five justices of the South Carolina Supreme Court joined in an order dismissing an interlocutory appeal of a nearly identical order "because the underlying circuit court order at issue is not immediately appealable." *Childers v. Davis Mechanical Contractors*, No. 2024-000005 (March 27, 2024) ("*Childers*"). The argument for immediate appealability raised in that appeal—Section 14-3-330(4) of the South Carolina Code—is the same argued raised by Travelers and Continental here.[3] The outcome should be no different, and Travelers and Continental should not be permitted to continue to clog our courts with meritless appeals like this one.

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[1] After receiving the Supreme Court's March 27 Order in *Childers*, the Receiver's counsel reached out to Travelers and Continental requesting they withdraw the interlocutory appeals. (Supp. App. 34). Both Travelers and Continental refused. (Supp. App. 40, 42.)

[2] Since December 2023, at least nineteen notices of appeal have been filed in this Court from cases involving receiverships. *See* Appellate Case Nos. 2023-002006, 2023-002007, 2023-002008, 2023-002009, 2023-002010, 2023-002011, 2024-000342, 2024-000348, 2024-000341, 2024-000337, 2024-000501, 2024-000501. Thirteen of those were filed in the last six weeks.

[3] Continental filed its Notice of Appeal of these orders on March 27, 2024, after this Court requested appealability memoranda from the parties. The Court subsequently consolidated Continental's appeal with Traveler's appeal of the same Orders on April 1, 2024. Both appeals should be dismissed as interlocutory for the reasons discussed herein. Continental's April 1, 2024 Motion to Enforce Exclusive Jurisdiction makes it clear that Continental joins in Travelers' belief that the orders are appealable pursuant to section 14-3-330(4). (Mtn to Enforce at p. 9.)

As the Supreme Court just recently held, the circuit court's Order denying Travelers' and Continental's motions to dismiss, strike, and dissolve the receivership is not immediately appealable. Holding otherwise would create an exception to section 14-3-330 that the Legislature has not adopted. Section 14-3-330(4), which relates to receiverships, applies only to an order creating the receivership, not to subsequent orders denying efforts to limit or dismiss the receivership, and indeed, an appeal of the order appointing a receiver for ACL already is pending. Similarly, this Court and the Supreme Court have held consistently that discovery orders like the circuit court's Order denying Travelers' and Continental's motions for protection from discovery are not immediately appealable. *See, e.g.,* October 16, 2019 Order, Appellate Case No. 2019-001651 (denying petition for writ of certiorari filed by USF&G, Sentry, and Zurich related to interlocutory discovery order); August 9, 2022 Order, Appellate Case No. 2022-000761 (granting motion to dismiss because discovery order was not immediately appealable).

BACKGROUND

The circuit court appointed the Receiver for the insurance assets of ACL on September 8, 2023, granting the Receiver "the power and authority [to] fully administer all insurance assets of [ACL] and any subsidiaries, accept service on behalf of ACL, engage counsel on behalf of ACL[,] and take any and all steps necessary to protect the interests of ACL whatever they may be." (Travelers App. 148, Order on Plaintiffs' Motion to Appoint a Receiver (Sept. 8, 2023).) The Receiver's charge is to "investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to ACL." (*Id.* at 7.) ACL filed a timely Notice of Appeal with this Court of the order appointing the Receiver and related orders. (Travelers App. 157, Notice of Appeal (Sept. 13, 2023).) Initial briefing in ACL's appeal has been completed.

Following his appointment and pursuant to the duties imposed on the Receiver in the Order appointing him, the Receiver initiated a third-party action against Travelers, Continental, and various other insurers of ACL. (Travelers App. 252, Summons and Third-Party Complaint (Sept. 19, 2023).) On October 23, Travelers filed a "Motion to Stay or Dismiss the Third-Party Claims of the Purported Receiver for Asbestos Corporation Limited and to Dissolve the Receivership" (Travelers App. 278, Motion to Stay or Dismiss the Third-Party Claims of the Purported Receiver for Asbestos Corporation Limited and to Dissolve the Receivership (Oct. 23, 2023)) and a corresponding motion for protection from discovery (Travelers App. 315, Motion for Protective Order (Oct. 23, 2023)). Continental filed Motion "to Dismiss, Stay, and/or Strike Third-Party Complaint, or, in the Alternative, to Sever the Third-Party Complaint or, in the further alternative, for a More Definite Statement on October 23, 2023, and a Motion for Protective Order on November 2, 2023. (Supp. App. 15.)

On February 26, 2024, the circuit court issued an Order Denying Travelers' Motion to Stay or Dismiss the Third-Party Claims of the Purported Receiver for Asbestos Corporation Limited and to Dissolve the Receivership and Denying Continental's Motion to Dismiss, Stay and/or Strike. (Travelers App. 384, Order Denying Motion to Dissolve (Feb. 26, 2024).) The court issued an additional order on February 26, 2024, denying the related motions for protection from discovery filed by Travelers, Continental, and other third-party defendants. (Travelers App. 403, Order Denying Motions for Protection From Discovery (Feb. 26, 2024).). These are the two Orders that are the subjects of Travelers' and Continental's interlocutory appeals.

ARGUMENT

"The right of appeal arises from and is controlled by statutory law." *Ex Parte Capital U-Drive-It, Inc*., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Id*. "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by [section] 14-3-330 [of the South Carolina Code]." *Id*. "Absent a specialized statute, an order must fall into one of several categories set forth in [s]ection 14-3-330 in order to be immediately appealable." *Id*.

The Orders denying (1) Travelers' and Continental's motions to dismiss and/or strike and to dissolve the receivership, and (2) Travelers' and Continental's motions for protection from discovery are neither final nor in "one of the several categories set forth in [s]ection 14-3-330." As a result, neither Order is immediately appealable.

Travelers claims that Section 14-3-330(4) entitles it to an immediate appeal of the circuit court's order denying its motion to "dissolve" the receivership "and to vacate and terminate [the] appointment" of the Receiver.[4] Travelers' Resp. at 7. Travelers' limits its claim to those portions of the Order and to that subsection of Section 14-3-330 because it recognizes that (1) other parts of the Orders on appeal are interlocutory orders not immediately appealable and (2) none of the other three categories authorized for appeal under Section 14-3-330 apply to an order denying a motion to "dissolve" a receivership.

But Travelers' and Continental's reliance on Section 14-3-330(4) rests on a misinterpretation of the statutory language, cites no supporting authority, and is simply incorrect. As Travelers is well aware, Travelers itself raised the same arguments on Section 14-3-330(4) in seeking immediate appeal in *Childers*; this Court should dismiss Travelers' appeal here just like

[4] Continental's April 1 Motion makes it clear Continental also relies on section 14-3-330(4) for appealability.

the South Carolina Supreme Court dismissed the appeal in *Childers v. Davis Mechanical Contractors, Inc.* last week. *See* March 27 Order, Appellate Case No. 2023-000727.

A. The South Carolina Supreme Court's March 27 Order in *Childers* is dispositive of the appealability question in this appeal.

In *Childers v. Davis Mechanical Contractors*, Travelers and other insurers appealed an Order denying Motions to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership. April 28, 2023 and May 5, 2023 Notices of Appeal, Appellate Case No. 2023-000727. This Court requested, and the parties filed, appealability memoranda in that appeal. The Receiver argued the Order was not immediately appealable because it was an interlocutory order that did not fall under the exceptions set forth in section 14-3-330. May 15, 2023 Appealability Memorandum of the Receiver, Appellate Case No. 2023-000727. Travelers and the other insurer appellants argued the Order was appealable under section 14-3-330(4) because the appellants characterized the order as one that "continued a receivership." May 15, 2023 Appealability Memoranda, Appellate Case No. 2023-000727. The Court issued an Order on August 9, 2023, finding that the appeal could proceed but "nothing in th[e] order prevent[ed] the parties from raise the issues of appealability and standing in their briefs." August 9, 2023 Order, Appellate Case No. 2023-000727. This Court did not find the orders appealable; instead, it postponed a decision on appealability until later in the appeal.

Travelers and the other insurers filed a motion requesting certification of the *Childers* appeal. Travelers and the other insurers wanted the issue of appealability of orders denying motions to dismiss or dissolve receiverships decided by the Supreme Court presumably to provide finality and clarity to their increasing reliance on the issue as a basis for appeals and refusals to participate in receivership actions. *See* Rule 204(b), SCACR ("Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of

major importance."). The South Carolina Supreme Court issued an Order on March 27, 2024, certifying the appeal, dispensing with further briefing, vacating this Court's denial of sanctions, and dismissing the appeal because "the underlying circuit court order at issue is not immediately appealable." (Supp. App. 1.)

The order involved in the *Childers* appeal was the same type of order at issue in this appeal—an order denying motions to dismiss and dissolve the Receivership. The Supreme Court has found that this type of order is not immediately appealable. In *Childers*, the Supreme Court considered Travelers' argument that an appeal from the same type of order involved in this appeal "is expressly authorized by South Carolina Code § 14-3-330(4)." May 15, 2023 Appealability Memorandum of Travelers at 4, Appellate Case No. 2023-000727. The Supreme Court also considered the other Payne & Keller insurers' argument that the same type of order involved in this appeal was appealable under section 14-3-330(4) because it "denied a request to dissolve the receivership and dismissed the Receiver's claims against Appellants, thereby 'continuing' the receivership over Payne & Keller." May 15, 2023 Appealability Memorandum of Certain Insurers at 11, Appellate Case No. 2023-000727. The Supreme Court rejected these arguments, finding that section 14-3-330(4) does not apply to orders denying motions to dismiss and dissolve receivership. That ruling is dispositive on the issue of appealability in this appeal.

In fact, Travelers implicitly concedes in its appealability memorandum that the Supreme Court's March 27 order in *Childers* applies to this appeal. On page 9 of its memorandum, Travelers states: "Indeed, in the context of another receivership case, Payne & Keller, this Court recently held, on two separate occasions, that Travelers' appeal of an order denying a motion to dissolve a receivership 'shall proceed.'" Travelers has already conceded that the rulings as to appealability in the *Childers* appeal apply in the context of this appeal because the appeals involve

the same type of orders. However, now, because it does not like the outcome, Travelers likely will attempt to walk back its previous reliance on appealability rulings in *Childers* to artfully maneuver its way around the Supreme Court's direct pronouncement and delay the proceedings in the receivership court further.

