

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Jean H. Toal  
Acting Circuit Court Judge

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Case No. 2019-CP-40-03003

Appellate Case No. 2020-

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**RECEIVED**  
**Dec 22 2020**  
**SC Court of Appeals**

Ann Finch, Individually and as Executor of the Estate of Franklin Finch; and Peter D. Protopapas, as Court-Appointed Receiver for Covil Corporation,.....Plaintiffs/Respondents,

v.

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

*Of Which*

United States Fidelity and Guaranty Company is the.....Appellant.

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**MOTION TO DISMISS  
AND  
ALTERNATIVE MOTION FOR EXPEDITED BRIEFING**

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Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Peter D. Protopapas, in his capacity as the Receiver for Covil Corporation (“the Receiver”), by and through the undersigned counsel, respectfully requests this Court dismiss the Notice of Appeal filed by United States Fidelity and Guaranty Company (“USF&G”) on December 21, 2020.

As this Court is well aware, the Receiver has been a party in several coverage litigation lawsuits involving Covil Corporation's insurers. Unfortunately, the Receiver is compelled to note Covil's insurers—especially USF&G—have repeatedly filed interlocutory and improper appeals requiring the Receiver to respond by filing motions to dismiss and occupying the valuable time of this Court and the South Carolina Supreme Court to review improper appeals and issue orders of dismissal. *See* October 16, 2019 Order, Appellate Case No. 2019-001651 (dismissing Zurich American Insurance Company's, USF&G's, and Sentry Insurance a Mutual Company's notices of appeal because the appealed order was an interlocutory discovery order); October 16, 2019 Order, Appellate Case No. 2019-001654 (denying petition for writ of certiorari to review an interlocutory discovery order); February 13, 2020 Order, Appellate Case No. 2020-000206 (dismissing Zurich American Insurance Company's and USF&G's notices of appeal as improper due to timely pending post-trial motions); May 22, 2020 Order, Appellate Case No. 2020-000749 (denying petition for writ of mandamus and finding it "not appropriate" because recusal decision was not ministerial); June 17, 2020 Order, Appellate Case No. 2020-000791 (dismissing USF&G's petition for a writ of supersedeas as improper due to no pending appeal); July 30, 2020 Order, Appellate Case No. 2020-000845 (dismissing USF&G's appeal due to its status as a non-party to the action). Because of USF&G's apparent methodology to avoid trial, subvert justice, deprive South Carolina courts from taking action to protect the rights of its citizens, and blatantly disregard the South Carolina Rules of Civil and Appellate Procedure, here we are—yet again—respectfully asking this Court to dismiss USF&G's Notice of Appeal.

The underlying case stems from a related case in which Plaintiff Ann Finch ("Finch") received a verdict in excess of \$32,000,000 against Covil Corporation ("Covil"), an administratively dissolved South Carolina Corporation. Thereafter, Finch filed suit in this matter

against USF&G, Zurich American Insurance Company (“Zurich” and collectively, with USF&G, the “Insurers”), and others for a declaratory judgment that the Insurers are the alter ego of Covil, as well as for claims involving alleged breaches of fiduciary duty by the Insurers and others. This case was removed to federal court by Zurich and then remanded to Chief Justice Toal by Order of Remand of Judge Bruce Howe Hendricks on June 4, 2020. Covil, by and through its Receiver, brought cross claims for alter ego, breach of fiduciary duty, negligence, malpractice, and other declaratory judgment actions. The circuit court realigned Finch and Covil for purposes of this litigation.

It is well-settled that equitable issues are for the court’s determination and legal issues are for a jury’s determination. *See, e.g., Floyd v. Floyd*, 306 S.C. 376, 379, 412 S.E.2d 397, 398-99 (1991) (“Where legal and equitable issues and rights are asserted in the same complaint, legal issues are for determination by a jury and equitable issues for the judge sitting as chancellor.”). Because this case involves both legal and equitable claims, Finch and the Receiver moved to bifurcate the upcoming trial, requesting the circuit court try the equitable alter ego claim prior to the remaining legal claims.<sup>1</sup> This proposed sequence is most logical since the circuit court must *first* determine whether the Insurers were the alter ego of Covil *prior to* a jury’s consideration of the remaining legal claims. Specifically, Finch brings a claim against USF&G for breach of

