RECEIVED
Jan 15 2025
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
For the Fifth Judicial Circuit
The Honorable Jean H. Toal,
Acting Circuit Court Judge

Civil Action No. 2023-CP-40-01759

Appellate Case Nos. 2024-002116, 2024-002117

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.; 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,

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, Altrad Investment Authority SAS, Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. are the

Petitioners.

RETURN TO PETITIONS FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv
COUNTER-STATEMENT OF THE QUESTION PRESENTED 1
INTRODUCTION 1
COUNTER-STATEMENT OF THE CASE 3
ARGUMENT 10
I. The Law Is Clear: The Circuit Court's Orders Awarding Discovery Sanctions Are Not Immediately Appealable. 10
A. The circuit court's discovery sanctions orders are not immediately appealable, and they contain no contempt findings. 12
B. The adverse inferences entered by the circuit court as part of discovery sanctions do not strike portions of Petitioners' Answers. 13
C. Petitioners are not entitled to injunctive relief. 16
CONCLUSION 18

TABLE OF AUTHORITIES

PAGE

CASES

Baker v. Port City Steel Erectors, Inc.,
261 S.C. 469, 200 S.E.2d 681 (1973) 14

Brown v. Allstate Ins. Co.,
334 S.C. 21, 542 S.E.2d 723 (2001) 14, 15

Davis v. Parkview Apartments,
409 S.C. 266, 762 S.E.2d 535 (2014) 12

Ex parte Capital U-Drive-It, Inc.,
369 S.C. 1, 630 S.E.2d 464 (2006) 10, 11

Fam. Servs. Inc. v. Inman,
No. 2020-001132, 2023 WL 5096715, at *7 (S.C. Ct. App. Aug. 9, 2023) 12

Gray Line Motor Tours, Inc. v. City of New Orleans,
498 F.2d 293 (5th Cir. 1974) 18

Grosshuesch v. Cramer,
377 S.C. 12, 659 S.E.2d 112 (2008) 12

Hagood v. Sommerville,
362 S.C. 191, 607 S.E.2d 707 (2005) 3, 11

In re Fort Worth Chamber of Com.,
100 F.4th 528 (5th Cir. 2024) 17, 18

Johnson ex rel. D'Andre G. v. Chaudhry,
No. 2013-UP-176, 2013 WL 8508086, at *1 (S.C. Ct. App. May 1, 2013) 12

Richardson v. Halcyon Real Est. Servs., LLP,
439 S.C. 419, 887 S.E.2d 153 (Ct. App. 2023)..13

Stokes v. Spartanburg Reg'l Med. Ctr.,
368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006)..14

Tillman v. Tillman,
420 S.C. 246, 801 S.E.2d 757 (Ct. App. 2017)..11

STATUTES & RULES

S.C. Code Ann. § 14-3-330 ....11, 12

COUNTER-STATEMENT OF THE QUESTION PRESENTED

1. Whether the Court of Appeals properly concluded the orders granting discovery sanctions were interlocutory orders that are not immediately appealable?

INTRODUCTION

Peter D. Protopapas, in his capacity as the court-appointed Receiver for Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, n/k/a Cape Intermediate Holdings Ltd.[1] (the "Receiver") respectfully requests this Court deny the Petitions for Writ of Certiorari filed on December 16, 2024 (the "December 2024 Petitions") by Petitioners in the above-captioned cases.[2]

---

[1] Petitioners' assertion that Cape is no longer an active defendant in the *Tibbs* case is incorrect and these assertions have been summarily rejected by multiple courts. *See* Order Granting Motion to Remand, *Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas v. Anglo American PLC, et al.*, C/A No. 3:24-3771-MGL (Aug. 13, 2024). The Tibbs Plaintiffs never dismissed Cape from their asbestos personal injury case. Instead, on June 29, 2023, two weeks after the tolling agreement between the Receiver and the Dean Omar law firm, the Receiver filed an answer in *Tibbs* because the complaint against Cape had not been dismissed and the claims were—and still are—live against Cape. And although Petitioners reference a tolling agreement, tolling agreements are not dismissals, but instead simply "extend the statutory limitations period on the plaintiff's claim." *See* Black's Law Dict. 1625 (9th ed. 2004). Further, the transcript of the pretrial hearing status report in *Tibbs* reflects the circuit court's understanding that there was not a dismissal of Cape. The following exchange took place regarding Cape's participation in the case:

> MR. CARROLL: Your Honor, may I – may I inquire . . . . This morning, Ms. – Ms. McVey mentioned that there are only two defendants left in Tibbs: Atlas and ACL. My understanding of – of third party practices is the cases are supposed to be tethered together. But – but I don't – . . . . I'm just wondering what happened to Cape.
> MS. McVEY: Cape is still in, the tolling agreement.
> THE COURT : Cape is still very much in it.
> MR. CARROLL: The tolling agreement. Okay. So they are?

