

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

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

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

Plaintiff,

v.

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

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

Asbestos Corporation Limited, By and Through Its Duly Appointed Receiver Peter D. Protopapas,..... Third-Party Plaintiff/ Respondent,

v.

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

of which

The Continental Insurance Company is the Appellant.

PETITION FOR REHEARING BY THE CONTINENTAL INSURANCE COMPANY

Respectfully submitted,

Dated: April 29, 2024

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INTRODUCTION

Appellant The Continental Insurance Company (“Continental”) hereby petitions this Honorable Court for rehearing of its Order dated April 12, 2024 (the “April 12 Order”), which dismissed this appeal and denied Continental’s unopposed motion to enforce Rule 205, SCACR. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Continental respectfully submits that the April 12 Order overlooked or misapprehended several critical points.

First, the April 12 Order cited and relied upon an unpublished order by the South Carolina Supreme Court in another case, *Childers v. Davis Mech. Contractors, Inc.* (S.C. Sup. Ct. Order dated Mar. 27, 2024). Under Rule 268(d)(2), SCACR, such orders “have no precedential value and should not be cited except in proceedings in which they are directly involved.” Moreover, because the Supreme Court’s unpublished *Childers* order contains no explanation of the Supreme Court’s rationale or basis for its ruling in that case, it provides no ground in any event for determining that the same ruling is required in the present matter.

Second, the April 12 Order cited and relied on decisional law addressing the appealability of denials of various types of motions to dismiss or strike and discovery motions. None of the cited decisions involved motions based on Rule 205, SCACR. This omission is critical because the motions at issue in this appeal raised -- first and foremost -- this Court’s exclusive jurisdiction under Rule 205. Because Rule 205 is supposed to be self-executing and does not identify the procedure to be followed when a circuit court proceeds in violation of the Court’s exclusive jurisdiction, authority as to other types of motions to dismiss is not dispositive or relevant. *See Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461, 464 n.4 (2013) (stating that whether an order is immediately appealable requires focusing “on substance rather than nomenclature”).

Third, the April 12 Order denied without explanation Continental’s Motion to Enforce Exclusive Jurisdiction under Rule 205, SCACR. No return was filed by the Respondents and thus no party disputed that the ongoing litigation against Continental is “affected by” the appeal of Asbestos Corporation Limited (“ACL”) that is currently pending in this Court. Although the April 12 Order noted the lack of a return, the Court appears to have overlooked that Continental’s “affected by” position was not controverted. Denial of the Motion to Enforce Exclusive Jurisdiction under these circumstances was improper because the terms of Rule 205 are mandatory as to matters “affected by” a pending appeal and provide for no exceptions.

For these reasons, and as discussed more fully below, rehearing of this matter is warranted and should be granted.

BACKGROUND

This matter arises from an asbestos personal injury action, *Mitchell v. 3M Co., et al.*, No. 2022-CP-40-02979 (Richland Cnty., South Carolina). On May 17, 2022, Plaintiff filed an Amended Complaint in *Mitchell* that included ACL. The Amended Complaint alleges injury as a result of exposure to asbestos and asserts that Atlas “is liable for damages stemming from its own tortious conduct[.]” Complaint, ¶13.

On September 8, 2023, the circuit court in another asbestos action, *Tibbs v. 3M Company, et al.*, No. 2023-CP-40-01759 (Cir. Ct. – Richland Cty., S.C.), entered two orders regarding ACL – an active Canadian corporation. By its Order of September 8, 2023, the circuit 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 circuit court appointed Peter D. Protopapas as Receiver for ACL to “marshal all of the available insurance assets” for ACL and take other actions specified in the order (“Receivership Order”). The Receivership Order stated that

the Receiver was granted the power and authority to, among other things, “assume control of the defense of asbestos claims made against ACL in the United States” and administer “any claims related to the actions or failure to act of ACL insurance carriers” Receivership Order, 6.

As the basis for the Receivership Order, the circuit 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 circuit court further found that “where there is active wrongdoing and illegal refusal to comply with this Court’s orders, the appointment of a receiver is appropriate.” *Id.*

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

Nevertheless, on September 19, 2023, Mr. Protopapas filed a Third-Party Complaint in the *Mitchell* action that relied entirely upon his appointment as receiver under the Receivership Order in *Tibbs*. The Third-Party Complaint asserts three causes of action against four insurers alleged to have issued policies insuring ACL that are “responsive to this lawsuit.” TPC, ¶¶9, 15, 21, 27. It seeks declarations requiring the third-party defendants to compensate him “for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants’ policies and to further declare that this obligation is unlimited.” *Id.* ¶48. It also seeks, among other things, an array of abstract, hypothetical, and contingent

declarations that do not present a specific, concrete matter for judicial resolution. *Id.* ¶¶38-39 & Prayer for Relief.

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

On February 26, 2024, the circuit court entered orders that denied all of the third-party defendants' motions in their entirety. On March 27, 2024, Continental appealed the February 26, 2024 orders. Likewise, on April 1, 2024, Continental filed with this Court a Motion to Enforce Exclusive Jurisdiction. Without any motion to dismiss the appeal or any return to the Motion to Enforce being filed by the Respondents, the Court entered its April 12 Order dismissing the appeal as not immediately appealable and denying the Motion to Enforce Exclusive Jurisdiction.

The April 12 Order stated noted that the appeal arose from "an order of the circuit court denying Appellants' motions to dismiss and to dissolve the receivership, as well as an order denying Appellants' motions for protection from discovery." April 12 Order, 1-2. It then stated, "[t]hese orders are not immediately appealable." *Id.*, 2. To support this statement, the Order cited eight decisions.