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<sup>1</sup> A motion to bifurcate is governed by Rule 42(b) of the South Carolina Rules of Civil Procedure. Rule 42(b) states:

The 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.

fiduciary duties. Finch concedes that claim can only be viable if USF&G is the alter-ego of Covil. On December 9, 2020, the Honorable Jean Hofer Toal granted the Motion to Bifurcate. Chief Justice Toal, explaining “imperative circumstances” existed, set a bench trial on the alter ego claim on January 11, 2021, and set the remainder of the case for trial on May 11, 2021 (“the Bifurcation Order”).<sup>2</sup> *See* Order at 4.

This Court should dismiss USF&G’s attempted appeal because the Bifurcation Order is not immediately appealable. *See Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) (“An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed.”). An appellate court’s jurisdiction is governed by section 14-3-330 of the South Carolina Code. Our State has undoubtedly disfavored piecemeal appeals, such as the one currently before the Court. *See Hagood*, 362 S.C. at 194, 607 S.E.2d at 708.

Staying true to this policy to avoid piecemeal appeals, South Carolina courts have historically held that bifurcation orders are generally not immediately appealable. *See Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 73, 533 S.E.2d 331, 333-34 (2000) (“Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence. We therefore hold that an order granting separate trials of issues in a contract case is not immediately appealable, either permissibly or mandatorily, pursuant to S.C. Code Ann. § 14-3-330(2) (1976).”); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 79, 533 S.E.2d 575, 578 (2000) (“We therefore hold that an order denying bifurcation of the issues of liability and damages in a personal injury case is not immediately appealable, either

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<sup>2</sup> The Receiver notes that this last minute attempt to delay the trial comes on the heels of a notification to Receivership court that the Receiver, Finch and Zurich have reached a settlement agreement. As such, USF&G is the only remaining insurer Defendant.

permissibly or mandatorily, pursuant to S.C. Code Ann. § 14-3-330(2) (1976).”); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 540-41, 773 S.E.2d 144, 147-48 (2015) (Kittredge, J., dissenting) (explaining a bifurcation order before the Court neither discontinued an action nor prevented an appeal); *id.* at 540-41, 773 S.E.2d at 147 (“[E]rror in an order granting or denying bifurcation does not transform the order into an appealable one.”).

USF&G argues the Bifurcation Order is immediately appealable because it has been deprived of its constitutional right to a jury trial. This is not the case. USF&G will have a jury trial on all the legal claims. In fact, the published Asbestos Docketing Order has set the jury trial for the legal claims on May 11, 2020. However, USF&G will not have a jury trial on the equitable claim. Indeed, a party is not entitled to a jury trial on an equitable claim. *See Wachovia Bank, Nat’l Ass’n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014) (providing parties are not entitled to a trial by jury in equitable actions).

USF&G grasps for support of its argument in the South Carolina Supreme Court’s decision in *Blackburn*. In *Blackburn*, the Supreme Court, when discussing *counterclaims*, explained, “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.” *Id.* at 329, 755 S.E.2d at 441. USF&G argues that because Covil has brought legal claims, *Blackburn* requires the legal claims must be tried first. However, Covil made *crossclaims* not *counterclaims*. Even if somehow counterclaims and crossclaims mean the same thing, which respectfully they do not, the *Blackburn* Court found that where counterclaims were permissive, they could not support a required jury trial. *Id.* at 330, 755 S.E.2d at 442.

Further, if *Blackburn* applies, the circuit court made clear that “imperative circumstances”

