THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND AND YORK COUNTIES
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case Nos. 2015-CP-46-02155, 2015-CP-46-03456, 2019-CP-40-00076, 2018-CP-40-04680, and 2018-CP-40-04940

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Appellate Case No. 2020-000845

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Ex Parte: United States Fidelity and Guaranty Company, Appellant,
v.
Peter D. Protopapas, in his capacity as Receiver of Covil Corporation, Respondent,

In Re:

Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith, Plaintiffs,
v.
CBS Corporation, a Delaware Corporation f/k/a Viacome, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporations; 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 Ervin Howe, deceased and Jeanette Howe, Plaintiffs,
v.
Air & Liquid Systems Corporation, Individually and as Successor-in-Interest to Buffalo Pumps, Inc.; Airco, Inc.; Airgas USA, LLC, f/k/a 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 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; CAN

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.; Sterline 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; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor 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, 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 Successorin-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; CAN 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 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 as Successor-in-Interest to Bowater, Inc.; Reynolds American, Inc., individually and as 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 as 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, Plaintiff's
v.
Air & Liquid Systems Corporation; Aurora Pump Company; BASF Catalyst LLC; BASF Corporation; BorgWarner Morse Tec, LLC; CBS Corporation; CAN 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.

REPLY TO USF&G'S RETURN IN OPPOSITION TO MOTION TO DISMISS APPEAL

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Peter D. Protopapas, in his capacity as the Receiver for Covil Corporation ("Respondent"), by and through the undersigned counsel, hereby submits the following Reply to USF&G's Return in Opposition to Motion to Dismiss Appeal, filed with the Court on June 22, 2020.

Respondent moved to dismiss this appeal based on a simple, indisputable proposition of law: Outside of narrow (and inapplicable) exceptions, "before [a person] can file an appeal," the person must "formally intervene and become a named party." *Condon v. State*, 354 S.C. 634, 642, 583 S.E.2d 430, 434 (2003); *accord Ex parte SCDMV*, 390 S.C. 457, 458, 702 S.E.2d 568, 568 (2010). When a person has failed to intervene, questions of standing are irrelevant. *Condon*, 354 S.C. at 642, 583 S.E.2d at 434. The South Carolina Supreme Court has never overruled this

holding, and it is fatal to USF&G's appeal. USF&G has no answer, and this appeal should be dismissed.

USF&G has responded with a meandering, 25-page Return in Opposition accompanied by 1200 plus pages of superfluous exhibits, but it devotes only 4 pages (Return at 19–23) to its right to appeal, the only issue before this Court. The first 18 pages of the Return unnecessarily recite USF&G's merits arguments, suggesting that this Court cannot apply its procedural rules "without a full understanding of the merits of the appeal itself." Return at 1.[1] That is simply not the law of South Carolina.

Accordingly, Respondent will not provide a detailed (or equally lengthy) response because none of USF&G's arguments (or its more general discussion of appealable orders) has any relevance to the procedural defects in its appeal. The Rules of Civil Procedure mandate that in order to appeal, USF&G was "*required,* like everyone else, to formally intervene and become a named party." *Condon*, 583 S.E.2d at 434 (emphasis in original).

When USF&G eventually (on page 19) turns to whether a non-party can appeal, its arguments fail both factually and legally. Factually, USF&G is not aggrieved. The order approving the settlement agreements specifically indicates that the order is not to be construed as making an ultimate determination on any contribution, indemnification, subrogation claims, if any

[1] Unsurprisingly, Respondent strongly disagrees with USF&G's merits arguments. As one example, USF&G states (at 14) that Respondent violated an injunction issued by Judge Hendricks by seeking the approval of the settlement agreements. But Respondent and the settling insurers submitted the order approving the settlement agreements to Judge Hendricks, who issued orders dismissing the settling insurers without any suggestion that the settlement agreements violated her injunction. Similarly, USF&G implies (at 14) that the circuit court erred by not holding a hearing on USF&G's objections, but as the circuit court explained in its April 10, 2020 Order and May 6, 2020 Order, the parties had fully briefed the matters, and the Supreme Court's Order expressly permitted trial courts not to hold hearings during the coronavirus emergency. April 10, 2020 Order at 3–4; May 6, 2020 Order at 2–3.

are ever made. *See* April 10, 2020 Order at 25, 27. The factual premise of USF&G's argument—that its rights have somehow been affected by an agreement between Respondent and a third party—is simply false.

More significantly, USF&G's argument rests on the wrong legal standard. USF&G confuses the procedural requirement of intervention with the requirement that a party have standing. *See* Return at 20 (arguing that anyone with "standing" can appeal). The South Carolina Supreme Court has expressly rejected this argument, holding that it need not "addres[s] the Attorney General's standing" to appeal because the Attorney General had failed to intervene. *Condon*, 354 S.C. at 642, 583 S.E.2d at 434. This holding applies directly here: USF&G's "standing" to appeal is irrelevant because USF&G failed to intervene.

The decision of the court of appeals in *Powell v. Bank of Am.*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008), is consistent. *Powell* notes that Rule 201(b), SCACR, incorporates general principles of standing to determining "whether **a party** ha[s] standing to appeal." *Id.* at 447, 665 S.E.2d at 242 (describing *Beaufort Realty Co. v. Beaufort County*, 551 S.E.2d 588–89, 589 (Ct. App. 2001) (emphasis added)). The case offers no support for USF&G's novel suggestion that principles of standing overrule the requirement that only parties can appeal. To the contrary, *Powell* confirms that Rule 201(b) requires that an "aggrieved party" both be (1) aggrieved and (2) a party. *See id.* ("In considering the Bank's ability to appeal from the order apportioning the escrowed funds, the Bank is neither a 'party' nor 'aggrieved.'"). The South Carolina Appellate Court Rules do not, as USF&G suggests, extend the right of appeal to "aggrieved nonparties."

