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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. 2024-001446
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. Hesterton 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.; Lowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services; Orporation 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

ArranCo US, LLC, Hawk Bidco US Inc., Sparrows Offshore, LLC, Mohed Altrad, Altrad Investment Authority SAS, Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. are the ..... Appellants.

THE ALTRAD DEFENDANTS' PETITION FOR REHEARING AND REHEARING *EN BANC* REGARDING THEIR RIGHT TO A JURY TRIAL

The Altrad Defendants respectfully petition this Court to rehear, including in its *en banc* capacity, their appeal of the circuit court's order denying their constitutional right to a jury trial. In dismissing this appeal, the Court appears to have broken one of the cardinal rules of South Carolina law: the substance of a claim, not its label, is what matters. The Court reinforced this well-established point just last month in a published decision: "'The substance of the relief sought,' not the form, is typically what matters." *Brawley v. Richland County*, Op. No. 6090, Howard Ad.Sh. 37, at 26 (S.C. Ct. App. Sept. 25, 2024) (quoting *Standard Fed. Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)). Yet, it relied only on labels in its dismissal order.

There are at least two independent reasons entitling the Altrad Defendants to a jury trial:

1. The Altrad Defendants are entitled to a jury trial on the first-party claim against Cape PLC, from which the Altrad Defendants' alleged third-party liability supposedly derives. Rule 14(a), SCRCP.

2. The putative third-party claims against the Altrad Defendants all seek only money damages, so despite their illusory "equity" label, the Altrad Defendants are entitled to a jury trial on those claims, which the Receiver himself has conceded in filings below also include claims at law.

The order dismissing this appeal doesn't address either of these points, wrongly takes away the Altrad Defendants' constitutional right to a jury trial, and does so based on the merits of this appeal without any actual merits briefing. It should be reconsidered accordingly—the constitutional rights at stake are too essential to allow them to casually fall by the wayside.

ARGUMENT

I. The Altrad Defendants are entitled to a jury trial on the question of Cape PLC's first-party liability to the *Tibbs* plaintiffs, but the dismissal order never addresses this threshold point.

It is settled law that orders impacting mode of trial, including trial by jury, "affect substantial rights under S.C. Code Ann. § 14-3-330(2)" and are thus subject to immediate appeal. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997); *see also Hagood v. Sommerville*, 362 S.C. 191, 196–97, 607 S.E.2d 707, 709 (2005) (mode of trial is a "well-established exception to the general rule" that nonfinal orders are nonappealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000) ("The majority of cases requiring immediate appeal involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate.") (collecting cases).

Not only may the issue be appealed immediately, litigants are required to appeal on an interlocutory basis or they will be precluded from raising their jury trial rights in any further appeal. *See, e.g.*, *Lester*, 327 S.C. at 266, 491 S.E.2d at 241 (failure to immediately appeal "an order affecting the mode of trial effects a waiver of the right to appeal that issue"); Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 156 (3d ed. 2016) ("[T]he failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue."); *id.* at 157 (reiterating that "these orders must be appealed immediately"). The requirement of immediate appeal is intended to "preserve" the constitutional jury trial right "which would otherwise be lost" if appeal is delayed until final judgment. *Hagood*, 362 S.C. at 197, 607 S.E.2d at 709 (citing *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004)).

As a dispositive threshold point, the Altrad Defendants are third-party defendants in this case. As a matter of law, they can be exposed to potential liability if, and only if, a jury first determines that Cape PLC has any liability to the *Tibbs* plaintiffs. *See, e.g.*, *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) ("Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability."). As Judge Gergel explains:

> "The third party claim must be 'derivative' of the plaintiff's claim because derivative liability is central to the operation of Rule 14. It is not sufficient that the third-party claim is a related claim; the claim must be derivatively based on the original plaintiff's claim." "Rule 14(a) does not allow the defendant to assert a separate and independent claim even though the claim arises out of the same general set of facts as the main claim." In other words, impleader "must involve an attempt to pass on to the third party all or part of the liability asserted against the defendant." . . . A third-party claim may be asserted under Rule 14(a)(1) "only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defending party."

CNH Indus. Cap. Am. LLC v. Able Contr., Case No. 9:16-cv-2520-RMG, 2017 U.S. Dist. LEXIS 16988, at *3–4 (D.S.C. Feb. 7, 2017) (quoting *Scott v. PPG Indus. Inc.*, 920 F.2d 927 (4th Cir. 1990), *United States v. Olavarrieta*, 812 F.2d 640 (11th Cir. 1987), Moore's Federal Practice § 14.04[3][a], and Wright, Miller, Kane & Marcus, 6 *Federal Practice & Procedure Civil* § 1446) (cleaned up).

