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SC Court of Appeals

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

Ann Finch, Individually and as Executor of 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.

USF&G'S RETURN IN OPPOSITION TO MOTION TO DISMISS

The question before this Court on a motion to dismiss is whether the December 9, 2020 circuit court order (the "December 9 Order") is immediately appealable. The answer to the question is "yes." *See, e.g.*, *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 737 S.E.2d 515 (Ct. App. 2013) (immediate interlocutory appeal reversing order requiring separate bifurcated trials of a bench claim and jury claim with the bench claim to be tried first); *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004) (recognizing that orders requiring bench trial that impair jury trial rights are immediately appealable and must be appealed immediately to avoid waiver). *See* 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."); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948 (1959) (in actions involving both equitable and legal claims and common issues of fact, legal claims must be tried to a jury first to preserve jury trial rights); *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014) (same); *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987) (same).

That Order sets a bench trial on one equitable alter-ego claim against appellant United States Fidelity and Guaranty Company ("USF&G") prior to a jury trial on several legal claims against USF&G in the same action—despite the fact that the legal and equitable claims all involve the same common issues of fact. Clear and unambiguous South Carolina law provides that where equitable and legal claims involve common issues of fact, the legal claims *must* be decided *first* by the jury; otherwise, the equity court's findings on common issues would have preclusive effect in the later jury trial, thereby impairing constitutional jury trial rights. *See, e.g.*, *Beacon Theatres*, 359 U.S. 500, 79 S.Ct. 948; *Blackburn*, 407 S.C. 321, 755 S.E.2d 437; *Johnson*, 292 S.C. 51, 354 S.E.2d 895; *Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515; *Bateman*, 358 S.C. at 676, 596 S.E.2d at 391 ("If both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court."). This rule embodies a constitutional safeguard, long recognized by the United States Supreme Court, the South Carolina Supreme Court, and this Court. The circuit court's decision to conduct a bench trial before a jury trial on the numerous legal claims clearly violated these principles.

The Order is immediately appealable under South Carolina Code § 14-3-330(2), because it deprives USF&G of a mode of trial to which it is legally entitled. *See, e.g.*, *Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515 (reversing order providing for a bench trial to be held prior to

jury trial on interlocutory appeal). Indeed, failure to immediately appeal such an order risks waiver. *See* Toal, *et al.*, *Appellate Practice in South Carolina*, *supra*, at 145 ("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.").

These basic principles should suffice to resolve the only issue presently before the Court, which is whether the December 9 Order is immediately appealable under South Carolina Code § 14-3-330(2). Most of the arguments raised by the Receiver for Covil Corporation (the "Receiver") in his motion to dismiss go to the merits of the appeal itself, and should be addressed following full briefing on the full appellate record. That is particularly so here, where the appeal raises important constitutional issues, the order under review so clearly violates settled law, and the only issue presently before the Court is being decided on an expedited basis, with limited briefing, and without a full record.

USF&G also respectfully notes at the outset that the Receiver's assertions that USF&G is attempting to "avoid trial, subvert justice, [and] deprive South Carolina courts from taking action to protect the rights of its citizens," and that USF&G is "blatantly disregard[ing] the South Carolina Rules of Civil and Appellate Procedure" (Mot. at 6-7) are both false and a thinly veiled invitation for this Court to put constitutional legal principles aside in the interest of punishing USF&G. As set forth herein, it is the circuit court's order and the Receiver's positions on this motion that are without support and contrary to established law. And the timing of this appeal was dictated by the timing of Respondents' motion seeking to have Justice Toal decide the alter ego issues before any of the remaining claims are tried to the jury. USF&G acted to preserve its constitutional right to a jury trial at all relevant times, and it sought review of the circuit court's trial sequencing order by

filing its notice of appeal well in advance of the deadline for doing so. Any delay in trial brought about by this appeal is a function of Respondents' own strategic decisions.

