

STATE OF SOUTH CAROLINA
In the Court of Appeals

ON APPEAL FROM RICHLAND AND YORK COUNTIES
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2020-000845

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SC Court of Appeals

Circuit Court Case Nos. 2015-CP-46-02155 (*Smith*), 2015-CP-46-03456 (*Howe*), 2019-CP-40-00076 (*Hopper*), 2018-CP-40-04680 (*Hill*), and 2018-CP-40-04940 (*Taylor*)

Ex Parte: United States Fidelity and Guaranty Company..... Appellant,

v.

Peter D. Protopapas, in his capacity as Receiver of Covil Corporation..... Respondent,

In Re:

Roxanne Falls, Individually and as Personal Representative of the Estate
of Charlotte Gaye Smith Plaintiffs,

v.

CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor
by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a
Westinghouse Electric Corporation; CNA Holdings, Inc., f/k/a Hoechst
Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese
Corporation (Sued Individually and as Successor-in-Interest to Fiber
Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Daniel
International Corporation; Fluor Daniel, Inc., f/k/a Daniel Construction
Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy
Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power
Supply Co. and Mill-Power Supply Company; Resolute FP US, Inc.; Union
Carbide Corporation; United States Fidelity and Guaranty Company;
Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; and United
Conveyor Corporation Defendants,

and

Timothy W. Howe, Individually and as Personal Representative of the
Estate of Wayne Erwin Howe, Deceased, and Jeannette Howe Plaintiffs,

v.

Air & Liquid Systems Corp., Individually and as Successor-in-Interest to
Buffalo Pumps, Inc; Airco, Inc.; Airgas USA, LLC, f/ka National Welding
Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora

Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC, Individually and as a Subsidiary of Davis-Standard LLC; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Productions, Inc., f/k/a Carolina Gasket and Rubber Company; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-Apco Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as Successor-in-Interest to Buell Engineering Co.; Flowserve Corporation, Individually and as Successor-in-Interest to Durco Pumps; Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as Successor-in-Interest to Buell Engineering Co.; Marsulex Environmental Technologies, LLC, as Successor-in-Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as Successor-in-Interest to Babcock Borsig Power, Inc., and Riley Stoker Corporation, Individually and as Successor-in-Interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc., f/k/a Marley Cooling Technologies, Inc., f/k/a The Marley Cooling Tower Co.; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc., f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries

Defendants,

and

Charles T. Hopper and Rebecca Hopper.....

Plaintiffs,

v.

Air & Liquid Systems Corp.; 3M Company; Advance Auto Parts, Inc.; Armstrong International, Inc.; Blackmer Pump Company; BW/IP, Inc.; CBS Corporation; CNA Holdings, LLC; Carrier Corporation; Circor Instrumentation Technologies, Inc.; Continental Tire the Americas, LLC; Covil Corporation; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; E.I. du Pont de Nemours and Company; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Flour Constructors International, Inc.; Fluor Daniel Services Corporation; Flour Enterprises, Inc.; FMC Corporation;

Ford Motor Company; Foster Wheeler Energy Corporation; Gardner Denver, Inc.; General Electric Company; Genuine Parts Company; Georgia Power Company; Goodrich Corporation; Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Honeywell International, Inc.; IMO Industries, Inc.; Ingersoll-Rand Company; International Paper Company; ITT LLC; The Lincoln Electric Company; Metropolitan Life Insurance Company; Miller Electric Mfg., LLC; National Automotive Parts Association; Newco Valves, LLC; O'Reilly Auto Enterprises, LLC; O'Reilly Automotive Stores, Inc.; Resolute FP US Inc.; Shell Oil Company; South Carolina Electric & Gas Company; South Carolina Public Service Authority; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc.; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Trane U.S.; Uniroyal Holding Inc.; Viking Pump, Inc.; Weir Valves & Controls USA, Inc.; The William Powell Company; Yeargin Potter Smith Construction, Inc.; Yuba Heat Transfer Corporation; and Zurn Industries Defendants,

and

James Michael Hill, Jr., as Executor of the Estate of James Michael Hill ... Plaintiff,

v.

Advance Auto Parts, Inc.; 4520 Corp., Inc., successor-in-interest to Benjamin F. Shaw Company; Air & Liquid Systems Corporation, individually and as successor-in-interest to Buffalo Pumps; Alcoa, Inc., successor to Reynolds Metals Company; Aurora Pump Company; BW/IP, Inc., individually and as successor-in-interest to Byron Jackson Pumps; CB&I Group Inc., individually and as successor-in-interest to The Shaw Group, successor to Benjamin F. Shaw Company; CB&I Laurens, Inc., f/k/a B.F. Shaw, Inc.; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., successor by merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; Celanese Corporation; CNA Holdings, LLC, f/k/a Celanese Corporation f/k/a Hoechst Celanese Corporation, sued individually and as successor-in-interest to Fiber Industries, Inc.; Circor Instrumentation Technologies, Inc., individually and f/k/a Hoke Inc.; Cleaver Brooks, Inc., f/k/a Aqua-Chem, Inc., d/b/a Cleaver-Brooks Division; Covil Corporation; Crane Co.; Crosby Valve, LLC; Dana Companies LLC; Daniel International Corporation; The Dow Chemical Company; Federal-Mogul Asbestos Personal Injury Trust, sued as successor to Felt-Products Manufacturing Co.; Fisher-Controls International, LLC, wholly owned subsidiary of Emerson Electric Company; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; General Electric Company; Genuine Parts Company, d/b/a Rayloc, a/k/a NAPA; The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Gorman-Rupp Company; Hollingsworth & Vose Company; Honeywell International, Inc., f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to

Bendix Corporation; Imerys Talc America, Inc., f/k/a Luzernac America, Inc., individually and as successor-in-interest to United Sierra Division of Cyprus Mines, Cyprus Industrial Minerals Company and Windsor Minerals, LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC, f/k/a ITT Corporation, ITT Industries, Inc., individually and as successor to ITT Fluid Products Corp., ITT Hoffman ITT Bell & Gossett Company and ITT Marlow; Johnson & Johnson; Johnson & Johnson Consumer Companies LLC, a subsidiary of Johnson & Johnson; Mallinckrodt LLC; Maremont Corporation; McDermott International, Inc., individually and as successor-in-interest to The Shaw Group, successor to Benjamin F. Shaw Company; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Mine Safety Appliances Company, LLC; National Automotive Parts Association; OfficeMax, Incorporated, f/k/a Boise Cascade Corporation; Pneumo Abex, LLC, individually, and as successor-in-interest to Abex Corporation; R.J. Reynolds Tobacco Company, individually and as successor-by-merger to Lorillard Tobacco Company LLC, f/k/a Lorillard Tobacco Company; Resolute FP US Inc., individually and successor-in-interest to Bowater, Inc.; Reynolds American, Inc., individually, and as successor-by-merger to Brown & Williamson Tobacco Corporation, successor-by-merger to The American Tobacco Company; Riley Power, Inc., f/k/a Riley Stoker Corporation and D.B. Riley, Inc.; Spence Engineering Company, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and successor-in-interest to Marley Cooling Towers Co.; Union Carbide Corporation; United Conveyor Corporation; The William Powell Company; and Zurn Industries, LLC, individually and as successor-in-interest to Zurn Industries, Inc. Defendants,

and

Denver D. Taylor and Janice Taylor Plaintiffs,

v.

