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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2024-001065
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, Incl; 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

Mohed Altrad; Altrad Investment Authority SAS; ArranCo US, LLC; Hawk Bidco US Inc.; Sparrows Offshore, LLC; Anglo American PLC; De Beers PLC; De Beers Centenary AG; De Beers Consolidated Mines Proprietary Ltd.; De Beers UK Ltd.; ESAB Corporation; Charter Consolidated Ltd.; and Central Mining & Investment Corporation Ltd. are the……Appellants.

RETURN OF APPELLANTS CHARTER CONSOLIDATED, LTD., ESAB CORPORATION, AND CENTRAL MINING AND INVESTMENT CORPORATION LTD. TO MOTION TO DISMISS APPEALS OF "INTERLOCUTORY ORDERS" [1]

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[1] By making this filing, the Charter Appellants do not waive, but instead specifically preserve, all defenses asserted and objections previously made regarding these proceedings through its written motions, oral arguments, memoranda and briefs, responsive pleadings, served responses, and appellate filings, including, *inter alia*, that: the Court lacks personal jurisdiction over each of the Charter Appellants; the Court lacks subject matter jurisdiction; the Receiver was improperly appointed; the Cape PLC receivership was improperly continued and modified and an entirely new receivership was granted over the separate entity named Cape Intermediate Holdings Limited ("CIHL"); the Receiver lacks standing; the Receiver's claims improperly pled, should be severed, and/or fail under Rules 12(b) and 14, SCRCP; and these proceedings and the claims asserted and relief sought against the Charter Appellants violate their fundamental procedural and substantive constitutional rights and protections.

Appellants Charter Consolidated Ltd. ("Charter"), ESAB Corporation ("ESAB"), and Central Mining and Investment Corporation Ltd. ("Central Mining," and collectively, "Charter Appellants") hereby respectfully submit this Return to Motion to Dismiss Appeals of "Interlocutory Orders" (the "Motion") filed by Peter D. Protopapas, in his purported capacity as the court-appointed receiver for Cape PLC[2] ("Respondent").

All arguments, authorities, and prior incorporations and adoptions by reference included in the Charter Appellants' prior filings, including briefs and related materials filed with this Court, the Supreme Court, and the circuit court, are incorporated by reference herein. Cf. Rule 208(b)(6), SCACR ("In cases involving more than one appellant or respondent, including cases consolidated for appeal, any number of parties may join in a single brief, and any party may adopt by reference all or any part of the brief of another."). *See also Stanley Smith & Sons, Inc. v. Dumas*, 315 S.C. 30, 33, 431 S.E.2d 595, 596 (Ct.App.1993) (the Court of Appeals took notice of the contents of the appellate record in another, unrelated case).

INTRODUCTION

Dismissal of this appeal would be error for at least six independent reasons, each of which is dispositive of Respondent's Motion.

First, Respondent appears to conflate prior appeals with this one, using inflammatory language calling this appeal "inappropriate" and stating that this is part of a "playbook" to "delay and frustrate" litigation. A party availing itself of valid legal arguments supported by the law—to

[2] Respondent and the circuit court have defined Cape and Cape PLC different ways at various times causing confusion. When citing to or referring to a filing or submission by either Respondent or the circuit court, the Charter Appellants have attempted to use the term in the same way used by Respondent or the circuit court therein.

protect against violations of substantial rights—does not justify dismissal of a valid appeal just because another party does not agree with those arguments.

Second, and more importantly, consideration of appealability should be based on the facts and occurrences in this case, not prior appeals or matters foreign to this one. No party has "shifted their effort," and there are no "insurance related entities" as Respondent suggests. Distracting from the actual effect of an order is not a valid means to seek dismissal of an appeal. Repeatedly stating this is a "third appeal" and that there is an "effort to disguis[e] orders" to cast aspersions on valid arguments is decidedly not a basis for dismissal under South Carolina law.

Third, as set forth below, South Carolina law *requires* a party to take an appeal of orders that may be interlocutory at the risk that an appellate court follows then-Chief Justice Toal's reasoning in *Davis v. Parkview Apartments* that failure to appeal may waive rights to a later appeal.[3] Indeed, as the Supreme Court has mandated, the method for challenging an incorrect discovery order is to refuse to comply with the order compelling discovery, obtain a contempt finding, and then appeal the contempt finding.[4] This is exactly what was done here.

