

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE HAMPTON COUNTY
Jean Hofer Toal, Chief Justice (Ret.), Supreme Court of South Carolina, Acting as
Circuit Court Judge

Case No. 2016-CP-25-0440

JAMES CALVIN SIZEMORE..... Respondent,

v.

WASTE MANAGEMENT OF SOUTH CAROLINA, INC. Appellant.

MOTION TO DISMISS APPELLANT WASTE MANAGEMENT OF SOUTH
CAROLINA, INC.'S NOTICE OF APPEAL

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ATTORNEYS FOR RESPONDENT

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent
James Calvin Sizemore ("Respondent") respectfully moves for dismissal of the appeal of

Appellant Waste Management of South Carolina, Inc. (“WMSC” or “Appellant”) on the grounds that there is not a final and appealable order from the Court of Common Pleas. WMSC’s appeal involves an interlocutory order that is not immediately appealable.

Appellant improperly seeks to appeal from the Order of Judge Jean H. Toal, Chief Justice (Ret.), Supreme Court of South Carolina, denying Appellant’s motion to transfer venue pursuant to S.C. Code Ann. § 15-7-30 and S.C. Code Ann. §15-7-100. Under the well-settled law of this state, Judge Toal’s ruling denying Appellant’s request to move the venue of this matter is not immediately appealable. As such, this appeal is premature and should be dismissed. The grounds for this motion are more fully set forth herein.

BACKGROUND AND PROCEDURAL POSTURE

James Sizemore was diagnosed with mesothelioma, a universally fatal disease caused by exposure to asbestos, in April of 2016. Respondent was exposed to asbestos over his career, which spans four decades and over 30 different counties across several states, as a pipefitter, welder, and boilermaker. Specifically, Respondent brought negligence claims against Appellant, among others, for exposing him to asbestos while he was working on premises owned and operated by Appellant and located in Hampton County, South Carolina. The case has been assigned to the Honorable Judge Jean H. Toal, Chief Justice (Ret.), Supreme Court of South Carolina.

On January 20, 2017, Appellant filed two separate motions seeking to change the venue of this matter; one motion pursuant to S.C. Code Ann. § 15-7-30 and the other pursuant to S.C. Code Ann. §15-7-100. Judge Toal, in denying Appellant’s motions, disagreed with Appellant and ultimately determined that Appellant had failed to meet its

burden to demonstrate that transfer of this matter to Greenville County was warranted pursuant to either S.C. Code Ann. § 15-7-30 or S.C. Code Ann. §15-7-100.

Appellant filed the instant notice of appeal on October 17, 2017. This Court should deny Appellant's improper attempt to manipulate this state's appellate procedures to prolong or ultimately deny Respondent his day in court.

ARGUMENT

WMSC's appeal to this Court is improper because Judge Toal's order denying its motions to transfer venue is not an immediately appealable order. Appeals from the Circuit Court are governed by South Carolina Appellate Court Rule 201 which is clear that "[a]ppel[s] may be taken . . . from any final judgment, appealable order or decision." SCACR 201(a). Thus, only "final" orders are appealable. *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (holding that South Carolina adheres to the final judgment rule, which provides that, with certain exceptions, an appeal lies only from a final judgment) *abrogated in part on other grounds by Hilton v. Flakeboard America Limited*, 418 S.C. 245, 791 S.C.2d 719 (2016)); *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) (explaining that an order is interlocutory if some further act must be done by the court prior to the determination of the rights of the parties).

South Carolina law clearly holds that the denial of motions to transfer venue are not immediately appealable. See *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 14 (2000). In *Breland*, the Supreme Court of South Carolina specifically held that "[r]equiring a defendant to wait until after trial to appeal the issue of proper venue is the most appropriate course to take where any error in that decision will not prejudice

the defendant any more than other interlocutory orders[.]” *Id.* at 94. The Supreme Court went on to hold that while proper venue is a “substantial right,” errors as to venue “will be correctable upon appeal after trial[.]” *Id.* at 94-95.

In *Breland*, after acknowledging that it had, indeed, previously entertained immediate appeals from order granting or denying motions to transfer venue, the Court also stated that the appealability of the venue issue was not raised by either party in those matters. *Id.* at 95. Further, those decisions failed to reference or discuss valid holdings from the Supreme Court and the Court of Appeals which clearly held that orders denying or granting motions for change of venue are not immediately appealable. *Id.* The Supreme Court’s holding that orders denying motions to transfer venue are not immediately appealable has been reaffirmed in the years since *Breland*. See *Lexington Ins. Co. v. South Carolina School Bd. Ins. Trust*, No. 2007-UP-534, 2007 WL 8400121 (S.C. Ct. App. Nov. 20, 2007); *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012) (acknowledging the *Breland* holding that orders denying motions to change venue are not immediately appealable).

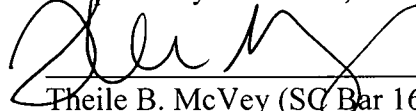
In the present case, Judge Toal’s order denied Appellant’s motions to transfer venue to Greenville County. This ruling does not constitute a “final” ruling that is immediately appealable, and Appellant’s Notice of Appeal fails to cite any authority that would suggest that *Breland* is inapposite to this matter. Respondent submits that there is none. Further, Appellant’s Notice of Appeal is wholly devoid of any assertion that any harm suffered as a result of Judge Toal’s order denying its motions to transfer venue cannot be rectified on appeal after a trial on the merits. There is no validity to Appellant’s apparent contention

that Judge Toal's order denying its motions to transfer venue is immediately appealable. Consequently, Appellant's Notice of Appeal must be dismissed.

CONCLUSION

For the above reasons, Respondent respectfully requests that this Court dismiss Appellant Waste Management of South Carolina, Inc.'s appeal as the Circuit Court's order denying its motions to transfer venue is not immediately appealable and remand this matter to the Circuit Court for further proceedings.

Respectfully submitted,



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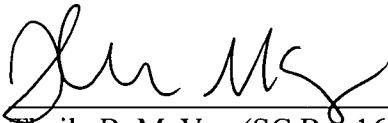
CERTIFICATE OF SERVICE

I, Theile B. McVey, Attorney for Plaintiff/Respondent, do hereby certify that on the 27th day of October 2017, I caused the attached **PLAINTIFFS' MOTION TO DISMISS DEFENDANT/APPELLANT WASTE MANAGEMENT'S APPEAL** to be served upon Defendants by mailing a copy to counsel as follows:

Timothy W. Bouch
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[Signature appears on the following page.]

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