

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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. 2024-001446

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., Sparrows Offshore, LLC, Mohed Altrad, Altrad Investment Authority SAS, Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. are the Appellant.....**APPELLANTS.**

PETITION FOR EN BANC REHEARING

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LLC, HAWK BIDCO (US) INC., AND SPARROWS
OFFSHORE, LLC**

INTRODUCTION

On August 30, 2024, the Sparrows Appellants appealed the circuit court’s order scheduling a bench trial on the ground that the circuit court’s order deprived the Sparrows Appellants of their right to a jury trial and their related right to have the jury trial on the underlying asbestos case—on which this matter purports to derive—occur first. In their response to the Receiver’s motion to dismiss the appeal as not immediately appealable, the Sparrows Appellants provided several independent grounds as to why these substantial rights exist and how the Sparrows Appellants have been deprived of them. In a two-paragraph order, this Court dismissed this appeal on September 18, 2024 without any analysis of the arguments set forth in the Sparrows Appellants’ Return to the Motion to Dismiss, and this Court did so not on appealability grounds before it but instead on the merits, which could only have been assessed after full merits briefing. Pursuant to Rule 221(a), SCACR, the Sparrows Appellants respectfully submit that the Court either “overlooked or misapprehended” these initial points.¹

The Dismissal Order recites only that the Receiver’s claims are for “unjust enrichment, constructive trust, alter-ego liability, veil piercing, and accounting.” *See* Order in Appellate Case No. 2024-001446 (filed Sept. 18, 2024). While the Dismissal Order contains no substantive analysis, the citations refer to the fact that each of the Receiver’s putative causes of action listed above typically constitute claims in equity which do not require a trial by jury. This simplistic basis for dismissal, based on the Receiver’s self-serving labels and not on the readily apparent “main purpose” of the Receiver’s claims, misapprehends the reason the circuit court’s June 20,

¹ In making this filing and continuing to prosecute this appeal, the Sparrows Appellants do not intend to waive, and expressly preserve, all defenses to the underlying action, including the defense of lack of personal jurisdiction.

2024 Order was appealed and serves to deny the Sparrows Appellants of their substantial right to trial by jury, protected by both the United States and South Carolina Constitutions and related substantive law that was cited in the Sparrows Appellants’ Return to the Motion to Dismiss and Expedite (the “Return”). Moreover, the Order dismissing this appeal makes no mention of the numerous other dispositive issues raised in the Sparrows Appellants’ Return. Accordingly, for the reasons set forth herein, the Sparrows Appellants respectfully request that this Court grant their Petition for En Banc Rehearing.

RELEVANT FACTUAL BACKGROUND

The following background, relevant to this appeal, was set forth in the Sparrows Appellants’ Return, and remains relevant to why this Court, sitting en banc, should grant rehearing.

First, however, and most importantly, the Sparrows Appellants are ArranCo US, LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC. They were formed, in Delaware, in the twenty-first century: Sparrows Offshore in 2003; ArranCo in 2008; and Hawk Bidco in 2012. The Sparrows Appellants do not now, nor have they ever, maintained their registered office or principal place of business in South Carolina. Instead, from its Texas principal place of business, Sparrows Offshore is in the crane business, while ArranCo and Hawk Bidco are Delaware holding companies. *None of them* have ever had any affiliation with or contacts to South Carolina or to the asbestos industry. *Each of them* only became distantly related to Appellant Altrad Investment Authority SAS (a French entity)—and even more so to the Cape PLC or Cape Intermediate Holdings Limited (“CIHL”) entities over which the Receiver purports to act—*beginning in mid-2022*. Despite the foregoing uncontroverted facts, the Sparrows Appellants are named in this litigation for alleged asbestos liabilities occurring thirty to fifty years before they even existed and longer before they were acquired in mid-2022 by a foreign entity.

