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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2020-001437
Circuit Court Case No. 2019-CP-40-02285

Peter D. Protopapas, in his capacity as Receiver for Covil Corporation,	Plaintiff,
v.	
Wall, Templeton & Haldrup, P.A.; Sentry Casualty Company; United States Fidelity and Guaranty Company; Zurich Insurance Company,.....	Defendants,
<i>Of Which:</i>	
United States Fidelity and Guaranty Company is the	Appellant,
<i>And</i>	
Peter D. Protopapas, in his capacity as Receiver of Covil Corporation, is the.....	Respondent.

**REPLY BRIEF OF APPELLANT
UNITED STATES FIDELITY AND GUARANTY COMPANY**

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	3
I. THE RECEIVER FAILS TO DEMONSTRATE THAT HE HAS A COGNIZABLE INTEREST IN SEEKING TO ELIMINATE COVIL’S DEFENSES.....	3
II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT NOTICE WAS NEVER PUBLISHED	6
A. Judge Simmons’s Order Required The Prior Receiver To Publish Notice.....	8
B. The Presumption Of Regularity Has Not Been Rebutted	10
C. The Circuit Court Otherwise Erred In Addressing Publication And Its Impact On The Statute Of Repose	13
III. THE STATUTE OF REPOSE FORECLOSES CLAIMS AGAINST COVIL.....	15
CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases

ATC S., Inc. v. Charleston County,
380 S.C. 191, 669 S.E.2d 337 (2008) 4, 6

Bailey v. Bailey,
312 S.C. 454, 441 S.E.2d 325 (1994) 4

Bielski v. Alfred Saliba Corp.,
984 F. Supp. 2d 1170 (M.D. Ala. 2013) 19

Brown v. Angelone,
150 F.3d 370 (4th Cir. 1998) 16

Emery v. Smith,
361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004)..... 9

Enoree Baptist Church v. Fletcher,
287 S.C. 602, 340 S.E.2d 546 (1986) 7

Finch v. Covil Corp.,
No. 1:16-CV-1077, 2020 WL 6063054 (M.D.N.C. Oct. 14, 2020)..... 10, 11

First United Methodist Church v. U.S. Gypsum Co.,
882 F.2d 862 (4th Cir. 1989) 18

Fust v. Arnar-Stone Laboratories, Inc.,
736 F.2d 1098 (5th Cir. 1984) 17

Hamilton v. Myerow,
No. 303223CWT, 2009 WL 885957 (Mass. Land Ct. Apr. 1, 2009) 19

Heaton v. Stirling,
No. CV 2:19-0540-RMG, 2020 WL 728604 (D.S.C. Feb. 13, 2020) 18

Hinton v. S.C. Dep’t of Prob., Parole & Pardon Servs.,
357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004)..... 20

Joseph v. S.C. Dep’t of Labor, Licensing & Regulation,
417 S.C. 436, 790 S.E.2d 763 (2016) 4

Kerr v. Richland Mem’l Hosp.,
383 S.C. 146, 678 S.E.2d 809 (2009) 19

Kirton v. Howard,
137 S.C. 11, 134 S.E. 859 (1926) 10

<i>Landgraf v. USI Film Products</i> , 511 U.S. 244 (1994).....	16
<i>Langley v. Pierce</i> , 313 S.C. 401, 438 S.E.2d 242 (1993)	18, 20
<i>Lawrence v. Gen. Panel Corp.</i> , 425 S.C. 398, 822 S.E.2d 800 (2019)	8
<i>Licht v. Ass’n Servs., Inc.</i> , 463 N.W.2d 566 (Neb. 1990)	14
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992).....	4
<i>Opternative, Inc. v. S.C. Bd. of Med. Examiners</i> , 433 S.C. 405, 859 S.E.2d 263 (Ct. App. 2021), <i>reh’g denied</i> (July 1, 2021).....	4
<i>Powell ex rel. Kelley v. Bank of Am.</i> , 379 S.C. 437, 665 S.E.2d 237 (2008)	5
<i>Quintana v. Los Alamos Medical Center, Inc.</i> , 889 P.2d 1234 (N.M. Ct. App. 1994)	17
<i>Rice v. Bamberg</i> , 72 S.C. 384, 51 S.E. 987 (1905)	10
<i>S.C. Dep’t of Social Servs. v. Winyah Nursing Homes, Inc.</i> , 282 S.C. 556, 320 S.E.2d 464 (S.C. Ct. App. 1984).....	14
<i>S.C. Nat. Bank v. S.C. Tax Comm’n</i> , 297 S.C. 279, 376 S.E.2d 512 (1989)	16
<i>Sarfati v. Wood Holly Assocs.</i> , 874 F.2d 1523 (11th Cir. 1989)	16
<i>Sohn v. Waterson</i> , 84 U.S. (17 Wall.) 596 (1873)	15, 16, 17
<i>The Fred Smartley, Jr.</i> , 108 F.2d 603 (4th Cir. 1940)	16
<i>Townsend v. Townsend</i> , 323 S.C. 309, 474 S.E.2d 424 (1996)	4
<i>United Methodist Church of Hyattsville v. U.S. Gypsum Co.</i> , 882 F.2d 862 (4th Cir. 1989)	18

<i>United States v. Vill. Corp.</i> , 298 F.2d 816 (4th Cir. 1962)	18
<i>Unruh v. Cacciotti</i> , 172 Wash. 2d 98, 257 P.3d 631 (Wash. 2011)	17
<i>Whitcomb v. Manderville</i> , 90 S.C. 384, 73 S.E.775 (1912)	10

