

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Jun 24 2024

S.C. SUPREME COURT

Appeal from Richland County
Court of Common Pleas
The Honorable Jean H. Toal, Circuit Court Judge

Civil Action No. 2023-CP-40-01759
Appellate Case No. 2024-000916

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

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiw-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell

Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC.....**DEFENDANTS,**

and

Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas, Third-Party Plaintiff..... **RESPONDENT,**

v.

Anglo American PLC, individually and as successor in interest to Anglo American Corporation of South Africa LTD., De Beers PLC, individually and as successor in interest to De Beers S.A., De Beers Centenary AG, De Beers Consolidated Mines Ltd., n/k/a De Beers Consolidated Mines Proprietary Ltd., De Beers UK Ltd., De Beers Jewellers LTD., De Beers Jewellers US, Inc., Anglo American US Holdings Inc., Element Six US Corp., Element Six Technologies US Corp., Element Six Technologies (OR) Corp., First Mode Holdings, Inc., Platinum Guild International (U.S.A.) Jewelry Inc., Lightbox Jewelry Inc., Forevermark US Inc., Anglo American Crop Nutrients (U.S.A.) LLC, Charter Consolidated Ltd., ESAB Corporation, Central Mining & Investment Corporation Ltd., Cape Holdco Ltd., The Law Debenture Corporation PLC, Cape Industrial Services Group Ltd., Mohed Altrad, Altrad UK Ltd., Cape UK Holdings Newco Ltd., Altrad Services, Ltd., f/k/a Cape Industrial Services Ltd., Altrad Investment Authority S.A.S., Sparrows Offshore Group Ltd., Hawk Bidco US Inc., ArranCo US, LLC, Sparrows Offshore, LLC, and The Sparrows Group, LLC.....**THIRD-PARTY DEFENDANTS,**

Of which ArranCo US, LLC, Hawk Bidco US Inc., Sparrows Offshore, LLC, Mohed Altrad, Altrad Investment Authority S.A.S., Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. are the**PETITIONERS.**

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
(Filed Subject to Petitioners’ Motion to Strike & Stay Deadline for Reply)

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CORPORATION LTD.**

INTRODUCTION

Rather than address any of the arguments set forth in Petitioners' petitions for writ of certiorari on the merits, Respondent has filed a lengthy return arguing about other appellate cases and their purported applicability here. Nothing changes the fact that the items addressed in the return are inapplicable for a host of reasons. Each authority relied on therein is markedly different from what occurred when the circuit court refused and denied Petitioners' requests for injunctive relief and thereafter when the court of appeals apparently disregarded the appealability statute—expressly permitting an immediate appeal of an interlocutory order refusing an injunction—and the controlling appealability analysis to be applied.

Rule 205 of the South Carolina Appellate Court Rules is clear and unambiguous. And, no appellate court has yet overruled or even addressed the unbroken line of precedent which Petitioners seek to have enforced in the face of the actions by the Receiver on behalf of both Cape PLC and Cape Intermediate Holdings Limited (“CIHL”) before the circuit court and outside of this litigation. Section 14-3-330(4) of the South Carolina Code is similarly clear and unambiguous—Petitioners have a statutory right to immediately appeal the refusal of the injunctions that were sought as the proper (and seemingly exclusive) mechanism for enforcing Rule 205 and its jurisprudence.

Rule 205 applies under the facts of this case for a simple reason: Petitioners have pending a subsection 14-3-330(4) appeal of a prior circuit court order that continued, modified, and granted an entirely new receivership, thereby rendering the creation, existence, propriety, and fundamental nature and power of the purported receivership each at issue as part of such appeal and, in turn, depriving the circuit court and the Receiver of any authority or jurisdiction to act. To date, no appellate court has set forth by order or opinion why Rule 205 would not apply in this case.