Air & Liquid Systems Corporation; Aurora Pump Company; BASF Catalyst LLC; BASF Corporation; Borgwarner Morse Tec, LLC; CBS Corporation; CNA Holdings, LLC; Cameron International Corporation; Carrier Corporation; Carver Pump Company; Caterpillar, Inc.; Celanese Corporation; Cleaver-Brooks, Inc.; Continental Tire The Americas, LLC; Covil Corporation; Crane Co.; Daniel International Corporation; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Frito-Lay, Inc.; Gardner Denver, Inc.; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC; John Crane, Inc.; The Lincoln Electric Company; Linde, LLC; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; McWane, Inc.; Metropolitan Life

Insurance Company; Resolute FP US Inc.; Riley Power, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc.; Springs Global US, Inc.; Trane US, Inc.; Viking Pump, Inc.; Warren Pumps, LLC; Weir Valves & Controls USA, Inc.; York International Corporation; and Zurn Industries, LLC Defendants.

USF&G'S RETURN IN OPPOSITION TO MOTION TO DISMISS APPEAL

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** Pro Hac Vice admitted - *Roxanne Falls*, 2015-CP-46-02155

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June 22, 2020

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RETURN IN OPPOSITION TO MOTION TO DISMISS

Through the vehicle of a receivership created for the Covil Corporation, the lower court has entered orders that purport to eliminate USF&G's contribution, subrogation, and indemnification rights that arise under both its insurance contract and longstanding South Carolina law. Despite the fact that the orders on appeal directly impair USF&G's rights including through injunctive provisions purporting to bar or limit USF&G's right to assert such claims, Covil's Receiver seeks to dismiss this appeal because USF&G was not a named party in the cases appearing in the orders' caption.

This is woefully misleading, as the orders expressly address and impair USF&G's rights and that is obviously what the court and parties intended. Further, USF&G had no obligation to move to intervene as a party in a lawsuit that did not involve any pleading or claim involving USF&G, despite the Receiver's attempt to use the captioned cases to cut off USF&G's rights. South Carolina law makes clear that a litigant who is aggrieved by a trial court's order may appeal that order, even if it was not a named party to the underlying litigation. That rule should apply fully here, where USF&G's status as a "non-party" is the result of artificial manipulation of the case's caption by the Receiver. If the Court accepts the Receiver's dismissal argument, the orders on appeal cannot possibly apply to USF&G under established principles of due process, which the Court should make clear if the Receiver's dismissal motion is granted.

At bottom, the Court cannot evaluate the Receiver's motion to dismiss without a full understanding of the merits of the appeal itself and this situation's procedural history. That background is set forth below. It is essential that the Court see the entire picture so that it can see how errant the Receiver's dismissal motion truly is.

STATEMENT OF THE “CASE”

The Receiver’s dismissal argument runs directly contrary to the entire recent history of Covil’s receivership. That history—which was commenced without adhering to any of the statutory procedures required for a court-appointed receiver, and which has been litigated in a shapeshifting form so that it is impossible for USF&G to know from around which corner the next attack may come—is recounted below.

The Receiver’s dismissal argument also runs directly contrary to the contents of the orders involved in this appeal. Those orders—which purport to rewrite Covil’s historic insurance program to shift the insurance burden of three decades of insurance coverage away from the actual policies that Covil purchased from several carriers to Zurich and USF&G (which issued a single two-year policy to Covil in the 1970s), and which purport to rewrite South Carolina law regarding contribution rights among carriers—are also summarized below.

I. Covil is a judicially-dissolved insulator from Greenville that has been out of business for nearly 30 years, but continues to be named as a defendant in asbestos litigation.

Covil was a Greenville-based insulation company that went out of business in 1991. In 1992, one of Covil’s creditors brought involuntary dissolution and receivership proceedings against it. Judge Simmons, the Greenville County Master in Equity, appointed a receiver for Covil and instructed the receiver to provide all statutorily-required notices to perfect the dissolution. (Appx. 23–25). Judge Simmons then held that the receiver performed all of the tasks ordered by the court (Appx. 39), and he deemed all of Covil’s remaining assets to be abandoned (Appx. 39, 43).

Both before and since its dissolution, Covil has been a serial, nominal asbestos defendant, and it had or has insurance coverage for at least some of the asbestos claims asserted against it. Those insurance contracts obligated the insurers to provide a defense for Covil, an obligation that

continued despite the fact that it ceased functioning as a going concern and no longer had any officers, employees, or operations as of 1992. Accordingly, USF&G, Zurich, and other insurers would retain counsel on Covil's behalf and defend the company against asbestos claims, as they were required to do as a matter of contract.

This not-uncommon situation played out for years without incident or concern, until a jury returned a multi-million dollar verdict against Covil in an asbestos matter in the Middle District of North Carolina. The judgment was entered on October 19, 2018, in *Finch v. BASF Catalysts LLC*, Case No. 1:16-cv-1077-CCE-JEP (M.D.N.C.). As would be expected when a large judgment is entered, Covil appealed the outcome. That appeal is presently before the Fourth Circuit as Appellate Case No. 19-1594.

To this point, every case against Covil had been defended, settled, dismissed, or otherwise resolved, all at the expense of Covil's insurers. But everything changed on November 1, 2018.

II. Counsel for asbestos plaintiffs enlisted the circuit court to appoint a new receiver for Covil, ostensibly to marshal Covil's insurance "assets" to pay claims for existing and future plaintiffs.

That day, the plaintiffs' attorneys in *Finch* filed a petition to have a receiver appointed for Covil. Covil had been out of business for nearly three decades and had no assets to satisfy that judgment. Ms. Finch's attorneys—who also represent the plaintiffs in each of the South Carolina asbestos cases captioned above and in other cases against Covil and numerous others—enlisted the circuit court to appoint a receiver for Covil with the stated objective of “taking possession of and disposing of any remaining assets of Covil Corporation,” which counsel conceded consisted only of “its insurance coverage.” (Appx. 49).¹

¹ Ms. Finch's attorneys indicated that they were filing the petition because days earlier, defaults had been entered in the *Taylor* case and another case, due to Covil's failure to answer. (Appx. 49).

Counsel filed their request to appoint a receiver only in *Taylor v. Air & Liquid Systems Corp.*, Case No. 2018-CP-40-4940. The circuit court granted the petition on November 2, 2018—the very next day, even though the receivership statute unambiguously requires no fewer than four days’ notice for such a drastic action “to any party to the action in possession of such property claiming an interest therein under any contract,” S.C. Code Ann. § 15-65-20—and appointed Peter Protopapas, Esq., to serve as Covil’s receiver. (Appx. 51).² It made this appointment without notice to any of Covil’s insurers, any kind of hearing, any evaluation as to whether it had jurisdiction to make such an appointment, or receipt of any evidence to support the “drastic” remedy of a receivership. *See, e.g., S. Trust Co. v. Cudd*, 166 S.C. 108, 114–16, 164 S.E. 428, 430 (1932) (warning “that the appointment of a receiver is a drastic remedy and should be exercised with caution and circumspection,” and reversing the appointment of a receiver because it was improperly done “during the progress of a case” without an evidentiary basis).

