THE STATE OF SOUTH CAROLINA
IN THE 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. 2023-002011
Appellate Case No. 2023-002010
Appellate Case No. 2023-002009

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 Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. are the...……..…. **PETITIONERS**.

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND CENTRAL MINING AND INVESTMENT CORPORATION LTD.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED

1. May the pre-judgment receiver appointed pursuant to S.C. Code Ann. § 15-65-10, et seq, over Cape PLC (an active UK Company) in the *Park v. Armstrong International, Inc.*, Case No. 2021-CP-40-02727 ("*Park Case*") pursuant to Plaintiff Park's Motion to Appoint Receiver ("Park Appointment Order") act on behalf of (and assert third-party claims for) Cape PLC in this different matter – the *Tibbs* case? Or, is a pre-judgment receiver appointed pursuant to S.C. Code Ann. § 15-65-10, et seq, limited to acting (and asserting any claims) in the case in which he was appointed?

2. To act as a pre-judgment receiver for Cape PLC in this case, must the Plaintiff (*Tibbs*) (or some other party in the case) first make a motion to appoint a receiver in this case and/or must the trial court first issue an order appointing a pre-judgement receiver in this case?

3. May a pre-judgment receiver be appointed in this case over a foreign corporation that is not a party to this case?

4. May the pre-judgment receiver appointed pursuant to S.C. Code Ann. § 15-65-10, et seq, for Cape PLC in the *Park Case (*pursuant to Plaintiff Park's Motion to Appoint Receiver) continue to act after the *Park Case* resolves? Or must the pre-judgment receivership be dissolved (or declared moot) because the *Park Case* was settled?

5. Is the pre-judgment receiver appointment order for Cape PLC in the *Park Case (*pursuant to Plaintiff Park's motion to appoint receiver) void *ab initio* pursuant to S.C. Code Ann. § 15-65-60 because the appointment order does not contain the mandatory clause "fixing the value of the property for which the bond may be given."

6. May a void appointment order be the basis for purported Receiver's action in this case?

7. By allowing the pre-judgment receiver appointed pursuant to S.C. Code Ann. § 15-65-10, et seq, over Cape PLC (an active UK Company) in the *Park Case* to act as Receiver for Cape PLC in this case, did the trial judge's order on appeal ("December 2023 Order") effectively grant a new appointment of Mr. Protopapas as receiver for Cape PLC in this case.

8. By allowing the pre-judgment receiver appointed pursuant to S.C. Code Ann. § 15-65-10, et seq, over Cape PLC (an active UK Company) in the *Park Case* to act as Receiver for a different entity - Cape Intermediate Holdings Ltd. ("CIHL") - in this case, did the December 2023 Order effectively grant a new appointment of Mr. Protopapas as receiver for CIHL in this case.

9. By allowing the pre-judgment receiver appointed pursuant to S.C. Code Ann. § 15-65-10, et seq, over Cape PLC (an active UK Company) in the *Park Case* to act for Cape PLC in this case when the Park Appointment Order stated that "the Court hereby appoints Peter Protopapas be and hereby is appointed Receiver <u>in this case</u> [the *Park Case*] pursuant to the South Carolina Law…", did the December 2023 Order effectively modify the Park Appointment Order to allow it to apply to this case?

10. By allowing the pre-judgment receiver appointed pursuant to S.C. Code Ann. § 15-65-10, et seq, over Cape PLC (an active UK Company) in the *Park Case* to act for CIHL (a different active UK Company) in this case, when the Park Appointment Order neither applied to nor mentioned CIHL, did the December 2023 Order effectively modify the Park Appointment Order to allow it to apply over CIHL (to add CIHL)?

11. As the December 2023 Order did not contain the mandatory clause "fixing the value of the property for which the bond may be given", is the appointment of Mr. Protopapas as receiver in this case over Cape PLC or CIHL in this case void for failure to comply with the condition precedent set forth in S.C. Code Ann. § 15-65-60 (1976 as amended). *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343, 348 (1928) (interpreting the provision under the previous receivership statute containing substantively identical language to Section 15-65-60 and holding that "[t]he provision for inserting a clause fixing the value of the property in the order appointing a receiver is mandatory, and without such clause the order is void."?

12. As the Park Appointment Order did not contain the mandatory clause "fixing the value of the property for which the bond may be given", is the Park Appointment Order void for failure to comply with the condition precedent set forth in S.C. Code Ann. § 15-65-60 (1976 as amended)? *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343, 348 (1928).

13. As there is no receiver appointment order (in *Park*, *Tibbs* or otherwise) over Cape PLC or CIHL that contains the mandatory clause "fixing the value of the property for which the bond may be given" in accordance with the requirements of S.C. Code Ann. § 15-65-60, is there no valid receivership appointment over Cape PLC or CIHL? *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343, 348 (1928).

14. Is the December 2023 Order immediately appealable pursuant to S.C. Code Ann. § 14-3-330(4) (authorizing immediate appeals of interlocutory orders "granting, continuing, modifying, or refusing the appointment of a receiver") because it 1) continued and/or modified the appointment order of Mr. Protopapas from the *Park Case* and/or 2) granted the appointment of Mr. Protopapas as receiver over both Cape PLC and CIHL in this - the *Tibbs* case?

