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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
Jean Hoefer Toal, Circuit Court Judge

Appellate Case No. 2023-001461
Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs, Respondents,

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,

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., 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 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 Appellants.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

COUNTER-STATEMENT OF ISSUES

1. Did the trial court abuse its discretion by holding Asbestos Corporation Limited in contempt and imposing sanctions due to its refusal to comply with the trial court's orders?

2. Did the trial court abuse its discretion by appointing a receiver to investigate and pursue Asbestos Corporation Limited's liability insurance interests in South Carolina?

STATEMENT OF FACTS

I. The Tibbs' claims arise from Asbestos Corporation Limited's contacts with South Carolina.

This lawsuit alleges John Tibbs developed asbestos-related lung cancer from repeated exposures to asbestos-containing products and materials manufactured, sold, and/or distributed by Appellant Asbestos Corporation Limited ("ACL") and used by or near Mr. Tibbs in South Carolina. Mr. Tibbs, joined by his wife Margaret, filed suit in the Richland County Court of Common Pleas, South Carolina.[1] (R. at 17- 112). In response, ACL challenged the trial court's authority to exercise personal jurisdiction on the basis that it is a Canadian company.

ACL's sales of asbestos products included sales to South Carolina. The record includes evidence showing ACL describes itself as "miners of chrysotile asbestos since 1878." (R. at 410). ACL organized in 1926 when it brought nine separate companies under single management. (R. at 453.) As early as 1934, ACL owned asbestos mines and mills in six Canadian locations. *Id.* Although based in Canada, ACL supplied asbestos "to all the markets of the world and there is no country engaged in the manufacture of asbestos products to which our fibers have not been shipped." (R. at 468).

ACL's clients included many major manufacturers of asbestos-containing products within the United States, including, National Gypsum (R. at 512-513, 519); Fibreboard (R. at 545); Eagle-Picher Industries (R. at 572-581); and HK Porter. Ernest Bratt, HK Porter's former asbestos group manager, testified that HK Porter owned a manufacturing facility in Bennettsville, SC from approximately 1964 through November 1976 (R. at 623, 627, 860, 876). The HK Porter Bennettsville Plant manufactured asbestos-containing products used in thermal insulation,

[1] The Tibbs filed an amended complaint on May 3, 2023 (R. at 113).

including asbestos cloth, asbestos tape, and asbestos yarn. (R. 613, 635-636, 812). HK Porter purchased chrysotile asbestos used in its products from ACL (R. at 667, 903-904).

Despite selling asbestos products directly into the United States, Asbestos Corporation Limited and affiliated Canadian asbestos companies[2] have challenged the jurisdiction of United States courts for decades. They have also refused to participate in discovery, claiming they are exempted from such obligations by the Quebec Business Concerns Record Act ("QBCRA").

ACL's challenges and arguments have repeatedly failed in dozens, if not hundreds, of cases filed against it and affiliated companies in South Carolina and throughout the United States. For instance, in *Lyons v. Bell Asbestos Mines, Ltd.* 119 F.R.D. 384 (D.SC. 1998), the South Carolina District Court granted a motion to compel discovery against a related Canadian corporation attempting to hide behind the QBCRA. The defendant in that matter cited the QBCRA in an effort to avoid producing discovery related to its motion to dismiss for lack of personal jurisdiction. This argument, which is the exact QBCRA argument ACL raises in this case, was rejected by the District Court.

Similarly, in *Lafferty v. Raymark*, 14 Phila. Co. Rptr. 111, 114, 1986 WL 501491 (Pa. Dist. Court 1986), the Pennsylvania District Court rejected another Quebec asbestos company's QBCRA argument, concluding the company "is asking for an even more unfair advantage. They want to *totally* bar discovery of *all* documents in Canada. Their position is untenable." (emphasis in original). Numerous other cases have the same result. *See, e.g.*, *Cent. Wesleyan Coll. v. W.R.*

[2] The interrelationship between ACL and other Canadian asbestos companies including Atlas Asbestos Co., Atlas Turner Inc., and Bell Asbestos has long been recognized by U.S. courts. *See*, *e.g.*, *Roberts v. Owens-Corning Fiberglass Corp.*, 101 F.Supp.2d 1067, 1082 (S.D.IN. 1999), recognizing and reciting the interrelationship of various Quebec asbestos companies. *See also*, *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 643-44 (simultaneous considering motions relating to Atlas Turner, Bell Asbestos, and Asbestos Corporation Ltd., and referencing them collectively as "Canadian Defendants"). Also of note, in another pending South Carolina asbestos case, Atlas Turner has acted in a nearly identical manner as ACL in this case and has filed an appeal in this Court relating to the same issues raised in this appeal. *See*, *Welch v. Atlas Turner, Inc.*, Appellate Case No. 2023-001096.

Grace & Co., 143 F.R.D. 628, 645 (D.S.C. 1992) aff'd, 6 F.3d 177 (4th Cir. 1993) (Court "finds that Defendants have failed to make an adequate showing that the QBCRA is in fact applicable to Plaintiff's discovery requests in the instant case or would preclude any discovery as may be approved by this court."); *Buttitta v. Allied Signal, Inc.*, 2010 WL 1427273 (N.J.Sup. Ct. App. Div. Apr. 5, 2010) (finding QBCRA did not prevent disclosure of documents and upholding striking of defendant's answer).

ACL and its related companies have also been losing personal jurisdiction arguments across the country since at least 1985. *See, e.g.*, *McDaniel v. Armstrong World Industries*, 603 F.Supp. 1337 (D.D.C. 1985); *In re Connecticut Asbestos Litigation*, 677 F.Supp. 70 (D.Conn. 1986); *Carre v. ACandS, Inc.*, 1986 WL 537 (E.D.PA. 1986); *Roberts v. Owens-Corning Fiberglass Corp.*, 101 F.Supp.2d 1076 (S.D.IN. 1999); *Deptula v. Derr Flooring Co.*, 1990 WL 96635 (E.D.PA. 1990); *Buttitta v. Allied Signal, Inc*., No. A-5263-07T1, 2010 WL 1427273, at *23 (N.J. Super. Ct. App. Div. Apr. 5, 2010) (citing *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern District of Iowa,* 482 U.S. 522, 544, 107 S.Ct. 2542 (1987)).

II. The trial court acted within its discretion when ACL refused to cooperate in discovery or otherwise comply with the court's orders.