Neither the plaintiffs nor the newly appointed Receiver instituted any separate proceeding specifically to address issues associated with any receivership. Instead, the receivership has drifted in an *ad hoc* fashion, all under the flag of the asbestos docket, which—as explained below—has been used to frustrate actual litigation pending between Covil and its insurers regarding coverage.

Covil has since settled (at no cost to Covil) and been dismissed from both of those cases. (Appx. 78, 80).

² Despite a receivership being a “drastic” remedy that should rarely be used, the asbestos plaintiffs’ attorneys have begun to ask the circuit court to appoint Mr. Protopapas the receiver over other companies that have not existed for nearly thirty years: Southern Insulation (requested on May 1, 2019, and granted on May 7, 2019, in *Hopper v. Air & Liquid Systems Corp.*, Case No. 2019-CP-40-76) and Starr Davis (requested on January 18, 2019, and granted on February 22, 2019, also in *Hopper*). Just as with Covil, the plaintiffs’ attorneys indicate that the only assets for these companies is insurance coverage.

III. The Receiver and Covil’s insurers are litigating Covil’s insurance coverage in federal court, but the Receiver is attempting to short-circuit those proceedings through requests to the circuit court to issue sweeping advisory opinions even though the circuit court lacks personal jurisdiction over USF&G and other carriers.

In light of the magnitude of the *Finch* judgment, Zurich promptly commenced a declaratory judgment action in the Middle District of North Carolina to sort out each carrier’s respective insurance obligations to Covil, and to resolve other coverage issues as between Covil and the insurers. That case is captioned *Zurich American Insurance Company v. Covil Corporation, by and through its Receiver, Peter D. Protopapas*, Case No. 1:18-cv-932-CCE-LPA (M.D.N.C.), and it was filed on November 6, 2018. It remains pending before Judge Eagles.

A. The Receiver filed a duplicative action that was removed to federal court.

Though federal courts routinely construe insurance contracts and issue declaratory relief regarding insurance responsibilities, the Receiver has fought their involvement at every turn. On November 27, 2018—just three weeks after *Zurich v. Covil* was filed in the Middle District of North Carolina—the Receiver filed a duplicative lawsuit in South Carolina circuit court. In that complaint, the Receiver attempted to present all of the issues that were already pending before the Middle District of North Carolina to the state court. (Appx. 55).

The Receiver also attempted to anchor that case in state court and render it non-removable by naming as defendants a handful of South Carolina asbestos plaintiffs who are represented by counsel responsible for the Receiver’s appointment: Timothy Howe, Jerry Crawford, Denver Taylor, and James Sizemore. This Court is already familiar with several of these litigants and their respective cases:

- Timothy Howe: Mr. Howe’s asbestos case was tried to a jury verdict, and the jury found in favor of the defense. Despite the complete defense verdict, the trial court awarded the plaintiffs’ counsel over \$300,000 in attorneys’ fees and costs as an unprecedented post-judgment “discovery sanction.” That ruling is on appeal before this Court as Appellate Case No. 2019-000164, which has been fully briefed.

- Jerry Crawford: Mr. Crawford’s asbestos case was tried to a jury verdict, and the jury found in favor of the defense. Despite the complete defense verdict, the trial court set aside the jury’s verdict in its capacity as the “13th juror.” That ruling is on appeal before this Court as Appellate Case No. 2018-001965, which has been fully briefed.
- James Sizemore: Mr. Sizemore’s asbestos case did not advance to trial, but instead the trial court struck Covil’s answer in its entirety as a “discovery sanction.” That ruling was appealed to this Court as Appellate Case No. 2018-000385, but was dismissed by consent of the parties after being fully briefed.

Despite the Receiver’s efforts to avoid federal diversity jurisdiction, the insurers removed that case to the District of South Carolina, where it is pending before Judge Hendricks under the caption *Covil Corp. v. Zurich American Insurance Co.*, Case No. 7:18-cv-3291-BHH (D.S.C.). Judge Hendricks realigned the parties and on June 14, 2019, denied the Receiver’s motion to remand the case back to state court. (Appx. 985).

B. The Receiver invited the circuit court to hold “status conferences” involving the same issues as are the subject of the federal coverage actions.

With its forum-shopping stymied, and even though there was no jurisdictional mechanism for haling the insurance carriers into state court, the Receiver nonetheless made various applications to the circuit court in an effort to undermine the federal coverage cases.

Just two business days after Judge Hendricks denied the motion to remand, the Receiver filed a request with the circuit court (1) that it hold a “status conference” in all of the above-captioned asbestos cases; (2) that it “requir[e] attendance of representatives” from each of Covil’s insurers; and (3) that it inquire into several topics, including *inter alia* “[p]rior management of the insurance policies,” “[t]he remaining and applicable limits of Covil’s insurance policies,” “coverage available under various coverage parts of the policies,” and even the various federal cases in which these exact issues were pending. (Appx. 82). The Receiver filed that motion in the same personal-injury cases that appear in the caption of this appeal:

- *Falls v. CBS Corp.*, Case No. 2015-CP-46-2155;
- *Howe v. Air & Liquid Systems Corp.*, Case No. 2015-CP-46-3456;
- *Hopper v. Air & Liquid Systems Corp.*, Case No. 2019-CP-40-76;
- *Hill v. Advance Auto Parts, Inc.*, Case No. 2018-CP-40-4680; and
- *Taylor v. Air & Liquid Systems Corp.*, Case No. 2018-CP-40-4940.

Neither USF&G nor any of Covil’s other carriers are parties to any of these matters, nor have these cases ever been consolidated. No summonses were ever issued for the receivership proceedings, including for the Receiver’s requested “status conference.” That request, however, set in motion a sequence that appears to be unprecedented in South Carolina jurisprudence.

The circuit court granted the motion on July 5, 2019, and held the requested “status conference” on July 11, 2019—even though it lacked jurisdiction over the insurers, and even though the issues raised by the Receiver’s request were not pending in any case before the state court.

Next, on September 13, 2019, the Receiver orally requested that the South Carolina circuit court again address the coverage issues that are pending before the federal courts. (Appx. 95). On September 19, 2019, the circuit court issued a “show cause” order in the above-captioned cases—again, to which the insurers are not parties—requiring each insurer to produce hundreds of thousands of pages of information, dating as far back as 1954, and to do it all by September 30th—in just eleven days. (Appx. 247, 303). The Receiver did not serve the insurers with that order until October 1, 2019—the day after their compliance deadline—and even then, the Receiver served the order by sending it to the Department of Insurance.

