

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Apr 11 2024

S.C. SUPREME COURT

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2023-000727
Circuit Court Case No. 2021-CP-40-03484

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. Dean
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.,
Payne & Keller Company, and PBI QSF, LLC, 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
American General Insurance Company, and Maryland Casualty
Company); Allstate Insurance Company; John Tighe; Sean
Anthony 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, Birmingham Fire 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, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman's Fund Insurance Company,

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, formerly known as 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 the.....

Appellants.

PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellants 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, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (collectively, “Appellants”) hereby submit this Petition for Rehearing as to this Court’s Order filed on March 27, 2024 (“March 27 Order”).

INTRODUCTION AND SUMMARY

In the March 27 Order, the Court granted Appellants’ request for certification and, without further briefing, dismissed their appeal “because the underlying circuit court order is not immediately appealable.” (Appx. p. 225). Appellants respectfully request rehearing on the ground that the March 27 Order “overlooked or misapprehended” (Rule 221(a), SCACR) that the underlying circuit court order concerning the receivership over Payne & Keller Company (“Payne & Keller”) was properly appealable pursuant to South Carolina Code § 14-3-330(4). That provision states that the Court “shall have appellate jurisdiction” and “shall review upon an appeal” an “interlocutory order ... granting, continuing, modifying, or refusing the appointment of a receiver.”

The March 31, 2023 Order by the Circuit Court (“Circuit Court Order”) that is the subject of this appeal did precisely that. It “continu[ed]” the appointment of a receiver, denying Appellants’ request to dissolve the receivership and dismiss the Receiver’s claims against Appellants. It also “modif[ied]” the receivership by changing the Receiver’s charge from taking all steps necessary to “protect the interests of Payne & Keller” to actively pursuing the undoing of Payne & Keller’s 1986 dissolution in Texas, opening the company up to liabilities that would

otherwise be barred by Texas's statute of repose. For these reasons, under South Carolina Code § 14-3-330(4), the Circuit Court Order is properly subject to review by this Court now.

Appellants were not parties to the original order by which the Circuit Court appointed the Receiver for Payne & Keller at the request of the underlying tort plaintiff. And because Payne & Keller is a Texas corporation that dissolved in 1986, no one was present to speak on its behalf. Thus, when the Receiver was appointed, there was no adversary process to test the merits of the appointment. Appellants' *only* means of challenging the Receiver's appointment was through their motion to dissolve it, which they filed after the Receiver sued them. If the receivership is invalid, then the Receiver lacks standing to pursue this third-party complaint against Appellants. By dismissing the appeal from the denial of the motion to dissolve, the March 27 Order effectively insulates the Receiver's appointment from immediate appellate review, contradicting the General Assembly's mandate that South Carolina courts must hear interlocutory appeals from orders concerning a receiver's appointment, whether they grant, continue, modify, or refuse the appointment of a receiver. The result is that Appellants will be forced to litigate against a receiver for a defunct Texas corporation even though Texas's Constitution and statute of repose prohibited suits by or against that dissolved company and the corporation has no property in this state. Appellants sought dissolution of the receivership on these grounds. The Circuit Court Order denied their request and permitted a suit against Appellants to continue that should not have existed. The Court should grant rehearing, vacate the March 27 Order, and hear this appeal on the merits.

Alternatively, the Court should grant rehearing and order full briefing and argument on this appeal, including the appealability issue. The issue of whether the Circuit Court Order is immediately appealable deserves a full vetting by this Court. It was addressed only in one paragraph in the Receiver's Return to Appellants' Motion for Certification, in which the Receiver

did not explain his rationale as to why the Circuit Court Order is not immediately appealable. *See* (Appx. p. 206). Appellants explained in their Reply to the Return why the Circuit Court Order is immediately appealable. (Appx. pp. 218-19). But the parties never fully briefed or argued the issue,¹ and the March 27 Order contains no explanation of the Court’s reasoning. Because of the volume of receivership proceedings in the Circuit Court, the issue of whether orders like these are appealable is likely to recur, and the Court should decide that issue on a complete record and in a reasoned opinion.

In addition, in seeking to defend his Texas domestication of a later order from the Circuit Court, the Receiver directly contradicted his position here that orders like these are not appealable. He argued that “South Carolina law provides a[] different treatment for orders in receivership actions,” allowing for their immediate appeal “because the status” and the “supervision is what’s important.” (Appx. p. 142, lines 5-23). If that is so, then the Circuit Court Order must be appealable now.

