

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Joan H. Toal
Acting Circuit Court Judge

Appellate Case No. 2023-000727

Lenora Childers, Individually and as Personal Representative of the
Estate of Lewis C. Childers, Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories, Inc.;
General Boiler Casing Company, Inc.; HEFCO, Inc.; J.R. Dean
Company, Inc.; Payne & Keller Company; SFB, Incorporated;
Stafford Insulation Company; Standard Insulation Company of
N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of
Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-
Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., Defendants,

Flame Refractories, Inc., United Construction Co. of Rome, Inc.,
Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe &
Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.,
Payne & Keller Company, and PBI QSF, LLC, By and Through
Their Duly Appointed Receiver Peter D. Protopapas, Third-Party
Plaintiffs,

v.

Zurich American Insurance Company (Individually and as
Successor to Northern Insurance Company of New York, Maryland
American General Insurance Company, and Maryland Casualty
Company); Allstate Insurance Company; John Tighe; Sean
Anthony Beatty; Dennis William Cahill; Catherine Ann Carlino;
Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael
Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel
Robert Keddie; Julie Ann Fortune; Michael John Crall; James
Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.;
Arrowpoint Capital Corp.; Admiral Insurance Company;
Continental Insurance Company (Individually and as Successor in
interest to Harbor Insurance Company); Hartford Accident and

Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd’s of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman’s Fund Insurance Company,

Third-Party Defendants,

of which

Payne & Keller Company, by and through its Receiver Peter D. Protopapas, is the Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company f/k/a Stonewall Insurance Company, individually and as successor in interest to Stonewall Surplus Lines Insurance Company; Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company are the Appellants.

APPELLANTS’ EMERGENCY MOTION TO CLARIFY AND ENFORCE RULE 205

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Insurance Company of Pittsburgh,
PA; Berkshire Hathaway Specialty
Insurance Company, formerly known
as Stonewall Insurance Company;
and The Continental Insurance
Company, individually and as
successor in interest to Harbor
Insurance Company.

INTRODUCTION

The circuit court appointed Respondent Peter D. Protopapas as the Receiver of Payne & Keller Company (“Payne & Keller”), a former Texas corporation whose existence was terminated by the state of Texas more than 30 years ago. Based on Payne & Keller’s terminated status, which has never been challenged and which has precluded the company from being sued since 1989, Appellant Travelers Casualty and Surety Company (“Travelers”) filed a motion to dissolve the Payne & Keller Receivership established by the South Carolina circuit court, because given the inability of anyone to sue Payne & Keller, continuation of the Receivership is unnecessary and improper.¹

The circuit court denied Appellants’ motion to dissolve the Receivership in an order dated March 30, 2023. The circuit court rejected Appellants’ argument that Texas’s statute of repose for claims against terminated Texas corporations like Payne & Keller precludes claims by or against Payne & Keller more than three years after the date of its dissolution, *i.e.*, 1989, thereby rendering the Receivership pointless and requiring its dissolution. Over Appellants’ objections, the circuit court held that the Receiver had made a prima facie showing that Payne & Keller was terminated as a result of fraud or constructive fraud under a new Texas law, Section 11.153(a) of the Texas Business Organizations Code, such that Texas’s three-year statute of repose does not apply to Payne & Keller. The court also rejected Appellants’ argument that applying Section 11.153(a) would violate the Texas Constitution, as it specifically forbids the retroactive application of the

¹ Appellants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (hereinafter collectively referred to as “Other Insurers,” collectively with Travelers as “Appellants”) joined Travelers’ motion to dissolve.

new statute. The circuit court's order also suggests that a South Carolina state court somehow has the power to revoke the termination of a foreign corporation and reinstate its corporate existence in another state as if the dissolution never happened.

Appellants have appealed the circuit court's order, and this Court has confirmed, on two separate occasions, that the appeal shall proceed. Thus, this Court has squarely before it the various issues raised by Appellants, including whether Texas's statute of repose applies to preclude claims by or against Payne & Keller. Per Rule 205, SCACR, this Court's jurisdiction over the issues on appeal is exclusive—the circuit court is divested of jurisdiction over all matters affected by the appeal, including issues regarding Payne & Keller's supposedly fraudulent termination and the application of Texas's statute of repose.

Unfortunately, after this Court confirmed that it was moving forward with the appeal, the circuit court issued an order on October 5, 2023, that expressly addresses and relies on its own view of the issues on appeal. Specifically, the circuit court's October 5, 2023 order states that Payne & Keller's Texas termination was improper and must be revoked because "Payne & Keller committed, at a minimum, constructive fraud when dissolving and thus revocation of the termination of Payne & Keller pursuant to Section 11.153 of the Texas Business Organizations Code is appropriate." The order relies on arguments copied-and-pasted from the Receiver's opposition to Travelers' motion to dissolve the Receivership. It purports to affirmatively revoke Payne & Keller's termination and to reinstate its corporate existence in Texas.

The circuit court issued its October 5, 2023 order revoking Payne & Keller's termination with the clear awareness that its order addressed and decided issues that were no longer within its jurisdiction. In briefing and at oral argument, Travelers and other parties made clear to the circuit court that per Rule 205, SCACR, these issues are exclusively before this Court, *i.e.*, the order

addressed and decided matters affected by this appeal and, as such, the circuit court is divested of jurisdiction over them. The circuit court effectively conceded this point during hearings in July and August 2023, acknowledging its lack of jurisdiction. Yet the circuit court abandoned that position without warning and issued an order that directly addresses and decides matters that are already within the exclusive jurisdiction of this Court.

To make matters worse, Appellants learned today, October 23, 2023, that the Receiver, without notice to any other party, provided the Texas Secretary of State with a copy of the circuit court's October 5, 2023 order, and asked her to enforce the order and formally revoke Payne & Keller's corporate termination. The Texas Secretary of State apparently issued a "Certificate of Revocation of Dissolution" on October 12, 2023, which the Receiver provided to the circuit court and Appellants for the first time earlier today. These subsequent actions stemming from the circuit court's order further impair one of Payne & Keller's and Appellants' main defenses regarding Payne & Keller's dissolution status and the applicability of Texas's statute of repose—issues that have been on appeal to this Court and are within this Court's exclusive jurisdiction since April 28, 2023, when Appellants filed their notices of appeal.

Appellants do not make this motion lightly. But because the circuit court has chosen to intrude on this Court's exclusive jurisdiction, and the Receiver has taken follow-up actions that further interfere with key issues on appeal, Appellants respectfully move for an emergency order from this Court that enforces Rule 205, SCACR, and enjoins the circuit court and the Receiver from any further efforts to proceed with matters affected by this appeal. Appellants also request that the current deadlines in this appeal be held in abeyance pending resolution of this motion, because if the circuit court's October 5, 2023 order is effective, and the Texas Secretary of State's

October 12, 2023 “Certificate of Revocation” is viewed as controlling despite the circumstances under which it was obtained, it will materially change critical issues in this appeal.

PROCEDURAL BACKGROUND

Ms. Childers Sues Payne & Keller in South Carolina Circuit Court

Payne & Keller is a former Texas corporation that dissolved in 1986 and was terminated by law in 1989. (App. Vol. I 1-5, Dissolution Papers for Frentex Enterprises Company of Texas, f/k/a Payne & Keller Company (Nov. 25, 1986).) Despite its terminated status, on July 14, 2021, the underlying plaintiff in this case, Lenora Childers, commenced an asbestos personal injury case against Payne & Keller and various other defunct companies in South Carolina circuit court. (App. Vol. I 6-44, Compl. dated July 14, 2021, in *Childers v. Davis Mechanical Contractors, Inc.*, Case No. 2021-CP-40-03484.) The apparent purpose of suing only defunct companies was to create a series of unlawful nationwide receiverships.

Ms. Childers Requests and the Circuit Court Appoints a Receiver Over Payne & Keller

On August 23, 2021, Ms. Childers filed a motion asking the circuit court to appoint Peter Protopapas as Payne & Keller’s Receiver, even though Payne & Keller was terminated as a corporation more than 30 years ago and has no property in South Carolina. (App. Vol. I 45-47, Mot. to Appoint dated Aug. 23, 2021.) Four days later, on August 27, 2021—without any notice to Appellants—the circuit court granted Ms. Childers’ motion and appointed Mr. Protopapas as the Receiver for Payne & Keller despite the fact that that company no longer exists. (App. Vol. I 48-51, Order Appointing Receiver dated Aug. 27, 2021.) The circuit court did so without any hearing.² The Receiver, ostensibly acting on behalf of Payne & Keller, a terminated company

² Ms. Childers voluntarily dismissed one of the other nine named defendants. She filed motions seeking the appointment of Mr. Protopapas as a receiver over each of the other eight remaining defendants. The circuit court granted all of these motions without a hearing.

that cannot sue or be sued, subsequently filed an improper third-party insurance coverage complaint against Appellants and other alleged historical insurers of Payne & Keller. (App. Vol. I 52-135, Second Am. Third-Party Compl. dated July 14, 2022.)

Travelers Moves to Dissolve the Receivership

On August 24, 2022, Travelers filed a motion to dismiss the Receiver’s third-party complaint and to dissolve the Receivership. (App. Vol. I 136-69, Mot. to Dismiss and Dissolve dated Aug. 24, 2022.) Other Insurers joined the motion to dissolve the Receivership. (App. Vol. I 170-73, Notice of Mot. and Joinder dated Sept. 19, 2022.) Travelers argued, among other things, that Payne & Keller can no longer sue or be sued under Texas law, so the Receiver’s claims against Travelers, purportedly on Payne & Keller’s behalf, necessarily fail and the Receivership must be dissolved. Travelers also explained that because Payne & Keller is a defunct foreign corporation without any property in South Carolina, the South Carolina circuit court did not have the power to appoint a Receiver over Payne & Keller. The Receivership was improper from the start and must be dissolved.

The Receiver opposed Travelers’ motion. (App. Vol. I 174-97, Receiver for Payne & Keller’s Response to Travelers’ Mot. to Dismiss and Dissolve dated Jan. 13, 2023.) Remarkably, in an effort to avoid Texas’s statutory repose period that has barred any claims by or against Payne & Keller for more than 30 years (*i.e.*, since 1989, three years after its termination), the Receiver speculated in his opposition brief that Payne & Keller may have engaged in some sort of fraud at the time of its 1986 dissolution, and argued that the circuit court—a state court located in South Carolina—should somehow reinstate Payne & Keller’s corporate existence in another state, *i.e.*, Texas. (*Id.* at 181-86.)

The Circuit Court Denies Appellants' Motion to Dissolve

In a March 30, 2023 order, the circuit court denied Appellants' motion to dismiss and dissolve the Payne & Keller receivership. (App. Vol. I 198-207, Order Denying Mot. to Dismiss and Dissolve dated Mar. 30, 2023 (filed Mar. 31, 2023).) The March 30 order not only rejected the dissolution grounds Appellants raised and continued the Receivership, but it also modified the scope and purview of the Receivership by authorizing the Receiver to pursue his unpled fraud theory, with the ultimate goal of revoking Payne & Keller's termination in Texas. (*Id.* at 202.)

Appellants Appeal the Order Denying the Motion to Dissolve

On April 28, 2023, Appellants timely appealed the circuit court's order denying the motion to dissolve the Payne & Keller Receivership. The appeal remains pending before this Court. The appeal asks this Court to decide, among other things:

- Whether the circuit court erred by appointing a Receiver over Payne & Keller, a dissolved Texas corporation that does not have any property in South Carolina, and by denying Travelers' motion to dissolve the Receivership.
- Whether the circuit court erred in finding that alleged liability insurance policies issued by non-South Carolina-based insurers to Payne & Keller in Texas are "property within [South Carolina]" so as to justify the appointment of the Receiver under S.C. Code Ann. § 15-65-10(4).
- Whether the circuit court erred in finding Texas's statute of repose for claims against dissolved Texas corporations like Payne & Keller does not apply to preclude claims by or against Payne & Keller more than three years after the date of its dissolution—1989 for Payne & Keller—thereby rendering the Receivership a nullity and requiring its dissolution.
- Whether the circuit court erred in finding the Receiver had made a prima facie showing that Payne & Keller was terminated as a result of fraud or constructive fraud under Section 11.153(a) of the Texas Business Organizations Code, such that Texas's three-year statute of repose does not apply to Payne & Keller.
- Whether the court erred in finding that the retroactive application of Section 11.153(a) of the Texas Business Organizations Code would not violate the Texas Constitution.

