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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

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2020-001437
Circuit Court Case No. 2019-CP-40-02285

Peter D. Protopapas, in his capacity as Receiver for Covil Corporation,	Plaintiff,
v.	
Wall, Templeton & Haldrup, P.A.; Sentry Casualty Company; United States Fidelity and Guaranty Company; Zurich Insurance Company,.....	Defendants,
<i>Of Which:</i>	
United States Fidelity and Guaranty Company is the	Appellant,
<i>And</i>	
Peter D. Protopapas, in his capacity as Receiver of Covil Corporation, is the.....	Respondent.

RETURN IN OPPOSITION TO MOTION TO DISMISS APPEAL

The Receiver’s latest attempt to dodge this appeal is puzzling. Briefing closed and the appeal was perfected in October 2021. After nearly two years, the Receiver now asks the Court to dismiss this appeal on grounds of alleged mootness. Because the issue on appeal remains very much alive and in dispute, the Court should reject this transparent attempt to avoid appellate review, allow this appeal to proceed, and hold that the Covil Corporation is immune from suit due to the expiration of the statute of repose for dissolved South Carolina corporations.

BACKGROUND

Covil was a South Carolina-based insulator that was involved in the distribution or installation of insulation materials, some of which contained asbestos. In 1991, it ceased all operations, and one of its creditors sought judicial appointment of a receiver to marshal Covil's assets. *First Savings Bank, F.S.B. v. Covil Corp.*, Case No. 91-CP-23-4445 (Ct. Com. Pl. Greenville Cty.). The circuit court agreed and appointed L. Winston Lee to serve as Covil's receiver. (R. p. 651.) It then expanded Mr. Lee's authority to serve as "a general receiver for Covil Corporation" and granted his request for Covil to "be judicially dissolved." (R. pp. 700–01.)

As part of the order vesting Mr. Lee with authority as Covil's general receiver, the circuit court instructed him to publish notice of Covil's dissolution consistent with South Carolina Code § 33-14-107. (R. p. 704.) The dissolution statute triggers a repose period after which all claims against Covil are barred, making it a key part of any receiver's responsibility to preserve the dissolved company's assets and minimize its liabilities. And six months after instructing Mr. Lee to publish notice of Covil's dissolution, the circuit court issued an order stating that Mr. Lee "has fully complied with the previous Orders of this Court in liquidating [Covil's] assets." (R. p. 701.) It then approved Mr. Lee's decision to "abandon[]" all of Covil's "remaining assets," finalized the judicial dissolution, and discharged Mr. Lee as Covil's receiver. (R. p. 738.)

The expiration of the statutory response period following Covil's judicial dissolution in 1992 should have been sufficient to protect it from future claims, including from asbestos plaintiffs. Yet, instead of protecting Covil from claims, the current Receiver—appointed in 2018 at the request of an asbestos plaintiff, the day after that plaintiff requested the appointment, and without a hearing—filed a motion with the circuit court seeking "clarification" regarding "the impact of Covil's prior receivership" with respect to the statute of repose. Rather than protect the

interests of Covil, the new receiver sought (and obtained) a ruling that Covil should be subject to ongoing lawsuits without the protections afforded it as a result of its prior dissolution. (R. p. 430.)

In the order on appeal, the circuit court held that South Carolina’s statute of repose against dissolved companies does not block claims against Covil here. It determined that “no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil,” “Covil’s prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil,” and “pending and future asbestos claims” against Covil “remain viable” despite the statute of repose. (R. pp. 10, 13–14.)

Covil has remained a defendant in underlying asbestos suits continuously since that ruling, and it remains subject to suits to this day. USF&G has, and continues, to fund Covil’s defense to these suits notwithstanding settlement of certain litigation between USF&G and the new Receiver. The circuit court’s finding that Covil should not be afforded the protections of a dissolved corporation constituted legal error and should be corrected by this Court, and the Receiver’s attempt to dodge appellate scrutiny should be denied.

ARGUMENT

I. The underlying litigation remains ongoing.

In his motion, the Receiver argues “the issues in the action styled *Peter D. Protopapas as Receiver for Covil Corp. v. Wall, Templeton & Haldrup, P.A.*, C/A No. 2019-CP-40-02285 also have been resolved,” making this appeal moot. (Mot. at 3.) But this is not true.

