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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 No. 2025-000052

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.

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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"), by and through his undersigned counsel, respectfully requests this Court deny the Petitions for Writ of Certiorari filed on January 9, 2025 (the "January 2025 Petitions") by Petitioners in the above-captioned case.[2]

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[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 are as follows:

- Mohed Altrad and Altrad Investment Authority S.A.S.

Petitioners deploy a common strategy in this appeal as in prior appeals, of unilaterally renaming the appeal of an order – here, a scheduling order setting a trial date – and casting it as a different type of order on appeal – here, a mode of trial 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 ten (10) 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 practically 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] Meanwhile, 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.[5]

• ESAB Corporation; Charter Consolidated Ltd.; and Central Mining & Investment Corporation Ltd.

[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. On January 21, 2025, the circuit court issued an order holding that the trial in this case "scheduled to begin February 3, 2025, is continued until the oral arguments are heard before the Supreme Court of South Carolina on February 11, 2025, and a decision is rendered in cases 2023-001461 and 2023-001096."

[5] As to Petitioners' arguments that the *Adams* case and the English order are "special and important reasons" to grant certiorari over the scheduling order appeal, the Receiver disagrees. The January 2025 Petitions involve an appeal from a singular scheduling order, and the issue before the Court is whether the Court of Appeals properly found the scheduling order was an interlocutory order that is not immediately appealable. The Receiver further incorporates by reference herein his arguments that the *Adams* case is not relevant to this case, and that the unilateral English order has not, and cannot, be recognized by any court in the United States, which are contained in the December 6, 2024 Motion to Strike, December 13, 2024 Emergency Motion for Supersedeas, and the December 23, 2024 Reply, filed in Appellate Case No. 2024-001499. Further, on January 16,

The January 2025 Petitions are virtually identical in basic substance to the Petitions for Writ of Certiorari filed by Petitioners on December 16, 2024 (the "December 2024 Petitions"), wherein Petitioners seek premature, interlocutory review of the circuit court's scheduling order entered on June 20, 2024. Likewise, as is their *modus operandi*, in their January 2025 Petitions, Petitioners seek this Court's certiorari review of the Court of Appeals' well-justified decision to dismiss the appeal as interlocutory because the underlying interlocutory decision is not immediately appealable. Petitioners sought—and continue to seek with their January 2025 Petitions—premature, interlocutory review of the circuit court's scheduling order entered on October 2, 2024.

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 total number of days this case has been pending, it has spent nearly 70% of those 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.*, Appellate Case 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

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2025, this Court issued an Order stating, "Any attempt by a foreign court to intervene in and threaten the participants in matters properly pending in the courts of South Carolina would be shocking and indefensible. The dispute giving rise to the English Court's attempt to intervene in these matters involves the appropriate reach of the Receiver appointed by the South Carolina Circuit Court – an issue this Court will hear during its February term of court and resolve after oral argument." Despite this Court's January 16 Order stating that attempts by a foreign court to intervene in and threaten the participants would be "shocking and indefensible," the Altrad Petitioners have continued to pursue their action against the Receiver in France, attempting to serve documents on the Receiver related to that case as recently as February 6, 2025.

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. Otherwise, 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, stems 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.

On September 6, 2023, the circuit court scheduled trial in this matter for April 15, 2024. (App. at 49.) [6]

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 (the "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 the Dissolution Appeals. Those Petitions are 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

[6] The references to the appendix refer to the appendix attached to the Receiver's Motion to Dismiss and Expedite, filed with the Court of Appeals on September 5, 2024 in Appellate Case No. 2024-001446.

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 Appeals") and unilaterally renamed 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 on the Discovery Appeals, 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"). 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. Petitioners filed petitions seeking writs of certiorari from this Court with respect to the May 23 Orders, which are pending. *See* Appellate Case Nos. 2024-002116, 2024-002117.

