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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND AND YORK COUNTIES
Court of Common Pleas

RECEIVED

The Honorable Jean H. Toal
Acting Circuit Court Judge

FEB 07 2020

SC Court of Appeals

Appellate Case No. 2020-
Circuit Court Case Nos. 2015-CP-46-02155 (*Smith*), 2015-CP-46-03456 (*Howe*), 2019-CP-40-
00076 (*Hopper*), 2018-CP-40-04680 (*Hill*), and 2018-CP-40-04940 (*Taylor*)

United States Fidelity and Guaranty Company Appellant,

v.

Peter D. Protopapas, in his capacity as Receiver of Covil Corporation Respondent,

in the following cases:

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

v.

CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor
by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a
Westinghouse Electric Corporation; CNA Holdings, Inc., f/k/a Hoechst
Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese
Corporation (Sued Individually and as Successor-in-Interest to Fiber
Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Daniel
International Corporation; Fluor Daniel, Inc., f/k/a Daniel Construction
Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy
Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power
Supply Co. and Mill-Power Supply Company; Resolute FP US, Inc.; Union
Carbide Corporation; United States Fidelity and Guaranty Company;
Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; and United
Conveyor Corporation Defendants,

and

Timothy W. Howe, Individually and as Personal Representative of the
Estate of Wayne Erwin Howe, Deceased, and Jeannette Howe Plaintiffs,

v.

Air & Liquid Systems Corp., Individually and as Successor-in-Interest to
Buffalo Pumps, Inc; Airco, Inc.; Airgas USA, LLC, f/ka National Welding
Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora
Pump Company; A.W. Chesterton Company; Beloit Corporation; Black
Clawson Converting Machinery, LLC, Individually and as a Subsidiary of

X
CB

Davis-Standard LLC; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Productions, Inc., f/k/a Carolina Gasket and Rubber Company; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-Apco Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as Successor-in-Interest to Buell Engineering Co.; Flowserve Corporation, Individually and as Successor-in-Interest to Durco Pumps; Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll-Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as Successor-in-Interest to Buell Engineering Co.; Marsulex Environmental Technologies, LLC, as Successor-in-Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as Successor-in-Interest to Babock Borsig Power, Inc., and Riley Stoker Corporation, Individually and as Successor-in-Interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc., f/k/a Marley Cooling Technologies, Inc., f/k/a The Marley Cooling Tower Co.; Sterling Fluid Systems (USA) LLC; Trane U.S., Inc., f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries

Defendants,

and

Charles T. Hopper and Rebecca Hopper.....

Plaintiffs,

v.

Air & Liquid Systems Corp.; 3M Company; Advance Auto Parts, Inc.; Armstrong International, Inc.; Blackmer Pump Company; BW/IP, Inc.; CBS Corporation; CNA Holdings, LLC; Carrier Corporation; Circor Instrumentation Technologies, Inc.; Continental Tire the Americas, LLC; Covil Corporation; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; E.I. du Pont de Nemours and Company; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Flour Constructors International, Inc.; Fluor Daniel Services Corporation; Flour Enterprises, Inc.; FMC Corporation; Ford Motor Company; Foster Wheeler Energy Corporation; Gardner Denver, Inc.; General Electric Company; Genuine Parts Company; Georgia Power Company; Goodrich Corporation; Gorman-Rupp Company; Goulds

Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Honeywell International, Inc.; IMO Industries, Inc.; Ingersoll-Rand Company; International Paper Company; ITT LLC; The Lincoln Electric Company; Metropolitan Life Insurance Company; Miller Electric Mfg., LLC; National Automotive Parts Association; Newco Valves, LLC; O'Reilly Auto Enterprises, LLC; O'Reilly Automotive Stores, Inc.; Resolute FP US Inc.; Shell Oil Company; South Carolina Electric & Gas Company; South Carolina Public Service Authority; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc.; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Trane U.S.; Uniroyal Holding Inc.; Viking Pump, Inc.; Weir Valves & Controls USA, Inc.; The William Powell Company; Yeargin Potter Smith Construction, Inc.; Yuba Heat Transfer Corporation; and Zurn Industries

Defendants,

and

James Michael Hill, Jr., as Executor of the Estate of James Michael Hill ...

Plaintiff,

v.

Advance Auto Parts, Inc.; 4520 Corp., Inc., successor-in-interest to Benjamin F. Shaw Company; Air & Liquid Systems Corporation, individually and as successor-in-interest to Buffalo Pumps; Alcoa, Inc., successor to Reynolds Metals Company; Aurora Pump Company; BW/IP, Inc., individually and as successor-in-interest to Byron Jackson Pumps; CB&I Group Inc., individually and as successor-in-interest to The Shaw Group, successor to Benjamin F. Shaw Company; CB&I Laurens, Inc., f/k/a B.F. Shaw, Inc.; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., successor by merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; Celanese Corporation; CNA Holdings, LLC, f/k/a Celanese Corporation f/k/a Hoechst Celanese Corporation, sued individually and as successor-in-interest to Fiber Industries, Inc.; Circor Instrumentation Technologies, Inc., individually and f/k/a Hoke Inc.; Cleaver Brooks, Inc., f/k/a Aqua-Chem, Inc., d/b/a Cleaver-Brooks Division; Covil Corporation; Crane Co.; Crosby Valve, LLC; Dana Companies LLC; Daniel International Corporation; The Dow Chemical Company; Federal-Mogul Asbestos Personal Injury Trust, sued as successor to Felt-Products Manufacturing Co.; Fisher-Controls International, LLC, wholly owned subsidiary of Emerson Electric Company; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; General Electric Company; Genuine Parts Company, d/b/a Rayloc, a/k/a NAPA; The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Gorman-Rupp Company; Hollingsworth & Vose Company; Honeywell International, Inc., f/k/a Allied-Products Liability Signal, Inc., sued as successor-in-interest to Bendix Corporation; Imerys Talc America, Inc., f/k/a Luzernac America, Inc., individually and as successor-in-interest to United Sierra Division of Cyprus Mines, Cyprus Industrial Minerals Company and Windsor Minerals, LLC; Ingersoll-Rand Company; International Paper Company;

ITT LLC, f/k/a ITT Corporation, ITT Industries, Inc., individually and as successor to ITT Fluid Products Corp., ITT Hoffman ITT Bell & Gossett Company and ITT Marlow; Johnson & Johnson; Johnson & Johnson Consumer Companies LLC, a subsidiary of Johnson & Johnson; Mallinckrodt LLC; Maremont Corporation; McDermott International, Inc., individually and as successor-in-interest to The Shaw Group, successor to Benjamin F. Shaw Company; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Mine Safety Appliances Company, LLC; National Automotive Parts Association; OfficeMax, Incorporated, f/k/a Boise Cascade Corporation; Pneumo Abex, LLC, individually, and as successor-in-interest to Abex Corporation; R.J. Reynolds Tobacco Company, individually and as successor-by-merger to Lorillard Tobacco Company LLC, f/k/a Lorillard Tobacco Company; Resolute FP US Inc., individually and successor-in-interest to Bowater, Inc.; Reynolds American, Inc., individually, and as successor-by-merger to Brown & Williamson Tobacco Corporation, successor-by-merger to The American Tobacco Company; Riley Power, Inc., f/k/a Riley Stoker Corporation and D.B. Riley, Inc.; Spence Engineering Company, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and successor-in-interest to Marley Cooling Towers Co.; Union Carbide Corporation; United Conveyor Corporation; The William Powell Company; and Zurn Industries, LLC, individually and as successor-in-interest to Zurn Industries, Inc.....

Defendants,

and

Denver D. Taylor and Janice Taylor.....

Plaintiffs,

v.

Air & Liquid Systems Corporation; Aurora Pump Company; BASF Catalyst LLC; BASF Corporation; Borgwarner Morse Tec, LLC; CBS Corporation; CNA Holdings, LLC; Cameron International Corporation; Carrier Corporation; Carver Pump Company; Caterpillar, Inc.; Celanese Corporation; Cleaver-Brooks, Inc.; Continental Tire The Americas, LLC; Covil Corporation; Crane Co.; Daniel International Corporation; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Frito-Lay, Inc.; Gardner Denver, Inc.; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC; John Crane, Inc.; The Lincoln Electric Company; Linde, LLC; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; McWane, Inc.; Metropolitan Life Insurance Company; Resolute FP US Inc.; Riley Power, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc.; Springs Global US, Inc.; Trane US, Inc.; Viking Pump, Inc.; Warren Pumps, LLC; Weir Valves & Controls USA, Inc.; York International Corporation; and Zurn Industries, LLC

Defendants.

USF&G's MOTION TO HOLD APPEAL IN ABEYANCE

Appellant United States Fidelity and Guaranty Company ("USF&G") respectfully submits this Motion to Hold this Appeal in Abeyance of the Court's Order on Rule to Show Cause entered on January 8, 2020 (the "Contempt Order").

