

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

May 03 2021

S.C. SUPREME COURT

The Honorable Jean H. Toal
Acting Circuit Court Judge

Court of Appeals 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, 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 Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for United States Fidelity & Guaranty Company (“USF&G”) certifies that it filed a petition for rehearing or rehearing *en banc* with the South Carolina Court of Appeals on January 20, 2021. (Appx. 351.)¹ The Court of Appeals ruled on that petition on April 5, 2021. (Appx. 378.)

¹ Because this matter was dismissed by the Court of Appeals, and initial briefs were thus not filed in that court, a record on appeal was not created. The Appendix provides documents relevant to the dismissal. *See* Rule 242(e)(2), SCACR.

“The right of trial by jury shall be preserved inviolate.”²

“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.”³

QUESTIONS PRESENTED FOR REVIEW

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 without even permitting its appeal of these issues to be heard on the merits. The specific questions for review are:

1. **Immediate appealability of orders infringing on jury trial rights:** It is well established that parties have the constitutional right to have legal claims decided fully by a jury *before* equitable claims are decided by a judge when the legal and equitable claims involve common issues of fact. It is equally well established that trial court orders involving the mode of trial—such as those impacting the right to trial by jury—are immediately appealable as affecting a substantial right under S.C. Code Ann. § 14-3-330(2). Did the Court of Appeals err in holding that USF&G’s appeal from a circuit court order requiring a bench trial on equitable claims prior to a jury trial on legal claims involving the same common issues of fact was not immediately appealable?

2. **Conflating of questions of appellate jurisdiction and the merits of the appeal:** Did the Court of Appeals err in dismissing USF&G’s appeal based on its *sua sponte* determination, on an expedited motion to dismiss and without an appellate record, that it was “not apparent that the circuit court’s bifurcation order deprived appellant of a mode of trial” because “[f]rom the filings provided by the parties, we cannot determine what factual issues (if any) necessarily overlap

² S.C. Const. art. I, § 14.

³ Rule 38(a), SCRCP.

between the legal and equitable claims,” particularly where it was undisputed that the legal and equitable claims involve numerous common issues of fact?

STATEMENT OF THE CASE

The South Carolina Constitution “preserve[s] inviolate” the right to a jury trial. S.C. Const. art. I, § 14. Because of this, well-established authority in South Carolina—as well as throughout the United States—mandates that when a case involves both equitable claims triable to the court and legal claims triable to the jury presenting 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 litigants’ constitutionally protected rights to have a jury, not judge, decide all aspects of jury-triable claims. Orders violating this rule impact mode of trial, and therefore give rise to immediate appeal under S.C. Code Ann. § 14-3-330(2). Indeed, the cases are legion in which a party’s failure to immediately appeal such mode-of-trial orders results in waiver.

USF&G seeks a writ of certiorari because the Court of Appeals’ dismissal of its mode-of-trial appeal is contrary to settled law, denies USF&G of constitutional rights, and reveals an urgent need for this Court to provide guidance concerning the appealability of trial orders that infringe on jury rights. Here, the circuit court, over USF&G’s objection, scheduled equitable claims for a bench trial before a jury trial on legal claims, despite obvious and undisputed overlapping issues of fact relevant to both trials. USF&G appealed, and the Court of Appeals dismissed the appeal on motion, before merits briefing or even any record on appeal. The Court of Appeals based its order on a finding that it was “not apparent” from the briefing on the motion to dismiss the appeal whether USF&G had been deprived of a mode of trial—thus effectively declining to hear the appeal because it could not resolve the merits of the appeal at the motion to dismiss stage. The

Court of Appeals' legally and procedurally flawed ruling reflects confusion about mode of trial appeals that should be addressed and corrected by this Court.

I. Respondents' Bifurcation Strategy

Petitioner USF&G is one of multiple insurers that 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, ceased all of its operations in 1991, and was judicially dissolved in 1992. Because the policy that USF&G issued to Covil in 1976 obligated USF&G (subject to the remaining limits of the policy) 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.