Here, the *Tibbs* plaintiffs asserted claims of negligence, strict liability, breach of warranties, and loss of consortium against Cape PLC (and all other "products defendants"). (Am. Compl. (May 3, 2023).) As a matter of law, these are claims at law requiring a jury trial, just as the *Tibbs* plaintiffs demanded. And, as a matter of law, it will be up to a jury to assess how liability is to be apportioned among the several defendants. S.C. Code Ann. §§ 15-38-15(c), (d).

Rule 14(a), SCRCP, entitles the Altrad Defendants to "assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim" at that trial. In other words, the Receiver cannot simply allege endless, unknown damages against the Altrad Defendants through a third-party complaint. As a matter of law, the third-party defendants' only potential exposure is "derivative" of whatever a jury first determines to be Cape PLC's liability to the *Tibbs* plaintiffs. As a matter of law, the Altrad Defendants have a right to appear at the first-party jury trial to defend against any potential liability against Cape PLC, where a "zero liability" outcome in the first-party trial would necessarily eliminate any potential exposure of the Altrad Defendants to supposed "derivative" liability.

While the Altrad Defendants moved to dismiss the third-party complaint because it fails to comport with Rule 14, there is no doubt that, in the circuit court's view, the Altrad Defendants' potential liability is only derivative. In fact, after a different group of third-party defendants removed the case to federal court, Judge Toal wrote a letter to federal Judge Lewis regarding the case, in which Judge Toal described the claims against the Altrad Defendants as "derivative" three times in a single page. (Letter from Toal to Lewis (July 9, 2024).)

Importantly, the Altrad Defendants have only recently learned about a secret agreement between the Receiver and the lawyers representing the *Tibbs* plaintiffs (and the *Park* plaintiffs, and numerous other plaintiffs on the Asbestos Docket) through which the plaintiffs purportedly agreed to dismiss their claims against Cape PLC in exchange for the Receiver tolling the statute of limitations on behalf of Cape PLC. That agreement actually predates the third-party complaint.

The Altrad Defendants acknowledge that there is no stipulation of dismissal entered in the Public Index; however, the fact that Cape PLC is no longer a defendant in the first-party case has been confirmed repeatedly by the plaintiffs in both writing and orally in open court. *See* Rule 43(k),

SCRCP (confirming that agreements between the parties become binding when "made in open court and noted upon the record"). (Confirmations of Cape PLC's Dismissal by *Tibbs* Counsel.)

The fact that the *Tibbs* plaintiffs have confirmed that they have no claim pending against Cape PLC should be all the Court needs to dismiss the third-party complaint outright, as the absence of any potential first-party liability necessarily erases the Altrad Defendants' potential exposure to any derivative liability as a matter of law. But if the Court believes that there may still be a chance of first-party liability against Cape PLC, that can only be established after a jury trial.

The order on appeal eliminated that jury trial, and it is immediately appealable accordingly. But the order dismissing this appeal ***never acknowledges this threshold issue***, which strongly suggests that this whole issue was overlooked or misapprehended. Rehearing is therefore necessary to ensure the Altrad Defendants' jury trial right is enforced and protected.

II. The Altrad Defendants are entitled to a jury trial on the question of Cape PLC's third-party claims, which the Receiver concedes sound in law and equity, but the dismissal order never addresses this point, either.

If a jury ever assigns any liability to Cape PLC—which, as noted above, will never happen because of the agreement between the Receiver and the *Tibbs* plaintiffs' counsel—then the Altrad Defendants are also entitled to a jury trial regarding the Receiver's claims. No doubt, the Receiver has attached labels to his claims to suggest they are equitable and not for a jury's consideration. But in South Carolina, labels don't matter; the substance of a pleading controls—as the Court reiterated just last month. *See, e.g.*, *Brawley*, Howard Ad.Sh. 37, at 26 ("'The substance of the relief sought,' not the form, is typically what matters." (quoting *Mungo*, 306 S.C. at 26, 410 S.E.2d at 20)).

Here, the only actual relief the Receiver seeks is money. As he puts it, the Receiver seeks "billions of dollars" from the third-party defendants as a "reckoning." (Receiver's App. 10.) And

while he affixes equitable labels to his claims, his requested relief is limited to money. (Receiver's App. 59–60, ¶ 130 (requesting that the circuit court "require that each of the [third-party defendants] to return funds that have been wrongfully diverted from meeting obligations and responsibilities in the United States, in an amount to be proven at trial"); Receiver's App. 61, ¶ 136 (requesting that the circuit court "require each of the [third-party defendants] to return funds that have been wrongfully diverted from meeting Cape's obligations and responsibilities in the United States, in an amount to be proven at trial"); Receiver's App. 63–64 (alleging "alter ego" and "accounting" claims to assist with determining how much money should allegedly be returned to Cape PLC).)

