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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.

PETITION FOR REHEARING/REHEARING *EN BANC*

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"The right of trial by jury shall be preserved inviolate."[1]

"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." [2]

INTRODUCTION

The issue raised by this petition is whether a party may be deprived of constitutionally protected jury trial rights, contrary to directly on-point decisions of this Court and the South Carolina Supreme Court, and without even permitting its appeal of these issues to be heard on the merits.

Appellant United States Fidelity and Guaranty Company ("USF&G") is an insurance company that, along with other insurers, provided commercial liability insurance to Covil Corporation ("Covil"), a former insulation supplier and contractor. Covil has been a serial defendant in asbestos litigation since the mid-1970s as a result of its sale and use of asbestos-containing insulation products between the 1950s and early 1970s. In 1991, Covil ceased all of its operations, and was judicially dissolved in 1992. Because the policy that USF&G issued to Covil in 1976 obligated USF&G to continue to defend and indemnify Covil after it ceased operations and became insolvent, USF&G, along with other insurers, has defended and settled claims against Covil continuously from the 1970s through the present.

Plaintiff Ann Finch ("Finch") filed and litigated an asbestos-related tort action against Covil and other defendants in federal court in North Carolina. *See Finch, et al. v. BASF Catalysts, LLC., et al.*, No. 16-cv-01077 (M.D.N.C.) ("*Finch I*"). Following a favorable judgment against Covil, Finch, along with Covil's recently-appointed receiver Peter D. Protopapas (the "Receiver")

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1 S.C. Const. art. I, § 14.

2 Rule 38(a), SCRCP.

asserted various claims against USF&G in this action arising from USF&G's defense of Covil. In addition to the Receiver's claims for breach of contract, alleged bad faith failure to settle the *Finch I* action, negligence, and other legal claims asserted by Finch and the Receiver, both Plaintiffs assert claims under the unprecedented theory that USF&G should be deemed to have inherited all of Covil's tort liabilities—in perpetuity—as Covil's purported alter ego, based on the fact that USF&G defended Covil as it was legally obligated to do after Covil had gone out of business. By order dated December 9, 2020 (the "December 9 Order"),[3] the circuit court granted Plaintiffs' motion to bifurcate the trial and scheduled the alter ego claims for a bench trial to be held *before* the jury trial on the Plaintiffs' legal claims.

It is well established in South Carolina and throughout the country, however, that when a case involves both equitable claims triable to the court and legal claims triable to the jury, and those claims involve common issues of fact, the jury trial must proceed first with the jury's findings binding on the court. Otherwise, the equity court's findings on common issues would have preclusive effect in the later jury trial, thereby impairing the aggrieved party's constitutionally protected right to have a jury, not judge, decide issues bearing on legal claims. *See, e.g.*, *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 354 S.E.2d 895 (1987); *Plantation 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); *see also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948 (1959). 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 December 9 Order blatantly violated these principles.

[3] USF&G previously submitted an Appendix in Support of its Return in Opposition to the Receiver's Motion to Dismiss, which contains the December 9 Order, as well as other supporting documents.

USF&G seeks rehearing and rehearing *en banc* of this Court's order dated January 6, 2021 (the "Dismissal Order") dismissing USF&G's appeal from the circuit court's December 9 Order. In deciding without explanation or citation to authority that the December 9 Order is not immediately appealable, the Dismissal Order, issued by a single Judge of this Court, marked a stark departure from unambiguous South Carolina law—including this Court's own precedent. *See, e.g.*, *Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515 (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*, 358 S.C. 667, 596 S.E.2d 386 (recognizing that orders requiring bench trial that impairs jury trial rights are immediately appealable and must be appealed immediately to avoid waiver); *see also* 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.").

This Court has recognized that orders directing that factual issues common to legal and equitable claims be tried first to the equity court rather than the jury are immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) (1976) because such orders deprive a party 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, this Court has repeatedly held that "the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." *Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 386, 752 S.E.2d 269, 274 (Ct. App. 2013) (quoting *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997)); *accord, Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 431 S.E.2d 587, 590 (1993) ("Issues regarding mode of trial *must* be raised in the trial court at the *first opportunity*, and the order of the trial judge is *immediately appealable*.") (emphasis added)

(citation omitted). This rule embodies a preference that mode-of-trial issues be fully and finally resolved *before* the parties and the trial court undergo the time and expense of a trial.