After receiving the Supreme Court's March 27 Order in the *Childers* appeal, the Receiver's counsel reached out to Travelers' counsel, Continental's counsel, and counsel for a number of other insurers involved in appeals of similar interlocutory orders requesting that the insurers withdraw the appeals due to the Supreme Court's ruling that these appeals were interlocutory. (Supp. App. 34.) Travelers' counsel wrote back on April 1, 2024, stating: "[T]he Supreme Court's order of March 27th contains no information, discussion, or analysis as to why the order on appeal in that case is not immediately appealable" and continued to rely on "the plain language of South Carolina Code § 14-3-330(4)" to support this appeal because the Supreme Court "did not explain how that statute is inapplicable here."[5] (Supp. App. 42.) [6]

Notably, Travelers had no issue citing to this Court's one-sentence ruling deferring the appealability question in the *Childers* appeal when it believed that ruling was in its favor. Now,

[5] Continental's counsel sent a similar letter questioning the applicability of the March 27 Order. (Supp. App. 40.)

[6] Travelers has taken a similar stance in rejecting this Court's September 8, 2023 Order and November 21, 2023 Order in the *Childers* appeal holding that "the receivership action and the receiver's ability to carry out his duties are not stayed" during the pendency of appeal. August 9, 2023 Order and November 21, 2023 Order, Appellate Case No. 2023-000727. Travelers has argued to this Court and the circuit court that because the Court of Appeals did not embrace and specifically address their repeated briefing and arguments that Rule 205 deprives the Receiver Court and Receiver from the ability to proceed, this Court must be overlooking their arguments or wrongly ignoring their arguments. For Travelers, it seems to be beyond the realm of possibilities that the courts have heard, considered, and rejected Travelers' efforts to prevent the Receivership court and the Receiver from identifying and securing Receiver assets during the artillery of appeals. The same is true with Continental, as it recently filed a Motion to Enforce Exclusive Jurisdiction, raising arguments that have already been rejected by this Court in the *Childers* appeal. Pursuant to C-Track, the appeal, including the Receiver's deadline for responding to Continental's motion, is being held in abeyance until the Court rules on the appealability issues.

faced with a clear ruling on appealability from the Supreme Court rejecting the application of section 14-3-330(4), Travelers feigns trouble understanding the ruling of the Supreme Court. The Supreme Court has spoken—section 14-3-330(4) does not apply to orders denying motions to dismiss third-party complaints filed by the Receiver and denying motions to dissolve Receiverships.

Travelers' and Continental's obstinate refusals to recognize and abide by orders of South Carolina appellate courts further their continued goal of at frustrating the orderly administration of the asbestos docket and the chief administrative judge appointed by the Chief Justice to oversee this docket. These insurers, and insurers in other receivership cases, continuously raise already-rejected arguments under the guise that our appellate courts must speak individually in every receivership appeal, selectively refusing to listen to any rulings they do not like. While the insurers pursue meritless appeals and repetitive rulings from this Court and the Supreme Court, the receivership action continues to be delayed. The South Carolina courts involved in adjudicating these matters cannot move forward efficiently.

Both this Court and the Supreme Court have warned insurers numerous times that pursuing appeals for the purpose of delay is sanctionable conduct under Rule 269 of the South Carolina Appellate Court Rules. (Supp. App. 13 (March 9, 2021 Order, Appellate Case No. 2020-001670), 8 (February 5, 2024 Order, Appellate Case No. 2023-001461), 5 (February 14, 2024 Order, Appellate Case No. 2023-000727).) Despite the repeated warnings and orders instructing these vexatious appellants to cease these tactics, it is clear such warnings have fallen on deaf ears. To be sure, these improper appeals and refusals to abide by court orders have successfully accomplished the intended result of delay and obstruction. Pursuing legitimate appeals in good faith is one thing. Repeatedly pursuing rejected arguments and refusing to recognize orders of

South Carolina courts is another matter. Travelers and Continental are two more insurers in a long line that have made it clear they will continue their abuse of the appellate process until this Court or the Supreme Court refuse to allow it. Absent decisive and meaningful consequences, there will be no change in this contemptuous behavior.[7]

Accordingly, the Receiver believes the Supreme Court's March 27 Order is dispositive on the issue of appealability but addresses the merits of Travelers' repeated appealability arguments once again below.

B. The Order is not appealable under Section 14-3-330(4).

Like it did in the appeal at issue in *Childers*, Travelers claims the Order denying its motion to dismiss or dissolve is immediately appealable under section 14-3-330(4). In issuing its order in *Childers* last week, the South Carolina Supreme Court necessarily rejected this argument. The basis for doing so is rooted in the language of section 14-3-330(4), because neither the order in *Childers* nor the order at issue here is an order relating to an injunction, nor are they orders granting, continuing, modifying, or refusing the appointment of a receiver. *See* § 14-3-330(4). No injunctions have been sought or entered here, and although the third-party claims in the underlying action are brought by ACL's Receiver—just like the third-party claims in *Childers* were brought by the receiver in that case—, the Order did not alter or affect the Receiver's appointment in any way.[8]

[7] In an ironic twist, Travelers' latest communication attempts to deflect from its pursuit of non-meritorious appeals by suggesting that it is somehow improper for the Receiver to continue its pleas to cease the frivolous appeals and point out the impropriety in refusing to do so. (Supp. App. 42.)

[8] As the Court is aware, the issues related to the initial order appointing the Receiver already are on appeal to this Court in *Tibbs v. 3M Company*, Appellate Case No. 2023-001461. Allowing an additional appeal that also seeks to challenge the legality and propriety of the appointment of the Receiver serves no purpose but to waste judicial resources and delay the underlying proceedings.

Travelers claims that because the circuit court's order denying its motion to dismiss and "dissolve" the receivership "indisputably 'continue[s]' a receivership," it is "squarely within the scope of Section 14-3-330(4)." Travelers' Resp. at 7–8. Travelers' interpretation of Section 14-3-330(4) is incorrect and contrary to the South Carolina Supreme Court's order last week in *Childers v. Davis Mechanical Contractors*.

1. Section 14-3-330(4) is concerned with "appointments"—not "receiverships"

As an initial matter, the appealability statute only provides for immediate appellate review of orders affecting "the *appointment* of a receiver." S.C. Code Ann. § 14-3-330(4) (emphasis added). Critically, the statute does not allow the interlocutory appeal of an order affecting "a receivership." *See Aiken v. S.C. Dep't of Revenue*, 429 S.C. 414, 420, 839 S.E.2d 96, 99 (2020) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." (*quoting State v. Smith* (*In re Decker*), 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))); *Hartford Accident & Indem. Co. v. Lindsay*, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979) ("Full effect must be given to each section of a statute, giving words their plain meaning, and, in the absence of ambiguity, words must not be added or taken away.").

Although, upon first glance, the distinction between orders affecting the appointment of a receiver and a receivership per se may appear illusory, upon closer examination, the distinction is real, reflected in the language of the appealability statute, and has been acknowledged as legally significant by South Carolina courts, which have recognized that the creation of a receivership and the appointment of a receiver are separate acts. *See, e.g., In re Citizens' Exch. Bank*, 140 S.C. 471, 493, 139 S.E. 135, 143 (1927) ("The power of the Circuit Judge to designate a receiver is, clearly, a matter of discretion; perhaps even of more enlarged discretion than that of deciding in the first instance whether or not there should be a receivership."); *S. Tr. Co. v. Cudd*, 166 S.C. 108, 113-

14, 164 S.E. 428, 429-30 (1932) ("That the power to appoint a receiver is inherent in a Court of equity is fully realized and approved. Also, that the matter of ordering a receivership is very much within the discretion of the Circuit Judge, is likewise well realized." (citations omitted)).

A receiver acts on behalf of, as an officer of, the appointing court. *See Ex parte Cusaac*, 244 S.C. 572, 580, 137 S.E.2d 764, 768 (1964) ("A receiver represents the Court appointing him; he is an officer of the Court and is the agency through which the Court acts."). Thus, the appealability statute rightly focuses on, and allows immediate appellate review of, orders conferring the authority of the court on an individual. *See Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc*., 360 S.C. 473, 479, 602 S.E.2d 83, 87 (Ct. App. 2004) ("The refusal of a trial court to appoint a receiver should be immediately appealable because of the potential harm in not having an unbiased party to protect a corporation's assets."). Admittedly, orders concerning receiverships often will affect both the receivership itself and the appointment of a receiver simultaneously—for example, when a receivership is created and a receiver appointed, or when a receivership is dissolved and a receiver relieved of the appointment. However, such is not the case here. In the circuit court, Travelers argued ACL's receivership itself was improper and sought the dissolution of the entire receivership. None of Travelers' arguments related to the appointment of the Receiver as such; thus, the Order, which rejected those arguments, does not fall within the ambit of section 14-3-330(4).

2. Even if section 14-3-330(4) applies to "receiverships," the circuit court's Order denying Traveler's motion did not "modify" or "continue" anything.

Even assuming section 14-3-330(4) applies to "receiverships" per se, the Order denying Traveler's motion is nonetheless not immediately appealable because it did not "modify" or "continue" anything—either the Receiver's appointment or the ACL receivership as a whole.

First, the Order did not "modify[] . . . the appointment of [ACL's] receiver" or ACL's receivership generally. *Cf. In re Fifty-Four First Mortg. Bonds*, 15 S.C. 304, 314 (1881) ("The authority of a receiver rests . . . in the orders of the court by which he is appointed."). Instead, the Court merely denied Travelers' Motion to Stay or Dismiss the Third Party Claims of the Purported Receiver for Asbestos Corporation Limited and to Dissolve the Receivership.

Similarly, the Order did not "continu[e] . . . the appointment of [ACL's] receiver" or ACL's receivership generally. In arguing the Order "continued" ACL's receivership, Travelers relies on an overly broad interpretation of section 14-3-330 that is contrary to precedent and would ultimately lead to numerous improper appeals out of the asbestos Receivership Court and from unrelated actions involving receiverships. *See Tillman*, 420 S.C. at 250, 801 S.E.2d at 760 ("To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly . . . .").

