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Jun 06 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hofer Toal, Chief Justice (Ret.)

Case No. 2020-CP-40-02098

Appellate Case No. 2022-000761

Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas,

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance, Co.; Sam J. Crain & Co., Inc.; and South
Carolina Property and Casualty Insurance Guaranty Association, Defendants,

Of whom Pennsylvania National Mutual Casualty Insurance Company is the Appellant.

MOTION TO DISMISS APPEAL OF INTERLOCUTORY DISCOVERY ORDERS

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Peter D. Protopapas, in his capacity as the Receiver for Covil Corporation (“the Receiver”), by and through the undersigned counsel, respectfully requests this Court dismiss the frivolous Notice of Appeal filed by Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) on May 31, 2022.

In contradiction to decades worth of case law governing appealability, Penn National improperly attempts to appeal two interlocutory discovery orders filed by the Honorable Jean

Hoefer Toal on May 5, 2022, and May 26, 2022.¹ The circuit court captured the essence of the underlying matter in its May 26 order denying Penn National’s Motion for Reconsideration:

This matter is an ongoing discovery issue, revolving around Penn National’s refusal to produce insurance policies, and this is not immediately appealable. Accordingly, a Motion for Reconsideration is inappropriately raised. The South Carolina Supreme Court has held, “an order denying or compelling pretrial discovery is not directly appealable since it is an intermediate or interlocutory decision. (citations omitted).”²

South Carolina law is clear—and has been clear for many years—that an order granting a motion to compel and directing a party to participate in discovery is an interlocutory order that is not immediately appealable. *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) (holding discovery orders are interlocutory and are not immediately appealable because they do not involve the merits of the action or affect a substantial right); *Ex Parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) (“An order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14–3–330 (1976)”); *Ex Parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (“[A]n order denying or compelling pretrial discovery is not directly appealable since it is an intermediate or interlocutory decision.”).³

¹ For clarity, the May 5, 2022 order is captioned “Order on Discovery Motions,” and the May 26 order denies a motion for reconsideration of the May 5 Order on Discovery Motions.

² May 26, 2022 Order at 2.

³ Pursuant to section 14-3-330 of the South Carolina Code, appellate courts have jurisdiction over interlocutory orders only if the interlocutory order involves the merits; affects a substantial right; or grants, continues, modifies, or refuses an injunction or receivership. “An order involves the merits when it ‘finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense[.]’” *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017) (quoting *Mid-State Distributions, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). An order affects a substantial right when it “(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial, or (c) strikes out an answer or any part thereof or any pleading in any action.” S.C. Code Ann. § 14-3-330(2). The orders made the basis of this appeal very obviously do not affect substantial rights.

The orders Penn National attempts to appeal are clearly interlocutory discovery orders. By its very terms, the May 5, 2022 order, entitled “Order on Discovery Motions,” arose from “various discovery disputes between” Covil and Penn National.⁴ Moreover, the circuit court’s May 26, 2022 order denying Penn National’s motion to reconsider the May 5 order went so far as to say “Orders involving discovery disputes such as this do not qualify as appealable Orders.”⁵

The introduction to the May 5 Order on Discovery Motions lists the following discovery matters under consideration by the circuit court:

Ellis & Winters LLP’s March 22, 2022 letter report on its inquiry into the existence and storage of certain historic policy documents pursuant to this Court’s November 5, 2021 Discovery Order; the Receivers’ February 24, 2022 Motion to Compel and April 1, 2022 Supplemental Motion to Compel; the Receiver’s March 17, 2022 Motion to Challenge the Confidentiality of Certain Documents; Penn National’s December 22, 2021 Motions to Quash; and Penn National’s April 7, 2022 Motion to Seal.⁶

By way of background, these orders arise from ongoing discovery disputes between Covil and Penn National over Penn National’s prolonged refusal to produce historic policy documents to Covil. As recognized by the circuit court, Covil has “diligently pursued discovery of all insurance policies issued by Penn National that cover Covil, in any way, through written requests for information as well as multiple depositions” and Penn National has continuously refused to produce the information under the guise that it is unable to locate historic policy documents without a policy number and the material is too voluminous to manually search. (May 5 Order on Discovery Motions at 4–6.) Accordingly, the circuit court “ordered Penn National to open its repository of insurance policies and to facilitate a review performed by Covil’s insurer-appointed

⁴ May 5 Order on Discovery Motions at 1.

⁵ May 26 Order at 2. In this order, the circuit court also noted that “Penn National’s Motion for Reconsideration does not recite an accurate reflection of this Court’s Order or the activity of the parties in this protracted discovery dispute.”

