THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2020-001437

Appeal From Richland County
Jean Hoefer Toal, Acting Circuit Court Judge

Opinion No. 6037
Heard October 11, 2023 – Filed November 22, 2023

AFFIRMED

Matthew Todd Carroll, of Womble Bond Dickinson (US), LLP, of Columbia, Mary Elizabeth O'Neill, of Womble Bond Dickinson (US), LLP, of Charlotte, NC, Andrew T. Frankel, of New York, NY, and Mary Beth Forshaw, of New York, NY, all for Appellant.

G. Murrell Smith, Jr., Jonathan M. Robinson, and Shanon N. Peake, all of Smith Robinson Holler DuBose Morgan, LLC, of Columbia, for Respondent.

MCDONALD, J: This appeal arises from an action brought by the dissolved Covil Corporation's appointed Receiver, Peter D. Protopapas, against one of Covil's insurers, United States Fidelity and Guaranty Company (USF&G). USF&G appeals the special circuit court's order clarifying the status of the Receivership and rejecting USF&G's argument that South Carolina's statute of repose available to dissolved corporations bars asbestos personal injury claims against Covil. We affirm the order of the special circuit court.

Facts and Procedural History

Covil sold insulation products for many years, and some of these products contained asbestos. Covil's operations also included the installation and removal of insulation at industrial facilities throughout South Carolina. Thus, Covil has been named as a defendant in asbestos bodily injury suits since 1976. Plaintiffs in these lawsuits alleged that during specified periods, Covil made, manufactured, sold, distributed, installed, or removed insulation materials containing asbestos.

Covil ceased business operations in 1991, and the South Carolina Secretary of State revoked Covil's corporate charter in 1993. Throughout the course of Covil's operations, it had insurance coverage through various insurers, including USF&G, Zurich, Sentry, Hartford, and TIG.

In 1991, the Greenville County master-in-equity appointed a receiver for Covil (the Prior Receiver). By order filed May 12, 1992, the master judicially dissolved Covil and ordered the Prior Receiver to provide known claimants with notice of dissolution pursuant to section 33-14-106 of the South Carolina Code and to publish the notice required by section 33-14-107. The master also ordered the Prior Receiver to gather and dispose of Covil's assets.

On November 11, 1992, the Prior Receiver filed a petition to terminate his receivership. The petition described the actions taken by the Prior Receiver and included an accounting of the Prior Receiver's expenditures. This accounting does not reference any expenses paid to publish a notice of dissolution or otherwise paid to a newspaper. In a November 12, 1992 order, the master discharged the Prior Receiver, finding he had "fully complied with the previous Orders of this Court in

liquidating the assets of his Defendants, that his accounting is in order and that the relief sought by him should be approved."

In 2018, Covil defaulted in two mesothelioma cases, and in November 2018, the special circuit court appointed Receiver to represent Covil's interests. The Receiver later filed a motion to clarify the special circuit court's Appointment Order. The circuit court granted this motion, finding Receiver was vested with all rights of Covil, including the right to access files retained by two law firms Covil's insurers retained to represent their insured.

On April 24, 2019, the Receiver filed a bad faith action against USF&G, Zurich, and Sentry (Insurers) as well as a legal malpractice action against one of the law firms (Law Firm) that represented Covil. The Receiver alleged Insurers acted as Covil's alter ego in conducting Covil's post-dissolution affairs prior to Receiver's appointment, including making decisions as to the disposition of litigation against Covil and the treatment and characterization of claims against Covil's insurance policies. The Receiver further asserted Insurers and Law Firm acted in bad faith in choosing not to appear in the two 2018 cases in which Covil was held in default.

The Receiver subsequently sought an order of contempt to address Insurers' failures to comply with several special circuit court orders, including an order requiring Insurers to provide Receiver with requested insurance documentation. Following a hearing, the special circuit court issued a January 8, 2020 order describing the troubling issues that have arisen in Covil's asbestos litigation involving Insurers. This order noted Insurers had been "operating an otherwise defunct Covil for purposes of managing Covil's asbestos litigation" for over two decades and had failed to cooperate with the Receiver despite several court orders directing them to do so. The special circuit court explained that despite repeated instructions and discovery orders, Insurers failed to provide the Receiver with all relevant insurance policy limits and documentation necessary for the Receiver to participate in mediating Covil's asbestos litigation. This order further noted the Receiver had gone to great lengths in his effort to piece together the necessary coverage information. Notably, the special circuit court found the Receiver had submitted evidence demonstrating USF&G's prior claims practice involved the systematic destruction of historical insurance coverage documentation in the hope that policyholders would be unable to produce the policy records necessary to establish coverage. The special circuit court found USF&G spoliated relevant evidence and noted it would "issue an appropriate sanction to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field."

