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 Nos. 2023-002006 and 2024-000524
Circuit Court Case No. 2023-CP-40-01759

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.; 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.; 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,

of which

Asbestos Corporation Limited is the..... Appellant,

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 and Altrad Investment Authority SAS are the..... Appellants.

ALTRAD DEFENDANTS' PETITION FOR REHEARING

The Court's order dismissing this appeal confirms precisely why this appeal is proper and should not be dismissed. The Court characterized the ruling below as one "granting the receiver's motions to compel discovery." It is facially true that the order on appeal authorized discovery, and "discovery" is not the subject of the appeal. The appeal is on the question of authority of the Receiver to continue functioning in ***any*** capacity—inside of litigation, or outside of litigation. And that is exactly why that order is immediately appealable under South Carolina Code § 14-3-330(4). That statute vests the Altrad Defendants with the right to immediately appeal an order that "refus[es]" their request for an injunction on ***all*** receivership activity as a matter of law.

The General Assembly's choice of the phrase "refusing an injunction" to describe what orders are immediately appealable indicates an obvious intent to allow for immediate review of an order like the instant one that tries to pocket veto an injunction request but then authorizes conduct by an adversary that is, by definition, contrary to the requested injunction. If no appeal is allowed here, then courts in South Carolina can simply ignore motions for injunctions, deny them under a different name, and the aggrieved party will never get the interlocutory appeal guaranteed by statute. It is no surprise, then, that the case law controlling this issue is directly contrary to the Court's dismissal order. *See, e.g.*, *Gray Line Motor Tours, Inc. v. New Orleans*, 498 F.2d 293, 296 (5th Cir. 1974) ("If, for example, an action has the effect of denying the requested relief without actually making a formal ruling, then the refusal of the district court to issue a specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable [under 28 U.S.C. § 1292(a)(1), which uses the same language as S.C. Code Ann. § 14-3-330(4)].").

To be clear: This is not an interlocutory "discovery" appeal, whereby the Altrad Defendants seek immediate review of the scope of a discovery request or something else related to discovery under Rules 26 through 37 that would typically be unreviewable absent a contempt finding. This is obvious because the Altrad Defendants took the unprecedented step of filing their opening brief and designation of matter concurrently with their notice of appeal so that the Court could see exactly what the true issue on appeal is: "Did the circuit court err by exercising jurisdiction it no longer has and ***by failing to enjoin the receiver's conduct pending appeal***?" (Injunction Appeal Opening Br. at 1 (filed Mar. 19, 2024) (emphasis added).)

Contrary to the characterization of the issue recited in the Court dismissal order, this appeal goes to the very heart of the Rule of Law. The circuit court has unlawfully appointed a receiver over an active, foreign company that had no notice of the potential receivership and in no way is subject to the jurisdiction of a South Carolina state court. And the purpose of the appointment is a mystery. Cape PLC was never served with anything in the case from which the initial appointment arises, and Cape Intermediate Holdings Limited is a going concern in the United Kingdom that has no connection to South Carolina: it has no property in South Carolina, has no creditors in South Carolina, is not subject to any judgment in South Carolina, and is not even a party to the *Tibbs* case from which this third-party action arises. Truly, virtually everything about the appointment violates the United States Constitution and South Carolina law as explained in the Altrad Defendants' opening brief in the appeal regarding the appointment order. (Appointment Appeal Opening Br. at 10–47 (filed Feb. 22, 2024).)

The impropriety of the Receiver's appointment is currently pending for appellate review. During that appeal, Rule 205, SCACR, strips jurisdiction from trial courts over any matter that is affected by the appeal—including the Receiver's very authority to operate. That rule provides:

> 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.

The rule is clear on its face: Any issue that is involved with an appeal is within the "exclusive jurisdiction" of the appellate court, which necessarily renders all such issues beyond the reach of the circuit court's jurisdiction. *See Morris v. Morris*, 295 S.C. 37, 40, 367 S.E.2d 24, 26 (1988) ("This Court has exclusive jurisdiction over an appeal upon the service of a Notice of Intent to Appeal."); *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 112, 576 S.E.2d 191, 197 (Ct. App. 2003) ("Circuit courts generally lose subject matter jurisdiction of a case when a notice of appeal is filed and served."); *Binkley v. Burry*, 352 S.C. 286, 294, 573 S.E.2d 838, 843 (Ct. App. 2002) ("Once an appeal is filed, the appellate court has exclusive jurisdiction over the matter."); Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 121 (3d ed. 2016) (confirming that "[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal").

