THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

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

Appellant.

FINAL REPLY BRIEF OF APPELLANT ASBESTOS CORPORATION LIMITED

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ARGUMENT IN REPLY

I. The circuit court abused its discretion in striking ACL's pleadings because it did not consider all the required factors.

As explained in ACL's principal brief, there are four factors a court must consider when determining the appropriate discovery sanction: "the nature of discovery sought, the discovery stage of the case, willfulness, and the degree of prejudice." *Richardson on Behalf of 15th Cir. Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 600, 846 S.E.2d 14, 17 (Ct. App. 2020). "If the court does not consider these factors, an abuse of discretion occurs." *Id.*

The circuit court abused its discretion because it clearly did not consider all four required factors. The circuit court decided to strike ACL's pleadings based solely on its determination that ACL willfully failed to produce a witness. Indeed, it is clear from the circuit court's order and the hearing transcripts that the circuit court did not consider the nature of the discovery sought, the discovery stage of the case, or the degree of prejudice ACL would suffer because those factors are not mentioned at all. Our courts have made it clear that "[i]f the court does not consider these factors, an abuse of discretion occurs." *Id.* Accordingly, the circuit court abused its discretion in striking ACL's pleadings because it did not consider all the required factors.

II. The circuit court erred in appointing a receiver because ACL has no property in South Carolina.

The circuit court cannot appoint a receiver over a foreign corporation's property and assets that are not in South Carolina. This is common sense, straightforward, black

letter law.[1] To avoid this problem, the circuit court used section 38-61-10 of the South Carolina Code to construe that ACL has property in South Carolina. The circuit court erred in doing so.

Section 38-61-10 is merely a conflicts/choice of law provision. Neither Respondents nor the circuit court cited any authority in which this statute was used outside of a conflicts of law context. Appellant has also failed to find such authority. The lack of authority supporting the circuit court's ruling and Respondents' argument makes sense because section 38-61-10 in its entirety provides the following:

> 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 the State *are considered to have been made within this State* and are subject to the laws of this State.

§ 38-61-10 (emphases added). Contrary to the circuit court's ruling and Respondents' argument, section 38-61-10 does not allow courts to construe insurance

[1] Indeed, ACL's principal brief provided ample authority supporting this basic rule of law. *See Pollock v. Carolina Interstate B. & L. Assn.*, 48 S.C. 65, 25 S.E. 977, 980 (1896) ("'The power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him.'" (quoting Gluck & B. Rec. p. 3)); *Id.* ("'[C]ourts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers.'" (quoting 20 Am. & Eng. Enc. Law, 65, 66)); *Ex parte First Pennsylvania Banking & Tr. Co.*, 247 S.C. 506, 508, 148 S.E.2d 373, 374 (1966) ("[T]he jurisdiction of a state is restricted to its own territorial limits."); *Id.* ("[T]he general rule is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction. A statute which purports to have such operation is invalid."); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489 (4th Cir. 2007) ("South Carolina rules of construction provide that statutes must not be read to operate outside the state's borders."); *Id.* ("The South Carolina Supreme Court has written repeatedly that South Carolina statutes have no extraterritorial effect because the general rule is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction." (cleaned up)).

assets as *property in* South Carolina; it merely replaces the common law rule of *lex loci contractus* for insurance contracts in the conflict of laws context.[2]

The circuit court and Respondents both erroneously rely on the following statement from the Supreme Court for support that ACL has property in South Carolina: "The whole property of the corporation 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, remains in its custody, to be administered and distributed by it." *Porter v. Sabin*, 149 U.S. 473, 480 (1893). That case, however, dealt with the issue of state and federal courts "exercising jurisdiction over the same territory," which was still a relatively novel system in 1893. *Id.* Indeed, the property in *Porter* was already within the state's territory, making it subject to both the state and federal courts' jurisdiction, unlike the property at issue here. Therefore, *Porter* is not applicable because ACL is a foreign corporation that has never had property or assets in South Carolina. Accordingly, the circuit court erred in appointing a receiver because ACL has no property in South Carolina.

