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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 Nos. 2023-002006, 2024-001063
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; Corporation Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply,

Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Incl; SPX Corporation; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable, LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves and Controls US, Inc.; Velan Valve Corp.; Viking Pump, Inc; Vistra Intermediate Company LLC; The William Powell Company; Wind Up, Ltd.; Yuba Heat Transfer LLC; and Zurn Industries, LLC, Defendants,

of which

Asbestos Corporation Limited is the..... Appellant,

and

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

v.

Anglo American PLC, individually and as successor in interest to Anglo American Corporation of South Africa Ltd.; DeBeers PLC; DeBeers Centenary AG; DeBeers Consolidated Mines Ltd.; DeBeers S.A.; DeBeers UK Ltd.; DeBeers Jewelers US, Inc.; Angle American US Holdings Inc.; Element Six US Corp.; Element Six Technologies US Corp.; Element Six Technologies (OR) Corp.; First Mode Holdings, Inc.; Platinum Guild International (USA) Jewelry Inc.; Forevermark US Inc.; Anglo American Crop Nutrients (USA), LLC; Charter Consolidated Ltd.; ESAB Corporation; Central Mining & Investment Corporation Ltd.; Cape Holdco Ltd.; The Law Debenture Corporation PLC; Cape Industrial Services Group Ltd.; Mohed Altrad; Altrad UK Ltd.; Cape UK Holdings Newco Ltd.; Altrad Services Ltd., f/k/a Cape Industrial Services Ltd.; Altrad Investment Authority SAS; Sparrows Offshore Group Ltd.; Hawk Bidco US Inc.; Arranco US, LLC; Sparrows Offshore, LLC; The Sparrows Group, LLC, Third-Party Defendants,

of which

Mohed Altrad and Altrad Investment Authority SAS are the..... Appellants.

THE ALTRAD DEFENDANTS' PETITION FOR REHEARING AND REHEARING *EN BANC* REGARDING THEIR APPEAL OF CONTEMPT ORDERS THAT STRIKE A PART OF THEIR ANSWER AND THAT REFUSE AN INJUNCTION REQUIRED BY LAW

The Altrad Defendants respectfully petition this Court to rehear, including in its *en banc* capacity, their appeal of the circuit court's orders striking their first defense, holding them in contempt for disobeying a discovery order that was entered without jurisdiction, and refusing to enter an injunction required by law. In dismissing this appeal, the Court appears to have broken one of the cardinal rules of South Carolina law: the effect of an order, not its label, is what matters.

The Supreme Court has previously reversed this Court's dismissal of appeals when it has mistakenly relied on the superficial label of an order instead of carefully reviewing the order's substance and effect. *See, e.g., Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 535, 538–40, 773 S.E.2d 144, 144, 146–47 (2015) (reversing this Court's dismissal of an appeal where the trial order was “ostensibly under the label of ‘bifurcation,’” but it had the effect of granting “potential summary judgment on the issues of direct corporate liability,” rendering it immediately appealable under South Carolina Code § 14-3-330(2)(a), and reiterating that appellate “review of trial court orders is not constrained by how the order is styled”).

Respectfully, it appears the Court has made the same mistake here as it did in *Morrow*. There are at least three independent reasons these orders are immediately appealable, none of which are acknowledged in the dismissal order:

1. **Strikes a Defense.** The circuit court's contempt orders strike the Altrad Defendants' first defense of a general denial, rendering it immediately appealable under South Carolina Code § 14-3-330(2)(c). That statute allows immediate review of “an order affecting a substantial right made in an action when such order strikes out an answer or any part thereof or any pleading in any action.” *Id.* (emphasis added). The dismissal order never references this statute.

2. **Contempt.** In South Carolina, when a party disputes the content of a discovery ruling, it has two choices: comply and waive its appellate rights, or refuse and appeal the subsequent order. *See Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014) (“However, to challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding.”). That is precisely what has happened here, but the dismissal order never references this process or rule.
3. **Refusal to Enjoin.** When a party seek an injunction to which it is entitled as a matter of law, yet the circuit court refuses to enter that injunction, the circuit court’s refusal is immediately appealable. *See* S.C. Code Ann. § 14-3-330(4) (allowing immediate appeal of “an interlocutory order or decree in a court of common pleas . . . refusing an injunction”). The dismissal order never references this statute.

The order dismissing this appeal doesn’t address any of these points, wrongly takes away the Altrad Defendants’ statutory right to appeal these issues, and does so without the benefit of an appellate record or any merits briefing. It should be reconsidered accordingly, as the Altrad Defendants—a French individual, and a French company—cannot lawfully be punished for refusing to engage in boundless discovery when Rule 205 deprives the circuit court and the Receiver—a putative arm of the circuit court—of jurisdiction to proceed while an appeal involving the Receiver’s appointment is pending.

