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Jul 31 2023

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.

**REPLY IN SUPPORT OF RECEIVER'S
MOTION TO DISMISS**

This appeal is moot. There is currently no relevant case in which third-party claims, crossclaims, or direct claims are pending against USF&G. All such claims have been dismissed. As a result, there is no case—including the case on appeal—in which USF&G is raising or could raise the affirmative defense that is the subject of this appeal. The appeal should be dismissed.

In response, USF&G asserts that “the issue on appeal remains very much alive and in dispute” (Return at 1) but is careful not to indicate *in which case* that is allegedly so. That is because the issue in this case is not alive and is not in dispute. All the parties have settled. And there is currently *no case* where USF&G has raised or could raise the affirmative defense at issue here. Accordingly, USF&G’s jurisdictional arguments are meritless.

DISCUSSION

The Motion to Dismiss explained why the settlement of this case (and every case in which USF&G could raise the affirmative defense at issue in this appeal) has rendered this appeal moot. *See* Motion at 3-5. In response, USF&G does not meaningfully challenge the facts as laid out in the Motion and does not mention a single South Carolina case dealing with the mootness doctrine (let alone argue these facts qualify for any of the three exceptions to that doctrine). Thus, this Court should grant the motion and dismiss this appeal as moot.

As an initial matter, it is undisputed that this Court should not (and cannot) consider this appeal if it is moot. Motion at 3-4 (citing *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002); *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009)). A case is moot and should not be considered if “no actual controversy capable of specific relief exists,” “when judgment, if rendered, will have no practical legal effect upon the existing controversy,” or “when some event occurs making it impossible” to “grant effectual relief.” *Sloan*, 380 S.C. at 535. Nor is there any dispute that settlement of a case moots the issues that previously would have been decided on appeal. Motion at 4 (citing *S.C. State Highway Dep’t v. McKeown Food Store No. 9*, 254 S.C. 180, 183, 174 S.E.2d 342, 343 (1970); *Cheap-O’s Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 603, 567 S.E.2d 514, 517 (Ct. App. 2002)).

USF&G does not cite or challenge the applicability of any of this mootness case law. Instead, it simply argues that, based on the circumstances here, this appeal is “obviously not moot.” Return at 5.¹

¹ USF&G also never mentions, let alone argues that it qualifies for, any of the three exceptions to the mootness doctrine the Motion discussed (at 5). That choice waives any argument that, if the appeal is moot, USF&G may qualify for an exception from the mootness doctrine. *See Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 657, 780 S.E.2d 263, 275 (Ct. App. 2015)

USF&G’s response brief also does not dispute that the asbestos personal injury suits brought against it directly as Covil’s alter ego (including *Hutto v. Covil Corp.*) in which USF&G asserted the affirmative defense relating to Covil’s dissolution and corporate status, all have settled with all claims against USF&G being dismissed. *See* Motion at 2-3; *id.* at 2 n.1 (listing cases). Nor does USF&G dispute that it is not a party to any pending or active asbestos case in which it is asserting or could assert the affirmative defense at issue in this appeal. *Id.* at 3. So, resolving the issue on appeal will have no “practical effect on the existing controversy” because USF&G’s affirmative defense no longer exists in the underlying case, and it would not “grant effectual relief” because USF&G is not currently in *any case* where it has raised or could raise this (incorrect) defense.

Not disputing the above, USF&G argues the appeal is not moot for two reasons. Both are meritless.

First, USF&G asserts that the issues in the underlying case—*Peter D. Protopapas as Receiver for Covil Corp. v. Wall, Templeton & Haldrup, P.A.*, C/A No. 2019-CP-40-02285—have not been resolved and cites an order dismissing with prejudice all claims between Covil and USF&G related to *Finch v. BASF Catalysts LLC* and *Finch v. Sentry Casualty Company* but not dismissing any “other claims” between the two. True enough, the October 19, 2021 dismissal order includes that language. What USF&G omits, however, is that since that Order, the case has fully resolved. As noted in the Motion (at 3) and not disputed by USF&G, Covil has now settled its malpractice claim against Covil’s former lawyers—Wall, Templeton & Haldrup—and settled with Zurich and the underlying asbestos plaintiffs. Put simply, there are now no “other claims”

(explaining that argument is waiver, or not “preserved,” when not made in opposition to motion). For the reasons the Motion explained, it cannot qualify for any of those exceptions.

between Covil and USF&G in the underlying litigation, and there is no “ongoing dispute between the parties.” *Contra* Return at 4.

USF&G never says what ongoing issues there are between Covil and itself (or anyone else) in the underlying litigation. The reason is simple: there are none. The case is fully resolved (though not officially closed on the docket).² And importantly for purposes of mootness, there is no possible argument—USF&G certainly does not make one—that USF&G’s affirmative defense has any relevance to the underlying case in which all parties have settled.