At bottom, the issue raised by the current motion is straightforward and narrow: whether the circuit court's order of December 9, 2020 is immediately appealable under South Carolina Code § 14-3-330(2) because it affects the mode of trial and involves a substantial right. For the reasons set forth herein, it clearly is, the Court should deny the Receiver's motion, and the appeal should be permitted to proceed in accordance with the South Carolina Appellate Court Rules, just like any other mode of trial appeal would.

I. BACKGROUND

This action arises from an asbestos-related tort action filed and litigated in federal court in North Carolina, in which Plaintiff Ann Finch ("Finch") received a verdict against Covil Corporation ("Covil"), a dissolved South Carolina corporation. *See Finch, et al., v. BASF Catalysts, LLC., et al.*, No. 16-cv-01077 (M.D.N.C.) ("*Finch I"*). After that judgment, Finch filed this action against Covil's insurers, including USF&G, and Covil's defense attorneys, under the novel (and legally unfounded) theory that insurers and defense counsel for a dissolved corporate tortfeasor should be liable as its alter ego based on the fact that USF&G (and other insurers) defended and indemnified Covil after it went out of business, despite the fact that insurers are *legally obligated* to continue defending and indemnifying an insured after it becomes bankrupt, insolvent, or is otherwise defunct. Finch later amended her complaint to assert a claim for breach of fiduciary duty. Covil's Receiver was also named by Finch as a defendant, but the complaint did not seek any relief against Covil or the Receiver.

The Receiver asserted cross-claims against USF&G and the other insurer and attorney defendants and was realigned as a plaintiff by the circuit court. Specifically, the Receiver not only joined plaintiff Finch in asserting a claim based on "alter ego, agency or instrumentality" liability

(App. 176-177, Finch's 9/16/2020 Second Amended Complaint, First Cause of Action, ¶¶ 37-44; App. 202-203, Receiver's 10/1/2020 Amended Cross-Claims, Seventh Cause of Action, ¶¶ 122-129), the Receiver also has asserted legal claims against USF&G including (i) aiding and abetting Covil's attorneys' alleged breach of their fiduciary duties to Covil; (ii) breach of contract for bad faith failure to defend Covil in *Finch I*; (iii) breach of contract for bad faith processing of claims; (iv) tortious bad faith processing of claims; and (v) negligence related to Covil's defense.[1] Each of these claims and the agency allegations of the alter ego claim are jury trial issues. All parties have demanded trials by jury in their respective pleadings. *See* App. 224, USF&G's 10/1/2020 Answer to the Second Amended Complaint at 16; App. 243, USF&G's 10/16/2020 Answer to the Receiver's Cross-Claims at 18; App. 180, Finch's 9/16/2020 Second Amended Complaint at 16; App. 37, Receiver's 7/18/2019 Cross-Claims, *Ann Finch v. Sentry Cas. Co., et al.*, No. 3:19-cv-01827 (D.S.C.), ECF 17, at 37.[2]

It is undisputed that numerous common factual issues exist here as between the legal and equitable alter ego claims. As counsel for Finch put it recently, in Respondents' view, "the same facts are indicative of the different crimes."[3] Likewise, the Receiver's principal alter ego expert, John Freeman, recently testified in his deposition that he is relying on the very same facts relevant

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[1] The Receiver previously asserted claims against USF&G in a parallel pending federal coverage action, *Covil Corp., by and through its Receiver Peter Protopapas, and Ann Finch v. Zurich American Insurance Co., et al.*, No. 1:18-cv-932 (M.D.N.C.) (App. 40, ECF No. 72; App. 87, ECF No. 155), including breach of contract and bad faith claims that are nearly identical to the claims the Receiver asserts here. USF&G moved in this action to stay the Receiver's duplicative claims, but the circuit court denied that motion, also on December 9, 2020.

[2] The Receiver's October 1, 2020 Amended Cross-Claims did not include a specific jury demand, although the body of the cross-claims seeks "actual and consequential damages in an amount to be determined by a jury." *See* App. 198, Receiver's 10/1/2020 Amended Cross-Claims ¶ 94.