ARGUMENT

I. The circuit court’s rulings strike the Altrad Defendants’ defense of a general denial, but the dismissal order doesn’t address this indisputable point.

In addition to the absence of personal jurisdiction, the Altrad Defendants’ chief defense to the “third-party complaint” is a general denial. (*See* Altrad Defs.’ Ans. at 48 (“Any allegation not specifically admitted above is denied.”).) The only paragraphs of the “third-party complaint” that even allege “facts” involving the Altrad Defendants are Paragraphs 116 through 119, and the Altrad Defendants have denied all such allegations. (*Id.* ¶¶ 116–19.)

As part of its contempt order, the circuit court issued “adverse inferences” against the Altrad Defendants that deem all of the Receiver’s allegations (and dozens of “facts” that were

never even alleged) to be true. (Order Granting Motion for Sanctions and Motion for Adverse Inferences at 27–31.) Critically for purposes of this petition, these “inferences” do not go away if the Altrad Defendants ultimately decide to participate in discovery. Instead, the circuit court has deemed these inferences to be “rebuttable inferences that are subject to evidentiary challenge by these parties in these proceedings should these recalcitrant Third-Party Defendants elect to participate in these proceedings, as they are required to do by our rules and the orders of this Court.” (*Id.* at 16.)¹

By making these inferences only “rebuttable,” the circuit court has stricken the Altrad Defendants’ defense of a general denial. In South Carolina, as everywhere else, the party pleading a fact has the burden of proving it. *See O’Neal v. Carolina Farm Supply, Inc.*, 279 S.C. 490, 493, 309 S.E.2d 776, 779 (Ct. App. 1983) (acknowledging that “the burden of presenting evidence of a fact was on the party pleading it”). But in making these adverse inferences merely “rebuttable,” the circuit court has shifted the burden of “disproof” to the Altrad Defendants even if they ultimately do participate. Rather than forcing the Receiver to prove his allegations against the Altrad Defendants in the face of their denial of the same, the circuit court has eliminated the Altrad Defendants’ “general denial” defense and is now forcing the Altrad Defendants to prove that they did not do the things alleged.

That burden-shifting only happens for affirmative defenses, not for general denials. As this Court explains:

¹ The Altrad Defendants strongly object to the mischaracterization of them as “recalcitrant defendants.” Each and every procedural step they have taken in this litigation has been fully supported by statute, case law, rule, or—most importantly—the United States Constitution. They are not “recalcitrant”; they are steadfastly protecting themselves from an abusive process in a court that has no jurisdiction over them and from a Receiver who has no lawful basis for operating. Protecting one’s rights and going through the steps required to preserve one’s issues for appellate review does not render a litigant “recalcitrant”; it is what the law requires.

In other words, it [an affirmative defense] assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable. On the other hand, where the defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case.

Id. at 494, 309 S.E.2d at 779. Accordingly, by shifting the burden of “disproof” to the Altrad Defendants, the circuit court necessarily eliminated the Altrad Defendants’ defense that denied the Receiver’s allegations and forced the Receiver to prove his allegations. The Receiver even acknowledged this burden-shifting in his motion to dismiss this appeal: “Moreover, as explained above, the circuit court specifically explained that the adverse inferences are simply rebuttable presumptions that Appellants can refute through evidentiary challenge.” (Receiver’s Mot. to Dismiss at 13.)

The circuit court’s sanction of striking the Altrad Defendants’ defense that denies the Receiver’s allegations is wrong as a matter of law, as the circuit court has no jurisdiction to issue such a sanction in the first place. And it is immediately appealable under the appellate statute, which allows for immediate appeals of “an order affecting a substantial right made in an action when such order strikes out an answer or any part thereof or any pleading in any action.” South Carolina Code § 14-3-330(2)(c) (emphasis added). This appeal is entirely proper as a matter of South Carolina law, but the order dismissing it never addressed this straightforward basis for immediate appeal. That oversight or misapprehension of the underlying order should be corrected through rehearing.

II. The sanctions orders follow the *Davis* procedure for appealing discovery rulings, but the dismissal order doesn’t address this indisputable point, either.

This appeal is also proper because the Altrad Defendants followed the Supreme Court’s prescription from *Davis* to seek review of improper discovery rulings. In *Davis*, the Supreme Court

held that a litigant waives its ability to challenge an adverse discovery ruling if it complies with that ruling in any way. *See* 409 S.C. at 280–81, 762 S.E.2d at 543 (explaining that by partially complying with “the circuit court’s formulation of discovery,” the appellant had bound himself to those prior discovery rulings as “law of the case”). Rather than any form of compliance, “to challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding.” *Id.* at 280, 762 S.E.2d at 543.