A copy of the pertinent transcript excerpt was attached as Exhibit 1 to the Receiver's Reply to Appellants' Returns to Motion to Dismiss Appeals of Interlocutory Orders, filed on September 12, 2024 in Appellate Case Nos. 2024-001063, 2024-001064, and 2024-001065.

[2] Petitioners and their corresponding case numbers are as follows:

Petitioners deploy a common strategy in this appeal as in prior appeals, of unilaterally renaming the appeal of an order, here a discovery sanctions order, and casting it as a different type of order on appeal – a contempt appeal. Since the commencement of this action on June 30, 2023, there have been twenty (20) notices of appeal filed, all of which have been dismissed. There are currently nine (9) petitions pending in this Court filed by Petitioners requesting writs of certiorari in this case, *John A. Tibbs v. Asbestos Corporation Limited, et al.,* 2023-CP-40-01759, following dismissals from the Court of Appeals because the orders on appeal are interlocutory and not immediately appealable.[3] Petitioners purpose in continuing to pursue successive improper appeals of every order issued by the circuit court is to delay and avoid trial in this case, which has been set and rescheduled multiple times following Petitioners' refusal to participate in this litigation[4], while Petitioners seek favorable rulings in foreign jurisdictions and threaten the Receiver with the seizure of assets, fines, and imprisonment for fulfilling his court-appointed duties. The December 2024 Petitions seek this Court's certiorari review of the Court of Appeals' well-justified decision to dismiss the appeals as interlocutory because the underlying interlocutory decision is not immediately appealable. Petitioners sought—and continue to seek with their December 2024 Petitions—premature, interlocutory review of the circuit court's orders granting discovery sanctions entered on May 23, 2024.

- Mohed Altrad and Altrad Investment Authority S.A.S. (Appellate Case No. 2024-002116);
- ESAB Corporation; Charter Consolidated Ltd.; and Central Mining & Investment Corporation Ltd. (Appellate Case No. 2024-002117).

[3] *See* Appellate Case Nos. 2025-000052, 2024-002117, 2024-002116, 2024-002114, 2024-001499, 2024-001423, and 2024-000916.

[4] Trial has been scheduled in this case on April 15, 2024, December 9, 2025, and February 3, 2025.

The Receiver filed the third-party complaint in this case on June 30, 2023, and Petitioners filed their first appeal on December 18, 2023. Out of the 563 days the case has been pending, it has spent 392 days on appeal from an order denying a motion to dismiss the third-party complaint and dissolve the receivership—the very same type of order this Court has ruled is not immediately appealable after rejecting some of the very same arguments by some of the very same counsel in *Childers v. Davis Mechanical Contractors*, et al. No. 2024-000005 (S.C. Sup. Ct. Order dated March 27, 2024) (dismissing, in an order signed by all five justices, as not immediately appealable an order denying motions to dismiss and dissolve a receivership). Without these improper interlocutory appeals spanning over a year, the case could have been tried and presented to this Court with a full record. This is exactly the reason our appellate court rules disfavor and prohibit piecemeal appeals. *See Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial."). Petitioners' strategy being utilized in this case of avoiding litigation by appealing interlocutory orders has been widespread across asbestos receiverships in recent years, wasting the limited resources of our appellate courts which have now had to issue over forty (40) dismissals of interlocutory appeals. All the while, Petitioners attempted to improperly remove the case to federal court and have initiated new actions against the Receiver in both the United Kingdom and France. Respectfully, this Court should stop Petitioners from continuing their legal strategy of appealing interlocutory orders while they forum shop and delay any trial on the merits in the United States, or litigants will be back again and again before this Court on interlocutory orders tying up the time and resources of the appellate courts on issues properly before the circuit court.

COUNTER-STATEMENT OF THE CASE

This action, and the appointment of the Receiver, stem from an underlying asbestos lawsuit in which Cape was named but refused to participate. On June 4, 2021, Isabella Park filed a lawsuit

asserting personal injury claims arising from asbestos exposure against (among others) an English entity, Cape PLC, individually and as successor in interest to Cape Asbestos Company Ltd. *See* Compl., *Park v. Armstrong Int'l, Inc. et al.*, No. 2021-CP-4002727 (June 4, 2021), at 1, 7. Ms. Park sought relief after being "diagnosed with mesothelioma caused by exposure to asbestos dust and fibers" unintentionally "brought home" for years "as a result of her husband's work with and around asbestos-containing products." *Id.* at ¶ 4.

On June 9, 2021, less than five months from her diagnosis, and only five days after filing her lawsuit, Ms. Park passed away. On November 17, 2021, Ms. Park's son, Keith, amended the complaint, appearing individually and as personal representative to Ms. Park's estate (the "*Park* Plaintiffs"), to assert a wrongful death action. *See* First Amended Compl., *Park et al. v. Armstrong Int'l, Inc., et al.*, No. 2021-CP-4002727 (Nov. 17, 2021). The amended complaint added Cape Intermediate Holdings Limited (f/k/a Cape Intermediate Holdings PLC) (together with all predecessors in interest, "Cape") as a defendant. Cape Intermediate Holdings Limited and Cape PLC—both referring to the same English company originally named Cape Asbestos Co. Ltd.—were identified as successors in interest to Cape Asbestos Company Ltd. *Id.* at 9; *see also id.* at ¶¶ 26–27. In December 2021, the *Park* Plaintiffs served the named Cape entities, which (as has been their practice for decades) never answered, moved, or otherwise responded.

On March 17, 2023, the circuit court appointed a receiver for an entity identified as Cape PLC as successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd. pursuant to S.C. Code § 15-65-10(5), as well as § 15-65-10(4) in the alternative. Order, *Park et al. v. Armstrong Int'l, Inc. et al.*, No. 2021-CP-4002727 (Mar. 17, 2023) ("Appointment Order"), at 1. Pursuant to the Appointment Order and South Carolina law, the Receiver has "power and authority [to] fully administer all assets of Cape, . . . engage counsel on behalf of Cape and take any and all

steps necessary to protect the interests of Cape"—in proper satisfaction of claims against Cape — "whatever they may be." *Id.* The Appointment Order further vested the Receiver with "rights, authority and powers with respect to" Cape's property, including to "obtain from any . . . third party, any financial records belonging to or pertaining to" Cape. *Id.* at 2.

On June 30, 2023, the Receiver filed the Third-Party Complaint, asserting claims against Petitioners for (i) unjust enrichment (first cause of action), (ii) constructive trust (second cause of action), (iii) alter ego and veil-piercing liability (third cause of action), and (iv) accounting (fourth cause of action). *See* Third-Party Compl., *Tibbs v. 3M Company, et al.*, No. 2023-CP-40-01759 (June 30, 2023). Each of the Third-Party Defendants named in the Third-Party Complaint are alleged to have facilitated, caused, or directed Cape's U.S.-based asbestos sales and liability-avoidance scheme, or otherwise acted as successors in interest to or beneficiaries of entities involved in that scheme, and are therefore responsible for the bodily injury underlying the claims against Cape, including specifically those claims asserted by South Carolinians.

Petitioners filed motions to dissolve the Cape receivership and motions to dismiss the third-party complaint. On December 6, 2023, the circuit court issued an order denying the motions to dissolve the receivership and the motions to dismiss for lack of personal jurisdiction. Petitioners filed notices of appeal of the December 6, 2023 order denying the motions to dissolve the receivership and motions to dismiss based on lack of personal jurisdiction ("Dissolution Appeals"). *See* Appellate Case Nos. 2023-002006, 2023-002007, 2023-002009, 2023-002010, 2023-002011. The Court of Appeals dismissed the Dissolution Appeals and denied the subsequent petitions for rehearing. Petitioners have petitioned this Court for review of the Court of Appeals' dismissal of those appeals. That Petition is pending. *See* Appellate Case Nos. 2024-001423, 2024-001499.

Petitioners refused to participate in any discovery in the case, pointing to the pendency of the Dissolution Appeals as an excuse to avoid their discovery obligations. Petitioners failed to provide substantive responses to discovery, instead serving objections based on Rule 205, SCACR, and refused to produce witnesses for scheduled depositions. On January 12, 2024, the Receiver filed motions to compel Petitioners' participation in discovery. Petitioners opposed the motion and included a "cross-motion to enjoin" in their opposition briefing. On March 12, 2024, the Circuit Court issued an Order Granting the Receiver's Motions to Compel Discovery Responses of Third-Party Defendants and 30(b)(6) Depositions of Arranco US, LLC and Central Mining & Investment Corporation Ltd. The circuit court noted: "The Court notes that although Third-Party Defendants included in the[] February 16 filings what they have terms as 'cross-motions' for 'injunctive relief,' the Court advised the parties by email on February 21, 2024, that those requests for injunctive relief will remain under the Court's advisement to be addressed at another time." (March 12 Order at p. 3.) In the March 12 order, the circuit court directed all Third-Party Defendants "(i) to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests with 14 days of entry of this Order and (ii) to begin producing documents in response to the Receiver's Requests for Production the same day," and (iii) as to Arranco and Central Mining, "to designate witnesses for . . . Rule 30(b)(6) depositions" by March 19 and "produce those witnesses" by April 2. (March 12 Order at 13).

On March 19, 2024, Petitioners filed notices of appeal from the March 12 Order ("the Discovery appeal") and reclassed the March 12 Order as an order denying an injunction instead of a discovery order to attempt to manufacture immediate appealability. The Court of Appeals dismissed those appeals as interlocutory. *See* April 17, 2024 Order, Appellate Case No. 2024-

00524. Petitioners requested certiorari from this Court, which is pending. *See* Appellate Case No. 2024-000916.

Pursuant to the March 12 Order, Petitioners were required, *inter alia*, to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests within 14 days and to begin producing documents in response to the Receiver's Requests for Production the same day. They did not. Motions practice ensued in light of Petitioners' refusal to participate in discovery. On April 3, 2024, the Receiver filed a Motion to Pre-Admit Exhibits. Additionally, on April 5, 2024, and April 12, 2024, the Receiver filed a Motion for Adverse Inference and a Motion for Sanctions, respectively, against Petitioners.

On May 23, 2024, the circuit court issued two orders addressing these motions (the "May 23 Orders").

i. Order Granting the Receiver's Motion to Pre-Admit Exhibits

The circuit court granted the Receiver's Motion to Pre-Admit Exhibits, which sought a ruling that all exhibits included on the Receiver's trial exhibit list (submitted as Exhibit A to the Motion) be admitted and deemed authentic (the "May 23 First Order"). In doing so, the circuit court explained in detail the efforts the Receiver went through in attempting to prepare his case for trial. (May 23 First Order at 3-4.) Moreover, the circuit court explained in detail Petitioners' efforts to the contrary. (*Id*. at 4, 6-7.) The circuit court acknowledged that it is well established in South Carolina that judges sitting without a jury have wide latitude "to admit all evidence" and then "evaluate the evidence and ascertain the truth." (*Id*. at 4 (citation omitted).) The circuit court found that "[j]udicial economy is best served by allowing judges the ability to use their training, skill, and experience to make these evidentiary determinations while considering the legal issues

in a case," and ultimately held that here, "[p]re-admitting evidence will save this Court and the parties the time and burden of lawyers arguing about exhibits during the trial day." (*Id*. at 5, 6.)

The circuit court further held that its "determination that all of the Receiver's trial exhibits are authentic" is an appropriate sanction for Petitioners' "persistent and baseless refusal . . . to participate in the discovery process" when there is "no active stay of discovery in this case." (*Id*. at 6, 7.) The circuit court determined that this sanction was justified because Petitioners' "discovery misconduct" resulted in the Receiver being "unable to authenticate documents that otherwise would have been authenticated under Rule 901 during the normal course of discovery." (*Id*. at 7.)

ii. Order Granting the Receiver's Motion for Sanctions and Motion for Adverse Inference

The circuit court granted the Receiver's Motion for Adverse Inference and Motion for Sanctions, which requested certain sanctions for Petitioners' ongoing discovery misconduct, including (1) that certain inferences be drawn with respect to Petitioners, including with respect to their alleged current and historical statuses as the alter ego(s) of Cape, and alleged unjust enrichment from Cape's liability-avoidance scheme, and (2) for an award of fees and costs associated with bringing these Motions (the "May 23 Second Order"). To contextualize its findings and adverse inferences made in the May 23 Second Order, the circuit court first summarized the allegations in the Receiver's Third-Party Complaint regarding the "remarkable system of avoiding responsibility for the harm caused by Cape's asbestos over a period of decades," and the alleged interconnected history of Cape and Petitioners. (May 23 Second Order at 4.) The circuit court then detailed Petitioners' refusal to provide any discovery to the Receiver to prepare this case for trial, as well as the Receiver's ongoing diligent efforts to obtain such discovery to get this case ready for trial. (*Id*. at 10-13.) The circuit court explained that the legal