Fourth, Respondent is wrong in asserting there is no finding of contempt. Under any definition or analysis of contempt under South Carolina law, the appealed Orders of May 23, 2024, constitute contempt. *See* Order Granting the Receiver for Cape PLC's Motion to Pre-Admit

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[3] *Davis v. Parkview Apartments*, 409 S.C. 266, 281 & n.15, 762 S.E.2d 535, 543 & n.15 (2014) (characterizing unappealed discovery rulings as "law of the case").

[4] *Tucker v. Honda of South Carolina Manufacturing, Inc.*, 354 S.C. 574, 577 (S.C. 2003)("an order compelling discovery does not ordinarily involve the merits of the case and may not be appealed. Since a contempt order is final in nature, an order compelling discovery may be appealed only after the trial court holds a party in contempt. Thus, a party may comply with the order and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal.")(internal citations omitted).

Exhibits ("Pre-Admission Order"); Order Granting the Receiver for Cape PLC's Motion for Sanctions and Motion for Adverse Inference as to the Altrad and Charter Third-Party Defendants ("Sanction Order"), each filed May 23, 2024 (collectively, the "May 23 Orders"). Although Respondent attempts to characterize the orders in a way to insulate the circuit court proceedings from appellate review, it is the *effect of an order*, not its title or carefully crafted wording attempting to dictate appealability that controls the analysis to be applied by this Court.[5] The circuit court issued findings that mirror the definition of contempt, based its sanctions on this Court's cases upholding contempt sanctions, but was careful not to include the word "contempt." The effect, however, is unmistakably a contempt order. A "contempt order also is a final order that is immediately appealable." *Hooper v. Rockwell*, 334 S.C. 281, 291-92 (S.C. 1999).

Fifth, the sanctions issued by May 23 Orders strike Charter Appellants defenses, strike part or all of pleadings, and determine the ultimate issues in this case in favor of the Respondent. An order that "strikes out an answer or any part thereof or any pleading in any action" is immediately appealable. S.C. Code Ann. § 14-3-330(2)(c).

[5] Various matters were heard at the April 25, 2024, hearing before Chief Justice Toal. Discussions of various receiverships occurred, with procedure and arguments bleeding over, sometimes inapplicably, between cases. The Charter Appellants were subjected to these orders of contempt as a result of appeals and related assertion of arguments as to South Carolina's established law regarding Rule 205 of the South Carolina Appellate Court Rules, which have not been addressed on the merits by any appellate court to date.

In discussing the exact same issue, counsel for Respondent made clear what was actually being sought: "Your Honor, I hate to use this word, but it applies, is nothing short of contemptuous. And how the Court deals with it, you know, that's up to the Court. But unless a court deals with it, it's not going to stop." Transcript of April 25, 2024 Hearing in *McDowell v. A.O. Smith Corporation, et al.* and *J.F. Davis v. 3M Company, et al.* at 35:16–24 (counsel describing conduct as "contemptuous" and asking court to act accordingly).

Sixth, and finally, the circuit court's refusal to grant (or rule on) the request for injunctive relief that has been outstanding for months —is an immediately appealable issue created in the May 23 Orders. S.C. Code Ann. § 14-3-330(4)(authorizing appeals of an "an interlocutory order or decree in a court of common pleas . . . refusing an injunction").

These grounds alone warrant denial of the Respondent's Motion. This Court should require Respondent to answer why a circuit court's use of the appealed orders to find and punish for contempt and to shift the burden of proving a case onto defendants, in a purported third-party case scheduled for a bench trial[6], does not meet the grounds of appealability set forth herein.

PROCEDURAL POSTURE

Charter Appellants 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 on March 6, 2023 (nine months after the case had resolved) [7] 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 Charter Appellants nor Cape PLC were given

[6] At the specific request of one attorney for the Receiver, the circuit court has set this case for a bench trial on December 9, 2024. Appellants have served a notice of appeal since the order denied them of a mode of trial to which they are entitled as a matter of right. E.g., *Cobb v. S.C. Dep't of Transp*., 365 S.C. 360, 363, 618 S.E.2d 299, 300 (2005) ("If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review."). Acknowledgment of this trial setting should not be construed as waiver of any arguments relative to Charter Appellants common-law and constitutional rights to a trial by jury, if they are not dismissed before the trial date.

[7] The circuit court in *Park* ordered trial on June 20, 2022. (Docketing Order at 2 (filed Dec. 1, 2021, in Park).) On June 3, 2022, Mr. Park's counsel reported to the Court that the case was "fully resolved." (Email from Ms. McVey to 479 recipients (June 3, 2022).) Other than stipulations of dismissal being filed, the case was over, and no damages or liability was ever attributed to Cape PLC.

notice of Park Plaintiff's motion to appoint a pre-judgment receiver. The Park Appointment Order was entered *ex parte*. There was no adverse party to oppose or to test the merits of the appointment.