Statutes

S.C. Code Ann. § 33-14-105.....	7
S.C. Code Ann. § 33-14-106.....	6, 7, 14
S.C. Code Ann. § 33-14-106(c)	6
S.C. Code Ann. § 33-14-106(d).....	20
S.C. Code Ann. § 33-14-107.....	passim
S.C. Code Ann. § 33-14-107(c)	13
S.C. Code Ann. § 33-14-330(b).....	7, 9, 14

Rules

Rule 12(f), SCRCP	13
Rule 56(a), SCRCP	13
Rule 56(c), SCRCP.....	13

Other Authorities

16A FLETCHER CYC. CORP. § 8142.....	18
30 S.C. JUR. EVID. § 21	10
9 CYC. OF FED. PROC. § 27:20 (3d ed.)	18
Adam Bain, <i>Determining the Preemptive Effect of Federal Law on State Statutes of Repose</i> , 43 U. BALT. L. REV. 119 (2014).....	19

INTRODUCTION

Respondent's brief on appeal fails to demonstrate either that Covil's Receiver¹ had standing to seek and obtain a ruling that strips Covil of a significant defense in underlying asbestos lawsuits against it, or, even if the Receiver had standing to undermine its own defenses, that the circuit court's ruling should be upheld on the merits.

First, the Receiver fails to show that he has standing to seek a ruling that the statute of repose does not bar third-party tort plaintiffs from asserting claims against Covil. Instead, the Receiver argues the uncontested but irrelevant point that he had standing to bring his underlying claims against USF&G, and attempts to bootstrap standing through the circular argument that he has standing to move against Covil's own defenses so long as he believes those defenses lack merit. This Court should reject these arguments and affirm that a receiver has no standing to attack the receivership entity's own defenses or otherwise seek to increase its potential liability, which is precisely the sort of abuse of the adversary process that the standing doctrine exists to prevent.

Second, the Receiver fails to defend the circuit court's legally flawed conclusion that notice of Covil's dissolution was never published during Covil's judicial dissolution proceedings in 1992. The record is clear that the court overseeing the judicial dissolution directed Covil's prior receiver to publish notice pursuant to the statute governing judicial dissolutions. The record is also clear that the court subsequently found that his orders had been complied with and, on that basis, discharged the prior receiver. In spite of this, the circuit court held that because a copy of the published notice has not been located three decades later, and the prior receiver's accounting records did not contain a specific line item reflecting payment of the costs of publication, the judge who oversaw the dissolution failed to ensure that the statutorily mandated publication had

¹ Capitalized terms have the meanings given them in USF&G's initial brief.

occurred, and the prior receiver disobeyed an explicit court order. These conclusions run counter to well-settled evidentiary presumptions as to the regularity and finality of prior court orders. It also was error to make conclusive factual determinations on the limited record presented by the Receiver's motion. Moreover, even if factual questions about publication of notice existed, they should be resolved at summary judgment or trial in a manner consistent with South Carolina's rules of civil procedure and rules of evidence—not summarily disposed of via ad hoc receivership motions.

Third, the Receiver's argument that the statute of repose does not apply to future, contingent claims brought against Covil is also wrong. The Receiver's primary contention is that because Covil dissolved in 1992, applying the current version of the statute, enacted in 2004, would be impermissibly retroactive. No such retroactivity concerns apply here, however, because, as numerous courts have recognized, the proper way to apply a newly-enacted time bar *prospectively* is to run it from the date of enactment, such that the ten-year period relevant here would start in 2004 and expire in 2014. Indeed, there is no reason to assume the Legislature, in enacting the current version of the statute, would have desired the illogical outcome under which claims against corporations that dissolved in 2004 or later would become time-barred starting in 2014, but claims against corporations that dissolved before 2004 would persist indefinitely into the future.

Finally, the Court should disregard the various unsubstantiated attacks on USF&G scattered throughout the Receiver's briefing. Those disputed allegations have absolutely nothing to do with any of the issues on appeal. Whether USF&G purportedly "mismanaged" the defense of asbestos cases brought against Covil after it dissolved—which USF&G vigorously denies—has not been adjudicated by any trial court and is not now before this Court. The same is true of the Receiver's baseless accusations that "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.” *See* Resp. Br. 4. Similarly, the Receiver’s intimation that this appeal is somehow improper because the circuit court rejected USF&G’s arguments makes no sense. *See* Resp. Br. 3-4 (“Yet despite multiple [lower court] rulings rejecting these arguments ... USF&G repeats its unsuccessful arguments again on appeal.”). USF&G, like every appellant who appears before this Court, filed this appeal precisely because its position did not prevail in the court below and thus it is for this Court to decide these important issues of South Carolina law.

For these reasons, and as discussed further below and in USF&G’s initial brief, the decision on appeal granting the Receiver’s Motion to Clarify should be reversed.

ARGUMENT

I. THE RECEIVER FAILS TO DEMONSTRATE THAT HE HAS A COGNIZABLE INTEREST IN SEEKING TO ELIMINATE COVIL’S DEFENSES

The Receiver contends that he, “standing in Covil’s shoes, plainly ... has standing to sue USF&G to recover damages for USF&G’s bad faith mismanagement of Covil’s assets.” (Resp. Br. 12). That, however, is not the standing question presented on this appeal. Instead, the relevant question is whether the Receiver has legal standing to seek and obtain a ruling that—in the words of the order on appeal, which was drafted by the Receiver and adopted by the circuit court—(i) “Covil’s prior receivership presents no impediment to the assertion of asbestos personal injury claims against Covil”; (ii) “no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil”; and (iii) “nothing from the prior Receivership precludes ... personal injury asbestos claimants from filing lawsuits against Covil.” (R. p. __, __; Sept. 25, 2020 Order Granting Receiver’s Motion To Clarify at 2, 9). Conspicuously absent from the Receiver’s brief is any explanation as to why he, as Receiver for Covil, has any legally

cognizable interest in stripping Covil of a substantial defense in underlying asbestos suits against Covil.