The language of section 14-3-330(4) was first enacted into South Carolina law in 1901 (through Act 358) as section 11(4) of the Code of Civil Procedure.[9] At the time South Carolina courts commonly appointed receivers on a temporary basis,[10] and it was likewise common for such

[9] See 1901 S.C. Acts 623 ("Be it enacted by the General Assembly of the State of South Carolina: That section 11 of the Code of Civil Procedure of this State relating to the jurisdiction of the Supreme Court, be and the same is hereby amended by the addition thereto of the following subdivision to be numbered '4.'"); id. ("4. An interlocutory order or decree in the Court of Common Pleas, granting or continuing or modifying or refusing an injunction, or else granting or continuing or modifying or refusing the appointment of a Receiver hereafter granted in any action . . . ."); *see also Williams v. Jones*, 62 S.C. 472, 481, 40 S.E. 881, 884 (1902) (ruling an order "was appealable before the act of 1901, 23 Stat., 623--for it involved the merits; and secondly, it was appealable under said act just quoted, for that act provides that the Supreme Court may review 'An interlocutory order or decree in the Court of Common Pleas, granting or continuing or modifying or refusing an injunction, or else granting or continuing or modifying or refusing the appointment of a receiver hereafter granted in any action'"). Although it has been recodified several times, the relevant language of section 14-3-330(4) has remained a part of South Carolina's statutory scheme from 1901 to the present day.

[10] *See, e.g.*, *Montgomery & Crawford, Inc. v. Arcadia Mills*, 173 S.C. 464, 483, 176 S.E. 589, 596 (1934) ("Judge Stoll signed the order making H. A. Ligon temporary receiver . . . ."); *Moore v. S. Mut. B. & L. Ass'n*, 50 S.C. 89, 93, 27 S.E. 543, 545 (1897) ("[O]n the 12th of February, 1897, a temporary receiver of the defendant association was appointed . . . ."); *Hughes v. Edisto Cypress*

temporary receiverships to be extended or made permanent—or "continued."[11] This practice of "continuing" temporary receiverships still takes place in South Carolina. *See, e.g., Wilmington Trust Nat'l Assoc. v. Piedmont Center Owner, LLC et al*., 2019 S.C. C.P. LEXIS 513, *1 (S.C. Ct. Comm. Pl., Greenville Cnty., Mar. 8, 2019) ("At the hearing held on March 8, 2019, Plaintiff submitted evidence and testimony from the interim Receiver in support of the **continued** Receivership, and requested that the Court extend the Receiver Order until subsequent order of this Court, in accordance with the terms of the Receiver Order, which are incorporated herein." (emphasis added)). Accordingly, the language in section 14-3-330(4) allowing for the immediate appeal of orders "continuing . . . the appointment of a receiver" was not intended to apply to the

Shingle Co., 51 S.C. 1, 21, 28 S.E. 2, 9 (1897) ("C. B. Free was, under the order of Judge Witherspoon, appointed as temporary receiver . . . ."); *Tillinghast v. Bos. & Port Royal Lumber Co*., 39 S.C. 484, 486, 18 S.E. 120, 121 (1893) (noting a party "applied for and obtained an order for the appointment of a temporary receiver"); s*ee also Hand v. Savannah & C. R. Co*., 17 S.C. 219, 274 (1882) ("It can hardly be necessary to say, what has been so often held, that the objects for the appointment of a receiver are temporary in their character."); s*ee also* 1930 S.C. Civil Code § 5564 ("If it appears to the Court that the corporation is insolvent or in imminent danger of insolvency the Court may appoint a temporary receiver of the corporation pending dissolution."); Tardy's Smith on Receivers 2d, § 3 (1920) (distinguishing temporary and permanent receivers).

[11] *See, e.g., Carroll v. Cash Mills*, 125 S.C. 332, 336, 118 S.E. 290, 291 (1923) ("On February 21, 1921, the temporary receivership was made permanent, by order of the Circuit Judge."); *Wylie v. Commercial & Farmers' Bank*, 63 S.C. 406, 408, 41 S.E. 504, 505 (1902) ("After answers were in, an application was made to have the temporary receiver made permanent receiver. This was ordered in June, 1899."); *White v. Commercial & Farmers' Bank*, 60 S.C. 122, 123, 38 S.E. 453, 454 (1901) (noting "a temporary receiver was appointed on the 3d day of February, 1900 (afterwards made permanent)"); *State v. Port Royal & Augusta R.R. Co*., 45 S.C. 470, 477, 23 S.E. 383, 384 (1895) ("On the same day such temporary receiver was made permanent receiver."); see also 75 C.J.S. *Receivers* § 79 ("According to the showing made, the court may make, or refuse to make, an order **continuing** a temporary receiver previously appointed." (emphasis added)); *Stair v. Meissel*, 207 Ind. 280, 283, 192 N.E. 453, 454 (1934) ("It is, therefore, ordered by the court that the receivership herein be and the same is hereby **continued** and made permanent pending the determination of the main cause of action in this cause." (emphasis added)); *Singer v. Goff*, 334 Mich. 163, 167, 54 N.W.2d 290, 292 (1952) ("Equity courts have inherent power to appoint a receiver, and it is a matter of discretion whether a receivership shall be **continued** or discontinued. The record in the instant case shows that, after the expiration of the 1-year period, the court issued various orders which necessarily imply a **continuance** of the Singer receivership." (emphasis added) (citations omitted)).

current circumstance, in which a court simply rejects a third party's attempt to challenge and dissolve a receivership. Instead, it was intended to apply to instances where a temporary receivership was explicitly extended in duration, whether made permanent or remaining as a temporary receivership with a later termination date.

For section 14-3-330(4) to allow the instant appeals of the Order—which did not "continue" ACL's receivership, and at most,[12] simply declined to dissolve it—the statute would need to contain appropriate alternative language, as other jurisdictions have done. *See, e.g.*, Okla. Stat. tit. 12, § 993(4) (allowing the immediate appeal of an order that "refuses to vacate the appointment of a receiver"); Mo. Rev. Stat. § 512.020(2) (allowing the immediate appeal of an order "refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers"); Kan. Stat. Ann. § 60-2102(a)(3) (allowing the immediate appeal of "[a]n order that . . . refuses to wind up a receivership"); 4 V.I.C. § 33(b) ("The Supreme Court of the Virgin Islands has jurisdiction of appeals from . . . (2) Interlocutory orders . . . refusing orders to wind up receiverships . . . .").

Underlying and reinforcing Respondent's interpretation of section 14-3-330(4) is an important consideration: that receivers, once appointed, should be able to carry out their court-ordered duties without other entities interfering by filing unnecessary, improper, and time-consuming appeals. If Travelers' and Continental's view of section 14-3-330(4) is accepted, insurers in the asbestos Receivership Court, and debtors to entities in receivership elsewhere, could invent any number of reasons why a receivership or a receiver's appointment is improper,

[12] "[A]n appellate court should look to the effect of an interlocutory order to determine its appealability . . . ." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). Here, the Order had no effect on ACL's receivership, whether to its duration, scope, the identity of the Receiver, or otherwise. Consequently, the Order does not warrant review by this Court. *See, e.g., Cobb v. Maccaro*, 310 S.C. 303, 306, 423 S.E.2d 156, 157 (Ct. App. 1992) (ruling the refusal to dissolve a mechanic's lien was not immediately appealable).

regardless of merit, move for dissolution of the receivership on that basis, and appeal the denial of such motions as orders "continuing" the receivership. In fact, under such a broad interpretation as Travelers and Continental would have this Court adopt, ordinary motions to dismiss and motions for summary judgment against a receiver's claims containing a perfunctory argument that, upon dismissal or adjudication of the claims, the receivership should be dissolved, would be immediately appealable. This interpretation would upend foundational appealability law in South Carolina. *See Silverman v. Campbell*, 326 S.C. 208, 211, 486 S.E.2d 1, 2 (1997) (recognizing "it is well-settled that the denial of summary judgment is not directly appealable"); *McLendon*, 313 S.C. at 526 n.2, 443 S.E.2d at 540 n.2 (observing "the denial of a motion to dismiss is not directly appealable").

Allowing such appeals would also stymie actions involving receiverships in the circuit court, as each appellant would argue that the receivership's propriety affects the viability of the entire action. Such an interpretation of section 14-3-330(4) is not what the legislature intended with respect to receiverships in enacting the section, nor would it be consonant with the general rule that section 14-3-330 should be narrowly construed. *See Stone*, 426 S.C. at 295, 826 S.E.2d at 870; *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. The appropriate time to challenge the propriety of a receivership is at its outset—which section 14-3-330(4) explicitly allows by providing for the immediate appeal of orders "granting . . . the appointment of a receiver"—not now, after the receivership has been established and the Receiver appointed. And, while the Receiver contests the merits of that appeal, that appeal is proceeding with regard to the ACL receivership.

In sum, section 14-3-330(4) does not afford Travelers and Continental any basis to appeal the Orders, and their appeals should be immediately dismissed.

C. The Orders are not immediately appealable under Section 14-3-330(1)-(3).

Pursuant to section 14-3-330 of the South Carolina Code, appellate courts have jurisdiction over interlocutory orders only if the interlocutory order involves the merits, affects a substantial right, or grants, continues, modifies, or refuses an injunction or receivership. "An order involves the merits when it 'finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense[.]'" *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017) (quoting *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). An order affects a substantial right when it "(a) in effect determines the action and presents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial, or (c) strikes out an answer or any part thereof or any pleading in any action." S.C. Code Ann. § 14-3-330(2). The Orders on appeal here do not involve the merits or affect substantial rights, and even Travelers does not claim otherwise.[13]

[13] Travelers does not argue that Sections 14-3-330(1)-(3) apply. The Orders on appeal do not "involve the merits" under section 14-3-330(1). "An order [that] involves the merits is one that 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) (*quoting Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). Here, the Orders do not finally determine any matter concerning any party's causes of action or defenses—they merely allow this case to proceed to the discovery phase of the litigation. *See McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) ("Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue[s] raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable . . . ." (citation omitted).