The 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 Charter Appellants. Further, while Tibbs Plaintiffs have not moved for the appointment of a receiver over Cape PLC (or CIHL), they did make a motion for an appointment of a pre-judgment receiver over Defendant Asbestos Company Limited. On September 8, 2023, the circuit court issued an order holding Defendant Asbestos Corporation Limited ("ACL") in contempt and striking its answer/pleadings in this matter. On the same day, the circuit court entered a second order in this action (that was predicated on the first order) and appointing Peter D. Protopapas as Receiver for ACL. ACL promptly filed a notice of appeal on September 13, 2023 as to both orders. It is undisputed that these orders were immediately appealable, and this appeal is still pending.[8] Despite objections by parties regarding the lack of the circuit court's jurisdiction to proceed with ANY further action in this case pursuant to Rule 205, SCRAP, the case continued.

The Receiver served Interrogatories and Requests for Production directed to Charter Appellants in and before September 2023. Charter Appellants subsequently filed combined Motions for Protective Order (the "Protective Order Motions") on October 6, 2023. The Protective Order Motions sought an order that Charter Appellants have "no obligation to respond to the Discovery Requests or to the 30(b)(6) Notice" until the issues raised in Third-Party Defendants' Motions to Dismiss and Motions to Dissolve "have been *fully resolved*."[9] The Motions for Protective Order requested that discovery be stayed pending the full resolution of the issue of

[8] See Appellate Case No. 2023-001461.

[9] See e.g., ESAB Protective Order Motion, at p. 5; Charter Protective Order Motion, at p. 5; Central Mining Protective Order Motion, at p. 5 (emphasis added).

whether the pre-judgment receiver appointment should be vacated, including any appeal. Notwithstanding the multiple outstanding appeals and Rule 205, this court disposed of the Motions for Protective Order on March 12, 2024 (same order than granted Respondent's motions to compel).

The circuit court scheduled a jury trial for the underlying claims asserted by Plaintiffs (Tibbs) on April 15, 2024. The day before the pretrial hearing, counsel for Tibbs notified the circuit court and all counsel of record that Plaintiff was no longer pursuing claims against Cape PLC.[10] Prior to April 15, 2024 (the trial date) the remaining defendants were held to be in default.

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[10] On April 8, 2024, counsel for Plaintiff (Tibbs) confirmed to the court and all parties in the case that Cape PLC was not a defendant in the Tibbs case. The e-mail stated:

> Chief Justice Toal:
>
> I write to give you an update on the April block of cases. Below are the remaining defendants in each case.
>
> **Flynn**
>
> Atlas Turner
>
> **Goodwin**
>
> Atlas Turner
>
> **Mitchell**
>
> Atlas Turner
>
> **Tibbs**
>
> ACL (ACL's answer was struck and it is currently in the Court of Appeals)
>
> Atlas Turner
>
> **Donaghy/Potter**
>
> Atlas Turner (currently in default)
>
> Spirax Sarco
>
> **Link**
>
> Atlas Turner (currently in default)

No trial ensued. There has been no determination of liability or damages between Plaintiff Tibbs and Cape PLC, and Cape PLC is no longer an active defendant in this case. Nonetheless, the circuit court issued the May 23 Orders and recently issued an order setting the derivative third-party case for a bench trial in December 2024.

STANDARD OF REVIEW

The critical inquiry on a motion to dismiss an appeal from an interlocutory order is whether the order is immediately appealable, which arises from and is controlled by statute.[11] Absent a specialized statute, a party may only appeal from an interlocutory order that falls within S.C. Code Ann. § 14-3-330 (2017).[12] Under § 14-3-330, a party may appeal from an interlocutory order involving the merits; affecting a substantial right; striking out an answer or any part thereof; or granting, continuing, modifying, or refusing an injunction or receivership.[13]

ARGUMENT

Respondent's Motion is based on three factually incorrect arguments with no basis in the law: (1) that the May 23 Orders are not contempt; (2) that the May 23 Orders neither "determine the action" nor do they constitute the striking of any part of the Charter Appellants' Answer in the lower court; and (3) that the circuit court's continued and repeated refusal and denial of injunctive relief actually did not occur. *See* Motion generally. *None* of these arguments is availing.

