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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Appellate Case No.: 2018-00386

Roxanne Falls, individually and as Personal Representative of the Estate of Charlotte Gaye Smith,.....Respondent,

v.

CBS Corporation, et al.,.....Defendants,

Of which, Covil Corporation is.....Appellant.

EMERGENCY PETITION FOR WRIT OF SUPERSEDEAS

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Attorneys for Defendant Resolute FP US, Inc.

The Defendant Resolute FP US, Inc. ("Resolute") hereby petitions for a writ supersedeas in extraordinary and emergency circumstances and under extreme time constraints. Resolute seeks supersedeas instructing the circuit court not to conduct any further proceedings in this case until this appeal is terminated, including but not limited the trial currently scheduled to begin on March 12, 2018.

STATEMENT OF THE CASE

The Respondents allege that that Charlotte Gaye Smith contracted an indivisible asbestos-related injury *(i.e.,* a mesothelioma) for which numerous Defendants - including Resolute and the Appellant Covil Corporation ("Covil") - are responsible. On February 23, 2018, the circuit court entered an order striking Covil's pleadings, essentially placing Covil into default ("the Order"). On March 1, 2018, Covil properly commenced an appeal of the Order in this Court.

Numerous Defendants, including Resolute, filed motions to enforce the automatic appellate stay under Rule 241, SCACR, due the Covil's filing and service of its Notice of Appeal. The presiding circuit court judge conducted a hearing on the morning of March 9, 2018, during which the judge heard those motions to enforce the stay. The judge denied those motions from the bench and indicated that she planned to commence the trial on Monday, March 12, 2018.

STANDARD OF REVIEW

A supersedeas is an extraordinary writ, which appellate courts use only when necessary to preserve the fruits of a meritorious appeal, to avoid irreparable harm, or to prevent a miscarriage of justice. *See Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) ("[T]he purpose . . . of a supersedeas . . . is to . . . preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." (quoting 4A C.J. S. APPEAL & ERROR § 662 at 494–95 (1957)); *Andrews v. Sumter Commercial & Real Estate Co.*, 69 S.E.

604, 606 (S.C. 1910) (explaining that a supersedeas should be issued "only to the extent clearly made to appear to be necessary to prevent irreparable injury or a miscarriage of justice").

ARGUMENT

The circuit court apparently based its decision not to abide by the automatic stay on a belief that the Order is not immediately appealable. However, that belief is clearly erroneous. The Order expressly strikes Covil's pleadings. As the South Carolina Supreme Court has recognized, an order that "strikes out an answer or any part thereof or any pleading in any action" is immediately appealable. S.C. Code Ann. § 14-3-330(2); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 n.4 (1993) ("It should be noted that § 14-3-330 also allows appeal from an order affecting a substantial right. This is when such order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.") (emphasis added). Therefore, the Order is immediately appealable by Covil, and Covil has properly commenced this appeal.

Under well-settled rule and precedent, Covil's proper Notice of Appeal in this Court immediately divested the circuit court of jurisdiction for all matters affected by the appeal. Under Rules 205 and 241, SCACR, that Notice of Appeal removed jurisdiction from the trial court and must, therefore, stay all remaining matters. *Grosshuesch v. Cramer*, 377 S.C. 12, 31 n. 7, 659 S.E.2d 112, 122 n. 7 (2008) ("We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal.").

Rule 205, SCACR, provides an appellate court with exclusive jurisdiction over matters on appeal. The circuit court may only proceed with matters not affected by the appeal. Rule 241(a), SCACR, addressing matters which are stayed while on appeal, provides:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Thus, a lower court may not act or issue orders that affect an issue on appeal, which would include, but not be limited to, proceeding to trial.

Pursuant to Rule 241(a), when an appeal has been filed, the circuit court can only proceed as to matters that are wholly unaffected by the issues on appeal. *See generally Gattis v. Murrell's Inlet VFW No. 10420,* 353 S.C. 100, 112, 576 S.E.2d 191 (Ct. App. 2003). However, even in matters wholly unaffected by an appeal, a circuit court has the inherent discretion and authority to stay any matter pending before it where such relief is in the best interests of justice. *See City of Spartanburg v. Belk's Dep't Store,* 199 S.C. 458, 20 S.E.2d 157 (1942). As explained below, Covil's appeal necessarily affects the trial of the case against Resolute and all other Defendants. Thus, the trial is automatically stayed under the applicable rule. Furthermore, applying the stay in this case promotes the interests of justice.