ARGUMENT

I. THE CIRCUIT COURT ORDER IS IMMEDIATELY APPEALABLE UNDER SOUTH CAROLINA CODE § 14-3-330(4).

A. By passing Section 14-3-330(4), the General Assembly recognized the importance of immediate access to appellate review of receivership-related orders.

South Carolina Code § 14-3-330(4) states the Supreme Court “shall have appellate jurisdiction” and “shall review upon appeal” an “interlocutory order . . . granting, continuing, modifying, or refusing the appointment of a receiver.” Thus, the General Assembly both authorized and mandated review of appeals from interlocutory orders on receivership

¹ The parties provided substantive memoranda on the appealability issue in response to a request from the Court of Appeals. After considering those memoranda, the Court of Appeals held that the appeal would proceed. (Appx. pp. 123-25).

appointments. And it did not limit that review just to orders granting or refusing appointments. It included broad and inclusive language stating that South Carolina’s appellate courts “shall review” any orders that grant, modify, continue, or refuse the appointment of a receiver. The four terms, collectively, encompass every step the Court can take with respect to a receivership: granting—creating a receivership; modifying—changing a receivership; continuing—refusing to dissolve or prolonging a receivership; refusing—denying a receivership in the first instance. At each step, the General Assembly deemed it necessary to guarantee appellate review. The plain wording of the statute sends the message that appellate review of a circuit court’s actions with respect to a receivership must be broadly available. By including this broad language in the statute, the General Assembly ensured that parties facing claims asserted by receivers, such as Appellants here, would have an immediate ability to challenge the existence of the receivership and access the appellate courts on those issues without having to wait for the entire case to be adjudicated. “[A]n adjudication of a receivership is a harsh and drastic remedy, one to be granted only with great caution....” *Penn Mut. Life Ins. Co. v. Cudd*, 172 S.C. 88, 172 S.E. 787, 788 (1934). Mandating prompt review of receivership orders ensures that this harsh and drastic remedy is not exercised erroneously.

Consistent with this goal, the South Carolina courts, including this Court, have repeatedly found that Section 14-3-330(4) authorizes review of interlocutory orders involving disputes over receiverships. See *Vasiliades v. Vasiliades*, 231 S.C. 366, 98 S.E.2d 810 (1957) (reviewing interlocutory order dissolving receivership even when other parts of the order on appeal were not yet reviewable); *Wrenn v. Wrenn*, 228 S.C. 588, 91 S.E.2d 267 (1956) (reviewing interlocutory order denying motion to appoint receiver); *Lyles v. Williams*, 96 S.C. 290, 80 S.E. 470 (1913) (reviewing interlocutory order denying appointment of a receiver and dissolving an injunction).

B. The Circuit Court Order continued and modified the Payne & Keller receivership and, thus, is subject to appellate jurisdiction.

Section 14-3-330 grants appellate jurisdiction over appeals of orders that continue or modify a receivership. The Circuit Court Order does both.

Appellants moved to dissolve the receivership for several reasons, including that: (1) Payne & Keller could not sue or be sued under Texas law because it had been dissolved since 1986; (2) a receivership in South Carolina over a Texas corporation that existed in Texas and was incorporated and ultimately dissolved under Texas law is not proper; (3) Payne & Keller did not own property located in South Carolina, and its out-of-state insurance policies are not property within the state sufficient to permit a receivership.²

Faced with these arguments, the Circuit Court had two options: (1) dissolve the receivership; or (2) continue it. The Circuit Court chose to continue it by denying Appellants' Motion to Dissolve. This decision falls squarely within the parameters for immediate appeal set forth in South Carolina Code § 14-3-330(4).

The Circuit Court Order also modified the receivership – another action that permits immediate appeal. A receiver's authority is only as broad as the orders authorizing his appointment. Here, the order appointing the receiver directed him to “take any and all steps necessary to protect the interests of Payne & Keller whatever they may be.” (Appx. p. 82). Instead of raising and preserving Payne & Keller's immunity from suit under Texas law, however, the Receiver opposed Appellants' Motion to Dissolve, arguing that Payne & Keller's dissolution was

² As to a foreign corporation, South Carolina law only permits appointment of a receiver “of the property within this State of foreign corporations.” S.C. Code § 15-65-10(4).

fraudulent and could be revoked.³ In the Circuit Court Order, the Court ruled that the Receiver had appropriately made this argument and could explore it “through the discovery process.” (Appx. p. 90). Thus, the Receiver’s charge changed from taking “any and all steps necessary to protect the interests of Payne & Keller whatever they may be” (Appx. p. 82) to actively pursuing an argument that Payne & Keller fraudulently dissolved as a means of opening the company up to liabilities from which it was protected under Texas’s statute of repose. It was not in Payne & Keller’s interest to attack the company’s dissolution and reopen it to otherwise-barred liabilities.