Armed with an order as to which compliance was literally impossible, the Receiver filed another request for a show cause hearing with the circuit court. (Appx. 257). The Receiver filed

that motion on October 24, 2019; the circuit court granted it five days later and issued an order requiring Covil’s insurers to appear and “be prepared to discuss by policy and annual period or portion thereof the original and remaining limits of Covil’s insurance policies under all applicable coverage parts” and virtually everything else that was at issue in the insurance disputes pending before the District of South Carolina and the Middle District of North Carolina. (Appx. 262).

C. The circuit court issued contempt orders against Covil’s insurers which include sweeping advisory opinions that attempted to create insurance coverage by rewriting the plain language of Covil’s actual insurance policies, and to change South Carolina insurance law, all in the name of a sanction.

The circuit court held its show cause hearing on November 12, 2019, and thereafter issued a contempt order on January 8, 2020. In that order, the circuit court—again, with no personal jurisdiction over the insurers, without any of the insurance issues actually pending before it, and without any kind of discovery process or evidentiary procedures—issued a 20-page ruling drafted and proposed by the Receiver that attempted to address and purported to resolve almost every insurance-related issue that is the subject of the declaratory judgment actions pending in the District of South Carolina and the Middle District of North Carolina. (Appx. 279).

The contempt ruling directly contravenes governing insurance law as well as the plain language of actual insurance contracts between Covil and its insurers, and even created additional coverage for Covil out of whole cloth, all as a purported sanction against entities that were not properly before the court. The order ended with an unprecedented instruction that “this Order be forwarded to the South Carolina Attorney General and to the South Carolina Department of Insurance for their consideration and further action, as they may deem appropriate.” (Appx. 301).³

³ USF&G and other insurers timely filed and served motions to reconsider the contempt order. (E.g., Appx. 303). It filed and served a notice of appeal with this Court out of an abundance of caution. (Appx. 332). And on February 7, 2020, USF&G filed and served a motion to stay the contempt order pending the resolution of the motion to reconsider and subsequent appeal, and

Critically for purposes of the instant motion to dismiss this appeal, the contempt order contained the same caption of five cases in which the orders in this appeal were entered. USF&G is not a party to any of those cases—none of Covil’s carriers are—yet neither the Receiver nor the circuit court has *ever* suggested that USF&G’s exclusion as a named party to that contempt order means that the contempt order does not apply to USF&G. To the contrary, the Receiver has repeatedly relied upon that order, citing it nearly a dozen times as supposedly “resolving” the insurance coverage issues between Covil and its insurers at issue in the federal coverage litigation. (*E.g.*, Appx. 904, 930, 934, 939, 956, 969, 1076, 1093, 1103).

Nor is the Receiver alone in attempting to misuse the contempt order. In virtually every new asbestos case filed since the order’s entry, asbestos plaintiffs—represented by the same counsel who sought the Receiver’s appointment in the first place—have sued USF&G and other insurers as direct defendants. They do not allege that these insurers manufactured or handled any asbestos-containing products that caused injury. They do not allege that these insurers owned any facilities where the plaintiffs breathed asbestos fibers. Instead, they allege that by providing Covil with a contractually-required defense under various insurance contracts, the insurers became the “alter ego” of Covil and in so doing, allegedly assumed its debts and liabilities.⁴ It is an extreme theory that finds zero support in the law from any court in the country—other than the contempt

sought prompt resolution of that motion given that numerous parties had been citing to and attempting to utilize the contempt order in multiple jurisdictions. (Appx. 385). The Receiver has not filed any opposition to either motion, but both motions remain pending and have not been argued or ruled upon by the circuit court. On June 19, 2020, the Supreme Court denied a Petition for a Writ of Supersedeas on the basis that no appeal is currently pending.

⁴ These cases include at least *Pavlish v. Covil Corp.*, 2019-CP-42-3968; *Hutto v. Covil Corp.*, Case No. 2019-CP-40-6956; *Hagan v. Armstrong Int’l, Inc.*, Case No. 2020-CP-40-265; *Rampey v. Covil Corp.*, Case No. 2020-CP-40-585; *Reilly v. Covil Corp.*, 2020-CP-40-952; *Jonas v. Air & Liquid Systems Corp.*, Case No. 2020-CP-40-1163; *Murphy v. Covil Corp.*, Case No. 2020-CP-40-1364; and *McCullough v. 4520 Corp.*, Case No. 2020-CP-40-01952.

order, from which the plaintiffs quote liberally to argue that the circuit court has already decided this issue, again without regard to the fact that USF&G is not a named party in the cases captioned in the contempt order. (*E.g.*, Appx. 620).

D. The District of South Carolina issued an injunction preventing the Receiver from seeking further rulings from the state court regarding Covil’s insurance coverage.

Following the circuit court’s issuance of the sanctions order, Judge Hendricks issued an order that should have put an end to the Receiver’s efforts to resolve coverage issues before the circuit court. Specifically, on February 27, 2020, in a 25-page decision, the federal court enjoined the Receiver from “further pursuing judicial determinations in underlying state tort suits regarding insurance coverage issues arising from policies issued or allegedly issued to Covil by the Insurers.” (Appx. 1031).

Judge Hendricks’s order suspended the Receiver’s cross-claims against USF&G and other insurers in the state-level asbestos cases—the same ones pushing the “alter ego” theory of liability—in which the Receiver has attempted to present all of the insurance coverage issues that are pending before two separate federal courts.

E. Despite the federal court’s injunction, the Receiver sought and received rulings from the circuit court regarding Covil’s insurance coverage that directly impair USF&G’s legal and contractual rights.

Despite Judge Hendricks’s injunction, the Receiver nevertheless pressed forward with filings to the circuit court, again with the amalgamated caption that appears on this appeal, although the Receiver has recently taken it upon itself to add to the caption, “In re: Receivership of Covil Corporation, by and through its Receiver Peter D. Protopapas.” On March 4, 5, and 6, 2020, the Receiver filed motions in each of the captioned cases for the circuit court to approve a “qualified settlement fund” for the Receiver to administer and use to pay claims against Covil, and

to approve settlement agreements that the Receiver entered with some of Covil’s insurers to provide the proceeds to that fund. (Appx. 395, 426, 432).

On March 13, 2020, the Receiver refiled those same motions to approve the qualified settlement fund and settlement agreements in *Pavlish v. Covil Corp.*, 2019-CP-42-3968. (Appx. 439.) *Pavlish* is one of the cases in which an asbestos plaintiff claims that Covil’s insurers were its “alter ego” because they provided a contractually-required defense after the company ceased operations.⁵ USF&G is a named defendant in *Pavlish*.