Given ACL's resistance to the court's jurisdiction, the Tibbs promptly tendered jurisdictional discovery about ACL's presence in South Carolina and its sale of products into the state. (R. at 402-407). ACL indicated that it would never produce a witness in response to the Tibbs' Notice of Deposition. On July 19, 2023, the Honorable Judge Jean H. Toal denied ACL's challenge to the trial court's ability to exercise personal jurisdiction and ordered ACL to respond to the Tibbs' discovery requests and prepare and produce a 30(b)(6) witness by July 24, 2023. (R. at 1-2; R. at 224:14-227:25). In its Order, the trial court warned ACL that failure to respond to the Tibbs' discovery and provide a corporate representative for deposition would result in ACL being

held in contempt. (R. at 1). ACL failed to respond to discovery or produce a corporate representative for deposition as ordered by the trial court.

Because of ACL's failure to comply with the trial court's order, on July 26, 2023, the Tibbs requested the trial court hold ACL in contempt and strike ACL's pleadings. (R. at 1136-1138). Two days after filing their motion requesting that the trial court hold ACL in contempt and strike its pleadings, the Tibbs also moved for the appointment of a receiver over ACL's "defense in US asbestos litigation, [to] tender ACL's claims to its' carriers and marshal ACL's insurance assets and satisfy claims." (R. at 1140-1144).

ACL responded to the Tibbs' motions in consolidated fashion, arguing (while still asserting the trial court lacked jurisdiction over it) that its failure to comply with the trial court's Order was defensible—and therefore not an act of willful disobedience—because, according to ACL, it believed that personal jurisdiction did not exist and because "there were no individuals alive and capable of responding to the issues proposed." (R. at 1299-1310). Additionally, ACL objected to the appointment of a receiver because he was suggested by the Tibbs' counsel and had served in the role in other matters, and because ACL is a Canadian corporation with no assets in South Carolina in contradiction to S.C. Code Ann. §§ 15-65-10(4) or (5). (R. at 1299-1310).

The Tibbs replied that none of ACL's excuses for failing to comply with the trial court's Order to participate in discovery offered absolution. (R. at 1173-1182). As the Tibbs had argued in their Response in Opposition to ACL's Motion to Dismiss—which the trial court denied in July of 2023—the QBCRA does not prohibit ACL from participating in discovery in South Carolina. Additionally, the Tibbs argued that ACL had, in previous cases, appeared for depositions, yet continued to refuse to answer critical questions based on the alleged prohibitions imposed by the QBCRA. Further, the Tibbs argued that, despite ACL's argument that it had no living witness to

respond to the Tibbs' discovery requests, South Carolina Rule of Civil Procedure 30(b)(6) required ACL to educate an individual on what is available, known, or knowable to the company. (R. at 1177-1181).

Given ACL's failure "to produce a witness as ordered by the Court", failure to "identify a witness or a date on which it will produce a witness", and ACL's failure "to fully answer discovery and provide documents ordered to be produced by this Court", the Honorable Judge Jean H. Toal found ACL to be in contempt and, "[g]iven this intentional and willful refusal to participate in discovery," struck ACL's pleadings. (R. at 3-7). The trial court then subsequently granted the Tibbs' motion for the appointment of a receiver. (R. at 8-16).

In the Order striking ACL's answer, the trial court detailed ACL's defiance of its Order and the Court's warning of the consequences that would befall ACL if it defied the Court's Order to participate in discovery. (R. at 3). "ACL has made it clear that it does not intend to participate in this matter and that this Court's orders on discovery will continue to be ignored." (R. at 3). To date, ACL has continued to refuse to prepare and produce a representative for deposition.

In a separate order, the trial court held a receiver was necessary to marshal and protect ACL's insurance assets. (R. at 8-16). In the Receiver Order, the court recognized ACL was in contempt for its failure to comply with the Orders and that its answer had been struck as a sanction for that failure. (R. at 9). The Receiver Order explained that receiverships were not just for insolvent entities and could be instituted when a debtor:

> is trying to defeat his creditors by an act or course of conduct which indicates moral fraud-a conscious intent to defeat, delay or hinder creditors in the collection of debts-then a court will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud without requiring the creditor to run the risk of losing his debt from the delay of obtaining judgment and return of nulla bona on the execution.

(R. at 10) (*citing*, *Virginia Carolina Chemical v. Hunter*, 84 S.C. 214 (1909)). The trial court found that it was "the moral fraud of Atlas' personal jurisdiction claims . . . and [ACL's] continued refusal to participate in this that warrants the appointment of a receiver." (R. at 10).

ACL now appeals the orders striking its answer and appointing a receiver. Although not appealing the issue, ACL continues to refuse to acknowledge South Carolina courts' jurisdiction over it, asserting South Carolina courts are a "Judicial Hellhole."[3]

STANDARDS OF REVIEW

I. Standard of Review as to Contempt

"A finding of contempt rests within the sound discretion of the trial judge." *DiMarco v. DiMarco*, 393 S.C. 604, 607, 713 S.E.2d 631, 633 (2011). Specifically, "[e]ven though a party is found to have violated a court order, the question of whether or not to impose sanctions remains a matter for the court's discretion." *Hook v. S.C. Dep't of Health & Envtl. Control,* 439 S.C. 52, 74, 885 S.E.2d 442, 454 (Ct. App. 2023). "On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion." *Brandt v. Gooding,* 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Historic Charleston Holdings, LLC v. Mallon,* 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009).

II. Standard of Review as to Appointment of a Receiver

"[T]he appointment of a receiver is within the discretion of the circuit judge." *Midlands Utility, Inc. v. South Carolina Dep't of Health*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). A

[3] *See,* Initial Brief of Appellant, p. 16, FN 12.

trial court's decision whether to appoint a receiver is reviewed for abuse of discretion. *Richland County v. South Carolina Dep't of Revenue*, 422 S.C. 292, 312, 811 S.E.2d 758, 769 (2018).

ARGUMENT

I. The trial court properly held ACL in contempt.

The trial court properly held ACL in contempt after it defied the trial court's order to participate in discovery. Civil contempt occurs when a party willfully disobeys a clear and definite court order. *See Phillips v. Phillips*, 288 S.C. 185, 188, 341 S.E.2d 132, 133 (1986); *see also Welchel v. Boyter*, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973) (to support contempt finding, language of court order "must be clear and certain rather than implied"). Once the party seeking a contempt finding makes prima facie showing by pleading the order and demonstrating noncompliance, "the burden shifts to the respondent to establish his defense and inability to comply." *Noojin v. Noojin*, 417 S.C. 300, 307, 789 S.E.2d 769, 772 (Ct. App. 2016) (quoting *Eaddy v. Oliver*, 345 S.C. 39, 42, 545 S.E.2d 830, 832 (Ct. App. 2001)).