Respondent Ann Finch ("Finch") litigated to a favorable judgment an asbestos-related tort action against Covil in North Carolina federal court. *See Finch, et al., v. BASF Catalysts, LLC., et al.*, No. 16-cv-01077 (M.D.N.C.) ("*Finch I*"). Thereafter, while a coverage action was pending in North Carolina federal court, she 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 deemed to have inherited all of its tort liabilities—in perpetuity—as an alter ego. (Appx. 253, Finch's 9/16/2020 Second Amended Complaint at ¶¶ 37-55.) The alter ego claim is based on the fact that USF&G (and other insurers) defended and indemnified Covil after it went out of business, something that USF&G was contractually obligated to do under its contract of insurance. Finch later amended her complaint to assert a claim for breach of fiduciary duty. (Appx. 256, Finch's 9/16/2020 Second Amended Complaint at ¶¶ 56-61.) Finch also named as a defendant—but sought no relief against—the Receiver.

The Receiver, acting on behalf of Covil, asserted cross-claims against USF&G and the other insurer and attorney defendants and was subsequently realigned as a plaintiff by the circuit court. In addition to joining Respondent Finch in asserting a claim based on a theory of “alter ego, agency or instrumentality” (Appx. 279, Receiver’s 10/1/2020 Amended Cross-Claims at ¶¶ 122-129), the Receiver asserted legal claims against USF&G including (i) aiding and abetting Covil’s attorneys’ alleged breach of 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. (Appx. 275-278, 280-281, Receiver’s 10/1/2020 Amended Cross-Claims at ¶¶ 95-121, 130-136.) These legal claims are pled based on the exact same factual allegations as the Receiver’s alter ego claims and, like the alter ego claims, arise from USF&G’s involvement in the defense and settlement of asbestos tort claims brought against Covil after Covil ceased doing business.⁴ 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.⁵

On October 2, 2020, Respondents filed a joint motion labeled “Ann Finch and Covil Corporation’s Motion to Bifurcate” seeking to bifurcate trial of the alter ego claims and legal

⁴ See, e.g., Appx. 275, Receiver’s 10/1/2020 Amended Cross-Claims at ¶ 100 (alleging, in support of aiding and abetting breach of fiduciary duty claim, that USF&G “improperly instructed each of Covil’s lawyers to breach their fiduciary duties to their insured, Covil, by treating [USF&G and Covil’s other insurers] as the client”); *id.* ¶ 107 (alleging in support of bad faith failure to defend claim that USF&G and Covil’s other insurers “breached their duty to defend Covil by determining what was best for Covil without consulting with an independent Covil”); *id.* ¶ 114 (alleging in support of contract claim for bad faith processing of claims that USF&G and Covil’s other insurers “breached their respective contracts in bad faith by unilaterally running Covil”).

⁵ Appx. 301, USF&G’s 10/1/2020 Answer to the Second Amended Complaint at 16; Appx. 320, USF&G’s 10/16/2020 Answer to the Receiver’s Cross-Claims at 18; Appx. 257, Finch’s 9/16/2020 Second Amended Complaint at 16; Appx. 114, 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.

claims and requesting that the court conduct a bench trial of the equitable alter ego claims first, with a jury trial of the legal claims scheduled for a later date. (Appx. 1, Motion to Bifurcate.) USF&G opposed the motion on the basis that conducting the bench trial first would impermissibly impair USF&G's constitutional jury trial rights due to the numerous fact issues common to both the alter ego claims and the legal claims. (Appx. 7, Opposition to Motion to Bifurcate.)

II. The Circuit Court's Order

Oral argument on the motion was held on November 23, 2020, and the circuit court ruled for Respondents, scheduling the alter ego claims for bench trial before jury trial on the legal claims. On December 9, 2020, the circuit court entered a proposed order submitted by Respondent Finch styled as an "Order on Motion to Bifurcate" (the "Circuit Court Order"). In that order, the circuit court ruled that "a bench trial on the alter ego claim will be conducted in the Richland County Judicial Center on January 11, 2021" with the jury trial claims to be held thereafter. (Appx. 325, Circuit Court Order at 4.) The Circuit Court Order asserted, for the first time in this case, the novel theory that holding the bench trial on alter ego claims first was warranted by "imperative circumstances" resulting from the Covid-19 pandemic. (Appx. 324, Circuit Court Order at 3.) The Order stated that since Finch had stipulated that her breach of fiduciary duty claim depended on a predicate finding of alter ego liability, it would be inappropriate to "insist on a jury sitting in place for a one to two week trial in the midst of a global pandemic," given that if the court rejected the alter ego theory, "the jurors' service would be needless." (Appx. 324, Circuit Court Order at 3). This ruling was premised on a clear error, because among other reasons, it is undisputed that multiple other legal claims that arise from substantially the same factual allegations—including the Receiver's aiding and abetting breach of fiduciary duty, breach of contract, bad faith, and negligence claims—remain pending and are not dependent on any predicate alter ego finding. Any

suggestion the disposition of the alter ego claim could altogether obviate the need for a jury trial was simply wrong.