Next, the Orders do not affect any of Appellants' substantial rights and do not also "in effect determine[] the action and prevent[] a judgment from which an appeal might be taken or discontinue[] the action," "grant[] or refuse[] a new trial," or "strike[] out an answer or any part thereof or any pleading." § 14-3-330(2). As a result, the Orders are not immediately appealable under section 14-3-330(2). *See, e.g., Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) ("Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order."); *Du Pont v. Du Bos*, 33 S.C. 389, 394, 11 S.E. 1073,

CONCLUSION

For the foregoing reasons, the Orders at issue are not immediately appealable, and the Court should dismiss this appeal.

(Signature page follows)

1074-75 (1890) ("It is quite clear that the order here under review is not appealable . . . ; for even granting that it affects a substantial right, that is not sufficient, for it must also, in effect, determine the action and prevent a judgment from which an appeal might be taken, and this it certainly does not do.").

Because the Orders do not affect a substantial right of Appellants, they also do not fall within section 14-3-330(3). The Orders were not entered in a "special proceeding" or "after judgment." § 14-3-330(3). Instead, the Orders were entered in a typical civil action before judgment, and so section 14-3-330(3) is inapplicable. *See Allen v. Partlow*, 3 S.C. 417, 418 (1872) (observing a special proceeding is "any remedy other than an action or ordinary proceeding in a Court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence" (emphasis added)); *see also Smith v. Saye*, 131 S.C. 378, 381, 127 S.E. 568, 569 (1925) (distinguishing between a "special proceeding" and a "civil action"); Rule 3, SCRCP ("A civil action is commenced when the summons and complaint are filed with the clerk of court . . . .").

Finally, Travelers does not address the order denying the motions for protective order in its appealability memorandum. It cannot and does not argue that the Order requiring it and Continental to participate in discovery is immediately appealable, which the South Carolina Supreme Court has made clear it is not. *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) (holding discovery orders are interlocutory and are not immediately appealable because they do not involve the merits of the action or affect a substantial right); *Ex Parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) ("An order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14–3–330 (1976)"); *Ex Parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) ("[A]n order denying or compelling pretrial discovery is not directly appealable since it is an intermediate or interlocutory decision."); *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) ("Discovery orders . . . are interlocutory and are not immediately appealable.").

RESPECTFULLY SUBMITTED

s/ Shanon N. Peake
SMITH ROBINSON HOLLER DUBOSE AND MORGAN, LLC
G. Murrell Smith, Jr. (S.C. Bar # 66263)
Jonathan M. Robinson (S.C. Bar # 68285)
Shanon N. Peake (S.C. Bar #102723)
2530 Devine Street, Suite 1B
Columbia, South Carolina 29205
(803) 254-5445

Counsel for the Receiver

April 3, 2024

RECEIVED
Apr 03 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

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

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.; Bahnson, Inc.; Beaty 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,

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 Travelers Casualty and Surety Company f/k/a Aetna Life & Casualty Co., and The Continental Insurance Company are the Appellants.

SUPPLEMENTAL APPENDIX

ORDERS

MOTIONS

OTHER MATERIALS

The Supreme Court of South Carolina

Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers, Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories, Inc.; General Boiler Casing Company, Inc.; HEFCO, Inc.; J.R. Deans Company, Inc.; Payne & Keller Company; SFB, Incorporated; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; Defendants.

Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; and Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, Third-Party Plaintiffs,

v.

Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland All American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler; Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital

Corp.; Admiral Insurance Company; Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company; Hartford Accident and Indemnity Company; Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc.; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

Of which, Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, is the Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna

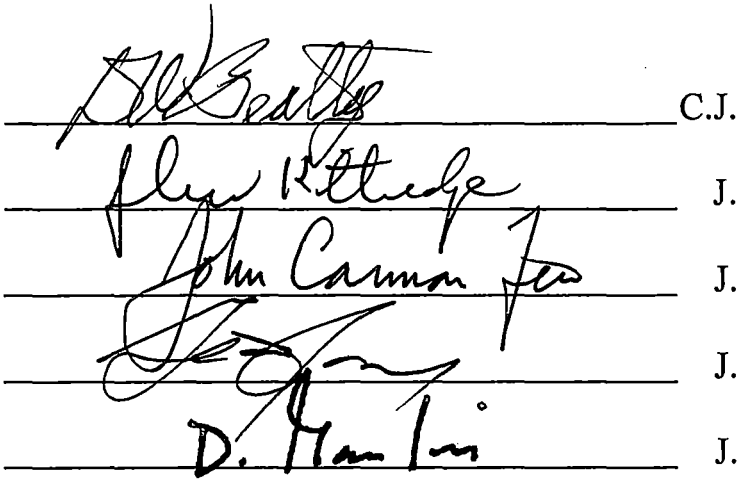
Casualty and Surety Company, are Appellants.

Appellate Case No. 2024-000005

ORDER

Appellant AIG Property Casualty Company (AIG) has filed a motion for certification of Appellate Case No. 2023-000727 pursuant to Rule 204(b), SCACR. Appellant Travelers Casualty and Surety Company has filed a motion joining AIG's motion for certification.

We grant the motion for certification and motion for joinder, dispense with further briefing, vacate the court of appeals denial of sanctions, and dismiss the appeal because the underlying circuit court order at issue is not immediately appealable.



C.J.

J.

J.

J.

J.

Columbia, South Carolina
March 27, 2024

cc:
Wesley Brian Sawyer
Brian Montgomery Barnwell
John Belton White, Jr.
Marghretta Hagood Shisko
Scott Shutte
Christopher Rutledge Jones

G. Murrell Smith, Jr.
Jonathan M. Robinson
Shanon N. Peake
Matthew Todd Carroll
Mary Elizabeth O'Neill
Harry Lee
The Honorable Jenny Abbott Kitchings

The South Carolina Court of Appeals

Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers, Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories, Inc.; General Boiler Casing Company, Inc.; HEFCO, Inc.; J.R. Deans Company, Inc.; Payne & Keller Company; SFB, Incorporated; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; Defendants.

Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; and Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, Third-Party Plaintiffs,

v.

Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland All American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler; Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental

Insurance Company, Individually and as Successor in interest to Harbor Insurance Company; Hartford Accident and Indemnity Company; Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc.; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

Of which, Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, is the Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company, are Appellants.

Appellate Case No. 2023-000727

ORDER

After careful consideration, Respondent Peter Protopapas's motion for sanctions is denied. However, any further actions by any party taken for the purpose of delay during the pendency of this appeal may result in sanctions pursuant to Rule 269, SCACR.

Bethea H. Verdin
FOR THE COURT

Columbia, South Carolina

FILED
Feb 14 2024

cc:
Wesley Brian Sawyer, Esquire
Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
Harry Lee, Esquire
Brian Montgomery Barnwell, Esquire
John Belton White, Jr., Esquire
Marghretta Hagood Shisko, Esquire
Brady Edwards, Esquire
Scott Shutte, Esquire
Christopher Rutledge Jones, Esquire
G. Murrell Smith, Jr., Esquire
Jonathan M. Robinson, Esquire
Shanon N. Peake, Esquire

The South Carolina Court of Appeals

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

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,

Of which Asbestos Corporation Limited is the Appellant,

and

Peter Protopapas, Duly Appointed Receiver for Atlas Corporation Limited, is the Respondent,

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 Mohed Altrad, Altrad Investment Authority S.A.S., ArranCo US, LLC, Hawk Bidco US Inc., Sparrows Offshore, LLC, Anglo American PLC, De Beers, PLC, De Beers Centenary AG, De Beers Consolidated Mines Proprietary Ltd., De Beers UK Ltd., ESAB Corporation, Charter Consolidated Ltd., and Central Mining & Investment Corporation Ltd. are Appellants.

Appellate Case No. 2023-001461

ORDER

Century Indemnity Company and Federal Insurance Company (collectively, Chubb Insurers) have filed a motion to intervene in this appeal for the purpose of filing a "motion to clarify and enforce Rule 205" of the South Carolina Appellate Court

Rules. After careful consideration, the motion to intervene is denied and this court declines to act upon Chubb Insurers' concomitantly-filed motion.

Receiver Peter Protopapas has filed a motion to be added as a Respondent in this appeal. No return was filed. After careful consideration, we grant the motion and the caption is amended as set forth in this order.

Appellant Asbestos Corporation Limited (ACL) filed a petition for supersedeas on November 22, 2023. On December 7, 2023, ACL requested leave to withdraw the petition for supersedeas. After careful consideration, we grant the request to withdraw and therefore decline to act upon the petition.[1] Accordingly, the Receiver's motion to dismiss ALC's petition for supersedeas is denied as moot.

Receiver Protopapas's request to supplement the record on appeal is denied as premature. The Receiver's request for attorney's fees and sanctions, or, alternatively, to remand this appeal to the circuit court, is also denied. However, any further actions by any party taken for the purpose of delay during the pendency of this appeal may result in sanctions pursuant to Rule 269, SCACR.

C.J.

FOR THE COURT

Columbia, South Carolina

FILED
Feb 05 2024

cc:
Stephen Lynwood Brown, Esquire
Russell Grainger Hines, Esquire
James D. Gandy, III, Esquire
Theile Branham McVey, Esquire
Jamie Rae Rutkoski, Esquire
Aaron Daniel Chapman, Esquire
David Christopher Humen, Esquire

---

[1] We decline to act upon the relief requested by Respondents John and Margaret Tibbs' in their "return to request to set briefing schedule"; any request for action by this court must be in the form of a motion. Moreover, the Tibbs' request regarding the briefing schedule and their request to deny ACL's supersedeas on the merits are now moot.

Kevin Kendrick Bell, Esquire
Charles William Branham, III, Esquire
Matthew Todd Carroll, Esquire
Kevin A. Hall, Esquire
Mary Elizabeth O'Neill, Esquire
Shanon N. Peake, Esquire
G. Murrell Smith, Jr., Esquire
John Thomas Lay, Jr., Esquire
Gray Thomas Culbreath, Esquire
Lindsay Anne Joyner, Esquire
Laura Watkins Jordan, Esquire
Eleanor Lasseigne Jones, Esquire
Jonathan M. Robinson, Esquire
Steven James Pugh, Esquire
Benjamin Palmer Carlton, Esquire
Carmen Vaughn Ganjehsani, Esquire
Ashwin Ray Sanzgiri, Esquire
James H. Elliott, Jr., Esquire
Cameron D Berthelsen, Esquire
A. Victor Rawl, Jr., Esquire

The Supreme Court of South Carolina

Ann Finch, Individually and as Executor of Estate of Franklin Finch; and Peter D. Protopapas as Court Appointed Receiver for Covil Corporation, Respondents,

v.