The March 12 Order issued by the circuit court denied and refused the injunctions sought for a likewise simple reason: Petitioners each asked for an injunction to have the Appellate Court Rules enforced and the circuit court did not give it to any of them. Specifically, the circuit court refused the injunctive relief sought by attempting to hold those requests in abeyance, denied the injunction by not acting on the requests, and has since evidenced that denial by continuing to act and allowing the Receiver to continue to act in contravention of the same Appellate Court Rules on which the injunction requests were based.

Such denial and refusal of the injunction sought is immediately appealable for a final simple reason: S.C. Code Ann. § 14-3-330(4) says so.

This Court should grant the petition for writ of certiorari, reinstate this appeal as required by the appealability statute, and either consider this appeal on the merits of Rule 205's exclusivity provision or remand the case to the court of appeals with instructions to hear the merits of Petitioner's appeal.

ANALYSIS

The circuit court's March 12 Order denied and refused the injunctions Petitioners sought and was issued by the circuit court without jurisdiction to do so and in violation of Rule 205. Petitioners properly appealed that March 12 Order pursuant to the express language of subsection 14-3-330(4) of the statute governing appealability and the black-letter point of South Carolina law that the effect of an order—not its label—controls the analysis of appealability. The court of appeals erred by dismissing Petitioners' appeal of the circuit court's refusal to issue an injunction. Now, rather than explain on the merits why the March 12 Order is not immediately appealable as set forth in section 14-3-330(4) or why Rule 205 does not apply, Respondent has instead provided a set of universally inapplicable authorities in an attempt to muddle the issues between different

parties, different appeals, different receiverships, and different circuit court cases. Respondent has not even attempted to respond to those dispositive points, because there is no substantive opposition to be made.

I. Respondent’s chart of appellate cases has no bearing.

In an attempt to lump Petitioners in with a number of other entities—all of whom are wholly unrelated to them and are not parties to this case—Respondent included a lengthy chart, spanning across six (6) pages, that has no bearing on this case and seems to be included only as fictional support for an unsupportable sanctions request included well beyond the page limit for Respondent’s return. Even more so, portions of the analysis that precedes and follows the chart highlights the reality that the charted information has zero connection to events in this case. *See, e.g.,* Return at 15 (stating “[d]espite the repeated warnings and orders instructing vexatious appellants to cease these tactics, it is clear such warnings have fallen on deaf ears,” where no such warnings have been issued to Petitioners because they are simply availing themselves of their requisite appellate rights).

Respondent’s chart includes circuit court cases involving what appear to be largely insurance companies in the context of other receiverships, primarily over alleged insurance coverage previously written for defunct or dissolved entities, and provides only the final resolution, devoid of the context, with zero analysis of how those cases control or are even relevant to the case-by-case analysis appellate courts are required to conduct to determine appealability. As referenced throughout this case, there are no insurance policies, carriers, or defunct or dissolved entities at issue. *None.* Notably, *none* of those cases appear to involve requests for injunctive relief to enforce mandatory Appellate Court Rules, and *none* of those cases concern appealability of orders refusing a request for injunctive relief. *See* Return at 10–15 (inclusive of this Court’s

recent March 27, 2024 Order dismissing as not immediately appealable the appeal in *Childers v. Davis Mechanical Contractors, Inc., et al.* (Appellate Case 2024-000005)). And *none* involve appeals that arise, as here, out of the circuit court creating a completely new receivership while also rewriting an initial receivership appointment order to improperly modify and continue a prior receivership over a different entity. Simply, this chart is inconsequential, and the citations included therein are inapposite.

II. Any discussion or analysis of “stay” is irrelevant.

In a similar attempt to obfuscate the issue of Rule 205’s divestiture of jurisdiction or authority from the circuit court, Respondent attempts to focus the analysis on “stays.” *See, e.g.*, Return at 17–18, 26–27. This too is extraneous and insignificant; the required analysis under Rule 241, SCACR, for *stays and supersedeas* petitions is separate and wholly distinct from the *jurisdictional* inquiry mandated by Rule 205, SCACR. A decision on one does not, and cannot, affect or dictate the other. *Compare* Rule 241, SCACR (“As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order”) *with* Rule 205, SCACR (limiting the lower court to proceed only “with matters not affected by the appeal”).

