THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Opinion No. 6037
Appellate Case No. 2024-000623

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This appeal arises from a suit by an administratively dissolved company—Covil Corporation ("Covil")—through its court appointed Receiver, Respondent Peter D. Protopapas ("the Receiver"), against its insurer, Petitioner United States Fidelity and Guaranty Company ("USF&G"). The Receiver alleges, among other things, that USF&G grossly mishandled asbestos litigation against Covil, specifically the case of *Hill v. Covil Corporation*, CA NO. 2018 –CP-40-04680, in breach of the relevant insurance policy and the duty of good faith. From 1976–2016, Covil collectively settled hundreds of lawsuits for under $500,000. During this time period, Covil went out of business (1991) and its insurers, namely USF&G, hid and destroyed policies in order to avoid contractual obligations to defend and indemnify Covil for asbestos-related personal injury claims. Since Justice Toal's appointment of the Receiver, Covil has collectively settled cases for over $20 million and has succeeded in marshaling over $45 million of Covil's assets into a fund available to compensate those injured South Carolina citizens who may have legitimate asbestos claims against Covil. USF&G continues to seek to avoid its contractual obligations to Covil so that it can be unjustly enriched at the expense of South Carolinians suffering from asbestos-related cancer.

USF&G seeks this Court's review of a decision by the Court of Appeals affirming an interlocutory order of the Special Circuit Court (by Justice Toal), which held that USF&G cannot assert the ten-year statute of repose for claims against dissolved corporations set forth in section 33-14-107 of the South Carolina Code to bar the Receiver's claims. Specifically, the Court of Appeals affirmed Justice Toal's finding that USF&G could not demonstrate that the publication of the notice of dissolution required for the statute of repose to run had occurred. Indeed, the Court of Appeals recognized that the circumstances affirmatively showed that the publication did not

occur. That factual finding is consistent with the view of every court to consider these same arguments USF&G presents here.[1] These are claims that Justice Toal previously characterized as "specious," "frivolous," "absurd," and "unethical."[2]

Nothing in USF&G's petition warrants this Court's discretionary review. The primary issue is a factual one: whether there is any evidence that Covil's dissolution was ever published. This Court is generally not in the business of reviewing factual determinations by the Circuit Court, which are entitled to deference on appeal. To the extent USF&G attempts to raise legal issues with the Court of Appeals decision, they are contrary to well-established law that the Court of Appeals faithfully applied.

First, the Court of Appeals properly rejected USF&G's argument that the Receiver somehow lacks standing to urge the Circuit Court to adjudicate an affirmative defense against its suit. USF&G's argument is not that the Receiver lacks an interest in the litigation, but rather that USF&G views the Receiver's interest as improper because it could increase Covil's liability. That is not a standing argument, and it is meritless. The Receiver's court-appointed role specifically requires it to reject frivolous defenses, such as the one that USF&G attempted to self-servingly raise for Covil.

Second, USF&G presents no basis for overturning Justice Toal's factual finding that there is no evidence that notice of Covil's dissolution was published. After a careful review of the

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[1] *See* Order Denying Motions to Reconsider and Motion to Stay, *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155 (Ct. Com. Pl., May 7, 2020) ("The Court refuses to ignore the plain language of the statute and the clearly expressed legislative intent that section 33-14-107 does not bar claims that did not exist at the time of Covil's dissolution . . . ."); *Finch v. Covil Corp.*, No. 1:16-CV-01077, 2020 WL 6063054, at *5 (M.D.N.C. Oct. 14, 2020) ("The Court finds that the receiver did not publish a notice in compliance with § 33-14-107(b).").

[2] Order Denying Motions to Reconsider and Motion to Stay, *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155 (Ct. Com. Pls., May 7, 2020).

record, the Court of Appeals found the record was "devoid of evidence that Covil or the Prior Receiver *ever* published the necessary notice of dissolution." (Appx 011). USF&G's petition points to no facts overlooked by the courts below, and its attempts to turn this factual determination into a legal issue are meritless.

Third, Justice Toal correctly held that even if the required notice had been published, the version of section 33-14-107 in effect when Covil was administratively dissolved in 1992 does not apply to contingent or future claims. It is undisputed that the claims at issue here are contingent and future claims, therefore section 33-14-107 is inapplicable. While the South Carolina Legislature later amended section 33-14-107 to extend its reach to contingent and future claims, the amendment does not avail USF&G. Amendments to statutes of repose are presumed to apply only prospectively—not retroactively—and nothing in the text of the amendments alters that presumption. As a result, the amendments to section 33-14-107 do not apply to corporate dissolutions that occurred before the amendments, like Covil's administrative dissolution in 1992.