- Whether the circuit court erred in rejecting Travelers’ argument that a South Carolina circuit court does not have the power to revoke the termination of a foreign corporation like Payne & Keller and reinstate its corporate existence in another state, Texas, as if the dissolution never happened.

On May 5, 2023, this Court asked the parties to file memoranda addressing the issue of appealability. In an Order dated August 9, 2023, the Court ruled: “After careful consideration of the parties’ memoranda on appealability, this appeal shall proceed.”

On August 23, 2023, the Receiver filed an “Expedited Motion to Clarify the Court’s Order on Appealability.” In his Motion to Clarify, the Receiver asked the Court to “clarify that the pendency of this appeal does not stay the underlying Receivership action and the Receiver may continue carrying out his court-appointed duties while this appeal is pending.” (Mot. to Clarify at 5.). The Motion to Clarify did not reference the issue of jurisdiction under Rule 205, SCACR; rather, it was limited to the subject of a “stay” at the circuit court level.

On September 8, 2023, the Court issued an Order “clarify[ing] that Appellants’ appeal of the circuit court’s March 31, 2023 order denying their motion to dismiss third-party claims and dissolve the Payne & Keller receivership shall proceed” and “further clarify[ing] that the March 31, 2023 order is not stayed during pendency of this appeal.” (Order dated Sept. 8, 2023 at 1.) The Court explained that “the receivership action and the receiver’s ability to carry out his duties are not stayed.” (*Id.*) Neither the Receiver’s Motion to Clarify nor the Court’s Order addressed the issue of *jurisdiction* under Rule 205, SCACR.

Ms. Childers Moves to Revoke Payne & Keller’s Corporate Termination for the Exact Same Reasons Raised in the Receiver’s Opposition to Appellants’ Now-Appealed Motion to Dissolve

On June 14, 2023, Ms. Childers filed a motion asking the circuit court to revoke the corporate termination of Payne & Keller pursuant to Section 11.153 of the Texas Business Organizations Code. (App. Vol. I 208-214, Pl. Childers’s Mot. to Revoke dated June 14, 2023.)

The motion was copied-and-pasted from the Receiver’s opposition to Travelers’ motion to dissolve the Receivership, which is now on appeal before this Court. (*Compare* App. Vol. I 209-13, Pl. Childers’s Mot. to Revoke at 2-6, *with* App. Vol. I 182-86, Receiver’s Opp’n to Travelers’ Mot. to Dissolve at 9-13.) Travelers filed an opposition to Ms. Childers’s motion to revoke on July 7, 2023, and Other Insurers joined in Travelers’ opposition. (App. Vol. I 215-41, Travelers’ Opp’n to Pl. Childers’s Mot. to Revoke dated July 7, 2023); (App. Vol. I 242-43, Other Insurers’ Joinder dated July 7, 2023.) The circuit court held a hearing on the motion on July 10, 2023, at which time it deferred ruling on the motion due to its admitted lack of jurisdiction, *i.e.*, because the Motion to Revoke depends on the resolution of matters that are pending before this Court in the present appeal. For example, the circuit court noted: “I am acutely aware of my role as a circuit court judge. I am not supposed to get outside my guard rails and that’s what I don’t want to do in connection with something that’s pending in front of an appellate court.” (App. Vol. I 312, July 10, 2023 Hearing Tr. at 69:7-11.) During a subsequent hearing on August 21, 2023, the Court once again declined to rule on the motion, also because of its lack of jurisdiction. (App. Vol. I 343, August 21, 2023 Hearing Tr. at 64:5-8.)

Ms. Childers Emails the Circuit Court a Proposed Order Granting Her Motion to Revoke

Despite all of this, on September 26, 2023, Ms. Childers’s counsel emailed the circuit court judge a proposed order granting her motion to revoke, entitling the order “Findings of Fact and Conclusions of Law on Plaintiffs’ [sic] Motion to Revoke the Termination of Payne & Keller Company” (the “proposed order”). (App. Vol. I 359-60, Email from Pl. Childers’ Counsel dated September 26, 2023.) Travelers’ counsel sent a response email on September 28, 2023, noting again the circuit court’s lack of jurisdiction to issue the proposed order due to Rule 205, SCACR, and requesting 10 days to respond if the circuit court intended to consider the proposed order.

