IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEXINGTON INSURANCE CO.,

\$ No. 675, 2012D

Defendant BelowAppellant,

\$ Court Below—Superior Court

v. \$ of the State of Delaware,
in and for New Castle County

CONAGRA FOODS, INC.,

\$ C.A. No. N09C-02-170

Plaintiff BelowAppellee.

Submitted: January 17, 2013 Decided: February 4, 2013

Before HOLLAND, JACOBS, and RIDGELY, Justices.

ORDER

This 4th day of February 2013, upon consideration of the notice to show cause and the response and answer thereto, it appears to the Court that:

(1) Following a jury verdict rendered on May 7, 2012, the Superior Court entered a final judgment in favor of the plaintiff-appellee, ConAgra Foods, Inc. ("ConAgra"), on November 30, 2012. On December 14, 2012, the defendant-appellant, Lexington Insurance Co. ("Lexington"), moved for a new trial. On December 28, 2012, Lexington appealed to this Court from the November 30, 2012 Superior Court final judgment. On January 4, 2013, the Clerk issued a notice to Lexington directing it to show cause why its

appeal should not be dismissed for its failure to comply with Supreme Court Rule 42 when appealing from an interlocutory order.

- (2) Lexington responded to the notice to show cause on January 14, 2013. Lexington concedes that, because it timely moved for a new trial on December 14, 2012, its present appeal is interlocutory. Lexington contends that it filed its notice of appeal out of an abundance of caution to preserve its appellate rights "due to the arguable tension between Superior Court Civil Rule 59(b) . . . and Supreme Court Rule 6" In its answer to Lexington's response on January 17, 2013, ConAgra agrees that Lexington's timely-filed motion for a new trial renders the Superior Court's November 30, 2012 judgment interlocutory.¹ ConAgra contends, however, that this appeal must be dismissed for failure to file an interlocutory notice of appeal under Supreme Court Rule 42.
- (3) We agree. The law is clear that a timely-filed motion for a new trial tolls the time for taking an appeal from an otherwise final judgment of the trial court.² As a result, Lexington's appeal is premature and must be

¹ Despite its contention that Lexington's appeal is interlocutory, ConAgra filed a notice of cross-appeal in the event that Lexington's appeal is permitted to proceed.

² Tomasetti v. Wilmington Savings Fund Soc'y, 672 A.2d 61, 64 (Del. 1996).

dismissed. The filing fee for any future appeal from the Superior Court judgment shall be waived.

NOW, THEREFORE, IT IS ORDERED that Lexington's appeal and ConAgra's cross appeal are hereby DISMISSED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice