

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
For the Fifth Judicial Circuit
The Honorable Jean H. Toal,
Acting Circuit Court Judge

RECEIVED
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SC Court of Appeals

Civil Action No. 2023-CP-40-01759

Appellate Case Nos.
2023-002006
2023-002007
2023-002008
2023-002009
2023-002010
2023-002011

John A. Tibbs and Margaret B. Tibbs,

Plaintiffs,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Hesterton 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.; Beatty 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.; Lowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services; Orporation 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, Incl; 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; and Zurn Industries, LLC,

Defendants,

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.; DeBeers PLC; DeBeers Centenary AG; DeBeers Consolidated Mines Ltd.; DeBeers S.A.; DeBeers UK Ltd.; DeBeers Jewelers US, Inc.; Angle 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 (USA) Jewelry Inc.; Forevermark US Inc.; Anglo American Crop Nutrients (USA), 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 SAS; Sparrows Offshore Group Ltd.; Hawk Bidco US Inc.; Arranco US, LLC; Sparrows Offshore, LLC; 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 the

Appellants.

**OPPOSITION TO MOTION TO
DISMISS INTERLOCUTORY APPEALS**

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules (“SCACR”), Third-Party Defendants/Appellants Anglo American plc, De Beers plc, De Beers Consolidated Mines Proprietary Limited, De Beers Centenary AG, and De Beers UK Limited (“Appellants”) respectfully submit this memorandum of law in opposition to the Motion to Dismiss Interlocutory Appeals (the “Motion” or “Mot.”) filed by Third-Party Plaintiff/Appellee Peter D. Protopapas, in his purported capacity as receiver for Cape plc (“Appellee”), on April 16, 2024.

I. The *Childers* Order Does Not Require Dismissal of the Instant Appeals.

In his Motion, Appellee asserts that the South Carolina Supreme Court’s March 27, 2024 memorandum opinion in *Childers v. Davis Mechanical Contractors, et al.*, No. 2024-000005 (the “*Childers* Order”) holds “decisively” that orders denying motions to dissolve a receivership are not immediately appealable. (Mot. at 3–4.) This is not true.

The *Childers* Order, which is three sentences long, provides only that “the underlying circuit court order at issue [in *Childers*] is not immediately appealable.” While the underlying order in that case may have concerned a motion to dissolve a receivership, the *Childers* Order does not discuss the facts and circumstances upon which that order was based, the procedural history of the case, or the reasoning for the Supreme Court’s decision. Nor does the *Childers* Order on its

face establish a categorical rule against interlocutory appeals of orders denying motions to dissolve a receivership to be applied in all other cases, as the Receiver suggests.

Moreover, because the *Childers* Order is a memorandum opinion and not a published decision of the Supreme Court, it has no precedential value and therefore does not control the disposition of the instant appeals. *See* Rule 220(a), SCACR (memorandum opinions “shall be of no precedential value”); Rule 220(b)(1), SCACR (“The Supreme Court may file a memorandum opinion dismissing an appeal . . . when, in unanimous decision, the Supreme Court determines that a published opinion would have no precedential value . . .”).

II. The Circuit Court’s December 6 Order Is Immediately Appealable as an Order Granting or Modifying a Receivership.

Even if the *Childers* Order were controlling as to the immediate appealability of an order denying a motion to dissolve a receivership (which it is not, for reasons discussed above), the instant appeals still would be properly before this Court on an independent ground: the order on appeal not only denied the Third-Party Defendants’ motions to dissolve the receivership, but also modified the receivership and granted a new receivership over a different entity in a different lawsuit. Indeed, prior to entering the December 6, 2023 order denying the Third-Party Defendants’ motions to dissolve the receivership and motions to dismiss for lack of personal jurisdiction (the “December 6 Order”), the Circuit Court had never appointed a receiver over Cape Intermediate Holdings Limited (“CIHL”), the entity purportedly in receivership in this action. Instead, the Circuit Court had appointed Appellee receiver over a different entity, Cape plc. Moreover, prior to entering the December 6 Order, the Circuit Court had never placed any entity (Cape plc, CIHL, or otherwise) into receivership in the *Tibbs* action, and had only appointed Appellee receiver over Cape plc in the unrelated *Park* action. Despite the fact CIHL and Cape plc were two separately named defendants in the *Park* action, and the fact the *Park* appointment order only applied to Cape