basis for Petitioners' refusal to participate in discovery and comply with the circuit court's prior orders compelling discovery was based solely on Petitioners' arguments that Rule 205, SCACR, posed a jurisdictional bar preventing this action from continuing because by simply appealing the circuit court's orders denying their motions to dismiss and dissolve the receivership, they could deprive the circuit court of jurisdiction for an indeterminate time period. (*Id*. at 11-12.) The circuit court found that Petitioners' purported justification for their discovery misconduct was "legally untenable" because "[t]hese very same arguments . . . have been repeatedly dismissed by the Court of Appeals and Supreme Court" identifying those attempts to appeal as interlocutory and not immediately appealable under South Carolina law. (*Id*. at 12 and n.5.) The circuit court emphasized that Petitioners' claimed right of non-participation in discovery was "frivolous and flatly inconsistent with those recent, directly applicable decisions of the Court of Appeals and Supreme Court—while appearing to further an improper purpose, *i.e*., to delay progress in this matter." (*Id*. at 13.)

The circuit court acknowledged that South Carolina law provides that "the failure or refusal of a party to produce evidence may create an adverse inference where such evidence is within his knowledge, and within his power to produce, is not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him." (*Id*. at 15 (citation omitted).) The circuit court found that Petitioners' continued discovery misconduct amounted to "bad faith, willful disobedience, and gross indifference to the rights of the Receiver and [the circuit court's] management of its docket." (*Id*. at 15.) Based on this, the circuit court held that certain adverse inferences were warranted against Petitioners on facts and matters underlying the Receiver's claims. (*Id*. at 15-16.) Specifically, the circuit court drew the adverse inference that each of Petitioners "was at relevant times the alter ego of Cape, requiring piercing of the corporate veil,"

and that each of them was "responsible for or has benefitted unjustly from Cape's liability-avoidance scheme." (*Id*. at 16, 27.) Importantly, the circuit court emphasized that "these rebuttable inferences are subject to evidentiary challenge by these parties in these proceedings." (*Id*. at 16.) The circuit court further clarified that "this sanction as an intermediate form of relief, which stops short of more severe sanctions, such as striking their pleadings or holding them in default." (*Id*.)

The circuit court also held that, in light of Petitioners' failure to show substantial justification for their discovery misconduct, as well as the circuit court's finding that it amounted to "bad faith, willful disobedience, and gross indifference to the rights of the Receiver and the [circuit court's] management of its docket," an award of reasonable attorneys' fees and costs in favor of the Receiver was proper as a sanction against Petitioners for the "litigation activities to date necessary for addressing these Third-Party Defendants' frivolous positions and proceedings," culminating in the Receiver's Motions. (*Id*. at 32-33.)

Petitioners appealed the May 23, 2024 Orders, and the Court of Appeals dismissed the appeals as interlocutory. *See* September 18, 2024 Order, Appellate Case No. 2024-001063; September 18, 2024 Order, Appellate Case No. 2024-001065. Now, Petitioners have filed petitions seeking writs of certiorari from this Court.

ARGUMENT

I. The Law Is Clear: The Circuit Court's Orders Awarding Discovery Sanctions Are Not Immediately Appealable.

The Court should deny the Petitioners' Petitions for Writ of Certiorari because neither of the two orders appealed by them are immediately appealable.

A party's right to appeal arises from and is governed by statute. *See Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Traditionally, an appeal may be pursued

only after the entry of final judgment. *See id.* "A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution." *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017). "An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed." *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005).

"The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by [section 14-3-330 of the South Carolina Code]." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 6, 630 S.E.2d at 467. "Absent a specialized statute, an order must fall into one of several categories set forth in [s]ection 14-3-330 in order to be immediately appealable." *Id.* Section 14-3-330 is "construed narrowly" with the goal of avoiding "circuitous litigation and needless appeals." *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. To be sure, "[p]iecemeal appeals" are disfavored in South Carolina. *See Hagood*, 362 S.C. at 196, 607 S.E.2d at 709.

