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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
The Honorable Jean H. Toal, Circuit Court Judge

Civil Action No. 2023-CP-40-01759
Appellate Case No. 2023-002007

John A. Tibbs and Margaret B. Tibbs……**PLAINTIFFS**,

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**,

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 ArranCo US, LLC, Hawk Bidco US Inc., and Sparrows Offshore, LLC are the...……...……**APPELLANTS**.

APPELLANTS ARRANCO US, LLC; HAWK BIDCO (US) INC.; AND SPARROWS OFFSHORE, LLC'S PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION[1]

On December 18, 2023, Third-Party Defendants ArranCo US, LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC (hereinafter "Sparrows Appellants") filed a Notice of Appeal of the circuit court's December 6 Order which transmuted the "Cape PLC receivership"—created in a different Richland County circuit court action—by continuing it, modifying it, and even purporting to grant a new receivership over a different entity known as Cape Intermediate Holdings Limited ("CIHL"). On Motion by Respondents, this Court dismissed, outright, the appeal of the December 6 Order, first ruling the appeal of personal jurisdiction rulings in the December 6 Order was not immediately appealable without considering the personal jurisdiction issues were appealed appurtenant to the grounds that are immediately appealable pursuant to subsection 14-3-330(4) of the South Carolina Code. Then, to dispose of the appealable issues as to the granting, continuation, and modification of a receivership, this Court erroneously cited a Supreme Court Order—not opinion—in a case that was before the Supreme Court on entirely different procedure and facts.

As contemplated by Rule 221(a), this Court both overlooked and misapprehended the grounds on which the Sparrows Appellants appealed the December 6 Order and, as a result of that misapprehension and misunderstanding of the arguments, erroneously dismissed the appeal. *See* Rule 221(a), SCACR. Respectfully, this Court did so by overlooking and misapprehending the controlling statute permitting this interlocutory appeal, the controlling standard as to appealability, and the controlling, fundamental principles of statutory interpretation and separation of powers, all in the context of a receivership that requires heightened scrutiny. The Sparrows Appellants

[1] By continuing to prosecute this appeal, the Sparrows Appellants do not intend to waive, and expressly preserve, all defenses to the underlying action, including the defense of lack of personal jurisdiction and impropriety of the purported receivership(s).

respectfully request this Court reconsider and rehear this case *en banc*, reinstate the appeal, allow the matter to proceed to full merits briefing, and vacate the rulings below.

BACKGROUND

This Court is now well familiar with the background in this case. Nonetheless, this brief recitation of facts is relevant to why the December 6 Order is appealable—as compared to the order in the *Childers v. Davis Mechanical Contractors, Inc., et al.* case relied upon by this Court to dismiss of this appeal.[2] The circuit court appointed Peter D. Protopapas as the Receiver over one entity, "Cape PLC," in the case of *Park v. Armstrong International, Inc., et al.*, 2021-CP-40-02727. Cape PLC was one named defendant in that case, and CIHL was a separate named defendant.[3] Relying on demonstrably incorrect facts set forth in the Motion to Appoint a Receiver, Cape PLC was purportedly placed into a pre-judgment receivership. After incorrectly noting "Cape, a foreign corporation, has forfeited its charter and has further failed to answer this case," the order appointing the Receiver over "Cape PLC" (and somehow inclusive of "its subsidiaries and global affiliates"[4]) set forth expansive rights and duties, including the mandate that the Receiver "take any and all steps necessary to protect the interests of Cape whatever they may be."

Thereafter, and notwithstanding an included, express limitation that the Receiver was appointed "in this [*Park*] case" (i.e., not beyond *Park*) the Receiver nevertheless filed, in the *Tibbs* case underlying this appeal, a Third-Party Complaint that first named the Sparrows Appellants. The Receiver's third-party pleading alleged groupings of Third-Party Defendants were each, in

[2] Fuller statements of fact are contained in the Sparrows Appellants' Initial Brief, filed Feb. 22, 2024, and Return to Motion to Dismiss, filed May 6, 2024 (with Appendix), which are adopted.

