

86482

THE STATE OF SOUTH
CAROLINA
In the Court of Appeals

RECEIVED

APR 17 2018

SC Court of Appeals

APPEAL FROM HAMPTON
COUNTY
Court of Common Pleas

Jean Hoefler Toal, Circuit Court

Judge Case No.: 2016-CP-25-0440

James Coleman Sizemore, as Personal Representative of the Estate of
James Calvin Sizemore, Decedent, Respondent,
v.

Bowater Paper Mill; E.I. DuPont De Nemours and Company; Foster
Wheeler Energy Corporation; Daniel International Corporation;
Resolute FP US, Inc.; CBS Corporation; Cleaver Brooks, Inc.;
Covil Corporation; Fluor Constructors International; Fluor Constructors
International, Inc.; Fluor Daniels Services Corporation;
Fluor Enterprises, Inc.; General Electric Company; Genuine Parts Company;
Georgia- Pacific Consumer Products LP; Honeywell International, Inc.;
SCANA Corporation; Riley Power, Inc.; and Waste Management of
South Carolina, Inc., Defendants,

Of which, Resolute FP US, Inc. is.....Appellant.

MOTION TO DISMISS APPEAL

This motion is made pursuant to Rule 240 of the South Carolina Appellate Court Rules,
which governs motions and petitions generally. Plaintiff/Respondent James Calvin Sizemore, as
Personal Representative of the Estate of James Calvin Sizemore, Decedent, respectfully moves
this Court to dismiss the appeal of Defendant/Appellant Bowater Paper mill k/n/a Resolute FP

US, Inc. ("Bowater") on the grounds that neither order that it seeks to appeal involves a final and appealable order from the Court of Common Pleas. Bowater improperly seeks to appeal from the orders of Acting Circuit Court Judge Jean H. Toal denying Bowater's motion to dismiss and motion for a stay of proceedings pending the resolution of an appeal filed by co-defendant Covil Corporation ("Covil"). Under the well-settled law of this state, Judge Toal's rulings denying both of these motions are not immediately appealable. As such, this appeal is premature and should be dismissed.

BACKGROUND AND PROCEDURAL POSTURE

Decedent James Calvin Sizemore was diagnosed with mesothelioma on April 27, 2016. James Sizemore was exposed to asbestos over his career, which spanned decades, as a pipefitter, millwright, and boiler tender at various plants and mills throughout the state of South Carolina and Louisiana. His family brought negligence claims against Bowater, among others, for exposing him to asbestos while he was working on Bowater's premises. The case was assigned to the Honorable Judge Jean H. Toal and the trial in this matter was scheduled to begin on March 12, 2018, behind two other asbestos cases.

On February 9, 2018, while Judge Toal was preparing to hear motions for summary judgment from the remaining defendants in this matter, Bowater filed a motion to dismiss on the ground that James Sizemore was its statutory employee and, as a result, the Workers' Compensation Commission had exclusive jurisdiction over the claims that James Sizemore's heirs and estate had raised against Bowater. Judge Toal disagreed and denied Bowater's motion, finding that Bowater had failed to demonstrate that James Sizemore was a statutory employee who was performing work that was "part of [Bowater's] trade, business, or occupation" pursuant to S.C. Code Ann. §42-1-400.

Bowater also filed a motion seeking to stay the trial in this matter pending the resolution of the appeal noticed by Covil. It argued that a stay was necessary for the proper allocation of fault. According to Bowater, because it is alleged that James Sizemore has an indivisible injury for which Bowater and Covil were responsible, to proceed with the trial in this matter without having Covil present would limit Bowater's right to present its "empty chair defense." Judge Toal disagreed and confirmed that Bowater could raise this defense even if Covil was not present at trial. The motion to stay was denied.

Trial did not proceed in this case on March 12, 2018, because trial in another case started that date. A new trial date has not been set. It is anticipated that Covil's appeal will be decided well before this case goes to trial.

ARGUMENT

I. **Bowater has not appealed a final judgment or order.**

Bowater's attempt to appeal to this Court is improper because Judge Toal's orders denying its motion to dismiss and motion to stay the trial of this matter are not immediately appealable orders. Appeals from the trial court are governed by Rule 201, SCACR, which is clear that "[a]pp[ea]l[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).

Similarly, section 14-3-330, which governs appellate jurisdiction “for correction of errors of law in law cases,” states, in relevant part, that the Supreme Court shall have appellate jurisdiction to review:

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]

S.C. Ann. §14-3-330. Judge Toal’s orders denying Bowater’s motion to dismiss and motion to stay the trial in this matter do not fall into either the category described in Rule 201 or section 14-3-330.