For these reasons and others discussed below, USF&G's latest attempt to undermine and delay the important work of the Special Circuit Court and the Receiver should be rejected. This Court should deny review.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that the Receiver had standing to seek, and properly sought, clarification of the Circuit Court's appointment order.

2. Whether the Court of Appeals properly affirmed the Circuit Court's factual finding that publication of the dissolution notice necessary to trigger the statute of repose did not occur during the prior receivership.

3. Whether the Circuit Court correctly held that the legislature's 2004 amendment of section 33-14-107 is irrelevant because the 2004 amendment does not retroactively apply to corporate dissolutions that occurred prior to the amendment's passage.

4. Whether the Court of Appeals properly referenced prior findings by the Circuit Court designated in appellate record.

COUNTER-STATEMENT OF THE CASE

I. Factual Background

A. Covil's insurers, including USF&G, controlled and mismanaged Covil's asbestos litigation following Covil's administrative dissolution.

Covil was an insulation contractor in the business of installing, repairing, and removing asbestos-containing insulation in industrial facilities in North Carolina, South Carolina and throughout the Southeast. Covil went out of business in 1991, and the corporation administratively dissolved in 1992. (R. p. 6.) From at least 1964 until 1991, Covil installed, removed, and repaired insulation in industrial facilities. (R. pp. 115–16.) It has been alleged that, through at least 1986, Covil's operations involving the repair, replacement, removal, or disturbance of insulation exposed persons to asbestos, which has resulted in numerous asbestos personal injury lawsuits against Covil. (R. p. 116.) Personal injury plaintiffs have continued to sue Covil for asbestos-related injuries following its administrative dissolution in 1992. (R. pp. 115–16)

For more than 25 years after Covil ceased its business operations, USF&G and other insurers controlled Covil's defenses in these lawsuits, made all litigation and settlement decisions, determined how to use and dispose of Covil's remaining assets (primarily, Covil's insurance policies), and otherwise conducted all of Covil's affairs. (R. pp. 116–17.) During this period, USF&G and other insurers treated Covil as their alter ego and wielded it to suit their interests, not Covil's interests. (R. pp. 116–17.) Among other things, USF&G and the other insurers hired counsel ostensibly to represent Covil in the asbestos cases, but that counsel took direction from USF&G and the other insurers exclusively, without regard for Covil's interests. (R. p. 118.)

B. Justice Toal appointed a new receiver for Covil, who sued USF&G and other Insurers for breach of the insurance policies and bad faith.

Sitting by designation as Acting Circuit Court Judge and Chief Administrative Judge over all asbestos litigation filed in South Carolina, Justice Toal "observed several irregularities in the way that Covil conducted itself in its litigation," and granted a motion to appoint a new receiver. (R. p. 23.) These irregularities included Covil having "inexplicably defaulted on two mesothelioma asbestos cases" in late 2018. (R. p. 23.) Thereafter, on November 2, 2018, Justice Toal appointed Peter Protopapas as receiver to manage Covil's litigation. (R. pp. 16–18, 42–44.)

The Receiver soon learned of USF&G's and the other insurers' gross mismanagement of asbestos lawsuits against Covil, including in particular the case of *Hill v. Covil Corporation,* CA NO. 2018 –CP-40-04680. In April 2019, the Receiver sued USF&G, Zurich American Insurance Company ("Zurich"), Sentry Casualty Company, and the lawyers the insurers hired to represent Covil in the *Hill* lawsuit, Wall Templeton. The Receiver asserted claims against USF&G for liability as Covil's alter ego, breach of Covil's insurance policies, bad faith handling of Covil's insurance claims, and negligence. (R. pp. 124–33.)

II. Procedural History

A. USF&G asserted a statute of repose affirmative defense to the Receiver's claims against it.

In answer to the Receiver's complaint, USF&G and Zurich (which has since settled) asserted as an affirmative defense to Covil's claims against them that:

> 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. Plaintiff's claims against USF&G are necessarily barred also because Plaintiff's alleged claims against USF&G are derivative of underlying asbestos claims against Covil.

(R. p. 255.) While USF&G's statute of repose affirmative defense is vague, it merely rehashes the same arguments previously rejected in other proceedings. There is nothing new here, and no reason to overturn prior rulings.

USF&G's statute of repose defense focuses on a prior Covil receivership that was formed, administered, and terminated in *First Savings Bank, FSB v. Covil Corp.*, C/A No. 91-CP-23-04445 (Ct. Com. Pl.) ("*FSB v. Covil*"), in Greenville County in the early 1990s. There, on May 12, 1992, Judge Charles B. Simmons, Jr. appointed a receiver ("the prior receiver") to marshal and liquidate Covil's assets and distribute the resulting proceeds.[3] (R. pp. 463–66.) In the same order, Judge Simmons also instructed that, "to the extent not already accomplished, the Receiver shall publish the Notice required by § 33-14-107[.]" (R. p. 466.) Six months later, the prior receiver detailed all the steps he took to marshal and liquidate Covil's assets and submitted a detailed accounting of his expenditures. (R. pp. 663–79.) The prior receiver's submissions did not mention any newspaper publication, and his detailed accounting does not reflect any expenses associated with a newspaper publication of a notice of dissolution. (R. pp. 663–79.) Furthermore, during the course of this litigation, no such publication was found. As a result, there is no evidence in the record that the prior receiver published the notice of dissolution required to begin the statute of repose.