Respectfully, the Dismissal Order is contrary to an extensive body of South Carolina authority, most of which the Receiver has never confronted in this Court. The Dismissal Order overlooked or misapprehended this precedent and the impact of the December 9 Order on USF&G's constitutionally protected jury trial rights, departing from prior Supreme Court and Court of Appeals decisions in numerous, yet unexplained, ways. The Dismissal Order therefore presents a clear case for rehearing *en banc*. *See* Rules 219(a), 221(a), SCACR. Indeed, rehearing by the full Court is *particularly* warranted here, where this departure from settled law was decided by a single Judge, on an expedited basis, with limited briefing, and without a full record, in a proceeding that raises important constitutional issues.

ARGUMENT

The extensive South Carolina precedent supporting USF&G's position was discussed in detail in USF&G's Return in Opposition to the Receiver's Motion to Dismiss. The Receiver opted to rest on his opening brief, declining to address the majority of this authority at all. Nonetheless, the Dismissal Order provides only that "the underlying order is not immediately appealable," without any reasoning or indication of the basis for that decision.

Rehearing is warranted because the Order necessarily overlooks or misapprehends the circuit court's December 9 Order and governing law, including this Court's cases instructing that the circuit court's order must be appealed immediately. *See* Rule 221(a), SCACR. Accordingly, rehearing should be granted *en banc* in order to "maintain uniformity of [the Court's] decisions." *See* Rule 219(a), SCACR.

Rehearing by the entire court is also warranted because USF&G's appeal raises important constitutional concerns, and the Dismissal Order could be read as accepting restrictions on the

right to trial by jury not previously contemplated by South Carolina law, including a purported COVID-19-related "imperative circumstances" exception adopted by the circuit court in its December 9 Order. *See* Rule 219(a), SCACR (rehearing *en banc* appropriate "when the proceeding involves a question of exceptional importance"). Before this Court lends its imprimatur to such novel reasoning—never before upheld by this Court—it should consider this issue on the merits and issue a reasoned decision that will provide guidance in other similarly situated cases as well as those that may yet be unforeseen.

A. The December 9 Order Is Immediately Appealable As A Matter Of Settled Law.

South Carolina law—including this Court's own precedent—provides a clear answer to the sole issue presented by Respondent's Motion to Dismiss USF&G's appeal: the December 9 Order is immediately appealable under S.C. Code Ann. § 14-3-330(2) (1976) because the appeal concerns the deprivation of a 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*, 327 S.C. at 266, 491 S.E.2d at 241; *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); *N.C. Fed. Sav. & Loan Ass'n v.*

DAV Corp., 298 S.C. 514, 517, 381 S.E.2d 903, 904 (1989) (reversing in part an order dismissing, as not immediately appealable, an appeal from a trial court order denying a jury trial on legal claims).

Not only *may* such orders be appealed immediately, they *must* be appealed on an interlocutory basis in order to avoid waiver of any objections and of 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[4] did not seriously dispute these points in his Motion to Dismiss. Instead, he attempted to characterize the December 9 Order as a run-of-the-mill bifurcation order, and from that faulty premise, argued that it is not immediately appealable. USF&G has never disputed 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 was no ordinary bifurcation order, and South Carolina law precludes reliance on the mere styling of such orders in determining appealability. Indeed, Judge Hewitt of this Court secured the most recent pronouncement of this principle from the South Carolina Supreme Court in *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015), in which the

[4] The other Plaintiff, Ann Finch, did not move to dismiss this appeal or join in the Receiver's motion.

court unequivocally recognized that the title of an order—in that case, as here, 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 take place before a jury trial on legal claims. *See Plantation Fed. Bank*, 401 S.C. 507, 737 S.E.2d 515. And this Court has repeatedly *refused* to consider appeals of orders affecting the mode of trial after final judgment where such orders were not appealed immediately. *See, e.g.*, *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998); *Preferred Sav. Bank v. Elkholy*, 303 S.C. 95, 98, 399 S.E.2d 19, 21 (Ct. App. 1990); *see also Salon Proz*, 420 S.C. at 93-94, 800 S.E.2d at 490 (recognizing that order of reference to court of equity despite a jury trial demand would affect mode of trial and that failure to immediately appeal would constitute waiver, but finding no waiver where there was no evidence party received notice of the order "and given the important right involved here"). This principle is so well established that the Court has taken to reinforcing it by way of *per curiam* summary opinions. *See, e.g.*, *Triad Mech. Contractors v. Built Right Constr.*, No. 2017-001205, 2020 WL 1547839, at *1 (Ct. App. Apr. 1, 2020); *Vanderbilt Mortg. & Fin. v. Bull*, No. 2015-002194, 2018 WL 1747954, at *2 (Ct. App. Apr. 11, 2018) (refusing to consider whether special referee erred in ruling on validity of a mortgage, a claim in equity, prior to a jury trial on counterclaims where appellant failed to immediately appeal order of reference that would have deprived party of a mode of trial). As in *Plantation Federal Bank*, 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 issues of fact common to the equitable and legal claims and clear authority prohibiting such a result.