Moreover, the circuit court set unsound and dangerous precedent that could justify widespread violations of litigants' rights by reasoning that Covid-19-related court delays, common to countless litigants entitled to trial by jury over the last year, constitute "imperative circumstances" sufficient to override USF&G's jury trial rights. *See Plantation Fed. Bank v. Gray*, 401 S.C. 507, 510, 737 S.E.2d 515, 517 (Ct. App. 2013) (the "imperative circumstances" exception to the trial sequencing rule "is very narrowly limited" and requires a showing of "irreparable harm"), quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 68 (2020) (*per curiam*) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten."). Such "imperative circumstances" cannot exist where merely delaying the jury trial would enable the proper trial sequencing and where, as here, Respondents ultimately seek only payment of money. *See, e.g., 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"). The Receiver, in fact, has *never* argued in this litigation that Respondents would be irreparably harmed absent proceeding in a manner that would impair USF&G's jury trial rights; for this reason alone, the exceptionally narrow "imperative circumstances" exception has no bearing here.

The Circuit Court Order also included an alternative rationale for denying USF&G's right to a jury trial. That alternative holding misapplied this Court's precedents by relying on waiver principles that could not possibly apply here. Under this Court's holding in *Wachovia Bank, N.A.*

v. Blackburn, 407 S.C. 321, 329, 755 S.E.2d 437, 441 (2014), where a defendant asserts *compulsory* legal counterclaims against the plaintiff's equitable claims, the counterclaims must be tried first to preserve the right to trial by jury. Under *Blackburn*, the same rule does not apply in the case of *permissive* legal counterclaims, because by choosing (rather than being compelled) to assert such permissive counterclaims against an equitable complaint, the counterclaim-plaintiff is deemed to have waived its jury rights. *Id.* Based on *Blackburn*'s holding concerning permissive counterclaims, the circuit court reasoned that the legal cross-claims asserted by the Receiver were, if anything, "permissive" and therefore USF&G had no right to a jury trial on those claims. (Appx. 325, Circuit Court Order at 4.)

This ruling was clearly erroneous. The Receiver was realigned as a co-plaintiff prior to the circuit court's trial sequencing order; there was thus no basis for that court to view its claims as "cross-claims." As a plaintiff, application of the mode of trial analysis to the Receiver's claims against USF&G is even more straightforward than in the compulsory counterclaim context: Where one or more plaintiffs assert legal and equitable claims in the same case, it is settled that the legal claims give rise to a jury trial right and must be determined first. *See, e.g., Bateman v. Rouse*, 358 S.C. 667, 676, 596 S.E.2d 386, 391 (Ct. App. 2004) (defendant was entitled to 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"). Moreover, the analogy to permissive counterclaims could not possibly apply here, as the holding in *Blackburn* is premised on the intentional waiver of jury trial rights *by the party asserting the counterclaim*. *See John D. Hollingsworth on Wheels v. Arkon Corp.*, 273 S.C. 461, 463, 257 S.E.2d 165, 166 (1979) (citation omitted) ("By electing to assert its counter-claim in response to [an] equitable action, [a defendant] waive[s] its right to a jury trial.").

It cannot be that *the Receiver's* choice to assert legal cross-claims against USF&G results in a waiver *by USF&G* of its constitutional right to a jury trial on those claims.

In sum, in denying USF&G the mode of trial to which it is entitled, the Circuit Court Order erred in multiple ways and should not be permitted to stand without immediate appellate review.