Pursuant to section 14-3-330, appellate courts have jurisdiction over interlocutory orders only if the interlocutory order (1) involves the merits; (2) affects a substantial right; or (3) grants, continues, modifies, or refuses an injunction or receivership. "An order involves the merits when it finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense," *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017) (citation and internal quotation marks omitted). An order affects a substantial right when it "(a) in effect determines the action and presents 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," S.C. Code Ann. § 14-3-330(2). None of those scenarios exist here, and neither is there any "refusal to enter the requested injunction" as Petitioners purport.

A. The circuit court's discovery sanctions orders are not immediately appealable, and they contain no contempt findings.

Petitioners claim the circuit court's orders are immediately appealable because certain findings therein are allegedly tantamount to contempt findings. Petitioners' argument, however, is without merit.

South Carolina law is clear that "discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right." *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008). "[O]rders addressing discovery sanctions are not immediately appealable." *Fam. Servs. Inc. v. Inman*, No. 2020-001132, 2023 WL 5096715, at *7 (S.C. Ct. App. Aug. 9, 2023) (citing *Grosshuesch*, 377 S.C. at 30, 659 S.E.2d at 122 (declining to address an assignment of error to the circuit court's denial of a request to impose sanctions on a party because the question was not immediately appealable)). *See also Johnson ex rel. D'Andre G. v. Chaudhry*, No. 2013-UP-176, 2013 WL 8508086, at *1 (S.C. Ct. App. May 1, 2013) (dismissing appeal of circuit court's "discovery sanction order allowing [party] to present only one expert witness at trial on issues of liability" because this decision was "not immediately appealable"). 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." *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014).

Here, contrary to Petitioners' arguments, the circuit court's May 23 Orders merely impose discovery sanctions in the form of pre-admitting exhibits, drawing certain adverse inferences, and awarding reasonable attorney's fees and costs. It is well-established in South Carolina that such

interlocutory orders addressing discovery sanctions are not immediately appealable. Further, the May 23 Orders simply do not hold any Petitioner in contempt and clearly do not contain any contempt findings. Indeed, the circuit court explicitly stated that the discovery sanctions in these orders is "an intermediate form of relief, which stops short of more severe sanctions, such as striking their pleadings or holding them in default." (May 23 Second Order at 16.) The circuit court went on to clarify that while such harsher sanctions may eventually be warranted if Petitioners continue to refuse to participate in discovery and comply with the circuit court's orders, "those sanctions are not the subject of this Order, nor should this Order be interpreted as tantamount thereto." (*Id*.) Petitioners cannot simply rebrand unappealable orders imposing discovery sanctions into appealable contempt orders where the orders do not in fact contain any contempt findings.

In addition, the circuit court's award of reasonable attorneys' fees and costs in favor of the Receiver as a sanction for Petitioners' discovery misconduct is also not immediately appealable. The South Carolina Court of Appeals recently held that the "award of attorney's fees and costs as a discovery sanction . . . is interlocutory and not immediately appealable." *Richardson v. Halcyon Real Est. Servs., LLP*, 439 S.C. 419, 424-25, 887 S.E.2d 153, 156 (Ct. App. 2023) ("We conclude the award of attorney's fees and costs as a . . . discovery sanction neither involves the merits of the case nor affects a substantial right and is therefore not immediately appealable.").

B. The adverse inferences entered by the circuit court as part of discovery sanctions do not strike portions of Petitioners' Answers.

Petitioners claim the circuit court's orders are immediately appealable because the entering of adverse inferences and presumptions of fact herein purportedly effectively shifted the burden of "disproof" of the Receiver's claims against them and struck out portions of Petitioners' Answers. This argument likewise fails.

