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
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.

RESPONSE TO MOTION FOR LIMITED REMAND

In an attempt to short-circuit Petitioner's jury trial rights and this Court's review of a lower court order that is squarely contrary to long-established South Carolina law regarding the appealability of mode-of-trial orders, Respondents ask this Court to pause its consideration of these important issues and, instead, send this case back to the circuit court so that they can proceed without the constitutional safeguards of a jury. Their motion did not provide the Court or Petitioner United States Fidelity and Guaranty Company ("USF&G") with their proposed submission to the circuit court, but Respondents have now confirmed in writing that they are proposing to seek dismissal of their legal claims "without prejudice." (Ex. A to Respondents' June 11, 2021 filing.)

In so doing, Respondents seek to preserve the ability to first hold a bench trial on their equitable claims, and then revive their legal claims to be tried only after the bench trial is complete and the underlying facts have already been found by the circuit court. In other words, they are attempting to achieve through procedural maneuvering what the Constitution forbids.

There can be little doubt that the circuit court's order is both immediately appealable and incorrect as a matter of law. Even the case cited by Respondents in their "motion for a limited remand" ("Remand Motion") stands for the proposition that such an order is immediately appealable. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539–40, 773 S.E.2d 144, 147 (2015) ("We are therefore free to evaluate the trial court's order as what it is—not merely what it appears to be [*i.e.* an order with the label of 'bifurcation']—and hold that it is one which is immediately appealable.") (cited in Footnote 3 of Respondents' Remand Motion). And South Carolina law is uniform that when legal and equitable claims have overlapping facts—a point that the parties have never disputed here—the legal claims must be tried to a jury first as a matter of constitutional law. *See, e.g.*, *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 510, 737 S.E.2d 515, 517 (Ct. App. 2013) ("If there are factual issues common to both the legal and equitable claims, the legal claim, 'absent the most imperative circumstances,' must be tried, that is, disposed of, first." (quoting *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 56, 354 S.E.2d 895, 897 (1987))).

Petitioner has no objection to holding this petition in abeyance so long as it is conditioned on the dismissal of Respondents' jury trial claims *with* prejudice so that any bench trial on the equitable claims would not risk improperly impairing Petitioner's constitutionally protected jury trial rights. Because that is not what Respondents have in mind, however, Respondents' proposed "limited remand" would simply provide an alternative vehicle to override Petitioner's jury trial

rights. That is precisely what this Court's decisions and those of numerous other courts have sought to avoid in order to protect "inviolate" constitutional jury trial rights, S.C. Const. art. I, § 14; Rule 38(a), SCRCP, as explained in more detail in the petition. Accordingly, the Court should deny Respondents' Remand Motion and grant the petition to address these important issues on the merits.

BACKGROUND

This case concerns legal and equitable claims asserted by Respondents Ann Finch ("Finch") and Peter Protopapas, as Receiver (the "Receiver") for Covil Corporation ("Covil") against USF&G in an action pending before former Chief Justice Toal, acting as Chief Judge for Administrative Purposes over South Carolina state court asbestos litigation. Finch obtained a tort judgment in North Carolina federal court against Covil, a defunct South Carolina-based asbestos contractor, and subsequently commenced this action against Covil's insurers (including USF&G) and Covil's defense counsel to recover the balance of the judgment not covered by Covil's insurance policies.

Finch's primary theory is that Covil's insurers and defense counsel should be deemed to have inherited all of Covil's tort liabilities in perpetuity as "alter egos" based on their involvement in the defense of asbestos litigation against Covil after Covil went out of business. (Appx. 253, Finch's 9/16/2020 Second Amended Complaint.) This theory finds no support in any case law anywhere in the United States. Nevertheless, Covil's Receiver, who has since been realigned as a plaintiff, has likewise asserted an equitable alter ego claim against USF&G and other defendants. (Appx. 279, Receiver's 10/1/2020 Amended Cross-Claims at ¶¶ 122-129.) Respondents have also asserted legal claims against USF&G, including for breach of fiduciary duty; aiding and abetting Covil's attorneys' alleged breach of fiduciary duties; breach of contract for bad faith failure to defend Covil; breach of contract for bad faith processing of claims; tortious bad faith processing

of claims; and negligence related to Covil's defense. (Appx. 256, Finch's 9/16/2020 Second Amended Complaint at ¶¶ 56-61; Appx. 275-278, 280-281, Receiver's 10/1/2020 Amended Cross-Claims at ¶¶ 95-121, 130-136.) These legal claims arise from the same overlapping set of factual allegations that Respondents also rely upon to support their equitable alter ego claims, namely USF&G's involvement in the defense and settlement of asbestos tort claims brought against Covil after it ceased doing business.[1]

On October 2, 2020, Respondents filed a joint motion seeking to bifurcate trial of the alter ego claims from trial of legal claims and requesting that the court conduct a bench trial of the equitable alter ego claims before a jury trial of the legal claims. (Appx. 1, Motion to Bifurcate.) USF&G opposed the motion because 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.) The circuit court granted Respondents' bifurcation request, ruling that "a bench trial on the alter ego claim will be conducted in the Richland County Judicial Center on January 11, 2021" with any jury trial on the legal claims to be held thereafter. (Appx. 325, Circuit Court Order at 4.) As addressed in USF&G's Petition for Certiorari (*see* May 3, 2021 Petition for Certiorari at 6-9), the Circuit Court Order is plagued by error, including its findings that conducting a bench trial before a jury trial is necessary based on "imperative circumstances" presented by the COVID-19 pandemic, and that

[1] *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").