The Receiver asserts that “[s]tanding means having ‘a personal stake in the subject matter of a lawsuit.’” (Resp. Br. 12) (quoting *Joseph v. S.C. Dep’t of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769 (2016)). That is true, but standing also requires “‘an invasion of a *legally protected interest* which is (a) concrete and particularized, and (b) ‘actual or imminent’” rather than conjectural or hypothetical.” *Opternative, Inc. v. S.C. Bd. of Med. Examiners*, 433 S.C. 405, 859 S.E.2d 263, 267–68 (Ct. App. 2021), *reh’g denied* (July 1, 2021) (quoting *ATC S., Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992))) (emphasis added). Covil’s Receiver, standing in Covil’s shoes, has no *legally protected interest* in obtaining a judicial determination validating adverse nonparty asbestos tort plaintiffs’ legal rights to sue Covil, and nothing the Receiver cites suggests otherwise. A receiver’s professional interest in the continuation of a receivership does not suffice, just as the attorneys’ interests in continued representation of their clients did not suffice in *Townsend v. Townsend*, 323 S.C. 309, 314, 474 S.E.2d 424, 427 (1996) and *Bailey v. Bailey*, 312 S.C. 454, 441 S.E.2d 325 (1994).

Rather than articulating any legally protected interest Covil has in a ruling removing an “impediment to the assertion of asbestos personal injury claims against Covil,” the Receiver asserts that (i) he has standing to “petition the Circuit Court for an order rejecting an affirmative defense to the Receiver’s own claims against USF&G”; (ii) USF&G’s standing argument is actually an estoppel argument; (iii) he has sole discretion to determine what is in Covil’s best interests; and (iv) an alleged breach of Covil’s contractual obligations to cooperate with its insurers does not

implicate the Receiver's standing. (Resp. Br. 13-14). None of these arguments withstands scrutiny.

First, had the Receiver sought only to strike the defense asserted by USF&G on the grounds that it did not provide a viable defense to the Receiver's claims against USF&G, standing would likely not be at issue. That, however, is not what the Receiver did. Instead, the Receiver filed a "Motion to Clarify Status of Receivership" which sought general declarations for the benefit of *adverse* nonparty asbestos plaintiffs against Covil. The Receiver did not, for instance, seek a ruling that the statute of repose has no impact on the viability of the Receiver's claims against USF&G; he sought and obtained rulings that "no version of section 33-14-107 precludes an asbestos personal injury plaintiff from bringing claims against Covil" and that "nothing from the prior Receivership precludes ... personal injury asbestos claimants from filing lawsuits against Covil." (R. p. ___; Sept. 25, 2020 Order Granting Receiver's Motion To Clarify at 9). These declarations do not vindicate any right of the Receiver but instead expressly *impair* Covil's rights for the benefit of unspecified nonparty "personal injury asbestos claimants" in lawsuits *against* Covil, and whose claims the Receiver has no right to assert. *See Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 445, 665 S.E.2d 237, 241 (2008) ("We are unaware of any law (and the Bank has cited none) supporting the idea that one party may acquire standing by asserting the interest of an adverse party. ... [W]hile we understand the Bank's desire to limit its potential exposure in [the] underlying action, this practical concern falls far short of the 'injury in fact' standing requirement. Not every practical concern equates to the legal interest required for standing.").

Second, the contention that USF&G is asserting some type of estoppel argument is simply incorrect. The Receiver's lack of a legally protected interest in seeking rulings for the direct benefit of tort plaintiffs who may assert claims against Covil is a question of standing under clear

precedent requiring an inquiry into whether an invasion of a legally protected interest exists. *See, e.g., ATC S., Inc.*, 380 S.C. 191, 669 S.E.2d 337. The Receiver provides no support for his claim that USF&G is actually arguing “that the Receiver should somehow be estopped from ... act[ing] against Covil’s interest.” (Resp. Br. 13). Whether unspecified estoppel principles might be implicated where a party seeks to attack its own legal defenses has no relevance to the standing analysis.

Third, the Receiver’s assertion that he has sole discretion to determine Covil’s interests and litigation positions is similarly misplaced. The scope of the Receiver’s authority is not at issue here, nor is the wisdom of the Receiver’s litigation positions or whether they comport with the Receiver’s duties of cooperation under any insurance policy. Whatever the Receiver’s authority is to take positions on Covil’s behalf in litigation, including in the numerous cases against Covil that the Receiver has demanded be defended by USF&G, the Receiver remains subject to the same rules of standing and justiciability as any other litigant. And those rules clearly do not support a finding that Covil’s Receiver has standing to affirmatively seek a judicial declaration that the statute of repose is legally inapplicable to asbestos personal injury plaintiffs’ claims against Covil.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT NOTICE WAS NEVER PUBLISHED

As USF&G established in its initial brief, and the Receiver acknowledges, Judge Charles B. Simmons, Jr., who presided over Covil’s prior receivership and judicial dissolution, directed Covil’s first receiver, Winston Lee, on May 12, 1992, to “publish the Notice required by § 33-14-107.”² Six months later, on November 12, 1992, the prior receivership court issued an order