> Mr. Protopapas wrote to you and I understand that you will have a status conference on ACL and Atlas Turner Wednesday morning. I am attaching a proposed agenda to this email but I am happy to make any changes. We have also delivered notebooks to both you and Ms. Diaz. By copy of this email, I am notifying defense counsel of my communication with the Court. Thanks, Theile

(Ex. A, McVey Email in Tibbs (Apr. 8, 2024).

[11] *See Hagood v. Sommerville*, 362 S.C. 191, 194-95, 607 S.E.2d 707, 708 (2005).

[12] *See id.*

[13] *See id.*

In the May 23 Orders, the circuit court issued sweeping sanctions for failure to comply with "the Court's March 12 Order" which required "complete answers to the Receiver's Discovery Requests with 14 days of entry of this Order…." As sanctions, the May 23 Orders:

(i) "pre-admitted into evidence" *over two thousand—2*,548, to be exact—exhibits and held them to be "authentic" against three sets of third-party defendants including Charter Appellants,[14] and

(ii) held "that each of the Charter Third-Party Defendants was at relevant times the alter ego of Cape, requiring piercing of the corporate veil. Likewise, each of the Charter Third-Party Defendants is responsible for or has benefitted unjustly from Cape's liability-avoidance scheme."[15]

These sanctions effectively determine Respondent's underlying action. The May 23 Orders do this first by finding for the Receiver on the factual and legal issues in his pleading and second by striking various defenses in the Charter Appellants' responsive pleadings. To be clear, these adverse inferences against the Charter Appellants and pre-admitted exhibits were ordered by a court which purports to be the sole decider of the outcome in the upcoming **bench trial** (notwithstanding Charter Appellants jury demand). Whether alone or when combined with the granting of attorneys' fees—erroneously also included as part of the Sanction Order —these unjustifiable actions are findings of contempt and are immediately appealable. *Ex parte Cannon,* 385 S.C. 643, 660, 685 S.E.2d 814, 823 (Ct. App. 2009) ("[A] finding of contempt is immediately appealable.").

[14] Pre-Admission Order at 7.

[15] Sanction Order at 16.

Moreover, the General Assembly has set forth that the following types of orders are immediately appealable: "An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action" S.C. Code Ann. § 14-3-330(2) (2017). The May 23 Orders on appeal fall precisely under the Legislature's statutory pronouncement of immediately appealable grounds.

As this Court is well aware, the circuit court's decision as to how an order is entitled does not control an inquiry into appealability. *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."). Accordingly, appellate courts must look to the effect of an order to determine what that order does. *See, e.g.*, *id.* (noting appealability depends on "the substance of the order"); *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability . . . ."); *Cape Romain Contrs., 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 circuit court's Sanction Order devotes a number of pages to appealability, reflective of an apparent effort to insulate its erroneous decision from appellate review. *See generally* Sanction Order. Likewise, the Pre-Admission Order attempts to conduct its own appealability analysis. *See generally* Pre-Admission Order. But this Court is required to go beyond the titles of such orders and Respondent-drafted language included therein endeavoring to control the appealability inquiry and determine what the orders actually do. In making its appealability

inquiry, appellate courts are "free to evaluate the trial court's order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 540, 773 S.E.2d 144, 147 (2015); *see also generally Towles v. United Healthcare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842–43 (Ct. App. 1999) (holding that an order requiring discovery and permitting a defendant to re-seek to compel a matter to arbitration after the close of discovery was immediately appealable because "[t]he circuit court's order favored litigation over arbitration").

Even a cursory review of the content of the May 23 Orders, the bases for ruling, and the effect thereof reveals their true—and appealable—nature.

A. <u>The May 23 Orders Constitute Contempt.</u>

The Respondent points out that the Sanction Order does not use the word "contempt." However, the combined effect of the two May 23 Orders—by their unequivocal terms—is to hold the Charter Appellants in contempt as a basis for the above referenced sanctions. This is merely contempt by another name. *Compare* Rule 37, SCRCP (outlining appropriate sanctions) *with Miller v. Miller*, 375 S.C. 443, 457, 652 S.E.2d 754, 761 (Ct. App. 2007) (describing contempt in manner similar to the relief sought in the Proposed Orders); *see also Richardson v. Halcyon Real Est. Servs., LLP*, 439 S.C. 419, 425, 887 S.E.2d 153, 156 (Ct. App. 2023) (drawing distinction between Rule 37 sanctions and final orders that "reserve no further questions or directions for future determination," which would be the effect of the May 23 Orders).

