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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2019-CP-40-02285

Appellate Case No. 2020-001437

Peter D. Protopapas, as Receiver for Covil Corporation, Respondent,

v.

Wall, Templeton & Haldrup, P.A.; Sentry Casualty Company; United States Fidelity and Guaranty Company; Zurich American Insurance Company, Defendants,

of which

United States Fidelity and Guaranty Company is the Appellant.

MOTION TO DISMISS

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Respondent Peter D. Protopapas, as Receiver for Covil Corporation (collectively, “the Receiver”), by and through the undersigned counsel, respectfully request the Court dismiss the Notice of Appeal filed by United States Fidelity and Guaranty Company (“USF&G”) on October 26, 2020, because the underlying cases have now settled, and there is no longer a justiciable controversy for this Court to hear.

Background

A. This Appeal Seeks Review of Affirmative Defenses Raised in Now Settled Asbestos Cases

In 2020, asbestos personal injury plaintiffs sued USF&G in a series of actions, alleging that

USF&G acted as alter ego of Covil. In its answers to those actions, including *Hutto v. Covil Corp.*, *et al.*, C/A No. 2019-CP-40-06956 (“Hutto”), USF&G asserted affirmative defenses related to Covil’s corporate status, including the following:

Covil is a dissolved corporation and claims against it, including against any entity alleged to be Covil’s “alter ego” are barred under S.C. Code Ann. § 33-14-106 and 33-14-107. Plaintiffs’ claims against USF&G are necessarily barred also because Plaintiffs’ claims against USF&G are derivative of underlying asbestos claims against Covil.

See Appellant’s Initial Brief at 9.

In a Motion to Clarify the Status of the Receivership, the Receiver for Covil sought clarification of the impact, if any, of Covil’s prior receivership and dissolution on the cases pending before the court, specifically whether asbestos plaintiffs were able to maintain personal injury claims against Covil in light of USF&G’s affirmative defenses. *See* Sept. 25, 2020 Order, C.A. No. 2019-CP-40-02285.

On September 25, 2020, the circuit court (Chief Justice Jean Hoefler Toal, retired) granted the Receiver’s Motion to Clarify and found, “Covil’s prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil.” (Order at 10). The September 25, 2020 Order, which clarified USF&G’s ability to rely on a particular defense is the subject of the instant appeal.

B. During the Pendency of this Appeal, All Cases in which USF&G Asserted this Affirmative Defense Have Been Resolved

In addition to the *Hutto* matter, USF&G’s opening brief in this appeal identified seventeen additional asbestos personal injury claims in which USF&G had been sued as the alter ego of Covil and had asserted the same affirmative defenses related to Covil’s corporate status.¹

¹ *James M. Bailey, et al. v. Aerco International, Inc., et al.*, C/A No. 2020-CP-10-03949 (Ct. Com. Pl., Charleston Cty.); *Norma D. Bowlin, as Personal Representative of the Estate of Gary Jay Moss v. Covil Corp., et al.*, C/A No. 2020-CP-40-02692 (Ct. Com. Pl., Richland Cty.); *Richard F. Carpenter, et al. v. Armstrong International, Inc., et al.*,

During the pendency of this appeal, Covil has resolved each of the 18 asbestos personal injury actions in which USF&G asserted the affirmative defense at issue. The claims against USF&G in those actions likewise have been dismissed. USF&G is not a party to any pending Covil asbestos case, and no action otherwise provides an opportunity for USF&G to assert the affirmative defense made the basis of this appeal.

Further, the issues in the action styled *Peter D. Protopapas as Receiver for Covil Corp. v. Wall, Templeton & Haldrup, P.A., et al.*, C/A No. 2019- CP-40-02285 (“Wall Templeton”) also have been resolved: Covil’s claims against its former defense lawyers have been settled and paid; Covil’s alter ego claims against USF&G and Zurich have been settled and paid; and the asbestos claims in *Hill* and *Taylor* have been settled and paid.

In short, all of the actions in which USF&G asserted the affirmative defense at issue have been resolved. This appeal therefore should be dismissed as moot.

DISCUSSION

A threshold inquiry for any court is a finding of justiciability, specifically, whether the litigation presents a case or controversy. *See Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634,

C/A No. 2020-CP-40-04475 (Ct. Com. Pl., Richland Cty.); *Robbie M. Efird, as Administrator of the Estate of Robin M. Efird, et al. v. Arconic, Inc., et al.*, C/A No. 2020-CP-40-05869 (Ct. Com. Pl., Richland Cty.); *Joe Eldra Goodwin, et al. v. Armstrong International, Inc., et al.*, C/A No. 2020-CP-40-04613 (Ct. Com. Pl., Richland Cty.); *Mildred F. Hagan, et al. v. Armstrong International, Inc., et al.*, C/A No. 2020-CP-40-00265 (Ct. Com. Pl., Richland Cty.); *Stephen C. Horton, et al. v. Armstrong International, Inc., et al.*, C/A No. 2020-CP-40-05526 (Ct. Com. Pl., Richland Cty.); *Tracy Jolly Pavlish, et al. v. Covil Corp., et al.*, C/A No. 2019-CP-42-03968 (Ct. Com. Pl., Spartanburg Cty.); *Shea Jonas King, individually and as the Administrator CTA of the Estate of Ronnie J. Jonas v. Air & Liquid Systems Corp., et al.*, C/A No. 2020-CP-40-01163 (Ct. Com. Pl., Richland Cty.); *Dianne McCullough, et al. v. 4520 Corp., Inc., et al.*, C/A No. 2020-CP40-01952 (Ct. Com. Pl., Richland Cty.); *Edward R. Morgan, et al. v. Armstrong International, Inc., et al.*, C/A No. 2020-CP-40-05731 (Ct. Com. Pl., Richland Cty.); *Nicholas Leon Murphy, et al. v. Covil Corp., et al.*, C/A No. 2020-CP-40-01364 (Ct. Com. Pl., Richland Cty.); *Robert B. Picklesimer, et al. v. 4520 Corp., Inc., et al.*, C/A No. 2020-CP-40-02868 (Ct. Com. Pl., Richland Cty.); *Joseph Franklin Rampey, Jr., as Personal Representative of the Estate of Joseph Franklin Rampey v. Covil Corp., et al.*, C/A No. 2020-CP-40-00585 (Ct. Com. Pl., Richland Cty.); *Katherine R. Shields, Executrix of the Estate of James Joseph Reilly, et al. v. Covil Corp., et al.*, C/A No. 2020-CP-40-00952 (Ct. Com. Pl., Richland Cty.); *Eunice H. Sims, Individually and as the Personal Representative of the Estate of Waymon F. Sims, Jr. v. 3M Co., et al.*, C/A No. 2020-CP-40-05935 (Ct. Com. Pl., Richland Cty.); and *Jack E. Taylor v. Armstrong International, Inc., et al.*, C/A No. 2020-CP-40-06134 (Ct. Com. Pl., Richland Cty.). *See* Appellant’s Initial Brief at 12, fn. 22.