² R. p. __; May 12 Order at 5 ¶ 9. The May 12 Order also instructed Mr. Lee to “provide the claimants of Covil Corporation ... known to him with the Notice as required by [S.C. Code] § 33-14-106,” and set forth a detailed procedure, consistent with the procedure set forth in Section 33-

“find[ing] that [the receiver] has fully complied with the previous Orders of this Court in liquidating [Covil’s] assets.”³ The court went on to finalize Covil’s dissolution and discharge the prior receiver in a November 30, 1992 Final Order fully winding up Covil’s affairs.⁴

As USF&G’s initial brief also demonstrated, South Carolina’s judicial dissolution statute provides, as it did in 1992, that “[a]fter entering the decree of dissolution, *the court shall direct* the winding up and liquidation of the corporation’s business and affairs in accordance with Section 33-14-105 and *the notification of claimants in accordance with Sections 33-14-106 and 33-14-107.*” S.C. Code Ann. § 33-14-330(b) (emphases added). Thus, South Carolina’s judicial dissolution statute explicitly requires that statutory notice to creditors *shall* be given during the course of judicial dissolution proceedings. As a result, in directing the prior receiver to “publish the Notice required by § 33-14-107,” Judge Simmons was enforcing a statutory requirement governing such proceedings. And he unambiguously held that the receiver complied with his orders. Accordingly, Judge Simmons’s orders and his findings of compliance with the statutory publication requirement are controlling under South Carolina law and, as USF&G asserted in its initial brief and the Receiver did not dispute or even address, one circuit court judge “does not have the authority to set aside the order of another.” *See* App. Br. 32 (quoting *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986)). It was therefore error for the circuit court to reach a contrary determination below.

14-106(c), for resolution of claims asserted by such known claimants. *See* R. p. __; May 12 Order at 5 ¶ 10.

³ R. p. __; Nov. 12 Order at 2.

⁴ R. p. __; Nov. 30 Order at 3 ¶¶ 7–8.

The Receiver makes two arguments in defending the circuit court’s determination that, in substance, Winston Lee disobeyed Judge Simmons’s order and failed to publish notice, and that Judge Simmons incorrectly found Mr. Lee in compliance and dissolved the receivership notwithstanding this failure. First, the Receiver argues that Judge Simmons’s order merely gave Mr. Lee the option to publish the notice. Second, the Receiver argues that the absence of other affirmative evidence of publication is sufficient to conclusively demonstrate that publication did not in fact occur. Both arguments are meritless.

A. Judge Simmons’s Order Required The Prior Receiver To Publish Notice

The Receiver is incorrect that Judge Simmons merely gave Mr. Lee the option to publish notice. The Receiver contends that while Judge Simmons ordered that Mr. Lee “shall publish the Notice required by § 33-14-107,” Section 107 only states that a corporation “may” publish notice of dissolution and leaves the decision to publish “to the discretion of the dissolving company.” (Resp. Br. 20 n.10). From this, the Receiver reasons that “[s]ince no notice is *required* by section 33-14-107, it is unreasonable to assume from that direction alone that notice was published.” *Id.* The Receiver’s argument, however, ignores the plain words of Judge Simmons’s order. The court’s use of the word “shall” clearly *required* Mr. Lee to publish the notice. *See Lawrence v. Gen. Panel Corp.*, 425 S.C. 398, 406, 822 S.E.2d 800, 804 (2019) (“[T]he term ‘shall’ means the action is mandatory.”). Yet according to the Receiver, because Section 33-14-107 provides that “[a] dissolved corporation *may* publish notice,” it technically does not “require” anything, and therefore Judge Simmons’s order did not command Mr. Lee to take any particular action, but rather just advised him of an option he already had. In other words, according to the Receiver, had Judge Simmons ordered that Mr. Lee “shall publish the Notice *contemplated* by § 33-14-107,” Mr. Lee would have been required to do so, but since Judge Simmons ordered that Mr. Lee “shall publish the Notice *required* by § 33-14-107,” Mr. Lee was somehow *not required* to publish notice. This

interpretation is contrary to the language of the order and contrary to settled law that court orders should not be construed in a way that would render them meaningless or ineffective. *See, e.g., Emery v. Smith*, 361 S.C. 207, 219, 603 S.E.2d 598, 604 (Ct. App. 2004) (rejecting interpretation under which a “provision of the decree ... would be rendered meaningless”).

Moreover, the Receiver’s argument that publication was optional fails to take account of S.C. Code Ann. 33-14-330(b) as discussed in USF&G’s initial brief. *See* App. Br. 21, 32. Reading Section 107 in the context of Section 330(b) further demonstrates that publication was not optional. Section 107 is contained within Article 1 of Chapter 14 of the SCBCA, governing voluntary dissolutions. Its introductory statement that “[a] dissolved corporation *may* publish notice of its dissolution” is relevant in the voluntary dissolution context, where the dissolving corporation is acting on its own behalf, through its board of directors. By contrast, Section 330(b), set forth in Article 3 of Chapter 14 concerning judicial dissolutions, states that in the context of a judicial dissolution, “the court *shall* direct ... the notification of claimants in accordance with,” *inter alia*, Section 107 (emphasis added). Thus, the SCBCA gives corporations that voluntarily dissolve the option to publish notice, but makes publication mandatory where, as here, the corporation is judicially dissolved. The Receiver’s contention that publication remains optional in the judicial dissolution context cannot be reconciled with this plain statutory language.