The trial court did not abuse its discretion in holding ACL in contempt. On July 19, 2023, after hearing arguments regarding ACL's challenge to the exercise of personal jurisdiction over it, the trial court unequivocally directed ACL to prepare and produce a corporate designee for deposition. (R. at 1). Simultaneously, the trial court ordered ACL to answer the Tibbs' discovery requests regarding its presence and sale of products in South Carolina. (R. at 1). ACL did not comply with either of the trial court's directives, and further made it known that it never intended to comply. The Tibbs made the necessary *prima facie* showing supporting their request that ACL be held in contempt.

When the burden shifted to ACL to "establish [its] defense and inability to comply," ACL failed. It relied instead on arguments that the trial court had already denied, such as the QBCRA, which, as the trial court and numerous courts across the country have found, does not prohibit

and/or prevent the trial court from exercising personal jurisdiction over ACL and does not prohibit and/or prevent ACL from participating in discovery.[4] *See, e.g., Lyons v. Bell Asbestos Mines, Ltd.*, 119 F.R.D. 384, 387-88 (D.S.C.1988); *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628 (1992); *American Industrial Contracting, Inc. v. John-Manville Corp., 326 F. Supp. 879* (W.D. Pa. 1971*; Buttitta v. Allied Signal, Inc*., No. A-5263-07T1, 2010 WL 1427273, at *23 (N.J. Super. Ct. App. Div. Apr. 5, 2010).

The Supreme Courts of both the United States and Canada have rejected ACL's position. The United States Supreme Court has held that blocking statutes "do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." *Societe Nationale Industrielle Aerospatiale et al. v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 544, 107 S.Ct. 2542 (1987).

Moreover, in 1993, the Supreme Court of Canada held that the QBCRA cannot be used by a Quebec-based corporation to deny litigants in other forums proper discovery. *Hunt v. T&N, Plc*, (1993) 4 S.C.R. 289.

> While a province is not debarred from enacting any legislation that may have some effect on litigation in other provinces, it must respect minimum standards of order and fairness. The statute at issue here does not meet those standards. The whole purpose of a blocking statute is not to keep documents in the province, but to impede successful litigation in other jurisdictions by refusing recognition and compliance with orders issued there. While this is no doubt part of sovereign right, it certainly runs counter to comity.

Id. at 292. To the extent this ruling did not entirely abrogate the QBCRA, it at a minimum foreclosed ACL's reliance upon the statute in cases such as this.

[4] Even if it might otherwise apply, the QBCRA does not limit the Tibbs' right to depose ACL's corporate representative. The language of the statute references only specific documents which should not be removed from Quebec, it says nothing about deposing a corporation's representatives during litigation.

ACL also contended that it had no employees with personal knowledge to designate as a corporate representative. This argument is also meritless. The South Carolina Supreme Court has held that the trial court should look to the federal decisions for the interpretation of our Rules of Civil Procedure. *See Gardiner v. Newsome Chevrolet-Buick, Inc.,* 340 S.C. 328, 404 S.E.2d 200 (S.C. 1991) (citing Lightsey & J. Flanagan, *South Carolina Civil Procedure,* (2d ed. 1985)); *Hodge v. Myers,* 255 S.C. 542, 180 S.E.2d 203, 206 (1971) (holding that "litigants and attorneys should be allowed liberal discovery" and that the requested discovery "would help the parties in their quest of the whole truth"); *Dunbar v. Vandermore,* 295 S.C. 493, 369 S.E.2d 150 (Ct. App. 1988) (federal case law should be persuasive in interpreting the rules).

South Carolina Rule of Civil Procedure 30(b)(6) provides that when a party that is an organization or corporation receives a notice of deposition, the corporation:

> shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. [. . .] The persons so designated shall testify as to matters known or reasonably available to the organization.

Rule 30(b)(6), SCRCP provides that a party may notice the deposition of a corporation and describe with reasonable particularity the matters on which examination is requested. In that event the corporation shall designate one or more persons and for each person designated, the matters on which he or she will testify. The rule does not provide an alternative to designating a representative on properly noticed areas of inquiry. This Court has addressed the broad scope of discovery in stating, "In South Carolina the scope of discovery is very broad and an objection on relevance grounds is likely to limit only the most excessive discovery request." *Samples v. Mitchell*, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997).

Similarly, according to Federal Rule of Civil Procedure 30(b)(6), which is substantially similar to SCRCP 30(b)(6), when a party has created a 30(b)(6) notice and identified the matters

of examination with reasonable particularity, the responding party must produce one or more designated witnesses. Fed. R. Civ. P. 30(b)(6). Those witnesses must be fully prepared to testify regarding the matters of examination. Fed. R. Civ. P. 30 Advisory Committee's Note, Sub. (b)(6) (1970 Amendment); *United States v. Taylor,* 166 F.R.D. 356, 361 (M.D.N.C. 1996); *Prokosch v. Catalina Lighting, Inc.,* 193 F.R.D. 633, 638 (D. Minn. 2000). Contrary to Atlas Turner's position, the party responding to a 30(b)(6) deposition notice has "absolutely no right...to refuse to designate a witness." *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1148 (10th Cir. 2007). Failure to produce a witness who is both prepared and has authority to speak on behalf of the organization is tantamount to failure to appear at the deposition. *T & W Funding Co., XII v. Pennant Rent-A-Car Midwest, Inc*., 210 F.R.D. 730, 735 (D. Kan. 2002). The responding party must prepare its witnesses to provide the organization's knowledge and positions, not only about facts, but also about the organization's subjective beliefs, opinions, interpretation of documents, and interpretation of events. *Lapenna v. Upjohn Co.,* 110 F.R.D. 15, 20 (E.D. Pa. 1986); see also, *Alexander v. F.B.I,* 186 F.R.D. 148 (D.D.C. 1999*)*; *Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 66-67 (D.P.R. 1981); Donald E. Frechette, "Beware of Fed. R. Civ. P 30(b)(6) Deposition," *For the Defense* 38 (2000); *Wilson Land Corp. v. Smith Barney, Inc.*, 2001 WL 1745241 (E.D.N.C.); *United States v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996); *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 37 (D. Mass 2001).