As explained in *Tillman v. Oakes*, 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012), these separate rules, with separate accompanying analyses, cannot be conflated:

When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending. The answer to the first question is governed by the stay and supersedeas provisions of Rule 241

The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR

398 S.C. at 254–55, 728 S.E.2d at 50–51; *see also Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 533–34, 787 S.E.2d 485, 493–94 (2016) (analyzing both Rules 205 and 241, SCACR). Respondent has yet to engage on, or even attempt to distinguish, these controlling authorities.

As part of Respondent’s continued improper attempt to conflate Rule 241 (governing “stays”) with Rule 205 (governing “jurisdiction”), and as done by Respondent before both the circuit court and the court of appeals, Respondent cites to and relies upon interlocutory procedural orders from the court of appeals in the wholly unrelated “Payne & Keller” matter—*Childers v. Davis Mechanical Contractors, Inc., et al.* (Appellate Case No. 2023-000727). *See* Return at 19, 32–33, 36. In that appeal, on November 21, 2023, the court of appeals issued an order on an emergency motion to clarify and enforce Rule 205 filed by various appellants. That order stated the motion to clarify was “prompted by an order issued by the circuit court on October 5, 2023” and stated nothing more than: “This court will take no action on any order which is not properly before it,” citing a case which states a notice of appeal is required for the court of appeals to decide on a circuit court order. *See Payne & Keller*, S.C. Ct. App. Order, dated November 21, 2023 (Appellate Case No. 2023-000727).

By its *plain text*, this particular court of appeals order did nothing more than tell the appellants in that particular matter that the court was simply withholding ruling on an issue until a notice of appeal of the circuit court’s underlying order was filed with the court of appeals. To take such an order and cite it, as valid precedent, in other matters—procedurally and factually distinct—is incorrect. Simply, the court of appeals did not issue any ruling or guidance relative to Rule 205; instead, it said it could not do so given the procedural record of the matters before it.

Earlier, on September 8, 2023, as part of the same Payne & Keller appeal, the court of appeals rejected another argument related to a *stay* of a circuit court order. However, that order

did not address or mention Rule 205. Instead, it relied on Rule 62(a), SCRCF, and Section 14-3-450 of the South Carolina Code—both of which are inapplicable here¹—to rule “the March 31, 2023 order is not *stayed* during the pendency of this appeal. . . . Accordingly, the receivership action and the receiver’s ability to carry out his duties are not *stayed*.” *See Payne & Keller, S.C. Ct. App. Order*, dated Sept. 8, 2023 (Appellate Case No. 2023-000727) (emphasis added). Here again, this procedural order regarding a *stay* is immaterial to the issues particular to this appeal.

Rule 205 has no exception; this Court should not accept Respondent’s invitation to create one by disregarding a clear, unambiguous, and binding Appellate Court Rule and its well-established supporting jurisprudence through citation to non-binding, procedural orders applying a separate, but inapplicable Appellate Court Rule or refusing to substantively rule altogether.

III. The March 12 Order was not merely a discovery order.

As set forth in the petitions, the circuit court was not “merely a discovery order.” It is clear discovery orders are interlocutory and not immediately appealable—but that is not what occurred here. In this case, on February 16, 2024, Petitioners timely moved for injunctive relief in the face of repeated violations of Rule 205’s self-executing mandate. Respondent never actually filed opposition to that request. Thereafter, the circuit court stated it would be refusing to rule on the request for injunctive relief at that time (and it has continued to do so in the intervening months,

¹ Rule 241, SCACR, has exceptions and thereby renders Rule 62(a), SCRCF, and Section 14-3-450 relevant in that context (again, inapplicable here). What’s more, that “stay” ruling was incorrect as a matter of law. The General Assembly specifically provided the Appellate Court Rules control when there is a conflict between those Rules and any statutory provisions related to appeals involving receivers or injunctions. *See* 1991 S.C. Acts No. 115, § 5 (“In event of conflict between any provision of the South Carolina Appellate Court Rules and any other statutory provision as to appellate procedure not repealed in this act, the provision of the rules shall control.”). Section 14-3-450’s “stay” provision is irreconcilable with Rule 205’s deprivation of jurisdiction from the circuit court, and the General Assembly has declared that Rule 205 controls the analysis.