[3] No Third-Party Defendants named in the underlying case were sued in *Park*.

[4] No notice or other due process was afforded any of such "subsidiaries and global affiliates," inclusive of the Sparrows Appellants, relative to the purported "Cape PLC" receivership.

some way, involved in the mining, importation, sale, or distribution of asbestos into the United States on behalf of Cape PLC. That is even though each of the Sparrows Appellants was **formed** in **Delaware in the 2000s** and then **later acquired in mid-2022** by an entity distantly, and only recently related, via multiple tiers of corporate hierarchy, to the Cape PLC entity over which the Receiver was appointed and even more distantly to the separate CIHL entity over which—as part of the rulings in the December 6 Order pertinent to this appeal—this receivership has been deemed to exist. The Receiver's pleading now seeks "a day of reckoning" for conduct that occurred decades prior in an industry in which the Sparrows Appellants have never participated, to which they have no relation, and for which they have received no benefit.

The Sparrows Appellants filed a motion seeking dissolution of the Cape PLC receivership, attempting to remedy the litany of fatal factual and procedural errors that plagued the creation of the receivership in *Park*. This litany of errors which has *never* been reviewed—and would never be reviewed unless done so here because of the manner in which it occurred (after the *Park* case was "fully resolved" based on communications between counsel therein and the circuit court)—warrants this Court receiving full briefing of the issues, hearing argument, and reversing the circuit court's decision: (1) denying every ground for relief and allowing the defective receivership to continue; (2) modifying the receivership; and (3) granting a new receivership over CIHL in the face of substantive and procedural defects and in disregard of the constitutional rights of both the entity(ies) in receivership and the purported targets thereof. Short of doing so, the Sparrows Appellants' statutory right to an immediate appeal will have been stripped away; S.C. Code Ann. § 14-3-330(4)—the protections of which have been engrained for well over a century—will have been left hollow; and the circuit court's order granting, modifying, and continuing a receivership—each a "drastic" action under our jurisprudence—will have been left unreviewable.

ARGUMENT

I. The December 6 Order Is Immediately Appealable.

In South Carolina, "[t]he right of appeal arises from, and is controlled by, statutory law. 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." Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 140 (3d ed. 2016) ("[A]n order generally must fall into one of several categories set forth in section 14-3-330 to be immediately appealable."). The appealability statute is clear:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: . . . (4) An *interlocutory order* or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or *granting*, *continuing*, *modifying*, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330(4) (emphasis added).

Subsection 14-3-330(4) is designed specifically to route actions related to receiverships directly to the appellate courts to avoid the exact situation that transpired in the circuit court below. But, without explanation or analysis as to the effect of the December 6 Order separate from its nomenclature, without citation to the controlling statute, and contrary to fundamental statutory interpretation principles engrained in our jurisprudence, this Court dismissed a clearly appealable order. *See, e.g.*, *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly."); *Rainey v. Haley*, 404 S.C. 320, 323, 745 S.E.2d 81, 83 (2013) (holding that courts have "no right to impose another meaning" when words in a statute are "clear and definite" (quotation omitted)); *A.O. Smith Corp. v. S.C. Dep't of Health & Envlt. Control*, 428 S.C. 189, 202, 833 S.E.2d 451, 458 (Ct. App. 2019) ("An appellate court cannot construe a statute

without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute." (quotation omitted)).

Moreover, the Receiver has never rebutted any of these points in seeking to have this appeal dismissed, nor did the Court address them. The dismissal was based on a flawed procedural analysis based on nomenclature used in a Supreme Court Order with no precedential value, rather than a robust, case-by-case review of the substantive issues. *See, e.g.*, *Spalt v. S.C. DMV*, 423 S.C. 576, 584, 816 S.E.2d 579, 583 (2018) (holding that labels and nomenclature do not control); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 540, 773 S.E.2d 144, 147 (2015) (appellate courts must "evaluate the trial court's order as what it is—not merely what it appears to be"); *Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461, 464 n.4 (2013) (appealability is a function of "substance rather than nomenclature").

a. <u>The December 6 Order Created a Receivership over Cape Intermediate Holdings Limited (CIHL) for the First Time</u>.