plc, Appellee purports to have filed the Third-Party Complaint in the *Tibbs* action as receiver for CIHL based on his appointment in the unrelated *Park* action as receiver for Cape plc. Appellee's "bait and switch" from being receiver for Cape plc in *Park* to receiver for CIHL in *Tibbs* formed one of the bases for the Third-Party Defendants' motions to dissolve.

In his opposition to the motions to dissolve, Appellee argued that if the Circuit Court agreed there was a factual and legal disconnect between the entity placed into receivership in *Park* (Cape plc) and the entity for which he purports to act as receiver in *Tibbs* (CIHL), the Circuit Court could simply "amend" the appointment order entered in the *Park* action to "clarify" that Appellee is receiver over CIHL in the *Tibbs* action. See Third-Party Plaintiff's Omnibus Opposition to Motions to Dissolve, filed October 18, 2023, at 17 n.13 ("The Court can simply amend the Appointment Order to clarify . . . if the Court finds that appropriate."), 20 n.15 ("The Receiver would have no objection to the Court's amendment of the Appointment Order to identify Cape Intermediate Holdings Ltd., if the Court finds that appropriate.").

In its December 6 Order (which was written by Appellee), the Circuit Court "clarified" that "the Cape entity for which the Receiver has been appointed" in the *Tibbs* action is CIHL, the "130-year-old entity [that] is alleged to have sold most of the blue (crocidolite) and brown (amosite) asbestos in the United States and in South Carolina," and not Cape plc, the "new entity allegedly created in the Bailiwick of Jersey in April 2011." See December 6 Order at 16–17. The "new" Cape plc, however, was the only entity placed into receivership in the *Park* action, as CIHL was a separately named defendant in the *Park* action but was not subject to an appointment order.

In short, the December 6 Order was the first time the Circuit Court identified CIHL, as opposed to Cape plc, as the entity that purportedly has been placed into receivership in the *Tibbs*

action.¹ That order, therefore, constitutes an order both modifying the existing receivership appointment order (which was limited to Cape plc) and granting a new receivership over a different entity, CIHL, in a different lawsuit, *Tibbs*.²

Both orders granting receiverships and orders modifying receiverships are immediately appealable. *See* S.C. Code Ann. § 14-3-330(4) (“The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal . . . [a]n interlocutory order or decree in a court of common pleas . . . *granting*, continuing, *modifying*, or refusing the appointment of a receiver.” (emphasis added)). Regardless of what occurred in the *Childers* action, which does not involve any of the Appellants, that case would not dictate whether the facts and circumstances in *this* case make the December 6 Order subject to immediate appeal. For the reasons set forth above and in section III, *infra*, the instant appeals are properly before this Court, and Appellee’s Motion should be denied.

III. The Court Has Discretion to Hear Appeals of the Circuit Court’s Order Denying Appellants’ Motions to Dismiss for Lack of Personal Jurisdiction.

In his Motion, Appellee suggests that Appellants’ appeals of the Circuit Court’s order denying their motions to dismiss for lack of personal jurisdiction also are procedurally improper. (*See* Mot. at 3–4). Appellee is incorrect. South Carolina appellate courts have long “made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately

¹ Appellee recently corroborated his and the Circuit Court’s intention to place CIHL into receivership in his responses to Appellants’ discovery requests. (*See* Appellee’s Response and Objections to De Beers Consolidated Mines Proprietary Limited’s First Set of Interrogatories, Interrogatory No. 7, attached hereto as **Exhibit A**, identifying the “entity at issue and in receivership” in the *Tibbs* action as “Cape PLC, n/k/a Cape Intermediate Holdings Ltd.” (emphasis added)).