including as to Petitioners' subsequent requests for injunctive relief, all as summarized in the timeline included as part of the petition before the Court). This alone is immediately appealable regardless of the label afforded the ruling. *See* S.C. Code Ann. § 14-3-330(4).

All of Respondent's authority that discovery orders are not appealable appears to be correct, yet simultaneously misses the point as to why this circuit court order was appealed and the case-by-case standard that should have been applied when assessing appealability. Separate and apart from the fact the granting of Respondent's motion to compel was, in fact, a refusal and denial of the motion for injunction,² the Court only needs to look to what the circuit court has done after this appeal was perfected for it to be evident the refusal and denial of the injunction occurred as of the date of the March 12 Order and is continuing.

Since refusing the injunction, and thereby denying it, the circuit court has allowed further actions in violation of Rule 205 to occur—both by acting itself and through the Receiver, an arm of the court. On April 3, 2024, Respondent filed a motion to preadmit exhibits which was followed on April 5, 2024, by a motion for adverse inference as to the Petitioners. These requests were followed by a motion for sanctions on April 12, 2024. Via orders entered on May 23, 2024, the circuit court has now sanctioned Petitioners—essentially holding them in contempt, striking a primary defense, and finding for the Receivership as to the primary allegations of the third-party complaint—in pertinent part, for their reliance on Rule 205, as well as “pre-admitting” over 2,500 exhibits as a discovery sanction. Setting aside the fact that granting a motion to compel violates Rule 205 as should have been applied here given the underlying issues pending on appeal, the argument that this order addressed a “garden-variety discovery issue,” *see* Return at 24, does not obviate the fact this order in reality refused and denied an injunction. Repeatedly stating this is

² *See Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293, 296 (5th Cir. 1974).

only a discovery order does not change the result and impact of such an order and what has and continues to occur in the circuit court. Since the February 2024 filings seeking injunctive relief, the circuit court has continued to act, and has allowed Respondent to act, in violation of Rule 205. That began with the March 12 Order which denied and refused the injunction.

No appellate court has yet answered the question of why Rule 205 suddenly ceases to apply when an appeal is perfected pursuant to section 14-3-330 of the South Carolina Code as it was here and has in other cases.³ That is because Rule 205 obviously *does* apply here. On the other hand, appellate courts have been clear in approving immediate appeals of denials or refusals of injunctions, even where those denials or refusals are in the context of otherwise-unappealable denials. *Williams v. Northwestern Sec. Life Ins. Co.*, 307 S.C. 462, 464–65, 415 S.E.2d 809, 810 (1992) (deciding otherwise-unappealable denials of Rule 12(b) motions were immediately appealable because, as here, they denied injunctions that the defendants sought as a matter of law, rather than as discretionary injunctions under the traditional multi-part test); *Hazel v. Blitz USA, Inc.*, 433 S.C. 120, 124, 857 S.E.2d 4, 6 (2021) (reviewing on immediate appeal the propriety of the denial of an injunction required as a matter of law).

³ Respondent likewise states: “Finally, the March 12 Discovery Order reiterated ‘[d]iscovery was to continue’—a finding consistent with the Receiver’s express communication three months earlier to both the Court and the Third-Party Defendants that discovery could proceed and no Protective Order Motions remained pending—a communication to which no Third-Party Defendant responded at all, much less challenged.” (emphasis omitted). The Receiver’s misunderstanding of the case’s procedural posture and unilateral disregard of the Appellate Court Rules and controlling cases cannot and does not control here, nor does it have any impact on the fact that Rule 205 and the appealability of this order, especially where this *fundamental* misunderstanding of Rule 205 is the very reason for this appeal.