II. THE RECEIVER’S ARGUMENTS AGAINST APPEALABILITY ARE ERRONEOUS AND CONTRADICTORY.

In his Return to Appellants’ Motion for Certification, the Receiver cited to his filing in the Court of Appeals arguing that the appeal should be dismissed as interlocutory. *See* (Appx. p. 206 (citing May 15, 2023 Respondent’s Memorandum on Appealability (“Appealability Memo”))).

The Receiver’s Appealability Memo did not present any persuasive reasons for overlooking South Carolina Code § 14-3-330(4). For one, the Receiver argued that the provision allowing for appeals of orders “continuing” receiverships only applies 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.” (Appx. p. 108). But the General Assembly did not limit this provision to decisions that explicitly extend temporary receiverships.

³ The statute the Receiver relied upon to argue that Payne & Keller’s dissolution could be undone was enacted more than a decade after that dissolution, and Texas’s Constitution prohibits the retroactive application of statutes to resurrect barred claims. *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (1991) (“Thus, we have written that a statute extending the limitations period of a claim already barred by limitations violates the Texas Constitution’s prohibition against retroactive laws, which is article I, section 16.”). Moreover, although not at issue in this appeal, the Receiver lacked factual support for his arguments that Payne & Keller committed fraud when it dissolved. For instance, the Receiver never identified a single claim that went unpaid between 1986, when Payne & Keller dissolved, and 1989, when the statute of repose barred any claims against the company.

Rather, it applies to any orders “continuing” receiverships. The word “continue” means to “allow to remain in a place or condition.” See “Continue,” *Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/continue>. Under the plain meaning of the statute, an order refusing to dissolve a receivership and permitting a receiver to remain in place is an order “continuing” a receivership, and under Section 14-3-330(4), it is subject to immediate appeal.

The Receiver argues that Section 14-3-330(4) should be read more narrowly than its plain meaning. However, this Court has not adopted his view, as *Williams v. Northwestern Security Life Insurance Co.*, 307 S.C. 462, 464, 415 S.E.2d 809, 810 (1992), shows. In *Williams*, an insurer moved to dismiss a claim against it based on an order of liquidation and injunction issued by a North Carolina court. The trial judge denied the insurer’s motion, and the insurer appealed. The plaintiff argued that the denial of the motion to dismiss was an interlocutory order that was not immediately appealable. But this Court held that the order was immediately appealable because the denial of the insurer’s motion to dismiss had “in effect” refused the injunction from the North Carolina court. *Id.* at 464. Here, too, the Circuit Court Order denying dismissal undisputedly had the effect of “continuing” the receivership, and it is appealable.

Likewise, this Court accepted an appeal and reversed denial of a motion to vacate an injunction in *Zero Church v. Britton*, 188 S.C. 274, 198 S.E. 848 (1938). Section 14-3-330 uses the exact same language for when injunction orders and receivership orders may be appealed, i.e., orders “granting, continuing, modifying, or refusing.” Just like the orders in *Williams* and *Zero Church*, the Circuit Court Order denying dissolution of the receivership undisputedly had the effect of “continuing” the receivership, and it is appealable. To hold otherwise is contrary to this Court’s precedent.

Nor is the Receiver correct that the Circuit Court Order did not “modify” the Receivership. (Appx. pp. 105-06). The Order appointing the Receiver required him to “take any and all steps necessary to protect the interests of Payne & Keller whatever they may be.” (Appx. p. 82). In the Circuit Court Order, however, the Circuit Court permitted the Receiver to pursue a course of action seeking to revoke Payne & Keller’s dissolution as purportedly “fraudulent,” thereby eliminating its statute of repose defense under Texas law. That course of action could not possibly be in “the interests of Payne & Keller.” Indeed, because of the Receiver’s “fraud” argument, Payne & Keller has now been sued many times in recent months, in multiple jurisdictions, including by plaintiffs who had once dropped claims against the company. By allowing the Receiver to seek to undo Payne & Keller’s decades-ago dissolution and expose the company to this potential tort liability, the Circuit Court Order fundamentally modified the scope of the Receiver’s authority.