ACL could not evade its discovery obligations, thereby undermining South Carolina's Rule 30(b)(6), by asserting that no witnesses are available who personally have direct knowledge concerning the areas of inquiry. *United States v. Taylor,* 166 F.R.D. 356, 362 (M.D.N.C. 1996); *Prokosch v. Catalina Lighting, Inc.,* 193 F.R.D. 633, 638 (D. Minn. 2000); *Pham v.*

Hartford Fire Ins. Co., 193 F.R.D. 659, 663 (D. Colo. 2000). In fact, the witness does not need to have *any* personal knowledge of the matter in issue. *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 691 (S.D. Fla. 2012); *Federal Civil Rules Handbook*, 2012 Ed. at 838. The Rule makes plain that a party cannot subvert the beneficial purposes of the Rule by simply incanting that no witness is available who personally has direct knowledge concerning all areas of inquiry. *Prokosch v. Catalina Lighting, Inc.,* 193 F.R.D. 633, 638 (D. Minn. 2000).

In *QBE*, an insurance company was sued for subrogation and a Florida District Court was forced to confront what consequence should flow from a plaintiff insurance company's failure to designate a witness to bind the corporation under Fed. R. Civ. P. 30(b)(6). The insurance company produced a witness with insufficient or no knowledge of 47 noticed topics and then promised to produce a supplemental witness but was unsuccessful in so doing. *See id*. at 680-81. After sanctioning the insurer by precluding testimony on topics for which it was unprepared, the court considered the insurer's obligations where it had a lack of familiarity "with many of the underlying facts" known to its insured. *Id*. at 681. While the result--i.e., preclusion of testimony--was the same, it was not a sanction, but "a natural consequence of QBE's inability to obtain knowledge from its insured on the relevant subjects listed in the 30(b)(6) notice." *Id*. The court explained it was "patently unfair" to permit the insurer to avoid a corporate deposition on these topics "yet allow it to take a position at trial on those very same issues by introducing testimony which [the requesting party] was unable to learn about during a pre-trial 30(b)(6) deposition." *Id*.

Particularly apt to this dispute, the *QBE* Court explained that "[t]he mere fact that an organization no longer employs a person with knowledge on the specified topics does not relieve the organization of the duty to prepare and produce an appropriate designee." *Id*. at 689 (citing *Fowler v. State Farm Mut. Auto. Ins. Co.*, No. 07-00071 SPK--KSC, 2008 WL 4907865, at

*4 (D. Haw. 2008), *Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D 534, 540 (D. Nev. 2008), *Taylor*, 166 F.R.D. at 362, and *Ecclesiastes 9:10--11--12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1147 (10th Cir. 2007)). When the corporation lacks an employee with knowledge, it is not without recourse, but must prepare a designee "by having them review available materials, such as fact witness deposition testimony, exhibits to depositions, documents produced in discovery, materials in former employees' files and, if necessary, interviews of former employees or others with knowledge." *Id*. The corporation's obligation to testify about facts within its collective knowledge includes testimony "about the corporation's *position, beliefs and opinions*." *Id*. (emphasis added); *see also, Union Pump Company v. Centrifugal Technology, Inc.*, 404 Fed. Appx. 899, 903–904 (5th Cir. 2010).

With knowledge of these cases in mind, the trial court in this matter overruled ACL's objection to the Tibbs' Rule 30(b)(6) notice.

Given that neither the QBCRA nor ACL's lack of employees with personal knowledge prevented ACL from participating in discovery, its failure to comply with the trial court's orders was intentional and willful. In the context of civil contempt, an act is willful if it is "done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." *Spartanburg Cnty. Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82–83, 370 S.E.2d 872, 874 (1988) (citation omitted). ACL intentionally failed to produce a corporate representative for deposition and intentionally failed to produce documents responsive to the Tibbs' discovery requests. Parties to litigation, especially after having their objections overruled, cannot choose to simply ignore their legal obligations without consequence.

The trial court acted within its discretion in holding ACL in contempt. The decision to do so was not based on an error of law or a factual conclusion which lacked evidentiary support. The trial court's ruling holding ACL in contempt for failure to comply with its directives should be affirmed.

II. Striking ACL's pleadings was the proper sanctions for ACL's willful defiance of the trial court's order.

Faced with ACL's willful defiance of its order to participate in discovery, the trial court levied sanctions against ACL in the form of striking ACL's pleadings pursuant to South Carolina Rule of Civil Procedure 37(b)(2)(C) and *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). Rule 37(b)(2)(C) is clear that "[i]f a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure" including "[a]n order striking out pleadings or parts thereof[.]" S.C.R.C.P. 37(b)(2)(C).

ACL does not deny that it did not comply with the court's orders. In fact, the trial court's order holding ACL in contempt made it clear that ACL did "not intend to participate in this matter and that [the trial court's] order on discovery [would] continue to be ignored." (R. at 3). Consequently, the trial court struck ACL's pleadings.

The trial court's action was warranted by the extreme nature of ACL's continued defiance of the court's authority. Where the trial court orders a sanction that results in default or dismissal, such as the striking of a party's pleadings, "the end result is harsh medicine that should not be administered lightly." *Griffin,* 334 S.C. at 198, 511 S.E.2d at 718; *see also Karppi v. Greenville Terrazzo Co.,* 327 S.C. 538, 547, 489 S.E.2d 679, 684 (Ct. App. 1997) ("A sanction which results in a default or dismissal is harsh punishment which should be imposed only if there is some showing of willful disobedience or gross indifference to the rights of the adverse party."). The

sanction should be aimed at the specific misconduct of the party sanctioned and should not be used improvidently to prevent a decision on the merits. *Griffin,* 334 S.C. at 198, 511 S.E.2d at 719; *Karppi,* 327 S.C. at 543, 489 S.E.2d at 682. The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. *Karppi,* 327 S.C. at 543, 489 S.E.2d at 682. Finally, when a sanction "would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Griffin,* 334 S.C. at 198–99, 511 S.E.2d at 719; *see also Karppi,* 327 S.C. at 543, 489 S.E.2d at 682 ("Before invoking this severe remedy, the trial court must determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants.").

While striking ACL's pleadings is a harsh sanction, it was the proper sanction given ACL's misconduct. The sanction was reasonable and was the result of willful disobedience. Although the Tibbs filed suit naming ACL in April of 2023, ACL has not participated in this matter in good faith. It never answered South Carolina's master discovery. It never retained and/or tendered experts. ACL never complied with its discovery obligations by repeatedly contending that the trial court lacked personal jurisdiction over it and that it could not participate in discovery because of a blocking statute. Even after the trial court dismissed ACL's objections to participating in this case, ACL continued to delay. It flagrantly ignored the trial court's directives, turning a deaf ear to the explicit warnings given by the trial court for doing so, and continued to disregard its obligations to participate in this case.

