

86483

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APR 17 2018

SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean Hoefler Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as Circuit Court Judge

Case No. 2015-CP-46-2155

**ROXANNE FALLS, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF CHARLOTTE GAYE SMITH,..... PLAINTIFF/RESPONDENTS,**

v.

**CBS CORPORATION; CAN HOLDINGS;
CELANEASE CORPORATION; CLEAVER BROOKS, INC;
COVIL CORPORATOIN; DANIEL INERNATIONAL; FLUOR
DANIEL, INC.; FLUOR DEANIEL SERVICES CORPORATION;
FOSTER WHEELER ENERGY CORPORATOIN; GENERAL
ELECTRIC COMPANY; MP SUPPLY, INC.; RESOLUTE FP US, INC.;
UNION CARBIDE CORPORATOIN; UNITED STATES FIDELITY
AND GUARANTY COMPANY; UNIROYAL, INC.; AND,
UNITED CONVEYOR CORPORATION DEFENDANTS,**

OF WHOM

BOWATER PAPER MILL k/n/a 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 Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith, 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 there is no final and appealable order from the Court of Common Pleas. Bowater improperly seeks to appeal from the Orders of Judge Jean H. Toal denying its motion for summary judgment, motion for a stay of proceedings pending the resolution of an appeal filed by co-defendant Covil Corporation, and an unidentified motion related to alleged deficiencies of Falls’s pleadings.¹ Under the well-settled law of this state, Judge Toal’s rulings denying Bowater’s motion for summary judgment and motion to stay are not immediately appealable. In addition, any ruling regarding Falls’s pleadings would presumably be from a motion to dismiss, which is also not immediately appealable. As such, this appeal is premature and should be dismissed.

BACKGROUND AND PROCEDURAL POSTURE

Decedent Charlotte Gaye Smith was diagnosed with mesothelioma, a fatal cancer caused by exposure to asbestos, on May 7, 2015. Smith was exposed to asbestos during her marriage to her first husband who worked as an insulator during their marriage from 1967 to 1991. The dust from the asbestos-containing products that her husband used or was exposed to at work remained on his clothing until Smith laundered his contaminated work clothing. Smith died from mesothelioma on November 25, 2015. Her family brought negligence claims against Bowater, among others, for exposing Smith to asbestos through the use of asbestos at the Bowater Paper Mill in Catawba, South Carolina. The case was assigned to the Honorable Judge Jean H. Toal and was assigned a trial date of March 12, 2018, behind another asbestos case.

Prior to the scheduled trial date, Judge Toal held a hearing on Bowater’s “Motion for Summary Judgment and Dismissal.” Bowater argued that the case should be dismissed pursuant

¹ Appellant has made no effort to identify which rulings pertaining to Respondent’s pleadings are the potential subject of its appeal.

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 orders denying summary judgment are not immediately appealable. *Ballenger v. Bowen*, 313 S.C. 476, 476, 443 S.E.2d 379, 380 (1994). As the Supreme Court of South Carolina recognized in *Ballenger*, “[a] denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial.” *Id.* at 477, 443 S.E.2d at 380. Further, the denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings

by a motion to reconsider the summary judgment motion or by a motion for a directed verdict.”

Id.

In the present case, Judge Toal’s order denying Bowater’s motion for summary judgment does not constitute a “final” ruling that is immediately appealable, and Bowater’s Notice of Appeal fails to cite any authority that would support immediate review by this Court. Consequently, this Court should dismiss Appellant’s Notice of 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 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

to Rule 56, SCRCF, because it, as a premises owner, owed no duty of care to Smith. Judge Toal disagreed and denied the motion. She found that, in accordance with the holding of the Supreme Court of South Carolina in *Hardee v. Bio-Medical Applications of South Carolina, Inc.*, 636 S.E.2d 629 (2006), if Bowater knew that asbestos could cause lung diseases and that it could be carried home on the clothes and impact third parties, particularly those in regularly contact with employees, then Smith's injury from the inhalation of asbestos-containing dust was foreseeable and Bowater had a duty of care to reasonably foreseeable third parties such as Smith.

Bowater also filed a motion seeking to stay the trial 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 Smith 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 for summary judgment and motion to stay the trial of this matter are not immediately appealable orders. Appeals from the Circuit Court are governed by Rule 201, SCACR, which is clear that "[a]ppel[s] may be taken . . . from any final judgment, appealable order or decision."

