

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FOR THE FIFTH JUDICIAL CIRCUIT
)	
ANN FINCH, Individually and as Executor of the Estate of FRANKLIN FINCH,)	C/A NO. 2019-CP-40-3003
)	
Plaintiff,)	<i>In Re:</i>
)	Asbestos Personal Injury Litigation
v.)	Coordinated Docket
)	
UNITED STATES FIDELITY AND GUARANTY COMPANY, et al.)	
)	
Defendants.)	

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 SC Court of Appeals

ORDER ON MOTION TO BIFURCATE

Before the Court is Ann Finch’s, individually and as the personal representative of Franklin Finch (“Finch”) and Covil Corporation’s, by and through its Receiver Peter Protopapas, (“Covil” and together with Finch, the “Plaintiffs”) Motion to Bifurcate. The Court has reviewed the pleadings of the parties and heard argument on this matter. Therefore, being fully apprised, the court hereby GRANTS the Motion to Bifurcate and enters this Order on the same.

BACKGROUND

This case arises out of claims brought by Ann Finch against United States Fidelity and Guaranty Company (“USF&G”), Zurich American Insurance Company (“Zurich” and together with USF&G, the “Insurers”) and others for a declaratory judgment that the Insurers are the alter ego of Covil Corporation (“Covil”), a South Carolina Corporation, as well as for claims involving alleged breaches of fiduciary duty by the Insurers and others. Similarly, Covil, by and through its Receiver, brought cross claims for alter ego, breach of fiduciary duty, malpractice, negligence and certain other declaratory judgment actions. This Court realigned Finch and Covil for the purpose

of this case. The case arises primarily as a result of a verdict in excess of \$32,000,000 in favor of Finch against Covil.

LAW AND ARGUMENT

Rule 42(b) of the South Carolina Rules of Civil Procedure provides that

[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.

Rule 42(b), SCRPC. The decision to bifurcate a trial will only be reversed for a trial court's abuse of discretion. *Winthrop Univ. Trs. for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 166, 791 S.E.2d 152, 165 (Ct. App. 2016). The bifurcation of this trial is appropriate.

A. Alter ego is a non-jury question

The alter-ego claim as set forth in the Plaintiff's pleadings has two parts. Plaintiff first requests a declaratory judgment that the insurance companies, USF&G and Zurich, are the alter egos of Covil Corporation, against whom Ms. Finch received a \$32-million verdict. Plaintiff then requests that if it is determined that these two insurance companies are the alter egos of Covil, Finch prays that the \$32-million verdict against Covil be enforced against USF&G and Zurich.

The question of whether to pierce the corporate veil via an allegation of alter ego sounds in equity. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012). As a result, the alter ego claims will be tried to the bench without a jury. *Williford v. Downs*, 265 S.C. 319, 321, 218 S.E.2d 242, 243 (1975) (confirming that "[i]n equity the parties are not entitled, as a matter of right, to a trial by jury. Courts of equity have always been permitted to decide issues without the intervention of a jury."); *U.S. Bank N.A. v. Meisner*, No. 2019-UP-066, 2019 WL 581219, at *1 (Ct. App. Feb. 13, 2019).

B. Alter ego will be tried first to the Court

Finch's claim of Breach of Fiduciary Duties rests on the foundation that USF&G and Zurich are the alter egos of Covil. Finch concedes that if USF&G and Zurich are not the alter ego of Covil, then her breach of fiduciary duty claim fails. Thus, unless and until this Court finds that an Insurer is Covil's alter ego, the claim for breach of fiduciary duty cannot proceed. Both parties cite and rely on *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014). In *Blackburn*, the South Carolina set forth a decision tree through which trial courts can determine the order in which claims should be tried. In that decision, the Supreme Court stated:

If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.

Blackburn at 330, 755 S.E.2d at 442 (emphasis added). Here, the Insurers would insist on a jury sitting in place for a one to two week trial in the midst of a global pandemic¹ at the end of which, the jury must wait, however long, for the Court to make its findings relating to alter ego before it could possibly begin deliberating on the legal claims. Moreover, in the event that the Court finds that the Insurers are not the alter ego of Covil, the jurors' service would be needless. Given that it is mandatory that this Court determine the alter-ego status of the Insurers prior to any findings by a jury for claims of breach of fiduciary duty, the Court finds that imperative circumstances both as to the required alter-ego determination and that of the national pandemic require that the claims of alter ego be tried first.

¹ While this Court believes that with the appropriate measures a jury trial can be safely conducted, the Court further sees no reason to conduct such a trial needlessly.

C. Crossclaims are not compulsory

USF&G² contends that because Covil has brought legal claims, *Blackburn* dictates those claims be tried first. *See Blackburn* at 330, 755 S.E.2d at 442. Assuming, without deciding, that crossclaims and counterclaims are intended to be the same thing, USF&G fails to take the next step in the analysis of the issue.³ In *Blackburn*, the Supreme Court set forth a decision tree, beyond the facts of that case, to guide courts in how they deal with claims at law and in equity brought in the same manner. The *Blackburn* court concluded that where counterclaims were permissive, that they could not support a required jury trial. *See id.* Here it is undisputed that the Receiver could have, and in fact did, bring his crossclaims in a wholly separate lawsuit pending before this Court. That he also asserted them as crossclaims in the instant action is of no moment. While a strict reading of *Blackburn* suggests that because the crossclaims—again, assuming that they are the same as counterclaims—are permissive, no jury is required to decide them. Thus, the Court errs on the side of caution and bifurcates them for a later decision.

CONCLUSION

For the foregoing reasons this Court determines that the Plaintiffs' claim of alter ego must, for imperative circumstances, be tried first. Therefore, a bench trial on the alter ego claim will be conducted in the Richland County Judicial Center on January 11, 2021. The remainder of the case will be set for trial on May 11, 2021. The analysis of whether this proceeding will be a jury trial or bench trial will be determined at a later date. Therefore, for the reasons stated, the Court GRANTS Plaintiffs' Motion to Bifurcate.

² Zurich has joined USF&G's position on the matters presently before the Court.

³ This Court is of the opinion that the Supreme Court uses the words it means to use and means to use the words it uses.

AND IT IS SO ORDERED this ____ day of _____, 2020.

Jean H. Toal, Chief Justice of the Supreme
Court, Retired, acting as Circuit Court Judge



Richland Common Pleas

Case Caption: Ann Finch , plaintiff, et al vs Sentry Casualty Company , defendant,
et al
Case Number: 2019CP4003003
Type: Order/Bifurcate

So Ordered

Jean H. Toal