On December 12, 2019, Sandra Hutto, personal representative of the Estate of Donald L. Hutto, and other family members filed an action against numerous defendants, including Covil and Insurers. Hutto's complaint included wrongful death and survival claims arising from Donald's exposure to asbestos-containing materials and raised additional claims related to Insurers' handling of Covil's asbestos litigation. These included Hutto's claims that Insurers acted as Covil's alter ego and with others to effectuate "their common purpose of exclusive, unilateral control by running Covil's affairs in all material respects." Hutto claimed Insurers controlled Covil for nearly thirty years and "made Covil's defense of asbestos litigation nearly, if not completely, impossible." She further asserted Insurers' conduct made them "fully responsible for all of Covil's liabilities prior to appointment of the Receiver."

On February 21, 2020, Covil, by and through Receiver, crossclaimed against USF&G and Zurich. Covil claimed USF&G and Zurich were fully responsible for all of Covil's liabilities prior to Receiver's appointment because they acted as Covil's alter ego in managing Covil's assets and in acting on Covil's behalf. Covil also brought a crossclaim against these insurers for their bad faith failure to defend Covil in the Hutto litigation. USF&G answered, raising as an affirmative defense the statute of repose available to dissolved corporations through sections 33-14-106 and 33-14-107 of the South Carolina Code. USF&G asserted that if it were found to be Covil's alter ego, it was entitled to assert all claims and defenses to which Covil would be entitled, including this statute of repose.

On April 10, 2020, the special circuit court granted joint motions to establish the Covil Qualified Settlement Fund (QSF) and to approve settlements between the Receiver and Sentry and two other insurers.[1] Following the approval of the settlement agreements and the establishment of the QSF, all claims against Hartford, Sentry, and TIG were assigned to the QSF.

On July 20, 2020, the Receiver filed an amended complaint in the bad faith and legal malpractice action against Law Firm, USF&G, and Zurich. USF&G timely answered and raised several affirmative defenses. Among these was USF&G's affirmative defense that all claims against Covil or any entity alleged to be Covil's

[1] Hartford, Sentry, and TIG all agreed to buy back their policies in excess of the policy limits.

alter ego were barred by the statute of repose for claims against dissolved corporations. Zurich raised the same statute of repose defense.[2]

On July 21, 2020, the Receiver filed a motion to clarify the status of the Receivership. In this motion, the Receiver asked that the special circuit court "clarify the impact, if any, of these affirmative defenses and thus finally adjudicate this issue of South Carolina law."

In its September 25, 2020 order clarifying the status of the receivership, the special circuit court held "nothing from the prior Receivership precludes the current Receivership or personal injury asbestos claimants from filing lawsuits against Covil." The circuit court further found no evidence exists to support a finding that notice of Covil's dissolution was ever published as was required to trigger the statute of repose. The special circuit court specifically referenced the 1992 master's orders addressing the Prior Receivership, explaining the November 1992 order stated only that the Prior Receiver complied with previous orders to liquidate Covil's assets—the 1992 order made *no* finding as to whether the notice of dissolution was ever published. The circuit court determined that even if the notice of dissolution had been published, claims against Covil were not barred as a matter of law under the post-2004 section 33-14-107(c) because the amended version of the statute applied only to corporate dissolutions subsequent to its 2004 enactment. Yet, the circuit court further noted claims against Covil were not barred under the prior version of the statute either because the statute's reference to "unknown claims" referred to claims unknown to the corporation, not those unknown to the claimant. Finally, the circuit court found the Reporter's Comment for § 33-14-107 revealed the intent of the Legislature "to exclude nonexistent claims from the reach of both section 33-14-106 and -107 at the time of Covil's dissolution."

USF&G appealed and in July 2023, the Receiver moved to dismiss this appeal as moot, asserting all underlying cases alleging USF&G acted as Covil's alter ego had settled. USF&G opposed this motion, arguing certain claims remained and the question of whether Covil is subject to future asbestos claims is not moot. The Receiver timely filed a reply and on August 3, 2023, this court requested that USF&G file a surreply responding to five specific questions relevant to the court's mootness inquiry. USF&G filed a surreply largely unresponsive to the court's questions, and the Receiver sought leave to respond. The court granted such leave and accepted the Receiver's response as filed. Although the court declined to

[2] The Receiver ultimately settled the claims against Law Firm and Zurich.

dismiss the appeal, it instructed the parties to be prepared to address mootness, in addition to the issues raised in their briefs, at oral argument.