Because the Receiver’s motions raised several concerns for USF&G (and Zurich, which also objected to the motions), USF&G filed a limited objection. USF&G explained that it does not intend to impede the Receiver from settling with various other insurers, but objected to the Receiver’s proposed settlement order to the limited extent it encroached on USF&G’s right to protect itself from overpaying on asbestos claims against Covil without receiving any corresponding compensation or credit. On these limited issues, USF&G’s objections were, and remain, squarely on-point with South Carolina law in every material respect:

“Excess” Coverage: The Receiver proposed to establish a qualified settlement fund with cash deposited by the settling insurers, but to pay claims with those funds as if the settling insurers’ policies were excess policies that were obligated to pay claims only to the extent the non-settling insurers—USF&G and Zurich—did not have coverage to fully pay a claim. But the settling insurers’ policies were not solely excess-coverage policies. As a matter of settled South Carolina

⁵ Ms. Pavlish represents the estate of Mr. Beverly Dale Jolly. Like Messrs. Howe, Crawford, and Sizemore discussed above in the text, this Court is already familiar with Mr. Jolly’s case. It was tried to a jury verdict, and the jury awarded the plaintiffs \$300,000 in damages. Despite the jury’s findings as to damages, the trial court more than sextupled the jury’s award through *nisi additur* and then refused to set-off the resulting \$1.87 million damages from the amounts the plaintiffs had previously recovered through settlements with other defendants. That ruling is on appeal before this Court as Appellate Case No. 2017-002611, which has been fully briefed.

law, the Receiver is barred from rewriting the terms of Covil's insurance policies. *See, e.g., Nat'l Cash Register Co. v. Burns*, 217 S.C. 310, 313–14, 60 S.E.2d 615, 617 (1950) (“The general rule is that the appointment of a receiver will not change any existing contractual relation or create any new contractual relation or right of action thereon, and a receiver can do nothing to impair a contract as between the parties thereto.” (quoting 45 Am. Jur. 117)).

Contribution, Indemnity, and Subrogation Rights: The settlement approval motions also sought to eliminate USF&G's (and Zurich's, for that matter) rights to contribution, indemnification, and subrogation vis-à-vis other insurers to ensure that each insurer pays only its pro rata obligation for claims brought against Covil. This, too, is in violation of well-settled South Carolina law. *See, e.g., Canal Ins. Co. v. Ranger Ins. Co.*, 489 F. Supp. 492, 496 (D.S.C. 1980) (applying South Carolina law and stating that “[t]here is no question that an insurer which pays more than its proportionate share of a debt which is equally and concurrently due by another insurer, or other insurers, has a right to contribution from the others”); *Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 45, 717 S.E.2d 589, 591 (2011) (holding that “the scope of [each insurer's] liability is limited to damages accrued during its ‘time on the risk’”).

It is also contrary to the circuit court's contempt order of January 8, 2020, which specifically preserved each carrier's contribution rights. (*See* Appx. 300 (“Finally, each individual insurer will nevertheless be protected fully against the possibility that it paid too much on a single asbestos claim by its right to seek contribution from any other insurer, but not from Covil, whose policy also was triggered by the asbestos suit.”)).⁶

⁶ As noted above, USF&G has filed a Rule 59 motion with respect to this order, which has been pending since January 17, 2020. Regarding this issue, though, it is notable that the circuit court previously recognized USF&G's right to contribution and to not pay more than its pro rata share for asbestos claims.

And it is contrary to the plain language of USF&G’s policy with Covil, which contains an unambiguous subrogation clause. (*See* Appx. 1171 (“Section 14. In the event of any payment under this endorsement the Company shall be subrogated to all of the Insured’s rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do whatsoever else is necessary to secure such rights.”)). As noted above, it is impermissible for a court to rewrite or eliminate contractual obligations through a receivership. *See National Cash Register*, 217 S.C. at 317, 60 S.E.2d at 618 (“Receivership may affect procedure upon, but not the substance of, contract obligations.”).

* * * * *

USF&G filed its limited objection on March 20, 2020. While it was in the process of uploading its objection in each of the cases in which the Receiver filed its motions, the Receiver filed a “notice of withdrawal” of its motions with respect to the *Pavlish* case, the only case in which the approval motion was filed in which USF&G is a named defendant. (*Compare* Appx. 493 (filing timestamp of 3:21 pm on March 20, 2020, for USF&G’s limited objection in the *Howe* case), *with* Appx. 486 (filing timestamp of 3:37 pm on March 20, 2020, for the Receiver’s notice of withdrawal of its motions in the *Pavlish* case)).

This withdrawal was apparently filed to manufacture an argument that USF&G lacked standing to voice its limited objection because it was not included in the caption of any of the other cases in which the Receiver filed its motions (though none of the other insurers—settling or otherwise—are included in those captions, either). Despite the fact that the Receiver sought to enjoin and limit USF&G’s rights of contribution, indemnity, and subrogation, the Receiver’s chief argument against USF&G’s limited objection was that USF&G does “not have standing to seek

any relief in these cases, including relief related to the Qualified Settlement Fund, or ‘QSF.’” (Appx. 515).

Notwithstanding the Receiver’s standing argument, the circuit court initially acknowledged, as USF&G had noted, that the Receiver’s submissions violated Judge Hendricks’ injunction and sought to do more than simply approve private settlements as between the settling parties. In particular, via an email on April 9, 2020, the circuit court instructed the Receiver to modify its proposed settlement order to “[m]ake it clear that I am *making no determinations* regarding insurance policy coverage or *contributions*.” (Appx 1199 (emphasis added)).

The Receiver ignored this instruction and submitted a proposed order that explicitly purports to alter Covil’s historic insurance coverage and prejudicially impacts USF&G’s (and Zurich’s) contribution, indemnification, and subrogation rights. On April 10, 2020, the circuit court entered this proposed order proposed less than 45 minutes after it was emailed to the circuit court. (Appx. 559, 590). There was no hearing on USF&G’s objections. The order approves of a settlement fund of \$44.5 million, of which the Receiver and its counsel are entitled to recover 33.3%, plus its costs to date, plus an ongoing, undisclosed management fee. (Appx. 559).

On April 20, 2020, USF&G timely filed a Rule 59 motion to reconsider that order, again emphasizing the limited nature of its objection, but making clear that the order wrongly impairs USF&G’s rights of contribution, subrogation, and indemnification that are unmistakable as a matter of South Carolina law and its insurance policy with Covil. (Appx. 725).⁷ That same day,

⁷ USF&G’s Rule 59 motion also noted for the circuit court’s awareness that USF&G had recently become aware of the fact—pursuant to discovery materials produced by Zurich in the coverage case pending in the Middle District of North Carolina—Judge Simmons had judicially dissolved Covil in 1992 and had deemed all of Covil’s remaining assets abandoned. (Appx. ____.) USF&G and others, including the Receiver, had historically believed that Covil was administratively dissolved by the Secretary of State in 1993. However, in April 2020, counsel for Zurich discovered Judge Simmons’s orders judicially dissolving Covil. The orders judicially

the Receiver retaliated against USF&G for attempting to protect its legal and contractual rights by filing a motion for sanctions pursuant to Rule 11 and the South Carolina Frivolous Civil Proceedings Sanctions Act. (Appx. 710).

By order dated May 7, 2020, the circuit court denied USF&G's motion to reconsider. It disregarded all of USF&G's arguments regarding the impairment of USF&G's rights, noting: "The Court has ruled that the Objecting Insurers are not parties to these actions, have failed to avail themselves of the procedures available to become parties to these actions, and therefore lack standing to file any objections in these actions." (Appx. 764). On May 18, 2020, the Receiver filed yet another sanctions motion, this time seeking Rule 11 and Frivolous Civil Proceedings Act sanctions against USF&G and its counsel personally for filing a Rule 59 motion that is, of course, required by South Carolina appellate law and asserting positions concerning Covil's judicial dissolution that would have benefited Covil. (Appx. 765).