Nevertheless, the crux of USF&G's statute of repose argument contends that, as part of the prior receiver's efforts to wind down the corporation, the prior receiver in fact published a notice to potential creditors in 1992, which triggered the statute of repose under section 33-14-107. USF&G further argues that the statute of repose, as amended in 2004—12 years after Covil was administratively dissolved—bars all asbestos claims against Covil, including unknown or contingent claims such as the Receiver's claims against USF&G here.

[3] In May of 2020, Judge Simmons transferred the receivership to Justice Toal, Acting Circuit Court Judge and Chief Administrative Judge over all asbestos litigation.

As noted above, USF&G and Zurich raised the same argument in other cases. In *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155, which also was before Justice Toal, USF&G attempted to intervene in order to object to a settlement agreement between the Receiver and several other insurers concerning Covil's asbestos liability. USF&G argued in its objection that the settlement was barred by the actions of the prior receiver because the statute of repose had run on asbestos claims against Covil. Justice Toal firmly rejected USF&G's "newly found, self-serving argument that Covil no longer has any underlying liabilities in asbestos cases in South Carolina due to its dissolution," because section "33-14-107(a) and (b) are clearly inapplicable in the context of these asbestos claims against Covil."[4] Justice Toal further found that USF&G's "late and seemingly frivolous objection simply raises additional questions about the propriety" of USF&G's management of Covil's litigation prior to the appointment of the Receiver, because USF&G had never raised the same defense on Covil's behalf before then. (*Id.* at 15.)

Similarly, in *Finch v. Covil Corporation*, 1:16-CV-01077, 2020 WL 6063054, at *9 (M.D.N.C. Oct. 14, 2020), Zurich asserted the same statute of repose argument in a motion to intervene and for relief from a judgment against Covil. Zurich argued that it had recently learned of the 1991–92 receivership administratively dissolving Covil, that the receiver published a notice of dissolution, and as a result the statute of repose barred the *Finch* plaintiff's claims against Covil. The Federal District Court rejected Zurich's statute of repose argument for several reasons, including that "Zurich has submitted no evidence from any newspaper showing that the notice was actually published, much less that any published notice met the statutory requirements set by § 33-14-107(b)." (*Id.* at *10.)

[4] (R. p. 645.)

B. The Receiver moved for clarification of the status of the receivership in light of USF&G's statute of repose affirmative defense.

As discussed above, in connection with the Circuit Court's order overruling USF&G's attempted objection to approval of the settlement in *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155, Justice Toal had already rejected USF&G's statute of repose argument. Accordingly, after service of USF&G's Answer to the Receiver's Complaint in this case in which USF&G asserted the very same statute of repose argument—this time in the form of an affirmative defense—the Receiver moved for an order that would fully and finally adjudicate the impact, if any, that the prior receivership had on the current receivership and this case. (R. pp. 429–43.)

As he had argued in opposition to USF&G's objection to the *Falls v. CBS Corp.* settlement, the Receiver argued in the Motion for Clarification that there is no evidence that the prior receiver published the notice required by 3-14-107(c), and therefore the repose period never started running. (R. pp. 437–38.) The Receiver further argued that even if the notice had been published, the version of section 33-14-107 in effect at the time of Covil's administrative dissolution did not bar the future or contingent claims at issue here, and that the 2004 amendment to the statute of repose did not apply retroactively to dissolutions prior to 2004. (R. pp. 440–42.)

In response to the Receiver's motion, USF&G argued primarily that the Receiver lacks standing to challenge its affirmative defense to the Receiver's claims because, according to USF&G, the statute of repose defense purportedly would benefit Covil if it had merit. As USF&G put it, "Covil does not have a legally-protected interest in exposing itself to tort judgments, and parties sued as vicariously responsible for Covil's torts are entitled to assert those same defenses—even if Covil acts against its own legal interests by gratuitously waiving them."[5] USF&G mistakenly believes

[5] (R. p. 714.)

that the Receiver has been appointed to protect USF&G's interest and to assist them in avoiding their contractual obligations to defend and indemnify Covil for asbestos-related personal injury claims. While the Receiver may have a duty to cooperate with the insurer in defending underlying tort actions and has done so, the Receiver is not obligated to aid its carriers by asserting specious defenses and hiding and ignoring assets to avoid legitimate creditors/claimants. On the contrary the Receiver has been "charged with marshaling Covil's assets and prudently using those assets to address Covil's asbestos liabilities in a responsible fashion." (R. p. 646.).

