

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Civil Action No. 2023-CP-40-01759
Appellate Case No. 2024-001064

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

v.

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

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

and

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

v.

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

Of which ArranCo US, LLC, Hawk Bidco US Inc., and Sparrows Offshore, LLC, are the.....**APPELLANTS.**

PETITION FOR EN BANC REHEARING

Steven J. Pugh (S.C. Bar No. 14341)
Benjamin P. Carlton (S.C. Bar No. 101142)
Carmen V. Ganjehsani (S.C. Bar No. 73515)
Ashwin R. Sanzgiri (S.C. Bar No. 105198)
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400

**ATTORNEYS FOR APPELLANTS ARRANCO US,
LLC, HAWK BIDCO (US) INC., AND SPARROWS
OFFSHORE, LLC**

ARGUMENT

This Court, upon Motion of the Receiver—the Respondent—dismissed this appeal on September 18, 2024. That dismissal order characterizes the appealed orders as “an order granting Respondent’s motion for sanctions pursuant to Rule 37(b), SCRPC and an order granting Respondent’s motion to pre-admit exhibits ahead of a bench trial.” *See* Order in Appellate Case No. 2024-001064 (filed Sept. 18, 2024) (“Dismissal Order”). The Dismissal Order itself establishes the Court overlooked and misapprehended the basis for appeal. The appealed orders were not merely “discovery orders” as the string citation indicates—the nature of the orders was to “preadmit exhibits” as the Court noted, *and* to impose a number of dispositive “adverse inferences” in what has been (improperly) set as a bench trial. Despite the “sanction” moniker, the Orders’ combined effect is unquestionably contempt under black-letter South Carolina law. Any other ruling—including the dismissal which occurred here—indicates this reality was both overlooked (as evidenced in the text of the order) and misapprehended (as evidenced by the dismissal itself). Accordingly, pursuant to Rules 219 and 221(a), SCACR, the Sparrows Appellants respectfully request that this Court grant their petition for en banc rehearing to ensure the issues raised are properly addressed.

This appeal should proceed on the merits for multiple reasons. Respondent conflated 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 protect against violations of substantial rights—does not justify misguided invective by opposing counsel or, more importantly, dismissal of a valid appeal just because the opposing party disagrees with those arguments. The Court should have rejected that argument. It necessarily must have overlooked the fact that this appeal was not taken for

delay. This misapprehending of the arguments is evidenced through this Court’s citation to an ill-fitting statement from the *Richardson* case¹ for a proposition that immediate appeals can create delays, which was not why the appealed orders were appealed. *See* Dismissal Order.

Moreover, as set forth below and in prior filings, South Carolina law actually *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 a discovery order waives rights as to that order in a later appeal.²

Finally, this Court incorrectly ruled that the appealed orders are merely discovery orders issued pursuant to Rule 37, SCRPC. Under any definition or analysis of civil contempt under South Carolina law, the appealed May 23 Orders constitute contempt. And, while this Court, the circuit court, and the Receiver characterize these orders in a way that insulates the lower court proceedings from appellate review, it is the *effect of an order*, not its title nor included language attempting to dictate appealability that controls the analysis to be applied by this Court. The circuit court issued findings that are contempt, an immediately appealable issue.³ At the same time, and

¹ Below, the Sparrows Appellants cite the *Richardson* case for the authority applicable here, namely, the distinction arising where an order effectively determines the action.

² *Davis v. Parkview Apartments*, 409 S.C. 266, 281 & n.15, 762 S.E.2d 535, 543 & n.15 (2014) (characterizing un-appealed discovery 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).

