

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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Appellate Case No. 2020-001663  
Circuit Court Case No. 2019-CP-40-03003

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**RECEIVED**

**Dec 30 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, ..... 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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NOTICE OF WITHDRAWAL OF USF&G'S  
EMERGENCY MOTION TO ENFORCE RULE 205

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On December 23, 2020, USF&G filed an emergency motion to enforce Rule 205 with this Court, seeking an emergency ruling to enforce a simple, indisputable point: when an order is on appeal, the issue is exclusively within the appellate court's jurisdiction. *See, e.g., Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (explaining that "Rule 205 divests the lower court or administrative tribunal of jurisdiction over 'matters affected by the appeal'" (quoting *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012))) (emphasis supplied by the Court of Appeals).

That motion was necessitated by correspondence from the circuit court indicating that it would proceed with a bench trial in this matter even though USF&G had timely noticed its appeal of an order that changed the mode of trial from that of a jury trial to which USF&G is entitled as a matter of longstanding law to a bench trial in violation of USF&G's rights.

The immediate appealability of that order is not subject to legitimate dispute.<sup>1</sup> Because it improperly takes away USF&G's right to a jury trial on factual issues that are common between legal and equitable claims pending against it, the order adversely impacts the mode of trial to which USF&G is entitled. Therefore, the order is both immediately appealable and ***must be*** immediately appealed. *See generally* Jean H. Toal, et al., *Appellate Practice in South Carolina* 145 (3d ed. 2016) (“Orders denying a party’s right to a mode of trial must be appealed immediately, and a party runs the risk of waiving the right to appeal if that party fails to so immediately appeal.”). To hold otherwise would require reversal of scores of decisions of South Carolina’s appellate courts and would turn settled South Carolina appellate law on its head.

After USF&G filed its emergency motion and a similar one before the Supreme Court, the circuit court changed its position and notified the parties through an email that if USF&G’s appeal remains pending, then the bench trial would not proceed. A copy of that correspondence is attached hereto. And yesterday, the circuit court held a status conference with the parties at which the circuit

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<sup>1</sup> In seeking dismissal of the appeal, the Receiver filed a motion to dismiss that relied only on two cases that were issued the same day: *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000), and *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000). The Supreme Court specifically rejected both in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146–47 (2015), in a case where now-Judge Hewitt successfully argued that the substance, rather than the mere title, of a so-called “bifurcation” order dictates whether the order may be immediately appealed. *Morrow* applies with full force here and makes it obvious that this appeal is proper. USF&G will plan to address this, along with other points, in its response in opposition to the Receiver’s motion to dismiss.

court reinforced this understanding of its absence of jurisdiction until the matter is remanded to it by the appellate courts.

Because the circuit court has now acknowledged its jurisdictional boundary, both in writing and orally at a status conference, USF&G is confident that the circuit court will indeed honor the fact that jurisdiction regarding the mode of trial of this matter presently lies solely with this Court and remains before the appellate courts until the appeal concludes and a remittitur is issued. Accordingly, USF&G respectfully withdraws its emergency motion without prejudice.

*Signature Page Attached*

Respectfully submitted,

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Attorneys for Petitioner United States Fidelity and  
Guaranty Company

December 30, 2020

## Carroll, Todd

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**From:** Toal, Jean <JToal@sccourts.org>  
**Sent:** Wednesday, December 23, 2020 4:21 PM  
**To:** Carroll, Todd; Murrell Smith; Perry, Christina M.; tmcvey@kassellaw.com; jholder@dobslegal.com; Trey Branham; Jescelyn Spitz; Jon Robinson; Shanon Peake; mwhardee; jwhite@spartanlaw.com; Shisko, Marghretta; jonescr@gmail.com; brady.edwards@morganlewis.com; Nancy.patterson@morganlewis.com; 'brad.nes@morganlewis.com'  
**Cc:** Frankel, Andy T; Forshaw, Mary Beth; O'Neill, Elizabeth; Carnevale, Michael S.; Turner, Alan; DuBose, Susan; Davis, William P.; Johnson, Debbie (US)  
**Subject:** RE: service of Petition for Writ of Prohibition

### EXTERNAL EMAIL: Open Attachments and Links With Caution.

Mr. Carroll: Thank you for sending me your filings. Please understand that I am not trying to preclude any action by the Court of Appeals or the Supreme Court regarding the trial of this matter. If the Court of Appeals denies Plaintiffs' Motion to Dismiss USF&G's appeal or fails to act thereon before Jan. 11, 2021, this matter will not be tried on Jan. 11, 2021. If the Court of Appeals grants Plaintiffs' Motion to Dismiss, this matter will proceed to trial as scheduled unless the Supreme Court issues a Writ of Prohibition. In the meantime, nothing in the Appellate Rules forbids conducting a status conference to discuss how the bench trial is conducted if it goes forward. Time is so close that it makes sense to provisionally discuss how we proceed if the case is tried in accordance with its current schedule. Particularly in these "Corona Times" and in light of the Supreme Court's recent orders regarding bench trials as affected by the Covid 19 pandemic, it is important to do as much advance planning as possible for court proceedings. Nothing we do in status conference will conflict with the authority of the Court of Appeals and Supreme Court in this matter. No party will waive any rights it asserts by engaging in this provisional planning. Best regards, Jean Toal