15. Is the denial of the prejudgment right to tender a bond to dissolve a receivership (and avoid this litigation) pursuant to S.C. Code Ann. § 15-65-60 a substantial right allowing the immediate appeal of the trial judge's order pursuant to S.C. Code Ann. § 14-3-330(2)?

16. When and how may the order granting a pre-judgment receiver appointment in the *Park Case* be challenged and immediately appealed, where 1) neither the entity being placed into receivership (Cape PLC) nor any of the entities alleged to be holding its assets (Petitioners) were provided notice of a motion to appoint receiver, a hearing on a motion to appoint receiver, or the entry of an order appointing receiver), 2) the receivership appointment order is defective on its face (and is void ab initio pursuant to South Carolina Supreme Court precedent) as it omits the mandatory clause providing the value for which a bond may be provided to dissolve the receivership), 3) the appointed receiver brings a third party complaint in a different case, and 4) the appointed receiver purports to (and is allowed to) act as receiver over a different entity than the one over which he was appointed (and that is not a party to the case)?

INTRODUCTION

Petitioners were not parties to *Park v. Armstrong International, Inc.*, Case No. 2021-CP-40-02727 ("*Park Case*") where the Park Appointment Order over Cape PLC was entered that stated that "the Court hereby appoints Peter Protopapas be and hereby is appointed Receiver **in this case** [the *Park Case*] pursuant to the South Carolina Law…". Neither Petitioners nor Cape PLC were given notice of Park Plaintiff's motion to appoint receiver. The Park Appointment Order was entered *ex parte*. Thus, when the Receiver was appointed, there was no adversary process to test the merits of the appointment.

The Receiver is attempting to block any challenge to his authority to act. It is undisputed that Park Appointment Order is based on admittedly false information (Cape PLC is NOT dissolved) and facially omits mandatory information required in all South Carolina receivership appointment orders (the mandatory clause "fixing the value of the property for which the bond may be given" to vacate the receivership as set forth in S.C. Code Ann. § 15-65-60 (1976 as amended)). Receiver argues that because he was appointed as a pre-judgment receiver in the *Park Case*, he may use that order to file claims in any other case – as he did here. Further, Receiver argues that no party (including Petitioners) may appeal the order granting and/or expanding his authority to act for Cape PLC in any case until after final verdict – after the pre-judgment statutory protections afforded those who are alleged to have property belonging to the entity in receivership have become moot. This argument should be rejected.

Initially, the Park Appointment Order appointed Mr. Protopapas pursuant to S.C. Code Ann. § 15-65-10 to be the pre-judgment receiver over Cape PLC in the *Park Case* only. Neither Title 15 nor the Park Appointment Order allows the Receiver to act in cases other than the *Park Case*. Enforcement of this long-recognized principle 1) supports a ruling that Receiver lacks

standing to pursue this third-party complaint against Petitioners, and 2) is in line with the position that the Park Appointment Order may only be challenged in the *Park Case*. The Park Plaintiff who made the motion to appoint receiver over Cape PLC would be the opposing party to an appeal of the Park Appointment Order (not the Receiver). Park Plaintiffs are the parties statutorily liable for Mr. Protopapas improper appointment. S.C. Code Ann. § 15-65-90 (1976 as amended) (where receiver "improperly appointed, the costs, charges and expenses of such receivership shall [be charged upon] the party procuring the appointment.")[1] Park Plaintiffs are not parties to this case, have no interest in the Tibbs' claims, and have no interest in the Receiver's third-party derivative action against Petitioners. Further, while *Tibbs* Plaintiffs did make a motion for an appointment of a receiver over Defendant Asbestos Company Limited, *Tibbs* Plaintiffs have not move for the appointment of a receiver over Cape PLC (or CIHL). This Court should hold that the Receiver has no authority or standing to bring the third-party claims in this case.

Petitioners' only avenue to challenge the Receiver's improper assertion of third-party derivative claims in *Tibbs* was to challenge the Receiver's appointment and authority by motion in *Tibbs* (after Receiver asserted the claims against Petitioners) – which they did. However, the circuit court issued the December 6, 2023 order ("December 2023 Order" or "order on appeal") which not only allowed the Receiver to assert the third-party claims in *Tibbs* on behalf of Cape PLC, it also allowed the Receiver to assert claims on behalf of a different entity – CIHL – that is not a defendant in the *Tibbs* case.

Accordingly, the effects of the December 2023 Order are as follows: 1) the order granted the appointment of Mr. Protopapas as pre-judgment receiver over both Cape PLC and CIHL for

[1] Receiver claims that the three law firms that he has retained to prosecute the third-party claims against Petitioners have worked more than 3300 hours at a claimed cost of over 2.5 million dollars. See Receiver's Report on Attorney's Fees and Costs filed in the *Tibbs* case on June 24, 2024.

the *Tibbs* case; 2) the order continued and/or modified the appointment order of Mr. Protopapas from the *Park Case* to allow him to assert claims in the *Tibbs* case; and/or 3) the order violated Petitioners pre-judgment substantial right to provide a bond and vacate the receiver appointment afforded by S.C. Code Ann. § 15-65-60. Each of these effects is immediately appealable. The issue of whether the December 2023 Order is immediately appealable deserves a full vetting by this Court.

