THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.), Acting Circuit Court Judge

Case No. 2019-CP-40-02285

Appellate Case No. 2020-001437

Peter D. Protopapas, as Receiver for Covil Corporation, Plaintiff/Respondent,

v.

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

of which

United States Fidelity and Guaranty Company is the Appellant.

INITIAL BRIEF OF RESPONDENT

G. Murrell Smith, Jr. (S.C. Bar. # 66263)
Jonathan M. Robinson (S.C. Bar # 68285)
Shanon N. Peake (S.C. Bar # 102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, Third Floor
Columbia, South Carolina 29205
(803) 254-5445

Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

This appeal arises from a suit by an administratively dissolved company—Covil Corporation ("Covil")—through its court appointed Receiver, Respondent Peter D. Protopapas ("the Receiver"), against its insurer, Appellant United States Fidelity and Guaranty Company ("USF&G"). The Receiver alleges, among other things, that USF&G grossly mishandled asbestos litigation against Covil, specifically the case of *Hill v. Covil Corporation*, CA NO. 2018 –CP-40-04680, in breach of the relevant insurance policy and the duty of good faith. USF&G appeals from an interlocutory order of the Circuit Court granting the Receiver's motion for clarification of the impact, if any, of USF&G's affirmative defense asserting that acts taken during a prior Covil receivership bars asbestos claims against Covil and, by means of some unstated derivation, also bars the Receiver's claims against USF&G alleging mismanagement, breach of contract, and bad faith. As it has unsuccessfully argued before,[1] USF&G contends that the ten-year statute of repose for claims against dissolved corporations set forth in section 33-14-107 of the South Carolina Code bars the Receiver's claims. Every court to have considered this defense has rejected it.

Retired Supreme Court Chief Justice and acting Circuit Court Judge Jean H. Toal has consistently held that Covil's prior receivership does not implicate the statute of repose and presents no impediment to the Receiver's claims against USF&G, and a North Carolina federal district court agreed. In light of this disposition, the following issues are presented for review:

1. Did the Circuit Court correctly hold that the Receiver has standing to oppose USF&G's statute of repose affirmative defense to the Receiver's claims against USF&G?

[1] *See* Order Denying Motions to Reconsider and Motion to Stay, *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155 (Ct. Com. Pl., May 7, 2020) ("The Court refuses to ignore the plain language of the statute and the clearly expressed legislative intent that section 33-14-107 does not bar claims that did not exist at the time of Covil's dissolution . . . ."); *Finch v. Covil Corp.*, No. 1:16-CV-01077, 2020 WL 6063054, at *5 (M.D.N.C. Oct. 14, 2020) ("The Court finds that the receiver did not publish a notice in compliance with § 33-14-107(b).").

2. Section 33-14-107's repose period is triggered on publication of notice to potential claimants. Did the Circuit Court correctly hold that there is no evidence that such notice was ever published and, therefore, that the statute of repose has not been triggered?

3. Did the Circuit Court correctly hold that, even if the required notice had been published, USF&G's affirmative defense still fails because the version of section 33-14-107 in effect at the time of Covil's administrative dissolution in 1992 does not apply to the contingent and post-dissolution claims at issue in this case?

4. Did the Circuit Court correctly hold that the legislature's 2004 amendment of section 33-14-107 is irrelevant because the 2004 amendment does not retroactively apply to corporate dissolutions that occurred prior to the amendment's passage?

INTRODUCTION

Covil was an insulation contractor in the business of installing, repairing, and removing asbestos-containing insulation in industrial facilities in North Carolina, South Carolina and throughout the Southeast. Covil ceased these operations in 1992, after which it came under the control of its insurers, including Appellant USF&G. The insurers, including USF&G, grossly mismanaged the defense of asbestos personal injury litigation against Covil, in violation of the relevant insurance policies and the duty of good faith. When the insurers' mismanagement of Covil reached the point that they allowed two default judgments to be entered against Covil, Justice Toal, who oversees all asbestos litigation pending in South Carolina, granted a motion to appoint a new receiver for Covil.

In November 2018, Justice Toal appointed Peter Protopapas to serve as the new receiver. Thereafter the Receiver filed suit against Covil's insurers, including USF&G. Since his appointment, the Receiver has succeeded in marshaling over 45 million dollars of Covil's assets into a fund available to compensate those injured South Carolina citizens who may have legitimate asbestos claims against Covil. The Receiver has also brought actions against USF&G for its role in this decades-long scheme of misusing Covil to serve its and other insurers' interests.

USF&G has stubbornly resisted its obligations and sought to evade responsibility for its nearly thirty-year history of mismanaging Covil's litigation across multiple cases in various courts. This appeal represents yet another such effort, and arises from USF&G's assertion of an affirmative defense and arguments against the Receiver's claims that Justice Toal characterized as "specious," "frivolous," "absurd," and "unethical."[2] Yet despite multiple rulings rejecting these

[2] Order Denying Motions to Reconsider and Motion to Stay, *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155 (Ct. Com. Pls., May 7, 2020).

arguments in both the Circuit Court and in a related case in federal district court for the Middle District of North Carolina—and being admonished by the Circuit Court—USF&G repeats its unsuccessful arguments again on appeal.[3]

This appeal centers around USF&G's assertion of an affirmative defense to the Receiver's claims under the 10-year statute of repose set out in section 33-14-107 of the South Carolina Code. USF&G contends that the statute of repose bars asbestos claims against Covil following its administrative dissolution and, by means of some unstated derivation, also bars the Receiver's claims against USF&G alleging mismanagement of Covil, breach of contract, and bad faith. If USF&G's defense were sustained, then USF&G would avoid millions of dollars of insurance obligations to South Carolinians and others injured by Covil's actions in the 1970s.

From 1976–2016, Covil collectively settled hundreds of lawsuits for under $500,000. Since Justice Toal's appointment of the Receiver, Covil has collectively settled cases for over $20 million. USF&G seeks to avoid its contractual obligations to Covil so that it can be unjustly enriched at the expense of South Carolinians suffering from asbestos-related cancer. That result should not be permitted, and the ruling below should be affirmed in its entirety. Justice Toal correctly held that USF&G's statute of repose defense is legally and factually meritless for two main reasons, neither of which are undermined by USF&G's arguments on appeal.

First, section 33-14-107's repose period is triggered only if a notice of the corporation's dissolution is published in a newspaper. USF&G contends that such a notice was published in

[3] Order Denying Motions to Reconsider and Motion to Stay, C/A No. 2015-CP-46-02155 (Ct. Com. Pls., May 7, 2020) ("The Court refuses to ignore the plain language of the statute and the clearly expressed legislative intent that section 33-14-107 does not bar claims that did not exist at the time of Covil's dissolution . . . ."); *Finch v. Covil Corp.*, No. 1:16-cv-1077, 2020 WL 6063054, at *5 (M.D.N.C. Oct. 14, 2020) ("The Court finds that the receiver did not publish a notice in compliance with § 33-14-107(b).").