United States Fidelity and Guaranty Company; Zurich American Insurance Company; and Wall, Templeton & Haldrup, P.A., Defendants,

Of which United States Fidelity and Guaranty Company is the Petitioner.

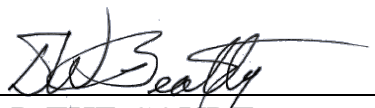
Appellate Case No. 2020-001670

ORDER

Respondent Peter D. Protopapas asks this Court to award sanctions and attorney's fees against Petitioner and its attorneys for filing a petition for a writ of prohibition with this Court. We deny the request.

We understand the complexity of the issues in this litigation, and we acknowledge parties in any given case have the right to protect and further their interests within the bounds of applicable rules and case law. Attorneys for the parties have an obligation to protect and further their clients' respective interests within the bounds of applicable rules and case law. We, in turn, expect the parties and their attorneys in this and any other case to fully cooperate with the trial court in order to ensure the case is tried or otherwise disposed of in a timely manner. Any action taken for the purpose of delaying the disposition of this case will, under appropriate

circumstances, merit the imposition of sanctions under Rule 269, SCACR.



C.J.

FOR THE COURT
Few, J., not participating

Columbia, South Carolina
March 9, 2021

cc: Theile Branham McVey, Esquire
Mark Weston Hardee, Esquire
Jonathan M. Robinson, Esquire
G. Murrell Smith, Jr., Esquire
Shanon N. Peake, Esquire
Jescelyn Tillman Spitz, Esquire
John Belton White, Jr., Esquire
Marghretta Hagood Shisko, Esquire
Christopher Rutledge Jones, Esquire
Austin Tyler Reed, Esquire
Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
William Pearce Davis, Esquire
Susan Drake DuBose, Esquire
Michael S. Carnevale, Esquire
Andrew T. Frankel, Esquire
Mary Beth Forshaw, Esquire
Alan Turner, Esquire
Jonathan Marshall Holder, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiffs,

v.

3M Company, et al.,

Defendants.

****

Asbestos Corporation Limited, By and Through Its Duly Appointed Receiver Peter D. Protopapas,

Third-Party Plaintiff,

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; and Travelers Casualty and Surety Company fka The Aetna Casualty and Surety Company;

Third-Party Defendants.

Case No. 2022-CP-40-02979

NOTICE OF MOTION AND MOTION BY THE CONTINENTAL INSURANCE COMPANY TO DISMISS, STAY, AND/OR STRIKE THE THIRD-PARTY COMPLAINT, OR, IN THE ALTERNATIVE, TO SEVER THE THIRD-PARTY COMPLAINT OR, IN THE FURTHER ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

TO: BRIAN M. BARNWELL, ESQUIRE, ATTORNEY FOR THE THIRD-PARTY PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Third-Party Defendant The Continental Insurance Company ("Continental"), by and through its undersigned counsel, does hereby move: (1) for an order dismissing or staying this third-party action pursuant to South Carolina Appellate Court Rules 205 and 241; and (2) if this third-party action is not dismissed or stayed pursuant to

Rule 205 or 241, for an order dismissing and/or striking the claims against Continental in the Third-Party Complaint (the "Third-Party Complaint" or "TPC") pursuant to South Carolina Rules of Civil Procedure 12(b)(6) and 14(a) or, in the alternative, severing such claims, or, in the further alternative, requiring a more definite statement pursuant to SCRCP 12(e). The grounds for this motion, which are discussed more fully in Sections I through IV herein, may be summarized as follows.

First, Asbestos Corporation Limited ("ACL") is the subject of two closely related orders by this Court. On September 8, 2023, the Court held ACL in contempt and struck its pleadings in *Tibbs v. 3M Company, et al.*, No. 2023-CP-40-01759 (Cir. Ct. – Richland Cty., S.C.). On the same day, the Court entered a second order in the *Tibbs* action that was predicated on the first order and appointed Peter D. Protopapas as Receiver for ACL. ACL promptly filed a notice of appeal on September 13, 2023 as to both orders. This notice of appeal established the exclusive jurisdiction of the Court of Appeals and automatically stayed the effect of both orders. Nevertheless, despite the notice, Mr. Protopapas on September 19, 2023 filed the present third-party action against Continental and other insurers. The Third-Party Complaint relied entirely on authority granted to Mr. Protopapas pursuant to the appealed orders that ACL had challenged. Because this action was filed at a time when the authority of Mr. Protopapas to act as Receiver was stayed, the Third-Party Complaint was void ab initio and should be dismissed. In the alternative, because the third-party action unquestionably will be affected by the appeal, it lies within the exclusive jurisdiction of the Court of Appeals and is automatically stayed pursuant to Rules 205 and 241.

Second, the claims asserted against Continental by the Receiver in the Third-Party Complaint relate to an insurance policy that Continental allegedly issued to ACL. This complaint alleges that an unspecified number of lawsuits for asbestos-related bodily injury have been filed

against ACL based on its historic operations that included the sale of asbestos-containing products and asbestos materials. These allegations do not state an actual justiciable controversy with Continental, and also do not involve claims by a party to the original action asserting that Continental is or may be liable to Third-Party Plaintiff for all or part of the claims of the underlying Plaintiff Ted Everette Mitchell, individually and as Executor of the Estate of Patsy Ann Mitchell ("Plaintiff"). Accordingly, if the third-party action is not dismissed or stayed pursuant to SCACR 205 and 241, the claims against Continental should be dismissed and/or stricken under SCRCP 12(b)(6) and 14, or, in the alternative, severed into a separate action, or, in the further alternative, subject to an order requiring a more definite statement under SCRCP 12(e).

BACKGROUND

This is an asbestos personal injury action. On May 17, 2023, Plaintiff filed an Amended Complaint 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, in a separate asbestos action (*Tibbs*), this Court 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").

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.[1]

Nevertheless, on September 19, 2023, Mr. Protopapas (who himself was not a party to this lawsuit and took no action to join it) filed a purported Third-Party Complaint in this action. The Third-Party Complaint asserts multiple causes of action against four insurers alleged to have issued policies to 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.

In conjunction with filing the Third-Party Complaint, Mr. Protopapas immediately served voluminous and wide-ranging discovery requests. As to Continental, this onerous discovery entails 183 separate requests (27 interrogatories and 156 document requests), the vast majority of

[1] The orders attached to and incorporated in the Notice of Appeal are: "Order Holding Atlas Asbestos Company, Ltd. in Contempt" (September 8, 2023) and "Order on Plaintiffs' Motion to Appoint a Receiver" (September 8, 2023).

which demand information on subjects that go far beyond the *Mitchell* suit or the policy allegedly issued to ACL.

ARGUMENT

I. The Third-Party Action Should Be Dismissed Or Stayed Pursuant To Rules 205 and 241

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 seeks to use the jurisdiction of this Court to prosecute a third-party action and use the discovery tools attendant to that judicial proceeding. He does 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. This Court therefore 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.

In addition, the impact of the pending appeal extends further in this matter. Rule 241(a) provides as follows:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree, or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 241(a), SCACR. Under the terms of this Rule, the matters decided in the appealed orders and the relief ordered therein were automatically stayed by the notice of appeal. This stay extends to any action taken pursuant to the relief granted by the appealed order. Accordingly, as of September 13, 2023, any authority of Mr. Protopapas to take action as Receiver was stayed. Under these circumstances, the Third-Party Complaint filed in this action on September 19, 2023 was void ab initio and should be dismissed.

It should be noted that, under the circumstances of the present matter, the application of Rules 205 and 241 is not altered by SCRCP Rule 62(a). 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. 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 this Court.

In addition, although consideration of Rule 241 is not necessary to grant this motion, the application of Rule 241(a) in the present matter is also not altered by Rule 62(a).

Rule 62(a) only applies to "execution . . . upon a **judgment** [and] . . . proceedings . . . for its enforcement." Likewise, the rule's exception in pertinent part applies only to "an interlocutory or final **judgment** . . . **in a receivership action**." "Judgment" as defined in Rule 54(a) "includes any decree or order which dismisses the action as to any party or finally determines the rights of any party." *See Gateway Enters., Inc. v. S.C. Dept. of Revenue*, 341 S.C. 103, 106 (2000) (stating that Rule 62(a) "applies only to judgments as defined in Rule 54(a)") (quoting Wright & Miller, Federal Practice and Procedure, Section 2902 (2d ed. 1995)).

By its own terms, Rule 62(a) does not apply to the present matter. The Receivership Order does not dismiss any action. It does not purport to finally determine the rights of any party. The Receivership Order accordingly is not a "judgment" within the meaning of this rule and the present action does not involve any execution or enforcement of a "judgment."[2]

Furthermore, as pertinent here, the Receivership Order was not a stand-alone order

[2] 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 the 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.

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 and the automatic stay under Rule 241(a). 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 Rules 205 and 241 is automatic and does not require an order by this Court, the Receiver's insistence upon prosecuting this litigation has made it necessary for Continental to raise the matter at this time. As the Receiver filed the Third-Party Complaint after the service of the notice of appeal, this Court should dismiss this action and affirm that the Contempt Order, the Receivership Order, and the Receiver's authority to act, including his filing and prosecution of claims and discovery against Continental in this third-party action, were and continue to be stayed. This Court also should affirm that the exclusive jurisdiction over this matter lies with the Court of Appeals. Further, under the particular circumstances of this action and even if the Court disagrees that the scope of Rules 205 and 241 requires a dismissal or stay, the Court should exercise its discretion to

stay this proceeding.

II. The Claims In The Third-Party Complaint Against Continental Should Be Dismissed Under Rule 12(b)(6)

If the third-party action is not dismissed or stayed pursuant to Rule 205 or 241, the claims against Continental in the Third-Party Complaint should be dismissed for failure to state a claim upon which relief can be granted.