The circuit court's May 23 Orders specifically held that the adverse inferences entered therein as part of discovery sanctions are "rebuttable inferences [that] are subject to evidentiary challenge by" Appellants. (May 23 Second Order at 16.) Thus, the adverse inferences drawn by the circuit court are not tantamount to foreclosing Petitioners from contesting the case on the merits that would affect a substantial right. Moreover, South Carolina law is clear that when the adverse inference "presumption is drawn, it cannot be treated as independent evidence of a fact otherwise unproved, but can only be considered in determining the credibility or probative force of the evidence presented." *Baker v. Port City Steel Erectors, Inc.*, 261 S.C. 469, 476, 200 S.E.2d 681, 683 (1973). "The fact that the unfavorable inference may be drawn ***does not require that the jury draw it***. It is a matter for the jury to say whether the failure to produce the . . . evidence warrants the inference that it would be unfavorable." *Id*. at 476, 200 S.E.2d at 683-84 (emphasis added). Thus, "the [adverse] inference has the effect only of authorizing the jury to give greater weight to the evidence of the adverse party, or to give less weight to the evidence of the party who had failed to call the witness, than it might otherwise have done." *Id*. at 476, 200 S.E.2d at 683 (citation and internal quotation marks omitted). *See also Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006) (holding that the following "language reflect[ed] the law of South Carolina and should have been charged [to the jury] based on the evidence": "I charge you that when a party fails to preserve material evidence for trial, it is for you to determine whether the party has offered a satisfactory explanation for that failure. If you find the explanation unsatisfactory, you are permitted—***but not required***—to draw the inference that the evidence would have been unfavorable to the party's claim." (emphasis added)). Further, it is well established in South Carolina that judges sitting without a jury have wide latitude "to admit all evidence" and then "evaluate the evidence and ascertain the truth." *Brown v. Allstate Ins. Co.*, 334

S.C. 21, 27, 542 S.E.2d 723, 726 (2001). The storied career, training, skill, and experience of Chief Justice Toal (Retired), the circuit court judge in this case, are unparalleled and make her fully equipped and capable of making impartial evidentiary determinations while considering the issues in this action, which includes determinations of whether a presumption should be drawn or has been rebutted.

The circuit court's ruling that the exhibits on the Receiver's trial exhibit list be deemed admitted and authentic also does not "determine the action" nor does it affect a substantial right. As the circuit court explained in the May 23 First Order, South Carolina judges have wide latitude to admit all evidence and then evaluate it to ascertain the truth. (May 23 First Order at 4.) Unlike a juror, a judge is uniquely situated to separate the admissible from the inadmissible even if the judge has heard both, and there is no need to keep inadmissible evidence from the fact finder to prevent prejudice. (*Id*. at 5.)

Further, the adverse inferences drawn by the circuit court do not effectively strike portions of Petitioners' Answers. Indeed, the circuit court expressly stated that its sanctions order "***stops short of*** more severe sanctions, ***such as striking [the parties'] pleadings*** or holding them in default," and explicitly clarified that "those sanctions are ***not the subject of this Order***, nor should this Order be interpreted as tantamount thereto." (May 23 Second Order at 16 (emphasis added).) Petitioners cannot circumvent South Carolina's threshold for interlocutory appeals by inaccurately portraying the orders as tantamount to striking their Answers, particularly when the circuit court itself clearly stated that its sanctions are not striking any party's pleadings. Moreover, as explained above, the circuit court specifically explained that the adverse inferences are simply rebuttable presumptions that Petitioners can refute through evidentiary challenge. Simply put, contrary to Petitioners' claim, the circuit court did **<u>not</u>** enter irrefutable negative inferences that strike out

portions of Petitioners' pleadings and defenses. Instead, the circuit court's orders leave Petitioners entirely free to mount any defense they want should they choose to do so.

C. Petitioners are not entitled to injunctive relief.

Petitioners argue that the May 23 Orders are immediately appealable because they constitute the circuit court's sustained refusal to issue a requested injunction. This argument is unavailing.

Petitioners' so-called requests for injunctive relief were eleventh-hour requests tacked on to their February 16, 2024 memoranda opposing the Receiver's January 12, 2024 Motions to Compel. A defendant should not be allowed to unilaterally convert a discovery order on a motion to compel into an immediately appealable issue by slipping a so-called "cross-motion for injunction" into their briefing opposing the underlying motion to compel.[5] Otherwise, any litigant could manufacture an immediately-appealable issue out of ***any garden-variety discovery order at any point*** by simply opposing the underlying motion with a "gotcha" request to enjoin the moving party from taking any action. Indeed, five days after these "injunctive" requests materialized, the circuit court informed Petitioners by email on February 21 that the circuit court would allow the parties to submit proposed orders on the fully briefed motions to compel, but that these "recent motions for injunctive relief" would "remain under the Court's advisement to be addressed at a later time." (*See* Exhibit 3 to the Receiver's Reply to Appellants' Returns to Motion to Dismiss Appeals of Interlocutory Orders, filed Sept. 12, 2024 in Appellate Case Nos. 2024-001063, 2024-001064, 2024-001065.) Consistently with the circuit court's indication to all counsel, the March 12, 2024 Order expressly stated that Petitioners' belated insertion of requests for "injunctive relief"

[5] Notably, there is no active order by any court staying discovery in the proceeding before the circuit court. Petitioners have failed to seek a stay of discovery from either the circuit court or the Court of Appeals.

in their responses to the Motions to Compel were not yet under submission for the Court's consideration:

> Although Third-Party Defendants included in [their] February 16 filings [submitted in opposition to the Receiver's Motions to Compel] what they have termed to be 'cross-motions' for 'injunctive relief,' the Court advised the parties by email on February 21, 2024, that those requests for injunctive relief will remain under the Court's advisement to be addressed at another time.