1992, but Justice Toal correctly found that none of the evidence gathered over the intervening thirty-year period demonstrates that notice was ever published, and all available evidence supports the opposite conclusion. Thus, Justice Toal correctly found the statute of repose does not apply, and, because the issue is dispositive, this Court could affirm on this ground alone.

Second, Justice Toal correctly held that even if the required notice had been published, the version of section 33-14-107 in effect when Covil was administratively dissolved in 1992 does not apply to contingent or future claims. It is undisputed that the claims at issue here are contingent and future claims, therefore section 33-14-107 is inapplicable. While the South Carolina Legislature later amended section 33-14-107 to extend its reach to contingent and future claims, the amendment does not avail USF&G. Amendments to statutes of repose are presumed to apply only prospectively—not retroactively—and nothing in the text of the amendments alters that presumption. As a result, the amendments to section 33-14-107 do not apply to corporate dissolutions that occurred before the amendments, like Covil's administrative dissolution in 1992.

For these reasons and others discussed below, Justice Toal's ruling that USF&G's statute of repose affirmative defense is legally and factually deficient is correct and should be affirmed.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Covil's Insurers, Including USF&G, Controlled and Mismanaged Covil's Asbestos Litigation Following Covil's Administrative Dissolution.

Covil went out of business in 1991, and the corporation administratively dissolved in 1992. (Order Granting Receiver's Motion to Clarify Status of Receivership, *Protopapas v. Wall, Templeton & Haldrup, P.A.*, C/A No. 2019-CP-40-02285 (Ct. Com. Pl. Sept. 25, 2020) ("Sept. 25, 2020 Order"), p. 2.) From at least 1964 until 1991, Covil installed, removed, and repaired insulation in industrial facilities. (First Am. Compl. ("FAC") ¶¶ 8–10.) It has been alleged that,

through at least 1986, Covil's operations involving the repair, replacement, removal, or disturbance of insulation exposed persons to asbestos, which has resulted in numerous asbestos personal injury lawsuits against Covil. (*Id.* ¶ 11). Personal injury plaintiffs have continued to sue Covil for asbestos-related injuries following its administrative dissolution in 1992. (*Id.* ¶¶ 10–11.)

For more than 25 years after Covil ceased its business operations, USF&G and other insurers controlled Covil's defenses in these lawsuits, made all litigation and settlement decisions, determined how to use and dispose of Covil's remaining assets (primarily, Covil's insurance policies), and otherwise conducted all of Covil's affairs. (*Id.* ¶¶ 12–15, 17.) During this period, USF&G and other insurers treated Covil as their alter ego and wielded it to suit their interests, not Covil's interests. (*Id.* ¶¶ 16, 18.) Among other things, USF&G and the other insurers hired counsel ostensibly to represent Covil in the asbestos cases, but that counsel took direction from USF&G and the other insurers exclusively, without regard for Covil's interests. (*Id.* ¶ 25.)

B. Justice Toal Appointed a New Receiver for Covil, Who Sued USF&G and Other Insurers for Breach of the Insurance Policies and Bad Faith.

Sitting by designation as Acting Circuit Court Judge and Chief Administrative Judge over all asbestos litigation filed in South Carolina, Justice Toal "observed several irregularities in the way that Covil conducted itself in its litigation," and granted a motion to appoint a new receiver. (Order for Rule to Show Cause Hearing, *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155 (Ct. Com. Pl. Jan. 8, 2020), p. 3). These irregularities included Covil having "inexplicably defaulted on two mesothelioma asbestos cases" in late 2018. (*Id.*) Thereafter, on November 2, 2018, Justice Toal appointed Peter Protopapas as receiver to manage Covil's litigation. (Order Appointing a Receiver for Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C/A No. 2018-CP-40-04940 (Ct. Com. Pl. Nov. 2, 2018); Order Granting Motion to Clarify the Receiver Order, *Taylor v. Air & Liquid Sys. Corp.*, C/A No. 2018-CP-40-04940 (Ct. Com. Pl. Mar. 4, 2019).)

The Receiver soon learned of USF&G's and the other insurers' gross mismanagement of asbestos lawsuits against Covil, including in particular the case of *Hill v. Covil Corporation*, CA NO. 2018 –CP-40-04680, the case at issue here. In April 2019, the Receiver sued USF&G, Zurich American Insurance Company ("Zurich"), Sentry Casualty Company, and the lawyers the insurers hired to represent Covil in the *Hill* lawsuit, Wall Templeton. The Receiver asserts claims against USF&G for liability as Covil's alter ego, breach of Covil's insurance policies, bad faith handling of Covil's insurance claims, and negligence. (FAC, pp. 11–20.)

II. PROCEDURAL HISTORY

A. USF&G Asserted a Statute of Repose Affirmative Defense to the Receiver's Claims Against It.

In answer to the Receiver's complaint, USF&G and Zurich (which has since settled) asserted as an affirmative defense to Covil's claims against them that:

> Covil is a dissolved corporation and claims against it, including against any entity alleged to be Covil's "alter ego" are barred under S.C. Code Ann. § 33-14-106 and 33-14-107. Plaintiff's claims against USF&G are necessarily barred also because Plaintiff's alleged claims against USF&G are derivative of underlying asbestos claims against Covil.

(USF&G Answer to FAC, p. 14). While USF&G's statute of repose affirmative defense is vague, it merely rehashes the same arguments previously rejected in other proceedings. There is nothing new here, and no reason to overturn prior rulings.

USF&G's statute of repose defense focuses on a prior Covil receivership that was formed, administered, and terminated in *First Savings Bank, FSB v. Covil Corp.*, C/A No. 91-CP-23-04445 (Ct. Com. Pl.) ("*FSB v. Covil*"), in Greenville County in the early 1990s. There, on May 12, 1992, Judge Charles B. Simmons, Jr. appointed a receiver ("the prior receiver") to marshal and liquidate

Covil's assets and distribute the resulting proceeds.[4] (May 12, 1992 Order, *FSB v. Covil*, pp. 2–5.) In the same order, Judge Simmons also instructed that, "to the extent not already accomplished, the Receiver shall publish the Notice required by § 33-14-107[.]" (*Id.* at 5.) Six months later, the prior receiver detailed all the steps he took to marshal and liquidate Covil's assets and submitted a detailed accounting of his expenditures. (Nov. 11, 1992 Petition of Receiver, *FSB v. Covil*.) The prior receiver's submissions did not mention any newspaper publication, and his detailed accounting does not reflect any expenses associated with a newspaper publication of a notice of dissolution. (*See id.*) As a result, there is no evidence in the record that the prior receiver published the notice of dissolution required to begin the statute of repose.