III. USF&G's Appeal and the Court of Appeals' Summary Dismissal

USF&G timely noticed its appeal of the Circuit Court Order on December 21, 2020. (Appx. 33, Notice of Appeal.) The next day, the Receiver (but not Finch) filed a motion to dismiss the appeal, arguing that because the Receiver had asserted cross-claims, not compulsory counterclaims, USF&G lacked a constitutional right to a jury trial, and that the circuit court properly found that COVID-19-related court delays justified overriding USF&G's constitutionally protected jury rights. (Appx. 42, Motion to Dismiss.) The Receiver *did not* argue that no common issues of fact existed as between the pending legal and equitable claims against USF&G.

At the Receiver's request, the Court of Appeals ordered expedited briefing. (Appx. 54, 12/23/2020 Court of Appeals' Correspondence), and USF&G filed its Return on December 31, 2020. (Appx. 56, Return to Motion to Dismiss.) In addition to refuting the Receiver's arguments, USF&G explained in detail the basis for its position that "[i]t is undisputed that numerous common factual issues exist here as between the legal and equitable alter ego claims." (Appx. 60, Return to Motion to Dismiss at 5). Given the procedural posture, namely that the Court of Appeals did not yet have the record on appeal or any briefing on the merits of the appeal, USF&G further stated that "[t]here 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 . . .*" *Id.* at 5 n.4 (emphasis added). The Receiver rested on his opening brief, declining to address on reply the arguments or authority

presented by USF&G or to dispute the factual overlap across the legal and equitable claims. (Appx. 348, Receiver Correspondence.)

On January 6, 2021, a single judge of the Court of Appeals dismissed USF&G’s appeal without explanation or citation. (Appx. 349, 1/6/2021 Court of Appeals Order.) USF&G timely sought rehearing or rehearing *en banc*. (Appx. 351, Petition for Rehearing.) The Court of Appeals denied the petition on April 5, 2021, explaining that rehearing was not warranted because the court could not “determine what factual issues (if any) necessarily overlap between the legal and equitable claims” from the parties’ filings and, thus, it was not “apparent that the circuit court’s bifurcation order deprives appellant of a mode of trial.” (Appx. 381, 4/5/2021 Court of Appeals Order.) The Court of Appeals also observed that Section 14-3-330 should be narrowly construed and that a “bifurcation” order is not immediately appealable under mode of trial analysis but rather may be reviewed on appeal from final judgment. (Appx. 381, 4/5/2021 Court of Appeals Order.) This petition timely follows.

ARGUMENT

I. The Circuit Court’s Order Is Immediately Appealable Because It Is A Mode-of-Trial Order Affecting Constitutional Rights

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, litigants are *required* to appeal on an interlocutory basis or they will be precluded from raising objections and jury trial rights in any further appeal. *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”); Jean H. Toal, *et al., Appellate Practice in South Carolina* 156 (3d ed. 2016) (“[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 requirement of immediate appeal is intended to “preserve” the constitutional jury trial right “which would otherwise be lost” if appeal is delayed until final judgment. *Hagood*, 362 S.C. at 197, 607 S.E.2d at 709, citing *Bateman*, 358 S.C. at 675, 596 S.E.2d at 390.

In *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015), this Court unequivocally ruled that the title of a document—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). The South Carolina Constitution “preserve[s] inviolate” the right to a jury trial, S.C. Const. art. I, § 14, and 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.⁶ Therefore, where,

⁶ 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

as here, an order does more than merely bifurcate claims, and instead has some substantive effect rendering it immediately appealable under South Carolina Code § 14-3-330, its label as a “bifurcation” order is irrelevant to its appealability.

Here, by ordering a bench trial of equitable claims before a jury trial of legal claims involving common issues, the circuit court violated USF&G’s constitutional right to trial by jury as established by this Court’s precedent, which plainly 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 v. S.C. Nat’l Bank*, 292 S.C. 51, 56, 354 S.E.2d 895, 897 (1987), quoting *Beacon Theatres*, 359 U.S. 500 (emphasis added); *see also 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 where the bench claim was scheduled to be tried first).

This trial sequencing rule is necessary because it 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—adjudicating 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 (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

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”).

seeking trial by jury 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 (1962) (where a complaint alleges combined legal and equitable claims with common fact issues, the legal claims must be tried to a jury first). USF&G’s jury trial rights are thus not adequately preserved by the fact that the circuit court left open the possibility of a jury trial to be held after the conclusion of a bench trial. Rather, the proper sequencing of the bifurcated jury trial *before* the bench trial is critical to preservation of USF&G’s rights.