On January 2, 2024, the Sparrows Appellants demanded a jury trial “on all issues so triable” as part of their protective Answer timely filed with the circuit court in response to the Receiver’s Third-Party Complaint. *See* Answer, at p.1 (Caption) & p.63 (“Prayer for Relief”) (**App. 1, 63**). Then, on April 8, 2024, counsel for the *Tibbs* Plaintiffs emailed the circuit court and a listserv of counsel indicating that only two defendants remained in the first-party asbestos action brought by John and Margaret Tibbs—(i) Asbestos Corporation Limited (“ACL”) and (ii) Atlas Turner. *See* Email from Counsel for *Tibbs* Plaintiffs (Apr. 8, 2024) (**App. 64–66**). At the hearing held by the circuit court two days later, the same counsel for the *Tibbs* Plaintiffs put on the record that Cape PLC was no longer a defendant² and, when asked “what happened to Cape,” the same counsel referenced an undisclosed “tolling agreement”—the first public mention of any “agreement” between the Receiver and the *Tibbs* Plaintiffs. Hearing Tr., at 33:16–17; 155:8–25 (Apr. 10, 2024) (**App. 100, 222**).³

Weeks later, during an April 25, 2024 hearing before the circuit court, the terms and import of the secretive “tolling agreement” remained undisclosed to both the Appellants and the circuit court:

MR. CARROLL: Because Rule 14 only allows a third party to try to transmit the first-party liability to the third-party defendants. If there is no first-party liability, then there’s nothing to transmit the third-party defendants. We’ve not seen the tolling agreement. I assume you are going to ask Mr. Lay about the status of that case. The first-party Tibbs versus Cape case. I don’t know any details beyond what I just told you.

THE COURT: It’s a tolling agreement between who and who?

² CIHL has never been a named defendant in *Tibbs*.

³ Even though the “tolling agreement” was immediately requested, it was not produced to Third-Party Defendant Anglo American PLC (“Anglo American”) until June 18, 2024 following the circuit court’s June 6, 2024 entry of a “Confidentiality Order.” *See* Anglo American’s Notice of Removal, at ¶ 8 filed June 28, 2024 [ECF 1] (accepted for filing by Richland County Clerk of Court on July 2, 2024) [hereinafter, “Anglo American Removal Notice”] (**App. 256**).

MR. CARROLL: My understanding is it's between the plaintiffs and the receiver.

THE COURT: And it tolled what? The statute of limitations?

MR. CARROLL: I don't know.

THE COURT: *That's way too doggone vague for me to make any sense.*

Hearing Tr., 42:14–44:17 (emphasis added) (**App. 425–26**).

As part of Anglo American's June 28, 2024 removal to federal court, *some* clarity as to the “tolling agreement” was *finally* obtained. As described by Anglo American, this “tolling agreement” is in reality a non-confidential agreement of dismissal (the “Dismissal Agreement”), as, on June 12, 2023 (*before* the Receiver's pleading against the Sparrows Appellants was filed), the Receiver “agreed to toll the statute of limitations on the *Tibbs* [P]laintiffs' claims against Cape [PLC] in exchange for the *Tibbs* [P]laintiffs' agreement to **dismiss their claims against Cape [PLC]**.” Anglo American Removal Notice, at ¶ 8 (emphasis in original) (**App. 259**). In the district court's August 13, 2024 Remand Order (filed with the circuit court on August 14, 2024), the Dismissal Agreement was similarly described:

The tolling agreement provides that the Receiver and certain counsel *consent to the dismissal of specific claims filed by counsel's clients against Cape plc* without prejudice in exchange for Cape plc's assent to tolling the applicable limitations period. The purpose of the agreement is to allow the parties *evaluate the dismissed claims* outside of litigation. The agreement provides for *refiling of the dismissed claims* in the event settlement is not effectuated.

(Emphasis added).

Thereafter, at a status conference held by the circuit on July 16, 2024, counsel for the *Tibbs* Plaintiffs once again confirmed the status as to Cape PLC by noting that “we still have a case against ACL” (i.e., not Cape PLC). Hearing Tr., at 3:8–14 (July 16, 2024) (**App. 342**).

Within this same timeframe and mere days before Anglo American’s June 28, 2024 removal, the circuit court—for the first time—ordered that a *bench trial* of the Receiver’s claims begin starting December 9, 2024, untied to any trial of the underlying *Tibbs* first-party tort action. See June 20, 2024 “Order Scheduling Trial Date” [the “Order”]. That Order is the subject of this proper, timely appeal.