To state a cause of action for declaratory judgment, "a party must demonstrate a justiciable controversy." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71 (1995). A justiciable controversy exists "[w]here a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party." *Power v. McNair*, 255 S.C. 150, 153-54 (1970) (internal quotation and citation omitted). "An issue that is contingent, hypothetical, or abstract is not ripe for judicial review," and there must be "a real or actual controversy between the litigants at the time of the institution of the DJ Action." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595 (2013) (internal citation and quotation omitted).

The Third-Party Complaint fails to allege facts demonstrating an actual justiciable controversy with Continental, and the First, Second and Third Causes of Action should accordingly be dismissed as to Continental. The Receiver asserts that Continental has a duty to defend or reimburse defense costs with respect to the "ACL Asbestos Suits."[3] TPC, ¶¶8, 38-39, 44-45, 48. Yet the Third-Party Complaint never fully identifies the lawsuits at issue. *See* TPC, ¶8, Prayer for Relief. The Third-Party Complaint uses generic and nonspecific phrases, such as "ACL Asbestos Suits" and "asbestos suits potentially covered under the Third-Party Defendants' policies" to refer to the lawsuits in which a justiciable controversy purportedly exists, TPC, ¶¶8, 39, 43, 44, 48, but

[3] Paragraph 8 only refers to "the instant suit filed by Ted Everette Mitchell, individually and as Executor of the Estate of Patsy Ann Mitchell."

never defines or identifies these lawsuits. Likewise, the Third-Party Complaint seeks declarations on various insurance coverage issues concerning these unspecified lawsuits. With the exception of the *Mitchell* suit, the Receiver fails to identify any particular pending asbestos action as to which he contends these issues have arisen and as to which an actual controversy currently exists with Continental. Without identification of specific actions and the specific facts in each action required to allege a present controversy with Continental, the Third-Party Complaint does not present a specific, concrete matter for judicial resolution, but rather seeks declarations that are abstract, hypothetical, and contingent.

The duty to defend, which is the subject of multiple declarations sought in the Second and Third Causes of Action, cannot be determined without identification of the specific lawsuit at issue. Under basic principles of law, "the duty of a liability insurance company to defend a claim brought against its insured [is] determined by the allegations of the third party's complaint." *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15 (Ct. App. 1994), *aff'd*, 321 S.C. 310 (1996). The Receiver has not identified the particular lawsuits as to which he seeks relief – let alone the allegations of the complaints therein – and relief thus cannot be granted on these declarations concerning the duty to defend.[4] Similarly, issues relating to any duty to indemnify (TPC, ¶39) also cannot be adjudicated in a vacuum. *See Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595 (2013). Accordingly, the declaratory judgment claims by the Receiver against Continental should be dismissed pursuant to Rule 12(b)(6).

[4] The First Cause of Action seeks a declaration that Continental and the other third-party defendants must provide the Receiver with copies of responsive policies. The Third-Party Complaint does not allege that any justiciable controversy exists in this regard. The absence of such an allegation is dispositive because one of the requirements for a ripe controversy is that "there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party." *Power*, 255 S.C. at 153-54.

The Third-Party Complaint includes a request for a declaration as to present and future Receiver's fees and expenses. The Receiver requests declarations that Continental must compensate the Receiver for "asbestos suits potentially covered under the Third-Party Defendants' policies" and that "this obligation is unlimited" but fails to identify the underlying asbestos suits, nor could it identify such future lawsuits. TPC, ¶48. Such an indefinite request about unknown and unknowable underlying lawsuits is an improper request for declaratory relief. As discussed above, the existence of an insurer's duty to defend cannot be determined without identification of the specific lawsuit(s) at issue and the allegations therein. In the absence of such allegations, there is no claim upon which relief can be granted and this request should be dismissed pursuant to Rule 12(b)(6).

III. The Claims In The Third-Party Complaint Against Continental Should Be Stricken Pursuant to Rule 14(a) or, in the Alternative, Severed

Rule 14(a) provides that a defendant may commence a third-party complaint against a party "who is or may be liable to [defendant] for all or part of the plaintiff's claim." Rule 14(a), SCRCP. The Rule further provides that "[a]ny party may move to strike the third-party claim, or for its severance or separate trial." *Id.*

Courts applying the South Carolina Rules and their federal counterparts have repeatedly held that claims regarding insurance coverage should not be combined in the same action as the underlying tort claims against the insured. *See Builders Mut. Ins. Co. v. Island Pointe, LLC,* 431 S.C. 93 (2020) (affirming denial of insurer's motion to intervene in tort action and trial court's decision "to leave all coverage issues to a subsequent declaratory judgment action"); *Thomas v. Tramaine-Frost*, 2017 U.S. Dist. LEXIS 29522 (D.S.C. Jan. 12, 2017) (severing negligence claims against an alleged tortfeasor from coverage claims against an insurer); *Todd v. Cary's Lake Homeowners Ass'n*, 315 F.R.D. 453 (D.S.C. 2016) (severing tort claims from claims against

insurer); *Cramer v. Walley*, 2015 U.S. Dist. LEXIS 84400 (D.S.C., June 30, 2015) (holding that claims for negligent operation of automobile should not be joined with claim against insurer for declaratory judgment on coverage).

A third-party complaint "must be derivative of the plaintiff's claim because [d]erivative liability is central to the operation of Rule 14. It is not sufficient that the third-party claim is a related claim; *the claim must be derivatively based on the original plaintiff's claim*." *Johnson v. M.I. Windows and Doors, Inc.*, No. 2:11-CV-0167, 2012 WL 1015798, at *2 (D.S.C. Mar 23, 2012) (emphasis in original) (internal citations and quotations omitted); *Laughlin v. Dell Fin. Servs., L.P.*, 465 F. Supp. 2d 563, 566 (D.S.C. 2006). Stated another way, a third-party complaint "must involve an attempt to pass on to the third party all or part of the liability asserted against the defendant.... An impleader claim may not be used to assert any and all rights to recovery arising from the same transaction or occurrence as the underlying action." *CNH Industrial Capital America LLC v. Able Contracting, Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. Feb. 7, 2017) (internal quotations omitted) (dismissing third-party complaint because claims were not derivative); *Johnson*, 2012 WL 1015798, at *2 (severing third-party complaint because claims were not derivative).

In this action, the Receiver improperly seeks to achieve this result by means of a third-party complaint under Rule 14. However, as noted above, this rule only permits impleader against a party "who is or may be liable to [defendant] for all or part of the plaintiff's claim." To be proper, a third-party complaint must allege that the liability of the third-party defendant on the claim against it "is in some way dependent upon the *outcome* of the main claim." *Laughlin*, 465 F. Supp.

2d at 566.[5] Rule 14 does not allow the defendant to assert a separate and independent claim, even if the claim arises out of the same general set of facts as the main claim. *Id.*

Here, none of the claims seek a ruling that Continental is liable to ACL for all or part of the tort claims by Plaintiff. As discussed above, the Third-Party Complaint does not seek any declaration specific to the claim of Plaintiff. Furthermore, the declaratory judgment claims do not seek any determination that Continental is liable for indemnification or any other claim that is alleged to be dependent on the outcome of the main claim in the *Mitchell* action. The Receiver's claims against Continental therefore are not properly asserted under Rule 14. *See Cruz v. Weber-Stephen Prods., LLC*, 2018 U.S. Dist. LEXIS 1243, at *6 (N.D. Tex. Jan. 4, 2018) (quoting *Majors v. Am. Nat'l Bank of Huntsville*, 426 F.2d 566, 568 (5th Cir. 1970)) (Rule 14 "is not designed as a vehicle for the trying together of separate and distinct causes of action, or for the introduction, into the main action, of several parallel, but independent, actions, or separate and independent claims.").

Furthermore, even in instances where the requirements of Rule 14 are satisfied (which they are not here), third-party complaints may still be stricken or severed when the third-party lawsuit "will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." *Beach v. Hudson*, 380 S.E.2d 869, 871 (S.C. App. 1989); *see Ballard v. S. Cotton Oil Co.*, 145 F. Supp. 886, 887 (E.D.S.C. 1956) (applying South Carolina law and refusing to permit the interpleader because injecting insurance into a trial would be prejudicial to the insurer). Here, the Third-Party Complaint clearly complicates this litigation by adding three new causes of action for declaratory judgment and adding four additional third-party defendants. By adding these claims,

[5] The Note to Rule 14 indicates that it was drafted to be "substantially the same as the Federal Rule" 14, so federal law is cited whenever squarely applicable.

the Third-Party Plaintiff will "all but submerge" Plaintiff's original claim and should be stricken. *Beach*, 380 S.E.2d at 871 (striking third-party complaint because court deemed that adding four additional parties and seven causes of action would unduly complicate the litigation). Under South Carolina law, prejudice arises when the third-party complaint "introduce[s] unrelated issues and unduly complicate[s] the original suit." *Id.* Furthermore, as commentators and courts have observed, a defendant's insurer may also be prejudiced if insurance is injected into a tort action because, among other things, the jury "may decide to increase the damages awarded to plaintiff" if it is "aware of the insurance company's existence." 6 C. Wright, A. Miller & M. Kane, 6 Fed. Prac. & Proc. Civ. § 1443 (3d ed.). Additionally, Continental may be prejudiced by Receiver's decision to seek relief as part of the underlying tort action to the extent it allows Plaintiff to take part in and/or be privy to discovery related to Continental and/or insurance related information that Plaintiff would otherwise not be entitled to, including but not limited to information about the investigation, defense, and resolution of underlying claims.

For these reasons, the claims by the Receiver against Continental in the Third-Party Complaint should be stricken or, in the alternative, severed into a separate action.

In addition, Rule 14 provides that a third-party action may be brought by "a defending party" in the original action. Mr. Protopapas is not a party to this action, and did not seek or receive permission from the Court to intervene in the case prior to filing the third-party action. Likewise, neither Mr. Protopapas nor ACL sought leave to file a third-party complaint. For these additional reasons, the Third-Party Complaint should be stricken.