South Carolina law thus makes clear that an order providing for a bench trial on equitable claims to precede a jury trial on legal claims presenting common fact issues is more than a “bifurcation” order—it impacts the mode of trial and is immediately appealable. Denying USF&G its right to appeal such an order is the opposite of maintaining USF&G’s jury rights *inviolata*, as the South Carolina Constitution requires. Because of this, the circuit court erred in ordering such bifurcation, and the Court of Appeals further erred by dismissing USF&G’s appeal.

II. The Court of Appeals Further Erred By Improperly Venturing Into the Merits Without a Record or Merits Briefing

In dismissing USF&G’s appeal, the Court of Appeals held:

From the filings provided by the parties, we cannot determine what factual issues (if any) necessarily overlap between the legal and equitable claims. Thus, it is not apparent that the circuit court’s bifurcation order deprives appellant of a mode of trial.

Accordingly, the petition for rehearing is denied, and the appeal is dismissed. . . .

(Appx. 381, 4/5/2021 Court of Appeals Order.) As support, the Court of Appeals cited *Stone v. Thompson*, 426 S.C. 291, 295–96, 826 S.E.2d 868, 870 (2019), for the proposition that South Carolina Code § 14-3-330 is “narrowly constru[ed],” and *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72–73, 533 S.E.2d 331, 333 (2000), for the proposition that ordinary bifurcation

orders that do not impact jury rights are subject to review for abuse of discretion after final judgment. (Appx. 381, 4/5/2021 Court of Appeals Order.) The Court of Appeals' conclusion, however, is unsupported by the very precedents on which it relied.

As an initial matter, the Court of Appeals erred in dismissing USF&G's appeal based on a finding that it "[could not] determine" at the motion to dismiss stage whether common factual issues existed as between the legal and equitable claims, and thus that it was "not apparent" whether USF&G had been deprived of a mode of trial. The Receiver did not move to dismiss based on the absence of factual overlap between the legal and equitable claims—an issue that ultimately bears on the merits of the appeal, not the threshold question of appealability. Moreover, the Court of Appeals did not actually determine that no overlapping fact issues existed—it merely pointed to an ostensible inability to definitively resolve the issue based on the parties' motion to dismiss briefing. That, however, is a reason to allow the appeal to proceed to merits briefing and designation of the record, not to dismiss the appeal before the appellant has an opportunity to fully and fairly present the relevant record evidence. Indeed, cases such as *Flagstar* show that putative mode of trial appeals are properly dismissed only where the court can determine that "[i]n this case, no party is denied the right to trial by jury." *Flagstar*, 341 S.C. at 72, 533 S.E.2d at 333; *see also Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees*, 344 S.C. 522, 524, 544 S.E.2d 642, 643 (Ct. App. 2001) (dismissing appeal where action was equitable in nature and, thus, transfer to the non-jury docket did not deprive appellant of a mode of trial to which he was "entitled as a matter of right"). Here, by contrast, the Court of Appeals pointedly *declined* to conclude whether or not USF&G would be so deprived, but nonetheless dismissed the appeal.

The Court of Appeals' dismissal ruling also ignored the substantial record evidence and argument set forth in USF&G's filings that demonstrated the undisputed factual overlap among

the Respondents' legal and equitable claims asserted against USF&G—overlap that is apparent on the face of the Receiver's Cross-Complaint, which asserts both the Receiver's legal claims and his equitable alter ego claims based on precisely the same factual allegations (*see supra* note 4 and accompanying text), as well as from Respondents' positions as reflected in numerous other pleadings, discovery responses, and expert testimony. For example, as USF&G explained in its Return:

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." 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 to the Receiver's bad faith, breach of contract and other legal claims to support his alter ego opinions that the claims are "overlapping." 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.