USF&G's jury rights do not apply because the Receiver's legal claims were originally styled as cross-claims before the parties were realigned. (Appx. 324–25, Circuit Court Order at 3–4.)

After USF&G noticed its appeal of the Circuit Court Order because it impacted the mode of trial and was therefore subject to immediate appeal, the Receiver filed a motion to dismiss for lack of jurisdiction (Appx. 42, Motion to Dismiss), which was subsequently granted prior to briefing on the merits and without the Court of Appeals having the benefit of a record on appeal. (Appx. 349, 1/6/2021 Court of Appeals Order.) Even though USF&G's motion papers demonstrated that "numerous common factual issues exist here as between the legal and equitable alter ego claims" (Appx. 60, Return in Opposition to Motion to Dismiss at 5), and the Receiver has never contended otherwise or sought dismissal on such basis, the Court of Appeals denied USF&G's petition for rehearing or rehearing *en banc* because it could not "determine what factual issues (if any) necessarily overlap between the legal and equitable claims" from the parties' motion papers 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.)

USF&G timely filed its petition for certiorari in this Court on May 3, 2021. Rather than respond to the petition, Respondents have now moved to remand this matter to the circuit court, asserting that they "intend to file motions to amend their pleadings and remove the non-alter ego causes of action against USF&G," which if granted would "moot[]" the appeal of the Circuit Court Order because "there would be no remaining causes of action to be tried before a jury." (Remand Motion at 3.) Because Respondents did not attach a proposed motion or otherwise disclose the nature of the dismissals they would seek from the circuit court, USF&G sought clarification as to whether Respondents' proposed dismissal would be with or without prejudice and requested an extension from this Court, which this Court granted on June 11, 2021. Respondents have taken

the position that they intend to seek dismissal "without prejudice," as they reiterated in their June 11, 2021 Response to USF&G's Motion for Extension of Time and Request to Expedite. *See* Response at 3 & Ex. A.

By seeking to dismiss their legal claims without prejudice, Respondents are clearly attempting to avoid having this Court rule on these important issues, and at the same time avoid having an impartial jury address the facts of this case while reserving to themselves the opportunity to reassert their legal claims *after* the bench trial on their "alter ego" claim. The Court should not countenance such procedural maneuvering and should direct Respondents to proceed with briefing on the merits of the petition.

ARGUMENT

I. Respondents' Motion Should Be Denied

In their motion, Respondents assume without analysis that if this Court grants their motion, they can unilaterally drop their legal claims from this dispute and eliminate USF&G's jury trial rights, and they cite Rule 15's liberal policy for amending pleadings as the nexus for their motion. (Remand Motion at 5 & n.4.) But Rule 15 prohibits amending pleadings when doing so would prejudice an adverse party. *See* Rule 15(a), SCRCP (permitting amendments only "when justice so requires *and does not prejudice any other party*") (emphasis added).

This Court has been clear that legal prejudice occurs when a plaintiff's voluntary dismissal without prejudice would deprive a defendant of a procedural right to which it would otherwise be entitled if the case proceeded as the plaintiff originally pled it. *See, e.g.*, *Burry & Son Homebuilders v. Ford*, 310 S.C. 529, 531, 426 S.E.2d 313, 314 (1992) (affirming the circuit court's denial of a plaintiff's motion to voluntarily dismiss without prejudice because that would have eliminated the defendant's right to have his counterclaim heard in his home county, and "the loss

of proper venue in one's county of residence suffices to establish legal prejudice" sufficient to deny a motion under Rule 41(a)(2), which is the functional equivalent to what Respondents are attempting to orchestrate through their current manipulation of the pleadings). Here, Respondents' proposed plan would deprive USF&G of a right far greater than the venue concern of *Burry*—the constitutional safeguard of a jury trial.

As explained in the petition for certiorari, well-established authority in South Carolina—as well as throughout the United States—mandates 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, Inc. v. Westover*, 359 U.S. 500, 510 (1959) (emphasis added); *see also Plantation Fed. Bank v. Gray*, 401 S.C. 507, 510, 737 S.E.2d 515, 517 (Ct. App. 2013) (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).

The Circuit Court Order violated these principles, set dangerous precedent, and should be taken up by this Court on writ of certiorari and reversed. The constitutional problems presented by that order—and multiple rounds of briefing in three courts—could have been avoided had

Respondents sought dismissal of their legal claims months ago. If Respondents truly seek to "eliminate" the legal claims from this action through a dismissal with prejudice, USF&G would have no objection.