Standard of Review

"Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015) (quoting *Grier v. AMISUB of S.C., Inc.,* 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012)). As to findings of fact, however, a circuit court's order "will only be disturbed on appeal if the findings are wholly unsupported by the evidence or controlled by an erroneous application of the law." *Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011).

Analysis

I. Standing

USF&G argues the Receiver lacked standing to seek a ruling on section 33-14-107 that could increase Covil's liability by eliminating an affirmative defense to asbestos personal injury actions. We disagree with USF&G's characterization of the Receiver's filing and with its standing argument.

"A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a 'real party in interest.'" *Stoney v. Stoney*, 425 S.C. 47, 64, 819 S.E.2d 201, 210 (Ct. App. 2018) (quoting *Ex Parte Gov't Emps. Ins. Co.*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007)); *see also Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (To have standing, "one must be a real party in interest. 'A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.'" (quoting *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999))).

In *Sea Pines*, our supreme court explained:

> In *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), the United States Supreme Court enunciated a stringent standing test. *Lujan* set forth the "irreducible

> constitutional minimum of standing," which consists of the following three elements:
>
> > First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Sea Pines Ass'n for Prot. of Wildlife, Inc., 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan* at 559–61) (alterations in original).

Here, the special circuit court appointed Receiver "with the power and authority to fully administer all assets of Covil [including] the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers." Thus, the Receiver clearly has an interest in determining whether Covil is subject to future claims as it seeks to fulfill the requirements of the Appointment Order. Moreover, it appears Covil has suffered injury through the conduct of USF&G in the Hutto (and perhaps other) asbestos litigation. The Receiver's need for clarification in considering Covil's potential future liability and proper available defenses relates concretely to the management of Covil's assets and is particularly pertinent to any claims handling or bad faith claims that may remain against USF&G.[3] The record reveals years of concerning conduct on the part of USF&G and others as they prepared for the onslaught of asbestos litigation to come. We accordingly find the Receiver had standing to seek—and properly sought—clarification of the special circuit court's Appointment Order.[4]

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[3] The parties disagree as to whether any such claims remain.

[4] USF&G argued to the special circuit court that the Prior Receivership barred both the institution of the current Receivership and all subsequent litigation by or

II. Mootness

"An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Croft as Tr. of James A. Croft Tr. v. Town of Summerville*, 433 S.C. 473, 480, 860 S.E.2d 352, 356 (2021) (quoting *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001)). "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 the Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006).

> In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc. v. Alexander, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015) (internal citations omitted) (quoting *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596)).

The Receiver argues this appeal is moot because all matters in which USF&G has raised the statute of repose as an affirmative defense have been resolved. Such matters include Covil's action against Law Firm, its alter ego claims against USF&G, and the underlying claims in the cases in which USF&G chose to default.

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against Covil. To the extent USF&G seeks to pursue such an argument beyond the context of the statute of repose arguments discussed *infra* in Section III, we find such argument meritless. Abundant evidence in this record establishes USF&G's problematic claims handling and litigation practices related to Covil. This behavior, including but not limited to the policy of systematic document destruction, alone necessitated the appointment of the current Receiver. The deliberate decisions to default in the two 2018 cases further reflect the need for the special circuit court's appointment and clarification orders.

But, even if the prior settlements rendered the current case moot (which USF&G strongly disputes), an exception to the mootness doctrine applies here. *See Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc.*, 414 S.C. at 359, 778 S.E.2d at 900 ("[If the] decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." (quoting *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596)).

Under the Appointment Order, the Receiver has authority and control over Covil's assets, including available insurance coverage. Therefore, it is imperative that the Receiver understand Covil's potential remaining liabilities in order to properly manage Covil's assets and any further claims against Covil that may arise. Whether Covil will be subjected to future claims involving USF&G policy coverage remains unclear, but our decision here would likely affect such claims or have collateral consequences for the parties should USF&G or another insurer attempt to raise this affirmative defense in future litigation. Because an appellate ruling addressing the statute of repose may have consequences beyond the current case, we decline to dismiss this appeal as moot.

III. Statute of Repose

In addition to its arguments challenging Receiver's standing and the procedural posture of the motion to clarify, USF&G asserts "the statute of repose bars claims against Covil regardless of whether the 2004 or 1992 version of the statute applies." We disagree.

USF&G argues the special circuit court erred in finding the pre-2004 version of section 33-14-107—effective at the time of Covil's 1992 dissolution—was the applicable version of the statute. Still, USF&G further asserts claims against Covil are barred under either version of the statute because the master's November 1992 order is dispositive as to the question of whether the Prior Receiver published the notice of Covil's dissolution necessary to trigger the statute of repose.

