

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HAMPTON COUNTY AND YORK COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as 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; CNA 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.

REPLY IN SUPPORT OF MOTIONS TO DISMISS APPEAL

Respondents James Coleman Sizemore, as Personal Representative of the Estate of James Calvin Sizemore, Decedent, and Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith, submit this Reply in support of their respective motions to dismiss this consolidated appeal of Appellant Resolute FP US, Inc. f/k/a Bowater Incorporated (“Resolute/Bowater”).

ARGUMENT

I. The trial court orders are not immediately appealable.

The law is well-established that a trial court order on a motion to stay is not immediately appealable, regardless of whether the motion is granted or denied. *See Carolina Water Serv., Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm’n*, 373 S.C. 96, 97-98, 644 S.E.2d 681, 682 (2007) (order lifting stay); *Williamsburg Rural Water & Sewer Co. v. Williamsburg Cty. Water & Sewer Auth.*, No. 2007-MO-071, 2007 WL 8434643, at *2 (S.C. Dec. 17, 2007) (order denying motion to stay); *Edwards v. SunCom*, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006) (order granting motion to stay); *Serv. Corp. of S.C. v. Bahama Sands Dev., LLC*, No. 2011-UP-300, 2011 WL 11734673, at *2 (S.C. App. June 14, 2011) (order denying motion to stay).

In its Return, Resolute/Bowater attempts to carve out an exception to this clear rule by contending that a substantive right is at stake. It argues that it has a “statutory right to have fault allocated” to other defendants in the case, including Covil, and that Judge Toal’s decision not to stay trial proceedings during the pendency of Covil’s appeal infringes on that right.

The premise of Resolute/Bowater’s argument is flawed. It does not have the right to have any particular defendant in the case or the right to allocate fault to other joint tortfeasors. This was established in two recent opinions of the Supreme Court that analyzed the rights and remedies afforded by the South Carolina Contribution Among Joint Tortfeasors Act (“the Act”), codified at

S.C. Code § 15-38-15. See *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017); *Smith v. Tiffany*, 419 S.C. 548, 799, S.E.2d 479 (2017).

In *Smith*, the Court reaffirmed the longstanding principle that joint tortfeasors are not necessary parties under Rule 19, SCRCP. 419 S.C. at 562. A defendant generally has no right to bring other joint tortfeasors into the lawsuit. This is based on the “plaintiff chooses” rule. *Id.* That rule provides that “one who is injured by the wrongful act of two or more joint tortfeasors has an election or option to sue each of such tortfeasors separately or to join them as parties in a single action.” *Id.* (quoting *Simon v. Strock*, 209 S.C. 134, 138, 39 S.E.2d 209, 211 (1946)). The choice of whom to sue is given to the plaintiff, not the defendant. *Id.* That has been the law in South Carolina for almost two hundred years and was not changed by the Act. *Id.* at 563-64. The Supreme Court concluded “that absent explicit and unmistakable legislative intent to abrogate this well-established right, a joint tortfeasor remains merely a permissive party and joinder under Rule 19 is not required for complete relief to be accorded.” *Id.* at 564-65.

Further, a tort defendant has no right to have fault allocated to another alleged joint tortfeasor under the Act. *Id.* at 556-58. While one purpose of the Act was to protect nonsettling defendants and fairly apportion damages among joint tortfeasors, that was not the only underlying policy goal. *Id.* at 556. Rather, “the legislature was attempting to strike a fair balance for all involved—plaintiffs and defendants—and to do so in a way that promotes and fosters settlements.” *Id.* at 557. To this end, section 15-38-15(C) only allows named “defendants” to be listed on the verdict form for the allocation of fault. *Id.* at 559-60; *Machin*, 419 S.C. at 545.

At the same time, in section 15-38-15(D), the legislature preserved defendants’ rights to argue the empty chair defense as to all “potential tortfeasors.” *Smith*, 419 S.C. at 557. The Court explained that “the General Assembly took steps to protect nonsettling defendants by codifying a

nonsettling defendant's right to argue the so-called empty chair defense in subsection (D) and, in subsection (E), the right to offset the value of any settlement received prior to the verdict" *Id.* Under subsection (D), "[a] defendant **shall retain the right** to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." S.C. Code § 15-38-15(D) (emphasis added).