On January 17, 2020, Non-Party USF&G filed a Motion to Reconsider, Alter or Amend the Court's Contempt Order, pursuant to SCRPC 6(a), 52(b), 59(e), and 60(b) ("Motion to Reconsider"). Although the Motion to Reconsider tolls the time within which to file a notice of appeal, and the trial court has not yet ruled on that motion, out of an abundance of caution, USF&G filed contemporaneously herewith a Notice of Appeal of the Contempt Order. For the reasons set forth below, USF&G respectfully requests that this Court hold this appeal in abeyance and remand to make clear that the trial court retains jurisdiction to rule on the Motion to Reconsider.

BACKGROUND

This appeal of a contempt order raises important issues of due process, jurisdiction, principles of insurance law, and the propriety of extraordinary and unprecedented sanctions issued by Justice Jean Hofer Toal, who has been appointed to serve as Chief Judge for Administrative Purposes over all asbestos litigation within the State of South Carolina.

USF&G is an insurance company that issued a commercial liability policy in 1976 to a company known as Covil Corporation ("Covil"). Covil was a regional supplier of insulation materials. Covil ceased its operations in 1991 and was dissolved by the South Carolina Secretary of State in or about 1993. Given their contractual obligation to defend and, where coverage exists, indemnify, their insured regardless of the insolvency, bankruptcy or "defunct" nature of the insured, USF&G and other insurers of Covil have been defending and indemnifying Covil in asbestos litigation from the 1970s through the present. Indeed, it could potentially be considered

bad faith for insurers to refuse to defend an insured such as Covil simply because it ceased its operations, no longer has any employees, or became “defunct” or otherwise insolvent. And so long as an insurer has a contractual obligation to defend its insured—which it must do whether or not the insured has any ongoing operations or employees—the insurer has the right to control both the defense and settlement of the underlying actions.¹

In November 2018, Justice Toal appointed Peter Protopapas as a Receiver for Covil (the “Receiver”) at the request of one of the underlying plaintiffs’ counsel suing Covil. Since that time, Covil (acting through its Receiver and represented by the firm Morgan Lewis & Bockius LLP and others) and its insurers have been litigating a coverage action styled *Zurich American Insurance Co. v. Sentry Casualty Co., et al.*, No. 1:18-cv-00932 (M.D.N.C.) (the “North Carolina Coverage Action”), to resolve questions concerning the interpretation of the insurers’ policies, as well as the existence, terms and conditions of policies the Receiver claims may have been issued during certain periods in the 1950s and 1960s. USF&G, the Receiver, and other insurers, have been extensively involved in litigating these coverage issues and are actively engaged in ongoing fact and expert discovery in the North Carolina Coverage Action.

Despite its status as a non-party in the underlying asbestos lawsuits and ongoing discovery in the North Carolina Coverage Action, USF&G was ordered to attend various hearings scheduled by Justice Toal and to produce voluminous materials requested by the Receiver. Pursuant to the Court’s orders, USF&G has produced hundreds of thousands of pages of documents to the Receiver. USF&G has separately produced voluminous documents and provided 30(b)(6)

¹ See *Allstate Ins. Co. v. Wilson*, 259 S.C. 586, 592, 193 S.E.2d 527, 530 (1972) (insurer “had the right and the duty to control the defense until such time as it was determined that it had no liability insurance coverage”); *Sentry Select Insurance Company v. Maybank Law Firm, LLC*, 426 S.C. 154, 157–58, 826 S.E.2d 270, 272 (2019) (“Pursuant to the insurance contract, the insurer has a duty to defend its insured Many insurance contracts provide the insurer has a right to investigate and settle claims as a representative of the insured.”).

deposition testimony in connection with the pending North Carolina Coverage Action. Nonetheless, the Receiver filed a Rule to Show Cause before Justice Toal, seeking to hold USF&G in contempt for allegedly violating the Court's orders, including the November 2018 order appointing the Receiver (which did not order USF&G or other insurers to do anything), and subsequent orders that were not timely served on USF&G but pursuant to which USF&G nonetheless has complied with at significant cost and expense.

