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May 02 2024

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
Acting Circuit Court Judge

Appellate Case No. 2023-002011
Appellate Case No. 2023-002010
Appellate Case No. 2023-002009
Appellate Case No. 2024-000524
Circuit Court Case No. 2023-CP-40-01759

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

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. 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; and Zurn Industries, LLC,

Defendants,

of which

Asbestos Corporation Limited is the.....

Appellant,

and

Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas,

Third-Party Plaintiff/ Respondent,

v.

Anglo American PLC, individually and as successor in interest to Anglo American Corporation of South Africa Ltd.; DeBeers PLC; DeBeers Centenary AG; DeBeers Consolidated Mines Ltd.; DeBeers S.A.; DeBeers UK Ltd.; DeBeers Jewelers US, Inc.; Angle American US Holdings Inc.; Element Six US Corp.; Element Six Technologies US Corp.; Element Six Technologies (OR) Corp.; First Mode Holdings, Inc.; Platinum Guild International (USA) Jewelry Inc.; Forevermark US Inc.; Anglo American Crop Nutrients (USA), LLC; Charter Consolidated Ltd.; ESAB Corporation; Central Mining & Investment Corporation Ltd.; Cape Holdco Ltd.; The Law Debenture Corporation PLC; Cape Industrial Services Group Ltd.; Mohed Altrad; Altrad UK Ltd.; Cape UK Holdings Newco Ltd.; Altrad Services Ltd., f/k/a Cape Industrial Services Ltd.; Altrad Investment Authority SAS; Sparrows Offshore Group Ltd.; Hawk Bidco US Inc.; Arranco US, LLC; Sparrows Offshore, LLC; The Sparrows Group, LLC,

Third-Party Defendants,

of which

Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. are the Appellants.

**PETITION FOR REHEARING
BY APPELLANTS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND
CENTRAL MINING AND INVESTMENT CORPORATION LTD.**

The Court’s order dismissing this appeal (the “April 17 Order”) overlooked or missapprehended that a single order may have more than one effect.¹ Often a circuit court order rules on more than one motion. Here, the Court suggests that it would be impossible for an order to both 1) rule on a discovery motion, and 2) refuse injunctive relief. The Court stated: “Appellants characterize the circuit court's action as refusal to enter an injunction. Upon careful review, the order on appeal should be characterized as an order granting the receiver’s motion to compel discovery.” April 17 Order. In fact, the March 12, 2024 Order (“March 12 Order”) both grants the receiver’s motion to compel discovery and refuses Appellants’ request for injunction.² Notably, this Court did not state that the March 12 Order did not refuse an injunction. Because one of the effects of the March 12 Order was the refusal of the requested injunction, this interlocutory order

¹ Appellants maintain that the circuit court does not have subject matter jurisdiction because of the pending appeals in this matter. Rule 205 SCARC. Likewise, because of the appeals pending at the time the circuit court issued the March 12 Order, the March 12 Order is void *ab initio*.

² Appellants requested that the circuit court deny the receiver’s motion to compel discovery and grant Appellants’ request for injunction. Had this been the outcome, the Receiver would be arguing that the grant of the injunction would be immediately appealable even though the order also denied a discovery motion. Such an order would be ruling on the same competing requests as are addressed by the order on appeal here.

is immediately appealable under South Carolina Code § 14-3-330(4).

BACKGROUND

A more complete recitation of the factual and procedural background of this matter is set forth in the Initial Briefs for the December 2023 Appeal and March 2024 Appeal, but a short summary is provided herein for the Court’s convenience.

In *Tibbs v. 3M Company, et al.*, No. 2023-CP-40-01759 (Cir. Ct. – Richland Cty., S.C.) (“Tibbs Action”), Peter D. Protopapas (the “Receiver”) who was not a party to the action, filed a “third-party complaint” against Appellants and numerous other third-party defendants asserting that they all should be deemed the alter ego of defendant Cape PLC.

Appellants and other third-party defendants discovered multiple, significant defects in the Receiver’s appointment over “Cape PLC and its subsidiaries, affiliates, successors, and assigns”³ in a prior asbestos action, *Park v. Armstrong International, Inc.*, Case No. 2021-CP-40-02727 and therefore moved to dissolve the receivership on numerous grounds including that it was void *ab initio*. The circuit court denied the motion. The Appellants’ appealed (“December 2023 Appeal”). These appeals are pending, and Appellants’ have filed their initial brief.⁴

Although the December 2023 Appeal immediately divested the circuit court of jurisdiction over all matters affected by the legitimacy of the receivership, the Receiver purported to continue to litigate against Appellants, including pursuing discovery from them. Appellants asserted that Rule 205 precluded the circuit court and the Receiver from taking action in this case because the exclusive jurisdiction was with this Court. Instead of addressing Appellants’ assertions related to Rule 205 and subject matter jurisdiction, the Receiver charged forward with discovery.

