THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY AND YORK COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Appellate Case No.: 2018-000618

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 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 the ..... Appellant.

AND

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

v.

CBS Corporation; CAN Holdings, Inc.; Celanese Corporation; Cleaver-Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc.; Resolute FP US, Inc.; Union Carbide Corporation; United States Fidelity and Guaranty Company; Uniroyal, Inc.; United Conveyor Corporation, Defendants,

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

RETURN TO MOTIONS TO DISMISS APPEAL

The Appellant Resolute FP US, Inc. ("Resolute") submits this Return in opposition to the Respondents' Motion to Dismiss in these consolidated appeals.

STATEMENT OF THE CASE

The Respondents allege that their decedents contracted indivisible asbestos-related injuries (mesothelioma) for which numerous Defendants - including Resolute and Covil Corporation ("Covil") - are responsible. On February 23, 2018, the circuit court entered an order striking Covil's pleadings for alleged discovery misconduct, essentially placing Covil into default ("the Order"). The Order affected three different cases, including the two consolidated in the present appeal. On March 1, 2018, Covil properly commenced appeals of the Order in those multiple cases. This Court consolidated the appeals under Appellate Case Number 2018-00385, and that appeal is still pending as of the date of this Return.

After Covil commenced its appeal, numerous Defendants, including Resolute, filed motions to enforce the automatic appellate stay under Rule 241, SCACR. 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 a trial on Monday, March 12, 2018. This meant a merits trial in the cases consolidated for this appeal would potentially go forward without the necessary participation of Covil.

One of the cases involved in that hearing did go to trial on that date, but it was not one of the cases involved in the current appeal. The case that went to trial lasted for the majority of the specially scheduled two-week tern of court. Consequently, the circuit court judge could not call any other cases on the roster for trial during that term. The judge has not yet scheduled the trials for the cases involved in this appeal, but it is believed these cases will be at or near the top of the asbestos cases roster when the next term of court is set.

ARGUMENT

I. The order denying the motion to enforce the appellate stay is immediately appealable because it eliminates one of Resolute's defenses.

Contrary to the Respondents' assertions, the challenged order is not an innocuous procedural ruling that simply denies a motion to enforce the appellate stay created by Covil's appeals. Rather, it severely prejudices Resolute's substantive rights by both effectively barring Resolute's ability to present and pursue crucial defenses asserted in its pleadings and eviscerating Resolute's well-established right to benefit from the South Carolina statutory set-off scheme. Accordingly, the circuit court's order prejudicially negates Resolute's substantial rights and is immediately appealable.

Section 14-3-330 of the South Carolina Code governs appealability of orders from the circuit court. In relevant part, that section allows for an immediate appeal of "[a]n order affecting a substantial right made in an action when such order ... strikes out an answer or any part thereof or any pleading in any action." S.C. Code Ann. §14-3-330(2) (emphasis added). *See also 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.") Here, even though the circuit judge's order did not expressly strike any of Resolute's defenses, that is the unavoidable result of any decision allowing trials to proceed against other defendants while the automatic appellate stay shields Covil from having to participate in those proceedings.

These consolidated cases involve 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. South Carolina Code §15-38-15(D) preserves a

defendant's broad right to pursue an "empty chair defense" by seeking to cast blame on a non-party for the plaintiff's alleged harm as long as the non-party can be characterized as a "potential tortfeasor." Section 15-38-15(C)(3) further provides for the allocation of fault by way of a special verdict 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 if Covil were present and participating at trial, it would qualify as a "defendant" that is subject to an allocation of fault for the Respondents' alleged damages. 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. This is established law, which the Respondents have not even attempted to dispute in their dismissal motions.

However, Covil's absence from trial based on its pending appeal would prevent its inclusion on a §15-38-15(C)(3) special verdict form.[1] As a result, Resolute would lose its statutory right to have fault allocated to a "defendant" that the Respondents named in their own Complaints or to obtain a set-off if Covil settles the cases against it prior to verdict.[2] While Covil would still be a defendant, it would not have any participatory role in the trials against

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[1] Resolute does not concede this point and reserves the right to argue otherwise in the circuit court if necessary. However, Resolute does acknowledge that the Supreme Court's recent opinions in *Smith* and *Machin* arguably appear to point towards that conclusion.

[2] This is an important point, since the Supreme Court cited a plaintiff's right to choose which defendants to sue, or not to sue, as support for its conclusion that non-parties cannot be included on a special verdict form for purposes of allocating fault. Here, though, the Respondents did choose to sue Covil, which means that basic reasoning does not apply.