(App. Vol. I 361-62, Email from Travelers' Counsel dated Sept. 28, 2023.) The circuit court judge never responded to counsel's email and, instead, before the expiry of 10 days, entered the proposed order submitted by Ms. Childers's counsel. (App. Vol. I 363-71, Findings of Fact and Conclusions of Law on Pl.'s [sic] Mot. to Revoke the Termination of Payne & Keller Company dated Oct. 5, 2023.)

The Circuit Court Revokes Payne & Keller's Termination

The circuit court's October 5, 2023 order is substantially identical to Ms. Childers's proposed order. It purports to revoke Payne & Keller's termination and reinstate its corporate existence in Texas. The order is not only unconstitutional on its face, the circuit court plainly did not have jurisdiction to issue it under Rule 205, SCACR. On October 16, 2023, Appellants filed motions to vacate or reconsider the circuit court's order. (App. Vol. II 1-371, Motion to Vacate or Reconsider; App. Vol. III 1-231, Joinders.)

On October 20, 2023, the circuit court judge emailed the parties:

Chief Justice Toal has scheduled a hearing on the Motion to Vacate or in the Alternative Motion to Reconsider the Court's October 5, 2023 Order filed by Certain Insurers and Travelers' Joinder. She would like to discuss whether she should consider reopening the matter, have an additional hearing at another date or now, and to discuss how to move forward regarding these latest filings. The hearing has been added to the agenda for October 25, 2023 at 9:30 AM.

(App. Vol. III 232-33, Oct. 20, 2023 Circuit Court Email; App. Vol. III 234-35, Oct. 20, 2023 Circuit Court Email.) The Receiver sent a response email asking the circuit court to "schemul[e] Payne & Keller's motions for a different day," even though the Receiver neither filed nor responded to the motion to revoke that was the subject of the scheduled hearing. (App. Vol. III 240, Oct. 20, 2023 Email from the Receiver.) Nonetheless, 35 minutes later, the circuit court approved the Receiver's request to cancel and reschedule the hearing. (App. Vol. III 242, Oct. 20,

2023 Circuit Court Email; App. Vol. III 243, Notice of Cancellation of Hearing.) The hearing has not been rescheduled. All of this occurred after the Receiver had without any form of notice secretly moved ahead in Texas unbeknownst to any other party.

**The Receiver Secretly Asks the Texas Secretary of State to Enforce the
Circuit Court’s Order Revoking Payne & Keller’s Termination
Without Notice to Appellants or This Court**

On October 23, 2023, the Receiver filed with the circuit court a “Notice of Filing,” attaching a “Certificate of Revocation of Dissolution” of Frentex f/k/a Payne & Keller, dated October 12, 2023 and signed by the Texas Secretary of State. (App. Vol. III 246, Oct. 23, 2023 Notice of Filing and Oct. 12, 2023 Certificate of Revocation.) It appears the Receiver secretly sought and obtained this document from the Texas Secretary of State by providing the Secretary of State with a copy of the circuit court’s October 5, 2023 order, and asking the Secretary of State to formally revoke Payne & Keller’s termination. He did not provide any notice to Appellants or this Court of his conduct, which he says he did “[p]ursuant to the [circuit court’s] previous rulings and instructions,” (*id.*), notwithstanding the fact that issues regarding Payne & Keller’s dissolution status and the applicability of Texas’s statute of repose are on appeal and within this Court’s exclusive jurisdiction.