As a result, despite the Receiver’s efforts to avoid these conclusions, the circuit court’s finding that notice was not published amounts to a holding that (i) Covil’s prior receiver Winston Lee disobeyed an explicit court order by failing to publish notice, and (ii) Judge Simmons failed to ensure that notice was published as required by the SCBCA’s judicial dissolution provisions, and instead closed the proceedings and dissolved the receivership with this statutory requirement unsatisfied. These findings were made not because of any evidence actually establishing that

notice was not published, but instead merely based on negative inferences drawn from the lack of additional corroborating evidence of publication. This result is contrary to South Carolina law.

B. The Presumption Of Regularity Has Not Been Rebutted

The Receiver does not dispute that South Carolina law presumes that a receiver has acted in compliance with court orders and his or her fiduciary obligations. *See Whitcomb v. Manderville*, 90 S.C. 384, 73 S.E. 775, 777 (1912) (“the presumption is always in favor of the correct performance of his duty by an officer, and every reasonable intendment will be made in support of such presumption”) (internal quotations and citation omitted). This presumption can be disregarded only where there is “substantial evidence of opposition.” 30 S.C. JUR. EVID. § 21. A core function of this presumption is to establish as an evidentiary matter that officials complied with orders where, as here, there is no direct proof. *See, e.g., Rice v. Bamberg*, 72 S.C. 384, 51 S.E. 987, 987 (1905) (“There is no positive proof that the sheriff and the clerk carried out the order of the court; but, in the absence of proof to the contrary, the presumption is that these officers performed the duties required of them and that the proceeds of sale were applied to claims adjudged by the court in that cause to be valid debts of the estate of the testator.”); *Kirton v. Howard*, 137 S.C. 11, 134 S.E. 859, 866 (1926) (“[T]he ‘case’ fails to show that the certificate of appointment of the new trustee, Sanders, was indorsed upon the original deed, if said deed was found, or that such appointment was recorded in the office of the clerk of court, as required in the statute, to which we have called attention, yet in the absence of any evidence to the contrary, the court is bound to assume that the designated public officers performed the duties required of them by the act.”).⁵

⁵ The Receiver cites findings made by the U.S. District Court for the Middle District of North Carolina on a motion for relief from judgment filed by another insurer in another action. *See Finch v. Covil Corp.*, No. 1:16-CV-1077, 2020 WL 6063054 (M.D.N.C. Oct. 14, 2020). USF&G was not a party to that case or to that motion, which applied the exacting standard applicable to a motion

Here, the Receiver points to nothing in the record that evidences noncompliance with the order requiring publication. Instead, the Receiver relies on the absence of evidence, including filings from the prior receivership that do not expressly mention notice, and concludes that such absence implies noncompliance. This contention is precisely what the presumption forbids. For example, the Receiver cites Mr. Lee’s petition and his accounting records, which do not reference publication of notice, as evidence that Mr. Lee in fact disobeyed the court order requiring publication. But neither the Receiver nor the circuit court explain why the presumably modest expenses of publishing a notice in a local newspaper would warrant a distinct line item in Mr. Lee’s accounting records, as opposed to being folded into a general line item such as the \$1,576.50 “Receiver Expense” cited by USF&G.

The Receiver goes so far as to contend that the lack of a copy of the notice attached to the petition “is reason enough to find that no notice was ever published” and that it is “unreasonable speculation” to account for the possibility that publication of notice could be encompassed by the “Receiver Expense” line item on the accounting. (Resp. Br. 22). Yet if the absence of a copy of the notice and a separate line item for the publication expense in Mr. Lee’s petition and accounting are purportedly such strong evidence that Mr. Lee had not complied with Judge Simmons’s order directing publication, they would have been similarly strong evidence of noncompliance to Judge Simmons, who had issued the order requiring compliance and was tasked with overseeing the receivership.

seeking to vacate a final judgment, which requires “egregious error” or that the judgment be “void.” *See id.* at *10. Those heightened standards have no relevance here, nor did that court purport to apply (or even reference) the presumption of regularity that the Receiver concedes applies.

The Receiver also argues that the November 12 Order does not support a finding of compliance with the prior order requiring publication because it states that Mr. Lee “has fully complied with the previous Orders of this Court *in liquidating [Covil’s] assets[.]*”⁶ However, liquidation of Covil’s assets was the primary purpose of the receivership. (R. p. __; May 12 Order at 1-2) (“It appears and I find that this appointment as a general receiver is necessary[,] just and proper *for the purpose of liquidating the assets of Covil Corporation . . .* it is therefore ORDERED, ADJUDGED AND DECREED . . . [t]hat L. Winston Lee be, and he hereby is, appointed the permanent Receiver of Covil Corporation . . . for the purpose of marshalling and liquidating such assets.”) (emphasis added). Therefore, in finding that Mr. Lee had complied with the court’s previous orders “in liquidating [Covil’s] assets,” Judge Simmons was not suggesting that Mr. Lee had *not* complied with other aspects of his prior orders. To the contrary, in the very same sentence of the November 12 Order, Judge Simmons also found that “the relief sought by [Mr. Lee] should be approved,” including the discharge of Mr. Lee from his duties as receiver and the entry of a final judgment closing the proceedings—relief that would only have been warranted had the court’s prior orders been complied with in full.