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 Bowater’s instant 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 Bowateer’s motion to stay trial. This ruling 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 *Edwards* is inapposite to this matter. Further, the 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 Smith’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 her 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.

IV. Bowater's Notice of Appeal as to unidentified alleged deficiencies with Falls's pleadings is insufficient.

In its Notice of Appeal, Bowater states that it intends to raise appealable issues "based on deficiencies in the Respondent's pleadings." Notice, at 2. The Notice of Appeal does not, however, identify what motion or ruling about the pleadings is at issue. Bowater has therefore failed to comply with Rule 203, SCACR, which governs the filing, form, and content of the Notice of Appeal. Bowater has failed to identify the judgment and/or the date of the order from the trial court regarding the alleged deficiencies in Falls's pleadings. Bowater briefly discusses the orders announced by the Circuit Court on March 9, 2018, that it intends to challenge, but then notes that it will also challenge additional orders. Bowater disregards Rule 203 and makes no effort to properly and sufficiently identify those orders it wants to appeal.

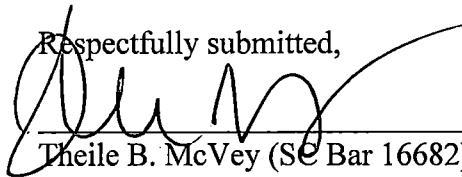
Although it is unclear what rulings Bowater is even trying to appeal, to the extent that it seeks to challenge trial court orders denying motions to dismiss Falls's complaint for an alleged failure to state a claim, the denial of such motions are not immediately appealable. *Woodward v. Westvaco Corp.*, 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)).

For these reasons, this Court should dismiss Bowater's Notice of Appeal as to the unidentified rulings regarding Falls's pleadings.

CONCLUSION

Falls respectfully requests that this Court dismiss Bowater's appeal as Judge Toal's orders denying its motions for summary judgment and to stay the trial of this matter pending resolution of a co-defendant's appeal are not immediately appealable. Additionally, the appeal of unidentified rulings should be dismissed both because Bowater has failed to comply with Rule 203 governing the content and form of the Notice of Appeal, and because any potential ruling about the pleadings would not be immediately appealable anyway.

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 RESPONDENTS

April 17, 2018

Other Counsel of Record:

R. Hawthorne Barrett

Thomas M. Kennaday

Sam V. Priddy

Turner Padget 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

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

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

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.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean Hoefler Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as Circuit Court Judge

Case No. 2015-CP-46-2155

**ROXANNE FALLS, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF CHARLOTTE GAYE SMITH,..... PLAINTIFF/RESPONDENTS,**

v.

**CBS CORPORATION; CAN HOLDINGS;
CELANEASE CORPORATION; CLEAVER BROOKS, INC;
COVIL CORPORATOIN; DANIEL INERNATIONAL; FLUOR
DANIEL, INC.; FLUOR DEANIEL SERVICES CORPORATION;
FOSTER WHEELER ENERGY CORPORATOIN; GENERAL
ELECTRIC COMPANY; MP SUPPLY, INC.; RESOLUTE FP US, INC.;
UNION CARBIDE CORPORATOIN; UNITED STATES FIDELITY
AND GUARANTY COMPANY; UNIROYAL, INC.; AND,
UNITED CONVEYOR CORPORATION DEFENDANTS,**

OF WHOM

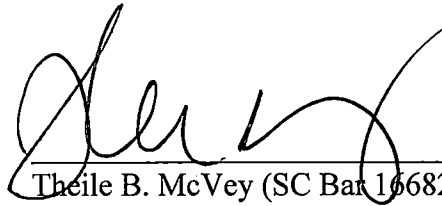
BOWATER PAPER MILL k/n/a RESOLUTE FP US, INC., IS APPELLANT.

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

RECEIVED
APR 17 2018
SC Court of Appeals

below) by causing them to be deposited in the United States mail with sufficient postage attached.



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

Thomas M Kennaday, Esquire
R. Hawthorne Barrett, Esquire
Sam V. Priddy, Esquire
Turner Padgett Graham & Laney
1901 Main Street, Seventeenth Floor
P O Box 1473
Columbia, SC 29201

Attorneys for 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 Rheneay
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.