IV. <u>In The Further Alternative, The Court Should Require a More Definite Statement</u>

In the further alternative, and to the extent that the Court does not dismiss, stay, strike, or sever the claims by the Receiver, Continental moves for a more definite statement pursuant to Rule

12(e). For the reasons set forth above, the allegations in the Third-Party Complaint are so vague and ambiguous that it is not reasonable to request Continental to frame a responsive pleading. At minimum, the Receiver should be required to 1) set forth each specific claim(s) asserted against ACL for which a declaration as to coverage is sought, 2) set forth each policy or policies that are allegedly implicated, and 3) set forth the specific facts and material policy terms that allegedly support the declaration sought and demonstrate that an actual dispute exists.

This motion is based upon the foregoing, such memorandum of support as may be filed later, the statutes and case law of the State of South Carolina, the pleadings filed in this matter, and such other material as may be properly received by the Court in connection therewith.

WHEREFORE, Continental respectfully requests that the Court:

- Issue an order that this third-party action is dismissed or, alternatively, stayed pursuant to Rules 205 and 241.
- If this action is not dismissed or stayed pursuant to Rule 205 or 241, issue an order dismissing the claims against Continental in the Third-Party Complaint pursuant to Rule 12(b)(6) and 14(a) or, in the alternative, severing such claims, or, in the further alternative, requiring a more definite statement pursuant to Rule 12(e).

Dated: October 23, 2023

GORDON REES SCULLY MANSUKHANI, LLP

By: *s/ A. Victor Rawl, Jr.*

A. Victor Rawl, Jr. (SC 09261)
Email: vrawl@grsm.com
40 Calhoun Street, Suite 350
Charleston, SC 29401
Telephone: 843-278-5900

Counsel for Third-Party Defendant
The Continental Insurance Company

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

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Asbestos Corporation Limited, By and Through Its Duly Appointed Receiver Peter D. Protopapas,

Third-Party Plaintiff,

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Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America; The Continental Insurance Company; Federal Insurance Company; and Travelers Casualty and Surety Company fka The Aetna Casualty and Surety Company;

Third-Party Defendants.

Case No. 2022-CP-40-02979

NOTICE OF MOTION AND MOTION BY THE CONTINENTAL INSURANCE COMPANY FOR PROTECTIVE ORDER

TO: BRIAN M. BARNWELL, ESQUIRE, ATTORNEY FOR THE THIRD-PARTY PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that The Continental Insurance Company, by and through its undersigned counsel, hereby moves this Court for a protective order pursuant to Rule

26(c), SCRCP.[1] Continental respectfully asks that the Court enter an order staying discovery until after this Court has resolved Continental's Motion to Dismiss, Stay, and/or Strike the Third-Party Complaint, or, in the Alternative, to Sever the Third-Party Complaint, or, in the Further Alternative, for a More Definite Statement (the "Pending Motion").

1. This matter involves Asbestos Corporation Limited ("ACL"), which is the subject of two orders by this Court. On September 8, 2023, the Court held ACL in contempt and struck its answer in *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (Cir. Ct. – Richland Cty., S.C.). On the same day, the Court entered a second order in the *Tibbs* action that was predicated on the first order and appointed Peter D. Protopapas as Receiver for ACL.

2. ACL promptly filed a notice of appeal on September 13, 2023 as to both orders.

3. Despite this notice of appeal Mr. Protopapas on September 19, 2023 filed the present third-party action against Continental and other insurers. The third-party complaint relies entirely on authority granted to Mr. Protopapas pursuant to the appealed orders that ACL is currently challenging.

4. With the third-party complaint, Mr. Protopapas served 183 separate requests (27 interrogatories and 156 document requests), the vast majority of which demand information on subjects that go far beyond the *Mitchell* suit or the policies allegedly issued to ACL. See Exhibit A hereto.

5. On October 23, 2023, Continental responded to the Third-Party Complaint by filing the Pending Motion. The Pending Motion is fully incorporated by reference herein.

6. On October 26, 2023, Mr. Protopapas served a Notice of Videotaped 30(b)(6)

[1] Undersigned counsel certifies that the Receiver's counsel was consulted prior to the filing of this motion in an unsuccessful attempt to resolve these issues.

Deposition of The Continental Insurance Company (noticed for November 15, 2023) that included 24 separate topics of examination. See Exhibit B hereto.

7. As set forth more fully in the Pending Motion, the present third-party action unquestionably will be affected by the pending appeal. This action therefore is within the exclusive jurisdiction of the Court of Appeals and is automatically stayed pursuant to Rules 205 and 241.

8. SCRCP 26(c) provides that "upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which an action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense," including an order "that the discovery not be had . . .." Rule 26(c), SCRCP.

9. Discovery should not go forward against Continental until after a ruling has been issued on the Pending Motion. As discussed therein, discovery and other litigation activity should be stayed pending resolution of the appeal noticed by ACL, which has challenged the validity of the orders upon which the Receivership is based and thus the Receiver's standing to pursue third-party claims. In addition, broad-ranging and onerous discovery should not be permitted where the Court has not yet determined the threshold issues under Rule 12(b)(6), Rule 14(a), and other grounds in the Pending Motion that could limit or eliminate the need for discovery.[2]

10. This motion is based upon the foregoing, any memorandum of support that may be filed later, the statutes and case law of the State of South Carolina, the pleadings filed in this matter,

[2] Continental expressly preserves, and does not waive, any and all applicable objections to the discovery requests and deposition notice served by Mr. Protopapas, including without limitation objections based on: the attorney-client privilege, work product doctrine, common interest doctrine, and other applicable privileges or protections; the requests' lack of relevance, improperly broad scope, and vagueness; the duplicative and unduly burdensome nature of the requests; and the requests' demand for information that is proprietary and/or confidential.

and such other material as may be properly received by the Court in connection therewith.

WHEREFORE, for the foregoing reasons and others appearing in the record, Continental respectfully requests that the Court grant this motion and order that discovery in this third-party action against Continental, including the written discovery set forth in paragraph 4 above and the deposition set forth in paragraph 6 above, shall not go forward at this time.

Dated: November 2, 2023

GORDON REES SCULLY MANSUKHANI, LLP

By: *s/A. Victor Rawl, Jr.*

A. Victor Rawl, Jr. (SC 09261)
Email: vrawl@grsm.com
40 Calhoun Street, Suite 350
Charleston, SC 29401
Telephone: 843-278-5900

Counsel for Third-Party Defendant The Continental Insurance Company

SMITH ROBINSON
Forward thinking. Results driven.
Smith Robinson Holler DuBose and Morgan, LLC

COLUMBIA 2530 Devine Street, Columbia, SC 29205 P: 803.254.5445 F: 803.254.5007
SUMTER 126 N. Main Street, Sumter, SC 29151 P: 803.778.2471 F: 803.778.1643
CAMDEN 935 Broad Street, Camden, SC 29020 P: 803.432.1992 F: 803.432.0784

March 28, 2024

VIA Email Only:

Mr. A. Victor Rawl, Jr.
Gordon & Rees LLP
677 King Street, Suite 450
Charleston, SC 29403
vrawl@grsm.com

Mr. James H. Elliott, Jr.
Richardson Plowden & Robinson, PA
235 Magrath Darby Blvd, Suite 100
Mt. Pleasant, SC 29464
jelliott@richardsonplowden.com

Mr. Matthew Todd Carroll
Womble Bond Dickinson (US) LLP
1221 Main Street
Suite 1600
Columbia, SC 29201
todd.carroll@wbd-us.com

Mr. Steven James Pugh
Richardson Plowden & Robinson, PA
1900 Barnwell St.
Columbia, SC 29201
spugh@richardsonplowden.com

Mr. Stephen L. Brown
Clement Rivers, LLC
PO Box 993
Charleston, SC 29402
sbrown@ycrlaw.com

Dear Vic, Todd, James, Steven, and Stephen:

I am writing to advise that the Supreme Court confirmed yesterday, in an Order signed by all 5 justices (attached), that issues raised in your appeal are not immediately appealable. Additionally, the Court vacated a Court of Appeals decision denying sanctions against the parties and attorneys who have, after multiple warnings from the appellate courts, pursued these interlocutory and/or improper appeals. These issues are now back before the circuit court.

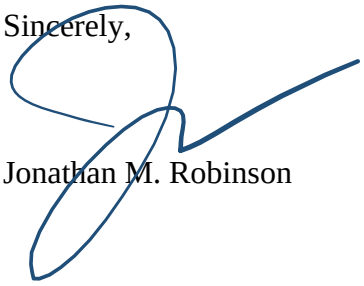
As you are aware, in the last 4 months you have collectively filed 16 appeals in the following cases:

1. Appellate Case No. 2023-002006
2. Appellate Case No. 2023-002007

3. Appellate Case No. 2023-002008
4. Appellate Case No. 2023-002009
5. Appellate Case No. 2023-002010
6. Appellate Case No. 2023-002011
7. Appellate Case No. 2024-000342
8. Appellate Case No. 2024-000348
9. Appellate Case No. 2024-000337
10. Appellate Case No. 2024-000341
11. Appellate Case No. 2024-002006 (second notice of appeal filed 3/19/2024)
12. Appellate Case No. 2024-002007 (second notice of appeal filed 3/19/2024)
13. Appellate Case Nos. 2024-002009, -002010, -002011 (second notice of appeal filed 3/19/2024)
14. Appellate Case No. 2024-_____ (notice of appeal filed 3/28/2024 in *Mitchell*)
15. Appellate Case No. 2024-_____ (notice of appeal filed 3/28/2024 in *Welch*)
16. Appellate Case No. 2024-_____ (notice of appeal filed 3/28/2024 in *Welch*)

As a courtesy, we are requesting you withdraw the improper appeals on or before close of business Monday, April 1, 2024. Please consider this notice a Rule 11 communication to the extent any such notice is required.

Sincerely,



Jonathan M. Robinson

JMR/dlf
Enclosure

The Supreme Court of South Carolina

Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers, Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories, Inc.; General Boiler Casing Company, Inc.; HEFCO, Inc.; J.R. Deans Company, Inc.; Payne & Keller Company; SFB, Incorporated; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; Defendants.

Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; and Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, Third-Party Plaintiffs,

v.

Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland All American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler; Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital

Corp.; Admiral Insurance Company; Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company; Hartford Accident and Indemnity Company; Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc.; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

Of which, Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, is the Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna

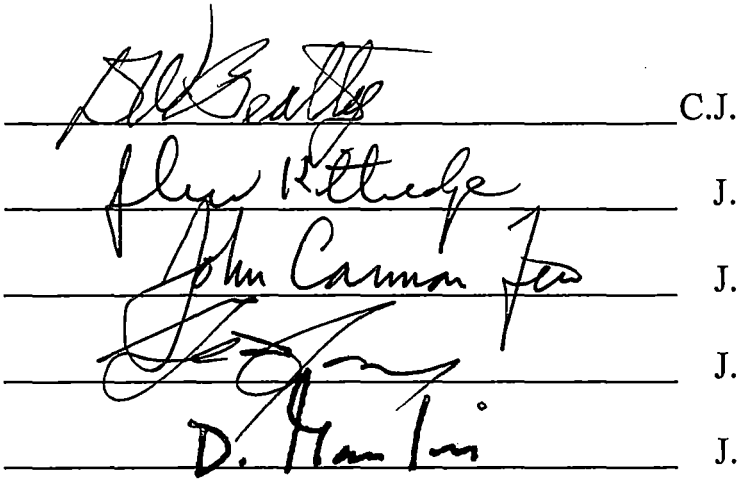
Casualty and Surety Company, are Appellants.

Appellate Case No. 2024-000005

ORDER

Appellant AIG Property Casualty Company (AIG) has filed a motion for certification of Appellate Case No. 2023-000727 pursuant to Rule 204(b), SCACR. Appellant Travelers Casualty and Surety Company has filed a motion joining AIG's motion for certification.

We grant the motion for certification and motion for joinder, dispense with further briefing, vacate the court of appeals denial of sanctions, and dismiss the appeal because the underlying circuit court order at issue is not immediately appealable.



C.J.

J.

J.

J.

J.

Columbia, South Carolina
March 27, 2024

cc:
Wesley Brian Sawyer
Brian Montgomery Barnwell
John Belton White, Jr.
Marghretta Hagood Shisko
Scott Shutte
Christopher Rutledge Jones

G. Murrell Smith, Jr.
Jonathan M. Robinson
Shanon N. Peake
Matthew Todd Carroll
Mary Elizabeth O'Neill
Harry Lee
The Honorable Jenny Abbott Kitchings

A. VICTOR RAWL, JR.
PARTNER
VRAWL@GRSM.COM
DIRECT DIAL: (843) 714-2501

GORDON&REES
SCULLY MANSUKHANI
YOUR 50 STATE PARTNER™

ATTORNEYS AT LAW
40 CALHOUN STREET, SUITE 350
CHARLESTON, SC 29401
WWW.GRSM.COM

April 1, 2024

VIA E-MAIL

Mr. Jonathan M. Robinson, Esquire
Smith Robinson
2530 Devine Street
Columbia, SC 29205
jon.robinson@smithrobinsonlaw.com

Re: *Welch and Mitchel* Appeals – Response to March 28, 2024 Letter

Dear Jon:

I hope you are doing well. I represent third-party 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. ("Certain London Market Insurers") (together, the "Appellants"), concerning appeals pending in *Welch and Mitchell*. I am in receipt of your letter dated March 28, 2024, which appears to demand that all parties challenging the propriety of the appointment of Mr. Protopapas as the receiver for several different active UK and Canadian corporations ("the Receiver") immediately dismiss all appeals. Appellants respectfully decline to voluntarily dismiss their appeals.

The Receiver's demand appears to be based on the Supreme Court order of March 27, 2024 ("Order"), which the Receiver suggests confirms that the appeals are somehow improper. However, the Order consists of a single sentence that provides no explanation of the ruling, no analysis of South Carolina Code § 14-3-330(4), and no explanation as to why that statute would be inapplicable to the appeals at issue. Moreover, the Receiver offers no analysis or argument of any kind as to how or why the Order would apply to appeals in other matters and/or why the Order would require dismissal of all pending appeals against the Receiver. Based on the plain language of South Carolina Code § 14-3-330(4) (as well as other reasons), the orders at issue in these other appeals are immediately appealable.

Further, the parties to the *Payne & Keller* appeal have a period of time under the Appellate Court Rules to seek clarification of the Order. Until the time to request rehearing has expired, there does not appear to be any reason for parties in other cases to voluntarily withdraw their respective appeals, especially as the consequences of doing so would be highly prejudicial. In addition, the *Payne & Keller* appeal contains issues that are materially different that the appeals at issue. After the time has run for rehearing, Appellants would be happy to consider any argument by the

Receiver as to how the present appeals may be impacted by the final resolution of the *Payne & Keller* appeal.

Finally, in addition to the above, Appellants adopt and incorporate by reference all arguments presented in response to your letter by the other recipients, and Appellants do not waive any of their objections or positions by responding to your letter.

As always, I am happy to discuss the above.

Sincerely,

GORDON REES SCULLY MANSUKHANI, LLP

A. Victor Rawl, Jr.

WOMBLE BOND DICKINSON

M. Todd Carroll
Direct Dial: 803.454.7730
Direct Fax: 803.381.9130
E-mail: todd.carroll@wbd-us.com

April 1, 2024

Via Electronic Mail Only
Mr. Jon Robinson
jon.robinson@smithrobinsonlaw.com

Re: Your Letter of March 28, 2024

Dear Jon:

We write on behalf of Travelers Casualty and Surety Company in response to your letter of March 28, 2024, in which the Receiver again threatens to seek sanctions if numerous parties do not voluntarily withdraw legitimate appeals. Respectfully, our client disagrees with several aspects of the Receiver's position as set forth in your correspondence. In addition to the below, our client adopts and incorporates by reference all arguments presented by the other recipients in response to your letter, and our client does not waive any of its objections or positions by responding to your letter.

Primarily, the Supreme Court order of March 27th contains no information, discussion, or analysis as to why the order on appeal in that case is not immediately appealable. Based on the plain language of South Carolina Code § 14-3-330(4), the order at issue in these cases are immediately appealable. Notably, the Receiver has never contended otherwise, and the Supreme Court's March 27th order did not explain how that statute is inapplicable here. The parties to the Payne & Keller appeal have a period of time under the Appellate Court Rules to seek clarification of the Supreme Court's March 27th order, and until that time has expired, there does not appear to be any reason for parties in other cases to voluntarily withdraw their respective appeals, as the consequences of doing so would be highly prejudicial.

Likewise, the issues raised in our client's appeals listed in your March 28th correspondence are materially different from those presented in the Payne & Keller matter. Without further explanation from the Receiver as to how the order in the Payne & Keller case can extend to other appeals that involve appealable issues different than those presented in Payne & Keller, our clients cannot agree to the voluntary withdrawal of any appeals.

Finally, we do not appreciate your client's continued threats of sanctions. They are baseless. Your client knows fully that our client is pursuing legitimate legal positions; each and every argument our client has presented in every case adverse to your client—regarding the merits, the procedure, the unconstitutionality of the proceedings, or otherwise—has been

supported by on-point statutes, cases, rules, or some combination thereof. The continuous threat of sanctions against our client if it does not simply submit to the Receiver's demands borders on the frivolous and is not a legitimate litigation tactic.

Respectfully,

/s/ M. Todd Carroll

cc: Counsel of Record

RECEIVED
Apr 03 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

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

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.; Bahnson, Inc.; Beaty 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,

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 Travelers Casualty and Surety Company f/k/a Aetna Life & Casualty Co., and The Continental Insurance Company are the Appellants.

PROOF OF SERVICE

I certify that a true copy of the Receiver for Asbestos Corporation Limited's Response Regarding Appealability and Supplemental Appendix in this case have been served on the following, this 3rd day of April, 2024, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (g)(3) of the South Carolina Supreme Court's March 20, 2020 Order, as amended May 29, 2020. Pursuant to subsection (g)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

Counsel Served: **E-Mail**

A. Victor Rawl, Jr.
Gordon & Rees LLP
677 King Street, Suite 450
Charleston, SC 29403
vrawl@grsm.com

Matthew Todd Carroll
Mary Elizabeth O'Neill
Womble Bond Dickinson (US) LLP
1221 Main Street, Suite 1600
Columbia, SC 29201
todd.carroll@wbd-us.com

elizabeth.oneill@wbd-us.com

Harry Lee (*admitted pro hac vice*)
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
hlee@steptoe.com

Attorneys for Appellant

Stephen L. Brown
James D. Gandy, III
Stephen A. Griffith, Jr.
Clement Rivers, LLP
PO Box 993
Charleston, SC 29402
sbrown@ycrlaw.com
tgandy@ycrlaw.com
sgriffith@ycrlaw.com

Attorneys for Respondent

John K. Chandler
jchandler@rplegalgroup.com
Brian M. Barnwell
bb@rplegalgroup.com
Rikard & Protopapas, LLC
PO Box 5640
Columbia, SC 29250

Attorneys for Receiver for Insurance Assets of Asbestos Corporation Ltd.

s/ Shanon N. Peake
SMITH ROBINSON, LLC
Shanon N. Peake (S.C. Bar #102723)
2530 Devine Street
Columbia, South Carolina 29205
(803) 254-5445

Counsel for the Receiver

April 3, 2024

From:	Dot Faulkenberry
To:	vrawl@grsm.com; "todd.carroll@wbd-us.com"; O"Neill, Elizabeth; hlee@steptoe.com; sbrown@ycrlaw.com; tgandy@ycrlaw.com; sgriffith@ycrlaw.com
Cc:	John Chandler; Brian Barnwell; Shanon Peake; Jon Robinson; Lindsay Valek; Murrell Smith
Subject:	Mitchell v 3M Company, etc. - Case No. 2024-000341
Date:	Wednesday, April 3, 2024 4:26:00 PM
Attachments:	The Receiver"s Response re Appealability ACL Mitchell, 2.pdf Supplemental App Index with attachments - Mitchell, 1.pdf

---

Please find attached for service a copy of the Receiver's Response Regarding Appealability and Supplemental Appendix that we are filing with the Court today.

Thank you,
Dot

SMITH ROBINSON
Forward thinking. Results driven.
Smith Robinson Holler DuBose and Morgan, LLC
www.SmithRobinsonLaw.com

Dot Faulkenberry
Paralegal

E: dot@smithrobinsonlaw.com
P: 803.254.5445
D: 803.704.1101
F: 803.254.5007

Columbia Office
2530 Devine Street
Columbia, SC 29205