Contempt has been defined as:

> [T]he voluntary and intentional doing or failing to do or inciting another to do or fail to do or disregarding of something the law or court forbids the doing of or requires done or given proper regard. This includes conduct that tends to bring the authority or administration of the court or law into disregard or disrespect. . . . It has been held to include purpose and an overt act even if the attempt failed. The power of contempt is essential to the preservation of

> order in judicial proceedings and to the enforcement of judgments, orders or rules. The power is therefore not confined but inherent in all courts and necessary to the due and proper administration of justice.

Timothy L. Brown, *South Carolina Contempt Law*, at 1 (2d ed. 2011). The elements of contempt are as follows:

> (A) The existence of a valid duty, order or obligation or prohibition;
>
> (B) Appropriate knowledge/notice (actual or imputed) of element (A), with sufficient time to comply; [and]
>
> (C) A willful, voluntary or even an attempted violation of the duty, order or obligation found in element (A).

Brown, *supra*, at 7; *see also Ex parte Cannon*, 385 S.C. at 660–61, 685 S.E.2d at 824 ("Contempt results from the willful disobedience of a court order . . . . A willful act is one . . . done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." (internal quotations omitted)).

In the May 23 Orders, the circuit court may not have expressly used the word "contempt," but the circuit court's findings equate to holding the Charter Appellants in contempt. Indeed, the Sanction Order is predicated on the Charter Appellants' alleged "flagrant violations of the Court's March 12 Order" granting the Receiver's motions to compel discovery. Sanction Order at 10–11. The circuit court further found that the Third-Party Defendants' "continued discovery misconduct" amounted to "willful disobedience"—the exact standard for contempt. *See id.* at 15.

The circuit court also relied on cases describing contempt sanctions in the Sanctions Order In support of its authority to issue the many sanctions, including "designating facts as established," the circuit court relied on *Griffin Grading v. Tire Service Equipment* – a case specifically

evaluating contempt sanctions. Sanction Order at 13; *Griffin Grading v. Tire Service Equipment*, 334 S.C. 193, 196-98 (S.C. Ct. App. 1999)(affirming contempt sanction of striking of answer based on noncompliance with order compelling discovery and considering "evidence of bad faith and willful, intentional disobedience").

The way the circuit court imposed sanctions also demonstrates that there was a finding of contempt. Here the circuit court used both civil contempt sanctions and criminal contempt sanctions. The Sanction Order issues certain sanctions that are unconditional (criminal) and one that is conditional (civil).

"The purpose of civil contempt is 'to coerce the defendant to do the thing required by the order for the benefit of the complainant… "The conditional nature of the punishment renders the relief civil in nature because the contemnor `can end the sentence and discharge himself at any moment by doing what he had previously refused to do."' *Poston v. Poston*, 331 S.C. 106, 111, 502 S.E.2d 86, 88 (1998). "The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders." *Id.*

Most of the sanctions issued were not conditional. As part of its contempt sanctions, the circuit court issued "adverse inferences" against the Charter Appellants that deem all of the Receiver's allegations (and dozens of "facts" that were never even alleged) to be true. Sanction Order at 15-26. Critically for purposes of this motion, these "inferences" do not go away if the Charter Appellants ultimately decide to participate in discovery. However, the circuit court has put in a partial civil contempt aspect to the sanction by allowing the sanction to be less severe if Charter Appellants later comply with discovery. Specifically, the circuit court deemed these inferences to be "rebuttable inferences that are subject to evidentiary challenge by these parties in these proceedings <u>should</u> these recalcitrant Third-Party Defendants elect to participate in these

proceedings, as they are required to do by our rules and the orders of this Court." (Id. at 16.) *Compare* Sanction Order at 16 (above-quoted) *with Miller*, 375 S.C. at 457, 652 S.E.2d at 761 ("The conditional nature of the punishment renders the relief civil in nature because the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do.").

Similarly, in describing the authority by which it ruled, the circuit court even referenced "inherent authority," another feature of a contempt ruling. *Compare* Pre-Admission Order at 6, *with Miller*, 375 S.C. at 453, 652 S.E.2d at 759 ("The power to punish for contempt is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice."). If the circuit court were ruling on the basis of a statute or court rule, it would not need to note an abstract—and inapplicable—inherent authority. However, in a contempt ruling, such a statement would be important, which is presumably why it was included here.