ARGUMENT

Under Rule 205, SCACR, the circuit court did not have jurisdiction to rule on Ms. Childers’s motion to revoke, because the matters raised in the motion are necessarily affected by this appeal, over which this Court has exclusive jurisdiction. As Travelers repeatedly explained to the circuit court (*see, e.g.*, App. Vol. I 216-17, Travelers’ Opp’n to Pl. Childers’s Mot. to Revoke at 2-3), Ms. Childers’s motion to revoke is based entirely—almost word-for-word—on arguments Payne & Keller’s Receiver made in his opposition to Travelers’ motion to dissolve the

Receivership. The circuit court explicitly addressed the Receiver’s termination-by-fraud arguments in its order, and those arguments are presently on appeal before this Court. As a result, under Rule 205, the circuit court did not have jurisdiction to address the motion to revoke or any other “matters affected by the appeal.”

This jurisdictional point is not debatable—it is black-letter law. *See* Rule 205, SCACR (“Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.” (emphasis added)); *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (explaining that “Rule 205 divests the lower court or administrative tribunal of jurisdiction over ‘matters affected by the appeal’”) (emphasis provided by the Supreme Court) (quotation and other citation omitted); *Lancaster v. Ga.-Pac. Corp.*, 403 S.C. 136, 137, 742 S.E.2d 867, 868 (2013) (“Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate Court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court.”); *Tillman v. Oakes*, 398 S.C. 245, 255 & n. 3, 728 S.E.2d 45, 51 & n.3 (Ct. App. 2012) (reiterating that “[u]nder Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal,” and explaining that this rule “deprives the lower court of the power to address a particular issue, or ‘matter,’ during the pendency of the appeal”); Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 121 (3d ed. 2016) (explaining that “[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal”).

Despite the Receiver's efforts to have the appeal dismissed, this Court has rightly determined that the appeal shall proceed. *See* Order dated Aug. 9, 2023 ("this appeal shall proceed"); Order dated Sept. 8, 2023 (reiterating that the appeal "shall proceed"). Because Ms. Childers's motion to revoke asked the circuit court to issue an order to revoke Payne & Keller's Texas termination based on grounds squarely on appeal before this Court, the circuit court lacked the jurisdiction to issue the October 5 order, and it must be vacated or clarified to be without force or effect.

No one—not the circuit court, not Ms. Childers, and not the Receiver—can seriously suggest that the revocation-by-fraud issue raised in the motion to revoke is not a "matter affected by the appeal." Again, the Receiver first made this argument in his opposition to Travelers' motion to dissolve the Payne & Keller Receivership, the resolution of which is now on appeal. (App. Vol. I 216-17, 221-22, 227-29, Travelers' Opp'n to Pl.'s Mot. to Revoke at 2-3, 7-8, 13-15.) The Receiver did so in an effort to avoid Texas's statute of repose, which fully protects Payne & Keller from suit—and bars Payne & Keller or its Receiver from bringing suit against Appellants—and it has done so for over three decades. Effectively, the Receiver has asked the circuit court to revive potential liability for Payne & Keller that has been extinguished as a matter of law since 1989.

The circuit court accepted the Receiver's argument and denied Appellants' motion to dissolve. (App. Vol. I 202, Order Denying Mot. to Dissolve dated Mar. 30, 2023, at 5 (filed Mar. 31, 2023) ("this Court finds the Receiver has made a prima facie showing that Payne & Keller 'was terminated as a result of actual or constructive fraud,' § 11.153(a), and dismissal on the basis of the termination is unwarranted".)) The circuit court's March 30 order authorized the Receiver to pursue his fraud theory with the ultimate goal of revoking Payne & Keller's termination under

Texas law. (*Id.* at 5.) Appellants appealed that order, but Ms. Childers then filed a copycat motion asking for the very relief the circuit court said it lacked jurisdiction to provide.