This Court overlooked the facts as to which entity (Cape PLC) was placed into a Receivership in *Park* and which was put into a receivership (CIHL) in *Tibbs*. The following facts are undisputed, are a matter of public record, appear to have been understood by the plaintiffs in both *Park* and *Tibbs*, and should, therefore, be dispositive of *any* question as to appealability:

1) Cape PLC and CIHL are two different legal entities, both of which are solvent and active.

2) Cape PLC is a registered public company in the Bailiwick of Jersey, an island in the English Channel.

3) Cape PLC came into existence in 2011.

4) Cape Asbestos Company Limited was incorporated in the United Kingdom in 1893 and is now known as CIHL.

5) The *Park* Plaintiffs, and their counsel, were clearly aware Cape PLC and CIHL were different because the *Park* Plaintiffs named them both, as separate defendants, in their pleadings.

6) The *Park* Plaintiffs sought a pre-judgment receivership over only Cape PLC.

7) The circuit court granted the requested pre-judgment receivership over only Cape PLC in the *Park* case.

8) The *Tibbs* Plaintiffs named only Cape PLC in their pleadings.

9) Only Cape PLC filed the *Tibbs* Third-Party Complaint.

10) Neither Cape PLC nor CIHL have any property in, connection to, or judgement awarded against either in South Carolina.

On December 5, 2023, before the circuit court ruled on the Motion to Dissolve, Cape PLC was in a receivership (which should have been limited only to the *Park* case). On December 6, by erroneous judicial act, the receivership was now over CIHL in the separate *Tibbs* case. This is because—without any notice, hearing, or other process or proceeding under the South Carolina statutorily delineated receivership scheme—the circuit court arbitrarily used the concept of a "n/k/a" to connect the undisputedly disparate entities of Cape PLC and CIHL. And, this was done without anyone having ever sought to put CIHL—an existing solvent entity—in a receivership, providing the requisite statutory notice thereof, or complying with the substantive and procedural due process requirements in order to do so.

This is the quintessential "granting" of a receivership contemplated in subsection 14-3-330(4) and is a factual circumstance that is absent from any of the other receivership litigation currently or previously proceeding before this Court. *See, e.g.*, *N. River Ins. Co. v. Gibson*, 244 S.C. 393, 397, 137 S.E.2d 264, 266 (1964) ("To deny means to withhold, to refuse to grant." (quoting *Ballentine's Law Dictionary*, at 360)). In the context of receiverships, this Court has previously held that "granting" is synonymous with "appointing" a receiver. *See Shapemasters*

Golf Course Builders, Inc. v. Shapemasters, Inc., 360 S.C. 473, 479–80, 602 S.E.2d 83, 86–87 (Ct. App. 2004) (holding that an order appointing a custodian was not immediately appealable under subsection 14-3-330(4) because a "custodian" and a "receiver" are not the same under the law, while indicating that an order "appointing" a receiver would be immediately appealable).

b. <u>The December 6 Order Also Modified the Cape PLC Receivership</u>.

Subsection 14-3-330(4) specifically notes that when a receivership is "modified," that decision is immediately appealable. The circuit court's March 17 Order in *Park* which created the receivership over Cape PLC stated:

> Plaintiffs have moved this Court to appoint a Receiver over Cape PLC, pursuant to S.C. Code §15-65-10(4)-(5). This Court finds that the application is meritorious under the applicable statute because Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) ("Cape Asbestos") and its subsidiaries and global affiliates (collectively, "Cape" or the "Company") *have dissolved and Cape, a foreign corporation, has forfeited its charter* and has further failed to answer this case and therefore, Plaintiffs request for an expedited ruling on this motion is appropriate and also granted.
>
> Therefore, this Court hereby appoints Peter Protopapas be and hereby is appointed Receiver *in this case* pursuant to the South Carolina Law . . . .

(App. to Return 231) (emphasis added).

