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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
Jean Hoefler Toal, Chief Justice (Ret.)

Case No. 2023-CP-40-01759

Appellate Case No. 2023-001461

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

v.

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

Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking ump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC,

of which

Asbestos Corporation Limited, is the Appellant

and

Peter Protopapas, Duly Appointed Receiver for Asbestos Corporation Limited, is a Respondent.

**BRIEF OF COURT-APPOINTED RECEIVER PETER D. PROTOPAPAS IN
RESPONSE TO LONDON INSURERS' AMICUS BRIEF**

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ATTORNEYS FOR THE RECEIVER

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INTRODUCTION

The amicus brief filed by Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies ("the London Insurers") adds nothing of significance to the proper resolution of this appeal. The London Insurers mischaracterize the proceedings below, the grounds that led to the appointment of the Receiver, and the relevant law. And the legal arguments they do make are entirely redundant to, and suffer from the same flaws as, those already made by ACL.

As has become all too common in asbestos cases in this State, ACL and its insurers have engaged in egregious litigation misconduct before Chief Justice Toal (ret.), presiding as Circuit Judge over the Richland County Court of Common Pleas (the "Circuit Court"), in an effort to evade liability for, and hide insurance assets available to pay, claims stemming from asbestos exposures in this State. As detailed in the Receiver's brief on appeal, the Circuit Court acted well within its discretion and consistent with longstanding law in appointing a receiver for ACL for the limited purpose of marshaling ACL's previously concealed insurance assets (which by law are deemed property held within South Carolina) and thereby making them available respond to qualifying asbestos tort claims brought against ACL. This is, after all, why ACL bought these insurance policies many decades ago in the first place.

ACL's and the London Insurers' attacks on the Circuit Court's Order are meritless and mischaracterize both the Order itself and the relevant law. Nor does the Circuit Court's Order appointing a receiver threaten in any way the availability or proper functioning of insurance markets in South Carolina. The London Insurers' unsupported and hyperbolic protestations to the contrary are self-serving and unpersuasive. For decades, these and other insurers have evaded responsibility for coverage that they are contractually bound to provide. While they are predictably upset that they are finally being held accountable for their contractual obligations, enforcing those

decedes-old contracts is hardly a threat to South Carolina insurance markets today. The London Insurers’ amicus brief—like ACL’s meritless appeal— constitute further efforts to delay that day of accountability. The Circuit Court’s Order should be affirmed.

ARGUMENT

I. The Circuit Court’s Receivership Order Was Lawful And Appropriate.

The London Insurers assert that the Circuit Court’s Order appointing a receiver for ACL was unlawful because (1) it was imposed as a discovery sanction, and (2) ACL is an ongoing foreign corporation with no assets in South Carolina. Both attacks are based on blatant mischaracterizations.

A. There was a valid basis for the appointment of a receiver.

First, it is simply false that the Circuit Court appointed the receiver as a discovery sanction. As explained in the Receiver’s primary brief (Resp. Br. pp. 7–11, 15–18), the Circuit Court did impose an appropriate sanction on ACL for its refusal to comply with the Circuit Court’s discovery and related orders, but that sanction was the striking of ACL’s answer. (R. p. 5 (“Given [ACL’s] intentional and willful refusal to participate in discovery, the Court hereby strikes ACL’s pleadings.”)).

Such striking of pleadings is a fitting and common sanction for a party who, despite answering the complaint, refuses to participate in the proceedings. *See Scott v. Greenville Housing Authority*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (2003) (holding court had the option under Rule 37(b)(2)(C), SCRPC, “to completely strike (the defendant’s) pleadings ... as a sanction for its failure to cooperate in discovery”); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (“If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking

pleadings, dismissing the action, or rendering a default judgment.”). Indeed, the London Insurers do not challenge in their amicus brief the Circuit Court’s authority to impose a sanction on ACL for its intransigent refusal to comply with discovery and related orders. Nor does it challenge the Circuit Court’s sanction of striking ACL’s answer.

The Circuit Court appointed the Receiver, not as a discovery sanction, but because ACL’s failure to comply with discovery orders and the striking of its answer made a default judgment imminent. Moreover, given ACL’s intentional and willful refusals to comply with the Court’s orders and its misrepresentations concerning the availability of insurance coverage, the Circuit Court was faced with the prospect of ACL’s misconduct directly leading to the unavailability of potential relief for South Carolina asbestos tort victims. The appointment of a receiver in these circumstances was well within the Circuit Court’s discretion and consistent with settled law.

Under South Carolina law, “[a] receiver may be appointed by a judge of the circuit court . . .’ in a variety of situations.” *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 697 n.2, 869 S.E.2d 859, 862 n.2 (Ct. App. 2022) (quoting S.C. Code Ann. § 15-65-10). In addition to the four specific scenarios in which Section 15-65-10 authorizes receiverships, the statute provides that a court may appoint a receiver “[i]n such other cases as are provided by law or may be in accordance with the existing practice....” § 15-65-10(5); see *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384, 1 S.E.2d 797, 805–06 (1939) (receivers are historically appointed by courts sitting in equity to ensure a fair result). As the Circuit Court recognized, appointment of the Receiver in this case accords with the longstanding historical practice, as well as the Circuit Court’s current practice in other asbestos cases. (*See R.* pp. 9–12.)

Most importantly, while “the power of appointment of a receiver should be resorted to only in exceptional circumstances,” *Knotts*, 1 S.E.2d at 805, this case presents a classic example of just

such an exceptional circumstance: namely, where a defendant “is trying to defeat his creditors by an act or course of conduct which indicates moral fraud—a conscious intent to defeat, delay or hinder creditors in the collection of debts.” *Va. Carolina Chem. v. Hunter*, 84 S.C. 214, 66 S.E. 177, 179 (1909). Faced with a defendant’s “conscious intent to defeat, delay or hinder creditors in the collection of debts,” “***a court will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud,***” including appointment of a receiver. *Id.* at 179 (emphasis added); accord *Weis v. Goetter*, 72 Ala. 259, 261 (Ala. 1882) (“In cases where an estate is held by a party, under a title obtained by fraud, actual or constructive, a receiver will be appointed.” (quoting STORY’S EQ. JUR. § 834)); see, e.g., *Philips Med. Sys. Int’l, B.V. v. Bruetman*, 982 F.2d 211, 212 (7th Cir. 1992) (affirming the district court’s default judgment and appointment of receiver given the defendant’s “utter disregard for such procedural niceties as showing up for depositions and obeying court orders to remain in the country”); *Clark v. Walter T. Bradley Coal, Lime & Cement Co.*, 6 App. D.C. 437, 443–49 (D.C. Ct. App. 1895) (similar). The Circuit Court employed this historical practice here, appointing the Receiver and granting him “powers . . . related to the insurance assets of ACL.” (R. p. 13.)

Moreover, another historical use of a receiver is to help effectuate a judgment. See S.C. Code Ann. § 15-65-10(2) (“A receiver may be appointed by a judge of the circuit court . . . [a]fter judgment, to carry the judgment into effect[.]”). While a default judgment against ACL has not yet been entered, as the Circuit Court explained, the entry of a default judgment is the inevitable and “practical result of” striking ACL’s answer for failure to participate in the proceedings. Aiding the Circuit Court in the formulation and enforcement of such a judgment is a longstanding basis for the appointment of a receiver.

Were it otherwise, as ACL and the London Insurers envision, then the courts of this State would be powerless to meaningfully protect creditors in this State, such as the asbestos tort victims here, from ACL’s “conscious intent to defeat, delay or hinder [them] in the collection of debts.” *Va. Carolina Chem.*, 66 S.E. at 179. ACL could refuse to comply with the Circuit Court’s orders and misrepresent its insurance and other assets to the Circuit Court—both of which it unquestionably did here—and the Court would be denied the very mechanism designed in equity to independently verify and bring ACL’s South Carolina assets before the Court to potentially respond to claims of South Carolina residents. That is hardly the law of South Carolina, and thankfully so.