In sum, the only evidence that exists shows that Mr. Lee complied with Judge Simmons’s order requiring publication of notice, and the mere absence of additional proof of such publication some three decades later is not sufficient to rebut the presumption of regularity that attaches to the conduct of Mr. Lee and Judge Simmons in the prior proceedings. Given this, the circuit court clearly erred in finding that the record conclusively demonstrated that Mr. Lee disobeyed Judge Simmons’s orders, notice was never published as required by South Carolina law, and Judge Simmons disregarded Mr. Lee’s noncompliance.

⁶ R. p. __; Nov. 12 Order at 2 (emphasis added).

C. The Circuit Court Otherwise Erred In Addressing Publication And Its Impact On The Statute Of Repose

The circuit court also erred in making conclusive factual determinations against USF&G on an ad hoc motion brought on an incomplete record. The South Carolina Rules of Civil Procedure provide the proper framework for addressing the viability of a defense asserted by a defendant in its answer. The plaintiff may move at the outset of the case under Rule 12(f), SCRCPP, to strike “any insufficient defense” as a matter of law. The plaintiff may also move under Rule 56(a), SCRCPP, for partial summary judgment where “there is no genuine issue as to any material fact.” Rule 56(c), SCRCPP. Or, if factual disputes prevent pretrial resolution, the merits of a defense are determined on a full evidentiary record at trial. Here, by contrast, the circuit court conclusively resolved disputed factual matters against the non-movant in the novel context of a “motion to clarify,” without regard to the status of discovery in any proceeding, the rules of evidence, or the rules of civil procedure. This impermissibly lax approach to procedural due process is exemplified by the Receiver’s primary reliance, in arguing that “[t]here are no disputed facts that require development,” on 20-year-old handwritten notes allegedly written by an employee of an unaffiliated insurer, the admissibility of which under the rules of evidence would be questionable at best. *See* Resp. Br. 23. This disregard for normal court procedures provides independent grounds for this Court to vacate the circuit court’s order and clarify that the South Carolina Rules of Civil Procedure are not suspended merely because a receiver has been appointed for one of the parties.

Finally, the Receiver makes much of USF&G’s statement that even assuming notice had not been published, no party with a currently viable claim against Covil could have been prejudiced, claiming that it “boils down to a bald request for the Court to rewrite section 33-14-107(c) to provide for a blanket statute of repose.” (Resp. Br. 19). The Receiver’s argument only

serves to further demonstrate that the circuit court should not have resolved questions of notice against USF&G on this motion.⁷ The Receiver’s extensive discussion of *Department of Social Services v. Winyah Nursing Home*, 282 S.C. 556, 320 S.E.2d 464, 468 (Ct. App. 1984), is particularly instructive. The Receiver attempts to distinguish *Winyah*, which construed a predecessor dissolution statute, by claiming that “[u]nlike the statute at issue here, which makes publication of notice optional,” the statute in *Winyah* “mandated” such publication. (Resp. Br. 18). But, as discussed in detail above, the statute at issue here also makes publication of notice mandatory where, as here, the corporation is judicially rather than voluntarily dissolved. *See* S.C. Code § 33-14-330(b) (“After entering the decree of dissolution, the court shall direct ... the notification of claimants in accordance with Sections 33-14-106 and 33-14-107.”). Therefore, assuming no notice was published, *Winyah* is on all fours with this appeal, and the questions *Winyah* presents regarding whether any specific creditors were actually prejudiced by noncompliance should be considered—in the concrete context of an actual claim brought by a creditor claiming such prejudice rather than the abstract context of the Receiver’s motion—before the impact of potential non-publication on the running of the statute is adjudicated.

⁷ The Receiver is incorrect that USF&G failed to preserve this point. In response to the Receiver’s citation below, in his Motion to Clarify Status of Receivership, to *S.C. Dep’t of Social Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (S.C. Ct. App. 1984), USF&G’s opposition to that brief pointed out the rule in *Winyah* that “a defect in the dissolution procedure ‘continues the corporation with respect to creditors whose rights are prejudiced by the noncompliance.’” *See* R. p. __; USF&G’s Opposition to Motion to Clarify at 11 n.4 (quoting *Winyah* at 562) (emphasis added in brief below); *see also* R. p. __; USF&G’s Opposition to Motion to Clarify at 11 n.4 (citing *Licht v. Ass’n Servs., Inc.*, 463 N.W.2d 566, 570 (Neb. 1990) for the holding that the “clear implication” of *Winyah* is that a technically defective “dissolution would be valid as against” “unprejudiced creditors”). USF&G’s opposition brief below went on to observe that “[e]ven if the Receiver were permitted to assert the rights of asbestos plaintiffs or otherwise seek to maximize Covil’s liabilities, asbestos plaintiffs seeking to pursue claims against Covil in 2019 were also in no way prejudiced by the Clerk of Court’s supposed failure to deliver the dissolution order to the Secretary of State in 1992.” (R. p. __; USF&G’s Opposition to Motion to Clarify at 11 n.4). This is precisely the argument USF&G made in its initial brief in this appeal.

III. THE STATUTE OF REPOSE FORECLOSES CLAIMS AGAINST COVIL

The Receiver does not dispute that the current version of Section 107, as amended in 2004, expressly forecloses contingent or future claims, arguing instead that this version of the statute does not apply to Covil because Covil dissolved in 1992 and applying the 2004 statute to Covil would be improperly “retroactive.” (Resp. Br. 28). However, as USF&G explained in its initial brief, Section 107 is properly applied *prospectively* by running the repose period for corporate dissolutions that predate the 2004 amendment from the date of that enactment, under the well-established rule set forth in *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596 (1873) and its progeny. (App. Br. 23-28). The *Sohn* rule strikes a balance that avoids both unfair retroactive effect and arbitrarily disparate treatment of claims, and the Receiver fails either to undermine the *Sohn* rule or to make a persuasive case for the application of a different rule in this context.