Nevertheless, the crux of USF&G's statute of repose argument contends that, as part of the prior receiver's efforts to wind down the corporation, the prior receiver in fact published a notice to potential creditors in 1992, which triggered the statute of repose under section 33-14-107. USF&G further argues that the statute of repose, as amended in 2004—12 years after Covil was administratively dissolved—bars all asbestos claims against Covil, including unknown or contingent claims such as the Receiver's claims against USF&G here.

As noted above, USF&G and Zurich raised the same argument in other cases:

- In *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155, which also was before Justice Toal, USF&G attempted to intervene in order to object to a settlement agreement between the Receiver and several other insurers over Covil's asbestos liability. USF&G argued in its objection that the settlement was barred by the actions of the prior receiver because the statute of repose had run on asbestos claims against Covil. Justice Toal firmly rejected USF&G's "newly found, self-serving argument that Covil no longer has any underlying liabilities in asbestos cases in South

[4] In May of 2020, Judge Simmons transferred the receivership to Justice Toal's court.

Carolina due to its dissolution," because section "33-14-107(a) and (b) are clearly inapplicable in the context of these asbestos claims against Covil."[5] Justice Toal further found that USF&G's "late and seemingly frivolous objection simply raises additional questions about the propriety" of USF&G's management of Covil's litigation prior to the appointment of the Receiver, because USF&G had never raised the same defense in Covil's behalf before then. (*Id.* at 15.)

- Similarly, in *Finch v. Covil Corporation*, 1:16-CV-01077, 2020 WL 6063054, at *9 (M.D.N.C. Oct. 14, 2020), Zurich asserted the same statute of repose argument in a motion to intervene and for relief from a judgment against Covil. Zurich argued that it had recently learned of the 1991–92 receivership administratively dissolving Covil, that the receiver published a notice of dissolution, and as a result the statute of repose barred the *Finch* plaintiff's claims against Covil. The Federal District Court rejected Zurich's statute of repose argument for several reasons, including that "Zurich has submitted no evidence from any newspaper showing that the notice was actually published, much less that any published notice met the statutory requirements set by § 33-14-107(b)." (*Id.* at *10.)

B. The Receiver Moved for Clarification of the Status of the Receivership in Light of USF&G's Statute of Repose Affirmative Defense and Justice Toal Granted the Receiver's Motion.

As discussed above, in connection with the Circuit Court's order overruling USF&G's attempted objection to approval of the settlement in *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155, Justice Toal had already rejected USF&G's statute of repose argument. Accordingly, after service of USF&G's Answer to the Receiver's Complaint in this case in which USF&G asserted the very same statute of repose argument—this time in the form of an affirmative defense—the

[5] (Order Denying Motions to Reconsider and Stay, *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155 (Ct. Com. Pl. May 6, 2020), p. 13).

Receiver moved for an order that would fully and finally adjudicate the impact, if any, that the prior receivership had on the current receivership and this case. (Motion to Clarify Status of Receivership, *Protopapas v. Wall, Templeton & Haldrup, P.A.*, C/A No. 2019-CP-40-02285 (Ct. Com. Pl. Jul 21, 2020).)

As he had argued in opposition to USF&G's objection to the *Falls v. CBS Corp.* settlement, the Receiver argued in the Motion for Clarification that there is no evidence that the prior receiver published the notice required by 3-14-107(c), and therefore the repose period never started running. (Motion to Clarify at 9–10.) The Receiver further argued that even if the notice had been published, the version of section 33-14-107 in effect at the time of Covil's administrative dissolution did not bar the future or contingent claims at issue here, and that the 2004 amendment to the statute of repose did not apply retroactively to dissolutions prior to 2004. (*Id.* at 12–14.)

In response to the Receiver's motion, USF&G argued primarily that the Receiver lacks standing to challenge its affirmative defense to the Receiver's claims because, according to USF&G, the statute of repose defense purportedly would benefit Covil if it had merit. As USF&G put it, "Covil does not have a legally-protected interest in exposing itself to tort judgments, and parties sued as vicariously responsible for Covil's torts are entitled to assert those same defenses—even if Covil acts against its own legal interests by gratuitously waiving them."[6]

Justice Toal had previously considered and rejected USF&G's standing argument in *Falls v. CBS Corp*. There, Justice Toal held that the "Receiver is certainly under no obligation to advance frivolous arguments or to assert specious defenses to Covil's asbestos cases," and that "[n]on-Party USF&G's contention that the Receiver . . . is undermining Covil's asbestos defenses by refusing to behave unethically (at USF&G's behest) is absurd." (Order Denying Motions to

[6] (USF&G Opp. to Motion to Clarify at 1.)

Reconsider and Motion to Stay, p. 14.) Justice Toal adhered to her prior reasoning and rejected USF&G's argument that the Receiver lacked standing to challenge USF&G's affirmative defense.

On the merits, USF&G rehashed the same arguments it asserted in *Falls v. CBS Corp.*, and Justice Toal rejected them yet again, holding that the prior receivership has no effect on claims against Covil and, therefore, no effect on the Receiver's claims against USF&G. (Sept. 25, 2020 Order.) In particular, Justice Toal found the evidence showed that the prior receiver had not published any newspaper notice and that the statute of repose therefore had not begun to run. (*Id.* at 5–6.) Justice Toal also reviewed Judge Simmons's November 11, 1992 order, and "upon close examination," determined that the order does not reflect any finding that notice was published. (*Id.*) Justice Toal further held that, even if a notice had been published, USF&G's defense lacks merit because: (1) the version of the statute in effect in 1992 plainly did not preclude contingent and future claims, like those at issue here; and, (2) the 2004 amendment expanding the statute to cover such claims is not retroactive. (*Id.* at 6–9.)

Justice Toal granted the Receiver's motion, and this appeal followed.

STANDARD OF REVIEW

The Circuit Court's interpretation of statutes are reviewed by this Court *de novo*, and its factual findings are entitled to deference. *See Town of Arcadia Lakes v. State Dep't of Health & Env't Control*, 433 S.C. 47, 52, 855 S.E.2d 325, 328 (Ct. App. 2021); *Eddins v. Eddins*, 304 S.C. 133, 136, 403 S.E.2d 164, 166 (Ct. App. 1991); *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 661, 521 S.E.2d 749, 751 (Ct. App. 1999). "This court will be bound by the factual findings of the trial court made in response to motions preliminary to trial where the findings are supported by evidence and not clearly wrong or controlled by error of law." *Doe v. Howe*, 362 S.C. 212, 215, 607 S.E.2d 354, 355 (Ct. App. 2004).