Justice Toal had previously considered and rejected USF&G's standing argument in *Falls v. CBS Corp*. There, Justice Toal held that the "Receiver is certainly under no obligation to advance frivolous arguments or to assert specious defenses to Covil's asbestos cases," and that "[n]on-Party USF&G's contention that the Receiver . . . is undermining Covil's asbestos defenses by refusing to behave unethically (at USF&G's behest) is absurd." (R. p. 646.) Justice Toal adhered to her prior reasoning and rejected USF&G's argument that the Receiver lacked standing to challenge USF&G's affirmative defense.

On the merits, USF&G rehashed the same arguments it asserted in *Falls v. CBS Corp.*, and Justice Toal rejected them yet again, holding that the prior receivership has no effect on claims against Covil and, therefore, no effect on the Receiver's claims against USF&G. (R. pp. 5–15.) In particular, Justice Toal found the evidence showed that the prior receiver had not published any newspaper notice and that the statute of repose therefore had not begun to run. (R. pp. 9–10.) Justice Toal also reviewed Judge Simmons's November 11, 1992 order, and "upon close examination," determined that the order does not reflect any finding that notice was published.[6]

[6] Additionally, the circuit court had the entire court file in *First Savings Bank, FSB v. Covil Corp.*, C/A No. 91-CP-23-04445, as Judge Simmons transferred this case to Justice Toal. (R. p. 691).

(R. pp. 9–10.) Justice Toal further held that, even if a notice had been published, USF&G's defense lacks merit because: (1) the version of the statute in effect in 1992 plainly did not preclude contingent and future claims, like those at issue here and (2) the 2004 amendment expanding the statute to cover such claims is not retroactive. (R. pp. 10–13.)

Justice Toal granted the Receiver's motion, and this appeal followed. After briefing and oral argument, the Court of Appeals issued an opinion on November 22, 2023, affirming the circuit court's decision. The Court of Appeals found that the Receiver had standing to seek—and properly sought—clarification of the Special Circuit Court's Appointment Order, noting that the Receiver properly sought clarification of the appointment order because the Receiver has an interest in determining whether Covil is subject to future claims, and if so, what defenses are available to those claims. (Appx. p. 007). As to USF&G's argument that the statute of repose bars claims against Covil, the Court of Appeals found that based on the plain language of either the 2004 or 1992 version of the statute, a statutorily compliant notice of publication was necessary to trigger the statute of repose, but there is no evidence that the Prior Receiver ever published the necessary notice of dissolution. (Appx. p. 012). As a result, the Court of Appeals affirmed the Special Circuit Court's 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." *Id*.

USF&G filed a Petition for Rehearing on December 6, 2023, and the Court of Appeals denied rehearing on March 18, 2024. (Appx. p. 195). The instant Petition for Writ of Certiorari followed.

ARGUMENT

I. The Court of Appeals properly found that the Receiver had standing.

There is no reason to review the Court of Appeals' correct determination that the Receiver had standing to seek the order on appeal. Contrary to USF&G's contention, the Receiver has the requisite "personal stake in the subject matter of a lawsuit." *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769 (2016). The Receiver suffered an (i) injury in fact, (ii) traceable to USF&G (and the other insurer defendants), and (iii) redressable by a court ruling—all this Court requires for standing. *Id.* (*citing Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res*., 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001)).

Upon appointment, the Receiver was "charged with marshaling Covil's assets and prudently using those assets to address Covil's asbestos liabilities in a responsible fashion." (R. p. 646.). The Receiver, standing in Covil's shoes, brought suit against USF&G to recover damages for USF&G's bad faith mismanagement of Covil's assets.[7] Contrary to the USF&G's suggestions, that misconduct is well-documented. As part of that suit, USF&G put forward an affirmative defense that claims against Covil were barred by the statute of repose. In order to prosecute its suit against USF&G—which the Receiver plainly had standing to bring—it necessarily had standing to seek clarification from Justice Toal on what the Receiver believed to be a baseless affirmative defense by a defendant in that suit.

Moreover, as the Court of Appeals recognized, because of its role in maintaining Covil's assets, 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" and that interest "is particularly

[7] USF&G's reliance on *Kleckley v. Northwestern National Casualty Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000) is misplaced. There, the party asserting a tort action for an insurer's bad faith refusal to pay benefits was a non-party to the insurance contract. *Id*. Here, by contrast, by his appointment, the Receiver stands in Covil's shoes.

pertinent to any claims handling or bad faith claims that may remain against USF&G." (Appx. p. 007). The Court of Appeals made no error requiring this Court's review.