[3] App. 267, 12/11/2020 email from C. Branham to A. Frankel.

to the Receiver's bad faith, breach of contract and other legal claims to support his alter ego opinions that the claims are "overlapping."[4] In fact, Respondents' alter ego theory is virtually identical to the bad faith claim: that USF&G "dominated and controlled" Covil through its alleged actions related to defense and settlement in the *Finch I* case, as well as its defense of Covil in numerous other cases, which breached alleged tort and contract duties owed by USF&G to plaintiffs, constituting wrongful conduct sufficient to render USF&G liable for all of Covil's tort liabilities as its insured's purported alter ego.

On October 2, 2020, Respondents jointly moved to bifurcate trial of the alter ego claims from trial of the remaining claims, to first conduct a bench trial of the alter ego claims, and to schedule trial of the remaining claims for a later date. Appellant opposed Respondents' motion, arguing that conducting the bench trial before the jury trial would, given the myriad common issues of fact, impermissibly impair USF&G's constitutional jury trial rights. Oral argument on this and a host of other motions proceeded on November 23, 2020, and the circuit court orally ruled for Respondents during the hearing, and requested proposed orders. On December 9, 2020, the circuit court entered the order submitted by Respondents.

USF&G noticed its appeal of the December 9 Order on December 21, 2020. The Receiver (but not Respondent Finch) filed the instant motion to dismiss on December 22, 2020.

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[4] App. 263, Excerpt of 12/10/2020 John P. Freeman Deposition Tr., at 58:11-18 ("Q. It seems to me that a lot of the factual material that you've recited over the course of your last few answers [on the issue of alter ego liability] are directly relevant to the breach of contract and bad faith claims, would you agree with that? A. I would agree that they're relevant, but I also have this to say, it's very common in law to have overlapping claims, very common."). There is voluminous additional evidence that common issues of fact exist as between the equitable and legal claims. This point is undisputed and, if necessary, can be addressed in greater detail in connection with briefing on the merits of the appeal if the Receiver attempts to change course and argue that no such common issues exist.

II. THE DECEMBER 9 ORDER IS IMMEDIATELY APPEALABLE BECAUSE IT WOULD DEPRIVE APPELLANT OF A MODE OF TRIAL AND AFFECTS SUBSTANTIAL RIGHTS

The December 9 Order is immediately appealable under South Carolina Code § 14-3-330(2) because the appeal raises the issue of the mode of trial to which USF&G is legally entitled. *See, e.g.*, *Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515, *supra*; *see also S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017) (recognizing right to immediately appeal order of reference requiring determination by master-in-equity of both legal and equitable claims). It is well-established that orders impacting mode of trial, including trial by jury, "affect substantial rights under S.C. Code Ann. § 14-3-330(2)" and are thus subject to immediate appeal. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997); *see also Hagood v. Sommerville*, 362 S.C. 191, 196–97, 607 S.E.2d 707, 709 (2005) (mode of trial is a "well-established exception to the general rule" that nonfinal orders are nonappealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000) ("The majority of cases requiring immediate appeal involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate.") (collecting cases).

Not only *may* the issue be appealed immediately, it *must* be appealed on an interlocutory basis to avoid waiver of USF&G's objections and its jury trial rights. *See, e.g.*, *Lester*, 327 S.C. at 266, 491 S.E.2d at 241 (failure to immediately appeal "an order affecting the mode of trial effects a waiver of the right to appeal that issue"); *Bateman*, 358 S.C. at 675, 596 S.E.2d at 390 ("[T]he purpose of requiring an immediate appeal of the denial of the right to a jury trial is to preserve a party's constitutional rights that would otherwise be lost"); Toal, *et al.*, *Appellate Practice in South Carolina*, *supra*, at 156 ("[T]he failure to timely appeal an order affecting the

mode of trial effects a waiver of the right to appeal that issue."); *id.* at 157 (reiterating that "these orders must be appealed immediately").