ACL supplied two reasons as to why it could not comply with the trial court's order. Neither of those reasons had merit and, as the trial court determined, neither was a sufficient reason for ACL to refuse to participate in discovery. First, ACL argued that it had no one to designate as a

corporate witness. However, the party responding to a 30(b)(6) deposition notice has "absolutely no right...to refuse to designate a witness." *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1148 (10th Cir. 2007). Despite having this objection to the Tibbs' discovery requests overruled, ACL still refused to comply. Second, as mentioned above, ACL objected to its participation in discovery arguing that the QBCRA prevented it from responding to the Tibbs' discovery requests, including sitting for its own deposition. The trial court, after reviewing cases from across the country, held, just as other courts have, that the QBCRA did not prevent ACL from participating in this litigation.[5]

The trial court was explicit in explaining the consequence that ACL would suffer if it did not comply with the court's order by stating that "[f]failure to answer the Court ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt." ACL received the exact consequence promised by the trial court. In doing so, the trial court considered the requisite factors such as "the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin, supra*. When the trial court held ACL in contempt, the court acknowledged that, despite ACL's arguments to the contrary, ACL's failure to comply and participate in this case was willful and intentional. The court mentioned, when striking ACL's answer, that ACL has refused to participate in meaningful discovery. The prejudice suffered by the Tibbs because of ACL's conduct is undeniable. ACL's stated unwillingness to engage in any meaningful way in this matter meant that the Tibbs could not gather the information needed to thoroughly support their allegations. ACL failed to articulate the

[5] ACL confuses its ownership of the raw asbestos fibers with whether or not this Court can consider its relationship with the ultimate distributor of the product to resolve ACL's jurisdictional challenge. To be clear, the designation "FOB", meaning "free on board", is simply a contract designation regarding which contractual party is liable if the goods in question get damaged during transport. The designation has no relevance to whether ACL had sufficient minimum contacts with South Carolina such that the exercise of personal jurisdiction over ACL in this case violates ACL's due process concerns.

prejudice it would suffer by participating in discovery outside of alleged criminal and/or civil penalties it might face in Canada.[6] ACL does not deny that the Tibbs were prejudiced by its conduct because it cannot, in good faith, do so.

In its brief, ACL argues that striking its pleadings, in addition to holding the entity in contempt, was unreasonable because ACL defied only one order. But neither Rule 37 nor binding precedent require repeated disobedience of a court's orders before a party can be held in contempt or before sanctions can be levied against a party. Rule 37 gives the court discretion to impose sanctions after a single incidence of disobedience. The cases cited at ACL serve only to illuminate the trial court's discretion regarding when and if to impose sanctions.

In *Griffin*, *supra*., the trial court held the defendant in contempt after its second failure to comply with a consent order. 334 S.C. at 196-197. The trial court in *Griffin*, much like the trial court here, warned the defendant of the consequences for failing to comply, which included "among other sanctions, the striking of [its] answer." *Id.* at 197 (alteration in original). The defendant continued to dodge its discovery obligations by filing for protective orders and filing a motion to dismiss. *Id.* Despite the denial of its motions, the defendant still refused to comply with orders from the trial court and its obligations to participate in discovery. *Id.* at 197. The trial court ultimately determined the defendant had engaged in a "pattern of non-compliance" and, as a sanction, struck the defendant's answer. *Id.* at 198.

On appeal, the South Carolina Court of Appeals affirmed the trial court's sanction—striking the defendant's pleadings—as appropriate given the defendant's "multiple, egregious discovery abuses" that blocked the opposing party's attempts to conduct meaningful discovery. *Id.*

[6] ACL did not identify any of the alleged potential criminal or civil penalties that it faced if it participated in this litigation. Nor did it cite to a single instance where a Canadian entity was found to have violated the QBCRA by participating in American litigation or the penalties exacted against that entity.

at 198-200. Like *Griffin,* the Tibbs' case has been pending for almost a year and the Tibbs have not been able to take the 30(b)(6) deposition of ACL and have not received meaningful answers to interrogatories or requests to produce.

Similarly, in *McNair v. Fairfield County*, 379 S.C. 462 (2008), the South Carolina Court of Appeals affirmed the trial court's sanctions after the defendant failed to provide adequate responses to the plaintiff's discovery requests despite being ordered by the trial court to do so. The trial court in *McNair* ordered the defendant to provide complete responses to the plaintiff's interrogatories. *Id.* at 464. The defendant failed to do so. *Id.* The defendant argued that it could not comply with the trial court's order "because of a funding deadline imposed by the Federal Aviation Administration (the FAA)". *Id.* The defendants requested additional time to negotiate with the FAA, which the trial court granted. *Id.* When granting the requested additional time, the trial court "warned it was inclined to strike the answer," but gave the defendant "forty-five days to reach some kind of an accord." *Id.* at 465. Despite being given the additional time that it requested, the defendant failed to reach any resolution with either the FAA or the plaintiff. *Id.* The trial court, because of the defendant's failure to comply, issued an order striking the defendant's answer. *Id.*

On appeal, the Court of Appeals noted that the trial court had warned the defendant that it was inclined to strike the defendant's answer, in addition to other explicit findings, such as the delay causing prejudice to the plaintiff's right to have his claim heard, and that the defendant's failure to "make any attempt to comply with the court order" being a blatant violation of SCRCP 37(b)(2). *Id.* at 467. The Court of Appeals held that the trial court did not abuse its discretion in striking the defendant's answer. *Id.*

Missing *Griffin* and *McNair* is the notion that the trial court must wait for repeated failures to comply with its orders before either holding a party in contempt or imposing sanctions. Here,

there was no reason to wait. Unlike the defendant in *Griffin* and much like the defendant in *McNair*, ACL never made any attempt to comply with the directives of the trial court to submit to discovery, and in fact indicated that it never intended to comply with the trial court's orders.

While the penalty for ACL's flagrant disregard of the trial court's orders is harsh, striking ACL's answer without waiting for ACL to never comply was reasonable and proper. What else was the trial court to do? ACL never offered the trial court an alternative sanction which would have better suited this situation, especially given that the trial court had already denied its request for summary judgment. ACL, with full knowledge of the consequences awaiting it if it did not prepare and produce a corporate representative for deposition and/or produce documents requested by the Tibbs during the discovery period in this case, chose its punishment. The trial court acted within its discretion in giving ACL the very punishment it promised. The trial court's finding on this issue should be affirmed.