The Receiver now asks this Court to dismiss USF&G's timely appeal of the settlement approval orders that squarely enjoin its rights. Yet again, the Receiver tries to intimidate USF&G from protecting itself against rulings that are directly contrary to basic norms of due process,

dissolving Covil give rise to the statute of repose contained in South Carolina Code § 33-14-107, which bars all known and unknown claims that are not filed within a certain period of time following publication of notice of the dissolution. That time period—whether five years, pursuant to a pre-2004 statutory amendment, or ten years following that amendment—has long since expired, and should give rise to a complete, unwaivable, un-tollable defense to Covil against all asbestos claims. *See G&P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003) (holding that a statute of repose is not subject to "counter-assertions, such as waiver, tolling, and estoppel"). USF&G duly apprised the circuit court of this new issue, but specifically stated that the situation was still being investigated and "will be raised separately in the appropriate proceedings and with further briefing." (Appx. 725). Despite the fact that the issue was not perfected for the circuit court's consideration, and despite the Receiver's obligation to minimize Covil's liabilities, the Receiver invited the circuit court to devote eleven pages of its order denying USF&G's Rule 59 motion to discussing the prior receivership and ruling that it did not give rise to any defenses in lawsuits against Covil. (Appx. 5 –15.)

personal jurisdiction, and South Carolina insurance law by threatening that it “may seek additional appropriate relief as permitted under South Carolina law” against UFS&G for this appeal. (Motion to Dismiss at 4, n.1.) This Court should not endorse such sharp litigation tactics, nor should it dismiss this appeal, which is properly before the Court.

APPELLATE JURISDICTION

On June 12, 2020, this Court issued a letter requesting that the parties address the appealability of the orders on appeal. There is no doubt that those orders are appealable, and this is so for several reasons. *See Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 178–79 (1990) (acknowledging that an order may be appealable for multiple reasons).

I. “Final Order Affecting a Substantial Right”

South Carolina Code § 14-3-330(3) authorizes appeals of “[a] final order affecting a substantial right made in any special proceeding,” such as the present matter. As explained above, the orders on appeal not only affect, but impair, USF&G’s contractual and legal rights to ensure that it does not pay more than its pro rata share for claims brought against Covil. *See, e.g., Canal Insurance*, 489 F. Supp. at 496 (holding that, as a matter of South Carolina law, “an insurer which pays more than its proportionate share of a debt which is equally and concurrently due by another insurer, or other insurers, has a right to contribution from the others”); *Crossmann*, 395 S.C. at 45, 717 S.E.2d at 591 (holding that “the scope of [each insurer’s] liability is limited to damages accrued during its ‘time on the risk’”).

Moreover, these orders are final, as *there is no actual case pending before the circuit court involving management of the receivership*, and there is no “further act which must be done by the court prior to a determination of the rights” set forth in orders. *Mid-State Distribs., Inc. v. Century*

Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). Accordingly, this Court has appellate jurisdiction pursuant to Section 14-3-330(3).

II. “Intermediate Judgment . . . Involving the Merits”

Alternatively, if the Court believes that the receivership proceeding is somehow the amalgamation of the five cases listed in the caption to this appeal—which, again, have never been consolidated by the lower court or the subject of any pleading asserted on behalf of the Receiver—and that there are some presently-unknown activities left for the circuit court to undertake with respect to the receivership, then the Court has appellate jurisdiction over these orders by virtue of South Carolina Code § 14-3-330(1). That section permits appeals of intermediate judgments that “involv[e] the merits.” *Id.* A decision “involv[es] the merits” when it “finally determin[e]s some substantial matter forming the whole or a part of some cause of action or defense” between the litigants. *Mid-State Distributors*, 310 S.C. at 334, 426 S.E.2d at 780 (quoting *Jefferson v. Gene’s Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)).

Here, the circuit court’s orders finally determine that USF&G (and Zurich, too, for that matter) are prohibited from asserting its rights to contribution, subrogation, and indemnification against Covil’s other insurers. (Appx. 483 –485.) There is no other mechanism in the state court system that can or will address this issue, making it a “final determination” of the point (as far as the circuit court is concerned) and eligible for appeal even if these orders are viewed as intermediate pursuant to South Carolina Code § 14-3-330(1).

III. “Order . . . Modifying . . . the Appointment of a Receiver”

This appeal may also proceed under South Carolina Code § 14-3-330(4), which provides that an immediate appeal can be taken of an order “granting, continuing, modifying, or refusing the appointment of a receiver.”

By the plain terms of the orders on appeal, the circuit court has morphed the Receiver from one who is marshaling assets for a long-defunct and previously-dissolved company to a claims administrator who has been given a fund of \$44.5 million—less the Receiver’s 33.3% contingency fee, unspecified costs incurred to date, and unspecified “management” fees going forward—to pay and administer claims brought by the very plaintiffs who are responsible for his appointment in the first place. And by the plain language of the settlement fund’s operating agreement, the Receiver is now able to administer the fund and pay claims “free of the supervision of the Court,” and the Receiver “shall not be required to file with the Court any inventories or accountings” of how the fund’s proceeds have been disbursed. (Appx. 413 – 414 ; Art. VI, §§ 6.1, 6.3 of QSF Operating Agreement). This new and expanded authority and autonomy marks a sea change to the scope of the receivership, and it renders the orders appealable pursuant to Section 14-3-330(4).

IV. “Order . . . Granting . . . an Injunction”

Fourth and finally, South Carolina Code § 14-3-330(4) also makes appealable any order “granting, continuing, modifying, or refusing an injunction.”

The circuit court orders specifically hold that “all [c]laims for contribution, indemnification, subrogation, or otherwise” against Covil’s carriers who are settling with the Receiver “*by other insurers of Covil are barred*” and must be brought only against the settlement fund, though there has been no analysis whatsoever to ensure that the fund will have sufficient resources to make whole the “other insurers of Covil.” (Appx. 583) (emphasis added)). Because the circuit court is attempting to enjoin USF&G’s ability to enforce its rights, the orders are immediately appealable pursuant to Section 14-3-330(4). *See, e.g., Gibbs v. Kimbrell*, 311 S.C. 261, 271, 428 S.E.2d 725, 731 (Ct. App. 1993) (reiterating that injunctions, even if temporary, are immediately appealable pursuant to South Carolina Code § 14-3-330(4)).

ARGUMENT

I. Because the circuit court’s orders directly impact—and, in fact, target USF&G—it has standing to appeal.

The Receiver asks the Court to dismiss this appeal because USF&G is not a “party” to the orders that directly impact USF&G’s contractual and legal rights. But this is not the law.