³ See R. p. ___; Mot. to Appoint Receiver at 1 (filed Mar. 6, 2023, in *Park*).

⁴ Appellate Case Nos. 2023-002009, 002010, and 002011.

The Receiver filed motions to compel discovery from Appellants. In response, Appellants argued *inter alia* that the circuit court should grant an injunction – and moved for an order enjoining the Receiver from pursuing discovery or any other action in this case.

The circuit court ruled on the briefs without a hearing and issued the March 12 Order, which addressed both the Receiver’s Motion to Compel and Appellants request for injunction. The circuit court specifically listed the motions to compel considered and stated: “On February 16, 2024, the Third-Party Defendants filed materials opposing the Motions to Compel.”⁵ The circuit court acknowledged that materials opposing the motions to compel included the competing injunctive relief requested by the Appellants. The March 12 Order referenced the requested injunctive relief on the face of the order: “The Court notes that although Third-Party Defendants included in these February 16 filings what they have termed to be “cross-motions” for “injunctive relief,” the Court advised the parties by email on February 21, 2024, that those requests for injunctive relief will remain under the Court’s advisement to be addressed at another time.”⁶ As the circuit court stated, it considered the request for injunctive relief, but refused to rule.

Further, the court made it clear that the March 12 Order, in addition to granting motions to compel and refusing the requested injunction, also had the effect of ruling on all of third-party defendants’ motions for protective order. The cover e-mail from the circuit court to the March 12 Order stated: “It is also the Court’s understanding this Order disposes of all motions to compel or protective orders.”⁷

⁵ R. p. ____; Order (Mar. 12, 2024).

⁶ R. p. ____; Order fn2 (Mar. 12, 2024).

⁷ R. p. ____; E-mail from Court (Eva Diaz) to Counsel of Record attaching the March 12, 2012 order with subject line: “Cape PLC v. Anglo American PLCC, et al. (2023-CP-40-01759) – Pending Motions to Compel” (Mar. 12, 2024)

Appellants filed a notice of appeal of the March 12 Order on March 19, 2024 (“March 2024 Appeal”).

ARGUMENT

The March 2024 Order is Immediately Appealable Because it Refused the Request for Injunctive Relief

Appellants respectfully submit that the March 12 Order is more than just “an order granting the receiver’s motion to compel discovery.” Initially, pursuant the circuit court’s cover e-mail, the March 12 Order also disposes of third-party defendants’ motions for protective order. Also, the March 12 Order addressed several motions to compel (as opposed to a single motion as suggested by the language of the April 17 Order above.) Most importantly, in addition to ruling on several motions to compel and motion for protective order, the March 12 Order references, acknowledges consideration of, but refuses Appellants’ request for injunction. Accordingly, the March 12 Order has several effects (not just one): 1) granting several motions to compel discovery, denying several motions for protective order, and refusing Appellants’ request for injunction.

This Court must look to the order’s actual effect (all effects) to determine whether it is appealable.⁸ The relief requested by the Receiver and by the Appellants was mutually exclusive. By granting the motions to compel, the circuit court had to 1) deny the Appellants’ motions for protective order (acknowledged by the circuit court), and 2) refuse the injunctive relief. Similarly, had the circuit court granted the Appellants’ injunctive relief, it would have had to deny the Receiver’s motions to compel.

⁸ See *Spalt v. S.C. Dep’t of Motor Vehicles*, 423 S.C. 576, 584, 816 S.E.2d 579, 583 (2018) (“The label given to the order is not determinative of its immediate appealability.”); *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479 (“[A]n appellate court should look to the effect of an interlocutory order to determine its appealability”); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461, 464 n.4 (2013) (explaining that whether an order is immediately appealable is a function of “substance rather than nomenclature”).

The March 2024 Order refused Appellants’ request for an injunction by taking it “under advisement” yet simultaneously holding that the receivership is not “stayed” and allowing the Receiver to continue the very activities Appellants sought to enjoin, including compelling discovery from the Appellants and others.⁹ Accordingly, the circuit court’s order granting the motions to compel was a defacto refusal to issue the requested injunctive relief enjoining discovery actions by the Receiver. The circuit court’s refusal to enjoin the Receiver rendered the March 2024 Order immediately appealable.¹⁰

The South Carolina statute governing interlocutory appeals of injunction orders is substantially similar to the corresponding federal rule.¹¹ As a result, South Carolina courts often look to federal authority when interpreting analogous state court rules or statutes.¹²

⁹ See, e.g., *Towles*, 338 S.C. at 35, 524 S.E.2d at 842–43 (holding that delaying the grant of a motion to compel arbitration until after discovery rendered the order compelling discovery immediately appealable, as the circuit court had “favored litigation over arbitration” despite not finally resolving the question of arbitrability).