ARGUMENT

I. THE RECEIVER HAS STANDING TO CHALLENGE USF&G'S STATUTE OF REPOSE DEFENSE

Justice Toal correctly rejected USF&G's argument that the Receiver lacks standing to challenge USF&G's "specious" statute of repose defense, and thus the ruling below should be affirmed. USF&G identifies no error in Justice Toal's order.[7] Indeed, USF&G's arguments on appeal (App. Br. 13–18) merely restate the same arguments that Justice Toal derided as "absurd," and USF&G makes no effort to show that Justice Toal's reasoning or conclusions are incorrect.[8]

As an initial matter, "standing" does not describe the argument that USF&G is actually making. Standing means having "a personal stake in the subject matter of a lawsuit." *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769 (2016). South Carolina courts generally use the United States Supreme Court's formulation for the elements of standing: "(1) the plaintiff must have suffered an 'injury in fact;' (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be 'redressed by a favorable decision.'" *Id.* (*quoting Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001)).

The Receiver, standing in Covil's shoes, plainly satisfies all of the foregoing requirements and has standing to sue USF&G to recover damages for USF&G's bad faith mismanagement of Covil's assets.[9] Nor can there be any debate that, as the plaintiff in an action against USF&G, the

---

[7] (Order Denying Motions to Reconsider and Stay, *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155 (Ct. Com. Pl. May 6, 2020), p. 14.)

[8] (*Id.*)

[9] All of the cases USF&G cites in support of its argument that the concept of standing relates to whether a party can seek a particular form of relief or file a particular type of motion are inapposite because they all involved non-parties attempting to seek relief from the court. *See, e.g.*, *Ex Parte*

Receiver has standing to petition the Circuit Court for an order rejecting an affirmative defense to the Receiver's own claims against USF&G.

Rather than a "standing" argument, USF&G argues that by challenging USF&G's statute of repose affirmative defense, the Receiver is acting against what *USF&G* perceives to be Covil's interest. That is not a standing argument—it is essentially an argument that the Receiver should somehow be estopped from challenging USF&G's affirmative defense because it would be inconsistent with the purpose of a receivership to act against Covil's interest. Even if that were a valid argument (it is not), *USF&G* has no capacity to decide what is, or is not, in *Covil's* interest. That power and responsibility rests exclusively with the court-appointed Receiver, who is "charged with marshaling Covil's assets and prudently using those assets to address Covil's asbestos liabilities in a responsible fashion." (Order Denying Motions to Reconsider and Stay, *Falls v. CBS Corp.*, C/A No. 2015-CP-2155 (Ct. Com. Pl. May 6, 2020), p. 14.) The Receiver has determined that Covil's interest is served by defeating USF&G's statute of repose defense because it is legally and factually meritless and serves only as a barrier to the Receiver's claims against USF&G.

USF&G's self-serving assertion that the Receiver's "purported subjective belief that the statute of repose defense lacks merit . . . does not entitle, much less require, the Receiver to seek judicial rulings" overruling its affirmative defense is unsupported by any authority, is not an argument about standing, and is wrong. (App. Br. at 18.) As Justice Toal correctly reasoned, the Receiver is neither required nor permitted "to advance frivolous arguments," nor to "assert

---

Lexington Cnty., 314 S.C. 220, 442 S.E.2d 589 (1994) (finding non-party Lexington County did not have standing to participate in *ex parte* proceeding to determine the reasonableness of investigative or expert services related to a death penalty defense); *Townsend v. Townsend*, 323 S.C. 309, 314, 474 S.E.2d 424, 427–28 (1996) (finding a non-party attorney did not have standing to file a motion to reconsider an order removing him from a case).

specious defenses" like USF&G's bogus statute of repose defense. (Order Denying Motions to Reconsider and Stay, *Falls v. CBS Corp.*, C/A No. 2015-CP-46-02155 (Ct. Com. Pl. May 6, 2020), p. 14.) It is the Receiver's duty to exercise reasoned judgment, acknowledge the reality that asbestos claims against Covil are *not barred* by the statute of repose, and to pursue coverage from USF&G and Covil's other insurers. The Receiver has been doing exactly that.

USF&G's similar insinuation that, by opposing its meritless affirmative defense, the Receiver is somehow failing to comply with its "contractual obligation to assist in cooperating in Covil's defense" is not a standing argument either, and also is meritless. (App. Br. at 18.) Justice Toal correctly held that USF&G's "contention that the Receiver is somehow not cooperating with Covil's insurers and is undermining Covil's asbestos defenses by refusing to behave unethically (at USF&G's behest) is absurd." (*Id.*) USF&G does not even acknowledge Justice Toal's rebuke, much less attempt to refute it.

The Receiver has sued USF&G for profiting from intentionally mismanaging asbestos litigation against Covil. The Receiver has no duty to cooperate with USF&G's bad faith, no duty to support USF&G's frivolous affirmative defense, and has standing to seek an order from the Court overruling USF&G's affirmative defenses to the Receiver's claims. USF&G's arguments must be rejected, and the ruling below should be affirmed.

II. THE CIRCUIT COURT CORRECTLY HELD THAT USF&G'S STATUTE OF REPOSE DEFENSE FAILS AS A MATTER OF FACT AND LAW

Justice Toal correctly held that USF&G's statute of repose defense fails as a matter of both fact and law, and that USF&G's arguments are irreconcilable with the plain text and legislative purposes of the act. Section 33-14-106 provides, in relevant part, that "a dissolved corporation may dispose of the **known claims** against it by following the procedure described in this

section. . . . (d) For purposes of this section, '**claim' does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution**." (emphasis added).

Section 33-14-107, as it existed at the time of Covil's administrative dissolution, provided:

> (a) A dissolved corporation may publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.
>
> (b) The notice must:
>
> (1) be published once in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this State, its registered office) is or was last located;
>
> (2) describe the information that must be included in a claim and provide a mailing address where the claim may be sent; and
>
> (3) state that a claim against the corporation is barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.
>
> (c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:
>
> (1) claimant who did not receive written notice under Section 33-14-106;
>
> (2) a claimant whose claim was timely sent to the dissolved corporation but not acted on.
>
> (d) A claim may be enforced under this section:
>
> (1) against the dissolved corporation to the extent of its undistributed assets; or
>
> (2) if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of his pro rata share of the claim or the corporate assets distributed to him in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to him.

In 2004, section 33-14-107 was amended to add subsection (c)(3), which created a bar to claims for "a claimant whose claim is contingent or based on an event occurring after the effective date of the dissolution."

USF&G's statute of repose defense fails because, as Justice Toal correctly held, notice of dissolution is required to trigger the statute of repose and there is no evidence that such notice was ever published. Moreover, even if notice had been published, the plain text of the statute in effect in 1992, when Covil was administratively dissolved, does not reach future claims like those at issue here, and the 2004 amendments are not retroactive and so have no effect on this case.