South Carolina’s appellate courts regularly adjudicate appeals of non-parties in a wide variety of circumstances. *See, e.g., State v. Smith (In re Decker)*, 322 S.C. 212, 212–15, 471 S.E.2d 459, 460–61 (1995) (holding that a non-party reporter who had been incarcerated for refusing to disclose confidential sources associated with the Susan Smith criminal case could appeal that contempt order); *State v. Register (In re Doe)*, 308 S.C. 534, 536–38, 419 S.E.2d 771, 772–73 (1992) (authorizing a non-party minor’s appeal of an order requiring her “to provide samples of her blood, saliva, and pubic and head hair for testing,” and vacating the ruling below because it did not satisfy “constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures”); *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881–82 (1986) (“Instead of appealing immediately, a non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and *appeal after he is held in contempt for his failure to comply.*”) (emphasis added); *Ex parte S.C. DOR*, 350 S.C. 404, 406–08, 566 S.E.2d 196, 197–99 (Ct. App. 2002) (vacating an order that extinguished a tax lien after the trial court conducted a foreclosure sale of mortgaged property in 2000, realized in 2001 that the Department of Revenue—which was not a party to the foreclosure action—had a lien on that property, and then attempted to terminate that tax lien by issuing a show cause order requiring the agency to explain why its lien should not be extinguished pursuant to the earlier foreclosure order to which the agency was not a party).

As illustrated by *Ex parte S.C. DOR*, third parties have a right to appeal a trial court order impacting the third party's rights that is issued without the trial court first acquiring personal jurisdiction over the third party or making the third party an actual party to the case. That is precisely what happened here. None of the receivership proceedings have legitimately haled USF&G before the circuit court, and USF&G has repeatedly objected to its involvement—including the series of “status conferences,” the January 8, 2020 contempt order, and now the orders presently on appeal. Yet its rights have been expressly and continuously impaired by the circuit court's rulings. *Ex parte S.C. DOR* makes clear not only that USF&G has standing to appeal, but that those orders must be vacated as to USF&G, at the very least for lack of personal jurisdiction.

Contrary to the Receiver's argument, there is nothing talismanic about the term “party.” Instead, “there are no material distinctions between the requirements of establishing standing under general standing principles and the requirements to appeal pursuant to Rule 201(b), SCACR.” Jean Hoefer Toal et al., *Appellate Practice in South Carolina* at 131 (3d ed. 2016) (citing *Powell v. Bank of Am.*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008)).

In *Powell*, this Court explained that the analysis for a litigant's ability to appeal under Rule 201(b), SCACR, coincides with the traditional three-part test for Article III standing: an injury-in-fact, traceable to the acts of the adversary, that can be redressed by a favorable ruling by the court. 379 S.C. at 444, 665 S.E.2d at 241. This is why non-parties—such as the source-protecting newswoman, an involuntarily-searched minor, an unwilling recipient of a discovery subpoena, and a lienholder whose lien is wiped out in litigation to which it was never included as a defendant—have been able to appeal rulings that applied to them even though they were not “parties” to the cases in which those orders were entered.

USF&G readily meets this threshold. The orders on appeal specifically call out USF&G and Zurich—“other insurers of Covil,” in the circuit court’s parlance and among the only insurers currently defending and indemnifying Covil in the underlying asbestos lawsuits—and bar them from enforcing their rights to “contribution, indemnification, subrogation, or otherwise” with respect to Covil’s carriers who are supplying the Receiver’s settlement fund. (Appx. 58.) Such a prohibition is contrary to USF&G’s insurance contract with Covil, as well as the established South Carolina law. *See, e.g., Crossmann*, 395 S.C. at 45, 717 S.E.2d at 591 (holding that “the scope of [each insurer’s] liability is limited to damages accrued during its ‘time on the risk’”). USF&G has suffered an injury-in-fact by having its rights cut off by the circuit court; that injury is the result of the Receiver’s efforts to cut those rights off; and this Court can readily redress that injury by vacating those orders, or at least blue-penciling out the provisions that apply to USF&G.

The cases cited in the Receiver’s motion do not require a different outcome. In both *Ex parte South Carolina Department of Motor Vehicles*, 390 S.C. 457, 702 S.E.2d 568 (2010), and *Condon v. State*, 354 S.C. 634, 583 S.E.2d 430 (2003), the putative appellants had nothing to do with the proceedings at the lower court. Instead, both, without moving to intervene below, voluntarily attempted to interject themselves into cases and rulings that did not impact them directly. Their private rights were never even addressed, much less impaired, by any order issued by the circuit court. *See DMV*, 390 S.C. at 457, 702 S.E.2d at 568 (noting that the disputed order simply authorized a citizen to get a driver’s license, and that the state had already been represented in the proceedings by the solicitor’s office, who did not object to the citizen’s request); *Condon*, 354 S.C. at 636–37, 642, 583 S.E.2d at 431–32, 434 (explaining that the attorney general “wishe[d] to become involved in a case” involving attorneys’ fees being awarded to other litigants under a settlement agreement, even though the agreement did not involve or impact the attorney general’s

office in any way). At most, *DMV* and *Condon* require non-parties who are not the subject of any adverse decision by a trial court to first seek intervention at the trial level before they have standing to appeal.

That is a far cry from this case, for several reasons. First, unlike the putative appellants in *DMV* and *Condon* who tried to elbow their way into the case, USF&G has specifically objected to its involvement in the receivership proceedings and has stated its objection every way it knows how to stay *out* of those proceedings. The circuit court has no personal jurisdiction over USF&G—no summons has ever been issued with respect to the so-called receivership proceedings—and the insurance issues (the only issues that actually impact USF&G) are already pending before the District of South Carolina and the Middle District of North Carolina, meaning that the circuit court could not proceed with adjudicating them even if they were rightly joined at the state level because of Rule 12(b)(8), SCRPC, and its unambiguous prohibition against circuit courts adjudicating duplicative litigation. USF&G does not have to waive and forfeit that constitutionally-provided objection in order to have standing to appeal.

Second, unlike the orders on appeal in *DMV* and *Condon* that did not target the putative appellants, USF&G's rights are expressly put at issue, and impaired, by the circuit court's orders involved in this appeal. Despite not being a "party" below, USF&G has been involuntarily dragged into this dispute by virtue of the orders on appeal.

Third and finally, USF&G had no obligation to intervene in these cases in order to prevent the Receiver and the circuit court from impairing its rights and increasing its obligations. Indeed, the Supreme Court recently reiterated that insurers have no right to intervene in litigation involving an insured and, in fact, recognized that doing so could run contrary to Rule 411, SCRE, and related cases that deem evidence of liability insurance to be generally inadmissible. *Builders Mut. Ins. Co.*

v. Island Pointe, LLC, Op. No. 27970, 2020 S.C. LEXIS 68, at *4–13 & n.1 (S.C. Sup. Ct. filed May 13, 2020) (Shearouse Adv.Sh. No. 19 at 48). Here, there are no claims against USF&G in the underlying personal injury actions, and there is no pleading that would require or even permit USF&G to participate in the cases as a named party. If insurers have no right to intervene in an insured’s case and doing so would violate established law, it cannot be the case that USF&G was required to take a futile and impermissible act in order to have standing to appeal.