Second, USF&G notes generally that there have been other asbestos cases filed against Covil. Return at 4-5 & n.1. But even if Covil “will continue to be a serial defendant in asbestos litigation,” *id.* at 5-6, that does not mean *USF&G’s* affirmative defense for suits brought *against USF&G* is somehow ripe for review. Perhaps recognizing this, USF&G also predicts that in the future “plaintiffs, USF&G, and Covil will continue to litigate the viability of the statute of repose,” *id.*, but it has pointed to no existing case where it is a defendant, third-party defendant, or crossclaim defendant for that litigation to take place.

Courts decide cases—not differences of opinion. A disputed issue in the abstract is not enough for justiciability. It must be present in an actual case or controversy between the parties—and USF&G conspicuously fails to identify a single case where that is true. Even if USF&G is right that, in the future, “the viability of the statute of repose” will be at issue and thus similar arguments will be brought to this Court in a future case, Return at 6, that is no reason for the Court to resolve that *future case* “when judgment, if rendered, will have no practical legal effect *upon the existing controversy.*” *Sloan*, 380 S.C. at 535 (emphasis added). To do so would require this

² The last docket activity was over two years ago on July 12, 2021 (the dismissal of Zurich from the case). The last docket activity from the asbestos personal injury plaintiffs was in May 2021, and they have now settled.

Court to issue a true advisory opinion on potential future events. And, as the Motion argued (at 5) and USF&G does not dispute, if the issue does come up in the future, there is no reason to think it will evade review. Parties may (or may not) settle future litigation as they have done here, but that is not a reason to decide an issue no longer relevant to this appeal.

Finally, USF&G contends that it will be required “to endlessly defend Covil against asbestos claims”—but this is exactly the thing that it specifically contracted to do as Covil’s insurer. Return at 4. Attempting to avoid contractual duties is not a compelling reason for this Court to ignore the principle of mootness.

If, in a future case where USF&G is a defendant or has an adverse litigation position with Covil and seeks to raise its affirmative defense to Covil’s corporate status, it may do so.³ So long as that case does not become moot, USF&G may appeal any such decision. But it has presented no reason or argument overcoming mootness here.

CONCLUSION

“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.” *Sloan v. Greenville County*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). The Court should grant the Motion and dismiss this appeal as moot.

(Signature page follows)

³ USF&G also asserts (at 5) that its defense at issue on appeal “is not so limited” to just an affirmative defense, but “is an affirmative defense that USF&G is asserting in its capacity as one of Covil’s historic insurance carriers.” But USF&G cites no case law allowing it to raise an argument that Covil does not wish to raise, nor any reason USF&G can raise this affirmative defense if it is not party to a case. It presently is not—so the appeal is moot.

Respectfully submitted,

s/Shanon N. Peake

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
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Jean Hoefler Toal, Chief Justice (Ret.)

Case Nos. 2019-CP-40-06956 and 2019-CP-40-02285

Appellate Case No. 2020-001437

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

v.

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

AND

Sandra S. Hutto, individually and as Personal Representative of the Estate of Donald L. Hutto,
Brian Hutto, and Candace H. Youngblood, Plaintiffs,

v.

Covil Corporation; Sentry Insurance A Mutual Company; Southern Insulation, Inc.; Starr Davis
Company, Inc.; Starr Davis Company of South Carolina, Inc.; United States Fidelity &
Guarantee Company; Zurich American Insurance Company; 3M Company; AECOM; Armstrong
International, Inc.; Aurora Pump Company; BW/IP, Inc.; Carboline Company; CBS Corporation;
CGR Products, Inc.; Daniel International Corporation; Fisher Controls International, L.L.C.;
Fluor Constructors International, Inc.; Fluor Enterprises, Inc.; Foster Wheeler Energy
Corporation; The Goodyear Tire And Rubber Company; Grinnell, LLC; Hajoca Corporation;
IMG Industries, Inc.; John Crane, Inc.; Metropolitan Life Insurance Company; Spirax Sarco,
Inc.; Trane U.S., Inc.; Uniroyal Holding, Inc; Velan Valve Corporation; Viking Pump, Inc.; Weir
Valves & Controls U.S.A., Inc., Defendants,

of which

United States Fidelity and Guaranty Company is the Appellant,

and

Covil Corporation, by and through its Receiver, Peter D. Protopapas and Peter D. Protopapas, in
his capacity as Receiver of Covil Corporation are the Respondents.

PROOF OF SERVICE

I certify that a true copy of the Reply in Support of the Receiver's Motion to Dismiss in this case has been served on the following, this 31st 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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July 31, 2021.

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Subject: Appellate Case No. 2020-001437
Date: Monday, July 31, 2023 5:45:00 PM
Attachments: [POS Reply, 2.pdf](#)
[REPLY ISO Motion to Dismiss, 2.pdf](#)

Good Afternoon,

Please find attached for service the Receiver's reply in support of the motion to dismiss in the above-referenced appeal that we are filing in the Court of Appeals today.

Thank you,
Shanon

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