A. The Statute of Repose is Triggered By Publication of Notice.

As originally enacted and as amended, section 33-14-107 of the South Carolina Code provides a conditional period of repose. Specifically, section 33-14-107(a) provides that "[a] dissolved corporation may publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice." S.C. Code Ann. § 33-14-107(a); *accord* S.C. Code Ann. § 33-14-107(a) (1988). Section 33-14-107(b) thereafter provides requirements for the notice if a corporation chooses to publish one. S.C. Code Ann. § 33-14-107(b); *accord* S.C. Code Ann. § 33-14-107(b) (1988). Finally, section 33-14-107(c) sets forth the statute of repose—five years for the previous version of the statute and ten years as later amended. S.C. Code Ann. § 33-14-107(c); S.C. Code Ann. § 33-14-107(c) (1988).

By its plain text, the repose period is triggered only "[i]f the dissolved corporation publishes a newspaper notice in accordance with subsection (b)." S.C. Code Ann. § 33-14-107(c); *accord* S.C. Code Ann. § 33-14-107(c) (1988). USF&G nevertheless argues that the statutory notice "is inconsequential," positing that the statue of repose applies even if notice is not published unless the party whose claims are to be foreclosed demonstrates prejudice from the lack of notice. (App. Br. 34–35.) This argument is unpreserved because USF&G raises it for the first time on

appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Even if the argument could be considered, it must be rejected because it violates the principal rule of statutory interpretation that the plain and unambiguous statutory language must be applied as written. *See Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 598, 654 S.E.2d 284, 289 (Ct. App. 2007) ("When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and this court has no right to impose another meaning."). The text here is unambiguous. A dissolved corporation "*may*" publish a newspaper notice, and any such notice "*must*" comply with statutory requirements. S.C. Code Ann. § 33-14-107(a)–(b) (emphases added). The statute is equally unambiguous that publication is an absolute pre-requisite to trigger the ten-year repose period. *Id.* § 33-14-107(c) ("***If*** the dissolved corporation publishes a newspaper notice . . . the claim of each of the following claimants is barred . . . .") (emphasis added). Absent such notice, there is no statute of repose in effect and claims may continue to be brought against the dissolved corporation.

USF&G seemingly admits that publication of notice is required for the repose period to begin. (App. Br. at 20 ("[Section 33-14-107] sets forth a statute of repose for unknown claims against dissolved corporations, barring such claims once a prescribed period . . . passes *after publication of notice of dissolution*." (emphasis added)).) Nevertheless, USF&G argues that even if notice was never published, the statute of repose may still apply against a creditor who was not prejudiced by the lack of notice. (App. Br. at 34.) USF&G's strained interpretation has no foundation in the text of the statute and must be rejected. Section 33-14-107 says nothing about prejudice to creditors, its notice provision includes no exceptions, and the courts are not

empowered to create exceptions where the Legislature has declined to do so. *See Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 119, 328 S.E.2d 621, 622 (1985) (refusing to "carve an exception" to statutory requirements because "[s]uch a change is the function of the legislature, and this Court refuses to usurp legislative authority in this matter.").

USF&G's purported concern that if the statute is applied as written "claims against Covil should persist indefinitely into the future" is incorrect. (App. Br. 3, 22.) Section 33-14-107(c) provides that the repose period starts running at any time by publication of a notice, which means that such a notice may be filed at some point in the future. But even if that were not so, it would be no reason to reconfigure the statute contrary to its text. *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language . . . .").

USF&G's reliance on *Department of Social Services v. Winyah Nursing Home*, 282 S.C. 556, 320 S.E.2d 464, 468 (Ct. App. 1984) is misplaced. The statute of repose at issue in *Winyah*, section 33-21-220(a), required that after dissolution of a corporation, any party having a claim against the corporation commence an action within two years from the dissolution or have the claim barred. Unlike the statute at issue here, which makes publication of notice optional, section 33–21–60(b) *mandated* that immediately subsequent to filing with the Secretary of State its intent to dissolve, the corporation shall cause notice of the filing to be mailed to each known creditor and to the South Carolina Tax Commission. The corporation was also required to publish such notice in a newspaper. The evidence in *Winyah* showed that the defendant corporation's notice of dissolution was not provided to the plaintiff/creditor as required by the statute. This Court therefore held that the defendant's "[f]ailure to strictly comply with the mandates of the dissolution

statutes effectively continues the corporation with respect to creditors whose rights are prejudiced by the noncompliance." *Winyah*, 282 S.C. at 562.

Winyah is no help to USF&G because it does not hold—as USF&G argues—that the claims of a plaintiff who was not prejudiced by lack of notice are barred as though notice had actually been provided. More importantly, however, is that section 33-14-107 simply operates differently than section 33-21-220(a). Unlike the statute in *Winyah*, the publication of notice under 33-14-107(c) is optional and there is no repose period unless and until "the dissolved corporation publishes a newspaper notice in accordance with subsection (b)." S.C. Code Ann. § 33-14-107(c). Whether or not a claimant is prejudiced is irrelevant to the statutory requirements for triggering section 33-14-107(c)'s repose period.

USF&G's argument essentially boils down to a bald request for the Court to rewrite section 33-14-107(c) to provide for a blanket statute of repose. The plain language of the statute and the intent of the Legislature compel the Court to deny USF&G's improper request.

B. Justice Toal Correctly Found No Evidence That The Prior Receiver Published Notice of Dissolution.

Because the statute of repose turns on publication of notice of dissolution, USF&G's defense depends entirely on demonstrating that such a notice was published by Covil's first receiver in 1992. Absent evidence that such a notice was published according to the statutory requirements, USF&G's statute of repose defense necessarily crumbles.

No such evidence exists. Justice Toal surveyed the record, which had been transferred to Justice Toal's court along with the Covil receivership in 2020, and correctly held that there is *zero evidence* that the first receiver ever published the statutory notice. (Sept. 25, 2020 Order, p. 6.). USF&G does not dispute Justice Toal's reasoning or findings of fact. Instead, USF&G's

arguments on appeal merely reassert the same wholly speculative presumption that notice was published sometime in 1992 despite the absence of any evidence.

1. The record is devoid of evidence of publication of notice.

Publication of the notice of dissolution was mentioned only once during the initial receivership proceedings. Specifically, by order dated May 12, 1992, the court detailed many instructions for the prior receiver, including the following: "to the extent not already accomplished, the [r]eceiver shall publish the Notice required by § 33-14-107[.]"[10] (May 12, 1992 Order, *FSB v. Covil*, p. 5 ¶ 9.) Publication of notice of dissolution was never addressed again, either by the prior receiver or the court.

The remainder of the May 12, 1992 order instructed and empowered the prior receiver to marshal and liquidate Covil's assets. (*See id.* at 2–5 ¶¶ 3–8.) The court directed, "upon liquidation of Covil Corporation . . . , the [r]eceiver shall submit an accounting to this Court and petition for authority to make final disbursement of the proceeds from such liquidation." (*Id.* at 6–7 ¶ 15.) On November 11, 1992, the prior receiver submitted the accounting and petitioned for authority to make final disbursements of the proceeds from the liquidation, as instructed. (Nov. 11, 1992 Petition of Receiver, *FSB v. Covil*.) On the same date, the court concluded that the receiver had "fully complied with the previous Orders of this Court in liquidating the assets" and "that his accounting is in order." (Nov. 11, 1992 Order, *FSB v. Covil*, p. 2.)