Then, on December 6, the circuit court modified the Cape PLC receivership. First, by footnote, the circuit court specifically noted: "Although the Order [in *Park*] appointing the Receiver incorrectly described Cape as 'dissolved,' even though Cape is still a going concern in the United Kingdom, that does not impact the legality of the Receivership, as dissolution of the entity placed in receivership is not required under subsection (5)." Dec. 6 Order at p.25 n.16 **(App. to Return 368)**. Seemingly, *by footnote*, in an order in a completely separate case, the circuit court "resolved" errors in its prior *Park* appointment order. For that to be anything other than

modification defies logic, apart from the fact it was otherwise wholly erroneous.[5] *See generally Modification*, BLACK'S LAW DICTIONARY at 1095 (9th ed. 2009) (defining "modification," in pertinent part, as "[a] change to something; an alteration" and further as "[a] qualification or limitation of something"). Moreover, the extension of the receivership—which the *Park* appointment order ruled was only to be "in this [*Park*] case"—into *Tibbs* is clearly a modification of the scope of the receivership itself by both its express terms and the impact thereof. To find a court order that, on its face, limits a receivership to one circuit court case is now extended to and permanent in all unrelated cases, is not supported in the law and should not be overlooked by this Court.

c. <u>The December 6 Order Also Continued the Cape PLC Receivership</u>.

Subsection 14-3-330(4) specifically notes that when a receivership is "continued," that decision is immediately appealable. A continuation can be looked at two ways. First, a continuation can be the general ruling that a receivership may simply carry on its activity. *Pickett v. Fid. & Cas. Co. of New York*, 60 S.C. 477, 38 S.E. 160, 163 (1901); *see also, e.g.*, *Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, 437 S.C. 343, 348–49, 878 S.E.2d 896, 899 (2022) (describing the "blackletter definition" of the "continuing claim doctrine" as one where "a series of distinct events" is treated "as a single continuing event" for purposes of assessing a statute of limitations); *Townsend v. Singleton*, 257 S.C. 1, 10, 183 S.E.2d 893, 897 (1971) ("After such termination [of a

[5] This retroactive application of law and fact with no support is a modification, and, such a modification is not permitted by South Carolina law. *Ex parte Strom*, 343 S.C. 257, 264–65, 539 S.E.2d 699, 702–03 (2000) ("*Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should have been done, with a retroactive effect. Nunc pro tunc orders can only be used to place in the record evidence of judicial action that has actually taken place. 'A prerequisite for a nunc pro tunc order . . . is some previous action by the court that is not adequately reflected in its record.'" (internal citations omitted)).

lease], one continuing to occupy the premises, absent a new agreement, express or implied, comes squarely within the definition of a tenant at will."). Second, it can be the more specific ruling that the receivership can carry on its activity in a case outside of the one in which it was created. Here, both have occurred; the receivership was "continued" as contemplated in subsection 14-3-330(4).

As to the first possible definition of "continue," the circuit court clearly held in the December 6 Order—through the erroneous refusal to dissolve the receivership and prevent it from acting further in *Tibbs*—that the Cape PLC receivership was properly created, legally sound, and able to continue acting. As to the second possible definition of "continue," the circuit court made two decisions that indicate the Cape PLC receivership from *Park* could continue in *Tibbs*. First, in the face of the court's own appointment order stating the Receiver was appointed "in this case" (*Park*), the same court decided that the Receiver could then act in *Tibbs*. Second, after being made aware of all the errors in *Park*, rather than granting the motion to dissolve, the circuit court allowed the receivership *continue* into *Tibbs*. Under any common understanding of the word "continue," the December 6 Order, among other things, continued the Cape PLC receivership. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535–36, 725 S.E.2d 693, 695 (2012) ("[Courts] must follow the plain and unambiguous language in a statute and have 'no right to impose another meaning.'" (citing *Cabiness v. Town of James Island*, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011))).

d. <u>The *Childers* Order Is Both Inapplicable and Irrelevant to this Appeal</u>.

i. <u>*Payne & Keller* Has Zero Factual or Issue Overlap with *Tibbs*</u>.