Second, USF&G cites cases involving the narrow exception that nonparties have been permitted to appeal "when the district court has ordered them to do something." *Douglas v. The W. Union Co.*, 955 F.3d 662, 665 (7th Cir. 2020). South Carolina applies "the same rule applied

by the federal courts," *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 882 (1986), in which (as in South Carolina) "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988).[2]

The cases cited by USF&G fit within this rule:[3] all involve circuit courts ordering a non-party to do so something. *See Matter of Decker*, 322 S.C. 212, 212, 471 S.E.2d 459, 460 (1995) (involving an appeal of an order finding a non-party newspaper reporter in contempt of court for refusing to identify her source); *State v. Register*, 308 S.C. 534, 536 & n.1, 419 S.E.2d 771, 772 & n.1 (1992) (involving an order requiring a witness in the case to submit to invasive procedures to obtain samples of her blood, saliva, and hair and noting that "[o]rdinarily, this type of order is not directly appealable"); *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) (suggesting that a nonparty could appeal a contempt finding for refusing to attend a deposition and produce documents).

Although USF&G has been held contempt, this appeal does not concern the contempt finding, it concerns the circuit court's approval of a settlement. No authority permits a non-party to appeal such an order.

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[2] Like the South Carolina Supreme Court, the Supreme Court of the United States affirmatively rejected the proposition a nonparty may appeal merely because "that nonparty has an interest that is affected by the trial court's judgment," instead directing that "such a nonparty [should] seek intervention for purposes of appeal." *Marino*, 484 U.S. at 304.

[3] *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 566 S.E.2d 196 (Ct. App. 2002), is essentially the other side of the coin. The South Carolina Department of Revenue ("SCDOR") was essentially being treated as a party—the circuit court ordered it to appear for a rule to show cause, issued an order "binding [SCDOR] to the master's initial Judgement of Foreclosure and Sale," and directing the Clerk of Court to "to annotate the judgment roll so as to reflect the SC Dept. of Revenue and Taxation . . . [is] bound by the aforedescribed Judgment of Foreclosure and Sale," *id.*—despite the fact that the SCDOR was never properly served with a summons. *See id.* at 407–08, 566 S.E.2d at 198 (agreeing that "the master's rule to show cause did not contain the essential elements of a summons").

Finally, USF&G half-heartedly suggests (at 22–23) that it might not have been permitted to intervene, relying on *Builders Mutual Insurance Company v. Island Pointe, LLC*. In *Builders Mutual*, our Supreme Court found two insurers did not have an automatic right of intervention in order to "participat[e] in the preparation of a special verdict form or a general verdict form" for submission to the jury during the trial in a construction defect case. *Builders Mut. Ins. Co. v. Island Pointe, LLC*, Op. No. 27970, (S.C. Sup. Ct. filed May 13, 2020) (Shearouse Adv. Sh. No. 19 at 51, 53). The case says nothing about an insurer's ability to intervene to object to settlements agreements between a party and other insurers. Had USF&G moved to intervene, and had the circuit court denied its motion, USF&G could have appealed the denial of that order, as in *Builders Mutual*.

And in any event, there is no question that a motion to intervene would have been granted. The circuit court expressly and repeatedly admonished USF&G that if it wished to be heard, the proper course was to intervene. *See* April 10, 2020 Order Granting Joint Motions to Establish Covil Qualified Settlement Fund and to Approve Settlements at 11 (explaining that USF&G was "required to seek leave to intervene in these cases" if it "wished to object to the establishment of the Covil QSF or to the approval of the[] settlements"); May 6, 2020 Order Denying Motions to Reconsider and Motion to Stay at 2. (reiterating that USF&G failed to intervene).

But instead of intervening, USF&G made the strategic choice to attempt to seek the benefits of party status (filing papers and being heard by courts) while avoiding the burdens (being bound by a judgment). This Court should not permit this gamesmanship. USF&G was unwilling to appear in the circuit court as a party and made the conscious, strategic choice not to intervene. There is nothing unfair or inequitable about holding USF&G to the consequences of its decision: USF&G cannot appeal, and this appeal should be dismissed.

Nor is there any basis for this Court to issue any sort of advisory opinion about the possible effects of any order in hypothetical future cases. Return at 23–25. Any arguments related to the contempt order—or any other orders that are not the subject of this attempted appeal—may be raised and considered at the appropriate time. A finding that USF&G cannot appeal the settlement agreement as a non-party does nothing to undermine the power of the circuit court to hold USF&G in contempt as a non-party.

CONCLUSION

This Court should not allow USF&G to continue to manipulate our system by choosing which procedural rules of our state it believes should apply to it and which it believes should not. *Ex parte SCDMV* and *Condon* apply directly, and the failure of USF&G to formally intervene as a party is fatal to its right to appeal. Further, the orders USF&G attempts to appeal clearly state they do not make any ultimate determination on any claims that may be brought in the future by USF&G or any other insurance companies. Respondent respectfully requests the Court dismiss this appeal.

Respectfully submitted,

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June 26, 2020.