² If the December 6 Order does not constitute an order modifying the *Park* appointment order and granting a receivership over CIHL, then Cape plc, and not the “130-year-old entity” whose conduct is alleged to form the basis for the Third-Party Complaint, remains the only Cape entity that has been placed into receivership in either the *Park* action or the *Tibbs* action.

appealable when these appeals are companion to issues that are reviewable.” *Brown v. Cnty. of Berkley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (citing *Pitts v. Jackson Nat’l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 512 (Ct. App. 2002)); *see also, e.g., Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (“An order that is not directly appealable may be considered if there is an appealable issue before the court.” (citing *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001))); *Morris v. Anderson Cnty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (“[T]his Court may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation.”).

Here, because the portion of the December 6 Order denying the Third-Party Defendants’ motions to dissolve the receivership is immediately appealable, *see supra* section II, the Court may exercise its discretion to also hear Appellants’ appeals of the portion of the same December 6 Order denying their motions to dismiss for lack of personal jurisdiction. Indeed, the instant appeals present a paradigm case where exercising discretion to hear an appeal not otherwise directly appealable will promote judicial economy and avoid unnecessary litigation. *See Edge*, 366 S.C. at 517, 623 S.E.2d at 390; *Morris*, 349 S.C. at 610, 564 S.E.2d at 651. Both issues on appeal—the validity of the purported receivership over CIHL, and whether Appellee made a *prima facie* case for the exercise of specific jurisdiction over Appellants—are fundamental to whether Appellee can pursue his claims against Appellants before the Circuit Court, and a decision in favor of Appellants on either issue will result in immediate dismissal of the action (either because Appellee lacks authority to bring third-party claims on behalf of CIHL, or because the Circuit Court lacks personal jurisdiction over Appellants). Accordingly, this Court should exercise its

discretion to hear Appellants’ appeal of the Circuit Court’s order denying their motions to dismiss for lack of personal jurisdiction. *See, e.g., Edge*, 366 S.C. at 517, 623 S.E.2d at 390 (exercising discretion to hear cross-appeal of order denying motion to dismiss that was otherwise not directly appealable, reasoning that considering the cross-appeal would “avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy)”).³

IV. Appellants Adopt the Arguments of the Other Third-Party Defendants/Appellants in Opposition to Appellee’s Motion.

To the extent not inconsistent with the arguments raised in this opposition brief, Appellants respectfully adopt and join in the arguments raised by the other Third-Party Defendants/Appellants (*see* Mot. at 3 n.1) in their oppositions to Appellee’s Motion.

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³ In his recently served discovery responses, Appellee objected to discovery on jurisdictional issues on the basis that the Circuit Court had already decided in its December 6 Order that Appellants are subject to personal jurisdiction in this case. (*See* Appellee’s Response and Objections to De Beers plc’s First Set of Interrogatories, Interrogatory Nos. 17–19, attached hereto as **Exhibit B**). Appellants contest that assertion, as they have the right to reassert their challenge to personal jurisdiction at summary judgment and trial, and are not confined to only challenging jurisdiction on the pleadings. However, to the extent this Court finds the December 6 Order represents the final judgment of the Circuit Court with respect to personal jurisdiction, as Appellee now seems to argue to avoid having to produce discovery relating to alleged contacts of Appellants with South Carolina, that portion of the order would be immediately appealable. *See* Rule 201, SCACR. In such case, this Court could exercise discretion to hear appeals of the Circuit Court’s order denying the motions to dissolve regardless of whether that order “modified” or “granted” the appointment of a receivership as contemplated by S.C. Code Ann. § 14-3-330(4). Appellee cannot have it both ways and try to avoid his discovery obligations before the Circuit Court by arguing the issue of personal jurisdiction has been definitively decided, while arguing before this Court that Appellants’ jurisdictional appeal is an improper interlocutory appeal that the Court does not need to entertain on the merits.

**RICHARDSON PLOWDEN
& ROBINSON, P.A.**

/s/ James H. Elliott, Jr.

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