III. The Trial Court Did Not Abuse Its Discretion in Appointing a Receiver.

ACL's appeal raises two arguments to support its claim that the trial court abused its discretion in appointing a receiver, (1) the circuit court lacks jurisdiction over property outside South Carolina, and (2) Section 15-65-10 is inapplicable because it is not "in accordance with the existing practice." The trial court considered and correctly rejected both arguments. The Tibbs respectfully request this Court do the same.

A. ACL has insurance interests in South Carolina.

The crux of ACL's arguments on appeal is that it does not have any property in South Carolina that is subject to the control of a receiver. It makes this assertion despite refusing to produce any witness, interrogatory answers, or documents on this issue in discovery, even after being ordered to do so.

As Judge Toal noted in her order appointing a receiver,

> [the trial court's] view of the scope of a receiver's authority is not unique. The United States Supreme Court recognized in *Porter v. Sabin*, 149 U.S. 473 (1893) that "[t]he whole property of the corporation [is] within the jurisdiction of the court which appointed the receiver, **including all its rights of action**, except so far as already lawfully disposed of under orders of that court, [and remains in its custody, to be administered and distributed by it."

(R. at 10-11) (emphasis in original).

South Carolina Code §38-61-10 states,

> All contracts of insurance on property, lives, or interests in this state are considered to be made in the State and all contracts of insurance the applications for which are taken within this State are considered to have been made within this State and are subject to the laws of this State.

In 1992, the Supreme Court addressed this statute in an opinion authored by Justice Toal herself. The Court held, "it is immaterial where the contract was entered into. Further there is no requirement that the policyholders or insurers be citizens of South Carolina. What is solely relevant is where the property, lives, *or interests insured are located*." *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) (emphasis added).

The South Carolina District Court similarly considered §38-61-10 in *Hartsock v. American Auto. Inc. Co.*, 788 F.Supp.2d 447 (D.S.C. 2011). Following *Sangamo*, it determined that its first inquiry must be "where the subject of the insurance contract is located." *Id.* at 451. Although the insurance policy was issued in North Carolina and covered some North Carolina property, the court nonetheless found South Carolina substantive law applied to the dispute under §38-61-10. "Plaintiff's interest and property located outside of this state are not at issue here. In this action, Plaintiff seeks coverage solely on a vehicle registered and located in South Carolina. *Id.* at 452. Quoting *Sangamo*, the district court went on to find §38-61-10 constitutional because "insuring property, lives and interests in South Carolina constitutes a significant contact with this state." *Id.* at 452, *citing Sangamo*, 414 S.E.2d at 131.

In *Okatie Hotel Group, LLC v. Amerisure Ins. Co.*, No. 2:04-2212-23, 2006 WL 91577 (D.S.C. January 13, 2006), the South Carolina District Court explicitly considered whether §38-61-10 applied to liability insurance policies. In that case, the Defendant argued "the policy at issue is a liability policy, not a property policy. Thus, the statute does not apply by its own terms." *Id.* at *4. The South Carolina District Court rejected this argument, finding "the plain language of §38-61-10 contemplates a broad application of South Carolina law to insurance contracts with any significant connection to South Carolina, and the court is bound by the plain meaning of the statute's language." *Id.*

The *Okatie* court went on to note "*Sangamo* explicitly embraced a broad reading of §38-61-10's applicability." *Id.* The court summed up its decision to apply §38-61-10 to a product liability insurance policy by holding, "[f]inally, and perhaps most importantly, neither the South Carolina Supreme Court in *Sangamo* nor the statute emphasize the location of property or lives upon inception of the insurance contract. Rather, both emphasize only the general location of property, lives, and interests within the state and that 'it is immaterial where the contract was entered into.'" *Id.*, *citing Sangamo*, 414 S.E.2d at 130. *See also*, *Helsin-Kim v. CIGNA Group Ins.*, 377 F.Supp.2d 527, 531-32 (D.S.C. 2005) (rejecting Defendant's attempt to distinguish *Sangamo* and finding "§38-61-10 contemplates a broad application of South Carolina law to insurance contracts with any significant connection to South Carolina.").

The United States Supreme Court has recognized, "[t]he whole property of the corporation [is] within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, [and] remains in its custody, to be administered and distributed by it." *Porter v. Sabin,* 149 U.S. 473, 480 (1893). Thus,

as stated in the trial court's order, "the appointment of a receiver over those [insurance] assets is appropriate." (R. at 12).

ACL attempts to argue *Sangamo* stands for the proposition that §38-61-10 is merely a rule of conflicts provision. But neither *Sangamo* nor the plain language of the statute sets forth such a limitation. *Sangamo* considered §38-61-10 in the conflict of laws context because that was what was at issue in that case. But it did nothing to limit the statute to only such considerations. In fact, *Sangamo* explicitly recognized, "We find that insuring property, lives and interests in South Carolina constitutes a significant contact with this state. South Carolina has a substantial interest in who bears the ultimate liability for operations conducted in this state which result in injury to South Carolina property and citizens." *Sangamo*, 307 S.C. at 149. And as the original author of *Sangamo*, Justice Toal was certainly well-qualified to interpret it and apply it to the facts of this case. As such, ACL's efforts to limit the holding *Sangamo* and scope of §38-61-10 to merely being a conflict of laws provision are without merit.

It is well-established that insurance interests are "property." *See, e.g., In re Krafft-Murphy Company, Inc.*, 82 A.3d 696, 703 (Del. 2013) ("contingent contractual rights, such as unexhausted liability insurance policies, are 'property' . . .."); *see also*, *Kolb v. Cook*, 284 S.C. 598, 327 S.E.2d 379 (1985) (recognizing liability coverage as an undistributed asset of an estate). The Receiver Order appoints a receiver for "ACL's Insurance Assets." Such assets included "any claims related to the actions or failure to act of ACL's insurance carriers." The Receiver Order instructed "the Receiver to investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to ACL." (R. at 14).