³ Various matters were heard at the April 25, 2024 hearing before former Chief Justice Toal. Discussions of various receiverships occurred, with procedure and arguments bleeding over, sometimes indiscernibly, between cases. The Sparrows Appellants were subjected to these orders of contempt as a result of appeals and related assertion of arguments as to South Carolina’s clearly 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. At that hearing, under the caption of a different matter and discussing different parties, the issue of Rule 205—a key factor in the Court’s contempt orders—arose. In discussing the exact same issue in those related cases, counsel for the Receiver made clear what was actually being sought: “Your Honor, I hate to use this word,

as part thereof, the circuit court struck portions of the Sparrows Appellants' pleadings through the adoption of numerous dispositive "adverse inferences" and the erroneous preadmission of thousands of exhibits, essentially determining the matter on the Receiver's pleadings. Relatedly, the circuit court's refusal to address the Sparrows Appellant's request for a stay and injunction—thereby denying the injunctive relief that would effectuate the stay provisions of the South Carolina Appellate Court Rules and clearly established precedent—is an immediately appealable issue created in the May 23 Orders.

In light of all of these points, the Court should have denied the Motion to Dismiss and allowed the appeal to continue. The circuit court's May 23 Orders which punish the Sparrows Appellants for contempt and shift the burden of proof onto the defendants in a purported third-party case scheduled for a bench trial meet the grounds for appealability as set forth herein. The Receiver's arguments against appealability have neither legal nor factual support. Upon rehearing en banc, the Court should determine that the appealed orders are immediately appealable under the applicable statutory and precedential case law.

I. In Assessing Appealability, the Court Should Conduct a Proper Analysis of the Effect of the Appealed Orders.

This Court seemingly accepted the three incorrect arguments the Receiver made in his Motion to Dismiss, even though these arguments have no basis in fact or law. Those arguments were: (1) the May 23 Orders are not contempt; (2) the May 23 Orders neither "determine the action" nor do they constitute the striking of any part of the Sparrows Appellants' Answer in the

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 (emphasis added) (counsel describing conduct as "contemptuous" and asking court to act accordingly).

lower court; and (3) the circuit court’s continued and repeated refusal and denial of injunctive relief actually did not occur. *See* Mot. Each of the Receiver’s arguments fail when the appealed orders are properly analyzed for appealability.

It is well-established that how an order is titled 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, when assessing appealability, the Court *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”).

In the appealed orders, the circuit court issued sweeping rulings requested by the Receiver which—under the guise of “discovery sanctions” and in a case that is presently and improperly set for a *bench trial*,⁴ completely untethered from the first-party tort action⁵ from which the “third-party” complaint is supposed to be derivative—(i) admitted *over two thousand*—2,548, to be exact—exhibits as “genuine” against three sets of third-party defendants but somehow reserved them as not admitted nor genuine against another set of third-party defendants *and* (ii) imposed a

⁴ The circuit court’s June 20, 2024 “Order Scheduling Trial Date,” setting the case for bench trial, is now on appeal as an order depriving the Sparrows Appellants of their constitutional jury trial rights, thereby impacting the mode of trial and their substantial rights.

⁵ The Plaintiffs in the first-party tort action demanded a jury trial.

number of dispositive “adverse inferences.” These adverse inferences are, again, with respect to only a subset of third-party defendants and they effectively determine the Receiver’s claims against them. The Dismissal Order issued by this Court overlooked the dispositive “adverse inference” aspect of the appealed orders.

The below-defined May 23 Orders effectively determined the Receiver’s action by finding for the Receiver on the factual and legal issues in his “day of reckoning”⁶ pleading and by striking various defenses in the Sparrows Appellants’ responsive pleadings. To be clear, these adverse inferences against the Sparrows Appellants and others and voluminous pre-admitted exhibits were ordered by a court which is also currently set to be the sole decider of the outcome in the upcoming *bench trial*. See Order Granting the Receiver for Cape PLC’s Motion to Pre-Admit 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 (“Adverse Inference Order”), each filed May 23, 2024 [collectively, the “May 23 Orders”]. Whether alone or when combined with the granting of attorneys’ fees—erroneously also included as part of the Adverse Inference 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.”).