II. The denial of Bowater’s motion for summary judgment is not immediately appealable.

South Carolina law clearly holds that motions to dismiss are not immediately appealable. *Woodward v. Westvaco Corp.*, 319 S.C. 240, 242-43, 460 S.E.2d 392, 394 (1995), *overruled on other grounds by Sabb v. South Carolina State University*, 350 S.C. 416, 567 S.E.2d 231 (2002). In *Woodward*, the Supreme Court of South Carolina held that “[a]bsent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgment, decrees, or orders listed in S.C. Code Ann. § 14-3-330.” *Id.* at 242. The petitioner in *Woodward* brought a negligence claim seeking damages for personal injuries that he sustained when a hose at the respondent’s facility disengaged and sprayed him with “black liquor.” *Woodward*, 319 S.C. at 241, 460 S.E. 2d at 393. The respondent moved for summary judgment, arguing that the circuit court did not have subject matter jurisdiction over the petitioner’s action because petitioner was its statutory employee and was limited to bringing his claims against respondent under the Workers’ Compensation Act. *Id.* The trial court denied the respondent’s motion but, on appeal, the Court

of Appeals reversed, holding that the petitioner was respondent's statutory employee. *Id.* at 241-242, 460 S.E.2d at 393.

The South Carolina Supreme Court determined that the Court of Appeals had incorrectly concluded that denials of motions to dismiss were immediately appealable based on the holdings of cases—*Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) and *Duncan v. Provident Mut. Life Ins. Co.*, 310 S.C. 465, 427 S.E.2d 657 (1993)—in which the parties had not raised the appealability of the orders denying the motions to dismiss. *Id.* at 242, 460 S.E.2d at 393. The Court clarified:

An order *denying* a motion to dismiss for lack of subject matter jurisdiction does not *finally* determine anything. See *McLendon v. South Carolina Dep't of Highways and Pub. Transp.*, 313 S.C. 525, 443 S.E.2d 539 (1994) (like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage in the proceedings). Consequently, while such orders may involve a substantial right, they do not fall under § 14-3-330(2)(a) because they do not in effect determine the action and prevent a judgment from which an appeal might be taken or discontinue the action. For the same reason, such orders do not “involve the merits” under § 14-3-330(1). See *Mid-State Distributors v. Century Importers*, 310 S.C. 330, 426 S.E.2d 777 (1993) (for an order to “involve the merits” as that term is used in § 14-3-330, it must *finally determine* some substantial matter forming the whole or a part of some cause of action or defense).

Id. at 242, 460 S.E.2d at 393-94.

In the present case, Judge Toal's order denying Bowater's motion to dismiss does not constitute a “final” ruling that is immediately appealable, and Bowater's Notice of Appeal fails to cite any authority that would suggest that the Supreme Court's ruling in *Woodward* is inapposite to this matter. There is none. This Court should dismiss Bowater's appeal.

III. The denial of Bowater's motion to stay is not immediately appealable.

Similarly, the trial court's denial of Bowater's motion to stay is not immediately appealable. *Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529 (2006). The interlocutory order in

Edwards involved the granting of a motion to stay trial pending a resolution from the Federal Communication Commission. *Id.* at 93, 631 S.E.2d at 530. When the trial court granted the request to stay the matter, the plaintiff appealed. *Id.* In dismissing the plaintiff's appeal, the Supreme Court of South Carolina specifically held that the order granting the motion to stay "does not involved the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken." *Id.* at 94, 631 S.E.2d at 530. The Supreme Court went on to note, importantly, that an order granting a motion to stay does not discontinue the proceedings. *Id.* "It merely temporarily stays the matter pending a ruling by the FCC." *Id.* at 94-95, 631 S.E.2d at 530-31.

Bowater may cite the cases in which this state's appellate courts have reviewed appeal requests from orders granting or denying motions to stay. This Court has already addressed this issue, however, and discussed why those cases no longer offer no support for Bowater's position. In *Edwards*, after acknowledging that there were cases in which appellate courts had, indeed, previously entertained immediate appeals from orders granting or denying motions to stay, the Court stated that the cases in which those appeals were granted turned on "broad language which this Court no longer follows." *Id.* at 95, 631 S.E.2d at 531. In those cases, *Hiott v. Contracting Services*, 276 S.C. 632, 633, 291 S.E.2d 224, 225 (1981) and *Dill v. Moon*, 14 S.C. 338 (1880), the court had reasoned that "the word 'merits' naturally bears the sense of including all that the party may claim of right in reference to his case It may be concluded that whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies to this court." *Id.* The Court noted that pursuant to the law at the time of the *Edwards* decision, which is the current law governing Appellant's instant notice of

appeal, “an order must affect a substantial right **and** prevent a judgment from which an appeal may later be taken in order to be immediately appealed.” *Id.* (emphasis in original).