⁶ May 5 Order on Discovery Motions at 1.

defense counsel, Ellis & Winters” and directed Ellis & Winters to “report back to the Court with suggestions for meeting Covil’s needs to identify responsive coverage while not wasting Penn National’s resources.” (May 5 Order on Discovery Motions at 7).

This process occurred over a period of several months, and Ellis & Winters submitted their recommendations to the circuit court on March 22, 2022. (*Id.*) The Ellis & Winters report “provided an array of options for imaging and review of Penn National’s policies, even in the absence of a policy number.” (*Id.*) On April 11, 2022, the circuit court held a hearing on the ongoing discovery issues related to the Ellis & Winters report and Covil’s motions to compel. The Ellis & Winters report revealed Penn National’s abject failure to participate in the discovery process without the circuit court’s intervention and oversight. Importantly, and highlighted by the circuit court, “The Report also explained that, after one day of in-person searching within the microfiche cards at Penn National’s headquarters, Ellis & Winters located three newly discovered policies covering Covil that Penn National had not produced to Covil.” (May 5 Order at 7.) As aptly stated by the circuit court, the ongoing discovery disputes have caused the court to lose “all confidence in Penn National’s willingness and ability to independently participate in discovery” and Penn National’s conduct “amounts to a total and complete refusal to comply with its discovery obligations.” (May 5 Order on Discovery Motions at 8.) Therefore, the circuit court found it had no choice but to intervene and direct Penn National to meaningfully participate in discovery.

Specifically, the circuit court ordered Penn National to (1) digitize certain microfiche records and produce the digitized records to the Receiver, (2) produce code keys for its policy prefixes to the Receiver, (3) produce all information disclosed to Ellis & Winters used as a basis for identifying policy numbers for three newly discovered Covil insurance policies, and (4) produce all underwriting documentation in its possession, custody, or control for various

receiverships. (May 5 Order on Discovery Motions at 9–10.) The Court also found Penn National was responsible for bearing the cost of complying with their own discovery obligations and put certain parameters in place to ensure the confidentiality of Penn National’s insureds’ information. (May 5 Order on Discovery Motions at 11–12.) The Court also found the Receiver was entitled to take a deposition of Penn National pursuant to Rule 30(b)(6) of the South Carolina Rules of Civil Procedure. (May 5 Order on Discovery Motions at 15.) Penn National filed a motion requesting the circuit court reconsider the May 5 order, and the circuit court declined. (May 26 Order.) In short, the orders made the subject of this appeal relate only to discovery.

As such, the May 5 and May 26 orders are clearly interlocutory discovery orders that are not subject to an immediate appeal. The orders direct Penn National to produce a multitude of documents that it has previously refused to produce. Because of Penn National’s failure to abide by its discovery obligations, the circuit court had to intervene to direct Penn National on the specific documents it needed to produce and on the exact manner it expected Penn National to take to facilitate the production. This is simply another order in a long line of orders that the circuit court has been forced to issue due to Penn National’s unwillingness to meaningfully participate in discovery without the circuit court’s intervention.

Neither the May 5 nor May 26 orders make any contempt findings against Penn National. Although the circuit court discusses Penn National’s various failures in the discovery process, the circuit court has not yet held Penn National in contempt for refusing to comply with any orders. However, the circuit court has been forced to micromanage the discovery dispute to instruct Penn National on how to adequately meet its discovery obligations under our rules of civil procedure.

This appeal is ripe for dismissal because it is simply Penn National’s attempt to further delay matters, neglect its legal obligations to participate in discovery, and avoid going to trial on

the underlying issues. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 14 (2000) (noting “the avoidance of a trial is not a sufficient reason to justify immediate appellate review”). Unfortunately, this is not the first time Covil’s insurers have attempted to abuse our appellate courts to subvert justice. For example, in a separate case, other insurers of Covil attempted to appeal a similar interlocutory discovery order of the circuit court "requiring [the insurers] to locate and disclose a large number of documents,” and the Supreme Court dismissed the appeal because “discovery orders are not appealable” and denied the contemporaneously filed Petition for Writ of Certiorari. *See Exhibit A, October 16, 2019 Orders, Appellate Case No. 2019-001651.* In denying Penn National’s Motion for Reconsideration, the circuit court noted in its Order that the Motion for Reconsideration was “inappropriately raised” and cited for the parties the governing South Carolina law holding that discovery orders are not immediately appealable. (May 26 Order at 2.) Nevertheless, in flat disregard of the authority provided to Penn National by the circuit court, Penn National has continued to waste the time of our Courts by taking this meritless appeal.

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Receiver respectfully requests that the Court dismiss the Notice of Appeal filed by Penn National on May 31, 2022. The circuit court orders Penn National attempts to appeal are not immediately appealable, and the Court should refuse to expand the narrow construction of section 14-3-330 and ignore clear South Carolina law to allow Penn National to continue to evade its discovery obligations.