IV. Petitioners are merely availing themselves of appellate rights and their statutory mandate.

As set forth in the petitions, Petitioners assert the order on appeal is immediately appealable as a result of the circuit court’s denial and refusal of injunctive relief. There is no escaping the fact that in March, the circuit court chose not to—refused—to rule on the motions that sought such relief. Thereafter, the circuit court has acted repeatedly, each time choosing to violate the bounds of Rule 205 and relying on inapposite procedural orders to do so rather than published opinions like *Tillman v. Oakes* and *Stokes-Craven* which are mandatory authority on all courts in this state.⁴ See Section II, *supra*.

Appealability is a case-by-case decision. None of the other receivership cases cited in the return address—head on—why Rule 205 does not apply here. The Receiver’s silence on that point alone should be dispositive. In fact, in the various orders cited by the circuit court and Respondent, the question was either not posed to the court of appeals *or* the court of appeals disposed of the issue on some other grounds before it was possible to rule on whether Rule 205 did or did not operate to divest the circuit court with authority or jurisdiction to continue acting while an earlier,

⁴ Aside from the orders set forth in Section II above and their clear inapplicability, Respondent cites two other appellate court orders. Those orders did not reject Rule 205 requests on their merits—to date, no court has done so—rather they dismissed appeals based on a case-specific decision as to appealability of the underlying order. That is not at issue here, and applicability of those procedural orders to this case would be improper when the analysis is supposed to be case-by-case. Compare Order, *Mitchell v. 3M Company*, Appellate Case No. 2024-000341 (filed Apr. 12, 2024) (refusing to rule on Rule 205 issue due to disposition on other grounds) and Order, *Welch v. Advance Auto Parts*, Appellate Case No. 2024-000337 (filed Apr. 12, 2024) (same) with Order, *Tibbs v. 3M Company, et al.*, Appellate Case No. 2024-000524 (filed Apr. 17, 2024) (not addressing Rule 205).

proper appeal of the circuit court’s December 6 order was working its way through the appellate process.⁵

Respondent likewise cites a number of cases for the purported proposition that when an order appealed is interlocutory, jurisdiction does not transfer to the appellate court. *See* Return at 33–35. Contrary to the authorities cited in the petitions governing Rule 205 and exclusive jurisdiction, none of those cases apply here for the simple reason that there has not yet been a final decision that the appeal of the December 6 order was interlocutory and unappealable and a remittitur issued. Indeed, the Petitioners’ appeals of the December 6 order are undoubtedly proper—that order created a completely new receivership (as requested by the Receiver), and it modified and continued the prior receivership appointment in so doing. That appeal is squarely within the letter and spirit of subsection 14-3-330(4), and there has never been any reasoned argument to the contrary. Petitioners appeals of the December 6 order are proper and ongoing.

In Respondent’s first cited case on this point, *S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 536 (1986), the jurisdiction analysis was conducted post hoc based on a final determination that the appeal was invalid. That has not occurred here. Moreover, both relevant citations in *Arnold*—*State v. Dingle*, 279 S.C. 278, 282, 306 S.E.2d 223, 225 (1983) and *Crout v. S.C. Nat’l Bank*, 278 S.C. 120, 124, 293 S.E.2d 422, 424 (1982)—are cases related to the prior Supreme Court Rule 41 and analyzed issues of “supersedeas” and “stay,” which, as discussed above, are covered under inapplicable Rule 241 of the South Carolina Appellate Court Rules.

⁵ Respondent appears to seek to tangentially attack the appeal of the circuit court’s December 6 order. That order was issued in error for a number of reasons, and as a result of section 14-3-330 of the South Carolina Code, is being appealed. Until a remittitur is issued as to that appeal, Petitioners assert that Rule 205 applies to all matters affected by that appeal as stated above, as set forth in the Petition, and as set forth in the briefing to the court of appeals.