required the equitable alter ego claim must be tried first. *See id.* (“If there are factual issues common to both claims, absent the *most imperative circumstances*, the at law claim must be tried first.” (emphasis added)). We are in the middle of a global pandemic. In fact, on December 3, 2020, the Supreme Court issued an Order mandating the circuit courts statewide shall not commence any jury trials after December 4, 2020. *See Re: Circuit Court Jury Trials*, S.C. Sup. Ct. Order dated December 3, 2020 (“[I]n light of the ongoing increase in COVID-19 cases throughout South Carolina, and the expectation by the medical community and experts that the number of positive cases will continue to increase in the near future, it is prudent to once again make changes to the operations of the circuit courts for the protection of those who work within the courts, as well as those who serve our state by participating in jury service.”). Additionally, an alter ego finding must be made by the trial court prior to any jury deliberations on the legal claims. It is entirely illogical to suggest a jury must be present for a lengthy trial in the midst of a global pandemic and wait for the circuit court to determine whether the Insurers are the alter ego of Covil. Not only is USF&G’s suggestion illogical, but it is also potentially dangerous to the health of the members of the jury. Chief Justice Toal’s decision to try the equitable claim first was well within her discretion, especially due to these imperative circumstances. *See Standard Warehouse Co. v. Atl. Coast Line R. Co.*, 222 S.C. 93, 103, 71 S.E.2d 893, 895 (1952) (“Where a case contains both legal and equity issues, it is discretionary with the trial Judge as to which shall be tried first, and ordinary that one is tried first which is more likely to aid in deciding the entire controversy.”).

Appealability matters are made on a case-by-case basis. *See Hagood*, 362 S.C. at 194, 607 S.E.2d at 708. Finch’s and the Receiver’s attempts to pursue justice in this litigation and other matters has unfortunately morphed into a stop-and-go enterprise due solely to USF&G’s litigation

tactics. At the core of this appeal, USF&G is attempting to delay going to trial on these issues. USF&G's attempts to avoid trial, subvert justice, deprive South Carolina courts from taking action to protect the rights of its citizens, and blatantly disregard the South Carolina Rules of Civil and Appellate Procedure should not be tolerated by this Court. To be sure, the avoidance of trial is not a substantial right. *See Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). This Court should dismiss USF&G's appeal.

The alter ego claim is set for a bench trial on January 11, 2021. The Receiver maintains USF&G's appeal should be dismissed. Because time is of the essence, the Receiver respectfully asks for this Court to require an expedited response to this Motion to Dismiss. If the Court ultimately decides the appeal should not be dismissed, the Receiver respectfully moves for briefing and consideration of the merits of the appeal to be expedited.

Respectfully submitted,

**SMITH | ROBINSON**  
Smith Robinson Holler DuBose and Morgan, LLC

*s/Jonathan M. Robinson*  
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This 22<sup>nd</sup> Day of December 2020

Columbia, South Carolina

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Jean H. Toal  
Acting Circuit Court Judge

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Case No. 2019-CP-40-03003

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v.

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

*Of Which*

United States Fidelity and Guaranty Company is the.....Appellant.

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**PROOF OF SERVICE**

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I, the undersigned attorney of the law offices of Smith Robinson Holler DuBose and Morgan, LLC, do hereby certify that on December 22, 2020, I have served all counsel in this action with a copy of the pleading(s) hereinbelow in accordance with the Supreme Court’s May 29, 2020 Administrative Order by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Documents Served: Motion to Dismiss and Alternative Motion for Expedited Briefing

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This 22<sup>nd</sup> Day of December 2020.

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[image003.png](#)  
[image004.png](#)  
[Motion to Dismiss Bifurcation Appeal - Finch v. USFG.FINAL\\_.pdf](#)  
[image005.png](#)

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Good afternoon,

Please find attached the Receiver's Motion to Dismiss and Alternative Motion for Expedited Briefing in *Finch and Protopapas, as Receiver for Covil Corporation v. United States Fidelity & Guaranty Company, Zurich American Insurance Company, and Wall Templeton & Haldrup*, Circuit Court Case No. 2019-CP-40-03003, which we are electronically filing with the Court of Appeals today, served on you pursuant to subsection (g)(3) of the South Carolina Supreme Court's May 29, 2020 Amended Order discussing the operation of the appellate courts during the coronavirus emergency.

Thank you,

Austin

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**Subject:** service of Notice of Appeal

Counsel,

Please find attached a Notice of Appeal in *Finch and Protopapas, as Receiver for Covil Corporation v. United States Fidelity & Guaranty Company, Zurich American Insurance Company, and Wall Templeton & Haldrup*, Circuit Court Case No. 2019-CP-40-03003, which we are electronically filing with the Court of Appeals today and are serving on you via this email, as permitted by Section (g)(3) of Supreme Court Order 2020-05-29-02. Best regards,

Todd

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