The Receiver begins by discussing the uncontroversial principle that retroactive application of statutes is generally disfavored. (Resp. Br. 28-29). This, of course, is wholly consistent with the *Sohn* rule and the reasons it was adopted. *See Sohn*, 84 U.S. at 599-600 (explaining that the legislature should not be presumed to intend for a newly enacted limitations period to immediately extinguish previously-timely claims). From there, however, the Receiver contends that the *Sohn* rule is itself a form of retroactive application that is only permissible if applied to statutes of limitations, which are “procedural,” as opposed to statutes of repose, which are “substantive.” (Resp. Br. 28-29). That is not the case. As the Fourth Circuit has explained, the *Sohn* rule *does not* “amount[] to giving [a new time bar] a retroactive effect . . . because [t]he limitation is applied not to divest vested rights or to invalidate proceedings theretofore had, or to affect in any way

conditions existing prior to its enactment, but merely to limit the time within which existing rights may be asserted.” *The Fred Smartley, Jr.*, 108 F.2d 603, 608 (4th Cir. 1940).⁸

Nor does the procedural/substantive distinction bear the weight the Receiver ascribes to it in this context. “Legislative intent governs whether a statute of limitations will have prospective or retrospective application,” *S.C. Nat. Bank v. S.C. Tax Comm’n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989), and “there is nothing talismanic about identifying a rule as procedural if its application results in genuinely retroactive effects.” *Brown v. Angelone*, 150 F.3d 370, 373 (4th Cir. 1998) (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 275 n.29 (1994)). Thus, “[w]hen application of a new limitation period would wholly eliminate claims for substantive rights or remedial actions considered timely under the old law, the application is impermissibly retroactive.” *Id.* (internal quotations and citations omitted). Indeed, if the Receiver’s argument were correct, there would be no need to apply the *Sohn* rule to statutes of limitations, since, as mere procedural rules, their application to matters arising before their enactment would not raise concerns about retroactivity in the first instance. *See Landgraf*, 511 U.S. at 275 (“Changes in procedural rules may often be applied in suits arising before their enactment *without raising concerns about retroactivity.*”) (emphasis added); *Sarfati v. Wood Holly Assocs.*, 874 F.2d 1523, 1528 (11th Cir. 1989) (citing *Sohn* for the proposition that “a limitations statute which substantively limits the

⁸ The Receiver’s contrary contention appears to arise from the *Sohn* Court’s observation that a “literal interpretation” of the statute at issue in that case could have the (retroactive) effect of immediately barring an action that accrued more than two years before its enactment. 84 U.S. at 598. But there is nothing in the text of the current version of Section 107 to indicate that it would not apply to dissolutions predating the 2004 amendments. Like the statute in *Sohn*, a literal application of Section 107 to dissolutions occurring more than ten years before the 2004 amendment would have the effect of immediately barring contingent claims upon that 2004 enactment. Thus, *Sohn* crafted a rule to address the potential unfairness arising from precisely the sort of enactment at issue here.

right will not be applied retroactively to cover causes of action already in existence at the time of enactment absent a clear legislative intent”).

Because of this, the *Sohn* rule applies irrespective of whether a time bar is considered a statute of limitations or a statute of repose. *See* App. Br. 26 (discussing *Unruh v. Cacciotti*, 172 Wash. 2d 98, 257 P.3d 631 (Wash. 2011) (applying *Sohn* to a statute of repose) and *Fust v. Arnar-Stone Laboratories, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984) (applying *Sohn* to statute that imposed an “absolute bar” on claims after three years)); *see also* App. Br. 27 (discussing *Quintana v. Los Alamos Medical Center, Inc.*, 889 P.2d 1234 (N.M. Ct. App. 1994) (applying corporate dissolution time bar to corporation that dissolved before time bar was enacted)). Treating limitations and repose periods similarly for these purposes furthers legislative intent because repose periods, which provide an absolute bar to liability after a defined time period, are typically *more* protective of defendants than limitations periods, which can be tolled. A newly-enacted statute of limitations running from discovery of a claim could bar claims just as easily as a new statute of repose barring claims a certain number of years after the last act of the defendant, and it is illogical to presume that by enacting a more protective repose period, as opposed to a less-protective limitations period, the legislature intended to leave defendants facing *staler* liabilities entirely unprotected. *See, e.g., Quintana*, 889 P.2d at 1236 (reasoning that “the legislature would have intended the same time limitation to apply to” corporations that “dissolved prior to the 1975 Act as those dissolved subsequently,” and that “the reasons for repose would be stronger for pre-1975 dissolutions”); *Sohn*, 84 U.S. at 599 (rejecting an approach that would apply a time bar only to claims arising after its enactment as inconsistent with legislative intent, as it would “leave[] all actions existing at the passage of the act, without any limitation at all”).