Moreover, the General Assembly 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

⁶ As clear from the substance of his pleading, the “reckoning” sought is in the form of billions of dollars of monetary legal damages, from the substance of his pleadings.

thereof or any pleading in any action” S.C. Code Ann. § 14-3-330(2). The May 23 Orders on appeal fall precisely under the General Assembly’s statutory pronouncement of immediately appealable grounds. Yet, this Court did not give due weight to the General Assembly’s statement of South Carolina’s public policy regarding appellate oversight.

The circuit court’s Adverse Inference Order devoted a number of pages to appealability, reflective of an apparent effort to insulate its erroneous decision from immediate appellate review. *See generally* Adverse Inference Order. Likewise, the Pre-Admission Order attempts to conduct its own appealability analysis. *See generally* Pre-Admission Order. But, this Court was required to go beyond the titles of such orders and Respondent-drafted and circuit-court-approved language included therein endeavoring to control the appealability inquiry and mask 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 their effect reveals their true—and immediately appealable—nature. The Court should have conducted this review and determined the orders were appealable.

II. The Court Overlooked that the Effect of the May 23 Orders Was Contempt.

The combined effect of the two May 23 Orders—by their unequivocal terms—is to punish the Sparrows Appellants, ruling in the Receiver’s favor on the allegations forming the core of his

pled claims and providing support for numerous dispositive “adverse inference” findings through “authenticated” evidence in an as-scheduled, upcoming bench trial. This is merely contempt by misnomer, yet this Court conducted no analysis on this issue in its Dismissal Order. *Compare* Rule 37, SCRPC (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, as relied on by this Court, and final orders that “reserve no further questions or directions for future determination,” which would be the actual effect of the May 23 Orders).

As has been defined:

Contempt is the 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 light of the definition and elements of contempt, the May 23 Orders cannot be characterized as merely discovery sanctions.

In the May 23 Orders, the circuit court notably avoided the word “contempt,” but the circuit court’s findings unmistakably equate to holding the Sparrows Appellants in contempt. Indeed, the Adverse Inference Order is predicated on the Sparrows Appellants’ alleged “flagrant violations of the Court’s March 12 Order” granting the Receiver’s motions to compel discovery. *See* Adverse Inference 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’s imposition of numerous dispositive adverse inferences as a punishment for alleged willful violations of an order compelling discovery is the substantive equivalent of an appealable contempt sanction. *Davis*, 409 S.C. at 280, 762 S.E.2d at 543 (Toal, C.J.) (“[T]o challenge the specific rulings of . . . discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding.”). Reference to the fact that actions have been taken “despite repeated orders of this Court,” Adverse Inference Order at 4, and findings that the circuit court was using its “inherent power” directly fall within the first element of contempt—existence of a valid duty. Here, the circuit court clearly believed its orders on prior motions to compel were valid and justifiable such that they created an obligation on the part of the Sparrows Appellants. The circuit court likewise held that there was knowledge of such an obligation and

“willful disobedience” of the same, which is exactly why it took the action that it did. If that alone is not sufficient to make evident that these Orders were indeed contempt, the circuit court went well beyond that threshold by including conditions to its rulings that clearly align the orders with what case law has established as contempt and contempt sanctions. This Court upon en banc rehearing should find that the orders constitute contempt.

“The purpose of civil contempt is ‘to coerce the defendant to do the thing required by the order for the benefit of the complainant.’” *Poston v. Poston*, 331 S.C. 106, 111, 502 S.E.2d 86, 88 (1998). Exactly in line with that hallmark of contempt, the circuit court stated: “The Court notes that these rebuttable inferences 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.” *Compare* Adverse Inference Order at 16 (quoted above) *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 (such as Rule 37), it would not also 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 aimed to exact both punitive and coercive punishments against the Sparrows 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)).