The Court's citation to the order in *Childers v. Davis Mechanical Contractors, Inc., et al.* (hereinafter "*Payne & Keller*"), seems to indicate the Court either merely adopted the nomenclature from that order or otherwise applied all of the underlying facts in that case—which led to the Supreme Court's issuance of that order on the facts there—and found them to be largely

identical, rendering that *Payne & Keller* order wholly dispositive in *Tibbs*. *Compare* S.C. Sup. Ct. Order, dated March 27, 2024 (Appellate Case No. 2024-000005) (two sentence order stating specific order in that case is not immediately appealable without reference or citation to the controlling subsection 14-3-330(4) of the South Carolina Code) *with Morrow*, 412 S.C. at 538, 773 S.E.2d at 146 ("By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis."). This, however, *cannot* be correct in either circumstance.

The fundamental differences in facts and procedure in *Payne & Keller* led to requests for different motions—albeit, still motions entitled "Motion to Dissolve"—which sought relief necessarily different from the relief sought by the Sparrows Appellants below. And, as a result of the fundamental differences in the facts (and thereby, the motions), the resultant orders issued by the circuit court in *Payne & Keller* on one hand, and this case on the other hand, are completely different. The Supreme Court's *Payne & Keller* order cannot have *any* bearing on the appealability of the order in this case because of the stark factual distinctions between the receivership at issue there and the receivership(s) in this matter.

In *Payne & Keller*, on January 2, 2024, a number of third-party-defendant *insurers* filed a motion for certification of their appeal to the South Carolina Supreme Court. *See* C-Track entry dated January 3, 2024 in Appellate Case No. 2023-000727. That motion sought to certify an issue as to whether a *continued* receivership over Payne & Keller was appropriate in light of the circuit court's denial of a motion to dissolve. By signed order, the Supreme Court decided the issue, stating nothing more than:

> 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.

Payne & Keller, S.C. Sup. Ct. Order, dated March 27, 2024 (Appellate Case No. 2024-000005).

Review of the motion to certify filed in *Payne & Keller* reveals issues of: (1) a receivership over a dissolved corporation resurrected by the circuit court in a foreign jurisdiction; and (2) issues relating to insurance coverage of an entity placed into a receivership. There is *zero* congruency between the facts and issues in *Payne & Keller* and the facts and issues in this case. Because appealability is determined *case-by-case*, rote reliance on a Supreme Court order in a case as factually distinct as this one is wholly inappropriate.

More specifically, in *Payne & Keller*, the insurer third-party defendants sought appellate review of this Court's applicable ruling denying the receivership dissolution relief sought. In response to the circuit court's inquiry into appealability, a number of the insurers explained how the circuit court order fit within subsection 14-3-330(4), under the specific facts and procedural posture in that case, by arguing: (1) a denial of a motion to dissolve in effect and as a direct consequence thereof necessarily *continues* a receivership and (2) by permitting the Receiver to act outside of his appointment mandate through pursuit of a revocation of Payne & Keller's Texas termination, this Court in effect and as a direct consequence thereof necessarily *modified* the receivership. *See* AIG Appealability Response, dated May 15, 2023, at 9–10; Travelers Appealability Response, dated May 15, 2023, at 5–7 (Appellate Case No. 2023-000727).

Here, the appealability inquiry as to the December 6 Order is factually distinguishable, including because a primary issue at hand concerns the circuit court's *granting* of an entirely new receivership (in *Tibbs*) over a legal entity (CIHL) separate and distinct from Cape PLC named in the court's underlying Order of Appointment (in *Park*). **(*See* App. to Return at 418–21, 362)**.

By *granting* an entirely new receivership, misconstruing the inapplicable doctrine of "misnomer," and ignoring South Carolina binding precedent, including as stated in *Porter v. Brown*,[6] the Court in fact also *modified* and *continued* a receivership. **(*See id.*)**. This is especially clear given that the circuit court's December 6 Order was issued following briefing by the Receiver expressly requesting amendment and modification to the underlying Order of Appointment.[7]

ii. The *Payne & Keller* Order Is Not Precedent.