¹⁰ See *Arnal v. Fraser*, 371 S.C. 512, 517-23, 641 S.E.2d 419, 421-24 (2007); *Wingate v. Wingate*, 289 S.C. 574, 575, 347 S.E.2d 878 (1985); *Wilson v. Walker*, 340 S.C. 531, 540, 532 S.E.2d 19, 23 (Ct. App. 2000); S.C. Code § 14-3-330(4) (authorizing immediate appeals of interlocutory orders “refusing an injunction”); *Hazel v. Blitz USA, Inc.*, 433 S.C. 120, 124, 857 S.E.2d 4, 6 (2021) (addressing on immediate appeal the propriety of an order that allowed a case to proceed and refused to “permanently enjoin” the claims against a defendant based on a bankruptcy court order).

¹¹ Compare S.C. Code § 14-3-330(4) (authorizing appeal of “[a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction”), with 28 U.S.C. § 1292(a)(1) (authorizing appeal of “[i]nterlocutory order of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions”).

¹² See *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) (“In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules.”); *State v. Taylor*, 333 S.C. 159, 170-72, 508 S.E.2d 870, 875-76 (1998) (examining federal authorities when “Rule 106, SCRE, has not been interpreted by this [c]ourt,” but was “substantially similar to Rule 106 of the Federal Rules of Evidence”).

The United States Supreme Court has recognized that “where an order has the ‘practical effect’ of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction.”¹³ In recognizing the “practical effect” test, which the South Carolina Supreme Court has also adopted,¹⁴ the Supreme Court reiterated that “the label attached to an order is not dispositive,” and that “we have not allowed district courts to ‘shield’ [their] orders from appellate review’ by avoiding the label ‘injunction.’”¹⁵ Consequently, the circuit court’s footnote 1 purporting to keep the cross-motions for injunction “under advisement” while denying the relief sought is not effective to insulate the appealed order from review. Indeed, courts have held that delay or inaction in ruling on a cross-motion for injunction is equivalent to denial and entitles the

¹³ See *Abbott v. Perez*, 585 U.S. 579, 629, 138 S. Ct. 2305, 2339, 201 L. Ed. 2d 714 (2018).

¹⁴ See *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479 (“[A]n appellate court should look to the effect of an interlocutory order to determine its appealability”)

¹⁵ See *Abbott*, 585 U.S. at 594, 138 S. Ct. at 2319.

aggrieved party to interlocutory appeal:

Because the district court did not expressly deny the motion here, we must determine whether the district court's inaction, in light of the unique expedited nature of the case, amounts to an "effective" denial.

It's generally understood that a motion for preliminary injunctive relief "must be granted promptly to be effective," so if a district court does not timely rule on a preliminary-injunction motion, it can effectively deny the motion. We have accordingly recognized that simply sitting on a preliminary-injunction motion for too long can effectively deny it.¹⁶

Additionally, the fact that the March 12 Order facially compelled discovery (and denied motions for protective order), while addressing, but not specifically denying the cross-motions for injunction does not matter. Courts have found that "discovery orders" that have the practical effect of denying pending motions for injunction are immediately appealable.¹⁷

Here, the purpose of Rule 205, and Appellants' cross-motion for injunction to enforce it, is to prevent trial court proceedings from occurring that affect matters on appeal. The effect of the appealed order in this case was to deny the cross-motions for injunction, which sought not only to bar the Receiver from pursuing discovery but also sought to enjoin him from taking any action—inside or outside of Court—to impair the rights of Appellants under the auspices of the appealed

¹⁶ See *In re Fort Worth Chamber of Commerce*, No. 24-10266, --- F.4d ----, 2024 U.S. App. LEXIS 8336, at *7 (5th Cir. Apr. 5, 2024).

¹⁷ See *United States v. Tex. Educ. Agency*, 431 F.2d 1313 (5th Cir. 1970) (holding that the appeal of an order setting a pretrial conference was permitted, where an injunction ordering school desegregation for the 1970-71 term was sought but the pretrial conference was set ten days after school began, thereby delaying any prospect of the injunctive relief sought until after the action sought to be enjoined had occurred).

receivership order. Consequently, the circuit court's order denying that injunctive relief is immediately appealable under S.C. Code § 14-3-330(4).

CONCLUSION

Appellants respectfully request the Court rehear its April 17 Order, reinstate this appeal, and decide this matter on its merits after full briefing and oral argument.¹⁸

May 2, 2024

Respectfully submitted,

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¹⁸ Per Rule 208(b)(6), SCACR, Appellants incorporate herein, to the extent applicable, all additional arguments raised and authorities cited by similarly situated Appellants Mohed Altrad, Altrad Investment Authority S.A.S., ArranCo US, LLC, Hawk Bido (US) Inc., and Sparrows Offshore, LLC.

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PROOF OF SERVICE

I, the undersigned of the law offices of Gordon Rees Sculls Mansukhani LLP, attorneys for Appellants Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd., do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): PETITION FOR REHEARING BY APPELLANTS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND CENTRAL MINING AND INVESTMENT CORPORATION LTD.

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