A jurisdictional prohibition renders the circuit court without power to act. *See, e.g.*, *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) ("Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause." (quoting 32A Am. Jur. 2d *Federal Courts* § 581 (2007))).

And that is exactly how courts have enforced Rule 205 when a circuit court does anything that touches on an issue that is already pending on appeal. The South Carolina Supreme Court has repeatedly warned circuit courts to stand down when a matter is on appeal. *See, e.g.*, *Lancaster v. Ga.-Pac. Corp.*, 403 S.C. 136, 137–38, 742 S.E.2d 867, 868 (2013) ("Pursuant to Rule 205,

SCACR, upon the service of a notice of appeal, the appellate Court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court. . . . [W]e hereby remind the bench and bar that action on a settlement may not be taken by the lower court, except with regard to matters not affected by the appeal, while the matter is pending before this Court."); *Grosshuesch v. Cramer*, 377 S.C. 12, 31 n.7, 659 S.E.2d 112, 122 n.7 (2008) ("We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal.").

Time after time, when circuit courts ignore that warning outside of the context of asbestos litigation, both the Supreme Court and this Court have deemed circuit court orders void *ab initio*. *See, e.g.*, *Arnal v. Fraser*, 371 S.C. 512, 517–23, 641 S.E.2d 419, 421–24 (2007) (conducting matter-by-matter analysis of lower court rulings; voiding *ab initio*, "for lack of jurisdiction," those rulings that were affected by the matter on appeal; and noting that, per Rule 205, "the lower court may not act or issue orders that affect an issue on appeal"); *Wingate v. Wingate*, 289 S.C. 574, 575, 347 S.E.2d 878, 878 (1985) (holding that a family court's order reducing alimony payments "is void" because "alimony was an issue on appeal from the divorce decree" and "this Court had exclusive jurisdiction over the alimony issue"); *Wilson v. Walker*, 340 S.C. 531, 540, 532 S.E.2d 19, 23 (Ct. App. 2000) (vacating a contempt order "for lack of jurisdiction" because the trial court issued it while an earlier order on which the contempt order was based was on appeal).

And the Supreme Court has reiterated that Rule 205's scope is broad and removes circuit court jurisdiction over anything that might affect an issue on appeal. Consider *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016).

There, the Supreme Court was asked to reverse its prior ruling in *Epstein v. Brown*, 363 S.C. 372, 382–83, 610 S.E.2d 816, 821 (2005), where a 3–2 court held the statute of limitations

for a legal malpractice claim begins the moment a client knows or should know she has a claim against her counsel, regardless of the pendency of an appeal. In *Stokes-Craven*, the Court initially reversed *Epstein*, and it did so based on its view of a 1994 opinion from the Oklahoma Court of Appeals. *Stokes-Craven Holding Corp. v. Robinson*, 2015 S.C. LEXIS 328, at *21–25 (S.C. Sup.Ct. Sept. 9, 2015), *withdrawn and substitute opinion issued at* 416 S.C. 517, 787 S.E.2d 485 (2016). But that ruling resulted in another 3–2 split among the justices, with then-Chief Justice Toal and Justice Kittredge finding that *Epstein* was more consistent with South Carolina's discovery rule for potential tort claims. *Id.* at *32 (Toal, C.J., dissenting, joined by Kittredge, J.).

The *Stokes-Craven* Court then reconsidered its initial opinion and issued what became the controlling opinion of the Court. Upon reconsideration, a 4–1 majority again overruled *Epstein*, but it scuttled any reliance on out-of-jurisdiction case law. Instead, the Court held that its ruling "is strictly based on existing appellate court rules"; specifically, Rule 205. 416 S.C. at 532, 787 S.E.2d at 493. The new *Stokes-Craven* majority—which now included then-Acting Justice Toal and Justice Kittredge—held the statute of limitations for a malpractice claim could not run during the pendency of an appeal as a matter of law because Rule 205 deprived the circuit court of jurisdiction to consider anything that may in any way touch on the appeal:

> Furthermore, Rule 205 divests the lower court or administrative tribunal of jurisdiction over "***matters affected by the appeal***," which necessarily would include a legal malpractice cause of action that is based on the outcome of the appealed verdict, judgment, or ruling. *See Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012) ("[T]he lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter affected by the appeal' under Rules 205 and 241(a)."); *Black's Law Dictionary* 68 (10th ed. 2014) (defining "affect" as "to produce an effect on; to influence in some way").
>
> Consequently, until the appeal is resolved against the client, there is no legally cognizable cause of action for an attorney's alleged malpractice. Upon resolution of the appeal, a cause of action for legal malpractice accrues triggering the statute of limitations.