Plaintiffs have never disputed that numerous common factual issues exist as between their legal claims and the equitable alter ego claims asserted against USF&G. Nor could they, as all of their claims arise out of USF&G's defense of Covil in asbestos-related tort actions, including the *Finch I* claim. Plaintiffs predicate their alter ego claims on a host of factual findings they seek from the circuit court about the sufficiency of the defense that USF&G provided to Covil and settlement efforts—findings that are nearly identical to the fact issues they must prove to a jury in connection with the Receiver's claims for breach of contract and bad faith, among other legal claims. And both the alter ego claims and the legal claims seek the same money damages based on the amount of the verdict in the *Finch I* case, in addition to unprecedented declarations they ask the circuit court to enter in the bench trial declaring that USF&G be deemed responsible for all of Covil's tort liabilities in perpetuity as Covil's alleged alter ego.

South Carolina precedent clearly prohibits the mode of trial ordered by the circuit court, due to the preclusive impact a preceding bench trial would have on USF&G's right to have legal claims tried fully to a jury. To the extent that the Court dismissed the appeal on the superficial rationale offered by the Receiver that the December 9 Order is a typical "bifurcation" order and for that reason not immediately appealable, the Court clearly misapprehended the nature of the order and its impact on USF&G's jury trial rights. As noted above, to protect the constitutional right to a jury trial, South Carolina Supreme Court precedent (consistent with U.S. Supreme Court and other state and federal decisions) 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.

The opposite approach, taken by the circuit court and validated by this Court's single-Judge Dismissal Order, disposes of common issues through a bench trial before they are tried to a jury and thus risks "limit[ing] [a party's] opportunity fully to try to a jury every issue" on which it is entitled to a jury trial. *Beacon Theatres*, 359 U.S. at 504, 79 S.Ct. at 953. This is 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. *Id.* (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 on the legal claim [i]s deprived of that right as to these common issues," thus "undercut[ting]" the party's constitutionally protected jury trial rights. *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 in order to protect the right to trial by jury).

In his Motion to Dismiss, the Receiver also disingenuously argued that USF&G's jury trial rights were preserved because the circuit court scheduled a later jury trial on the remaining legal claims, ignoring the preclusive effect the bench trial would have on the numerous issues of fact common to the equitable and legal claims. The fact that the circuit court left open the possibility of a jury trial to be held after the conclusion of a bench trial is therefore of no moment for purposes of determining appealability, 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.

Based on these well-established principles, numerous decisions of this Court, exemplified in cases like *Plantation Federal Bank*, *Bateman*, and *Salon Proz*, confirm that a trial court order permitting a bench trial on fact issues common to equitable and legal claims, rather than requiring a jury to decide such issues, violates constitutional jury trial rights and is immediately appealable as impacting the mode of trial. *Plantation Fed. Bank*, 401 S.C. at 510, 737 S.E.2d at 517; *Bateman*, 358 S.C. at 674-76, 596 S.E.2d at 390-91; *Salon Proz*, 420 S.C. at 93, 800 S.E.2d at 490. These cases make clear that USF&G's appeal should not have been dismissed. The Dismissal Order represents a notable and unexplained deviation from this Court's prior decisions and, for that reason, warrants rehearing.

Further, because it is not clear from the Dismissal Order why the Court concluded that the December 9 Order is not immediately appealable in the face of this clear precedent, it leaves open the likelihood that the Dismissal Order may be interpreted as having been based on one of the alternative, merits-based explanations proffered by the Receiver, thereby preventing *any* appellate review of these important constitutional issues. Those alternative rationales, addressed in turn below, inappropriately delved into the merits of the appeal rather than the threshold issue of appealability that could be decided on a motion to dismiss, prior to merits briefing and without any record on appeal. In any event, those arguments are equally inconsistent with governing law, and even the possibility that this Court's decision could be interpreted as adopting one of these rationales in the context of this important constitutional appeal warrants rehearing *en banc*.

B. Any Reliance On The Fact That The Receiver's Legal Claims Were Styled As Cross-Claims Warrants Rehearing *En Banc.*

To the extent the Court relied in any part on the Receiver's argument that the jury

sequencing principles set forth above are inapplicable here because some of the legal claims asserted against USF&G were originally asserted as cross-claims before the Receiver was realigned as a plaintiff, rehearing by the full Court should be granted. The Receiver's reasoning on this point appeared to be as follows: (i) 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; (iii) therefore, a defendant has no right to a jury trial on a legal claim if that claim is asserted by way of a cross-claim. That reasoning has no support in this Court's precedents or in basic logic.