In arguing to the contrary, USF&G does not really make a standing argument at all. Instead, USF&G argues that by challenging USF&G's statute of repose affirmative defense, the Receiver is acting against what *USF&G* perceives to be Covil's interest, which it claims "is directly contrary to the very purpose of receiverships." (Pet. at 13). In other words, USF&G concedes that the Receiver has a legal interest in the dispute over the availability of the statute-of-repose defense but complains that its interest on behalf of Covil should require it to support the defense, even if doing so is contrary to the facts and the law.

USF&G's argument grossly misunderstands the role and legal duties of the Receiver. Yes, the Receiver stands in the shoes of Covil, but it also has unique duties to the Court. As the U.S. Supreme Court in *Porter v. Sabin,* 149 U.S. 473, 479 (1893) (emphases added), explained:

> When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, ***the court assumes the administration of the estate***. ***The possession of the receiver is the possession of the court; and the court itself holds and administers the estate through the receiver, as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it***.

Thus, Justice Toal correctly reasoned that the Receiver is neither required nor permitted "to advance frivolous arguments," nor to "assert specious defenses" like USF&G's meritless statute-of-repose defense. (R. p. 646.). Rather, it is the Receiver's duty to exercise reasoned judgment, acknowledge the reality that asbestos claims against Covil are *not barred* by the statute of repose, and to pursue coverage from USF&G and Covil's other insurers. The Receiver has been doing exactly that. Here the Receiver has determined that Covil's interest is served by defeating USF&G's statute of repose defense because it is legally and factually meritless and serves only as a barrier to the Receiver's claims against USF&G. The Court of Appeals' ruling recognizing this legitimate interest is correct. Nothing about this issue warrants this Court's review.

II. There is no basis for reviewing the Circuit Court's finding that the notice of dissolution was not published.

USF&G has, correctly, abandoned any argument that the statute of repose could be triggered even if notice of Covil's dissolution were not published. Therefore, all that remains is a question of fact—whether the notice was published by the prior receiver who oversaw Covil's dissolution in 1992. After a careful review of the record, Justice Toal found that there was no evidence of publication, and the Court of Appeals affirmed that finding in its thorough review and opinion. USF&G's petition is simply an attempt to overturn that factual finding. That is not an issue that warrants this Court's discretionary review. See Rule 242, SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and ***will be granted only where there are special and important reasons.***" (emphasis added)). In any event, there was ample basis for the Court of Appeals to affirm Justice Toal's finding, and further review is unwarranted. Indeed, USF&G has put forward no evidence that publication occurred, and—as both courts below found—the circumstances strongly suggest that it did not.

A. The statute of repose is triggered by publication, which is discretionary.

Since its enactment, Section 33-14-107(a) has provided that "[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." S.C. Code Ann. § 33-14-107(a); *accord* S.C. Code Ann. § 33-14-107(a) (1988). Section 33-14-107(c), in turn, sets forth the statute of repose—five years for the previous version of the statute and ten years as later amended. S.C. Code Ann. § 33-14-107(c); S.C. Code Ann. § 33-14-107(c) (1988). By its plain text, the repose period is triggered only "[i]f the dissolved corporation publishes a newspaper notice in accordance with subsection (b)." S.C. Code Ann. § 33-14-107(c); *accord* S.C. Code Ann. § 33-14-107(c) (1988).

The publication discussed in Section 33-14-107 is also not mandatory. It has always been a decision that was left to the discretion of the dissolving company. *See* S.C. Code Ann. § 33-14-107(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."); *accord* S.C. Code Ann. § 33-14-107(a) (1988) (same).). USF&G incorrectly claims that this discretion only exists for voluntary dissolutions but that judicial dissolutions, like the one carried out by the prior receivership court, require publication. This argument is based on a misreading of the law. USF&G claims that Section 33-14-330(b)—the section dealing with final decrees for judicial dissolutions—states that "'the court shall direct' publication of the dissolution for judicially-dissolved corporations." (Pet. at 14). It does not. In reality, that section states that:

> After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with Section 33-14-105 and the notification of claimants ***in accordance with*** Sections 33-14-106 and 33-14-107.

S.C. Code Ann. § 33-14-330(b) (emphasis added). USF&G's omission of the statute's language is significant. The words "in accordance with" followed by the statutory sections mean that those provisions are incorporated in full, here including the discretionary nature of the publication option. Put differently, the most natural reading of this section is that notice (and liquidation) in a judicial dissolution is supposed to be the same as for an individual one—including giving the company the choice whether to publish notice of the dissolution or not. Therefore, contrary to USF&G's claims, (*see* Pet. at 15), nothing about Justice Toal's order suggests that Covil's dissolution was improper (on this basis) or collaterally attacks the prior receivership court's dissolution.