Id. at 534, 787 S.E.2d at 494 (emphasis supplied by the Supreme Court).

To remove any doubt about the wide breadth of Rule 205's reach, Chief Justice Pleicones observed that the *Stokes-Craven* majority broadly applies Rule 205 to eliminate the circuit court's jurisdiction to consider even "inchoate and speculative collateral lawsuits" during an appeal that raises similar or related issues. *Id.* at 538, 787 S.E.2d at 496 (Pleicones, C.J., concurring in judgment).

* * * * *

The upshot of this unbroken line of authority is obvious: Because this Court is currently considering an appeal involving *inter alia* (1) whether the Receiver was unlawfully appointed as a matter of both federal and South Carolina law (either as a receivership over Jersey-based Cape PLC, as initially appointed, or as a receivership over U.K.-based CIHL, as subsequently modified); (2) if the appointment was somehow valid, the scope of the Receiver's authority; and (3) whether the circuit court has jurisdiction over the Altrad Defendants in the first place, every issue related to the receivership appointment is presently within this Court's "exclusive jurisdiction" pursuant to Rule 205 and beyond the reach of the circuit court's jurisdiction.

If the circuit court lacks jurisdiction to proceed, so does the Receiver. The Receiver purports to be "the officer of the Court" or "the arm of the Court." *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 217, 118 S.E. 303, 304 (1923). But the absence of jurisdiction renders the circuit court without power to act. *See Limehoue*, 404 S.C. at 104, 744 S.E.2d at 572 (holding that "[w]ithout jurisdiction, a court cannot proceed at all in any cause"). Because the circuit court unambiguously lacks jurisdiction to proceed, the Receiver himself also lacks authority to conduct any activity (including in litigation, such as discovery, or outside of litigation), as he cannot possibly have any greater power to function than does the circuit court that appointed him. *See*

Pollock v. Carolina Interstate Bldg. & Loan Ass'n, 48 S.C. 65, 75, 25 S.E. 977, 980 (1896) ("Having the right to appoint a receiver in their territory alone, such appointee is a creature of the appointing power, and cannot have greater power than his creator. The stream cannot rise higher than its source.").

Rule 205 is designed to be self-executing and to apply automatically; the absence of jurisdiction renders the circuit court without power to act. Yet, the Receiver's insistence upon advancing the litigation below while the validity of his very appointment is pending on appeal forced the Altrad Defendants to seek an injunction against the Receiver to enforce Rule 205. But by authorizing the Receiver to continue his activities—including "discovery," as the Court acknowledged in its order dismissing this appeal—the circuit court necessarily refused to enter the injunction sought by the Altrad Defendants, rendering that order immediately appealable as a matter of right. *See* S.C. Code Ann. § 14-3-330(4) (authorizing appeals of any order "refusing an injunction").

This case is no different from *Hazel v. Blitz USA, Inc.*, 433 S.C. 120, 124, 857 S.E.2d 4, 6 (2021), and *Williams v. Northwestern Sec. Life Ins. Co.*, 307 S.C. 462, 464–65, 415 S.E.2d 809, 810 (1992), where otherwise-unappealable denials of Rule 12(b) motions were immediately appealable because, as here, they denied injunctions that the defendants sought as a ***matter of law***, rather than as discretionary injunctions under the traditional multi-part test.

Nor is it different from *Towles v. United Healthcare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842–43 (Ct. App. 1999), where an otherwise-unappealable denial of a motion without prejudice was immediately appealable because the effect of the circuit court's ruling was to "favor[] litigation over arbitration," which is immediately appealable.

Nor is it different from *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539–40, 773 S.E.2d 144, 146–47 (2015), where an otherwise-unappealable "bifurcation order" was immediately appealable because it deprived the plaintiffs of their right to "bring[] their case against the defendant of their own choosing."