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**From:** Carroll, Todd [mailto:Todd.Carroll@wbd-us.com]  
**Sent:** Wednesday, December 23, 2020 3:45 PM  
**To:** Murrell Smith <murrell@smithrobinsonlaw.com>; Toal, Jean <JToal@sccourts.org>; Perry, Christina M. <cmperry@sccourts.org>; tmcvey@kassellaw.com; jholder@dobslegal.com; Trey Branham <tbranham@dobslegal.com>; Jescelyn Spitz <jspitz@rplegalgroup.com>; Jon Robinson <jon@smithrobinsonlaw.com>; Shanon Peake <shanonp@smithrobinsonlaw.com>; mwhardee <mwhardee@bellsouth.net>; jwhite@spartanlaw.com; Shisko, Marghretta <mshisko@spartanlaw.com>; jonescr@gmail.com; brady.edwards@morganlewis.com; Nancy.patterson@morganlewis.com; 'brad.nes@morganlewis.com' <brad.nes@morganlewis.com>  
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**Subject:** RE: service of Petition for Writ of Prohibition

\*\*\* **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Murrell,

Thank you kindly for your note. As you observed, the Court of Appeals has issued briefing schedules for the motions pending before that Court. As a courtesy to Her Honor, I was waiting a little later in the afternoon to see if the Supreme Court would issue similar guidance so that we could pass everything along to Chief Justice

Toal in a single email, rather than sending piecemeal messages that take unnecessary jabs at opposing counsel and incorrectly suggest that we aren't complying with the Appellate Court Rules. I'm not familiar with any rule that directs parties to file or serve appellate filings on the circuit court—other than filing a copy of the notice of appeal with the circuit court, which we did on Monday afternoon. If there's another rule that I've missed, it was certainly unintentional, and I'd appreciate you letting me know the rule so that I don't make this apparent mistake going forward in other matters.

Your Honor,

Please find attached for the Court's awareness materials that were filed a little bit ago with the Supreme Court and Court of Appeals. As indicated above, we were going to send everything at the end of the day in order to give the Supreme Court an opportunity to potentially issue a schedule like the Court of Appeals did so that Your Honor would know as much as the parties when the business day draws to a close. However, so we don't appear nonresponsive to Murrell's message below, we wanted to go ahead and pass these along. If we receive anything else from either appellate court, we will certainly let Your Honor know.

Best regards, and we will co-sign on Murrell's note about best wishes to all for the holiday season and hope that everyone is able to get some rest and stay safe,

Todd

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**From:** Murrell Smith <[murrell@smithrobinsonlaw.com](mailto:murrell@smithrobinsonlaw.com)>

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**Subject:** RE: service of Petition for Writ of Prohibition

**Todd**

I see that USF&G has, again, not included Chief Justice Toal on the service of their two latest filings today of a Writ of Prohibition in the Supreme Court and a Motion to Stay in the Court of Appeals. I am copying Chief Justice Toal and Ms. Perry on this email to alert them of these filings as these could potentially impact the January 11<sup>th</sup> trial date and request that USF&G file and serve them with the Court as required by the SCACR.

**Chief Justice Toal,**

I am providing you the latest communication for the SC Court of Appeals concerning USF&G's appeal of your Order of Bifurcation and on the Motion to Stay. The Court of Appeals has set a briefing schedule on our recently filed Motion to Dismiss USF&G's Appeal and USF&G's Motion to Stay which are due before the trial date. We would request that the Court conduct a Status Conference next week so we can determine the process in moving forward in light of these recent filings.

I hope everyone gets to take a hiatus from this case to enjoy a few days of this Holiday Season. I wish everyone Happy and Safe Holiday . Murrell



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**From:** Carroll, Todd <[Todd.Carroll@wbd-us.com](mailto:Todd.Carroll@wbd-us.com)>

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**Subject:** service of Petition for Writ of Prohibition

Counsel,

Please find attached an Emergency Petition for a Writ of Prohibition and accompanying appendix 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 Supreme Court 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

**Todd Carroll**

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**PROOF OF SERVICE**

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Petitioner, do hereby certify that I have served all parties to this petition with a copy of the pleading(s) specified below by emailing them as the addresses below:

Pleading(s):                    Notice of Withdrawal of USF&G’s Emergency Motion to Enforce Rule 205

Parties Served:

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*Counsel for the Respondent Receiver for Covil Corporation*

By: /s/ Jodi Renner

December 30, 2020

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**Dec 30 2020**  
**SC Court of Appeals**