The Sparrows Appellants did exactly what the South Carolina Supreme Court has required to appeal a discovery order: suffer contempt. *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.”); *see also 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.”). In fact, immediate appeal is required or the Sparrows Appellants risk waiver of the right to challenge the discovery orders. By focusing on a Rule 37, SCRCF, label, this Court overlooked and misapprehended the effect of the May 23 Orders—an aggregation of contempt findings and resulting punishments to the Sparrows Appellants

III. This Court Also Overlooked that the May 23 Orders Effectively Struck Portions of the Sparrows Appellants' Answer and Determine the Action.

This Court is required to look to the effect of the orders on appeal, not just the superficial label. *Spalt*, 423 S.C. at 584, 816 S.E.2d at 583 (“The label given to the order is not determinative of its immediate appealability.”). For similar reasons as set forth above, the Sparrows Appellants submit this Court, in fact, overlooked additional effects of the appealed orders in dismissing this appeal.

In addition to finding and punishing for contempt, the combined effect of the two May 23 Orders was to essentially determine the action—akin to a judgment on the pleadings—which is what it is in a scheduled bench trial.⁷ The adverse inferences against the Sparrows Appellants, in conjunction with the pre-admitted exhibits, “determines the action” such that nothing the Sparrows Appellants could ever do—despite the Orders having language to the contrary—would effectively rebut the inference. *See Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005) (describing order as effectively determining 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”). At the April 25, 2024 hearing before the circuit court, counsel for the Receiver stated “we can prove our case right now. We got the documents to prove it up.” Transcript of April 25, 2024 Hearing in *John A. Tibbs v. 3M Company, et al.*, at 8:6–10. Counsel added, “We know they did it. They did it. . . . The only question is are we going to be able to hold them accountable? We know they did it.” *Id.* at 9:11–23. This context around the Receiver’s requested May 23 Orders is

⁷ Acknowledgment of a trial setting should not be construed as waiver of any arguments relative to the Sparrows Appellants’ common-law and constitutional rights to a trial by jury—if they are not dismissed before the trial date—an issue now also on appeal. The circuit court has now moved the trial date and the Receiver appears to believe a bench trial will occur, despite the jury demand made by various parties, including the Sparrows Appellants.

important because it shows the Receiver was seeking entry of Orders that comported with “the documents to prove it up” and left nothing for the Court to do but take inferences and hold parties accountable for what the Receiver supposedly already “knows.”

The “inferences” adopted are the elements for each of Respondent’s pled causes of action against the Sparrows Appellants. The circuit court’s issuance of the May 23 Orders in effect strikes the Sparrows 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” *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 Sparrows 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 (Toal, C.J) (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).

The Receiver asserts that while an adverse inference is taken, it does not “require that *the jury draw it.*” Mot. to Dismiss at 12 (emphasis added). That *cannot* be applicable here. At the Receiver’s request—contrary to certain third-party defendants’ jury trial demands—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 hydrogen-bomb contempt sanctions, there is no likelihood that the adverse 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. Unless and until the circuit court orders the applicable issues be tried before a jury, the Receiver’s arguments that adverse inferences do not determine an action are wholly unavailing.

In summary, the circuit court made findings constituting contempt against the Sparrows Appellants and imposed punishment in the form of orders which in effect determine the action against them. These orders were, therefore, immediately appealable under § 14-3-330 as affecting a substantial right. The fact these compelling arguments were presented and ignored indicates this Court both overlooked and misapprehended the Sparrows Appellants’ arguments, warranting rehearing.

IV. The Circuit Court Again Refused and Denied a Request for Injunction.

The Court likewise overlooked—by not addressing at all—the fact the circuit court again, through issuing orders, rejected, refused, and denied a request for injunctive relief.

The Receiver asserted there was a “brazen” attempt to appeal. The Sparrows Appellants acknowledge that the orders contain no reference to an injunction—but the circuit court’s refusal to address the Sparrows 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 recognized (Mot. to Dismiss at 9), the refusal of an injunction is immediately appealable. S.C. Code Ann. § 14-3-330(4).