In the present case, Judge Toal’s order denied Bowater’s motion to stay trial. Under *Edwards*, this ruling does not constitute a “final” ruling that is immediately appealable. Further, Bowater’s Notice of Appeal is wholly devoid of any valid assertion that any harm would result from Judge Toal’s order denying the motion to stay trial. As Judge Toal stated in her ruling, Bowater retained the right to assert its empty-chair defense and to argue to the jury that Covil is to blame for James Sizemore’s injuries and death. In this aspect, Covil’s status is no different than a once-active defendant who has settled with the plaintiff prior to the beginning of trial. To determine otherwise is to deprive a plaintiff of the right to settle his claims against any defendant prior to trial and would grant Bowater, and defendants in future cases, the right to demand that an initially-named defendant remain an active defendant so that the jury may apportion fault. This is not the law in this state.

A further consideration is that Bowater’s motion to stay is moot. There is no urgency to the situation because this case did not proceed to trial in March 2018 and is not yet reset for trial. Covil’s appeal will almost certainly be completed by the time this case is reset for trial.

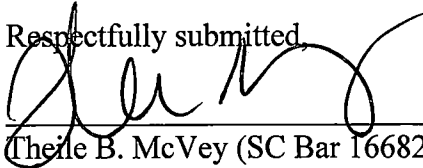
In short, Judge Toal’s order denying Bowater’s motion to stay trial is not immediately appealable. Consequently, Bowater’s appeal must be dismissed.

CONCLUSION

For the above reasons, Respondent respectfully requests that this Court dismiss Bowater’s appeal, as Judge Toal’s orders denying Bowater’s motion to dismiss and motion to stay trial are not immediately appealable.

[Signature appears on the following.]

Respectfully submitted,



Theile B. McVey (SC Bar 16682)

tmcvey@kassellaw.com

KASSEL MCVEY, ATTORNEYS AT LAW

1330 Laurel Street

Post Office Box 1476

Columbia, South Carolina 29202

803-256-4242

803-256-1952(Facsimile)

Other email: emoultrie@kassellaw.com

Jonathan Holder (SC Bar 77935)

jholder@dobllp.com

DEAN OMAR BRANHAM, LLP

302 N. Market Street, Suite 300

Dallas, Texas 75202

214-722-5990

214-722-5991 (Facsimile)

COUNSEL FOR RESPONDENT

April 17, 2018

Columbia, South Carolina.

Other Counsel of Record:

R. Hawthorne Barrett

Thomas M. Kennaday

Sam V. Priddy

Turner Padgett Graham & Laney, P.A.

P.O. Box 1473

Columbia, SC 29202

(803) 254-2200

Attorneys for Appellant Resolute FP US, Inc.

William Early, Esquire
Pierce, Hems, Sloan & McLeod, LLC
PO Box 22437
Charleston, South Carolina 29413

Attorneys for CNA Holdings and
Hoechst Celanese Jennifer M.
Techman, Esquire
Andrew S. Rogers, Esquire
Evert Weathersby Houff
3455 Peachtree Road NE, Suite 1550
Atlanta, Georgia 30326

Attorneys for Foster Wheeler Energy
Corp.

Robert O. Meriwether, Esquire
James B. Glenn, Esquire
Robert C. Wood, Jr., Esquire
David G. Traylor, Jr.
Nelson Mullins Riley & Scarborough
PO Box 11070
Columbia, South Carolina 29211

Attorneys for USF&G

Steven J. Pugh, Esquire
Joseph E. Thoensen, Esquire
Richardson Plowden & Robinson, P.A.
1900 Barnwell St.
Columbia, South Carolina 29201

Attorneys for Cleaver Books

Moffat McDonald, Esquire
W. David Conner, Esquire
Scott Edward Frick, Esquire

Haynsworth Sinkler Boyd, PA
ONE North Main Street, 2nd Floor
P.O. Box 2048
Greenville, South Carolina 29602-2048

Attorneys for Daniel International, et al.

Daniel B. White, Esquire
Ronald G. Tate, Jr., Esquire
T. David Rheney
Gallivan White & Boyd, PA
Post Office Box 10589
Greenville, South Carolina 29603

Attorneys for Covil Corporation

Breon C. M. Walker, Esquire
Gallivan White & Boyd
P.O. Box 7368
Columbia, South Carolina 29202

Attorney for SCANA Corporation

Dell P. Chappell
Nelson Mullins Riley & Scarborough,
LLP
PO Box 11070
Columbia, South Carolina 29211

Attorney for EU DuPont De Nemours &
Co.