The London Insurers, like ACL, contend that ACL has not engaged in “moral fraud” sufficient to appoint a receiver because it is relying on its “jurisdictional defense.” (Amicus Br. p. 12). But as the Circuit Court emphasized, ACL’s jurisdictional defense is inconsistent with “decades of opinions dismissing those very assertions.” (R. p. 3). Such flouting of unambiguous court orders based on defenses repeatedly rejected by this court—and numerous other U.S. courts—is indeed moral fraud, *i.e.*, a “conscious intent to defeat, delay or hinder [the asbestos tort Plaintiffs] in the collection of debts.” *Va. Carolina Chem.*, 66 S.E. at 179.

Moreover, ACL’s moral fraud is further confirmed by its repeated misrepresentations to the Circuit Court regarding the availability of insurance to cover injuries it caused in the United States. As explained in detail in the Receiver’s primary brief (Resp. Br. pp. 6–7), the Receiver has uncovered clear evidence of insurance—and agreements with insurers to liquidate that insurance into trusts for victims—in direct contradiction of ACL’s representations to the Circuit Court.

For these reasons, the appointment of a receiver here is “in accordance with the existing practice” of appointing receivers in appropriate situations in asbestos suits. § 15-65-10(5). Courts

in other jurisdictions have also recognized Protopapas as a trusted receiver in insurance matters. For example, the Delaware Court of Chancery recently appointed Protopapas to serve as a receiver in a matter before that court. *See In re Reinz Wis. Gasket, LLC*, 2022-0859 (Del. Ch. Aug. 3, 2023) (appointing Peter D. Protopapas as receiver). Thus, the Receiver’s appointment in this case accords with both historical practice and presently existing practice in the Circuit Court to deal with its asbestos docket, which involves many defunct or recalcitrant defendants. That appointment should be affirmed under section 15-65-10(5).

B. The Receiver was appointed to administer property within the State.

The London Insurers also base their attacks on the Receivership Order on the false assertion that ACL is an ongoing foreign corporation with no assets in South Carolina. Putting aside that ACL sold significant quantities of asbestos into South Carolina, as an initial matter, neither this Court nor the Circuit Court need take ACL at its word when it asserts that it has no assets in South Carolina—especially given ACL’s contemptuous refusal to comply with the Circuit Court’s discovery orders and its misrepresentations regarding its insurance coverage. Indeed, identifying ACL’s South Carolina assets, including any insurance assets covering ACL’s South Carolina liabilities, is one of the Receiver’s primary tasks.

And the Receiver has already uncovered and presented evidence in the Circuit Court showing that ACL has coverage under insurance policies covering the injuries it caused to South Carolina residents. (Receiver Br. 6-7). Under South Carolina law, insurance policies covering injuries in South Carolina to South Carolina residents are deemed to be assets in the State both for purposes of applying South Carolina law and for establishing jurisdiction. South Carolina Code 38-61-10 states: “All contracts of insurance on property, lives, or interests in this state are considered to be made in the State and all contracts of insurance the applications for which are taken within this State are considered to have been made within this State and are subject to the

laws of this State.” Insurance policies covering property, lives, or interests in South Carolina are plainly subject to the Circuit Court’s jurisdiction. *See id.*

As this State’s Supreme Court has made clear, under Section 38-61-10, it is “immaterial where [an insurance] contract was entered into” or whether “the policyholders or insurers [are] citizens of South Carolina.” *Sangamo Weston v. Nat’l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992). What matters for the Court’s exercise of jurisdiction is whether the insurance policies cover “property, lives, or interests” in the State. *Id.* Thus, under this provision, “South Carolina substantive law governs” ACL’s insuring assets covering South Carolina property and victims—including South Carolina law involving the appointment of a receiver over those assets. (Receivership Order at 5 (quoting *Sangamo*, 307 S.C. at 149)).