The last filing in this case at the circuit court—filed in October 2021—was an order granting a partial motion to dismiss some of the claims between the Receiver and USF&G. The Receiver refused to dismiss this action in its entirety and insisted that remaining claims go forward.

The order granting partial dismissal is attached as Exhibit A, and it could not be clearer about the ongoing dispute between the parties:

It is hereby ordered that the Parties' Joint Motion to Dismiss With Prejudice is granted, and all claims and allegations between Covil and USF&G in the above-captioned action are dismissed to the extent such claims or allegations relate to Finch v. BASF Catalysts, LLC, et al., C.A. No. 1:16-cv-01077 (M.D.N.C.), and Finch v. Sentry Casualty Company et al., C.A. No. 2019-CP-40-03003 (S.C. Com. Pl.). This dismissal is with prejudice, and each party shall bear its own attorney's fees and costs. All other claims and allegations between Covil and USF&G are not impacted by this order and remain pending.

(Ex. A, Order Granting Joint Motion to Dismiss with Prejudice, at 1 (Oct. 19, 2021) (emphasis added).)

Because Covil's amenability to suit remains a central issue relevant to the ongoing dispute between the parties, the Receiver's mootness argument is simply incorrect. His motion should be denied accordingly.

II. The underlying issue remains ongoing.

The issue on appeal before the Court is whether Covil is immune from suit going forward due to the expiration of the statute of repose for dissolved South Carolina corporations. Instead of protecting Covil from liability, the Receiver has staked out a position that Covil is able to be sued—a position that keeps Covil's insurance carriers (including USF&G) on the hook to endlessly defend Covil against asbestos claims. The order on appeal strikes the statute of repose as a defense for Covil against “pending and future asbestos claims.” (R. p. 10.)

Because the circuit court's order on its face applies to all future asbestos claims against Covil—and there have been at least seven new asbestos cases filed in 2023 alone naming Covil as

a defendant¹—the propriety of that ruling is obviously not moot. Without this Court’s assessment of the interplay between the prior receivership and the statute of repose, Covil will continue to be a serial defendant in asbestos litigation despite its prior dissolution.

To dodge this straightforward point, the Receiver styles the statute of repose as an affirmative defense for USF&G. (*E.g.*, Mot. at 4–5.) But it is not so limited. It is an affirmative defense that USF&G is asserting in its capacity as one of Covil’s historic insurance carriers. To summarize USF&G’s appellate argument:

Covil was dissolved by court order in 1992. That order held that the court-appointed receiver had complied with all of the court’s prior instructions regarding winding up Covil’s affairs, including publishing notice of Covil’s dissolution. By South Carolina law, the prior receiver triggered a repose period that has unquestionably expired, thereby blocking all future claims against Covil.

If this Court agrees with USF&G’s position, then pursuant to South Carolina Code § 33-14-107, Covil is done with litigation, period. It can no longer be sued, it no longer has any potential exposure to liability, and the parties and the circuit court can close the books on this second receivership.

¹ *E.g.*, *Sawyer v. 3M Co.*, Case No. 2023-CP-38-00132 (filed Jan. 26, 2023); *Flynn v. Standard Insulation Co. of N.C.*, Case No. 2023-CP-40-00633 (filed Feb. 6, 2023); *McLeod v. Air & Liquid Sys. Corp.*, Case No. 2023-CP-40-01652 (filed Mar. 29, 2023); *Tibbs v. 3M Co.*, Case No. 2023-CP-40-01759 (filed Apr. 5, 2023); *Berley v. AECOM Energy & Constr. Inc.*, Case No. 2023-CP-40-02840 (filed May 31, 2023); *Donaghy v. 4520 Corp.*, Case No. 2023-CP-40-03108 (filed June 14, 2023); *Reich v. Air & Liquid Sys. Corp.*, Case No. 2023-CP-40-03243 (June 22, 2023). Including these matters, USF&G’s records indicate that there have been 96 new cases filed against Covil since the new Receiver was appointed, 22 of which remain open with the claims against Covil unresolved. The issues presented on appeal are clearly not moot.

If this Court disagrees with USF&G's position, then Covil will continue to be a defendant in asbestos cases unless and until the Receiver re-publishes notice of Covil's dissolution and the repose period re-expires.