At bottom, if the Receiver’s argument were accepted, a trial court could issue *any* order directing *any* third party to undertake *any* actions or cutting off *any* of the third party’s rights, and the third party would be helpless to appeal such an order unless it voluntarily subjected itself to the trial court’s jurisdiction. Notably, in the other pending lawsuits that do name USF&G under novel and improper theories of alleged “alter ego” liability, USF&G has moved to dismiss on the basis that the exercise of personal jurisdiction over USF&G with respect to such claims would violate controlling United States Supreme Court and South Carolina precedent. Intervening would require USF&G to risk waiving those defenses in other lawsuits solely to prevent the encroachment of its rights in the above-captioned cases—a Hobson’s choice that the Due Process Clause forecloses and that *Ex parte S.C. DOR* and the myriad other cases cited above confirm is not the law. The Court should deny the Receiver’s motion to dismiss this appeal accordingly.

II. If USF&G does not have standing to appeal, then the orders on appeal are void on their face insofar as they relate to USF&G.

As a corollary to the arguments above, if USF&G does not have standing to appeal the orders presented here, then those orders cannot apply to USF&G. In a sense, the Receiver’s motion to dismiss has actually made USF&G’s chief appellate argument for it: because the Receiver never made USF&G a “party” to the receivership proceedings, orders entered against USF&G in those proceedings are void *ab initio* insofar as they relate to USF&G.

This conclusion is inescapable from a straightforward application of personal jurisdiction jurisprudence. “Personal jurisdiction is another essential component of a court’s power to hear and decide cases, as it refers to the ability of a court to bring a particular person into its adjudicative process.” Toal, *Appellate Practice in South Carolina* at 117.

When, as here, a court enters an order without first securing jurisdiction over an entity through issuance of a summons or other process that provides at least thirty days to respond to specific claims, that order is void. *See, e.g., Citizens & Southern Nat’l Bank v. First Palmetto State Bank & Trust Co.*, 279 S.C. 252, 253–54, 305 S.E.2d 80, 80–81 (1983) (reversing a rule to show cause order issued against a bank seeking to force it to release a mortgage that had been the subject of prior litigation because the bank “was not made a party” to the case and “the court did not acquire jurisdiction” over the bank with the show cause order); *Ex parte S.C. DOR*, 350 S.C. at 408, 566 S.E.2d at 198–99 (holding that because no summons or equivalent had been served on the Department of Revenue to make it a party to litigation involving property on which the agency had a lien, “the master lacked personal jurisdiction over SCDOR, and the order binding it to the master’s initial Judgment of Foreclosure and Sale ***is void and must be vacated***”) (emphasis added).

USF&G has never been served with a summons or with any other process that could somehow bring it within the circuit court’s jurisdiction with respect to the *ad hoc* receivership proceedings; there is no dispute about this. While USF&G intends to present this “lack of personal jurisdiction” argument as one of several issues in its appellate briefing, the outcome of this appeal should be the same even if the Court is inclined to accept the Receiver’s dismissal argument, as the natural consequence of the Receiver’s argument is that all of the receivership proceedings are improper with respect to USF&G, and the circuit court’s orders are void *ab initio* for lack of jurisdiction.

Accordingly, if the Court accepts the Receiver’s dismissal argument, such a dismissal will necessarily mean that the orders on appeal do not apply to USF&G as a matter of law because of its “non-party” status to the receivership proceedings from which those orders came. The long-settled law of personal jurisdiction—a constitutional requirement imposed by the Due Process Clause—compels this outcome.

CONCLUSION

This Court should not simply turn a blind eye to the proceedings below. Without jurisdiction, the circuit court has issued orders that attempt to (a) limit or erase USF&G’s contractual and legal rights; (b) enjoin USF&G from asserting those rights; and (c) empower the Receiver and broaden the scope of the receivership. Those orders are appealable for multiple reasons, and this Court has appellate jurisdiction over them.

However, the Receiver cannot have it both ways. Either the Court rejects the Receiver’s argument and USF&G has standing to appeal those orders, or the Court accepts the Receiver’s argument and those orders cannot bind USF&G as a matter of hornbook law regarding personal jurisdiction. *E.g., Ex parte S.C. DOR*, 350 S.C. 408, 566 S.E.2d at 198–99. In all circumstances, though, the orders on appeal cannot apply to USF&G or impair its rights on a going-forward basis.

Respectfully submitted,

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* Pro Hac Vice admitted – *Hopper*, 2019-CP-40-00076

** Pro Hac Vice admitted - *Roxanne Falls*, 2015-CP-46-02155

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June 22, 2020

Carroll, Todd

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Subject: RE: Appellate Case No. 2020-000845 - Respondent's Memorandum on Appealability

Attachments: Proof of Service of Return in Opposition to Motion to Dismiss Appeal (Appellate Case No. 2020-000845).pdf; USF&G's Return in Opposition to Motion to Dismiss Appeal (Appellate Case No. 2020-000845).pdf

Counsel,

Please find attached USF&G's return in opposition to the Respondent's motion to dismiss Appellate Case No. 2020-000845, along with a proof of service. These materials, along with an accompanying appendix, are being e-filed today and are served on you pursuant to subsection (g)(3) of the South Carolina Supreme Court's amended order discussing the operation of the appellate courts during the coronavirus emergency. The appendix can be downloaded through the link below, which has no sign-in requirements and does not require any credentialing in order to access the materials:

<https://download.wbd-us.com/bds/Login.do?id=A0555821112&p1=o2j007wsbgggjdcccdlccffijj20>

Best,

Todd

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Subject: Appellate Case No. 2020-000845 - Respondent's Memorandum on Appealability

EXTERNAL EMAIL: Open Attachments and Links With Caution.

Good Afternoon,

Please find attached a copy of Respondent's Memorandum on Appealability that is being filed in the Court of Appeals today, served on you pursuant to subsection (g)(3) of the South Carolina Supreme Court's amended order discussing the operation of the appellate courts during the coronavirus emergency.

Thank you,

Shanon



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June 22, 2020

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Jun 22 2020

SC Court of Appeals

Via Electronic Filing

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Ex Parte: USF&G v. Protopapas, in his capacity as Receiver of Covil Corp.*
Return in Opposition to Motion to Dismiss Appeal
Appellate Case No. 2020-000845

Dear Ms. Kitchings:

Please find accompanying this letter USF&G's Return in Opposition to Motion to Dismiss Appeal and an appendix accompanying the same. In the Return, USF&G also addresses the issues raised in the Court's letter of June 12, 2020, which sought input regarding the appealability of the orders involved in this appeal.

These materials are being e-filed pursuant to the Supreme Court's Order 2020-05-29-02 regarding Operation of the Appellate Courts During the Coronavirus Emergency. We have also served this filing via email on counsel in this matter, as permitted by Section (g)(3) of that same order.

We appreciate the Court's consideration of this submission. If the Court has any difficulty opening these electronically-submitted materials, please let us know, and we will be pleased to submit it via an alternate method.

Best regards,

/s/ M. Todd Carroll

Attachments

cc: All Counsel of Record