

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

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

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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.

REPLY TO RETURN TO NOTICE OF WITHDRAWAL OF USF&G'S
EMERGENCY MOTION TO ENFORCE RULE 205

In light of the circuit court's reversal of its position about proceeding with trial while an appeal is pending, USF&G withdrew its emergency motion to enforce Rule 205. In response to that notice of withdrawal, the Receiver for Covil—but not the other Respondent—filed a “return” to the withdrawal in which it lodged *ad hominem* attacks at USF&G. This inflammatory rhetoric has become the norm of this litigation and, quite disappointingly, is indicative of the state of the entire asbestos docket.

Because the “return” asserts that USF&G’s decision to enlist this Court to protect its constitutional right to a jury trial is really “part of the larger pattern of inaccurate statements and inappropriate appellate filings,” USF&G feels required to file a short reply.

With its now-withdrawn motion, USF&G provided this Court with copies of both the circuit court’s pre-emergency motion correspondence (indicating that it would press on with trial unless affirmatively restrained from doing so by an appellate court) and the circuit court’s post-emergency motion correspondence (indicating that it would no longer proceed with trial until the appeal is resolved). USF&G made no “misstatements”; those emails speak for themselves.

It is obvious what is happening below. The Respondents are attempting to have a single judge, without any involvement of a jury, transfer a \$32-million judgment from the defunct Covil Corporation—as well as the entirety of Covil’s underlying liability for all present and future asbestos lawsuits that may be filed against Covil in perpetuity—to an insurance carrier that has dared to push back against the Respondents’ unprecedented and dangerous litigation theories. But their claims are based on factual allegations that must first be heard and resolved by a jury as a matter of constitutional law.

USF&G’s fundamental, substantial right to a jury trial is at stake in this important appeal. That is why the order is immediately appealable, as discussed in much greater detail in USF&G’s December 31st opposition to the Receiver’s misguided motion to dismiss this appeal, to which neither the Respondent has any response.¹ And that is why it is imperative that USF&G’s right to

¹ A judge of this very Court secured the most recent pronouncement from the South Carolina Supreme Court on this exact subject just a few years ago, and that ruling specifically and expressly rejects the very same arguments and authorities that the Receiver has put forth in seeking dismissal of this appeal. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). The Receiver argues in its “return” that the circuit court believes that the “bifurcation” order is not immediately appealable. Respectfully, the circuit court’s supposed position on the point is not only directly rejected by *Morrow* and several other decisions that have specifically

a jury trial be as zealously protected by this Court as it is by the South Carolina Constitution, the United States Constitution, and courts nationally.

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held that a so-called “bifurcation” order must be immediately appealed if it affects the mode of trial—*e.g.*, *Planation Fed. Bank v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013), *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004)—but it is also irrelevant. *See, e.g.*, *State v. Cooper (In re Cooper)*, 342 S.C. 389, 398, 536 S.E.2d 870, 875–76 (2000) (holding that the Supreme Court and the Court of Appeals resolve disputes that arise under the Appellate Court Rules); Jean H. Toal *et al.*, *Appellate Practice in South Carolina* 344 (3d ed. 2016) (“When no procedure is specified, authority to resolve such a dispute [about the application of the Appellate Court Rules] vests in the appellate court in which the appeal is pending, ***not the circuit court.***”) (emphasis added).

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
todd.carroll@wbd-us.com
S.C. Bar No. 74000
M. Elizabeth O'Neill
S.C. Bar No. 104013
elizabeth.oneill@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

BAKER RAVENEL & BENDER, LLP

William Pearce Davis
wdavis@brblegal.com
Susan D. Dubose
sdubose@brblegal.com
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, SC 29202
(803) 799-9091

SIMPSON THACHER & BARTLETT LLP

Andrew T. Frankel (*admitted pro hac vice*)
afrankel@stblaw.com
Mary Beth Forshaw (*admitted pro hac vice*)
mforshaw@stblaw.com
Alan Turner (*admitted pro hac vice*)
aturner@stblaw.com
Michael S. Carnevale (*admitted pro hac vice*)
michael.carnevale@stblaw.com
425 Lexington Avenue
New York, NY 10017
(212) 455-3073

Attorneys for Appellant United States Fidelity and
Guaranty Company

January 4, 2021

PROOF OF SERVICE

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

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

Parties Served:

Theile B. McVey (tmcvey@kassellaw.com)
Jonathan M. Holder (jholder@dobslegal.com)
Charles W. Branham, III (tbranham@dobslegal.com)

Counsel for Respondent Ann Finch

Jescelyn Tillman Spitz (jspitz@rplegalgroup.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Shanon N. Peake (shanonp@smithrobinsonlaw.com)
Mark W. Hardee (mwhardee@bellsouth.net)
John B. White, Jr. (jwhite@spartanlaw.com)
Marghretta H. Shisko (mshisko@spartanlaw.com)
Christopher R. Jones (jonescr@gmail.com)
Brady Edwards (brady.edwards@morganlewis.com)
Nancy Patterson (nancy.patterson@morganlewis.com)
W. Brad Nes (brad.nes@morganlewis.com)

Counsel for the Respondent Receiver for Covil Corporation

By: /s/ M. Todd Carroll

January 4, 2021