(Signature page follows)

Respectfully submitted,

s/Shanon N. Peake

G. Murrell Smith, Jr. (S.C. Bar # 66263)

Jonathan M. Robinson (S.C. Bar # 68285)

Shanon N. Peake (S.C. Bar #102723)

Smith Robinson Holler DuBose and Morgan, LLC

2530 Devine Street, Suite 1B

Columbia, South Carolina 29205

(803) 254-5445

ATTORNEYS FOR RESPONDENT

June 6, 2022.

EXHIBIT A

The Supreme Court of South Carolina

Ex Parte: Zurich American Insurance Company, Sentry Insurance a Mutual Company and United States Fidelity and Guaranty Company, Appellants.

In Re:

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

v.

CBS Corporation, et al., Defendants,

In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopas, Respondent.
and

Timothy W. Howe Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe, Plaintiffs,

v.

Air & Liquid Systems Corporation, et al., Defendants,

In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopas, Respondent.

and

Charles T. Hopper and Rebecca Hopper, Plaintiffs,

v.

Air & Liquid Systems Corporation, et al., Defendants,

In Re: Receivership of Covil Corporation by and through
its Receiver Peter D. Protopas, Respondent.

and

James Michael Hill, Plaintiff,

v.

Advance Auto Parts, Inc., et al., Defendants.

In Re: Receivership of Covil Corporation by and through
its Receiver Peter D. Protopas, Respondent.

and

Denver D. Taylor and Janice Taylor, Plaintiffs,

v.

Air & Liquid Systems Corporation, et al., Defendants,

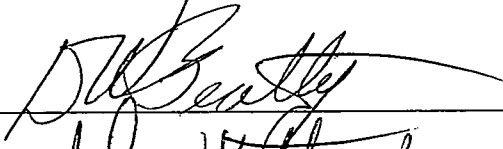
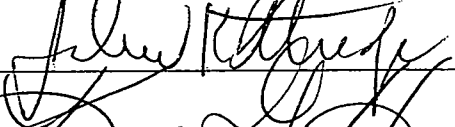
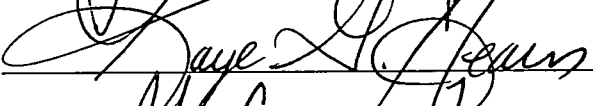

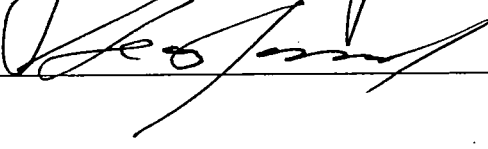
In Re: Receivership of Covil Corporation by and through
its Receiver Peter D. Protopas, Respondent.

Appellate Case No. 2019-001651

ORDER

Petitioners have filed Notices of Appeal from an order of the circuit court requiring
Petitioners to locate and disclose a large number of documents to Respondent.
Because discovery orders are not appealable, we dismiss the Notices of Appeal.
See Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 S.E.2d 112, 122, (2008) (holding
discovery orders are interlocutory and are not immediately appealable because they
do not involve the merits of the action or affect a substantial right); *Patterson v.*

Specter Broad. Corp., 287 S.C. 249, 249, 335 S.E.2d 803, 803 (1985) (holding an order compelling discovery is not immediately appealable).

	C.J.
	J.
	J.
	J.
	J.

Columbia, South Carolina

October 16, 2019

cc:

- Peter H. Dworjanyn, Esquire
- Laura Ruth Baer, Esquire
- Robert G. Rikard, Esquire
- Jescelyn Tillman Spitz, Esquire
- G. Murrell Smith, Jr., Esquire
- Jonathan M. Robinson, Esquire
- Wesley Brian Sawyer, Esquire
- William Pearce Davis, Esquire

The Supreme Court of South Carolina

Ex Parte: Zurich American Insurance Company, Sentry Insurance a Mutual Company, and United States Fidelity and Guaranty Company, Petitioners.

In Re:

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

v.

CBS Corporation, et al., Defendants,

In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopas, Respondent.

and

Timothy W. Howe Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe, Plaintiffs,

v.

Air & Liquid Systems Corporation, et al., Defendants,

In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopas, Respondent.

and

Charles T. Hopper and Rebecca Hopper, Plaintiffs,

v.

Air & Liquid Systems Corporation, et al., Defendants,

In Re: Receivership of Covil Corporation by and through
its Receiver Peter D. Protopas, Respondent.

and

James Michael Hill, Plaintiff,

v.

Advance Auto Parts, Inc., et al., Defendants.