Moreover, the Receiver expressly concedes that Section 107 “is different” from other statutes of repose, in that it is “conditional” rather than operating as an “absolute bar” on liability. (Resp. Br. 30). This completely undercuts the Receiver’s argument that *Sohn* cannot apply here because of an ill-founded and formalistic substance/procedure distinction between statutes of repose and statutes of limitations. The “substantive” nature of statutes of repose is linked to the fact that they impose an “absolute bar” on claims. *See, e.g., Heaton v. Stirling*, No. CV 2:19-0540-RMG, 2020 WL 728604, at *3 (D.S.C. Feb. 13, 2020) (“Unlike a statute of limitations, the statute of repose cannot be equitably tolled because it ‘creates a substantive right’ and ‘an absolute limit beyond which liability no longer exists...’”) (quoting *United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989)). Thus, to the extent a substance/procedure distinction controlled here, the Receiver fails to demonstrate that Section 107 would be characterized as substantive. Indeed, as USF&G noted in its initial brief (App. Br. 24 n.30), authorities that have considered the issue have concluded that statutes that specify the time period in which claims may be brought against dissolved corporations “alter[] no substantive right” but “only alter[] the procedure by which substantive rights may be judicially enforced,” and are therefore considered “remedial measures” that can be applied “retroactive[ly].” *United States v. Vill. Corp.*, 298 F.2d 816, 819–20 (4th Cir. 1962). *See also* 16A FLETCHER CYC. CORP. § 8142 (“[S]tatutes that provide to some degree for the survival of remedies or claims for a limited period of time after dissolution of the corporation . . . are remedial in nature.”); 9 CYC. OF FED. PROC. § 27:20 (3d ed.) (same).⁹

⁹ None of the authorities the Receiver cites support the proposition that Section 107 or similar statutes are “substantive” or operate solely prospectively, much less that the *Sohn* rule cannot be applied to such statutes. Most do not discuss retroactivity at all, but instead address the substantive nature of statutes of repose in inapposite contexts. *See Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993) (tolling does not apply to statutes of repose); *First United Methodist Church v. U.S.*

The Receiver’s final argument is that applying the *Sohn* rule to Section 107 would be unfair to claimants against Covil, because the repose period in Section 107 is dependent on notice in order to “fairly put claimants on notice of the steps they must take to protect their rights.” (Resp. Br. 30). According to the Receiver, if the *Sohn* rule applied, such claimants would only receive constructive notice and would not be able to adequately protect their rights. *See id.* (“USF&G’s approach would deem persons whose claims were nonexistent or contingent in 1991 to have received notice in 1991”). As a matter of standing, such arguments should be made *by such claimants*, not by Covil’s Receiver. But in any event, the statute expressly contemplates that creditors with contingent future claims as of the date of dissolution will *never* receive anything more than constructive notice. For instance, had Covil dissolved in 2004 and published the requisite notice at that time, there would be no dispute that contingent tort claims against Covil would be barred as of 2014, ten years later. A claimant who first discovered his or her claim against Covil after 2014 would have no right to recover, even though such a claimant would not have received actual notice and could not have protected his or her right to recover against Covil before that time. Any hardship imposed on such claimants simply reflects the Legislature’s balancing of competing interests in recovery and repose. *See Langley*, 313 S.C. at 404, 438 S.E.2d

Gypsum Co., 882 F.2d 862 (4th Cir. 1989) (same); *Kerr v. Richland Mem’l Hosp.*, 383 S.C. 146, 678 S.E.2d 809 (2009) (addressing whether a statute of repose for medical malpractice claims applied to claims asserting government liability under the Tort Claims Act); Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. BALT. L. REV. 119 (2014) (discussing preemption). The only cases the Receiver cites specifically for the proposition that a statute of repose is treated differently from a statute of limitations in the retroactivity context are *Bielski v. Alfred Saliba Corp.*, 984 F. Supp. 2d 1170, 1174 (M.D. Ala. 2013) and *Hamilton v. Myerow*, No. 303223CWT, 2009 WL 885957, at *5 (Mass. Land Ct. Apr. 1, 2009). *Bielski* is an Alabama federal district court case applying a statute of repose for construction claims “prospectively” to claims that accrue after its enactment without addressing the *Sohn* rule, and *Hamilton*, a Massachusetts land court case, held that a particular statute of limitations *did* apply retroactively, but did not address what would constitute “retroactive” or “prospective” application of a statute of repose. Neither case supports the Receiver’s position.

at 244 (“Statutes of repose are based upon considerations of the economic best interests of the public as a whole . . . Society benefits when claims and causes are laid to rest after having been viable for reasonable time. When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission.”) (citation omitted). The Receiver’s notice argument thus presents no basis not to apply Section 107 to claims against Covil.

Moreover, as USF&G argued in its initial brief, the version of Section 107 in effect at the time of Covil’s dissolution also bars contingent and future claims against Covil, as evidenced by the inclusion in Section 106(d) (concerning known claims) of an express carve-out for contingent liabilities, indicating that Section 107—which lacked such a carve-out—encompassed contingent claims. (App. Br. 28). The Receiver argues that Section 106(d) “says nothing” about Section 107. (Resp. Br. 28). However, the Court is obligated to construe prior Section 107 in the context of the entire statute, including Section 106(d). *See Hinton v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004) (“Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction.”). Additionally, as discussed in USF&G’s initial brief, the history of the statutory scheme supports a construction of the prior statute that would not have permitted corporate post-dissolution liability to continue indefinitely by containing no bar against future and contingent claims. *Id.* (“Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.”). The Receiver’s interpretation of the prior version of Section 107 should be rejected because it elevates a Reporter’s comment

above a construction that harmonizes parallel provisions and honors the overarching purpose of the statute.

CONCLUSION

The circuit court's September 25, 2020 order granting the Receiver's Motion to Clarify should be reversed.

Respectfully submitted,

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I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them as the addresses below:

Pleading(s): Reply Brief of Appellant

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