ARGUMENT

I. The Receiver’s “Third-Party” Complaint Seeks Monetary Legal Damages.

This Court should have—and was required to—reject the Receiver’s attempt to mask his true intentions behind claims⁴ which are “equitable” in name only. The relevant question in determining the right to trial by jury⁵ is whether an action is legal or equitable; there is no right to trial by jury

⁴ As noted in the Return, the Receiver’s pleading below is patently improper, and preventing review of this fact appears to be the underlying basis for the Receiver’s serial motions to dismiss, without ever engaging on the merits, of otherwise valid appeals. Under Rule 14(a) of the South Carolina Rules of Civil Procedure, a defendant is permitted to implead and pursue claims against a third party only if it “is or may be liable to [defendant] for all or part of the plaintiff’s claim”; it “does not allow the defendant to assert a separate and independent claim.” Rule 14(a), SCRPC; see also *Uptagrafft v. United States*, 315 F.2d 200, 202 (4th Cir. 1963) (“The right to bring in such third party exists only when the third party ‘is or may be liable to him for all or part of plaintiff’s claim against him.’”). Before the “third-party” pleading was filed, the Receiver agreed with counsel for the *Tibbs* Plaintiffs to indefinitely toll the statute of limitations as to the *Tibbs*’ claims against Cape PLC. Thus, the case below is entirely improper, and has been from its inception—a fact that has only been recently discovered by the Appellants. This fact is important, because as set forth below, not only are the Sparrows Appellants entitled to a jury trial of any third-party claims, but, as a mandatory condition precedent, there must first be a jury trial between the original *Tibbs* Plaintiffs and Cape PLC. Given the Dismissal Agreement, that mandatory condition precedent will never be satisfied.

⁵ As with the United States Constitution, the South Carolina Constitution “preserve[s] inviolate” the fundamental right to a jury trial. S.C. Const. art. I, § 14; see also U.S. Const. amend. VII (“[T]he right of trial by jury shall be preserved . . .”); *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 600, 681 S.E.2d 879, 884 (2009) (“The right to trial by jury is a fundamental right.”). The South Carolina Rules of Civil Procedure reiterate this constitutional mandate, in Rule 38(a) concerning the right to trial by jury and in Rule 42(b) governing bifurcation. See, e.g., Rule 38(a), SCRPC (“The right of trial by jury as declared by the Constitution . . . shall be preserved to the parties inviolate.”); Rule 42(b), SCRPC (“The court, in furtherance of convenience or to avoid prejudice,

for equitable actions.” *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Characterization of an “action as equitable or legal depends on the [plaintiff’s] ***main purpose in bringing the action.***” *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) (emphasis added) (citations omitted).

Such an analysis is not determined by labels included in a pleading and could not be properly assessed on a motion to dismiss. The Dismissal Order indicates that this Court misapprehended or overlooked the arguments as to why this action was brought. In properly evaluating the pleadings, the court should look to the body of the complaint, the prayer for relief, and other relevant facts. *Id.* As the Supreme Court has stated:

Generally, however, it may be said that the essential character of the cause of action, and the *remedy or relief it seeks*, as shown by the allegations of the complaint, determine whether a particular action is at law or in equity, unaffected by the conclusions of the pleader or by what the pleader calls it, or the prayer for relief, or the nature of the defense interposed, or new matter stated in the reply, or whether the action is statutory or otherwise. Notwithstanding this, however, it is said that the nature of the issues as raised by the pleadings or the pleadings and proof, and *character of relief sought* under them, determines the character of an action as legal or equitable.

Bell v. Mackey, 191 S.C. 105, 3 S.E.2d 816, 822 (1939) (emphasis added).

or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . or third-party claim[] or of any separate issue . . . always preserving inviolate the right of trial by jury as declared by the Constitution”); *see also* Rule 38(a), SCRCP (“Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.”); Rule 38(b), SCRCP (“Any party may demand a trial by jury of any issue triable of right by a jury”); Rule 38(c), SCRCP (“In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable.”).

Thus, this Court is required to conduct a proper merits analysis of the claims, which, if done, would lead to one conclusion: the Receiver’s main purpose is seeking monetary legal⁶ damages from the Sparrows Appellants. The Receiver’s pleading shows he seeks only one thing—relief in the form of money for “**billions of dollars** of past, present, and calculable future damages.” See (**App. 282**) (introducing main purpose sought by self-described “reckoning”) (emphasis added); (**App. 326**) (referring to unpaid responsibilities); (**App. 331**) (seeking money from all third-party defendants); (**App. 332**) (noting desire for additional resources, i.e., cash); (**App. 337**) (including “other and further relief” in prayer for relief). In fact, each of these requests, along with the Receiver’s running theme of seeking compensation, reflect the essential character of the Receiver’s causes of action and the relief sought which this Court should analyze in determining whether the Sparrows Appellants are entitled to a jury trial. *Ins. Fin. Servs., Inc.*, 271 S.C. at 293, 247 S.E.2d at 318 (noting body of complaint, prayer for relief, and related circumstances are relevant).