Compare Rule 241, SCACR *with* Rule 41 § 1, Supreme Court Rules (former rule cited in *Crout*) *with* Rule 205, SCACR; *see also* *Tillman*, 398 S.C. at 254–55, 728 S.E.2d at 50–51 (noting wholly disparate analyses required for Rules 241 and 205 of the South Carolina Appellate Court Rules).

Respondent next references *Dibble v. Schade*, 308 S.C. 88, 93, 417 S.E.2d 104, 107 (Ct. App. 1992) and *Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees*, 344 S.C. 522, 524, 544 S.E.2d 642, 643 (Ct. App. 2001). *Dibble* and *Brown* simply cite *Arnold* with no added analysis and for the same reasons, are inapplicable to what is asserted and is to be applied here. *Fibkins v. Fibkins*, 303 S.C. 112, 116, 399 S.E.2d 158, 161 (Ct. App. 1990), also relied on by Respondent, cited *Arnold* without analysis, but moreover, occurred under a completely different factual context than exists in this case. As with *Arnold*, the appealed order relied on by the losing party had *already* been determined to be not appealable—something that has not occurred in this case, and cannot occur in this case. In all, Respondent’s cited authority is unavailing, and the required result remains—this Court should grant the petitions, reinstate this appeal as required by the appealability statute, and either consider this appeal on the merits of Rule 205’s exclusivity provision or remand the case to the court of appeals with instructions to hear the merits of Petitioner’s appeal.

V. The sanctions request is improper and must be denied.

Respondent concludes his return with a heavy-handed request for sanctions. The Court should fully reject such posturing, as sanctions are wholly unwarranted in this case for three separate reasons—each of which is dispositive.

First, it is procedurally improper. A request for sanctions as requested by a party to an appeal must be by motion. Rule 269, SCACR. In turn, Rule 240 governs motions, requiring an affidavit of service, a memorandum in support, and an appendix or affidavit to support the motion. *See* Rule 240(c), SCACR. They must be filed with the clerk of the appellate court, afforded time

for a return and a reply, and be accompanied by a filing fee. Rule 240(d), SCACR. None of that has occurred here, and to include such a request at the end of an excessively long return to a petition for writ of certiorari, when valid appeals have been pursued, is wholly improper. *See* Rule 240(g) (“Failure of the moving party to perform any act required by this Rule may be deemed an abandonment of the motion or petition.”).

Second, the Petitioners are entitled to take this interlocutory appeal as a matter of law—South Carolina Code § 14-3-330(4) expressly gives them this right—and were even *required* to take it under this Court’s precedent. In *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014), this Court reviewed a finding of contempt and sanctions. However, the appellants sought review of various discovery orders issued leading up to the sanctions. But, because the appellants appealed only the order awarding sanctions, this Court held “the merits of the underlying discovery orders, including the Privilege Order and the Discovery Order, are not before us for consideration.” 409 S.C. at 280, 762 S.E.2d at 543 (characterizing un-appealed rulings as “law of the case”). In so holding, the Court stated: “The Record makes clear that Appellants considered an appeal of one or more of those orders, at one time even seeking review of the Privilege Order in the court of appeals, which was held to be interlocutory.” *Id.* at 280, 762 S.E.2d at 543. Thus, the Court held that to have appellate review of discovery orders, they must be appealed, even though they may be dismissed as interlocutory, to avoid having them summarily dismissed at a later stage as not before the Court for consideration. Here, by contrast, the Petitioners properly appealed the underlying “discovery” order because it had the effect of refusing an injunction required by law due to the circuit court’s lack of jurisdiction.