Aside from the fact the grounds for the Motion to Dissolve and resulting December 6 Order are completely distinct from those in the analog *Payne & Keller* orders, the South Carolina Appellate Court Rules make clear this Supreme Court Order opinion is not precedent and is not to be relied on in the way this Court relied on it. Rule 220(a) provides: "The appellate court shall make its decisions in writing by published opinions or memorandum opinions, with any concurring or dissenting opinions attached." Clearly, that has not occurred here. Additionally, Rule 220(b) requires that "[i]n every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case."[8] Likewise, that too has not occurred, including because no authority has been cited and no explanation has been provided. With the nuanced facts of an entirely different

[6] 149 S.C. 151, 157–59, 146 S.E. 810, 812–13 (1929) (vacating a receivership appointment despite a "misnomer" argument identical to that made by the Receiver in this case).

[7] *See, e.g.*, **(App. to Return at 445)** (urging that "[t]he Court can simply amend the Appointment Order to clarify . . . if the Court finds that appropriate"); **(App. to Return at 448)** (asking circuit court to amend *Park* order).

[8] Rule 220(b), SCACR, has exceptions that either (i) do not apply or (ii) reinforce that this South Carolina Supreme Court Order has no precedential value. *See* Rule 220(b)(1), SCACR; *see also* Rule 268(d)(2) ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.").

receivership, parties, circumstances, circuit court order, appellate procedure, briefing, and other significant substantive differences, a three-sentence Order—without explanation or citation—cannot have bearing on the issues in this case.

Respectfully, the December 6 Order is appealable pursuant to subsection 14-3-330(4) and is untied to the non-precedential procedural orders in the distinguishable *Payne & Keller* case.

II. Dismissing this Appeal Is Contrary to the Statutory Scheme, Jurisprudence, and Public Policy of this State Regarding Receiverships.

Not only does the dismissal of the Sparrows Appellants' appeal circumvent the clear statutorily protected right to an immediate appeal afforded by subsection 14-3-330(4), but it also runs afoul of long-established jurisprudence and underlying public policy as to judicial oversight of receiverships. *See, e.g.*, 1901 S.C. Acts No. 358 (codifying appellate jurisdiction over "[a]n interlocutory order or decree in the Court of Common Pleas . . . granting or continuing or modifying or refusing the appointment of a Receiver"); *Lyles v. Williams*, 96 S.C. 290, 293, 80 S.E. 470, 471 (1913) (recognizing that the Supreme Court had a "clear[] duty . . . to pass upon the questions raised" per the 1901 Act and declining to dismiss an appeal of an interlocutory order refusing a receivers).

Judicial oversight is critical because a receiver exists strictly to take the property of another, a concept at odds with traditional and constitutional property rights and privileges, which is precisely why receivers are to be rarely appointed in the first place. *See, e.g., Miller v. S. Land & Lumber Co.*, 53 S.C. 364, 367, 31 S.E. 281, 282 (1898) ("While the court of equity, in proper cases, has the power to place a debtor's property in the hands of a receiver, this power should be exercised with great caution, *lest the injury thereby caused be far greater than the injury sought to be averted*." (emphasis added)). Because the appointment of a receiver is a drastic remedy, as is the continuation and modification of such an appointment, the South Carolina General Assembly

has ***prohibited*** receivers from: **(i)** being appointed unless and until strict compliance with notice requirements is accomplished, *see* S.C. Code Ann. §§ 15-65-20 to -30; **(ii)** being appointed on a pre-judgment basis unless a bond is also established such that the property in dispute can be appropriately secured, *see* S.C. Code Ann. §§ 15-65-50 to -80; *see also Truesdell v. Johnson*, 144 S.C. 188, 204, 142 S.E. 343, 348 (1928) (holding that an order appointing and continuing a receivership "is void" because it failed to contain the "mandatory" bond provision); and **(iii)** reaching outside of the State of South Carolina, squarely at issue here as set forth in prior briefing.

By dismissing this statutorily permitted appeal, the Court will have stripped the Sparrows Appellants of their rights and will have left unchecked—contrary to its duty and mandate to do so—clear violations of each of these prohibitions relative receiverships that should never have been granted in the first place,[9] and the consequences will be severe.[10] The Court should continue to uphold the established statutory scheme, jurisprudence, and public policy of this state as to receiverships by reinstating this appeal and hearing the issues involved on the merits.

