

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY AND YORK COUNTY  
Court of Common Pleas

Jean Hoefler Toal, Circuit Court Judge

Appellate Case No.: 2018-000618

**RECEIVED**

MAR 04 2019

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 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.

\_\_\_\_\_  
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## ARGUMENT

### **I. This case presents a scenario that does not fall within the scope of the Supreme Court's decisions in *Machin* and *Smith*.**

Resolute's first two issues on appeal address the trial judge's error in refusing to acknowledge and abide by the stay that Covil's appeal created, and the appealability of that erroneous decision. Those issues are intertwined because they both relate to Resolute's loss of a serious and substantial right – i.e. the right to full apportionments of fault among all defendants in the cases. The trial judge should have enforced the stay in order to prevent the loss of that right, and the failure to do so is immediately appealable under S.C. Code §14-3-330(2)(c). The close connection between the two issues is, thus, readily apparent. For that reason, and to avoid unnecessary repetition, Resolute will present its reply arguments for both issues under this single heading.

In arguing against the application of the appellate stay, the Respondents rely heavily on two recent decisions by the South Carolina Supreme Court: *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017), and *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017). Those cases are not controlling, however, because they do not address the precise situation that exists in the present case. Although *Machin* and *Smith* provide guidance for other issues relating to apportionment of fault among multiple defendants, they do not answer the specific question presented here. This is a critical distinction that the Respondents' Brief fails to acknowledge or address.

In *Machin*, the Supreme Court held, *inter alia*, that when a defendant in a civil action argues the plaintiff's employer caused the claimed damages, the defendant is not entitled to have the employer included on the verdict form for purposes of fault allocation. The primary basis for the Court's conclusion was the fact that the applicable

statute refers to fault being allocated among “defendants,” and employers cannot be “defendants” in that context due to the exclusivity provision of the Worker’s Compensation Act. 419 S.C. at 545-46, 799 S.E.2d at 477-78.

The issue in *Smith* was whether a defendant was entitled to have a non-party, who had settled with the plaintiff prior to the lawsuit being filed, included on the verdict form for purposes of allocating fault. Relying on the perceived policy goals of the South Carolina Contribution Among Joint Tortfeasors Act (S.C. Code §15-38-15, *et seq.*), the Supreme Court held the defendant was not entitled to have a non-party included in the verdict form. As the Respondents note in their brief, one of the policy goals that the Court acknowledged in *Smith* was a plaintiff’s right to decide whom to include and/or exclude as defendants in a lawsuit.

*Machin* and *Smith* are recent decisions, and Resolute does not argue that this Court should not follow them in cases where they are controlling. But the present appeal does not involve one of those cases. Unlike *Machin*, these cases do not involve a request to include a party that is not a defendant – and could not be a defendant – in the allocation of fault. Unlike *Smith*, these cases do not involve an attempt to include a person or entity that settled prior to the lawsuit (i.e. a non-party) in the fault allocation. Rather, this appeal presents a scenario that neither *Machin* nor *Smith* covered.

The Respondents named Covil as a defendant and is actively pursuing claims against Covil in these cases. Covil did not pay any settlement to the Respondents, and its temporary “absence” from the cases stems solely from a valid appeal of a sanctions order that struck its pleadings. But for that sanctions order, the trials of these cases would have proceeded as scheduled, with Covil fully participating. The Respondents cannot deny

that if that alternative scenario had played out, Covil would have been included in the jury's fault allocation. This is because Covil remains in the case and is neither a non-party nor a settling defendant.

This is a key reason why the present case is distinguishable from *Machin* and *Smith*. In those cases, the appealing defendants were attempting to add non-parties to the case solely for purposes of fault allocation. In ruling against those defendants, the Supreme Court essentially determined that the governing statute did not provide any right or mechanism for adding non-parties to achieve a full determination of fault. More precisely, the Court concluded the General Assembly, by enacting the statute as written, did not intend for non-parties to be included.

Here, however, there is no need to include non-parties in the fault allocation, and Resolute has not made any such request. Covil is a party. It was included as a defendant in the Respondents' Complaints, and it continues to be a defendant. The fact that Covil has exercised its right to challenge appealable interlocutory orders does not mean that Covil has suddenly ceased to be a defendant in these cases. The appealed orders did not dismiss Covil or grant judgment in its favor. To the contrary, the orders had the practical effect of placing Covil in default. Thus, regardless of how this Court rules on Covil's appeal, Covil will still be a defendant in these cases. Either Covil will regain its ability to challenge liability at trial through its appeal, or it will not. But in either scenario, Covil will be an active defendant at trial when that appeal concludes.