637 (Ct. App. 2002). “The court does not concern itself with moot or speculative questions.” *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). “A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.” *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (S.C. 2006) (citing *Mathis v. South Carolina State Highway Dep’t.*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (S.C. 1973)). The Court “will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.” *Mathis*, 260 S.C. at 346 (citing *Fabian’s Uptown v. South Carolina Tax Commission*, 247 S.C. 164, 146 S.E.2d 608 (S.C. 1966)). “This is true when some event occurs making it impossible for the reviewing Court to grant effectual relief.” *Cheap-O’s Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 603, 567 S.E.2d 514, 517 (Ct. App. 2002) (quoting *Byrd v. Irmo High School*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996)). The settlement or dismissal of a case is an event that makes it impossible for this Court to grant effectual relief. See *S.C. State Highway Dep’t v. McKeown Food Store No. 9*, 254 S.C. 180, 183, 174 S.E.2d 342, 343 (1970) (“The settlement ended the litigation and rendered moot the issue which appellant now seeks to have the court decide.”); *Cheap-O’s Truck Stop, Inc.*, 350 S.C. at 603, 567 S.E.2d at 517 (“Because we find the present case was settled and the settlement is enforceable, the issue is moot.”).

Any decision as to the potential impact of USF&G’s past affirmative defense would have no practical legal effect because there is no longer any pending case wherein USF&G has asserted this affirmative defense. Further, none of the three exceptions to the mootness doctrine apply. See *Sloan v. Greenville Cty.*, 380 S.C. at 535, 670 S.E.2d at 667.

First, the discrete issue regarding USF&G’s affirmative defense is not “capable of

repetition but evading review.” See *Curtis v. State*, 345 S.C. 557, 568, 549 S.E. 2d 591, 596 (2001). The Covil alter ego allegations against which USF&G raised its affirmative defenses were asserted in 18 asbestos personal injury cases in 2020, but those cases have been resolved. Since that time, no other asbestos personal injury claim has been filed against USF&G as alter ego of Covil. While those causes of action are capable of repetition, personal injury litigation is not a quickly dissipating activity that would evade review. See generally *Byrd*, 321 S.C. 426, 468 S.E.2d 861 (1996) (finding exception applied to a review of school suspension activity); *Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc.*, 185 W.Va. 168, 406 S.E.2d 65 (1991) (finding exception applied to review of an appeal from a trial court’s injunction).

Second, USF&G does not present “questions of imperative and manifest urgency.” See *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596. This case presents a narrow legal issue regarding the impact of a specific affirmative defense related to potential applicability and interpretation of a receivership statute that was last amended in 2004. That the issue has not been addressed in the intervening nineteen years demonstrates the lack of urgency for this Court.

Third, a decision by this Court will not “affect future events, or have collateral consequences for the parties.” *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596. Because all the underlying actions in which USF&G sought to rely on the affirmative defense raised in this appeal have been resolved, a decision in this Court would have no collateral consequences to the parties.

Because no actual controversy remains and no exception to the mootness doctrine applies, this Court should dismiss this appeal to avoid giving an opinion on an abstract or theoretical matter.

CONCLUSION

The resolution of all eighteen underlying asbestos personal injury actions with claims directly against USF&G, as well as all issues raised in the *Protopapas v. Wall Templeton* matter,

has rendered USF&G's Notice of Appeal in the instant action moot. *See Sloan v. Greenville Cty.*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) ("The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation.").

Respectfully submitted,

/s/ Jescelyn Spitz

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APPEAL FROM RICHLAND COUNTY
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United States Fidelity and Guaranty Company is the Appellant.

PROOF OF SERVICE

I certify that a true copy of the Motion to Dismiss in this case has been served on the following, this 13th day of July, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (g)(3) of the South Carolina Supreme Court's March 20, 2020 Order, as amended May 29, 2020. Pursuant to subsection (g)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

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Subject: Appellate Case No. 2020-001437 - Respondent's Motion to Dismiss
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[2023.07.13 POS for Covil - USFG Appeal - Motion to Dismiss as Moot.pdf](#)

Dear counsel,

Attached for service upon you please find Respondent's Motion to Dismiss in the above reference matter, which we are filing with the Court of Appeals today.

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