III. Personal Jurisdiction Issues Are Properly Before this Court.

For all of the reasons in Section I of this Petition, this Court must address the merits-based issues of the creation, continuation, and granting of both the Cape PLC and CIHL receiverships. The December 6 Order also ruled in error on issues as to personal jurisdiction. This Court should hear those attendant issues as part of a merits-based inquiry given the other appealable issues

[9] As explained in the Sparrows Appellants' Initial Brief (filed Feb. 22, 2024), incorporated herein in full, the circuit court had no authority to create receiverships over Cape PLC or CIHL—active, foreign entities—and doing so was violative of federal and state law and constitutional protections.

[10] *See generally* Amicus Curiae Brief of Underwriters at Lloyd's, London at p.20–27 (filed Apr. 26, 2024, in Appellate Case No. 2023-001461) (explaining that if left uncorrected by this Court, "the receivership order [involving an active Canadian company] will destabilize insurance markets, harm South Carolina insureds, and damage South Carolina's economy").

before the Court. *See, e.g.*, *QZO, Inc. v. Moyer*, 358 S.C. 246, 252, 594 S.E.2d 541, 545 (Ct. App. 2004) ("Although a pre-trial motion to dismiss based on lack of personal jurisdiction is not usually immediately appealable, it can be considered when other appealable issues are presented to an appellate court."). Based on this black-letter law, the appealability inquiry centers on whether these issues have been presented with another immediately appealable issue. That has occurred here. This Court overlooked that the circuit court's findings are collectively appealable and that judicial economy warrants resolution of all of these issues.

CONCLUSION & REQUEST FOR EN BANC REVIEW

For the reasons set forth herein, the Sparrows Appellants respectfully request this Court reinstate the appeal, resume briefing of the issues, and rehear this case on the merits to resolve the immediately appealable issues of the continuation, modification, *and* granting of the Cape PLC and CIHL receiverships and the closely related personal jurisdiction issues.

As described herein, and in accordance with Rule 219, SCACR, given that consideration of the full Court is necessary to secure and maintain uniformity of its decisions—and further given that these proceedings involve questions of exceptional importance—relative to receiverships and oversight thereof, *en banc* rehearing is warranted, and the Sparrows Appellants' request for the same should be granted.[11]

[11] Per Rules 240 and 208(b)(6), SCACR, the Sparrows Appellants adopt and incorporate herein all additional arguments raised and authorities cited by similarly situated Appellants in Appellate Case Nos. 2023-002006–002011 & 2024-000524, including that refusal to provide statutory pre-judgment protections implicates a substantial right as contemplated in subsection 14-3-330(2) of the South Carolina Code. Further, the Sparrows Appellants incorporate herein all prior filed pleadings, and motions, memoranda, appellate briefing, and other relevant materials that may be properly considered by this Court.

Respectfully submitted,

/s Steven J. Pugh

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May 24, 2024

CERTIFICATE OF SERVICE

I, Ashwin R. Sanzgiri, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellants ArranCo US, LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC, do hereby certify that I have this date served the foregoing **PETITION FOR REHEARING AND REHEARING EN BANC**, dated May 24, 2024, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated April 24, 2024, on all counsel of record using the primary email addresses listed in the Attorney Information System (if applicable).

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Subject:	John A. Tibbs v. Asbestos Corporation Limited (Appellate Case No. 2023-002007)
Date:	Friday, May 24, 2024 3:46:17 PM
Attachments:	Petition for Rehearing (Dec. 18 Appeal) - Sparrows Appellants (5-24-24) (3386364).pdf

Good afternoon,

Please find served upon you the Petition for Rehearing on behalf of Appellants ArranCo US, LLC; Hawk Bidco (US) Inc.; and Sparrows Offshore, LLC in the above-referenced case which we will be filing with the Court of Appeals of South Carolina later today.

Please let me know if you have any questions.

Thank you,

Ashwin

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