Covil's continuing status as a defendant is crucial to this issue because it demonstrates why *Machin* and *Smith* do not support the Respondents' arguments. In fact, when one considers the Supreme Court's underlying rationale, those cases actually

support Resolute's position. In both *Machin* and *Smith*, the Court relied heavily on the legislature's use of the word "defendant" in the governing statute. *See, e.g., Machin*, 419 S.C. at 535-36, 799 S.E.2d at 472. That statute states, in relevant part:

The jury, or the court if there is no jury, shall:

(1) specify the amount of damages;

(2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning "comparative negligence"; and

(3) upon a motion by at least one defendant, where there is a verdict under items (1) and (2) above for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict under the procedures described at subitem (b) below the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct, as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property. In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item (2) above, will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent. ...

S.C. Code Ann. §15-38-15(C) (Supp. 2015) (emphasis added). The Court concluded that the multiple uses of the word "defendant" in the statute revealed a legislative intent not to include non-parties in the fault allocation process.<sup>1</sup>

As discussed above, Covil remains a "defendant" in these cases. Covil has neither settled nor been dismissed as a party. Covil has appealed a sanctions order, but that does not change its status as a defendant. Thus, Resolute is entitled under §15-38-

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<sup>1</sup> To support this position, the Court contrasted §15-38-15 with a similar Georgia statute that uses the broader phrase "all persons or entities" rather than the more limited term "defendants." 419 S.C. at 546-47, 799 S.E.2d at 477-78.

15(C) to have Covil included in the allocation of fault – something that cannot happen if the trials proceed during Covil’s appeal. *Machin* and *Smith* do not mandate any conclusion to the contrary. If anything, those decisions support Resolute’s argument that the trial judge’s attempt to force trials without Covil’s participation deprived Resolute of a crucial, substantial right. Accordingly, the trial judge’s decision in that regard is both erroneous and immediately appealable.

The Respondents make much of their right, as the plaintiffs, to choose which defendants to sue. According to the Respondents, this right trumps Resolute’s statutory right to a full and fair fault allocation, and they again cite the two recent decisions, particularly *Smith*, as support. South Carolina’s courts certainly recognize a plaintiff’s ability to select which defendants to sue, as *Smith* notes. That right does not avail the Respondents here, however, because their argument has a fatal flaw that they fail to address: They **did** choose which defendants to sue, and Covil was one of them.<sup>2</sup> Covil’s appeal does not change that fact. As previously discussed, Covil is not a non-party (or even a former party) that Resolute is attempting to bring into the cases for fault allocation. Covil is a defendant, chosen by the Respondents, that has neither settled out nor been dismissed. The Respondents had the right not to include Covil as a defendant, and if they had not, the grounds for the current appeal might not exist. But the Respondents did elect to include Covil. That decision made Covil a defendant, which it remains, and it triggered Resolute’s substantial, statutory right to include Covil in the allocation of fault.

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<sup>2</sup> The Respondents suggest that trials without Covil would be no different than if they had not sued Covil in the first place. They did sue Covil, however, which makes that assertion irrelevant.

In addition to being the correct legal decision, enforcing the stay created by Covil's appeal would also promote judicial efficiency. As argued in the primary Appellant's Brief, the result of Covil's appeal will necessarily affect the other defendants. If this Court (and/or the Supreme Court) upholds the sanction against Covil, the Respondents will likely proceed to a damages hearing against Covil.<sup>3</sup> That hearing could potentially produce an award that fully compensates the Respondents, making further proceedings unnecessary. If Covil's appeal succeeds, on the other hand, a single trial of each case could take place with a full and proper fault allocation, thereby eliminating the need for multiple trials of the same case. Thus, enforcing the stay is not only the correct legal result, but it also greatly reduces the risk of duplicative and wasteful proceedings in the trial court.

The Respondents do not really appear to dispute that larger point. Instead, they attempt to change the focus by pointing to their interest in getting their cases tried as soon as possible. This desire is no doubt true, and it is understandable. But it does not, in and of itself, mandate any particular result. Surely all plaintiffs (or at least the vast majority of them) want to get their cases resolved quickly and without delays. But if that preference had the force and effect the Respondents suggest, then no interlocutory appeals would ever be allowed. The legislature has chosen to make such appeals proper in certain cases, however, which means that the resulting delay is not a valid ground for

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<sup>3</sup> Here, it should be noted that the Initial Appellant's Brief contained a scrivener's error stating that the "Appellants" could proceed to a damages hearing against Covil. Resolute obviously intended to use the term "Respondents," and this error will be corrected in the Final Appellant's Brief. Clearly, Resolute would have no right or ability to seek damages against Covil in such a hearing. That right would belong solely to the Respondents, a fact that is clear when the sentence containing the scrivener's error is read in the context of the full argument where it appears.

opposing them. Since the present cases involve an order that is immediately appealable for the reasons previously stated, the Respondents' laments about delayed trials are simply not relevant. They are merely an attempt to elicit a decision based on sympathy rather than on the law.