The London Insurers rely on cases holding that insurance proceeds may not be attached until after judgment has been rendered and the amount of the claim has been established. (Amicus Br. pp. 12–15 (citing *Howard v. Allen*, 254 S.C. 455, 460–61, 176 S.E.2d 127, 129 (1970) and *Pcs Nitrogen, Inc. v. Cont’l Cas. Co.*, 436 S.C. 254, 264–65, 871 S.E.2d 590, 595 (2022))). But attachment is not at issue here. The question is one of the Circuit Court’s jurisdiction over ACL’s potential coverage claims to satisfy the tort claims of South Carolina residents. Since those policies insure “property, lives, or interests” in the State, they are assets in the State for purposes of the Circuit Court’s jurisdiction. Indeed, ACL’s potential claims against its insurers for coverage comprise the primary assets of the Receivership estate, and those claims are deemed assets in South Carolina under Section 39-61-10. *See Protopapas v. Zurich Am. Ins. Co.*, 2023 WL 2206640, at *2 (D.S.C. Feb. 24, 2023) (Coggins, J.), appeal dismissed sub nom., *Protopapas v. Travelers Cas. & Sur. Co.*, 94 F.4th 351 (4th Cir. 2024); *Protopapas v. Travelers Casualty & Surety Co.*, 94 F.4th 351, 358 (4th Cir. 2024) (“Exercising federal jurisdiction over a suit by or against a state-appointed

receiver, who functions as an ‘arm’ or ‘executive’ of the state-receivership court, would infringe on the state court’s control over the receivership assets — its exclusive jurisdiction.”).

Nor does the fact that ACL is a foreign corporation or an ongoing concern alter that analysis. The London Insurers claim that because ACL is “a solvent, active Canadian corporation,” the appointment of the Receiver amounts to a “corporate death penalty.” (Amicus Br. p. 5). But their overheated rhetoric does not change the fact that the Receiver was appointed only for the limited purpose of marshaling ACL’s previously concealed South Carolina insurance assets. That is a core role for receivers appointed in South Carolina, especially in asbestos cases, and one that imposes only limited interference with ACL’s other activities. Nor does the appointment of a receiver for this limited purpose put ACL’s insurers in an impossible “Catch-22” concerning whether to comply with the requirements of the Receivership Court or ACL. (Amicus Br. pp. 23–24). Both ACL and its Insurers are properly subject to the jurisdiction of the Receivership Court, and they disregard its lawful requirements at their own peril. And to the extent the appointment of a receiver, even for this limited purpose, entails some interference with ACL’s autonomy, it is solely as a result of ACL’s own litigation and related misconduct.¹

II. The Receivership Order Will Not Harm Insureds, Insurance Markets, Or The Economy in South Carolina.

Dialing their overwrought rhetoric to even more hyperbolic heights, the London Insurers claim that the Receivership Order will “destabilize the relationship between insurers and insureds in South Carolina . . ., necessitate higher insurance premiums for South Carolina insureds . . ., and deter insurers from issuing policies to South Carolina companies as well as out-of-state companies

¹ The London Insurers also repeat ACL’s flawed constitutional arguments that the Receivership Order violates the Due Process and Commerce Clauses of the U.S. Constitution. Those arguments rely on the same mistaken premise that the insurance policies are not assets in the State under Section 38-61-10, and they fail for all the reasons explained in the Receiver’s primary brief (at 18-20).

that might be haled into court in the State.” (Amicus Br. p. 20). That wild allegation is laughable and wholly unsupported.