Resolute, and Resolute would not be able to seek a jury's full and fair apportionment of fault among all defendants, including Covil. Thus, the complete benefit of this statutory defense of apportionment would be taken away, and Resolute would be left with a toothless remedy that would only be partial, at best.

Granted, Resolute might technically be able to appeal the circuit judge's refusal to enforce the stay after the trials, but by that point, it would be too late for this Court to grant Resolute full relief or prevent serious harm to its interests. Assuming *arguendo* that the trials went forward without Covil and resulted in verdicts against the remaining defendants, the resulting apportionment of fault among those defendants would not involve Covil. This means the jury would have to apportion larger amounts of fault to the remaining defendants. Covil's absence from the apportionment form would make that result practically inevitable because there would still be 100% of fault to allocate, but one less defendant in the pool. Resolute, like the other remaining defendants, would therefore wind up with a higher percentage of fault than it would have received if Covil had been involved. This would, of course, directly impact the amount of the verdict the Respondents could seek to recover from Resolute.

Again, one might argue that the "extra" percentages of fault assigned to defendants like Resolute could be set aside in an appeal after the trials. Although that might be true, by that point the damage would already be done. An appeal does not automatically prevent a plaintiff from seeking to collect a money judgment. As a result, Resolute could face enforcement proceedings for judgments against it that would be artificially inflated due to Covil's absence from the trials. Resolute's only option to prevent such enforcement actions would be to obtain a stay of execution of the judgment under Rule 62, SCRCP. But that "relief" would require Resolute to obtain and post an appellate bond, and the amount of that bond would be based on

the improperly inflated percentage of responsibility for the verdict. Thus, Resolute would still be forced to pay out a larger share of the judgment than it should have faced, just for the opportunity to seek reversal of the order that led to that larger share's existence in the first place. The only way to prevent that unfair result is to recognize that the order effectively bars one of Resolute's defenses so that the ruling is immediately appealable. Any other outcome would result in irreparable harm.

Although Resolute has not found any cases directly on point, South Carolina's appellate courts have repeatedly found immediate appeals to be warranted in analogous cases where an appeal after a final judgment would not afford any meaningful relief. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) (an order disqualifying a party's attorney in a civil case is immediately appealable because "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the afflicted party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification."); *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004) (denial of a motion to proceed anonymously was immediately appealable because a post-judgment appeal would not adequately protect the party's claimed need for privacy); *Lakes v. State*, 333 S.C. 382, 510 S.E.2d 228 (Ct. App. 1998) (denial of a motion to proceed in forma pauperis was immediately appeal because otherwise the plaintiff could not pursue the case at all); *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993) (denial of a motion to dismiss for lack of subject matter jurisdiction was immediately appealable because this threshold issue had to be determined in order for the lower court to hear the case); *Knight Pub. Co. v. University of S.C.*, 295 S.C. 31, 367 S.E.2d 20 (1988) (order allowing discovery of materials claimed to be confidential was immediately appealable because

it in effect determined the action and prevented any meaningful appellate review); *rev'd on other grounds*, *Simpson v. Sanders*, 314 S.C. 413, 445 S.E.2d 93 (1994); *Rutledge v. Tunno*, 63 S.C. 205, 41 S.E. 308 (1902) (denial of a motion to intervene is immediately appealable because the purported intervenor would have no other way to obtain appellate review). The same reasoning applies to the present appeal, and the Court should reach the same ultimate conclusion.

It is no answer to argue, as the Respondents do, that this situation is akin to one in which a defendant settles out of a case prior to trial leaving other defendants still involved. The General Assembly crafted a remedy specifically designed for those situations when it gave non-settling defendants the right to set off all settlement amounts paid by other parties. *See* S.C. Code Ann. §15-38-50. This statutory right protects against some of the harms that arise when the allocation of fault does not include all of the original defendants. Although, as discussed above, such an allocation would lead to artificially inflated percentages for the remaining defendants, the right to a setoff would reduce the amount of the verdict. This would tend to negate, or at least significantly limit, the harm caused by "incomplete" allocation of fault.

Here, though, that protection does not exist because Covil did not settle out of the case. Indeed, Covil did not "get out" of the case in any way. Covil remains a defendant, and the Respondents are still pursuing claims against that company. Covil has not paid any settlement to lessen the impact of its lack of participation in the trials, and it is merely a dormant party due to its appeal. As a result, Resolute is forced to endure the harms caused by partial and inadequate apportionments of fault, but it does not get the benefit of any setoff from Covil's absence from trial. Clearly, then, this situation is <u>not</u> analogous to one involving a settling co-defendant, and the Respondents' arguments to that effect are erroneous.