(Appx. 60, Return in Opposition to Motion to Dismiss at 5 (internal footnotes omitted).) USF&G cited and submitted to the Court of Appeals an Appendix of record evidence, including the relevant pleadings, correspondence reflecting Finch's counsel's concession as to the existence of overlapping facts, and the testimony from the deposition of the Receiver's principal expert to the same effect.⁷ USF&G further explained in its Return that "[t]here is voluminous additional evidence that common issues of fact exist as between the equitable and legal claims" and offered

⁷ See Appx. 344, Court of Appeals Appx. 267 (12/11/2020 email from C. Branham to A. Frankel); Appx. 340, Court of Appeals Appx. 263 (Excerpt of 12/10/2020 John P. Freeman Tr., at 58:11-18).

that, “if necessary,” this issue “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.” (Appx. 61, Return in Opposition to Motion to Dismiss at 6). As noted above, the Receiver never argued in the circuit court that no common issues existed between the equitable and legal claims, nor did the Receiver change course on appeal, declining to contest this or any other of USF&G’s points in a reply brief.

This substantial submission far exceeded what was required of USF&G at the motion to dismiss stage. At that stage, this Court’s precedents contemplate nothing more than “some minimal inquiry” by the Court of Appeals regarding “the appealability of [the] order which is alleged to have deprived a party of a mode of trial.” *Flagstar*, 341 S.C. at 72 n.7, 533 S.E.2d at 333 n.7. This guidance plainly contemplates that the merits of mode-of-trial appeals should not be fully litigated in the guise of a motion to dismiss, particularly where, as here, constitutional rights hang in the balance. There is no question under South Carolina law that trial by jury is a “mode of trial,” denial of which gives rise to immediate appealability. Indeed, the “majority” of mode-of-trial cases involve deprivation of the jury trial right. *See Senter*, 341 S.C. at 78, 533 S.E.2d at 577. Likewise, there is no question here as to which claims are legal and which are equitable, or whether USF&G failed to timely demand a jury trial. The nature and extent of the factual overlap among the different claims is properly a merits question. To the extent that question is even contested by the parties, it can be resolved after full briefing and designation of matter in the record, not on a motion to dismiss before a record even exists.⁸

⁸ Similarly, when assessing whether particular categories of orders should fall within the “mode of trial” rule for purposes of appealability, courts do not conduct a searching inquiry into the merits of the individual case. Rather, courts generally ask whether the trial-related “right” raised by the appellant is sufficiently “substantial” under Section 14-3-330(2) to warrant immediate appeal and whether the trial court’s decision is of the sort that should be corrected

III. The Court of Appeals' Decision Conflicts with Prior Decisions of This Court, Involves Novel Questions of Law, and Implicates Important Constitutional Rights

Rule 242(b), SCACR, provides that this Court considers factors including whether “the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court”; whether there are “novel questions of law”; and whether “substantial constitutional issues are directly involved,” when evaluating whether to grant a writ of certiorari. A writ of certiorari may also be granted when there are “special and important reasons” for doing so. *Id.*; see also *In re Breast Implant Product Liability Litig.*, 331 S.C. 540, 543, 503 S.E.2d 445, 447 (1998).

Certiorari is clearly warranted here. The circuit court’s order flies in the face of settled law aimed at ensuring that South Carolina litigants’ constitutional rights to jury trials are not violated by trial sequencing orders, and does so on bases that, to USF&G’s knowledge, have never before been adopted by any other court, either within or outside of South Carolina. Rather than correcting the circuit court’s error, the Court of Appeals dismissed the appeal on different—but similarly novel and unsupported—grounds. The approaches taken by the circuit court and the Court of Appeals in this case contravene this Court’s clear precedents instructing that trial orders that would deny a litigant its right to a jury trial can and must be immediately appealed, notwithstanding how those orders are styled. See, e.g., *Morrow*, 412 S.C. 534, 773 S.E.2d 144.

before, rather than after, a trial. Compare *Senter*, 341 S.C. at 78, 533 S.E.2d at 577 (determining that typical orders bifurcating liability and damages do not trigger the mode of trial rule because any errors can be corrected after trial), with *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 453, 661 S.E.2d 81, 87 (2008) (holding that trial court orders imposing an “opt-in” notification procedure for putative class members are immediately appealable as affecting a mode of trial because the orders would result in certain claims being barred by the statute of limitations); see also *Hagood*, 362 S.C. at 197-198, 607 S.E.2d at 710 (holding that an order disqualifying an attorney in a civil case is immediately appealable as affecting a substantial right). This categorical approach to appealability further demonstrates that the Court of Appeals ventured improperly into merits considerations in this case.