Only one of these citations related to the appeal of the denial of a motion to dissolve a receivership. This citation was to the Supreme Court's unpublished order in *Childers v. Davis Mech. Contractors, Inc.* (S.C. Sup. Ct. Order dated Mar. 27, 2024). In that case, involving a different receivership and different circumstances, the Supreme Court's order *in its entirety* stated as follows:

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.

Childers v. Davis Mech. Contractors, Inc. (S.C. Sup. Ct. Order dated Mar. 27, 2024), at 2.

The remaining citations in the April 12 Order were to decisions that involved appeals of denials of a motion to dismiss, motion to strike, or discovery motion. The motions to dismiss at issue in these decisions were premised on Rule 12(b)(6), SCRCR, lack of subject matter jurisdiction, and lack of personal jurisdiction. None of these decisions cited by the April 12 Order involved motions based on Rule 205, SCACR.

The April 12 Order concluded by noting that Continental had filed a motion to enforce the Court's exclusive jurisdiction over this matter pursuant to Rule 205. As to this motion, the April 12 Order simply stated "Respondents did not file a return. The motion is denied." It provided no further explanation and cited no authority in support of the denial.

ARGUMENT

I. The Supreme Court’s Unpublished *Childers* Order Provides No Basis For Dismissing This Appeal Of The Circuit Court’s Order Continuing The Appointment Of A Receiver

The April 12 Order relied exclusively on the Supreme Court’s unpublished Order in *Childers* to rule that the circuit court’s denial of a motion to dissolve receivership was not immediately appealable. However, under Rule 268(d)(2), SCACR, “unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.” The Court’s reliance upon this non-precedential order in itself warrants a rehearing so that this appeal may be fully considered in this case under applicable precedent.

In addition, even if the *Childers* order could be considered, it would not dictate the result in this action. The Supreme Court’s order provided only a statement of its ruling -- “We . . . dismiss the appeal because the underlying circuit court order at issue is not immediately appealable.” It did not discuss the rationale for this ruling. It did not refer to the factual circumstances or the bases in statutory or decisional law that led to this ruling. The Supreme Court order, saying simply that the circuit court order “at issue” in *Childers* could not be immediately appealed, thus provides no guidance for other cases.

Under these circumstances, this *Childers* order should not be interpreted as establishing *sub silentio* a new precedential rule that is never stated therein – that the denial of any motion to dissolve any receivership cannot be immediately appealed. Any such rule would be contrary to South Carolina Code §14-3-330(4), which creates appellate jurisdiction and requires review upon appeal of “[a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing the appointment of a receiver.” Here, the Court should fully consider application of this statute to the circumstances of this appeal. Continental submits that because

any order “continuing” the appointment of a receiver is immediately appealable and because the circuit court’s order continued the appointment of the receiver in multiple ways, this appeal is proper.

II. The April 12 Order Relied On Decisions That Did Not Involve Motions Based On Rule 205

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).

By its terms, Rule 205 is self-executing and does not identify a procedure to be followed when a circuit court proceeds in violation of this Court’s exclusive jurisdiction. Continental accordingly followed the approach that appeared to be suggested by this Court’s November 21, 2023 order in *Childers v. Davis Mechanical Contractors, Inc., et al.*, Appellate Case No. 2023-000727 (S.C. Ct. of App.). See Motion for Exclusive Jurisdiction, at 3 n.3. The April 12 Order nevertheless dismissed the appeal, including with respect to the aspects of the appealed order that addressed Rule 205. It did so on the basis of prior decisions addressing a motion to dismiss, motion to strike, or discovery motions on a variety of grounds. None of these grounds involved -- as in the present matter -- the issue of this Court’s exclusive jurisdiction under Rule 205. The Court

thus appears to have misapprehended the scope of the prior authority cited in the April 12 Order. Rehearing is therefore warranted to allow full consideration of the issues presented by motions and orders that involve Rule 205 as a matter of substance. *See Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461, 464 n.4 (2013) (stating that whether an order is immediately appealable must focus on “substance rather than nomenclature”); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539-40, 773 S.E.2d 144, 147 (2015) (stating the court is “free to evaluate the trial court’s order as what it is -- not merely what it appears to be – and hold that it is one which is immediately appealable”).

III. The April 12 Order Denied Continental’s Motion To Enforce Exclusive Jurisdiction Even Though It Was Uncontroverted That This Matter Will Be “Affected By” ACL’s Pending Appeal

Continental’s Motion to Enforce Exclusive Jurisdiction set forth in detail the manner in which the ongoing litigation against Continental will be “affected by” ACL’s appeal challenging the receivership appointment of Mr. Protopapas within the meaning of Rule 205. The Respondents did not file a return to Continental’s Motion prior to the issuance of April 12 Order. As such, they did not dispute the effect that ACL’s challenge to the receivership would have if successful. Nor could they, for the third-party action was expressly brought by Mr. Protopapas as “duly appointed receiver for ACL.” Rule 205, as set forth above, is mandatory and provides for no exceptions with respect to “matters . . . affected by the appeal.” Under these circumstances, the denial of Continental’s Motion was unwarranted and should be further considered upon rehearing.

CONCLUSION

Continental respectfully requests the Court rehear its April 12 Order, reinstate this appeal, and decide this matter on its merits after full briefing and oral argument.

April 29, 2024

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned of the law offices of Gordon Rees Sculls Mansukhani LLP, attorneys for Appellant The Continental Insurance Company do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Petition for Rehearing by The Continental Insurance Company

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April 29, 2024