Yet, this Court did not address that the lower court’s refusal and denial of an injunction. Instead, it seemingly overlooked or misapprehended that the requests for injunctive relief were merely the Sparrows Appellants’ only method of putting before the circuit court—and possibly this Court—the requisite 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. 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).⁸ This issue was fully briefed in

⁸ 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, as discussed below, has no bearing on the question posed by a Rule 205 analysis. The other, as noted above, never reached the Rule 205 question because of the manner in which it was placed before the Court.

the Sparrows Appellants' Return to Motion to Dismiss Appeals of Interlocutory Discovery Order (which arguments are fully incorporated herein by reference), and the Sparrows Appellants respectfully submit that such arguments and authorities were overlooked or misapprehended by this Court.

IV. Rehearing En Banc Is Warranted.

Rule 219 of the South Carolina Appellate Court Rules allows for en banc review when “consideration by the full court is necessary to secure or maintain uniformity of its decisions” or “the proceeding involves a question of exceptional importance.” Both grounds are met here, and review should be en banc. South Carolina law leaves no dispute as to the mandatory focus of the appealability inquiry and the application of section 14-3-330. This Court accepted the Receiver’s contentions without following the appropriate appealability inquiry. The issues here—contempt of court, masked behind “discovery sanctions”—are of exceptional importance given the high standard required before holding a party in contempt. Moreover, the Dismissal Order stands alone when contrasted with the clear body of case law cited above. Accordingly, because the Dismissal Order itself stands for lack of uniformity in decision and concerns matters of exceptional importance, en banc review is necessary.

CONCLUSION

For the reasons set forth herein, the Sparrows Appellants respectfully request this Court grant en banc rehearing of this matter of exceptional importance.⁹

⁹ Per Rule 208(b)(6), SCACR, the Sparrows 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., ESAB Corporation, Charter Consolidated Ltd., and Central Mining & Investment Corporation Ltd.

Respectfully submitted,

s/Steven J. Pugh

Steven J. Pugh (S.C. Bar No. 14341)

Benjamin P. Carlton (S.C. Bar No. 101142)

Carmen V. Ganjehsani (S.C. Bar No. 73515)

Ashwin R. Sanzgiri (S.C. Bar No. 105198)

RICHARDSON, PLOWDEN & ROBINSON, PA

1900 Barnwell Street

Columbia, South Carolina 29201

Tel.: (803) 771-4400

spugh@richardsonplowden.com

bcarlton@richardsonplowden.com

cganjehsani@richardsonplowden.com

asanzgiri@richardsonplowden.com

*Attorneys for Appellants ArranCo US,
LLC, Hawk Bidco (US) Inc., and Sparrows Offshore,
LLC*

October 10, 2024

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellants ArranCo US, LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC, do hereby certify that I have this date served the foregoing **PETITION FOR EN BANC REHEARING**, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated April 24, 2024, on all counsel of record using the primary email addresses listed in the Attorney Information System (if applicable).

Parties Served:

John T. Lay, Jr. (jlay@gwblawfirm.com)
Gray T. Culbreath (gculbreath@gwblawfirm.com)
Lindsay A. Joyner (ljoyner@gwblawfirm.com)
Laura W. Jordan (ljordan@gwblawfirm.com)
Eleanor L. Jones (ejones@gwblawfirm.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanonp@smithrobinsonlaw.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Troy S. Brown (troy.brown@morganlewis.com)
Dana E. Becker (dana.becker@morganlewis.com)
Brady Edwards (brady.edwards@morganlewis.com)
Robert W. Jacques (robert.jacques@morganlewis.com)
Paul A. Scudato (paul.scudato@morganlewis.com)

Counsel for the Receiver for Cape PLC

Theile B. McVey (tmcvey@kassellaw.com)
John D. Kassel (jkassel@kassellaw.com)
Jamie D. Rutkoski (jrutkoski@kassellaw.com)
Charles William Branham, III (tbranham@dobslegal.com)
Kevin W. Paul (kpaul@dobslegal.com)
David Christopher Humen (dhumen@dobslegal.com)

Counsel for Plaintiffs

James H. Elliott, Jr. (jelliott@richardsonplowden.com)
Cameron D. Berthelsen (cberthelsen@richardsonplowden.com)

Counsel for AA/DB Non-US Third-Party Defendants

A. Victor Rawl, Jr. (vrawl@grsm.com)

John Nichols (john@bluesteinattorneys.com)

Counsel for Co-Appellants ESAB Corporation; Central Mining and Investment Corp., Ltd.; and Charter Consolidated Ltd.