II. The Sparrows Appellants Are Entitled to a Jury Trial.

This Court also overlooked or otherwise misapprehended that outside of the Receiver’s third-party action in which the Sparrows Appellants are entitled to a jury trial, South Carolina law also affords a third-party defendant the ability to litigate the first-party lawsuit.⁷ Accordingly, there are two matters in which the Sparrows Appellants are entitled to trial by jury, and the circuit court’s June 20 Order has deprived them of both.

⁶ The animating purpose of securing money damages is apparent from various exchanges the Receiver has had with the circuit court and from the circuit court’s own statements as to why this, along with dozens of other, receiverships have been created.

⁷ This should not be construed as a waiver or concession that this is a proper third-party case. Stated most simply, the third-party nature of this action is questionable, at best. However, as the circuit court has ruled this action is somehow proper under Rule 14, SCRCF, until that ruling is reversed, the Sparrows Appellants and all other third-party defendants retain the right to trial by jury in the first-party action.

a. **The Sparrows Appellants Are Entitled to a Jury Trial in the First-Party Case.**

The Dismissal Order does not address that the Sparrows Appellants are entitled to a jury trial in the first-party action between the *Tibbs* Plaintiffs and Cape PLC and any other remaining defendants. This is by virtue of operation of Rule 14, SCRCF, which affords a third-party defendant the right to “stand in the shoes” of a third-party plaintiff—the underlying defendant, here, Cape PLC—as part of the defense of claims for which “derivative liability” would normally be capable of being passed through to the third-party defendants. *See* Rule 14, SCRCF; *see also generally, Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1141, 1149 (D. Haw. 2007) (acknowledging the third-party defendant’s right “to stand in [the defendant/third-party plaintiff’s] shoes for the purposes of defending against the [plaintiff’s] claims”); Moore’s Federal Practice § 14.25 (Matthew Bender 3d ed.) (“[T]he impleader rule recognizes the derivative nature of the third-party defendant’s potential liability and permits it essentially to stand in the defendant’s shoes and assert its defenses.”).

There should be no doubt **the issues in the *Tibbs* first-party action are triable by jury**, as is a regular occurrence in asbestos cases pending before the circuit court and has been demanded by the *Tibbs* Plaintiffs themselves. *See Tibbs* First Am. Compl. at 97 (“A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.”) (**App. 570**); Hearing Tr., at 27:11–13 (July 16, 2024) (“And the Tibbs family itself, . . . [t]hey deserve their day in court”) (**App. 366**).

This dynamic—between the status of and jury trial demanded in the first-party action and the circuit court’s subsequent bench-trial setting in the purported third-party action—appears to have been entirely overlooked by this Court. This alone presents a basis for rehearing of this Court’s dismissal of the Sparrow Appellants’ appeal.

b. The Sparrows Appellants Are Entitled to a Jury Trial on the “Third-Party” Claims.

If Cape PLC is somehow found liable in the first-party tort action,⁸ the Sparrows Appellants will then be entitled to the jury trial they have demanded⁹ on the “third-party” claims, insofar as they still exist at the time of trial. As evident from the “Introductory Statement” in the Third-Party Complaint,¹⁰ the Receiver’s own concession in his briefing submitted to the circuit court,¹¹ and other facts and circumstances relevant to these proceedings, the “main purpose in bringing the action” is the recovery of “billions of dollars of past, present, and calculable future damages” as

⁸ Cape PLC **cannot be found liable** in the first-party tort action because Cape PLC had been dismissed from the *Tibbs* action by virtue of the Dismissal Agreement, a reality that has now been confirmed by (1) the terms of the June 12, 2023 Dismissal Agreement that have been disclosed (**App. 256**) and (2) by repeated representations to the circuit court, including: (i) in an April 8, 2024 email (**App. 64–66**); (ii) during the April 10, 2024 hearing (**App. 154–55**); and (iii) during the July 16, 2024 status conference (**App. 341–81**). This is precisely why the Receiver’s action is, and has been, illusory from the date of filing and should not be permitted to proceed, especially in violation of the Sparrows Appellants’ constitutional rights.