The Respondents refer to Resolute's position on the appellate stay as "gamesmanship." That characterization is inaccurate and unwarranted. Resolute is not pursuing "delay for delay's sake." Resolute is only doing everything it can do (and must do) to protect its significant right under the statute to have an allocation of fault that includes all defendants. Resolute cannot exercise that right until Covil's appeal has ended. This is why the trial judge erred in refusing to abide by the appellate stay, and it is why that erroneous decision is immediately appealable. Without the ability to challenge that erroneous decision now, Resolute's substantial right would be lost.

Therefore, this Court should proceed to address this issue on the merits and then reverse and remand with instructions that the trial judge must stay all further proceedings in these cases until Covil's appeal has reached its final conclusion.

**II. The Court should reverse the denial of Resolute's motion to dismiss in the Sizemore case.**

Resolute anticipated and addressed the Respondents' arguments on this "statutory employee" issue in its primary brief. To avoid unnecessary repetition, Resolute will not re-assert those arguments in response to the Respondents' Brief. Instead, Resolute respectfully directs the Court's attention to the relevant section of its primary brief.

Nevertheless, Resolute does wish to respond to one specific assertion made in the Respondents' Brief. The Respondents claim that "[s]pecialized maintenance of equipment such as boilers are not an 'integral part' of paper manufacturing." [Resp.

Brief, p. 31.] The record is clear – and the Respondents do not seriously dispute – that Resolute cannot manufacture paper without properly operating boilers. Thus, maintaining those boilers in working order is certainly and necessarily an “integral part” of Resolute’s business. The Respondents’ argument to the contrary ignores both the realities of the paper manufacturing industry and the previous South Carolina cases that support Resolute’s position.

For this reason, and based on the grounds and authorities raised in Resolute’s primary brief, the Court should reverse on this issue and remand with instructions to grant Resolute’s motion to dismiss in the Sizemore case based on the “statutory employee” doctrine.

### **III. Resolute did not owe any legal duty to Smith.**

The Respondents’ Brief argues in favor of duties owed by Resolute to Smith’s ex-husband, who worked in a Resolute/Bowater facility, and then asserts those duties also extended to Smith, even though she had no connection Resolute or its facility. As argued in the Appellant’s Brief, the Respondents’ position on this issue, which reflects the trial judge’s ruling, is erroneous.

The Respondents rely heavily on two cases in asserting their position: *Hardee v. Bio-Medical Applications of SC, Inc.*, 370 S.C. 511, 636 S.E.2d 629 (2006), and *Dorrell v. South Carolina Dept. of Transp.*, 361 S.C. 312, 605 S.E.2d 12 (2004). Yet, those cases are not as broad in their holdings as the Respondents suggest. Both of the cases involved very specific scenarios, and the Supreme Court has expressly recognized that their scope is limited.

As the Respondents note, *Hardee* recognized a duty owed by a medical professional to foreseeable victims of a very specific kind of harm (i.e. people injured by the negligent driving of a patient who had undergone a procedure for which impaired driving ability was a known side effect). Significantly, however, the Supreme Court explained that this was a “very narrow” holding. 370 S.C. 516, 636 S.E.2d at 632. Indeed, the Court later declined to extend that holding to contexts beyond the medical profession. See *Rydde v. Morris*, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009) (distinguishing *Hardee* and declining to recognize a duty by an attorney to a third-party based on work done for a client).

In *Dorrell*, the Supreme Court found a duty to an injured motorist where a paving company hired by the South Carolina Department of Transportation allegedly created a dangerous condition on a public roadway. Again, though, the duty recognized in *Dorrell* is limited in scope, as a later Supreme Court case demonstrates. In *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 644 S.E.2d 43 (2007), the Court declined to extend *Dorrell* to cover a different factual scenario. As the Court explained, the decisions in *Dorrell* and related cases “involved the negligence of homebuilders and contractors in carrying out their contractual duties which created a significant risk of physical injury to foreseeable users of the tortfeasor’s end product.” 373 S.C. at 50, 644 S.E.2d at 47 (emphasis added). There were no “foreseeable users of [an] end product” involved in *McCullough*, which meant the holding in *Dorrell* did not apply.

The same distinguishing fact exists in the present cases. There is no allegation that Resolute created a product for foreseeable users. Although these cases involve a product (asbestos), Resolute played no role in manufacturing or selling it. Thus, while

the reasoning behind *Dorrell* might apply to other types of defendants, it has no relevance to Resolute, and it certainly does not create any duty on Resolute's part to people such as Smith, with whom it had no connection or relationship.