William Coates, Esquire
Roe Cassidy Coates & Price, P.A.
P.O. Box 10529
Greenville, South Carolina 29603

Attorney for Genuine Parts Company

THE STATE OF SOUTH
CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON
COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No.: 2016-CP-25-0440

RECEIVED

APR 17 2018

SC Court of Appeals

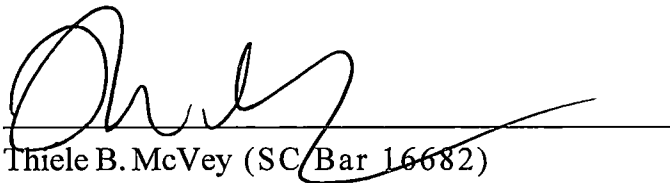
James Coleman Sizemore, as Personal Representative of the Estate of
James Calvin Sizemore, Decedent, Respondent,
v.

Bowater Paper Mill; E.I. DuPont De Nemours and Company; Foster
Wheeler Energy Corporation; Daniel International Corporation;
Resolute FP US, Inc.; CBS Corporation; Cleaver Brooks, Inc.;
Covil Corporation; Fluor Constructors International; Fluor Constructors
International, Inc.; Fluor Daniels Services Corporation;
Fluor Enterprises, Inc.; General Electric Company; Genuine Parts Company;
Georgia- Pacific Consumer Products LP; Honeywell International, Inc.;
SCANA Corporation; Riley Power, Inc.; and Waste Management of
South Carolina, Inc.,Defendants,

Of which, Resolute FP US, Inc. is.....Appellant.

PROOF OF SERVICE

The undersigned, an attorney in this matter of the Appellant Resolute FP US,
Inc., certifies that I have this **17th day of April, 2018**, served copies of the **Notice of
Motion and Motion to Dismiss Appeal** upon all other counsel of record (listed below).



Thiele B. McVey (SC Bar 16682)

John D. Kassel KasselMcVey (CS Bar 3286)

1330 Laurel Street

P.O. Box 1476

Columbia, SC 29202-1476

803-256-4242

803-256-1952 (Facsimile)

Attorney for Respondent

April 17, 2018

Counsel of Record:

R. Hawthorne Barrett
Thomas M. Kennaday
Sam V. Priddy
Turner Padgett Graham & Laney, P.A.
P.O. Box 1473
Columbia, SC 29202
(803) 254-2200

Attorneys for Appellant Resolute FP US, Inc.

William Early, Esquire
Pierce, Hems, Sloan & McLeod, LLC
PO Box 22437
Charleston, South Carolina 29413

Attorneys for CNA Holdings and Hoechst
Celanese

Robert O. Meriwether, Esquire
James B. Glenn, Esquire
Robert C. Wood, Jr., Esquire
David G. Traylor, Jr.
Nelson Mullins Riley & Scarborough, LLP
PO Box 11070
Columbia, South Carolina 29211

Attorneys for USF&G

Jennifer M. Techman, Esquire
Andrew S. Rogers, Esquire
Evert Weathersby Houff
3455 Peachtree Road NE, Suite 1550
Atlanta, Georgia 30326

Attorneys for Foster Wheeler Energy Corp.

Steven J. Pugh, Esquire
Joseph E. Thoensen, Esquire
Richardson Plowden & Robinson, P.A.
1900 Barnwell St.
Columbia, South Carolina 29201

Attorneys for Cleaver Books

Moffat McDonald, Esquire
W. David Conner, Esquire
Scott Edward Frick, Esquire
Haynsworth Sinkler Boyd, PA
ONE North Main Street, 2nd Floor
P.O. Box 2048
Greenville, South Carolina 29602-2048

Attorneys for Daniel International, et al.

Breon C. M. Walker, Esquire
Gallivan White & Boyd
P.O. Box 7368
Columbia, South Carolina 29202

Attorney for SCANA Corporation

William Coates, Esquire
Roe Cassidy Coates & Price, P.A.
P.O. Box 10529
Greenville, South Carolina 29603

Attorney for Genuine Parts Company

Daniel B. White, Esquire
Ronald G. Tate, Jr., Esquire
T. David Rheney
Gallivan White & Boyd, PA
Post Office Box 10589
Greenville, South Carolina 29603

Attorneys for Covil Corporation

Dell P. Chappell
Nelson Mullins Riley & Scarborough, LLP
PO Box 11070
Columbia, South Carolina 29211

Attorney for EU DuPont De Nemours & Co.