⁹ See Sparrows Appellants’ Answer, at p.1 (Caption) & p.63 (“Prayer for Relief”) (**App. 1, 63**).

¹⁰ This “Introductory Statement” states (**App. 282**):

This lawsuit seeks **to finally hold accountable** three groups of Third-Party Defendants (including their predecessors in interest) who are responsible for the sale and use of asbestos or asbestos-containing products throughout the United States, including in South Carolina, and which caused or materially contributed to thousands of deaths from mesothelioma or other asbestos-related disease, and **billions of dollars of past, present, and calculable future damages**. . . . In sum, these three groups of Third-Party Defendants have wreaked havoc in the United States, padded their already massive coffers with blood money on top of blood money, and amused themselves with the supposed ingenuity of their scheme to avoid any responsibility. **This lawsuit begins their reckoning.**

(Emphasis added).

¹¹ See Receiver’s Mot. to Preadmit Exhibits as a Discovery Sanction, at 2 (April 3, 2024) (conceding that his claims “sound[] in equity *and law*.” (emphasis added)).

part of a self-proclaimed “reckoning” (i.e., not restitution, an accounting, or other equitable relief). *See Ins. Fin. Servs., Inc.*, 271 S.C. at 293, 247 S.E.2d at 318 (citations omitted); *see also* Rule 38(a), SCRPC (“Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.”).

Of course, the causes of action relative to the *Tibbs* Plaintiffs’ Complaint require trial by jury. And, there appears to be no dispute about that fact. Barring consent to dismiss the Sparrows Appellants because of the improper third-party nature of the case, it would appear all parties agree that if this case is properly derivative, then a jury trial in the first instance is required between the *Tibbs* Plaintiffs, Cape PLC, and any other remaining defendants. Thereafter, and only if Cape PLC is found liable, the Receiver’s third-party action must proceed before a jury, as the “main purpose” and only real relief being sought by the Receiver is “billions of dollars . . . [in] damages.” The Receiver thus seeks a legal, not equitable, reckoning. Accordingly, this Court should reverse its order and allow for this appeal to proceed on the merits as to whether the circuit court has denied the Sparrows Appellants their right to a jury trial.

III. The Circuit Court Order Appealed from Is Immediately Appealable as the Sparrows Appellants’ Chosen Mode of Trial Was Rejected on June 20, 2024.

For the reasons set forth above, there should be no doubt that the Sparrows Appellants are being subjected to claims primarily seeking monetary legal damages which entitle the Sparrows Appellants to a trial by jury. Relatedly, there is no doubt the first-party claims are triable by jury, and such was demanded. While the Court did not address the actual appealability of the order and rather rendered a decision on the merits, it bears noting that the June 20 Order was appealable.

First, the Supreme Court has held that orders affecting the mode of trial affect substantial rights under subsection 14-3-330(3) and *must be* immediately appealed. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997); *see also 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.”); *Satcher v. Satcher*, 351 S.C. 477, 490, 570 S.E.2d 535, 542 (Ct. App. 2002) (“Orders affecting the mode of trial affect substantial rights protected by statute and must, therefore, be immediately appealed.”). Thus, it is clear that the Sparrows Appellants were required to appeal this Order.¹²

Second, this Court must consider that a denial or deprivation of a party’s right to a jury trial on any issue so triable is immediately appealable as an order affecting a substantial right. S.C. Code Ann. § 14-3-330(2) (“The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: . . . (2) 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. . . .”); *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 as 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.”); *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 non-appealable); *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

¹² It also appears the Sparrows Appellants are required to appeal all such orders confirming or otherwise denying their chosen mode of trial to avoid issues of waiver, law of the case, or other related doctrines that would preclude their valid protection under both the South Carolina and United States Constitutions.

policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate.”); *N.C. Fed. Sav. & Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 904 (1989) (reversing in part an order dismissing, as not immediately appealable, an appeal from a trial court order denying a jury trial on legal claims).