On June 20, 2024, the circuit court issued a scheduling order (the "June 20, 2024 Scheduling Order"), stating:

> This third-party action was previously scheduled for trial on April 15, 2024. On April 10, 2024 during a pre-trial status conference, the Court granted a continuance due to the lack of participation in the discovery process by the Third-Party Defendants.
>
> The matter is now scheduled for a bench trial the week of December 9, 2024 at the Richland County Judicial Center, Courtroom 3B, beginning at 9:30 AM. Additionally, a pre-trial conference is scheduled for December 5th at the Richland County Judicial Center, Courtroom 3B, beginning at 9:30 AM.

Petitioners appealed the June 20, 2024 Scheduling Order on August 30, 2024.[7] The Court of Appeals dismissed the appeal on September 18, 2024, and denied rehearing on November 14, 2024. *See* Appellate Case No. 2024-001446. Petitioners filed the December 2024 Petitions

[7] The Notices of Appeal were filed more than 30 days after the June 20, 2024 Scheduling Order due to an improper removal of the case to which Petitioners consented on June 28, 2024. The United States District Court for the District of South Carolina remanded the case to the circuit court on August 13, 2024, finding removal was not proper. *Tibbs v. 3M Co.*, No. 3:24-cv-3771-MGL, ECF No. 75 (D.S.C. Aug. 13, 2024). Petitioners filed their notices of appeal after remand.

seeking a writ of certiorari from this Court with respect to the June 20, 2024 Scheduling Order. *See* Appellate Case No. 2024-2114.

On October 2, 2024, the circuit court issued a scheduling order setting timelines for the completion of discovery in anticipation of trial and rescheduling the trial to begin on February 3, 2025 (the "October 2, 2024 Scheduling Order"). Petitioners appealed the October 2, 2024 Scheduling Order on November 1, 2024, and Petitioners also moved to consolidate their appeals of the June 20, 2024 Scheduling Order and the October 2, 2024 Scheduling Order. The Court of Appeals dismissed Petitioners' appeal of the October 2, 2024 Scheduling Order on November 5, 2024 and declined to rule on Petitioners' motion for consolidation. *See* Appellate Case No. 2024-001862. The Court of Appeals denied rehearing on December 10, 2024. *See id*. Petitioners have now filed the January 2025 Petitions, seeking a writ of certiorari from this Court with respect to the October 2, 2024 Scheduling Order.

ARGUMENT

Because the January 2025 Petitions are based on the same substantive arguments that Petitioners have already raised in their December 2024 Petitions, the Receiver's arguments in support of his request for this Court to deny the January 2025 Petitions are necessarily familiar to the ones the Receiver has already raised in his Return to the December 2024 Petitions.

I. The Circuit Court's October 2, 2024 Scheduling Order Is Not Immediately Appealable.

The Court should deny the January 2025 Petitions because the October 2, 2024 Scheduling Order is not immediately appealable. Petitioners do not possess the right to a jury trial on any of the Receiver's claims, and in any event, Petitioners have acknowledged the trial in this case will be a bench trial.

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*, 420 S.C. at 249, 801 S.E.2d at 759 (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).

Here, Petitioners are clearly not entitled to a jury trial in this declaratory judgment action. *See C & S Real Estate Servs. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (granting a motion to dismiss an appeal where the appellant did not have a right to a jury trial); *Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees*, 344 S.C. 522, 524–25, 544 S.E.2d 642, 643 (Ct. App. 2001) (dismissing an appeal from an order transferring a case to a non-jury roster because there was no right to a jury trial).