This case involves numerous Defendants facing claims based on separate acts, but seeking the same set of damages. The General Assembly has provided certain remedies and procedures for defendants in such scenarios. While S.C. Code §15-38-15(D) preserves a broad right on the part of a defendant to pursue an "empty chair defense" by seeking to cast blame on a non-party for the plaintiffs' alleged harm as long as the non-party can be characterized as a "potential tortfeasor," §15-38-15(C)(3) provides for the allocation of fault by way of a special verdict only as to "each *defendant*." In keeping with this distinction, the Supreme Court has indicated that "only the parties to a lawsuit" may be listed in a special verdict form submitted to a

jury for an allocation of fault under §15-38-15(C)(3). *See Smith v. Tiffany,* 419 S.C. 548, 559-60, 799 S.E.2d 479 (2017); *Machin v. Carus Corp.,* 419 S.C. 527, 545-46, 799 S.E.2d 468 (2017).

Here, it is indisputable that - were Covil present at trial - it would qualify as a "defendant" subject to an allocation of fault for Ms. Smith's alleged injury. Thus, it is also clear that Resolute (and the other Defendants) would be entitled to have Covil's name listed on the special verdict form submitted to the jury for the purpose of making such an allocation.

However, if Covil's absence from trial (based on its pending appeal) prevents its inclusion on a §15-38-15(C)(3) special verdict form, Resolute's right to have fault allocated to a "defendant" named by the Respondents in their own Complaint as a party liable in part for the injury would be eviscerated. Such an outcome would be particularly unjust, given that the effect of the challenged Order - unless and until reversed on appeal - is to render Covil liable to the Respondents for Ms. Smith's injury as a matter of law. *See generally QZO, Inc. v. Moyer,* 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004). Under such circumstances, despite the Respondents' choice to sue Covil as a Defendant, and the Order holding Covil liable to them as a matter of law, Resolute would be unable to allocate any fault to Covil for purposes of determining its own proportional liability, if any. In addition, Resolute would not have the benefit of a setoff of Covil's settlement because Covil has not settled. Thus, under the logic of *Gattis,* the Order necessarily affects a crucial defense and procedure that should be available to Resolute and the other Defendants.

Additionally, and as emphatically stated in *Collins Music Co. v.* C. *W. Smith,* 332 S.C. 145, 147 503 S.E.2d 481, 482 (Ct. App. 1998), "[i]t is well-settled in this state that 'there can be no double recovery for a single wrong and a plaintiff may recover his actual damages only once.'" Proceeding to trial in the absence of Covil would fly in the face of that rule, in that it would give rise to a substantial risk of an impermissible double recovery were Resolute to be found liable to the

Respondents by the jury. Upon such a result, the Respondents could proceed to a separate verdict against Covil, either by way of a default judgment or, were this Court's Order reversed by the pending appeal, by way of a standard jury trial. Assuming that liability was imposed against Covil in either of these two fashions, an impermissible double recovery would seem a certainty by operation of S.C. Code Ann. §15-38-15(E).[1] Section 15-38-15(E) provides for a proportional set-off of "any settlement received from any potential tortfeasor prior to the verdict" over and against a non-settling defendant's proportional liability as determined by the jury, but does not otherwise appear to preserve any right of set-off or contribution among joint-tortfeasors. Plainly, even a full recovery for Ms. Smith's alleged injury had from Resolute by way of a jury verdict in an earlier trial would not constitute a "settlement" and, thus by operation of the plain language of §15-38-15(E), would seemingly not be available to Covil as a set-off to any subsequent judgment entered against it. Such an outcome would be manifestly unjust. This further demonstrates why the interests of justice require a stay, even if Rule 241(a) did not automatically create one.

CONCLUSION

For these reasons, this Court should issue a writ of supersedeas ordering the circuit court to honor the automatic appellate stay and to refrain from any further proceedings in this action, including but not limited to the trial scheduled for March 12, 2018.

(Signature on next page)

[1] Proceeding in this fashion of conducting two trials would also be a waste of judicial recourses.

Respectfully submitted,

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Attorneys for Defendant Resolute FP US, Inc.

March 9, 2018

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CBS Corporation, et al.,.....Defendants,

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PROOF OF SERVICE

I certify this 9th day of March 2018 that I have served a copy of DEFENDANT RESOLUTE FP US, INC.'S EMERGENCY PETITION FOR WRIT OF SUPERSEDEAS upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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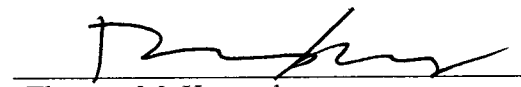
March 9, 2018

By: 

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March 9, 2018

VIA HAND DELIVERY:

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Roxanne Falls, individually and as Personal Representative of the Estate of Charlotte Gaye Smith v. CBS Corporation, et al.
Appellate Case No.: 2018-00386
File No.: 13790.101

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Defendant Resolute FP US, Inc.'s Emergency Petition for Writ of Supersedeas regarding the above-referenced matter. Also enclosed are the original and one copy of the Proof of Service and our check for the filing fee. Please file the original filings and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Sincerely,

Thomas M. Kennaday

TMK/tj
Enclosures
cc: All counsel of record (w/enc.)