In any event, the order on appeal was limited to whether the statute of repose was triggered. That question turns simply on whether the notice was published *in fact*. Therefore, even if

publication of the notice was required, which it was not, that has no bearing on whether the statute of repose was actually triggered. *See* S.C. Code Ann. § 33-14-107(c); *accord* S.C. Code Ann. § 33-14-107(c) (1988) (applying the statute of repose "*[i]f* the dissolved corporation publishes a newspaper notice in accordance with subsection (b)."") (emphasis added). As discussed below, the Court of Appeals properly affirmed Justice Toal's holding that there was not any evidence of publication, and, therefore the statute of repose was not triggered.

B. The Court of Appeals properly upheld Justice Toal's finding that there was no evidence of publication.

Publication of the notice of dissolution was mentioned only once during the initial receivership proceedings. Specifically, a May 12, 1992 order, referenced above, containing many instructions for the prior receiver included the following: "to the extent not already accomplished, the [r]eceiver shall publish the Notice required by § 33-14-107[.]" (R. p. 466.) The remainder of the May 12, 1992 order instructed and empowered the prior receiver to marshal and liquidate Covil's assets. (R. pp. 7–10.) The court directed, "upon liquidation of Covil Corporation . . . , the [r]eceiver shall submit an accounting to this Court and petition for authority to make final disbursement of the proceeds from such liquidation." (R. pp. 467–68.)

On November 11, 1992, the prior receiver submitted the accounting and petitioned for authority to make final disbursements of the proceeds from the liquidation, as instructed. (R. pp. 662–79.) On the same date, the court concluded that the receiver had "fully complied with the previous Orders of this Court in liquidating the assets" and "that his accounting is in order." (R. p. 709.)

USF&G's petition relies entirely on these two orders to assert that Justice Toal and the Court of Appeals were required to find that publication occurred. (*See* Pet. at 13). Not so. Neither order states that the prior receiver in fact published notice of the dissolution. As the Court of

Appeals recognized, the November 11, 1992 order does not say what USF&G wants it to say. Plainly read, the order reflects the court's finding that the prior receiver "fully complied" with the court's orders "***in liquidating the assets***." (*Id.* (emphasis added)). The order makes no statement whatsoever about whether the notice of dissolution was published. Accordingly, Justice Toal found that the November 11, 1992 order provides no basis to presume that notice of dissolution was published, and as the judge with authority over the prior receivership and applying the requisite deference owed to this determination, the Court of Appeals affirmed. Moreover, because the order does not speak to publication, Justice Toal's finding is in no way a collateral attack on the November 11 order, as USF&G incorrectly argues. (Pet. at 18).

Instead, as the Court of Appeals recognized, "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." (Appx. p. 0012). This includes the "Petition of Receiver" on which the November 11, 1992 order was expressly based. (R. p. 709.) In that petition, the prior receiver detailed the acts he took as Covil's receiver. The petition says nothing about the publication of a notice of dissolution in a newspaper. Yet it does list several other detailed acts taken by the prior receiver, including that he "marshalled and liquidated the assets and collected the accounts of" Covil; retained counsel; "sold all the furniture, fixtures, inventory[,] and equipment of Covil Corporation at public auction"; and addressed remediation of hazardous materials in inventory sold to another company. (R. pp. 664–66.)

The Circuit Court and Court of Appeals also properly relied on the prior receiver's accounting. The accounting details, line-by-line, every disbursement the prior receiver made while carrying out his duties, but it shows no payment for publication. (R. p. 671.) USF&G's speculation that the lines for "Attorney Cost" and "Receiver's Expenses" could encompass the publication of

notice is unfounded and was properly ignored by the Circuit Court and Court of Appeals. More likely, those expenses related to the court's prior order authorizing the prior receiver to "incur and pay . . . reasonable expenses," such as "the expense of the premium" for the bond the court required and "the cost of labor, including sales and/or other employees." (R. pp. 463–64.), as well as any expenses for carrying out the acts the prior receiver described in his petition including selling all "furniture, fixtures, inventory[,] and equipment . . . at public auction." (R. p. 664).

Ultimately, contrary to USF&G's assertions, this evidence supports the common-sense inference that had the prior receiver published the notice of dissolution we would expect to find a record of it. *See Finch v. Covil Corp.*, No. 1:16-cv-1077, 2020 WL 6063054, at *10 (M.D.N.C. Oct. 14, 2020) (addressing the same issue and concluding that "[a]ny inference of compliance is rebutted by the absence of direct proof of publication, which one could reasonably expect to exist"). Yet, [redacted]. (R. pp. 850–51).[8] The insurers were aware of the prior receivership and were closely monitoring the status of Covil between 1991 and 2001. On November 14, 1991, [redacted]. (R. p. 823–24). On April 15, 1992, [redacted]. (R. pp. 826–28). The Circuit Court and Court of Appeals properly reached the same conclusion, and there is no basis for this Court to review, much less reverse, that factual determination. *See United States v. SCA Servs. of Indiana,*

[8] USF&G now claims that this memorandum should not have been considered because it is "hearsay." (Pet. at 21). USF&G never objected to the use of the memorandum in the trial court or in its initial brief before the Court of Appeals, the objection is therefore waived. *See Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 657, 780 S.E.2d 263, 275 (Ct. App. 2015).