In Re: Receivership of Covil Corporation by and through
its Receiver Peter D. Protopas, Respondent.

and

Denver D. Taylor and Janice Taylor, Plaintiffs,

v.

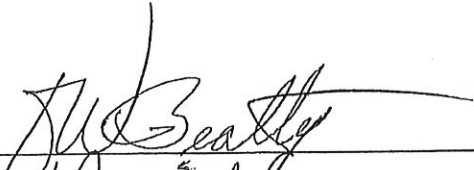
Air & Liquid Systems Corporation, et al., Defendants,

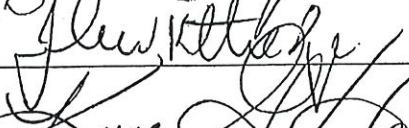
In Re: Receivership of Covil Corporation by and through
its Receiver Peter D. Protopas, Respondent.

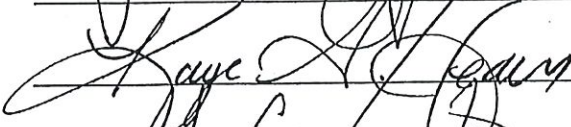
Appellate Case No. 2019-001654

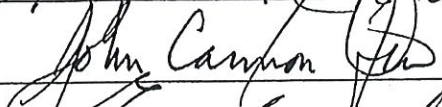
ORDER

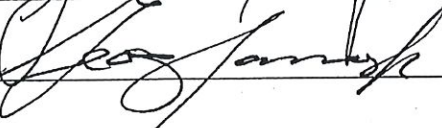
United States Fidelity and Guaranty Company (USF&G) and Sentry Insurance a Mutual Company (Sentry) ask to join Zurich American Insurance Company in its request for a common law writ of certiorari to review an order of the circuit court requiring Petitioners to locate and disclose a large number of documents to Respondent. The motions to join are granted. We deny the petition for a writ of certiorari.



C.J.


J.


J.


J.


J.

Columbia, South Carolina

October 16, 2019

cc:

Peter H. Dworjanyn, Esquire
Laura Ruth Baer, Esquire
Robert G. Rikard, Esquire
Jescelyn Tillman Spitz, Esquire
Jonathan M. Robinson, Esquire
G. Murrell Smith, Jr., Esquire
Wesley Brian Sawyer, Esquire
The Honorable Jean Hoefler Toal
Lee H. Ogburn, Esquire
Ezra S. Gollogly, Esquire

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APPEAL FROM RICHLAND COUNTY
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Case No. 2020-CP-40-02098

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Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas,

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v.

Pennsylvania National Mutual Casualty Insurance, Co.; Sam J. Crain & Co., Inc.; and South Carolina Property and Casualty Insurance Guaranty Association, Defendants,

Of whom Pennsylvania National Mutual Casualty Insurance Company is the Appellant.

PROOF OF SERVICE

I, the undersigned attorney of the law offices of Smith Robinson Holler DuBose and Morgan, LLC, do hereby certify that on June 6, 2022, I have served all counsel in this action with a copy of the pleading(s) hereinbelow using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules.

Documents Served: Motion to Dismiss Appeal of Interlocutory Discovery Orders

Counsel Served: **E-Mail**

David G. Harris II – dharris@goldbergsegalla.com

David L. Brown – dbrown@goldbergsegalla.com

Brady A. Yntema – byntema@goldbergsegalla.com

(Signature page follows)

Respectfully submitted,

s/Shanon N. Peake

G. Murrell Smith, Jr. (S.C. Bar # 66263)

Jonathan M. Robinson (S.C. Bar # 68285)

Shanon N. Peake (S.C. Bar #102723)

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ATTORNEYS FOR RESPONDENT

June 6, 2022.

From: [Shanon Peake](mailto:Shanon.Peake)
To: dharris@goldbergsegalla.com; Brown, David L.; byntema@goldbergsegalla.com
Cc: [Jon Robinson](mailto:Jon.Robinson); [Murrell Smith](mailto:Murrell.Smith); Nes, W. Brad; [Dot Faulkenberry](mailto:Dot.Faulkenberry); [Lindsay Valek](mailto:Lindsay.Valek)
Subject: Appellate Case No. 2022-000761 - Motion to Dismiss
Date: Monday, June 6, 2022 12:36:00 PM
Attachments: [Motion to Dismiss with Exhibit, 1.pdf](#)
[POS Mtn to Dismiss, 2.pdf](#)

Good Afternoon,

Please find attached for service the Motion to Dismiss Appeal of Interlocutory Discovery Orders that we are filing with the Court of Appeals today.

Thanks,
Shanon

SMITH ROBINSON
Forward thinking. Results driven.

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Shanon Peake

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