The Respondents also cite OSHA regulations promulgated in the early 1970s as an alleged source of duty owed to Smith. However, the Respondents have not cited any controlling authority for that proposition, instead offering only their own, unsupported assertion. In fact, it is well settled that OSHA standards and regulations apply only to an employer and its employees. *See, e.g., Norris v. Excel Industries, Inc.*, 139 F. Supp.3d 742, 748 (D. W. Va. 2015) (“OSHA standards apply only to employees with respect to the relationship with their employees”); *Palermo v. Port of New Orleans*, 933 So.2d 168, 177 (La. App. 4 Cir. 2006) (“OSHA applies only to employers with respect to providing safety for their employees.”). *See also Smiley v. Economy Forms Corp.*, 846 F.2d 73 (4<sup>th</sup> Cir. 1988); *McKinnon v. Skil Corp.*, 638 F.2d 270, 275 (1<sup>st</sup> Cir. 1981); *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 675 (5<sup>th</sup> Cir. 1978); *Russell v. Bartley*, 494 F.2d 334, 336 (6<sup>th</sup> Cir. 1974).

Smith's ex-husband was not an employee of Resolute/Bowater. Rather, he was an independent contractor. This means the OSHA regulations cited by the Respondents do not provide any basis for a legal duty owed to Smith's ex-husband. It necessarily follows that if Resolute owed no duty to the ex-husband, it could not possibly have owed any duty to Smith. Therefore, the Respondents' assertions to the contrary are without merit.

Furthermore, even if, as the Respondents claim, mere foreseeability can serve as a the basis for a duty under regulations or the common law of South Carolina (which Resolute disputes), that element of foreseeability is absent in this case. Smith's ex-

husband worked as a contractor at the Resolute/Bowater facility. It is not reasonably foreseeable that an independent contractor's household members will suffer injury based on some sort of exposure sustained by the contractor himself. *See generally Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 696 (Iowa 2009) ("One who employs an independent contractor owes no general duty of reasonable care to a member of the household of an employee of the independent contractor."); *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 740 N.W.2d 206, 216 (Mich. 2007) (holding that no duty existed between employer and independent contractor's stepdaughter).

Finally as to this issue on appeal, the arguments asserted in section IV.G. of the Respondents' Brief are not relevant because the authorities cited in that section are based on a different kind of scenario. Arguing that Resolute somehow self-created a duty to warn Smith of the dangers of asbestos, the Respondents rely on *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006). But *Madison*, and the other cases cited in this section, involved fact patterns in which the defendants failed to protect the plaintiffs from harm by specific third-party wrongdoers. This case does present that kind of scenario. Indeed, the Respondents appear to acknowledge as much. *See* Resp. Brief, p. 43 ("This is not an 'ordinary' third party case, which would posit Mrs. Smith's ex-husband as the third party who 'inflicted harm' on his wife by exposing her to dangerous asbestos fibers.") Accordingly, the Respondents' reliance on the cited "third-party cases" is misplaced, and those authorities do not support the Respondents' argument on this issue.

As argued in Resolute's Appellant's Brief, recognizing a duty to Smith under these circumstances would constitute an unwarranted expansion of the concept of a legal

duty of care in South Carolina. As far as the Respondents have been able to show, Smith never set foot on the premises of the Resolute/Bowater facility. There is no evidence or indication that Smith ever had any business or personal dealings with Resolute whatsoever. Simply put, Resolute had no relationship with Smith, special or otherwise. South Carolina's appellate courts have not previously recognized a duty where the connection between the purported plaintiff and defendant is as extenuated (or even non-existent) as in the present case, and this Court should not do so now. Therefore, the Court should reverse and remand with instructions to grant summary judgment in Resolute's favor for the Smith case.

### CONCLUSION

Based on the arguments and authorities presented above, as well as those in the Appellant's Brief, the Court should reverse and remand with instructions for the trial judge to stay all further proceedings in these cases until Covil's appeal is finally concluded. Alternatively, the Court should reverse and remand with instructions to grant Resolute's dispositive motions in the Sizemore and Smith cases.

Respectfully submitted,



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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

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SC Court of Appeals

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James Calvin Sizemore, Decedent, ..... Respondent,

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

AND

Roxanne Falls, Individually and as Personal Representative of the  
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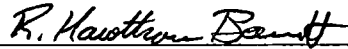
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Union Carbide Corporation; United States Fidelity and Guaranty Company;  
Uniroyal, Inc.; United Conveyor Corporation, Defendants,

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 4<sup>th</sup> day of March, 2019, served copies of the **Initial Reply Brief** upon all counsel for the Respondents (listed below) by causing them to be deposited in the United States mail with sufficient postage attached.



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March 4, 2019

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SC Court of Appeals

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 originals and one copy each of the Initial Reply Brief and the Proof of Service. Please file the originals and return the stamped copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.



R. Hawthorne Barrett

RHB  
Enclosures

cc: Theile B. McVey, Esq.  
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