Despite its compliance with the Court's orders, on January 8, 2020, Justice Toal issued the Contempt Order. The Contempt Order is a 19-page opinion, nearly verbatim in all material respects to the form of order requested by the Receiver and his counsel, which reflects a wish-list of findings and conclusions the Receiver requested and which the Receiver has already attempted to use to circumvent the North Carolina Coverage Action and to prejudice USF&G in ongoing litigation. Among other things, in the guise of court-ordered *sanctions*, the Contempt Order:

- ***Creates out of whole cloth and imposes on USF&G*** a contractual obligation to defend and indemnify Covil under supposed insurance contracts that purportedly contain egregious terms, conditions, and *unlimited* coverage obligations at the Receiver's request for a 10-year span—despite the lack of any evidence of such terms and conditions, no evidence that USF&G willfully violated any court order, and despite the fact that the existence, terms and conditions of any such policies is squarely the subject of ongoing fact and expert discovery and motion practice in the pending North Carolina Coverage Action;
- ***Alters*** the insurance contract agreed to between USF&G and Covil in 1976 that was produced to the Receiver and is subject of the North Carolina Coverage Action by “finding” that this contract contains no aggregate limits of liability, contrary to the express terms and conditions of the policy itself;
- ***Finds*** that USF&G conducted itself as Covil's “alter ego” because USF&G defended and controlled Covil's defense in litigation after Covil dissolved, despite the fact that USF&G was *complying* with its contractual obligations in doing so and the absence of any briefing from the parties on the propriety and standards of proof necessary to impose alter ego liability;²

² Taking a cue from the Receiver's allegations, plaintiffs in several underlying tort actions have begun naming USF&G in asbestos personal injury and wrongful death actions on the novel theory

- **Imposes** five pages of rulings on a host of substantive insurance coverage legal issues that in numerous respects contravene established law and were issued without full briefing, and which are completely untethered to the captioned tort actions in which the Contempt Order was issued;
- **Finds** that USF&G is in contempt of orders entered by Justice Toal in 2018 and 2019 for allegedly destroying documents in the *1980s*, based on a hearsay expert report served on USF&G in an unrelated reinsurance dispute in a New York state action by USF&G's litigation adversary (a reinsurer), that has nothing to do with Covil, does not demonstrate that USF&G destroyed *any* Covil-related documents, is inadmissible, and in any event could not possibly support a finding that USF&G intentionally violated any order entered by the trial court in 2018.

By this appeal, USF&G seeks review of this unprecedented order. To ensure that the numerous issues raised by the Contempt Order are properly preserved for appeal, and in order to ensure Justice Toal has another opportunity to consider USF&G's objections that were not addressed in the Contempt Order, USF&G filed a timely Motion to Reconsider on January 17, 2020.

ARGUMENT

I. The Appeal Should Be Held in Abeyance Pending Resolution of the Motion to Reconsider.

Pursuant to Rule 205, SCACR, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal.³ USF&G filed the Motion to Reconsider to ensure that all of the issues raised below were properly preserved on appeal. USF&G has also filed a motion to stay the Contempt Order in the trial court. Although a timely Rule 59(e) motion stays

that USF&G should be deemed liable for all of Covil's tort liabilities as an alter ego of its insured. USF&G has moved to dismiss those actions for lack of personal jurisdiction.

³ Rule 205, SCACR, provides:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

the period within which an appeal must be taken, by not filing a notice of appeal USF&G would have run the risk that its appeal would be considered untimely.⁴ To be clear, USF&G believes that its Motion to Reconsider was properly filed, and is aware that parties should not reflexively file both Rule 59(e) motions and notices of appeal. *Cf. Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780–81 (2004) (observing that procedural rules should be construed to avoid placing “a party between the proverbial rock and a hard place” created by the potential need to file Rule 59(e) motion to avoid waiver and the risk of forfeiting the right to appeal if an appellate court later determines the Rule 59(e) motion was unnecessary). Given the nature of the Contempt Order and USF&G’s status as a non-party, however, and the unique circumstances presented here, USF&G could not reasonably risk either a finding of waiver or a loss of its appellate rights.

Under these circumstances, therefore, for the reasons set forth above, USF&G requests that this Court hold the appeal in abeyance pending resolution of the Motion to Reconsider, but make clear that the trial court retains jurisdiction to rule on the Motion to Reconsider. Alternatively, if the Court determines that dismissal of USF&G’s appeal is appropriate, USF&G respectfully requests that any such dismissal be deemed without prejudice.

Signature Page Attached

⁴ Although USF&G only raised issues in its Motion to Reconsider that were properly raised previously, whether or not the trial court can be said to have considered and ruled on all of those issues is less clear given the unusual nature of Justice Toal’s 19-page ruling, which did not directly address many of the arguments raised by USF&G but which the Receiver may argue was indirectly addressed in the Contempt Order.

Respectfully submitted,

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February 7, 2020

PROOF OF SERVICE

I, the undersigned Legal Assistant of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below through the United States mail, postage prepaid, at the address(es) below:

Pleading(s): USF&G's Motion to Hold Appeal in Abeyance
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