The Receiver does not seriously dispute these points. Instead, he attempts to characterize the December 9 Order as a run-of-the-mill bifurcation order, and from that faulty premise argues that it is not immediately appealable. USF&G does not dispute that ordinary bifurcation rulings, such as those bifurcating trial of liability and damages, are not orders that affect the mode of trial so as to authorize an immediate appeal. But the December 9 Order not only bifurcated the proceedings, it also ordered the equitable claims to be tried in a bench trial before a jury trial is held on legal claims, despite the numerous common issues of fact and clear authority prohibiting such a result due to the preclusive impact of a preceding bench trial on USF&G's right to have legal claims tried fully to a jury.

In *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015), the South Carolina Supreme Court unequivocally ruled that the title of a document, including in that case an order styled as one of "bifurcation," does not control the question of appealability:

> We decline the [respondents'] invitation to base our decision on the manner in which the motion was characterized—one of bifurcation. Our review of trial court orders is not constrained by how the order is styled. The trial court's order is quite distinct from other orders of bifurcation which have come before this Court. We are therefore free to evaluate the trial court's order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable.

412 S.C. at 539–40, 773 S.E.2d at 147 (internal citations omitted). Likewise, this Court has heard immediate appeals of bifurcation orders where, as here, those orders required that a bench trial on equitable claims precede a jury trial on legal claims. *See Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515.

Nor are USF&G's jury trial rights preserved by virtue of the fact that the circuit court scheduled a jury trial on the legal claims following the bench trial. The South Carolina Constitution "preserve[s] inviolate" the right to a jury trial. S.C. Const. art. I, § 14. The South Carolina Rules of Civil Procedure reiterate that constitutional mandate, both in Rule 38(a) concerning the right to trial by jury and in Rule 42(b), governing bifurcation.[5] As explained above, to protect this constitutional right, South Carolina Supreme Court precedent provides that "[i]f there are factual issues common to both [legal and equitable] claims, absent the 'most imperative circumstances,' the 'at law' claim must be tried first." *Johnson*, 292 S.C. at 56, 354 S.E.2d at 897 (quoting *Beacon Theatres*, 359 U.S. 500, 79 S.Ct. 948); *see also Blackburn*, 407 S.C. at 329, 755 S.E.2d at 441. This ensures that "the findings of the jury are binding on the sitting judge, as trier of the equitable claims." *Johnson*, 292 S.C. at 55, 354 S.E.2d at 897.[6] The opposite approach—disposing of common issues through a bench trial before they are tried to a jury—risks "limit[ing] [a party's] opportunity fully to try to a jury every issue" on which it is entitled to a jury trial, because "determination of the issue . . . by the judge might operate either by way of res judicata or collateral estoppel" to preclude the jury from independently considering common issues. *Beacon Theatres*, 359 U.S. at 504, 79 S.Ct. at 953 (citation and internal quotation marks omitted). Put another way, the result of trying an equitable claim first is "that any issue common to both the legal and equitable claims [i]s finally determined by the court and the party seeking trial by jury

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[5] Rule 38(a), SCRCP ("The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate."); Rule 42(b), SCRCP ("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 . . . always preserving inviolate the right of trial by jury as declared by the Constitution").

[6] As can be addressed further in merits briefing, this constitutional sequencing rule has been applied in state and federal decisions throughout the country.

on the legal claim [i]s deprived of that right as to these common issues," thus "undercut[ting]" the jury trial right. *Dairy Queen v. Wood*, 369 U.S. 469, 472, 82 S.Ct. 894, 897 (1962) (where a complaint alleges combined legal and equitable claims with common fact issues, the legal claims must be tried to a jury first). Thus, just as the prospect of a later jury trial following a bench trial was not sufficient to prevent reversal of the bifurcation order in *Plantation Federal Bank*, 401 S.C. 507, 737 S.E.2d 515, the fact that the circuit court here left open the possibility of a jury trial to be held after the conclusion of a bench trial in which the court would necessarily make findings on factual issues common to the legal claims is of no moment for purposes of determining appealability.