But if this Court does nothing and dismisses this appeal as "moot" despite USF&G's direct ongoing interest in the outcome of this appeal, then plaintiffs, USF&G, and Covil will continue to litigate the viability of the statute of repose from the prior receivership as a defense to asbestos claims against Covil, and they will no doubt end up right back in front of this Court making the very same arguments that have been fully briefed and ready for oral argument with this Court since October 4, 2021. In the meantime, USF&G will continue to be required to pay fees to defend Covil against claims that should be barred as a matter of law.

Because the issue on appeal continues to be contested and continues to impact not only the instant litigation but also scores of other "pending and future asbestos claims" (R. p. 10), the Receiver's mootness argument is plainly wrong. This matter is active and needs resolution by the state's appellate courts.

CONCLUSION

The Court should deny the Receiver's motion, allow this appeal to proceed, and hold that the 1992 judicial dissolution of Covil triggered a now-expired repose period that blocks all claims against Covil.

Signature Page Attached

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll

S.C. Bar No. 74000

todd.carroll@wbd-us.com

M. Elizabeth O'Neill

S.C. Bar No. 104013

elizabeth.oneill@wbd-us.com

1221 Main Street, Suite 1600

Columbia, SC 29201

(803) 454-6504

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)

afrankel@stblaw.com

425 Lexington Avenue

New York, NY 10017

(212) 455-3073

Attorneys for Appellant United States Fidelity and
Guaranty Company

July 24, 2023

EXHIBIT A

Order Granting Joint Motion to Dismiss with
Prejudice (Oct. 19, 2021)

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

Vs.

Wall Templeton & Haldrup, P.A., et al.,

Defendants.

Case Number 2019-CP-40-02285

**ORDER GRANTING JOINT MOTION
TO DISMISS WITH PREJUDICE**

Before the Court is the Joint Motion to Dismiss With Prejudice submitted by Covil Corporation (“Covil”) and United States Fidelity and Guaranty Company (“USF&G”).¹ Upon consideration thereof and for good cause shown,

IT IS HEREBY ORDERED that the Parties’ Joint Motion to Dismiss With Prejudice is **GRANTED**, and all claims and allegations between Covil and USF&G in the above-captioned action are dismissed to the extent such claims or allegations relate to *Finch v. BASF Catalysts LLC, et al.*, C.A. No. 1:16- cv-01077 (M.D.N.C), and *Finch v. Sentry Casualty Company et al.*, C.A. No. 2019-CP-40-03003 (S.C. Com. Pl.).² This dismissal is with prejudice, and each party shall bear its own attorney’s fees and costs. All other claims and allegations between Covil and USF&G are not impacted by this order and remain pending.

IT IS SO ORDERED.

¹ The Court also notes that Receiver previously settled with (1) Zurich American Insurance (*Finch v. Sentry Casualty Company et al.*, C.A. No. 2019-CP-40-03003 (S.C. Com. Pl.)) and (2) Wall Templeton & Haldrup, P.A., et al. (in this civil action). See Orders Granting Joint Motion to Dismiss with Prejudice dated March 2, 2021

² USF&G has appealed an Order to Clarify which is pending before the Court of Appeals (App. Case No. 2020-001437). USF&G’s and Receiver’s Joint Motion to Dismiss certain claims involves matters not affected by the appeal. The parties have also effectuated dismissals of Finch related claims in the companion cases *Finch v. BASF Catalysts LLC, et al.*, C.A. No. 1:16- cv-01077 (M.D.N.C.) (Joint Stipulation of Dismissal, ECF No. 450) and *Finch v. Sentry Casualty Company et al.*, C.A. No. 2019-CP-40-03003 (S.C. Com. Pl.) (Order Granting Joint Motion to Dismiss with Prejudice for Finch related claims filed simultaneously herewith).



Richland Common Pleas

Case Caption: Peter D Protopapas , plaintiff, et al vs Wall Templeton & Haldrup Pa ,
defendant, et al
Case Number: 2019CP4002285
Type: Order/Dismissal

So Ordered

Jean H. Toal

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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) specified below by emailing them as the addresses below:

Pleading(s): Return in Opposition to Motion to Dismiss Appeal

Parties Served:

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanon@smithrobinsonlaw.com)

Counsel for the Respondent Receiver for Covil Corporation

By: /s/ M. Todd Carroll

July 24, 2023