When a party only seeks to recover money, a jury trial is required, irrespective of how a litigant styles its claims. Rule 38(a), SCRCP. And even if the Court believes that there are some equitable remedies in the Receiver's third-party complaint that push his pleading outside of this rule, there is no doubt that he seeks relief at law—"billions of dollars" in alleged damages—such that the equitable issues cannot be determined until after a jury first resolves the legal issues. *See Floyd v. Floyd*, 306 fS.C. 376, 379–80, 412 S.E.2d 397, 398–99 (1991) ("Even in a case in equity if, during the trial of such case, any question should arise which a party is entitled to have determined on the law side of the court, such determination should be had. Where legal and equitable issues and rights are asserted in the same complaint, legal issues are for determination by a jury and equitable issues for the judge sitting as chancellor."); *Bateman*, 358 S.C. at 673, 596 S.E.2d at 389 ("Where legal and equitable issues or rights are raised in the same complaint, the legal issues are for determination by a jury and the equitable issues are for determination by the court.").

The Receiver even conceded in his filings to the circuit court that his claims "sound[] in equity ***and law***." (Receiver's Motion to Preadmit Exhibits as a Discovery Sanction at 2 (Apr. 3, 2024) (emphasis added).) That admission makes a jury trial unavoidable.

But like the first-party jury trial issue discussed above, the Court never acknowledges any of the substance of the Receiver's third-party claims. The Court must have misunderstood or misapprehended the posture of this case when it dismissed the appeal because the Receiver himself has conceded that his claims sound in law, entitling the Altrad Defendants to the jury trial they demanded in their responsive pleading. Rehearing is therefore essential to correct this unmistakable error.

SUGGESTION OF REHEARING EN BANC

The Court should rehear this petition *en banc* because the constitutionally-enshrined right to a jury trial is at stake in this litigation. The Altrad Defendants are entitled to a jury trial for multiple reasons discussed above. Yet, the Court dismissed this appeal without any analysis of either of those reasons, and instead relied only on the illusory labels the Receiver affixed to his claims. That's flatly contrary to established law in South Carolina—labels simply don't matter, but they were given dispositive treatment here with no regard to the actual substance of what relief is being sought below, and with no regard to the fact that the Receiver himself conceded in his filings to the trial court that his claims sound at least in part in law.

More concerning is the fact that the Court dismissed this appeal on its merits, but without any merits briefing. That is a dangerous precedent for this Court to set; the Appellate Court Rules are designed to allow at least a three-judge panel to consider the parties' respective arguments and to apply the law to the facts appearing in the record after full briefing and full preparation of the appellate record. As it stands, the Altrad Defendants have had a constitutional right taken from

them without the benefit of briefing or even preparation of an appellate record. And they've had that right taken from them even though South Carolina law is settled that orders depriving a litigant of its right to a jury trial must be appealed at once. *See, e.g.*, *Lester*, 327 S.C. at 266, 491 S.E.2d at 241 (failure to immediately appeal "an order affecting the mode of trial effects a waiver of the right to appeal that issue"); Toal, *Appellate Practice in South Carolina* 156 ("[T]he failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue."); *id.* at 157 (reiterating that "these orders must be appealed immediately").

If the Altrad Defendants cannot now appeal this order setting a bench trial—the very first order in the case that purports to dispatch their right to a jury trial—then when will they ever have a chance to protect that right? South Carolina courts have been clear that the requirement of immediate appeal is intended to "preserve" the constitutional jury trial right "which would otherwise be lost" if appeal is delayed until final judgment. *Hagood*, 362 S.C. at 197, 607 S.E.2d at 709 (citing *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004)). Yet, that's precisely what the Court's dismissal order requires of the Altrad Defendants—to wait until a final judgment before reviewing what's happening below, which will be too late.

The full Court of Appeals should intercede and review the circuit court's order. It wrongly deprives the Altrad Defendants of their constitutional right to a jury trial in multiple ways; the Receiver has no response to this other than relying on misleading labels found in his pleading; and the Court's dismissal order ignores the actual issues raised in this appeal that make the order below immediately appealable as a matter of right. Accordingly, the Altrad Defendants respectfully request that the Court grant this petition and rehear this matter in an *en banc* capacity.[1]

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[1] The Altrad Defendants file this petition without waiving, and while specifically preserving, their objections to personal jurisdiction. Additionally, they respectfully join and adopt by reference

Respectfully submitted,

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October 10, 2024

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any petitions for rehearing filed by the Sparrows Defendants and the Charter Defendants in their respective appeals of the same underlying order.

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellants Altrad Investment Authority SAS and Mohed Altrad, 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): The Altrad Defendants' Petition for Rehearing and Rehearing *En Banc* Regarding Their Right to a Jury Trial

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