However, Respondents' proposal to send this case back to the circuit court so that they can dismiss their legal claims without prejudice would result in an end-run around the right to a jury trial to which Petitioner is entitled if this case proceeds as it was pled and litigated for nearly two years. If allowed to hold their legal claims in reserve to be redeployed later, Respondents would certainly contend in subsequent proceedings on those claims that collateral estoppel prevents a jury from deciding any of the overlapping factual issues decided in the bench trial. *See Carolina Renewal, Inc. v. S.C. Dep't of Transp*., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (discussing collateral estoppel); *see* Appx. 60-61, Return in Opposition to Motion to Dismiss at 5-6 (discussing the numerous common issues of fact and citing to 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).[2] Indeed, that is precisely the reason this Court and others have required jury trial claims be heard first where, as here, there are common fact issues. *See* May 3, 2021 Petition for Certiorari, at 12-13.

Respondents' proposed remand, in substance, would violate USF&G's jury rights to the same extent as the current procedure challenged via this appeal. Authorizing such a course of action would allow procedural gamesmanship to trump substantive constitutional rights, directly contradicting the principle that such rights must be preserved "inviolate," eliminating a mode of

[2] *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).

trial to which USF&G is entitled, and creating legal prejudice to USF&G. This is the result that the trial sequencing rule that is central to this appeal was intended to avoid, and it is why Respondents' motion for a "limited remand" should be denied. *See Dairy Queen v. Wood*, 369 U.S. 469, 472 (1962) (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 jury trial right).

Respondents could easily obviate USF&G's opposition to their Remand Motion by clarifying that they do not, in fact, intend to pursue the above course of action, and agreeing to dismiss their legal claims with prejudice to avoid the risk of overriding Petitioner's constitutionally protected jury trial rights. Unless and until they do so, however, Respondents' motion should be denied. Granting the motion under the present circumstances would exalt procedure over substance and allow Respondents to effectuate the denial of USF&G's constitutional jury trial rights while at the same time depriving USF&G of the right to appellate review. Such a result would be inconsistent with the interests of justice and with South Carolina law, and should not be countenanced by this Court.

II. This Appeal Is Not Moot

In their June 11, 2021 Response to USF&G's Motion for Extension of Time and Request to Expedite, Respondents, for the first time, argue that "this appeal is already moot." (Response at 3.) Respondents apparently now contend that because the original trial dates set by the Circuit Court Order have passed, that Order no longer has any effect. This appeal is not moot for several reasons.

First, Respondents themselves specifically acknowledged that "this appeal is not currently

moot" in their Remand Motion. (Remand Motion at 5.) Their latest argument is contradicted by their own filings with this Court.

Second, USF&G's appeal is not predicated on these specific trial dates, but rather on the Circuit Court Order's express determination that the bench trial should proceed before any jury trial on the legal claims. *See* Appx. 324, Circuit Court Order, Law and Argument § B ("Alter ego will be tried first to the Court"); *see also id.* at 3 (finding that "imperative circumstances … require that the claims of alter ego be tried first"); *id.* at 4 (rejecting the argument that the Receiver's legal claims should "be tried first" and "bifurcat[ing] them for a later decision"). Those rulings are not mooted simply because the dates initially set for trial have passed. Indeed, past correspondence with the circuit court confirms that, should the case be returned without reversal of the Circuit Court Order, the circuit court would schedule the bench trial first.[3]

Respondents' belated mootness argument, to the extent it is properly before this Court, should therefore be rejected. If accepted, many "mode-of-trial" appeals could never be adjudicated, given the inevitable passage of time while the appeal process plays out. That result cannot be squared with this State's rule that "[i]ssues regarding mode of trial must be raised in the trial court at the first opportunity." Jean H. Toal, et al., *Appellate Practice in South Carolina* 156 (3d ed. 2016). The appealability of orders impacting mode of trial would become dependent on the technicality of whether trial dates were set forth in the same or a separate order, and would lead to serial appeals of the same issue as new orders with new trial dates are entered and successively "mooted." This, plainly, is not the law. *See Sloan v. Dep't of Transp.*, 365 S.C. 299,

[3] *See* Ex. A (Jan. 6, 2021 Email from Finch's counsel proposing the scheduling of a new trial date if the original bench trial date passed before issuance of a remittitur, and circuit court response proposing "that we set the Bench Trial on the Alter Ego issue for Jan. 25, 2021").

303, 618 S.E.2d 876, 878 (2005) (discussing the mootness exceptions for issues that are "capable of repetition but evading review" and for decisions that "may affect future events.").

Third and finally, the issue at stake in this appeal—that is, whether a trial court can discard a litigant's right to a jury trial at the request of an adverse party—is one of the highest importance. The right to a jury trial is a safeguard guaranteed by the Constitution. The order below strikes that essential right at Respondents' request under the label of "bifurcation," and this Court should accept this appeal and vacate that ruling to ensure that this kind of procedural maneuvering does not happen in future litigation. *See Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001) (reiterating that "an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest" despite arguments that the appeal is moot).

CONCLUSION

For the foregoing reasons, Respondents' Motion for Limited Remand should be denied, or any grant of such motion should be conditioned on Respondents' agreement to seek dismissal of the subject causes of action with prejudice.

Respectfully submitted,

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