It is also insufficient to argue that Resolute would still have an empty chair defense if the cases are tried without Covil's involvement. While it is true Resolute would have the right to present an empty chair defense, that does not mean Resolute would receive an even trade for the loss of its statutory right to a full and meaningful apportionment of fault. An empty chair defense is necessarily an "all or nothing" argument. Since the absent party cannot be included for purposes of fault apportionment, the defendant can only argue that the missing party was solely responsible for the plaintiff's damages. This can be a powerful argument in some cases, and totally shifting blame to another party would obviously be the preferable outcome for any defendant. Yet, the empty chair argument does not allow for the second line of defense, which is to assert that even if fault is somehow shared, the other party should receive a higher percentage of it. That fallback position does exist through the apportionment statute.[3] Indeed, by enacting that statute, the General Assembly has recognized the importance of making that additional defense available.

In addition to causing immediate and unjust harm to Resolute, dismissing the current appeal and allowing the trials to proceed under these circumstances would wind up benefiting Covil. While its own appeal continued – and protected it from any further proceedings in the lower court – Covil could sit back and watch the trials against the remaining defendants such as Resolute. If the Respondents were successful in those trials, they might consider themselves to be made whole and drop their actions against Covil. Even if that did not happen, Covil could claim the amounts of the judgments paid by Resolute and the other defendants as setoffs, thereby

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[3] For example, consider the two very different possible scenarios in the present cases. If Covil is absent from the trials, Resolute can only argue that Covil is the sole liable party. But if Covil is an active trial defendant, Resolute can make that argument and present an alternative theory that even if Resolute has some fault, it is much lower than Covil's. As would any defendant, Resolute would rather have both options available, and under the applicable law, it should.

reducing its own potential liability. In other words, by being able to lie in the weeds during the trials against the other defendants, Covil could receive an unfair advantage over those other defendants in terms of its eventual exposure and its responsibility for paying a judgment. This would give Covil an unjust win-fall over the defendants that played by the discovery rules and took their turn in the trial barrel. This state's courts should not countenance such a result.

Indeed, this scenario would be particularly galling in light of the reason for Covil's absence from the trials. The order at issue in Covil's appeal struck its Answers and defenses as a sanction for purported misconduct and/or failure to cooperate during discovery. To be clear, Resolute takes no position on whether any such misconduct occurred or whether the sanction was justified. Those disputes are between Covil and the Respondents. But if there was misconduct by Covil, that company should not reap any benefits from the order imposing sanctions for it. Yet, as discussed above, that will be the outcome if the Court dismisses the current appeal.

The Respondents cite as support for their motions a case in which the Supreme Court found that an order granting a motion for a stay was not immediately appealable. *Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529 (2006). That case is distinguishable, however, because it dealt with an order granting a stay, which did not have any harmful effects on the opposing party other than delaying a trial so that a federal administrative agency could first issue a ruling. Indeed, a review of the Court's brief opinion reveals no discussion whatsoever of any effects the order had other than the stay itself. There is no indication that the appealing party even argued that such other effects existed.

As the previous discussion demonstrates, the challenged order has effects that go far beyond merely refusing to acknowledge and follow the automatic appellate stay. Most

significantly, those effects include stripping a vital defense from Resolute through no fault of its own. Nothing akin to that scenario was involved in *Edwards*, and, therefore, that case is readily distinguishable.

By relying on *Edwards*, the Respondents place too much emphasis on what the challenged order purports to be and ignore what it actually is. It is not the name or the type of an order that matters for purposes of appealability, but rather the order's overall impact. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). In *Morrow*, the Supreme Court concluded an order was immediately appealable, regardless of what it was called, because it implicated the appellant's substantial rights. As the Court stated, "Our review of the trial court order is not constrained by how the order is styled." *Id.* at 539, 773 S.E.2d at 147 (emphasis added). The Court further cited *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 479 (Ct. App. 2011), for the proposition that "an appellate court should look to the effect of an interlocutory order to determine its appealability." *Id.* at 540, 773 S.E.2d at 147 (emphasis added).

Morrow did not involve an order granting or denying a stay, but its reasoning applies by analogy to the present case. As discussed above, the effect of the circuit judge's order makes it immediately appealable under the statute, no matter what the order is called. Even if orders regarding stays are not immediately appealable as a general principle, an order like the one in this case is still immediately appealable because it impacts a substantial right. *Morrow* stands for that proposition, and the Court should follow that precedent here.