At the time of Covil's dissolution, section 33-14-107 provided, in pertinent part:

> (a) A dissolved corporation may publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(b) The notice must:

(1) be published once in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this State, its registered office) is or was last located;

(2) describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and

(3) state that a claim against the corporation is barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:

(1) a claimant who did not receive written notice under Section 33-14-106;

(2) a claimant whose claim was timely sent to the dissolved corporation but not acted on.

S.C. Code Ann. § 33-14-107 (a)-(c) (1988).

Subsection (c) of 33-14-107 was amended in 2004, and now reads as follows:

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within ten years after the publication date of the newspaper notice:

> (1) a claimant who did not receive written notice pursuant to Section 33-14-106;
>
> (2) a claimant whose claim was timely sent to the dissolved corporation but not acted on; and
>
> (3) a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution.

S.C. Code Ann. § 33-14-107(c) (2006). The 2004 amendment added subsection (c)(3)'s bar for claimants whose claims are "contingent or based on an event occurring after the effective date of the dissolution." *Id.* This amendment also extended the repose period for claims against a dissolved corporation from five to ten years "after the publication date of the newspaper notice." *Id.*

"It is well-established that '[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.'" *Grier*, 397 S.C. at 535, 725 S.E.2d at 695 (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "What the General Assembly says in the text of the statute is the best evidence of its intent, and this Court is bound to give effect to the legislature's expressed intent." *Aiken v. S.C. Dep't of Revenue*, 429 S.C. 414, 419, 839 S.E.2d 96, 99 (2020). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 10–11, 760 S.E.2d 785, 790 (2014) (quoting *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010)).

Based on the plain language of either version of section 33-14-107, a statutorily compliant notice of publication was necessary to trigger application of the statute of repose available to a dissolved corporation. But the record here is devoid of evidence that Covil or the Prior Receiver *ever* published the necessary notice of dissolution. USF&G references the master's 1992 order finding the Prior Receiver complied with the court's prior orders, but the order merely states the Prior Receiver "fully complied with the previous Orders of this Court in liquidating the assets of his Defendants." The master made *no finding* as to whether a notice of dissolution was published—the order simply does not address publication. Further, when the Prior Receiver filed the petition seeking to dissolve that receivership, he attached a document detailing his expenses; this accounting makes

no mention of funds paid to publish a notice of dissolution nor does it reference payment to a newspaper. More notably, a 2001 claim file activity memorandum from a different Covil insurer notes "Covil no longer around . . . dissolution was filed[,] however no evidence that formal notice was filed [illegible] published . . . will investigate; push the law firm that handled the dissolution to file notice.

In sum, evidence in the record supports the special circuit court's finding that publication of the dissolution notice necessary to trigger the statute of repose did not occur during the Prior Receivership. Moreover, there is no evidence in the record to support an argument that Covil published a notice of dissolution following the 2004 statutory amendment.[5] Accordingly, we affirm the order of the special circuit court, including the findings that "no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil" and "nothing from the prior Receivership precludes the current Receivership or personal injury asbestos claimants from filing lawsuits against Covil."[6]

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[5] In a case involving Covil and Zurich, a North Carolina District Court similarly addressed the lack of published notice of Covil's dissolution. *See Finch v. Covil Corp.*, No. 1:16-CV-1077-CCE-JEP, Memorandum Opinion Order at 9 (M.D.N.C. Oct. 14, 2020) ("The Court finds that the receiver did not publish the notice in compliance with § 33-14-107(b)" and "[t]here is no evidence that Covil published a notice of dissolution after the 2004 provision was enacted, and the Court finds that it did not.").

[6] Because USF&G cannot satisfy the necessary predicate of publication, we need not address which version of § 33-14-107(c) might apply had such publication occurred or further consider the operation of the statute. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting a reviewing court need not address remaining issues when disposition of a prior issue is dispositive). And, we reject USF&G's argument that a "presumption of regularity" establishing the Prior Receiver faithfully discharged all responsibilities applies to the question of publication. The crux of USF&G's position as to this claimed presumption appears to be that it would be problematic to allow the Receiver to rely on the absence of evidence of publication to conclude "that such absence implies noncompliance." In light of the evidence of non-publication previously referenced, we disagree with USF&G's contention that the special circuit court used "a negative inference to overcome a well-established presumption." *See also Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000) (acknowledging "the well-established rule that the party pleading an affirmative defense 'has the burden of proving it'" (quoting *Hoffman v.*

Conclusion

Based on the foregoing, the order of the special circuit court is

AFFIRMED.

VINSON, J., and BROMELL HOLMES, A.J., concur.

Greenville County, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963))). We further disagree that the special circuit court's findings serve to collaterally attack the master's November 1992 order. Like the circuit court, we do not read the 1992 order to include the finding USF&G so strenuously urges us to presume.