STATEMENT OF THE CASE

Although the circuit court has previously appointed receivers over defunct or insolvent entities in cases involving alleged insurance coverage (as a purported means to access legacy insurance policies), this non-insurer case marks a remarkable shift because here the circuit court appointed a receiver over an active, solvent, foreign entity, with no assets in South Carolina—an act with no precedent given how far it strays beyond the boundaries of the receivership statute and precedent.

The circuit court in the *Park Case* granted the motion to appoint pursuant to subsections 15-65-10(4) and (5) of the South Carolina Code (2005). Based on carried over demonstrable errors from the motion to appoint noting "Cape, a foreign corporation, has forfeited its charter and has further failed to answer this case," the Order appointing the Receiver over "Cape PLC" and "its subsidiaries and global affiliates" set forth the following expansive rights and duties, including:

> Therefore, this Court hereby appoints Peter Protopapas be and hereby is appointed Receiver *in this case* pursuant to the South Carolina Law with the power and authority fully administer all assets of Cape, accept service on behalf of Cape, engage counsel on behalf of Cape and take any and all steps necessary to protect the interests of Cape whatever they may be. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Cape as well as any claims related to the actions or failure to act of Cape's insurance carriers.

Thereafter, in this underlying asbestos case, wholly unrelated to the circuit court action in which the Receiver was appointed, the Receiver made an appearance and filed a "general denial" "on behalf of" Cape PLC. [2] The following day, the Receiver filed a Third-Party Complaint against Petitioners, alleging that Petitioners were parties in possession of funds belonging to Cape PLC and seeking to place those funds in the hands of the Receiver.[3] The Receiver filed the third-party complaint without leave of the circuit court and even though he was not a defendant in *Tibbs* and had not been appointed as a receiver in *Tibbs*.

The Third-Party Complaint also sought funds allegedly belonging to CIHL, even though 1) CIHL was/is not a defendant in the *Tibbs* case, 2) CIHL is not the entity referenced or covered by the Park Receivership Order, and 3) Mr. Protopapas had not been appointed receiver over CIHL by any other order.

Petitioners challenged Receiver's authority to file claims for Cape PLC and CIHL in the *Tibbs* case by filing a motion styled as a motion to dissolve receivership. The circuit court recognized that one of the primary issues raised by the motion to dissolve was whether a pre-judgment receiver appointed in a case is limited to pre-judgment activities in that case. In addressing Receiver's counsel, the Court made the following statements/observations:

- THE COURT: The implication of what they're arguing is that this receivership is confined to the Park Case. Transcript. P. 58

- THE COURT: Mr. Lay, speak for a minute about the contention that somehow or another [the receivership] falls because the Park Case was settled. P. 57

[2] See "Answer of Cape PLC" filed June 29, 2023.
[3] See Receiver's Third-Party Complaint filed on June 30, 2023.

The Court then confirmed the Receiver's position that being appointed as pre-judgment receiver upon motion of the Plaintiff in the *Park Case* gave him the authority to act in any future case where Cape PLC may be named as a defendant:

> THE COURT: Well, your position, then, is that once the receiver is appointed for a corporation that is alleged to be a corporation that has assets in South Carolina, … you're saying that a receiver, once appointed, is the receiver for that corporation no matter what the posture of the liability claims that involve it in South Carolina is?
>
> MR. LAY: Yes, ma'am.

The Receiver's position does not comport with the South Carolina receivership statute set forth in Title 15, South Carolina precedent, or the South Carolina or US constitutions. The Receiver was appointed upon the motion of the Park Plaintiff for purposes of the *Park Case* only.

Petitioners asserted in their motions to dismiss and to dissolve receivership that 1) the circuit court did not have subject matter jurisdiction to hear the third-party complaint, 2) not only was the Park Appointment Order matter fatally defective, it specifically limited Mr. Protopapas authority to the *Park Case* (excluding all other matter including the *Tibbs* case), 3) Mr. Protopapas did not have authority to act as a receiver in the *Tibbs* case because the circuit court had not granted a receivership in this case, 4) even if Mr. Protopapas has authority to act for Cape PLC, it did not have authority to act for (and had never been appointed a receiver over) CIHL, and 5) that any receivership appointment is defective without the mandatory "**clause fixing the value of the property for which the bond may be given**" as required by S.C. Code Ann. § 15-65-60. The circuit court entered the December 2023 Order finding that Mr. Protopaps may act as receiver in the *Tibbs* case, and further finding: 1) that the entities presently known and Cape PLC and CIHL

