

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2021-000462
Circuit Court Case No. 2019-CP-40-03003

Ann Finch, Individually and as Executor of the Estate of Franklin Finch; and Peter D. Protopapas, as Court Appointed Receiver for Covil Corporation,....Respondents,

v.

United States Fidelity and Guaranty Company; Zurich American Insurance Company; and Wall, Templeton & Haldrup, P.A.,.....Defendants,

Of Which

United States Fidelity and Guaranty Company is the.....Petitioner.

MOTION FOR LIMITED REMAND

Respondents, by and through the undersigned counsel, respectfully move this Court under Rule 240 of the South Carolina Appellate Court Rules for an Order holding this appeal in abeyance and remanding the action to the circuit court for the limited purpose of the circuit court's consideration of motions by Respondents to amend their pleadings and remove several causes of

action currently asserted against Petitioner, thereby obviating the current need for further appellate review in this action.¹

BACKGROUND

This action arose out of a related federal case in which Ann Finch (“Finch”) obtained a verdict in excess of \$32,000,000 against Covil Corporation (“Covil”), a South Carolina corporation. *See Finch v. Covil Corp.*, C.A. No. 1:16-CV-01077 (M.D.N.C.). Thereafter, Finch filed the instant action against United States Fidelity and Guaranty Company (“USF&G”); Peter Protopapas, as the Court Appointed Receiver for Covil (“the Receiver”); and others, asserting (*inter alia*) a breach of fiduciary duty claim against USF&G and claims based on USF&G’s status as Covil’s alter ego. (App’x 242–57). Similarly, in his answer to Finch’s Second Amended Complaint, the Receiver asserted (*inter alia*) crossclaims against USF&G for its aiding and abetting the breach of a fiduciary duty, bad faith, negligence, and claims based on USF&G’s status as Covil’s alter ego. (App’x 243–85). The circuit court later realigned the parties, seating the Receiver as a plaintiff alongside Finch and against the remaining defendants.² (App’x 322–23).

On December 9, 2020, the circuit court granted the realigned plaintiffs’ motion to bifurcate, ordering that the plaintiffs’ alter ego claims would first proceed to a bench trial, while the remaining claims would be tried later before a jury. (App’x 325). This bifurcation order is the subject of the instant appeal. (App’x 33).

ARGUMENT

¹ Respondents note their Return to the Petition for Writ of Certiorari is due on June 2, 2021. Respondents respectfully request that this deadline be held in abeyance while the Court considers this motion.

² As a result of subsequent settlements and consent dismissals, USF&G is now the only remaining defendant in this action.

1. A remand from this Court is necessary because USF&G’s appeal divested the circuit court of its authority to adjudicate Respondents’ intended motions.

USF&G’s appeal of the bifurcation order precludes the circuit court “from proceeding with matters . . . affected by the appeal.” Rule 205, SCACR; *see id.* (“Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . .”). Additionally, this Court’s opinions interpreting Rule 205 demonstrate that the circuit court is currently prohibited from considering any matter that could affect the instant appeal.³ *See Grosshuesch v. Cramer*, 377 S.C. 12, 31, 659 S.E.2d 112, 122 (2008) (“We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters *affecting the issue on appeal.*” (emphasis added)); *Arnal v. Fraser*, 371 S.C. 512, 519, 641 S.E.2d 419, 422 (2007) (“Under Rule 205 . . . , the lower court may not act or issue orders *that affect an issue on appeal.*” (emphasis added)).

Here, Respondents intend to file motions to amend their pleadings and remove the non-alter ego causes of action against USF&G. Should the circuit court grant the motions, USF&G’s appeal of the bifurcation order would be mooted because there would be no remaining causes of action to be tried before a jury. Any such motions would therefore “affect[] the issue on appeal” here and are disallowed by this Court’s precedent. *Grosshuesch*, 377 S.C. at 31, 659 S.E.2d at 122. Accordingly, a limited remand of this action to the circuit court is necessary to ensure the circuit court is vested with the authority to adjudicate the motions.

³ Although bifurcation orders are not generally immediately appealable (which the Court of Appeals found to be the case here), and the appeal from an unappealable interlocutory order does not transfer jurisdiction to the appellate courts, Respondents seek relief from this Court out of an abundance of caution to prevent USF&G’s inevitable additional appeal that would result from Respondents filing their motions to amend in the circuit court without first seeking a remand here. *See generally Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 540, 773 S.E.2d 144, 147 (2015) (listing cases stating the general rule that bifurcation orders are not immediately appealable); *S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 586, 340 S.E.2d 535, 536 (1986) (“Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay further proceedings in the lower court.”).

2. A remand for the limited purpose of hearing Respondents’ intended motions is appropriate at this time.

The South Carolina Appellate Court Rules permit motions to remand during the pendency of an appeal. *See* Rule 240(a), SCACR (including “motions to remand” as a proper class of appellate court motion); Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 378 (3d. ed. 2016) (“A party may move for remand in the appellate courts for a variety of reasons.”).