Rather, South Carolina courts recognize that the Receiver's causes of action are equitable in nature and are not triable by a jury. "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997); *see also Barrett v. Miller*, 283 S.C. 262, 264, 321 S.E.2d 198, 199 (Ct. App. 1984) ("Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff."); *McDaniel v. Kendrick*, 386 S.C. 437, 441, 688 S.E.2d 852, 855 (Ct. App. 2009) ("An action to declare a constructive trust is an action in equity."); *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) ("In general, equitable principles govern the veil-piercing remedy," and "[i]n applying South Carolina's veil-piercing doctrine, as all forms of equitable relief, the equities of both sides are to be considered, and each case must be decided on its own particular facts." (internal quotation marks and citations omitted)); *Rogers v. Salisbury Brick Corp*., 299 S.C. 141, 144, 382 S.E.2d 915, 917 (1989) ("An

accounting is essentially an equitable remedy.") (internal citations omitted));[8] *O'Neal v. Pearson*, No. 2007-UP-340, 2007 WL 8327921, at *3 (S.C. Ct. App. July 6, 2007) (observing the claims for constructive trust and accounting, among other claims, "are all equitable actions").

Petitioners have failed to identify any specific factual issues in this action that would give them a right to a jury trial. Even in their Notices of Appeal, Petitioners did not identify any specific factual issues or causes of action in this case that are triable by a jury. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (noting an issue is not preserved for appellate review unless it is "raised to the trial court with sufficient specificity" (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002))).

The Receiver has found no authority that a scheduling order is appealable (because it is not). *See 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 as non-appealable an appeal from a denial of a motion to extend deadlines in a scheduling order). Petitioners' chief argument emphasizes that the circuit court order is an order affecting the *mode* of trial, which would render it immediately appealable. This, however, is misleading. This Court has recognized, "An order denying a party a jury trial is not immediately appealable unless it deprives him of a mode of trial ***to which he is entitled as a matter of right***." *C & S Real Est. Servs., Inc. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (emphasis added); *see also Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees*, 344

[8] The Supreme Court of South Carolina went on to say in *Rogers*: "Equitable jurisdiction for an accounting may also be invoked (1) in actions involving long and complicated accounts where it would not be practicable for a jury to comprehend the issues and correctly make adjustment, and (2) when there is a need for discovery." *Id*. Both elements are present in *Tibbs*, making the Receiver's accounting claim especially necessary to be tried by the circuit court, rather than by a jury.

S.C. 522, 523, 544 S.E.2d 642, 642 (Ct. App. 2001). In other words, an order denying a party a jury trial is ***not*** immediately appealable if the party is not entitled to a jury trial to begin with.

Both *Massengale* and *Brown* involved requested appellate review of orders related to the trial mode of equitable issues. In *Massengale*, this Court considered an order denying a jury trial where the appellant sought a jury trial on five counterclaims she asserted in a mortgage foreclosure action. 290 S.C. at 300, 350 S.E.2d at 192. This Court found that two were equitable in nature, and appellant "clearly had no right to a jury trial on these claims." *Id.* The remaining three were permissive counterclaims, and under South Carolina law, "[w]hen a defendant asserts these permissive counterclaims which are legal in nature, he waives the right to a jury trial on these issues." *Id.* at 301, 350 S.E.2d at 193. Because "[t]he order under appeal did not deprive appellant of a mode of trial to which she was entitled as a matter of right," this Court granted the respondent's motion to dismiss, and found "the order is not immediately appealable." *Id.* at 300, 301, 350 S.E.2d at 192, 193. In *Brown*, the Court of Appeals similarly found that an appellant was not entitled to a jury trial in a case involving a contract dispute in which the appellant sought rescission and restitution as remedies. 344 S.C. at 525, 544 S.E.2d at 643. While the respondent had not filed a motion to dismiss the appeal, the Court of Appeals found that "issues relating to subject matter jurisdiction may be raised at any time," and when "an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction" to the appellate court. *Id.* at 524–25, 544 S.E.2d at 643 (citations omitted). Because the case involved only equitable remedies, the Court of Appeals found "the court properly granted the motion to transfer the case to the non-jury roster," and dismissed the appeal of the interlocutory order. *Id.* at 525, 544 S.E.2d at 643.