The May 23 Orders aim to exact "hydrogen bomb" punishments against the Charter Appellants and others. *See, e.g.*, *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990) ("The sanction should be aimed at the specific misconduct of the party sanctioned. In other words, the sanction should be a rifle-shot, not a shotgun blast. In the instant case, the sanction was a hydrogen bomb."). By dropping this "hydrogen bomb," the adverse inferences and pre-admitted exhibits unquestionably function as a coercive civil contempt ruling, and the accompanying attorneys' fees award sought is a civil compensatory fine. *See, e.g.*, *Jarrell v. Petoseed Co.*, 331 S.C. 207, 209–10, 500 S.E.2d 793, 794 (Ct. App. 1998) ("Civil contempt sanctions serve two functions: to coerce future compliance and

to remedy past noncompliance . . . . A civil compensatory fine is analogous to a tort judgment for damages caused by wrongful conduct." (internal citations omitted)).

Moreover, the Charter Appellants have done exactly what the Supreme Court has required in order to appeal a discovery order: suffer contempt. *See Davis*, 409 S.C. at 280–81, 762 S.E.2d at 543 ("[T]o challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding."). Indeed, the Supreme Court has explicitly laid out the process for challenging a discovery order. *See Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881–82 (1986) ("[A]n order directing a party to participate in discovery is interlocutory and not directly appealable . . . . Instead of appealing immediately, a non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply."). Specifically, the party must "refuse to comply with the order" and then "appeal after he is held in contempt for his failure to comply." *Ex parte Whetstone*, 289 S.C. at 580; *see also Ross v. Med. Univ. of S.C.*, 312 S.C. 532, 435 S.E.2d 877 (Ct. App. 1993) *rev'd* 317 S.C. 377, 379, 453 S.E.2d 880, 882 (1994) (describing how, following remittitur after an initial appeal of a discovery order was dismissed as interlocutory, defendant refused to comply with discovery order, was held in contempt, and then was able to appeal both the discovery order and the contempt/sanctions order). Anything less than following this exact procedure, which was what was done here, and the Charter Appellants risk waiver of the right to challenge the discovery orders (and the contempt order). *Cf. Jones v. Robinson*, 2023-UP-369, 2023 WL 7685902, at *5 (S.C. Ct. App. Nov. 15, 2023) (in an unpublished opinion the Court held that if a party does not refuse to comply with a discovery order and suffer contempt, the discovery order becomes law of the case, citing *Davis v. Parkview Apartments*).

To be clear, the circuit court issued the March 12 Order over Charter Appellants' numerous objections, including but not limited to those related to the outstanding appeal of the lawfulness of the pre-judgment receiver appointment, Rule 205, SCACR, and outstanding Motions for Protective Order, and ordered the Charter Appellants "to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests within 14 days." (Order at 13 (Mar. 12, 2024).) They did not, and instead held fast to their myriad objections, including the complete lack of personal jurisdiction of a South Carolina State Court over them. The May 23 Orders are the result of the Charter Appellants' reliance on their prior objections. If they participate in discovery in any way, Davis deems those good faith objections waived. Charter Appellants could not reasonably risk waiver under these extreme circumstances, so they followed the Davis process - the only path the Supreme Court has charted for seeking review of discovery rulings.

Accordingly, this Court should reject the Receiver's arguments that the circuit court's May 23 Orders are not immediately appealable.

B. The May 23 Orders Essentially Strike Portions Of The Charter Appellants' Answers And Result In Essentially Determining The Action.

In addition to finding and punishing for contempt, the combined effect of the two May 23 Orders is to essentially determine the action—akin to a judgment on the pleadings—which is what it is in a bench trial. The adverse inferences against the Charter Appellants, in conjunction with the pre-admitted exhibits, "determines the action" such that nothing the Charter Appellants could ever do—despite the Orders having language to the contrary—would properly rebut the inference. *See Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005) (describing order which effectively determines the action because it affects "the overall litigation and trial of the case" and "the right to a particular mode of trial, a well-established substantial right").

Respondent asserts that while an adverse inference is taken, it does not "require that the jury draw it." Motion, at 12. That *cannot* be applicable here. At Respondent's request, all issues are currently set to be tried before the circuit court in a *bench trial*. At a bench trial before the very judge who entered such harsh, contempt sanctions, there is no likelihood that the inference will not be drawn by the judge as factfinder. Of course, the inference will be taken as a matter of fact—a circuit court does not instruct itself before deliberating. The arguments that adverse inferences do not determine an action are wholly unavailing. Further, the Sanction Order does not indicate that "adverse inference" is discretionary. Instead, the Sanction Order states:

> As to the Charter Third-Party Defendants, the Court draws the adverse inference that each of the Charter Third-Party Defendants was at relevant times the alter ego of Cape, requiring piercing of the corporate veil. Likewise, each of the Charter Third-Party Defendants is responsible for or has benefitted unjustly from Cape's liability-avoidance scheme.