are different and distinct entities;[4] 2) that the circuit court in the *Park Case* "appointed a receiver for Caple PLC";[5] that Mr. Protopapas is seeking through his third-party complaint to assert claims on behalf of CIHL (not the presently existing Cape PLC),[6] that correct corporate names are not required for service of process – imputing notice of a new receivership to Cape Intermediate Holdings Limited even though the name "Cape PLC" was used for service;[7] that the Park Appointment Order was flawed because it incorrectly found that Cape PLC was dissolved;[8] and that Mr. Protopapas may now act as pre-judgment receiver for Cape PLC and Cape Intermediate Holdings Limited for the *Tibbs* case.[9] The primary effect of the December 2023 Order was to grant a new pre-judgment receiver appointment in *Tibbs* over both Cape PLC and a new entity, CIHL. The December 2023 Order may also have had the effect of modifying and/or continuing

[4] The circuit court explained: "Cape PLC (as it was known from 1989 to 2011, and as is now known as Cape Intermediate Holdings Ltd.) is the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.)…." December 2023 Order Page 6. "The second Cape PLC, on the other hand, is a new entity allegedly created in the Bailiwick of Jersey in April 2011…. Other than the common name, there is no evidence the Park Plaintiffs meant to sue the new Bailiwick of Jersey entity as a defendant in their asbestos exposure lawsuit. The new entity was not organized in the United Kingdom; the new entity has existed for less than 20 years; and there is no indication in the record the new entity was the same entity that historically sold asbestos in the United States (nor could there be given its relative infancy)." December 2023 Order Page 17.

[5] December 2023 Order page 4.

[6] December 2023 Order pages 6-9 summarizing third-party complaint allegations of "Cape" that all predate Cape PLC's 2011 formation.

[7] The circuit court stated "To the extent the 'Cape PLC' name should not have been included in the service of process paperwork because it was a 'formerly known as' name rather than a current name, that misnomer does not render service ineffective." December 2023 Order page 19.

[8] The circuit court stated: "Although the order appointing the Receiver [in Park] incorrectly described Cape as 'dissolved,' even though Cape is still a going concern in the United Kingdom, that does not impact the legality of the Receivership, as dissolution of the entity placed in receivership is not required under subsection (5)." December 2023 Order Page 25, fn 16. See also generally December 2023 Order page 23-25 where the circuit court relies entirely on S.C. Code Ann. § 15-65-10(5) and does not reference S.C. Code Ann. § 15-65-10(4).

[9] The circuit court stated "Accordingly, the Court finds the evidence of records shows the proper Cape entity was served with process of both the summons and complaint in the Park lawsuit, forming the foundation for this Court to exercise jurisdiction over Cape and institute the Receivership …." December 2023 Order page 22.

the Park Receiver Order. All of the above should be immediately appealable pursuant to S.C. Code Ann. § 14-3-330(4).

Moreover, the relevant receivership statutes require certain **pre-judgment** protections for those whose assets are sought by a receiver (here Petitioners). Specifically, "[w]henever the court … shall appoint a receiver **before final judgment in the cause** there **shall** be inserted in the order of appointment **a clause fixing the value of the property for which the bond may be given**, as prescribed in Section 15-65-50. And upon the due execution and filing of such bond thereafter **before final judgment in the cause** the court or judge **shall vacate the appointment of such receiver**…." S.C. Code Ann. § 15-65-60 (emphasis added). This statutory protection is so vital that an appointment order without it is deemed to be **void**. *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343, 348 (1928) ("[t]he provision for inserting a clause fixing the value of the property in the order appointing a receiver is mandatory, and without such clause the order is void."). The receivership statutes clearly mandate this right for Petitioners "before final judgment"; it is, therefore, a substantial right. Accordingly, the Petitioners (as the entities owning the property that is being sought by the receiver) would only have the ability to enforce their pre-judgment statutory rights (including but not limited to the right to file a bond and vacate the receivership) by challenging the receivership in the *Tibbs* case. The circuit court denied Petitioners' challenge, part of which was specifically based on the above referenced statutes. These substantial pre-judgment statutory rights will be lost (moot) if not appealable until after final judgment. Accordingly, these issues must be appealable now. Section 14-3-330(2).

The court of appeals erred in dismissing the appeal of the circuit court's order 1) allowing the pre-judgment receiver appointed in *Park* to bring third-party claims in *Tibbs*, 2) granting, modifying and/or continuing the appointment of Mr. Protopapas as receiver over Cape PLC, 4)

granting the appointment of Mr. Protopapas as receiver over CIHL, and 4) denying Petitioners right to pay a bond to dissolve the receivership(s), and this Court should grant certiorari and remand to the court of appeals for briefing and hearing on the merits.

If rulings such as the one made by the circuit court here were upheld under these circumstances, then 14-3-330(4) of the South Carolina Code giving the right to immediately appeal orders "granting, continuing, modifying, or refusing the appointment of a receiver" would be rendered meaningless and would so disproportionately favor the party requesting a receiver (and/or as here the receiver himself) over the entity placed in receivership and parties alleged to hold assets of the entity in receivership as to violate due process.