The *Brown* case also illustrates why Petitioners' continued reliance on Rule 205 of the South Carolina Appellate Court Rules is misplaced. Because the orders Petitioners have attempted to appeal are not immediately appealable, jurisdiction has not transferred to the appellate courts. *See also* Receiver's June 24, 2024 Return to Petitions for Writ of Certiorari (as to Discovery Appeals), filed in Appellate Case No. 2024-000916. Thus, contrary to Petitioners' argument, the appealed-from October 2, 2024 Scheduling Order was not entered in contravention of Rule 205.

Moreover, this issue is not properly preserved for this Court's review because Petitioners never addressed it with the circuit court. As discussed herein, Petitioners, in hearings and numerous pleadings before the circuit court, admitted this action was a bench trial. For instance, Petitioners never proposed their own scheduling order, moved for reconsideration of the circuit court's issuance of the June 20, 2024 Scheduling Order or the October 2, 2024 Scheduling Order, or otherwise contested the circuit court's decision to try the case as a bench trial. In fact, Petitioners have not substantively participated in the trial court proceedings at all on the grounds that the orders of the South Carolina Circuit Court, Court of Appeals, and Supreme Court holding that Receivership cases are not stayed during appeals of interlocutory orders have been wrong or are simply inapplicable to them. Instead, they continue to ignore the circuit court rulings as they file appeal after appeal. In the present instance, Petitioners appealed the October 2, 2024 Scheduling Order without raising any arguments to the circuit court and providing it with the opportunity to address their purported demand for a jury trial. "In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court." *Winkler v. State*, 418 S.C. 643, 662, 795 S.E.2d 686, 697 (2016) (quoting *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004)).

Finally, even if (1) Petitioners were entitled to a jury trial (they are not), (2) a scheduling order were appealable (it is not), and (3) Petitioners had tried to obtain relief from the circuit court before appealing (they plainly did not), Petitioners waived their ability to contest a bench trial numerous times and ***even admitted it on the record before the circuit court***:

- After the Receiver deliberately chose not to demand a trial by jury in his Complaint, on September 20, 2023, the circuit court issued an order setting the case for trial during the April 15, 2024 trial term. (App. 69).

- In its respective January 2, 2024 Answer, each Petitioner vaguely demanded a trial by jury (App. 132, 195, 258) without identifying any issues that would be triable by a jury or requesting the issuance of a new scheduling order that converted the April 15, 2024 bench trial to a jury trial.

- No Petitioners objected to or otherwise disputed the Receiver's contention in his April 4, 2024 pre-trial hearing status report that the trial would be a non-jury trial. (App. 260, 263, 265).

- At the April 10, 2024 pre-trial hearing, the circuit court stated that the Receiver's claims against Petitioners would be tried in a non-jury setting. (App. 402). No Petitioner objected at the hearing.

- The circuit court reluctantly postponed trial due to the third-party defendants' (including Petitioners) refusal to participate in discovery and directed the parties to submit proposed scheduling orders. (App. 422-23). No Petitioner did so.

- On April 9, 2024, and April 19, 2024, Petitioners filed separate memoranda and all admitted this action involved "**a bench trial of equitable claims**." (App. 432, 441, 468).

- At the April 25, 2024 hearing on the Receiver's motion for discovery sanctions against Petitioners for their complete failure to participate in discovery, counsel for the Altrad Petitioners expressly admitted that the Receiver's claims would rightly be tried without a jury: "***Given that this is a bench trial***, I don't know how you can have an adverse inference in a bench trial. ***The judge is the decider***." (App. 534) (4/25/24 Tr. at 43:2–4) (emphases added). Neither he nor counsel for any of the other Petitioners objected to a non-jury trial at this hearing or otherwise attempted to correct this clear and unequivocal statement.