[10] Importantly, section 33-14-107 has never *required* notice of dissolution to be published. It has always been a decision that was left to the discretion of the dissolving company. (*See* S.C. Code Ann. § 33-14-107(a) ("A dissolved corporation *may* publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice." (emphasis added)); *accord* S.C. Code Ann. § 33-14-107(a) (1988) (same).) The Court directed the prior receiver to publish any notice *required* by section 33-14-107. Since no notice is *required* by section 33-14-107, it is unreasonable to assume from that direction alone that notice was published.

On this record, USF&G contends that notice of dissolution was published in 1992. But USF&G has not produced a copy of a notice of dissolution, nor has it produced any other record from which it might be inferred that a notice was published. Nor has USF&G been able to conjure even a single witness who recollects publication of a notice of dissolution.

All USF&G has is the November 11, 1992 order itself—which says nothing about publication of a notice of dissolution. USF&G nevertheless contends that the November 11, 1992 order establishes that the prior receiver did, in fact, publish notice of Covil's administrative dissolution under section 33-14-107(b). (App. Br. 31.) So interpreted, USF&G contends that the November 11 order cannot be questioned. (*Id.* at 32.)

The November 11, 1992 order does not say what USF&G wants it to say. Plainly read, the order reflects the court's finding that the prior receiver "fully complied" with the court's orders "*in liquidating the assets*." (*Id.* (emphasis added)). The order does not state that the prior receiver "fully complied" with any requirement to publish notice of dissolution. Accordingly, Justice Toal found that the November 11, 1992 order provides no basis to presume that notice of dissolution was published, and as the judge with authority over the prior receivership, Justice Toal's interpretation is entitled to deference. *Cf. Eddins*, 304 S.C. at 136, 403 S.E.2d at 166.

Justice Toal's interpretation also is supported by more than the plain language of the November 11, 1992 order. It is supported by the "Petition of Receiver" on which the November 11, 1992 order was expressly based. (Nov. 11, 1992 Order, *FSB v. Covil*, p. 2.) In that petition, the prior receiver detailed the acts he took as Covil's receiver. According to the prior receiver, he "marshalled and liquidated the assets and collected the accounts of" Covil; retained counsel; "sold all the furniture, fixtures, inventory[,] and equipment of Covil Corporation at public auction"; and addressed remediation of hazardous materials in inventory sold to another company. (Nov. 11,

1992 Petition of Receiver, *FSB v. Covil*, pp. 2–4 ¶¶ 6–7.) The petition says nothing about the publication of a notice of dissolution in a newspaper.

The prior receiver's accounting also says nothing about publication of notice. The accounting details, line-by-line, every disbursement the prior receiver made while carrying out his duties, none of which show payment for publication, to a publication company, or to a newspaper. (Ex. A to Nov. 11, 1992 Petition of Receiver, *FSB v. Covil*, p. 1.) USF&G's retort that the "Receiver Expense" line-item "clearly *could have* included the newspaper-publication expenses," (App. Br. 33 (emphasis added)), is pure speculation, and unreasonable speculation at that.

The prior receiver attested that these expenses were compensable "in accordance with the previous Orders" of the court. (Nov. 11, 1992 Petition of Receiver, *FSB v. Covil*, p. 2 ¶ 5.) The court's prior orders authorized the prior receiver to "incur and pay . . . reasonable expenses," such as "the expense of the premium" for the bond the court required and "the cost of labor, including sales and/or other employees." (May 12, 1992 Order, *FSB v. Covil*, 2–3 ¶ 4.) If the notice had been published and paid for with funds for which the receiver expected to be reimbursed, then a copy of the notice likely would have been included with the receiver's petition and included in the case files transferred to Judge Toal in 2020.

That no such copy exists is reason enough to find that no notice was ever published. It is far more reasonable to conclude instead that the "Receiver Expenses" line-item reflects the cost of bond premiums and the labor and other expenses the prior receiver incurred carrying out the acts described in his petition—including selling all "furniture, fixtures, inventory[,] and equipment . . . at public auction" (Nov. 11, 1992 Petition of Receiver, *FSB v. Covil*, p. 2 ¶ 7)—than to infer that these expenses were for an act the receiver did not mention and for which there is no evidence. (*See id.*).

2. There are no disputed facts that require development.

USF&G complains that even if the record lacks evidence that notice was published, the record is "incomplete" and the question whether notice was published should be adjudicated later, after additional "fact development." (App. Br. 33–34.) This argument was correctly rejected below. USF&G does not and cannot identify what other facts it might develop to raise a genuine dispute over whether notice was published after all this time. Indeed, a March 2001 memorandum in the files of USF&G's former co-defendant, Zurich, expressly acknowledges that there was "no evidence" that the notice was published. (Ex. S to Motion to Clarify.)

USF&G's plea for further fact development also defies common sense. As the federal district court for the Middle District of North Carolina concluded after considering precisely the same arguments and evidence at issue here, if notice had been published in a newspaper, one would reasonably assume that there would be direct evidence of that publication. *Finch v. Covil Corp.*, No. 1:16-cv-1077, 2020 WL 6063054, at *10 (M.D.N.C. Oct. 14, 2020) ("Any inference of compliance is rebutted by the absence of direct proof of publication, which one could reasonably expect to exist . . . ."). That direct evidence does not exist.

USF&G has had nearly thirty years to gather additional facts and ample motivation to do so: from 1991 through the Receiver's appointment in 2018, USF&G actively litigated all manner of asbestos-related claims asserted against Covil. That the evidence it speculates may exist has not appeared in all this time is proof positive that such evidence does not exist.

3. The "presumption of regularity" adds no merit to USF&G's arguments.

USF&G's alternative contention (App. Br. 31) that under the presumption of regularity the Court must presume notice was published simply because the prior receiver was instructed, "to the extent not already accomplished," to "publish the Notice required by § 33-14-107" is meritless and

only underscores the factual and logical leaps USF&G requires to stitch its arguments together. (May 12, 1992 Order, *FSB v. Covil*, p. 5 ¶ 9.)

The presumption of regularity has no role to play here; it applies only "in the absence of any evidence to the contrary." *Kirton v. Howard*, 137 S.C. 11, 134 S.E. 859, 866 (1926). As discussed, there is ample evidence that the prior receiver in fact did not publish the notice, including the prior receiver's sworn petition, his detailed accounting, the Zurich memo, and the common-sense proposition that there would be affirmative evidence of a 1991 newspaper publication (as opposed to say, a 1921 publication), if any such publication occurred.