That is precisely the procedure the Altrad Defendants have followed here. The circuit court’s prior order about discovery—through which the circuit court wrongly refused to enjoin both itself and the Receiver due to the pendency of an appeal regarding the unlawfulness of his very appointment—instructed the Altrad Defendants “to provide responsive, substantive, and complete answers to the Receiver’s Discovery Requests within 14 days.” (Order at 13 (Mar. 12, 2024).) They did not, and instead held fast to their myriad objections, including the complete lack of personal jurisdiction of a South Carolina State Court over them, an individual French citizen with zero connection to South Carolina and a French company with zero connection to South Carolina.

The orders now on appeal are the result of the Altrad Defendants’ reliance on their prior objections. If they participate in discovery in any way, *Davis* deems those objections waived. That is not a risk the Altrad Defendants could reasonably take under these extreme circumstances, so they followed the *Davis* process for seeking review of the prior decision. The Altrad Defendants do not suffer contempt lightly, but it is the only path the Supreme Court has charted for seeking review of discovery rulings.

The Receiver sought dismissal because the orders on appeal don’t use the exact word “contempt,” but this is a superficial and meaningless argument. As this Court knows, the substance

of an order, not its “nomenclature,” controls the appealability analysis. *See Spalt v. S.C. DMV*, 423 S.C. 576, 584, 816 S.E.2d 579, 583 (2018) (explaining that “[t]he label given to the order is not determinative of its immediate appealability” and holding that the substance of the order” is what controls); *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”); *Thornton v. SCE&G 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 . . .”).

This Court describes “contempt” as the natural result of “the willful disobedience of a court order,” and it further explains that “the record must clearly and specifically reflect the contemptuous conduct.” *Ex parte Cannon*, 385 S.C. 643, 660–61, 685 S.E.2d 814, 824 (Ct. App. 2009) (quoting *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001)). And the purpose of 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).

Here, the circuit court determined that it was “preadmitting” 2538 exhibits that had never been the subject of discovery “as a sanction for the persistent and baseless refusal of the Altrad Third-Party Defendants and the Charter Third-Party Defendants to participate in the discovery process.” (Order Preadmitting Exhibit at 6 (May 23, 2024).) It determined that it was going to effectively decide this case on its “merits” through a series of “adverse inferences” because most of the “third-party defendants” “continue to refuse any effort at compliance with the Court’s orders and the discovery rules of this State.” (Order Issuing Adverse Inferences at 15 (May 23, 2024).) It continued: “The Court finds that this continued discovery misconduct on the part of these Third-Party Defendants amounts to bad faith, willful disobedience, and gross indifference to the rights

of the Receiver and this Court’s management of its docket.” (*Id.*) And it explained that the goal of these sanctions is to prompt these litigants into participating in discovery—activity that, of course, would result in a waiver of the Altrad Defendants’ objections under *Davis*. (*Id.* at 16.)

In other words, the circuit court used the exact terminology and framework of “contempt” to describe why it issued the orders it did. This is precisely what *Davis* requires to bring appellate scrutiny to the circuit court’s rulings, but the order dismissing this appeal never once acknowledged *Davis* or the fact that substance of the orders on appeal amount to contempt sanctions under South Carolina. *Ex parte Cannon*, 385 S.C. at 660, 685 S.E.2d at 823 (“Additionally, the finding of contempt is immediately appealable.”). Because it overlooked settled law that contempt orders are immediately appealable, the Court should rehear this appeal and reverse its dismissal order for this second independent reason.

III. The circuit court’s sustained refusal to grant the Altrad Defendants’ injunction request is immediately appealable, but the dismissal order doesn’t address this third indisputable point.

To enforce Rule 205’s grant of exclusive jurisdiction to this Court, the Altrad Defendants and others moved for an injunction of all litigation activity by the Receiver due to the absence of jurisdiction below. That motion was filed on February 16, 2024. It was renewed on April 9, 2024.

To date, the circuit court has refused to even take up these motions. While it has resolved motion after motion that the Receiver has filed, these motions to enforce Rule 205 have been ignored for more than half a year.

The law doesn’t allow the sustained refusal to issue a requested injunction—that is required as a matter of law, not as a matter of the circuit court’s equitable discretion—to remain idly with the circuit court. The General Assembly has specifically given immediate appellate rights over “an

interlocutory order or decree in a court of common pleas . . . refusing an injunction.” S.C. Code Ann. § 14-3-330(4).