PROCEDURAL HISTORY

Petitioners now seek review of the court of appeals' determination of appealability of the December 2023 Order granting, modifying, and/or continuing the appointment of Mr. Protopapas as receiver over Cape PLC and CIHL in the *Tibbs* case.

TIMELINE

The following timeline sets forth particular events relevant to this appeal:

Date	Event
June 3, 2022	*Park* plaintiff notified court that no defendants remain for trial in *Park Case*
March 17, 2023	Cape PLC receivership created in *Park* – Park Appointment Order
June 30, 2023	Third-party complaint in *Tibbs* filed
August 21, 2023	Dispositive motions filed by Petitioners, including motions to dissolve receivership and motions to dismiss, including for lack of personal jurisdiction
October 25, 2023	Circuit court hearing on Petitioners' motion to dissolve and motion to dismiss for lack of personal jurisdiction

December 6, 2023	Circuit court issues order denying Petitioners' motions and granting Mr. Protopapas ability to act as receiver for Cape PLC and CIHL in Tibbs, which is the order on appeal
December 18, 2023	Notice of appeal filed by Petitioners relative to December 2023 Order
April 16, 2024	Respondent files motion to dismiss March 19 appeal
May 6, 2024	Petitioners file return to motion to dismiss
May 9, 2024	Court of appeals dismisses appeal
May 24, 2029	Petitioners file petition for rehearing
June 18, 2024	Petition for rehearing denied by court of appeals

ARGUMENT

A. Because a Pre-Judgment Receivership Order over a Foreign Entity is Limited to the Case in which the Receiver is Appointed (*Park*), The December 2023 Order Grants the Appointment of a Receiver in *Tibbs*.

1. South Carolina courts may not appoint receivers to manage the affairs of foreign corporations.

South Carolina law comports with the universal rule in American jurisdictions that courts may not appoint corporate receivers for foreign corporations.[10] The only provision of South

[10] Boynton v. Consolidated Indem. & Ins. Co., 180 S.C. 279, 294, 185 S.E. 731, 737 (1936) (circuit court "was without authority to appoint a receiver" for New York corporation because it "is a foreign corporation; there is a total failure of any proof that it has property in this state"); Pollock v. Carolina Interstate Bldg. & Loan Ass'n, 48 S.C. 65, 74-75, 25 S.E. 977, 980 (1896) (if one state cannot dissolve corporations formed in other states, a fortiori it cannot appoint a receiver for foreign corporations; "Having the right to appoint a receiver in their territory alone, such appointee is a creature of the appointing power, and cannot have greater power than his creator;" "If a corporation is not dissolved ipso facto by the appointment of a permanent receiver, with how much greater force does it apply to the appointment of a temporary receiver!"); Holbrook v. Ford, 39 N.E. 1091, 1094 (Ill. 1894) ("The general rule is that a court of equity will not appoint a receiver for a foreign corporation where such corporation has no property in the state"); Frankland v. Remington Phono. Corp., 119 A. 127, 127-28 (Del. Ch. 1922) (proposition that courts can appoint general receivers for foreign corporations is "beyond doubt as not tenable"); Republic Mtn. Silver Mines v. Brown, 58 F. 644, 648 (8th Cir. 1893) (Colorado federal court had no power in equity to appoint liquidator to wind up corporation formed in Great Britain; "It is hardly necessary to remark

Carolina law that authorizes appointment of a receiver to manage the affairs of a corporation (corporate receiver) is found in Title 33 (Corporations), and the statute explicitly excludes any "foreign corporation" from its scope. S.C. Code Ann. §§ 33-14-320(a) & 33-1-400(4) (2005). The circuit court did not purport to appoint Mr. Protopapas as receiver pursuant to Title 33.

2. South Carolina law limits appointment of a receiver for foreign corporations to only the South Carolina assets of the foreign corporation.

The only provision of South Carolina law that authorizes appointment of a receiver in connection with a foreign corporation is S.C. Code Ann. § 15-65-10(4), which authorizes a receiver for the "property within this State of foreign corporations." However, this section is only applicable where the corporation "has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights…" S.C. Code Ann. § 15-65-10(4).

Both the Receiver and the circuit court disclaimed that Mr. Protopapas was appointed as receiver for Cape PLC pursuant to Section 15-65-10(4). See Receivership Order; See Order on Motion to Dissolve Receivership, p.13. As the circuit court recognized, the Appointment Order's reference to Section 15-65-10(4) was incorrect because Cape PLC is not "dissolved."[11] Further, the Receiver offered no evidence that Cape PLC has any assets in South Carolina. S.C. Code Ann. § 15-65-10(4).

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that if courts of equity . . . have no jurisdiction to dissolve a domestic corporation, and to wind up its affairs, much less can the exercise such powers with respect to a foreign corporation."); Stafford & Co. v. Mills, 13 R.I. 310, 310 (1881) (court had "no power to appoint a receiver of the estate of a foreign corporation"); North State Copper & Gold Min. Co. v. Field, 20 A. 1039, 1040-41 (Md. 1885) (citing Stafford; Maryland had no jurisdiction to control the internal affairs of a North Carolina corporation; "Our courts possess no visitorial power over [foreign corporations], and can enforce no forfeiture of charter for violation of law. . . . These powers belong only to the state which created the corporation.").