M. Todd Carroll (todd.carroll@wbd-us.com)

Kevin A. Hall (kevin.hall@wbd-us.com)

M. Elizabeth O'Neill (elizabeth.oneill@wbd-us.com)

Counsel for Co-Appellants Mohed Altrad and Altrad Investment Authority SAS

Stephen L. Brown (sbrown@yrlaw.com)

James D. Gandy, III (tgandy@yrlaw.com)

Stephen A. Griffith (sgriffith@yrlaw.com)

Counsel for Asbestos Corporation Limited

/s/ Ashwin R. Sanzgiri

Ashwin R. Sanzgiri (S.C. Bar No. 105198)

RICHARDSON, PLOWDEN & ROBINSON, PA

Post Office Drawer 7788

Columbia, South Carolina 29202

(803) 771-4400

**ATTORNEY FOR APPELLANTS ARRANCO US, LLC,
HAWK BIDCO (US) INC., AND SPARROWS
OFFSHORE, LLC**

Date: October 10, 2024


From: [Ashwin Sanzgiri](#)
To: [Vic Rawl](#); [John Nichols](#); [Meredith Brown](#); tmcvey@kassellaw.com; jkassel@kassellaw.com; kpaul@dobslegal.com; jrutkoski@kassellaw.com; tbranham@dobslegal.com; achapman@dobslegal.com; dhumen@dobslegal.com; khardin@dobslegal.com; tbarnes@dobslegal.com; pdp@rlegalgroup.com; jchandler@rlegalgroup.com; bb@rlegalgroup.com; Kevin.Hall@wbd-us.com; Elizabeth.ONeill@wbd-us.com; [James Elliott](#); [Cameron Berthelsen](#); [Steve Pugh](#); [Ben Carlton](#); [Carmen Ganjehsani](#); jon@smithrobinsonlaw.com; murrell@smithrobinsonlaw.com; ljoyner@gwblawfirm.com; jlay@gwblawfirm.com; gculbreath@gwblawfirm.com; lJordan@gwblawfirm.com; ejones@gwblawfirm.com; dana.becker@morganlewis.com; brady.edwards@morganlewis.com; robert.jacques@morganlewis.com; paul.scrudato@morganlewis.com; shanonp@smithrobinsonlaw.com; [Charity McQueen](#); Donna.Yingling@wbd-us.com; Todd.Carroll@wbd-us.com; [Helen Elliott](#); troy.brown@morganlewis.com
Subject: John A. Tibbs v. Asbestos Corporation Limited (10) (Appellate Case No. 2024-001064)
Date: Thursday, October 10, 2024 3:26:02 PM
Attachments: [Petition for Rehearing - Sparrows Appellants 10-10-24.pdf](#)

Good afternoon,

Please find served upon you the Petition for Rehearing on behalf of ArranCo US, LLC; Hawk Bidco (US) Inc.; and Sparrows Offshore, LLC, in the above-referenced case which we will be filing with the Court of Appeals of South Carolina later today.

Thank you!

Ashwin

HOME	BIO	LOCATION
	<p>Ashwin R. Sanzgiri Attorney ASanzgiri@RichardsonPlowden.com</p>	<p>Richardson Plowden & Robinson, P.A. 1900 Barnwell Street Columbia, SC 29201 Tel: 803.576.3732 Fax: 803.779.0016 www.RichardsonPlowden.com</p>

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