Indeed, this appeal starkly illustrates why courts have imposed the sequencing rule as a critical safeguard of constitutional jury trial rights. Respondents undoubtedly believe they have a far greater likelihood of prevailing before the circuit court than a jury, perhaps because Justice Toal has repeatedly indicated in various pretrial rulings and statements, in this and other actions, her view that she has already concluded USF&G and other Covil insurers in fact "pretended to be Covil" as part of an alleged "scheme to operate Covil as an undisclosed alter ego of these insurance companies."[7] And the Respondents have made clear that all of the same basic factual allegations they rely upon to support the Receiver's and Finch's legal claims arising from insurers' defense of Covil—whether breach of fiduciary duty, breach of contract, bad faith handling and processing of

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[7] *See, e.g.*, App. 146, January 8, 2020 Order in *Falls v. CBS Corp., et al*., No. 2015-CP-46-02155 (the "January 8 Order"), at p. 3, which was entered in an action in which USF&G was not a party and over its objection. USF&G filed a motion to reconsider, alter, or amend the January 8 Order on January 17, 2020, nearly a year ago. The circuit court has refused to rule on that motion and declined multiple efforts to schedule the motion for hearing, effectively depriving USF&G of any ability to obtain appellate review. Nonetheless, the Receiver intends to argue, through the Receiver's purported alter ego expert, that the circuit court's disputed findings in this order support a finding in this case that the insurers should be deemed responsible for Covil's tort liabilities under the alter ego doctrine.

claims, or negligence—are also the basis for their novel alter ego claim. Thus, absent intervention by a higher Court, it appears that very little, if anything, would remain for the jury on any of these claims following the proposed bench trial, and USF&G's constitutional rights would be trampled. Far from maintaining USF&G's jury trial rights *inviolate*, this process would render those rights all but illusory.

In short, because the December 9 Order deprives USF&G of a mode of trial to which it is legally entitled, USF&G's appeal from that order is proper under South Carolina Code § 14-3-330(2) and the Receiver's motion should be denied.

III. THE RECEIVER'S REMAINING ARGUMENTS GO TO THE MERITS OF THE APPEAL AND ARE IRRELEVANT AND, REGARDLESS, SHOULD BE REJECTED

The Court should deny the Receiver's motion and consider the Receiver's remaining arguments, which go to the merits of the appeal itself, under the normal appellate process. Should, however, the Court choose to consider the Receiver's additional arguments at this juncture without the benefit of full briefing or an appellate record, and despite the fact that those arguments go to the merits of the appeal itself, those arguments should be rejected for the reasons set forth below.

A. The Fact That The Receiver's Legal Claims Were Styled As Cross-Claims Is Irrelevant To USF&G's Jury Rights

The Receiver makes the convoluted argument that because it asserted legal claims against USF&G as cross-claims before the Receiver was realigned as a plaintiff, USF&G has no right to a jury trial on those claims. Specifically, the Receiver's reasoning appears to be as follows: (i) under South Carolina precedent, a defendant that asserts legal counterclaims against a plaintiff that brought only equitable claims has a right to a jury trial on compulsory counterclaims, but not on permissive counterclaims; (ii) cross-claims are permissive, in that there is no rule of civil procedure equivalent to the rule that requires compulsory claims to be asserted as part of the same action; so

(iii) a defendant has no right to a jury trial on a legal claim if that claim is asserted by way of a cross-claim.