[2] *See Hartsock v. Am. Auto. Ins. Co.*, 788 F. Supp. 2d 447, 450 (D.S.C. 2011) ("Historically, in insurance coverage disputes, South Carolina courts have followed the doctrine of *lex loci contractus*, and applied the law of the state where the contract was formed. *See Sangamo Weston, Inc. v. Nat'l Surety Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992). However, this rule was modified by a statute enacted in 1947 and now codified at South Carolina Code section 38-61-10."); *Okatie Hotel Grp., LLC v. Amerisure Ins. Co.*, No. CIV.A. 2:04-2212-23, 2006 WL 91577, at *3 (D.S.C. Jan. 13, 2006) ("South Carolina choice of law encompasses both the traditional *lex loci contractus* doctrine and S.C. Code Ann. § 38-61-10. Historically, South Carolina courts followed the rule of *lex loci contractus* and applied the law of the state where the insurance contract was formed. However, a statute enacted in South Carolina in 1947, S.C. Code Ann. § 38-61-10, modified the traditional rule of *lex loci contractus*." (internal citations omitted)).

III. The circuit court erred in appointing a receiver because South Carolina's receivership statute is inapplicable to ACL.

A. Section 15-65-10(5) of the South Carolina Code is inapplicable because it is not a part of existing practice to appoint a receiver over a foreign corporation's out-of-state assets.

Neither the circuit court nor Respondents cite a single case in which a state court appointed a receiver over a foreign corporation's out-of-state property. They also fail to cite a single case in which section 38-61-20 of the South Carolina Code was used to deem property within the state. As discussed above, the cases they cite merely used section 38-61-20 to construe insurance contracts as *made* in South Carolina, not property *within* South Carolina. The circuit court appointing a receiver over a foreign corporation's out-of-state assets cannot be part of an existing practice of law if there is no evidence that it has ever been done before. Thus, the circuit court erred in appointing a receiver pursuant to section 15-65-10(5).

B. S.C. Code Ann. § 15-65-10(1) is inapplicable because ACL has not committed any fraud and does not have any judgments against it.

Initially, ACL notes that Respondents did not raise this statute to the circuit court, and the circuit court did not mention this statute in its order. Therefore, this Court should not consider whether section 15-65-10(1) is applicable.

Regardless, ACL's inability to produce a requested witness is not a fraud on Respondents. ACL's personal jurisdiction defenses are also not a fraud on Respondents. Finally, ACL does not have any judgments pending against it in South Carolina. Accordingly, section 15-65-10(1) is inapplicable.

C. Section 15-65-10(4) of the South Carolina Code is inapplicable because ACL has not forfeited any corporate or property rights, and it has no property in South Carolina.

Again, ACL notes that Respondents did not raise this statute to the circuit court, and the circuit court did not mention this statute in its order. Therefore, this Court should not consider whether section 15-65-10(4) is applicable.

Regardless, section 15-65-10(4) clearly provides that it applies to foreign corporations' property in South Carolina. § 15-65-10(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*." (emphasis added)). As discussed in Section II, ACL has no property in South Carolina. Additionally, ACL has not forfeited any corporate or property rights, regardless of location. Thus, section 15-65-10(4) is inapplicable.

IV. ACL's initial brief did not violate South Carolina's professional standards.

Respondents take exception to the name of a website and misconstrue ACL's citation to that website as an afront to the judicial system. ACL did not intend to disparage the circuit court but wanted to note that others have taken exception to the rulings at issue. This point was clearly made in ACL's Reply to Respondents' Reply to Respondents' Opposition to Appellant's Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas, and ACL incorporates that into this Reply Brief. Respondents present a mere red herring to avoid the complete lack of authority supporting their position that the circuit court may, under the facts of this case, appoint a receiver to control assets outside the jurisdiction of this state as well as this country.

V. ACL has not waived or abandoned its personal jurisdiction defense because a pretrial denial of a motion to dismiss for lack of personal jurisdiction is interlocutory and not directly appealable.

In *Mid-State Distributors, Inc. v. Century Importers, Inc.*, our supreme court explicitly held that "the denial of a motion to dismiss under Rule 12(b)(2), SCRCP, is interlocutory and not directly appealable." 310 S.C. 330, 336, 426 S.E.2d 777, 781 (1993). Therefore, ACL has not waived or abandoned its personal jurisdiction defense. Contrary to Respondents' claims otherwise, ACL's personal jurisdiction defense is still viable and will be appealed at the appropriate time.

CONCLUSION

For the foregoing reasons, along with those set forth in its principal brief, ACL asks this Court to reverse the circuit court's decisions to place ACL in contempt, strike ACL's pleadings, and appoint the purported receiver.

Respectfully submitted,
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Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC,

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APPELLANT'S CERTIFICATION FOR FINAL REPLY BRIEF

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I, Stephen L. Brown, do hereby certify that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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