Finally, failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. *Id.* If an order which affects the mode of trial is not immediately appealed, the party has no remedy in the future. *Creed v. Stokes*, 285 S.C. 542, 542–43, 331 S.E.2d 351, 352 (1985) (holding where appellant failed to timely appeal an order referring dispute to master-in-equity, appellant could not later complain that he had been entitled to a trial by jury); see also *Edwards v. Timmons*, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988) (per curiam) (concluding appellant’s failure to immediately appeal order referring matter to the master-in-equity was the law of the case). There was no such waiver here—this was the first opportunity the Sparrows Appellants had to take appeal of *an order* denying their chosen mode of trial. Jean H. Toal, et al., *Appellate Practice in South Carolina* 156 (3d ed. 2016); see also *id.* at 145 (“Orders denying a party’s right to a mode of trial must be appealed immediately, and a party runs the risk of waiving the right to appeal if that party fails to so immediately appeal.” (emphasis added)); *id.* at 157 (reiterating that “these orders must be appealed immediately” (emphasis added)); *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 431 S.E.2d 587, 590 (1993) (“Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable.” (emphasis added) (citation omitted)); *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 93–94, 800 S.E.2d 488, 490–91 (Ct. App. 2017) (recognizing immediate right to appeal order of reference for determination of issues by master-in-equity in action involving both equitable and legal claims, and reiterating that “[t]he failure to immediately appeal *an order* affecting the mode

of trial effects a waiver of the right to appeal that issue” (emphasis added) (quoting *First Union Nat’l Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998))).

Thus, in light of the fact that the Sparrows Appellants *are* entitled to a jury trial, this Court should hear, en banc, their required appeal of the circuit court’s denial of that right.

IV. Rehearing En Banc Is Necessary.

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.

First, South Carolina law leaves no dispute as to the manner of appealability inquiry, application of section 14-3-330, when jury trials are appropriate, and the other related issues set forth herein. Yet, without explanation—and in fact, entirely ignoring the first-party trial on which the Sparrows Appellants are entitled to a trial by jury—this Court dismissed this appeal on a merits basis but in response to an appealability inquiry. This dismissal is entirely at odds with what South Carolina law requires, and is at odds with what the United States Constitution guarantees. On that basis alone, this denial shows a lack of uniformity in decisions.

Second, and equally compelling, is the exceptional importance of this appeal. The Receiver tells the Court he is seeking billions of dollars in damages. He agrees with the *Tibbs* Plaintiffs to dismiss the case against the entity he purports to represent. He then opposes all appellate review, refuses to engage in merits briefing, and seeks a trial only before the circuit court rather than a jury. Not only does the denial of a trial by jury violate the applicable state and federal constitutional provisions, but it allows a compounding of errors below. With what is at stake—

according to the pleadings below—this is certainly a “a question of exceptional importance.” Thus, this Court should rule on this Petition en banc.

CONCLUSION

The Sparrows Appellants are entitled to a jury trial on two issues. First, insofar as the “third-party” action is somehow proper, they are entitled to a trial by jury relative to the first-party claims against Cape PLC. Second, insofar as the Sparrows Appellants remain in this case and liability attaches as to Cape PLC, they are entitled to a trial by jury on the allegations in the “third-party” complaint due to the fact that the relief sought by the Receiver is billions of dollars in monetary legal damages.

The Sparrows Appellants, informed of these constitutional rights and related law, appealed the first written notice, via Order on June 20, 2024, by timely perfecting this appeal. On all of the bases set forth herein—and in the Return—this Court overlooked and misapprehended the Sparrows Appellants’ arguments. Accordingly, and further given the lack of uniformity in decisions and the questions of exceptional importance contained herein, this Court should grant the request for rehearing en banc and allow this appeal to proceed on the merits.

Respectfully submitted,

s/Steven J. Pugh

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October 10, 2024

Oct 10 2024

SC Court of Appeals

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).

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Date: October 10, 2024

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Subject: John Tibbs v. Asbestos Corporation (12) (Appellate Case No. 2024-001446)
Date: Thursday, October 10, 2024 3:17:06 PM
Attachments: [Petition for Rehearing - Sparrows Appellants.pdf](#)

Good afternoon,

Please find attached for filing the Petition for Rehearing in the above matter on behalf of ArranCo US, LLC; Hawk Bidco (US) Inc.; and Sparrows Offshore, LLC, along with proof of service. The filing fee will be delivered to the Court within 5 business days.

We continue to appreciate the Court's time and consideration.

Ashwin Sanzgiri

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