None of this remotely holds up to even modest scrutiny. As a preliminary matter, the Receiver has been realigned as a plaintiff. There are no claims against the Receiver, and that his claims against USF&G were originally asserted as cross-claims is a historical artifact. Thus, even if the Receiver's reasoning made sense in the context of typical cross-claims among co-defendants (and it does not), it would not apply here because the Receiver is now a co-plaintiff, and where plaintiffs assert legal and equitable claims in the same case, the legal claims give rise to a jury trial right and must be determined first. *See, e.g.*, *Bateman*, 358 S.C. at 676, 596 S.E.2d at 391 (defendant was entitled to a jury trial on legal claims asserted alongside equitable claims, and "[i]f both the legal claims and the equitable claims are to be tried in a single proceeding, the legal issues are to be determined first, and the findings of the jury are binding on the court"). Cases such as *Bateman* and others are directly contrary to the Receiver's suggestion that the sequencing rule only applies in the context of counterclaims.[8]

The Receiver's argument also fails on its own terms. The different treatment of compulsory and permissive counterclaims is based on a waiver theory, and "waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Sanford v. State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607, *clarified*, 386 S.C. 274 (2009). As to permissive counterclaims, courts have held that "[b]y electing to assert its counter-claim in response to [an]

[8] In addition to this Court's application of the sequencing rule when legal and equitable claims were asserted in the same complaint rather than in the context of counterclaims (*see, e.g.*, *Bateman*, 358 S.C. at 676, 596 S.E.2d at 391), the South Carolina Supreme Court in *Johnson* cited to multiple federal cases applying the trial sequencing rule in similar circumstances. *See Johnson*, 292 S.C. at 55, 354 S.E.2d at 897 (citing, *inter alia*, *Roscello v. Sw. Airlines Co.*, 726 F.2d 217, 221, *reh'g denied*, 732 F.2d 941 (5th Cir. 1984)).

equitable action, [a defendant] waive[s] its right to a jury trial." *John D. Hollingsworth on Wheels v. Arkon Corp.*, 273 S.C. 461, 463, 257 S.E.2d 165, 166 (1979) (citing *Welborn v. Cobb*, 92 S.C. 384, 75 S.E. 691 (1912)). Compulsory counterclaims, however, do not result in waiver. *See C & S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986). This is because a waiver finding would deprive litigants of constitutionally-protected jury rights, not as a result of their own conscious choices but automatically, by operation of the rules of civil procedure. *See id.* (citing *Lisle Mills, Inc. v. Arkay Infants Wear, Inc.*, 90 F. Supp. 676 (E.D.N.Y. 1950)) (citations omitted); *cf.* Wright & Miller, 6 Fed. Prac. & Proc. Civ. § 1405, *Right to Jury Trial* (3d ed.) ("Since defendant is obliged to interpose the claim, it has been suggested that to compel defendant to waive the right to a jury trial by doing so is unconstitutional."). But no such waiver concerns apply here, as USF&G has not waived any jury trial rights. And it cannot be that because ***the Receiver*** brought legal cross-claims against USF&G, that should result in a waiver by ***USF&G*** of its constitutional right to a jury trial on those claims (and the legal claim asserted by the Receiver's co-plaintiff, Finch). Yet that is the import of what the Receiver is suggesting and further demonstrates the absurdity of the Receiver's argument that the sequencing rule somehow only applies in the context of counterclaims.

In short, the reason courts require trial of jury issues first where there are common issues of fact is to safeguard constitutional jury trial rights, and has nothing to do with whether the bench and jury trial claims happen to have been asserted in the same complaint, in cross-claims, or in counterclaims.

B. The Fact that Finch's Fiduciary Duty Claims Are Untenable Absent a Finding of Alter Ego Does Not Justify Impairing USF&G's Jury Trial Rights

The Receiver next argues that USF&G is not entitled to a jury trial on his co-plaintiff's legal claim for breach of fiduciary duty prior to a bench trial on alter ego because "Finch concedes

that [the fiduciary duty] claim can only be viable if USF&G is the alter-ego of Covil." Mot. at 4. Because of this, the Receiver argues that "an alter ego finding must be made by the trial court prior to any jury deliberations on the legal claims." *Id.* at 6. The Receiver contends that holding a jury trial first would be unnecessary and "potentially dangerous to the health of the members of the jury" and that by seeking to preserve its jury rights, USF&G is somehow seeking to require a jury to "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." *Id.* Thus, the Receiver concludes, the circuit court's decision to first hold a bench trial is justified by "imperative circumstances." *Id.* Again, the Receiver is mistaken, both on the facts and the law.