Inc., 837 F. Supp. 946, 952–53 (N.D. Ind. 1993) (finding a corporation "failed to take advantage of" statute of repose and claims against the corporation were not barred where corporation did not give notice of its dissolution pursuant to Indiana's similar statute).

C. The Court of Appeals correctly placed the burden of proof on USF&G.

Perhaps recognizing that it cannot present any evidence that the notice of dissolution was published, USF&G spills much ink suggesting that the burden of proof should have somehow been on the Receiver to prove the negative. That is not the law. USF&G raised the issue as an affirmative defense to the Receiver's claims against it. It is well-established that a defendant has the burden of proof to establish an affirmative defense. *See Pike v. S.C. Dep't of Transp*., 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000).

USF&G's arguments to the contrary are meritless. USF&G is blatantly incorrect when it suggests that "The Receiver's motion to 'clarify the status of Covil's receivership' . . . did not seek any adjudication of USF&G's affirmative defenses." (Pet. at 15). The Receiver described the motion as a:

> "Motion to Clarify the Status of the Receivership as raised in both Zurich American Insurance Company's ("Zurich") ***Tenth Affirmative Defense*** in *Protopapas v. Wall*, Templeton & Haldrup, P.A., Cause No. 2019-CP-40- 02285 (S.C. Com. Pl. June 15, 2020), and United States Fidelity and Guaranty ("USF&G")'s ***affirmative defenses*** in *Hutto v. Covil Corp.*, Cause No. 2019-CP-40-06956 (S.C. Com. Pl. July 13, 2020).

(R. pp. 429–30) (emphasis added). And in the Circuit Court's order, Justice Toal described the purpose of the order as being to "to clarify the impact, if any, of Zurich's and USF&G's . . .***affirmative defenses*** related to Covil's prior receivership." (R. p. 006).

USF&G next complains that the motion was not styled as a standard motion for Summary Judgment, a motion under Rule 12, or the result of "a trial on the merits in which USF&G would have been afforded an opportunity to present and cross-examine witnesses." (Pet. at 15). The

motion was filed as a motion to clarify because of the special and consolidated nature of the receivership proceedings. USF&G did not object to the procedure in the Circuit Court, nor would it have had any basis to do so. As such, nothing about the styling of the motion somehow shifted the burden of proof to the Receiver to disprove a fact that is central to USF&G's affirmative defense.

Nor can USF&G shift the burden to the Receiver by arguing that the presumption of regularity required the Court of Appeals to presume notice was published simply because the prior receiver was instructed by the court at the time to do so. First, the presumption of regularity has no role to play here; it applies only "in the absence of *any* evidence to the contrary." *Kirton v. Howard*, 137 S.C. 11, 134 S.E. 859, 866 (1926) (emphasis added). As discussed above, there is ample evidence that the prior receiver in fact did not publish the notice, including the prior receiver's sworn petition, his detailed accounting, an insurer's memorandum, and the common-sense proposition that there would be affirmative evidence of a 1991 newspaper publication (as opposed to say, a 1921 publication), if any such publication occurred. Both the Court of Appeals and the Circuit Court properly recognized this evidence and declined to apply any presumption to this case. USF&G's own authority recognizes that a legal presumption can only apply is there are "facts sufficient to support the application of the presumption." *State Acc. Fund v. S.C. Second Inj. Fund*, 409 S.C. 240, 246, 762 S.E.2d 19, 22 (2014). USF&G presented none here.

Second, as discussed above, section 13-14-107 *does not* require publication, therefore, any failure to publish the notice would not have been any dereliction of the prior receiver's duty. And, consequently, this would not mean that the prior receivership court "entered the dissolution order without a proper foundation," *contra* USF&G. (Pet. at 18).

Ultimately, USF&G's reliance on the presumption simply underscores that, despite years of litigation, it has failed to present any evidence that could call Justice Toal's factual finding into doubt. This argument, too, provides no basis for review, much less reversal, of the Court of Appeals affirmance of that factual determination.

III. Justice Toal correctly held that the 2004 Amendment to the statute of repose are not retroactive.

Because the Court of Appeals properly affirmed the finding that there was no evidence notice of dissolution was published, that is the end of the matter. But even if USF&G could somehow show that notice was published, which it cannot, then the question remains whether the statute of repose would apply to current and future asbestos claims. The Circuit Court properly held that it does not.