Critically, the Legislature does not force a litigant in the Altrad Defendants’ position to wait until their injunction request is outright “denied”; instead, it chose the word “refusing” to indicate that even a passive failure to enter a requested injunction is appealable, just like it does under the federal appellate statute. *See* 28 U.S.C. § 1292(a)(1) (creating appellate jurisdiction for interlocutory orders “granting, continuing, modifying, refusing or dissolving injunctions”) (emphasis added); *In re Fort Worth Chamber of Com.*, 100 F.4th 528, 533 (5th Cir. 2024) (“[I]f a district court does not timely rule on a preliminary-injunction motion, it can effectively deny the motion. We have accordingly recognized that simply sitting on a preliminary-injunction motion for too long can effectively deny it.” (citing 16 Wright & Miller, Federal Practice & Procedure § 3924.1 (3d Ed.))); *Gray Line Motor Tours, Inc. v. City of 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.”).

Accordingly, the Receiver’s argument on this point—that the requests for injunctive relief “continue to remain pending” after more than half a year on the docket (Receiver’s Mot. to Dismiss at 14)—confirmed precisely why they are immediately appealable, as the circuit court’s sustained refusal to grant relief required by Appellate Court Rule 205 is immediately reviewable under Section 14-3-330(4).

Nor is it even unusual for South Carolina courts to review the denial of an injunction request on an interlocutory basis. *See, e.g., Hazel v. Blitz USA, Inc.*, 433 S.C. 120, 124, 857 S.E.2d 4, 6 (2021) (reviewing on immediate appeal the propriety of the denial of an injunction required

as a matter of law); *Williams v. Nw. Sec. Life Ins. Co.*, 307 S.C. 462, 464–65, 415 S.E.2d 809, 810 (1992) (deciding otherwise-unappealable denials of Rule 12(b) motions were immediately appealable because, as here, they denied injunctions that the defendants sought as a matter of law, rather than as discretionary injunctions under the traditional multi-part “equitable” test).

The orders below are immediately appealable for this third independent reason, but it too went unaddressed in the dismissal order. Because the dismissal order overlooked the controlling law or misapprehended the effect of the orders below on this third point, the Court should grant this motion and reinstate this appeal.

SUGGESTION OF REHEARING *EN BANC*

The Altrad Defendants have rightly appealed the circuit court’s contempt orders that strike a part of the Altrad Defendants’ answer and that refuse to enter an injunction required by law. This appeal follows the established, direct, and uncontroverted South Carolina law. Yet, the dismissal order ignores Supreme Court precedent—including *Morrow*, where a current member of this Court was one of the successful counsel of record in advancing the exact same “the effect of the order on appeal controls, not its title” argument that the Altrad Defendants are urging here, but that the Court overlooked or mistakenly disregarded when dismissing this appeal.

Summary dismissal of valid and important appeals has become a trend in cases involving receiverships that arise out of the Asbestos Docket, where the circuit court enters an order with an appealable “effect” but seemingly with an unappealable “label.” In several instances, this Court has dismissed appeals through single-judge rulings that do not appear to account for the substance of the underlying orders. (*See, e.g.*, Sept. 18, 2024 Order in Appellate Case No. 2024-001446 (dismissing appeals of order requiring a nonjury trial on claims at law or that only seek money damages, which is immediately appealable under South Carolina Code § 14-3-330(2)); May 9,

2024 Order in Appellate Case Nos. 2023-002006, 2023-002007, 2023-002008, 2023-002009, 2023-002010, 2023-002011 (dismissing numerous appeals of order granting a new receivership, and modifying the scope of and continuing a prior receivership, which is immediately appealable under South Carolina Code § 14-3-330(4)); Apr. 17, 2024 Order in Appellate Case No. 2024-000524 (dismissing appeals of order refusing to enjoin proceedings below due to a lack of jurisdiction pursuant to Rule 205, SCACR, which is immediately appealable under South Carolina Code § 14-3-330(4)).)

Respectfully, South Carolina law demands otherwise. The state’s appellate courts have provided clear instructions to litigants about the importance of preserving issues and the severe consequences of not timely appealing issues that are immediately appealable. The state’s appellate courts have been equally clear that the appeal–don’t appeal decision does not turn on an order’s label, but instead is controlled by what the order actually does to the litigant or to the litigation.

The orders at issue in this appeal indisputably have the effect of striking part of the Altrad Defendants’ answer, holding them in contempt for standing on their jurisdictional objections, and refusing to enter an injunction that is compelled as a matter of South Carolina law. They are immediately appealable as a matter of right for each of these three independent reasons, yet the dismissal order does not appear to account for any of them. In order to correct that oversight and ensure that the settled law regarding immediately appealability remains uniform and predictable, the Altrad Defendants respectfully suggest that the Court rehearing the dismissal of this matter in its *en banc* capacity.²

² 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 any petitions for rehearing filed by the Sparrows Defendants and the Charter Defendants in their respective appeals of the same underlying orders.

Respectfully submitted,

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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 Appeal of Contempt Orders that Strike a Part of Their Answer and that Refuse an Injunction Required by Law

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