- On May 13, 2024, Petitioners filed separate objections to the Receiver's proposed order on the Motion to Pre-Admit Exhibits relying on the fact that this action is a bench trial. As they did at the April 25, 2024 hearing, the Altrad Petitioners again argued in their objections that the Receiver "cannot rely on the latitude normally afforded to judges regarding admitting evidence **in a bench trial**" because the presumption could not apply if the judge pre-admitted exhibits. (App. 565) (Altrad Obj. p. 3, n.1) (emphasis added). In their objections, the Charter Petitioners stated: "The Opposition was premised on . . .

the fact that it would be inappropriate for **a court, engaging in a bench trial**, to award an adverse inference closely mirroring the third-party claims pleaded and the prayer for relief sought before litigation on the merits occurs." (App. 586) (Charter Obj. p. 6) (emphasis added).

- On May 23, 2024, the circuit court granted the Receiver's Motion to Pre-Admit Exhibits as a discovery sanction for Petitioners' failure to participate in discovery. In its decision, the circuit court expressly stated that "[i]t 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.'" (App. 642) (citation omitted). Petitioners appealed this decision without raising their purported jury rights to the circuit court. *See* Appellate Case Nos. 2024-002116, 2024-002117. Thus, Petitioners waived their right to now contest the subsequent scheduling order setting a bench trial.

- On June 20, 2024, the circuit court issued the appealed-from June 20, 2024 Scheduling Order, setting the case for a non-jury trial on December 9, 2024. (App. 648). Petitioners did not raise any objections or file a motion seeking reconsideration of the June 20, 2024 Scheduling Order.

- On October 2, 2024, the circuit court issued the appealed-from October 2, 2024 Scheduling Order, which rescheduled the non-jury trial in this case and set it to begin on February 3, 2025. Yet again, Petitioners did not raise any objections or file a motion seeking reconsideration of the October 2, 2024 Scheduling Order. At no point did Petitioners raise any arguments to the circuit court that they believed they were entitled to a jury trial or identify what issues they believed entitled them to a jury trial.

The above timeline clearly outlines the myriad opportunities during which Petitioners were required to contest a bench trial in this matter and belies their assertion that they acted in a timely manner. Petitioners' admissions on the record at the April 25, 2024 hearing and in various filings before the circuit court that this case would be tried in a bench trial wholly undermines this appeal. Petitioners are not now permitted to take a contrary position. Instead, they have waived their argument as to their purported right to a jury trial.

This Court has been here before in another case involving an asbestos receivership.[9] In *Covil Corporation v. Pennsylvania National Mutual Insurance Company*, Appellate Case No.

[9] The Court may look to the contents of the appellate record in other, unrelated cases, especially where, as here, the cases are in "the same procedural posture." *See Stanley Smith & Sons, Inc. v. Dumas*, 315 S.C. 30, 33, 431 S.E.2d 595, 596 (Ct. App. 1993) (the Court of Appeals took notice of the contents of the appellate record in another, unrelated case).

2022-001722, Penn National attempted to appeal an order of the circuit court scheduling a non-jury trial in a declaratory judgment action. Penn National did not object to a non-jury trial at the status conference and did not seek reconsideration of the scheduling order. Later, Penn National filed a Motion to Confirm Jury Trial Demand but failed to articulate the factual issues it believed existed in the case that would entitle it to a jury trial. When the circuit court denied Penn National's motion, it appealed. Penn National also tried to couch its appeal as a mode of trial appeal. The Court of Appeals granted the Receiver's Motion to Dismiss the appeal. *See* February 8, 2023 Order, Appellate Case No. 2022-001722. This Court subsequently denied certiorari in the case. *See* November 7, 2023 Order, Appellate Case No. 2023-001079. Similarly, Petitioners here never contested the October 2, 2024 Scheduling Order by insisting on their right to a jury trial. Instead, ***after*** admitting in multiple filings to the circuit court that the case would be tried non-jury, they improperly appealed the October 2, 2024 Scheduling Order.

CONCLUSION

These premature, interlocutory appeals were properly dismissed by the Court of Appeals. This Court should deny the January 2025 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 in this case through improper procedural maneuvering should be brought to a decisive end.

[Signature block on following page]

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