Sanction Order at 16 (emphasis added). The liability has already been determined.

The "inferences" adopted are the elements for each of Respondent's pled causes of action against the Charter Appellants. The circuit court's issuance of the May 23 Orders in effect strikes the Charter Appellants' Answer—which denied the Receiver's various claims (including alter-ego, veil piercing, and unjust enrichment)—and renders any defense that could be asserted non-viable, thereby affecting a substantial right, as set forth in South Carolina case law, and "remov[ing] a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479; *see also, e.g.*, *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) ("Orders affecting a substantial right 'discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.'"); *Henderson v. Wyatt*, 8 S.C. 112, 112 (1877) ("An order to involve the merits must finally determine some

substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled."); *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988) ("Subsection (2)(c) permits the direct appeal of orders which affect a substantial right by striking out an answer."); *McLaughlin v. Strickland*, 279 S.C. 513, 516, 309 S.E.2d 787, 789–90 (Ct. App. 1983) ("McLaughlin contends that the case is not properly before us because the order denying Strickland's motion was interlocutory and therefore not appealable. Since the order effectively forecloses Strickland from contesting the case on the merits, it affects a substantial right and is appealable."). By affecting a substantial right and mode of trial, the Charter Appellants are *required* to appeal to avoid waiver of their rights. *See, e.g.*, *Davis*, 409 S.C. at 280, 762 S.E.2d at 543 (characterizing un-appealed rulings as "law of the case" and refusing to address merits of orders underlying sanctions when each individual order was not appealed even though the orders themselves were, on their face, un-appealable). *See also Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (Pursuant to § 14–3–330(2), this Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable. [citations omitted] These cases not only permit, but indeed require, immediate appeal in the event of denial of a mode of trial to which one is entitled as a matter of right. Failure to immediately appeal such an order forever bars appellate review.")

Further, one of Charter Appellants' primary defenses to the "third-party complaint" is a general denial. ("Any allegation not specifically admitted above is denied."). As part of its Sanction Order, the circuit court issued "adverse inferences" against the Charter Appellants that deem <u>all</u> of the Receiver's allegations related to Charter Appellants (and dozens of "facts" that were never even alleged) to be true (including facts specifically denied.) Compare Receiver's

Third-Party Complaint to Sanction Order at 16-26. This is the equivalent of striking Charter Appellants' answer.

However for purposes of this motion, these "inferences" do not go away if the Charter Appellants ultimately decide to participate in discovery. Instead, the circuit court has deemed these inferences to be "rebuttable inferences that are subject to evidentiary challenge by these parties in these proceedings should these recalcitrant Third-Party Defendants elect to participate in these proceedings, as they are required to do by our rules and the orders of this Court." (Id. at 16.)

By making these inferences "rebuttable," the circuit court has stricken the Charter Appellants' defense of a general denial. In South Carolina, as everywhere else, the party pleading a fact has the burden of proving it. *See O'Neal v. Carolina Farm Supply, Inc*., 279 S.C. 490, 493, 309 S.E.2d 776, 779 (Ct. App. 1983) (acknowledging that "the burden of presenting evidence of a fact was on the party pleading it"). But in making these adverse inferences merely "rebuttable," the circuit court has shifted the burden of "disproof" to the Charter Appellants. Rather than forcing the Receiver to prove his allegations against the Charter Appellants in the face of their denial of the same, the circuit court has eliminated the Charter Appellants' "general denial" defense and is now forcing the Charter Appellants to prove that they did not do the things alleged. That burden-shifting only happens for affirmative defenses, not for general denials. [16]

[16] "In other words, it [an affirmative defense] assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable. On the other hand, where the defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case." *O'Neal v. Carolina Farm Supply, Inc*., 279 S.C. at 494, 309 S.E.2d at 779.

Accordingly, by shifting the burden of "disproof" to the Charter Appellants, the circuit court necessarily eliminated the Charter Appellants' defense that denied the Receiver's allegations and forced the Receiver to prove his allegations.

The circuit court's sanction of striking the Charter Appellants' defense that denies the Receiver's allegations is wrong as a matter of law, as the circuit court has no jurisdiction to issue such a sanction in the first place. And it is immediately appealable under the appellate statute, which allows for immediate appeals of "an order affecting a substantial right made in an action when such order strikes out an answer or any part thereof or any pleading in any action." South Carolina Code § 14-3-330(2)(c) (emphasis added).

In summary, this appeal is entirely proper, and the Receiver's motion to dismiss should be denied.