Moreover, remands are commonly allowed when appropriate under the circumstances. *See Arnal*, 371 S.C. at 519 n.4, 641 S.E.2d at 422 n.4 (observing, while discussing Rule 205’s prohibition of a lower court’s consideration of appealed matters, that “[a] party can always seek a remand from an appellate court if the circumstances of the particular case require it”). Consistent with this principle, our appellate courts have granted remand motions in a variety of contexts. *See, e.g., Reese v. State*, 425 S.C. 108, 109, 820 S.E.2d 376, 377 (2018) (granting the State’s motion to remand, filed in lieu of a return to the petition for a writ of certiorari, to allow the PCR court to enter an order that included detailed findings of fact and conclusions of law); *Jensen v. Doe*, 295 S.C. 69, 367 S.E.2d 162 (1988) (denying a certiorari petition without prejudice after the petitioner “move[d] for this Court to dismiss her petition . . . and to remand this matter to the trial court for the purpose of amending the complaints”); *Otten v. Otten*, 287 S.C. 166, 166, 337 S.E.2d 207, 208 (1985) (granting the appellant’s motion to remand, dismissing the appeal without prejudice, and remanding for consideration of the appellant’s Rule 59(e) and 60(a), SCRCP, motions); *see also Branco v. Hull Storey Retail Grp., LLC*, No. 2017-000998, 2021 WL 118536, at *1 (S.C. Ct. App. Jan. 13, 2021) (“This court thereafter granted Appellants’ motion to remand, holding the appeal in abeyance pending the trial court’s resolution of Appellants’ motion to amend[the order on appeal under Rule 52(b), SCRCP].”).

Here, such a remand is warranted. The order from which appeal was taken bifurcated Respondents' alter ego claims from their remaining claims and directed that a bench trial on the alter ego claims be conducted prior to a jury trial on the remaining claims. (App'x 5). Respondents now intend to amend their pleadings and eliminate the non-alter ego claims from this action. Were the circuit court to grant Respondents' motions to amend,⁴ the bifurcation issue, the circuit court's order, and this appeal would all be mooted. *See Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief." (citation omitted)); *see, e.g., Ferguson v. Charleston Lincoln/Mercury, Inc.*, 344 S.C. 502, 510, 544 S.E.2d 285, 289 (Ct. App. 2001) (affirming the trial court's finding "that the issue of class certification was mooted by the dismissal of [a] claim"), *aff'd as modified sub nom. Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002).

Although this appeal is not currently moot, that is only due to the fact that Rule 205, SCACR, as interpreted by this Court, prevents the circuit court from considering Respondents'

⁴ Respondents believe the circuit court should grant their motions because eliminating the non-alter ego claims does not result in any prejudice to USF&G. *See* Rule 15(a), SCRCR (providing "leave [to amend] shall be freely given when justice so requires and does not prejudice any other party"); *Valentine v. Davis*, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (Ct. App. 1995) ("Rule 15(a) . . . permits an existing plaintiff to add, modify, *delete*, or change claims against an existing defendant." (emphasis added)); *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005) ("Leave to amend pleadings pursuant to Rule 15, SCRCR, shall be liberally and freely given when justice so requires and does not prejudice any other party."); *id.* ("The prejudice Rule 15 envisions is a lack of notice that the *new issue* is going to be tried, and a lack of opportunity to refute it." (emphasis added)); *id.* at 286, 607 S.E.2d at 717 ("This rule strongly favors amendments and the court is encouraged to freely grant leave to amend."); *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) ("Prejudice occurs when the amendment states a *new claim or defense* which would require the opposing party to introduce additional or different evidence to prevail in the amended action." (emphasis added)).

forthcoming motions to amend while jurisdiction over the bifurcation issue rests with this Court. Respectfully, this Court should look beyond this technicality and decline to expend its time and resources rendering what would ultimately amount to an advisory opinion on the bifurcation question. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (“An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists.”); *Biter v. S.C. Emp. Sec. Comm’n*, 276 S.C. 493, 494, 280 S.E.2d 60, 61 (1981) (noting “[t]his Court has consistently refrained from rendering [advisory] opinions”). If the Court denies this motion and proceeds with reviewing the dismissal of this appeal, Respondents’ motions to amend will be filed upon the appeal’s ultimate remand, likely rendering this Court’s decision a nullity. Proceeding in that manner would waste the time and resources of both the parties and the appellate courts. Alternatively, granting this motion will promote judicial economy, preserve resources, and allow for a quicker resolution of this action in the circuit court.

CONCLUSION

Based on the foregoing, Respondents respectfully ask that this Court hold this appeal in abeyance and remand to the circuit court for the limited purpose of considering Respondents’ motions to amend their pleadings.

Signature page to follow.

RESPECTFULLY SUBMITTED,

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June 1, 2021

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