Finally, concluding that the challenged order is immediately appealable is not only the correct legal result, but it also promotes judicial economy and lessens the risk of inconsistent results. If the current situation stands, the circuit court will likely have to conduct duplicative

trials of the same cases (i.e. once against the other defendants and then later against Covil). This would result in the same two cases taking up a disproportionate amount of the circuit court's scarce time for asbestos trials, and it might also lead to inconsistent verdicts. Recognizing that this appeal can and should proceed, on the other hand, minimizes those potential problems. It makes it much more likely that the cases will only have to be tried once and that the trials will involve a full and proper apportionment of fault among all defendants, assuming there is a finding of liability. Resolute respectfully submits that this is the only conclusion that is just and sensible under these facts.

II. The Court should also review the other challenged orders.

Resolute's Notices of Appeal in these cases also reference other orders, including but not limited to the denial of Resolute's motions for summary judgment. In their dismissal motions, the Respondents rely solely on case law stating that such types of orders are not immediately appealable. While the Respondents have accurately cited those cases, they have failed to acknowledge the long-established exception to the general rule. "An order not immediately appealable will nonetheless be considered if there is an appealable issue before the appellate court, and a ruling on appeal will avoid unnecessary litigation." Toal, et al., *Appellate Practice in South Carolina* (2d Ed.) at 88 (citing *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998)); *see also Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct. App. 2001) ("Our appellate courts, however, have recognized an exception to this rule. Specifically, the courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable.") (emphasis added).

Here, the circuit judge's decision not to enforce the appellate stay is immediately appealable for the reasons previously discussed. Furthermore, including those other rulings in this appeal will avoid unnecessary litigation by providing direction to the circuit court and making a later appeal on those issues unnecessary. Therefore, the entire appeal should remain in this Court, and all of the rulings referenced in Resolute's Notices of Appeal should be reviewed.

III. Resolute's appeal is not moot.

The Respondents suggest that the current appeal is moot now that the cases against Resolute were not called to trial during the March 2018 term of court. According to the Respondents, enforcement of the appellate stay is unnecessary because the next term of asbestos court has not been set, and Covil's appeal will likely be concluded before that happens. With all due respect, the Respondent's prediction appears to be overly optimistic.

Based on information from this Court's online case management system, it appears Covil's appeal has not even reached the briefing stage, as the necessary lower court transcripts are still being produced. Even if both sides seek no extensions and brief the case in the timeline contemplated by the Appellate Court Rules, it will still likely be late August, at the earliest, before the parties file their final briefs and the Record on Appeal. If so, a final decision by this Court probably will not come until late in 2018 or even early 2019. Of course, the losing party will then have the option of seeking review by the Supreme Court, a process that can easily take another six-to-nine months. Thus, it is possible, if not probable, that Covil's appeal will remain pending well into next year.

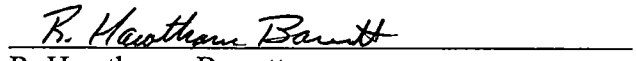
Based on that timeline, the Respondents' suggestion that Covil's appeal will conclude before the next term in the circuit court for asbestos trials is dubious. The Respondents have failed to demonstrate with certainty that the circuit court will schedule no further terms for

asbestos trials until late in the first quarter of 2019, which is the only circumstance that would make this appeal unnecessary. They have also not offered to honor the appellate stay if the next term of court occurs before then. Consequently, the Respondents cannot credibly argue that the current appeal is moot, and the Court should reject that assertion.

CONCLUSION

Based on these authorities and arguments, the Court should deny the Respondents' Motions to Dismiss.

Respectfully submitted,



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May 4, 2018

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In the Court of Appeals

APPEAL FROM HAMPTON COUNTY AND YORK COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

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

PROOF OF SERVICE

The undersigned, an attorney in this matter of the Appellant Resolute FP US, Inc., certifies that I have this **4th day of May, 2018**, served copies of the **Return to Motions to Dismiss Appeal** upon all other counsel of record (listed below) by causing them to be deposited in the United States mail with sufficient postage attached.

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May 4, 2018

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May 4, 2018

Via Hand Delivery

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

Re: James Coleman Sizemore, et al. v. Bowater Paper Mill, et al.
Roxanne Falls, et al. v. CBS Corp., et al.
Consolidated Appellate Case No. 2018-000618
Our File No. 13790.00101

Dear Ms. Kitchings:

Enclosed are the following materials: (1) the originals and seven copies of the Return to Motions to Dismiss Appeal, and (2) the original and one copy of the Proof of Service. Please file the originals and necessary copies and return the extra stamped copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.

R. Hawthorne Barrett

RHB
Enclosures

cc: All Record Counsel