As a preliminary matter, the Receiver has been realigned as a plaintiff. There are no claims against the Receiver, and the fact 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, it does not apply because the Receiver is now a co-plaintiff. Moreover, the trial sequencing rule is not confined to the context of counterclaims; rather, where plaintiffs assert against a defendant 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").[5]

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[5] 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 Supreme Court in *Johnson* cited to multiple

Even if not precluded by this Court's decision in *Bateman*, the Receiver's argument fails on its own terms. The different treatment of compulsory and permissive counterclaims is based on waiver principles, 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] 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). But no such waiver concerns apply here, as USF&G has not waived any jury trial rights, unlike a defendant that asserts permissive legal counterclaims in response to a complaint raising only equitable claims. 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 would be the extraordinary import of what the Receiver argues in his Motion to Dismiss.

In short, the reason courts require trial of jury issues first, before a bench trial of equitable claims where there are common issues of fact, is to safeguard constitutional jury trial rights. That constitutional safeguard is not limited only to cases involving counterclaims, as argued by the Receiver and as accepted by the circuit court. This Court already confirmed the more general

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federal cases applying the trial sequencing rule in similar circumstances, thus further demonstrating that the rule is not confined to cases involving only legal counterclaims. *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, *reh'g denied*, 732 F.2d 941 (5th Cir. 1984)).

applicability of the principle in *Bateman*, and the Dismissal Order deviated from that precedent to the extent it declined to apply the trial sequencing rule because of a belief that it is not applicable unless the legal claims were asserted by way of counterclaims as the circuit court reasoned. This warrants rehearing *en banc*. *See* Rule 219(a), SCACR.

C. Any Reliance On A Determination Of Imperative Circumstances Warrants Rehearing *En Banc.*

The Receiver also argued in his Motion to Dismiss that "imperative circumstances" justified impairing USF&G's jury trial rights in this action. Specifically, the Receiver's Motion to Dismiss argued that USF&G should not be 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 that claim "can only be viable if USF&G is the alter-ego of Covil." Mot. at 4. Based on that premise, the Receiver argued 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 contended that holding a jury trial first would therefore 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 was 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 concluded, the circuit court's decision to first hold a bench trial is justified by "imperative circumstances." *Id.*

To the degree the Dismissal Order relied on this argument in dismissing USF&G's appeal, it ignored the claims asserted in this action by the Receiver and misapprehended the "imperative circumstances" exception to the trial sequencing rule—an exception never before accepted as a basis to deny jury rights in any ruling of a South Carolina appellate court—justifying rehearing under Rule 221. Reliance on "imperative circumstances" to deny USF&G's right to a jury trial is not only a departure from this Court's precedent, but also implicates important constitutional

concerns—*i.e.*, whether and when the current pandemic can justify infringing on a defendant's constitutionally protected jury trial rights. Such a decision (to the extent it was a basis for the Dismissal Order) should not be based on a two-sentence order without explanation by a single Judge. Rather, the full Court should rehear the Dismissal Order to reconsider its import, if any. *See* Rule 219(a), SCACR (rehearing *en banc* appropriate when "necessary to secure or maintain uniformity of [the Court's] decisions, or . . . when the proceeding involves a question of exceptional importance"); *see also Williamson v. Middleton*, 383 S.C. 490, 494, 681 S.E.2d 867, 869 (2009) (court may grant rehearing *en banc* for reasons not explicitly set forth in Rule 219); *Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 86-87, 459 S.E.2d 851, 855 (Ct. App. 1995) (granting rehearing and adopting "the better rule" "[a]fter full consideration of the policy reasons behind" the relevant statute and "after a review of the case law of other states dealing with this issue"), *aff'd*, 325 S.C. 248, 481 S.E.2d 706 (1997).

As an initial matter, the issue of imperative circumstances and the pandemic was not briefed or argued to the circuit court below. 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 USF&G's objection. Putting aside the unfairness of dismissing USF&G's appeal on these merits-based grounds that were not argued below without providing it the opportunity for full briefing in this Court, the argument that "imperative circumstances" exist here is too consequential to adopt through expedited motion practice without full briefing and consideration by this Court.