[11] See Footnote 8.

Accordingly, it is undisputed that Mr. Protopapas was not (and could not be) appointed receiver over a foreign corporation (either Cape PLC or CIHL) or its assets pursuant to S.C. Code Ann. § 15-65-10(4).

For the above reasons, there was no basis under South Carolina law to appoint a receiver over Cape PLC in *Park*, nor was there a basis to appoint a receiver over either Cape PLC or CIHL in *Tibbs*.

3. S.C. Code Ann. § 15-65-10(5) does not support the appointment of a receiver over a foreign corporation.

The Receiver argues and the circuit court stated that the receivership appointment was pursuant to S.C. Code Ann. § 15-65-10(5), which authorizes a court to appoint a receiver only where "provided by law" or "in accordance with the existing practice." The Receiver however could point to no "existing practice" that allowed a receiver to be appointed over a foreign corporation with no South Carolina assets. If a receiver could be appointed over a foreign corporation pursuant to § 15-65-10(5) (which Petitioners dispute) the receivership would be limited to the foreign corporation's in-state assets. *Boynton v. Consol. Indem. & Ins. Co.*, 180 S.C. 279, 293, 185 S.E. 731, 737 (1936) (reversing appointment of a receiver because there was a "total failure of any proof" that the foreign company "has property in this state"). As there has been no suggestion by any party that either Cape PLC or CIHL have any South Carolina assets, there is no basis for the appointment of a receiver under this section either.

4. Per Existing Practice - Receiver may not act beyond case where appointed.

Even if a receiver could be appointed over a foreign corporation pursuant to S.C. Code Ann. § 15-65-10(5), such appointment would be limited to the case in which the appointment occurred. Importantly, the "existing practice" cited in S.C. Code Ann. § 15-65-10(5) is the practice of Courts of Equity prior to passage of the statute in 1870. As the Supreme Court held in

Virginia-Carolina Chem. Co. v. Hunter,[12] this provision requires an inquiry into what Courts of Equity had jurisdiction to the 1870 passage of Code of Procedure (1870 S.C. Acts 423 *et seq.*):

> [Section 265, now 15-65-10(5)] gives the old practice the force of a statute by the enactment that a receiver may be appointed "in such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this Code of Procedure." *The first inquiry* is whether the record shows a case warranting the appointment of a receiver *under the general jurisdiction and practice of the court of equity*, aside from the special provisions of the Code of Procedure. . . .

84 S.C. 214, 220, 66 S.E. 177, 179 (1909) (Emphasis added.)

Under the pre-Code "existing practice" a receiver appointed to hold assets had no authority to act in other cases. *Clinkscales v. Pendleton Mfg. Co.*, 9 S.C. (9 Rich.) 318, 323 (1878) (where a receivership was issued in a particular case *pendente lite*, "the sole object of the Receivership is to preserve the property, to answer the purposes of a decree, as between the parties to the suit, without affecting the interest of third persons not parties"); *Gadsden v. Whaley*, 14 S. C. 210 (1880) ("In a proper case the court will appoint a receiver who is an executive officer – the hand of the court – to administer the assets of the estate…. By virtue of any general authority as receiver, he has no right to sue be sued, or defend"); *In re Fiftv-Four First Mortg. Bonds*, 15 S. C. 304 (1881).

5. The Park Appointment Order is Limited to the *Park Case* by its own terms.

The circuit court in the *Park Case* appeared to have agreed with the state of the law limiting a receiver's actions to one case. The Park Appointment Order specifically states: "the Court hereby appoints Peter Protopapas be and hereby is appointed Receiver **in this case** pursuant to the South Carolina Law…" (emphasis added). The order in no way states that Mr. Protopapas may act for Cape PLC in other cases.

[12] Cited by the circuit court in the Park Appointment Order (attached to Receiver's Third-Party Complaint in the *Tibbs* Case.)

6. S.C. Code Ann. § 15-65-10, *et seq.* demonstrates that a receiver appointment is limited to single cause.

That the appointment of a receiver is limited to a single case or cause is supported by the plain language of the receivership statutes. (S.C. Code Ann. § 15-65-10 *et seq.).* SC. Code Ann. §§ 15-65-50 and 15-65-60 demonstrate the clear intent for a receiver appointed pursuant to Title 15 to be limited to the cause in which he was appointed. The statutes repeatedly limit the appointment of a receiver to "the cause" (singular) and refer to "before final judgment" (again referring to a single case):

First, the receivership statute that allows a party to avoid a pre-judgment appointment of a receiver by providing a bond sufficient to satisfy a judgment clearly demonstrates that an appointment is limited to a single cause. S.C. Code Ann. § 15-65-50 ("No receiver of the property of any …corporation shall be appointed **before final judgment** **in the cause** if the party claiming the property so sought to be placed in the hands of a receiver …shall offer a bond…to meet and satisfy any decree or **judgment** or order that may be made **in the cause**.") It is undisputed that the receivership(s) at issue are pre-judgment.