Justice Toal's finding that notice was never published is correct, supported by evidence, and is therefore binding. *Howe*, 362 S.C. at 215, 607 S.E.2d at 355; *see United States v. SCA Servs. of Indiana, Inc.*, 837 F. Supp. 946, 952–53 (N.D. Ind. 1993) (finding a corporation "failed to take advantage of" statute of repose and claims against the corporation were not barred where corporation did not give notice of its dissolution pursuant to Indiana's similar statute); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to "address remaining issues when disposition of [a] prior issue is dispositive").

C. Justice Toal Correctly Held That Even If Notice Had Been Published The Statute Of Repose Does Not Apply To The Claims At Issue Here.

Because there is no evidence that the statutory notice was published, this Court need not reach USF&G's other arguments and can affirm on that basis alone. If the Court nevertheless considers USF&G's other arguments, it should reject them and affirm Justice Toal's holding that the statute of repose does not reach the claims at issue here whether or not notice was published.

The version of the statute of repose in effect in 1992, when Covil was administratively dissolved, did not reach contingent or future claims. USF&G asserts its statute of repose defense to various asbestos-related claims asserted against Covil and to the Receiver's claims and cross-

claims for bad faith, breach of contract, and alter ego liability. None of these claims were known or could have been known to Covil—contingent or extant—when Covil administratively dissolved in 1992, because at that time USF&G's bad faith mismanagement of asbestos litigation against Covil had not yet occurred. Because these are contingent or future claims, they cannot be barred by section 33-14-107.

Section 33-14-107 was enacted in 1988 and derived, nearly verbatim, from Section 14.07 of the 1984 Model Business Corporation Act ("Model Act"). Official Comment, § 33-14-107; *see also* Official Comment & S.C. Reporters' Comments, S.C. Code Ann. § 33-1-101.[11] The Legislature, however, deviated from Section 14.07 of the Model Act in one significant way. Section 14.07(c) of the Model Act and the original section 33-14-107(c) applied a statute of repose to (1) claims held by persons who did not receive direct written notice of dissolution, if such notice was required under Section 14.06 of the Model Act or section 33-14-106 of the South Carolina Code; and (2) claims that were timely sent to the dissolved corporation but not acted upon. § 33-14-107(c) (1988).

However, Section 14.07(c) of the Model Act also applied to (3) *contingent claims or claims based on post-dissolution events*. Notably, the South Carolina Legislature omitted that provision

[11] USF&G argues the Court should ignore the South Carolina Reporter's Comments. (App. Br. 29.) However, this Court and the South Carolina Supreme Court have routinely looked to the South Carolina Reporter's Comments to provide important context when interpreting statutes, especially any amendments or revisions to statutes. *See Conran v. Yager*, 263 S.C. 417, 422, 211 S.E.2d 228, 230 (1975) (finding the South Carolina Reporter's Comments persuasive); *Adams v. Grant*, 292 S.C. 581, 586, 358 S.E.2d 142, 144 (Ct. App. 1986) (citing the South Carolina Reporter's Comments); *C. Ray Miles Const. Co. v. Weaver*, 296 S.C. 466, 470, 373 S.E.2d 905, 907 (Ct. App. 1988) (same); *Jones Leasing, Inc. v. Gene Phillips & Assocs.*, 282 S.C. 327, 331, 318 S.E.2d 31, 33 (Ct. App. 1984) (same); *Nat'l Equip., Ltd. v. David Jones Sales, Trucking Div., Inc.*, 268 S.C. 551, 554, 235 S.E.2d 125, 126 (1977) ("The South Carolina Reporter's Comment is likewise persuasive[.]"); *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 283, 711 S.E.2d 912, 916 (2011) (looking to the South Carolina Reporter's Comments to provide context for "the purpose for the 1988 revision of the statute").

from section 33-14-107(c). *See id.*; S.C. Reporters' Comments, § 33-14-107 ("[T]he new provision does not contain subsection (c)(3) of the Model Act Section 14.07 providing that contingent claims and those based on an event occurring after dissolution are subject to the . . . statute of repose, too."). As the Reporters' Comments correctly observe, the statue of repose "only applie[d] to claims existing at dissolution." S.C. Reporters' Comments, § 33-14-107.

The Legislature did not expand the reach of the statute of repose to contingent and future claims until 2004. *See* § 33-14-107(c); 2004 S.C. Acts 221, § 18. USF&G posits that this amendment merely clarified that section 33-14-107(c) reached contingent and future claims all along. (App. Br. 28–29.) That position lacks merit. *See Cannon v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 371 S.C. 581, 584, 641 S.E.2d 429, 430 (2007) ("It is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law."); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 433–34, 468 S.E.2d 861, 865 (1996) (finding when one statutory provision does not include a right that is included in another statutory provision, legislative intent is that a right will not be implied where it does not exist).

Moreover, it is a settled principle of statutory interpretation that, absent some contrary indication, a legislature's deviations from a model or uniform act are deliberate. *See* 2B SUTHERLAND STATUTORY CONSTRUCTION § 52:5 (7th ed.) ("[W]hen a legislature models a statute after a uniform act, but does not adopt particular language, courts conclude that the omission was 'deliberate,' or 'intentional[.]'").[12] This is especially true when only a few, non-stylistic changes

[12] This proposition is not controversial. *See, e.g.*, *Donajkowski v. Alpena Power Co.*, 596 N.W.2d 574, 580 n.14 (Mich. 1999) ("Deviation from the language in a model act is presumed to be deliberate[.]"); *Newbold v. Globe Life Ins. Co.*, 274 S.E.2d 905, 909 (N.C. App. 1981) (same); *Johnson v. Ryan*, 346 P.3d 789, 794 (Wash. Ct. App. 2015) (same); *Doemer v. Callen*, 847 F.3d 522, 532 (7th Cir. 2017) (same); *Hughes Elecs. Corp. v. Citibank Del.*, 15 Cal. Rptr. 3d 244, 257 (Cal. Ct. App. 2004) (same).

are made. The more similar two provisions are, the more significant are their differences. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071–72 (2018) (noting a difference between statute and the statute it was modeled on "requires respect, not disregard").

The 1988 Legislature's decision not to enact Section 14.07(c)(3) of the Model Act—a provision in the middle of a section the Legislature otherwise enacted in full—plainly was deliberate. And the 2004 Legislature's decision to change course and add that provision to the statute was intentional and, contrary to USF&G's position, not a mere clarification of existing law. Nothing in the text of the amendment, its legislative history, or any other relevant authority suggests that the 2004 Legislature added an entirely new-but-superfluous subsection—subsection (c)(3)—simply for clarification. *See, e.g., Edwards v. State Law Enf't Div.*, 395 S.C. 571, 578, 720 S.E.2d 462, 466 (2011) (explaining that when a statute is silent on a topic there is "no language for the subsequent amendments to clarify"). In fact, the amendment stands strongly in opposition to USF&G's position. If section 33-14-107 already encompassed nonexistent claims prior to 2004, the addition of subsection (c)(3) would have been entirely unnecessary and that language would be surplusage. *See Pike v. State Dep't of Transp.*, 332 S.C. 605, 618, 506 S.E.2d 516, 523 (Ct. App. 1998) ("[A] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.").