Any product liability insurance held by ACL would be for the purpose of insuring claims against it arising out of harm caused by ACL's products. This "interest" exists in every jurisdiction

where ACL sold products, including South Carolina. The trial court acted reasonably and within its jurisdiction by appointing a receiver to investigate the existence of such assets. To the extent such assets exist, it was well within the trial court's power to appoint a receiver to exercise control over them for the protection of ACL's creditors and claimants in South Carolina.[7]

B. The Trial Court Followed "Existing Practice" Pursuant to S.C. Code Ann. § 15-65-10(5).

ACL also argues the Trial Court's order appointing a Receiver failed to follow "existing practice." Under South Carolina code §15-65-10,

> A receiver may be appointed by a judge of the circuit court, either in or out of court:
>
> (1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and which is in the possession of an adverse party and the property, or its rents and profits, are in danger of being lost or materially injured or impaired, except in cases when judgment upon failure to answer may be had without application to the court;
>
> (2) After judgment, to carry the judgment into effect;
>
> (3) After judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment;
>
> (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations; and
>
> (5) In such other cases as are provided by law or may be in accordance with the existing practice, except as otherwise provided in this Code.

The trial court primarily relied upon subsection (5) in deciding to support a receiver. (R. 9-12). Historically, receivers are appointed by courts sitting in equity when needed to ensure a fair result. *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384 (1939). Indeed,

[7] Under South Carolina law, "the term 'creditor' has been held sufficiently comprehensive to include those holding claims arising out of tort.'" *Moultis v. Degen*, 279 S.C. 1, 6, 301 S.E.2d 554, 557 (1983). As such, the Tibbs are creditors of ACL whose interests should be protected by a receiver.

"[t]he right to have a receiver appointed is an ancient one . . .." *Pelzer v. Hughes*, 27 S.C. 408 (1887).

As the trial court noted in its order,

> "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 Courts of this state have found appropriate.

(R. at 10). As set forth in *Virginia Carolina Chemical*, 84 S.C. 214 (1909), *citing Miller v. Hughes*, 33 S.C. 541, 12 S.E. 419 (1890),

> when a debtor is trying to defeat his creditors by an act or course of conduct which indicates moral fraud-a conscious intent to defeat, delay, or hinder his creditors in the collection of their debts-then a court of equity will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud without requiring the creditor to run the risk of losing his debt from the delay of obtaining judgment and a return of nulla bona on the execution.

The *Virginia-Caroline Chemical* court went on to note that the South Carolina Supreme Court had followed and approved of *Miller v. Hughes* on multiple occasions, *citing*, *Meinhard v. Youngblood,* 37 S.C. 231, 15 S.E. 950, 16 S.E. 771 (1892); *Sires v. Sires*, 43 S.C. 266, 21 S.E. 115 (1895), and *Bank v. Dowling*, 45 S.C. 677, 23 S.E. 982 (1896).

In this case, a receiver was and is necessary to achieve an equitable and fair result. As the trial court found, ACL "is trying to defeat his creditors by an act or course of conduct which indicates moral fraud-a conscious intent to defeat, delay or hinder creditors in the collection of debts." (R. at 10). "[I]t is exactly the moral fraud of ACL's personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions and ACL's continued refusal to participate in this that warrants the appointment of a receiver. Thus, where there is active wrongdoing and illegal refusal to comply with this Court's orders, the appointment of a receiver is appropriate." (R. at 10).

ACL has engaged in a scheme where it claims it does no business in South Carolina and has no assets in South Carolina, but simultaneously claims it will not and cannot answer questions about either issue, even in direct violation of court orders that it do so. Given ACL's complete refusal to voluntarily participate in the process, a Receiver is necessary to investigate these questions.

Further evidence of ACL's "moral fraud" is set forth in The Receiver Asbestos Corporation Limited's Motion to Supplement the Record for Fraud on the Court, filed with this Court on December 11, 2023. Specifically, in an August 21, 2023, hearing, ACL's counsel repeatedly represented to the trial court that ACL has no insurance coverage for this matter or other asbestos claims made against ACL, and thus there is no coverage for it to tender. (R. 259:3-7, 260:8-22, 281:23-282:1, 282:22-25, 308:8-15). As set forth in the Receiver's motion, after this appeal was initiated, the Receiver discovered evidence that these representations were false.

Specifically, Great American Insurance Company ("GAIC")—an insurance company located in Ohio—recently produced to the Receiver various documents that ACL provided to GAIC. These documents show that ACL has *for years* provided regular updates to excess insurers regarding the status of ACL's asbestos liabilities in the United States, as well as the impairment of ACL's insurance program's limits of liability through the payment of costs of ACL's asbestos litigation.

As further set forth in the Receiver's motion, the most recent annual report from ACL's chief financial officer, Mario Simard, to its excess insurers encloses ACL's "[r]eport of the asbestos litigation as of December 31, 2022." (R. at 1400-1405). This report includes summaries of the number of claims pending, dismissed and settled, and summaries of expense and indemnity paid for such claims. Notably, Mr. Simard's letter states that "[a]s previously advised, Asbestos

Corporation Limited and its primary insurers are in agreement that the primary insurance coverage has been completely exhausted," but goes on to state that "Asbestos Corporation Limited presently finances the costs of the asbestos litigation using the third and fourth excess layer coverage**.**" (R. at 1400). Additional documents (R. at 1407-1409, 1415-1421) submitted by the Receiver confirm the ACL's maintains multiple layers of excess insurance coverage, and its representations to the contrary to the trial court are but part of an ongoing scheme throughout the United States to morally defraud those injured or killed by its deadly products.

ACL's claim that it has no insurance, just like its claim that it cannot produce documents, and its claim that it cannot produce witnesses, is part of on decades-long, nationwide scheme to avoid responsibility for injuring and killing persons throughout the United States with its deadly asbestos products. These claims are demonstrably false and represent the type of "moral fraud" which supports the appointment receiver under South Carolina law. ACL has shown it is unwilling to answer questions about its assets in discovery, even when ordered by a Court to do so, and it has shown it is willing to lie to the Court on the record and let that lie stand on the record for months without correction. The Receiver has already uncovered evidence ACL has not only refused to produce, but which it has affirmatively misrepresented to the trial court. This Court should permit him to continue his work pursuant to the authority granted him by the trial court, as it is the only remedy for the moral fraud perpetrated by ACL.

ACL's ongoing refusal to accept the jurisdiction of any United States court, including South Carolina's trial court in this case, is precisely the type of "moral fraud" the receivership statute is meant to address. Having asserted that it will never comply with discovery requests, the only option left to the trial court was to appoint a receiver to investigate the existence of ACL's liability

insurance assets which could be used to satisfy a South Carolina judgment against ACL. The trial court's decision to appoint a receiver was not only reasonable, it was necessary.