Third, before Petitioners filed an appeal of the March 12 order, the court of appeals made clear that parties with pending appeals (such as the pending appeals of the December 6 order) are

not to file “motions to clarify” to seek enforcement of Rule 205, SCACR, and that the court of appeals would not take “action on any order which is not properly before it.” *See* Order in Appellate Case No. 2023-000727 (filed Nov. 21, 2023).⁶ In that case, the motion to clarify was filed in an appellate case on the appeal of a different order. Petitioners, rather than seeking clarification by interlocutory motion, contemporaneously filed proper notices of appeal and their initial briefs seeking enforcement of Rule 205, and in the interim, sought injunctive relief to preserve their rights.⁷ The only other option was to file a similar motion to clarify with the court of appeals, which would have been directly contrary to the court of appeals’ prior instruction issued in spite of the fact Rule 240 allows broad motions practice before the appellate courts of this state. *See* Rule 240, SCACR; Jean H. Toal, et al., *Appellate Practice in South Carolina* 379 (3d ed. 2016)

⁶ The circuit court referenced both the November 21 order in Appellate Case No. 2023-000727 as well as the September 8 order in the same case. As discussed above, neither of those court of appeals’ orders addresses head-on the issue as to Rule 205. One discusses only a stay, which, as discussed above, has no bearing on the question posed by a Rule 205 jurisdiction analysis. *Tillman*, 398 S.C. at 254–55, 728 S.E.2d at 50–51 (noting fundamental differences between analysis under Rule 241 and Rule 205). The other, as noted, never reached the Rule 205 question because of the manner in which it was placed before the court of appeals. And, respectfully, the September 8 order is wrong as a matter of law.

And as noted above, the General Assembly has expressly provided that in the event of any perceived conflict between the Appellate Court Rules (like Rule 205) and statutory procedures regarding appellate proceedings (like Section 14-3-450, as cited by the September 8 order) must be resolved in favor of the Appellate Court Rule—here, Rule 205 and its exclusivity provision. *See* 1991 S.C. Acts No. 115, § 5 (“In event of conflict between any provision of the South Carolina Appellate Court Rules and any other statutory provisions as to appellate procedure not repealed in this act, *the provision of the rules shall control.*” (emphasis added)).

⁷ The fact that the Petitioners took the extraordinary step of filing their opening briefs and designations of matter at the same time that they filed their notices of appeal, and before they even had the transcript of the trial-level proceedings, is proof-positive that the Receiver’s refrain that every adverse filing is done for purposes of delay is simply not true. The Court should not credit that unsupported narrative.

(“Because motions are used in the appellate courts to seek specific relief, there is *no limit to the type of motion* that could be filed in the appellate courts.” (emphasis added)).

The circuit court’s March 12 order—constituting action taken in violation of the precepts and limitations of Rule 205—was placed properly before the court of appeals for enforcement. *See, e.g., Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004) (“The requirement of service of the notice of appeal is jurisdictional.”). For the court of appeals’ November 21 order referenced above to provide its stated avenue for relief, it must have contemplated exactly this manner of appeal. And, again, the General Assembly has specifically vested the Petitioners with the right to immediately appeal the circuit court’s refusal to enter an injunction required as a matter of law due to the lower court and the Receiver lacking jurisdiction to proceed. S.C. Code Ann. § 14-3-330(4). Sanctions are not warranted and should be rejected.

CONCLUSION

For the reasons set forth herein, and in the petitions for writ of certiorari, Petitioners respectfully request grant the petitions, reinstate this appeal as required by the appealability statute, and either consider this appeal on the merits of Rule 205’s exclusivity provision or remand the case to the court of appeals with instructions to hear the merits of Petitioners’ appeal.⁸

[SIGNATURE BLOCKS TO FOLLOW]

⁸ Per Rules 208(b)(6) and 240, SCACR, Petitioners incorporate herein, to the extent applicable, all additional arguments raised and authorities cited by all similarly-situated parties. Additionally, the materials cited herein are available with the court of appeals, via C-Track, in Appellate Case Nos. 2024-000524, 2023-002006, 2023-002007, 2023-002008, 2023-002009, 2& 023-002010, or are otherwise a matter of public record as part of the public index before the circuit court in Civil Action No. 2023-CP-40-01759. *See* S.C. Sup. Ct. Order 2024-04-30-02. To the extent the Court desires for these materials to be compiled and presented to the Court, Petitioners stand willing to do so.

Respectfully submitted,

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