Especially in light of these clear indications of the Legislature's intent, section 33-14-106(d) of the South Carolina Code cannot bear the weight of USF&G's contrary argument. Section 33-14-106(d) provides: "For purposes of this section, 'claim' does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution." The fact that section 33-14-107 does not contain a similar exclusion does not suggest that the pre-2004 version of the statute encompasses such claims. That provision explains what the word "'claim'

does not" mean, and only "[f]or purposes of this section [33-14-106]." § 33-14-106(d) (emphasis added). That provision, by its own terms, says nothing about what the word "claim" *does* mean in the statute at issue, section 33-14-107.

Further, the term "Unknown" in the title to section 33-14-107 refers to claims unknown *to the dissolved corporation*, not to claims unknown *to the claimant*. This interpretation is consistent with the language of subsection (a), which provides that "[a] dissolved corporation may publish notice of its dissolution and request that *persons with claims* against the corporation present them in accordance with the notice." § 33-14-107(a) (emphasis added). Absent the explicit contradictory language in subsection (c)(3), which was not added until the 2004 amendment, the plain language of subsection (a) and the remainder of section 33-14-107 is most reasonably read to apply only to existing unknown claims—not nonexistent claims.

D. The 2004 Amendments to the Statute of Repose are Not Retroactive.

Finally, USF&G argues that the statute of repose may reach the claims at issue here even though they are future and contingent claims because, according to USF&G, amendments to the statute in 2004 intended to extend the statute to such claims can be read retroactively. Justice Toal properly rejected this argument as well under well-established principles of South Carolina law.

Statutes of repose, like all statutes, presumptively do not apply retroactively. *Snavely v. Perpetual Fed. Sav. Bank*, 306 S.C. 348, 350–51, 412 S.E.2d 382, 383–84 (1991). Only "a specific provision *of clear legislative intent to the contrary*" suffices to rebut that presumption. *Id.* The 2004 amendment does not reflect such intent, and USF&G does not argue otherwise.

Section 33-14-107(c) is a statute of repose, not a statute of limitations, because it "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." *Langley v. Pierce*, 313 S.C. 401, 403–04, 438 S.E.2d 242, 243 (1993) (citation omitted) (quoting *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 865–866 (4th Cir.

1989))); *see also Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 148, 678 S.E.2d 809, 811 (2009) ("[T]he statute of repose portion of section 15-3-545(A) is substantive law, unlike a statute of limitations, which is procedural law."); Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. Balt. L. Rev. 119, 131 (2014) (noting "courts have recognized that while statutes of limitations are procedural, statutes of repose are substantive").

The distinction between substantive laws like statutes of repose and procedural laws like statutes of limitation is relevant here because statutes implicating substantive rights are strictly interpreted to be *prospective* in application. *See Edwards*, 395 S.C. at 579, 720 S.E.2d at 466 ("When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only."); *Indep. Ins. Co. v. Indep. Life & Acc. Ins. Co.*, 218 S.C. 22, 33, 61 S.E.2d 399, 404 (1950) ("Statutes tending to destroy private rights should be construed not only strictly, but as not retrospective in operation."); *see, e.g.*, *Corbett v. City of Columbia*, 294 S.C. 327, 331–32, 364 S.E.2d 459, 461 (1988) ("[W]e held that the repeal of § 42–9–100 involved substantive rights and that the amendment would not be applied retroactively."); *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011) (reasoning that because an act "create[d] substantive rights and impose[d] new obligations," it would "apply prospectively absent clear indication to the contrary by the Legislature").

Other courts have similarly held statutes of repose apply prospectively only. *See Bielski v. Alfred Saliba Corp.*, 984 F. Supp. 2d 1170, 1174 (M.D. Ala. 2013) ("Since statutes of repose such as § 6-5-221 are substantive and not remedial law, they apply only prospectively—to claims which accrue after the effective date of the statute."); *Hamilton v. Myerow*, No. 303223CWT, 2009 WL

885957, at *5 (Mass. Land Ct. Apr. 1, 2009) ("[A] statute of repose is, generally, considered to affect substantive rights and, so, only applies prospectively.").

USF&G fails to grapple with this well-settled South Carolina law. Instead, USF&G urges the Court to hold that the ten-year period of repose began anew in 2004 for contingent and future claims. (App. Br. 25.) The authority USF&G relies on, however, is inapposite. Those cases involved statutes of limitations (procedural laws) that the courts determined *did* apply retroactively, forcing the courts to fashion solutions to the fundamental unfairness of retroactive application that, without notice, destroys various rights to sue. *See, e.g.*, *Sohn v. Waterson*, 84 U.S. 596, 599–600 (1873).

Nor does USF&G's work-around make sense in context of the specific statute of repose here. A statute of repose begins to run, by operation of law, on "the date of the last culpable act or omission of the defendant." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014). Such a statute reflects legislative judgment that there be an outer limit and "an absolute bar on a defendant's temporal liability." *Id.* But section 33-14-107 is different. The period of repose is conditional, triggered only by a corporation publishing the requisite notice; it is not automatic or absolute. § 33-14-107(c). Once triggered, the repose period runs from "*the publication date* of the newspaper notice," *id.* (emphasis added), not the date of liability-triggering conduct.

USF&G ignores this distinct feature of section 33-14-107. (*See* Sept. 25, 2020 Order, p. 8 n.3.) Publication is not merely the statutory trigger for beginning the repose period; it is the means the Legislature determined was necessary to fairly put claimants on notice of the steps they must take to protect their rights. USF&G's approach would deem persons whose claims were nonexistent or contingent in 1991 to have received notice in 1991. That is precisely the sort of retroactive application that, absent clear legislative intent, is forbidden under South Carolina law.

See, e.g., *Indep. Ins. Co.*, 218 S.C. at 33, 61 S.E.2d at 404 ("Statutes tending to destroy private rights should be construed not only strictly, but as not retrospective in operation.").

CONCLUSION

For all the foregoing reasons, the Circuit Court's decision below finding USF&G's statute of repose affirmative defense to be factually and legally meritless should be affirmed.

Respectfully submitted,

s/ Shanon N. Peake

G. Murrell Smith, Jr. (S.C. Bar. # 66263)
Jonathan M. Robinson (S.C. Bar # 68285)
Shanon N. Peake (S.C. Bar # 102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, Suite 1B
Columbia, South Carolina 29205
(803) 254-5445

Attorneys for Respondents

July 23, 2021.