Review of the full record will reveal that the circuit court's reference to imperative circumstances and the pandemic was not briefed or argued to the circuit court. It was instead inserted by counsel for Finch into a proposed order—following briefing, argument, and the circuit court's oral ruling that was silent on this issue—that the circuit court then signed and adopted over Appellant's objection. The Receiver's arguments to this Court were never made below and, in any event, do not justify overriding USF&G's jury trial rights.

As an initial matter, the Receiver's argument makes no sense because the breach of fiduciary duty claim is not the sole legal claim in the case. Multiple legal claims brought by the Receiver are pending that arise from substantially the same factual allegations. Those claims, ranging from breach of contract, to bad faith, to negligence, do not depend on an alter ego finding, and will need to be tried to a jury. Thus, the circuit court's finding that "in the event that the Court finds that the Insurers are not the alter ego of Covil, the jurors' service would be needless" (App. 247, Dec. 9 Order at 3) is simply wrong. A jury *will* need to be empaneled for the trial of the Receiver's legal claims, regardless of how the circuit court resolves the alter ego issue.

Second, USF&G is not seeking to risk the health of potential jurors, and the Receiver's speculation to the contrary is baseless and offensive. Any jury trial should only be held once it can be conducted safely—and indeed in an order issued December 17, 2020, the trial court set the *Finch* jury trial for May 11, 2021. Presumably that setting and all other asbestos jury trials docketed in December will commence after the public health crisis improves, and USF&G does not presume to speak for the appropriate State authorities on such issues. But that is a circumstance that is common to all litigants with constitutional rights to trial by jury. Thus, it cannot be that a litigant's jury rights can be overridden on a theory that pandemic-related delays constitute "imperative circumstances," and to hold otherwise would set a dangerous precedent justifying widespread violations of litigants' rights to trial by jury.

Moreover, "the discretion to try an equitable claim first" under the "imperative circumstances" exception "is very narrowly limited and must, whenever possible, be exercised to preserve jury trial" and, importantly, "should only be exercised in the face of 'irreparable harm' to the plaintiff if the legal claims were to be tried first." *Plantation Fed. Bank*, 401 S.C. at 510, 737 S.E.2d at 517 (quoting *Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956). Potential pandemic-related delays that apply to all litigants cannot justify denial of constitutional jury rights, particularly in cases that (as here) ultimately seek only payment of money.[9] The Receiver, in fact, has *never* argued—in the circuit court or this Court—that the Receiver or Finch would be

[9] *See, e.g.*, *Beacon Theatres*, 359 US at 506-507, 79 S.Ct. at 954-55 ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable origins to be tried ahead of legal ones, since this has the same effect as an equitable injunction of the legal claims"); *Plantation Fed. Bank*, 401 S.C. at 511; 737 S.E.2d at 517-18 (imperative circumstances not justified by declining economy, to prevent payment of taxes, or to prevent sale of property as such concerns do not "represent the kind of 'irreparable harm' contemplated by the Supreme Court that would justify infringing on [a party's] constitutional right to a trial by jury").

irreparably harmed absent proceeding in a manner that would impair USF&G's jury trial rights, and for this reason alone the narrow "imperative circumstances" exception has no bearing in this appeal, let alone a basis to short circuit the appeal altogether through the guise of a motion to dismiss. As the United States Supreme Court recently cautioned, "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) (*per curiam*).