The circuit court's willingness to sign Ms. Childers's proposed order granting the motion to revoke is particularly disappointing, and surprising, given that the circuit court previously acknowledged the jurisdictional prohibition. (App. Vol. I 312, July 10, 2023 Hearing Tr. at 69:7-11 ("THE COURT: I am acutely aware of my role as a circuit court judge. I am not supposed to get outside my guard rails and that's what I don't want to do in connection with something that's pending in front of an appellate court. MR. LEE: It [*i.e.*, Rule 205 covers] matters affected by the appeal, not the same case, not the same claim, not the same motion, but -- THE COURT: It does say that."); *id.* at 36:3-4 ("THE COURT: The Court of Appeals is going have the right to make that finding [regarding constructive fraud]".)) The circuit court also indicated that there would be another hearing before it decided whether to take any action on the motion to revoke. (*See id.* at 78:6-19 ("[MR. SAWYER:] Just for point of clarification, the impact holding pending a ruling by the court, will there be another hearing. I have points I wanted to put on the record, but I don't want to waste the court's time if we're going to have the Court of Appeals. THE COURT: Yes, I should say that and make that clear, that this is an adjourned proceeding, not a -- MR. SAWYER: We're not closing the book. THE COURT: Or a paused proceeding, I guess you could say. I am not declaring the hearing at an end. I am pausing it or adjourning it until I receive further information. Right now, my main concern is the Court of Appeals and my authority. . . .")) At that time, the circuit court judge refused to consider the motion, concluding "I am going to hold my ruling in abeyance until we hear from the Court of Appeals," because "I don't want to step beyond my boundaries with the Court of Appeals." (*Id.* at 75:8-9, 14-16.)

Simply put, the circuit court openly admitted its concern that it did not have jurisdiction to rule on Ms. Childers's motion to revoke because the issues raised in that motion are squarely before this Court. Nothing has changed.

As an apparent justification for violating Rule 205, SCACR, the circuit court's October 5 order granting the motion to revoke notes that the Payne & Keller Receivership action is not "stayed" (App. Vol. I 363-64, Order at 1-2), citing this Court's September 8, 2023 Order. But this Court's September 8, 2023 Order relates only to the subject of a stay, *not jurisdiction*. Order dated Sept. 8, 2023 ("the receivership action and the receiver's ability to carry out his duties are not stayed."). The existence of a stay does not address, and has nothing to do with, the circuit court's lack of *jurisdiction* to rule on Ms. Childers's motion when matters affecting that motion are on appeal. The absence of a stay obviously does not mean the presence of circuit court jurisdiction. Rule 205 and the case law enforcing it are clear that lower courts have no power to proceed with matters that are affected by a pending appeal. *See supra* at 11.

Simply put, the circuit court is and was divested of jurisdiction to rule on Ms. Childers's motion under Rule 205, and the question of a stay was irrelevant to that analysis:

Note that the existence or nonexistence of a stay under Rule 241 does not control the [lower] court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a matter affected by the appeal under Rules 205 and 2041(a).

Toal, *Appellate Practice in South Carolina*, at 121 (citing *Tillman*).

As discussed above, without any notice to Appellants, the Receiver apparently provided the Texas Secretary of State with a copy of the circuit court's October 5, 2023 order, and asked her to enforce the order and formally revoke Payne & Keller's termination and reinstate its corporate existence in Texas. On October 12, 2023, the Texas Secretary of State issued a

“Certificate of Revocation,” which purports to revoke Payne & Keller’s termination as of October 12, 2023. The Receiver did not notify Appellants of the “Certificate of Revocation” until October 23, 2023, when he filed a “Notice of Filing” with the circuit court. He did so only after the circuit court indicated that it was reconsidering its October 5, 2023 order. (App. Vol. III 236-244, Circuit Court Email and the Receiver’s Response.) This Court needs to step in immediately to stop any further efforts to undermine this Court’s exclusive jurisdiction over the issues on appeal.

CONCLUSION

Appellants respectfully request that the Court issue an order enforcing its exclusive jurisdiction under Rule 205, SCACR, confirming that the circuit court did not have jurisdiction to issue its October 5, 2023 order, and enjoining the circuit court and the Receiver from any further efforts to proceed with matters affected by this appeal.

If the circuit court’s October 5, 2023 order and the Receiver’s efforts to use the Texas Secretary of State’s October 12, 2023 “Certificate of Revocation” are allowed to continue, it would materially add to and change the issues in this appeal. As a result, Appellants respectfully request that the current deadlines in this appeal be held in abeyance pending resolution of this motion. Appellants also respectfully request that the Court grant this motion on an expedited basis so that the parties, this Court, and the circuit court can proceed with certainty as quickly and efficiently as possible.

Signature Page Attached

Respectfully submitted,

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October 23, 2023

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Appellants' Emergency Motion to Clarify and Enforce Rule 205

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October 23, 2023