The Receiver’s argument that Appellants are not “aggrieved parties” similarly lacks merit. *See* (Appx. p. 110). Appellants are defendants in a third-party action filed by the Receiver, in which he seeks monetary and other relief against them. *See* (Appx. p. 61 ¶ 181 (seeking an order that Appellants must “compensate the Receiver”)). Appellants were the movants in the Motion to Dissolve, which the Circuit Court denied. Had the Circuit Court ruled in their favor, the Receivership would have been dissolved and the Receiver’s claims against Appellants would have been dismissed. Appellants are aggrieved by the Circuit Court Order.

In his Appealability Memo, the Receiver did not cite a single case holding that a party who is sued by a receiver is not aggrieved when its request for dismissal is denied. Indeed, although the Receiver relied on *Luckenbach v. Laer*, 190 Cal. 395, 212 P. 918 (Cal. 1923), *Luckenbach* noted that a party who is sued by a receiver has the right to challenge the receivership in that lawsuit. *See* 190 Cal. at 400 (“The question of the right of the receiver to maintain the action in the capacity

in which he sues is a question that must be determined in [that action].”). That is exactly what Appellants are doing here, and they are aggrieved by the denial of their Motion.⁴

Finally, the Receiver has now contradicted his own position that orders like the Circuit Court Order are not immediately appealable. After the Circuit Court accepted the Receiver’s argument that he could pursue revocation of Payne & Keller’s dissolution, the tort plaintiff—Lenora Childers—followed the Receiver’s lead and sought an order under Texas law revoking Payne & Keller’s dissolution, which the Circuit Court granted on October 5, 2023. The Receiver then took that Order to Texas and “domesticated” it by filing it with a Texas court. Appellant National Union sought to vacate the domesticated order, in part because it is not a final judgment. At a hearing on the Motion to Vacate, the Receiver’s attorney argued that orders in receivership actions are sufficiently “final” to justify domestication because they are immediately appealable:

THE COURT: ... Mr. Edwards, why do you believe that this is a final judgment?

MR. EDWARDS: Your Honor, the order is an order in ... “a receivership action.” ... *South Carolina law provides a[] different treatment for orders in receivership actions.* ... *You see that in the rules of appellate procedure and you’ve seen that in the appellate rulings in the Payne & Keller case in South Carolina. The reason for that, and I mentioned this briefly at our last hearing, is that a receivership is not a final outcome. It is a status of court supervised management.* ... *And so you see in the South Carolina rules exceptions for purposes of appeal, exceptions for purposes of stay for matters like receiverships, accountings and injunctions because the status is what’s important. The supervision is what’s important.*

(Appx. p. 142, lines 3-23) (emphasis added).⁵

⁴ Certain Appellants are also defendants in two other lawsuits filed by the Receiver in the Circuit Court.

⁵ The Texas trial court did not rule on the motion to vacate and that court’s jurisdiction over the domesticated order expired as a matter of law. The appeal concerning the domesticated order is pending in the Texas Court of Appeals. Appellants’ motion to vacate and to reconsider the October 5 order remains pending before the Circuit Court.

Thus, the Receiver has told a Texas Court that an order entered in this receivership action is immediately appealable and therefore “final” such that it can be domesticated in another state.⁶ Yet in this Court, he is arguing that the Circuit Court Order is an interlocutory order that is not immediately appealable, relying on the very same statute before both courts. The Receiver cannot have it both ways. He cannot represent to the Texas courts that receivership orders are immediately appealable in South Carolina and then tell this Court that no appeal is permitted. The General Assembly decided that issue when it passed Section 14-3-330(4). Under that statute, although the Circuit Court Order is interlocutory and not final, it is immediately appealable under South Carolina Code § 14-3-330(4) because it concerns the status of the receivership.

CONCLUSION

The Court should grant rehearing, vacate the March 27 Order, and hear this appeal on the merits. Alternatively, the Court should grant rehearing and order full briefing and argument on this appeal, including whether the Circuit Court Order is appealable.

Respectfully submitted,

s/ Wesley B. Sawyer

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⁶ To be clear, Appellants have never contended that the Circuit Court Order is appealable because it is a “final” order or judgment. Rather, Appellants have always argued that Section 14-3-330(4) specifically states that this type of interlocutory order is immediately appealable. *See* S.C. Code 14-3-330(4) (stating that the Supreme Court shall have appellate jurisdiction and shall review “an interlocutory order or decree . . . continuing [or] modifying . . . the appointment of a receiver”) (emphasis added).

of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company

April 11, 2024