The Court found codification of the empty chair defense to be "a critical feature of the statute." *Id.* at 557. In so doing, the legislature recognized that there would be situations in which potential tortfeasors were not parties to the suit. *Id.* at 557-58. The empty chair defense is a potentially powerful defense because it can interrupt the plaintiff's burden to prove that the defendant was negligent and that such negligence was a proximate cause of the accident or injury. *Id.* at 557 n.2.

Applying these principles to the case before this Court, it becomes clear that Resolute/Bowater has no substantial rights at stake in the denial of its motion to stay. Plaintiff chose to sue Covil, as was her right, and also chose to move the trial court to strike Covil's pleadings as a discovery sanction, as also was her right. That these choices have resulted in the potential absence of Covil from trial during pendency of Covil's appeal has no legal significance to the remaining nonsettling defendants. If Plaintiff had chosen not to sue Covil at all, this would be the state of affairs.

Further, Resolute/Bowater retains the important right, codified in the Act, to argue to the jury that Covil bears responsibility for Plaintiff's damages. This is the balance of interests established by the General Assembly: while Resolute/Bowater has no right to allocate fault among all potential tortfeasors, only to other defendants, it still retains the right to argue the empty chair

defense. Resolute/Bowater's chief complaint is that this system is unfair. This same lament was rejected by the Supreme Court in *Smith*, which not only found the empty chair defense to be "substantial enough to warrant codification," but also noted that "this is the approach sanctioned by the General Assembly in the Act." 419 S.C. at 557 n.2.

In its Return, Resolute/Bowater essentially concedes that the other trial court orders it has appealed are not immediately appealable orders. Return at p. 11. While it urges this Court to accept its appeal of those other orders as companion issues to its appeal of the stay order, it has failed to demonstrate that the stay order is, itself, immediately appealable. Resolute/Bowater has also made no attempt to show how the denial of a summary judgment motion, or other unspecified orders, are in any way related to the issue of whether trial should be stayed. This Court should not accept the appeal of any orders in this case.

II. This appeal is moot.

Resolute/Bowater contends that its appeal is not moot because it is unclear how much time it will take the Court to decide Covil's appeal. It ignores, however, that there is *no trial date pending* in this case. It has appealed the denial of a motion to stay trial when there is no upcoming trial on a date certain. Plaintiff does not expect that trial will be re-set any time during this calendar year, as the trial court's docket is already full for the year.

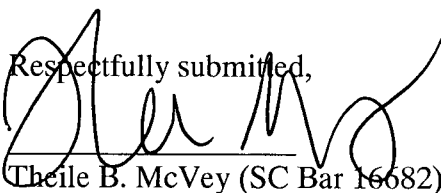
"The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation." *Sloan v. Greenville Cty.*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). An appeal is moot when intervening events render a case nonjusticiable. *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). This is "when judgment, if rendered, will have no practical legal effect upon [the] existing controversy" and it is "impossible for [the] reviewing Court to grant

effectual relief.” *Id.* (quoting *Mathis v. South Carolina State Highway Dept.*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

Here, after Resolute/Bowater’s motion to stay trial was denied, an intervening event occurred: the trial date was cancelled. There is thus no effective relief to be offered by this Court. Resolute/Bowater is appealing a stay order pertaining to a trial that is no longer set. If the Court were to accept the appeal, it would be deciding an issue that is purely academic at this point – whether a trial at some unknown point in the future should be stayed if Covil still has an appeal pending. The Court should therefore find Resolute/Bowater’s appeal of the stay order to be moot.

CONCLUSION

Respondents respectfully request that this Court dismiss Resolute/Bowater’s consolidated appeal of Judge Toal’s orders denying a stay of trial, denying summary judgment, and denying other unspecified relief, as these are not immediately appealable orders, and the stay issue presented by Resolute/Bowater is moot.

Respectfully submitted,


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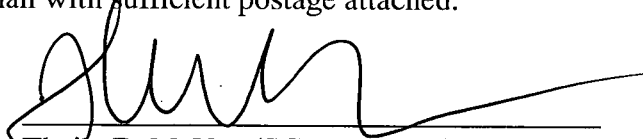
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PROOF OF SERVICE

The undersigned, an attorney in this matter of the Appellant Resolute FP US, Inc., certifies that I have this **9TH day of May, 2018**, served copies of the **REPLY IN SUPPORT OF 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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