As such full briefing would show, the Receiver is mistaken both on the facts and the law, as no "imperative circumstances" justify overriding USF&G's jury trial rights. First, any adoption of the Receiver's specific "imperative circumstances" argument overlooked that Finch's breach of

fiduciary duty claim is *not* the sole legal claim in this case. Multiple legal claims brought by the Receiver are pending that arise from substantially the same factual allegations as those supporting his alter ego claim. Those claims, ranging from breach of contract, to bad faith, to negligence, in no way 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" (Dec. 9 Order at 3) was simply wrong. A jury *will* need to be empaneled for the trial of the Receiver's legal claims regardless of how the alter ego issue is resolved.

Second, to the degree this Court's Dismissal Order was motivated by the desire to protect potential jurors from sitting during a pandemic, the Court accomplished that objective by determining that the Receiver's interest in holding a bench trial trumped USF&G's constitutional right to trial by jury. Allowing the Receiver's interests in convenience and efficiency and other strategy choices to trump USF&G's constitutional rights would be a remarkable and unprecedented result. USF&G has never sought to risk the health of potential jurors or suggested that any jury trial should be held before it could be conducted safely. Indeed, the circuit court set the *Finch* jury trial for May 11, 2021, and scheduled numerous other cases for jury trial before May 2021. Presumably that setting and all other jury trials docketed by the circuit court will commence after the public health crisis improves. But the parties here are similarly situated in this regard to all litigants with constitutional rights to trial by jury that are facing COVID-19-related delays. 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.

The Dismissal Order, however, which provides no indication of the Court's rationale, could be interpreted by lower courts in this State—including most obviously the circuit court, which presides over all asbestos-related matters pending in the State—as placing this Court's endorsement on the wholesale substitution of bench trials for jury trials, even where a party has a right to a jury trial protected by the Constitution, for the duration of the pandemic. And it would encourage gamesmanship by enticing plaintiffs to add equitable claims seeking the same relief and based on the same facts as their legal claims to achieve the same result, yet without any constitutional jury trial safeguards. These risks as well warrant rehearing of the Dismissal Order *en banc*. *See* Rule 219(a), SCACR.

In addition, to the degree this Court relied on a finding of "imperative circumstances" to justify violation of USF&G's jury trial rights, such a rationale deviates from this Court's precedent in *Plantation Federal Bank*. As this Court explained in that case in reversing on immediate appeal a trial court order directing a bench trial on equitable claims prior to jury trial on the legal claims, the decision to try an equitable claim first based on imperative circumstances "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 510-11, 737 S.E.2d at 517-18 (potential financial losses 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") (quoting *Beacon Theatres*, 359 U.S. at 510, 79 S.Ct. at 956). Pandemic-related delays that apply to *all* litigants cannot justify denial of constitutional jury rights, particularly in cases that (as here) ultimately seek

payment of money.[6] The Receiver, in fact, has *never* argued—in the circuit court or this Court—that the Receiver or Finch would be 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 could not serve as a basis for dismissing this appeal. 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*).

Finally, rehearing is also warranted to the extent the Court's Dismissal Order credited the Receiver's argument 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. Even if the fiduciary duty claim were the only legal claim in this case (which, as noted above, it is not), procedural 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

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[6] *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").

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."). This is reflected in the text of Rule 42(b) itself, 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." Rule 42(b), SCRCP (emphasis added).

Thus, to the extent the Dismissal Order relied on the procedural difficulties of which the Receiver now complains, that Order misapprehended the trial sequencing rule and is contrary to Rule 42(b), SCRCP by ignoring the court's obligation to "preserv[e] inviolate" the parties' right to trial by jury. A party's desire to avoid a jury trial or to maximize perceived trial efficiencies cannot override constitutionally protected 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"). Thus, even if the Court accepted in full the Receiver's framing of Finch's fiduciary duty claim, such a conclusion could not justify dismissing this appeal.

* * * *

This case starkly illustrates why courts have imposed the sequencing rule as a critical safeguard of constitutionally protected jury trial rights. The Plaintiffs have made clear that the same factual allegations they rely upon to support their legal claims—whether breach of fiduciary duty, breach of contract, bad faith handling and processing of claims, or negligence—are also the basis for their novel alter ego claim. 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, thereby trampling USF&G's constitutional rights. Far from maintaining USF&G's jury trial rights *inviolate* as the Constitution, the Rules of Civil Procedure, and numerous decisions in this State and elsewhere require, the process imposed by the circuit court would render those rights all but illusory.

CONCLUSION

For the reasons set forth above, USF&G respectfully urges that the Court grant rehearing *en banc* pursuant to Rules 219 and 221, SCACR .

Respectfully submitted,

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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 petition with a copy of the pleading(s) specified below by emailing them as the addresses below:

Pleading(s): USF&G's Petition for Rehearing/Rehearing *En Banc*

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