First, the London Insurers based their dire predictions—as they do their flawed legal arguments—on gross mischaracterizations of the Receivership Order.² They falsely claim the Order “effectively dissolved ACL, displacing the duly appointed board and officers of an active, solvent foreign corporation”; that it would “encourage the appointment of a receiver whenever an out-of-state corporation asserts its rights to raise jurisdictional defenses and object to discovery”; and that “perhaps even more troublingly,” by imposing a receiver as a discovery sanction (which the Order does not do), it “could open the door to the imposing of receivership on active *South Carolina* corporations that raise good-faith objections to discovery.” (Amicus Br. p. 20). None of this is true, for the reasons detailed above and in the Receiver’s primary brief. Far from demonstrating any actual threat to insurance markets or public policy, the London Insurer’s sky-is-falling predictions demonstrate only the lengths they will go to evade their contractual liability in these cases. The only thing threatened by the Circuit Court’s careful and limited appointment of the Receiver in this case is ACL’s and the London Insurers’ ability to continue to evade their longstanding contractual obligations to South Carolina residents based on litigation misconduct and misrepresentations.

Second, the London Insurer’s complaints about their expectations at the time they wrote the policies in question are both misleading and beside the point. They claim that when they

² In support of their assertions, the London Insurers cite a now-vacated sanctions order issued by the Circuit Court for their failure to comply with the order requiring ACL’s insurers to appear at the mediation of two asbestos personal injury cases with full settlement authority. The Circuit Court vacated this order after a joint request by the parties following the settlement of these asbestos personal injury cases, and the London Insurers withdrew their appeals of the sanctions order. *See* August 20, 2024 correspondence, Appellate Case No. 2024-000501.

“agreed to issue insurance coverage for ACL, they did so on the understanding that they were insuring a Canadian company managed by a board of directors and officers operating under the settled principles of Canadian corporate law.” (Amicus at 23). In truth, the policies in question were excess insurance policies issued to General Dynamics and its subsidiaries, one of which is ACL. In any event, to the extent the Insurers knew they were providing coverage to ACL, they also understood (or should have understood) that ACL would be sending asbestos-containing products throughout the United States, including in South Carolina, and they wrote policies to protect against the risks that these products would injure residents of South Carolina. That South Carolina law provides an effective mechanism to hold them to account for those contractual obligations is neither surprising nor unfair. And as explained above, the Receivership Order is only for the narrow purpose of marshalling ACL’s insurance coverage over property, lives, or interests in South Carolina. ACL remains a Canadian corporation “operating under the settled principles of Canadian corporate law.” (Amicus at 23).

The appointment of a receiver to marshal ACL’s South Carolina insurance coverage does not undermine any reasonable expectation its insurers had at the time they issued the policies in question. At most, it undermines those insurers’ expectation, developed through years of successful dissembling and legal machinations, that they could evade their contractual obligations to respond to claims from injured South Carolina residents indefinitely. That bubble has now burst thanks to the Receivership Order and the fruitful work the Receiver has already performed in identifying insurance assets available to satisfy the claims of injured South Carolina residents—assets ACL misrepresented to the Circuit Court. Those “expectation” interests deserve no protection under the law, and for this reason, too, the Receivership Order should be affirmed.

CONCLUSION

The London Insurers' amicus brief adds nothing to the proper analysis of this appeal. The Court should affirm the challenged Circuit Court orders in full.

Respectfully submitted,

s/Shanon N. Peake

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of which

Asbestos Corporation Limited, is the Appellant

and

Peter Protopapas, Duly Appointed Receiver for Asbestos Corporation Limited, is a Respondent.

PROOF OF SERVICE

I certify that a true copy of the Brief of Court-Appointed Receiver Peter D. Protopapas in Response to London Insurers' Amicus Brief in this case has been served on the following, this 30th day of September, 2024, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (g)(3) of the South Carolina Supreme Court's March 20, 2020 Order, as amended May 29, 2020. Pursuant to subsection (g)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

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September 30, 2024

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Subject: Appellate Case No. 2023-001461 - Tibbs v. Asbestos Corporation Limited
Date: Monday, September 30, 2024 4:55:59 PM
Attachments: [image002.png](#)
[image003.png](#)
[Receiver"s Response to Amicus. 4.pdf](#)

Please find attached for service the Receiver's Response to London Insurers' Amicus Brief that we are filing with the Court of Appeals today.

Thank you,
Dot



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