Second, the receivership statute that allows a party to vacate a pre-judgment appointment of a receiver by providing a bond also demonstrates that an appointment is limited to a single case. S.C. Code Ann. § 15-65-60 ("Whenever the court … shall appoint a receiver **before final judgment** **in the cause** there shall be inserted in the order of appointment a clause fixing the value of the property for which the bond may be given, as prescribed in Section 15-65-50. And upon the due execution and filing of such bond thereafter **before final judgment** **in the cause** the court or judge shall vacate the appointment of such receiver….").

In addition, pursuant to S.C. Code Ann. § 15-65-90, the Park Plaintiffs are responsible for their motion to appoint and for an improper appointment of a receiver. S.C. Code Ann. § 15-65-90

(1976 as amended) (where receiver "improperly appointed, the costs, charges and expenses of such receivership shall [be charged upon] the party procuring the appointment.") This section further suggests that the action of the receiver is intended to be limited to the case in which he was appointed.

For the above reasons, Mr. Protopapas' appointment under the Park Appointment Order was limited to the *Park Case*. Mr. Protopapas had/has no authority under the Park Appointment Order to act as receiver in the *Tibbs* case. Accordingly, there must have been a new receivership granted in *the Tibbs Case* in order for Mr. Protopapas to act. The circuit court order at issue allowing Mr. Protopapas to act as receiver over both Cape PLC and CIHL in the *Tibbs* case had the effect of granting a new receiver appointment in *The Tibbs case* (and possibly modifying the Park Receiver Order.)[13] The order must be immediately appealable. Section 14-3-330(4).

B. The December 2023 Order must be immediately appealable because it not only grants a new receiver appointment, but also denies Petitioners' Critical Substantial Pre-Judgment Statutory Rights

[13] This Court must look to the order's actual effect (all effects) to determine whether it is appealable. 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 relief requested by the Petitioners was to disallow Mr. Protopapas from acting as receiver for either Cape PLC or CIHL in *Tibbs* and/or to vacate the Park Appointment Order. The December 2023 Order allowed Mr. Protopapas to act as receiver in a new case (*Tibbs*) and over a new entity (CIHL). Accordingly, the effect of the March 2023 Order was to grant the appointment of a receiver, modify the appointment of a receiver and/or continue the appointment of a receiver – all of which are immediately appealable.

As argued by Petitioners in their motions to dismiss/dissolve, the Park Appointment Order is defective on its face because it appoints a pre-judgment receiver but does not provide the *mandatory* "clause fixing the value of the property for which the bond may be given, as prescribed in Section 15-65-60." S.C. Code Ann. § 15-65-60. This statutory right has been in place for over one hundred years and has been upheld by the South Carolina Supreme Court. *Truesdell v. Johnson*, 144 S.C. 188, 197, 142 S.E. 343, 348 (1928)(where a party whose assets were sought to be put into the hands of a receiver appealed an appointment order without the mandatory clause, the South Carolina Supreme Court held that the appointment order was void). The *Truesdell* court first fully quoted Subdivisions 8 and 9 of ***Section 524*** of the Code of Civil Procedure (1922), which is substantively identical to S.C Code Ann. § 15-65-60 and 15-65-50. The court then reasoned as follows:

> The appellant urges that these subdivisions are applicable in all cases where a ***receiver*** is appointed before final judgment in the cause, that they are intended to assure to the person claiming or in possession of the property sought to be placed in the hands of a ***receiver*** the right to retain or to replevy the same, and that the provision in Subdivision 9 for the insertion in the order appointing the ***receiver*** of a clause fixing the value of the property is mandatory. The respondent contends that it was a condition precedent to the insertion in the order of a clause fixing the value of the property that the person in possession should "offer" the bond before the order appointing the ***receiver*** was granted, and that, as the appellant did not "offer" the bond at the hearing on the application for appointment of a ***receiver***, he cannot now complain of the omission of the clause fixing the value of the property.
>
> We do not agree with the respondent's position. The appointment of a ***receiver***, as we have said, is a drastic measure, and the Legislature has made provision for protecting the interests of the person claiming or in possession of the property for which a ***receiver*** is sought….
>
> Nor do we agree with the respondent that the order of the Judge directing the ***receiver*** to make an inventory of the assets of the company was equivalent to a clause fixing the value of the property. All other considerations aside, the law does not provide for vacating the appointment of the ***receiver*** upon the filing of a bond with penalty fixed according to the *inventory value* of the property, and the appointment of the ***receiver*** would not be vacated upon a bond with penalty so fixed--the penalty must be double the value of the property *as fixed in the order*

> *appointing the* ***receiver***. The provision for inserting a clause fixing the value of the property in the order appointing a ***receiver*** is mandatory, and without such clause the order is void.

Truesdell v. Johnson, 144 S.C. 188, 203-204, 142 S.E. 343, 348 (1928)(emphasis in original). Accordingly, as the Park Appointment Order does not contain the mandatory clause, it is void.