C. S.C. Code Ann. § 15-65-10(4) Supports Appointment of a Receiver.

S.C. Code Ann. 15-65-10(4) also supports the appointment of a receiver. Under this provision, a receiver may be appointed when a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations.

ACL has willfully refused to produce a corporate witness to testify about its corporate assets in violation of the trial court's orders. As noted in Plaintiff's Motion for the Appointment of a Receiver, one of the reasons such discovery was necessary was because of the belief that ACL, like its sister company Atlas Turner,[8] is refusing to tender the defense of its asbestos lawsuits to its insurance companies. (R. at 243:11-244:8, 1141-1142). Thus, absent the appointment of a receiver, there was an imminent risk that ACL's insurance assets might have been unavailable to satisfy any judgment the Tibbs obtained. Given ACL's insistence that it has no other assets subject to the jurisdiction of this State, these facts provided an additional basis for the trial court's appointment of a Receiver to investigate and marshal the insurance assets of ACL.

IV. ACL's Initial Brief Violates South Carolina's Professional Standards.

ACL's appeal brief asserts South Carolina is a "Judicial Hellhole." Footnote 12 of its brief

[8] Courts have long recognized the interrelationship between Asbestos Corporation Limited and Atlas Turner, and the companies have acted in lockstep with each other in cases filed across the United States for decades. *See*, *e.g.*, *Roberts v. Owens-Corning Fiberglass Corp.*, 101 F.Supp.2d 1067, 1082 (S.D.IN. 1999), recognizing and reciting the interrelationship of various Quebec asbestos companies. *See also*, *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 643-44 (simultaneous considering motions relating to Atlas Turner, Bell Asbestos, and Asbestos Corporation Ltd., and referencing them collectively as "Canadian Defendants"). Also of note, in the *Welch* appeal, Atlas Turner's appeal raises the same issues raised in this appeal. *See also*, ACL's Appellant's Motion to Confirm Automatic Stay and/or Purported Receiver's Lack of Jurisdiction or, Alternatively, Verified Petition for Supersedeas, which repeatedly references the *Welch* case and parrots Atlas Turner's position taken in that matter (large portions of their briefing are substantively identical). ACL's motion also notes counsel for ACL also represents Atlas Turner in *Welch* (at p. 7, FN 10).

cites to "Judicial Hellholes," a website created by the American Tort Reform Foundation and designed for the sole purpose of disparaging the judicial system. ACL's citation to this industry and insurance fabricated propaganda is inappropriate and a violation of South Carolina's rules and professional standards for multiple reasons. Such reasons include,

1. citing to materials outside the record,
2. falsely accusing South Carolina courts of "hostility to defendants in asbestos cases,"
3. making untrue and unsupported assertions that South Carolina courts have forced other defendants into a position in which they had "no choice but to settle for inflated value. . ." and,
4. suggesting South Carolina is a "judicial hellhole" in violation of the "Lawyer's Oath" and the South Carolina Rules of Professional Conduct.

As an initial matter, ACL cites a website that was not designated as evidence to the trial court, and which is not in the record of appeal. Under South Carolina's appellate rules, arguments must be supported "with reference to the record on appeal," App. R. 208(E). "The Record shall not . . . include matter which was not presented to the lower court or tribunal." App. R. 210(c). South Carolina appellate courts "are confined to the record in deciding issues on appeal." *Timms v. Timms*, 286 S.C. 291, 333 S.E.2d 74 (1985). As such, ACL's efforts to submit new "evidence" to this Court in the form of the Judicial Hellholes website is inappropriate.

Further, ACL makes the unsupported, untrue, and unproveable claims that South Carolina courts show "hostility to defendants in asbestos cases,"[9] and have left other asbestos defendants

[9] The Judicial Hellholes 2023 entry for South Carolina complains at length about sanctions imposed on Cleaver Brooks in another asbestos matter. To the extent this Court gives such arguments any consideration, it should take judicial notice that, 1) the South Carolina Court of Appeals upheld those sanctions, *Howe v. Air & Liquid Systems Corp.*, 2021 WL 5626487 (S.C. Ct. App. 2021), *rehearing denied,* and 2) Cleaver Brooks voluntarily dismissed its appeal while it was pending before the Supreme Court. *See* June 22, 2023, Supreme Court Order dismissing appeal, Appellate Case No. 2022-000368.

"no choice but to settle for inflated settlement values. . .." Once again, these assertions are unsupported by any evidence in the record.[10]

Finally, ACL's characterization of South Carolina as a "judicial hellhole," is a violation of South Carolina's attorney rules for civility. South Carolina lawyers "must act in a dignified and professional manner, with proper respect for the parties, witnesses, opposing counsel, and for the Court. When a lawyer fails to conduct himself appropriately, he brings into question the integrity of the judicial system, and, as well, disserves his client." *In re Goude,* 296 S.C. 510, 512, 374 S.E.2d 495, 497 (1988).

Rule 402(h)(3) SCACR establishes the requirements for the admission to practice law in South Carolina and contains the "Lawyer's Oath." This oath includes the clause, "I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them. . .."

ACL's appellate briefing violates this oath. "It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice." S.C. R. Prof. Conduct. 8.4(d). The South Carolina Supreme Court has taken a dim view of attorneys disparaging South Carolina's legal system, noting attorneys are subject to discipline for "engag[ing] in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute. . .." *In re Anonymous Member of the South Carolina Bar*, 392 S.C. 328, 334, 709 S.E.2d 633, 636 (2011). "The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation. . . Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client. We caution the bar that

[10] Given that settlement agreements typically include confidentiality provisions, it is unclear how ACL could have any information about settlements with other parties absent a breach of confidentiality by settling defendants.

henceforth, this type of conduct could result in a public sanction." *Id.,* 392 S.C. at 337-38, 709 S.E.2d at 638.

ACL's initial refusal to recognize South Carolina courts' authority over it provided sufficient basis for the trial court to sanction it. ACL now doubles down, not only refusing to recognize South Carolina's authority, but citing a website whose sole purpose is to disparage the judicial system, explicitly calling South Carolina courts a "judicial hellhole." ACL's assertions are unsupported, untrue, inappropriate, a violation of the rules of professionalism, and should not be considered or condoned by this Court.

CONCLUSION

The trial court did not abuse its discretion in holding ACL in contempt, striking its Answer, or in appointing a receiver over its insurance assets. For these reasons, Appellees John and Margaret Tibbs respectfully request this Court affirm the trial court's orders striking ACL's Answer and appointing a receiver for ACL's insurance assets.

Respectfully submitted, May 21, 2024

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