Further undermining any suggestion that it is necessary to override USF&G's jury trial rights by expediting the Receiver's and Finch's bench trial claim before the legal claims as a result of the COVID-19 pandemic, the Receiver has amassed tens of millions of dollars in settlement proceeds for Covil (including $45 million in prior settlements and an undisclosed sum under a recently announced settlement with Zurich American Insurance Company) presumably available to satisfy the *Finch I* judgment. The Receiver has also asserted breach of contract and bad faith claims for the amount of the judgment (beyond the full limits of the USF&G policy, which USF&G has already paid to Respondent Finch) in a parallel separate federal action in which cross-motions for summary judgment by the Receiver and USF&G have been fully briefed.[10] Thus, there is already another court in a position to rule on the propriety of the Receiver's claims against USF&G, at least insofar as the Receiver seeks extra-contractual relief relating to the underlying *Finch I* judgment.

Finally, the Receiver argues that trying the alter ego claim prior to the fiduciary duty claim is "most logical" because the fiduciary duty claim depends on an alter ego finding. Mot. at 3. However, even if the fiduciary duty claim were the only legal claim in this case, procedural

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[10] *See Covil Corp., by and through its Receiver Peter Protopapas, and Ann Finch v. Zurich American Insurance Co., et al.*, No. 1:18-cv-932 (M.D.N.C.).

convenience or efficiency considerations cannot justify abrogation of constitutional jury rights, whether under the extremely narrow "imperative circumstances" exception or otherwise. *See, e.g.*, *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1107 (5th Cir. 1972) (applying *Beacon Theatres* to require a trifurcated proceeding, even though it would "wreak[] havoc with [the court's] strong policies against piecemeal litigation," in order to preserve the jury trial right). The right to jury trial has thus been upheld even where the jury triable claim is contingent on the resolution of an equitable claim. *See, e.g.*, *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1127 (5th Cir. 1978) ("The justification for the failure to pay royalties must be determined with respect to both the legal and equitable claims. Although the claim for damages cannot succeed unless the lease is cancelled, extenuation is an issue common to both. We do not find 'imperative circumstances' that would justify the court in deciding the common issue with respect to the equitable aspect of the case, thus denying a jury trial of that issue."); *AMF Inc. v. Nat'l Boat Works, Inc.*, No. C-75-125, 1975 WL 21202, at *1 (M.D.N.C. Nov. 25, 1975) ("Where there is a claim for money damages which is both legal in nature and dependent upon the validity of equitable claims, the legal and equitable issues are common to each other and the parties are entitled to a determination by a jury of any factual questions related to the equitable issues."). Indeed, this is reflected in the text of Rule 42(b), which provides that while a court may bifurcate trial "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy," it must, nevertheless, "always preserv[e] inviolate the right of trial by jury as declared by the Constitution."

Thus, to the extent the procedural difficulties of which the Receiver now complains are the result of the need to harmonize USF&G's jury rights with the bifurcated trial procedure he himself requested over USF&G's objection, the Receiver's complaints fail. Similar solicitude is not owed

to a party's desire to avoid a jury trial or to maximize perceived trial efficiencies as is owed to a party's constitutionally protected jury rights. *See, e.g.*, *In re Lockheed Martin Corp.*, 503 F.3d 351, 358 (4th Cir. 2007) ("To permit the plaintiff's choice of a customary but not constitutionally required mode of trial to prevent a defendant from taking advantage of his constitutionally guaranteed mode of trial is inconsistent with the Supreme Court's admonition that the Seventh Amendment right to a jury trial must be preserved 'wherever possible.'") (quoting *Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956); *see also Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956 ("[T]he right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court"). In sum, even if the Court accepts in full the Receiver's framing of Finch's fiduciary duty claim, the motion must nonetheless be denied.

IV. CONCLUSION

For the reasons set forth herein, the circuit court's order of December 9, 2020 is immediately appealable under South Carolina Code § 14-3-330(2) because it affects the mode of trial and involves a substantial right, and thus the Receiver's motion to dismiss USF&G's appeal should be denied.

Respectfully submitted,

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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): **USF&G'S RETURN IN OPPOSITION TO MOTION TO DISMISS**

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