(*See* Exhibit 4 the Receiver's Reply to Appellants' Returns to Motion to Dismiss Appeals of Interlocutory Orders, filed Sept. 12, 2024 in Appellate Case Nos. 2024-001063, 2024-001064, 2024-001065, March 12, 2024 Order at 3 n.1.) The circuit court clearly stated that it will address these "injunctive" relief requests at a later time. Thus, Petitioners cannot simply rebrand the circuit court's pronouncement as a "refusal" to rule on their so-called requests for "injunctive relief," and they do not provide any controlling South Carolina authority to the contrary.

Petitioners' reference to a couple of cherry-picked non-South Carolina cases is insufficient to provide support for their proposition that the circuit court "simply sitting" on their "injunction" requests for too long can be construed as effectively denying them. Moreover, the cases Petitioners cite are distinguishable. In *In re Fort Worth Chamber of Com.*, 100 F.4th 528 (5th Cir. 2024), the Fifth Circuit found that under the fact-specific circumstances and the "***unique expedited nature***" of the case, the district court's inaction on the motion for a preliminary injunction amounted to effective denial. *Id*. at 533 (emphasis added). The Fifth Circuit admonished, however, that "whether a district court fails to act promptly ***depends entirely on context***." *Id*. at 534 (emphasis added). Importantly, the Fifth Circuit recognized that "plaintiffs cannot simply say they need an expedited ruling and then appeal by claiming effective denial when they don't get it on their preferred timeline," and the Fifth Circuit emphasized that "[d]istrict courts have wide discretion in managing their docket, and they do not necessarily deny a motion by failing to rule on a parties'

requested timeline." *Id*. at 535. The facts and procedural issues in *Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293 (5th Cir. 1974) are completely unrelated to the circumstances here. In *Gray Line Motor Tours*, the Fifth Circuit found that the district court's order staying considerations of that portion of the airport ground carrier's suit against the city airport authority and others relating to legality of the 15 percent gross revenue charge imposed on ground carriers, until a state court had had an opportunity to determine its legality under state law, had the effect of denying a preliminary injunction, and the Fifth Circuit had jurisdiction under the interlocutory appeals statute to review the stay order. *Id*. at 297–98.

The circuit court here neither expressly nor implicitly refused to rule on the Petitioners' requests for "injunctive relief." Instead, the circuit court did not make any rulings on these requests, clearly stated in writing that it intended to address them at a later time, not even seven months had elapsed after Petitioners tacked on their eleventh-hour "injunctive" requests in their responses to the Motions to Compel, and the circuit court diligently attended to other important matters and fully briefed motions in the case, in addition to managing all of the other cases on its docket, during this time period. As a result, the May 23 Orders do not constitute the circuit court's refusal to issue a requested injunction and instead are interlocutory and not immediately appealable.

CONCLUSION

These premature, interlocutory appeals were properly dismissed by the Court of Appeals. This Court should deny the Petitions. Petitioners' serial interlocutory appeals—in the face of clear case law forbidding their appeals—should be soundly rejected and their continued efforts to delay trial through improper procedural maneuvering should be brought to a decisive end.

(Signature page follows)

Respectfully Submitted,

By:

s/ Peter D. Protopapas

Peter D. Protopapas
SC Bar 68304
2110 N. Beltline Blvd
Columbia, South Carolina 29204
803.978.6111
pdp@rplegalgroup.com

The Receiver[6]

January 15, 2025

[6] Because Petitioners continue to pursue threats of imprisonment, fines, and seizure of assets of the Receiver and the Receiver's attorneys, the Receiver is submitting this Return himself as an officer of the Court and as the court-appointed Receiver pending this Court's decision on the Receiver's Emergency Motion and request to enjoin Petitioners and their counsel from threatening and attempting to execute criminal threats against the Receiver and members of the South Carolina bench and bar.