Nor is it different from federal cases that have held that orders that do not rule on injunction requests are tantamount to "refusals" to issue injunctive relief, thereby rendering an order immediately appealable under 28 U.S.C. § 1292(a)(1), which uses the identical language of South Carolina Code § 14-3-330(4) with respect to immediate review of injunction rulings. *See, e.g.*, *In re Fort Worth Chamber of Commerce*, No. 24-10266, --- F.4d ----, 2024 U.S. App. LEXIS 8336, at *7 (5th Cir. Apr. 5, 2024) (recognizing that "if a district court does not timely rule on a preliminary-injunction motion, it can effectively deny the motion" and render its decision immediately appealable); *see also Gray Line Motor Tours*, 498 F.2d at 296 ("If, for example, an action has the effect of denying the requested relief without actually making a formal ruling, then the refusal of the district court to issue a specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable.").

The Court's order dismissing this appeal failed to acknowledge that "the effect of an interlocutory order" is what "determine[s] its appealability." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). The disimissal runs directly contrary to the myriad cases discussed above. And by acknowledging that the circuit court's order allows the Receiver to proceed with "discovery" even though the propriety of the receivership itself is on appeal, the Court's dismissal order actually confirms exactly why the circuit court's ruling that refused to enjoin the Receiver from all activity under Rule 205, SCACR, is immediately appealable under South Carolina Code § 14-3-330(4).

CONCLUSION

The Court's dismissal order is irreconcilable with both South Carolina Code § 14-3-330(4) and the cases catalogued above that control this appealability inquiry. Neither the South Carolina Code nor these controlling authorities are anywhere addressed in the dismissal order, suggesting that the Court may have overlooked them or misapprehended the effect of the circuit court's order on appeal. The Receiver certainly has no answer to them, nor does he have any answer to the Rule 205 issue that renders the circuit court (and the receivership itself) without jurisdiction to proceed. Accordingly, the Altrad Defendants respectfully request that the Court grant this Petition, reinstate this appeal, and rule on the critical issues presented in this appeal.[1]

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
Kevin A. Hall
S.C. Bar No. 15063
kevin.hall@wbd-us.com
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

Attorneys for Appellants Mohed Altrad and Altrad Investment Authority SAS

May 2, 2024

[1] Per Rule 208(b)(6), SCACR, the Altrad Defendants incorporate herein, to the extent applicable, all additional arguments raised and authorities cited by all similarly-situated co-appellants.

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellants Altrad Investment Authority SAS and Mohed Altrad, 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): Altrad Defendants' Petition for Rehearing

Parties Served:

John T. Lay, Jr. (jlay@gwblawfirm.com)
Gray T. Culbreath (gculbreath@gwblawfirm.com)
Lindsay A. Joyner (ljoyner@gwblawfirm.com)
Laura W. Jordan (ljordan@gwblawfirm.com)
Eleanor L. Jones (ejones@gwblawfirm.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanonp@smithrobinsonlaw.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Troy S. Brown (troy.brown@morganlawis.com)
Dana E. Becker (dana.becker@morganlewis.com)
Brady Edwards (brady.edwards@morganlewis.com)
Robert W. Jacques (robert.jacques@morganlewis.com)
Paul A. Scrudato (paul.scrudato@morganlewis.com)

Counsel for the Receiver for Cape PLC

Theile B. McVey (tmcvey@kassellaw.com)
John D. Kassel (jkassel@kassellaw.com)
Jamie D. Rutkoski (jrutkoski@kassellaw.com)
Charles William Branham, III (tbranham@dobslegal.com)
Kevin W. Paul (kpaul@dobslegal.com)
David Christopher Humen (dhumen@dobslegal.com)

Counsel for Plaintiffs

James H. Elliott, Jr. (jelliott@richardsonplowden.com)
Cameron D. Berthelsen (cberthelsen@richardsonplowden.com)

Counsel for Co-Appellants AA/DB Non-US Third-Party Defendants

Steven J. Pugh (spugh@richardsonplowden.com)
Benjamin P. Carlton (bcarlton@richardsonplowden.com)
Carmen V. Ganjehsani (cganjehsani@richardsonplowden.com)
Ashwin R. Sanzgiri (asanzgiri@richardsonplowden.com)

Counsel for Co-Appellants ArranCo US, LLC; Hawk Bidco (US) Inc.; and Sparrows Offshore, LLC

A. Victor Rawl, Jr. (vrawl@grsm.com)

Counsel for Co-Appellants ESAB Corporation; Central Mining and Investment Corp., Ltd.; and Charter Consolidated Ltd.

Stephen L. Brown (sbrown@ycrlaw.com)
James D. Gandy, III (tgandy@ycrlaw.com)
Stephen A. Griffith (sgriffith@ycrlaw.com)

Counsel for Asbestos Corporation Limited

By: /s/ M. Todd Carroll

May 2, 2024