C. <u>The Circuit Court Again Refused And Denied A Request For Injunction.</u>

Respondent asserts there is a "brazen" attempt to appeal here. The Charter Appellants agree that the orders contain no reference to an injunction—but the circuit court's refusal to address the Charter Appellants' request for an injunction and stay, as required by the South Carolina Appellate Court Rules here, constitutes the denial and refusal of an injunction. *See, e.g.*, *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) (recognizing that "if a district court does not timely rule on a preliminary-injunction motion, it can effectively deny the motion" and render its decision immediately appealable); *see also Gray Line Motor Tours, Inc. v. New Orleans*, 498 F.2d 293, 296 (5th Cir. 1974) ("If, for example, an action has the effect of denying the requested relief without actually making a formal ruling, then the refusal of the district court to issue a specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable."); *see also Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) (explaining why refusal to rule can be akin to

denial); *D.C. v. Trump*, 959 F.3d 126, 130 (4th Cir. 2020) (same). As even Respondent recognizes (Motion, at 9), the refusal of an injunction is immediately appealable. S.C. Code Ann. § 14-3-330(4).

What Respondent calls "eleventh-hour" requests are merely the Charter Appellants' only method of putting before the circuit court—and possibly this Court—the issues relative to lack of lower court jurisdiction until a remittitur has been issued on the appeal of the circuit court's prior orders, which affect all matters below. *See* Rule 205, SCACR; *see also Maybank 2754, LLC v. Zurl*o, Op. No. 6081 (S.C. Ct. App. filed Aug. 7, 2024) (Howard Adv. Sh. No. 30 at 85) (reiterating that Rule 205 deprives the circuit court of jurisdiction to issue rulings on all matters that are affected by the appeal, *i.e.* where the outcome of the appeal would have an impact on the circuit court ruling). This Court has made clear that parties before it are not to file "motions to clarify" and that the Court will not take "action on any order which is not properly before it." *See* Order in Appellate Case No. 2023-000727 (filed Nov. 21, 2023).[17] This issue was fully briefed in the Charter Appellants' Return to Motion to Dismiss Appeals of "Interlocutory Discovery Order" in Appellate Case No. 2024-000524. Those arguments are fully incorporated herein by reference.

CONCLUSION

For the reasons set forth herein, the Charter Appellants respectfully request this Court deny

[17] 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. Neither point addresses head-on the issue as to Rule 205. One discusses only a stay, which has no bearing on the question posed by a Rule 205 analysis. The other never reached the Rule 205 question because of the manner in which it was placed before the Court. As this Court has recently reiterated, a decision on a motion to dismiss an appeal that does not contain "findings or holdings related to" the underlying court's jurisdiction is not a substantive ruling on whether Rule 205 applies. *See Maybank 2754, LLC v. Zurl*o, 2024 WL 3688319 at *3 n. 6, Howard Adv. Sh. No. 30 at 91 n. 6 (S.C. Ct. App. Aug. 7, 2024) (rejecting argument that the one-page decision on a motion to dismiss was a substantive ruling on whether the underlying court's action was improper under Rule 205).

Respondent's Motion and resume the briefing timeline to determine the merits of the appeal of the May 23 Orders.[18]

Dated: September 5, 2024

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[18] Per Rule 208(b)(6), SCACR, the Charter 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.

EXHIBIT A

Vic Rawl

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Subject: April Block remaining Defendants and proposed agenda

Attachments: Proposed Agenda april 10.docx

Chief Justice Toal:

I write to give you an update on the April block of cases. Below are the remaining defendants in each case.

Flynn
Atlas Turner

Goodwin
Atlas Turner

Mitchell
Atlas Turner

Tibbs
ACL (ACL's answer was struck and it is currently in the Court of Appeals)
Atlas Turner

Donaghy/Potter
Atlas Turner (currently in default)
Spirax Sarco

Link
Atlas Turner (currently in default)

Mr. Protopapas wrote to you and I understand that you will have a status conference on ACL and Atlas Turner Wednesday morning. I am attaching a proposed agenda to this email but I am happy to make any changes. We have also delivered notebooks to both you and Ms. Diaz. By copy of this email, I am notifying defense counsel of my communication with the Court. Thanks, Theile

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PROOF OF SERVICE

I, the undersigned of the law offices of Gordon Rees Scully Mansukhani, LLP, attorneys for Appellants Counsel 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): RETURN OF APPELLANTS CHARTER CONSOLIDATED, LTD., ESAB CORPORATION, AND CENTRAL MINING AND INVESTMENT CORPORATION LTD. TO MOTION TO DISMISS APPEALS OF"INTERLOCUTORY ORDERS"

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