Likewise, with regard to the circuit court order in *The Tibbs case* allowing Mr. Protopapas to act as receiver of Cape PLC and CIHL (granting the new receivership), the circuit court also has failed to provide the *mandatory* "clause fixing the value of the property for which the bond may be given, as prescribed in Section 15-65-60." S.C. Code Ann. § 15-65-60. As Petitioners are the "part[ies] claiming the property so sought to be placed in the hands of a receiver," they are entitled to know the amount "for which the bond may be given" so that they have the opportunity to file "such bond … **before final judgment in the cause** [to] vacate the appointment of such receiver…." S.C. Code Ann. §§15-65-50 -15-65-60. As the mandatory clause does not exist in an appointment order in *the Tibbs case*, any such receiver appointment in *Tibbs* is also void. *Truesdell v. Johnson*, 144 S.C. 188, 203-204, 142 S.E. 343, 348 (1928).

This Court should not deny Petitioners' right to appeal the circuit court's refusal to provide this pre-judgment statutory protection. S.C. Code Ann. §§15-65-50 -15-65-60 clearly mandate this statutory right/protection for Petitioners "before final judgment in the cause": It is a substantial right. The identity of the "part[ies] claiming the property so sought to be placed in the hands of a receiver" (Petitioners) was not known prior to the Receiver filing the third-party complaint in *the Tibbs case*. Accordingly, regardless of whether the receiver was appointed in *Park* or *Tibbs*, the Petitioners (as the entities owning the property that is being sought by the Receiver) would only have the ability to enforce their pre-judgment statutory rights (including but not limited to the right to file and bond and vacate the receivership) by challenging the receiver appointment in the *Tibbs*

case – which they did. Petitioners specifically argued that the receivership order must be vacated for failure to comply with the above statutes. By denying Petitioners' motions, the circuit court appointed Mr. Protopapas to act as receiver over both Cape PLC and CIHL in the *Tibbs* case, but refused to provide the mandatory statutory protections. The order must be immediately appealable or Petitioners will be denied the ability to enforce their pre-judgment statutory protections. Allowing the appointment of the receiver to continue without the statutory protections until after final judgment would moot the protections. Further, pursuant to *Truesdale*, the appointment order(s) is/are void, and the circuit court has no subject matter jurisdiction. Petitioners should be allowed to have this issue decided by the appellate court now.

C. The Appealability of the December 2023 Order Granting and/or Modifying the Appointment of a Receiver Is Not Changed By the Recent Appellate Orders Cited by the Receiver.

On its face, the December 2023 Order is an immediately appealable order because it grants a new receivership in *the Tibbs case* and/or modifies the *Park* Receiver Order. Both of these effects squarely fall within the gambit of S.C. Code Ann. § 14-3-330(4). The Receiver's sole argument to the contrary is that the Court should be bound by certain non-binding unpublished orders in different cases that rejected a party's request to dissolve a receivership claiming that failure to do so equated to an order continuing the appointment of a receiver. Beyond being non-binding precedent, however, each of these cases is meaningfully distinguishable as none involved granting and/or modifying the appointment of a receiver. An order granting the appointment of a new pre-judgment receiver, in a new case, over two entities (one entirely new) is vastly different than an order refusing to dissolve an already existing receivership that was appointed in the case in which the receiver was appointed. Payne and Keller. As such, the cases cited by the Receiver

are inapplicable and not controlling, and the December 2023 Order is immediately appealable under Section 14-3-330(4).

CONCLUSION

By dismissing the appeal the Court of Appeals has contradicted the General Assembly's mandate that South Carolina courts must hear interlocutory appeals from orders concerning a receiver's appointment, whether they grant, continue, modify, or refuse the appointment of a receiver. The result is that Petitioners will be forced to litigate against a pre-judgment receiver improperly appointed in the *Park Case*, who is now bringing third-party claims in the Tibbs case that are wholly unrelated to the *Park Case*.

Because Section 14-3-330 contemplates an immediate appeal, Petitioners respectfully request this Court grant the petition for writ of certiorari, reinstate this appeal as required by the appealability statute, and either consider this appeal on the merits or remand the case to the court of appeals with instructions to hear the merits of Petitioners' appeal.[14]

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND CENTRAL MINING AND INVESTMENT CORPORATION LTD.

[14] Per Rule 208(b)(6), SCACR, Petitioners 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 in their filed or soon to be filed Petitions for Cert. in Appellate Case Nos. 2023-2006 and 2023-2007.

PROOF OF SERVICE

I, A. Victor Rawl, the undersigned, of Gordon Rees Scully Mansukhani, LLP for Petitioners Charter Consolidated Ltd., ESAB Corporation, and Central Mining and Investment Corporation Ltd., do hereby certify that I have this date served the foregoing **PETITION FOR WRIT OF CERTIORARI**, dated September 3, 2024, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated April 24, 2024, on all counsel of record using the primary email addresses listed in the Attorney Information System (if applicable).

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Date: September 3, 2024