The 2004 amendment to Section 33-47-107(c) extends the statute of repose to "a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution." But there is no textual or other evidence that the legislature intended the 2004 amendment to apply retroactively to dissolutions (or more specifically, notices of dissolutions) that occurred prior to the effect date of the amendment.

As the Circuit Court recognized, statutes of repose, like all statutes, presumptively do not apply retroactively. *Snavely v. Perpetual Fed. Sav. Bank*, 306 S.C. 348, 350–51, 412 S.E.2d 382, 383–84 (1991). Only "a specific provision *of clear legislative intent to the contrary*" suffices to rebut that presumption. *Id.* None is present here. Moreover, a statute of repose, like the one at issue here, creates and impacts substantive rights. See *Langley v. Pierce*, 313 S.C. 401, 403–04, 438 S.E.2d 242, 243 (1993). This is critical, because this Court reads statutes affecting substantive rights prospectively, not retroactively (as USF&G would do). *See Edwards*, 395 S.C. at 579, 720

S.E.2d at 466 ("When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only").[9]

USF&G is therefore incorrect that "the repose period runs from the point of the statutory amendment." (Pet. at 23). It presents no South Carolina authority for this proposition and the authority it relies on from other jurisdictions is inapposite. The cases it cites involve statutes of limitations (which generally do not affect substantive rights), not statutes of repose, and each involved a circumstance where the court determined that the law at issue did apply retroactively, but fashioned a remedy to avoid unfairness. *See, e.g.*, *Sohn v. Waterson*, 84 U.S. 596, 599–600 (1873).

Moreover, USF&G's proposed retroactive reading is inconsistent with the basic structure of this statute of repose. It is clear that the period of repose is triggered only by a corporation publishing the requisite notice; it is not automatic or absolute. § 33-14-107(c). Once triggered, the repose period runs from "***the publication date*** of the newspaper notice," *id.* (emphasis added), not the date of any liability-triggering conduct. Reading the statute as applying from 2004 onward would be inconsistent with the text, because all agree that no notice of dissolution was published in, or after, 2004. Instead, USF&G's approach would deem persons whose claims were nonexistent or contingent in 1991 to have received notice in 1991. That is precisely the sort of retroactive application that, absent clear legislative intent, is forbidden under South Carolina law.

[9] Other courts have similarly held statutes of repose apply prospectively only. *See Bielski v. Alfred Saliba Corp.*, 984 F. Supp. 2d 1170, 1174 (M.D. Ala. 2013) ("Since statutes of repose such as § 6-5-221 are substantive and not remedial law, they apply only prospectively—to claims which accrue after the effective date of the statute."); *Hamilton v. Myerow*, No. 303223CWT, 2009 WL 885957, at *5 (Mass. Land Ct. Apr. 1, 2009) ("[A] statute of repose is, generally, considered to affect substantive rights and, so, only applies prospectively.").

See, e.g., Indep. Ins. Co., 218 S.C. at 33, 61 S.E.2d at 404 ("Statutes tending to destroy private rights should be construed not only strictly, but as not retrospective in operation.").

IV. The Court of Appeals properly referenced evidence designated in the appellate record of USF&G's misconduct to inform its discussion of certain issues.

Finally, USF&G claims that the Court of Appeals "improperly appear [sic] to rely" on a January 8, 2020 Order of the Circuit Court. (Pet. at 24). That order, which was designated as part of the appellate record, detailed litigation misconduct by USF&G (as well as other insurers) in failing to comply with the Circuit Court's orders. Contrary to USF&G' s contention, nothing about the Court of Appeals decision upholding the Circuit Court's finding that the notice of publication was not published was "based on" that order. (Pet. at 25). The Court of Appeals properly took notice of these prior findings of the Circuit Court as background for its decision.

USF&G has no authority for the proposition that the Court of Appeals cannot take notice of a prior order of the Circuit Court; nor can it collaterally attack that order here.[10] To the extent USF&G is upset with Justice Toal's findings, it has itself to blame. As the January 8 order details, USF&G engaged in a consistent pattern of disregard of the Circuit Court's orders—refusing to provide basic policy information to its insured's receiver. (R. p. 26). Although not the basis for the Court of Appeals decision, USF&G's litigation practices are well-known to South Carolina trial and appellate courts.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the previous briefs, this Court should deny USF&G's Petition for Writ of Certiorari.

[10] The one case USF&G cites, *Wessinger v. Rauch*, 288 S.C. 157, 159, 341 S.E.2d 643, 644 (Ct. App. 1986), involves the res judicata effect of an order denying summary judgment, it has no relevance to whether the Court of Appeals may take notice of prior findings of the Circuit Court.

Respectfully submitted,

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