Certiorari is also warranted because this appeal centrally concerns the preservation of the rights of defendants in South Carolina state courts to trial by jury. That right is “preserved inviolate” by the State constitution. S.C. Const. art. I, § 14. Immediate appeals from orders depriving litigants of their jury rights are authorized because of the constitutional significance of those rights. And, this Court recognized the danger of impeding on a litigant’s right to a fair trial when it adopted Rule 42(b), SCRCP, regarding bifurcations. Consistent with the South Carolina constitution and this Court’s precedent, that rule instructs the trial courts to “always preserv[e] inviolate the right of trial by jury as declared by the Constitution or as given by a statute of the State.” The rulings of the circuit court and Court of Appeals cannot be squared with these constitutional protections. Rather than taking care to preserve USF&G’s jury rights “inviolate,” the procedures adopted or authorized by those courts have rendered USF&G’s jury rights almost entirely illusory, based on nothing more than Respondents’ trial strategy preference to have the circuit court make factual findings before, and in place of, the jury. That is the opposite of what this Court’s decisions require, as made clear in cases such as *Johnson* and *Blackburn* as discussed above. And considerations of procedural convenience cannot justify abrogation of litigants’ jury rights. See, e.g., *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1107 (5th Cir. 1972) (requiring particular trial procedure, even though it would “wreak[] havoc with [the court’s] strong policies against piecemeal litigation,” in order to preserve jury trial rights). This Court’s intervention is therefore necessary to vindicate USF&G’s constitutional rights.

Granting a writ of certiorari will also enable this Court to provide needed guidance to the Court of Appeals and to litigants regarding what is required to establish appealability with respect to interlocutory mode-of-trial appeals. The Court of Appeals’ decision in this case reflects uncertainty regarding how appellate courts should draw the line between appealability and merits

issues, given that both phases can be understood to effectively pose the same question—*i.e.*, whether the appellant has been deprived of a mode of trial to which they are entitled.

Similarly, the Court of Appeals' decision also presents several novel questions of law, appellate practice, and procedure, including (i) the factual or evidentiary showing, if any, required of a mode-of-trial appellant at the motion to dismiss stage; (ii) how such record evidence is to be presented at the motion to dismiss stage, prior to designation of the record; (iii) whether the Court of Appeals can properly dismiss appeals prior to the designation of the record as a result of ostensible failures to present sufficient evidence; and (iv) whether the Court of Appeals can, as here, properly dismiss a mode-of-trial appeal without deciding whether a mode of trial is in fact at issue. Guidance from this Court on these matters would help clarify this area of law going forward, thereby reducing the burden imposed on litigants and the court system from potentially unnecessary appeals and motion practice and ensuring that litigants' substantive constitutional rights are not lost as a result of avoidable procedural missteps.

Lastly, certiorari is warranted here because the Court of Appeals' dismissal of USF&G's appeal would lead to significant inefficiencies. Orders denying a party a mode of trial to which they are entitled *must* be immediately appealed and cannot be challenged in an appeal from final judgment. *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”). USF&G immediately appealed the Circuit Court Order precisely in order to avoid such waiver. Yet the Court of Appeals dismissed USF&G's appeal without deciding whether or not “the circuit court's bifurcation order deprives appellant of a mode of trial.” If this Court does not grant certiorari, USF&G would be forced to proceed, over its objection, to a bench trial and a subsequent jury trial on overlapping issues, and to again lodge this same appeal after final judgment—at which point

Respondents may well contend that the circuit court's factual findings were binding on the jury under principals of collateral estoppel and res judicata, or that USF&G's mode-of-trial challenges have been waived. That unfair Catch-22 cannot be the law. At the same time, a ruling that USF&G's mode of trial challenges *can* be pursued after final judgment would appear to create a novel, *ad hoc* exception to South Carolina's waiver rule, creating a potential trap for litigants who may henceforth avoid taking immediate appeal of mode-of-trial orders affecting substantial rights based on the reasoning of the court below. Granting certiorari and reversing the Court of Appeals' dismissal of USF&G's appeal will thus not only prevent manifest unfairness and preserve constitutional jury trial safeguards, but also further the orderly development of South Carolina law.

CONCLUSION

For the foregoing reasons, USF&G's petition for certiorari should be granted.

Respectfully submitted,

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